

*STATE V. ROBERT: WHY MITIGATION WAIVERS DURING  
CAPITAL SENTENCING UNDERMINE FUNDAMENTAL  
JUSTIFICATIONS OF PUNISHMENT*

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On October 15, 2012, at 10:24 PM, South Dakota death row inmate Eric Robert was pronounced dead.<sup>1</sup> Only eighteen months earlier, Robert was serving an eighty-year sentence for kidnapping.<sup>2</sup> During this brief period, Robert murdered a sixty-two year old corrections officer during a failed two-man escape from the South Dakota State Penitentiary, pled guilty to first-degree murder, received a death sentence for his crime, and was ultimately executed by lethal injection.

Robert's execution signified a relatively rare phenomenon in South Dakota. Since reinstating the death penalty in 1933, the state has carried out only four executions,<sup>3</sup> and as of November 2012, there were only three inmates sitting on the state's death row.<sup>4</sup> Even more unusual than the sentence itself, however, was the speed with which the state acted to carry it out, given that the average death row inmate in the United States typically spends over a decade on death row.<sup>5</sup> By contrast, Robert spent less than a year on death row and was executed in 2012 for a murder committed in 2011, a time frame that comes close to a modern<sup>6</sup> death penalty efficiency record.<sup>7</sup> Amidst heightened concerns regarding the efficacy and fairness of the death penalty as punishment as well as the growing backlog of inmates waiting on death row, why did Eric Robert receive such swift justice? The reason is simple: Robert demanded to be put to death.

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\* J.D., Georgetown University Law Center, May 2013; B.A., University of Pennsylvania, 2008. I would like to thank the editors and staff of the ACLR for all of their hard work and valued input on this Note, as well as Professor Silas Wasserstrom for his guidance and encouragement. © 2014, Adam L. Dulberg.

1. David Bailey, *South Dakota Executes Man Who Killed Guard in Escape Attempt*, REUTERS (Oct. 16, 2012, 2:21 AM), <http://www.reuters.com/article/2012/10/16/us-usa-southdakota-execution-idUSBRE89F08020121016>.

2. *Id.*

3. *See Frequent Questions*, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, <http://doc.sd.gov/about/faq/capitolpunishment.aspx> (last visited Jan. 10, 2014).

4. *Id.*

5. *Time on Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/time-death-row> (last visited Jan. 10, 2014).

6. *See infra* notes 97–104 and accompanying text.

7. Gary Gilmore was executed on January 17, 1977, just five months after the crime and two months after the death sentence was reimposed. *See Gilmore v. Utah*, 429 U.S. 1012 (1976).

The concept of death penalty “volunteering,”<sup>8</sup> whereby a defendant consents to his own execution, is not entirely uncommon.<sup>9</sup> Since the reinstatement of the death penalty in 1976, 141 inmates have volunteered to be executed by waiving at least part of their ordinary appeals at the time of their execution.<sup>10</sup> What distinguished Robert from most death penalty volunteers, however, was his resolute determination to receive the death penalty *before* receiving his sentence. Prior to waiving all of his post-sentencing appeals and challenging the legality of a state-mandated appellate review of his sentence in order to expedite his death, Robert first instructed his counsel not to present any mitigating evidence on his behalf during the pre-sentencing hearing. He then subsequently asked the judge directly to sentence him to death.<sup>11</sup> Robert was well aware that his mitigation waiver would almost certainly guarantee the death sentence he requested,<sup>12</sup> given that his crime clearly satisfied multiple aggravating factors provided in the state’s death penalty sentencing scheme.

While such a firm and calculated intent to be executed would typically raise red flags regarding the defendant’s competency, Robert’s waiver was deemed knowing and voluntary in part due to his thoughtful, retributivist justification for seeking a death sentence:

I do not want to die or desire to die, instead I deserve to die; this I have always stated . . . .<sup>13</sup> Victims of non-capital offenses receive their justice when the perpetrator is placed in custody. Victims in capital cases receive their justice when the perpetrator is executed . . . . I am free to admit my guilt, as well as acknowledge and accept society’s punishment just as I am free to proclaim innocence in defiance of a verdict. I believe that the sentence of death is justly deserved in any murder and should be carried out . . . . Give the Ron Johnson family their justice, they have been forced to wait too long. I finish where I started—I deserve to die.<sup>14</sup>

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8. See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 940 n.5 (2005).

