No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWIN HART TURNER, *Petitioner,*

v.

STATE OF MISSISSIPPI, *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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THIS IS A CAPITAL CASE

Mr. Turner is scheduled to be executed on February 8th, 2012.

QUESTION PRESENTED

Petitioner is facing imminent execution for the killing of two men at a gas station in 1995. Petitioner has no prior criminal history, but has battled an inherited mental illness since childhood, spending months at a time in psychiatric hospitals throughout adolescence. At twenty-two, Petitioner was involuntarily committed to the state hospital for three months, and was released just weeks before the crime. Petitioner has demonstrated that at the time of the offense he suffered from a serious mental illness that substantially impaired his ability (a) to appreciate the nature, consequences, or wrongfulness of his conduct, (b) to exercise rational judgment in relation to conduct; or (c) to conform his conduct to the requirements of the law.

1. Whether Mississippi's capital punishment scheme violates the constitutional prohibition on cruel and unusual punishment where it applies to offenders who, in the same manner as juvenile offenders and mentally retarded offenders, are less morally culpable as a result of serious mental illness.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edwin Hart Turner, a state capital inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the Mississippi Supreme Court denying his *Successive Application to Proceed in the Trial Court with a Petition for Post-Conviction Relief*.

OPINIONS BELOW

The Mississippi Supreme Court opinion denying Mr. Turner's *Successive Application*, *Turner v. State*, No. 97-DP-00583 (Miss. Jan. 26, 2012), is unreported. It is reproduced in the Appendix to this petition.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Mississippi Supreme Court on the basis of 28 U.S.C. § 1257. The Mississippi Supreme Court denied petitioner's application on January 26, 2012.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution:

AMEND. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND. XIV: No State shall . . . deprive any person of life, liberty, or property, without due process of law.

The questions further implicate the following statutory provision:

28 U.S.C. § 1257 which provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

Edwin Hart Turner faces execution on February 8, 2012. He is on Mississippi's death row for killing two men at a gas station in 1995. He had no prior criminal history, but had battled serious, inherited mental illness since childhood. Just six weeks before the crime, he had been released from a three-month stay at a mental institution. At the time of the offense, Mr. Turner's mental illness significantly impaired his capacity (a) to appreciate the nature, consequences or wrongfulness of his conduct, (b) to exercise rational judgment in relation to his conduct, or (c) to conform his conduct to the requirements of the law.

In spite of his mental illness, under the laws of the State of Mississippi, the jury found him guilty of capital murder and returned a verdict of death. In forty of the fifty states, an offender under these facts would have either been ineligible for execution, or at least had substantial opportunity to present evidence that this illness should exempt him from execution.

I. Procedural history and decision below

Edwin Hart Turner was sentenced to death on February 14, 1997 for two counts of capital murder. The Mississippi Supreme Court affirmed his conviction and death sentence,[1] and eight years later, denied post-conviction relief, and his requests for discovery and an evidentiary hearing.[2] A timely federal habeas corpus petition, including a request for an evidentiary hearing, was denied by the United States District Court for the Northern District of Mississippi in 2010.[3] The District Court denied a certificate of appealability as to all claims, as did the United States Fifth Circuit Court of Appeals.[4] This Court denied Mr. Turner's petition for a writ of certiorari

[1] *Turner v. State*, 732 So. 2d 937 (Miss. 1999), *cert. denied*, *Turner v. Mississippi*, 528 U.S. 969 (1999).

[2] *Turner v. State*, 953 So. 2d 1063 (Miss. 2007).

[3] *Turner v. Epps*, No. 4:07CV77-WAP, 2010 WL 653880 (N.D. Miss. 2010).

[4] *Turner v. Epps*, 412 Fed. App'x 696 (5th Cir. 2011).

on January 9, 2012.[5]

On January 6, 2012, Mr. Turner filed a *Successive Petition for Post-Conviction Relief* in the Mississippi Supreme Court. Mr. Turner urged that because he suffers (and suffered at the time of the offense) from a serious mental illness which reduced his culpability, his execution would be cruel and unusual, and in violation of the Eighth and Fourteenth Amendments.

Though the state urged that his petition be dismissed as procedurally- and time-barred, on January 26, 2012 the Mississippi Supreme Court denied Mr. Turner's petition on the merits of its federal constitutional claim.[6] The court ruled,"[t]his Court rejects Turner's plea that the decisions in *Atkins v. Virginia* and *Roper v. Simmons*, should be extended to capital petitioners with alleged 'severe mental disorders' and that his execution should be prohibited."[7]

The court further denied Mr. Turner's petition under principles of *res judicata*, holding: "Turner made no argument [at trial or on direct appeal] that he was insane or incompetent to stand trial." Mr. Turner does not dispute this factual statement. It is, however, irrelevant to the question presented to the Mississippi Supreme Court—whether his execution, despite a serious mental illness which diminished his moral culpability, violates the Eighth and Fourteenth Amendments. Whether Mr. Turner should have escaped legal culpability because of insanity or incompetence was not a question before the court. Had Mr. Turner been insane he would have been found not guilty, had he been incompetent he would not have been tried. The issue presented can only arise in the case of persons who are competent and not insane (under the

[5] *Turner v. Epps*, No. 11-5038, 2012 WL 33368 (U.S. Jan. 9, 2012)..

[6] *Turner v. State*, No. 2012-DR-00033-SCT(Miss. Jan. 26, 2012) (Unpublished, attached as Appendix A).

[7] This result is unsurprising given the author's only grudging acceptance of this Court's ruling in *Roper* itself. *Dycus v. State*, 910 So. 2d 1100, 1103 (Miss. 2005) (Randoph, J. concurring) ("I concur in the majority's opinion and judgment because my oath and loyalty to this office and the law require me to comply with the mandate of the United States Supreme Court in *Roper v. Simmons*" but urging that "If blindly followed, this treatment of the Constitution shall most assuredly lead to the ruin and destruction of the noblest democratic experiment in the history of man.").

Mississippi sanity standard) but nevertheless suffer a serious impairment due to mental illness that, like mental retardation, renders the imposition of a death sentence a cruel and unusual punishment. It is this blind-spot in Mississippi's capital scheme that Mr. Turner challenged. Mr. Turner's quarrel is not with the definition of legal insanity in use by the State of Mississippi *per se*, but its use without additional protections to prevent the *execution* of the seriously mentally ill.[8]

Evidence was presented to the court below that supports Mr. Turner's claim that he suffers from a serious mental illness which could have substantially impaired his ability (a) to appreciate the nature, consequences, or wrongfulness of his conduct, (b) to exercise rational judgment in relation to conduct or (c) to conform his conduct to the requirements of the law. The facts pled by Petitioner were assumed true in the court below in reaching its decision.[9]

II. Edwin Hart Turner suffers from a serious mental illness which impacts his moral culpability for these offenses.

Edwin Hart Turner faces execution for killing two men at a Mississippi gas station in 1995. He had no prior criminal history. Just six weeks before the crime, Hart was released from a three-month stay at a mental institution. He had been involuntarily committed for treatment

[8] While a state's sanity standard may, and indeed in the majority of states does, cover the rule Petitioner urges, Mississippi applies the unmodified Victorian-Era *M'Naghten* rule which does not. For a critique of this rule see generally *United States v. Freeman*, 357 F.2d 606, 608 (2d Cir. 1966) (engaging in a critique of the rule's failure to account for the realities of mental illness, and a lengthy account of the peculiar history of the *M'Naghten* rule–a retrograde result of direct pressure from Queen Victoria after a man considered insane under the prevailing psychology of the day, Daniel M'Naghten, was acquitted by reason of insanity for the assassination of the Prime Minister's secretary.).

