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UNITED STATES OF AMERICA

The execution of mentally ill offenders

Summary Report¹

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

Mother of 19-year-old murder victim,
California, November 1960

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

Sister of death row inmate, June 2000

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

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



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

¹ This is a summary version of a 180-page report entitled: USA: 'People are seeing you do this': The execution of mentally ill offenders, AI Index: AMR 51/003/2006, January 2006, <http://web.amnesty.org/library/Index/ENGAMR510032006>. Please see full report for full details, including numerous case studies and sources.

A gap in the ‘evolving standards of decency’

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

Indiana Supreme Court Justice, September 2002

By end December 2005, more than 1,000 men and women had been put to death in the United States of America since executions resumed there in 1977. Dozens of these people had histories of serious mental impairment, either from before the crimes for which they were sentenced to death, or at the time of their execution. Some had mental retardation², others suffered from mental illness, and some were diagnosed with both. For some, the diagnosis was of mental disorders caused by appalling childhood abuse, prison violence, or their experiences as soldiers sent into combat by their government. For others, mental illness appears to have been inherited. For some of those executed, years on death row had led to mental health problems or exacerbated existing ones. Mentally ill inmates are among the more than 100 people since 1977 to have dropped their appeals and “consented” to their own execution, a death wish made possible by a state all too willing to see freedom of choice for such individuals carried through to its lethal conclusion.

In some cases, there were serious doubts about the defendant’s competence to stand trial – whether they genuinely understood the nature and seriousness of the proceedings against them or had the capacity to assist in their defence. Some had been restored to competency in psychiatric hospitals after their crimes, including with anti-psychotic medication. Doubts existed also in some cases about the defendants’ competence to plead guilty or to waive trial counsel and to represent themselves – indeed, some mentally ill defendants have demanded the death penalty as part of an apparent suicide bid. Some may even have committed murder in order to get a death sentence. In some cases, inadequate legal representation left juries unaware of the existence or extent of the mental impairment of the person they were being asked to sentence to death. In other cases, protecting their mentally ill clients from the death penalty proved an insurmountable challenge for under-resourced defence lawyers. Perhaps the defendant was medicated into a haze of non-cooperation, and to the jury, perceived remorselessness – a highly aggravating factor in the life or death decisions of capital jurors. Or perhaps the defendant’s delusional illness rendered them unwilling to divulge information to a lawyer or doctor believed to be part of a conspiracy against them.

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

² This report uses the term mental retardation, rather than learning disability, as it is the term used in the USA.

In an Appendix to this report, Amnesty International lists 100 of the men and women executed in the USA since the resumption of judicial killing there in 1977. Each of these individuals had suffered from some form of serious mental illness or mental impairment other than mental retardation. They represent one in 10 of the USA's judicial death toll since that date. The list is illustrative only. Many others from among the remaining over 900 executed prisoners have raised mental health issues, either at trial or on appeal. However, it is not possible to know how many people who had serious mental impairments are on death row or have been executed. Defence lawyers may not have recognized that their clients had mental problems. Many inmates have not had thorough mental health examination because of lack of funds to allow such assessments.

Over the years since 1977, the Supreme Court has provided some constitutional protections for mentally impaired people facing the death penalty, although these protections have either come only recently, or have been somewhat limited in effect. In 1986, in *Ford v Wainwright*, the Supreme Court ruled that the execution of the insane violates the US Constitution's Eighth Amendment ban on "cruel and unusual punishments". The *Ford* majority noted that the Eighth Amendment's prohibitions "are not limited to those practices condemned by the common law in 1789", but also recognize the "evolving standards of decency that mark the progress of a maturing society". It continued: "In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects".

However, the *Ford* majority neither defined competence for execution (although Justice Powell suggested that the test should be whether the prisoner is aware of his or her impending execution and the reason for it), nor did a majority mandate specific procedures that must be followed by the individual states to determine whether an inmate is legally insane. The result has been different standards in different states, judicial uncertainty, and minimal protection for seriously mentally ill inmates. Indeed, the *Ford* ruling is, at best, a minimal standard, and at worst a fig leaf for excusing one of the most indecent aspects of this cruel, inhuman and degrading punishment. In any event, the *Ford* decision never pretended to exempt those whose serious mental illness was found to fall short of a narrow legal definition of insanity. Two decades on, the time has surely come for judicial construction of a broader prohibition and greater protections for the seriously mentally ill in the capital justice process.

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

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

On 1 March 2005, the US Supreme Court removed another category of defendant from the reach of the death penalty, namely children. In *Roper v. Simmons*, a majority of five Justices to four brought the USA into compliance with “the overwhelming weight of international opinion against the juvenile death penalty”. The Court “affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual”. In finding that the death penalty against offenders who were under 18 years old at the time of the crime was indeed excessive, the *Roper* majority quoted the *Atkins* decision: “Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”.

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

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

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

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

“From a biopsychosocial perspective, primary mental retardation and significant Axis 1 disorders have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens’ words, ‘do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability’.”³

Only a tiny percentage of murders in the USA result in execution. The death penalty is a punishment in the United States that is supposed to be reserved for the “worst of the worst” crimes and offenders. In a decision in 1980, for example, the US Supreme Court overturned a death sentence because the defendant’s murders had not shown “a consciousness materially more ‘depraved’ than that of any person guilty of murder”. The *Atkins* decision picked up on this and stated: “If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”

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

Some judges in the USA have already recognized this fundamental inconsistency. In July 2003, for example, Judge Robert Henry on the US Court of Appeals for the 10th Circuit noted the *Atkins* ruling, and concluded that the imposition of the death penalty against Robert Bryan, a mentally ill Oklahoma death row inmate, “contributes nothing” to the goals of retribution and deterrence. Although Judge Henry was joined by three other judges on the court, it was not enough to stop Robert Bryan going to his execution in June 2004. In similar vein in September 2002, Justice Robert Rucker of the Indiana Supreme Court dissented against the death sentence of Joseph Corcoran, an Indiana inmate suffering from mental illness including schizophrenia. Justice Rucker drew attention to the *Atkins* decision:

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

There are, of course, many judges in the USA who have not yet come to this view. For example, in upholding the death sentence against mentally ill inmate John Edward Weik on 3 September 2002, all five Justices on the South Carolina Supreme Court wrote:

³ Alan A. Stone, M.D., *Supreme Court decision raises ethical questions for psychiatry*. Psychiatric Times, Vol. XIX; Issue 9, September 2002. The DSM-IV (Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition) – published by the American Psychiatric Association – operates a five-axis classification system. Clinical disorders are listed under Axis 1.

“while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant, the imposition of such a sentence upon a mentally ill person is not disproportionate.” In November 2004, two federal judges upheld the death sentence of Indiana death row inmate Arthur Baird, noting that while the US Supreme Court had prohibited the execution of offenders with mental retardation in *Atkins*, “it has not yet ruled out the execution of persons who kill under an irresistible impulse” brought about by mental illness. The judges acknowledged that “as an original matter, we might think it inappropriate to sentence to death a man as seemingly insane as Baird at the time of the murders. But it is not our judgment to make”. Arthur Baird’s death sentence was commuted by Governor Mitch Daniels on 29 August 2005, just two days before Baird was due to be executed. While he based his decision on other factors involved in the case, Governor Daniels’ commutation order referred to court findings that Baird was suffering from mental illness at the time of the crime and noted: “it is difficult to find reasons not to agree” with the findings of an Indiana Supreme Court judge that Baird is “insane in the ordinary sense of the word.”

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

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

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

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

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

inevitably leads to inconsistencies and errors, inescapable flaws which are exacerbated by discrimination, prosecutorial misconduct and inadequate legal representation.

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

To oppose the death penalty is not to excuse or minimize the consequences of violent crime, whether it is committed by mentally impaired offenders or anyone else. If it were, then a majority of countries are currently apologists for violent crime, clearly a nonsensical suggestion. Instead, to end the death penalty is to recognize that it is a destructive, diversionary and divisive public policy that is not consistent with widely held values. It not only runs the risk of irrevocable error, it is also costly – to the public purse, as well as in social and psychological terms. It has not been shown to have a special deterrent effect. It tends to be applied discriminatorily on grounds of race and class. It denies the possibility of reconciliation and rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing explanations that could inform positive strategies. It prolongs the suffering of the murder victim’s family, and extends that suffering to the loved ones of the condemned prisoner. It diverts resources that could be better used to work against violent crime and assist those affected by it. It is a symptom of a culture of violence, not a solution to it. It is an affront to human dignity. It should be abolished.

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

Background information and scope of the main report

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

US Supreme Court Justice, 24 June 1991

Amnesty International’s report of which this is a summary does not attempt to answer the complex question of precisely which defendants should be exempt from the death penalty on the grounds of mental illness at the time of the crime. At the time of writing, US experts on mental health and law, led by a Task Force of the American Bar Association of Individual

Rights and Responsibilities (ABA-IRR), were continuing to discuss this matter with the aim of achieving common agreement amongst legal and mental health professionals and advocates as to precisely what the term “mental illness” should mean when seeking to extend the “Atkins” protection to people with mental illness.⁴ Obviously, mental illness can incorporate a wide range of conditions, some more serious than others. In addition, mental illness is not necessarily present all of the time in a sufferer, whether because of treatment or remission. Mental retardation on the other hand is a permanent developmental disability.

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

 **Schizophrenia.** Schizophrenia is a devastating brain disorder that affects approximately 2.2 million adults in the USA. Schizophrenia interferes with a person’s ability to think clearly, to distinguish reality from fantasy, to manage emotions, make decisions and relate to others. The first signs of schizophrenia typically emerge in the teenage years or early 20s. Most people with schizophrenia suffer chronically or episodically throughout their lives, and are often stigmatized by a lack of public understanding about the disease. A person with schizophrenia does not have a “split personality”, and almost all people with schizophrenia are not dangerous or violent towards others when they are receiving treatment. The World Health Organization has identified schizophrenia as one of the 10 most debilitating diseases affecting humans. Symptoms of schizophrenia include hallucinations – hearing or seeing voices or things that are not there – and delusions such as believing that people are reading their mind, controlling their thoughts or plotting against them.

 **Bipolar disorder.** Bipolar disorder, or manic depressive illness, is a serious brain disorder that causes extreme shifts in mood, energy, and functioning. It affects 2.3 million adults in the USA, and is characterized by episodes of mania and depression that can last from days to months. It can run in families. Bipolar disorder is a chronic and generally lifelong condition with recurring episodes that often begin in adolescence or early adulthood, and occasionally even in children. It generally requires lifelong treatment, and recovery between episodes is often poor.

 **Major depression.** Major depression is a serious medical illness affecting nearly 10 million people in the USA in any given year. It can significantly interfere with an individual’s thoughts, behaviour, mood, activity, and physical health. Left untreated, depression can lead to suicide.

⁴ Since this report was written in mid-2005, an overview and analysis of the proposals of the ABA’s Task Force has been published in the Catholic University Law Review, Volume 54, in 2005 (see also Appendix 2 of this report).

- ✚ **Schizoaffective disorder.** This illness is characterized by a combination of symptoms of schizophrenia and an affective (mood) disorder. Today, most clinicians and researchers agree that it is primarily a form of schizophrenia. For a diagnosis of schizoaffective disorder, a person must have primary symptoms of schizophrenia (such as delusions, hallucinations or disorganized speech or behaviour) as well as prolonged symptoms of major depression or a manic episode.
- ✚ **Dissociative disorders.** These are so called because they are marked by a dissociation from or interruption of a person's fundamental aspects of consciousness (such as one's identity and history). There are many forms, the best known of which is dissociative identity disorder (formerly known as multiple personality disorder) where an individual has one or more distinct identity or personality that surfaces on a recurring basis. All of the dissociative disorders are thought to stem from trauma experienced by the sufferer.
- ✚ **Post Traumatic Stress Disorder.** PTSD is an anxiety disorder that can occur after someone experiences a traumatic event that caused intense fear, helplessness, or horror. The traumatic events can include war, childhood abuse, rape, natural disasters, accidents and captivity. Symptoms include re-experiencing (e.g. nightmares, flashbacks, hallucinations); avoidance (e.g. lack of recall of the traumatic event, limited range of emotion, feelings of detachment from others, feelings of hopelessness about the future); and increased arousal (e.g. inability to sleep, irritability, outbursts of anger, inability to concentrate, watchfulness, jumpiness).
- ✚ **Brain damage.** Also of relevance to this report is the issue of serious brain damage that may be equivalent to mental retardation, but which would not be defined as such because it occurred not as a lifelong developmental disability, but as the result of an accident or other traumatic event. The case of Nicholas Hardy in Florida is instructive. In February 1993, 18-year-old Hardy shot himself in the head after he had shot and killed James Hunt, a police officer who had stopped Hardy and three other youths. The suicide attempt left Nicholas Hardy in a coma for several weeks, after which he slowly regained the ability to speak and walk. A competency hearing was held in August 1993 to determine if he could stand trial. He was found to be incompetent due to his self-inflicted brain damage, and he was sent to the Mentally Retarded Defendant Program at Florida State Hospital. There he received training in an effort to restore him to competency. In February 1995, he was found competent to stand trial, and on 14 February 1996, he was sentenced to death. In June 1998, the Florida Supreme Court re-evaluated the aggravating factors in the crime and found that they were outweighed by the mitigating circumstances. The Court noted that the neurological experts who had examined Hardy concluded that his brain damage meant that he "was no longer the same person who killed Sergeant Hunt." It commuted the death sentence to life imprisonment without parole.
- ✚ **Organic brain syndrome (also known as organic mental disorder, chronic organic brain syndrome).** Organic brain syndrome is a general term referring to physical disorders of the brain arising from disease or trauma that cause decreased

mental function such as problems with attention, concentration and memory, confusion, anxiety and depression.⁵

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

In any event, the primary purpose of Amnesty International’s report is to illustrate that people with serious mental illness continue to be sentenced to death and executed in the United States of America, that existing safeguards are clearly inadequate to prevent this from happening, and that there is a profound inconsistency in exempting people with mental retardation from the death penalty while those with serious mental illness remain exposed to it.

