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# KILLING THE WILLING: "VOLUNTEERS," SUICIDE AND COMPETENCY

*John H. Blume**

## INTRODUCTION

When my client Robert South decided to waive his appeals so that his death sentence could be carried out, I understood why he might make that choice. Robert had a brain tumor that could not be surgically removed. Though not fatal, the tumor disrupted his sleep/wake cycle and had other negative physical consequences, including severe headaches, for his daily existence. He also had chronic post-traumatic stress disorder ("PTSD"), resulting from a profound history of childhood physical, emotional and sexual abuse. Robert suffered from daily recurrent flashbacks of the abuse. He had been on death row for almost a decade, and his children were grown. In his own words, he was "tired," and he no longer wanted to go on.

Even though he almost certainly would have obtained a new sentencing trial, and a life sentence seemed clearly obtainable, I did not view his choice as irrational. But it was suicidal. As a consequence, my feelings about his waiver were mixed; perhaps respect for him as a person should have led me to defer to, rather than resist, his choice. Rightly or wrongly, I opposed his choice, arguing that he was not competent to waive his appeals. But he was deemed competent, and, truth be told, correctly so. Despite my legal opposition to his choice, Robert asked me to be his "witness" at his execution, and I held his hand while the state took his life by means of lethal injection.

Robert's case is hardly an isolated incident. Since *Gregg v. Georgia*[1] ushered in the "modern era" of capital punishment,[2] there

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1. 428 U.S. 153 (1976).

2. For a more thorough description of the events culminating in the beginning of the "modern era" of capital punishment, see John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002).



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have been 885 executions,[3] 106 of which, including the first,[4] involved "volunteers,"[5] or inmates who waived their appeals and permitted the death sentence to be carried out.[6] Moreover, for every successful volunteer, there have been numerous death-row inmates who took affirmative steps to waive their appeals but subsequently changed their minds, and even more who contemplated forgoing additional legal challenges to their death sentence and submitting to execution.[7] Every death-row volunteer inevitably presents us with the following question: Should a death-row inmate who wishes to waive his appeals be viewed as a client making a legal decision to accept the justness of his punishment, or as a person seeking the aid of the state in committing suicide?

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3. Death Penalty Info. Ctr., Searchable Database of Executions, *at* http://www.deathpenaltyinfo.org/executions.php (last visited Jan. 13, 2005). This figure includes all executions which took place through the end of 2003. There have been additional executions since the end of 2003, but, for the purposes of the empirical analysis contained in this article, it was necessary to close the pool of relevant individuals at some logical point in time.

4. Gary Gilmore was executed on January 17, 1977, just five months after the crime, and two months after the death sentence was imposed. Gilmore v. Utah, 429 U.S. 1012, 1019 (1977) (Marshall, J., dissenting). Gilmore waived all appeals and opposed the efforts of others, including his mother, to intervene on his behalf. *Id.* at 1013-14 (Burger, C.J., concurring). There have also been several additional inmates who waived their appeals since the end of 2003. *See, e.g.*, Carla Crowder, *Mentally Ill Man Executed for 1988 Killing*, BIRMINGHAM NEWS (Ala.), Oct. 1, 2004. The 106 figure reflects the number of death-row inmates who waived their appeals through the end of 2003. *See infra* Appendix A, which collects the names of these death row inmates. The sources of their names include the Death Penalty Information Center database, *see supra* note 3, reported opinions, newspaper articles, and other publicly available sources.

5. "Volunteer" is the term generally used for a death-row inmate who waives his appeals in the academic literature as well as in the capital defense community. *See, e.g.*, G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983). There are other individuals on death row who have precluded their trial counsel from presenting any evidence or argument at the sentencing phase of their capital trials. *See, e.g.*, State v. Jordan, 804 N.E.2d 1 (Ohio 2004) (defendant waived presentation of any mitigating evidence). Some of these same individuals ultimately volunteer for execution; some do not. While the phenomenon is similar in many respects to that of volunteering, it is beyond the scope of this article, unless, of course, the individual ultimately waived his appeals.

6. Interestingly, there have been almost the same number of death-row inmates who have been exonerated. Nationwide, between 1973 and October 6, 2004, 117 people were released from death row due to evidence of innocence. Death Penalty Info. Ctr., Innocence and the Death Penalty, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (last visited Oct. 6, 2004).

7. For example, I have been involved in several other cases where the death-row inmate wrote the court a letter indicating that he wished to abandon any additional appeals, but in each case the inmate ultimately decided, at least for the time being, to continue on in the appellate process. *See* Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1902-03 (1998) (stating that many death-row inmates express a desire to die, but most change their minds); Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 801 (2002) (noting that most capital defendants "at one point or another, express[] a preference for execution over life in prison. Most of them, though, change their minds." (footnote omitted)).

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Both characterizations are in some respects accurate. Were it not for the fact that the client's choice, if unfettered, will result in his death, it would be clear that this is the kind of ultimate (as opposed to strategic) decision that a client is entitled to make for himself, regardless of the opinion of his lawyer.[8] Viewed from the client-choice vantage point, the only question is whether the client is competent to make that choice. On the other hand, were it not for the fact that the inmate has been sentenced to death, it would be illegal in virtually every jurisdiction for anyone to assist the inmate in actively hastening his own death.[9] From the assisted-suicide perspective, no death-row inmate should be permitted to abandon his appeals. Whether (or how) these two models can be reconciled remains unclear.

Further reflection about Robert South's case has led me to conclude that my own ambivalence, and its underlying reliance on rational choice, was, and should be, irrelevant. The question is not the rationality of a volunteer's choice — or its wisdom or morality. Instead, the question is whether laws relating to suicide apply, and those laws do not depend on the rationality of the desire to terminate one's life. Even persons in extreme pain, persons with no hope of improvement, persons certain to lose their mental abilities, or persons imposing enormous financial or psychological costs on family members can be prevented from committing suicide, and others are prohibited from assisting suicide under those circumstances — in every state but Oregon. Moreover, even in Oregon, only when the suicidal person is terminally ill is he protected from intervention by the state; and only then are prohibitions against third-party assistance relaxed. Unless and until legal norms governing suicide and assisted suicide change, if a court finds the volunteer is motivated by the desire to terminate his life, the rationality of his decision to do so should not be considered.

Although the volunteer phenomena has been the subject of a number of fractured judicial decisions,[10] hotly debated among lawyers who represent death-row inmates,[11] and in the legal literature,[12] the discussion has been largely polemic, with little recognition (or at least

8. A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 4-5.2 cmt. (3d ed. 1993) (noting that the client has the right to make "fundamental" decisions that are "crucial to the accused's fate").

9. Washington v. Glucksberg, 521 U.S. 702 (1997) (recognizing the near universal ban on assisted suicide, and holding that there is no constitutional right to physician-assisted suicide).

10. *See, e.g.*, Gilmore v. Utah, 429 U.S. 1012 (1976).

11. *See, e.g.*, Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849 (2000); Terry Towery, *"Volunteer" Clients — Whose Life Is It Anyway?*, CAL. DEFENDER, Summer/Fall 2002, at 10.

12. *See, e.g.*, Chandler, *supra* note 7; Garnett, *supra* note 7.

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acknowledgment) on either side that the volunteer phenomenon is not fully captured by either model. Those who either oppose, or wish to curtail, a death-row inmate's ability to waive his appeals refer to volunteer cases as nothing more than "state-assisted suicide;" on the other hand, advocates of permitting inmates to choose execution reject the suicide label, instead focusing on respect for a death-row inmate's right to choose whether to accept his punishment. And, perhaps not surprisingly, the current legal regime under which volunteering is regulated — the competency standard — is equally blind to an individual's motivation and thus embraces the same categorical rigidity.

This Article does not attempt to re-plow the either-or debate. Instead, I begin in Part I with a summary of the current legal standards for volunteering and assisted suicide. I attempt to place these standards within the context of the theoretical debate over volunteering. In doing so, I argue that the current standard for volunteering, which views volunteering as a simple matter of personal client choice, ignores the motivations behind that choice. The competency standard is indifferent to whether a volunteer is motivated by the desire to commit suicide or the desire to accept the justness of his punishment. Furthermore, because either motivation is potentially possible, and because different results should follow from a suicidal as opposed to an acceptance-of-the-justness-of-the-punishment motivation, I argue that neither side of the debate adequately accounts for the nuances of the unique phenomenon of volunteering. Instead, given the current legal norms prohibiting assisted suicide, we should ask whether, at least in some instances, the act of volunteering is best characterized as suicidal.

Part II explores how, and how often, volunteers are in fact similar to suicidal persons. Given the plausibility and prominence of the dissenting rhetoric of "assisted suicide" in cases involving volunteers, this Article offers some empirical comparisons between the characteristics of death-row inmates who have waived their appeals and been executed with those of people who commit suicide in the "free world." Several similarities are quite striking. Both groups contain disproportionately high percentages of white males, mentally ill individuals, and persons with substance abuse disorders.[13]

Demographic and epidemiological similarities between death-row volunteers and free-world suicides strongly suggest that the present competency standard is wrong in its wholesale rejection of the suicide model, and should be altered to reflect the prevalence of suicidal motivation.

13. In drawing these comparisons, this Article primarily considers statistical data about death row. However, to a lesser degree it takes into account the results of a questionnaire sent to attorneys who have represented volunteers.

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At this point, the existing data fall short of establishing that a death-sentenced inmate's decision to forgo further appeals is *always* the psychological equivalent of suicide. For this reason, even in jurisdictions that uniformly forbid assisted suicide, a complete prohibition against such waivers, and thus voluntary executions, is inappropriate. Part III proposes a standard for assessing waiver which takes into account the prevalence of suicidal motivation among volunteers, attempting to ensure that a death-row inmate is not permitted to use the death penalty as a means of committing state-assisted suicide, but also protecting the right of a mentally healthy inmate to forgo further appeals when motivated by acceptance of the justness of his punishment. I conclude by applying the standard to several hypothetical situations drawn from cases of actual volunteers.

## I. THE LAW AND THEORY OF VOLUNTEERING

In this section of the Article I will first discuss the development of the current legal standard for determining whether a death-row inmate will be permitted to waive his appeals, which asks only whether the individual is competent. I will then briefly discuss the law of assisted suicide. Finally, I will return to the theoretical debate over how the phenomena of volunteering should be assessed. In each instance, I will attempt to demonstrate that the question of individual motivation has been shortchanged.

### A. *Competency: The Current Legal Standard for Volunteering*

As I mentioned at the beginning of the Article, when I decided to challenge Robert South's request to waive further appeals, I was forced to argue that he was incompetent. That is because the Supreme Court has held that the only showing that a death-row inmate must make in order to forgo his appeals is that he is competent. The evolution of this standard, however, was a slow and fitful process.[14] The Court first faced this issue in *Rees v. Peyton*.[15] Rees, a Virginia death-row inmate, directed his attorney to withdraw a petition for certiorari filed on his behalf. Counsel refused to do so, ostensibly due to doubts about his client's competency. The Supreme Court remanded the case to the district court for a hearing to determine whether Rees should be permitted to waive his appeals and let the

14. 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, 122 (1998-99) (referencing the "confusing and conflicting line of cases concerning the standard to determine a defendant's competency to waive death penalty appeals").

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

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death sentence be carried out,[16] directing the district court to determine Rees's "mental competence," or 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."[17]

Even a quick parsing of *Rees* foreshadows difficulties in application, largely because the two alternatives posed by *Rees* are not mutually exclusive. A defendant could both have the capacity to "make a rational choice" and also suffer from a mental illness which "substantially affect[s] his capacity" to make a decision. As the Eighth Circuit has noted, there is an "overlap" in these two categories.[18]

This logical difficulty may explain the Court's odd reticence in *Gilmore v. Utah*, the next Supreme Court case to present the volunteering phenomenon.[19] By the time Gary Gilmore's case reached the Supreme Court, his motivation for waiving all appeals was transparently suicidal: he had attempted to kill himself six days after he personally told the Utah Supreme Court that he wished to withdraw an appeal previously filed without his consent.[20] Gilmore's mother attempted to file an appeal with the Supreme Court. The Court denied the application for a stay in a short *per curiam* opinion that did not even reference *Rees*. The majority stated simply:

> [T]he Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court's sentence was imposed, and, specifically, that the State's determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.[21]

Justices Marshall and White dissented in words often echoed by those who oppose the ability of death-row inmates to waive their appeals and volunteer for execution. In Justice Marshall's view, "the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but . . . also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."[22] He reasoned that without appellate review "an unacceptably high percentage of criminal

16. *Id.* at 313-14. Since the Supreme Court is not a factfinding court, the remand was necessary "in aid of the proper exercise of [the Supreme Court's] certiorari jurisdiction." *Id.* at 313.

17. *Id.* at 314.

18. Smith v. Armontrout, 812 F.2d 1050, 1057 (8th Cir. 1987).

19. *Gilmore*, 429 U.S. 1012 (1976).

20. *Id.* at 1015 nn.4-5.

21. *Id.* at 1013.

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

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defendants would be wrongfully executed — 'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State."[23] Similarly, Justice White would have held that "the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."[24]

The Court further muddied the waters in *Whitmore v. Arkansas*,[25] by *both* referring to *Gilmore* and its "knowing, intelligent, and voluntary" waiver standard[26] *and* also citing *Rees* in the course of stating that "there was no meaningful evidence that [the defendant] was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision."[27] Eventually, however, in *Demosthenes v. Baal*,[28] the Court embraced only that aspect of *Whitmore* that focused on whether the defendant was competent to give a "'knowing, intelligent, and voluntary waiver of his right to proceed.'"[29]

Finally, in *Godinez v. Moran*[30] the Court attempted to rationalize its wandering precedents. According to the Court, the phrase "rational choice" in *Rees* was equivalent to "rational understanding"[31] as used in *Dusky v. United States*.[32] *Dusky*, which addressed the question of when a defendant is competent *to stand trial*, established a two-pronged test for competency. According to *Dusky*, a defendant is competent to stand trial if: 1) he has a rational and factual understanding of the charges; and, 2) he has the ability to assist counsel.[33] Because the ability to assist counsel is not at issue in waiver of appeals, there is only one prong to competency: a defendant is competent to waive his appeals and permit the state to carry out the death sentence if he has a

23. Whitmore v. Arkansas, 495 U.S. 149, 171 (1990) (Marshall, J., dissenting).

24. *Gilmore*, 429 U.S. at 1018 (White, J., dissenting).

25. *Whitmore*, 495 U.S. 149 (1990).

26. *Id.* at 165. The proper interpretation of *Whitmore* was further complicated by its unusual procedural posture. The actual question before the Court involved the circumstances under which a third party could intervene to challenge a death-row inmate's death sentence. The Court held that "next friend" standing could not be obtained "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed." *Id.* Whether that standard is only applicable to next friend intervention, or whether it also governs the withdrawal of an appeal is not clear.

27. *Id.* at 166.

28. 495 U.S. 731 (1990).

29. *Demosthenes*, 495 U.S. at 734 (quoting *Whitmore*).

30. 509 U.S. 389 (1993).

31. *Godinez*, 509 U.S. at 398 n.9.

32. 362 U.S. 402 (1960).

33. *Dusky*, 362 U.S. at 402.

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rational and factual understanding of the consequences of his decision. If he does, then he can waive his appeals — assuming of course that the waiver is knowing, intelligent and voluntary. Thus it was not until almost fifteen years after *Gregg* that the standard for assessing waiver of a death-row inmate's appeals became, relatively speaking, settled.

### B. *The Law of Assisted Suicide*

The law of assisted suicide is relatively easy to summarize. Under English common law, and the law of the early American colonies, suicide itself was a felony that resulted in the forfeiture of one's property to the crown.[34] Although no state now punishes suicide or attempted suicide, "[i]n almost every State — indeed, in almost every western democracy — it is a crime to assist a suicide."[35] Some states forbid assisted suicide by treating it as a species of homicide through accomplice liability principles,[36] or, more commonly, as the Model Penal Code provides, assisted suicide is statutorily defined as a lesser crime.[37]

In recent years the increasing number of Americans who die protracted deaths in institutions has caused a reexamination of the assisted suicide ban, albeit only with respect to *physician*-assisted suicide. Overwhelmingly, this reexamination has led to reaffirmation of previous bans, even with respect to physician-assisted suicide.[38] Indeed, only Oregon has legalized any form of physician-assisted suicide, and Oregon has limited physician-assisted suicide to competent *and terminally ill* adults.[39]

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34. Washington v. Glucksberg, 521 U.S. 702, 711 (1997). This is not to say that there is not a great divide in the academy, as well as in the public, on the issue of assisted suicide. More nuanced discussions of this ambivalence about suicide, and other aspects of the ongoing death and dying debate, can be found in ROBERT A. BURT, DEATH IS THAT MAN TAKING NAMES: INTERSECTION OF AMERICAN MEDICINE, LAW, AND CULTURE (2002), and RONALD DWORKIN, LIFE'S DOMINION (1993).

35. *Glucksberg*, 521 U.S. at 710.

36. *See* People v. Kevorkian, 527 N.W.2d 714 (Mich. 1994) (overruling the common law definition of murder, which had included intentionally providing the means by which a person commits suicide; only when death was the direct and natural cause of defendant's act is he liable for murder).

37. MODEL PENAL CODE § 210.5 (1962) (providing that causing another to commit suicide is criminal homicide only if the actor purposely uses force, deception, or duress to cause the suicide, but is otherwise the lesser crime of aiding or soliciting suicide).

38. *Glucksberg*, 521 U.S. at 716. Ballot initiatives in Washington and California both lost in the early 1990s, and in the last decade legislatures in more than twenty states have introduced bills to legalize physician-assisted suicide, all of which have either languished or been defeated. Timothy Egan, *Assisted Suicide Comes Full Circle, to Oregon*, N.Y. TIMES, Oct. 26, 1997, § 1 (Magazine), at 2; Ezekiel J. Emanuel & Linda L. Emanuel, *Assisted Suicide? Not in My State*, N.Y. TIMES, July 24, 1997, at A21.

39. Four years after the Oregon initiative passed, only eight persons had died after taking lethal medications and two more were awaiting the filling of their prescriptions; nine were terminally ill with cancer and the tenth was dying of degenerative heart disease. Sam

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Moreover, the Supreme Court has recently reviewed the constitutionality of criminal prohibitions of assisted suicide, and in *Washington v. Glucksberg*, squarely held that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[40] Justices O'Connor, Ginsberg, and Breyer wrote concurring opinions, and commentators have interpreted those opinions in various ways. For example, Professor Sunstein believes that Justice O'Connor "signaled the possible existence of a right to physician-assisted suicide in compelling circumstances,"[41] while Professor Yale Kamisar reads her opinion to be limited to the "more narrow and more focused [question of] the liberty interest in obtaining needed pain relief or [whether] a state [may erect] legal barriers preventing access to such relief."[42] No matter; for our purposes, all of the justices, and even the litigants for the plaintiffs, were in agreement that the only right that might be recognized was a right *for the terminally ill.*[43] With rare exceptions, volunteers are not terminally ill, so neither the Oregon initiative nor any plausible claim of an evolving federal[44] constitutional right would encompass a death-sentenced inmate's decision to withdraw his appeals, if such a decision were considered assisted suicide.[45]

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Howe Verhovek, *Legal Suicide Has Killed 8, Oregon Says*, N.Y. TIMES, Aug. 19, 1998, at A16.

40. *Glucksberg*, 521 U.S. at 728.

