DEATH PENALTY AND MENTAL ILLNESS

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I. INTRODUCTION

Currently, individuals with severe mental illnesses categorically are eligible to receive the death penalty, however, evidence of severe mental illness can be presented during the sentencing phase as mitigating evidence. This paper will discuss mental illness and the criminal justice system and examine United States Supreme Court death

penalty jurisprudence as to categorical bans on death penalty eligibility of certain groups of individuals and whether individuals with severe mental illnesses should categorically be ineligible for the death penalty. The United States Supreme Court has previously found two categories of individuals ineligible for the death penalty.[1] This paper will also examine the existing categorical bans on death penalty eligibility of mentally retarded individuals and juveniles and whether the rationale of those bans should extend to include a categorical ban on death penalty eligibility for individuals with severe mental illness. This paper will further discuss arguments against making individuals with severe mental illness ineligible for the death penalty.

a. *What is Mental Illness?*

Mental illness refers to a wide range of conditions and disabilities.[2] The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) Axis I includes severe clinical disorders such as schizophrenia and other psychotic disorders.[3] Schizophrenia is defined as "a disorder that lasts for at least six months and includes at least one month of active-phase symptoms (i.e. two [or more] of the following: delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, negative symptoms)."[4] A psychotic disorder is defined as a mental disorder that involves the onset

[1] *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).
[2] Lyn Entzeroth, *The Challenge and Dilemma of Charting A Course to Constitutionally Protect the Severely Mental Ill Capital Defendant From the Death Penalty*, 44 Akron L. Rev. 529, 533 (2011).
[3] *See supra* note 2.
[4] *See supra* note 2 (quoting Am. Psychiatric Ass'n. Diagnostic & Statistical Manual of Mental Disorders (4th ed. 2000) at 298) [hereinafter "DSM-IV"].

of "delusions, hallucinations, disorganized speech (e.g., frequent derailment or incoherence), or greatly disorganized or catatonic behavior."[5]

b. Mental Illness in the Criminal Justice System

In 2006, the United States Department of Justice, Bureau of Justice Statistics released a special report discussing mental health problems in prisons and jails.[6] The report indicates that in mid-2005, more than half of all inmates had mental health problems, including 705,600 (56%) in State prisons, 78,800 (45%) in federal prisons and 479,900 (64%) in local jails.[7] The special report further indicates that 43% of state prisoners and 54% of jail inmates reported symptoms consistent with mania, 23% of state prisoners and 30% of jail inmates reported symptoms consistent with major depression and 15% of state prisoners and 24% of jail inmates reported symptoms consistent with a psychotic disorder.[8]

Prior to 2006, the Department of Justice released another report which indicated that in 1998 there were 283,800 inmates suffering from a mental illness, which represents 16% of state prisoners and jail inmates and 7% of federal prisoners.[9] Based upon the reports released by the Department of Justice, there has been a significant increase in the number of inmates that suffer from mental illnesses. Further, on any given day, there are

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[5] *See supra* note 2, p. 533-534 (quoting DSM-IV).
[6] Doris J. James & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, September 2006, revised December, 2006, http://www.bjs.gov/content/pub/pdf/mhppji.pdf.
[7] *See supra* note 6.
[8] *See supra* note 6.
[9] Martin Sabelli & Stacey Leyton, *Train Wreck and Freeway Crashes: An Argument For Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000) (citing Michael J. Sniffen, *Many Mentally Ill Americans Jailed*, AP Online, Jul. 12, 1999).

more than four times as many inmates in jails and prisons who suffer from schizophrenia, bipolar disorder and major depression than there are in hospitals.[10]

c. Mental Illness and the Death Penalty

According to Mental Health America, approximately five to ten percent of inmates on death row suffer from a severe mental illness.[11] As of April 1, 2013 there were 3,108 inmates on death row, which means between one hundred fifty five and three hundred and eleven inmates on death row suffer from a severe mental illness.[12] While the U.S. Supreme Court has not categorically banned the imposition of the death penalty on individuals with severe mental illness, the U.S. Supreme Court has banned the execution of individuals who are found to be incompetent at the time of execution.[13] The following paragraphs will discuss and analyze *Ford v. Wainwright* and *Panetti v. Quarterman* as well as *Atkins v. Virginia* and *Roper v. Simmons* to determine whether or not the holdings of those cases should extend to individuals with severe mental illnesses and whether individuals with severe mental illness should categorically be ineligible for the death penalty.

