CHAPTER 6
Reserving Capital Punishment for the Most Heinous Offenses and Most Culpable Offenders

Seven mental health experts testified in post-conviction proceedings on the question of whether Warren Hill's intellectual disability rendered him ineligible for capital punishment. The four experts put on the stand by Hill said that in their opinion he was intellectually disabled; the three experts for the state testified that he was not. The state court in Georgia determined that Hill had proved his intellectual disability by a preponderance of the evidence, but that he did not meet Georgia's exceedingly high burden to prove his intellectual disability beyond a reasonable doubt – the highest quantum of proof available in American law (although the court noted that the retardation issue "is an exceptionally close one under the reasonable doubt standard"). Georgia is the only capital punishment jurisdiction to require a defendant to meet such a burden in showing that she or he has intellectual disability and thus should not be executed. Because Hill had failed to satisfy the statutory requirement of proof beyond a reasonable doubt, the Georgia state court denied him relief.

Subsequently, all three of the experts for the state who originally testified that Hill was not mentally disabled repudiated their previous testimony and provided signed affidavits stating that they now considered Hill to have intellectual disability. The Georgia state court rejected his claim again, finding that its previous rejection of the intellectual disability claim was *res judicata* (already decided). In October 2013, the U.S. Supreme Court rejected Hill's petition for a new hearing to demonstrate evidence of his intellectual disability. As of the publication of this report, Hill's execution is on hold while the Georgia Supreme Court reviews his challenge to a state law that keeps secret the identities of those who make and supply Georgia's drugs for lethal injection.

Recommendation 20. Implementation of the Eighth Amendment's prohibition against execution of individuals who have intellectual disability should be improved.[1]

a) The defendant should be required to prove intellectual disability by a preponderance of the evidence.

In *Atkins v. Virginia*, the U.S. Supreme Court found sufficient evidence of a national consensus against the execution of persons with intellectual disability to justify a categorical rule prohibiting such executions.[2] However, the Court has not yet addressed the specific standard of proof that a defendant must meet to prove intellectual disability.[3]

The Committee believes that a defendant should only be required to prove intellectual disability by a preponderance of the evidence, rather than clear and convincing evidence or proof beyond a reasonable doubt. The issue is similar to the question presented in *Cooper v. Oklahoma*, where the U.S. Supreme Court held that it violated due process for a state to require a defendant to prove his or her incompetence to stand trial by "clear and convincing evidence."[4] The Court found that because the issue of competence to stand trial is protected by the U.S. Constitution, the defendant need only prove his or her incompetence by a "preponderance of the evidence." This is the burden of persuasion that most states have placed on defendants who must prove that they have intellectual disability.[5] However, Colorado, Delaware and Florida all require a defendant to prove the issue of intellectual disability by "clear and convincing evidence"[6] and Georgia requires proof "beyond a

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1 The term "mental retardation" is the term utilized by the U.S. Supreme Court in its decisions. Some commentators have now taken the position that the term "intellectual development disability" or simply "intellectual disability" is more appropriate. The Committee has chosen to utilize the term "intellectual disability" except where the use of the term "mental retardation" is necessary to explain U.S. Supreme Court precedent or for clarity.

2 *Atkins v. Virginia*, 536 U.S. 304 (2002).

3 On October 21, 2013, the U.S. Supreme Court granted certiorari in *Hall v. Florida*, 109 So. 3d 704 (Fla. 2012), *cert. granted*, 82 U.S.L.W. 3233 (U.S. Oct. 21, 2013) (No. 12-10882), concerning the legal standard for determining whether a person is too intellectually disabled to be executed for a murder. Florida law prohibits anyone with an IQ of 70 or higher from being classified as intellectually disabled, regardless of other evidence to the contrary. Hall's scores on three IQ tests ranged from 71 to 80, so he was deemed eligible for execution. An opinion in the case had not yet been issued at the time of publication of this report.

4 *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

5 *See* Ala. Code § 15-24-2 (2012); Cal. Penal Code § 1376(b)(1),(2) (West 2013); Neb. Rev. Stat. Ann. § 28-105.01 (West 2012).

