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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Crim. S049626
Plaintiff and Respondent,	Santa Clara County Superior Court
v.	No. 148113
STEPHEN EDWARD HAJEK and LOI TAN VO.	
Defendants and Appellants.	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

Appeal From the Judgment of the Superior Court
of the State of California for the County of Santa Clara

The Honorable Judge Daniel E. Creed

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THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION TO VACATE HIS JUDGEMENT OF DEATH BECAUSE HE SUFFERS FROM A SEVERE MENTAL ILLNESS

On August 18, 1995, appellant filed simultaneously "Defendant Hajek's Motion that the Death Penalty Violates the 8th Amendment" and "Defendant Hajek's Motion Under Section 190.4." (CT 2759-2763.) The first motion argued that the imposition of the death penalty in appellant's case would constitute cruel and unusual punishment under both the United States and California Constitutions (U.S. Const., Amend VIII; Cal. Const., art. I, sec. 17) because of his mental illness. (CT 2759-2760.) The second

motion argued that the trial judge should modify, pursuant to Penal Code section 190.4, subdivision (e), appellant's sentence to life without the possibility of parole because the aggravating nature of the crime did not outweigh substantially the fact that appellant's mental illness played a part in his crime and that such mental illness is beyond his control. (CT 2761-2763.)

The evidence presented at trial established that appellant suffers from severe mental illness. Dr. Minagawa testified that appellant had a significant Axis I disorder, cyclothymia. (RT 4588-4589, RT 4656-4661.) He explained that cyclothymia differs from bipolar disease[1] as a matter of degree. At the time of the crime, appellant experienced mood swings but they were not as severe as the mood swings characteristic of bipolar disease. (RT 4827.) Dr. Minagawa also testified that appellant was in the midst of a hypomanic or manic episode at the time of the murder in this case. (RT 4655-4656.) Like bipolar disease, cyclothymia is a serious affective disorder which can be treated only with medication because it is a disorder with a biochemical basis. (RT 4659.)

At the sentence modification hearing, the trial judge stated: "And I have no trouble believing that Mr. Hajek suffers from a major mental illness, mood disorder, and that it has [sic] been diagnosed and treated prior to this instant offense." (10/12/95 RT 44.) Nonetheless, the trial judge refused to modify the jury's verdict that appellant should be sentenced to death.

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[1] One of the psychiatrists who treated appellant in the Santa Clara County Jail diagnosed him as bipolar. (RT 4891.)

A. Executing the Severely Mentally Ill Constitutes Cruel and Unusual Punishment in Violation of the United States and California Constitutions

In *Weems v. United States* (1910) 217 U.S. 349, 378, the United States Supreme Court found that in order to give the federal prohibition against cruel and unusual punishment a "vital" interpretation, it "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." About a half century later, the Court held that the "cruel and unusual punishment" component of the 8th Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.)

1. The Rationales Underlying *Atkins v. Virginia*

In 2002, the U.S. Supreme Court held that the 8th Amendment prohibits the execution of individuals who suffered from mental retardation at the time of the capital offense. (*Atkins v. Virginia* (2002) 536 U.S. 304.) The *Atkins* court observed, "[b]ecause of their disabilities in the areas of reasoning, judgment, and control of their impulses, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serous adult criminal conduct." (*Id.* at p. 306.) The *Atkins* decision did not require a causal nexus between the defendant's mental retardation and the commission of the crime, thus creating a categorical exemption to the death penalty for the mentally retarded.

As Justice Stevens noted in the *Atkins* decision, the Court's decision in *Gregg v. Georgia* (1976) 428 U.S. 153, "identified 'retribution and deterrence of capital crimes by prospective offenders' as the social purposes served by the death penalty." (*Atkins v. Virginia, supra,* 536 U.S. at p.

313.)[2] Retribution in the context of the death penalty means "ensuring that only the most deserving of execution are put to death." (*Id.* at p. 319.) The *Atkins* decision found that the mentally retarded are less culpable because of their "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." (*Id.* at p. 318.) For many of those same reasons, the deterrence value of capital punishment is lost upon the mentally retarded because their cognitive and behavioral impairments make it less likely they will perceive the possibility of a death sentence as a deterrent.

Additional reasons cited in the *Atkins* decision for making the mentally retarded ineligible for the death sentence included: the risk that jurors would misinterpret the "demeanor" of the mentally retarded defendant for a lack of remorse for his/her crimes (*id.* at p. 320), and that the mentally retarded defendant would fail to make ". . . a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (*Ibid.*) The Court further observed that mental retardation "can be a two-edged sword that may enhance the likelihood that the aggravating [fact] of future dangerousness will be found by the jury." (*Id.* at p.321.)