41. Cass R. Sunstein, *Supreme Caution: Once Again, the High Court Takes Only Small Steps*, WASH. POST, July 6, 1997, at C1.

42. Yale Kamisar, *On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895, 905 (1998).

43. *Id.* at 912 ("From the outset of the litigation, the lawyers for the plaintiffs in the Washington and New York cases insisted that the right or liberty interest they claimed was limited to the terminally ill . . . .").

44. Some have argued that proponents of physician-assisted suicide should turn to state constitutional claims. *See* Charles H. Baron, *Pleading for Physician-Assisted Suicide in the Courts*, 19 W. NEW ENG. L. REV. 371 (1997). Thus far, no such attempt has been successful. Although Florida's Privacy Amendment establishes a "much broader" right than does the Due Process Clause, *see* Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985), the Florida Supreme Court adopted the rationale of *Glucksberg* in rejecting a claimed state constitutional right of physician-assisted suicide. Krischer v. McIver, 697 So. 2d 97 (Fla. 1997).

45. Some readers may ask whether *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990), provides a better analogy. *Cruzan* suggests (but does not hold) that competent patients have an absolute right to refuse life-sustaining treatment, even when the absence of that treatment will result in their death. Thus, in the volunteer context, a potentially meritorious appeal might be thought of as being similar to refusing medical treatment. If the appeal is successful, it may "cure" the defendant by relieving him of the death sentence. If the appeal is forgone, the result will be similar to refusing life-sustaining medical procedures: death. However, in my view the right to refuse life-saving medical treatment, assuming there is such a right, is grounded in the individual's right to bodily integrity, *id.* at 269, which is not at issue in the volunteer context. Furthermore, in the refusal-of-treatment situation, a third party does not have to take action to bring about the person's death, which again is not true

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Justice Stevens asked counsel representing the state of Washington whether the legislature had the constitutional authority to authorize assisted suicide, and he readily conceded that it did.[46] States could, of course, go far beyond any currently imaginable constitutional right to assisted suicide. A legislature could authorize not only physician-assisted suicide, but could extend that authorization to cases where the person asking for assistance was not terminally ill, and could extend immunity from prosecution beyond physician assistants. None have done so, however, and none seem remotely ready to do so.

### C. *The Theoretical Debate over Volunteering*

The debate over the propriety of permitting death-row inmates to voluntarily submit to execution has raged for three decades now. In *Lehnard v. Wolff*,[47] Justice Marshall reiterated the view, first articulated in *Gilmore*, that "[s]ociety's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."[48] He went on to object that "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death."[49] In Marshall's view, "the procedure [approved by the Court] amounts to nothing less than state-administered suicide."[50]

Those who oppose a death-row inmate's right to waive his appeals and submit to execution generally echo Marshall's two objections. First, they characterize state efforts to honor the condemned's death wish as "state-assisted suicide," often pointing out that state sanction of, and participation in, such suicidal behavior could even encourage imitation by other individuals who also wish to end their lives.[51]

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in the volunteer context. Thus, I believe that the circumstances of a volunteer are more like assisted suicide, and thus the *Glucksberg* analogy is more appropriate.

46. Kamisar, *supra* note 42, at 896.

47. 444 U.S. 807 (1979).

48. *Lehnard*, 444 U.S. at 811 (Marshall, J., dissenting from the denial of a stay of execution).

49. *Id.* at 815.

50. *Id.*; *accord Whitmore*, 495 U.S. at 172-73 (Marshall, J., dissenting) ("Because a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review." A particular punishment — especially the death penalty — should be imposed "only where necessary to serve the ends of justice, not the ends of a particular individual."); Hammett v. Texas, 448 U.S. 725, 732 (1990) (Marshall, J., dissenting) ("The defendant has no right to 'state-administered suicide.'" (quoting *Wolff*, 444 U.S. at 815)).

51. *See, e.g.*, Kathleen Johnson, Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 592 (1981). There are also those that argue that allowing capital defendants to waive their appeals and be executed will encourage other suicidal persons to commit crimes which will lead to a death sentence. Bernard L. Diamond, *Murder*

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Second, they argue that regardless of the defendant's wishes, the state has a vital and fundamental interest in ensuring that capital punishment, society's most severe penalty, not be imposed or carried out except in the most extreme cases,[52] noting that a person convicted

*and the Death Penalty: A Case Report*, *in* CAPITAL PUNISHMENT IN THE UNITED STATES 445, 445-446 (Hugo Adam Bedeau & Chester M. Pierce eds., 1976). It has happened. James French, who murdered an Oklahoma man that picked him up hitchhiking, testified at his trial that he committed murder in order to be executed. Despite his request for a death sentence, he was sentenced to life imprisonment. Several years later, French killed his cellmate. He again asked for the death penalty, this time successfully. Louis Jolyon West, *Psychiatric Reflections on the Death Penalty*, *in* CAPITAL PUNISHMENT IN THE UNITED STATES, *supra*, at 419, 426-27. Some commentators also opine that Gary Gilmore committed murder in Utah because it had the death penalty, and, more specifically, because the mode of execution was death by firing squad. *See, e.g.*, Strafer, *supra* note 5, at 866. Ted Bundy also told police investigators that he committed his final murders in Florida because it had the death penalty. Katherine van Wormer & Chuk Odiah, *The Psychology of Suicide-Murder and the Death Penalty*, 27 J. CRIM. JUST. 361, 366 (1999) (discussing a number of cases where it is believed that the murder was committed by the defendant as a method of committing suicide, and quoting a former director of a state department of corrections as saying "I know of a number of murder victims who would still be alive if the death penalty had not been in effect"). One of my former clients, a man with a long history of schizophrenia, agreed to confess to a triple murder only after the district attorney personally assured him that he would seek the death penalty in his case. *See* Long v. State, 823 S.W.2d 259 (Tex. Crim. App. 1991).

52. For example, in Wilford Berry's case in Ohio, his attorneys determined they were ethically obligated to pursue available appeals despite Berry's stated wish to die "because society has a stake in ensuring the reliability and integrity of any death sentence." Norman, *supra* note 14, at 107. The Attorney General, however, took the position that if "a volunteer wishes to have the death penalty, we will concur in that." *Id.*; *see also* Durocher v. Singletary, 623 So. 2d 482, 485 (Fla. 1993) (Barkett, C.J., concurring) ("[T]he State [interest] in imposing the death sentence transcends the desires of a particular inmate to commit state-assisted suicide."); Smith v. State, 686 N.E.2d 1264, 1275 (Ind. 1997) (holding that Smith's negotiated plea agreement to the death penalty was permissible, although the court pointed out that society has "an interest in executing only [defendants] who meet the statutory requirements and in not allowing the death penalty statute to be used as a means of state-assisted suicide"); State v. Dodd, 838 P.2d 86, 101 (Wash. 1992) (Utter, J., dissenting) ("To give paramount weight to Mr. Dodd's desires would, in effect, mean that the State is participating in Mr. Dodd's suicide."); Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting A Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 617 (2000) (arguing that "a defendant's choice" to die should not waive the Eighth Amendment because the constitutional provision "preserves the right of society not to have barbarous punishments used on its behalf"); Strafer, *supra* note 5, at 896 ("[T]he governmental interest in ensuring that the death penalty is administered in a constitutional manner should virtually always take precedence over the inmate's 'right to die.'"); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 865 (1987) ("Because every execution is in some sense a public spectacle, society has a special interest in making sure that death sentences are imposed only in accordance with the rule of law."); Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 818 (1990). This concern is bolstered by the high rate of error in capital cases. A comprehensive study conducted by Professor James Liebman of Columbia University found a 41% error rate in capital cases on direct appeal and a 40% error rate in federal habeas corpus proceedings between 1973 and 1995. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 4 (2000). Thus the empirical reality is that many, if not most, of the volunteers would have been granted a new trial at some point in the appeals process.

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of a crime has no right to choose his own sentence.[53] Opponents of permitting waiver have introduced a third theme: under the unique circumstances of death row — the conditions of confinement[54] and the pressure of living under a sentence of death[55] — a prisoner awaiting

53. *See* People v. Kinkead, 660 N.E.2d 852, 861-62 (Ill. 1995) (explaining that the "[d]efendant's request for the death penalty might be viewed as a plea for State-assisted suicide, and we do not believe the Illinois trial courts and juries should be put in the position of granting such requests as a matter of a defendant's stated preference" and remanding for a competency hearing in a case where the defendant had a history of suicide attempts, self-mutilation, psychiatric treatment, and was on antipsychotic medication around the time of entering the guilty plea); Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) (refusing to allow execution of capital defendant sentenced under invalid death penalty statute, noting that the defendant's right to waive certain rights "was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide.").

54. Conditions of confinement are frequently referred to as contributing to volunteerism. Harrington, *supra* note 11, at 850; Dieter, *supra* note 52, at 801. One experienced capital litigator noted that living conditions on death row are so dismal that they "'could cause the most stable person not to cope.'" Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 573 (1984) (quoting defense attorney Millard Farmer). There is some force to this contention. Most death-row prisoners are housed under conditions designed for inmates who are disciplinary problems, and not intended to be used for long-term incarceration. For example, most death-row inmates are typically confined to their cells for twenty-three hours a day in very small cells. Sanitation and eating conditions can be very poor. Dieter, *supra* note 52, at 802. Death-sentenced inmates are, with few exceptions, ineligible for prison jobs or correctional programs or even the usual forms of prison recreation, such as sports and movies. *See* White, *supra* note 52, at 871; *see also* ASS'N OF THE BAR OF THE CITY OF NEW YORK, DYING TWICE: CONDITIONS ON NEW YORK'S DEATH ROW (2001), *at* http://www.abcny.org/currentarticle/dying%20_twice2.html (last visited Mar. 5, 2004). Generally death-row inmates are not permitted "contact" visits with their family members, or if they are, the visits must occur under the close observation of numerous correctional officers. *See, e.g.*, Renee Cordes, *Confronting Death: More Inmates Give Up Appeals in Capital Cases*, TRIAL, Jan. 1994, at 11; Urofsky, *supra*, at 571. Confinement on death row has been referred to as "a living death, a place where the body is preserved while the person languishes and ultimately dies awaiting execution." ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 63 (2d ed. 1998). Another commentator has noted "the hypocrisy of stripping the condemned of their humanity, of everything that normally *permits* an individual to make autonomous decisions, and then almost unblinkingly recognizing the suffering inmate's decision to 'die with dignity' as a free and voluntary choice of an autonomous individual." Strafer, *supra* note 5, at 894. A number of successful volunteers, including Frank Coppola and Joseph Parsons, asserted that the conditions of confinement on death row were the reason they elected to waive their appeals. *See* Amnesty Int'l USA, The Illusion of Control: "Consensual" Executions, the Impending Death of Timothy McVeigh, and the Brutalizing Futility of Capital Punishment, *at* http://www.amnestyusa.org/countries/usa/document.do?id=3BE17F3606A4A32D80256A3100478E4D (Apr. 23, 2001).

55. According to one psychiatrist who studied death-row conditions, "What all share equally, however, is the relentless regime of lockdown, loneliness, isolation, and hopelessness, while one awaits death, exacting a terrible psychic, spiritual, psychological, and familial toll. A flight to death, then, is often a flight from the soul-killing conditions of death row." ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH 105 (1989). Albert Camus made a similar observation in his famous essay *Reflections on the Guillotine*:

> For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who,

execution can never make an "unconstrained choice to be executed."[56] This argument, unlike the first two, implicitly accepts the client-choice model of volunteers, but then argues that by the model's own terms, the choice is coerced, and therefore should not be dispositive.

Most arguments supporting a death-row inmate's right to waive his appeals, thereby hastening his death,[57] focus on the condemned prisoner's right of self-determination and his freedom to choose whether to prolong his life.[58] Often, proponents of this form of self-determination argue that giving the condemned the right to choose enhances the dignity of their lives.[59] One federal judge, for example, has said that it is completely rational for a death-row inmate to "forgo the protracted trauma of numerous death row appeals," and that not

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from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

Albert Camus, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 199 (Justin O'Brien trans., Vintage Books 1990); *see also* Knight v. Florida, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from the denial of certiorari) ("It is difficult to deny the suffering inherent in a prolonged waiting for execution — a matter which courts and individual judges have long recognized."); Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (discussing the "the inevitable long wait" that exacts a "frightful toll").

56. Harrington, *supra* note 11, at 851; *see also* White, *supra* note 52, at 865 (noting that many capital defense attorneys believe that capital defendants are not able to make a rational judgment about whether they want to be executed).

57. As discussed more fully in Part III.B, virtually no other citizen has the right to actively hasten his or her death. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that there is no constitutional right to physician-assisted suicide); *see also* Sampson v. State, 31 P.3d 88, 95 (Alaska 2001) (holding that there is no state constitutional right to physician-assisted suicide); Cass R. Sunstein, Essay, *The Right to Die*, 106 YALE L.J. 1123, 1123 (1997) (arguing that "the Supreme Court should not invalidate laws forbidding physician assisted suicide"). Although Oregon does allow assisted suicide under certain circumstances, those circumstances are extremely narrow and would not encompass the volunteers under discussion here. *See id.* at 1126.

58. *See, e.g.*, Johnson, *supra* note 51, at 616; *see also* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1376 (1988) ("[A] prisoner has a right to control his own fate within the constraints established by the law." (emphasis omitted)). One victim's rights' advocate, Dianne Clements of Houston's "Justice for All," put it this way: "[T]here is no such thing [as a consensual execution;] it is a phrase coined by those who oppose the death penalty.... It's just not true. Why can't death penalty opponents call it what it is: a person's decision to end the appellate process." Bryan Robinson, *Death-row inmates Prefer Death to Life: Rise of Volunteer Executions May Mean Death Isn't Worst Punishment*, ABC NEWS, Jan. 7, 2003, *at* http://abcnews.go.com/ US/story?id=90935&page=1.

59. *See, e.g.*, Johnson, *supra* note 51, at 594; *see also* Urofsky, *supra* note 54, at 582 ("[T]he final decision on whether to pursue or terminate appeals should be left to one person — that person whose life is at stake."); Chandler, *supra* note 7, at 1926 ("[T]he right to die with dignity on one's own terms cannot be underestimated and must trump an attorney's moral convictions."); Julie Levinson Milner, Note, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 283 (1998) ("[T]he right to die with dignity should exist for competent terminally sentenced individuals."). Some volunteers have expressed similar sentiments. Frank Coppola, who was executed in Virginia in 1982 after being permitted to waive his appeals, said he wanted to die "to preserve his dignity and spare his family further agony." Urofsky, *supra* note 54, at 558.

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honoring such a decision "den[ies the defendant's] humanity."[60] The purported parallel to suicide is distinguished first on the basis that society — through a jury or judge — has found the death penalty to be the appropriate punishment for the defendant's crime,[61] and second, on the basis that the desire to avoid "agonizing limbo in confinement" is not commensurate with a "specific intent to die."[62] In response to the objection that volunteers thwart the state's interest in assuring that death sentences are carried out only in appropriate cases, some commentators have argued that a competent defendant's right to make his own legal decisions trumps that state interest, given that the state has already determined through trial proceedings that the sentence is appropriate.[63]

Perhaps not surprisingly, those who argue that death-sentenced inmates should not be permitted to waive their appeals are overwhelmingly opposed to the death penalty, while those arguing for a generous waiver standard are, on the other hand, almost always supporters of the death penalty.[64] "Death penalty abolitionists oppose [volunteering] because their goal is to prevent executions, even those seemingly chosen by inmates.[65] Proponents of capital punishment support volunteering because they favor executions; consensual ones simply expedite the process."[66] There is irony in both positions. Many who decry volunteer executions as "state-assisted suicide" would, truth be told, support a client's decision to take his own life in a conventional way. Indeed, more than a few would support physician-assisted suicide for the rest of the population. On the other hand, most who support a death-row inmate's right to waive their appeals are, in fact, not only staunch supporters of capital punishment for the non-willing as well as the willing (having little concern for the "dignity" of the non-willing), but would adamantly oppose a death-row inmate's attempt at taking his own life, or for that matter, any person's attempt to take his or her own life.[67] Thus, at the end of the day, one suspects

60. Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 48, 51.

61. Johnson, *supra* note 51, at 628.

62. *Id.* at 617.

63. *Id.* at 621.

64. At least one exception to this general rule would be Professor Michael Mello. MICHAEL MELLO, THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZINSKI 191-93 (1999).

65. This view is expressed by one capital defense lawyer as follows: "'The state's goal of killing someone is immoral.'" White, *supra* note 52, at 859. Thus the defendant's desire to die is not important because the primary objective is "to prevent the state from realizing its immoral goal." *Id.*

66. Harrington, *supra* note 11, at 850.

67. A somewhat different aspect of this same general phenomena is the lengths prisons will go to in order to ensure that a death-sentenced inmate does not "cheat" the executioner

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that the attractiveness of the state-assisted suicide model, as opposed to the acceptance-of-a-just-punishment model, depends more on one's attitudes toward the state's power to kill than free-standing beliefs about which model more accurately captures the volunteer phenomenon.[68] Posed as mutually exclusive alternatives, it is not surprising that the Supreme Court has adopted the acceptance-of-responsibility model.

The concept of competency is, therefore, "squarely in the center of the debate,"[69] not to mention the center of the litigation, in cases where death-sentenced defendants attempt to drop their appeals.[70] This, however, is not quite the end of the story. The relevance of mental illness still tends to creep into both litigation and commentary. Lower courts have not always found the *Godinez* standard, discussed previously, to provide adequate guidance, and have employed other tests to probe the extent of the defendant's mental illness.[71] Some commentators have maintained that the desire to forgo appeals is per

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by taking his own life. For example, once an execution date is issued, most states move the inmate to a special cell and place him under twenty-four hour surveillance. A guard may even be posted outside the cell to prevent the inmate from committing suicide. ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 82 (2000). If a death-row inmate does attempt suicide, even if his execution is imminent, the state will inevitably make every effort to save the inmate's life and restore her health in order that the person can be executed. *Id.* at 98. For example, one of my former clients — David Martin Long — hoarded his antipsychotic medication and attempted to overdose the day before his scheduled execution. Texas prison officials provided emergency medical treatment, transported Mr. Long to a Department of Corrections medical center, pumped his stomach, revived him from a coma and then flew him back to Huntsville the next evening for his execution to be carried out. *Id.* at 98-99.

68. *Cf.* Samuel R. Gross, *Update: American Public Opinion on the Death Penalty — It's Getting Personal*, 83 CORNELL L. REV. 1448, 1472 (1998). Professor Gross argues that attitudes about the death penalty "are about killing." *Id.* A majority of Americans favor capital punishment because they believe in a "life for a life;" those who oppose capital punishment believe that killing by the state is wrong. *Id.* Both, he maintains, are "absolutist moral positions and unlikely to yield to information or argument." *Id.*

69. Harrington, *supra* note 11, at 855.

70. *See, e.g.*, State v. Dodd, 838 P.2d 86, 101 (Wash. 1992) (Utter, J., dissenting).

71. For example, some federal courts have adopted the following three-part analysis:

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

If the answer to the first question is no, the court need go no further: the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent. Rumbaugh v. Procunier, 753 F.2d 395, 398-99 (5th Cir. 1985); *accord* Ford v. Haley, 195 F.3d 603, 615 (11th Cir. 1999).