9. In fact, the first inmate to be executed after the national death penalty moratorium was lifted in 1976, Gary Gilmore, is considered a death penalty volunteer. Gilmore waived all appeals and opposed all efforts, including those made by his mother, to intervene on his behalf and stay the execution. See *Gilmore*, 429 U.S. at 1019 (Marshall, J., dissenting).

10. The Death Penalty Information Center’s list of death penalty volunteers includes 141 people. *Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers,”* DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> (last visited Jan. 10, 2014).

11. *State v. Robert*, 820 N.W.2d 136, 140–41 (S.D. 2012).

12. See John Hult, *Death Penalty Called Incentive for Robert*, ARGUSLEADER.COM (Oct. 20, 2012), [http://www.argusleader.com/article/20121021/NEWS/310210035/Death-penalty-called-incentive-Robert?nclick\\_check=1](http://www.argusleader.com/article/20121021/NEWS/310210035/Death-penalty-called-incentive-Robert?nclick_check=1).

13. *Eric Robert Writes Letter to AG Marty Jackley*, KDLT NEWS (Oct. 16, 2012, 9:21 PM), [http://www.kdlt.com/index.php?option=com\\_content&task=view&id=21199&Itemid=57](http://www.kdlt.com/index.php?option=com_content&task=view&id=21199&Itemid=57).

14. *AP Exclusive: Inmate Says Death Will Bring Justice*, FOXNEWS.COM (June 18, 2012), <http://www.foxnews.com/us/2012/06/18/ap-exclusive-inmate-says-death-will-bring-justice/>.

Robert also provided a more pragmatic basis necessitating his execution, stating that he needed to be incapacitated or else he would continue killing in prison.<sup>15</sup>

Robert's explanation suggests his execution was justified because it satisfied the two dominant theoretical concepts underlying the purpose of punishment, retributivism and consequentialism. However, that assertion can be challenged by analyzing how mitigation waivers affect the ability of a sentencing body to fulfill its duty in determining an appropriate punishment, as well as the impact of mitigation waivers on the legitimacy of the sentencing process as a whole. While many commentators have focused on the legal, ethical, and moral concerns regarding death penalty volunteers' competency or their decisions to waive post-sentencing appeals while on death row,<sup>16</sup> scholars have focused less on mitigation waivers during the sentencing phase of a death penalty case and specifically on how mitigation waivers comport with generally accepted theoretical justifications of punishment.<sup>17</sup> The prevailing notion is that the presentation of mitigation evidence is simply another procedural right belonging to the defendant that can be freely waived, and that courts should respect the defendant's autonomy in controlling the nature of his defense and his objectives at trial.<sup>18</sup>

However, the act of determining and imposing punishment is a societal duty that must ultimately be carried out solely by the delegated sentencing body, either the judge, the jury, or both. In a capital case, allowing a defendant to prevent the judge or jury from hearing mitigation evidence essentially allows the defendant to control his sentence by restricting the sentencing body from making a fully

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15. See John Hult, *Judge to Eric Robert: "May God Have Mercy on Your Soul,"* ARGUSLEADER.COM (Oct. 27, 2011), <http://www.argusleader.com/article/20111028/NEWS/110280317/>.

16. See, e.g., Blume, *supra* note 8, at 967–85 (proposing a standard for assessing appellate waivers to ensure that inmates are not requesting to die based on suicidal motivations); Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 510–15 (1983) (explaining why capital sentence review required by the Eighth Amendment cannot be waived).

17. While there are no articles focusing explicitly on the issue of whether mitigation waivers undermine our theoretical justifications for punishment, a few scholars have argued that mitigation waivers make death sentences incompatible with the Eighth Amendment. See, e.g., Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 TEMP. POL. & CIV. RTS. L. REV. 1, 15–40 (2011); Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After Schriro v. Landrigan*, 62 FLA. L. REV. 721, 732–62 (2010); see also Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 101–05 (2002) (calling for a balancing test between the individual's autonomy interest and the state's reliability interest at each stage of the capital sentencing process and arguing that at sentencing the state's interest is much stronger than that of a defendant).

