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Flying over the Cuckoo's Nest: How the Mentally Ill Landed into an Unconstitutional Punishment in South Carolina

Elle Klein

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**FLYING OVER THE CUCKOO'S NEST:
HOW THE MENTALLY ILL LANDED INTO AN UNCONSTITUTIONAL
PUNISHMENT IN SOUTH CAROLINA**

Elle Klein*

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I. INTRODUCTION

“They forget you are human.”¹

This was the response by South Carolina Department of Corrections Death Row inmate John Doe when asked what it is like living on death row for over 5,600 days.² In a criminal justice system that allows the typical

* 2018 J.D. Candidate at the University of South Carolina School of Law. The author is forever grateful to Susan Kuo for her endless guidance, support, and ink that filled the blank spaces of each new draft of this Note. Equal gratitude is given to Boyd Young for inspiring the author along this journey and allowing the author to tag along on countless trips to death row.

1. Interview with John Doe, Death Row Inmate, in Ridgeville, S.C. (Sep. 14, 2016).

2. *Id.*

offender to sit on death row for an average of eighteen years³ in solitary confinement, Doe's feelings are the rule rather than the exception.

Doe has never exhibited signs of mental illness,⁴ putting him in the minority category of capital offenders.⁵ A recent study conducted by Justice 360 found that thirty-four of the forty-eight current death row inmates in South Carolina qualified as severely mentally disabled.⁶ Inmates were characterized as mentally disabled if they suffered from mental illness, brain trauma/organic brain damage, or an intellectual disability that was corroborated by an expert's diagnosis, brain scan evaluation, or professional IQ test.⁷ Further research showed that mental illness, such as schizophrenia and bi-polar disorder,⁸ was the most common mental disability prevalent among these South Carolina Death Row inmates.⁹

South Carolina's current administration of the death penalty against the mentally ill defendant is unconstitutional in light of recent United States Supreme Court cases. The Supreme Court has held that certain categories of offenders shall not be subjected to the death penalty because of their diminished culpability and their inability to truly understand the

3. *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting).

4. For the purposes of this Note, mental illness refers to disorders of thought, mood or behavior. They are unrelated to intelligence and many can be treated effectively. Examples include depression, anxiety, schizophrenia and psychosis. Mental illness should be distinguished from insanity. The definition of insanity is a legal rather than medical concept. In South Carolina, the insanity of a defendant is determined by the M'Naghten Rule, that is—an accused person may be absolved of criminal responsibility if they were incapable of understanding their action or its wrongfulness. *See State v. Wilson*, 306 S.C. 498, 508, 413 S.E.2d 19, 25 (1992) (holding that South Carolina has chosen the M'Naghten test, or “right or wrong” test as its insanity defense).

5. Justice 360 is a South Carolina non-profit organization which works to reform policies and practices in capital proceedings through direct representation, serving appointed capital case attorneys with legal resources, policy research, and public education. The Justice 360 (formerly Death Penalty Resource & Defense Center) study was conducted through interviews with the attorneys for all forty-eight death row inmates on death row in 2014. The interviews consisted of questions pertaining to the inmates' mental health history and any effects that mental health may have had on the inmate's case. *See EMILY PAAVOLA, MENTAL DISABILITY AND THE DEATH PENALTY: WHY SOUTH CAROLINA SHOULD BAN THE EXECUTION OF THE SEVERALLY MENTALLY DISABLED* (2014) (on file with Justice 360).

6. *Id.* at 5.

7. *Id.* at 5 n.10.

8. AM. PSYCHIATRIC ASS'N, *THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* § 2 (5th ed. 2013) [hereinafter DSM-V]. Other disorders addressed in the DSM-V include disorders diagnosed in childhood, cognitive disorders, substance-related disorders, schizophrenia and other psychotic disorders, mood disorders, anxiety disorders, somatoform disorders, factitious disorders, dissociative disorders, sleep and eating disorders, impulse-control disorders, and sexual and gender identity disorders. *Id.*

9. *Id.*

consequences of their crimes.¹⁰ Like these offenders, the mentally ill defendant has a diminished culpability because they too are unable to adequately understand the nature of their crimes.¹¹ Unlike these offenders, however, South Carolina's death penalty statute allows for the execution of the mentally ill offender.¹²

This Note argues that the execution of offenders who are mentally ill, and that therefore have a diminished culpability, is contrary to the evolving "standards of decency that mark the progress of a maturing society"¹³ and violates the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁴ While this Note advocates for a categorical ban on the execution of mentally ill offenders, it recognizes that this call for action cannot be immediate. Therefore, it additionally argues that South Carolina should ban the use of death row for the mentally ill capital offenders in the meantime because it can exacerbate symptoms or cause a recurrence of psychotic episodes.¹⁵

Part II of this Note provides a case illustration of a capital offender in South Carolina suffering from mental illness. This illustration provides background information into the defendant's offenses, family history, medical diagnosis, and insight into capital trials in South Carolina. Further, this illustration demonstrates how executing this offender suffering from mental illness would have been incompatible with the evolving standards of decency and would constitute as cruel and unusual punishment.

Part III of this Note discusses recent United States Supreme Court opinions that held that mentally retarded offenders and juvenile offenders

10. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (banning the use of the death penalty against juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (stating that the court had no reason to disagree that "death is not a suitable punishment for a mentally retarded criminal").

11. See generally Dora W. Klein, *Categorical Exclusions from Capital Punishment*, 72 BROOK. L. REV. 1211 (2007) (arguing that the *Atkins* and *Roper* decisions created a false sense of justness because several other categories of offenders were not considered); See also Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1210 (2005) (suggesting that "[a]n offender's mental illness or addiction to drugs reduces his or her capacity to obey the law, thus making the offender less blameworthy"); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293, 294 (2003) ("The ultimate conclusion is that distinguishing between people with significant mental illness, people with mental retardation, and juveniles in the application of capital punishment violates the Equal Protection Clause.").

12. See S.C. CODE ANN. § 16-3-20 (2012) (making no reference to inapplicability to mentally ill offenders).

13. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

14. U.S. CONST. amend. VIII.

15. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104 (2010).

should be banned from execution due to their diminished culpability. Additionally, it examines the growing consensus against executing the mentally ill among various organizations, courts, and scholars.

Part IV analyzes why the refusal to categorically exempt mentally ill defendants from capital punishment violates the Constitution by comparing the diminished culpability of mentally ill defendants to the diminished culpability of offenders ineligible for the death penalty. It additionally discusses how the penological purposes of punishment that are required for the use of capital punishment are not met in executing the mentally ill. Further, it addresses the prevalence of mental illness among South Carolina capital offenders and how their mental illnesses relate to their diminished culpability and create procedural obstacles during their trials.

Because exempting the mentally ill from execution cannot be accomplished overnight, Part IV additionally discusses issues for the mentally ill in South Carolina's criminal justice system stemming from solitary confinement while on death row and a lack of professional mental health services while incarcerated. It further argues that the South Carolina legislature should rectify these systematic problems by prohibiting the use of death row until the execution of the mentally ill is categorically banned in South Carolina.

Part V discusses other state legislatures that have proposed or adopted legislation banning the use of the death penalty on the mentally ill defendant and the need for the South Carolina legislature to adopt a similar bill. It also discusses a recent bill proposed in South Carolina that would bar the mentally ill from the death penalty because of their diminished culpability.