6 Colo. Rev. Stat. § 18-1.3-1102 (2012); Del. Code Ann. tit. 11, § 4209(d)(3)(b)-(c) (2013); Fla. Stat. Ann. § 921.137 (West 2013).

reasonable doubt."[7] These elevated burdens of persuasion place an unconstitutional burden on defendants. In *Cooper*, the Court held that due to the importance of the constitutional interest at stake, an elevated burden of persuasion was unconstitutional. Based on the Court's reasoning in *Cooper*, the burden of persuasion for the issue of intellectual disability should similarly be limited to a "preponderance of the evidence."

b) There should be a rebuttable presumption that a person with an intelligence quotient ("IQ") below 75 has intellectual disability and therefore is ineligible for the death penalty. The prosecution should be permitted to rebut the presumption by clear and convincing evidence. An IQ above 70 can be considered in determining whether the defendant has demonstrated intellectual disability by a preponderance of the evidence, but should not be a bar to introducing evidence of intellectual disability.

In *Atkins*, the U.S. Supreme Court relied upon the clinically accepted definitions of mental retardation used by the leading organizations in the field, the American Association on Mental Retardation and the American Psychological Association. The virtually identical definitions require a showing of significantly subaverage intellectual functioning, accompanied by deficits in adaptive behavior and onset before age 18. Most states have used these definitions; some states, however, have embraced definitions of mental retardation that are fundamentally at odds with clinical consensus.

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For example, the first prong (significantly subaverage intellectual functioning) is normally determined by an IQ test and is understood as a score of two standard deviations below the mean or an IQ score of approximately 70. Importantly, given the standard error or measurement that is part of any test, it is universally accepted in the clinical community that an IQ score as high as 75 can evidence significantly subaverage intellectual functioning.[8]

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[7] Ga. Code Ann. § 17-7-131 (2012); *see Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc) (holding that the Georgia standard requiring proof of intellectual disability beyond a reasonable doubt was not an unreasonable application of federal law).

[8] Definitions of intellectual disability and mental illness should take into account scientifically-validated evolutions in these terms. For example, psychological research has identified a substantial and sustained increase in IQ scores over time, known as the Flynn-effect, requiring IQ testing to be re-standardized periodically over time. *See generally* Geraldine W. Young, *A More Intelligent and Just* Atkins*: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability,* 65 Vand. L. Rev. 615 (2012).

Some states, however, have rejected this scientific consensus and have adopted strict IQ cutoffs.[9] Some states have adopted a rebuttable presumption that the defendant has an intellectual disability based upon scores on standardized intelligence tests falling below a certain numerical threshold.[10] Other states have adopted a rebuttal presumption that the defendant does not have an intellectual disability if the score exceeds a numerical threshold.[11]

Florida for example, has adopted a strict 70 cutoff. If the person alleging they are intellectually disabled does not have an IQ score of 70 or below, then the claim fails as a matter of law even if all examining experts conclude, using the clinical definition, that the person is in fact intellectually disabled. Four other states similarly impose an IQ cutoff.[12] In other states, such as Arkansas, an IQ of 65 or below creates a rebuttable presumption of intellectual disability.[13] Other states use a specific score, usually 65 or 70, only as proof that the defendant has "significant subaverage intellectual functioning."[14] South Dakota's statute finds an IQ exceeding 70 to be presumptive evidence that the defendant does not have significant subaverage intellectual functioning.[15] In *Atkins*, the U.S. Supreme Court noted that "an IQ between 70 and 75 or lower [] is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."[16] The American Association on Intellectual and Developmental Disabilities ("AAIDD") currently includes an IQ of 70-75 or below in its definition of intellectual disability.[17]

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[9] Research has revealed that there is a measurement error rate of approximately 15 to 16 points. *See id.* at 621 n.34 (noting that Wechsler IQ and Stanford-Binet IQ have used 15 or 16 points as the standard deviation from the mean). Accordingly, definitions of intellectual disability and mental illness should take these error rates into account when ascribing numerical limits to those definitions.

[10] See Ark. Code Ann. § 5-4-618 (2012); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2013); Neb. Rev. Stat. Ann. 28-105.01 (West 2012).

