DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **201**

ORDER REGARDING DEFENDANT'S REVISED MOTION TO STRIKE THE DEATH PENALTY BECAUSE THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT THE EXECUTION OF INDIVIDUALS SUCH AS MR. HOLMES WHO SUFFER FROM A CHRONIC AND SERIOUS MENTAL ILLNESS (D-186a)

INTRODUCTION

On November 8, 2013, the defendant filed a motion asking the Court to prohibit the prosecution from seeking the death penalty in this case. Motion D-186 at p. 1. The defendant asserted that he suffered from a chronic and serious mental illness and that "the execution of individuals suffering from chronic and serious mental illness violates the state and federal constitutional prohibitions against cruel and unusual punishment." *Id.* According to the defendant, the holdings in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), which created

categorical rules prohibiting the execution of mentally retarded individuals and juveniles, should be extended to individuals who suffer from a chronic and serious mental illness. *Id.* at p. 23. The defendant's motion generally relied on the first Court-ordered sanity examination, which was conducted by Dr. Jeffrey Metzner. In particular, the defendant placed heavy emphasis on Dr. Metzner's findings that: (1) [redacted] (2) [redacted] and (3) [redacted] *Id.* at pp. 2, 6-7 (quoting C-58 at pp. 52, 54, 57).

Pursuant to the prosecution's motion, the Court found that the sanity examination performed by Dr. Metzner was incomplete and inadequate; therefore, a second sanity examination was ordered. *See generally* Order P-68. Shortly thereafter, the Court denied Motion D-186 without prejudice and granted the defendant leave to submit a revised motion, if appropriate, after the second sanity examination was completed. Order D-186 at p. 2. The report from the second Court-ordered sanity examination, which was completed by Dr. William Reid, was submitted on October 15, 2014. The defendant filed a revised version of Motion D-186 on October 29. *See* Motion D-186a. The revised motion raises

substantially the same arguments as Motion D-186. The prosecution objects to the motion. *See generally* Response. For the reasons articulated in this Order, the defendant's motion fails. Accordingly, without a hearing, it is denied as meritless.

DISCUSSION

I. Law

The Eighth Amendment prohibits excessive sanctions. *Atkins*, 536 U.S. at 311, 122 S.Ct. 2242. It provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Excessive sanctions include not only "inherently barbaric punishments," but also punishments that are "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (citation omitted). Indeed, central to the Eighth Amendment's "concept of proportionality" is "the precept of justice that punishment for crime should be graduated and proportioned to the offense" and the offender. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)); *see also Miller v. Alabama*, – U.S. –, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012) ("the right not to be subjected to excessive sanctions . . . . flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense") (quotation omitted). Whether a punishment is so disproportionate to the offense as to be deemed "cruel and unusual" must be

judged "not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins*, 536 U.S. at 311, 122 S.Ct. 2242. Thus, the Court looks to "the evolving standards of decency that mark the progress of a maturing society" to give meaning to the Eighth Amendment's prohibition against "cruel and unusual punishments." *Id.* at 311-12, 122 S.Ct. 2242 (quotation omitted).

Supreme Court precedent addressing the proportionality of sentences can be grouped into two categories: 1) cases involving challenges to the length of term-of-years sentences given the circumstances of a particular case; and 2) cases where the Court "implements the proportionality standard" by placing categorical restrictions on the death penalty. *Graham*, 560 U.S. at 59, 130 S.Ct. 2011. The defendant's motion involves only the second category.

In cases where the Supreme Court has adopted categorical restrictions on the death penalty, it has employed a two-part inquiry. *Id.* at 61, 130 S.Ct. 2011. First, the Court considers "objective indicia of society's standards . . . to determine whether there is a national consensus against the sentencing practice at issue." *Id.* (quotation omitted). The two objective indicia relied upon most heavily by the Court are sentencing laws enacted by the states and actual sentencing practices in states where the challenged sentence is permitted. *Id.* at 62, 130 S.Ct. 2011. However, "the clearest and most reliable objective evidence of contemporary

values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312, 122 S.Ct. 2242 (quotation omitted). The Court looks not only at the number of legislative enactments approving or disapproving of the challenged sentence, but also at "the consistency of the direction of change." *Id.* at 315, 122 S.Ct. 2242.

