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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO **Plaintiff,** **V.** **BRYAN C. KOHBERGER,** **Defendant.**	**CASE NUMBER CR29-22-2805** **MOTION TO STRIKE FUTURE DANGEROUSNESS AGGRAVATOR**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves to strike the future dangerousness aggravator listed in the state's Notice Pursuant to Idaho Code § 18-4004A. The State's aggravator should be struck because it fails to genuinely narrow

the class of defendants eligible for death and provides no standards to the jury to avoid imposing the death penalty in an arbitrary and capricious manner.

ISSUES

I. I.C. § 19-2515(9)(i) fails to narrow the class of death-eligible defendants.

II. I.C. § 19-2515(9)(i) is impermissibly vague.

III. I.C. § 19-2515(9)(i) is irrelevant to culpability and therefore cannot be an aggravator.

ARGUMENT

The United States Supreme Court has stated that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Fourteenth Amendment, prohibits a state from imposing the death penalty in an arbitrary and capricious manner. Instead, the sentencing body must be provided with standards which will genuinely narrow the class of crimes and the persons against whom the death penalty is imposed. *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742 (1983). *See also Gregg v. Georgia*, 428 U.S. 153, 206–07, 96 S.Ct. 2909, 2940–41, 49 L.Ed.2d 859, reh. denied 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976); *Furman v. Georgia*, 408 U.S. 238, 294, 92 S.Ct. 2726, 2754–55, 33 L.Ed.2d 346 (Brennan, J., concurring), reh. denied 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 164 (1972).

"To pass constitutional muster, a capital-sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 554 (1988) *citing Zant*, 462 U.S. at 877, 103 S.Ct. at 2742; *Gregg,* 428 U.S. 153, 96 S.Ct. 2909. The Court stated:"[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital

offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id*. The clear provisions of the Idaho statute provide that the narrowing occur in the sentencing phase of the trial, particularly here, where the allegation is simply premediated murder. *See*, *State v. Hall*, 163 Idaho 744, 788 (2018) (finding aggravating circumstances in Idaho are in both the definition of the crime and in the statutory aggravating circumstances).

That said, aggravating circumstances must meet two requirements: the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder (genuine narrowing), and the circumstance must not be unconstitutionally vague. *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 2635 (1994).

"Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform jurors what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion held invalid in *Furman v. Georgia." Maynard,* 486 U.S. at 361–62, 108 S.Ct. at 1858. A statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. *See*, *e.g., Maynard v. Cartwright,* 486 U.S. 356, 361-364, 108 S.Ct. 1853, 1857-59, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia,* 446 U.S. 420, 427-433, 100 S.Ct. 1759, 1764-1767, 64 L.Ed.2d 398 (1980).

In *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), the Idaho Supreme Court upheld the propensity aggravating circumstance as being constitutional. In doing so the Court construed the word "propensity" as follows:

> We would construe "propensity" to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the "propensity" language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than

> the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

Id. at 370–71, 670 P.2d at 471–72. The Court noted that:

> In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court rejected an argument that the circumstance of "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" was unconstitutionally vague. There the appellant had contended that the provision required the court to predict the future. It was noted that such speculation on future behavior is made by courts countless times daily in every sentencing decision and in every determination of bail, and by parole authorities constantly in probation decisions. *Jurek, supra*, 428 U.S. at p. 275, 96 S.Ct. at p. 2957 (opinion of Stewart, J., joined by Powell and Stevens, JJ.). White, J., joined by Chief Justice Burger and Rehnquist, J., concurred in the holding that the statutory aggravating circumstances of the Texas statute were sufficiently narrow in definition to withstand a challenge for vagueness. *Accord Proffitt v. Florida*, 428 U.S. 242, 255, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976).

Id.

Both holdings are problematic within the jurisprudence outlined above. First, the Idaho Supreme Court's definition of propensity to commit murder matches and even makes use of the language from the definition of murder. Essentially, the Court excluded manslaughter. Second, the United States Supreme Court failed to recognize that the vagueness inherent in the question of whether a particular individual poses a threat to society is that the very factors that might lead one person to conclude they should die may be thought of by another as a reason for mercy. It is not clear from the decades of authorities on the subject whether the homicidally inclined are to be despised or pitied. Finally, such evidence is not relevant to determining which defendants are culpable of acts worthy of the death penalty.