II. CASE ILLUSTRATION OF A SOUTH CAROLINA CAPITAL OFFENDER

The following case illustration is one of a South Carolina capital offender Joshua Jones. In the years prior to the incident that led to his arrest and subsequent conviction, Jones exhibited signs of mental illness.¹⁶ After his arrest and while incarcerated, Jones displayed signs of serious mental disturbance.¹⁷ Unlike other capital defendants in South Carolina,¹⁸ the

16. See Teddy Kulmala, *Jones Guilty of Murder*, AIKEN STANDARD (Feb. 3, 2014), http://www.aikenstandard.com/news/jones-guilty-of-murder/article_56a2eea9-225a-537e-9ddc-8a88873b5b85.html#comments (discussing the diminished mental capacity of Joshua Jones).

17. *Id.*

18. For example, Dylann Roof, who was convicted of killing nine people in a church in 2015, offered to plead guilty in exchange for a life sentence. The federal government declined his offer and proceeded with a capital trial. Alan Blinder & Kevin Sack, *Dylann Roof Found*

prosecution in Jones' case ultimately accepted Jones' plea offer as "guilty but mentally ill" in exchange for a life sentence instead of the death penalty.¹⁹ By accepting a "guilty but mentally ill plea," the prosecution and the circuit court inexplicitly acknowledged that Jones had a diminished culpability and subjecting him to the death penalty would be wrong.²⁰ As noted earlier, there is an overwhelming number of capital offenders on South Carolina's death row that suffer from a mental illness similar to Jones.²¹ However, unlike Jones, any pleas offers for life were rejected, their attorneys did not raise the issue, or the jury misperceived their mental illness, and all of these mentally ill offenders were given a death sentence.²²

While this case illustration portrays a capital offender who was able to negotiate a life sentence, it better serves to provide insight into the debilitating mental health issues that South Carolina mentally ill capital offenders experienced prior to their conviction and how they too had a diminished culpability that should have disallowed the use of the death penalty.²³ Had there been a statutory ban on executing the mentally ill, they too would have received a life sentence instead of a death sentence.

Joshua Jones was charged with the murder of Sandy Rogers, a Public Safety Officer in Aiken, South Carolina in January 2012.²⁴ Rogers and two other officers were responding to a call of two suspicious vehicles parked in a local park on the morning of January 28, 2012.²⁵ When Rogers approached a blue BMW at the park, the driver of the BMW, who was later identified as Jones, fired three shots at Rogers and fled the scene.²⁶ Rogers was taken to

Guilty in Charleston Church Massacre, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html>.

19. See *Death Row List*, S.C. DEP'T OF CORRECTIONS (2013), <http://www.doc.sc.gov/pubweb/news/death-row-report.pdf> (listing all current inmates sentenced to death. All listed inmates could have had a plea offer yet still later sentenced to death or they may not have offered a plea); Meg Kinnard, *Ivey to Die Today: Man Who Killed Officer, Businessman to be Executed at 6 p.m.*, THE T&D (May 8, 2009), http://thetandd.com/news/ivey-to-die-today-man-who-killed-officer-businessman-to/article_c238fe64-81ab-5fb2-9199-629d6e9912cc.html (including a list of regional death row inmates and a brief synopsis of their cases).

20. According to the current "guilty but mentally ill" statute, "[a] defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law." S.C. CODE ANN. § 17-24-20(A) (2012).

21. See *supra* Part I.

22. See *Death Row List*, *supra* note 19.

23. See Kulmala, *supra* note 16.

24. Kulmala, *supra* note 16.

25. *Id.*

26. *Id.*

Aiken Regional Medical Centers and pronounced dead later that afternoon.²⁷ The murder of a local law enforcement officer is a statutory aggravating circumstance in South Carolina, and therefore, makes the defendant eligible for the death penalty.²⁸ The prosecution's theory was that Jones misbelieved he was being arrested for another crime when he was approached by Rogers and shot her to escape.²⁹

Initially, Jones was given a psychiatric evaluation.³⁰ At the recommendation of a forensic psychiatrist and due to the behavior he exhibited after his arrest, Jones additionally underwent a clinical interview and neuropsychological evaluation while awaiting trial in 2013.³¹ After reviewing the evaluation results, the forensic psychiatrist, Donna Swartz, diagnosed and later testified that Jones suffers from schizophrenia.³²

Swartz' report and testimony noted several significant findings in Jones' past.³³ Jones has a maternal history of schizophrenia.³⁴ His great grandmother was committed to the South Carolina State Hospital where she was diagnosed with paranoid schizophrenia and experienced persecutory delusions.³⁵ Jones reported being sexually molested as a child by his uncle.³⁶ In June 2011, Jones attempted suicide by shooting himself in the head.³⁷ This resulted in severe brain damage which affected the areas of the brain controlling emotion, impulse control, and judgment in stressful situations.³⁸ Jones had inpatient treatment after his attempted suicide and was diagnosed with Major Depressive Disorder with suicidal ideation and Post Traumatic Stress Disorder.³⁹ While in inpatient treatment, he was described as disoriented, distractible, anxious, and as having a diminished memory.⁴⁰

After his arrest, Jones was observed biting his wrists to the point that they were bleeding, and standing in his cell so long that his feet were

27. *Id.*

28. S.C. CODE ANN. § 16-3-20(a)(7) (2012).

29. Kulmala, *supra* note 16.

30. DONNA SCHWARTZ-WATTS, PSYCHIATRIC EVALUATION 2 (Feb. 21, 2013) (Jones' psychiatric evaluation report by Dr. Swartz) (on file with author).

31. TORA BRAWLEY, NEUROPSYCHOLOGICAL EVALUATION (2013) (Jones' neuropsychological evaluation report by Dr. Brawley) (on file with author).

32. Kulmala, *supra* note 16.

33. *Id.*

34. SCHWARTZ-WATTS, *supra* note 30, at 2–4.

35. *Id.* at 2.

36. Kulmala, *supra* note 16.

37. *Id.*

38. *Id.*

39. SCHWARTZ-WATTS, *supra* note 30, at 3.

40. *Id.*

edematous.⁴¹ He told a designated examiner at the Aiken County Detention Center that he continually heard voices saying “we want to play with you” that encouraged him to commit violent acts.⁴² He also saw blurry ghosts in his periphery, and believed that we are living out the events from the book of Revelations.⁴³ He would often stand in his cell, moving little, whispering or growling “ahhh” repeatedly and holding his jaw stiffly while showing all of his teeth.⁴⁴ In a video from his bond hearing days after the murder, Jones is seen convulsing, growling, and even cursing at the judge.⁴⁵

This compilation of symptoms made it clear that Jones was suffering from some sort of severe mental illness at the time of the offense and was continuing to suffer. In 2014, Jones pled “guilty but mentally ill” in exchange for a life sentence without the possibility of parole to avoid the death penalty.⁴⁶ The prosecutor in the case, Strom Thurmond, Jr., stated to a local news source that there are cases and times where prosecutors are “ethically prohibited from leveraging the death penalty.”⁴⁷ This was one of them.⁴⁸

There is a myriad of possible reasons for why Jones was able to negotiate a life sentence as opposed to the death penalty. For example, the judge and prosecutors in Aiken County may have been more understanding of mental health issues and mental illness’ diminution on culpability. Therefore, they decided it was best to allow a life sentence. It is also possible that because Jones displayed such obvious symptoms of mental illness throughout his incarceration, such as at his bond hearing, that there was more pressure to accept the life plea. However, there is no precise answer.

