

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HUBERT L. MICHAEL	:	
	:	
Petitioner	:	
	:	
VS.	:	
	:	
	:	3:CV-96-1554
	:	(CHIEF JUDGE VANASKIE)
	:	
MARTIN HORN, Commissioner,	:	
Pennsylvania Dep't of Corrections;	:	
DONALD T. VAUGHN, Superintendent	:	
of the State Correctional Institution	:	
at Graterford; JOSEPH P.	:	
MAZURKIEWICZ, Superintendent of	:	
the State Correctional Institution at	:	
Rockview	:	
	:	
Respondents	:	

MEMORANDUM

At issue in this matter is whether death-sentenced Hubert Michael is competent and has knowingly, rationally, and voluntarily chosen to waive pursuit of a collateral challenge to his state court conviction and sentence. To decide these questions, I have carefully considered (a) the report and corroborating testimony of Robert M. Wettstein, M.D., a psychiatrist appointed by this Court to evaluate Mr. Michael in accordance with Rees v. Peyton, 384 U.S. 312 (1966), and other pertinent authority; (b) the testimony of Harry Krop, Ph.D., a forensic psychologist presented by the Defender Association of Philadelphia, Capital Habeas Corpus Unit (hereinafter referred to as the "CHCU"), whom Mr. Michael seeks to dismiss as his counsel; (c) the record of

state court proceedings concerning Mr. Michael's competency; (d) the exhibits presented at the hearing conducted by this Court; (e) this Court's colloquy of Mr. Michael; and (f) the post-hearing submissions made by Respondents, the CHCU and Mr. Michael. Based on my review of all pertinent materials, I have concluded that Mr. Michael is competent and his decision to forego a federal court collateral challenge to his state court conviction and sentence is knowing, rational and voluntary.

The CHCU argues that even if Mr. Michael may dismiss it as his counsel and abandon this litigation, it has presented a "non-waivable" claim, which this Court must adjudicate. Specifically, the CHCU insists that this Court address the merits of its claim that the prosecutor, defense counsel, and the state trial court "colluded with each other to impose a death sentence simply because Mr. Michael asked for it." (Petitioner's Memorandum Regarding Non-Waivable Claim (Dkt. Entry 109) at 2; emphasis in original.) Because governing Supreme Court and Third Circuit precedent precludes this Court from adjudicating a petition that Mr. Michael has knowingly, rationally and voluntarily chosen not to pursue, e.g., Whitmore v. Arkansas, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976); United States v. Hammer, 226 F.3d 229 (3d Cir. 2000), the habeas corpus petition filed by the CHCU – without Mr. Michael's authorization – will be dismissed without considering the merits of the so-called "non-waivable" claim.

## I. BACKGROUND

On the morning of July 12, 1993, Mr. Michael pulled up along side 16-year-old Trista Eng, who was walking to her summer job at a Hardee's Restaurant.<sup>1</sup> Mr. Michael offered to drive her to work. Trista accepted the invitation. Instead of taking Ms. Eng to her summer job, Mr. Michael drove to a remote location in the State Game Lands in York County. He then forced Ms. Eng out of the vehicle, and shot her three times with a .44 magnum: once in the chest, once in the back, and once in the back of the head. He then concealed the body in some weeds.

At the time of the murder, Mr. Michael was being prosecuted on a rape charge. Asserting that sex with the rape complainant had been consensual, Mr. Michael believed that he was the victim of an unjust prosecution. He has explained the murder of Ms. Eng as an act of vengeance for the unjust prosecution.

Several days after committing the murder, Mr. Michael fled the state in a rental vehicle. He was apprehended by Utah state police on July 27, 1993. A .44 magnum was found in the rental car.

Mr. Michael was brought back to the Commonwealth and jailed in the Lancaster County Prison on the pending rape charges. On August 24, 1993, while incarcerated at the Lancaster

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<sup>1</sup>Unless otherwise indicated, the facts underlying Mr. Michael's conviction have been gleaned from the Pennsylvania Supreme Court's decision affirming the death penalty, Commonwealth v. Michael, 544 Pa. 105, 674 A.2d 1044 (1996) (hereinafter Michael I).

County Prison awaiting trial on the rape charges, Mr. Michael confessed to his brother that he had murdered a young woman and hid her body in the State Game Lands in York County. Mr. Michael's brother and other family members searched the area described by Mr. Michael, and eventually located a badly decomposed body wearing the remnants of a Hardee's Restaurant uniform. Id. The Pennsylvania State Police was summoned, and the body was later identified as that of Trista Eng. On August 27, 1993, Mr. Michael was charged with first degree murder.

At about the time he was charged with the murder of Ms. Eng, Mr. Michael fell down a flight of stairs at the Lancaster County Prison. (P-6, Lancaster Co. Prison records introduced at the Sept. 26, 2002 hearing.)<sup>2</sup> The Lancaster County Prison records from August 27, 1993 through September 1, 1993 document concerns that Mr. Michael was suicidal. On September 1, 1993, he was transferred to the "Medical Housing Area" for "closer observation."<sup>3</sup>

The Lancaster County Prison records, however, also document Mr. Michael's assertion that the fall down the stairs was not deliberate. According to the records, Mr. Michael stated that "if he wanted to kill himself he wouldn't jump down the stairs because that wouldn't kill him." Mr. Michael repeatedly denied any suicidal ideation.

In November of 1993, Mr. Michael escaped from the Lancaster County Prison by

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<sup>2</sup>The fall down the stairs is documented in a progress note entry for August 30, 1993. Above the entry, however, is the notation, "Late Entry 8-22-93."

<sup>3</sup>The prison record ascribes to Mr. Michael a suicide status of Level 1. The record indicates there are three levels, but no explanation of the levels is provided.

assuming the identity of another inmate who was scheduled to be released. (Dr. Wettstein Report at 7.) He was apprehended in New Orleans in approximately March, 1994. Upon being returned to the Commonwealth, he was jailed in the York County Prison.

While incarcerated in the York County Prison, Mr. Michael was prescribed Benadryl 50 mg for a skin rash. After hoarding the pills, Mr. Michael, on July 13, 1994, ingested 60 Benadryl tablets. Mr. Michael was hospitalized for this incident, which was viewed as an attempted suicide.<sup>4</sup> There is, however, no evidence that Mr. Michael received any psychiatric treatment at this time.<sup>5</sup> (1/13/97 PCRA Tr. at 107.)

Mr. Michael first stood trial on the Lancaster County rape charge. In September, 1994, he was convicted of rape, and subsequently sentenced to a prison term of 20 years.

Jury selection on the homicide charge commenced in Berks County on October 11, 1994.<sup>6</sup> During jury selection, Mr. Michael's counsel informed the trial judge that Mr. Michael had elected to plead guilty to first degree murder and kidnapping. As explained by the Pennsylvania

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<sup>4</sup>A psychiatrist has testified that Mr. Michael would have had to ingest 50 times as much Benadryl to receive a lethal dosage. (1/13/97 Transcript. of York County Post Conviction Relief Act ("PCRA") proceedings at 107.) Hereinafter, the transcript of the PCRA proceedings will be cited by the date of the hearing. Transcripts of this Court's hearing will be cited as follows "[Date] Habeas Tr. at \_\_\_\_."

<sup>5</sup>Mr. Michael suggested to Dr. Wettstein that this may have been an attempted escape. (10/21/02 Habeas Tr. at 6.)

<sup>6</sup>Mr. Michael's counsel had secured a change of venire. Michael I, supra note 1, at 108 n.1.

Supreme Court:

[A] review of the guilty plea colloquy establishes that the trial court questioned [Michael] at length regarding whether his guilty plea was knowing and voluntary including, *inter alia*, that he had discussed the matter carefully with his attorney, that he understood the charges against him including the charge of first degree murder, his right to a jury trial or bench trial, the presumption of innocence, the Commonwealth's burden proof, the right to confront the Commonwealth's witnesses, his waiver of those rights, his limited rights upon pleading guilty, the voluntariness of his plea, the elements of first degree murder, that the penalty for first degree murder is either life imprisonment or death which would be determined at a separate hearing, that his rights at the sentencing hearing includ[ed] the right to present any mitigating circumstances, and that he was satisfied with counsel.

Michael I, 544 Pa. at 108 n.2.

Within a week of pleading guilty, Mr. Michael advised the trial judge that he wanted to withdraw his guilty plea, asserting that he was not competent at the time of entering the plea and was having difficulty communicating with trial counsel. See Commonwealth v. Michael, 562 Pa. 356, 362-63, 755 A.2d 1274, 1277 (2000) (hereinafter Michael II). The request was denied. Pursuant to Mr. Michael's request, the trial court scheduled selection of a jury to determine whether the death penalty should be imposed.

On March 3, 1995, during a pre-sentencing conference, Mr. Michael informed the court that he did not want his attorney to present evidence of mitigating circumstances. Michael II, 562 Pa. at 365. The trial court, however, instructed defense counsel to be prepared to present evidence of possible mitigating circumstances, and informed Mr. Michael that he retained the

right at the sentencing hearing to present evidence of mitigating factors.

