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Reconsidering the Letter of the Law: On the Necessity of Expanding Death Penalty Exemptions for the Mentally Ill

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Introduction

The United States Supreme Court's recent death penalty jurisprudence demonstrates the Court's willingness to invalidate the death penalty as applied to specific classes of offenders, including those with mental disabilities and juveniles. The Supreme Court has grounded their pronouncements in the Eighth Amendment's prohibition against cruel and unusual punishment and the traditional application of the Eighth Amendment to facilitate proportional punishment and advance the primary goals of the Amendment. The Court has reasoned that the death penalty, as applied to defendants with mental disabilities and defendants under eighteen at the time of the offense, constitutes a disproportionate punishment because it fails to adequately advance either retribution or deterrence. The cognitive and volitional impairments apparent in defendants suffering from mental illness, create a parallel diminution in culpability and deterrability. Due to the similar situation of offenders suffering from mental illness, when compared with defendants with demonstrated mental disabilities and juvenile offenders- mental illness is the next appropriate frontier for the Supreme Court to apply their Eighth Amendment framework. Given that the death penalty is a disproportionate punishment, failing to adequately contribute to the principles of retribution or deterrence; the Supreme Court's emerging Eighth Amendment framework should be applied to categorically exclude a death penalty sentence for offenders suffering from a mental illness.

This paper will propose the Supreme Court should reconsider death penalty jurisprudence as it applies to the mentally ill. The current Eighth Amendment framework allows for the Court to find (1) a national consensus exists against imposing capital punishment upon the mentally ill as evidenced by state legislation and the consistency in the trend towards abolition, and (2) the execution of the mentally ill does not further the traditional principles of retribution or

deterrence. Due to the similarities between the prevailing death penalty cases of *Atkins v. Virginia* and *Roper v. Simmons*, when compared to the class of mentally ill offenders- the Court can further develop their framework in expanding the categorical exemptions for the death penalty. The adoption of this categorical exclusion would, in turn, compel the Supreme Court to review the current competency standard for execution, in order to adequately safeguard against the wrongful executions of the mentally ill. This paper will further recommend that the Supreme Court adopt the American Bar Association's standard for competency for execution.

Overview of the Eighth Amendment

The Eight Amendment to the United States Constitution provides: "excessive bail not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [1] The Amendment's ban on cruel and unusual punishment embraces those acts of punishment which had been considered cruel or unusual at the time the Bill of Rights was adopted.[2] However, the Amendment's proscriptions are not solely limited to those practices condemned by the common law as the Amendment also prohibits practices representing "evolving standards of decency that mark the progress of a maturing society."[3] Utilizing the evolving standards of decency lens, the Court also considers objective evidence of societal standards, particularly focusing upon the "clearest and most reliable objective evidence of contemporary values [which is represented through] the legislation enacted by the country's legislatures."[4] The Court uses the evidence

[1] U.S. Const. amend. VII
[2] *See Solem v. Helm*, 463 U.S. 277, 285-286 (1983).
[3] *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).
[4] Penry v. Lynaugh, 492 U.S. 302 (1989).

before it to determine whether a particular punishment comports with the fundamental human dignity that the Eighth Amendment protects.[5]

The Supreme Court, in *Weems v. United States*, held "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[6] The Court has applied this proportionality precept in cases interpreting the Eighth Amendment, informing the review by "objective factors to the maximum possible extent." [7] The reliance upon legislation as evidence of societal values is due to an understanding that legislative enactments follow from the constitutional role legislatures play when expressing the policy of a State, as "in a democratic society, legislatures, not courts, are constitutes to respond to the will and consequently the moral values of the people."[8] The Supreme Court has also recognized that specifications of punishments are "peculiarly questions of legislative police."[9] In cases which involve a legislative consensus that a certain practice violates the Eighth Amendment, the Court's judgment is "brought to bear" through positing the question of whether there is any reason to disagree with the judgment which has been reached by the legislators and citizens. While relying upon such legislative evidence, the Supreme Court has held that the death penalty is an excessive punishment, violative of the Eighth Amendment, when imposed upon either juveniles or mentally disabled defendants.

I. A national consensus exists against imposing capital punishment upon defendants suffering from a mental illness, a consensus which should compel the Supreme Court to review Eight Amendment jurisprudence in relation to the mentally ill.

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[5] *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).
[6] *Weems v. United States*, 217 U.S. 349 (1910).
[7] See Harmelin, 501 U.S. 1000 (quoting Rummel v. Estelle, 445 U.S. 274-275 (1980)).
[8] Gregg v. Georgia, 428 U.S. 153, 175-176 (1976).
[9] Gore v. United States, 357 U.S. 386, 393 (1958).