As noted earlier, many offenders on death row suffer from mental illness, but did not receive the same sentence as Jones.⁴⁹ In fact, several of them suffer from the exact same illness as Jones.⁵⁰ Why these mentally ill

41. *Id.*; see generally EDEMA OVERVIEW, WEBMD, <http://www.webmd.com/heart-disease/heart-failure/edema-overview#1> (last visited Dec. 30, 2016) (explaining that edema is the medical term for swelling, and the causes of edema).

42. SCHWARTZ-WATTS, *supra* note 30, at 4.

43. *Id.*

44. *Id.*

45. Chad Mills, *As Cop Killer Pleads Guilty, New Video Released Showing Mental Illness*, WRDW12 (Feb. 3, 2014, 7:15 PM), <http://www.wrdw.com/home/headlines/Joshua-Jones-pleads-guilty-to-murdering-Officer-Sandy-Rogers-243322151.html?device=phone>.

46. Kulmala, *supra* note 16.

47. Mills, *supra* note 45.

48. *Id.*

49. PAAVOLA, *supra* note 5.

50. *Id.*

men⁵¹ on death row received a death sentence as opposed to a life sentence like Jones is unclear. Perhaps they had prosecutors and judges who were less sympathetic to the effects of mental illness on one's ability to conform and abide by the law or understand the consequence of one's actions. Perhaps their symptoms were less obvious or extreme as Jones. However, one thing is clear. If there was a legislative ban in South Carolina on executing the mentally ill due to their diminished culpability, a substantial number of South Carolina's capital offenders who suffer from a mental illness would be serving a life sentence. Instead, they sit on death row awaiting an execution that is arguably a violation against the Eighth Amendment's ban on cruel and unusual punishment.

III. A GROWING CONSENSUS AGAINST THE DEATH PENALTY

A. The Use of the Death Penalty on Those with Diminished Culpability is Considered Cruel and Unusual Punishment

The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁵² The United States Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵³ These "evolving standards of decency" are determined by an array of sources including, state legislative enactments, the practice of sentencing juries, the opinions of social, religious, and professional organizations, international practices, and polling data.⁵⁴

The U.S. Supreme Court has described the contours of the Eighth Amendment as applied to *mentally retarded* offenders.⁵⁵ In 2002, the United

51. See DEATH PENALTY INFO. CTR., STATE BY STATE DATABASE: SOUTH CAROLINA, http://www.deathpenaltyinfo.org/state_by_state (last visited Dec. 19, 2016); see also VICTOR STREIB, DEATH PENALTY FOR FEMALE OFFENDERS, JANUARY 1, 1973, THROUGH DECEMBER 31, 2012, 5, 7, 12 (2013), <http://www.deathpenaltyinfo.org/documents/FemDeathDec2012.pdf> (discussing the execution history of women in South Carolina). All current death row offenders on South Carolina's death row are men. There are no women. In fact, South Carolina has executed just three women in the history of South Carolina's death penalty use.

52. U.S. CONST. amend. VIII.

53. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

54. See *id.* at 313–21.

55. *Id.* at 306–07. The Court cites to the American Psychiatric Association for a definition of mental retardation to be used throughout the case. Mental retardation is defined as

States Supreme Court ruled in *Atkins v. Virginia* that the Eighth Amendment forbids the death penalty for persons who suffer from *mental retardation* because it violated their constitutional right against cruel and unusual punishment.⁵⁶

The Supreme Court ruled that the death penalty was excessive for this group of offenders in viewing the Eighth Amendment in the light of “standards of evolving decency” and was not persuaded that executing the *mentally retarded* offender would “measurably advance the deterrent or retributive purpose of the death penalty.”⁵⁷ The underlying penological purpose behind retribution (that is, a wrongdoer gets his “just deserts”) is that the gravity of the punishment depends on the culpability of the wrongdoer.⁵⁸ In *Atkins*, the Court held that the *mentally retarded* are less culpable for their crimes or offenses because they are less able 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.”⁵⁹ Relying on the earlier language of the Supreme Court establishing that the death penalty is to be administered on only the “most extreme of crimes”⁶⁰ the Court determined that “the lesser culpability of the mentally retarded offender surely does not merit” the use of the death penalty on them.⁶¹

The Supreme Court was also not persuaded that the execution of the mentally retarded would serve as a deterrent.⁶² The mentally retarded are less likely to be deterred by the threat of the death penalty because of their cognitive deficiencies, and sparing them from this severe punishment “will

significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). Additionally, South Carolina also uses the term “mentally retarded” in several capital cases. See *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989).

56. *Atkins*, 536 U.S. at 306–07.

57. *Id.* at 321.

58. *Id.* at 319.

59. *Id.* at 318.

60. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

61. *Atkins*, 536 U.S. at 319.

62. See *id.* at 320 (“Thus, executing the mentally retarded will not measurably further the goal of deterrence.”).

not affect the cold calculus that precedes the decision of other potential murderers.”⁶³

Additionally, the *Atkins* Court stated that eliminating this subset of offenders is legitimate because there is a higher risk of wrongful execution of the mentally retarded offender.⁶⁴ This risk stems from the chance that the mentally retarded offender will make a “false confession” by mistake or because of their lesser ability to “give meaningful assistance to their counsel” because they are “typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”⁶⁵ Therefore, not only does the mentally retarded offender have diminished culpability, they may also be unable to effectively aid in their defense.⁶⁶ Further, the mentally retarded offender, much like the mentally ill offender,⁶⁷ may receive a wrongful conviction because of an increased likelihood the jury will find the defendant has an “aggravating factor of future dangerousness.”⁶⁸

The Court further described the contours of the Eighth Amendment as applied to the juvenile capital offender in *Roper v. Simmons*.⁶⁹ The Supreme Court, citing *Atkins*, reiterated that the death penalty is unconstitutional under the Cruel and Unusual Punishment Clause if it does not serve as retribution or act as a deterrence.⁷⁰ Courts have found that “[u]nless the death penalty . . . measurably contributes to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”⁷¹

The Court in *Roper* found that juveniles are not as culpable as adults for their crimes because they “lack [] maturity and [have] an underdeveloped sense of responsibility . . . are more vulnerable or susceptible to negative influences and outside pressures . . . [and have a] character [that] is not as

63. *Id.* at 319 (citing *Gregg*, 428 U.S. at 186).

64. *Id.* at 321.

65. *Id.*

66. *See id.*

67. *See infra* Part III.B.

68. *Atkins*, 536 U.S. at 321 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989)).

69. *Roper v. Simmons*, 543 U.S. 551, 551 (2005).

70. *Roper*, 543 U.S. at 571 (citing *Atkins*, 536 U.S. at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.))).

71. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). *See also* *Gregg*, 428 U.S. at 153–83 (1976); *Robinson v. California*, 370 U.S. 660 (1962); *Weems v. United States*, 217 U.S. 349 (1910).

well formed as that of an adult.⁷² Due to this diminished culpability, retribution is not an adequate and proportionate punishment for juveniles.⁷³

Juveniles are also not deterred by the death penalty because of their diminished culpability. The Court reasoned that “the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence”⁷⁴ and the chances that a juvenile has made a “cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”⁷⁵

B. There is a Growing Consensus That the Death Penalty Should Not be Used for Punishing the Mentally Ill

Today, there is substantial support for the idea that the evolving standards of decency not only prohibit the execution of mentally retarded and juvenile offenders, but also of the mentally ill. There are findings which show that Americans are against the use of the death penalty entirely. Support for the death penalty is at its lowest in more than four decades.⁷⁶ As of late 2016, less than half of Americans now favor the death penalty.⁷⁷ Further, juries around the country indicated their reluctance to inflict the death penalty by imposing only thirty death sentences in 2016, a 40% drop from last year and fewer than at any time since the Supreme Court reinstated capital punishment in 1976.⁷⁸

Additionally, recent polling of United States citizens makes clear that Americans reject death as a punishment option for the mentally ill specifically. According to a 2014 poll by Public Policy Polling, Americans oppose the death penalty for persons with mental illness by a margin of two-to-one.⁷⁹ The poll surveyed 943 Americans across the country and found that opposition to the death penalty for persons with mental illness was strong

72. *Roper*, 543 U.S. at 569–70 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

73. *Id.* at 571.

74. *Id.*

75. *Id.* at 572 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988)).

76. Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CTR. (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

77. *Id.*

78. Editorial, *The Continuing Collapse of the Death Penalty*, N.Y. TIMES (Dec. 26, 2016), https://www.nytimes.com/2016/12/26/opinion/the-continuing-collapse-of-the-death-penalty.html?emc=eta1&_r=0 (citing *The Death Penalty in 2016: Year End Report*, DEATH PENALTY INFO. CTR. (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>).

79. Press Release, *New Nationwide Poll Shows Americans Oppose Death Penalty in Cases Where Person has Mental Illness by 2-1 Margin* (Dec. 1, 2014) (on file with author).

across genders, income brackets, and education levels.⁸⁰ Such data provides strong support for the South Carolina legislature to ban the use of the death penalty on the mentally ill as a matter of public opinion.

These oppositional views towards the death penalty used against the mentally ill are also shared by South Carolinians.⁸¹ A survey by the University of South Carolina College of Arts and Sciences Institute for Public Service and Policy Research in 2009 found that “74.0% of adults of in South Carolina were opposed to the death penalty where a severely mentally ill person is convicted of murder, while only 16.3% were in favor.”⁸² However, the opposition towards the death penalty doesn’t stop here.

Some professional organizations are outwardly against the execution of mentally ill defendants.⁸³ For example, the American Bar Association (“ABA”) advocates for a categorical exemption of the severely mentally ill from capital punishment:

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 law⁸⁴

The ABA’s stance has been adopted by the National Alliance on Mental Illness (“NAMI”),⁸⁵ Mental Health America (“MHA”),⁸⁶ the American

80. *Id.*

81. *See* PAAVOLA, *supra* note 5, at 20.

82. *Id.* (citing University of South Carolina College of Arts and Sciences Institute for Public Service and Policy Research, “South Carolina State Survey” (Spring 2009)).

83. ABA, MENTAL ILLNESS RESOLUTION 1 (2006), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2006_am_122a.authcheckdam.pdc.

84. *Id.*

85. NAMI is a large grassroots mental health organization that works to raise awareness of mental health issues. *See* PUBLIC POLICY COMMITTEE OF THE BOARD OF DIRECTORS & THE NAMI DEPARTMENT OF PUBLIC POLICY & RESEARCH, PUBLIC POLICY PLATFORM OF THE NATIONAL ALLIANCE ON MENTAL ILLNESS § 10.9, at 73 (10th ed. 2014), https://www.nami.org/NAMI/media/NAMI-Media/downloads/Public-Policy-Platform_9-22-14.pdf; LAURIE FLYNN, NO DEATH PENALTY FOR PERSONS WITH SEVERE MENTAL ILLNESSES (Nat. All. Mental Illness, 1998).

86. MHA is a national community-based nonprofit dedicated to addressing the needs of those living with mental illness mainly through the promotion of mental health as a critical part of overall wellness, prevention services, early identification and intervention for at-risk

Psychiatric Association,⁸⁷ and the American Psychological Association.⁸⁸ NAMI's stance is "the death penalty is *never* appropriate for a defendant suffering from schizophrenia or other serious brain disorders."⁸⁹ NAMI's rationale is that the legal criteria used for evaluating crimes of people with mental illness was created over 200 years ago and with today's modern science, ability to accurately diagnosis, and medical treatment, a mental illness should serve as reason not to execute a criminal defendant.⁹⁰

MHA takes an analogous viewpoint and urges for a moratorium on the use of the death penalty against mentally ill offenders.⁹¹ MHA's reasoning is that a mentally ill offender is at such a substantial disadvantage in defending themselves against criminal charges, just like *Atkins'* discussion on the mentally retarded offender unwittingly confessing to crimes and their inability to provide meaningful assistance to counsel.⁹² Further, mentally ill offenders can be "threatened and coerced into false confessions, have difficulty understanding their rights, and have less access, because of their mental illness, to safeguards designed to protect fundamental rights, including the right to effective assistance of legal counsel."⁹³

Organizations outside of the United States also tend to agree that the execution of this vulnerable demographic is unacceptable by today's standards of decency and urge the United States to adopt legislation to prohibit the practice of executing the mentally ill defendant.⁹⁴ For example, the United Nations Commission on Human Rights has adopted resolutions urging all states that administer the death penalty "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."⁹⁵ Additionally, The United Nations Special Rapporteur on

individuals, and integrated care and treatment for those in need. See MENTAL HEALTH AM., POSITION STATEMENT 54: DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESS (approved Jun. 14, 2016).

87. The American Psychiatric Association is an organization of psychiatrists working to ensure humane care and treatment for people suffering from mental illness. See AM. PSYCHIATRIC ASS., POSITION STATEMENT: DIMINISHED RESPONSIBILITY IN CAPITAL SENTENCING (approved Dec. 2004).

88. E. Packard, *Associations Concur on Mental Disability and Death Penalty Policy*, 38 MONITOR ON PSYCHOLOGY 14, 14 (2007).

89. See FLYNN, *supra* note 85 (emphasis added).

90. *Id.*

91. MENTAL HEALTH AM., *supra* note 86, at 54.

92. *Id.*

93. *Id.*

94. See AMNESTY INT'L, *infra* note 95; AMNESTY INT'L, *infra* note 97.

95. AMNESTY INT'L, DEATH PENALTY AND MENTAL ILLNESS, <http://www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-and-mental-illness> (last visited Jan. 1, 2017).

Extrajudicial, Summary, or Arbitrary Executions asked that governments that continue to administer the death penalty against the mentally ill “bring their domestic legislation into conformity with international legal standards.”⁹⁶ Also, Amnesty International issued a comprehensive report on the execution of mentally ill offenders in the United States that urged state legislatures to adopt legislation prohibiting the execution of the mentally ill in part because implementing “premeditated ritualistic killing” against mentally ill offenders is offensive to the evolving standards of decency.⁹⁷

When it comes to who should be subjected to the death penalty, legal academics similarly contend that mentally ill offenders have a diminished culpability like mentally retarded offenders and juvenile offenders.⁹⁸ For the mentally ill defendant, “delusions, command hallucinations, and disoriented thought process[es] . . . represent greater dysfunction than that experienced by most ‘mildly’ retarded individuals . . . and by virtually any non-mentally ill teenager.”⁹⁹ Therefore, executing the mentally ill would violate the Eighth Amendment because like categories of offenders with diminished culpability have already been barred from eligibility of execution.¹⁰⁰

The call for legislative reform is not only coming from legal scholars, mental health organizations, and the ABA, but from state courts as well.¹⁰¹ In 2011, Ohio State Supreme Court Chief Justice Maureen O’Connor commissioned a joint task force to evaluate the administration of the death

96. *Id.*

97. AMNESTY INT’L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS (2006), <https://www.amnesty.org/download/Documents/72000/amr510032006en.pdf> (last visited Jan. 1, 2017).

