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DRANGINIS, J., concurring in the judgment. In concurring in today's judgment, I in no way am abandoning my belief, or the reasoning underlying it, that our statutory scheme does not permit a death sentenced defendant to waive the benefit that could result from the consolidated habeas litigation, ordered by this court, challenging the constitutionality of the administration of Connecticut's death penalty system. See *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 676, 717, 866 A.2d 554 (2005) (*Lavery* and *Dranginis, Js.*, dissenting). Nonetheless, because that issue presently is not before the court, I do not base my decision today on that issue. Rather, I address solely the issues with which we are confronted and those that are necessary to our resolution of the claims on appeal.

The court today develops a new rule limiting the ability of a defendant to challenge as involuntary any waiver of a constitutional right. Because I believe that it is unnecessary for this court to decide the issue and because I believe that such a general rule is unwise, I decline to join in the court's opinion. In so far as the court has concluded that special counsel has standing to appeal the trial court's ruling, I join with the court. I also adopt, for purposes of this opinion, the majority's recitation of the facts and procedural history of this case.

I agree with the majority that, although special counsel has framed the issue as one of voluntariness, the arguments made by special counsel are dependent on challenging the subsidiary facts found by the trial court that underlie its determination that the defendant's mental disorders, taken separately or together, do not affect substantially his ability to make rational choices. This argument challenges the factual determination of the defendant's volitional capacity as it relates to his competence, not whether, as a matter of law, his waiver was voluntary. See *Rumbaugh* v. *Procunier*, 753 F.2d 395, 399 (5th Cir.) (determination as to whether defendant suffers from mental disease that impairs his ability to make rational decision to waive further challenges to death sentence must be accepted unless clearly erroneous), cert. denied sub nom. *Rumbaugh* v. *McCotter*, 473 U.S. 919, 105 S. Ct. 3544, 87 L. Ed. 2d 668 (1985). As the majority has noted, our standard of review, therefore, on the issue of volitional capacity as it relates to the defendant's competence is whether the trial court's finding that the defendant has volitional capacity was clearly erroneous. Id.; see also *Demosthenes* v. *Baal*, 495 U.S. 731, 735, 110 S. Ct. 2223, 109 L. Ed. 2d 762 (1990) (state court's conclusion regarding defendant's competency to waive further challenges to death sentence is finding of fact entitled to presumption of cor-

rectness). Only after the court concludes that the defendant is competent because he possesses volitional capacity, do we review the trial court's conclusion that the defendant's waiver was voluntary under a de novo standard of review. See *State* v. *Cobb* 251 Conn. 285, 358–59, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

I

The majority has concluded that the defendant is competent and his waiver was voluntary. While I agree with the majority's conclusion that the defendant's waiver was voluntary, I disagree with the reasoning it employs in order to reach that end.

Generally, a finding of competency and a determination of whether waiver of a constitutional right was knowing, intelligent and voluntary, is a two step process, with the competency determination being a separate and distinct inquiry. *Godinez* v. *Moran*, 509 U.S. 389, 400–401, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (standard of competency to waive right to counsel). This is because, in most circumstances, the level of competency required to waive a constitutional right is the same competency required to stand trial. Id., 398. To be competent, therefore, a defendant merely must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . [have] a rational as well as factual understanding of the proceedings against him." (Internal quotation marks omitted.) *Dusky* v. *United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Although never specifically addressed, the degree of competency an individual must possess in order to waive remaining challenges to his death sentence has evolved into a somewhat different if not a somewhat higher standard. In *Rees* v. *Peyton*, 384 U.S. 312, 314, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966), the United States Supreme Court stated that the question of the defendant's competence was "whether he has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Several Courts of Appeal have adopted a three part inquiry to determine whether any individual defendant meets this standard of competence. This three part inquiry, first developed by the United States Court of Appeals for the Fifth Circuit, asks:

"(1) Is the person suffering from a mental disease or defect?

"(2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?

"(3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?" *Rumbaugh* v. *Procunier*, supra, 753 F.2d 398.[1] The court in *Rumbaugh* concluded that the third prong of this inquiry contained a volitional component; id.; a component not readily contained in the *Dusky* standard of competency. This third prong of the *Rumbaugh* competency inquiry, whether by design or consequence, lays the factual predicate necessary to determine whether, as a matter of law, a defendant's waiver of further challenges to his death sentence is voluntary.

In the present case, because the majority concludes that the trial court reasonably could have found that the defendant possesses the volitional capacity necessary for competency under *Rumbaugh*'s third factor, it also concludes that the defendant's waiver must have been voluntary unless evidence of external coercion existed. Under a competency standard where volition is considered and given great weight, this conclusion is logical. After all, if the defendant has the volitional capacity to make a reasoned choice, he also must have the volitional capacity to effect a voluntary waiver. The majority's conclusion, therefore, that external coercion is a necessary factual predicate to a determination of involuntary waiver, is of little significance until one realizes that the majority's conclusion applies to *all* waivers of constitutional rights, not only to the waiver of further challenges to sentences of death.

