

TALKING POINTS¹

MENTAL DISABILITIES AND THE DEATH PENALTY

3-28-07

A. INTRODUCTION

There is a growing consensus of the need to protect many persons with severe mental illness from executions while still holding them accountable for their crimes.

Several national organizations, listed below, have adopted position statements regarding the application of the death penalty to persons with severe mental disabilities. They have recognized the need to exempt persons with disabling mental disorders when it would be inappropriate to sentence them to death or execute them. In taking these positions, these groups are not, in most instances, taking a position on whether the death penalty can otherwise be justified. Rather, they are saying that, even assuming it is otherwise justified, it is inappropriate under the circumstances described in their policies.

There is a need to increase public awareness of these issues. Once there is a sufficient core of informed citizens, they should press states to adopt legislation providing protections for persons in the criminal justice system suffering from serious cognitive disorders. The following information is provided in support of those goals.

Serious mental disabilities (SMD) defined.

The death penalty can be inappropriate for persons with serious mental disabilities (brain-based disorders), including:

- cognitive disorders that cause significant limitations in mental functioning as well as adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation,² dementia, or traumatic brain injury.
- severe mental disorders that significantly impair a person's capacity to:
 - ✓ appreciate the nature, consequences, or wrongfulness of their conduct;
 - ✓ express rational judgment in relation to conduct; or
 - ✓ conform their conduct to the requirements of the law.

Not included are disorders manifested only by:

- repeated criminal conduct; or
- acute effects of voluntary use of alcohol or other drugs.

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² "Mental retardation" is used in lieu of intellectual disabilities or developmental disabilities because it is the terminology used in the United States Supreme Court decision that exempts this narrow class of persons with brain-based disorders from the death penalty, *Atkins v. Virginia*, 536 U.S. 304 (2002).

Veterans who return with serious mental disorders.

These definitions include veterans who have sustained a traumatic brain injury (TBI) or have acquired Post-Traumatic Stress Disorder (PTSD) due to exposure to high levels of sustained violence during periods of prolonged conflict.³ These veterans are among the most egregious examples of those whom the system has failed. Having unselfishly sacrificed for their country, many have had their mental health needs disregarded. Denied access to adequate treatment, a few deteriorate to the point of engaging in offenses resulting from an impaired capacity to respond rationally to life stressors.

George Franklin Page is a Vietnam Veteran with a long history of PTSD. He was sentenced to death for a killing in 1995 that took place during a manic flashback episode during which he thought he was surrounded by soldiers shooting at him. At trial, the jury was provided little of the available evidence about his brain disorder and was provided psychiatric testimony that distorted the content of his military record. Defense counsel was denied a chance to hire mental health professionals to conduct a full evaluation.

Points in the criminal process when this issue can arise.

- 1) **Trial stage:** defendants suffering from a serious mental disability (SMD) at the time of the offense charged.
- 2) **After a death sentence has been imposed at trial:** condemned prisoners who develop a SMD during post-trial and collateral reviews of their death sentences.
- 3) **Executions:** death-row prisoners who have a SMD at the time they are to be executed.

Protections needed for persons with serious mental disabilities.⁴

1. **Trial stage:** Protection from having a death sentence sought or imposed at trial for persons who were suffering from a serious mental disability at the time of the homicides they are charged with committing when there is significant reason to believe that, absent the serious mental disability, the homicide would not have been committed. (*See Part C.*)
 - This is only an exemption from the death penalty, not an exemption from being tried, convicted, and sentenced to long prison terms pursuant to state laws, including life without parole where applicable.
 - This is an absolute exemption from a death sentence for defendants with mental retardation (i.e., diagnosed as having an onset before the age specified by state law; e.g., before age 22) as well as those who are functionally equivalent cognitively but

³ Information about TBI is available from the Brain Injury Association of America's website, <http://www.biausa.org/aboutbi.htm>. Information about PTSD is available from the PTSD Information Center website, <http://www.ncptsd.va.gov/ncmain/information/>.

⁴ This is discussed in greater detail below.

have a later onset (e.g., persons who acquire dementia or TBI after the onset age to diagnose mental retardation).

- The exemption from the death sentence for other serious mental disorders requires a significant reason to believe the crime would not have been committed absent that disorder.

2. **After trial:** Protection during post-trial collateral review proceedings when persons who are impaired due to a serious mental disability are unable to assist their counsel in identifying potential claims. In addition, protection against waiving collateral review when such waivers are likely based on impairments due to a serious mental disability. (*See Part D.*)

- For defendants who are considered “incompetent” to assist their counsel in pursuing post-trial collateral reviews of their convictions, this is only a stay of the proceedings until they become competent; or, if it ultimately appears that they will remain incompetent indefinitely, an exemption from the death penalty, not an exemption from having their convictions appealed and reviewed, or having their sentences changed to long prison terms pursuant to state laws, including life without parole where applicable.

