MENTAL DISABILITY AND THE DEATH PENALTY:
Why South Carolina Should Ban The Execution Of The Severely Mentally Disabled

A Report by
The Center for Capital Litigation

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INTRODUCTION

The United States routinely executes mentally disabled persons. Some of these individuals are so impaired that no one, in good conscience, could hold them fully accountable for their actions or the crimes for which they were convicted. Many lauded jurists, dating as far back as William Blackstone in 1769, have recognized that the death penalty should not be imposed on those with serious mental disabilities. Yet, almost 250 years later, the United States still executes its most vulnerable citizens. This report explains why South Carolina should amend the capital trial, sentencing, and post-conviction procedures to prohibit the execution of persons with a severe mental disability. Specific language for accomplishing these amendments appears in the proposed act, attached as Appendix A. Similar acts have been enacted in Connecticut, and are being seriously considered and studied by state legislatures in Kentucky and North Carolina.

Parts I and II of this report explain that severe mental disability is widespread in United States prisons and, specifically, on South Carolina's death row today. Part III describes the difficulties that the mentally disabled face in navigating South Carolina's current capital trial and sentencing procedures, and explains how the proposed act would change those procedures to remedy these problems. Parts IV and V explain that banning the execution of the severely mentally disabled is not only the right thing to do – because it is supported by recent United States Supreme Court precedent and society's current standards of decency – but it will also save the State millions of dollars a year.

I. Background: Severe Mental Disability & Capital Punishment in the United States.

Significant numbers of individuals with serious mental disabilities are currently housed on death row and in the general inmate population of U.S. jails and prisons today. In September

2006, the U.S. Department of Justice's Bureau of Justice Statistics released a report indicating that *more than half* of all prison and jail inmates in the United States had a mental health problem.[1] Similar studies demonstrate that the prevalence of mental illness is similar and often higher in the violent offender population.[2] In 1997, the Dallas Morning News reported that one in three of the 602 death row inmates who responded to the paper's questionnaire had undergone treatment for psychiatric problems, and international studies of people convicted of murder support these findings.[3]

While antiquated methods of thought often cited spiritual or character defects as the cause of mental disability, modern science has proven that mental disabilities consists of biologically based brain disorders, which cannot be overcome through "will power" and are not related to a person's character or intelligence, and diminished functioning caused by dementia or traumatic brain injury.[4] Mental illness, in particular, exists on a continuum of severity.

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1 Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Bureau of Justice Statistics, Mental Health Problems of Prison and Jail Inmates 1 (2006), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf. The data came from personal interviews with jail inmates and state and federal sentenced prisoners. The study counted persons with a documented history of mental illness (i.e. clinical diagnosis or treatment) as well as persons whose reported symptoms in the preceding twelve months met the criteria in the Diagnostic and Statistical Manual of Mental Disorders IV-TR. *Id.*

2 Dr. Dorothy Otnow Lewis, a professor of psychiatry at New York University, evaluated 15 death row inmates and found that nearly all had damaged brains due to illness or trauma, and most were also victims of severe physical and sexual abuse as children. *See* Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (finding that 9 of 15 death row inmates examined were chronically or episodically psychotic and two others met the criteria for bipolar mood disorder). In 2002, a team of researchers from the School of Policy and Practice, University of Pennsylvania, estimated that more than 26,000 persons with a mental illness were incarcerated for the crime of murder in the United States. *See* Phyllis L. Soloman, et al., "*Characteristics of Persons With Severe Mental Illness Who Have Been Incarcerated for Murder*," J. Am. Acad. Psychiatry Law 36:74-86, 2008. Mental health professionals agree, however, that even carefully crafted studies underestimate the problem of incarceration of the mentally ill due to under-diagnosis and under-reporting of mental illness among prison populations.

3 Fazel, S. and Grann, M., *Psychiatric morbidity among homicide offenders: A Swedish population study,* 161 AM. J. Psychiatry 2129-2131.