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[2] See also *Enmund v. Florida* (1982) 458 U.S. 782, 792 ["Unless the death penalty...contributes to one or both of these goals it 'is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'"]

2. Many of the Reasons Behind the *Atkins* Decision Apply to a Severely Mentally Ill Defendant Such as Appellant

While the *Atkins* decision obviously does not mandate a similar per se prohibition against executing the severely mentally ill, some of the underlying rationales of that decision do apply to the question of whether the trial judge erred when he denied the post-trial motion to modify appellant's death sentence because he suffers from serious mental illness. As the following discussion will establish, as was true with the issue of mentally retarded defendants, both professional opinion and international law disapproves of the execution of the severely mentally ill.

a. Mental Health Organizations

Virtually every major United States mental health association which has addressed the issue of execution of the mentally ill has either called for an outright ban of the practice or for a moratorium until an adequate evaluation process can be implemented. The National Association for the Mentally Ill ("NAMI") categorically "oppose[s] the death penalty for persons with severe mental illnesses. . ." (http://www.nami.org/Content/ContentGroups/Press_Room1/1998/January_1998/Nodeathpenalty/index.cfm [last visited on October 7, 2005].) The National Mental Health Association ("NMHA") has stated a similar position. (http://www.nmha.org/position/deathpenalty/index.cfm [last visited on October 7, 2005].)

Indeed, mental health organizations unanimously agree that the current capital punishment systems in the United States do not address adequately the complexity of issues inherent in cases involving mentally ill defendants. (See, e.g., Am. Psychiatric Assn., Moratorium on Capital Punishment in the United States (approved October 2000), APA Document

Ref No. 200006, available at http://www.psych.org/edu/other res/ lib_archives/archives/200006 .pdf [last visited October 7, 2005].) The American Psychological Association (APA) has stated that too many "procedural problems, such as assessing competency," make the capital punishment system unfair to the mentally ill. (*Ibid.*)

These procedural inadequacies fall far short of the "basic requirements of due process," according to the American Psychiatric Association ("AMPA"). The former president of AMPA, Dr. Alan A. Stone, has written:

> [f]rom a biopsychological perspective, *primary mental retardation and significant Axis I disorders have similar etiological characteristics.* And the mentally ill suffer from many of the same limitations that, in Justice Stevens' words, "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.' 'Evolving standards of decency' mean many different things to different people. But an important part of our standards of decency derive from our scientific understanding of behavior. I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.

Stone, *Supreme Court Decision Raises New Ethical Questions for Psychiatry*, Psychiatric Times (September 2002; Vol. XIX; Issue 9; emphasis added.)

b. International Law

The earliest conceptions of the 8th Amendment to the U.S. Constitution reflected the opinions of other civilized nations. The phrase "cruel and unusual" punishment originated in the English Bill of Rights of 1689. The phrase became part of the U.S. Constitution with the understanding that international customs and "opinions of mankind" would play an important role in the new American government. (Louis Henkin, *A*

Decent Respect to the Opinions of Mankind (1985) 25 Marshall L.Rev. 215.) Justice Harry Blackman wrote that "[t]he drafters of the [8th] Amendment were concerned at root, with 'dignity of man,' and understood the 'evolving standards of decency' should be measured, in part, against international norms." (*The Supreme Court and the Law of Nations* (1994) 104 Yale L.J. 39, 45-46.) The First Chief Justice of the Supreme Court observed in *Chisolm v. Georgia* (1793) 2 U.S. 419, 474, that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations." In *Atkins v. Virginia, supra*, the Supreme Court, in evaluating the "evolving standards of decency," considered international law in deciding that the execution of the mentally retarded violates the 8th Amendment prohibition against cruel and unusual punishment. In the 21st century, it is clear that other nations, and therefore international law, condemn the execution of the mentally retarded. (*Id.* at p. 316, fn. 21.)

The United States is a signatory to the International Covenant on Civil and Political Rights ("ICCPR"). The Human Rights Commission ("HRC") of the United Nations has interpreted the treaty as forbidding the execution of persons with severe mental illness. When the United States signed the covenant, the government issued a reservation to article six, stating that the United States reserved the right to execute any person conviction under existing or future laws. The HRC of the United Nations has found this reservation by the United States to be invalid because it fails to accord with the object and purpose of the document. (See Concluding Observations of the HRC: U. S. of America, U.N. Doc.CCPR/C/79/Add/50; A/50/40, paras. 266-304. 279 (1995).)

