

# ***MENTAL ILLNESS: MISCONCEPTIONS AND THE MULTIPLIER EFFECT***

## ***Professor E. Lea Johnston***

*University of Florida Research Foundation Professor, University Term Professor Professor of Law, University of Florida Levin  
College of Law  
(352) 273-0794 | [johnston@law.ufl.edu](mailto:johnston@law.ufl.edu)*

## ***Bonnie Hoffman***

*Director of Public Defense Reform and Training, National Association of Criminal Defense Lawyers  
(202) 465-7649 | [bhoffman@nacdl.org](mailto:bhoffman@nacdl.org)*

## ***Akin Adepaju***

*Assistant Federal Defender, Federal Defender's Office  
(412) 644-6565 | [akin\\_adejolu@fd.org](mailto:akin_adejolu@fd.org)*

## ***Professor Deborah Denno***

*Arthur A. McGivney Professor of Law, Founding Director of the Neuroscience and Law Center, Fordham University School of  
Law  
(212) 636-6868 | [ddenno@law.fordham.edu](mailto:ddenno@law.fordham.edu)*

**NACDL's 2020 Presidential Summit & Symposium**

***"Prison Brake: Rethinking the Sentencing Status Quo"***

**October 19-22, 2020**



## **Mental Illness: Misconceptions and the Multiplier Effect**

### A Panel Discussion

Panelists: [Akin Adepaju](#), J.D., LL.M, Assistant Federal Defender  
[Deborah W. Denno](#), Ph.D, J.D., Fordham University School of Law  
[E. Lea Johnston](#), J.D., University of Florida School of Law

Moderator: [Bonnie Hoffman](#), Director of Public Defense, National Association of Criminal Defense Lawyers

- I. Overview: Individuals with mental illness are overrepresented in the criminal legal system. The mistaken beliefs and misunderstandings about mental illness, including those held by crucial criminal system decision makers such as judges, prosecutors, defense lawyers and jurors, can lead to greater punishment of those with severe mental illness. This can be especially true when it comes to those facing the death penalty. This panel discussion will examine the legal, scientific, and practical issues surrounding defendants with SMI, especially those charged with capital offenses and those presenting not guilty by reason of insanity (NGRI) defenses.

Mental health issues have broad impact in death-penalty cases. One in ten prisoners executed in the United States are “volunteers” — defendants or prisoners who have waived key trial or appeal rights to facilitate their execution. Mental illness also affects defendants’ decisions to represent themselves, their ability to work with counsel, and jury’s perceptions of their motives and whether they pose a future danger to society if they are sentenced to life in prison.

- II. Mental Illness and the Criminal Legal System
  - a. [Serious Mental Illness](#) (SMI): Although there is no consistent definition of SMI, it typically refers to a mental, behavioral, or emotional disorder resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities. Examples of SMI typically include major depression, severe bipolar disorder, and disorders along the schizophrenia spectrum.
  - b. Individuals with severe mental illness are overrepresented in the criminal legal system. It is estimated 1 in 5 people in jail and 1 in 10 people in prison have a serious mental illness. By contrast only 5% of the general population has been diagnosed with a SMI.
    - i. See: Seth J. Prins, [The Prevalence of Mental Illness in U.S. State Prisons: A systematic review](#), *Psychiatr.* 2014 July 65 (7), 862-872.
    - ii. [Bureau of Justice Statistics, Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12](#) (NCJ 250612, June 2017)

- c. Detention Centers as mental health warehouses
  - i. According to the [American Psychiatric Association](#), over the past several decades there has been a steady decrease in the health care structure for those with SMI. In 1955 there was 1 psychiatric bed for every 300 Americans; in 2005, there was 1 for every 3,000 people.
  - ii. Currently some of the largest mental health service providers are the [jails in major metropolitan areas](#), such as [Cook County](#) (Chicago), [Miami-Dade](#), FL, and [Harris County](#) (Houston).
  - iii. State-by-state data regarding the number of people incarcerated who have a mental illness, along with other key indicators, can be found at: <https://www.treatmentadvocacycenter.org/browse-by-state>
  