On March 20, 1995, the date set for jury selection on the sentencing phase of the case, Mr. Michael informed the trial court that he had decided to waive his right to be sentenced by a jury, would stipulate to the existence of the two aggravating circumstances alleged by the Commonwealth, and would stipulate that there were no mitigating circumstances. As described by the Pennsylvania Supreme Court:

Again the record reveals that the sentencing court conducted an extensive colloquy in order to make certain that [Michael's] stipulation was knowing and voluntary. The sentencing court expressly questioned [Michael] regarding whether he understood his right to present mitigating circumstances, his right to be sentenced by a jury, and that the jury might sentence [him] to life imprisonment rather than death if mitigating circumstances were presented. [Michael], however, responded that he understood these rights and the benefits of having mitigating circumstances introduced at his sentencing hearing but declined his right to do so. He further stated that he was satisfied with counsel.

Michael I, 544 Pa. at 109 n.4. The trial court accepted Mr. Michael's waiver of a right to a jury trial on the sentencing phase of the case, and, finding that aggravating circumstances outweighed mitigating circumstances, imposed the death penalty.

On March 24, 1995, Mr. Michael signed an affidavit which confirmed his understanding of his right to litigate, before a jury or a judge, the question of his guilt, the degree of murder, and whether the death penalty was warranted. Id. at 111 n.6. The affidavit further confirmed that Mr. Michael had instructed his counsel not to call witnesses or present any evidence during

the sentencing hearing. Id. The affidavit concluded:

12. Should I receive a sentence of death, I have instructed my attorney . . . to forward this Affidavit to the Supreme Court of Pennsylvania.

13. It is my intent to inform the Pennsylvania Supreme Court that I am satisfied with my pleas of guilty and the sentence of death I receive in order that the Pennsylvania Supreme Court affirm as rapidly as permitted by law, the conviction and sentence.

14. Finally, my attorneys have reviewed this case and this Affidavit with me and I am satisfied with their representation.

Id.

Although presented with this affidavit, the Pennsylvania Supreme Court undertook an independent review of the record.<sup>7</sup> In an opinion issued on April 17, 1996, the court found that the elements of first degree murder were established; the sentence of death was not the product of passion, prejudice or other arbitrary factor; the record established the existence of at least one aggravating circumstance; and the sentence was not disproportionate when compared to sentences imposed in similar circumstances. Based upon these findings, the unanimous Supreme Court affirmed the conviction and sentence, explaining that "[w]here there are no mitigating factors and a finding of at least one aggravating circumstance, the sentencing

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<sup>7</sup>The court explained that it was obligated to conduct an independent review of the record in any case in which the death penalty has been imposed. Michael I, supra note 1, 544 Pa. at 110. Pennsylvania is 1 of 37 states that provides for review of all death sentences regardless of the defendant's wishes. See Thomas P. Bonczar & Tracy L. Snell, U.S. Dep't of Justice, "Capital Punishment, 2002," in Bureau of Justice Statistics Bulletin, at 3 (Nov. 2003).

court has no discretion but to impose the death penalty." Id. at 113.

On July 31, 1996, Governor Thomas Ridge signed an execution warrant. Mr. Michael's execution was scheduled for August 27, 1996 at 10:00 p.m.

On August 21, 1996, the CHCU filed in this Court a motion for stay of execution and request for appointment of counsel. (Dkt. Entry 1.) On August 22, 1996, in accordance with McFarland v. Scott, 512 U.S. 849 (1994), the execution was stayed and the CHCU was appointed as counsel for Mr. Michael. (Dkt. Entry 4.)

On August 29, 1996, Respondents petitioned the Court to rescind the appointment of counsel for Mr. Michael and to vacate the stay of execution. (Dkt. Entry 8.) In support of this request, Respondents presented Mr. Michael's letter to the York County District Attorney's Office dated August 24, 1996, which stated:

On or about Wednesday, August 21 and Thursday, August 22, I signed some papers that would give me a 60 or 90 day stay of execution. These papers were brought to me by some representatives of the [CHCU]. I felt pressured to sign these papers by certain family members and also some representatives of the [CHCU].

After thinking this over, I have dismissed these people from representing me in any court proceedings. On a visit to Graterford on Friday, August 23, I informed Pam Tucker, a representative of [CHCU], that she and her associates were dismissed from acting as my attorneys in any future legal matter.

Furthermore, I do not want any court documents, trial transcripts, police reports, or any other papers released to any people who claim to represent me. This also applies to my case in Lancaster

as well. I do not give anyone my authorization to obtain such documents on my behalf. When my stay expires I wish to have the Governor re-sign my warrant as soon as possible.

The CHCU responded by asserting that Mr. Michael was not competent. In support of this assertion, the CHCU related that Mr. Michael's sisters and brother had recounted that Mr. Michael had been the victim of an abusive father, suffered bouts of depression, and abused drugs, including cocaine, quaaludes, heroin, percodan and steroids. They also asserted that he had sustained a serious head injury in his youth, and had become withdrawn following his mother's death in 1988. The CHCU also referred to Mr. Michael's vacillation during the course of the state court proceedings: entering a guilty plea only on the date of jury selection; trying to withdraw the plea less than a week later; requesting a jury determination of the appropriate sentence; and then waiving that request on the date of jury selection. The CHCU also related that Mr. Michael had exhibited bizarre and erratic behavior in the presence of members of the CHCU, but had authorized filings in state and federal court to contest his conviction and sentence. (Dkt. Entry 12.)

By Order dated October 10, 1996, the CHCU was directed to meet with Mr. Michael to determine his position with respect to its continued representation of him. (Dkt. Entry 27.) On October 22, 1996, the CHCU filed a statement of its position, along with a supporting declaration of Attorney Billy H. Nolas. In his declaration, Attorney Nolas related that he had met with Mr. Michael on October 17, 1996. According to Attorney Nolas, during the meeting, Mr.

Michael "was agitated, incoherent, irrational, sad, unable to control his varying emotions, and ultimately became catatonic and completely uncommunicative." (Declaration of Billy H. Nolas, Esq. (Dkt. Entry 30) at ¶ 9.) Attorney Nolas' declaration concluded that, on October 21, 1996, Mr. Michael had authorized the CHCU to litigate his post-conviction proceedings. Attorney Nolas asserted that "I do not believe that there is any 'waiver' issue before the Court and request, as appointed counsel, that the Court allow us to complete and file Mr. Michael's habeas petition." (Id. at ¶ 11.)

On October 25, 1996, the CHCU supplemented the statement previously submitted and requested a status conference. (Dkt. Entry 31.) Attached to the supplemental statement was a document signed by Mr. Michael, which provided:

I, Hubert L. Michael, Jr., hereby retain Billy Nolas to represent me for all purposes in regard to PCRA proceedings presently ongoing in the Court of Common Pleas of York County, Pennsylvania. I do not authorize representation by any other attorney.

The first sentence of the statement was typewritten. The second sentence of the statement was handwritten, apparently by Mr. Michael.

Because proceedings under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq., had been commenced in the Court of Common Pleas of York County, this Court, by Order dated November 21, 1996, stayed this habeas corpus proceeding pending the exhaustion of state court remedies. (Dkt. Entry 35.) Respondents appealed the November 21, 1996 Order. By judgment order dated June 16, 1997, the stay of

this litigation was affirmed by the Third Circuit. (Dkt. Entry 55.)

The Court of Common Pleas of York County conducted evidentiary hearings that concerned, inter alia, Mr. Michael's competence to plead guilty and waive presentation of mitigating circumstances. In connection with this issue, Mr. Michael submitted to psychiatric and neuropsychological evaluations.

The neuropsychologist retained by the CHCU, Barry M. Crown, Ph.D., concluded that Mr. Michael was "brain damaged with deficits in multiple cognitive and affective areas," with "the causative basis for this [being] both neurodevelopmental and the result of substance use." (Dr. Crown's Report of November 21, 1996.) Dr. Crown testified during the PCRA proceeding that Mr. Michael was not competent at the time of his guilty plea and sentencing proceedings. (12/13/96 PCRA Tr. at 91.)

Mr. Michael's counsel also presented the testimony of Harry Krop, Ph.D., a Florida clinical psychologist. Dr. Krop opined that he had "substantial questions regarding [Michael's] competency both in terms of entering a plea, waiving his rights and so forth."<sup>8</sup> (12/30/96 PCRA Tr. at 174.) In response to questioning from the state trial court as to whether Dr. Krop's opinion concerned only Mr. Michael's competency at the time of his guilty plea and sentencing, or that Mr. Michael is "incompetent generally and can't cooperate with counsel ever," Dr. Krop

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<sup>8</sup>Dr. Krop explained that he was not in a position to opine that Mr. Michael was incompetent in 1994 and 1995 because he had not evaluated him during that time period. (12/30/96 PCRA Tr. 175-76.) His testimony was evidently offered to support the claim that trial counsel had been ineffective in failing to have a psychiatric evaluation of Mr. Michael made.

stated, "It's my opinion as of [December 12, 1996] that he was competent to proceed at this proceeding." (Id. at 187.) In the course of Dr. Krop's testimony, he also stated that "the capacity to communicate with an attorney and relate is one of the more significant issues with regard to the competency criteria." (Id. at 186.)