3. **At the time of execution:** Protection from having a death sentenced carried out for prisoners on death row who have a serious mental disability affecting their ability to appreciate the nature or reason for their execution. (*See Part E.*)

National organizations that have recognized the need for these protections.

The following organizations have formally acknowledged the need to protect persons with severe mental disabilities from death sentences where their execution would be inappropriate.

- **American Bar Association (ABA), House of Delegates Resolution 112A** (August 2006) [herein the “ABA Resolution”].
 - Available at: <http://www.ndrn.org/issues/cj/ABA%20Resolution-%20feature%20article305.pdf>
 - *See Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).
 - For further information, contact: Ron Tabak, rtabak@probonolaw.com.
- **American Psychiatric Association (APA).** Position Statement: Diminished Responsibility in Capital Sentencing (Dec. 2004); and Mentally Ill Prisoners on Death Row (Dec. 2005).
 - Available respectively at: http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf; and http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf
 - For further information, contact: Richard Bonnie, jrb6f@virginia.edu
- **American Psychological Association (APA).** Council of Representatives, Council Policy Manual: N. Public Interest (incorporating policy adopted by the Council of Representatives in February 2006)

- Available at: <http://www.apa.org/about/division/cmpubint2.html#8>.
 - For further information, contact: Donna Beavers, dbeavers@apa.org.
- **National Alliance on Mental Illness (NAMI). Public Policy Platform of the National Alliance on Mental Illness** (8th ed. 2006), p. 49-50.
 - Available at: http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38245
 - For further information, contact: Ron Honberg, ronh@nami.org.

The ABA Resolution⁵

In 2003, the ABA's Section of Individual Rights and Responsibilities created a task force to consider the subject of mental disability and the death penalty. This was a multidisciplinary taskforce of people knowledgeable on this subject including: legal experts; experts in the fields of psychology and psychiatry; and representatives from several mental disability advocacy groups. This task force proposed recommendations that were adopted by the ABA House of Delegates in August 2006. They can be summarized as follows.

- 1. Intellectual disabilities at the time of offense.** Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior resulting from mental retardation, dementia, or a traumatic brain injury.
- 2. Mental disorders at the time of offense.** 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 to: (a) appreciate the nature, consequences or wrongfulness of their conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of the law. This does not include a disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs.
- 3. Mental disability after sentencing.** A sentence of death should not be carried out if the prisoner has a serious mental disability that significantly impairs his or her capacity to: (a) make a rational decision not to pursue post-conviction proceedings available to challenge the validity of the conviction or sentence; (b) understand or communicate pertinent information or otherwise assist counsel; or (c) understand the nature and purpose of the punishment, or to appreciate the reason for its imposition.⁶

⁵ The resolutions/position statements of the other three national organizations reference in these Talking Points are identical in content to the ABA Resolution, except that only the ABA Resolution specifically states, in portions of paragraph 3, that if the death sentence is vacated, the sentence shall become the next most severe punishment provided by law.

⁶ In addition, procedures are specified to be followed in each of these categories.

B. DEATH PENALTY - BACKGROUND INFORMATION

How death sentences are imposed.

- The United States Supreme Court has held that, in order to prevent the arbitrary and discriminatory application of the death penalty, it must be imposed by decisionmakers whose discretion has been informed by consideration of evidence relating to:
 - √ **aggravating factors:** circumstances about the offense that makes it more heinous or cruel (e.g., the murder of a police officer or a murder in the course of a rape);⁷ and
 - √ **mitigating factors:** any evidence about the defendant that a juror might reasonably view as a reason to impose a sentence other than death (e.g., no prior history of criminal activity; remorse; cooperating with law enforcement officers investigating the offense; a mental disability).
- Capital murder trials consist of two separate phases. During the first, the **guilt phase**, evidence is presented to the decisionmaker (typically a jury) to determine whether the defendant is guilty of the offense(s) charged.
- If the decisionmaker returns a verdict finding the defendant guilty of capital murder, a sentencing trial, **the penalty phase**, is held. During the penalty phase, jurors hear evidence relating to **aggravating circumstances** and, if presented, **mitigating circumstances**.
- In general, if the prosecution fails to establish that the proven aggravating factors outweigh the mitigating factors that exist, a death sentence cannot be imposed. (The actual formulation varies between states.) In most states, the alternative is life in prison without the possibility of parole.
- If a death sentence is imposed, the defendant can appeal to ask the state's highest court to review the legality of the death sentence.
- If the appeal is not successful, death-sentenced prisoners can seek post-conviction review in state courts, and federal habeas corpus review in federal courts.
- The United States Supreme Court does not automatically review all death sentences; it has discretion to select which cases to accept for review after direct appeal, after state post-conviction review, and after federal habeas corpus review.

U.S. Constitution's ban on excessive punishments.

