RECENT CASES

HABEAS CORPUS — VOLUNTARY WAIVER — FIFTH CIRCUIT DECLINES TO PERMIT REINSTATEMENT OF WAIVED HABEAS APPEAL. — *Wilcher v. Epps*, No. 06-70043, 2006 WL 2986476 (5th Cir. Oct. 17, 2006), *cert. denied*, 127 S. Ct. 466 (2006).

When a death row inmate voluntarily ends his habeas proceeding and then changes his mind, what is the standard by which a court should determine whether to reinstate his appeal? The Supreme Court has never considered this question, and the federal courts of appeals and state courts have answered in widely divergent fashion. Recently, in *Wilcher v. Epps*,[1] the Fifth Circuit handed down a ruling more restrictive of a petitioner's ability to reinstate than that of any other circuit. The court affirmed the district court's holding that a petitioner who changed his mind did not present a compelling enough reason to reopen the appeals process.[2] In so doing, the Fifth Circuit left lower courts with vast discretion and little guidance with respect to the exercise of that discretion; that is, it failed to provide a rule or rubric to weigh the interests that factor into a decision to reinstate. Moreover, the federal judiciary as a whole needs a unifying procedural rule on reinstating appeals. To ensure proper consideration of capital petitioners' and society's interests, courts should adopt a bright-line rule that, absent a clear showing of manipulative intent, a petitioner who seeks for the first time to reinstate his appeal must be permitted to do so, and that subsequent post-waiver reinstatements remain discretionary.

On March 6, 1982, Bobby Glen Wilcher robbed and murdered Velma Odell Noblin and Katie Bell Moore in Scott County, Mississippi.[3] Wilcher was convicted of two counts of capital murder and sentenced to death on both counts.[4] On direct appeal, the Mississippi Supreme Court affirmed the convictions and the sentences.[5] The Fifth Circuit subsequently found one of the jury instructions at the sentencing proceedings to be unconstitutionally vague, requiring resentencing.[6] In both cases, Wilcher was again condemned to death, and his sentences were affirmed on appeal.[7] The Mississippi Supreme Court

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[1] No. 06-70043, 2006 WL 2986476 (5th Cir. Oct. 17, 2006), *cert. denied*, 127 S. Ct. 466 (2006).

[2] *See id.* at *3.

[3] Wilcher v. State, 697 So. 2d 1087, 1091 (Miss. 1997) (en banc).

[4] *See* Wilcher v. Epps, No. 3:98-CV-236WS, 2006 WL 1674300, at *1 (S.D. Miss. June 14, 2006).

[5] Wilcher v. State, 455 So. 2d 727, 737 (Miss. 1984) (en banc) (Moore case); Wilcher v. State, 448 So. 2d 927, 929 (Miss. 1984) (en banc) (Noblin case).

[6] Wilcher v. Hargett, 978 F.2d 872, 879 (5th Cir. 1992).

[7] Wilcher v. State, 697 So. 2d 1123, 1140 (Miss. 1997) (en banc) (Moore case); *Wilcher,* 697 So. 2d 1087, 1113 (Miss. 2003) (en banc) (Noblin case).

denied post-conviction relief,[8] and Wilcher filed federal habeas petitions in the U.S. District Court for the Southern District of Mississippi.[9] On May 24, 2006, Wilcher filed a pro se motion to drop his appeals.[10] In June, while his lead attorney was abroad,[11] the district court conducted a hearing and granted Wilcher's request, finding him competent to waive his appeals.[12] Against his client's wishes, Wilcher's attorney then applied for a Certificate of Appealability (COA) to appeal the dismissal.[13] On July 7, four days before he was to be executed and while the appeal was pending, Wilcher signed an affidavit that he did in fact want to pursue his appeals and moved to reinstate his federal habeas proceeding.[14]

