Washington and Lee Journal of Civil Rights and Social Justice

Volume 29
Issue 2 *Symposium Edition (2021–2022)*

Article 6

Spring 2023

Severe Mental Illness and the Death Penalty: A Menu of Legislative Options

Richard J. Bonnie
rbonnie@virginia.edu, rbonnie@virginia.edu

Severe Mental Illness and the Death Penalty: A Menu of Legislative Options

Richard J. Bonnie*

Abstract

In 2003, the American Bar Association established a Task Force on Mental Disability and the Death Penalty to further specify and implement the Supreme Court's ruling banning execution of persons with intellectual disability and to consider an analogous ban against imposing the death penalty on defendants with severe mental disorders. The Task Force established formal links with the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness and the final report was approved by the ABA and the participating organizations in 2005 and 2006. This brief article focuses primarily on diminished responsibility at the time of the offense, summarizing the reasons why an exclusion for severe mental illness is needed and reviewing the key drafting issues that can be expected to arise in defining the clinical criteria for exclusion. A key question is whether state trial judges and judges appointed to state appellate courts embrace their constitutionally grounded duties to assure sparing and humane administration of the death penalty. Assiduous efforts to prevent execution of prisoners with severe mental illness is a necessary element of that judicial assignment.

* Richard J. Bonnie is the Harrison Foundation Professor of Medicine and Law and the director of the Institute of Law, Psychiatry, and Public Policy at the University of Virginia. He has co-authored leading textbooks on criminal law and public health law and devoted special attention during his career to public policies relating to mental health and substance abuse.

Table of Contents

Within a year after the U.S. Supreme Court decided *Atkins v. Virginia*[1], the American Bar Association established a Task Force on Mental Disability and the Death Penalty to further specify and implement the Court's ruling banning execution of persons with mental retardation (the preferred phrase is now "intellectual disability") and to consider an analogous ban against imposing the death penalty on defendants with "severe mental disorders."[2] A Task Force convened by the ABA in 2003 included 24 lawyers and mental health professionals, including the author.[3] The Task Force also established formal links with the American Psychological

1. 536 U.S. 304, 321 (2002) (holding that executing people with mental retardation violated the Eighth Amendment's ban on cruel and unusual punishment).

2. *See Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2004) (describing the ABA's three recommendations concerning the role of mental disability in capital cases).

3. This is a first-hand account of the deliberations of the Task Force drawn from electronic files maintained by the author.

Association, the American Psychiatric Association, and the National Alliance on Mental Illness. After iterative drafts of the Task Force's Recommendations were carefully considered by these professional organizations, the final version was approved by the American Psychiatric Association, the American Psychological Association and NAMI in 2005 and by the ABA in 2006.[4] The "black letter statements" (reproduced below) were accompanied by a formal Report. The Report and Recommendations also address other important issues relating to mental illness and capital adjudication – specifically, competence for post-conviction proceedings and competence to be executed – as well as diminished responsibility at the time of the offense. However, this article focuses primarily on diminished responsibility at the time of the offense.

****

ABA BOX

AMERICAN BAR ASSOCIATION RESOLUTION ON MENTAL DISABILITY AND THE DEATH PENALTY (2006)

(ALSO ADOPTED BY THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND NATIONAL ALLIANCE ON MENTAL ILLNESS)

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and

4. The full report is published in *Special Feature: Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL AND PHYSICAL DISABILITY L. REP. 5, 668–77 (2006).

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 purposes of this provision.

3. Mental Disorder or Disability after Sentencing

(a) *Grounds for Precluding Execution*. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

(b) *Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post-Conviction Proceedings.* If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

> (c) *Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post-Conviction Proceedings.* If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to the sentence imposed in capital cases when execution is not an option.
>
> (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 the sentence imposed in capital cases when execution is not an option.