The Eighth Amendment to the United States Constitution declares: *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The ban on cruel and unusual punishment prohibits: certain gruesome methods of punishment (e.g., torture, burning at the stake, crucifixion); punishments that are grossly disproportionate to (too harsh for) the particular crime; and death sentences that have not been decided in a fair

⁷ Each state has by statute adopted a list of aggravating factors that can be considered when relevant in a particular case.

manner and by an impartial jury, or that are disproportionate, given the relatively less moral culpability of the defendant.

Persons currently exempt from the death penalty.

The United States Supreme Court has held the death penalty is an excessive punishment for two groups of individuals who have significantly diminished moral culpability for their crimes in comparison with the "average murderer."

These two groups are defendants who, at the time they committed a capital offense (an offense for which the death penalty otherwise could be imposed):

- Had **mental retardation**.

Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that . . . the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded defendant. *Atkins v. Virginia*, 526 U.S. 304 (2002).

- Were **minors (younger than 18 years old)**.

Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished to a substantial degree, by reason of youth and immaturity. *Roper v Simmons*, 543 U.S. 551 (2005).

Key factors in recognizing diminished culpability in *Atkins* and *Roper*.

The Supreme Court decisions exempting persons with mental retardation and minors from the death penalty recognized several key factors in arriving at those conclusions.

- retribution is related to culpability, and this justification for the most severe punishment does not exist when culpability for a crime is reduced by developmental immaturity;
- decreased capacity to understand and process information;
- impaired logical reasoning;
- poor impulse control;
- inability to comprehend reactions of others;
- lack of maturity, undeveloped sense of responsibility;
- vulnerability or susceptibility to negative influences and outside pressures;
- concerns about whether jurors can fairly weigh, as mitigating, evidence relating to diminished responsibility of these defendants;
- lack of evidence that capital punishment will deter other individuals with mental retardation or who are minors;
- retribution is related to culpability, and this justification for the most severe punishment does not exist when culpability for a crime is reduced by developmental immaturity;
- concerns about procedural due process for defendants with impaired ability to assist counsel.

Mental retardation is not the only brain-based disability that needs to be exempt from the death penalty, in appropriate circumstances.

It is profoundly inconsistent to exempt people with mental retardation from the death penalty while others remain exposed to it who had serious mental disabilities likely to have affected them at the time of the crime. Both groups of defendants are impaired by brain-based disorders that they have not chosen to have. More importantly, both are substantially less morally culpable than the "average murderer."

Persons with untreated, or inappropriately treated, serious mental disorders can engage in actions that they would likely not have otherwise taken. Severe mental disorders can cause individuals to experience impairments that can affect their actions.

- Impairments in:**
- orientation to reality (hallucinations, delusions, perceptions of persecution)
 - logical reasoning
 - processing and comprehension of information
 - impulse control
 - memory and concentration

The symptoms and functional effects of severe mental illness, if they exist at the time of a capital crime, can diminish criminal culpability sufficiently to make the imposition of the death penalty disproportionate and, thus, inappropriate (as it is for those with mental retardation or who are minors).

Given the rationale provided in both the *Atkins* and *Simmons* rulings of exempting the death penalty for those with "reduced moral culpability," it is appropriate to extend this in appropriate cases to those suffering from serious mental disorders at the time of their offenses. Persons suffering from a serious mental disability at the time they committed a capital offense are significantly less culpable than the "average murderer." Therefore, they need similar protections to those accorded to defendants who have mental retardation or who were minors at the time of their offenses.

The ABA Resolution proposes two categories of exemptions from the death penalty (but not from being tried, convicted and sentenced to the prison term provided for under state law):

- An absolute exemption from a death sentences for defendants with mental retardation (diagnosed as having an onset before the age specified by state law; e.g., before age 22) as well as those who have functionally equivalent cognitive impairments but with a later age of onset (e.g., persons who acquire dementia or TBI after the age of onset to diagnose mental retardation).
- An exemption for other serious mental disorders when there is a significant reason to believe the crime would not have been committed absent that disorder (*see* Definitions above on page 1).

The Supreme Court did not initially recognize the Constitutional exemptions for those who had mental retardation or were minors at the time they committed capital offenses. It only

recognized these exemptions after prohibitions were in existence in many states as a result of legislation or state court decisions protecting these groups of defendants. Similarly, it is likely that any exemptions with regard to people with serious mental disorders will be created initially by the action of legislative bodies and, perhaps, some state courts interpreting their state constitutions.

C. OFFENSE ISSUES: DEFENDANTS WITH SERIOUS MENTAL DISABILITIES AT THE TIME OF THE OFFENSE

There is no safety net to protect people with serious mental disabilities at the time of their offenses from being sentenced to death or executed.

Larry Robinson was diagnosed with paranoid schizophrenia three years before the murders for which he was sentenced to die. His mother repeatedly sought help, but was told that the state had no resources unless he turned violent. He was executed by the state of Texas in 2000.

The insanity defense does not protect all persons with mental disabilities.

