

TABLE OF CONTENTS

Overview: A gap in the ‘evolving standards of decency’	2
Background information and scope of this report.....	15
Reality check 1 – Existing protections are clearly not enough.....	21
Reality check 2 – Insane in most people’s books yet executed	25
Reality check 3 – ‘Guilty but mentally ill’ and sentenced to die.....	30
Reality check 4 – Finality at the expense of fairness?	36
Waiting for the evolution: state law as a measure of ‘decency’	42
‘Mindless vengeance’: Would-be goals of death penalty fail.....	48
Protecting the dignity of society	51
In denial: Burying society’s mistakes	56
Subjective opinion & inexact science in an adversarial system	59
The mentally ill: Also at ‘special risk of wrongful execution’?	67
A double-edged sword: aggravator <i>and</i> mitigator?	69
Apparently motiveless crimes.....	74
Particularly “aggravated” crimes	76
Easy prey for unscrupulous police and prosecutors.....	81
Poor witnesses on their own behalf	87
Especially vulnerable to inadequate defence representation	92
Drugged defendants	94
Racial, cross-cultural and cumulative aspects in a broken system	98
Competence to stand trial.....	106
Death wish 1 – Competence to waive counsel or plead guilty	111
Death wish 2 – Competence to waive appeals.....	115
Competency for execution – the 20-year failure of Ford.....	120
A roll call of shame: Time for majority judicial intervention.....	124
Curing to kill – masking insanity with medication.....	132
A question of medical ethics.....	134
Found incompetent but still on death row.....	136
Unethical: Psychiatric testimony used to kill.....	137
Mental illness on or because of death row	143
Cycle of violence – from the home to the death chamber	148
Killing state: the soldier and the executioner.....	153
Conclusion: The worst of the worst, or a failure of leadership?.....	164
Recommendations.....	167
Appendix 1 – Illustrative list of 100 executed prisoners	170
Appendix 2 – Recommendations of an ABA Task Force.....	189

UNITED STATES OF AMERICA

The execution of mentally ill offenders

I cannot believe that capital punishment is a solution – to abolish murder by murdering, an endless chain of murdering. When I heard that my daughter’s murderer was not to be executed, my first reaction was immense relief from an additional torment: the usual catastrophe, breeding more catastrophe, was to be stopped – it might be possible to turn the bad into good. I felt with this man, the victim of a terrible sickness, of a demon over which he had no control, might even help to establish the reasons that caused his insanity and to find a cure for it...

Mother of 19-year-old murder victim,
California, November 1960¹

Today, at 6pm, the State of Florida is scheduled to kill my brother, Thomas Provenzano, despite clear evidence that he is mentally ill.... I have to wonder: Where is the justice in killing a sick human being?
Sister of death row inmate, June 2000²

I’ve got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this.

Final statement of Monty Delk, mentally ill man executed in Texas on 28 February 2002



Tina Morris with the body of her mentally ill brother, James Colburn, minutes after his execution in Texas in March 2003. © photo: Fabian Biasio - pixsil

¹ Quoted in *Hanged by the neck*. Arthur Koestler and C.H. Rolph, Penguin Books, 1961. The letter continued: “My daughter was against capital punishment. When she was eight years old she came home from school one day and told me a little boy had thrown a glass of water over her. ‘And what did you do?’ I asked her. ‘At first’, she said, ‘I wanted to do the same to him, but I suddenly saw myself doing what he did... He would have won’.”

² *Death penalty at dinnertime*. By Catherine Forbes. Orlando Sun Sentinel, 20 June 2000.

Overview: A gap in the ‘evolving standards of decency’

The underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency.

Indiana Supreme Court Justice, September 2002³

On 30 May 2002, a jury in Maryland sentenced Francis Zito to death. It had earlier convicted him of shooting two police officers at point-blank range in February 2001 after they came to his trailer home in response to a complaint that he was playing music too loud. The killings were as brutal as they were apparently motiveless. The crime is not the whole story, however. Francis Zito had long suffered from serious mental illness, including a combination of schizophrenia and bipolar disorder, for which he had been hospitalized some two dozen times in the previous decade, but for which he was not taking medication at the time of the crime.

Francis Zito’s pre-trial detention was spent in a psychiatric hospital. At a subsequent hearing, doctors for the defence said he was not competent to stand trial, while others for the prosecution said that he had regained competence after his treatment. The court decided that he was competent and the trial went forward. Interviewed on the opening day, the prosecutor summed up the state’s theory: “You can have a mental illness and still be capable of understanding your actions. That’s the case with Mr Zito. This isn’t going to be rocket science. He was right there on planet Earth in Centreville, Maryland. He knew they were police officers.”⁴ For the defence, the plea was one that Francis Zito was not criminally responsible by reason of insanity. At the trial, during which the defendant had difficulty focussing on the proceedings, and would repeatedly stand or speak out of turn, the jury rejected the plea and found him guilty of first-degree murder. At the sentencing, the defence lawyer appealed to the jury to reject execution: “The death penalty is reserved for the worst of the worst. Frank Zito is not the worst of the worst”. For his part, the prosecutor urged the jury instead to recall the crime and the suffering of the relatives, saying “I can’t think of anything worse”.⁵ After six hours of deliberation, the jury sent Zito to join the large number, believed to be hundreds, of people on death rows in the United States of America (USA) with histories of serious mental illness.⁶

Ten years before Francis Zito was sent to death row, Ricky Ray Rector was taken off it and executed. His is one of the defining cases of the “modern” era of judicial killing in the USA. To this day, that such a severely brain-damaged man could be found competent to stand trial, and then competent to be executed, still defies belief. Once the courts had washed their hands of his fate, the politics of the death penalty ensured the execution of this African American man sentenced to death by an all-white jury for killing a white police officer in Arkansas in 1981.

³ *Corcoran v State*, 774 N.E.2d 495, 502 (2002), Justice Rucker dissenting.

⁴ *Mental state likely to be key in Zito trial*. Baltimore Sun, 13 May 2002.

⁵ *Zito sentenced to death*. Associated Press, 30 May 2002.

⁶ Francis Zito died of lung cancer six months after his trial.

Ricky Rector had shot himself in the head prior to his arrest. The bullet wound and subsequent surgery resulted in the loss of a large section of the front of his brain. As his execution approached, the death watch log maintained by prison personnel at the Cummins Unit in Varner revealed an inmate displaying clear signs that he was seriously mentally disabled. The log's entry for 21 January 1992, for example, described Ricky Rector as "dancing in his cell.... Howling and barking while sitting on his bunk.... Walking back and forth in the Quiet Cell snapping his fingers on his right hand and began noises with his voice like a dog." Whether or not to proceed with his execution, a journalist later wrote, "became a test in Arkansas of the lengths to which a society would pursue the old urge to expiate one killing by performing another – and a test of the state's highest temporal authority, the governor, who alone could stop it."⁷

The Arkansas governor, who at the time was seeking the highest office in the country, chose not to stop it. Breaking off from presidential campaigning, Governor Bill Clinton flew back from New Hampshire for Ricky Ray Rector's execution. This calculated killing, when it came on 24 January 1992, had a final outrage in store. The execution team had to search for 50 minutes to find a suitable vein in which to insert the lethal injection needle. Rector, apparently not comprehending what was happening to him, helped them in their macabre task. Earlier, as was his daily habit, he had left the slice of pecan pie from his final meal "for later". And shortly before that, catching a glimpse of Governor Clinton on the television news, Ricky Rector told one of his lawyers, "I'm gonna vote for him for President".

On 14 August 2000, President Clinton, approaching the end of his term in office, described his country as "the leading force for human rights in the world" and one that was "more decent, more humane" than it had been eight years earlier.⁸ He made his claim in the same month that 10 more people died in his country's death chambers, including at least four who had serious mental impairments,⁹ and only a matter of weeks after an execution that echoed that of Ricky Ray Rector in 1992. This time it was Thomas Provenzano, a prisoner with a long history of mental illness, who was put to death in Florida. A judge ruled him competent

Some people did get access to come into my brain against every law and make odvious scrabble word games and show me horrible gouls lunging at my face like every dam second of every dam day and knight now for 2 years...It's torture. I can't sleep hallucinating with all of these voices I hear. Medical help needed right away!

Thomas Provenzano, grievance form, 1 August 1995, death row Florida. Thomas Provenzano was executed in 2000. [Spelling as in original.]

In 1999, US Supreme Court Justice Anthony Kennedy wrote: "It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond out own powers to describe". *Olmstead v. L.C.*, 527 U.S. 581 (1999).

⁷ *Death in Arkansas*. By Marshall Frady. The New Yorker, 22 February 1993.

⁸ Remarks to the Democratic National Convention, Los Angeles, 14 August 2000.

⁹ Juan Soria (Texas), John Satterwhite (Texas), and Dan Hauser (Florida) had histories of serious mental illness (see Appendix). Oliver Cruz (Texas) had mental retardation.

for execution despite finding “clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ”. On 20 June 2000, Thomas Provenzano was strapped to a gurney and had the lethal injection needles inserted in his arms. Eleven minutes before he was due to be killed, a federal court issued a stay of execution. The needles were withdrawn and he was taken back to his cell. A few hours later, the court lifted the stay, without comment, and Thomas Provenzano was put through the same procedure again. This time he was killed.

Terminology used in this report

Terminology used in discussing mental health is subject to wide variation both nationally and internationally. The most widely recognized sources of medical definitions in mental health are the Diagnostic and Statistical Manual of the American Psychiatric Association, Fourth Edition (DSM-IV) and the International Classification of Diseases, of the World Health Organization Edition of the World Health Organization (ICD-10).¹⁰ These definitions can be technical and very detailed. Key concepts used in this report are defined below. Simplified explanations of particular mental disorders are given on pp.18-19.

Mental disorder: This term encompasses all types of problem with mental function including mental illness, arrested or incomplete development of mind (known as mental retardation), psychopathic disorder and any other disorder or disability of the mind.

Mental illness: This term refers to disorders of thought, mood or behaviour. They are unrelated to intelligence and many can be treated effectively. Examples include depression, anxiety, and psychosis.

Mental retardation: This refers to arrested or incomplete development of intellectual capacity. It starts in childhood and is irreversible. It is not curable, though education and training can improve the life skills of many of those with this disability.

Insanity: The definition of insanity is a legal rather than medical concept. The first concept of insanity was drawn from English common law (the M’Naghten Rule) and stated that accused persons were absolved of criminal responsibility if they were incapable of understanding their action or its wrongfulness. A finding of insanity could lead to acquittal on these grounds. More recently the concept of “volition” – the capacity of the person to ensure that their behaviour conforms to the law – was introduced in US jurisprudence. A person unable to conform to legal requirements may be ruled to have a diminished level of responsibility.

Competence: Like insanity, competence is a legal, rather than medical, term. In the USA and many countries, an accused or convicted person must have a capacity to understand the legal process they face and the possible consequences of that process in order to be liable to trial or punishment. Competence must be demonstrated to proceed with a trial, with sentencing the prisoner or with carrying out an execution.

¹⁰American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders*. Fourth Edition, Text Revision, Washington DC: APA, 2000; World Health Organization. *International Statistical Classification of Diseases and Related Health Problems*, Tenth Revision – ICD-10. Second edition. Geneva: WHO, 2005.

President Clinton's successor arrived in the White House with his record on the death penalty well known. George W. Bush's five years as governor of Texas had seen 152 executions in that state, one in five of all executions nationwide in the previous quarter of a century. However, with national concern about the fairness and reliability of the capital justice system on the increase, a small sign that the death penalty was perhaps no longer the unadulterated vote-winner in the USA that it had been perceived to be in 1992 was that during the 2000 presidential campaign, Governor Bush was placed on the defensive about his support for executions. Campaigning in Iowa in January 2000, for example, Governor Bush came under pressure to stop the execution of Larry Robison, a man with paranoid schizophrenia who had been denied appropriate mental health care before his crime. The *Dallas Morning News* wrote that the governor "has a responsibility to step away from the campaign trail" to oppose Larry Robison's killing, adding that "executing a criminal who suffered from mental illness before he murdered and who lacked the resources for psychiatric care serves no public purpose".¹¹ The grassroots advocacy organization, the National Alliance for the Mentally Ill (now NAMI), appealed to the Governor not to "compound the tragedy of [Robison's] crimes and the failures of the mental health system with the cruelty of a criminal justice system that lacks compassion", a veiled reference to the governor's campaigning platform of "compassionate conservatism". In the event, conservatism rather than compassion won the day, and the governor refused to intervene. His spokesman said that the governor had supported increased funding for mental health services in Texas, and was not responsible for any inadequacy in treatment afforded to Larry Robison years earlier.

In addition to the obvious suffering due to mental disorders, there exists a hidden burden of stigma and discrimination faced by those with mental disorders. In both low- and high-income countries, stigmatization of people with mental disorders has persisted throughout history, manifested by stereotyping, fear, embarrassment, anger and rejection or avoidance. Violations of basic human rights and freedoms and denial of civil, political, economic, social and cultural rights to those suffering from mental disorders are a common occurrence around the world, both within institutions and in the community. Physical, sexual and psychological abuse is an everyday experience for many with mental disorders. In addition, they face unfair denial of employment opportunities and discrimination in access to services, health insurance and housing policies.
World Health Organization, 2005 (*WHO Resource Book on Mental Health, Human Rights and Legislation*.)

More than 800 men and women have been put to death in the USA since Ricky Ray Rector was executed in 1992. Dozens of these people had histories of serious mental impairment, either from before the crimes for which they were sentenced to death, or at the time of their execution. Some had mental retardation¹², others suffered from mental illness, and some were diagnosed with both. For some, the diagnosis was of mental disorders caused by appalling

¹¹ *Mentally ill inmate should remain incarcerated*. Dallas Morning News, 20 January 2000.

¹² This report uses the term mental retardation, rather than learning disability, as it is the term used in the USA.

childhood abuse, prison violence, or their experiences as soldiers sent into combat by their government. For others, mental illness appears to have been inherited. For some of those executed, years on death row had led to mental health problems or exacerbated existing ones. Mentally ill inmates are among the more than 100 people since 1977 to have dropped their appeals and “consented” to their own execution, a death wish made possible by a state all too willing to see freedom of choice for such individuals carried through to its lethal conclusion.

You know, we recognize that we are not perfect people, that we suffer from infirmities of the mind, and that's all right.

What's important is that all our mistakes are made of the mind and not the heart, and if we can do these things, we can live with them.

White judge to an all-white jury which had just voted for the death penalty for Howard Gooden, a mentally ill African American man, 19 May 1999, Mississippi.

In some cases, there were serious doubts about the defendant's competence to stand trial – whether they genuinely understood the nature and seriousness of the proceedings against them or had the capacity to assist in their defence. Some had been restored to competency in psychiatric hospitals after their crimes, including with anti-psychotic medication. Doubts existed also in some cases about the defendants' competence to plead guilty or to waive trial counsel and to represent themselves – indeed, some mentally ill defendants have demanded the death penalty as part of an apparent suicide bid.¹³ Some may even have committed murder in order to get a death sentence. In some cases, inadequate legal representation left juries unaware of the existence or extent of the mental impairment of the person they were being asked to sentence to death. In other cases, protecting their mentally

ill clients from the death penalty proved an insurmountable challenge for under-resourced defence lawyers. Perhaps the defendant was medicated into a haze of non-cooperation, appearing to the jury as remorselessness – a highly aggravating factor in the life or death decisions of capital jurors. Or perhaps the defendant's delusional illness rendered them unwilling to divulge information to a lawyer or doctor believed to be part of a conspiracy against them.

For some, a prosecutorial willingness to denigrate evidence of mental disability or even to portray such impairment as a sign of a person's dangerousness and thus a reason against leniency, may have tipped their punishment towards a death sentence, rather than life imprisonment. In some cases, medical professionals joined in an unethical pact with the state to predict with absolute certainty the future threat posed by a defendant. In numerous instances, society's decision to kill followed its own failure to heed warnings of a particular individual's potential for violence and to ensure appropriate remedial assistance or care.

In an Appendix to this report, Amnesty International lists 100 of the men and women executed in the USA since the resumption of judicial killing there in 1977. Each of these individuals had suffered from some form of serious mental disorder other than mental

¹³ See, for example, the case of Jeremy Sagastegui , pp.110-113 below.

retardation.¹⁴ They represent one in 10 of the USA's judicial death toll since that date. The list is illustrative only. Many others from among the remaining over 900 executed prisoners have raised mental health issues, either at trial or on appeal. However, it is not possible to know how many people who had serious mental impairments are on death row or have been executed. Defence lawyers may not have recognized that their clients had mental problems. Many inmates have not had thorough mental health examination because of lack of funds to allow such assessments.

The US Supreme Court halted executions in 1972, in *Furman v. Georgia*.¹⁵ However, only two of the Justices found that the death penalty violated the US Constitution *per se*, in all cases violating the Eighth Amendment's ban on "cruel and unusual punishments". The other three Justices who concurred in the judgment found only that it was unconstitutional in the arbitrary way in which it was being applied. Rather than lead their jurisdictions towards abolition, state legislators set about rewriting their capital statutes to take account of the *Furman* decision. In *Gregg v. Georgia* on 2 July 1976, having examined such statutes, the US Supreme Court accepted that the problem of arbitrariness could be fixed by a system under which the judge or jury would be provided "adequate information and guidance", preferably at a sentencing hearing separate from the guilt/innocence stage of the trial. It stated that the application of the punishment must be compatible "with the basic concept of human dignity at the core of the [Eighth] Amendment" and therefore must serve valid penological purposes, namely deterrence and retribution. It lifted the moratorium and executions resumed on 17 January 1977.¹⁶

The Eighth Amendment was added to the US Constitution in 1791. In 1910, the Supreme Court stated that the Amendment "is progressive and does not prohibit merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice".¹⁷ The Court took up this theme half a century later when it said that the definition of "cruel and unusual punishments" was not permanently fixed, but instead must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society".¹⁸ The *Gregg* decision essentially took the view that the death penalty must be compatible with contemporary US values because of the number of states that had enacted new capital statutes after the *Furman* ruling.

Over the years since the *Gregg* decision, the Supreme Court has provided some constitutional protections for mentally impaired people facing the death penalty, although these protections have either come only recently, or have been somewhat limited in effect. In

¹⁴ For a list of 40 cases of people with claims of mental retardation who were executed in the USA between 1984 and 2001, see pp 100-101, *USA: Indecent and internationally illegal – The death penalty against child offenders*, September 2002, <http://web.amnesty.org/library/Index/ENGAMR511432002>.

¹⁵ *Furman v. Georgia*, 408 U.S. 238 (1972). The defendant in this case, William Furman, had been diagnosed with "Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder".

¹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁷ *Weems v. United States*, 217 U.S. 349 (1910).

¹⁸ *Trop v. Dulles*, 356 U.S. 86 (1958).

1986, in *Ford v Wainwright*, the Supreme Court ruled that the execution of the insane violates the US Constitution's Eighth Amendment ban on "cruel and unusual punishments". The *Ford* majority noted that the Eighth Amendment's prohibitions "are not limited to those practices condemned by the common law in 1789", but also recognize the "evolving standards of decency that mark the progress of a maturing society". It continued: "In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects".¹⁹

However, the *Ford* majority neither defined competence for execution (although Justice Powell's suggestion that the test should be whether the prisoner is aware of his or her impending execution and the reason for it has generally been adopted), nor did a majority mandate specific procedures that must be followed by the individual states to determine whether an inmate is legally insane. The result has been different standards in different states, judicial uncertainty, and minimal protection for seriously mentally ill inmates – as demonstrated by what happened to Thomas Provenzano.

Indeed, Thomas Provenzano's experience was echoed a year later in Ohio. In mid-2001, a seriously mentally ill prisoner, Jay Scott, twice came minutes from execution – once, he had already had catheters inserted in his arms ready for the lethal injection when a court issued a stay. He was eventually put to death on 14 June 2001. Shortly before he was killed, he reportedly told relatives that he was "looking forward to the basketball game", apparently referring to a match to be played the following night. Protesting his colleagues' refusal to stop the execution, Justice Paul Pfeifer of the state Supreme Court applied the "evolving standards of decency" theory to Ohio's own constitutional ban on "cruel and unusual punishments":

"When the Constitution of the United States was ratified, slavery was legal and women could not vote. At various times in our country's past, states tortured prisoners and performed barbaric executions, including flogging, castration, drowning, pressing, and sawing-in-half. Over the years, our society evolved... When Ohioans consider the countries that still practice slavery, we call them uncivilized; when Ohioans consider the countries that do not permit women to vote, we call them repressive; when Ohioans consider the countries that commit state-sponsored torture, we call them barbaric.

This court has a chance to take a step towards being a more civilized and humane society. This court could declare that in the interests of protecting human dignity, Section 9, Article I of the Ohio Constitution prohibits the execution of a convict with a severe mental illness. I believe that the 'evolving standards of decency that mark the progress of' Ohio call for such a judicial declaration.

Jay D. Scott is in no other way a sympathetic man. He is a twice-convicted murderer who does not appear to express remorse for his crimes. But I cannot get

¹⁹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

*past one simple irrefutable fact: he has chronic, undifferentiated schizophrenia, a severe mental illness... Executing Jay D. Scott says more about our society than it says about him.*²⁰

The state killing of people such as Thomas Provenzano and Jay Scott indicate that the *Ford* ruling is, at best, a minimal standard, and at worst a fig leaf for excusing one of the most indecent aspects of this cruel, inhuman and degrading punishment. In any event, the *Ford* decision never pretended to exempt those whose serious mental illness was found to fall short of a narrow definition of incompetence for execution. Two decades on, the time has surely come for judicial construction of a broader prohibition and greater protections for the seriously mentally ill in the capital justice process.

Justice Powell stated in his *Ford* concurrence that “the only question raised” by Alvin Ford’s claim was “not whether, but when, his execution may take place”, and noted that “if petitioner is cured of his disease, the State is free to execute him”. A reminder of this came in 2003, when the US Court of Appeals for the Eighth Circuit ruled by a narrow majority that Arkansas officials could forcibly medicate mentally ill death row prisoner Charles Singleton even if that made him competent for execution. In October 2003, by refusing to take Singleton’s appeal against this ruling, the US Supreme Court allowed it to stand and the State of Arkansas to set an execution date. Charles Singleton was put to death on 6 January 2004.

A landmark decision in June 2002 finally outlawed the death penalty for people with mental retardation. In *Atkins v. Virginia*, the Supreme Court held by six votes to three that the execution of such offenders is an excessive sanction, violating the Eighth Amendment ban on “cruel and unusual punishments”.²¹ The Court reasoned that mental retardation diminishes personal culpability, and renders the death penalty in the case of this category of offenders difficult to justify on deterrence and retribution grounds. The *Atkins* ruling overturned a 1989 decision, *Penry v. Lynaugh*, by finding that “standards of decency” in the USA had evolved in the intervening years to the point at which a “national consensus” had emerged against such executions – primarily reflected in state-level legislation banning the execution of the mentally retarded. From an international human rights perspective, an encouraging footnote attached to the *Atkins* opinion acknowledged that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”

On 1 March 2005, the US Supreme Court removed another category of defendant from the reach of the death penalty, namely children. In *Roper v. Simmons*, a majority of five Justices to four brought the USA into compliance with “the overwhelming weight of international opinion against the juvenile death penalty”.²² The Court “affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual”. In finding that the death penalty against offenders who were under 18 years old at the time of the crime was

²⁰ *State v. Scott*, 748 N.E.2d 11, 19 (2001), Justice Pfeifer dissenting.

²¹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²² *Roper v. Simmons*, 125 S.Ct. 1183 (2005).

indeed excessive, the *Roper* majority quoted the *Atkins* decision: “Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”.

The *Atkins* and *Roper* decisions cannot but leave a question mark over another category of offender, namely the mentally ill. If the diminished culpability associated with youth and mental retardation render the death penalty an excessive punishment when used against offenders from those categories, what about people suffering from serious mental disorder other than retardation, such as serious brain damage, at the time of the crime? Should they not also be ineligible for execution?

Justice Stevens, writing for the Supreme Court majority in *Atkins*, concluded that:

“Mentally retarded persons... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan...Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”

While mental retardation and mental illness are not the same, the analysis given in the *Atkins* ruling nevertheless could be applied to the latter. For example, a mentally ill person’s delusional beliefs may cause them to engage in illogical reasoning and to act on impulse. A former President of the American Psychiatric Association wrote following the *Atkins* decision that:

*“... the mentally ill suffer from many of the same limitations that, in Justice Stevens’ words, ‘do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability’.”*²³

Only a tiny percentage of murders in the USA result in execution. As the lawyer trying to defend Francis Zito from the death penalty in Maryland in 2002 argued, the death penalty is a punishment in the United States that is supposed to be reserved for the “worst of the worst” crimes and offenders. In a decision in 1980, for example, the US Supreme Court overturned a death sentence because the defendant’s murders had not shown “a consciousness materially more ‘depraved’ than that of any person guilty of murder”.²⁴ The *Atkins* decision picked up on this and stated: “If 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.”

²³ Alan A. Stone, M.D., *Supreme Court decision raises ethical questions for psychiatry*. Psychiatric Times, Vol. XIX; Issue 9, September 2002.

²⁴ *Godfrey v. Georgia*, 446 U.S. 420 (1980).

Can someone with a serious mental impairment other than retardation at the time of the crime ever be said to possess the “extreme culpability” assumed by the death penalty? If society’s standards of decency have evolved to prohibit the state-sanctioned killing of child offenders and those with mental retardation, how can that same society still permit the likes of Ricky Ray Rector, Thomas Provenzano and Charles Singleton to be put to death?

Some judges in the USA have already recognized this fundamental inconsistency. In July 2003, for example, Judge Robert Henry on the US Court of Appeals for the 10th Circuit noted the *Atkins* ruling, and concluded that the imposition of the death penalty against Robert Bryan, a mentally ill Oklahoma death row inmate, “contributes nothing” to the goals of retribution and deterrence. Although Judge Henry was joined by three other judges on the court, it was not enough to stop Robert Bryan going to his execution in June 2004.²⁵ In similar vein in September 2002, Justice Robert Rucker of the Indiana Supreme Court dissented against the death sentence of Joseph Corcoran, an Indiana inmate suffering from mental illness including schizophrenia. Justice Rucker drew attention to the *Atkins* decision:

*“I respectfully dissent because I do not believe a sentence of death is appropriate for a person suffering a severe mental illness. Recently the Supreme Court held that the executions of mentally retarded criminals are ‘cruel and unusual punishments’ prohibited by the Eighth Amendment of the United States Constitution. There has been no argument in this case that Corcoran is mentally retarded. However, the underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency”.*²⁶

The United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted in 1984 and endorsed by consensus by the UN General Assembly, prohibit the execution of “persons who have become insane”. A resolution adopted in 1989 on the implementation of the Safeguards recommended that UN member states eliminate “the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”. In recent years, the UN Commission on Human Rights has repeatedly adopted resolutions calling for an end to the use of the death penalty against anyone suffering from any form of mental disorder.

There are, of course, many judges in the USA who have not yet come to this view. For example, in upholding the death sentence against mentally ill inmate John Edward Weik on 3 September 2002, all five Justices on the South Carolina Supreme Court wrote: “while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, the imposition of such a sentence upon a mentally ill person is not disproportionate.”²⁷ In November 2004, two federal judges upheld the death sentence of Indiana death row inmate Arthur Baird, noting that while the US Supreme Court had prohibited the execution of

²⁵ *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), Judge Henry, concurring in part and dissenting in part. Joined by Judges Seymour, Ebel and Lucero.

²⁶ *Corcoran v State*, 774 N.E.2d 495 (In. 2002), Justice Rucker dissenting.

²⁷ *State v. Weik*, 587 S.E.2d 683.

offenders with mental retardation in *Atkins*, “it has not yet ruled out the execution of persons who kill under an irresistible impulse” brought about by mental illness. The judges acknowledged that “as an original matter, we might think it inappropriate to sentence to death a man as seemingly insane as Baird at the time of the murders. But it is not our judgment to make”.²⁸ Arthur Baird’s death sentence was commuted by Governor Mitch Daniels on 29 August 2005, just two days before Baird was due to be executed. While he based his decision on other factors involved in the case, Governor Daniels’ commutation order referred to court findings that Baird was suffering from mental illness at the time of the crime and noted: “it is difficult to find reasons not to agree” with the findings of an Indiana Supreme Court judge that Baird is “insane in the ordinary sense of the word.”

On the question of young offenders, the Supreme Court majority in *Roper v. Simmons* wrote that “the overwhelming weight of international opinion against the juvenile death penalty rest[s] in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime”. So, too, surely, in the case of people with mental illness. A month after the *Atkins* ruling, Justice James Zazzali of the New Jersey Supreme Court wrote in the case of death row inmate Leslie Ann Nelson, who according to both defence and prosecution psychiatric testimony is “a seriously disturbed and depressed person who has suffered from serious mental illness throughout her life”:

*“The State’s legitimate penological interests that purportedly are served by the death penalty are unconstitutionally diminished if the State executes such a mentally ill and psychologically disturbed person... Executions, our most extreme form of indignation, cannot be carried out on a defendant whose irrationalities were exacerbated at the time of her criminal acts to such an extent as to undermine our confidence that she is fully culpable. If capital punishment is constitutional, it must be reserved for those defendants whose capacities allow them to be fully culpable.”*²⁹

While the US Supreme Court majority in *Atkins v. Virginia* had given a nod to international standards, the majority in *Roper v. Simmons* gave an even firmer one: “It does not lessen fidelity to the Constitution or pride in its origins”, they said, “to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our heritage of freedom”. Just as on the question of child offenders, in repeated resolutions in recent years the United Nations (UN) Commission on Human Rights has called on all countries to desist from using the death penalty against anyone suffering from a mental disorder.

The USA should also end the use of the death penalty against *anyone*. The death penalty *per se* contravenes evolving international standards of decency, with a clear and growing majority of countries not executing anyone, let alone the mentally ill. In 1998, an Illinois Supreme Court Justice wrote in dissent in the case of a (mentally impaired) death row prisoner:

²⁸ *Baird v. Davis*, 388 F.3d 110 (7th Cir. 2004).

²⁹ *State v. Nelson*, 173 N.J. 417, 30 July 2002, Justice Zazzali concurring.

*“My colleagues turn aside defendant’s constitutional challenge with the observation that the American criminal justice system is one of the best in the world. The sentiment has a pleasant and reassuring tone, but it overlooks an important fact. The supposedly ‘inferior’ justice systems of other nations are abandoning capital punishment at an unprecedented rate.”*³⁰

In the seven years since Justice Harrison’s dissent, over 20 more countries have abolished the death penalty, bringing to 121 the number of countries which have abandoned this punishment in law or practice.³¹ In those same six years, the USA has executed more than 500 prisoners, dozens of whom had serious mental impairments.

Amnesty International opposes all executions, regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner. While this report is about people with mental illness facing the death penalty, their cases also illustrate the wider flaws of an outdated punishment. The state’s attempt to select the “worst of the worst” crimes and offenders out of the thousands of murders committed each year inevitably leads to inconsistencies and errors, inescapable flaws which are exacerbated by discrimination, prosecutorial misconduct and inadequate legal representation.

In the cases of offenders with claims of mental retardation or mental illness, their fellow human beings will in the end be called upon to make subjective life-or-death decisions about which of these defendants or inmates should be included in these categories and which should not. In the 1986 *Ford v. Wainwright* decision, four US Supreme Court Justices acknowledged that although “the stakes are high”, the evidence of whether a prisoner is incompetent for execution “will always be imprecise”. A fifth Justice added that “unlike issues of historical fact, the question of [a] petitioner’s sanity calls for a basically subjective judgment.” In a recent decision, in April 2005, the US Court of Appeals for the Fourth Circuit reiterated this when it said “undoubtedly, determining whether a person is competent to be executed is not an exact science”.³² In other words, there will always be errors and inconsistencies on the margins. Arbitrariness in the application of the death penalty is abhorrent as well as unlawful. In the end, there is only one solution – abolition.

To oppose the death penalty is not to excuse or minimize the consequences of violent crime, whether it is committed by mentally impaired offenders or anyone else. If it were, then a majority of countries are currently apologists for violent crime, clearly a nonsensical suggestion. Instead, to end the death penalty is to recognize that it is a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in

³⁰ *People v. Bull*, 705 N.E.2d 824 (Ill. 1998), Justice Harrison concurring in part, dissenting in part. Donald Bull had mental impairment, and an IQ ranked in the bottom two per cent of the population. He died on death row on 18 September 2002, a few months before the then Governor of Illinois commuted the death sentences of all those on death row in his state because of his doubts about the reliability and fairness of the capital justice system.

³¹ See <http://web.amnesty.org/pages/deathpenalty-countries-eng>.

³² *Walton v. Johnson*, 407 F.2d 285 (4th Cir. 2005).

social and psychological terms. It has not been shown to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim's family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity. It should be abolished.

"Our Government", wrote a US Supreme Court Justice in 1928, "is the potent, the omni-present teacher. For good or for ill, it teaches the whole of our people by its example".³³ By its use of the death penalty, in the end, the state is peddling what amounts to a delusional theory: namely that by killing a selection of those it convicts of murder, it can offer a constructive solution to violent crime. In reality, the state is taking to refined, calculated heights what it seeks to condemn – the deliberate taking of human life. As French writer Albert Camus asked, what is capital punishment but the most premeditated of murders, to which no criminal act, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish criminals who had warned their victims of the date at which they would be killed and who, from that moment onward, had been confined at the captor's mercy for years. "Such a monster", Camus suggested, "is not encountered in private life."³⁴

In 1972, US Supreme Court Justice William Brennan put it another way: "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity... In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."³⁵ In the 1995 decision outlawing the death penalty in South Africa, Justice Mahomed on that country's highest court built on Justice Brennan's conclusion: "It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilization, must be compromised, by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find so repugnant in the conduct of the offender in the first place."³⁶

For the USA to be pursuing this premeditated ritualistic killing in the 21st century against offenders suffering from serious mental illness is particularly offensive to widely held standards of decency.

³³ *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis dissenting.

³⁴ *Réflexions sur la peine Capitale*, 1957.

³⁵ *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan concurring.

³⁶ *The State v. T Makwanyane and M Mchunu*, Constitutional Court of the Republic of South Africa, 6 June 1995, Mahomed, J., concurring. Justice Mahomed went on to become Chief Justice.

Background information and scope of this report

The stark realities are that many death row inmates were afflicted with serious mental impairments before they committed their crimes and that many more develop such impairments during the excruciating interval between sentencing and execution.

US Supreme Court Justice, 24 June 1991³⁷

From the outset of a capital case, the mental condition of the defendant may have a bearing on the case. For example, the defendant's mental state at the time of the crime may be reflected in the plea he or she enters in the trial court, such as "not guilty by reason of insanity".

The modern legal definition of insanity derived from the 1843 English *M'Naghten* case.³⁸ Under this rule, the defendant is "insane", and therefore absolved from criminal responsibility, if, as a result of mental impairment, he or she did not know at the time of the otherwise criminal act that the act was wrong. This defence was subsequently broadened in the USA to include a "volitional" clause, exonerating defendants from criminal responsibility if they lacked the capacity to control their conduct to the requirement of the law.

This relaxation of the insanity defence led to a backlash, particularly after the 1982 case of John Hinckley, who was sent to mental hospital after being found not guilty by reason of insanity for his attempted assassination of President Ronald Reagan. Several states and the federal government amended their insanity laws – such as by dropping the volitional criterion to make it a harder verdict to achieve – or even abolished the defence entirely. Indeed, the defence is successful in only a minority of cases. In 2002, a veteran California prosecutor suggested that "you can be crazy as a loon, but that does not mean you're legally insane".³⁹ Contrary to what some prosecutors have hinted to jurors, a successful insanity plea does not mean release from detention, but involuntary commitment to a psychiatric facility.

National attention was drawn to the insanity defence in 2002 by the case of Andrea Yates, against whom Texas prosecutors were seeking a death sentence for drowning her five young children. There was compelling evidence that she had been suffering from severe mental illness, namely undiagnosed schizophrenia and post-partum depression. The jury rejected the insanity defence, however, a decision that was inconsistent with current scientific knowledge

³⁷ *Rector v. Bryant*, 501 U.S. 1239 (1991). Justice Marshall, dissenting.

³⁸ Daniel M'Naghten shot the secretary to the Prime Minister. He was apparently suffering from symptoms of paranoid schizophrenia at the time, and the jury returned a verdict of not guilty by reason of insanity. The House of Lords in response to public concern devised what would become known as the M'Naghten Rules: "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong".

³⁹ 'Odds against insanity defense: Stayner strategy rarely succeeds.' *San Jose Mercury News*, 3 September 2002.

relating to post-partum psychosis.⁴⁰ Debate about the issue continued after another Texas jury in 2004 found Deanna Laney not guilty by reason of insanity for killing two of her children.

In the 1970s and 80s, some US states created a new verdict between “not guilty by reason of insanity” and “guilty”, namely “guilty but mentally ill”. In theory, defendants found guilty but mentally ill were supposed to be guaranteed mental health care during their incarceration. However this has largely proved illusory and the “guilty but mentally ill” verdict has been widely criticized. It appears to have been a legislative response aimed at assuaging public outrage following particular high-profile cases, rather than a more preventive and treatment approach to people with mental illness who commit serious crimes.⁴¹

Evidence relating to the mental health of the defendant may also be introduced in mitigation against a death sentence. In the USA, death penalty trials are split into two stages. First there is the guilt/innocence phase. If the defendant is found guilty of the capital charge, the trial will move into a sentencing phase. At this second stage of the trial, the defence can present any mitigating evidence in an attempt to persuade the jury to vote for life rather than death, while the prosecution will make the case for execution by presenting the “aggravating” factors relating to the crime and offender.

Aside from the defence plea and the mitigating evidence, the question of an individual’s mental “competence” may also be raised at any one of a number of points in the capital process, including:

- Competence to waive interrogation rights, e.g. the right to a lawyer or to remain silent
- Competence to stand trial
- Competence to waive their right to counsel and to act as their own lawyer
- Competence to plead guilty

⁴⁰ “Whereas England’s Infanticide Law provides probation and mandates psychiatric treatment for mothers with mental illness who commit infanticide, ‘killer mothers’ may face the death penalty in the United States. Contemporary neuroscientific findings support the position that a woman with postpartum psychosis who commits infanticide needs treatment rather than punishment and that appropriate treatment will deter her from killing again. Psychiatrists have a vital role in recognizing the signs and symptoms of peripartum psychiatric disorders, particularly postpartum psychosis, and in early identification of and intervention with at-risk mothers.” Margaret G. Spinelli, M.D., ‘Maternal infanticide associated with mental illness: Prevention and the promise of saved lives.’ *Am. J. Psychiatry* 2004; 161: 1548-1557. See also, Deborah W. Denno, ‘Who is Andrea Yates? A short story about insanity’, *10 Duke J. Gender L. & Pol’y* 1, 2003. In 2005, Andrea Yates’s conviction was vacated and she was remanded for retrial.

⁴¹ The first “guilty but mentally ill” (GBMI) statute was enacted in 1975 in Michigan and followed public outrage at the case of two people who had been found not guilty by reason of insanity, but were subsequently released and committed further violent crimes. In 1981, Indiana became the second state to enact a GBMI statute in response to a violent crime in which an insanity defence was offered. Following the Hinkley case in 1982, 10 more states enacted GBMI statutes and some rewrote their insanity defence laws to exclude the volitional prong. From: *Killing the non-willing: Atkins, the volitionally incapacitated, and the death penalty*, by John Blume and Sheri Lynn Johnson, *55 South Carolina Law Review* 93, 2003.

- Competence to drop appeals against conviction and death sentence
- Competence to be executed

These issues will be illustrated with cases later in the report, showing that the procedures used to assess “competence” have frequently failed to protect people suffering from serious mental illness.

In the June 2002 *Atkins* decision prohibiting the execution of people with mental retardation, the US Supreme Court noted that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus”. As in the *Ford v. Wainwright* decision in 1986 ruling that it is unconstitutional to execute prisoners who have become incompetent for execution, the Court left it up to the individual states to decide how to comply with the decision.⁴² While the *Ford* ruling – as will be shown below – has offered minimal protection for people with serious mental illness at the time of their execution and needs to be revisited by the Court as a matter of urgency, the extent of the protection provided by the *Atkins* decision remains to be seen.⁴³ This matter is beyond the scope of this current report.

- Mental illnesses cannot be overcome through “will power” and are not related to a person’s “character” or intelligence.
- Mental disorders fall along a continuum of severity. The most serious and disabling conditions affect five to 10 million adults (2.6 – 5.4%) and three to five million children ages five to 17 (5 – 9%) in the USA.
- Without treatment the consequences of mental illness for the individual and society are staggering: unnecessary disability, unemployment, substance abuse, homelessness, inappropriate incarceration, suicide and wasted lives; The economic cost of untreated mental illness is more than 100 billion dollars each year in the United States.
- The best treatments for serious mental illnesses today are highly effective; between 70 and 90 percent of individuals have significant reduction of symptoms and improved quality of life with a combination of pharmacological and psychosocial treatments and supports;
- Stigma erodes confidence that mental disorders are real, treatable health conditions. We have allowed stigma and a now unwarranted sense of hopelessness to erect attitudinal, structural and financial barriers to effective treatment and recovery.

From: *About mental illness*. www.nami.org

⁴² In a footnote to the *Atkins* decision, the Supreme Court pointed to definitions of mental retardation used by the American Association of Mental Retardation and the American Psychiatric Association. In the *Ford* decision, only a concurring opinion by a single Justice attempted to define competence for execution.

⁴³ There are already concerns in this regard. While a number of people with mental retardation have been removed from death rows by the courts or acts of executive clemency since *Atkins*, there are fears that some people with strong claims of mental retardation may yet be executed. Indeed, three years after the *Atkins* ruling, a number of states have not passed legislation on the issue. For example, in Alabama and Mississippi, there are still no clear procedures as to how trial courts should proceed on cases of people with mental retardation claims facing capital charges or for determining who on death row should have their death sentence reversed as a result of *Atkins*. With different states adopting different postures on this issue, yet more inconsistency in US capital case outcomes looms.

Neither does this report attempt to answer the complex question of precisely which defendants should be exempt from the death penalty on the grounds of mental illness at the time of the crime. At the time of writing, US experts on mental health and law, led by a Task Force of the American Bar Association Section of Individual Rights and Responsibilities (ABA-IRR), were continuing to discuss this matter with the aim of achieving common agreement amongst legal and mental health professionals and advocates as to precisely what the term “mental illness” should mean when seeking to extend the “*Atkins*” protection to people with mental illness.⁴⁴ Obviously, mental illness can incorporate a wide range of conditions, some more serious than others. In addition, mental illness is not necessarily present all of the time in a sufferer, whether because of treatment or remission. Mental retardation on the other hand is a permanent developmental disability.⁴⁵

Nevertheless, it may be helpful to the reader to have a brief description of the mental illnesses that are most frequently mentioned in this report. This information is adapted from that provided by NAMI, a grassroots advocacy organization in the USA (formerly known as the National Alliance for the Mentally Ill). This and further information can be accessed at www.nami.org. Information can also be accessed on the website of the National Institute of Mental Health, at www.nimh.nih.gov.

- **Schizophrenia.** Schizophrenia is a serious brain disorder that affects approximately 2.2 million adults in the USA. It interferes with a person’s ability to think clearly, to distinguish reality from fantasy, to manage emotions, to make decisions and to relate to others. The first signs of schizophrenia typically emerge in the teenage years or early 20s. Most people with schizophrenia suffer chronically or episodically throughout their lives, and are often stigmatized by a lack of public understanding about the disease. A person with schizophrenia does not have a “split personality”, and almost all people with schizophrenia are not dangerous or violent towards others when they are receiving treatment. The World Health Organization has identified

⁴⁴ Since this report was written in mid-2005, an overview and analysis of the proposals of the ABA’s Task Force has been published in the *Catholic University Law Review*, Volume 54, in 2005 (see also Appendix 2 of this report).

⁴⁵ In its *Atkins v. Virginia* decision, the US Supreme Court pointed to the definitions of mental retardation used by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). AAMR: “Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” APA: “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.”

schizophrenia as one of the 10 most debilitating diseases affecting humans. Symptoms of schizophrenia include hallucinations – hearing voices when no one has spoken or seeing things that are not there – and delusions such as believing that people are reading their mind, controlling their thoughts or plotting against them.

- **Bipolar disorder.** Bipolar disorder, or manic depressive illness, is a serious brain disorder that causes extreme shifts in mood, energy, and functioning. It affects 2.3 million adults in the USA, and is characterized by episodes of mania and depression that can last from days to months. It can run in families. Bipolar disorder is a chronic and generally lifelong condition with recurring episodes that often begin in adolescence or early adulthood, and occasionally even in children. It generally requires lifelong treatment, and recovery between episodes is often poor.
- **Major depression.** Major depression is a serious medical illness affecting nearly 10 million people in the USA in any given year. It causes lowering of mood, reduction of energy, and tiredness. Left untreated, depression may lead to suicide.
- **Schizoaffective disorder.** This illness is characterized by a combination of symptoms of schizophrenia and an affective (mood) disorder. Today, most clinicians and researchers agree that it is primarily a form of schizophrenia. For a diagnosis of schizoaffective disorder, a person must have primary symptoms of schizophrenia (such as delusions, hallucinations or disorganized speech or behaviour) as well as prolonged symptoms of major depression or a manic episode.
- **Dissociative disorders.** These are so called because they are marked by a loss of the normal integration between memories of the past, awareness of identity and immediate sensations, and control of bodily movements. There are many forms, the best known of which is dissociative identity disorder (formerly known as multiple personality disorder) where an individual has one or more distinct identities or personalities that surface on a recurring basis. All of the dissociative disorders are thought to stem from trauma experienced by the sufferer.
- **Post traumatic stress disorder (PTSD).** PTSD is an anxiety disorder that can occur after someone experiences a traumatic event that caused intense fear, helplessness, or horror. The traumatic events can include war, childhood abuse, rape, natural disasters, accidents and captivity. Symptoms include re-experiencing (e.g. nightmares, flashbacks, hallucinations); avoidance (e.g. lack of recall of the traumatic event, limited range of emotion, feelings of detachment from others, feelings of hopelessness about the future); and increased arousal (e.g. inability to sleep, irritability, outbursts of anger, inability to concentrate, watchfulness, jumpiness).
- **Brain damage.** Also of relevance to this report is the issue of serious brain damage that may be equivalent to mental retardation, but which would not be defined as such

because it occurred not as a lifelong developmental disability, but as the result of an accident or other traumatic event.⁴⁶

- **Organic brain syndrome (also known as organic mental disorder, chronic organic brain syndrome).** Organic brain syndrome is a general term referring to physical disorders of the brain arising from disease or trauma that cause decreased mental function such as problems with attention, concentration and memory, confusion, anxiety and depression.⁴⁷

There are currently around 3,400 people on death row in the USA. It is not known how many of them suffer from mental disorders of the sort listed above. The National Mental Health Association has estimated that five to 10 per cent of the US death row population have serious mental illness.⁴⁸ This would be consistent, for example, with a recent study which investigated 2,005 people convicted of homicide in Sweden over a 14-year period. The researchers believe that it is the largest study to date of mental disorders in homicide offenders. It found that one in five suffered from a psychotic illness. Specifically, 8.9 per cent of the individuals had been diagnosed with schizophrenia, 2.5 per cent with bipolar disorder, and 6.5 per cent with other psychotic disorders. The study pointed out that the homicide rate in Sweden was about three times lower than in the USA and suggested that “in countries with more liberal gun laws, the proportion of mentally disordered homicide offenders may be different”. The study pointed out that earlier research in the United Kingdom and Finland had each found that six per cent of homicide offenders suffered from schizophrenia.⁴⁹

In any event, the primary purpose of this report is to illustrate that people with serious mental illness continue to be sentenced to death and executed in the United States of America, that existing safeguards are clearly inadequate to prevent this from happening, and that there

⁴⁶ This concept, the definition of which is not taken from NAMI, is illustrated by the case of Nicholas Hardy in Florida. In February 1993, 18-year-old Hardy shot himself in the head after he had shot and killed James Hunt, a police officer who had stopped Hardy and three other youths. The suicide attempt left Nicholas Hardy in a coma for several weeks, after which he slowly regained the ability to speak and walk. A competency hearing was held in August 1993 to determine if he could stand trial. He was found to be incompetent due to his self-inflicted brain damage, and he was sent to the Mentally Retarded Defendant Program at Florida State Hospital. There he received training in an effort to restore him to competency. In February 1995, he was found competent to stand trial, and on 14 February 1996, he was sentenced to death. In June 1998, the Florida Supreme Court re-evaluated the aggravating factors in the crime and found that they were outweighed by the mitigating circumstances. The Court noted that the neurological experts who had examined Hardy concluded that his brain damage meant that he “was no longer the same person who killed Sergeant Hunt.” It commuted the death sentence to life imprisonment without parole. See: *Hardy v. State*, 11 June 1998.

⁴⁷ This information is adapted from that provided by the US National Library of Medicine and the National Institutes of Health, and MedicineNet.com

⁴⁸ NMHA. Death Penalty and People with Mental Illness. Available at www.nmha.org.

⁴⁹ Seena Fazel and Martin Grann, Psychiatric morbidity among homicide offenders: A Swedish population study. *Am J Psychiatry* 2004; 161: 2129-2131. The study also found that 92 per cent of the homicide offenders had some psychiatric diagnosis.

is a profound inconsistency in exempting people with mental retardation from the death penalty while those with serious mental illness remain exposed to it.

Amnesty International is an abolitionist organization which campaigns to end the death penalty in all cases everywhere. While pursuing this aim, which may take many decades in some countries, it also seeks to narrow the scope of capital punishment, in line with international standards, and to promote moratoriums on executions. Therefore, as it did previously on the issue of child offenders and those with mental retardation, Amnesty International will join with others seeking to protect people with mental illness from the death penalty in the USA. It recognizes that some individuals or organizations may support such an exemption from the less-than-abolitionist position that the death penalty is acceptable as long as it is more narrowly and reliably applied. Indeed, some may even see a narrower death penalty as easier to defend against the abolitionist tide. For its part, Amnesty International supports narrowing the scope of the death penalty insofar as it represents progress towards abolition. Thus, even while it supports such measures, the organization will continue to seek to persuade all proponents of the death penalty, whether they are politicians, prosecutors, or members of the public, to change their minds and drop their support for any judicial killing at all.

Reality check 1 – Existing protections are clearly not enough

He did a terrible thing, but he was sick. Where is the compassion? Is this the best our society can do?

Yvonne Panetti, mother of Scott Panetti, Texas death row inmate, 2003⁵⁰

Pro-death penalty officials, whether they be prosecutors, legislators, governors or judges, may claim that existing safeguards in US federal and state law protect the seriously mentally impaired from execution. For example, in August 2000, the then Attorney General of Texas, the state which accounts for a third of all executions in the USA since 1977, claimed that the Texas justice system “offers no less than five separate procedural protections for capital murder defendants who may have any form of mental incapacity”. He said the “five-layered system of safeguards ensur[ing] due process for all mentally impaired defendants” consists of the following protections:

- No person may be put to trial unless he is mentally competent to understand the charges against him and to assist his attorneys at trial;
- No person may be convicted of a crime unless the state proves beyond a reasonable doubt to the jury that the defendant intended to commit the criminal act;
- It is a defense to prosecution for a crime if a defendant shows he was mentally unable to know that his conduct was wrong;

⁵⁰ For a full report on Scott Panetti’s case, see USA: ‘Where is the compassion?’ *The imminent execution of Scott Panetti, mentally ill offender*, AI Index: AMR 51/011/2004, January 2004. <http://web.amnesty.org/library/Index/ENGAMR510112004>.

- In the punishment phase of a capital murder case, a defendant may present to the jury any and all evidence of mental impairment in mitigation against a death sentence;
- A death row inmate cannot actually be executed unless he is mentally competent, which means that he understands that he is going to be executed and the reasons why.⁵¹

Do the Attorney General's assurances remain credible when set against the reality on the ground? A case in point is that of Scott Panetti, who was sentenced to death in Texas in 1995 for killing his parents-in-law in 1992. He has a long history of mental illness, including schizophrenia. He was hospitalized more than a dozen times in numerous facilities before the crime, which he claimed was committed under the control of an auditory hallucination. He also claimed that divine intervention had meant that his victims did not suffer, and that demons had been laughing at him as he left the scene of the crime.

In July 1994, a hearing to determine if he was competent to stand trial was declared a mistrial when a jury could not reach a verdict. Two months later a second hearing was held. His lawyer testified that in the previous two years, he had had no useful communication with Scott Panetti because of his delusional thinking. A psychiatrist for the defence concluded that Panetti was not competent to stand trial. A psychiatrist who testified for the prosecution agreed with the previous diagnoses of schizophrenia, and that Scott Panetti's delusional thinking could interfere with his communications with his legal counsel, particularly under situations of stress as in a courtroom. However, he concluded that the defendant was competent to stand trial. The jury agreed.

Scott Panetti then waived his right to counsel, and the case went to trial in September 1995 with the defendant acting as his own lawyer. He pleaded not guilty by reason of insanity (at the time of the crime), a notoriously difficult plea on which to be successful, even for an experienced trial lawyer. Scott Panetti dressed as a cowboy during the proceedings, and gave a rambling presentation in his defence. Numerous people who attended the trial as witnesses have variously described the trial as a "farce", a "joke", a "circus", and a "mockery". In post-conviction affidavits they concluded, from their prior knowledge of Panetti and their observations of him during the proceedings, that he was incompetent to stand trial. For example, a doctor who had previously treated Scott Panetti for schizophrenia in 1986 concluded that Panetti was "acting out a role of an attorney as a facet of his mental illness, not a rational decision to represent himself". An attorney called by Scott Panetti as a witness later stated: "The courtroom had the atmosphere of a circus. The judge just seemed to let Scott run free with his irrational questions and courtroom antics."

Another lawyer, who was appointed as Panetti's stand-by counsel, wrote in an affidavit: "This was not a case for the death penalty. Scott's life history and long term mental problems made an excellent case for mitigating evidence. Scott did not present any mitigating evidence because he could not understand the proceeding". He recalled that "His trial was truly a

⁵¹ *Texas guards rights of the mentally impaired*. John Cornyn, Attorney General of Texas. Letters to the Editor, St Louis Post-Dispatch, 18 August 2000.

judicial farce, and a mockery of self-representation. It should never have been allowed to happen.” The lawyer said that he spoke to two jurors who “told me that Scott probably would not have received the death penalty if the case had been handled differently”. Another lawyer spoke to two other jurors. They “said that if Scott had been represented by attorneys that he would not have received the death penalty”. One of them said that the jurors had voted for death out of their fear of his irrational behaviour at the trial.

Another witness at the trial, a reporter familiar with courtroom procedures, has recalled: “I watched as Scott questioned some of the jurors. The jurors would look scared.” One of the doctors who was at the trial has said: “In my opinion, Scott’s mental illness had an effect on the jury that was visible. It was obvious from the appearance of the jury that Scott antagonized them by his verbal rambling and antics. Scott was completely unaware of the effect of his words and actions. Members of the jury had hostile stares and looked at Scott in disbelief while he rambled and made no sense.”

A psychiatrist who evaluated Scott Panetti in 1997 concluded that he suffers from schizoaffective disorder, a combination of schizophrenia and bipolar disorder. This expert added that Panetti’s decision to waive his own counsel was under the influence of persecutory delusions, and his ability to represent himself in court was substantially impaired by disturbances in his thought processes”. The psychiatrist further concluded that Panetti had not been competent to stand trial.

However, the state successfully continued to defend the death sentence on appeal. In 2002, the US Court of Appeals for the Fifth Circuit wrote: “During trial, Panetti proceeded while dressed in a cowboy suit, gave the appearance of hallucinating, and carried on rambling dialogues. He did, however, formulate a trial strategy, improved his performance over time, and was able to effectively examine and cross-examine witnesses”. In its subsequent brief to the US Supreme Court in 2003, the Texas Attorney General’s Office argued that “Panetti’s apparent inability to consult with his court appointed attorney was the result of his conscious choice not to cooperate rather than a by-product of his mental illness”. On 1 December 2003, the Supreme Court announced that it was refusing to consider the case.

The state set a date for Scott Panetti’s execution of 5 February 2004. The Texas Board of Pardons and Paroles rejected clemency by 15 votes to one. Then, on the eve of the execution, a federal judge issued a stay of execution in order that Panetti’s competency for execution could be determined.

At state-level, two court-appointed mental health experts concluded that Scott Panetti knew that he was to be executed, and had the ability to understand why. The defence objected to their methods and conclusions and sought funds to do their own investigation and requested that the state court hold an evidentiary hearing. Their efforts were unsuccessful; on 26 May 2004, the state court concluded that Scott Panetti had “failed to show by a preponderance of the evidence that he is incompetent to be executed”. His lawyers appealed to the federal District Court, which granted resources to the defence and ordered a hearing on the competency issue.

The hearing was held on 7 and 8 September 2004. The defence presented four mental health experts. The state presented the two experts appointed by the state court in the earlier proceedings, and two correctional staff from death row (who, in essence, testified that Panetti appeared to know that he is going to be executed, but they did not know if he understood why).

The defence experts, including a forensic psychologist who had worked for the Federal Bureau of Prisons for 20 years, testified that Scott Panetti suffers from either schizophrenia or schizoaffective disorder. They testified that Panetti knows that he is on death row, and that he is to be executed. However, they had also concluded that Panetti believes that the official reason for his execution is “a sham” and that the real reason is to stop him from preaching the gospel. Far from being grounded in reality, they said, Scott Panetti’s delusional and grandiose belief is that his execution is part of a conspiracy against him, involving “the forces of evil, demons, and devils”. The experts testified that they did not believe that Scott Panetti was faking his illness, and also noted that his condition had worsened on death row because he had stopped taking his medication after he had a “revelation” in April 1995.

For the prosecution, the two state court-appointed experts testified that Panetti had refused to co-operate with their evaluation because they would not answer questions about their religious preferences, although they acknowledged that he had told them that he believed he was to be executed to stop him from preaching. The psychiatrist admitted that Scott Panetti had “serious psychological problems”, but that simply because Panetti “is preoccupied with religion and may even, at some level, genuinely believe that he is being executed for preaching the gospel” did not “render him incapable of understanding why the authorities have ordered his execution”. He and the other state expert said that Panetti was capable of understanding why he was going to be executed, but admitted that they did not know if he actually did understand.

On 29 September 2004, the federal judge ruled that because Scott Panetti “knows he has committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed”.⁵² The defence appealed, and the federal judge, clearly of the opinion that the standard for competency for execution is a minimal standard and the law on the issue “less than clear”, granted leave to appeal to the US Court of Appeals for the Fifth Circuit. In their opening brief, Scott Panetti’s lawyers wrote:

“Mr Panetti holds a Kafkaesque belief that the State of Texas, in league with demonic forces, wants to execute him to prevent him from preaching God’s word. His belief is genuine. His belief is not grounded in reality. His belief is the product of his delusions brought on by severe mental illness... Although he appears to have a factual awareness of the State’s professed reason for his impending execution, the nature of his mental illness causes him to misperceive the logical connection between

⁵² *Panetti v. Dretke*, US District Court for the Western District of Texas, 29 September 2004.

*his murder of his parents-in-law and his penalty of death. He does not have a rational understanding of the reason for his execution.*⁵³

At the time of writing, the case was still in the Fifth Circuit. Previous cases raised doubts that the outcome would be a just one.

Reality check 2 – Insane in most people’s books yet executed

[A]ll of his understanding about his legal situation was delusional: in his view, and he truly believed this, his only ‘offense’ was knowing the mafia’s secrets, and his punishment, which was death, was being exacted by the mafia to keep him from telling their secrets.

Former Chief Psychiatrist, Texas death row, on Harold Barnard⁵⁴

The Texas Department of Criminal Justice records Harold Barnard’s final statement before being executed on 2 February 1994 as ending in “a couple of sentences garbled”. What Harold Barnard was trying to say before the state killed him will never be known. Perhaps there was some reference to the “Japanese Duck Mafia”, the people he had long believed were going to kill him. In any event, what is clear is that the system failed to heed overwhelming evidence that he was insane and stop his execution. It is staggering that, more than a decade later, the problem has still not been addressed. People as ill as Harold Barnard can be, and have been, executed in the USA.

Harold Barnard was sentenced to death in 1981 for the killing the previous year of 16-year-old Tuan Nguyen during the robbery of a convenience store in Galveston, Texas. At the sentencing his defence lawyers presented some evidence about his troubled childhood and the large amount of alcohol and drugs he had consumed shortly before the crime. The jury also heard that, several months before the murder, Harold Barnard had been beaten on the head with a tyre lever by his son-in-law. He had sustained severe head injuries which apparently went largely untreated. His mother testified how his personality and ability to function changed after this incident. For example, he had been a successful carpenter, roofer and construction worker prior to the injury, but was unable to work after it. However, the defence did not present any expert testimony relating to possible brain damage or psychological disorder, including incipient schizophrenia.⁵⁵

On death row, Harold Barnard’s serious mental illness became more and more pronounced. By the time his execution date was set in early 1994, all the mental health professionals, including prison doctors, who had examined, diagnosed and treated him over the years were in agreement – he could not understand the reason for or reality of his execution, rendering his execution unlawful under *Ford v. Wainwright*. However, one doctor,

⁵³ *Panetti v Dretke*, In the US Court of Appeals for the Fifth Circuit, opening brief of petitioner-appellant, 2005.

⁵⁴ Unless otherwise stated, the details of Harold Barnard’s case are provided by his former appellate attorneys, including from conversations with Amnesty International in 2002 and 2005 and from their comprehensive January 1994 Petition for Writ of Habeas Corpus and Motion for Stay of Execution and for Evidentiary Hearing in federal court (*Barnard v. Collins*).

⁵⁵ *Barnard v. Collins*, 958 F.2d 634 (5th Cir. 1992).

after having conducted a brief interview with Barnard, testified that he was competent for execution. The fact that Harold Barnard was executed, in effect, on the opinion of a single doctor in the face of overwhelming expert opinion to the contrary speaks volumes of the state's willingness to kill on the basis of unreliable evidence.

Five different prison doctors, all psychiatrists and psychologists employed by the Texas Department of Corrections (TDC), agreed that Harold Barnard was not competent to be executed. These were not doctors employed by the defence or the prosecution as part of the litigation on Harold Barnard's case. They were experts who had observed, examined, evaluated and treated Barnard over the course of the previous decade that he had spent on death row. They had come to their respective decisions before the issue had been raised in the courts.