[11] Idaho Code Ann. § 19-2515A (2012); Ky. Rev. Stat. Ann. § 532.140 (West 2013); N.C. Gen. Stat. Ann. § 15A–2005 (2013); Okla. Stat. Ann. tit. 21, § 701.10b (West 2013); S.D. Codified Laws § 23A-27A-26.2 (2013); Tenn. Code Ann. § 39-13-203 (2013).

[12] Brief of The American Association on Intellectual and Developmental Disabilities, et al. as Amici Curiae Supporting Petitioner, at 23 n.29, *Hall v. Florida*, No. 12-10882 (Dec. 23, 2013) ("There appear to be, at most, five States (Florida, Alabama, Virginia, Idaho, and Kentucky) that impose an inflexible ceiling at an IQ score of 70.").

[13] Ark. Code Ann. § 5-4-618 (2012).

[14] *See also* N.C. Gen. Stat. Ann. §15A-2005 (2013); Okla. Stat. Ann. tit. 21, § 701.10b (West 2013); Tenn. Code Ann. § 39-13-203 (2013).

[15] S.D. Codified Laws § 23A-27A-26.1 (2013).

[16] *Atkins*, 536 U.S. at 309 n.5.

[17] American Association of Intellectual and Developmental Disabilities, Definition of Intellectual Disability, http://aaidd.org/intellectual-disability/definition.

Given the stakes in a death penalty case, states should allow for a rebuttable presumption that a person with an IQ below 75 has intellectual disability and is therefore ineligible for the death penalty. This would help to ensure that all defendants with intellectual disability are identified and afforded the constitutional protections associated with that diagnosis. It will also control for potential errors or deviations in testing and will allow for the fact that a single subject, tested multiple times, may receive a range of scores. The prosecution should be permitted to rebut the presumption with clear and convincing evidence. This approach ensures that standardized intelligence tests are given appropriate weight, but also allows the prosecution to rebut such evidence.

In addition, in order to ensure that intellectual disability issues are properly identified and legally assessed, such claims should be permitted by defendants as well as "next friends," at least in state post-conviction, federal habeas and clemency proceedings. Research reflects that many death row inmates who waive their appeal rights – so-called death penalty "volunteers" – have mental illness, although many of these issues never come to light. Permitting "next friend" appeals will permit courts to hear and adjudicate these issues.

c) Diagnostic tests requiring documentation of lack of adaptive functioning by age 18 should be excused for good cause.

A plurality of states require that intellectual disability must have manifested during the development period, and at least by the age of 18. At least two states (Utah and Indiana) increase the age of onset to 22 years of age. This component often must be proved by specific documentation. Colorado allows for the requirement of documentation to be excused by the court upon a finding that extraordinary circumstances exist.[18] However, in the scientific field and increasingly in court decisions, it is commonly accepted that adaptive behavior can be assessed retrospectively, based on the subject's recollections (although this approach gains credibility where corroborated by contemporaneous records).

Indiana requires that intellectual disability be documented in a court-ordered evaluative report before the age of 22.[19] This proof requirement places an impossible burden on defendants who, through no fault of their own, were not evaluated as children. Proving the age-of-onset component is often difficult for many defendants whose school and medical records either cannot easily be found or never existed in the first place. The AAIDD has identified a number of reasons that might explain the lack of an earlier, official diagnosis of intellectual disability, including:

- the individual was excluded from a full school experience;

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18 Colo. Rev. Stat. § 18-1.3-1101(2) (2012).

19 Ind. Code Ann § 35-36-9-2 (West 2013).

- the person's age precluded his or her involvement in specialized services such as special education programs;
- the person was given no diagnosis or a different diagnosis for 'political purposes,' such as protection from stigma or teasing, avoidance of assertions of discrimination, or relating to conclusions about the potential benefits or dangers of a particular diagnosis;
- the school's concern about over-representation for data-reporting purposes of specific diagnostic groups within their student population;
- parental concerns about labels;
- contextual school-based issues such as availability or non-availability of services and potential funding streams at that time; and
- the lack of referral into the diagnostic process due to cultural and linguistic differences.[20]

In light of these factors, lack of documentation of impairment of adaptive functioning by age 18 should be excused for good cause in order to eliminate unreasonable burdens on defendants who have intellectual disability, but lack the required documentation. In such cases, courts should consider any reasonable evidence of impairment irrespective of age of onset.

d) If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for *de novo* determination by the jury. The court's pretrial determination should not be communicated to the jury.