In December of 1996, Dr. Krop had participated in a clinical interview of Mr. Michael along with the Commonwealth's expert, Larry A. Rotenberg, M.D., Director of Psychiatry for the Reading Hospital and Medical Center. To avoid duplicative testing, Drs. Krop and Rotenberg agreed to share results. Testing included a Wechsler Adult Intelligence Scale - Revised, which revealed a full scale IQ of 100, the same IQ result obtained in testing in 1972, when Michael was 16 years old. Dr. Rotenberg interpreted the test results as consistent with a finding that Mr. Michael was competent intellectually and exhibited no signs of organic dysfunction. (December 12, 1996 Report of Dr. Rotenberg at 12.) Dr. Rotenberg further reported that the Beck Depression Inventory and Beck Anxiety Inventory, administered by Dr. Krop, "yielded scores which are non-symptomatic, non-depressed, and non-anxious." (Id.) The Minnesota Multi-axial Personality Inventory - 2 ("MMPI-2") "showed a normal personality profile with no elevated subscales." Dr. Rotenberg explained that the test results were "also indicative of a lack of organicity and lack of defect in the central nervous system." (Id.) Dr. Rotenberg's diagnostic impressions were "[h]istory of multi-substance abuse and possibly dependence," "Antisocial

Personality Disorder," and Narcissistic Personality Disorder."<sup>9</sup> (Id. at 13.) Dr. Rotenberg's report concluded that Mr. Michael "is currently competent to make all his decisions," and that, "[w]ithin reasonable medical certainty it can be said that at no time was this individual in a situation where he was not competent to make decisions or to know the consequences of his decisions." (Id.)

Dr. Rotenberg testified during the PCRA hearings in a manner consistent with his report. (1/13/97 PCRA Tr. at 84-97.) During the course of his testimony, he explained that the diagnosis of antisocial and narcissistic personality disorders did not involve major mental illness nor psychosis. (Id. at 97-98, 100-101.) He also related that these disorders are not considered to be exculpatory conditions. (Id. at 98, 101.) In discussing the antisocial personality disorder, Dr. Rotenberg testified that such a "person has a complete ability to not do what they have done." As an example of behavior reflecting an antisocial personality, Dr. Rotenberg referred to Mr. Michael's escape from prison in November of 1993:

The escape [from] Lancaster County Prison is both brilliant and sociopathic. It's brilliant because it takes an enormous amount of plotting to sit in a cell with someone else to steal the other person's

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<sup>9</sup>According to the Diagnostic and Statistical Manual of Mental Disorders, 4th ed., Text Revision (2000) (DSM-IV-TR), an "antisocial personality disorder" is a "pattern of disregard for, and violation of the rights of, others." (Id. at 685.) A "narcissistic personality disorder" is "a pattern of grandiosity, need for admiration and lack of empathy." The DSM-IV-TR defines a "personality disorder" as "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." (Id.)

identity, to walk out when the other person is called, and to walk away from prison.

So that is brilliant, and it is very competent, but it's also sociopathic. It's antisocial in the sense that he had no connection with the fact that the other person was suffering. A breathing human being who by taking his identity away was obviously going to endure a lot of hardship.

(Id. at 99.) Dr. Rotenberg also testified that he disagreed with Dr. Crown's assessment of brain damage, pointing to the fact that Mr. Michael had attained the same IQ score in 1972 and 1996, even though the drug use on which Dr. Crown had relied occurred between those two years.

(Id. at 105.)

The state trial court denied relief on all claims.<sup>10</sup> Mr. Michael, represented by the CHCU, took an appeal to the Pennsylvania Supreme Court.

While the matter was pending before the Supreme Court, Michael filed an affidavit indicating that he wanted to withdraw the appeal. Michael II, 562 Pa. at 360. The CHCU again questioned Mr. Michael's competence to make such a decision. The high court remanded the matter to the trial court to determine whether Mr. Michael was competent to discontinue the PCRA appeal.

The trial court again conducted an evidentiary hearing. Prior to the start of the hearing on February 23, 1999, Attorney Nolas presented on behalf of Mr. Michael an affidavit indicating that Mr. Michael did not desire to undergo additional psychiatric evaluation, did not want a

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<sup>10</sup>The record before this Court does not include the PCRA Court's decision.

hearing on his current mental state, and asked to have the appeal on the merits decided expeditiously by the Pennsylvania Supreme Court. (2/23/99 PCRA Tr. at 4-5.) The York County Court elected to proceed with the hearing. Only Dr. Rotenberg testified. He reiterated his conclusion that Mr. Michael was not suffering from a major mental illness. (Id. at 16-17.) As to the contention that he was suffering from depression and that his decision to abandon appeals was a reflection of this mental illness in order "to have the state help him with a sort of state assisted suicide," Dr. Rotenberg testified:

In my opinion . . . nothing could be further from the truth. Mr. Michael has, in my opinion, never been depressed. He has never suffered from a major depression. I believe that, if I recall correctly, . . . way back he took an overdose somewhere in the prison. Again, as a product of his inability to tolerate frustration and to delay gratification, but I do not believe that he was ever clinically depressed . . . . He never had the clinical symptoms of depression or of dysthymic disorder.

I think it is important to note . . . , people with personality disorders will try to hurt themselves or others for the simple reason that they have trouble delaying disposition, delaying gratification, and in my view, Mr. Michael never had a depression, never suffered from depression, that his reasoning was never impaired by depression.

That, in fact, in the five-hour interview [conducted in December of 1996], which included a number of tests including the Beck Depression Inventory and other [inventories] indicating depression, in fact, he scored very low and very normally. So that, in my view the essential element of his capriciously and repeated changing of his mind is merely a product of the continuing nature of his personality difficulty, which is not a mental illness, which does not incapacitate him in any way, which does not make him unable to make decisions.

On the contrary, in reviewing the material provided . . . , one is constantly struck by the very logic . . . and reasonableness of Mr. Michael's opinions with regard to his own decision at any one point.

(Id. at 18-19.)

Following Dr. Rotenberg's testimony, the court engaged in a colloquy with Mr. Michael, who confirmed that it was his desire that the Pennsylvania Supreme Court decide the appeal quickly based on the merits of the case. (Id. at 36.) He also confirmed that he did not want to participate in any additional psychiatric evaluations. (Id. at 35.) After listening to the colloquy, Dr. Rotenberg, on redirect examination, testified that his view of the competence of Mr. Michael had been "strengthened." (Id. at 38.) Dr. Rotenberg explained that Mr. Michael "showed himself to be lucid, coherent and somewhat manipulative, and so it showed him to be logical, coherent, non-depressed, non-psychotic, non-demented, and not suffering from any mental illness." (Id.)

At the conclusion of the hearing, the trial court found that there was "no mental health component" to Mr. Michael's decision to withdraw his appeal. The trial court explained:

During the entire period of time [that] the Court has had frequent colloquies with the Defendant, such as the one we held today, we have always found that the Defendant is lucid in his responses. He is able to communicate, to understand the question and give an appropriate response, and, in fact, he even verbalized things beyond the basic question that the Court asked.

We believe [that this is the] hallmark of someone who is not suffering from mental illness, but can understand the nature of the proceedings and participate in them fully and help counsel with the

matter.

(Id. at 41.)

The case then returned to the Pennsylvania Supreme Court. Noting that Mr. Michael was now asking the court to decide the merits of his appeal quickly, “essentially repudiating his request to withdraw the appeal,” Michael II, 562 Pa. at 361, the court elected to address all the issues raised in the proceeding. In an opinion issued on July 20, 2000, the court concluded that all claims were without merit. In particular, the court found that trial counsel had not been ineffective in failing to investigate and present indicia of Mr. Michael’s alleged incompetency, explaining:

The issue of Michael’s competency has been litigated numerous times in numerous contexts during the prosecution of this case. He has failed to establish incompetency at any stage of this litigation, and has thus failed to meet his burden of proof . . . .

Id. at 366. With respect to claims pertaining to the failure to present mitigating evidence and effectively stipulating to a death penalty, the court wrote that “[c]ounsel was ethically obligated to abide by Michael’s decision with regard to . . . his refusal to present evidence of mitigation.”

Id. at 367.<sup>11</sup>

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<sup>11</sup>The Pennsylvania Supreme Court had previously ruled that an attorney has no duty to present evidence of mitigating circumstances when his client instructs him or her not to do so. See, e.g., Commonwealth v. Sam, 535 Pa. 350, 367-69, 635 A.2d 603, 611-12 (1993). It has also held that the trial court has no duty to compel production of evidence of mitigating circumstances, even where it has reason to believe that such evidence exists. Commonwealth v. Tedford, 523 Pa. 305, 338-40, 567 A.2d 610, 626-27 (1989). Federal courts have also ruled

(continued...)

On August 1, 2000, an application for re-argument was filed with the Pennsylvania Supreme Court on Mr. Michael's behalf. On October 18, 2000, counsel for the Commonwealth received a letter from Mr. Michael, stating:

I understand that my death sentence was upheld by the Pennsylvania Supreme Court. This letter is to reiterate my position regarding the matter.

The organization known as [CHCU] does not represent me in any capacity. Anything they file on my behalf is of their own doing. I do not authorize them to act as my legal counsel.

Furthermore, my state of mind is not an issue, as I am mentally competent. I mention this because I know [CHCU] is trying to use this issue as the basis of their defense.

I am sending this letter to the Attorney General's office so that it may be forwarded to the proper court.