****

When the aims of the Report were being discussed by the ABA leadership, the drafters were queried about whether we envisioned that the ABA statement would be seen by the courts as evidence of evolving standards of proportionality that might eventually underlie a constitutional ruling banning the death penalty for defendants who met the diminished responsibility criteria. My answer, on behalf of the drafters, was that the main immediate target of our diminished responsibility recommendation was state legislatures, not the courts. Only Connecticut had enacted a *per se* exclusion based on diminished responsibility[5] and we did not

5. *See Connecticut Death Penalty Laws*, OLR RSCH. REP. (2005) ("A defendant cannot receive the death penalty if the court or jury determines

expect a groundswell of legislative action embracing the ABA's categorical exclusion. In 2006, it could not plausibly be argued that a categorical exclusion based on mental illness represented an emerging contemporary standard of proportionality, as the Supreme Court had characterized legislative willingness to ban the death penalty for defendants with intellectual disability in Atkins v. Virginia in 2002.[6] We recognized that it will take some time before a plausible argument can be made that executing an offender who was severely mentally ill at the time of the offense contravenes "evolving standards of decency" in a civilized society.

It is also noteworthy that the drafters of the Model Penal Code did not endorse a *per se* exclusion based on mental illness or any other specified mitigating factor.[7] Instead, the MPC declares that the jury "shall [not] impose the death penalty if it finds at least one aggravating circumstance and that there are no mitigating circumstances sufficiently substantial to call for leniency."[8] Among the prescribed list of mitigating circumstances is that "at the time of the murder, the capacity of the defendant to appreciate the [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication."[9]

There was little immediate legislative interest in the ABA recommendation on diminished responsibility attributable to mental illness. It took about a decade before the ABA's "severe mental illness" recommendation began to attract legislative attention. Stakeholder coalitions emerged in Virginia and Ohio in 2015. Six years later the mental illness exclusion was adopted in

---

that . . . (2) he was mentally retarded at the time of the crime; (3) his mental capacity or ability to conform his conduct to the requirements of law was significantly impaired at the time of the crime (but not so impaired as to constitute a defense) . . . .") [perma.cc/392Q-E66N].

6. *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002) ("[O]ur death penalty jurisprudence [reflects] the legislative consensus that the mentally retarded should be categorically excluded from execution.").

7. See MODEL PENAL CODE § 210.6, cmt. 1 ("[T]he Model Code . . . does not take a position on whether the sentence of death should be retained or abolished.").

8. MODEL PENAL CODE § 210.6(2).

9. MODEL PENAL CODE § 210.6(3)(g).

Ohio[10] and undoubtedly would have been enacted in Virginia if the Commonwealth had not abolished the death penalty altogether.[11] However, the intensive efforts to develop sound diminished responsibility bills in Virginia and Ohio will be of interest to reformers in other states. This brief paper summarizes the reasons why an exclusion for severe mental illness is needed and reviews some of the key drafting issues that can be expected to arise.

I. Safeguards against Executing Defendants or Prisoners with Severe Mental Illness

Some might say that we already have adequate safeguards to prevent capital punishment of persons with severe mental illness. Various legal rules allow mental illness to be taken into account during the proceedings in a capital case and in post-conviction proceedings: (1) a defendant who is incompetent to stand trial may not be tried; (2) a person who was mentally ill at the time of the capital offense may not be convicted and punished if found not guilty by reason of insanity; (3) a defendant convicted of a capital offense may not be sentenced to death if the judge or jury finds that the necessary aggravating circumstances do not exist or that the evidence in mitigation, including severe mental illness, outweighs the evidence in aggravation; and (4) a defendant sentenced to death may not be executed unless, at the time of the execution, (s)he is able to understand the nature and purpose of the punishment. Why aren't these rules sufficient to prevent execution of a person with severe mental illness?

---

10. *See Ohio Bars Death Penalty for People with Severe Mental Illness*, DEATH PENALTY INFO. CTR. (Jan. 11, 2021) ("On January 9, 2021, Governor Mike DeWine signed into law House Bill 136, which prohibits imposing the death penalty on or carrying it out against individuals whose severe mental illness at the time of the offense significantly impaired their judgment, capacity, or ability . . . .")[perma.cc/EC68-2AZD].