4 National Alliance on Mental Illness, "What is Mental Illness: Mental Illness Facts (2009)," available at http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm

Although a large proportion of the population (an estimated 1 in 5 families, or 20%) is affected by mental illness, the burden of *serious* mental illness is concentrated in a much smaller proportion – around 6% of Americans.[5] The gravest among these mental illnesses include: major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder, panic disorder, post traumatic stress disorder, and borderline personality disorder.[6]

Americans have long recognized a belief in the societal duty to care for the severely mentally disabled. The best treatments for serious mental illnesses today are highly effective; between 70 and 90 percent of individuals have significant reduction of symptoms and improved quality of life with a combination of pharmacological and psychosocial treatment and support.[7] But, gaping disparities in treatment define the modern American system of mental health. A recent report by the United States Surgeon General describes the complex patchwork of mental health services in the United States as being so fragmented as to only constitute a *de facto mental health system,* as opposed to a comprehensive and organized system of established care.[8] There are significant groups of people who fall through the cracks of the current framework, and these same people often find themselves caught in the machinery of our legal system.

Although mental illness affects Americans in all walks of life – it does not discriminate on the basis of race, ethnicity, income, creed, or geography – there is a demonstrated increased

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(last viewed on March 25, 2009). A serious mental illness is defined by federal regulations to include any mental illness that significantly interferes with an area of social functioning. Beyond this, a smaller subpopulation of approximately 2.6% were found to suffer from a severe and persistent mental illness, which includes schizophrenia, bipolar disorder, and severe forms of depression, panic disorder, and obsessive-compulsive disorder.

5 *Id.*

6 *Id.*

7 *Id.*

8 Satcher, Davidm, "Mental Health: A Report of the Surgeon General," (2008) available at http://www.surgeongeneral.gov/library/mentalhealth/home.html (last viewed March 15, 2009).

prevalence of mental disorder among the African-American population than among whites.[9] This higher rate is not due to any intrinsic biological difference between races, but rather is a function of socio-economic status. People in the lowest ends of the socioeconomic stratus are over two times more likely than those in the highest strata to suffer from mental illness.[10] The most often cited reason to explain this difference is that those in the lowest strata experience an alarming amount of poverty related stress, which has been shown to be a risk factor for mental illness.[11] When socio-economics are taken into account, the difference in prevalence among racial groups disappears.[12]

Further, race is also an important variable in regard to the provision of treatment for those suffering from mental illness. According to the Surgeon General, the United States mental health system is not well equipped to meet the needs of racial and ethnic minorities.[13] A variety of empirical studies have demonstrated that minority groups are under-served by the mental health system, that a constellation of barriers deter racial and ethnic minorities from seeking treatment, and that those who do seek treatment often find it woefully inadequate to meet their needs.[14] A 2006 study by Ojeda and McGuire found that African-Americans were less likely to access outpatient treatment than whites, and that African-Americans with serious mental

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

illnesses waited significantly longer after the first onset of psychosis before receiving treatment of any kind.[15]

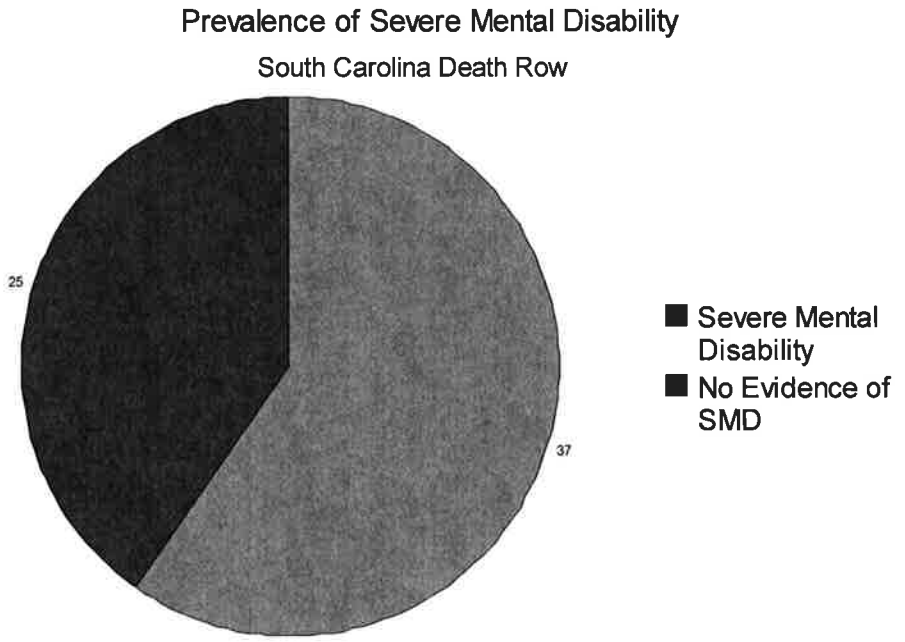
II. More Than Forty Percent of South Carolina's Death Row Population Suffers from a Serious Mental Disability.

