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## DEATH PENALTY: AN OVERDUE EXEMPTION FOR THE SEVERELY MENTALLY ILL

JOSEPHINE MARINO\*

### I. INTRODUCTION

A Texas man shaved his head, dressed in camouflage, and carried an armed sawed-off shotgun and a deer rifle as he went to his parents-in-law's home.<sup>1</sup> He shot them at close range in front of his wife and three-year-old daughter.<sup>2</sup> He then kept his wife and daughter hostage in a bunkhouse where he had been living and only released them to safety after a lengthy standoff with the police.<sup>3</sup> A Texas jury convicted him of capital murder and sentenced him to death.<sup>4</sup>

Now consider a man who has suffered from severe mental illness for over thirty years.<sup>5</sup> His judgment is severely impaired, and his thinking and perception are profoundly disturbed.<sup>6</sup> He has been diagnosed with chronic undifferentiated schizophrenia and schizoaffective disorder and has been prescribed antipsychotic medication to alleviate some of his symptoms while his auditory and visual hallucinations only exacerbate his delusions of paranoia and grandiosity.<sup>7</sup> He is unable to overcome the delusions, and he believes that he is engaged in spiritual warfare with Satan as his psychotic religiosity takes over.<sup>8</sup>

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<sup>1</sup> Petition for Writ of Certiorari, *Panetti v. Stephens*, No. 13-8453, 2014 WL 3687250, at \*5 (5th Cir. 2014)

<sup>2</sup> *Panetti v. Stephens*, 727 F.3d 398, 400 (5th Cir. 2013).

<sup>3</sup> Petition for Writ of Certiorari, *supra* note 1, at \*6.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> *Id.* at \*4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at \*4-5.

These two stories are both true. These frightening realities describe the actual realities of one man, Scott Panetti. In the first story describing Panetti's crime, Panetti is a cold-hearted murderer. In the second story describing his complex and unstable mental history, Panetti is a man tormented by the mysterious and dark workings of his mind. When the two are blended together, the heartbreaking tale of Scott Panetti is created with many victims – his parents-in-law, his wife, his daughter, his parents, and even Panetti himself.

“The death penalty is the gravest sentence our society may impose” and “[p]ersons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”<sup>9</sup> Over the years, the Supreme Court has refused to inflict the death penalty on several groups of individuals because doing so would be a clear and gross violation of the Constitution's Cruel and Unusual Punishment Clause.<sup>10</sup> These exempted groups include juvenile offenders,<sup>11</sup> intellectually disabled offenders,<sup>12</sup> and insane offenders.<sup>13</sup>

However, no such exemption has been created for offenders who are severely mentally ill. In fact, in 2015, Scott Panetti petitioned the Supreme Court for review of his capital sentence whereby he claimed that he was severely mentally ill and argued that executing the severely mentally ill is a violation of the Cruel and Unusual Punishment Clause.<sup>14</sup> In denying the petition for review, the Supreme Court gave no explanation or indication for the reasons behind its denial.<sup>15</sup> Without any detailed insight from the Supreme Court and an approximation that between twenty percent of all individuals on death row suffer from severe mental illness, it is more than likely that more appeals on behalf of other

<sup>9</sup> *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014).

<sup>10</sup> U.S. CONST. amend. VIII. (stating “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

<sup>11</sup> *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>12</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>13</sup> *Ford v. Wainwright*, 477 U.S. 399, 399 (1986).

<sup>14</sup> *Panetti v. Texas*, No. 14–7312, 2015 WL 133411 at \*1 (U.S. June 12, 2015). Panetti's petition for writ of certiorari to determine whether he cannot be executed due to severe mental illness was denied.

<sup>15</sup> *Id.* “Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied.”

severely mentally ill individuals on death row will be made in the near future.<sup>16</sup>

This Note takes the position that an exemption for severely mentally ill offenders from the death penalty is not only warranted, but also long overdue. Part I will use the Supreme Court's own opinion in *Hall v. Florida* to make the argument that the Supreme Court has theoretically carved out such an exemption in its prior opinions, which it must now follow. This Note heavily relies on *Hall* for two reasons. First, in *Hall*, the Court was addressing intellectually disabled offenders and much of its opinion can be applied to severely mentally ill offenders. Second, the Court delivered the *Hall* opinion in 2014. It is the most recent death penalty opinion, and its expressed ideas of punishment are consistent with the Court's earlier exemption-creating death penalty cases, which are used throughout the opinion and its antecedents.

Part II will concentrate on the absence of the three principle rationales justifying punishment when executing an intellectually disabled offender, and how such an absence equally exists when a severely mentally ill offender is executed. Further, this Note will use the *Hall* opinion to demonstrate how the Supreme Court deferred to mental health professionals and the medical community when reaffirming the exemption for intellectually disabled offenders and how such deference is warranted for creating an exemption for severely mentally ill offenders.