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se evidence of incompetency,[72] based on the view that a rational (or at least a mentally normal) person, if given a choice, would always prefer life over death.[73] Some state courts, moreover, have expressed dissatisfaction with the competency standard in a different way, holding that a competent defendant can waive discretionary review, but may not waive any appeal as of right.[74]

These persisting counter-currents, like the initial debate, pose the question of whether the competency standard is nuanced enough to adequately address the volunteer phenomenon. Most troubling are the cases that present active indications of suicide. Thus, for example, in *United States v. Hammer*,[75] Judge Nygaard, dissenting from the denial of rehearing, concluded that if courts allow capital defendants to waive their right to appeal, the courts must develop a standard that will better assure that the request for a waiver is "sound, certain, and appropriate."[76] According to Judge Nygaard, the defendant, whose waiver the majority approved, killed his cell mate for the purpose of obtaining a death sentence, and "plainly enlists the Court in his suicide."[77] In his opinion, the similarity between the defendant's position and the pleas of the terminally ill for assisted suicide was inescapable.[78]

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72. HUGO ADAM BEDEAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 122 (1977).

73. Johnson, *supra* note 51, at 599. Lester Maddox, a former governor of Georgia, concluded that William Clark, a death-row inmate who expressed a desire to die, "must be nuts," because "[e]ven animals want to live. I don't believe any person who has any sense at all would want to die." Urofsky, *supra* note 54, at 567.

74. *See, e.g.*, *Dodd*, 838 P.2d at 100 ("We hold that a defendant may waive general review, but may not waive review of his sentence, under RCW 10.95.100."); Judy v. State, 416 N.E.2d 95, 102 (Ind. 1981); Commonwealth v. McKenna, 383 A.2d 174, 180 (Pa. 1978). Most post-*Gregg* capital-sentencing statutes have some statutorily required review of the death sentence in connection with the "direct appeal," i.e., the first appeal, generally to the state's highest court, following the conviction and imposition of sentence. Section 16-3-25(C) of the South Carolina Code is fairly typical of these mandatory review provisions, and requires the court to determine whether: (1) "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;" (2) "whether the evidence supports the jury's or judge's findings of a statutory aggravating circumstance;" and, (3) "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases." S.C. CODE ANN. § 16-3-25(C) (Law. Co-op. 2003). In addition, the appellant can raise claims of legal error which may have occurred at trial. S.C. CODE ANN. § 16-3-25(B).

In the states which do not permit waiver of mandatory appeals, a competent volunteer's right of self-determination, while not completely discounted, is nevertheless not permitted to trump society's interests (and the courts' interest) in achieving some degree of certainty that the death penalty is appropriately administered. These jurisdictions have apparently decided that it is not only the rights of the death-row inmate that are implicated by his or her decision to waive further appeals and submit to execution.

75. 239 F.3d 302 (3d Cir. 2001).

76. United States v. Hammer, 239 F.3d 302, 304 (3d Cir. 2001) (Nygaard, J., dissenting).

77. *Id.* at 306.

78. *Id.*

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## II. COMPARING TWO PHENOMENA: SUICIDE AND VOLUNTEERING

Albert Camus believed "[t]here is but one truly serious philosophical problem, and that is suicide."[79] But, aside from the philosophical problem, there is a problem of characterization. Is a particular act suicide? Now that I have discussed the current legal standard for assessing the validity of a death-row inmate's decision to waive his appeals, and the two primary competing theoretical models, I turn to the question which is the heart of this Article: Is it appropriate to view death-row volunteers, at least some of the time, as persons attempting to commit suicide?

If we start with plain meaning, "suicide" would appear to encompass a death-row inmate's decision to forgo his appeals and submit to execution. Dictionaries define suicide as "the act or an instance of intentionally killing oneself,"[80] and "self-destruction," or "the deliberate termination of one's own life."[81] Ideally, one would cross-check the dictionary and legal definitions of suicide against the psychiatric one, but psychiatry has no "standard nomenclature for self-harming acts or behaviors."[82] Nonetheless, from a psychiatric point of view, suicide undoubtedly includes indirect and passive termination of one's existence, such as choosing not to take life-preserving medication[83] or not moving out of the way of an oncoming train — as long as an intent to kill one's self is present.[84]

This is a formal approach, and, as discussed above, the problem with such formality is that it risks obscuring possibly significant differences between committing suicide and volunteering for execution. Volunteering *also* formally resembles acceptance of responsibility in other civil and criminal contexts. The inmate could be deemed to be saying, "the jury, the conscience of the community has spoken, and I accept their judgment." Formal resemblances cannot tell us definitively which of the two different legal models ought to be applied. For that reason, it seems important to look at other ways in

79. ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 3 (Justin O'Brien Trans., Alfred A. Knopf 1955) (1942).

80. AMERICAN HERITAGE COLLEGE DICTIONARY 1358 (3d ed. 1993).

81. BLACK'S LAW DICTIONARY 1434 (6th ed. 1990).

82. Bryan L. Tanney, *Psychiatric Diagnoses and Suicidal Acts*, *in* RONALD W. MARIS ET AL., COMPREHENSIVE TEXTBOOK OF SUICIDOLOGY 311, 314 (2000). The American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV-TR 369-76, 706-10 (2000) lists suicidal acts and suicidal ideation as symptoms of Major Depressive Disorder and Borderline Personality Disorder, but it does not define them. *See* Tanney, *supra*, at 315, 319.

83. However, this would be permitted under existing law. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (suggesting that a competent, terminally ill patient does have the right to refuse life-sustaining treatment).

84. MARIS ET AL., *supra* note 82, at 31.

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which the phenomenon of volunteering is — or is not — like the phenomenon of suicide.

### A. *Suicide*

The government collects reliable demographic and etiological data on suicide. Suicide is among the leading causes of death; in the last decade it has ranged from approximately the 8th to the 11th leading cause of death in the United States.[85] In fact, it outnumbers homicide as a cause of death.[86] Nearly 30,000 people die each year from suicide,[87] but suicide rates vary widely among population subgroups.

#### 1. *Demographic Characteristics*

Those who commit suicide in the United States are overwhelmingly white and male. As a general matter, men are four times more likely to commit suicide than women.[88] In 2000 and 2001, 73% of all suicides were committed by white males.[89] For white men, the annual suicide rate is 19.1 per 100,000.[90] White men commit suicide at a higher rate than every other group except Native American men, and white men commit suicide at twice the rate of black or Latino men.[91]

#### 2. *Etiological Factors*

According to the National Institute of Mental Health ("NIMH"), over 90% of suicide victims suffer from a diagnosable mental disorder,

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85. *See* Centers for Disease Control and Prevenion, Leading Causes of Death, 1900-1998, *at* http://www.cdc.gov/nchs/data/dvs/lead1900_98.pdf (last visited March 16, 2005); Nat'l Inst. of Mental Health, Suicide Facts and Statistics, *at* http://www.nimh.nih.gov/suicideprevention/suifact.cfm (last visited Nov. 4, 2004) [hereinafter NIMH, Suicide Facts].

86. For example, in 2001, there were 30,622 suicides as opposed to 20,308 homicides. NIMH, Suicide Facts, *supra* note 85.

87. *Id.*; *see also* NAT'L INST. OF MENTAL HEALTH, IN HARM'S WAY: SUICIDE IN AMERICA 1 (2003), *available at* http://www.nimh.nih.gov/publicat/NIMHharmsway.pdf (last visited Mar. 5, 2004) [hereinafter NIMH, IN HARM'S WAY].

88. NIMH, IN HARM'S WAY, *supra* note 87, at 1; NIMH, Suicide Facts, *supra* note 85; NCIPC, Suicide, *supra* note 85.

89. NIMH, IN HARM'S WAY, *supra* note 87, at 1; NIMH, Suicide Facts, *supra* note 85.

90. *See* Ned Calogne, *Screening for Suicide Risk: Recommendation and Rationale*, AM. FAM. PHYSICIAN, Dec. 1, 2004, *at* http://www.aafp.org/afp/20041201/usx.html.

91. Suicide Facts: A Brief Overview of Suicide, *at* http://www.a1b2c3.com/suilodge/facovr1b.htm (last visited March 9, 2003) (reproducing material from GEO STONE, SUICIDE AND ATTEMPTED SUICIDE (1999)). The overall, age-adjusted national suicide rate is 10.6 suicides for every 100,000 people. Calogne, *supra* note 90.

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most commonly a depressive disorder or a substance-abuse disorder.[92] There is also a high prevalence of bipolar disorder,[93] post-traumatic stress disorder, and other personality disorders.[94] Substance abuse is found in 25% to 55% of suicides, though two-thirds of suicide victims who were substance abusers also suffered from a major depressive episode.[95] One-third of suicides by suicide victims suffering from substance abuse were precipitated by loss or anticipation of loss of a close personal relationship.[96]

Because schizophrenics are such a small percentage of the population, they do not comprise a large proportion of suicide victims. Nonetheless, schizophrenia strongly predisposes individuals to suicide: it is estimated that ten percent of all schizophrenic patients commit suicide.[97] New research also indicates that alterations in neurotransmitters such as serotonin are associated with an increased risk of suicide.[98]

In particular, hopelessness — the tendency to expect that negative events will occur and to feel powerless to change the likelihood of negative outcomes — is a strong predictor of suicide.[99] Persons who are married are also less likely to commit suicide than those who are separated, divorced, or widowed.[100] Social isolation is also a predisposing factor.

Many readers may also be surprised to learn that suicide is contagious.[101] And it appears to be even more contagious among

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92. NIMH, IN HARM'S WAY, *supra* note 87, at 1.

93. Kay Redfield, *Suicide and Bipolar Disorder*, 60 J. CLINICAL PSYCHIATRY 47 (Supp. 9 2000).

94. Matthew K. Nock & Peter M. Marzuk, *Suicide & Violence*, *in* THE INTERNATIONAL HANDBOOK OF SUICIDE AND ATTEMPTED SUICIDE, *supra* note 92, at 438-39.

95. George E. Murphy, *Psychiatric Aspects of Suicidal Behavior: Substance Abuse*, in THE INTERNATIONAL HANDBOOK OF SUICIDE AND ATTEMPTED SUICIDE, *supra* note 92, at 135.

96. *Id.* at 140.

97. Marx De Hert & Jozef Peuskens, *Psychiatric Aspects of Suicidal Behavior: Schizophrenia*, *in* THE INTERNATIONAL HANDBOOK OF SUICIDE AND ATTEMPTED SUICIDE, *supra* note 92, at 121-22.

98. NIMH, IN HARM'S WAY, *supra* note 87, at 1.

99. Lyn Y. Abramson et al., *The Hopelessness Theory of Suicidality*, *in* SUICIDE SCIENCE 17, 20, 23 (Thomas Joiner & M. David Rudd eds., 2000).

100. Depression Ctr., About Suicide: Depression and Suicide, *at* http://www.depressioncenter.net/professional/suicide (last visited Feb. 1, 2005).

101. Suicide contagion is defined as "a process by which exposure to the suicide or suicidal behavior of one or more persons influences others to commit or attempt suicide." Patrick W. O'Carroll et al., Ctrs. For Disease Control & Prevention, *Suicide Contagion and the Reporting of Suicide: Recommendation from a National Workshop*, MORBIDITY AND MORTALITY WEEKLY REPORT, Apr. 22, 1994, No. RR-6, at 13-18, *at* http://www.cdc.gov/mmwr/preview/ mmwrhtml/00031539.htm (last visited Feb. 1, 2005); Madelyn S. Gould, *Suicide Contagion*, AM. SOC'Y FOR SUICIDE PREVENTION, *at* http://www.afsp.org/research/articles/gould.html (last visited Nov. 9, 2004) ("Evidence of

vulnerable populations, i.e., psychiatric patients and prison inmates.[102] Observers have noted that closeness to a person who commits suicide increases the likelihood of suicide. As does a "shared environmental stressor."[103] For juveniles, the contagion effect is particularly pronounced.[104]

### 3. *Non-Predictors of Suicide*

Intuitively, one might expect that objectively worse conditions would prompt higher rates of suicide, but such an intuition would be wrong, at least when viewed in the broadest terms. Thus, for example, poor people do not commit suicide at higher rates than do more wealthy people.[105] Or to cite a more drastic example, rates of suicide at Auschwitz and other Nazi concentration camps were relatively low.[106]

### 4. *Attempted Suicide*

National data on attempted suicide are not compiled, but NIMH has expressed confidence in several interesting conclusions from more limited studies.[107] First, there are far more attempted suicides than completed suicides; estimates range from eight to twenty-five times as many attempts.[108] Second, the ratio of attempts to completed suicides is higher in women and youth.[109] Third, the strongest risk factors for attempted suicide in adults are depression, alcohol abuse, cocaine use, and separation or divorce.[110]

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suicide clusters and imitative deaths has been reported in accounts from ancient times through the twentieth century."); *see also* Sunstein, *supra* note 57, at 1129 (stating that "suicide seems remarkably contagious" and noting the "bandwagon or cascade effects" of suicide).

102. Gould, *supra* note 101.

103. *Id.*

104. *Id.*

105. Suicide Facts: A Brief Overview of Suicide, *supra* note 91. Relatedly, suicide rates are inversely related to level of education. *Id.*

106. *Id. See also* L. Ettinger, *On Being a Psychiatrist and a Survivor*, *in* CONFRONTING THE HOLOCAUST: THE IMPACT OF ELIE WIESEL 186, 196-97 (Alvin H. Rosenfeld & Irving Greenberg eds., 1978) (noting that few people committed suicide and the majority of the prisoners in the death camps struggled to stay alive despite the fact that they lived in intolerable conditions where the likelihood of survival seemed nonexistent).

107. NIMH, IN HARM'S WAY, *supra* note 87, at 2; NIMH, Suicide Facts, *supra* note 85.

108. NIMH, IN HARM'S WAY, *supra* note 87, at 2.

109. *Id.*

110. *Id.* Among younger people, the factors are the same, with one caveat: separation or divorce (not surprisingly) is not a predictor, but aggressive and disruptive behaviors are. *Id.*

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## B. *Volunteering*

Data on volunteers are not systematically gathered, and must be assembled using a variety of sources.[111] As Appendix A demonstrates, there have been 106 successful volunteers in the modern era, a number that comprises almost 13% of the total number of executions during this period. It is difficult to calculate the overall rate of volunteering in a way that is comparable to the suicide rates of the general population.[112] One method would be to look at the percentage of death-row inmates that successfully volunteer in any given year, but just a quick look at Appendix A reveals that this "rate" would range from a low of 0 per 100,000 in 1973-76, 1978, 1980, 1983-84, and 1991, to a high of 330 per 100,000 in 1999.[113] It is hard to calculate an average rate over time, but it is clear that it would be enormously higher than suicide rates in the "free world." A rough cut could be obtained by taking the total number of volunteers (106), the average death-row population during the period from 1977 through 2002 (2230)[114] and the

111. The data regarding inmates who waived their appeals and submitted to execution used in this Article was gathered as follows. I reviewed (and cross-checked) two lists of inmates who have been executed which are systematically maintained by the Death Penalty Information Center, *at* http://deathpenaltyinfo.org/article.php?did=414&scid=8 (2005), and by the NAACP Legal Defense Fund, *at* http://www.naacpldf.org/content.aspx?article=297 (2005). Both lists designate which inmates were volunteers. Additional information regarding individual volunteers was obtained from reported state and federal decisions, from newspaper articles, and, in some cases, from discussions with or information provided by the inmate's prior counsel.

112. Some readers might ask why I would look at volunteers as opposed to actual suicides on death row. In other words, if these inmates are truly suicidal, why don't they take their own life? Some do, of course, and an estimate of the number of suicides on death row is contained in Appendix E. However, in my judgment, actual suicides are not an accurate measure of suicidal activity on death row. It is difficult for death-row inmates to commit suicide. Inmates do not have access to firearms, a very common method of committing suicide (especially among white males). NIMH, IN HARM'S WAY, *supra* note 87, at 1 (noting that suicide by firearm is the most common method of suicide and that eighty percent of all such suicides are committed by white men). It is also very difficult for inmates to obtain enough of any drug to kill themselves by means of an overdose, another very common method of suicide. *Id.* Prisoners can try and horde prescribed medication (assuming they are prescribed medication) in order to "overdose." However, in most prisons, inmates are forced to take their medication in the presence of medical staff. Hanging and slitting one's wrists are theoretically possible, but remain difficult due to the fact that death-row inmates are generally under very close observation by correctional officers. On most death rows it is a "rules infraction" to block visual access into the cell. And, unlike other persons, condemned prisoners have at their disposal a foolproof method of ending their lives: execution. I once posed the "why not suicide" question directly to my former client Robert South. In response, Robert discussed the difficulty in doing so, and expressed the fear that he would only turn himself into a "vegetable." He knew that by waiving his appeals, his life would certainly be terminated.

113. In 1999, there were twelve volunteers, *see infra* Appendix A, and 3527 death-row inmates, *see* Death Penalty Info. Ctr., Size of Death Row by Year, http://www.deathpenaltyinfo.org/ article.php?scid=9&did=188#year (last visited Feb. 3, 2005).

114. *See* Death Penalty Info. Ctr., Size of Death Row by Year, *supra* note 113.

number of years (27), which yields a rate of approximately 150 volunteers per 100,000 persons, a figure that is more than a ten-fold increase over ordinary suicide rates, which average around 10.7 suicides per 100,000.[115]

The problem with such a comparison is that its meaning is less than clear. On one side of the debate, it could be argued that death-row conditions produce these disparities; on the other side, it could be argued that the phenomenon being measured is not suicide at all, but acceptance of the justness of one's punishment. Because death row hardly comprises a random sample of the American population, it is impossible to know whether these volunteers, if on the outside, would be more suicide-prone than their neighbors, as well as impossible to know if they would be "volunteering" had they not committed a horrible crime.

### 1. *Demographic Data*

What may shed more light on the "assisted suicide v. acceptance of a just punishment" debate, however, is to look at subgroups *within* death row, to see whether their rates of volunteering vary, and whether any such variations resemble those found in the suicide literature. Table 1 summarizes this information.

115. NIMH, Suicide Facts, *supra* note 85. Since volunteers who attempt to waive their appeals are — if competent — virtually always successful in ending their own lives, one might ask whether the better comparison is to attempted, rather than completed, suicides. There are no failed overdoses or nonfatal gunshot wounds in the execution chamber. As noted previously, the data on the number of attempted suicides is admittedly unreliable, but it is estimated that there are eight to twenty-five times more attempted suicides than actual suicides. If the rate of attempted suicides is the comparison baseline, then the rate of volunteering closely resembles the attempted suicide rate in the free world.