- d. Impact of SMI on punishment
  - i. Although often seen as a mitigating factor, persons with SMI can face significant negative case outcomes, experiencing incarceration in more significant ways than those without SMI.
    - 1. Individuals with SMI are more likely than non-ill persons to suffer physical and sexual assaults. Johnston, E. Lea, [Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness](#) (March 25, 2013). *Journal of Criminal Law and Criminology*, Vol. 103, No. 1, 2013.
    - 2. Individuals with SMI can experience greater difficulties abiding by institutional rules. As a result, they may face more disciplinary sanctions, are more likely to lose good time earning, and are at a greater likelihood of being placed in solitary confinement. They may also be less likely to be granted opportunities to participate in work release, honor block, or other similar programs.
    - 3. Those with SMI are generally more likely to experience isolation, face decompensation, and suicidal ideations.
  - ii. Those with SMI [spend longer periods of time](#) in jail. A key contributing factor may be the [extended wait times](#) for in-patient restoration of competency services.
    - 1. 78% of states report waiting lists of up to 30 days for individuals to be placed in in-patient hospital settings for evaluation and/or restoration services.
    - 2. At least 3 states report waits of 6 to 12 months.
  
- e. Legal Issues with Mental Illness and the Criminal Legal System
  - i. There are several intersecting issues relating to a person's mental state and relate to both the degree of impairment and the point in time in which that impairment exists.
    - 1. Competency to stand trial:
      - a. Examines the accused's mental state at the present time.

- b. Competency is fluid and can change over the course of a case.
  - c. A person is incompetent if they are unable to rationally communicate with their counsel or rationally comprehend the nature of the proceedings against them. [Dusky v. U.S](#), 362 US 402 (1960).
  - d. An individual cannot stand trial (or make other significant legal decisions, such as pleading guilty) if they are incompetent as it violates the due process clause of the 5<sup>th</sup>/14<sup>th</sup> amendments.
2. Sanity: (Not Guilty by Reason of Insanity (NGRI) or Not Criminally Responsible (NCR))
- a. Examines the accused's mental state at the time of the offense.
  - b. Sanity is static.
  - c. To find an individual NGRI/NCR there are 3 findings that are made
    - i. First the judge/jury must find the criminal offense occurred, and
    - ii. That the accused is the person who committed the offense.
    - iii. Only if those findings are made, can the judge/jury can address whether the accused is nevertheless not guilty (or not criminally responsible) for those actions because they were not sane at the time they committed the offense.
  - d. An individual found not to be sane at the time of the offense cannot be held criminally liable for their actions.
  - e. Such individuals, however, frequently face other forms of restrictions on their liberty, including commitment to a state psychiatric facility.
3. Post-conviction SMI
- a. Individuals who are convicted of crimes, may, become incompetent/insane while serving a sentence. .
  - b. If the person's mental condition is such that they are presently insane, they may not be executed (even though they were found to be sane at the time of their offense). [Ford v. Wainwright](#), 477 U.S. 399 (1986) (holding the execution of those who are currently insane violates the 8<sup>th</sup> Amendment prohibition on cruel and unusual punishment, as it serves no deterrent or retributive effect).

- ii. Raising an Insanity Defense
  - 1. The standards for the insanity defense vary from state-to-state. A listing of state statutes can be found in the [AAPL Practice Guide for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense](#) (2014)
  - 2. Federal Standard; “at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.” [18 U.S.C. 17](#)
  - 3. Typically, a plea of insanity is an affirmative defense. Individuals are presumed to be sane, and the accused bears the burden of proving they met the legal definition of insanity at the time of the offense.
    - a. In some jurisdictions the burden is by a preponderance of the evidence (see e.g. Maryland)
    - b. In some jurisdictions the burden is by clear and convincing evidence. (See e.g. 18 USC 17)