Part III will focus on the Supreme Court's "evolving standard of human decency" test that it has created specifically for death penalty cases. This Note will provide two examples – one domestic and one international – as evidence demonstrating society's overall reluctance on executing offenders with mental illness. These examples show that executions of the severely mentally ill violate the "evolving standards of human decency" test, demanding that the Supreme Court create an exemption for the

<sup>16</sup> *Id.* This estimate is from Mental Health America; the association is formerly known as National Mental Health Association. Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illness*, <http://www.mentalhealthamerica.net/positions/death-penalty> (last visited Oct. 23, 2016).

severely mentally ill from the death penalty on the grounds of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>17</sup>

Part IV will revisit the Supreme Court's opinions in both *Ford v. Wainwright* and *Hall*, taking an in depth look at the state's procedures used in those cases and the reasons for holding that such procedures were unconstitutional. The Supreme Court has left the task of developing execution and sentencing procedures to the states and, using both *Ford* and *Hall*, this Note will provide some guidance on the minimum procedures that the Supreme Court should require for states in assessing severe mental illness, satisfying the Eighth Amendment.

## II. LEGAL PRECEDENT CARVES OUT AN EXEMPTION FOR THE SEVERELY MENTALLY ILL

### A. *Three Principle Justifications for Punishment*

As mentioned above, the Supreme Court has carved out several exemptions from capital punishment for particular groups of individuals.<sup>18</sup> Throughout these opinions, the Court has laid out the principle justifications for punishment, which have become its template when deciding the constitutionality of capital punishment. As recently as 2014, the Court, yet again, resorted to this template in *Hall*.<sup>19</sup> There, the Court reaffirmed its holding in *Atkins v. Virginia*, which created an exemption for intellectually disabled offenders by throwing out Florida's threshold IQ cut off to determine death penalty eligibility.<sup>20</sup> It found that "no

<sup>17</sup> *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>18</sup> See *Roper*, 543 U.S. at 575 (stating that juvenile offenders cannot constitutionally be given the death penalty); see also *Atkins*, 536 U.S. at 321 (holding that for the intellectually disabled, a death penalty sentence is excessive); see also *Ford*, 477 U.S. at 410 (stating that the Eighth Amendment prohibits states from inflicting the death penalty upon insane offenders).

<sup>19</sup> *Hall*, 134 S.Ct. at 1990 (finding that where Hall and his accomplice kidnapped, beat, raped, and murdered their pregnant twenty-one-year-old victim, in addition to robbing a convenience store and shooting the sheriff's deputy, the death penalty, as applied to Hall was an unconstitutional punishment because of Hall's intellectual disability).

<sup>20</sup> *Hall*, 134 S.Ct. at 2001; *Atkins*, 536 U.S. at 321:

Our independent evaluation of the issue reveals no reason to disagree with the judgment of 'the legislatures that have recently addressed the matter' and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment

legitimate penological purpose is served by executing a person with intellectual disability.”<sup>21</sup> Further, it stated that to do so contravenes the Eighth Amendment, “for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.”<sup>22</sup>

In reaching its decision, the Supreme Court identified the three principle rationales justifying punishment – rehabilitation, deterrence, and retribution – which we have seen throughout its death penalty opinions.<sup>23</sup> First, the Supreme Court reasonably and logically conceded that rehabilitation is not an applicable rationale for the death penalty.<sup>24</sup> Second, it noted that the premise of the deterrence rationale is not served by executing those that, because of their condition, are “unable to make calculated judgments” and have “diminished ability’ to ‘process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>25</sup> Last, the Supreme Court reasoned that retributive values are not fulfilled by executing those who have diminished capacity, which “lesse[ns] [their] moral culpability and, hence, the retributive value of the punishment.”<sup>26</sup> Thus, no justification for punishment is served by executing individuals who “by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn

in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.

<sup>21</sup> *Hall*, 134 S.Ct at 1992 (citing *Atkins*, 536 U.S. at 317, 320). After *Atkins* was decided, Hall filed a motion claiming that he had an intellectual disability and, therefore, he could not be executed. When Florida held a hearing to consider his motion, Hall again presented evidence of his intellectual disability, including an IQ test score of 71. In response, Florida argued that its law required that, as a threshold matter, Hall show an IQ score of 70 or below before he could present any additional evidence of his intellectual disability, so therefore, he could not be found intellectually disabled.

<sup>22</sup> *Id.* at 1992.

<sup>23</sup> *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)).

<sup>24</sup> *Hall*, 134 S.Ct. at 1993.

<sup>25</sup> *Id.* (quoting *Atkins*, 536 U.S. at 320).