A study on mental disability among prisoners on South Carolina's death row conducted by the Center For Capital Litigation revealed that serious mental disability is pervasive. Information regarding mental disability was collect for the 62 inmates currently on South Carolina's death row. The method of collection was to contact the inmates' current and past legal representation, and when feasible, to review trial transcripts. An inventory of mental health information was collected on each inmate, and the criteria written in the Proposed Act was used to determine whether they qualified as severely mentally disabled.

Of the 62 inmates, 25 qualify as severely mentally disabled, or slightly more than 40%. Although, this figure is quite high, it corroborates past research demonstrating the prevalence of severe mental illness among death row inmates. The table and chart below demonstrate the findings.

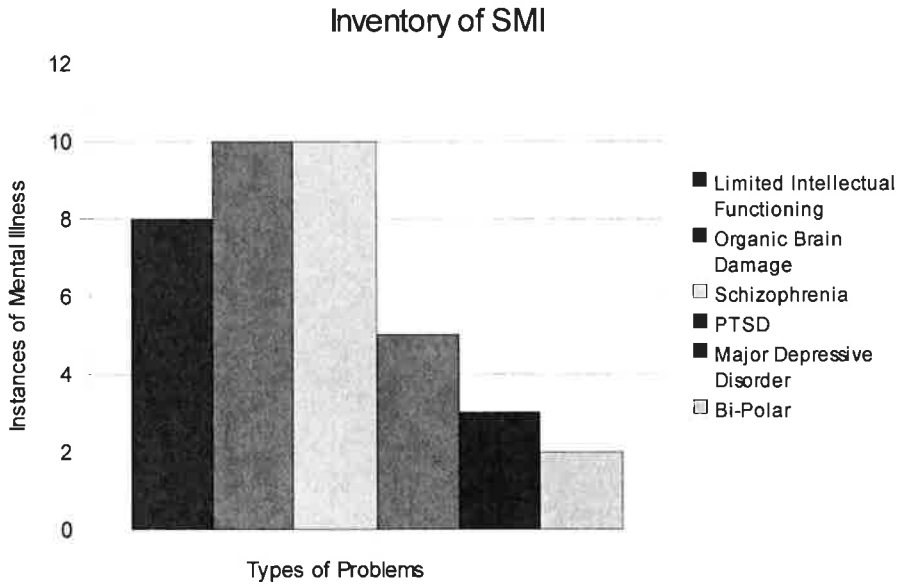
15 Ojeda, V. D., & McGuire, T. G., "Gender and racial/ethnic differences in use of outpatient mental health and substance use services by depressed adults" *Psychiatry Q, 77*(3), 211-222 (2006).

Severe Mental Disability (%)	None/Insufficient Evidence (%)	Total Death Row Population
25 (40.32%)	37 (59.68%)	62



Further qualitative research identified the most prevalent mental illnesses identified among the death row population. The most often reported problems were schizophrenia and organic brain damage, followed by limited intellectual functioning (<70 IQ), Post-Traumatic Stress Disorder, Major Depressive Disorder, and Bi-Polar Disorder. The table and chart below demonstrate these findings.

Mental Illness	Schizophren-ia	Organic Brain Damage	Limited Intellectual Functioning	PTSD	Depression	Bi-Polar
# of Occurences	10	10	8	5	3	2



Unfortunately, the presence of severe mental illness can be found not only on our current death row, but also among the prisoners we've executed in the recent past. Since reinstating the death penalty in 1976, South Carolina has executed 40 prisoners, many of whom clearly suffered from severe mental illness.