[9] *Neal v. State*, 525 So. 2d 1279, 1281 (Miss. 1987) (stating that Mississippi treats a denial of post-conviction relief without an evidentiary hearing as the granting of "a motion to dismiss for failure to state a claim" under Miss. R. Civ. P. 12(b)(6)); In re *Enlargement & Extension of the Municipal Boundaries v. City of Biloxi*, 744 So. 2d 270, 276 (Miss. 1999) (stating that "[t]he well-pleaded allegations of the complaint must be taken as true" when considering a 12(b)(6) motion).

pursuant to a court-order.[10]

Hart suffers from a "severe and chronic" inherited mental illness which he has struggled with since at least adolescence.[11] In the court below Petitioner presented evidence from highly-qualified experts who concluded "to a reasonable degree of certainty" that Mr. Turner suffered from an Axis 1 mental disorder as defined by the DSM IV,[12] and that at the time of the offense "he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."[13] In reaching their conclusions, the experts note Hart's family history of heritable mental disorders,[14] his own extensive pre-offense psychiatric treatment,[15] his

[10] Affidavit of Marc Zimmerman, Exhibit D-1 ¶ 37, *Turner v. State*, No. 2012-DR-00033-SCT (Miss. Jan. 26, 2012) [hereinafter Zimmerman Affidavit].

[11] *Id.* at ¶ 10.

[12] Zimmerman Affidavit at ¶ 10 ("Records are replete with descriptions of his depression, agitation, impulsivity, anger, anxiety, poor judgment, suicidal behavior, and alcohol and substance dependence. Based on the materials that I have reviewed and based on my interview with Hart, I believe that he likely suffers from a bipolar disorder or possible schizo-affective disorder."); Declaration of Mark C. Webb, Exhibit E ¶¶ 22-23, *Turner v. State*, No. 97-DP-00583 (Miss. Jan. 26, 2012) (Axis 1 bipolar disorder) [hereinafter Webb Declaration]; *See also*, Affidavit of Donna Marie Schwartz-Watts, Exhibit C ¶ 16, *Turner v. State*, No. 2012-DR-00033-SCT (Miss. Jan. 26, 2012) [hereinafter Schwartz-Watts Affidavit].

[13] Zimmerman affidavit at ¶ 57; *See, also* Schwartz-Watts Affidavit at ¶ 11 ("it is my opinion, to a reasonable degree of medical certainty, that there is a reasonable basis to believe that, at the time of the homicides on December 1 3 , 1 995, Mr. Turner' s severe mental disorder or disability significantly impaired his capacity (a) to appreciate the nature, consequences or wrongfulness of his conduct, (b) to exercise rational judgment in relation to his conduct, and (c) to conform his conduct to the requirements of tile law.").

[14] Schwartz-Watts Affidavit at ¶¶ 18-20 (Noting that"[f]amily history is extremely relevant to the evaluation of Mr. Turner. Both Bipolar Disorder and Schizophrenia, the major Axis I mental disorders in the Diagnostic and Statistical Manual of Mental Disorders, have a documented high degree of heritability" and listing "Nellie Mae Bonner, Mr. Turner's great-grandmother on his father's side, was committed to Whitfield, first in 1945, then in 1949, and for the third time in 1956. She was diagnosed as schizophrenic. Her daughter Frances Bonner Turner was diagnosed as schizophrenic and was admitted to Whitfield in 1956, in 1 958, and again in 1961. The 1961 hospitalization lasted for four full years. The hospital records indicate that Mrs. Turner was at times depressed and at other times restless, agitated and very anxious. Mr. Turner's father and namesake, Edwin Turner, fired a gun in a shed full of dynamite in 1985. The shed exploded, killing the older Edwin. Family members believe that Edwin Turner's recklessness was a successful, albeit passive, suicide attempt. Hart Turner's great-great grandfather also committed suicide."); *See also*, Zimmerman Affidavit at ¶ 7; Affidavit of Marc Zimmerman, Exhibit D ¶ 7, *Turner v. State*, No. 2012-DR-00033-SCT (Miss. Jan. 26, 2012) [hereinafter Zimmerman Affidavit 2].

[15] Schwartz-Watts Affidavit at ¶¶17-28 (Listing Hart's numerous pre-offense psychiatric treatments and diagnoses from Major Depression, St. Joseph Hospital 5/3/91, Agitated Depression, Greenwood Leflore Hospital 12/27/91, Chronic Agitated Depression, Greenwood Leflore Hospital 1/30/93, Chronic Depression, Major Depression, and

multiple serious suicide attempts including shooting himself in the head with a rifle,[16] his organic brain damage caused physical and emotional trauma,[17] and his symptoms of serious mental illness in the immediate lead-up to the crime.[18]

Hart's mental disturbance wasn't surprising given his background. Though Hart was a bright, "considerate and affectionate boy" who would "hug you when he saw you," he was raised in an environment of abuse and trauma. At eighteen Hart attempted suicide, putting the barrel of a rifle in his mouth and pulling the trigger. The barrel of the gun slipped enough to spare his life, but the bullet blasted through his face leaving him permanently disfigured.[19]

Five years, and several unsuccessful treatments later, Hart slit his wrists, and was hospitalized and treated for an impulse disorder. Hart was discharged, but was quickly readmitted by a court order, pursuant to a Mississippi statute which permits the involuntary commitment of a person with mental illness for mental treatment.[20] Hart was diagnosed as

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Recent Agitated Depression, Greenwood Leflore Hospital 6/25/95 and 7/19/95. He was prescribed numerous anti-depressant medications over these years, including Imipramine, Busbar, Deseryl, Valium, and Prozac). *See also*, Zimmerman Affidavit at ¶¶19-30.

[16] Schwartz-Watts Affidavit at ¶¶ 22 ("Hart Turner shot himself in the face at close range with a rifle. He suffered severe damage to his face, jaw, mouth and nose … it is significant that as of April 1991, Mr. Turner's perception of reality, reasoning ability, and impulse control were significantly impaired. A person with normal facilities of perception, reasoning, and self-control does not place a rifle in his mouth and pull the trigger."); *See also*, Schwartz-Watts Affidavit at ¶¶ 23-28 (describing other suicide attempts); Zimmerman Affidavit at ¶¶ 18-38 (describing other suicide attempts and treatments).

[17] Dr. Schwartz-Watts describes the significance of this damage, "Mr. Turner suffered physical damage to his brain both by closed head injuries and substance abuse. In this connection, there is abundant evidence that Mr. Turner suffered closed head injuries, complained of headaches, lack of attention and focus and abused substances which can cause deterioration in brain function. Also, Mr. Turner suffered repeated physical and emotional trauma, which alone, and in combination with the physical injuries to his brain, would affect the areas of Mr. Turner's brain which control reasoning and conduct." Schwartz-Watts Affidavit at ¶ 15.

[18] Zimmerman Affidavit at ¶ 54 ("There are numerous indications that Hart was in a manic phase for a great deal of the time from his discharge until the crime.").

[19] Schwartz-Watts Affidavit at ¶ 22.