<sup>26</sup> *Hall*, 134 S.Ct. at 1993 (citing *Atkins*, 536 U.S. at 319) (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”).

from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others, because these individuals bear “diminish[ed] . . . personal culpability” and there is no retributive value gained from their execution.<sup>27</sup>

The three principle justifications for punishment that the Supreme Court concluded were not served by executing intellectually disabled offenders in *Hall* – high culpability, effective deterrence, and rehabilitation – which are also absent when a severely mentally ill offender is executed.<sup>28</sup> First, as the Court pointed out in *Hall*, rehabilitation does not apply to the death penalty.<sup>29</sup> Second, the death penalty does not deter offenders who suffer from severe mental illness.<sup>30</sup> Because a severely mentally ill offender is unable to assess reality, he is also unable to be deterred by possible punishments like the death penalty.<sup>31</sup>

Finally, the severely mentally ill have reduced culpability.<sup>32</sup> Offenders who suffer from delusions and other effects of severe mental illness are unable to fully comprehend their actions and the consequences of those actions.<sup>33</sup> Although these offenders may have committed some of the most horrific crimes, scholars still argue that the characteristics of severe mental illness make these defendants less culpable than defendants without severe mental illnesses.<sup>34</sup> Such characteristics include the inability to conform one’s actions to society’s moral standards, the lack of understanding that one’s actions are wrong, and continuing to commit the crime because of one’s illness.<sup>35</sup>

Additionally, the Supreme Court has considered the impact of the trial process from a defendant’s condition. The risk of unfair

<sup>27</sup> *Hall*, 134 S.Ct. at 1999 (quoting *Atkins*, 536 U.S. at 318).

<sup>28</sup> Lise E. Rahdert, *Hall v. Florida and Ending the Death Penalty for Severely Mentally Ill Defendants*, 124 *YALE L.J.* 34, 38 (2014).

<sup>29</sup> *Hall v. Florida*, 134 S. Ct. 1986, 1992–93 (2014).

<sup>30</sup> *Id.* at 1993 (citing *Atkins*, 536 U.S. 304, 320 (2002)); see Lyn Entzerth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 *AKRON L. REV.* 529, 549 (2011).

<sup>31</sup> Rahdert, *supra* note 28, at 38.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 38 n.31 (citing Entzerth, *supra* note 30, at 556 (“noting that severe mental illnesses such as schizophrenia’ can disable and deprive their victims of rational thought processes and control,’ and citing relevant psychological research.”)).

<sup>34</sup> Rahdert, *supra* note 28, at 38.

<sup>35</sup> *Id.*

trial is present for severely mentally ill offenders because, like intellectually disabled offenders, they are unable to effectively participate in their own defense.<sup>36</sup> The Supreme Court has even recognized that, prior to the imposition of bans on executing juveniles and the intellectually disabled, jurors viewed the defendant's youth or intellectual disability as making him "more dangerous and deserving of death."<sup>37</sup> In *Hall*, the Supreme Court held that the Eighth Amendment's prohibition on executing the intellectually disabled "protect[s] the integrity of the trial process."<sup>38</sup> The trial process is similarly compromised with the execution of severely mentally ill offenders, and therefore, a ban on executing them must be imposed.<sup>39</sup>

Therefore, because the reasons for exempting the intellectually disabled "apply equally to profoundly mentally ill defendants, it is both unjustifiable and inconsistent for the Court to allow those with a severe mental illness to be executed."<sup>40</sup> No purpose is served by executing individuals who suffer from severe mental illness and without purpose, the punishment is cruel, unusual, and hence, unconstitutional.<sup>41</sup>

<sup>36</sup> *Id.* at 38-39 (citing Entzeroth, *supra* note 30, at 558) (noting that a mentally ill defendant is less able to "assist in his defense, make rational legal decisions, or adequately advise his lawyer about meaningful defenses.").

<sup>37</sup> Entzeroth, *supra* note 30, at 546.

<sup>38</sup> Rahdert, *supra* note 28, at 40.

<sup>39</sup> *Id.* at 40.

<sup>40</sup> *Id.* at 38 (citing Entzeroth, *supra* note 30, at 557-58; Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV 3 (2000) (discussing various arguments for preventing mentally ill defendants with psychoses from being executed).

<sup>41</sup> Outside the scope of this Note, but important to consider, is the argument raised by Judge Price of the Court of Criminal Appeals of Texas. While supporting the premise of this Note by saying "I can imagine no rational reason for carving a line between the prohibition on the execution of a mentally retarded person or an insane person while permitting the execution of a severely mentally ill person," his argument is a broader one. He argues that, "carving out another group that is ineligible for the death penalty is a band aid solution for the real problem. Evolving societal values indicate that the death penalty should be abolished in its entirety." This argument is based on the idea of human error. "[S]ociety is now less convinced of the absolute accuracy of the criminal justice system." "[B]ecause the criminal justice system is run by humans, it is naturally subject to human error." Therefore, "[t]here is no rational basis to believe that this same type of human error will not infect capital murder trials. Ex parte Panetti, No. WR-37,145-04, 2014 WL 6974007, at \*1-2 (Price, J., dissenting). Although Judge Price makes a compelling argument, this Note agrees with the former part of his dissenting opinion but declines to embrace the position in the latter because abolishment of the death penalty does not seem to be in the near horizon.



