

Avoiding *Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate

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INTRODUCTION

On January 17, 2008, the historic case of *Daryl Renard Atkins v. Commonwealth of Virginia*¹ finally came to an end, nearly ten years after the original trial and death sentence in the case.² Despite expectations that the case would end with the determination of Atkins' mental status, that finding was not what commuted his death sentence to one of life without the possibility of parole. Instead, a finding of prosecutorial misconduct saved Darryl Atkins' life.³ That said, Atkins' case, and the United States Supreme Court decision overturning *Penry v. Lynaugh*⁴ and abolishing the death penalty for the "mentally retarded," has led to significantly more litigation than most decisions of this nature. Because the Supreme Court left to the states the task of defining "mental retardation"⁵ for purposes of implementing its decision, there has been a great deal of controversy not only in defining the term, but also in creating the procedural structure for making the determination. While many states have

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1. *Atkins v. Virginia*, 536 U.S. 304 (2002) [hereinafter *Atkins III*].

2. Donna St. George, *Death Sentence Commuted in Virginia Case: Prosecutor Action is Issue, Not Mental Status of Defendant*, WASHINGTON POST, January 18, 2008, at B6.

3. *Prosecutorial Misconduct Leads to Life Sentence for Daryl Atkins*, DEATH PENALTY INFORMATION CENTER, (2008), <http://www.deathpenaltyinfo.org/node/2288>.

4. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

5. The American Association on Intellectual and Developmental Disabilities (formerly known as the American Association on Mental Retardation or "AAMR") suggests that the term "mental retardation" be changed to "intellectual disability." This would be a change in the nomenclature only, without any change in the clinical definition itself. A formal proposal for such change will be included in the 2009/2010 publication of the 11th Edition of the definition, classification and systems of supports manual. *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45-2 INTEL. AND DEVELOPMENTAL DISABILITIES JOURNAL 116-124. (forthcoming 2009-2010) While the author agrees with the AAIDD's reasons for the change of terms, to avoid confusion, the term "mental retardation" (as used by the United States Supreme Court in *Atkins III*) will be used throughout this article.

adopted the clinical definition endorsed by the American Association on Intellectual and Developmental Disabilities⁶ (“AAIDD”) and/or the American Psychiatric Association (“APA”), in their desire to limit the impact of *Atkins* they have twisted the definition to something that could exclude even severely mentally retarded individuals. This article focuses on the definitional aspect of the *Atkins* decision by examining the Court’s holding and mandate, and reviewing how states have addressed the issue. It concludes by proposing a legal definition of “mental retardation” that encompasses both the relevant clinical definitional aspects and the reduced culpability issues identified by the Court in determining who may be constitutionally subjected to capital punishment under the Eighth Amendment.

I. *ATKINS V. VIRGINIA*

In 2002, the United States Supreme Court held that executing a mentally retarded individual violated the Eighth Amendment.⁷ *Atkins* overturned a decision rendered thirteen years earlier in *Penry v. Lynaugh*⁸ in which the Supreme Court found that, at least at that time, there was no societal consensus against such punishment.

A. *The Road to the Supreme Court*

Around midnight on August 16, 1996, Daryl Atkins and William Jones abducted, robbed and killed Eric Nesbitt. Mr. Nesbitt died from eight gunshot wounds to the thorax, chest, abdomen, arms, and legs.⁹ At trial, both Atkins and Jones admitted the abduction and robbery, but their testimony was in direct conflict regarding who actually killed Mr. Nesbitt. Because Virginia applies the “triggerman rule,”¹⁰ the identity of the shooter was the pivotal issue for purposes of the capital charge. Jones testified that after Atkins started shooting at Nesbitt, he jumped on Atkins and struggled with him for the gun. During this struggle, Atkins was shot in the leg.¹¹ Atkins testified as the only defense witness during the guilt phase of the trial. He testified that Jones shot Nesbitt and that one of the shots hit Atkins in the leg.¹² The jury convicted Atkins of capital murder.¹³

During the sentencing phase of the trial, the Commonwealth sought the

6. This organization was formerly known as the American Association on Mental Retardation (AAMR).

7. *Atkins III*, 536 U.S. 304.

8. *Penry*, 492 U.S. at 302.

9. *Atkins v. Virginia*, 510 S.E.2d 445, 450 (Va. 1999) [hereinafter *Atkins I*].

10. Under the “triggerman” rule, only the person who actually commits the act of killing may be convicted of capital murder and subject to the death penalty. See *Frye v. Virginia*, 345 S.E.2d 267, 280 (Va. 1986).

11. *Atkins I*, 510 S.E.2d at 450.

12. *Id.* at 451.

13. *Id.*

death penalty under both of Virginia's aggravating circumstances—future dangerousness and vileness.¹⁴ The Commonwealth's evidence included Atkins' prior convictions,¹⁵ testimony from former robbery victims and victim impact testimony from Nesbitt's mother. Atkins presented testimony from forensic psychologist Evan Nelson. Dr. Nelson testified regarding Atkins' mental status, indicating that Atkins had a full scale IQ of 59.¹⁶ Based on his examination of Atkins, Dr. Nelson testified that he "falls in the range of being mildly mentally retarded."¹⁷ Dr. Nelson also testified that Atkins was highly unlikely to pose any threat of future dangerousness if given a life sentence.¹⁸ Despite this, the jury returned a verdict of death, finding that the Commonwealth had proved both of the aggravating circumstances—future dangerousness and vileness¹⁹—beyond a reasonable doubt.²⁰

On appeal to the Virginia Supreme Court, Atkins' capital murder conviction was affirmed, but his death sentence was reversed. His case was remanded for a new sentencing hearing because the verdict form read and provided to the jury in the sentencing phase did not contain the option of sentencing Atkins to life imprisonment upon a finding that neither of the aggravating factors was proven beyond a reasonable doubt.²¹

Upon remand, Atkins again presented evidence from Dr. Nelson that he had a full scale IQ of 59 and that he was "mildly mentally retarded."²² This time, the Commonwealth presented rebuttal evidence from Stanton E. Samenow, a forensic clinical psychologist. Dr. Samenow testified that Atkins was of at least average intelligence, based on interactions with him in two meetings.²³ After hearing this testimony, and other evidence presented by the

14. *Id.* VA. CODE ANN. § 19.2-264.2 (1977).

15. The Commonwealth presented evidence that Atkins had at least eighteen prior felony convictions for such crimes as attempted robbery, robbery, abduction, breaking and entering with the intent to commit larceny, grand larceny, maiming and use of a firearm. *Atkins v. Virginia*, 534 S.E.2d 312, 317 (Va. 2000) [hereinafter *Atkins II*].

16. *Atkins I*, 510 S.E.2d at 450. Atkins' verbal IQ was 64 and his performance IQ was 60. Dr. Nelson testified that "the full scale IQ is not a simple mathematical average between 64 and 60. It's actually putting all of the items back together, charting out a graph of the scores and then figuring out where people stand."