[20] MISS. CODE ANN. §41-21-63 et seq. (West 2011). A person with mental illness is defined as "any person who has a substantial psychiatric disorder of thought, mood, perception, orientation or memory which grossly impairs judgment, behavior, capacity to recognize reality or to reason or understand …" *Id.* In order to order involuntary commitment the court must rely on an affidavit which must "contain factual descriptions of the proposed patient's

having a major depressive disorder and personality disorder, and prescribed Prozac. Hart's Prozac dosage was quickly doubled. A month later, Hart was again released. He reported the Prozac had him "feeling so good," but that it left his mind going "too fast" to sleep or make a complete sentence in his head.[21] His mania deepened.

Six weeks after his release Hart, who had no prior criminal history, shot and killed Everett Curry and Eddie Brooks, in an irrational and impulsive crime. There was no conceivable motive for the crime–Hart was well-off financially as a result of his father's tragic death–and had no history of violence or criminal activity.[22] The crime was itself rash, impulsive and bizarrely ill-conceived. Hart was infamous in his small Mississippi town because he wore a towel wrapped around his face at all times to hide the disfigurement he had suffered when his suicide attempt failed. Not only was Hart wearing this towel at the time of the killings he was wearing a jacket that said "Turner" on it.[23] At trial numerous witnesses testified that they knew of Hart and his towel before the incident, and each easily identified Hart[24] – who was sitting at the defense table shrouded in his signature towel.[25]

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recent behavior, including a description of the behavior, where it occurred, and over what period of time it occurred, if known." *Id*. at § 41-21-65.

[21] Petitioner presented evidence demonstrating that Prozac is contra-indicated for individuals suffering from bipolar disorder because it can "light up" mania - "a bipolar patient like Mr. Turner would be under the influence of extreme mental or emotional disturbance. He would, in fact, mobilize an infinite amount of emotional turmoil, unleashing a hurricane of uncontrollable impulses, as was seen in the weeks leading up to December 13, 1995, and tragically and irreversibly on that date." Webb Declaration at ¶¶ 22-23.

[22] Schwartz-Watts Affidavit at ¶ 72.

[23] (Trial Tr. 1139:25-1140:1) ["Trial Tr." refers to the transcript of the trial contained in the record on direct appeal on file with the Mississippi Supreme Court, *Turner v. State* (No. 97-DP-00583-SCT)]

[24] (Testimony of Therrell Turner; Trial Tr. 662:23-28); (Testimony of Naraseeyappa Rajanikanth; Trial Tr. 710:23-712:4).

[25] (Testimony of A.C. Hankins, Trial Tr. 917:8-17).

REASONS FOR GRANTING THE PETITION

I. The Eighth and Fourteenth Amendments forbid the execution of the seriously mentally ill.

Mr. Turner has been diagnosed with serious mental illnesses which substantially impaired him in a way that "do[es] not warrant an exemption from criminal sanctions, but [] do[es] diminish [his] personal culpability." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). In spite of his mental illness, under the laws of the State of Mississippi, the jury found him guilty of capital murder and returned a verdict of death. The execution of seriously mentally ill offenders like Mr. Turner is cruel and unusual punishment. Mr. Turner urges this court to recognize that the Eighth and Fourteenth Amendments bar the execution of a seriously mentally ill individual – defined as an offender with a severe mental disorder or disability that, at the time of the offense, significantly impaired his capacity (a) to appreciate the nature, consequences or wrongfulness of his conduct, (b) to exercise rational judgment in relation to his conduct, or (c) to conform his conduct to the requirements of the law. This standard is drawn from the language recommended jointly by the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness in their recommendation that the seriously mentally ill should not be subject to capital punishment.[26]

This Court's own precedent compels the conclusion that the Eighth and Fourteenth Amendments prohibit the state from executing an individual who is seriously mentally ill. A growing consensus exists that offenders who fall into this category should not be subject to execution, and an analysis of this Court's existing Eighth Amendment jurisprudence

[26] Am. Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006); Am. Psychiatric Ass'n, Diminished Responsibility in Capital Sentencing, http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx [hereinafter the ABA/APA Recommendation].

demonstrates why – the seriously mentally ill are less morally culpable, their execution fails to contribute to legitimate penological goals, and their rights are not adequately protected in a case-by-case approach.

A. Overview

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision is applicable to the states through the Fourteenth Amendment. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion).

The Eighth Amendment bars the imposition of a penalty on a particular category of individuals, even where that penalty is generally permissible, where characteristics of those individuals would render the penalty disproportionate. *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *Atkins*, 536 U.S. at 313, *Graham v. Florida*, 130 S. Ct. 2011 (2010).

In determining whether the Eighth Amendment creates such a categorical bar, this Court engages in a two-step analysis – first, looking to "objective indicia of society's standards" for a "national consensus against the sentencing practice at issue," and second, assessing the sentence applying its own precedent and "independent judgment" to determine "whether the punishment in question violates the Constitution." *Graham*, 130 S. Ct. at 2022 (*citing Roper, 543 U.S. at* (2005)).

This analysis is most searching in death penalty cases. As this Court has observed "when the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint. … For these reasons we have explained that capital punishment must be limited to those offenders who commit a narrow category of the most

serious crimes and whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008).

B. A broad national consensus against the execution of the seriously mentally ill exists, and continues to build.

1. The vast majority of states protect the seriously mentally ill from execution at some stage of the proceedings.

The vast majority of states already conform to the categorical bar Petitioner proposes. States accomplish the bar in a variety of ways – by imposing a more progressive definition of legal insanity, by permitting the defense of diminished capacity, or by instituting an independent bar on the execution of the seriously mentally ill – but the result is the same. Offenders like Mr. Turner are eligible for execution in only ten states, while in 40 they would be spared.

In sixteen states Mr. Turner would be protected from criminal liability by the state's test of legal insanity. Thirteen states exclude those who as a result of mental illness lack "substantial capacity to appreciate the wrongfulness of his or her actions or to conform his or her actions to requirements under the law."[27&28] Two others exclude offenders whose mental illness creates an "irresistible impulse" to commit the act.[29] Finally, in New Hampshire, an offense the jury

[27] This definition, drawn from the Model Penal Code, as been adopted in: Arkansas, Ark. Code Ann. § 5-2-312 (West 2011); Connecticut CONN. GEN. STAT. § 53a-13(a) (West 2011); Hawaii, HAW. REV. STAT. § 704-400(1) (2011); Kentucky, KY. REV. STAT. ANN. § 504.020 (West 2011); Maryland, MD. CODE ANN., CRIM. PROC. § 3-109 (West 2011); Massachusetts, *Commonwealth v. McHoul*, 226 N.E.2d 556, 563 (Mass. 1967); Michigan, MICH. COMP. LAWS ANN. § 768.21a (West 2011); Oregon, OR. REV. STAT. § 161.295 (West 2009); Rhode Island, *State v. Johnson*, 399 A.2d 469, 476 (R.I. 1979); Vermont, 13 VT. STAT. ANN. TIT. § 4801 (2011); West Virginia, *State v. Lockhart*, 542 S.E.2d 443, 451 (W. Va. 2000); Wisconsin, WIS. STAT. ANN. § 971.15 (West 2011); Wyoming, WYO. STAT. ANN. § 7-11-305(b) (2011).

