

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04A656

**THERESA LANTZ, COMMISSIONER
OF CORRECTION, et al.**

Applicants

v.

**MICHAEL B. ROSS, by his next
friend, GERARD A. SMYTH, CHIEF
PUBLIC DEFENDER**

**THIS IS A CAPITAL CASE
EXECUTION SCHEDULED:
JANUARY 28, 2005; 2:01 A.M.**

**STAY ORDERED BY DISTRICT
COURT AND SECOND CIRCUIT
COURT OF APPEALS**

Respondent

**APPLICATION TO JUSTICE GINSBURG
TO VACATE STAY OF EXECUTION OF MICHAEL ROSS**

The Commissioner of Correction of the state of Connecticut, et al., by counsel, hereby apply to the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice presiding over the United States Court of Appeals for the Second Circuit, for relief from the order for a stay of execution of Michael Ross granted January 24, 2005, by the District Court of the District of Connecticut and on January 25, 2005 by the United States Court of Appeals for the Second Circuit. In support of their application, the Commissioner, et al. say as follows:

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Michael Ross, who is a forty-five year old graduate of Cornell University, was convicted of six counts of capital felony and sentenced to death in 1987. He has fired the public defenders as his counsel, retained private counsel, Attorney T.R. Paulding, and opted to forgo discretionary challenges to his convictions and sentences. His former counsel, represented here by Chief Public Defender Gerard Smyth, seek to force Ross to engage in litigation by acting on his behalf as "next friend." Every state court and one federal district court that has considered the matter has found that Michael Ross is competent to elect to forgo further legal challenges to his conviction. A second district court, *Chatigny J.*, on January 24, 2005, concluded it was not bound by those conclusions, opted to hold its own competence hearing, and issued the stay which is the subject of this application.

A. Prior Proceedings

After a trial to determine guilt, a jury convicted Michael Ross of six counts of capital felony in violation of Connecticut General Statutes § 53a-54b (rev. to 1987). At a separate sentencing hearing pursuant to Connecticut General Statutes § 53a-46a, the same jury found an aggravating factor and no mitigating factor. Accordingly, the trial court, *Ford, J.*, sentenced Ross to death on each count. On appeal, the Connecticut Supreme Court affirmed the judgment of guilt, reversed the judgment imposing the death penalty, and remanded this case for a new penalty hearing. *State v. Ross*, 230 Conn. 183 (1994), *cert. denied*, 513 U.S. 1165 (1995) (*Ross I*). Ross was represented during these proceedings by the public defender. *Id.* at 187.

Two interlocutory appeals followed the remand. In the first, Ross and the state reserved for the Connecticut Supreme Court questions related to whether he could stipulate to the factors required for a death penalty and be sentenced to death without a full penalty hearing. *State v. Ross*, 237 Conn. 332 (1996) (*Ross II*). Michael Ross dismissed the public defender during these

proceedings, and requested to proceed pro se. The trial court conducted a competency hearing and Ross was found competent to proceed and to represent himself with the help of stand-by counsel. Initially, the Connecticut public defenders were appointed as standby counsel. They moved to vacate that appointment because Ross's stated goal of accepting the death penalty created an insoluble conflict of interest based on their opposition to the death penalty. Thereafter, Attorney T.R. Paulding was appointed stand-by counsel and argued the reservation before the Connecticut Supreme Court.

The Connecticut Supreme Court rejected the reservation. *State v. Ross*, 237 Conn. at 332. Ross and the state then attempted to enter into a stipulation that would lead to a sentence of death. *State v. Ross*, 1997 Conn. Super. LEXIS 1419, May 23, 1997. The trial court, *Miano, J.*, refused to accept this stipulation. *Id.* Consequently, the case was scheduled for a second penalty hearing and Ross again was represented by two attorneys from the specialized Capital Litigation section of the Public Defender's office.

The second penalty proceedings generated a second set of interlocutory appeals unrelated to the present issues. The Connecticut Supreme Court decided in the state's favor on both issues presented. *State v. Ross*, 251 Conn. 579 (1999).

The case proceeded to a second penalty hearing. In that hearing, a second jury found an aggravating factor and no mitigating factor regarding all six capital felonies. Accordingly, the trial court, *Miano, J.*, sentenced the defendant to death on each count. *State v. Ross*, 269 Conn. 213, 221-222 (2004). (*Ross IV*).

As required by Connecticut General Statutes § 53a-46b, the defendant's death sentences were reviewed by the Connecticut Supreme Court. He again was represented by the public defenders. All six death sentences were affirmed. *Ross IV*, 269 Conn. at 226-227 (listing issues raised). The Connecticut Supreme Court concluded, *inter alia*, that Ross's suicide attempt shortly before the new pen-

alty hearing , together with his attempt to accept the death sentence and trial counsels' representations about his mental state, had not imposed on the trial court the obligation to hold a competency hearing. The Supreme Court concluded that the trial court reasonably could have determined, on the basis of its canvass of the defendant at the November 20, 1998 hearing, and the lack of any testimony, exhibits or medical reports to support the defendant's claim of incompetence, that there was no reasonable doubt that the defendant not only understood the nature of the proceedings but also was able to communicate with and assist his counsel. *Ross IV*, 269 Conn. at 273. Ross filed a timely motion for reconsideration that was denied by the Connecticut Supreme Court on September 8, 2004.

B. Issuing The Death Warrant

On September 21, 2004, Attorney T.R. Paulding, who had acted as stand-by counsel during Ross's efforts to stipulate to a death sentence in 1995 and argued before the state Supreme Court in *Ross II*, entered an appearance in the Superior Court, Judicial District of New London, Connecticut in lieu of the Public Defender's office. Simultaneously, Attorney Paulding transmitted a letter to the presiding judge in New London, informing him that Ross did not want to pursue any further appeals or collateral attacks on his death sentence and that he wanted the court to set an execution date. T. 10/6/04 at 1-2.

At a hearing on October 6, 2004, Ross appeared before the court, *Clifford, J.* In open court, Ross made it clear that any effort to prevent or delay his execution – be it by a third party or a governmental entity – would be contrary to the decisions he has made in his own case. T. 10/6/04 at 9. The trial court canvassed Ross about his decision to forgo further challenges. *Id.* at 2-4. Attorney Paulding stated that he had begun discussing the matter with Ross in February of 2004, several months prior to the State Supreme Court's decision affirming the death sentences. *Id.* Attorney

Paulding stated that Ross had considered his options thoroughly. Paulding declared that he had no doubt, from his years of interacting with Ross, that Ross was fully competent and aware of the consequences of his actions. *Id.*

Ross signed an affidavit prior to the October 6, 2004 hearing in which he declared that the only person authorized to file an action on his behalf is Attorney Paulding, and that a filing from anybody else in any forum seeking any form of relief is "without my authorization and contrary to my wishes." App. at 2. Ct. Exh 2, 12/9/04.

The trial court, consistent with Connecticut law, presumed Ross was competent and noted that there was nothing to indicate otherwise. Pursuant to Connecticut General Statutes § 54-100, January 26, 2005, was set as the date to carry out Ross's execution. T. 10/6/04 at 7. No representative of the public defenders office appeared at the October 6, 2004 hearing or filed any documents to: 1) contest Ross's decision to select new counsel 2) challenge his competence to do so, or 3) challenge his competence to forgo any further appeals.