This letter was brought to the attention of the Pennsylvania Supreme Court. By Order dated January 10, 2001, re-argument was denied.

While the PCRA proceedings were pending, Mr Michael wrote to this Court on three separate occasions, asking that this Court refrain from granting any stay of execution. (Letters of April 15, 1997 (Dkt. Entry 53), July 9, 1997 (Dkt. Entry 54), and December 26, 2000 (Dkt. Entry 56).) In his letter of December 26, 2000, Mr. Michael wrote:

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<sup>11</sup>(...continued)  
that a defense attorney is not obligated to present evidence of mitigating circumstances where the defendant knowingly and voluntarily elects not to present such evidence. See Singleton v. Lockhart, 962 F.2d 1315, 1321-22 (8th Cir. 1992).

I am satisfied with the sentence I have received in this matter. Furthermore, I am of sound mind as I type this letter to the courts. I was mentally competent at the time of the homicide, I was mentally competent when I pleaded guilty in court, and I am mentally competent at the present time.

Any attorneys who claim to represent my best interests in court are not authorized by me to do so. These same attorneys may try to claim that I am not mentally competent. This is false information and severely tests the court's intelligence. As I pleaded guilty in court, the attorneys know that the "insanity issue" is the only avenue for them to pursue. However, in doing so they are deceiving the courts.

On January 25, 2001, the CHCU filed a motion to restore this case to active status, along with a request for 120 days within which to file a habeas corpus petition. (Dkt. Entry 57.) Respondents answered this motion with their own motion to remove present counsel and appoint new counsel due to a conflict of interest. (Dkt. Entry 59.) The basis for the Respondents' motion was Mr. Michael's letter of December 26, 2000, stating that the CHCU was not authorized to represent him. The CHCU responded to this motion by requesting that Mr. Michael be transferred to a federal mental health care facility for a 60-day evaluation for purposes of determining his competency. (Dkt. Entry 66.) The Respondents objected to transferring Mr. Michael to a federal mental health facility, requesting that any competency evaluation be conducted in the state institution where Mr. Michael was incarcerated. Respondents also argued that the PCRA court's competency decision was entitled to a presumption of correctness that stood un rebutted.

By Memorandum and Order filed on September 20, 2001, this Court ruled that the presumption of correctness ordinarily attaching to state court competency determinations, see Demosthenes v. Baal, 495 U.S. 731 (1990), should not be applied here because the PCRA court's determination was not reviewed by the Pennsylvania Supreme Court. (September 20, 2001 Memorandum at 12.) This Court explained that "to hold otherwise would mean that those persons who may seek to establish 'next friend' status based upon Michael's incompetency would be foreclosed from doing so by an incomplete adjudication in state court." (Id.) This Court also rejected the CHCU's contention that commitment to a federal facility for purposes of a 60-day evaluation was required. Instead, Robert M. Wettstein, M.D., a board-certified psychiatrist and clinical professor in the Department of Psychiatry at the University of Pittsburgh School of Medicine, was appointed pursuant to Fed. R. Evid. 706. Specifically, Dr. Wettstein was appointed for the purpose of assisting this Court "in determining (1) whether Mr. Michael suffers from a mental disease, disorder or defect; (2) whether a mental disease, disorder or defect prevents Mr. Michael from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder or defect prevents Mr. Michael from making a rational choice among his options." (September 20, 2001 Memorandum at 18.) Dr. Wettstein was also requested to assist the Court "in determining whether Mr. Michael has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,' and a 'rational as well as factual understanding of the proceedings against him.'" (Id.) Dr.

Wettstein was directed to conduct such examinations and testing of Mr. Michael at his place of incarceration as Dr. Wettstein deemed appropriate. Finally, Dr. Wettstein was asked to opine as to whether a competency evaluation could be made given conditions at Mr. Michael's place of incarceration and the level of his cooperation. (Id.)

On June 20, 2001, while the question of the proper procedural avenue for determining Mr. Michael's competence was pending before this Court, the CHCU filed a 146-page habeas corpus petition. (Dkt. Entry 78.) Mr. Michael did not sign the petition or otherwise endorse its filing.

On May 29, 2002, Dr. Wettstein submitted a comprehensive report. The report was based upon his review of the PCRA record concerning the competency question, including the testimony of mental health experts; York County Prison records for 1994; state prison records for the period 1995 through 2001; letters written by Mr. Michael to this Court;<sup>12</sup> Mr. Michael's school records; an affidavit of Mr. Michael's sister dated August 28, 1996; an August 26, 1993 transcribed interview of Mr. Michael's brother; a psychiatric evaluation report prepared by Dr. Rotenberg; psychological test results; Dr. Crown's report; and the results of tests administered

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<sup>12</sup>Throughout the period of time that this matter has been pending with this Court, Mr. Michael has written to the Court to reiterate his position that he does not want to pursue a habeas corpus challenge to his conviction and sentence, and does not want to be represented by the CHCU. (E.g., Letters of March 6, 2001 (Dkt. Entry 65), May 3, 2001 (Dkt. Entry 75), August 13, 2001 (Dkt. Entry 83), December 3, 2001 (Dkt. Entry 88), April 3, 2002 (Dkt. Entry 90), January 14, 2003 (Dkt. Entry 128), March 10, 2003 (Dkt. Entry 132), April 14, 2003 (Dkt. Entry 133), May 28, 2003 (Dkt. Entry 134), September 15, 2003 (Dkt. Entry 135), and February 19, 2004 (Dkt. Entry 136).)

by Dr. Wettstein to Mr. Michael over the course of two days in December of 2001. The report also took into account the more than eight (8) hours of interviews of Mr. Michael conducted over two consecutive days. Dr. Wettstein concluded, with reasonable psychiatric certainty, that Mr. Michael is not suffering from any mental disease, disorder or defect, including any "cognitive dysfunction," which substantially adversely affects his ability to make a decision with regard to pursuing his legal appeals, and that Mr. Michael has the ability to consult with his attorneys with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him. Dr. Wettstein also concluded that "no substantial benefit would accrue to referring [Mr. Michael] for a 60 day psychiatric evaluation in a forensic psychiatric hospital . . . ." (Dr. Wettstein Report at 18.)

By Order entered on July 8, 2002, Attorney Joseph Cosgrove was appointed to represent the interests of Mr. Michael in this matter, and an evidentiary hearing concerning Dr. Wettstein's report was scheduled for September 26, 2002. (Dkt. Entry 102.) On the day of the hearing, the CHCU submitted a memorandum of law, asserting that "there is at least one claim in the Petition for Writ of Habeas Corpus that must be addressed by this Court without regard to Mr. Michael's stated wishes or the outcome of [the competency determination]." (Dkt. Entry 109.) The Respondents were directed to answer this memorandum, and the matter was taken under advisement. The question of Mr. Michael's competency proceeded to an evidentiary hearing on September 26, 2002.

The hearing began with this Court's colloquy of Mr. Michael. His responses to the Court's questions revealed a rational understanding of each inquiry. He acknowledged his right to proceed with this case, and that a possible outcome would be a new trial that could result in an acquittal or a sentence other than death. (9/26/02 Habeas Tr. at 9-10.) He also acknowledged that termination of this litigation would provide no assurance of the prompt execution of the death penalty, and that it may be years before he would be executed in any event. He also understood that a moratorium on the death penalty could be imposed, placing his sentence in limbo for a long time. (Id. at 10.) He also understood that, in light of the one-year statute of limitations on habeas corpus cases, a change of mind occurring in the future with respect to pursuit of a collateral attack on his conviction may be time-barred. (Id. at 12.) He confirmed his desire to not be represented by the CHCU. He reiterated that he wanted this proceeding terminated. (Id.) In response to the question as to why he wanted to dismiss counsel and abandon any challenge to his conviction, he explained that he was not opposed to the death penalty. (Id. at 13.) In response to the court's inquiry concerning his written statement to the Pennsylvania Supreme Court that he wanted a decision on the appeal from the denial of his PCRA petition, Mr. Michael said that it was simply his intention to expedite the process. (Id. at 14-15.)

Dr. Wettstein's report was accepted as his direct testimony, and after brief inquiry by the Court, he was examined by CHCU counsel, respondents' attorney, and Attorney Cosgrove,

appearing as counsel for Mr. Michael. The CHCU presented Dr. Krop as its sole witness.

At the request of the CHCU, a post-hearing briefing schedule was established. In its post-hearing brief, the CHCU essentially took the position that there was insufficient data on which to premise a competency determination, and urged once again that Mr. Michael be committed to a federal mental health facility for at least 60 days for observation and evaluation regarding his competency to discharge counsel and waive habeas corpus review. (Dkt. Entry 125.) Respondents' post-hearing brief strenuously objected to any further evaluation proceedings, and asked that Mr. Michael be found competent. Attorney Cosgrove, at the direction of Mr. Michael, filed a response on January 22, 2003, indicating that Mr. Michael "opposes the sixty (60) day mental health evaluation proposed by the [CHCU], and again asserts that he is mentally sound." The CHCU filed a reply brief on February 3, 2003, reiterating its position that "the Court should commit Mr. Michael to a federal mental health facility for long-term observation and evaluation." (Dkt. Entry 131 at 6.)