[10] Ronald S. Honberg, *The Death Penalty and Mental Illness: The Injustice of Imposing Death Sentences on People With Severe Mental Illnesses*, 54 Cath. U.L. Rev. 1153 (2005).
[11] Mental Health America, *Death Penalty and People with Mental Illness* (*available at* www.mentalhealthamerica.net/go/position-statement/54) (formerly known as National Mental Health Association).
[12] *Death Row Inmates By State* (April 1, 2013), http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year.
[13] *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 399 (1986).

II. CATEGORICAL EXCLUSION OF MENTALLY RETARDED INDIVIDUALS FROM THE DEATH PENALTY

In *Atkins v. Virginia* the United States Supreme Court held that executions of mentally retarded violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.[14] Atkins was convicted by a jury of abduction, armed robbery, and capital murder for abducting an individual, robbing him of the money on his person, driving him to an automatic teller machine to withdraw additional cash and taking him to an isolated location and shooting him eight times and killing him.[15] During the penalty phase, the defendant offered testimony of a forensic psychologist who had evaluated Atkins during the trial phase and concluded that Atkins was "mildly mentally retarded."[16] The psychologist based his opinions on interviews with people who knew the defendant, review of his school and court records and administration of a standard intelligence test which indicated the defendant had an IQ of 59.[17] The State presented rebuttal testimony from another doctor who testified that in his opinion, the defendant was not mentally retarded but rather of at least average intelligence and diagnosed the defendant with having antisocial personality disorder.[18] Atkins was ultimately sentenced to death and appealed his death sentence on the grounds that it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment because he was mentally retarded.[19]

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[14] 536 U.S.304 (2002).
[15] *Id*. at 307.
[16] *Id*. at 308.
[17] *Id*. at 308-309.
[18] *Id*. at 309.
[19] *Id*. at 309-310.

a. National Consensus Against the Death Penalty for Mentally Retarded Individuals

The Supreme Court held that the Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[20] The Supreme Court looked to the judgment of the State legislatures as to death eligibility of individuals who were mentally retarded to determine whether there was a national consensus against the imposition of the death penalty on individuals who were mentally retarded.[21] The court found that when *Atkins* was decided in 2002, there were eighteen states that had laws on their books that prevented the imposition of the death penalty on individuals who were mentally retarded along with twelve states that completely rejected the death penalty, as opposed to only two states with those laws on their books in 1989 when the issue of mental retardation and the death penalty was previously before the court.[22] The court held that it wasn't the number of states that currently banned the imposition of the death penalty on individuals who were mentally retarded, but rather the consistency in the direction of change from 1989 to 2002.[23] The court left it up to the States to determine what constitutes mental retardation, but cited to the clinical definition of mental retardation as requiring sub-average intellectual functioning, significant limitations in adaptive skills, such as communication, self-care and self-direction and manifestation of such symptoms before the age of 18.[24]

[20] *Id*. at 311-213 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)).
[21] *Id*. at 312-313.
[22] *Id*. at 314-315.
[23] *Id*. at 315.
[24] *Id*. at 318.

b. *Lack of Furtherance of Deterrence or Retribution*

The Supreme Court further went on to analyze whether individuals who were mentally retarded had the requisite culpability to be considered the worst of the worst and therefore eligible for the death penalty.[25] The court held that individuals who are mentally retarded have diminished capacities, which diminished their personal culpability.[26] This diminished culpability brings into question whether the justifications of the death penalty are further with the execution of mentally retarded individuals.[27] The court held in *Gregg v. Georgia* that retribution and deterrence are the social purposes served by the death penalty.[28] The court in *Atkins* applied the standard established in *Enmund v. Florida* that in order for the death penalty to be constitutional as to mentally retarded individuals, the imposition of the death penalty had to "measurably contribute to one or both of [the two purposes of the death penalty]" and if it was "nothing more than the purposeless and needless imposition of pain and suffering," then it was constitutional.[29] In terms of retribution, the court held that if the culpability of an average murderer is insufficient to justify the death penalty, the mentally retarded defendant with an even lesser culpability surely does not further the goal of retribution.[30]

