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Ronald J. Tabak

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**EXECUTING PEOPLE WITH MENTAL DISABILITIES:  
HOW WE CAN MITIGATE AN AGGRAVATING SITUATION**

RONALD J. TABAK\*

INTRODUCTION

In 2003, the American Bar Association's Section of Individual Rights and Responsibilities created a task force (hereinafter "the Task Force") to consider the subject of mental disability and the death penalty. It included people knowledgeable on this subject from the fields of law, psychology, and psychiatry, as well as leading people from several mental disability advocacy groups.

The Task Force, which I chair, has proposed the following recommendations, which were most recently revised into the current wording in the Spring of 2005:<sup>1</sup>

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 behavior, 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

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\* Ronald J. Tabak is Special Counsel at Skadden, Arps, Slate, Meagher & Flom LLP. He has chaired or co-chaired the Capital Punishment Committee of the American Bar Association Section of Individual Rights & Responsibilities for almost twenty years. He is chair of the Task Force on Mental Disability and the Death Penalty, formed by the Section of Individual Rights & Responsibilities. Mr. Tabak is a 1974 graduate of Harvard Law School and clerked for U.S. District Judge John F. Dooling, Jr., E.D. N.Y.

1. This proposal was previously published in *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1115, 1115-16 (2005) [hereinafter *Recommendations of the Task Force*].

solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

### 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 a 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.

I have described in the *Catholic University Law Review* the reasons why the Task Force was created and some of the concerns underlying its proposal.<sup>2</sup> The three parts of the proposal are discussed in detail in that same law review issue by Professor Christopher Slobogin (who discusses parts 1 and 2)<sup>3</sup> and Professor Richard J. Bonnie (who discusses part 3).<sup>4</sup>

In this article, I will discuss where the Task Force's proposal stands now in three leading professional associations. I will also discuss some of the bases for the proposal. In addition, I will set forth the views of the Constitution Project and several judges who believe it is unacceptable to execute people with serious mental disabilities. Further, I will include examples, mostly drawn from a recent report by Amnesty International,<sup>5</sup> of troublesome cases that illustrate the need for serious consideration of the Task Force's proposal.

#### *Consideration of the Task Force Proposal by Leading Professional Associations*

As of December 2005, the American Psychiatric Association approved the entire Task Force proposal: having in December 2004 approved paragraph two of the proposal,<sup>6</sup> in December 2005 it approved paragraphs one<sup>7</sup> and three.<sup>8</sup>

As of February 2006, the American Psychological Association approved the entire Task Force proposal: having in February 2005 approved paragraph two of the proposal, along with earlier versions of the proposal's first and third

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2. Ronald J. Tabak, *Overview of Task Force Proposal on Mental Disability and the Death Penalty*, 54 CATH. U. L. REV. 1123 (2005).

3. Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005) [hereinafter *Mental Disorder*].

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

5. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE EXECUTION OF MENTALLY ILL OFFENDERS (Jan. 2006), available at [http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/\\$File/AMR5100306.pdf](http://web.amnesty.org/library/pdf/AMR510032006ENGLISH/$File/AMR5100306.pdf) (last visited Apr. 19, 2006) [hereinafter AI REPORT].

6. See American Psychiatric Association, *Diminished Responsibility in Capital Sentencing: Position Statement* (2004), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200406.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf) (last visited Apr. 19, 2006); *Recommendations of the Task Force*, *supra* note 1, at 1115.

7. See American Psychiatric Association, *Death Sentences for Persons with Dementia or Traumatic Brain Injury: Position Statement* (2005), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200508.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200508.pdf) (last visited Apr. 19, 2006); *Recommendations of the Task Force*, *supra* note 1, at 1115.

8. See American Psychiatric Association, *Mentally Ill Prisoners on Death Row: Position Statement* (2005), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200505.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf) (last visited Apr. 19, 2006); *Recommendations of the Task Force*, *supra* note 1, at 1115-16.

paragraphs,<sup>9</sup> in February 2006 it approved the current versions of paragraphs one and three.<sup>10</sup>

The American Bar Association's policy-making body, the House of Delegates, will be asked to approve the Task Force proposal at its meeting in August 2006.<sup>11</sup>

*Reasons for Excluding Certain People with Mental Disabilities from Death Penalty Eligibility*

1. The Task Force Proposal Bars Only the Death Sentence, Not Convictions

Paragraphs one and two of the Task Force proposal advocate excluding certain people with mental disabilities from eligibility for the death penalty.<sup>12</sup> (Paragraph three deals with certain people already sentenced to death whose mental disabilities bear on subsequent legal proceedings.)<sup>13</sup> In proposing that those covered by paragraphs one and two be exempt from capital punishment, the Task Force *is not* addressing the question of the circumstances under which people with mental disabilities can be *convicted*.

Accordingly, if paragraphs one and two of the Task Force proposal were adopted, that would have *no impact* on who could be convicted of capital murder. Indeed, those covered by these paragraphs could still be convicted and sentenced to as much as life without any possibility of parole. In this respect, paragraphs one and two would work in the same way as statutes and now Supreme Court decisions that preclude certain people from being given the death penalty – but not from being convicted and punished.

With that in mind, it is worth considering the context of those Supreme Court decisions.<sup>14</sup>

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9. See American Psychological Association, Excerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18-20, 2005).

10. See American Psychological Association, Excerpt from the Council of Representatives 2006 Meeting Minutes (Feb. 17-19, 2006).

11. The proposal to be presented to the House of Delegates is different in minor respects from the language set forth above in the text, in that changes in wording have been made in paragraph 3(c) and 3(d) to remove any potential doubt that, where either provision applies, the sentence would be the one that would be applicable in a capital case in situations in which the death penalty is not a sentencing option.

12. *Recommendations of the Task Force*, *supra* note 1, at 1115.

13. *Id.* at 1115-16.

14. The discussion of Supreme Court cases that follows is based on an oral presentation by Professor James Ellis during an American Bar Association program on August 8, 2005, which the author moderated. Much of the ensuing discussion of how this bears on the Task Force's paragraphs one and two is based on an oral presentation at that same program by Dr. Joel Dvoskin.