The Fifth Circuit denied the COA application and dismissed Wilcher's motion to reinstate his appeals.[15] The court found that Wilcher's attorney had "filed no motion . . . for authority to 'withdraw' Wilcher's *pro se* motion that was filed in and granted by the district court" and had cited no precedent to support vacating the order ending the appeal.[16] Moreover, the court wrote, "[t]his sudden about-face strikes us as nothing more than an Eleventh-hour death row plea for mercy finally elicited from Wilcher by Counsel."[17] On July 11, the U.S. Supreme Court intervened twenty-six minutes before Wilcher was to be executed and granted a stay later that day,[18] but on October 2, the Court denied certiorari.[19] With his newly set execution date of Oc-

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[8] Wilcher v. State, 863 So. 2d 776, 836 (Miss. 2003) (en banc) (Noblin case); Wilcher v. State, 863 So. 2d 719, 776 (Miss. 2003) (en banc) (Moore case).

[9] *Wilcher*, 2006 WL 1674300, at *2.

[10] *Id.* at *1.

[11] An attorney who worked for Wilcher's counsel's law firm appeared at the hearing. Wilcher v. Epps, No. 3:98-CV-236WS, 2006 WL 1766718, at *1 (S.D. Miss. June 23, 2006).

[12] *Wilcher*, 2006 WL 1674300, at *2–3. On his own initiative, Wilcher's lawyer filed a motion to reinstate the stay of execution, which the court denied on June 23. *Wilcher*, 2006 WL 1766718, at *5. The court concluded that "[Wilcher] has reminded his attorneys that he, not they, should be the ultimate decision-maker as to these matters . . . . This court agrees with Wilcher that this call is his to make." *Id.* On June 30, the district court denied counsel's further motion to set aside the June 14 and June 23 rulings, holding that Wilcher's lawyer had no standing to appeal for him. Wilcher v. Epps, No. 3:98-CV-236WS, 2006 WL 1851270, at *1 (S.D. Miss. June 30, 2006).

[13] Wilcher v. Anderson, 188 F. App'x 279, 280 (5th Cir. 2006) (per curiam).

[14] *Id.* at 280.

[15] *Id.* at 281.

[16] *Id.* at 280.

[17] *Id.*

[18] *See* Wilcher v. Epps, 127 S. Ct. 9, 9 (2006) (mem.); Sid Salter, Sara McAdory & Jimmie Gates, *High Court Halts Wilcher Execution, Stay Granted*, CLARION-LEDGER (Jackson, Miss.), July 12, 2006, at 2A. The Court voted six to three to stay the execution, with Chief Justice Roberts and Justices Scalia and Alito voting to deny the application. *Wilcher*, 127 S. Ct. at 9.

[19] Wilcher v. Epps, 127 S. Ct. 214, 214 (2006) (mem.). As a consequence of the denial of certiorari, the stay was automatically lifted. *See Wilcher*, 127 S. Ct. at 9.

tober 18 approaching, Wilcher filed a motion in federal district court to reinstate his habeas petition.[20]

The U.S. District Court for the Southern District of Mississippi denied the motion.[21] Wilcher had argued that the court should reinstate his appeals through its authority under Federal Rule of Civil Procedure 60(b)(6) and that not doing so would require it to "adopt a rule that a first-time decision to waive appeals is irrevocable."[22] The court explained that nothing in the rule requires reinstatement when "the defendant simply has changed his mind."[23] Rather, Rule 60(b)(6) gives courts the discretion to reinstate only under "extraordinary" circumstances, and the defendant "bears the burden of demonstrating . . . [that he] warrant[s] relief."[24] Such relief depends on "the circumstances of each case,"[25] and here, Wilcher had provided no "*moving*, valid reason"[26] for relief.

The Fifth Circuit affirmed the next day. Writing for the court, Chief Judge Jones[27] explained that the denial of a motion based on Rule 60(b)(6) is reviewed for abuse of discretion.[28] She detected none in the district court's finding that Wilcher "failed to demonstrate that a motion to withdraw a voluntarily dismissed habeas petition qualified as an 'extraordinary circumstance.'"[29] Finally, the court hinted at a rule for the application of Rule 60(b)(6) to post-waiver motions to reinstate habeas proceedings: to receive such relief, a petitioner would have to demonstrate, first, that "he deserved a chance to revive his habeas petition," and second, that he "ha[d] a meritorious claim for relief."[30] After the Fifth Circuit affirmed the refusal to reinstate, the Supreme Court denied the application for stay and denied certiorari.[31]

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[20] Emergency Motion To Reinstate Petition for Writ of Habeas Corpus, To Withdraw Petitioner's Pro Se Motion, and To Reinstate Stay of Execution at 1, Wilcher v. Epps (No. 3:98-CV-236WS), 2006 WL 2973054 (S.D. Miss. Oct. 16, 2006) [hereinafter Emergency Motion].

