Report of the Task Force on Mental Disability and the Death Penalty

REPORT

PREAMBLE

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that execution of people with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment. The Individual Rights and Responsibilities Section of the American Bar Association recognized that *Atkins* offered a timely opportunity to consider the extent, if any, to which other types of impaired mental conditions ought to lead to exemption from the death penalty. To achieve that objective, the Section established a Task Force on Mental Disability and the Death Penalty. The Task Force, which carried out its deliberations from April, 2003 to March, 2005, was composed of 24 lawyers and mental health professionals (both practitioners and academics), and included members of the American Bar Association, the American Psychological Association, the American Psychiatric Association, the National Association for the Mentally Ill and the National Mental Health Association.[1] The following commentary discusses the three paragraphs of the proposal.

PARAGRAPH 1:

Paragraph 1 of the Recommendation is meant to exempt from the death penalty persons charged with capital offenses who have significant limitations in both intellectual functioning and adaptive skills. Its primary purpose is to implement the United States Supreme Court's holding in *Atkins v. Virginia*,[2] which declared that execution of offenders with mental retardation violates the cruel and unusual punishment prohibition in the Eighth Amendment. The Court based this decision both on a determination that a "national consensus" had been reached that people with mental retardation should not be executed,[3] and on its own conclusion that people with retardation who kill are not as culpable or deterrable as the "average murderer," much less the type of murderer for whom the death penalty may be viewed as justifiable.[4]

While the *Atkins* Court clearly prohibited execution of people with mental retardation, it did not define that term. The Recommendation embraces the language most recently endorsed by the American Association of Mental Retardation, which defines mental retardation as a disability originating before the age of eighteen that is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[5] The language of the Recommendation is also consistent with the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, which defines a person as mentally retarded if, before the age of 18, he or she

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1 The Task Force's members are Dr. Michael Abramsky; Dr. Xavier F. Amador; Michael Allen, Esq.; Donna Beavers; Professor John H. Blume; Professor Richard J. Bonnie; Colleen Quinn Brady, Esq.; Richard Burr, Esq.; Dr. Joel A. Dvoskin; Dr. James R. Eisenberg; Professor I. Michael Greenberger; Dr. Kirk S. Heilbrun; Ronald Honberg, Esq.; Ralph Ibson; Dr. Matthew B. Johnson; Professor Dorean M. Koenig; Dr. Diane T. Marsh; Hazel Moran; John Parry, Esq.; Professor Jennifer Radden; Professor Laura Lee Rovner; Robyn S. Shapiro, Esq.; Professor Christopher Slobogin; and Ronald J. Tabak, Esq. Drs. Paul S. Appelbaum, Howard V. Zonana and Jeffrey Metzner also contributed significantly to the Task Force's deliberations and recommendations.

2 536 U.S. 304 (2002).

3 *Id.* at 313-17.

4 *Id.* at 318-20.

5 MANUAL OF THE AMERICAN ASSOCIATION OF MENTAL RETARDATION 13 (10th ed., 2002).

exhibits "significantly subaverage intellectual functioning" (defined as "an IQ of approximately 70 or below") and "concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[6] Both of these definitions were referenced (albeit not explicitly endorsed) by the Supreme Court in *Atkins*, and both have been models for states that have defined retardation for purposes of the death penalty exemption.[7] Both capture the universe of people who, if involved in crime, *Atkins* describes as less culpable and less deterrable than the "average murderer." As the APA's Diagnostic and Statistical Manual indicates, even a person with only "mild" mental retardation, as that term is defined in the Manual, has a mental age below that of a teenager.[8]

The language in this part of the Recommendation is also meant to encompass dementia and traumatic brain injury, disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen. Dementia resulting from the aging process is generally progressive and irreversible, and is associated with a number of deficits in intellectual and adaptive functioning, such as agnosia (failure to recognize or identify objects) and disturbances in executive functioning connected with planning, organizing, sequencing, and abstracting.[9] The same symptoms can be experienced by people with serious brain injury. Of course, people with dementia or a traumatic head injury severe enough to result in "significant limitations in both intellectual functioning or adaptive behavior" rarely commit capital offenses. If they do, however, the reasoning in *Atkins* should apply and an exemption from the death penalty is warranted, because the only significant characteristic that differentiates these severe disabilities from mental retardation is the age of onset.[10]

PARAGRAPH 2:

Paragraph 2 of the Recommendation is meant to prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability. The Recommendation uses the phrase "disorder or disability" because, even though those words are often used interchangeably, some prefer one over the other. The Recommendation indicates that only those individuals with "severe" disorders or disabilities are to be exempted from the death penalty, and it specifically excludes from the exemption those diagnosed with conditions that are primarily manifested by criminal behavior and those whose abuse of psychoactive substances, standing alone, renders them impaired at the time of the offense.