2. The Capital Sentencer's Consideration of Aggravating and Mitigating Circumstances Is Inadequate to Deal with the Problems of Executing Those Individuals with Serious Mental Disorders Who Are Dealt with in the Task Force Proposal

When, in *Penry v. Lynaugh* in 1989, the Supreme Court first considered the constitutionality of the sentencing of people with mental retardation to death, it perceived that the lower courts in these cases were handling them in a manner that was not in accord with *Lockett v. Ohio*.<sup>15</sup> That is, while *Lockett* held that factors such as mental retardation should be able to be given real mitigating effect, that was not happening in the *Penry* lower courts.<sup>16</sup> Indeed, the Supreme Court threw out Mr. Penry's death sentence because Texas had not established procedures and jury instructions that permitted proper mitigating effect to be accorded his mental retardation.<sup>17</sup>

Some members of the Court already felt at the time of the 1989 *Penry* decision that there was merit to the argument that mental retardation significantly reduces a defendant's moral culpability for capital murder.<sup>18</sup> But the majority was not prepared to hold that the death penalty for people with mental retardation categorically violated the Eighth Amendment.<sup>19</sup> The Court did say that it might some day hold differently, as a result of further evolution of standards of decency and if proposals to bar the death penalty for people with mental retardation were to survive the crucible of the legislative process in a large number of states.<sup>20</sup>

By the time of *Atkins v. Virginia*, the Supreme Court concluded that enough had changed with regard to the standards of decency that it would now hold unconstitutional the execution of people with mental retardation.<sup>21</sup> But its holding was not based *solely* on the many additional state laws barring such executions.

In addition, the Court said that its holding reflected the Court's view that people with mental retardation are less culpable and less deterrable than the average murderer because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."<sup>22</sup>

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15. *Penry v. Lynaugh*, 492 U.S. 302, 319-28 (1989).

16. *See id.* (citing *Lockett v. Ohio*, 438 U.S. 586 (1978)).

17. *Id.* at 310-11, 328.

18. *See id.* at 337.

19. *See id.* at 335.

20. *See id.* at 340.

21. 536 U.S. 304, 321 (2002).

22. *Id.* at 318.

Three years later, the Court said much the same thing about those who commit capital murder prior to age eighteen. Thus, in *Roper v. Simmons*, the Court stated:

Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.<sup>23</sup>

Thus, the Court concluded that the problems inherent in making people with mental retardation or juveniles subject to capital punishment could not be adequately addressed by considering aggravating and mitigating factors in the sentencing proceeding.<sup>24</sup> The aggravator/mitigator regime was producing many death sentences that were inconsistent with (a) the Court's understanding about the relatively lessened culpability of those with mental retardation or juveniles and (b) the national consensus against executing such people.<sup>25</sup>

The part of the Court's reasoning in *Atkins* and *Roper* dealing with moral culpability is equally true for those seriously mentally disabled people who would be exempted from the death penalty by paragraphs one and two of the Task Force's proposal.

Moreover, a problem arises when jurors are asked to "weigh" evidence bearing on diminished responsibility. The problem is that juries often view such evidence as being an *aggravating* factor, when it is supposed to be viewed as a *mitigating* factor. Although this problem arises in cases involving evidence of immaturity as well as cases involving evidence of mental retardation, it is particularly apparent in cases involving severe mental illness. Many jurors create what amounts to a presumption that someone with severe mental illness will be dangerous in the future.<sup>26</sup>

Because of fear that juries will act in this manner, many defense attorneys decide not to present evidence of severe mental illness as part of their sentencing phase case. Counsel who act in this manner are frequently held not to have been ineffective.

For example, counsel for Robert Bryan in Oklahoma did not present any mental health evidence, although Mr. Bryan had chronic paranoid

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23. 543 U.S. 551, 571 (2005). The Court went on to say that the possibility that teenage offenders would be deterred by the death penalty "is so remote as to be virtually nonexistent." *Id.* at 571-72 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion)).

24. *See id.* at 573.

25. *Id.* at 564-67, 571.

26. *See* Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 669-70 (2000); Joshua N. Sondheim, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 420 (1990).

schizophrenia, a history of organic brain disease, and had previously been found incompetent to stand trial.<sup>27</sup> The Tenth Circuit concluded that counsel had acted “strategically,” out of concern that mental health testimony “would do more harm than good[,]” by adding to the jury’s concern about future dangerousness.<sup>28</sup>

There are two major problems with a legal system in which such severe mental illness is viewed by sentencers as aggravating or is never presented in the sentencing hearing out of concern that it will be viewed as aggravating (or due to counsel’s failure to find evidence of the mental illness).

First, this is inconsistent with the role that mental illness is supposed to play in capital sentencing proceedings. What the capital sentencer should do is recognize that someone with severe mental illness is seriously disabled in a way that is really important to, and *diminishes*, moral culpability. Yet, it does not help a capital defendant that jurors’ or judges’ perceptions about the impact of mental illness on future dangerousness is wrong if they are allowed to act on their misconceptions or if defense counsel fails to present mental illness due to concern about those misconceptions.

Second, it is inconsistent with studies showing that “offenders with mental disorder do *not* pose a greater risk than their non-disordered counterparts.”<sup>29</sup>

#### ADDITIONAL JUSTIFICATIONS FOR PARAGRAPH ONE OF THE TASK FORCE’S PROPOSAL

In addition to the points made above that support both paragraphs one and two of the Task Force’s proposal, there are additional reasons for adopting paragraph one.

The main purpose of paragraph one is to help insure that *Atkins* is properly implemented in a manner that truly results in preventing the execution of people who have mental retardation under the most commonly used definitions, those of the American Association of Mental Retardation and the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*.<sup>30</sup> There are some states in which statutes or court decisions have applied definitions under which some who would be considered to have mental retardation under these leading definitions are instead considered not to be retarded.<sup>31</sup>

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27. *Bryan v. Mullin*, 335 F.3d 1207, 1212-13 (10th Cir. 2003).

28. *Id.* at 1222, 1223.

29. *Mental Disorder*, *supra* note 3, at 1151 (citing James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 139 (1998); Marnie E. Rice & Grant T. Harris, *A Comparison of Criminal Recidivism Among Schizophrenic and Nonschizophrenic Offenders*, 15 INT’L J.L. & PSYCHIATRY 397, 404 (1992)).

30. *See id.* at 1134-35.

31. *See id.* at 1135 n.10.

