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MENTALLY ILL PRISONERS ON DEATH ROW: UNSOLVED PUZZLES FOR COURTS AND LEGISLATURES

Richard J. Bonnie⁺

The circumstances under which a defendant's mental illness or other mental disability at the time of the offense should preclude a death sentence are considered by other participants in the Symposium. In this paper, I want to focus on the problems relating to mental illness or other mental disabilities that arise *after* sentencing, where the underlying values at stake are the dignity of the condemned prisoner and the integrity of the law. I will address three conceptually independent (although often clinically overlapping) grounds for precluding or postponing execution of mentally ill prisoners on death row:

1. Prisoners whose impaired understanding of the nature and purpose of the punishment may render them incompetent for execution under *Ford v. Wainwright*¹ (I will refer to this category of prisoners as "*Ford* incompetent").

2. Prisoners whose mental illness impairs their ability to assist their lawyers or otherwise to participate meaningfully in post-conviction proceedings (I will refer to this category of prisoners as "unable to assist counsel").

3. Prisoners who do not want to initiate or who want to terminate post-conviction proceedings challenging the validity of the conviction or death sentence (I will refer to this category of prisoners as "volunteers" for execution).

As I discuss each of these grounds for precluding execution, I will present the pertinent text of a proposal recently approved by the American Bar Association's (ABA) Task Force on Mental Disability and the Death Penalty on which I am serving.² Parallel proposals are also being considered by various mental health advocacy groups and

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1. 477 U.S. 399, 409 (1986).

2. The Task Force was established under the auspices of the American Bar Association (ABA) Section of Individual Rights and Responsibilities. The full text of the Task Force's proposal is set forth in this issue. See *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1115 (2005) [hereinafter *Task Force Recommendations*].

professional organizations,³ and will eventually be presented for adoption by the ABA House of Delegates.

Before turning to the specific issues raised by mentally ill prisoners on death row, it is important to place this discussion in a somewhat broader context. As I have written elsewhere:

Because contending moral intuitions about the death penalty are so strongly felt, practices regarded as unproblematic elsewhere in the administration of criminal justice inevitably become controversial in capital cases. In some contexts . . . disputes about particular features of the law merely echo the overarching disputes about the legitimacy of the death penalty itself. In most contexts, however, the arguments center on the implications of the assertion, endorsed even by those who believe the death penalty to be legitimate, that “the penalty of death is qualitatively different” from other forms of criminal punishment. From this premise, courts and commentators have deduced an unending series of rules and obligations uniquely applicable to capital cases.

. . . [However,] plausible arguments purporting to show why the rules in death cases should be different can be raised in connection with every feature of the process and that wholesale acceptance of these arguments could make implementation of the death penalty a practical impossibility.⁴

In this paper, I aim to develop broadly acceptable solutions to the unique problems presented by mentally ill prisoners on death row, not to stake out symbolic positions categorically exempting people with mental illness from the death penalty, nor to create impediments to its administration. The goal is to correct deficiencies in current law and practice that have allowed legitimate concerns about severely mentally ill prisoners to be overlooked. The challenge of reform is to identify ways of correcting these deficiencies that are also respectful of the popular will in states with capital punishment and of the public officials who bear the responsibility for faithfully executing the law.

With these preliminary observations in mind, I will now turn to the three grounds upon which execution of mentally ill prisoners should be precluded. In each case, I will present general principles, including the Task Force proposals, before turning to the remaining puzzles.

3. See, e.g., AM. CIVIL LIBERTIES UNION, MENTAL ILLNESS AND THE DEATH PENALTY IN THE UNITED STATES (2005), <http://www.aclu.org/DeathPenalty/DeathPenalty.Cfm?ID=17380&c+299>.

4. Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1363-64 (1988) (footnotes omitted).

I. IMPAIRED UNDERSTANDING OF THE NATURE OR PURPOSE OF THE PUNISHMENT

We should begin with the Supreme Court's 1986 decision in *Ford v. Wainwright*,⁵ holding that execution of an incompetent prisoner constitutes cruel and unusual punishment proscribed by the Eighth Amendment.⁶ Unfortunately, the Court failed to specify a constitutional definition of incompetence or to prescribe the constitutionally required procedures for adjudicating the issue.⁷ As expected, state and federal courts have not been of one mind about either of these matters,⁸ and neither have the commentators.

Another problem is that the Court also failed to set forth a definitive rationale for its holding that might have helped resolve these open questions. Rather it listed, without indicating their relative importance, a number of possible reasons for the competence requirement.⁹ These rationales included the need to ensure that the offenders could provide counsel with information that might lead to vacation of sentence;¹⁰ the view that, in the words of Lord Coke, execution of "mad" people is "a miserable spectacle . . . of extream inhumanity and cruelty [that] can be no example to others";¹¹ and the notion that retribution cannot be exacted from people who do not understand why they are being executed.¹² Apparently, based on the latter rationale, Justice Powell, in his concurring opinion in *Ford*, stated: "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the

5. 477 U.S. 399 (1986).

6. *Ford*, 477 U.S. at 409-10. The Court addressed issues relating to competence for execution in three previous cases. See *Solesbee v. Balkcom*, 339 U.S. 9, 10, 13-14 (1950) (holding that, as applied, a Georgia statute allowing the governor and three physicians he appoints to determine whether an insane prisoner is now sane and can be executed does not violate due process); *Phyle v. Duffy*, 334 U.S. 431, 439-40, 443-44 (1948) (holding that a challenge to a California statute that only allows the prison warden to initiate competency proceedings based on "good reason" to believe the prisoner is insane was not ripe for review because the prisoner did not file a writ of mandamus to compel the warden to initiate proceedings); *Nobles v. Georgia*, 168 U.S. 398, 409 (1897) (holding that the defendant, who became insane after sentencing and conviction, did not have an absolute right to adjudication by a court and a jury on the question of insanity).

7. See *Ford*, 477 U.S. at 418 (Powell, J., concurring in part and concurring in the judgment).

8. Compare, e.g., *Patterson v. Dretke*, 370 F.3d 480, 485-86 (5th Cir. 2004) (finding that a state court's reliance on other evidence of the defendant's sanity was not inconsistent with *Ford*'s mandate), with *Commonwealth v. Haag*, 809 A.2d 271, 282 (Pa. 2002) (concluding that *Ford* is limited only to the imposition of the death penalty and does not apply to a state's power to implement post-conviction procedures).

9. *Ford*, 477 U.S. at 406-09.

10. *Id.* at 407.

11. *Id.* (quoting 3 EDWARD COKE, INSTITUTES *6).