[21] Wilcher v. Epps, No. 3:98-CV-236WS, 2006 WL 2973054, at *5 (S.D. Miss. Oct. 16, 2006).

[22] Emergency Motion, *supra* note 20, at 6. Rule 60(b) provides criteria by which, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding." FED. R. CIV. P. 60(b). The Rule (60)(b)(6) criterion includes "any other reason justifying relief from the operation of the judgment." *Id.* at 60(b)(6).

[23] *Wilcher*, 2006 WL 2973054, at *4.

[24] *Id.* at *5.

[25] *Id.* at *4.

[26] *Id.* at *3.

[27] Chief Judge Jones's opinion was joined by Judges Smith and DeMoss.

[28] *Wilcher*, 2006 WL 2986476, at *2.

[29] *Id.* Judge Jones also suggested that the district court could have viewed Wilcher's motion to reinstate as a successive habeas petition under 28 U.S.C. § 2244(b). *Id.* at *3. In that case, however, his motion would be barred for failure to raise the issue on appeal or for failure to meet the statute's filing requirements. *Id.*

[30] *Id.* at *4 n.5.

[31] Wilcher v. Epps, 127 S. Ct. 466, 466 (2006) (mem.).

The State of Mississippi executed Bobby Wilcher on October 18, 2006.[32]

The Fifth Circuit missed the opportunity to lay down a general rule for assessing motions to reinstate voluntarily waived appeals, leaving lower courts with insufficient guidance on how to exercise their discretion.[33] Given the policy rationales for and against reinstatement, the federal judiciary should adopt a bright-line rule that, absent a clear showing of manipulative intent, a petitioner's motion to reinstate his appeal after waiving it once must be granted and that subsequent post-waiver reinstatement lies in the court's discretion. This rule would protect against unconstitutional execution, respect the petitioner's choice, and serve the public's interest in the reliability of capital punishment, while guarding against the specter of intentional delay.

As the *Wilcher* court understood, post-waiver motions to reinstate appeals lie almost wholly in the discretion of trial judges, but how should judges exercise that discretion? Should they allow petitioners to reinstate at all? Compelling policy interests weigh both for and against permissiveness. The principle of respecting individual choice counsels in favor of allowing a petitioner to change his mind about a voluntary motion. As an initial waiver is predicated on a showing of voluntariness and awareness of consequences,[34] a subsequent voluntary choice should be afforded similar weight. Moreover, ambivalence among death-row inmates with regard to waiver is not necessarily unusual.[35] Particularly with respect to inmates who have demonstrated past indecisiveness, courts might have an additional reason to defer to a subsequent choice.[36]

Most rights of criminal defendants, however, may not be recovered once waived. A defendant who waives his right to trial — a right arguably more important than the statutory right to appeal, given that it guards the gateway between liberty and incarceration — may not

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[32] *See* Jimmie E. Gates, *11 Mins. Conclude 24-Year Ordeal*, CLARION-LEDGER (Jackson, Miss.), Oct. 19, 2006, at 1A.

[33] Indeed, the court went out of its way not to provide a rule, instead choosing not to publish the opinion and designating it as nonprecedential. *Wilcher*, 2006 WL 2986478, at *4 n.*.

[34] *See* Whitmore v. Arkansas, 495 U.S. 149, 165 (1990) (describing knowing, intelligent, and voluntary waiver of right to appeal).

[35] For example, one defense attorney reports that "a majority of those on death row have at some point" expressed "a clear preference for the death penalty over life imprisonment" but that most capital defendants he represented "eventually change[d] their minds." Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855 (1987).