- Dr Joseph Leggett, one of Harold Barnard's former treating psychiatrists, testified that Barnard was "a severely mentally ill man with a fixed, deeply ingrained delusional system. He was very psychotic throughout the time I saw him as my patient. He also experienced auditory hallucinations. He was diagnosed as paranoid schizophrenic. Mr Barnard is not one of those people whose psychosis is periodic or cyclical, coming and going at times. Rather, he was always psychotic...The primary theme in his delusion, which remained constant throughout the time I treated Mr Barnard, was one of conspiracy: that the mafia and its agents were involved in an elaborate conspiratorial plot to have him put to death...because he knew all of their secrets, about the terrible things they were doing.... He had no appreciation or understanding that there was a connection between the crime for which he was convicted and his being on death row. This was because all of his understanding about his legal situation was delusional: in his view, and he truly believed this, his only 'offense' was knowing the mafia's secrets, and his punishment, which was death, was being exacted by the mafia to keep him from telling their secrets... I have no doubt that Mr Barnard's severe mental disorder is real, and that he is in no way malingering"⁵⁶
- Dr Yates Morgan, one of Harold Barnard's former treating psychologists, testified that Barnard was "incapable of having a rational or cogent understanding or appreciation about his legal status or his reason for being on death row. Mr Barnard's delusional thinking contaminated his entire understanding of the world around him... I cannot imagine that he could appreciate in any way the actual purpose of his punishment... For example, I remember Mr Barnard telling me that the oriental mafia was practicing germ warfare around the perimeter of his cell."⁵⁷

⁵⁶ Affidavit of Dr Joseph Leggett, Central Regional Psychiatrist, Texas Department of Corrections; Former Chief Psychiatrist, Ellis 1 Unit and primary treating psychiatrist for Harold Barnard. 1993.

⁵⁷ Affidavit of Dr C. Yates Morgan, Current Chief Psychologist, Texarkana Federal Correctional Institute, Former Supervising Psychologist, Ellis II Unit of TDC, Psychiatric Services Supervisor, Ellis I Unit, and primary treating psychologist for Harold Barnard. 1993.

- Dr Santiago Caberto, who was one of Harold Barnard's treating psychiatrists at TDC from 1982 to 1991, stated that during his treatment of Barnard, "he was psychotic as evidenced by his formal thought disorder with auditory hallucinations, paranoid delusional system and lack of insight and defective judgment. I firmly believe that he was not able to understand in a rational manner the reason for impending execution".⁵⁸
- Dr Howard Blevins evaluated Harold Barnard in 1987 on behalf of the Texas Attorney General's Office. In that evaluation, Barnard had "launched into a rather confusing diatribe in which he mentioned the 'Mafia', 'Japanese hit men', 'Three D Ducks', 'Italians', and 'Greeks', in which he and his father 'did not commit any crimes but fought them in self defense'... Mr Barnard reiterated that he had allowed his wife to hypnotize him and that she was able to 'blank out my memory of the Mafia killings and the memory of hypnosis'." Dr Blevins concluded that Barnard was not legally insane at that time, but predicted that his condition was likely to deteriorate. By 1994, he believed that his prediction had come to pass: "In my professional opinion, the results of the [current] evaluations... appear to be consistent with the results, conclusions and prognosis I rendered in my evaluation of September 21, 1987. At that time I concluded that there was a distinct probability that he could become substantially dysfunctional in his cognitive and reasoning abilities."⁵⁹
- Dr Windel Dickerson, former chief psychologist for the TDC, concluded that Harold Barnard was incompetent for execution.⁶⁰

In addition, Harold Barnard's appeal lawyers hired other experts to assess their client on the question of his competency for execution. They, too, concluded that he was incompetent.

- Dr Allen Childs, a psychiatrist, reviewed Barnard's records, interviewed prison guards and inmates and examined Barnard. He concluded that: "Mr Barnard is profoundly psychotic, is unquestionably not feigning this psychosis and is likely to remain in this state of delusion indefinitely. He thoroughly believes the Mafia is behind his impending execution. Mr Barnard does not *suspect* this to be true, he *knows* it. His delusional system which dominates his thinking renders him incapable of any rational understanding why he is being put to death."⁶¹
- Dr Philip Murphy, a clinical psychologist, reviewed Harold Barnard's records, interviewed prison mental health personnel, guards and inmates and examined the

⁵⁸ Psychiatric evaluation of Dr Santiago Caberto, M.D., Current Psychiatrist, Riverside Correctional Facility, Ionia, Michigan, Former Psychiatrist, TDC Ellis 1 Unit.

⁵⁹ Letter of Dr Howard Blevins, Former Central Region Psychiatric Services Supervisor, TDC, 1994.

⁶⁰ Letter of Dr Dickerson, Ph.D,

⁶¹ Report of Dr Allen Childs, M.D., Practicing Psychiatrist and part-time Psychiatrist for Vernon State Mental Hospital, Vernon, Texas. Date?Vernon State Hospital at that time was the state facility in Texas which performed competency and sanity evaluations in criminal cases for courts throughout Texas.

prisoner himself. He concluded that “Mr Barnard is presently psychotic, due to a long-standing schizophrenic illness. This illness is marked especially by a bizarre delusional system whereby a plot by an ‘oriental’ arm of the Mafia was going to assassinate him... Mr Barnard believes, based on his delusional psychosis, that he is to be executed by members of the mafia (or ‘Japanese Duck Mafia’, or the ‘Cosa Nostra’, or the Gambino crime family, etc.) as a vendetta against him and his family”.⁶²

Harold Barnard denied that he had any mental illness. For example, he told Dr Childs that the prison personnel were “lying” when they related his bizarre behaviour such as rolling around in the exercise area “shouting at or batting away imaginary persecutors”. Dr Childs also revealed that TDC records on Harold Barnard over the years variously diagnosed him as “schizophrenic”, “psychotic”, or “paranoia delusional”. Dr Murphy also stated that the TDC records reflected Harold Barnard’s long-standing history of auditory hallucinations, most commonly of members of the mafia who were trying to have him killed. As early as 1985, a nurse in the Ellis 1 Unit noted that Harold Barnard “states that his food and medicine are poisoned. Wants to make the streets of Houston safe – children being stolen by the mafia – old women being raped by organized crime. Wants the federal marshals called in, so that he can explain what is going on – his life and his family’s lives are endangered by the mafia.”

At an evidentiary hearing in state court in July 1993, a federal magistrate judge for the Western District of Texas, Austin Division, testified on Harold Barnard’s behalf. Prior to becoming a federal magistrate judge in 1992, Judge Alan D. Albright had been Harold Barnard’s former volunteer appellate lawyer. Judge Albright unequivocally stated that, in his opinion, Harold Barnard had no rational understanding of his legal situation. He stated that he and Barnard “did not have an attorney/client relationship that is anything – that is like anything that has been in my experience before. I wasn’t able to go to Harold to get any help on the case. I wasn’t able to explain to him why I was raising the defense I was raising... In fact, during our conversations when I was there [on death row], sometimes he would stop and basically ask me who I was and why I was there.” A lawyer, who was involved in challenging Harold Barnard’s competency for execution, wrote to Amnesty International in June 2005:

“Harold did not believe the young victim he shot actually died. He believed with maniacal certainty that his impending execution was not punishment for his crime, but was simply another of many examples of the omnipresence and malevolence of the Japanese Ducks, controlling the courts, police, all authorities. Harold wrote his schizophrenic mother long letters almost every other day, telling her to buy a gun to protect herself from the Japanese Ducks, and that he would be out of prison and home soon to protect her. When Harold’s attorneys visited him, he frequently spent some time warning them personally to beware of the Ducks, out of what appeared to be a very genuine concern for their own families...”

⁶² Report of Dr Philip J. Murphy, Ph.D., Practicing Clinical Psychologist in Oklahoma City, Oklahoma, 1993.

No one could have observed Harold in the courtroom for his execution competency hearing, with his pyjama-like prison outfit hanging off him and his shackles rattling due to his constant shaking, without perceiving that this gentle, anxious, diminutive man was, at the same time, utterly harmless and mentally destroyed".

With this extent of evidence, one would imagine that Harold Barnard would have been removed from the reach of the executioner. It was not to be. The state produced one doctor, Dr Edward Gripon, who concluded that Barnard, although mentally ill, was competent for execution. Dr Joseph Leggett, the TDC psychiatrist described Dr Gripon's assessment as "a woefully inadequate determination of Harold Barnard's present sanity. He appears to have made numerous diagnostic decisions based upon a very cursory and conclusory examination". Dr Leggett emphasised that "unlike Dr Gripon" he had observed Harold Barnard over a prolonged period and had personally conducted "thorough psychiatric examinations of Harold Barnard on many occasions, and I have had access to and have read Harold Barnard's full medical history".⁶³ Dr Childs responded that "frankly, I am astonished at Dr Gripon's conclusions. There are a number of factual inaccuracies in his evaluation which could not possibly be there had he reviewed all of the records as he says he did." Dr Murphy likewise criticized Dr Gripon's conclusions. Yet another psychiatrist who treated Harold Barnard on death row also disagreed with the state's expert, stating that "I am not clear how Dr Gripon came to such a vastly different conclusion", except that he "appears to have done only a cursory and superficial evaluation of Mr Barnard."⁶⁴

Dr Gripon said that Barnard had explained to him "the circumstances of his conviction and the fact that he had been found guilty", that he was on "Death Row", and that he faced the process of lethal injection. However, Dr Gripon had apparently not asked Barnard why he was on death row or was to be executed. The fact that Barnard knew he was on death row and was going to be killed and that he had been convicted was not the point. The point was that he thought it was all part of a conspiracy by the mafia to assassinate him. Dr Leggett continued: "Though I do not hold any opinion about the ultimate correctness of the death penalty, I do firmly believe that no one should be executed on the basis of conclusions drawn from questions never asked, or from a critical line of inquiry inadequately pursued."

Not only did Dr Gripon's report contradict all the other experts, he also contradicted himself on a number of issues during his live testimony at the evidentiary hearing in July 1993. For example, in his report, unlike every other doctor, Dr Gripon had denied that Harold Barnard experienced auditory hallucinations. In his testimony, he conceded that Barnard did experience hallucinations, thereby undermining his own conclusion that Barnard was not suffering from schizophrenia.

In September 1993, the state court recommended denial of relief. It took the position of Dr Gripon, finding that Harold Barnard knew that he was going to be executed by lethal injection and that he had been convicted of murder. It found that the defence had established

⁶³ Affidavit of Joseph Leggett, M.D., in response to letter of Dr Gripon.

⁶⁴ Report of Aaron Fink, M.D.

only that “his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything that happens to him to a conspiracy...” The Texas Court of Criminal Appeals adopted the lower court’s findings. An execution date was set. The federal courts refused to stop the execution. The US Court of Appeals for the Fifth Circuit noted the defence’s assertion that seven experts had been ignored in favour of a single court-appointed witness, but held that “an unexpected outcome does not automatically render the state procedure unfair” and that “a state court’s finding of competency to be executed is entitled to a presumption of correctness”.⁶⁵ Ten years later, in 2004, a federal judge would cite the Fifth Circuit’s decision in Harold Barnard’s case in ruling that Scott Panetti (above) was competent for execution – despite Panetti’s delusional belief that his execution was part of a conspiracy between the state and satanic forces to have him killed for preaching the gospel.

The Fifth Circuit Court of Appeals has recently and repeatedly come in for sharp criticism from the US Supreme Court for its findings in death penalty cases.⁶⁶ The Barnard case suggests that it should have stepped in much earlier. The Supreme Court should intervene at the earliest opportunity to prohibit the execution of inmates with serious mental illness.

Reality check 3 – ‘Guilty but mentally ill’ and sentenced to die

James Wilson could not control his own worst impulses. Sometimes our judicial system has the same problem.

Editorial, Georgia, 14 May 1989⁶⁷

If doubts still remain that a person with serious mental illness can be condemned to death in the USA, the case of James Wilson should dispel them. While his case may be unique in the post-1977 era of judicial killing in the United States – a judge sentenced him to death despite finding that Wilson’s mental illness rendered him unable to control his conduct at the time of the crime – it demonstrates how a person with mental illness can end up on death row and how the appeal system may fail to remedy a manifest injustice.

On 26 September 1988, 19-year-old James William Wilson walked into the cafeteria of Oakland Elementary School in Greenwood, South Carolina, and opened fire with a gun he had earlier taken from his grandmother’s house and ammunition he had bought from a shop. When the .22 nine-shot revolver was empty, he reloaded, walked into a classroom down the hall and began shooting again. He ran out of ammunition for a second time and climbed out of a window. Outside, Wilson surrendered to the school’s head teacher who told him to put his hands up. He did so until the police arrived and took the teenager into custody. As a result of the shooting rampage, eight-year-old Shequila Bradley was dead and 10 other people - eight children and two teachers - had bullet wounds. A second eight-year-old girl, Tequila Thomas, died of her injuries three days later, having never regained consciousness. It was a crime,

⁶⁵ *Barnard v. Collins*, 13 F.3d 871 (5th Cir. 1994).

⁶⁶ See, for example, *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Miller-El v. Dretke*, 73 U.S.L.W. 4479 (2005).

⁶⁷ *It’s Wrong to Kill the Mentally Ill*. The Atlanta Journal and Constitution. 14 May 1989.

among the first of a number of school shootings that would occur across the USA over subsequent years, which traumatized the small city of Greenwood, and reverberated across the nation.⁶⁸ It was also to set a legal precedent in the state for the treatment of the mentally ill by the criminal justice system.

James Wilson comes from a family with a history of mental illness going back at least four generations and he himself began displaying mental problems from an early age, as well as becoming the target of emotional and physical abuse within his home environment.⁶⁹ By the age of 13, when he showed symptoms of mental illness, family members gave him prescription drugs meant for other relatives. He began to self-medicate with illicitly obtained medication, including sedatives, pain-killers, anti-depressants and anti-psychotic drugs. He was an inpatient in psychiatric hospital at least six times during his teens. However, the family failed to ensure that he attended follow-up appointments or other treatment programs. In April 1988, when he turned 19, his father's health insurance ceased to cover him, and he was denied readmission to hospital. His mental condition deteriorated over the months leading up to the shooting. He was placed under psychiatric evaluation the day after his arrest. He was evaluated as suffering from borderline personality disorder. In its onset period, schizophrenia is commonly misdiagnosed as borderline personality disorder. James Wilson's illness would indeed later be diagnosed as schizophrenia.

Recent research supported by the National Institute of Mental Health, an agency of the US Department of Health, has found that half of all lifetime case of mental illness begin by the age of 14, and that there are often long delays – sometimes decades – between the onset of symptoms and when the sufferers seek and obtain help.⁷⁰ A recent study of 18 young offenders on death row in Texas found that all but one came from extremely violent and/or abusive families in which mental illness was prevalent in multiple generations. Fifteen (83 per cent) of the inmates had signs and symptoms of early-onset mental illness in the bipolar, schizoaffective or hypomanic range of disorders.⁷¹

⁶⁸ James Wilson told a psychiatrist after the crime that he had identified with Laurie Dann, who in May 1988 had shot several children at a school in Winnetka, Illinois, killing an eight-year-old boy. Dann, who had a history of mental problems, then killed herself. In subsequent years there were shootings in numerous schools across the USA, including in Alaska, Arkansas, California, Colorado, Florida, Kentucky, Mississippi, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington State.

⁶⁹ Expert evidence has revealed that “Wilson's father had abused him severely, beating him at various points with a belt, a can, and a shoe and, on occasion, threatening him with a gun”. *Wilson v. Ozmint*, 352 F. 3d 847 (4th Cir. 2003).

⁷⁰ *Mental illness exacts heavy toll, beginning in youth*. National Institute of Mental Health, press release, 6 June 2005.

⁷¹ Dorothy Otnow Lewis et al, Ethics questions raised by the neuropsychiatric, neuropsychological, educational, developmental, and family characteristics of 18 juveniles awaiting execution in Texas. *Journal of the American Academy of Psychiatry and Law* 2004; 32: 408-29.

The prosecution decided to seek the death penalty against James Wilson for the murder of the two girls.⁷² The defendant had a number of possible pleas, including not guilty by reason of insanity. Under the latter defence, if successful, he would have been found not criminally responsible if at the time of the crime he was unable to tell right from wrong. He would have been committed to secure confinement in a psychiatric hospital.

In the event, James Wilson pleaded “guilty but mentally ill” under a law enacted by the South Carolina legislature in 1984. Under this law, a defendant is guilty but mentally ill if, at the time of the crime, he or she could tell right from wrong but was unable to conform his or her conduct to the requirements of the law “because of mental disease or defect”. The burden is on the defendant to prove this. After a three-day hearing at which he heard testimony from various experts, Circuit Judge James E. Moore determined that James Wilson’s mental state at the time of the crime met the statutory definition of “guilty but mentally ill”. James Wilson’s plea was accepted and he became the 92nd person to be found guilty but mentally ill under the 1984 statute. Two weeks later, on 9 May 1989, James Wilson became the first of them to be sentenced to death.

The mental health professionals who had evaluated Wilson after the crime had considered the question of whether James Wilson was legally insane or guilty but mentally ill as “debatable” and “more than a close question”. During the plea hearing, Dr Donald Morgan, then Associate Director of a division of the South Carolina Department of Health, who had been ordered by the court to evaluate James Wilson, testified that Wilson fitted the category of guilty but mentally ill. After his testimony, Dr Morgan stayed in the courtroom. During a break in proceedings, he informed one of the defence lawyers that he had altered his opinion having heard further testimony about Wilson’s behaviour at the time of the crime. Dr Morgan now believed that the defendant had been legally insane at the time of the offence. However, the lawyer neither told the defendant of this development nor requested a recess to consider the matter further.⁷³

Perhaps the lawyer failed to inform James Wilson that there was now professional support for an insanity defence because the mentally ill teenager was showing signs of being incapable of assisting in his defence or deciding how to plead. It only emerged after the trial that he had told his lawyers that he was scared of being seen by a jury, suggesting that fear may have motivated his decision to waive trial by jury, enter a guilty plea, and face sentencing by a judge. Shortly before the plea, James Wilson had shaved off all his head and body hair, telling his attorneys that this was so that he could receive “special thoughts”. For post-conviction proceedings, Dr Seymour L. Halleck, an eminent forensic psychiatrist who conducted an exhaustive review of the case, concluded that James Wilson was suffering from

⁷² There were two “aggravating” factors in the crime either of which meant that the prosecution could seek the death penalty under state law: 1) two people were murdered, and 2) they were under 11 years old. Judge Moore affirmed the aggravating factors.

⁷³ *Wilson v. Maynard and Condon*. Petitioner’s traverse, memorandum of law in opposition to motion for summary judgment, and request for and evidentiary hearing on selected claims. In the United States District Court for the District of South Carolina, August 2002.

schizophrenia at the time, had not been competent to evaluate his legal options and make the guilty plea, and was probably not competent to stand trial at that time either.

His trial lawyers presented no mitigation evidence or witnesses at the sentencing. Nor did they present evidence that was available of James Wilson's remorse about the shooting. Nor did they seek to explain that the powerful anti-psychotic medication their client was taking during his trial proceedings was causing him to appear unemotional and detached. His lawyers, experts and other observers variously described the defendant as having "a flat facial expression", "a very flat affect", or displaying a "disinterested", "totally flat", or "zombie-like" demeanour. James Wilson's lack of visible emotion was even noted in the media reporting of the case.⁷⁴ The theme of the prosecutor's argument for execution was that James Wilson, a mentally ill teenager from an abusive background, "chose to live the way that he did". The prosecutor argued that despite "a tendency today to put the blame on society, or to put the blame on circumstances, we can never as a civilized society abandon individual responsibility for actions". The judge agreed, despite finding four statutory mitigating factors in addition to his earlier finding that Wilson had not, due to mental impairment, been able to control his conduct at the time of the crime.⁷⁵

There was widespread criticism of the judge's decision, from lawyers, advocates for the mentally ill, and newspaper editorials. A few days after the sentence, for example, the South Carolina paper, *The State*, wrote, "[I]f Wilson were a cold-blooded killer in control of his mental faculties, we would applaud the death sentence. But is there any justice in electrocuting a young man who desperately needed help and did not get it, whose mind was so diseased that he could not resist his murderous impulses? We think not."⁷⁶ In neighbouring North Carolina, *The Charlotte Observer* posed a similar question: "Why impose on this pathetic man the maximum penalty a sane, calculating murderer would get? ...A humane society does not compound its fear and ignorance of mental illness by treating the mentally ill as common criminals. That's what South Carolina has done in the case of James William Wilson."⁷⁷ In similar vein, the *Atlanta Journal-Constitution* in Georgia said:

"While Wilson's crime was inarguably ghastly, his disordered mental state makes his rampage more a hideous tragedy than unmitigated outrage. What purpose would his execution serve? At best, Wilson's execution would be no more than a hopeless gesture of protest against a crime that defies understanding. At worst, it would be an

⁷⁴ *Wilson v. Evatt*, Applicant's post-hearing memorandum of law in support of the amended application for post-conviction relief. In the Greenwood County Court of Common Pleas, 25 November 1996.

⁷⁵ The statutory mitigating factors found by the judge were: 1) defendant has no significant history of prior violent crime conviction; 2) the murder was committed under the influence of mental or emotional disturbance; 3) capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and 4) the age or mentality of the defendant at the time of the crime.

⁷⁶ 'Wilson case raises legal, ethical questions.' 14 May 1989.

⁷⁷ 'Wilson sentence a travesty.' 12 May 1989.

*act of unspeakable meanness. James Wilson could not control his own worst impulses. Sometimes our judicial system has the same problem.*⁷⁸

At a post-conviction hearing, one of James Wilson's trial lawyers testified that he and his co-counsel had "felt confident that [the judge] would decide that [Wilson] shouldn't receive the death penalty" because of the defendant's mental illness.⁷⁹ The lawyer testified to their belief that even if their client was sentenced to death, the acceptance of the plea of guilty but mentally ill "would have some power on appeal" which would lead to the death sentence being overturned. The other trial lawyer testified that he had believed that the court's acceptance of the plea meant that "Wilson would not get the death penalty or if he did, it would never be upheld [on appeal]." The two lawyers were wrong. The death sentence has survived the appeals process intact.

On 6 January 1992, James Wilson's case set a legal precedent in South Carolina when the state Supreme Court confirmed the death sentence. The court ruled that it was not unconstitutional to execute a person found guilty but mentally ill for actions over which, due to that illness, they had no control. It further ruled that the execution of such a defendant does not violate the constitutional ban on cruel and unusual punishment.⁸⁰ In a dissenting opinion, Justice Finney wrote:

"When considered in light of [Wilson's] personal culpability, it becomes obvious that the penalty of death in this case is excessive; both in an absolute sense and when compared with other death sentences confirmed by this Court. This may be the only instance in South Carolina and indeed, according to my research, in the entire nation where the death penalty has been imposed after a factual determination that mental illness deprived the offender of sufficient capacity to conform his conduct to the standard required by law.... I would find that under these circumstances, a death sentence amounts to cruel and unusual punishment in violation of the eighth amendment."

The case went to the federal courts. In January 2003, a federal judge on the District Court for the District of South Carolina overturned the death sentence, finding various constitutional errors in the guilty plea proceedings and the sentencing hearing. The state appealed to the US Court of Appeals for the Fourth Circuit to overturn the District Judge's ruling. The defence also appealed, arguing that to impose a death sentence on someone who was unable to conform his conduct to the requirements of the law violates the US Constitution.

⁷⁸ 'It's wrong to kill the mentally ill.' 14 May 1989.

⁷⁹ The lawyers had evidently believed that the original judge assigned to the case – Judge Thomas L. Hughston, a former public defender – would not hand down a death sentence against someone who was found to be guilty but mentally ill. However, after the prosecution delayed the trial date, Judge Moore was assigned to the case. He was the prosecutor's former law partner and said to be more prosecution-oriented than Judge Hughston. *Wilson v. Evatt*, Applicant's post-hearing memorandum of law in support of the amended application for post-conviction relief. In the Greenwood County Court of Common Pleas, 25 November 1996.

⁸⁰ *State v Wilson*, 413 S.E.2d 19 (S.C. 1992).

On 17 December 2003, the Fourth Circuit Court of Appeals vacated the District Court's ruling, applying the substantial deference that federal courts must apply to state court rulings in the USA.⁸¹ It rejected the defence lawyer's claim that there was a national consensus against such executions (see *Waiting for the Evolution*, below). In June 2004, the US Supreme Court refused to take the case. The following month the South Carolina Supreme Court ordered a hearing into the question of whether James Wilson is competent to be executed. At the time of writing, that hearing was still pending.

James Wilson remains on death row. His schizophrenia has become more pronounced over the years. Due to the lack of stimulation and lack of treatment, he has become more withdrawn and isolated. He rarely leaves his cell and has difficulty carrying on even rudimentary conversation. He has gone through periods where he refuses to wash; prison guards have sometimes dressed him in nothing but plastic rubbish sacks because he defecates and urinates in his clothes; he has lost all but one of his teeth because he let them rot.

Regardless of whether James Wilson meets the (minimal) standard of competency to be executed under *Ford v. Wainwright*, Amnesty International believes that his execution would violate the international prohibition on the arbitrary deprivation of life. The *Atkins v. Virginia* ruling in 2002 found that the execution of people with mental retardation was unconstitutional on the grounds that their impairments, while "not warrant[ing] an exemption from criminal sanctions... diminish their personal culpability" and render execution an excessive punishment. While no claim has been made that James Wilson has mental retardation, it is an "unreviewable fact" that James Wilson is facing execution for a crime over which he "was unable to control his behaviour".⁸² In other words his personal culpability was diminished as a result of his mental illness.

Arbitrariness, whether in relation to the deprivation of liberty or of life, violates international law, including the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992.⁸³ The Human Rights Committee, the expert body established by the ICCPR to oversee its implementation, has stated, regarding the right to liberty, that "arbitrariness" is not to be equated simply with "against the law", but should be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.⁸⁴

The fact that James Wilson is facing execution, while a person with mental retardation will not, is neither appropriate, nor just, nor consistent. His execution would be arbitrary.⁸⁵

⁸¹ *Wilson v Ozmint*, 352 F.3d 847 (4th Cir. 2003).

⁸² *State v Wilson*, 413 S.E.2d 19, (S.C. 1992).

⁸³ Article 6: "No one shall be arbitrarily deprived of his life". Article 9: "No one shall be subjected to arbitrary arrest".

⁸⁴ UN Doc. CCPR/C/39/D/305/1988, 15 August 1990.

⁸⁵ As, arguably, would the execution of any person with serious mental illness unless there was a demonstrable reason why that person was more culpable or deterrable than a person with mental retardation. For a discussion of this issue under US constitutional law, see Christopher Slobogin, 'What *Atkins* could mean for people with mental illness', 33 *N.M. L. Rev.* 293, 2003.

Reality check 4 – Finality at the expense of fairness?

A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict.

US Supreme Court Justice, June 2005⁸⁶

At a hearing in Arizona on 9 June 1999, all three mental health experts who had examined, observed and interviewed death row inmate Michael Poland said that his mental illness – a delusional disorder that made him believe that he had superhuman powers that would keep death at bay – rendered him incompetent for execution. This included the psychiatrist chosen and appointed at the state’s request, who testified that the prisoner’s “full psychological awareness is that he’s not to be executed”. However, the state Attorney General argued that it was time for Michael Poland to “pay the price that he deserves for killing these two men twenty-one years ago”.⁸⁷ The state got its way, and Michael Poland was put to death a week later.

Punishments do not come more final or irreversible than the death penalty. An error discovered after execution cannot be rectified. An inequity revealed *post-mortem* cannot be redressed. If this were the only reason to abolish the death penalty, it would be reason enough. This is a punishment that denies the possibility of human error. Yet no system can eradicate error and the inevitability of inconsistency in sentencing outcomes. This is as true in cases involving defendants with mental illness as with any other. Perhaps more so, given that our knowledge of the ailments of the human mind remains an inexact science, and people with mental impairments are generally less able to assist in their defence than others.⁸⁸

From the executing state’s perspective, however, the death penalty brings with it an interest in achieving “finality”. Once the state obtains a death sentence, finality becomes the aim rather than the problem. State prosecutors urge judges to reject appeals. Legislators respond to what they perceive as unnecessarily long or “frivolous” appeals with laws aimed at speeding up the process of getting the condemned inmate to the execution chamber. Judges elected or appointed in part in the belief that they will not oppose the death penalty may also adopt a conservative position on motions and appeals brought on behalf of condemned prisoners challenging aspects of the capital process. In a federated system of government, it may be that “states’ rights” demand deference for state court rulings by the federal judiciary.

This has been the case in the USA. Since 1977, for example, the US Supreme Court has handed down rulings creating strict rules of procedural default (whereby an issue is lost for appeal if it was not raised in the lower courts); raising the hurdle over which condemned inmates must step to win evidentiary hearings; limiting the retroactivity of constitutional

⁸⁶ *Bell v. Thompson*, US Supreme Court, 27 June 2005, Justice Breyer dissenting.

⁸⁷ *Poland v. Don*, Petition for Special Action and Motion for a Stay of Execution, In the Supreme Court of Arizona, 13 June 1999.

⁸⁸ In the case of Michael Poland above, the state relied on lay witnesses who had had passing contact with the prisoner to defeat the unanimous expert opinion that he was legally insane. In effect, the state was able to argue that because Michael Poland appeared “normal” to lay people, he did not have the mental illness that the expert opinion unanimously concluded that did have.

decisions; facilitating state claims that a constitutional violation amounted to “harmless error”; and erecting barriers to the filing of successive petitions.⁸⁹ In 1995, Congress eliminated federal funding for post-conviction defender organizations which had provided lawyers for indigent death row inmates for their appeals and had a high success rate in uncovering violations. Then, in 1996, President Bill Clinton signed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) into law. “From now on”, he said at the signing, “criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences.”⁹⁰ The Act placed new, unprecedented restrictions on prisoners raising claims of constitutional violations. It imposed severe time limits on the raising of constitutional claims, restricted the federal courts’ ability to review state court decisions, placed limits on federal courts granting and conducting evidentiary hearings, and prohibited “successive” appeals except in very narrow circumstances.

The cases of Horace Kelly, Ronnie Conner and Gregory Thompson – each of whom has been diagnosed as suffering from serious mental illness, including schizophrenia – illustrate how the state’s pursuit of finality can run into conflict with fairness – and how execution threatens to cement injustice into such cases.

In the years since being sent to death row in California in 1986, prison doctors have described Horace Kelly as “psychotic”, “gravely disabled” and suffering from chronic schizophrenia. In 1995, a court-appointed psychiatrist found that Kelly was “suffering from a psychotic mental disorder of such severity that it precludes his capacity to appreciate his current legal position and make rational choices”. In September 1997, a three-judge panel of the US Court of Appeals for the Ninth Circuit ruled that Horace Kelly had lost the right to federal judicial review because he had missed the one-year deadline, imposed by the AEDPA, for filing federal appeals after a state death sentence becomes final. “The Act will not have been very effective at all”, the panel majority said, if it failed to stop delays in cases such as Kelly’s, which it described as a “saga” and an attempt at “semipiternal [everlasting] delay”. The decision overturned a District Court decision that the AEDPA did not apply to the case. One of the three Ninth Circuit judges, Judge Wallace Tashima, dissented against what he called a “Draconian result – precluding Kelly from ever filing a first federal petition”, pointing out that much of the delay had been caused by the District Court’s “attempts to grapple with Kelly’s mental problems”, including the question of the prisoner’s competence to proceed with appeals.⁹¹

The Ninth Circuit agreed to rehear the case in front of 11 judges who, at a hearing in July 1998, were urged by California’s Deputy Attorney General to dismiss the appeal on the

⁸⁹ For a list of rulings and further discussion, see, Stephen B. Bright, Is fairness relevant? The evisceration of federal habeas corpus review and limits on the ability of state courts to protect fundamental rights. John Randolph Tucker Lecture, College of Law, Washington and Lee University, 1997. Published in Volume 54, *Washington and Lee Law Review*, page 1 (Winter 1997). <http://www.schr.org/reports/docs/washlee.pdf>.

⁹⁰ *Last rights*. LA Weekly, 3-9 April 1998.

⁹¹ *Calderon v. Kelly*, US Court of Appeals for the Ninth Circuit, 18 September 1997.

grounds that “this case is about finality.”⁹² The state’s appeal was rejected by the full court, who decided that the AEDPA did not apply to the case. This time, Judge Tashima wrote the majority opinion, stating that “it would be inappropriate for us to prevent [federal judicial review] merely to accommodate the state’s desire for a quick execution”.⁹³ Given that a jury had earlier found Kelly competent for execution despite compelling evidence that he was insane (see below), if the original Ninth Circuit panel decision that the AEDPA governed had been allowed to stand, Horace Kelly would have been put to death. As it is, he remains on death row, hopefully providing an opportunity for an appropriate outcome to prevail.

In November 2002, the US Court of Appeals for the Fifth Circuit noted that the AEDPA did control the appeal filed on behalf of Ronnie Conner, a death row inmate in Mississippi. Conner had first been diagnosed with schizophrenia in the 1980s. He was sentenced to death in 1990 for the murder in January of that year of an elderly woman who was abducted and died after having her throat slit. At the capital trial, Ronnie Conner’s lawyer did “nothing whatsoever” to prepare for the sentencing phase of the trial, despite knowing of his client’s mental illness and despite this evidence being “readily available”.⁹⁴ After the jury voted to convict Ronnie Conner, the lawyer “frantically” tried to locate a doctor or other expert witness to testify at the sentencing stage which was due to begin the next day. He failed to find anyone, and instead put the defendant’s sister on the stand, much of whose testimony was excluded as hearsay. She said that her brother had been treated for mental illness for about a decade and that she thought that he sometimes did not take his medication. Conner himself gave contradictory testimony on whether or not he had taken his medication on the day of the crime. The Fifth Circuit conceded that the mental health evidence presented in mitigation was “skeletal” and “presented to the jury in an abbreviated form with no elaboration”.

Under the 1984 US Supreme Court decision *Strickland v. Washington*, to win an appeal on the grounds of inadequate legal representation at trial, a condemned inmate must show not only that the trial lawyer’s performance was deficient, but also that this deficiency had altered the outcome of the trial. The appeal courts are required to be “highly deferential” to a defence lawyer’s performance, “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”, and avoid “the distorting effects of hindsight”.⁹⁵ The AEDPA made a successful claim on this issue even harder to achieve. It prohibits a federal court from granting relief unless the state appeal court’s decision in the case “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”.

On appeal, a number of experts signed affidavits relating to the question of Ronnie Conner’s mental health. A doctor who had treated Conner in the two years before the crime,

⁹² Sacramento Bee, 24 July 1998.

⁹³ *Calderon v. Kelly*, US Court of Appeals for the Ninth Circuit, 8 December 1998.

⁹⁴ *Conner v. Epps*, US Court of Appeals for the Fifth Circuit, 18 November 1992. In a post-conviction affidavit, the lawyer admitted that he had not prepared for sentencing, explaining that he had been convinced (and remained convinced) of Conner’s innocence, and so concentrated on the guilt/innocence stage of the trial.

⁹⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

for example, said that he could have told the jury about Conner's schizophrenia, that its symptoms included auditory hallucinations, that Conner had once jumped from a moving train as a result of voices telling him to, that he did not always take his medication, and that he had impaired control over his conduct because of his mental illness. A social worker testified that she would have told the jury that Conner was in all likelihood off his medication at the time of the crime. A psychiatrist signed an affidavit that, in his opinion, Conner was mentally ill at the time of the crime and unable to control his conduct to the requirements of the law.

Nevertheless, applying the *Strickland* test, the Mississippi Supreme Court decided that although the trial lawyer's performance had been deficient, it had not altered the trial's outcome.⁹⁶ The US Court of Appeals for the Fifth Circuit agreed. The trial lawyer's performance had been deficient – he “had an obligation at least to investigate and perhaps present this potentially mitigating evidence because it could reasonably have been expected to augment [Conner's] case”, it said, but added that “deficiency is not enough”. The federal court noted that it was bound by the AEDPA, and ruled that the Mississippi Supreme Court's finding had not “unreasonably” applied the *Strickland* test, in fact had “faithfully” applied it despite acknowledging that “it might be tempting to argue that Conner was prejudiced by his attorney's lack of foresight.”⁹⁷

At the time of writing, Ronnie Conner remained on death row. In 2002, his lawyers informed Amnesty International that he would often refuse to come out of his cell, convinced of a conspiracy against him and that any conversation would be bugged. He frequently refused to take his medication because of his paranoia.⁹⁸ In 2003, a federal judge described the mental health care on Mississippi's death row as “grossly inadequate” (see below).

Gregory Thompson, who has been diagnosed as suffering from schizophrenia, has been on Tennessee's death row for two decades. In June 2005, the US Supreme Court was split on his case. Four Justices suggested that Thompson's execution would amount to “a serious miscarriage of justice”. The five others, citing the state's interest in “finality”, gave the State of Tennessee the green light to put Thompson to death for the murder of Brenda Lane 20 years earlier.⁹⁹

Arrested the day after the 1 January 1985 murder, Gregory Thompson had quickly confessed to the crime and helped police to find Brenda Lane's body. Prior to the trial, his lawyers asked for funds so that they could hire a psychiatrist to examine Thompson. Their request was granted by the trial court. However, they did not hire a psychiatrist, but rather an industrial psychologist. At Thompson's subsequent trial the defence submitted no evidence at the guilt/innocence stage and he was convicted of first degree murder. At the sentencing

⁹⁶ *Conner v. State*, 632 So.2d 1239 (Miss. 1993).

⁹⁷ *Conner v. Epps*, US Court of Appeals for the Fifth Circuit, 18 November 2002.

⁹⁸ In June 2005, Ronnie Conner's appeal lawyer told Amnesty International that she was hopeful that his death sentence might be overturned on the claim that Conner has mental retardation and that his execution would violate *Atkins v. Virginia*. The issue was pending in the courts at the time of writing.

⁹⁹ *Bell v. Thompson*, 27 June 2005.

phase, the defence psychologist testified that he did not think that Thompson had any serious mental illness, but that he was very remorseful. The prosecution presented a psychologist, who testified that Thompson was not mentally ill, and in fact had shown signs of faking mental illness. The jury sentenced Gregory Thompson to death.

For state post-conviction proceedings in 1991 and 1992, Gregory Thompson's appeal lawyers sought funding for further mental health evaluations. They submitted testimony from a psychologist who stated that a review of Thompson's prison records revealed that he had been variously diagnosed with bipolar disorder, schizoaffective disorder and paranoid schizophrenia, that he had displayed symptoms such as hallucinations, delusions, paranoia, suicide attempts, that he was considered not to be malingering, and that he had been prescribed anti-psychotic medication. She stated that a full evaluation was needed to establish if it was likely that such impairment had existed at the time of the crime. The request for funds was denied, as was the claim that Thompson had been denied adequate legal representation at his trial. The state courts affirmed the death sentence and the case moved into the federal courts.

In January 2003, a three-judge panel of the US Court of Appeals for the Sixth Circuit ruled by two votes to one against Thompson. Applying the AEDPA, Judge Suhrheinrich deferred to the state courts and said that under the limitations imposed by the AEDPA on inmates obtaining evidentiary hearings in federal court, the US District Court had not erred in dismissing his petition in 2000 without holding such a hearing. Judge Moore concurred in the result. Judge Clay dissented, saying that the performance of the trial lawyers had been "well below an objective standard of reasonableness" in failing to hire an experienced psychiatrist rather than an industrial psychologist with no experience in capital cases to assist on the mental health question. Even under the stringent requirements of the AEDPA, he said, the death sentence should not stand. Judge Clay concluded that it was likely that a thorough psychiatric evaluation would have revealed evidence of Thompson's mental illness and could have been used to portray a "far more sympathetic figure" to the jury, with the reasonably probable outcome that the jurors would not have voted for the death penalty. Judge Clay may well have been right. As will be shown later in this report, in many cases jurors left unaware of a defendant's mental impairment at the trial have later signed affidavits indicating that they would have voted for life if such evidence had been presented.

The Sixth Circuit's rejection of Gregory Thompson's appeal was not its final word on the matter, however. On 23 June 2004, after the US Supreme Court had said that it would not review the case and the state had set an execution date, the three judges on the Sixth Circuit issued a new opinion, reversing their January 2003 ruling. A medical report by a forensic psychologist retained by Thompson's federal appeal lawyers had come to Judge Suhrheinrich's attention – for some reason it had been missing from the documents filed in the original appeal. The psychologist, Dr Faye Sultan, had investigated Thompson's "horrendous childhood, his family history of mental illness his self-destructive schizophrenic behaviour (including auditory hallucinations) as a child, his mood swings and bizarre behaviour as a young adult, and a worsening of that behaviour after a serious beating to the

head that he suffered while in the Navy.”¹⁰⁰ She concluded that Thompson had already suffered from episodes of schizophrenia at the time of the crime. This, the Sixth Circuit said, “was extremely probative testimony” which demanded the evidentiary hearing denied by the District Court in 2000. It also issued a stay of execution.

The state appealed, and on 27 June 2005, the US Supreme Court, by five votes to four, reversed the Sixth Circuit’s ruling. It found that the Sixth Circuit panel had abused its discretion in the way it had revisited Thompson’s case. The majority wrote:

*“a dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals’ willingness to correct a decision that it perceived to have been mistaken. A court’s discretion... must be exercised, however, in a way that is consistent with the State’s interest in the finality of convictions that have survived direct review within the state court system. Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson’s crimes merit the ultimate punishment...[T]he Court of Appeals did not accord the appropriate level of respect to that judgment”.*¹⁰¹

Writing for the four Justices in the minority, Justice Breyer said:

“I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than ignore the problem... When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today’s decision takes an unfortunate step in the wrong direction”.

Gregory Thompson was scheduled to be executed on 7 February 2006, despite the fact that seven of the last 12 judges to review his case had concluded that he should have been granted relief. Indeed, Thompson’s prison file contains over 4,000 pages documenting his serious mental illness. On 5 January 2006, the execution was stayed by the US District Court for the Eastern District of Tennessee in order for it to consider whether Thompson is competent to be executed. In the name of fairness and decency, the state should use the opportunity afforded by this stay to abandon its bid for lethal finality.

¹⁰⁰ *Bell v. Thompson*, US Supreme Court, 27 June 2005, Justice Breyer, dissenting.

¹⁰¹ Given the assertion that this sentence reflects the judgment of the citizens of Tennessee, it is worth noting that Gregory Thompson, an African American, was sentenced to death by an all-white jury for the murder of a white woman. The only prospective African American juror had been peremptorily dismissed by the prosecution, purportedly because he was not pro-death penalty enough (see *Reality Check 4*, above). Not only was no one of the defendant’s race represented on the jury, none of the many citizens of Tennessee who opposed the death penalty were represented either.

Waiting for the evolution: state law as a measure of ‘decency’

We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.

US Supreme Court, *Atkins v. Virginia*, June 2002

In both the *Roper v. Simmons* and *Atkins v. Virginia* rulings, outlawing the execution of child offenders and people with mental retardation respectively, the US Supreme Court used as its principle measure of “evolving standards of decency” state-level legislation on the two issues. Writing the *Roper* decision, Justice Kennedy noted that the tallies were the same on both issues – 30 states prohibited the execution of each category of offender, including the 12 states which were abolitionist all together. Because of the nature of the juvenile and mental retardation issues – for which definitions are relatively straightforward – it was easy for the Supreme Court to tally which states had prohibited the death penalty in each category. It is not so easy to make a similar assessment on the question of mental illness. Amnesty International understands that only one of the death penalty states in the USA, Connecticut, currently prohibits the execution of a person on the grounds of mental illness at the time of the crime.¹⁰²

Although Amnesty International recognizes that the US Supreme Court uses this tallying method to assess whether a national consensus has emerged – indeed the organization argued that this method mandated the prohibition of the juvenile death penalty following the *Atkins* ruling¹⁰³ – the organization considers it a questionable method by which to decide an issue of basic human rights. History shows that countries which have turned their backs on the death penalty, or any particular aspect of it, have done so as the result of principled leadership rather than following some measure of popular opinion. “Democracy” should surely not be used to justify a measure which “is uniquely degrading to human dignity”.¹⁰⁴ The USA claims to be founded upon and committed to human dignity. Fundamental human rights are to be promoted and respected now, not put aside for some unspecified day in the future.

Certainly the Supreme Court’s technique of measuring a national consensus by state legislative activity is hugely slow – the *Roper* ruling, for example, came 30 years after entry into force of the International Covenant on Civil and Political Rights, one of the treaties banning the execution of child offenders. There was a wait of more than a decade between the United Nations adopting a resolution urging member states to eliminate the death penalty “for

¹⁰² “The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds... that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation... or (3) *the defendant’s mental capacity was significantly impaired or the defendant’s ability to conform the defendant’s conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution*” (emphasis added). Connecticut Penal Code. Chapter 952, Section 53a-46a (h)(3), available at <http://www.cga.ct.gov/2005/pub/Chap952.htm#Sec53a-46a.htm>.

¹⁰³ USA: *Indecent and internationally illegal – The death penalty against child offenders*, September 2002, <http://web.amnesty.org/library/Index/ENGAMR511432002>.

¹⁰⁴ *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan, concurring.

persons suffering from mental retardation”, and the *Atkins* decision in June 2002.¹⁰⁵ A country’s claims to be a progressive force for human rights are drained of meaning when it lags so far behind on this fundamental human rights issue. In an increasingly abolitionist world, the USA’s credibility when criticising other country’s human rights violations will be increasingly undermined by its resort to judicial killing. The credibility gap will be even greater when it is offenders with serious mental illness who are being killed by the state.

In the *Roper* and *Atkins* decisions, having found that state legislation pointed to a national consensus against executing child offenders and those with mental retardation, the US Supreme Court conducted its own independent analysis and found no reason to disagree with those states that had legislated to that effect. On the question of the mentally ill, Amnesty International would hope that the Supreme Court could reverse this procedure, so that “in the end [its] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment”.¹⁰⁶ It should apply its independent analysis to the question of the execution of people with serious mental illness, and recognize that such executions achieve nothing, just as the execution of minors and people with mental retardation cannot fulfil the would-be goals of the death penalty. In Supreme Court parlance, executions which fail “measurably” to contribute to the goals of retribution or deterrence are “nothing more than the purposeless and needless imposition of pain and suffering”.¹⁰⁷ The execution of the seriously mentally ill surely falls into this category.

Regardless of whether the Supreme Court finds that some measure of legislative activity reveals a “national consensus” against executing the mentally ill, it should surely not insult the population of the USA by suggesting that, when fully informed, their standards of decency have not evolved to the point of opposing such executions.¹⁰⁸ This time, the Court should take the lead and, at the earliest opportunity, give a clear signal to the individual states that the execution of people with serious mental illness will no longer be tolerated. The message should be clear: either state legislators prohibit the execution of offenders with serious mental illness or their prosecuting authorities will face reversal of death sentences against such offenders in the courts.

Amnesty International considers it unlikely that the US Supreme Court will in the near future accept the argument that a national consensus against the execution of people with

¹⁰⁵ UN Economic and Social Council (ECOSOC) Resolution 1989/64, adopted 24 May 1989.

¹⁰⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁰⁷ *Enmund v. Florida*, 458 U.S. 782 (1982) (finding the death penalty disproportionate for person who aids and abets in commission of a murder, but does not kill, attempt to kill or intend to kill the victim).

¹⁰⁸ In 1972, the California Supreme Court found that the death penalty violated the state constitution. Chief Justice Wright wrote: “Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it even-handedly applied to a substantial proportion of the persons potentially subject to execution”. *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

serious mental illness is already reflected in state laws. However, of relevance to such an argument might include the fact that:

- 12 US states are abolitionist, and a 13th, New York, has a *de facto* moratorium on the death penalty in place after its capital statute was found unconstitutional by the state's highest court and has not been reinstated. These states are not using the death penalty against anyone, let alone people with mental illness.¹⁰⁹
- 25 of the 37 death penalty states, as well as the federal government, have as statutory mitigating factors for consideration by capital juries at sentencing either (1) the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform that conduct to the requirements of the law was impaired; or (2) the defendant was acting under extreme mental or emotional disturbance.¹¹⁰
- In at least five states – Arizona, Florida, Mississippi, Ohio and Nevada – a number of inmates suffering from mental illness have been removed from death row under proportionality review.¹¹¹
- Of the death penalty states which allow defendants to plead “guilty but mentally ill” (GBMI), only four have passed death sentences in GBMI cases.¹¹² Only one such defendant is believed to remain on death row – James Wilson in South Carolina (see *Reality Check 3*, above).

The difficulty faced by those arguing that even a case as clearly unjust as James Wilson's is unconstitutional is shown by the response of the appeal courts. Ruling on Wilson's case in December 2003, the US Court of Appeals for the Fourth Circuit considered the question of the constitutionality of executing a person who had been found by the trial court to have “lack[ed] sufficient capacity to conform his conduct to the requirements of the law”. The Fourth Circuit deferred to the South Carolina Supreme Court's rejection of this claim. The state court had concluded that it was “unconvinced that Wilson has proven a national consensus exists against the imposition of the death penalty” upon defendants who had

¹⁰⁹ The states are: Alaska; Hawaii; Iowa; Maine; Massachusetts; Michigan; Minnesota; North Dakota; Rhode Island; Vermont; West Virginia; Wisconsin.

¹¹⁰ The states are: Alabama; Arizona; Arkansas; California; Colorado; Florida; Indiana; Kansas; Kentucky; Maryland; Mississippi; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New Mexico; North Carolina; Ohio; Pennsylvania; South Carolina; Tennessee; Utah; Virginia; Washington; Wyoming. Provided by Mark Warren, Human Rights Research, Canada. See also, Ellen Fels Berkman, ‘Mental illness as an aggravating circumstance in capital sentencing’, 89 Colum. L. Rev. 291, 296-98 (1989).

¹¹¹ Cases cited in *Wilson v. Maynard and Condon*, Memorandum of law in support of motion for partial summary judgment, In the United States District Court for the District of South Carolina, 15 July 2002. Proportionality review – in those states with this provision, before the appeal court affirms it, the death sentence is compared to other cases to see if it is proportionate. The Nevada Supreme Court has since ruled out actual proportionality review, although it does conduct a form of *ad hoc* review with similar impact.

¹¹² The states are: Delaware, Illinois, Indiana and South Carolina.

suffered from an “irresistible impulse” rather than those who lacked all reason and inability to distinguish right from wrong.

James Wilson’s appeal lawyers had presented the Fourth Circuit with evidence of a national consensus against executing individuals who lacked the capacity to conform their conduct to the law. They argued that in 17 states, 10 of which have the death penalty, the acceptance by the trial court of the equivalent level of volitional capacity as had been found by Wilson’s trial judge, would have protected the defendant from all criminal responsibility and any punishment.¹¹³ In addition, in two other death penalty states¹¹⁴, an equivalent defendant would not have been eligible for the death penalty. In other states the question remains unclear. In any event, South Carolina is the only state whose law defines a GBMI defendant as someone who was unable to control his or her conduct due to mental illness *and* which has also decided that such a defendant can be eligible for the death penalty.

However, the Fourth Circuit rejected this argument, holding that “the fact that nineteen states would not have allowed Wilson to receive the death penalty does not, standing alone, establish a national consensus against the execution of individuals like Wilson. At best it demonstrates that the number of states where the execution of such individuals was not possible roughly equalled the number of states in which the South Carolina Supreme Court found that such individuals could have been executed”.¹¹⁵

In any event, state legislation may lag behind what informed opinion on issues relating to the death penalty would consider acceptable. Capital punishment is a highly politicized punishment. While supporting the death penalty – all too often for its perceived appeal as a vote-winning “tough-on-crime” measure – politicians have generally failed to offer the electorate any measurable evidence that judicial killing, let alone of offenders with mental illness, offers a constructive solution to violent crime. A politician who supports the death penalty should surely at least ensure that his or her electorate is fully informed about the issue.

In March 2002, the White House spokesman was asked: “Does President Bush believe the death penalty is appropriate for anyone who’s convicted who’s mentally ill?” The spokesman responded that “the President believes that those are decisions for juries to make based on the laws of their states.”¹¹⁶ When he was Governor of Texas, George W. Bush had said the same thing about the execution of people with mental retardation. In 1999, opposing a bill that would have prohibited the execution of such offenders in his state, he responded that “that’s

¹¹³ The states are: Arkansas, Connecticut, Georgia, Hawaii, Kentucky, Maryland, Massachusetts, Michigan, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. As the lawyers argued, if any of the seven non-death penalty states were to reinstate the death penalty, defendants found to have been unable to conform their conduct to the law, would be ineligible for the death penalty in the same way as the 10 other states.

¹¹⁴ Montana and New York. The latter’s death penalty law has since been found unconstitutional and New York therefore currently has a *de facto* moratorium on the death penalty in place.

¹¹⁵ *Wilson v Ozmint*, 352 F.3d 847 (4th Cir. 2003).

¹¹⁶ Ari Fleischer, White House press briefing, 14 March 2002.

up to the juries to make those decisions. I like the way the law is now".¹¹⁷ He made this statement not long before the US Supreme Court in March 2001 decided to re-examine the constitutionality of such executions, eventually outlawing them, in *Atkins v. Virginia* in June 2002. Governor Bush's response suggests that the politics of the death penalty can render a politician's stated position on this punishment an unreliable indicator of contemporary standards of decency.¹¹⁸

Similarly, jury decisions to pass death sentences against mentally ill defendants should not necessarily be taken as a reliable indicator of wider societal values. As the American Psychiatric Association pointed out in the wake of the *Atkins* decision:

*"A systematic risk of disproportionate punishment also arises in cases involving defendants with severe mental illness. Even though defendants with mental illness are entitled to introduce mental health evidence in mitigation of sentence, commentators on capital sentencing have often observed that juries tend to devalue undisputed and strong evidence of diminished responsibility in the face of strong evidence in aggravation. Indeed, such evidence is often a double-edged sword, tending to show both impaired capacity as well as future dangerousness".*¹¹⁹

In any event, citizens who will not pass a death sentence for moral or other reasons cannot sit on a capital jury. Those who do sit as capital jurors, therefore, by definition hold views at the punitive end of the punishment/rehabilitation spectrum. For example, research has indicated that "death qualified" jurors are more likely to convict capital defendants who suffer from mental disorders.¹²⁰ Moreover, capital jurors may be denied the full picture of the defendant's impairment, or have their prejudices stoked by prosecutors.

If juror decisions were the measure, then a case such as that of Richard Taylor in Tennessee might suggest that standards of decency failed to evolve on this issue in the two decades from 1984. Richard Taylor, who suffers from mental illness including schizophrenia, was first sentenced to death in that year. His conviction for a 1981 murder was overturned because his mental health history had not been properly investigated by the defence. However, he was then found incompetent to stand trial, and only found competent again 19 years later

¹¹⁷ *Fort Worth Star-Telegram*, 14 April 1999.

¹¹⁸ The US Supreme Court announced that it would revisit the mental retardation issue in March 2001, eventually leading to the *Atkins* ruling. On the presidential campaign trail in 2000, Governor Bush denied that Texas executed prisoners with mental retardation, a few hours before just such an execution was carried out (when a reporter pointed out that several US states ban the execution of the mentally retarded, Governor Bush replied, "So do we, in Texas"). *Despite records, Bush denies mentally retarded executed*, *Houston Chronicle*, 10 August 2000. Oliver Cruz, a prisoner with mental retardation, was executed in Texas on 9 August 2000.

¹¹⁹ *Diminished responsibility in capital sentencing: Position statement*. The American Psychiatric Association, Approved by the Assembly, November 2004, and by the Board of Trustees, December 2004.

¹²⁰ Phoebe C. Ellsworth et al. The death-qualified jury and the defense of insanity. 8 *Law & Hum. Behav.* 81 (1984).

after being treated in state hospital, including by forcible medication. The conservative *Nashville City Paper* described the 2003 retrial as a “sad spectacle” and a “grave injustice”:

*“Taylor asked to act as his own attorney because he said he believes all capital defense attorneys are conspiring to have their clients executed. Judge Russ Heldman granted Taylor’s request because he said Taylor appeared polite, cordial and seemingly competent. We have a huge problem believing that, given Taylor’s demeanour in the courtroom. Taylor didn’t ask any questions of most witnesses. He gave no closing argument, called no witnesses of his own and waived his right to present mitigating evidence, such as his mental health history, during sentencing. For most of the trial he sat in a semi-catatonic state, arms dangling at his side. Several times, Heldman had to call to him to get his attention, a possible side effect of the anti-psychotic medication he is taking. Predictably he was found guilty again and sentenced to death.”*¹²¹

It had taken the jury less than three hours to convict Richard Taylor and sentence him to death.¹²² Informed jurors, on the other hand, may be sympathetic to mental health mitigation if it is properly presented in a way that seeks to explain, not excuse, the defendant’s actions. In a number of cases, jurors have later come forward to say that they would not have voted for death if they had known the extent of the defendant’s mental impairments (see *A double-edge sword*, below, for examples). Are not these belated but informed opinions – reached away from the heightened atmosphere of a capital trial and the prosecution’s relentless pursuit of a death sentence – an indicator of how “standards of decency” can evolve when people are better informed?

Among other informed people are those involved in advocacy for people suffering from mental illness. The US organization, NAMI, for example, takes the position that “the death penalty is never appropriate for a defendant suffering from schizophrenia or other serious brain disorders”.¹²³ It believes that “persons who have committed offenses due to states of mind or behaviour caused by a brain disorder require treatment, not punishment”.¹²⁴ The National Mental Health Association (NMHA) has concluded that “our current system of justice inadequately addresses the complexity of cases involving criminal defendants with mental illness. Therefore, NHMA calls upon states to suspend using the death penalty until more just, accurate and systematic ways of determining and considering a defendant’s mental status are developed”.¹²⁵ The American Psychiatric Association has adopted the language in the current three-prong proposal on exempting people with mental illness from the death penalty put forward by the Task Force of the American Bar Association Section of Individual

¹²¹ ‘Cases show big difference in self-representation.’ *Nashville City Paper*, 27 October 2003.

¹²² ‘In 3-hour span, Taylor convicted, condemned.’ *The Tennessean*, 17 October 2003. The Williamson County District Attorney was quoted as saying after the trial: “I think justice has been served”.

¹²³ ‘No death penalty for persons with severe mental illnesses.’ Statement by Laurie Flynn, Executive Director, National Alliance for the Mentally Ill, 12 January 1998.

¹²⁴ *The criminalization of people with mental illness*. NAMI position paper.

¹²⁵ *Death penalty and people with mental illness*. National Mental Health Association, Policy Position: P-44.

Rights and Responsibilities (see Appendix 2). The American Psychological Association is also expected to adopt the same language in early 2006.¹²⁶

Perhaps a Kentucky judge spoke for many people in the USA in 1999 when he granted a defence motion to exclude the death penalty as an option in the case of Kimberly Harris on the grounds of her mental illness. She had been charged with capital murder following the April 1997 shooting of Deborah Bell and Patty Eitel, two directors at the Louisville nursing home where Harris had worked as a nursing assistant until she was fired several weeks earlier. At first she had been found incompetent to stand trial due to her mental illness, but after treatment she was found competent and her trial was scheduled for April 1999.

Circuit Judge Stephen Ryan granted the motion to remove the death sentence as an option after having held an evidentiary hearing. He said: “Based upon the record in its entirety, including the uncontroverted evidence before this Court that Kimberly Harris suffers from a significant mental illness, the Court finds under the principles of fundamental fairness, due process and proportionality it would be unconscionable to impose a death sentence upon this particular defendant. Kimberly Harris is an emotionally disturbed, mentally ill, 23-year-old female who has no prior criminal history. Pursuant to its authority and discretion, the Court declines to engage in an exercise in futility by submitting the option of the death penalty to the jury in this case.”¹²⁷

Judge Ryan then allowed Kimberley Harris to enter a plea of “guilty but mentally ill” to two counts of intentional murder and scheduled her sentencing for 15 April 1999. At that stage the maximum sentence she could have faced was life imprisonment without the possibility of parole for 25 years. Although Judge Ryan’s ruling was subsequently overturned, that was the sentence she received after a jury rejected the prosecution’s bid for a death sentence.¹²⁸

‘Mindless vengeance’: Would-be goals of death penalty fail

Mental illness reduces his personal culpability for his acts, rather than increases it. If his violence was the result of illness, then punishing him for his violence is the same as punishing him for his illness

¹²⁶ The American Psychological Association earlier adopted the language of an earlier Task Force proposal, and is expected to incorporate the refinements to prongs one and three (it already has adopted the current language of prong two). Ronald J. Tabak, ‘Overview of Task Force proposal on mental disability and the death penalty’, 54 *Catholic U. L. Rev.* 1123 (2004-2005).

¹²⁷ *Commonwealth v. Ryan and Harris*. 5 S.W.3d 113 (Ky. 1999).

¹²⁸ The state appealed to the Kentucky Supreme Court and the sentencing was postponed. On 26 August 1999, referring to Judge Ryan’s “lofty list of reasons” for excluding the death penalty, it ruled that he had not had the authority to bar the punishment when he did. Kimberly Harris was convicted after a jury trial in February 2001. The jury rejected her insanity defence, but also rejected the death penalty and sentenced her to life without parole for 25 years. There have been cases in Kentucky in which guilty but mentally ill pleas have been negotiated in return for a promise that the prosecution would not seek death, but there is no Kentucky law prohibiting the death penalty in such cases.

Psychiatrist, report on schizophrenic man on Virginia's death row, 1997¹²⁹

In 2001, the *Washington Post* wrote an editorial on the case of Russell Weston, a seriously mentally ill man accused of shooting dead two police officers in the US Capitol building three years earlier, and against whom the US federal government had not ruled out seeking a death sentence if ever he could be found competent to stand trial:

*“It’s hard to imagine that trying, convicting and sentencing Mr Weston – to confinement, to death or to anything else – would deter other paranoid schizophrenics from acting on their murderous delusions. Nor is it clear what great retributive interest is served by punishing someone who believes that he is saving the world from cannibals, that time reverses itself and that the people he killed are not permanently dead.”*¹³⁰

The following year, the US Supreme Court ruled in *Atkins v. Virginia* that the death penalty should no longer be used against offenders with mental retardation. It concluded that the penological goals of retribution or deterrence are not furthered by such use of the death penalty. On deterrence, the six Justices in the majority wrote:

“The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.”

The theory that the death penalty has any special deterrence effect has largely been discredited.¹³¹ Indeed, “in a civilized society where people are valued for their intrinsic worth, as ends rather than means, to deliberately kill an individual so that he may serve as an example to others seems untenable. Using capital punishment as a deterrent seems patently unfair because it punishes the inmate for the potential crimes of others, not just for what he

¹²⁹ Affidavit, Dr Mark Mills, March 1997. The case concerned Calvin Swann.

¹³⁰ ‘An insane system.’ Editorial. *Washington Post*, 30 July 2001.

¹³¹ In January 2000, then US Attorney General Janet Reno said: “I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point”. Weekly media briefing, US Justice Department, 20 January 2000. Two years later, a US Supreme Court Justice said much the same thing, writing: “I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime... Studies of deterrence are, at most, inconclusive.” *Ring v. Arizona*, 536 U.S. 584 (2002), Justice Breyer, concurring in the judgment.

has done.”¹³² Nevertheless, some politicians continue to ascribe their support for judicial killing to a belief in the deterrent theory (without providing any credible supporting evidence).¹³³ Amnesty International urges them to ask themselves how executing the 100 people listed in the appendix to this report furthered the goal of deterrence. Certainly no one believes that the death penalty can deter people from becoming psychotic. The 1976 *Gregg v. Georgia* Supreme Court decision that allowed executions to resume in the USA noted that, whatever the evidence surrounding the deterrence argument, “[w]e may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect.” Any deterrent effect, the Court suggested, would only apply to “carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act”.

