

## Chapter 2

# Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment

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### 2.1 Introduction

In 2002, the United States Supreme Court determined that the Eighth Amendment ban on cruel and unusual punishments precluded execution of those with mental retardation in view of their reduced culpability and deterability (*Atkins v. Virginia*, 2002). In 2005, it extended this precedent to those whose capital offenses were committed when they were below age 18 (*Roper v. Simons*, 2005). Like those with mental retardation, juveniles were found to be significantly less culpable and deterable than the average capital murderer. Hence, juveniles were deemed to be categorically less appropriate for capital punishment. For these two categories of offenders, the Court determined that capital punishment would be insufficiently related to the two principal goals of the death penalty, retribution, and deterrence, and that death therefore would be a disproportionate penalty in violation of the Eighth Amendment. As a result, those with mental retardation and who are juveniles at the time of the offense were exempted from capital punishment.

Four leading professional associations – the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill – have recommended that the approach reflected in *Atkins* and *Roper* be extended to severe mental illness (American Bar Association, 2006; American Psychiatric Association, 2005; American Psychological Association Council of Representatives, 2006; National Alliance on Mental Illness, 2006, Section 9.9.1). These four professional organizations recommended that the states adopt legislation exempting offenders from the death penalty if at the time of the offense, their mental illness “significantly impaired their capacity” to “appreciate the nature, consequences, or wrongfulness of their conduct”; to

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“exercise rational judgment in relation to the conduct”; or “to conform their conduct to the requirements of law” (American Bar Association, 2006; American Psychiatric Association, 2005; American Psychological Association Council of Representatives, 2006; National Alliance on Mental Illness, 2006, Section 9.9.1).

These recommendations would not apply to exclude from capital punishment all offenders suffering from severe mental illness at the time of the offense, but only those who were functionally impaired in the specified ways. This chapter endorses the wisdom of these recommendations and proceeds on the assumption that they will be accepted in the future. It assumes that they will be accepted either by state legislatures as a matter of policy or by courts applying the Eighth Amendment principles of *Atkins and Roper* or principles of equal protection (Slobogin, 2003). Although severe mental illness at the time of the offense should not categorically exclude capital punishment,<sup>1</sup> when it significantly diminishes the offender’s culpability or deterability, the analogy to mental retardation and juvenile status is strong and suggests that the death penalty would similarly be unconstitutional. The debate on the wisdom of the proposals to preclude the death penalty for those with severe mental illness made by the four professional associations, and on the extent to which their acceptance is constitutionally compelled, may depend in part on how this mental illness capital punishment exclusion issue is determined.

If a standard for excluding the death penalty similar to the one proposed by the four professional associations is adopted legislatively, or if severe mental illness would render capital punishment such a disproportionate penalty in at least some (but certainly not all) cases sufficient to implicate the Eighth Amendment, how should the issue be decided in individual cases? Should the issue be determined by pretrial motion made to the trial judge or a special jury convened for this purpose? Should it be determined by the capital jury at the penalty stage that would follow conviction for a capital crime? This chapter analyzes the various factors that should be considered in resolving the procedural question of how this exclusion from capital punishment should be determined, and argues that Eighth Amendment values and considerations of accuracy, cost, and therapeutic jurisprudence all tilt strongly in the direction of having the issue decided pretrial by the trial judge. The chapter then examines whether having the trial judge make the determination would be inconsistent with *Ring v. Arizona* (2002), which reflects the Sixth Amendment’s constitutional preference for jury determinations of disputed issues of fact in capital sentencing. Finally, the chapter analyzes whether the prosecution or the defense should have the burden of persuasion on the Eighth Amendment question, and by what standard of proof that burden should be carried.

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<sup>1</sup> The author believes that capital punishment should be abolished altogether, and that at some point in the future it will be found to violate the Eighth Amendment’s ban on cruel and unusual punishments. See *People v. Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1033 & 1050 (1973) (a case, declaring the New York Death Penalty unconstitutional, that was argued by the author). Until that day arrives, however, arguments short of total abolition are appropriate for certain categories of offenses or offenders, including certain of those with severe mental illness at the time of the offense.

## **2.2 Considering the Alternative Judge and Jury Modes of Determining the Mental Illness Death Penalty Exclusion Issue**

As is well known, procedural rules often have substantive impacts, and may even be outcome determinative. The procedural method chosen to determine the mental illness capital punishment exclusion issue thus can have consequences for the number of offenders excluded on this basis and on the accuracy of these determinations. Moreover, because legislative change in this area will be driven, if not compelled, by Eighth Amendment principles, the choice of the procedural method used to determine the exclusion issue also should take into account the resulting impact on Eighth Amendment values. The differing procedural possibilities also will impact cost and efficiency, and will have inevitable consequences for the psychological well being of the judges, lawyers, jury members, and survivors of the victim who are affected, as well as for the defendant himself. The debate on the wisdom of barring capital punishment for those with severe mental illness or the constitutional necessity of doing so will be informed by how the exclusion issue would be determined procedurally.

Should this issue be determined by the trial judge at a pretrial hearing, by a special jury convened for purposes of making such a pretrial determination, by the capital jury at the penalty phase, or by some combination of these? Capital cases are bifurcated trials in which the trial on guilt or innocence is followed, for those who are convicted, by a separate penalty phase at which the same jury hears evidence concerning aggravating and mitigating circumstances and is asked to recommend life or death. If at a pretrial hearing, the trial judge or special jury were to determine that the death penalty should be barred as a result of the defendant's mental illness at the time of the offense, the case no longer would be treated as a capital case. Such a preliminary determination would occur following a hearing at which expert testimony would be adduced. In such cases, if the defendant were found to satisfy statutory criteria for excluding the death penalty or capital punishment were determined to be a disproportionate penalty in view of the offender's mental illness at the time of the offense, the death penalty would be removed from consideration and the case would proceed as a non-capital homicide case. In the alternative, the mental illness capital punishment exclusion issue could be folded into the penalty phase, and the capital jury could be asked to make the determination, either at the outset of the penalty phase or as part of its weighing of aggravating and mitigating circumstances. Indeed, it is possible to conclude that allowing the capital jury at the penalty phase to consider evidence of mental illness would be all that should be required, and that a pretrial determination of the issue would be unnecessary.

This chapter analyzes how these issues should be determined. In declaring the death penalty for those with mental retardation unconstitutional, the Supreme Court in *Atkins v. Virginia* (2002, p. 317) declined to specify procedures for determining whether a particular offender was mentally retarded, preferring to leave this procedural question to the states. In thinking about the question of how the mental illness death penalty exemption determination should be made, we should consider which procedural approach would

best effectuate the underlying Eighth Amendment values. In addition, we should take into account considerations of accuracy, cost, and therapeutic jurisprudence.

### 2.2.1 Accuracy

Judges are likely to be more accurate decision-makers than juries in determining whether the defendant, at the time of the offense, satisfied statutory criteria for excluding the death penalty or suffered from such a serious mental illness that his culpability and deterability were diminished to the extent that capital punishment would offend the Eighth Amendment. This is essentially a normative or constitutional question, more than it is a factual question, and its resolution involves interpretation of clinical testimony and application of a legal standard that may be over the heads of typical jurors. Although there are significant factual components of the determination, including the need to ascertain the defendant's mental condition at the time of the offense and its impact on the crime, the issues seems more suitable for judicial than for jury determination. Judges are accustomed to making pretrial mixed fact/law determinations of this kind, for example, competency to stand trial, pretrial suppression motions, pretrial motions to dismiss for double jeopardy or speedy trial reasons, and determinations under *Atkins* of whether the offender suffered from mental retardation.

Judges may be more accurate decision-makers than juries in determining whether an offender's mental illness should disqualify him from capital punishment for several reasons. First, jury selection practices in capital cases produce juries that are biased in favor of the prosecution and in favor of imposing the death penalty. Prospective jurors are subjected to an elaborate *voir dire* process that seeks to ascertain their views on capital punishment, and that allows prosecutors to exclude all or virtually all who express opposition to the death penalty. This process, known as "death qualification" (Rozelle, 2006; Sandys & McClelland, 2003; Winick, 1982), allows prosecutors to challenge for cause prospective jurors whose scruples against the death penalty substantially impair them from following their oath as jurors to fairly consider conviction and a possible death sentence (*Uttecht v. Brown*, 2007; *Wainwright v. Witt*, 1985). At present, some 60% of the American public favor the death penalty, although that support decreases to about 50% when life in prison without possibility of parole is the alternative (Liptak, 2007b). A 2007 poll released by the Death Penalty Information Center shows that 39% of Americans report moral objection to the death penalty that would disqualify them from serving as jurors in a capital case (Liptak, 2007b). A recent Supreme Court decision, by requiring added deference to trial court determinations of whether a prospective juror's views on the death penalty would substantially impair his ability to follow jury instructions in capital cases (*Uttecht v. Brown*, 2007, pp. 2223–2224), will make it even easier for prosecutors to exclude by challenge for cause prospective jurors who express reservations about capital punishment (Liptak, 2007b). Even when prosecutors are unable to use challenges for cause to exclude such jurors, empirical research shows

that they systematically use peremptory challenges to accomplish this purpose (Winick, 1982).