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TABLE 1

VOLUNTEERS, EXECUTIONS, AND DEATH SENTENCES BY RACE[116]

| | Executed Voluntarily (n=103) | Executed Involuntarily (n=786) | On Death Row (n=3436) |
|---|---|---|---|
| Black Males | 2.9% | 38.9% | 42.1% |
| Hispanic Males | 6.8% | 6.4% | 10.1% |
| White Males | 87.4% | 52.4% | 45.5% |
| Other Males | 2.9% | 2.3% | 2.3% |
| Total | 100% | 100% | 100% |

Two striking patterns emerge from this table. Indeed, it was casual observance of these patterns that originally prompted me to consider measurable similarities between suicide and volunteering. Almost 85% of those who were executed after waiving their appeals are white males,[117] despite the fact that white males account for only about 45% of all death-row inmates.[118] Looked at from the perspective of the other major racial group on death row, African Americans, the pattern is equally stark: only 3% of volunteer executions involved

116. Three out of nine white females were executed involuntarily, and there are twenty-seven white females on death row. The only black female to be executed was executed involuntarily. There are sixteen black females on death row. There are six Hispanic females on death row, and two other females. NAACP-LDF, DEATH ROW USA, SPRING 2004, *at* http://www.deathpenaltyinfo.org/ DRUSA-20040401.pdf (last visited Feb. 3, 2005). Looking for departures from the patterns of suicide, one might observe that the number of women volunteers is commensurate with their representation on death row. However, due to the small sample size, the data on women and volunteering is probably inconclusive. Indeed, with respect to suicide, the Center for Disease Control cautions that "rates based on 20 or fewer deaths may be unstable." Nat'l Ctr. for Injury Prevention and Control, National Summary of Injury Mortality Data, *at* http://www.cdc.gov/ncipc/osp/aboutmrt.htm (emphasis added) (last visited Feb. 3, 2005). Proportionate or disproportionate representation rides on so few cases that chance cannot be excluded as the explanation. Examination of two of the three female volunteer cases is instructive. Both are atypical in at least two respects: the crime committed and the timing of the attempt to volunteer. Christina Riggs was sentenced to death for the murder of her two children, murders that were accompanied by a failed (but clearly genuine) suicide attempt. Riggs asked her jury for a death sentence. *See* Riggs v. Arkansas, 3 S.W.3d 305, 307-08 (Ark. 1999). Aileen Wuornos was a serial killer with multiple death sentences, and pled guilty to capital murder. *See* Wuornos v. Florida, 644 So. 2d 1000, 1003-04 (Fla. 1994).

117. Interviews by the author with numerous capital defense attorneys also reveal that most death-row inmates who threaten or attempt to waive their appeals, and who then change their minds, are also white males. Interviews with capital defense attorneys (on file with author).

118. Death Penalty Info. Ctr., Race of Death-Row Inmates Executed Since 1976, *at* http://www.deathpenaltyinfo.org/article.php?scid=5&did=184#inmaterace (last visited Nov. 4, 2004). Latinos are slightly under-represented (10 percent of death row compared to 6.8 percent of successful volunteers) and Native Americans are over-represented by a factor of two, but as discussed in the text, the small numbers make these comparisons of unreliable.

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black men, who comprise 42% of the current death-row population.[119] There has been no discussion of the reason for the racial disparity in the legal literature.[120]

### 2. *Etiological Factors*

*a. Mental illness.* The fact that many death-row inmates have mental diseases or disorders is well documented,[121] which, given the data about suicide discussed previously, appears to be a likely explanation of the high rates of volunteerism, if volunteering is seen as a form of suicide. But whether volunteering should be seen as a form of suicide *is* the question. Thus, it becomes necessary to look at the volunteer subpopulation and ascertain the frequency at which it suffers from mental illness. According to one psychiatrist, "[w]hen you look at people who are either asking for the death penalty or are not actively fighting it, many of them are depressed and, in fact, suicidal."[122] According to another, many volunteers come from abusive families and accept death as a way of punishing themselves.[123] As Appendix B reveals, of the 106 volunteers, at least 93 (88%) had documented mental illness or severe substance-abuse disorders.[124] Table 2 summarizes this information.

TABLE 2

VOLUNTEERS FOR EXECUTION WITH MENTAL ILLNESS AND/OR SUBSTANCE ABUSE

| | |
|---|---|
| Mental Illness | 77.36% (82/106) |
| Substance Abuse | 52.83% (56/106) |
| Mental Illness and/or Substance Abuse | 87.74% (93/106) |

119. *Id.* While the number of death-row inmates has generally risen over the years, the overall racial composition of death row has remained relatively constant.

120. The only discussion of this phenomenon is from a current death-row inmate, who has argued that most volunteers are white because prison is more of a stigma to white inmates and their families: "Blacks have a longer history of rejection from this society than the relatively recent era of grudging acceptance." MUMIA ABU-JAMAL, LIVE FROM DEATH ROW 94 (1995).

121. Harrington, *supra* note 11, at 867; Norman, *supra* note 14, at 134. However, there are no reliable statistical data that capture the precise rate of mental illness among the men and women of death row.

122. Renée Cordes, *Confronting Death: More Inmates Give Up Appeals in Capital Cases*, TRIAL, Jan. 1994, at 12 (quoting Spencer Eth, a psychiatrist who teaches at UCLA).

123. *Id.* (quoting San Francisco clinical psychologist Joan Cartwright).

124. *See infra* Appendix B. It is likely that many, if not most, of the remaining thirty volunteers also had a psychiatric or substance-abuse disorder, or both. The reported figure is based on the currently available information found in reported opinions, newspaper articles, relevant web sites, and, in some instances, from the structured questionnaire submitted to counsel for all volunteers that could be identified and located.

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Even more striking is the prevalence of the most severe mental illness (which also happens to be the strongest suicide predictor): fourteen cases involved schizophrenia, and several more reported delusions that may reflect schizophrenia.[125] Depression, and its half-sibling, bipolar disorder, accounted for at least twenty-three other cases, and post-traumatic stress disorder was present in another ten. Finally, at least thirty had previously attempted suicide.[126]

*b. Hopelessness.* Commentators have argued that many decisions to elect death are the result of despair and loneliness rather than acceptance of responsibility,[127] and certainly such a motivation would be consistent with the phenomenon of suicide. Official reports, however, provide no measure of the frequency of hopelessness. To attempt to address this vacuum, as well as several other missing pieces of the puzzle, I constructed a questionnaire for attorneys for the volunteers. Despite the risk that these completed questionnaires will reflect the lawyers' prior beliefs about volunteers rather than attitudes they have actually observed, it seemed prudent to ask because, in many instances, the volunteer's attorney will have the best perspective regarding the individual's actual motivation.[128] Thirty-nine percent cited a sense of hopelessness in the inmate's decision to forgo his appeals.

*c. Contagion.* Attorneys who represent death-row inmates often comment on what the suicide literature refers to as the contagion effect. Part of the conventional wisdom among capital defense attorneys is that when one death-row inmate waives his appeals, others frequently do so as well, or put differently, one volunteer begets another. It is difficult to know how to measure contagion objectively. A perusal of Appendix D, which lists the volunteers by state in chronological order, does provide support for the contention that volunteerism is highly contagious. During one eight-month stretch

125. *See infra* Appendix B.

126. *See infra* Appendix B. Recent research links suicide and violence. Nock and Marzuk note that the psychiatric illnesses usually associated with suicidal behavior are the same illnesses linked to violent behavior. Nock & Marzuk, *supra* note 94, at 438-39. They posit that the "common thread underlying violence and suicide [is] increased impulsiveness, affective liability [sic], disinhibition, and problems with reasoning and decision-making." *Id.* at 439. Furthermore, the research indicates abnormal serotonin levels are present in a significant number of cases involving both suicide and violence toward others. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 279 (Harold I. Kaplan & Benjamin J. Sadock eds., 5th ed. 1989).

127. White, *supra* note 52, at 857.

128. The information was gathered as follows: Based upon news reports, reported opinions, and relevant web sites, I identified counsel for the volunteer in all of the 106 cases. Questionnaires were sent to all attorneys for whom regular mail or email addresses could be found. Responses were received from attorneys in 44 of 106 volunteer cases. A sample questionnaire is provided in Appendix C.

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in 1999, for example, the State of Texas executed four men who waived further appeals,[129] and on two other occasions Texas saw three other volunteer executions in a twelve-month period.[130] Four of the five volunteer executions in South Carolina took place in little more than a year in 1996-97.[131] There have been groupings of volunteers in other states as well.[132] Attorneys for the condemned almost uniformly report that attempts to volunteer and threats of volunteering significantly increase after a volunteer is executed.[133]

### 3. *Non-Predictors? Objective Conditions*

As described in Part II, some commentators have argued that abysmal conditions of confinement create a sense of hopelessness and desperation that produces volunteering. As noted previously, many

129. Aaron Foust (4/28/99); Charles Tuttle (7/1/99); Richard Wayne Smith (9/21/99); Robert Atworth (12/14/99). In addition, three other volunteers were executed between February of 1996 and February of 1997: Leo Jenkins (2/9/96); Joe Gonzales (9/18/96); Richard Brimage (2/10/97). *See infra* Appendix D.

130. Jeffrey Barney (4/16/86); Ramon Hernandez (1/30/87); Eliseo Moreno (3/4/87); Joe Gonzales (9/18/96); Richard Brimage (2/20/97); Benjamin Stone (9/25/97). *See infra* Appendix D.

131. Robert South (5/31/96); Michael Torrence (9/6/96); Cecil Lucas (11/15/96); Michael Elkins (6/13/97). *See infra* Appendix D. The author knew all four of the South Carolina volunteers, and discussed their decisions to waive their appeals with each of them at some point prior to their execution. Similarly, these four men each discussed their decision to waive their appeals with each other. While the reasons that these four men ultimately decided to waive their appeals varied, it was evident that their persistence in forgoing further appeals — despite significant pressure from their attorneys, and in some instances their family members, to change their minds — was influenced by the resolve of the other volunteers.

132. For example, Virginia had three volunteer executions in a twelve-month period from March of 2001 to April of 2002. Thomas Akers (3/1/01); James Earl Patterson (3/14/02); Daniel Zirkle (4/2/02). Oklahoma had three volunteer executions in one fifteen month period, and two others in a two month period. Scott Carpenter (5/8/97); Michael Long (2/20/98); Stephen Wood (8/5/98); Floyd Medlock (1/16/01); Ronald Fluke (3/27/01). Florida had two sets of two volunteers coming on the heels of each other. In fact, there were two in one week. Dan Hauser (8/25/00); Edward Castro (12/7/00); Rigoberto Sanchez-Velasco (10/2/02); Aileen Wournos (10/9/02). The two volunteer executions in Oregon took place during an eight month stretch. Douglas Wright (9/6/96); Harry Moore (5/16/97). *See infra* Appendix D.

133. Interviews with capital defense attorneys (on file with author). It is possible, of course, that some of these apparent instances of contagion are statistically predictable extremes in a normal distribution. But that does not appear to be the case. For example, to assess the degree of clustering in the South Carolina volunteers' executions, I examined the gap times between the individuals' execution dates. A two-sample t-test was applied which demonstrated that the gap times are significantly shorter (i.e., execution dates are consequently clustered together) for the volunteers ($p=.07$). In the data analysis I used the logarithmically transformed gap times and bootstrap critical values with 10,000 replications. Several of my colleagues and I are currently examining rates of executions (including volunteer executions) nationally, and in the various states, in search of similar statistically significant patterns that may exist.

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liken death-row confinement to torture.[134] In some measure, this claim is in tension with the claim that volunteering resembles suicide, because suicide does *not* seem to be strongly predicted by some intuitively obvious objective factors. Indeed, to the extent the claim can be tested, it appears that external conditions do not clearly predict volunteer rates. Appendix E presents the volunteer rates on a state-by-state basis. An examination of the rates of volunteering in each of the states reveals little or no pattern, or at least no pattern that can be clearly associated with objective conditions of confinement.[135]

Because some commentators have focused on the harshness of prison conditions, I first investigated whether volunteer rates varied as a function of the conditions of confinement. I did not find any evidence to support this hypothesis. For example, death-row conditions in Texas are severe, whether measured by recreation time, isolation, opportunity for visitation, or physical characteristics of the cell; yet Texas has a moderate rate of volunteers. Even more striking are the rates of Alabama, Florida, Georgia, and California; despite less-than-decent death-row conditions, the volunteer rates are strikingly low. And a number of states have had no volunteers, e.g., Louisiana and Mississippi, despite the fact that conditions on death row in both states are harsh. On the other end of the continuum, Utah has a phenomenally high rate of volunteers, almost ten times the national average, but its prisons have not been particularly castigated; moreover, Delaware and Washington, numbers two and three in rates of volunteers, are also unexceptional death-row environments.[136]

In fairness, this lack of an identifiable pattern is most likely attributable to the fact that while the conditions of confinement on various death rows do vary to some degree, virtually all death-sentenced inmates experience life as described previously in this

134. *See, e.g.*, LLOYD STEFFEN, EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY 127 (1998) ("[A] strong case can be made that torture attends death row confinement and isolation."); WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 176 (2d ed. 1991) (noting that death-row inmates are subject to "extraordinary deprivations").

135. For purposes of this Article, the rate of volunteerism was calculated in two ways. The first was to determine the percentage of volunteers in relation to the total number of people sentenced to death in the jurisdiction. The second was to determine the percentage of volunteers in relation to the number of executions in the jurisdiction. Both rates are reflected in Appendix E. The first would appear to be the more accurate measure, since some states have had only a handful of executions due to several different factors including: a small population; low death-sentencing rates; and high success rates in the appellate process. For a more detailed discussion of death-sentencing rates and reversal rates in capital cases see John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999).

136. Admittedly, it is difficult to compare conditions on various death rows, and there is inevitably a degree of subjectivity involved in this analysis. I have been to the death rows of California, Georgia, New Mexico, South Carolina, Texas, and Virginia and I have discussed the conditions of confinement on the death rows of the other states with both inmates and attorneys.

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Article. In virtually every state, death-row inmates are "locked down" in their cell for most of the day, have little or no access to educational or other prison programs, and experience great isolation and loss of relationships. The theory that conditions of confinement motivate inmates' decisions to waive their appeals is supported by reported statements made by a number of volunteers,[137] as well as by the results of the defense attorney questionnaires. A total of 26 of 44 respondents, or 59%, indicated that conditions of confinement played a significant role in their decision to submit to execution. Thus, the existence of marginally better conditions in some states may not be sufficient to overcome the basic threshold level of conditions of confinement that exist on all death rows.[138] Death-row inmates are undoubtedly socially isolated, and, as noted above, isolation is a risk factor for suicide. In a similar vein, most death-row inmates are not married (either never having been married or being currently divorced), and individuals that are not married commit suicide at higher rates than those who are married.

Proponents of the harsh-conditions theory of volunteering might object on the ground that it is not the physical conditions, but the psychological ones, that matter: it is the inevitability, or at least the great likelihood, of execution that prompts volunteers. At least as a comparative matter, this claim is also unsupported by the facts. Appendix E shows, by state, the percentage of those sentenced to death and executed who volunteered. The percentage of those executed who were volunteers ranges from 100% (Idaho, New Mexico, Oregon, and Pennsylvania) to 0% (Colorado, Louisiana, Wyoming, Mississippi, Montana, Nebraska, and Tennessee), but there is no readily apparent pattern. Texas is again instructive. Texas has imposed more death sentences (816) and executed far more inmates (313) than any other state,[139] yet its rate of volunteerism is quite ordinary.

Another way to look at prospects for relief is to consider the federal circuit in which the defendant's case will ultimately be heard. In the Fourth Circuit, those chances are the worst, and in the Ninth Circuit, the best.[140] Nonetheless, Nevada and Washington, both in the Ninth Circuit, have very high rates of volunteers, and North Carolina,

137. *See, e.g.*, Robert Anthony Phillips, *Volunteering for Death: The Fast Track to the Death House*, CRIME MAG. (n.d.) *at* http://www.crimemagazine.com/deathrowvolunteers.htm (last visited Feb. 3, 2005) (noting that one of the most prevalent reasons for volunteering cited by the death-row volunteers themselves is the conditions of confinement on death row).

138. And, as noted previously, this may also explain why the rate of volunteerism among death-row inmates is so much higher than the suicide rate.

139. Death Penalty Info. Ctr., Searchable Database of Executions at http://www.deathpenalty info.org/executions.php (last visited Jan. 13, 2005).

140. LIEBMAN ET AL., *supra* note 52.

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in the Fourth Circuit, has an unusually low rate of volunteers.[141] In fact, the overall rate of volunteers is slightly higher in the Ninth Circuit than it is in the Fourth Circuit.[142] This is not to say that, at the margin, neither prison conditions nor ultimate likelihood of execution do not matter; these rough numbers do not permit such a sweeping assertion. What can be said at this point is that the stark numbers clearly support a volunteering-is-like-suicide hypothesis, but do not seem to support a prison-conditions-and/or-inevitably-of-execution-causes-volunteers hypothesis.

#### 4. *Acceptance of the Justness of the Punishment*

None of the data thus far discussed bear on the question of whether inmates who volunteer are motivated by acceptance of the justness of their punishment, which, as was previously discussed, is a principal reason that commentators and courts have offered in support of permitting a death-row inmate to volunteer. The questionnaire attempted to probe that possibility in two ways: first, by looking at whether the punishment *is* likely to be just, and second by asking directly whether the attorney observed evidence of that motivation. In sixteen of the forty-four cases (36%), attorneys for the volunteer stated that acceptance of responsibility or acknowledgement of guilt was a factor in the inmate's decision to submit to execution. Thus, it does appear to be the case that some volunteers are motivated by acceptance of the justness of the death sentence.

## III. A MORE NUANCED LEGAL MODEL OF VOLUNTEERS

### A. *Distinguishing Acceptance of Responsibility from Suicidal Motivation*

In the end, the conclusions that I draw from a comparison of those who commit suicide and those who waive their appeals and submit to execution are relatively modest. I do not think that I have shown — or that subsequent data will show — that volunteering is inevitably a suicidal act. The data set complete enough to permit such a conclusion does not yet exist, and absent a change in the current legal standard, which ignores motivation, likely never will. My previous discussions with attorneys for volunteers (discussions which may not be random, but certainly are numerous), and the questionnaires obtained from attorneys for volunteers, provide further evidence that many, if not most, volunteers are motivated by the desire to commit suicide. But

141. *See infra* Appendix E.

142. *See infra* Appendix F (presenting the number and rate of volunteers by federal judicial circuit).

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judgments about motivation are controversial, and readers may question the impartiality of the volunteers' attorneys' judgments.

What I think the data do demonstrate, however, is that there are important similarities between persons who commit suicide and those who volunteer for execution. Volunteers resemble those who commit suicide in ways that are extremely unlikely to be attributable to chance. Race is a strong predictor of both suicide and volunteering, and the numbers are large enough that we can be certain the association is not a matter of chance in either case. The role of mental illness and substance abuse cannot be as precisely quantified due to the difficulty in calculating the base rates for all persons sentenced to death. Nonetheless, these factors provide another striking and not easily dismissed similarity. Mental illness and substance abuse are strongly associated with suicide, and volunteers suffer from extremely high rates of mental illness and substance abuse — clearly higher than the rates that prevail among nonvolunteers. What is particularly noteworthy is the high rate of schizophrenia among volunteers, given the apparent causal link between schizophrenia and suicide, as well as the high incidence of other mental disorders (depression, bipolar disorder, and PTSD) that make someone prone to commit suicide in the "free world." These similarities, along with the reports of capital defense attorneys, support the conclusion that suicidal desires are *a more likely* explanation for volunteering than is the desire to accept the justness of a death sentence — a motive for which there is some anecdotal information, but little empirical evidence.

The law, therefore, rather than closing its eyes to the possibility of suicide, should investigate it. Nothing compels the use of a one-size-fits-all legal standard. If, in a particular case, a desire to accept the justness of the imposed punishment motivates the individual, then the only barrier to waiver of further appeals should be incompetency.[143] But if a desire to commit suicide motivates the particular death-row inmate, then that desire should not be accommodated. In determining whether client prerogative or the prohibition against suicide should govern, courts should ask whether acceptance of a just punishment motivates the client's choice. This requires two distinct inquiries, one objective and one subjective.

First, in order for acceptance of a just punishment to legitimate what appears to be (and has the same consequences as) suicide, the punishment must actually be just. The question of what makes a punishment just has provoked a vast literature in a number of disciplines, and obviously many participants in the debates about volunteers would not accept that capital punishment is ever just.[144]

143. An incompetent death-row inmate, even one who has exhausted his appeals, cannot be executed. Ford v. Wainwright, 477 U.S. 399, 409-10 (1986).

