IN THE
SUPREME COURT OF THE UNITED STATES

No. 18-_____

BILLY RAY IRICK,
Petitioner,

v.

TONY MAYS, WARDEN
Riverbend Maximum Security Institution

Respondent.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE
EXECUTION SET FOR AUGUST 9, 2018 AT 7 PM

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Question Presented

Does the imposition of the death penalty on a person who was severely mentally ill at the time of the offense constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution?

Parties to the Proceedings in the Lower Courts

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Billy Ray Irick respectfully requests that the Court review this original petition for writ of habeas corpus and grant relief from his unconstitutional sentence of death. In support of his petition, Mr. Irick sets forth the following:

Statement of the Basis for Jurisdiction

The Court has jurisdiction to entertain this original petition under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a*). See also Felker v. Turpin*, 518 U.S. 651, 658–62 (1996).

Required Statement under 28 U.S.C. §2242

Billy Ray Irick is not making application to the federal district court of the district in which he is held because no lower federal court would consider his claim in light of the lack of controlling authority from this Court as of yet. Petitioner asserts he is, by virtue of his severe mental illness, ineligible for a death sentence as a matter of law. Such a claim should not be subject to state procedural bars because to do so would result in a fundamental miscarriage of justice. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 348 (1992); *Smith v. Murray*, 477 U.S. 527, 537–38 (1986).

The restrictions on second or successive habeas corpus applications contained in 28 U.S.C. § 2244(b)(1) and (2), which "inform [this Court's] . . . consideration of original habeas petitions," *Felker v. Turpin*, 518 U.S. at 662–63, do not bar consideration of the claims raised herein. Petitioner has not made this application initially in district court, *see* 28 U.S.C. § 2242 and Supreme Court Rule 20.4, because adequate relief cannot be had in that court in light of the strict requirements of 28 U.S.C. §§ 2244(b) and 2253. Because this petition relies on interpretations of this Court's evolving jurisprudence, Petitioner cannot show he "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by 28 U.S.C. § 2244(b)(2)(A). Similarly, although Petitioner

alleges factual and legal predicates for his claim not previously available that would preclude his death sentence, *see Sawyer v. Whitley*, 505 U.S. at 348, he cannot show that "but for constitutional error, no reasonable fact finder would have found [him] . . . guilty of the underlying offense" as required by 28 U.S.C. § 2244(b)(2)(A). This case thus presents an exceptional circumstance which warrants the exercise of this Court's discretionary powers, for the relief sought can be obtained only from this Court where that power is "informed," but not necessarily limited by these statutory restrictions. *See Felker v. Turpin, supra*.

Constitutional Provisions Involved

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment states, in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

Statement of the Case

Billy Ray Irick has a lifelong severe mental illness which manifested in early childhood and was present before and during the offense for which he was convicted, the rape and murder of his friends' child Paula Dyer. Unbeknownst to trial counsel—who noticed an intent to present an insanity defense which was withdrawn as trial began—Billy was exhibiting psychotic behavior in the days and weeks leading up to Paula Dyer's death. Billy had been living for approximately two years in Clinton, Tennessee, with Kathy and Kenny Jeffers, and their children, as an adopted member of the family. Kenney was stepfather to Paula Dyer. After the family home burned down in March 1985, the family moved to Knoxville into two different residences. Kenny and Billy

moved into Kenny's parents' home. Ramsey Jeffers (Kenny's father), Linda Jeffers (his wife), and Cathy Jeffers (Kenny's sister) all lived at that home while Kathy Jeffers and the children stayed elsewhere. Billy lived in that home in March and April 1985 until his arrest on April 15, 1985.

One night, Ramsey noticed Billy roaming the house at night after everyone had gone to sleep. He stopped Billy, who was carrying a machete, and asked him what he was doing. Billy replied that he was going down the hall "to kill" Ramsey Jeffers' son, Kenny. Ramsey Jeffers knew of no explanation or possible motivation for Billy's bizarre behavior. Mr. Jeffers convinced Billy to put down the machete and return to his room, but apparently no legal action was taken.

In the same time frame, Billy chased a school-aged girl with the same machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." Mr. and Mrs. Ramsey Jeffers, along with their daughter, Cathy Jeffers, stated in affidavits that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." In her affidavit, Cathy Jeffers stated that Billy told her, "[t]he only person that tells me what to do is the voice." She also recalled an evening when he was frantic that the police would enter the home and kill them with chainsaws.

As discussed below, the relevant evidence of Billy's mental state at the time of the offense was not discovered until late in habeas proceedings, was procedurally defaulted, and thus never adjudicated on the merits by the federal courts. The first time Billy was evaluated by a psychiatrist since prior to trial was by Dr. Peter Brown, in December 2009 and January 2010. Dr. Brown testified in competency to be executed proceedings in 2010. Dr. Brown found that Mr. Irick "has suffered from a lifelong severe psychiatric illness and that at the time of the offense he was suffering from psychosis." *State v. Irick*, 320 S.W.3d 284, 288 (Tenn. 2010). Dr. Brown diagnosed Mr. Irick as suffering from a psychotic disorder, "a condition manifested by gross perceptual and

thinking deficits, such as hallucinations, delusions, and gross disorganization of behavior." *Irick*, 320 S.W.3d at 288–89.

Mr. Irick, as captured in neuropsychological testing conducted in November and December of 2009, also suffers from a cognitive disorder— a condition manifested by significant problems in the processing of information. *Id*. at 288–90. Neuropsychological testing indicates "gross impairment in Mr. Irick's executive function, relating to his ability to integrate information from various processes in order to make decisions, to plan, and to control impulses." *Id.* The State's expert in the most recent proceedings addressing Billy Irick's mental state testified there was "no question" that petitioner had experienced "command hallucinations" and "persecutory hallucinations" in the past as recounted in the Jeffers' affidavits. Comp. Tr., pp. 129–30.

Mr. Irick's psychotic illness at the time of the offense was so severe that, given the principles guiding relative culpability in sentencing as set forth by this Court, he is constitutionally ineligible for execution. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the intellectually disabled are categorically exempt from receiving the death penalty. The same characteristics cited by the Atkins Court in finding the intellectually disabled ineligible for execution apply with equal force to individuals with severe mental illness. Because the "standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments have evolved to the point that society agrees that severely mentally ill individuals lack the requisite moral culpability to warrant the penalty of death, this Court should find that individuals such as Mr. Irick are categorically exempt from execution. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

A. Procedural History

On November 1, 1986, a Knox County jury convicted Billy Ray Irick of first degree felony murder and two counts of aggravated rape of a seven-year-old child. *State v. Irick*, 762 S.W.2d 121, 124 (Tenn. 1988), cert. denied *Irick v. Tennessee*, 489 U.S. 1072 (1989). His trial lawyers had noticed their intention of presenting an insanity defense but it was withdrawn as trial began as they had "not been able to gather evidence [they] could present to the Court on an insanity defense." Trial Vol. 2, 152. The jury sentenced Mr. Irick to death on the murder conviction after hearing from just two witnesses—an assistant district attorney who testified that Mr. Irick attempted to plead guilty at arraignment and a clinical social worker who began working with Billy when he was six years old. Trial Vol. 11, 995–1057 (entire sentencing proof). The Tennessee Supreme Court affirmed petitioner's convictions and sentences on direct appeal. *Irick*, 762 S.W.2d at 135. Mr. Irick then filed an unsuccessful petition for post-conviction relief. *Irick v. State*, 973 S.W.2d 643, 644 (Tenn. Crim. App. 1998), perm. app. denied (Tenn. June 15, 1998), cert. denied 525 U.S. 895 (1998). Petitioner also unsuccessfully challenged his convictions and sentence in federal habeas corpus proceedings. *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009), cert. denied 559 U.S. 942 (2010).

On May 10, 2010, the State filed a motion with the Tennessee Supreme Court asking the court to set an execution date for petitioner. *State v. Irick*, 320 S.W.3d 284, 287 (Tenn. 2010). Petitioner raised the issue, as required by Tennessee law at that juncture, of incompetence to be executed and requesting a hearing to determine his competency. *Id*. The trial court entered an order finding petitioner competent to be executed and the Tennessee Supreme Court affirmed the judgment of the trial court. *Id.* This Court denied review in *Irick v. Tennessee*, 562 U.S. 1145 (2011).

