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Atkins v. Virginia 122 S. Ct. 2242 (2002)

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I. Facts

On August 16, 1996, Daryl Renard Atkins ("Atkins") and William Jones ("Jones"), armed with a semiautomatic handgun, abducted Eric Nesbitt ("Nesbitt") from the parking lot of a convenience store.[1] While taking money from Nesbitt's wallet, Atkins found Nesbitt's ATM card and instructed Jones to drive to a nearby bank. Bank security cameras recorded Nesbitt leaning across Jones to operate the ATM machine while Atkins pointed the gun at Nesbitt.[2] After Nesbitt withdrew $200, Jones drove Atkins and Nesbitt to an isolated location. Atkins and Nesbitt stepped out of the truck and Atkins shot Nesbitt eight times, killing Nesbitt.[3]

Jones and Atkins both testified during Atkins's trial.[4] Their testimonies were generally consistent with the exception that each claimed that the other actually shot and killed Nesbitt.[5] A jury convicted Atkins of the abduction, robbery, and capital murder of Nesbitt.[6] It also found him guilty of the use of a firearm during these offenses.[7]

At the sentencing hearing, Atkins presented the testimony of a forensic psychologist who stated that Atkins fell "in the range of being mildly mentally retarded."[8] On cross-examination, the psychologist stated that he believed Atkins was competent to stand trial and that it appeared that Atkins could appreciate the nature of his behavior.[9] The jury found that Atkins constituted a future danger to society and that the murder of Nesbitt was outrageously or

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1. Atkins v. Virginia, 122 S. Ct. 2242, 2244 (2002).

2. Atkins v. Commonwealth, 520 S.E.2d 445, 449 (Va. 1999).

3. *Id.* at 450.

4. *Atkins*, 122 S. Ct. at 2244. The prosecution allowed "Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins." *Id.* at 2244 n.1.

5. *Id.*

6. *Id. See generally* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person in the commission of a robbery or attempted robbery"); VA. CODE ANN. § 18.2-48 (Michie Supp. 2002) (setting forth the circumstances under which abduction is a Class 2 felony); VA. CODE ANN. § 18.2-58 (Michie 1996) (setting forth the punishment for robbery).

7. *Atkins*, 122 S. Ct. at 2244. *See generally* VA. CODE ANN. § 18.2-53.1 (Michie 1996) (stating that use or display of a firearm during the commission of certain felonies "shall constitute a separate and distinct felony").

8. *Atkins*, 510 S.E.2d at 451.

9. *Id.*

wantonly vile.[10] It fixed his sentence at death.[11] Upon appeal, the Supreme Court of Virginia found that the jury was given a misleading jury form.[12] The court set aside the sentence and remanded the case for a new sentencing hearing.[13] On remand, a jury found the future dangerousness and vileness aggravators present and sentenced Atkins to death.[14] Upon appeal, Atkins argued that he could not be sentenced to death because of his mental retardation.[15] Relying on *Penry v. Lynaugh* ("*Penry I*"),[16] the Supreme Court of Virginia rejected Atkins's claim.[17]

II. Holding

The United States Supreme Court held that the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment in violation of the Eighth Amendment.[18]

III. Analysis

Atkins argued that his death sentence constituted cruel and unusual punishment under the Eighth Amendment because of his mental retardation.[19] The United States Supreme Court first considered the judgment of the state legislatures as to whether the death penalty is a suitable punishment for the mentally retarded.[20] The Court then addressed whether it agreed with the consensus of the legislatures.[21]

When the federal government reinstated the federal death penalty in 1988, it provided that the mentally retarded were not eligible to receive the death penalty.[22] The next year, in *Penry I*, the United States Supreme Court concluded that even though fourteen states did not have the death penalty and two states that had the death penalty had expressly banned the imposition of a death

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10. *Id. See generally* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that a defendant may only receive a death sentence if a jury finds an aggravating factor and recommends that a death sentence be imposed).

11. *Atkins*, 510 S.E.2d at 453.

12. *Id.* at 457.

13. *Id.*

14. *Atkins*, 122 S. Ct. at 2246.

15. *Id.*

16. 492 U.S. 302 (1989).