With respect to deterrence, the imposition of the death penalty can only serve as a deterrent when a murder is premeditated and deliberate.[31] Mentally retarded individuals

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[25] *Id*. at 317.
[26] *Id*. at 318.
[27] *Id*. at 318-319.
[28] 428 U.S. 153, 183 (1976).
[29] *Atkins*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).
[30] *Id*.
[31] *Id*.

have a lesser culpability, which makes it less likely that they will understand the possibly of death or that they will be able to control their actions based upon that information.[32]

In addition to imposition of the death penalty on mentally retarded individuals, who are less culpable than even the average defendant, not furthering the goals of retribution and deterrence, there is a risk that the evidence of a defendant's mental retardation will be a double-edged sword.[33] While evidence of mental retardation may show the jury that the defendant was less culpable, a mentally retarded defendant may be unable to give meaningful assistance during the penalty phase and the evidence of mental retardation may be used against the defendant to find the likelihood of future dangerousness.[34]

Ultimately the court holds that there was a national consensus against the imposition of the death penalty on mentally retarded individuals and that the goals of retribution and deterrence were not furthered by execution of mentally retarded individuals and therefore the imposition of the death penalty on mentally retarded individuals violates the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.[35]

III. CATEGORICAL EXCLUSION OF JUVENILES FROM THE DEATH PENALTY

In 2005, the United States Supreme Court held that individuals who commit murders before the age of eighteen are ineligible for the death penalty.[36] In *Simmons*, the defendant, who was 17 and a junior in high school, along with two other friends at

[32] *Id*. at 320.
[33] *Id*. at 320-321.
[34] *Id*.
[35] *Id*. at 321.
[36] *Roper v. Simmons*, 543 U.S. 551 (2005).

approximately 2:00 a.m. entered the home of the victim.[37] The three boys duct taped the victims eyes, mouth and wrists, put her in her own vehicle and drove her to a state park.[38] Once at the park, they covered her head with a towel, tied her hands and feet together with electrical wire, wrapped her whole face with duct tape and threw her from a bridge, causing her to drown in the water.[39] The defendant was charged as an adult and convicted with burglary, kidnapping, stealing and murder in the first degree.[40] During the penalty phase, both the state and defense counsel addressed the age of the defendant.[41] The jury recommended a death sentence and the trial judge accepted that recommendation and sentenced the defendant to death.[42] The defendant's case ultimately made it before the United States Supreme Court on the issue of whether the court's ruling in *Atkins* established that the constitution prohibits the execution of juveniles who are under the age of eighteen at the time of the commission of the crime.[43] The court ultimately held in favor of the defendant and found that execution of persons who were under the age of 18 at the time the offense was committed violated the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.[44]

a. National Consensus Against the Death Penalty for Juveniles

To begin their analysis, the court followed the analysis of *Atkins* and looked to "the evolving standards of decency that mark the progress of a maturing society" to determine if the punishment of death for juveniles is so disproportionate that it is cruel

[37] *Id*. at 556.
[38] *Id*.
[39] *Id*. at 556-557.
[40] *Id*. at 557.
[41] *Id*. at 558.
[42] *Id*.
[43] *Id*. at 559.
[44] *Id*. at 578.

and unusual.[45] The court determined that there was a national consensus against the death penalty for juveniles that was similar to that found in *Atkins*.[46] Like in Atkins, there are thirty states total that ban execution of juveniles, including twelve states that have completely rejected the death penalty and eighteen states that have statutorily or judicially banned executed of juveniles.[47] Further, in the states that have not banned the death penalty for juveniles, the practice is uncommon.[48] Within the ten years prior to *Simmons*, only Oklahoma, Texas and Virginia have executed individuals who were juveniles at the time of the commission of the crime.[49] The court recognized that there was less of a significant change in *Simmons* as in *Atkins* but found that the consistency of the change was consistent with the change in *Atkins*.[50] Further, the ban on juvenile executions began prior to the ban on executions of mentally retarded and therefore the change took place over a longer period of time.[51] The consistency in the trend toward banning the death penalty for individuals under the age of eighteen at the time of commission of the crime provides sufficient evidence that society views juveniles "as categorically less culpable than the average criminal."[52]

b. Lack of Furtherance of Deterrence or Retribution

The death penalty can only be imposed on "offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the