12. *Id.* at 409.

punishment they are about to suffer and why they are to suffer it.”¹³ Justice Powell pointed out that states are free to preclude execution on other grounds (particularly inability to assist counsel),¹⁴ but most courts and commentators have assumed that the Eighth Amendment requirement is limited to the test stated by Powell.¹⁵

Most commentators have also agreed with Justice Powell’s view that the *Ford* competence requirement is grounded in the retributive purpose of punishment.¹⁶ I have also suggested that executing someone who is unaware of the nature and purpose of the impending execution fails to show adequate respect for the dignity of the condemned prisoner as a human being, the foundational value of the Eighth Amendment.¹⁷

With these preliminary observations in mind, let us turn to four questions that need to be resolved.

1. What Does It Mean to “Understand” or “Appreciate” the “Purpose” of the Punishment?

There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose of (or reasons for) the execution. Consider the facts of *Barnard v. Collins*,¹⁸ decided by the Fifth Circuit in 1994. In that case, the state habeas court had found that Barnard’s “perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia.”¹⁹ Despite the fact that Barnard’s understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that “his pending execution was because he had been found

13. *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment).

14. *Id.* at 422 n.3 (Powell, J., concurring in part and concurring in the judgment).

15. *See, e.g.*, *Coe v. Bell*, 209 F.3d 815, 818 (6th Cir. 2000); *Cox v. Norris*, 167 F.3d 1211, 1212 (8th Cir. 1999); *Walton v. Johnson*, 269 F. Supp. 2d 692, 701 (W.D. Va. 2003); Bruce Ebert, *Competency To Be Executed: A Proposed Instrument To Evaluate an Inmate’s Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 29 n.3 (2001). *But see, e.g.*, Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 OKLA. L. REV. 1, 39 (2002).

16. *See, e.g.*, Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 671 (2000); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 49-56 (1986).

17. Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67, 86-88 (1990).

18. 13 F.3d 871 (5th Cir. 1994).

19. *Id.* at 876.

guilty of [the] crime” was sufficient to support the state habeas court’s legal conclusion that he was competent to be executed.²⁰

More recently, a Texas federal district court relied on the narrow *Barnard* definition when it found Scott Panetti, another delusional prisoner, competent to be executed.²¹ Expert testimony introduced on Panetti’s behalf tended to show that he “does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him” and that he “believes the real reason he is to be executed is for preaching the Gospel.”²² However, the district court concluded that, under *Barnard*, Panetti’s “delusional beliefs—even those which may result in a fundamental failure to appreciate the connection between the petitioner’s crime and his execution—do not bear on the question of whether [he] ‘knows the reason for his execution’ for the purposes of the Eighth Amendment.”²³ Because Panetti “knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed.”²⁴

In order to emphasize the need for a deeper understanding of the state’s justifying purpose for the execution, the ABA Task Force’s proposal would require that an offender not only must “understand” the nature and purpose of punishment but also must “appreciate” its personal application in his own case—that is, why it is being imposed *on him*.²⁵ This formulation is analogous to the distinction often drawn between a “factual understanding” and a “rational understanding” of the reason for the execution.²⁶ If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed.

2. What Procedures Should Be Required for the Competence Determination?

State courts have disagreed about the procedures required to make *Ford* competence determinations. A sensible outline of the required

20. *Id.* at 876-77 (emphasis omitted).

21. *Panetti v. Dretke*, No. A-04-CA-042-SS (W.D. Tex. Sept. 29, 2004) (order denying petition for writ of habeas corpus).

22. *Id.*

23. *Id.*

24. *Id.*

25. See *Task Force Recommendations*, *supra* note 2, § 3(a).

26. See *Martin v. Dugger*, 515 So. 2d 185, 188 n. (Fla. 1987).

procedures appears in the ABA Standard 7.5-7²⁷ and the Sixth Circuit's decision in *Coe v. Bell*.²⁸ The prisoner is entitled to state-subsidized counsel and expert assessment once evidence raising a significant doubt about his competence is discovered.²⁹ The issue should be adjudicated at a hearing before a judge at which the prisoner bears the burden of proving his incompetence by a preponderance of the evidence.³⁰

3. *If the Prisoner Is Found Incompetent for Execution, Should Treatment Be Undertaken to Restore Competence?*

Whether a person found incompetent to be executed should be treated has been highly controversial because it implicates not only the prisoner's constitutional right to refuse treatment but also the ethical integrity of the mental health professions.³¹ The drafters of the *ABA Criminal Justice Mental Health Standards* took note of this problem in 1987, but declined to address it.³² What should be done?

Consider first the prisoner who objects to treatment. Does the Constitution permit the state to forcibly medicate him for the purpose of restoring his competence for execution? Admittedly, the state has a powerful interest in carrying out the sentence of death, an interest perhaps even more compelling than the state's generic interest in bringing criminal cases to trial that was at stake in *Sell v. United States*.³³ Some courts have decided that the government may forcibly medicate incompetent individuals, if necessary to render them competent to be executed, on the ground that once an individual is fairly convicted and sentenced to death, the state's interest in carrying out the sentence outweighs any individual interest in avoiding medication.³⁴ However,

27. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.7 (1988).

28. 209 F.3d 815 (6th Cir. 2000).

29. See *id.* at 818-20; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS §§ 7-5.7(a)-(d) (1988).

30. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS §§ 7-5.7(c)-(f) (1988); see also Paul F. Enzina & Jana L. Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency To Be Executed After Ford v. Wainwright*, 41 FLA. L. REV. 115, 133-36 (1989).

31. See Bonnie, *supra* note 17, at 82-86; Richard J. Bonnie, *Medical Ethics and the Death Penalty*, HASTINGS CENTER REP., May/June 1990, at 12, 15-17 [hereinafter Bonnie, *Medical Ethics*]; Richard J. Bonnie, *The Death Penalty: When Doctors Must Say No*, 305 BRIT. MED. J. 381, 382 (1992); Kirk Heilbrun et al., *The Debate on Treating Individuals Incompetent for Execution*, 149 AM. J. PSYCHIATRY 596, 596-97, 604 (1992); Douglas Mossman, *The Psychiatrist and Execution Competency: Forging Murky Ethical Waters*, 43 CASE W. RES. L. REV. 1, 6-9, 22, 35 (1992).

32. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.7 cmt. (1988).

33. 539 U.S. 166, 169, 180 (2003).