## **II. DISCUSSION**

### **A. Competency to Forego a Collateral Challenge to a Conviction and Sentence**

This case implicates case law precedent concerning a death-sentenced defendant's right to abandon a pending challenge to the conviction and/or sentence, e.g., Rees v. Peyton, 384 U.S. 312 (1966), and requiring a putative next friend of the death row inmate to establish the inability of the death row inmate to appear on his own behalf to pursue the litigation. See

Whitmore v. Arkansas, 495 U.S. 149 (1990). In Rees, the death-sentenced state court defendant directed his counsel to withdraw a petition for certiorari. The defendant's counsel informed the Court that he would not comply with this directive without a determination of his client's mental competency. The Court remanded the matter, instructing the trial court to determine whether the defendant had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." 384 U.S. at 314. In Whitmore, the Court held that next friend standing is not available when it is shown that "the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded." 495 U.S. at 165. The Third Circuit has recognized that "the Whitmore standard is further illuminated by the Court's opinion in Dusky v. United States, 362 U.S. 402 . . . (1960) (per curiam), in which the Court considered the standard for determining competency to stand trial." White v. Horn (In re Heidnik), 112 F.3d 105, 111 (3d Cir. 1997) (per curiam). In Dusky, the Court agreed with the suggestion of the Solicitor General that the proper "test must be whether [the defendant] had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402. Thus, "Whitmore's reference to knowing, intelligent, and voluntary waiver [is not] divorced from the fundamental concept that

underlies any notion of competency – that of rationality.” In re Heidnik, 112 F.3d at 111 n.6.

The principles of Rees, Whitmore and Dusky, as explained in Heidnik, will be applied here.<sup>13</sup>

Courts in circumstances similar to those presented here have engaged in a three-part analysis:

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

See Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir. 2000); Ford v. Haley, 195 F.3d 603, 615 (11th Cir. 1999); Comer v. Stewart, 230 F. Supp. 2d 1016, 1036-37 (D. Ariz. 2002). If the death row inmate is found competent to waive a legal challenge to his conviction and sentence, the court must then ascertain that the waiver was not only rational, but also knowing and voluntary.

See Fahy v. Horn, Civ. A. No. 99-5086, 2003 U.S. Dist. LEXIS 14742, at \*60-61 (E.D. Pa. Aug.

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<sup>13</sup>In the next friend context, the burden of proof is placed on the party seeking to advance the cause of the death-sentenced inmate. See White v. Horn (In re Heidnik), 112 F.3d 105, 111 (3d Cir. 1997). The burden is to “establish by clear evidence the inability of the death row inmate to appear on his own behalf to prosecute the action.” Id. It is unclear whether this allocation of the burden of proof applies where the defendant seeks to discontinue a challenge to his conviction or sentence. In this case, allocation of burden of proof is not significant because it is clear that Mr. Michael is competent, and it is equally clear that commitment to a federal mental health facility for more evaluation is not warranted.

26, 2003) (“[C]ompetency to waive a right, and the question of whether the waiver was knowing and voluntary, are distinct inquiries.”).

The Court-appointed expert, Dr. Wettstein, engaged in a comprehensive evaluative process to address the questions pertinent to a competency determination. He reviewed all relevant records, including previous psychiatric testimony and evaluations, as well as testimony presented in the PCRA case. He interviewed Mr. Michael for more than eight hours over a two-day period, and administered appropriate tests. The CHCU expert, Dr. Krop, acknowledged that Dr. Wettstein’s interview and evaluation was “probably above and beyond what most mental health professionals need and do in terms of their evaluations.” (10/21/02 Habeas Tr. at 53.) Dr. Wettstein’s 18-page report details the information he learned upon review of the records, his mental status examination of Mr. Michael, the results of psychological testing, and his diagnosis. Employing the approach endorsed by the DSM-IV, published by the American Psychiatric Association, Dr. Wettstein diagnosed Mr. Michael as follows:

- |          |   |
|----------|---|
| Axis I   | 1. Major depressive disorder singular or recurrent type in remission.<br>2. Polysubstance abuse disorder in full remission.                     |
| Axis II  | Antisocial, obsessive compulsive, and narcissistic personality traits.  |
| Axis III | Current medical problems include Hepatitis C.   |
| Axis IV  | Current stressors include this litigation; prolonged incarceration on death row.  |
| Axis V   | Current global assessment of functioning scale score of approximately 70, reflecting the absence of significant depressive or other symptoms of |

functional impairment.

(Dr. Wettstein Report at 14.)

Dr. Wettstein's report, accepted as his direct testimony in this matter (9/26/02 Habeas Tr. at 5), explained that the diagnosis of major depressive disorder was based upon a 1994 notation in the York County Prison records contemporaneous with the Benadryl overdose. Dr. Wettstein observed that the "depressive episode is not well characterized in the records, and the inmate did not receive psychiatric treatment following the suicide attempt." (Dr. Wettstein Report at 14.) He further explained that he found the major depressive disorder to be "in full remission given the current absence of significant symptoms or signs," adding that Mr. Michael "has never had a history of psychotic signs or symptoms, and no psychosis is evident at this time . . . ." (Id. at 15.) Substance abuse disorder was based upon a documented history of past substance use, even though denied by Mr. Michael, but was viewed in full remission because there was no evidence of any recent substance abuse. While noting that Mr. Michael exhibited a variety of personality traits of anti-social, narcissistic and obsessive compulsive types, Dr. Wettstein concluded that Michael did not meet the criteria of the specified personality disorders in DSM IV.<sup>14</sup> (Id.) As to his intellectual functioning, Dr. Wettstein found Mr. Michael "well within

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<sup>14</sup>As explained at page 686 of DSM-IV-TR:

Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself that are exhibited in a wide range of social and personal contexts. Only when personality traits are inflexible and

(continued...)

the average range, with better verbal than performance functioning.” (Id.)

In his “CONCLUSIONS,” Dr. Wettstein wrote:

This 45 year-old single, white male was referred for psychiatric evaluation regarding his ability to waive further review of his conviction and death sentence for a homicide which occurred in 1993. He has not received any psychiatric or mental health treatment since being sent to state prison in 1995 except for an occasional sedative dose of Vistaril for bedtime sleep. He has not been a behavior problem while incarcerated at SCI Graterford and stated that he has had two minor misconducts without violence to other inmates or correctional officers.

Although the inmate’s siblings and girlfriend have reportedly described him as periodically depressed prior to the homicide, there has been no evidence of persistent depressed mood or clinical depression subsequent to his July 1994 apparent suicide attempt by overdose at York County Prison. Some depressed mood was noted in April 2001 in Graterford during or after the course of his treatment with Interferon injections for Hepatitis C, but such depressive reactions are common during the course of that form of treatment, which ended in 2001. There was no subsequent evidence of clinical depression during the time of the present interviews. Instead, the inmate presented in the lengthy psychiatric interviews without sadness, tearfulness, slowing of his speech or thinking, rejection, suicide ideation, indecisiveness, loss of interest in activities, neglect of his physical health, or unusual social isolation. He not only denied the presence of depressive symptoms but showed no evidence of depressive signs in the interviews on an objective basis.

....

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<sup>14</sup>(...continued)

maladaptive and cause significant functional impairment or subjective distress do they constitute Personality Disorders.

During the course of the psychiatric interviews, the inmate expressed clearly his desire to discontinue his legal appeals on their merits and stated his wish that the courts impose the death sentence as ordered in 1995 by the trial court. He repeatedly stated to me that he has no wish for a new trial or sentencing process, and even if they were imposed he would repeat his earlier guilty plea and waiver of litigation. He does not believe that there was any ineffective assistance of counsel at his guilty plea and sentencing but was aware that an appellate court could disagree with his opinion. He is clearly aware that imposing a sentence of death will result in his death, and there is no delusional or unclear thinking of the consequences of a death sentence . . . . He was able to discuss these issues in a rational and coherent fashion without emotionality, impulsivity, confusion or indecisiveness.

Based upon the available information, it is my psychiatric opinion that the inmate, at the present time, has the mental capacity to understand the choice between life and death and can make a knowing and intelligent decision not to pursue further legal remedies. He fully comprehends the ramifications of his decision and has the ability to reason logically regarding these matters. He has the ability to manipulate information concerning the pursuit of his appeals, and has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation. The inmate understands his legal position and the options available to him.

. . . .

It is my psychiatric opinion, with reasonable psychiatric certainty, that he is not suffering from a mental disease, mental disorder, or mental defect including any "cognitive dysfunction" which substantially adversely affects his ability to make a decision with regard to pursuing his legal appeal. Finally, it is my psychiatric opinion, with reasonable psychiatric certainty, that the defendant retains sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him.

(Id. at 15-16, 17, 18; emphasis added.)

Finally, Dr. Wettstein opined that psychiatric hospitalization as an aid in resolving this matter was not indicated. While acknowledging that “[e]ven a psychiatric evaluation over ten hours on two consecutive days will not identify every conceivable emotional and cognitive problem . . . ,” Dr. Wettstein wrote that “the present evaluation is a good sample of the inmate’s current functioning and that no substantial benefit would accrue to referring him for a sixty day psychiatric evaluation in a psychiatric hospital based upon his current clinical condition.” (Id. at 18.) Dr. Wettstein further explained that he saw “no evidence of any emotional instability or lability during the interviews, and thus [saw] no indication for referral for psychiatric hospitalization as an aide in resolving this matter.” (Id. at 18.)

