INDICTMENT NO. (12-31-04)

THE STATE OF TEXAS IN THE DISTRICT COURT OF

vs. COUNTY, TEXAS

 JUDICIAL DISTRICT

**MOTION PRECLUDE THE DEATH PENALTY AS A SENTENCING OPTION**

**(Reduced Capacity Due to Mental Illness)**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, (CLIENT NAME), by and through counsel and pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3,10, 13 & 19 of the Texas Constitution and Tex.C.Crim.Proc. Articles 1.05, 1.051,

15.17, 16.01, 20.17, 26.04 26.052 and would show the court the following:

1. (CLIENT NAME) has been indicted for the offense of capital murder.
2. The State is seeking the death penalty. The Eight Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case. Gilmore v. Taylor, 508 U.S.

333, 113 S.Ct. 2112, 124 L. Ed.2d 306 (1993) and Woodson v. North Carolina, 428 U.S. 280,

305 (1976). This Court and the Court of Criminal Appeals are bound by the law to make certain that a sentence of death is not wantonly or freakishly imposed and that the purposes of Art.

37.071 are accomplished in a constitutional manner. *Ellason v. State*, 815 S.W. 2d 6565 (Tex.Crim.App. 1991).

1. Those prohibitions embodied within the Eighth Amendment to the United States Constitution include the prohibition against the infliction of a cruel and unusual punishment. Article 1, Section 13 of the Texas Constitution provides even greater protection in that this section bars the infliction of a “cruel **or** unusual punishment” (emphasis added).
2. The State of Texas has charged that it was the **conscious** objective or desire of (NAME OF CLIENT) to cause the death of and/or that he was **aware** that his conduct was reasonably certain to cause the death of .
3. The capacity of (CLIENT NAME) to form a conscious objective or desire is reduced by impairments in his cognitive ability. His cognitive ability has been reduced by his mental illness, which has been diagnosed as .

This mental illness impairs the cognitive ability of (CLIENT NAME) in the following areas: (a)

(b)

(c)

# *THE RATIONALE OF ATKINS*

1. There are definite correlations between impairments suffered by the mentally ill and those people who are impaired by mental retardation. Persons who are mentally retarded and commit crimes have a reduced capacity, which diminishes their personal culpability, and execution of the mentally retarded violates the Eighth Amendment’s prohibition on the infliction of Cruel and Usual Punishment. Atkins v. Virginia, 536 U.S. 304 (2002). The offender with mental

retardation suffers from sub-average intellectual functioning and has significant limitations in adaptive skills, they frequently know the difference between right and wrong, are competent to stand trial, but “by definition” they have diminished capacity 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 other’s reactions. Their deficiencies do not warrant an exemption from criminal sanctions but diminish their personal culpability. Id*.* at

317-318. In other words, mentally ill offenders “like those with mental retardation or who were juveniles at the time of the offense, have diminished responsibility for their actions. All merit punishment, but not the extreme penalty.”1 Moreover, “when severe mental illness imposes impairments comparable to mental retardation and juvenile status on judgment, rationality, and the ability to foresee consequences and control behavior, it would appear similarly less justifiable to impose the death penalty as retribution for past crimes or as a deterrent to future ones. To the extent that mental illness produces effects that reduce volitional control and blameworthiness to the same degree as mental retardation and juvenile status, the imposition of the death penalty would seem insufficiently related to the purposes of capital punishment to allow its application consistent with the Eighth Amendment.”2

1 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 37.

2 Ibid p. 30.

The Supreme Court has found that the death penalty serves the social purposes of retribution and deterrence. Gregg v. Georgia*,* 428 U.S. 153, 183 (1976). Retribution

“necessarily depends on the culpability of the offender.” Atkins*,* 536 U.S. at 319. Capital

punishment must be limited to a narrow category of offenders whose “extreme culpability makes them ‘the most deserving of execution.’” Id., quoted in Roper v. Simmons, 125

S.Ct. 1183, 1194 (2005).