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6 See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 49 (text rev. 4th ed. 2000) (hereafter DSM-IV-TR).

7 536 U.S. at 308 n.3. DEATH PENALTY INFO. CTR., STATE STATUTES PROHIBITING THE DEATH PENALTY FOR PEOPLE WITH MENTAL RETARDATION, www.deathpenaltyinfo.org/article.php?scid (describing state laws).

8 DSM-IV-TR, *supra* note 9, at 43 (stating that people with "mild" mental retardation develop academic skills up to the sixth-grade level, amounting to the maturity of a twelve year-old). For more on the definition of retardation, see James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MEN. & PHYS. DIS. L. REP. 11-24 (2003); Richard J. Bonnie, *The APA's Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia,* 32 J. AM. ACAD. PSYCHIAT. & L. 304, 308 (2004).

9 DSM-IV-TR, *supra* note 9, at 135 (describing symptoms of dementia).

10 *Compare id.*, at 135 (describing symptoms of dementia) with *id.* at 46 (symptoms of mental retardation).

Rationale: This part of the Recommendation is based on long-established principles of Anglo-American law that the Supreme Court recognized and embraced in *Atkins* and recently affirmed in *Roper v. Simmons*,[11] in which it held that the execution of juveniles who commit crimes while under the age of eighteen is prohibited by the Eighth Amendment. In reaching its holding in *Atkins*, the Court emphasized that execution of people with mental retardation is inconsistent with both the retributive and deterrent functions of the death penalty. More specifically, as noted above, it held that people with mental retardation who kill are both less culpable and less deterrable than the average murderer, because of their "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."[12] As the Court noted, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[13] Similarly, with respect to deterrence, the Court stated, "[e]xempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers."[14]

The Court made analogous observations in *Simmons*. With respect to culpability, the Court stated:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.[15]

On the deterrence issue it said, "'[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[16]

The same reasoning applies to people who, in the words of the Recommendation, have a "severe mental disorder or disability" that, at the time of the offense: "significantly impaired their capacity" (1) "to appreciate the nature, consequences, or wrongfulness of their conduct"; (2) "to exercise rational judgment in relation to the conduct"; or (3) "to conform their conduct to the requirements of law." Offenders who meet these requirements, even if found sane at trial, are not as culpable or deterrable as the average offender. A close examination of this part of the Recommendation makes clear why this is so.

The Severe Mental Disorder or Disability Requirement. First, the predicate for exclusion from capital punishment under this part of the Recommendation is that offenders have a "severe" disorder or disability, which is meant to signify a disorder that is roughly equivalent to disorders that mental health professionals would consider the most serious "Axis I diagnoses."[17] These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder,

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11 125 S.Ct. 1183 (2005).

12 536 U.S. at 318.

13 *Id.* at 319.

14 *Id.*

15 125 S.Ct. at 1196.

16 *Id.* (quoting *Thompson v. Oklahoma,* 487 U.S. 815, 837 (1988)).

17 *See* DSM-IV-TR, *supra* note 9, at 25-26 (distinguishing Axis I diagnoses from Axis II diagnoses).

and dissociative disorders – with schizophrenia being by far the most common disorder seen in capital defendants. In their acute state, all of these disorders are typically associated with 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.[18] Some conditions that are not considered an Axis I condition might also, on rare occasions, become "severe" as that word is used in this Recommendation. For instance, some persons whose predominant diagnosis is a personality disorder, which is an Axis II disorder, may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience "psychotic-like symptoms ... during times of stress."[19] However, only if these more serious symptoms occur at the time of the capital offense would the predicate for this Recommendation's exemption be present.

The Significant Impairment Requirement. To ensure that the exemption only applies to offenders less culpable and less deterrable than the average murderer, this part of the Recommendation further requires that the disorder significantly impair cognitive or volitional functioning at the time of the offense. *Atkins* held the death penalty excessive for *every* person with mental retardation, and the Supreme Court therefore dispensed with a case-by-case assessment of responsibility. However, for the disorders covered by this second part of the Recommendation, preclusion of a death sentence based on diagnosis alone would not be sensible, because the symptoms of these disorders are much more variable than those associated with retardation or the other disabilities covered by the Recommendation's first paragraph.