I. I.C. § 19-2515(9)(i) fails to narrow the class of death-eligible defendants.

The gloss placed on future dangerousness by the Idaho Supreme Court makes anyone who is found guilty of murder a candidate for death. This is because the Court's holding differentiates

murder from manslaughter, rather than creating a subclass of murders. Murder is defined in Idaho as:

> the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

I.C. § 18-4001. The Supreme Court's interpretation of future dangerousness would clearly catch all torturers within its ambit, so the only question is whether those who unlawfully kill with malice aforethought are meaningfully separate out by the Court's gloss. The legislature defines malice aforethought as:

> Such malice may be express or implied. It is express when there is manifested a **deliberate intention** unlawfully to take away the life of a fellow creature. It is implied when **no considerable provocation appears**, or when the circumstances attending the killing show an abandoned and malignant heart. [emphasis added]

I.C. § 18-4002.

This language corresponds almost exactly with that use by the Supreme Court to define those with a propensity to kill:

> We would construe "propensity" **to exclude, for example, a person who has no inclination to kill but in an episode of rage, such as during an emotional family or lover's quarrel, commits the offense of murder**. We would doubt that most of those convicted of murder would again commit murder, and rather we construe the "propensity" language to specify that person who is **a willing, predisposed killer**, a killer who **tends toward destroying the life of another**, one who kills with **less than the normal amount of provocation**. We would hold that propensity assumes a **proclivity**, a **susceptibility**, and even an **affinity** toward committing the act of murder.- [emphasis added]

Id. at 370–71, 670 P.2d at 471–72. These definitions are essentially the same:

(1) Both definitions rely on a lack of provocation.
(2) A propensity, an inclination, a willingness, an affinity, and a tendency toward murder are all synonymous within this context. Inclination/propensity as defined by the Oxford American Dictionary means:

A person's natural tendency or urge to act or feel in a particular way.

NEW OXFORD AMERICAN DICTIONARY 878 (3rd ed. 2010). Affinity means:

A spontaneous or natural liking or sympathy for someone or something.

Id. at 27. To be willing is to be "inclined to do something." *Id*. at 1978. To have a predisposition toward a thing is to have "a liability or tendency.. to hold a particular attitude or act in a particular way." *Id*. at 1376. The New Oxford American Dictionary defines susceptibility as:

The state or fact of being likely or liable to be influence or harmed by a particular thing.

Id. at 1751. It would be impossible for a person to be inclined to murder without being susceptible to the concept.

(3) To kill without inclination, propensity, or intent, but in a "fit of rage" is traditionally understood to be manslaughter. *See State v. Norris*, 2 N.C. 429, 443 (1796) ("If two persons suddenly fall out and fight, and in the contest one kills the other, that is manslaughter: the blood is heated, the passions boil, rage dictates his conduct, and whilst the blows are passing, there is no leisure for reflection, nor time for reason to assume its empire." *citing* Keeling 56).

Indeed Idaho defines voluntary manslaughter as:

> the unlawful killing of a human being including, but not limited to, a human embryo or fetus, without malice. It is of three (3) kinds:
>
> (1) Voluntary--upon a sudden quarrel or heat of passion.

I.C. § 18-4006.

Therefore, the Supreme Court's gloss is a list of synonyms that define anyone who would commit murder as already defined by the legislature. It does not accomplish the genuine narrowing required by the Eighth Amendment.

II. I.C. § 19-2515(9)(i) is impermissibly vague.

The United States Supreme Court held that future dangerousness was not vague as it was something judges had to do all the time. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). While this is true, the vagueness of future dangerousness does not lie in what the

concept means but what a jury is intended to do with the information. Traditionally, future dangerousness was seen as mental illness, which in turn was seen as a mitigating circumstance. The Supreme Court has, confusingly, also held to this traditional understanding in reversing death penalty cases. Is evidence of future dangerousness both an aggravating and mitigating factor? If it is, then how can this evidence be "adequate[ ] to inform jurors what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion held invalid in *Furman v. Georgia"*? *Maynard,* 486 U.S. at 361–62, 108 S.Ct. at 1858.

At the founding and throughout the 19th century, mental illness was a difficult issue for the judiciary. *See, generally*, Susanna L. Blumenthal, LAW AND THE MODERN MIND: CONSCIOUSNESS AND RESPONSIBILITY IN AMERICAN LEGAL CULTURE (2016). Theories about how the mind operated led many scholars to conclude that negative behaviors were symptoms of mental illness and thus removed responsibility for all evil actions. *See id*. at 61, 75, 84, 89, 129 (discussing "moral insanity"). In essence, since no rational being would behave badly, all criminals were madmen.