How, under this theory, would it further the goal of deterrence to execute, for example, George Banks? Pennsylvania Governor Ed Rendell said that the warrant he signed in October 2004 for 62-year-old Banks to be executed was “very, very appropriate”, adding that when he had campaigned for election he had “told people I was for the death penalty in the most severe cases – and I believe this fits into the ‘most severe case’ category”.¹³⁴ George Banks’ crime was indeed unusually extreme – he was sentenced to death for a shooting that left 13 people dead, including five of his own children. That he suffers from mental illness, however, is also undisputed. The shootings occurred within days of his having been assessed as suicidal, depressed and displaying paranoid thinking. At his trial, both prosecution and defense experts agreed that he suffered from a “serious mental defect”, including “paranoia psychosis”. Affirming his death sentence in 1987, the Pennsylvania Supreme Court noted that:

“we wish to make clear that we are aware that [Banks] suffers and has suffered from a mental defect that contributed to his bizarre behavior both in the courtroom and on September 25, 1982, when thirteen innocent persons were murdered by his hand. His behavior was inexplicable, and his thought-processes remain difficult to comprehend.”

Since being on death row, George Banks has made numerous suicide attempts and threats of suicide. He has been diagnosed with suffering from various mental illnesses, including paranoid schizophrenia, depression, and schizoaffective disorder. His delusional thoughts and behaviour included engaging in a hunger strike in an attempt to force the authorities to exhume his murder victims to prove his conspiracy theory that one or more of them had been killed by the police. In 2004, a psychiatrist concluded that George Banks was incompetent to be executed under *Ford v. Wainwright* and incompetent to assist his lawyers. He wrote:

¹³² Melinda S. Campbell. *Sell, Singleton, and forcible medication – running roughshod over liberty*. University of Toledo Law Review, Vol. 35, Spring 2004, page 718.

¹³³ Among the US politicians who say they base their support of the death penalty on deterrence is President George W. Bush. In January 2005, in his written responses to Senators at the time of his nomination to the post of Attorney General, the then White House Counsel Alberto Gonzales repeatedly noted that: “The President believes the death penalty deters crime and saves lives”.

¹³⁴ *Execution date nears for killer of 13*. Associated Press, 23 November 2004.

*“As a result of Mr Banks’ psychotic thought disorder, clinically significant depression and disordered personality, his contact with reality, and ability to determine what reality is, are seriously impaired. For example, for several years Mr Banks has expressed the belief that his convictions and sentences were vacated by God, and that he should have been released from prison as a result. He believes that he is being held illegally as the result of a conspiracy.”*¹³⁵

George Banks’ 2 December 2004 execution date was stayed on the question of his competency. At the time of writing, a hearing in state court on the question of competency was still pending, with the State of Pennsylvania continuing to seek his execution. It is surely clear that not only was he not deterred from his crime by the threat of the death penalty, but no-one suffering from similarly delusional thinking would be so deterred either.

On the question of the retributive goal of the death penalty, the *Atkins* majority said: “With respect to retribution – the interest in seeing that the offender gets his just deserts – the severity of the appropriate punishment necessarily depends on the culpability of the offender”. The death penalty assumes absolute, 100 per cent culpability, on the part of the condemned. If there is any diminished culpability, then the retributive goal fails, as the punishment becomes disproportionate. In *Roper v. Simmons* in March 2005, the Court found the same in the case of children under 18 years old at the time of the crime: “Once the diminished culpability of juveniles is recognized, it is evidence that the penological justifications for the death penalty apply to them with lesser force than to adults”.¹³⁶ So, too, with the seriously mentally ill. As Scott Panetti’s sister, Vicki Panetti, said to Amnesty International three weeks before this seriously mentally ill man was scheduled to be executed on 5 February 2004:

“My brother did an awful thing, but he was a mentally ill man... now the state is doing all it can to make sure it gets him to the execution chamber. How does this help anyone? I believe that Scott could not help what he did. He was sick. But the State of Texas will be committing a coldly calculated murder if it kills Scott. How can this be justice? Surely my country can do better than this?”

Scott Panetti was not executed as scheduled. However, at the time of writing he was still on death row and facing the possibility of a new execution date (see *Reality Check 1*).

Protecting the dignity of society

A psychologist testified at David Long’s Texas trial that Long was probably insane at the time of the crime and recommended a full neurological examination because of the “high probability” that brain damage played a role in the offence. The psychologist said that without

¹³⁵ George E. Banks, mental health history and competency. Richard G. Dudley, 16 November 2004.

¹³⁶ In *Roper*, the Supreme Court also found that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence”. Such characteristics, the Court noted, include impulsiveness and vulnerability to outside pressures, and “render suspect any conclusion that a juvenile falls among the worst offenders”. So, too, surely, in the case of people with serious mental illness.

such an examination, a complete diagnosis was impossible. The court refused to release the funds to the defence lawyers so that they could have such an evaluation carried out. The prosecution psychiatrist testified, *without having examined David Long*, that the defendant was “sociopathic” but sane. The jury sentenced him to death. Post-conviction neurological testing confirmed that David Long did indeed have brain damage.

David Long attempted suicide by drug overdose two days before he was due to be executed in Texas on 8 December 1999. He was still in intensive care in hospital in Galveston, about 200 kilometres from the Texas death chamber, as his scheduled execution approached. As in other cases, David Long’s suicide bid was not interpreted as a mental health issue, but rather a prisoner’s effort to cheat the executioner.¹³⁷ In denying a stay of execution, state Judge Ed King ruled: “The desire to cheat the hangman or thumb your nose at the state does not mean you’re incompetent to be executed.” The state authorities saw no reason to delay either, and in contrast to the lack of resources provided for his defence at the time of the trial, the state spared no expense in having him killed. He was flown by aeroplane to Huntsville, accompanied by a full medical team to ensure his safe arrival. As he was given the lethal injection, David Long “snorted and began gurgling. A blackish-brown liquid spouted from his nose and mouth and dribbled to the floor”.¹³⁸ This was the charcoal solution that had been used to detoxify his body, only hours before it would be injected with lethal chemicals. The niece of one of David Long’s murder victims, who had come to attend the execution, became distressed at the spectacle and left the witness room.

According to the US Supreme Court, “the basic concept underlying the Eighth Amendment [ban on cruel and unusual punishments] is nothing less than the dignity of man”.¹³⁹ The US government claims to be committed to the principles of human dignity. In September 2003, President George W. Bush told the UN General Assembly that the USA and the United Nations shared a common commitment, namely “that human beings should never be reduced to the objects of state power or commerce, because their dignity is inherent”. In his inaugural address as President on 20 January 2001, a little over a year after he refused, as Governor of Texas, to intervene to stop the execution of David Long, he pledged “to affirm the dignity of our lives and every life”. He has repeated his country’s commitment to the “non-negotiable demands of human dignity” many times since.

In *Ford v. Wainwright*, outlawing the execution of people who are incompetent to be executed, the US Supreme Court majority noted that one of the aims of such a ban was “to protect the dignity of society itself from the barbarity of exacting mindless vengeance”.¹⁴⁰ The death penalty, in Amnesty International’s opinion, is *per se* incompatible with human dignity – both of the condemned and of society itself. Sometimes there are signs that it is indeed

¹³⁷ Other examples include that of Robert Brecheen who attempted suicide a few hours before his execution in Oklahoma in August 1995. He was rushed to hospital to have his stomach pumped, then taken to the execution chamber and killed. In Texas in April 1997, David Lee Herman slashed his wrists before his execution. He was treated and then put to death.

¹³⁸ ‘Man who tried suicide executed.’ *Dallas Morning News*, 9 December 1999.

¹³⁹ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁴⁰ *Ford v. Wainwright*, *op. cit.*

vengeance rather than retribution fuelling pro-execution sentiment, even in the case of condemned inmates with serious mental illness. There are numerous examples of elected state officials – prosecutors, governors, legislators, even judges – making comments that suggest it is anger, hatred and politics, rather than justice and fairness, that drive the system.

In 1992, dissenting from the Louisiana Supreme Court's prohibition of the state forcibly medicating Michael Perry in order to make him competent for execution, Justice Cole wrote:

“What seems arbitrary to me is the fact the survivors of the victims of Perry's crimes, as well as society at large, should be deprived of a just resolution of the matter through the fortuity of Perry's having become insane after conviction and sentence but before the sentence should be carried out... One thing that will not be arbitrary but will be fairly predictable, however, is the number of present and future death row inmates who become 'insane' upon reading the majority's opinion...

American citizens grow increasingly appalled by, and alienated from, a legal system that affords criminals greater rights than law abiding taxpayers. Contemporary society is awash with callous, cold-blooded killers who themselves are provided room, board, clothing, and medical care at taxpayers' expense for an average of 8-15 years from the time of the crime to the time (if ever) of execution. Restoring a convicted murderer to sanity and subsequently carrying out the sentence is in no way unacceptable to contemporary society...The fact that he fortuitously, perhaps conveniently, became insane prior to his execution does not detract from the legitimacy of his sentence.”¹⁴¹

In 1996, the Oklahoma Attorney General displayed a similarly disturbing attitude to the execution of the mentally ill. His comments concerned the case of Glen Ake and Steven Hatch. Glen Ake shot dead two people after he and Hatch had robbed their home. Steven Hatch had already left the house when the seriously mentally ill Glen Ake shot the couple. The two men were sentenced to death in separate trials. Diagnosed with chronic paranoid schizophrenia, Glen Ake had initially been found incompetent to stand trial. After treatment in a mental hospital, he was ruled competent on the condition that he be treated with anti-psychotic medication during the proceedings. In a landmark ruling, his conviction and death sentence were overturned by the US Supreme Court because, despite the fact that his sanity at the time of the crime was a significant factor at the trial, the indigent defendant was denied access to expert psychiatric assistance.¹⁴² At his retrial, Glen Ake was sentenced to life imprisonment. Steven Hatch's death sentence survived, however. At his clemency hearing in July 1996, his appeal lawyer asked if Hatch's execution would serve justice “or vengeance because we can't reach the one who pulled the trigger?” State Attorney General Drew Edmondson, who is still in office, countered that the injustice was not that Hatch would be executed, but that Ake would not be.¹⁴³ Steven Hatch was put to death in August 1996. A state

¹⁴¹ *State v. Perry*, 610 So.2d 746 (Louis. 1992), Justice Cole dissenting.

¹⁴² *Ake v. Oklahoma*, 470 U.S. 68 (1985)

¹⁴³ 'Hatch denied clemency.' *Tulsa World*, 25 July 1996. Drew Edmondson was elected Attorney General of Oklahoma in 1994, re-elected in 1998, and elected for a third term in 2002.

Senator, who was the son of the murder victims, witnessed the execution. He had written the law that allowed him to do so. In 1997 he authored an amendment to the law which allowed additional murder victims' relatives, including in-laws and grandchildren, to witness executions.¹⁴⁴

When the murder victim's family is against the execution, the state will tend to ignore it as much as it will ignore the suffering of the condemned prisoner's family and as much as it will stand shoulder to shoulder with bereaved relatives who favour a retributive killing.¹⁴⁵ Shortly before the execution of Pedro Medina in Florida in 1997, a state Supreme Court Justice noted that that "the surviving daughters of the victim in this case have testified that they do not believe that Medina killed their mother and they are against him being executed." He noted that "it is undisputed at this point that the State possessed evidence that implicated [another man] in the murder and failed to disclose this evidence to the defendant".¹⁴⁶

Pedro Medina maintained his innocence to the end. His final words before being executed in the electric chair were "I am still innocent". His execution caused international outrage. During the execution in the state's electric chair, the mask covering Medina's face burst into flames and smoke filled the death chamber. The response of various state politicians was highly disturbing. The Attorney General Bob Butterworth said: "People who wish to commit murder, they better not do it in Florida because we may have a problem with our electric chair".¹⁴⁷ Governor Lawton Chiles said: "Putting somebody to death is not the most friendly thing that you do, [but] that is the law of Florida"¹⁴⁸ The chairman of the Senate Criminal Justice Committee, Al Gutman, said: "The death penalty is not a pleasant thing. It's not meant

¹⁴⁴ An execution, of course, cannot guarantee emotional "closure" for the bereaved, and can promote vengeful sentiments. After Dion Smallwood was executed in Oklahoma in 2001, the victim's daughter said: "I am sad at the way he went, because it was very easy" ('Oklahoma City killer is put to death after apology.' *Tulsa World*, 19 January 2001). After Roger Berget was executed in Oklahoma in 2000, a relative of the murder victim complained that the execution was "easy – way too easy" for Berget. Earlier the victim's family members had said that their hoped for "closure" could not be total because Berget's co-defendant had received a life sentence ('Teacher's murderer executed.' *The Shawnee News-Star*, 9 June 2000). Does this mean that the families of the 99 per cent of victims whose murders result in a sentence of less than death are being denied "closure" by the state? Both Roger Berget and Dion Smallwood had been diagnosed with bipolar disorder.

¹⁴⁵ A study published in 1999 found that families of the condemned can suffer serious stigmatization, social isolation, depression and "chronic grief". However, the study noted that while murder victims' relatives are allowed to testify at the trial about the impact of the crime on their lives, and may also receive state-funded psychotherapy, costs for attending trials, and other assistance, the relatives of the condemned receive no such support. 'What about our families? Using the impact on death row defendants' family members as a mitigating factor in death penalty sentencing hearings' by Rachel King and Katherine Norgard. *Florida State University Law Review*, Vol 26:1119, 1999. See also, Rachel King, *Capital consequences: Families of the condemned tell their stories* (2005).

¹⁴⁶ *Medina v. State*, 690 So.2d 1241 (1997), Justice Anstead, concurring in part, dissenting in part.

¹⁴⁷ 'Condemned man's mask bursts into flame during execution.' *New York Times*, 26 March 1997.

¹⁴⁸ 'Fire during execution renews debate on death.' *Palm Beach Post*, 26 March 1997.

to be. It's supposed to work as a deterrent."¹⁴⁹ Senate Majority Leader Locke Burke rejecting suggestions that the state should switch to lethal injection, said that "A painless death is not punishment. It's important that there is a deterrent and a punishment element."¹⁵⁰

The indecency of the execution and the official reaction to it was compounded by the fact that Pedro Medina had a long history of mental illness, including a diagnosis of paranoid schizophrenic or major depressive disorder with psychotic features. At the age of 19 he had been taken from a mental hospital in his native Cuba and put on a boat to the USA as part of the Mariel boatlift in 1980. The crime for which he was sentenced to death occurred in Florida in 1982. His appeal lawyers challenged his imminent execution based on expert evidence that he was insane. They presented "extensive evidence of his long mental illness which included the detailed reports and affidavits of three professional mental health experts who had examined the defendant at length. These experts concluded that the defendant was incompetent to be executed insofar as his mental ability to comprehend what was happening to him."¹⁵¹

Two years and a half years after Pedro Medina's execution, at a Florida House of Representatives Criminal Justice and Corrections Council hearing, Representative Howard Futch suggested that because death row inmate Thomas Provenzano thought he was Jesus Christ – which even the courts agreed was the reason he believed he was to be killed – the state should "just crucify him". The legislator continued: "I'd make him a cross, and we could take it out there to Starke [death row] and nail him up." The *St Petersburg Times* described Representative Futch's comments as "vicious, ill-judged and revealing. In his dim-witted way, Futch has laid bare the truth of the death penalty in Florida: It's not about justice. It's not about deterring crime. It's about vengeance."¹⁵² Thomas Provenzano was executed in Florida on 21 June 2000.¹⁵³ Shortly before he was killed, his sister wrote:

"I have to wonder, where is the justice in killing a sick human being? I know that the death of a loved one is an incredibly awful experience – particularly when the cause of death is murder. But the horror of losing a loved one to execution is all but ignored by this society. Why? Must this society pick and choose who to feel sympathy for? Does this indifference to inmates' families somehow make executions more tolerable? Despite what one may feel about the concept of the death penalty, it must be remembered that it is a deliberate, but avoidable act of homicide that always leaves a grieving family in its wake. It never brings a victim back to life. And, even

¹⁴⁹ *Ibid.*

¹⁵⁰ 'Electric chair defended.' *Gainesville Sun*, 29 March 1997.

¹⁵¹ *Medina v. State*, 690 So.2d 1241 (1997), Justice Anstead, concurring in part, dissenting in part.

¹⁵² 'A barbarous attitude.' Editorial, *St Petersburg Times*, 13 October 1999.

¹⁵³ By then, Florida had hastily switched to lethal injection after the US Supreme Court had announced in October 1999 that it would examine the constitutionality of executions in Florida's electric chair. Fearful that the subsequent ruling could lead to the reversal of Florida's death sentences, the legislature held a special session in January 2000 in which it adopted lethal injection. The US Supreme Court dropped its case and on 23 February 2000, Florida carried out its first execution by lethal injection.

death penalty proponents now concede the fact that it does not deter others from committing violent crimes.

I tried to get help for Thomas when he first started having these problems, but we were denied the help he needed. We could not afford private hospitalization. The only way I could get help for him without his permission was if he did something violent. Eventually he did do something violent, but instead of being offered help, he was sentenced to death.

We need intervention programs so that people like myself can find help for a loved one who is mentally ill – before they harm either themselves or an innocent person. If my brother had been properly treated years ago, he wouldn't be on death row now. More importantly, the three people he harmed would still be whole.

Try to remember me at 6pm...this Tuesday. That is when the State will deliberately take the life of my mentally ill brother, despite the fact that other alternatives exist. That is when I will join the ranks of Florida citizens who have lost a loved one to unnecessary violence.”¹⁵⁴

In denial: Burying society's mistakes

If Larry had got the treatment that we begged for for years, five people would be alive today and Larry wouldn't be on death row.
Lois Robison, mother of Larry Robison, 1999

The death penalty represents a refusal by society to accept even minimal responsibility in the crime which resulted in a punishment that assumes 100 per cent culpability on the part of the defendant. In some cases involving mentally impaired defendants, there are indications that individuals within wider society failed to heed warnings that could have averted a tragedy. This is not to suggest that crimes committed by mentally impaired people are to be condoned or excused. It is, however, to ask whether society could devote its energies and resources more constructively.

Should society have taken any responsibility in Cyril Wayne Ellis's crime, for example, rather than responding with the death penalty? He had a history of mental illness and in the weeks leading up to his crime, Cyril Ellis had been displaying mental problems, including auditory hallucinations. A test taken at the time indicated possible paranoid schizophrenia. After an apparent suicide attempt, Ellis was treated in a psychiatric hospital. He left the hospital voluntarily after two days, in a disturbed state. On the same day, 30 January 1986, he attempted to buy a gun from a local shop. He did not have enough money to purchase the weapon, so one of the shop assistants agreed to loan him his own gun. Ellis then purchased ammunition from the shop and left. That transaction had appalling consequences. The following day, Cyril Ellis killed two people and injured several others during a shooting spree in Oklahoma City. He was sentenced to death and remained on death row for the next 15

¹⁵⁴ 'Dinner Time on Tuesday.' Pre-publication copy of letter written to media, by Catherine Forbes, 20 June 2000.

years. During that time, the state devoted legal resources arguing in the appeal courts that it should be allowed to kill Cyril Ellis. It almost succeeded. It was not until 10 December 2002 that the US Court of Appeals for the Tenth Circuit overturned Ellis's death sentence on the grounds that the trial court had improperly excluded critical evidence of his insanity at the time of the crime.¹⁵⁵

Scott Panetti is on death row in Texas for shooting his parents-in-law in 1992, several years after he was first diagnosed with schizophrenia and two months after the last of his many hospitalizations in psychiatric facilities. In a 1999 affidavit, Sonja Alvarado, the victims' daughter and Scott Panetti's estranged wife, recalled a number of incidents prior to the crime in which she alleged that the police had failed to act on the family's concerns about the threat that Scott Panetti posed. She recalled that after one incident only weeks before the killing of her parents, "My mother and I begged the police to take the rifles. Scott had his deer rifle, the 30.06 rifle he used to kill my parents, and the other shotgun at my parents house. Even though the police were told to take the guns, they did not. Scott had made threats against my parents."

Police, prosecutors and the courts should conduct themselves in a way that protects the rights, not only of the victims of crime but also of particularly vulnerable populations, including persons with mental disorders. One important goal of the criminal justice system should be to ensure that no one with a mental disorder is inappropriately held in police custody or in a prison. At present, this goal is not often achieved. Far too many people with mental disorders are prosecuted and imprisoned, often for relatively minor offences. There is increasing worldwide concern about people with mental disorders being incarcerated in prisons, rather than being cared for in mental health facilities... The large numbers of persons with mental disorders incarcerated in prisons is a by-product of, among other things, unavailability or reduced availability of public mental health facilities, implementation of laws criminalizing nuisance behaviour, the widespread misconception that all people with mental disorders are dangerous, and an intolerance in society of difficult or disturbing behaviour... Unfortunately, prisons have become de facto mental hospitals in a number of countries... Mental health legislation can help to prevent and reverse this trend by diverting people with mental disorders from the criminal justice system to the mental health care system.

World Health Organization, 2005 (WHO Resource Book on Mental Health, Human Rights and Legislation,

Forty-two-year-old Larry Keith Robison was executed in Texas on 21 January 2000, 17 years after he killed five people in Fort Worth. He always maintained that the appalling events of 10 August 1982 were the result of auditory and visual hallucinations brought on by his mental illness. He was first diagnosed as suffering from paranoid schizophrenia three years before the murders, but the Texas mental health care services repeatedly said that they did not

¹⁵⁵ *Ellis v. Mullin*, 312 F.3d 1201 (10th Cir. 2002).

have the resources to treat him unless he turned violent. The state had no such hesitation in devoting resources to its own lethal response to the crime.¹⁵⁶

Larry Robison's story is not unique, and one does not have to look far to find a similar case. Forty-three-year-old James Colburn was executed in Texas on 26 March 2003. He had an extensive history of paranoid schizophrenia, an illness with which he was first diagnosed when he was 17 years old. In November 2002, his sister Tina Morris recalled to Amnesty International:

“As a child, James was very good, but when he reached puberty that's when we started seeing differences in him. He became very isolated, not into the family at all, real withdrawn, he was scared of everybody, he was in constant fear... He would say this little man would eat out of his stomach... The little demon would tell him what to do. He said that one time it told him to kill my grandmother, which was like his mother, and he said he had to leave the house for about a week to fight the voices. He was 16.

When my parents' insurance wouldn't cover him after [he was] 18, he didn't have insurance coverage. But James himself tried to check himself in to Tri County [hospital] in Conroe. James begged for help. He had been in Galveston mental hospital, he had been at one here in Houston. He had been in a lot of different facilities, but when he turned 18 and the insurance was cut off, ..., we begged for help, begged for help... My grandparents and my parents drained their finances pretty much trying to help him. He tried himself, he went to the Tri County, he himself wanted help, and they, you know, just pushed him out on the street, give him his SSI [social security] check, and just push him out there, and he was scared in society. He likes being in confined places, because he feels like he can fight those voices off if he is by himself.

My brother --, I'm going tell you honestly -- everybody pushed him away because when you would meet him, it would look like he was looking straight through you, and he was scared, and he never smiled. He was just constantly scared. I remember taking him numerous times to places trying to get him jobs as a dishwasher and everything else and everybody was just scared of him. And he never hurt anybody up until this day, up until when he did this to Peggy Murphy, he never hurt anyone. In his previous convictions, you see, my brother never hurt anyone, he was never violent. But I think he committed this crime because he knew he'd be locked away, he thought for the rest of his life.

My mother called me at home, and I was living in an apartment at the time, and she said 'Tina you need to get the Conroe Courier and look at the front page'. And I went and got it and I seen what happened...this is what it had come

¹⁵⁶ For further information on the case, including testimony from Lois Robison, see USA: Time for humanitarian intervention: The imminent execution of Larry Robison (AMR 51/107/99, July 1999), <http://web.amnesty.org/library/Index/ENGAMR511071999>.

to. He's committed such a desperate crime because he's so... he just needs help, he's so desperate. Nobody helped him. Nobody helped him. Nobody."

After the execution, Tina Morris said: "The state has killed a very mentally ill man. I feel sorry for the victim's family but I also feel sorry for my family right now, too." James Colburn's brother added: "Society is very uneducated when it comes to mental illness".

As James Colburn's execution approached in November 2002, the *Houston Chronicle* asked "what justice is there, really, in carrying out a capital punishment sentence for a person who suffers from voices and hallucinations caused by a disabling major mental illness? Adequate mental health services may have spared Colburn years of suffering and might have spared his victim's life. It is no secret that Texas has inadequate resources for helping the mentally ill lead normal lives. Looked at another way, it would be better for all and a service to justice if such serious mental health issues were addressed before there is any need to deal with them within the criminal justice system and on death row."¹⁵⁷

In July 2004, the *Houston Chronicle* wrote that the problem has not yet been fixed, noting that there were nearly 7,000 people with mental illness in Texas waiting for treatment. The paper continued:

*"The vast majority of mentally ill people are not violent; taken seriously, either with supervision or institutionalization, those who do pose a threat to others can also be managed... The [waiting] list exists because funds simply aren't there to treat them all. Meanwhile, it costs about \$2.3 million to try one capital murder case and endless appeals can drive the cost higher. No matter how many executions jurors order up, Texas always manages to find the cash. These priorities are wrong and dangerous. For the sake of public safety, legislators must value prevention as much as punishment for violent crime. Attending to the mentally ill is a sane way to start."*¹⁵⁸

Subjective opinion & inexact science in an adversarial system

It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy

US Supreme Court, 1880¹⁵⁹

In a landmark ruling in 1995, the highest court in South Africa found the death penalty to be unconstitutional. Writing his concurrence with the opinion, the Chief Justice of the Court noted that:

¹⁵⁷ 'Genuine justice calls for sparing severely mentally ill.' *Houston Chronicle*, 6 November 2002.

¹⁵⁸ 'Prison sentence may be the first official attention for mentally ill.' *Houston Chronicle*, 23 July 2004.

¹⁵⁹ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

“The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defence... and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts, and is almost certainly present to some degree in all court systems. Such factors can be mitigated, but not totally avoided, by allowing convicted persons to appeal to a higher court... Imperfection inherent in criminal trials means that error cannot be excluded; it also means that persons similarly placed may not necessarily receive similar punishment. This needs to be acknowledged. What also needs to be acknowledged is that the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials...[T]he question is, whether this is acceptable when the difference is between life and death.”¹⁶⁰

The following examples serve as a reminder that, in addition to the subjective lay opinion that will come into play in the jury room, subjective prosecutorial and judicial opinion, as well as divergent expert opinion, can often feature in cases involving defendants who raise claims of mental illness, either in arguing diminished criminal responsibility, in mitigation against a death sentence, or as a reason not to carry out an execution. One reason to abolish the death penalty is the inherent impossibility of even the most sophisticated justice system ensuring the fair, consistent and error-free selection of those who “deserve” to die.

There is much we do not know about mental health – it is not an exact science, and inevitably experts and lay witnesses alike will make errors or bring their own biases into the courtroom. Indeed, the fear and ignorance surrounding the question of mental illness may make the adversarial system of criminal justice particularly unsuited to adjudicating such cases, not least where decisions of life and death are concerned. The US capital justice system has been shown to be prone to prosecutorial misconduct, inadequate legal representation for indigent defendants, as well as juror prejudice.¹⁶¹ In such a system, how much more vulnerable is a category of offender, the mentally ill, about whom there is a general level of ignorance and fear?

- At the June 2005 death penalty trial of Isaac Jones in Chattanooga, Tennessee, for the shooting of a police officer, three experts for the defence testified that they had diagnosed the defendant with schizophrenia. The prosecutor told the

¹⁶⁰ *The State v. T Makwanyane and M Mchunu*, Constitutional Court of the Republic of South Africa, 6 June 2005, Chaskalson P delivering judgment of the court (finding the death penalty unconstitutional).

¹⁶¹ A major study released in June 2000, concluded that death sentences in the USA are “persistently and systematically fraught with error”. The most common errors, the study found, were “1) egregiously incompetent defense lawyers who didn’t even look for – and demonstrably missed – important evidence that the defendant was innocent or did not deserve to die; and 2) police or prosecutors who did discover that kind of evidence but suppressed it, again keeping it from the jury.” *A Broken System: Error Rates in Capital Cases, 1973-1995*, James S. Liebman, Jeffrey Fagan and Valerie West, Columbia Law School, New York.

jury, “Let’s get one thing perfectly straight. Schizophrenics don’t kill. Killers kill”.¹⁶²

- In Texas, Ramon Mata vacillated between appealing his death sentence and dropping his appeals and asking to be executed as soon as possible. Mata had a long history of mental illness, was receiving medication in prison for such illness and had made several suicide attempts on death row. A court-appointed psychologist and psychiatrist both concluded that Mata was not competent to drop his appeals. The psychiatrist had determined that Mata was suffering from a paranoid delusional disorder and that his suicide attempts and his delusions of seeing and talking with his murder victim were genuine. The defence urged a federal judge to declare Mata incompetent to waive his appeals or to hold a hearing to determine the issue. The federal judge described the defence motion as based on “trendy and trashy psycho-analytical analysis” and dismissed the motion without ruling on competency. In 1999, after further vacillation by the prisoner, the judge ruled Mata competent, without having held any hearings, or ordered any further examination. The court based its decision on the fact that Mata had been found competent to stand trial 13 years earlier.¹⁶³
- In the case of Arthur Baird, the Indiana Supreme Court wrote in 1997 that: “We do not exclude the possibility that a scientific breakthrough [relating to our understanding of mental illness] may generate post-trial evidence that justifies revisiting the findings of an earlier jury or an earlier sentence”.¹⁶⁴ In 2004, in the same case, the US Court of Appeals for the Seventh Circuit wrote:

“No doubt had Baird been sane he would not have killed his wife and parents, if only because he would not have believed that the government was going to pay him a million dollars for his ideas about how to solve the nation’s problems; the delusion seems somehow to have precipitated these rationally motiveless crimes. But he knew he was committing murders and knew it was wrong to do so, and no one can assign a precise weight to the delusion, or the obsessive-compulsive disorder to which the delusion was in some way related, in the mental process that led to the killing of his parents. Clearly, his volition, his self-control, was impaired by a mental disease – but how much, in relation to other unknown factors at work in his mind during the period in which the murders occurred, we shall never know. Judgment in a case such as this is

¹⁶² ‘Jurors hear arguments on mental state of shooter.’ *The Tennessean*, 16 June 2005. The jury rejected the prosecutor’s pursuit of a capital murder conviction and returned a verdict of second-degree murder, thus removing the death penalty as a sentencing option.

¹⁶³ The US Court of Appeals for the Fifth Circuit expressed sympathy for the federal judge’s “frustration of the length of the appeals process”, but said that “the answer is not to eviscerate... constitutional protections”. It sent the case back down to another federal district judge for further proceedings. *Mata v. Johnson*, 210 F.3d. 324 (5th Cir. 2000). Ramon Mata died a few months after this opinion.

¹⁶⁴ *Baird v. State*, 688 N.E.2d. 911 (Ind. 1997).

committed to the discretion of the state courts. It is for them, not us, to determine in each individual case what weight to give mental disease that does not obliterate consciousness of wrongdoing in deciding whether to impose the death penalty for murder."¹⁶⁵

- In May 1998, at a competency hearing, a California jury decided by nine votes to three that death row inmate Horace Kelly was sane enough to be executed, in other words that he knew the reality for, and reality of, his punishment, despite compelling evidence to the contrary. One of the jurors who voted for execution reportedly said that the prohibition on executing the insane was "a bunch of baloney", adding that "anyone locked up in a tiny cell for 13 years with no windows and no contact with the outside world is going to go crazy", but that was no reason that they should not be executed. Another of the pro-execution jurors described the evidence of Kelly's severe mental illness as "too textbook".¹⁶⁶ Another said: "I think he's definitely ill, but I don't think he was insane". Another of the nine said: "Our purpose was to determine is this man sane or not. After three weeks of testimony, it wasn't a hard decision to make. He knew that he is going to die." Another said: "[E]ven with schizophrenia, there are levels of awareness. He knows what's happening. I think he knows why." In contrast, the foreman of the jury pointed to the fact that six of the seven psychiatrists who testified had concluded that Kelly was incompetent: "The evidence clearly showed that he was insane".¹⁶⁷ Although the 9-3 ruling cleared the way for execution, Horace Kelly remains on death row in California.
- Jerry McWee was executed in South Carolina on 16 April 2004 for a murder of a shop assistant during a robbery in 1991. At the sentencing phase of the trial, the defence presented a psychiatrist who testified that the defendant was mentally ill, suffering from "severe depression", "psychosis" and "command hallucinations" from a dead cousin. For the prosecution, another psychiatrist testified that, in his opinion, Jerry McWee was faking his mental illness.¹⁶⁸ During closing arguments, the prosecutor referred to the defendant as "like a dog turned wrong and gone rabid".¹⁶⁹

When the mental health of the defendant or inmate is an issue in the trial or on appeal, it will frequently be the case that the defence and the prosecution will each find one or more mental health experts to testify. Too often it can become, in essence, a "swearing match" between the two sets of experts, with the jury ending up none the wiser. Worse, in some cases, prosecutors will have inflamed the situation by playing on juror prejudice and fear.

¹⁶⁵ *Baird v. Davis*, No. 388 F3d 1110 (7th Cir. 2004). Arthur Baird's sentence of death was commuted by Governor Mitch Daniels on 29 August 2005 (see page 12 for details).

¹⁶⁶ 'Killing joke.' *LA Weekly*, 20 May 1998.

¹⁶⁷ 'Killer found sane enough for execution.' *San Francisco Chronicle*, 15 May 1998.

¹⁶⁸ *McWee v. Weldon*, 283 F.3d 179 (4th Cir. 2002).

¹⁶⁹ *Augusta Chronicle*, 14 July 1999.

At Andrew Brannan's trial in Georgia in January 2000, the defence raised an insanity defence, presenting experts to testify that Brannan, a Vietnam War veteran, had been under the influence of combat-related post-traumatic stress disorder when he shot a police officer. In closing arguments the prosecutor urged the jury not to let the defence experts – what he called “these hired guns” – “muddy up the water”, like an octopus squirting out ink to confuse attackers: “And while they're in that murky ink, that old octopus slithers, just slithers away”. “What's an expert?” the prosecutor asked the jury, urging them to reject the insanity defence. Responding to his own question, he characterized an expert as “somebody thirty miles from home with a briefcase”, whom the jurors should ignore in preference to their own “common sense”. Stoking juror fears, he suggested that an insanity verdict would mean release, rather than involuntary commitment to a psychiatric facility. The jury was persuaded and it sent Andrew Brannan to death row, where he remains (see *Killing State*, below).

In *Atkins v. Virginia*, US Supreme Court Justice Antonin Scalia dissented from the majority's ruling prohibiting the execution of people with mental retardation (as he did in the subsequent *Roper v. Simmons* ruling against the execution of child offenders). He argued that the *Atkins* decision threatened to turn “the process of capital trial into a game”, and suggested that it would lead to many individuals faking mental retardation to escape the death penalty. He said that “whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all.”

Justice Scalia's opinion would undoubtedly find favour among some in the prosecutorial community. In 2002, for example, a former District Attorney in Georgia wrote that “the problem with many death penalty cases is that defense lawyers are raising issues related not to insanity but to the much broader area of mental illness... I would be mentally ill if I thought they were going to put me to death”. He suggested that jurors can “sift it out and come to a proper conclusion. But then years later, we have a hue and cry, ‘This person should not be executed because they are mentally ill or retarded’.”¹⁷⁰ In similar vein, in 1999 the head of the criminal appeals division of the Arizona Attorney General's Office, frustrated by the refusal of members of the medical profession to breach ethical codes by restoring mentally ill death row inmate Claude Maturana to competency for execution, said: “It's the excuse of the month. All of a sudden, everyone on death row is incompetent to be executed”. The mother of the murder victim agreed that the prisoner should be executed, despite having been found to be insane: “It's time to set a precedent. The whole thing is nothing but a scam. [The prisoner] understands what he did and why he did it. The victim should have rights, too.”¹⁷¹ Her suffering is understandable. The state's response, however, is unacceptable. It should find ways other than executing mentally ill inmates to help the families of murder victims.

The suggestion that the defendant or inmate is faking or exaggerating their mental illness is a position that has frequently been adopted by the state. This occurred in the case of James

¹⁷⁰ ‘Insanity defense being misused in effort to avoid death penalty’, by Joe Briley, former District Attorney of the Ocmulgee Judicial Circuit. *Atlanta Journal-Constitution*, 25 February 2002.

¹⁷¹ *Dallas Morning News*, 9 August 1999.

Willie Brown in Georgia, and raises serious questions about the fairness of the system that took him to the execution chamber.

James Brown had a long history of mental illness, including repeated diagnoses of schizophrenia. He joined the army at the age of 17, but was discharged after less than two years because of his mental illness.¹⁷² Without proper treatment, he began to take illegal drugs and was first arrested in 1968 when he was 20. He was found incompetent to stand trial, and committed to a psychiatric facility. He was arrested in 1975 for the murder of Brenda Watson. Again, he was found incompetent to stand trial due to his mental illness and committed for treatment. His trial was delayed for six years on the grounds of mental incompetence. This meant that between the time of his first arrest and his 1981 murder trial, he was in mental facilities for 70 per cent of the time, both on an involuntary and voluntary basis. His 1981 trial resulted in a death sentence, but in 1988 a federal court overturned his death sentence due to doubts that he had been competent to stand trial seven years earlier. He was retried in 1990, and again sentenced to death.

At the retrial, the defence presented two experts who testified that James Brown suffered from chronic paranoid schizophrenia. In a subsequent affidavit, given in 1994, one of these experts stated: "Considering the type of illness, his extensive medical history and my examination of Mr Brown, it was my opinion to a reasonable degree of medical certainty that Mr Brown was psychotic at the time of the alleged offense and that he acted upon delusions and therefore, could not distinguish between right and wrong at the time. Based upon my recent review of the additional materials, I stand by my original diagnosis and this opinion." In addition, two inmates who were in the county jail at the time of James Brown's arrest gave post-conviction affidavits that describe how he was out of touch with reality and psychotic.

The state's position at the 1990 retrial, however, was that James Brown was faking his mental illness. It presented a doctor who stated that, in his opinion, the defendant did not have schizophrenia, but had suffered drug-induced flashbacks. This doctor appears to have ignored James Brown's long history and repeated diagnoses of mental illness – over the years more than 25 mental health experts employed by the state had found James Brown to be mentally ill and not malingering. In closing arguments, the prosecutor stated to the jury: "That brings us to the question that [the defence lawyer] wanted you to consider, should we put the mentally

¹⁷² At the time he joined the army, James Willie Brown was emerging from a childhood of deprivation and abuse – like many on death row. According to a 1994 affidavit given by a clinical psychologist, James Brown was born in 1948 to a 15-year-old mother and an alcoholic father. Theirs was one of the poorest families in a low-income neighbourhood. The children were subjected to routine physical abuse, principally by the father. According to the psychologist: "Instruments of abuse included belts, boards, branches, cords, and fists, and the children were also kicked. In addition to beatings of the children, the father also often brutally beat the mother with his fists in front of the children. When [James Brown] attempted to aid his mother while she was being beaten, he only earned himself yet another beating from his father... According to [Brown], his brothers and his mother, the father's beatings were extremely severe, leaving welts, drawing blood, and even, in [his] case, causing unconsciousness. The father not only beat [him] at home but also did so in public, in front of friends and family, and [James Brown] reports that the father appeared to take great pride and pleasure in humiliating him like this."

ill to death. Well, I don't know the answer to that question... And you don't have to decide that question in this case. Because, ladies and gentlemen, this man isn't mentally ill, he has never been mentally ill, and he is not mentally ill today. He was not mentally ill on the [day of the crime].”

To bolster the state's theory that the defendant was malingering, the prosecution presented a former inmate, Anita Tucker, who said that James Brown had confided in her that he was faking his illness. Anita Tucker later recanted that testimony, and testified in post-conviction proceedings that her earlier testimony was part of a deal with the prosecution in exchange for her early release on her own criminal charges. James Willie Brown was executed in Georgia on 4 November 2003.

The state's claim that a person is faking their mental illness may also come in the post-conviction stage as the state pursues the execution of the death sentence it obtained at trial. This happened in the case of Monty Delk who was put to death in Texas on 28 February 2002 for the murder of Gene Olan Allen in 1986 when Delk was 19 years old. Monty Delk's mental health problems first emerged in 1989. In 1990, the prison medical authorities diagnosed him with bipolar disorder with psychotic features, and also raised the possibility that he was suffering from schizo-affective disorder. He was given anti-psychotic drugs and lithium. Monty Delk displayed a pattern of disturbed behaviour over his years on death row, including covering himself in faeces, and incoherent jabbering. He repeatedly expressed delusional beliefs, such as that he was a submarine captain, a CIA or FBI agent, or a member of the military. At a court hearing in 1993, at which an earlier execution date was set, he responded to the judge in prolonged streams of unbroken gibberish. At another hearing in 1997 to determine his competency to continue with his appeals, Monty Delk was gagged and then removed from the courtroom after repeatedly interrupting the court with nonsensical utterances. He was later brought back in, but removed again when he continued to utter nonsense, such as saying to the judge “I is you”; “Will you please blow my head off”; and “I'm an FBI agent”. At the hearing, a former chief mental health officer with the Texas prison system said that his review of the prison records and his own contact with Monty Delk suggested that the prisoner was suffering from a severe mental illness.

Three years earlier, the prison diagnosis of Monty Delk had been changed to one of malingering - that he was feigning mental illness to avoid execution. This followed an alleged statement to this effect made by Delk to another inmate and overheard by a prison staff member. In 1999 when the state's death row was transferred from Huntsville to Livingston, medical staff at the new unit diagnosed Delk with bipolar disorder. However, after they were made aware of the 1994 re-diagnosis, the official position once again became that his mental illness was pretence. If Monty Delk was indeed acting, he fooled many mental health professionals. He also maintained the “act” for years and right up to the point of his death. The Texas Department of Criminal Justice recorded Monty Delk's final statement as:

“I've got one thing to say, get your Warden off this gurney and shut up. I am from the island of Barbados. I am the Warden of this unit. People are seeing you do this”.

Some prosecutors have revealed that they consider mental health defences to be an excuse, a position which may be shared by a certain percentage of the population and, therefore, jurors. In 1999, Sean Sellers became the first and only person to be executed in the USA in the “modern” era of the death penalty for a crime committed at the age of 16. In his post-conviction proceedings, evidence emerged that he suffered from serious mental illness. A few months after the trial, a renowned expert, Dr Dorothy Lewis, found that Sellers was chronically psychotic and exhibiting symptoms of paranoid schizophrenia and other major mood disorders. In 1992, six years after the trial, three mental health professionals diagnosed Sean Sellers as having multiple personality disorder (MPD – now known as dissociative identity disorder), an illness in which “alter” personalities manifest themselves in the sufferer. In 1998, the US Court of Appeals for the 10th Circuit admitted that, if believed by a jury, the evidence that Sellers was suffering from this mental illness at the time of the crime, “renders the person known as Sean Sellers actually innocent”. It noted that the psychiatric evidence was “clear, strong and supportive”. Nevertheless, restricted by the rules applicable to appeals of state sentences in federal court, the 10th Circuit upheld the sentence.¹⁷³

As Sean Sellers’ execution approached, the prosecutor who put him on death row, Oklahoma County District Attorney Bob Macy, was asked in an interview if it would “make any difference to your view if it turned out he did have Multiple Personality Disorder?” The prosecutor replied: “No, I regard it as an excuse, it would not change my mind. One of the personalities did the killing and needs to be held accountable”.¹⁷⁴

Two years later, in a dissent against the impending execution of an inmate with schizophrenia in Ohio, a more enlightened view was heard. Justice Paul Pfeifer of the Ohio Supreme Court wrote: “Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness... Executing [Jay Scott] will be another assertion that taking the life of a person with mental illness is no different than taking the life of a person without mental illness... I believe Ohioans are better than that... I believe that executing a convict with severe mental illness is a cruel and unusual punishment”.¹⁷⁵

An execution cannot provide an answer to an apparently inexplicable crime or the role that the offender’s mental impairment may have played in it. Instead it is a response that seeks to blot out the symptom rather than understand the disease.

¹⁷³ *Sellers v. Ward*, 135 F.3d 1333 (10th Cir. 1998).

¹⁷⁴ Interview by Edward Stourton. *Dead Kid Walking*, BBC TV, broadcast ABC, 16 August 1999. Bob Macy and other Oklahoma County prosecutors have repeatedly been criticized by appeal courts for prosecutorial misconduct. See *USA: Old habits die hard – The death penalty in Oklahoma*, AMR 51/055/2001, April 2001, <http://web.amnesty.org/library/Index/ENGAMR510552001>. For more on Sean Sellers’ case, see *USA: Killing hope: The imminent execution of Sean Sellers*, AMR 51/108/98, December 1998, <http://web.amnesty.org/library/Index/ENGAMR511081998>.

¹⁷⁵ *State v. Scott*, 92 Ohio St.3d 1(2001), Justice Pfeifer, dissenting.

The mentally ill: Also at 'special risk of wrongful execution'?

The US Supreme Court majority in *Atkins v. Virginia* noted that a part of the reason for prohibiting the execution of offenders with mental retardation was that “in the aggregate [they] face a special risk of wrongful execution”. By this, the Court meant not only that the particular vulnerabilities of such individuals placed them at particular risk of wrongful conviction, but also of being sentenced to death when a non-impaired individual might receive a life prison term. The *Atkins* ruling stated:

“The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes... [M]oreover, reliance on mental retardation as a mitigating factor can be a two edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”¹⁷⁶

As in the case of individuals with mental retardation, most people suffering from mental illness will never commit a violent crime. Nevertheless, a mentally ill defendant who has committed a capital offence may be at heightened and unfair risk of receiving a death sentence compared to defendants with no or lesser impairments, or in some cases being wrongfully convicted:

- Even if found competent to stand trial, the defendant’s capacity to assist their lawyer or understand the proceedings may still be impaired;
- As a part of their illness, a defendant suffering from a mental condition such as severe depression or a paranoid disorder may refuse to allow mitigation to be presented or may even plead guilty and demand the death sentence.
- Due to the stigma attached to mental illness, not least if it is linked to a family history of such illness or to childhood abuse, a defendant may seek to downplay his or her ailment or simply not be a good reporter of it to defence counsel.
- If the defendant’s mental illness is still showing symptoms at the time of the trial, he or she may act irrationally or appear to do so to jurors, heightening fears of future dangerousness, a highly aggravating factor in the minds of capital jurors.
- A mentally ill defendant, especially if taking medication at the time of the trial, may display a flat affect and be perceived as remorseless, again a highly aggravating factor in the mind of capital jurors.

¹⁷⁶ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

- A mentally ill defendant may be particularly difficult to represent for an under-resourced or inexperienced defence lawyer;
- A mentally ill defendant may be particularly vulnerable to unscrupulous prosecutors or police;
- Jurors ignorant of or frightened by mental illness or suspicious of the state's capacity to appropriately treat the mentally ill may be swayed towards a death sentence, fearing the defendant's propensity for future violence.
- If their crime was committed as a result of mental illness, it may appear motiveless. Thus, the offence may display a senseless brutality, further heightening the jury's fears about future dangerousness.

Arbitrariness thus threatens to be a result of the fact that people with mental retardation have been exempted from execution while those with serious mental illness at the time of the crime have not.

In addition, the choices made by mentally ill capital defendants and inmates can inject a further arbitrariness into the death penalty process. Due to mental illness, a defendant may plead guilty, demand the death penalty and/or refuse to appeal their death sentence beyond the mandatory direct appeal. Even if found competent to do so, this potentially adds to the arbitrariness of the death penalty. Such inmates could win on appeal, as happened in Pennsylvania in the case of Joey Miller. He gave up his appeals and came 48 hours from execution before he changed his mind and allowed an appeal to federal court to be filed. Six months after the *Atkins v. Virginia* ruling, Joey Miller's death sentence was commuted to life imprisonment because of his mental retardation.

The rate of error in US capital cases has been found to be very high.¹⁷⁷ Dissenting against their colleagues' refusal to stop the execution of an Arkansas inmate who had waived his appeals, two US Supreme Court Justices warned in 1990 that such statistics "make clear that in the absence of some form of appellate review, an unacceptably high percentage of criminal defendants would be wrongfully executed – 'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State".¹⁷⁸ The case of Joey Miller, who would have been killed if he had not allowed his appeal to be filed, illustrates this point.

In 1977, Justice White of the US Supreme Court argued that "the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment". Two years after that, Justice Marshall protested that "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death".¹⁷⁹ Mental illness has

¹⁷⁷ E.g., *A Broken System: Error Rates in Capital Cases, 1973-1995*, op.cit.

¹⁷⁸ *Whitmore v. Arkansas*, 495 U.S. 149 (1990), Justice Marshall, joined by Justice Brennan, dissenting.

¹⁷⁹ *Lehnard v. Wolff*, 444 U.S. 807 (1979), Justice Marshall, dissenting from the denial of a stay of execution.

often appeared to be trigger in this acquiescence, and thus the cause of potential arbitrariness and error left irreversible by the finality of execution (see *Death Wish 2*, below).

James Elledge was executed in Washington State on 28 August 2001 for the murder of a woman in 1998. He had turned himself in after the crime, after allegedly twice attempting suicide. At the trial, he pleaded guilty. He refused to allow any mitigating evidence to be presented, telling the jury that “the wicked part of me needs to die”. The jury was therefore left unaware of evidence that there was a history of mental illness in his family, and that he himself suffered from mental illness. On death row, Elledge refused to appeal against his death sentence. On 6 August 2001, the state Clemency and Pardons Board voted 3-2 against clemency. One of the dissenting members said that the case was “very troubling”, in that the outcome of the trial might have been different “depending on whether [the jury] got the full story or not”.

A double-edged sword: aggravator *and* mitigator?

In Texas, the state responsible for more than a third of all US executions, jurors can only hand down a death sentence if they decide that the defendant will likely commit future acts of violence if allowed to live, even in prison. This is the so-called “future dangerousness” question. In a Texas case in 1989, *Penry v. Lynaugh*, the US Supreme Court recognized that evidence of a defendant’s mental retardation could act as a “two-edged sword”, by being both a mitigating factor against, and an aggravating factor for, a death sentence. The offender’s mental retardation, the Court wrote, “may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future”.¹⁸⁰

At that time, the sentencing instructions provided to Texas juries gave them no explicit way to give mitigating effect to such evidence.¹⁸¹ Indeed a year before the *Penry* ruling, two US Supreme Court Justices had dissented against the Court’s refusal to take the case of Robert Streetman, a Texas death row inmate who had sustained a serious head injury as a child and thereafter suffered from a series of mental problems including persistent delusions and hallucinations. In the dissent, Justices Brennan and Marshall wrote: “the record discloses that Streetman has had a history of mental illness, stemming from an injury incurred while he was in the fifth grade, a circumstance that in every other jurisdiction would be considered mitigating. Yet the jury that sentenced him to die could draw but one inference from this evidence: Streetman posed a substantial threat of future dangerousness... [E]vidence that could evoke feelings of sympathy or convince a jury that the defendant is not culpable enough to deserve death is perversely transformed into a factor militating solely in favor of death....”¹⁸² Robert Streetman was executed in 1988.

However, the Supreme Court’s analogy of a “two-edged sword” was not limited to one particular state – Texas – at one particular time – pre-1989. A defendant’s future

¹⁸⁰ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

¹⁸¹ See *USA: Beyond reason: The imminent execution of John Paul Penry*, AMR 51/195/1999, 1 December 1999, <http://web.amnesty.org/library/index/ENGAMR511951999>.

¹⁸² *Streetman v. Lynaugh*, 484 U.S. 992 (1988).

dangerousness has been shown to be a highly aggravating factor in the minds of capital jurors in the USA. A jury which has just convicted a mentally ill defendant of a violent capital crime may have a particular fear of his or her capacity for future violence, or distrust the state's ability or willingness to ensure appropriate mental health care and public security. In Texas, a finding of "future dangerousness" remains a prerequisite for a death sentence. Even though capital jurors in Texas now have a specific instruction that allows them to give mitigating weight to any aspect of the crime or defendant they think calls for lenience, fear, prejudice or ignorance may still leave mental illness on balance as an aggravating factor in their minds. Indeed, studies have found that capital jurors can view a defendant's serious mental illness as an aggravating factor.¹⁸³

One study, for example, describes a case in which a California jury returned a death sentence despite being persuaded by expert psychiatric witnesses that the defendant had a severe mental illness. However, the jurors were also concerned about the defendant's future dangerousness. One juror questioned for this study said: "What we decided was that regardless of his illness, if he was a danger to society, then the only solution would be the capital punishment". Another juror, asked to characterize the strongest factors for and against handing down the death penalty in the case, responded in a way that captured the potentially double-edged nature of mental illness in the minds of capital jurors: "For: His incurability. Against: His illness".¹⁸⁴ Yet the Supreme Court has suggested that mental illness is among those factors "that actually should militate in favor of a lesser penalty".¹⁸⁵ For such illness to act as an aggravating factor would be unconstitutional.

Arguing for a death sentence, the prosecutor at the 1995 Texas trial of seriously mentally ill defendant James Colburn (see above p.56) suggested that the jury might prevent mass murder if they voted for execution: "To save the life of an innocent person is a huge thing when it is compared with the taking of a person that voluntarily chose to kill. How many lives will it save? I submit to you, even if there's a chance it will save one, he should be executed. But who knows, it may save one, it may save a dozen, it may save a hundred." Despite such exhortations, the jury evidently wished to consider a life sentence for this mentally ill man. During its deliberations, the jury foreman wrote a note to the trial judge asking if the

¹⁸³ For example, Lawrence T White, 'The mental illness defense in the capital murder hearing,' *Behavioral Sciences and the Law* 1987; 5: 411-21 (Suggests that the available research indicates that a mental illness defense at a capital penalty phase will be ineffective because 1) death qualified jurors do not respond favorably to psychological explanations of criminal behavior, and 2) such a defense may mislead jurors into believing the defendant has a high probability of future dangerousness. Factors associated with successful mental illness defenses are outlined). Joshua N. Sondheimer, *A continuing source of aggravation: The improper consideration of factors in death penalty sentencing*, 41 *Hastings L.J.* 409, 420 (1990); Garvey, Stephen P. 'The emotional economy of capital sentencing', 75 *New York University Law Review* 26 (2000).

¹⁸⁴ Scott E. Sundby, 'The jury as critic: An empirical look at how capital juries perceive expert and lay testimony', 83 *Va. L. Rev.* 1109, 1165-66 (1997)

¹⁸⁵ *Zant v. Stephens*, 462 U.S. 862 (1983).

defendant would be eligible for parole if he received a life sentence. The judge replied that the jurors were not to concern themselves with the issue of parole.¹⁸⁶

In 1999, the foreman from the Colburn jury signed an affidavit. In it, he stated that, in his opinion, “the lack of information regarding when Mr Colburn could be released was a significant factor in some jurors’ decisions at the punishment phase”. This would appear to be confirmed by the affidavit of another member of the jury who said that her “central concern was with protecting society, and the only way I thought I could do that was to make sure that Mr Colburn did not receive parole... [Th]e Judge’s reply only increased our frustration. We still had no idea if Mr Colburn would be released in ten, fifteen, twenty or forty years... Consequently, jurors continued to discuss the possibility that Mr Colburn would be released early”. This juror said that the “primary reason” that she had voted for a death sentence was because of her “fear that Mr Colburn would be released early. Mr Colburn was 34 years old at trial. Had I realized that he would not finish serving his prison time until he was over 70 years of age, I sincerely believe that I would have voted to give him a life sentence”.

The aggravator/mitigator dilemma faced by lawyers representing mentally ill defendants has been noted within the judiciary. For example, in rejecting claims that the trial lawyers of Florida death row inmate Pedro Medina (see above) had been ineffective for failing to investigate and present evidence of his mental illness to the jury, the trial judge wrote in post-conviction proceedings:

“the testimony of the two psychologists and one psychiatrist...showed in essence that defendant was psychotic; he had organic brain damage; he was diagnosed to be suffering from paranoid schizophrenia or major depressive disorder, recurrent, with psychosis, of long standing, and he was potentially dangerous. Only the psychiatrist testified that Medina could be rehabilitated and then only if stabilized by proper medication and therapy. All of this testimony was derogatory and would have had, if anything, an adverse effect on the jury... [I]t would have more likely strengthened the jury’s resolve to recommend a sentence of death.”¹⁸⁷

The Florida Supreme Court upheld the lower court’s finding that the defence lawyers had not performed inadequately. As one of its Justices wrote in 1997, the Court made such a finding “not on the basis that the illness was not serious, but rather by approving the trial court’s determination that the evidence of mental illness may have harmed Medina’s case”.¹⁸⁸ Pedro Medina was executed in March 1997.

In some states, such as Oklahoma and Virginia – which, along with Texas, account for half of the USA’s executions since 1977 – “future dangerousness” is one of a number of possible aggravating factors that can make a murder eligible for the death penalty. Robert

¹⁸⁶ At that time in Texas, the maximum prison sentence before parole could be considered was 40 years. On 16 June 2005, Governor Rick Perry signed into law a bill adding life imprisonment without the possibility of parole as a sentencing option for juries in Texas.

¹⁸⁷ *Medina v. State*, 573 So. 2d. 293, (Fla. 1990).

¹⁸⁸ *Medina v. State*, 690 So.2d 1241 (1997), Justice Anstead, concurring in part, dissenting in part.

Bryan was executed in Oklahoma on 8 June 2004 for killing his aunt in 1993. He had been diagnosed with chronic paranoid schizophrenia, and had a history of organic brain disease which may have been related to his severe diabetes dating back decades. Despite serious concerns about his competence to stand trial, and the fact that he had previously been found incompetent to stand trial, Robert Bryan's trial lawyer presented no mental health evidence at either stage of the trial. The US Court of Appeals for the 10th Circuit upheld his death sentence in 2003. The federal court found that the lawyer had acted "strategically" by not raising mental health mitigation at the sentencing phase of the trial, noting that "he was fearful that any [mental health testimony] during the second stage would do more harm than good." The lawyer, it found, had been concerned that any such testimony "might play into the prosecution's case that Bryan was a continuing threat to society".¹⁸⁹

In the USA, appeal courts are required to give substantial deference to the performance of trial lawyers and federal appeal courts to the rulings of their state counterparts. In many cases, seemingly excessive deference has led to death sentences being upheld on the grounds that the failure of trial counsel to present mental health evidence was either "harmless" to the outcome of the trial or the result of "strategic" choice. In the above case of Robert Bryan, for example, one of the 10th Circuit judges wrote a strong dissent, joined by two colleagues:

"Robert Leroy Bryan is a delusional, severely diabetic victim of organic brain damage... Mr Bryan's counsel provided the most ineffective defense I have ever seen, amounting to a concession of guilt and relating none of the reams of compelling mitigating evidence... [W]e cannot insulate an unreasonable tactic not to present mitigating evidence by labelling it a two-edged sword. Mr Bryan's lawyer was clearly ineffective as a matter of law."

A member of the ABA-IRR Task Force (see Appendix 2) has pointed to evidence that "contrary to the apparent beliefs of juries and prosecutors, offenders with mental disorder do not pose a greater risk than their non-disordered counterparts".¹⁹⁰ Moreover, informed jurors may be sympathetic to mental health mitigation if it is properly presented in a way that seeks to explain, not excuse, the defendant's actions, and if they do not have their fears or prejudices stoked by a state in pursuit of a death sentence. In a number of cases, jurors have later come forward to say that they would not have voted for death if they had known the extent of the defendant's mental impairments. For example:

- In the case of Abu-Ali Abdur'Rahman, on death row in Tennessee, eight of the jurors from his trial have signed affidavits saying that they might or would not have voted for death if they had heard the mitigating evidence of his childhood abuse and mental health problems, including post-traumatic stress disorder. For example, one of them said: "If I had known anything about the defendant's background, that he had been abused as a child, and that he may have suffered from a mental disorder or mental illness that could help explain why he did what he did, then I do not believe that I

¹⁸⁹ *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003).

¹⁹⁰ Christopher Slobogin, 'Mental disorder as an exemption from the death penalty: The ABA-IRR Task Force recommendations.' 54 *Catholic U. L. Rev.* 1133 (2004-2005).

would have voted for the death penalty”. Another wrote: “It is my belief that I would have voted for life for [Abdur’Rahman] rather than death if I had heard the details of this man’s life and the extent of his mental illness.” And another: “I would have voted to know all about the way his father treated him and about his mental problems. I don’t want [him] put to death”.

- In the case of Arthur Baird, a seriously mentally ill man sentenced to death in Indiana, six jurors from the original trial later indicated that they would have supported a sentence of life imprisonment without parole, which was not an option at the time of the trial.¹⁹¹
- The foreman of the jury from James Chambers’ trial in Missouri later signed an affidavit stating his belief that the jury would not have sentenced Chambers to death if it had heard evidence of his mental limitations, which the defence lawyer had failed to present. A mental evaluation of Chambers in 1982 found that he had suffered from depression for about two months prior to the murder. He was reported to have spent time in five mental hospitals for evaluation and treatment during his lifetime. He suffered a serious head injury at the age of six, and is alleged to have been regularly beaten by his father. He had been diagnosed as suffering from “incipient paranoid schizophrenia”. None of this evidence had been presented to the jury. However, James Chambers was executed in 2000.
- In 2000, five jurors signed statements that they would not have sentenced Alexander Williams to death if they had known about his abusive childhood and serious mental illness, including schizophrenia. His execution was halted in 2002 and his death sentence commuted.
- Three jurors from the trial of Tracy Hansen in Mississippi later signed affidavits that they might not or would not have voted for a death sentence if they had heard of the physical, sexual and psychological abuse Hansen suffered as a child, and of his subsequent substance abuse and brain damage. One of them stated: “very little evidence was presented on Tracy Hansen’s behalf... If I am to be responsible for so serious a penalty as the death penalty, I deserve to hear all of the evidence, both for and against the defendant, before making my decision.” Tracy Hansen was executed in July 2002.
- Donald Beardslee was executed in California on 19 January 2005. One of the jurors from his trial had said that if he had known that Beardslee had severe brain damage, as revealed only after the trial, he would not have voted for the death penalty.¹⁹² One such vote at the trial would have meant a life rather than a death sentence.
- Several of the jurors from Troy Kunkle’s trial in Texas later stated that they would have voted for life, but had felt constrained by the jury instructions they were given.

¹⁹¹ Arthur Baird’s sentence was commuted by the Governor of Indiana on 29 August 2005. (See p. 12).