144. *See supra* text accompanying note 65.

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Even persons who agree that the death penalty is potentially just will inevitably disagree over whether it is just in a particular case. Thus, for example, one person might deem prior military service a strong mitigating factor, and another might deem a history of childhood deprivation more significant. The jury normally resolves these and similar differences of opinion.[145]

For the purpose of sorting suicide from acceptance, however, I think a "floor" rather than a "ceiling" approach is in order. Many punishments that the law allows may be unjust. But at the very least, a punishment is not just if American law would *preclude* it. Put differently, whatever else a volunteer might be doing, he is not "accepting" a societal determination of the "justness of his punishment" if the society actually deems that punishment unjust. There are three species of reasons that a particular death sentence would be precluded on this objective prong: factual innocence; "innocence of the death penalty," which generally refers to the absence of an aggravating factor that renders a crime death eligible;[146] and the defendant's categorical ineligibility for the death penalty.[147]

Even if a punishment is arguably objectively just, motivation for the waiver of appeals might have nothing to do with acceptance of the punishment's justness. Therefore, before allowing a competent volunteer to waive further appeals, a court should conduct a second, subjective inquiry: Why does the volunteer want to waive his appeals? If the answer is that, with due regard for individual variation in phrasing, he accepts that death is the appropriate punishment for his crime, then he should be permitted to waive his appeals. If, on the other hand, the motivation appears suicidal, then waiver should not be permitted.

I postpone briefly the matter of how this two-pronged test should be applied. First it seems desirable to explain why I reject alternative formulations of the objective and subjective prongs that, when I began this project, seemed attractive. I rejected an alternative formulation of the objective prong because it would make volunteering too difficult, and I rejected an alternative formulation of the subjective prong because it would make volunteering too easy.

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145. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998).

146. *See* Sawyer v. Whitley, 505 U.S. 333, 344-45 (1992).

147. For example, the Supreme Court has determined that defendants under the age of sixteen are not eligible for the death penalty. Thompson v. Oklahoma, 487 U.S. 815 (1988). The Court has also held that, in the felony-murder context, a defendant is not eligible for the death penalty unless he was a major participant in the offense and demonstrated a reckless indifference to human life. Tison v. Arizona, 481 U.S. 137 (1987). Last term, the Court held that mentally retarded offenders were not eligible for the death penalty. Atkins v. Virginia, 536 U.S. 304 (2002).

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Instead of asking whether the punishment is arguably "unjust," one could ask whether the volunteer has "viable claims."[148] This is a much broader standard, encompassing numerous procedural claims, such as ineffective assistance of counsel, unconstitutional jury composition, juror misconduct, defective jury instruction, selective prosecution, and prosecutorial misconduct claims. This standard, I think, goes too far, given the distinction our system recognizes between just outcomes and fair procedures. An outcome may be just even if arrived at by improper procedures, and a person therefore could accept an outcome as just even if the attendant procedures were deeply flawed. If death were not the consequence of waiver, clearly a client could choose to forgo "viable" claims for any number of reasons, including acceptance of the substantive correctness of a procedurally compromised judgment. Thus, a "viable claim" formulation of the objective prong results in rejection of a client-choice model even when the client is motivated by acceptance of a just punishment rather than suicidal desires. Just as the currently reigning competency standard ignores the resemblance between volunteering and suicide, a "viable claims" prong ignores the resemblance between volunteering and other valid client choices; given the plausibility of both comparisons, and the likelihood of individual differences, neither unitary model should be employed by courts facing volunteers.

The immediately obvious alternative for the subjective prong would seem to be, "Is the volunteer's choice rational?" To some, a rational choice test for volunteers is an oxymoron: the choice to die is never the product of rational thinking.[149] Others would argue that choosing death sometimes is rational, depending on what dire circumstances — extreme pain, a terminal illness, mental incompetence, shame, or exorbitant cost to one's family — accompany the choice of sustaining one's life. But, just as rationality does not excuse participation in a suicide, it also should not legitimize a death-row inmate's decision to waive his appeals and submit to execution.

Thus, I return to the two-prong test with which this section began: the requirement of an objectively just punishment and the requirement of subjective acceptance of the justness of that punishment. That these are the two hurdles confronting a competent death-row inmate who whishes to waive all appeals does not tell us how high each hurdle should be; we are left with the questions of what is the burden of proof, and who should bear those burdens?

148. This standard might resemble the standards governing issuance of certificates of appealability in habeas corpus cases. *See* 28 U.S.C. § 2253(c)(2) (2000) (asking whether the "applicant has made a substantial showing of the denial of a constitutional right").

149. *See, e.g.*, *supra* note 73 and accompanying text.

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With respect to the "objectively just" prong, previous assertion[150] of any non-frivolous claim that precludes imposition of the death penalty on this individual for this crime is sufficient to trigger further inquiry into the objective justness of the punishment. In many post-conviction cases there are *no* claims of factual innocence,[151] innocence of the death penalty, or categorical ineligibility for the death penalty; certainly in the majority of post-conviction cases there are no such *non-frivolous* claims. But in those cases in which there are non-frivolous claims, a court is obliged to determine those claims on their merits before permitting waiver. The nature and placement of the burden of persuasion depends, then, upon previous assignments of those burdens under the law governing the specific claim.

With respect to the "subjective acceptance" prong, such a borrowing of the appropriate burden is not possible. In assigning that burden, three considerations seem relevant, two of which point toward assigning the burden of proof to the proponent of waiver, and one of which is ambiguous. First, one might ask who has the best access to information about the motivation for the waiver. Clearly, the volunteer who is attempting to waive his appeals has the best available information about his own motivations, so this consideration weighs in favor of assigning the burden to the proponent of waiver. Second, one might ask what is most likely to be the correct interpretation of the volunteer's motivation, and assign the burden of persuasion to the side advocating the less commonly correct interpretation. Here, the available empirical evidence may be inconclusive, but the evidence that does exist strongly points to suicidal motivation rather than acceptance of a just punishment in the vast majority of cases. So, this consideration also supports placing the burden on the proponent of waiver. Finally, one might consult the relative costs of erroneous determination of suicidal motivation versus erroneous determinations of a desire to accept a just punishment. Viewed in pecuniary terms, the costs of erroneously finding suicidal motivation are higher, but viewed in terms of loss of human life — one of the few "compelling

150. The diligent reader may note the use of the passive voice. I do not here embark upon questions of third-party standing. Instead, I address the most common kind of volunteer case, in which the defendant's attorney has previously asserted claims on his behalf. In the less typical case, a defendant may attempt to waive all of his rights from a very early point in legal proceedings, a point at which meritorious claims of innocence, death penalty innocence, and categorical ineligibility may not yet have been asserted. My impulse is that similarities to suicide should prompt some special procedure, perhaps appointment of a *guardian ad litem* to assert such claims, but that those similarities do not justify self-designated third parties' intervention.

151. *But see* Death Penalty Info. Ctr., Innocence and the Death Penalty, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (last visited Oct. 6, 2004) (stating that 117 former death-row inmates have been released due to newly discovered evidence of innocence).

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governmental interests" recognized by the Supreme Court[152] — the costs of erroneously finding acceptance of a just punishment are higher, and thus this factor does not conclusively point in either direction. Nonetheless, considering all three factors strongly suggests that the burden of persuasion regarding subjective motivation should be upon the proponent of waiver. In other words, the condemned prisoner must demonstrate that the desire to waive his appeals is not motivated by the desire to commit suicide.

As for what the burden of proof should be, the "clear and convincing evidence" standard is the best fit. Arguments can be made in support of both a higher burden (beyond a reasonable doubt) and a lower burden (preponderance of the evidence). If the inmate were required to demonstrate beyond a reasonable doubt that the desire to waive his appeals was not motivated by a desire to commit suicide, there would unquestionably be fewer successful volunteers, thus reducing what in the assisted suicide context has been referred to as the "profound risks to many individuals who are ill and vulnerable."[153] On the other hand, the standard may be so onerous that it prevents a death-row inmate who truly does accept the justness of his punishment from waiving his appeals and submitting to execution. The preponderance of the evidence standard is generally used in assessing competency in other areas.[154] While I have argued that competency is not sufficiently nuanced for determining whether a death-row inmate should be permitted to waive his appeals, it does not necessarily follow from that conclusion that the commonly used preponderance standard is inappropriate. However, given the high likelihood of suicidal motivation and the fact that a judicial decision permitting waiver will result in execution,[155] I ultimately conclude that the higher clear and convincing evidence standard is appropriate as it reflects "the gravity with which we view the decision to take one's own life . . . and our reluctance to encourage or promote these decisions."[156]

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152. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990) (referring to the state's "unqualified interest in the preservation of human life").

153. Washington v. Glucksberg, 521 U.S. 702, 719 (1997) (quoting the New York Task Force on Assisted Suicide).

154. Cooper v. Oklahoma, 517 U.S. 348 (1996).

155. It is important to note that unlike a judicial decision permitting waiver, a judicial decision rejecting the inmate's desire to waive his appeals is not necessarily final. If the individual inmate can produce new or additional evidence that the motivation is, in fact, acceptance of the justness of the punishment, there is nothing to prevent a court from revisiting the issue.

156. *Glucksberg*, 521 U.S. at 729 (quoting the New York Task Force on Assisted Suicide). In *Cruzan*, the Court endorsed a Missouri statute which required that an incompetent person's desire to withdraw life-sustaining treatment be demonstrated by clear and convincing evidence. 497 U.S. at 280.

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### B. *Applying the Test*

In order to explore how my proposal would operate in the "trenches" of capital litigation, I will next examine several different hypothetical scenarios drawn from real cases. Because all of these cases are ones in which the volunteer would pass the bare competency standard now in effect, they also offer an opportunity to consider whether the current standard is sufficiently nuanced to protect against death-row inmates using the legal system as a means of suicide.

#### 1. *Freddie: Factual Innocence*

Imagine a death-row inmate. To make it easier, call him Freddie. Freddie has been on death row for ten years. He is now thirty-eight years old. Freddie was convicted of murder and sentenced to death for the burglary, sexual assault, and murder of an eighty-two-year-old woman. The prosecution's theory at trial was as follows: Freddie, a methamphetamine addict, needed money to support his drug habit. Freddie knew the victim had a large amount of cash hidden in the house because he had previously worked for her doing odd jobs. So, he broke in to steal the money. When the victim awoke and found him in the house, Freddie raped her and stabbed her numerous times.

Freddie was arrested on an anonymous tip, and eventually gave a statement that although not directly incriminating, included the following assertion: "If I did it, I don't remember it." The evidence against Freddie, in addition to the statement, was a hair comparison expert's testimony that pubic hair found on the victim's bed was in all respects consistent with Freddie's pubic hair, and a state serologist's testimony that Freddie had type A blood and that the semen found in the victim's vaginal vault also came from a person with type A blood. Freddie did not testify, but his lawyers presented an alibi defense. In reply, the prosecution presented a jailhouse informant who testified that Freddie confessed to him that he had committed the murder while high on drugs. Freddie was convicted of all charges.

At the sentencing phase of the trial, the prosecution presented evidence of Freddie's prior criminal record, including his release from prison for a prior robbery only six months earlier, as well as several other "unadjudicated" robberies Freddie supposedly had committed before and after the murder to support his drug habit. Freddie's attorneys presented his history of mental illness as evidence in mitigation. Freddie had been diagnosed with bipolar disorder in his late teens, and for the next twenty years he had been in and out of mental institutions. Defense experts explained that Freddie's use of methamphetamines was a failed attempt at "self-medication." Evidence was also presented of several prior suicide attempts. The jury sentenced Freddie to death. Following the trial, Freddie was

convicted of the other robberies, and he was sentenced to life imprisonment without possibility of parole under the state's recidivist statute.

On appeal, his convictions were affirmed, but the death sentence was reversed due to an instructional error. Freddie's same attorneys continued to represent him at the sentencing retrial, and Freddie was again sentenced to death. This time the state court affirmed the death judgment, and the U.S. Supreme Court denied certiorari. By now, Freddie had been on death row for almost a decade.

New attorneys are appointed to represent Freddie in post-conviction proceedings. Freddie tells his new lawyers during their first meeting that he is innocent, but that he is ready to die. He asks for their help in having the death sentence carried out as soon as possible. Freddie explains that life on death row is intolerable; that he only gets out of his cell for an hour a day; that there are no opportunities to work; that his family no longer visits; and that he just cannot live anymore with the pressure of impending death. Counsel's review of Freddie's prison records reveals that two years ago Freddie attempted suicide by taking an overdose of Tylenol. He was discovered vomiting in his cell. Freddie was rushed to a hospital, his stomach was pumped, and his life was saved. Despite the prior history of bipolar disorder, he is currently not being medicated or treated for his mental illness. A prison psychiatrist who examined Freddie after the suicide attempt determined that he was malingering.

Freddie's new attorneys don't believe he is innocent. But in an attempt to stall Freddie's decision to waive his appeals, they request DNA testing — which was not available at the time of trial — on the hair and semen. The state court grants the motion, and everyone is surprised to learn that Freddie is telling the truth: the hair and semen are not his. Counsel rush to the prison to tell Freddie the great news. To their amazement, he is less than enthusiastic. In fact, Freddie still wants to die. He explains to his attorneys that he will still have to live the rest of his life in prison due to the life sentences on the subsequent robbery convictions. He has thought about it a great deal, and he would rather die than spend the rest of his life in prison. Freddie says that he would commit suicide if he could, but he prefers a more certain and painless method.

Freddie's attorneys leave, optimistic that Freddie will change his mind. The next week, however, they receive a letter Freddie has written to the judge and the Attorney General asking that counsel be discharged and the sentence carried out. The judge, following state law, orders a competency evaluation. The designated mental health experts conclude that, despite the fact that Freddie is bipolar and currently depressed, he is competent. Although the competency determination did not require any further findings, the experts report that if Freddie's depression is treated appropriately, he is likely to

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change his mind. Although reluctant to do so, the court believes that since Freddie is competent, he has no choice but to grant Freddie's motion. He dismisses the case, and pursuant to state law, an execution date is scheduled.

His attorneys, still hopeful, request executive clemency from the governor. According to state law, however, the inmate himself must request clemency. Freddie refuses to do so, still insisting he would rather die than live his life in prison. Several weeks later, he is executed.

The reader who doubts that such cases are common would be right to be skeptical. Demonstrably innocent defendants *rarely* volunteer. But occasionally they do.[157] Interviews with attorneys for other exonerated former death-row inmates reflect that some of them attempted, or expressed the desire, at some point in the proceedings to forgo their appeals and let the sentence be carried out.[158] Undoubtedly there are even more volunteers who, though factually guilty of some offense, are innocent of the death penalty.

Because Freddie was deemed competent, under current law a court could, and likely would, deem the waiver knowing and intelligent, and thus clear the way for execution. In contrast, Freddie's attempted waiver would fail both prongs of the standard advanced in this Article. First, Freddie cannot accept the justness of his punishment because he is demonstrably not guilty of the underlying offense; thus the punishment is objectively unjust. On the subjective prong, there is ample evidence that Freddie wishes to waive his appeals in order to commit suicide. His motivation seems clear — he wants to end his life — and forgoing his appeals is just another in a line of suicide attempts. He would, therefore, be unable to demonstrate that the primary motivation for waiver is the desire to accept the justness of his punishment.

### 2. *Lemuel: Categorical Exemption*

Let's think about another hypothetical death-row inmate, Lemuel. Lemuel was convicted of murder and sentenced to death for killing a neighbor in a dispute over the proceeds of a welfare check. Lemuel confessed almost immediately after the police began to question him. He told the authorities that he needed money to buy crack cocaine. Lemuel led police to the murder weapon, a bloody knife that was

157. There are several cases where inmates who were subsequently exonerated attempted to waive their appeals. Isidore Zimmerman came within a few minutes of electrocution. A stay was entered, much to his disappointment. He was later exonerated. *See* Strafer, *supra* note 5, at 869; *see also* State v. Dodd, 838 P.2d 86, 103 (Wash. 1992) (acknowledging that "the lure of ceasing to resist the death penalty may be as great for the innocent as for the guilty").

158. Interviews with capital defense attorneys (on file with author).

buried in the yard near the house where he lived with his parents and siblings. He also had money in his pants pocket at the time of his arrest; the money was approximately the amount of the victim's recently cashed check. At trial, the defense presented no evidence and did not otherwise contest Lemuel's guilt. The jury found him guilty of murder in short order.

At the sentencing phase of the proceedings, the prosecution presented evidence that Lemuel had previously been convicted of manslaughter, for which he served ten years of a twenty-year sentence. Lemuel's trial counsel called a psychologist who testified that Lemuel was mentally retarded, that he failed several grades, including the first, and that he had been placed in special education classes until he dropped out of school in the eighth grade. The prosecution did not dispute Lemuel's mental retardation, but argued extensively that Lemuel has been, was, and would continue to be dangerous. After several hours of deliberation, the jury sentenced Lemuel to death.

Throughout the state and federal post-conviction proceedings, Lemuel's attorneys raised a variety of challenges to Lemuel's death sentence based on his mental retardation. Those appeals were all unsuccessful. But, three weeks before Lemuel's scheduled execution, the United States Supreme Court decided *Atkins v. Virginia*,[159] which held that mentally retarded persons could not be executed. Not surprisingly, Lemuel's attorneys were elated, and they immediately filed a second state post-conviction petition maintaining that carrying out Lemuel's death sentence would be cruel and unusual punishment in violation of *Atkins*. The court stayed the execution.

Within days, however, Lemuel informs his attorneys that he does not want to pursue any new appeals (or "apples" as he calls them). He has recently become a "born again" Christian through the efforts of a prison chaplain. The chaplain, a fundamentalist Christian, believes in "blood atonement," and he has convinced Lemuel that since he is clearly guilty (which Lemuel does not dispute), he must accept his punishment in order to enter the kingdom of heaven. With the chaplain's assistance, Lemuel files a motion asking the court to dismiss the new post-conviction petition, relieve counsel, and set an execution date.

Lemuel's attorneys challenge their client's competency, and the court, as is required under state law, orders a competency evaluation. The experts conclude that Lemuel is mildly mentally retarded; his I.Q. is tested at 68. But the experts also agree that Lemuel has the ability to make a rational decision about whether to waive his appeals. After a hearing, the trial court dismisses the petition, as it is required to do

159. 536 U.S. 304 (2002).

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under state law, and schedules an execution date. Lemuel will not permit his attorneys to seek executive clemency, and he is executed.[160]

Again, since Lemuel was deemed competent, current law would permit him to forgo his appeals and let the death sentence be carried out. Despite his mental retardation, the waiver would almost certainly be deemed knowing, voluntary and intelligent; persons with mental retardation, for example, are routinely determined to be competent to waive their *Miranda* rights or their right to trial and plead guilty.[161] However, Lemuel's attempted waiver would fail under the objective prong of the proposed standard. The punishment is unjust because persons with mental retardation are no longer eligible for capital punishment in light of *Atkins*. The question of whether Lemuel's motivation is suicidal is a closer question than in Freddie's case. One could argue that Lemuel's stated reason for waiver — that he accepts his punishment in order to obtain blood atonement so that he may enter the Kingdom of God — is not suicidal, but rather is an acceptance of the justness of the death sentence. Although the relationship with the prison minister and Lemuel's mental retardation does raise concerns about coercion, reasonable minds may differ as to whether Lemuel has carried his burden of demonstrating that the motivation is not to commit suicide.[162] Nevertheless, because the

160. Joey Miller, a former Pennsylvania death-row inmate, came within forty-eight hours of being executed before he relented and allowed a federal habeas corpus petition to be filed on his behalf. In December of 2002, Mr. Miller's death sentence was modified to a sentence of life imprisonment due to his mental retardation. Interview with Robert Dunham, Assistant Federal Public Defender, Capital Habeas Unit, Phila., Pa. (Oct. 22, 2003) (transcript on file with author). Despite his mental retardation and brain damage, Mr. Miller had been found competent to waive his appeals. *Id.*

161. *See, e.g.*, Merrill v. State, 482 So. 2d 1147 (Miss. 1986) (finding mentally retarded defendant competent to waive *Miranda* rights).