The first specific type of impairment that this part of the Recommendation recognizes as a basis for exemption from the death penalty (if there was a severe disorder at the time of the offense) is a significant incapacity "to appreciate the nature, consequences, or wrongfulness" of the conduct associated with the offense (section (a)). This provision is meant to encompass those individuals with severe disorder who have serious difficulty appreciating the wrongfulness of their criminal conduct. For instance, people who, because of psychosis, erroneously perceived their victims to be threatening them with serious harm would be covered by this language,[20] as would delusional offenders who believed that God had ordered them to commit the offense.[21]

Section (a) also refers to offenders who fail to appreciate the "nature and consequences" of the crime. This language would clearly apply to offenders who, because of severe disorder or disability, did not intend to engage in the conduct constituting the crime or were unaware they were committing it.[22] It would also apply to delusional offenders who intended to commit the crime and knew that the conduct was wrongful, but experienced confusion and self-referential thinking that prevented them from recognizing its full ramifications. For example, a person who experiences delusional beliefs that electric power lines are implanting demonic curses, and thus comes to believe that he or she must blow up a city's power station, might understand that

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18 *See id.*, at 275-76 (schizophrenia); 301 (delusional disorders); 332-33 (mood disorder with psychotic features); 125 (delirium); 477 (dissociative disorders).

19 *See id.*, at 652. Other Axis II diagnoses that might produce psychotic-like symptoms include Autistic Disorder, *id.* at 75, and Asperger's Disorder. *Id.* at 84.

20 This is a fairly common perception of people with schizophrenia who commit violent acts. See Dale E. McNiel, *The Relationship Between Aggressive Attributional Style and Violence by Psychiatric Patients*, 71 J. CONSULTING & CLINICAL PSYCHOLOGY 404, 405 (2003).

21 *Cf. People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915) (stating that if a person has "an insane delusion that God has appeared to [him] and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong").

22 These offenders would not have the *mens rea* for murder, and perhaps not even meet the voluntary act requirement for crime. *See* Wayne LaFave, Criminal Law 405 (3d ed. 2000) (describing the voluntary act requirement under the common law).

destruction of property and taking the law into one's own hands is wrong but might nonetheless fail to appreciate that the act would harm and perhaps kill those who relied on the electricity.

The second type of impairment recognized as a basis for exemption from the death penalty under this part of the Recommendation (in section (b)) is a significant incapacity "to exercise rational judgment in relation to the conduct" at the time of the crime. Numerous commentators have argued that irrationality is the core determinant of diminished responsibility.[23] As used by these commentators, and as made clear by the Recommendation's threshold requirement of severe mental disability, "irrational" judgment in this context does not mean "inaccurate," "unusual" or "bad" judgment. Rather, it refers to the type of disoriented, incoherent and delusional thinking that only people with serious mental disability experience. Furthermore, as noted above, the Recommendation requires that the irrationality occur in connection with the offense, rather than simply have existed prior to the criminal conduct.

Under these conditions, offenders who come within section (b) would often also fail to appreciate the "nature, consequences, or wrongfulness" of their conduct. But there is a subset of severely impaired individuals who may not meet the latter test and yet who should still be exempted from the death penalty because they are clearly not as culpable or deterrable as the average murderer. For instance, a jury rejected Andrea Yates' insanity defense despite strong evidence of psychosis at the time she drowned her five children. Apparently, the jury believed that, even though her delusions existed at the time of the offense, she could still appreciate the wrongfulness (and maybe even the fatal consequences) of her acts. Yet that same jury spared Yates the death penalty, probably because it believed her serious mental disorder significantly impaired her ability to exercise rational judgment in relation to the conduct.[24]

The third and final type of offense-related impairment recognized as a basis for exemption from the death penalty by this part of the Recommendation is a significant incapacity "to conform [one's] conduct to the requirements of law" (section (c)). Most people who meet this definition will probably also experience significant cognitive impairment at the time of the crime. However, some may not. For example, people who have a mood disorder with psychotic features might understand the wrongfulness of their acts and their consequences, but nonetheless feel impervious to punishment because of delusion-inspired grandiosity.[25] Because a large number of offenders can make plausible claims that they felt compelled to commit their crime, however, enforcement of the Recommendation's requirement that impairment arise from a "severe" disorder is especially important here.

Exclusions. In addition to the severe disability threshold and the requirement of significant cognitive or volitional impairment at the time of the offense, a third way this part of the Recommendation assures that those it exempts from the death penalty are less culpable and deterrable than the average murderer is to exclude explicitly from its coverage those offenders whose disorder is "manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs." The Recommendation's reference to mental disorders "manifested primarily by repeated criminal conduct" is meant to deny the death

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23 *See, e.g.*, HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 218 (1979); MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 244-245 (1985); Stephen J. Morse, *Immaturity and Irresponsibility,* 88 J. Crim. L. & Criminology 15, 24 (1997); ROBERT F. SCHOPP, AUTOMATISM, INSANITY AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 215 (1991).

24 For a description of the Yates case, see Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 Duke J. Gender L. & Pol'y 37 (2003).