Petitioner subsequently filed a petition for writ of error coram nobis on October 14, 2010, claiming that newly discovered evidence—among which was the Jeffers' affidavits, Dr. Peter Brown's evaluation and testimony in the competency hearing, an affidavit from the doctor who evaluated Mr. Irick at trial without the benefit of the Jeffers' information—proved that he was insane at the time of the offenses due to severe mental illness. *Billy Ray Irick v. State*, No. E2010–02385–CCA–R3–PD, 2011 WL 1991671 at *7–16 (Tenn. Crim. App. May 23, 2011), perm. app. denied (Tenn. Aug. 25, 2011). The coram nobis court denied relief, and the Tennessee Court of Criminal Appeals, noting that a petition for writ of error coram nobis is an "extraordinary procedural remedy," affirmed the denial, finding that the petition was time-barred and finding that the evidence failed to meet the evidentiary standard required to grant relief. *Id.*

Additionally, Petitioner's Rule 60(b) motion requesting relief from judgment based on the late-developed mental health evidence previously unavailable due to the federal court's denial of funding for experts[1] was denied utilizing an "actual innocence of the death penalty" standard. *Irick v. Bell*, 2010 WL 4238768 (E.D. Tenn. 2010), cert. denied No. 10-6363 (2011). A second Rule 60(b) motion based on *Martinez v. Ryan*, 556 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013)[2] was also denied. *See Irick v. Carpenter*, 2014 WL 12721407, at *1 (E.D. Tenn. 2014).

Mr. Irick is set to be executed on August 9, 2018 at 7 p.m.

B. Statement of Facts

Billy Ray Irick was born on August 26, 1958, about a month after his mother's contractions began and her water broke. His mother had kidney infections three times during pregnancy and

[1] During the district court proceedings, counsel sought and were denied funds for mental health experts three times, even after Mr. Irick's attorney used his own funds to secure an initial records review by two Chattanooga psychologists, who were unable to travel to Nashville to evaluate Mr. Irick due to the insufficient funds available.

[2] Mr. Irick asserted that his claims of ineffective assistance of trial (and post-conviction) counsel for failing to investigate and present evidence of his mental health condition in both the guilt and sentencing phases of trial should not have been found to be procedurally defaulted due to the ineffective assistance of post-conviction counsel.

due to allergic reactions almost lost the baby several times. Upon birth there were complications and Billy and his mother were released from the hospital only after six days because he "was almost a blue baby." Trial Vol. 11, 1009; Trial Exhibit 53, Trial Exhibit 60 (date of birth). Billy's mother "stayed in a state of shock after the baby was born for about six months." Trial Vol. 11, 1010; Trial Exhibit 53. Infants who are not able to be with their parents during the first months of life "are considered high risk …." Trial Vol. 11, 1053. The infant "is so biophysiologically influenced during those first few months" that separation poses a great risk to the child's development. *Id*. at 1053–54.

When Billy was six years old and in the first grade, he was referred to the Knoxville Mental Health Center by his principal, who wanted an evaluation to determine whether Billy had some form of organic brain damage because of birth trauma or in utero complications. Trial Vol. 11, 1009; Trial Exhibit 53. By age six, Billy had been reporting to people outside the home that his mother tied him up with a rope and beat him. Trial Exhibit 53; Trial Vol. 11, 1040. A clinical social worker observed that Billy's problems at age six were apparently already "long standing" and that Billy's behavior/condition was consistent with abused children. Trial Vol. 11, 1007–08.

In May of 1965, when Billy was still just six years old, Dr. John A. Edwards, a clinical psychologist found that his testing revealed "moderate to severe emotional difficulties," and concluded that Billy was "suffering from a severe neurotic anxiety reaction with a possibility of mild organic brain damage." Trial Exhibit 57. While "not now actively schizophrenic," Billy was "severely disturbed." *Id.* In June 1965, an evaluation noted that "Billy experiences intense anxiety in the home" and he was in the midst of a "psychoneurotic anxiety reaction, severe with possible mild organic brain damage." Trial Exhibit 59.

Billy's mother "had psychiatric problems of her own and was [] not able to function in the role of parent . . . ." Trial Vol. 11, 997. By November 1966, his mother had "become increasingly more disturbed to the point that recently she had to be placed on heavy medication and the possibility of hospitalization for her" was still being considered. Trial Exhibit 61. Billy's father Clifford "had [a] very unstable work situation with low income and he recently changed jobs again." Trial Exhibit 61.[3] He "could not be depended upon" to help. *Id.* Billy was admitted to Eastern State psychiatric hospital at the age of eight and spent the next ten months (October 24, 1966–August 30, 1967) as an inpatient, though at that point in time, Eastern State had only limited experience with treating children, at least as inpatients. Trial Vol. 11, 997–98. Billy was medicated from the time he was seen at the Medical Center and was drugged with the potent anti-psychotic drug Thorazine while at Eastern State, with doses escalating from 12.5 mg to 50 mg daily by April 1967 when he was eight years old.

Billy was discharged on August 30, 1967, from Eastern State psychiatric hospital and transferred to Church of God Home in Sevierville, Tennessee. Trial Vol. 11, at 1004. Billy lived at the Children's Home for the next several years. During these years, between the ages of eight and thirteen, his parents rarely visited. However, in June of 1972, when Billy was thirteen, the Children's Home arranged a rare visit to his parents' home for Billy. The visit and its aftermath went very badly. During the visit, Billy used an axe to destroy the family television set, clubbed flowers in the flower bed, and, in a very disturbing incident, used a razor to cut up the pajamas that his younger sister was wearing as she slept. On July 25, 1972, Billy was transferred back to Eastern State psychiatric hospital as an inpatient after breaking a window to access a girl's bedroom. He

[3] The family's income was $1,600 per year. Trial Exhibit 53.

was removed after she began screaming and a knife was recovered on the bed. He was discharged March 2, 1973 at the age of fourteen to his parents' home.

Ms. Inez Prigmore was a neighbor of the Irick family when Billy returned home to the family living at Bakertown Road in Knoxville, Tennessee. Ms. Prigmore lived, on a part time basis, two doors from the Irick home. She describes Billy's father, Clifford Irick, as an excessive drinker and a brutal man. Ms. Prigmore could frequently hear Clifford Irick swearing at his wife and children from his residence approximately 1000 feet away. She could also hear the sounds of the children being struck within the home and observed Billy, his mother, and one or more sisters at various times with bruises on their bodies. Clifford Irick hit one of his daughters, who was pregnant at the time, knocking her to the ground.

When Billy was around fifteen years old, Ms. Prigmore saw Billy's father hit him in the back of the head with a piece of lumber, knocking him to the ground. Later, when Billy was about seventeen, she heard Clifford Irick tell Billy to leave the house and to never return. Billy joined the Army in 1975 and was discharged for unknown reasons. By the 1980's, he met Kenny Jeffers and later Kenny's wife Kathy Jeffers. Billy was adopted into the family and lived with them for the two years. He regularly babysat the family's five children when the Jeffers were at work or otherwise out of the home. Trial Vol. 6, 545–46, 564. At trial, Kathy Jeffers stated that her relationship with the petitioner was "like brother and sister" and that Billy had cared for the children and had never been a "cause for concern" with them. *Id.*, 544, 564–65.

Kathy Jeffers testified that while the family and Billy were living in Clinton, Tennessee, their home had been destroyed by fire, but Billy had rescued two of her children, getting the boys out before the house burned down. Trial Vol. 6, 564–65. Subsequently, the Jeffers and petitioner, as a family, relocated to Knoxville, Tennessee. *Id.*, 544. However, upon relocating to Knoxville,

Kathy and Kenny Jeffers separated. Kathy and the children moving into a two-bedroom house on Exeter Street around the first of March 1985, while Kenny and the petitioner moved in with Kenny's parents on Virginia Avenue in Knoxville. *Id.*, 546–47. Even after the separation, petitioner continued to babysit and play with the Jeffers children much as he had done before, though not as often. *Id.*, 567.