[45] *Id*. at 561.
[46] *Id*. at 564.
[47] *Id*.
[48] *Id*. at 564-565.
[49] *Id*. at 565.
[50] *Id*. at 566.
[51] *Id*. at 566-567.
[52] *Id*. at 568 (quoting *Atkins*, 536 U.S at 316).

most deserving of execution.'"[53] Because of the diminished culpability of juveniles, and mentally retarded, the death penalty cannot be imposed, no matter how heinous the crime.[54] There are three differences between juveniles and adults that demonstrate that juveniles do not fit in the category with the worst of the worst.[55] First, juveniles lack maturity and the sense of responsibility found in adults, which often results in impetuous and ill-considered actions and decision."[56] Second, juveniles are more vulnerable to negative influences and peer pressure.[57] Finally, the character of juveniles are not as well formed as that of adults and their personality traits are less fixed.[58] Based upon those differences, the conduct of juveniles cannot be considered as morally reprehensible as that of an adult.[59] The reasoning that justified the holding in *Thompson v. Oklahoma* applies to all juveniles under the age of 18.[60]

Once it is determined that juveniles have a diminished capacity, it is clear that the justifications for the death penalty apply with less force than adults.[61] Retribution is not furthered if the death penalty is imposed on one with diminished capacity.[62] In *Atkins*, the Supreme held that if the culpability of the average murderer is insufficient to warrant imposition of the death penalty, then the diminished capacity of the mentally retarded

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[53] *Id*. (quoting *Atkins*, 536 U.S. at 319).
[54] *Id*.
[55] *Id*. at 569.
[56] *Id*. (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).
[57] *Id*. (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).
[58] *Id*. at 570.
[59] *Id*. (citing *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (Eighth Amendment prohibits the imposition of the death penalty on juveniles under the age of 16)).
[60] *Id*. at 570-571 (citing *Thompson*, 487 U.S. at 833-838)).
[61] *Id*. at 571.
[62] *Id*.

does not merit that form of retribution, and the same is true of juveniles.[63] As far as deterrence, it is unclear whether the death penalty has a significant or measureable deterrent effect on juveniles and therefore there is concern that juveniles will be less susceptible to deterrence.[64] Ultimately, the court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on defendants who were under the age of 18 at the time of the commission of their crimes.[65]

IV. UNCONSTITUTIONALITY OF EXECUTING DEFENDANTS SUFFERING FROM SEVERE MENTAL ILLNESS

Two cases have been decided by the United States Supreme Court addressing the issue of executing defendants who are insane at the time of execution.[66] *Ford v. Wainwright* holds that it violates the Eighth Amendment to execute a defendant who was convicted and sentenced to death but is insane at the time of execution.[67] *Panetti v. Quarterman* holds that an inmate can be executed if at the time of their execution they have a rational understanding of the reason for and meaning of the punishment of death, not just a mere awareness.[68]

In *Ford*, the defendant was convicted of murder and sentenced to death and there was no suggestion that the defendant was incompetent at the time the murder was committed, during trial or during sentencing.[69] However, approximately eight years after the defendant was sentenced to death, he began to have occasional peculiar ideas or

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[63] *Id*. (citing *Atkins*, 536 U.S. at 319)).
[64] *Id*.
[65] *Id*. at 578.
[66] *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 399 (1986).
[67] *Ford*, 477 U.S. 399.
[68] *Panetti*, 551 U.S. 930.
[69] *Ford*, 477 U.S. at 401.

confused perceptions, which became more serious over time, including an obsession with the Ku Klux Klan and delusions of being tortured in the prison and his family members being held hostage.[70] Approximately one year after the defendant's behavior began changing a psychiatrist determined that the defendant was suffering from a mental disease that resembled Paranoid Schizophrenia with Suicide Potential, which was severe enough to affect the defendant's ability to assist in the defense of his life.[71] The defendant then refused to see his psychiatrist because he thought he was part of the conspiracy so the defendant's attorney had another doctor meet with the defendant.[72] During the interview, the defendant made statements such as "I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner will be executed," and "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over."[73] Following the interview, the doctor determined that the defendant had no understanding of why he was being executed, made no connection between the crime he committed and the death penalty and sincerely believed that he would not be executed because he owned the prisons and controlled the governor through mind waves.[74] Following the appointment of a three-psychiatrist panel to determine the defendant's competency to be executed, the governor of Florida signed the defendant's execution warrant and the defendant appealed arguing that the Eighth Amendment places a substantive restriction the State's power to take the