[36] Wilcher's subsequent choice was unequivocal: "Upon further reflection, I now wish to . . . proceed with all appeals and other remedies available to me under the law. I do not want to be executed, and I have instructed my attorneys to do everything in their power to help me avoid execution." Affidavit of Bobby Wilcher at 1, Wilcher v. Anderson, 188 F. App'x 279 (5th Cir. July 10, 2006) (No. 3:98-CV-236WS).

withdraw his guilty plea once sentenced.[37] This restriction is based partly on the concern that defendants could throw court dockets into disorder: they might repeatedly start, stop, and restart their trials to stave off ultimate punishment. This same concern applies to waiver and reinstatement of capital habeas proceedings; indeed, Wilcher's habeas judge, in rejecting the reinstatement request, explained that "[t]he courts cannot be held hostage to the whim, the vacillation of a death-row inmate."[38] The restriction, then, serves the interest in finality: prohibiting defendants from retracting their waivers helps courts manage their dockets and secures closure in criminal cases. These interests are important in capital cases, which can drag on for years.[39]

Countering these interests, however, is the widely recognized idea that the death penalty is "qualitatively different from a sentence of imprisonment, however long."[40] Because "execution is the most irremediable and unfathomable of penalties,"[41] the Eighth Amendment "gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."[42] Moreover, capital cases appear to be infected with bias or procedural error more than other criminal cases.[43] Reviewing courts thus recognize a heightened public interest in reliability and the perception of legitimacy,[44] as well as a reason to believe those interests are underserved, in death

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[37] FED R. CRIM. P. 11(e).

[38] Wilcher v. Epps, No. 3:98-CV-236WS, 2006 WL 2973054, at *3 (S.D. Miss. Oct. 16, 2006). The judge explained the effects of reinstating previously waived appeals: "To so hold, the courts would permit death-row inmates to lengthen the appeal process, [to] delay th[e] execution and to frustrate justice. To so hold, the courts would open a window for death-row inmates to again and again force the courts to consider and reconsider issues of competency . . . ." *Id.*

[39] *See, e.g.*, Commonwealth v. Saranchak, 810 A.2d 1197, 1202 (Pa. 2002) (Castille, J., dissenting) ("The fact of a capital trial, and the delays inherent in capital cases[,] often prove extremely trying to the victim's family.").

[40] Woodson v. North Carolina, 428 U.S. 280, 305 (1976); *see also* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (noting that "death is different"). *But see* Murray v. Giarratano, 492 U.S. 1, 10 (1988) (holding that death is not so different as to require states to provide counsel in capital appeals); *Saranchak*, 810 A.2d at 1201 (Castille, J., dissenting) (noting that "there are philosophical reasons to question the notion that death should be deemed categorically different from other criminal sentences").

[41] Ford v. Wainwright, 477 U.S. 399, 411 (1986).

[42] Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363–64 (1977) (White, J., concurring in the judgment)); *Woodson*, 428 U.S. at 305.

[43] *See* ERIC M. FREEDMAN, HABEAS CORPUS (2001). Professor Freedman offers the following conclusions from his examination of habeas case law:

> In America today capital defendants systematically receive less due process than others. . . . [T]heir cases are more likely than those of defendants not facing execution to have been infected by distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion. For these reasons, the existence of a meaningful federal habeas corpus remedy for state prisoners is especially important in death penalty cases . . . .

Id. at 147 (footnote omitted).

[44] *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 884–85 (1976).

cases. In addition, both victims' interest in closure and courts' interest in finality may be lesser in capital than in noncapital cases, at least insofar as the convictions themselves are not challenged and the proceedings "may stretch on for many years regardless."[45]