The other purpose of paragraph one is to expand the *Atkins* conclusion to people who are the same in their IQ and ability to function in life as those considered mentally retarded but who became disabled in these respects after childhood due to dementia or traumatic brain injury. Because the leading definitions of mental retardation require that the disability have arisen prior to adulthood, people who later experience dementia or traumatic brain injury prior to their crimes are not exempted by *Atkins* even though their relative mental culpability is just as low as those who developed their disability during childhood.<sup>32</sup>

#### ADDITIONAL JUSTIFICATIONS FOR PARAGRAPH TWO OF THE TASK FORCE'S PROPOSAL

Paragraph two of the Task Force's proposal would exempt from capital punishment people with such disorders as schizophrenia and psychosis, under circumstances where they have lesser moral culpability and deterrability than what the Supreme Court described in *Atkins* and *Roper* as "the average murderer."<sup>33</sup> Those whom paragraph two would exempt will have experienced at the time of the crime "such effects of their mental illness as delusions, hallucinations, significant thought disorders, and highly disorganized thinking."<sup>34</sup>

Paragraph two deals with people who, because of their mental disabilities are so mentally disconnected that they have many fewer options than "the average murderer" in dealing with the difficult circumstances that often lead to crimes of violence.<sup>35</sup> Many of them are more likely to act out of abnormal fear, anger, outrage, or panic due to mental disabilities that distort their perceptions of reality.<sup>36</sup> Generally, those to whom paragraph two would apply are more impaired in their ability to avoid committing serious crimes than are juveniles under age eighteen, whom *Roper* categorically exempts from capital punishment.<sup>37</sup>

Courts would be helped in applying paragraph two by the fact that there are laws in most death penalty states regarding which mental conditions are

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32. *See id.* at 1134.

33. *Recommendations of the Task Force*, *supra* note 1, at 1115; *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

34. Tabak, *supra* note 2, at 1128.

35. *Recommendations of the Task Force*, *supra* note 1, at 1115; *Atkins*, 536 U.S. at 319.

36. Dr. Joel Dvoskin, *Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities*, Presentation at the American Bar Association's Annual Meeting (Aug. 8, 2005).

37. Prof. Christopher Slobogin, *Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities*, Presentation at the American Bar Association's Annual Meeting (Aug. 8, 2005).

significantly disabling conditions.<sup>38</sup> Paragraph two ties these conditions to impairment of the skills people must have in order to avoid committing crimes of violence.<sup>39</sup> Moreover, the term “rational judgment,” used in paragraph two, is something that psychologists and psychiatrists explain to judges and juries all the time.<sup>40</sup>

Lest someone think that paragraph two is not necessary because of the existence of the insanity defense, it is important to recognize that five states with the death penalty have no insanity defense, and that no state with the death penalty has an insanity defense that would apply to everyone covered by paragraph two.<sup>41</sup> Moreover, even in states in which the insanity defense seemingly would apply to some people covered by paragraph two, juries in those states continue to find such people not to be insane.<sup>42</sup> This may occur because the insanity defense requires a jury to find a defendant “not guilty” of the crime, in that it is used to determine whether a person bears any criminal responsibility for a crime. Accordingly, the inapplicability or failure of the insanity defense in a case is irrelevant in deciding whether or not the convicted defendant should be executed. Whether a person is guilty is a very different question than whether the person should be executed. This is particularly so when the person is severely mentally ill. The determination of whether a guilty person with a type of mental illness covered by paragraph two should be executed requires its own legal standard, distinct from the insanity defense.

#### THE CONSTITUTION PROJECT’S SUPPORT OF PARAGRAPH TWO

The Constitution Project, in February 2006, released a revised set of recommendations by its blue-ribbon committee on the death penalty.<sup>43</sup> This committee includes people who support the death penalty, people who oppose the death penalty, Democrats, Republicans, liberals, and conservatives.<sup>44</sup>

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38. See *Mental Disorder*, *supra* note 3, at 1135 n.10.

39. Dr. Joel Dvoskin & Prof. Dorean Koenig, Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities, Presentations at the American Bar Association’s Annual Meeting (Aug. 8, 2005).

40. *Recommendations of the Task Force*, *supra* note 1, at 1115; Dr. Joel Dvoskin, Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities, Presentation at the American Bar Association’s Annual Meeting (Aug. 8, 2005).

41. See *Mental Disorder*, *supra* note 3, at 1146 n.66.

42. Prof. Christopher Slobogin, Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities, Presentation at the American Bar Association’s Annual Meeting (Aug. 8, 2005); see also *Mental Disorder*, *supra* note 3, at 1145-46.

43. The Constitution Project, *Mandatory Justice: The Death Penalty Revisited*, vii, available at <http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf> (last visited Apr. 25, 2006) [hereinafter *Mandatory Justice*].

44. *Id.*

Within the committee, there are people with “experience with nearly every facet of the criminal justice system, as judges, prosecutors, policymakers, victim advocates, defense lawyers, journalists, and scholars.”<sup>45</sup>

The revised recommendations, which the blue-ribbon committee adopted in 2005, include (unlike the original 2001 recommendations) a provision regarding people with mental illness.<sup>46</sup>

This recommendation is worded exactly the same as the first sentence of the Task Force’s paragraph two.<sup>47</sup> The supporting commentary suggests adding the other sentence of the Task Force’s paragraph two.<sup>48</sup>

The blue-ribbon committee’s commentary explains the bases for its mental illness recommendation. It says that, as with mental retardation:

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.

....

Strong evidence of diminished responsibility due to mental illness should preclude a death sentence and should not be weighed against evidence in aggravation. The core rationale for precluding death sentences for defendants with mental retardation is equally applicable to defendants with severe mental illness. However, the purely diagnostic exclusion utilized in *Atkins* is not a plausible approach in dealing with mental illness. Even among persons with major mental disorders, such as schizophrenia, symptoms vary widely in severity, as does the impact of the disorder on the person’s behavior. Thus, a mere diagnosis of a major mental disorder does not identify a narrow class of cases in which a death sentence would virtually always be disproportionate to the offenders’ culpability. Instead, the category must be further narrowed to

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45. *Id.*

46. *Id.* at xiii, xv, xvii.