[70] *Id*. at 402.
[71] *Id*. at 402-403.
[72] *Id*. at 403.
[73] *Id*.
[74] *Id*.

life of an insane inmate.[75] The court discusses the history of the common law rule against executing defendants who are insane at the time of execution and the fact that at the time of the decision no State in the Union permitted the execution of the insane and ultimately affirms the common law rule against execution of the insane and finds execution of the insane in violation of the Eighth Amendment.[76]

In *Panetti*, the defendant was charged with capital murder for killing his wife's mother and father in front of his wife and daughter.[77] The court ordered a psychiatric evaluation, which indicated the defendant suffered from a fragmented personality, delusions and hallucinations and that the defendant had been prescribed medication that would have even been difficult for someone not suffering from psychosis to tolerate.[78] However, the defendant was found to be competent to stand trial and competent to waive his right to counsel.[79] The petitioner exhibited strange behavior throughout trial in and out of the jury's presence and evidence was presented that the defendant had stopped taking his medication a few months before trial, which is said to exacerbate the underlying mental dysfunction.[80] The defendant was found guilty and sentenced to death.

The defendant appealed his death sentence and his case ultimately ended up in front of the United States Supreme Court on the issue of whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives them of the mental capacity to understand that they are being executed as punishment for a crime.[81] The

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[75] *Id*.
[76] *Id*. at 405-418.
[77] *Panetti*, 551 U.S. at 935-936.
[78] *Id*. at 936.
[79] *Id*.
[80] *Id*. at 936-937.
[81] *Id*. at 955.

Supreme Court rejected the standard followed by the Court of Appeals as being too restrictive to protect the defendant's Eighth Amendment rights.[82] The standard stated that the competency of the defendant is determined by whether they are aware that they are going to be executed and why they are going to be executed and foreclosed a defendant from showing that his mental illness obstructs a rational understanding of the reason for his execution.[83] The court recognizes that *Ford* does not set forth a standard of competency, but concludes that *Ford* does not indicate that a defendant's delusions are irrelevant to comprehension or awareness if the delusions so impair the defendant's concept of reality that they cannot reach a rational understanding of the reason for their execution.[84] "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."[85] Ultimately, the Supreme Court finds the record was not developed enough as to how the defendant's mental illness affected the competency analysis and remanded the case for further proceedings.[86]

V. ARGUMENTS IN FAVOR OF MAKING INDIVIDUALS WITH SEVERE MENTAL ILLNESS INELIGIBLE FOR THE DEATH PENALTY

The Supreme Court in *Atkins* and *Simmons* held that individuals who suffer from mental retardation and juveniles are categorically ineligible for the death penalty.[87] The Supreme Court in each case analyzed whether there was a national consensus in favor of the categorical ban and whether the justifications for the death penalty, including

[82] *Id*. at 956-957.
[83] *Id*. at 956.
[84] *Id*. at 958.
[85] *Id*.
[86] *Id*. at 961-962.
[87] *Simmons*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304 (2002).

deterrence and retribution, were furthered by death eligibility of individuals with mental retardation and individuals under the age of 18 at the time of commission of the crime.[88]

a. *Social Opposition to Death Eligibility of Individuals With Severe Mental Illness*

While no State, either by statute or common law, has categorically excluded individuals with a severe mental illness from the death penalty, there is much support for the categorical exclusion.[89] In 2004, the American Bar Association established a task force on mental disability and the death penalty.[90] The task force proposed three recommendations to the ABA regarding whether individuals with mental disabilities should be eligible for the death penalty.[91] The first two recommendations request a prohibition on execution of offenders whose mental illness rendered them less culpable at the time of the commission of the crime and the third recommendation requests a prohibition on execution of offenders whose mental illness renders them incompetent to pursue appeals or to be executed.[92] The first recommendation reads as follows:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use

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[88] *Simmons*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304 (2002).
[89] *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668 (2006).
[90] *Id*.
[91] *Id*.
[92] Christopher Slobogin, *Symposium: The Death Penalty and Mental Illness: Mental Disorder as an Exemption From the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 Cath. U.L. Rev. 1133, 1133-1134 (2005).