25 DSM-IV-TR, *supra* note 9, at 332-33.

penalty exemption to those offenders whose only diagnosis is Antisocial Personality Disorder.[26] This language is virtually identical to language in the Model Penal Code's insanity formulation, which was designed to achieve the same purpose.[27] However, the Recommendation uses the word "primarily" where the MPC uses the word "solely" because Antisocial Personality Disorder consists of a number of symptom traits in addition to antisocial behavior, and therefore the MPC language does not achieve its intended effect. Compared to the MPC's provision, then, the Recommendation's language broadens the category of offenders whose responsibility is not considered sufficiently diminished to warrant exemption from capital punishment.

Similarly, the Recommendation denies the death penalty exemption to those offenders who lack appreciation or control of their actions at the time of the offense due "solely to the acute effects of voluntary use of alcohol or other drugs." Substance abuse often plays a role in crime. When voluntary ingestion of psychoactive substances compromises an offender's cognitive or volitional capacities, the law sometimes is willing to reduce the grade of offense at trial, especially in murder cases,[28] and evidence of intoxication should certainly be taken into account if it is offered in mitigation in a capital sentencing proceeding.[29] However, in light of the wide variability in the effects of alcohol and other drugs on mental and emotional functioning, voluntary intoxication alone does not warrant an automatic exclusion from the death penalty.[30] At the same time, this Recommendation is not meant to prevent exemption from the death penalty for those offenders whose substance abuse has caused organic brain disorders or who have other serious disorders that, in combination with the acute effects of substance abuse, significantly impaired appreciation or control at the time of the offense.[31]

How This Recommendation Relates to the Insanity Defense. The language proposed in this part of the Recommendation is similar to modern formulations of the insanity defense.[32] Nonetheless, in light of the narrow reach of the defense in most states (and its abolition in a few),[33] many offenders who meet these criteria will still be convicted rather than acquitted by reason of insanity. Even in those states with insanity formulations that are very similar to the

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26 *Id.* at 650 et. seq. (defining as a symptom of antisocial personality disorder "failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest").

27 *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01(2) and commentary (draft, 1962) (stating that "mental disease or defect as used in the insanity formulation does not include "abnormality manifested only by repeated or otherwise anti-social conduct").

28 *See generally* LAFAVE, *supra* note 25, at 415-16.

29 *See* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Model of Criminal Justice*, 83 OREGON L. REV. 631, 679 n.237 (2004) (listing statutes and judicial decisions from over a dozen states that have recognized intoxication as a mitigating circumstance).

30 In *Montana v. Egelhoff*, 518 U.S. 37 (1996), a plurality of the Supreme Court held that the voluntary intoxication defense is not constitutionally required. *Id.* at 38. At least 13 states now reject the voluntary intoxication defense. See Molly McDonough, *Sobering Up*, 88 A.B.A. J. 28 (2002).

31 *See, e.g.*, DSM-IV-TR, *supra* note 9, at 170 (describing dementia due to prolonged substance abuse).

32 The language in 2(a) and 2(c), for instance, is almost identical to the language in the Model Penal Code's insanity formulation. *See* MODEL PENAL CODE, *supra* note 30, at § 4.01(1).

33 Today, five states do not have an insanity defense, another twenty-five do not recognize volitional impairment as a basis for the defense, and many states define the cognitive prong in terms of an inability to "know" (as opposed to "appreciate") the wrongfulness of the act or, as is true in federal court, leave out the word "substantial" in the phrase "lack of substantial capacity to appreciate" in the Model Penal Code formulation. *See* RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 534-36 (4th ed. 2004).

Recommendation's language, these individuals might be convicted, for a whole host of reasons;[34] in such cases, the Recommendation would require juries and judges to consider whether cognitive and volitional impairment removes the defendant from being among the most morally culpable offenders. This approach rests on the traditional understanding that significant cognitive or volitional impairment attributable to a severe disorder or disability often renders the death penalty disproportionate to the defendant's culpability, even though the offender may still be held accountable for the crime.[35] It also underlies the various formulations of diminished responsibility that predated the contemporary generation of capital sentencing statutes.[36]

How This Recommendation Relates to Mitigating Factors. This part of the Recommendation sets up, in effect, a conclusive "defense" against the death penalty for capital defendants who can demonstrate the requisite level of impairment due to severe disorder at the time of the offense. However, the criteria in the Recommendation do not exhaust the relevance of mental disorder or disability in capital sentencing. Those offenders whose mental disorder or disability at the time of the offense was not severe or did not cause one of the enumerated impairments would still be entitled to argue that their mental dysfunction is a mitigating factor, to be considered with aggravating factors and other mitigating factors in determining whether capital punishment should be imposed.[37]

PARAGRAPH 3:

This paragraph of the Recommendation is meant to address three different circumstances under which concerns about a prisoner's mental competence and suitability for execution arise after the prisoner has been sentenced to death. Subpart (a) states that execution should be precluded when a prisoner lacks the capacity (i) to make a rational decision regarding whether to pursue post-conviction proceedings, (ii) to assist counsel in post-conviction adjudication, or (iii) to appreciate the meaning or purpose of an impending execution. The succeeding subparts spell out the conditions under which execution should be barred in these three situations.

Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings. The United States Supreme Court has ruled that a competent prisoner is entitled to forgo available appeals.[38] If the prisoner is not competent, the standard procedure is to allow a so-called "next friend" (including the attorney) to pursue direct appeal and collateral proceedings aiming to set aside the conviction or sentence. Subpart 3(b) of the Recommendation addresses the definition of competence in such cases, providing that a next friend petition should be allowed when the prisoner has a mental disorder or disability "that significantly impairs his or her capacity to make a rational decision."

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34 *See generally* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997) (exploring reasons for hostility to the insanity defense).

35 *See* Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 (1989) (noting that "nearly two dozen jurisdictions list as a statutory mitigating circumstance the fact that the defendant's capacity to appreciate the criminality of her conduct was substantially impaired, often as a result of mental defect or disease" and that "an equally high number of states includes extreme mental or emotional disturbance as a mitigating factor").

36 *See generally* SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925).

37 *See, e.g.*, MODEL PENAL CODE, *supra* note 30, at § 210.6.

38 *See, e.g.*, *Gilmore v. Utah*, 429 U.S.1012 (1977).

Reportedly, 13% of the prisoners executed in the post-*Gregg* era have been so-called "volunteers."[39] Any meaningful competence inquiry in this context must focus not only on the prisoner's understanding of the consequences of the decision, but also on his or her *reasons* for wanting to surrender, and on the rationality of the prisoner's thinking and reasoning. In *Rees v. Peyton*,[40] the U.S. Supreme Court instructed the lower court to determine whether the prisoner had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether the prisoner is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises."[41] Unfortunately, the two alternative findings mentioned by the Court are not mutually exclusive – a person with a mental disorder that "affects" his or her decision-making may nonetheless be able to appreciate his or her position and make a "rational" choice. For this reason, the lower courts have integrated the *Rees* formula into a three-step test: (1) does the prisoner have a mental disorder? (2) if so, does this condition prevent the prisoner from understanding his or her legal position and the options available to the prisoner? (3) even if understanding is unimpaired, does the condition nonetheless prevent the prisoner from making a rational choice among the options?[42]

Because the courts have adopted a fairly broad conception of mental disorder (the first step) and the prisoner's understanding of his or her "legal position" (the second step) is hardly ever in doubt in these cases, virtually all the work under the *Rees* test is done by the third step.[43] Conceptually, the question is relatively straightforward – is the prisoner's decision attributable to the mental disorder or to "rational choice"?

Unequivocal cases of irrationality rarely arise. For example, if an offender suffering from schizophrenia tells his or her attorney to forgo appeals because the future of civilization depends upon the offender's death,[44] the "reason" for the prisoner's choice can comfortably be attributed to the psychotic symptom. However, decisions rooted in delusions are atypical in these cases. The usual case involves articulated reasons that may seem "rational" under the circumstances, such as (a) a desire to take responsibility for one's actions and a belief that one deserves the death penalty or (b) a preference for the death penalty over life imprisonment. The cases that give the courts the most trouble are those in which such apparently "rational" reasons are intertwined with emotional distress (especially depression), feelings of guilt and remorse, and hopelessness. In many cases, choices that may otherwise seem "rational" may be rooted in suicidal motivations. Assuming, for example, that the prisoner is depressed and suicidal but has a genuine desire to take responsibility, how is one to say which motivation "predominates"?

John Blume has studied the prevalence of significant mental disorder among the 106 prisoners who have volunteered for execution. According to Blume, 14 of the "volunteers" had recorded diagnoses of schizophrenia, 23 had recorded diagnoses of depression or bipolar disorder, 10 had records of PTSD, 4 had diagnoses of borderline personality disorder and 2 had been diagnosed with multiple personality disorder. Another 12 had unspecified histories of

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

40 384 U.S. 312 (1966) (case remanded for competency determination after condemned prisoner directed attorney to withdraw petition for certiorari).

41 *Id.* at 314.

42 *See, e.g., Hauser v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000); *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir 1985).

43 Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. UNIV. L. REV.1169 (2005).