Prosecutorial removal of all or virtually all prospective jurors who express reservations about the death penalty through a combination of these jury challenges produces capital juries that are unrepresentative of the community and more likely to convict and impose death than juries as a whole (Rozelle, 2006; Sandys & McClelland, 2003; Winick, 1982). Research has demonstrated significant differences between those excluded because of their reservations about capital punishment and resulting juries (Butler & Moran, 2002; Haney, Hurtado, & Vega, 1994; Neices & Dilahay, 1987). Those excluded were found to be less punitive, more concerned with due process, more favorably disposed to mitigating circumstances, and less prone to find aggravating circumstances than those included on capital juries. An extensive body of empirical research demonstrates the conviction proneness of death-qualified capital juries (Hovey v. Superior Court, 1980 (reviewing studies); Grigsby v. Mabry, 1985 (considering studies); Cowan, Thomson, & Ellsworth, 1984; Fitzgerald & Ellsworth, 1984). Death-qualified research subjects were found to have attitudes that were more accepting of the presumption of innocence, less likely to draw negative inferences from a defendant's failure to testify, more trusting of the prosecutor, less trusting of the defense attorney, less receptive to the insanity defense, and more favorable to harsh punishment for crime (Fitzgerald & Ellsworth, 1984). A meta-analysis of 14 studies of the relationship between juror attitudes toward capital punishment and conviction proneness confirmed that the more an individual favors capital punishment, the more he is likely to favor conviction (Allen, Mabry, & McKelton, 1998). Although the sufficiency and legal significance of this research was rejected by the Supreme Court in *Lockhart v. McCree* (1986), the Court appeared to misunderstand the research or to be disingenuous in its analysis of it (Ellsworth, 1988).

More recent research, including comprehensive studies conducted by the Capital Jury Project under grants from the National Science Foundation (Bowers, Fleury-Steinner, & Antonio, 2003; Bowers & Foglia, 2003; Capital Jury Project, 2007), has confirmed the conclusion of the earlier studies that the death qualification process produces capital juries tilted in favor of the prosecution and the death penalty (Allen, et al., 1998 (meta-analysis)). Unlike the older studies rejected in *McCree*, in which the research subjects were not themselves capital jurors, the newer studies involved research subjects who previously had served on capital juries. Because the research subjects had received jury instructions and made actual death penalty determinations, albeit at an earlier time, the results of these newer studies more reliably reflect capital jury behavior than the older studies, which had used non-jurors as subjects.

The tools of challenge for cause and peremptory challenge make it easy for prosecutors to death-qualify capital juries (Winick, 1982). However, defense attorneys have a more limited ability to remove jurors who are death-prone. Jury panels often contain at least some venire persons who favor the death penalty to such an extent that they feel they should vote automatically to impose it for those convicted of capital crimes. Such jurors are biased on the penalty question and subject to removal for cause (*Morgan v. Illinois*, 1992, p. 729). However, they seem less detectable by defense attorneys at *voir dire*, perhaps because they are less forthcoming or less conscious of their biases

than are those with scruples against the death penalty (Rozelle, 2006, pp. 788–789; Sandys & McClelland, 2003, pp. 400–401). As a result, such jurors frequently are seated on capital juries (Bowers & Foglia, 2003, pp. 60–61).

These jurors can be considered to be “mitigation impaired,” viewing mitigating circumstances as irrelevant and unwilling to consider them in support of a sentence less than death (Blume, Johnson, & Threlkheld, 2001, p. 1228; Garvey, 1998; Sandys & McClelland, 2003, p. 401). Inclusion of such mitigation impaired jurors on capital juries further skews such juries in favor of conviction and imposition of death.

Mitigation impaired jurors include those who would vote automatically for the death penalty should the defendant be convicted of a capital offense, and who therefore are subject to challenge for cause, and those whose attitudes favoring capital punishment, although not so strong as to preclude their consideration of an alternative sentence, are “mitigation impaired” in the sense that they refuse to give consideration to certain mitigating circumstances, even though the law requires such consideration. These prospective jurors are even more difficult to detect by defense attorneys at the *voir dire* than are those who would vote automatically for death, and therefore are considerably less likely to be removed for cause or by peremptory challenge (Sandys & McClelland, 2003, pp. 403–404). As a result, capital juries frequently contain mitigation impaired jurors.

Research by the Capital Jury Project conducted on jurors who previously had served on capital juries demonstrated that significant numbers reject various mitigating circumstances as factors they would take into account in deciding sentence and even state that they would consider them to be factors supporting a death sentence (Sandys & McClelland, 2003, p. 403). Thus, for example, some one in five jurors stated they would not consider or would consider as supporting death such strong mitigators as having a lingering doubt about the defendant’s guilt or degree of culpability and mental retardation (p. 404). More than half of former jurors in the study would have rejected many of the standard mitigators as factors that would make them less likely to vote for death, including juvenile status at the time of the offense, that the defendant had been seriously abused as a child, that the defendant had no previous criminal record, that the killing was not premeditated, or that the defendant was under the influence of alcohol or drugs at the time of the offense (p. 404). Less than one-third of the former jurors would consider in their determination of sentence such strong mitigating circumstances as mental illness or extreme mental or emotional disturbance at the time of the offense or that the defendant had been institutionalized in the past, but not provided needed treatment (pp. 404–405).

These results raise grave concerns about the ability of capital juries to be accurate decision-makers on the critical question of imposition of capital punishment. This is so particularly because these studies involved research subjects who themselves previously served as capital jurors and thus had been instructed about their role in considering mitigating circumstances. Substantial numbers of capital jurors, quite simply, often are unwilling or unable to consider mitigation evidence.

The research conducted by the Capital Jury Project also demonstrates that capital jurors often reach their decision about penalty at the criminal trial itself and based upon what transpired there, instead of based on evidence presented at the penalty

phase (Bowers, et al., 2003, pp. 426–432; Bowers, Sandys, & Steiner, 1998). This study, also based on interviews with people who had served as capital jurors in prior cases, showed a pervasive pattern in which half of the capital jurors stated that, at the guilt stage of the trial, they thought they knew what the sentencing decision should be (Bowers, et al., 2003, p. 426). Seventy percent of those who had prematurely decided in favor of death and 57% of those in favor of life characterize themselves as “absolutely convinced” prior to the penalty phase, in nearly all of the remaining jurors reported themselves as “pretty sure” (p. 427). Moreover, most of these premature deciders held steadfastly to their conviction for the duration of the proceedings (p. 427). This research thus demonstrates that a significant percentage of capital jurors make their decisions prematurely and that their minds thereafter are closed to consideration of the evidence presented at the penalty phase, the instructions of the trial judge concerning penalty, and the arguments of their fellow jurors. These jurors thus prejudge the penalty question, and therefore are biased on the issue.

Many of the jurors in the study attributed their premature decisions to unmistakable proof of guilt, heinous aspects of the crime, and physical evidence presented at trial, especially graphic photographs or audio or videotape evidence (p. 430). These jurors seem to come to the trial with a predisposition that death is the only acceptable punishment for capital murder, a predisposition that is activated by the gruesome facts of the crime (p. 431). More than half of the jurors in the study expressed the mistaken view that death was the only acceptable penalty for certain crimes, such as repeat murder, premeditated murder, and multiple murder (p. 432), and nearly half thought it was the only acceptable punishment for killing of a police officer or prison guard, or murder by a drug dealer (pp. 432–433).

It has long been known that capital juries often fail to understand jury instructions (Eisenberg & Wells, 1993). The Capital Jury Project also studied juror’s comprehension of instructions by the trial judge at the penalty phase. This research showed that many jurors failed to understand which factors may and may not be considered at the penalty phase and the level of proof and degree of concurrence needed for findings concerning aggravating and mitigating circumstances (pp. 437–438). Half of the jurors mistakenly believed that mitigating factors had to be proved beyond a reasonable doubt, and 54% mistakenly believed that jurors had to agree unanimously on a mitigating factor before it could be considered (p. 438). Although capital juries are instructed to weigh both aggravating and mitigating factors, the study showed that many capital jurors mistakenly believed that the death penalty was required, without regard to mitigating circumstances, when the evidence proved that the defendant’s conduct was heinous, vile, or depraved (43%) or that the defendant would be dangerous in the future (37%) (p. 440). These fundamental misconceptions demonstrate that capital juries either do not understand the instructions they are given about aggravating and mitigating factors and that they are to weigh them in the particular case and make a moral judgment concerning life or death, or are unwilling or unable to follow them.

Significant questions about the ability of the capital jury to be fair and accurate in playing its role in the capital sentencing process are raised not only by its composition as a result of death qualification, but also by the very process through which such death qualification occurs. The death qualification process itself tends to bias the jury

in favor of believing that the death penalty is an appropriate punishment generally and in the particular case (Haney, 1980; Haney, 1984). Professor Haney suggests that the typical elaborate *voir dire* inquiry into attitudes concerning the death penalty, generally conducted before the entire venire, may itself bias the venire in favor of death and perhaps also in favor of guilt. Prolonged discussion of the death penalty at *voir dire* suggests to prospective jurors that the defendant's guilt is presumed by the attorneys and the judge. It desensitizes jurors to the possibility of imposing the death penalty, communicates the law's disapproval of death penalty opposition, and increases the acceptability of pro-death penalty attitudes. "Rather than simply discovering prejudice, the process of death qualification tends to create it" (Haney, 1980, p. 525).

Prospective jurors observing one of their fellow members being removed by the judge when their responses to questions by the prosecutor and the judge admit that they have reservations against the death penalty quickly learn that the correct answer to such questions should be that they favor capital punishment. This is the answer, after all, that these authority figures seem to want to hear, and those who do not provide it are met with disapproval and are ceremoniously banished from the group. By focusing the jurors' attention on the death penalty at the outset of their participation in the case, the jury selection process provides a frame for all that follows, conveying the message that the defendant must be guilty and deserving of the death penalty, and providing a lens through which they will view the evidence they subsequently will hear at both the trial and the penalty phase. One of the Capital Jury Project's studies provides further support for these conclusions (Bowers & Foglia, 2003, p. 65). Some 10% of jurors in the study, when asked about their perceptions of the impact upon them of the *voir dire*, reported that the questions made them think the defendant must be or probably was guilty and deserving of the death penalty, while only 1% thought the opposite.