While psychology has come a long way since the 19th century, the definition of mental disorder still contains the basic concept that a person choosing sustained negative behaviors is mentally ill. According to the DSM-V, a mental disorder is:

> A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

DSM-V at 20. Practically speaking, every case where a jury is asked to find a person is likely to pose a threat of future dangerousness will involve underlying significant disturbances in that person's mental functioning.

From the Supreme Court's view, a mental illness of a type that renders a person unable to understand the meaning of or reason for it bars the application of the death penalty. *See, Ford v. Wainwright*, 477 U.S. 399, 417, 106 S.Ct. 2595, 2606 (1986). All other forms of mental illness are mitigating and only an ineffective attorney would not fully investigate and consider presenting such evidence to a jury. *See Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003).

In turn, legislatures have labeled this same evidence as aggravating by pointing out that the factors that reduce culpability are increasing the threat the defendant in question poses to society. There is nothing new about making this observation, but by placing the legislative weight on the aggravation side of the scale the evidence considered constitutionally mitigating is rendered a danger to the capital defendant. *See, Penry v. Lynaugh*, 492 U.S. 302, 324, 109 S.Ct. 2934, 2949 (1989) *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002); *see also Royal v. Taylor* 188 F.3d 239 (4th Cir. 1999) (noting that evidence of psychological impairments as a mitigating factor in sentencing can be a "double-edged sword").)

The best response to this decision the Supreme Court has made is that though the legislature renders the evidence aggravating at the base of a death qualifying "pyramid" the jury can still treat it as mitigating at the "apex." *See, Walton v. Arizona*, 497 U.S. 639, 716, 110 S.Ct. 3047, 3090 (1990) (Stevens, J. dissenting); *Zant v. Stephens*, 462 U.S. 862, 870-872, 103 S.Ct. 2733, 2739-2740 (1983). That explanation of how the system is to work is made all the more Kafkaesque by states like Idaho that require defendants to give up rights and privileges in order to introduce evidence of a mental disorder. I.C. § 18-207. The system is not well-served by permitting the legislature to make the purpose of psychological evidence unclear for juries. Studies have shown that juries are confused by the double intentions behind such evidence and typically find it aggravating. *See,* Ronald J. Tabak, *Overview of the Task Force Proposal on Mental Disability and*

the Death Penalty, 54 CATH. U. L. REV. 1123, 1123-31 (2005) (Exhibit A). Therefore, for the clarity of the jury, the future dangerousness aggravator should be struck in this matter.

III. I.C. § 19-2515(9)(i) is irrelevant to culpability and thus cannot be an aggravator.

More concerning from a constitutional standpoint is that the United States Supreme Court has never actually held that evidence of future dangerousness is relevant to whether someone should die. The Eighth Amendment requires that defendants only be condemned to death if they are *deserving* of the ultimate punishment based on their *culpability*, not their dangerousness. *See, e.g.*, *Atkins*, 536 U.S. at 319, 122 S.Ct. at 2251. In *California v. Ramos*, 463 U.S. 992, 1005-08, 103 S.Ct. 3446, 3455-56 (1983), the United States Supreme Court held:

> Closely related to, yet distinct from respondent's speculativeness argument is the contention that the Briggs Instruction is constitutionally infirm because it deflects the jury's focus from its central task. Respondent argues that the commutation instruction diverts the jury from undertaking the kind of individualized sentencing determination that, under *Woodson v. North Carolina*, 428 U.S., at 304, 96 S.Ct., at 2991, is "a constitutionally indispensable part of the process of inflicting the penalty of death."
>
> As we have already noted, *supra,* at 3454, as a functional matter the Briggs Instruction focuses the jury's attention on whether this particular defendant is one whose possible return to society is desirable. In this sense, then, the jury's deliberation is individualized. The instruction invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society.
>
> Any contention that injecting this factor into the jury's deliberations constitutes a departure from the kind of individualized focus required in capital sentencing decisions was implicitly rejected by the decision in *Jurek.* Indeed, after noting that consideration of the defendant's future dangerousness was an inquiry common throughout the criminal justice system, the joint opinion of Justices Stewart, POWELL, and STEVENS observed: "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." 428 U.S., at 276, 96 S.Ct., at 2958. As with the Texas scheme, the California sentencing system ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition. Cal.Penal Code Ann. § 190.3 (West Supp.1983).