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

⁵ This information is adapted from that provided by the US National Library of Medicine and the National Institutes of Health, and MedicineNet.com

Reality check – Existing protections are clearly not enough

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

Yvonne Panetti, mother of Scott Panetti, Texas death row inmate, 2003

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

- No person may be put to trial unless he is mentally competent to understand the charges against him and to assist his attorneys at trial;
- No person may be convicted of a crime unless the state proves beyond a reasonable doubt to the jury that the defendant intended to commit the criminal act;
- It is a defense to prosecution for a crime if a defendant shows he was mentally unable to know that his conduct was wrong;
- In the punishment phase of a capital murder case, a defendant may present to the jury any and all evidence of mental impairment in mitigation against a death sentence;
- A death row inmate cannot actually be executed unless he is mentally competent, which means that he understands that he is going to be executed and the reasons why.

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

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

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

Another lawyer, who was appointed as Panetti’s stand-by counsel, wrote in an affidavit: “This was not a case for the death penalty. Scott’s life history and long term mental problems made an excellent case for mitigating evidence. Scott did not present any mitigating evidence because he could not understand the proceeding”. He recalled that “His trial was truly a judicial farce, and a mockery of self-representation. It should never have been allowed to happen.” The lawyer said that he spoke to two jurors who “told me that Scott probably would not have received the death penalty if the case had been handled differently”. Another lawyer spoke to two other jurors. They “said that if Scott had been represented by attorneys that he would not have received the death penalty”. One of them said that the jurors had voted for death out of their fear of his irrational behaviour at the trial.

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

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

However, the state successfully continued to defend the death sentence on appeal. In 2002, the US Court of Appeals for the Fifth Circuit wrote: “During trial, Panetti proceeded while dressed in a cowboy suit, gave the appearance of hallucinating, and carried on rambling dialogues. He did, however, formulate a trial strategy, improved his performance over time, and was able to effectively examine and cross-examine witnesses”. In its subsequent brief to the US Supreme Court in 2003, the Texas Attorney General’s Office argued that “Panetti’s

apparent inability to consult with his court appointed attorney was the result of his conscious choice not to cooperate rather than a byproduct of his mental illness". On 1 December 2003, the Supreme Court announced that it was refusing to consider the case.

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

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

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

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

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

On 29 September 2004, the federal judge ruled that because Scott Panetti “knows his committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed”.⁶ The defence appealed, and the federal judge, clearly of the opinion that the standard for competency for execution is a minimal standard and the law on the issue “less than clear”, granted leave to appeal to the US Court of Appeals for the Fifth Circuit. In their opening brief, Scott Panetti’s lawyers wrote:

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

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

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

We have pinpointed that the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.
US Supreme Court, *Atkins v. Virginia*, June 2002

In both the *Roper v. Simmons* and *Atkins v. Virginia* rulings, outlawing the execution of child offenders and people with mental retardation respectively, the US Supreme Court used as its principle measure of “evolving standards of decency” state-level legislation on the two issues. Writing the *Roper* decision, Justice Kennedy noted that the tallies were the same on both issues – 30 states prohibited the execution of each category of offender, including the 12 states which were abolitionist all together. Because of the nature of the juvenile and mental retardation issues – for which definitions are relatively straightforward – it was easy for the Supreme Court to tally which states had prohibited the death penalty in each category. It is not so easy to make a similar assessment on the question of mental illness. Amnesty International understands that only one of the death penalty states in the USA, Connecticut, currently prohibits the execution of a person on the grounds of mental illness at the time of the crime.⁷

⁶ *Panetti v. Dretke*, US District Court for the Western District of Texas, 29 September 2004.

⁷ “The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds... that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation... or (3) the defendant’s mental capacity was significantly impaired or the defendant’s ability to conform the defendant’s conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a

Although Amnesty International recognizes that the US Supreme Court uses this tallying method to assess whether a national consensus has emerged – indeed the organization argued that the method mandated the prohibition of the juvenile death penalty following the *Atkins* ruling – the organization considers it a questionable method by which to decide an issue of basic human rights. History shows that countries which have turned their backs on the death penalty, or any particular aspect of it, have done so as the result of principled leadership rather than following some measure of popular opinion. “Democracy” should surely not be used to justify a measure which “is uniquely degrading to human dignity”.⁸ The USA claims to be founded upon and committed to human dignity. Fundamental human rights are to be promoted and respected now, not put aside for some unspecified day in the future.

Certainly the Supreme Court’s technique of measuring a national consensus by state legislative activity is hugely slow – the *Roper* ruling, for example, came 30 years after entry into force of the International Covenant on Civil and Political Rights, one of the treaties banning the execution of child offenders. There was a wait of more than a decade between the United Nations adopting a resolution urging member states to eliminate the death penalty “for persons suffering from mental retardation”, and the *Atkins* decision in June 2002. A country’s claims to be a progressive force for human rights are drained of meaning when it lags so far behind on this fundamental human rights issue. In an increasingly abolitionist world, the USA’s credibility when criticising other country’s human rights violations will be increasingly undermined by its resort to judicial killing. The credibility gap will be even greater when it is offenders with serious mental illness who are being killed by the state.

In the *Roper* and *Atkins* decisions, having found that state legislation pointed to a national consensus against executing child offenders and those with mental retardation, the US Supreme Court conducted its own independent analysis and found no reason to disagree with those states that had legislated to that effect. On the question of the mentally ill, Amnesty International would hope that the Supreme Court could reverse this procedure, so that “in the end [its] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment”.⁹ It should apply its independent analysis to the question of the execution of people with serious mental illness, and recognize that such executions achieve nothing, just as the execution of minors and people with mental retardation cannot fulfil the would-be goals of the death penalty. In Supreme Court parlance, executions which fail “measurably” to contribute to the goals of retribution or deterrence are “nothing more than the purposeless and needless imposition of pain and suffering”.¹⁰ The execution of the seriously mentally ill surely falls into this category.

defense to prosecution” (emphasis added). Connecticut Penal Code. Chapter 952, Section 53a-46a (h)(3), available at <http://www.cga.ct.gov/2005/pub/Chap952.htm#Sec53a-46a.htm>.

⁸ *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan, concurring.

⁹ *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁰ *Enmund v. Florida*, 458 U.S. 782 (1982) (finding the death penalty disproportionate for person who aids and abets in commission of a murder, but does not kill, attempt to kill or intend to kill the victim).

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

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

In March 2002, the White House spokesman was asked: “Does President Bush believe the death penalty is appropriate for anyone who’s convicted who’s mentally ill?” The spokesman responded that “the President believes that those are decisions for juries to make based on the laws of their states.” When he was Governor of Texas, George W. Bush had said the same thing about the execution of people with mental retardation. In 1999, opposing a bill that would have prohibited the execution of such offenders in his state, he responded that “that’s up to the juries to make those decisions. I like the way the law is now”. He made this statement not long before the US Supreme Court in March 2001 decided to re-examine the constitutionality of such executions, eventually outlawing them, in *Atkins v. Virginia* in June 2002. Governor Bush’s response suggests that the politics of the death penalty can render a politician’s stated position on this punishment an unreliable indicator of contemporary standards of decency.

Similarly, jury decisions to pass death sentences against mentally ill defendants should not necessarily be taken as a reliable indicator of wider societal values. For a start, citizens who will not pass a death sentence for moral or other reasons cannot sit on a capital jury. Those who do sit as capital jurors, therefore, by definition hold views at the punitive end of the punishment/rehabilitation spectrum. Moreover, capital jurors may be denied the full picture of the defendant’s impairment, or have their prejudices stoked by prosecutors.

Informed jurors, on the other hand, may be sympathetic to mental health mitigation if it is properly presented in a way that seeks to explain, not excuse, the defendant’s actions. In a number of cases, jurors have later come forward to say that they would not have voted for death if they had known the extent of the defendant’s mental impairments. Are not these belated but informed opinions – reached away from the heightened atmosphere of a capital trial and the prosecution’s relentless pursuit of a death sentence – an indicator of how “standards of decency” can evolve when people are better informed?

Among other informed people are those involved in advocacy for people suffering from mental illness. The US organization, NAMI, for example, takes the position that “the death penalty is never appropriate for a defendant suffering from schizophrenia or other serious brain disorders”. It believes that “persons who have committed offenses due to states of mind or behaviour caused by a brain disorder require treatment, not punishment”. The National Mental Health Association (NMHA) has concluded that “our current system of justice inadequately addresses the complexity of cases involving criminal defendants with mental illness. Therefore, NHMA calls upon states to suspend using the death penalty until more just, accurate and systematic ways of determining and considering a defendant’s mental status are developed”. The American Psychiatric Association has adopted the language in the current three-prong proposal on exempting people with mental illness from the death penalty put forward by the Task Force of the American Bar Association Section of Individual Rights and Responsibilities (see Appendix 2). The American Psychological Association is also expected to adopt the same language in early 2006.¹¹

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

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

Psychiatrist, report on schizophrenic man on Virginia’s death row, 1997

In June 2002, the US Supreme Court ruled in *Atkins v. Virginia* that the death penalty should no longer be used against offenders with mental retardation. It concluded that the penological goals of retribution or deterrence are not furthered by such use of the death penalty. On deterrence, the six Justices in the majority wrote:

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

¹¹ The American Psychological Association earlier adopted the language of an earlier Task Force proposal, and is expected to incorporate the refinements to prongs one and three (it already has adopted the current language of prong two). Ronald J. Tabak, ‘Overview of Task Force proposal on mental disability and the death penalty’, 54 *Catholic U. L. Rev.* 1123 (2004-2005).

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

On the question of the retributive goal of the death penalty, the *Atkins* majority continued: “With respect to retribution – the interest in seeing that the offender gets his just deserts – the severity of the appropriate punishment necessarily depends on the culpability of the offender”. The death penalty assumes absolute, 100 per cent culpability, on the part of the condemned. If there is any diminished culpability, then the retributive goal fails, as the punishment becomes disproportionate. In *Roper v. Simmons* in March 2005, the Court found the same in the case of children under 18 years old at the time of the crime: “Once the diminished culpability of juveniles is recognized, it is evidence that the penological justifications for the death penalty apply to them with lesser force than to adults”. So, too, with the seriously mentally ill.

Subjective opinion & inexact science in an adversarial system

It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy
US Supreme Court, 1880

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

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

is a category of offender, the mentally ill, about whom there is a general level of ignorance and fear?

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

The suggestion that the defendant or inmate is faking or exaggerating their mental illness is a position that has frequently been adopted by the state, including in circumstances where this accusation appears to have been far from the truth. Some prosecutors have revealed that they consider mental health defences to be an excuse, a position which may be shared by a certain percentage of the population and, therefore, jurors.

In 2001, Justice Paul Ffeifer of the Ohio Supreme Court wrote: “Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness... I believe that executing a convict with severe mental illness is a cruel and unusual punishment”.