To see that this is the effect of the majority's conclusion, one need only look so far as the cases to which they cite for the proposition that external coercion is a necessary predicate finding to a determination of involuntary waiver. The case on which the majority relies is *Colorado* v. *Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986), which held that government coercion or state action was necessary for a determination that a *confession or waiver of Miranda rights* was involuntary under federal constitutional law. The *Connelly* court explained that because the main threat in the area of involuntary confessions is police overreaching, it logically follows that where no police coercion exists, a confession cannot be involuntary. Id., 164. This, however, is not the case in all situations where waiver is necessary. For example, a threat of government coercion rarely exists where a defendant wishes to waive his right to counsel. Such a waiver, nonetheless, must be knowing, intelligent and *voluntary*. See *Godinez* v. *Moran*, supra, 509 U.S. 402. The defendant desiring to waive counsel, however, need not show volitional capacity, for the competency standard by which he is evaluated is the *Dusky* standard, not the *Rumbaugh* standard. Such an individual may have

a mental disease or defect that does not impair his ability to develop a basic understanding of the proceedings in which he is involved; *Dusky* v. *United States*, supra, 362 U.S. 402; yet that same disease or defect may affect substantially his volitional capacity. Because volitional capacity is not at issue in the determination of his competency, this impairment can be addressed solely through a determination that his waiver of his right to counsel is not voluntary. Under the new rule adopted by the majority, however, this impairment is of no consequence. Unless the state has taken affirmative action to force the defendant's hand in waiving his right to counsel, it is of no significance that the defendant is incapable of exercising free will. I cannot agree with such a formulation.

In setting forth this new rule, the majority is writing on a blank page of federal law. The United States Supreme Court has not extended *Connelly* to this extent, nor has any Circuit Court of Appeals. In making this ruling, the majority also is doing as a matter of federal law what this court has been loathe to do as a matter of state law. To date, this court has not adopted the *Connelly* limitations on voluntariness, even in the area of confessions, as a matter of state law. Each time it has been faced with the question, it has declined to rule one way or the other. See *State* v. *Roseboro*, 221 Conn. 430, 443–44, 604 A.2d 1286 (1992); *State* v. *Northrop*, 213 Conn. 405, 419–20, 568 A.2d 439 (1990); *State* v. *Gonzalez*, 206 Conn. 213, 222, 537 A.2d 460 (1988). Furthermore, there is no need to develop this new requirement. In ruling that the defendant's waiver was voluntary, the trial court did not depend on the nonexistence of external factors, nor is this conclusion necessary to a determination that the defendant's waiver was voluntary. Rather, as indicated previously, it is enough to recognize that in a death penalty situation, where a more rigorous standard of competency is utilized, the predicate facts supporting a finding that the defendant has the volitional capacity necessary for competence also support the ultimate conclusion that the defendant is able to effect a voluntary waiver.

II

I agree with the majority's conclusion, and the reasoning it employs, that the trial court's determination that the defendant is competent was not clearly erroneous. Because I disagree with the majority that a waiver is voluntary absent state coercion, I also reach the question of whether, as a matter of law, the defendant's waiver was voluntary. I conclude that it was.

"The standard for an effective waiver . . . is that it must be knowing and intelligent, as well as voluntary. . . . Relying on the standard articulated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), we have adopted the definition of a valid waiver . . . as the intentional relinquishment or abandonment

of a known right. . . . In determining whether this strict standard has been met, a court must inquire into the totality of the circumstances of each case.'' (Citations omitted; internal quotation marks omitted.) ***State*** v. ***Ouellette***, 271 Conn. 740, 752, 859 A.2d 907 (2004). Some of the factors that comprise the ''totality of the circumstances'' include but are not limited to: (1) the defendant's experience and familiarity with the legal system; (2) the defendant's level of intelligence, including his IQ; (3) his age; (4) his level of education; (5) his emotional state; and (6) the existence of any mental disease, disorder or defect. ***State*** v. ***Toste***, 198 Conn. 573, 580–81, 504 A.2d 1036 (1986). In evaluating whether, as a matter of law, the state has proved waiver by a preponderance of the evidence, we defer to the trial court's findings on subsidiary factual questions, such as those that laid the foundation for the court's determination that the defendant possesses volitional capacity. See ***Colorado*** v. ***Connelly***, supra, 479 U.S. 168; ***State*** v. ***Whitaker***, 215 Conn. 739, 753, 578 A.2d 1031 (1990).

Reviewing the record in light of these factors, I conclude that the state has met its burden of proving that the defendant's waiver was voluntary by a preponderance of the evidence. Although not at issue in this appeal, it is clear from the defendant's own testimony, as well as the testimony of all four psychiatrists, that the defendant can effect a knowing and intelligent waiver, as he has a thorough understanding of all his legal options and the consequences of exercising or not exercising any one of those options. Furthermore, the subsidiary facts that provided the bases for the trial court's conclusion that the defendant has the necessary volitional capacity to be competent to waive further appeals and collateral challenges to his sentences of death, as well as the lack of any evidence of death row syndrome or segregated housing unit syndrome, leads me to conclude that, as a matter of law, his waiver of further challenges is a voluntary one that meets the standards of ***Johnson*** v. ***Zerbst***, supra, 304 U.S. 464.

I, therefore, concur in the judgment.

[1] Both the Second Circuit and this court have neither adopted nor rejected the ***Rumbaugh*** three part inquiry. The only other circuit to have addressed the adoption or rejection of the ***Rumbaugh*** analysis explicitly is the Eleventh Circuit, which has adopted it. See ***Lonchar*** v. ***Zant***, 978 F.2d 637, 641–42 (11th Cir. 1992). The Ninth Circuit has neither adopted nor rejected the ***Rumbaugh*** formulation, though, like this court, it used the three part test when that test was used by a District Court considering a death sentenced defendant's competency. See ***Dennis*** v. ***Budge***, 378 F.3d 880, 888 n.4 (9th Cir.), cert. denied, U.S. , 125 S. Ct. 16, 159 L. Ed. 2d 847 (2004).