# DEFENDER ASSOCIATION OF PHILADELPHIA

**BY: ELLEN T. GREENLEE, Defender, and**

**Marc Bookman and Karl Schwartz, Asst. Defenders Identification No. 00001**

**1441 Samson Street**

**Philadelphia, PA 19102 Attorneys for Khalid Jones**

COMMONWEALTH OF PENNSYLVANIA : COURT OF COMMON PLEAS

CRIMINAL TRIAL DIVISION

VS. : C.P.0408 - 0771 KHALID JONES : CHARGES: Murder, etc.

# MOTION TO PRECLUDE THE COMMONWEALTH FROM SEEKING THE DEATH PENALTY AGAINST A SEVERELY MENTALLY ILL DEFENDANT

TO THE HONORABLE CAROLYN ENGEL TEMIN, JUDGE IN THE COURT OF COMMON PLEAS:

Khalid Jones, by his attorneys, Marc Bookman and Karl Schwartz, Assistant Defenders, respectfully files this Motion, and in support thereof avers:

Khalid Jones was born on April 23, 1975. He is charged with two counts of murder and lesser offenses; the incident occurred in the early morning hours of March 27th, 2004. At the time of the alleged crime, and for a good deal of his life, Mr. Jones has suffered from severe mental illness that will be detailed below. The Commonwealth has given notice that it will seek to impose the death penalty upon Mr. Jones. This Court is now asked to bar the application of that extreme punishment in this case. Subjecting Khalid Jones to the death penalty for the instant

offense, committed when he was suffering from a severe mental illness, would violate the Eighth Amendment of the United States Constitution, Article One Section Thirteen of the Pennsylvania Constitution, and international law.

On August 8, 2006 the American Bar Association House of Delegates, in language already previously adopted by the American Psychological Association and the American Psychiatric Association, unanimously passed the following resolution:

RESOLVED, That the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to implement the following policies and procedures:

1. Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
2. **Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.**
3. Mental Disorder or Disability after Sentencing
4. Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to

understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case. Procedures to be followed in each of these categories of cases are specified in (b) through (d) below.

1. Procedure in Cases Involving Prisoners Seeking to Forgo or Terminate Post- Conviction Proceedings. If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner's behalf to initiate or pursue available remedies to set aside the conviction or death sentence.
2. Procedure in Cases Involving Prisoners Unable to Assist Counsel in Post- Conviction Proceedings. If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings. If the court finds that there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future, it should reduce the prisoner's sentence to the sentence imposed in capital cases when execution is not an option.
3. Procedure in Cases Involving Prisoners Unable to Understand the Punishment or its Purpose. If, after challenges to the validity of the conviction and death sentence have been exhausted and execution has been scheduled, a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option (Emphasis added to original).

The American Bar Association, long recognized as the leading legal organization in the country, has had its Guidelines pertaining to limitations on the utilization of the death penalty cited and adopted by the United States Supreme Court on numerous recent occasions. See, e.g., Wiggins v. Smith, 539 U.S.

510 (2003); Florida v. Nixon, 543 U.S. 175 (2004); Rompilla v.

Beard, 125 S.Ct. 2456 (2005). Thus, it is profoundly significant

that the ABA House Of Delegates has now unanimously set forth a Resolution barring the death penalty for defendants suffering a severe mental disorder or disability. As will be seen below, Khalid Jones clearly fits the parameters of this Resolution, and to seek the death penalty against him would violate the Eighth and Fourteenth Amendments to the United States Constitution and the parallel clauses of the Pennsylvania Constitution.

# HISTORY OF KHALID JONES’S MENTAL ILLNESS

On April 27, 1992, at the age of seventeen, Khalid Jones was involuntarily hospitalized at the Charter Fairmount Institute for suicidal tendencies, and was found to suffer from depression due to his poor cognitive abilities. Specifically, the test results yielded the conclusion that Mr. Jones’s cognitive difficulties prevented him from being able to mediate his impulses and his feelings. He was discharged from Charter Fairmount Institute on May 28, 1992. He was prescribed Stelazine

to help control his impulses, and was diagnosed with Atypical Depression and severe learning disabilities.