For a variety of reasons, therefore, capital juries may be more biased and less accurate decision-makers than would be the trial judge. Like jurors, trial judges may favor the death penalty, but they are more likely to be able to set aside their attitudes about capital punishment when asked to determine, at a pretrial hearing, whether the defendant suffered from serious mental illness that significantly diminished his culpability and deterability. Juries may be limited in their ability to understand complex legal terms even when jury instructions seek to explain or translate them into ordinary language, and as the Capital Jury Project research shows, often have mistaken views about their roles in capital sentencing or are unable or unwilling to follow the instructions they are given (Eisenberg & Wells, 1993; Bentele & Bowers, 2001, pp. 1046–1049). By contrast, judges are more likely to understand complex legal standards and are more likely to apply them rather than some other standard that they may think should be applied. In short, judges probably are more due process oriented than capital juries and more likely to attempt conscientiously to apply the relevant legal standard. Moreover, they will not be subject to the biasing effects of the death qualification process and will be less subject to the psychological pressures that impair many capital jurors' ability to be fair and accurate. In considering, at a pretrial hearing, whether the defendant should be exempted from capital punishment as a result of his mental illness, the judge will be more likely to understand expert testimony about the defendant's psychopathology and its impact on his

culpability and deterability. Although death-qualified capital juries are prosecution prone, and therefore likely to be more accepting of prosecutor's arguments that the defendant's mental illness should not disqualify him from receiving the death penalty, trial judges are more able to be neutral and detached decision-makers when considering the arguments of the prosecution and defense.

The ability of capital juries to decide the death penalty exclusion issue fairly and accurately also is diminished as a result of the misconceptions and stereotypes that many people still have about mental illness. The jury may be more likely than the trial judge to associate serious mental illness with dangerousness, to accept the stereotype of people with mental illness as violent, and to think that the death penalty is the best or only way to protect the community from potential future harm by the defendant (Perlin, 1994, p. 274; Slobogin, 2000, pp. 19–23; Slobogin, 2003, pp. 305, 313). Juries, for example, rarely return a verdict of acquittal by reason of insanity, perhaps basing their decision more on the perceived need to protect the community from the defendant's future dangerousness than on the normative principles embodied in the legal insanity standard (Perlin, 1994, p. 274; Perlin, 1996, pp. 216–217; Slobogin, 2000, pp. 19–20; Slobogin, 2003, p. 305). Indeed, although the test for legal insanity varies among jurisdictions, empirical studies show that the insanity defense test used makes little difference in jury verdicts (Simon & Aaronson, 1988, pp. 125–127; Steadman, et al., 1993, pp. 45–62). Because the standard for exempting a defendant from the death penalty as a result of his mental illness is similar to the legal insanity standard, juries may have similar difficulties in making the determination. Although judges may have their own biases against people with mental illness and will share the desire to protect the community from harm, they are more likely to be able to set aside their biases and will understand that, should the decision be to exempt the defendant from the death penalty, a life sentence, should he be convicted or plead guilty, will adequately protect the public.

If the death penalty exclusion issue is determined by the capital jury at the penalty phase, that jury will already have heard the gruesome facts of the crime and have determined that the defendant is guilty. Can the jury then make a fair and impartial determination of whether the defendant's mental illness should disqualify him from the death penalty? The research demonstrates that capital jurors, many of whom are biased in favor of death and "mitigation impaired," when asked to determine life or death at the penalty phase of the proceedings often focus on the gruesome facts of the crime and the finding they already have made that the defendant is guilty (Bentele & Bowers, 2001, pp. 1046–1049). Based on these factors, they vote for death without considering mitigating circumstances. If asked post-trial to make a threshold determination of whether the defendant should be excluded from capital punishment as a result of his mental illness, they are likely to respond similarly. A jury that has determined that the defendant has committed a particularly heinous, atrocious, and cruel murder may psychologically be unable to ascertain whether the defendant suffers from such a serious mental illness that capital punishment should be excluded from consideration free of the biasing affects of the facts they have heard and determined.

In other contexts, the Supreme Court has found a due process violation when juries have been asked to ignore facts they have heard and concluded are true. For

example, in *Jackson v. Denno* (1964), the Supreme Court held that due process is violated when the jury is assigned the role of determining both the voluntariness of a confession and its veracity. Even though the jury may be instructed to ignore the confession if it finds it was coerced. This cannot be done free of the biasing effects of its determination that the confession is accurate. As a result, the Court held that due process required a pretrial judicial determination of the coercion issue at a suppression hearing held by the trial judge outside the presence of the jury.

Similarly, in *Bruton v. United States* (1968), the Supreme Court also invalidated a jury instruction on the ground that it was psychologically beyond the juries' ability to follow. The Supreme Court considered the situation of a joint trial in which one defendant's confession is admitted into evidence and implicates an additional co-defendant. When a conspiracy has not been charged, the statement will be inadmissible hearsay with regard to the non-confessing co-defendant, and when the confessing defendant refuses to testify, there is a Confrontation Clause problem under the Sixth Amendment. The Court previously had upheld the efficacy of jury instructions in this context that ordered the jury to disregard the statement when considering it in connection with the non-confessing defendant's guilt, although considering it in connection with the guilt of the declarant. However, in *Bruton*, it concluded that having heard and considered the statement, the jury would be psychologically unable to then ignore it. Rejecting the assumption that these instructions were efficacious, the Court therefore held that, to avoid unfairness to the non-confessing defendant, one of several measures would need to be taken. The statement implicating both the declarant and the non-confessing defendant either would not be admissible in evidence or would be admissible only following its redaction in ways that would prevent the jury from knowing that the non-confessing defendant was implicated or from speculating about this possibility (*see Gray v. Maryland*, 1998), or the co-defendants would need to be severed for separate trials (Fed. R. Crim. P. 14).

For similar reasons, a jury that has decided the defendant is guilty of a gruesome murder may be unable psychologically to determine the mental illness/death penalty exclusion issue free of the biasing effects of the determination it already has made (Bentele & Bowers, 2001, pp. 1046–1049). This biasing effect would not occur if the issue were to be decided pretrial, either by the judge or by a special jury convened for this purpose. However, the added costs and burdens on the community of convening a separate jury to decide this question make it unlikely that legislatures would adopt this approach. Moreover, even if a special jury were to be convened for this purpose, the question would arise as to whether this jury should be subject to the usual death qualification process that occurs at the *voir dire* in capital cases. Prosecutors (as well as defendants) have a right to jurors that are unbiased and to jury selection practices that provide them with a reasonable opportunity to exclude those who do not meet this standard. In *Lockhart v. McCree* (1986), the Supreme Court rejected the contention that the Constitution prohibits the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the penalty phase of the trial. For the same reasons, it would be unlikely that the Court would require the convening

of a separate jury that was not death qualified to determine pretrial whether capital punishment should be barred because of the defendant's mental illness at the time of the offense. Requiring the typically lengthy *voir dire* process to occur twice in one case, would add considerably to the cost and duration of capital cases. Moreover the death qualification process that would occur in screening a special jury convened to decide the death penalty exemption issue would similarly skew the composition of the special jury and produce parallel biasing effects to those described earlier. If a pretrial determination of the death penalty exemption issue is deemed more desirable than a post-trial determination of the issue by the capital jury that convicted the defendant, it therefore is extremely unlikely that a special jury would be used for this purpose, and it would be preferable for that determination to be made by a judge.

In deciding whether a judicial determination of the issue would be more or less accurate than a jury determination, consideration might be given to the question of whether judges are more severe than juries in sentencing generally, and in capital sentencing in particular. There is conflicting social science evidence concerning whether the judge or the jury is more severe in making the capital punishment determination. In the small number of jurisdictions in which the capital jury plays an advisory role and the judge makes the ultimate decision, the literature shows that judges more frequently override jury recommendations of life and impose a death sentence compared to when they override jury recommendations of death and impose a life sentence (Bowers, Foglia, Giles, & Antonio, 2006, p. 978; Bright & Keenan, 1995, pp. 776–813; Burnside, 1999, pp. 1039–1044; *Harris v. Alabama*, 1995, pp. 519–520 (Stevens, J., dissenting)).

In making these override decisions, judges are not immune from political pressures, and studies show that the occurrence of life-to-death judicial overrides is concentrated in the year before the judge must stand for re-election (Bowers, et al., pp. 978, 989, 1005; Bright & Keenan, 1995, pp. 776–813; Burnside, 1999, pp. 1039–1044; Stevenson, 2003, pp. 1193–1194). Life-to-death overrides, particularly occurring in the run-up to judicial elections, may reflect the fact that state judges, most of whom are elected officials, may not wish to appear to be soft on crime. The risk that not imposing a death sentence may give rise to this appearance, however, may be less in the context in which the trial judge is asked to make a pretrial determination of whether mental illness should exempt the defendant from capital punishment under the Eighth Amendment or statutory exclusion criteria. This risk may be considerably higher in cases in which the defendant already has been convicted and the gruesome facts of the crime have appeared in the media. The appearance of being soft on crime will be less in cases, such as those under consideration, in which a pretrial hearing is all that has occurred and has focused on the defendant's mental illness and its impact on the crime, rather than on the gruesome facts of the crime and the victim's suffering. Although the testimony may inevitably touch upon some of the facts of the crime, it would not be as extensive as would occur at the trial itself as part of the prosecutor's proof of guilt. A defense motion to exclude the death penalty on the basis of the defendant's mental illness at the time of the offense concedes, for purposes of the motion, that the defendant has committed the offense, therefore rendering it unnecessary for the prosecutor to prove guilt in connection with rebutting the motion. The political

pressures that may produce judge overrides of jury recommendations of life in cases in which the defendant has been convicted of capital murder thus may not carry over to the lower visibility judicial pretrial determination of whether the defendant's mental illness at the time of the crime should disqualify him from capital punishment, or may carry over to a much lesser extent. The appearance that the judge is soft on crime may be greater when the judge declines to impose death following a jury conviction of a heinous crime than when the judge, pretrial and preconviction, accepts the testimony of clinical experts that the defendant suffered from such severe mental illness at the time of the offense that the death penalty should be precluded.