C. The Public Defender's Motions

On December 1, 2004, the public defender filed several motions with the Superior Court in New London, Connecticut seeking to delay or block the defendant's execution. The public defender moved to be admitted as a litigant as Ross's "next friend," to be granted party status as an intervener, or to be appointed a friend of the court. The recurring premise of these motions is that Ross was and is incompetent to make any decision to waive further appeals and collateral review.

On the same date, the public defender, purporting to be counsel to Michael Ross, filed with this Court a petition for certiorari and the motion for leave to proceed *in forma pauperis*.

D. Hearing on December 9, 2004

On December 9, 2004, the trial court, *Clifford, J.*, in response to a motion filed by the state, held a hearing to further explore Ross's competency to forgo his right to seek post-conviction relief. During that hearing, Attorney Paulding reiterated that he had represented Ross in 1995, when Ross was found competent. T. 12/9/04 at 8-9. In February of 2004, before the Connecticut Supreme Court had issued its opinion upholding the second death sentence, Ross contacted Attorney Paulding, and, anticipating that the Connecticut Supreme Court would affirm his death sentence, asked Paulding to represent him and make it known to the Connecticut court that he had no interest in further direct or collateral appeals. *Id.* at 12, 31. Attorney Paulding met with Ross in late May or early June, and by letter dated July 23, 2004, agreed to represent Ross. *Id.* at 13, 31. Prior to sending the letter, Attorney Paulding notified the office of the public defender of his intent to represent Ross. *Id.* at 32. After Attorney Paulding agreed to represent him, Ross sent letters to the public defenders informing them that he no longer needed their services and that he was represented by private counsel. *Id.* at 31-32. Subsequently, Ross met with public defenders on several occasions. *Id.* at 34-35. Attorney Paulding noted that the public defender's office had, on September 23 and October 25, 2004, sent Ross draft petitions for a writ of certiorari to this Court. *Id.* at 15-16, 18. Attorney Paulding stated that Ross told him he did not want the petition filed and wanted Attorney Paulding to state for the record that he did not authorize the filing of such a petition. *Id.* at 19. Ross reaffirmed that the affidavit that he signed in October, declaring that he was foregoing all further post-conviction relief, represented his previous and present position. *Id.* at 36.

At the end of the hearing, the trial court ruled as follows:

Clearly, from what I've heard here today, Mr. Ross appears to have sufficient ability to understand the nature of his decision, to assist in making rational and competent decisions regarding his rights, and, specifically, his right to pursue other appellate avenues. He clearly was lucid, understood the Court's questions, the attorney's questions. He's educated, intelligent, articulate, insightful, clearly understands, in my opinion, the lines he is foregoing, and he certainly is firm in his decision. He certainly

appears to understand his position and the options that are available to him and is ability to make rational choices.

However, my concern is the standard of competency. ... [T]he standard seems to be competency for someone to waive any appeals whether they are suffering from a mental disease, disorder or defect; whether, if they are suffering from that, does that prevent them from understanding their legal position and the options available to them. ... [A]s a lay person, I certainly feel he was competent under any standard that would apply. But I don't know what mental disorders, disease or defect he may be suffering from and what potential effects they may have on his decision. T. 12/9/04 at 64-65.

The trial court had already spoken with Dr. Michael Norko, who had evaluated Ross in 1995, and that doctor was willing to evaluate Ross in time for a hearing scheduled for December 28, 2004.

E. Ruling on Public Defender's Motions

At a hearing on December 15, 2004, the trial court denied the public defender's motions to be admitted as a litigant as Ross's "next friend," to be granted party status as an intervener, or to be appointed a friend of the court. The trial court stated, however, that should it determine on December 28, 2004 that Ross was not competent, it would revisit the question of whether the public defender could be "next friend." T. 12/15/04 at 73. In addition, the trial court found that Ross was competent to fire the public defender as counsel and competent to choose attorney Paulding. T. 12/15/04 at 74. The trial court reiterated what it had stated on December 9: it had seen nothing to indicate that Ross was not competent, and furthermore, that in the entire history of this prosecution there was no serious suggestion that Ross ever was incompetent. However, it deferred a final ruling on Ross's competency to waive further appeals until it heard from the examining doctor on December 28. Finally, the trial court denied the public defender's motion for a stay of execution to appeal the trial court's denial of their motion to intervene.

On December 23, 2004, after the trial court (*Clifford J.*) denied their motions to appear on behalf of Ross, the public defenders filed a writ of error and motions for stay of the December 28,

2004 hearing and the January 26, 2005 execution. *Id.* at 75-76. The Connecticut Supreme Court dismissed both of those motions for stay on December 27, 2004.

F. The Resumption of the Competency Hearing on December 28, 2004

At the outset of the December 28 hearing, the trial court first noted that, at the end of the December 9 hearing, although "I did not have a question at that time concerning Mr. Ross's competency nor was it being requested of me by either of the parties, out of an abundance of caution, I ordered that there be an evaluation done to determine competency." T. 12/28/04 at 2..

The trial court asked whether the public defender had, as it had requested, furnished to Attorney Paulding "some evidence concerning – on the issue of competency because they were claiming on their good faith and belief." *Id.* at 4-5. Attorney Paulding explained that after the December 15 hearing, he provided the public defenders' representative with his business card and offered to set up a meeting to discuss any information they had concerning the defendant. *Id.* at 5. Attorney Paulding stated that he offered to process that information for the purposes of Dr. Norko's examination but told them "the appropriate time was now." *Id.* at 5.

Other than Attorney Karen Goodrow, who represented Ross at the second penalty hearing and provided her insights to Dr. Norko, every other member of the public defender's office remained mute. *Id.* at 5. The court noted, therefore, that "[a]t this point there is no other evidence before me" and resumed the competency hearing. *Id.* at 8.

Dr. Norko testified that the defendant had an excellent understanding of the legal proceedings and the ramifications of his decision. *Id.* at 14. Moreover, Ross was able to reason through his thought processes and describe a rational decision-making process. *Id.* at 14. Although Ross was, at times emotional, "[t]he topic was one in which it would be appropriate to be tearful and sad." *Id.* at 14. Ross was able to describe his feelings in a "very serious and thoughtful way.... And

the bottom line is that he does not wish to cause any further pain to the families of his victims." *Id.* at 23-24.

I think he is manipulating the information he has available in a rational way, applying his own sense of values about them and reaching what within that sense of values is a logical decision.

Id. at 25. According to Dr. Norko, to determine competency, he needs to know if there is a rational basis for the individual's decision, he does not have to agree with it. *Id.* at 42.

Dr. Norko went through all of Ross's confirmed mental impairments and indicated that some, like clinical depression, are in remission and, ultimately, none compromised his competence. *Id.* at 26, 27, 28. Dr. Norko also reviewed information he received from Attorney Goodrow and others about the internal debate Ross is experiencing and indicated that such a process is normal for someone making such a monumental decision. *Id.* at 33-34.

Dr. Norko testified that the medications administered to Ross "are probably improving his ability to make decisions rather than interfering with it." *Id.* at 35. Ross is not psychotic or delusional. *Id.* Ross also is not suicidal. *Id.* at 56.