After the move, in March and April of 1985, Billy's mental condition was deteriorating rapidly.[4] Kenny's parents Ramsey and Linda Jeffers, and their daughter Cathy—with whom Billy lived in March and April 1985—were never interviewed until visited by investigators while Mr. Irick's case was in federal habeas proceedings. Kenny's father, Ramsey, who was also the step-grandfather of the victim, saw Billy roaming the house with a machete one night after everyone was in bed. He stopped Billy and asked him what he was doing. Billy replied that he was going down the hall "to kill" Kenny. Ramsey Jeffers knew of no explanation or possible motivation for Billy's bizarre behavior. Mr. Jeffers convinced Billy to put down the machete and return to his room, but no legal action was taken.

Around the same time, Billy, wielding the machete, also chased a school-aged girl down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." Mr. and Mrs. Ramsey Jeffers, along with their daughter, Cathy, stated in affidavits that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." In her affidavit, Cathy stated that Billy told her, "[t]he only person that tells me what to do is the voice." She also recalled an evening when he was frantic that the police would enter the home and kill them with chainsaws.

[4] The jurors were never informed of the events recounted by the Jeffers since trial counsel failed to investigate them.

The two mental health experts (Dr. Bruce Seidner for the state and Dr. Peter Brown for Petitioner) who have reviewed the Jeffers' affidavits, evaluated Mr. Irick, and testified at his competency to be executed hearing both describe these incidents as evidence of a psychotic event. *See State v. Irick*, 320 S.W.3d 284, 288 (Tenn. 2010) (Dr. Brown testified that "at the time of the offense [Billy Irick] was suffering from psychosis."); Comp. Tr., pp. 129–30 (Dr. Seidner testified that there was "no question" that petitioner had experienced "command hallucinations" and "persecutory hallucinations" in the past as recounted in the Jeffers' affidavits.)

Also, Dr. Clifton R. Tennison, who had conducted a pretrial forensic screening of Mr. Irick for competency and mental condition at the time of the offense, Trial Vol. XI, 1065, reviewed the Jeffers affidavits after the habeas petition had been dismissed and was on appeal. Dr. Tennison stated in an affidavit that he could no longer have confidence in his earlier evaluation because he had not been provided all material evidence. He states, in part:

> "The information contained within the attached affidavits [the three Jeffers affidavits] raises a serious and troubling issue of whether Mr. Irick was psychotic on the date of the offense and at any previous and subsequent time. That is, this historical information would have been essential to a determination of a role of a severe mental illness—a mental disease or defect - in his ability to have appreciated the nature and wrongfulness of his behavior, and therefore, to the formation of an opinion with regard to support for the insanity defense. ...
>
> The fact that this information was not provided to me prior to my evaluation of Mr. Irick is very troubling to me as a medical professional and as a citizen with regard to issues of ethics, humanitarian concern, and clinical accuracy. I am concerned that in the light of this new evidence, my previous evaluation and the resulting opinion were incomplete and therefore not accurate...
>
> I further note that behavioral health science greatly advanced since 1985 and especially within the last five to ten years. While the basis screening and assessment procedures for forensic evaluations have remained consistent in principal, diagnostic criteria and categories have changed, scientific data and testing instruments have been improved and expanded, and the clinical handling of evidence and standards for opinions and testimony have changed. Because of such changes and advances, and especially in the light of this new information, it is my professional opinion to a reasonable degree of medical certainty that without further

> testing and evaluation, no confidence should be placed in Mr. Irick's 1985 evaluations of competency to stand trial and mental condition at the time of the alleged offense.

Irick Record 896–99. This change of opinion is critical since the sentencing jurors heard only that Dr. Tennison, after a one-hour meeting with Mr. Irick and a review of some childhood records, found no evidence of a mental illness or defect. Trial Vol. XI, 1067–68. Further, he testified his diagnostic impression was that Mr. Irick likely suffered from an anti-social personality disorder. *Id.*, 1069.

On the day of the offense, April 15, 1985, Kathy Jeffers returned to the Exeter Street home at approximately 3:30 or 4:00 p.m. where she saw Billy Irick, along with her husband, Kenny, and another friend. Trial Vol. 6, 549–50. At approximately 5:00 or 5:30 in the afternoon, Mrs. Jeffers laid down for a nap and did not wake until 8:00 or 8:30 in the evening. During that period of time, the Jeffers children, including Paula, were cared for by the petitioner and Kenny. *Id.*, 552. After putting the children to bed around 9:00 p.m., Mrs. Jeffers noticed Billy on her back porch. At first, she thought he was talking to someone, but then realized that "he was talking to himself" and that she could not understand what he was saying. It sounded like "mumbles" to her. *Id.*, 554, 568.

After showering, she again saw Billy in the kitchen where they spoke. She learned that earlier in the day the petitioner had been literally chased out of the Virginia Avenue home with a broom by Kenny Jeffers' mother, Linda. *Id.*, 568–69. Billy told Kathy that he was upset with Kenny's mother over the incident and that he would be leaving for Virginia the next day. He wanted to leave that night, but Kenny wanted him to babysit the children. *Id.*, 555–56. During this conversation, Kathy saw Billy leave the kitchen, go to the porch and bring back a quart of beer in a paper bag, from which he was drinking. *Id.*, 555. Because Billy was drinking, Kathy Jeffers went to use a pay phone, called Kenny to watch the children, and came back to tell Billy that Kenny

would come watch the children while she left for work. *Id.*, 557. She arrived at work around 10:30 pm. *Id.* About midnight Mr. Jeffers received a telephone call from Irick telling him to come home, there was something wrong with Paula, saying, "I can't wake her up." *State v. Irick*, 762 S.W.2d 121, 133 (Tenn.1988). When Kenny Jeffers arrived at the house Billy was waiting at the door. *Id.* The child was lying on the living room floor with blood between her legs. *Id.* Mr. Jeffers checked her pulse, wrapped her in a blanket and took her to Children's Hospital where she was pronounced dead a short time later. *Id.*, 133–34.

At arraignment, Billy Irick attempted to plead guilty as charged. Trial Vol. 11, 1055–56.

REASONS FOR GRANTING WRIT OF CERTIORARI

The "evolving standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments prohibit the execution of the severely mentally ill.

"A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). The Eighth Amendment is not embedded in amber, it is dynamic, and the Court must look to the "evolving standards of decency that mark the progress of a maturing society" in defining the contours of that which is "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In determining whether contemporary standards of decency require a finding that a particular punishment is unconstitutional, a court should look to "objective factors to the maximum possible extent." *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle,* 445 U.S. 263, 274–75 (1980)). This Court has found a number of factors persuasive: whether state legislative enactments indicate that a national consensus has emerged against the imposition of a particular

punishment;[5] whether prosecution and sentencing trends in locations where such punishments are permissible indicate the practice is nevertheless uncommon;[6] polling data;[7] whether there is a consensus among relevant professional and social organizations;[8] and how the international community views the practice.[9]

In addition to looking to objective indicia of consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response, given either the severity of the crime or the moral culpability of the defendant. *See Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). This Court, citing both objective indicia of consensus and its own reasoned judgment, has previously identified several classes of defendants for whom the death penalty is impermissible.[10] These defendants, by virtue of possessing characteristics that diminish their moral culpability, have been deemed ineligible for execution.

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[5] *See e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (finding a national consensus against imposing the death penalty upon juvenile defendants when 30 states prohibit the juvenile death penalty; 12 states that have rejected the death penalty entirely and 18 states that have, either by express enactment or judicial interpretation, excluded juveniles from capital punishment).

[6] *See e.g.*, *Atkins*, 536 U.S. at 316 (finding persuasive that, even in the states that regularly execute offenders and permit the execution of the intellectually disabled, seemingly only five such offenders had been executed since this Court upheld the practice in *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

[7] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (examining public opinion polls in support of a ban on the execution of the intellectually disabled).