47. Compare *id.* at xxv with *Recommendations of the Task Force*, *supra* note 1, at 1115. The congruence between the Task Force’s recommendations and the Constitution Project’s recommendation is not coincidental. The expert advisor with regard to the Constitution Project’s mental disorder proposal was Professor Richard Bonnie, who also served on the Task Force. See *Mandatory Justice*, *supra* note 43, at xii; University of Virginia School of Law, Faculty, Richard J. Bonnie, available at <http://www.law.virginia.edu/lawweb/Faculty.nsf/PrFHPbW/rjb6f> (last visited Apr. 25, 2006).

48. *Mandatory Justice*, *supra* note 43, at 25-26; *Recommendations of the Task Force*, *supra* note 1, at 1115.

include only those defendants whose severe mental disorders are characterized by significant impairments of responsibility-related capacities.

....

... At a minimum, the existence of psychotic symptoms at the time of the offense (*i.e.*, delusions, hallucinations, or other significant impairments of the defendant's perception or understanding of reality or capacity for rational judgment) should preclude a death sentence because any offender who was so grossly disturbed lacked the requisite level of responsibility, even if the precise criteria required for a finding of legal insanity were not met. Beyond the clear-cut cases of psychotic symptoms, the most widely accepted formula for defining diminished responsibility is found in . . . the Model Penal Code. [sic] Section 210.6(4)(g) includes among mitigating circumstances the following:

At the time of the murder, the capacity of the defendant to appreciate the criminality wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

... [T]he best approach is to tighten and narrow the Model Penal Code language to require a significant impairment of responsibility-related capacities resulting from severe mental disorder.<sup>49</sup>

#### JUDGES' RECOGNITION OF THE PROBLEM DEALT WITH IN PARAGRAPH TWO

In recent years, many judges have concluded that people with serious mental illnesses should not be subject to capital punishment. Among these are the following:

Ohio Supreme Court Justice Paul Pfeifer relied on the state constitution of Ohio when he said in 2001, prior to both *Atkins* and *Roper*:

This court has a chance to take a step toward being a more civilized and humane society. This court could declare that in the interests of protecting human dignity, Section 9, Article 1 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 past one simply 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.<sup>50</sup>

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49. *Id.* at 24-26.

In 2002, in the wake of *Atkins*, Indiana Supreme Court Justice Robert Rucker relied on the Eighth Amendment to the United States Constitution, in dissenting from the affirmance of the death sentence of Joseph Corcoran,<sup>51</sup> whose mental illness included schizophrenia.<sup>52</sup> He said:

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. . . . 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.<sup>53</sup>

Similarly, New Jersey Supreme Court Judge James Zazzali said the following, in concurring in granting relief to death row inmate Leslie Ann Nelson, who according to psychiatric experts from both sides was “a seriously disturbed and depressed person who has suffered from serious mental illness throughout her life[:]”<sup>54</sup>

Executions . . . 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, so that the death penalty can exact its intended retributive value. . . .

. . . .

. . . I reason similarly [to *Atkins*], for if the culpability of the average murderer is insufficient to invoke the death penalty as our most extreme sanction, then the lesser culpability of Nelson, given her history of mental illness and its connection to her crimes, “surely does not merit that form of retribution.”<sup>55</sup>

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50. *State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting) (2001). Mr. Scott was executed in June of 2001. See Death Penalty Information Center, Execution Database, <http://www.deathpenaltyinfo.org/getexecdata.php> (last visited Apr. 25, 2006) [hereinafter Execution Database].

51. *Corcoran v. State*, 774 N.E.2d 495, 502-03 (Ind. 2002) (Rucker, J., dissenting) (citations omitted).

52. *Id.* at 501 (opinion of the court).

53. *Id.* at 502.

54. *State v. Nelson*, 803 A.2d 1, 50 (N.J. 2002) (Zazzali, J., concurring).

55. *Id.* at 47 (quoting *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)).

Thereafter, in 2003, Judge Robert Henry, writing for himself and three other Tenth Circuit Judges, dissented from the denial of sentencing relief for Oklahoma death row inmate Robert Bryan.<sup>56</sup> He stated:

The Supreme Court has held that the deficiencies borne by the mentally retarded “do not warrant an exemption from criminal sanctions, but diminish their personal culpability.” The Court’s logic applies no less to those in Mr. Bryan’s shoes who suffer from severe mental deficiencies. . . .<sup>57</sup>

Ohio Chief Justice Thomas Moyer’s 2003 dissent from the Ohio Supreme Court’s 4-3 decision to affirm Stephen Vrabel’s death sentence was based on his interpretation of Ohio’s death penalty statute.<sup>58</sup> Even the majority recognized that Mr. Vrabel had been “evaluated by various mental health professionals as suffering from paranoid schizophrenia or a personality disorder with schizophrenic features . . . .”<sup>59</sup> Chief Justice Moyer stated, in dissent:

. . . I am persuaded by clear evidence in the record that [Mr. 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 [this] 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 certainly consistent with the conclusion that Vrabel suffered from a mental disease or defect at the time of his criminal course of conduct.<sup>60</sup>

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56. Bryan v. Mullin, 335 F.3d 1207, 1225 (2003) (Henry, J., concurring and dissenting).

57. *Id.* at 1237 (citations omitted). Mr. Bryan was executed in June 2004. See Execution Database, *supra* note 50.

58. State v. Vrabel, 790 N.E.2d 303, 319-21 (Ohio 2003) (Moyer, J., dissenting).

59. *Id.* at 318.

60. *Id.* at 319-20. Mr. Vrabel did not pursue post-conviction or habeas relief and did not seek clemency. See AI REPORT, *supra* note 5, at 76. He was executed on July 14, 2004. Death Penalty Information Center, Executions in the United States in 2004, available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=839> (last visited Apr. 30, 2006). His volunteering to be executed is relevant, given his severe mental illness, to paragraph three of the Task Force’s proposal. See AI REPORT, *supra* note 5, at 75; *Recommendations of the Task Force*, *supra* note 1, at 1116.

## EXAMPLES OF PROBLEMATIC CASES TO WHICH PARAGRAPH TWO MAY BE RELEVANT

In addition to the troublesome cases discussed in the preceding section of Robert Bryan, Jay D. Scott and Stephen Vrabel (who have all been executed), and Joseph Corcoran (who remains on death row), there have been many recent troubling cases in which the adoption of paragraph two of the Task Force's proposal might have helped inmates avoid execution.