On October 8, 2000, at the age of 25, Mr. Jones was hospitalized at the Belmont Center for Comprehensive Treatment for auditory hallucinations and paranoia. Mr. Jones admitted himself because he was “hearing voices.” On October 13, 2000, Mr. Jones was discharged with a diagnosis of Organic Psychosis resulting from childhood meningitis and a head injury, and was prescribed Risperdal.

On March 13, 2004, at the age of 29, Mr. Jones was involuntarily hospitalized under the Mental Health and Procedures Act at Belmont Center for comprehensive treatment after an altercation with his girlfriend. ***This was only two weeks before the instant offense occurred.*** At the time of his admission, Mr. Jones was found to have tangential thought processes, paranoia, visual distortions of ghosts, and a host of other symptoms of mental illness. However, before a full evaluation could be given, Mr. Jones was discharged on March 16, 2004, against medical advice, as the complainant failed to appear at a commitment hearing. Nonetheless, the presiding doctor recommended his further commitment for twenty days.

Prior to Mr. Jones’s discharge, Dr. Barry Farber was able to diagnose him with Psychosis.

On June 6, 2004, just three months after his prior hospitalization, Mr. Jones was admitted to the Horsham Clinic. He was hospitalized due to increasing auditory hallucinations. Mr. Jones was diagnosed with Schizoaffective Disorder, Bipolar Type.

According to the DSM-IV-TR, there are 4 diagnostic criteria for Schizoaffective Disorder. First, “an uninterrupted period of illness during which, at some time, there is either a Major Depressive Episode, a Manic Episode, or a Mixed Episode concurrent with symptoms that meet Criterion A for Schizophrenia.” Only two out of five criteria are necessary to meet Criterion A for Schizophrenia. They include delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms. Mr. Jones presented with both delusions and hallucinations, well satisfying the diagnosis of Schizoaffective Disorder.

The second diagnostic criterion for Schizoaffective Disorder is “[d]uring the same period of illness [characterizing the first criterion], there have been delusions or hallucinations for at least two weeks in the absence of prominent mood swings.”

The third factor states that “[s]ymptoms that meet criteria for a mood episode are present for a substantial portion of the

total duration of the active and residual periods of the illness.”

The final factor going into a diagnosis of Schizoaffective Disorder is that “[t]he disturbance is not due to the direct physiological effects of a substance or a general medical condition.”

Thus, it is fair to say that Khalid Jones has a long and florid history of mental illness, and that his severe mental illness manifested itself in mental health commitments under the Mental Health and Procedures Act just before and just after the

instant offense.

# OVERVIEW

In 2002 the United States Supreme Court decided Atkins v. Virginia, 536 U.S. 304 (2002), and held that executing mentally

retarded individuals violated the Eighth Amendment’s ban on cruel and unusual punishments. In Atkins, the Court cited the

following factors in support of its decision: nineteen state legislatures had recently adopted statutes prohibiting the execution of the mentally retarded; the rarity of actual executions of mentally retarded people; international condemnation of the practice; and the inherent mental limitations of the mentally retarded that prevent them from functioning as fully capable adults.

In 2005, the Court addressed a similar issue in Roper v.

Simmons, 125 S.Ct. 1183, wherein it held executing juveniles

violated the Eighth Amendment. The Court in Simmons looked to the Eighth Amendment’s ban on cruel and unusual punishments in the context of history, tradition and precedent. The Court noted that this framework, like that used in Atkins, required

looking to “the evolving standards of decency that mark the progress of a maturing society” in reaching its decision.

Simmons at 1190. Applying an analysis similar to that used for

the mentally retarded, the Court held that juveniles should be immune from execution because of inherent difference between juveniles and adults that render them less culpable than the worst offenders the death penalty is intended to target. Simmons

at 1195.

The Supreme Court has yet to examine the execution of the mentally ill who, like juveniles and mentally impaired persons, are cognitively and emotionally limited in ways that directly impact upon their culpability. It is fair to say, however, that the holdings in Atkins and Simmons were levied to remedy those very wrongs inherent in the execution of severely mentally ill defendants.