[28] In addition to being adopted by many states, the rule has been incorporated by judicial decision as the rule of responsibility for federal crimes in practically all of the federal judicial circuits. *See United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *Wade v. United States*, 426 F.2d 164 (9th Cir. 1970); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963).

[29] New Mexico, *State v. Dorsey*, 603 P.2d 717, 719 (N.M. 1979) ("the accused, as a result of disease of the mind ... (a) did not know the nature and quality of the act or (b) did not know that it was wrong or *(c) was incapable of*

determines was a product of the offender's mental illness is not subject to criminal liability.[30]

Of the remaining thirty-four states where Mr. Turner might be held criminally culpable, in twenty-two he could only be found guilty of a lesser, non-capital offense on the showing, often called "diminished capacity," that his mental illness negated the required *mens rea* for the crime.[31] Mississippi does not permit the defense of diminished capacity, and indeed does not require specific intent in order to convict of first degree murder. [32]

Of the remaining twelve states two – Illinois and Minnesota – have abolished the death penalty. As a result, there are only ten states in which a defendant with the impairments Mr. Turner has been found to have by Dr. Zimmerman and Dr. Schwartz could be exposed to capital punishment. Even in the remaining ten states, sentiment is now running against the execution of the seriously mentally ill. In both Ohio and Indiana in the last decade, the Governor has stepped in to grant clemency to death row defendants expressly on the basis of their serious mental illness, although it did not rise to the level of legal insanity.[33]

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preventing himself from committing it) (emphasis added); Virginia, *Orndorff v. Commonwealth*, 691 S.E.2d 177, 179 n.5 (Va. 2010).

[30] *State v. Abbott*, 503 A.2d 791, 794 (1985).

[31] Alaska, ALASKA STAT. § 12.47.020; California, CAL. PENAL CODE § 28; Colorado, COL. REV. STATE. § 18-1-803; Delaware, DEL. CODE ANN. TIT. 11 § 401; Georgia, *Pickle v. State*, 635 S.E.2d 197 (Ga. 2006); Idaho, IDAHO CODE ANN. § 18-207; Iowa, *State v. Collins*, 305 N.W.2d 434 (Iowa 1981); Kansas, KAN. STAT. ANN. § 22-3219; Maine, ME. REV. STAT. ANN. TIT. 17-A, § 38; Missouri, MO. ANN. STAT. § 552.015; Montana, *State v. Sandrock*, 95 P.3d 153 (Mont. 2004); Nebraska, *State v. Golka*, 796 N.W.2d 198 (Neb. 2011); New Jersey, N.J. STAT. ANN. § 2C:4-2; New York, N.Y. PENAL LAW § 40.15; North Carolina, *State v. Daniel*, 429 S.E.2d 724 (N.C. 1993); North Dakota, N.D. CENT. CODE § 12.1-04.1-01; Pennsylvania, *Commonwealth v. Walzack*, 360 A.2d 914 (Pa. 1976); South Dakota, *State v. Schouten*, 707 N.W.2d 820 (S.D. 2005); Tennessee, *State v. Hatcher*, 310 S.W.3d 788 (Tenn. 2010); Texas, *Davis v. State*, 313 S.W.3d 317, 328 (Tex. Crim. App. 2010); Utah, UTAH CODE ANN. § 76-2-305; Washington, *State v. Atsbeha*, 16 P.3d 326 (Wash. 2001).

[32] MISS. CODE ANN. §97-3-19(2)(e) (West 2011) ("the killing of a human being without the authority of law by any means or manner shall be capital murder in the following cases . . . when done with or without any design to effect death by any person engaged in the commission of the crime of . . . robbery"); *id.* §99-19-101(7)(a) ("in order to return and impose a sentence of death the jury must make a written finding of one or more of the following . . . (a) The defendant actually killed").

[33] *See*, Press Release, John Kasich, Governor of the State of Ohio, Kasich Commutes Murphy Death Sentence to Life Without Parole (September 26, 2011) (available at http://governor.ohio.gov/Portals/0/pdf/news/09.26.11%20Kasich%20Commutes%20Joseph%20Murphy.pdf) (Commuting the death sentence of Joseph Murphy based on

The fact that states have taken a variety of approaches to the problem is the very essence of democracy, [34] and does not diminish the moral force of the consensus. In assessing the objective indicia of a national consensus, this Court has held that its analysis should extend beyond a dry review of the statutes in force in each jurisdiction, and take account of the reality of sentencing in those jurisdictions. *Graham*, 130 S. Ct. at 2023 (finding that though 37 states permitted on paper the imposition of a life without parole sentence on a juvenile for a non-homicide, the Court was obliged to look at "actual sentencing practices" in assessing the presence of a consensus). Indeed, one state, Connecticut, has explicitly exempted the seriously mentally ill from execution, and several others have considered similar legislation.[35]

In some ways, the national legislative consensus against executing the seriously mentally ill is far stronger than the national consensus against executing the mentally retarded or juveniles. In *Atkins*, nineteen death penalty states prohibited the execution of the mentally retarded. *Atkins*, 536 U.S. at 321-22 (Rehnquist, J. dissenting). In *Roper*, eighteen death penalty states prohibited the execution of juveniles. *Roper*, 543 U.S. at 559-60.

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the unanimous recommendation of the Parole Board and the advocacy of the National Association of Mental Illness); Gov. Daniels Exec. Order No. 05-23, *reprinted in* Indiana Register, Vol. 29, No. 1 at 325-26 (Oct. 1, 2005). (Indiana Governor Mitch Daniels commuted sentence of Arthur Baird in part because of his mental illness).

[34] *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 286-87 (1932) (Brandeis, J. dissenting)).

[35] Connecticut exempts a capital defendant from execution if his "mental capacity was significantly impaired or [his] ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution[.]" Connecticut exempts a capital defendant from execution if his "mental capacity was significantly impaired or [his] ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution[.]" CONN. GEN. STAT. § 53a-46a (h)(3) (West 2011). Both Kentucky and North Carolina have also considered, but not yet passed, legislation to bar the execution of a defendant who "had a severe mental disorder or disability that significantly impaired his or her capacity to appreciate the nature, consequences, or wrongfulness of his or her conduct, exercise rational judgment in relation to conduct, or conform his or her conduct to the requirements of the law." H.R. 446, 144th Gen. Assemb., Reg. Sess. (Ky. 2009); *accord* H.R. 553, 147th Gen. Assemb., Reg. Sess. (N.C. 2007); S. 1075, 147th Gen. Assemb., Reg. Sess. (N.C. 2007) (using almost identical language to define mental illness). Indiana also considered legislation to ban the execution of individuals with "severe mental illness," defined as a diagnosis of schizophrenia, schizoaffective disorder, bipolar disorder, major depression, or delusional disorder. S. 22, 116th Gen. Assem., 1st Reg. Sess. (Ind. 2009).