Please note, in this connection, that paragraph two of the Task Force's proposal would be relevant to the cases described below and to the cases discussed in the preceding section only if the defendant's mental disability existed at the time of the crime and had a significant impact on the commission of the crime.

*Executed People*

In May 2004, Texas Governor Rick Perry, rejecting the 5-1 recommendation of the state's board of pardons and paroles, denied clemency to Kelsey Patterson.<sup>61</sup> It was undisputed that "Patterson's history of paranoid schizophrenia was both extreme and well-diagnosed. He had been in and out of the state's mental health system and criminal justice system since the 1980s. In the last few weeks of his life, he was delusional."<sup>62</sup> Mr. Perry justified his action by saying that since Texas at that time did not have life without parole (something added to Texas law a year later), it was possible that Mr. Patterson might be paroled.<sup>63</sup> Yet, he would not have been eligible for parole until twenty-eight years later, when he would have been seventy-eight-years-old.<sup>64</sup> As the Dallas Morning News stated in an editorial, "Even the Texas board [of pardons and parole] – hardly a bench known for limp-wristed liberalism – recognized the cruelty of executing somebody suffering from the disease."<sup>65</sup> An editorial in the *San Antonio Express-News* added, "This case proves it's time to question the sanity of our application of the death penalty in Texas."<sup>66</sup>

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61. Editorial, *Perry Ignores Facts to Allow Execution*, SAN ANTONIO EXPRESS-NEWS, May 20, 2004, at 6B [hereinafter *Perry Ignores Facts*].

62. *Id.* Indeed, although Mr. Patterson had taken part in two prior shootings, he had never gone to trial in those cases because he was considered to be legally insane. See Alan Berlow, *Pardoned by 'Hell Law' but Doomed Anyway*, L.A. TIMES, May 12, 2004, at B13. Both times, after being given powerful drugs in a state mental hospital, "he was released without supervision and stopped taking his medications[.]" and at his capital murder trial, his "nonsensical outbursts" led to his being thrown out of the courtroom for almost half the trial. See *id.*

63. See Editorial, *Sparing a Life?: Texas Wrong, Oklahoma Right on Executions*, DALLAS MORNING NEWS, May 20, 2004, at 22A.

64. *Id.*

65. *Id.*

66. *Perry Ignores Facts*, *supra* note 61, at 6B.

In an earlier case, Texas, in 2003, executed James Colburn, whom the prosecutors agreed had paranoid schizophrenia and was delusional.<sup>67</sup> Yet, the jury was not told of his mental disease, which led to “delusions of persecution, multiple suicide attempts, hospitalizations, incoherent thinking, auditory hallucinations [and] psychotic episodes.”<sup>68</sup> At trial, he was under heavy sedatives to keep his symptoms under control, and he slept through much of it.<sup>69</sup>

The Houston Chronicle editorialized after the Patterson execution:

In case after case in Texas, a mentally ill patient is ineligible for state care; exhausts, disrupts and bankrupts his family; stops taking his medication; and eventually, with tragic consequences, becomes a danger to himself and others.

Even proponents of capital punishment must admit that it would be better to spend millions of dollars more on treating the mentally ill, thus preventing some of the crimes they commit, than to have to spend those millions on capital prosecutions and decades of appeals after the loss of innocent life.

Before an execution, family members of both murderer and victim are received in a hospitality room near the execution chamber in Huntsville. There they are greeted by a grotesque wall of pictures of executed defendants. As long as Texas denies treatment to seriously ill citizens before they commit a crime and executes delusional offenders after they kill, the pictures on that wall will increase inexorably.<sup>70</sup>

Another seriously mentally ill person to be executed (as Patterson was) in 2004 was Sammy Perkins.<sup>71</sup> North Carolina executed him in October 2004.<sup>72</sup> His jury never heard about (a) his bi-polar disorder, which resulted in his being found ranting in public – often naked – in his late teens and early twenties, (b) his being too poor to get help or medication, or (c) his wild mood swings, depression, and manic highs.<sup>73</sup>

In 2000, Florida executed Thomas Provenzano, even though both sides' experts had agreed at trial that a factor leading to his crime was his paranoid, fixed delusional belief that the legal system was persecuting him.<sup>74</sup> On appeal

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67. See Paul Harris, *Compassion in the Great Republic of Texas*, May 20, 2004, available at <http://www.axisoflogic.com/cgi-bin/exec/view.pl?archive=59&num=7941> (last visited Apr. 30, 2006).

68. *Id.*

69. *Id.*

70. Editorial, *Delusional: Treat Mentally Ill Before They Commit a Capital Crime*, HOUSTON CHRONICLE, May 30, 2004, at 2, available at Lexis-Nexis, News & Business, Houston Chronicle.

71. Sammy Crystal Perkins, available at <http://www.clarkprosecutor.org/html/death/US/perkins933.htm> (last visited Apr. 30, 2006).

72. *Id.*

73. *Id.*

74. AI REPORT, *supra* note 5, at 78-79.

the Chief Justice of the Florida Supreme Court dissented from affirmance of the death sentence because the evidence was, in his view, “overwhelming that Provenzano’s capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law” had been “substantially impaired.”<sup>75</sup>

*People Still on Death Row*

Among the many who still are on death row, despite having serious mental illness at the time of the crime, are the following – the first two of whom have not been executed only because of doubts about whether they are mentally competent to be executed.

In South Carolina, James Wilson has been on death row since 1989 despite the jury’s having found him “guilty but mentally ill.”<sup>76</sup> Having been a psychiatric inpatient at least six times as a teenager, he was denied readmission when he became nineteen and his father’s health insurance no longer covered him.<sup>77</sup> Five months later, he opened fire in an elementary school cafeteria, killing two and injuring many others.<sup>78</sup> The defense at trial presented nothing in the sentencing proceeding and failed to tell the jury that his flat expression at trial was due to his taking strong anti-psychotic medication.<sup>79</sup> Among the numerous editorials criticizing the imposition of the death sentence was that of the *Atlanta Journal-Constitution*, which 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 act of unspeakable meanness. James Wilson could not control his own worst impulses. Sometimes our judicial system has the same problem.<sup>80</sup>

In 1992, Justice Finney, in dissenting from the South Carolina Supreme Court’s affirmance of Mr. Wilson’s death sentence, said that he had found no other case in which capital punishment had “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.”<sup>81</sup>

75. *Provenzano v. State*, 497 So. 2d 1177, 1185 (1986) (McDonald, J., dissenting).