98. Slobogin, *supra* note 11, at Pt. III. See also Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 557–58 (2011) (arguing that those with severe mental illness may possess the same diminished culpability as teenagers and mentally retarded offenders whom the Supreme Court has held are protected from the death penalty by the Eighth Amendment); Helen Shin, *Is the Death of the Death Penalty Near the Impact of Atkins and Roper on the Future of Capital Punishment for Mentally Ill Defendants*, 76 FORDHAM L. REV. 465, 515–16 (2007) (arguing that the arguments the Supreme Court made about the diminished culpability of juveniles and mentally retarded persons can also be applied to the severely mentally ill).

99. Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 3, ¶ 12 (2000).

100. Bruce J. Winick, *The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B. C. L. REV. 785, 856 (2009).

101. See Chris Davey, *Death Penalty Task Force Releases Final Report*, COURT NEWS OHIO (May 21, 2014), http://www.courtnewsohio.gov/happening/2014/deathPenaltyTFReport_052114.asp#.WKpyYxiVSt8 (highlighting the results of a study of the death penalty commissioned by the Chief Justice of the Ohio Supreme Court).

penalty in Ohio.¹⁰² The task force's final suggestions, released in 2014, included a recommendation to enact legislation to exclude those with "serious mental illness" from the death penalty.¹⁰³ In a recent capital case, Justice Pfeifer of the Ohio Supreme Court wrote "[m]ental illness is a medical disease . . . [and] executing a convict with a severe mental illness is cruel and unusual punishment."¹⁰⁴

Additionally, judges are recognizing that there is a parallel diminution of culpability between the mentally retarded and the mentally ill.¹⁰⁵ For example, Indiana Supreme Court Justice Rucker wrote that "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."¹⁰⁶

IV. NO DEATH PENALTY FOR THE DIMINISHED CULPABILITY OFFENDERS . . . SHOULD THIS INCLUDE THE MENTALLY ILL?

A. Mental Illness in South Carolina's Prison System and its Prisoners Diminished Culpability

A significant portion of the U.S. population (an estimated 18%) is affected by mental illness.¹⁰⁷ The most debilitating among these mental illnesses include: major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder, panic disorder, post-traumatic stress disorder, and borderline personality disorder.¹⁰⁸ Rather than receiving the treatment and help they need, many suffering from mental illness end up

102. *Id.*

103. *Id.*

104. *State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting).

105. *See Overstreet v. State*, 877 N.E.2d 144, 175 (2007) (finding no principled distinction between the diminished capacities exhibited of the mentally ill defendant and the diminished capacities that exempt the mentally retarded from execution); *Bryan v. Mullin*, 335 F.3d 1207, 1237 (2003) (finding that the logic used in *Atkins* should apply to those who suffer severe mental disabilities). *Contra State v. Weik*, 587 S.E.2d 683, 687 (2002) (finding that "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").

106. *Corcoran v. State*, 774 N.E.2d 495, 502 (2002) (Rucker, J., dissenting).

107. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> (last visited Jan. 2, 2017).

108. DSM-V, *supra* note 8.

incarcerated.¹⁰⁹ In fact, a person suffering from a mental illness in the United States is three times more likely to be incarcerated than hospitalized.¹¹⁰

There is also evidence that mental illness is highly prevalent in the capital offender population of South Carolina.¹¹¹ As noted in the introduction, Justice 360 of Columbia, SC discovered that there is an extensive number of capital offenders within the South Carolina Department of Corrections suffering from a serious mental disability, which includes traumatic brain injury, mental illness, or intellectual disability.¹¹² Of the forty-eight capital offenders on death row at the time of the study, thirty-four qualified as severely mentally disabled, or slightly more than 70%.¹¹³ Mental illness, defined as including schizophrenia, post-traumatic stress disorder, major depressive disorder, and bipolar disorder, was the most prevalent mental disability.¹¹⁴ Twelve inmates suffered from multiple types of these three conditions such as mental illness and traumatic brain injury or mental illness and an intellectual disability.¹¹⁵

Many of these illnesses, such as schizophrenia, interfere with a person's ability to think coherently, manage emotions, make decisions, and relate to others.¹¹⁶ Symptoms of schizophrenia¹¹⁷ include hallucinations (hearing voices, seeing objects and people, or smelling things that others cannot perceive), delusions ("a fixed, relatively immutable, persistent, false belief

109. This over-incarceration is argued to have been the result of the deinstitutionalization movement of the 1960s. Many state mental institutes were shut down and those individuals released from these institutions found themselves homeless, arrested for petty crimes or homelessness, or using drugs to self-medicate. See Michael Vitiello, *Addressing the Special Problems of the Mentally Ill Prisoners: A Small Piece of the Solution to Our Nation's Prison Crisis*, 88 DENV. U. L. REV. 57, 60–63 (2010) (citing H. Richard Lamb & Leona L. Bachrach, *Some Perspectives on Deinstitutionalization*, 52 PSYCHIATRIC SERV. 1039, 1044 (2001), <http://psychservices.psychiatryonline.org/cgi/reprint/52/8/1039>).

110. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. L. REV. 1 (2012).

111. PAAVOLA, *supra* note 5, at 5.

112. *Id.*

113. *Id.*

114. *Id.* at 6.

115. *Id.*

116. *Schizophrenia*, NAT'L ALL. ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Conditions/Schizophrenia> (last visited Jan. 2, 2017) (hereinafter *Schizophrenia*). See generally CHARLOTTE SCHOOL OF LAW, MENTAL ILLNESS AND THE DEATH PENALTY IN NORTH CAROLINA: A DIAGNOSTIC APPROACH 11 (2007), www.deathpenaltyinfo.org/files/pdf/CharlotteMI.pdf (discussing how research finding a correlation between mental illness and violence depends on a combination of factors).

117. *Schizophrenia*, *supra* note 116.

that has no basis in reality”),¹¹⁸ negative symptoms (such as flat affect), and cognitive disturbances/disorganized thinking.¹¹⁹

These symptoms experienced by the mentally ill may diminish their culpability like other categorically exempted offenders.¹²⁰ *Atkins* decided that the mentally retarded offender was ineligible for the death penalty because of their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹²¹ *Roper* reached the same decision with respect to juveniles because “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”¹²² The brief description above of the possible symptoms experienced by the mentally ill makes clear that people who suffer from mental illness also have great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior.¹²³

Further, considering the potential symptoms defendants with mental illnesses may experience, it is likely these defendants are unable to effectively assist their attorneys or participate significantly in their defense due to their inability to think coherently and relate to others.¹²⁴ This in turn may lead to an increased chance of wrongful convictions of the mentally ill offender like the increased chance of wrongful conviction of the mentally retarded offender as discussed in *Atkins*.¹²⁵ For example, a defendant with severe mental illness such as schizophrenia may be incapable of or reluctant to cooperate with their lawyers in the investigation and preparation of their case due to a negative symptom such as poor executive functioning skills.¹²⁶

118. Adrian Furnham, *The Psychology of Delusions*, PSYCHOLOGY TODAY (June 23, 2015), <https://www.psychologytoday.com/blog/sideways-view/201506/the-psychology-delusions>.