2. There is a growing consensus against the imposition of capital punishment.

On the more general question, there is broad movement toward the reduction in use of capital punishment. In the last five years, four states – Illinois, New York, New Jersey, and New Mexico – have abolished capital punishment altogether, bringing the number of states without the death penalty to sixteen.[36] Legislation to abolish the death penalty was introduced in fifteen additional states in 2011, and in Oregon, the governor has declared a moratorium on executions while the future of the practice is considered.[37]

Even in the states where the death penalty remains, its use is confined to a minority of counties.[38] Just ten percent of the counties in the United States imposed all the death sentences in the country from 2004 to 2009, and from 2007 to 2009 it was just five percent of counties.[39] The number of death sentences nationwide has dropped by seventy-five percent in the last fifteen years.[40] Even the very architects of the modern capital scheme have given up. In 2010, the American Law Institute withdrew its support for the model capital sentencing statute it had drafted citing "intractable institutional and structural obstacles to ensuring a minimally adequate

[36] Even among the 34 states that still permit the death penalty, its frequency of use varies widely. Three states, Texas, Virginia and Oklahoma, account for more than half of the total executions nationwide since 1976, while several death states have *de facto* bars on capital punishment even while it persists on the books. Six states, Colorado, Kansas, Nebraska, New Hampshire, Oregon, Pennsylvania, Wyoming, have not executed anyone in the last fifteen years. Death Penalty Information Center, Searchable Execution Database, http://www.deathpenaltyinfo.org/views-executions.

[37] Governor John Kitzhaber, Press Release: November 22, 2011, http://governor.oregon.gov/Gov/media_room/press_releases/p2011/press_112211.shtml (last visited Feb. 1, 2011). Indeed Governor Kitzhaber based his decision in large part on this emerging consensus: "Courts (and society) continue to reinterpret when, how and under what circumstances it is acceptable for the state to kill someone. Over time, those options are narrowing. Courts are applying stricter standards and continually raising the bar for prosecuting death penalty cases. Consider that it was only six years ago that the U.S. Supreme Court reversed itself and held that it is unconstitutional to impose capital punishment on those under the age of 18. For a state intent on maintaining a death penalty, the inevitable result will be bigger questions, fewer options and higher costs."

[38] Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. (forthcoming in January 2012) (manuscript at 233), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914638##.

[39] *Id*.

[40] In 1996, 315 people were sentenced to death nationwide. In 2011, 78 people were sentenced to death. DEATH PENALTY INFORMATION CENTER, FACTS ABOUT THE DEATH PENALTY (2012), http://www.deathpenaltyinfo.org/FactSheet.pdf.

system for administering capital punishment."[41] There is a clear national trend away from the imposition of capital punishment.

3. There is broad recognition in the national and international community that the execution of the seriously mentally ill is cruel and inhumane.

This treatment of the mentally ill is consistent with, and in part driven by, innovations in our understanding of psychiatry and its relationship with criminality. While a growing national and international consensus is not dispositive, it is "not irrelevant." *Graham*, 130 S.Ct. at 2033 (quoting *Enmund v. Florida*, 458 U.S. 782, 795-96 (1982)).

Public support for the death penalty in this country is waning, and particularly so for the execution of the seriously mentally ill. Justice Evelyn Lundberg Stratton of the Ohio Supreme Court noted this trend:

> [A] Gallup Poll conducted in October 2003 found that while almost two thirds of Americans surveyed support the death penalty, 75 percent of those surveyed in 2002 opposed executing the mentally ill. Society's discomfort with executing the severely mentally ill among us is further evidenced by the American Bar Association's formation of a task force in 2003 to consider mental disability and the death penalty.

State v. Ketterer, 111 Ohio St.3d 70 (2006), (Stratton, J., concurring) (internal citations omitted), *See also*, *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002), *State v. Scott*, 748 N.E.2d 11, 20 (Ohio 2001).

Numerous national legal, medical, and psychological associations have spoken out against the execution of individuals with severe mental illness. The American Psychological Association, the American Psychiatric Association, the National Alliance for the Mentally Ill, and the American Bar Association have all passed resolutions urging the exemption of those with

[41] Carol S. Streiker & Jordan M. Streiker, *Report to the ALI Concerning Capital Punishment, in* REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, annex B at 1 (2009), *available at*, http://www.ali.org/doc/Capital%Punishment_web.pdf.

serious mental illness from the death penalty.[42]

The international community condemns the practice with near unanimity.[43] The United Nations Commission on Human Rights has adopted a resolution urging all countries that still maintain capital punishment "[n]ot to impose the death penalty on a person suffering from any form of mental disorder." Comm'n on Hum. Rts. Res. 2001/ 68 ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (Apr. 25, 2001).[44]

C. It is cruel and unusual punishment to execute the seriously mentally ill because their illness renders them less morally culpable, and their execution does not serve any valid penological interest.

This Court has held that in addition to considering the bare facts of a national consensus, and even in the absence of such a consensus, the Eighth Amendment compels "[t]he judicial exercise of independent judgment" into the "culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 130 S. Ct. at 2026; *see also*, *Roper*, 543 U.S. at 563; *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (Powell, J., concurring and dissenting); *Enmund*, 458 U.S. at 797 (1982). In doing so, the Court *inter alia*, "considers whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 130 S.Ct. at 2026 (*citing Kennedy v. Louisiana*, 554 U.S. 407 (2008), *Roper*, 543 U.S. at 571-72, *Atkins*, 536 U.S. at 318-20).

This analysis is not static – the Eighth Amendment "draws its meaning from the evolving

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[42] ABA/APA Recommendation at 668 (2006) (noting that the is the joint work of the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill).

[43] *See generally*, Amnesty Int'l, *United States of America: The Execution of Mentally Ill Offenders*, at 170-88, available at http://www.amnesty.org/en/library/asset/AMR51/003/2006/en/75c16634-d46f-11dd-8743-d305bea2b2c7/amr510032006en.html [hereinafter Amnesty International, *Execution of the Mentally Ill*].

[44] This Court recognizes that "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But [t]he climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant." *Graham*, 130 S.Ct. at 2033.

standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100-01, s*ee also*, *Kennedy*, 554 U.S. at 419; *Weems v. United States*, 217 U.S. 349, 378 (1910) (Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice").

1. Under the definition Petitioner urges, serious mental illness significantly reduces an offender's personal culpability.

Under this Court's reasoning in *Atkins* and *Roper* the seriously mentally ill are not as blameworthy as the average offender. The question of personal moral culpability is central to the Eighth Amendment inquiry because "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quotations omitted). This Court recognized in *Atkins* and *Roper* that the mentally retarded and juveniles possess characteristics which lessen their culpability and prevent them from being considered among the "worst" offenders, for whom the death penalty is appropriate. *Id.*, *See also*, *Atkins*, 536 U.S. at 318-20.

The seriously mentally ill – like adolescents and the mentally retarded – have diminished personal culpability such that they are certainly not among those offenders most deserving of execution. *Atkins* and *Roper*, taken together, broadly point to the major deficits which diminish the culpability of juveniles and the mentally retarded – that these individuals have difficulty in rational decision-making and controlling impulses,[45] and that these individuals are more

[45] *Roper*, 543 U.S. at 569 (immaturity leads juveniles to "impetuous and ill-considered actions and decisions" and as a result they are "overrepresented statistically in virtually every category of reckless behavior"); *Atkins*, 536 U.S. at 318 (the mentally retarded 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 … [and] often act on impulse rather than pursuant to a premeditated plan").

vulnerable to negative influence and manipulation.[46] *Roper* adds a third consideration – that juvenile offenders are not irredeemable, and are more capable of rehabilitation.[47] These characteristics also apply to the seriously mentally ill to similarly reduce their culpability.[48]

Mentally ill defendants, like individuals with intellectual disabilities, have cognitive and behavioral impairments that disrupt logical reasoning and diminish impulse control. In urging that the severely mentally ill be spared execution, the American Psychiatric Association noted that the relevant qualifying disorders are "typically associated with delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment." [49] Indeed, under the definition Petitioner urges, serious mental illness necessarily includes either substantial impairment of cognitive processing or impulse control. The vulnerability to manipulation and negative influence is common to those with mental illness just as it is to juveniles and the mentally retarded.[50] Finally, similar to juvenile offenders reforming their behavior in the fullness of time, mental illness can often be treated and managed with medication, particularly in a structured environment.