Offenders, whose reasoning capacities render them less than fully culpable for their crimes, are not eligible for the death penalty3 because “they do not act with the level of moral culpability that characterizes the most serious adult conduct.” Atkins, 536 U.S.

at 306. As a result, the Court found that the diminished mental capacity of the mentally retarded, including their disabilities in “areas of reasoning, judgment, and control of impulses,” does not merit the death penalty as appropriate retribution. Id.

Additionally, the social purpose of deterrence is not served by executing the mentally retarded. Since the mentally retarded suffer from impairments in their cognitive functioning, they are less likely to be able to process the information that the death penalty is a possible punishment. As a result, the person with mental retardation cannot examine their behavior, evaluate the possible punishments, and “control their conduct based upon that information” in the same manner as other adults in society. Atkins, 536

U.S. at 320. This inability to conform conduct undermines the identified social purposes of deterrence and makes the execution of persons with mental retardation nothing more

3 See e.g*.,* Roper v. Simmons, 125 S.Ct. 1183, 1196 (2005) (finding that “[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, by reason of youth and immaturity”); see also Thompson v. Oklahoma, 487 U.S. 815 (1988).

than “the purposeless and needless imposition of pain and suffering.” Enmund v. Florida,

458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

# *ATKINS AND THE MENTALLY ILL*

1. The mental illness of (NAME OF CLIENT) has reduced his mental capacity in a way that is as profound (if not more so) than one who is impaired by retardation, and therefore, the rationale in Atkins is equally applicable to those individuals suffering from

severe mental illness.

Many scholars, lawyers, and mental health experts have already noted this connection between mental retardation and mental illness. For example, Doctors Victor Scarano and Bryan Liang believe “Atkins opens the door for the same arguments to be

brought forward in death penalty cases involving the mentally ill.” Victor R. Scarano & Bryan A. Liang, Mental Retardation and Criminal Justice: *Atkins*, the Mentally Retarded,

and Psychiatric Methods for the Criminal Defense Attorney, 4 HOUS. J. HEALTH L. &

POL’Y 285, 310 (2004). After all, the mentally ill suffer from the same diminished capacities, including the inability to control impulses, as those cited by the Court in Atkins. John H. Blume & Sherry L. Johnson, Killing the Non-Willing: *Atkins*, The

Volitionally Incapacitated, and the Death Penalty, 55 S.C. L. REV. 93, 126-27 (2003); and

Scarano & Liang, supra.

Likewise, Christopher Slobogin argues that “there may not be any plausible reasons for differentiating between the execution of people with mental illness and execution of people with mental retardation.” Christopher Slobogin, What *Atkins* Could

Mean For People With Mental Illness, 33 N.M.L. Review 293, 293 (2003). Slobogin

takes this argument a step further, noting that the “the delusions, command hallucinations, and disoriented thought process[es] of those who are mentally ill represent greater dysfunction than that experienced by most ‘mildly’ retarded individuals (the only retarded people likely to commit crime)”. Christopher Slobogin, Mental Illness and the

Death Penalty, 1 Cal. Crim. L. Rev. 3, (2000) *available at*

[http://www.boalt.org/CCLR/v1/v1sloboginfr.htm.](http://www.boalt.org/CCLR/v1/v1sloboginfr.htm) As a result of these similarities,

imposing the death penalty on the mentally ill does not further the social goals of retribution and deterrence as is also violates the Eighth Amendment to the United States Constitution.

All offenders are culpable, but there are varying degrees of culpability. Our legal system, and our society, deal with these differences in culpability by meeting out different punishments for different individuals, ensuring that “only the most deserving of execution are put to death,” Atkins, 536 U.S. at 319. As a result, the societal value of

retribution “necessarily depends on the culpability of the offender, ”Id.