17. *Id.*

18. *Id.*

19. Before a defendant may be sentenced to death in Virginia, the court or jury must "find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." VA. CODE ANN. § 19.2-264.2 (1977).

20. *Atkins I*, 510 S.E.2d at 453.

21. *Id.* at 456. Although not discussed within the body of the opinion, the court also directed that, on remand, Atkins was entitled to a sentencing phase charge instructing the jury to consider all mitigating evidence, including his mental retardation. *Id.* at 445.

22. *Atkins II*, 534 S.E.2d at 318.

23. *Id.*

Commonwealth, the second jury sentenced Atkins to death, finding that the Commonwealth had proven both aggravating factors beyond a reasonable doubt.²⁴

Atkins again appealed to the Virginia Supreme Court, arguing, among other things, that a death sentence was disproportionate²⁵ given his full scale IQ of 59.²⁶ Atkins buttressed this argument with evidence that the death penalty had not been imposed on any other defendant in Virginia with an IQ as low as his.²⁷ The Court found that mental retardation was a factual question, and that the jury was responsible for deciding what, if any, weight it should be accorded in terms of the sentencing decision.²⁸ In upholding Atkins' death sentence, the majority relied on the fact that "[t]he Supreme Court of the United States has ruled that imposition of the death penalty on a mentally retarded defendant with the approximate reasoning capacity of a seven-year-old child does not violate the Eighth Amendment prohibition against cruel and unusual punishment solely because of the defendant's mental retardation."²⁹

Justices Hassell and Koontz dissented, arguing that Atkins' death sentence should be commuted to life without the possibility of parole under the Virginia proportionality statute,³⁰ which requires the reviewing court to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar crimes committed within the Commonwealth of Virginia.³¹ Regarding Dr. Samenow's testimony, Justice Hassell stated in his dissenting opinion, "I simply place no credence whatsoever in Dr. Samenow's opinion that the defendant possesses at least average intelligence. I would hold that Dr. Samenow's opinion that the defendant possesses average intelligence is incredulous as a matter of law."³²

24. *Id.* at 314. To establish the future dangerousness aggravator, the jury may consider the defendant's prior criminal record, past history, the circumstances surrounding the commission of the offense and the heinousness of the crime. *Edmonds v. Virginia*, 329 S.E.2d 807, 813 (Va. 1985). The vileness aggravator may be proven with evidence an aggravated battery on the victim, which has been defined as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Goins v. Virginia*, 470 S.E.2d 114, 131 (Va. 1996).

25. Atkins was not arguing for a categorical exemption at this point. Instead his argument focused on the proportionality review that is required under Virginia Code Section 17.1-313(C). This appellate review requires Virginia Supreme Court to determine whether the sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor; and [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in other cases, considering both the crime and the defendant." VA. CODE ANN. § 17.1-313(C) (1998).

26. For a discussion regarding the calculation of a full scale IQ score, see note 16, *supra*.

27. *Atkins II*, 534 S.E.2d at 318.

28. *Id.* at 320.

29. *Id.* at 319.

30. VA. CODE ANN. § 17.1-313 (1998).

31. *Atkins II*, 534 S.E.2d at 323.

32. *Id.* Justice Hassell also noted that Dr. Samenow knowingly breached the ethical standards as enunciated by the American Psychological Association in the *Ethical Principles of Psychologists and Code of Conduct*, by using obsolete tests and outdated test results as the basis

As a precursor to the U.S. Supreme Court's ultimate decision, Justice Koontz noted in his dissenting opinion:

Moreover, it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.³³

Atkins filed a petition a writ of certiorari to the United States Supreme Court, which was granted on September 25, 2001.³⁴ According to the Court, it granted Atkins' petition for certiorari "[b]ecause of the gravity of the concerns expressed by the dissenters (referring to Justices Hassell and Koontz), and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years."³⁵ The Court held that it was time "to revisit the issue that we first addressed in the *Penry*³⁶ case."

B. The Supreme Court's Mandate

In *Atkins*, the U.S. Supreme Court evaluated the mental retardation issue in accordance with its established Eighth Amendment jurisprudence setting forth the applicable standard of review in capital cases.³⁷ Claims of excessive punishment are judged by currently prevailing standards. As noted in *Trop v. Dulles*: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁸

Based on the "evolving standards of decency" analysis set forth in *Trop*, the Court established a two-step analysis for claims of excessive punishment. First, the Court looks to objective factors indicative of current societal values. After determining whether a societal consensus exists, the Court then applies its own judgment "by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."³⁹ The second part of the analysis, the Court considers the extent to which the punishment at issue advances the penological purposes of the death penalty—namely retribution and deterrence.

for his opinion that Atkins was not mentally retarded. *Id.* at 324.

33. *Id.* at 325.

34. *Atkins v. Virginia*, 533 U.S. 976 (2001).

35. *Atkins III*, 536 U.S. at 310.

36. *Penry*, 492 U.S. at 302 (1989) (holding that the death penalty is not a *per se* disproportionate punishment for mentally retarded defendants).

37. See *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991); *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

38. *Trop*, 356 U.S. 86, 100-101 (1958).

39. *Atkins III*, 536 U.S. at 313.

Applying the first part of the analysis, the Court found that since its decision in *Penry v. Lynaugh*⁴⁰ finding no Eighth Amendment barrier to the execution of mentally retarded individuals, a significant number of jurisdictions had enacted statutes prohibiting the execution of mentally retarded individuals.⁴¹ According to the Court, this legislative activity⁴² indicated a consistent direction of change and provided “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”⁴³

In the second part of the analysis, the Court made its own judgment on the issue, with the majority finding that the national consensus against such executions was supported by the relative lack of connection between the punishment and the penological goals of deterrence and retribution.⁴⁴ The theory of deterrence in capital cases is premised on the notion that individuals will desist from committing capital offenses out of fear that it will result in their own death. However, according to the majority:

[I]t is the same cognitive and behavioral impairments that make these [mentally retarded] defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.⁴⁵

In addition to the severely weakened or nonexistent deterrent effect of executing mentally retarded offenders, the Court also found that the penological goal of retribution was not satisfied in these cases. The goal of retribution is served only where the offender actually committed the offense, and the punishment is proportionate to the crime.⁴⁶ The majority concluded:

The risk ‘that the death penalty will be imposed in spite of factors which may call for a less severe penalty’ is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more

40. *Penry*, 492 U.S. at 302.

41. *Atkins III*, 536 U.S. at 314.

42. In addition to the number of statutes enacted, the Court also considered the fact that the legislative activity in each jurisdiction was overwhelmingly in favor of abolishing the punishment at issue. The Court also considered the fact that the execution of mentally retarded offenders was uncommon in those jurisdictions that permitted it. *Id.* at 316.