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[46] *Roper*, 543 U.S. at 569 ("juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"); *Atkins*, 536 U.S. at 318 (the mentally retarded " are followers rather than leaders").

[47] *Roper*, 543 U.S. at 570 ("The personality traits of juveniles are more transitory, less fixed.")

[48] ABA/APA Recommendation at 670.

[49] *Id.*

[50] Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 847-48 (2010) ("Individuals who are highly suggestible or compliant are more likely to confess falsely. So too are the developmentally disabled, cognitively impaired, juveniles, and the mentally ill--all of whom tend to be unusually suggestible and compliant. The developmentally disabled are more likely to confess falsely for a variety of reasons. Youth is also a significant risk factor for police-induced false confessions. Finally, people with mental illness are also disproportionately likely to falsely confess, especially in response to accusatorial police pressure.").

2. The execution of the seriously mentally ill is unconstitutionally disproportionate because it lacks "any legitimate penological justification."

In bringing its judgment to bear on the constitutionality of a particular punishment, this Court assesses whether that punishment has a legitimate penological justification. Where a particular punishment "makes no measurable contribution to acceptable goals of punishment," it will be considered unconstitutional as the "purposeless and needless imposition of pain and suffering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In the death penalty context, there are two valid penological goals to consider – retribution and deterrence. *Atkins*, 536 U.S. at 319.

The validity of retribution in the context hinges on the culpability of the offender, and "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree." *Roper*, 543 U.S. at 571; *See, also, Atkins*, 536 U.S. at 319. The culpability of the seriously mentally ill is significantly diminished in the same manner as juveniles and the mentally retarded. Accordingly, the execution of the seriously mentally ill cannot stand on a retributive justification.[51]

Similarly, with regard to deterrence, this Court has held that where the characteristics of the offender rendering him less culpable would also frustrate the deterrent impact of his execution, his execution would be cruel and unusual. *Atkins*, 536 U.S. at 319-20. *See also, Roper*, 543 U.S. at 571. Again, as discussed *supra*, the characteristics of the seriously mentally ill which render him less culpable – namely poor decisionmaking and impulsivity – also "frustrate the deterrent impact" in much the same way as juveniles and the mentally ill.

3. Given the parallels between the mentally ill and other individuals exempt from execution, the continued execution of the seriously mentally ill violates the Equal Protection Clause.

A capital punishment scheme which permits the execution of the mentally ill while

[51] *See*, ABA/APA Recommendation at 670.

recognizing that evolving standards of decency prevent the execution of juveniles and the mentally retarded unconstitutionally deprives the mentally ill of Equal Protection under the law. Where the characteristics that make individuals in those categories exempt from execution are present in another group that is still threatened, the Equal Protection Clause is implicated.

This Court has not determined what level of scrutiny should apply to this challenge. Because it would implicate a fundamental right (the right to be free from cruel and unusual punishment) it would be most proper to apply strict scrutiny, regardless of whether the seriously mentally ill are considered a suspect class.[52]

Regardless of the standard applied, capital schemes cannot constitutionally distinguish between the seriously mentally ill and those categories dealt with in *Roper* and *Atkins*. One can hardly conceive of a rationale the government can provide for the execution of a group where that group's functional equivalent has been exempted because evolving standards of decency dictate that their execution "is nothing more than the purposeless and needless imposition of pain and suffering." *Atkins*, 536 U.S. at 319.

D. The considerations which motivated this Court to implement categorical bars on the execution of juveniles and the mentally retarded apply with equal force to the seriously mentally ill.

This Court recognized in *Roper* and in *Atkins* that there may be compelling reasons to categorically bar a punishment, rather than relegating the characteristic to the status of mitigating circumstance. In fact, the argument is far more compelling in the case of the mentally ill. Here

[52] *Cf, City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (finding that a zoning ordinance which discriminated against the mentally retarded was subject to rational basis review where no fundamental right was implicated). *See also, Walker v. True*, 399 F.3d 315, 328 (4th Cir. 2005) (Gregory, J. dissenting) ("The majority's error begins by adopting the Warden's contention that Virginia's scheme merits merely rational-basis review. It is plain that 'when state laws impinge on personal rights protected by the Constitution,' strict scrutiny -- not rational-basis review -- is warranted. The Eighth Amendment's prohibition against the cruel and unusual punishment embodied by the execution of the mentally retarded is surely a fundamental, personal constitutional right. Thus, Virginia's law should be sustained only if it is 'suitably tailored to serve a compelling state interest.'").

the characteristic which defines the category explicitly turns on offender's culpability – an offender suffering from serious mental illness under the definition urged is *ipso facto* less culpable. Petitioner urges this Court to recognize that the Constitution bars the execution of offenders whose severe mental disorder or disability at the time of the offense, significantly impaired his capacity (a) to appreciate the nature, consequences or wrongfulness of his conduct, (b) to exercise rational judgment in relation to his conduct, or (c) to conform his conduct to the requirements of the law. By contrast, the Court in *Roper* and in *Atkins* had to be satisfied with a mere correlation – those within the category *generally* possessed characteristics rendering them less culpable.

1. Ceding the issue to the purview of penalty-phase juries runs the serious risk that mental illness will not be accounted for in a constitutionally sufficient manner.

In electing to impose categorical bans on the execution of mentally retarded and juvenile offenders, this Court expressed concern that a case-by-case assessment would be under-inclusive, and indeed, in some cases juries might inappropriately disregard the mitigation or consider the characteristic in aggravation rather than mitigation. In *Roper* this Court held:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

543 U.S. at 572-73; *See also, Atkins,* 536 U.S. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury").

The danger is far greater in the context of offenders suffering from a serious mental illness that that illness may be used by jurors in aggravation rather than as mitigation. Despite a

growing understanding of mental illness, a significant stigma still exists:

> [E]vidence has emerged suggesting that mental illness may in fact be construed as an aggravating factor by juries considering the death penalty. In other words, the presence of a serious mental illness may increase the chance that the death penalty will be imposed.[53]

Even more vexing – the proof of a diagnosis of serious mental illness for a capital defendant will often require reference to prejudicial or aggravating facts:

> [I]n many cases an offender's mental illness, although presumptively mitigating, might also be directly connected with an aggravating circumstance. For instance, an offender's risk for violence might be the result of mental illness. Similarly, the "heinousness" of the murder might in some way be related to mental disorder ... [There is] voluminous research indicating that jurors often perceive evidence of mental illness as an aggravating circumstance (usually because they believe it correlates with dangerousness), rather than as a mitigating circumstance.[54]

Further, evidence continues to build that capital juries are not well-suited in the face of the overwhelming emotion of a penalty phase presentation to make the sort of technical determination which would exempt the seriously mentally ill from execution. Studies have demonstrated that death-qualified capital juries generally have difficulty considering mitigation and life sentences.[55]

It is not enough that the majority of death states ask juries to consider an offender's

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[53] RISDON N. SLATE & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS 342, 339 (2008); *See also*, Liliana Lyra Jubilut, *Death Penalty and Mental Illness: The Challenge of Reconciling Human Rights, Criminal Law, and Psychiatric Standards*, 6 SEATTLE J. SOC. JUST. 353, 377 (2007); Michael L. Perlin, *The Sanest Lies of furors in Death Penalty Cases:The Puzzling Role of Mitigating Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 274 (1994).