Dr. Norko testified that nobody from the public defender's office had contacted him to provide him with studies or documents about any syndromes suffered by those on death row which may impair their ability to make a rational choice. *Id.* at 44-45.

What also became apparent from Dr. Norko's testimony and painfully clear from Ross's testimony is that, since October 6, the greatest anxiety that he has suffered has been caused by the public defenders, who tried a myriad of extraordinary tactics designed to change his mind and extend the legal proceedings. *Id.* at 41.¹ When Ross took the stand, he provided details.

¹ Dr. Norko's 1995 report is Court exhibit 5, his 2004 report is exhibit 6.

Ross testified that he became most upset when events occurred that could potentially delay his execution. *Id.* at 58. He described tactics used by the public defender's representatives when they explained some of the claims he could raise on appeal. For example, when discussing a claim based on *Tennard v. Dretke*, 124 S.Ct. 2562 (2004), Ross was told that he was the only Connecticut death-row inmate who could raise that claim. *Id.* at 60.

And basically she told me, if I did not raise this issue . . . that effectively it would be possible that [other death-row inmates] could be executed because I did not raise this issue on their behalf.

And I had a lot of problems dealing with that and I needed my Vistaril [an anti-anxiety medication with sedating qualities] that night.

Id. at 60. "I have enough guilt to deal with, and adding four more lives was difficult. And I needed my Vistaril then." *Id.* at 68. Ross was so upset with the conduct of the public defenders representatives that he decided to terminate their visitation privileges.² *Id.* at 71.

And they're [the public defenders] being disingenuous when they say they're looking out for my well being, because they know what this is doing to me.

Id. at 71-72.

After the hearing the trial court found:

beyond a reasonable doubt based on Attorney Paulding's representations and opinions and observations, Michael Ross's statements to this Court and his testimony today, the exhibits submitted along with the expert testimony by Dr. Noriko that Michael Ross is competent pursuant to the standard of *Rees v. Peyton*³ and clearly that would make him competent, and I would so find under General statutes [sic] 54-56d.

Since I have found Michael Ross competent to forego his right to pursue any post-conviction relief, I also find based on the hearing, the last hearing of December 9 and

² Ross excepted Attorney Barry Butler, a public defender, whose conduct Ross has not found similarly objectionable. *Id.* at 71.

³ 384 U.S. 312, 314 (1966).

today that Mr. Ross's decision to waive or forego those rights is knowingly, intelligently, and voluntarily made.

Id. at 81-82. The trial court also found that Ross:

is not motivated by a desire to commit so-called judicial state assisted suicide. ... He has indicated before this court under oath and not under oath that he is concerned for the victims' families, and he accepts the decisions of two juries.

Id. at 77.

The court found that Attorney Paulding, Ross's counsel, was competent and effective, and was confident that if Attorney Paulding saw any indication that Ross was becoming incompetent "he will make it known to the Court immediately." *Id.* at 77. Finally, Ross was reminded that he was still free to seek legal relief should he change his mind. *Id.* at 82. Ross understood his rights. *Id.* at 82.⁴

G. Connecticut Supreme Court Rulings on First Writ of Error

On January 5, 2005, the Connecticut Supreme Court, sitting en banc, heard oral argument on the public defender's first writ of error. The Court on January 7, 2005, issued an order stating that "After a thorough review of the record of the proceedings before the trial court ... we find the record devoid of any offer of any meaningful evidence that the defendant is not competent within the meaning of *Demosthenes v. Baal*, 495 U.S. 731 (1980)." Nonetheless, because the public defenders had represented at oral argument that they did possess evidence of Ross's incompetence, the Court afforded them an opportunity to provide it directly with a written offer of proof as to any "meaningful evidence" within its possession that would cast reasonable doubt on Ross's competence. In response, the public defenders submitted an offer of proof which included the proposed testimony of several public defenders and doctors Grassian and Goldsmith.

⁴ Indeed, Ross stated that he might have viable claim under *Brady v. Maryland*, 373 U.S. 83 (1963). "If I would want to make a claim on the *Brady* issue, I have counsel, not only counsel but on my own, if I wish." T. 12/9/04 at 47. This, Ross still has access to the courts.

On January 14, 2005, after reviewing the public defenders' written offer of proof, including Dr. Grassian's opinion, the Connecticut Supreme Court issued a slip opinion in *State of Connecticut v. Michael Ross*, SC 17335, dismissing the public defenders' first writ of error and affirming Judge Clifford's judgment that: (1) the public defenders had presented no "meaningful evidence" of incompetence that would have entitled them to an evidentiary hearing and, therefore, they do not have standing to appear as Michael Ross's next friend; and (2) denied the public defenders permission to appear as amicus curiae. First, in accordance with *Demosthenes v. Baal*, 495 U.S. 731, 732 (1990), the Connecticut Supreme Court held that the Constitution does not require a trial court to grant an adversarial hearing to a third party when the putative next friend has not presented "meaningful evidence" that the defendant is incompetent, particularly where, as here, the defendant is represented by qualified counsel who has an ethical responsibility to act in his client's best interests. *Ross*, S.C. 17335, slip op. at 31, 29-30 n.15. Applying *Demosthenes* to the public defenders' specific claims in this case, and after carefully reviewing the record, the Connecticut Supreme Court found that despite "numerous opportunities" to present meaningful evidence to the trial court that would call into question Ross's competence, the public defenders had failed to do so. *Id.* at 31, 33. In addition, after reviewing the public defenders' written submission of January 10, 2005, the Connecticut Supreme Court concluded that the proffer "did not constitute meaningful evidence of the defendant's incompetence." *Id.* at 31. The Connecticut Supreme Court noted that much of the proposed evidence already had been provided to Dr. Michael Norko, the independent psychiatrist who examined Ross, and was addressed by Dr. Norko in his written report and testimony at the competency hearing on December 28, 2004. *Id.* at 32. Specifically, it concluded, with respect to the proposed testimony of Dr. Grassian:

We also conclude that Grassian's proposed testimony on the effect of segregated confinement on the defendant's ability to make a rational and voluntary choice is

speculative. Grassian has neither examined the defendant nor inspected the conditions of the defendant's confinement. Norko stated in his report that the defendant has frequent visitors in prison, corresponds with numerous people and regularly prays, reads, listens to music, watches television and does puzzles and word games. Norko also found that, although the defendant occasionally suffered from some of the symptoms listed by Grassian, he generally slept well, had a normal appetite and a good energy level, was able to concentrate and to process thought, had no memory disturbances and expressed no suicidal thoughts. Moreover, Grassian's proposed testimony that Norko had failed to recognize that the defendant's intelligence would allow him to conceal a "hidden agenda" is not supported by the record. Norko specifically stated in his report that the defendant "has hidden things from the [prison's mental health] staff in the past" He further stated that Chaplin "has tried to look through the surface, but does not see any significant concerns."

Slip op. at 32-33.

H. Connecticut Supreme Court Proceedings on Second Writ of Error

On January 12, 2005, two days before the Connecticut Supreme Court released its opinion dismissing the public defenders' first writ of error and affirming the trial court's judgment, the public defender filed a second writ of error, alleging four errors of law in the trial court's decision on December 28, 2004, finding that Ross is competent to abandon further review of his death sentence and, further, that his decision to do so was knowing, intelligent and voluntary. On January 19, 2005, the Connecticut Supreme Court issued orders dismissing the public defenders' second writ of error as well as their motions to stay Ross's execution.

