

“The Purposeless and Needless Imposition of Pain and Suffering”: Challenging the Death Penalty for the Severely Mentally Ill in Virginia

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In light of the Supreme Court’s rulings *Atkins v. Virginia* and *Roper v. Simmons*, the time has come to consider whether the severely mentally ill also deserve the categorical protections recognized in these decisions. This memo explores a constitutional ban of the death penalty for defendants whose crimes were the products of severe mental illness. It focuses on litigating this emerging issue in Virginia. Part One outlines an argument that death sentences for the severely mentally ill are unconstitutional under the Supreme Court’s rationale in *Atkins v. Virginia* and *Roper v. Simmons*, and under the Equal Protection Clause of the Fourteenth Amendment. Part Two examines these issues as they relate to Virginia law and procedure. The language of the Virginia statute that makes severe mental illness a mitigating factor at sentencing is considered as the basis for a workable constitutional standard and Virginia death sentence trends for the severely mentally ill are examined. The paper concludes with a discussion of how counsel can best raise these issues during the course of a Virginia capital trial. For a practical introduction to litigating mental health issues, it is highly recommended that an attorney defending a capital client consult the International Justice Project’s comprehensive “A Practitioner’s Guide to Defending Capital Clients Who Have Mental Disorders and Impairments”.<sup>1</sup>

## **Part 1: The Constitution Bars the Death Penalty for the Mentally Ill**

### **The Problem of the Mentally Ill**

Current law allows people to be sentenced to death in the United States for crimes they committed while suffering from severe mental illnesses.<sup>2</sup> According to Mental Health America (formerly the National Mental Health Association), in 2006 roughly 5-10% of those on death row could be diagnosed with these debilitating conditions.<sup>3</sup> This demonstrates the prevalence of serious mental health problems among those convicted of capital murder, and suggests that a substantial number of those on death row were likely mentally ill to at least some degree during the commission of their crimes.

Capital defendants can suffer from a variety of disorders including, “schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders” that can cause,

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<sup>1</sup> Anne James and Matthew Cross (compiled), “A Practitioner’s Guide to Defending Capital Clients Who Have Mental Disorders and Impairments”, available at

<[http://www.nofsw.org/Defending\\_Clients\\_Who\\_Have\\_Mental\\_Disorders\\_and\\_Impairments.pdf](http://www.nofsw.org/Defending_Clients_Who_Have_Mental_Disorders_and_Impairments.pdf)>.

<sup>2</sup> Amnesty International, “United States of America: The Execution of Mentally Ill Offenders”, pg. 170, <<http://www.amnesty.org/en/library/asset/AMR51/003/2006/en/73c0b3fe-d46f-11dd-8743-d305bea2b2c7/amr510032006en.pdf>>, (2006) (lists 100 prisoners executed since 1977 and discusses their various serious mental health problems).

<sup>3</sup> Mental Health America, “Position Statement 54: Death Penalty and People With Mental Illnesses”, <<http://www.nmha.org/go/position-statements/54>>, (2006). See also Richard J. Bonnie, “Mentally Ill Prisoners On Death Row: Unsolved Puzzles For Courts And Legislatures”, 54 *Cath. U. L. Rev.* 1169, 1192 (2005).

“delusions (fixed, clearly false beliefs); hallucinations (clearly erroneous perceptions of reality); extremely disorganized thinking; or very significant disruption of consciousness, memory, and perception of the environment.”<sup>4</sup> Capital defendants can also be afflicted by conditions caused by their life experiences such as post traumatic stress disorder and brain damage.<sup>5</sup>

Schizophrenia may be the most common mental illness among capital defendants.<sup>6</sup> Its relevant symptoms can include delusions, hallucinations, disorganized speech, and grossly disorganized or catatonic behavior.<sup>7</sup> Individuals may experience voices in their heads and beliefs that others are reading their thoughts or trying to harm them.<sup>8</sup> There is no permanent cure for schizophrenia; symptoms can only be managed to varying degrees with treatment.<sup>9</sup>

Dissociative disorders are “marked by a loss of the normal integration between memories of the past, awareness of identity and immediate sensations, and control of bodily movements.”<sup>10</sup> Such disorders lead to a person having “distinct identities” that manifest themselves at different times.<sup>11</sup> Post traumatic stress disorder is an anxiety disorder that can follow traumatizing events that cause, “intense helplessness, fear, or horror” such as “war, childhood abuse, rape, natural disasters, accidents and captivity”.<sup>12</sup> Symptoms can include re-experiencing the traumatic event through flashbacks or nightmares, detachment from others, limited range of emotion, irritability, outbursts of anger, and inability to concentrate, among others.<sup>13</sup>

It is true that the capital sentencing system includes some safeguards designed to address these mental health concerns. These include the insanity defense, a requirement that mental illness be considered as a mitigating factor, and the requirement that an offender be mentally competent to be executed. However, these protections do not serve to prevent death sentences, or even executions, for the severely mentally ill.<sup>14</sup> As discussed below, mandatory consideration of mental illness can also act as an aggravating factor during jury deliberation to the extent that it is considered as evidence of future dangerousness.<sup>15</sup> The requirement of *Ford v. Wainwright* and *Panetti v. Quarterman*, that a defendant be competent for execution, does not focus on the defendant’s state at the time of the crime or on whether or not the death penalty is appropriate as applied to that particular defendant, but is directed

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<sup>4</sup> Ronald J. Tabak, *Mental Disability and Capital Punishment A More Rational Approach To A Disturbing Subject*, 34-SPG Hum. Rts. 5, 6 (2007)

<sup>5</sup> *Supra* note 2 at 19-20.

<sup>6</sup> *Supra* note 4 at 6; *supra* note 2 at 20.

<sup>7</sup> Bethany C. Bryant, “Expanding Atkins And Roper: A Diagnostic Approach to Excluding the Death Penalty as Punishment For Schizophrenic Offenders”, 78 Miss. L.J. 905, 921 (2009).

<sup>8</sup> *Id.* at 926.

<sup>9</sup> *Id.*; National Institute of Mental Health, “How is schizophrenia treated?”, <<http://www.nimh.nih.gov/health/publications/schizophrenia/how-is-schizophrenia-treated.shtml>>, (2011).

<sup>10</sup> *supra* note 2 at 19.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* note 2.