States have established different procedures for raising and deciding intellectual disability issues. Most states address this question in a pretrial hearing process. Pretrial resolution prevents states from engaging in an unnecessary capital trial if the defendant is found to have intellectual disability before the trial begins.[21] However, some states, such as Louisiana, require the jury to determine the issue of intellectual disability during capital sentencing.[22] Several states use a bifurcated approach. In North Carolina, if the court finds the defendant

[20] John H. Blume, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J.L & Pub. Pol'y 690, 730 (2009).

[21] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 12 (2003).

[22] La. Code Crim. Proc. Ann. art. 905.5.1 (2013).

does not have intellectual disability, the defendant may then present evidence of intellectual disability at trial.[23] A similar bifurcated approach was approved by the U.S. Supreme Court in the context of determining the validity of forced confessions.[24]

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Whether or not the determination of intellectual disability can be left solely to the judge was called into question by *Arizona v. Ring*,[25] in which the Supreme Court held that the Sixth Amendment right to a jury required that Arizona's aggravating factors for the death penalty be determined by the jury. The Court held that because the aggravating factors were "the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury."[26] It has been suggested that the issue of intellectual disability could be the "functional equivalent" of an element of a crime, and as such, the Sixth Amendment would allow the defendant to demand a determination by the jury.[27]

If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for *de novo* determination by the jury. The court's pretrial determination should not be communicated to the jury. This approach would preserve the economic resources of the state by preventing a capital trial in some instances, but also would provide constitutional protections to those defendants who are not found to have intellectual disability in a pretrial proceeding.

Recommendation 21. The death penalty should not be applied to persons who, at the time of the offense, suffered from severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.

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23 N.C. Gen. Stat. Ann. § 15A-2005 (2013).

24 *Jackson v. Denno,* 378 U.S. 368 (1964).

25 536 U.S. 584 (2002).

26 *Id.* at 609.

27 Ellis, *supra* note 21, at 15.

Two years after *Atkins*, in *Roper v. Simmons*,[28] the U.S. Supreme Court declared unconstitutional the execution of juveniles who commit crimes while under age eighteen. The Court rooted both holdings in the death penalty's retributive purpose and its diminished deterrent effect on juvenile offenders and offenders with intellectual disability, who generally possess lesser capacity. In *Atkins*, the Court reasoned:

> The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. . . . Thus, executing the intellectually disabled will not measurably further the goal of deterrence.[29]

In *Roper*, the Court followed the *Atkins* Court's reasoning closely. The Court stated in *Roper* that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders," for whom the death penalty should be reserved. Those differences include a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions," "more vulnerab[ility] or suscepti[bility] to negative influences and outside pressures, including peer pressure" and incompletely developed character.[30] Accordingly, the Court concluded that "[t]he 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."[31]

Although the Court has yet to declare unconstitutional the execution of offenders with serious mental illness, the same rationale underpinning the Court's rulings in *Atkins* and *Roper* would apply in such cases.[32] *Mental Health America* estimates that 5-10 percent of all death

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28 543 U.S. 551 (2005).

29 *Atkins*, 536 U.S. at 320.

30 *Roper*, 543 U.S. at 569.

31 *Id.* at 599.

32 Bruce J. Winick, The Supreme Court's Emerging Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier 7-9, 40 (2008), at http://www.deathpenaltyinfo.org/files/umjournal08.pdf (reasoning that like intellectual disability and juvenile status, "[s]evere mental illness at the time of the offense may significantly diminish the offender's blameworthiness and amenability to deterrence," and therefore although a categorical disqualification from capital punishment may not be appropriate, an individualized determination of whether a defendant lacks sufficient culpability and deterability to allow