When analyzing whether legislative evidence provides sufficient support for a national consensus regarding an Eighth Amendment question, the Supreme Court has evaluated the State legislatures' capital punishment policies and considerations through the evolving standards of decency lens. In *Atkins v. Virginia*, the Court studied state legislative considerations of the suitability of imposing the death penalty on mentally disabled defendants. The Court found a national consensus against imposing the death penalty upon the mentally disabled as evidenced by (1) the vast number of states that had enacted legislation prohibiting the executions of mentally disabled persons, (2) the absence of any state legislation which reinstates the ability to execute mentally disabled defendants, and (3) the executions of mentally disabled persons are uncommon even in states which allow the practice. Despite the Supreme Court's previous pronouncement in *Penry v. Lynaugh*, which held that there was insufficient evidence to suggest a national consensus against the execution of mentally disabled defendants, numerous state legislatures subsequently addressed the issue.[10] The Court recounted the states which adopted legislation banning the imposition of the death penalty upon a mentally disabled defendant, despite the Supreme Court's declaration.[11] At the time, thirty states prohibited the death penalty for the mentally disabled.[12] The Court found the consistency in the direction of change as well as the number of states which prohibited the execution of mentally disabled persons was powerful evidence of the societal notion that the mentally disabled are "categorically less culpable than the

[10] In Penry, the Supreme Court held that the Eighth Amendment's prohibition of cruel and unusual punishment did not categorically prohibit death penalty sentences for mentally disabled defendants. The Court determined that the two states which had prohibited the execution of mentally disabled defendants in conjuncture with the fourteen states which prohibited the death penalty generally- did not establish a national consensus against such executions. Penry v. Lynaugh 492 U.S. 302 (1989).

[11] Atkins 536 U.S. at 347.

[12] Of the 30 states which prohibited the death penalty imposition on the mentally disabled, 12 of the states had abandoned the death penalty altogether and the remaining 18 states had maintained the death penalty, but specifically excluded the mentally disabled from its reach. Roper v. Simmons, 543 U.S. 551, 564 (2005).

average criminal."[13] Further, each of the legislatures which addressed the issue overwhelming voted in favor of the prohibition, acting as additional proof of the national consensus. Thus, the consideration of the legislative guidance prompted the Court to extend Eighth Amendment protections to the mentally disabled by categorically barring the imposition of the death penalty upon this class of persons.

Following the analytical precedent set forth in *Atkins v. Virginia*, the Supreme Court considered the constitutionality of imposing capital punishment upon juvenile offenders in the case of *Roper v. Simmons*. The Court reviewed objective indicia of a national consensus on juvenile capital punishment by analyzing state legislative policies. The Court found that thirty states had enacted legislation prohibiting the imposition of the death penalty for juvenile offenders. Of the remaining twenty states which did not prohibit a death penalty sentence for juveniles- executions among juvenile offenders were relatively infrequent.[14] Further, the Court surveyed the number of executions upon juveniles within the ten years preceding the case and found that only three states had executed juvenile defendants within the ten-year period.[15] Similar to the Court's findings in *Atkins*, the Court found consistency in the direction of change as well, considering that no state which had previously prohibited capital punishment for juveniles had reinstated the punishment.[16] The Court held that the objective indicia of consensus, including "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" provided sufficient evidence that juveniles are considered categorically less

[13] Atkins 536 U.S. at 216.
[14] Roper v. Simmons, 543 U.S. 551, 564 (2005).
[15] See Id.
[16] See Id.

culpable in comparison to the average defendant.[17] Thus, the Court held that the Eighth Amendment prohibits the execution of juvenile offenders, categorically prohibiting the installation of the death penalty in cases involving minor defendants.

Applying the evolving standards of decency lens, an evaluation of the State legislatures' capital punishment policies and considerations with regard to the mentally ill, reveals a national consensus exists against imposing capital punishment for mentally insane offenders. The Supreme Court found evidence of a strong national consensus in both *Atkins* and *Roper* based upon the existence of a sixty percent majority of states (thirty states in each case) which forbid the punishment in consideration. With regard to the insanity defense, there are a total of forty-six states which maintain a form of the affirmative insanity defense for criminal defendants. In the alternative, only a minority of states (the remaining four states of Montana, Idaho, Utah, and Kansas)- do not provide an affirmative insanity defense for criminal defendants.[18] Consequently, the Supreme Court must find that a ninety-two percent majority of states (that is, 46 out of 50 states) which provide for the affirmative insanity defense, represents a national consensus, as a ninety-two percent majority is far more significant than a sixty percent majority. Further, the imposition of the insanity defense in a vast majority of states, represents the national acceptance of the principles underlying the defense, including, "separating from the criminal-justice system those who should only be subjected to medical-custodial measures, as their mental state precludes the kind of personal culpability necessary for punitive measures."[19] Similar to the understanding of the vulnerabilities of the mentally disabled and juvenile defendants, it is clear a

[17] Roper v. Simmons, 543 U.S. 551, 567 (2005).
[18] COMMENT: CRUELTY TO THE MENTALLY ILL: AN EIGHTH AMENDMENT CHALLENGE TO THE ABOLITION OF THE INSANITY DEFENSE, 56 Am. U.L. Rev. 1281.
[19] Wayne R. LaFave, Criminal Law § 7.1 (4th ed. 2003)

majority of legislators and citizens agree the mentally ill are considered "categorically less culpable" when compared to average defendants.[20]