<sup>15</sup> Ronald J. Tabak, “Executing People With Mental Disabilities: How We Can Mitigate An Aggravating Situation”, 25 St. Louis U. Pub. L. Rev. 283, 288 (2006).

only to the constitutionality of the actual imposition of the punishment.<sup>16</sup> Finally, the insanity defense is not often attempted because it is very difficult for defendants to successfully prove at trial.<sup>17</sup>

### **Categorical Bars: *Atkins v. Virginia* and *Roper v. Simmons***

In *Atkins v. Virginia* the Supreme Court held that the Eighth Amendment bars the imposition of the death penalty on mentally retarded defendants.<sup>18</sup> In reaching the conclusion that the execution of the mentally retarded was “excessive,” the Court followed its established practice of evaluating the “evolving standards of decency that mark the progress of a maturing society” to determine the scope of the amendment’s limitations on punishment.<sup>19</sup> This analysis consists of two parts: a survey of objective evidence to determine contemporary societal values and the Court’s application of its own independent judgment on the issue.<sup>20</sup> The Court found that society had begun to demonstrate its rejection of the execution of the mentally retarded, based primarily on evidence that many state legislatures had abolished the practice since the question had last been considered and that the states which retained the option did not often exercise it.<sup>21</sup> In applying its own judgment, the Court stated that the two goals justifying capital punishment recognized in *Gregg v. Georgia*-- retribution and deterrence--cannot apply to the mentally retarded since their culpability is decreased by the very nature of their impairment.<sup>22</sup> Without evidence of retribution or a deterrent effect, capital punishment simply amounts to “nothing more than the purposeless and needless imposition of pain and suffering.”<sup>23</sup>

After acknowledging that the mentally retarded could still be culpable to some degree and be found competent to stand trial, the Court described the symptoms of mental retardation: “[B]y definition they have diminished capacities 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.”<sup>24</sup> Since the death penalty is to be reserved for the most heinous of crimes, for which the average murderer is not even sufficiently culpable, the Court found that no retributive rationale could justify sentencing mentally retarded offenders to death.<sup>25</sup> As for deterrence, since the mentally retarded have a lower capacity for learning from experiences and mistakes and controlling their impulses they would be unlikely to consider death as a possible consequence of their actions and therefore act accordingly.<sup>26</sup> The Court ruled that in order to adequately protect this particular class of defendants the Eighth amendment requires a per se bar against the death penalty.

<sup>16</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti v. Quarterman*, 551 U.S. 930 (2007).

<sup>17</sup> Daniel J. Nusbaum, “The Craziest Reform of Them All: A Critical Analysis Of The Constitutional Implications of “Abolishing” The Insanity Defense”, 87 Cornell L. Rev. 1509, 1512-1514 (2002).

<sup>18</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>19</sup> *Id.* at 311-312.

<sup>20</sup> *Id.* at 312-313.

<sup>21</sup> *Id.* at 314-316. (In *Atkins* the Court overruled its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) which held that the Eighth amendment required no per se bar against executing the mentally retarded).

<sup>22</sup> *Id.* at 318-319. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>23</sup> *Id.* at 319.

<sup>24</sup> *Id.* at 318.

<sup>25</sup> *Id.* at 319.

<sup>26</sup> *Id.* at 319-321.

In 2005, the Court undertook a similar analysis in *Roper v. Simmons* to find that the Eighth amendment also prohibited capital punishment for offenders under the age of 18.<sup>27</sup> As was the case in *Atkins*, the Court found that a legislative trend towards abolishing the death penalty for juveniles, and the infrequency of its application in states yet to abolish, reflected a societal consensus that minors were by definition less culpable for their crimes.<sup>28</sup> Juveniles were found to be immature and without a developed sense of responsibility, more susceptible to influence, and lacking a well formed character.<sup>29</sup> Similar to the mentally retarded, these indications of diminished culpability removed any retributive justification for the punishment.<sup>30</sup> The Court also noted that there was no evidence that capital punishment deterred minors, and that life in prison was already a very substantial punishment for those under the age of 18.<sup>31</sup> For the purposes of this discussion about capital punishment for the severely mentally ill, it is worth noting that the Court examined international norms demonstrated by the laws of other countries and international agreements to conclude that, “the overwhelming weight of international opinion” was opposed to the juvenile death penalty.<sup>32</sup>

### **Extending the Protections of *Atkins* and *Roper* to the Severely Mentally Ill**

Together, *Atkins* and *Roper* demonstrate the Court’s willingness in recent years to categorically exempt certain groups from the death penalty on the grounds that these groups possess characteristics that negate any constitutionally acceptable rationale for the imposition of capital punishment. The next logical step is protection for the severely mentally ill. *Atkins’* and *Roper’s* reasons for excluding people from a potential death sentence apply equally to those suffering from severe mental illnesses.

As is the case with the mentally retarded and juveniles, severe mental illness can render an individual less culpable for his or her actions and less likely to be deterred.<sup>33</sup> In difficult or stressful situations, individuals suffering from symptoms such as “delusions, hallucinations, significant thought disorders, and highly disorganized thinking’ ... are more likely to act out of abnormal fear, anger, outrage, or panic due to mental disabilities that distort their perceptions of reality.”<sup>34</sup> There are a wide variety of potential diagnoses that can cause these symptoms and reactions and others.<sup>35</sup>

Since schizophrenia arises commonly with capital defendants and has been often examined in the literature, it is useful to make comparisons between schizophrenia and mental retardation for the purposes of discussion. An attorney litigating these issues would want to focus on his or her client’s individual symptoms and compare them to those in *Atkins*.<sup>36</sup> Schizophrenia is a psychotic illness.<sup>37</sup> In

<sup>27</sup> *Roper v. Simmons*, 543 US 551 (2005).

<sup>28</sup> *Id.* at 567.

<sup>29</sup> *Id.* at 569-571.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 571-572.

<sup>32</sup> *Id.* at 575-578, quotation at 578.

<sup>33</sup> Christopher Slobogin, *Minding Justice: Laws That Deprive People With Mental Disability of Life and Liberty* 73 and 80-81 (2006).

<sup>34</sup> *Supra* note 15 at 290.

<sup>35</sup> *Supra* note 2 at 18-20.

<sup>36</sup> *Supra* note 1 at 200-201 (Discussion of symptoms and associated mental disorders).

<sup>37</sup> *Supra* note 33 at 73.

addition to delusions and hallucinations, symptoms include “disorganized speech and grossly disorganized behavior.”<sup>38</sup> “People who suffer from psychosis also have great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior.”<sup>39</sup> These are very similar to the characteristics of mental retardation indentified in *Atkins* and mentioned above.<sup>40</sup> Hallucinations and delusions, which further distort a sufferer’s understanding of reality and can exert influence on his or her actions, represent additional symptoms not associated with mental retardation which further tend to diminish culpability.<sup>41</sup>

Since those suffering from severe mental illnesses during the commission of their crimes have their behavior influenced and modified by forces beyond their control, they too are less culpable than the average murderer.<sup>42</sup> Their blameworthiness must decrease since in many cases we can imagine it is possible that but for a mental illness, a person would not have committed a capital murder. A condition which causes a person to be unable to properly perceive the world around him or gather and organize his thoughts necessarily diminishes his moral responsibility for his decisions or actions.<sup>43</sup> Additionally, the greater the degree of impairment, the less a person is culpable.<sup>44</sup> Supreme Court jurisprudence has made it clear that without sufficient culpability the retribution demanded by the Eighth Amendment cannot be found.<sup>45</sup>

Since people with certain mental illnesses also have impaired capacity to understand the consequences of their actions and control themselves, they cannot be deterred by the threat of punishment.<sup>46</sup> These conditions will often prevent people from understanding that their actions could ultimately lead to their own deaths, such that they would be afraid of the consequences and modify their actions to avoid them.<sup>47</sup> Delusions and hallucinations can be very powerful and vivid and could even cause a person to believe that his crimes are moral.<sup>48</sup> A disorder that causes a person to act with impulse will not allow deterrence since “decisions” are made without any sort of consideration of their

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 74.