I. State Habeas Corpus Proceedings

On December 27, 2004, two identically titled Petitions for Writ of Habeas Corpus, Prayer for Stay of Execution and Request for Appointment of Counsel were lodged in Superior Court on behalf of Ross, again, in an effort to delay the execution. One was prepared by the public defenders and the second on behalf of Dan Ross, Ross's father, each claiming to be "next friend." Each "next friend" claimed, *inter alia*, to be entitled to a hearing on Ross's competence to choose to forgo further post-conviction proceedings.

On January 3, 2005, the habeas court (*Fuger, J.*) held a hearing consistent with Practice Book § 23-24(a) to determine whether the court lacked jurisdiction to “issue the writ.” The Court permitted the two purported next friends to demonstrate that they had standing to file the petitions on behalf of Michael Ross and to present some evidence of Ross's incompetence. Over the objections of the public defenders and Dan Ross that they were not ready to proceed, the habeas court repeatedly told them that "now" was the time to present what evidence they had. T. 1/3/05 at 8, 13, 15. The public defenders proffered the transcripts of the proceedings before Judge Clifford of October 6, December 9, December 15, and December 28, 2004. T. 1/3/05, Vol. I at 45. Dan Ross joined in the public defenders’ proffer, adding that he would testify as to his son’s incompetence as well. The habeas court determined that both the public defenders and Dan Ross had failed to raise any doubt about Ross’s competence and thus lacked standing. T. 1/3/05, Vol II at 17. Both the petitions were rejected. On January 18, 2005, the public defenders and Dan Ross each filed writs of error challenging the habeas court’s rejection of their respective habeas corpus petitions.

J. Proceedings on Writs of Error From the Rulings of the State Habeas Court, *Fuger, J.*

Oral argument regarding the writs of error filed on January 18, 2005, challenging Judge Fuger’s rejection of the respective habeas corpus petitions by Michael Ross’s putative next friends were held on January 21, 2005. These writs were dismissed on January 25, 2005. *In re Application of Petition for Writ of Habeas Corpus by Dan Ross as Next Friend*, S.C. 17342, and *In re Application for Petition for Writ of Habeas Corpus by Office of the Chief Public Defender as Next Friend*, S.C. 17343. In reaching the conclusion that the public defender had a full and fair opportunity to litigate Ross's alleged incompetence before the trial court, *Clifford, J.*, and before the Supreme Court itself in the offer of proof, the Connecticut Supreme Court reiterated its earlier finding that Dr. Grassian's proposed testimony on the effect of confinement of Ross's ability to make

a rational and voluntary choice was "speculative." Grassian had neither examined Ross nor inspected the conditions of confinement. The Court found that Ross did not live an isolated existence on death row. Moreover, Ross himself testified that he lived a productive life on death row including creating and maintaining a law library.

K. United States Supreme Court Orders Respecting Proceeding *In forma Pauperis*

In two orders issued on January 10, 2005 in *Ross v. Connecticut*, this Court denied the public defenders' motion to proceed *in forma pauperis* and their motion to delay consideration of that motion until state court proceedings on their efforts to intervene as "next friend" had been finally determined. *Michael B. Ross v. Connecticut*, No. 04M35. The premise of both motions was that the petition should be accepted without an affidavit of indigence because Ross was incompetent when he refused to sign the affidavit and when he fired the public defenders as counsel. This Court had access to the transcripts from all the proceedings before Judge Clifford, the habeas decision by Judge Fuger, but not the entire transcript, and the decision by the United States District Court, *Dronney, J.* dismissing Dan Ross's action under 42 U.S.C. § 1983.

L. Federal 1983 Action by Dan Ross as "Next Friend"

Dan Ross, Michael Ross's father, challenged the protocol for lethal injection as "next friend" of Michael Ross in a federal action pursuant to 42 U.S.C. § 1983. *Dan Ross v. Rell et al*, 3:04-CV-2186. On January 10, 2005, the District Court, *Dronney, J.*, rejected the assertion that Ross was incompetent, but did not stop there. "In addition, the Court [made] an independent finding that Michael Ross is competent to proceed on his own behalf, and that the Court lacks a sufficient basis to appoint a next friend to litigate this issue." 1/10/05 Opinion at 5. After discussing various standards of competency, the Court found that "Michael Ross exceeds the threshold required by all of these standards." *Id.* at 5-6. The District Court relied on Michael Ross's participation via closed-circuit

television in the hearing held by that Court in Rockville, Connecticut on January 7, 2005, as well as the same documentation that was before the state habeas court – including the transcripts of October 6, December 9, 15, and 28 of 2004, Michael Ross’s affidavit of October 6, 2004 and Judge Clifford's rulings which were the subject of the public defenders' first two writs of error. *Id.* at 6. As part of its finding, the District Court noted that despite Ross's various psychiatric disorders, "[t]he Court's own observation of Michael Ross at the hearing of January 7, 2005 confirms that he is competent under these standards." *Id.* at 6-7. The District Court found that Ross's responses were rational and intelligent and that he was "quite familiar" with all of the legal and factual issues relevant to lethal injection. *Id.* at 7. "Given Michael Ross's amply demonstrated competence before this and other courts, there is no basis for ordering a full evidentiary hearing on the issue of his competency." *Id.*

M. The Federal Petition for Habeas Corpus

Gerard A. Smyth, the Chief Public Defender, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and a motion to stay the impending execution. In that petition, Smyth challenged the Connecticut Supreme Court’s finding that they had presented no meaningful evidence that Ross was not competent to elect to forgo further challenges to his convictions and sentences and requested next friend status to raise such challenges on his behalf, but raised no challenges to the underlying convictions or sentences.

The respondent Commissioner moved to dismiss, and on Monday, January 24, 2005, the District Court, *Chatigny, J.*, commenced a hearing. The petitioner argued that the state court findings that the public defender had failed to proffer meaningful evidence that Ross was incompetent were not entitled to a presumption of correctness because the underlying proceedings before Judge Clifford were "flawed." T.12/24/05 at 10. The procedural flaw was that the trial court did not permit the public defenders to make an offer of proof that Ross's mental defect affected his volitional

capacity, and that the trial court had been required to do so if there were "colorable" allegations in the petition that Ross was incompetent. *Id.* at 10-11. The petitioner also argued that the competency examination that Judge Clifford ordered to be conducted by Dr. Norko could not cure that defect because no party challenged Dr. Norko's conclusions and because Dr. Norko was not familiar with the syndrome about which Dr. Grassian expected to testify. *Id.* at 13-14. The offer of proof submitted to the Connecticut Supreme Court also did not cure that claimed procedural flaw, argued the petitioner, because Dr. Grassian had not been able to examine Ross or the actual conditions under which Ross has been living. *Id.* at 14-16.