> More to the point, however, is the fundamental difference between the nature of the guilt/innocence determination at issue in *Beck* and the nature of the life/death choice at the penalty phase. As noted above, the Court in *Beck* identified the chief vice of Alabama's failure to provide a lesser included offense option as deflecting the jury's attention from "the *central issue* of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id*., at 642, 100 S.Ct., at 2392 (emphasis added). In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. "But the Constitution does not require the jury to ignore other possible ... factors in the process of selecting ... those defendants who will actually be sentenced to death." *Zant v. Stephens*, 462 U.S., at [878], 103 S.Ct., at 2743 (footnote omitted). As we have noted, the essential effect of the Briggs Instruction is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See p. 3454 *supra.* This element "is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant." *Id*., at [900], 103 S.Ct., at 2755 (REHNQUIST, J., concurring in the judgment).

(footnote omitted). In *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S.Ct. 1669, 1671 (1986) the Court ruled that evidence showing that a person will be a well-behaved prisoner, despite having *no relevance to culpability*, was relevant mitigating evidence. Thus, the Court has only tangentially considered the issue. This Court should consider the question directly: if the Eighth Amendment requires that the death penalty only be imposed on the worst of the worst whose *culpability* supports such a punishment, how is risk of future dangerousness relevant?

The only explanation that can work within the Court's jurisprudence is the pyramid analogy from *Zant*. But that would require that future dangerousness be considered *only* once the jury has found aggravators in terms of culpability raising the defendant up the pyramid. In other words- future dangerousness cannot be an aggravator differentiating one murderer from the next. It can only operate as a consideration once a jury has found the defendant to be culpable of a crime worse than first degree murder.

Thus, this Court should strike the Future Dangerousness aggravator.

CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

(a) the future dangerousness aggravator in the State's Notice Pursuant to Idaho Code § 18-4004A be struck;

(b) the Court not instruct the jury on future dangerousness.

DATED this 4 day of September, 2024.

BY: _____
JAY LOGSDON
INTERIM CHIEF PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 5 day of September, 2024, addressed to:

Latah County Prosecuting Attorney –via Email: paservice@latahcountyid.gov
Elisa Massoth – via Email: legalassistant@kmrs.net

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54 Cath. U. L. Rev. 1123

Catholic University Law Review
Summer, 2005

Symposium: The Death Penalty and Mental Illness
Ronald J. Tabak

OVERVIEW OF TASK FORCE PROPOSAL ON MENTAL DISABILITY AND THE DEATH PENALTY

A. WHY THE TASK FORCE WAS CREATED

In 2003, the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IR&R) formed a Task Force to consider mental disability and the death penalty. The Task Force includes professionals knowledgeable in law, psychology, and psychiatry, some of whom are advocates for people with mental disability. [1]

After an organizational meeting in late 2003 and early 2004, the Task Force began substantive work. By mid-2004, the Task Force had developed a proposal with three prongs. Later that year the National Alliance for the Mentally Ill (NAMI) adopted this proposal as policy. In February 2005 so did the American Psychological Association. In November 2004 the American Psychiatric Association adopted as policy prong two of the Task Force's proposal.

The impetus for the Task Force's creation was the Supreme Court's holding in *Atkins v. Virginia* [2] and the reactions thereto. In *Atkins*, the Court held that it is unconstitutional to execute people with mental retardation. [3] Within hours after the decision in *Atkins* was announced, the National Mental Health Association stated that the same principles and reasoning that *Atkins* applied to the mentally retarded were equally applicable to many with mental illness, who the Association said should also be categorically exempted from capital punishment. [4] Moreover, public opinion polling showed a strong majority opposing executions of people with mental illness. [5]

The ABA IR&R concluded that in view of these developments, serious consideration should be given to whether some people with mental illness should be exempt from execution and how to deal with several issues concerning mental illness of death row inmates.

*1124 B. THE LEGAL AND LEGISLATIVE BACKGROUND

Unlike mental retardation, there have not been serious legislative efforts to exempt people with serious mental illness from the death penalty. One likely reason for this legislative inaction is that those who might have wished to propose such legislation could not advocate that everyone with mental illness should be exempt from execution because there are various effects and differing degrees of permanency. Whereas mental retardation is essentially a permanent condition with certain basic effects, and everyone meeting one of the generally accepted definitions of mental retardation [6] is significantly less morally culpable than the “average” murderer, the same can not be said of everyone with mental illness. It was apparent to the ABA IR&R that to conceptualize *which* mentally ill people should not be executed and *under what circumstances* would require considerable additional thought. The ABA IR&R formed the Task Force in order to facilitate such conceptual thinking.