34. *E.g.*, Singleton v. Norris, 319 F.3d 1018, 1025-27 (8th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 832 (2003).

treating a condemned prisoner, especially over his objection, for the acknowledged purpose of enabling the state to execute him strikes many observers as barbaric and also violates fundamental ethical norms of the mental health professions.³⁵

According to nearly universal ethical opinion within the mental health professions, treatment with the purpose or inevitable effect of enabling the state to carry out an otherwise prohibited execution is unethical, whether or not the prisoner objects, except in two highly restricted circumstances (an advance directive by the prisoner while competent requesting such treatment or a compelling need to alleviate extreme suffering).³⁶ Because treatment is unethical, it is not “medically appropriate” and is therefore constitutionally impermissible when a prisoner objects under the criteria enunciated by the Supreme Court in *Sell*³⁷ and *Washington v. Harper*.³⁸ As the Louisiana Supreme Court observed in *State v. Perry*,³⁹ medical treatment to restore execution competence “is antithetical to the basic principles of the healing arts,” fails to “measurably contribute to the social goals of capital punishment,” and “is apt to be administered erroneously, arbitrarily or capriciously.”⁴⁰

There is only one sensible solution to this dilemma:⁴¹ a death sentence should be automatically commuted to a lesser punishment after a prisoner has been found incompetent for execution. Maryland has so prescribed.⁴² The Task Force Recommendations also embrace this view. Once an offender is found incompetent to be executed, execution should no longer be a permissible punishment.

4. When Should Courts Be Willing to Adjudicate Claims of Ford Incompetence?

When should courts be willing to entertain *Ford* claims? The current practice is to do so only when execution is genuinely imminent.⁴³ Should courts be willing to adjudicate these claims at an earlier time?

35. See Heilbrun et al., *supra* note 31, at 599.

36. See Brief of Amici Curiae American Psychiatric Association and American Medical Association at *6-*20, *Perry v. Louisiana*, 498 U.S. 38 (1990) (No. 89-5120), 1990 WL 10013108; Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Physician Participation in Capital Punishment*, 270 J. AM. MED. ASS'N 365, 365-68 (1993); see also Bonnie, *Medical Ethics*, *supra* note 31, at 16.

37. *Sell*, 539 U.S. at 179.

38. 494 U.S. 210, 227 (1990).

39. 610 So. 2d 746 (La. 1992).

40. *Id.* at 747-48, 751.

41. A state could try to restore a prisoner's competence without medical treatment, but the prospects of an enduring change in the prisoner's condition are slight.

42. MD. CODE ANN., CORRECTIONAL SERVICES §§ 3-904(c), (h)(2) (1999).

43. *Herrera v. Collins*, 506 U.S. 390, 406 (1993).

Unfortunately, instead of alleviating the clinician's ethical dilemma, this approach would simply revive it. Assuming that a judicial finding of incompetence—whenever rendered—would bar execution (as proposed above), condemned prisoners and their lawyers would have powerful incentives to allow mental illness to remain untreated (as well as to fabricate or exaggerate symptoms) as soon as a *Ford* hearing is legally available. It would be a sorry spectacle indeed if prisoners who had been stabilized on anti-psychotic medication to stand trial suddenly terminated their medication as soon as they were placed on death row. When, if ever, could treatment be ordered over the defendant's objection under these circumstances? And what should the treating psychiatrist do? Because a purposeful failure to treat could be viewed as an instrument of compassion, it is likely that many clinicians would be deterred from providing any treatment needed to prevent deterioration. To avoid such morally perverse incentives, *Ford* adjudications should be available only when legal challenges to the validity of the conviction and sentence have been exhausted, and execution has been scheduled.⁴⁴ If such adjudications were permitted at any earlier time, I see no way to avoid a very slippery slope.⁴⁵ Section 3(d) of the *Task Force Recommendations* embraces this view:

44. This does not preclude litigation challenging the validity of the sentence from simultaneously occurring. For all practical purposes, "exhaustion" means that one full sequence of state habeas review and federal habeas review have occurred. No execution date set during the initial rounds of state and collateral review is a "real" date. However, given the many procedural barriers to successive petitions for collateral review, an execution date set after the completion of the initial rounds may be intended by the state to be a "real" date, even if a successive petition has been filed or is being planned. In such a case, the state may contest the prisoner's request for a stay of execution. In the Task Force's view, a *Ford* claim should be considered on its merits in such a case.

45. If treatment of a condemned prisoner to restore competence after being found incompetent is unethical, is it also unethical to treat a prisoner whose collateral appeals have been exhausted, whose condition is deteriorating, and who *might* be found incompetent if the matter were adjudicated? Does the imminence of execution override an otherwise legitimate clinical justification for consensual treatment?

What if collateral appeals have not yet been exhausted? What if they have just begun? A strong ethical barrier against treating prisoners who *might* be *Ford*-incompetent could become a justification for refusing to treat all mentally ill prisoners on death row. Surely this cannot be a morally proper response either by correctional authorities or mental health professionals. The only sensible place to draw the line, in my opinion, is after a court has found the prisoner incompetent under *Ford*. Before that point, treatment is ethical if it is otherwise medically appropriate. Once the prisoner has been found *Ford*-incompetent by a court, however, treatment is almost always unethical, and the sentence should be commuted.

These observations have been addressed to the ethical issues associated with consensual treatment. If a condemned prisoner objects to treatment at any time, however, it should not be provided unless ordered by a court in conformity with applicable state law

Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.⁴⁶

II. IMPAIRED ABILITY TO ASSIST COUNSEL IN POST-CONVICTION PROCEEDINGS

Although Justice Powell's concurring opinion in *Ford* suggested that awareness of the nature and purpose of the punishment is the sole test for execution competence, he acknowledged the possibility that a severely mentally ill prisoner who understands the nature and purpose of the punishment may nonetheless be unable to provide meaningful assistance to his lawyer during the post-conviction process, thereby raising doubts about the reliability of any adjudication bearing on the validity of the conviction or death sentence.⁴⁷ Indeed, Sir William Blackstone linked the prohibition against executing "insane" prisoners to the possibility that "had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."⁴⁸ However, Justice Powell observed that the risk of injustice was greater in Blackstone's day, when executions followed quickly after trial, than it is today, when extensive review of death sentences is provided in both state and federal courts.⁴⁹

Not everyone has agreed with Justice Powell. Several states have included inability to assist counsel as a ground for precluding execution,⁵⁰ as did the drafters of the *ABA Criminal Justice Mental Health Standards*. Standard 7-5.6 provides that a prisoner is incompetent to be executed "if, as a result of mental illness or mental retardation, [he] lacks sufficient capacity to recognize or understand any fact which might exist which

and with federal constitutional requirements. See *Washington v. Harper*, 494 U.S. 210, 227 (1990).

46. *Task Force Recommendations*, *supra* note 2, § 3(d).

47. See *Ford v. Wainwright*, 477 U.S. 399, 420-21 (1986) (Powell, J., concurring in part and concurring in the judgment).

48. *Id.* at 407 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24-*25).