> of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.[93]

There have been a number of cases where a defendant's mental illness has affected an appellate court's decision to overturn the defendant's death sentence.[94] In *Cooper v. State*, the defendant was charged with robbing a pawnshop owner and shooting to death.[95] During the penalty phase the defendant presented testimony from two mental health experts.[96] One doctor testified that the defendant was brain-damaged, had a history of seizures, suffered from frontal lobe dysfunction, and was under the influence of extreme mental or emotional disturbance.[97] The other doctor testified that the defendant scored high on tests for paranoia and schizophrenia and was borderline retarded.[98] The jury recommended the death penalty and the court imposed a sentence of death.[99] Ultimately, the court overturned the defendant's death sentence and found it was disproportionate compared to other capital cases, because the mitigating factors outweighed the aggravating factors.[100] The court found that the defendant's abusive childhood, brain damage, mental retardation, mental illness, being eighteen at the time the murder was committed and having no criminal history made his crime one of the most mitigated they had reviewed.[101]

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[93] *See supra* note 92, at 1139 (quoting *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668 (2006).
[94] See *Cooper v. State*, 739 So.2d 82 (Fla. 1999); *Haynes v. State*, 739 P.2d 497 (Nev. 1987); *State v. Thompson*, 2007 Tenn. Crim. App. LEXIS 328 (April 25, 2007).
[95] *Cooper*, 739 So. 2d at 83.
[96] *Id*. at 83-84.
[97] *Id*.
[98] *Id*.
[99] *Id*. at 84.
[100] *Id*. at 85-86.
[101] *Id*.

In *Haynes v. State*, the defendant walked up to Robert Ross, who was washing his car, and hit him on the head twice with an iron pipe, because the defendant believed Ross had been involved in taunting the defendant for masturbating behind some bushes.[102] The defendant exhibited very strange behavior both before he committed the murder and after he committed the murder, including multiple arrests for odd behavior and making satanic statements while in the presence of police following the murder.[103] The defendant was examined by a psychiatrist after the murder and was diagnosed with having a chronic psychotic illness, schizophrenic disorder.[104] The defendant had a history of admissions in mental hospitals in multiple states within three years of the murder.[105] The jury found the defendant guilty and imposed the death penalty.[106] The court found that the fact that the defendant was a homeless wanderer who had been in and out of mental hospitals for the past 4-5 years outweighed the single aggravating circumstance.[107] The court overturned the defendant's death sentence on the grounds that it was disproportionate to the penalty imposed in similar cases, considering both the defendant and the crime.[108]

In *State v. Thompson*, the defendant was convicted of first degree murder, aggravated assault and arson and sentenced to death.[109] His conviction was overturned and remanded for a new trial.[110] Prior to the second trial, the defendant was found

[102] *Haynes*, 739 P.2d at 498-499.
[103] *Id*.
[104] *Id*. at 499-500.
[105] *Id*. at 500.
[106] *Id*.
[107] *Id*. at 503-504
[108] *Id*.
[109] *Thompson*, 2007 Tenn. Crim. App. 328, at *3.
[110] *Id*.

incompetent to stand trial.[111] However, within six months the defendant was found to have become competent.[112] He was again convicted of first degree murder, aggravated assault and arson and sentenced to death.[113] Throughout the life of the defendant he had been diagnosed with character disorder, gross emotional immaturity, depression, sociopathic, passive aggressive personality, schizophrenia, unspecified mental retardation and anti-social personality disorder.[114] The appellate court found that the evidence presented at trial did not support the jury's finding "of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating…circumstances so found."[115] The court found that the defendant had a very extensive history of mental illness which dated back to his childhood, which resulted in his capacity "to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law" being substantially impaired.[116]

b. *Death Penalty Eligibility of Individuals With Severe Mental Illness Does Not Further the Goals of Deterrence or Retribution*

It is clearly established that the death penalty can only be imposed on "offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[117] The Supreme Court has categorically determined that individuals with mental retardation and individuals under the age of eighteen at the time of the commission of the crime have a diminished capacity

[111] *Id*. at 4.
[112] *Id*.
[113] *Id*.
[114] *Id*. at 6-11.
[115] *Id*. at 94-100.
[116] *Id*.
[117] *Simmons*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319).

no matter how heinous the murder was that they committed.[118] While age of the defendant at the time of the commission of the crime can be easily determined, whether or not the defendant suffered from a severe mental illness at the time of the commission of the crime is much more difficult.