76. AI REPORT, *supra* note 5, at 32.

77. *Id.* at 31.

78. *Id.* at 30-31.

79. *Id.* at 33.

80. *Id.* at 33-34 (quoting Editorial, *It’s Wrong to Kill the Mentally Ill*, ATLANTA J.-CONST., May 14, 1989).

81. *State v. Wilson*, 413 S.E.2d 19, 29-30 (S.C. 1992) (Finney, J., dissenting).

George Banks was sent to Pennsylvania's death row for killing thirteen people, including five of his own children.<sup>82</sup> According to Amnesty International, "[T]he 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.'"<sup>83</sup> In upholding his death sentence in 1987, the Pennsylvania Supreme Court acknowledged that:

. . . [W]e are aware that [Mr.] 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.<sup>84</sup>

While on death row, Mr. Banks

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.<sup>85</sup>

In December 2004, the Pennsylvania Supreme Court ordered a stay of execution so that there could be a hearing regarding Mr. Banks' competency.<sup>86</sup> On February 27, 2006, Luzerne County President Judge Michael Conahan ruled that Mr. Banks could not be executed because he "cannot make rational choices because of his major mental illness, cannot rationally comprehend his death sentences, has a hopeless prognosis and will not improve to any acceptable degree . . ."<sup>87</sup> The prosecution said it would appeal.<sup>88</sup>

George Franklin Page is on North Carolina's death row.<sup>89</sup> A Vietnam Veteran with a long history of post-traumatic stress disorder, Mr. Page was sentenced to death for a killing in 1995 that took place during a manic flashback episode in which he thought he was surrounded by soldiers shooting

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82. AI REPORT, *supra* note 5, at 50.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 51.

87. Michael Rubinkam, *Judge Rules Pa. Killer Can't Be Executed: Judge Rules that Pennsylvania Mass Murderer Not Competent to Be Executed*, ABC NEWS, Feb. 28, 2006, available at <http://abcnews.go.com/US/LegalCenter/wireStory?id=1669631&CMP=OTC-RSSFeeds0312> (last visited Apr. 30, 2006).

88. *Id.*

89. Amnesty International, *Death Penalty/Legal Concern: George Franklin Page*, available at <http://web.amnesty.org/library/Index/ENGAMR510312004?open&of=ENG-2M4> (last visited Apr. 30, 2006).

at him.<sup>90</sup> The jury did not hear much of the available evidence about his post-traumatic brain disorder, but it did hear the state psychiatrist distort what Page's military records said.<sup>91</sup> The defense was denied a chance to hire a medical health professional to undertake a full evaluation.<sup>92</sup>

Gregory Thompson is on Tennessee's death row.<sup>93</sup> On June 27, 2005, the Supreme Court held that Tennessee could execute him, despite the fact that, unbeknownst to the judges who had previously considered the case, his lawyers had failed to find or use at trial "a doctor's report suggesting that [Mr.] Thompson had . . . been schizophrenic at the time of the crime . . . ."<sup>94</sup> The Court, in a 5-4 vote, reversed the Sixth Circuit's grant of habeas corpus relief, holding that deference to state court judgments precluded the federal courts from considering this newly discovered evidence – which was found by "an intern for Senior Judge Richard F. Suhrheinrich, a conservative appointee" of the first President Bush.<sup>95</sup> While the Task Force's paragraph two would not deal with the procedural issue on which Mr. Thompson's case foundered, it might, if adopted into law in Tennessee, have provided an independent, valid basis for relief once the document was found.

#### *A Rare Commutation After a Bizarre Court Decision*

In an opinion that is, at best, highly muddled, the Seventh Circuit, in 2004, denied relief to Indiana death row inmate Arthur Baird II.<sup>96</sup> It said that Mr. Baird surely would not have committed the killings if he had "been sane," if for no other reason than a sane person "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."<sup>97</sup> It went on to say that he knew he was engaging in killings and that this was wrong, "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 his killing his parents."<sup>98</sup> It then reasoned that even though "[c]learly, his volition, his self-control, was impaired by a mental disease[.]" it could not say by "how much, in relation to other unknown factors at work in his mind during the

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90. *Id.*

91. *See id.*

92. *Id.*

93. Charles Lane, *Justices Back Tenn. Execution Despite Court Error*, WASH. POST, June 28, 2005, at A5.

94. *Id.*; *Bell v. Thompson*, 125 S. Ct. 2825, 2829 (2005).

95. Lane, *supra* note 93, at A5.

96. *Baird v. Davis*, 388 F.3d 1110, 1120 (7th Cir. 2004).

97. *Id.* at 1119.

98. *Id.* at 1119-20.

period in which the murders occurred . . . .”<sup>99</sup> On this basis, it said the state courts, not the federal courts, must decide “what weight to give mental disease that does not obliterate consciousness of wrongdoing in deciding whether to impose the death penalty for murder.”<sup>100</sup>

The Task Force recommendation’s second paragraph, if adopted by Indiana, would have avoided the Seventh Circuit’s ever getting this case.

Fortunately for Mr. Baird, Indiana’s Governor Mitch Daniels commuted his death sentence on August 29, 2005.<sup>101</sup> Governor Daniels changed the sentence to life without parole because that sentence had not been available at the time of trial and many trial jurors and the victims’ family believed he deserved that lesser sentence because of his mental illness.<sup>102</sup>

#### A FEW OBSERVATIONS ABOUT PARAGRAPH THREE OF THE TASK FORCE PROPOSAL

My discussion hereon of paragraph three of the Task Force proposal will be brief, for several reasons.

First, Professor Bonnie’s article with regard to paragraph three, published in the *Catholic Law Review*,<sup>103</sup> thoroughly discusses the three types of situations on which paragraph three bears and the reasons why the Task Force came out where it did regarding these scenarios.

Second, I do not believe there is much case law with regard to prisoners unable to assist counsel in post-conviction proceedings.