Evidence of the growing national consensus against imposing capital punishment upon the mentally ill is also evidenced through the introduction of state legislation prohibiting the imposition of the death penalty upon any person with a severe mental illness. Currently, there are a total of 27 states which retain the death penalty, and of these 27 states, there are 11 states which have proposed legislation specifically exempting a death penalty sentence in relation to defendants suffering from mental illness.[21] The following states have introduced the respective legislation in relation to expanding the safeguards for defendants with mental illness: Missouri (House Bill 2509, 2018); Kentucky (Senate Bill 107, 2018 and HB 237, 2020); North Carolina (Senate Bill 166, 2017); Texas (House Bill 3080 , 2017); Ohio (Senate Bill 40/ House Bill 81, 2017/ 2018); Tennessee (House Bill 345/ Senate Bill 378, 2017/ 2018); South Dakota (House Bill 1099, 2017); Indiana (House Bill 1522/ Senate Bill 1348, 2017); Arkansas (House Bill 2710, 2017); Ohio (House Bill 136, 2021); Arizona (Senate Bill 1250, 2020).[22] While the substantive law differs between state legislatures, the common underlying purpose of the legislation is to provide a cohesive framework and procedure for determining whether a defendant suffers from a mental illness, and whether this mental illness has significantly impaired the person's capacity. Among the legislation, the following or very similar language, presents the substantive change in law "The death penalty may not be imposed upon any person with a severe mental illness with significantly impaired capacity at the time the offense was committed."[23] Ohio is the first state to

[20] Atkins 536 U.S. at 216.
[21] American Bar Association, https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/resources/
[22] *See Id.*
[23] South Dakota House Bill 1099.

officially adopt the substantive law, banning the imposition of the death penalty on defendants who were laboring under a serious mental illness during the commission of the offense.[24] The statutory language incorporates the American Bar Association's Mental Illness Resolution which was adopted in 2006.[25]

Despite the inability of many state legislatures to pass the legislation exempting the mentally ill from the death penalty, many of the state legislatures have remained persistent in proposing new bills, while amending the substantive provisions and revising the legislation to strengthen the support for the reformation. The persistence in revisiting the issue of the mentally ill and the death penalty supports the direction of change and shift in the general consensus towards protecting this unique class of defendants. Further, it is worth noting that the states which maintain the death penalty (and thereby have not introduced legislation to this effect), have seen an increase in resistance to capital punishment- culminating in proposed legislation to ban the death penalty altogether.[26] Three states- Louisiana, Oklahoma, and Wyoming have each seen legislation introduced into the state House and Senate, regarding the complete ban of the death penalty.[27] Along the same trend, within the past four years- Washington, New Hampshire, Colorado, and Virginia, have each banned the death penalty outright.[28] These events validate the

[24] See Ohio House Bill 136. On January 9, 2021, Ohio Governor Mike DeWine signed House Bill 136 into law. The law provides a statutory definition for "serious mental illness," requiring a defendant be diagnosed with either schizophrenia, schizoaffective disorder, bipolar disorder, or delusional disorder. The defendant has the burden of proving that, at the time of their offense, their mental illness significantly impaired their "capacity to exercise rational judgment" preventing their ability to "conform their conduct to the requirements of law" or "appreciate[e] the nature, consequences, or wrongfulness" of their conduct. Ohio House Bill 136

[25] "Several States Consider Repealing or Reforming Death Penalty Laws." American Bar Association, https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/resources/

[26] *See Id.*

[27] *See Id.*

[28] *See Id.*

trend against the imposition of the death penalty at large, and introduce the possibility there may one day be a growing national consensus to categorically ban capital punishment.

Justifications for Capital Punishment

II. Because the death penalty's justifications of retribution and deterrence are not furthered when applied to offenders suffering from mental illness, the imposition of capital punishment is a cruel and unusual sentence, violation of the Eighth Amendment.

The execution of defendants with mental illnesses does not measurably advance the deterrent or retributive purposes of the death penalty. The Supreme Court recognized two justifications for the imposition and use of the death penalty in the case of *Gregg v. Georgia*, identifying "retribution and deterrence of capital crimes by prospective offenders" as the social purposes which are served through capital punishment. [29] The imposition of the death penalty on a certain person or class of persons must "measurably contribute to one or both of these goals [otherwise] it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment." [30] Supreme Court jurisprudence has consistently confined the imposition of the death penalty to an incredibly narrow category, as those crimes which measurably contribute to the social purposes served through capital punishment, include only the most serious crimes.

Defendants who suffer from severe disorders or mental conditions are incapable of comprehensive analysis and rational decision-making, preventing them from furthering either the

[29] Gregg v. Georgia, 428 U.S. 153, 183 (1976).
[30] Enmund v. Florida, 458 U.S. 782 (1982).

retributive or deterrent justifications for the death penalty. Many mentally ill defendants share the same cognitive and behavioral deficiencies which the Atkins court relied upon in holding the death penalty a cruel and unusual punishment when applied to the mentally disabled. Similar to the *Atkins* Court's reliance on the inability of mentally disabled defendants to control their impulses, engage in logical reasoning, or to process the severity and possibility of execution- mentally ill defendants share many of these same vulnerabilities. Mental disorders and conditions such as schizophrenia[31], major depressive disorders[32], bipolar disorder[33], dissociative disorders[34], dementia[35], or delirium[36]- are all conditions which may render a defendant significantly less culpable and deterrable when compared to the typical offender. According to the American Bar Association's Task Force on Mental Disability and the Death Penalty, each of the listed disorders, "are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very