row inmates have severe mental illness.[33] According to a 2002 Gallup Poll, 75 percent of Americans surveyed opposed the death penalty for mentally ill defendants. Likewise, a 2009 California poll revealed that 64 percent of respondents opposed sentencing severely mentally ill defendants to death.[34] The American Bar Association, the American Psychiatric Association, the American Psychological Association and the National Association of Mental Illness all support prohibition of the death penalty for severely mentally ill offenders.[35] In 2007, the Indiana "Bowser Commission" recommended that the state exempt persons with severe mental illness from the death penalty.[36] In 2013, the Joint Task Force to Review the Administration of Ohio's Death Penalty, created by the Ohio Supreme Court and the Ohio Bar Association, recommended that a person suffering from "serious mental illness" at the time of the offense should not be eligible for the death penalty.[37]

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capital punishment is appropriate); *see generally* Helen Shin, *Is the Death of the Death Penalty Near? The Impact of Atkins and Roper on the Failure of Capital Punishment for Mentally Ill Defendants*, 76 Fordham L. Rev. 465 (2007) (arguing that there is a growing national and international consensus against subjecting mentally ill defendants to capital punishment).

33 *See* Mental Health America, Position Statement 54: Death Penalty and People With Mental Illness, at http://www.nmha.org/go/position-statements/54.

34 *See* Press Release, Univ. of Calif. Santa Cruz, New poll by UCSC professor reveals declining support for the death penalty (Sept. 1, 2009).

35 *See* American Bar Association, Recommendation 122A (Aug. 2006), at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf (as supported by the American Psychiatric Association and American Psychological Association). However, the Indiana Supreme Court found that the execution of a prisoner who was mentally ill at the time of the offense was not cruel and unusual punishment under the Indiana Constitution and noted that the U.S. Supreme Court has never included mentally ill murder defendants in the same protected category as intellectually disabled murder defendants. *See Matheney v. State*, 833 N.E. 2d 454 (Ind. 2005).

36 Indiana Legislative Services Agency, Final Report of the Bowser Commission 3 (Nov. 2007), at http://www.in.gov/legislative/interim/committee/reports/BCOMAB1.pdf.

37 Alan Johnson, *Group Wants to Exclude Severely Mentally Ill from Death Penalty*, Columbus Dispatch, Sept. 27, 2013.

The Committee recommends that the death penalty not be applied to persons who, at the time of the offense, had severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.

a) A "significant impairment" at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial.

Prior to its prospective abolition of the death penalty in 2012, Connecticut was the sole death penalty jurisdiction to adopt legislation regarding mentally ill offenders. Connecticut law excluded from death eligibility (in addition to minors and persons with intellectual disability) defendants whose mental capacity or ability to conform their conduct to the requirements of law was significantly impaired, but not so impaired in either case to constitute a defense to prosecution.[38] Although Connecticut is the only jurisdiction in the United States to have adopted such a mandate, other state legislatures have considered (but not passed) similar legislative proposals, including Kentucky, North Carolina, Indiana, and Tennessee.[39]

For example, the North Carolina legislature considered a proposal that persons having a "severe mental disability" at the time of the offense be excluded from death eligibility. Under this proposal, mental disabilities manifested primarily by repeated criminal conduct or attributable to the acute effects of alcohol or other drugs would not, standing alone, constitute a severe mental disability. The North Carolina proposal provides for a pretrial hearing, on motion by the defendant (with supporting affidavits), as to whether the defendant had a severe mental disability at the time of the commission of the offense. The burden in this hearing is upon the defendant to prove, by clear and convincing evidence, such a severe mental disability. If a trier of fact does not find in the pretrial hearing that the defendant had a severe mental disability at the time of the offense, then the defendant may introduce evidence regarding such disability during the sentencing hearing and such evidence may be considered by the jury as a special issue prior to the consideration of aggravating or mitigating factors during the penalty phase.

The Committee recommends that, consistent with the North Carolina proposal, a "significant impairment" at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial. Given the nuances of the determinations that

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38 Conn. Gen. Stat. 53a-46a(h)(3) (repealed 2012).