The same rationale the Supreme Court used to conclude individuals with mental retardation and juveniles were less culpable or deterrable and therefore ineligible for the death penalty applies to individuals with severe mental illness whose level of culpability and deterrability is affected by their mental illness.[119] One difference between severe mental illness and mental retardation is the difficulty in accurately diagnosing a severe mental illness.[120] However, there are difficulties in properly diagnosing an individual with mental retardation and it is not impossible to properly diagnose an individual with a severe mental illness and in fact assessments are carried out regularly in the criminal justice system with regards to the insanity defense.[121]

VI. ARGUMENTS AGAINST MAKING INDIVIDUALS WITH SEVERE MENTAL ILLNESS INELIGIBLE FOR THE DEATH PENALTY

As previously stated, the Supreme Court in *Atkins* and *Simmons* analyzed whether there was a national consensus in favor of categorically banning individuals with mental retardation and whether the justifications of deterrence and retribution were furthered by imposition of the death penalty on individuals with severe mental illness.[122]

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[118] *Id*.
[119] *See supra* note 92, at 1140
[120] *See supra* note 92, at 1148
[121] *See supra* note 92, at 1148-1149
[122] *Simmons*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304 (2002).

a. *Differences Between Mental Illnesses and Mental Retardation and Age*

As stated previously, it is very easy to determine the age of an individual at the time of the commission of the crime. However, it is more difficult to properly determine whether an individual suffered from mental retardation at the time of the commission of the crime and even more difficult to determine whether an individual suffered from a severe mental illness at the time of the commission of the crime. One very important distinction between severe mental illness and mental retardation is the consistency of impairment.[123] Individuals with mental retardation are constantly impaired by their condition.[124] However, individuals that suffer from severe mental illnesses may have good days and bad days and may from time to time experience "relative lucidity and lack of impairment."[125] Because of this very important difference, it is difficult to say that an individual who suffers from a severe mental illness can never, as a matter of law, be as culpable as a normal murderer.[126]

Another very important distinction between severe mental illness and mental retardation is the tests used to diagnose either condition. There has been established a three-part test used to determine whether an individual suffers from mental retardation. This test includes some subjective elements which leave room for error in diagnoses. In the area of severe mental illness there are many tests are used to determine a diagnosis but there is no standard test that is generally accepted by all. In fact, in each case where insanity is an issue, there can be conflicting testimony from the State and the defendant.

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[123] Mark E. Coon, *Student Work: Drawing the Line at Atkins and Roper: The Case Against Additional Categorical Exemptions From Capital Punishment for Offenders With Conditions Affecting Brain Function*, 115 W. Va. L. Rev. 1221, 1234 (2013).
[124] *See supra* note 123.
[125] *See supra* note 123.
[126] *See supra* note 123, at 1234-35.

It is argued that with regard to capital sentencing, there must be a substantial measure of individualization, especially when discussing severe mental illness.[127] Because of the advances in science, it is easier to determine the true culpability of offenders who suffer from severe mental illness.[128] However the culpability determination should be made on a case-by-case basis and not categorically.[129]

b. *No National Consensus to Categorically Exclude Individuals With Severe Mental Illness From the Death Penalty*

The largest argument against a categorical death penalty exclusion for individuals with severe mental illness is the fact that not one single state has put in place such a categorical ban, either by statute or by common law. It is clear from *Atkins* and *Simmons* that such a national consensus in favor of the categorical ban is required in order for the Supreme Court to find as a matter of law, that individuals with severe mental illness are less culpable than the average murderer and therefore not eligible for the death penalty regardless of the nature of the crime.[130]

In further support of the argument that there is no national consensus in favor of a categorical death penalty exclusion for individuals with severe mental illness, there have been some defendants who suffer from a severe mental illness and have had their death sentences upheld on appeal.[131] In *Commonwealth v. Baumhammers*, the defendant shot and killed five individuals, shot and injured one individual, pointed a loaded gun at

