Recommendation

The diminished culpability of defendants with mental retardation arises from their intellectual and adaptive limitations, not the cause of these limitations.[302] Accordingly, persons who suffer from these limitations should be afforded the same protection under the law, irrespective of the cause of the disability.

The Assessment Team, therefore, recommends that Virginia adopt a law prohibiting the application of the death penalty to anyone who, at the time of the offense, suffered from significant limitations in both their general intellectual functioning and adaptive behavior, whether resulting from mental retardation, dementia, traumatic brain injury, or other disease or disability. The defendant would have to prove that s/he suffers from the same intellectual functioning and adaptive behavior limitations as a person with mental retardation.

D. Protocol #4

> **The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's 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 recommendation.**

Following the U.S. Supreme Court's decision in *Atkins v. Virginia* banning the application of the death penalty to persons with mental retardation,[303] the ABA adopted a policy calling for the prohibition of the execution of persons who suffer from severe mental disorders.[304] Much as the ban on executing persons with mental retardation was supported by the American Association on Intellectual and Developmental Disabilities, this proposal is supported by three leading mental health groups: the American Psychiatric Association,[305] the American Psychological Association,[306] and the National Institute on Mental Illness.[307]

This Protocol, based on ABA policy, is carefully drawn to ensure that the exemption would apply only to a narrow class of the severely mentally ill. The mental disorder must be "severe,"

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[302] *See* Atkins v. Virginia, 536 U.S. 304, 318 (2002) (holding that mentally retarded defendants' "deficiencies . . . diminish their personal culpability").

[303] *Id*.

[304] ABA, *supra* note 3.

[305] *Position Statement on Diminished Responsibility in Capital Sentencing*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2005_DiminishedResponsibility.pdf (last visited Dec. 18, 2012).

[306] ABA, *supra* note 3, at 3 (citing Am. Psychological Ass'n, Excerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18–20, 2005); Excerpt from the Council of Representatives 2006 Meeting Minutes (Feb. 17–19, 2006).

[307] *Criminal Justice and Forensic Issues*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302 (last visited Dec. 18, 2012).

meaning a serious psychotic disorder such as schizophrenia, mania, major depressive disorder, or a dissociative disorder that causes "delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment."[308] The disorder must "significantly impair cognitive or volitional functioning at the time of the offense" and therefore "only applies to offenders less culpable and less deterrable than the average murderer."[309] Moreover, the exemption would not apply to persons with disorders, such as antisocial personality disorder and other Axis II personality disorders, which manifest primarily by repeated criminal conduct or are attributable solely to the acute effects of voluntary use of alcohol or other substances.

This position extends the logic of the U.S. Supreme Court's decisions in *Atkins*—prohibiting the execution of those with mental retardation—and *Roper v. Simmons*—prohibiting the execution of juvenile offenders—to those with severe mental illnesses because the application of the death penalty in those cases is "inconsistent with both the retributive and deterrent functions of the death penalty."[310] Like persons with mental retardation, persons suffering from these severe mental illnesses or disorders possess "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[311] For these reasons, the execution of those with a severe mental illness similarly does not serve the death penalty's deterrent and retributive purposes.[312]

Virginia Law on the Application of the Death Penalty to Persons with Severe Mental Disorders

Virginia law does not prohibit the application of the death penalty to persons who suffer from severe mental disorders or mental disabilities other than mental retardation.[313]

Virginia does permit a criminal defendant to prove that s/he is not guilty by reason of insanity.[314] Criminal insanity can be demonstrated in one of two ways: (1) by proving that, at the time of the offense, the defendant "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong"; or (2) by proving that his/her "mind has become so impaired by disease that [s/]he is totally deprived of the mental power to control or restrain his[/her] act."[315] Virginia's two insanity tests differ significantly from the severe mental illness standard articulated in this Protocol.

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[308] ABA, *supra* note 3, at 6.
[309] *Id.* at 6–7.
[310] *Id.* at 5. *See also* Roper v. Simmons, 543 U.S. 551, 578 (2005); Atkins v. Virginia, 536 U.S. 304, 320-321 (2003).
[311] *Atkins*, 536 U.S. at 318. *See also Roper*, 543 U.S. at 551 ("Retribution 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.").
[312] ABA, *supra* note 3, at 6.
[313] *See* Juniper v. Warden, 707 S.E.2d 290, 310–11 (Va. 2011) (noting that there was no "controlling authority" to support the argument that executing the seriously mentally ill is unconstitutional).
[314] Morgan v. Commonwealth, 646 S.E.2d 899, 902 (Va. Ct. App. 2007).
[315] *Id.* (internal quotation marks omitted). These standards are known as the M'Naghten Rule and the irresistible impulse test, respectively. *Id.*

Conclusion

Virginia law does not forbid the execution of persons who were severely mentally impaired as described in this Protocol. Thus, Virginia is not in compliance with Protocol #4.

Recommendation

The Assessment Team recommends that Virginia enact a law forbidding death sentences for and executions of persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. The law should make explicit that a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, 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 exclusion from capital punishment.

This procedure only would affect a defendant's eligibility for the death penalty. Those defendants qualifying as having a severe mental disorder under this standard would still be eligible to stand trial. If found guilty of capital murder, the defendant would be sentenced to life in prison without parole in accordance with Virginia law.

E. Protocol #5

> **To the extent that a mental disorder or disability does not preclude imposition of a death sentence pursuant to a particular provision of law (see Protocols #3–4 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.**

As the U.S. Supreme Court has noted, capital defendants suffering from disabilities such as mental retardation face a special risk of wrongful execution because the disability "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[316] Moreover, empirical studies have found that jurors are more likely to impose a death sentence when a defendant is mentally ill or emotionally disturbed, irrespective of whether the evidence of mental illness is offered as a mitigating factor.[317]

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[316] *Atkins*, 536 U.S. at 321.

[317] *See, e.g.*, David Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688–89 (1998) (noting, in Table 6, that submission of a defendant's "extreme emotional disturbance" as a mitigating circumstance increased the likelihood of a death sentence in capital cases in Philadelphia between 1983 and 1993). *See also* Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).