The Commissioner argued that the factual findings of the state courts were entitled to the presumption of correctness mandated by 28 U.S.C. § 2254(e)(1), and that Chief Public Defender Smyth bore the burden of showing by clear and convincing evidence that the state court finding of competence was incorrect. *Id.* at 17, 27-29, 31-32. The Commissioner also argued that the issue of volitional capacity was "thoroughly examined by the trial court, Judge Clifford." *Id.* at 19, 24. To the District Court's expressed concern that Dr. Norko did not address the "core issue" that an "individual's volitional capacity has been impaired as a result of his long-term exposure to the difficult conditions at Northern;" *Id.* at 20; the Commissioner argued that *Rees v. Payton* and *Whitmore* require that the prisoner's mental disease prevent him from making a rational choice about continuing or abandoning further litigation. *Id.* at 21-23. The Commissioner further argued that the public defenders had been dilatory in bringing any evidence of incompetence forward and that they had declined numerous opportunities to present an offer of proof. *Id.* at 24-27. In addition, the Commissioner argued that the public defender had not been entitled to an evidentiary hearing. *Id.* at 30-31. Finally, the Commissioner argued that under 28 U.S.C. § 2254(d), the District Court

could not overturn the state court rulings unless they constituted an erroneous application of United States Supreme Court precedent. *Id.* at 35-36.

After listening to oral arguments, the Court concluded that it required an evidentiary hearing, because the state court proceedings were "quite irregular." *Id.* at 36.

It is unusual, in my experience, for a reviewing court to attempt to correct a procedural inadequacy by inviting a written submission itself. And I don't believe that it should be approved as the procedure to be used in a case where the question is whether the death sentence – the individual is going to waive rights and accept death.

Id. at 36. The District Court stated that it had "affidavits from serious people;" *Id.* at 37; who opined that Ross's volitional capacity is impaired by the conditions of his confinement, and that it would need a psychiatrist to tell it that that is not the case.⁵ *Id.* at 37. Noting that the public defenders claimed that Dr. Norko had stated he did not know any thing about that syndrome, "[t]hat can't be sufficient procedurally, It's not binding on me. It can't be." *Id.* at 37-38. The District Court stated that it had reviewed the record of the state court proceedings and found that no "reasonable person looking at this record could say categorically this man is competent." *Id.* at 38.

The District Court then proceeded to hear the direct testimony of Dr. Stuart Grassian, who testified consistently with the proposed testimony previously submitted to the Connecticut Supreme Court in the first writ of error and which was attached to Smyth's proffer of evidence of Ross's incompetence. *Id.* at 46-74. Dr. Grassian confirmed that the public defenders had delayed, testifying that he was contacted by the public defenders in October of 2004, told to do nothing until a few weeks ago when boxes of materials were delivered to him. *Id.* at 51-52. These documents included the materials that were submitted in the offer of proof to the Connecticut Supreme Court, as well as testimony from various proceedings. *Id.* at 52-53. The respondent then began its cross-examination

⁵ Judge Chatigny further noted that he had personally visited Northern Prison and could not be sure whether that would affect his opinion or not. T. 1/24/05 at 37.

of Dr. Grassian. *Id.* at 75. The District Court interrupted and questioned Dr. Grassian. *Id.* at 79-84. Thereafter, it recessed for lunch. When the proceedings reconvened – and before the respondent could continue its cross-examination of Dr. Grassian – the District Court denied the respondent’s motion to dismiss. *Id.* at 84-87. It then granted Smyth next friend status and entered a stay of execution. *Id.*

The District Court issued a written opinion that evening. *See* Ruling and Order. It began by stating that the written opinion is "no substitute for review of the hearing transcript." Order at 2. The District Court articulated the standard for next friend status as set forth in this Court's opinions in *Whitmore v. Arkansas* and *Rees v. Payton*. Order at 3. It held that the "evidence presented by the Office to support its claim that Ross is not competent under the *Rees* standard is more than sufficient to satisfy its initial burden of producing 'meaningful evidence.'" *Id.* at 4. Therefore, it appointed Smyth next friend and held that the Court had subject matter jurisdiction. *Id.* at 3. The District Court held that it was not bound by the Connecticut Supreme Court's determination that the proffer was not "meaningful evidence" because the case relied upon by the Commissioner, *Demosthenes v. Baal*, 495 U.S. 731 (1990), was "clearly distinguishable with regard to the probative value of the evidence supporting the state court's competency finding." *Id.* at 5. In particular, the District Court noted that "no particularized finding was made concerning Ross's volitional capacity ... evidently because Dr. Norko did not focus on that issue" and because Dr. Norko was not familiar with "Special Housing Unit Syndrome." *Id.* at 6. The District Court also found "support" in Ross's history of multiple suicide attempts, as well as his correspondence and other writings. *Id.* at 6. The District Court also declined to defer to the state court reliance on observations of Ross, because the courts did not have the benefit of Dr. Grassian's explanation that Ross could "malingering good." *Id.* at 7. The District Court rejected the Commissioner's claim that the public defenders had been dilatory in bringing

proof of their allegations to the state courts, finding that their effort has been reasonable in the circumstances. *Id.* at 9. "On learning that Ross had 'volunteered' to be executed, the Office presented a next friend petition to the Superior Court." *Id.* at 9. Finally, the District Court concluded that a stay of execution was necessary to permit the public defenders to litigate their claims that Ross is incompetent. *Id.* at 10.

N. The Second Circuit Ruling

On January 24, 2005, the Commissioner filed a motion with the Second Circuit Court of Appeals to vacate the stay. The Second Circuit heard argument on the motion on January 25, 2005, and denied the motion. The Court, without addressing the obligation of the federal courts to accord a presumption of correctness to the state court findings on the issue of jurisdiction, held that the first question for the District Court was whether Smith had standing and therefore the District Court had jurisdiction. Opinion at 1. It further ruled that the District Court had made an inadequate record to support its conclusion that there was meaningful evidence that Ross was incompetent. Therefore, it concluded, it was premature for the District Court to determine next friend standing because the District Court lacked the evidence that the proceedings it had ordered were to produce.

We therefore deny the motion to vacate the stay of execution and we dismiss this appeal because, until there is an adequate record upon which the district court can determine whether or not Smyth has standing to bring this proceeding and the court therefore has jurisdiction over it, we are not in a position to review any such determination.

Slip Op. (January 25, 2005) at 3-4. It noted that should the District Court determine that Smith had standing to act as next friend, the District Court would then decide the habeas petition on its merits.

Slip Op. at 4.

II. REASONS WHY THE STAY MUST BE VACATED

The District Court and the Second Circuit improperly determined that the federal court, in a habeas corpus proceeding under 28 U.S.C. § 2254, must independently make the determination of standing that depends on Ross's competency. In so doing, they failed to defer to the state court proceedings in two respects. First, they improperly failed to determine whether the state court, when it found Ross competent, had unreasonably applied *Demosthenes v. Baal*, the controlling United States Supreme Court precedent, and second, they failed to respect the required presumption of correctness of state court factual findings when they did not require the Chief Public Defender Gerard Smyth to establish that the state court factual findings were improper by clear and convincing evidence.