One factor that may bear on the question of the relative severity of judge vs. jury sentencing is that prosecutors, when surveyed, favor jury sentencing, while defense lawyers favor sentencing by judges (Smith & Stevens, 1984). Yet, data from Alabama after it transitioned from a jury to a judge sentencing system, found that judges were significantly more harsh in imposing sentences for robbery (35.9 years) than had juries been under the preexisting jury sentencing process (22.5 years) (Smith & Stevens, 1984). This finding, however, may not extrapolate to capital sentencing, and probably will do so to even a lesser extent than the pretrial determination of whether capital punishment should be removed from consideration because of the defendant's mental illness.

The relative severity of judges versus juries in sentencing may inevitably be difficult to ascertain, but the crucial question here should be accuracy, rather than severity. In the capital context, in particular, there is strong reason to think that judges will be more fair and accurate decision-makers than juries in resolving the issue of whether statutory criteria for barring the death penalty as a result of mental illness had been satisfied or an offender's mental illness should exempt him from capital punishment under the Eighth Amendment. The Supreme Court recently had the occasion to consider the relative accuracy of judge versus jury determinations of whether to impose capital punishment (*Schiro v. Summerlin*, 2004) in determining whether its prior decision in *Ring v. Arizona* (2002), holding that the Sixth Amendment requires a jury determination of the existence of an aggravating circumstance that would justify imposition of the death penalty, should be made retroactive, the Court discussed the literature on the relative accuracy of judges and juries in capital sentencing. The Court concluded that the evidence on this question was "equivocal" (p. 356) (*citing* Eisenberg & Wells, 1993; Garvey, 2000; Bowers et al., 1998). If the evidence concerning the relative accuracy of judges vs. juries in capital sentencing is equivocal, this may reflect an absence of studies on relative accuracy, rather than evidence that capital juries are more accurate than judges in capital sentencing. In any event, accuracy in capital sentencing is different than accuracy in making the pretrial determination of whether capital punishment should be excluded on the basis of the defendant's mental illness at the time of the offense. In this latter context, there would seem to be strong reason to favor the conclusion that judges are more accurate in making the mixed fact/constitutional or statutory determination of whether the defendant's mental illness at the time of the offense should preclude consideration of the death penalty. The technical nature of the evidence involved in determining this question, turning largely on expert clinical testimony concerning

the defendant's mental illness and its impact on the crime, suggests that law-trained and experienced judges would be more accurate in determining this issue pretrial. In addition, judges would be more reliable decision-makers on the death penalty exclusion issue, more consistent in their application of statutory or constitutional standards than *ad hoc* groups of lay jurors who will lack previous experience in making decisions of this kind (*Schriro v. Summerlin*, 2004, p. 356; *Profitt v. Florida*, 1976, p. 252 (joint opinion of Steward, Powell, & Stevens, JJ.)).

For the many reasons discussed in this section, capital juries are considerably less likely to apply the proper legal standard free of the biases that the social science research has so forcefully demonstrated.

Accuracy is particularly important in capital cases in view of the high social disutility of an erroneous death sentence. Death is different, the Supreme Court has repeatedly recognized, and this difference argues strongly for procedures that we think will produce a higher degree of accuracy (*Gilmore v. Taylor*, 1993; *California v. Ramos*, 1983; *Eddings v. Oklahoma*, 1982; *Enmund v. Florida*, 1982, p. 3377; *Beck v. Alabama*, 1980, p. 637; *Lockett v. Ohio*, 1976, pp. 604–605 (plurality opinion of Berger, C.J.); *Coker v. Georgia*, 1977, p. 584; *Gardner v. Florida*, 1977, pp. 357–358, (plurality opinion of Stevens, JJ.); *Gregg v. Georgia*, 1976, pp. 187–189; *Woodson v. North Carolina*, 1976, pp. 303–304 (plurality opinion)). Moreover, limitations on habeas corpus review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (2006) tend to insulate fact-finding from effective habeas review and to require a high degree of deference to such fact-finding (e.g., *Uttecht v. Brown*, 2007, p. 2224). These limitations increase the risk that an erroneous death sentence will avoid correction, and therefore also argue strongly for procedures that are likely to increase the accuracy of the determination of the mental illness capital punishment exclusion question. To minimize the risk of error in this context, the question of whether a defendant's mental illness at the time of the offense should exclude the possibility of a death sentence should be determined pretrial by the trial judge.

### 2.2.2 Cost

In considering whether the mental illness capital punishment exclusion issue should be decided pretrial or at the penalty stage, and if pretrial, by the judge or a special jury convened for this purpose, we should also take into account considerations of cost. A pretrial determination, by either judge or jury, would affect considerable cost savings. Such a pretrial determination is both cost effective and more time efficient than having the issue determined at the penalty phase of a capital trial. Capital trials typically are considerably more lengthy than non-capital trials, necessitating additional judicial, prosecutorial, defense lawyer, jury, and judicial personnel time and courtroom use. The Supreme Court of New Mexico recognized these differences between capital and non-capital trials, noting that “trials involving the death penalty ‘are qualitatively

and quantitatively distinct from other criminal proceedings” (New Mexico v. Flores, 2004, p. 764). The court recognized the “tremendous hardships in terms of time, emotion, energy, and expense” that are involved in capital trials (p. 764). The court invoked these cost considerations to justify its interpretation of a statute requiring a presentence judicial hearing of the question concerning whether a defendant should be excluded from capital punishment as a result of mental retardation. Although the statute specified a post-conviction, presentence hearing, the court, noting the considerably higher costs of capital cases compared to non-capital murder trials, construed the statute to permit the issue to be determined at a pretrial judicial hearing upon motion of the defendant. Because of the extraordinary nature of capital prosecutions, the court concluded, “every effort must be made to avoid a death penalty trial as early in the proceedings as possible where capital punishment is precluded as a matter of law” (p. 764). The court was justifying its decision that the exclusion from capital punishment required by *Atkins* for those with mental retardation be determined at a pretrial judicial hearing, but its analysis supports as well having the issue of whether mental illness should disqualify an offender from capital punishment resolved in the same fashion. If the issue is determined pretrial in favor of excluding the offender from a potential death sentence, the greater investment of resources, time, and emotional energy, that having the issue determined at the penalty phase would necessitate would be avoided.

The fiscal savings alone of avoiding a capital trial that might be unnecessary are themselves quite substantial (Death Penalty Information Center, 2007a). For example, in Washington state, death penalty trials cost about \$467,000 more than non-capital murder trials, and on average, approximately \$100,000 more for appeals (Death Penalty Information Center, 2007a; Washington State Bar Association, 2007, p. 20). Furthermore, because capital trials were estimated to take 20 or 30 days longer, an additional extra cost in terms of trial court operation should be included, and this was estimated to be \$46, 640 to \$69, 960 (Washington State Bar Association, 2007, p. 18). In Kansas, “costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration” (Death Penalty Information Center, 2007b). The trial phase of a capital case alone is estimated to cost one million dollars (Block, 2007, p. 27; Liptak, 2007a). Another estimate is that capital cases cost five million dollars, some ten times more than non-capital murder trials (Gibbons, 1988, p. 66).

Cost considerations have led legislatures to require that the determination of the mental retardation exclusion from capital punishment mandated by *Atkins* occur pretrial. When the California legislature was considering how *Atkins* determinations should be made, the Senate Committee on Public Safety emphasized the fact that “a pre-trial procedure would avoid the extraordinary expenses associated with proceeding with a capital trial.” (California Bill Analysis, 2003). The federal courts also have recognized the cost advantages of making the *Atkins* determination pretrial. In *United States v. Nelson* (2006, p. 893), the federal district court noted that “significant resources are saved in terms of trial preparation, motion practice, *voir dire*, trial time, mitigation research, etc.”

If the judge decides the issue pretrial, rather than leaving it to the jury at the penalty phase, additional cost saving would result from avoidance of the very lengthy jury selection process that occurs in capital cases. If capital punishment is removed from consideration, and this is determined by the judge before jury selection commences, the death qualification process, in which prospective jurors are asked about their attitudes toward capital punishment, would be unnecessary. It is not unusual for jury selection in capital cases to last several weeks. If it is determined pretrial that the death penalty may not be imposed, the subsequent *voir dire* therefore would be substantially shorter, avoiding considerable judicial and attorney time and reducing the burdens of jury service. Because, for the reasons shown earlier, death-qualified juries are biased in favor of conviction, eliminating the elaborate *voir dire* inquiry into death penalty attitudes will have the added advantage of increasing the fairness and accuracy of those trials that remain necessary.

In addition, removal pretrial of the possibility of capital punishment will facilitate plea bargaining. In most capital cases, the real focus of the defense is on avoiding a death sentence. Although the chances of obtaining an acquittal may be exceedingly small, when the prosecution seeks the death penalty and is unwilling to accept a guilty plea that avoids it, almost all defendants will elect trial. If the death penalty possibility is removed pretrial, both parties will be more motivated to attempt to reach a negotiated settlement of the criminal charges, and many trials will thereby be avoided.

Furthermore, if the capital punishment issue is removed from consideration pretrial, rather than being determined at a post-conviction penalty phase hearing, the entire penalty phase would be rendered unnecessary. This would affect considerable cost savings as the penalty phase itself is a lengthy trial at which witnesses are presented concerning aggravating and mitigating circumstances, the attorneys present opening and closing arguments, the judge instructs the jury, and the jury engages in deliberations concerning sentence. Rather than this elaborate penalty phase trial, the usual sentencing hearing held before the trial judge would occur, and this typically is a brief hearing, instead of what often is a several week separate trial on penalty.

Every case in which a death sentence is imposed produces several layers of appeals, petitions for certiorari to the U.S. Supreme Court, and petitions for habeas corpus, each of which results in further appeals and petitions for certiorari. These involve considerable attorney, trial court, and appellate judge costs, and costs of printing records and briefs. Convictions in cases not involving a death sentence result in much fewer appeals, petitions for certiorari, and habeas corpus petitions. In cases in which the possibility of a death sentence is removed pretrial, these appellate and post-conviction costs thus will be substantially reduced.