### III. The Death Penalty

- a. Individuals facing capital punishment disproportionately suffer from a SMI. Cunningham, M.D. & Vigen, M.P. (2002), [Death row inmate characteristics, adjustment, and confinement: A critical review of the literature](#). *Behavioral Sciences and the Law*, 20(1/2), 191-210.
- b. Imposition of the death penalty on specific populations
  - i. Utilizing the view that the 8<sup>th</sup> amendment’s prohibition on cruel and unusual punishment is subject to change, based upon “evolving standards of decency,” the Supreme Court held the execution of those who have a significant intellectual disability.<sup>1</sup> [Atkins v. Virginia](#), 536 US 304 (2002).
  - ii. Using similar logic, the Court subsequently found the 8<sup>th</sup> amendment also prohibits the imposition of the death penalty on persons who were less than 18 years old at the time of the offense. [Roper v. Simmons](#), 543 US 541 (2005).
  - iii. In reaching these conclusions the Court recognized “Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them the most deserving of execution.” *Atkins* at 319.
  - iv. However, to date, no court bars the imposition of the death penalty on persons with severe mental illness.

---

<sup>1</sup> Note in its opinion the Supreme Court utilized the now rejected phrase “mentally retarded”

- v. For a more extensive examination of the reasons why those with SMI should not be subjected to the death penalty, see [ABA White Paper, Severe Mental Illness and the Death Penalty \(2016\)](#).
- c. Mental Illness as a Mitigating Factor
- i. Severe mental illness is expressly recognized *statutory* mitigating factor when a judge/jury is considering whether to impose the death penalty.
    - 1. See e.g. [18 USC §3592](#) “In determining whether a sentence of death is to be imposed on a defendant, the finder of fact **shall consider** any mitigating factor, including the following: (1) Impaired Capacity: the defendant’s capacity to appreciate the wrongfulness of the defendant’s conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge. . . . (6) Disturbance-The defendant committed the offense under severe mental or emotional disturbance. . . .(8) Other Factors-Other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against the imposition of the death sentence.”
  - ii. Despite the fact that SMI is considered a mitigating factor, individuals with SMI are at increased risk of receiving the death penalty.
    - 1. This fact can be difficult to quantify in that many factors can impact why a particular sentence is imposed. However, mock jury studies, capital juror interviews, and data studies support the conclusion that the stigmas and fears surrounding mental illness may contribute to decisions to impose the death penalty on those with SMI. Miley, et. al (2020), [An examination of the effects of mental disorders as mitigating factors on capital sentencing outcomes](#), *Behav Sci Law*. 2020; 1-25
    - 2. Possible reasons for such outcomes may include:
      - a. Presentation of the accused
        - i. If the defendant appears to erratic, they may be seen as posing a future danger
        - ii. If the defendant has a flat affect or does not display emotion, they may be perceived as lacking remorse
        - iii. If the defendant appears “normal” they may be seen as malingering, being manipulative, or attempting to avoid responsibility.
      - b. Mental illness evidence often results in a series of experts for the state and the defense presenting

competing views of the nature, severity, and impact of a defendant's mental state. Defense experts may be perceived as biased, resulting in not only the rejection of their evidence, but may also result in a belief the accused is attempting to evade responsibility. (Note, greater weight may be given to experts who had professional relations with the accused that pre-date the offense).

- c. Societal views of mental illness: although there is an increasing acceptance of mental health concerns, there is still a prevailing stigma attached with mental illness, including a belief that persons with SMI are extremely violent and dangerous.
3. As a result, evidence of SMI, rather than being a mitigating factor may in fact serve as an aggravating factor.

#### IV. Representing individuals with SMI: Practical Issues

- a. When an accused intends to raise an insanity defense or introduce evidence of mental illness in the sentencing phase it can trigger a number of responsibilities for the defense and rights for the prosecution.
  - i. Ex: if an accused raises an NGRI defense, the state typically has the right to seek an "independent" evaluation of the accused.
  - ii. [Federal Rule of Criminal Procedure Rule 12.2 - Notice of Defense Based on Mental Condition; Mental Examination.](#)
    1. Rule 12.2 applies both when the defense intends to present evidence of insanity at the guilt phase and when they intend to present expert evidence regarding "mental disease or defect or any other mental condition of the defendant bearing on . . . the issue of punishment in a capital case"
    2. Requires the defense to give notice to the prosecution
    3. Authorizes the court to order an accused submit to a psychiatric examination at the request of the prosecution.
  - iii. Generally there is a belief that presenting a mental health based defense can be positive in that it allows the introduction of mental health evidence early in the case, rather than waiting to the penalty phase. However, research indicates that the presentation of an NGRI defense can have negative impacts on both issues of guilt and on sentencing.
    1. Valerie P. Hans, [An Analysis of Public Attitudes toward the Insanity Defense](#), 24 CRIMINOLOGY 393 (1986)
    2. Jennifer L. Skeem, Jennifer Eno Loudon, & Jennee Evans, [Venirepersons's Attitudes Toward the Insanity Defense: Developing, Refining, and Validating a Scale](#), 286 L. & Hum. Behav. 623 (2004)