162. The questionnaires revealed that religion was a factor in the inmate's decision to waive his appeals in thirteen cases (29%). In a number of these cases, prison chaplains were influential in the volunteer's decision and encouraged the inmate to forgo any further appellate review of his convictions or death sentence. Most of these chaplains are fundamentalist Christians. This is not a new phenomena. Since colonial times, ministers have been an integral part of the execution process. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 17 (2002) (noting that a death sentence was deemed to be of "inestimable value" in leading a man to God). Samuel Johnson noted, somewhat satirically, that "when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." *Id.* Another minister stated: "There is no Place in the World . . . where such Pains are taken with condemn'd Criminals to prepare them for their death; that in the Destruction of the Flesh, the Spirit may be saved in the Day of the Lord Jesus." *Id.* (emphasis removed). In a number of cases, ministers would encourage the accused to plead guilty, a step that was tantamount to suicide due to the mandatory nature of most colonial sentencing systems. *See id.* at 15. One inmate who pleaded guilty to a capital offense and was executed stated: "I was so pressed in my Conscience to take the Guilt of Blood from the Land, on my self, that nothing could prevail with me to deny the Fact." *Id.* The access to and influence these prison chaplains have over death sentenced inmates does raise legitimate questions of coercion. In the context of euthanasia, for example, Ronald Dworkin has commented that those who are facing death due a terminal illness are "especially vulnerable to pressure" from family members or even their own physicians to end their lives quickly. DWORKIN, *supra* note 34, at 190. There is no reason to believe that death sentenced inmates

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waiver does not satisfy the first prong, Lemuel would not be permitted to waive his appeals. His death sentence would, in the course of those appeals, inevitably be modified to life imprisonment due to his mental retardation.

### 3. *Delbert: Suicidal Motivation*

Our third hypothetical death-row inmate is Delbert. Delbert, fifty-five, was convicted and sentenced to death for the murder of his three-year-old daughter, Melissa. At the time of Melissa's death, Delbert was separated from his wife, Karol, who was substantially younger than Delbert. The couple's marriage dissolved as a result of Delbert's alcoholism. Depressed over the failure of his marriage — his third — Delbert contemplated suicide. He finally decided that he would kill himself and Melissa, leaving Karol behind to suffer for abandoning him. Delbert decided that he would drive his car into a lake, and he and his daughter would drown together. One Friday evening, after picking Melissa up from Karol, he did just that. Delbert's own survival instincts kicked in, however, and he swam out of the car. He tried to save Melissa but was unable to do so. Extraordinarily remorseful, Delbert pleded guilty to Melissa's murder, and ordered his attorneys to present no mitigating evidence on his behalf. Delbert asked the judge to sentence him to death. The judge obliged.

Once on death row, Delbert's mother persuaded him to pursue his appeals. He did so temporarily, and was denied relief in state post-conviction proceedings. His mother has since died, and he has no other visitors. Delbert's attorneys filed a federal petition for writ of habeas corpus, and his case is now pending in the federal district court.

Delbert, however, no longer wants to challenge his death sentence; he is ready to die. He has recently learned that he has Alzheimer's disease, and Delbert is desperately afraid of what will happen to him in prison as the illness progresses. His attorneys, unlike most other capital defense attorneys, support Delbert's decision. They present an affidavit from a psychiatrist attesting to Delbert's competency. The affidavit indicates that Delbert is depressed — both over the death of his daughter and the news that he has Alzheimer's — but that he is not psychotic or delusional. In the doctor's opinion, Delbert's decision is rational. Since Delbert has never been deemed incompetent, and since neither the prosecution nor the defense is contesting his competency, the court does not order any additional evaluations and grants the motion dismissing Delbert's appeals. He is subsequently executed.

Since Delbert is competent, there is no obstacle under the current legal regime to the waiver of his appeals. Applying the standard

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are any less vulnerable to pressure to end their lives. An exhaustive discussion of this issue, however, is beyond the scope of this Article.

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advanced in this Article, the attempted waiver satisfies the justness prong. Delbert is guilty of a death-eligible offense, and he does not fall into any category of offenders for whom the death penalty is an impermissible punishment. However, he would not be able to meet his burden on the second prong, since his clear purpose in waiving the appeals is to end his own life rather than to accept the justness of his punishment. Despite the rational reason Delbert advances for his desire to die, if he took his own life it would clearly be deemed a suicide. Furthermore, no other member of society, upon discovery that they have Alzheimer's, would be able to go to a hospital and obtain a lethal injection. That "right," under existing law, belongs only to death-row inmates.

### 4. *Michael: Acceptance of a Just Punishment*

For our final hypothetical death-row inmate, let's imagine Michael. Michael was convicted of the strangulation and rape of a nine-year-old girl. The child was abducted in broad daylight from a convenience store in rural New Mexico. Michael did not deny guilt, and DNA evidence established he had sexual relations with the victim. Michael was arrested on the basis of descriptions of the kidnapper and the license tag of the car into which several witnesses saw the perpetrator force the victim. He confessed shortly after his arrest.

At the sentencing phase of the trial, the prosecution presented evidence of Michael's prior conviction for criminal sexual conduct with a minor, as well as the testimony of a psychiatrist who maintained, based on Michael's record and violent child pornography found during a search of his home, that Michael was a pedophile who, if released, would inevitably commit other sexual offenses against children. In mitigation, the defense presented evidence of Michael's service in the Navy and several commendations he received. The defense also presented evidence of Michael's good prison record during his previous incarceration. The defense's psychiatrist acknowledged that Michael was a pedophile, but explained that the etiology of the disorder lay in the fact that a priest had sexually abused Michael when he was a child. The psychiatrist also testified that Michael was able to control his sexual urges most of the time, but that he had become dis-inhibited a few days before the crime when he had suffered a closed head injury during an automobile accident. Finally, evidence was presented of Michael's cooperation with law enforcement in locating the victim's body, and his deep remorse for having committed the crime. After two days of deliberation, the jury returned a death verdict.

Michael's convictions and sentence were affirmed on direct appeal. In state post-conviction proceedings, he expresses a desire to be executed. The court, as required by state law, orders a competency

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evaluation. Michael tells the court-appointed experts that he no longer wishes to challenge his sentence. He acknowledges his guilt, and indicates that he is plagued by remorse both due to the crime and his inability to control his sexual arousal when viewing television programs displaying young girls. Michael explains that he has no interest in a life sentence, since he is well aware how pedophiles are treated in the general population, and he also says that he hopes his execution will give the victim's family some closure. He also expresses a fear that if he is ever released, he will harm other children. Michael tells the examiners that if he had been a juror, he too would likely have voted for the death penalty in his case.

The experts conclude that Michael is competent. They agree that he is a pedophile. While he is somewhat depressed, the experts believe Michael's depression is situational, and stems from his deep remorse and feelings of guilt. However, his decision to die is, in their opinion, rational. The court permits Michael to waive his appeals, and he is executed.

Utilizing the current competency standard, Michael is clearly able to volunteer for execution. His waiver is knowing, voluntary and intelligent. Furthermore, under the standard advanced in this Article, Michael would also be allowed to waive his appeals and permit the state to carry out the death sentence. There is no question of factual innocence, and he is clearly eligible for the death penalty under existing law. Thus the objective, just-punishment prong is satisfied. Furthermore, the weight of the evidence suggests that Michael accepts the appropriateness of the death penalty in his case. He professes a desire to bring closure to the victim's family, and his statement that if he were a juror he too would have voted for the death penalty indicates as much. There is nothing in the fact pattern (prior suicide attempts, a documented history of depression, or other significant mental illness) to indicate the statements should be taken at anything other than face value. Some concern might arise from Michael's stated fears of how he would be treated in the general prison population were he to ever obtain a life sentence and that he might harm other children were he to be released. Even if such fears are deemed suicidal in nature, they do not, on balance, appear to be his primary motivation. Thus Michael would carry his burden on the second, subjective prong as well.

### C. *Addressing Potential Objections*

One response to the preceding four hypotheticals might be: Why not let them all waive? For that matter, why not let incompetent defendants waive as well? It is possible to view death-row inmates as such different creatures from the rest of us that their deaths, however timed or motivated, do not diminish the rest of us. Another possible

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response is the mirror image of the first: Why would we ever permit waiver? For such readers, opposition to capital punishment trumps any consideration of individual choice. If one believes that capital punishment is never just, one need not tarry long over the costs of thwarting acceptance of a just punishment. Perhaps nothing more can usefully be said to either of these groups.

But for the reader whose reaction depends in part upon the particular story, this Article's proposal has some appeal. Three related concerns, however, might give that reader pause over the particular standard I have proposed: indeterminancy; malingering; and cost. Experience with the standard will provide more information about each of these concerns, but viewed at the outset, none appear especially problematic.

### 1. *Indeterminancy*

In one sense, questions of motivation are familiar to the courts. Thus, for example, a conviction of burglary requires determining whether the defendant had the *purpose* of committing a crime inside the building into which he broke.[163] Questions of motivation may, on the same facts, be decided differently by different factfinders, but we tolerate that indeterminancy. Likewise, we can tolerate the indeterminancy in deciding motivation in this context.

Perhaps, however, the concern is that the motivation at issue here is inherently less ascertainable. The last story, that of Michael, has provoked different responses. Some readers have thought, contrary to a literal reading of the "facts," that suicidal motivation was present and should preclude a waiver. In part, this is because a desire to spare the victims' family further pain can be construed either as a desire to die in order to spare them additional pain or as accepting the justness of their feelings that his death is appropriate. The first construction suggests suicidal motivation, just as the person who kills himself to spare his family the pain of watching him die slowly from a terminal illness is suicide; the second suggests a victim-focused view of what justice is, but is consistent with accepting the justness of his punishment. This may be the time to acknowledge that in some cases, acceptance of the justness of a punishment can coexist with suicidal desires. Indeed, if a person appreciates the terribleness of his crime, that appreciation may spawn both a belief that death is a just punishment and a desire to die to escape feelings of shame and guilt.

In such cases, waiver should be permitted, in part because the desire to die stems from appreciation of the moral severity of what the person has done, which is closely akin to acceptance of the justness of the punishment. The second reason for permitting waiver in these

163. *See, e.g.*, S.C. CODE ANN. § 16-11-311(A) (Law. Co-op. 2003).

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circumstances flows from our understandings of suicide: if one jumps in front of a car to save a child, we do not view such a death as suicide even if the person understands that the likely, or perhaps inevitable, consequence of the decision will be his own death. So long as there is a legitimate acceptance of the justness of one's punishment — not a feigned acceptance designed to secure acceptance of the waiver — the subjective prong is met.

### 2. *"Malingering Well"*

Which brings us to the next problem: feigned acceptance. The concern is sometimes expressed in criminal cases that the defendant is feigning mental illness to preclude or mitigate his punishment, that is, that he is "malingering." But defendants may also "malinger well" when they are sick, often because they wish to avoid the stigma of mental illness. Initially, it might seem that a defendant could feign the permissible motivation — acceptance of a just punishment — in order to bring about the termination of his life. For an intelligent defendant, such "malingering well," e.g., articulating a desire to "accept responsibility for his actions," may be possible, but it would be difficult.

First, unlike the situation with mental illness, there is little common knowledge of what corroborating behaviors would be exhibited by a person who in fact accepted the justness of his punishment. Second, defense lawyers are unlikely to *want* to coach their clients on this matter, and the State is unlikely to be *effective* in doing so, given the adversariness that generally marks the relationship between prosecutors and death-row inmates. Finally, suicide victims usually talk about suicide, or show other distinct signposts of suicide, prior to committing the act.[164] The desire to waive appeals is unlikely — whatever its source — to spring forth fully formed. Rather, there are likely to be conversations with attorneys and family members that can document suicidal motivation even if the volunteer denies it. Moreover, a history of suicide attempts, mental illness, or drug abuse will be helpful to the court in sorting out actual from feigned acceptance.[165]

164. Robert D. Goulding, *Prediction of Suicide and Attempted Suicide*, *in* THE INTERNATIONAL HANDBOOK OF SUICIDE AND ATTEMPTED SUICIDE, *supra* note 92, at 585 (noting that suicidal ideation, evidence of clinical depression, insomnia, panic attacks, difficulty concentrating, history of suicide attempts, social isolation, and schizophrenia are all predictors of suicide among individuals who are suicidal).

165. *See id.*

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### 3. *Cost*

The last question might be cost. Death penalty cases are extraordinarily protracted and expensive as compared to other cases, especially other criminal cases. Whether the time and money involved are well spent is subject to debate, but one might reasonably ask if, given the existence of capital punishment, imposing a further procedure is worth the suicides it will ferret out. My guess is that the overwhelming majority of volunteers are suicidal, which, if one accepts the desirability of deterring suicide, renders the cost-benefit tradeoff a very positive one. It may turn out that so few volunteers are motivated by acceptance of the justness of their punishment that courts will devise a quick screen for the handful of such cases. In any event, it must be remembered that unless the procedure for weeding out suicides is much more cumbersome than the present procedure for determining competency, the only cost of rejecting a volunteer is a return to the costs of the death penalty as ordinarily imposed. Given that most defense attorneys feel obliged to contest competency in every volunteer case, the marginal costs are likely to be small.

## CONCLUSION

Death-row inmates are not fungible, and their differences must be taken into account. This seemingly simple principle is a lesson that those on both sides of the capital punishment wars have resisted. For death penalty advocates, the Supreme Court's declaration that mandatory capital punishment schemes violate the constitution[166] should have signaled the wrong-headedness of broad generalizations. Nonetheless, the states fought truly individualized culpability determinations for decades, as the Court was forced to repeat over and over that *any* factor that might legitimately become the basis for a sentence less than death could not be kept from the jury.[167]

For death penalty opponents, the promise of wholesale abolition has been thwarted not only by *Gregg*, but also by *McCleskey*;[168] if lives are to be saved, it will be one at a time, or maybe, as recent decisions

166. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (holding North Carolina's mandatory death penalty statute invalid under the Eighth Amendment).

167. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978). For a more thorough description of the Supreme Court's jurisprudence in this area, see John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1213-25 (2001).

168. McClesky v. Kemp, 429 U.S. 279 (1987) (rejecting a systemic challenge to the Georgia death penalty based on Professor David Baldus's empirical study identifying racial discrimination in the state's capital-sentencing scheme). For a detailed discussion of the road to, and the aftermath of, *McClesky* see John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McClesky Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1774-80 (1998).

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in *Atkins*[169] and *Ring*[170] promise, occasionally a few hundred at a time — but not all at once. After the victories of *Atkins* and *Ring*, just as after the defeat of *Stanford*,[171] defense lawyers have to go back to the hard, everyday task of making the least sympathetic individual seem understandable, or at least human.[172]

The lesson of volunteers is yet another iteration of the fundamental lesson of death penalty jurisprudence: individualization. It is understandable both why death penalty abolitionists want to think of volunteering as state-assisted suicide, and why death penalty retentionists want to think of it as acceptance of the justness of punishment; each model gives its proponent a simple picture that justifies on the one hand preventing (or at least delaying) and on the other hand increasing (or at least accelerating) executions *for a relatively large class of capital defendants*. But once more, sweeping generalizations are misleading. We can only arrive at the right answer to the volunteer question — as opposed to the larger capital punishment question — by examining the motivation of each individual volunteer.

One commentator has opposed the right to physician-assisted suicide on the basis that "[a] decent society seeks to inculcate a strong norm in favor of preserving life even when things seem extremely bad."[173] The same principle holds true in the volunteer context. There should be a strong norm in favor of preserving life even when people have done extremely bad things. When a volunteer is both competent to make legal choices and motivated to accept the justness of his punishment, then he should be permitted to waive his further appeals. There are some such defendants, and their decisions should, in fact *must*, be respected, at least so long as other litigants have the power to override their attorney's recommendations. On the other hand, even if the volunteer is competent, when suicidal desires represent the

169. Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment does not permit the execution of mentally retarded offenders).

170. Ring v. Arizona, 536 U.S. 584 (2002) (holding that the jury must unanimously find the existence of any factor which makes a capital defendant eligible for the death penalty). *Ring* effectively invalidated the capital sentencing scheme in Arizona and several other judge sentencing states. Its implications for other capital sentencing mechanisms where the jury plays an "advisory" role is currently being litigated in Alabama, Florida, and Indiana.

171. Stanford v. Kentucky, 492 U.S. 361 (1989) (holding that the Eighth Amendment did not prohibit the execution of sixteen and seventeen-year-old offenders). However, the Supreme Court recently granted certiorari in *Roper v. Simmons*, 540 U.S. 1160 (Jan. 26, 2004) (No. 03-633), to reexamine whether the execution of juveniles is permitted by the Eighth Amendment.

172. *See* AUSTIN SARAT, WHEN THE STATE KILLS 174 (2001) (referring to the successful narrative strategy of the capital defense lawyer as being to change the narrative "from a horror story to a sentimental tale, from a story that evokes fear and disgust to one that evokes pity or identification").

173. Sunstein, *supra* note 57, at 1129.

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dominant motivation, courts should not permit waiver.[174] There are even more such defendants, and their decisions should not, indeed *must not*, be honored, at least so long as assisted suicide is not available to other persons in the jurisdiction. When all is said and done, we must treat volunteers like other human beings.

174. One commentator made the following relevant observation: "[The] power to execute is a power that can be wrongly used and justifications for wrongful use can be the products of self-deception." STEFFEN, *supra* note 134, at 115.