17. *Atkins*, 122 S. Ct. at 2246. *See generally* Penry v. Lynaugh, 492 U.S. 302, 305 (1989) (concluding that the Eighth Amendment does not preclude the execution of the mentally retarded simply by virtue of their mental retardation alone).

18. *Atkins*, 122 S. Ct. at 2252.

19. *Id.* at 2246.

20. *Id.* at 2248-50.

21. *Id.* at 2248.

22. *Id.*

sentence on a mentally retarded individual, a national consensus against executing the mentally retarded had not been reached.[23] Since then, twenty-one states have passed laws prohibiting the execution of the mentally retarded.[24] The Court considered this legislative trend to be evidence that society views the mentally retarded as "categorically less culpable than the average criminal" and concluded that a national consensus has developed against the practice.[25]

The Court discussed two reasons for agreeing with the national consensus against the imposition of the death penalty on the mentally retarded.[26] First, the Court considered two common justifications for the imposition of the death penalty, retribution and deterrence.[27] As to retribution, the Court stated that "the severity of the appropriate punishment necessarily depends on the culpability of the offender."[28] The Court understood the legislative trend against imposition of the death penalty to mean that society finds the mentally retarded less culpable.[29] Since the Court decided *Gregg v Georgia*,[30] it has narrowed the category of crimes to which the death penalty may be applied and has consistently sought to apply the death penalty only to those who most deserve the sentence.[31] The Court concluded that imposition of the death penalty on a group that is considered categorically less culpable is not appropriate.[32]

The Court stated that the theory of deterrence is based upon the idea that the severity of the death penalty would inhibit criminals from committing murderous crimes.[33] The Court found that a mentally retarded individual's "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" makes it less likely that she will conform her conduct to avoid the possibility of execution.[34] Due to these limitations on the ability of a person with mental retardation to reason and control herself, the death penalty would have no deterrent effect on her actions.[35] In addition, prohibiting the execution of individuals with mental

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23. *Id.* (citing *Penry*, 492 U.S. at 334).

24. *Atkins*, 122 S. Ct. at 2248-49. Similar legislation passed through one house of the legislature in additional states, including Virginia. *Id.*

25. *Id.* at 2249.

26. *Id.* at 2251.

27. *Id.*

28. *Id.*

29. *Id.* at 2249.

30. 428 U.S. 153 (1976).

31. *Atkins*, 122 S. Ct. at 2251; *see* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (holding that the death penalty does not "invariably violate the Constitution").

32. *Atkins*, 122 S. Ct. at 2251.

33. *Id.*

34. *Id.*

35. *Id.*

retardation will not lessen the death penalty's deterrent effect on other offenders because they still will face the possibility of execution.[36]

The Court also agreed with the national consensus of legislatures on the ground that the mentally retarded face an increased risk of being sentenced to death despite factors that call for a lesser punishment.[37] The mentally retarded face a greater risk of false or coerced confessions, a lesser ability to put on an effective presentation of mitigating evidence, and a diminished ability to provide meaningful assistance to counsel.[38] In many cases the mentally retarded are poor witnesses and appear to the jury to feel no remorse for their crimes.[39] Categorically, the mentally retarded face significant risks of wrongly being executed and the Court concluded that this risk justified exempting them from the death penalty.[40] In conclusion, the Court considered the Eighth Amendment in context of society's "evolving standards of decency" and held that the execution of the mentally retarded constitutes cruel and unusual punishment.[41]

IV. Application in Virginia

A Virginia capital defense attorney who suspects that his client is mentally retarded has an obligation to take certain steps to protect his client from a possible death sentence. First, counsel should make a motion for a mental health expert under *Ake v. Oklahoma*.[42] If the defense expert finds the defendant to be mentally retarded, then defense counsel has the option of taking this determination to the prosecution. In light of the expert's determination that the defendant is mentally retarded, the prosecution may agree to forego the formal determination of mental retardation and seek a maximum sentence of life in prison.