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

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

From a biopsychosocial perspective, primary mental retardation and significant Axis 1 disorders have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens’ words, ‘do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Former President of the American Psychiatric Association, September 2002

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

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

two edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”¹²

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

- ❖ Even if found competent to stand trial, the defendant’s capacity to assist their lawyer or understand the proceedings may still be impaired;
- ❖ As a part of their illness, a defendant suffering from a mental condition such as severe depression or a paranoid disorder may refuse to allow mitigation to be presented or may even plead guilty and demand the death sentence.
- ❖ Due to the stigma attached to mental illness, not least if it is linked to a family history of such illness or to childhood abuse, a defendant may seek to downplay his or her ailment or simply not be a good reporter of it to defence counsel.
- ❖ If the defendant’s mental illness is still showing symptoms at the time of the trial, he or she may act irrationally or appear to do so to jurors, heightening fears of future dangerousness, a highly aggravating factor in the minds of capital jurors.
- ❖ A mentally ill defendant, especially if taking medication at the time of the trial, may display a flat affect and be perceived as remorseless, again a highly aggravating factor in the mind of capital jurors.
- ❖ A mentally ill defendant may be particularly difficult to represent for an under-resourced or inexperienced defence lawyer;
- ❖ A mentally ill defendant may be particularly vulnerable to unscrupulous prosecutors or police;
- ❖ Jurors ignorant of or frightened by mental illness or suspicious of the state’s capacity to appropriately treat the mentally ill may be swayed towards a death sentence, fearing the defendant’s propensity for future violence.
- ❖ If their crime was committed as a result of mental illness, it may appear motiveless. Thus, the offence may display a senseless brutality, further heightening the jury’s fears about future dangerousness.

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

In addition, the choices made by mentally ill capital defendants and inmates can inject a further arbitrariness into the death penalty process. Due to mental illness, a defendant may

¹² *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

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

The rate of error in US capital cases has been found to be very high.¹³ Dissenting against their colleagues' refusal to stop the execution of an Arkansas inmate who had waived his appeals, two US Supreme Court Justices warned in 1990 that such statistics "make clear that in the absence of some form of appellate review, an unacceptably high percentage of criminal defendants would be wrongfully executed – 'wrongfully' because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State". The case of Joey Miller, who would have been killed if he had not allowed his appeal to be filed, illustrates this point.

Amnesty International's report also points out that no discussion of the US death penalty should ignore the impact of race in the capital justice system. For example, it asks: if being a black defendant in front of an all-white or almost all-white jury, and/or being accused of killing a white victim can serve as *de facto* aggravating factors in favour of a death sentence, how much more so if the defendant is also suffering from mental illness? Any fears or prejudices held, consciously or subconsciously, about "the other" are likely to be compounded. This may be even more pronounced if the legal representation of the defendant on the mental health question is inadequate, or the prosecution tactics over-zealous.

Competency for execution – the 20-year failure of Ford

In Ford, drawing on long-established common law principles, the Supreme Court held that the Eighth Amendment prohibits execution of the insane. Although the Ford Court identified some of the components necessary to demonstrate a constitutionally minimum definition of insanity, application of Ford presents challenges because the Court did not define insanity or mandate procedures that courts must follow in determining whether a defendant is insane.

US Court of Appeals for the Fourth Circuit, 28 April 2005

It is nearly two decades since the US Supreme Court ruled, in *Ford v. Wainwright*, that the execution of an insane prisoner violates the Eighth Amendment ban on "cruel and unusual punishments". In effect, this decision only affirmed what was already the case in the individual states. Indeed, 36 years earlier, a US Supreme Court Justice had written: "That it offends our historic heritage to kill a man who has become insane while awaiting execution cannot be gainsaid... [N]ot a State in the Union supports the notion that an insane man under sentence of death would legally be executed." The majority opinion in *Ford* in 1986 reiterated that "[t]oday, no State in the Union permits the execution of the insane", and added: "For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has

¹³ ¹³ E.g., *A Broken System: Error Rates in Capital Cases, 1973-1995*, op.cit.

never decided whether the Constitution forbids this practice. Today we keep faith with our common-law heritage in holding that it does.”

The pressing questions for the Supreme Court, then, were: What is the definition of competence for execution, and what procedures should the state employ to determine whether a prisoner meets this standard? The *Ford* opinion failed to answer either question. While five Justices – a narrow majority – joined to rule that the execution of the insane violated the Eighth Amendment of the Constitution, this majority broke down for the remainder of the ruling. In a separate opinion, Justice Powell offered “the meaning of insanity in this context” which had been left open by the Court:

“If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”

Arguably this is a minimal standard. Even if a condemned inmate seems to be able to make some connection between their crime and their punishment, if this connection takes place in an inner world that is entirely delusional and the product of profound mental illness, can they truly be said to have an understanding of what is happening to them and why? In any event, the *Ford* ruling has not prevented the execution of numerous inmates about whose sanity there were compelling doubts.

Also, the definition does not require states to determine if the prisoner has the capacity to be able to assist his or her lawyer. In his *Ford* concurrence, Justice Powell had suggested that it is “unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free”. The intervening years have shown that Justice Powell’s confidence was misplaced, given the rate of error in capital cases. For example, in 1998 Anthony Porter came 48 hours from execution for a crime he did not commit. His execution was stayed on a claim that Porter had mental retardation and was incompetent for execution. While a competency hearing was pending, some journalism students investigated the case and uncovered evidence of Porter’s innocence of the crime for which he had spent some 17 years on death row.

On the question of the procedures to be used to make competence-for-execution determinations, the *Ford* Court left to the individual states “the task of developing appropriate ways to enforce the constitutional constriction upon its execution of sentences”. Four of the Justices found that the Florida procedure (the case involved Alvin Ford on Florida’s death row) was flawed because it failed to “include the prisoner in the truth-seeking process”, and denied him or her “any opportunity to challenge or impeach the state-appointed psychiatrists’ opinions”. The four Justices found that the “most striking defect” was the fact that the competence determination rested “wholly within the executive branch”. Justice Powell disagreed that a judicial proceeding was required, suggesting that “a constitutionally acceptable procedure may be much less formal than a trial”, and that “an impartial officer or board” to review the evidence from both sides would suffice. Two other Justices believed that

the only flaw in Florida's procedures was that there was no opportunity for the prisoner to be heard, while the remaining two Justices, dissenting in full, wrote that "wholly executive procedures can satisfy due process" on this issue.

This failure to clarify procedures has meant that different states take different approaches. In April 2005, the US Court of Appeals for the Fourth Circuit issued a decision which illustrated that, two decades later, the *Ford* ruling is still causing problems. The ruling concerned Percy Walton, on death row in Virginia for three murders committed in 1996 when he was 18 years old. The Fourth Circuit agreed that the *Ford* ruling did require a finding that the prisoner was able to prepare for his or her death, and that the 1986 ruling and Justice Powell's concurrence required a broader inquiry than the one that the District Court judge had initiated in Percy Walton's case:

"A person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that he will be executed and that his crime is the reason why does not meet the standard for competence contemplated either in the opinion of the Ford Court or in Justice Powell's concurrence."

One of the three judges on the Fourth Circuit panel dissented, accusing the other two of "creating a new constitutional test for determining competence to be executed". Judge Shedd said that the "new prong is simply not part of the *Ford* ruling" and suggested that the majority had "cobble[d] together stray" statements from that ruling to come up with the criterion that a prisoner must be able to prepare for his or her death. Judge Shedd, echoing other prosecutors, judges and politicians who have warned that progressive standards will allow inmates to fake insanity to avoid execution, suggested that this "new prong effectively precludes capital punishment for any condemned inmate who even raises a claim of insanity".

The Attorney General of Virginia appealed for a rehearing of the issue in front of the whole Fourth Circuit. The Court granted a rehearing and the case was reargued in front of 13 judges in November 2005. By early January 2006, the court's decision was still pending.¹⁴

Clearly, it is time for the US Supreme Court to revisit its *Ford v. Wainwright* ruling. It should clarify and broaden the protection. For a start, the standard should include the defendant's ability to assist his or her counsel. There are so many errors uncovered in capital cases, some even found after clemency has been denied, that the prisoner's capacity to help their lawyer should be a requirement for a finding of competency. Moreover, a prisoner should be found to be able to do more than simply state some vague connection between the crime and their punishment. The condemned prisoner must have a genuine and *rational* understanding of the connection not just mere knowledge or awareness of the facts.

The US Supreme Court has held that the standard for competency to waive appeals in a death penalty case is whether the prisoner has "the capacity to appreciate his position and make a *rational* choice" (emphasis added). The Court has also found that competency

¹⁴ In the earlier decision, the Fourth Circuit panel had also sent the case back to the District Court to hold a hearing on the question of whether Percy Walton has mental retardation.

standard for pleading guilty, waiving the right to counsel, and for standing trial, is one and the same and also contains an element of *rationality*. The defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of *rational* understanding” and a “*rational* as well as a factual understanding of the proceedings against him” (emphasis added). Seeking to ensure such competency, the Court said, is a “modest aim”. Why should even that modest aim fall by the wayside in the state’s efforts to get a seriously mentally ill prisoner into the death chamber?

Perhaps, in the end, the US Supreme Court will recognize that it is simply not possible to find beyond a reasonable doubt which prisoners are competent for execution and which are not. As the Fourth Circuit court stated in its April 2005 decision on Percy Walton’s case, “undoubtedly, determining whether a person is competent to be executed is not an exact science”. In other words, there will always be errors and inconsistencies on the margins. In the end, there is only one solution – abolition.

Conclusion: The worst of the worst, or a failure of leadership?

Our nation was built on a promise of life and liberty for all citizens. Guided by a deep respect for human dignity, our Founding Fathers worked to secure these rights for future generations, and today we continue to seek to fulfil their promise in our laws and our society...[W]e reaffirm the value of human life...Through ethical policies and the compassion of Americans, we will continue to build a culture that respects life.

President George W. Bush, 14 January 2003

Regrettably, when the US Supreme Court reinstated the death penalty in *Gregg v. Georgia* in 1976, it concluded that “contemporary standards of decency” in the USA had not evolved to the point at which capital punishment *per se* was unconstitutional. It reached this conclusion after noting that in the four years since the Court had struck down the death penalty in *Furman v. Georgia* because of the arbitrary way in which it was being applied, at least 35 states had enacted new capital statutes, thus demonstrating that public opinion had not turned against judicial killing. However, the Court also said that “public perceptions of standards of decency”, as measured by such legislative activity, “are not conclusive”. A punishment, it said, “also must accord with the dignity of man which is the basic concept underlying the Eighth Amendment. This means, at least, that the punishment must not be excessive”.¹⁵

In *Roper v. Simmons* in 2005 and *Atkins v. Virginia* three years earlier, when the US Supreme Court finally removed children and people with mental retardation from the reach of the death penalty, it reiterated that “capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution”. In international terms, the decisions came shockingly late. In national terms, the fact that seriously mentally ill offenders remain subject to the death penalty in the USA stands in ever starker relief. Death sentences in such cases are surely excessive and incompatible with human dignity, whether the dignity in question is that of the offender or of society as a whole.

¹⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976), internal quote marks omitted.

Norris Taylor was sentenced to death not long after the *Gregg* ruling. Now 61 years old, he has been on North Carolina's death row for more than a quarter of a century. His current lawyer has said that Taylor is one of the most mentally ill people she has ever met.

Norris Taylor was brought up in poverty in Virginia. He was subjected to sexual, physical and emotional abuse by relatives and other adults. He used to wet his bed until adolescence, and each time he did so he would be beaten and sent to school in soiled clothes, where he would then be humiliated. He has reported that his lifelong headaches began when he was thrown down the stairs by his mother when he was seven years old. In his first five years of school, he was absent for nine weeks, eight weeks, six weeks, 11 weeks, and six weeks respectively. At the age of 15, he came into conflict with the law, and the following year he was charged with breaking and entering, and sent to juvenile detention. As a child, Norris Taylor began to have hallucinations, including seeing a man come out of a cupboard with an axe and try to kill him, and hearing voices in his head from the age of five or six that told him to hurt people.

In 1978, at the age of 34, Norris Taylor was charged with the murder of Cathy King. She was a guest at the motel where Taylor was working as a security guard. He had confronted her about registering as one person rather than as a party of two. He shot her after she called him a "nigger" and spat at him. Taylor was sentenced to life in prison, but escaped. He subsequently shot and killed Mildred Murcheson, a pregnant woman whose car he was trying to steal. During the trial, he repeatedly disrupted the proceedings by shouting and yelling, and spent much of the proceedings either removed from the courtroom or refusing to attend. His trial lawyers, with whom he refused to cooperate, believed that he was incompetent to stand trial. However, he also refused to cooperate with a doctor who was ordered to evaluate him.

Over the years, Norris Taylor has been diagnosed with paranoid schizophrenia, as well as post-traumatic stress disorder with dissociative episodes. He apparently believes that he is possessed by the devil, that he will come back to life if he is executed, and that Mildred Murcheson was the reincarnation of his dead wife (who he discovered had died of cancer after his escape from prison and prior to the Murcheson murder). What purpose would Norris Taylor's execution serve for wider society? Would it not amount to an act of senseless vengeance?