44 Cf. *Illinois v. Haynes*, 737 N.E.2d 169, 178 (Ill. 2000); *In re Heidnick*, 720 A. 2d 1016 (Pa 1998).

"mental illness."[45] Given this high prevalence of mental illness, the courts should be more willing than they now are to acknowledge suicidal motivations when they are evident and should be more inclined than they are now to attribute suicidal motivations to mental illness when the clinical evidence of such a link is convincing. The third step of the *Rees* test would then amount to the following: Is the prisoner who seeks execution able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder?[46] Given the stakes of the decision, a relatively high degree of rationality ought to be required in order to find people competent to make decisions to abandon proceedings concerning the validity of a death sentence.[47]

Prisoners Unable to Assist Counsel in Post-Conviction Proceedings. Subpart 3(c) of the Recommendation addresses the circumstances under which impaired competence to participate in adjudication should affect the initiation or continuation of post-conviction proceedings. The law in this area is both undeveloped and uncertain in many respects. However, some principles have begun to emerge.

Under the laws of many states and the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA), collateral proceedings are barred if they are not initiated within a specified period of time. However, it is undisputed that a prisoner's failure to file within the specified time must be excused if such failure was attributable to a mental disability that impaired the prisoner's ability to recognize the basis for, or to take advantage of, possible collateral remedies. Similarly, the prisoner should be able to lodge new claims, or re-litigate previously raised claims, if the newly available evidence upon which the claim would have been based, or that would have been presented during the earlier proceeding relating to the claim, was unavailable to counsel due to the prisoner's mental disorder or disability.[48]

Assuming, however, that collateral proceedings have been initiated in a timely fashion, the more difficult question is whether, and under what circumstances, a prisoner's mental disability should require suspension of the proceedings. Subpart 3(c) provides that courts should suspend post-conviction proceedings upon proof that a prisoner is incompetent to assist counsel in such proceedings and that the prisoner's participation is necessary for fair resolution of a specific claim.

Thorough post-conviction review of the legality of death sentences has become an integral component of modern death penalty law, analogous in some respects to direct review. Any impediment to thorough collateral review undermines the integrity of the review process and therefore of the death sentence itself. Many issues raised in collateral proceedings can be adjudicated without the prisoner's participation, and these matters should be litigated according to customary practice. However, collateral proceedings should be suspended if the prisoner's

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45 Blume, *supra* note 41, Appendix B, at 989-96. The text refers only to significant mental disorders that could have distorted the prisoner's reasoning process and impaired capacity for "rational choice." In addition to these cases, Blume reports that 20 of these prisoners had histories of substance abuse unaccompanied by any other mental disorder diagnosis, another 6 had personality disorders (with or without substance abuse) and 4 had sexual impulse disorders.

46 See Bonnie, *supra* note 46, at 1187-88. A more demanding approach would ask whether the prisoner is able to give plausible reasons that reflect authentic values and enduring preferences.

47 See Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA.L. REV. 1363, 1388-89 (1988); Cf. Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 UNIV. MIAMI L. REV. 539, 579-80 (1993).

48 *See, e.g., Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 (2004); *Commonwealth v. Haag*, 809 A.2d 271, 285 (PA, 2001).

counsel makes a substantial and particularized showing that the prisoner's impairment would prevent a fair and accurate resolution of specific claims,[49] and subpart 3(c) so provides.

Where the prisoner's incapacity to assist counsel warrants suspension of the collateral proceedings, it should bar execution as well, just as ABA Standards recommend. ABA Standard 7-5.6 provides that prisoners should not be executed if they cannot understand the nature of the pending proceedings or if they "[lack] sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or [lack] the ability to convey such information to counsel or to the court."[50] As the commentary to Standard 7-5.6 indicates, this rule "rests less on sympathy for the sentenced convict than on concern for the integrity of the criminal justice system."[51] Scores of people on death row have been exonerated based on claims of factual innocence, and many more offenders have been removed from death row and given sentences less than death because of subsequent discovery of mitigating evidence. The possibility, however slim, that incompetent individuals may not be able to assist counsel in reconstructing a viable factual or legal claim requires that executions be barred under these circumstances.

Once the post-conviction proceedings have been suspended on grounds of the prisoner's incompetence to assist counsel, should the death sentence remain under an indefinite stay? The situation is analogous to the suspension of criminal proceedings before trial; in that context, the proceedings are typically terminated (and charges are dismissed) after a specified period if a court has found that competence for adjudication is not likely to be restored in the foreseeable future. In the present context, it would be unfair to hold the death sentence in perpetual suspension. A judicial finding that the prisoner's competence to assist counsel is not likely to be restored in the foreseeable future should trigger an automatic reduction of the sentence to the disposition the relevant law imposes on capital offenders when execution is not an option.