The ABA IR&R did not expect the Task Force to formulate proposals that would form the basis for an immediate constitutional challenge, such as that which ultimately succeeded in *Atkins* [7] (after having previously failed in the late 1980s in *Penry v.*

Lynaugh [8]). Since an important basis for the Supreme Court's holding in *Atkins* was the fact that eighteen states had passed laws barring execution of people with mental retardation, [9] it appeared far more likely to the ABA IR&R that the most immediate impact of adopting a proposal on this subject would be in the legislative arena. As with mental retardation (and juveniles), such legislative efforts could be supported by death penalty proponents as well as opponents.

Although the initial impetus for the Task Force's creation came from the belief that there likely were categories of people with mental illness whose mental condition at the time of the crime should exempt them categorically from the death penalty, the ABA IR&R was also increasingly troubled by a growing number of instances in which people already on death row were getting executed despite troublesome facts about their mental state while on death row. These arose in three contexts. One concerned death row inmates who were "volunteering" to end legal and clemency proceedings and be executed, where this "decision" appeared to have been significantly influenced by serious mental illness. A second concerned people who were not mentally able ***1125** to assist counsel or otherwise participate meaningfully with respect to potentially meritorious issues following their initial appeal—where the post-conviction and habeas corpus proceedings nonetheless proceeded. The third context involved people who were being found "competent" for execution even though they did not truly understand why they were to be executed, or where, after having been found incompetent to be executed, an inmate was medicated for the sole purpose of enabling him to be executed.

An important point to recognize is that nothing that the Task Force was asked to consider, and nothing in the proposal it developed, would preclude anyone from being convicted of capital murder and being severely punished for it, up to and including life imprisonment without possibility of parole. Thus, the Task Force was addressing issues very different from insanity cases. Typically, someone who is found insane *cannot* be found guilty. Often, such people can be confined only as long as they remain insane.

C. DEVELOPMENT OF THE TASK FORCE'S PROPOSAL, AND ITS CONSIDERATION BY PROFESSIONAL ASSOCIATIONS

After organizational meetings in late 2003 and early 2004, the Task Force began substantive work. By mid-2004, the Task Force had developed a proposal with three prongs. Later that year, the National Alliance for the Mentally Ill (NAMI) adopted the first two prongs of this proposal as policy. [10] In February 2005 so did the American Psychological Association. [11] In November 2004 the American Psychiatric Association adopted as policy prong two of the Task Force's proposal. [12]

In the Spring of 2005, after further consultation with representatives of the American Psychiatric Association, the Task Force approved refined versions of prongs one and three of its proposal. [13] As of this writing, it is considered likely that later in 2005 the American Psychiatric Association ***1126** will adopt as policy the refined versions of prongs one and three and that either in late 2005 or early 2006 NAMI and the American Psychological Association will revise their policies to incorporate the refinements to prongs one and three. It is anticipated that in February 2006 the ABA House of Delegates will be asked to approve as policy the Task Force's entire proposal.

D. PRINCIPLE UNDERLYING THE FIRST TWO PRONGS OF THE TASK FORCE'S PROPOSAL

As noted above, the first two prongs of the Task Force's proposal make categorical exclusions from death penalty eligibility. [14] The first prong deals with people with mental retardation and with others who are functionally the same as those with mental retardation but whose disability did not commence during childhood years. [15] The second prong deals with people whose severe mental illness at the time of the crime makes them, in the Task Force's view, sufficiently less morally culpable for their actions than the "average murderer" [16] such that they should not be subject to the death penalty. [17]

With regard to those individuals covered by these prongs, the Task Force believes that important rationales in *Atkins* are equally applicable. As Ronald Honberg's article points out, the Court in *Atkins* said that concerns regarding retribution and deterrence, upon which it had relied in upholding the constitutionality of capital punishment in *Gregg v. Georgia*, [18] were of dubious applicability where the defendant has mental retardation. [19] The retribution rationale presupposes the absence of a compelling mitigating factor [20] —yet mental retardation is such a factor. As for deterrence, the Court doubted that capital punishment would

deter people whose mental retardation lessens impulse control, planning capability, and the ability to formulate a calculated scheme to kill someone. [21]

Moreover, as Mr. Honberg points out, the *Atkins* Court also cited the danger that people with mental retardation would be more likely to make coerced or otherwise false "confessions," to have a demeanor caused by their disability that would make jurors less likely to vote ***1127** against the death penalty, and to be less able to help counsel develop important mitigating evidence. [22] The Task Force feels that such dangers also exist with regard to those individuals covered by prongs one or two.