[8] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the broad consensus against executing the intellectually disabled that can be found among mental health professional organizations and diverse religious communities); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting that respected professional organizations oppose the execution of those who were under sixteen at the time of the offense).

[9] *See e.g.*, *Atkins*, 536 U.S. at 316 n.21 (citing the overwhelming disapproval of the international community for executing the intellectually disabled); *Thompson*, 487 U.S. at 830 (citing the view shared by our international peers that those who were under sixteen at the time of their crime should not be subject to execution).

[10] *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty is a disproportionate punishment for defendants convicted of raping a child); *Simmons*, 543 U.S. 551 (death penalty is a disproportionate punishment for juvenile defendants); *Atkins*, 536 U.S. 304 (death penalty is a disproportionate punishment for intellectually disabled defendants); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty is a disproportionate punishment for defendants who did not actually kill, intend to kill, or anticipate killing would occur); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty is a disproportionate punishment for defendants convicted of raping an adult woman).

In *Roper v. Simmons*, 543 U.S. 551 (2005), this Court held that the Eighth Amendment prohibits the execution of individuals who were juveniles at the time of the offense, because they lacked the culpability of adult offenders. Similarly, in *Enmund v. Florida*, 458 U.S. 782 (1982), this Court found that sentencing to death those who did not kill, intend to kill, or anticipate that death would occur was an unconstitutionally excessive punishment. Most pertinently, in *Atkins v. Virginia*, 536 U.S. 304, 306 (2002), this Court held that the Eighth Amendment prohibits the imposition of the death penalty upon the intellectually disabled because "their disabilities in areas of reasoning, judgment, and control of their impulses" mean they do not act with the requisite level of culpability.

The *Atkins* Court reasoned that the execution of the intellectually disabled does not serve either of the ostensible goals of the death penalty that were established in *Gregg v. Georgia*, 428 U.S. 153 (1976): namely, retribution and deterrence. Because the intellectually disabled are less culpable for the crimes they commit, the goal of retribution would not be served by their execution. The severely mentally ill—including Billy Ray Irick, who was psychotic at the time of his offense—form a class that shares the characteristics of the intellectually disabled in that their disabilities lie "in areas of reasoning, judgment, and control of their impulses." Thus, the same considerations cited by this Court in *Atkins* and *Simmons* apply with equal force to individuals with severe mental illness. This Court should issue this writ to determine whether the Eighth Amendment's prohibition of cruel and unusual punishment, defined by the "evolving standards of decency that mark the progress of a maturing society," exempts those suffering from severe mental illnesses from receiving the penalty of death.

Further, as there is no rational basis to distinguish between the intellectually disabled and the severely mentally ill for a categorical exemption from the death penalty, the Court should

recognize the severely mentally ill as an exempted class, consistent with the Equal Protection Clause of the Fourteenth Amendment.

I. It is unconstitutional to impose the death penalty upon the severely mentally ill because there is a developing national consensus against their execution.

In assessing whether the Eighth Amendment prohibits a particular punishment, this Court has looked to objective factors and has, accordingly, sought to identify whether there exists a "national consensus," against the imposition of that punishment.[11] In evaluating national consensus, the Court has relied on "legislation enacted by the country's legislatures" as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 331 (1989). This Court also looks to "measures of consensus other than legislation," *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). For example, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Finally, in addition to state legislation and national sentencing trends, this Court has also cited the opinions of relevant professional organizations, polling data, and international consensus in finding that standards of decency have evolved towards prohibition of a particular punishment. *See Atkins*, 536 U.S. at 316 n.21.

Taken together, these considerations reveal a national consensus against subjecting the severely mentally ill to the death penalty.

A. 24 jurisdictions do not execute the severely mentally ill.

19 states and the District of Columbia prohibit the death penalty and four states currently have governor-imposed moratoriums on executions.[12] While it is true that these 24 jurisdictions

[11] *See e.g.*, *Atkins*, 536 U.S. at 316 (finding a "national consensus" against executing the intellectually disabled); *Simmons*, 543 U.S. at 567 (finding a "national consensus" against executing juvenile defendants).

[12] *See* Death Penalty Information Center, *States With and Without the Death Penalty*, https://deathpenaltyinfo.org/states-and-without-death-penalty (last accessed August 1, 2018).

currently prohibit executing anyone, severely mentally ill or otherwise, the figure is nevertheless relevant, as this Court has included states prohibiting the death penalty altogether in its tally of states prohibiting the death penalty for certain offenders. For example, the *Simmons* Court observed that, "[w]hen *Atkins* was decided, 30 States prohibited the death penalty for the [intellectually disabled]. This number comprised 12 that had abandoned the death penalty altogether and 18 that maintained it but excluded the [intellectually disabled] from its reach." *Simmons*, 543 U.S. at 564. The Court cited a similar statistic for states prohibiting both the death penalty and the death penalty for juvenile offenders. *See id.*; *see also Penry I*, 492 U.S. at 334.

In addition to the 24 jurisdictions without the death penalty, eleven other states, plus the federal government and U.S. military, while still possessing active death penalty statutes, have not executed anyone in at least ten years.[13] In a few jurisdictions, it has been over 20 years or more since an execution was held.[14] Since 2010, only 18 states have carried out executions; one of those states, Delaware, has since abolished the death penalty and another, Washington, has since imposed a moratorium on the death penalty.[15] More recently, since 2015, only nine states have carried out executions.[16] All told, since 2010, 35 jurisdictions have not carried out executions

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[13] *See* Death Penalty Information Center, *Jurisdictions with no recent executions*, https://deathpenaltyinfo.org/jurisdictions-no-recent-executions (last accessed August 1, 2018).

[14] *Id.* Those jurisdictions include: California (last execution held in 2006); Kansas (last execution held in 1965); Montana (last execution held in 2006); Nebraska (last execution held in 1997); Nevada (last execution held in 2006); New Hampshire (last execution held in 1939); North Carolina (last execution held in 2006); Wyoming (last execution held in 1992); U.S. Government (last execution held in 2003); and, U.S. Military (last execution held in 1961).

[15] Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Louisiana, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Washington. *See* Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last accessed August 1, 2018).

[16] *Id.*

against the severely mentally ill (or any other defendant). In addition, since 2010, eight states have taken affirmative stances against the death penalty—two states (Maryland, New Mexico) have passed legislation ending the death penalty, two states' death penalty schemes have been struck down by their state supreme courts (Connecticut and Delaware), and five governors have imposed moratoriums on executions. Most significantly, in the first half of 2017 alone, legislatures in seven states introduced legislation prohibiting the execution of the severely mentally ill.[17] Four other state legislatures joined these jurisdictions in the interim.[18]

As the *Atkins* Court noted, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins*, 536 U.S. at 314. Since 2010, there has been a consistent drop in the number of states that carry out the death penalty—at this time, a clear majority of states—34—do not currently carry out executions.[19] Since 2015, 42 states have held no executions. These figures indicate an emerging national consensus against the death penalty for all defendants, including those who are mentally ill.

B. Of the 33 jurisdictions with death penalty statutes, 25 specifically address mental illness as a mitigating factor.

[17] *See* Death Penalty Information Center, *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness* https://deathpenaltyinfo.org/node/6673 (last accessed August 1, 2018) (the states at that point were Idaho, Indiana, North Carolina, Ohio, South Dakota, Tennessee, and Virginia).

[18] These states are Arkansas, HB 2170, *see* http://www.arkleg.state.ar.us/assembly/2017/2017R/Pages/BillInformation.aspx?measureno=HB2170; Kentucky, SB 107, *see* http://www.lrc.ky.gov/record/18RS/SB107.htm; Missouri, HB 2509 *see* https://house.mo.gov/bill.aspx?bill=HB2509&year=2018&code=R; and South Carolina, H. 3535, *see* https://www.scstatehouse.gov/sess121_2015-2016/bills/3535.htm (all sites last accessed August 5, 2018).

[19] This number includes the 32 states that have not carried out an execution since before 2010, plus Delaware and Washington, which carried out executions but since no longer practice the death penalty.