Determining the issue pretrial therefore would be much less costly than deferring its determination until after conviction and deciding it either at a separate proceeding prior to the penalty phase or at the penalty phase itself. If the issue is to be determined pretrial, having it done by a judge rather than a jury also will be less costly and more expeditious. Requiring determination of the issue pretrial, of course, will necessitate what could be a lengthy pretrial hearing on the question at which expert witnesses will testify and the attorneys will make legal arguments. The same expert

testimony and legal arguments, however, will occur anyway if the issue is deferred to the penalty phase, and probably will take much longer to present to a jury than to a trial judge alone. Moreover, determining the issue pretrial rather than at the penalty phase would avoid the necessity of jury instructions on the issue and the added time of jury deliberations needed to resolve it. For a variety of reasons, therefore, determining the issue at a pretrial judicial hearing would be considerably more efficient, less expensive, and less burdensome to the criminal justice process.

### ***2.2.3 Therapeutic Jurisprudence Considerations***

An additional consideration in determining whether the issue should be decided pretrial or during the penalty phase, and by judge or jury, is the therapeutic jurisprudence dimension. Therapeutic jurisprudence is an interdisciplinary field of legal scholarship and law reform that focuses attention on the psychological consequences of law and its processes for those affected. (Wexler & Winick, 1991; Wexler & Winick, 1996; Stolle, Wexler, & Winick, 2000; Winick & Wexler, 2003; Winick, 2005). Given that there are various alternative ways of determining the issue of whether mental illness at the time of the offense should exempt the defendant from a possible death sentence, which of these would achieve greater emotional well being for the various individuals affected – the judge, jury, attorneys, family of the victim, and the defendant himself?

#### **2.2.3.1 The Judge**

Trying a capital case probably produces significant added stress for the judge. The judge must be extra sensitive to the fairness of the proceedings, and will bear the greater emotional weight of a trial involving the added consequences of a possible death sentence. If the issue of whether the defendant suffers from sufficiently serious mental illness to exclude consideration of capital punishment is determined pretrial, this added stress will dissipate. The earlier the issue is resolved, the less stress the judge will experience. This stress for the judge will be dissipated, of course, whether the determination is made by the judge or a jury pretrial, and some judges might find it less stressful to have the issue determined by a jury, rather than making the decision themselves. However, empanelling a jury and having the jury determine the issue will take longer, thereby prolonging the stress that presiding at a death penalty case probably produces for most judges. By contrast, if the issue is determined post-verdict, the added stress of presiding at such a trial and the added responsibility of participating in the determination of whether to take someone's life may pose significant negative emotional consequences for the judge.

A capital case attracts considerably more media attention than a non-capital case would, with the result that the judge will be under the intense glare of media and

public scrutiny for an added period. Conscientious judges trying a capital case will experience the added pressure of ensuring the fairness and accuracy of the trial, minimizing the risk of an erroneous execution, and creating a record that will stand up to the intense scrutiny the case will receive post-conviction. The psychological burdens and pressures of trying a non-capital case are much less.

### **2.2.3.2 The Jury**

For similar reasons, serving on a capital jury produces considerable stress that can be hazardous to a jury member's mental and physical health. Studies have found that capital jurors experience heightened levels of stress (Miller & Bornstein, 2004, pp. 239–242). Capital jurors report feeling depression and/or anxiety (pp. 239–242). Many factors that contribute to the psychological and physiological distress of criminal jury service generally are much higher in capital than in non-capital cases. These include the presentation of gruesome and graphic evidence, intense media attention, fear of retribution by the defendant, sequestration, the length of the trial, relationship with other jurors, and community pressures (Cusack, 1999, p. 99). Each of these factors is present in a capital case to a heightened extent. When the death penalty is at stake, juror stress levels are higher than in non-capital cases, even when the facts of the cases are comparable (p. 99). The same study found that jurors who imposed the death penalty had a higher risk of “sustain[ing] clinically significant symptoms of post-traumatic stress disorder” (p. 100).

If the question of whether severe mental illness should exclude the possibility of capital punishment is determined pretrial by the judge, the capital jury will never be empanelled. Thus, the special stress of serving on a capital jury will be avoided. Even if a special jury is empanelled to determine the capital punishment exclusion issue pretrial, the stress of determining this issue will presumably be less than the stress of serving on a jury during an extended capital trial and penalty phase. Although the jury at such a pretrial exclusion determination will hear evidence concerning the defendant's mental illness, it is less likely that it will hear a full account of the gruesome facts of the crime and about the victim's suffering. The issues such a pretrial jury are asked to determine are more abstract than the question of whether the defendant should live or die. A pretrial determination of whether the possibility of capital punishment should be eliminated does not produce the same degree of pressure as a determination of whether the death sentence should be imposed. As a result, juror stress in such a circumstance should be considerably less than is usually encountered in serving on a capital jury.

### **2.2.3.3 The Attorneys**

The stakes for a prosecutor in trying a capital case are considerably higher than those in trying a non-capital case, as is the extent of media attention. As a result, the added stress of prosecuting a capital case may cause negative emotional consequences for

at least some prosecutors. The earlier that capital punishment is removed from consideration, the less will be the stress of this kind imposed on the prosecutor.

There is considerable stress in being a defense lawyer in a capital case. The defense attorney literally has his client's life in his hands, and the weight of this responsibility on his shoulders can cause high anxiety, depression, insomnia, and even a form of vicarious post-traumatic stress disorder. Excluding the death penalty from consideration at a pretrial phase, will alleviate these negative emotional effects.

#### **2.2.3.4 The Family of the Victim**

Although oftentimes the family of the victim of the capital crime seeks retribution and the death penalty, from an emotional perspective, this may be a misguided quest. A capital sentence, far from giving finality to the family's grief and anger, typically marks the beginning of a lengthy process, lasting 12 or more years in most jurisdictions, until capital punishment can be administered. During this period, the family's wounds are left open, and no sense of closure is achieved. There may be many occasions in which the governor issues a warrant of execution, which has the effect of renewing the family's emotional reaction to the original crime, only to be followed by perhaps inevitable stays of execution issued by various appellate and habeas courts, thereby renewing the family's anger and frustration. The capital punishment system "greatly adds to the years of anguish of the survivors of murder victims," and "holding out the death penalty as some sort of delayed remedy for their grief is a cruel hoax" (Lewis, Dow, Preate, Bright, & Tigar, 1994, p. 1196).

The family has itself been victimized by the capital crime. The murder of their loved one inevitably provokes shock, anguish, anger, and depression. Their participation in the capital trial, even if merely as observers, can provoke a form of "secondary victimization" (Acker & Karp, 2006, p. 154; Kanwar, 2002 pp. 228–229). The indeterminacy of the process can be a persistent source of frustration, resentment, and anxiety.

Rather than serving as a source of sympathy and vindication, the capital trial process seems to many families to neglect their interest and feelings and to focus more on the defendant's rights than what they may perceive to be their own (Armour, 2002, p. 376). The prosecutor, and not them, decides how the case will be presented, and they rarely will be consulted or have their wishes honored. "It's not fair," one family member complained (Gibbons, 1988, p. 67). They play a peripheral role, unless, of course, they are asked to testify, in which case they feel badgered and embarrassed by the defense attorney's cross-examination. "No one has the right to keep us locked out of the judicial process," one family member complained (p. 67). Rather than treating them with humanity and offering sympathy, the judicial system "treats them like a piece of evidence" (p. 67). Even at the penalty phase, they often do not get to tell their stories about how they felt about the victim's murder, and instead of being a memorial to their murdered family member, the penalty trial may be seen by them as an attempt to humanize the defendant and to place him in the best possible light. Family members feel that the way their loved ones are portrayed

in the proceedings “distorted who they had been,” with the result that “families felt they lost control of their truth about the victim” (Armour, 2002, p. 376).

The literature on the psychology of procedural justice teaches that when individuals involved in judicial proceedings are given a sense of “voice,” the ability to tell their story, and “validation,” the feeling that they have been heard and that what they have had to say was taken seriously, and treated with dignity and respect and in good faith, they are more satisfied with the proceeding and more likely to accept its outcome (Lind, et al., 1990; Lind & Tyler, 1988; Tyler, 1990, 2006; Thibaut & Walker, 1978). For the family of the victim, none of these elements may be satisfied. As a result, the pretrial process, the trial itself, and the penalty phase are an altogether unsatisfying experience. Moreover, in the capital process, the trial phase is just the tip of the iceberg. In the years that will follow any imposition of a death sentence, family members will be totally removed from the appellate and post-conviction processes that will prevent execution for a dozen or more years (Gibbons, 1988). They will experience increased resentment with each passing year, and come to feel that justice delayed truly is justice denied.

Many family members will experience a form of post-traumatic stress disorder stemming from the often heinous and cruel murder of the victim (p. 1; Amick-McMullan, et al., 1991). As a result, every occasion within the lengthy legal process that focuses their attention once again upon the horrible crime will reactivate the feelings of panic and anxiety that they experienced at the time of the crime. Rather than obtaining closure, the capital process, with its inherent appellate and post-conviction delays, can cause the family to relive again and again that nightmarish occasion and the feelings it unleashed. Every time a new execution warrant is signed, a stay of execution is granted, or a new petition is filed, media attention will again focus on the murder and cause all of their horrible memories to resurface (Vandiver, 2003, p. 621). Repeated descriptions of the crime in the media, sometimes accompanied by photographs, or videotape images, will make it difficult for the survivors of the victim “to put the murder behind them, or to focus their memories on the victim’s life rather than on his or her death” (p. 621). When an appeal or a post-conviction challenge is successful, necessitating a retrial or resentencing, the negative emotional effects for the family will be at their highest as they experience a replay of the entire process. Rather than putting an end to this unfortunate chapter in their lives, the capital process thus can prolong their nightmare indefinitely.