The definition of severe mental disorder or disability used in the ABA Resolution was adapted from the Model Penal Code (MPC) test for insanity used in many jurisdictions. However, not all jurisdictions have adopted the MPC. Other jurisdictions either do not recognize an insanity defense or define it more narrowly than the MPC test.

Even in jurisdictions that follow the MPC, a ban on the death penalty for persons with serious mental disorders/disabilities at the time of their offenses is still needed. In jurisdictions that allow for a verdict of “not guilty by reason of insanity,” jurors often are reluctant to return an insanity verdict in cases involving aggravated murders because the defendant is not convicted of the murders.⁸

Recognized purposes of the death penalty are not served by executing persons with mental disabilities at the time of their offense.

The recognized purposes of the death penalty are: deterrence (to stop people from committing capital offenses out of fear of being executed); and retribution (punishment proportionate to, and warranted by, the crime).

Deterrence

- People do not choose to have mental disabilities. The existence of the death penalty cannot deter people from becoming psychotic or having distorted reasoning.
- We know how to treat the symptoms of mental disabilities. Early identification and making available community-based mental-health services that are affordable, appropriate, adequate, and patient- and family-centered is the most effect solution for ensuing public safety, and cost-effective.
- All too often pleas for help from persons with mental disabilities, or their loved ones, have gone unheeded for a long time prior to their engaging in crime.
- After a person with a psychiatric disability has committed a violent crime, providing appropriate treatment and care is adequate to prevent future offenses.

⁸ Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 Calif. Crim L. Rev., art. 3 (2000), www.boalt.org/CCLR

Texas ranks 49th out of the 50 states in terms of the amount of money spent per capital in the treatment of the mentally ill (including funds for mental health services in jails or prisons). However, it spends an average of \$2.3 million dollars to try a death penalty case.

Retribution

- A punishment for the purpose of retribution must be proportionate to the nature of the offense. In a civilized society, capital punishment is excessive for minor crimes, crimes committed in legitimate self-defense, crimes unknowingly or involuntarily committed, and crimes committed by persons with reduced culpability due to immature brains (youth) or brain-based disorders (persons with mental retardation).
- Similarly, the death penalty is excessive for persons who commit capital murder due to other brain-based disorders, such as severe mental disabilities.

Defendants with serious mental disabilities who go to trial are at risk of being wrongfully sentenced to death.

When defendants have a serious mental disability at the time of their trials, there is a significant risk that they will be wrongfully sentenced to death.

Their ability to assist their attorneys often is impaired, resulting in important mitigating information not being investigated and presented for jurors to consider during the penalty phase.

Anthony Larette was assigned a trial lawyer with no capital experience. The jury was left entirely unaware of his history of mental illness, the symptoms of which included blackouts and hallucinations, and after a sentencing phase that lasted less than an hour, they voted for a death sentence. He was executed in Missouri in 1995.

Serving as a juror in a capital murder trial is a stressful and difficult experience. Jurors want to render the appropriate verdict based on all relevant information. It is fundamentally unfair to deprive jurors of relevant information when defendants are impaired in their ability to assist counsel, or are in denial about their mental illness and refuse to allow evidence about it to be presented at trial.

Another way in which jurors are deprived of relevant information is when defense counsels decide not to allow defendants to testify due to concerns about their testimony and demeanor while testifying being compromised by the symptoms of their mental disorders. Other defendants are so delusional that they insist on representing themselves without the assistance of counsel. Sometimes this is due paranoid beliefs that defense counsel is part of a conspiracy to harm the defendant, or delusional beliefs of defendants about their ability to represent themselves.

Guy LeGrand was allowed to represent himself during his trial in North Carolina. As a result, his jury never heard the extensive evidence of his psychosis, which manifested itself during his trial in bizarre and self-destructive ways.

These situations typically result in an unreliable sentencing decision at trial. These and related problems are attenuated by adopting the protections proposed by the ABA Resolution.

Demeanor issues at trial.

As with many individuals with mental retardation, persons with serious mental disorders often look and act differently, especially when their illnesses are aggravated by the stress of arrest, pre-trial incarceration, and trial. Due to lack of experience with and understanding about mental illness, most jurors are unable to interpret unusual courtroom behaviors caused by mental disorders.

Even when mental disorders are treated with medications, the medications often have side effects that can prejudice jurors against a defendant. These include:

- √ **parkinsonism** (stiffness of the trunk, arms, or legs, a decrease in facial expression, tremor, some forms of paralysis, and certain problems with control of movement);
- √ **akathisia** (a feeling of inner restlessness and the urge to move, often manifested by rocking while standing or sitting, lifting feet as if marching on the spot, and crossing and uncrossing the legs while sitting);
- √ **dystonia** (a neurological movement disorder in which sustained muscle contractions cause twisting and repetitive movements or abnormal postures.);
- √ **tardive dyskinesia** (involuntary movements of the tongue, lips, face, trunk, and extremities).