43. *Id.*

44. *Id.* at 320-21.

45. *Id.* at 320.

46. See generally, Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968); Benjamin B. Sendor, *Restorative Retributivism*, 5 *J. CONTEMP. LEGAL ISSUES* 323 (1994); Michelle Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *AM. CRIM. L. REV.* 1313 (2000).

aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.⁴⁷

Due to their mental status, mentally retarded defendants face greater risk of both wrongful conviction and inappropriate sentencing decisions. In addition to these heightened risks, the Court considers mentally retarded defendants categorically less culpable than the average criminal.⁴⁸ Although this lessened culpability does not excuse a mentally retarded individual's criminal conduct, it is seen as sufficient to remove the death penalty as a potential punishment (especially where the alternative sentence is life imprisonment without the possibility of parole).

Based on both the increasing number of state legislatures who oppose the application of capital punishment to mentally retarded individuals and the Court's own analysis of impact of the death penalty on the penological theories of deterrence and retribution, the Court found that the Eighth Amendment prohibited the imposition of the death penalty on mentally retarded defendants.⁴⁹ The Court, however, left to the states the task of implementing the ruling by defining the term "mental retardation."⁵⁰ Although the Court cited then-current clinical definitions,⁵¹ it did not give any more specific guidance to the states.

C. *The Road on Remand*

After finding that the execution of "mentally retarded" individuals violates the Eighth Amendment's prohibition against cruel and unusual punishments, the United States Supreme Court reversed Atkins' death sentence and remanded his case back to the Virginia Supreme Court. The Virginia Supreme Court found that no decision with respect to Atkins' mental health

47. *Atkins III*, 536 U.S. at 320-21 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

48. *Id.* at 316.

49. The majority opinion was written by Justice Stevens, who was joined by Justices O'Connor, Kennedy, Ginsburg, Souter and Breyer.

50. *Id.* at 317.

51. The Court noted both the AAMR and APA's definitions of "mental retardation." The AAMR definition at the time of the Court's decision was as follows: "*Mental retardation*" refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen." The American Psychiatric Association's definition was: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age eighteen (Criterion C)." *Atkins III*, 536 U.S. at 309 n.3.

status had been made at the original sentencing hearings or by the U.S. Supreme Court, and remanded the case to the original trial judge for a hearing⁵² on the issue of whether Daryl Atkins was “mentally retarded” as that term was defined by the Virginia legislature.⁵³

At the first hearing on the mental retardation issue, a jury found that Atkins failed to prove by a preponderance of the evidence that he was mentally retarded, as defined by the Virginia legislature.⁵⁴ Atkins appealed this finding, alleging procedural and evidentiary defects in the hearing.⁵⁵ The Virginia Supreme Court reversed the finding regarding whether Atkins was “mentally retarded” based on two of the errors alleged by Atkins – one involving the qualifications of the Commonwealth’s expert witness Dr. Samenow, and the other relating to information that was relayed to the jury regarding Atkins’ prior death sentence.

With respect to the first issue, the court found that Dr. Samenow⁵⁶ did not meet the requirements as set forth in the statute⁵⁷ defining “mental retardation” experts. Because there was no way to determine the degree of emphasis the jury placed on his testimony, the court found that the error was not harmless. Regarding the second issue, the court found that the trial judge’s jury instruction informing them that a finding of “mental retardation” would overturn a previous jury’s sentence of death prejudiced Atkins’ right to a fair

52. *Atkins v. Virginia*, 581 S.E.2d 514 (Va. 2003) [hereinafter *Atkins IV*].

53. VA. CODE ANN. § 19.2-264.3:1.1(A) (2003) states: “‘Mentally retarded’ means a disability, originating before the age of eighteen years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.”

54. *Atkins IV*, 581 S.E.2d at 95. In addition to the definition of mental retardation, the United States Supreme Court also left to states the task of developing procedural mechanisms to implement the Eighth Amendment ban on executing the mentally retarded. Virginia, like many other jurisdictions, placed the burden on the defendant to raise mental retardation as an issue, and once raised, to prove it by a preponderance of the evidence. VA. CODE ANN. § 19.2-264.3:1.1(C) (2003).

55. Among other things, Atkins argued on appeal that “the circuit court erred ‘by informing [the] jurors that, after a prior valid juror determination of sentence was made, the Supreme Court of the United States intervened by ruling that the execution of persons with mental retardation is cruel and unusual punishment, and that their decision regarding mental retardation would determine whether the prior valid juror determination of sentence would actually be imposed . . .’ the circuit court erred ‘by sustaining the Commonwealth’s objection to the qualifications and expert testimony of Dr. Richard Kelley;’ and . . . the circuit court erred ‘by overruling [Atkins’] objection to the expert qualification and subsequent testimony of Dr. Stanton E. Samenow as a Commonwealth witness.’” *Atkins IV*, 581 S.E.2d at 95.

56. Dr. Samenow is the same witness whose testimony Justices Hassell and Koontz found to be “incredulous as a matter of law” in *Atkins II*. *Atkins II*, 534 S.E.2d at 323.

57. VA. CODE ANN. § 19.2-264.3:1.2(A) (2003) provides that “mental retardation” experts must be “skilled in the administration, scoring and interpretation of . . . measures of adaptive behavior.”

trial on the issue of his mental retardation.⁵⁸

Once again, Atkins' case was remanded to the circuit court for a new sentencing hearing relating to his mental status. However, prior to the second mental retardation hearing, Atkins' attorney raised a potential *Brady*⁵⁹ violation from the original trial. Because both Atkins and his co-defendant, William Jones, admitted to the robbery and the shooting, the main issue at trial was the identity of the shooter. Atkins fingered Jones as the shooter, and Jones fingered Atkins as the shooter. Prior to the trial, the prosecution met with Jones and his attorney and made a deal with him to reduce his charge to first degree murder (no death penalty eligibility) and dismiss the robbery, use of a firearm, and abduction charges, in exchange for his testimony against Atkins. The discovery issue related to the existence of a tape recording of the prosecution team's interview with Jones. Initially, Jones' testimony did not match the forensic and physical evidence gathered in the case. However, after the approximately ninety-minute interview, Jones' testimony became much more consistent with the prosecution's other evidence. Prosecutors did not turn over the tape, nor information regarding Jones' change in testimony to Atkins' original trial counsel.

After hearing evidence regarding the alleged discovery violation, the trial judge found that "had [Atkins' attorney] been given the evidence, the outcome might have been different."⁶⁰ Because the issue related solely to whether Atkins was the triggerman, the court found that a new trial was unnecessary. And so, on January 17, 2008, almost twelve years after the original offense was committed, four trips to the Virginia Supreme Court, and one very famous trip to the United States Supreme Court, Daryl Atkins' death sentence was finally commuted to life.⁶¹ Ironically, this decision had nothing to do with the issue addressed by the Supreme Court in his case – namely, the execution of mentally retarded individuals.