Family members thus “often are not helped, and sometimes further victimized by the criminal justice system” (Vandiver, 2003). For survivors of the victim, the capital process often constitutes what has aptly been described as a form of “secondary victimization” (Acker & Karp, 2006). The secondary victimization problems encountered by family members in the capital process were well captured by a victim’s relative, who exclaimed: “You never bury a loved one who’s been murdered, because the justice system keeps digging them up” (Kanwar, 2002, p. 241). The capital punishment system “directly undermines” the “healing process and the survivor is repeatedly reminded of the offender’s actions” thus impeding recovery (Tabak & Lane, 1989, p. 132).

"In short, the capital punishment system's alienation of survivors, perpetuation of reminders of the crime, and prevention of swift and certain finality compound the survivors' suffering and grief" (p. 132). The prolonged suffering experienced by the survivors of the victim makes them feel that they "are forced to serve a life sentence without parole" (Gibbons, 1998, p. 66).

Although some survivors of the victim may view capital punishment as a means of obtaining closure, it actually may prolong their suffering and prevent closure from occurring. The idea that execution may bring closure "may be more a hoped-for result" than the reality of the experiences and responses of family members (Armour et al., 2006, p. 4). If and when execution actually occurs, it frequently does not bring the victim's survivors the relief they were seeking or put an end to their long ordeal (Armour et al., 2006, p. 2). Moreover, the lengthy capital process may actually provoke intra-family conflict as family members may have differing feelings about the death penalty (King, 2006, p. 294). Family quarrels about whether the offender should be executed can resurface repeatedly during the lengthy capital process, intensifying old family conflicts and alienating one family member from another.

In the long run, it may actually be more therapeutic for the family if the case is not treated as a capital case. If at a pretrial proceeding, the defendant is determined to be so mentally ill that capital punishment should be excluded from consideration because the defendant lacks the requisite degree of culpability and deterability, the family may be better able to come to terms with the crime and achieve a measure of understanding about the perpetrator. At this pretrial hearing, they will learn about the severity of the offender's mental illness and resulting impairment of his ability to have understood what he was doing when he killed the victim, to appreciate its wrongfulness, or to control his actions. They may not forgive him as a result, but this increased understanding may better allow them to come to terms with their loss. They may come to see the offender as less blameworthy than they had thought, or perhaps even not blameworthy at all. This may reduce their anger at the accused, and to allow them to focus more on the sadness of their loss and to deal with it more effectively. By contrast, if the case is treated as a capital case, they are more likely to hold on to their anger for a prolonged period. Held anger of this kind can be extremely debilitating, both psychologically and physiologically, causing a variety of negative emotional effects, compromising immunology, increasing blood pressure and the risk of heart attack or stroke, and even causing physical responses like neck or back pain (Winick, 2007a, p. 616; Winick, 2007b, p. 349). Letting go of this anger, which will be facilitated by a pretrial determination that the defendant's mental illness significantly diminished his culpability and deterability, therefore can increase the surviving family members' emotional and physical well being.

Even if the defendant's life is spared at such a pretrial proceeding, he likely will receive a life sentence, and the family may experience this as a sufficient measure of retribution. In any event, the case will end once the defendant is sentenced, and the family will not experience and re-experience the grief, anger, and negative emotions that are likely to resurface periodically during the lengthy period between a capital sentence and administration of the death penalty. This may better allow the

family's wounds to heal, and permit them to get on with their lives rather than to dwell continuously in the negative emotions that the murder and its aftermath will likely produce. The family thereby will more likely achieve closure if the death penalty is removed from consideration, particularly if done early on in the proceedings. Having the mental illness capital punishment exclusion issue determined pretrial rather than at the penalty phase, therefore, can produce therapeutic advantages for the survivors of the victim, and this therapeutic jurisprudence consideration thus argues for having the issue determined pretrial.

### **2.2.3.5 The Defendant**

Needless to say, being a capital defendant is intensely stressful, at least for most defendants. It probably produces extreme stress, anxiety, shame, embarrassment, fear, and depression. Facing the prospect of execution can produce or exacerbate mental illness in the defendant. Although facing non-capital murder charges will raise all of these emotional effects as well, there can be no doubt that they will be exaggerated even more so if the trial can bring a sentence of death. Thus, from the defendant's perspective, the antitherapeutic effects of facing capital punishment will be reduced if the issue of exclusion of the death penalty is determined pretrial.

## **2.2.4 Eighth Amendment Values**

Which procedural mechanism for determining the mental illness death penalty exemption issue – by the trial judge at a pretrial hearing or by the capital jury at a post-trial penalty stage hearing – would be more consistent with Eighth Amendment values? This chapter argues that accuracy in the determination of this issue would be increased by having the issue resolved pretrial by the judge rather than post-trial by the capital jury. Because “death is different,” requiring heightened procedural protections to minimize the risk of erroneous execution (*Gilmore v. Taylor*, 1993; *California v. Ramos*, 1983; *Eddings v. Oklahoma*, 1982; *Enmund v. Florida*, 1982 p. 3377; *Beck v. Alabama*, 1980, p. 637; *Lockett v. Ohio*, 1978 pp. 604–605 (plurality opinion of Berger, C.J.); *Coker v. Georgia*, 1977, p. 584; *Gardner v. Florida*, 1977, pp. 357–358, (plurality opinion of Stevens, JJ.); *Gregg v. Georgia*, 1976, pp. 187–189; *Woodson v. North Carolina*, 1976 pp. 303–304 (plurality opinion)), Eighth Amendment values would be furthered by having the issue determined at a pretrial judicial hearing. This chapter has proceeded on the assumption that the Eighth Amendment would be violated by imposition of capital punishment on a defendant whose mental illness at the time of the offense significantly reduced his culpability and deterability, and that in any event, legislatures should exempt such defendants from capital punishment as a matter of policy. Whether required by the Constitution or adopted as a matter of legislative judgment, the Eighth Amendment value of avoiding disproportionate punishment constitutes an important consideration in determining the procedures that should be used to make the exclusion decision.

The Supreme Court has frequently emphasized the importance of jury behavior in capital sentencing as an indication of community values in assessing the constitutionality of capital punishment (*Coker v. Georgia*, 1977; *Enmund v. Florida*, 1982; *Gregg v. Georgia*, 1976; *Woodson v. North Carolina*, 1976). Although not as significant as legislative behavior in this regard, jury behavior is, and has been treated by the Court as, important evidence of whether evolving standards of decency have rejected capital punishment as an appropriate criminal sanction. This consideration may argue in favor of having the jury determine the mental illness death penalty exemption question because jury behavior in making such determinations could provide evidence of community attitudes on the continued acceptability of capital punishment. Because juries reflect the “conscience of the community” more than do judges, the argument might be advanced that the determination of the mental illness exclusion from capital punishment should be made by the jury.

Justice Breyer has made a similar argument in the context of the court’s invalidation of judicial fact finding in capital cases in *Ring v. Arizona* (2002). Although the Court had relied on the Sixth Amendment right to jury trial, Justice Breyer, in a concurring opinion, relied instead on the Eighth Amendment’s emphasis on the jury’s role as the “conscience of the community” (*Ring v. Arizona*, 2002, pp. 613–619 (Breyer, J. concurring)). The main purpose for capital punishment is retribution, Justice Breyer asserted, and jury sentencing in such cases is essential because juries have a “comparative advantage” over judges in determining, in a particular case, whether a death sentence would serve that end (p. 614). This advantage, according to Justice Breyer, stems from their superior ability to “reflect more accurately the composition and experiences of the community as a whole,” thereby making them a better barometer of “the community’s moral sensibility” (pp. 815–816).

This argument, however, does not support having the jury rather than the judge makes the mental illness death penalty exclusion determination. First of all, this analysis is undermined by the death qualification process that characterizes American jury selection practices in capital cases. As discussed earlier, these practices produce juries that are more willing to impose death and to favor conviction than juries as a whole. These jury selection practices result in juries that do not reflect the conscience of the community. Instead, they reflect “community sentiment purged of its reluctance to impose a death sentence” (Winick, 1982, p. 80). The systematic exclusion from capital juries of the substantial percentage of citizens who oppose the death penalty “biases jury composition, resulting in a distorted exaggeration of the community’s willingness to impose the death penalty” (p. 81). Were the capital jury assigned the task of determining whether a defendant’s mental illness at the time of the offense should exempt him from capital punishment, its determination would provide only a distorted picture of community attitudes on the death penalty. Moreover, as previously shown, capital juries also are biased by having already heard and determined the heinous facts of the crime, frequently misunderstand their role in making death penalty decisions, reject or diminish the importance of mitigating circumstances, and misunderstand or ignore the jury instructions they are given. These compromise the jury’s ability to accurately reflect the “conscience of the community” on capital punishment. Because judges are not subject to the distorting

influences of the death qualification jury selection process or to these other biases or misconceptions, their decision on the mental illness death penalty exclusion question actually may more accurately reflect the moral attitudes of the community.

In any event, under the proposal made in this chapter, judges would play this role only in determining pretrial motions raising the issue of whether the defendant's mental illness at the time of the offense should bar the possibility of a death sentence. Should the judge deny such a motion, the capital jury, at the penalty phase that would follow any verdict of guilt, would make the actual determination of whether the defendant deserved the death penalty. In making this determination, the capital jury would have the opportunity to reflect the "conscience of the community" to the extent that it was able to.

As judges would be more accurate decision-makers on the mental illness death penalty exclusion question, allowing the issue to be determined, at least preliminarily, by trial judges would actually provide more reliable evidence of community attitudes. Properly understood, then, Eighth Amendment values argue for judicial rather than jury determinations of the issue. These Eighth Amendment values coalesce with considerations of accuracy, cost, and therapeutic jurisprudence to support assigning this task to the trial judge at a pretrial hearing.

## **2.3 Remaining Procedural Issues: Jury Trial, Burden of Persuasion, and Standard of Proof**

### ***2.3.1 Would a Pretrial Judicial Determination of the Death Penalty Exclusion Issue Violate the Defendant's Sixth Amendment Right to Jury Trial?***

This chapter argues that a pretrial determination of the mental illness death penalty exclusion issue would be preferable to having the issue determined post-conviction at or before the penalty phase, and that Eighth Amendment values and considerations of accuracy, cost, and psychological well-being tilt in favor of a judicial rather than a jury determination of the issue. Would this, however, violate the right to jury trial and the Supreme Court's holding in *Ring v. Arizona*, (2002)?