Third, while there are a fair number of cases with regard to the mental competency of prisoners to forego or terminate appeals or post-conviction proceedings, the courts often deny relief except for highly unusual cases in which a prisoner’s reasons for waiving available claims are clearly irrational. But as Professor Bonnie points out, far more often “apparently ‘rational’ reasons are intertwined with emotional distress (especially depression), feelings of guilt and remorse, and hopelessness,” and often what might seem to be a “rational” decision to waive further legal proceedings is really “rooted in suicidal motivations.”<sup>104</sup> As Professor Bonnie states, the “high prevalence of mental illness” among those who have volunteered for execution should make

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99. *Id.* at 1120.

100. *Id.* (citing *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Simmons v. Bowersox*, 235 F.3d 1124, 1137 (8th Cir. 2001); *Ortiz v. Stewart*, 149 F.3d 923, 943 (9th Cir. 1998); *Raulerson v. Wainwright*, 732 F.2d 803, 806-07 (11th Cir. 1984)).

101. Kevin Corcoran, *Daniels Spares Mentally Ill Killer; Man Who Was to Die This Week Will Spend Life in Prison; Debate on Issue Likely to Grow*, INDIANAPOLIS STAR, Aug. 30, 2005, at A1, A8, available at Lexis-Nexis, News & Business, The Indianapolis Star (Indiana).

102. *Id.*

103. See generally Bonnie, *supra* note 4.

104. *Id.* at 1187.

courts “more willing than they now are to acknowledge suicidal motivations when they are evident and . . . more inclined than they are now to attribute suicidal motivations to mental illness.”<sup>105</sup> Accordingly, Professor Bonnie goes on to say that the key question should be whether “the prisoner who seeks execution [is] able to give plausible reasons for doing so that are clearly *not* grounded in symptoms of mental disorder . . . .”<sup>106</sup>

This leaves, as the subject for my few remaining observations, the portion of the Task Force’s third paragraph that deals with whether death row inmates are mentally incompetent to be executed.<sup>107</sup> In this regard, the Task Force limited its proposal to inmates facing “real” execution dates. Typically, this would be after direct appeal, an initial state post-conviction proceeding, and a first federal habeas corpus proceeding have all been completed and an execution date has then been set.<sup>108</sup>

Why did the Task Force limit its proposal in this way? It did so because under its proposal, a judicial finding of incompetence to be executed would not merely cause a stay of execution; it would also result in the death sentence being reduced to whatever sentence (typically, life without parole) would be available under state law when the death sentence is off the table.

If a permanent lowering of a death sentence could result from a finding of incompetence to be executed at a time well before there is a “real” execution date, there would be a temptation to try to fake psychosis at earlier points in the process. But, as Dr. Joel Dvoskin pointed out at an ABA program in August 2005, such psychosis would be extraordinarily difficult to fake for long periods of time, especially under intense supervision by prison staff.<sup>109</sup>

Because a prisoner will typically be under close observation on death row for a substantial amount of time (generally, a number of years) while the post-conviction and federal habeas process proceeds, prior to there being a “real” execution date, the Task Force believes its requirement of a “real” execution date will avert successful efforts to fake incompetency to be executed.<sup>110</sup>

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105. *Id.* 1187-88.

106. *Id.* at 1188.

107. *See Recommendations of the Task Force, supra* note 1, at 1115-16.

108. Exceptions might exist where the death row inmate waives some or all of these proceedings or where the state and federal courts do nothing to preclude executions during the pendency of a first round of post-conviction and federal habeas proceedings and executions are indeed scheduled.

109. Dr. Joel Dvoskin, *Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities*, Presentation at the American Bar Association’s Annual Meeting (August 8, 2005).

110. Dr. Joel Dvoskin, *Community and Conscience: Executing Juveniles and the Mentally Impaired, Individual Rights and Responsibilities*, Presentation at the American Bar Association’s Annual Meeting (August 8, 2005); *see also* Bonnie, *supra* note 4, at 1175-76. The Task Force does not believe that second or subsequent rounds of post-conviction or federal habeas proceedings have to be completed in order for execution dates to be “real” because the procedures

Professor Bonnie's Catholic University Law Review article discusses in depth the bases for the Task Force's proposal that an inmate be found incompetent for execution if "a mental disorder or disability . . . 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."<sup>111</sup>

Therefore, I will simply discuss four cases (drawn from the recent Amnesty International report) that illustrate problems with the ways in which many courts now deal with claims of incompetency to be executed.

Thomas Provenzano was found competent to be executed by Florida Circuit Judge Randolph Bentley, even though Judge Bentley found that "in conjunction with his 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."<sup>112</sup> Judge Bentley based his conclusion on Mr. Provenzano's awareness that the factual basis for the execution would be the murder he committed.<sup>113</sup> The judge said he was "troubled" by the situation, particularly since Provenzano had "serious mental health problems," and because if (contrary to reality) the State had the burden to prove him incompetent for execution beyond a reasonable doubt, it would have been unable to carry such a burden.<sup>114</sup>

Although two of the seven Florida Supreme Court justices dissented, due to their view that Mr. Provenzano did not have "a rational understanding of the reason he is to be executed,"<sup>115</sup> the competency holding was affirmed. Thereafter, Governor Jeb Bush denied clemency, and Mr. Provenzano was executed in June 2000.<sup>116</sup>

In 1979, Charles Singleton was sentenced to death in Arkansas for murder.<sup>117</sup> By the end of his first decade on death row, he began to have delusions, including that he was "God and the Supreme Court," that the Supreme Court had freed him, and that if he were to be executed, his breathing would stop but a judge would cause his breathing to start again.<sup>118</sup> By the early 1990s, he often took anti-psychotic drugs, but when he failed to do so, his

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and laws governing such proceedings make relief thereon extraordinarily difficult, and they typically proceed extremely quickly.

111. See Bonnie, *supra* note 4, at 1177 (discussing the intended meaning of "understand," "appreciate," and "purpose"); *Recommendations of the Task Force*, *supra* note 1, at 1115.

112. AI REPORT, *supra* note 5, at 127 (quoting *Provenzano v. State*, 760 So. 2d 137 (Fla. 2000)).

113. *Id.*

114. *Id.* at 127-28.

115. *Id.* at 128 (quoting *Provenzano*, 760 So. 2d at 143 (Anstead, J., dissenting)).

116. *Id.* at 128.

117. *Id.* at 133.