II. THE DEFINITIONAL ISSUE

The Court in *Atkins* left the task of defining "mental retardation" to each individual state. Although this does not seem to be an insurmountably difficult

58. *Atkins v. Virginia*, 631 S.E. 2d 93, 100 (Va. 2006) [hereinafter *Atkins V.*].

59. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment).

60. Donna St. George, *Death Sentence Commuted In Va. Case*, WASHINGTON POST, Jan. 18, 2008, at B4.

61. On February 15, 2008, the prosecution agreed to a life sentence for Johnny Paul Penry. Penry was the named defendant in the first mental retardation case considered by the Supreme Court in 1989 (*Penry*, 492 U.S. 302), which was overturned by the Court's decision in *Atkins III*. Although Penry's IQ range had been measured between 50 and 63, Texas prosecutor's continued to seek a death sentence until the February plea agreement. DEATH PENALTY INFORMATION CENTER, (2008), <http://www.deathpenaltyinfo.org/node/2309>.

task at first blush, as with most issues involving the mixture of criminal law and psychology, it becomes more complicated as the issues are considered. This section of the article first addresses the underlying requirements of the Court's decision in *Atkins*, and then evaluates how states are addressing the issue of defining "mental retardation" in the context of the death penalty.

A. *What Atkins Requires*

In holding that the execution of mentally retarded individuals is an unconstitutionally disproportionate punishment violative of the Eighth Amendment, the Court focused mainly on the reasons why such offenders are categorically less deserving of the death penalty. Although the Court found that several state legislatures had banned such executions, this evidence was most relevant to the Eighth Amendment analysis for the reasons underlying the legislative decisions, not because of the specific number of jurisdictions that had banned the practice.

The Court based its independent analysis of the punishment, and ultimate finding of unconstitutionality, on two major premises: (1) the relatively lesser culpability of mentally retarded individuals as compared to average criminals; and (2) the effect of mental retardation on the penological purposes served by the death penalty.⁶²

With respect to the first premise, the Court viewed the multitude of legislative enactments opposing such punishment as "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."⁶³ The Court also emphasized the fact that the legislatures that had addressed the issue voted overwhelmingly in opposition of such punishment.⁶⁴ The Court specifically noted that mentally retarded individuals are, by definition, diminished in their ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses.⁶⁵ As such, although they are not so cognitively and behaviorally impaired as to deserve exculpation from all liability for their conduct, they are, as a group, less culpable and less deserving of the death penalty.⁶⁶ This lesser culpability is based not on the psychological label of "mental retardation," but on the cognitive and behavioral impairments experienced by these individuals.

62. *Atkins III*, 536 U.S. at 317.

63. *Id.* at 316.

64. *Id.*

65. *Id.* at 320.

66. This notion is supported by the dissenting opinion of Justices Hassell and Koontz in *Atkins II*, in which they concluded that, "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." *Atkins II*, 534 S.E.2d at 325.

Regarding the second premise of the Court's holding, relating to the penological purposes of the death penalty, the Court considered the effect of mental retardation on both deterrence and retribution. With respect to the former, the Court noted that the theory of deterrence works only to prohibit premeditated acts and only to the extent that the offender has the cognitive ability to weigh the consequences of his or her actions and appreciate the application of the death penalty, and the behavioral ability to conform his or her actions accordingly. Because mentally retarded individuals lack both the cognitive and the behavioral abilities necessary for a successful deterrence rationale, the Court found that this theory of deterrence is not served by the application of the death penalty to these individuals.⁶⁷

The theory of retribution is based on the notion of "just deserts," the idea that individuals who break the law deserve to be punished for their conduct. The theory of retribution also requires, first and foremost, punishment of only the factually guilty and that the "punishment fit the crime."⁶⁸ As such, the penological theory of retribution raises concerns regarding wrongful convictions and disproportionate punishment. The Court found that both of these concerns arise when dealing with a mentally retarded defendant.⁶⁹ The Court specifically noted:

The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty' is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.⁷⁰

In addition to these specific concerns, the Court also noted that the use of a defendant's mental retardation as mitigating evidence at a sentencing hearing often acts as double-edged sword that "may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."⁷¹ In such instances, not only is a defendant's lesser culpability not considered by a jury, it is twisted into an aggravating factor weighing in favor of the death penalty. Additionally, a mentally retarded defendant's lesser ability to give meaningful assistance to counsel makes him or her especially vulnerable to wrongful conviction.⁷²

67. *Atkins III*, 536 U.S. at 321.

68. *See generally*, MORRIS, ET AL., *supra* note 46.

69. *Atkins III*, 536 U.S. at 320-21.

70. *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

71. *Id.* at 321.

72. *Id.* Mentally retarded individuals are also much more likely to give false confessions than are individuals of average or greater intelligence. *See* Paul T. Hourihan, *Earl Washington's*

Based on these concerns, the Court found that it was “not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”⁷³ Therefore, in light of the evolving standards of decency applied under the Court’s Eighth Amendment jurisprudence, a majority of six Justices found that “such punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”⁷⁴

Although the *Atkins*’ Court left it to the states to define the term “mental retardation” and to determine the best procedural and evidentiary mechanisms for enforcing the Court’s “constitutional restriction upon [their] execution of sentences.”⁷⁵ The Court’s mandate then, was for the states to enact a definition of “mental retardation” that would include all defendants whose cognitive and behavioral impairments place them in the category of individuals deemed to have lesser culpability and a greater risk of wrongful conviction and/or execution. Based on the Court’s reference to prevailing clinical definitions, such terms should be the minimum required for compliance with the Court’s ruling. However, as discussed in Section III of this article, because the clinical definitions were drafted neither for the exacting context of statutory interpretation, nor for purposes of defining the category of less culpable individuals to whom the Court referred in *Atkins*, some amendments are necessary.

The following section discusses the definitions of “mental retardation” which state courts and legislatures have adopted pursuant to the Court’s mandate in *Atkins*.

B. State Approaches

Most states have approached the task of defining “mental retardation” by considering the clinical definitions adopted by the APA and AAIDD.⁷⁶ Given the Supreme Court’s reference to these definitions in *Atkins*, this approach seems prudent. The two main elements of the clinical definition of mental retardation are (1) subaverage intellectual functioning⁷⁷ and (2) concurrent

Confession: Mental Retardation and the Law of Confessions, 81 VA. L. REV. 1471, 1473 (1995); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 445 (1985).

73. *Atkins III*, 536 U.S. at 321.

74. *Id.*

75. *Id.* at 317 (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

76. *See infra* Section III(A).