[54] *See*, Gary B. Melton et al., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS, 289 (3d Ed. 2007).

[55] William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction*, AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (James R. Acker et al. eds., 2d ed., 2003) (Presenting findings from empirical interviews with hundreds of capital jurors that jurors routinely decide what sentence to impose before the penalty phase commences, that many death-biased venire persons survive the process of death qualification to become jurors, that jurors do not understand the meaning of mitigation evidence and do not understand or follow penalty phase instructions, that jurors believe death is mandatory in some cases).

mental illness among a list of statutory mitigating factors.[56] Where relegating consideration of the protected characteristic to the status of mitigating factor creates an "unacceptable risk" that the factor will be disregarded, a categorical bar is more appropriate. *See, Roper*, 543 U.S. at 573.

2. Much like youth and intellectual disability, a defendant's serious mental illness often undermines the procedural protections necessary to constitutionally apply our capital punishment scheme.

The mentally ill possess many of the characteristics that made juveniles and the mentally retarded less well-protected by constitutionally necessary procedural safeguards. The *Atkins* Court worried that placing mentally retarded defendants through the capital system is likely to "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins*, 536 U.S. at 317. The *Atkins* Court explained that the mentally retarded are at risk in our system because they are more subject to the pressures involved in false confessions, less able to persuasively present mitigation, less able to meaningfully assist counsel, likely to make poor witnesses, and may be prejudiced by their demeanor in the courtroom. *Id.* at 320-21. Each of these considerations apply with equal force to the seriously mentally ill.

The challenges that individuals with mental illness have, first in dealing with law enforcement, then working with counsel, and ultimately testifying before a jury, are even greater than the problems experienced by individuals with intellectual disabilities.[57] An additional threat to the procedural safeguards necessarily afforded in the capital context, however, is unique to the context of the seriously mentally ill – that mental illness may fuel defendants to actively obstruct the procedural protections countenanced in the modern capital scheme. The risk of this sort of self-sabotage exists at all stages of the process.

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[56] *See, e.g.*, Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 297 n.47 (1989) (listing state statutes that include "extreme mental or emotional disturbance as a mitigating factor).

[57] Am. Civil Liberties Union, *Mental Illness and the Death Penalty in the United States* (2009), http://www.aclu.org/files/pdfs/capital/mental_illness_may2009.pdf.

For example, mentally ill defendants may volunteer to waive all appeals and volunteer for execution. Between 1977 and 2005, 106 inmates were executed after waiving their appeals or otherwise volunteering for execution,[58] and seventy-seven percent of those individuals suffered from a documented mental illness.[59] Of the states which have carried out post-*Gregg* executions, eight have exclusively executed volunteers in the last decade or more. [60] This trend risks the capital punishment scheme "become[ing] an instrument for the effectuation of a suicide by a mentally ill man." *Rumbaugh v. McCotter*, 473 U.S. 919 (1985) (Marshall, J., dissenting from denial of *certiorari*).[61]

The risks to necessary procedural protections is not limited to condemned prisoners electing to forgo further appeals. Mentally ill defendants engage in self-defeating behavior at all stages of the process.[62] Numerous capital defendants with documented mental illnesses have taken the stand at the penalty phase in order to ask the jury to sentence them to death.[63] In 1980

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[58] John H. Blume, *Essay: Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 939-940 (2005).

[59] *Id*. at 963 (Table 2). *See, also*, Renee Cordes, *Confronting Death: More Inmates Give Up Appeals in Capital Cases*, TRIAL, Jan. 1994, at 12 (quoting psychiatrist Spencer Eth, a psychiatrist who teaches at UCLA "when you look at people who are either asking for the death penalty or are not actively fighting it, many of them are depressed and, in fact, suicidal.").

[60] Oregon Governor John Kitzhaber called for a moratorium on executions in part because "in the 27 years since Oregonians reinstated the death penalty, it has only been carried out on two volunteers who waived their rights to appeal." Governor John Kitzhaber, *supra* note 26. Other states have also executed only volunteers in the last decade or more: Louisiana (one, since 2002); Kentucky (two, since 1997); Connecticut (one, since 1977); Montana (one, since 1998); New Mexico (one, since 1977); Nevada (six, since 1996); Pennsylvania (three, since 1977); South Dakota (one, since 1977). Death Penalty Information Center, Searchable Execution Database, http://www.deathpenaltyinfo.org/views-executions.

[61] At issue in *Rumbaugh* was the fate of Charles Rumbaugh, whose parents brought a next of friend action to prevent his voluntary execution on the ground that he was incompetent to be executed. The Court of Appeals denied this request, finding that he "is able to feed relevant facts into a rational decision-making process and come to a reasoned decision; …In other words, Rumbaugh's disease influences his decision because it is the source of mental pain which contributes to his invitation of death." *Rumbaugh v. Procunier*, 753 F.2d 395, 402 (5th Cir. 1985).

[62] There are numerous accounts of mentally ill defendants testifying at penalty phase in order to request that the jury sentence them to death. *See, generally*, Amnesty International, *Execution of the Mentally Ill* (collecting accounts of 100 mentally ill individuals who have been executed).

[63] *See, e.g.*, *Goode v. Wainwright*, 704 F.2d 593, 599 (11th Cir. 1983) (Arthur Goode was executed in 1984 in Florida. Goode, who had recently escaped from a mental institution, acted in his own defense and "cleverly brought

Wayne Felde, a Vietnam veteran diagnosed with post traumatic stress disorder, was convicted and sentenced to death by a jury in Louisiana after requesting a death sentence. The tearful jury returned the death verdict along with a note:

> We, the Jury, recognize the contribution of our Viet Nam veterans and those who lost their lives in Viet Nam. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans. We have attempted, through great emotional and mental strain, to serve and preserve the judicial branch of our government by serving on this Jury. This trial will forever remain indelibly imprinted upon our minds, hearts, and consciences. Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkins' life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.

Felde v. Butler, 817 F.2d 281, 282 (5th Cir. 1987).

The seriously mentally ill may present at trial with bizarre, antagonistic, or other prejudicial behavior.[64] Indeed, Hart Turner's own trial was marked by just this risk, where Hart insisted on wearing his towel face-wrap throughout proceedings. The result was enormously prejudicial – not only did the defendant attend his own capital trial wearing clothing that matched witness descriptions of the perpetrator, but he presented as bizarre and vaguely sinister to the very jury tasked with assessing whether he had a spark of humanity worth saving.

II. Without a writ of certiorari from this Court, Mississippi will execute a man suffering from a serious, inherited mental illness which at the time of his crime

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out evidence to assure his own conviction" before requesting a death sentence. The Eleventh Circuit had "grave doubts concerning the wisdom" of permitting Goode to hold a mid-trial held a news conference confessing to the murder, particularly considering the jury had not been sequestered.); *Riggs v. State*, 3 S.W.3d 305, 307 (Ark. 1999) (Christina Riggs was executed in Arkansas in 2000 having demanded that the jury sentence her to death, and subsequently waiving her appeals. Riggs killed her two children and attempted to kill herself, and was diagnosed with depression.).