33 jurisdictions still maintain death penalty statutes.[20] Of those, 25—a full three-quarters—specifically ask juries to consider mental or emotional disturbance or capacity as a mitigating factor, circumstances which are of critical relevance in a defendant's mental health status.[21] Connecticut, for example, prior to abolishing the death penalty altogether, enacted a measure specifically prohibiting the execution of the severely mentally ill.[22] Other states, while not categorically exempting from execution offenders with severe mental illness, have nonetheless specifically directed the sentencing jury's attention to this factor as a mitigating circumstance.

Typical language is found in the North Carolina statute, which directs the jury to consider whether "the capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C. Gen. Stat. Ann.

[20] 31 states plus the federal government and the U.S. military. This includes the four states (Colorado, Oregon, Pennsylvania, and Washington) with governor-imposed moratoriums on executions. *See States With and Without the Death Penalty*, *supra* note 11.

[21] Ala. Code § 13A-5-51; Ariz. Rev. Stat. Ann. § 13-751(G); Ark. Code Ann. § 5-4-605; Cal. Penal Code § 190.3; Colo. Rev. Stat. Ann. § 18-1.3-1201(4); Fla. Stat. Ann. § 921.141(6); Ind. Code § 35-50-2-9(c); Ky. Rev. Stat. Ann. § 532.025(2)(b); La. Code Crim. Proc. Ann. art. 905.5; Miss. Code Ann. § 99-19-101(6); Mo. Rev. Stat. § 565.032(3); Mont. Code Ann. § 46-18-304(1); Nev. Rev. Stat. § 200.035; N.H. Rev. Stat. Ann. § 630:5(VI); N.C. Gen. Stat. Ann. § 15A-2000(f); Ohio Rev. Code Ann. § 2929.04(B); Or. Rev. Stat. Ann. § 163.150(1); 42 Pa. Cons. Stat. Ann. § 9711(e); S.C. Code Ann. § 16-3-20(C)(b); Tenn. Code Ann. § 39-13-204(j); Utah Code Ann. § 76-3-207(4); Va. Code Ann. § 19.2-264.4(B); Wash. Rev. Code § 10.95.070; Wyo. Stat. Ann. § 6-2-102; 18 U.S.C. § 3592(a).

[22] The statute read: "[t]he court shall not impose the sentence of death on the defendant if … at the time of the offense … the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Conn. Gen. Stat. § 53a-46a(h)(3). If it were not for Connecticut's 2012 abolition of the death penalty as a whole, this statute would still be enforced.

§ 15A-2000(f) (2),(6). Other statutes make relevant whether the impaired capacity was due to "mental disease or defect,"[23] "mental condition,"[24] or "mental illness."[25]

That so many death penalty states recognize mental illness as a mitigating factor is a clear legislative signal that severely mentally ill defendants—individuals who are so emotionally disturbed or mentally incapacitated that they cannot be expected to responsibly conform to lawful conduct—should not receive the death penalty. As explained further below, individualized sentencing and the discretion to consider mental illness mitigating are not sufficient to safeguard severely mentally ill individuals from receiving improvident death sentences. The only way to give effect to the emerging consensus that those suffering from severe mental illness not be executed is for this Court to acknowledge the inadequacies of individualized sentencing and recognize a categorical exemption for severely mentally ill defendants.

C. Prosecution and sentencing trends reflect a reluctance to impose the death penalty upon severely mentally ill defendants.

A broad national consensus is reflected not only in the judgments of legislatures, but also in the infrequency with which the punishment is actually imposed. As this Court has observed, "actual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62.[26] At the time *Graham* was decided, 39 jurisdictions permitted juveniles convicted of nonhomicide offenses to be sentenced to life imprisonment without parole. *Id.* This

[23] Ark. Code § 5-4-605(3); Cal. Penal Code § 190.3; Ind. Code § 35-50-2-9(c)(6); La. Code Crim. Proc. Ann. art. 905.5(e); Ohio Rev. Code § 2929.04(B)(3); Tenn. Code § 39-13-204(j)(8); Wash. Rev. Code § 10.95.070(6).

[24] Utah Code § 76-3-207(4)(d).

[25] Ky. Rev. Stat. § 532.025(2)(b)(7).

[26] *See e.g.*, *Simmons*, 543 U.S. at 567; *Atkins*, 536 U.S. at 316.

Court nevertheless found a national consensus against that punishment by examining "actual sentencing practices" and finding that such sentences were "most infrequent." The *Graham* Court emphasized that it was "incomplete and unavailing" to foreclose further examination of national consensus based on lack of state legislation alone. *Id.*

Recent high-profile trials have resulted in the extension of mercy due to jurors' consideration of a defendant's mental health as influential in their decision. For example, in the case of James Holmes, the Aurora, Colorado theater shooter,[27] a juror identified that "his severe mental illness…ruled out death" for the jurors who insisted on a life sentence;[28] a different juror confirmed that "[mental illness] was the issue" behind the divided result.[29] In a 2015 capital trial in Seattle, Washington, jurors in the case of Christopher Monfort voted 12-0 for a life sentence; a juror poll revealed that during guilt-innocence, they had been divided on the not-guilty-by-reason-of insanity plea but agreed unanimously on a life sentence during the punishment phase, given their concerns about his mental health.[30] In another Seattle case, jurors in the trial of Joseph McEnroe[31] cited his mental health as reason for the split decision and subsequent sentence of life imprisonment.[32]

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[27] *See People v. Holmes*, No. 12CR1522 (Dist. Ct., Arapahoe Co., Colo., Aug. 28, 2015).

[28] Jordan Steffan, *Aurora theater shooting juror breaks silence, says 3 voted for life*, The Denver Post (Oct. 2, 2015, 10:51 AM), http://www.denverpost.com/theater-shootingtrial/ci_28911988/aurora-theater-shooting-juror-breaks-silence-says-3 (last accessed August 1, 2018).

[29] Carly Moore, *Juror 17 reveals details of verdict, at least 1 theater shooting juror was against death sentence*, Colorado Channel 2 (Aug. 7, 2015, 7:31 PM), http://kwgn.com/2015/08/07/juror-17-reveals-details-of-verdict-at-least-1-theater-shooting-juror-wasagainst-death-sentence/ (last accessed August 1, 2018).

[30] *See State v. Monfort*, No. 091071876 (King Co., Wash. Sup. Ct., July 23, 2015).

[31] *See State v. McEnroe*, No. 071087164 (King Co., Wash., Sup. Ct., May 13, 2015).

[32] *See* Jennifer Sullivan and Steve Miletich, *Split jury spares Carnation killer McEnroe from death*, The Seattle Times (May 13, 2015, 2:16 PM), http://www.seattletimes.com/seattlenews/crime/mcenroe-escapes-death-sentence-for-6-carnation-murders/ (last accessed August 1, 2018).

Juries continue to appear to be influenced by a defendant's history of severe mental illness in weighing whether a death sentence is warranted. In a 2016 trial on the murder of a small town's police chief, jurors in rural Bell County, Texas failed to unanimously agree on a death sentence for David Risner, a respected former police officer who changed dramatically after developing posttraumatic stress disorder from spending time in Iraq as a military contractor.[33] In the 2017 capital murder trial of Andres Avalos out of Bradenton, Florida, jurors unanimously found that Avalos was mentally ill and then failed to reach a unanimous verdict imposing a death sentence for either of the two murders on trial; one of the prosecuting attorneys noted that the prosecution overcame a vigorous insanity defense in the guilt phase and the jury returned findings that Avalos was mentally ill and had an abnormal brain.[34]

Courts as well are recognizing that executing the severely mentally ill results in a disproportionate punishment. In 2014, the Florida Supreme Court, in a unanimous opinion, overturned the death sentence of Humberto Delgado, a mentally ill man convicted in the murder of a police officer, because his "long standing, potentially genetic, psychiatric illness," which was "outside of his control," as well as a host of other mitigating factors, resulted in a disproportionate punishment given the circumstances. *Delgado v. State*, 162 So.3d 971, 983 (Fla. 2015).