49. *Id.* at 420-21 (Powell, J., concurring in part and concurring in the judgment).

50. See, e.g., *Singleton v. State*, 437 S.E.2d 53, 57-58 (S.C. 1993); *State v. Harris*, 789 P.2d 60, 65 (Wash. 1990); *State v. Rice*, 757 P.2d 889, 913 (Wash. 1988).

would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.”⁵¹

Focusing exclusively on the conditions under which execution should be precluded (i.e., on the “definition” of incompetence for execution) misses the real target, in my opinion. The underlying issue is the impact that the prisoner’s possible incompetence should have on the post-conviction proceedings themselves. As already noted, courts typically will not entertain claims of incompetence for execution until all avenues of collateral relief have been exhausted.⁵² From this standpoint, Justice Powell must have been assuming that prisoners on the threshold of execution have already taken advantage of these post-conviction opportunities, leaving little risk that some critically important fact has been obscured throughout these proceedings or that a previously unknown defect in the conviction or sentence could yet emerge. These assumptions are warranted, of course, only if a prisoner’s impaired capacity to assist in post-conviction litigation would have been identified during the post-conviction proceedings, leading the courts to take appropriate precautionary action. However, one of the puzzles of current habeas practice is that the prisoner’s incompetence is not ordinarily recognized as a basis for suspending collateral litigation. This is where the problem lies and this is the deficiency that the ABA Task Force set out to address.⁵³

A prisoner’s inability to assist in post-conviction litigation must be addressed in a comprehensive manner and not only as a possible element of the Eighth Amendment bar against execution of a presently incompetent person. On the one hand, the rules governing collateral proceedings should be modified to protect the integrity of these proceedings long before an issue arises concerning whether an execution should go forward. On the other hand, if the collateral proceedings have been fully and fairly litigated, inability to assist counsel on the eve of execution may no longer be relevant, just as Justice Powell suggested.⁵⁴ Thus, the overriding question is whether impaired competence to participate in adjudication should have any bearing on the initiation or continuation of post-conviction proceedings.

The law in this area is both undeveloped and uncertain in many respects. However, some principles have begun to emerge, and these will be summarized before turning to the remaining puzzles.

51. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6 (1988).

52. See *supra* note 43 and accompanying text.

53. See *Task Force Recommendations, supra* note 2, § 3(c).

54. *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment).

A. Principles

1. Proof that a Prisoner's Incompetence Prevented Potentially Valid Claims from Being Raised, or Obscured Potentially Relevant Evidence in Earlier Post-Conviction Proceedings, Should Constitute "Cause" for Addressing Otherwise Defaulted Claims on the Merits in Subsequent Proceedings if the Prisoner Has Regained the Necessary Capacity, and Should Bar Execution if the Prisoner Has Not Regained Capacity

Under the laws of many states and the Federal Anti-Terrorism and Effective Death Penalty Act (AEDPA),⁵⁵ collateral proceedings are barred if they are not initiated within a specified period of time.⁵⁶ However, it is undisputed that a prisoner's failure to file within the specified time must be excused if such failure was attributable to a mental disability that impaired the prisoner's ability to recognize the basis for, or to take advantage of, possible collateral remedies.⁵⁷ Similarly, the prisoner should be able to lodge new claims, or relitigate previously raised claims, if the newly available evidence upon which the claim would have been based, or which would have been presented during the earlier proceeding relating to the claim, was unavailable to counsel due to the prisoner's mental disorder or disability.⁵⁸

Assuming, however, that collateral proceedings have been initiated in a timely fashion, the more difficult question is whether, and under what circumstances, a prisoner's mental disability should require suspension of the proceedings altogether.

2. Courts Should Suspend Post-Conviction Proceedings upon Proof that a Prisoner Is Incompetent to Assist Counsel in Such Proceedings and that the Prisoner's Participation Is Necessary for Fair Resolution of a Specific Claim

Thorough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law, analogous in some respects to direct review. Any impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself. However, habeas review is still collateral to the "main event" at trial and its review on direct appeal. The prisoner has no constitutional right to collateral review or to the

55. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

56. *See, e.g.*, 28 U.S.C. §§ 2262-66 (2000); N.Y. CRIM. PROC. LAW § 440.10(2)(c) (McKinney 1994).

57. *Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003).

58. *See, e.g.*, *Commonwealth v. Haag*, 809 A.2d 271, 285 (Pa. 2002); *Council v. Catoe*, 597 S.E.2d 782, 787 (S.C. 2004).

assistance of counsel in collateral proceedings.⁵⁹ Suspending collateral proceedings upon proof of the prisoner's incompetence could invite malingering and manipulation. Here is one context where the "death is different" argument must be used cautiously lest it be allowed to nullify the state's interest in the finality of the judgment affirmed on direct review as well as the state's legitimate interest in carrying out the death sentence.

No state now precludes continuation of the proceedings based solely on the prisoner's incompetence.⁶⁰ Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation and these matters should be litigated according to customary practice. However, a prisoner's impairments could obscure potentially valid claims, preventing counsel from finding out about them at all, or could inhibit his effective participation in an evidentiary hearing involving specific claims that are known to counsel. These problems are most likely to bear on allegations of ineffective assistance of counsel (e.g., trial counsel's failure to provide satisfactory advice, or to seek or develop possibly exculpatory or mitigating evidence). A consensus seems to be emerging that collateral proceedings should be suspended if and only if the prisoner's counsel makes a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims.⁶¹

59. *Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

60. *Cf. Ford v. Wainwright*, 477 U.S. 399, 408 & n.2 (1986).

61. *Catoe*, 597 S.E.2d at 787. The court in *Catoe* stated:

[T]he default rule is that [post-conviction review] hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his [post-conviction] counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the [post-conviction] judge may grant a continuance, staying the review of those issues until petitioner regains his competence.

Id.; see also *People v. Kelly*, 822 P.2d 385, 414 (Cal. 1992) ("[M]ental incompetence, although a basis for allowing 'next friend' standing to challenge the judgment, does not require cessation of postjudgment proceedings."); *Carter v. State*, 706 So. 2d 873, 875-76 (Fla. 1997) ("If a postconviction defendant is found incompetent, claims raising purely legal issues that are of record and claims that do not otherwise require the defendant's input must proceed."); *State v. Debra A.E.*, 523 N.W.2d 727, 735 (Wis. 1994) ("Pending the determination of competency and even after a determination of incompetency, defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the circuit court record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant.") (non-capital case).