¹⁹² ‘The case against an execution.’ *San Jose Mercury News*, 14 January 2005.

One of them stated that “I feel that the evidence of mental health problems, especially the schizophrenia, would have made a big difference”, if such evidence had been presented. Troy Kunkle was executed on 25 January 2005.

Apparently motiveless crimes

An apparently motiveless murder may be more likely to end in a death sentence, given that a jury may consider a random inexplicable act of extreme violence as an indicator of more to come. A violent crime that is the result of a delusional mind may appear to the rational observer to be motiveless and generate fear for that reason. This will be even more so if the state plays on those fears.

Kelsey Patterson committed just such a crime. The state played on the jurors’ fears. The result was the execution of a seriously mentally ill man. There is no doubt that it was Kelsey Patterson who shot and killed Louis Oates and Dorothy Harris on 25 September 1992. There would appear likewise to be little doubt that his serious mental illness lay behind the crime. After the shootings, Kelsey Patterson took off all his clothes except his socks and began to pace up and down the street, gesticulating and yelling incomprehensibly until the police arrived.

Kelsey Patterson had long suffered from paranoid schizophrenia. In 2000, a federal magistrate judge wrote that “Patterson had no motive for the killings – he claims he commits acts involuntarily and outside forces control him through implants in his brain and body. Patterson has consistently maintained he is the victim of an elaborate conspiracy, and his lawyers and his doctors are part of that conspiracy”.¹⁹³ He was found competent to stand trial despite his bizarre behaviour driven by his delusions and paranoia. Indeed, the federal judge magistrate wrote in his 2000 opinion that if he were reviewing this question *de novo* (anew), he would have found that Kelsey Patterson was incompetent to stand trial. However, he deferred to the jury’s finding of competence. During his actual trial, Kelsey Patterson’s mental illness was again on display and he was repeatedly removed from the courtroom when he kept interrupting. The defence plea was one of not guilty by reason of insanity – that is, that at the time of the crime he had not known right from wrong. The prosecutor had argued to the jury that to find a defendant legally insane on the basis that he has been diagnosed with schizophrenia would be tantamount to “a licence to kill”, and suggested that the defendant could be faking his illness. Kelsey Patterson’s jury rejected the insanity plea and sentenced him to death. He was executed on 18 May 2004.

Stephen Vrabel was executed in Ohio two months later, on 14 July 2004. He had been convicted of the murders of Susan Clemente, with whom he lived, and their three-year-old daughter, Lisa. On 3 March 1989, he bought a handgun and ammunition from a gun shop in Youngstown, near where they lived. In the apartment later that day, Stephen Vrabel shot Susan Clemente as she walked into the kitchen, and then shot her again when she was on the floor. It was an apparently motiveless crime, the couple had apparently had no recent

¹⁹³ *Patterson v. Johnson*. Magistrate Judge’s proposed findings and recommended disposition. US District Court for the Eastern District of Texas, Sherman Division, 27 October 2000.

argument or confrontation. He subsequently put both bodies in the refrigerator, the child's in the freezer compartment along with her favourite toys. Stephen Vrabel himself continued to live in the apartment for the rest of March 1989.¹⁹⁴

The following month, while he was away from the apartment, the bodies were found by the landlord. On hearing this, Stephen Vrabel conferred with a priest and turned himself in to the police. He admitted to the killings, saying that he did not know why he had first shot his girlfriend. He said that he had fired the second shot in order that she did not suffer any more, and that he had then shot Lisa because he surmised that her mother was dead and her father would be going to prison, leaving her alone. He directed the police to the gun used in the shootings. The police never discovered a motive for the crime. Stephen Vrabel had no significant prior criminal history.

Vrabel was found incompetent to stand trial because of his mental illness. He was committed to a maximum security psychiatric hospital, where he was forcibly medicated, and where he remained for the next five years until he was found competent to stand trial in 1995. In assessment reports in August 1995, one mental health professional concluded that Stephen Vrabel was "capable of participating meaningfully in his own defense", and another concluded that Vrabel had not known the "wrongfulness of his act" at the time of the murders, but that he was "capable of working with his attorney and aiding in his defense, though his cooperation will be erratic". The trial was held in September 1995. The jury rejected Vrabel's plea of not guilty by reason of insanity and convicted him of murder. At the sentencing phase, Stephen Vrabel presented only his own unsworn statement as evidence. During his statement, he said: "Basically what I am saying is there is nothing of a mitigatory factor that can outweigh the aggravating circumstances that occurred most notably of two people's lives being wiped out". The jury agreed and sentenced him to death.

In 2003, responding to Stephen Vrabel's direct (mandatory) appeal, the Ohio Supreme Court upheld the death sentence by a 4-3 vote, despite the majority acknowledging that Stephen Vrabel had been "evaluated by various mental health professionals as suffering from paranoid schizophrenia or a personality disorder with schizophrenic features". Chief Justice Thomas Moyer, joined by two other Justices, wrote in dissent:

"I am persuaded by clear evidence in the record that [Stephen Vrabel] suffers from a severe mental illness. On the record before us, I cannot conclude beyond a reasonable doubt that Vrabel's mental illness did not causally contribute to his tragic criminal conduct, thereby reducing his moral culpability to a level inconsistent with the imposition of the ultimate penalty of death. I do not believe that [his] crime falls within the category of the most heinous of murders for which the [Ohio] General Assembly has properly reserved the death penalty... [B]oth the facts surrounding the murders and the bizarre reasoning employed by Vrabel in explaining them are

¹⁹⁴ Shortly before his execution, Stephen Vrabel said that "part of the reason" that he had put the bodies into the refrigerator "was a belief that they would come back to life". *Family prepares for execution of killer*. Associated Press, 11 July 2004.

*certainly consistent with the conclusion that Vrabel suffered from a mental disease or defect at the time of his criminal course of conduct”.*¹⁹⁵

Stephen Vrabel did not pursue his appeals. Once an execution date was set in 2004, the Ohio clemency board considered the case at a meeting on 25 June 2004. The board was presented no petition for clemency. It noted that among the state’s arguments opposing clemency was: “The senselessness of the crime – no explanation of it has been given”.¹⁹⁶ With execution, of course, any hope for an explanation was extinguished.

Particularly “aggravated” crimes

Only a tiny percentage of murders in the USA lead to a death sentence, and an even smaller number end in execution. In order to qualify as capital crime in the first place a murder has to have “aggravating” circumstances. It has been estimated that only around 10 to 15 per cent of murders in the USA are “death-eligible”. Only around one per cent of murders result in a death sentence, and fewer still end in execution. As Amnesty International has illustrated elsewhere, this rate of attrition is not a sign of a system reliably selecting the “worst of the worst”, but a shameful lottery marked by arbitrariness, discrimination and error.¹⁹⁷ Indeed, the system of using “aggravating” factors to select which crimes will result in the death penalty may actually have an unfair impact on defendants with mental illness. Some of the crimes which appear to have been the result of mental illness are particularly bloody, brutal or frenzied. As with murders that appear motiveless, those that are particularly stomach-wrenching are more likely to end in a death sentence. Again, however, the brutality may be the result of a delusional or tormented mind, not some coolly calculated “clean” killing of an assassin.

Larry Robison’s crime was just such an offence. He decapitated his friend Ricky Bryant, and shot and slit the throats of four neighbours. Larry Robison later wrote about the killings. Entitled *The Making of a Schizophrenic*, the 31-page document relates how he had been called upon to liberate souls to ascend to a higher plane of existence. He recounted his hallucination that Ricky Bryant had urged him on even as he worked to sever his friend’s head from his body. Robison described how a digital clock in the bathroom had flipped over to display a row of zeros and had then begun acting like a stop clock. He wrote that he had interpreted this as a message that he had to liberate as many souls as possible before the liberation of his own.

¹⁹⁵ *State v. Vrabel*, 790 N.E.2d 303, 320 (Oh. 2003).

¹⁹⁶ *In re: Stephen Allen Vrabel A313-033*. State of Ohio Adult Parole Authority, Columbus, Ohio. Published 2 July 2004. The board unanimously concluded that “the inmate does not want clemency and no mercy appears warranted. There is no manifest injustice in denying Executive Clemency... Mental illness did not preclude imposition of the death sentence...”

¹⁹⁷ For example, *USA: Arbitrary, discriminatory, and cruel: an aide-mémoire to 25 years of judicial killing*, AI Index: AMR 51/003/2002, January 2002, <http://web.amnesty.org/library/Index/ENGAMR510032002>.

The prosecution presented an expert who stated that there was no evidence that Larry Robison had ever suffered from mental illness, and argued that he was faking it. None of the three doctors who had diagnosed Robison as suffering from paranoid schizophrenia prior to the crimes of August 1982 testified at the trial. The prosecutor urged the jury to reject Larry Robison's insanity defence, suggesting that acceptance of such a plea means that the defendant's "conduct is excused under the law" and "he cannot be held responsible". Given that a Texas jury cannot be told what is the consequence of a successful insanity plea, such comments are likely to have played on juror fears of releasing a dangerous offender back into the community. The prosecutor also argued to the jury to recognize Larry Robison's crime as one against which to "unleash" the "outrage of society and the righteous indignation of our society". The jury agreed, and their verdict was carried out in the Texas execution chamber on 21 January 2000.

James Bigby was sentenced to death in 1991 in Texas for a double murder despite one of the most notoriously pro-prosecution psychiatrists in the country testifying that this undoubtedly aggravated crime was the product of Bigby's paranoid schizophrenia. James Bigby was convicted of murdering Michael Trekell and his baby son in their home. The former was shot in the head, and the latter was drowned in the sink. James Bigby gave himself up and confessed to the killings. At his trial, Dr James Grigson, who appeared for the prosecution in scores of death penalty cases in Texas (see *Unethical*, below), testified that at the time of the murders, James Bigby was operating under the schizophrenia-induced delusion that Michael Trekell was involved in a conspiracy against him. Dr Grigson testified that "without the delusional state, without his schizophrenia, he would not have killed that person. There was no reason for it". The baby boy was killed, Dr Grigson said, as "part of an irrational act".¹⁹⁸

The killing of a law enforcement official is a particularly aggravated crime, and in certain jurisdictions it is a statutory aggravating factor making a crime eligible for the death penalty. Yet some such crimes appear to have specifically been the product of paranoid delusions in which the offender believes in the existence of a malevolent official conspiracy. Two such cases involved Russell Weston and Thomas Provenzano. The federal government has not ruled out seeking a death sentence against Weston if he is found competent to stand trial. Provenzano was put to death by the Florida authorities in 2000.

According to the indictment, on 24 July 1998, Russell Weston walked into the US Capitol building in Washington, DC, and shot dead two officers of the US Capitol Police and wounded a third. Russell Weston has a long history of mental illness, including paranoid schizophrenia.¹⁹⁹ For example, during the mid-1990's he had developed the notion that he was

¹⁹⁸ In 2005, James Bigby's death sentence was overturned on the grounds that, because evidence presented at the trial indicated that his mental illness was severe and unresponsive to treatment, the jury may have been unable to give it mitigating effect under the sentencing instructions they were given. *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. 2005).

¹⁹⁹ Background psychiatric information taken from documents filed in *USA v. Weston*, US District Court for the District of Columbia, unless otherwise stated.

in possession of secret information that made him a target of the government, and that rocking on the porch of his Montana cabin would make him a less easy target to hit. In 1996, he initiated an interview at the CIA's headquarters at Langley in Virginia, in which he "frequently returned to systematized bizarre delusional themes with paranoid and grandiose features". During the interview he told the CIA interviewer that before birth everyone is "bombarded with a microwave" that "mutates the cells", that had been cloned at birth, and that his father had been "hit by that interactive beam". He asked the agent, "how do you get a job at the CIA anyway? I've worked as an operative for the last 33 years" (Weston was 39 at the time). Three months later, after he showed signs of becoming dangerous, he was involuntarily committed to a psychiatric facility and given anti-psychotic medication, including forcibly. He was discharged after seven weeks, but his illness deteriorated as he failed to take his medication or return to hospital. In the week prior to 24 July 1998, he was said to be preoccupied with bizarre delusional beliefs: "In the greenhouse of time and neglect, Weston's illness worsened. His obsession with Washington grew. The city was diseased by 'Black Heva'. He was convinced that the override console for his imaginary Ruby Satellite System was kept on the first floor of the US Capitol."²⁰⁰

For seven years, the US Government has refused to rule out seeking the death penalty against Russell Weston if he is found competent to stand trial. They have been allowed by the courts to forcibly medicate him to render him competent to be tried.²⁰¹ At the time of writing, he had not yet been found to be competent.

Thomas Provenzano was executed in Florida in June 2000 for killing a bailiff, Arnie Wilkerson, in Orange County Courthouse, Orlando, in 1984. The shooting left two other bailiffs paralyzed, one of whom died in 1991. Provenzano's serious mental illness predated his crime.²⁰² His clemency petition to Governor Jeb Bush in June 2000 contained the following observations:

"Thomas Provenzano is a 50-year-old man with a life-long history of mental illness. By his early teens, Thomas's family noticed that he became unusually wary and suspicious of people. He grew increasingly anxious around others, even being suspicious of friends and family. By 1980 he refused to eat or drink at anyone's home but his own. He began telling his family that the police and courts were really trying to hurt people, particularly him. In August 1983, Thomas was stopped by two Orlando police officers for a traffic violation, and an altercation occurred resulting in charges for disorderly conduct. Thomas became obsessed with the case against

²⁰⁰ *A living hell or a life saved?* Washington Post, 23 January 2001.

²⁰¹ See *United States v. Weston*, US Court of Appeals, District of Columbia Circuit, 255 F.3d. 873, 27 July 2001. "Because antipsychotic medication is medically appropriate and is necessary to accomplish an essential state policy, the district court's order permitting the government to forcibly medicate Weston is affirmed".

²⁰² For example, in 1999, after an evidentiary hearing on the issue of Provenzano's competence for execution, a judge found "clear and convincing evidence that Provenzano has a delusional belief that he is Jesus Christ which predates the murder by several years". *Provenzano v. State*, In the Circuit Court of the Eighth Judicial Circuit, Bradford County, Florida, 8 December 1999.

him, constantly checking the court file and monitoring the whereabouts of the two officers. No matter what the outcome of his court hearing would be, it would have had little impact on Thomas's life. But he could not see it that way. By then Thomas had developed a fixed delusion in which he was Jesus Christ, and the police and courts were engaged in a conspiracy against him. When his name was called on January 10, 1984, and a bailiff approached him, Thomas believed this was it. He took out a gun and fired at sheriff's deputies. In the melee that followed Bailiff William Arnold Wilkerson was killed, and Officer Mark Parker was left paralyzed. Thomas did not shoot at any civilians."

At his trial the defence and prosecution experts had all agreed that Thomas Provenzano was mentally ill, and that his paranoid fears included the fixed delusional belief that he was being persecuted by the legal system and that these fears had contributed to his crime. However, the jury rejected his insanity defence and voted by the narrowest of margins, 7-5, that he should be executed. On direct appeal, the then Chief Justice of the Florida Supreme Court dissented against the death sentence, saying that he believed the evidence was "overwhelming that Provenzano's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" had been "substantially impaired".²⁰³

Violent crimes involving children, again, are particularly "aggravated". In some states, the fact that the murder victim is a child will be the factor that makes the crime eligible for the death penalty.

Durlyn Eddmonds was executed in Illinois in 1997 for the murder two decades earlier of a nine-year-old boy who suffocated as his face was pushed into a pillow as he was being raped. Durlyn Eddmonds had a history of mental illness. Four years before the crime, he had spent three months in a psychiatric hospital. A number of doctors initially found him incompetent to stand trial. Prior to his trial at least four doctors concluded that he suffered from schizophrenia. As two of the three judges on a panel from the US Court of Appeals for the Seventh Circuit reviewing the case pointed out in 1996, "even a cursory review of Eddmonds' file would have revealed long-standing, complex, and often severe mental problems".²⁰⁴ Yet despite this well-documented mental health history, his trial lawyer conducted no investigation into the mental health evidence to present in mitigation against the death sentence. Instead, the lawyer simply made a plea for mercy on the grounds that Durlyn Eddmonds had not meant to kill the child. The trial judge chose death, finding that Eddmonds represented a "continuing danger to society both inside and outside the prison walls".

Yet even the two Seventh Circuit judges who believed that the trial lawyer had "essentially abdicated his duty to make a reasonable inquiry of mitigating circumstances" agreed that that the death sentence should stand. In so doing, the court was choosing eradication rather than explanation, and perhaps allowing the inflammatory nature of the crime to cloud its better judgment. The judges focussed on the crime, describing it as "abominable", "almost unspeakable", and perhaps "what we simply call 'evil'", and

²⁰³ *Provenzano v. State*, 497 So.2d 1177, 1185 (Fla.1986), Chief Justice Parker, dissenting.

²⁰⁴ *Eddmonds v. Peters*, 93 F.3d 1307 (7th Cir. 1996). Judges Flaum and Rovner, concurring.

characterizing the defendant as a “rampaging sexual predator who poses a danger both in and outside of prison”. They added that “we are certain counsel’s failure to throw a few more tidbits from the past or one more diagnosis of mental illness onto the scale would not have tipped it in Eddmonds’ favour”.²⁰⁵ Fifteen months later, on 19 November 1997, Durlyn Eddmonds was killed in Illinois’ death chamber.

Like Durlyn Eddmonds, Eugene Gall was convicted of the rape and murder of a child. Like Durlyn Eddmonds, Gall suffers from serious mental illness, including paranoid schizophrenia. In October 2000, the US Court of Appeals for the Sixth Circuit noted that the murder of 12-year-old Lisa Jansen in April 1978 “engendered an understandably outraged and angry public as well as a prosecution determined to convict”. In such situations, the federal court wrote, “it is a court’s duty to ensure that amid the tragedy, anger and outrage over hideous acts perpetrated, a fair and constitutional trial took place”. It found that this had not occurred, concluding that “high publicity, Gall’s own actions, trial court mistakes, overzealous prosecutorial tactics combined with inexcusable oversights, and poor defense advocacy at various stages”, denied Gall a fair trial.²⁰⁶ It had taken more than 20 years for a court to find this.

In upholding Eugene Gall’s death sentence in 1980, the Kentucky Supreme Court said that “[w]hatever may be our personal viewpoints with regard to his mental condition, we are not permitted to substitute them for what the jury found under substantial conflicting evidence.”²⁰⁷ It then offered the opinion that: “It may be too much to ask of any set of men or

²⁰⁵ *Eddmonds v. Peters*, 93 F.3d 1307 (7th Cir. 1996).

²⁰⁶ *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000). In 1970, aged 22, Gall had been arrested in Ohio for rape. He was found incompetent to stand trial and was placed in a mental hospital for over a year. After being discharged, he pleaded guilty to the rape charges and was imprisoned for five years. He was released on parole in 1977 without any treatment plan. The murder of Lisa Jansen occurred the following year, as Gall’s mental condition deteriorated. He was found competent to stand trial, but during the proceedings, his lawyers informed the judge that they believed their client was incompetent. The defence psychiatrist, who was the only expert involved who had evaluated Gall’s mental condition over an extended period of time, testified that Gall’s schizophrenia had reasserted itself, that he was delusional, and that he had become incapable of assisting in his defence. The defendant then announced that he wanted to represent himself, and did not want the insanity defence presented. On the order of the court, another psychiatrist examined Gall for 45 minutes, and concluded that he was “normal”. The trial resumed with Gall acting as his own lawyer. The defence psychiatrist said that his behaviour “effectively destroyed any chance that he had of a defence of not guilty by reason of insanity and in fact if he should die as a result of his verdict, in effect, Eugene Gall killed himself”. A second psychiatrist testified that Eugene Gall was suffering from chronic paranoid schizophrenia, was insane at the time of the crime, and was incompetent to stand trial. During his cross-examination of the police officer who had found Lisa Jansen’s body, Eugene Gall accused him of having shot the girl with Gall’s gun. When he cross-examined the state pathologist, Gall asked him whether a photograph taken of a victim’s eye could reveal what the dead person last saw. People in the courtroom laughed out loud during Gall’s cross-examination of one of the arresting officers.

²⁰⁷ The jury had rejected Gall’s insanity defence and found him guilty of murder. On 2 October 1978 they recommended a death sentence, after finding no mitigating evidence, including finding that the defendant “was not suffering from a mental disease or defect.” One of the jurors later testified that he

women to make a dispassionate assessment of a criminal defendant's mental condition, especially in the setting of a revolting offense he has committed."²⁰⁸ This will particularly be the case when the prosecution engages in inflammatory or prejudicial arguments. At Eugene Gall's trial, the prosecutor had suggested that the defendant might be faking his mental illness and expressed his own personal beliefs about the credibility of key expert witnesses. He urged the jury not to be "hoodwinked into the defense of insanity", and warned that the jurors would "turn [Gall] loose on society" if they accepted such a plea. The defendant, the prosecutor argued, should not be allowed to "escape the ends of justice by retreating within the safety of his own skull".

The Sixth Circuit found that "because ours is a system of law, the arsenal available to a prosecutor to achieve that legitimate goal is limited to arguments rooted in properly introduced evidence and testimony rather than words and tactics designed to inflame passions, air unsubstantiated prosecutorial beliefs, and downplay the legitimacy of a legally recognized defense." The federal court found that the "overwhelming and undisputed evidence" was that Gall had not been sane at the time of the crime, and that he suffers from a permanent and severe mental illness. It reiterated that the heinousness of the crime had driven the prosecution to "secure a conviction at the expense of Gall's constitutional rights" The court recalled a US judge's warning from almost 200 years earlier, that the "constitution was made for times of commotion".²⁰⁹ Too often, prosecutors have allowed their pursuit of a death sentence to erode the constitutional rights of capital defendants.

Easy prey for unscrupulous police and prosecutors

With children and people with mental retardation since removed from the reach of the death penalty, at least in law, mentally ill offenders remain among its most vulnerable targets. Because of their mental impairments they have a diminished capacity compared to less impaired individuals to defend themselves in the capital justice process. Any prejudice or ignorance towards the mentally ill among law enforcement officials will compound this problem.

Police

A mentally ill suspect facing capital charges may, like people with mental retardation, be particularly susceptible to police coercion during interrogations. This may place them at risk of making false confessions or confessions that less impaired individuals would be less likely to give without seeking legal advice first. In addition, some mental impairments can lead to "confabulation" whereby the individual makes up details, or adopts those provided by others, in order to fill in gaps in memory. This can happen with people who have brain damage,

had not considered mental illness at the sentencing. He said that he had thought that the issue had been settled when they had rejected the insanity defence.

²⁰⁸ *Gall v Commonwealth*, 607 S.W.2d 97 (1980).

²⁰⁹ *Gall v. Parker*, US Court of Appeals for the Sixth Circuit, 30 October 2000. Quoting Judge Cranch in *United States v. Bollman*, 1807.

seizure disorders, post-traumatic stress disorder or dissociative disorders.²¹⁰ A confession is a powerful piece of evidence for the state to obtain. It may even open the door to the death chamber.²¹¹

James Colburn (see p.56 above) was arrested in June 1994 having told a fellow resident in the trailer park where he lived to call the police because he had just killed a woman and her body was in his home. On the same day, Colburn gave a videotaped statement to police, confessing to having strangled and stabbed Peggy Murphy. He told police that he suffered from schizophrenia, and during the confession there were indications that Colburn was struggling with his mental illness. He rocked back and forth in the chair when sitting and paced to and fro when standing. He lost control of his bladder, and had to be provided with dry clothing. The interrogating officer noticed that James Colburn was shaking uncontrollably. In his confession, Colburn said that he had seen Peggy Murphy on the highway and had invited her into his apartment. He stated that he had “this flash that he was going to hurt her”. He said that he tried to have sex with her, but that she did not want it, and he abandoned his attempt. He said that “this one impulse came over me said to kill her... I couldn’t stop myself.” After the murder he said that he had considered leaving the area, but had instead decided to go to his neighbour’s home and tell him to call the police. Despite his cooperation and his severe mental illness, the state pursued and obtained a death sentence, and James Colburn was executed in March 2003.

On 14 February 2000, the police were called to a shooting in a rural home outside Warrensburg in Johnson County in mid-western Missouri. The caller, Raymond Wood’s mother, said that her son had told her that he had shot his family. She also told the police that her son was mentally ill and was on medication. Raymond Wood was first admitted to a psychiatric facility in 1985 and had been admitted on numerous occasions since. He had been diagnosed with severe mental illness, including schizoaffective disorder. The police went to the house and found that Tina Wood and her six young children (aged from 18 months to 10 years) had been shot. The two youngest children were wounded, but alive. The four other children, and their mother, were dead. Raymond Wood was arrested at the scene.

²¹⁰ For example, Jay Jackman, a forensic psychiatrist who examined seriously mentally ill California death row inmate Horace Kelly in 1998 reported that Kelly “confabulated impossible or absurd answers to questions about his personal history and he lost track of earlier answers when questions were repeated.” Declaration of Jay M. Jackman, M.D., 12 June 1998. After his arrest in 1984, Kelly had been held for six days and questioned without a lawyer. He repeatedly maintained his innocence. The police turned off the tape recorder which was recording the police interview with Kelly. Forty minutes later, the police turned the recorder back on, and Kelly, his voice breaking into sobs, made a confession. See ‘Last Rights’, *LA Weekly*, 3-9 April 1998.

²¹¹ “One can have eyewitness testimonial evidence, circumstantial evidence, scientific evidence, and even videotaped evidence; but a confession explicitly admitting guilt signed by the defendant is the most powerful piece of evidence that can ever be introduced against him and will surely serve as the key that will lock the jail-house door and provide the juice to power the electric chair; and in these more civilized times, the juice for the needle.” Ex parte *Fierro*, 934 W.W.2d 370, 388 (Tx. Ct. Crim. App 1996), Judge Overstreet dissenting.

On the evening of the same day, Raymond Wood was questioned at the police station by two plainclothes police officers, one of whom was a close personal friend of Wood and a lay minister at his church. He led the interrogation, adopting the style he used when ministering to a member of his congregation. Raymond Wood explained that he had shot his wife, and then, realizing that his children would suffer from the loss of their mother, shot each child. He said that he then shot himself, and showed the officers abrasions and gunpowder burns on his forehead. During his interview, Raymond Wood referred to the “turmoil” he had been experiencing in the days leading to the shootings, and he talked of the “snares” in his head and of “too many ensnaring thoughts”. The interrogation was terminated abruptly when Raymond Wood’s mental health took a turn for the worse. He was placed on suicide watch and was placed in a restraint chair after he became uncontrollable. He was subsequently taken to hospital in restraints, and was assessed as suffering from a major psychosis, severe depression, and a major affective disturbance. He was involuntarily committed to a state psychiatric facility.

In February 2003, Raymond Wood’s lawyer filed a motion in the trial court seeking to suppress his confession, arguing that it had not been given voluntarily because he was mentally ill and because the authorities had used coercive conduct in selecting an interrogator who was a friend and minister to the prisoner. At a hearing, the minister/officer testified that he had had concerns at the time of the interrogation that Raymond Wood was out of touch with reality, and he described the defendant as being “gravely disabled” at that time. Members of Raymond Wood’s family testified that he had been exhibiting signs of his mental illness in the days before the shootings. For example, he and his wife had gone to a mental health facility on 11 February 2000, at which time he was described as suffering serious mental problems. Hospitalization was recommended, but he and Tina Wood opted for him to return home and start the prescribed medication, an antipsychotic and an antidepressant, at home. From 11 to 14 February, his condition continued to deteriorate, and he complained of hearing voices and of being possessed by the devil.

A psychiatrist for the defence testified that she believed that Raymond Wood’s mental illness meant that he could not have made a voluntary waiver of his rights (such as his right to have a lawyer present or to remain silent). A psychiatrist for the state, while concluding that Wood was able to knowingly make such a waiver, acknowledged the evidence that the defendant was actively psychotic in the days immediately preceding the shooting and at the time of the interrogation, and that on the morning of the shooting, Wood would have qualified for involuntary commitment to a mental hospital.

Following the hearing, the judge found that the confession had been involuntary. She found that the police had known at the time of the interrogation that Raymond Wood was mentally ill and that he had a history of serious mental illness and had been previously committed to psychiatric care. The authorities also knew that Wood was deeply religious and would likely respond to his minister during the interrogation. The judge stated: “Certain interrogation techniques...are so offensive to a civilized system of justice that they must be condemned. Such interrogation techniques, applied to the unique characteristics of the Defendant, exist in this case”. The state appealed the trial judge’s suppression of the

confession, but the Missouri Court of Appeals upheld the decision in March 2004.²¹² It was not until July 2004 that the prosecutor agreed to drop pursuit of the death penalty against him, following a national and international campaign urging her to do so. Currently, Raymond Wood remains in psychiatric hospital.

Sometimes it may be a combination of youth and mental impairment that may render a defendant vulnerable to coercive interrogation techniques. Todd Rettenberger was 18 years old when he was arrested in Salt Lake City in Utah in 1996, and questioned about a murder. He was interrogated for about two hours and then put in solitary confinement, without a pillow or blanket for about 22 hours, before being interrogated a second time. During the interrogation, the police repeatedly lied to the teenager, telling him they had evidence against him. They made at least three dozen false claims, “not merely ‘half-truths’ but complete fabrications” about evidence of Rettenberger’s guilt.²¹³ They used the “false friend” technique, whereby they pretended to be his friends and acting in his best interest. They repeatedly indicated that a confession would lead to leniency, including protecting him from execution. He admitted his involvement in the crime.

Todd Rettenberger’s defence lawyer argued that the confession – which “contained little information that was not first suggested or provided by the interrogating officers”²¹⁴ – should be ruled inadmissible because it had made under coercive circumstances. At a hearing, an expert testified that Rettenberger suffered from Attention Deficit Disorder, a below average IQ, and displayed symptoms of depression, anxiety disorder, thought disorder and schizophrenia. One of the police officers also testified, agreeing that the defendant had displayed such impairments and that he had been afraid of the death penalty. Nevertheless, the trial court ruled that the interrogation had not been “objectively coercive” and denied the defence motion. The decision was appealed to the Utah Supreme Court, which overruled the lower court.²¹⁵

While such cases illustrate the vulnerability of people with mental illness to state misconduct, the case of Ronald Williamson illustrates the potential consequences. He was sent to Oklahoma’s death row in 1988 for a murder he did not commit. He had a documented history of mental illness, including possible schizophrenia and bipolar disorder, going back to 1979. Yet despite this, and despite the fact that Williamson had been found incompetent to stand trial in the same court in an unrelated case under three years earlier, no competency determination was ever made. Despite Williamson’s disturbed behaviour during a preliminary hearing in 1988 being such that it led his lawyer to ask the judge “do you want me to load him down with about a hundred milligrams of [medication]”, the attorney never sought a competency hearing. Neither did the lawyer challenge a “confession” Williamson gave to

²¹² *State of Missouri v. Raymond Wood*, 128 S.W.3d 913 (Mo. Ct. App. 2004).

²¹³ *State of Utah v Todd Rettenberger*, 984 P.d2 1009 (1999).

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

police describing a dream in which he had committed the murder.²¹⁶ Williamson was released in 1999 after DNA evidence exonerated him. He had come within five days of execution in 1994.²¹⁷

Prosecutors

The US Supreme Court has stressed that the death penalty “is a different kind of punishment from any other which may be imposed in this country”, and that “[i]t is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”.²¹⁸ However, as already noted, there has been a willingness among some prosecutors in the USA to engage in highly questionable tactics in order to secure death sentences, including playing on the ignorance, fears and prejudices of jurors being asked to pass death sentences on defendants with mental impairments. Appeal courts have frequently failed to offer a remedy for serious misconduct they describe as “harmless”. Arguing for Stanley Hall’s execution at his 1996 trial in Missouri, for example, the prosecutor related a story to the jurors of how, when he was a child, he had had his dog put down, and that is what they should decide should happen to the defendant:

“When I was a young boy, I had a puppy and his name was Beauregard. He was about this long. Beauregard came from an animal shelter and he was a wonderful animal. He would follow you everywhere. He would stay on a little leash. He would come and he would wag his tail when you got home, pant and jump on you, and I found out Beauregard had distemper... And the veterinarian said... the right thing to do is have him put to sleep. And as a young child, I was – it was a tremendous decision. But there was only one right thing to do. You are faced with a tremendous decision but there is only one right thing to do and that man (Stanley Hall), this crime deserves the death penalty.”

The Missouri Supreme Court called the prosecutor’s argument a “shameless ploy”.²¹⁹ The US Court of Appeals for the Eighth Circuit called his remarks “irrelevant, unnecessary, and improper”.²²⁰ Nevertheless, they upheld the death sentence. Governor Matt Blunt denied

²¹⁶ For more on the case, see *Actual Innocence*, by Barry Scheck, Peter Neufeld and Jim Dwyer. Doubleday, New York, 2000.

²¹⁷ A twist to this case is the involvement of another death row inmate, Scott Lee Moore. Scotty Moore’s trial lawyer was denied the resources to investigate mitigating evidence of Moore’s long history of mental health problems. While on death row, Moore educated himself about the law and about mental illness, including his own clinical depression which had fuelled his earlier abuse of alcohol and drugs. He helped other prisoners with legal or other matters when they were unable to help themselves, because of illiteracy, lack of education or deteriorating mental health. One such prisoner was Ronald Williamson, whose serious and untreated mental illness Moore documented and drew to the attention of Williamson’s lawyers. Scotty Moore was executed six weeks after Ronald Williamson was released.

²¹⁸ *Gardner v. Florida*, 430 U.S. 349 (1977).

²¹⁹ *State v. Hall*, 955 S.W.2d 198, 208 (Mo. 1997).

²²⁰ *Hall v. Luebbbers*, 341 F.3d 706, 716 (8th Cir. 2003).

clemency, despite compelling evidence that Stanley Hall had mental retardation, and that his execution would violate the *Atkins v. Virginia* ruling. Stanley Hall was executed on 16 March 2005. His co-defendant, alleged to be a driving force in the crime for which Hall was killed, was never charged.²²¹

On other occasions, prosecutors have suggested that the mental impairment renders the defendant more dangerous, and therefore more “deserving” of execution. This was true in regard to the issue of mental retardation also.²²²

Percy Walton is on death row in Virginia. He has been diagnosed by numerous mental health experts as suffering from serious mental illness, including schizophrenia. His conduct in pre-trial detention was bizarre, and in the days before he entered a guilty plea he insisted that he would return to earth after his execution and bring the victims back with him. At his sentencing trial in Virginia in 1997, Percy Walton’s conduct was extremely prejudicial. He repeatedly burst out laughing and smiled inappropriately. For example, he laughed out loud during the testimony of the granddaughter of two of the murder victims. The prosecutor argued that Walton’s outbursts were a sign of lack of remorse, stating that “Percy Walton’s demeanour at the penalty phase of the trial, particularly on Wednesday when he repeatedly smiled while some of the saddest testimony was being presented, clearly reveals that he is a sadistic, ruthless and cold-blooded murderer who has no conscience, no remorse and no right to live in a civilized society”. The sentencing judge agreed, finding one of the aggravating factors warranting the death penalty was that Percy Walton posed a future danger to society.

The prosecution presented testimony from a known jailhouse “snitch” [informer] that Percy Walton had said that he was going to “play crazy”. The informant went to the prosecutor six weeks after the statement was allegedly made and only after the court-appointed psychologist had told the court that Percy Walton’s mental health was deteriorating and recommending that he be placed in a secure psychiatric facility. This was not the first time that this particular prosecutor had presented a witness who claimed that the defendant had said that he was going to “play crazy”. The earlier case – tried in front of the same judge with the same defence lawyer and same prosecutor – involved Calvin Swann, a man with a history of serious mental illness. The prosecutor presented a neighbour of Calvin Swann who testified that the latter had said that he was going to “play crazy”. Swann was sentenced to death.

In Oklahoma, Cyril Ellis was sent to death row for the murder of three people during a shooting spree. Prior to the crime, he had been admitted to a state psychiatric hospital for a court-ordered assessment of his competency to stand trial and of his mental condition at the time of the crime. He was diagnosed as suffering from chronic paranoid schizophrenia. The

²²¹ See AI Urgent Action, <http://web.amnesty.org/library/Index/ENGAMR510542005>

²²² For example, in the trial of Oliver Cruz, the defence lawyers argued that his mental retardation – his IQ had been assessed as low as 64 – should mitigate against a death sentence. The state did not dispute the evidence. Instead, the prosecutor argued that the fact that Cruz “may not be very smart” made him more dangerous and therefore deserving of the death penalty. Oliver Cruz was executed in Texas in 2000. His co-defendant, charged with the same crime, avoided the death penalty in a plea arrangement.

psychiatric report stated that while Ellis's mental illness was currently in remission and he was competent to stand trial, there was evidence that he had been "completely depersonalized" at the time of the shootings. Ellis had said that he had been hearing voices and felt that "his body was frozen by the demons and spirits trying to take over his body and his spirit".

His plea at the trial was one of not guilty by reason of insanity. However, the trial judge did not allow the pre-trial psychiatric report to be admitted into evidence. In its closing arguments, the prosecution urged the jury to reject the insanity defence, stressing the lack of supporting evidence from mental health professionals. Indeed, the prosecution mocked the defence and argued that Cyril Ellis was faking insanity. For example:

- "This insanity defence that Mr Ellis has brought to you is what I refer to as instant insanity. It's like instant mashed potatoes."
- "Again, instant insanity, insanity to his liking, insanity to justify these acts. That's what he is doing, folks: . . . He's a con."
- "Then the voice leaves him, and I guess he runs around the back of the house to see what is happening. Then the voice comes back again, and he runs over and he shoots Teresa three or four more times. The voice leaves. Then he sees Tameca; and the voice comes back, and he shoots Tameca. That's the way his insanity is working, folks."

Cyril Ellis was sentenced to death for the two murders and to prison terms of 3,000 years, 2,000 years and 1,000 years for the other shootings. Ellis remained on death row for 15 years until a federal court overturned his conviction and sentence on the grounds that the psychiatric report should have been admitted.²²³

Poor witnesses on their own behalf

David Kevin Hocker's murder trial in Alabama started and finished on the same day, 22 August 2000. Proceedings began at 9 o'clock in the morning and were completed before 5pm. The defence called no witnesses at either stage of the trial. Hocker had refused to allow his lawyer to present any mitigating evidence. The jury therefore never heard about Kevin Hocker's history of bipolar disorder or his abusive childhood. Nor did the jurors hear that his father, who also suffered from bipolar disorder (this illness can run in families), committed suicide when Kevin Hocker was eight years old. The father had been abusive to the children – Kevin Hocker's sister is reported to have been treated for post-traumatic stress disorder sustained as a result of the abuse. Kevin Hocker was first diagnosed with bipolar disorder as a teenager. His mother tried to get him help for his mental illness, but he would deny that he was ill. Instead, he took to self-medicating. His mother has said: "Had I been real well-heeled, I could have accomplished more, so I just feel like a failure". She recalled: "His mental illness, . . . that messed him up. But self-medicating that illness with street drugs is what

²²³ *Ellis v. Mullin*, 312 F.3d 1201 (10th Cir. 2002).

destroyed him". Kevin Hocker was again diagnosed with bipolar disorder by a prison doctor when incarcerated in the 1990s, but he stopped taking his medication because he said that it was not helping. His sister has said that he told her that he committed the crime in order to get the death penalty. The jury voted for death. On death row, he engaged in acts of self-mutilation. He was found unconscious in his cell one day, having removed one of his testicles with a razor blade. A few months later, he removed the other. He refused to appeal his death sentence, and was executed on 30 September 2004.²²⁴

In 1978, the US Supreme Court ruled that the sentencing authority in a capital case, whether judge or jury, must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death".²²⁵ A defendant with all their mental faculties intact is likely to be able to assist in their defence in this regard far better than a mentally impaired individual. The more serious the mental impairment, the more serious will be the barriers to preparing a full mitigation case. A capital mitigation specialist has written of the difficulties of defending mentally impaired and emotionally scarred clients from the death penalty:

*"Because of cognitive and other impairments and negative past experiences in the legal system, it is unlikely that the client will have immediate trust for the members of the defense team. In many instances, the client's disabilities have been exploited and s/he has been deceived and manipulated by individuals s/he trusted to help her/him.... Many clients have experienced brain trauma through abuse, illness, accidents, or exposure to toxic substances, rendering them unable to process, retain and apply information. Many clients also suffer from psychiatric diseases, such as bi-polar disorder (manic-depression), schizophrenia and clinical depression, which so distort their perception of reality that they are unable to understand or comply with requests for information."*²²⁶

It is, at best, an uphill task for a lawyer to represent a capital client, whether at trial or in post-conviction proceedings, if that client believes that the lawyer is part of a conspiracy against him or her. In 2002 Amnesty International was told by Andre Rosemond's lawyers that this seriously mentally ill inmate in South Carolina was convinced that his lawyers were conspiring against him and was writing letters daily to the judge about the conspiracy. During a post-conviction hearing, he sent the judge a letter saying that he wanted his lawyers arrested. In the case of Mar-reece Hughes, also on death row in South Carolina, Amnesty International has been told that his cooperation with his post-conviction lawyers and whether he wishes to continue to challenge conviction and death sentence depends on the severity of his

²²⁴ Sources: 'Mother finds she can accept son's date with executioner.' *Birmingham News*, 29 September 2004; 'Mentally ill man executed for 1998 killing.' *Birmingham News*, 1 October 2004; and Equal Justice Initiative, Montgomery, Alabama. *Hocker v. State*, 840 So.2d 197 (Ala. Crim. App. 2002).

²²⁵ *Lockett v. Ohio*, 438 U.S. 586 (1978).

²²⁶ 'Capital cases: Mitigation investigations' by Lee Norton. *The Champion*, May 1992.

schizophrenia at any one time. Yet his cooperation is crucial: there is evidence that he may not have been the gunman in the crime – the shooting of a police officer. Mar-reece Hughes was forcibly medicated in order to be made competent to stand trial, something to which his inexperienced trial lawyers did not object (see *Drugged Defendants*, below).

At jury selection for a hearing in Texas in 1993 to determine Kelsey Patterson's competency to stand trial, Patterson suddenly stood up and said: "I have an implant in me. I heard you in Dallas County in '86. As you how much you are going to invest. You said one percent". He was removed from the courtroom, as he would repeatedly be through this hearing and the subsequent trial. Patterson, who had been diagnosed as suffering from paranoid schizophrenia, refused to take advice from his trial lawyers, whom he accused of being part of the conspiracy against him.

At one stage in the competency hearing, the following interchange took place between him and his lawyer after he took the witness stand (against the advice of his legal counsel):

Patterson: *Purposely you have been part of it, then you come in here and play crazy with me, just as straight faced as ever.*

Lawyer: *What kinds of things have I done to you?*

Patterson: *You have talked on the speaker system. Even nasty in my food. I have put a spoon of mashed potatoes in my mouth and had to spit them out, after he said that he did something to the food.*

And in a subsequent exchange, Patterson accused the trial lawyer of having control of the "devices" that had been implanted in him:

Patterson: *They have some type of implant devices that they used on me in the military, which I receive. Like the device that they put in the inner ear in which they can send subliminal message and make a person act beyond their controllability to know you have taken an action.*

Lawyer: *Kelsey, do you believe those implants are still in your body?*

Patterson: *I know for a fact. Y'all play with it all of the time.*

He was sentenced to death. On death row, he refused to cooperate with his appeal lawyers or mental health professionals, still believing they were part of the conspiracy. Kelsey Patterson was executed on 18 May 2004. His appeal lawyer fought long and hard to keep him from being killed. The only "conspiracy" – apart from an alliance of state officials failing to see that they were involved in an indecent execution – was inside Kelsey Patterson's delusional mind.²²⁷

A defendant or inmate may seek to downplay his or her mental illness, either due to the stigma attached to mental illness or because he or she is actually seeking a death sentence in

²²⁷ See *USA: Another Texas injustice. The case of Kelsey Patterson, mentally ill man facing execution*, AI Index: AMR 51/047/2004, March 2004, <http://web.amnesty.org/library/Index/ENGAMR510472004>.

order to escape their suffering. At an October 2003 hearing to determine Indiana death row inmate Joseph Corcoran's competency to drop his appeals, three mental health experts testified that Corcoran suffers from paranoid schizophrenia, the symptoms of which included a delusion that the prison guards are torturing him via an ultrasound machine that causes him pain and his body to twitch and move uncontrollably. One of the experts, a forensic psychiatrist, testified:

*“[Joseph Corcoran] does his best to minimize the severity of his symptoms, to downplay that he might have any mental disorder. This has been a consistent theme throughout this process... [H]e has a real desire to appear bad rather than mad. So, he wants to be – it is better for him psychologically to appear that he is criminally responsible, than to admit that he has a serious mental illness that may have contributed to his behaviour in the past. It speaks to how powerful the stigma is against serious mental illness, that he would rather be executed than admit that schizophrenia might be contributing to his desire to die”.*²²⁸

Representing José Amaya Ruiz, an illegal immigrant from El Salvador accused of a double murder in Arizona, posed a huge challenge. His trial lawyer was unable to investigate Amaya Ruiz's life experiences in El Salvador or to determine the extent of his exposure to the war and political violence there before he came to the USA in 1984. Scars of bullet wounds on his body remained unexplained, for example. Two of his brothers were killed in the violence, and he recalled burying dead bodies in his village with his hands because he had no spade. However, his mental impairments made him a poor reporter of his life story, and an under-resourced defence lawyer was severely hampered in what she could discover for mitigation purposes. She recalled to Amnesty International in June 2005 that it had been “essentially impossible to obtain any mitigating evidence for José because he would not cooperate in providing information for family members or friends who might have been able to provide additional information as to his background. I believe his refusal to provide this information was a direct result of his mental health issues and his lack of understanding of the criminal justice system”.

The trial lawyer had informed the court during pre-trial and trial proceedings that her client was not cooperating with her and that he did not understand the proceedings. The court had found José Amaya Ruiz competent to stand trial. However, after each day of the trial, the defendant asked the lawyer whether the trial was over. At one point, he had asked her if it was the spectators in the court or the jury that would make the decision on his case. Prior to the trial a psychologist appointed by the court to evaluate Amaya Ruiz's competency, had

²²⁸ Dr George Parker, quoted in Justice Rucker's dissenting opinion in *Corcoran v. State*, 820 N.E. 2d. 655, Supreme Court of Indiana, 11 January 2005. This echoes other research. For example, a seminal study of 15 death row inmates, published in 1986, found that all had suffered head injuries in childhood and six were chronically psychotic. All but one had minimized or denied their psychiatric disorders, suggesting that they preferred to be perceived as “bad” rather than mentally impaired. Lewis, Dorothy Otnow, Jonathan H. Pincus, Marilyn Feldman, Lori Jackson, and Barbara Bard. Psychiatric, neurological, and psychoeducational characteristics of 15 death row inmates in the United States. *American Journal of Psychiatry* 1986; 143 : 838-45.

acknowledged that the defendant “had difficulty grappling with the concept of a jury”. The defence lawyer told the judge that Amaya Ruiz did not appear to understand what the role of the prosecutor was or what it meant to testify. She also relayed instances of “irrational behaviour” that suggested mental health problems, such as an attempt by Amaya Ruiz to commit suicide in his jail cell, and his speaking out in a loud voice at inappropriate moments during proceedings.

Amaya Ruiz was convicted. His lawyer again raised the question of his competency during the sentencing proceedings, during which he was removed after objecting to being shackled. After he was returned to the courtroom, the defence lawyer noted that her Hispanic client was upset and not listening to the proceedings through the interpreter. The judge admitted that he did “not know either whether or not he is competent”, but did not order an additional evaluation. The judge was not given information later revealed in the defendant’s medical records, that the jail authorities were prescribing him anti-psychotic medication, that Amaya Ruiz had displayed irrational behaviour at the jail, such as banging his head on the cell door, and had made another apparent suicide attempt. Without any further evaluation, José Amaya Ruiz was sentenced to death. The trial lawyer recalled to Amnesty International in June 2005 that “at the time of the sentencing, I believe he thought he would be executed that day in the courtroom”.

The state had maintained throughout the proceedings that José Amaya Ruiz was not mentally impaired. He remained on death row for nearly two decades. He came within days of execution in January 2001. By then he had been diagnosed with bipolar disorder and paranoid schizophrenia. He was treated with anti-psychotic medication for more than a decade, although he sometimes refused treatment, either because he believed he was not ill or that the drugs were poison. In 2000, he was taken to a secure psychiatric facility after a prison doctor concluded that he was incompetent to be executed under *Ford v. Wainwright*. He was restored to competency after treatment and given an execution date. A federal judge stopped the execution. In 2004, José Amaya Ruiz was ruled to have mental retardation and to be exempt from the death penalty under *Atkins v. Virginia*. His trial lawyer reflected to Amnesty International: “It is interesting that after all of the doctors’ evaluations and volumes of evidence that José was seriously mentally ill, the ultimate result was that the death penalty was dismissed because he was determined to be mentally retarded.”

A death row inmate who has mental illness but not mental retardation may still be executed. Monty Delk’s lawyer told Amnesty International in 2002 that he had had no rational communication with his client in the whole six years that he had represented him on appeal. For example, when the lawyer visited him on death row in December 2001, Monty Delk did not acknowledge his presence, or provide him any useful information. He apparently continued to believe that he was in the military and that he was in control of a large and powerful organization. Monty Delk, repeatedly diagnosed as suffering from serious mental illness, was executed in Texas in February 2002, shouting gibberish as he was killed.

Especially vulnerable to inadequate defence representation

William Jones was executed in Missouri on 20 November 2002. At his trial, he had been represented by lawyers who had no experience in capital cases. They failed to arrange for a mental health evaluation, and did not investigate or present evidence from hospital records which would have indicated that he had suffered a serious brain injury several months before the crime took place. A neurologist who examined William Jones during appeal proceedings, concluded that his behaviour at the time of the crime may have been affected by the injury. The US Court of Appeals for the Eighth Circuit upheld the death sentence in 2001 despite finding that “Counsel at least should have investigated [Jones’] hospital records and had them evaluated by an expert”.²²⁹

One of the defining aspects of the death penalty in the USA since 1977 has been the frequent inadequate legal representation afforded to indigent capital defendants. In case after case, people have been sentenced to death by juries who were left unaware of the real story of the person they were condemning to the execution chamber. In many cases, appeal courts have overturned the death sentences because of such failures. In many cases, they have not and the condemned prisoner has been put to death (see also Death wish 1, below).

While defendants suffering from serious mental illness pose particular and substantial challenges even to experienced trial lawyers who are willing to put the maximum effort in to defending his or her client from the death penalty, such a defendant is particularly vulnerable to a lawyer who does not have the motivation, experience or resources to put in a defence to the state’s pursuit of an execution. In some cases, a lawyer may not even recognize that there is a mental health issue in the case, especially if the defendant attempts to hide his or her illness or other impairment. There may also be significant problems in the cases of clients who have less well-documented mental health problems, such as serious brain damage or post-traumatic stress disorder.

The case of Gerardo Valdez in Oklahoma illustrates that thorough legal representation can make the difference between life and death. Gerardo Valdez, a Mexican national, confessed to police, having clearly misunderstood his rights. He was represented at trial by a lawyer who had never handled a capital case before. Valdez was sentenced to death in 1990. He was due to be executed on 19 June 2001. The Oklahoma Pardon and Parole Board voted by three votes to one to recommend that Governor Frank Keating commute the death sentence. The Board had been presented with newly-discovered evidence concerning Valdez’s background and medical history, including that he sustained brain damage as the result of a serious head injury during his youth. The Board had also received a letter from the Mexican government expressing its grave concerns over the Oklahoma authorities’ failure to notify Valdez of his right to consular assistance after arrest and stressing that this had contributed to his right to adequate representation. It was only with the post-conviction assistance of the Mexican authorities that the mental health evidence was revealed. However, with his appeals exhausted, Valdez’s fate was left with the executive clemency authorities.

²²⁹ *Jones v. Delo*, 258 F.3d 893, 902 (8th Cir. 2001).

Governor Keating initially granted a 30-day reprieve, following a personal telephone appeal from the President of Mexico. However, the Governor rejected the Board's recommendation and a new date of 30 August 2001 was set. It was only after this that the Oklahoma Court of Criminal Appeals stepped in and issued an indefinite stay. In 2002, the Court overturned the death sentence, finding that Valdez's trial lawyer "did not have the financial resources available to properly investigate" mitigating evidence. It added: "This Court cannot have confidence in the jury's sentencing determination... where the jury was not presented with very significant and important evidence bearing upon [Valdez's] mental status and psyche at the time of the crime."²³⁰ In November 2003, Gerardo Valdez was sentenced to life imprisonment. Many others have gone to their deaths – clemency rejected and no last-minute judicial reprieves – despite the fact that the jury which sent them to death row had not been presented with significant and important mental health evidence.

Fellow Mexican national Javier Suárez Medina was executed in Texas on 14 August 2002 for the murder of an undercover police officer. He, too, had been denied his consular rights after arrest. He never denied shooting the officer, but always maintained that he fired out of fear when he heard what he thought were gunshots. With the post-conviction assistance of the Mexican government, Javier Suárez's appeal lawyers uncovered compelling mitigating evidence not heard by the jury which sentenced him to death. This included new evidence that he was suffering from post-traumatic stress disorder (PTSD) as a result of traumatic events and abuse during his childhood and adolescence (he was 19 years old at the time of the crime). In his late teens he had witnessed at close quarters the drive-by shooting of an acquaintance at a party. An expert concluded that Suárez's mental impairments had affected his behaviour at the time of the crime. He concluded that Javier Suárez's description of the shooting was "consistent with an exaggerated acoustic startle response, one of the classic symptoms" of PTSD. The Texas Board of Pardons and Parole rejected clemency, Governor George W. Bush refused to intervene, and no court stepped in at the last minute as had occurred in Oklahoma in the Gerardo Valdez case.

Dwayne Allen Wright was executed in Virginia on 14 October 1998 for a crime committed when he was 17 years old. He had grown up in a deprived neighbourhood of Washington, DC, rife with criminal drugs activity, where he witnessed habitual gun violence and murder. He lost his father to incarceration in prison, his mentally ill mother was unemployed for long periods and, when he was 10 years old, his half-brother, with whom he was very close, was murdered. Dwayne Wright developed serious emotional problems. As a teenager, he was treated for "major depression with psychotic episodes", and doctors found signs of organic brain damage. At the sentencing phase of his trial for the murder of Saba Tekle, the defence lawyer accepted the court's nomination of a clinical psychologist to present evidence in mitigation. On cross-examination, the lawyer discovered for the first time that this expert, Stanton Samenow, was the author of a study in which he concluded that mental illness and environment are not responsible for people committing crimes, but that criminals act because they develop an ability to "get away with" their crimes and "live rather

²³⁰ *Valdez v. State*, 46 P.2d 703, 710 (Ok. 2002).

well” as a result.²³¹ In 1998, the US Court of Appeals for the Fourth Circuit acknowledged that the psychologist’s testimony had “dealt quite a blow to Wright’s mitigation defense”, but upheld the death sentence.²³² Shortly before his execution, Dwayne Wright’s appeal lawyers obtained affidavits from two of the jurors from the 1991 trial who said that they would not have voted for death if they had known the full extent of his mental impairment.

Drugged defendants

Kevin Hughes was removed from death row in Pennsylvania in 2005 not because of his mental illness – he has been diagnosed with paranoid schizophrenia – but because he was 16 years old at the time of the crime. Even without the *Roper v. Simmons* ruling in March 2005, he should have been taken off death row. At the time of his arrest in January 1980 for the murder of nine-year-old Rochelle Graham, there were signs that Kevin Hughes was suffering from mental health problems, when he told police that “voices” had driven him to murder the girl. He was found competent to stand trial. One doctor had found signs of schizophrenia, but believed that it was under control as a result of the anti-psychotic drug Thorazine. Another psychiatrist believed, however, that Kevin Hughes was not competent to stand trial as he was suffering from a delusional belief that “all he has to do is to tell his story to the judge and he will be sent home”. The judge ruled that the trial could proceed, but ordered, at the prosecutor’s request, that Kevin Hughes be kept on Thorazine throughout the proceedings.

The prosecutor argued to the jurors that they would have to “go beyond being human” to “show him mercy”. Arguing for the jury to hand down a death sentence, the prosecutor suggested that the defendant’s demeanour during the proceedings had showed a remorseless individual. Studies have shown that a perceived lack of remorse can be a highly aggravating factor in the minds of US capital jurors.²³³ The prosecutor pointed out that Kevin Hughes had been calm and taken notes during the proceedings. His appeal attorneys would later argue that this “calmness” was the result of the Thorazine he was being given and that the “notes” he was making were childish scribbles. In a post-conviction affidavit, Kevin Hughes’s aunt said that “the drugs they gave Kevin for the trial made him quiet and less moody, but he was even less able to understand... It was like having a trial with a three-year-old child. We could not understand how they could try someone so out of touch.” The jury duly sentenced Kevin Hughes to death, having not heard anything about his abusive childhood from which he was

²³¹ Dr Stanton Samenow featured also in the case of Daryl Atkins, the Virginia death row prisoner whose case led to the *Atkins v. Virginia* decision in June 2002. At his sentencing, a forensic psychologist had testified that Atkins had mental retardation and an IQ of 59. Dr Samenow testified for the state that, in his view, Atkins was of “average intelligence, at least”. When the Supreme Court of Virginia upheld his death sentence in 2000, two of the Justices dissented, describing Dr Samenow’s opinion as “incredulous as a matter of law”.

²³² *Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir. 1998).

²³³ For example, Theodore Eisenberg et al., ‘But was he sorry? The role of remorse in capital sentencing.’ 83 *Cornell L. Rev.* 1599 (1998). (“We also confirm the widespread conviction that remorse makes a difference to the sentence a defendant receives – provided jurors do not think the crime is too vicious”.)

just emerging, or his or his family's mental illness. Post-conviction affidavits revealed that his mother had been diagnosed with schizophrenia and gave details of Kevin Hughes's own history of mental health problems.

Many capital defendants with mental illness have been prescribed medication during their trial proceedings. Indeed, some may have been declared incompetent to stand trial unless or until medication restored them to competency. Medication can have a prejudicial impact on the demeanour of the defendant. US Supreme Court Justice Anthony Kennedy noted this in 1992:

"It is a fundamental assumption of the adversary system that the trier of fact observe the accused throughout the trial, while the accused is either on the stand or sitting at the defense table... At all stages of the proceedings, the defendant's behaviour, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial..."

The side-effects of anti-psychotic drugs may alter demeanor in a way that will prejudice all facets of the defense... The defendant may be restless and unable to sit still. The drugs can induce a condition called Parkinsonism, which, like Parkinson's disease, is characterized by tremor of the limbs, diminished range of facial expression, or slowed movement and speech. Some of the side effects are more subtle. Anti-psychotic drugs such as Mellaril can have a 'sedation-like effect' that, in severe cases, may affect thought processes...

As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies."²³⁴

James Colburn, a diagnosed paranoid schizophrenic, was executed in Texas on 26 March 2003. During his 1995 trial, he received injections of Haldol for his mental illness. Haldol is an anti-psychotic drug which can have a powerful sedative effect. A lay observer at the trial, a nurse with experience of mentally ill patients, stated in an affidavit that Colburn appeared to fall asleep on frequent occasions during the proceedings.²³⁵ In her opinion, his "lethargic state

²³⁴ *Riggins v. Nevada*, 504 U.S. 127 (1992), Justice Kennedy, concurring in the judgment.

²³⁵ "James Blake Colburn clearly experienced temporary losses of awareness while his trial was in progress and witnesses were testifying. James Colburn's lapses into what appeared to be a sleep state were not rare. The lapses were frequent in their occurrence. At intervals approximately ten minutes to fifteen minutes apart, James would begin to lean forward to the point that his chin rested on his chest and James was directly facing the table top before him. James would remain in this position until one or the other of his attorneys prodded him awake. When James did awaken he seemed confused..."

prevented him from participating in his defence or even paying attention to his own murder trial”.

In post-conviction affidavits, James Colburn’s trial lawyers stated that they believed that their client had been competent to stand trial. However, they acknowledged that their client had “dozed occasionally during the trial. On one occasion, Mr Colburn commenced snoring loudly and we requested a recess to permit him to wake up”. The trial record contains the following on that particular incident:

Defence lawyer 1: *Judge, I don’t think that it matters, but I think I need a break to walk my client around the room a little bit. He’s snoring kind of loud.*

Defence lawyer 2: *They apparently injected him last night to calm him down and I appreciate it. But he’s sleeping right now.*

Defence lawyer 1: *I don’t know if it’s going to matter too much, but I think it would be better if we had a minute to walk him around to wake him up.*

Before the trial, a psychologist had been appointed by the court to evaluate whether James Colburn was sane at the time of the murder, and whether he was competent to stand trial. The psychologist concluded that he was both sane and competent. However, his examination of Colburn was conducted 10 months before the trial. In a post-conviction affidavit, the psychologist said that having learned of the Haldol injections and the apparent sedative effect they had on James Colburn, “it is my opinion that during the trial itself, as opposed to the date on which I examined him...it is not reasonably probable that... Mr Colburn was legally competent to stand trial”. He further suggested that proceedings should have been suspended to “adjust Mr Colburn’s medication so that he was oriented and aware”.

A psychiatrist who conducted an assessment of James Colburn in 1997, and reviewed the records in the case, concluded that there were “serious questions and concerns regarding [Colburn’s] competency to stand trial at that time”, and that Colburn had been “seriously sedated during the time of his trial”.

As already noted, studies have shown that a perceived lack of remorse can be a highly aggravating factor in the minds of capital jurors, as is perceived future dangerousness which may be adduced from such demeanour.²³⁶ If the defendant’s demeanour is indeed the result of medication taken to treat mental illness, the defendant not only suffers the possible prejudice of this misperception, but the drug also may quell the more extreme symptoms of the mental illness, causing the jurors not to give so much weight to it in mitigation. In pre-trial detention four months before his capital murder trial in Virginia in 1997, Bobby Swisher was prescribed medication for his depression. However, the medication was not begun until two days before the trial. His lawyers, who did not ask for a postponement of proceedings or a competency hearing, decided not to put him on as a witness because the drugs were having such a sedative

²³⁶ For example, see Stephen P. Garvey, Aggravation and mitigation in capital cases: ‘What do jurors think?’ 98 *Colum. Law Rev.* 1538, 1563 (1998).

effect. In post-conviction affidavits, two jurors said that Bobby Swisher had presented like a “zombie” at the trial, and that “he showed no remorse”. Bobby Swisher was executed on 22 July 2003.