Prisoners Unable to Understand the Punishment or its Purpose. In *Ford v. Wainwright* (1986),[52] the U.S. Supreme Court held that execution of an incompetent prisoner constitutes cruel and unusual punishment proscribed by the Eighth Amendment. Unfortunately, the Court failed to specify a constitutional definition of incompetence or to prescribe the constitutionally required procedures for adjudicating the issue.[53] The Court also failed to set forth a definitive rationale for its holding that might have helped resolve these open questions. Rather it listed, without indicating their relative importance, a number of possible reasons for the competence requirement. These rationales included the need to ensure that the offenders could provide counsel with information that might lead to vacation of sentence; the view that, in the words of Lord Coke, execution of "mad" people is a "miserable spectacle . . . of extream inhumanity and cruelty [that] can be no example to others"; and the notion that retribution cannot be exacted

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49 *Council v. Catoe*, 359 S.C. 120, 597 S.E.2d 782, 787 ("[T]he default rule is that PCR [post-conviction review] hearings must proceed even though a petitioner is incompetent. For issues requiring the petitioner's competence to assist his PCR counsel, such as a fact-based challenge to his defense counsel's conduct at trial, the PCR judge may grant a continuance, staying review of these issues until petitioner regains his competence."); *Carter v. State*, 706 So.2d 873, 875-77 (Fla. 1997); *State v. Debra*, 523 N.W.2d 727 (Wisc. 1994) (non-capital case); *People v. Kelly*, 822 P.2d 385, 413 (Cal. 1992).

50 *ABA Criminal Justice Mental Health Standards* 290 (1989).

51 *Id.* at 291.

52 477 U.S. 399.

53 State courts have disagreed about the procedures required to make *Ford* competence determinations. This Recommendation does not deal with such procedural issues. For a treatment of this topic, *see ABA Standard 7.5-7* and *Coe v. Bell*, 209 F.3d 815 (6th Cir. 2000), which should be read in conjunction with the *ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases at* http://www.abanet.org/deathpenalty/publications/2005/2003Guidelines.pdf.

from people who do not understand why they are being executed.[54] Apparently based on the latter rationale, Justice Powell, in his concurring opinion in *Ford*, stated: "I would hold 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."[55] Justice Powell pointed out that states are free to preclude execution on other grounds (particularly inability to assist counsel), but most courts and commentators have assumed that the Eighth Amendment requirement is limited to the test stated by Justice Powell. Most commentators have also agreed with Justice Powell's view that the *Ford* competence requirement is grounded in the retributive purpose of punishment.[56]

There has been some confusion about the meaning of the idea that the prisoner must be able to understand (or be aware of) the nature and purpose for (reasons for) the execution. In *Barnard v. Collins*,[57] decided by the Fifth Circuit in 1994, the state habeas court had found that Barnard's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia."[58] Despite the fact that Barnard's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded that his awareness that "his pending execution was because he had been found guilty of the crime" was sufficient to support the state habeas court's legal conclusion that he was competent to be executed. [59]

In order to emphasize the need for a deeper understanding of the state's justifying purpose for the execution, subpart 3(d) of the Recommendation would require that an offender not only must be "aware" of the nature and purpose of punishment but also must "appreciate" its personal application in the offender's own case – that is, why it is being imposed *on the offender*. This formulation is analogous to the distinction often drawn between a "factual understanding" and a "rational understanding" of the reason for the execution.[60] If, as is generally assumed, the primary purpose of the competence-to-be-executed requirement is to vindicate the retributive aim of punishment, then offenders should have more than a shallow understanding of why they are being executed. Similarly, the offender should also have a meaningful understanding of what it means to be dead -- in the sense that life is terminated and that the prisoner will not be "waking up" or otherwise continuing his existence. Deficient understanding of what it means to be dead can be associated with mental retardation and with delusional beliefs symptomatic of severe mental illness. These profound deficiencies in understanding associated with mental disability should not be trivialized or ignored by analogizing them to widely shared uncertainty among normal persons about the existence of some form of spiritual "life" after death or about the possibility of resurrection.

The underlying point here is that the retributive purpose of capital punishment is not served by executing an offender who lacks a meaningful understanding that the state is taking his life in order to hold him accountable for taking the life of one or more people. Holding a person accountable is intended to be an affirmation of personal responsibility. Executing someone who

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54 *Id.* at 406-08.

55 *Id.* at 422 (Powell, J., concurring).

56 *See* Barbara Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. UNIV. L. REV. 35, 49-56 (1986); Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MEN. & PHYS. L. REP. 667, 675-77 (2000).

57 13 F.3d 871 (5th Cir, 1994).

58 *Id.* at 876.

59 *Id.*

60 *See Martin v. Florida*, 515 So. 2d 189, 190 (Fla. 1987).

lacks a meaningful understanding of the nature of this awesome punishment and its retributive purpose offends the concept of personal responsibility rather than affirming it.