# EVOLVING STANDARDS OF DECENCY DICTATE THAT EXECUTING A MENTALLY ILL OFFENDER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The Eighth Amendment’s prohibition against imposing cruel and unusual punishments is “directed, in part, against all

punishments which by their excessive length or severity are greatly disproportionate to the offenses charged.” Enmund v. Florida, 458 U.S. 782, 788 (1982) (internal quotations omitted).

In determining whether a sentence is disproportionate to the crime committed, the Court has looked to “evolving standards of decency that mark the progress of a maturing society.” Trop v. Dulles, 356 U.S. 86, 101 (1958)(plurality opinion). In the last

four years the Court has held that evolving standards of decency are violated by imposing the death penalty against juveniles and the mentally retarded. Roper v. Simmons, supra; Atkins v.

Virginia, supra.

People with chronic psychotic disorders, like Mr. Jones, share key characteristics with the mentally retarded. Both groups 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 their impulses, and to understand the reactions of others…[T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan.” Atkins at

318. Mr. Jones has had ongoing psychotic episodes, accompanied by auditory hallucinations, paranoia, and cognitive limitations. The language from Atkins cited *supra* describes his condition no less than it describes the condition of one who is mentally retarded.

# Mr. Jones lacks moral culpability

In Atkins, the United States Supreme Court determined that irrespective of the law’s requirement to hold mentally retarded persons criminally responsible, “[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses...they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.” 536

U.S. at 306. The Court further stated that these same impairments that hold mentally retarded persons less culpable “can jeopardize the reliability and fairness of capital proceedings against [them].” 536 U.S. at 306-307. That is, the Atkins court supported the exclusion of mentally retarded

persons from the death penalty because of their inability to assist their counsel in their own defense and because the likelihood was greater that their impairments would be used against them as aggravating, rather than mitigating factors, at sentencing. The Atkins Court was concerned that defendants with

mental retardation were at a greater risk of being wrongfully executed, despite the mitigating factor of mental retardation that would call for a less severe penalty. The Court stated that:

“[m]entally 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. As *Penry* demonstrated, moreover, 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.

Mentally retarded defendants in the aggregate face a special risk of wrongful execution. Atkins at 320-321 (internal citations omitted).

These same factors that led the court to exempt mentally retarded persons from capital punishment are even more applicable to severely mentally ill defendants like Mr. Jones. Given Mr. Jones’s long history of hallucinations and paranoia, he is at particular risk of having the manifestations of this illness used against him in court. Juries have long associated past psychotic behavior with future dangerousness, and used fear of mental illness as a justification for death rather than for life. Using mental illness as an aggravating rather than mitigating factor would be in violation of the United States and Pennsylvania constitutions, as well as 42 Pa.C.S. 9711.

# Public Opinion Opposes the Death Penalty for the Mentally Ill

On May 20, 2002 the Gallup Poll News Service released their findings on the application of the death penalty in America. The Gallup Poll specifically questioned Americans on the use of capital punishment for the mentally retarded, children, and the mentally ill. In 2002, prior to the Court’s decision in Atkins,

82% of Americans opposed the death penalty for mentally retarded persons. Similarly, 75% of Americans surveyed opposed the death penalty for mentally ill defendants. Only 69% of Americans

opposed the death penalty for juvenile offenders. Thus, when the United States Supreme Court held in Simmons that executing those under 18 violated the Eighth Amendment, more Americans were opposed to executing the mentally ill than executing defendants under 18 years old.1

The Atkins Court looked to the positions of leading professional organizations in support of the ban on the execution of the mentally retarded, and found a consensus in opposition. At 316, n.21. A similar consensus has been reached by mental health organizations. Nearly every major mental health association in the United States, as well as the American Bar Association, has published a policy statement addressing the umbrella issue of the execution of severely mentally ill offenders. All of these organizations call for a ban on executing mentally ill offenders.2

1See [http://poll.gallup.com/content/default.aspx?ci=1606&pg=1](http://poll.gallup.com/content/default.aspx?ci=1606&amp;pg=1)

2 American Psychiatric Association, *Moratorium on Capital*

*Punishment in the United States* (approved October 2000), APA Document Reference No. 200006, available at <http://www.psych.org/archives/200006.pdf>(last visited Oct. 14, 2005); American Psychological Association, *Resolution on the Death Penalty in the United States* (Aug. 2001), available at <http://www.apa.org/pi/deathpenalty.html>(last visited Oct. 14, 2005); National Alliance for the Mentally Ill, *The Criminalization of People with Mental Illness*, available at <http://www.nami.org/update/unitedcriminal.html>(last visited Oct. 14, 2005); National Mental Health Association, *Death Penalty and People with Mental Illness* (approved March 10, 2001), available at <http://www.nmha.org/position/deathpenalty/deathpenalty.cfm>(last visited Oct. 14, 2005).