*B. The Court's Deference to Mental Health Professionals*

In *Hall*, the Supreme Court acknowledged how it has, along with state courts and legislatures, consulted and learned from medical experts in the past.<sup>42</sup> In the context of mental health, the Supreme Court cites to these professionals because they use their expertise to study and assess the consequences of the classification schemes used in diagnosing mental or psychiatric disorders or disabilities.<sup>43</sup> Further, the Supreme Court noted that society relies upon this medical and professional expertise, which only highlights the importance of the medical community and how proper the Supreme Court thinks their influence is.<sup>44</sup>

Once again, the Court's deference to the mental health professionals in *Hall* and the context of intellectual disability equally applies in the context of severe mental illness. Similar to death penalty cases involving intellectually disabled offenders, the medical and legal communities have come together to oppose the death penalty for individuals with severe mental illness. The arguments mirror one another and are outlined below.

The American Psychiatric Association (the "APA") is an organization composed of psychiatrists "working together to ensure humane care and effective treatment for all persons with mental disorders . . ."<sup>45</sup> The APA is extensively cited by the Supreme Court in *Hall* and mentioned in *Roper v. Simmons*, where the Supreme Court carved out the exemption for juvenile offenders.<sup>46</sup> Part of the APA's mission is to "promote the highest quality care for individuals with mental disorders" and to "promote psychiatric education and research."<sup>47</sup>

In particular, the APA is cited for its Diagnostic and Statistical Manual of Mental Disorders ("DSM"), which is a diagnostic system and manual used by psychiatrists and other experts as well as the

<sup>42</sup> *Hall*, 134 S.Ct. at 1993.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Mission, Vision, and Values*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/about-apa/vision-mission-values-goals> (last visited Oct 23, 2016).

<sup>46</sup> *Hall*, 134 S.Ct. at 1988, 1994, 2000. In fact, a majority of the Court's citations were direct quotes from the amici curiae brief submitted by the APA.

<sup>47</sup> *Mission, Vision, and Values*, *supra* note 45.

Supreme Court.<sup>48</sup> The DSM considers Axis I diagnoses the most serious or severe disorders, including schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders.<sup>49</sup> All of these disorders are serious because they are typically associated with delusions, hallucinations, extremely disorganized thinking, or very significant disruption of consciousness, memory, and perception of the environment.<sup>50</sup> Axis I diagnoses constitute what is considered “severe mental illness.”

Accompanied by the APA, the American Psychological Association, the National Alliance on Mental Illness, and the American Bar Association (“ABA”) have joined “a widening chorus of professionals calling for a halt to death sentences and executions for defendants with severe mental disorders, which ‘significantly impaired’ their rational judgment or capacity to appreciate the wrongfulness of their conduct.”

Recently, the ABA made several recommendations for cases where a criminal defendant, who suffers from a severe mental illness, faces the death penalty. In its *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities* (the “Recommendation”), the ABA recognizes that *Atkins* “offered a timely opportunity to consider the extent, if any, to which other types of impaired mental conditions ought to lead to exemption from the death penalty.”<sup>51</sup>

The ABA strongly urges every jurisdiction that imposes capital punishment to adopt its guidelines and created the Task Force on Mental Disability and the Death Penalty.<sup>52</sup> The Task Force is composed of both lawyers and mental health professionals, including members of the APA and the American Psychological Association.<sup>53</sup>

The Task Force guidelines urge strongly against executing or sentencing a defendant to death who, at the time of the offense,

<sup>48</sup> *Hall*, 134 S.Ct. at 1990. There are different editions of the manual. The *Hall* Court cites to both the DSM-IV and DSM-V, which suggests that both have significance and authority.

<sup>49</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL, 25-26 (4th ed. 2000).

<sup>50</sup> *Id.* at 275-76 (schizophrenia), 301 (delusional disorders), 332-33 (mood disorder with psychotic features), 125 (delirium), 477 (dissociative disorders).

<sup>51</sup> *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 669 (2006).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

was under a severe mental disorder. More specifically, the ABA provides:

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 of attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.<sup>54</sup>

The ABA explains that this section is “meant to prohibit execution of persons with severe mental disability whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence *disproportionate to their culpability*.”<sup>55</sup> In explaining the rationale behind this section, the ABA cites the reasons behind the holding in *Atkins*, and more specifically, the absence of the three principle justifications for punishment previously discussed.<sup>56</sup>

Further, the ABA clarifies that its Recommendation is meant to reach offenders who have a “‘severe’ disorder or disability, one roughly equivalent to disorders that mental health professionals would consider the most serious ‘Axis I diagnoses.’”<sup>57</sup> The ABA explains that other conditions that are not technically an Axis I condition may also classify as “severe” in its Recommendation, but “only if these more serious symptoms occur at the time of the

<sup>54</sup> *Id.* at 670.

<sup>55</sup> *Id.* at 672 (emphasis added).

<sup>56</sup> *Id.* (citing *Atkins*, 536 U.S. at 318-19) (“More specifically . . . [the *Atkins* Court] held that people with mental retardation who kill are both less culpable and less deterrable than the average murderer, because of their ‘diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.’ As the Court noted, ‘[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.’ Similarly, with respect to deterrence, the Court stated, ‘[e]xempting the mentally retarded from [the death penalty] will not affect the ‘cold calculus that precedes the decision’ of other potential murderers.”).