Whether a person found incompetent to be executed should be treated to restore competence implicates not only the prisoner's constitutional right to refuse treatment but also the ethical integrity of the mental health professions.[61] Some courts have decided that the government may forcibly medicate incompetent individuals if necessary to render them competent to be executed, on the ground that once an individual is fairly convicted and sentenced to death, the state's interest in carrying out the sentence outweighs any individual interest in avoiding medication.[62] However, treating a condemned prisoner, especially over his or her objection, for the purpose of enabling the state to execute the prisoner strikes many observers as barbaric and also violates fundamental ethical norms of the mental health professions.

Mental health professionals are nearly unanimous in the view that treatment with the purpose or likely effect of enabling the state to carry out an execution of a person who has been found incompetent for execution is unethical, whether or not the prisoner objects, except in two highly restricted circumstances (an advance directive by the prisoner while competent requesting such treatment or a compelling need to alleviate extreme suffering).[63] Because treatment is unethical, it is not "medically appropriate" and is therefore constitutionally impermissible when a prisoner objects under the criteria enunciated by the Supreme Court in *Sell v. United States*[64] and *Washington v. Harper*.[65] As the Louisiana Supreme Court observed in *Perry v. Louisiana*,[66] medical treatment to restore execution competence "is antithetical to the basic principles of the healing arts," fails to "measurably contribute to the social goals of capital punishment," and "is apt to be administered erroneously, arbitrarily or capriciously."[67]

There is only one sensible policy here: a death sentence should be automatically commuted to a lesser punishment (the precise nature of which will be governed by the jurisdiction's death penalty jurisprudence) after a prisoner has been found incompetent for execution.[68] Maryland has so prescribed,[69] and subpart 3(d) of the Recommendation embraces this view. Once an offender is found incompetent to be executed, execution should no longer be a permissible punishment.

The current judicial practice is to entertain *Ford* claims only when execution is genuinely imminent. Should courts be willing to adjudicate these claims at an earlier time? Assuming that a judicial finding of incompetence – whenever rendered – would permanently bar execution (as proposed above), subpart 3(d) provides that *Ford* adjudications should be available only when

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61 Kirk S. Heilbrun, Michael L. Radelet, Joel A. Dvoskin, *The Debate on Treating Individuals Incompetent for Execution*, 149 AMERICAN JOURNAL OF PSYCHIATRY 596 (1992); Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics and the Needs of the Legal System*, 14 LAW & HUMAN BEHAVIOR 67 (1990).

62 *Singleton v. Norris*, 319 F.3d 1018 (8th Cir.) (*en banc*), *cert denied*, 124 S. Ct. 74 (2003).

63 See Council on Ethical and Judicial Affairs, American Medical Association, Physician Participation in Capital Punishment, 270 JAMA365 (1993); American Psychiatric Association and American Medical Association, Amicus Brief in Support of Petitioner in *Perry v. Louisiana*, 498 U.S. 38 (1990); Richard J. Bonnie, *Medical Ethics and the Death Penalty*, 20 HASTINGS CENTER REPORT, MAY/JUNE, 1990, 12, 15-17.

64 539 U.S. 166 (2003).

65 494 U.S. 210 (1990).

66 610 So.2d 746 (La. 1992).

67 *Id.* at 751.

68 A state could try to restore a prisoner's competence without medical treatment, but the prospects of an enduring change in the prisoner's condition are slight.

69 Md. Code of Correctional Services, 3-904(a)(2), (d)(1).

legal challenges to the validity of the conviction and sentence have been exhausted, and execution has been scheduled.[70]

Procedures: While this paragraph contemplates that hearings will have to be held to determine competency to proceed and competency to be executed, it does not make any recommendations with respect to procedures. Federal constitutional principles and state law will govern whether the necessary decisions must be made by a judge or a jury, what burdens and standards of proof apply, and the scope of other rights to be accorded offenders. Additionally, in any proceedings necessary to make these determinations, the victim's next-of-kin should be accorded rights recognized by law, which may include the right to be present during the proceedings, the right to be heard, and the right to confer with the government's attorney. Victim's next-of-kin should be treated with fairness and respect throughout the process.

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[70] This does not mean that no litigation challenging the validity of the sentence can be simultaneously occurring. For all practical purposes, "exhaustion" means that one full sequence of state post-conviction review and federal habeas review have occurred where, as in most jurisdictions, no execution date set during the initial round of collateral review is a "real" date. Given the many procedural barriers to successive petitions for collateral review, an execution date set after the completion of the initial round may be a "real" date, even if a successive petition has been filed or is being planned. In such a case, the state may contest the prisoner's request for a stay of execution. A *Ford* claim should be considered on its merits in such a case, and it should be considered earlier on in a jurisdiction where a "real" execution date is set during the initial round of collateral review.