Professor Slobogin's article discusses a basis on which some would disagree with both of these prongs, just as they disagree with *Atkins*. [23] These people say that such categorical exclusions stigmatize everyone with mental retardation or severe mental illness by suggesting they lack certain key qualities of human beings. [24] However, as noted above, these prongs do not say that such people cannot form sufficient intent to make them guilty of capital murder. [25] Rather, these prongs are premised on the view that certain categories of people cannot be sufficiently depraved to warrant the death penalty—as opposed to other punishments, including life without parole.

It is important, in this connection, to recognize that this same issue was debated within the community of advocates for, and family members of, people with mental retardation during the legislative efforts preceding *Atkins*. [26] Ultimately, all of the leading groups took the position that people with mental retardation should be exempt from capital punishment. [27] Significantly, the first organization to support the Task Force's proposal was NAMI, [28] the leading grassroots advocacy group for those with mental illness. [29]

E. PARTICULAR POINT REGARDING PRONG ONE

As Professor Slobogin's article points out, prong one is designed, inter alia, to help jurisdictions better implement *Atkins* by providing a definition for mental retardation. [30] This definition is almost identical to that of the American Association of Mental Retardation and is consistent with that of the American Psychiatric Association. [31]

As Professor Slobogin also notes, prong one exempts from the death penalty anyone whose disability at the time of the offense is functionally the same as mental retardation, with the only difference being that the ***1128** disorder causing great intellectual deficits arose after childhood. [32] An example is a significant loss of intellectual functioning, leading to an IQ in the mental retardation range, arising from a very serious head trauma. [33]

F. PARTICULAR POINTS REGARDING PRONG TWO

Prong two proposes exempting from the death penalty some of those who, at the time of the crime, have such serious mental illness that their culpability is as diminished as those with mental retardation. [34] This lesser extent of culpability arises from such effects of their mental illness as delusions, hallucinations, significant thought disorders, and highly disorganized thinking. This exemption would apply to those with such disorders as schizophrenia and psychosis, but not anti-social personality disorder.

However, having a severe mental disorder such as schizophrenia or psychosis at the time of the crime would not be sufficient to exempt an individual from capital punishment under prong two. In addition, the disorder must lead to one of three kinds of significant incapacity as of the time of the crime. As Professor Slobogin's article describes in greater detail, the disorder must (a) lessen the nature, consequences, or wrongfulness of the offense; (b) involve a significant incapacity "to exercise rational judgment in relation to conduct"; or (c) entail a significant incapacity "to conform their conduct to the requirements of the law." [35]

In any event, one would not come within the exemption provided by prong two if one's mental disorder were manifested primarily by repeated criminal conduct or were manifested solely by the acute impact of alcohol or drugs.

G. ADDITIONAL CONCERNS UNDERLYING PRONG TWO

The principle underlying prong two is discussed in Part D, above. Also of relevance in this regard are other, practical concerns. One such concern is the likelihood, as shown by the Capital Jury Project studies, that jurors will consider the severe mental illnesses covered by prong two to be *aggravating* factors, [36] i.e., factors making it more likely that they will vote for the death penalty, whereas the law requires that they be ***1129** considered, if at all, as *mitigating* factors, i.e., factors making it less likely that they will vote for the death penalty. This is often the case because jurors frequently equate severe mental illness with a greater likelihood of being dangerous in the future. [37]

This problem is compounded by the fact that jurors often do not understand what the word "mitigating" means. [38] They often think that it means the same as "aggravating." [39] They also often do not understand that the defendant does not have to prove a mitigating factor beyond a reasonable doubt—reasonable doubt being a concept that they are used to from the guilt phase. [40] They also often do not understand the instruction that even if only one juror finds a factor to be mitigating, that juror can consider it in his or her vote on the death penalty. [41] Most jurors believe, incorrectly, that *every* member of the jury must consider a factor to be mitigating in order for *anyone* to consider it. [42]

Some defendants forbid their attorneys from presenting evidence of mental illness at trial—sometimes due to the potential for embarrassment or the desire to shield their families from embarrassment, and other times because of their refusal or inability to believe that they have a severe mental illness. Obviously, even a juror who realizes that severe mental illness is relevant, if at all, only as a mitigating factor, and who recognizes what "mitigating" means and how to bring it to bear, cannot consider a defendant's severe mental illness when no evidence about it is presented.