Can someone with a serious mental impairment other than retardation at the time of the crime ever be said to possess the "extreme culpability" assumed by the death penalty? If society's standards of decency have evolved to prohibit the state-sanctioned killing of child offenders and those with mental retardation, how can that same society still permit people with serious mental illness to be put to death? While the precise definition of who would be excluded under laws prohibiting the execution of people with mental illness is beyond the scope of this report, the latter has shown that existing safeguards are inadequate, that seriously mentally ill offenders are at "special risk of wrongful execution", and that principled leadership is needed to remedy this situation.

In 1972 in *Furman v. Georgia*, Justice Marshall wrote: “It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.” Now that children and people with mental retardation have been removed from the reach of the death penalty, defendants with mental illness remain its most vulnerable targets in a capital justice system where prosecutorial misconduct occurs all too often and legal representation for indigent capital defendants is generally under-resourced.

Amnesty International has long recommended that the death penalty be abolished in the USA. It is a punishment that should never be a part of society’s response to crime, not least when that country claims to be a progressive force for human rights and a champion of human dignity. It is others, however, who have the power to end the death penalty in the USA, and regrettably, legislators, judges and politicians have shown little inclination to lead their country away from state-sanctioned killing.

As a minimum first step, however, perhaps the USA can be persuaded to rid itself of one of the most shameful aspects of this indecent punishment – the execution of people with serious mental illness. With the report of which this is a summary, Amnesty International will join the campaign for such an exemption for the mentally ill, even as the organization continues to seek to persuade the USA to end its use of the death penalty altogether.

Appendix 1 – Illustrative list of 100 executed prisoners

The following is a list of 100 people who have been executed in the USA since it resumed judicial killing in 1977. This list represents about 10 per cent of those put to death in the country during this period, and is for illustrative purposes only. It does not claim to be exhaustive – cases of others who have been executed have also raised serious questions relating to their mental health. While some of the people listed below had alleged mental retardation as well as mental illness or brain damage, the list does not include those whose alleged mental impairment fell squarely and solely within the bracket of “mental retardation” (for a list of 40 people executed between 1984 and 2001 despite claims of mental retardation see pages 100-101, *USA: Indecent and internationally illegal – The death penalty against child offenders*, September 2002, <http://web.amnesty.org/library/Index/ENGAMR511432002>). Finally, although some of the cases listed below raise the question of abusive backgrounds, the list is very far from exhaustive on this issue. It does not seek to illustrate the very many people executed in the USA who came from backgrounds of sometimes quite appalling childhood abuse, deprivation, poverty, racism, social marginalization, but for whom such backgrounds were not necessarily followed by diagnoses of consequent mental health problems. The symbol ■ denotes a prisoner who gave up his or her appeals and “consented” to execution.

1984

Arthur Goode **Florida.** Arthur Goode had a documented history of mental illness since the age of three. He escaped from a mental hospital in 1976 and killed a 10-year-old boy. He represented himself at his 1977 trial, during which, as the 11th Circuit Court noted, he “brought out evidence to

assure his own conviction, testified in gory detail as to his guilt, and argued to the jury that he should be convicted and sentenced to death". The 11th Circuit admitted that it had "serious doubts as to Goode's competence", but upheld his conviction. The Governor of Florida and three state-appointed psychiatrists held him to be mentally fit for execution, procedures that would be found unconstitutional two years later in *Ford v. Wainwright*.

1985

Morris Mason

Virginia. Morris Mason had a long history of mental illness and had spent time in three state mental institutions where he was diagnosed as suffering from paranoid schizophrenia. In the week before the murder for which he was condemned, he had twice sought help from his parole officer for his uncontrollable drinking and drug abuse - on the eve of the crime he had apparently asked to be placed in a "half-way house"; however, no facilities for this were available in Virginia. Three psychiatrists independently found Morris Mason to be suffering from paranoid schizophrenia over an eight-year period before his trial in 1978.

Charles Rumbaugh ■ **Texas.** Shortly before the murder of Michael Fiorillo during a robbery in 1975, Charles Rumbaugh had escaped from a mental hospital where he was being treated for manic depressive illness. Rumbaugh, who was 17 at the time of the crime, gave up his appeals. A dissenting opinion by two US Supreme Court Justices said: "Rumbaugh seeks death because he knows himself to be mentally ill and has lost hope of obtaining treatment. If not for his illness and his pessimism regarding access to treatment, he would probably continue to challenge his death sentence; but faced with his vision of life without treatment for severe mental illness, Rumbaugh chooses to die... a desperate man seeking to use the State's machinery of death as a tool of suicide."

1986

David Funchess

Florida. David Funchess, a decorated Vietnam War veteran, was sentenced to death in 1975 for the murder of two people during a robbery of a bar in 1974. He had been involved in some of the heaviest fighting in the Vietnam War. He was first diagnosed as suffering from post-traumatic stress disorder (PTSD) in 1982 by a leading expert on the disorder. The full extent of his condition was not known until further investigations in the month before his execution. His family described how he returned from Vietnam a changed person and addicted to heroin. He had been unable to tolerate noise, suffered from frequent flashbacks, sleeplessness and recurring nightmares. His trial lawyer did not investigate his client's background to present in mitigation.

1987

Billy Mitchell

Georgia. Billy Mitchell was found to have suffered from PTSD after being repeatedly homosexually raped while serving a prison sentence for a burglary he allegedly committed at the age of 16 during a bout of depression brought on by his parents' divorce. Formerly known as a student of exceptional intellectual and athletic ability, Mitchell then suffered from severe depression. He pleaded guilty to the murder of a 14-year-old grocery assistant during an attempted robbery in 1974. At the sentencing phase, his trial lawyer called no witnesses and presented no mitigating evidence.

1988

Robert Streetman

Texas. Robert Streetman sustained a serious head injury as a child and thereafter suffered from a series of mental problems including persistent delusions and hallucinations. He started taking drugs when he was eight, and dropped out of school at 14. Sentenced to death for the murder of a woman during a burglary of her home. He was 22 at the time. Two of his three accomplices served no prison time at all in return for their cooperation with the prosecution.

Wayne Felde

Louisiana. Wayne Felde was a Vietnam War veteran, and had seen heavy combat service as a "tunnel rat" (one who specialized in finding enemy tunnels). When he returned from Vietnam, his family found his personality dramatically changed: he became moody, irritable, prone to bouts of depression and flashbacks. He was diagnosed with PTSD. At his trial, he asked the

jury to sentence him to death, allegedly because of his PTSD-related depression. His lawyer presented no mitigating evidence.

Leslie Lowenfield **Louisiana.** A citizen of Guyana, Leslie Lowenfield was found competent to stand trial, even though three psychiatrists had found him to be “paranoid in the extreme”. His lawyers challenged his competency for execution. A clinical psychologist concluded that in all probability, Lowenfield was suffering from paranoid schizophrenia, and also found that he was “unable to understand the death penalty”. Nevertheless, the courts ruled that the execution could go ahead. In a dissent against the US Supreme Court’s 5-4 vote to deny a stay of execution, a Justice wrote: “Every court that has considered petitioner’s insanity claim has made a mockery of this Court’s precedent and of the most fundamental principles of ordered justice...”

1989

Herbert Richardson **Alabama.** Herbert Richardson was diagnosed as suffering from PTSD as a result of his service in the Vietnam War. A psychiatrist found that his mental condition “impacted Mr Richardson’s functioning significantly and played a contributing role” in the murder for which he was sentenced to death.

1990

Leonard Laws **■ Missouri.** A federal judge found that Leonard Laws’ trial attorney had been negligent for failing to present mitigating evidence at the sentencing, including evidence of severe psychological damage from his experience in the Vietnam War. The Eighth Circuit Court of Appeals reversed the decision. Two Justices dissented from the US Supreme Court’s decision to reject Laws’s appeal, saying that the trial lawyer’s performance had been “plainly deficient”, particularly in his failure to investigate the evidence that Laws was suffering from PTSD.

Dalton Prejean **Louisiana.** Dalton Prejean was a black defendant convicted by an all-white jury of the murder of a white police officer committed when Prejean was 17. Before the murder, he had been confined in various institutions between 1972 and 1976, during which time he was diagnosed as suffering from various mental conditions, including schizophrenia and depression. At the age of 14 in 1974, he was convicted as a juvenile for killing a taxi driver. Medical specialists at that time said that he would require “long-term in-patient hospitalization” under strict supervision and that he would benefit from a secure and controlled environment. However, he was released in 1976 without supervision because no state funding was available for further institutional care. Tests carried out in 1984 revealed that he suffered from organic brain damage, which impaired his abilities to control his impulses when under stress.

Thomas Baal **■ Nevada.** Thomas Baal had been in and out of mental institutions as a result of suicide attempts, depression, and drug abuse. He was diagnosed among other things with having latent schizophrenia and organic brain syndrome. He attempted suicide twice in the month before his execution for the 1988 murder of Frances Maves. Baal’s parents expressed their opinion that Maves would not have been killed if their son had received adequate psychiatric help. They said that “when the money ran out, they let him sign out of a mental hospital”. The parents said that their pleas for government assistance in getting psychiatric help were ignored.

James Smith **■ Texas.** James Smith had a long history of mental illness. In 1978 he was found not guilty by reason of insanity in a Florida prosecution. In 1981, he attempted suicide and was placed under psychiatric care. In 1985, a Texas court found him not competent to handle his appeal. A psychiatrist concluded that he suffered from paranoid schizophrenia, “marked by suicidal tendencies and religious delusions.” Two US Supreme Court Justices dissented from the decision to allow the execution to go ahead “when serious doubts remain concerning his mental competence” to waive his appeals. The dissent criticized the state’s procedures for determining competency, saying that the hearing into this issue “seems to have been little more than a non-adversarial, *ex parte* chat among the trial judge, the prosecutor and Smith”.

- Charles Coleman **Oklahoma.** Charles Coleman had a history of schizophrenia and brain damage first diagnosed when he was 15 years old. He also suffered from epileptic seizures throughout his life. The son of alcoholic parents, he was drinking alcohol regularly by the age of 12. According to experts, his brain damage could have resulted from foetal damage due to his mother's heavy drinking during pregnancy and from early neglect and malnutrition.
- 1992**
- Ricky Ray Rector **Arkansas.** Ricky Ray Rector was severely mentally impaired, as a result of essentially a frontal lobotomy conducted after he shot himself in the head on arrest. There was compelling evidence that **was incompetent for execution under *Ford v. Wainwright*.**
- Johnny Garrett **Texas.** Chronically psychotic and brain damaged, Johnny Garrett had a long history of mental illness and was severely physically and sexually abused as a child, which the jury never knew. He was described by a psychiatrist as "one of the most psychiatrically impaired inmates" she had ever examined, and by a psychologist as having "one of the most virulent histories of abuse and neglect... encountered in over 28 years of practice". Garrett was frequently beaten by his father and stepfathers. On one occasion, when he would not stop crying, he was put on the burner of a hot stove, and retained the burn scars until his death. He was raped by a stepfather who then hired him to another man for sex. It was also reported that from the age of 14 he was forced to perform bizarre sexual acts and participate in pornographic films. Introduced to alcohol by his family when he was 10, he subsequently indulged in serious substance abuse involving brain-damaging substances such as paint, thinner and amphetamines. The US Court of Appeals for the Fifth Circuit upheld a state court finding that his belief that his dead aunt would protect him from the chemicals used in the lethal injection did not render him incompetent to be executed (for a murder committed when he was aged 17).
- Donald Harding **Arizona.** Donald Harding was subjected to a childhood of abuse and neglect, and also witnessed serious violence between his mother and stepfather. He tried to commit suicide at the age of nine. Several neurological experts who examined Harding agreed that he suffered from organic brain dysfunction which left him unable to control aggressive impulses especially when under the influence of alcohol or other sedating drugs. Another expert said that he suffered from untreated PTSD developed as a result of brutal treatment and sexual assaults he received in an adult prison between the ages of 16 and 24.
- Robert Harris **California.** Robert Harris was born two months prematurely after his mother was kicked in the stomach by her husband. At the age of two, he was beaten unconscious by his father and required hospital treatment. He was beaten throughout his early childhood by his father and stepfather. When he was nine, his father was convicted and imprisoned for sexually abusing his daughters. At the age of 14 he was abandoned by his mother. When he was 15 he was caught with others driving a stolen car. The others were claimed by their families, Harris was not, and was sentenced to four years in a federal youth centre. There he was diagnosed as pre-psychotic, schizophrenic, suicidal and self-destructive. At 19 he was released with a recommendation that he seek treatment for his mental health problems. There was no evidence that he received treatment. After he was sentenced to death, tests revealed frontal lobe damage of a severity likely to have affected his ability to reflect on actions, weigh consequences, plan or organize, or reason rationally. He was diagnosed with Fetal Alcohol Syndrome, and was known to have sniffed gasoline, glue and paint fumes from the age of eight or nine. The jury did not learn of the full extent of his childhood abuse or mental impairments.
- Justin Lee May **Texas.** Justin Lee May suffered from brain damage and mental impairments stemming from physical abuse he suffered as a child. He suffered multiple illnesses as a child and endured regular, severe beatings from his father. On at least one occasion he was beaten to unconsciousness. He suffered numerous head injuries in early adulthood. In 1986 a medical examination revealed significant neurological brain damage and psychological abnormalities.