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# APPENDIX A
## VOLUNTEER EXECUTIONS, 1973-2003

| # | NAME | STATE | DATE OF EXECUTION | RACE/ SEX | AGE |
|---|---|---|---|---|---|
| 1 | Gary Gilmore | UT | 1/17/77 | W/M | 36 |
| 2 | Jesse Bishop | NV | 10/22/79 | W/M | 46 |
| 3 | Steven Judy | IN | 3/9/81 | W/M | 24 |
| 4 | Frank Coppola | VA | 8/10/82 | W/M | 38 |
| 5 | Stephen Peter Morin | TX | 3/13/85 | W/M | 34 |
| 6 | Charles Rumbaugh | TX | 9/11/85 | W/M | 28 |
| 7 | William Vandiver | IN | 10/16/85 | W/M | 37 |
| 8 | Caroll Cole | NV | 12/6/85 | W/M | 47 |
| 9 | Jeffrey Allen Barney | TX | 4/16/86 | W/M | |
| 10 | Ramon Hernandez | TX | 1/30/87 | H/M | 44 |
| 11 | Eliseo Moreno | TX | 3/4/87 | H/M | 27 |
| 12 | Arthur Bishop | UT | 6/10/88 | W/M | 36 |
| 13 | William Paul Thompson | NV | 6/19/89 | W/M | 52 |
| 14 | Sean Patrick Flannagan | NV | 6/23/89 | W/M | |
| 15 | Gerald Smith | MO | 1/18/90 | W/M | 31 |
| 16 | Jerome Butler | TX | 4/21/90 | B/M | 57 |
| 17 | Leonard Marvin Laws | MO | 5/17/90 | W/M | 40 |
| 18 | Thomas Baal | NV | 6/3/90 | W/M | 26 |
| 19 | Ronald Gene Simmons | AR | 6/25/90 | W/M | 49 |
| 20 | James Smith | TX | 6/26/90 | B/M | 37 |
| 21 | Charles Walker | IL | 9/12/90 | W/M | 50 |
| 22 | Steven Brian Pennell | DE | 3/14/92 | W/M | 34 |
| 23 | Westley Allan Dodd | WA | 1/5/93 | W/M | 31 |
| 24 | John George Brewer | AZ | 3/3/93 | W/M | 27 |
| 25 | James Allen Red Dog | DE | 3/3/93 | NA/M | 39 |
| 26 | Andrew Chabrol | VA | 6/17/93 | W/M | 36 |
| 27 | David Mason | CA | 8/24/93 | W/M | |
| 28 | Michael Durocher | FL | 8/25/93 | W/M | |
| 29 | Anthony Cook | TX | 11/10/93 | W/M | |
| 30 | Keith Wells | ID | 1/6/94 | W/M | 31 |
| 31 | Richard Lee Beavers | TX | 4/4/94 | W/M | 38 |
| 32 | John Thanos | MD | 5/17/94 | W/M | 44 |
| 33 | George Lott | TX | 9/20/94 | W/M | 47 |
| 34 | Nelson Shelton | DE | 3/17/95 | W/M | 27 |
| 35 | Thomas Grasso | OK | 3/20/95 | W/M | 32 |
| 36 | Keith Zettlemoyer | PA | 5/2/95 | W/M | 39 |
| 37 | Leon Moser | PA | 8/16/95 | W/M | 52 |

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APPENDIX A: VOLUNTEER EXECUTIONS, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE/ SEX | AGE |
|---|---|---|---|---|---|
| 38 | Phillip Lee Ingle | NC | 9/22/95 | W/M | 34 |
| 39 | Mickey Wayne Davidson | VA | 10/19/95 | W/M | 38 |
| 40 | Esequel Banda | TX | 12/11/95 | H/M | 31 |
| 41 | John Albert Taylor | UT | 1/26/96 | W/M | 38 |
| 42 | Leo Jenkins | TX | 2/9/96 | W/M | 38 |
| 43 | James Clark, Jr. | DE | 4/19/96 | W/M | 39 |
| 44 | Robert South | SC | 5/31/96 | W/M | 51 |
| 45 | Daren Lee Bolton | AZ | 6/19/96 | W/M | 30 |
| 46 | Michael Torrence | SC | 9/6/96 | W/M | |
| 47 | Douglas Franklin Wright | OR | 9/6/96 | W/M | |
| 48 | Joe Gonzales | TX | 9/18/96 | H/M | 36 |
| 49 | Doyle Cecil Lucas | SC | 11/15/96 | W/M | |
| 50 | Richard Brimage, Jr. | TX | 2/10/97 | W/M | 40 |
| 51 | Scott Carpenter | OK | 5/8/97 | NA/M | |
| 52 | Harry Charles Moore | OR | 5/16/97 | W/M | |
| 53 | Michael Eugene Elkins | SC | 6/13/97 | W/M | |
| 54 | Benjamin Stone | TX | 9/25/97 | W/M | 45 |
| 55 | Johnny Cockrum | TX | 9/30/97 | W/M | |
| 56 | Lloyd Wayne Hampton | IL | 1/21/98 | W/M | 44 |
| 57 | Robert A. Smith | IN | 1/29/98 | W/M | 47 |
| 58 | Ricky Lee Sanderson | NC | 1/30/98 | W/M | |
| 59 | Steven Renfro | TX | 2/9/98 | W/M | 40 |
| 60 | Michael Edward Long | OK | 2/20/98 | W/M | 35 |
| 61 | Arthur Martin Ross | AZ | 4/29/98 | W/M | |
| 62 | Stephen Wood | OK | 8/5/98 | W/M | 38 |
| 63 | Roderick Abeyta | NV | 10/5/98 | H/M | |
| 64 | Jeremy Sagastegui | WA | 10/13/98 | W/M | 27 |
| 65 | Wilford Berry | OH | 2/19/99 | W/M | 36 |
| 66 | James Rich† | NC | 3/26/99 | W/M | 26 |
| 67 | Alvaro Calambro | NV | 4/5/99 | A/M | 25 |
| 68 | Aaron Foust† | TX | 4/28/99 | W/M | 26 |
| 69 | Eric Christopher Payne | VA | 4/28/99 | W/M | 26 |
| 70 | Edward Lee Harper | KY | 5/25/99 | W/M | 50 |
| 71 | Charles Tuttle | TX | 7/1/99 | W/M | 35 |
| 72 | Gary Heidnick | PA | 7/6/99 | W/M | |
| 73 | Alan Willett | AR | 9/8/99 | W/M | 52 |
| 74 | Richard Wayne Smith | TX | 9/21/99 | W/M | 43 |

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APPENDIX A: VOLUNTEER EXECUTIONS, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE/ SEX | AGE |
|---|---|---|---|---|---|
| 75 | Joseph Parsons | UT | 10/15/99 | W/M | 35 |
| 76 | Robert Atworth | TX | 12/14/99 | W/M | |
| 77 | James Hampton | MO | 3/22/00 | W/M | 62 |
| 78 | Christina Riggs | AR | 5/2/00 | W/F | 28 |
| 79 | Richard Foster | TX | 5/24/00 | W/M | |
| 80 | Pernell Ford | AL | 6/2/00 | B/M | 35 |
| 81 | Bert Hunter | MO | 6/28/00 | W/M | 53 |
| 82 | Timothy McVeigh | FED | 6/11/00 | W/M | 33 |
| 83 | Dan Hauser | FL | 8/25/00 | W/M | 30 |
| 84 | Donald Miller | AZ | 11/8/00 | W/M | 36 |
| 85 | Edward Castro | FL | 12/7/00 | H/M | 50 |
| 86 | Floyd Medlock | OK | 1/16/01 | W/M | 29 |
| 87 | Thomas Akers | VA | 3/1/01 | W/M | 31 |
| 88 | Gerald Bivins | IN | 3/14/01 | W/M | 41 |
| 89 | Robert Lee Massie | CA | 3/27/01 | W/M | 59 |
| 90 | Ronald Dunaway Fluke | OK | 3/27/01 | W/M | 52 |
| 91 | Sebastian Bridges | NV | 4/21/01 | W/M | 37 |
| 92 | Clay King Smith | AR | 5/8/01 | W/M | 30 |
| 93 | James Elledge | WA | 8/28/01 | W/M | 58 |
| 94 | Terry Clark | NM | 11/6/01 | W/M | 45 |
| 95 | James Earl Patterson | VA | 3/14/02 | W/M | 35 |
| 96 | Daniel Zirkle | VA | 4/2/02 | W/M | 33 |
| 97 | Lynda Lyon Block | AL | 5/10/02 | W/F | 54 |
| 98 | Michael Passaro | SC | 9/13/02 | W/M | 40 |
| 99 | Earl Alexander Frederick, Sr. | OK | 7/30/02 | W/M | 51 |
| 100 | Rigoberto Sanchez-Velasco | FL | 10/2/02 | H/M | 43 |
| 101 | Aileen Wournos | FL | 10/9/02 | W/F | 46 |
| 102 | Newton Slawson | FL | 5/16/03 | W/M | 48 |
| 103 | Harold Loyd McElmurray | OK | 7/29/03 | W/M | 33 |
| 104 | Paul Hill | FL | 9/3/03 | W/M | 49 |
| 105 | Larry Hayes | TX | 9/10/03 | W/M | 54 |
| 106 | John Clayton Smith | MO | 11/29/03 | W/M | 42 |

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# APPENDIX B

## VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE DISORDERS, 1973-2003

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 1 | Gary Gilmore | UT | 1/17/77 | W | 36 | alcohol abuse; prior suicide attempts |
| 2 | Jesse Bishop | NV | 10/22/77 | W | 46 | substance abuse |
| 3 | Steven Judy | IN | 3/9/81 | W | 24 | personality disorder |
| 4 | Stephen Morin | TX | 3/13/85 | W | 34 | heroin addiction |
| 5 | Charles Rumbaugh | TX | 9/11/85 | W | 28 | depression, schizophrenia, alcohol & drug abuse, prior suicide attempts |
| 6 | William Vandiver | IN | 10/16/85 | W | 37 | personality disorder |
| 7 | Caroll Cole | NV | 12/6/85 | W | 47 | serious childhood abuse — PTSD, alcohol abuse |
| 8 | Richard Lee Beavers | TX | 8/18/86 | W | 38 | substance abuse, mental illness |
| 9 | Ramon Hernandez | TX | 1/30/87 | H | 44 | drug addiction |
| 10 | Eliseo Moreno | TX | 3/4/87 | H | 27 | depression resulting from divorce/alcohol abuse, prior suicide attempts |
| 11 | Arthur Bishop | UT | 6/10/88 | W | 38 | pedophilia |
| 12 | William Thompson | NV | 6/19/89 | W | 52 | alcohol abuse |
| 13 | Sean Patrick Flannagan | NV | 6/23/89 | W | | sexual identity disorder/alcohol abuse |

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APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 14 | Gerald Smith | MO | 1/18/90 | W | 31 | depression, drug & alcohol abuse, prior suicide attempts |
| 15 | Leonard Marvin Laws | MO | 5/17/90 | W | 40 | PTSD |
| 16 | Thomas Baal | NV | 6/3/90 | W | 26 | depression, possible brain damage, schizophrenia, prior suicide attempts and drug addiction |
| 17 | Ronald Gene Simmons | AR | 6/25/90 | W | 49 | pedophilia |
| 18 | James Smith | TX | 6/26/90 | B | 37 | paranoid schizophrenia, suicidal, prior suicide attempts |
| 19 | Charles Walker | IL | 9/12/90 | W | 50 | alcohol dependence |
| 20 | Westley Allan Dodd | WA | 1/5/93 | W | 31 | pedophilia & sadism with mixed personality disorder |
| 21 | John George Brewer | AZ | 3/3/93 | W | 27 | borderline personality disorder, multiple suicide attempts |
| 22 | James Allen Red Dog | DE | 3/3/93 | NA | 39 | bipolar disorder, brain damage and alcohol dependence |
| 23 | David Mason | CA | 8/24/93 | W | | severe childhood abuse, PTSD, prior suicide attempts |
| 24 | Michael Durocher | FL | 8/25/93 | W | | depression, prior suicide attempts |
| 25 | Keith Wells | ID | 1/6/94 | W | 31 | schizophrenia, drug & alcohol abuse |

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APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 26 | Richard Lee Beavers | TX | 4/4/94 | W | 38 | personality disorder, psychotic disorder & drug abuse |
| 27 | John Thanos | MD | 5/17/94 | W | 44 | borderline personality disorder, gender ID disturbance, drug abuse, multiple suicide attempts |
| 28 | George Lott | TX | 09/20/94 | W | 47 | mental illness |
| 29 | Nelson Shelton | DE | 03/17/95 | W | 27 | depression |
| 30 | Thomas Grasso | OK | 3/20/95 | W | 32 | possible mental illness, drug dependence and prior suicide attempts |
| 31 | Keith Zettlemoyer | PA | 5/2/95 | W | 39 | brain damage, schizophrenia, depression, PTSD, prior suicide attempts |
| 32 | Leon Moser | PA | 8/16/95 | W | 52 | depression, prior suicide attempts |
| 33 | Phillip Lee Ingle | NC | 9/22/95 | W | 34 | borderline personality disorder, schizoaffective disorder, drug & alcohol abuse, multiple suicide attempts |
| 34 | Mickey Wayne Davidson | VA | 10/19/95 | W | 38 | mentally ill, alcohol abuse |
| 35 | Esequel Banda | TX | 12/11/95 | H | 31 | psychotic disorder, alcohol abuse |

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APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 36 | John Albert Taylor | UT | 1/26/96 | W | 38 | pedophilia |
| 37 | Leo Jenkins | TX | 2/9/96 | W | 38 | personality disorder, drug abuse |
| 38 | James Clark, Jr. | DE | 4/19/96 | W | 39 | schizoid personality disorder, brain damage |
| 39 | Robert South | SC | 5/31/96 | W | 51 | brain tumor, PTSD, drug and alcohol dependence |
| 40 | Daren Lee Bolton | AZ | 6/19/96 | W | 30 | depression, possible brain damage; personality disorder, substance abuse |
| 41 | Michael Torrence | SC | 9/6/96 | W | | Schizophrenia, drug abuse |
| 42 | Douglas Franklin Wright | OR | 9/6/96 | W | | brain damage. |
| 43 | Doyle Cecil Lucas | SC | 11/15/96 | W | | depression, drug and alcohol abuse |
| 44 | Richard Brimage | TX | 2/10/97 | W | | drug abuse |
| 45 | Scott Carpenter | OK | 5/8/97 | NA | | brain damage/ seizure disorder |
| 46 | Harry Charles Moore | OR | 5/16/97 | W | | delusional disorder |
| 47 | Michael Eugene Elkins | SC | 6/13/97 | W | | depression, alcohol and drug dependence |
| 48 | Johnny Cockrum | TX | 9/30/97 | W | | PTSD, alcohol and drug abuse |
| 49 | Benjamin Stone | TX | 11/26/97 | W | 45 | drug & alcohol abuse |

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APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 50 | Robert A. Smith | IN | 1/29/98 | W | 47 | depression |
| 51 | Ricky Lee Sanderson | NC | 1/30/98 | W | | mental illness, drug abuse |
| 52 | Steven Renfro | TX | 2/9/98 | W | 40 | drug & alcohol abuse |
| 53 | Michael Edward Long | OK | 2/20/98 | W | 35 | depression, alcohol & drug abuse |
| 54 | Stephen Wood | OK | 8/5/98 | W | 38 | paranoid schizophrenia, brain damage, drug & alcohol abuse |
| 55 | Roderick Abeyta | NV | 10/5/98 | W | | drug abuse, mental illness, twice found incompetent |
| 56 | Jeremy Segastegui | WA | 10/13/98 | W | 27 | bipolar disorder, PTSD |
| 57 | Wilford Berry | OH | 2/19/99 | W | 36 | severe child abuse, PTSD, brain damage, schizophrenia, multiple prior suicide attempts |
| 58 | James Rich | NC | 3/26/99 | W | 26 | mentally ill, multiple suicide attempts |
| 59 | Alvaro Calambro | NV | 4/5/99 | A | 25 | borderline mental retardation, symptoms of schizophrenia |
| 60 | Aaron Christopher Foust | TX | 4/28/99 | W | 26 | substance abuse |
| 61 | Eric Christopher Payne | VA | 4/28/99 | W | 26 | mental illness, depression, drug abuse |

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## APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 62 | Edward Lee Harper | KY | 5/25/99 | W | 50 | schizophrenia form disorder |
| 63 | Charles Tuttle | TX | 7/1/99 | W | 35 | mental illness, brain damage, drug abuse |
| 64 | Gary Heidnick | PA | 7/6/99 | W | | paranoid schizophrenia, prior suicide attempts |
| 65 | Richard Smith | TX | 9/21/99 | W | 43 | drug & alcohol abuse |
| 66 | Alan Willet | AK | 11/8/99 | W | 52 | depression, drug abuse, prior suicide attempts |
| 67 | Ronald Atworth | TX | 12/14/99 | W | 31 | schizophrenia |
| 68 | James Hampton | MO | 3/22/00 | W | 62 | brain damage from self-inflicted gunshot wound to the head at the time of his arrest |
| 69 | Christina Riggs | AR | 5/2/00 | W | 28 | depression, attempted suicide, alcohol & drug abuse |
| 70 | Pernell Ford | AL | 6/2/00 | B | 35 | schizophrenia, prior suicide attempts |
| 71 | Dan Hauser | FL | 8/25/00 | W | 30 | bipolar disorder, delusional disorder, prior suicide attempts, alcohol abuse |
| 72 | Don Jay Miller | AZ | 11/08/00 | W | 36 | mental illness, substance abuse, prior suicide attempts |
| 73 | Edward Castro | FL | 12/07/00 | H | 50 | alcohol abuse |
| 74 | Floyd Medlock | OK | 1/16/01 | W | 29 | multiple personality disorder |

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## APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 75 | Thomas Akers | VA | 3/1/01 | W | 31 | brain damage, prior suicide attempts, severe child abuse, substance abuse, depression |
| 76 | Gerald Bivins | IN | 03/15/01 | W | 41 | substance abuse |
| 77 | Robert Lee Massie | CA | 3/27/01 | W | 59 | depression, prior suicide attempts |
| 78 | Ronald Dunaway Fluke | OK | 3/27/01 | W | 52 | depression, prior suicide attempts |
| 79 | Sebastian Bridges | NV | 4/21/01 | W | 37 | narcissistic personality disorder, prior suicide attempts |
| 80 | Clay King Smith | AR | 05/8/01 | W | 30 | drug abuse |
| 81 | James Elledge | WA | 08/28/01 | W | 58 | mental illness, alcohol abuse, prior suicide attempts |
| 82 | Terry Clark | NM | 11/6/01 | W | 45 | pedophilia, alcohol & drug abuse |
| 83 | James Patterson | VA | 3/14/02 | W | 35 | drug abuse |
| 84 | Daniel Zirkle | VA | 04/02/02 | W | 33 | drug abuse, prior suicide attempts |
| 85 | Richard Foster | TX | 05/24/02 | W | 47 | PTSD, substance abuse |
| 86 | Michael Passaro | SC | 9/13/02 | W | 40 | depression, alcohol & drug abuse |
| 87 | Earl Alexander Frederick, Sr. | OK | 7/30/02 | W | 51 | PTSD, multiple personality disorder, substance abuse |
| 88 | Rigoberto Sanchez-Velasco | FL | 10/02/02 | H | 43 | mental illness, brain damage |

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APPENDIX B: VOLUNTEERS WITH KNOWN MENTAL ILLNESS AND/OR SUBSTANCE ABUSE, 1973-2003, CONTINUED

| # | NAME | STATE | DATE OF EXECUTION | RACE | AGE | MENTAL ILLNESS |
|---|---|---|---|---|---|---|
| 89 | Aileen Wuornos | FL | 10/9/02 | W | 46 | borderline personality disorder, alcohol abuse |
| 90 | Newton Slawson | FL | 05/06/03 | W/M | 48 | drug abuse |
| 91 | Harold McElmurray | OK | 07/29/03 | W | 33 | mental illness, drug abuse |
| 92 | Larry Hayes | TX | 9/10/03 | W/M | 54 | bipolar, manic depressive |
| 93 | John Clayton Smith | MO | 11/29/03 | W/M | 42 | bipolar, manic depressive, prior suicide attempts |

## APPENDIX C
## QUESTIONNAIRE FOR LAWYERS/TEAM MEMBERS IN VOLUNTEER AND ATTEMPTED VOLUNTEER CASES

***Confidentiality Clause***: *The information you provide in this questionnaire will be used for research purposes for a study regarding individuals who have waived or attempted to waive their appeals. The information you provide will be used to compile statistics and to discuss illustrative cases, and will not be released in identifiable form. If you have represented more than one individual who has waived or attempted to waive his or her appeals, please fill out a separate form for each such individual.*

1. Name of the individual who waived or attempted to waive appeal(s):_____

2. Race of the individual who waived or attempted to waive his/her appeals:
   __ African-American __ Hispanic
   __ Asian __ Native American
   __ Caucasian __Other: _____

3. Age at time of waiver or attempted waiver _____

4. Male_____
Female____

5. State (or federal government) of conviction of capital offense:

___ Alabama
___ Arizona
___ Arkansas
___ California
___ Colorado
___ Connecticut
___ Delaware
___ Federal Government
___ Florida
___ Georgia
___ Idaho
___ Illinois
___ Indiana
___ Kansas
___ Kentucky
___ Louisiana
___ Maryland
___ Mississippi
___ Missouri
___ Montana
___Nebraska
___Nevada
___New Hampshire
___New Jersey
___ New Mexico
___ New York
___ North Carolina
___ Ohio
___ Oklahoma
___ Oregon
___ Pennsylvania
___ South Carolina
___ South Dakota
___ Tennessee
___ Texas
___ Utah
___ Virginia
___ Washington
___ Wyoming
___ Other:

6. Does the jurisdiction have protocols (beyond or more explicit than the constitutional standard) to prevent a death-row inmate from committing suicide when a death warrant is issued? _____ If yes, please explain, citing any relevant cases or statutes.