<sup>40</sup> *Id.* at 73.

<sup>41</sup> *Id.* at 74. (“If anything, the delusions, command hallucinations, and disoriented thought process of those who are seriously mentally ill represent greater dysfunction than that experienced by most “mildly” retarded individuals (the only retarded people likely to commit crime)”).

<sup>42</sup> *Supra* note 15 at 288.

<sup>43</sup> *Id.* at 290.

<sup>44</sup> Dora W. Klein, “Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?”, 72 *Brook. L. Rev.* 1211, 1248-1249 (2007).

<sup>45</sup> *Roper v. Simmons* at 571.

<sup>46</sup> *Supra* note 7 at 931-932 (discussion of deterrence in the context of schizophrenia).

<sup>47</sup> *State v. Nelson*, 173 N.J. 417, 488 (N.J. 2002) (Zazzali, J., dissenting) (“In addition, the fear of execution, while possibly serving as a deterrent under some circumstances with some individuals, cannot plausibly be thought to provide a deterring reason to mentally ill persons moved by irrational and delusional motives”)

<sup>48</sup> Ronald S. Honberg, “The Injustice of Imposing Death Sentences On People with Severe Mental Illnesses”, 54 *Cath. U. L. Rev.* 1153, 1161 (2005); Christopher Slobogin, “Mental Disorder as An Exemption From The Death Penalty: The ABA-Irr Task Force Recommendations”, 54 *Cath. U. L. Rev.* 1133, 1142 (2005) (considering offenders who believe they were ordered by God to commit their crimes).

consequences.<sup>49</sup> The Supreme Court assesses potential deterrence in relation to the particular defendant receiving the punishment, not murderers in general.<sup>50</sup> If his or her illness by definition prevents the rational calculation that deterrence requires, deterrence cannot serve as a justification for capital punishment.<sup>51</sup>

In *Atkins*, the Court also mentioned specific risks that mentally retarded defendants face throughout the course of a capital case. The Court was troubled by the notion that these defendants run an increased risk of receiving an unjust sentence.<sup>52</sup> The Court found that mentally retarded defendants are more susceptible to giving false confessions, that they have difficulty helping their counsel develop mitigation evidence, that they have problems assisting their counsel generally, that they can make poor witnesses, and that they may have trouble expressing remorse for their crimes to the jury's satisfaction.<sup>53</sup> "Mentally retarded defendants in the aggregate face a special risk of wrongful execution."<sup>54</sup> In *Roper*, the Court noted the danger that a minor's "objective immaturity, vulnerability, and lack of depravity" will not be adequately considered in mitigation and that the young age of an offender could even be viewed as an aggravating factor.<sup>55</sup>

The severely mentally ill often face these very same dangers, and their capital trials also carry the same impermissible risk of an unjust sentence. The severely mentally ill, even if competent to stand trial, may have trouble helping their counsel or understanding the process.<sup>56</sup> Severe depression or a paranoid disorder may cause a defendant to forgo mitigation or "volunteer" for a death sentence through a guilty plea.<sup>57</sup> "It is common for defendants with mental illnesses to deny that they are sick or need treatment, resulting in a refusal to allow mental illness to be raised as a defense or as a mitigating factor."<sup>58</sup> A defendant may downplay his mental illness or its symptoms to avoid the social stigma attached to the diagnosis.<sup>59</sup> An untreated illness could cause the defendant to act in a strange or frightening manner at trial, further alienating the jury and increasing the perception that he or she is dangerous.<sup>60</sup> Medication for treatment of a disorder may cause the defendant to appear emotionless and without remorse or interest in the proceedings.<sup>61</sup> Research by The Capital Jury Project has shown that the jury's perception of a defendant's remorse can have a strong impact on its impressions of the

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<sup>49</sup> *State v. Ketterer*, 111 Ohio St. 3d 70, 105 (Ohio 2006) (Stratton, J., concurring)(" Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities.").

<sup>50</sup> *Roper v. Simmons* at 572 (considering the potential for juvenile murderers to be deterred by the death penalty).

<sup>51</sup> *Roper v. Simmons* at 561-562.

<sup>52</sup> *Atkins v. Virginia* at 320.

<sup>53</sup> *Id.* at 320-321.

<sup>54</sup> *Id.* at 321

<sup>55</sup> *Roper v. Simmons* at 373.

<sup>56</sup> *Supra* note 2 at 67.

<sup>57</sup> *Id.*

<sup>58</sup> *supra* note 48 at 1164 (Honberg).

<sup>59</sup> *Supra* note 2 at 67.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

crime at issue.<sup>62</sup> Mentally ill defendants could also be more susceptible to rights abuses by police and prosecutors, such as coercive interrogation, and improper arguments to juries based on fears and stereotypes of the mentally ill or insinuations of malingering.<sup>63</sup> Crimes influenced by a defendant's hallucinations or delusions may appear to the jury to be without motive and therefore more frightening and increase the risk that it will find a defendant to be a future danger.<sup>64</sup> Considering all these potential dangers, the risk of unfairness that the Court found troublesome in *Atkins* is equally applicable to the severely mentally ill, and similarly serves to undermine the accuracy and legitimacy of their capital sentences.

Additionally, the severely mentally ill face an especially troubling dilemma. Mental illness is, of course, a mitigating factor to be considered by the jury.<sup>65</sup> However, some jurisdictions (including Virginia<sup>66</sup>) also allow juries to impose the death sentence based on their finding that the defendant will present a future danger if sentenced to life in prison.<sup>67</sup> In practice, this can lead to a situation in which an individual's severe mental illness, which both the legislature and the constitution require to be considered as a fact weighing against the imposition of the death penalty, is treated instead as a justification for a death sentence.<sup>68</sup> Jurors may fear that a mental illness (which is a contributing factor to the capital murder in the first place) will lead a defendant to murder again, and sentence him or her to death to prevent harm to others.<sup>69</sup> This outcome completely ignores a severely mentally ill defendant's decreased culpability.<sup>70</sup>

The Supreme Court acknowledged this "two-edged sword" problem when considering death sentences for the mentally retarded in *Penry v. Lynaugh*.<sup>71</sup> Research demonstrates that these fears are well grounded. Jurors often fail to understand the concept of mitigating factors and how they operate.<sup>72</sup> Future dangerousness is the second most discussed topic in the jury room next to the actual crime, whether or not it is a formal issue for the jury's consideration.<sup>73</sup> It is been found to be "more important to jurors than is mitigating evidence about mental illness".<sup>74</sup> Research also shows "that capital jurors can view a defendant's serious mental illness as an aggravating factor."<sup>75</sup> In light of this,

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<sup>62</sup> Theodore Eisenberg, Stephen P. Garvey, Martin T. Wells, "But Was He Sorry? The Role of Remorse in Capital Sentencing", 83 Cornell L. Rev. 1599, 1637 (1998).