3. Angela L. Bloechl et al., [\*An Empirical Investigation of Insanity Defense Attitudes: Exploring Factors Related to Bias\*](#), 30 INT'L J.L. & PSYCHIATRY 153 (2007),

b. Capital Cases

- i. In order to be eligible to be seated as a juror in a capital case, a juror must be "death qualified."

1. "Death Qualified" Jurors: in order to be qualified to sit on a capital case, jurors must be willing to consider and impose the full range of punishment. This includes being willing to impose the death penalty and the willingness to impose lesser sentences such as LWOP.
2. In defining these boundaries, the US Supreme Court in [\*Witherspoon v. Illinois\*](#), 391 US 510, 522 n.21 (1968) (emphasis added) explained jurors:  
*"cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. **The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.**"* *Id.* (emphasis added).

3. The *Witherspoon* Court defined excludable jurors as those who "made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."

- ii. "Death-qualified" juries may be particularly likely to reject an NGRI defense.

1. Brooke Butler & Adina W. Wasserman, [\*The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense\*](#), 36 J. APPLIED SOC. PSYCHOL. 1744 (2006)
2. Phoebe C. Ellsworth et al., [\*The Death-Qualified Jury and the Defense of Insanity\*](#), 8 LAW & HUM. BEHAV. 81 (1984)

- iii. Relying on the reasoning in *Witherspoon*, defense attorneys intending to present an NGRI defense, should seek to qualify jurors on the issue of insanity.
  1. Jurors should be “willing to consider” the full range of defenses an accused is entitled to present, including, expressly, an NGRI defense. Any juror who is “irrevocably committed” to vote against an NGRI finding, regardless of the evidence, should be deemed unqualified to be seated.
- iv. Voir Dire: the defense has a right to question the venire on their attitudes regarding the presentation of an insanity defense
  1. [People v. Stack](#), 493 N.E.2d 339, 343–45 (Ill. 1986)
  2. [Commonwealth v. Sequin](#), 656 N.E.2d 1229, 1231–33 (Mass. 1995)
  3. [State v. Moore](#), 585 A.2d 864, 880–82 (N.J. 1991)
  4. *State v. Hartman*, No. A-2498-17T1, 2020 WL 4577468, at \*2–5 (N.J. Super. Ct. App. Div. Aug. 10, 2020) (unpublished)
  5. Contra [State v. Stanko](#), 658 S.E.2d 94, 96–97 (S.C. 2008)

## V. The Role of Neuroscience

- a. Symposium: [Criminal Behavior & the Brain: When Law and Neuroscience Collide](#), Fordham L. Rev. (2016).
- b. Neuroscience can be a critical tool in litigating cases. Aono, D., Yaffe, G. & Kober, H. [Neuroscientific evidence in the courtroom: a review](#). *Cogn. Research* 4, 40 (2019).
- c. Deborah W. Denno, [CHANGING LAW’S MIND: HOW NEUROSCIENCE CAN HELP US PUNISH CRIMINALS MORE FAIRLY AND EFFECTIVELY](#) (2011)
- d. Deborah W. Denno, [The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases](#), 56 B.C. L. Rev. 493 (2015).
- e. Denno, Deborah W. (2019) "[Neuroscience and the Personalization of Criminal Law](#)," *University of Chicago Law Review*: Vol. 86 : Iss. 2 , Article 7.
- f. [A Place for Neuroscience in Criminal Law](#), Lecture by Deborah Denno, Law and the Mind Conference, Copernicus Center for Interdisciplinary Studies, Krakow (2018).