[31] Schizophrenia is a though disorder frequently accompanied by hallucinations and delusions which may distort reality and thereby prevent or seriously interfere with an individual's ability to engage in rational decision making. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. text rev. 2000) [hereinafter DSM-IV-TR]. A diagnosis of schizophrenia is appropriate once an individual's condition lasts for at least six months and includes one or more of the following symptoms of: delusions, hallucinations, disorganized speech, or catatonic behavior. *See Id.*

[32] Major depressive disorder is a mood disorder which can be categorized by the occurrence of at least one major depressive episode, resulting in a depressed mood for two of more weeks and the existence of at least four other symptoms of depression. DSM-IV-TR, *supra* note 48, at 345.

[33] Bipolar disorder is a mood disorder which is categorized by the occurrence of one or more manic episodes, including displays of elevated or irritable mood, and accompanied by one of more major depressive episodes. DSM-IV-TR, *supra* note 48, at 382.

[34] Dissociative disorders, including dissociative amnesia and dissociative identity disorder (multiple personality disorder) is categorized by the disruption of the normal integration of memory, identity, consciousness, and perception. DSM-IV-TR, *supra* note 48, at 519.

[35] Dementia is the existence of multiple defects in cognition resulting from a medical condition such as Alzheimer's disease, Huntington's disease, HIV, or head trauma. Symptoms include memory impairment and one of more of the following conditions: aphasia, apraxia, agnosia, or impaired executive functioning. DSM-IV-TR, *supra* note 48, at 148.

[36] Delirium is a condition caused by a disruption in conscious thought processes or perceptions, creating a diminished awareness of an individual's surroundings. DSM-IV-TR, *supra* note 48, at 136-7.

significant disruption of consciousness, memory, and perception of the environment."[37] Therefore, these severe mental disorders, disabilities, or conditions, substantially impair defendants' ability to "appreciate the nature, consequences, or wrongfulness of their conduct" or "to exercise rational judgment in relation to conduct" or "conform their conduct to the requirements of the law."[38]. A person operating under any of these mental disorders or conditions may experience distortions of reality which significantly reduce their ability to determine right from wrong or appreciate the wrongfulness of their conduct, let alone foresee or understand the consequences of their actions.[39] Further, it is also possible that an offender's symptomatology creates a severe misperception of reality and causes such irrationality that it significantly impairs their judgment at the time the crime is committed.[40] Because the execution of mentally ill criminals does not measurably advance the deterrent or the retributive purposes of the death penalty due to the inherent vulnerabilities and impairments in these classes of defendants, a death penalty sentence in any of these cases is violative of the Eighth Amendment.

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[37] *See* ABA Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006) at 670.

[38] ABA Task Force on Mental Disability and the Death Penalty, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006). The Task Force Report recommends exempting defendants with severe mental illness from capital punishment in specified circumstances. *See Id.* at 688. The Task Force included representatives from the ABA, APsyA and APA. *See Id.* at 669.The APsyA, APA, NAMI and MHA, have all approved the recommendations set forth in the Task Force Report with special attention to exempting defendants suffering from severe mental illness from capital punishment. See NAT'L ALLIANCE ON MENTAL ILLNESS, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS § 10.9.1.2, at 56-57 (8th ed. 2008); Am. Psychiatric Ass'n, Position Statement: Diminished Responsibility in Capital Sentencing, Dec. 2004.

[39] See ABA Task Force on Mental Disability, supra note 33, at 671.

[40] See Id.

A. Defendants suffering from a mental illness possess a diminished culpability due to their mental deficiencies, preventing the furtherance of retributive justice underlying the death penalty.

The lesser culpability of offenders laboring under the effects of a mental illness, does not merit retribution through the most extreme sanction available of capital punishment. The principle of retribution requires the severity of the appropriate punishment to necessarily depend upon the culpability of the specific offender or class of offenders.[41] An equitable sentence requires a court to consider the defendant's diminished culpability in lessening the degree of punishment.[42] Similarly, if a defendant is entirely inculpable- the imposition of any punishment does not further the goals of retribution and cannot be reconciled with the principles underlying death penalty jurisprudence.[43] Retribution justifies punishment on the grounds that the offender made the autonomous choice to commit the crime, a choice which theoretically is unaffected by external factors imposed upon his will.[44] The actor's free choice to commit the crime renders the offender deserving of punishment.[45] Therefore, in the alternative, the absence of free will precludes the attachment of blame to the actor's behavior, and in doing so, negates the suitability of retributive punishment.[46]

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[41] Atkins v. Virginia, 536 U.S. 304, 319.

[42] See Tison v. Arizona, 481 U.S. 137, 149 (1987). See also F. Allen, The Decline of the Rehabilitative Ideal 66 (1981))); 24 C.J.S. Criminal Law § 2001 (2006) (Emphasizing that the proportionality analysis requires that the punishment must be proportionate to the crime, requiring consideration of the particular circumstances of the offense and the "particular character of the defendant").

[43] See Id.