Defendants with serious mental disorders at the time of a capital offense can be protected from this cruel Catch 22 at trial by exempting them from the death penalty when they meet the criteria proposed by the ABA Resolution (i.e., when there is a significant reason to believe that the offense would not have occurred absent the disorder).

Danger of mental illness being used as an aggravating factor rather than a mitigating circumstance related to diminished culpability.

Every state has laws that include mental disease or defect as a mitigating factor. However, ignorance and fear about mental illness can result in jurors erroneously using mental illness as an aggravating factor rather than a mitigating factor despite jury instructions that attempt to guide jurors in the proper use of this evidence.

In some cases, prosecutors have played on jurors' fears of those with severe mental disorders by convincing them that such persons pose a threat of future dangerousness.

Herbert Welcome had mental retardation and mental illness in 1981 when he became involved in the heat-of-passion fatal shooting of an aunt and her boyfriend who had been exploiting and abusing him. Illiterate and unable to comprehend his trial proceedings, he sometimes slept in the courtroom and routinely smiled at everyone (an adaptive behavior he learned to use with strangers to seek their approval). Jurors were not informed of his intellectual impairments, and the prosecutor told them that his smiling during trial was a sign that he lacked remorse. Jurors sentenced him to death.

Defendants with serious mental disorders who ask to be sentenced to death.

Another way in which mental disorders can negatively affect the reliability of a capital murder trial is when defendants demand during their trial testimony that a death sentence be imposed.

In 1997, Christina Riggs, who came from a family with a history of mental illness and suicidal tendency, killed her two children and attempted to commit suicide by injecting herself with potassium chloride (a substance used in lethal injection executions in the US). That suicide attempt failed, but at her sentencing hearing she asked the jury for a death sentence: "I want to die. I want to be with my babies. I started this out seven months ago. And I want you to give me the death penalty. I don't want you to feel guilty." The jury granted her request for the death penalty, and on May 2, 2000, the state executed Christina Riggs using the same substance with which she had attempted suicide.

The standards for competency to stand trial fail to protect defendants with serious mental disabilities.

Although the U.S. Constitution requires that defendants be capable of participating knowingly and fully in their own defense, state competency standards are quite low and at times misunderstood and unevenly applied. There are defendants who were allowed to proceed to trial, and even represent themselves, despite serious questions about their competency.

Although serious questions existed about his competency to stand trial, Scott Panetti was allowed to fire his attorneys and represent himself. At trial, he wore a cowboy outfit, constantly used old western terminology, and asked irrational questions, frequently citing Biblical passages and engaging in incoherent and confused streams of consciousness. He was sentenced to death.

D. POST-TRIAL ISSUES: DEATH ROW PRISONERS WITH SERIOUS MENTAL DISABILITIES DURING POST-CONVICTION REVIEWS.

Appeals and collateral review -- the process.

After defendants have been convicted of capital murder and sentenced to death, they have a right to ask state and federal courts to review legal errors affecting the results of their trial, both the conviction as well as the sentence. The first step is an appeal to a higher state court (typically the highest court in the state). The **direct appeal** involves a paper review of the trial-court proceedings. There is no evidence or testimony presented. If the appeal is unsuccessful, the prisoner can then ask the U.S. Supreme Court to accept the case to review certain kinds of errors. That Court rarely accepts capital cases for review at this point.

The next phase of review involves collateral review in state courts, often referred to as **state post-conviction or state habeas review**. If there are factual issues (e.g., whether the prisoner was denied effective assistance of counsel at trial or the prosecution withheld significant evidence), an evidentiary hearing can be held. Typically, collateral review petitions are filed in the lower courts of the state. If unsuccessful, they are appealed to the highest state court. Collateral review in the state courts of alleged trial errors not dealt with on direct appeal (known as exhausting state-court remedies) is required before prisoners can seek review in the federal courts. After exhausting state-court remedies, the prisoner can again ask the U.S. Supreme Court to accept the case for review of certain types of errors. It is uncommon for that Court to accept capital cases for review at this point.

After exhausting state-court remedies, condemned prisoners can seek **review in the federal courts** by filing a writ of habeas corpus in the applicable United States District Court (there is at least one District Court in each state). In limited circumstances, that court can hold an evidentiary hearing to resolve factual issues. If unsuccessful in the District Court, the prisoner can request the appropriate federal Court of Appeals (the United States is divided into 12 Courts of Appeals) to review the results in the District Court. If that also is unsuccessful, the prisoner can ask the Supreme Court to accept the case for review. If the Supreme Court does not accept the case, or accepts the case and does not decide it in favor of the prisoner, a warrant of execution (setting an execution date) is likely to be issued by the state court or state official with authority to issue a warrant.

Impediments to a full and fair review of death sentences.