In some cases, the individual facing capital charges may be forcibly medicated. The US Supreme Court looked at this issue in 1992, when it ruled that David Riggins, a mentally ill death row inmate in Nevada, had been denied due process when he was forcibly medicated with anti-psychotic drugs during his 1988 capital trial. Its ruling was specific to the circumstances in which this had been done, however. Because the Nevada courts “failed to make findings sufficient to support forced administration of the drug”, the Supreme Court found in favour of Riggins. It stated that “Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the District Court had found, that treatment with antipsychotic medication was medically appropriate and, considering less intrusive methods, essential for the sake of Riggins’ own safety or the safety of others”.²³⁷

The US Supreme Court further held that the Nevada trial court’s error in not conducting a sufficient inquiry before ordering the forced medication left a “strong possibility” that the defendant’s fair trial rights had been “impaired”. “It is clearly possible”, the Court wrote, that the side effects of the drugs he was given – which could include a sedative or confusing effect in the patient – “had an impact upon not just Riggins’ outward appearance, but also the content of his testimony on direct or cross-examination, his ability to follow the proceedings, or the substance of his communication with counsel”.

Seven years after the *Riggins v. Nevada* ruling, the US Supreme Court halted the execution in Louisiana of Feltus Taylor 30 minutes before it was due to be carried out on 9 September 1999. The Court was responding to an appeal based on the claim that:

*“the State of Louisiana misadministered powerful psychotropic medication to Taylor during his capital trial without notice to either counsel. The failure to administer properly the medication had an extremely damaging effect on Taylor’s demeanor during trial and on his ability to convey appropriately his expressions of remorse to the jury. Even more significantly, this conduct by officials of the state contributed to a dramatic outburst by Taylor during the penalty phase of the trial when he overturned the defense counsel table in the presence of the twelve jurors who would soon decide whether to sentence him to life imprisonment or give him the death penalty”.*²³⁸

Feltus Taylor’s trial was held in January 1992. In pre-trial detention he was prescribed anti-psychotic medication for sleeplessness and anxiety. By the time of his federal appeals, most of his medical records from his pre-trial custody period had been destroyed. Some records did remain, however, and his appeals lawyers argued, supported by an affidavit from a psychiatrist, that his fair trial rights had been violated through the use of medication, the dosage of which had allegedly been doubled two weeks before the trial. The alteration or

²³⁷ *Riggins v. Nevada*, 504 U.S. 127, 18 May 1992.

²³⁸ *Taylor v. Cain*, In the Supreme Court of the United States. Petition for a writ of certiorari.

misadministration of the drugs, they argued, citing *Riggins v. Nevada*, had caused Feltus Taylor to have a flat affect and caused his violent outburst the day before this African American man was sentenced to death by an all-white jury. Having stayed his execution, the US Supreme Court dismissed the appeal without comment and Feltus Taylor was executed in June 2000.

Given the rate of wrongful conviction in capital cases in the USA – more than 120 people have been released from death rows in the country since 1973 on the grounds of innocence – the possible impact of powerful medication on defendants should not be overlooked in this regard. The case of Ernest Willis provides food for thought. He was sentenced to death in Texas in 1987 for an arson murder committed the year before. The state had only a weak circumstantial case. Ernest Willis had been on death row for years before his appeal lawyers uncovered evidence that he had been put on high dosages of anti-psychotic medication during the trial – not for mental illness, but for back pain. The dosages of Haldol and Perphenazine were higher even than for someone suffering from severe psychosis.

At the trial, the prosecutor had used the defendant's drugged-induced flat emotionless demeanour to urge the jury to pass a death sentence. He called Ernest Willis "an animal", a "satanic demon", referring to his "deadpan, insensitive, expressionless face" and "cold fish eyes" – "those weird eyes" that would "pop open like in some science-fiction horror film".²³⁹ In June 2000, a trial-level judge found that Willis had been denied adequate legal representation, that the prosecution had withheld favourable evidence (a psychiatric evaluation that it had requested which had found that Willis did not pose a future danger), and moreover that Willis had "sat through his entire trial under the debilitating influence of significant doses of two anti-psychotic medications that were administered to him by the state...without any medical basis or justification". The judge recommended that the Texas Court of Criminal Appeals order a new trial. Six months later, the Court refused to do so, rejecting all the claims. However, in 2004 a federal District Judge overturned Ernest Willis' conviction, finding that the prosecution had withheld exculpatory evidence, the defence representation had been inadequate, that the fire may well not have been caused by arson, and that the state had administered medically inappropriate medication.²⁴⁰ The county District Attorney (not the same official who prosecuted Willis) dismissed all charges after examining the case, saying that Willis "simply did not do the crime... I'm sorry this man was on death row for so long and that there were so many lost years."²⁴¹ Ernest Willis was released on 6 October 2004.

Racial, cross-cultural and cumulative aspects in a broken system

Before he was arrested for murder in Danville, Virginia, Calvin Swann had been involuntarily committed at least 16 times to mental hospital. State employees had diagnosed

²³⁹ *Death isn't fair*. Texas Monthly, December 2002.

²⁴⁰ *Willis v. Cockrell*, 2004 WL 1812698 United States District Court for the Western District of Texas, 9 August 2004.

²⁴¹ *Inmate Freed After 17 Years on Death Row*. Los Angeles Times, 7 October 2004.

him as suffering from schizophrenia more than 20 times prior to the crime, and had treated him with at least eight different powerful anti-psychotic drugs. There was a history of mental illness in his family. At the time of the crime, he was receiving social security benefits for his mental disability, and his family reported that he was “more ill than ever”.

Dr Mark Mills, a psychiatrist who reviewed the records and met Calvin Swann on death row in December 1996, described him as “an extraordinary victim of this extraordinary disease [schizophrenia]. I have only ever seen one person I would classify as exhibiting a more devastating pathology than Calvin Swann.” He concluded that Swann was insane at the time of the crime – “so impaired by disease that he was totally deprived of the mental power to control or restrain his acts.” Furthermore, he concluded that there was “a substantial probability that Calvin Swann was not competent to stand trial: “He was engaging in bizarre behaviour in jail. At trial, observers say, he did not appear to understand the gravity of the proceedings. He was squirming in his seat and looking for people he recognized in the audience, even when the death sentence was read. He was drinking water constantly. On the sole occasion he spoke on the record, it appeared that he did not understand the proceedings.” At that time, the psychiatrist concluded, Calvin Swann had “no factual or rational understanding of why he is in prison, or the fact that he is to be executed, or that there is a relationship between his crime and the impending execution”.²⁴²

How can such an ill person end up on death row? How can it be that his death sentence was upheld in the state and federal appellate courts? Although his death sentence was eventually commuted by the state governor just before his execution, his case shows how severely mentally ill people can be particularly vulnerable in the capital justice system.²⁴³

After Calvin Swann’s arrest for the 1992 murder, the police told him that they would use a “Retinal Image Machine” which would produce a photographic image of the last thing seen by the victim. Calvin Swann made a confession. The defence lawyer requested the appointment of a psychiatrist to assist in the case, including about the effects on the defendant of his schizophrenia and medication. The court had already appointed a psychologist, Dr Stanton Samenow, and rejected the request. This was despite Dr Samenow’s recommendation that a psychiatrist be appointed because he was not qualified to offer the assistance the defence was seeking. At the trial, Dr Samenow – known for his controversial views that crime is never caused by mental illness – testified that Calvin Swann had control over what he did, and had done so all his life. In his 1997 affidavit, Dr Mills testified that Dr Samenow’s “philosophy is not consistent with the tenets of forensic psychiatry. Forensic psychiatry is predicated upon the accepted notion that mental diseases and defects can have legal consequences.” Dr Samenow also testified that Calvin Swann had always been found

²⁴² Affidavit of Mark J. Mills, J.D., M.D., March 1997. By this stage, Dr Mills had “evaluated 3,500 individuals, and supervised 10,000 evaluations, about a thousand of whom I saw in a forensic context”. Among other things, Dr Mills at that time was serving as a consultant with the US Department of Justice.

²⁴³ Calvin Swann’s death sentence was commuted in 1999 by Governor James Gilmore. Swann died in prison in 2004.

competent to stand trial. This was not true, he had twice been found incompetent to stand trial in previous cases before being medicated and restored to competence.

Calvin Swann's jury decided that he would pose a future risk to society and voted for execution. Thus a familiar pattern emerges: a jury passes a death sentence on someone about whose mental illness they have limited knowledge and not a little fear.

However, no discussion of the USA's use of the death penalty should ignore the evidence of discrimination in its application. Studies have consistently shown that race – particularly race of victim, but also the race of the defendant – plays a role in who receives a death sentence. Blacks and whites are the victims of murder in approximately equal numbers in the USA, yet 80 per cent of those put to death since 1977 were convicted of crimes involving white victims.²⁴⁴

Calvin Swann was African American. The murder victim was white. The jury consisted of 12 white jurors. Calvin Swann became the seventh man sent to Virginia's death row by a Danville jury. All were African American.

At least 60 of the African American prisoners who have been put to death in the USA since 1977 were tried in front of all-white juries, most of them for killing white victims.²⁴⁵ The cases show a pattern of prosecutors removing prospective black jurors during jury selection.²⁴⁶ Some of these defendants were mentally ill or otherwise seriously impaired.²⁴⁷ Gregory Thompson, who is African American and has been diagnosed with schizophrenia, schizoaffective disorder and bipolar disorder, was sentenced to death by an all-white jury in Tennessee for the murder of a white woman. The prosecution peremptorily dismissed the only prospective black juror from the jury pool, and according to sworn testimony by the defence

²⁴⁴ See *USA: Death by discrimination – the continuing role of race in capital cases*, AI Index: AMR 51/046/2003, April 2003, <http://web.amnesty.org/library/Index/ENGAMR510462003>.

²⁴⁵ Page 40, *USA: Death by discrimination*, op. cit.

²⁴⁶ See, for example, *Miller-El v. Dretke*, 73 U.S.L.W. 4479 (June 13, 2005). The US Supreme Court said "It blinks reality" to deny that jurors were dismissed because they were black. Yet Thomas Miller-El's death sentence had survived 20 years of state and federal appeals. See *USA: Death by discrimination*, *supra*, op.cit., pages 53-54.

²⁴⁷ For example, Ricky Ray Rector, an African American man accused of killing a white police officer, was tried by an all-white jury. Rector was seriously impaired having shot himself in the head at the time of his arrest. He was executed in Arkansas in 1992. Manuel Babbitt, a black Vietnam War veteran suffering from post-traumatic stress disorder, was tried in front of 12 white jurors in California for killing a white woman. He was executed in 1999. Pernell Ford was put to death a year later in Alabama. This seriously mentally ill African American man represented himself in front of an all-white jury for killing two white people. Linroy Bottoson was tried by an all-white jury in Florida and executed in 2002 after being allowed to give up his appeals despite being found to suffer from chronic mental illness. Charles Singleton, forcibly medicated for his paranoid schizophrenia while on death row, was executed in Arkansas in 2004. He had been tried for killing a white woman by an all-white jury which had heard no mitigating evidence from the defence. His defence lawyer's entire closing argument for a life sentence consisted of nine short sentences telling the jury that he did not "envy you having to make the decision", but trusted that the jurors would reach the decision "you feel is proper in this case".

lawyer, the assistant attorney general subsequently remarked “I hope they [the 12 white jurors] fry that nigger”. In post-conviction proceedings, the prosecutor denied making the remark and claimed that he had dismissed the black juror because he was not strongly in favour of the death penalty. The state courts gave the prosecutor the benefit of the doubt and kept Gregory Thompson on death row (see *Reality Check 4*, above).²⁴⁸

Howard Gooden, an African American man, was sentenced to death by an all-white jury in Lamar County, Mississippi, in 1999 for the murder of a white man in November 1998.²⁴⁹ According to his trial lawyer, Howard Gooden was the only African American in the courtroom during the trial.²⁵⁰ The court allowed into evidence the statement of the victim, Willis Rigdon, after he had been shot and before he died. According to the witness, Willis Rigdon had said that he did not know who his assailant had been apart from “it was a black man”. The prosecution emphasised this declaration during the closing arguments, at least twice reminding the jurors that the victim had said that his assailant had been “a black male”. This declaration, or at least the prosecutor’s emphasis of it, risked injecting racial prejudice into a trial where the only “black man” in the courtroom was the defendant, with all of the jurors, prosecutors, defence lawyers, court personnel, spectators and judge, white. During post-conviction investigations by the defence in 2002, one of the jurors from Howard Gooden’s trial was interviewed by a member of the defence team. The interviewer has testified that the juror said that she had been convinced of Howard Gooden’s guilt because “that’s how black people are”.²⁵¹

If being a black defendant in front of an all-white or almost all-white jury, and/or being accused of killing a white victim can serve as *de facto* aggravating factors in favour of a death sentence, how much more so if the defendant is also suffering from mental illness? Any fears or prejudices held, consciously or subconsciously, about “the other” are likely to be compounded. This may be even more pronounced if the legal representation of the defendant on the mental health question is inadequate, or the prosecution tactics over-zealous.

Howard Gooden’s lawyer failed to discover a diagnosis of chronic paranoid schizophrenia made about his client six months before the crime when he was previously in prison.²⁵² In this

²⁴⁸ See *Thompson v. State*, 958 S.W.2d 156 (Ct.Crim.App. 1997).

²⁴⁹ In court documents, his name is variously spelt as Goodin and Gooden.

²⁵⁰ Affidavit of Stacy Prewitt, 30 April 2002.

²⁵¹ Affidavit of Stacy Prewitt, 30 April 2002.

²⁵² The trial lawyer also did not bother to investigate evidence that Gooden has mental retardation. In a post-conviction affidavit, the lawyer explained that just prior to Gooden’s trial he had represented another capital defendant. In that case he had presented evidence of his client’s mental retardation, but because that defendant was sentenced to death even with such evidence, “I felt presenting such evidence [in Howard Gooden’s case] was futile”. The earlier client was Mack Wells, who has since been taken off death row on the grounds of his mental retardation, following the *Atkins* decision. At the time of writing, Wells was the only Mississippi inmate to have been successful on this issue, although there a preliminary order had been signed to this effect in the case of Jimmie Mack. (Two other inmates who had raised mental retardation claims, David Blue and Ronald Foster, were removed from death row because they were under 18 at the time of the crime, following the *Roper v. Simmons* decision.)

evaluation, the doctor wrote that Gooden displayed “delusional thinking” and was having “auditory hallucinations”, which he had experienced for several years, and for which he had been treated with anti-psychotic medication.²⁵³ On the question of mental illness, in his post-conviction affidavit the lawyer stated that:

“I knew something was wrong with Mr Gooden, besides the retardation, but I really couldn’t put my finger on why he was so odd. I never knew Mr Gooden was a diagnosed paranoid schizophrenic or that he was receiving Social Security Disability for his condition. He mentioned it for the first time in passing on the stand at trial, at which point it was too late to follow up with investigation... Given the time and resources I had to prepare for his capital murder trial, there was simply no way I could have known to look for Mr Gooden’s records because the time I spoke with the client he was very crazy and not helpful in preparing his defense at all. I had to get his sister to talk to him on occasion for me in order to explain things to him. I begged Mr Gooden not to take the stand, but he was completely irrational and would not listen to the advice of counsel in that regard”.

Howard Gooden’s own testimony was the only evidence presented concerning his mental illness. He stated that he was drawing disability benefit and suffered from hallucinations. When the lawyer asked him what he meant by this, Howard Gooden replied, “Encountering voices in my mind. Encountering voices in my mind... talking to me in an obnoxious way, evil way.” On cross-examination, the prosecutor suggested that Howard Gooden was making his illness and prior treatment up, asking “could we expect any of those doctors to testify about that today, or are we just pretty much going to have to take your word for it?” There were no expert witnesses and no medical records submitted to the jury.

In his closing arguments asking for a life sentence – little more than a rambling statement of the immorality and ineffectiveness of the death penalty²⁵⁴ – the defence lawyer showed his ignorance of his client and of his history of mental illness, when he said to the jury: “I look over here at Howard, and I don’t know whether Howard cares or not. I really don’t.” Then, he

Three years after the *Atkins* ruling, the procedures for determining the mental retardation issue in Mississippi remained unclear. The legislature had not passed a law, and the state Supreme Court had handed down a number of rulings which left trial courts without a clear set of rules as to how to adjudicate mental retardation claims. After the Mississippi Supreme Court sent Gooden’s case back to the trial court in 2003 on the questions of mental retardation and inadequate defence representation on the mental illness issue, the trial court denied relief on the basis that the state’s expert had said that he did not have mental retardation. The defence was provided no expert, and questions have been raised about the expertise of the state’s evaluator. In dismissing the mental retardation claim, the trial judge threw out the ineffective assistance of counsel claim also. At the time of writing, the matter was on appeal.

²⁵³ Report of Dr Michael Whelan, May 1998.

²⁵⁴ Of course, this was an argument unlikely to register with jurors who have been selected because they can pass a death sentence. Indeed, the prosecutor noted to the jury that “the people who indicated they were opposed to capital punishment were excused... Now, the time has come for you to put into action what you said you believed in.”

said: “Apparently, he was treated in the Department of Corrections for his mental problems. Obviously, it did not help”. For his part, the Assistant District Attorney argued to the (12 white) jurors to “give the defendant what he deserves. Give him the death penalty, just like he gave to Willis Rigdon.” The District Attorney argued for the jurors to give the victim’s family justice: “It would not be justice for them for the defendant to be able to read and watch television and sleep in his jail cell, while Mr Rigdon lies cold in his grave”. The Mississippi Supreme Court has said that it found it “troubling that the prosecutor would exhibit such blatant contempt of the law in order to obtain a death sentence” by using such arguments. However it said that “the prosecutors’ crude appeals likely did not influence the jury one way or another”.²⁵⁵ Howard Gooden remained on death row at the time of writing.

The only black juror at the trial of African American juror Louis Truesdale in South Carolina later came forward to say that she had wanted to impose a life sentence, but had been intimidated into changing her vote to death. She recalled that one of the 11 white jurors had said of Truesdale, convicted of killing a white person, “this nigger has to fry”. In 1998 the US Court of Appeals for the Fourth Circuit upheld Louis Truesdale’s death sentence. Among his appeal claims had been that his trial lawyers failed to present the jury with evidence of brain damage that impaired his judgment and ability to think rationally. The Fourth Circuit court found that:

*“Truesdale’s counsel deliberately steered away from developing any mental health evidence, calculating that it would not help portray Truesdale as normal and capable of rehabilitation. Mental health evidence like that of Truesdale’s organic brain dysfunction is a double-edged sword that might as easily have condemned Truesdale to death as excused his actions. The decision not to pursue this line of inquiry exemplifies the type of reasonable ‘strategic judgment’ that we respect.”*²⁵⁶

Given that the jurors reached their sentencing decision in less than half an hour, it has to be considered likely that even if the defence had presented mental health evidence in mitigation, it would have had no effect on their allegedly racially charged deliberations.²⁵⁷ Louis Truesdale was executed on 11 December 1998.

²⁵⁵ *Gooden v. State*, 787 S.2d 639, 653 (Miss. 2001). The District Attorney subsequently responded to the state Supreme Court criticism of the prosecutors, written by Justice Mills, as “nothing more than a personal slam by someone who is throwing his weight around simply because he is in a position to do so.” Letter to Mississippi Attorney General Sonny White from District Attorney Ken Turner, dated 7 June 2001.

²⁵⁶ *Truesdale v. Moore*, 142 F.3d 749 (4th Cir. 1998).

²⁵⁷ In some trials, the atmosphere in the juryroom is alleged to have become quite threatening. At the Oklahoma trial of Walanzo Robinson, black, the jury consisted of 11 whites and one African American. Post-conviction investigations by the defence revealed that the sole black juror had not wanted to vote for the death penalty. The juror told an investigator that she had been subjected to mental and physical intimidation by fellow jurors, who “yelled and screamed” at her, and “slammed down papers and their hands or fists on the table” because she was the only person to fail to vote for death. She said that fellow jurors had said that she was just “one nigger helping out another” and that the “jury was not leaving the room without a death sentence”. After eight hours of such pressure, she said that she

Research based on interviews with capital jurors in the USA has concluded that race of juror can have an impact in death penalty trials, as jurors take into the jury room their life experiences as well as their cultural prejudices: “Not surprisingly, the perspectives of blacks on crime and the criminal justice system diverge widely from those of whites”. Generally, blacks have less confidence in the fairness of the system, while whites are more likely to see the system as over-lenient: “Whites are apt to make pro-prosecution interpretations of evidence, especially when defendants are black... And in capital cases, blacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts”.²⁵⁸

The (white) prosecutor at William Hance’s sentencing in Georgia in effect turned the evidence of his mental health problems into a reason for the (almost all-white) jury to vote for the death penalty. During its closing arguments, the prosecutor argued that Hance lacked remorse, was incapable of rehabilitation and that he would pose a future danger to society. According to his appeal lawyers, the “State went so far as to characterize [William Hance’s] mental health expert as a witness for the State. The State argued that [Hance’s] mental health problems were a reason to execute [him] – not reason to allow him to live.”²⁵⁹ As in Louis Truesdale’s case, it is impossible to divorce concern about the prosecutor’s actions in this regard from the troubling racial aspects of the case. Indeed, a US Supreme Court Justice dissented against the death sentence, not only because there was “substantial evidence that William Henry Hance is mentally retarded as well as mentally ill”, but also because there was “reason to believe that his trial and sentencing proceedings were infected with racial prejudice”.²⁶⁰

William Hance, who was African American, was first tried in 1979. His jury consisted of 11 whites and one black after the prosecutor had used nine of 10 peremptory challenges to dismiss prospective black jurors during jury selection. Hance’s death sentence was overturned on appeal and a retrial ordered. In 1984, he was condemned to death again, and again the jury consisted of 11 whites and one black. This time the (same) prosecutor had used seven out of eight peremptory strikes to remove blacks from the jury pool.²⁶¹ The sole black juror later

relented and voted for death because she was “tired of the hostility and cruelty of the other jurors”. In 1999, a federal district judge acknowledged that the allegations made by the juror, “if proven true, are egregious and intolerable”. Walanzo Robinson was executed in March 2003.

²⁵⁸ William J. Bowers, Benjamin D. Steiner, Marla Sandys. ‘Death sentencing in black and white: An empirical analysis of the role of jurors’ race and jury racial composition.’ *University of Pennsylvania, Journal of Constitutional Law*, Volume 3, Number 1, February 2001.

²⁵⁹ *Hance v. Zant*, Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, 1994.

²⁶⁰ *Hance v. Zant*, 511 U.S. 1013, 31 March 1994, Justice Blackmun, dissenting.

²⁶¹ In 1990, after leaving his post as District Attorney to become a judge, the prosecutor testified about his criteria for deciding whether to pursue the death penalty when he was District Attorney. As well as looking at the aggravating evidence, he said: “I talked with, in most cases, the families of the victims”. During his term in office, he obtained eight death sentences. In one case, the murder victim was black. This was the victim in the William Hance case. In that case, he said he did not talk to the family of the

came forward to say that she had not voted for death because of William Hance's mental impairment, but that the 11 white jurors had decided to tell the judge that all 12 had reached a unanimous verdict for execution. The black juror – who claimed that one of the white jurors had characterized Hance as “just one more sorry nigger that no one would miss” – said that she had been too intimidated to protest. One of the white jurors also later came forward to testify in an affidavit that “there was a good deal of racial tension in the jury room, and the other jurors made repeated comments between themselves about the race of the defendant and the one black woman holding out. I specifically remember one white woman, back in the hotel room, stating ‘the nigger admitted he did it, he should fry’.

If an immigrant or foreign national accused of a capital crime has mental illness of any kind, cross-cultural challenges will be substantial (see also case of José Amaya Ruiz, *Poor witnesses on their own behalf*, above). The more inexperienced, under-resourced, unmotivated, or prejudiced the defence lawyer, the greater the problem and the more likelihood of unfairness in outcome. This unfairness will be further compounded in the event that prosecutorial zealotry tips over into misconduct.

Hung Thanh Le was sentenced to death for the murder of a fellow Vietnamese refugee in Oklahoma City in 1992. His post-arrest interrogation was marked by questionable police conduct against this foreign national who did not have access to consular or other assistance to help him overcome language and cultural barriers.²⁶² Hung Le's trial lawyers had done almost no investigation into his background or preparation of the witnesses. As a result, the mitigation testimony was brief, and did not include any expert evidence about the possible impact of Hung Le's refugee past on his behaviour. A juror from the trial later stated that a Vietnamese woman who was on the jury had not wanted to impose a death sentence, and had unsuccessfully tried to persuade the other jurors that Hung Le's actions at the time of the stabbing of his friend may have been affected by his background. After the trial, a Vietnamese psychologist concluded that, as a result of his life experiences, Hung Le was suffering from post-traumatic stress disorder at the time of the crime. Hung Le was 16 years old when he fled Vietnam. He witnessed, and was subjected to, violence and deprivation in his years in refugee camps in Cambodia and Thailand.

murder victim, because “there really was not family to talk with”. This was untrue. Indeed, Hance's appeal lawyers obtained an affidavit from the victim's brother that he did not support Hance's execution, and that neither would their mother have done.

²⁶² After his arrest, the police had made no effort to obtain an interpreter, despite Hung Le's limited command of English. He waived his right to have a lawyer present, yet towards the end of the interview, Hung Le said: “Too many things confusing me right now. I still don't know what to do and what to say. I don't have an attorney”. Asked whether he wanted a lawyer, he replied “No what is it? Like what for is it?” At a later hearing, Hung Le explained that he had had no prior contact with law enforcement in the USA, apart from a speeding ticket, and that he had feared that he might face torture if he did not cooperate with the police, as he said had been police practice in Vietnam. His statement to police was admitted at the trial despite the questionable circumstances under which it had been given. Indeed, a different judge had allowed Hung Le to withdraw his guilty plea on the grounds that, even with an interpreter, he had not understood the proceedings, including that he could be sentenced to death.

Not only were the mainly non-Vietnamese jurors denied any expert mental health evidence on which to base their verdict, they were encouraged by the prosecutor to let revenge creep into their deliberations. Arguing for execution, the prosecutor asked the jurors “do you really think that justice would be done if this man goes to prison, gets three meals a day and a clean bed every night and regular visits from his family while Hai Nguyen [the murder victim] lies cold in his grave?” This, the prosecutor argued, “doesn’t even come close to being justice... and you can only do justice in this case by bringing in a verdict of death”. The prosecutor also misstated the law when he told jurors that they did not need to consider in mitigation any evidence “about whether [Hung Le had] been a good guy in the past or anything like that”. He told the jury that “this man may be a small man in stature but he’s cold as an icicle. The state submits he’s without compassion or feelings”. Clearly, the actions of the state could be so described when officials took Hung Le from his cell, strapped him down, and killed him on 23 March 2004.²⁶³ In his final statement, Hung Le expressed remorse for his crime and apologized to the victim’s wife.

Competence to stand trial

If somebody is competent to stand trial, then they are competent to receive whatever sentence is appropriate. Most people who commit cruel and heinous crimes have some sort of mental problem or they couldn’t do it in the first place.

Grant Woods, former Attorney General of Arizona, 2000²⁶⁴

Under US law, a criminal defendant may not be tried unless he or she is competent.²⁶⁵ The test is whether the defendant has “sufficient present ability to consult with his lawyer

²⁶³ Governor Brad Henry rejected a unanimous recommendation by the state Pardon and Parole Board that the death sentence should be commuted to life imprisonment. On 26 February 2004, seven minutes before Hung Le was to be put to death, Governor Henry had stopped the execution after the Vietnamese embassy in Washington DC asked for a delay. On 19 March 2004, the embassy faxed a letter to Governor Henry expressing appreciation for the reprieve, and saying that it had received information on such issues as “Mr Le’s inadequate command of the English language for legal and procedural purposes; the prosecutorial misconduct...; the absence of prior-to-trial psychological evaluations; and Mr Le’s Post-Traumatic Stress Disorder.” The letter also noted the recommendation from the Pardon and Parole Board. However, the letter did not expressly ask for clemency.

²⁶⁴ *Killer dad not ‘evil person’*. The Arizona Republic, 10 September 2000.

²⁶⁵ This report covers only the USA’s use of its death penalty in its ordinary criminal justice system. It should be noted, however, that in the context of the “war on terror”, the US administration is proposing to try selected foreign nationals in front of military commissions set up under a Military Order signed by President George W. Bush on 13 November 2001. The military commissions will have the power to hand down death sentences. In the event that such trials do take place, the defendants are likely to have been held for years in indefinite detention in virtually incommunicado detention. Such conditions in the US Naval Base in Guantánamo Bay, for example, have long since been reported by the International Committee of the Red Cross to have caused a serious deterioration in the psychological well-being of large numbers of the detainees held in the base. The question of such individuals’ competency to stand trial must be raised. Trials by military commissions – executive bodies, not independent and impartial courts – will violate international fair trial standards. Amnesty International continues to oppose their

with a reasonable degree of rational understanding” and has “a rational as well as factual understanding of the proceedings against him”.²⁶⁶ The trial court must hold a hearing if “bona fide doubt” about the defendant’s competency to stand trial is raised.²⁶⁷ If the issue of whether a defendant was competent to stand trial is challenged on appeal, that is, after the trial, the determination should be based on “evidence of [defendant’s] irrational behavior, his demeanor at trial, and any prior medical opinion”.²⁶⁸

Nevertheless, capital defendants have stood trial for their lives despite compelling evidence that they were incompetent. Once such a defendant has been convicted and sentenced to death, it is an uphill task to persuade an appeal court that he or she had been incompetent at the time of the trial. This can be illustrated by the example of Oklahoma.

Oklahoma law used to presume that a criminal defendant was competent to stand trial unless he or she proved their incompetence by “clear and convincing” evidence. In 1996, in *Cooper v Oklahoma*, the US Supreme Court found that this burden of proof was unconstitutionally high, and that the standard must be a “preponderance” of the evidence. The case involved Byron Cooper, sentenced to death for the murder of an 86-year-old man during a burglary. He had been found competent to stand trial despite displaying mentally disturbed behaviour. For example, he spent much of the proceedings crouching in the fetal position and talking to himself. The State of Oklahoma had fought the appeal against his sentence. Shortly before the US Supreme Court heard oral arguments in the case, Attorney General Drew Edmondson wrote that the “effect of lowering that standard of proof – to make it easier for criminal defendants to hide behind a claim of mental incompetence – is to frustrate justice. This lawsuit is another example of why people are so disgusted with the criminal justice system. It represents another chance for the criminal to slap justice in the face.”²⁶⁹

Prosecutors in Oklahoma pursued the execution of Stephen Vann White for nearly two decades for the 1982 stabbing murder of Shirley Mann in Okmulgee. Stephen White was first sentenced to death in 1984. He had been found incompetent to stand trial in November 1983, but found competent five months later after treatment in Eastern State Hospital (ESH). His 1984 conviction was overturned in 1988 because the jury selection process had not been transcribed. At a December 1988 hearing, a doctor from ESH testified that White was incompetent to stand for retrial but that with anti-psychotic medication he could be restored to competency. After treatment at ESH, the doctor reported in February 1989 that White was competent as long as he was kept on the appropriate medication. White was sentenced to death at a retrial in May 1989.

use and call for the Military Order to be revoked. See, for example, USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, AI Index: AMR 51/063/2005, May 2005, <http://web.amnesty.org/library/Index/ENGAMR510632005>.

²⁶⁶ *Dusky v. United States*, 362 U.S. 402 (1960).

²⁶⁷ *Pate v. Robinson*, 383 U.S. 375 (1966).

²⁶⁸ *Drope v. Missouri*, 420 U.S. 162 (1975).

²⁶⁹ ‘It’s important to remember victims’ as convicted killer’s appeal nears’ by Attorney General Drew Edmondson. *The Oklahoma Gazette*, 27 December 1995. Drew Edmondson was still Attorney General in 2005.

Following the 1996 *Cooper* decision, Stephen White was granted a retrospective competency hearing to establish if he had been competent to stand trial under the revised standard of proof set by *Cooper*. At the hearing, held in 1997, the defence presented three expert witnesses and the two defence lawyers from the retrial. All five testified that, in their opinion, Stephen White had been incompetent in 1989. The two lawyers recalled that they had never had a meaningful conversation with him about the case, and that he had never participated in the preparation or presentation of his defence. The lead attorney, who had been practicing law for 28 years and had defended several hundred clients, said that he had never encountered a client who had behaved in this way before. All three mental health experts testified that Stephen White suffers from schizophrenia and organic brain syndrome. The latter, they claimed, was likely caused by White's long history of inhaling toluene, a chemical found in paint, which can cause irreversible brain damage. In 1983, Stephen White's IQ was assessed at 67, placing him in the mental retardation range.

For its part, the state claimed that Stephen White was faking his mental illness and presented three witnesses in court who testified to this. Two of them were social workers, who were not qualified to make an expert diagnosis. The state also read into the record the 1983 opinion of two doctors from ESH, who had claimed that White was malingering. All three defence experts concluded that White was not faking. One of them stated that he could not conceive how ESH "would keep a patient over a six-year period in the hospital on ten different admissions for almost two years of his life", if he was a malingerer. Another concluded that someone who was not genuinely mentally ill should not be given the medications that the state hospital was prescribing White, especially at such high dosages.

Nevertheless, at the 1997 hearing, the court found that Stephen White had been competent to stand trial eight years earlier. In 1999, the Court of Criminal Appeals overturned Stephen White's death sentence because the 1989 jury had not been properly informed of its sentencing options. For at least two more years, Stephen White was in Oklahoma State Penitentiary awaiting a resentencing hearing, with Okmulgee County intending to seek a third death sentence nearly two decades after the crime. Finally, in 2003 the prosecution agreed to a sentence of life imprisonment without parole.

The phenomenon of seriously mentally impaired people being found competent to stand trial for their lives is not confined to Oklahoma. It was also illustrated on 25 September 2000 when a North Carolina judge ruled that Johnnie Lee McKnight, accused of a capital crime committed in 1997 when he was 17 years old, was competent to stand trial. Judge Knox Jenkins had just overseen a competency hearing at which four mental health experts – two forensic psychiatrists and two forensic psychologists – all testified that Johnnie McKnight's learning disability and mental illness rendered him incapable of understanding his situation and being able to assist his defence attorneys. For example, a forensic psychiatrist at a state-run mental facility testified that Johnnie McKnight did not fully appreciate the seriousness of the charges, and that he would be unable to comprehend the court proceedings or to assist in his defence. She testified that McKnight had suffered auditory hallucinations since he was 12 years old, and was on anti-psychotic medication. She also noted the possibility that he might suffer from post-traumatic stress disorder as a result of seeing his brother stab someone to

death when he was about 12. An expert on learning disabilities testified that the defendant had mental retardation, with an IQ of 52. No expert evidence was presented to the contrary.²⁷⁰

In finding Johnnie McKnight competent to stand trial, Judge Jenkins said that “the Court must consider the quality and convincing force of the evidence rather than the quantity of evidence.” He said that the experts’ testimony conflicted with that of Johnnie McKnight’s co-defendant, Maurice Smith. Smith, who in 1999 pleaded guilty to the reduced charge of second-degree murder in return for testifying against McKnight, told the competency hearing of Johnnie McKnight’s alleged role in the crime. Judge Jenkins found McKnight competent after noting Smith’s contention that McKnight was able to perform basic tasks such as playing cards and driving a car, and had an ability to “purchase items and sell drugs with the ability to understand correct change” and “to read and remember lyrics from rap music”.²⁷¹

Percy Walton, an African American man, is on death row in Virginia for three murders committed when he was 18 years old. There is compelling evidence that this seriously mentally ill man was not competent to stand trial or to plead guilty. After his arrest in late 1996 for the murder of an elderly white couple and a 33-year-old black man in Danville, he displayed irrational behaviour. In telephone calls from the jail to his family, he insisted that his mother was his sister, and referred to his father as his brother, his grandfather as his father and his grandmother as his mother. He said that he had discovered that he had two brothers, when he had none. He told his mother he was the Queen Bee, and his grandmother that he was Superman. He told relatives that he was Jesus Christ, and that he was a millionaire. He insisted that he would come back to life as soon as he was executed, and that he would retrieve and bring back alive his grandfather who had recently died.

In pre-trial custody, his lawyer noted Walton’s unusual behaviour. In February 1997, for example, Percy Walton claimed to be Percy Gunn (Walton’s father) and also the “King of Hearts”. During a subsequent meeting, Walton told his lawyer that if he closed his eyes he could not be seen. He remained convinced that he would be released on bail despite his lawyer stating that this would not happen. Walton demanded a speedy trial at which his innocence would be proven. By July 1997, however, he was saying that he wanted to plead guilty because the “[electric] chair is for killers”. In a 1999 affidavit, his trial lawyer recalled how Percy Walton “did not meaningfully assist us in preparing a defense... Often times it was extremely difficult to communicate with Mr Walton, and there were occasions where we

²⁷⁰ *State v. McKnight*. Transcript of competency hearing, Cumberland County Superior Court, 31 August 2000.

²⁷¹ *State v. McKnight*. Order. Cumberland County Superior Court, 25 September 2000. For four years, the state intended to seek the death penalty. Amnesty International organized a worldwide campaign to persuade the prosecutors to drop the death penalty, because of McKnight’s age at the time of the crime and his mental impairments. Shortly, before the trial was due to begin in September 2001, the defence was informed that the prosecution had changed its mind and decided not to seek a death sentence. The defence then again raised the question of McKnight’s competency. Another hearing was held, in front of a different judge. That judge ruled that McKnight was incompetent to stand trial. The defendant was involuntarily committed to state psychiatric hospital, where he was put in a “competency restoration program”.

could not tell whether he understood what we were saying to him. Other times it was clear from Mr Walton's questions and responses to my questions that Mr Walton understood little of what I was telling him." The lawyer recalled that "we were unable to convince Mr Walton that he would not come back to life" if he was executed.

The defence asked for a mental health expert and the court appointed Dr Stanton Samenow, known as a prosecution-friendly psychologist (see case of Dwayne Wright, in *Especially vulnerable to inadequate defence representation*, above). Nevertheless after a number of meetings with Walton, Dr Samenow had serious doubts about his competence to stand trial, finding that the articulation of his thoughts was incomprehensible and irrelevant. He was particularly troubled by Walton's notion that execution did not result in permanent death. He recommended that Walton be placed in a secure psychiatric hospital on the grounds that he was a danger to himself and others. The trial court rejected this. In a 2001 affidavit, Dr Samenow wrote that the symptoms that Walton displayed in July 1997 were "consistent with forms of schizophrenia", but that he had not been able to make such a diagnosis without further evaluation. He stated that it was and remained his opinion that at that time Percy Walton was not competent to stand trial. However, he was not called to testify to that effect after the court ordered a psychiatrist at the state hospital to conduct an assessment. This psychiatrist determined that Walton was competent after a single meeting with the defendant, and without consulting with the trial lawyers, the family or Dr Samenow.

In September 1997, Percy Walton told his lawyer that he wanted to plead not guilty and have a jury trial because he was innocent. Days later, he reverted to admitting guilt again. At the end of that month, asked whether he would plead guilty or not guilty, he refused to speak, but responded by writing the word "chair" on a piece of paper. He told his attorneys that he wanted to be executed in order "to come back to life so he could be with his honeys". In court in October 1997, Percy Walton pleaded guilty to the murders and the judge accepted the plea.

The proceedings then moved into the sentencing phase. During the hearing, Percy Walton laughed, smiled and waved to family members. He even laughed during the "victim impact" testimony of one of the murder victims' granddaughters. During a break in the proceedings, he refused to come out of the holding cell, stating that he wanted to "go down the road and have the [electric] chair". He was shackled, sprayed with mace, and forcibly returned to the courtroom. He was sentenced to death. In 1999, a psychiatrist, a neuropsychologist and a neurologist evaluated Percy Walton and concluded that he suffered from severe chronic schizophrenia. It was their opinion that he was suffering from this illness at the time of the trial and that in all likelihood he had been incompetent to stand trial or to make rational decisions about his various legal options, such as how to plead.

The trial of a capital defendant is a critical part of the state's pursuit of an execution. Questions of professional ethics therefore arise when a defendant the state wants to kill is declared incompetent to stand trial and is then sent for treatment. For if that treatment is successful, the defendant may be returned to the courtroom to face trial for his or her life. An example of this occurred on 7 February 2005 in Louisville, Kentucky, when Sherman Noble was sentenced to death. He had been convicted of three murders committed in March 1987. He was found incompetent to stand trial and involuntarily committed to Central State Hospital

in Louisville where he was diagnosed with paranoid schizophrenia, a diagnosis he had also had before the crimes. He was not found competent to stand trial until 1997, and following lengthy pre-trial litigation, brought to trial in 2004.

While the state has an undeniable interest in pursuing the conviction of violent offenders, the death penalty for people suffering from mental illness cannot be described as essential state policy. What is more the death penalty frequently puts professionals involved in that process in positions where their involvement raises serious moral and ethical dilemmas. As ever, the answer to such questions is abolition of the death penalty itself.

Death wish 1 – Competence to waive counsel or plead guilty

A defendant who is utterly incapable of conducting his own defense cannot be considered 'competent' to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered 'competent' to make such a choice.

US Supreme Court Justices, 1993²⁷²

In numerous cases, seriously mentally ill defendants have been allowed to waive their right to a lawyer, and have represented themselves. Some have been sentenced to death after trials where they were clearly not representing their best interests. In some of these and other cases, such defendants have also been allowed to plead guilty.

Pernell Ford was executed in Alabama's electric chair on 2 June 2000 for the murder in 1983 of Linda Griffith and her mother, Willie Griffith, committed when Ford was 18 years old. He was tried in 1984 in front of an all-white jury (he was black, the two victims were white). Shortly before the trial, he dismissed his lawyers. He was found competent to act as his own lawyer despite his youth, his limited formal education, an IQ measured at 80, and his history of mental problems. From the age of six, Pernell Ford had spent extended periods in mental health institutions, and by 13 was being prescribed powerful anti-psychotic and anti-depressant drugs. During his adolescence he attempted suicide several times, by methods including overdose, hanging and poisoning.

The only "defence" Pernell Ford offered was that God would intervene at the trial and bring the victims back to life. For most of the proceedings, Ford remained silent and withdrawn. There was no opening statement on his behalf, no objections, and no cross-examination of any witnesses. At his sentencing, Pernell Ford dressed himself in a white bed sheet, worn toga-style with a belt and shoulder strap made from a white towel. In a long speech, he asked the judge to have the coffins of the Griffiths brought into the courtroom so that God could raise them from the dead in front of the jurors. He was sentenced to death. On death row, he periodically gave up his appeals, but resumed them when his mental health stabilized. He was diagnosed as suffering from schizophrenia and depression and treated with a range of drugs. He was executed after giving up his appeals.

In 1993, the US Supreme Court ruled that the competency standard for a defendant to waive his right to a lawyer or to plead guilty is the same as the competency standard for

²⁷² *Godinez v. Moran*, 509 U.S. 389 (1993), Justice Blackmun, joined by Justice Stevens, dissenting.

standing trial.²⁷³ In other words, once a defendant is found competent to stand trial – under the test he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him” – the defendant is, by definition, competent to waive counsel and to plead guilty.

The case before the Supreme Court involved Richard Moran, sentenced to death in Nevada for shooting two people in a bar and, nine days later, shooting his former wife. After the latter crime, he shot himself and slit his wrists. He survived, confessed from his hospital bed, and was charged with capital murder. He initially pleaded not guilty, but 10 weeks later informed the court that he wished to fire his lawyers and plead guilty, giving the reason that he did not want any mitigation evidence presented. At that time, psychiatric reports indicated that he was severely depressed. In the jail, he was being prescribed four drugs which he would later testify had a numbing effect on him. Without the court conducting a hearing, he was found competent to waive counsel and allowed to plead guilty. He presented no defense, called no witnesses, and offered no mitigation. He was sentenced to death.

Two of the US Supreme Court Justices dissented, arguing that the trial court should have held a separate competency hearing on this issue under these circumstances. They pointed out that:

*“A person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin. The majority’s monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose... The record in this case gives rise to grave doubts regarding...Moran’s ability to discharge counsel and represent himself. Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution... To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. [We] cannot condone the decision to accept, without further inquiry, the self-destructive ‘choice’ of a person who was so deeply medicated and who might well have been severely mentally ill.”*²⁷⁴

Richard Moran was executed in 1996. Meanwhile, seriously mentally ill defendants continue to be allowed to represent themselves at trial and/or plead guilty in apparent suicide bids.

In 1995, Jeremy Sagastegui raped and killed a three-year-old whom he was baby-sitting, and shot and killed the boy’s mother and her friend when they returned home. He gave a detailed confession to the crime, saying that he had killed the child because he was “going to grow up to be a molester... he didn’t deserve to die but... he had no supervision [and] was probably going to grow up to be a murderer”. At his 1996 trial, Jeremy Sagastegui waived his right to counsel and acted as his own lawyer. He rejected jurors less likely to favour the death penalty, and objected when the prosecution rejected a juror who would have automatically

²⁷³ *Godinez v. Moran*, 509 U.S. 389 (1993).

²⁷⁴ *Godinez v. Moran*, 509 U.S. 389 (1993), Justice Blackmun, joined by Justice Stevens, dissenting.

returned a death sentence. Jeremy Sagastegui pleaded guilty, and offered no mitigating evidence. The jury was therefore left unaware that he had been conceived as a result of a rape, rejected by his mother in infancy and childhood, and subjected to severe abuse as a child, including repeated rape and sexual abuse by his stepfather and other male relatives. The were left unaware that shortly before the crime, a doctor had diagnosed Sagastegui as suffering from schizophrenia and bipolar disorder, and that he had been admitted to a mental facility three months before the crime as a suicide risk and treated for depression. In custody during the trial proceedings, a doctor had diagnosed Sagastegui as suffering from probable bipolar disorder as well as post-traumatic stress disorder. Jeremy Sagastegui urged the jurors to sentence him to death, which they did. On death row, where he was prescribed anti-psychotic medication, he refused to appeal his death sentence. He was executed in October 1998, less than three years after the crime.

A matter of weeks after Jeremy Sagastegui was executed, Thomas Akers was arrested in Virginia for the murder of Wesley Smith. With a history of mental problems and a childhood of deprivation and abuse, he had come into conflict with the law from an early age and been confined in juvenile facilities. Despite his mental problems, including brain damage, hallucinations, extreme depression, and at least one suicide attempt, he never received the appropriate long-term therapeutic care that was recommended by mental health professionals at the time. In 1987, when he was 17, he was arrested for stealing, tried and sentenced to adult prison. After a few months, he wrote to the judge who had sentenced him, and asked to be put to death in Virginia's electric chair. After being paroled in August 1998, he began wearing a necklace with an electric chair pendant. He told his family that he was going to be executed. In December 1998, he was arrested for the murder of Wesley Smith. Thomas Akers told his court-appointed lawyers not to bother with a defence, and in April 1999 wrote to the prosecutor: "I have no sympathy or remorse for beating Wesley Smith to death... I am my own "god". I take lives at will and I believe and follow myself. Death is all fun and games to me and my "followers".... By the way I challenge you and any Franklin County Judge to a courtroom dual by a "straight trial". I don't even want a jury trial!... I don't believe the Commonwealth or judges have the heart to sentence me to death. And if I do get live [sic] without parole I promise Virginia I will plot and scheme behind bars and escape and come back to Franklin County and execute justice to

A natural outgrowth of a mental health system that withholds needed treatment until a person with a mental illness becomes dangerous is that police officers and sheriff's deputies are forced to become front line mental health workers. The safety of both law enforcement officers and citizens is compromised when law enforcement responds to crises involving people with severe mental illnesses who are not being treated. In 1998, law enforcement officers were more likely to be killed by a person with mental illness than by an assailant with a prior arrest for assaulting police or resisting arrest. And people with mental illnesses are killed by police in justifiable homicides at a rate nearly four times greater than the general public.... There are also many cases where individuals with mental illnesses provoke police into killing them. This is now commonly called "suicide by cop".

Law enforcement and people with mental illnesses. Briefing Paper, Treatment Advocacy Center, Arlington, Virginia, USA, 2005
<http://www.psychlaws.org/BriefingPapers/BP16.htm>

some special people I have in mind! Don't procrastinate. Let's get the killing on the way! ... I've mastered 33 degrees in 11 years. I possess 360 degrees of pure rawl [sic] power." He then wrote to the trial judge directly: "...If you choose to let me live and not seek the death penalty then the next person or persons I kill the death will be your fault by allowing me to live and not sentencing me to death. So what I want to do is waive the jury and plead guilty to capital murder in your court and be sentenced to death... Don't have sympathy [sic] or compassion for me in your courtroom. I don't have sympathy for myself much less for people or person I intend to kill in the future..." At the sentencing in November 1999, the judge sentenced Akers to death. Thomas Akers waived his right to appeal and was executed 15 months later.

Other mentally ill defendants have retained counsel but pleaded guilty in circumstances suggesting they were embarking on a suicide bid. In Georgia in 1998, Daniel Colwell's lawyer was aware that his client suffered from serious mental illness and that he would demand a death sentence at his trial as part of a suicide bid. Nevertheless, the judge dismissed the lawyer's motion to have Colwell ruled incompetent to stand trial and to receive treatment for his illness. Daniel Colwell had been diagnosed throughout his adult life as suffering from various mental illnesses, including schizophrenia. His pre-crime medical records include references to his suicidal ideations.²⁷⁵ These included ideations about suicide-by-execution.²⁷⁶

At the trial, Colwell insisted that his lawyer read out a letter he had written, warning the jury of the consequences of not passing a death sentence. "I might torture your family or friends. As long as I am alive, I might kill again. Jurors, why take the risk? Daniel Colwell must die. God has selected you jurors to seek justice for Daniel Colwell and the victims. Death is the answer. God has no problem with it. I should suffer, and the greatest suffering is death." The judge refused to allow the defence lawyer to withdraw from the case, dismissed his objections to the court's deference to Colwell's illness-driven self-destructive strategy, and insisted that he put his client on the witness stand as Colwell wished. There Colwell testified that he committed murder in order that the state would execute him for it. He said that he brought a gun in July 1996 in order to kill himself, but when he discovered that he could not do it, he randomly selected Mitchell Bell and Judith Bell and shot them dead in a car park. From the witness stand, he again threatened the jurors if they failed to vote to send

²⁷⁵ For example: "Very determined to commit suicide" (3 July 1989); "History of discontinuing medications..., frequently states that he is going to commit suicide" (27 October 1989); "...says he wants to commit suicide and will 'work through the Legislature' to change the laws so that people who wish to kill themselves may do so without fear of punishment" (21 October 1991);

²⁷⁶ A psychiatric report from April 1993 states: "The threat in 1992, was that he threatened to kill a human, such that he would get the electric chair. He wanted to kill himself in that manner." A report later that year recalls Colwell's "statement to a counsellor that he wishes he had murdered someone so that he could be executed by the state." A 1995 psychiatric report written a year before the crime for which he is now on death row states: "Daniel Colwell is a 34-year-old, single, black male from Sumter County who presents after being discharged from the Prison System around two months ago. The patient was in prison because [he] had threatened to kill [an] official. He was doing this because he wanted to be executed, and he thought that if he killed someone important they would kill him. He had around three suicide attempts in the past... He at times will hear voices telling him to kill himself."

him to the electric chair. The jury granted Colwell his wish and sentenced him to death in October 1998.

On death row, Daniel Colwell's will to live appeared to fluctuate with his medication. In mid-1999 he decided that he wanted to live and took up his appeals. At that time, his lawyer said: "He now realizes that the decisions which he made before and during his trial were decisions which were not the acts of a sane and rational human being. This is exactly the argument we made: Dan Colwell is ill. Stop the process and get him treated, so he won't want to die and realize what he did was a result of his mental illness. The irony of this is that he's finally received proper treatment on death row."²⁷⁷

However, in 2000, the prison changed his medication back to what he was being prescribed as an out-patient prior to the 1996 murders. That medication had exacerbated his bipolar disorder and is thought to have directly contributed to his state of mind around the time of the crime. He dropped his appeals. Legal efforts continued on his behalf, and at times Daniel Colwell would be forcibly medicated on death row. Then, in January 2003, Colwell hanged himself in his cell. The state subsequently agreed to an out-of-court settlement in a wrongful death lawsuit brought by his family, which they donated to anti-death penalty and pro-mental health efforts in the state. The extent to which any misadministration of drugs by the authorities contributed to his death may never be known. In June 2005, his trial lawyer, now Director of the Georgia Public Defender Standards Council, recalled to Amnesty International how Daniel Colwell's case appeared from the outset to be one in which "no-one in the system seemed to care". He added that to this day, "someone as mentally ill as Daniel Colwell could be still be tried, sentenced to death and executed in the State of Georgia. The struggle is far from over."

The death penalty did not deter a severely mentally ill man from committing a double murder. Indeed, the evidence suggests that it had the opposite effect. Daniel Colwell's case should serve as one chilling reminder of why the state should end its attachment to this destructive punishment.

Death wish 2 – Competence to waive appeals

Rumbaugh seeks death because he knows himself to be mentally ill and has lost hope of obtaining treatment. If not for his illness and his pessimism regarding access to treatment, he would probably continue to challenge his death sentence; but faced with his vision of life without treatment for severe mental illness, Rumbaugh chooses to die... a desperate man seeking to use the State's machinery of death as a tool of suicide.

Two US Supreme Court Justices, 1985²⁷⁸

An early sign that the USA's post-1976 era of the death penalty was not going to be reserved for the most culpable defendants, or comply with international law and standards, was the execution of Charles Rumbaugh in September 1985. He was 17 years old at the time

²⁷⁷ *Americus killer changes his mind, wants to live*. Atlanta Journal-Constitution, 14 July 1999.

²⁷⁸ *Rumbaugh v. McCotter*, denial of *certiorari*, Justices Marshall and Brennan dissenting.

of the crime and had serious mental illness. He became the 48th person to be put to death since the resumption of executions in 1977, and the sixth to have given up his appeals and “consented” to his execution.

This phenomenon has continued. About one in 10 of the people executed in the USA since 1977 have been so-called “volunteers”, death row prisoners who had dropped their appeals and “consented” to execution.²⁷⁹

Any number of factors may lead a prisoner not to pursue appeals against his or her death sentence, including mental disorder, physical illness, remorse, bravado, religious belief, the severity of conditions of confinement, including prolonged isolation and lack of physical contact visits, the bleak alternative of life imprisonment without the possibility of parole, pessimism about appeal prospects, a quest for notoriety, or simply a desire to gain a semblance of control over a situation in which the prisoner is otherwise powerless.

A condemned prisoner who drops his appeals has to be competent to do so. The test which some courts in the USA use to determine this is based on a 1966 US Supreme Court decision and is “whether [s/]he has the capacity to appreciate his [/her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether [s/]he is suffering from a mental disease, disorder, or defect which may substantially affect his [/her] capacity...”²⁸⁰ If a condemned inmate is found incompetent to waive his or her appeals, someone found to have legal standing as a “next friend” may pursue litigation on their behalf.²⁸¹ A state court’s finding that an inmate was competent to waive their appeals is entitled to a presumption of correctness.²⁸²

According to recent research, between 1976 and 2004 there were only seven cases in which condemned inmates who waived their appeals were found incompetent to do so.²⁸³ Again, the standard is a minimal one. The recent case of Joseph Corcoran in Indiana is instructive on the difficulty in determining what constitutes rational decision-making by an inmate under a death sentence and what does not.

Joseph Corcoran is on death row in Indiana, having been convicted in May 1999 of killing his brother, his sister’s fiancé, and two other people at his sister’s home in July 1997. An expert testified that Corcoran suffered from a mental disorder, and the trial court found in

²⁷⁹ As of the end of 2005, at least 118 of the 1,004 (12 per cent) prisoners executed in the USA since 1977 had dropped their appeals and “consented” to their execution. See also *USA: The Illusion of Control*, AI Index: AMR 51/053/2001, April 2001, <http://web.amnesty.org/library/Index/ENGAMR510532001>.

²⁸⁰ *Rees v. Peyton*, 384 U.S. 312 (1966). For a detailed discussion of this case, see Phyllis L. Crocker, *Not to decide is to decide: The US Supreme Court’s thirty-year struggle with one case about competency to waive death penalty appeals*. 49 *Wayne L. Rev.* 885, Winter 2004.

²⁸¹ See *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

²⁸² *Demosthenes v. Baal*, 495 U.S. 731 (1990).

²⁸³ *Not to decide is to decide, op.cit.* The cases identified by this research were those of John Cockrum (Texas); Michael O’Rourke (Arkansas); Colin Clark (Louisiana); Kevin Scudder (Ohio); Kenneth Stewart (Virginia); Thomas Hays (Oklahoma); Donney Council (South Carolina).

mitigation, although not enough to warrant a life sentence, that Corcoran had acted “under the influence of a mental or emotional disturbance” at the time of the crime. Since being on death row, Joseph Corcoran’s mental health has deteriorated, and he has been diagnosed as suffering from paranoid schizophrenia.

Joseph Corcoran dropped his appeals, and the trial court held a hearing in October 2003 to determine his competency to do so.²⁸⁴ The state acknowledged that Corcoran suffers from mental illness. The defence presented three experts – a forensic psychiatrist, a clinical psychologist, and a neuro-psychologist – who had each separately evaluated Corcoran and reviewed his records. All three concluded that he was unable to make a rational decision to waive his appeals. They stated that the symptoms of his schizophrenia included recurrent delusions that the prison guards were torturing him through the use of an ultrasound machine, and that he was saying things without knowing and that this was causing people to be angry with him and mock him. Such delusions, the experts concluded, were causing him to hasten his execution in order to be relieved of his suffering. They were unanimous that his thought processes could not be described as rational or logical and that he was therefore incompetent to make the decision to drop his appeals.

Joseph Corcoran himself testified at the hearing, saying that the reason he wanted to waive his appeals was that he was guilty of murder, and “I should be executed. That is all there is to it.” He appeared to have a good understanding of the legal status of his case, and that the result of not pursuing his appeals would be execution. Yet at the same time, he was suffering a delusional sickness. In December 2003, the trial court ruled that Joseph Corcoran was competent to waive his appeals, and this decision was upheld by the Indiana Supreme Court in January 2005. However one of the five Justices dissented, agreeing with the view of the three mental health experts that because of Corcoran’s delusions, his decision-making could not be described as rational. Justice Rucker pointed out that according to the expert testimony, far from faking his mental illness, Corcoran was trying to downplay it, and that the more time one spent with him, the more “you begin to understand how his thought process is a little bit skewed. And, in fact, the deeper you go, the more skewed it appears. And you can begin to understand how he might feel that execution might be preferable to life as he currently experiences it.” Justice Rucker agreed, stating that although “Corcoran is a man of considerable intelligence and expressive powers...the fact that he offers what otherwise might be considered a rational explanation for his decision to die is itself intricately related to his mental illness”.

Joseph Corcoran was set an execution date of 21 July 2005, but decided to resume his appeals. A number of condemned prisoners with serious mental illness, who have been allowed to waive their appeals, have been executed (see Appendix).²⁸⁵ Two such people were

²⁸⁴ The information on Joseph Corcoran’s competency hearing is taken from *Corcoran v. State*, 820 N.E.2d 655, Supreme Court of Indiana, 11 January 2005.

²⁸⁵ See also: *Killing the willing: ‘volunteers’, suicide and competency*, by John H. Blume, Cornell Law School, Legal Studies Research Paper Series, No. 04-022. This paper can be obtained at: <http://ssrn.com/abstract=591263>.

Gary Heidnik, executed in Pennsylvania in July 1999, and Christina Riggs who was put to death in Arkansas 10 months later.

By the time of his execution, Gary Heidnik had a history of diagnoses of paranoid schizophrenia going back two decades. He was convicted of appalling crimes committed over a six-month period in 1986 and 1987. According to the record, he kidnapped six women during that period, murdering two of them by starvation and physical abuse. Gary Heidnik never challenged his death sentence, handed down by a jury in 1988 and affirmed by the Pennsylvania Supreme Court in 1991, but his execution was delayed for years as the then governor refused to sign death warrants. In March 1997, a new governor issued a warrant for Heidnik to be executed the following month, and the prisoner reaffirmed his refusal to challenge his death sentence. Lawyers filed a claim that Heidnik was incompetent for execution under *Ford v. Wainwright*, and the trial court convened a hearing on the issue. At the hearing, Gary Heidnik asserted his innocence of the murders, and that he had been framed by the kidnapped victims who had themselves carried out the killings. He stressed his belief that the Federal Bureau of Investigation could prove his innocence, and had sought to contact the agency for years. He said that the outrage at his execution as an innocent man would bring an end to the death penalty in the USA. His lawyers argued that this was a clear symptom of his delusions.

Three mental health professionals, including the chief psychologist of the state prison where Heidnik was held, who had all examined Heidnik on a number of occasions, agreed that he suffered from paranoid schizophrenia. The US Court of Appeals for the Third Circuit noted that one of the experts, who had treated Heidnik, related that his symptoms included “a series of fixed false beliefs which are patently absurd and inconsistent with reality, which are all-encompassing in nature and which color every aspect of his cognitive functioning... He further observed that there was no point of contact between Heidnik and the rational world”.²⁸⁶ The prison’s chief psychologist, along with the other two experts, concluded that Heidnik’s delusions rendered him entirely incompetent to drop his appeals and be executed.

However, the state’s sole expert witness at the hearing essentially testified that Gary Heidnik did not suffer from paranoid schizophrenia, was not delusional, was not mentally ill, and was not incompetent. Dr John O’Brien had met Heidnik once, for about 90 minutes. He said that many prisoners maintained their innocence, so “I don’t regard that as delusional and I don’t regard it as delusional in Mr Heidnik’s situation either”.²⁸⁷

The court sided with the state and rejected the claim that the prisoner was incompetent. The Pennsylvania Supreme Court subsequently issued a stay of execution until further notice. Separately, a federal district judge held an emergency hearing on the issue of whether Heidnik was competent to waive his appeals. Dr O’Brien again testified, as well as sitting at the prosecution’s table and assisting the state in cross-examining the defence witnesses. The district court’s subsequent decision that Heidnik was competent was overturned by the US Court of Appeals for the Third Circuit, which in turn was reversed by the US Supreme Court.

²⁸⁶ *In re Gary Heidnik and White v. Horn*, 112 F.3d 105,109 (3rd Cir. 1997).

²⁸⁷ *Ibid.*

However, the state Supreme Court stay of execution held while litigation continued around the issue of Heidnik's competence to waive his appeals and of his daughter's "next friend" standing to pursue appeals on his behalf. The trial court appointed Dr O'Brien to evaluate Heidnik, despite the fact that he had been a witness for the state previously. He concluded that he was competent to waive his appeals. For the defence, two doctors testified that Heidnik was not competent.