A. The Federal Courts Must Defer to State Court Proceedings Unless the State Courts Unreasonably Apply United States Supreme Court Precedent

1. Standard of Review Under 28 U.S.C. §2254

The standard governing review of claims by federal habeas corpus petitioners is set forth in §28 U.S.C 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”). The act amended §2254(d) to read as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000), this Court recognized that when Congress enacted AEDPA, it “placed a new restriction on the power of federal courts to grant writs

of habeas corpus to state prisoners.” *Id.* at 399. The Court stated that §2254 (d)(1) “prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” *Id.* This Court identified two principles to guide the lower federal courts in applying the reasonableness standard of §2254 (d)(1). First, this Court made clear that the reasonableness of the application of federal law by state courts would be judged by an objective standard. “[A] federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Id.*, 529 U.S. at 409. Second, this Court emphasized that an unreasonable application of federal law is different from an application that is simply incorrect or erroneous. This Court stated that:

In §2254 (d)(1), Congress specifically used the word “unreasonable” and not a term like “erroneous” or “incorrect.” Under §2254 (d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Williams v. Taylor, *supra*, 411; accord Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S.Ct. 357 (2002) (*per curiam*); Yarborough v. Alvarado, ___ U.S. ___, 124 S.Ct. 2140 (2004).

Thus, the provisions of §2254 (d)(1) require the federal courts to give great respect to the process provided by state courts, which are equally empowered to interpret and enforce the federal constitution, when determining whether to grant habeas corpus relief. See Sawyer v. Smith, 497 U.S. 227, 241, 110 S.Ct. 2822, rehearing denied, 497 U.S. 1051, 111 S.Ct. 17 (1990) (“State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution.”)

2. The Circuit Court Erred by Failing to Accept the Issue of “Next-friend” Standing, to the Extent it Rests on a Factual Finding of Ross’s Competence, Is Also Subject to the Presumption of Correctness

The court of appeals agreed with the District Court that it had to hold an independent hearing on the fact of competence to determine its own jurisdiction and only then would it be bound by § 2254. This is fundamental error.

This Circuit Court and district must credit the state court’s determination that Michael Ross is competent because a “state court’s determinations on the merits of a factual issue are entitled to a presumption of correctness on federal habeas review.” *Demosthenes v. Baal*, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam). This presumption of correctness applies to a “state court’s conclusion regarding a defendant’s competency. . . .” *Demosthenes*, 495 U.S. at 735, 110 S.Ct. at 2225, citing *Maggio v. Fulford*, 462 U.S. 111, 117 (1983). See also *Francis S. v. Stone*, 221 F.3d 100, 114 (2d Cir. 2000) (issue of competence to stand trial “has generally been held to be an issue of fact, entitled to deference by a federal habeas corpus court”).

Demosthenes, in which the United States Supreme Court held that competence was an issue of fact and that the state court findings were to be presumed correct, was decided in 1990 under 28 U.S.C § 2254(d)(8) which provided that “a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless the applicant shall establish or it shall appear, or the respondent shall admit” or “the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.” That statute is the precursor of the present 28 U.S.C. § 2254(e)(1) which provides that “[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting

the presumption of correctness by clear and convincing evidence.” Thus, the quantum of evidence necessary to rebut the presumption actually has increased. At the time that *Demosthenes* was decided, an individual could overcome the presumption by showing that the factual finding was “not fairly supported by the record.” Now, to invalidate the presumption, he must present “clear and convincing evidence” that the state court finding is erroneous. Thus, in these proceedings under § 2254, the state court’s finding that Ross is competent is presumed correct. Subsumed in that finding is that, per *Demosthenes*, the public defenders failed to provide meaningful evidence to alter or cast doubt on the issue of competency.

It in its decision, the circuit court indicated that the district court must decide for itself whether the *Whitmore* standards are satisfied. Circuit Court Slip Opinion p. 2 line 12-31; p. 3 lines 1-13. The court went on to declare that the district court would be bound to § 2254 only *after* that finding. The circuit court acted as if the Connecticut Supreme Court’s finding of competency—a finding also made by another federal district court—did not exist and federal court start from scratch.

As in *Demosthenes*, if federal jurisdiction to entertain a federal habeas corpus action is bound a factual finding of the prisoner’s competency, the federal court must afford that finding a presumption of correctness. There is no separate and independent federal hearing unless the criteria of § 2254 are met, a subject not even addressed by the circuit court.

3. The state court reasonably applied federal law, as determined by the United States Supreme Court, and therefore, the stay should be vacated

The state courts, both Judge Clifford in the trial court, and the Connecticut Supreme Court on review, properly and reasonably applied United States Supreme Court precedent governing the procedure for determining whether a third party may have "next friend" standing. Both levels of the state court cited and properly applied *Ford v. Wainwright*, 477 U.S. 399 (1986) (hearing necessary

to satisfy Ross's due process rights), *Demosthenes v. Baal*, 495 U.S. 731 (1990) (requiring meaningful new evidence for third party to be entitled to hearing on competence) and *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (requirements of "next friend" standing). The District Court cited two grounds for concluding that it was not bound by those legal conclusions: first, the proceedings below were "quite irregular" and the Supreme Court could not cure any deficiency by permitting the public defenders to submit an offer of proof to that Court; and second, the District Court distinguished *Demosthenes*, concluding that this case involved "meaningful new evidence" of incompetence that met the *Demosthenes* standard whereas the evidence proffered by the purported next friend in *Demosthenes* did not. First, the District Court incorrectly concluded that the precedent of this Court prohibits an appellate court to correct what it perceived as a mistake of a trial court. This Court, in *Gilmore v. Utah*, 429 U.S. 1012 (1976), did permit independent inquiry by an appellate court to enhance trial court rulings with respect to "next friend" standing.

[T]he Utah Supreme Court held a hearing on the Utah Attorney General's motion to vacate a stay of execution of sentence entered two days earlier by that court. Gilmore was present, and, in response to questions from several justices, stated that he thought he had received a fair trial and a proper sentence, that he opposed any appeal in the case, and that he wished to withdraw an appeal previously filed without his consent by appointed trial counsel.

Id. at 1015. The United States Supreme Court relied, in part, on this interaction in the state's highest court to reject Bessie Gilmore's claim of standing. If this type of procedure in a state's highest Court is reliable enough for the United State's Supreme Court to reject "next friend" standing, then it follows that the District Court has no authority to rule differently. Moreover, in *Bell v. Cone*, this court explicitly held that a state appellate court's ruling can correct any constitutional defect in the proceeding below. (slip op. at 1, January 24, 2005) (reversing Sixth Circuit Court of Appeals, which had concluded that Tennessee aggravating factor was unconstitutionally vague and that state supreme court's review, which applied a narrowed constitutional definition, could not cure consti-

tutional defect; holding that Tennessee Supreme Court could correct the alleged constitutional defect). The Connecticut Supreme Court applied *Demosthenes*, thus its procedure was not flawed and was entitled to the presumption of correctness.

As to the second point, both the District Court and the Second Circuit Court of Appeals appear to conclude that a federal court must determine whether it has jurisdiction, and to do that, it must make a de novo determination of standing and Ross's competence. Only then, reasons the Second Circuit, does a federal court have the obligation to apply the deference mandated by 28 U.S.C. 2254. This is wrong. The habeas petition only alleges that the state court improperly denied the petitioners next friend standing. There are allegations in the petition addressing Ross's convictions or sentences. Thus, the state court conclusions regarding competence are the only state court rulings implicated in the petition to which deference may be accorded.

4. The District Court erred when it did not defer to the reasonable determination of facts by the state courts as required by 28 U.S.C. § 2254(d)(2).