If the prosecution does not agree to life, either by plea or by waiving death, counsel should then file a Motion to Strike Death. At the hearing on this motion, the court may find that the prosecution failed to show beyond a reasonable doubt that no reasonable jury could find that the defendant was not retarded.[43] A successful Motion to Strike Death leaves the defendant ineligible for the death penalty, and the trial would proceed with life in prison as the maximum available sentence.[44] An unsuccessful Motion to Strike Death leaves the defendant eligible

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36. *Id.*

37. *Id.*

38. *Atkins*, 122 S. Ct. at 2252.

39. *Id.*

40. *Id.*

41. *Id.*; *see* Trop v. Dulles, 356 U.S. 86, 101 (1958) (stating that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

42. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that the state must provide a defendant with a competent psychiatrist to assist in the preparation of his defense).

43. *See infra* text accompanying notes 71-74.

44. *See Atkins*, 122 S. Ct. at 2252.

for the death penalty. However, the issue of the defendant's mental retardation may still play a critical role in the defendant's trial and sentencing.

General evidence of a defendant's mental retardation may enter a trial in several ways. First, the Court in *Atkins* noted that the mentally retarded have a greater likelihood of giving forced or coerced confessions.[45] If the defendant has given a confession, evidence of his mental retardation may be used to create doubt as to the reliability of the confession.[46] Second, the Court observed that mentally retarded individuals have a reduced ability to understand and process information, engage in logical reasoning, and control impulses.[47] Although Virginia does not formally recognize a diminished capacity defense,[48] mental retardation evidence might cast doubt on whether the defendant premeditated the killing.[49] Psychological evidence is admissible in Virginia insofar as it bears on the presence or absence of the requisite mental state.[50] Throughout the guilt phase of the trial, defense counsel should be mindful that mental retardation will reappear in the sentencing phase.[51]

In addition to these basic considerations, defense counsel should keep in mind that there are other sources for definitions of mental retardation. In *Atkins*, the Court noted the definition found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM IV").[52] It also noted the similar definition provided by the American Association of Mental Retardation.[53]

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45. *Id.* at 2251-52.

46. *See, e.g.*, Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 411 (2002) (analyzing Pritchett v. Commonwealth, 557 S.E.2d 205 (Va. 2002)).

47. *Atkins*, 122 S. Ct. at 2252.

48. *See* Stamper v. Commonwealth, 324 S.E.2d 682, 688 (Va. 1985) (holding that diminished capacity evidence is not admissible in Virginia); Smith v. Commonwealth, 389 S.E.2d 871, 879-80 (Va. 1990) (applying the reasoning of *Stamper* to a death penalty case).

49. *See* VA. CODE ANN. § 18.2-31 (Michie Supp. 2002) (including premeditation in the definition of capital murder).

50. *See generally* Vaughan v. Commonwealth, 376 S.E.2d 801 (Va. Ct. App. 1989) (admitting psychological evidence relevant to premeditation).

51. *See infra* text accompanying notes 75-77.

52. *Atkins*, 122 S. Ct. at 2245.

> "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 18 years (Criterion C)."

Id. (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994)).

53. *Id.*

> The American Association of Mental Retardation (AAMR) defines mental retardation 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

State statues also provide definitions of mental retardation. Section 37.1-1 of the Virginia Code defines mental retardation as "substantial subaverage general intellectual functioning which originates during the development period and is associated with impairment in adaptive behavior."[54] Section 15A-2005 of the General Statutes of North Carolina prohibits the imposition of a death sentence on a mentally retarded individual.[55] This statute includes in its definition of mental retardation a significantly subaverage intellectual functioning that manifested itself before eighteen and an IQ of seventy or below.[56] Counsel may attempt to utilize the definition that best describes his client.

V. Issues Left Unresolved by Atkins

The Court acknowledged that despite the national consensus against the execution of the mentally retarded, disagreement may arise over what constitutes mental retardation.[57] In *Ford v. Wainwright*,[58] the Court stated that the Eighth Amendment prohibits the execution of the insane.[59] The Court then left to the states the determination of how to enforce this constitutional restriction.[60] Similarly, in *Atkins*, the Court gave the states the responsibility of implementing the Eighth Amendment's restriction on the execution of the mentally retarded.[61] The Court did not give the states significant guidance as to how to meet the Eighth Amendment's restriction.[62] While the precise IQ level or definition of mental retardation may not be clear, a defendant may use the general standards

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> 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 18."