After observing this Court’s colloquy of Mr. Michael, Dr. Wettstein reiterated the conclusions expressed in his report and accepted as his direct testimony. (9/26/02 Habeas Tr. at 16-24.) In summary, Dr. Wettstein opined in response to the Court’s questions that Mr. Michael is competent to waive counsel and dismiss his challenge to his conviction and sentence. (Id. at 23.)

Dr. Wettstein was cross-examined extensively by the CHCU concerning Mr. Michael’s apparent dissimulation, or “faking good,” on test taking. He was also vigorously interrogated with respect to Mr. Michael’s repeated denials of negative aspects of his life history. The CHCU argued with Dr. Wettstein that Mr. Michael was covering up his depression by denying

occurrences that could produce depression, such as parental abuse and drug abuse.

The neutral and detached court-appointed expert, however, remained steadfast in his conclusion that Mr. Michael is not clinically depressed or undergoing a depressive episode:

I do not see evidence for that. It may be, yes, that he has concealed from me some depressive symptoms, that's likely to be true, but his behavior, objectively and as I can infer it otherwise, is not consistent with someone who has, at least, a severe clinical depression. He was able to communicate well with me, that's not something you conceal from an examiner.

His report of his functioning, in terms of his grooming and his exercise and his activity and his concern about health, that is not consistent with someone who has clinical depression at this time.

(9/26/02 Habeas Tr. at 70-71.) Dr. Wettstein was equally firm in his conclusion that Mr. Michael is not suicidal:

[J]ust as in the case of many individuals who have severe terminal medical illnesses, they don't really wish to die but they believe they wish to be relieved of their suffering. So the same applies, I think, to Mr. Michael. He does not really wish to die, he is not clinically depressed, he is not suicidal, he does not really wish to die, but he wishes to be relieved of having to live on death row.

.....

If Mr. Michael were released to the streets today, he would not wish to die. However, he is not released to the streets and there's no immediate likelihood the he will be released to the streets, to my knowledge. His wish is not to remain on death row, because of quality of life issues, because he believes that the death penalty was appropriate in his case. So he wants to expedite the execution in his case. He does not wish to die, otherwise, he does not wish to remain for the rest of his life on death row or for the pendency of

any appeals either.

(10/21/02 Habeas Tr. at 12-14.)

Dr. Wettstein explained that Mr. Michael's desire to discontinue legal challenges to his conviction and sentence was neither tantamount to a death wish nor the product of depression:

I don't see [Mr. Michael's wish to discontinue his appeal] as mood-dependent, I don't see him as depressed, at this point in time. I see his functioning is good, in terms of self care, medical interest, activity, energy. I don't see, objectively, the presence of depression at this point.

(9/26/02 Habeas Tr. at 70.)

Dr. Wettstein further explained that Mr. Michael's desire to discontinue legal challenges was the product of a rational thought process:

[Mr. Michael] indicated that he does favor the death penalty, and in his case, believes that the death penalty was an appropriate punishment, given the nature of the crime, and he indicated that if the tables were turned and he had been the victim rather than the perpetrator, then, that would be an appropriate sentence for that particular Defendant.

(10/21/02 Habeas Tr. at 7.) Dr. Wettstein also explained that his desire to be relieved of having to live on death row and feelings of guilt for the crime also provide rational bases for his desire to discontinue legal challenges. (Id. at 12.)

Dr. Wettstein's report and testimony afford an ample foundation for a conclusion that Mr. Michael "has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation . . . ." Rees, 384 U.S. at 314. Dr. Wettstein's report

and testimony also compel the conclusion that Mr. Michael possesses “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . has a rational as well as factual understanding of the proceedings against him.” Dusky, 362 U.S. at 402.

The testimony of Dr. Krop, presented by the CHCU, does not undermine confidence in these conclusions. First, Dr. Krop last evaluated Mr. Michael in late 1996, at which time he found him competent. (10/21/02 Habeas Tr. at 83.) Second, Dr. Krop conceded that a decision to discontinue legal challenges to a death sentence can be the product of a rational thought process. (Id. at 80.) And third, while he questioned Dr. Wettstein’s conclusion that depression is in remission, he conceded that he had no independent data to suggest that Mr. Michael is currently depressed:

Q. You have no independent data or anything to suggest that Mr. Michael currently is depressed, do you?

A. That he is currently depressed, as of today?

Q. Yes.

A. No, I do not have data, as of today, or as of the time (Dr. Wettstein) made his decision.

(Id. at 81.)

Indeed, Dr. Krop did not opine that Mr. Michael lacks the capacity to appreciate his current position and make a rational choice to discontinue this litigation. Instead, Dr. Krop

stated that he “can’t rule out the possibility that he does not have the ability to make those rational decisions.” (Id. at 52.) Dr. Krop testified that “in the abundance of caution,” Mr. Michael should be transferred to a federal facility “which has mental health evaluators and has multi-disciplinary teams available and the training and the expertise to conduct a competency evaluation or other types of psycholegal evaluation . . . .” (Id. at 52.) Dr. Krop explained:

I’m not questioning Dr. Wettstein’s ability or capacity to make that determination [of competency], the only thing that I am, I believe, saying is that I believe that there is sufficient historical data, in combination with the data that Dr. Wettstein gathered from his own evaluation that certainly calls into question the need for more extensive evaluation.

. . . .

[W]hat my ultimate opinion is that there is sufficient data from Dr. Wettstein’s evaluation and my own review of materials, including my own prior evaluation . . . , to call into question Mr. Michael’s competency to make the decisions in a rational manner, and what I am proposing or recommending to the Court is that a more extensive evaluation be conducted, which would allow larger samples of behavior than either Dr. Wettstein or I had available to us, that is to be done in a facility which will . . . give a multi-disciplinary team an opportunity to do more extensive testing, more observations in a more realistic kind of setting to truly make a determination as to the Defendant’s mental state and how that mental state may affect . . . his decisionmaking processes.

(Id. at 75, 77; emphasis added.)

Relying upon Dr. Krop’s testimony, the CHCU argues:

The evidence shows that Mr. Michael is or may be suffering from several mental diseases, disorders or defects which may substantially affect his capacity under Rees: (A) there are serious

questions about whether his depression is truly in remission; (B) he may suffer from Post-Traumatic Stress Disorder; (C) he may suffer from Cognitive Disorder; and (D) he does suffer from Personality Disorder.<sup>15</sup>

(CHCU Post-Hearing Brief at 31.) The CHCU asserts that questions pertaining to Mr. Michael's mental health warrant his placement in federal custody for an extended period of observation and evaluation.

The CHCU's argument appears to proceed from the unsound premise that the possibility of a mental "disease, disorder or defect," or the possibility that such a defect substantially affects Mr. Michael's capacity, is sufficient under Rees, regardless of findings made as to Mr. Michael's competency. Other courts, however, have "rejected a construction of the Rees standard that first require[s] an inquiry into the capacity of the inmate to make the waiver decision, and then, if the inmate [is] found to have the capacity, to require an inquiry whether the inmate was 'suffering from a mental disease, disorder or defect which may substantially affect that capacity.'" Comer, 230 F.Supp. 2d at 1036. As explained in Franklin ex rel. Berry v.

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<sup>15</sup>Dr. Krop testified that he believed that a diagnosis of "personality disorder NOS," i.e., not otherwise specified, may be indicated. (10/21/02 Habeas Tr. at 48.) He also added, however, that his difference with Dr. Wettstein, who diagnosed only personality traits, was "just a matter of semantics . . ." (Id.) It should be noted that Dr. Rotenberg had diagnosed personality disorders, as opposed to Dr. Wettstein's diagnosis of personality traits. It appears, however, that the PCRA court rejected the diagnosis of personality disorder based on the CHCU's cross-examination of Dr. Rotenberg. (See Habeas Corpus Petition, (Dkt. Entry 78), at 61.) In any event, as explained in the text, the existence of a personality disorder would not compel a finding that Mr. Michael lacks the capacity to make a rational decision to abandon litigation over the death penalty.

Francis, 144 F.3d 429, 433 (6th Cir. 1998):

The [Rees] test is not conjunctive but rather is alternative. Either the condemned has the ability to make a rational choice with respect to proceeding or he does not have the capacity to waive his rights as a result of his mental disorder.

See also Smith v. Armontrout, 812 F.2d 1050, 1057 (8th Cir. 1987) ("Though Rees recites these two portions of the standard as disjunctive alternatives, there is necessarily an area of overlap between the category of cases in which at the threshold we see a possibility that a decision is substantially affected by a mental disorder, disease, or defect, and that of cases in which, after proceeding further, we conclude that the decision is in fact the product of a rational thought process.").

In this case, Dr. Wettstein was unequivocal in his conclusion that Mr. Michael's desire to discontinue this case, expressed consistently for a number of years, is the product of a rational thought process. (9/26/02 Habeas Tr. at 22-24.) Dr. Wettstein was cross-examined extensively on the impact of Mr. Michael's dissimulation and avoidance, as well as the possibility of PTSD or a cognitive disorder, and remained unyielding in his opinions. Furthermore, he had the opportunity to listen to Dr. Krop's testimony. In response to the Court's questioning following Dr. Krop's testimony, Dr. Wettstein testified as follows:

Q. [F]irst, as to Dr. Krop's testimony, concerning your diagnosis, and in particular, the Axis I diagnosis of depression in remission. As I understand that testimony, he questioned that diagnosis. Having heard Dr. Krop's testimony is it still your opinion that the diagnosis is appropriate?