JAMES EARL REED

James Earl Reed was executed by the South Carolina Department of Corrections on Friday, June 20, 2008 at the Broad River Correctional Institution in Columbia, SC. Reed had been on death row since 1996, convicted for the murders of his ex-girlfriend's parents, Joseph and Barbara Lafayette.

Despite pleas from defense attorneys that he had an IQ of 77 and was not competent even to stand trial due to extensive brain damage, Reed was allowed to represent himself in court, becoming the first person under the state's current capital punishment law to do so. Reed suffered from paranoid delusions and was convinced his own attorneys were conspiring with the solicitor's office to kill him. After the jury took just 30 minutes to deliver a conviction, Reed requested an attorney to represent him during the sentencing phase of his trial and his request was denied. The jury delivered a death sentence.

In 2003, Reed requested to drop all of his appeals and be executed. In a letter to the Associated Press, Reed wrote, "I am standing upon my word that his case be dismiss or I be killed."

At 11:20 pm on June 20, 2008, the curtains were opened so witnesses could view the execution. Reed was strapped into the electric chair, and a leather mask placed over his head. Electrodes were connected to his head and ankle. As the circuit was made, Reed jerked forward, and witnesses reported hearing a sound similar to that of a gas station fuel pump. At 11:25 the electrodes were removed and two minutes later James Earl Reed was pronounced dead. He was 49 years old.

III. Current Capital Trial Procedures Fail To Protect The Severely Mentally Disabled.

A. Current Procedure.

Currently, when a criminal defendant is charged with a capital crime, there is a two-part trial. The first part of the trial is the guilt-or-innocence phase, in which the jury determines whether or not the defendant committed the crime. If a defendant is found guilty, there is a second phase of the trial, called the sentencing phase. In the sentencing phase, the State presents evidence of aggravating factors in support of the death penalty. The defendant presents evidence of mitigating factors that he hopes will sway the jury in favor of a life sentence.

South Carolina law clearly defines the presence of a mental disability as mitigating evidence. Despite the law, however, empirical studies conclusively demonstrate that juries tend to view mental illness and disability as an *aggravating* factor rather than a reason to spare the defendant from death.[16] Additional studies suggest that race (and racism) interferes with a jury's ability to view mental illness as a mitigating factor at sentencing. For example, in a 2000 mock jury study, researchers found that white jurors were significantly more likely to undervalue, disregard, and even improperly use mitigating evidence in a black defendant case as opposed to those who sentenced a white defendant.[17] African-Americans, for a variety of reasons, are more

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[16] *See e.g.,* Kevin M. Doyle, *Lethal Crapshoot: The Fatal Unreliability Of The Penalty Phase*, 11 U. Pa. J. L. & Soc. Change 275 (2008); Steven Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration Of Mitigating Factors In Death Penalty Sentencing*, 41 Hastings L. J. 409 (1990); Ellen Fells Berkman, *Mental Illness As An Aggravating Circumstance In Capital Sentencing*, 89 Colum. L. Rev. 291 (1989).

[17] Mona Lynch and Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law and Human Behavior 337 (2000); *see also*, Steven P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26 (2000) (finding that white jurors were less likely than black jurors to imagine being in the defendant's situation or to find the defendant likeable as a person); Joseph Rand, *The*

likely in general to receive a death sentence than whites. In a comprehensive 1998 study, the race of the victim and the race of the defendant each were found to influence sentencing.[18] Not only did the killing of a white person make a death sentence more likely, but black defendants were also more likely than white defendants to be sentenced to death. A 2004 study of racial attitudes found that respondents who scored highly on a test of racial prejudice were more likely to support capital punishment.[19] In a recent study on the impact of defendant race in capital trials, Professor Eberhart and her colleagues determined that the probability of a death sentenced is influenced by the degree to which the jury perceives the defendant to have a stereotypically black appearance (e.g., broad nose, thick lips, dark skin).[20] Juries are heavily influenced by the question of "future dangerousness" when deciding whether to impose death or a lesser sentence.[21] A juror's prejudicial view of African-Americans can make the difference between juries properly treating severe mental disability as a mitigating factor and improperly treating it as a predictor of future violent behavior.