39 *See* Kentucky H.B. 145, 12 Reg. Sess. (Jan. 3, 2012) and H.B. 446, 06 Reg. Sess. (Mar. 20, 2006) (providing for exclusion of defendants with severe mental disorders at the time of the offense from the death penalty); Indiana S.B. 22, 116th Gen. Assem., 2nd Reg. Sess. (Jul. 1, 2010), North Carolina H.B. 137 and S.B. 309, 2009-2010 Reg. Sess., Tennessee H.B. 2064 and S.B. 1692, 107th Gen. Assem. (2011-2012) (providing that persons with severe and persistent mental illness (at the time of the murder) cannot be executed, but may receive life in prison without parole).

would need to be made to determine significant impairment at the time of the offense, the Committee recommends that all death penalty jurisdictions afford the defendant this separate hearing mechanism.

b) A "significant impairment" at the time of the offense should mean any significant impairment, whether or not such impairment was due to voluntary action (such as voluntary intoxication or drug use or an affirmative decision not to self-medicate).

Any determination of mental capacity should not be undermined by the fact that the offender voluntarily used alcohol or drugs, or failed to take medication, resulting in such impairment.[40] So long as the offender had diminished capacity at the time of the offense, their moral culpability may be sufficiently mitigated to be considered a "significant impairment" and therefore to warrant application of the exclusion. Other organizations, such as the ABA, recommend that 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." Both the ABA and the Committee's recommendations have in common a fact-specific approach. The Committee recognizes that a single instance of severe voluntary alcoholism or failure to take anti-psychosis medications, for example, is a voluntary act that could result in the death of another and, while punishment may be appropriate, death may not be the appropriate punishment.

Recommendation 22. A defendant who shows reckless indifference but does not personally kill, attempt to kill, or intend that a killing take place should not be eligible for capital punishment. States should exclude from death eligibility those who were convicted under a felony murder theory alone.

Felony murder is a strict liability doctrine that relieves the prosecution of its burden of proving that the defendant had a culpable mental state with respect to the death of the victim. In order to obtain a felony murder conviction, the prosecution need only prove that the defendant had the mental state required for the underlying felony.

Using a felony murder theory, the prosecution may achieve a murder conviction if it establishes only two elements: (1) that a death occurred (2) during the course of a felony in which the defendant participated.[41] Although some jurisdictions may impose some

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[40] *See* Zachary D. Torry & Kenneth J. Weiss, *Medication Noncompliance and Criminal Responsibility: Is the Insanity Defense Legitimate?*, 40 J. Psychiatry & Law 219 (2012) (exploring the complexities of assigning criminal responsibility for the noncompliant psychiatric offender).

[41] Erwin S. Barbre, Annotation, *What Constitutes Termination of Felony for Purpose of Felony-Murder Rule*, 58 A.L.R.3d 851, § 2 (1974) ("It has been said that the primary function of the [felony murder] doctrine is to relieve the prosecution of the necessity of proving, and the jury of the necessity of finding, actual malice on the part of the defendant in the commission of the homicide...").

additional technical requirements that limit the felony murder rule's application, the doctrine remains one of strict liability primarily requiring proof of only these two elements. In most jurisdictions, these elements eliminate the bare necessity of the prosecution proving that the defendant caused the death.

The felony murder theory has been much criticized because it circumvents the typical *mens rea* (state of mind) and causation requirements for criminal culpability, even supporting the convictions of defendants who did not kill, attempt to kill or intend a killing. Nevertheless, felony murder remains an extensively used method for obtaining murder convictions. Currently, the felony murder rule remains in full force in all but a handful of states. In the majority of states with the death penalty, a defendant may be sentenced to death even if she or he was not responsible for the murder.[42]

Even if the doctrine may be used to support a murder conviction, it does not follow that a felony murder defendant should be eligible for the death penalty. The U.S. Supreme Court first took on the issue of death eligibility for felony murder defendants in *Enmund v. Florida*. There, the Court held that the Eighth Amendment precludes imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed.[43] The Court clarified its *Enmund* decision five years later in *Tison v. Arizona*. In *Tison*, the Supreme Court held that the death penalty may constitutionally be imposed on felony murderers so long as two caveats are met: (1) the defendant was a major participant in the felony, and (2) the defendant manifested at least "reckless indifference to human life."[44] The "reckless indifference" standard permits imposition of capital punishment on defendants who did not kill, attempt to kill or intend that a killing occur.