18. It is widely claimed that mitigation waivers are consistent with the defendant's right to self-representation, recognized in *Faretta v. California*, 422 U.S. 806 (1975). See, e.g., *United States v. Davis*, 285 F.3d 378, 381 (5th Cir. 2002); Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1384–86 (1988) (arguing that the defendant's right to control his case outweighs any societal interest in how capital punishment is administered). For a more complete list of proponents of mitigation waivers and capital defendant autonomy see Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 696–97 n.20 (2006).

informed judgment as to whether the defendant deserves to be executed and whether the community is entitled to carry out the execution. When the prosecution is able to satisfy its burden of demonstrating sufficient aggravating factors and the defendant then chooses not to provide any mitigating circumstances that might help explain his behavior or character, the practical effect is that the capital sentencer grants the defendant's death wish. This decision is made regardless of whether the sentence was actually deserved or whether the adverse consequences of allowing defendants to force the State to execute them outweighs the benefits derived from capital punishment in the first place. Such a result necessarily undermines basic justifications of punishment.

This Note seeks to demonstrate that a defendant convicted of a capital offense should never have the right to subjugate the role of the judge or jury in capital sentencing by waiving the presentation of mitigation evidence regardless of whether the waiver was knowing and voluntary. Part I will consider the facts of *State v. Robert*, in order to better assess the background and motivation of Eric Robert, the actions taken by Robert's counsel, and the court's response to his death request. Part II will examine the development and purpose of mitigation evidence in the sentencing phase of a capital case as well as the legal jurisprudence governing waivers in the capital sentencing process. Part III will present a criticism of mitigation waivers and arguments favoring the capital defendant's autonomy during sentencing by showing how such waivers undercut both retributivist and consequentialist goals of punishment. To that end, Part III-A will provide a brief synopsis of retributivism and consequentialism and discuss how both theories are used to justify capital punishment. Part III-B will focus specifically on how mitigation waivers undermine any retributivist possibility of the death penalty as just punishment, while Part III-C will consider other adverse consequences from a consequentialist standpoint that result from allowing a defendant control over receiving a death sentence.

## I. STATE V. ERIC ROBERT

### A. *Robert's Background*

By all accounts, Eric Robert did not have the troubled childhood or extensive criminal history that is often associated with other inmates found on death row. Born in Massachusetts on May 31, 1962, Robert was raised by his mother after his father left when he was six years old.<sup>19</sup> He moved with his mother and younger sister to Hayward, Wisconsin when he was a young child and quickly became a father figure in the household, taking care of his sister, Jill, while his mother

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19. John Hult, *SD Man Went from Model Citizen to Death Row*, LOS ANGELES TIMES, Oct. 14, 2012, <http://www.latimes.com/topic/aan-sd-man-went-from-model-citizen-to-death-row-20121014,0,7321567.story#axzz21b6qz3DO>.

worked three jobs and studied to earn a college degree.<sup>20</sup> Robert quickly developed a reputation as a responsible and studious young man; he graduated eighteenth in his high school class at Hayward High School in 1980 and put himself through college at the University of Wisconsin-Superior by working weekends and summer breaks.<sup>21</sup>

After graduating with a biology degree in 1984, he returned to work in Hayward.<sup>22</sup> In 2000, Robert was hired as the wastewater treatment supervisor for Superior, and his application at that time stated that he had not missed a day of work in ten years.<sup>23</sup> Robert's fellow employees described him as affable and easy going as well as a "natural born leader" who accomplished more in his eighteen months as supervisor than any of his predecessors.<sup>24</sup> Robert eventually lost his job after failing to comply with a city residence requirement but continued to assist the city in a consulting role.<sup>25</sup> Robert also volunteered extensively in his free time, including coaching a little league baseball team, working for a volunteer ambulance service, and organizing a memorial fund for a sheriff killed in the line of duty.<sup>26</sup>