Moreover, persons with severe mental disabilities are often unable to assist their attorneys or participate meaningfully in their defense. For example, defendants with severe

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Demeanor Gap: Race, Lie Detection, and the Jury, 33 Conn. L. Rev. 1 (2000) (finding that white jurors are more likely to erroneously believe that black defendants and black witnesses are lying based on demeanor).

18 Baldus, D.C., Woodworth, G., Zuckerman, D., Weiner, N.A., & Broffit, B., *Racial discrimination and the death penalty in the post-Furman era: An empirical and legal overview, with recent findings from Philadelphia*, 88 Cornell L. Rev. 1638-1770 (1998).

19 Young, Robert L, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 Delaware Behavior 151, 167 (2004).

20 Eberhardt, J.L., Davies, P.G., Purdie-Vaughns, V.J., Johnson, S.L., *Looking deathworthy: perceived stereotypicality of black defendants predicts capital sentencing outcomes*, *Psychological Science 17, Volume 5* 383-386 (2006).

21 *See e.g.*, John H. Blume, Stephen P. Garvey & Sheri L. Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397 (2001).

mental disability can be unable or unwilling to cooperate with their attorneys in the investigation and preparation of their case. A mentally disabled defendant may insist on representing himself or may waive important rights because of the effects of his illness. If a defendant is taking psychotropic drugs during trial, he may give the jury the impression that he is not remorseful or does not care, when in reality, the effects of his medications are to blame for his demeanor. On the other hand, if a serious mental illness is left untreated, a defendant may be belligerent, confusing or frightening to a jury. Pre-trial protections are needed for defendants who face these challenges in the criminal justice system due to their disability.

B. Proposed Changes to Procedure.

The proposed bill attached in Appendix A to this report allows the State and the defendant to present evidence regarding serious mental disability to a circuit court judge before a capital trial begins. If the judge determines that a defendant was severely mentally disabled at the time of the crime, the case is declared non-capital and the defendant becomes ineligible for the death penalty. The bill does not prohibit a defendant from presenting evidence of serious mental disability at other stages of the trial if the judge does not initially find that the defendant is seriously mentally disabled. The proposed bill allows the defendant to be criminally responsible, but caps his punishment at life without the possibility of parole if found guilty of the crime. These protections will also apply to persons already on death row when the legislation goes into effect.

JAMIE WILSON

Jamie Wilson, 39, suffers from chronic schizophrenia. He has been on death row since the age of nineteen. Tried and convicted in 1989 for a school shooting that resulted in the deaths of two children, Wilson is the only person ever to be sentenced to death for an offense that the fact-finder determined was beyond his volitional control.

Wilson was born into a family with an alarmingly high prevalence of mental illness, at least four generations of recorded psychiatric hospitalization, violence, and drug abuse. Jamie suffered physical abuse from his father, mother, and grandparents. In his middle years, his father would often pull out a gun and threaten to kill him. By age 13, he was being given un-prescribed, psychoactive medication by his grandparents to control disruptive behavior.

Jamie first began to exhibit emotional problems at the age of five, when he developed a debilitating stutter. By age eight, he was extremely anxious about germs, had elaborate food preparation rituals, and bathed compulsively. From early adolescence, Jamie was paranoid, and as a teenager he reversed day and night, common behavior among people who suffer from schizophrenia. Wilson was first hospitalized for mental illness at the age of fourteen, and hospitalized six more times before the age of eighteen. In the time leading up to the crime, Wilson began to experience increasingly frequent auditory hallucinations. He and his family attempted to commit him for inpatient mental health treatment, but he was refused because he was no longer covered under his father's health insurance.

Shortly after his arrest, Jamie was evaluated by the forensic unit of the South Carolina Department of Mental Health. There, the state mental health experts were unanimous in finding that Wilson suffered from command hallucinations at the time of the crime, and that his mental illness had deprived him of the ability to conform his behavior to the law. At trial, Jamie's defense called four mental health professionals, including the chief state psychiatrist and psychologist, both of whom testified that the crime occurred during a psychotic episode in which Jamie lacked the capacity to conform his conduct to the requirements of the law. After considering all psychiatric testimony, the trial judge announced that he found Wilson "guilty but mentally ill," meaning Jamie's mental illness rendered him unable to comply with the law. Notwithstanding this finding, the trial judge sentenced Jamie to die.

