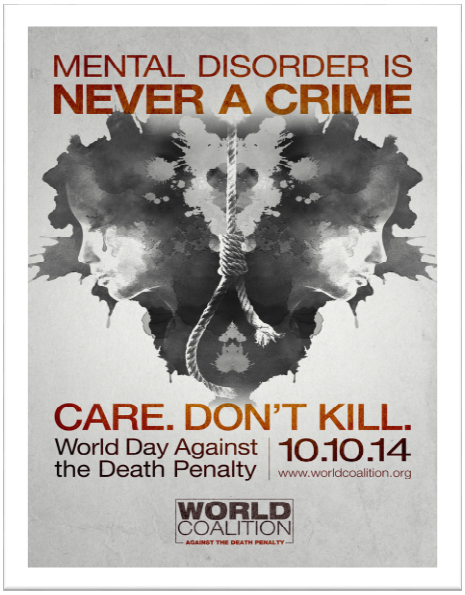

DEATH PENALTY AND MENTAL HEALTH

Factsheet for Judges

12th World Day Against the Death Penalty

On 10 October 2014, the World Coalition Against the Death Penalty and other abolitionists worldwide will mark the 12th World Day Against the Death Penalty by drawing attention to the special concerns faced by accused and condemned prisoners with mental health problems. While opposing the death penalty absolutely, abolitionists are also concerned to see existing protections implemented. Among these is the requirement in human rights standards that persons with serious mental illness or intellectual disabilities should not face the death penalty.

Background

The death penalty, where it is provided for in law, is required to be reserved for the most serious offenders (the "worst of the worst") and to offer the highest level of protection for those subject to it. International standards provide protection for specific populations who should never be subject to execution: children, pregnant women and "the insane". However, "The real difficulty with the safeguard lies not in its formal recognition but in its implementation. (…) There is an enormous degree of subjectivity involved when assessing such concepts as insanity, limited mental competence and 'any form of mental disorder'. The expression 'any form of mental disorder' probably applies to a large number of people sentenced to death."[1]

While the death penalty remains, persons with mental disabilities are at risk of being sentenced to death and executed in breach of international standards. **This briefing paper provides concrete examples of what can be done to address this risk, including by implementing existing standards barring the imposition of death sentences or executions on those with intellectual disabilities and those who are seriously mentally ill.**

Deterrence and Retribution as Sentencing Considerations

As a judge, you will be required to align your sentence to a specific purpose. One of the main considerations that judges take into account during sentencing is deterrence, both general and specific. To date there is no evidence to suggest that issuing a death sentence deters members of society from committing serious crimes more than terms of imprisonment. This failure to deter is more evident for people with serious mental illness or intellectual disability. People do not choose to develop mental illness and the existence of the death penalty cannot deter people from becoming psychotic or from behaving in a manner that stems from their disorder(s).

Another sentencing consideration that judges often cite is retribution. The retributive purpose of the death penalty however, is not served when an offender lacks a meaningful understanding that the state is taking his life in order to hold him accountable for his crime. It offends the concept of personal responsibility.

So, prosecuting a capital case involving a defendant with severe mental illness is expensive and diverts valuable resources away from effective crime prevention measures and mental health treatment programs.[2]

[1] Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General. UN Doc. E/2010/10, December 2009.

[2] Kristin Houlé, Mental Illness and the Death Penalty - Resource Guide, 2nd edition, March, 2008, Texas Coalition to Abolish the Death Penalty.

A Defendant with Mental Illness and/or Intellectual Disability

Sometimes judges find it difficult to interpret unusual courtroom behaviours, such as frequent outbursts or uncontrolled talking, as manifestations of mental illness or intellectual disability. They also might be unaware of the side effects of anti-psychotic medications, which might render the defendant emotionless or without affect.[3]

Case study - James Colburn – Texas 2003
James Colburn was diagnosed with schizophrenia as a teenager and spent time in and out of mental health institutions, crisis centres, and prison. In the week leading up to the murder of Peggy Murphy, he was allegedly experiencing auditory and visual hallucinations, some of which commanded him to commit suicide. Colburn turned himself in to the police and gave a videotaped confession in which he could be seen rocking back and forth and shaking uncontrollably. While in jail awaiting trial, he was placed on suicide watch on several occasions during his 1995 trial, Colburn received injections of Haldol, an anti-psychotic drug that caused him to sleep throughout the proceedings and to appear emotionless.