<sup>57</sup> *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, *supra* note 51, at 670.

capital offense would the predicate for this Recommendation's exemption be present."<sup>58</sup> The purpose of this section of the ABA's Recommendation is to make sure that its exemption only applies to "offenders less culpable and less deterrable than the average murderer" and does so by "further requir[ing] that the disorder significantly impair cognitive or volitional function at the time of the offense."<sup>59</sup>

The ABA explains the types of offenders that this provision is meant to protect. Section (a) would apply to "offenders who, because of severe disorder or disability, did not intend to engage in the conduct constituting the crime or were unaware they were committing it" and "offenders who intended to commit the crime and knew that the conduct was wrongful, but experienced confusion and self-referential thinking that prevented them from recognizing its full ramifications."<sup>60</sup> Section (b) would apply to offenders with "the type of disoriented, incoherent and delusional thinking that only people with serious mental disability experience."<sup>61</sup> Last, Section (c) would probably apply to offenders who "experience significant cognitive impairment at the time of the crime."<sup>62</sup>

The ABA continues to set guidelines for these criminal defendants exhibiting severe mental illness in the conviction process. It provides certain 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

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 671.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

of the punishment, or to appreciate the reason for its imposition in the prisoner's own case . . . .<sup>63</sup>

In addition, the ABA continues to set forth guidelines for cases involving prisoners seeking to forgo or terminate post-conviction, cases involving prisoners unable to assist counsel in post-conviction proceedings, and cases involving prisoners unable to understand the punishment or its purpose.<sup>64</sup>

Therefore, it is readily apparent that both the legal and medical communities have strived to emphasize the injustice and immorality that come from executing individuals with severe mental illness. In fact, the Supreme Court's template based on the three principle rationales for punishment are central themes to the APA's and ABA's definitions of severe mental illness, as well as the ABA's Recommendation. Further, these are the precise communities that should be given deference by the Supreme Court in determining an exemption for the severe mentally ill as it has in the past for the currently exempted groups.

### III. THE EVOLVING STANDARDS OF DECENCY

Also, evident in these exemption-creating opinions is the Supreme Court's reliance on "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate to be 'cruel and unusual.'<sup>65</sup> The Supreme Court professes its duty to strike down law that "contravenes our Nation's commitment to dignity" and that "den[ies] the basic dignity that the Constitution protects."<sup>66</sup>

<sup>63</sup> *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, *supra* note 51, at 671.

<sup>64</sup> *Id.* at 668.

<sup>65</sup> *Roper*, 543 U.S. at 551 (quoting *Trop v. Dulles*, 356 U.S. at 101). "Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the 'evolving standards of decency that marks the progress of a maturing society.'" *Ford*, 477 U.S. at 406 (quoting *Trop*, 356 U.S. at 101). "Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). "Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world." *Hall*, 134 S.Ct. at 2001.

<sup>66</sup> *Hall*, 134 S.Ct. at 2001.

Few, if any, would argue that executing severely mentally ill offenders meets any standard of decency, or that doing so is what marks the United States as a mature society. In fact, society has begun to not only move away from the idea of executing severely mentally ill offenders, but rather, is actively seeking that it is prohibited to do so.

A poll released in December 2014 found that Americans oppose the death penalty for individuals suffering from mental illness by a margin of 2 to 1.<sup>67</sup> Public Policy Polling conducted this nationwide poll, which consisted of a survey of 943 registered voters.<sup>68</sup> The survey found that 58% of respondents would oppose the death penalty for individuals suffering from mental illness.<sup>69</sup> Remarkably, the opposition is very evenly distributed. First, the “opposition was consistent across all political parties – 62% of Democrats, 59% of Republicans, and 51% of Independents.<sup>70</sup> Second, opposition was also consistent across all regions of the country” – 64% from the Midwest, 61% from the West, and 55% from both the South and Northeast.<sup>71</sup> Last, “opposition to the death penalty for persons” suffering from mental illness was “strong across both genders and all income and education levels.”<sup>72</sup>

Robert Smith, an assistant law professor at the University of North Carolina at Chapel Hill commissioned this survey.<sup>73</sup> He stated that this poll carries great significance as new research, which shows an “emerging consensus against using capital punishment in cases where the defendant is mentally ill.”<sup>74</sup> Further, “[t]he poll joins other new data demonstrating that sentencing trends are down across the country for death-eligible defendants with severe mental illness. Combining this public polling, sentencing practices, and the recommendations of the

<sup>67</sup> Press Release, Laura Burstein, *New Nationwide Poll Shows Americans Oppose Death Penalty in Cases where Person has Mental Illness By 2-1 Margin* (Dec. 1, 2014) (available at [https://drive.google.com/file/d/0B1LFfr8Iqz\\_7RDJBZzA2NGJzWG8/view](https://drive.google.com/file/d/0B1LFfr8Iqz_7RDJBZzA2NGJzWG8/view)).

<sup>68</sup> *Id.* This survey “was conducted on November 24-25, 2014 and has a margin of error of +/- 3.1.”