77. The APA definition refers to “significantly subaverage intellectual functioning.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41 (4th ed. 2000). The AAIDD definition refers to “significant limitations . . . in intellectual functioning.” AM. ASS’N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS* (Ruth Luckasson et al. eds., 10th ed. 2002).

significant limitations in adaptive functioning.⁷⁸ These elements both directly relate to the culpability and penological issues identified as the basis for the Court's holding in *Atkins*. The third element requires onset prior to the age of eighteen. This element is present in the clinical definition to differentiate "mental retardation" from disabilities acquired later such as traumatic brain damage and dementia.⁷⁹ However, it has no relation to the Court's underlying rationale in *Atkins*.

1. Intellectual and Behavioral Components

All states that have defined "mental retardation" in the context of capital cases have included both an intellectual and a behavioral component.⁸⁰ However, jurisdictions have not set uniform parameters with respect to these components. For example, approximately half of the jurisdictions set a specific IQ threshold for purposes of determining cognitive impairment.⁸¹ Most jurisdictions set the requisite IQ level at 70 or below.⁸² Of these jurisdictions, New Mexico and Nebraska not only set the threshold at 70 or below, but provide that such a score "shall be presumptive evidence of mental retardation."⁸³ Arkansas and Illinois have created presumptions supporting a finding of mental retardation when the IQ level is at or below 65,⁸⁴ or at or

78. The APA definition refers to "significant limitations in adaptive functioning in at least two of the following skill areas: communications, self-care, home living, social/interpersonal skills, use of community resources, self-directions, functional academic skills, work, leisure, health and safety." AM. PSYCHIATRIC ASS'N, *supra* note 77. The AAIDD definition refers to significant limitations . . . in adaptive behavior as expressed in conceptual, social and practical adaptive skills." AM. ASS'N ON MENTAL RETARDATION, *supra* note 77.

79. See Am. Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668 (2006); Richard J. Bonnie and Katherine Gustafson, *The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L. REV. 811, 854 (2007).

80. The federal government has not specifically defined "mental retardation" within its statute. It simply states that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c) (1994).

81. Jurisdictions setting a specific IQ threshold are Arizona, Arkansas, Delaware, Idaho, Illinois, Kentucky, Maryland, New Mexico, North Carolina, South Dakota, Tennessee, and Washington.

82. Jurisdictions setting the required IQ threshold at 70 or below are: Delaware (11 DEL.C. ANN. § 4209(d)(3) (2007)); Idaho (I.C. ANN. § 19-2515A(1)(b) (2006)); Indiana (IND.CODE § 19-2515A(1)(A) (2006)); Kentucky (KY. REV. STAT. ANN. § 532.130(2) (1990)); Maryland (MD. CODE ANN., CRIM. LAW § 2-202(b)(1)(i) (2002)); Nebraska (NEB. REV. STAT. § 28-105.01 (2000)); New Mexico (N.M. STAT. ANN. 1978, § 31-20A-2.1(A) (2007)); North Carolina (N.C. GEN. STAT. ANN. § 15A-2005(a)(2) (2001)); South Dakota (S.D. CODIFIED LAWS § 23A-27A-26.2 (2007)); Tennessee (TENN. CODE ANN. § 39-13-203(a)(1) (2005)); and Washington (WASH. REV. CODE ANN. 10.95.030(2)(c) (1993)).

83. N.M. STAT. ANN. 1978, § 31-20A-2.1(A) (2007); NEB. REV. STAT. § 28-105.01 (2000)).

84. The Arkansas statute provides that "[t]here is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below." ARK. CODE ANN. § 5-4-618(a)(2) (2006).

below 75,⁸⁵ respectively. Conversely, South Dakota's statute provides that an IQ score exceeding 70 "is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning."⁸⁶ Connecticut,⁸⁷ Florida,⁸⁸ Kansas,⁸⁹ and Virginia⁹⁰ have not adopted a particular IQ cutoff, but instead require a score on a standardized testing instrument that is "at least two standard deviations below the mean."⁹¹ Many other jurisdictions simply refer generally to a requirement that the defendant have "significantly subaverage general intellectual functioning."⁹² This particular language comes directly from the widely accepted APA definition set forth in the DSM-IV.⁹³

With respect to the second component of the definition—significant limitations in adaptive functioning—all states that have defined "mental retardation" in the context of capital cases have included some form of adaptive limitation. However, as with the intellectual deficit component, states are not uniform in the definitions they have adopted. Most jurisdictions base this component on one of the generally accepted clinical definitions, but some have created definitions that have no support in the clinical literature. For example, Kansas defines the component as subaverage intellectual functioning "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."⁹⁴ This definition reads more like an insanity defense than a mental retardation diagnosis and is not supported in the clinical field. Utah has adopted a similar definition, requiring "significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas."⁹⁵ Ironically, Utah has also adopted the clinical definition for adaptive functioning, but applies it only where the prosecution intends to present evidence of a "confession by the defendant which is not supported by

85. The Illinois statute provides that "An intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation." 725 ILL. COMP. STAT. 5/114-15(d) (2007).

86. S.D. CODIFIED LAWS § 23A-27A-26.2 (2007).

87. CONN. GEN. STAT. ANN. § 1-1g (b) (2007).

88. FLA. STAT. ANN. § 921.137(1) (2006).

89. KAN. STAT. ANN. § 76-12b01(i) (2007).

90. VA. CODE ANN. § 19.2-264.3:1.1(A)(i).

91. This definition generally equates to an IQ score of 70 or below, because 70 is typically two standard deviations below the mean on a test designating 100 as the mean. See Bonnie, *supra* note 79, at 834.

92. Jurisdictions using this language to define the cognitive deficit component include: California (CAL. PENAL CODE § 1376(a) (2003)); Colorado (COLO. REV. STAT. ANN. § 18-1.3-1101(2) (2002)); Georgia (GA. CODE ANN., § 17-7-131(a)(3) (2006)); Kansas (KAN. STAT. ANN. § 21-4623 (2007)); Missouri (MO. ANN. STAT. 565.030 (2007)); Nevada (NEV. REV. STAT. § 174.098(7) (2007)); Texas (*Ex parte Briseno*, 135 S.W.3d 1, 8 (2004)) and Utah (UTAH CODE ANN. 1953 § 77-15a-102(1) (2007)). Louisiana uses the current AAIDD definition which describes the cognitive element as "significant limitation in . . . intellectual functioning." (LA. CODE CRIM. PROC. ANN. art. 905.5(H)(1) (2007)).

93. AM. PSYCHIATRIC ASS'N, *supra* note 78.

94. KAN. STAT. ANN. § 21-4623(e) (2007).

95. UTAH CODE ANN. 1953 § 77-15a-102(1) (2007).

substantial evidence independent of the confession.”⁹⁶ As with Kansas’ definition, this definition is not clinically supported.