In *Ring*, the jury, deadlocking on premeditated murder, found the defendant guilty of felony murder which took place during an armed robbery. Under state law, *Ring* could not be sentenced to death unless further findings were made by a judge, conducting a separate sentencing hearing, concerning the existence of specified aggravating circumstances. The trial judge conducted such a hearing, and finding the presence of several aggravating circumstances, sentenced *Ring* to death. *Ring* challenged the constitutionality of the Arizona statute, arguing that it violated the Sixth Amendment right to jury trial "because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty" (p. 595). In *Ring*, the Supreme Court accepted these arguments, finding that a jury trial is required for determination of

any issue of fact that serves as a statutory predicate to administration of the death penalty (p. 589).

A consideration of the procedures used to determine whether a defendant is mentally retarded under *Atkins*, thereby barring the possibility of the death penalty and of their constitutionality under *Ring* provides a useful starting point for examining the Sixth Amendment question under consideration here. In *Atkins v. Virginia* (2002), the Supreme Court held that the execution of mentally retarded individuals violated the Eighth Amendment. The Court, however, did not offer a specific procedure for determining the existence of mental retardation and left the development of procedures up to the states (*Atkins v. Virginia*, 2002, p. 317). The Court stated simply that “we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences” (pp. 316–317).

In an article following *Atkins*, Professor James Ellis, the attorney for the petitioner in *Atkins*, offered suggestions for how states should proceed (Ellis, 2003). He recommended two bifurcated schemes. The first (Alternative A) begins with a pretrial bench hearing on death eligibility, with a subsequent opportunity for the defense to present the issue to a trial jury. The second (Alternative B) addresses the mental retardation issue in a special pretrial hearing before a separate jury from the one that will ultimately hear the trial (p. 16). Most states have adopted alternative A (e.g., California Penal Code § 1376, 2007; Colorado Revised Statutes § 18-1.3-1102–1104, 2007; Idaho Code § 19-2515A, 2007; Kentucky Revised Statutes § 532.130–140, 2007; Louisiana Code of Criminal Procedure § 905.5.1; see Death Penalty Information Center, 2007c).

When Professor Ellis suggested these approaches, it was not known whether courts would interpret *Atkins* as standing for the proposition that mental retardation is the functional equivalent of an element of the crime and would therefore necessitate a jury determination. It was with this concern in mind that he postulated his suggestions (p. 16). Professor Ellis expressed the view that, “[I]t is not absolutely clear whether the post-*Atkins* question of whether a defendant has mental retardation is the ‘functional equivalent’ of an element of the crime, but it certainly bears most of the attributes described in *Ring*” (p. 16).

These concerns about the applicability of *Ring*, however, seem incorrect, and the lower courts have declined to consider this to be an element of the crime. *Ring* held that, “Capital defendants, no less than non-capital defendants... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment” (p. 589). Applying its earlier decision in *Apprendi v. New Jersey* (2000), the Court determined that the Sixth Amendment applies to the fact finding mission of deciding whether aggravating circumstances exist.

In responding to *Atkins*, about half of the states created procedures in which a judge made the decision pretrial (e.g., California Penal Code § 1376, 2007; Colorado Revised Statutes § 18-1.3-1102–1104, 2007; Idaho Code § 19-2515A, 2007; Kentucky Revised Statutes § 532.130–140, 2007; Louisiana Code of Criminal Procedure § 905.5.1, 2007; see Death Penalty Information Center, 2007c). These procedural schemes have been challenged by defendants as contravening the Sixth Amendment under *Ring*. However, in responding to these challenges, state courts

have concluded that a pretrial determination by a judge is consistent with the principles set forth in *Ring*. In *New Mexico v. Flores* (2004), the New Mexico Supreme Court held that the Sixth Amendment did not preclude a statutory procedure which called for a pretrial judicial determination of mental retardation. In *Flores*, the defendant was charged with first degree murder and sought an *Atkins* determination. The defendant argued that whether he was mentally retarded was a factual issue that *Ring* required a jury to determine (p. 762). The court held that “*Apprendi* and *Ring* do not apply to cases where the factual finding at issue operates to lower the maximum penalty rather than to raise the punishment above the statutory maximum” (p. 762). As a finding of mental retardation would lower the maximum penalty, it is not an element of the offense, the court found, thereby making *Ring* inapplicable. In reaching its determination, the New Mexico Supreme Court noted opinions from other state and federal courts that reached the same conclusion (*New Mexico v. Flores*, 2004, pp. 763–764, *In re Johnson*, 2003 p. 405; *Head v. Hill*, 2003, p. 620; *ex parte Briseno*, 2004). Other state supreme courts have followed suit and found that *Ring* does not apply to pretrial judicial determinations (e.g., *State v. Grell*, 2006) *Bowling v. Kentucky*, 2005, p. 381; *Russell v. Mississippi*, 2003).

Federal statutes make no provision for the procedures used to resolve whether a defendant is mentally retarded. The Federal Death Penalty Act (2002) prohibits the execution of those with mental retardation. In considering how the presence of mental retardation should be determined under the federal statute, the Fifth Circuit has held that *Ring* “does not render the absence of mental retardation an element of the sentence that is constitutionally required to be determined by a jury” (*United States v. Webster*, 2004, p. 792). A federal district court in Colorado reached the same result (*United States v. Sablan*, 2006, p. 16).

These decisions rejecting a Sixth Amendment challenge to having the *Atkins* issue determined at a pretrial judicial hearing seem plainly correct. *Ring* was limited to the situation where the determination of an aggravating circumstance that made the defendant eligible for capital punishment was assigned to a judge rather than to the jury. Rather than constituting such an aggravating circumstance, mental retardation is a mitigating factor that conclusively precludes capital punishment.

Moreover, a decision by the trial judge that the defendant does not qualify for the mental retardation exclusion from capital punishment does not amount to a determination that he will receive a death sentence. This issue will be determined subsequently by a jury at the penalty phase should the defendant be convicted. A rejection of mental retardation by the trial judge at a pretrial hearing does not preclude the capital jury from reaching the opposite conclusion at the penalty stage (*New Mexico v. Flores*, 2004, p. 1270). Under the Eighth Amendment, the sentencing jury may “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” (*Lockett v. Ohio*, 1978, p. 604; accord *Penry v. Lynaugh*, 1989, p. 328; *Eddings v. Oklahoma*, 1982, p. 114; *New Mexico v. Flores*, 2004, p. 1270). Thus, a defense contention that the offender is mentally retarded, and as a result must be conclusively excluded from capital punishment, may be renewed in front of the capital jury at the penalty hearing.

For identical reasons, allowing the judge to make a pretrial determination of whether capital punishment should be excluded as a result of the defendant's mental illness at the time of the offense will not violate the Sixth Amendment. If the judge finds that the defendant is not sufficiently mentally ill to bar the death penalty, the defendant will be able to raise the issue again, to the jury during the penalty phase. Even if the trial court at the pretrial hearing has rejected his mental illness capital punishment exclusion contention, he is free again to raise his mental illness as a mitigating circumstance at the penalty phase, and to argue to the jury that this mitigating factor is so strong that it should preclude a sentence of death. This would provide the defendant with a second opportunity to contend that his mental illness should make the death penalty inapplicable, and is in accord with society's and the Supreme Court's strong interest in avoiding erroneous executions. This chapter's proposal that the mental illness death penalty exclusion issue be determined at a pretrial judicial hearing therefore will not frustrate *Ring's* concern that the jury's fact finding role in capital sentencing not be usurped.

### ***2.3.2 Burden of Persuasion***

In determining whether the defendant's mental illness at the time of the offense should preclude capital punishment, an additional question is which party – the state or the defendant – should bear the burden of persuasion, and by what standard of proof should that burden be carried. The process for resolving the *Atkins* mental retardation exemption from capital punishment issue again provides a useful analogy. Because the finding of mental retardation has not been deemed to be the equivalent of an element of the underlying crime, the burden can be placed on the defendant (Ellis, 2003, p. 16). The standard of proof concerning the existence of mental retardation, however, should not exceed preponderance of the evidence (p. 16). Post-*Atkins* cases uphold the constitutionality of placing the burden of proof on the defendant and of using a preponderance of the evidence standard. All of the post-*Atkins* statutes that deal with the burden of persuasion question allocate the burden to the defendant (e.g., California Penal Code § 1376, 2007; Nevada Revised Statutes § 174.098, 2007; New York Code of Criminal Procedure § 400.27(12), 2007; Tennessee Code Annotated § 39-13-203, 2007; Death Penalty Information Center, 2007c). Even when the statute fails to specify, the courts have agreed that the burden should be placed upon the defendant. In *State v. Grell* (2006), the Supreme Court of Arizona compared the finding of mental retardation to proving affirmative defenses and concluded that “[p]roof of mental retardation is like proof of an affirmative defense in that it serves to relieve or mitigate a defendant's criminal responsibility, and as with affirmative defenses, the evidence of retardation will lie largely within the possession and control of the defendant” (*State v. Grell*, 2006, p. 522). The Supreme Court of Indiana upheld a state statute, which placed the burden on the defendant to prove his mental retardation by comparing an *Atkins* determination to competency to stand trial (*Pruitt v. Indiana*, 2005, pp. 99–100). The Court relied

on *Medina v. California* (1992), in which the U.S. Supreme Court held that placing the burden on a criminal defendant to prove incompetence was consistent with the requirements of due process in that it did not offend principles of fundamental fairness (*Medina v. California*, 1992, p. 453).