[44] See State v. Herrera, 895 P.2d 359, 375 (Utah 1995) (Stewart, Assoc. C.J., dissenting) ("Without the consent of the will, human actions cannot be considered as culpable; nor where there is no will to commit an offense, is there any just reason why a party should incur the penalties of law made for the punishment of crimes and offenses." (quoting 1 Russell On Crimes 2 (4th ed. 1865))).

[45] Jodie English, The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense, 40 Hastings L.J. 1, 21 (1988) (arguing the possession of free will is an essential element of retributive theory).

[46] *See Id.*

The execution of defendants suffering from mental illness, whom as a class possess diminished culpability, is necessarily disproportionate to their blameworthiness, thereby failing to serve retributive goals. An offender suffering from mental illness, is oftentimes incapable of making autonomous decisions due to the illness' restriction of their free will and decision-making ability. A defendant's actions are often the result of their mental disease, which clouds their cognition or inhibits their volitional control, as opposed to the result of a "controllable conscious choice."[47] Severe mental illness may also impair judgment and rationality, thereby producing effects that reduce volitional control and blameworthiness to the same or even lesser of a degree as mental disability or juvenile status.[48] A person suffering from a severe mental illnesses may experience distortions of reality which in turn, significantly reduce the ability to appreciate the wrongfulness of their conduct or to understand the consequences of their actions. To this extent- the death penalty lacks a sufficient connection to the principles underlying capital punishment, effectively barring the imposition of the death penalty in relation to the mentally ill.[49]

B. The deterrence justification for the death penalty is not applicable to mentally ill defendants whose cognitive and behavioral impairments prevent the rational decision-making process and the consideration of the possibility of execution.

Defendants with mental illnesses are less likely to rationally process the information of the possibility of execution as a punishment to their actions and competently control their conduct based upon an understanding of this information. The theory of deterrence is predicated

[47] COMMENT: CRUELTY TO THE MENTALLY ILL: AN EIGHTH AMENDMENT CHALLENGE TO THE ABOLITION OF THE INSANITY DEFENSE, 56 Am. U.L. Rev. 1281 at 1323.
[48] ARTICLE: THE SUPREME COURT'S EVOLVING DEATH PENALTY JURISPRUDENCE: SEVERE MENTAL ILLNESS AS THE NEXT FRONTIER, 50 B.C. L. Rev. 785
[49] *See id.*

upon the notion that the severity of the death penalty will inhibit criminal actors from engaging in murderous or especially heinous conduct.[50] Society is given an example of the consequences of wrongful actions thereby deterring other possible offenders from engaging in similar conduct.[51] However, deterrence is only effective if citizens can identify with the offender and the circumstances surrounding the offense. A sane offender is unlikely to identify with an insane offender who is sentenced to the death penalty, thereby the general public will likely not be susceptible to the deterrent effect of punishing the insane.

In *Atkins v. Virginia*, the Supreme Court held that executing individuals with intellectual disabilities violates the Eighth Amendment's prohibition against cruel and unusual punishment. In coming to their holding, the court analyzed the social purposes of the imposition of the death penalty in conjuncture with the particular vulnerabilities of mentally disabled defendants, to determine whether capital punishment is a suitable punishment in these cases. The court accounted for the cognitive and behavioral impairments of mentally disabled offenders, as these impairments affect the moral culpability of these defendants. The court recounted numerous factors which contribute to the vulnerabilities of these defendants including the "diminished ability to understand and process information, to learn from experience, to engaged in logical reasoning, or to control impulses, and to understand the reaction of others." [52] These impairments threaten mentally disabled defendants' ability to process the severity of the possibility of execution as a penalty and also hamper their ability to control their conduct based upon this underlying threat.[53] Because the execution of mentally disabled criminals does not measurably

[50] See, e.g., Model Penal Code § 4.01 (Proposed Official Draft 1962)
[51] COMMENT: CRUELTY TO THE MENTALLY ILL: AN EIGHTH AMENDMENT CHALLENGE TO THE ABOLITION OF THE INSANITY DEFENSE, 56 Am. U.L. Rev. 1281.
[52] Atkins 536 U.S. at 2250.
[53] See Id.

advance the deterrent or the retributive purposes of the death penalty due to the inherent vulnerabilities and impairments in this class of defendants, the Court held the death penalty is excessive as an unsuitable punishment for a mentally disabled criminal.

Defendants suffering from severe mental illness which significantly limits their ability to understand the wrongfulness of their conduct or to control their impulses and behavior, are similarly situated to those defendants who are mentally disabled or who were juveniles at the time of their offense. Deterrence would be ineffective for those defendants suffering from a mental illness that "significantly impairs their ability to understand the nature and consequences of their conduct, to appreciate its wrongfulness, or to exercise control over it."[54] If an individual is not in complete control over his behavior (due to the influence of mental illness), it would be inappropriate for the individual to receive the moral condemnation and punishment applied in the criminal justice system of social control.[55] Capital punishment is only justified for those individuals who have the capacities of awareness, control, and free will needed to be autonomous, moral agents.[56] Because the execution of the mentally ill does not "measurable contribute" to either retributive justice or deterrence of capital crimes by prospective offenders, the imposition of the death penalty upon a mentally ill defendant can qualify as "nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.[57]

The Current Competency Standard

[54] ARTICLE: THE SUPREME COURT'S EVOLVING DEATH PENALTY JURISPRUDENCE: SEVERE MENTAL ILLNESS AS THE NEXT FRONTIER, 50 B.C. L. Rev. 785 at 820.
[55] See Id.
[56] See Id.
[57] *Atkins*, 536 U.S. at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

III. The current competency standard for execution, as set forth in the Supreme Court cases of *Ford v. Wainwright* and *Panetti v. Quarterman*, fails to provide a judicially manageable standard, necessitating revision by the Court.