IV. The Supreme Court's decisions in *Atkins* and *Roper* provide substantial support for a ban on the execution of those with severe mental disabilities.

A. The Eighth Amendment bars the death penalty for juveniles and mentally retarded individuals.

The Eighth Amendment to the United States Constitution prohibits excessive sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[22] A claim that punishment is excessive is judged by the standards that currently prevail in the community. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[23] The "evolving standards of decency" are measured by a variety of sources including state legislative enactments and jury verdicts; the opinions of social and professional organizations with "germane expertise"; the opposition to the practice by "widely diverse religious organizations"; international practice; and, polling data.[24]

In 2002, the United States Supreme Court determined in *Atkins v. Virginia*, that the Eighth Amendment prohibits the death penalty for individuals who suffer from mental retardation.[25] To protect the constitutional rights of this vulnerable group, the Court categorically excluded them from the punishment of death. Three years later, in *Roper v. Simmons*, the Court relied on much the same reasoning in prohibiting the execution of juveniles.[26] In both *Atkins* and *Roper*, the Court reaffirmed the long-standing principle that the

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[22] U.S. Const. Amend. XVIII.

[23] *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

[24] *Atkins*, 536 U.S. at 313-321.

[25] *Id.* at 306.

[26] 543 U.S. 551 (2005).

death penalty is unconstitutional if it does not serve two purported social functions of punishment: (1) retribution; and, (2) deterrence. "Unless the death penalty . . . measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment."[27] And, in both cases, the Court found that that the death penalty did not serve either goal for these two groups.

With respect to the goal of retribution – i.e., the interest in seeing that the offender gets his "just desserts" – the severity of the appropriate punishment necessarily depends on the culpability of the offender.[28] In *Atkins*, the Court held that the mentally retarded are less culpable for their crimes because they are less able to "understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[29] Given that the death penalty is reserved for the "worst of the worst," the Court concluded that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[30] Moreover, because of their cognitive impairments, the mentally retarded are less likely to be deterred by the threat of the death penalty, and exempting them from that punishment "will not affect the cold calculus that precedes the decision of other potential murderers."[31]

Similarly, the Court found that juveniles are less culpable than adults for their crimes because they: (1) "lack a maturity" and have "an underdeveloped sense of responsibility"; (2)

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[27] *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

[28] *Atkins,* 536 U.S. at 319.

[29] *Id.* at 318.

[30] *Id.* at 320.

[31] *Id.*

"are more vulnerable or susceptible to negative influences and outside pressures"; and, (3) have a character that is not as well formed as that of a mature adult.[32] Likewise, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[33]

Finally, the Court stated that categorically excluding these groups is justified because they face a "special risk of wrongful execution."[34] Both groups have a higher possibility of false confessions and may be less able to give meaningful assistance to their counsel. They may typically be poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. Mental retardation, especially, "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[35]

B. Present standards of decency support banning the execution of individuals who are severely mentally disabled.

Today there is considerable objective support for the notion that evolving standards of decency prohibit the execution of the severely mentally disabled.

The American Bar Association supports a categorical exemption of the severely mentally ill from capital punishment:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder

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[32] *Roper*, 543 U.S. at 569-70.

[33] *Id.* at 571.

[34] *Atkins*, 536 U.S. at 320.

[35] *Id.* at 321.

> manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.[36]

The ABA recommendations have been adopted by the National Alliance on Mental Illness ("NAMI"),[37] the National Mental Health Association,[38] the American Psychiatric Association,[39] and the ABA House of Delegates.[40] Virtually every major mental health association in the United States that has addressed the issue of the execution of mentally ill offenders vigorously supports either an outright ban or a moratorium until an adequate comprehensive evaluation system is implemented. NAMI believes that "the death penalty is *never* appropriate for a defendant suffering from schizophrenia or other serious brain disorders."[41] The National Mental Health Association ("NMHA") takes a similar position:

> The NMHA believes that our current system of fact-finding in capital cases fails to identify who among those convicted and sentenced to death actually has a mental illness. Thus, there is reason to believe that individuals with mental illness are being executed without the criminal justice system knowing of the existence of that illness and, therefore, without the requisite consideration of whether that mental illness may be a mitigating factor in these cases. Our current system of justice does not

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[36] Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115, 1115 (2005).