A factor that numerous jury studies have shown is crucial in capital sentencing is whether the defendant appears to show remorse. [43] Many people with certain kinds of mental illness do not—due to medication they are given to treat that mental illness—show much emotion of any kind about anything while in court. [44] This is often misinterpreted by the ***1130** jury, particularly if there is no expert testimony offered by the defense to explain to the jury why the defendant may not show remorse. [45]

H. SUMMARY OF PRONG THREE

The Task Force proposal's third prong deals with mental illness's impact on prisoners who have already been sentenced to death. [46] As Professor Bonnie's article discusses, these include prisoners who, as a result of their mental illness, seek to "volunteer" for execution; "[p]risoners whose mental illness impairs their ability to assist [counsel] or otherwise to participate meaningfully in post-conviction [or habeas corpus] proceedings;" and "[p]risoners whose impaired understanding of the nature and purpose of the punishment may render them incompetent for execution." [47]

Prong three would prevent the waiver of claims by inmates whose mental illness is a principal factor in their decision to "volunteer" for execution. [48] Also under prong three, post-conviction or habeas proceedings would be suspended if death row inmates cannot assist counsel or otherwise participate meaningfully on issues as to which they might secure relief from their conviction or death sentence. [49] Finally, under prong three, if a person facing a reasonably imminent execution is so mentally disabled that he does not understand why the state is going to execute him, his sentence would be reduced to a non-death sentence. [50]

I. PARTICULAR POINTS REGARDING PRONG THREE

Professor Bonnie's article summarizes the bases for prong three, and discusses how it would work. [51] The following are a few high points.

The Task Force believes it is unacceptable to permit death row inmates to forgo or drop post-conviction and habeas corpus proceedings challenging their convictions or sentences where their mental disorders significantly impair their ability to decide

rationally whether to pursue such relief. As Mr. Honberg's article states, “the pain ... of living with a severe mental illness is [sometimes] so [great] that death may seem like a better alternative,” particularly in light of egregious death row conditions and, in some cases, the failure to provide them with medical treatment ***1131** for their severe mental disorder(s).[52] As he points out, such defendants usually change their minds after being medicated and stabilized.[53]

Under the Task Force proposal, a next friend acting on an inmate's behalf should be allowed to initiate or pursue post-conviction or habeas corpus remedies at times when the inmate is unable, due to mental disorder(s), from rationally deciding to begin or carry through with such litigation.

The Task Force also believes that where a mental disorder significantly impairs a death row inmate's ability to assist counsel, yet the inmate's participation is necessary for a fair and accurate adjudication of specific claims in post-conviction or habeas corpus proceedings, those proceedings should be suspended. It would be fundamentally unfair to decide claims adversely to a mentally disabled death row inmate who might have succeeded on those claims if he had been able to assist his counsel. Under the Task Force's proposal, an inmate's death sentence should be reduced if there is no significant likelihood of the inmate's becoming able to assist his counsel with regard to such claims in the foreseeable future.

Finally, the Task Force's proposal regarding people facing reasonably imminent execution is necessary because, although the Supreme Court held in *Ford v. Wainwright*[54] that it is unconstitutional to execute people who have become incompetent for execution,[55] it did not provide a clear definition of such incompetence. Although this issue does not arise in most cases, there are a wide variety of holdings in those cases in which it has arisen. Some of these are very troubling.

For example, in *Barnard v. Collins*,[56] the Fifth Circuit held that Mr. Barnard was competent to be executed even though he suffered from the delusion that he was chosen for execution as the result of a conspiracy of various societal groups and the Mafia.[57] In 2004, a Texas federal district judge relied on *Barnard* in holding that Scott Panetti was competent for execution —despite his delusion that the State and forces of evil were conspiring against him and that he was going to be executed for preaching the gospel.[58] Under the Task Force proposal, the death sentences of such people would be vacated, and a lesser punishment imposed.

Footnotes

1 The Task Force's members are: Dr. Michael Abramsky; Dr. Xavier F. Amador; Michael Allen, Esq.; Donna Beavers; John Blume, Esq.; Professor Richard J. Bonnie; Colleen Quinn Brady, Esq.; Richard Burr, Esq.; Dr. Joel Dvoskin; Dr. James R. Eisenberg; Professor I. Michael Greenberger; Dr. Kirk Heilbrun; Ronald Honberg, Esq.; Ralph Ibson; Dr. Matthew B. Johnson; Professor Dorean M. Koenig; Dr. Diane T. Marsh; Hazel Moran; John Parry, Esq.; Professor Jennifer Radden; Professor Laura Lee Rovner; Robyn S. Shapiro, Esq.; Professor Christopher Slobogin; and Ronald J. Tabak, Esq.

2 536 U.S. 304 (2002).