In Atkins, the Supreme Court concluded that mentally retarded offenders are

categorically lacking in moral blameworthiness because of their cognitive limitations and inability to control impulses. These characterizations of diminished culpability are also applicable to those who suffer from mental illness because the mentally ill exhibit disabilities in reason and impulse control. Blume & Johnson, supra, at 126-27. Indeed,

“[f]or those with mental illness, the activities and vagaries of life are often difficult and may lead to unacceptable social behaviors, resulting in the commission of illegal acts.”

Scarano & Liang, supra, at 311. Therefore, a mentally ill person is not as mentally

culpable as the average-minded murderer because of his dysfunction. And, as per the analysis in Atkins*,* if the mental culpability of an “average murderer” is insufficient to

impose the death penalty, then such a punishment imposed on a less mentally culpable person is not merited, particularly when that person suffers from the same disabilities as the categorically-excluded mentally retarded offenders. Atkins, 536 U.S. at 319.

The issue of culpability of the mentally ill has also been addressed in the recent case of Panetti v.Quarterman4, which involved “a different but related legal test”5, the

standard for competency to be executed. In this case, the Court stated that the execution of a severely mentally ill prisoner “serves no retributive purpose”6 and thus violates the Eighth Amendment. As Winick summarizes, “in other words ‘the objective of community vindication’ by execution of a condemned prisoner whose ‘mental state is so distorted by a mental illness’ that he is prevented from recognizing the severity of his offense is ‘called in question’ since ‘his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole’7”8 Furthermore, the Court observed that “gross delusions stemming from severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose.”9 Thus “Panetti’s language suggests that when such illness produces gross delusions or

4 127 S. Ct. 2842 (2007).

5 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 48.

6 Panetti, 127 S. Ct. at 2861 (citing Ford v. Wainwright, 477 U.S. 399, 408).

7 Ibid.

8 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 48.

9 Panetti at 2862.

other cognitive effects, significantly distorting the offender’s understanding and appreciation of his conduct and of its wrongfulness, capital punishment will serve no retributivist purpose, and therefore would be cruel and unusual.”10

This conclusion is shown into even harsher relief when one analyses the offender in clinical terms. The mentally ill “may experience such distortions of reality that their ability to appreciate the wrongfulness of their conduct or to understand its consequences may be significantly reduced, such as when their psychosis causes them to mistakenly believe that their victims are attacking them or involves hallucinations commanding them to kill them. Similarly, their symptomatology may create such gross irrationality that it significantly impairs their judgment at the time of the crime.”11 This has been recognized by the Texas courts, for example in Yates v. State, whereby Andrea Yates was found not

guilty by reason of insanity for the bathtub drownings of her five young children. Ms Yates’ delusional state was so severe that she believed that Satan was inside her and thus killed her children to try to save them from hell. In this case Ms Yates had reduced culpability and deterability as a result of her mental illness even though she understood her conduct to be illegal.”12

Likewise, the execution of the mentally ill does not serve the societal goal of deterrence. The mentally ill are unlikely to control their behavior based upon the knowledge that the death penalty is a possible punishment for their behavior because they have “great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their

10 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 49.

11 Ibid p. 52.

12 Yates v. State, 171 S.W.3d 215 (Tex. App. Houston 1st Dist. 2005).

behavior. Slobogin, What *Atkins* Could Mean For People With Mental Illness, supra, at

304. Therefore, much like adolescents, who are categorically exempt from the death penalty, persons with mental illness are not likely to make the “kind of cost-benefit analysis that attaches any weight to the possibility of execution.” Thompson v.

Okalahoma, 487 U.S.815, 837 (1988). Furthermore, “just as it is for mentally retarded

offenders, the ‘cold calculus’ of cost and benefit is ‘at the opposite end of the spectrum from behavior’” for offenders with mental illness. Atkins, 536 U.S. at 319-20 citing

Gregg, 428 U.S. at 186 quoted in Blume & Johnson, supra, at 129. Thus, both logic and

Supreme Court precedent dictate the conclusion that the death penalty cannot serve a deterrent purpose when applied to offenders with mental illness.