- Nollie Martin **Florida.** Nollie Martin suffered from severe mental impairment as a result of several serious head injuries he received in childhood. He had a history of psychosis, suicidal depression and self-mutilation and had been physically and sexually abused from infancy.
- Robert Black **Texas.** Robert Black was diagnosed with PTSD as a result of his experiences in the Vietnam War. He was twice hospitalized in mental institutions.
- 1993**
- John Brewer **■ Arizona.** John Brewer had a history of mental problems. As a young child, he was an outpatient in a psychiatric clinic for about three years. His first of several suicide attempts occurred at the age of seven, his last one less than six months before his crime, the murder of his pregnant girlfriend in 1988. Brewer was sentenced by a judge after waiving his right to a jury trial. The prosecutor had decided not to seek a death sentence a few weeks before the sentencing hearing, but presented aggravating evidence at the sentencing hearing in the mistaken belief that the law obliged him to. The judge decided that the aggravating evidence outweighed the mitigating circumstances and sentenced Brewer to death.
- James Red Dog **■ Delaware.** James Red Dog was a Native American who was raised in poverty on a Sioux Indian Reservation in Montana. Exposed to alcohol and drugs from an early age, and developed mental problems. He was diagnosed with bipolar disorder. He suffered a number of head injuries throughout his life, including a fractured skull caused by his father when he was a child.
- Robert Sawyer **Louisiana.** Robert Sawyer had various mental impairments, and suffered from schizophrenia. He had a long history of requiring medication, including electroconvulsive therapy and anti-psychotic drugs. He was committed three times to mental institutions. Although his severe mental impairments were documented from his teenage years, his lawyer failed to obtain the evidence or present it to the jury. Sawyer grew up in a violent environment. His mother was beaten by his father until she committed suicide, apparently to escape the brutality. Robert Sawyer was then brought up by his father, who subjected him to regular beatings. There was evidence that these beatings caused head injuries. He was never educated.
- James Clark **Arizona.** James Clark was represented at trial by a lawyer who had never handled a capital case. He failed to carry out any investigation of mitigating evidence. Had he done so, he would have discovered that James Clark was born to very young alcoholic parents who subjected him to severe physical abuse throughout his childhood. He tried to commit suicide at the age of 16. Sentenced to death for a crime committed in 1977 at the age of 19. In 1992, a clinical psychologist and expert in the treatment of adult male victims of childhood abuse, concluded that Clark had been suffering from PTSD, as a result of his childhood experiences, at the time of the crime.
- Larry Johnson **Florida.** Larry Johnson was diagnosed with PTSD as a result of his service in the Vietnam war.
- Curtis Harris **Texas.** Curtis Harris had an IQ of 77 and significant brain damage. Suffered serious head injuries as a child. One of nine children brought up by an alcoholic father who beat the children regularly with electric cords, belts, a bullwhip and fists. On one occasion, Curtis Harris was hit over the head by his father with a wooden board and his cranium was permanently indented by the blow. Sentenced to death for a murder committed at the age of 17.
- David Mason **■ California.** David Mason was subjected to severe physical, psychological and verbal abuse by his strict fundamentalist Christian parents. He attempted to kill himself at the age of five by swallowing a bottle of pills and setting his clothes on fire, the first of at least 25 reported

attempts in the next 20 years. His behaviour from an early age was uncontrollable. He set fires, attacked other children, and at the age of eight was found standing over his baby brother's crib with a knife. His parents reportedly resorted to locking him in a room called "the dungeon", a bedroom with the windows nailed shut. When he was 11 and defecated in his clothes, his mother pinned a baby's soiled nappies on him and made him wear his own soiled underwear on his head. On another occasion, his father allegedly strapped him to a workbench, gagged him and beat him unconscious. Mason was diagnosed with PTSD.

Christopher Burger **Georgia.** Christopher Burger was mentally ill and brain damaged from the severe physical abuse he suffered as a child. Was sentenced to death for a crime committed when he was 17.

1994

Harold Barnard **Texas.** Numerous current (in 1994) and former prison doctors who had evaluated and treated Harold Barnard over the previous decade all found that he was incompetent for execution as a result of his mental illness, chronic paranoid schizophrenia.

John Thanos **Maryland.** John Thanos had a long history of mental illness, including schizophrenia-like symptoms. He suffered severe physical and emotional abuse as a child, sustained several serious head injuries over the years and abused alcohol and drugs. He had a history of suicide attempts, the first at the age of 11. He first entered the adult prison system when he was 15 years old, and was allegedly raped and physically assaulted. He spent almost all his adult life in the prison system. In prison he attempted suicide on a number of occasions, including by hanging himself, slashing his wrists and cutting his throat. After his arrest for murder in September 1990, five months after being released, he confessed to the crime and in an apparent intent to be executed as soon as possible. While awaiting trial, he attempted suicide several more times. On one occasion, he swallowed 14 sharpened pencils, 15 spoons, his eyeglasses and a plastic toothbrush sharpened at both ends. He was sentenced to death by a trial judge after he waived his right to trial by jury. Four medical experts concluded in 1994 that Thanos had been mentally incompetent to stand trial or understand his legal options at the time of his trial, and five experts considered that he was incompetent to waive his appeals.

David Lawson **North Carolina.** As a young child, David Lawson developed psychiatric problems. He was diagnosed as suffering from depression and given medication. A psychiatrist who treated Lawson on death row, stated that Lawson suffered from "severe recurrent cyclical depression that has plagued his entire life... It is an illness which left untreated, drastically alters David's ability to think rationally and act in his own best interests. No evidence relating to Lawson's poor mental health or his history of abuse as a child was presented to the jury.

1995

Varnell Weeks **Alabama.** Psychiatrists for both the state and the defence diagnosed Varnell Weeks as suffering from paranoid schizophrenia, with symptoms including hallucinations and delusions. No evidence of his mental condition was introduced at the trial. Once he had been convicted, he waived the jury sentencing, and asked the (elected) judge to sentence him to death. Prison records revealed that he would on occasion stand in his cell naked and smeared with feces, making incomprehensible sounds. At a hearing to determine his competency for execution, Varnell Weeks appeared with a domino tied to a string on his shaved head. In response to the judge's questions, he responded with a rambling discourse on serpents, "cybernetics", albinos, Egyptians, the Bible and reproduction. He believed he was God in various forms, that his execution was part of a millennial religious scheme to destroy mankind, and that he would not die but that he would be transformed into a tortoise and reign over the universe. The judge acknowledged Weeks' mental illness and delusions, and stated that he was "insane" according to "the dictionary generic definition of insanity" and what "the average person on the street would regard as insane". However, the judge ruled that the electrocution could proceed.

Keith Zettlemoyer **■ Pennsylvania.** Keith Zettlemoyer was reported to suffer from brain damage, schizophrenia, depression and PTSD, and had made prior suicide attempts.

John Fearance **Texas.** A claim that John Fearance was incompetent for execution was unsuccessful. There was evidence that he suffered from paranoid schizophrenia. His claim that his rights were violated when he was forcibly medicated to render him competent for execution was rejected on the basis that the claim should have been raised earlier.

Phillip Ingle **■ North Carolina.** Phillip Ingle was subjected to sexual and emotional abuse as a child. Made several suicide attempts, beginning at age seven. As a young adult, he reportedly shot himself and deliberately crashed his car into a building. He took to alcohol and drug abuse as a teenager. Reported to suffer from schizoaffective disorder, and medicated on death row for his mental illness. He was sentenced to death for the murders of two elderly couples in separate crimes. He claimed that he hallucinated that his victims were demons with red eyes.

Anthony Larette **Missouri.** Anthony Larette had a long history of mental illness going back to his childhood when he sustained head injuries. Spent two years in a mental hospital. Discharged from the army because of mental illness, and spent several years in mental institutions or prison after that. He was assigned a trial lawyer with no capital experience. The jury was left entirely unaware of LaRette's history of mental illness, the symptoms of which included blackouts and hallucinations, and after a sentencing phase which lasted less than an hour, they voted for a **death sentence**.

1996

James Clark **■ Delaware.** James Clark was reportedly born to a 15-year-old girl who gave him up for adoption to an older couple. In 1994, after serving 22 years of a 30-year prison sentence for kidnapping a 16-year-old girl, he was released against his wishes, apparently telling the parole board that he could not cope with release and asking that his parole be denied. Within a few weeks of his return to his adoptive parents, James Clark had shot them both dead. At his 1994 trial, he asked for the death sentence. After sentencing, he was placed in the psychiatric unit of the prison hospital, where he was prescribed anti-depressant medication and force fed when he refused to eat. After being transferred to the death watch cell in 1996, he attempted suicide. He was placed on "strip suicide watch" in a "ram room" (a cell with a hole in the floor for a toilet, and with no lighting, books, television, radio, or pen and paper where he was stripped naked 24 hours a day). After 30 days in this cell, he was taken before a judge and asked if he wanted to pursue his appeals. He replied that he did not, stating that he "couldn't stand the pain any more".

Robert South **■ South Carolina.** Robert South was diagnosed with PTSD as a result of severe childhood abuse.

Michael Torrence **■ South Carolina.** A doctor diagnosed Michael Torrence as suffering from schizophrenia before a pre-trial competency hearing.

Larry Lonchar **Georgia.** Larry Lonchar reportedly had brain damage and suffered from bipolar disorder with paranoid tendencies

1997

Pedro Medina **Florida.** Pedro Medina had a long history of serious mental illness. He was released from a psychiatric hospital in Cuba immediately before leaving that country and coming to the USA as part of the Mariel boatlift in 1980. The murder for which he was sentenced to death occurred two years later. He was diagnosed with various illnesses, including paranoid schizophrenic or major depressive disorder with psychosis. His appeal lawyers raised a claim that he was incompetent to be executed, citing detailed reports of two psychologists and one

psychiatrist who concluded that Medina was insane. The appeal was summarily dismissed without a hearing.

- Scott Carpenter **■ Oklahoma.** At his sentencing, an expert witness testified about head injuries that Scott Carpenter had suffered, and speculated that he may have had a seizure at the time of the killing. Scott Carpenter suffered a head injury when he was aged six, when he was struck by a nail in the right temporal lobe. Carpenter suffered four other severe head injuries, the last of which occurred two months before the murder. Numerous witnesses described the defendant as quiet, respectful, cooperative, non-violent and a good student. He had no prior arrests or convictions. He was 22 when executed, the youngest person to be executed since 1977.
- Robert Madden **Texas.** Robert Madden reportedly suffered from brain damage and schizophrenia. A psychiatrist who examined Robert Madden 12 days before his execution reported that he was incompetent for execution. He claimed innocence in his final statement, and his last sentences before being put to death were recorded by the Texas Department of Criminal Justice as “unintelligible”.
- Durlyn Eddmonds **Illinois.** Durlyn Eddmonds was executed for the rape and murder of a young boy in 1977. He was not tried for two and a half years, during which time a number of doctors had found him incompetent to stand trial. In 1973, he was in a psychiatric hospital for three months. Within weeks of the crime, four doctors had diagnosed Eddmonds as suffering from schizophrenia.
- 1998**
- Joseph Cannon **Texas.** Joseph Cannon was executed for a crime committed when he was 17. Post-conviction examination resulted in a diagnosis of organic brain syndrome. One psychologist considered Cannon’s case history “exceptional” in the extent of the brutality and abuse he had suffered as a child. At the age of four he had been hit by a pick-up truck and suffered a fractured skull and other injuries. He was in hospital for 11 months and unconscious for part of that time. His head injury left him hyperactive. He suffered from a speech impediment and did not learn to speak clearly until he was six. He was expelled from school in first grade, receiving no other formal education. He drank and sniffed gasoline and at the age of 10 was diagnosed as suffering from organic brain damage as a result of the solvent abuse. He was diagnosed as suffering from schizophrenia and treated in mental and psychiatric hospitals from an early age. He was sexually abused by his stepfather when he was seven and eight; and was regularly sexually assaulted by his grandfather between the ages of 10 and 17.
- Douglas Gretzler **Arizona.** A dissenting opinion on the Ninth Circuit Court of Appeals noted that in Douglas Gretzler’s case, “the only real issue at trial was Gretzler’s mental state at the time of the murders”, and yet he had been denied psychiatric assistance to prepare this defence. The dissent listed evidence discovered after Gretzler’s conviction, including: “at age 13, Gretzler was diagnosed as suffering from anxiety and depression; from age 13 until the time the murders were committed, Gretzler used amphetamines and LSD as a means of self-medication; when Gretzler was 16, his older brother killed himself; Gretzler suffered from a significant mental disorder – ‘schizophrenic reaction, paranoid type’ - throughout most of his life; at the time of the offences, Gretzler was taking intravenous doses of amphetamines, had gone without sleep for several days, and likely suffered from amphetamine-induced psychosis; amphetamine-induced psychosis can impair the ability to premeditate and lead to paranoia and hyper-suggestibility - a condition which causes a person to follow commands or suggestions without any thought as to whether the action is right, wrong, or even possible; the amphetamine-induced psychosis may have permitted Gretzler’s companion to control Gretzler’s actions. A psychiatrist had found before the trial, that at the time of the murders, Douglas Gretzler was probably in “an acute paranoid state and possibly paranoid schizophrenic”.