3 *Id.* at 321. In March 2005 the Supreme Court relied heavily on *Atkins* in holding unconstitutional the execution of anyone who was under eighteen-years-old at the time of the offense. Roper v. Simmons, 125 S. Ct. 1183, 1192, 1200 (2005).

4 Patty Reinert, *Death Penalty Debate Reopened by Court's Retardation Decision*, HOUSTON CHRON., June 22, 2002, at A17; *see also* Mike Tolson, *Ill Inmate Can Find No Escape*, HOUSTON CHRON., Nov. 4, 2002, at A1 (quoting Ronald Honberg, Legal Director of the National Alliance for the Mentally Ill).

5 DEATH PENALTY INFO. CTR., SUMMARIES OF RECENT POLL FINDINGS, http:// www.deathpenaltyinfo.org/article.php?scid=23&did=210 (last visited Apr. 17, 2005).

6 *See, e.g.*, AM. ASS'N ON MENTAL RETARDATION, THE AAMR DEFINITION OF MENTAL RETARDATION (2002), *available at* http:// www.aamr.org/Policies/pdf/definitionofMR.pdf.

7 *See* *Atkins*, 536 U.S. at 310, 321.

8 *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989).

9 *Atkins*, 536 U.S. at 314-15.

10 *See* PUB. POLICY COMM. OF THE BD. OF DIRS. & DEP'T OF PUB. POLICY & RESEARCH, NAT'L ALLIANCE FOR THE MENTALLY ILL, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE FOR THE MENTALLY ILL §§ 9.6.1.1-.2 (rev. 7th ed. 2004).

11 *See* American Psychological Association, Exerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18-20, 2005) (on file with the Catholic Unviersity Law Review).

12 *See* AM. PSYCHIATRIC ASS'N, DIMINISHED RESPONSIBILITY IN CAPITAL SENTENCING: POSITION STATEMENT (2004), *available at* http:// www.psych.org/edu/other_res/lib_archives/archives/200406.pdf.

13 The latest version of the entire Task Force proposal, including the revised prongs one and three, are set forth in this Issue. *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 (2005) [hereinafter *Task Force Recommendations*].

14 *Id*. §§ 1-2.

15 *Id*. § 1.

16 *See* Atkins v. Virginia, 536 U.S. 304, 318-20 (2002).

17 *See Task Force Recommendations, supra* note 13, § 2.

18 428 U.S. 153, 183, 187 (1976) (plurality opinion).

19 *Atkins*, 536 U.S. at 318-20; Ronald Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1158 (2005).

20 *See* *Atkins*, 536 U.S. at 319.

21 *Id*. at 319-20.

22 *Id*. at 320-21; Honberg, *supra* note 19, at 1158.

23 Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133, 1136-39, 1147-50 (2005).

24 *Id*. at 1136-37.

25 *See supra* Part B, p. 1125.

26 *See* *Atkins*, 536 U.S. at 316 n.21.

27 *See id*.

28 *See supra* note 10 and accompanying text.

29 *See* Honberg, *supra* note 19, at 1154.

30 *See* Slobogin, *supra* note 23, at 1134.

31 *Id*.

32 *Id*. at 1135.

33 *Id*.

34 *See Task Force Recommendations, supra* note 13, § 2.

35 Slobogin, *supra* note 23, at 1142-44.

36 *See* 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).

37 *See id*. at 1166.

38 *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1053-54 (1995).

39 *See id*.

40 Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 10-11 (1993); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995).

41 Luginbuhl & Howe, *supra* note 40, at 1167.

42 *Id*.

43 Sundby, *supra* note 36, at 1560; *see also* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1616-17 (1998).

44 *See* Riggins v. Nevada, 504 U.S. 127, 143 (1992) (Kennedy, J., concurring).

45 *See* Sundby, *supra* note 36, at 1558, 1595.

46 *See Task Force Recommendations, supra* note 13, § 3.

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

48 *See Task Force Recommendations, supra* note 13, § 3(b).

49 *See Task Force Recommendations, supra* note 13, § 3(c).

50 *See Task Force Recommendations, supra* note 13, § 3(d).

51 Bonnie, *supra* note 47, at 1169-70.

52 Honberg, *supra* note 19, at 1165.

53 *Id*.

54 477 U.S. 399 (1986).

55 *Id*. at 409-10.

56 13 F.3d 871 (5th Cir. 1994).

57 *Id*. at 876-78.

58 Panetti v. Dretke, No. A-04-CA-042-SS, at 16-18 (W.D. Tex. Sept. 29, 2004) (order denying writ of habeas corpus and staying execution pending appeal).

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