118. AI REPORT, *supra* note 5, at 133.

delusions got worse.<sup>119</sup> He was then medicated involuntarily, which caused his psychotic symptoms to abate.<sup>120</sup>

His counsel asserted – after an execution date was set – that since a necessary constitutional basis for the involuntary medication was that the treatment be “in his medical interest,”<sup>121</sup> he could not constitutionally be executed since execution could not possibly be in his medical interest. However, in 2003, the *en banc* Eighth Circuit held, by a 6-5 vote, that Mr. Singleton could be executed because “[e]ligibility for execution is the only unwanted consequence of the medication[,]” which otherwise was in his medical interest.<sup>122</sup>

Writing for four of the five dissenters, Judge Gerald Heaney stated:

Charles Singleton suffers from mental illness that makes him psychotic. . . . The drugs often mask his underlying psychosis. . . . 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 called “the barbarity of exacting mindless vengeance.”

. . . .

. . . 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.<sup>123</sup>

On October 6, 2003, the United States Supreme Court denied certiorari.<sup>124</sup> Mr. Singleton was executed on January 6, 2004.<sup>125</sup>

Scott Panetti has been on Texas’ death row since 1995 for killing his wife’s parents in 1992.<sup>126</sup> Prior to the crime, he was hospitalized more than a dozen times and had been diagnosed with, among other things, schizophrenia.<sup>127</sup> A July 1994 hearing as to whether he was competent to stand trial ended in a mistrial because the jury could not agree.<sup>128</sup> Two months later, a jury found him competent to stand trial even though the prosecution’s psychiatrist testified that he had schizophrenia and that his delusions could

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119. *Id.*

120. *Id.*

121. *See* Singleton v. Norris, 319 F.3d 1018, 1020, 1026, 1030, 1037 (8th Cir. 2003).

122. *Id.* at 1026.

123. *Id.* at 1030, 1034 (Heaney, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (Marshall, J., concurring)).

124. *Singleton*, 540 U.S. at 832.

125. AI REPORT, *supra* note 5, at 9.

126. *Id.* at 22.

127. *Id.*

128. *Id.*

interfere with his ability to communicate with his lawyers.<sup>129</sup> At trial, he waived counsel and represented himself, and in rambling fashion, he asserted an insanity defense.<sup>130</sup> A doctor who had earlier treated him for schizophrenia said that he was “‘acting out a role of an attorney as a facet of his mental illness, not a rational decision to represent himself.’”<sup>131</sup> He presented no mitigating evidence.<sup>132</sup> After the death sentence was imposed, one juror told a lawyer that the jury had voted for capital punishment due to fear created by Mr. Panetti’s irrational actions at trial.<sup>133</sup> His conviction and death sentence were nonetheless upheld on appeal and in later proceedings, including federal habeas corpus.<sup>134</sup>

After an execution date was set, a state court held a hearing on his competency to be executed and concluded that he had not proven incompetence.<sup>135</sup> A federal court hearing was then held.<sup>136</sup> The defense experts testified that he was not competent.<sup>137</sup> One state psychiatrist said that although he had “serious psychological problems” and “may even, at some level, genuinely believe he is being executed for preaching the gospel,” he was still competent to be executed.<sup>138</sup> Both he and the state’s other expert conceded that they were not sure if Mr. Panetti really knew why he was to be executed.<sup>139</sup>

The federal district judge denied relief but granted leave to appeal.<sup>140</sup> He based his decision on the fact that Mr. Panetti knew that “the reason the State has given for his execution is his commission of those murders . . . .”<sup>141</sup> The judge felt constrained by a Fifth Circuit precedent, *Barnard v. Collins*,<sup>142</sup> which held that although the inmate’s comprehension of why he was to be executed was impeded by delusions, he was competent because he knew that the stated reason for the execution was his conviction of the crime.<sup>143</sup> Accordingly, the judge said that Mr. Panetti’s

[d]elusion[al] beliefs – even those which may result in a fundamental failure to appreciate the connection between . . . [his] crime and his execution – do not

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129. *Id.*

130. *Id.*

131. AI REPORT, *supra* note 5, at 22.

132. *Id.*

133. *Id.* at 23.

134. *Id.* at 23-24.

135. *Panetti v. Dretke*, 401 F. Supp. 2d 702, 703 (W.D. Tex. 2004).

136. *Id.*

137. AI REPORT, *supra* note 5, at 24.

138. *Id.*

139. *Panetti*, 401 F. Supp. 2d at 707.

140. *Id.* at 712.

141. *Id.*

142. *Id.* at 709.

143. *Barnard v. Collins*, 13 F.3d 871, 876-77 (5th Cir. 1994).

bear on the question of whether . . . [he] “knows the reason for his execution” for the purposes of the Eighth Amendment.<sup>144</sup>

Under the Task Force’s proposal, the legal standard used by the Fifth Circuit in *Barnard* and the district court in *Panetti* would be changed such that if a death row inmate, due to delusions, believes that the real reason for his impending execution is something other than his guilt of the crime, he would be found incompetent to be executed.<sup>145</sup>

Finally, Arizona death row inmate Michael Poland was executed in June 1999 even though “all three mental health experts who had examined, observed and interviewed . . . [him] 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.”<sup>146</sup> Among these experts was the state’s expert psychiatrist, who testified that Mr. Poland’s “full psychological awareness is that he’s not to be executed.”<sup>147</sup> The prosecution based its contrary argument on lay witnesses who had relatively little contact with him.<sup>148</sup>

#### CONCLUSION

We need to address the practice of executing people for crimes that likely would not have occurred but for their serious mental disabilities. We also must deal with situations in which death row inmates are too mentally incapacitated (a) to make rational decisions about waiving appeals, (b) to help their post-conviction counsel, or (c) to appreciate the actual reasons why they are to be executed.

The proposals supported by the American Psychological Association and the American Psychiatric Association, and that will be considered in August 2006 by the American Bar Association, should be given serious consideration by our legislators and courts. Tragic situations have given rise to these proposals, and it would be tragic if we did not take them seriously.

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144. *Panetti*, 401 F. Supp. 2d at 712. On May 9, 2006, the Fifth Circuit affirmed the district court’s decision in *Panetti*, in view of *Barnard* and other Fifth Circuit precedents. *Panetti v. Dretke*, No.04-70045, 2006 WL 1229158 (5th Cir. May 9, 2006).

145. Bonnie, *supra* note 4, at 1173.

146. AI REPORT, *supra* note 5, at 36.

147. *Id.*

148. *Id.* at 36 n.88.