# The Pennsylvania Constitution Bars Imposition of the Death Penalty on the Severely Mentally Ill

The history of capital punishment in Pennsylvania makes it clear that Pennsylvania has played a leading role in narrowing the application of capital punishment. This history favors an interpretation of Article 1, Section 13 independent of the Eighth Amendment.

Pennsylvania's leading role in narrowing the application of capital punishment dates back to pre-Independence times, when the colony drastically limited the number of crimes for which the death penalty could be imposed. "In the late seventeenth century,

... only eleven crimes in Pennsylvania were punishable by death, while in England the number was fifty, and [in England] that number expanded over the next century to more than two hundred. Moreover, of the eleven capital crimes [in Pennsylvania], only murder and treason mandated capital punishment." Kermit L. Hall, *The Magic Mirror: Law In American History*, at 31 (1989).

Of all American colonies, Pennsylvania "broke most fully" with the English tradition of widespread application of capital punishment. Id. at 34. "In 1682, [Pennsylvania] developed a

criminal code that prefigured later developments in the late eighteenth and early nineteenth centuries. The code emphasized

Specifically, NMHA, APA, and AMPA believe that the criminal justice system routinely executes many mentally ill individuals without adequately considering that illness as a mitigating factor. Supra.

the use of prisons and fines, and it forbade capital punishment," id. at 34, in all cases except where murder was "premeditated" or "with malice." Increased British control over the colony undermined these reforms, and application of the death penalty was again expanded. Id.

But during the Revolution and in the early years of Independence, Pennsylvania again took a leading role in constricting capital punishment; it "was a hub of reform activity." Id., at 170. The Pennsylvania Constitution of 1776 "direct(ed) future legislators to compose a new and more humane criminal code 'as soon as may be.'" Id. By 1786 the Commonwealth had abolished the death penalty for robbery, burglary, and sodomy. Eight years later the Commonwealth implemented "an even more radical proposition," distinguishing two separate "degrees" of murder, with only first-degree murder punishable by death. Id.

After Independence, some of the Commonwealth's leading statesmen argued that capital punishment should be abolished. Benjamin Rush, a renowned Philadelphia physician and one of the signers of the Declaration of Independence, "was the strongest voice for reform [and abolition] in the new nation." Id. In 1788 Pennsylvania Attorney General William Bradford also became a death penalty abolitionist. Negley K. Teeters, *Hang By The Neck": The Legal Use Of Scaffold And Noose, Gibbet, Stake, And Firing Squad From Colonial Times To The Present* (1967). While the death

penalty avoided abolition, the abolitionist movement succeeded in narrowing its use, and in other reforms, such as the abolition of public executions. Id.

In short, Pennsylvania "was a model of the moderate purposes of law reform" regarding capital punishment, and led the new nation in narrowing the application of the death penalty. Hall, supra, at 170; see also Lawrence M. Friedman, *Crime and Punishment*

*In American History*, at 73 (1993) (also describing Pennsylvania's "leading role" in limiting capital punishment).

In Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937

(1982), our Supreme Court undertook an historical analysis of Article 1, Section 13, and decided that the death penalty *per se* is not "cruel punishment" under the Pennsylvania Constitution. The Court opined that Eighth Amendment protections were "coextensive" with those of Article 1, Section 13. Concurrently, the Court recognized that "...the Pennsylvania prohibition against

`cruel punishment,' like its federal counterpart's prohibition against `cruel and unusual punishment,' is not a static concept," and went on to quote Trop's "evolving standards" language. Id.,

454 A.2d at 967-968.

Zettlemoyer was decided in the context of an adult

defendant's claim that "imposition of the death penalty is

*inevitably* `cruel punishment' under Article 1, Section 13," Id.,

454 A.2d at 967 (emphasis added). In Commonwealth v. Means, 773

A.2d 143 (2000), our Supreme Court recently acknowledged that death penalty questions other than that posed in Zettlemoyer certainly might implicate the protections of Article 1, Section

13:

Contrary to the decision of the trial court, we do not find the statutory subsections at issue violative of the (Eighth Amendment). However, this does not end our analysis, we must now turn our attention to appellee's argument, and the trial court's conclusions, under the Pennsylvania Constitution....Appellee recognizes that in Commonwealth v Zettlemoyer (cite), after a thorough historical review, this Court rejected the argument that Article 1, Section 13 provided greater protection against the imposition of a sentence of death than the Eighth Amendment. Appellee distinguishes Zettlemoyer, arguing that the question in that case focused on whether death is per se cruel and unusual punishment. In this case, appellee asserts, it is not the penalty itself, but rather the decision-making process by which the jury chooses to impose death that is at issue. Appellee is correct; Zettlemoyer is distinguishable on that basis "

Id., 773 A.2d at 150-51.

Thus the Means court determined that a question concerning

victim impact testimony was sufficiently "distinguishable" from Zettlemoyer's analysis that a separate analysis of Article 1,

Section 13 was required.

Pursuant to Means, and even without considering the impact of

"evolving standards," the question of whether a severely mentally ill offender can be executed consistent with Pennsylvania's prohibition against "cruel punishment" also is wholly "distinguishable" from Zettlemoyer's inquiry concerning an adult.

The question is distinct, far more narrow, and of at least equal gravity as Means' question concerning victim impact testimony.

In pronouncing that Article 1, Section 13's protections are "co-extensive" with the Eighth Amendment, the Zettlemoyer Court did not predict the United States Supreme Court's decision in Harmelin v. Michigan, 501 U.S. 957 (1991), in which the Court explicitly held that the "cruel *and unusual*" language of the Eighth Amendment demanded a result vastly different, and more punitive, than would the word "cruel" standing alone. Given Harmelin's analysis, it is inescapable that Article 1, Section

13's prohibition of "cruel punishments" constricts the state's power in a way that the Eighth Amendment does not.

Thus, even assuming *arguendo* that Zettlemoyer's analysis of Article 1, Section 13 was impeccable, Means, Harmelin, *and* our

"evolving standards of decency" each would require independent analysis of our state Constitution in this case, and a result different from that obtained in Zettlemoyer. If the federal

Constitution did not prohibit the execution of severely mentally ill offenders, our state Constitution would.3

3 While no state court has yet reached the above conclusion, individual and notable state court Justices have. See, Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting); State v. Nelson, 803 A.2d 1, 47 (N.J. 2002) (Zazzali, J., concurring) (Atkins applies to severely mentally ill defendants as a matter of state constitutional law).

# INTERNATIONAL LAW PROHIBITS THE EXECUTION OF MENTALLY ILL OFFENDERS

1. **Introduction**

Subjecting Mr. Jones to a capital sentence, in addition to violating the Eighth Amendment as discussed above, would be in violation of principles of international law that this Court is bound to enforce. The exemption of the severely mentally ill from capital punishment is a recognized norm of customary international law which, having acquired the character of *jus cogens*, may not be deviated from under any circumstance.

Lastly, the execution of a severely mentally ill offender is forbidden by Article 6 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), the provisions of which the United States is bound to respect as a result of its ratification of the treaty in 1992.

In the last few years the United States Supreme Court has noted the importance of international treaties, laws, and opinions in its decision-making process. See, Atkins, supra

(execution of mentally retarded offenders “overwhelmingly disapproved” within the international community); Lawrence v.

Texas, 123 S.Ct. 2472 (2003) (international treaty and opinion cited in condemnation of sodomy laws). The United States Supreme Court has relied on international law to provide an

objective set of standards for construing and interpreting the United States Constitution. Thus, for the last 50 years the United States Supreme Court has cited international law and opinion when it has had occasion to analyze the Eighth Amendment. See, Thompson v. Oklahoma, 487 U.S. 815, 830-831

(1988) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”); Enmund v.