- A. Yes, it is. I see no indication, at all, that Mr. Michael is depressed or has been depressed for a period of time, in terms of years.

(10/21/02 Habeas Tr. at 104-05.) Dr. Wettstein was also questioned why he remained confident in his diagnosis that depression was in remission in light of the results from the MMPI-2 test, which showed that Mr. Michael was dissimulating. Dr. Wettstein acknowledged that while the MMPI-2 results had to be considered with caution, they could not be regarded as invalid. (9/26/02 Habeas Tr. at 30-31.) At the conclusion of the proceedings, he elaborated:

I look beyond the self-report of Mr. Michael, also, and his behavior. So I was particularly concerned about his grooming, about his attention to his health and about -- through the medical records, there are many references, for instance, when the Hepatitis C issue arose, he was the one who requested the Hepatitis C testing.

He was the one who requested treatment for Hepatitis. He is the one who requested treatment for diabetes, even though he doesn't have it. He is the one who has asked for regular testing and a diet. He is the one who has made all of these requests from the state for medical care. That is not, at all, consistent with someone who is seriously depressed by any means. People, typically, who are depressed, neglect their health, neglect their self care. They do not exercise, in the way that Mr. Michael exercises. He told me, for instance, and I didn't write this in the report, that he utilizes all of his exercise at yard time. He does a thousand sit ups in the course of an hour. Now, I've never heard of a depressed person, seriously depressed person interested in doing that kind of exercise on a regular basis.

(10/21/02 Habeas Tr. at 105-06.) Dr. Wettstein elaborated that it was not only the fact of these behaviors of Mr. Michael, but also their duration, that buttressed his conclusion that Mr. Michael's capacity to understand his situation and make a rational decision is not impaired by

depression.

The CHCU points out that attention to personal hygiene, exercise, and health does not necessarily foreclose a diagnosis of depression. It cannot be seriously disputed, however, that a psychiatrist may rely on such factors in making the overall assessment that a particular person is not depressed.

Even the existence of an active depressive episode would not preclude a finding of competency: "My testimony is that even if he were depressed, that doesn't automatically mean he is unable to or incompetent to waive his appeals." (10/21/02 Habeas Tr. at 28.) Dr. Krop acknowledged "that even if possible personality traits or disorders and possible cognitive dysfunction, . . . were present, and even after some period of time that he was seen and those were diagnosed, [Mr. Michael] could still be competent to waive counsel and waive further appeals." (Id. at 85.)

Case law confirms that, in determining competency, the existence of a mental disease or disorder is not dispositive. See Ford v. Haley, 195 F.3d 603, 617 (11th Cir. 1999) (fact that death row inmate suffered from depression and a personality disorder did not render clearly erroneous district court's finding that the death row inmate was competent to dismiss his habeas petition and counsel); Fahy, 2003 U.S. Dist. LEXIS 14742, at \*61-62 (fact that defendant may have been "acutely psychiatrically ill" did not preclude the district court from finding him competent); White v. Horn, 54 F.Supp. 2d 457, 468 (E.D. Pa. 1999) (diagnosis of

schizophrenia not incompatible with a conclusion of competency). That a person may suffer from a mental disorder, "without more, is wholly insufficient to meet the legal standard that the Supreme Court has laid down for this kind of case." Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988). Nor does the mere disagreement of mental health experts prevent a court from finding the death-sentenced inmate competent. See Smith, 812 F.2d at 1057-59.

This Court, in its Memorandum Opinion of September 20, 2001, observed that, to the extent that authority exists to order a sovereign state to surrender a death-sentenced inmate to a federal facility for purposes of a competency evaluation, "such authority should be exercised sparingly, informed by the considered opinion of qualified professionals." (September 20, 2001 Memorandum (Dkt. Entry 80) at 16.) This Court's charge to Dr. Wettstein included advising the Court whether an appropriate competency evaluation necessitated removing Mr. Michael from state custody and sending him to a federal mental health facility. In his report, as well as in his testimony, Dr. Wettstein opined that such action was not required. The conclusion was reiterated after Dr. Krop's testimony. (10/21/02 Habeas Tr. at 107.)

Dr. Wettstein was appointed by this Court to inform its decision on this important matter. He thus stands as neutral expert witness. In light of Dr. Krop's retention by the CHCU (who appear to take the position that any decision to abandon litigation must not be the product of a rational thought process, a position inconsistent with prevailing precedent), his opinion is

appropriately viewed with a measure of skepticism.<sup>16</sup> There was no evidence of possible bias on the part of Dr. Wettstein. In fact, prior to this proceeding, Dr. Wettstein had testified only on behalf of the defense in death penalty cases. (9/26/02 Habeas Tr. at 16-17.) There can also be no dispute about Dr. Wettstein's qualifications. He is exceptionally well-qualified to opine on the matters before the Court. Moreover, his opinions were premised on extensive testing and interviews over a two-day period, as well as careful consideration of a large amount of materials. By no means can his review be considered perfunctory. Under these circumstances, I find his opinions credible and reliable.

A sovereign state should be required to surrender custody of a death-sentenced inmate only where there is a compelling showing of the need to do so. In the face of the credible, reliable, unequivocal, and essentially unrebutted opinion of the court-appointed expert, no such

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<sup>16</sup>Circumspection with respect to Dr. Krop's call for an extended evaluation period is also warranted due to the fact that he found Mr. Michael competent at the end of 1996. This opinion was rendered closer in time to Mr. Michael's apparent suicide attempt in 1994. In 1995, MMPI test results indicated that Mr. Michael endorsed depressive symptoms. (9/26/02 Habeas Tr. at 60-61.) Yet, apparently because Mr. Michael had authorized pursuit of the PCRA proceedings in 1996, Dr. Krop found him competent. As noted above, Dr. Krop found in 1996 that Mr. Michael had the capacity to consult with his lawyers, stating that "the capacity to communicate with an attorney and relate is one of the more significant issues with regard to the competency criteria." (12/30/96 PCRA Tr. at 186.) No evidence has been presented that Mr. Michael lacked the capacity when he testified before this Court that he wants to end these proceedings, and Dr. Wettstein found that such capacity is and has been present. It thus appears that Dr. Krop's opinion may be result-oriented: Mr. Michael is competent only when allowing others to pursue challenges to his conviction and sentence.

showing has been made here.<sup>17</sup> Neither referral to a federal mental health facility nor additional testing is required to render an adjudication on Mr. Michael's competency.

Based upon Dr. Wettstein's report and testimony, the exhibits introduced during the two-day evidentiary hearing conducted in this matter, and this Court's colloquy of Mr. Michael, the following findings of fact are made:

- Mr. Michael does not presently suffer from a mental disease, disorder or defect.
- Mr. Michael has the emotional, intellectual and psychiatric capacity to understand his legal position and the options available to him.
- No mental disease, defect or disorder prevents Mr. Michael from understanding his legal position and available options.
- No mental disease, defect or disorder precludes Mr. Michael from making a rational choice among his options.
- Mr. Michael has sufficient present ability to consult with his lawyers with a rational as well as a factual understanding of these proceedings.
- Mr. Michael is competent to dismiss the CHCU as counsel and dismiss this collateral challenge to his conviction and sentence.

This Court also finds that Mr. Michael's decisions are knowing, rational and voluntary.

"A waiver is voluntary if, under the totality of the circumstances, [it] was the product of a free

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<sup>17</sup>As noted above, Dr. Wettstein testified that Mr. Michael has the capacity to make an informed and rational decision. Kr. Krop did not testify that Mr. Michael lacked such capacity.

and deliberate choice rather than coercion or improper inducement." Fahy, 2003 U.S. Dist. LEXIS 14742, at \*62. Stated otherwise, "a decision is involuntary if it stems from coercion, whether mental or physical." Id.

There is no evidence in this case that the conditions of Mr. Michael's death-row confinement are so harsh that his decision can be viewed as the product of coercion. Moreover, the decision has been consistently repeated to this Court over a number of years. It is thus not the product of uncontrollable impulsivity. Dr. Krop, himself, acknowledged that the consistency of Mr. Michael's position in this Court "is an indication of an absence of impulsive behavior . . . ." (10/21/02 Habeas Tr. at 79.) Mr. Michael's decision "is not the result of an overborne will or the product of an impaired self-determination brought on by the exertion of any improper influences." Comer, 230 F. Supp. 2d at 1071.

Mr. Michael has provided a rational explanation for his desire to discontinue this litigation: his approval of the death penalty as an appropriate punishment for murder, his admission that the murder of Ms. Eng qualifies for the death penalty, his feelings of remorse, and his dissatisfaction with the prospect of life in prison. Similar explanations for electing to forego challenges to convictions and death sentences have been accepted as rational in similar contexts. See, e.g., Devetsco v. Horn (In re Zettlemoyer), 53 F.3d 24, 27-28 (3d Cir. 1995); Comer, 230 F. Supp. 2d at 1063; United States v. Hammer, 25 F. Supp. 2d 518, 525-28 (M.D. Pa. 1998). Accordingly, Mr. Michael's waiver of his right to pursue this case is knowing, rational

and voluntary.