Every state court that has examined the issue has determined that Ross is competent to choose to forgo further appeals. The Connecticut Supreme Court adhered to this determination after review of the offer of proof of Dr. Grassian's testimony. The District Court explicitly acknowledged that the record supported that determination, but that the testimony of Dr. Grassian in the District Court had undermined that finding. The District Court stated:

When I read the transcripts of the hearings, including the statements of Mr. Ross, I felt strongly that he was competent and I could well understand why the people who have looked into it have come to that conclusion, but I think it is important now that we have the benefit of Dr. Grassian's testimony to recognize, as he said, that the comfort level one gets looking at Mr. Ross and listening to him may be ill founded. In fact, the certitude that one can feel about his competence based on the canvass of him, regardless of everything else, may be mistaken. The very fact that one has that sense of confidence may be, as Dr. Grassian says, a red flag.

T.1/24/05 at 85-86. The District Court erred. Disturbances to its "comfort level" simply do not reach the high standard of a determination that the state court's were unreasonable. The Connecticut Supreme Court reasonably determined from the facts before it, which included the summary of Dr. Grassian's testimony, that Ross was competent. The stay should be vacated.

B. The District Court Failed to Presume Correct the Factual Findings of Competence Made by the State Courts

1. Standard of review under 28 U.S.C. § 2254(e)(1)

The standard governing review of factual findings of state courts by federal habeas courts is set forth in 28 U.S.C. § 2254(e)(1).

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). Thus, in habeas corpus proceedings under 28 U.S.C. § 2254, the state court's factual determinations are entitled to a presumption of correctness. *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223 (1990). This presumption applies to the findings of state courts at both the trial and appellate levels. *Sumner v. Mata*, 449 U.S. 539, 546-47, 101 S.Ct. 764 (1981). Chief Public Defender Smyth had "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). He sought to file a federal habeas corpus petition on behalf of Ross as his "next friend," but is entitled to "next friend" status only if he can establish that Ross is incompetent. *Whitmore v. Arkansas*, 495 U.S. 149, 165, 110 S.Ct. 1717 (1990). This Court has "held that a state court's conclusion regarding a defendant's competency is entitled to such a presumption. *Maggio v. Fulford*, 462 U.S. 111, 117 (1983)." *Demosthenes v. Baal*, 495 U.S. at 735.

2. The District Court failed to accord the mandated presumption of correctness to the state court factual findings

The District Court failed to accord the presumption of correctness due to state court findings of competence and that the evidence proffered by the public defenders did not constitute meaningful new evidence under *Demosthenes*. Here, Smyth fell far short of meeting this burden, and therefore, the District Court erred in granting the stay. Every court that has addressed the issue of Michael Ross's competence – Judge Clifford in the state trial court, Judge Fuger in the state habeas court, Judge Droney in the federal district court on Dan Ross's 1983 action, and the Connecticut Supreme Court on review of Judge Clifford's ruling – found that the public defenders lacked standing to litigate on behalf of Michael Ross. Most importantly, despite their repeated failures to proffer any evidence of Ross's incompetence, the Connecticut Supreme Court gave them yet another chance to do so by way of a written offer of proof. That proffer included Dr. Grassian's expert opinion about Michael Ross's competence and the testimony of the public defenders that was put before Judge Chatigny. The Connecticut Supreme Court then held, applying this Court's controlling precedent, that the public defenders failed to make the requisite showing of “meaningful evidence” of incompetence in order to allow them to participate in an evidentiary hearing to establish standing. *Whitmore v. Arkansas*, 495 U.S. 149, 157, 163, 166 (1990), *Demosthenes v. Baal*, 495 U.S. 731 (1990). It also determined that the hearing accorded by the state trial courts, plus the supplemental offer of proof granted by that Court, afforded the public defenders the opportunity to present whatever evidence they had of Ross's competence. This was a reasonable application of *Ford* and *Demosthenes* and thus was entitled to the presumption of correctness.

In its opinion, the District Court asserted that it was not bound by the state court findings because the state court had relied on the opinion of Dr. Norko, which did not address the issues raised by Dr. Grassian, and the observations of Ross by the several trial courts, which could not

assess Dr. Grassian's opinion that Ross could "malingering good." Opinion at 6-7. Pursuant to 28 U.S.C. § 2254(d)(2), however, the district court can look solely to the record before the state Supreme Court. Thus, the District Court failed to take into account that the Connecticut Supreme Court was aware of Dr. Grassian's opinions because the public defenders' proffer contained them. In its finding that Dr. Grassian did not provide "meaningful evidence," the Connecticut Supreme Court reviewed several facts that contradicted Grassian's theory about Ross's possible impairment. *State v. Ross*, slip opinion at 15-16. Grassian's theory is based on the effect of isolation on Ross's will. Rather than isolation, Ross has "frequent visitors" and "corresponds with numerous people." *Id.* Dr. Grassian also set forth several distinct conditions Ross should be exhibiting from his alleged isolation. Dr. Norko found, however, that "although the defendant occasionally suffered from some of the symptoms listed by Grassian, (anxiety and depression) he generally slept well, had a normal appetite and a good energy level, was able to concentrate and process thoughts, had no memory disturbances and expressed no suicidal thoughts." *Id.* In other words, the state Supreme Court considered the possible manners in which living on death row could affect a prisoner according to Dr. Grassian's theory and found that they did not apply to Ross. The state court's conclusion that the proffer did not place Ross's competence in doubt was entitled to the presumption of correctness.

A correct application of the presumption of correctness should have resulted in the same conclusion this Court reached in *Demosthenes*. There was no jurisdiction for the federal court to exercise its power. "A grant of a stay is an exercise of judicial power, and [this court is] not authorized to exercise such power on behalf of a party who has not first established standing." *Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993). Because the Supreme Court's decision that Ross is competent is reasonable under the proper standards, Smyth "lacks next friend standing, [and] [this district

court] lack[ed] jurisdiction to issue a stay.” *Dennis ex rel. Butko v Budge*, 378 F.2d 880, 895 (9th Cir. 2004).

C. The Chief Public Defender Was Not Entitled to the Equitable Remedy of a Stay of Ross's Execution

The District Court erred in determining that Chief Public Defender Smyth is entitled to the equitable remedy of a stay of Ross's execution. It ruled that the effort to timely bring to the state courts any evidence that Ross was not competent "reasonable in the circumstances." Opinion at 9. This finding directly contradicts the finding of the Connecticut Supreme Court that "[u]pon careful review of the record, we believe that the [public defenders] had numerous opportunities to present evidence in support of its claim and failed to do so." *State v. Ross*, slip op. at 31. The Supreme Court finding is presumed correct and District Court be overturned.

“Whether his claim is framed as a habeas petition or as a §1983, [Chief Public Defender Smyth] seeks an equitable remedy.” *Gomez v. United States Dist. Court*, 503 U.S. 653, 653-54, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (*per curiam*). When a district court is considering whether to grant a stay under 28 U.S.C. § 2251 it must apply the following four-part test:

[W]hether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is granted, whether the stay would substantially harm other parties, and whether granting the stay would be in the public interest.