Id. (quoting AM. ASS'N OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (emphasis in original omitted) (9th ed. 1992).

54. *See* VA. CODE ANN. § 37.1-1 (Michie Supp. 2002) (defining mental retardation).

55. *See* N.C. GEN. STAT. ANN. § 15A-2005 (2001).

56. *See id.* All statutes that barred the imposition of the death penalty on the mentally retarded are pre-*Atkins* and are therefore never to be understood to substantively or procedurally meet the constitutional standard of *Atkins*.

57. *Atkins*, 122 S. Ct. at 2250.

58. 477 U.S. 399 (1986).

59. *Atkins*, 122 S. Ct. at 2250; Ford v. Wainwright, 477 U.S. 399, 410, 416-17 (1986) (holding that the Eighth Amendment prohibition on execution of the insane required states to impose adequate procedures for insanity determinations).

60. *Ford*, 477 U.S. at 416-17.

61. *Atkins*, 122 S. Ct. at 2250.

62. *Id.* In *Ford*, the Court instructed the states that when implementing a procedure for determining insanity, the lodestar must be "the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination . . . It is all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Ford*, 477 U.S. at 417.

suggested by *Ford* to argue that certain rights must be afforded a defendant who claims mental retardation.[63]

Not only does *Atkins* not address the constitutional definition of mental retardation, neither does it address procedurally how the *Atkins* rule is to be applied.[64] The determination of mental retardation may be made pretrial, at the conclusion of the guilt phase, at a special mental retardation determination proceeding, or at the sentencing hearing. First, the determination of mental retardation may be made prior to trial at a special proceeding. Second, the jury could be given a special verdict form at the conclusion of the guilt phase. Third, the trial could be trifurcated into the guilt phase, a mental retardation determination proceeding, and then, if no mental retardation was found, the sentencing proceeding. Finally, mental retardation could be considered a gateway factor at the sentencing hearing. The prosecution would be forced to prove beyond a reasonable doubt that the defendant is not mentally retarded in order to proceed with the sentencing hearing. In *Atkins*, the Court observed that a mentally retarded defendant has a reduced ability to assist counsel and present mitigating evidence, thus the defendant should not be put through the sentencing hearing unless no mental retardation has been found.[65]

Atkins serves as a constitutional limitation on the imposition of the death penalty.[66] In *Tison v Arizona*[67] and *Enmund v Florida*,[68] the Court set forth the minimum Eighth Amendment mens rea and actus reus that a defendant must have exhibited during the commission of a crime in order to be sentenced to death.[69] In the federal death penalty system, the *Enmund* and *Tison* factors act as a gateway that the Government must pass in order to reach jury consideration of the death sentence.[70] Analytically, *Atkins* is identical to *Enmund* and *Tison*. A jury must find an absence of mental retardation beyond a reasonable doubt in order to consider the death penalty.

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63. *See Atkins*, 122 S. Ct. at 2250; *Ford*, 477 U.S. at 417 (advising the states to implement procedures that allow for adversary presentation of evidence and selection of experts who will present neutral evidence as to a defendant's mental competence).

64. *See Atkins*, 122 S. Ct. at 2244-52.

65. *See id.* at 2252.

66. *Id.*

67. 481 U.S. 137 (1987).

68. 458 U.S. 782 (1982).

69. *See* Tison v. Arizona, 481 U.S. 137, 156-58 (1987) (holding that if the individualized inquiry into defendant's culpability reveals major participation in the felony and a reckless indifference to human life, the culpability requirement of *Enmund* is sufficient to warrant imposition of the death penalty); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that a sentence of death was excessive and in violation of the Eighth Amendment when imposed on an accomplice to murder).

70. *See* 18 U.S.C. § 3591(a) (2002) (requiring the defendant to have acted intentionally in order to be death eligible); 21 U.S.C § 848(n) (2002) (listing the aggravating factors that make a defendant death eligible).