Courts have divided on whether the habeas court should order examination and make a finding on the prisoner's competence for post-conviction adjudication once it has been raised by the prisoner's attorney. One view is that because incompetence is not a barrier to adjudication, there is no need for the matter to be adjudicated. *Kelly*, 822 P.2d at 413. The contrary view is that the issue should be determined to establish a record on the matter in the event that the prisoner's incompetence is involved as "cause" for

3. Proof that a Prisoner's Capacity to Understand or Communicate Information, or Otherwise to Assist Counsel Is Significantly Impaired, and that the Prisoner's Participation Is Necessary for a Fair Resolution of Specific Claims Bearing on the Validity of the Conviction or Death Sentence, Should Bar Execution

It follows from what has already been said that if the prisoner's incapacity to assist counsel warrants suspending the collateral proceedings, it should bar execution as well, just as ABA Standards recommend and the laws of several states now provide.⁶² ABA Standard 7-5.6 provides that prisoners should not be executed if they cannot understand the nature of the pending proceedings or if they "lack[] sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lack[] the ability to convey such information to counsel or the court."⁶³ As the commentary to Standard 7-5.6 indicates, "[t]he rule rests less on sympathy for the sentenced convict than on concern for the integrity of the criminal justice system."⁶⁴ Scores of people on death row have been exonerated based on claims of factual innocence, and many more offenders have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence.⁶⁵ The possibility, however slim, that incompetent individuals may not be able to assist counsel in reconstructing a viable factual or legal claim requires that executions be barred under these circumstances.

4. The Death Sentence Should Be Commuted If the Proceedings Have Been Suspended and the Prisoner's Competence Is Not Likely to Be Restored

Once the post-conviction proceedings have been suspended on grounds of the prisoner's incompetence to assist counsel, what should happen to the death sentence? The situation is analogous to the suspension of criminal proceedings before trial; in that context, the proceedings are typically terminated (and charges are dismissed) after a specified period if a court has found that competence for adjudication is not likely to be restored in the foreseeable future.⁶⁶ In the present context, it would be unfair to hold the death sentence in perpetual

reconsideration of otherwise forfeited claims at a later time. *Debra A.E.*, 523 N.W.2d at 735. The latter view is preferable.

62. See, e.g., MO. ANN. STAT. § 552.060 (West 2002).

63. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6 (1988).

64. *Id.* § 7-5.6 cmt.

65. DEATH PENALTY INFO. CTR., INNOCENCE: FREED FROM DEATH ROW, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited June 4, 2005).

66. See, e.g., N.J. STAT. ANN. § 2C:4-6 (West Supp. 2004).

suspension. In another concession to the “qualitative difference” between death and other punishments, a judicial finding that the prisoner’s competence to assist counsel is not likely to be restored in the foreseeable future should trigger an automatic reduction of the sentence to a lesser punishment, as the ABA Task Force has recommended.

Here is language concerning competence to assist counsel proposed by the ABA Task Force:

Procedures in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner’s sentence to a lesser punishment.⁶⁷

B. A Remaining Puzzle: Should Treatment to Restore Competence Be Ordered During Collateral Proceedings?

In light of the usual practice of post-conviction litigation, there is typically no need for the court to order treatment to restore the prisoner’s competence for post-conviction adjudication. The litigation will move forward notwithstanding the prisoner’s incompetence and will resolve most, if not all, claims. To the extent that some claims may be obscured by the prisoner’s incompetence, the prisoner (on counsel’s advice) has an incentive to seek treatment in order to identify and present all available challenges to the conviction and sentence.⁶⁸ Under these circumstances, mental health professionals should have no ethical qualms about providing requested treatment on a consensual basis: Doing so enhances the prisoner’s autonomy and his capability to assist in post-conviction litigation, and would not remove any legal impediment to

67. *Task Force Recommendations*, *supra* note 2, § 3(c). The terms “post-conviction proceeding” and “proceeding” in the Task Force Recommendations refer to direct appeal, state post-conviction proceedings, including requests for review by the state’s highest court and by the U.S. Supreme Court, and federal habeas corpus proceedings, including requests for review by the Supreme Court.

68. Only if the prisoner is incompetent under *Ford* and likely to remain so in the absence of treatment does the prisoner have an incentive to refuse treatment.

execution (as would treatment of a prisoner already found to be incompetent for execution).

As suggested above, however, collateral proceedings should be suspended if the prisoner's participation is required for a fair adjudication. If proceedings have been suspended, should treatment be ordered to restore the prisoner's competence? Even if the prisoner objects? Whether it is lawful to order treatment over the prisoner's objection under these circumstances would be governed by the criteria set forth by the Supreme Court in *Sell v. United States*.⁶⁹ As noted above, it is likely that these criteria could be met in cases involving collateral challenges to death sentences.

Aside from the constitutional issues, however, treatment of condemned prisoners to restore their competence for post-conviction proceedings raises the familiar ethical dilemma for mental health professionals. On the one hand, the legal context is similar to that presented by *Ford* claims since execution is legally precluded unless the prisoner's competence is restored.⁷⁰ In this sense, the inevitable effect of successful treatment is to remove a barrier to execution. On the other hand, even if the prisoner's capacity is restored, the direct and immediate effect is simply to revive the post-conviction adjudication. In this respect, the procedural posture is similar to treatment to restore competence to stand trial in a capital case: competence restoration allows the prisoner's legal challenges to proceed; it does not open the door to execution. Obviously, restoring competence to participate in post-conviction proceedings falls somewhere between restoring competence to stand trial on capital charges (ethically permissible) and restoring competence for execution under *Ford* (ethically impermissible). Admittedly the connection between the clinician's actions and the execution, if one occurs, is not as remote as it is before trial, but neither is it as immediate and direct as it is under *Ford* when all judicial remedies have been exhausted and execution is imminent.

This is a perplexing problem, and the Task Force did not take a position on it. My own inclination is to say that treatment is ethically permissible under these circumstances.

69. 539 U.S. 166, 180-83 (2003).

70. It is therefore equivalent to the situation envisioned by the drafters of the ABA Standards and those states (such as South Carolina) that include capacity to assist counsel as a component of the test for execution competence. See *Singleton v. State*, 437 S.E.2d 53, 56-58 (S.C. 1993); ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.6(b) (1988).