As a judge you may need to decide whether the defendant is malingering (according to the American Psychiatric Association, malingering is the deliberate fabrication or gross exaggeration of psychological or physical symptoms for personal gain or to achieve a tangible goal). It is important to note however that malingering does not exclude the presence of a genuine disorder. Dr. Richard Rogers, one of the leading experts on the issue of malingering, has stated "It is common for both malingering and a genuine disorder to be observed in the same person. When a person is formally classified with malingering, a thorough evaluation still must be conducted regarding the presence of a genuine disorder."[4]
Sometimes defendants with mental illness might not have the capacity to testify on their own behalf (though some might insist on doing so anyway). They might also seek to represent themselves or otherwise not cooperate with legal counsel, sometimes as a result of delusions about their attorneys or a belief that they are part of a conspiracy against them.

The Defence Attorney

Court-appointed attorneys might have no experience with offenders with mental illness and might not conduct a proper investigation into their clients' medical history and its impact on their behaviour. Making matters worse, defendants with mental illness often lack the capacity to communicate with or effectively assist their attorney. Defendants might not share information related to their mental illness with their attorney or might not allow this information to be presented to the tribunal of fact. This means that important mitigating evidence that might be persuasive is not presented during the sentencing phase of a trial.

Death Penalty Project – An excerpt from 'The Inevitability of Error'
In many cases from the Caribbean and elsewhere, individuals who are sentenced to death have subsequently been found to be suffering from mental illness and/or an intellectual disability, thus impacting on the safety of their convictions and the lawfulness of their death sentences. This is especially so in countries where the level of mental health services, training and resources is lacking. The reality is that the death penalty is regularly being imposed on persons with significant mental disorder who are, therefore at risk of execution contrary to recognised norms and the strict procedural requirements that countries are obliged to observe in all capital cases.

[3] Kristin Houlé, Mental Illness and the Death Penalty - Resource Guide, 2nd edition, March, 2008, Texas Coalition to Abolish the Death Penalty.
[4] Rogers, R. Ed., Clinical Assessment of Malingering and Deception, 2nd edition, 1997. p. 48.

There are many examples of defendants being wrongly sentenced to death by virtue of the fact that inadequate or no medical evidence was produced at trial.[5]

Unfortunately in many cases, when evidence of a defendant's mental illness does surface it is often used as an aggravating factor by prosecutors. They might use it to convince the tribunal of fact that the defendant poses a "future danger."
Death row inmates with severe mental disorders might not be competent to assist their attorneys in post-conviction proceedings (appeals). They might not consent to or cooperate with psychiatric evaluations or sign the release forms necessary to provide their attorneys with critical information about their medical history. And, some death row inmates with severe mental illness might choose to give up their appeals and "volunteer" for execution.

Legal Commentary on Mental Illness and Intellectual Disability

For legal commentary **on mental illness**, please visit:
http://www.deathpenaltyworldwide.org/mental-illness.cfm
For legal commentary **on intellectual disability**, please visit:
http://www.deathpenaltyworldwide.org/mental-retardation.cfm

Key definitions:

What is mental health?

The World Health Organization (WHO) defines health not only in terms of physical health but also with respect to *mental* health. According to the WHO, **good mental health refers to "a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community.**"[6] By contrast, mental ill-health or mental disorder comprises various conditions characterized by impairment of cognitive, emotional, or social functioning caused by psychosocial or biological factors. In other cases, impairments of intellectual capacity occurs as a result of developmental disorders.
Both types of impairments and disorders affect behaviour, decision-making and culpability for actions and for this reason are widely considered in legal processes including capital trials. Mental illness can often be alleviated by treatment and is generally not related to intellectual capacity, while intellectual disability (called mental retardation in legal and medical texts) which starts before the age of 18, is generally lifelong, and is manifested by sub-average intellectual capacity.