Prior to *Atkins*, there were no gateway factors in Virginia because Sections 18.2-18 and 18.2-31 of the Virginia Code subsume the *Enmund-Tison* issue.[71] *Atkins* creates the Commonwealth's first gateway factor. After *Atkins*, the absence of mental retardation is an element under *Ring v Arizona*.[72] Thus, the Commonwealth must prove that the defendant is not mentally retarded before the jury can consider death.

The Court in *Atkins* did not address whether the defendant bears the burden of proving mental retardation or the prosecution bears the burden of proving no mental retardation.[73] In addition, the Court did not address what burden applies. In both Virginia and the federal system, the government bears the burden of proving the *Enmund-Tison* factors beyond a reasonable doubt.[74] The defendant does not bear the burden of proving that he did not have the necessary mens rea or actus reus.[75] If the absence of mental retardation acts as a threshold that must be met before the jury can consider death, analogous to the *Enmund-Tison* threshold, then the Commonwealth would have the burden of proving beyond a reasonable doubt that the defendant is not mentally retarded. If the Commonwealth has the burden of proof at this point in the proceeding, then logically it should also have the burden of proof at a mental retardation determination that occurs prior to trial.[76]

The State's burden to prove non-mental retardation beyond a reasonable doubt, assuming it is successfully met, does not end the mental retardation analysis. Section 19.2-264.4(B) of the Virginia Code specifically makes mental retardation a mitigator.[77] It is perfectly possible for the jury to find no mental retardation, thus passing the gateway, hear evidence in aggravation, hear general evidence of the defendant's mental retardation, and find mental retardation to be a mitigator. For example, assume that the mental retardation IQ level is set at seventy for *Atkins* purposes. Defendant scores a seventy-two, but has other mental retardation attributes, such as deficient life skills and/or onset before age eighteen. A jury can find that this level of low intellectual functioning is a reason to sentence the defendant to life rather than death. The definition of mental

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71. *See* VA. CODE ANN. §§ 18.2-18, 18.2-31 (Michie Supp. 2002).

72. *See* Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002) (holding that any "factor" which makes the defendant death eligible functions as an element of the offense and the Sixth Amendment demands that it be found by a jury).

73. *See Atkins*, 122 S. Ct. at 2252. The Court did not address whether the jury must unanimously find mental retardation. *Id.*; *see Ring*, 122 S. Ct. at 2428.

74. *See* 18 U.S.C. § 3591(a); 21 U.S.C § 848(n); VA. CODE ANN. §§ 18.2-18, 18.2-31.

75. *Cf.* Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (acknowledging that the prosecution cannot shift to the defendant the burden of proving the absence of an element of a crime).

76. *See supra* text accompanying note 43.

77. *See* VA. CODE ANN. § 19.2-264.4(B) (2000) (stating that "mitigation . . . may include . . . the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law").

retardation need not be the same for *Atkins* and section 19.2-264.4(B) purposes.[78] In *Atkins*, mental retardation acts as a bar to death.[79] In mitigation, mental retardation is a reason to show mercy.

VI. Conclusion

The United States Supreme Court held that the Eighth Amendment prohibits the execution of the mentally retarded.[80] The Court did not set forth any standards or procedures for states to use in implementing this prohibition. The states that had already legislated against the execution of the mentally retarded must now reassess their procedures to ensure that the Eighth Amendment rights of the mentally retarded are adequately protected. Those states, including Virginia, that had not legislated against the imposition of the death penalty on the mentally retarded must now implement procedures in compliance with *Atkins*.

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78. *See id.*; Eddings v. Oklahoma, 455 U.S. 104, 113-17 (1982) (finding that a defendant should be permitted to present mitigating evidence of a violent family history); Lockett v. Ohio, 438 U.S. 586, 607 (1978) (stating that a defendant should not be prevented from presenting mitigating evidence of his record or character to the jury). *Lockett* and *Eddings* likely forbid the use of *Atkins* to bar mental retardation as a mitigator. They stand for the proposition that the state cannot forbid the admission of, and must instruct the jury to consider, evidence that may convince a single juror to spare the defendant's life. *Eddings*, 455 U.S. at 113-17; *Lockett*, 438 U.S. at 607.

79. *Atkins*, 122 S. Ct. at 2252.

80. *Id.*