*Medina* is closely analogous, and the approach it uses for resolving due process challenges suggests that allocating the burden of persuasion at a pretrial hearing to the defendant to establish that his mental illness at the time of the offense should disqualify him from capital punishment would not be unconstitutional. *Medina* rejected the balancing test of *Matthews v. Eldridge* (1976) that the Court had used in administrative law contexts for measuring the process that is due when the state seeks to deprive an individual of a liberty or property interest. In state criminal cases, instead of using *Matthews* balancing, the Court announced that it would use a fundamental fairness test that would emphasize whether the challenge practice had been rejected as unfair by our history and traditions (*Medina v. California*, 1992, pp. 445–446; see Winick, 1993, pp. 820–825). Under this test, it would be constitutional to place the burden of persuasion on the defendant on the mental illness death penalty exemption issue. There is no historical antecedent for a pretrial proceeding to determine whether mental illness should exempt a defendant from a possible death penalty, and as a result, placing the burden on the defendant cannot be said to violate historical conceptions of fairness.

Moreover, the usual factors that are invoked in allocating burdens of persuasion – considerations of fairness, probability, and policy (Cleary, 1959; Winick, 1993, pp. 846–858) – tilt in the direction of placing the burden of persuasion on the defendant in the mental illness death penalty context involved here. The fairness inquiry focuses on which party has superior access to the evidence in question (Cleary, 1959, p. 5; Winick, 1993, p. 846). As in the competency to stand trial issue involved in *Medina*, the defense will have superior access compared to the prosecution to evidence concerning the defendant's mental illness and the extent of its functional impairment. It therefore would not violate principles of fairness to place the burden on the defendant.

The factor of probability focuses attention on the extent to which the issue that must be proven is more or less likely to be true, and counsels that, other things being equal, the burden be placed upon the party contending for the improbable event (Cleary, 1959, pp. 11–12; Winick, 1993, p. 847). In this context, it will only be in rare cases that mental illness will be so severe as to satisfy statutes that exempt offenders from the death penalty or will impair an offender's blameworthiness for wrongdoing and ability to control his conduct to the extent that the Eighth Amendment would bar his execution. Thus, considerations of probability also argue for placing the burden on the defendant.

The third factor – policy – focuses attention on how the allocation decision might impact whatever policy considerations might be relevant (Cleary, 1959, p. 11; Winick, 1993, pp. 849–858). In this context, the relevant policies would include the strong societal value of avoiding erroneous execution, and also achievement of the general purposes of the criminal sanction, including its educative, deterrence, and retributivist purposes. The burden of persuasion allocation decision will affect outcomes only in cases in which the evidence is in equipoise, with the result that these

policies will rarely be implicated. This is so because the evidence usually tips in one direction or another, and rarely will be so evenly divided that the burden will dictate the outcome. Because the defendant has superior access to evidence concerning his own mental condition, and can hire clinical experts to assist in the gathering and presentation of such evidence at state expense when he is indigent (*Ake v. Oklahoma*, 1985), placing the burden on the defendant will not frustrate the societal interest in avoiding wrongful execution nor otherwise undermine the purposes of criminal punishment. As a result, placing the burden upon the defendant would be consistent with the usual considerations that enter into burden allocation decision-making.

### 2.3.3 *Standard of Proof*

If the burden of persuasion is placed upon the defendant, a preponderance of the evidence standard would seem to be the appropriate measure by which this burden should be carried. Indeed, the Eighth Amendment and due process principles may forbid imposition of a standard higher than preponderance of the evidence (*Pruitt v. Indiana*, 2005, p. 103). The U.S. Supreme Court has held that a statute placing the burden of persuasion on the defendant to prove incompetency to stand trial by clear and convincing evidence violated due process (*Cooper v. Oklahoma*, 1996, p. 350). The Court reasoned that a heightened standard impermissibly increased the risk of error (p. 362).

In the *Atkins* mental retardation context, most states placing the burden of persuasion on the defendant apply a preponderance of the evidence standard (e.g., Arkansas Code § 5-4-618 (2007); California Penal Code § 1376 (2007); Kentucky Revised Statutes 532.130-140 (2007); see Death Penalty Information Center (2007c)). A minority, however, apply a clear and convincing evidence standard (e.g., Arizona Revised Statutes § 13-703.02 (2007); Florida Statutes § 921.137 (2007); North Carolina General Statutes § 15A-2005 (2007); see Death Penalty Information Center (2007c)). Applying the approach of *Cooper*, the Indiana Supreme Court invalidated a statute requiring a defendant to show mental retardation by clear and convincing evidence on the basis that it would result in the execution of some offenders who actually suffered from mental retardation (*Pruitt v. Indiana*, 2005, p. 103). Several state courts, however, have upheld the constitutionality of such statutes (*State v. Grell*, 2006; *People v. Vasquez*, 2004). *Cooper* is closely analogous, and as a result, the standard of proof by which a defendant should be required to establish that his mental illness at the time of the offence was so severe that he should be exempted from capital punishment should be the preponderance standard.

## 2.4 Conclusion

This chapter proceeds on the assumption that the extension of *Atkins* and *Roper* to the context of mental illness will occur at some point in the future. Like mental retardation and juvenile status, severe mental illness, at least in some cases,

can produce such severe functional impairments that it will substantially diminish an offender's culpability and deterability. As a result, the Eighth Amendment should exclude capital punishment for this category, and state statutes should follow the recommendations of the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness prohibiting the death penalty for severe mental illness occurring at the time of the offense.

The debate on whether this exclusion should occur may turn in part on the question of how the issue should be determined procedurally. Moreover, if this exclusion is adopted either statutorily or judicially, the procedural question of how it will be determined will need to be faced. This chapter has argued that the issue should be resolved pretrial by the trial judge.

Such a pretrial judicial determination has been the general approach adopted by the states in the wake of *Atkins* for determination of the mental retardation exclusion issue. Having the issue decided pretrial by the trial judge, rather than at the penalty phase by the capital jury, would increase the accuracy of the determination made. Capital jury selection procedures bias resulting juries in favor of capital punishment, and empirical research has demonstrated that capital juries also are biased by having heard and determined the facts of the heinous murder. Such juries have been shown to apply a presumption in favor of death and to misunderstand or disregard their role with regard to mitigating circumstances. Juries also may misunderstand clinical evidence concerning the offender's mental illness and its impact on his functioning at the time of the offense, may incorrectly equate mental illness with dangerousness, and may incorrectly think that the death penalty is the only way to protect the community from the defendant's future violence. The trial judge will not be subject to these biases and misconceptions, and will be better able to understand the clinical testimony and decide the legal/constitutional issue in question.

In addition, having the judge make the determination pretrial will be considerably more efficient and less costly than having the issue resolved by the capital jury at the penalty phase. Capital trials are much more expensive than non-capital trials, with the result that determining the exclusion question at an early time can avoid much needless cost and delay. Having the issue resolved at an early point also can be justified based on therapeutic jurisprudence considerations. Capital trials are significantly more stressful than non-capital trials, with the result that determining the issue at an early point will avoid much stress for the trial judge, the attorneys, the jury, and the defendant. Moreover, although the families of the victim may often seek the death penalty, rather than providing closure and enabling them to come to terms with their loss, capital trials and the long delays between capital sentencing and execution may actually prevent their wounds from healing. Should the death penalty be removed from consideration at an early time based on the defendant's mental illness at the time of the offense, this may better allow the family to come to terms with their loss, perhaps reducing their anger at the offender and permitting them to deal more effectively with their grief and sadness.

Having the issue determined pretrial by the trial judge will not offend Eighth Amendment values or the Sixth Amendment right to jury trial. Although we typically think of the jury as reflecting the “conscience of the community,” the biasing affects of capital jury selection and the other problems described earlier that compromise the accuracy of capital juries suggest that trial judges may reflect the conscience of the community on the mental illness/death penalty question more accurately than the capital jury. Although *Ring v. Arizona* (2002) reflects a constitutional preference for jury determinations of aggravating circumstances that might justify the death penalty, having the trial judge determine the essentially legal question of whether capital punishment should be excluded because of extreme mental illness at the time of the offense will not offend Sixth Amendment values. Trial judges make a variety of pretrial determinations of issues that might have the effect of precluding the death penalty, including ruling on pretrial motions to dismiss for lack of speedy trial or double jeopardy, or determinations under *Atkins* of whether the defendant suffers from mental retardation and therefore should be spared the death penalty. Allowing the trial judge to make these determinations does not offend the Sixth Amendment, and as a result, the right to jury trial would not be violated by having the trial judge determine the mental illness/capital punishment exclusion issue. Should the trial judge deny such a pretrial motion to bar capital punishment, the capital jury will have a full opportunity to pass on all factual issues relating to whether the death penalty should be imposed, including a renewed defense submission that the offender’s mental illness constitutes a conclusive mitigating circumstance.

In determining the mental illness/capital punishment exclusion issue, the burden of persuasion should be placed upon the defendant. This would not offend principles of due process under the Supreme Court’s approach in *Medina v. California* (1992), and is consistent with the considerations traditionally invoked in allocating burdens of persuasion – considerations of fairness, probability, and policy. The standard of proof, however, should not exceed preponderance of the evidence. Indeed, imposition of a higher standard upon the defendant, such as clear and convincing evidence, would raise significant due process problems. Allocating the burden of persuasion to the defendant and requiring that it be carried by a preponderance of the evidence has been the general practice in making mental retardation determinations under *Atkins*, and this approach should be followed here as well.

State legislatures and courts have not as yet had the occasion to respond to the question of the implications of *Atkins* and *Roper* for those with mental illness. In thinking about whether capital punishment should be precluded as a result of severe mental illness at the time of the offense, it is important to consider the procedural questions presented concerning how the issue should be determined. Considerations of accuracy, cost, and therapeutic jurisprudence strongly favor a determination of the issue pretrial by the trial judge, rather than at the penalty phase by the capital jury. Determination of the issue this way will offend neither Eighth Amendment nor Sixth Amendment values, and indeed, the greater accuracy produced by having the trial judge decide the issue would further both Eighth Amendment and due process concerns for avoiding erroneous executions.

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