<sup>63</sup> *Supra* note 2 at 81-87.

<sup>64</sup> *Id.*

<sup>65</sup> Pamela A. Wilkins, "Rethinking Categorical Prohibitions On Capital Punishment: How The Current Test Fails Mentally Ill Offenders And What To Do About It", 40 U. Mem. L. Rev. 423, 477 (2009).

<sup>66</sup> See Va. Code Ann. § 19.2-264.4 (mitigating factor) and § 19.2-264.2 (future dangerousness).

<sup>67</sup> *Supra* note 2 at 71-72.

<sup>68</sup> *Supra* note 15 at 288 ("Many jurors create what amounts to a presumption that someone with severe mental illness will be dangerous in the future.")

<sup>69</sup> *Supra* note 2 at 70.

<sup>70</sup> *Supra* note 15 at 289.

<sup>71</sup> *Supra* note 2 at 69. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>72</sup> Ronald J. Tabak, "Overview Of Task Force Proposal On Mental Disability And The Death Penalty", 54 Cath. U. L. Rev. 1123, 1129 (2005).

<sup>73</sup> *Supra* note 65 at 475.

<sup>74</sup> *Id.* at 477.

<sup>75</sup> *Supra* note 2 at 70.

some defense attorneys have strategically chosen not to present mental health mitigation in order to avoid this “double-edged sword,” and appellate courts---in what amounts to acknowledgement of the risk---have held that attorneys are not ineffective for making such calculations<sup>76</sup>

This risk is magnified for offenders whose diagnosis can carry a dangerous stigma, such as schizophrenia.<sup>77</sup> As mentioned above, *Roper* recognized, in the context of minors, a risk that juries would be unable to properly consider mitigating evidence.<sup>78</sup> This troubling danger further justifies the finding of a constitutional ban on executing offenders with severe mental illness, since it is the only real way to ensure that mental illness is treated as the mitigating factor it is required to be. When a mitigating factor is instead treated as an aggravating factor contrary to the requirements of state procedural law, “a flagrant due process violation has occurred.”<sup>79</sup> This distortion becomes especially stark in Virginia when considered alongside evidence that there exists very little risk of an offender committing acts of serious violence while in the custody of the Virginia Department of Corrections.<sup>80</sup> Furthermore, offenders with mental illnesses simply do not present a greater danger than others.<sup>81</sup>

The biggest hurdle in litigating an extension of *Atkins* and *Roper* to the severely mentally ill is overcoming the Court’s reliance on objective factors to demonstrate that society’s evolving standards of decency have shifted to reject the death sentence in this situation. *Atkins* and *Roper* both found strong evidence of this aversion by examining how the issues were treated by state legislatures.<sup>82</sup> Legislative trends away from allowing the executions of the mentally retarded and minors largely explain the Court’s willingness to reverse its previous holdings.<sup>83</sup> Only one state, Connecticut, has banned the death penalty for the severely mentally ill, and as of 2006 no other state was considering doing the same.<sup>84</sup> “[A] determination that evolving standards of decency have been abridged still requires some evidence of statutory evolution, and that evidence simply does not exist with respect to the execution of people with mental illness.”<sup>85</sup>

This does not mean that the issue is settled, however. As discussed in regards to *Atkins* and *Roper*, the Court also applies brings it own judgment to bear in determining if the death penalty is a

<sup>76</sup> *Id.* at 71-72. (citing *Medina v. State*, 690 So.2d 1241 (Fla. 1997) and *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003)). See also *supra* note 15 at 288.

<sup>77</sup> *Supra* note 33 at 89 (death qualified mock jurors more hostile to defendants with schizophrenia than those with mental retardation and others).

<sup>78</sup> *Supra* note 15 at 288.

<sup>79</sup> *Supra* note 33 at 87.

<sup>80</sup> Virginia Department of Corrections, “State Responsible Offender Population Trends: FY2005-FY2009” 13, 17, <[http://www.vadoc.state.va.us/about/facts/research/new-statsum/offenderpopulationtrends\\_fy05-fy09.pdf](http://www.vadoc.state.va.us/about/facts/research/new-statsum/offenderpopulationtrends_fy05-fy09.pdf)> (2010). (1 inmate was murdered in the period of 2005-2009 out of an average population of over 36,000 inmates; in 2009 there were 0.15 aggravated assaults of DOC staff per 1,000 inmates and 0.59 aggravated assaults on inmates per 1,000).

<sup>81</sup> *Supra* note 33 at 80.

<sup>82</sup> *Atkins v. Virginia* at 314-16. *Roper v. Simmons* at 567.

<sup>83</sup> *Atkins v. Virginia* at 314 (“Much has changed since then.” (in reference to *Perry v. Lynaugh*, 492 U.S. 302 (1989)). *Roper v. Simmons* at 565 (“we still consider the change from *Stanford* to this case to be significant.” (*Stanford v. Kentucky*, 492 U.S. 361 (1989) upheld the imposition of the death penalty for minors)).

<sup>84</sup> *Supra* note 33 at 67; Conn. Gen. Stat. § 53a-46a(h).

<sup>85</sup> *Id.*

constitutionally proportionate punishment for a particular group.<sup>86</sup> The question has been left unanswered whether this independent judgment is sufficient to effectuate a ban.<sup>87</sup> In decisions prior to *Atkins*, the Court struck down provisions under the Eighth Amendment without looking for a legislative consensus, or if it did find such a consensus, the Court still emphasized the primacy of its independent judgment.<sup>88</sup>

An attorney arguing this point must take the position that when considering capital punishment for the severely mentally ill, the Court should place more reliance on its own judgment. Precedent does not explicitly demand a finding of a legislative consensus<sup>89</sup>, and the Court should not consider such a consensus a prerequisite to recognizing Eighth Amendment protections. Generally, the Court should focus on the protections it has created for the mentally retarded and minors and realize that there is no credible argument to withhold the same protections from the severely mentally ill.<sup>90</sup> It is possible to speculate that if legislators and voters were adequately informed of the impact of severe mental illnesses on defendants, the similarities to the effects of mental retardation, and the decreased culpability and chance for deterrence, they might vote to similarly ban their death sentences.<sup>91</sup> The Court should properly view an objective evidence of society's judgment as support for their independent assessment and not a requirement.<sup>92</sup> In a 2008 decision, *Kennedy v. Louisiana*, the Court stated, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."<sup>93</sup> This suggests that it reserves the ultimate judgment of a punishment's proportionality for itself.<sup>94</sup> Independent judgment is especially vital since capital murder defendants are a marginalized minority who must rely on the courts for protection of their fundamental rights, elected officials having nothing to gain by supporting them. The Court must adhere to its "underlying principle that the death penalty is reserved for a narrow category of crimes and offenders" by excluding from that narrow category those with severe mental illness.<sup>95</sup>

Nevertheless, there exist some objective factors that the Court may point to confirm its own conclusion that executing those who were unable control their actions is excessive. First, since

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<sup>86</sup> *Roper v. Simmons* at 563-564.