### *1. The Kidnapping Conviction*

While members of the community considered Robert a "model citizen," close friends and former girlfriends stated that he suffered from alcoholism and had a tendency to become angry, aggressive, and sometimes violent when intoxicated, especially towards women. On July 24, 2005, two months after he moved to Sioux Falls, South Dakota, Robert followed an eighteen-year old woman in his pickup truck and used his spotlights to pull her over on a rural road at 2:00 AM.<sup>27</sup> According to the victim, Robert identified himself as an undercover plainclothes police officer and asked her to get out of the car to perform a field sobriety test.<sup>28</sup> After requiring the woman to empty her car's trunk so that he could perform a search, Robert forced the victim into the trunk and then left her briefly to drive his truck to an empty lot at the end of the road. Robert then returned to the victim's car and drove it to the same lot.<sup>29</sup>

During this time, the victim managed to use her cell phone from the trunk to call the Pennington County Sheriff's Department. The victim was ultimately

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20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

unharmful, as authorities arrived at the scene moments later.<sup>30</sup> Robert fled before police arrived, but immediately became the prime suspect due to the presence of his pickup at the crime scene. Eventually he admitted to pulling the victim over and was arrested.<sup>31</sup>

Robert pled guilty to kidnapping but contested the prosecutor's assertion at sentencing that he intended to sexually assault the victim, a fact that if demonstrated by a preponderance of the evidence at sentencing would have enabled the judge to significantly increase the potential sentence.<sup>32</sup> Prosecutors stated that such intent could be inferred from the ax, mattress, and pornographic material found in the bed of Robert's pickup truck. Robert claimed he was intoxicated at the time of the incident and merely intended to rob the woman. He also presented character witnesses who stated that Robert often slept in his pickup truck and had never shown an interest in younger women.<sup>33</sup> Judge Warren Johnson of the Meade County Circuit Court agreed with the prosecution and sentenced Robert to eighty years in prison as a result.<sup>34</sup> According to the Judge, "the Wisconsin Eric Robert [was] a totally different person from the South Dakota Eric Robert" that was before him in January 2006.<sup>35</sup>

## 2. *The Murder of Corrections Officer R. J. Johnson*

According to Robert's attorney, Mark Kadi, Robert was enraged at the length of his sentence and immediately attempted to secure a sentence reduction.<sup>36</sup> After his appeal failed, Robert became despondent and suicidal.<sup>37</sup> In a letter written to the *Argus Leader* shortly after Robert's execution, Kadi stated that his client viewed his life sentence as being "identical to a death sentence with the exception that the latter had a set date" and that he felt he "needed to get out, one way or the other."<sup>38</sup>

Robert first attempted to escape from prison in May 2007 by cutting the lock on a shower room door. Four years later, Robert attempted to commit suicide by drug overdose.<sup>39</sup> According to Robert and his attorney, Robert then devised an escape plan that involved a murder, which would satisfy the death penalty statute in the event his escape failed. Robert analyzed the state's capital punishment statute before the escape and was aware that killing a law enforcement officer would satisfy an aggravating factor necessary for death penalty eligibility.<sup>40</sup>

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.*

36. *Id.*

37. Hult, *Death Penalty Called Incentive for Robert*, *supra* note 12.

38. *Id.*

39. *Id.*

40. *Id.*

On the morning of April 12, 2011, corrections officer R. J. Johnson arrived for work at the Pheasantlands Industry Building, a factory on the premises of the South Dakota State Penitentiary for inmates on work assignment. Johnson, a twenty-year veteran at the prison, was celebrating his sixty-third birthday that day and had only volunteered to come in after another officer called out sick.<sup>41</sup> At approximately 10:30 AM, Robert and another inmate, Rodney Berget, walked into the facility carrying loads of laundry.<sup>42</sup> Despite Robert's classification as a maximum security risk, he was allowed to move freely during the day due to his job assignment as a laundry orderly.<sup>43</sup>

Both Robert and Berget hid in the laundry room and waited for Johnson, who was on patrol.<sup>44</sup> When Johnson approached, Robert hit him in the back of the head with a lead pipe, which he had obtained earlier that day in order to beat and kill the officer.<sup>45</sup> The two men repeatedly struck Johnson in the face and head, even as he lay immobilized on the ground. According to the medical examiner's report, the attack fractured Johnson's skull in three locations and partially exposed his brain.<sup>46</sup> Robert and Berget then wrapped Johnson's head in plastic wrap to prevent him from breathing or screaming for help.<sup>47</sup>