11. *See* Samantha O'Connell, *Virginia Becomes First Southern State To Abolish the Death Penalty*, ABA (March 24, 2021) ("On March 24th at around 2pm EDT, Virginia Gov. Ralph Northam officially signed HB2263 into law, abolishing the death penalty in the Commonwealth of Virginia.") [perma.cc/7S26-C5KY].

A. Trial Incompetence

If an individual is found incompetent to stand trial, he/she cannot be prosecuted unless and until he regains competence (unrelated to the defendant's mental condition at time of crime). The standard for competency requires "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him."[12] Why doesn't preventing trial of a person who lacks competence to stand trial prevent a death sentence for a person with mental illness? The short answer is that even if initially found incompetent, a severely mentally ill defendant (SMI) will typically be treated and found to have been restored to competence, and may then be found guilty and sentenced to death. Unfortunately, in all too many cases, a defendant with severe mental illness who is found competent to understand the charges and assist counsel does not in fact receive a fair trial because his (or her) continuing incapacities impede preparation and presentation of defense.

B. Legal Insanity

If a defendant was severely mentally ill at the time of the offense, (s)he is entitled to acquittal if (s)he can prove to the judge or jury that (s)he was not criminally responsible (i.e., was "legally insane"). In Virginia, a defendant may be found to be legally insane if (s)he (1) did not know the nature of the act or that it was wrong;[13]

---

12. Dusky v. United States, 362 U.S. 402, 402 (1960).
13. *See* White v. Commonwealth, 272 Va. 619, 625 (2006)

> [U]nder the *M'Naghten* test for insanity, recognized in Virginia, the defendant may prove that at the time of the commission of the act, he was suffering from a mental disease or defect such that he did not know the nature and quality of the act he was doing, or, if he did know it, he did not know what he was doing was wrong.

or (2) had an "irresistible impulse" to commit the act.[14] The insanity defense is raised in less than one percent of felony cases.[15] So-called "NGRI" verdicts[16] are extremely rare and virtually non-existent in capital cases.

C. Diminished Responsibility

If a defendant is convicted of a capital crime, the trier of fact can "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[17] In the language of the Supreme Court, mitigating factors encompass the "diverse frailties of humankind."[18] Mental illness is a mitigating factor in Virginia. Other states that specify mitigating factors in their capital sentencing statute typically incorporate the language in the Model Penal Code. Under Virginia's death penalty statute repealed in 2021, the specified mitigating factors included: "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and "at the time of commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to

14. *See* Morgan v. Commonwealth, 50 Va. App. 120, 127 (2007) ("The irresistible impulse defense is available where the accused's mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act" (quoting Godley v. Commonwealth, 2 Va.App. 249, 251)(internal quotations omitted)).

15. *See generally* RICHARD J. BONNIE ET. AL., CRIMINAL LAW 564 (4th ed. 2015).

16. *See* Bailey Wendzel, Note, *Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense*, 57 AM. CRIM. L. REV. 391, 391 (2020) (defining NGRI as "not guilty by reason of insanity").

17. Lockett v. Ohio, 438 US 586, 587 (1978).

18. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.").

the requirements of law was significantly impaired."[19] For purposes of this essay, the key question is whether the prescribed mitigating criteria provide a meaningful safeguard against unwarranted death sentence of persons with severe mental illness. Unfortunately, the answer is "no."

Neither of these mitigating findings relating to mental illness precludes a death sentence and juries typically find that they are outweighed by the aggravating factors.[20] Trial judges and appellate courts hardly ever set aside a death sentence after "reweighing" the evidence. Even worse, jurors often find mental illness to be an aggravating rather than mitigating according to several studies done by the Capital Jury Project.[21] This is known as the "double-edged sword" problem.[22] It is especially troubling because evidence of severe mental illness, even though introduced in mitigation of punishment, can instead have the perverse effect of convincing the jury that the defendant presents a future danger to society, either in prison or in connection with an escape.

D. Incompetence for Execution

In 1986, the Supreme Court held that the execution of an "insane" prisoner is unconstitutional under the Eighth Amendment.[23] In *Panetti v. Quarterman*,[24] the Court declared that

---

19. *See* VA. CODE ANN. § 19.2-264.4 (repealed 2021).