III. IMPAIRED ABILITY TO MAKE A RATIONAL DECISION TO FORGO POST-CONVICTION PROCEEDINGS

According to John Blume, twelve percent of the prisoners executed in the post-*Gregg* era have been so-called “volunteers.”⁷¹ The literature reveals a genuine and deeply felt ethical disagreement about whether attorneys and courts should accede to the wishes of prisoners who seek to forgo or abandon their “appeals,” including direct appeal as well as collateral review.⁷² It also echoes the even more anguishing problems that arise during the criminal prosecution itself, when the defendant seeks to waive counsel altogether, to sabotage counsel’s representation, to plead guilty, to forbid counsel from exploring or presenting mitigating evidence, or requests the judge to impose a death sentence.⁷³

I have taken the view that respect for the dignity of the defendant or condemned prisoner requires counsel to adhere to the wishes of a competent client and precludes the courts from directing otherwise, as long as the substantive predicates for a death sentence under state law and the Federal Constitution have been established.⁷⁴ Others disagree, insisting that executing prisoners who abandon their appeals amounts to “state-assisted suicide.”⁷⁵ The United States Supreme Court has endorsed the traditional understanding,⁷⁶ and I will take that as my starting point. The “puzzles” in this context relate to the meaning of competence and the consequences of a finding of competence.

71. John Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 940 (2005).

72. See, e.g., Bonnie, *supra* note 4, at 1380-89; Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 542-45 (2003); C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL., POL’Y & L. 1109, 1145 (2004); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 876-94 (1983); Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1296-99 (2001).

73. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 579-80 (1993); cf. Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel To Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95 (1987).

74. Bonnie, *supra* note 4, at 1389.

75. Blume, *supra* note 71, at 942; see also Strafer, *supra* note 72, at 903-04.

76. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (order terminating stay of execution).

A. Basic Principle: If the Prisoner Is Not Competent to Make a Rational Decision, the Court Should Authorize a Next Friend to Initiate and Pursue Collateral Relief

The standard procedure is to allow a so-called “next friend” (including the attorney) to pursue direct appeal and collateral proceedings aiming to set aside the conviction or sentence if the prisoner is shown to lack the capacity to make a rational decision.⁷⁷ The Task Force Recommendations are clear and straightforward on this point:

Procedures in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings. If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner’s behalf to initiate or pursue available remedies to set aside the conviction or death sentence.⁷⁸

B. The Puzzles

Several complex questions lurk beneath the surface of this simple proposition. Although the Task Force took no position on them, I will present my own views below.

1. What Does “Competence” Mean?

A cursory review of the reported cases concerning prisoners who seek execution suggests that the courts are highly reluctant to find prisoners incompetent to make decisions regarding post-conviction challenges (or even pre-conviction waivers). No more than five to ten percent are found incompetent.⁷⁹ What does competency mean in this context?

The minimum requirement for competence would be what I will call the “waiver” standard. A valid waiver of the right to pursue post-conviction remedies requires a knowing and intelligent choice,⁸⁰ and

77. See *Whitmore v. Arkansas*, 495 U.S. 149, 162-63 (1990); Bonnie, *supra* note 4, at 1366 n.9.

78. *Task Force Recommendations*, *supra* note 2, § 3(b).

79. John Blume states, based on his empirical study as well as extensive personal experience, that “[a]lmost all inmates who attempt to waive their appeals are found competent.” Email from John Blume, Associate Professor of Law, Cornell University to Richard J. Bonnie, John S. Battle Professor of Law, University of Virginia, Director, University of Virginia Institute of Law, Psychiatry and Public Policy (Feb. 28, 2005, 9:06:46 EST) (on file with author) [hereinafter Email from John Blume]. He estimates that more than “90 [percent] who persist in their efforts to ‘volunteer’ are ultimately allowed to do so.” *Id.*

80. *Demosthenes v. Baal*, 495 U.S. 731, 734 (1990); *Gilmore*, 429 U.S. at 1013.

“competence” to make a valid waiver essentially requires capacity to understand the consequences of forgoing or terminating the proceedings.⁸¹ The great majority of prisoners who have sought to forgo or terminate post-conviction proceedings have probably been competent under this standard—they have known full well that the consequence of the waiver will be execution. Indeed, the desire for execution is the very reason for waiving their rights.

The point, of course, is that any meaningful competence inquiry must focus on the prisoner’s *reasons* for wanting to surrender to the state, and on the rationality of the prisoner’s thinking and reasoning. This was the focus of the Supreme Court’s effort to articulate the governing standard in *Rees v. Peyton*.⁸² In *Rees*, the Court instructed the lower court to determine whether the prisoner had 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.”⁸³ The problem with this standard is that the two alternative findings mentioned by the Court are not mutually exclusive—a person with a mental disorder that “affects” his decisionmaking may nonetheless be able to appreciate his position and make a “rational” choice. For this reason, the lower courts have integrated the *Rees* formula into a three-step test: (1) does the prisoner have a mental disorder?; (2) if so, does this condition prevent him from understanding his legal position and the options available to him?; and (3) even if his understanding is unimpaired, does the condition nonetheless prevent him from making a rational choice among the options?⁸⁴

The courts have adopted a fairly broad conception of mental disorder (the first step)⁸⁵ and the prisoner’s understanding of his or her “legal position” (the second step) is hardly ever in doubt in these cases. Thus,

81. Cf. *Godinez v. Moran*, 509 U.S. 389, 400-01 & 401 n.12 (1993).

82. 384 U.S. 312 (1966) (remanding case for competency determination after condemned prisoner directed attorney to withdraw petition for certiorari).

83. *Id.* at 314.

84. See, e.g., *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000); *Rumbaugh v. Procnier*, 753 F.2d 395, 398 (5th Cir. 1985).

85. See, e.g., *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1251-52 (9th Cir. 2000) (order issuing stay of execution) (depression), *vacated by* 531 U.S. 986 (2000); *St. Pierre v. Cowan*, 217 F.3d 939, 943-44 (7th Cir. 2000) (bipolar disorder); *Vargas v. Lambert*, 159 F.3d 1161, 1170-71 (9th Cir. 1998) (order issuing stay of execution) (psychosis), *vacated by* 525 U.S. 925 (1998); *Lonchar v. Zant*, 978 F.2d 637, 642 (11th Cir. 1992) (moderate depression); *Smith ex rel. Smith v. Armontrout*, 632 F. Supp. 503, 511-14 (W.D. Mo. 1986) (order continuing stay of execution) (borderline personality disorder), *aff’d sub nom. Smith ex rel. Mo. Pub. Defender Comm’n v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987).

virtually all the work under the *Rees* test is done by the third step. Conceptually, the question is relatively straightforward—is the prisoner’s decision attributable to the mental disorder or to “rational choice”?