A Supreme Court ruling prohibiting the imposition of the death penalty in relation to a defendant with mental illness would require the Court to revisit the competency standard for execution. The current competency standard for execution fails to adequately account for the effect mental illness may have upon a defendant, either during the commission of the crime, or while the defendant is on death row. The lack of a competency standard which considers the re effects of mental illness upon the ability of the defendant to make autonomous decisions, reason, and engage in effective decision-making, would ultimately hinder the ability of the courts to protect the mentally ill from wrongful executions. Thereby, it is crucial to understand the difficulties posed by the current competency standard in evaluating a standard to take its place.

The Supreme Court first addressed the issue of competency for execution in the case of *Ford v. Wainwright* in which the court determined that the Eighth Amendment proscribed the execution of insane prisoners.[58] Subsequent to his conviction for murder and his death sentencer, petitioner Ford submitted a habeas corpus petition in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing on the question of his sanity.[59] In addressing Ford's competency to be executed under Florida Law, a panel of three psychiatrists evaluated whether Ford possessed "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him," ultimately rendering a finding of competency.[60] Ford appealed the court's competency determination to the United States Supreme

[58] *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986).
[59] *See Ford*, 477 U.S. at 404.
[60] *Ford*, 477 U.S. at 404

Court, which granted certiorari to determine whether the Constitution places a substantive restriction on the State's power to take the life of an insane prisoner and to analyze the adequacy of the Florida state court procedure with regard to the competency determination.[61] The Court ultimately held "the Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."[62] While the Court held that Florida's procedure for determining competency in death penalty cases was inadequate to preclude federal redetermination of the constitutional issue, the Court left the question of determining the proper procedure with regard to competency determinations, to the states.[63] The Court explained the exercising of judicial restraint in stating, "we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[64]

Despite the lack of a majority opinion or a framework pronouncement, Justice Powell's concurrence has since become the commonly adopted standard with regard to setting forth the minimum process a State must provide to a prisoner raising a Ford-based competency claim. The concurrence established a two-prong test regarding the requisite showing for competency to be executed in order to uphold a sentence for capital punishment.[65] Justice Powell maintained a defendant is competent for execution:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold

[61] *See Id*. at 405.
[62] *Ford*, 477 U.S. at 410.
[63] *See Id*. at 416.
[64] *See Id.*
[65] *Lowenfield v. Butler,* 843 F.2d 183, 187 (5th Cir. 1988).

that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.[66]

Once a prisoner demonstrates the requisite preliminary showing that his current mental state bars his execution, the protection afforded by procedural due process includes providing a "fair hearing in accordance with fundamental fairness.[67] Thereby, a prisoner must be accorded an "opportunity to be heard," although a "constitutionally acceptable procedure may be far less formal than a trial."[68] Justice Powell elaborated upon the necessary procedure, including the requirement that the State "provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the States' own psychiatric examination."[69] However, Justice Powell intentionally did not set forth "the precise limits that due process imposes in this area," observing the principle of judicial restraint in stating that a State "should have substantial leeway to determine what process best balances the various interests at stake" once it has met the "basic requirements" essential for due process.[70] Through the exercise of judicial restraint, the opinion and concurrence left the protection of the "insane" in the hands of each State legislature, failing to provide concrete guidance or standards for application in these sensitive cases.

The Supreme Court reaffirmed the standards set forth in *Ford*, in the case *of Panetti v. Quarterman*. In *Panetti*, the petitioner was convicted of murder and sentenced to the death penalty by the 216th Judicial District Court in Texas. Panetti appealed his sentence to the Supreme Court, claiming that he was not competent to be executed due to mental illness, asking

[66] *Ford*, 477 U.S. 421.
[67] *Ford*, 477 U.S. at 426, 424 (opinion concurring in part and concurring in judgment).
[68] *Ford*, 477 U.S at 424.
[69] *Ford*, 477 U.S. at 427.
[70] *Ford*, 477 U.S. at 427

the Court to determine whether a prisoner is competent to be executed if the prisoner had only a factual awareness of the reasons for execution but did not understand those reasons due to a mental illness.[71] The Supreme Court reviewed the Court of Appeals' standard for competency for execution and the application of the standard to the current case. The Appellate Court's competency determination considered whether a prisoner is aware "that he is going to be executed and why he is going to be executed," further considering that appellant was aware he committed the murders, aware he would be executed, and aware of the reason the State had given for his execution.[72] Under the Circuit precedent, these considerations concluded the analysis as a matter of law- as these three factual findings necessarily demonstrated that a prisoner is competent for execution, thereby precluding petition from establishing incompetency.[73] The Supreme Court rejected this standard as too dismissive, reasoning that under case precedent set forth in *Ford*, a prisoner is not automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution.[74] The petitioner's evidence of psychological dysfunction that resulted in a "fundamental failure to appreciate the connection between the petitioner's crime and his execution," should have been considered in the calculation of the competency analysis.[75] The Court ultimately rejected the Court of Appeals competency for execution standard, but declined to set forth a rule governing all competency-for-execution determinations.[76] Following the precedent set forth in *Ford*, the Court again exercised the principle of judicial restraint, further relying upon the States to develop their own standards and