20. *See* Chelsea Creo Sharon, *The "Most Deserving" of Death*, 46 HARV. C.R.-C.L. L. REV. 223, 237 (2011) ("[A]ggravating factors frequently do not aim to isolate the most death-worthy offenders and are so broad and numerous as to apply to nearly every first-degree murder.")

21. *See generally* William J. Bowers, James R. Acker, and Charles S. Lanier, *Capital Jury Project and Capital Punishment Research Initiative (CPRI)*, UNIVERSITY AT ALBANY [perma.cc/W2CT-A8E4].

22. *See generally* Richard J. Bonnie, "Psychiatry and the Death Penalty, Emerging Problems in Virginia," 66 VA. L. REV. 167 (1980).

23. *See* Ford v. Wainwright, 477 U.S. 399, 410 (1986) ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.").

24. 551 U.S. 930, 935 (2007) (holding that a Texas state trial court failed "to provide the procedures to which petitioner was entitled under the Constitution" when considering petitioner's showing of mental incompetency to prevent execution).

"[t]he test for whether a prisoner is insane for Eighth Amendment purposes is whether the prisoner is aware of his impending execution and of the reason for it."[25] The Court explained: "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."[26] The "petitioner's [. . .] mental problems have resulted in the delusion that the stated reason is a sham, and that the State actually wants to execute him to stop him from preaching."[27] Complex ethical issues can arise for clinicians expected or requested to provide restorative treatment to a condemned prisoner who has been found incompetent for execution or to assess whether such a prisoner's competence has been restored.[28]

II. Conclusion: None of these safeguards is sufficient, taken alone or together, to prevent execution of a person with chronic and severe mental illness.

A. Extending Atkins and Roper to Persons with Severe Mental Illness

The Supreme Court views the death penalty as the ultimate punishment – reserved for the most blameworthy offenders who commit the most aggravated homicides. An exemption for "severe mental illness" may appear to be a logical extension of *Roper*[29] and *Atkins.*[30] But there are two important differences between exclusions based on immaturity and intellectual disability, on the one hand, and mental illness, on the other. One is that the criteria for immaturity and intellectual disability are relatively

25. *Ford,* 477 U.S. at 399.

26. *Panetti*, 551 U.S. at 959.

27. *Id*. at 930.

28. *See generally* Richard J. Bonnie, *Panetti v. Quarterman, Mental Illness, the Death Penalty and Human Dignity*, 5 OHIO STATE J. CRIM. L. 257 (2007).

29. 543 U.S. 551, 575 (2005) (holding that the death penalty cannot be imposed for crimes committed by defendants under the age of 18).

30. 536 U.S. 304 (2002) (concluding that the death penalty cannot be imposed for persons who are "mentally retarded," or, in preferred language, have an intellectual disability).

determinate. In *Roper*, exemption can be defined in terms of birthdate and in *Atkins*, it is defined by a diagnosis (MR/ID) with relatively objective psychometric criteria. But a simple reference to a diagnosis of "severe mental illness" will not be specific enough to provide a useful legal criterion because of the variety of disorders, the differences in severity of symptoms within each disorder, and the indeterminacy of diagnoses relating to inevitable inter-rater disagreement. Moreover, even if the diagnoses were sufficiently accurate and reliable for legal purposes, legal criteria of "diminished responsibility" are still needed to further specify the legal exemption. Finally, even if the application of these criteria is sufficiently objective to provide a proper scientific basis for a legal standard, the principle of diminished responsibility due to severe mental illness has virtually no foundation in constitutional jurisprudence – and an exemption by two state legislatures (Connecticut and Ohio) is insufficient to provide objective evidence of "evolving standards of proportionality" in American law (so far). In addition, more work needs to be done to satisfy the demands of clarity and specificity if severe mental illness is to serve a formal role in administration of the death penalty.