The state courts refused to stop the execution. The litigation turned to the federal courts again and on 6 July 1999, the US Court of Appeals for the Third Circuit refused to issue a stay. One of the three judges dissented. Judge McKee pointed out that in a federal district court hearing a week earlier, the state had agreed that Heidnik's mental condition was the same then as it had been in 1997. Judge McKee recalled that in 1997, the Third Circuit had found Heidnik to be incompetent after reviewing a "nearly identical record" as now.²⁸⁸ In 1997, he said, the Third Circuit had issued a stay after finding that:

*"a paranoid schizophrenic suffering from broad-based delusional perceptions has made a decision to die immediately rather than pursue available judicial remedies that conceivably might save his life. The only explanation he has advanced for having chosen immediate death is that after his death the public will become convinced that he was an innocent victim of a conspiracy and that the realization that he has been executed though innocent will end capital punishment once and for all. Petitioners' three experts unanimously concluded that Heidnik's death decision is based on his delusional perception of reality – and has no rational basis. Dr O'Brien [the Commonwealth's witness] has simply failed to explain how Heidnik's choice has a rational basis and is not based on his delusional perception".*²⁸⁹

By the state's own admission, there had been no change in Heidnik's condition since then. Judge McKee concluded that the appeal brought by Heidnik's daughter had provided "clear and convincing evidence" of Heidnik's incompetence. The Judge said that the court must not allow Heidnik's crimes, which were "etched into the collective memor[y]" and which "made everyone feel less human to think that anyone could do what he did to another human being", to "define our analysis". Judge McKee said that he was dissenting from his colleagues' refusal to stop the execution because he could not "stand by and say nothing while an insane person is put to death by the state contrary to the mores of civilized society". Gary Heidnik was put to death a few hours later.

On the night of 4 November 1997, Christina Riggs, who came from a family with a history of mental illness and suicidal tendency, killed her two young children, Justin Dalton Thomas and Shelby Alexis Riggs. Having sedated them with an anti-depressant, she planned

²⁸⁸ Judge McKee noted that the state had presented another witness at the state hearing. Dr Sadoff had supported the state's theory that Heidnik's choice to waive his appeals was rooted in his attempt to derive social meaning from his death (i.e. his belief that outrage at his execution would end capital punishment), and was therefore a rational choice. However, Judge McKee also noted that Dr O'Brien had previously asserted this, and the Third Circuit had rejected that position in its 1997 decision.

²⁸⁹ *White v. Horn*, US Court of Appeals for the Third Circuit, 6 July 1999, Judge McKee, dissenting.

to inject them with potassium chloride (the chemical used to stop the heart in US lethal injections), which she had got from the hospital where she worked as a nurse. She did not realize that it should be diluted before use. When she injected Justin, therefore, he awoke in pain. She then gave him morphine and smothered him with a pillow. Not wanting to inject Shelby, she proceeded to smother her with a pillow also. She carried both children to her bed and lay them in it. She then wrote a suicide note to her mother and took a large quantity of anti-depressant pills and injected herself with potassium chloride concentrate. Not being diluted, it ate a hole in her arm, collapsing her vein and never reaching her heart. The pills rendered her unconscious.

She was discovered the next morning and taken to hospital where she was stabilised in intensive care and kept under police guard. On the night of 5 November 1997, her family, who had still not been allowed to see her, hired a lawyer. Before he arrived, however, the police took an eight-minute taped confession from Christina Riggs early on the morning of 6 November. Much of her statement was inaudible as she was crying throughout, and towards the end appeared to be hallucinating. At her trial, a psychiatrist and a psychologist testified that her actions were the result of severe depression. They gave their opinion that, to her, the children's deaths were an act of love and an extension of her own suicide. The psychologist said: "The pathological suicidal depression that she was in... effectively precluded her from being able to do something more reasonable, something more appropriate. From the outside looking in, the death of two children like this is pretty horrible. From the inside looking out, it looks like an act of mercy." For the state, a psychiatrist and a psychologist did not dispute that her suicide bid was genuine, but testified that they did not believe that she was sufficiently depressed to justify the defence of not guilty by reason of mental impairment. The jury agreed and convicted her of capital murder after less than an hour of deliberation.

At the sentencing, Christina Riggs refused to have any evidence presented on her behalf and asked the jury for a death sentence: "I want to die. I want to be with my babes. I started this out seven months ago. And I want you to give me the death penalty. I don't want you to feel guilty." Having been granted her wish, she then refused to appeal her sentence. On 2 May 2000, Christina Riggs was given the lethal injection by the state that she had attempted to administer to herself 29 months earlier.

Competency for execution – the 20-year failure of Ford

In Ford, drawing on long-established common law principles, the Supreme Court held that the Eighth Amendment prohibits execution of the insane. Although the Ford Court identified some of the components necessary to demonstrate a constitutionally minimum definition of insanity, application of Ford presents challenges because the Court did not define insanity or mandate procedures that courts must follow in determining whether a defendant is insane.

US Court of Appeals for the Fourth Circuit, 28 April 2005

It is nearly two decades since the US Supreme Court ruled, in *Ford v. Wainwright*, that the execution of an insane prisoner violates the Eighth Amendment ban on "cruel and unusual punishments". In effect, this decision only affirmed what was already the case in the individual states. Indeed, 36 years earlier, a US Supreme Court Justice had written: "That it

offends our historic heritage to kill a man who has become insane while awaiting execution cannot be gainsaid... [N]ot a State in the Union supports the notion that an insane man under sentence of death would legally be executed.”²⁹⁰ The majority opinion in *Ford* in 1986 reiterated that “[t]oday, no State in the Union permits the execution of the insane”, and added: “For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids this practice. Today we keep faith with our common-law heritage in holding that it does.”²⁹¹

The pressing questions for the Supreme Court, then, were: what is the definition of competence for execution, and what procedures should the state employ to determine whether a prisoner meets this standard? The *Ford* opinion failed to answer either question. While five Justices – a narrow majority – joined to rule that the execution of the insane violated the Eighth Amendment of the Constitution, this majority broke down for the remainder of the ruling. The closest the majority came to the question of definition was to note that:

“[T]oday, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today... It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.”

In a separate opinion, Justice Powell built on this to offer “the meaning of insanity in this context” which had been left open by the Court:

“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 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.”

Arguably this is a minimal standard. Even if a condemned inmate seems to be able to make some connection between their crime and their punishment, if this connection takes place in an inner world that is entirely delusional and the product of profound mental illness, can they truly be said to have an understanding of what is happening to them and why? Also, the definition does not require states to determine if the prisoner has the capacity to be able to assist his or her lawyer. In his *Ford* concurrence, Justice Powell had suggested that it is “unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free”. The intervening years have shown that Justice Powell’s confidence was misplaced, given the rate of error in capital cases. For example, in 1998 Anthony Porter came 48 hours from execution for a crime he did not commit. His execution was stayed on a claim that Porter had mental retardation and was incompetent for execution.

²⁹⁰ *Solesbee v. Balkom*, 339 U.S. 9 (1950), Justice Frankfurter, dissenting.

²⁹¹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

While a competency hearing was pending, some journalism students investigated the case and uncovered evidence of Porter's innocence of the crime for which he had spent some 17 years on death row.

On the question of the procedures to be used to make competence-for-execution determinations, the *Ford* Court left to the individual states "the task of developing appropriate ways to enforce the constitutional constriction upon its execution of sentences".²⁹² Four of the Justices found that the Florida procedure (the case involved Alvin Ford on Florida's death row) was flawed because it failed to "include the prisoner in the truth-seeking process", and denied him or her "any opportunity to challenge or impeach the state-appointed psychiatrists' opinions". The four Justices found that the "most striking defect" was the fact that the competency determination rested "wholly within the executive branch". Justice Powell disagreed that a judicial proceeding was required, suggesting that "a constitutionally acceptable procedure may be much less formal than a trial", and that "an impartial officer or board" to review the evidence from both sides would suffice. Two other Justices believed that the only flaw in Florida's procedures was that there was no opportunity for the prisoner to be heard, while the remaining two Justices, dissenting in full, wrote that "wholly executive procedures can satisfy due process" on this issue.

This failure to clarify procedures has meant that different states take different approaches. The fairness of existing procedures in some states remains in serious question. In the case of Arizona, for example, this was noted by a federal judge when he stopped the execution of Salvadoran national José Amaya Ruiz in January 2001. This prisoner had been diagnosed with bipolar disorder and paranoid schizophrenia. He was treated with anti-psychotic medication for more than a decade, although he sometimes refused treatment, either because he believed he was not ill or that the drugs were poison. In 2000, he was taken to a secure psychiatric facility after two doctors concluded that he was incompetent to be executed under *Ford v. Wainwright*. He was restored to what the state hospital determined was competency for execution. The Arizona prosecuting authorities asked the state Supreme Court to set a date. The trial court determined that under Arizona law, the state hospital's certification of competency meant that it no longer had jurisdiction to consider further legal challenges. The state Supreme Court upheld that decision and issued an execution date of 18 January 2001, stating that "all requisite standards are satisfied". Two Justices dissented, arguing that there should be a hearing at which the state hospital's finding of competency could be challenged. US District Judge William D. Browning stopped the execution. He noted that the *Ford* decision had left unclear "what state procedures are adequate for addressing a competency-to-be executed claim." He found the Arizona procedures wanting, noting that under Arizona law:

²⁹² The Supreme Court majority said the same thing in 2002 in the *Atkins v. Virginia* decision outlawing the death penalty for offenders with mental retardation. The only difference was that it added a pointer towards acceptable definitions of mental retardation for states to follow: "The statutory definitions of mental retardation [in individual states] are not identical, but generally conform to the clinical definitions [of the American Association of Mental Retardation and the American Psychiatric Association]."

*“the decision about when and if a prisoner has recovered competency for execution rests entirely with the chief medical officer of the state hospital... [A] prisoner found incompetent by a superior court judge and then later declared competent by the state hospital has no direct method of challenging the state officer’s determination. The statutes do not provide for a hearing before a judge to determine sufficiency or reliability of the hospital’s evaluation... nor do the statutes provide for the appointment of defense experts to examine the prisoner, a hearing at which to present any evidence which may contradict the hospital’s report, or a right to appeal [to] the Arizona Supreme Court....”*²⁹³

Judge Browning found that Arizona’s procedures were “substantially inadequate” to protect a condemned prisoner’s “right to a fair redetermination of his competency”. He cited statutes in a number of other states (Tennessee, California, Kentucky, Mississippi, Montana, Nebraska, New York and Wyoming) requiring or allowing for a judicial hearing into a competency-for-execution claim. He ordered a federal evidentiary hearing. However, in the event, the hearing was never held as José Amaya Ruiz was eventually found to have mental retardation and re-sentenced to life imprisonment following *Atkins v. Virginia*. Arizona had revised its competency-for-execution laws in 1993 and amended again in 1999. They have not been changed since. In other words, according to Judge Browning (and at least two state Supreme Court Justices), 20 years after the *Ford v. Wainwright* decision, the Arizona procedures still fail to pass constitutional muster.

Other states have provided slow, minimal or no responses to the *Ford* ruling. For example, it was 13 years before Texas enacted Article 46.4 of its Code of Criminal Procedure. The law, which came into force on 1 September 1999, sets out the procedures governing competency to be executed. Within a year, a judge on the Texas Court of Criminal Appeals (TCCA) had dissented from the majority’s dismissal of a death row inmate’s claims surrounding his competency to be executed, accusing the Court of reading “the absence of a provision in article 46.04 which explicitly deals with the appointment of counsel” as “negation of the constitutional right to counsel at critical stages of a criminal prosecution”. The judge also found the majority’s finding that the TCCA could review only findings of incompetence “equally disturbing”, pointing out that “[u]nder the majority’s logic, a trial court may insulate itself from review by this Court by the simple expedient of finding all applicants competent.” “Surely”, the judge wrote, “the legislature would not want its stated intention of not executing incompetent persons to be so easily over-ridden”.²⁹⁴ Perhaps not, but seriously mentally ill inmates have gone to their execution in Texas since then, including Monty Delk, James Colburn and Kelsey Patterson.

²⁹³ *Amaya-Ruiz v. Stewart et al.* Order for stay of execution. In the United States District Court for the District of Arizona. 5 January 2001.

²⁹⁴ *Ex parte Jeffrey Henry Caldwell*, 58 S.W.3d 127 (Tx Ct. Crim. App. 2000), Judge Johnson, dissenting from order dismissing application for a writ of habeas corpus.

In other states, no legislation has been enacted on this issue since the *Ford* ruling. In 2005, the US Court of Appeals for the Fourth Circuit described as “troubling” the admission by the authorities in Virginia “that there is no procedure in Virginia for raising a *Ford* claim”.²⁹⁵

A roll call of shame: Time for majority judicial intervention

It is unsurprising, then, that two decades after the *laissez-faire* ruling in *Ford v. Wainwright*, (a) individual states have maintained a range of procedures to determine the issue of competence for execution and (b) seriously mentally ill inmates have been executed. This shameful situation has not gone unnoticed by members of the judiciary along the way. Examples of such judicial concern include the following cases:

- **Lesley Lowenfeld, executed in Louisiana, 1988**

Lesley Lowenfeld, a national of Guyana, had been found competent to stand trial, even though three psychiatrists had found him to be “paranoid in the extreme”. After his execution date was scheduled, a clinical psychologist concluded that in all probability, Lowenfeld was suffering from paranoid schizophrenia, and also found that he was “unable to understand the death penalty”. Nevertheless, the courts ruled that the execution could go ahead. In a dissent against the US Supreme Court’s 5-4 vote to deny a stay of execution, Justice Brennan wrote:

“Every court that has considered petitioner’s insanity claim has made a mockery of this Court’s precedent and of the most fundamental principles of ordered justice... It is beyond me why [the psychologist’s] unrefuted affidavit, which was the sole evidence before the courts, did not establish petitioner’s insanity by a preponderance of the evidence... The haste that attended disposition of this case is reprehensible. It is hardly surprising that a case scudding through the state courts in 24 hours should yield orders devoid of law or logic - the ones in this case simply read ‘DENIED’ - for which the description ‘terse’ would be charitable. If the federal courts are intent on accelerating the pace at any cost, as they were in this case, their only choice is to take procedural shortcuts and give short shrift to substance. And simple arithmetic suggests grave injustice when the Court of last resort takes 15 minutes to read and analyze 17 pages of opinions from the court below and cast a vote on life or death. Due process means little if it requires the courts to provide an ‘opportunity to be heard’, without imposing on them a concomitant duty to listen - and, at least when a life is at stake, to listen very carefully. Presumably, it was in recognition of the injustice that four of us (one less than the requisite five) voted to stay petitioner’s execution, so as to consider his insanity claim in an atmosphere that was not itself lunatic. Regrettably, this case is not atypical. It is the natural product of a penal system conducive to inaccurate factfinding and shoddy analysis...”

- **Ricky Ray Rector, executed in Arkansas, 1992**

²⁹⁵ *Walton v. Johnson*, 407 F.3d 285 (4th Cir. 2005).

Court-appointed examiners found that “no mental illness or defect prevents [Ricky Ray Rector] from being aware of his impending execution and the reason for it”. However, they also concluded that because of his mental impairments it was unlikely that Ricky Ray Rector could assist his lawyer in any meaningful way in uncovering facts “that might make his punishment unlawful or unjust”. The courts refused to stop the execution, saying that, under *Ford*, the only thing that mattered was whether the prisoner understood the reality and reason for his execution. Justice Marshall dissented against the Supreme Court’s refusal to intervene. He noted that the *Ford* decision had left open the definition of competence for execution, and therefore had not answered the question as to whether the prisoner should be able to assist his lawyer or not. Justice Marshall noted that the *Ford* majority had cited 200-year-old old commentary on English law (by Sir William Blackstone) which held that if a condemned prisoner became insane, the execution should be stayed because only when the inmate was competent, might he be able to allege “something in stay of judgment or execution”. Justice Marshall added further historical references as to why the definition of competence for execution should include whether the inmate can assist his or her legal counsel. Justice Marshall noted that there were many mentally ill inmates on death row in the USA: “Unavoidably, then, the question whether such persons can be put to death once the deterioration of their faculties has rendered them unable even to appeal to the law or the compassion of the society that has condemned them is central to the administration of the death penalty in this Nation.” To this day, however, this question remains unanswered by the US Supreme Court and the execution of condemned prisoners who cannot assist their lawyers as their execution approaches continues.

- **Varnell Weeks, executed in Alabama, 1995**

Varnell Weeks had been diagnosed with paranoid schizophrenia at least seven years before the crime for which he was sentenced to death. An Alabama trial judge held a competency hearing in April 1995. He noted the wide variations among the individual states on this issue and that the US Supreme Court “decided an incompetent cannot be executed, but did not articulate a standard to determine whether a person is competent to be executed.” The judge went on to acknowledge that “Alabama law itself is not a model of clarity”. The law provided for an execution to be suspended if the prisoner is “insane”, but the highest state courts had failed “to give clear meaning to the word *insane* as used in the statute”. However, the trial judge agreed with the defence lawyers to apply the American Bar Association’s suggested standard.²⁹⁶ In his order issued after the hearing, the judge noted that:

²⁹⁶ “A. Convicts who have been sentenced to death should not be executed if they are currently mentally incompetent. If it is determined that the condemned convict is currently mentally incompetent, execution should be stayed. B. A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceeding, what he or she was tried for, the reason for the punishment or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or retardation, the convict lacks sufficient capacity to recognize or understand any fact which may exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or the court.” Standard 7.5-6, American Bar Association Criminal Justice Mental Health Standards.

“All of the experts are agreed...that the mental disorder of the Defendant is significant. Unquestionably, based on the best psychological and psychiatric evaluations available, the Defendant suffers from a serious mental disorder... [E]ssentially everyone agrees that the Defendant is schizophrenic, paranoid type; that he suffers from delusions and occasional hallucinations... Unquestionably, the average person on the street would regard the Defendant to be ‘insane’, and the Defendant meets the dictionary generic definition of insanity. The Defendant asserts that he is God in various manifestations, such as God the Father, Jesus Christ, Allah. But the Defendant knows that when he is executed, his physical life will come to an end. He believes that he will then be transformed.”²⁹⁷

One of Varnell Weeks’s beliefs was that he would be transformed into a tortoise and reign over the universe. The judge noted that one of the experts at the competency hearing pointed out that while many people believe in an after-life, most “don’t think they will be running the place”. The judge acknowledged that “what the expert says may be true, but it is also true that what happens beyond death is beyond his expertise; and the Defendant and anyone else is free to believe what they wish about the hereafter”. The judge also acknowledged that the behaviour at the hearing of Varnell Weeks himself “was a bit unusual”. The judge wrote: *“He brought unusual objects with him and walked in a somewhat strange manner. On the first day, he wore a band around his head with a domino on it that had black dots on a white background. It was a double-seven. The Defendant explained that the domino was with him, i.e. Weeks, pointing out that there are seven days in a week.”*

The judge determined, however, that Varnell Weeks could understand what was happening and why “despite the fact that he suffers from a severe mental disorder”. The judge said that it would be inappropriate for the court to “veer away...into the metaphysical arena of the nature of consciousness and the nature of reality, a description of what is normal, and other philosophical questions”. “Even in the realm of psychology”, he continued, “there would be great room for disagreement as to the nature of ‘understanding’ and of what is ‘normal’.” The judge found that Varnell Weeks was “clearly competent to be executed” at the time of the hearing, although he acknowledged that to adjudicate on the question of whether he would be competent at the time of his execution, “it might appear that the Court can answer that question only with the use of a crystal ball”, and the state should monitor his mental health up to the point of execution.

On the eve of his execution three weeks later, the US Court of Appeals for the 11th Circuit refused to issue an emergency stay. One of the three judges dissented: *“Tomorrow morning Alabama plans to execute Varnell Weeks, a delusional paranoid schizophrenic who two psychologists and one psychiatrist, one of whom was state-appointed, found to be severely mentally ill and whom the state court acknowledge meets the general definition of insanity. The majority resolves grave and complex legal issues in Weeks’s case without oral argument,*

²⁹⁷ *State v. Weeks*. In the Circuit Court of Macon County, Alabama. Case No. CC-82-042. Order denying petition for relief from sentence of death on grounds of mental incompetency to be executed, 21 April 1995. Circuit Judge Dale Segrest.

on less than full briefing, and after a minimal period of contemplation. Because I believe the Eighth Amendment's prohibition on executing the insane requires more than a cursory review, I would grant...a stay".²⁹⁸ Varnell Weeks was executed in Alabama's electric chair the following day, 12 May 1995.

- **DH Fleenor, executed in Indiana, 1999**

DH Fleenor, who had long shown signs of mental illness, had refused to see his lawyers in the weeks leading up to his execution because of his belief that they were part of a conspiracy against him. Several priests in recent contact with DH Fleenor had expressed concern that he was seriously delusional and did not understand his punishment. The prison's Catholic chaplain, who had signed an affidavit to this effect, was banned by the prison authorities from visiting DH Fleenor and other condemned inmates on the grounds of "philosophical differences", namely the chaplain's opposition to the death penalty. Two other priests, apparently intimidated by the prison authorities' hardline approach, decided against signing affidavits about DH Fleenor's mental health because they did not want to risk losing their access to death row prisoners. Legal attempts to have an independent psychiatric evaluation of DH Fleenor failed, and he was executed shortly after midnight on 9 December 1999. The day before, dissenting from a court decision to allow Fleenor's execution to proceed, a judge wrote: "...one [cannot] dismiss easily the evidence of prison chaplains. Although not necessarily trained psychiatrists or psychologists, their experience, and in some instances training, ought to require that a judicial system gives their views a respectful assessment, even if such respect is not found within the prison walls."²⁹⁹

- **Thomas Provenzano, executed in Florida, 2000**

Thomas Provenzano had a history of serious mental illness, including paranoid schizophrenia, dating back to before the crime. In December 1999, following extensive hearings, Circuit Judge Randolph Bentley found that: "Thomas Provenzano has, for over twenty years on occasion, believed that he is Jesus Christ. In conjunction with this delusional belief, Provenzano believes that he is not going to be executed because he murdered another human being, but that he really will be executed because he is Jesus Christ". However, Judge Bentley continued: "Provenzano's delusional belief that his conviction and sentence of death are not the real reasons for his impending execution does not impair his factual and rational understanding of the fact that he is facing pending execution for his conviction and sentence of death for murdering Bailiff Arnie Wilkerson during a shoot-out at the Orange County Courthouse."

Judge Bentley's disquiet in reaching this conclusion was clear. He stated that the present standard for competency is "a minimal standard"; that his ruling "should not be misinterpreted as a finding that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not"; and that "if the burden were on the State to prove beyond a reasonable doubt that Provenzano is competent to be executed, the

²⁹⁸ *Weeks v. Jones*, 52 F.3d 1559, 1574 (11th Cir. 1995), Judge Kravitch dissenting.

²⁹⁹ Circuit Judge Kenneth F. Ripple. US Court of Appeals for the Seventh Circuit.

Court would conclude that there is reasonable doubt. The Court understands that this is not the standard, and that the State does not have the burden to prove anything. Nevertheless, given the nature of the penalty, the Court cannot help but be troubled by this fact.”³⁰⁰

On 25 May 2000, the Florida Supreme Court upheld the competency ruling. Two of the seven judges dissented, saying: “It is impossible to conclude in this case that Provenzano has a rational understanding of the reason he is to be executed when we have a judicial finding based upon clear and convincing evidence that Provenzano genuinely believes as a matter of fact that he ‘really will be executed because he is Jesus Christ’... Provenzano does not rationally understand the reason the death penalty is being imposed on him. Indeed, under the trial court’s findings, should he be put to death he will go to his death believing he is being killed because he is Jesus Christ”.³⁰¹ Thomas Provenzano’s sister appealed to Governor Jeb Bush in a hand-delivered letter to spare her brother, saying: “As you know, Thomas is severely mentally ill. He believes he is Jesus Christ and that he is going to be executed because people hate Jesus.” Governor Bush denied clemency. On 20 June 2000, Thomas Provenzano was granted a stay of execution by the 11th US Circuit Court of Appeals, 10 minutes before he was scheduled to be put to death. He was already strapped to the gurney (execution trolley) with the lethal injection needles inserted in his arms when the stay came through. Less than 24 hours later, the court dissolved its stay and Thomas Provenzano was put through the same ritual and killed.

- **Kelsey Patterson, executed in Texas, 2004**

Kelsey Patterson, long diagnosed with paranoid schizophrenia, the symptoms of which included believing that devices had been implanted in him that controlled him, refused to meet with the independent mental health expert appointed by a federal magistrate judge and an expert hired by the defence to evaluate his competency to be executed. In Patterson’s delusional world, doctors and lawyers were a part of the conspiracy against him. The two experts agreed that Patterson’s refusal to be examined was a product of his mental illness. After a hearing in 1999, the judge noted that the defence expert “was concerned because recent letters from Patterson indicated that Patterson believed that the execution could easily be stopped by the state district court if that court would only recognize and acknowledge the conspiracy against him, and that Satan was controlling the legal process and court system, and that he had received a permanent stay of execution from the board of pardons and parole.” The judge nevertheless found Kelsey Patterson competent to be executed, noting that “all that is required for legal competency is for the prisoner to understand the fact of his impending execution and connection between his crime and the execution. That the prisoner may believe that he is not morally responsible for the killing because he was being controlled by outside forces is not part of the test.” The judge did express concern that Kelsey Patterson believed that he had a permanent stay of execution from the clemency board. Patterson’s execution did not happen at that time as legal proceedings continued. During oral arguments in the case in

³⁰⁰ *Provenzano v. State*, In the Circuit Court of the Eighth Judicial Circuit, Bradford County, Florida, 8 December 1999.

³⁰¹ *Provenzano v. State*, 760 So. 2d 137, 143 (Fla. 2000). Justice Anstead, dissenting.

2002, a federal judge on the US Court of Appeals for the Fifth Circuit asked the state prosecutor: “What are we doing here? This is a very sick man”, and wondered how the state would respond when Kelsey Patterson was brought into the lethal injection chamber “screaming about Satan”.

When he received another execution date in 2004, Kelsey Patterson began writing various letters to courts and the Board of Pardons and Paroles. Again, they were clearly delusional. For example, one written to a federal court in February 2004 urged the judge:

“Honor Honor Honor my rights give me my rights is in amnesty give me my rights give me my rights stop the death warrants death warrants murders stop the execution stop and remove the execution execution date execution date told to me by Major Miller on January 15 who said the order cam from Attorney General of Texas execution murder execution execution punishments body health destruction disfigurement... devil murder homo rape death machines death warrants death warrants murder execution execution date execution hell that is being did to me my bodies from my body my men from me Kelsey Patterson my eye my sign my vision my family my family see and apply in action in action for me my family the fact the Texas Court of Criminal Appeals and kuntz-TDCJ authority have told me stay and that I have been given a permanent stay from execution based on innocence...”

Strapped down for execution on 18 May 2004, Kelsey Patterson was asked if he had a final statement. According to the Texas prison authorities, he responded:

“Statement to what? State what? I am not guilty of the charge of capital murder. Steal me and my family’s money. My truth will always be my truth. There is no kin and no friend; no fear what you do to me. No kin to you undertaker. Murderer. [Portion of statement omitted due to profanity]. Get my money. Give me my rights. Give me my rights. Give me my rights. Give me my rights. Give me my life back.”

Judicial recognition of the problem continues

In April 2005, the US Court of Appeals for the Fourth Circuit issued a decision which illustrated that, two decades later, the *Ford* ruling is still causing problems. The ruling concerned Percy Walton, on death row in Virginia for three murders committed in 1996 when he was 18 years old. There is evidence that he has suffered from schizophrenia since he was 16 years old. He pleaded guilty at his trial in 1997. In 1999, three mental health experts concluded that he suffers from chronic paranoid schizophrenia and was probably suffering from this illness at the time of the crime.

Three days before Percy Walton was due to be executed in May 2003, a federal District Court issued a stay in order to assess the claims that he was incompetent for execution under *Ford v. Wainwright*. The District Court held a hearing in July 2003.³⁰² A prison psychologist overseeing Virginia’s death row population testified that she did not believe Percy Walton

³⁰² The details of the competency hearings and findings are taken from *Walton v. Johnson*, 407 F.3d 285 (4th Cir. 2005), unless otherwise stated.

understood that he was to be executed or why. A prison psychiatrist who had examined Walton several times recently testified that he was “floridly psychotic” and did not comprehend his imminent execution. Another psychiatrist testified, who had also seen Walton several times testified that Walton did not understand “in any sustained sort of way” the reality of or reason for his execution, and was also incompetent to assist his lawyer. A neuropsychologist concurred in these findings of incompetence. Percy Walton’s own testimony at the hearing added weight to these expert views.³⁰³ For the state, another prison psychiatrist testified that Percy Walton was “a mature young man who elected a lifestyle which has been a disappointment to him and has not fulfilled his expectations”. He testified that Walton “has a full understanding of what’s going on”.

The District Court decided that it could not resolve the competence issue and held another hearing in February 2004. With the agreement of the two parties, the court appointed a neutral expert to evaluate Walton within the scope of two questions: 1) whether Walton understands that he is to be punished by execution, and 2) whether Walton understands why he is being punished.” Anything else, the judge said would be immaterial. At the hearing, the psychiatrist testified that “my sense is that the standard for [competency for] execution is sufficiently low that, sadly, Mr Walton meets that standard”. He also concluded that Walton’s mental condition probably unable to prepare for his death. Following the hearing, the District Court found Percy Walton competent for execution.³⁰⁴

Percy Walton’s lawyers appealed to the US Court of Appeals for the Fourth Circuit, arguing that the *Ford* decision requires not only that the condemned inmate understands that he is to be executed and why, but that he is able to assist in his defence and able to prepare for his death. The Fourth Circuit admitted that the *Ford* decision “presents challenges” because it had neither defined insanity nor mandated the procedures for making competency determinations. It rejected the argument that to be found competent for execution a condemned prisoner should be able to assist his lawyer, although it noted that several states do have that added safeguard in their procedures (for example, Mississippi). However, the Fourth Circuit agreed that the *Ford* ruling did require a finding that the prisoner was able to prepare for his or her death, and that the 1986 ruling and Justice Powell’s concurrence required a broader inquiry than the one that the District Court judge had initiated in Percy Walton’s case:

“A person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that he will be executed and that his crime is the reason why does not meet the standard for competence contemplated either in the opinion of the Ford Court or in Justice Powell’s concurrence.”

³⁰³ For example – Attorney: *If you have an execution date, does that mean that you have been sentenced to death?* Walton: *Umm, nah. I don’t think – I don’t think so.* Attorney: *What does it mean?* Walton: *I believe – I believe – I believe so, but I don’t know. You know what I’m saying? I don’t know.* Attorney: *You believe it does mean you’ve been sentenced to death?* Walton: *No.*

³⁰⁴ *Walton v. Johnson*, 306 F. Supp. 2d 597, United States District Court for the Western District of Virginia, 2004.

One of the three judges on the Fourth Circuit panel dissented, accusing the other two of “creating a new constitutional test for determining competence to be executed”. Judge Shedd said that the “new prong is simply not part of the *Ford* ruling” and suggested that the majority had “cobble[d] together stray” statements from that ruling to come up with the criterion that a prisoner must be able to prepare for his or her death. Judge Shedd, echoing other prosecutors, judges and politicians who have warned that progressive standards will allow inmates to fake insanity to avoid execution, suggested that this “new prong effectively precludes capital punishment for any condemned inmate who even raises a claim of insanity”.

The Attorney General of Virginia appealed for a rehearing of the issue in front of the whole Fourth Circuit. The Court granted a rehearing and the case was reargued in front of 13 judges in November 2005. By early January 2006, the court’s decision was still pending.³⁰⁵

Clearly, it is time for the US Supreme Court to revisit its *Ford v. Wainwright* ruling. It should clarify and broaden the protection. For a start, the standard should include the defendant’s ability to assist his or her counsel. There are so many errors uncovered in capital cases, some even found after clemency has been denied, that the prisoner’s capacity to help their lawyer should be a requirement for a finding of competency. Moreover, a prisoner should be found to be able to do more than simply state some vague connection between the crime and their punishment. The condemned prisoner must have a genuine and *rational* understanding of the connection not just mere knowledge or awareness of the facts.

The US Supreme Court has held that the standard for competency to waive appeals in a death penalty case is whether the prisoner has “the capacity to appreciate his position and make a *rational* choice” (emphasis added).³⁰⁶ The Court has also found that competency standard for pleading guilty, waiving the right to counsel, and for standing trial, is one and the same and also contains an element of *rationality*. The defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding” and a “*rational* as well as a factual understanding of the proceedings against him” (emphasis added).³⁰⁷ Seeking to ensure such competency, the Court said, is a “modest aim”. Why should even that modest aim fall by the wayside in the state’s efforts to get a seriously mentally ill prisoner into the death chamber?

A lawyer recalled to Amnesty International in June 2005 about how the State of Texas had managed to execute Harold Barnard in 1994 (see *Reality Check 3*, above) despite overwhelming evidence that he did not have a rational understanding of his impending execution. The lawyer, who had been involved in the case at that time, recalled that the only mental health expert to find that Barnard was competent for execution, “talked to him just long enough to get Harold to utter the magic words in *Ford* about knowing that he is to be executed and the reason why, without tarrying long enough to examine whether Harold *rationaly* understood what he was saying”.

³⁰⁵ In the earlier decision, the Fourth Circuit panel had also sent the case back to the District Court to hold a hearing on the question of whether Percy Walton has mental retardation.

³⁰⁶ *Rees v. Peyton*, 384 U.S. 312 (1966).

³⁰⁷ *Godinez v. Moran*, 509 U.S. 389 (1993).

Perhaps, in the end, the US Supreme Court will recognize that it is simply not possible to find beyond a reasonable doubt which prisoners are competent for execution and which are not. As the Fourth Circuit court stated in its April 2005 decision on Percy Walton's case, "undoubtedly, determining whether a person is competent to be executed is not an exact science".³⁰⁸ In other words, there will always be errors and inconsistencies on the margins. In the end, there is only one solution – abolition.

Curing to kill – masking insanity with medication

Based on the medical history of this case, I am left with no alternative but to conclude that drug-induced sanity is not the same as true sanity. Singleton is not 'cured'; his insanity is merely muted, at times, by the powerful drugs he is forced to take. Underneath this mask of stability, he remains insane.

Federal judge, 2003

Alexander Williams's mental illness worsened in his 15 years on death row in Georgia. This African American, who was sentenced to death for killing a 16-year-old white girl when he was 17 years old, was diagnosed as suffering from paranoid schizophrenia and schizoaffective disorder with bipolar features. His symptoms included delusions and auditory and visual hallucinations. Sometimes, the prison authorities would forcibly medicate him with anti-psychotic drugs, using teams in full riot gear to enter his cell, hold him down and shackle him, while others injected him. Without such medication, Alexander Williams's competence for execution under *Ford v. Wainwright* came into question. A prison doctor's entry on his case on 16 December 1998, for example, stated: "I do not believe that this inmate can or will cooperate with us on voluntary medications due to the severe psychotic illness from which he suffers chronically. There has been a degree of improvement in his overall functioning since he has been receiving the medication on a regular basis involuntarily... I believe that should the medications be interrupted, we could reasonably expect a fairly rapid deterioration in his mental state."

A forcible medication order against him remained in effect as he faced an execution date in 2002. After an international and national campaign on his behalf, he was granted clemency because of his mental illness.³⁰⁹ His death sentence was commuted to life imprisonment without the possibility of parole on 25 February 2002 after the Georgia Board of Pardons and Paroles heard evidence from the three psychiatrists whom it sent into the prison to assess the inmate. Announcing the commutation of the decision, the Chairman of the Board said that "making sure that Williams will remain in an eight foot by 10 foot prison cell for the rest of his life with absolutely no hope of parole" would hopefully help the murder victim's mother

³⁰⁸ *Walton v. Johnson*, US Court of Appeals for the Fourth Circuit, 28 April 2005.

³⁰⁹ USA: *Crying out for clemency: The case of Alexander Williams mentally ill child offender facing execution*, AI Index: AMR 51/139/00, September 2000, <http://web.amnesty.org/library/Index/ENGAMR511392000>.

“the closure she so deserves”. However, 34-year-old Alexander Williams, still serving an unlawful punishment in harsh conditions, committed suicide in November 2002.³¹⁰

Like Alexander Williams, Charles Singleton’s mental condition worsened in the almost quarter of a century that he was on death row in Arkansas. He too was diagnosed as suffering from schizophrenia. He was an African American man sentenced to death by an all-white jury in 1979 for the murder of a white woman, Mary Lou York, who was stabbed to death on 1 June that year during the robbery of the grocery where she worked.

By the late 1980’s Charles Singleton had begun to suffer delusions, including that his cell was possessed by demons, that his brother took him out for walks from his cell, that a prison doctor had implanted a device in his ear, and that his thoughts were being stolen when he read the Bible. Over the years, he described himself as “God and the Supreme Court”, expressed the belief that he had been freed by the US Supreme Court, that execution was just a matter of stopping breathing and that a judge would do something to restart his breathing again, that the actors Sylvester Stallone and Arnold Schwarzenegger were somewhere between this universe and another and were trying to save him, and, in a letter to the Eighth Circuit Court, that Mary Lou York “is somewhere on this earth waiting for me – her groom”.

By the early 1990s Charles Singleton was regularly on anti-psychotic drugs. When he did not take the medication, or he needed increased or different medication, his symptoms would worsen. He was put on an involuntary medication regime, under a 1990 US Supreme Court decision (*Washington v Harper*) which allows state authorities “to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest.”³¹¹

While under this forcible medication regime, Charles Singleton’s psychotic symptoms abated, and the state subsequently set an execution date. His lawyers appealed that it was unconstitutional to restore his *Ford* competency through forcible medication – in other words, that it cannot be in the prisoner’s medical interest to make him competent to be executed. The execution was stayed while the courts considered the issue.

In October 2001, a three-judge panel of the US Court of Appeals for the Eighth Circuit ruled 2-1 that Charles Singleton’s death sentence should be commuted to life imprisonment without the possibility of parole.³¹² The state appealed for a rehearing in front of the full court and in February 2003, the Eighth Circuit ruled 6-5 that Arkansas officials could forcibly medicate Charles Singleton even if that made him competent for execution. The majority wrote that “Singleton presents the court with a choice between involuntary medication followed by an execution and no medication followed by psychosis and imprisonment.” In a

³¹⁰ Alexander Williams was 17 at the time of the crime. His death sentence violated the international ban on the use of the death penalty against child offenders. His sentence of life imprisonment without the possibility of parole also violated international law because he was under 18 years old at the time of the crime (Article 37 of the UN Convention on the Rights of the Child).

³¹¹ *Washington v Harper*, 494 U.S. 210 (1990).

³¹² *Singleton v. Norris*, 267 F.3d 859 (8th Cir. 2001).

breathtaking understatement, the Court wrote that: “Eligibility for execution is the only unwanted consequence of the medication.” The majority concluded that the state does not violate *Ford v Wainwright* “when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care”. Dissenting, Judge Gerald Heaney wrote:

“Charles Singleton suffers from mental illness that makes him psychotic. At time he has been forced to take powerful psychotropic drugs; at other times he takes the medication voluntarily. The drugs often mask his underlying psychosis. The majority believes this makes him fit for execution. I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what [Supreme Court] Justice [Thurgood] Marshall [in Ford v. Wainwright] called ‘the barbarity of exacting mindless vengeance’.”

Judge Heaney continued:

*“Based on the medical history in this case, I am left with no alternative but to conclude that drug-induced sanity is not the same as true sanity. Singleton is not ‘cured’; his insanity is merely muted, at times, by the powerful drugs he is forced to take. Underneath this mask of stability, he remains insane. Ford’s prohibition on executing the insane should apply with no less force to Singleton than to untreated prisoners”.*³¹³

Despite the strength of this dissent, which was joined by three other judges (a fifth judge dissented on different grounds), the US Supreme Court refused to intervene. On 6 October 2003, it dismissed Charles Singleton’s appeal, thereby allowing the Eighth Circuit’s ruling to stand and freeing up the State of Arkansas to set an execution date. In the event, in the months leading up to his execution, Charles Singleton took his medication voluntarily. He refused to apply for clemency, but his lawyer filed a clemency petition on his behalf. The state governor refused to intervene. Forty-four-year-old Charles Singleton was executed on 6 January 2004. He had written a rambling final statement, including “As it is written, I will come forth as you will go. I too am going to take someone’s place. You’ve taught me what you want done and I will not let you down”.³¹⁴

A question of medical ethics

In his dissent in the Singleton case, Judge Heaney also noted that the majority’s decision would force the medical community to violate ethical standards:

“Physicians are duty bound to act in the best interests of their patients. Consequently, the ethical standards of both the American Medical Association and the American Psychiatric Association prohibit members from assisting in the execution of a condemned prisoner. Needless to say, this leaves those doctors who are treating psychotic, condemned prisoners in an untenable position: treating the prisoner may

³¹³ *Singleton v. Norris*, 319 F.3d 1018, 1030 (8th Cir. 2003).

³¹⁴ *Arkansas executes mentally ill man*. CNN.com, 7 January 2004.

provide short-term relief but ultimately result in his execution, whereas leaving him untreated will condemn him to a world such as Singleton's, filled with disturbing delusions and hallucinations."

The question of medical ethics when pitted against the state's pursuit of execution in this way was raised in the case of French national Claude Maturana. On death row in Arizona, Maturana was diagnosed as suffering from chronic paranoid schizophrenia. He was transferred to a cell in a maximum security unit of the state hospital in February 1999 after a judge ruled him incompetent for execution under *Ford v. Wainwright*. It was then for the chief medical officer at the hospital to assess if his condition changed. In June 1999, for example, Dr Jerry Dennis wrote to the court that "due to chronic paranoid schizophrenia, [Maturana] does not adequately understand that he was convicted of murder and sentenced to death".

Dr Dennis expressed the dilemma in which he found himself as a doctor. He could change or increase the medication that Claude Maturana was receiving which might alleviate the symptoms. If this occurred, however, he would be, in effect, sending him to the death chamber. "I'm frustrated because I'm trying to do what's right and what's ethical. It has nothing to do with whether or not I believe in the death penalty. The question here is: How can I restore him to competency so he can be killed? I just can't do that. I just won't do that. I'd resign first".³¹⁵ Moreover, the authorities could find no one in the hospital who would take over the case and restore Claude Maturana to competency.

The Arizona Attorney General's Office continued to seek Maturana's execution. The then head of its criminal appeals section said: "We're trying to make sure the law is carried out. We're not going to stick our heads in the sand simply because a doctor believes he has an ethical concern". The prosecuting authorities argued that the state law required the hospital to find a willing doctor. The state advertised around the country for a doctor willing to do what the Arizona medical professionals were not. It found a willing doctor in Georgia. He subsequently found Claude Maturana competent for execution, although acknowledging that he was suffering from serious mental illness.³¹⁶ The litigation on the case continued, until Claude Maturana died in hospital on 26 December 2002.

In 1992, the Louisiana Supreme Court set an example for others to follow. It prohibited the state from pursuing a "medicate-to-execute" scenario. The case involved Michael Perry, who was convicted of killing five members of his family in 1983. He had first been diagnosed as suffering from schizophrenia 12 years earlier, at the age of 16, and was committed to psychiatric hospitals on numerous occasions. He was found competent to stand trial for the murders only after 18 months of treatment. He was subsequently found to be incompetent for execution. The medical experts "reported that Perry suffers from an incurable schizoaffective disorder that causes his days to be a series of hallucinations, delusional and disordered thinking, incoherent speech, and manic behaviour. These symptoms can be temporarily diminished with antipsychotic drugs, they testified, but his underlying insanity can never be

³¹⁵ *Dallas Morning News*, 9 August 1999.

³¹⁶ *National Law Journal*, 24 January 2000.

permanently cured or quelled.”³¹⁷ The trial court had ordered that he be medicated, forcibly if necessary. However, the Louisiana Supreme Court reversed that decision, finding that forcibly medicating a prisoner to restore him to competence for execution violated the state’s constitution. Among other things, it said that “forcing a prisoner to take antipsychotic drugs to facilitate his execution does not constitute medical treatment but is antithetical to the basic principles of the healing arts.” It continued:

“The punishment intended for Perry is severely degrading to human dignity. It will involve far more than the mere extinguishment of human life. Unlike other death row prisoners, Perry will yield to the state the control of his mind, thoughts and bodily functions, ingest or absorb powerful toxic chemicals, and risk of suffer harmful, possibly fatal, drug side effects. He will not be afforded a humane exit but will suffer unique indignities and degradation. In fact, he will be forced to linger for a protracted period, stripped of the vestiges of humanity and dignity usually reserved to death row inmates, with the growing awareness that the state is converting his own mind and body into a vehicle for his execution. In short, Perry will be treated as a thing, rather than a human being, and deliberately subjected to something inhuman, barbarous and analogous to torture.”

In May 1991, a South Carolina trial judge determined that Fred Singleton was incompetent for execution. The state appealed to the South Carolina Supreme Court, but was unsuccessful.³¹⁸ The Court adopted a two-prong test for determining competency, under which it held that Singleton was clearly incompetent.³¹⁹ Citing the *Perry* ruling in Louisiana, and the similarity between the two states’ constitutions, it also rejected the notion that it could be constitutional to forcibly medicate an inmate in order to restore him to competency for execution. It concluded that “justice can never be served” by such an approach.

The Louisiana and South Carolina rulings render even more shocking the Eighth Circuit’s decision in the Charles Singleton case in Arkansas a decade later, and the failure of the US Supreme Court to intervene.

Found incompetent but still on death row

More than a decade later, Michael Perry and Fred Singleton remain on death row in Louisiana and South Carolina respectively. In another case, Gary Alvord remains on death row in Florida more than 20 years after he was declared incompetent for execution. Alvord, who committed three murders after he escaped from a mental hospital in Michigan in 1973, was sentenced to death in 1974. He was due to be executed on 29 October 1984, but was found to

³¹⁷ *State v. Perry*, 610 So.2d 746 (Louis. 1992).

³¹⁸ *Singleton v. South Carolina*, South Carolina Supreme Court, 1993.

³¹⁹ “The first prong is the cognitive prong which can be defined as: whether a convicted defendant can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. The second prong is the assistance prong which can be defined as: whether the convicted defendant possesses sufficient capacity or ability to rationally communicate with counsel”.

be incompetent for execution by three psychiatrists. He was transferred to a state mental hospital, where his case caused controversy among the staff in relation to the ethics of treating a person's mental illness if the effect of that treatment was to render him competent for execution. In 1987, after nearly three years in the hospital, Gary Alvord's stay of execution was lifted and he was taken back to death row. There has never been a formal finding of competence.³²⁰ Alvord's case has been called "one of Florida death row's little-known secrets, a living symbol of the system's tragic failings".³²¹

Gary Alvord, Michael Perry and Fred Singleton are just three of the inmates under sentence of death in the USA who have been found incompetent for execution, and not found competent since. They remain in their twilight world serving a "life sentence" on death row unless and until they are later found to be competent and taken to the execution chamber.

The total number of such inmates is unknown but is believed to be well into double figures. For example, Amnesty International understands that there are at least three people currently on Pennsylvania's death row who have been found incompetent for execution, and at least another two on death row in Mississippi, and two others in South Carolina. The organization also has a copy of a letter from a county District Attorney in Texas providing a state appeals court with the names of five inmates prosecuted by his office who were currently "incompetent to be executed". The letter informs the court that the District Attorney will "periodically" request "re-evaluation" of the inmates' competency, and that "if any re-evaluation concludes that the listed inmate(s) is competent to be executed, appropriate steps will be taken" to continue the legal process. The letter is dated 31 October 1995. More than a decade later, all five remain on death row.

For decency's sake, at a bare minimum, Amnesty International urges states to remove permanently from death row, if necessary through acts of executive clemency, all condemned inmates found incompetent for execution. By removing them to more appropriate surrounds, the state also removes the temptation to have doctors restore them to competency for execution.

Unethical: Psychiatric testimony used to kill

It is impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution's paramount concern for reliability in capital sentencing.
US Supreme Court Justice, 1983³²²

³²⁰ For information on Gary Alvord's case, see Chapter 10 of *Executing the mentally ill: The criminal justice system and the case of Alvin Ford*, by Kent S. Miller and Michael L. Radelet, Sage Publications, 1993; and Page 83, *USA – The death penalty*, Amnesty International Publications, AI Index: AMR 51/01/87, 1987.

³²¹ *Death row dean shows how justice system fails*. St Petersburg Times, 5 December 1999.

³²² *Barefoot v Estelle*, 463 U.S. 880 (1983), Justice Blackmun dissenting.

At Thomas Barefoot's sentencing in Texas nearly 30 years ago, the State of Texas presented two psychiatrists, whose testimony lasted for more than half of the hearing. Neither had examined the defendant or asked to examine him. Instead, at the trial, they were asked an extended hypothetical question about an individual whose case mirrored that of Thomas Barefoot. One of the doctors responded that the defendant was "a criminal sociopath". There was no chance, he said, of rehabilitation and the condition might even "become accelerated" in the coming years. There was "a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society", even if "society" meant prison. The other psychiatrist, Dr James Grigson, testified at his trial that whether Barefoot was in prison or at large, there was a "100 per cent and absolute" chance that he would commit future acts of violence and be a continuing threat to society. The jury took an hour to sentence Thomas Barefoot to death.

In 1983, the US Supreme Court took the case and ruled that psychiatric testimony regarding the future dangerousness of a defendant, presented to the jury during the sentencing phase of the trial, is admissible even if the testimony is not based on any interview with the defendant. Such predictions are widely recognized as "junk science", unreliable and unethical. In an *amicus curiae* (friend of the court) brief filed in the US Supreme Court in the *Barefoot* case, the American Psychiatric Association stated that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession". Justice Blackmun, joined by two other Justices, protested the Court's ruling:

"The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result – even in a capital case – because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake – no matter how heinous his offense – a requirement for greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself."

Thomas Barefoot was executed in October 1984. He became the fourth person to be put to death in Texas since it resumed executions in 1982. More than 350 people have been put to death in the state since then, and more than 400 await execution. In each of these hundreds of cases, a jury has unanimously voted that the state has proved beyond a reasonable doubt that the defendant will pose a future violent risk to society if allowed to live, even in prison, a prerequisite for a death sentence in Texas. In many cases, the state has presented psychiatric testimony purporting to predict the defendant's future dangerousness in order to seek to persuade the jury to vote for death.

The late Dr James Grigson was one of number of psychiatrists willing to testify for the prosecution as to their virtual or absolute certainty that a defendant will commit future acts of violence. Dr Grigson is believed to have so testified in more than 150 cases in Texas, over 90 per cent of which ended in a death sentence. He repeatedly testified that his predictions are

100 per cent accurate, despite the fact that they were consistently based on nothing more than hypothetical questions posed by the prosecutor.³²³

Who knows how much weight jurors give to this “expert” testimony in any particular case? One Texas Court of Criminal Appeals Judge wrote: “It seems to me that when Dr Grigson testifies at the punishment phase of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty... When Dr Grigson speaks to a lay jury...the defendant should stop what he is then doing and commence writing out his last will and testament – because he will in all probability soon be ordered by the trial judge to suffer a premature death.”³²⁴ One of the jurors who sentenced Texas defendant David Wayne Stoker to death said later of Dr Grigson: “You couldn’t help but listen to what he was saying. [He’s] a doctor. He had a lot of influence on what we decided.”³²⁵ David Stoker was executed in 1997 despite doubts about his guilt.

John Thomas Satterwhite, diagnosed with paranoid schizophrenia and learning disabilities, was executed in Texas on 16 August 2000 for the murder of Mary Frances Davis in 1979 during the robbery of a shop in San Antonio in March of that year. His case tells a story of state prosecutors willing to use unreliable and unethical psychiatric testimony in order to obtain a death sentence against a seriously mentally impaired individual.

Prior to his 1979 trial John Satterwhite was examined by a psychiatrist, Dr James Grigson, on the request of the prosecution but without the defence lawyer being informed. Dr Grigson concluded that John Satterwhite had “a severe antisocial personality disorder and is extremely dangerous and will commit future acts of violence.” At the actual trial, the prosecution argued that Satterwhite’s “future dangerousness” meant that he should be executed, and presented Dr Grigson’s testimony in support of its position. The jury was persuaded and Satterwhite was sentenced to death.

Two years later, the US Supreme Court considered the case of another Texas death row inmate, Ernest Benjamin Smith. As with Satterwhite, Dr Grigson had testified at Smith’s trial that the defendant was “a very severe sociopath” who had “no regard for another human

³²³ In the case of Randall Dale Adams, released from a decade on death row after being proved innocent, Dr Grigson continued to maintain that the prediction of future dangerousness that he had made at Randall’s trial was accurate. Kerry Max Cook spent two decades on death row in Texas for a crime he did not commit, and once came 11 days from execution. In 1999, DNA evidence excluded Cook and implicated another man. At Cook’s trial, Dr Grigson had testified that he was “absolutely 100 per cent certain that he is and will continue to be a threat no matter where he is”.

³²⁴ *Bennett v. State*, 766 SW. 2d 227 (Tx. Crim.App. 1989), Judge Teague dissenting. Baby Ray Bennett, the defendant in that case, had his sentence commuted to life imprisonment after he had spent 10 years on death row. He has earned trustee status in prison, and has only had minor disciplinary incidents, including possessing lottery tickets. See *Deadly Speculation*, noted below in this section.

³²⁵ *Flawed trials lead to death chamber*. Chicago Tribune, 11 June 2000. The *Chicago Tribune* found that in at least 29 of the 131 cases of people executed in Texas between January 1995 and June 2000, “the prosecution presented damaging testimony from a psychiatrist who, based upon a hypothetical question describing the defendant’s past, predicted the defendant would commit future violence. In most of these cases, the psychiatrist offered this opinion without ever examining the defendant.”

being's property or for their life" and that he would "go ahead and commit other similar or same criminal acts if given the opportunity to do so." Dr Grigson's damning testimony stemmed from a 90-minute court-ordered interview he had conducted with Smith in jail to determine his competency to stand trial. In 1981 the US Supreme Court vacated Smith's death sentence on the grounds that the use of the testimony had violated his constitutional right to be told that he could remain silent, have a lawyer present (and informed that the interview could encompass the issue of the defendant's future dangerousness), and be warned that whatever he said could be used against him.³²⁶ Ernest Smith was subsequently sentenced to life imprisonment. Despite the prosecution expert's prediction of Smith's future dangerousness, he is reported to have been a model inmate, having an unblemished disciplinary record in over 20 years of imprisonment.³²⁷

It took another seven years until John Satterwhite would, temporarily, benefit from the *Smith* decision. In 1986, the Texas Court of Criminal Appeals agreed that the use of Dr Grigson's testimony had been unconstitutional, as identified in *Smith*, but argued that it was a "harmless" error in Satterwhite's case. In 1988, the US Supreme Court disagreed and overturned Satterwhite's death sentence, ruling that it was impossible to tell if the sentencing outcome would have the same in the absence of Grigson's testimony.³²⁸

Not to be denied the execution of Satterwhite, Texas decided to pursue another death sentence against him at a retrial. The first obstacle was for the prosecution to convince a jury that this mentally impaired defendant was competent to stand trial. They were twice unsuccessful, with two separate juries unable to decide whether Satterwhite was competent. At a third hearing, the state's psychiatrist, Dr John Sparks, spoke to the defendant during a break in proceedings, without the knowledge of the defence lawyer. Over the objections of the defence that the use of this testimony against Satterwhite would violate *Smith*, Dr Sparks informed the jury that, based on this clandestine interview, he had determined that Satterwhite was aware of what was going on around him. The defence lawyer moved for a mistrial on the grounds that Dr Sparks's testimony violated *Smith*. The jury voted that Satterwhite should stand trial.

At the 1989 retrial, Dr Jerome Tilles, a psychiatrist formerly employed by the state prison system, testified for the defence that Satterwhite suffered from chronic paranoid schizophrenia, and had done so since his teens. He also concluded that John Satterwhite had mental retardation. A second expert endorsed this view. For the state, Dr Sparks testified that Satterwhite was not mentally ill and had not been so diagnosed. Satterwhite was sentenced to death again.

After the trial, two "missing" state medical documents came to light, both of which could have been used to challenge Dr Sparks's testimony at the pre-trial hearings and the retrial itself. One was a "Master Problem List", in which the state listed "Mental Illness" as Satterwhite's primary problem. The second was a Minnesota Multiphasic Personality

³²⁶ *Estelle v Smith*, 451 U.S. 454 (1981).

³²⁷ See Texas Defender Service, *Deadly Speculation*, noted below in this section.

³²⁸ *Satterwhite v Texas*, 486, U.S. 249 (1988)

Inventory (MMPI), a standard psychological test performed on Satterwhite in 1983. At an appeal hearing, Dr Tilles testified that Satterwhite's abnormal MMPI scores supported a diagnosis of paranoid schizophrenia. He also testified that Dr Sparks's interview of Satterwhite at the third 1989 competency hearing breached ethical standards. All appeals failed and John Satterwhite was executed, 21 years after the crime.

Rodolfo Hernandez was put to death in Texas two years later, on 30 April 2002. Before his September 1985 trial, because he had been treated for various mental disorders over the previous 15 years, and because there were doubts about his sanity at the time of the March 1985 crime and his competence to stand trial, his lawyer filed a motion for the judge to appoint a "qualified disinterested expert" to conduct a mental examination. The motion requested that the defence lawyers be allowed to be present at the examination or at least that the session be videotaped for future reference. The motion made clear that the lawyers objected to any such examination if these requirements were not met.

The court denied the motion, instead appointing Dr John Sparks, who proceeded to interview Hernandez, but did not review his extensive psychiatric or medical records, except for a single 1974 report indicating that Rodolfo Hernandez suffered from schizophrenia. He concluded that Rodolfo Hernandez had an antisocial personality disorder, was not mentally ill, and was competent to stand trial. The defence was not told that the scope of the examination would include an assessment of future dangerousness. Hernandez was not warned by Dr Sparks that anything he said during the examination could be used at the sentencing phase of his trial.

Rodolfo Hernandez was duly convicted and the trial moved into its sentencing phase. The prosecution called Dr Sparks as an expert witness. He testified to his expertise, saying that he had been involved in some 1500 criminal cases as a forensic psychiatrist. He was asked to assume as true a detailed description of a "hypothetical" capital offender and murder which was identical to the case against Rodolfo Hernandez, including dates and places. Dr Sparks was then asked to give his opinion on whether such a defendant would commit future acts of criminal violence and hence pose a continuing threat to society. The defence objected, but was overruled. Dr Sparks testified that there was "a high likelihood" that such defendant would commit future acts of violence.

On cross-examination, the defence lawyers introduced Hernandez's medical records, showing that he had been diagnosed with chronic paranoid schizophrenia, and that he had been treated with anti-psychotic medication, electro-shock therapy and other methods. The defence lawyers elicited testimony from Dr Sparks that it could be possible that Hernandez had symptoms of schizophrenia at and around the time of the crime. However, the prosecution then asked him to give his opinion as to how he would diagnose the "hypothetical" offender that had earlier been described. Dr Sparks responded that, "assuming a great deal", the case suggest an anti-social personality disorder. He agreed with the prosecutor's suggestion that it would "be fair to say then that this type of person could kill without any problem whatsoever".

After the defence attempted to raise the evidence of the defendant's history of serious mental illness, the prosecution abandoned its "hypothetical" scenario and asked Dr Sparks if

he had examined Rodolfo Hernandez prior to the trial. Dr Sparks responded that he had. The defence objected. The prosecution argued that it had been the defence which had “opened the door” to mental health diagnoses. The judge ruled that Dr Sparks would be allowed to testify as to his “medical findings”, which had been “opened up by questions” presented by the defence. However, the judge said that Dr Sparks would not be allowed to give his opinion on Hernandez’s future dangerousness based upon his interview with the defendant. Of course, he already had done, albeit under the guise of a “hypothetical” question.

Under further questioning, Dr Sparks testified that he had diagnosed Hernandez as having anti-social personality disorder. He further testified that if he had reviewed Hernandez’s records, he would have diagnosed him with paranoid schizophrenia in remission as well as anti-social personality disorder. He added that people suffering from paranoid schizophrenia “are generally well organized, are generally reasonably intelligent, and although the plans may be part of the illness, they can make and do make plans.”

Despite the fact that the prosecution’s use of Dr Sparks’s testimony flew in the face of the US Supreme Court’s *Estelle v. Smith* ruling of four years earlier (above), Rodolfo Hernandez’s death sentence survived the appeals process with minimal dissent. A judge on the US Court of Appeals for the Fifth Circuit did protest, describing the Fifth Circuit’s acceptance of the Texas Court of Criminal Appeals “terse” order affirming the death sentence as “highly creative”. He concluded that the unconstitutional use of Dr Sparks’s testimony “had a substantial and injurious influence on the jury’s determination of the issue of future dangerousness”:

*“Dr Sparks was unequivocal in his testimony regarding Hernandez’s future dangerousness. He stated that an offender who had committed a crime identical in every detail with Hernandez’s offense had an anti-social personality disorder and was therefore a continuing threat to society. He revealed that, based on his examination of Hernandez, Hernandez had an anti-social personality disorder. Even when confronted with records that might have indicated that Hernandez’s behavior was attributable to paranoid schizophrenia, he adhered to his original conclusion based on his examination of Hernandez that Hernandez’s behavior was attributable to the anti-social personality disorder, conceding only that he would have altered his diagnosis to reflect paranoid schizophrenia in remission, in addition to the anti-social personality disorder”.*³²⁹

A recent study reviewing 155 Texas cases in which the prosecution used “experts” to predict a defendant’s future dangerousness found that the “experts” were wrong 95 per cent of the time.³³⁰ However, the *Barefoot v. Estelle* decision still holds after more than 20 years. Although the US Supreme Court in 1993 held that trial judges must act as “gate-keepers” to

³²⁹ *Hernandez v. Johnson*, 248 F.3d 344 (5th Circ. 2001).

³³⁰ *Deadly Speculation: Misleading Texas capital juries with false predictions of future dangerousness*. Texas Defender Service, 2004, <http://www.texasdefender.org/DEADLYSP.PDF>.

assess the credibility of scientific evidence before it is presented to a jury, the Court has not reconsidered its *Barefoot* ruling in light of that subsequent *Daubert* decision.³³¹

In April 2000, a federal judge voted to uphold the death sentence of Miguel Flores, a Mexican national on death row in Texas. Yet Circuit Judge Emilio M. Garza made no secret of his concern about the psychiatric testimony which may have put him there, and his view that such future dangerousness evidence appears to fail the *Daubert* test. “Overall,” wrote Judge Garza, “the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness”.³³²

Dr Clay Griffith, without meeting or examining the defendant, had testified at the trial of his certainty that Flores was a future danger. Indeed, Dr Griffith had told the jury that examining the defendant would be “a hindrance” to an accurate prediction. Judge Garza, who noted that a “brief search” of the published cases involving Dr Griffith’s testimony revealed that he had testified “yes” to a defendant’s future dangerousness on 22 occasions and “no” on zero occasions, wrote: “The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 (the year of the *Barefoot* decision) that neither the [US Supreme] Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals that psychiatric predictions of long-term future violence are wrong more often than they are right” (internal quotations omitted). Judge Garza concluded: “If that [legal] process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened.”