<sup>87</sup> Bruce J. Winick, "The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness As The Next Frontier", 50 B.C. L. Rev. 785, 801 (2009).

<sup>88</sup> *Id.* at 802-804 (examining the decisions in *Robinson v. California*, 370 U.S. 660 (1962)(No consideration of a societal consensus, including legislative enactments); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *Emmund v. Florida*, 458 U.S. 782 (1982)).

<sup>89</sup> *Supra* note 87.

<sup>90</sup> *Id.* at 811.

<sup>91</sup> See generally *supra* note 2 at 45-48 (general discussion of what could impact or change society's view on the execution of the severely mentally ill or be a better indicator of them).

<sup>92</sup> *Supra* note 87 at 801-814. (argues that the Court's decisions in *Atkins*, *Roper*, and *Kennedy v. Louisiana*, 544 U.S. 407 (2008) suggest that the Court can rely on its own proportionality review to ban the death penalty for the severely mentally ill).

<sup>93</sup> *Kennedy v. Louisiana* at 434 (quoting *Coker v. Georgia* at 597)(quotations removed). See *supra* note 87 at 812 for a further discussion of this quotation's significance.

<sup>94</sup> *Supra* note 87 at 811-813.

<sup>95</sup> *Roper v. Simmons* at 568-569.

legislative consensuses exist against the execution of the mentally retarded and minors, it is not a huge leap to draw at least some support from that same consensus and apply it to a different category of offenders whose culpability is decreased for many of the same reasons. There is also some legislative recognition that mental illness reduces culpability. This is shown by the fact that most death penalty states have statutory mitigating factors that account for the impact of mental illness and the existence of the insanity defense.<sup>96</sup> As discussed below, the American Bar Association created a Task Force to examine this issue and has adopted its recommendation prohibiting the death penalty for offenders afflicted by severe mental illness at the time of the commission of their crime under certain circumstances.<sup>97</sup> This recommendation has also been adopted by the American Psychological Association, the National Alliance for the Mentally Ill, and the American Psychiatric Association.<sup>98</sup> International norms forbid the execution of anyone, especially the mentally ill.<sup>99</sup> In *Atkins* international practice was mentioned in a footnote and in *Roper* it was discussed in greater detail.<sup>100</sup> Some appellate judges have also begun to voice their disagreement with the practice of sentencing the severely mentally ill to death in dissents and concurring opinions.<sup>101</sup> Finally, statistics suggest that the general public also disagrees with the practice. “In a Gallup poll conducted in May of 2002, approximately seventy-five percent of Americans responded that they opposed the death penalty when asked whether they favored or opposed it for the ‘mentally ill.’”<sup>102</sup>

In light of the rationales of *Atkins* and *Simmons*, and their equal applicability to the severely mentally ill, the Court may soon accept that Eighth amendment precludes sentencing the mentally ill to death for many of the same reasons. Counsel should argue that protections for the severely mentally ill are the next logical extension while emphasizing the importance and primacy of the Court’s own judgment of society’s “evolving standard of decency”.

Not only does Eighth Amendment jurisprudence extend to bar the death penalty for those suffering from mental illness, but the Court’s decisions in *Atkins* and *Roper* also raise the possibility that equal protection demands that those with severe mental illness are treated the same as those who are

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<sup>96</sup> *Supra* note 65.

<sup>97</sup> *Supra* note 7 at 930-931 (discussion of professional organizations’ stances on executing the mentally ill).

<sup>98</sup> *Id.*

<sup>99</sup> Amnesty International, “Death Penalty: Ratification of International Treaties”, <<http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties>>; Amnesty International, “Death Penalty and Mental Illness”, <<http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-mental-illness/page.do?id=1101090>> ; *supra* note 7 at 931.

<sup>100</sup> *Atkins* at 316 n. 21; *Roper* at 575-578.

<sup>101</sup> See *Corcoran v. State*, 774 N.E.2d 495, 502-503 (Ind. 2002) (Rucker, J., dissenting); *State v. Nelson*, 803 A.2d 1, 41-50 (N.J. 2002) (Zazzali, J., concurring); *State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting); *Bryan v. Mullin*, 335 F.3d 1207, 1237 (10th Cir. Okla. 2003) (Henry, J., concurring and dissenting); and *State v. Vrabel*, 790 N.E.2d 303, 319-321 (Ohio 2003) (Moyer, C.J., dissenting). For a discussion of these cases see *supra* note 15 at 293-295.

<sup>102</sup> *Supra* note 7 at 930. (Bryant); See also *State v. Nelson*, 803 A.2d 1, 42-44 (N.J. 2002) (Zazzali, J., concurring) (“An examination of jury verdicts in New Jersey capital sentencing trials in which juries have found the 5d mitigating factor shows that attitudes toward those with mental illness or defects are evolving, with a growing reluctance to execute those whose mental disease or defect or intoxication contributes to their difficulty in reasoning about what they are doing.”).

excused from capital punishment. As explained above, there is no practical difference between the severely mentally ill and minors or the mentally retarded that justifies their different treatment.<sup>103</sup> This is especially true for schizophrenics.<sup>104</sup> The severely mentally ill are equally less culpable and undeterrable. A survey of Supreme Court decisions that evaluate classifications based on mental disability suggests that only a rational basis need be put forward to justify the discrimination.<sup>105</sup> However, at least one commentator (Christopher Slobogin) has argued that in practice the Court has seemed to apply a “rational basis with bite” test, requiring an increased showing of the need for the different treatment.<sup>106</sup> There is a strong argument that in light of their similarities there is no justification to treat the mentally ill differently, especially when considering the deprivation of the right to life. There must be demonstrated to be “good reason to believe that offenders with mental illness are more culpable or deterrable than offenders with mental retardation.”<sup>107</sup> Slobogin has examined three potential arguments that could be made to justify the difference in regards to schizophrenia: 1) mental illness is more difficult to diagnose than mental retardation, 2) it is more “characterological” and that the sufferer bears some responsibility for the severity of the illness, and 3) that mental illness is more likely to lead to violent behavior.<sup>108</sup> He concludes that mental retardation is also difficult to diagnose and that any problems can be cured by demanding a higher standard of proof for mental illness.<sup>109</sup> He finds that when a mentally ill person fails to get adequate treatment, that failure to seek help is often a symptom of the disease itself.<sup>110</sup> Finally, he states that data do not support that the mentally ill are more dangerous in prison than others and that they, “are no more likely to recidivate than offenders who suffer from mental retardation.”<sup>111</sup> Based on these points Slobogin concludes that the different treatment should not withstand even rational basis review.<sup>112</sup> While the Eighth amendment argument is the strongest for counsel in Virginia to raise, it is worth also following the development of equal protection law in the context of mental impairment.