Concerns about a prisoner's mental competence and suitability for execution can arise at any time after imposition of the death sentence. The stress of having a death sentence coupled with the harsh conditions on death row can cause prisoners to deteriorate mentally, especially those who are emotionally fragile due to undiagnosed and/or untreated mental disorders.

Some of the obstacles to fair and meaningful review of death sentences are concerns that arise about a prisoner's lack of capacity to:

- apprise their counsel or courts of facts that, if raised in a timely manner, could provide a basis for relief in post-conviction proceedings; and
- make a rational decision regarding whether to pursue post-conviction proceedings (i.e., proceed with their execution without further review of their death sentences).

The ABA Resolution: para. 3(a)

A death sentence should not be carried out if:

- a condemned prisoner has a mental disability, and
- that disability significantly impairs the prisoner's capacity to:
 - make a rational decision to waive or terminate available post-conviction proceedings, or
 - understand or communicate pertinent information or otherwise assist his counsel with regard to legal issues requiring the prisoner's participation.

Prisoners who ask to waive post-conviction proceedings.

Competent prisoners, including those on death row, are entitled to choose not to pursue appeals of their death sentences (known as "waiving" review). If a prisoner is not competent, the standard procedure is to allow someone (e.g., a relative or the attorney) to act as a "next friend" to pursue post-conviction review on behalf of the prisoner.

The ABA Resolution: para. 3(b)

- When a condemned prisoner has a mental disability that significantly impairs the prisoner's ability to make a rational decision, and
- the prisoner seeks to waiver post-conviction proceedings:
 - the court should permit a next friend acting on the prisoner's behalf to initiate and pursue available remedies to set aside the conviction or death sentence.

Reportedly, 13% of the prisoners executed under modern death-penalty statutes (those adopted since 1972) have been "volunteers" – prisoners who asked to be executed without completing available review of their death sentences. Many of them were executed despite having a mental disorder or disability that significantly impaired their ability to make a rational decision.

A three-step test is typically used by federal courts to determine competency to waive post-conviction reviews and proceed with an execution.

- (1) Does the prisoner have a mental disorder?

- (2) If so, does this condition prevent the prisoner from understanding his or her legal position and the options available to the prisoner?
- (3) Even if understanding is unimpaired, does the condition nonetheless prevent the prisoner from making a rational choice among the options?

The primary focus tends to be the third step: whether the prisoner's decision is attributable to the mental disorder or to a "rational choice." In most cases, the condemned prisoner gives reasons that might seem "rational" under the circumstances; e.g., a desire to take responsibility for one's actions and a belief that one deserves the death penalty; a preference for the death penalty over life imprisonment. Troublesome are the cases in which apparently "rational" reasons are intertwined with emotional distress (especially depression), feelings of guilt and remorse, and hopelessness. Choices that may otherwise seem "rational" could be rooted in suicidal motivations. When a prisoner is depressed and suicidal but has stated a desire to take responsibility and be executed, courts are ill suited to determine which is the predominant motivation.

A study of 106 prisoners who had volunteered for execution found recorded diagnoses of: schizophrenia for 14 prisoners; depression or bipolar disorder for 23; PTSD for 10; borderline personality disorder for 4; and multiple personality disorder for 2; and another 12 had unspecified histories of mental illness.⁹ Given this high prevalence of mental illness, courts should be more willing to acknowledge suicidal motivations when they are evident and should be more inclined to attribute suicidal motivations to mental illness when there is a convincing link to clinical evidence of such.

A relatively high degree of rationality should be required in order to find condemned prisoners competent to waive review of the validity of their sentences. The appropriate test should be: Is the prisoner who seeks execution able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder?

Prisoners lacking competence to assist counsel in post-conviction proceedings.

The reliability of post-conviction proceedings is compromised when condemned prisoners are incompetent to assist counsel representing them. Courts should suspend post-conviction proceedings upon proof that a prisoner is incompetent to assist counsel and the prisoner's participation is necessary for a fair resolution of a specific claim.

The ABA Resolution: para. 3(c)

- The court should suspend proceedings if:
 - a condemned prisoner has a mental disability that impairs capacity to assist counsel and
 - the prisoner's participation is necessary for a fair resolution of specific claims relating to the validity of the conviction or death sentence.

⁹ John Blume, Killing the Willing: Volunteers, Suicide and Competency, 103 MICH. L. REV. 939, 959 (2005).

- If the court determines that restoration of competency is unlikely in the foreseeable future:
 - a death sentence should be reduced to lesser punishment.¹⁰

Since 1973, over 120 prisoners have been released from death row based on evidence of their innocence. Many more have had their death sentences overturned and replaced with prison terms due to the discovery of mitigating evidence not presented at trial that jurors should have heard in deciding the appropriate penalty. It is possible that incompetent prisoners are unable to assist their counsel in reconstructing factual or legal claims that would render their death sentences invalid. Hence, condemned prisoners who are incompetent to assist counsel should not be executed.

Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice. However, post-conviction proceedings should be suspended if the prisoner's counsel makes a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims.

Once the post-conviction proceedings have been suspended due to a prisoner's incompetence to assist counsel, the death sentence should not remain under an indefinite stay. A judicial finding that a prisoner's competence to assist counsel is not likely to be restored in the foreseeable future should result in a reduction of the death sentence to the relevant sentence under state law for capital offenders when execution is not an option.

¹⁰ This approach is analogous to the suspension of criminal proceedings before trial due to incompetence to stand trial; in that context, the proceedings are typically terminated and charges are dismissed after a specified period of time if a court finds competence is not likely to be restored in the foreseeable future.

E. TIME OF EXECUTION ISSUES: DEFENDANTS WITH SERIOUS MENTAL DISABILITIES AT THE TIME OF THEIR EXECUTION.

In 1986, the U.S. Supreme Court ruled that the execution of prisoners who are insane (those who do not understand the reason for, or the reality of, their punishment) violates the U.S. Constitution, *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* decision did not define incompetence to be executed, or outline the procedures that states should use to make those determinations. It left that up to each state. In many states there are inadequate protections to prevent the execution of prisoners who have a serious mental disability at the time of their execution that prevents them from understanding they are to be executed as punishment for their crimes.

Prisoners unable to understand the punishment or its purpose should not be executed.

Condemned prisoners with mental disabilities should not be executed if they lack a factual or a rational understanding regarding his or her execution. For example, an execution should not take place if a condemned prisoner lacks the capacity to understand that her execution will result in death and she will never be revived or alive afterwards; or if the condemned irrationally believes that his conviction and death sentence have been reversed and there is a conspiracy by the FBI and aliens to keep that a secret in order to kill him because they believe he has stolen classified information that they do not want revealed.

The ABA Resolution, para. 3(d)

A death sentence should be reduced to the maximum prison term available when:

- collateral review proceedings have concluded and an execution date has been set, and
- a prisoner has a mental disability that significantly impairs the prisoner's ability:
 - to understand the nature and purpose of the punishment, or
 - to appreciate the reason for its imposition in the prisoner's own case.

Clemency does not protect the insane from being executed.

Often for political reasons, governors tend to be hesitant to grant clemency on behalf of prisoners on death row seeking clemency to commute their death sentences to life imprisonment. Only a few governors have had the courage and understanding to commute death sentences due to concerns about executing mentally ill offenders.

There are many examples of persons with severe mental illness who have been executed since the *Ford* decision.

Bobby Wilcher, who suffered from bi-polar disorder and had a long history of psychological problems was executed in Mississippi in 2006.

Donald Beardslee was executed in California in 2005 despite suffering from severe mental illness and brain damage.

It is unethical for medical professionals to use drugs to induce competency to be executed.

It is profoundly ironic for prisoners with serious mental disabilities to have been denied medical treatment prior to their crimes and then for the government to seek to forcibly medicate them in order to make them competent to be executed. It also raises ethical issues for health care professionals, trained in the healing arts, to prescribe treatment for the primary purpose to enable the state to carry out an execution of someone who has been found incompetent to be executed.

By the early 1990s, Charles Singleton was regularly put on various anti-psychotic drugs. When he did not take the medication, or he needed increased or different medication, his symptoms would worsen. When his illness became severe, he was put on an involuntary medication regime. When his psychotic symptoms abated, the state of Arkansas executed him in 2004 (after he had spent 24 years on death row).

After a prisoner has been found incompetent for execution, the only one sensible policy is for a death sentence to be automatically commuted to alternative term of imprisonment available under the applicable state law.

F. STIGMA ISSUES **Addressing concerns that exemption** **from the death penalty might be stigmatizing**

It is undeniable that it still is very stigmatizing in our society for persons to be regarded as having a mental illness. Persons known to have with mental illness, even when it is being appropriately treated and without active symptoms, have experienced discrimination in the workplace and other aspects of their lives.

It can be anticipated that some self-advocates and advocates will wonder if initiatives to ban the death penalty for persons with severe mental disorders will increase the stigma of mental illness – that these initiatives will generate incorrect perceptions that people with mental illness are prone to commit violent crimes.

Initiatives to protect people with mental disabilities from the death penalty can actually help address stigma issues and reduce prejudice and bias about mental illness. These initiatives inevitably must be accompanied by a public awareness campaign to help the public to:

- understand that nobody is exempt from acquiring a mental disorder; and
- appreciate the challenges of living with a mental illness in a society that is uninformed and unsupportive.

Failure of the mental-health care system to meet known needs.

Capital defendants who have a serious mental often have a history of mental illness that had never been diagnosed or, if diagnosed, was left untreated. The failure of the mental health systems in the United States to appropriately deal with mental health problems is well documented. The President's New Freedom Commission on Mental Health has called it a badly fragmented "system in shambles" (*Interim Report to the President*, October 29, 2002).