[127] *See supra* note 123, at 1224.
[128] *See supra* note 123, at 1224.
[129] *See supra* note 123, at 1224.
[130] *Simmons*, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304 (2002).
[131] *Rodgers v. State*, 3 So. 3d 1127 (Fla. 2009); *State v. Johnson*, 207 S.W.3d 24 (Mo. 2006); *Commonwealth v. Baumhammers*, 599 Pa. 1 (2008), *cert. denied*, 558 U.S. 821(2009).

another individual, set fire to a house and vandalized two synagogues.[132] The defendant was initially found to be mentally incompetent, but within five months the court found he became competent and a jury ultimately convicted him and sentenced him to death.[133] On appeal, the defendant argued that the imposition of the death penalty on an individual who is mentally ill violates the Eighth Amendment and argues that *Atkins* should be extended to individuals suffering from severe mental illness.[134] The court rejects the defendant's argument in this case as they did in *Commonwealth v. Faulkner*, wherein the court held that a finding of substantial impairment does not bar the imposition of the death penalty because the legislature failed to provide that a finding of substantial impairment could preclude a death sentence.[135]

In *State v. Johnson*, the defendant was charged with attempting to rape a six-year-old girl and killing her by throwing bricks and rocks at her head.[136] The defendant argued at trial that he suffered from schizophrenia and therefore could not have deliberating killed the victim.[137] The jury found him guilty of all offenses and sentenced him to death for the murder.[138] The defendant argued on appeal that his death sentence violated the Eighth Amendment and cited to *Atkins* arguing that his severe mental illness impaired his ability to reason and control his conduct, similar to an individual who suffers from mental retardation. The court cites to multiple cases in which a death

[132] *Baumhammers*, 599 Pa. at 13-14.
[133] *Id*. at 14.
[134] *Id*. at 61.
[135] *Id*. at 61-63.
[136] *Johnson*, 207 S.W.3d at 31.
[137] *Id*. at 34.
[138] *Id*.

sentence was upheld where the defendant suffered from a severe mental illness.[139] The court ultimately found the defendant's death sentence to be proportionate and upheld it.[140]

In *Rodgers v. State*, the defendant pled guilty to first degree murder, conspiracy to commit murder, giving alcohol to a minor and abusing a human corpse.[141] Following the penalty phase, the jury recommended death and the trial court followed then recommendation.[142] The defendant's death sentence was vacated and his case was remanded for a new penalty phase.[143] During the second penalty phase, the defendant waived his right to a jury trial and told the court that if he could sign a paper, get a death sentence and go back to death row he would do it.[144] The defendant was sentenced to death for a second time and on appeal he argued that the trial court and his trial counsel erred in not requesting a competency hearing following the defendant's waiver to a jury recommendation.[145] He based his argument upon the trial court's knowledge of the defendant's significant history of mental illness.[146] The court rejected the defendant's argument and ultimately upheld his death sentence.

VII. CONCLUSION

As previously stated, the Supreme Court analysis of a categorical ban on death penalty eligibility includes an analysis of whether there is a national consensus in favor of the ban and whether or not the imposition of the death penalty furthers the goals of

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[139] *Id*. at 50-51.
[140] *Id*.
[141] *Rodgers*, 3 So. 3d 1127, 1129 (2009).
[142] *Id*.
[143] *Id*.
[144] *Id*. at 1130.
[145] *Id*. at 1131-1132.
[146] *Id*. at 1132.

retribution and deterrence. There currently is no national consensus like that which was found by the Supreme Court in *Atkins* and *Simmons* as to death eligibility of individuals with severe mental illnesses. However, social opposition of death eligibility of those individuals is growing and therefore it is only a matter of time before the national consensus moves in the direction towards opposition of death eligibility of individuals with severe mental illness. As has been demonstrated above, the imposition of the death penalty on individuals with severe mental illnesses does not further the goals of retribution or deterrence.

In conclusion, the issue of mental illness in the criminal justice system is growing and must be addressed. It is only a matter of time until the national consensus will favor a ban on imposition of the death penalty on individuals with severe mental illness and only a matter of time before the Supreme Court will accept that national consensus and expand the holdings of *Atkins* and *Simmons* to categorically ban imposition of the death penalty on individuals with severe mental illness.