7. If one or more of the victims was a family member of the client, please indicate the victim's relationship to the client:

___ Brother ___ Father ___ Sister
___ Cousin ___ Grandparent(s) ___ Spouse
___ Child ___ Mother ___ Other:

8. If the client had a history of mental health problems prior to the offense which resulted in the death sentence, please indicate with which illness(es) the client had been diagnosed:

____Bipolar Disorder
____ Schizophrenia

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___ Multiple Personality Disorder
___ Post-Traumatic Stress Disorder
___ Attention Deficit Disorder
___ Attention Deficit Hyperactivity Disorder
___ Obsessive Compulsive Disorder
___ Depression
___ Other:

9. If the client suffered from mental illnesses or mental impairments **at the time s/he volunteered for execution**, please indicate which s/he suffered from at that time:

___Bipolar Disorder
___ Schizophrenia
___ Multiple Personality Disorder
___ Post-Traumatic Stress Disorder
___ Attention Deficit Disorder
___ Attention Deficit Hyperactivity Disorder
___ Obsessive Compulsive Disorder
___Depression
___ Other:

10. Did any member of the individual's family have a history of mental health problems?

a. If yes, please explain, noting relationship and diagnosis or nature of illness.

11. Did the client have any history of suicide attempts or suicidal behavior?

a. Did the client attempt suicide pre-incarceration?
b. Did the client attempt suicide while incarcerated?
c. If yes, was the suicide attempt
___ prior to waiver or attempted waiver? How long prior?
___ after waiver or attempted waiver? How long after?
d. If the client was executed, how long was it between the suicide attempt and the execution?

12. While on death row, did the individual receive visits from family members, friends, etc.?

a. If yes, please explain from whom and how often

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13. At what point in the appeals process did the client attempt to volunteer for execution?
____prior to or during trial
____prior to or during direct appeal
____prior to or during state post-conviction proceedings
____prior to or during federal district court proceedings
____prior to or during federal court of appeals proceedings
____prior to or during petition for certiorari
____other

14. Was your client successful in attempting to waive his appeals?
____yes
____no

15. Did your client change his mind at any point after he attempted to volunteer?
___no
___yes

If yes, when? _____
Why?_____
_____
_____

16. If the client was **unsuccessful** in his/her attempt(s) to volunteer, did the client make a "serious" effort to waive his or her appeals (e.g. file court documents requesting to volunteer)?
a. If yes, why did the attempt fail?
____found incompetent?
____changed his/her mind?
____other

17. What were the client's stated reasons for waiving or attempting to waive his or her appeals? Please circle any that apply and explain.

a. Relationships (e.g., failed relationships with family members or loved ones)?

b. Conditions of confinement?

c. Religion: The client believed his/her death was the "right" punishment for the crime?

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d. Religion: Other (e.g., an influential person, such as a prison chaplain)?

e. Untreated mental illness?

f. Health (not mental health; *e.g.* heart disease, cancer)?

g. Sense of hopelessness?

h. Remorse?

i. Acceptance of responsibility/acknowledgment that s/he deserved to die for crimes (non-religious)?

j. Other?

18. Which, if any, of the following factors, **in your opinion**, actually played a role in the individual's decision to waive his/her appeals and volunteer for execution? Please indicate your estimation of importance in the decision:

a. Relationships (e.g., failed relationships with family members or loved ones)?

b. Conditions of confinement?

c. Religion: The client believed his/her death was the "right" punishment for the crime?

d. Religion: Other (e.g., an influential person, such as a prison chaplain)?

e. Untreated mental illness?

f. Health (not mental health; e.g., heart disease, cancer)?

g. Sense of hopelessness?

h. Remorse?

i. Acceptance of responsibility/acknowledgment that s/he deserved to die for crimes (non-religious)?

j. Other?

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19. Was the volunteer mentally retarded or a person with borderline mental retardation?

    a. If yes, please explain.

20. Did the volunteer's case present issues of factual innocence?

    a. If yes, please explain.

21. In your opinion, was the volunteer guilty of the underlying offense, but innocent of the death penalty? (e.g., statutory aggravating factor was not present)

    a. If yes, please explain.

22. Did the individual's case present any issues beyond factual innocence and innocence of the death penalty which were likely to be successful in the appeals process?

    a. If yes, please explain.

23. Was the client's competency to waive his/her appeals challenged?

    a. If yes, please explain.

24. Was there *any* issue regarding the client's competency to be executed?

    a. If yes, please explain.

25. Did you attempt to dissuade or prevent the client from volunteering?

    a. yes, but through persuasion only
    b. yes, by enlisting others to help persuade client
    c. yes, by legal action
    d. no

26. Describe your attitude toward clients who attempt to drop their appeals_____

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_____
_____
_____

26. Was the incarceration for which the client waived his appeals the first incarceration for the client?

27. To the best of your knowledge, did your client's waiver of appeals prompt other inmates to contemplate and/or pursue waiving their appeals?
____yes
____no

a. If yes, what is your basis for this knowledge?
b. Please provide any information you have regarding these inmates who were prompted to waive their appeals based on your client's waiver?

28. Is there something this questionnaire has failed to ask about that you think was important?
_____
_____
_____
_____

# APPENDIX D

## VOLUNTEER EXECUTIONS BY STATE, 1973-2003

| NAME | STATE | DATE |
|---|---|---|
| Pernell Ford | AL | 06/02/00 |
| Lynda Lyon Block | AL | 05/10/02 |
| | | |
| Ronald Gene Simmons | AR | 06/25/90 |
| Alan Willett | AR | 09/08/99 |
| Christina Riggs | AR | 05/02/00 |
| Clay King Smith | AR | 05/08/01 |
| | | |
| John George Brewer | AZ | 03/03/93 |
| Daren Lee Bolton | AZ | 06/19/96 |
| Arthur Martin Ross | AZ | 04/29/98 |
| Donald Miller | AZ | 11/08/00 |
| | | |
| David Mason | CA | 08/24/93 |
| Robert Lee Massie | CA | 03/27/01 |
| | | |
| Steven Brian Pennell | DE | 03/14/92 |
| James Allen Red Dog | DE | 03/03/93 |
| Nelson Shelton | DE | 03/17/95 |
| James Clark, Jr. | DE | 04/19/96 |
| | | |
| Michael Durocher | FL | 08/25/93 |
| Dan Hauser | FL | 08/25/00 |
| Edward Castro | FL | 12/07/00 |
| Rigoberto Sanchez-Velasco | FL | 10/02/02 |
| Aileen Wournos | FL | 10/09/02 |
| Newton Slawson | FL | 05/16/03 |
| Paul Hill | FL | 09/03/03 |
| | | |
| Keith Wells | ID | 01/06/94 |
| | | |
| Charles Walker | IL | 09/12/90 |
| Lloyd Wayne Hampton | IL | 01/21/98 |
| | | |
| Steven Judy | IN | 03/09/81 |
| William Vandiver | IN | 10/16/85 |

APPENDIX D: VOLUNTEER EXECUTIONS BY STATE, 1973-2003, CONTINUED

| NAME | STATE | DATE |
|---|---|---|
| Robert A. Smith | IN | 01/29/98 |
| Gerald Bivins | IN | 03/14/01 |
| | | |
| Edward Lee Harper | KY | 05/25/99 |
| | | |
| John Thanos | MD | 05/17/94 |
| | | |
| Gerald Smith | MO | 01/18/90 |
| Leonard Marvin Laws | MO | 05/17/90 |
| James Hampton | MO | 03/22/00 |
| Bert Hunter | MO | 06/28/00 |
| John Clayton Smith | MO | 11/29/03 |
| | | |
| Phillip Lee Ingle | NC | 09/22/95 |
| Ricky Lee Sanderson | NC | 01/30/98 |
| James Rich | NC | 03/26/99 |
| | | |
| Terry Clark | NM | 11/06/01 |
| | | |
| Jesse Bishop | NV | 10/22/79 |
| Caroll Cole | NV | 12/06/85 |
| William Paul Thompson | NV | 06/19/89 |
| Sean Patrick Flannagan | NV | 06/23/89 |
| Thomas Baal | NV | 06/03/90 |
| Roderick Abeyta | NV | 10/05/98 |
| Alvaro Calambro | NV | 04/05/99 |
| Sebastian Bridges | NV | 04/21/01 |
| | | |
| Wilford Berry | OH | 02/19/99 |
| | | |
| Thomas Grasso | OK | 03/20/95 |
| Scott Carpenter | OK | 05/08/97 |
| Michael Edward Long | OK | 02/20/98 |
| Stephen Wood | OK | 08/05/98 |
| Floyd Medlock | OK | 01/16/01 |
| Ronald Dunaway Fluke | OK | 03/27/01 |
| Earl Alexander Frederick, Sr. | OK | 07/30/02 |
| Harold Loyd McElmurry | OK | 07/29/03 |

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APPENDIX D: VOLUNTEER EXECUTIONS BY STATE, 1973-2003, CONTINUED

| NAME | STATE | DATE |
|---|---|---|
| Douglas Franklin Wright | OR | 09/06/96 |
| Harry Charles Moore | OR | 05/16/97 |
| | | |
| Keith Zettlemoyer | PA | 05/02/95 |
| Leon Moser | PA | 08/16/95 |
| Gary Heidnick | PA | 07/06/99 |
| | | |
| Robert South | SC | 05/31/96 |
| Michael Torrence | SC | 09/06/96 |
| Doyle Cecil Lucas | SC | 11/15/96 |
| Michael Eugene Elkins | SC | 06/13/97 |
| Michael Passaro | SC | 09/13/02 |
| | | |
| Stephen Peter Morin | TX | 03/13/85 |
| Charles Rumbaugh | TX | 09/11/85 |
| Jeffrey Allen Barney | TX | 04/16/86 |
| Ramon Hernandez | TX | 01/30/87 |
| Eliseo Moreno | TX | 03/04/87 |
| Jerome Butler | TX | 04/21/90 |
| James Smith | TX | 06/26/90 |
| Anthony Cook | TX | 11/10/93 |
| Richard Lee Beavers | TX | 04/04/94 |
| George Lott | TX | 09/20/94 |
| Esequel Banda | TX | 12/11/95 |
| Leo Jenkins | TX | 02/09/96 |
| Joe Gonzales | TX | 09/18/96 |
| Richard Brimage, Jr. | TX | 02/10/97 |
| Benjamin Stone | TX | 09/25/97 |
| Johnny Cockrum | TX | 09/30/97 |
| Steven Renfro | TX | 02/09/98 |
| Aaron Foust† | TX | 04/28/99 |
| Charles Tuttle | TX | 07/01/99 |
| Richard Wayne Smith | TX | 09/21/99 |
| Robert Atworth | TX | 12/14/99 |
| Richard Foster | TX | 05/24/00 |
| Larry Hayes | TX | 09/10/03 |
| | | |
| Gary Gilmore | UT | 01/17/77 |

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## APPENDIX D: VOLUNTEER EXECUTIONS BY STATE, 1973-2003, CONTINUED

| NAME | STATE | DATE |
|---|---|---|
| Arthur Bishop | UT | 06/10/88 |
| John Albert Taylor | UT | 01/26/96 |
| Joseph Parsons | UT | 10/15/99 |
| | | |
| Frank Coppola | VA | 08/10/82 |
| Andrew Chabrol | VA | 06/17/93 |
| Mickey Wayne Davidson | VA | 10/19/95 |
| | | |
| Westley Allan Dodd | WA | 01/05/93 |
| Jeremy Sagastegui | WA | 10/13/98 |
| James Elledge | WA | 08/28/01 |
| | | |
| Timothy McVeigh | FEDERAL | 06/11/00 |

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# APPENDIX E

## NUMBER OF VOLUNTEER EXECUTIONS BY STATE, 1973-2003

| State | Total # Sentenced to Death[175] | Total # of Executions | # of Volunteers | % of Those Sentenced to Death Who Volunteer for Death | % of Those Executed Who Volunteer for Death | Total # of Suicides on Death Row[176] | Total # of Natural Deaths on Death Row |
|---|---|---|---|---|---|---|---|
| UT | 18 | 6 | 4 | 22.23 | 66.67 | 0 | 0 |
| DE | 35 | 13 | 4 | 11.43 | 30.78 | 0 | 0 |
| WA | 37 | 4 | 3 | 8.11 | 75 | 1 | 1 |
| NV | 131 | 9 | 8 | 6.11 | 88.89 | 3 | 7 |
| VA | 134 | 89 | 7 | 5.22 | 7.87 | 2 | 3 |
| IN | 93 | 11 | 4 | 4.30 | 36.36 | 1 | 1 |
| AR | 109 | 26 | 4 | 3.67 | 15.38 | 1 | 2 |
| OR | 61 | 2 | 2 | 3.28 | 100 | 0 | 1 |
| NM | 14 | 1 | 1 | 7.14 | 100 | 0 | 1 |
| Fed. Gov. | 28 | 3 | 1 | 3.57 | 33.33 | 0 | 0 |
| SC | 165 | 28 | 5 | 3.03 | 17.85 | 0 | 4 |
| IDo | 38 | 1 | 1 | 2.63 | 100 | 0 | 1 |
| OK | 269 | 71 | 8 | 2.97 | 11.26 | 1 | 8 |
| TX | 816 | 320 | 23 | 2.81 | 7.18 | 3 | 23 |
| MD | 51 | 3 | 1 | 1.96 | 33.33 | 1 | 1 |
| MO | 150 | 61 | 5 | 2.67 | 6.78 | 2 | 8 |
| AZ | 227 | 22 | 4 | 1.76 | 18.18 | 1 | 10 |
| KY | 75 | 2 | 1 | 1.33 | 50 | 0 | 2 |
| PA | 318 | 3 | 3 | 0.94 | 100 | 0 | 12 |
| IL | 290 | 12 | 2 | 0.68 | 16.67 | 1 | 10 |
| AL | 361 | 28 | 2 | 0.55 | 7.14 | 5 | 14 |

175. Death Penalty Information Center, US Department of Justice, Bureau of Statistics, January 2004. This is the number of death sentences as of December 31, 2002.

176. These numbers, provided by both the U.S. Department of Justice, Bureau of Justice Statistics, as well as individual state agencies, the Death Penalty Information Center, and the Legal Defense Fund, are almost certainly a low estimate, as most of these agencies, admittedly, have not kept accurate count regarding the cause of death of some prisoners. Thus some of the "natural" deaths on death row were, in all likelihood, suicides.

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## APPENDIX E: NUMBER OF VOLUNTEER EXECUTIONS BY STATE, 1973-2003, CONTINUED

| State | Total # Sentenced to Death[177] | Total # of Executions | # of Volunteers | % of Those Sentenced to Death Who Volunteer for Death | % of Those Executed Who Volunteer for Death | Total # of Suicides on Death Row[178] | Total # of Natural Deaths on Death Row |
|---|---|---|---|---|---|---|---|
| NC | 411 | 31 | 3 | 0.73 | 9.68 | 5 | 10 |
| FL | 771 | 58 | 7 | 0.91 | 12.06 | 9 | 31 |
| GA | 213 | 34 | 0 | 0 | 0 | 0 | |
| OH | 287 | 10 | 1 | 0.34 | 10 | 5 | 10 |
| CA | 724 | 10 | 2 | 0.27 | 20 | 12 | 31 |
| CO | 12 | 1 | 0 | 0 | 0 | 0 | 1 |
| CT | 9 | 0 | 0 | 0 | 0 | 0 | 0 |
| KS | 10 | 0 | 0 | 0 | 0 | 0 | 0 |
| LA | 132 | 27 | 0 | 0 | 0 | 0 | 3 |
| MA | 4 | 0 | 0 | 0 | 0 | 0 | 0 |
| MS | 150 | 6 | 0 | 0 | 0 | 0 | 3 |
| MT | 10 | 2 | 0 | 0 | 0 | 0 | 0 |
| NE | 23 | 3 | 0 | 0 | 0 | 0 | 3 |
| NJ | 56 | 0 | 0 | 0 | 0 | 0 | 3 |
| NY | 7 | 0 | 0 | 0 | 0 | 0 | 0 |
| RI | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| SD | 6 | 0 | 0 | 0 | 0 | 0 | 0 |
| TN | 156 | 1 | 0 | 0 | 0 | 0 | 10 |
| WY | 6 | 1 | 0 | 0 | 0 | 0 | 1 |
| **TOTAL** | **6152** | **899** | **106** | **1.72** | **11.79** | **53** | **215** |

177. Death Penalty Information Center, US Department of Justice, Bureau of Statistics, January 2004. This is the number of death sentences as of December 31, 2002.

178. These numbers, provided by both the U.S. Department of Justice, Bureau of Justice Statistics, as well as individual state agencies, the Death Penalty Information Center, and the Legal Defense Fund, are almost certainly a low estimate, as most of these agencies, admittedly, have not kept accurate count regarding the cause of death of some prisoners. Thus some of the "natural" deaths on death row were, in all likelihood, suicides.

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# APPENDIX F

## NUMBER OF VOLUNTEER EXECUTIONS BY FEDERAL JUDICIAL CIRCUIT, 1973-2002

| Federal Circuit | Total # of Death Sentences | Total # of Executions | # of Volunteers | % of Inmates Executed Who Volunteered | % of Inmates Sentenced to Death Who Volunteered |
|---|---|---|---|---|---|
| **First** | 4 | 0 | 0 | 0 | 0 |
| **Second** | 16 | 0 | 0 | 0 | 0 |
| **Third** | 409 | 16 | 7 | 43.75 | 1.71 |
| **Fourth** | 761 | 151 | 16 | 10.59 | 2.55 |
| **Fifth** | 1098 | 355 | 28 | 7.89 | 2.28 |
| **Sixth** | 518 | 13 | 2 | 25.00 | 0.38 |
| **Seventh** | 383 | 23 | 6 | 28.57 | 1.38 |
| **Eighth** | 288 | 90 | 4 | 4.44 | 3.13 |
| **Ninth** | 1001 | 50 | 20 | 40.00 | 2.00 |
| **Tenth** | 329 | 81 | 14 | 17.28 | 4.26 |
| **Eleventh** | 1345 | 120 | 9 | 7.5 | 0.67 |
| **TOTAL** | **6152** | **899** | **106** | **11.79** | **1.72** |

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