Several months before David Lynch (a Navy veteran with no prior criminal record) was sentenced to death in 1993, he voluntarily admitted himself to a psychiatric hospital following a suicide attempt. He told examiners that he had considered killing himself and others, said he heard persistent sounds that others did not, and shared that he felt persecuted by his neighbors. Doctors concluded he was merely depressed and prescribed Prozac, and discharged him after two weeks.

The criminal justice system has increasingly become the *de facto* mental health treatment system in the United States, largely due to the unavailability of psychiatric treatment and mental health services for those in need.¹¹ In some states severely mentally ill individuals cannot receive state-sponsored care until they have been proved to be violent and a danger to society.

Larry Robison, who was executed in Texas in 2000 had been diagnosed with paranoid schizophrenia three years before the murders for which he was sentenced to die. His mother repeatedly sought help but was told that the state could not provide any resources unless he turned violent.

The vast majority of people with serious mental disorders do not need costly, long-term in-patient commitments to establish a treatment regimen. Providing timely and appropriate community-based health-care services to those in need is the least expensive and generally most effective approach to meeting their needs and maintaining public safety.

Highly vulnerable population.

As discussed in Part D, above, defendants with serious mental disabilities are at special risk of being wrongfully sentenced to death. Hence, this small number of defendants should be exempt from the death penalty in accordance with the ABA Resolution.

¹¹ See Frontline, The New Asylums. <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/> .

Anthony Larette was assigned a trial lawyer with no capital experience. The jury was not made aware of his history of mental illness, the symptoms of which included blackouts and hallucinations. After a sentencing phase that lasted less than an hour, the jury voted for a death sentence and Larette was executed in Missouri in 1995.

G. ADDITIONAL INFORMATION AND RESOURCES

Articles

- Bonnie, R.J. Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures. 54 *Cath. U.L.Rev.* 1123 (2005).
- Honberg, R. The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses. 54 *Catholic U. L. Rev.*, 1153 (2005).
- Tabak, R. J. Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation. 25 *St. Louis U. Pub. L. Rev.* 2 (2006).
- Slobogin, C. Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations. 54 *Catholic U. L. Rev.* 1133 (2005).

Websites

- Death Penalty Information Center, www.deathpenaltyinfo.org.
- NAMI website (general, comprehensive information about mental illnesses, including legal issues), www.nami.org.
- National Mental Health Association, Death Row Inmates Resource Center, <http://www1.nmha.org/position/deathPenalty/index.cfm>

H. FACTS AND FIGURES

- **Fact: Capital murder trials do not always protect innocent people from being sentenced to death. Persons with serious mental disabilities are at greater risk of being convicted and sentenced to death for offenses they did not commit.**

In 1998 Anthony Porter came within 48 hours of execution for a crime he did not commit. His execution was stayed on a claim that Porter had mental retardation and was incompetent for execution (in August of 1998, his IQ was measured at 51). While a competency hearing was pending, some journalism students investigated the case and uncovered evidence of Porter's innocence of the crime for which he had spent some 17 years on death row. He was ultimately exonerated and freed.

- **Fact: We know how to safely treat persons with mental disabilities who are in prison.**

Due to a mental health system in this country that is broken, persons who were suffering from serious mental disorders at the time they committed a capital offense often did not have access to affordable, adequate and appropriate treatment to manage the symptoms of their disorders. The problem is not lack of knowledge about how to treat and care for people with serious mental disorders, but a lack of accessible resources, especially early identification and intervention through community-based services.

- **Fact: The death penalty is expensive and diverts resources away from effective crime prevention and mental health treatment programs.**

Because life is at stake, capital trials take longer and require more careful review. Conditions of confinement and supervision on death row are more expensive.

The California death penalty system costs taxpayers \$114 million per year beyond the costs of keeping convicts locked up for life. Taxpayers have paid more than \$250 million for each of the state's executions.

The most comprehensive study in the country found that the death penalty costs North Carolina \$2.16 million per execution over the costs of sentencing murderers to life imprisonments. The majority of those costs occur at the trial level.

- **Fact: Not all persons with serious mental disabilities are violent or dangerous.**

Although some persons with mental disabilities have symptoms that set them apart, such as talking to themselves or voices only they can hear, it is incorrect to automatically assume that they are dangerous or prone to violence.

Despite media coverage that conveys a different impression, serious mental illness is quite rare, and therefore contributes very little to the overall rate of violence in the general population. It is much lower than that associated with substance abuse, for example.

Most people with schizophrenia, major depression, or bipolar disorders do not commit assaultive acts. In addition, there is no difference between the risk of violence between people with a psychiatric disorder being treated and people without such disorders.

- **Fact: People with SMD are more likely to be victims rather than victimizers.¹²**

¹² Swanson, JW, et al., A National Study of Violent Behavior with Schizophrenia, *Archives of General Psychiatry*, 63:490-499 (May 2006).