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Press Release, Laura Burstein, *New Nationwide Poll Shows Americans Oppose Death Penalty in Cases where Person has Mental Illness By 2-1 Margin* (Dec. 1, 2014) (available at [https://drive.google.com/file/d/0B1LFfr8Iqz\\_7RDJBZzA2NGJzWG8/view](https://drive.google.com/file/d/0B1LFfr8Iqz_7RDJBZzA2NGJzWG8/view)).

<sup>74</sup> Burstein, *supra* note 67.

mental health medical community, it is clear that a consensus is emerging against the execution of a person like Scott Panetti, who suffers from a debilitating illness which is similar to intellectual disability in that it lessens both his culpability and social value of his execution.”<sup>75</sup>

Amnesty International is an organization that advocates for prisoners and people at risk “whose human rights have been violated or are under threat of violation.”<sup>76</sup> One of the areas of focus for Amnesty International is the death penalty and mental illness specifically in the United States. In fact, its webpage features a quote by Yvonne Panetti, mother of Scott Panetti, where she stated, “He did a terrible thing, but he was sick. Where is the compassion? Is this the best our society can do?”<sup>77</sup>

Amnesty International reports provide the international standard of human decency in one report, stating that “[t]he execution of those with mental illness or ‘the insane’ is clearly prohibited by international law. Virtually every country in the world prohibits the execution of people with mental illness.”<sup>78</sup> However, the United States, as recently as early 2014, has executed individuals with long histories of severe mental illness, along with India, Japan, and Pakistan.<sup>79</sup> For support, Amnesty International lists findings of international resolutions. First, in 1997, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions found that governments continue to use the death penalty “with respect to . . . the mentally ill are particularly called upon to bring their domestic legislation into conformity with international legal standards.”<sup>80</sup> Second, in 2000, the UN Commission on Human Rights urged all states that still maintain

<sup>75</sup> *Id.*

<sup>76</sup> *Prisoners and People at Risk*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/prisoners-and-people-at-risk> (last visited Mar. 1, 2015).

<sup>77</sup> *Death Penalty and Mental Illness*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-mental-illness> (last visited Mar. 1, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> *2014 World Day Against the Death Penalty: Protecting People with Mental and Intellectual Disabilities from the Use of the Death Penalty*, AMNESTY INT’L (Oct. 2014), <https://www.amnesty.org/download/Documents/4000/act510052014en.pdf>.

<sup>80</sup> *Death Penalty and Mental Illness*, *supra* note 77.

the death penalty “not to impose it on a person suffering from any form of mental disorder; not to execute any such person.”<sup>81</sup>

The two examples above demonstrate how both the domestic community and the international community are strongly against executing severely mentally ill offenders. Therefore, an exemption must be created for these individuals because society’s standards have clearly evolved away from executing them. Under its own test, the Supreme Court must do away with punishments that are not in conformity with its evolving human decency standard.

#### IV. PROPOSED EXEMPTION

Because of the Supreme Court’s own precedent, an exemption is warranted for severely mentally ill offenders facing the death penalty. Some of the Supreme Court’s opinions in exemption-creating death penalty cases have considered at-length state tests for death penalty eligibility. This section of the Note examines the procedures for assessing mental illness and offers some key guidance.

##### A. *Ford v. Wainwright*

In *Ford v. Wainwright*, the Supreme Court held that “[t]he Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”<sup>82</sup> There, the question before the Supreme Court was whether the Florida district court was obligated to hold an evidentiary hearing on the question of the habeas corpus petitioner’s sanity.<sup>83</sup> At the time, Florida law directed the governor to stay the execution and appoint a commission of three psychiatrists when informed that a person under the sentence of death may be insane.<sup>84</sup> More specifically, Florida law provided that “[t]he examination of the convicted person shall take place with all three psychiatrists present at the same time.”<sup>85</sup> “After receiving the report of the commission, the Governor must determine whether ‘the convicted person has the

<sup>81</sup> *Id.*

<sup>82</sup> *Ford*, 477 U.S. at 410.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 412.

<sup>85</sup> *Id.*



mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him' and "if the Governor finds that the prisoner has that capacity, then a death warrant is issued; if not, then the prisoner is committed to a mental health facility. The procedure is conducted wholly within the executive branch, *ex parte*, and provides the exclusive means for determining sanity."<sup>86</sup>

The reports of the three examining psychiatrists reached conflicting diagnoses but the same ultimate finding of competency.<sup>87</sup> Petitioner's counsel attempted to submit other written materials to the governor, including reports of two other psychiatrists who examined his client in greater detail.<sup>88</sup> However, the governor did not inform counsel whether his submission would be considered and subsequently made his decision by issuing a death warrant.<sup>89</sup>

The Supreme Court found that Florida's procedural review "fail[ed] to achieve even the minimal degree of reliability required for the protection of any constitutional interest . . ."<sup>90</sup> The Supreme Court noted several deficiencies in Florida's procedure.