119. *Schizophrenia*, *supra* note 116.

120. *See generally* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that mentally retarded offenders are not eligible for the death penalty because of their diminished capacity); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that juveniles are not eligible for the death penalty because of their diminished capacity).

121. *Atkins*, 536 U.S. at 318.

122. *Roper*, 543 U.S. at 561.

123. Slobogin, *supra* note 11, at 304.

124. *See* CHARLOTTE SCHOOL OF LAW, *supra* note 116, at 21.

125. *See supra* Part III.A.

126. *See generally* *Schizophrenia*, NAT'L INST. OF MENTAL HEALTH (Feb. 2016), *Schizophrenia*, https://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml#part_145430 (last visited Jan. 3, 2017) (some patients with schizophrenia experience cognitive

The same mentally ill defendant may demand to represent himself or may waive essential rights as a result of delusions about their attorneys or the belief that they are a part of a conspiracy scheme against them.¹²⁷ If a defendant is on medications at the time of the trial, there is a chance that he may appear drowsy, uninterested in the trial, or lacking remorse to the jury when it is actually the side effects of his medications causing such behavior.¹²⁸ On the other hand, if a mental illness is left untreated, a defendant may appear to be pugnacious, agitated, or out of control to a jury.¹²⁹

B. Punishment Goals Are Not Served by Executing the Mentally Ill Defendant

Like the Court's discussion in *Atkins* and *Roper*,¹³⁰ using the death penalty against the mentally ill does not advance the requisite deterrent or retributive punishment purposes necessary to inflict the death penalty. People do not decide to develop mental illness. The existence of the death penalty cannot deter people from experiencing schizophrenic episodes or from acting in a manner that stems from their illness.¹³¹ Further, it is hard to deter a mentally ill offender who gives little to no thought to the possible consequences of their actions because they are experiencing hallucinations, delusions, or distorted thinking.¹³²

The retributive purpose of the death penalty is also not served when an offender is unable to meaningfully understand that the state is taking his life

symptoms such as poor executive function, or the ability to understand information and use it to make decisions).

127. KRISTIN HOULE, MENTAL ILLNESS AND THE DEATH PENALTY RESOURCE GUIDE (2d ed. 2008), tcadp.org/wp-content/uploads/2010/06/MIDP_Resource_GuideSecond_edition.pdf.

128. *See generally Mental Health Medications*, NAT'L INST. OF MENTAL HEALTH (Oct. 2016), https://www.nimh.nih.gov/health/topics/mental-health-medications/index.shtml#part_149866 (last visited Jan. 3, 2017) (describing the side effects of medications such as antidepressants and anti-anxiety medications, which can make someone agitated, restless, aggressive or violent, etc., and which can lead to drowsiness, unsteadiness, problems with coordination, difficulty remembering, etc.).

129. *Id.*

130. *Atkins*, 536 U.S. at 318; *Roper*, 543 U.S. at 561.

131. HOULE, *supra* note 127, at 4.

132. *See The Death Penalty: Questions and Answers*, AM. CIV. LIBERTIES UNION (Sept. 2011), <https://www.aclu.org/other/death-penalty-questions-and-answers?redirect=death-penalty-questions-and-answers> ("The death penalty has no deterrent effect. . . . People commit murders . . . because they are mentally ill, giving little or no thought to the possible consequences of their acts.").

to hold him accountable for his crime.¹³³ Holding someone accountable is meant to be an affirmation of personal responsibility and giving the offender his “just deserts.”¹³⁴ Executing someone who lacks a meaningful understanding of the nature of his punishment and its retributive purpose offends the notion of personal responsibility rather than affirming it.¹³⁵

C. *The Current State of Death Row in South Carolina*

While this Note advocates for the categorical ban on the execution of mentally ill offenders because of their diminished culpability, it also recognizes that passing legislation takes time. While the legislature works on statutorily banning the use of the death penalty against the mentally ill,¹³⁶ it should also ban the use of death row for the mentally ill capital offender.

Death row today involves an excessive delay between sentencing and execution, solitary confinement, and a lack of professional help for mental health.¹³⁷ While cruel in its own regard to the non-mentally ill prisoner, the aftermath of being sentenced to death has especially cruel effects on the mentally ill.¹³⁸ For example, the stress, unstructured days, and lack of meaningful interaction with other people can exacerbate symptoms or induce recurrence of episodes by the mentally ill offender.¹³⁹

The length of stay on death row also negatively impacts the symptoms of the mentally ill.¹⁴⁰ The average time on death row has increased over the last few decades. In 1960, the average time from sentencing to punishment was two years.¹⁴¹ However, inmates today spend close to sixteen years on death row.¹⁴² In South Carolina, the average wait time on death row was

133. See ABA, *supra* note 83, at 1 (explaining death sentence should not be carried out against a prisoner who lacks the ability to understand the “nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case”).

134. *Id.* at 12.

135. See *id.* at 16 (explaining that offenders should have “more than a shallow understanding of why they are being executed” for the retributive aim of punishment to be fulfilled).

136. H. 3535, 121st Gen. Assemb. Reg. Sess. (S.C. 2016).

137. Metzner & Fellner, *supra* note 15, at 104.

138. See *id.* at 105 (explaining the results of class action cases challenging segregating the mentally ill as “unconstitutionally cruel because of the psychological harm”).

139. *Id.* (citing Sasha Abramsky & Jamie Fellner, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH 14 (2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf>).

140. Metzner & Fellner, *supra* note 15, at 104.

141. *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015).

142. TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT 2012—STATISTICAL TABLES (May 2014), <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>.

over 14 years.¹⁴³ While these excessive delays are arguably necessary to ensure proper appeals,¹⁴⁴ the mentally ill offender is forced to spend over a decade subjected to an environment that can cause the reoccurrence of episodes or exacerbation of symptoms.¹⁴⁵

In most states, including South Carolina, death row inmates are segregated and housed in buildings separated from the general prison population, but suffer from much more than simply being confined in a separate building.¹⁴⁶ In fact, confinement on death row has been described as a “living death . . . a place where the body is preserved while the person languishes and ultimately dies awaiting execution.”¹⁴⁷ Most death row prisoners are housed in conditions designed for inmates who are disciplinary problems, and not intended to be used for long term incarceration.¹⁴⁸

Like most states, South Carolina enforces restrictions on death row inmates that isolate them from human interaction.¹⁴⁹ These restrictions vary from facility to facility,¹⁵⁰ but can include: confinement to a single-person cell with a steel bed, steel toilet, and small writing table, in an area ranging from thirty-six feet to one hundred feet for up to twenty-three hours a day,¹⁵¹ isolation during meal times (eaten in this same cell);¹⁵² isolation during

143. *The Faces of South Carolina's Death Row*, POST & COURIER (Oct. 16, 2015), http://www.postandcourier.com/news/the-faces-of-south-carolina-s-death-row/article_de65784b-c532-5390-bfc2-ceb44fa33dad.html

144. *See, e.g., Death Penalty Appeals Process*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited Jan. 3, 2017) (explaining the death penalty appeals process).

145. Metzner & Fellner, *supra* note 15, at 105 (citing Abramsky & Fellner, *supra* note 139, at 14).

146. Robert Johnson, *Solitary Confinement Until Death by State Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213, 1216 (2016) (citing ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH x-xi (1981)); *see also supra* note 1.