In addition to the constitutional claims, there are also several public policy arguments that can be made in favor of abolishing capital punishment for the severely mentally ill that are worth mentioning and support the Court resolving this issue. These arguments may be useful to counsel in consideration of the real world implications supporting a protection for the severely mentally ill. This is not to suggest that this issue would be better addressed in the legislative arena, but is recognition that policy concerns can influence Supreme Court decision-making. These points include:

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<sup>103</sup> *Supra* note 33 at 67 (“The same types of assertions that *Atkins* and *Simmons* make about people with mental retardation and juveniles can be made about people with significant mental illness.”).

<sup>104</sup> *Id.* at 73-74.

<sup>105</sup> *Id.* at 68-73 (examines the evolution of the Court’s jurisprudence through *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432 (1985), *Heller v. Doe*, 509 U.S. 312 (1993), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) to determine the appropriate level of scrutiny).

<sup>106</sup> *Id.* at 72-73.

<sup>107</sup> *Id.* at 73.

<sup>108</sup> *Id.* at 75.

<sup>109</sup> *Id.* at 75-77.

<sup>110</sup> *Id.* at 77-79.

<sup>111</sup> *Id.* at 79-80.

<sup>112</sup> *Id.* at 75.

- Sparing the severely mentally ill from capital punishment increases the legitimacy of the American criminal justice system as a whole and of capital punishment as a sentence.
- The United States would be moving towards acceptance of international norms related to capital punishment.
- The Court's eventual ruling would amount to a formal recognition of the devastating effects of severe mental illness on offenders.<sup>113</sup>
- The death sentences that are subsequently imposed would increase in legitimacy since there would be further assurance that those receiving the penalty are truly the most culpable among the pool of murderers.
- There would be an increase in accuracy in the capital system since the risks of an unfair result unique to the severely mentally ill at trial would be moot.
- Defendants would not be facing capital punishment who would be unable to properly defend themselves. The risk of wrongful convictions would therefore decrease.
- Exempting the severely mentally ill from the capital system would also decrease costs, since their cases could be litigated as normal murders with a more streamlined trial and appellate process.<sup>114</sup>
- Finally, trial and appellate courts would not have to deal with as many cases and issues relating to defendants' competency to be executed if many inmates with pre-existing mental health problems were spared from execution at the outset.

## Section 2: Virginia's Mitigating Factors as a Model for the Constitutional Standard

Once the argument that the Eight Amendment bars the execution of the severely mentally ill is accepted, the next issue becomes identifying the appropriate constitutional standard. Mental illness can take a variety of forms with a variety of symptoms manifested at different stages of an affected person's life.<sup>115</sup> As a result, a per se bar based simply on any particular diagnosis of a mental illness, like the mental retardation bar adopted in *Atkins*, is untenable. Courts must adopt a test that reflects the impact of the disorder on the defendant's decision making at the time of the murder in order to determine if he or she sufficiently lacked culpability and the possibility of being deterred.

Virginia's statutory mitigating factor provides a starting point for this constitutional standard. Virginia Code Section 19.2-264.4(B)(ii) recognizes as a mitigating factor evidence that:

“[T]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance[.]”

Similarly, Section 19.2-264.4(B)(iv) allows the jury to consider as a mitigating factors that:

<sup>113</sup> See note 99.

<sup>114</sup> See generally Oleg Nudelman, “The Death Penalty as a Luxury: The High Cost of Capital Punishment in Trying Economic Times”, Virginia Capital Case Clearinghouse, <<http://www.vc3.org/deptimages/Research%20Files/Death%20Penalty%20Cost%20Research.pdf>> (Free registration with VC3.org by defense counsel required)(Discusses studies examining the increased cost of death penalty cases in the federal system and several states and how they relate to Virginia).

<sup>115</sup> *Supra* note 72 at 1124.

“[A]t the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired[.]”

As a point of departure for fashioning a constitutional dividing line, these provisions have the value of being practical, they recognize the impact of mental illness on decision making, they can be used to properly identify mental disorders whose symptoms serve to decrease culpability and the chance of deterrence, and their language is familiar to Virginia courts and has the approval of the General Assembly. These tests represent how the legislature believes mental illness is properly assessed in sentencing convicted murderers. For these reasons Virginia courts may be more amenable to adopting this proposed standard. It also saves defense counsel the trouble of devising and explaining the merits of an alternate standard to the court and it has the value of being grounded in the familiar insanity defense.<sup>116</sup>

However, since the standard will be used for a more rigorous purpose---the complete exclusion from the death penalty for those who fall under it---it should be tightened to reflect that fact. The constitutional standard should use the language of the mitigating statute, but add the explicit requirement that the offender be clinically diagnosed with a serious mental illness present at the time of the offense. The ABA Task Force Recommendation addressing this topic requires such a showing of a “severe mental disorder or disability”.<sup>117</sup> Since Section 19.2-264.4(B)(ii) provides for the impact of an “emotional or mental disturbance” this is functionally equivalent to a finding of a disorder or disability and can be changed to reflect the diagnostic requirement. An appropriate constitutional standard based on Virginia law could take into account the following:

The court shall not impose the sentence of death on the defendant if the capital felony was committed while the defendant was under the influence of a severe mental disorder or disability, such that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

A lawyer advocating for this standard can be confident that it is not over-encompassing, but at the same time adequately protects many mentally ill defendants. An individual who meets this standard will not have the culpability or potential for deterrence required for the imposition of the death penalty since the standard is concerned with a person’s altered perceptions and actions beyond their control. The “capacity to appreciate criminality” portion covers those individuals who because of their disorder did not realize that their conduct was breaking the law.<sup>118</sup> In order to be properly convicted of capital murder (or of any other criminal offense) an offender must realize what he is doing, and know that his actions are criminal in nature. This section would cover those whose delusions cause them to believe

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<sup>116</sup> See for example Model Penal Code § 4.01 (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”)

<sup>117</sup> *supra* note 48 at 1139 and 1141. (Generally designed to encompass disorders such as “schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders.”) (Slobogin).