The intellectual and behavioral deficit components of mental retardation are the most important ones for implementing the Court’s mandate in *Atkins*. Both of the premises noted by the Court in support of its holding—reduced culpability, and insufficient connection to the penological theories of deterrence and retribution—are directly related to the diminished intellectual and adaptive abilities of mentally retarded individuals. The problem with the adaptive deficit definitions adopted in Kansas and Utah is that they have little or no relation to the clinically defined disability of mental retardation. As such, they violate the letter of the *Atkins* mandate by excluding a potentially large number of individuals the Court intended to include within the protected category. There may also be valid concerns with states adopting specific IQ thresholds or creating presumptions based solely on a defendant’s IQ score,⁹⁷ but these concerns pale in comparison to the reformulations of adaptive deficit measurements enacted by Kansas and Utah.

2. Developmental Origin Component

The third component in the clinical definition of mental retardation relates to the age of onset. As discussed earlier, this requirement is clinically significant because it distinguishes mental retardation from later acquired brain deficits, but it has no significance to the Eighth Amendment concerns regarding “mental retardation.”⁹⁸ Nevertheless, all but two jurisdictions considering the issue have adopted some form of developmental origin requirement.⁹⁹ Most jurisdictions follow the clinical definition and set the age of onset at eighteen.¹⁰⁰ A handful of jurisdictions do not set a specific age but require

96. The Utah statute provides as follows:

(2) A defendant who does not meet the definition of mental retardation under Section 77-15a-102 is not subject to the death penalty if:

(a) the defendant has significantly subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning;

(b) the functioning described in Subsection (2)(a) is manifested prior to age 22; and

(c) the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.

UTAH CODE ANN. 1953 § 77-15a-101(2) (2003).

97. Bonnie, *supra* note 79.

98. See *id.* at 854.

99. Jurisdictions with an age of onset requirement include the following: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nevada, North Carolina, South Dakota, Tennessee, Texas, Utah and Washington.

100. Arizona (ARIZ. REV. STAT. § 13-703.02 (2006)); Arkansas (ARK. CODE ANN. § 5-4-618(a)(1)(A) (2006)); California (CAL. PENAL CODE § 1376(a) (2003)); Connecticut (CONN. GEN. STAT. ANN. § 1-1g (b) (2007)); Delaware (DEL. CODE ANN. tit. 11 § 4209(d)(2) (2007)); Florida (FLA. STAT. ANN. § 921.137(1) (2006)); Idaho (IDAHO CODE ANN. § 19-2515A(1)(a) (2006)); Illinois (725 ILL. COMP. STAT. ANN. 5/114-15(d) (2007)); Kansas (KAN. STAT. ANN. § 76-12b01(d) (2007)); Louisiana (LA. CODE CRIM. PROC. art. 905.5.1(H)(1) (2003)); Missouri (MO.

onset “during the developmental period.”¹⁰¹ Indiana,¹⁰² Utah,¹⁰³ and Maryland¹⁰⁴ set the developmental origin requirement at age 22. Only two jurisdictions—New Mexico¹⁰⁵ and Nebraska¹⁰⁶—exclude developmental origin from their definitions of mental retardation.

Including the developmental origin element within the statutory definition excludes individuals from the *Atkins* holding who suffer from the same cognitive and adaptive deficits as mentally retarded individuals, based solely on when or how the brain damage occurs. Such arbitrary exclusion certainly violates the spirit, if not the letter, of the Court’s mandate in *Atkins*. While it is unclear whether jurisdictions adopting a developmental origin requirement are intentionally excluding cognitively and adaptively impaired individuals from the definition of mental retardation, it seems more likely that these jurisdictions are attempting to conform the definition of mental retardation to the clinical requirements.¹⁰⁷ However, blind adherence to an element that has virtually no relation to the defining characteristics of the group of individuals recognized by the Court in *Atkins*, results in an unconstitutionally narrow definition.

III. A CONSTITUTIONALLY ACCEPTABLE DEFINITION OF “MENTAL RETARDATION”

As discussed in Section II(A), *supra*, the Court in *Atkins* based its holding of unconstitutionality on the fact that mentally retarded defendants suffer from cognitive and behavioral impairments that result in a “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses.”¹⁰⁸ Therefore, any definition of “mental retardation” adopted in a capital jurisdiction must include individuals falling within this category. The Court also made specific reference to currently prevailing clinical definitions of “mental retardation,” although it did not specifically require the adoption of such definitions.¹⁰⁹ Because the Court was considering the effect of a clinically defined psychological condition on

ANN. STAT. 565.030 (2007)); North Carolina (N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(a) (2001)); South Dakota (S.D. CODIFIED LAWS § 23A-27A-26.1 (2007)); Tennessee (TENN. CODE ANN. § 39-13-203(a)(3) (2005)); Texas (*Ex Parte Briseno*, 135 S.W.3d 1, 8 (2004)); and Washington (WASH. REV. CODE ANN. § 10.95.030(2)(3) (2007)).

101. See Colorado (COLO. REV. STAT. ANN. § 18-1.3-1101(2) (2002)); Georgia (GA. CODE ANN., § 17-7-131(a)(3) (2006)); Kentucky (KY. REV. STAT. § 532.130 (2) (1990)); and Nevada (NEV. REV. STAT. 174.098(7) (2007)).

102. See IND. CODE § 35-36-9-2 (2007).

103. See UTAH CODE ANN. 1953 § 77-15a-102(2) (2007).

104. See MD. CODE, CRIM. LAW § 2-202(b)(1)(i) (2002).

105. See N.M. STAT. ANN. 1978, § 31-20A-2.1(A) (2007).

106. See NEB. REV. STAT. § 28-105.01 (2000).

107. Although Louisiana has specifically excluded individuals with “organic” or “traumatic brain damage occurring after age eighteen” from the general category of mentally retarded defendants. LA CODE CRIM. PROC. art. 905.5.1(H)(2)(m) & (s) (2003).

108. *Atkins III*, 536 U.S. at 320.

109. *Id.* at 309, n.3.

the cognitive and behavioral capabilities of an individual afflicted with that condition, the clinical definitions should be the starting point for defining “mental retardation” under *Atkins*. However, as discussed in the immediately following sections, to the extent that the clinical definitions of “mental retardation” artificially narrow the category of less culpable individuals identified in *Atkins*, they fall short of the Court’s mandate.

When the fields of psychology and criminal law intersect, it generally leads to tension between the two – especially when clinical definitions are at issue. These intersections have arisen in other areas of criminal law relating to the insanity defense,¹¹⁰ diminished capacity,¹¹¹ and competency determinations.¹¹² With respect to those issues, the tension comes from the legal system asking psychologists and psychiatrists to make findings based on legal standards rather than standards set forth in a clinical diagnostic manual. The tension with the “mental retardation” issue stems from criminal law borrowing a clinical definition that was never intended to be subjected to the rigors of statutory interpretation or to define the specific category of individuals that the Court identified in *Atkins*.