Bundy v. Wainwright, 808 F.2d 1410, 1421 (11th Cir. 1987); *cf.*, *Barefoot v. Estelle*, 463 U.S. 880, 895-896 (1983); *accord Rostker v. Goldberg*, 448 U.S. 1306, 1308, 101 S.Ct. 1, 2, (1980) (in chambers, Brennan, J.) (including as factor that "in a close case it may be appropriate to 'balance the equities' – to explore the relative harms to the applicant and respondent, as well as the interest of the public at large").

A stay is an equitable remedy, and "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and ... attempt[s] at manipulation." *Ibid.* Thus, before granting a stay, a district court must consider not only the likeli-

hood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim. Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

(Internal citations omitted). *Nelson v. Campbell*, 124 S.Ct. 2117, 2126 (2004) (1983 action); *see also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654, 112 S.Ct. 1652 (1992) (per curiam) (The Court "may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). When Chief Public Defender Smyth's claims are reviewed in light of these standards, it is clear he has not made the requisite showing to stay Ross's execution.

First, the District Court erred in failing to determine whether there is a likelihood of success on the merits of the issue of competence.⁶ It simply decided that it wanted to conduct the inquiry itself.

Second, Chief Public Defender Smyth claims that he satisfies the irreparable harm factor. Although the "irreparable harm" factor is satisfied in every death penalty case, that factor is manifestly not dispositive. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985). If it were, a stay would be granted in every capital case. There is also at stake a valid final judgment of the Connecticut Supreme Court after twenty years of litigation and four appeals, two dealing with the substance of the case. *See Brooks v. Estelle*, 459 U.S. 1061, 1061-62 (1982). As the Connecticut Supreme Court affirmed in its slip opinion, also at stake is Ross's constitutional right to decide his own fate; *Vega v. Stamford Hospital*, 236 Conn. 646 (1996); his constitutional right to counsel of choice; *State v. Peeler*, 265 Conn. 460 (2004); and his right as a citizen not to have litigation foisted

⁶The District Court does not appear to have addressed the § 1983 claim raised in the petition for habeas corpus.

upon him by a former lawyer that intrudes on those interests. *Burton v. Motolese*, 267 Conn. 1 (2004) (upholding disbarment of lawyer who filed pleadings contrary to client's wishes and continued to represent client after attorney-client relationship terminated); *Lenhard v. Wolff*, 443 U.S. 1306 (1979), *stay vacated*, 444 U.S. 807 (1979) ("[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Id.* at 1306). "The state, the victim's family and the defendant [who is opposed to any further actions being filed] are entitled to a disposition of this [matter] now." *State v. Cobb*, 251 Conn. 285, 500 (1999).

The Connecticut Supreme Court ruled in dismissing the public defenders' writ of error that "[u]pon careful review of the record, we believe that the [public defenders] had numerous opportunities to present evidence in support of its claim and failed to do so." *State v. Ross*, slip op. at 31. The Connecticut Supreme Court's finding that the public defenders were dilatory must also be afforded a presumption of correctness. The evidence supporting that finding includes that the public defenders knew since July of 2004 that they were going to be replaced by Attorney Paulding who would assist Ross in forgoing further appeals. Thus, they had months to prepare to respond to Ross's decision to accept a sentencing date at the October 6 hearing. Nevertheless, no representative of the public defenders office appeared at that hearing or filed any documents to: 1) contest Ross' decision to select new counsel, 2) challenge his competence to do so, or 3) challenge his competence to forego any further appeals. During the summer of 2004, the public defender's office never gave the slightest inkling that Michael Ross was incompetent. Indeed, the Court must presume that by filing a motion for reconsideration in July, the petitioners believed Ross competent at that time. They certainly had a duty to report otherwise. Rules of Professional Conduct Rule 1-14 (b).

The record also reflects that the public defenders met with Ross several times to show him drafts of a petition for a writ of certiorari to the United States Supreme Court. Presumably, they would not have met with him repeatedly to discuss appellate strategy if they believed he was no longer competent as required by General Statutes § 54-56d. It was only after Ross refused to authorize the petition to the Supreme Court and to sign the affidavit that he was indigent, that they asserted their opinion that Ross suddenly had become incompetent. That claim was not asserted until December 1, 2004, and then, on “information and belief” rather than substance. On December 9, public defender Karen Goodrow was asked to provide information to Judge Clifford that Ross was incompetent. She declined. Instead, a representative of the Chief Public Defenders office stated that once their motions to intervene were docketed they would “prepare and present” their evidence on competency. T. 12/9/04 at 61-62.

Moreover, at the December 15 hearing, the trial court recommended that the public defenders provide Attorney Paulding with any information in their possession suggesting Ross is incompetent so it could be investigated prior to the December 28 hearing. They chose, instead, to ignore counsel of choice and to continue to impose themselves in the process. In addition, at the state habeas hearing before Judge Fuger, the public defenders were told that the time had come to present what evidence they had of Ross's incompetence. They made an oral proffer similar to that conveyed in response to the Connecticut Supreme Court's order in the proceedings on the writ of error. Indeed, it took an order from the Connecticut Supreme Court to pry an offer of proof from the public defenders on January 10, 2005. That offer contained information that was available before October 6, with much of the correspondence dated years ago.

D. The Dilatory Practices of the of Public Defenders, as Found by the State Supreme Court Foreclose Them from Having a Hearing on Competency in Federal Court

When the findings that the public defenders were responsible for the delay in providing their offer of proof to the Connecticut Courts is afforded the presumption of correctness, they then are then foreclosed from obtaining a new hearing in federal court. 2254 (e)(2).

The state court finding and the facts detailed above should be afforded great deference because the state Supreme Court is responsible for supervising proceedings therein. That determination is really a matter, therefore, of state law that cannot be overlooked because the district court disagrees.

The District Court failed to accord the presumption of correctness to the Connecticut Supreme Court finding that the public defenders were dilatory despite the fact that the testimony before it of Dr. Grassian also supported that finding. Dr. Grassian testified that he was contacted by the public defenders in October of 2004, and was told to do nothing. It was not until December 2004 that the public defenders gave him a box of materials to review; that box was comprised of the documents submitted to the Connecticut Supreme Court in offer of proof of the public defenders.

CONCLUSION

The Second Circuit's stay order of January 25, 2005 must be vacated.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this document complies with the requirements of Practice Book § 66-3, and that a copy was emailed on January 26, 2005 to, John Holdridge, Assistant Public Defender, Office of the Chief Public Defender, 30 Trinity Street, 4th Floor, Hartford, CT 06106, Telephone No. (860) 509-6418, Fax No. (860) 509-6497, Lauren Weisfeld, Senior Assistant Public Defender, Office of the Chief Public Defender, 2911 Dixwell Avenue, 4th Floor, Hamden, CT 06518, Telephone No. (203) 867-6150, Fax No. (203) 867-6157, T.R. Paulding, Jr., Esq., 400 Hebron Avenue, Glastonbury, CT 06320, Telephone No. (860) 659-9300, Fax No. (860) 659-9301, Hubert J. Santos, Esq., Hope Seeley, Esq., both of Santos & Seeley, P.C., 51 Russ Street, Hartford, CT 06106, Telephone No. (860) 249-6548, Fax No. (860) 724-5533 and to Patrick J. Culligan, Chief of Capital Defense and Trial Services, Office of the Chief Public Defender, 30 Trinity Street, 4th Floor, Hartford, CT 06106, Telephone No. (860) 509-6418, Fax No. (860) 509-6497.

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