In the majority of states with the death penalty, a defendant may be sentenced to death even if she or he was not responsible for the murder.

Death penalty eligibility criteria must narrow the range of first-degree murder convictions that are potentially subject to the death penalty. The felony murder rule undermines this goal. As one commentator explained:

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42 *See* Death Penalty Information Center, State by State Database (search by state in dropdown box), http://www.deathpenaltyinfo.org/state_by_state; *see also Enmund v. Florida*, 458 U.S. 782, 789-794 (1982) (describing various states' murder and capital punishment statutes' use of felony murder).

43 *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

44 *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

> The felony murder rule disregards the normal rules of criminal culpability and provides homicide liability equally for both the deliberate rapist/killer and the robber whose victim dies of a heart attack, as well as for the robber's accomplice who is absent from the scene of the crime.[45]

In some jurisdictions, the felony murder rule can make the defendant guilty of murder when a law enforcement officer or victim mistakenly kills a third person or an accomplice during the felony. The rule applies even when the felon extracts a promise from a co-defendant to hurt no one, but the co-defendant shoots the victim anyway. The rule equates the felon for whom a killing by a co-defendant was unforeseeable with the cold-blooded murderer.[46]

The felony murder rule also promotes other irrational results. Someone who purposely kills in anger, but has not committed an additional, underlying felony, might not face the death penalty, while another who had no intention whatsoever to kill but whose co-defendant does so accidentally during a felony may nevertheless face death. Yet the former scenario is surely more egregious than the latter in terms of moral culpability. A defendant whose reckless driving results in a death is not subject to the death penalty, but a felony murderer's recklessness could result in his execution. Moreover, where the murder is intentional, a non-triggerman may even be held vicariously liable and receive the death penalty if his or her co-defendant committed the murder in an especially heinous or cruel manner. Such distinctions are difficult to justify.

A small minority of states recognize the disproportionality of imposing the death penalty on a defendant who did not kill or otherwise aid or abet a killing. For example, Alabama's capital murder statute states that:

> A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense . . . unless the defendant is legally accountable for the murder.[47]

Similarly, Arkansas's capital murder statute states that:

> It is an affirmative defense to any prosecution . . . for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid in the homicidal act's commission.[48]

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45 Richard Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1115-16 (1990).

46 *See id.*

47 Ala. Code § 13A-5-40(c) (2012).

48 Ark. Code Ann. § 5-10-101(b) (2012).

Kansas's capital murder statute requires that all death eligible murders be "intentional and premeditated."[49] Further, the Kansas Supreme Court has clarified that the Kansas Death Penalty Act does not permit the imposition of the death penalty for the crime of felony murder; the crime of capital murder always requires an intentional and premeditated killing.[50] Although Virginia's capital murder statute does not restrict death eligibility in felony murders to the triggerman,[51] the Supreme Court of Virginia has held that only the triggerman is death eligible in a felony murder scenario.[52]

Other states have chosen to limit the felony murder aggravator rather than eliminate death eligibility for felony murder. Nebraska, Oklahoma and South Dakota have eliminated felony murder as an aggravator altogether. Wyoming requires that the defendant "killed another human being purposely and with premeditated malice" while engaged in the felony.[53]

The strict liability felony murder doctrine should not be used as an eligibility criterion for the death penalty. The death penalty must be reserved for the "worst of the worst," the most culpable of offenders. A mental state of "reckless disregard" should not be sufficient to merit the harshest of available penalties. To demonstrate the over-inclusiveness of the felony murder rule, it is possible for a defendant to have shown reckless indifference but not have killed, attempted to kill or intended that a killing take place. Thus, this Committee recommends that states exclude from death eligibility those who were convicted under a felony murder theory alone.

49 Kan. Stat. Ann. § 21-5401 (West 2012).

50 *State v. Scott*, 183 P.3d 801 (Kan. 2008).

51 Va. Code Ann. § 18.2-31 (2013).

52 *Harrison v. Commonwealth*, 257 S.E.2d 777 (Va. 1979).

53 Wyo. Stat. Ann. § 6-2-102(h)(xii) (2012).