Unequivocal cases of irrationality rarely arise. For example, if an offender suffering from schizophrenia tells his or her attorney to forgo appeals because the future of civilization depends upon the offender’s death,⁸⁶ the “reason” for the prisoner’s choice can comfortably be attributed to the psychotic symptom. However, decisions rooted in delusions are atypical in these cases. The usual case involves articulated reasons that may seem “rational” under the circumstances, such as (a) a desire to take responsibility for one’s actions and a belief that one deserves the death penalty or (b) a preference for the death penalty over life imprisonment.⁸⁷ The cases that give the courts the most trouble are those in which such apparently “rational” reasons are intertwined with emotional distress (especially depression), feelings of guilt and remorse, and hopelessness. In many cases, choices that may otherwise seem “rational” may be rooted in suicidal motivations. Assuming, for example, that the prisoner is depressed and suicidal but has a genuine desire to take responsibility, how is one to say which motivation “predominates”?

John Blume argues that the *Rees* inquiry should be abandoned altogether and that suicidal motivation should be sufficient, in itself, to preclude execution even if the prisoner is not legally incompetent.⁸⁸ He bases his argument on the view that a model derived from the law’s unequivocal ban against assisted suicide⁸⁹ should be deployed in deciding whether to honor the condemned prisoner’s wishes, displacing the legal model of prisoner autonomy (with its emphasis on “competence”) that now prevails.⁹⁰ Blume’s analysis has strong intuitive appeal and has the advantage of dispensing with the need to decide whether a given motivation should or should not be “attributed” to “disorder.”⁹¹ However, neither courts nor legislators are likely to be willing to depart from the traditional autonomy model embraced in *Rees*, with its dispositive emphasis on incompetence attributable to mental disorder.

Nonetheless, courts and legislatures should pay close attention to Blume’s data regarding the prevalence of significant mental disorder

86. *People v. Haynes*, 737 N.E.2d 169, 178 (Ill. 2000); see also *In re Heidnik*, 112 F.3d 105, 107 (3rd Cir. 1997) (order continuing stay of execution).

87. See Strafer, *supra* note 72, at 861-62.

88. See Blume, *supra* note 71, at 977-82.

89. *Id.* at 957-60.

90. *Id.* at 952-53.

91. See *id.* at 977-82.

among the 106 prisoners who have volunteered for execution.⁹² According to Blume, fourteen of the “volunteers” had recorded diagnoses of schizophrenia, twenty-three had recorded diagnoses of depression or bipolar disorder, ten had records of post-traumatic stress disorder, four had diagnoses of borderline personality disorder, and two had been diagnosed with multiple personality disorder.⁹³ Another twelve had unspecified histories of “mental illness.”⁹⁴

Given this high prevalence of mental illness, the courts should be more willing than they now are to acknowledge suicidal motivations when they are evident and should be more inclined than they now are to attribute suicidal motivations to mental illness. The third step of the *Rees* test would then amount to the following: Is the prisoner who seeks execution able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder?⁹⁵ Given the stakes of the decision, a relatively high degree of rationality ought to be required in order to find people competent to make decisions to abandon proceedings concerning the validity of a death sentence.⁹⁶

2. Should Treatment Be Provided upon Request to a Prisoner Who Has Been Found Incompetent to Decide to Forgo or Terminate Post-Conviction Proceedings?

Should a prisoner, whose desire to forgo or terminate post-conviction proceedings has been overridden, receive treatment designed to restore the necessary capacity? The ABA Task Force decided not to address this issue. In my own view, however, I see no persuasive reason for withholding treatment from prisoners who seek it. A competent prisoner is entitled to abandon the litigation. If the prisoner’s decision to forgo or terminate post-conviction proceedings is overridden on the grounds of doubted competence, the prisoner’s desire for autonomy-restoring treatment should be respected even though one possible consequence of the treatment is to enable the prisoner to terminate the proceedings and request execution. It should be emphasized, however, that many

92. *Id.* at 970.

93. *Id.* app. B & 971.

94. *See id.* app. B. The text refers only to significant mental disorders that could have distorted the prisoner’s reasoning process and impaired capacity for “rational choice.” *See id.* at 970-72. In addition to these cases, Blume reports that seventeen of these prisoners had histories of substance abuse unaccompanied by any other mental disorder diagnosis, another seven had personality disorders (with or without substance abuse), and four had sexual impulse disorders. *See id.* app. B.

95. *See Rees v. Peyton*, 384 U.S. 312, 314 (1966). A more demanding approach would ask whether the prisoner is able to give plausible reasons that reflect authentic values and enduring preferences.

96. *See Bonnie*, *supra* note 4, at 1388-89; *cf. Bonnie*, *supra* note 73, at 579-80.

prisoners are likely to change their minds (authorizing post-conviction proceedings) as a result of successful treatment.⁹⁷

3. *Is Competence the Only Issue?*

Under prevailing practice, courts are often reluctant to override the prisoner's preferences in cases involving mixed motivations, and they may be unwilling to change that practice as suggested above. However, competence is not the only issue. Even if the prisoner is *competent*, his choices may be strongly influenced by situational depression associated with feelings of guilt and remorse, a condition that is often amenable to treatment. History shows that many such prisoners change their minds.⁹⁸ For this reason alone, courts should not be in a hurry to proceed in these cases, and should suspend proceedings or toll statutory time periods to permit a reasonable period of therapeutic intervention.

This problem is particularly acute in cases where the prisoner's unwillingness to contest a death sentence takes root immediately after the crime. Two cases brought to the attention of the Supreme Court graphically illustrate the problem. Gary Gilmore, whose case was immortalized by Norman Mailer in *The Executioner's Song*, was sentenced to death on October 7, 1976, three months after his arrest for killing a gas station attendant and a motel manager in separate incidents over the course of two days.⁹⁹ He was executed on January 17, 1977, after waiving his right to direct appeal, and after the Supreme Court declined to intervene, rejecting his mother's effort, as his "next friend," to stay the execution.¹⁰⁰ Gilmore insisted that he had been treated fairly

97. John Blume has estimated, based on his empirical study of "volunteers," that about half of the prisoners who seek to forgo or terminate judicial proceedings eventually change their minds. Email from John Blume, *supra* note 79.

98. See Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 854-55 (1987).

99. NORMAN MAILER, *THE EXECUTIONER'S SONG* (1979).

100. *Gilmore v. Utah*, 429 U.S. 1012, 1013-14 (1976) (terminating stay of execution on the ground that Gilmore had knowingly and intelligently waived his right to seek federal relief and that his mother lacked standing as "next friend" to seek a stay). Gilmore had been found competent to stand trial by several examining psychiatrists, and was later found competent to waive his right to direct appeal by a prison psychiatrist. *Id.* at 1015 n.5 (Burger, J., concurring). Justice Marshall expressed skepticism about the competency finding:

I cannot agree . . . that Gilmore has competently, knowingly, and intelligently decided to let himself be killed. Less than five months have passed since the commission of the crime; just over two months have elapsed since sentence was imposed. That is hardly sufficient time for mature consideration of the question, nor does Gilmore's erratic behavior . . . evidence such deliberation.