Mental illness on or because of death row

It is a terrible thing to be condemned to death, and confined for years in a small cell, with little to do except to prepare for execution. It seems self-evident that the conditions under which the condemned spend those last years should not involve additional punishment. Yet, at present, the six condemned prisoners on New York’s death row endure a host of indignities and restrictions that normally are employed only as punishment for the violation of important prison rules. To impose these conditions on the UCP’s inmates as a matter of course, that is, even if they have obeyed every rule that the system enacts, is harshness without purpose, a fair definition of cruelty

The Association of the Bar of the City of New York, 2001³³³

The mental health of Nguyen Tuan Anh Nguyen, a former child refugee from Vietnam deteriorated during the seven years that he was held in H-Unit of Oklahoma’s State

³³¹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

³³² *Flores v Johnson*, 210 F.3d 456 (5th Cir. 2000), concurring opinion.

³³³ *Dying twice: Conditions on New York’s death row*. The Association of the Bar of the City of New York, August 2001, http://www.abcnyc.org/Publications/reports/show_html.php?rid=51. UCP stands for Unit for Condemned Persons, i.e. death row.

Penitentiary. His symptoms included psychotic-like episodes in his cell where he would scream for extended periods. To what extent living under sentence of death in one of the harshest prisons in the country contributed to his mental health is not known, and it can only be imagined what effect his screaming had on those other inmates who could hear him.

Tuan Nguyen was executed in the first few minutes of 10 December 1998, Human Rights Day, despite evidence that he was legally insane. John Duvall was executed a week later. His clemency petition noted: "Since November 1991, Mr Duvall has lived in the underground tomb known as H-Unit at Oklahoma State Penitentiary at McAlester. Except for a trip to court in 1992 and a trip to the hospital in 1996, John has not seen a blade of grass, a bird, a tree or anything of nature in these seven years. Except for those brief trips, John has not breathed real air in these seven years."

H-Unit, where Oklahoma's male death row population has been housed since November 1991, is constructed entirely of concrete with the living accommodation sited effectively underground. It is an electronically controlled facility designed to minimize contact between inmates and prison staff. Prisoners are confined for 23 or 24 hours a day in cells measuring 7' 7" (2.31m) wide by 15' 5" (4.70m) long by 8' 4" (2.54m) high. The walls, floors and ceilings are of unpainted concrete. Each cell has two concrete beds on either side of an uncovered toilet and sink. There is no other furniture in the cells apart from two concrete shelves on the back wall which serve as a "table" and two similar shelves above these. The cell doors are solid metal, except for the upper part which has a plexiglass window with thick bars on the outside. There are no windows to the outside world. There is no natural fresh air ventilation to the cells, which are air-conditioned through a pipe system in which air is passed in and out of two vents in the back of each cell. After visiting the unit in 1994, Amnesty International concluded that the conditions under which death row inmates were being held in H-Unit constituted cruel, inhuman and degrading treatment in violation of international law and standards.³³⁴

Most of the death row population in H-Unit are kept "double-celled", that is, two inmates to a cell. Prisoners who are kept alone in cells are those who are considered to be a physical threat to other inmates, or unstable. Tuan Anh Nguyen, for example, was kept single-celled in the years before he was killed. Until he died in 1997, Thomas Hays had been kept single-celled for six years in H-Unit because of the severity of his mental illness.³³⁵ H-Unit is no

³³⁴ USA: *Conditions for death row prisoners in H-Unit, Oklahoma State Penitentiary*, AI Index: AMR 51/34/94. A Human Rights Watch (HRW) delegate visited H-Unit in 1999. In a letter to Oklahoma's Director of Corrections, dated 19 June 2000, the organization wrote: "Human Rights Watch concurs with and fully endorses the findings of Amnesty International in its 1994 report... We find it deeply troubling that Amnesty's findings are as valid today as several years ago when the report was written; that is, there have been no significant changes in the conditions under which prisoners in the H-Unit live".

³³⁵ Thomas Hays had been on death row for 20 years, having been the first person sentenced to death under its current death penalty laws. He had been found incompetent for execution in the mid-1980s, but had remained on death row for another decade and a half.

place for the healthy, let alone people who are mentally ill. Such conditions can cause mental health problems and exacerbate existing ones.³³⁶

By all accounts, the conditions in H-Unit remain as harsh as ever more than a decade after Amnesty International's report. In 2000, when Human Rights Watch raised concerns about conditions in the unit and their potential impact on the mental health of inmates, the Director of the Department of Corrections responded that the Department had "no intentions of responding to any concerns that you have with H-Unit.... I am not intending to be impolite, but your correctional philosophy and the correctional philosophy in the state of Oklahoma differs substantially, and there is no reason to initiate any further dialogue or correspondence."³³⁷

Conditions in H-Unit are an example of an increasingly punitive rather than rehabilitative approach to incarceration adopted during the 1980s and 1990s under which maximum security prisoners are warehoused until they die, are executed or released. Death row inmates have seen their conditions of detention worsen as a part of such developments. In some cases, the conditions are as severe as those in the USA's "supermaximum" security prisons, a concept "now embedded in American corrections".³³⁸ Certain aspects of the supermaximum security prisons have been described by the UN Committee against Torture as "excessively harsh", and the UN Human Rights Committee as "incompatible" with international standards.³³⁹ Prolonged isolation in conditions of reduced sensory stimulation can cause severe physical and psychological damage, even on health individuals, and even without the added psychological stressor of a death sentence.³⁴⁰ An expert on detention conditions and

³³⁶ In a lawsuit filed on behalf of Ronald Williamson, a mentally ill man who was released in 1999 after he was proved to be innocent, the state was accused of "malicious and sadistic action" towards Williamson during his incarceration in H-Unit. The lawsuit charged that on occasion, Williamson was placed in one of the unit's double-doored solitary confinement punishment cells, "not because of any discipline problem, but as an alternative to providing any meaningful treatment for Ron Williamson's mental disorder." It alleged that prison employees "instituted restrictions and took actions calculated to sadistically cause Ron Williamson even more mental anguish than he already was experiencing". It accused officials of acting "with deliberate indifference" to Williamson's mental illness, and of operating "a regular practice of employing unreliable and/or underqualified persons in mental health positions and maintained a staffing level – particularly in relation to death row – that was clearly inadequate to meet the mental health needs." In Williamson's case, the lawsuit alleged, this denial of adequate care resulted in "the extreme mental and physical suffering of Ron Williamson, to the point that on many occasions he screamed in agony practically all day, and became painfully emaciated."

³³⁷ Letter from James L. Saffle, Director, Oklahoma Director of Corrections, 26 September 2000.

³³⁸ *Supermax prisons and the Constitution: Liability concerns in the Extended Control Unit*. By William C. Collins. Funded and published by the National Institute of Corrections, US Department of Justice, November 2004.

³³⁹ Committee against Torture: UN Doc. A/55/44 (1999-2000), para. 179(f) (2000). Human Rights Committee: UN Doc. CCPR/C/79/Add.50 (1995).

³⁴⁰ For example, UK prisoners held in conditions similar to those in US supermax facilities have suffered disorders including impaired eyesight, weight loss, muscle wastage, memory loss and anaemia.

mental health has written: “Every prisoner placed in an environment as stressful as a supermax unit, whether especially prone to mental breakdown or seemingly very sane, eventually begins to lose touch with reality and exhibit some signs and symptoms of psychiatric decompensation, even if the symptoms do not qualify for a diagnosis of psychosis.”³⁴¹ At least two federal courts in the USA have recognized that the type of conditions of confinement in supermaximum security prisons can lead to serious psychological harm.³⁴²

In 1999 and 2000, Texas death row was transferred from Ellis Unit in Huntsville to Polunsky (formerly Terrell) Unit in Livingston. From being held in tiered cells with barred fronts and in a regime that allowed group religious and recreational activities, work in a garment factory, and television, the inmates were transferred to a regime of confinement alone in his cell (six and a half feet by 11 feet on its longest side) for 23 to 24 hours a day. The cell has a built-in toilet, sink, bed, desk and shelving, all steel. Each cell has a steel door with two slits that serve as windows into the unit section (“Pod”). There is a single closed window three inches wide and about four feet long running horizontally high along the outside wall. In order to be able to look out of this window, the prisoner would have to stand on his bed. The window of a cell viewed by an Amnesty International delegate during a visit to the prison on 2 May 2001 afforded a view of razor wire and little else.

Each of the Polunsky Unit’s six Pods has an indoor exercise area, an enclosed space split into two halves separated by floor-to-ceiling wire mesh. In this small area, a prisoner can take exercise alone for up to an hour – there may or may not be a fellow inmate in the opposing half of the exercise area at that time. Because the exercise area is actually housed in the Pod itself, overlooked by cells, its atmosphere and surrounds fail to provide a qualitatively different experience from in-cell time. Amnesty International has been told that many inmates choose not to take exercise because they consider the transfer from the cell to the exercise area and back a humiliating exercise, including handcuffing and strip-searching. Amnesty International has been told that there are more inmates displaying possible detention-related mental health problems than there were at Ellis Unit, although the Texas authorities have not responded to Amnesty International’s request for any available comparative statistics they may have on this issue.

Visits by family members and others in Polunsky Unit, as in many other states, are “non-contact”, conducted through plexiglass and via telephone. Prisoners may thus be held for many years with almost no human contact and little outside or group stimulation or fresh air and sunlight. Such harsh conditions may lead to anxiety, depression or other mental health problems in an inmate and could explain why a number of prisoners have chosen to drop their

See UK: *Special Security Units – Cruel, Inhuman and Degrading Treatment*, AI Index: EUR 45/06/97, 1997.

³⁴¹ Terry Kupers, M.D. *Prison madness: The mental health crisis behind bars and what we must do about it*, Jossey-Bass Publishers, San Francisco, 1999.

³⁴² *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D.Cal. 1995) and *Jones v. Berge*, 164 F. Supp. 2d. 1096 (W.D.Wisc. 2001). Cited in *Supermax prisons and the Constitution*, *op.cit.*

appeals and “consented” to their own execution. In New Mexico, for example, Terry Clark was found competent to drop his appeals despite evidence that he suffered brain damage (of the right frontal lobe), and suffered from a major depressive disorder with paranoid features. Lawyers had argued against the execution, holding that his decision to drop his appeals could not be described as voluntary given the psychological impact of spending more than 10 years on New Mexico’s death row, where conditions had become increasingly harsh over the years, with reduced human contact and restrictions on activities. Again, inmates are held in their cells for 23 hours a day.

The sense of isolation on death row may be one reason why 10 out of 11 of the people put to death in Nevada between 1977 and June 2005 had given up their appeals. Nevada’s death row is based at Ely, in the east of the state. It is situated some 400 kilometres from Las Vegas and over 500 kms from Reno, the two main centres of population in one of the least densely populated states of the USA. Such distances undoubtedly make it difficult for people to visit death row inmates.

The isolation to which condemned inmates were being subjected in Mississippi was just one of the aspects of death row conditions which a lawsuit argued amounted to cruel and unusual punishment in violation of the US Constitution and “toxic” to the inmates’ mental health.³⁴³ In May 2003, a federal judge agreed, ruling that the death row conditions in Mississippi State Penitentiary offended “contemporary concepts of decency, human dignity and precepts of civilization which we profess to possess”. Judge Jerry Davis found that death row inmates were being subjected to “profound isolation, intolerable stench and filth, consistent exposure to human excrement, dangerously high temperatures and humidity, insect infestations, deprivation of basic mental health care, and constant exposure to severely psychotic inmates in adjoining cells.”³⁴⁴ Among other things, the federal judge found that:

- the filthy conditions impacted on the mental health of inmates;
- the probability of heat-related illness was high for death row inmates, particularly those suffering from mental illness who either did not take appropriate steps to deal with the heat or whose medications interfere with the human body’s temperature regulation;³⁴⁵
- there were at least six severely psychotic inmates on death row, and many others had been diagnosed with mental illness. The exposure to the severely psychotic individuals, who would for example scream and throw feces, was intolerable;³⁴⁶

³⁴³ The lawsuit was filed by the National Prison Project of the American Civil Liberties Union.

³⁴⁴ *Russell v. Johnson*, US District Court for the Northern District of Mississippi, 21 May 2003.

³⁴⁵ There is concern, for example, that this could have contributed to the death of Emile Duhamel, who was found dead in his death row cell in Ellis Unit in Texas on 9 July 1998. Duhamel suffered from paranoid schizophrenia and was anti-psychotic medication.

³⁴⁶ A leading psychiatrist in the field of detention conditions and mental health care in prisons, Terry Kupers, reported to the judge that “[t]he presence of severely psychotic prisoners who foul their cells, stop up their toilets, flood the tiers with excrement and keep other prisoners awake all night with their

- the isolation of death row, combined with the conditions on it and the fact that its population are awaiting execution, would weaken even the strongest individual;
- the mental health care provided to inmates was “grossly inadequate”. Mental health consultations were not conducted in private, causing inmates not to relate their problems, and powerful medications were prescribed but the patients not monitored.

The state appealed and in June 2004, the US Court of Appeals affirmed a number of Judge Davis’ orders for injunctive relief relating to the conditions and the threat they posed to the well-being of the inmates, a concern to which the prison authorities had displayed “deliberate indifference”.³⁴⁷

Deliberate indifference is a phrase that could be used to describe the failure of the US authorities to lead their country away from the death penalty. This calculated assault on human dignity is compounded when the conditions to which condemned inmates are subjected go beyond what is necessary for their confinement. State correctional authorities should examine whether death row conditions meet international standards for the treatment of prisoners, and ensure that treatment for those with mental illness is adequate. Any prisoners suffering from psychosis should be removed from death row to more appropriate locations.

Cycle of violence – from the home to the death chamber

We do not profess to be unmoved by the dreadful circumstances of Tucker’s childhood, and we understand the relevance of such evidence to the jury’s determination of Tucker’s moral culpability at the time he committed the murder

US Court of Appeals for the Fifth Circuit, upholding a death sentence, 2001³⁴⁸

Jeffrey Tucker was executed in Texas on 14 November 2001. In July 1988 he purchased a gun and ammunition from a pawn shop and soon afterwards shot a man and stole his truck. The jury which sentenced Tucker to death in October 1989 heard little of his abusive childhood and no expert evidence about its effects on his mental health. In 1997, both of his trial lawyers signed affidavits acknowledging their failure. One of them wrote: “it was certainly not due to any legal strategy, tactic or plan that we neglected to pursue and introduce documents or testimony regarding Mr Tucker’s mental illness... The idea of investigating a client’s childhood and mental health history was new to us.” Both lawyers said they believed that such evidence could have saved their client’s life.³⁴⁹

A psychological evaluation in 1997 found compelling evidence that Jeffrey Tucker had experienced severe PTSD since childhood and/or adolescence. It suggested that “had appropriate psychotherapy ever been conducted during residential treatment or his

incessant screams and shouts [is] virtually certain to cause medical illnesses and a destruction of mental stability and functioning.”³⁴⁶ Terry Kupers, M.D., quoted in: *Mississippi told to fix conditions on death row*, Los Angeles Times, 24 May 2003.

³⁴⁷ *Russell v. Johnson*, US Court of Appeals for the Fifth Circuit, 28 June 2004.

³⁴⁸ *Tucker v. Johnson*, 242 F.3d 617, 622 (5th Cir. 2001).

³⁴⁹ Affidavits of Mike A. Smiddy and John D. Moore, 24 October 1997.

hospitalization, and had appropriate...medication ever been instituted, the incident for which Mr Tucker is currently incarcerated may never have occurred.” It found evidence that the shooting of the victim may have occurred during an PTSD flashback when the victim lunged across the front seat of the truck at Tucker. The latter recalled that during this episode, “I saw my Dad jumping out at me. I was back there. Then the gun went off.” The evaluation described Jeffrey Tucker’s case as “a prototypical illustration of the possible long-term consequences of untreated childhood sexual abuse. A pervasive sense of stigmatization, betrayal, powerlessness, and traumatic sexualization derived from the child physical and sexual abuse that he endured, coalesced and literally ‘ticked away’, much like a psychological time bomb, until a constellation of certain external and internal stimuli and intrusive recollections ‘detonated’ within Jeffrey...”³⁵⁰ The US Court of Appeals for the Fifth Circuit upheld the death sentence in 2001, adding that it did “not profess to be unmoved by the dreadful circumstances of Tucker’s childhood, and we understand the relevance of such evidence to the jury’s determination of Tucker’s moral culpability at the time of the crime”.³⁵¹ Nevertheless, it held that the fact that the jury had not heard the bulk of such evidence had not altered the outcome of the trial.

In his reflections on the death penalty, Ronald Spivey wrote that among those being executed in the USA were “those so criminally abused as children that they never had a chance to develop normally to a well-balanced human being”.³⁵² Ronald Spivey was on death row in Georgia for a quarter of a century before being executed in 2002. He himself had suffered a childhood of emotional and physical abuse and had a history of psychiatric problems. As a child, his father used to beat him, lock him in cupboards, and threaten to kill him. The boy fled home on numerous occasions, only to be returned by the authorities. At school, it was recognized that he had severe emotional problems, and he began receiving mental health treatment at the age of 12. However, his father frequently prevented him from receiving the psychiatric care he needed, apparently believing that beating him was more appropriate.

Ronald Spivey’s experience is far from isolated amongst the USA’s death row population.³⁵³ The background of deprivation and abuse from which large numbers of those

³⁵⁰ Psychological evaluation. Jeffrey Eugene Tucker, Counseling, Testing & Psychiatric Services, Tyler, Texas. Date of report: 19 September 1997.

³⁵¹ *Tucker v. Johnson*, 242 F.3d 617, 622 (5th Cir. 2001).

³⁵² “America is killing the economically deprived, those of the lower socioeconomic strata, killing the insane, killing the retarded, killing illiterates, killing the emotionally crippled, killing the socially disenfranchised and the politically powerless of our society, killing those so criminally abused as children that they never had a chance to develop normally to a well-balanced human being.” *Welcome to Hell: Letters and writings from death row*. Compiled and Edited by Jan Arriens, Northeastern University Press, 1997. It was said that Ronald Spivey may have had the highest IQ of any death row prisoner in the USA (around IQ 170).

³⁵³ Much has been written about the backgrounds of US death row prisoners. Randolph Loney, a farmer and pastor who has been visiting prisoners on Georgia’s death row weekly since 1985, stressed to an Amnesty International delegate in Atlanta in 2002 the importance, when considering the subject of mental health and the death penalty, of recognizing the abuse to which many on death row were

on death row in the USA come – and its possible mental health consequences – is an aspect of this punishment which, like race and economic class, is impossible to ignore.³⁵⁴ Sometimes it is neglect rather than physical abuse which raises questions of wider societal responsibilities. Adremy Dennis, for example, was executed in Ohio on 13 October 2004 for a murder committed when he was 18 years old. He had been born to a mentally unstable 19-year-old mother and an abusive father who she left when Adremy was five years old. His schooling and medical care suffered as a result of the effective absence of any parenting. He never had any treatment for his history of blackouts, and there is evidence that he suffered from untreated Attention Deficit Hyperactivity Disorder, which made him particularly vulnerable to self-medicating on illegal drugs and alcohol (he was intoxicated at the time of the crime). When he was 15, he was taken into care by social services. As his execution date approached, three of the eight Ohio parole board members voted for clemency, noting expert psychological evidence of the “serious effect” of the “severe and debilitating child neglect from birth until age fifteen”. They also suggested that the “school system had missed a vital opportunity to help Dennis”, when it failed to take any action about his absenteeism (in the year before he was taken into care, he was absent from school for 122 days).

“Over and over, clinicians and researchers have observed the interactive and synergistic relationships among childhood trauma, Post-traumatic Stress Disorder (PTSD), substance abuse and violence. Among the common psychological legacies of childhood trauma is PTSD, the symptoms of which often lead abuse victims to seek relief through self-medication – the consumption of mind-altering drugs and alcohol that deaden feeling, alleviate fears and anxieties, and provide temporary states of artificial euphoria. Especially when chronic, such abuse of mind-altering drugs and alcohol often contributes to a generalized deterioration in patients’ lives; loss of relationships; loss of jobs. As a consequence and possibly also as a corollary, it also often leads patients into violence – through connections with violent individuals, and through an increasing reliance on crime to find the money to pay for the substances they are abusing, and through disinhibition of violent impulses. Further, some of the symptoms of PTSD itself, in particular hyper-vigilance and hyper-reactivity to

subjected as children. Separately, he has written “Born of impotence, [rage] is a feeling that so many of the men I have visited have experienced throughout their lives, beginning with their mistreatment as children. It is an emotion that led many of them to murder... Reflecting on my own rage, I have been able to imagine how this feeling can lead people who have been consistently abused or neglected to commit terrifying acts of violence.” Randolph Loney, ‘A dream of the tattered man. Stories from Georgia’s death row’. William B. Eerdmans Publishing Company (2001), p. 26.

³⁵⁴ As already noted, a recent study of 18 young offenders on death row in Texas found that all but one came from extremely violent and/or abusive families in which mental illness was prevalent in multiple generations. Dorothy Otnow Lewis *et al*, Ethics questions raised by the neuropsychiatric, neuropsychological, educational, developmental, and family characteristics of 18 juveniles awaiting execution in Texas. *Journal of the American Academy of Psychiatry and Law* 2004; 32: 408-29.

*particular stimuli, may render a victim more susceptible to violent behaviour, a susceptibility that may be greatly enhanced by substance abuse.*³⁵⁵

In case after case among the condemned, a history of physical, sexual or emotional abuse is revealed. Time after time, lawyers appointed by the state to defend indigent capital defendants have failed to investigate such backgrounds, leaving juries in the dark about the life stories of those against whom they are being asked to pass a death sentence. Scores of such people have been executed in the USA since 1977. They include:

- Gary Etheridge. He was physically abused by his father, particularly when his father was drunk. His mother suffered mental illness and made repeated suicide attempts, one of which Gary Etheridge had witnessed as a child. He was repeatedly raped and physically abused by an older brother starting from when he was six years old. Gary Etheridge began using drugs and getting into trouble with the law from the age of 12. His four brothers, also brought up in this abusive environment, have all been to prison. Gary Etheridge attempted suicide on at least two occasions, once after being raped while serving a prison term for a prior, non-violent offence. His severe depression, when left untreated outside prison, contributed to his self-medicating with illegal drugs and to serious drug addiction. He was intoxicated on a combination of heroin and cocaine when the sexual assault and murder of 15-year-old Christi Chauvierre occurred. At his Texas trial for that murder, his lawyers were aware of such mitigating evidence, but chose not to present it. They feared that such evidence could be used by the prosecutor to argue that Gary Etheridge would be a future danger if allowed to live (a prerequisite for a death sentence in Texas). Indeed at the 1990 trial, the judge had referred to the defendant as a “piece of trash” and “a blight on society”. The jury’s verdict that he was an unacceptable risk to society and should be killed was carried out on 20 August 2002.
- Marlon Williams. He was executed in Virginia on 17 August 1999. At the time of his crime he was emerging from a childhood of appalling physical abuse. For example, when he was 11 he was beaten with a broom handle so severely by his mother that his two blackened eyes were 95 per cent swollen shut. She sent him to school in this condition. He was immediately taken to hospital, where he was also found to have a ring imprint on his forehead. He was diagnosed with major depression at 13, and at 15 a psychological evaluation described him as “a very psychologically damaged young man”, who was having psychotic episodes. After living in various homes, including his mother’s again, he was taken back into the custody of Social Services until he turned 18. Thirteen months later Helen Bedsole was shot dead, the crime for which Williams was sentenced to death. The judge who sentenced him was left largely unaware of the abuse and mental health problems.

³⁵⁵ Lisak, D. and Miller, P.M. (2003). *Childhood abuse, PTSD, substance abuse and violence*. In P.C. Ouimette and P. Brown (Eds.), *PTSD and substance abuse comorbidity*. Washington DC: American Psychological Association. Pre-publication copy of article on file at Amnesty International.

- William Smith. He grew up in an environment of deprivation and abuse. His mother suffered from mental illness, as did his stepfather, who was also violent towards the children. From the age of nine to 14, William Smith himself was resident in a psychiatric facility where he was treated with anti-psychotic medication and electric shock therapy. After he left there as a young teenager, he took to living on the streets or with friends. He began using drugs, and would later be diagnosed with alcohol dependence, cannabis dependence and cocaine dependence which, in a post-conviction assessment, a clinical psychologist concluded may have affected Smith's conduct on the night of the crime. His trial lawyers did not begin to prepare for the sentencing phase of the trial until a few days beforehand, and failed to present expert mental health testimony prepared for this phase. The Ohio parole board unanimously rejected clemency, despite finding that there were a number of mitigating factors in the case: namely that William Smith suffered "an abysmal childhood of deprivation and abuse"; that he had displayed a "sincere, genuine and strong expression of remorse" for the crime (in a meeting with a parole board member, William Smith had "tearfully stated that he takes full responsibility for his inexcusable, unjustifiable and inexplicable behaviour"); that, at the time of the crime, he had "suffered from a personality disorder that may have manifested in a loss of impulse control"; and that he has "demonstrated exemplary conduct and adjustment" in prison. William Smith was executed in Ohio on 8 March 2005.
- Betty Lou Beets. She went to her death in the Texas execution chamber on 24 February 2000, two weeks before her 63rd birthday. The jury was left unaware of crucial mitigating evidence, including Beets' traumatic history of severe physical and sexual abuse from an early age. Expert testimony in post-conviction proceedings found that she suffered from post-traumatic stress disorder (PTSD), Battered Woman Syndrome and organic brain damage. Appeals from the UN Special Rapporteurs on extrajudicial, summary or arbitrary executions and on violence against women were among the thousands of calls for Governor George W. Bush to stop the execution. The UN experts urged the Governor to consider "the specific circumstances of the crime and in particular the violent abuse which Betty Lou Beets suffered at the hands of her spouses and the effect of this abuse on her state of mind and her actions."
- Abu-Ali Abur'Rahman remains on death row in Tennessee for the stabbing murder of Patrick Daniels in 1986. He has been diagnosed as suffering from PTSD. While not denying that he was involved in the crime, Abu-Ali Abdur'Rahman has consistently maintained that he cannot remember the stabbing itself, a possible sign of a PTSD blackout.³⁵⁶ During his childhood, he had suffered appalling abuse at the hands of his father, a military policeman. This abuse included the child being stripped, tied up, and locked in a cupboard; being struck on the penis with a baseball bat; and being made to eat a pack of cigarettes as punishment for smoking, and when he vomited forced to eat the vomit. His jury heard none of this evidence. Nor did it learn of his mental

³⁵⁶ His co-defendant avoided the death penalty by testifying against Abdur'Rahman. Such testimony is notoriously unreliable.

health problems. In 1998 a federal judge overturned the death sentence, citing the “utterly ineffective assistance of counsel at his sentencing hearing”. However, the US Court of Appeals for the Sixth Circuit reinstated the death sentence in 2002 over a dissent by one of the three judges. According to a Tennessee Supreme Court Justice, not even the two Sixth Circuit judges who voted to reinstate the death sentence “seriously challenge[d] the finding that Abdur’Rahman had received deficient representation”. By 2002, eight of the nine jurors contacted by Abdur’Rahman’s appeal lawyers had signed affidavits saying that they might or would not have voted for death if they had heard the mitigating evidence.³⁵⁷

Others have been executed whose PTSD appears to have been the result of traumatic violence later in life, including in the context of war (see next section) and in state institutions. For example, Donald Harding, executed in Arizona in 1992, was diagnosed with untreated PTSD sustained as a result of sexual and physical brutality he was subjected to in adult prison, including as a teenager. Another such case was that of Samuel Smith, executed in Missouri on 23 May 2001.

Samuel Smith was sentenced to death and executed for stabbing to death a fellow prisoner, Marlin May, in Missouri State Penitentiary in January 1987. A fight had erupted between a number of inmates, in which Samuel Smith became involved. Five months earlier, Smith had himself been stabbed and was in hospital for a week. For his trial for the murder of Marlin May, he was originally represented by the two lawyers who were representing the two inmates accused of stabbing Smith in the earlier incident. They were removed after Smith discovered the conflict of interest, but in the eight months they had been on the case, they had interviewed no witnesses nor prepared any mitigation evidence. They were replaced by a lawyer who had no capital trial experience, who presented no mental health evidence. After Smith was sentenced to death, he was diagnosed as suffering from PTSD as a result of the earlier stabbing that may have triggered the crime five months later.³⁵⁸

Undoubtedly, the links between trauma suffered by individuals during childhood or later in life and their own propensity to violence are complex and variable. Abolitionists are not seeking to excuse criminal violence, but to end a sanction that is blind to this complexity and diverts resources from efforts to explain past violence and prevent its recurrence. The death penalty is a simplistic solution that denies any causation and is itself a part of a cycle of violence that does not move our understanding of the roots of violence forward one iota.

Killing state: the soldier and the executioner

*Mr Brannan’s whole life involved service to his country... He served two tours in Vietnam...
Mr Brannan killed at the direction of his government, and he witnessed many more killings*

³⁵⁷ For more information on this case, see USA: *Not in the jury’s name. The imminent execution of Abu-Ali Abdur’Rahman*, AI Index: AMR 51/075/2003, June 2003, <http://web.amnesty.org/library/Index/ENGAMR510752003>.

³⁵⁸ Application for reprieve from and/or commutation of a sentence of death. May 2001.

including that of his commanding officer... [He] came home with medals of commendation; he also came home with Post Traumatic Stress Disorder
Appeal brief for Andrew Brannan, Georgia death row, 2002³⁵⁹

In a book published in 1995 on the psychological effects of war on combatants, Dr Jonathan Shay wrote of his aim to “put before the public an understanding of the specific nature of catastrophic war experiences that not only cause lifelong disabling psychiatric symptoms but can *ruin* good character. I have a specific aim in doing this: to promote a public attitude of *caring* about the conditions that create such psychological injuries, an attitude that will support measures to prevent as much psychological injury as possible. It is my duty as a physician to do my best to heal, but I have an even greater duty to *prevent*.”³⁶⁰ In his introduction to the book, Dr Shay quotes one of his Vietnam veteran clients, diagnosed with Post Traumatic Stress Disorder (PTSD):

“I haven’t really slept for twenty years. I lie down, but I don’t sleep. I’m always watching the door, the window, then back to the door. I get up at least five times to walk my perimeter, sometimes it’s ten or fifteen times. There’s always something within reach, maybe a baseball bat or a knife, at every door. I used to sleep with a gun under my pillow, another under my mattress, and another in the drawer next to the bed. You made me get rid of them when I came into the program here. They’re over at my mother’s, so I know I can get them at any time, but I don’t. Sometimes I think about them – I want to have a gun in my hands so bad at night it makes my arms ache.”

Dr Shay noted that about three-quarters of a million heavy combat veterans were still alive in the mid-1990s, about a third of whom were “still suffering in this manner”. A nationwide study conducted during the 1980s and published in 1992 concluded that 35.8 per cent of male Vietnam combat veterans met the full American Psychiatric Association diagnostic criteria for PTSD. Over 70 per cent of combat veterans had experienced at least one of the symptoms at some time in their lives, even if he was not given the full PTSD diagnosis.³⁶¹

David Funchess had joined the Marine Corps in 1965 at the age of 18, and was sent to Vietnam in 1967, where he was involved in some of the heaviest fighting of the war. His military record was excellent, and he received five medals for bravery during his tour of duty. However, he was badly wounded in a landmine explosion and was hospitalized in Japan. He was eventually returned to duty, but, suffering from depression, his military record deteriorated and, after frequently going absent without leave, he received a dishonourable

³⁵⁹ *Brannan v. State*, In the Supreme Court of the United States. On petition for writ of certiorari to the Supreme Court of Georgia

³⁶⁰ Jonathan Shay, M.D., Ph.D., *Achilles in Vietnam: Combat trauma and the undoing of character*. New York: Touchstone, 1995.

³⁶¹ Kulka, R.A. et al., *National Vietnam Veterans Readjustment Study* (New York: Brunner/Mazel, 1992), as cited in *Achilles in Vietnam, op.cit.*

discharge in 1971. Four years later, this African American Vietnam veteran was sentenced to death for killing two white people during a robbery of a bar in 1974.

David Funchess was first diagnosed as suffering from PTSD in 1982 by a leading expert on the disorder. This psychologist found that, although David Funchess was reluctant to dwell on them, his wartime experiences, together with the murder of his brother shortly before his tour of duty in South Vietnam and certain incidents in his childhood, had combined to cause a depressive reaction characteristic of a severe form of PTSD. The psychologist stated that the disorder was produced by massive internalized stress, which could erupt on occasion into uncontrollable outbursts of aggressive behaviour. The symptoms included long-term suppression of emotions, dissociation from reality, mental impairment and memory loss.

His family described how he returned from Vietnam a changed person and addicted to heroin. He had been unable to tolerate noise, suffered from frequent flashbacks, sleeplessness and nightmares. It was said that he could not enter a house or room without first crouching down with an imaginary machine gun as if ready for combat. Unable to spend time indoors, he would often build what his sisters described as “foxholes” and sleep in them under the house. Later he took to sleeping in cars, and unable to find work drifted into petty crime.

The lawyer who represented David Funchess at trial later testified that he had been unaware of the existence of PTSD and had had neither the information nor the resources to seek expert input to present to the jury. Neither had the lawyer talked to his client’s family. David Funchess was executed in Florida in 1986.

In his 1995 book, Dr Jonathan Shay continues his testimony of combat veterans from the Vietnam War:

“Once when my daughter was younger... she came up behind me and before I knew it I had her by the throat up against the wall. I can still see her eyes. I put her down and just walked out of the house without saying anything to anybody and didn’t come back for a week. I felt lower than dogshit. I hate it that my kids have to be so careful around me. I made them that way, and I hate it...”

I think I don’t have long to live because I have these dreams of guys in my unit standing at the end of my sofa and blood coming down off them and up the sofa. I wake up screaming and the sofa soaked with sweat. It seems like if the blood reaches me I’m going to die when it does. Other nights I dream of the guys calling to me from the graveyard. They’re calling to me, ‘Come on , come on. Time to rest. You paid your dues. Time to rest’.”

Manuel Babbitt was a black decorated Vietnam veteran diagnosed with PTSD. On his return to the USA from the Vietnam War, he experienced severe difficulties adjusting to civilian life and slid into serious alcohol and drug problems. He spent eight months in a mental hospital where conditions at the time were described by a federal judge as “shocking” and “unconstitutional”. His declining mental health was diagnosed, but never treated. A leading expert on PTSD among Vietnam War veterans concluded that Babbitt was suffering from a combat-related flashback, aggravated by hallucinogenic drugs, when he killed Leah

Schendel in 1980, and hid and tagged her body as soldiers had hidden and tagged their fallen comrades in Vietnam. Manuel Babbitt was executed in California on 4 May 1999.

David Funchess, Manuel Babbitt, Wayne Felde, Herbert Richardson, Leonard Laws, Robert Black, Larry Johnson, Joseph Atkins and James Johnson are among those former soldiers who served in the Vietnam War who were later convicted of murders in civilian life and executed.³⁶² They were all diagnosed with PTSD. Their cases serve as a stark reminder of the lasting effects of war on individuals and raise questions about the responsibility of the state towards those it sends to war and who bring home a capacity for violence in their scarred psyches. With thousands of soldiers returning from the recent US-led invasions of Afghanistan and Iraq, the US authorities should learn from the earlier cases if history is not to repeat itself.

There are other Vietnam veterans still on death row in the USA. George Page in North Carolina and Andrew Brannan in Georgia are two of them.

George Page served 16 years in the military, including in the Vietnam War. Now 65 years old, he has been on death row in North Carolina for the past decade. In late February 2004, he came one day from execution before he received a court-issued stay based. He was sentenced to death for the shooting of a police officer in 1995.

On the morning of 27 February 1995, police officers were called to the scene of a shooting in Winston-Salem. When they arrived, they found that George Page had fired several shots from the window of his apartment using a high-powered rifle. He fired more shots, one of which ricocheted through two car windows before striking Officer Stephen Amos in the chest, fatally wounding him. An officer who was a crisis negotiator spoke by telephone with George Page who said he wanted to speak with his psychologist and his psychiatrist, under whose treatment he had been for various mental disorders for some time. Following further negotiations, George Page agreed to leave his weapon and go with his psychiatrist and the

³⁶² See Appendix for details. This list does not claim to be exhaustive. For example, Samuel McDonald was executed in Missouri in 1997. In post-conviction evidence not heard by the jury, Dr John Waite testified that Samuel McDonald suffered from PTSD as a result of his experiences in the Vietnam War. According to an appeal brief based on this testimony, this had caused McDonald “to act in an impulsive manner, impaired or extinguished his ability to deliberate, and rendered him incapable of reflection”. Others Vietnam War veterans have been sentenced to death. For example, Michael Taylor was sentenced to death in Ohio in 1993 for a bar shooting. He had enlisted in the US Army at the age of 17, and was sent to Vietnam where he witnessed numerous killings of soldiers on both sides, as well as civilians. According to the Ohio Public Defender, Michael Taylor suffered from PTSD, for which he never had assistance after he returned from the war. His death sentence was overturned by a federal court in 2003. He died of cancer the following year. In the case of Dennis Orbe, it was his father who served in the Vietnam War. When the father returned home from the war, he became very abusive to his three sons, and physically and emotionally abused Dennis. Dennis Orbe was executed in Virginia in 2004. Prior to his capital crime, he had been suffering from severe depression and was showing suicidal tendencies. See also the case of Hung Thanh Le, a refugee from Vietnam, diagnosed with PTSD, and executed in Oklahoma in 2004 (see section on *Racial, cross-cultural and cumulative aspects in a broken system*, above).

officer to the psychologist's office. He was taken into custody shortly thereafter. He reportedly said at the time of the shooting that he was surrounded by soldiers who were shooting at him, a possible sign of a PTSD flashback. The trial jury was told by the state psychiatrist that Page did not have combat-related PTSD because he served as a mechanic in Vietnam and had not been in combat. Nevertheless, his military records show that he was stationed in an area of active conflict and bombing. Research shows that soldiers in various occupations can suffer PTSD.

George Page's former wife stated in an affidavit in 2004 that "when George returned from Vietnam, he had completely changed...When he got back, he was really standoffish and he just didn't get close to people again. After he returned from Vietnam, there were many times when I would wake up in the middle of the night and George wouldn't be in the bedroom. I would get up and would find him in the kitchen. He would usually be drinking. He would be sitting on the floor and crying...The next morning, he would never remember what had happened...Something traumatic must have happened to George while he was in Vietnam. He very rarely talked about his time in Vietnam but he seemed to be tortured by those experiences". She did not testify at the trial because she was not contacted by his lawyers. In her affidavit she states: "I wish I had been able to talk to George's trial attorneys and to the jury that decided George's fate. George had become a completely different man after he went to Vietnam".

In another affidavit in 2004, George Page's daughter recalled that there were times after his return from Vietnam "when he seemed to have lost his mind and not know what was happening...I clearly remember this one time when my father started hollering, 'I got him Charlie. I got him, Charlie.'...After he calmed down, he didn't remember what had happened". She was not contacted by the trial lawyers either. George Page's son-in-law, who did testify at the trial, has stated in an affidavit that he "didn't get a chance to tell the jury about... episodes that made it clear to me that George had serious mental health problems". In another affidavit, George Page's brother-in-law has recalled an incident when Page suddenly "jumped up from his chair and ran out of the house. He was yelling, 'They're going to kill me'". George Page's sister recalls "times that George would see and hear things that weren't real. It seemed like he was hallucinating".

A mental health expert who evaluated George Page during appeal proceedings concluded that he suffers from PTSD and bipolar disorder. George Page's mental health records indicate suicide attempts and treatment for major depression. He has been prescribed medication, including drugs used to treat bipolar disorder, throughout his time on death row, where he remains pending further appeals.

Four years after a North Carolina jury sentenced George Page to death, a Georgia jury rejected Andrew Brannan's plea of not guilty by reason of insanity and found him guilty of murder. Two days later, on 30 January 2000, the jurors voted for a death sentence. Again, the murder victim was a police officer and the defendant was a Vietnam veteran. To the trial prosecutor at Brannan's trial, the victim was a "hero", while the defendant was a "savage", "wicked", "Lucifer", "the Devil", and "an animal", whose claim that he had acted under

combat-related traumatic stress was a smokescreen thrown up to avoid criminal responsibility. The death of Deputy Kyle Dinkheller was an undoubted tragedy, but such inflammatory arguments by a government official seeking a retributive killing should be considered unacceptable.

Andrew Brannan was born in Alabama in November 1948. His father and both of his brothers served in the army. He himself enlisted in the Army Reserves in 1968. In 1969, he became a Reserve commissioned officer in the US Army. His training and military records speak of “outstanding leadership”, of a soldier who “would be an asset to any unit” and whose “enthusiasm was contagious and contributed immeasurably to...morale”. Andrew Brannan served two tours of duty in Vietnam, heading Company D of the 23rd Artillery Infantry Division. As part of his duties, he led reconnaissance missions for six months at a time.

On return from Vietnam in 1971, Andrew Brannan was still only 22 years old. He had psychological problems, however, and his attempt to finish his education, and later his marriage, fell apart. He first sought help for his psychological problems in 1984, two months after his younger brother, who also served in Vietnam, committed suicide. Andrew Brannan was diagnosed with PTSD. One particular event which haunted him was the death of his commanding officer who stepped on a booby trap landmine during a scouting mission, an incident for which Brannan felt a sense of guilt. A 1989 psychiatric report referred to this as the incident “to which he most frequently has flashbacks”. The report also refers to his “chronic depression with Vietnam dreams and flashbacks”.

In September 1989, Andrew Brannan was admitted to the long-term PTSD treatment program in the Veterans Administration Medical Center in Augusta, Georgia. From that point, until the time of his crime in January 1998, he was treated for PTSD on an inpatient and outpatient basis, receiving psychotherapy and medication. As well PTSD, he was diagnosed with major depression and bipolar disorder. He was put on 100 per cent service-connected disability allowance as a result of his combat-related mental illness.

During the 1990s, Andrew Brannan purchased some wooded land in Laurens County in rural Georgia and built a home, which included a lookout tower on its upper storey. He would spend long periods there, interspersed with time spent with his mother at her home in Stockbridge, Georgia, helping her and her neighbours with outdoor work.

Dr. Robert Storms, a psychologist who conducted a psychological evaluation of Andrew Brannan prior to the trial, summed up his mental health condition in the decade prior to the crime thus:

“As is made clear through the massive amount of treatment documentation, Mr Brannan has manifested the major criteria for PTSD. Throughout the late eighties and early nineties, Mr Brannan reported recurring, intrusive thoughts of Vietnam; nightmares, avoidance of stimuli associated with battle or Vietnam. His social/occupational functioning was severely impaired as evidenced by his long term retreats into hiking and living in the woods; his inability to hold steady employment; and his inability to develop long term social relationships. He has engaged in both alcohol and drug abuse in order to self-medicate, although neither appears to have

been a major problem. Mr Brannan has manifested associated mood disorders such as Major Depression and possibly Bi-Polar Illness (Manic-depression). He has been treated with medication and psychotherapy for years. He has manifested both remissions and relapses. Shortly before the incident leading to his arrest, he appears again to have been manifesting a relapse as evidenced by his discussion [with a doctor] of near death experiences in Vietnam.”

On 12 January 1998, driving home from Stockbridge, Andrew Brannan pulled his truck over to the side of the road. Sheriff's Deputy Kyle Dinkheller, who had recorded Brannan speeding, pulled in behind and switched on the video camera on his dashboard. Evidence of what happened next was recorded on the video and played to the jury at Brannan's subsequent trial. At Deputy Dinkheller's instruction, Andrew Brannan got out of his truck and walked towards the deputy's patrol car. As he walked, he put his hands in his pockets and was ordered to remove them. There was then shouting between the two men, with Brannan telling the officer that he was a Vietnam veteran and that he feared for his life. Brannan returned to his vehicle and retrieved a gun. Deputy Dinkheller radioed for help, but shooting between the two men began, lasting for just over five minutes. Deputy Dinkheller was shot multiple times and died. Andrew Brannan was hit with a single bullet to the abdomen. He drove home, went into the woods, wrapped himself in a sleeping bag and covered himself with a tarpaulin and foliage. Police found him there the next morning. He was arrested and taken to hospital for surgery to his gunshot wound.

Dr Robert Storms reviewed the patrol car videotape and stated that “even to the casual observer, Mr Brannan's behavior appears bizarre. He jumps, ducks, and dodges as if in combat... His behaviour is out of proportion to the stimuli triggering it. Mr Brannan could state no motive for his actions apart from the military language he used to describe it.” Although Andrew Brannan had only a patchy recall of events, he told Dr Storms that “I was engaged with a target... I had to suppress enemy fire... I had to follow standard infantry doctrine... I had to put up a volume of fire...” Dr Storms said that Brannan “was unable to state any reason for animosity toward the deputy and his basic memory is that of being afraid.”

Once Andrew Brannan was charged and had entered a plea of not guilty by reason of insanity, the trial judge ordered a psychological evaluation of the defendant. Dr Gary Carter, a psychiatrist at the Central State Hospital, where Brannan was being held pre-trial. Dr Carter found Brannan competent to stand trial and also concluded that he could distinguish right from wrong at the time of the shootings – that is, that he was not legally insane at the time of the crime. However, among Brannan's statements to Dr Carter was the following, where he recalls the crime and blurs it with his Vietnam experience, suggesting that he may have been in a dissociative state:

“Well, I believe he was pointing a weapon at me, if I remember correctly. And that's when I felt as scared as I had ever been. Now, I used to think I wasn't scared in Vietnam. I took a great deal of pride in having been, you know, a small unit commander. I had more things to do if I was going to die. It was just gonna – I was

just gonna have to die while I was on the radio or whatever, you know, but I had a job to do. You know, for my men. And that was just all there was to it.... And then I started panicking. And usually I don't panic either. And then I started thinking about my men and how I couldn't leave my men. I couldn't – I couldn't let my men down... I have crossed the thin red line. You know, I have accepted death. I am just doing it, you know, following training doctrine. You know, you put down suppressive fire. That way your opponent can't aim when he shoots at you... And everything seemed real slow. And these bullets were coming and they were clicking bamboo – and there was a target but I couldn't really see it. You know, it was just green and you know, I could see the foliage jumping, you know."

Three other mental health experts who testified reached different conclusions to that of Dr Carter. Dr Storm, above, concluded that "Mr Brannan was not in contact with reality during the incident leading to his arrest and that his behaviour can be accurately described as psychotic. It is likely that he was suffering some sort of combat related flashback... [I]t is my clinical opinion that Mr Brannan was experiencing a disorder of mood that prevented him from distinguishing right from wrong at the time of the incident leading to his arrest". Dr Donald Harris, then the Chief of Psychological Services at Central State Hospital, stated that his assessment of Andrew Brannan suggested that he may have been "out of touch with reality", and that far from malingering, was actually defensive in his responses and trying to downplay symptoms and mental health problems. Dr Avrum Weiss, a psychologist specializing in working with veterans (including Andrew Brannan) from the Vietnam War and Gulf War suffering from combat-related PTSD. He had reviewed the patrol car video tape and post-crime interviews, including with Dr Carter, and testified that "it seems fairly clear to me that Mr Brannan was in a dissociative state" at the time of the crime.

Dr Weiss was subjected to questioning by a prosecutor clearly aimed at playing on any prejudices jurors may have against defences based on claims of mental impairment. For example:

Q. Is it true or not true that most everyone has a mental illness of some degree?

A. No, that's not true.

Q. That's not true, so we have perfect mental health, all of us?

In closing arguments, the prosecutor urged the jury not to let the defence experts –what he called "these hired guns" – "muddy up the water", like an octopus squirting out ink to confuse attackers: "And while they're in that murky ink, that old octopus slithers, just slithers away". Specifically referring to Dr Weiss, the prosecutor said "He's paid by the Defendant... He talked about PTSD, I contend everybody's got a little bit of PTSD. We've all been through some trauma or another. We all have some problems from it."

"What's an expert?" the prosecutor asked the jury, urging them to reject the insanity defence. He suggested in response to his own question that an expert is "somebody thirty miles from home with a briefcase", and that the jury should rely on their "common sense" instead. Stoking juror fears, he suggested that an insanity verdict would mean release, rather than involuntary commitment to a psychiatric facility:

“Well, let’s just forget all of them and let’s use some common sense and forget the experts because you don’t have to listen to ‘em. You’re not stuck with them. They’re just making opinions. You make the decisions. You are the ones who make the decisions. And I’m telling you, don’t let ‘em make fools out of all of us. Don’t fix it so when we get ready to leave here, Andrew Brannan runs up and says, make way for me on that elevator, I’m going to ride down with you. Don’t do that.”

Andrew Brannan remains on death row.

A study published in July 2004 concluded that at least one in six of US troops returning from Iraq would be in need of psychological therapy of some kind as a result of their time in the conflict.³⁶³ The 2004 annual report of the US Department of Veterans Affairs (VA) Special Committee on Post-Traumatic Stress Disorder noted that “Past experience predicts that this generation of combat veterans is at high risk of PTSD and other related post-traumatic disorders... Preliminary findings demonstrate that combat veterans of Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) are at significant risk for mental health problems.” The VA report pointed to an army survey in 2003 finding that about 15 per cent of the surveyed soldiers who had been deployed to Iraq met the screening criteria for PTSD, seven per cent for depression, and seven per cent for generalized anxiety. Only about one in three of those who said they wanted mental health assistance received it. The suicide rate for soldiers deployed to Iraq between January and October 2003 was higher than rates reported during the Vietnam War or first Gulf war.³⁶⁴

In September 2004, the executive director of the National Gulf War Resource Center in Washington, DC, wrote of the “hidden toll” of the “war on terror”, namely “the rising mental health toll from the Iraq war and other US combat operations abroad”. He continued:

“Studies indicate that troops who served in Iraq are suffering from post traumatic stress disorder and other problems brought on by their experiences on a scale not seen since Vietnam. These figures have mental health professionals and veterans groups worried, and with good reason. At a time when our troops are working hard to answer the nation’s call, their own needs remain unmet. Barriers to mental health care persist both in the field and at home, leaving mental health problems to fester. The personal burden on troops affected by mental trauma and on their families is enormous, and these mental health problems have consequences for communities and the nation as well. The full extent of this hidden cost of war will not be apparent for some years to come, but experts believe it may involve tens of thousands of service members. Preparing for the challenge at hand and extending the appropriate care and respect to our troops must be a top priority.”³⁶⁵

³⁶³ Charles Hoge et al. Combat duty in Iraq and Afghanistan, Mental health problems, and barriers to care. *New England Journal of Medicine*, Vol. 351, No. 1 (1 July 2004).

³⁶⁴ *Fourth Annual Report of the Department of Veterans Affairs. Under Secretary for Health’s Special Committee on Post-traumatic Stress Disorder: 2004*. October 2004.

³⁶⁵ Stephen Robinson, *Hidden toll of the war in Iraq*. Center for American Progress, September 2004.

Stephen Robinson continued: “The aftermath of the Vietnam War demonstrated the consequences of failing to provide our warriors with immediate treatment, care, and readjustment services to help them recover from traumatic wartime exposures... Some individuals suffering from wartime mental trauma express both suicidal and homicidal thoughts. ‘Sometimes I want to kill people’, stated one soldier interviewed for this paper. Others can have violent outbursts with family members and friends...”

Two months earlier, Stephen Robinson, in his capacity as head of the National Gulf War Resource Center, was among those who had appealed for clemency for Mark Bailey, a former US Navy submariner on death row in Virginia. Although the case did not involve post-traumatic stress disorder, it did raise questions of the mental health of a former serviceman. Mark Bailey, a veteran of the first Gulf war, had been diagnosed with bipolar disorder and had had long struggle with mental illness, a factor not considered by the jury which sentenced him to death for killing his wife and child in 1998. The clemency appeal from the National Gulf War Resource Center pointed out that:

“Right now as we write to you soldiers from Iraq and Afghanistan are returning home with serious mental health disorders. There are reports of a rise of suicides among troops stationed in Iraq, and have heard accounts of effective policies not being fully or properly implemented. We know that returning troops will face behavioral, emotional, and psychological difficulties re-adjusting to civilian life. Mr Bailey’s record indicates that he needed and did not receive proper diagnosis, treatment and care for his mental illness all while serving in the most demanding and isolated positions in the military. We recognize that in your clemency determination that you will weigh a variety of factors with respect to this case. Please ensure that the years of faithful service are included in your decision. Please ensure that his untreated mental health disorders are considered. In a perfect world this tragedy would have been averted by proper diagnosis and care. However, we don’t live in a perfect world but we do believe that putting Mr Bailey to death will only make this sad story even worse.”³⁶⁶

Governor Warner denied clemency and Mark Bailey was executed on 22 July 2004 in Virginia’s death chamber.

In March 2005, the executive director of the National Center for Post-Traumatic Stress Disorder at the Department of Veterans Affairs urged readiness to help returning US soldiers from Afghanistan and Iraq:

“[T]he psychiatric consequences for our newest veterans will have much in common with the psychological anguish of their predecessors. We must be ready for these

³⁶⁶ Letter to Governor Mark R. Warner, re Mark Wesley Bailey, from Stephen Robinson, executive director, National Gulf War Resource Center, 13 July 2004.

*veterans. We must learn from past mistakes and make good use of our new clinical and conceptual tools. Our veterans deserve nothing less.*³⁶⁷

In an interview on 8 February 2004 on NBC's "Meet the Press", President George W. Bush said: "I'm a war president. I make decisions here in the Oval Office in foreign policy matters with war on my mind." A year earlier, he had not allowed evidence of the mental damage of war on a former soldier to be a cause for clemency in the case of Louis Jones, a former soldier on federal death row for a murder committed in February 1995. After returning home after Operation Desert Storm/Desert Shield in Saudi Arabia in 1990 and 1991, Louis Jones had displayed significant behavioural and personality changes. He lost his sense of humour, became dominating, possessive, rigid in his thinking, and began drinking to excess. He suffered from daily headaches. The 2004 annual report of the special committee on PTSD of the Department of Veterans Affairs noted research finding that 10 per cent of all veterans of Operation Desert Storm current have PTSD. The VA report continued:

*"As with other medical disorders, the complications of traumatic stress are often as prevalent, severe and persistent as PTSD itself. These include major depression, alcohol abuse (often beginning as an effort to sleep), narcotic addiction (often beginning with pain medication for combat injuries), job loss, family dissolution, homelessness, violence towards self and others, and incarceration. It may be possible now to prevent these complications if decisive action is taken now."*³⁶⁸

At Louis Jones' federal murder trial in October 1995, a psychologist testified that, in his opinion, Louis Jones' experience in the Gulf war had intensified the PTSD that he had suffered as a result of his involvement in the US invasion of Grenada in 1983, in which he had led his platoon in a dangerous parachute jump under hostile fire. At the trial, a psychologist, a neurologist and a psychiatrist variously stated their opinion that on the night of the crime, Louis Jones was suffering from various mental problems, including a major depressive disorder, a dissociative disorder, PTSD, cognitive disorder and alcohol intoxication. The neurologist testified that Louis Jones had suffered brain damage, which made it difficult for him to control impulses.

As his execution approached in 2003, Louis Jones' clemency petition raised the claim that he suffered from brain damage as a result of Gulf War Syndrome, evidence which had not been raised at the 1995 trial due to the lack of scientific and medical knowledge on this subject at that time.³⁶⁹ President Bush rejected clemency and Louis Jones was executed on 18 March 2003. Two days later, the USA invaded Iraq.

³⁶⁷ Matthew J. Friedman, Veterans' mental health in the wake of war. *New England Journal of Medicine*, 352; 13. 31 March 2005.

³⁶⁸ *Fourth Annual Report of the Department of Veterans Affairs. Under Secretary for Health's Special Committee on Post-traumatic Stress Disorder: 2004.* October 2004.

³⁶⁹ *Another planned killing by the US Government - The imminent federal execution of Louis Jones*, AI Index: AMR 51/020/2003, February 2003, <http://web.amnesty.org/library/Index/ENGAMR510202003>.

In a speech in London on 16 February 2004, Nobel Peace Laureate Archbishop Desmond Tutu made a link between President Bush's record on executions and his administration's pre-emptive military policy. The Archbishop argued that the death penalty is a flawed policy that brutalizes society while making it no safer, and that the war in Iraq was based on flawed intelligence and has made the world "a great deal less safe than before". Archbishop Tutu suggested that a positive development would be if politicians would more readily admit their human fallibility, adding that it is "large-hearted and courageous people who are not diminished by saying 'I made a mistake'."

Amnesty International believes that the death penalty is a mistaken policy that offers a simplistic response to the complex problem of violent crime. The executions of people suffering from mental disorders – including former soldiers with post-traumatic stress disorder as a result of wartime experiences – are among the more indecent manifestations of an outdated punishment

Conclusion: The worst of the worst, or a failure of leadership?

Our nation was built on a promise of life and liberty for all citizens. Guided by a deep respect for human dignity, our Founding Fathers worked to secure these rights for future generations, and today we continue to seek to fulfil their promise in our laws and our society...[W]e reaffirm the value of human life...Through ethical policies and the compassion of Americans, we will continue to build a culture that respects life.

President George W. Bush, 14 January 2003³⁷⁰

James Madison, one of the principal Framers of the US Constitution and the country's fourth President, warned against setting the Constitution in stone. He wrote: "Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times..., they have not suffered a blind veneration for antiquity"³⁷¹ In similar vein, Madison's immediate predecessor as President, Thomas Jefferson, wrote in 1816:

"[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors..."³⁷²

The US Supreme Court has echoed such sentiment when indicating how it will interpret the Constitution's prohibition on "cruel and unusual punishments" under the Eighth Amendment. In 1910, it stated that the Amendment "is progressive and does not prohibit

³⁷⁰ National Sanctity of Human Life Day, 2003, by the President of the United States of America. A Proclamation, 14 January 2003.

³⁷¹ *The Federalist Papers*, Number 14.

³⁷² Letter to Samuel Kercheval, 12 July 1816, 15. *The Writings of Thomas Jefferson* 40-42 (Memorial ed. 1904). Quoted in *Furman v. Georgia*.

merely the cruel and unusual punishments known in 1689 and 1787, but may acquire wider meaning as public opinion becomes enlightened by humane justice”.³⁷³ Half a century later it reiterated that the definition of “cruel and unusual punishments” was not permanently fixed, but instead must draw its meaning from “the evolving standards of decency that mark the progress of a maturing society”.³⁷⁴ In 2005, when the Court prohibited the execution of offenders for crimes committed when they were under 18 years old, Justice Stevens noted that:

“Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court’s interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.”

Regrettably, when the Supreme Court reinstated the death penalty in *Gregg v. Georgia* in 1976, it concluded that “contemporary standards of decency” in the USA had not evolved to the point at which capital punishment *per se* was unconstitutional. It reached this conclusion after noting that in the four years since the Court had struck down the death penalty in *Furman v. Georgia* because of the arbitrary way in which it was being applied, at least 35 states had enacted new capital statutes, thus demonstrating that public opinion had not turned against judicial killing. However, the Court also said that “public perceptions of standards of decency”, as measured by such legislative activity, “are not conclusive”. A punishment, it said, “also must accord with the dignity of man which is the basic concept underlying the Eighth Amendment. This means, at least, that the punishment must not be excessive”.³⁷⁵

In *Roper v. Simmons* in 2005 and *Atkins v. Virginia* three years earlier, when the US Supreme Court finally removed children and people with mental retardation from the reach of the death penalty, it reiterated that “capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”. In international terms, the decisions came shockingly late. In national terms, the fact that seriously mentally ill offenders remain subject to the death penalty in the USA stands in ever starker relief. Death sentences in such cases are surely excessive and incompatible with human dignity, whether the dignity in question is that of the offender or of society as a whole.

Norris Taylor was sentenced to death not long after the *Gregg* ruling. Now 61 years old, he has been on North Carolina’s death row for more than a quarter of a century. His current lawyer has said that Taylor is one of the most mentally ill people she has ever met.

Norris Taylor was brought up in poverty in Virginia. He was subjected to sexual, physical and emotional abuse by relatives and other adults. He used to wet his bed until adolescence,

³⁷³ *Weems v. United States*, 217 U.S. 349 (1910).

³⁷⁴ *Trop v. Dulles*, 356 U.S. 86 (1958).

³⁷⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976), internal quote marks omitted.

and each time he did so he would be beaten and sent to school in soiled clothes, where he would then be humiliated. He has reported that his lifelong headaches began when he was thrown down the stairs by his mother when he was seven years old. In his first five years of school, he was absent for nine weeks, eight weeks, six weeks, 11 weeks, and six weeks respectively. At the age of 15, he came into conflict with the law, and the following year he was charged with breaking and entering, and sent to juvenile detention. As a child, Norris Taylor began to have hallucinations, including seeing a man come out of a cupboard with an axe and try to kill him, and hearing voices in his head from the age of five or six that told him to hurt people.

In 1978, at the age of 34, Norris Taylor was charged with the murder of Cathy King. She was a guest at the motel where Taylor was working as a security guard. He had confronted her about registering as one person rather than as a party of two. He shot her after she called him a “nigger” and spat at him. Taylor was sentenced to life in prison, but escaped. He subsequently shot and killed Mildred Murcheson, a pregnant woman whose car he was trying to steal. During the trial, he repeatedly disrupted the proceedings by shouting and yelling, and spent much of the proceedings either removed from the courtroom or refusing to attend. His trial lawyers, with whom he refused to cooperate, believed that he was incompetent to stand trial. However, he also refused to cooperate with a doctor who was ordered to evaluate him.

Over the years, Norris Taylor has been diagnosed with paranoid schizophrenia, as well as post-traumatic stress disorder with dissociative episodes. He apparently believes that he is possessed by the devil, that he will come back to life if he is executed, and that Mildred Murcheson was the reincarnation of his dead wife (who he discovered had died of cancer after his escape from prison and prior to the Murcheson murder). What purpose would Norris Taylor’s execution serve for wider society? Would it not amount to an act of senseless vengeance?

Can someone with a serious mental impairment other than retardation at the time of the crime ever be said to possess the “extreme culpability” assumed by the death penalty? If society’s standards of decency have evolved to prohibit the state-sanctioned killing of child offenders and those with mental retardation, how can that same society still permit people with serious mental illness to be put to death? While the precise definition of who would be excluded under laws prohibiting the execution of people with mental illness is beyond the scope of this report, the latter has shown that existing safeguards are inadequate, that seriously mentally ill offenders are at “special risk of wrongful execution”, and that principled leadership is needed to remedy this situation.

In 1972 in *Furman v. Georgia*, Justice Marshall wrote: “It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.” Now that children and people with mental retardation have been removed from the reach of the death penalty, defendants with mental illness remain its most vulnerable targets in a capital justice system where prosecutorial misconduct occurs all too often and legal representation for indigent capital defendants is generally under-resourced.

Amnesty International has long recommended that the death penalty be abolished in the USA. It is a punishment that should never be a part of society's response to crime, not least when that country claims to be a progressive force for human rights and a champion of human dignity. It is others, however, who have the power to end the death penalty in the USA, and regrettably, legislators, judges and politicians have shown little inclination to lead their country away from state-sanctioned killing.

As a minimum first step, however, perhaps the USA can be persuaded to rid itself of one of the most shameful aspects of this indecent punishment – the execution of people with serious mental illness. With this report, Amnesty International will join the campaign for such an exemption for the mentally ill, even as the organization continues to seek to persuade the USA to end its use of the death penalty altogether.