In Lockett v. Ohio*,* 438 U.S. 586, 605 (1978), the Supreme Court acknowledged

the impossibility of creating a perfect procedure for imposing the death penalty. Nevertheless, the Court determined that mitigating circumstances, which may call for a less severe punishment, must be considered by the jury in order to satisfy the requirements of the Eighth and Fourteenth Amendments. In Atkins*,* the court considered

the fact that “mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes,” Atkins*,* 536 U.S. at 320-21.

Mentally ill offenders face similar obstacles. Severe mental illness, like significant cognitive impairments, sharply constricts a defendant’s ability to “give meaningful assistance to counsel.” Blume & Johnson, supra, at 130. Mentally ill

offenders often do not trust counsel and therefore, refuse to help them prepare the case.

Id. Likewise, the mentally ill offender is not helpful regarding facts of the crime. And,

perhaps most importantly, mentally ill defendants are often unable to conform their conduct to the “requirements of courtroom decorum and procedure.” Id. Thus, they are

“typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” Atkins, 536 U.S. 304, 320-21 (2002) quoted in Blume

& Johnson, supra, at 130. Furthermore, there is much stigma against the mentally ill as

“values are largely shaped by often sensational media portrayals of mental illness and by stereotypes and irrational prejudice against those with mental illness”13. This precludes seeing mental illnesses as medical illnesses, which are illnesses “producing effects that are symptoms of illness outside the individual’s control, rather than being due to moral depravity.”14

This is reflected in Atkins, which also illustrates that mental retardation as a

mitigating fact may actually be used as an aggravating factor of future dangerousness, which may make the defendant more likely to receive a death sentence. Mentally ill defendants face the exact same risks. Mental illness, like youth and mental retardation, is universally considered a mitigating fact for sentencing. Slobogin, What Atkins Could

Mean For People With Mental Illness, supra, at 312. “[I]mpaired intellectual

functioning” is inherently mitigating and, therefore, meets the definition of ‘constitutionally relevant’ mitigating evidence. Tennard v. Dretke, 124 S.Ct. 2562, 2569-

72 (2004), cited in Perry v. State, 158 S.W.3d 438 (Tex. Crim. App. (2004).

13 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 60.

14 Ibid.

However, similarly to mental retardation, mental illness may actually be used as an aggravating fact in order to show future dangerousness. Slobogin, What Atkins Could

Mean For People With Mental Illness, supra, at 313. For example, research shows that

“despite the fact that offenders with serious disorders are not more likely to re-offend than the general offender population, the public tends to equate mental disorder with dangerousness.” Christopher Slobogin, Is *Atkins* the Antithesis or Apotheosis of Anti-

Discrimination Principles?: Sorting out the Groupwide Effects of Exempting People with

Mental Retardation from the Death Penalty, 55 ALA. L. REV. 1101, 1107. In this way,

mental illness can be a “two-edged sword,” engendering greater fear of future violence. Atkins, 536 U.S. at 321, quoted in Blume & Johnson, supra, at 131. Indeed, “juries also

may misunderstand clinical evidence concerning the offender’s mental illness and its impact on his functioning at the time of the offense, may incorrectly equate mental illness with dangerousness, and may incorrectly think that the death penalty is the only way to protect the community from the defendant’s future violence”15. This unfairly biases the jury during the penalty phase of a capital trial against a mentally ill defendant, making him more susceptible to receive the death penalty. This would directly contradict Eighth Amendment values against awarding disproportionate punishments to crimes committed. Consequently, since the Supreme Court has deemed this risk too great for the mentally retarded, then it must be as great for the mentally ill, who share numerous characteristics with the mentally retarded.

1. A punishment is excessive and therefore prohibited by the Eighth Amendment if its is

15 Ibid p. 64.

not graduated and proportioned to the offense. Weems v. United States, 217 U.S. 349, 367

(1910). A claim that punishment is excessive is judged by currently prevailing standards of decency. Trop v. Dulles, 356 U.S. 86, 100-101 (1958). The proportionality review

should be informed by objective factors to the maximum possible extent. Harmelin v.