That said, recent interest in statutory exclusions for severe mental illness – and what appears to be an accompanying professional consensus – provide some reason for optimism. The starting point for legislatures and courts is the consensus definition of "severe mental illness" approved by the ABA and its partner organizations in 2006:

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 purposes of this provision.[31]

31. RECOMMENDATION 122A, at 1 (ABA 2006).

Bills based on the ABA-recommended language were introduced in 2015-2016 legislative sessions in Ohio and Virginia. Such a bill was adopted in Ohio in 2021 and is no longer necessary in Virginia because capital punishment was abolished in 2021. Momentum is now building in other states. Bills have recently been under consideration, for example, in Georgia, Idaho, Indiana, North Carolina, South Dakota, South Carolina, and Tennessee.

B. Definition of "Severe Mental Illness"

As noted above, the 2006 ABA proposal is only a starting point for legislative or judicial action. It requires further specification. One of the most challenging issues arising in legislative consideration of a proposed death penalty exemption for "severe mental illness" is whether the definition can be amplified (and perhaps narrowed). The ABA proposal refers only to "severe mental illness" that "significantly impairs" the relevant responsibility-related capacities. Inevitably, questions are raised about whether "mental illness" refers to "any diagnosis" in the current version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. (The current version is DSM-5 TR).[32] Does it include, for example, "personality disorders"? By narrowing the statutory category to "severe" disorders, what has been excluded? Does "severe" refer to the intensity of symptoms that must be determined case-by-case? Or does it refer only to a sub-category of DSM-5 TR disorders?

To the extent that I can offer insight about the "drafters' intentions," one important clarification appears in the accompanying ABA report:

C. The Severe Mental Disorder or Disability Requirement

First, the predicate for exclusion from capital punishment under this part of the Recommendation is that offenders have a "severe" disorder or disability, which is meant to signify a disorder

32. *See generally* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM 5-TR) (5th ed. 2013).

that is roughly equivalent to disorders that mental health professionals would consider the most serious "Axis I diagnoses." These disorders include schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders – with schizophrenia being by far the most common disorder seen in capital defendants. In their acute state, all of these disorders are typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment. Some conditions that are not considered an Axis I condition might also, on rare occasions, become "severe" as that word is used in this Recommendation. For instance, some persons whose predominant diagnosis is a personality disorder, which is an Axis II disorder, may at times experience more significant dysfunction. Thus, people with borderline personality disorder can experience "psychotic-like symptoms . . . during times of stress." [Other Axis II diagnoses that might produce psychotic-like symptoms include Autistic Disorder and Asperger's Disorder.] However, only if these more serious symptoms occur at the time of the capital offense would the predicate for this Recommendation's exemption be present.[33]

In sum, as far as diagnoses are concerned, "severe mental disorder" refers mainly (but not always) to Axis I diagnoses and to disorders associated with "psychotic symptoms." Not surprisingly questions of this nature predictably arise in legislative deliberations, and these discussions sometimes lead to proposals to include amplifying statements in the statute itself. Deliberations in Virginia and Ohio are illustrative. In the following section, I have set out alternative statutory formulations that are more specific than the ABA proposal. In each instance, proposals to add additional criteria to the ABA proposal and to define the additional requirement with greater specificity were offered during the legislative deliberations.

---

33. *See Special Feature: Recommendations and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL AND PHYSICAL DISABILITY L. REP. 5, 668, 670–71 (2006).

The alternatives considered by the Virginia legislators in consultation with the author were the following:

1. Require proof of "active psychotic symptoms."

2. Require proof of "active psychotic symptoms" defined with greater clinical specificity.

3. Omit requirement of "active psychotic symptoms" while requiring and defining "qualifying diagnoses."

4. Require proof of "active psychotic symptoms" while requiring and defining "qualifying diagnoses."

5. Require proof of "active psychotic symptoms" defined with greater clinical detail while also requiring and defining "qualifying diagnoses."

These options were explained as follows:

1. Require proof of "active psychotic symptoms"

As used in this section, "severe mental illness" means the *exhibition of active psychotic symptoms* that substantially impaired the individual's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include a disorder manifested primarily by repeated criminal conduct or attributable to the acute effects of voluntary use of alcohol or any drug.