Florida, 458 U.S. 782, 796 n.22 (1982) (death penalty for

“felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”); Coker v.

Georgia, 433 U.S. 584, 596 n. 10 (1977) (the court looked to

“the climate of international opinion concerning the acceptability of a particular punishment,” specifically the death penalty for rape where death did not result); Trop v.

Dulles, 356 U.S. 86, 102 (1958) (the Court looked to “[t]he civilized nations of the world [which were] in virtual unanimity that statelessness is not to be imposed as punishment for crime.”).

# Treaty Obligations and the International Covenant on Civil and Political Rights

International law, treaties and opinion dictate that persons with mental illness should not be subject to capital sentencing. Thus, since state and Federal Courts are bound to enforce international treaties under the Supremacy Clause, subjecting Mr. Jones to the death penalty would be in violation of international law. From the founding of this nation to the present day, international laws and treaties have been held enforceable in state and federal courts. Chisolm v. Georgia, 2 U.S. (2 dall.) 419, 474 (1973) (Jay, C.J.); The Nereide, 13 U.S.

(9 Cranch) 388, 422 (1815); The Paquete Habana, 175 U.S. 677,

700 (1900); Filartiga v. Pena Irala, 630 F.2d 876 (2d Cir.

1980). Indeed, under Supremacy Clause jurisprudence, international treaty obligations supersede any inconsistent state laws. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Missouri v. Holland, 252 U.S. 416 (1920); Antoine v. Washington,

420 U.S. 194, 201 (1975).

The United States ratified the International Covenant on Civil and Political Rights (hereinafter the ICCPR) in 1992. The ICCPR specifically forbids arbitrary use of the death penalty: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” (999 U.N.T.S. 171 (1966), art. 6). Article 7 of the ICCPR provides, in relevant part: “No one shall be subjected

to torture or to cruel, inhuman or degrading treatment or punishment.” Id. The interpretation and application of the ICCPR falls within the jurisdiction of the United Nations Human Rights Committee (hereinafter HRC), a panel of experts established under the ICCPR. United States courts have recognized that decisions of the HRC should be given great deference when interpreting the provisions of the ICCPR. See,

e.g., United States v. Duarte-Acero, 208 F.3d 1282, 1287 (11th

Cir. 2000) (rejecting double jeopardy claim under the ICCPR based on Human Rights Committee rulings); Maria v. McElroy, 68

1. Supp. 2d 206, 232 (E.D.N.Y. 1999) (“The Human Rights Committee’s General Comments and decisions in individual cases are recognized as a major source for interpretation of the ICCPR.”); cf. State v. Carpenter, 69 S.W. 3d 568, 578 (Tenn.

2001) (stating that the ICCPR is the “supreme law of the land”).

The HRC has interpreted this treaty to forbid the execution of persons with severe mental illness. Interpreting the ban on cruel, inhuman or degrading punishment enshrined under ICCPR Article 7, the HRC has declared: “When the death penalty is applied by a State party for the most serious crimes  it must be carried out in such a way as to cause the least possible physical and mental suffering.” Human Rights Committee, General Comment 20, para. 6 (Forty-fourth session, 1992) (reprinted in Compilation of General Comments and General Recommendations

Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 30 (1994)). In the case of Francis v. Jamaica, Communication No. 606/1994 U.N.H.R.C., on 12 August 1994, the United Nations Human Rights Committee held that the execution of an individual who was mentally disturbed, but examined and found not to be “insane,” amounted in that case to cruel, inhuman or degrading treatment in violation of Article 7 of the ICCPR. The Committee is of the view that arbitrary does not simply mean “against the law” but “must be interpreted more broadly to include elements of inappropriateness [and] injustice.” Van Alphen v. the

Netherlands, (No. 305/1988), U.N. Doc. A/45/40, Vol. II, p. 108,

§5.8.

While the United States issued a reservation to Article Six4, the HRC has concluded that the reservation is invalid. Eleven other signatory nations filed objections to the reservations of the United States; specifically Sweden, in its objection, points out that such reservations, in attempting to modify or exclude application of fundamental provisions of the ICCPR by invoking general principles of national law, undermine the basis of international treaty law.