[71] *Panetti v. Quarterman*, 551 U.S. 930, 969 (2007).
[72] *Panetti v. Dretke*, 448 F.3d at 819 (quoting *Barnard*, 13 F.3d at 877); see also *Panetti v. Dretke*, 448 F.3d at 818 (discussing Ford, 477 U.S., at 421-422, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (Powell, J., concurring in part and concurring in judgment)).
[73] *Panetti*, 551 U.S. at 956.
[74] *See Id.* at 960.
[75] *Panetti v. Dretke*, 401 F. Supp. 2d, at 712.
[76] *Panetti*, 551 U.S. at 960, 961.

analyses in relation to substantively defining the standard for capacity and applying it to prisoners on death row.

While the Supreme Court held that the Eighth Amendment bars execution of a category of defendants qualifying as "insane", the bounds of the exemption were not concretely established by either *Ford* or *Panetti*. The Justices failed to provide a concrete definition for the term "insane," in either case, nor was there a test proposed as to how to determine whether a defendant meets this threshold. The exercise of judicial restraint displayed in both *Ford* and *Panetti*, results in a divergence of law across the nation. The lack of guidance further "fails to prevent the arbitrary and capricious application of the Eighth Amendment restriction on execution of the insane," due to the variance in legislation from one state to another. The ambiguity in the current competency standard places an immense burden on the criminal justice system and judicial system and also presents grave opportunities for miscarriages of justice. There is an immense need for expansive safeguards in this context, due to the finality of capital punishment and the possibility for a irreparable injury in the form of an unconstitutional execution. The lack of concrete legislation or uniform, substantive standards across the United States may prove deadly for death row inmates who should otherwise be protected by the Eighth Amendment's prohibition on cruel and unusual punishment. The immense possibility for grave constitutional injury heightens the immediacy and importance in reviewing the current competency standard and revising the standard to adequately safeguard the Constitutional rights of U.S. citizens.

Proposal for Revision of Competency Standard

IV. In order to effectuate the Supreme Court pronouncement in *Ford v. Wainwright*, underscoring the Eighth Amendment's prohibition of sentencing an insane prisoner to the death penalty, the current standard for competency must be revised.

Most states currently use the competency standard pronounced in Justice Powell's concurring opinion in *Ford* or have developed a similar approach based upon the Supreme Court case. Congress has also adopted Justice Powell's test in enacting its statutory test for the determination of competence within The Federal Death Penalty Statute.[77] The Statute forbids execution of prisoners who "as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person."[78] The statute incorporates Justice Powell's competence standard, reading "A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person." Additionally, four federal circuit courts have addressed competency for execution and have subsequently adopted Justice Powell's proffered test as the appropriate standard to determine competence.[79] In *Walton v. Johnson*, the United States Court of Appeals for the Fourth Circuit explained its adoption of Justice Powell's competency standard.[80] The Fourth Circuit reasoned that it was bound to use the pronounced

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[77] *See Id.*

[78] 18 U.S.C. § 3596(c) (2000)

[79] *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006). *See, e.g., Scott v. Mitchell*, 250 F.3d 1011, 1014 (6th Cir. 2001) (concluding that "Ohio's Ford statute," i.e., "that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict," is the appropriate standard for incompetence to be executed); *Massie v. Woodford*, 244 F.3d 1192, 1195 n. 1 (9th Cir. 2001) (citing Ford for the proposition that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it"); *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995) (recognizing that the Ford standard requires only that an inmate "know the fact of his impending execution and the reason for it"); *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991) (adopting the competency standard in finding that "according to Ford, we must examine two factors in assessing petitioner's competency to be executed: (1) whether petitioner understands that he is to be punished by execution; and (2) whether petitioner understands why he is being punished").

[80] *See Id.*

standard despite the lack of a substantive test for determining competency, explaining "Justice Powell's proffered test represents the only ground on which a majority of the Court agreed regarding the standard for determining mental competence to be executed, and we are bound by it.[81] Thereby, Justice Powell's competency standard remains the prevailing law despite the questions left by the Supreme Court in interpreting the standard or adopting a framework for application.

The current competency standard for execution does not adequately protect prisoners suffering from a mental illness which affects their ability to reason, engage in rational decision-making, or conform their conduct to societal standards. In the Eighth Amendment context, the key question is whether the individual's condition produces a functional impairment of cognition or volition that significantly reduces his culpability or deterrability.[82] The current standard of competency should be revised to reflect these ideals as well as the social consensus that executing the mentally ill violates the cruel and unusual prohibition of the Eighth Amendment. In order to adequately address the issues with the current competency standard and protect the insular minorities that are prisoners plagued by mental illness, the United States Supreme Court should adopt the recommendations proposed by the American Bar Association with regard to evaluating mental illness and the imposition of the death penalty.