Id. at 1019 (Marshall, J., dissenting).

by the state of Utah in all respects save its unwillingness to execute him more quickly.¹⁰¹ He attempted suicide in prison to make the point.¹⁰²

The second case, discussed in a previous work of mine, also illustrates this problem:

Richard Moran was charged with three counts of capital murder in Nevada for killing two people in a bar on August 2, 1984 and for shooting his former wife in a separate incident seven days later. Immediately after shooting his wife, Moran attempted suicide by shooting himself in the abdomen and slashing his wrists. While in the hospital recovering from his wounds, he summoned the police and confessed to all three homicides. Soon after discharge from the hospital, he was referred for forensic assessment of his competence to stand trial, and two examining psychiatrists interviewed him separately [in mid-September]. Each psychiatrist concluded that Moran understood the charges and was able to assist his attorney. Taking note of his depression and remorse, one of the psychiatrists observed that "Moran may not make the effort necessary to assist counsel in his own defense." The record also shows that Moran was prescribed several depressants and anti-anxiety drugs during the pretrial period.

. . . [I]n November, [only three months after the offense] Moran appeared in court, "expressed extreme remorse" for the killings, discharged his counsel, changed his pleas to guilty, refused the trial court's offer of standby counsel, and announced that he wanted no mitigating evidence presented on his behalf at the sentencing proceeding. The trial court accepted Moran's waiver of counsel and pleas of guilty after conducting a plea colloquy during which Moran uttered "monosyllabic responses to leading questions from the court about his legal rights and the charged offense." In January, 1985 [five months after the offenses], a three-judge panel imposed death sentences for each of the three homicides. . . .

Wholesale capitulation by remorseful capital defendants is not unusual. Such defendants typically insist on pleading guilty against counsel's advice and instruct counsel to refrain from introducing any evidence in mitigation, or like Richard Moran, they discharge their attorneys and plead guilty while unrepresented. These defendants also frequently request sentences of death.¹⁰³

101. *Id.* at 1013 n.1; MAILER, *supra* note 99, at 490-92.

102. *See* MAILER, *supra* note 99, at 590.

103. Bonnie, *supra* note 73, at 587-88 (footnotes omitted).

Why are courts in such a hurry in cases like this? The prosecution is all too willing to take advantage of the defendant's surrender, seeking what is essentially an uncontested death penalty, and trial judges are all too willing to stand by and let it happen. Why? Even if these defendants are competent to waive their rights, the courts are not obliged to accede to the defendant's wishes to expedite the proceedings. Why don't the courts insist on a waiting period?

After the damage is done, many of these defendants change their minds. The following passage illustrates this fact:

Capital defendants who have failed to defend themselves or seek leniency at trial and who have received death sentences often regret their behavior thereafter. They then file appeals or habeas petitions seeking to nullify the convictions and death sentences they so ardently sought. The possibility of strategic behavior in such cases cannot be altogether ruled out, but the most likely explanation is that medication, counseling, and the passage of time alleviate the prisoners' acute distress and[, as a result,] they eventually come to prefer life, even with suffering and guilt, to death. [Richard Moran changed his mind, filing a] state habeas petition in July of 1987. Among other claims, he alleged that he had not been competent to waive counsel or to enter valid guilty pleas in November of 1984 and that, in any event, the trial court had not undertaken a constitutionally adequate inquiry regarding his competence to do so.¹⁰⁴

That was only one of the trial court's mistakes, in my opinion. However, the same judge, on state habeas, managed to make the necessary factual findings to insulate his rulings from reversal, and the Supreme Court refused to do anything about it, making bad law in the process.¹⁰⁵

We don't know whether Gary Gilmore would have changed his mind because the Supreme Court of Utah allowed him to waive direct review, and the U.S. Supreme Court was unwilling to slow down the train as it headed toward the hastiest execution of the modern era.¹⁰⁶

Courts should not allow depressed defendants to sabotage their legal defense. They should, in effect, require a "waiting period" before a defendant is permitted to waive counsel at trial (or make other decisions not to contest the death penalty) or to forgo post-conviction proceedings. In this respect, at least, the analogy with suicide is an apt one. A genuine screen for depression and a waiting period are morally essential

104. *Id.* at 588 (footnote omitted).

105. *Godinez v. Moran*, 509 U.S. 389, 392-93 (1993); *Bonnie*, *supra* note 73, at 588.

106. *Gilmore*, 429 U.S. at 1013; *accord id.* at 1019 (Marshall, J., dissenting).

components of a law allowing physician-assisted suicide.¹⁰⁷ In the context of capital prosecutions and collateral review of death sentences, such requirements are a relatively costless concession to the undeniable truth that “death is qualitatively different” from other punishments, however severe.

IV. CONCLUSION

In the context of deep and enduring disagreement about the desirability of capital punishment, courts and legislatures in thirty-eight states face the challenge of designing and administering a fair and humane system for imposing this controversial sanction while being respectful of the popular will. One increasingly scrutinized issue is the execution of offenders with serious mental illness. Although firm estimates are not available, the prevalence of serious mental illness on death row is likely higher than most readers imagine—perhaps as high as five to ten percent at any point in time. The ABA Task Force on Mental Disability and the Death Penalty has formulated three proposals designed to preclude execution of condemned prisoners with severe mental illness while also taking adequate account of the societal interest in carrying out executions in cases involving the most heinous crimes. The two parts of the Task Force’s three-part recommendation discussed by Professor Slobogin aim to reduce the number of mentally disordered offenders sentenced to death. Even if these two proposals are adopted, however, difficult legal problems will continue to arise when condemned prisoners experience symptoms of severe mental illness on death row. The third part of the Task Force’s recommendation aims to deal with these problems.

The Task Force proposal deals, respectively, with impairments of decisional competence in forgoing legal challenges to the death sentence, competence to assist counsel in post-conviction adjudication, and competence at the time of execution. Ultimately, these proposals aim to counteract unseemly haste in executing acutely disturbed prisoners who seek to terminate their appeals while respecting the “dignity of the condemned”; to minimize mistakes in post-conviction adjudication; and to avoid the morally appalling prospects of executing a prisoner who lacks a genuine moral understanding of the nature or purpose of the execution or of medicating such a prisoner for the sole purpose of enabling the state to carry out the execution. In this Article, I have sought to explain the Task Force’s rationale for these proposals, to point

107. See, e.g., OR. REV. STAT. §§ 127.820, .850 (2003); Franklin G. Miller et al., *Regulating Physician-Assisted Death*, 331 NEW ENG. J. MED. 119, 120-21 (1994).

the way toward their successful implementation, and to identify the problems the Task Force proposals leave unsolved.