4 The United States of America’s reservations read in pertinent part “(2) [t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment.”

# Customary International Law

The prohibition of the execution of the severely mentally ill has also long been entrenched as a customary norm of international humanitarian law, to which all states are bound regardless of whether they have ratified a treaty to that effect. Customary norms are created when two elements are present: (1) state practice consistent with the norm and (2) *opinio juris*, that is, an *official* acceptance of the norm by the international community. As to the matter of consistent state practice, the U.S. Supreme Court has acknowledged the fact that “for centuries no jurisdiction has countenanced the execution of the insane.” Ford v. Wainwright, 477 U.S. at 401. Professors

Geoffrey Hazard and David Louisell authoritatively state that “[b]y the law of all common law jurisdictions, and, as far as we know, the law of all civilised nations, a person who is insane cannot be punished.” Geoffrey C. Hazard, Jr. & David W. Louisell, *Death the State, and the Insane*, 9 UCLA L.Rev. 381,

381 (1962). Having exhaustively scrutinised relevant U.N. documents, William A. Schabas discerns that “[t]here is in fact no empirical evidence that any state actually executes the insane, even though many have no legislative provisions to this effect.” William A. Schabas, “International Norms on Execution of the Insane and the Mentally Retarded,” 4 *Criminal Law Forum* 95, 113-114 (1993). By common consensus, it is evident that

state practice *consistently* and universally proscribes the execution of the severely mentally ill.

Having established that the prohibition is a matter of consistent state practice, a satisfaction of the requirement of *opinio juris* to achieve customary status may be readily inferred from the U.N. Economic and Social Council Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, U.N. ESCOR, Supp. No. 1, at 33,

U.N. Doc. E/1984/92 (1984) (hereinafter the U.N. Safeguards).

The Safeguards, adopted in 1984 by U.N. General Assembly resolution, received almost unanimous support from U.N. state party members and forbid the application of the death penalty “on persons who have become insane.” *Id*.

It is well recognised that “declaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be ... and if adopted by consensus or virtual unanimity [such declaratory pronouncements] are given substantial weight.” Restatement (Third) of the Foreign Relations Law of the United States, § 103 cmt. c. This prohibition was expanded in 1989 by the Economic and Social Council, in its clarification of Safeguard 3, to not only preclude the execution of the “insane,” but also to eliminate the death penalty for “persons suffering from mental retardation or *extremely limited mental competence*, whether at the stage of

sentence or execution.” United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, ECOSOC Res. 1989/64, U.N. Doc. E/1989/91 (1989), at 51, ¶ 1(d) In

1996, the Council reiterated its call for full implementation of the Safeguards, in part because of concerns for the lack of protection from the death penalty of those who are severely mentally disabled. United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1996/15, U.N. Doc. E/CN.15/1996/15 (23 July 1996).

Moreover, since 1997, the United Nations Human Rights Commission [hereinafter the Commission], a United Nations charter body made up of representatives from 53 countries, has repeatedly called on countries that maintain the death penalty to observe the U.N. Safeguards. U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/1997/12 (1997); U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/1998/8 (1998). Since 1999, not only has the Commission’s call for observance of the safeguards been persistently reiterated, but the resolution has been adopted with additional language, expanding the scope of the prohibition, urging retentionist countries “[n]ot to impose the death penalty on a person suffering from *any form of mental*

*disorder* or to execute any such person.” U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc.

E/CN.4/1999/61 (1999); U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/2000/65 (2000); U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/2001/68 (2001); U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/2002/77 (2002);

U.N. Commission on Human Rights, *Question of the Death Penalty*,

U.N. Doc. E/CN.4/2003/67 (2003); U.N. Commission on Human Rights, *Question of the Death Penalty*, U.N. Doc. E/CN.4/2004/67 (2004). In concurrence, the European Union has consistently asserted that the execution of persons “suffering from any form of mental disorder . . . [is] contrary to internationally recognized human rights norms and neglect[s] the dignity and worth of the human person.” *EU Memorandum on the Death Penalty* (Feb. 25, 2000), *available at* <http://www.eurunion.org/> legislat/DeathPenalty/eumemorandum.htm (visited on Sept. 10, 2004), at 4.