<sup>118</sup> See *id.* at 1142-1143 for a discussion of similar provisions in the ABA Taskforce Recommendation.

their victims were threatening them with serious harm.<sup>119</sup> The “conform conduct” portion will likely cover those who “experience significant cognitive impairment at the time of the crime” or those whose delusions make them believe that they are not subject to punishment.<sup>120</sup>

The ABA Task Force Recommendation additionally would bar the death penalty when the offender has impaired ability “to exercise rational judgment in relation to conduct”, expands the appreciation of “criminality” of actions from the proposed standard to the appreciation of “nature, consequences, and wrongfulness”, and exempts “disorders manifested primarily by repeated criminal conduct” or caused solely by the use of drugs or alcohol.<sup>121</sup> Defense counsel will have to decide whether to suggest a standard with these additional provisions in order to encompass their client, or make the standard even more stringent. Replacing “criminality” with the broader ABA suggestion of “nature, consequences, and wrongfulness” would of course be desirable since it would likely serve to encompass more defendants, but advocating for that language begins to diminish the benefits of a standard rooted in Virginia statutory language. Despite all of these suggestions, the Virginia provisions can also remain as mitigating factors to be considered in regards to defendants who do not meet the constitutional standard but whose mental impairments still deserve to be given weight by the jury.<sup>122</sup>

Since this discussion concerns a Constitutional standard and not a statute, the precise language is not crucial. The idea is that the standard identifies those characteristics of a defendant’s mental illness that a judge can look for when considering the death penalty as it applies to that defendant. Virginia law and the ABA Task Force Recommendation help identify which elements are important when reaching these decisions and the proposed standard is designed to give counsel a test to consider or suggest while litigating these issues.

### **Evolving Standards of Decency in Virginia**

When discussing evidence of evolving standards of decency while litigating in Virginia, it is also worth discussing jury sentencing trends in the state. A survey of Virginia Supreme Court death penalty cases since 1979 reveals that no individuals with unequivocal severe mental illnesses at the time of the commission of their crimes that were shown at trial have been sentenced to death.<sup>123</sup> This demonstrates that jurors in Virginia are not prone to sentencing people to death who clearly suffer from these illnesses.<sup>124</sup> It also suggests that jurors in Virginia often find evidence of severe mental illness to outweigh aggravating factors. Va. Code Ann. § 17.1-313(C)(2) requires the Court to determine if a death

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<sup>119</sup> *Id.* at 1142.

<sup>120</sup> *Id.* at 1144.

<sup>121</sup> *Id.* at 1139.

<sup>122</sup> *Id.* at 1146-1147.

<sup>123</sup> Based on the author’s review of published Virginia Supreme Court cases undertaking sentence review required by Va. Code Ann. § 17.1-313 (formerly § 17-110.1). No cases were found in which the Supreme Court accepted that a convicted defendant was severely mentally ill at the time of the commission of the offense or in which the defense presented uncontradicted evidence of such affliction.

<sup>124</sup> See *Swann v. Commonwealth*, 247 Va. 222 (Va. 1994), *Mackall v. Commonwealth*, 236 Va. 240 (1988)

(examples of cases in which mental illness of the offender is suggested, but no clear uncontroverted evidence of a diagnosis presented).

sentence is excessive or disproportionate to impose on a particular defendant.<sup>125</sup> The fact that juries have prevented the Court from having to make that determination for a severely mentally ill defendant shows that they routinely find the death penalty excessive for that group. It also may suggest that prosecutors in Virginia do not consider death an appropriate penalty for severely mentally ill offenders. Additionally, some prosecutors may recognize that juries will not sentence them to death and therefore choose settle these cases rather than allow them to reach the sentencing phase. However, these points should not be interpreted as evidence that the current system adequately screens out mental illness cases that do not deserve death. As we have seen, other states have sentenced severely mentally ill offenders to death.<sup>126</sup> Their lives are still placed in serious jeopardy when put through the capital sentencing process. The fact that jurors in Virginia have been able in most, or even all, cases to intervene does not mean that an offender with decreased culpability and deterrability will not be unjustly sentenced to death in the future. The inherent risks these defendants face in the system examined above are always present.

### **When Best to Raise the Constitutional Claims**

It is important that counsel litigating an Eighth amendment claim based on severe mental illness raise the issue at the appropriate time to maximize its chance of success. The claim can potentially be raised pre-trial, as a motion to strike death as a possible punishment after all the evidence has been presented at the penalty phase, and at sentencing.

The first option is to raise the Eighth amendment claim by pretrial motion to strike the death penalty as a possible punishment, and request a hearing to establish the presence and severity of the defendant's mental illness. There are several advantages to this. First it injects the issue into the case early and sets the tone that severe mental illness is a central issue and will be litigated aggressively throughout the proceedings. It informs the judge of the client's impairments prior to hearing the evidence of the crime, demonstrates early on that the defense has a strong case in mitigation, and focuses the whole proceeding on it at the outset. The news media might also begin to focus on the client's impairment. The strength of the claim and of the mitigation evidence might persuade the Commonwealth to accept a negotiated disposition for a less-than-death sentence or otherwise influence the prosecutor to reassess whether the case is really death-worthy. It might also make sense to raise a mental illness claim while the client's mental health is at issue following an adverse ruling on the client's competency to stand trial. This allows counsel to shift the focus from the client's current mental condition to his mental state prior to and during the commission of the crime, a time at which he may well have been even more impaired. Raising an Eighth Amendment bar pretrial may also force the Commonwealth to put a lot of work into the case at a relatively early stage, especially if the judge grants a hearing. If the judge happens to grant the motion, the advantage of having raised the issue pretrial is obvious, and the Commonwealth will be forced to appeal if it wishes to pursue the death penalty

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<sup>125</sup> (“[T]he court shall consider and determine ... [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”).

<sup>126</sup> See note 2.

further.<sup>127</sup> The costs of a capital trial are also then avoided.<sup>128</sup> In most states other than Virginia, *Atkins* claims of mental retardation are determined pre-trial and most often by a judge.<sup>129</sup> It is also an appropriate time address these issues since the defense's court-appointed mental health expert examines the defendant and presents his report to the defense pre-trial.<sup>130</sup>

Whatever the advantages to the defense in moving to strike the death penalty pretrial, counsel will have to distinguish the Virginia Supreme Court's decision in *In Re Horan* in order to secure such a pre-trial determination.<sup>131</sup> *Horan* arose from a trial judge's decision to strike the death penalty as a remedy for the Commonwealth's violation of the defendant's consular notification rights derived from the Vienna Convention, an international agreement.<sup>132</sup> The Virginia Supreme Court granted the writ of mandamus requested by the Commonwealth, which compelled the trial judge to proceed with the capital case and sentencing as required by Virginia Code § 19.2-264.3(C).<sup>133</sup> The Court held that mandamus was appropriate because the judge's action was barred by Virginia law and outside the parameters of her discretion.<sup>134</sup> Her actions amounted to an adjudication of the defendant's sentence pre-trial.<sup>135</sup> "Furthermore, by directing the Commonwealth's Attorney that he may not seek the death penalty if [the defendant] is found guilty of capital murder, Judge Alden performed an executive function and exercised discretion that resides solely in the Commonwealth's Attorney."<sup>136</sup>