**B. The “Non-Waivable” Claim.**

The CHCU maintains that, despite Mr. Michael's competent choice to discharge it as his counsel, this Court must nonetheless adjudicate a claim styled by the CHCU as “collusion” of the trial court, defense counsel and prosecutor to arrange for the death sentence because Mr. Michael wanted it. Contrary to the CHCU's assertion, this Court lacks the authority to adjudicate this claim.

In Gilmore v. Utah, 429 U.S. 1012 (1976), the Court held that where, as here, a death-sentenced inmate has competently, knowingly, and intelligently elected to forego legal challenges to his conviction and sentence, a federal court is without jurisdiction to consider any claim advanced on behalf of the death-sentenced inmate by another. In dismissing the matter for want of jurisdiction, the majority specifically rejected the type of argument advanced by the CHCU here -- that the inmate was “unable” as a matter of law to waive the right to review.

Gilmore was followed by Whitmore v. Arkansas, 495 U.S. 149 (1990). At issue in Whitmore was “whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forego his right of appeal to the State Supreme Court.” Id. at 151. The essence of the third-party's contention was that a state must provide appellate review of a conviction and sentence before it can proceed to execute a person. Id. at 154. Chief Justice Rehnquist explained that “before a federal court can consider

the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue.” Id. Chief Justice Rehnquist elaborated that the “threshold inquiry into standing ‘in no way depends on the merits’ of the [petitioner’s] contention that particular conduct is illegal, . . . .” Id. at 155 (emphasis added). In finding standing to be lacking, the Court rejected the contention that the public interest in enforcing the Eighth Amendment was sufficient to allow the suit to proceed in federal court. Chief Justice Rehnquist wrote that “[t]his allegation raises only the ‘generalized interest of all citizens in constitutional governance,’ and is an inadequate basis on which to grant . . . standing to proceed.” Id. at 160 (citation omitted). Moreover, “[t]he uniqueness of the death penalty and society’s interest in its proper imposition” did not “justify a relaxed application of standing principles.” Id. at 161.

Later in the same term in which Whitmore was decided, the Court held that a federal habeas corpus court was without jurisdiction to enter a stay of execution where a state court, following a hearing, found the defendant competent to waive his right to seek post-conviction review. In light of the state court competency determination, the Court found that there was absent “an adequate basis . . . for the exercise of federal power.” Demosthenes v. Baal, 495 U.S. 731, 737 (1990).

More recently, the Third Circuit has rejected the notion of a non-waivable claim that may be pursued by someone other than a death sentenced inmate who is competent and has knowingly and voluntarily waived legal challenges to his conviction and sentence. United

States v. Hammer, 226 F.3d 229 (3d Cir. 2000). At issue in Hammer was whether a death-sentenced defendant could forego a direct appeal from a death sentence imposed under the Federal Death Penalty Statute, 18 U.S.C. §§ 3591-98. In the course of holding that the competent death-sentenced inmate could dismiss the appeal, the unanimous panel observed that “it does not appear that any other person has a legally-cognizable interest in these proceedings.” Hammer, 226 F.3d at 237.

In the face of this authority, the CHCU has mustered only a twice-reversed decision of a district judge, United States v. Davis, 150 F. Supp. 2d 918 (E.D. La. 2001), and 180 F. Supp. 2d 797 (E.D. La. 2001), rev'd, 285 F.3d 378 (5th Cir. 2002), cert. denied, White v. United States, 537 U.S. 1066 (2002), and a Pennsylvania Supreme Court decision, Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978). Regardless of the merits of those decisions, they have no bearing on the threshold question of standing being presented here. McKenna, in which the court undertook to address the constitutionality of the Pennsylvania death penalty law even though the defendant declined to raise the challenge, was decided under state law. Davis dealt with the right to waive counsel at the death penalty phase of a case, a right that was twice-enforced by a majority of the Fifth Circuit by way of writs of mandamus.<sup>18</sup> Davis does not address the question of a “non-waivable” claim in the context of a federal court collateral review

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<sup>18</sup>Only one of the Fifth Circuit decisions appears to have been published, but it is clear that the Fifth Circuit twice instructed the District Court that the defendant could waive counsel at the penalty phase of his murder prosecution.

of a state court conviction.

In this regard, it bears noting that the so-called non-waivable claim was presented to and considered by the Pennsylvania Supreme Court in connection with the appeal taken from the PCRA proceedings. The Pennsylvania Supreme Court, quoting from the CHCU brief, stated that one of the issues before it is “whether the stipulated-to death penalty is constitutionally unreliable.” Michael II, 562 Pa. at 361 n.1. The court also noted that the CHCU contended that a “stipulation that there was no mitigating factors was a knowingly false representation . . . .” Id. at 366. Having acknowledged these contentions, the court ruled that counsel for Mr. Michael was bound to accept his direction not to present mitigating evidence, and that there existed no precedent that required a defendant to present mitigating evidence. Id. at 367-68. Thus, the CHCU has had an opportunity to litigate the “non-waivable” claim.

In any event, as noted above, standing “in no way depends on the merits of the . . . contention that particular conduct is illegal.” Whitmore, 495 U.S. at 155. Where, as here, a death-sentenced inmate is found to be competent and has knowingly and voluntarily waived federal habeas corpus review, a federal court is without power to act in the matter. See In re Zettlemyer, 53 F.3d at 28; Smith, 812 F.2d at 1059.

### III. CONCLUSION

To determine whether Mr. Michael is competent to decide to dismiss counsel and this habeas corpus proceeding, this Court sought to provide “a constitutionally adequate fact-finding

inquiry to make a reliable determination . . . ." Mata v. Johnson, 210 F.3d 324, 327 (5th Cir. 2000). That process included (1) a current examination by a highly qualified expert, (2) an opportunity for the parties to present pertinent evidence, and (3) an examination of Mr. Michael in open court concerning his decision to waive further proceedings. For purposes of this proceeding, Mr. Michael was also appointed independent counsel.

Throughout these proceedings, Mr. Michael has maintained the consistent position that he does not seek federal court intervention with respect to his conviction and sentence. Having found, without hesitation, that Mr. Michael is competent, and has made a knowing, rational and voluntary decision, this Court has no choice but to honor that decision. As did the death-sentenced inmate in Comer, Mr. Michael "has made a competent and free choice, which 'is merely an example of doing what you want to do, embodied in the word liberty.'" 230 F. Supp. 2d at 1072. Also worth reiterating here is the Eleventh Circuit's admonition in Sanchez-Velasco v. Sec'y of the Dep't of Corr., 287 F.3d 1015, 1033 (11th Cir. 2002), affirming a district court's finding that a defendant competently, knowingly and voluntarily waived federal court collateral review:

[W]e should not forget the values that motivated the Supreme Court's Whitmore decision and what is really at stake in these kind of cases. These cases are about the right of self-determination and freedom to make fundamental choices affecting one's life. . . . [A] death row inmate . . . does not have many choices left. One choice the law does give him is whether to fight the death sentence he is under or accede to it. Sanchez-Velasco, who is mentally competent to make that choice, has decided not to contest his

death sentence any further. He has the right to make that choice. . . . He has never asked [Capital Collateral Regional Counsel] to represent him or consented to have them do so. He has directed them to leave his case alone, and the law will enforce that directive.

Likewise, this Court has no choice but to enforce Mr. Michael's knowing, rational and voluntary directive that legal challenges to his conviction and sentence cease.

s/ Thomas I. Vanaskie  
Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HUBERT L. MICHAEL	:	
	:	
Petitioner	:	
	:	
VS.	:	
	:	
	:	3:CV-96-1554
	:	(CHIEF JUDGE VANASKIE)
	:	
MARTIN HORN, Commissioner,	:	
Pennsylvania Dep't of Corrections;	:	
DONALD T. VAUGHN, Superintendent	:	
of the State Correctional Institution	:	
at Graterford; JOSEPH P.	:	
MAZURKIEWICZ, Superintendent of	:	
the State Correctional Institution at	:	
Rockview	:	
	:	
Respondents	:	

ORDER

NOW, THIS 10th DAY OF MARCH, 2004, for the reasons set forth in the foregoing

Memorandum, IT IS HEREBY ORDERED THAT:

1. The Defender Association of Philadelphia, Capital Habeas Corpus Unit, its successors or assigns, David Wycoff, Esq., Michael Wiseman, Esq., and any other attorneys of the Capital Habeas Corpus Unit are dismissed as counsel for Hubert L. Michael.
2. Joseph M. Cosgrove, Esq. is directed to send a copy of this Memorandum and Order to Mr. Michael, and is dismissed as counsel for Hubert L. Michael.
3. Hubert L. Michael's motion to dismiss the habeas corpus petition filed in this matter is

**GRANTED.**

4. The stay of execution previously imposed by this Court's Order of August 22, 1996 is **VACATED.**

5. The Clerk of Court is directed to mark this matter **CLOSED.**

s/ Thomas I. Vanaskie  
Thomas I. Vanaskie, Chief Judge  
Middle District of Pennsylvania

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