[37] *See* Public Policy Committee of the Board of Directors and the NAMI Department of Public Policy and Research, "Public Policy Platform of the National Alliance on Mental Illness," § 9.6, at 43 (7th ed. Dec. 2004); Laurie Flynn, "No Death Penalty for Persons with Severe Mental Illnesses," National Alliance on Mental Illness (Jan. 12, 1998).

[38] *See* NMHA Position Statement: Death Penalty and People with Mental Illness, National Mental Health Association (approved June 11, 2006).

[39] *See* American Psychiatric Association, Position Statement: Diminished Responsibility in Capital Sentencing (approved Dec. 2004).

[40] *See* American Bar Association, News from the Annual Meeting (released August 8, 2006).

[41] *See* Laurie Flynn, *supra* note 21.

> adequately address the complexity of cases involving defendants with mental illness.[42]

Indeed, mental health organizations unanimously agree that the current capital punishment system inadequately addresses the complexity of issues inherent in cases involving mentally ill defendants. Like the NMHA, the American Psychological Association ("APA") has explained that too many "procedural problems, such as assessing competency," render capital punishment unfair to the mentally ill.[43] According to the APA, these procedural inadequacies fall far short of the "basic requirements of due process."[44] The former president of the American Psychological Association, Dr. Alan A. Stone, has written that:

> [T]he mentally ill suffer from many of the same limitations that, in Justice Stevens' words, 'do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.' Evolving standards of decency mean different things to different people. But an important part of our standards of decency derive from our specific understanding of behavior. I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.[45]

Legal scholars agree that there is no plausible legal reason for differentiating between the execution of people with mental illness and execution of people with mental retardation or juveniles.[46] "[I]f anything, the delusions, command hallucinations, and disoriented thought

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[42] *See* NMHA Position Statement, *supra* note 42.

[43] American Psychological Association, *Resolution on the Death Penalty in the United States* (adopted August 2001).

[44] *Id.*

[45] Alan Stone, Supreme *Court Decision Raises New Ethical Questions for Psychiatry*, Psychiatric Times (September 2002; Vol. XIX, Issue 9).

[46] Christopher Slobogin, *What Atkins Could Mean For People With Mental Illnes*, 33 N.M.L. Review 293, 293 (2003).

process[es] of those who are mentally ill represent greater dysfunction than that experienced by most 'mildly' retarded individuals (the only retarded people likely to commit crime)."[47]

The international community concurs that the execution of the severely mentally disabled is unacceptable by today's standards of decency and fairness.[48] The Human Rights Committee of the United Nations has interpreted the International Covenant on Civil and Political Rights to forbid the execution of persons with severe mental illness.[49] In addition, the United Nations Commission on Human Rights has consistently adopted resolutions calling on all states that maintain the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person." The Commission has interpreted the phrase "mental disorder" to encompass both mental illness and mental retardation. The European Union has consistently asserted that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[50] As recently as 2006, Amnesty International concluded an in-depth study and issued a final report concluding:

> State legislatures should in consultation with experts in the field of criminal law and mental health, adopt legislation prohibiting the execution of people with serious mental illness or other

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[47] Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 Cal. Crim. L. Rev. 3 (2000).

[48] In *Roper v. Simmons*, the court found that it was significant that no other country in the world executes juvenile offenders. "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Roper v. Simmons,* 543 U.S. 551, 575 (2005).

[49] *See* William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Crim. L. F. 95, 100-01 (1993): *see also*, International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174.

[50] EU Memorandum on the Death Penalty (Feb. 25, 2000).

> impairments other than mental retardation at the time of the crime or the time of execution.[51]

Thus, just as in *Atkins* and *Roper*, where international law and considered professional opinion weighed against the execution of persons with diminished culpability due to youth or mental retardation, international law and professional opinion strongly support a ban on executing the severely mentally ill.