The Commonwealth will likely cite *In Re Horan* for the proposition that circuit courts may not make pre-trial rulings that remove death as a potential sentence. However, the distinction can be made in the present situation because a mentally ill defendant's disproportionality claim is grounded in the Federal Constitution, which is supreme to the Virginia sentencing statute. This would allow a judge to make a pre-trial determination that the penalty cannot be constitutionally imposed. Applying the sentencing statute at issue itself would amount to a violation of the defendant's rights. While the *Horan* opinion did not examine the legal basis of the trial judge's ruling, it can be presumed that the Court did not feel it appropriate for a circuit judge to enforce rights based on an international agreement. Had her ruling had more legal support, it is possible that the Virginia Supreme Court may have found that she acted properly within her discretion and addressed the merits of her decision. Counsel can additionally make the simple point that it is obvious that a pretrial ruling to strike death for an offender who is under the age of 18 is appropriate, and that it is surely within a trial judge's discretion to treat other categorical bars similarly. Just as a court would not undertake the futile exercise of conducting a capital sentencing proceeding for a minor, neither should it be required to conduct such a hearing in other

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<sup>127</sup> Va. Code Ann. § 19.2-398 gives the Commonwealth the ability to appeal pre-trial.

<sup>128</sup> See note 114.

<sup>129</sup> James W. Ellis, "Mental Retardation and the Death Penalty: A Guide to State Legislative Issues", 12-13 <<http://www.deathpenaltyinfo.org/documents/MREllisLeg.pdf>>.

<sup>130</sup> Va. Code Ann. § 19.2-264.3:1.

<sup>131</sup> *In re Horan*, 271 Va. 258 (Va. 2006).

<sup>132</sup> *Id.* at 258.

<sup>133</sup> *Id.* at 265.

<sup>134</sup> *Id.* at 262-263.

<sup>135</sup> *Id.* at 263.

<sup>136</sup> *Id.*

situations where the death penalty could not constitutionally be imposed. It is also worth mentioning that Virginia Supreme Court Rule A:9(b)(2) provides that any, “defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial.”<sup>137</sup> This would seem to encompass a motion to bar the imposition of the death penalty based on severe mental illness. In any event, should a trial court read *Horan* to prohibit pre-trial litigation of mental health issues, the *Horan* Court does explicitly affirm that in the event of a jury death sentence, a trial judge has discretion to decline to impose the punishment at that point.<sup>138</sup>

Of course, a motion to strike the death penalty may also be made after the penalty phase evidence has concluded but prior to the jury’s sentencing deliberations. At this point all the evidence of mental illness would be fully developed in the record. The judge would not have to conduct a separate hearing after deciding that the Eighth Amendment bars the punishment, since he will already know the extent of the defendant’s illness while making his decision. The potential exists that the defense demonstration of the severe mental illness will take the debate out of the abstract and serve to influence the judge. However, the judge may be hesitant at this point to remove the question from the jury and may assume that it will be able to sort this issue out during its deliberations.

Finally, of course, the constitutionality of a death sentence for an offender with severe mental illness can be raised when the judge decides whether or not to accept the jury’s recommended sentence of death under Virginia Code § 19.2-264.5. At this point the judge can properly decide that death is inappropriate, whether or not he finds that the death penalty would be unconstitutional. Evidence of severe mental illness should have been well developed during the penalty phase case in mitigation and on its own can serve to have a recommendation set aside. The problem is at this point the jury has determined that a finding of vileness and/or future dangerousness outweighs whatever mitigation was presented, and the judge may not want to interpose his own judgment. He may also think that the Supreme Court will reverse a disproportionate death verdict on appeal if it is really appropriate.

Despite all these considerations, in the event of a death sentence an attorney must rigorously argue on appeal that the sentence is disproportionate in consideration of the evidence in the record of the defendant’s severe mental illness. This may prove to be successful even if the Virginia Supreme Court quickly dispatches the constitutional claims. While the Court has never been presented with evidence strong enough to reverse a sentence on proportionality grounds, it has not had occasion to consider these issues in light of an uncontroverted diagnosis of schizophrenia or other serious mental disorder.<sup>139</sup>

The defense attorney litigating these issues needs to be aware of when and how they would ultimately prefer to have a hearing to determine a defendant’s severe mental illness. Under Virginia law, determinations of mental retardation to preclude the death penalty are made by the jury during the sentencing phase of the capital trial.<sup>140</sup> In *Prieto v. Commonwealth* the Virginia Supreme Court held

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<sup>137</sup> Va. Sup. Ct. R. 3A:9(b)(2).

<sup>138</sup> *Horan* at 263.

<sup>139</sup> See note 123.

<sup>140</sup> Va. Code Ann. § 19.2-264.3:1.1.

that this statute, “clearly mandates that the issue of mental retardation be determined by the jury as part of the sentencing phase” and did not allow for a separate hearing.<sup>141</sup> This sets an unfortunate precedent for consideration of severe mental illness, and it should be kept in mind that this ultimate outcome would not be ideal. To avoid the adjudication of complicated mental health issues by the jury while it is also examining the vileness of the murder in question, the defendant’s prior crimes and unadjudicated bad acts, and victim impact testimony, defense counsel should argue for a pre-trial or pre-penalty phase determination of mental illness by the judge or by a jury empanelled for that sole purpose. It must be shown that a fair and reliable evaluation of the severity of the defendant’s mental illness cannot be accomplished without a separate hearing, and that to the extent that Virginia’s statutory procedure would not allow such a hearing, it violates due process. The constitutional arguments in favor of a separate hearing are beyond the scope of this paper, but in the event a judge agrees that the Eighth amendment bars capital punishment for the severely mentally ill this issue will be counsels’ next concern.<sup>142</sup>

## Conclusion

This paper has explored the constitutional issues surrounding the execution of the severely mentally ill and outlined the argument for an extension of the decisions in *Atkins* and *Roper*. It also examined how these issues may relate to Virginia law and trial practice to help maximize their chance of success. It is to be hoped that the Supreme Court will soon acknowledge that the severely mentally ill suffer from many of the same impairments as mentally retarded and juvenile offenders, with the same significance for the death penalty’s retributive and deterrent rationales, and that the Court will act on this issue without waiting for the inevitably slow development of an explicit legislative consensus.

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<sup>141</sup> *Prieto v. Commonwealth*, 682 S.E.2d 910, 922-923 (Va. 2009).

<sup>142</sup> For analogous arguments in the mental retardation context see “Memorandum In Support of a Pre-Trial Determination of Mental Retardation”, Virginia Capital Case Clearinghouse, <<http://www.vc3.org/mr/docs/SmithMRproceduresmemo.doc>> (Free registration with VC3.org by defense counsel required).