- Stephen Wood ■ **Oklahoma.** Stephen Wood was sentenced to death for the murder of a fellow prisoner. At the time of the stabbing, Wood was serving a sentence of life imprisonment without the possibility of parole for two other murders. Stephen Wood had been diagnosed with paranoid schizophrenia combined with right brain hemisphere dysfunction. At his trial, a mental health expert testified that as a result of his schizophrenia, Wood had a delusion as an avenger, specifically of sexually abused children. The murder victim, a minister, was serving a 40-year prison sentence for molestation and sexual assault of young girls in his congregation.
- Jeremy Sagastegui ■ **Washington.** In 1995, Jeremy Sagastegui raped and killed a three-year-old whom he was baby-sitting, and shot and killed the boy's mother and her friend when they returned home. At his 1996 trial, Sagastegui acted as his own lawyer. He rejected jurors less likely to favour the death penalty, and objected when the prosecution rejected a juror who would have automatically returned a death sentence. Sagastegui pleaded guilty, and offered no mitigating evidence. The jury was left unaware that he was conceived as a result of a rape, rejected by his mother in infancy and childhood, and subjected to severe abuse as a child, including repeated rape and sexual abuse by his stepfather and other male relatives. Neither were they made aware that he had been diagnosed with schizophrenia and bipolar disorder shortly before the crime and treated in a psychiatric hospital as a suicide risk. Sagastegui urged the jurors to sentence him to death, and then waived his appeals. In 1996, a prison doctor diagnosed him as suffering from bipolar disorder with depressive episodes and post-traumatic stress disorder.
- Tuan Anh Nguyen **Oklahoma.** The mental health of Tuan Anh Nguyen, a former child refugee from Vietnam, had deteriorated during the seven years that he was held on death row, with symptoms that included psychotic-like episodes in his cell where he would scream for extended periods.
- Andrew Smith **South Carolina.** Andrew Smith raised an insanity defence at his trial, presenting the testimony of a clinical psychologist who testified that Smith suffered from schizophrenia and a dissociative disorder at the time of the murders and could not distinguish between right and wrong. He was on anti-psychotic medication prior to the trial.
- 1999**
- Joseph Atkins **South Carolina.** Joseph Atkins was a veteran of the Vietnam war. After a night of drinking on 27 October 1985, Joe Atkins dressed in military fatigues, armed himself with a machete and shotgun and engaged in other behaviour possibly indicative of a PTSD flashback, and killed his adoptive father and the 13-year-old daughter of his neighbours.
- Sean Sellers **Oklahoma.** Sean Sellers was sentenced to death for crimes committed when he was 16 years old. He had a history of mental problems from early childhood. After his trial, a mental health expert found him to be chronically psychotic, exhibiting symptoms of paranoid schizophrenia and other major mood disorders. In 1992, six years after the trial, three mental health professionals diagnosed Sellers with multiple personality disorder (dissociative identity disorder). The 10th Circuit Court of Appeal, "although troubled by the extent of the uncontroverted clinical evidence proving Petitioner suffers from Multiple Personality Disorder... and that the offenses were committed by an 'alter' personality", denied relief.
- Wilford Berry ■ **Ohio.** Wilford Berry suffered a childhood of extreme sexual and physical abuse. His first attempt at suicide occurred when he was aged 11, the first of 11 such attempts. At 14 he was diagnosed as suffering from severe schizophrenia, but received inadequate treatment. At 19 he was sentenced to six years in prison for car theft in Texas. While incarcerated, he was raped by another inmate and attempted suicide. In 1995, Justice Craig Wright of the Ohio Supreme Court dissented against Berry's death sentence, saying "I cannot sanction the penalty of death for a person who appears to be mentally ill".

- James David Rich ■ **North Carolina.** James David Rich pleaded guilty and represented himself at his sentencing. Reportedly had a history of mental illness, including schizophrenia and depression, and suffered an abusive childhood. He reportedly had a history of suicide attempts; when he was 12 years old, he stood in front of his elementary school class and shot himself in the stomach.
- Alvaro Calambro ■ **Nevada.** Alvaro Calambro, a national of the Philippines, reportedly suffered mental illness, with schizophrenia-type symptoms.
- Manuel Babbitt ■ **California.** Manny Babbitt was a decorated Vietnam veteran whose capital crime appears to have been linked to combat-induced PTSD. On his return to the USA, he experienced severe difficulties adjusting to civilian life and slid into serious alcohol and drug problems. He spent eight months in a mental hospital where conditions at the time were described by a federal judge as “shocking” and “unconstitutional”. His declining mental health was diagnosed, but never treated. A leading expert on Vietnam combat-related PTSD concluded that Babbitt was suffering from a combat-related flashback, aggravated by hallucinogenic drugs, when he killed Leah Schendel in 1980, and hid and tagged her body as soldiers had hidden and tagged their fallen comrades in Vietnam.
- Edward Harper ■ **Kentucky.** Defence lawyers argued that Edward Harper suffered from delusions, had a history of suicidal tendencies within his family, and required a psychiatric evaluation to assess his competency to drop his appeals. Reportedly suffered from a form of schizophrenia.
- Michael Poland ■ **Arizona.** Michael Poland’s attorney was unsuccessful in having his execution stopped on the grounds of mental incompetence. Two psychologists and a psychiatrist agreed that Michael Poland suffered from a delusional disorder that rendered him incompetent for execution, and all agreed that he was not faking this recognized mental illness. He believed that he had superhuman powers that would keep death away from him. However, a state court found Michael Poland competent for execution. In his final statement before being put to death, Poland reportedly said: “I’d like to know if they’re going to give me lunch afterwards”.
- Gary Heidnik ■ **Pennsylvania.** Gary Heidnik had a documented 30-year history of paranoid schizophrenia. The jury, left unaware of this, failed to find that he was mentally ill. Heidnik’s daughter successfully blocked his execution in 1997 on the grounds that his paranoid delusions left him incompetent to waive his appeals. The courts permitted him to be executed in 1999, despite there having been no material change in his mental condition.
- Marlon Williams ■ **Virginia.** Marlon Williams was subjected to appalling physical abuse as a child. For example, when he was 11 he was beaten with a broom handle so severely by his mother that his two blackened eyes were 95 per cent swollen shut. She sent him to school in this condition. He was immediately taken to hospital, where he was also found to have a ring imprint on his forehead. He was diagnosed with major depression at 13, and at 15 a psychological evaluation described him as “a very psychologically damaged young man”, who was having psychotic episodes. After living in various homes, including his mother’s again, Williams was taken into the custody of Social Services until he turned 18. Thirteen months later Helen Bedsole was shot dead, the crime for which Williams was executed. The judge who sentenced him to death was left largely unaware of the abuse and mental health problems.
- D.H. Fleenor ■ **Indiana.** DH Fleenor had long shown signs of mental illness, had refused to see his lawyers in the weeks leading up to his execution because of his belief that they were part of a conspiracy against him. Several priests in recent contact with DH Fleenor had expressed concern that he was seriously delusional and did not understand his punishment. The prison’s Catholic chaplain, who had signed an affidavit to this effect, was banned by the prison authorities from visiting DH Fleenor and other condemned inmates on the grounds of “philosophical

differences”, ie the chaplain’s opposition to the death penalty. Two other priests, apparently intimidated by the prison authorities’ hardline approach, decided against signing affidavits about DH Fleenor’s mental health because they did not want to risk losing their access to death row prisoners. Legal attempts to have an independent psychiatric evaluation of DH Fleenor failed.

2000

- Larry Robison** **Texas.** Larry Robinson always claimed that his crime was the result of his mental illness. He was diagnosed with paranoid schizophrenia three years before the murders for which he was sentenced to die. His mother sought help, but was told that the state had no resources unless he turned violent. None of the three doctors who diagnosed Larry Robison as suffering from paranoid schizophrenia were called to testify at the trial.
- Betty Lou Beets** **Texas.** Betty Lou Beets had a lengthy history of well-documented head injuries, including repeated blows at the hands of abusive men, as well as a near-fatal car accident in 1980. Expert testimony in post-conviction proceedings established that she suffered from post-traumatic stress disorder, battered women’s syndrome and organic brain damage and that she was learning disabled and hearing-impaired. According to defence experts, her multiple disabilities left her with gravely impaired judgement and extremely dependent on others. At the time of the murder, she was abusing alcohol and diet pills. Sentenced to death for killing her husband, her traumatic history of physical and sexual abuse from an early age was not presented to the jury.
- Robert Coe** **Tennessee.** Robert Coe was diagnosed as suffering from brain damage and paranoid schizophrenia. His childhood was marked by extreme poverty and his father’s physical and sexual abuse. In 1975, at the age of 19, Coe was found incompetent to stand trial due to mental illness. He was described as a “seriously disturbed young man” whose disposition to violence and sexual aggression was “a lesson garnered from his father”. His illness included auditory hallucinations in which he would hear his father screaming at him. He was sentenced to death for the abduction, rape and murder of an eight-year-old girl in 1979.
- Christina Riggs** ■ **Arkansas.** Christina Riggs killed her two children in 1997, and unsuccessfully attempted to kill herself on the same night. Her actions were apparently the result of mental illness, including severe depression. She demanded the death penalty at her trial and refused to appeal her death sentence.
- Pernell Ford** ■ **Alabama.** From the age of six, Pernell Ford spent extended periods in mental health institutions, and by 13 was being prescribed powerful anti-psychotic and anti-depressant drugs. During his adolescence he attempted suicide several times. He was found competent to act as his own lawyer despite his youth, his borderline mental retardation and mental illness. The only “defence” he offered was that God would intervene at the trial and bring the victims back to life. At his sentencing, Pernell Ford dressed himself in a white bed sheet, worn toga-style with a belt and shoulder strap made from a white towel. In a long speech, he asked the judge to have the coffins of the Griffiths brought into the courtroom so that God could raise them from the dead in front of the jurors. On death row, he periodically gave up his appeals, but resumed them when his mental health stabilized. He was diagnosed as suffering from schizophrenia and depression and treated with a range of drugs. Pernell Ford claimed that he was able to transport himself anywhere on earth, by a method he called “translation”. He stated that one of his first “translations” from his cell was to India, where he now had a number of wives. He said that when he died he would become the Holy Spirit and sit on the left hand of God, and that he had already visited heaven in an earlier “translation”.
- Roger Berget** **Oklahoma.** Roger Berget suffered from bipolar disorder, and had attempted suicide shortly before the sentencing hearing. His trial lawyer stated in a later affidavit: “I simply did not understand the importance of mental health evidence to present a full picture...this entire area

was left uninvestigated.” The lawyer also admitted that he failed to investigate Roger Berget’s abusive childhood: “There were indicators of serious childhood trauma that should have been investigated and explored by an expert”. At the age of 14, Roger Berget suffered a serious head injury in a car accident. At 15 he was sent to adult prison to begin the first of a number of prison sentences for robbery.

Thomas Provenzano Florida. Thomas Provenzano had a history of serious mental illness, including paranoid schizophrenia, dating back to before the crime. The judge who found him competent for execution found “clear and convincing evidence that Provenzano has a delusional belief that the real reason he is being executed is because he is Jesus Christ.” The judge noted that Thomas Provenzano had held this belief for over 20 years. However, the judge stated that the present standard for competency is a “minimal standard”. He said that his ruling “should not be interpreted as a finding that Thomas Provenzano is a normal human being without serious mental health problems, because he most certainly is not”.