Recommendations

As already stated, and as illustrated in Appendix 2, experts in the USA on law and mental health continue to develop criteria for establishing which defendants suffering from mental illness should be exempted from the death penalty under an “*Atkins* extension”. Amnesty International will join in working to promote legislation on this issue at state level in the USA. Meanwhile, the organization will continue to seek total abolition of the death penalty in the United States, as it does worldwide.

All government officials should promote the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, including:

- All persons have the right to the best available mental health care, which shall be part of the health and social care system (Principle 1.1);
- All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person (Principle 1.2);
- ... persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness... should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible... (Principle 20.1 and 20.2).

In addition:

The Federal Government, particularly the President, members of Congress, and the Justice Department, should:

- Ensure that no federal prosecutor pursues a death sentence against any defendant with serious mental illness;

- Make public statements at every opportunity against the execution of people with serious mental illness;
- Impose a moratorium on federal executions;
- Legislate to abolish the federal death penalty;
- Engage in a programme of public education about the reality of capital punishment with the aim of encouraging abolition in individual states.

State legislatures should:

- In consultation with experts in the field of criminal law and mental health, adopt legislation prohibiting the execution of people with serious mental illness or other impairments other than mental retardation at the time of the crime or the time of execution;
- Adopt legislation prohibiting the execution of people with mental retardation, in line with *Atkins v. Virginia*, if this has not already been done;
- Ensure adequate funding for indigent capital defence;
- Support or adopt measures imposing a moratorium on executions;
- Legislate to abolish the death penalty.

Prosecutors should:

- Participate in training programs to assist them in recognizing the signs and symptoms of serious mental illness and other impairments;
- Reject pursuit of the death penalty against anyone in cases where there is credible evidence of their serious mental illness or other impairment at the time of the crime;
- Become familiar with and adhere to the United Nations Guidelines on the Role of Prosecutors, and on international human rights law and standards in general, in particular the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and respect recommendations of international human rights bodies such as the Inter-American Commission on Human Rights;
- Reject unreliable psychiatric testimony that claims to be able to predict future dangerousness of capital defendants.

Capital defence lawyers should:

- Attend training programmes aimed at helping them to recognize signs and symptoms of serious mental illness and other impairments, and how more effectively to defend such individuals from the death penalty;

Clemency authorities should:

- Ensure that no one with a claim of serious mental illness or other impairment is executed;

- Promote a moratorium on executions.

Prison authorities should:

- Ensure that all people with mental illness on death row receive appropriate treatment, and that anyone suffering severe psychosis is removed from death row.

Mental health professional bodies should:

- Exercise vigilance to ensure that the ethics of their profession are not violated by the death penalty system;
 - Communicate concern to the authorities where widely accepted principles which protect people with mental illnesses are breached;
- .

Appendix 1 – Illustrative list of 100 executed prisoners

The following is a list of 100 people who have been executed in the USA since it resumed judicial killing in 1977. This list represents about 10 per cent of those put to death in the country during this period, and is for illustrative purposes only. It does not claim to be exhaustive – cases of others who have been executed have also raised serious questions relating to their mental health. While some of the people listed below had alleged mental retardation as well as mental illness or brain damage, the list does not include those whose alleged mental impairment fell squarely and solely within the bracket of “mental retardation” (for a list of 40 people executed between 1984 and 2001 despite claims of mental retardation see pages 100-101, *USA: Indecent and internationally illegal – The death penalty against child offenders*, September 2002, <http://web.amnesty.org/library/Index/ENGAMR511432002>). Finally, although some of the cases listed below raise the question of abusive backgrounds, the list is very far from exhaustive on this issue. It does not seek to illustrate the very many people executed in the USA who came from backgrounds of sometimes quite appalling childhood abuse, deprivation, poverty, racism, social marginalization, but for whom such backgrounds were not necessarily followed by diagnoses of consequent mental health problems. The symbol ■ denotes a prisoner who gave up his or her appeals and “consented” to execution.

1984

Arthur Goode **Florida.** Arthur Goode had a documented history of mental illness since the age of three. He escaped from a mental hospital in 1976 and killed a 10-year-old boy. He represented himself at his 1977 trial, during which, as the 11th Circuit Court noted, he “brought out evidence to assure his own conviction, testified in gory detail as to his guilt, and argued to the jury that he should be convicted and sentenced to death”. The 11th Circuit admitted that it had “serious doubts as to Goode’s competence”, but upheld his conviction. The Governor of Florida and three state-appointed psychiatrists held him to be mentally fit for execution, procedures that would be found unconstitutional two years later in *Ford v. Wainwright*.

1985

Morris Mason **Virginia.** Morris Mason had a long history of mental illness and had spent time in three state mental institutions where he was diagnosed as suffering from paranoid schizophrenia. In the week before the murder for which he was condemned, he had twice sought help from his parole officer for his uncontrollable drinking and drug abuse - on the eve of the crime he had apparently asked to be placed in a “half-way house”; however, no facilities for this were available in Virginia. Three psychiatrists independently found Morris Mason to be suffering from paranoid schizophrenia over an eight-year period before his trial in 1978.

Charles Rumbaugh ■ **Texas.** Shortly before the murder of Michael Fiorillo during a robbery in 1975, Charles Rumbaugh had escaped from a mental hospital where he was being treated for manic depressive illness. Rumbaugh, who was 17 at the time of the crime, gave up his appeals. A dissenting opinion by two US Supreme Court Justices said: “Rumbaugh seeks death because he knows himself to be mentally ill and has lost hope of obtaining treatment. If not for his illness and his pessimism regarding access to treatment, he would probably continue to challenge his death sentence; but faced with his vision of life without treatment for severe mental illness, Rumbaugh chooses to die... a desperate man seeking to use the State’s machinery of death as a tool of suicide.”

1986

David Funchess **Florida.** David Funchess, a decorated Vietnam War veteran, was sentenced to death in 1975 for the murder of two people during a robbery of a bar in 1974. He had been involved in some of the heaviest fighting in the Vietnam War. He was first diagnosed as suffering from post-traumatic stress disorder (PTSD) in 1982 by a leading expert on the disorder. The full extent of his condition was not known until further investigations in the month before his execution. His family described how he returned from Vietnam a changed person and addicted to heroin. He had been unable to tolerate noise, suffered from frequent flashbacks, sleeplessness and recurring nightmares. His trial lawyer did not investigate his client's background to present in mitigation.

1987

Billy Mitchell **Georgia.** Billy Mitchell was found to have suffered from PTSD after being repeatedly raped while serving a prison sentence for a burglary he allegedly committed at the age of 16 during a bout of depression brought on by his parents' divorce. Formerly known as a student of exceptional intellectual and athletic ability, Mitchell then suffered from severe depression. He pleaded guilty to the murder of a 14-year-old grocery assistant during an attempted robbery in 1974. At the sentencing phase, his trial lawyer called no witnesses and presented no mitigating evidence.

1988

Robert Streetman **Texas.** Robert Streetman sustained a serious head injury as a child and thereafter suffered from a series of mental problems including persistent delusions and hallucinations. He started taking drugs when he was eight, and dropped out of school at 14. Sentenced to death for the murder of a woman during a burglary of her home. He was 22 at the time. Two of his three accomplices served no prison time at all in return for their cooperation with the prosecution.

Wayne Felde

Louisiana. Wayne Felde was a Vietnam War veteran, and had seen heavy combat service as a "tunnel rat" (one who specialized in finding enemy tunnels). When he returned from Vietnam, his family found his personality dramatically changed: he became moody, irritable, prone to bouts of depression and flashbacks. He was diagnosed with PTSD. At his trial, he asked the jury to sentence him to death, allegedly because of his PTSD-related depression. His lawyer presented no mitigating evidence.

Leslie Lowenfield **Louisiana.** A citizen of Guyana, Leslie Lowenfield was found competent to stand trial, even though three psychiatrists had found him to be "paranoid in the extreme". His lawyers challenged his competency for execution. A clinical psychologist concluded that in all probability, Lowenfield was suffering from paranoid schizophrenia, and also found that he was "unable to understand the death penalty". Nevertheless, the courts ruled that the execution could go ahead. In a dissent against the US Supreme Court's 5-4 vote to deny a stay of execution, a Justice wrote: "Every court that has considered petitioner's insanity claim has made a mockery of this Court's precedent and of the most fundamental principles of ordered justice..."

1989

Herbert Richardson **Alabama.** Herbert Richardson was diagnosed as suffering from PTSD as a result of his service in the Vietnam War. A psychiatrist found that his mental condition "impacted Mr Richardson's functioning significantly and played a contributing role" in the murder for which he was sentenced to death.

1990

Leonard Laws **Missouri.** A federal judge found that Leonard Laws' trial attorney had been negligent for failing to present mitigating evidence at the sentencing, including evidence of severe psychological damage from his experience in the Vietnam War. The Eighth Circuit Court of Appeals reversed the decision. Two Justices dissented from the US Supreme Court's decision to reject Laws's appeal, saying that the trial lawyer's performance had been "plainly deficient", particularly in his failure to investigate the evidence that Laws was suffering from PTSD.

- Dalton Prejean **Louisiana.** Dalton Prejean was a black defendant convicted by an all-white jury of the murder of a white police officer committed when Prejean was 17. Before the murder, he had been confined in various institutions between 1972 and 1976, during which time he was diagnosed as suffering from various mental conditions, including schizophrenia and depression. At the age of 14 in 1974, he was convicted as a juvenile for killing a taxi driver. Medical specialists at that time said that he would require “long-term in-patient hospitalization” under strict supervision and that he would benefit from a secure and controlled environment. However, he was released in 1976 without supervision because no state funding was available for further institutional care. Tests carried out in 1984 revealed that he suffered from organic brain damage, which impaired his abilities to control his impulses when under stress.
- Thomas Baal **■ Nevada.** Thomas Baal had been in and out of mental institutions as a result of suicide attempts, depression, and drug abuse. He was diagnosed among other things with having latent schizophrenia and organic brain syndrome. He attempted suicide twice in the month before his execution for the 1988 murder of Frances Maves. Baal’s parents expressed their opinion that Maves would not have been killed if their son had received adequate psychiatric help. They said that “when the money ran out, they let him sign out of a mental hospital”. The parents said that their pleas for government assistance in getting psychiatric help were ignored.
- James Smith **■ Texas.** James Smith had a long history of mental illness. In 1978 he was found not guilty by reason of insanity in a Florida prosecution. In 1981, he attempted suicide and was placed under psychiatric care. In 1985, a Texas court found him not competent to handle his appeal. A psychiatrist concluded that he suffered from paranoid schizophrenia, “marked by suicidal tendencies and religious delusions.” Two US Supreme Court Justices dissented from the decision to allow the execution to go ahead “when serious doubts remain concerning his mental competence” to waive his appeals. The dissent criticized the state’s procedures for determining competency, saying that the hearing into this issue “seems to have been little more than a non-adversarial, *ex parte* chat among the trial judge, the prosecutor and Smith”.
- Charles Coleman **Oklahoma.** Charles Coleman had a history of schizophrenia and brain damage first diagnosed when he was 15 years old. He also suffered from epileptic seizures throughout his life. The son of alcoholic parents, he was drinking alcohol regularly by the age of 12. According to experts, his brain damage could have resulted from foetal damage due to his mother’s heavy drinking during pregnancy and from early neglect and malnutrition.
- 1992**
- Ricky Ray Rector **Arkansas.** Ricky Ray Rector was severely mentally impaired, as a result of essentially a frontal lobotomy conducted after he shot himself in the head on arrest. There was compelling evidence that he was incompetent for execution under *Ford v. Wainwright*.
- Johnny Garrett **Texas.** Chronically psychotic and brain damaged, Johnny Garrett had a long history of mental illness and was severely physically and sexually abused as a child, which the jury never knew. He was described by a psychiatrist as “one of the most psychiatrically impaired inmates” she had ever examined, and by a psychologist as having “one of the most virulent histories of abuse and neglect... encountered in over 28 years of practice”. Garrett was frequently beaten by his father and stepfathers. On one occasion, when he would not stop crying, he was put on the burner of a hot stove, and retained the burn scars until his death. He was raped by a stepfather who then hired him to another man for sex. It was also reported that from the age of 14 he was forced to perform bizarre sexual acts and participate in pornographic films. Introduced to alcohol by his family when he was 10, he subsequently indulged in serious substance abuse involving brain-damaging substances such as paint, thinner and amphetamines. The US Court of Appeals for the Fifth Circuit upheld a state court finding that his belief that

his dead aunt would protect him from the chemicals used in the lethal injection did not render him incompetent to be executed (for a murder committed when he was aged 17).

- Donald Harding **Arizona.** Donald Harding was subjected to a childhood of abuse and neglect, and also witnessed serious violence between his mother and stepfather. He tried to commit suicide at the age of nine. Several neurological experts who examined Harding agreed that he suffered from organic brain dysfunction which left him unable to control aggressive impulses especially when under the influence of alcohol or other sedating drugs. Another expert said that he suffered from untreated PTSD developed as a result of brutal treatment and sexual assaults he received in an adult prison between the ages of 16 and 24.
- Robert Harris **California.** Robert Harris was born two months prematurely after his mother was kicked in the stomach by her husband. At the age of two, he was beaten unconscious by his father and required hospital treatment. He was beaten throughout his early childhood by his father and stepfather. When he was nine, his father was convicted and imprisoned for sexually abusing his daughters. At the age of 14 he was abandoned by his mother. When he was 15 he was caught with others driving a stolen car. The others were claimed by their families, Harris was not, and was sentenced to four years in a federal youth centre. There he was diagnosed as pre-psychotic, schizophrenic, suicidal and self-destructive. At 19 he was released with a recommendation that he seek treatment for his mental health problems. There was no evidence that he received treatment. After he was sentenced to death, tests revealed frontal lobe damage of a severity likely to have affected his ability to reflect on actions, weigh consequences, plan or organize, or reason rationally. He was diagnosed with Fetal Alcohol Syndrome, and was known to have sniffed gasoline, glue and paint fumes from the age of eight or nine. The jury did not learn of the full extent of his childhood abuse or mental impairments.
- Justin Lee May **Texas.** Justin Lee May suffered from brain damage and mental impairments stemming from physical abuse he suffered as a child. He suffered multiple illnesses as a child and endured regular, severe beatings from his father. On at least one occasion he was beaten to unconsciousness. He suffered numerous head injuries in early adulthood. In 1986 a medical examination revealed significant neurological brain damage and psychological abnormalities.
- Nollie Martin **Florida.** Nollie Martin suffered from severe mental impairment as a result of several serious head injuries he received in childhood. He had a history of psychosis, suicidal depression and self-mutilation and had been physically and sexually abused from infancy.
- Robert Black **Texas.** Robert Black was diagnosed with PTSD as a result of his experiences in the Vietnam War. He was twice hospitalized in mental institutions.
- 1993**
- John Brewer **Arizona.** John Brewer had a history of mental problems. As a young child, he was an out-patient in a psychiatric clinic for about three years. His first of several suicide attempts occurred at the age of seven, his last one less than six months before his crime, the murder of his pregnant girlfriend in 1988. Brewer was sentenced by a judge after waiving his right to a jury trial. The prosecutor had decided not to seek a death sentence a few weeks before the sentencing hearing, but presented aggravating evidence at the sentencing hearing in the mistaken belief that the law obliged him to. The judge decided that the aggravating evidence outweighed the mitigating circumstances and sentenced Brewer to death.
- James Red Dog **Delaware.** James Red Dog was a Native American who was raised in poverty on a Sioux Indian Reservation in Montana. Exposed to alcohol and drugs from an early age, and developed mental problems. He was diagnosed with bipolar disorder. He suffered a number of

head injuries throughout his life, including a fractured skull caused by his father when he was a child.

Robert Sawyer **Louisiana.** Robert Sawyer had various mental impairments, and suffered from schizophrenia. He had a long history of requiring medication, including electroconvulsive therapy and anti-psychotic drugs. He was committed three times to mental institutions. Although his severe mental impairments were documented from his teenage years, his lawyer failed to obtain the evidence or present it to the jury. Sawyer grew up in a violent environment. His mother was beaten by his father until she committed suicide, apparently to escape the brutality. Robert Sawyer was then brought up by his father, who subjected him to regular beatings. There was evidence that these beatings caused head injuries. He was never educated.

James Clark **Arizona.** James Clark was represented at trial by a lawyer who had never handled a capital case. He failed to carry out any investigation of mitigating evidence. Had he done so, he would have discovered that James Clark was born to very young alcoholic parents who subjected him to severe physical abuse throughout his childhood. He tried to commit suicide at the age of 16. Sentenced to death for a crime committed in 1977 at the age of 19. In 1992, a clinical psychologist and expert in the treatment of adult male victims of childhood abuse, concluded that Clark had been suffering from PTSD, as a result of his childhood experiences, at the time of the crime.

Larry Johnson **Florida.** Larry Johnson was diagnosed with PTSD as a result of his service in the Vietnam war.

Curtis Harris **Texas.** Curtis Harris had an IQ of 77 and significant brain damage. Suffered serious head injuries as a child. One of nine children brought up by an alcoholic father who beat the children regularly with electric cords, belts, a bullwhip and fists. On one occasion, Curtis Harris was hit over the head by his father with a wooden board and his cranium was permanently indented by the blow. Sentenced to death for a murder committed at the age of 17.

David Mason **California.** David Mason was subjected to severe physical, psychological and verbal abuse by his strict fundamentalist Christian parents. He attempted to kill himself at the age of five by swallowing a bottle of pills and setting his clothes on fire, the first of at least 25 reported attempts in the next 20 years. His behaviour from an early age was uncontrollable. He set fires, attacked other children, and at the age of eight was found standing over his baby brother's crib with a knife. His parents reportedly resorted to locking him in a room called "the dungeon", a bedroom with the windows nailed shut. When he was 11 and defecated in his clothes, his mother pinned a baby's soiled nappies on him and made him wear his own soiled underwear on his head. On another occasion, his father allegedly strapped him to a workbench, gagged him and beat him unconscious. Mason was diagnosed with PTSD.

Christopher Burger **Georgia.** Christopher Burger was mentally ill and brain damaged from the severe physical abuse he suffered as a child. Was sentenced to death for a crime committed when he was 17.

1994

Harold Barnard **Texas.** Numerous current (in 1994) and former prison doctors who had evaluated and treated Harold Barnard over the previous decade all found that he was incompetent for execution as a result of his mental illness, chronic paranoid schizophrenia.

John Thanos **Maryland.** John Thanos had a long history of mental illness, including schizophrenia-like symptoms. He suffered severe physical and emotional abuse as a child, sustained several serious head injuries over the years and abused alcohol and drugs. He had a history of suicide attempts, the first at the age of 11. He first entered the adult prison system when he was 15 years old, and was allegedly raped and physically assaulted. He spent almost all his adult life

in the prison system. In prison he attempted suicide on a number of occasions, including by hanging himself, slashing his wrists and cutting his throat. After his arrest for murder in September 1990, five months after being released, he confessed to the crime and in an apparent intent to be executed as soon as possible. While awaiting trial, he attempted suicide several more times. On one occasion, he swallowed 14 sharpened pencils, 15 spoons, his eyeglasses and a plastic toothbrush sharpened at both ends. He was sentenced to death by a trial judge after he waived his right to trial by jury. Four medical experts concluded in 1994 that Thanos had been mentally incompetent to stand trial or understand his legal options at the time of his trial, and five experts considered that he was incompetent to waive his appeals.

David Lawson **North Carolina.** As a young child, David Lawson developed psychiatric problems. He was diagnosed as suffering from depression and given medication. A psychiatrist who treated Lawson on death row, stated that Lawson suffered from “severe recurrent cyclical depression that has plagued his entire life... It is an illness which left untreated, drastically alters David’s ability to think rationally and act in his own best interests. No evidence relating to Lawson’s poor mental health or his history of abuse as a child was presented to the jury.

1995

Varnell Weeks **Alabama.** Psychiatrists for both the state and the defence diagnosed Varnell Weeks as suffering from paranoid schizophrenia, with symptoms including hallucinations and delusions. No evidence of his mental condition was introduced at the trial. Once he had been convicted, he waived the jury sentencing, and asked the (elected) judge to sentence him to death. Prison records revealed that he would on occasion stand in his cell naked and smeared with feces, making incomprehensible sounds. At a hearing to determine his competency for execution, Varnell Weeks appeared with a domino tied to a string on his shaved head. In response to the judge’s questions, he responded with a rambling discourse on serpents, “cybernetics”, albinos, Egyptians, the Bible and reproduction. He believed he was God in various forms, that his execution was part of a millennial religious scheme to destroy mankind, and that he would not die but that he would be transformed into a tortoise and reign over the universe. The judge acknowledged Weeks’ mental illness and delusions, and stated that he was “insane” according to “the dictionary generic definition of insanity” and what “the average person on the street would regard as insane”. However, the judge ruled that the electrocution could proceed.

Keith Zettlemoyer **■ Pennsylvania.** Keith Zettlemoyer was reported to suffer from brain damage, schizophrenia, depression and PTSD, and had made prior suicide attempts.

John Fearance **Texas.** A claim that John Fearance was incompetent for execution was unsuccessful. There was evidence that he suffered from paranoid schizophrenia. His claim that his rights were violated when he was forcibly medicated to render him competent for execution was rejected on the basis that the claim should have been raised earlier.

Phillip Ingle **■ North Carolina.** Phillip Ingle was subjected to sexual and emotional abuse as a child. Made several suicide attempts, beginning at age seven. As a young adult, he reportedly shot himself and deliberately crashed his car into a building. He took to alcohol and drug abuse as a teenager. Reported to suffer from schizoaffective disorder, and medicated on death row for his mental illness. He was sentenced to death for the murders of two elderly couples in separate crimes. He claimed that he hallucinated that his victims were demons with red eyes.

Anthony Larette **Missouri.** Anthony Larette had a long history of mental illness going back to his childhood when he sustained head injuries. Spent two years in a mental hospital. Discharged from the army because of mental illness, and spent several years in mental institutions or prison after that. He was assigned a trial lawyer with no capital experience. The jury was left entirely unaware of LaRette’s history of mental illness, the symptoms of which included blackouts and

hallucinations, and after a sentencing phase which lasted less than an hour, they voted for a death sentence.

1996

James Clark **■ Delaware.** James Clark was reportedly born to a 15-year-old girl who gave him up for adoption to an older couple. In 1994, after serving 22 years of a 30-year prison sentence for kidnapping a 16-year-old girl, he was released against his wishes, apparently telling the parole board that he could not cope with release and asking that his parole be denied. Within a few weeks of his return to his adoptive parents, James Clark had shot them both dead. At his 1994 trial, he asked for the death sentence. After sentencing, he was placed in the psychiatric unit of the prison hospital, where he was prescribed anti-depressant medication and force fed when he refused to eat. After being transferred to the death watch cell in 1996, he attempted suicide. He was placed on “strip suicide watch” in a “ram room” (a cell with a hole in the floor for a toilet, and with no lighting, books, television, radio, or pen and paper where he was stripped naked 24 hours a day). After 30 days in this cell, he was taken before a judge and asked if he wanted to pursue his appeals. He replied that he did not, stating that he “couldn’t stand the pain any more”.

Robert South **■ South Carolina.** Robert South was diagnosed with PTSD as a result of severe childhood abuse.

Michael Torrence **■ South Carolina.** A doctor diagnosed Michael Torrence as suffering from schizophrenia before a pre-trial competency hearing.

Larry Lonchar **Georgia.** Larry Lonchar reportedly had brain damage and suffered from bipolar disorder with paranoid tendencies

1997

Pedro Medina **Florida.** Pedro Medina had a long history of serious mental illness. He was released from a psychiatric hospital in Cuba immediately before leaving that country and coming to the USA as part of the Mariel boatlift in 1980. The murder for which he was sentenced to death occurred two years later. He was diagnosed with various illnesses, including paranoid schizophrenic or major depressive disorder with psychosis. His appeal lawyers raised a claim that he was incompetent to be executed, citing detailed reports of two psychologists and one psychiatrist who concluded that Medina was insane. The appeal was summarily dismissed without a hearing.

Scott Carpenter **■ Oklahoma.** At his sentencing, an expert witness testified about head injuries that Scott Carpenter had suffered, and speculated that he may have had a seizure at the time of the killing. Scott Carpenter suffered a head injury when he was aged six, when he was struck by a nail in the right temporal lobe. Carpenter suffered four other severe head injuries, the last of which occurred two months before the murder. Numerous witnesses described the defendant as quiet, respectful, cooperative, non-violent and a good student. He had no prior arrests or convictions. He was 22 when executed, the youngest person to be executed since 1977.

Robert Madden **Texas.** Robert Madden reportedly suffered from brain damage and schizophrenia. A psychiatrist who examined Robert Madden 12 days before his execution reported that he was incompetent for execution. He claimed innocence in his final statement, and his last sentences before being put to death were recorded by the Texas Department of Criminal Justice as “unintelligible”.

Durlyn Eddmonds **Illinois.** Durlyn Eddmonds was executed for the rape and murder of a young boy in 1977. He was not tried for two and a half years, during which time a number of doctors had found him

incompetent to stand trial. In 1973, he was in a psychiatric hospital for three months. Within weeks of the crime, four doctors had diagnosed Eddmonds as suffering from schizophrenia.

1998

Joseph Cannon

Texas. Joseph Cannon was executed for a crime committed when he was 17. Post-conviction examination resulted in a diagnosis of organic brain syndrome. One psychologist considered Cannon's case history "exceptional" in the extent of the brutality and abuse he had suffered as a child. At the age of four he had been hit by a pick-up truck and suffered a fractured skull and other injuries. He was in hospital for 11 months and unconscious for part of that time. His head injury left him hyperactive. He suffered from a speech impediment and did not learn to speak clearly until he was six. He was expelled from school in first grade, receiving no other formal education. He drank and sniffed gasoline and at the age of 10 was diagnosed as suffering from organic brain damage as a result of the solvent abuse. He was diagnosed as suffering from schizophrenia and treated in mental and psychiatric hospitals from an early age. He was sexually abused by his stepfather when he was seven and eight; and was regularly sexually assaulted by his grandfather between the ages of 10 and 17.

Douglas Gretzler

Arizona. A dissenting opinion on the Ninth Circuit Court of Appeals noted that in Douglas Gretzler's case, "the only real issue at trial was Gretzler's mental state at the time of the murders", and yet he had been denied psychiatric assistance to prepare this defence. The dissent listed evidence discovered after Gretzler's conviction, including: "at age 13, Gretzler was diagnosed as suffering from anxiety and depression; from age 13 until the time the murders were committed, Gretzler used amphetamines and LSD as a means of self-medication; when Gretzler was 16, his older brother killed himself; Gretzler suffered from a significant mental disorder – 'schizophrenic reaction, paranoid type' - throughout most of his life; at the time of the offences, Gretzler was taking intravenous doses of amphetamines, had gone without sleep for several days, and likely suffered from amphetamine-induced psychosis; amphetamine-induced psychosis can impair the ability to premeditate and lead to paranoia and hyper-suggestibility - a condition which causes a person to follow commands or suggestions without any thought as to whether the action is right, wrong, or even possible; the amphetamine-induced psychosis may have permitted Gretzler's companion to control Gretzler's actions. A psychiatrist had found before the trial, that at the time of the murders, Douglas Gretzler was probably in "an acute paranoid state and possibly paranoid schizophrenic".

Stephen Wood

■ **Oklahoma.** Stephen Wood was sentenced to death for the murder of a fellow prisoner. At the time of the stabbing, Wood was serving a sentence of life imprisonment without the possibility of parole for two other murders. Stephen Wood had been diagnosed with paranoid schizophrenia combined with right brain hemisphere dysfunction. At his trial, a mental health expert testified that as a result of his schizophrenia, Wood had a delusion as an avenger, specifically of sexually abused children. The murder victim, a minister, was serving a 40-year prison sentence for molestation and sexual assault of young girls in his congregation.

Jeremy Sagastegui

■ **Washington.** In 1995, Jeremy Sagastegui raped and killed a three-year-old whom he was baby-sitting, and shot and killed the boy's mother and her friend when they returned home. At his 1996 trial, Sagastegui acted as his own lawyer. He rejected jurors less likely to favour the death penalty, and objected when the prosecution rejected a juror who would have automatically returned a death sentence. Sagastegui pleaded guilty, and offered no mitigating evidence. The jury was left unaware that he was conceived as a result of a rape, rejected by his mother in infancy and childhood, and subjected to severe abuse as a child, including repeated rape and sexual abuse by his stepfather and other male relatives. Neither were they made aware that he had been diagnosed with schizophrenia and bipolar disorder shortly before the crime

and treated in a psychiatric hospital as a suicide risk. Sagastegui urged the jurors to sentence him to death, and then waived his appeals. In 1996, a prison doctor diagnosed him as suffering from bipolar disorder with depressive episodes and post-traumatic stress disorder.

Tuan Anh Nguyen **Oklahoma.** The mental health of Tuan Anh Nguyen, a former child refugee from Vietnam, had deteriorated during the seven years that he was held on death row, with symptoms that included psychotic-like episodes in his cell where he would scream for extended periods.

Andrew Smith **South Carolina.** Andrew Smith raised an insanity defence at his trial, presenting the testimony of a clinical psychologist who testified that Smith suffered from schizophrenia and a dissociative disorder at the time of the murders and could not distinguish between right and wrong. He was on anti-psychotic medication prior to the trial.

1999

Joseph Atkins **South Carolina.** Joseph Atkins was a veteran of the Vietnam war. After a night of drinking on 27 October 1985, Joe Atkins dressed in military fatigues, armed himself with a machete and shotgun and engaged in other behaviour possibly indicative of a PTSD flashback, and killed his adoptive father and the 13-year-old daughter of his neighbours.

Sean Sellers **Oklahoma.** Sean Sellers was sentenced to death for crimes committed when he was 16 years old. He had a history of mental problems from early childhood. After his trial, a mental health expert found him to be chronically psychotic, exhibiting symptoms of paranoid schizophrenia and other major mood disorders. In 1992, six years after the trial, three mental health professionals diagnosed Sellers with multiple personality disorder (dissociative identity disorder). The 10th Circuit Court of Appeal, “although troubled by the extent of the uncontroverted clinical evidence proving Petitioner suffers from Multiple Personality Disorder... and that the offenses were committed by an ‘alter’ personality”, denied relief.

Wilford Berry **Ohio.** Wilford Berry suffered a childhood of extreme sexual and physical abuse. His first attempt at suicide occurred when he was aged 11, the first of 11 such attempts. At 14 he was diagnosed as suffering from severe schizophrenia, but received inadequate treatment. At 19 he was sentenced to six years in prison for car theft in Texas. While incarcerated, he was raped by another inmate and attempted suicide. In 1995, Justice Craig Wright of the Ohio Supreme Court dissented against Berry’s death sentence, saying “I cannot sanction the penalty of death for a person who appears to be mentally ill”.

James David Rich **North Carolina.** James David Rich pleaded guilty and represented himself at his sentencing. Reportedly had a history of mental illness, including schizophrenia and depression, and suffered an abusive childhood. He reportedly had a history of suicide attempts; when he was 12 years old, he stood in front of his elementary school class and shot himself in the stomach.

Alvaro Calambro **Nevada.** Alvaro Calambro, a national of the Philippines, reportedly suffered mental illness, with schizophrenia-type symptoms.

Manuel Babbitt **California.** Manny Babbitt was a decorated Vietnam veteran whose capital crime appears to have been linked to combat-induced PTSD. On his return to the USA, he experienced severe difficulties adjusting to civilian life and slid into serious alcohol and drug problems. He spent eight months in a mental hospital where conditions at the time were described by a federal judge as “shocking” and “unconstitutional”. His declining mental health was diagnosed, but never treated. A leading expert on Vietnam combat-related PTSD concluded that Babbitt was suffering from a combat-related flashback, aggravated by hallucinogenic drugs, when he killed Leah Schendel in 1980, and hid and tagged her body as soldiers had hidden and tagged their fallen comrades in Vietnam.

- Edward Harper **Kentucky.** Defence lawyers argued that Edward Harper suffered from delusions, had a history of suicidal tendencies within his family, and required a psychiatric evaluation to assess his competency to drop his appeals. Reportedly suffered from a form of schizophrenia.
- Michael Poland **Arizona.** Michael Poland's attorney was unsuccessful in having his execution stopped on the grounds of mental incompetence. Two psychologists and a psychiatrist agreed that Michael Poland suffered from a delusional disorder that rendered him incompetent for execution, and all agreed that he was not faking this recognized mental illness. He believed that he had superhuman powers that would keep death away from him. However, a state court found Michael Poland competent for execution. In his final statement before being put to death, Poland reportedly said: "I'd like to know if they're going to give me lunch afterwards".
- Gary Heidnik **Pennsylvania.** Gary Heidnik had a documented 30-year history of paranoid schizophrenia. The jury, left unaware of this, failed to find that he was mentally ill. Heidnik's daughter successfully blocked his execution in 1997 on the grounds that his paranoid delusions left him incompetent to waive his appeals. The courts permitted him to be executed in 1999, despite there having been no material change in his mental condition.
- Marlon Williams **Virginia.** Marlon Williams was subjected to appalling physical abuse as a child. For example, when he was 11 he was beaten with a broom handle so severely by his mother that his two blackened eyes were 95 per cent swollen shut. She sent him to school in this condition. He was immediately taken to hospital, where he was also found to have a ring imprint on his forehead. He was diagnosed with major depression at 13, and at 15 a psychological evaluation described him as "a very psychologically damaged young man", who was having psychotic episodes. After living in various homes, including his mother's again, Williams was taken into the custody of Social Services until he turned 18. Thirteen months later Helen Bedsole was shot dead, the crime for which Williams was executed. The judge who sentenced him to death was left largely unaware of the abuse and mental health problems.
- D.H. Fleenor **Indiana.** DH Fleenor had long shown signs of mental illness, had refused to see his lawyers in the weeks leading up to his execution because of his belief that they were part of a conspiracy against him. Several priests in recent contact with DH Fleenor had expressed concern that he was seriously delusional and did not understand his punishment. The prison's Catholic chaplain, who had signed an affidavit to this effect, was banned by the prison authorities from visiting DH Fleenor and other condemned inmates on the grounds of "philosophical differences", ie the chaplain's opposition to the death penalty. Two other priests, apparently intimidated by the prison authorities' hardline approach, decided against signing affidavits about DH Fleenor's mental health because they did not want to risk losing their access to death row prisoners. Legal attempts to have an independent psychiatric evaluation of DH Fleenor failed.
- 2000**
- Larry Robison **Texas.** Larry Robison always claimed that his crime was the result of his mental illness. He was diagnosed with paranoid schizophrenia three years before the murders for which he was sentenced to die. His mother sought help, but was told that the state had no resources unless he turned violent. None of the three doctors who diagnosed Larry Robison as suffering from paranoid schizophrenia were called to testify at the trial.
- Betty Lou Beets **Texas.** Betty Lou Beets had a lengthy history of well-documented head injuries, including repeated blows at the hands of abusive men, as well as a near-fatal car accident in 1980. Expert testimony in post-conviction proceedings established that she suffered from post-traumatic stress disorder, battered women's syndrome and organic brain damage and that she was learning disabled and hearing-impaired. According to defence experts, her multiple

disabilities left her with gravely impaired judgement and extremely dependent on others. At the time of the murder, she was abusing alcohol and diet pills. Sentenced to death for killing her husband, her traumatic history of physical and sexual abuse from an early age was not presented to the jury.

- Robert Coe **Tennessee.** Robert Coe was diagnosed as suffering from brain damage and paranoid schizophrenia. His childhood was marked by extreme poverty and his father's physical and sexual abuse. In 1975, at the age of 19, Coe was found incompetent to stand trial due to mental illness. He was described as a "seriously disturbed young man" whose disposition to violence and sexual aggression was "a lesson garnered from his father". His illness included auditory hallucinations in which he would hear his father screaming at him. He was sentenced to death for the abduction, rape and murder of an eight-year-old girl in 1979.
- Christina Riggs **Arkansas.** Christina Riggs killed her two children in 1997, and unsuccessfully attempted to kill herself on the same night. Her actions were apparently the result of mental illness, including severe depression. She demanded the death penalty at her trial and refused to appeal her death sentence.
- Pernell Ford **Alabama.** From the age of six, Pernell Ford spent extended periods in mental health institutions, and by 13 was being prescribed powerful anti-psychotic and anti-depressant drugs. During his adolescence he attempted suicide several times. He was found competent to act as his own lawyer despite his youth, his borderline mental retardation and mental illness. The only "defence" he offered was that God would intervene at the trial and bring the victims back to life. At his sentencing, Pernell Ford dressed himself in a white bed sheet, worn toga-style with a belt and shoulder strap made from a white towel. In a long speech, he asked the judge to have the coffins of the Griffiths brought into the courtroom so that God could raise them from the dead in front of the jurors. On death row, he periodically gave up his appeals, but resumed them when his mental health stabilized. He was diagnosed as suffering from schizophrenia and depression and treated with a range of drugs. Pernell Ford claimed that he was able to transport himself anywhere on earth, by a method he called "translation". He stated that one of his first "translations" from his cell was to India, where he now had a number of wives. He said that when he died he would become the Holy Spirit and sit on the left hand of God, and that he had already visited heaven in an earlier "translation".
- Roger Berget **Oklahoma.** Roger Berget suffered from bipolar disorder, and had attempted suicide shortly before the sentencing hearing. His trial lawyer stated in a later affidavit: "I simply did not understand the importance of mental health evidence to present a full picture...this entire area was left uninvestigated." The lawyer also admitted that he failed to investigate Roger Berget's abusive childhood: "There were indicators of serious childhood trauma that should have been investigated and explored by an expert". At the age of 14, Roger Berget suffered a serious head injury in a car accident. At 15 he was sent to adult prison to begin the first of a number of prison sentences for robbery.
- Thomas Provenzano **Florida.** Thomas Provenzano had a history of serious mental illness, including paranoid schizophrenia, dating back to before the crime. The judge who found him competent for execution found "clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ." The judge noted that Thomas Provenzano had held this belief for over 20 years. However, the judge stated that the present standard for competency is a "minimal standard". He said that his ruling "should not be interpreted as a finding that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not".

- Juan Soria **Texas.** Last-minute appeals to stay the execution on the grounds that Soria was mentally incompetent for execution, were unsuccessful. Juan Soria had a history of self-mutilation and suicide attempts, the most recent of which took place a few days before the execution. On 25 July, the eve of the execution, a psychologist employed by the defence to examine Juan Soria concluded that he was not competent for execution. A judge rejected the claim. Local reports of the execution noted that as Juan Soria was strapped to the gurney, he was “covered with sheets to conceal numerous self-inflicted wounds.” According to the reports, in his final statement Juan Soria compared his execution to surgery: “They say I’m going to have surgery, so I guess I will see everyone after the surgery is performed.”
- John Satterwhite **Texas.** At two competency hearings in 1989 prior to his retrial, juries were twice unable to decide whether Satterwhite was mentally fit to stand trial. At the 1989 trial, a psychiatrist formerly employed by the state prison system, testified for the defence that Satterwhite suffered from chronic paranoid schizophrenia, and had done so since his teens. He also concluded that Satterwhite had mental retardation. A second expert endorsed this view.
- Dan Hauser **Florida.** Dan Hauser was executed for the murder of Melanie Marie Rodrigues on 1 January 1995. He had suffered from bipolar disorder since late adolescence, and had been suicidal in the past. During manic phases he was irrational and delusional. A psychiatrist stated that it was likely that he was suffering from a manic episode at the time of the crime. He was also intoxicated with alcohol on the night of the murder. He regularly abused alcohol and suffered from alcoholic blackouts. The courts rejected an appeal against the execution filed on behalf of Hauser’s mother. The appeal argued that Dan Hauser was not mentally competent to waive his appeals and that his decision to do so was part of a plan to commit suicide. It argued that Hauser had made up gruesome details of the crime to ensure that he would be sentenced to death. The details given by Hauser, the appeal argued, were inconsistent with his initial confession and did not fit with independent scientific evidence of the physical evidence. Hauser had also lied to the trial court when he said that he had never been treated for mental illness, when in fact he had received psychiatric treatment as both an inpatient and an outpatient at several mental facilities.
- 2001**
- Dion Smallwood **Oklahoma.** Dion Smallwood was initially found incompetent to stand trial. After nearly three months of treatment, the psychiatric hospital determined that he could stand trial, although it noted that he remained “a danger to himself and others”, the standard in Oklahoma for commitment to a psychiatric facility. The jury never heard any expert mental health testimony from the defence at either stage of the trial. Dion Smallwood had sought psychiatric help shortly before the murder of Lois Fredericks because his condition was deteriorating. On 10 January 1992 he went to a mental health facility, stating that he was having “a crisis”. The counsellor was busy and asked him to come back in two hours. Although she noted that he was “obviously in relapse”, she did not follow up on his whereabouts when he did not return. A clinical psychologist who assessed Smallwood after his conviction found that he suffered from bipolar disorder: “This psychiatric disturbance when of the severity of that of Dion, disrupts all areas of functioning, relationships, occupational, social, and often requires hospitalization to prevent harm to self or others. Dion never had this necessary treatment”. She said that had he received such treatment, “it is unlikely that his situation would have created the intense symptoms he experienced that culminated in the death of Mrs Fredericks”.
- Thomas Akers **Virginia.** Thomas Akers was born to a 16-year-old mother into a life of poverty, abuse and parental neglect. He engaged in solvent abuse from as early as 11. At school he was placed in special education classes for pupils with learning disabilities. He ran away from home and lived with a man who sexually abused him. Thomas Akers was committed to a series of juvenile facilities for various property offences. At one of the juvenile institutions, he attempted suicide by breaking a light bulb and cutting himself over 100 times. Despite his

mental problems, including brain damage, hallucinations and extreme depression, he never received the appropriate long-term therapeutic care that was recommended by mental health professionals at the time. In 1987, when he was 17, he was arrested for stealing, tried and sentenced to adult prison. After a few months, he wrote to the judge who had sentenced him, and asked to be put to death in Virginia's electric chair. After being paroled in August 1998, he began wearing a necklace with an electric chair pendant. He told his family that he was going to be executed. In December 1998, he was arrested for the murder of Wesley Smith. Thomas Akers told his court-appointed lawyers not to bother with a defence, and demanded the death sentence from the prosecutor and the judge. After he got his wish in November 1999, Thomas Akers waived his right to appeal and was executed 15 months later.

Dennis Dowthitt **Texas.** Dennis Dowthitt had suffered from mental illness since he was a teenager. His original trial lawyers did not investigate this issue, or the abuse he suffered as a child, to present in mitigation. One of several mental health experts, who have assessed Dowthitt since his conviction, concluded that his profile was "consistent with paranoid and schizophrenic features". A second expert stated that the tapes of Dennis Dowthitt's interrogation showed his "severe mental problems".

Jay Scott **Ohio.** Jay Scott developed serious mental illness on death row. In December 2000 a prison doctor diagnosed him as suffering from schizophrenia. Prior to this, doctors have variously described him as "delusional" and as having a "major depressive disorder, chronic with psychotic features". Jay Scott was reported to have suffered from auditory hallucinations - a symptom of schizophrenia - from as early as 1992. His disturbed behaviour over the years included setting fire to his cell, banging his head against the wall, screaming incoherently, and fouling his food and then eating it. During psychotic episodes in 2000, he was taken out of his cell and placed on 24-hour suicide watch. He has been given anti-psychotic drugs. Jay Scott's background is one of poverty, deprivation, and exposure to violence from an early age. At his 1984 trial, his lawyers decided not to present any mitigating evidence to this effect because they feared it would reveal details of his criminal history.

Miguel Richardson **Texas.** Miguel Richardson had a long history of bipolar disorder and was medicated on death row.

Jim Lowery **Indiana.** At the clemency hearing, the Indiana Parole Board heard testimony from a psychologist who had recently diagnosed Jim Lowery as still suffering from PTSD as a result of his treatment in the mental institutions. The psychologist also testified that Lowery should never have been placed in those facilities. Jim Lowery's childhood was marked by poverty and parental neglect. He first got into trouble as a young teenager, after taking his father's car for joyriding in. When he was 15 or 16, his parents took him to court and a judge committed him to a state mental facility, even though no evidence had been presented that he was mentally ill. The teenager ran away from the institution several times, telling his brothers and sisters that he had witnessed inmates being given electro-shock treatment and that he was afraid this would happen to him. He was transferred to the maximum security unit of another institution, the Norman Beatty Hospital, which has since been closed. There he was subjected to repeated gang rapes by staff. He was released at the age of 18. He took to drugs, alcohol, and property crime, and was in and out of the prison system until the crime for which he was sentenced to die.

Terry Mincey **Georgia.** Two years earlier before the crime, Terry Mincey had had a near fatal motorcycle accident. At the trial, although family members testified that he had undergone a drastic personality change after the accident, with severe mood swings and an impaired memory, the defence presented no expert mental health evidence about the head injury and its possible effects. In a post-conviction affidavit, a psychologist opined that the injury would have

impaired Mincey's judgment and impulse control: "Mincey's head injury was a significant factor in the case - a factor which when considered establishes that Mr Mincey's actions on the night of the offense were the irrational impulsive actions of a brain damaged individual and not the actions of a cold, calculated, and premeditated murderer". Eight years after the trial, Terry Mincey's appeal lawyers discovered notes that the prosecutor had taken during a pretrial meeting with the state's psychiatrist, who was a member of the state forensic team which had evaluated Mincey in May 1982. The prosecutor's notes included the following about Terry Mincey: "Brain damage in auto accident. Reflexes more active on 1 side. This indicates motor muscle power differential. It is possible he might now be more susceptible to irrational behavior". The notes were not provided to the defence.

James Elledge ■ **Washington.** James Elledge was sentenced to death for the murder of a woman in 1998. He turned himself in to the police, after allegedly twice attempting suicide. He pleaded guilty to first degree murder and refused to allow any mitigating evidence to be presented. The jury was unaware that he had pleaded insanity in a previous case, his reported history of mental illness, and his childhood abuse. He refused to appeal his death sentence.

Jose High **Georgia.** Jose High, black, was on death row for 23 years for the murder of 11-year-old Bonnie Bulloch, white, when High was a teenager. In post-conviction affidavits, three mental health experts said that Jose High suffered from "a major mental illness with psychotic features", "a seizure disorder", "significant brain damage" and "borderline intellectual functioning". They concluded that he suffered from such disorders at the time of the crime, as well as before and after it. The experts also reviewed Jose High's videotaped "confession" to the police. They state that it clearly shows his mental illness, indicates that he was manipulated by the police during questioning, and calls into question the extent of his role in the crime. The video was not disclosed to the defence at the time of the trial and only came to light in 1991. In prison, Jose High was diagnosed with schizoaffective and depressive disorders. His medical records over the years revealed that, despite being given powerful medication, he suffered visual and auditory hallucinations, as well as seizures and suicidal ideation. He was subjected to severe physical abuse at the hands of his father. Jose High's lawyer presented no expert or other witnesses at the sentencing phase. In his final statement before being executed, High said that it had not been he who had shot Bonnie Bulloch. His two co-defendants had their death sentences overturned on appeal.

Jeffrey Tucker **Texas.** Jeffrey Tucker was a victim of childhood physical, sexual and emotional abuse. In upholding his death sentence in 2001, the US Court of Appeals for the Fifth Circuit stated that "we do not profess to be unmoved by the dreadful circumstances of Tucker's childhood, and we understand the relevance of such evidence to the jury's determination of Tucker's moral culpability at the time he committed the murder". In 1997, a psychiatrist had concluded that Tucker suffered from brain damage and post-traumatic stress disorder. His trial lawyers did not present mental health evidence at the trial, and presented minimal mitigating evidence about his childhood. They later admitted that "it was certainly not due to any legal strategy, tactic or plan that we neglected to pursue and introduce documents or testimony regarding Mr Tucker's mental illness at either phase of the trial. In fact, such evidence would have helped us immeasurably. The idea of investigating a client's childhood and mental health history was new to us."

2002

James Johnson **Missouri.** At his trial for the murder of three police officers and the wife of one of them, Jim Johnson pleaded "not guilty by reason of mental disease or defect". The defence position was that he suffered PTSD as a result of his wartime experiences in Vietnam, and that he had experienced Vietnam-related flashbacks on the night of the murders which made him believe that he was confronted by the enemy and rendered him incapable of appreciating the wrongfulness of his conduct. However, the lawyer's failure to prepare adequately allowed the

state to discredit this defence. Although three experts testified that Johnson suffered from PTSD, the jury convicted Johnson on four counts of first-degree murder and sentenced him to death on all four counts. A state Supreme Court judge, dissenting against his colleagues' decision to uphold the death sentence, wrote: "Defense counsel's unprofessional failure to interview [the prosecution witnesses] led the defense to make demonstrably false claims in its opening statement, claims that utterly destroyed the credibility of the PTSD theory before the defense even presented any evidence... I find it reasonably likely that a jury that had not seen the defense destroy its own credibility on this issue would have been sufficiently receptive to the expert diagnosis of a mental disease or defect to permit a reasonable likelihood of a different result... While Mr Johnson may not, as the jury found, have met the legal definition of insanity, whatever drove Mr Johnson to go from being a law-abiding citizen to being a multiple killer was certainly something akin to madness. I am not convinced that the performance of his counsel did not rob Mr Johnson of any opportunity he might have had to convince the jury that he was not responsible for his actions".

Monty Delk **Texas.** Post-conviction, in 1990, the prison medical authorities diagnosed Monty Delk with bipolar disorder with psychotic features, and also raised the possibility that he was suffering from schizo-affective disorder. Monty Delk displayed a pattern of disturbed behaviour over his years on death row, including covering himself in feces, and incoherent jabbering. He has repeatedly expressed delusional beliefs, such as that he is a submarine captain, a CIA or FBI agent, or a member of the military. At a court hearing in 1993, he responded to the judge in prolonged streams of unbroken gibberish. At another hearing in 1997, Monty Delk was gagged and then removed from the courtroom after repeatedly interrupting the court with nonsensical utterances. At the hearing, a former chief mental health officer with the Texas prison system said that his review of the prison records and his own contact with Monty Delk suggested that the prisoner suffered from a severe mental illness. From time to time, the state contended that Delk was malingering to avoid execution. About four hours before the scheduled execution, the Fifth Circuit lifted a lower court stay. Strapped down for execution, Monty Delk shouted gibberish and obscenities.

Rodolfo Hernandez **Texas.** Rodolfo Hernandez was diagnosed as suffering from paranoid schizophrenia. See main report, in the section *Unethical: Psychiatric testimony used to kill*.

Linroy Bottoson **Florida.** A renowned mental health expert concluded, after examining Linroy Bottoson and reviewing his records, that "Mr. Bottoson's chronic mental illnesses currently render him unable to rationally and factually understand and appreciate the reason that the State of Florida is seeking his execution and unable to factually comprehend that his death will in fact occur. This man cannot perceive any connection between any crime and the punishment that is scheduled. Because of his fixed psychotic delusions he has no current capacity to come to grips with his own conscience, with the crime, with mortality, with his sentence, or with reality. He understands himself to be locked in the middle of a battle between Jesus and Satan, a battle that he is certain, as one of God's prophets, Jesus will win. Mr. Bottoson believes that he will not be executed because humankind needs him."

2003

James Colburn **Texas.** James Colburn was diagnosed with schizophrenia before the crime. When he gave a statement to police on the day of the murder, after he handed himself in, there were indications that he was struggling with his illness. During his 1995 trial, James Colburn received injections of Haldol, an anti-psychotic drug which can have a powerful sedative effect. A lay observer, a nurse with experience of mentally ill patients, has stated in an affidavit that Colburn appeared to fall asleep on frequent occasions during the proceedings. A psychiatrist who conducted an assessment of James Colburn in 1997, and reviewed the records in the case, concluded that there were "serious questions and concerns regarding [Colburn's] competency to stand trial at that time", and that Colburn had been "seriously sedated during the time of his trial".

John Smith **■ Missouri.** John Smith was diagnosed with mental illness, specifically bipolar disorder with psychotic features, and was on medication in prison. He dropped his appeals. According to his attorneys, he had previously made a suicide attempt while on death row.

Louis Jones **Federal.** After serving in Operation Desert Storm/Desert Shield in Saudi Arabia in 1990 and 1991, Louis Jones displayed significant behavioural and personality changes. He lost his sense of humour, became dominating, possessive, rigid in his thinking, and began drinking to excess. He suffered from daily headaches. At the trial a psychologist testified that, in his opinion, Louis Jones' experience had intensified the PTSD that he had suffered as a result of his involvement in the US invasion of Grenada in 1983, in which he had led his platoon in a dangerous parachute jump under hostile fire. At the trial, a psychologist, a neurologist and a psychiatrist variously stated their opinion that on the night of the crime, Louis Jones was suffering from various mental problems, including a major depressive disorder, a dissociative disorder, PTSD, cognitive disorder and alcohol intoxication. The neurologist testified that, in his opinion, Louis Jones had suffered brain damage, which made it difficult for him to control impulses. His clemency petition raised the claim that he suffered from brain damage as a result of Gulf War Syndrome, evidence which had not been raised at the 1995 trial due to the lack of scientific and medical knowledge on this subject at that time.

James Brown **Georgia.** James Willie Brown had a long history of mental illness, including repeated diagnoses of schizophrenia. His trial for murder was delayed for six years on the grounds of mental incompetence. He was eventually tried and sentenced to death in 1981, but was granted a new trial by a federal court in 1988 due to doubts over his competency to stand trial in 1981. He was retried in 1990, and again sentenced to death. At the retrial, the defence presented two experts who testified that James Brown suffered from chronic paranoid schizophrenia. The state's position at the 1990 retrial, however, was that James Brown was faking his mental illness. It presented a doctor who stated that, in his opinion, the defendant did not have schizophrenia, but had suffered drug-induced flashbacks. This doctor appears to have ignored James Brown's long history and repeated diagnoses of mental illness (over the years more than 25 mental health experts employed by the state have found James Brown to be mentally ill and not malingering). To bolster the state's theory that the defendant was malingering, the prosecution presented a former inmate, Anita Tucker, who said that James Brown had confided in her that he was faking his illness. Anita Tucker later recanted that testimony, and testified that her earlier testimony was part of a deal with the prosecution in exchange for her early release on her own criminal charges.

2004

Charles Singleton **Arkansas.** Charles Singleton was sentenced to death in 1979 for the murder of Mary Lou York. Charles Singleton's mental condition worsened in the years that he was on death row, and he has been diagnosed as likely suffering from schizophrenia. By the late 1980's he had begun to suffer delusions, including that his cell was possessed by demons, that a prison doctor had implanted a device in his ear, and that his thoughts were being stolen when he read the Bible. Over the years, he has described himself as the Holy Ghost and "God and the Supreme Court", expressed the belief that he had been freed by the Supreme Court, that execution is just a matter of stopping breathing and that a judge could restart his breathing again, that Sylvester Stallone and Arnold Schwarzenegger were between this universe and another and trying to save him, and, in a letter to a federal court, that Mary Lou York "is somewhere on this earth waiting for me – her groom". By the early 1990s Charles Singleton was regularly on anti-psychotic drugs. When he did not take the medication, or he needed increased or different medication, his symptoms would worsen. When his illness became severe, he was put on an involuntary medication regime. His psychotic symptoms abated, and the state set an execution date.

- Kevin Zimmerman Texas.** Kevin Zimmerman was originally charged with murder, not capital murder. He was appointed a succession of lawyers who all withdrew from the case for various reasons, having done little or no work on the case. After a year, Zimmerman wrote letters to the prosecutor and court, in effect daring them to charge him with capital murder. He was recharged, this time with capital murder. A doctor who later reviewed the case stated in an affidavit that the claims in Zimmerman's letters were "patently absurd" and that the records indicate that at the time he was "psychotic", "potentially suicidal and required suicide prevention measures". His trial lawyers, who had no capital trial experience, failed to have Zimmerman evaluated for his mental competency to stand trial even though there was evidence that he might not be able to assist in his own defence. They did not investigate his family background, and did not learn that he had a history of mental problems beginning after a serious bicycle accident at the age of 11, as a result of which he had a plate put in his head. There were numerous relatives and neighbours who could have testified that his personality and behaviour changed after the accident. The lawyers failed to present expert psychiatric evidence to support the claim of self-defence or to present as mitigation evidence against the death penalty. In 1997, an expert conducted an evaluation of Kevin Zimmermann, and found that his childhood brain injury had "materially affected his behavioral control, both as an adolescent and at the time of the stabbing". In 1995 another doctor had concluded that Zimmerman showed signs of a mental disorder characterized by impaired impulse control and judgment. In 2003, a psychologist concluded that Kevin Zimmerman had suffered a "traumatic and serious frontal brain injury at the age of eleven which resulted in the development of seizures, personality changes, explosive outbursts as well as post-explosive amnesia." She said that due to the mental impairments, the murder for which Zimmerman was sentenced to death "should not be considered as a predatory/premeditated crime." She also concluded that Kevin Zimmerman's "behaviour at the time of the crime and around the time of his trial raises the strong probability that he was suffering from a separate mental illness or disorder" at those times.
- Hung Thanh Le Oklahoma.** The jury heard no expert evidence of the possible impact of Hung Thanh Le's traumatic refugee experiences on his actions. After the trial, a Vietnamese psychologist concluded that Hung Le was suffering from post-traumatic stress disorder at the time of the crime – the murder of a fellow Vietnamese refugee in Oklahoma City in 1992. Hung Le had reportedly witnessed, and was subjected to, violence and deprivation in the refugee camps in Cambodia and Thailand.
- Kelsey Patterson Texas.** After shooting Louis Oates and Dorothy Harris in 1992, Kelsey Patterson put down the gun, undressed and was pacing up and down the street in his socks, shouting incomprehensibly, when the police arrived. In 2000, a federal judge wrote that "Patterson had no motive for the killings – he claims he commits acts involuntarily and outside forces control him through implants in his brain and body. Patterson has consistently maintained he is a victim of an elaborate conspiracy, and his lawyers and his doctors are part of that conspiracy. He refuses to cooperate with either; he has refused to be examined by mental health professionals since 1984, he refuses dental treatment, and he refuses to acknowledge that his lawyers represent him. Because of his lack of cooperation, it has been difficult for mental health professionals to determine with certainty whether he is exaggerating the extent of his delusions, or to determine whether he is incompetent or insane. All of the professionals who have tried to examine him agree that he is mentally ill. The most common diagnosis is paranoid schizophrenia." Patterson was first diagnosed with schizophrenia in 1981. A jury found him competent to stand trial for the murders. Yet his behaviour at his competency hearing, and at the trial itself – when he repeatedly interrupted proceedings to offer rambling narrative about his implanted devices and other aspects of the conspiracy against him – provided compelling evidence that his delusions did not allow him a rational understanding of what was going on or the ability to consult with his lawyers. After learning of his execution date, Patterson wrote rambling letters to various officials. In the letters he referred to a permanent stay of execution that he said he


had received on grounds of innocence. Kelsey Patterson's family had tried unsuccessfully to get treatment for him prior to his crime.

- Robert Bryan **Oklahoma.** Robert Bryan had been diagnosed with chronic paranoid schizophrenia, and had a history of organic brain disease which may have been related to his severe diabetes dating back decades. Despite serious concerns about his competence to stand trial, and the fact that he had previously been found incompetent to stand trial, Robert Bryan's trial lawyer presented no mental health evidence at either stage of the trial.
- Stephen Vrabel **■ Ohio.** Stephen Vrabel shot his girlfriend and their child in 1989, and then put their bodies in the refrigerator. He was found incompetent to stand trial and he was committed to a psychiatric hospital where he remained for the next five years, until he was found competent to stand trial. He was diagnosed with serious mental illness, including paranoid schizophrenia. Three Ohio Supreme Court Justices dissented against his death sentence on the ground of Vrabel's mental illness.
- Kevin Hocker **■ Alabama.** Kevin Hocker suffered from bipolar disorder. His trial for a 1998 murder lasted one day. The trial lawyer presented no witnesses, and Hocker refused to allow any mitigating evidence to be presented, so the jury was left unaware of the abuse he was subjected to as a child, his history of mental illness, or the fact that his father had also suffered from bipolar disorder and had committed suicide when Hocker was eight years old. Kevin Hocker then refused to appeal his sentence. He mutilated himself on death row, including cutting off his testicles. His mother and sister said that he had been suicidal for years. His sister said that her brother had told her that he committed the crime in order to get the death penalty.
- Mark Bailey **Virginia.** Lawyers for Mark Bailey, a former Navy submariner, appealed for clemency from the Governor of Virginia on the grounds that Bailey suffered from bipolar disorder, and had faced "a continuous struggle with his mental illness", a factor which was not considered by the jury when it sentenced him to death for killing his wife and child in 1998.

2005

- Donald Beardslee **California.** Donald Beardslee's clemency lawyers revealed evidence of his mental impairment. An expert conducted an assessment of Beardslee and concluded that he suffered from severe brain damage, and that the right hemisphere of his brain was virtually non-functioning. The expert concluded that in all likelihood he had suffered from this impairment since birth and it was exacerbated by serious head injuries he sustained when a teenager and in his early 20s. The expert concluded that the brain damage likely affected his behaviour at the time of the crime, and also that the severity of the impairment would likely have left jurors interpreting his flat demeanour as indicating a callous individual. The prosecutor repeatedly depicted Beardslee as a remorseless killer, and told the jury that they could evaluate him from his demeanour in the courtroom. The jury was not presented with the evidence of brain damage, allowing the prosecutor to argue that the defendant was "not suffering from any mental disorder".
- Troy Kunkle **Texas.** At the time of the crime, Troy Kunkle was just over 18 years old, with no criminal record, and emerging from a childhood of deprivation and abuse. At times, his parents had suffered from mental illness. When Troy Kunkle was 12, his father's mental condition deteriorated, resulting in severe mood swings during which he would subject Troy Kunkle to severe physical abuse. It was during this time that the boy's problems at school escalated, conduct which would later be used by the state in its effort to persuade the jury to vote for his execution. In post-conviction evaluations, a psychologist concluded that Troy Kunkle was suffering from schizophrenia, a diagnosis he said was backed up by prison records. He stated that much of Troy Kunkle's early adolescent behaviour problems could be "linked to his father's aggressive and psychotic behaviour" towards him throughout his childhood, as well as

to the lack of nurturing when his mother was herself suffering from serious mental illness. The psychologist concluded that an expert evaluation at the time of the trial would likely have shown Troy Kunkle's emerging mental disorder, and the exacerbating effect of substance abuse on this. The jury heard no expert testimony, however.



Appendix 2 – Recommendations of an ABA Task Force

Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behaviour, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
2. 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 the purposes of this provision.
3. Mental Disorder or Disability after Sentencing
 - (a) *Grounds for Precluding Execution.* 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. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.
 - (b) *Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings.* If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.
 - (c) *Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings.* If a court finds at any time that a prisoner under

sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.

- (d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.

2005

For further information and analysis of the Task Force's proposals, see the *Catholic University Law Review*, Volume 54 (2004-2005).