147. John Blume, *Killing the Willing: “Volunteers,” Suicide, and Competency*, 103 MICH. L. REV. 939, 950 n.54 (2005) (citing ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 63 (2d ed. 1998)).

148. *Id.* at 950 n.54.

149. *See* Marah Stith McLeod, *Does the Death Penalty Require Death Row?—The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525, 538 (2016) (“Most states impose restrictions on death-sentenced inmates that isolate them from human interactions.”).

150. *Id.* at 538. Prison administrators are responsible for establishing and maintaining death row. There is no legislative mandate. For example, South Carolina’s death penalty statute (S.C. CODE ANN. § 16-3-20), not only does not mention that those sentenced to death must be segregated from others, but also does not mention that those sentenced to death need to have additional restrictions in place.

151. ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 4, 9 (2013).

152. *Id.* at 4.

exercise time;¹⁵³ denial of access to religious services;¹⁵⁴ denial of access to work or employment opportunities;¹⁵⁵ and no-contact visitations with family members and loved ones.¹⁵⁶

Studies have consistently shown that prisoners subjected to isolation suffer the same symptoms caused by physical torture or suffer a great deal of psychological harm.¹⁵⁷ These studies have shown that people subjected to solitary confinement exhibit a variety of physiological and psychological reactions including perceptual distortions and hallucinations,¹⁵⁸ appetite loss and weight loss,¹⁵⁹ problems sleeping,¹⁶⁰ talking to oneself,¹⁶¹ and lower levels of brain functioning.¹⁶² Additionally, suicide rates and incidents of self-harm are much higher in solitary confinement.¹⁶³

Further, research has shown that prisoners with pre-existing mental illnesses prior to incarceration are particularly vulnerable to suffering from this inescapable isolation.¹⁶⁴ Any pre-existing mental illnesses, which have been statistically proven to be prevalent among South Carolina death row inmates, are exacerbated by these harsh conditions.¹⁶⁵ Solitary confinement for the mentally ill offender poses a grave risk of psychiatric injury, self-

153. Exercise, for those states that permit death row inmates to have an hour or less of exercise, often consists of leaving their cell to go to a cage, pen, or cell. Access to exercise equipment, or even a simple ball to bounce, is extremely rare. *Id.* at 5.

154. *Id.* at 6

155. *Id.* at 5.

156. *Id.*; see also *supra* note 1 (John Doe said that he has only been able to touch his fifteen-year-old daughter three times during her lifetime).

157. ACLU, *supra* note 151, at 6 (citing Hernán Reyes, *The Worst Scars Are In The Mind: Psychological Torture*, 89 INT. REV. OF THE RED CROSS 591, 608 (2007); Metin Basoglu, et al., *Torture vs. Other Cruel, Inhuman and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES GEN. PSYCHIATRY 277, 277 (2007)); see also Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 956 (2008), <https://www.aclu.org/other/stop-solitary-mental-health-resources?redirect=prisoners-rights/stop-solitary-mental-health-resources> (explaining that courts have expressed concern and condemnation that prisoners who are housed in supermax prisons suffer actual psychological harm).

158. ACLU, *supra* note 151, at 6 (citing Craig Haney, *Mental Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130, 134 (2003)).

159. *Id.* at 7 (citing Haney, *supra* note 158, at 130).

160. *Id.*

161. *Id.* (citing Haney, *supra* note 158, at 130).

162. *Id.*

163. *Id.* (citing Expert Report of Professor Craig Haney at 45–46, n.119, *Coleman v. Schwarzenegger/ Plata v. Schwarzenegger*, No: Civ S 90-0520 LKK-JFM P, C01-1351 TEH (E.D. Cal/N.D. Cal. Aug. 15, 2008)).

164. Metzner & Fellner, *supra* note 15, at 105.

165. *Id.*

harm, and even suicide because depriving these prisoners of social interaction keeps them from being grounded in reality.¹⁶⁶

There is also evidence that offenders within the South Carolina prison system have not been receiving adequate professional mental health services.¹⁶⁷ The South Carolina Department of Corrections was sued in 2005 on behalf of several inmates who were suffering from mental illnesses.¹⁶⁸ A state judge in Columbia, Michael Baxley, ruled that South Carolina prison officials were culpable of pervasive, systematic, unremitting violations of the state's constitution by abusing and neglecting mentally ill inmates.¹⁶⁹ He wrote that the Court found that SCDC is severely understaffed with respect to mental health officials,¹⁷⁰ the mentally ill are exposed to disproportionate use of force and segregation when compared with non-mentally ill inmates,¹⁷¹ the mental health services at SCDC lack a sufficiently systematic program to maintain treatment records,¹⁷² administration of psychotropic medications are inadequately supervised and evaluated,¹⁷³ and the current policies for suicide prevention and crisis intervention are inadequate and result in the unnecessary loss of life among the seriously mentally ill inmates.¹⁷⁴

He also wrote that mentally ill inmates spend a disproportionately longer period of time in solitary confinement.¹⁷⁵ One mentally ill inmate, James Wilson, spent 2,491 consecutive days in solitary confinement.¹⁷⁶ Often times, these extended sentences exceeded an inmate's projected release date by over five years.¹⁷⁷ These extended stays in solitary confinement are contrary to the American Correctional Association's

166. *Id.*; see generally U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 (Aug. 5, 2011).

167. See *infra* notes 168–185; see also Interview with Joshua Jones, Inmate, at S.C. Dep't of Corrections (Nov. 16, 2016) (where Jones said that his counselor was no longer working for the prison and that he had not seen another counselor in months, but he was still on his medication).

168. Andrew Cohen, *When Good People Do Nothing: The Appalling Story of South Carolina's Prisons*, ATLANTIC (Jan. 10, 2014), <http://www.theatlantic.com/national/archive/2014/01/when-good-people-do-nothing-the-appalling-story-of-south-carolinas-prisons/282938/>.

169. Order Granting Judgement in Favor of Plaintiffs, T.R., P.R., & K.W. v. S.C. Dep't of Corr. & William R. Byars, 2005-CP-40-2925 (Dist. Ct. S.C. Jan. 8, 2014).

170. *Id.* at 6.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 5.

175. *Id.* at 11.

176. Cohen, *supra* note 168.

177. Byars, 2005-CP-40-2925 at 11.

standards of disciplinary confinement for short periods of time.¹⁷⁸ Taking into account the facts that death row inmates spend the totality of their incarceration in solitary confinement¹⁷⁹ and that a majority of these inmates suffer from some form of mental illness,¹⁸⁰ these inmates are likely to experience an exacerbation of symptoms or relapse.

Further, the Order discussed the conditions of these solitary confinement cells and the treatment towards the mentally ill inmates within the unit.¹⁸¹ One inmate with schizophrenia, Jerome Laudman, was sprayed with chemical munitions and physically abused by a correctional officer.¹⁸² He was found lying on the cell floor in feces, vomit, and up to twenty trays of molding food.¹⁸³ The nurses and correctional officers refused to enter Laudman's cell, and he was eventually retrieved by two inmates.¹⁸⁴ He died later that day of a heart attack and the hospital note reported the presence of hypothermia.¹⁸⁵

If these are the conditions for mentally ill prisoners who have received a disciplinary sentence to solitary confinement, it makes one question what occurs behind the closed doors and restricted access of South Carolina's death row facilities. Solitary confinement is not recommended beyond "a short period,"¹⁸⁶ yet these death row inmates are subjected to it for decades.¹⁸⁷

V. STATE LEGISLATURES ADDRESSING THE DEATH PENALTY AND THE MENTALLY ILL

As discussed earlier in this Note, professional organizations and some courts support exempting the mentally ill from the death penalty.¹⁸⁸

178. *Id.* at 13 (citing AM. CORRECTIONAL ASS'N, ACA STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS SUPPLEMENT 306 (2008)) (explaining that the American Correctional Association defines disciplinary detention or punitive segregation in the ACA Standards for Adult Correctional Institutions as "a form of separation from the general population . . . for short periods of time [in] individual cells separated from the general population").