Giving differing weight to the policy arguments underlying reinstatement alternatives, courts have established disparate legal rules. A divided panel of the Ninth Circuit recently preempted the issue altogether in *Comer v. Schriro*,[46] barring death row inmates from withdrawing their appeals once they have initiated them. That court held that even though the petitioner's waiver was technically valid, "allowing a defendant to arbitrarily waive such review, once . . . the reviewing court has been presented with briefs that demonstrate the defendant's conviction or sentence may indeed be unconstitutional, violates the Eighth Amendment."[47] The New Jersey Supreme Court adopted the same rule ten years ago,[48] and Justice Marshall advanced the idea in a U.S. Supreme Court dissent in 1979.[49] This rule protects against administering the death penalty in inappropriate cases.[50] At the same time, it may violate an inmate's right to self-determination and compromise his ability to accept the sanction society has set upon him.[51]

In contrast, three circuits have allowed prisoners to abandon their appeals but also to resume them upon simple request. In *Smith v. Armontrout*,[52] when the defendant expressed his desire to end his appeal but his lawyer pursued it nonetheless, the Eighth Circuit dismissed the appeal. But the court emphasized that it "believes that Smith's petition . . . is not frivolous. If Smith changes his mind about pursuing his remedies, it is [our] intention to grant a certificate of probable cause and issue a stay . . . ."[53] The defendant did change his mind, and the court allowed him to reinstate his appeal.[54] In a case

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[45] Schriro v. Summerlin, 542 U.S. 348, 365 (2004) (Breyer, J., dissenting).

[46] 463 F.3d 934 (9th Cir. 2006), *reh'g en banc granted sub nom.* Comer v. Stewart, 471 F.3d 1359 (9th Cir. 2006).

[47] *Id.* at 949.

[48] *See* State v. Martini, 677 A.2d 1106, 1107 (N.J. 1996) ("[I]t is not the inmate . . . who determines when and whether the State shall execute a prisoner; rather, the law itself makes that determination. The public has an interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants."); *see also* State v. Reddish, 859 A.2d 1173, 1203 (N.J. 2004) ("We simply are not permitted to avert our eyes from the fairness of a proceeding in which a defendant has received the death sentence.").

[49] *See* Lenhard v. Wolff, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) ("Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver.").

[50] *See Comer*, 463 F.3d at 949, 959.

[51] *See* Evans v. Bennett, 440 U.S. 1301, 1305 (1979).

[52] 865 F.2d 1502 (8th Cir. 1988).

[53] *Id.* at 1507 n.6.

[54] *See* Smith v. Armontrout, 888 F.2d 530, 543 (8th Cir. 1989).

with similar facts, *St. Pierre v. Cowan*,[55] the Seventh Circuit explicitly followed the Eighth Circuit in taking a retraction "as the final word."[56] In fact, *St. Pierre* went beyond *Smith* by rejecting the petitioner's subsequent motion, after his retraction, to again waive the appeal. The court reasoned that when the prisoner "has flipped and flopped . . . to the point where it is practically impossible to know what his preferences are,"[57] taking up his retraction instead of a later waiver would make the proceedings "go forward more quickly and . . . conclude in a result recognized by all to be legitimate."[58] In 2004, the Third Circuit followed this spirit of permissiveness when it directed the lower court to reinstate a petitioner's appeal upon request.[59] This rule respects the defendant's choice, protects his interest in life, and serves society's interest in preventing unconstitutional executions. It does little, however, to address manipulation.

Less than two years ago, in *Pike v. State*,[60] Tennessee announced still a different rule. The state supreme court held that a petitioner who waives post-conviction review may revoke his waiver, but only within thirty days of the order granting that waiver.[61] The court also implied that this rule would apply solely to prisoners who had waived their rights to appeal only once before.[62] This rule is easy to administer and protects against manipulation by the defendant, but it is overly restrictive in a world in which death row inmates may miss the deadline due to psychiatric problems, lack effective counsel, or change their minds sincerely but too late.[63] Nor is it inconceivable that a prisoner would change his mind more than once, especially if he suffers from mental illness or emotional disturbance.

A better rule would modify the *Pike* holding: absent a clear showing of coercion by counsel or manipulative intent on the part of the petitioner, a court must grant any motion to reinstate appeals by a peti-

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55 217 F.3d 939 (7th Cir. 2000).

56 *Id.* at 950.

57 *Id.* at 940.

58 *Id.* at 950.