Michigan, 501 U.S. 957, 1000 (1991). Objective factors that were considered by the

Supreme Court in Atkins include the “broader social and professional consensus” Atkins,

536 U.S. at 316 n.21. as indicated by briefs and positions of the American Psychological Association and positions of religious communities of all faiths. Also to be considered are the views of “respected professional organizations and other nations that share our Anglo-American heritage and by leading members of the Western European Community. Thompson v. Oklahoma, 487 U.S. at 830-831 cited in Atkins, 536 U.S. at 316 n.21. The

positions of those groups to whom the United States Supreme Court has mandated this Court to consider are:

1. The American Psychological Association: It has asked that each jurisdiction that imposes the death penalty to stop until current deficiencies such as death penalty prosecutions involving persons with serious mental illnesses are ameliorated. See:<http://www.apa.org/pi/deathpenalty.html>
2. The American Bar Association: The ABA has called for a temporary moratorium of the death penalty “unless and until states could ensure the fair and impartial administration of the death penalty.” The ABA also opposes the execution of the mentally retarded and of juveniles in all circumstances. See: [http://www.abanet.org/media/deathpenaltyqa.html.](http://www.abanet.org/media/deathpenaltyqa.html)
3. The American Psychiatric Association: Opposes the imposition of the death penalty “if at the time of the offense, [the defendant] had a severe mental disorder or disability that specifically impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law.” See:<http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf>
4. The Western European Community and other members of the International Community. For example, The European Union opposed the death penalty in all circumstances. See: [http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm.](http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm) It has been stated that

“international human rights norms condemn the death penalty for defendants with severe mental illness”16. According to a Resolution adopted by the United Nations Commission on Human Rights, all countries that still maintain capital punishment are urged “[n]ot to impose the death penalty on a person suffering from any form of mental disorder….”17 This is especially pertinent as the courts in both Atkins and Roper considered “as further

evidence of contemporary standards ***the general consensus in the law of other countries and in international human rights law*** that rejected imposition of capital punishment for those with mental retardation and who were juveniles at the time of the offense”18 (emphasis added).

16 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 35.

17 United Nations Commission on Human Rights Res 2001/68, ¶ 4(e) (April 25, 2001).

18 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 34.

1. and others (counsel should include other organizations that have taken stands on execution of the mentally ill.

In addition to these organizations, almost every mental health association in the United States has published a policy statement addressing the issue of the execution of mentally ill offenders, and “all of those organization advocate either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented.” Blume & Johnson, supra, at 121.

1. The determination of what is “excessive” is made by viewing the standards of today, “not those at the time of the Bloody Assizes or when the Bill of Rights was adopted. The basic concept underlying the 8th Amendment is nothing less than the dignity of man — The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Atkins 536 U.S. at 311.
2. “Exempting the mentally ill from execution may also be required by principles of equal protection: “Equal protection requires that like cases be considered alike, and to the extent that severe mental illness imposes parallel deficits in culpability and deterability as mental retardation

and juvenile status, offenders suffering these effects also should be exempt from capital punishment.”19

1. The execution of one who is mentally ill violates the dignity of man generally and this Court, specifically. The execution of one whose personal culpability is diminished by mental illness is just as excessive and offensive as executing one whose personal culpability is reduced by mental retardation.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that this Court preclude the death penalty as a sentencing option in this case.

Respectfully submitted on this the day of ,

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By:

COUNSEL FOR THE ACCUSED

State Bar No.

Address:

Telephone: ( ) -

CO-COUNSEL

19 Winick, B. J. (2008) The Supreme Court’s Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, University of Miami School of Law, available at [http://ssrn.com/abstract=1291781,](http://ssrn.com/abstract%3D1291781) page 38.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to counsel for the State by hand-delivery of a copy of same this the day of , 200 .