Second, the Court "exercise[s] [] its own independent judgment" and determines whether the challenged sentence violates the Constitution. *Graham*, 560 U.S. at 61, 130 S.Ct. 2011 (citation omitted). In doing so, the Court is "guided by the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Id.* (quotation omitted). Thus, even in cases where objective indicia demonstrate a national consensus with respect to the punishment at issue, the Court's "own judgment is brought to bear, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313, 122 S.Ct. 2242 (quotation omitted). However, the Court has emphasized that its review "should be informed by objective factors to the maximum possible extent." *Id.* at 312, 122 S.Ct. 2242 (quotation omitted).

II. Application

As a preliminary matter, the prosecution disputes that the defendant suffers from a chronic and serious mental illness. Response at p. 2. Because this will be one of the contested issues at trial, it would be inappropriate for the Court to accept

the defendant's assertion at face value or to attempt to resolve the parties' disagreement in this Order. Inasmuch as the defendant's motion is premised on his assertion that he suffers from a chronic and serious mental illness, the motion fails.

Even assuming the defendant suffers from a chronic and serious mental illness, there is no evidence of a national consensus against the execution of chronically and seriously mentally ill individuals who are convicted of capital offenses. Only one state—Connecticut—has ever enacted legislation limiting the execution of certain mentally ill individuals, and that legislation has been rendered moot by Connecticut's abolishment of the death penalty.[1] A single legislative enactment is insufficient to show a national consensus or a "direction of change," *Atkins*, 536 U.S. at 315, 122 S.Ct. 2242, for or against a particular punishment. Rather, the Supreme Court has historically required considerably more before finding a national consensus. *See Roper*, 543 U.S. at 564, 125 S.Ct. 1183 (finding a national consensus against the execution of juvenile offenders where 30 states prohibited the execution of juveniles: "12 that have rejected the death penalty altogether, and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach"); *Atkins*, 536 U.S. at 313-16, 122

[1] The Connecticut statute prohibited the execution of a capital defendant if there was a specific finding that his "mental capacity was significantly impaired" or that his "ability to conform [his] conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." Conn. Gen. Stat. Ann. § 53a–46. The statute did not categorically exclude all individuals with mental illness or chronic and serious mental illness from receiving the death penalty. In any event, as the prosecution notes, the Connecticut statute was an "outlier" that stood "alone among the States." Response at pp. 6-7 n.2.

S.Ct. 2242 (finding the enactment by 16 states of legislation expressly prohibiting the execution of mentally retarded offenders in the preceding 13 years "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal"); *Stanford v. Kentucky*, 492 U.S. 361, 370-71, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), *overruled by Roper*, 543 U.S. 551, 125 S.Ct. 1183 (finding no national consensus with respect to the execution of juvenile offenders between the ages of 16 and 18 where, of 37 death penalty states, 22 permitted the death penalty for 16-year-old offenders and 25 permitted it for 17-year-old offenders); *Penry v. Lynaugh*, 492 U.S. 302, 333-35, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled by Atkins*, 536 U.S. 304, 122 S.Ct. 2242 (finding the enactment by two states of legislation prohibiting the execution of mentally retarded offenders "insufficient evidence of a national consensus" even when added to the 14 states that prohibited the death penalty altogether). Additionally, the defendant has presented no evidence that, in practice, the execution of a chronically and seriously mentally ill person is unusual in states that retain the death penalty.

Apparently recognizing the dearth of legislation prohibiting the execution of individuals with chronic and serious mental illness, the defendant avers that 19 states have effectively banned the execution of such individuals by adopting expansive definitions of legal insanity which exempt them from facing criminal

punishment at all. Motion at pp. 20-23. This argument, while creative, is speculative. There is no basis to conclude that the defendant, or any alleged offender who suffers from a chronic and serious mental illness, would inevitably be found not guilty by reason of insanity in one of those 19 states. Nor can the Court infer a legislative intent to bar the execution of the chronically and seriously mentally ill from the insanity statutes in those 19 states simply because they contain a broader legal definition of insanity.

As for the defendant's related assertion that Colorado's statutory definition of insanity is "outdated, narrow, and restrictive," *id.* at p. 20, such criticism should be directed to the legislature, not the Court. It is not the role of the judiciary to "act as overseer of all legislative action and declare statutes unconstitutional merely because [it] believe[s] they could be drafted better or more fairly applied." *People v. Dist. Court*, 185 Colo. 78, 81, 521 P.2d 1254, 1255 (Colo. 1974). The Court cannot disregard Colorado law and adopt the law of the 19 states mentioned by the defendant simply because he believes he would fare better under that law.

Moreover, the Court is not persuaded that it should exercise its independent judgment and conclude that "[t]he same reasoning which led the Supreme Court to ban the execution of juveniles and the mentally retarded" in *Atkins* and *Roper* respectively requires this Court to find that the death penalty is a constitutionally excessive sanction when applied to the chronically and seriously mentally ill.