Moreover, the HRC has adopted consecutive resolutions, in 1999-2001, calling on all nations and states which maintain the death penalty "[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person." In this context, the term "mental disorder" refers to both mental retardation and mental illness. (See, e.g., *The Question of the Death Penalty,* U.N. Hum.Rts.Comm., U.N. GAOR, 57th Sess., para. 3(e), U.N.Doc. E/CN.4/2000/2 (2000).)

c. Evolving Standards of Decency According to the Public

In a poll conducted by the Gallup organization in May 2002, 75% of the respondents opposed the use of the death penalty against the mentally ill. This poll surveyed 1, 012 Americans from across the country. (Http://www.pollingreport.com/crime.htm [last visited on October 7, 2005].)

3. This Court Should Vacate Appellant's Death Sentence Because He Suffers From Severe Mental Illness

The trial judge erred in failing to grant appellant's post-trial motion, based on the 8th Amendment, requesting that his death sentence be modified to life without the possibility of parole. The execution of defendants who suffered from severe mental illness at the time of the offense is contrary to the evolving standards of decency that mark the progress of a maturing society.

The U.S. Supreme Court has identified "two principal social purposes" served by capital punishment: "retribution and deterrence of capital crimes." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 335-336.) The rationale of the *Atkins* decision that mentally retarded murderers are so

lacking in the moral blameworthiness necessary to justify the death penalty should be applied to the severely mentally ill.

The Court noted in *Atkins* the cognitive limitations of the mentally retarded, citing inter alia their "diminished capacities . . . to control impulses," and the "abundant evidence that they often act on impulse rather than pursuant to a premeditated plan" (*Atkins v. Virginia, supra,* 536 U.S. at p. 318), characterizations which apply to appellant as described by mental health professionals during his trial. For example, Dr. Minagawa testified that, based on his review of the record and his testing of appellant, appellant was in a hypomanic state in the weeks leading up to the crime and at the time of the crime. (RT 4735-4736.) He also stated that although a person in a hypomanic state can plan, his/her rationality is diminished and his/her judgement is impaired. (RT 4742, 4744.) Such problems with mood swings, irrationality and impaired judgement are not within the control of the person who is in a hypomanic state unless that person is being medicated. (RT 4844.)

These problems were exacerbated in appellant's case by the fact that he also suffers from a personality disorder, borderline personality disorder with antisocial traits. According to Dr. Minagawa, the interaction between the hypomania and the borderline personality disorder heightened appellant's irrationality, impulsiveness and paranoia. (RT 4842-4844.) The fact that appellant was only 18 years old at the time of the crime further exaggerated the problems with impaired judgement, irrationality and impulsiveness. (RT 4892-4893.) As defense counsel argued at the section 190.4 hearing, while 18 years of age marks legal adulthood, it is in fact a

very dangerous age for young people because most of them are not emotionally mature.[3] (10/12/95 RT 41.)

Conclusion

The record in this case shows that appellant's severe mental illness render irrelevant and superfluous the two important social purposes–retribution and deterrence–of capital punishment identified by the U.S. Supreme Court in *Penry v. Lynaugh, supra,* and other decisions. Accordingly, this Court should reverse the trial judge's denial of "Defendant Hajek's Motion that the Death Penalty Violates the 8th Amendment" (CT 2759-2763) and vacate appellant's death sentence.

Respectfully submitted

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[3] Scientific research has established that the brains of juveniles are less developed than those of non-mentally retarded adults. (See, e.g., Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations* (2000) 24 Neuroscience & Biobehavioral Revs. 417.) In *Roper v. Simmons* (2005)__U.S.__, 125 S.Ct. 1183, the U.S. Supreme Court found that imposition of the death penalty upon juvenile offenders violates the 8th and 14th Amendments. While the *Roper* Court used a bright-line test of 18 years of age, Justice Kennedy noted in the majority opinion that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Id.* at p. 1196.)

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Hajek***
Case Number: **Superior Court No. Crim. 148113**
Supreme Court No. S049626

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

MOTION FOR PERMISSION TO FILE SUPPLEMENTAL OPENING BRIEF DECLARATION OF ALISON PEASE APPELLANT'S SUPPLEMENTAL OPENING BRIEF

by enclosing them in an envelope and
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The envelope was addressed and mailed on **October 14, 2005**, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **October 14, 2005**, at Sacramento, California

Pat Johnson