[64] See the discussion of the trial proceedings in *Panetti v. Quarterman*, 551 U.S. 930, 936 (2007) ("the net effect of this dynamic [the defendant's mental illness] was to render the trial truly a judicial farce"). *See, also*, Jim Yardley, *Amid Doubts About Competency, Mentally Ill Man Faces Execution*, N.Y. TIMES, Nov. 4, 2002, at A1 (discussing the impending execution of James Colburn despite evidence of serious mental illness: "One juror said Mr. Colburn's lack of emotion in the trial convinced her he was mean and lacked compassion, not insane. That juror, Kimberly Queener, who now says she would not vote for death, said the jury did not realize that Mr. Colburn's demeanor could be explained by chronic schizophrenia.").

substantially impaired his capacity to exercise rational judgment and control his conduct, and his ability to appreciate the wrongfulness of that conduct.

The State of Mississippi plans to execute Hart Turner at 6 p.m. on February 8, 2012. This Court should take jurisdiction over this extraordinarily important constitutional claim that should be heard on the merits before the state is permitted to kill him. *See, Trop,* 356 U.S. at 100-01. Hart had been released only weeks before the incident from an involuntarily psychiatric commitment, and fueled by his serious mental illness, he committed an impulsive and illogical crime. While that illness cannot absolve him of responsibility for the tragic result, it does reduce his moral culpability. In failing to recognize this, his execution will constitute "the purposeless and needless imposition of pain and suffering." *Atkins*, 536 U.S. at 319.

Petitioner urges that evolving standards of decency prohibit the execution of the seriously mentally ill. He made this argument in the court below, and that court denied his plea squarely on the merits. He is hardly alone in this argument; beyond the consensus discussed *supra* this issue has been raised in numerous cases. The Eighth Amendment is not static, "[s]ociety changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . . ."[65] Petitioner urges that this Court should determine whether executing the seriously mentally ill is barred by the Eighth and Fourteenth Amendments, and that it should do so before Mr. Turner is executed.

CONCLUSION

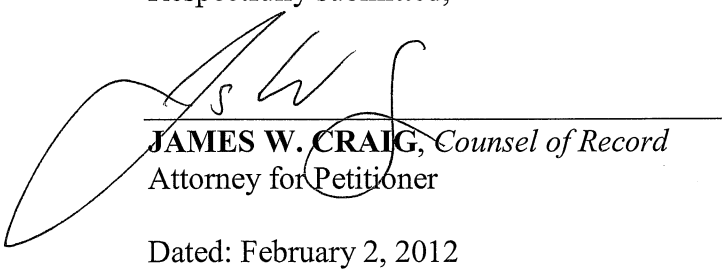
Edwin Hart Turner struggles with a lifelong inherited mental illness which impacted his ability to engage in rational and moral decision-making, and conform his conduct to the law at

[65] *Graham*, 130 S.Ct. at 2036 (Stevens, J., concurring).

the time of his offense. His death sentence is the product of an unconstitutional statutory scheme which failed to ensure that a man whose offense was the product of severe mental illness would be spared the death penalty – a result possible in only a handful of states. There is a broad and building consensus against the execution of seriously mentally ill offenders founded in the understanding that the seriously mentally ill are less culpable, and that their execution does not serve any valid penological purpose.

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issue.

Respectfully submitted,



JAMES W. CRAIG, *Counsel of Record*
Attorney for Petitioner

Dated: February 2, 2012

Serial: 174575

IN THE SUPREME COURT OF MISSISSIPPI

No. 2012-DR-00033-SCT

EDWIN HART TURNER

v.

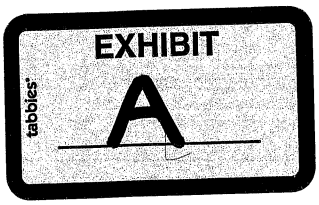
STATE OF MISSISSIPPI

ORDER

This matter is before the Court on the Successive Application for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief filed by counsel for Edwin Hart Turner. Also before the Court are the Response filed by the State of Mississippi and the Rebuttal filed by Turner.

Turner was convicted of two counts of capital murder in 1997. He was sentenced to death on both counts. This Court affirmed the convictions and sentences in ***Turner v. State***, 732 So.2d 937 (1999). Turner's initial petition for post-conviction relief was denied. ***Turner v. State***, 953 So.2d 1063 (Miss.2007). Turner's federal habeas concluded when the United States Supreme Court denied cert. on January 9, 2012. ***Turner v. Epps***, --- S.Ct. ----, 2012 WL 33368.

In this successive petition, Turner argues generally that the death penalty is a disproportionate punishment in that he suffers from a severe mental disability or disorder which, on the date of the offenses, significantly impaired his ability to reason and make judgments and his ability to control impulses. To the extent Turner argues that his mental condition, as it existed at the time of the killings, or at trial requires re-sentencing, we find



that claim to be barred by res judicata. Turner was examined prior to trial by mental health professionals for both the State and for the defense. Turner made no argument then that he was insane or incompetent to stand trial. The trial judge held a competency hearing and found that Turner was sane and competent. No mental impairment claim was raised in his direct appeal. The Court has already conducted two proportionality reviews and has found that application of the death penalty here is not disproportionate. The Court finds that this claim has been substantially reviewed in prior proceedings and should be dismissed.

Further, the Court declines Turner's request that Mississippi adopt new standards for judging legal insanity. The Court rejects Turner's plea that the decisions in ***Atkins v. Virginia,*** 536 U.S. 304 (2002) and ***Roper v. Simmons,*** 543 U.S. 551 (2005) should be extended to capital petitioners with alleged "severe mental disorders" and that his execution should be prohibited. The Court finds that those claims should be denied.

IT IS THEREFORE ORDERED that the Successive Application for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief filed by Edwin Hart Turner is dismissed in part and denied in part.

SO ORDERED, this the 26 day of January, 2012.

MICHAEL K. RANDOLPH, JUSTICE

KITCHENS AND KING, JJ., WOULD GRANT.

Serial: 174578

IN THE SUPREME COURT OF MISSISSIPPI

No. 97-DP-00583-SCT

EDWIN HART TURNER

v.

STATE OF MISSISSIPPI

ORDER

This matter is before the Court on the Motion to Reset Execution Date filed by the State of Mississippi. Also before the Court is the Response filed by Edwin Hart Turner. After due consideration, the Court finds that the State's Motion to Reset Execution Date is well taken and should be granted. The Court finds that the United States Supreme Court denied Turner's petition for writ of certiorari on January 9, 2012, and that no state or federal proceedings are now pending. The Court finds pursuant to Miss. Code Ann. § 99-39-29 that a date for the execution should be set.

IT IS THEREFORE ORDERED that the Motion to Reset Execution Date filed by the State of Mississippi is granted. The execution of Edwin Hart Turner shall take place on February 8, 2012 in the manner provided by law. It is further ordered that this order shall serve as the warrant of execution for Edwin Hart Turner.

SO ORDERED, this the 26 day of January, 2012.

MICHAEL K. RANDOLPH, JUSTICE

KITCHENS AND KING, JJ., WOULD DENY.