In cases in which severely mentally ill defendants do receive the death penalty, the defense bar has identified impediments that arise due to the defendants' deficiencies An inability to

[33] *See* Josie McCullough, *Former Officer Escapes Death Sentence in Police Chief's Murder*, Tex. Tribune (June 15, 2016, 9 PM), https://www.texastribune.org/2016/06/15/texas-man-escapesdeath-sentence-police-chiefs-mur/ (last accessed August 1, 2018).

[34] *See* Jessica de Leon, *Florida's new death penalty law hindered prosecutors in trial of Andres 'Andy' Avalos, Jr.*, Bradenton Herald (May 24, 2017, 9:33 AM), http://www.bradenton.com/news/local/crime/article152310382.html (last accessed August 1, 2018).

meaningfully contribute to their own defense, mental health evidence that became more aggravating than mitigating, an insistence on representing oneself, and asking for death are present in many cases in which defendants receive the death penalty, despite being severely mentally ill. For example, nearly all of these concerns were present in the recent capital murder trial of Dylann Roof, who was convicted of the murder of nine African-Americans parishioners attending a Bible study at the Emanuel A.M.E. Church in Charleston, South Carolina; Roof, who has been diagnosed with schizoid personality disorder and several other mental health issues, insisted on representing himself during the sentencing phase of his trial,[35] refused to present evidence of his mental health—or any evidence at all—, explicitly denied having any psychological issues, and told jurors that he could ask them "to give me a life sentence, but I'm not sure what good that would do;" Roof was sentenced to death.[36]

D. Relevant professional organizations, polling data, and the international community are all in favor of exempting the severely mentally ill from execution.

In addition to legislation and trends in prosecution, this Court has also cited other factors in identifying a national consensus, such as the opinions of relevant professional and social

[35] *See United States v. Roof*, No. 2:15-472-RMG, 2016 WL 8116670 (D.S.C. Dec. 5, 2016).

[36] *See* Alan Blinder and Kevin Sack, Dylann Roof is Sentenced to Death in Charleston Church Massacre, N.Y. Times (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/us/dylann-roof-trialcharleston.html (last accessed August 1, 2018); Shaila Dewan, Does the U.S. Execute People with Mental Illness? It's Complicated, N.Y. Times (Apr. 11, 2017), https://www.nytimes.com/interactive/2017/us/mental-illness-deathpenalty.html (last accessed August 1, 2018).

organizations,[37] polling data,[38] and views among the international community.[39] In *Atkins*, this Court cited as evidence of national consensus the official opposition of several mental health organizations, the overwhelming disapproval of the international community, and polling data showing a widespread consensus for prohibiting the execution of the intellectually disabled; the same evidence exists in support of finding a national consensus against the execution of the severely mentally ill.

Nearly every major mental health association in the United States has issued policy statements recommending the banning of the death penalty for severely mentally ill offenders. *See* Am. Psychiatric Ass'n, Position Statement on Diminished Responsibility in Capital Sentencing (approved Nov. 2004 and reaffirmed Nov. 2014);[40] American Psychiatric Association, *Moratorium on Capital Punishment in the United States* (approved October 2000), APA Document Reference No. 200006; American Psychological Association, *Resolution on the Death Penalty in the United States*; National Mental Health Association, *Death Penalty and People with Mental Illness* (approved March 10, 2001). The views of these organizations, which possess "germane expertise" in this area, demonstrate that the professional consensus is against executing the mentally ill. *See Atkins*, 536 U.S. at 316.

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[37] *See, e.g., Atkins*, 536 U.S. at 316 n.21 (citing the broad consensus against executing the intellectually disabled that can be found among mental health professional organizations and diverse religious communities); *Thompson*, 487 U.S. at 830 (noting that respected professional organizations oppose the execution of those who were under sixteen at the time of the offense).

[38] *See e.g., Atkins*, 536 U.S. at 316 n.21 (examining public opinion polls in support of a ban on the execution of the intellectually disabled).

[39] *See e.g., Atkins*, 536 U.S. at 316 n.21 (citing the overwhelming disapproval of the international community for executing the intellectually disabled); *Thompson*, 487 U.S. at 830 (citing the view shared by our international peers that those who were under sixteen at the time of their crime should not be subject to execution).

[40] Available at https://www.psychiatry.org/psychiatrists/search-directories-databases/policy-finder (last visited August 1, 2018).

The American Bar Association ("ABA") also publicly opposes executing or sentencing to death the severely mentally ill. The ABA passed a resolution on August 8, 2006, recommending that jurisdictions refrain from sentencing to death or executing individuals with severe mental disorders. Report in Support of Resolution 122A (Aug. 2006). Defendants should not be executed or sentenced to death if, at the time of the offense, they had "significant limitations in both their intellectual functioning and adaptive behavior," or had "a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law." The National Alliance on Mental Illness ("NAMI"), Mental Health America ("MHA"), the American Psychiatric Association, and the American Psychological Association have all adopted the ABA's position. fElle Klein, *Flying Over The Cuckoo's Nest: How The Mentally Ill Landed Into An Unconstitutional Punishment In South Carolina*, 68 S.C. L. Rev. 571, 582–83 (2017).

Public opinion polls, though limited, also support this consensus. A 2014 poll by Public Policy Polling revealed that nationwide, respondents oppose the death penalty for the mentally ill by a margin of two-to-one. The poll surveyed nearly 1,000 Americans and found that opposition to the death penalty for persons with mental illness was strong across genders, income brackets, and education levels. 68 S.C. L. Rev. at 581–82.

Finally, there is an overwhelming international consensus, not just against the death penalty, but also specifically against imposing the death penalty upon the severely mentally ill. This Court has often cited international laws and norms in its Eighth Amendment jurisprudence.[41]

[41] *See e.g. Atkins*, 536 U.S. at 316 n.21 (execution of intellectually disabled offenders "overwhelmingly disapproved" within the international community); *Thompson*, 487 U.S. at 830–31 ("The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-

The United Nations Commission on Human Rights has called for capital punishment countries to "[n]ot impose the death penalty on a person suffering from any form of mental disorder or to execute such person."[42] In a recent report by the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions emphasized concern "with the number of death sentences imposed and executions carried out" in the United States "in particular, in matters involving individuals who are alleged to suffer from mental illness."[43] The European Union has likewise declared that the execution of persons "suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person."[44]

E. There is an overwhelming national consensus that severely mentally ill offenders deserve special penological treatment.

In addition to the traditional indications of a national consensus against a punishment, there also exists in this country a broader trend of treating severely mentally ill offenders less harshly, due to recognition of the deficiencies caused by mental illness and the role they play in criminality. There is an emerging national consensus, not just for exempting the severely mentally ill from execution, but also for the more holistic goal of embracing a nuanced understanding of the

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American heritage, and by the leading members of the Western European community."); *Enmund*, 458 U.S. at 796 n.22 (death penalty for "felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker*, 433 U.S. at 596 n.10 (noting that the Court previously examined "the climate of international opinion concerning the acceptability of a particular punishment").

[42] *See, e.g*., U.N. Comm'n on Human Rights Res. 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (Apr. 21, 2004); U.N. Comm'n on Human Rights Res. 1996/91, U.N. Doc. E/CN.4/RES/1996/91 (Apr. 28, 1999).

[43] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N.Doc. A/HRC/26/36/ADD.2 (June 2, 2014).

[44] European Union, Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, presented to U.S. Assistant Secretary of State for Human Rights (Feb. 25, 2000), see http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/tortureand-capital-punishment/ (last visited August 1, 2018).

intersection of mental illness and criminal justice that prioritizes treatment over punishment and acknowledges the unique issues posed by mentally ill offenders. The social consensus that those suffering from severe mental illness warrant different penological treatment from those of sound mental health is reflected in current criminal justice practices.