Juan Soria Texas. Last-minute appeals to stay the execution on the grounds that Soria was mentally incompetent for execution, were unsuccessful. Juan Soria had a history of self-mutilation and suicide attempts, the most recent of which took place a few days before the execution. On 25 July, the eve of the execution, a psychologist employed by the defence to examine Juan Soria concluded that he was not competent for execution. A judge rejected the claim. Local reports of the execution noted that as Juan Soria was strapped to the gurney, he was “covered with sheets to conceal numerous self-inflicted wounds.” According to the reports, in his final statement Juan Soria compared his execution to surgery: “They say I’m going to have surgery, so I guess I will see everyone after the surgery is performed.”

John Satterwhite Texas. At two competency hearings in 1989 prior to his retrial, juries were twice unable to decide whether Satterwhite was mentally fit to stand trial. At the 1989 trial, a psychiatrist formerly employed by the state prison system, testified for the defence that Satterwhite suffered from chronic paranoid schizophrenia, and had done so since his teens. He also concluded that Satterwhite had mental retardation. A second expert endorsed this view.

Dan Hauser ■ Florida. Dan Hauser was executed for the murder of Melanie Marie Rodrigues on 1 January 1995. He had suffered from bipolar disorder since late adolescence, and had been suicidal in the past. During manic phases he was irrational and delusional. A psychiatrist stated that it was likely that he was suffering from a manic episode at the time of the crime. He was also intoxicated with alcohol on the night of the murder. He regularly abused alcohol and suffered from alcoholic blackouts. The courts rejected an appeal against the execution filed on behalf of Hauser’s mother. The appeal argued that Dan Hauser was not mentally competent to waive his appeals and that his decision to do so was part of a plan to commit suicide. It argued that Hauser had made up gruesome details of the crime to ensure that he would be sentenced to death. The details given by Hauser, the appeal argued, were inconsistent with his initial confession and did not fit with independent scientific evidence of the physical evidence. Hauser had also lied to the trial court when he said that he had never been treated for mental illness, when in fact he had received psychiatric treatment as both an inpatient and an outpatient at several mental facilities.

2001

Dion Smallwood Oklahoma. Dion Smallwood was initially found incompetent to stand trial. After nearly three months of treatment, the psychiatric hospital determined that he could stand trial, although it noted that he remained “a danger to himself and others”, the standard in Oklahoma for commitment to a psychiatric facility. The jury never heard any expert mental health testimony from the defence at either stage of the trial. Dion Smallwood had sought psychiatric help shortly before the murder of Lois Fredericks because his condition was deteriorating. On 10 January 1992 he went to a mental health facility, stating that he was having “a crisis”. The counsellor was busy and asked him to come back in two hours. Although she noted that he was

“obviously in relapse”, she did not follow up on his whereabouts when he did not return. A clinical psychologist who assessed Smallwood after his conviction found that he suffered from bipolar disorder: “This psychiatric disturbance when of the severity of that of Dion, disrupts all areas of functioning, relationships, occupational, social, and often requires hospitalization to prevent harm to self or others. Dion never had this necessary treatment”. She said that had he received such treatment, “it is unlikely that his situation would have created the intense symptoms he experienced that culminated in the death of Mrs Fredericks”.

- Thomas Akers **■ Virginia.** Thomas Akers was born to a 16-year-old mother into a life of poverty, abuse and parental neglect. He engaged in solvent abuse from as early as 11. At school he was placed in special education classes for pupils with learning disabilities. He ran away from home and lived with a man who sexually abused him. Thomas Akers was committed to a series of juvenile facilities for various property offences. At one of the juvenile institutions, he attempted suicide by breaking a light bulb and cutting himself over 100 times. Despite his mental problems, including brain damage, hallucinations and extreme depression, he never received the appropriate long-term therapeutic care that was recommended by mental health professionals at the time. In 1987, when he was 17, he was arrested for stealing, tried and sentenced to adult prison. After a few months, he wrote to the judge who had sentenced him, and asked to be put to death in Virginia’s electric chair. After being paroled in August 1998, he began wearing a necklace with an electric chair pendant. He told his family that he was going to be executed. In December 1998, he was arrested for the murder of Wesley Smith. Thomas Akers told his court-appointed lawyers not to bother with a defence, and demanded the death sentence from the prosecutor and the judge. After he got his wish in November 1999, Thomas Akers waived his right to appeal and was executed 15 months later.
- Dennis Dowthitt **Texas.** Dennis Dowthitt had suffered from mental illness since he was a teenager. His original trial lawyers did not investigate this issue, or the abuse he suffered as a child, to present in mitigation. One of several mental health experts, who have assessed Dowthitt since his conviction, concluded that his profile was “consistent with paranoid and schizophrenic features”. A second expert stated that the tapes of Dennis Dowthitt’s interrogation showed his “severe mental problems”.
- Jay Scott **Ohio.** Jay Scott developed serious mental illness on death row. In December 2000 a prison doctor diagnosed him as suffering from schizophrenia. Prior to this, doctors have variously described him as “delusional” and as having a “major depressive disorder, chronic with psychotic features”. Jay Scott was reported to have suffered from auditory hallucinations - a symptom of schizophrenia - from as early as 1992. His disturbed behaviour over the years included setting fire to his cell, banging his head against the wall, screaming incoherently, and fouling his food and then eating it. During psychotic episodes in 2000, he was taken out of his cell and placed on 24-hour suicide watch. He has been given anti-psychotic drugs. Jay Scott’s background is one of poverty, deprivation, and exposure to violence from an early age. At his 1984 trial, his lawyers decided not to present any mitigating evidence to this effect because they feared it would reveal details of his criminal history.
- Miguel Richardson **Texas.** Miguel Richardson had a long history of bipolar disorder and was medicated on death row.
- Jim Lowery **Indiana.** At the clemency hearing, the Indiana Parole Board heard testimony from a psychologist who had recently diagnosed Jim Lowery as still suffering from PTSD as a result of his treatment in the mental institutions. The psychologist also testified that Lowery should never have been placed in those facilities. Jim Lowery’s childhood was marked by poverty and parental neglect. He first got into trouble as a young teenager, after taking his father’s car for joyriding in. When he was 15 or 16, his parents took him to court and a judge committed him to a state mental facility, even though no evidence had been presented that he was

mentally ill. The teenager ran away from the institution several times, telling his brothers and sisters that he had witnessed inmates being given electro-shock treatment and that he was afraid this would happen to him. He was transferred to the maximum security unit of another institution, the Norman Beatty Hospital, which has since been closed. There he was subjected to repeated gang rapes by staff. He was released at the age of 18. He took to drugs, alcohol, and property crime, and was in and out of the prison system until the crime for which he was sentenced to die.

- Terry Mincey** **Georgia.** Two years earlier before the crime, Terry Mincey had had a near fatal motorcycle accident. At the trial, although family members testified that he had undergone a drastic personality change after the accident, with severe mood swings and an impaired memory, the defence presented no expert mental health evidence about the head injury and its possible effects. In a post-conviction affidavit, a psychologist opined that the injury would have impaired Mincey's judgment and impulse control: "Mincey's head injury was a significant factor in the case - a factor which when considered establishes that Mr Mincey's actions on the night of the offense were the irrational impulsive actions of a brain damaged individual and not the actions of a cold, calculated, and premeditated murderer". Eight years after the trial, Terry Mincey's appeal lawyers discovered notes that the prosecutor had taken during a pretrial meeting with the state's psychiatrist, who was a member of the state forensic team which had evaluated Mincey in May 1982. The prosecutor's notes included the following about Terry Mincey: "Brain damage in auto accident. Reflexes more active on 1 side. This indicates motor muscle power differential. It is possible he might now be more susceptible to irrational behavior". The notes were not provided to the defence.
- James Elledge** **Washington.** James Elledge was sentenced to death for the murder of a woman in 1998. He turned himself in to the police, after allegedly twice attempting suicide. He pleaded guilty to first degree murder and refused to allow any mitigating evidence to be presented. The jury was unaware that he had pleaded insanity in a previous case, his reported history of mental illness, and his childhood abuse. He refused to appeal his death sentence.
- Jose High** **Georgia.** Jose High, black, was on death row for 23 years for the murder of 11-year-old Bonnie Bulloch, white, when High was a teenager. In post-conviction affidavits, three mental health experts said that Jose High suffered from "a major mental illness with psychotic features", "a seizure disorder", "significant brain damage" and "borderline intellectual functioning". They concluded that he suffered from such disorders at the time of the crime, as well as before and after it. The experts also reviewed Jose High's videotaped "confession" to the police. They state that it clearly shows his mental illness, indicates that he was manipulated by the police during questioning, and calls into question the extent of his role in the crime. The video was not disclosed to the defence at the time of the trial and only came to light in 1991. In prison, Jose High was diagnosed with schizoaffective and depressive disorders. His medical records over the years revealed that, despite being given powerful medication, he suffered visual and auditory hallucinations, as well as seizures and suicidal ideation. He was subjected to severe physical abuse at the hands of his father. Jose High's lawyer presented no expert or other witnesses at the sentencing phase. In his final statement before being executed, High said that it had not been he who had shot Bonnie Bulloch. His two co-defendants had their death sentences overturned on appeal.
- Jeffrey Tucker** **Texas.** Jeffrey Tucker was a victim of childhood physical, sexual and emotional abuse. In upholding his death sentence in 2001, the US Court of Appeals for the Fifth Circuit stated that "we do not profess to be unmoved by the dreadful circumstances of Tucker's childhood, and we understand the relevance of such evidence to the jury's determination of Tucker's moral culpability at the time he committed the murder". In 1997, a psychiatrist had concluded that Tucker suffered from brain damage and post-traumatic stress disorder. His trial lawyers did

not present mental health evidence at the trial, and presented minimal mitigating evidence about his childhood. They later admitted that “it was certainly not due to any legal strategy, tactic or plan that we neglected to pursue and introduce documents or testimony regarding Mr Tucker’s mental illness at either phase of the trial. In fact, such evidence would have helped us immeasurably. The idea of investigating a client’s childhood and mental health history was new to us.”

2002

James Johnson

Missouri. At his trial for the murder of three police officers and the wife of one of them, Jim Johnson pleaded “not guilty by reason of mental disease or defect”. The defence position was that he suffered PTSD as a result of his wartime experiences in Vietnam, and that he had experienced Vietnam-related flashbacks on the night of the murders which made him believe that he was confronted by the enemy and rendered him incapable of appreciating the wrongfulness of his conduct. However, the lawyer’s failure to prepare adequately allowed the state to discredit this defence. Although three experts testified that Johnson suffered from PTSD, the jury convicted Johnson on four counts of first-degree murder and sentenced him to death on all four counts. A state Supreme Court judge, dissenting against his colleagues’ decision to uphold the death sentence, wrote: “Defense counsel’s unprofessional failure to interview [the prosecution witnesses] led the defense to make demonstrably false claims in its opening statement, claims that utterly destroyed the credibility of the PTSD theory before the defense even presented any evidence... I find it reasonably likely that a jury that had not seen the defense destroy its own credibility on this issue would have been sufficiently receptive to the expert diagnosis of a mental disease or defect to permit a reasonable likelihood of a different result... While Mr Johnson may not, as the jury found, have met the legal definition of insanity, whatever drove Mr Johnson to go from being a law-abiding citizen to being a multiple killer was certainly something akin to madness. I am not convinced that the performance of his counsel did not rob Mr Johnson of any opportunity he might have had to convince the jury that he was not responsible for his actions”.

Monty Delk

Texas. Post-conviction, in 1990, the prison medical authorities diagnosed Monty Delk with bipolar disorder with psychotic features, and also raised the possibility that he was suffering from schizo-affective disorder. Monty Delk displayed a pattern of disturbed behaviour over his years on death row, including covering himself in feces, and incoherent jabbering. He has repeatedly expressed delusional beliefs, such as that he is a submarine captain, a CIA or FBI agent, or a member of the military. At a court hearing in 1993, he responded to the judge in prolonged streams of unbroken gibberish. At another hearing in 1997, Monty Delk was gagged and then removed from the courtroom after repeatedly interrupting the court with nonsensical utterances. At the hearing, a former chief mental health officer with the Texas prison system said that his review of the prison records and his own contact with Monty Delk suggested that the prisoner suffered from a severe mental illness. From time to time, the state contended that Delk was malingering to avoid execution. About four hours before the scheduled execution, the Fifth Circuit lifted a lower court stay. Strapped down for execution, Monty Delk shouted gibberish and obscenities.

Rodolfo Hernandez **Texas.** Rodolfo Hernandez was diagnosed as suffering from paranoid schizophrenia. See main report, in the section *Unethical: Psychiatric testimony used to kill*.