Further, as in *Atkins*, polling of citizens of this country makes clear that Americans overwhelmingly reject death as punishment for the mentally ill. According to a 2002 Gallup poll (the last poll taken on this issue), 75 percent of those surveyed opposed executing the mentally ill, while only 19 percent supported it. The poll surveyed 1,012 Americans across the country.[52] Such data constitute objective evidence of how our society views this issue today. The same 2002 poll found that more participants – 26 percent – supported the death penalty for juvenile offenders than for mentally ill offenders, just 3 years before the United States Supreme Court banned the execution of juveniles.[53]

Knowledge about the seriousness and complexity of mental illness is also increasing in the judiciary. Justice Pfeifer of the Ohio Supreme Court has stated:

> Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so . . . I believe that executing a convict with a severe mental illness is cruel and unusual punishment. [54]

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[51] *Amnesty International Report The Execution of the Mentally Ill Offender* (2006), available at http://web.amnesty.org/library/index/ENGAMR510032006.

[52] Available at http://www.galluppoll.com/content/default .aspx?ci=1606.

[53] *Id.*

[54] *State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting).

Numerous other courts have recognized the interrelationship between mental retardation and other mental impairments.[55] Judge Zazzali, of the New Jersey Supreme Court, likewise concluded:

> Executions, our most extreme expression of indignation, cannot be carried out on a defendant whose irrationalities were exacerbated at the time of her criminal acts to such an extent as to undermine our confidence that she is fully culpable. If capital punishment is constitutional, it must be reserved for those defendants whose capacities allow them to be fully culpable, so that the death penalty can exact its intended retributive value.[56]

In short, the execution of defendants who are mentally ill at the time of the offense is contrary to the evolving standards of decency that mark the progress of a maturing society.

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[55] *See e.g., Bryan v. Mullin*, 335 F.3d 1207, 1237 (10th Cir. 2003) (Henry, dissenting) (finding that the Supreme Court's logic in *Atkins* "applies no less to those in [defendant's] shoes who suffer from severe mental deficiencies"); *People v. Danks*, 32 Cal.4th 269, 322, 82 P.3d 1249, 1285 (Cal. 2004) (Moreno, concurring) ("In Atkins, the United States Supreme Court held that to execute the mentally retarded is cruel and unusual punishment . . . The same mental capacities are impaired in a person suffering from paranoid schizophrenia, and the impairment may be equally grave"); *Corcoran v. State*, 774 N.E.2d 495, 502-503 (Ind. 2002) (Rucker, dissenting) ("I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. . . . The underlying rational for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency").

[56] *State v. Nelson*, 173 N.J. 417, 493, 803 A.2d 1, 47 (2002) (Zazzali, concurring).

DAVID MARK HILL

David Mark Hill was executed in South Carolina by lethal injection on June 6, 2008. Hill was sentenced to death in 2000 for the 1996 murder of three social workers at an office shooting in Aiken, SC.

At the time of the crime, Hill was suffering from post-traumatic stress disorder and a major depressive disorder. A number of traumatizing events contributed to Hill's psychological collapse, including his near drowning as a teenager, his guilt over causing a car crash that resulted in the death of his sister, witnessing an explosion at his workplace, and the stress of his daughter being left paraplegic after a car accident. In the months before the crime, Hill had attempted suicide several times.

Two weeks prior to the crime, Hill's daughter and twin sons had been removed from his home and taken into custody by DSS. On September 16, 1996, Hill entered the North Augusta, DSS office and shot three social workers. The next morning police found Hill lying on railroad tracks not far from the DSS office; he'd shot himself in the head with a shotgun, but survived with critical injuries.

In 2000, Hill was brought to trial. Although a doctor testified that he'd sustained frontal lobe damage to the brain when he shot himself, and was suffering from a degree of memory loss, Hill was found competent enough to understand the charges against him and told he would be able to follow legal proceedings if he paid attention. The jury returned a death sentence and in 2004 Hill's direct appeal was rejected by the South Carolina Supreme Court. In May 2007, Hill contacted the prosecuting authorities and asked them to help him "drop the rest of my appeals and have an execution date set." In June 2007, Hill changed his mind, then in July decided again to drop his appeals.

Despite Hill's history of severe mental illness, and the brain damage and neurological impairment he suffered as a result of the self-inflicted shotgun wound, a state psychiatrist testified that his decision to drop appeals appeared to be rational, and that he knew the consequences of his decision. A judge found that Hill was competent to waive his appeals, and this decision was upheld by the SC Supreme Court on April 28, 2008.