After Johnson was no longer conscious, the men concealed his body behind a crate.<sup>48</sup> Robert then removed Johnson's clothes and put on the uniform, while Berget climbed into a four-wheel cart.<sup>49</sup> Robert, posing as Johnson, attempted to exit the penitentiary gates while pushing the cart.<sup>50</sup> Johnson was later discovered by corrections officers lying in a pool of his own blood behind a crate in the Pheasantland Industries' Building.<sup>51</sup> CPR was attempted, but Johnson was pronounced dead shortly after arriving at the hospital.<sup>52</sup>

At 10:45 AM, Corrections Officer Jodi Hall, who was guarding the west gate of the penitentiary, noticed a man dressed as an officer but wearing a baseball cap walking with his head down and pushing a cart with a cardboard box wrapped in packaging tape.<sup>53</sup> When the man failed to swipe his identification badge, Hall

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41. See Hult, *SD Man Went from Model Citizen to Death Row*, *supra* note 19.

42. *Id.*

43. *Id.*

44. *Id.*

45. *State v. Robert*, 820 N.W.2d 136, 138 (S.D. 2012).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 139.

52. *Id.*

53. SD DEP'T OF CORR., SD DEPARTMENT OF CORRECTIONS AFTER-INCIDENT REPORT: HOMICIDE OF SENIOR CORRECTIONAL OFFICER RONALD "RJ" JOHNSON AND ESCAPE ATTEMPT BY INMATES RODNEY BERGET AND ERIC ROBERT 3 (2011).

approached and asked to see identification.<sup>54</sup> Robert stated that he had forgotten his badge, but Hall was suspicious and called Officer Matt Freeburg for assistance.<sup>55</sup> Freeburg, who did not recognize Robert and was also suspicious of his oversized uniform, told Hall to call the officer in charge.<sup>56</sup>

Sensing the plan had been foiled, Berget jumped out from the cart, and he and Robert immediately began attacking Freeburg.<sup>57</sup> Hall issued a distress call on her radio while Robert bolted towards the gate and attempted to scale the wall before becoming entangled in the barbed wire.<sup>58</sup> He then shouted at Hall to shoot him.<sup>59</sup> As more officers arrived, Robert realized he was surrounded and without options.<sup>60</sup> He eventually jumped down from the gate, shook Berget's hand,<sup>61</sup> and surrendered.<sup>62</sup>

*B. The Procedural History: Robert's Plea, Mitigation Waiver, and Appellate Review*

In the immediate aftermath of the failed escape, Sioux Falls prosecutors charged Robert with first-degree murder, felony murder, and simple assault.<sup>63</sup> Robert initially pled not guilty at the advice of his attorney, but came to an agreement with the government five months later that would allow him to plead guilty to the first-degree murder count, waive his right to sentencing by jury, and keep the death penalty on the table as a possible sentence. Not only did Robert have no qualms with prosecutors asking for the death penalty, but he insisted on death as the recommended sentence as a condition of pleading guilty.<sup>64</sup> At his plea hearing in September 2011, Robert was adamant that he never wavered in his intention to take full responsibility for his crime and that he had actually wanted to plead guilty when he was first arraigned.<sup>65</sup> He also requested that the judge sentence him as soon as possible.<sup>66</sup> Judge Bradley Zell of the South Dakota Second Judicial Circuit found Robert competent and accepted his plea and jury sentencing waiver as knowing and voluntary.<sup>67</sup>

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54. *Id.* at 4.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See *Eric Robert Pleads Guilty in Killing of Correctional Officer Ronald Johnson*, KSFY.COM (Sept. 16, 2011, 3:30 PM), <http://www.ksfy.com/story/15481461/eric-robert-pleads-guilty-in-killing-of-correctional-officer-ronald-johnson>.

64. *Id.*

65. *Id.*

66. *Id.*

67. *State v. Robert*, 820 N.W.2d 136, 139 (S.D. 2012).