For example, there is an extensive network of mental health courts across all 50 states, consisting of over 300 such courts.[45] Mental health courts, while diverse, can be broadly defined as specialized courts for mentally ill offenders that substitute traditional proceedings for a model centered on problem solving and treatment.[46] The purpose of mental health courts is to attempt to ameliorate the "disproportionate number of people with mental illnesses in the justice system"[47] and avoid the commission of additional crimes by encouraging treatment for mentally ill offenders.[48] Mental health courts, which have experienced a "recent surge in popularity,"[49] represent part of a rapidly growing national awareness of the importance of confronting the role mental illness plays in crime and the need—for the benefit of both the offender and the community—to address the problem in specialized ways. These courts are not limited to misdemeanor or nonviolent offenders; all told, there are at least 100 that also include felony offenders on their dockets.[50] These special courts clearly reflect a "consistency in the direction of

[45] *See* Adult Mental Health Treatment Court Locator, Substance Abuse & Mental Health Servs. Admin., available at http://www.samhsa.gov/gains-center/mental-health-treatment-courtlocator/adults (last visited August 1, 2018) (listing over 300 adult mental health courts).

[46] *See* Mental Health Courts: A Primer for Policymakers and Practitioners, at 4, The Council of State Governments Justice Center (2008), available at https://learning.csgjusticecenter.org/wpcontent/themes/c4-mhc/content/Module_1_Prep_Work/mhc-primer.pdf (last visited August 1, 2018).

[47] *Supra* at 3.

[48] *Supra* at 8.

[49] *Supra* at 1.

[50] *See Adult Mental Health Treatment Court Locator*, *supra* note 43.

change"[51] in the growing national awareness of the role serious mental illness plays in crime and the special consideration that must be afforded those who suffer severe mental illness.

II. It is unconstitutional to impose the death penalty on the severely mentally ill because of their diminished personal culpability.

In addition to identifying a national consensus, a court must also exercise its own independent judgment in determining whether a punishment is a disproportionate response,[52] given either the severity of the crime or the moral culpability of the defendant.[53] In order for a punishment to be an appropriate response to a crime, particularly in the capital sentencing realm, the severity of the punishment must be proportional to the defendant's personal culpability in the commission of the crime. For a state to impose the highest sanction of capital punishment, the defendant must meet the highest level of moral culpability—the "punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. Without such congruence, the punishment of death becomes "grossly disproportionate." *Id.* at 788 (quoting *Coker*, 433 U.S. at 592). Only the "most deserving" may be put to death. *Atkins*, 536 U.S. at 320. This principal is critical both to the individual in question and for the state exercising the power over life and death. *See Kennedy v. Louisiana,* 554 U.S. 407, 420 (2008) ("This [principle] is of particular concern . . . in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.").

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[51] *See Atkins*, 536 U.S. at 315 (noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change").

[52] *See e.g., Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597) (remarking that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of acceptability of the death penalty under the Eighth Amendment").

[53] *See e.g., Coker*, 433 U.S. at 598 (death penalty is an excessive penalty for a criminal defendant who has not taken a life); *Enmund*, 458 U.S. at 798 (death penalty is a disproportionate punishment for defendants who did not actually kill, intend to kill, or anticipate killing would occur).

The *Enmund* Court was concerned with a defendant's level of responsibility in the commission of the offense, but responsibility and guilt depend not just on the type of offense, but also on the type of offender. In *Atkins*, this Court determined that the deficiencies of the intellectually disabled "diminish[ed] their personal culpability." *Atkins*, 536 U.S. at 318. In order to be fully culpable for one's actions, one must be a fully rational, choosing agent with the capacity to evaluate the consequences of one's actions and be capable of being fairly expected to conform their behavior to that of a responsible citizen. Severe mental illness, like intellectual disability, is a persistent and frequently debilitating medical condition that impairs an individual's ability to make rational decisions, control impulse, and evaluate information and should garner the same constitutional protections. *See id.*at 318.

Because severely mentally ill defendants lack the requisite degree of moral culpability; because their impairments "jeopardize the reliability and fairness of capital proceedings," *Id.* at 307–08; and lastly, because their diminished culpability negates the acceptable goals of punishment, they should be held categorically ineligible for the death penalty.

A. Severely mentally ill individuals have impaired understanding and functioning such that their personal culpability is diminished.

Severe mental illness impairs the understanding and functioning of those afflicted in ways that substantially reduce their personal culpability. In *Atkins*, this Court described the following reasons for finding that intellectually disabled individuals, though not exempt from criminal sanctions, nevertheless possessed diminished culpability for their actions:

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Id. at 318. These characterizations apply with equal force to the severely mentally ill. Although severely mentally individuals who are not found incompetent to stand trial or "not guilty by reason of insanity" know the difference between right and wrong, they nevertheless have diminished capacities compared to those of sound mind. Hallucinations, delusions, disorganized thoughts, and disrupted perceptions of the environment lead to a loss of contact with reality and unreliable memories.

As a result, they have an impaired ability to analyze or understand their experiences rationally and as such, have an impaired ability to make rational judgments. These characteristics lead to the same deficiencies cited by the *Atkins* Court in finding the intellectually disabled less personally culpable—the severely mentally ill are similarly impaired in their ability to "understand and process information" (because the information they receive is distorted by delusion), "to communicate" (because of their disorganized thinking, nonlinear expression, and unreliable memory), "to abstract from mistakes and learn from experience" (because of their impaired judgment and understanding), "to engage in logical reasoning" (because of their misperceptions and disorganized thinking), and "to understand the reactions of others" (because of their misperceptions of reality and idiosyncratic assumptions).

Similarly, in its juvenile execution cases, this Court reasoned that juveniles lacked sufficient moral culpability because they "may have less capacity to control their conduct and to think in long-range terms," *Thompson*, 487 U.S. at 834, and because of their "immaturity," *Simmons*, 543 U.S. at 571. By the same token, persons experiencing symptoms of mental illness may have cognitive impairments and distortions of reality that reduce their culpability in ways that are arguably even more substantial than the developmental shortcomings of sixteen and

seventeen-year-olds. Their ability to control impulse, to think rationally—long-term or otherwise—are each substantially impaired by the disordered thinking and distorted perception characteristic of severe mental illness.

Severely mentally ill individuals suffer similar deficiencies in judgment and functioning as juveniles and the intellectually disabled. Just as juveniles and the intellectually disabled have been held exempt from capital punishment due to their diminished culpability, so, too, should the severely mentally ill.

B. Current safeguards against the imposition of an unconstitutionally disproportionate sentence are inadequate for severely mentally ill defendants.

The same factors that make severely mentally ill defendants less personally culpable also put them at a disadvantage in coping with the adjudicative process, thus increasing the risk of both unconstitutionally disproportionate sentences and even wrongful convictions. *See Atkins*, 536 U.S. at 320–21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (because of their "reduced capacity," intellectually disabled offenders are at risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" and "face a special risk of wrongful execution"). The *Atkins* Court observed that the intellectually disabled possessed characteristics that might "jeopardize the reliability and fairness of capital proceedings," *Atkins*, 536 U.S. at 307–08; for example, an increased propensity for "giving false confessions;" the inability to "make a persuasive mitigation showing" or "give meaningful assistance to their counsel" to assist in their own defense;[54] and, the likelihood of being "poor witnesses." *Id.* at 320.

[54] According to a 2012 study published by the National Registry of Exonerations, approximately 70% of wrongfully convicted defendants with mental illness falsely confessed, compared to only 10% of defendants without mental illness. See Toni Rose and Greg Hansch, *Severe mental illness and the death penalty*, Tex. Tribune (Mar. 20, 2017), https://www.tribtalk.org/2017/03/20/severe-mental-illness-and-the-death-penalty/ (last accessed August 1, 2018); Samuel R. Gross and Michael Shaffer, Exonerations in the United States, 1989-2012, National Registry of Exonerations (June 2012), available at https://repository.law.umich.edu/other/92/ (last accessed August 1, 2018).

Severely mentally ill offenders are similarly at risk. Their distorted perceptions of reality can affect the voluntariness and reliability of their confessions and their ability to contribute to their own defense; their diminished capacity brings into question whether they are capable of meaningfully consenting to a waiver of their rights to remain silent or have counsel present; their delusions cast doubt on the veracity of any statements they may make. These are but a few possible ways in which a severely mentally ill defendant's deficiencies may put him at risk of either an unconstitutionally disproportionate sentence or even a wrongful conviction.