59 *See* United States v. Hammer, No. 04-9001, at *7–8 (3d Cir. June 3, 2004) (per curiam) (order granting motion for stay of execution). Pennsylvania's state judiciary has also allowed petitioners to reinstate their appeals after waiving them. *See* Commonwealth v. Saranchak, 810 A.2d 1197, 1200 (Pa. 2002).

60 164 S.W.3d 257 (Tenn. 2005).

61 *Id.* at 259.

62 *See id.* at 267 (emphasizing that the capital prisoner in this case "had not previously waived or attempted to waive post-conviction review").

63 *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 962–64 (2005); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 867 (2000); White, *supra* note 35, at 867, 871–72. *But cf.* Coleman v. Thompson, 501 U.S. 722, 752–57 (1991) (holding inmate's right to review was forfeited when lawyer missed filing deadline).

tioner who has waived review only once; subsequent post-waiver reinstatements remain discretionary.[64] This rule departs from *Pike* in three ways: first, the court may deny a motion to reinstate if the government can show the petitioner seeks to delay for delay's sake; second, there is no effective time limit on this privilege, so that sincere petitioners who realize their mistake, say, thirty-one days after waiving will not be denied process;[65] third, an appellate court may permit reinstatement after a second (or further) waiver when it finds such a ruling would serve the interests of the criminal justice system. Moreover, limiting the guarantee to first-time waivers reflects the judicial intuition that a petitioner who waives a second time likely is attempting to exploit the judicial process.[66]

The Fifth Circuit correctly recognized the broad discretion that lower courts have under Federal Rule of Civil Procedure 60(b)(6). With so much discretion and so little guidance, these courts could produce a body of federal post-waiver reinstatement jurisprudence that is inconsistent and overly dependent on subjective value judgments. By adopting a rule that would provide reinstatement as of right to petitioners who have waived their appeals only once, courts can minimize inconsistency and subjectivity while retaining the discretion envisioned by the Federal Rules. Had the Fifth Circuit applied this rule in October 2006, Bobby Wilcher — who "had spent 24 years pursuing relief, never before abandoning or expressing any intent to abandon his efforts"[67] — would have received a fair assessment of his post-conviction claims before facing the gravest and most irrevocable of punishments.

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[64] Amici supporting Wilcher's October 17 certiorari petition proffered this same formulation, though they also advanced "a limited period during which a petitioner may seek relief from the judgment" in order to "protect the interests of finality." Brief of Amicus Curiae Habeas Law Scholars David R. Dow et al. at 18, Wilcher v. Epps, 127 S. Ct. 466 (2006) (No. 06-7196 (06A389)) [hereinafter Brief of Amicus Curiae]. They continued, "[s]o long as a capital prisoner asks to 'change her mind' and reinstate her right to a habeas appeal before that right would have otherwise expired, permitting reinstatement would not, in fact, extend access to habeas proceedings beyond what is already allowed." *Id.*

[65] Conversely, one danger of the rule is that an inmate might change his mind only a few moments before he is to be executed. A solution could involve requiring the prisoner to file a motion with a court, rather than to simply complete an oral communication with the executioner, to take advantage of this rule. Another danger is that inmates may universally avail themselves of their single free waiver. Certain forces, however, may prevent this kind of unprovable manipulation: Lawyers who understand that capital defendants frequently have genuine changes of heart will advise their clients not to waste their automatic reinstatement. Prisoners who feel they have a legitimate claim for relief will want to pursue it, rather than prolong their stay on death row. Other prisoners might refrain from false waiver and reinvocation for fear of antagonizing the judges that will hear their claims. To the extent that strategic delaying does occur, the benefits of the rule may still outweigh the costs of that manipulation.

[66] *See* Wilcher v. Epps, No 3:98-CV-236WS, 2006 WL 2973054, at *3 (S.D. Miss. Oct. 16, 2006) ("[T]his could happen again. Wilcher again could demand to die . . . and the courts, again, would have to postpone the execution . . . ." (footnote omitted)).

[67] Brief of Amicus Curiae, *supra* note 64, at 7.