The prohibition on executing the severely mentally ill is an established and universally recognized customary norm of international law. More importantly, it is evident that the prohibition is not so narrowly tailored as to only exempt “the insane” from execution but, more broadly, the prohibition extends to those of extremely limited mental competence. As

such, regardless of any finding of insanity under Ford,

international standards should inform a reinterpretation and expansion of the Eighth Amendment’s prohibition of the execution of the “insane” to incorporate the broader class of individuals who suffer from severe mental illness, particularly those, like Mr. Jones, who suffer from a chronic psychotic disorder.

* 1. ***Jus cogens***

In addition, as a customary norm of international humanitarian law, the prohibition on the execution of the severely mentally ill has acquired the character of *jus cogens*, a peremptory norm of general international law accepted and recognized by the international community of states as a binding obligation from which *no derogation* is permitted, regardless of the circumstance.

Article 53 of The Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331 [hereinafter the Vienna Convention], relates the primacy of *jus cogens*:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The contention that the prohibition of the execution of the severely mentally ill has acquired such character is supported

by the International Law Commission [hereinafter the ILC]. The ILC has tendered the view that the prohibition of any human rights violation may legitimately be regarded as *jus cogens.*

International Law Commission Commentary on Article 64 of the Vienna Convention on the Law of Treaties 1969, Y.B.I.L.C., 1966, II, pp. 247-248. “State conduct that is regarded as so fundamentally unacceptable by international society as to be contrary to rules of *jus cogens* and obligations *erga omnes* can be seen to  overlap substantially with the catalogue of acts prohibited by the customary international law of human rights.” Harris David J., *Cases and Materials on International Law*, London: Sweet & Maxwell, 1998, p. 837. In short, “no derogation is permitted” by the United States from the international prohibition on executing the severely mentally ill, by virtue of its status as a peremptory norm of international humanitarian law possessing the character of *jus cogens*. It is worthy of note that the United States courts have consistently recognized the primacy of *jus cogens* norms. E.g., Siderman de Blake v.

Republic of Argentina, 965 F.2d 699, 714 (9th Cir.1992);

Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir.1980);

Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939-40 (D.C. Cir. 1988). The United States Supreme Court has recently reaffirmed that the breach of an obligatory

international norm is actionable under federal law. See Sosa v.

Alvarez-Machain, 124 S. Ct. 2739, 2766-68 (2004).

Historically, execution of the severely mentally ill has long been recognised as inherently “inappropriate” and “unjust.” For illustration, we need only turn to English common law. As far back as 1797, Edward Coke, one of the most eminent jurists in English legal history, recognised that “the execution of the offender is for example  but so it is not when a mad man is executed, but should be a miserable spectacle, both *against the law*, and of *extreme inhumanity and cruelty*, and can be no example to others.” Edward Coke, *The Third Part of the Institutes of the Laws of England* 6 (1797).

In short, the execution of a severely mentally ill offender is a direct violation of Article 6, § 1 of the ICCPR, and thus a breach of international law. The United States ratified this international treaty in 1992, and is therefore bound to respect both its provisions and, more specifically, Article 6, § 1.

Once ratified, a treaty is binding law under the Supremacy Clause.

The United States has ratified the ICCPR, thereby recognizing the binding nature of its provisions. These international rules – the prohibitions against cruel, inhuman or arbitrary punishments – are a part of United States law, as set forth in U.S. treaty obligations. As such, they are directly

enforceable in U.S. courts and are available as an alternate basis for granting the petition for habeas corpus relief.

Treaties create binding obligations on the United States, and the courts must give full effect to these rules. Mr. Jones’s execution would be unlawful.

Wherefore, based upon all of the above arguments, the Eighth and Fourteenth Amendments to the United States Constitution, the parallel clauses of the Pennsylvania Constitution, and international law, Khalid Jones respectfully requests that the Commonwealth be barred from seeking the death penalty in the instant case.

Respectfully Submitted,

Marc Bookman

Karl Schwartz Assistant Defenders