In addition to being at a disadvantage in coping with the adjudicative process, severely mentally ill defendants are also poorly served by capital punishment's system of individualized sentencing. *See e.g., Zant v. Stephens,* 462 U.S. 862, 879 (1983) ("[w]hat is important…is an individualized determination on the basis of the character of the individual and circumstances of the crime"). For those who are not found "not guilty by reason of insanity" or incompetent to stand trial, individualized sentencing arguably presents further opportunity for a jury to give due regard to a defendant's mental capacity. However, although the system of case-by-case determination required by the Eighth Amendment in capital cases permits a jury to consider a defendant's mental illness and diminished capacity in meting punishment, this procedure does not sufficiently provide for a reliable assessment of culpability and, as such, does not adequately protect severely mentally ill defendants from improvident death sentences.

For example, although evidence of mental illness is meant to be mitigating, *see supra* Part I.B, it can often be just the opposite. As the *Atkins* Court observed, "reliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321.

Likewise, "their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* Similar concerns are relevant to the deficiencies of the severely mentally ill. Given the impaired ability to make reasoned judgments and the lack of impulse control characteristic of severe mental illnesses, it is very likely that a jury could—accurately—conclude that such individuals would be unable to curb their dangerous conduct in the future, even though their capacity to do so is outside of their control.

Furthermore, jurors' lack of experience with and faulty stereotypes regarding serious mental illness, coupled with the potential for prosecutors to exploit such ignorance or stereotypes, make juries ill equipped to judge the severity of someone's mental illness or the effect it has on their behavior. The erratic and unreasoned behavior of some severely mentally ill defendants may frighten a jury; their abrasive and unrelatable demeanor may alienate them; what may actually be a cognitively distorted perception of reality may, instead, appear to jurors as a lack of remorse.

Finally, the existing procedural safeguards of the competency to stand trial doctrine and the availability of a "not guilty by reason of insanity" plea are also inadequate in safeguarding the severely mentally ill from improvident death sentences. In order to be found incompetent to stand trial, "the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Similarly, a "not guilty by reason of insanity" plea requires, for example, that a defendant prove that he "as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of [his] acts." Tenn. Code Ann. § 39–11–501(a). Further, in Tennessee, a

defendant has the burden of proving the defense of insanity by clear and convincing evidence,[55] while being precluded from presenting an expert to opine on insanity.[56]

The procedural safeguards of competency and insanity have onerous burdens of proof—and necessarily so, because being found incompetent or insane has the effect, at least temporarily, of absolving the defendant of criminal responsibility. However, this high bar leaves many seriously ill defendants—who may have some understanding of their surroundings and conception of right and wrong, but whose capabilities are nevertheless significantly impaired—at the mercy of the adjudicative process, despite the fact that their diminished culpability entitles them to constitutional protection from execution. Individuals who fall short of insanity or incompetency should be held responsible for their crimes, but it is not just to hold severely mentally ill defendants, with their diminished capacity and functioning, to the same standards as mentally sound individuals.

The same factors that make severely mentally ill defendants less personally culpable also put them at a disadvantage in coping with the adjudicative process, which is inadequately suited to safeguarding the severely mentally ill from unconstitutionally disproportionate sentences and wrongful convictions.

C. Given their diminished personal culpability, imposing the death penalty on severely mentally ill defendants serves no legitimate penal objective.

Finally, the diminished culpability of severely mentally ill defendants negates any legitimate penal objective of imposing the death penalty upon such individuals. This Court has held that the death penalty violates the Eighth Amendment and "'is nothing more than the

[55] *See* Tenn. Code Ann. § 39–11–501(b).

[56] *See* Tenn. Code Ann. § 39–11–501(c) ("No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.").

purposeless and needless imposition of pain and suffering'" when it "'makes no measureable contribution to acceptable goals of punishment." *Penry I*, 492 U.S. at 335 (quoting *Coker*, 433 U.S. at 592). This Court has identified two acceptable goals of imposing capital punishment: "'retribution and deterrence of capital crimes.'" *Id*. at 335–36 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). In *Atkins*, this Court held that imposing the death penalty on the intellectually disabled advances neither of these goals. *Atkins*, 536 U.S. at 319–20. Likewise, neither the interest of retribution nor deterrence is served by executing the severely mentally ill.

Although retribution for grievous crimes is a legitimate objective of capital punishment, "retribution as a justification for executing [offenders] very much depends on the degree of [their] culpability […] the punishment must be tailored to [a defendant's] personal responsibility and moral guilt." *Enmund*, 458 U.S. at 800–01. As discussed above, severely mentally ill offenders possess diminished capacity and understanding and, as such, diminished personal culpability for their crimes. As the *Atkins* Court reasoned, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution." *Atkins*, 536 U.S. at 319. The same rationale applies to severely mentally ill offenders, whose cognitive impairments, delusions, and psychoses undermine retributive effect. A person whose illness makes him incapable of controlling his actions, who believes the world is far different from the one we inhabit, who is consumed by a metric of understanding that turns our conception of right and wrong on its head—this person cannot be held to the same standards as a rational citizen, who knows what he does. Execution is appropriate retribution only for those most deserving of death. *See, e.g.*, *id*. at 320 ("our narrowing jurisprudence[…] seeks to ensure that only the most

deserving of execution are put to death"). The goal of retribution is not served by putting to death those who are crippled by their own minds.

Similarly, because the cognitive deficiencies and distorted perception of severely mentally ill offenders prevent them from making reasoned judgments about the consequences of their actions, it is unlikely such individuals can be meaningfully deterred from committing capital crimes by the prospect of death. "The theory of deterrence in capital sentencing," the *Atkins* Court explained, "is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Id.* at 320. However, this type of cause-and-effect determination depends on one's capacity to engage in reasoned judgment.[57] As the *Atkins* Court observed, "it is the same cognitive and behavioral impairments that make [the intellectually disabled] less morally culpable … that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

The very same characteristics that impede the reasoned judgment of the intellectually disabled—"the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses"—are equally shared by those suffering from severe mental illness. *Id.* The cognitive impairments and delusional beliefs of the severely mentally ill similarly interfere with that person's ability to take into account the prospect of execution in conforming his or her conduct to the law. For example, individuals like Billy Ray Irick, who suffer from psychotic disorders, experience delusions or hallucinations, which may result in actions or decisions based on distorted perceptions of reality. *See* American Psychiatric Association,

[57] As Justice Powell observed, "the death penalty has little deterrent force against defendants who have reduced capacity for considered choice." *Skipper v South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11).

Diagnostic and Statistical Manual of Mental Disorders 299 (4th edition, text revised 2000). In addition, their ability to think, speak, and engage in goal-directed behavior is severely diminished. *Id*. Given the distorted perception and impaired cognition and functioning that is characteristic of those with psychotic disorder it is unlikely the threat of capital punishment would meaningfully deter such individuals from the criminal conduct they feel compelled to enact. Given their diminished personal culpability, imposing the death penalty upon the severely mentally ill makes no measurable contribution to the acceptable goals of punishment.

III. Mr. Irick should be exempt from execution due to his severe mental illness at the time of the offense.

Billy Ray Irick suffers from the severe mental illness of psychotic disorder and from a cognitive disorder which grossly impairs his ability to make decisions, to plan, and to control impulses. He was psychotic at the time of the offense and in the days leading up to then, chasing a school-aged girl with a machete down a Knoxville public street in broad daylight with the explanation that he "didn't like her looks." The people with whom he was living noted that Billy was frequently "talking with the devil," "hearing voices," and "taking instructions from the devil." Mr. Irick respectfully asks this Court to recognize that the "standards of decency that mark the progress of a maturing society" under the Eighth and Fourteenth Amendments have evolved to the point that society agrees that severely mentally ill individuals, such as Mr. Irick, lack the requisite moral culpability to warrant the penalty of death and are thus exempt from execution. *Trop*, 356 U.S. at 101.

CONCLUSION AND PRAYER FOR RELIEF

This Court should grant *certiorari* and schedule this case for briefing and oral argument.

Respectfully submitted,

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