2. Require proof of "active psychotic symptoms" defined with greater clinical specificity

As used in this section, "severe mental illness" means the *exhibition of active psychotic symptoms* that substantially impaired the individual's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise

rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include a disorder manifested primarily by repeated criminal conduct or attributable to the acute effects of voluntary use of alcohol or any drug.

"Active psychotic symptoms" means delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions), inability to distinguish fact from fantasy, extremely disorganized thinking, or significant disruption of consciousness or memory.

3. Omit requirement of "active psychotic symptoms" while requiring and defining "qualifying mental disorders."

As used in this section, "severe mental illness" means a *qualifying mental disorder* that substantially impaired the individual's capacity to (1) appreciate the nature, consequences, or wrongfulness of the individual's conduct; (2) exercise rational judgment in relation to the individual's conduct; or (3) conform the individual's conduct to the requirements of the law.

"*Qualifying mental disorder" means* one or more of the following mental disorders [diagnosed by a qualified person]: (i) Schizophrenia, (ii) Schizoaffective disorder, (iii) Bipolar disorder, (iv) Major depression, (v) Delusional disorder, (vi) Post-traumatic stress disorder, or (vii) any other disorder that can be associated with active psychotic symptoms in affected individuals. [The term does not include a mental disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other psychoactive drugs.]

4. Require proof of "active psychotic symptoms" while also requiring and defining qualifying diagnoses

As used in this section, "severe mental illness" means a *qualifying mental disorder characterized by active psychotic symptoms* that substantially impaired the individual's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include

a disorder manifested primarily by repeated criminal conduct or attributable to the acute effects of voluntary use of alcohol or any drug.

"Qualifying mental disorder" means one or more of the following mental disorders [diagnosed by a qualified person]: (i) Schizophrenia, (ii) Schizoaffective disorder, (iii) Bipolar disorder, (iv) Major depression, (v) Delusional disorder, (vi) Post-traumatic stress disorder, or (vii) any other disorder that can be associated with active psychotic symptoms in affected individuals. [The term does not include a mental disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of alcohol or other psychoactive drugs.]

5. Require proof of and "active psychotic symptoms" defined with greater clinical detail while also requiring and defining "qualifying diagnoses"

As used in this section, "severe mental illness" means a *qualifying mental disorder characterized by active psychotic symptoms* that substantially impaired the individual's capacity to (i) appreciate the nature, consequences, or wrongfulness of the person's conduct; (ii) exercise rational judgment in relation to the person's conduct; or (iii) conform the person's conduct to the requirements of the law. "Severe mental illness" does not include a disorder manifested primarily by repeated criminal conduct or attributable to the acute effects of voluntary use of alcohol or any drug.

"Active psychotic symptoms" means delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions), inability to distinguish fact from fantasy, extremely disorganized thinking, or significant disruption of consciousness or memory.

"Qualifying mental disorder" means one or more of the following mental disorders [diagnosed by a qualified person]: (i) Schizophrenia, (ii) Schizoaffective disorder, (iii) Bipolar disorder, (iv) Major depression, (v) Delusional disorder, (vi) Post-traumatic stress disorder, or (vii) any other disorder that can be associated with active psychotic symptoms in affected individuals. [The term does not include a mental disorder manifested primarily by

repeated criminal conduct or attributable solely to the acute effects of alcohol or other psychoactive drugs.]

III. Summary

None of the members of the ABA Task Force, or the participating representatives of the partner organizations, is a supporter of capital punishment. However, each of us and our affiliated organizations strongly support proposals designed to reduce the likelihood that individuals with severe mental illness will be executed. I am personally doubtful, however, that the states that choose to retain capital punishment in practice (vs leaving the possibility of a death sentence on the books while allowing it to drift into desuetude) will take the aggressive steps needed to avoid executions of persons with severe mental illness. That can be done only if state trial judges and judges appointed to state appellate courts embrace their constitutionally grounded duties to assure sparing and humane administration of the death penalty. For judges to take on this "activist" assignment is the only acceptable alternative to abolition. Assiduous efforts to prevent execution of prisoners with severe mental illness is a necessary (although not sufficient) element of that judicial assignment.