First, the procedure failed to include the prisoner in the "truth-seeking process" and to acknowledge the "Court's longstanding pronouncement that '[t]he fundamental requisite of due process of law is the opportunity to be heard."<sup>91</sup> Further, "[i]n all other proceedings leading to the execution of an accused, [the Supreme Court] has said that the factfinder must 'have before it all possible relevant information about the individual defendant whose fate it must determine."<sup>92</sup> A procedure that "precludes the prisoner or his counsel from presenting material relevant to his sanity or bars

<sup>86</sup> *Id.* at 412.

<sup>87</sup> *Id.*

<sup>88</sup> *Ford*, 477 U.S. at 413. One of petitioner's psychiatrists concluded that petitioner was not competent to be executed.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 411-13. The Supreme Court also found that the procedure in place fell short of the adequacy under *Townsend*. "The adequacy of a state-court procedure under *Townsend* is largely a function of the circumstances and the interests at stake. In capital proceedings, generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation omitted). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different (citation omitted)."

<sup>91</sup> *Id.* at 413 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

<sup>92</sup> *Ford*, 477 U.S. at 413 (quoting *Jurek v. Tex.*, 428 U.S. 262, 276 (1976) (plurality opinion)).

consideration of that material by the factfinder is necessarily inadequate.”<sup>93</sup> Additionally, “the minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.”<sup>94</sup>

In the context of mental illness, the Supreme Court recognized that because “psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms,’ the factfinder must resolve differences in opinion within the psychiatric profession ‘on the basis of the evidence offered by each party. . . .”<sup>95</sup> It further noted that “[t]he same holds true after conviction; without any adversarial assistance from the prisoner’s representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.”<sup>96</sup>

The second deficiency the Supreme Court found in Florida’s procedure was the inability to challenge or impeach the opinions of the psychiatrists appointed by the state.<sup>97</sup> The Supreme Court then suggested that cross-examination of the psychiatrists or something less formal to that extent because it would “contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert’s beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert’s degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report.”<sup>98</sup> The Court further stated that some questioning of the experts concerning their technical conclusions is needed otherwise “a factfinder simply cannot be expected to evaluate the various opinions particularly when they are themselves

<sup>93</sup> *Ford*, 477 U.S. at 414.

<sup>94</sup> *Id.* (quoting *Solesbee v. Balkcom*, 399 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

<sup>95</sup> *Ford*, 477 U.S. at 414 (quoting *Ake v. Okla.*, 470 U.S. 68, 81 (1985)).

<sup>96</sup> *Ford*, 477 U.S. at 414.

<sup>97</sup> *Id.* at 415.

<sup>98</sup> *Id.*

inconsistent.”<sup>99</sup> The Supreme Court feared that there would be a “significant possibility that the ultimate decision made in reliance on [state] experts will be distorted” under Florida’s procedure which failed to provide the prisoner’s representative with the opportunity to clarify or challenge the state experts’ opinions or methods.<sup>100</sup>

The third and “most striking defect” in Florida’s procedure was the placement of the ultimate decision “wholly within the executive branch.”<sup>101</sup> Florida’s procedure provided that the governor appointed the experts and ultimately decided whether the state could carry out the death sentence that it has sought.<sup>102</sup> The Supreme Court found this especially troublesome because the governor’s subordinates were responsible for “initiating every stage of the prosecution of the condemned from arrest through sentencing.”<sup>103</sup> Therefore, neutrality was wholly absent from the procedure, which is absolutely necessary for reliability in the fact-finding proceeding.<sup>104</sup>

While it left the task of developing constitutional procedures to the states, the Supreme Court eloquently stated that:

[T]he lodestar of any effort to devise a procedure must be overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the fact-finding determination. The stakes are high and the ‘evidence’ will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that “evidence” be conducive to the formation of neutral, sound, and professional judgments as to the prisoner’s ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.<sup>105</sup>

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Ford*, 477 U.S. at 416.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 417.

*B. Hall v. Florida*

In 2002, the Supreme Court ruled in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of the intellectually disabled.<sup>106</sup> As a result of *Atkins*, Hall filed a motion claiming that he had an intellectual disability and, therefore, he could not be executed.<sup>107</sup> When Florida held a hearing to consider his motion, Hall again presented evidence of his intellectual disability, including an IQ test score of 71.<sup>108</sup> In response, Florida argued that its law required that, as a threshold matter, Hall show an IQ score of 70 or below before he could present any additional evidence of his intellectual disability; therefore, he could not be found intellectually disabled.<sup>109</sup> The Florida Supreme Court rejected Hall's appeal and held that Florida's IQ cutoff was constitutional.<sup>110</sup>

On appeal, the Supreme Court held that the Florida statute at issue was unconstitutional.<sup>111</sup> It threw out Florida's threshold IQ test by holding that "the law requires that [Hall] have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime" and that Florida's statute was invalid under the Cruel and Unusual Punishment Clause of the Constitution.<sup>112</sup>

On its face, the Florida statute was consistent with both the views of the medical community and *Atkins*; nothing in the statute's text precluded recognition of a defendant's IQ score as a range as mental health professionals do.<sup>113</sup> However, the Florida Supreme Court interpreted the statute more narrowly and "held that a person whose [IQ] test score is above 70, including a score

<sup>106</sup> *Hall*, 134 S.Ct. at 1991; *Atkins*, 536 U.S. at 321.