The ABA recommends the adoption of the following policy with regard to evaluating the "competency" of a prisoner to be executed, focusing upon the effect of the mental illness during the commission of the crime:

[81] *See Id.* at 170.
[82] See Roper, 543 U.S. at 569-75; Atkins, 536 U.S. at 317-21.

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.[83]

This standard provides three factors to consider in relation to the impact of the mental illness upon the defendant. Each factor requires a consideration into one of more facets of the defendant's ability to understand and analyze the reality of the criminal law. The analysis does not solely hinge upon whether the defendant is coherent during the competency trial- coherent enough to understand the implications of the death penalty and the consequences of the commission of the crime. Instead of focusing upon the defendant's present mental state, the ABA's recommendation considers the fluidity of mental illness and the reality that a defendant suffering from mental illness may have episodes of insanity. Thereby, this particular section of the recommendation allows consideration of the defendant's mental state during the commission of the crime.

To better understand the differences between the current competency standard and the ABA's recommendation, I will posit a hypothetical situation. involving an individual who has been diagnosed with schizophrenia, a condition which causes him to frequently experience psychotic episodes, including vivid hallucinations and a distortion of the present reality. During

[83] American Bar Association ("ABA") Recommendation 122A, August 2006.

one particularly symptomatic episode, the defendant committed the crime of murder, a crime punishable by the death penalty. While on death row, the defendant attempts to invoke appellate review, arguing he is not competent to be executed by reason of mental illness due to his schizophrenia diagnosis. During the competency hearing, the current standard of law applied is Justice Powell's competency analysis, inquiring as to whether the defendant understands the implications of the death penalty and further understands they are to receive the death penalty due to the commission of their crime. Although the defendant was experiencing a psychotic episode which prevented him from engaging in rational decision-making and distorted his understanding of reality during the commission of the murder- Justice Powell's standard does not consider his mental state at this time. If the defendant is particularly asymptomatic during the competency hearing and is able to understand the implications of the death penalty and understand the crime, he committed subjects him to this punishment- the standard requires a finding that the defendant is "competent" to be executed. However, application of the ABA's standard in this exact hypothetical would allow consideration of the defendant's mental state during the commission of the crime, requiring a finding that the defendant was "not competent" and thereby can not be subjected to the death penalty.

The American Bar Association also recommends a standard which evaluates the effect of a prisoner's mental illness after the commission of the crime, focusing specifically on post-conviction proceedings. The ABA proposes the following recommendation:

> A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or

> otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.[84]

While the first section of the ABA's recommendation focuses upon analyzing the defendant's mental state during the commission of the crime, this second section shifts its focus to a post-conviction analysis. Thereby, not only is a defendant with mental illness provided broad protection before sentencing, but the ABA assures that the defendant receives the same protection after sentencing and during post-conviction review (e.g. a competency hearing.) This second section does not solely question whether the defendant can understand the imposition of the death penalty but analyzes whether the defendant's mental illness prevents or significantly impairs the defendant's ability to put forth a compelling defense. The ABA's standard proves to be more expansive and fluid, in that it allows for evidence to be presented as to each of the three factors specified in the recommendation, providing for a more expansive review of the defendant's mental state. Thereby, the ABA's full recommendation, including both pre-indictment and post-sentencing review provides the guidance and substantive framework not only necessary to ensure judicially manageable outcomes, but to adequately safeguard the mentally ill.

Conclusion

Applying the Eighth Amendment principles discerned in the Supreme Court cases of *Atkins* and *Roper* to the class of mentally ill defendants, it is evident that punishing the mentally

[84] American Bar Association ("ABA") Recommendation 122A, August 2006.

ill violates the Eighth Amendment's prohibition against excessive punishment. There is an overwhelming national consensus in support of protecting the mentally ill, endorsed by the independent reasoning that such punishment does not advance retributive justice or adequately deter future offenders, as well as the consensus evident in the legislative trend towards protecting the mentally ill in death penalty legislation. Thereby, the death penalty is a grossly disproportionate punishment when compared to the moral culpability of this class of offenders, further justifying the need for a categorical exemption. Accordingly, the Supreme Court should apply its Eighth Amendment jurisprudence to expand the protections to the mentally ill by categorically exempting the institution of the death penalty upon defendants with mental illnesses.

In order to adequately maintain the categorical exemption of the mentally ill from the death penalty, the current standard for competency requires authoritative guidance and amendment to a standard which is both definitive and predictable. The Supreme Court's inability to provide a conclusive and established standard, produces the opportunity for judicial uncertainty and divergence amongst state legislatures across the county, further intensifying the ability for grave injury. In order to prevent the arbitrary application of the death penalty against those whom the Eighth Amendment was designed to protect, the competency standard must be replaced with a judicially manageable standard which provides clear guidelines and an expansive framework, suitable for application in all competency hearings. The Supreme Court should adopt the American Bar Association's Recommendation on the standard for competency, in an effort to expand the protections for the mentally ill and prevent the arbitrary administration of capital punishment.