What are mental disabilities?

The language of disability is rapidly changing. Terms from the medical and legal fields such as mental illness and mental retardation are being supplemented by terms from the disability advocacy movement such as psychosocial disability (rather than mental illness) and intellectual disability (rather than mental retardation). However most death penalty laws retain earlier terminology and for that reason it is hard to avoid the existing legal terms.

- **"Insanity".** This term which still appears within legal and legislative terminology refers to persons' capacity to understand "the nature and quality" of their acts or, if they did understand it, not to know of the wrongness of their action. "Insanity" is not found in psychiatric diagnostic manuals – it is a legal term.
- **Mental illness** / **Psychosocial disability**. These terms refer to: (i) a medical or

[5] The inevitability of error: The administration of justice in death penalty cases, Death Penalty Project, 2014. p. 22.
[6] WHO. Strengthening mental health promotion. Geneva, World Health Organization, 2001: Fact sheet, No. 220.

psychological condition that disrupts a person's thinking, feeling, mood, ability to relate to others and daily functioning"[7]; (ii) the interaction between psychological and social/cultural components of … disability. The psychological component refers to ways of thinking and processing… experiences and…perceptions of the world…The social/ cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences/madness as well as the stigma that society attaches to …[the]…label …of… disabled.[8]

- **Mental retardation / Intellectual disability / Intellectual Developmental Disorder**) is a disorder with onset during the developmental period that includes both intellectual and adaptive deficits in in conceptual, social and practical domains.[9] With appropriate support, people with intellectual disability can function semi-independently, but will always have significant deficits and support needs.
- **Organic brain injury**. This refers to injury to the brain caused by a variety of traumatic events such as blows to the head, car accidents, or falls, or events such as asphyxiation, stroke, and substance abuse. The impact of these events is to decrease the capacity of the brain to function effectively leading to cognitive impairments which may (depending on the age at which the injury occurred, and the existence of sufficient adaptive deficits), to also cause the individual to be diagnosed with intellectual disability.
- **Degenerative brain disorders**. These include dementia and usually occur in later life, causing limits to intellectual functioning.

Increasingly, since the adoption of the Convention on the Rights of Persons with Disabilities[10] the concepts and language of "mental illness" have been challenged by a disability perspective reflecting the core values of non-discrimination and equal rights. The term "psychosocial disabilities" is emerging as an alternative to "mental illness", to underline both psychological and social components and to focus on the disabling effect of the disorder.

Convention on the Rights of Persons with Disabilities (2007)
States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention… Article 14(2)

Acknowledgements:

This factsheet uses information from the Texas Coalition Against the Death Penalty's report 'Mental Illness and the Death Penalty - Resource Guide', the Death Penalty Project's handbook 'The inevitability of error: The administration of justice in death penalty cases', the Death Penalty Worldwide database (www.deathpenaltywordwide.org) and from a memorandum prepared by Mr James Welsh, a former researcher and adviser on 'Health and Detention' at Amnesty International.
Full Factsheet available here: www.worldcoalition.org/worldday

[7] National Alliance on Mental Illness. What is mental illness? http://www.nami.org/Template.cfm?Section=By_Illness
[8] World Network of Users and Survivors of Psychiatry, 2008, Implementation Manual for the UN Convention on the Rights of Persons with Disabilities.
[9] The principal US organization on intellectual disability—the American Association on Intellectual and Developmental Disabilities -- changed terminology from "mental retardation" to "intellectual disability" in 2005. The American Psychiatric Association has adopted the term "Intellectual Disability (Intellectual Developmental Disorder)" in its most recent diagnostic manual (DSM-5 Guidebook, p. 34). The WHO is expected to do likewise in the forthcoming edition of its diagnostic manual (ICD-11).
[10] The Convention on the Rights of Persons with Disabilities. UN Doc. A/61/611, 6 December 2006, http://www.un.org/esa/socdev/enable/rights/convtexte.htm.