<sup>107</sup> *Hall*, 134 S.Ct. at 1991-92.

<sup>108</sup> *Id.* at 1992. The Court notes that Hall had nine IQ evaluations with scores ranging between 60 and 80. The sentencing court excluded two scores below 70 for evidentiary reasons. Therefore, the court only considered the scores between 71 and 80.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2001.

<sup>113</sup> *Hall*, 134 S.Ct. at 1994. The Florida statute defined intellectual disability for purposes of an *Atkins* proceeding as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." It further defines "significantly sub-average general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test."

within the margin for measurement error, does not have an intellectual disability and is barred from presenting additional evidence asserting the argument that he is so disabled.”<sup>114</sup>

The Supreme Court found that through its interpretation, Florida “[went] against the unanimous professional consensus.”<sup>115</sup> Further, it stated that states must “afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.”<sup>116</sup> Finally, the Supreme Court declared that:

The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.<sup>117</sup>

### *C. Guidelines for Determining a Defendant’s Severe Mental Illness*

The Supreme Court has left the task of developing the exact procedures for executing sentences to the states.<sup>118</sup> In the context of determining eligibility for the death penalty for defendants claiming severe mental illness, the states should be guided by *Ford* and *Hall*. Additionally, there are a few procedures that the Supreme Court not only look for but also require.

First, a state’s procedure for determining eligibility for the death penalty for defendants claiming severe mental illness must include the defendant in the process by allowing him and his representatives to set forth any materially relevant information about his mental health. This would provide the factfinder with all the information needed to make the ultimate decision of death penalty eligibility, including evidence of mental health

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2000.

<sup>116</sup> *Id.* at 2001.

<sup>117</sup> *Hall*, 134 S.Ct. at 2001.

<sup>118</sup> *Ford*, 477 U.S. at 416-17.

professionals who may disagree with one another. It is the factfinder's job to resolve such disagreements. Further, allowing the defendant to offer evidence that he deems materially relevant will also allow him to provide a more extensive evaluation of his mental health that may be more in depth than that done by the state.

Second, such a procedure must include a way for the defendant to challenge evaluations done by the state. When a defendant makes such a challenge, the evaluating psychiatrist should be required to disclose the process of his evaluations including the basis of his evaluation, exact factors used in the evaluation, history or risk of error in the evaluation, and response to any ambiguity claimed in the evaluation. Furthermore, the evaluating psychiatrist should be required to submit an affidavit providing for any personal bias in relation to the death penalty along with his confidence in the conclusions found by the evaluation.

Third, the procedure should have a separation between the authority charged with the ultimate decision of death penalty eligibility and the authority of appointing psychiatric experts to determine the defendant's mental health status. Finally, the evaluation done by the state should conform to the customary standards and norms of the usual procedures and methods employed by the mental health community.

## V. CONCLUSION

The Supreme Court has established several exemptions from the death penalty for qualifying individuals. These individuals include juveniles, the insane, and the intellectually disabled.<sup>119</sup> However, it has failed thus far to establish an exemption for individuals suffering from severe mental illness. These individuals are so vulnerable that they are unable to defend themselves from the government's harshest form of punishment. In addition, the three principle rationales that justify punishment – deterrence, rehabilitation, and retribution – are completely absent from executing the severely mentally ill. Furthermore, the

<sup>119</sup> *Roper*, 543 U.S. at 575; *Ford*, 477 U.S. at 399; *Atkins*, 536 U.S. at 321.

Supreme Court has used these three principle rationales extensively in the opinions that have created such exemptions.<sup>120</sup>

Combining the evolving decency standard along with the Court's notion that it is the ultimate decision maker, I urge the Court to create the overdue exemption for severely mentally ill offenders. The Supreme Court has repeatedly asserted its role as the Judiciary by stating that "the Constitution contemplates that in the end [its] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment"<sup>121</sup> and that the "exercise of independent judgment is the Court's judicial duty."<sup>122</sup> However, in failing to do so, the Supreme Court has undermined its own authority and independent judgment as the evolving standards of decency, along with the medical and legal communities, which relentlessly urge it to act.

<sup>120</sup> "First, there is a serious question whether either justification underpinning the death penalty—retribution and deterrence of capital crimes—applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death (citation omitted) the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, thus, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 305 (citing *Godfrey v. Ga.*, 446 U.S. 420, 433 (1980); "Once juveniles' diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders (citation omitted) provides adequate justification for imposing that penalty on juveniles." *Roper*, 543 U.S. at 553.

<sup>121</sup> *Hall*, 134 S.Ct. at 1999-2000 (quoting *Coker v. Ga.*, 433 U.S. 584, 597 (1977) (plurality opinion)).

<sup>122</sup> *Hall*, 134 S.Ct. at 2000 (citing *Roper*, 543 U.S. at 564).