With this tension in mind, it is easy to see how strict adherence to the elements of “mental retardation” identified in widely accepted clinical diagnostic manuals may lead to an overly narrow definition of the term “mental retardation” for purposes of implementing the Eighth Amendment ban the Court imposed in *Atkins*. While the clinical definitions are largely sufficient for purposes of implementing *Atkins*, there are some logical adjustments that must be made to avoid an unconstitutionally narrow definition of “mental retardation.”

Sections A and B discuss the specific clinical definitions of “mental retardation,” and the closely related clinical definitions of traumatic brain injury and dementia. Section C proposes a legal definition of the term “mental retardation” for purposes of implementing the Court’s decision in *Atkins*.

A. Clinical Definitions of Mental Retardation

There are two prevailing definitions of “mental retardation” widely accepted within the clinical community. The Court in *Atkins* cited a definition drafted by the American Association on Intellectual and Developmental Disabilities (AAIDD)¹¹³ and the American Psychiatric Association (APA).

110. See generally, Emily Campbell, *The Psychopath and the Definition of “Mental Disease of Defect” under the Model Penal Code Test of Insanity: A Question of Psychology of a Question of Law?*, 69 NEB. L. REV. 190 (1990).

111. See generally, Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7 (2007).

112. See *Dusky v. United States*, 362 U.S. 402 (1960); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993).

113. Formerly known as the American Association on Mental Retardation (AAMR).

The AAIDD definition of mental retardation cited by the Court refers to the 1992 version which states:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen.¹¹⁴

In 2002, the AAIDD revised the definition by categorizing the adaptive skill areas into three main groups, but without making real substantive change to the 1992 definition. The 2002 definition reads: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originates before age eighteen."¹¹⁵ The definition adopted by the American Psychiatric Association in 2000 is very similar. It says:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criteria A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.¹¹⁶

Both the current AAIDD and APA definitions break down the definition of mental retardation into three main elements: subaverage intellectual functioning, significant limitations in adaptive behavior, and age of onset. Aside from the specific list of adaptive behavior examples, there is really no substantive difference between the two clinical definitions. In fact, there is little disagreement among psychiatric professionals today regarding the clinical definition of mental retardation.¹¹⁷ What disagreement there is relates to the identification of intellectual and adaptive deficits, not to their existence as elements of the definition.¹¹⁸

114. *Atkins III*, 536 U.S. at 308 n.3 (quoting AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

115. AM. ASS'N ON MENTAL RETARDATION, *supra* note 77.

116. *Atkins III*, 536 U.S. at 309 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)).

117. See Bonnie, *supra* note 79, at 854; Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them from Execution*, 30 J. LEGIS. 77, 101 (2003).

118. Tobolowsky, *supra* note 117.

B. Traumatic Brain Injury and Dementia

Traumatic brain injury and dementia are disabilities very closely related to the clinical definition of “mental retardation,” in both substance and effect. Depending on their severity, both traumatic brain injury and dementia can result in the same intellectual and adaptive functioning deficits as mental retardation.¹¹⁹ The main difference between the three is that mental retardation requires onset prior to the age of eighteen, while traumatic brain injury and dementia¹²⁰ almost always occur after the age of eighteen. In fact, the inclusion of the developmental origin requirement within the clinical definition of mental retardation is to “differentiate between mental retardation and intellectual deficits ‘acquired’ after the developmental period, typically due to brain injuries or brain diseases such as dementia.”¹²¹

In light of the similarities in diagnosis and effect among mental retardation, traumatic brain injury and dementia, the American Bar Association, American Psychiatric Association, American Psychological Association and the National Alliance of the Mentally Ill all adopted recommendations that states include traumatic brain injury and dementia within their legal definition of mental retardation for purposes of applying the death penalty.¹²² The specific proposal as stated by the ABA, is as follows:

Defendants should not be executed or sentenced to death, if at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or traumatic brain injury.¹²³

This proposal could easily be implemented by excluding the developmental origin requirement normally applied to diagnoses of mental retardation. In the supporting notes following the proposed policy and procedure statements, the ABA stated that the proposal to incorporate cognitive and adaptive deficits caused by traumatic brain injury and dementia was premised on the fact that these disabilities have effects very similar to “mental retardation” and “the only significant characteristic that differentiates these

119. See Am. Bar Ass’n, *supra* note 79. (Dementia and traumatic brain injury are “disabilities very similar to mental retardation in their impact on intellectual and adaptive functioning except that they always (in the case of dementia) or often (in the case of head injury) are manifested after age eighteen.”)

120. The DSM IV-TR describes the diagnostic features of dementia as “the development of multiple cognitive deficits that include memory impairment and at least one of the following cognitive disturbances: aphasia, apraxia, agnosia, or a disturbance in executive functioning. The cognitive deficits must be sufficiently severe to cause impairment in occupational or social functioning and must represent a decline from a previously higher level of functioning. AM. PSYCHIATRIC ASS’N, *supra* note 77.

121. See Bonnie, *supra* note 79, at 854.

122. See Am. Bar Ass’n, *supra* note 79.

123. *Id.*

severe disabilities from mental retardation is the age of onset.”¹²⁴

C. *Proposed Legal Definition of “Mental Retardation”*

The Court in *Atkins* based its holding on the cognitive and adaptive deficits that are shared by all mentally retarded defendants, not on the label “mental retardation.”¹²⁵ If the latter were the case, the Court certainly would have required states to adopt a commonly accepted clinical definition of “mental retardation.” However, the Court left it to the states to consider and adopt a definition that would lend full credence to the Court’s finding that a defendant who is so cognitively and behaviorally impaired as to satisfy the clinical definition of mental retardation is also less morally culpable than average defendants and constitutionally less deserving of the death penalty. As such, in defining “mental retardation” for purposes of capital cases, states should look to the relevant clinical definitions,¹²⁶ but must also consider the underlying rationale of the Court in finding that the death penalty is a disproportionate punishment for mentally retarded defendants.

It defies all notions of fairness and logic to think that the Supreme Court intended that its holding in *Atkins* to apply only to individuals who were born with cognitive and behavioral impairments, and not apply to those who develop the same impairments later in life as a result of traumatic brain injury or brain disease such as dementia. When the premise of the Court’s holding was based solely on the defendant’s specific impairments, and not on the label of “mental retardation,” the Eighth Amendment requires a legal definition that includes all individuals who suffer from those impairments. There is no reasonable justification for excluding a defendant from the Eighth Amendment protection afforded by the Court in *Atkins* simply because his cognitive and behavioral deficiencies are the result of traumatic brain injury suffered in an automobile accident at age nineteen, as opposed to mental retardation onset in his adolescent years.

Although some have indicated that the developmental origin requirement might make it easier for courts and juries to identify malingering defendants,¹²⁷ certainly the Eighth Amendment would not support such arbitrary narrowing as a means of making the prosecution’s job easier – especially when the issue to be decided is whether the defendant should die for his conduct or spend the rest of his natural life incarcerated. Further support for this argument is provided by the fact that the issue of malingering has generally proven not to be an issue in mental retardation evaluations, even absent the age of onset criteria.¹²⁸

124. *Id.* at 670.