Linroy Bottoson

■ **Florida.** A renowned mental health expert concluded, after examining Linroy Bottoson and reviewing his records, that “Mr. Bottoson’s chronic mental illnesses currently render him unable to rationally and factually understand and appreciate the reason that the State of Florida is seeking his execution and unable to factually comprehend that his death will in fact occur. This man cannot perceive any connection between any crime and the punishment that is scheduled. Because of his fixed psychotic delusions he has no current capacity to come to grips with his own conscience, with the crime, with mortality, with his sentence, or with reality. He

understands himself to be locked in the middle of a battle between Jesus and Satan, a battle that he is certain, as one of God's prophets, Jesus will win. Mr. Bottoson believes that he will not be executed because humankind needs him."

2003

James Colburn

Texas. James Colburn was diagnosed with schizophrenia before the crime. When he gave a statement to police on the day of the murder, after he handed himself in, there were indications that he was struggling with his illness. During his 1995 trial, James Colburn received injections of Haldol, an anti-psychotic drug which can have a powerful sedative effect. A lay observer, a nurse with experience of mentally ill patients, has stated in an affidavit that Colburn appeared to fall asleep on frequent occasions during the proceedings. A psychiatrist who conducted an assessment of James Colburn in 1997, and reviewed the records in the case, concluded that there were "serious questions and concerns regarding [Colburn's] competency to stand trial at that time", and that Colburn had been "seriously sedated during the time of his trial".

John Smith

■ **Missouri.** John Smith was diagnosed with mental illness, specifically bipolar disorder with psychotic features, and was on medication in prison. He dropped his appeals. According to his attorneys, he had previously made a suicide attempt while on death row.

Louis Jones

Federal. After serving in Operation Desert Storm/Desert Shield in Saudi Arabia in 1990 and 1991, Louis Jones displayed significant behavioural and personality changes. He lost his sense of humour, became dominating, possessive, rigid in his thinking, and began drinking to excess. He suffered from daily headaches. At the trial a psychologist testified that, in his opinion, Louis Jones' experience had intensified the PTSD that he had suffered as a result of his involvement in the US invasion of Grenada in 1983, in which he had led his platoon in a dangerous parachute jump under hostile fire. At the trial, a psychologist, a neurologist and a psychiatrist variously stated their opinion that on the night of the crime, Louis Jones was suffering from various mental problems, including a major depressive disorder, a dissociative disorder, PTSD, cognitive disorder and alcohol intoxication. The neurologist testified that, in his opinion, Louis Jones had suffered brain damage, which made it difficult for him to control impulses. His clemency petition raised the claim that he suffered from brain damage as a result of Gulf War Syndrome, evidence which had not been raised at the 1995 trial due to the lack of scientific and medical knowledge on this subject at that time.

James Brown

Georgia. James Willie Brown had a long history of mental illness, including repeated diagnoses of schizophrenia. His trial for murder was delayed for six years on the grounds of mental incompetence. He was eventually tried and sentenced to death in 1981, but was granted a new trial by a federal court in 1988 due to doubts over his competency to stand trial in 1981. He was retried in 1990, and again sentenced to death. At the retrial, the defence presented two experts who testified that James Brown suffered from chronic paranoid schizophrenia. The state's position at the 1990 retrial, however, was that James Brown was faking his mental illness. It presented a doctor who stated that, in his opinion, the defendant did not have schizophrenia, but had suffered drug-induced flashbacks. This doctor appears to have ignored James Brown's long history and repeated diagnoses of mental illness (over the years more than 25 mental health experts employed by the state have found James Brown to be mentally ill and not malingering). To bolster the state's theory that the defendant was malingering, the prosecution presented a former inmate, Anita Tucker, who said that James Brown had confided in her that he was faking his illness. Anita Tucker later recanted that testimony, and testified that her earlier testimony was part of a deal with the prosecution in exchange for her early release on her own criminal charges.

2004

Charles Singleton

Arkansas. Charles Singleton was sentenced to death in 1979 for the murder of Mary Lou York. Charles Singleton's mental condition worsened in the years that he was on death row, and he has been diagnosed as likely suffering from schizophrenia. By the late 1980's he had

begun to suffer delusions, including that his cell was possessed by demons, that a prison doctor had implanted a device in his ear, and that his thoughts were being stolen when he read the Bible. Over the years, he has described himself as the Holy Ghost and “God and the Supreme Court”, expressed the belief that he had been freed by the Supreme Court, that execution is just a matter of stopping breathing and that a judge could restart his breathing again, that Sylvester Stallone and Arnold Schwarzenegger were between this universe and another and trying to save him, and, in a letter to a federal court, that Mary Lou York “is somewhere on this earth waiting for me – her groom”. By the early 1990s Charles Singleton was regularly on anti-psychotic drugs. When he did not take the medication, or he needed increased or different medication, his symptoms would worsen. When his illness became severe, he was put on an involuntary medication regime. His psychotic symptoms abated, and the state set an execution date.

Kevin Zimmerman Texas. Kevin Zimmerman was originally charged with murder, not capital murder. He was appointed a succession of lawyers who all withdrew from the case for various reasons, having done little or no work on the case. After a year, Zimmerman wrote letters to the prosecutor and court, in effect daring them to charge him with capital murder. He was recharged, this time with capital murder. A doctor who later reviewed the case stated in an affidavit that the claims in Zimmerman’s letters were “patently absurd” and that the records indicate that at the time he was “psychotic”, “potentially suicidal and required suicide prevention measures”. His trial lawyers, who had no capital trial experience, failed to have Zimmerman evaluated for his mental competency to stand trial even though there was evidence that he might not be able to assist in his own defence. They did not investigate his family background, and did not learn that he had a history of mental problems beginning after a serious bicycle accident at the age of 11, as a result of which he had a plate put in his head. There were numerous relatives and neighbours who could have testified that his personality and behaviour changed after the accident. The lawyers failed to present expert psychiatric evidence to support the claim of self-defence or to present as mitigation evidence against the death penalty. In 1997, an expert conducted an evaluation of Kevin Zimmermann, and found that his childhood brain injury had “materially affected his behavioral control, both as an adolescent and at the time of the stabbing”. In 1995 another doctor had concluded that Zimmerman showed signs of a mental disorder characterized by impaired impulse control and judgment. In 2003, a psychologist concluded that Kevin Zimmerman had suffered a “traumatic and serious frontal brain injury at the age of eleven which resulted in the development of seizures, personality changes, explosive outbursts as well as post-explosive amnesia.” She said that due to the mental impairments, the murder for which Zimmerman was sentenced to death “should not be considered as a predatory/premeditated crime.” She also concluded that Kevin Zimmerman’s “behaviour at the time of the crime and around the time of his trial raises the strong probability that he was suffering from a separate mental illness or disorder” at those times.

Hung Thanh Le Oklahoma. The jury heard no expert evidence of the possible impact of Hung Thanh Le’s traumatic refugee experiences on his actions. After the trial, a Vietnamese psychologist concluded that Hung Le was suffering from post-traumatic stress disorder at the time of the crime – the murder of a fellow Vietnamese refugee in Oklahoma City in 1992. Hung Le had reportedly witnessed, and was subjected to, violence and deprivation in the refugee camps in Cambodia and Thailand.

Kelsey Patterson Texas. After shooting Louis Oates and Dorothy Harris in 1992, Kelsey Patterson put down the gun, undressed and was pacing up and down the street in his socks, shouting incomprehensibly, when the police arrived. In 2000, a federal judge wrote that “Patterson had no motive for the killings – he claims he commits acts involuntarily and outside forces control him through implants in his brain and body. Patterson has consistently maintained he is a victim of an elaborate conspiracy, and his lawyers and his doctors are part of that conspiracy. He refuses to cooperate with either; he has refused to be examined by mental health professionals since 1984,

he refuses dental treatment, and he refuses to acknowledge that his lawyers represent him. Because of his lack of cooperation, it has been difficult for mental health professionals to determine with certainty whether he is exaggerating the extent of his delusions, or to determine whether he is incompetent or insane. All of the professionals who have tried to examine him agree that he is mentally ill. The most common diagnosis is paranoid schizophrenia.” Patterson was first diagnosed with schizophrenia in 1981. A jury found him competent to stand trial for the murders. Yet his behaviour at his competency hearing, and at the trial itself – when he repeatedly interrupted proceedings to offer rambling narrative about his implanted devices and other aspects of the conspiracy against him – provided compelling evidence that his delusions did not allow him a rational understanding of what was going on or the ability to consult with his lawyers. After learning of his execution date, Patterson wrote rambling letters to various officials. In the letters he referred to a permanent stay of execution that he said he had received on grounds of innocence. Kelsey Patterson’s family had tried unsuccessfully to get treatment for him prior to his crime.

Robert Bryan **Oklahoma.** Robert Bryan had been diagnosed with chronic paranoid schizophrenia, and had a history of organic brain disease which may have been related to his severe diabetes dating back decades. Despite serious concerns about his competence to stand trial, and the fact that he had previously been found incompetent to stand trial, Robert Bryan’s trial lawyer presented no mental health evidence at either stage of the trial.

Stephen Vrabel **■ Ohio.** Stephen Vrabel shot his girlfriend and their child in 1989, and then put their bodies in the refrigerator. He was found incompetent to stand trial and he was committed to a psychiatric hospital where he remained for the next five years, until he was found competent to stand trial. He was diagnosed with serious mental illness, including paranoid schizophrenia. Three Ohio Supreme Court Justices dissented against his death sentence on the ground of Vrabel’s mental illness.

Kevin Hocker **■ Alabama.** Kevin Hocker suffered from bipolar disorder. His trial for a 1998 murder lasted one day. The trial lawyer presented no witnesses, and Hocker refused to allow any mitigating evidence to be presented, so the jury was left unaware of the abuse he was subjected to as a child, his history of mental illness, or the fact that his father had also suffered from bipolar disorder and had committed suicide when Hocker was eight years old. Kevin Hocker then refused to appeal his sentence. He mutilated himself on death row, including cutting off his testicles. His mother and sister said that he had been suicidal for years. His sister said that her brother had told her that he committed the crime in order to get the death penalty.

Mark Bailey **Virginia.** Lawyers for Mark Bailey, a former Navy submariner, appealed for clemency from the Governor of Virginia on the grounds that Bailey suffered from bipolar disorder, and had faced “a continuous struggle with his mental illness”, a factor which was not considered by the jury when it sentenced him to death for killing his wife and child in 1998.

2005

Donald Beardslee **California.** Donald Beardslee’s clemency lawyers revealed evidence of his mental impairment. An expert conducted an assessment of Beardslee and concluded that he suffered from severe brain damage, and that the right hemisphere of his brain was virtually non-functioning. The expert concluded that in all likelihood he had suffered from this impairment since birth and it was exacerbated by serious head injuries he sustained when a teenager and in his early 20s. The expert concluded that the brain damage likely affected his behaviour at the time of the crime, and also that the severity of the impairment would likely have left jurors interpreting his flat demeanour as indicating a callous individual. The prosecutor repeatedly depicted Beardslee as a remorseless killer, and told the jury that they could evaluate him from his demeanour in the courtroom. The jury was not presented with the evidence of brain damage,

allowing the prosecutor to argue that the defendant was “not suffering from any mental disorder”.

Troy Kunkle **Texas.** At the time of the crime, Troy Kunkle was just over 18 years old, with no criminal record, and emerging from a childhood of deprivation and abuse. At times, his parents had suffered from mental illness. When Troy Kunkle was 12, his father’s mental condition deteriorated, resulting in severe mood swings during which he would subject Troy Kunkle to severe physical abuse. It was during this time that the boy’s problems at school escalated, conduct which would later be used by the state in its effort to persuade the jury to vote for his execution. In post-conviction evaluations, a psychologist concluded that Troy Kunkle was suffering from schizophrenia, a diagnosis he said was backed up by prison records. He stated that much of Troy Kunkle’s early adolescent behaviour problems could be “linked to his father’s aggressive and psychotic behaviour” towards him throughout his childhood, as well as to the lack of nurturing when his mother was herself suffering from serious mental illness. The psychologist concluded that an expert evaluation at the time of the trial would likely have shown Troy Kunkle’s emerging mental disorder, and the exacerbating effect of substance abuse on this. The jury heard no expert testimony, however.

Appendix 2 – Recommendations of an ABA Task Force

Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behaviour, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
2. Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for the purposes of this provision.
3. Mental Disorder or Disability after Sentencing
 - (a) *Grounds for Precluding Execution.* A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the

prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

- (b) *Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings.* If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.
- (c) *Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings.* If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to a lesser punishment.
- (d) *Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose.* If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to a lesser punishment.

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For further information and analysis of the Task Force's proposals, see the *Catholic University Law Review*, Volume 54 (2004-2005).