179. Johnson, *supra* note 146.

180. *Byars*, 2005-CP-40-2925 at 2.

181. Cohen, *supra* note 168.

182. *Byars*, 2005-CP-40-2925 at 15.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Johnson, *supra* note 146.

188. *See generally* ABA, *supra* note 83 (showing examples of professional organizations and court decisions supporting this exemption)

Additionally, other states have recently begun to recognize that mentally ill offenders have a diminished culpability that should prohibit the use of the death penalty against them.¹⁸⁹ For example, Connecticut recently prohibited the execution of the mentally ill.¹⁹⁰ Connecticut exempts a capital defendant from execution if his “mental capacity was significantly impaired or [his] ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution[.]”¹⁹¹

Other states have proposed similar legislation banning the execution of the mentally ill.¹⁹² Legislators in North Carolina and Kentucky introduced nearly identical bills, pulling language from American Bar Association’s Recommendation 122A,¹⁹³ to prohibit the execution of defendants who, at the time of the offense, “had a severe mental disorder or disability that significantly impaired their capacity to (a) appreciate the nature, consequences, or wrongfulness of their conduct, (b) exercise rational judgment in relation to conduct, or (c) conform their conduct to the requirements of the laws.”¹⁹⁴ Illinois also considered an act banning the execution of the mentally ill, however, it ultimately abolished the death penalty altogether in 2011.¹⁹⁵

Tennessee legislators introduced a bill to prohibit the execution of a person who had severe and persistent mental illness at the time of committing murder in the first degree.¹⁹⁶ In addition, Indiana introduced legislation to prohibit the use of the death penalty on an individual judicially determined to have had a severe mental illness, defined as schizophrenia, schizoaffective disorder, bipolar disorder, major depression, or delusional

189. *See, e.g., Overstreet v. State*, 877 N.E.2d 144 (2007) (finding no principled distinction between the diminished capacities exhibited of the mentally ill defendant and the diminished capacities that exempt the mentally retarded from execution); *see also Bryan v. Mullin*, 335 F.3d 1207, 1237 (2003) (finding that the logic used in *Atkins* should apply to those who suffer severe mental disabilities).

190. CONN. CODE ANN. § 53a-46a (h)(3) (2009).

191. *Id.*; *see also State v. Santiago*, 318 Conn. 1, 45–46, 122 A.3d 1 (Conn. 2015) (where the Connecticut Supreme Court abolished the death penalty altogether stating that “the death penalty . . . is so out of step with our contemporary standards of decency as to violate the state constitutional ban on excessive and disproportionate punishment”).

192. *See ABA, supra* note 83.

193. *Id.*

194. *State v. Lang*, 129 Ohio St. 3d 512, 650 (2011).

195. *See PAAVOLA, supra* note 5, at 1. *see also Ray Long, Illinois Death Penalty Ban Takes Effect Friday*, CHI. TRIBUNE (June 30, 2011), <http://www.chicagotribune.com/news/local/politics/chi-illinois-death-penalty-ban-takes-effect-friday-20110630-story.html>

196. *See PAAVOLA, supra* note 5, at 2.

disorder at the time of the offense.¹⁹⁷ The number of states contemplating banning the execution of mentally ill defendants offers influential support that our society views mentally ill offenders as less culpable than the average criminal defendant.

Bill 3535, currently residing in the House Judiciary Committee,¹⁹⁸ was proposed to the South Carolina legislature in February 2015.¹⁹⁹ This bill would ban the execution of an offender that had a severe mental disability at the time of the commission of the crime.²⁰⁰ The bill defines severe mental disability as “a *severe mental illness* that significantly impairs a person’s capacity to do any of the following: (i) appreciate the nature, consequences, or wrongfulness of the person’s conduct; (ii) exercise rational judgment in relation to conduct; or (iii) conform the person’s conduct to the requirements of the law . . .”²⁰¹ or as “dementia or traumatic brain injury that results in significantly sub-average general intellectual functioning, existing concurrently with significant limitations in adaptive functioning.”²⁰²

VI. CONCLUSION

The execution of defendants who are mentally ill is contrary to the evolving “standards of decency that mark the progress of a maturing society”²⁰³ and violates the Eighth Amendment against cruel and unusual punishment.²⁰⁴ In addition to rectifying the constitutional violation against cruel and unusual punishment, an exemption for mentally ill defendants from the death penalty would provide economic benefits by significantly reducing the years of lengthy and costly litigation. If judges could rule that a defendant was mentally ill and therefore exempted from the death penalty, the case would proceed as a non-capital one. Due to the fact that capital trials require additional protections such as a sentencing hearing where in-

197. *Legislation Limiting the Execution of Individuals with Mental Illness*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/mental-illness-and-death-penalty#legislation> (last visited Mar. 7, 2017).

198. H. 3535, 121 Gen. Assemb., Reg. Sess. (S.C. 2015).

199. See John Blume & Lindsey Vann, *Forty Years of Death: The Past, Present, and Future of the Death Penalty in South Carolina (Or Still Arbitrary after All These Years)*, 11 DUKE J. CONST. L. & PUB. POL’Y 183 (2016); see also H.R. 3535, 121st Gen. Assemb., Reg. Sess. (S.C. 2015).

200. H.R. 3535, 121st Gen. Assemb., Reg. Sess. (S.C. 2015).

201. *Id.*

202. *Id.*

203. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

204. U.S. CONST. amend. VIII.

depth mitigating evidence is presented based on months or years of mitigation specialists conducting research,²⁰⁵ the expenses of a capital trial are much higher than that of a non-capital case.²⁰⁶ Moreover, due to the fact that “death is different”²⁰⁷ and capital defendants receive automatic appeals as well as elected appeals,²⁰⁸ the costs and duration of a full capital trial to execution increase time and expenses.²⁰⁹ Legislation banning the death penalty for the mentally ill would essentially act as a sentencing cap by disallowing the death penalty, yet still allowing a defendant to receive life in prison without the possibility of parole.

Ultimately, the diminished culpability of the mentally ill, like the diminished culpability of the mentally retarded or juvenile, makes the execution of these individuals a violation against cruel and unusual punishment. Further, neither retribution or deterrence, which Courts have identified as necessary for upholding a death penalty is served by executing the mentally ill.²¹⁰ Therefore, the South Carolina legislature should adopt a statutory ban on the execution of these mentally ill defendants. South Carolina cannot forget they are human.

205. Paul Bruno, *The Mitigation Specialist*, NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, <https://www.nacdl.org/Champion.aspx?id=14626> (last visited Feb. 20, 2017).

206. RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, *THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL* (2013) (discussing the expense of a capital trial case).

207. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (explaining that the “penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”).

208. *Death Penalty Appeals Process*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/resources/dpappealsprocess> (last visited Jan. 3, 2017) (explaining the death penalty appeals process).

209. DIETER, *supra* note 206, at 2.

210. *See supra* Part III.