125. See discussion in Section II(A), *supra*.

126. The current clinical definitions are discussed in Section III(A), *supra*.

127. See Bonnie, *supra* note 79, at 854.

128. See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL AND PHYSICAL DISABILITY L. REP. 11, 13-14 (2003).

There are also inherent factors associated with traumatic brain injury and dementia that would act as a barrier to defendant malingering, such as evidence of the physical injury causing the associated brain damage.

As noted earlier, given the Court's specific reference to the prevailing and accepted clinical definitions of mental retardation, the legal definition of "mental retardation" as applied in capital cases should be based on that clinical definition. It is undisputed in the clinical arena that mental retardation includes both a cognitive and an adaptive component.¹²⁹ Although the specific language used in the AAIDD's 2002 definition differs slightly from the APA's 2000 definition, it is clear that both definitions are intended to convey the same idea and standard.¹³⁰ Therefore, either the AAIDD or the APA definition regarding the intellectual and adaptive elements of mental retardation should be sufficient to include the group of constitutionally protected defendants identified by the Court in *Atkins*.¹³¹

However, given the above discussion regarding traumatic brain damage and dementia, the developmental origin clinical requirement should not be included within the legal definition of "mental retardation." Because this element is only included in the AAIDD and APA definition to make a clinically relevant distinction between mental retardation and later acquired intellectual deficits,¹³² and has absolutely no relation to the culpability issues identified in *Atkins*, its exclusion from the legal definition of mental retardation will not have the effect of including individuals who were not intended by the Supreme Court to be a part of the categorically protected class.

Further support for this argument can be found in the Virginia Supreme Court's opinion in *Atkins V*,¹³³ which arguably, albeit indirectly, recognized the possibility that evidence not specifically related to the clinical definition of mental retardation may be relevant in an *Atkins* hearing. In reviewing the case on appeal from the first *Atkins* hearing, the court considered whether the trial court erred in refusing to allow expert testimony from a proffered defense witness.¹³⁴ This witness would have testified that Atkins was born with a number of physical abnormalities that could predispose him to have cognitive or developmental disabilities.¹³⁵ The court affirmed the trial court's ruling

129. See Bonnie, *supra* note 79, at 821 (citing Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 101 (2003)).

130. See Bonnie, *supra* note 79, at 821.

131. For a comprehensive discussion regarding the particular assessment measures and procedures that should be followed by professionals making mental retardation assessments, see Bonnie, *supra* note 79.

132. See Bonnie, *supra* note 79, at 854.

133. *Atkins V*, 631 S.E.2d 93.

134. Atkins sought to introduce testimony from Dr. Kelley as an expert in the field of pediatrics and genetics.

135. The proffered testimony was as follows:

Q: Now, were you able to determine to a medical certainty whether . . . Daryl Atkins

excluding this witness, but only because the proffered expert opinion was “speculative and without an adequate factual foundation,”¹³⁶ not because it was irrelevant to the issue of whether Atkins was “mentally retarded.”¹³⁷ This particular testimony was not specifically related to the clinical definition of mental retardation, but focused on the possibility that Atkins suffered from a “genetic syndrome” that could lead to developmental and cognitive disabilities.¹³⁸ Such testimony would be analogous to testimony relating to traumatic brain injury or dementia.¹³⁹

However, if states continue to include developmental origin as an element of the mental retardation analysis, it will result in an unconstitutionally narrow definition of the term, excluding individuals with the same cognitive and behavioral deficits as defendants fitting the clinical mental retardation definition.

CONCLUSION

In the over six years since the Supreme Court rendered its decision in *Atkins v. Virginia*, declaring it a violation of the Eighth Amendment to execute mentally retarded defendants, capital jurisdictions have struggled to enact provisions defining the class of individuals to whom the constitutional prohibition applies. Whether in an effort to contain the impact of *Atkins* as

suffers from a genetic syndrome?

A: I could not identify a specific genetic syndrome. Given the findings, I think any geneticist would pursue further by trying to identify – doing other genetic studies on the family with the assumption that there is a genetic lesion explaining the family’s – the constellation of the abnormalities. So we stopped at a certain point, but certainly it would be indicated to pursue this further with modern techniques to try to identify what gene or group of genes is abnormal.

Q: Again, taking into account the physical findings and the finding about the difficulty in retaining bike riding skills-

A: Right.

Q: Do you have an opinion to a medical certainty about whether this constellation of information created a risk factor in Daryl Atkins’ life for the development of a cognitive disability?

A: Yes, indeed. That the association of risk factors – the physical finding being a risk factor for brain involvement and the history of a very unusual type of learning disability.

Atkins V, 631 S.E.2d at 101.

136. The court stated that “Expert testimony is inadmissible if it is ‘speculative or founded on assumptions that have an insufficient factual basis.’” *Id.* (citing *Tittsworth v. Robinson*, 475 S.E.2d 261, 263 (1996)).

137. Although the court’s opinion seemed initially to be based on relevancy when it stated, “[u]pon objection by the Commonwealth, the circuit court held that Dr. Kelley’s testimony was not relevant to the determination of mental retardation. We agree,” the court’s entire discussion focused not on the relevancy of the proffered testimony to the determination of mental retardation, but on the court’s opinion that it was improperly speculative. *Atkins V*, 631 S.E.2d at 101.

138. *Id.*

139. Because the proffered opinion in this case was that Atkins suffered from the genetic abnormality from birth, the age of onset requirement would not have been an issue in this case. However, it would be completely irrational for a court to allow evidence of other cognitive impairments, but limit it to those that existed in the defendant prior to the age of eighteen.

much as possible or due to a general misunderstanding regarding the application of the clinical definitions, many jurisdictions have enacted provisions that are too narrow to include the cognitively and adaptively impaired individuals intended to be encompassed by the Court's decision.

When a jurisdiction fails to adopt a clinically accepted definition—at least with respect to the cognitive and adaptive deficit¹⁴⁰ elements—it fails to comply with the letter of the *Atkins* decision. Where a jurisdiction, as most have, fails to consider the artificially narrowing impact of a developmental origin element requiring onset prior to age eighteen,¹⁴¹ it fails to comply with the spirit of the *Atkins* decision. This is especially true where the narrowing element serves no purpose relevant to the culpability issues noted by the Court. The fact that such an element might serve in some minor way to weed out malingering defendants does not justify the effective exclusion of individuals whom the Supreme Court obviously meant to include within the constitutionally protected class created by *Atkins*.

140. Both Kansas and Utah have adopted definitions that are not supported in the clinical field. See notes 94 & 95, *supra*.

141. Jurisdictions with an age of onset requirement include the following: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Nevada, North Carolina, South Dakota, Tennessee, Texas, Utah and Washington.