Motion at p. 12. The defendant cites no precedent from the United States Supreme Court or any jurisdiction extending *Atkins* or *Roper* to the chronically and seriously mentally ill. *See generally* Motion. Actually, it appears that every single court that has considered the issue has found that neither *Atkins* nor *Roper* extends to the mentally ill. *See e.g.*, *Mays v. Stephens*, 757 F.3d 211, 219 (5th Cir. 2014) ("[N]either *Atkins* nor *Roper* [] created a rule of constitutional law making the execution of mentally ill persons unconstitutional" and "no subsequent Supreme Court decision announc[ed] such a rule"); *Dotch v. State*, 67 So. 3d 936, 1006 (Ala. Crim. App. 2010) (declining to "extend or expand the constitutional prohibition against the application of the death penalty" to persons who suffer from "long-lasting mental health problems"); *Simmons v. States*, 105 So. 3d 475, 511 (Fla. 2012) (finding no merit in claim that a mental condition other than insanity or mental retardation can exempt an individual from execution or that "defendants with mental illness must be treated similarly to those with mental retardation because both conditions result in reduced culpability"); *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005) (declining to extend *Atkins* to prohibit the execution of an individual "who is competent but mentally ill"); *Dunlap v. Commonwealth*, 435 S.W.3d 537, 616 (Ky. 2013) ("We are not prepared to hold that mentally ill persons are categorically ineligible for the death penalty"); *State v. Hancock*, 840 N.E.2d 1032, 1059 (Ohio 2006) (declining to hold that *Atkins* should be expanded

to exempt "a convicted murderer who was 'severely mentally ill' at the time of his offense" from the death penalty); *Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013) ("expressly reject[ing] that the *Atkins* rule or rationale applies to the mentally ill"); *Mays v. State*, 318 S.W.3d 368, 379 (Tex. Crim. App. 2010) ("there is no authority from the Supreme Court . . . suggesting that mental illness that is a 'contributing factor' in the defendant's actions or that caused some impairment or some diminished capacity, is enough to render one exempt from execution under the Eighth Amendment").

Absent support from the Supreme Court, or from any appellate court, this Court declines to extend *Atkins* and *Roper* to create a categorical rule prohibiting the execution of chronically and seriously mentally ill individuals who are convicted of capital crimes. Of course, the defendant will have ample opportunity to argue at any capital sentencing hearing that he suffers from a chronic and serious mental illness that makes him less culpable than other capital defendants. Section 18-1.3-1201(4)(b), C.R.S. (2014) specifically allows the defendant to contend, as mitigation, that his "capacity to appreciate [the] wrongfulness of [his] conduct or to conform [his] conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." The defendant may also present evidence of his "emotional state . . . at the time the crime was committed" and "[a]ny other evidence which in the court's opinion

bears on the question of mitigation." § 18-1.3-1201(4)(f),(l). Therefore, the defendant will be able to ask the jury to consider his alleged chronic and serious mental illness as mitigation, thereby "providing the individual determination that the Eighth Amendment requires in capital cases." *Dunlap*, 435 S.W.3d at 616.

Lastly, the defendant maintains that the execution of the chronically and seriously mentally ill "violates the state and federal constitutional provisions that guarantee substantive due process and equal protection of the laws." Motion at p. 2. As the Court explained in a previous Order, "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Order D-165 at pp. 15-16 (quotation omitted). Because "the Eight Amendment provides [] an explicit textual source of constitutional protection" against excessive sanctions, that Amendment, and not the more generalized notions of substantive due process and equal protection, is controlling. *See id.* at p. 16 (quotation omitted).

CONCLUSION

It would be premature and inappropriate for the Court to find over the prosecution's objection that the defendant suffers from a chronic and serious mental illness. At any rate, the defendant has not shown a trend among the states

to prohibit the execution of the chronically and seriously mentally ill. Nor has the defendant made a persuasive showing that the Court should exercise its judgment and find that the death penalty is a constitutionally excessive sanction when applied to the chronically and seriously mentally ill. Accordingly, without a hearing, the defendant's motion is denied as meritless.

Dated this 3rd day of December of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2014, a true and correct copy of the **Order regarding Defendant's revised motion to strike the death penalty because the State and Federal constitutions prohibit the execution of individuals such as Mr. Holmes who suffer from a chronic and serious mental illness (D-186a)** was served upon the following parties of record:

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