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Atkins v. Commonwealth 581 S.E.2d 514 (Va. 2003)

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I. Facts

Daryl Renard Atkins ("Atkins") was convicted of the capital murder of Eric Michael Nesbitt ("Nesbitt").[1] After finding the statutory aggravating factors of future dangerousness and vileness, the jury recommended, and the court imposed, a sentence of death.[2] On appeal, the Supreme Court of Virginia affirmed Atkins's conviction in *Atkins v. Commonwealth* ("*Atkins I*").[3] However, the court found error in the penalty phase and remanded the case to the circuit court for a new penalty proceeding on the capital murder conviction.[4] At the resentencing hearing, a new jury fixed Atkins's punishment at death and, in accordance with the jury verdict, the circuit court imposed a death sentence.[5] Atkins appealed this sentence on several grounds, including that the court should have, as a part of proportionality review, commuted his sentence of death to life imprisonment because he is mentally retarded.[6] The Supreme Court of Virginia rejected this view and affirmed the judgment of the circuit court in *Atkins v. Commonwealth* ("*Atkins II*").[7] The Supreme Court of Virginia was unable to conclude that Atkins's death sentence was " 'excessive or disproportionate to sentences generally imposed in this Commonwealth for capital murders comparable to Atkins' murder of Nesbitt.' "[8] Nor was the court "willing to commute Atkins' sentence of death to life imprisonment" without parole based solely on his IQ score.[9]

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1. Atkins v. Commonwealth, 510 S.E.2d 445, 453 (Va. 1999) [hereinafter *Atkins I*]. Atkins, armed with a semiautomatic handgun, abducted Nesbitt from a parking lot, drove him to an ATM, forced him to withdraw $200, and then drove him to an isolated area where he shot Nesbitt eight times, killing him. *Id.* at 449–50.

2. *Id.* at 453. *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).

3. *Atkins I*, 510 S.E.2d at 457.

4. *Id.* (remanding because "the trial court's instructions and the form the jury was given to use in discharging its obligations were in conflict").

5. Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000) [hereinafter *Atkins II*].

6. *Id.* at 318.

7. *Id.* at 321; *see* Penry v. Lynaugh, 492 U.S. 302, 305 (1989) (concluding that the Eighth Amendment does not preclude the execution of the mentally retarded by virtue of mental retardation alone).

8. Atkins v. Commonwealth, 581 S.E.2d 514, 515 (Va. 2003) [hereinafter *Atkins IV*] (quoting *Atkins II*, 534 S.E.2d at 321).

9. *Id.* (citing *Atkins II*, 534 S.E.2d at 321). In addition to a low IQ score, two forensic psychologists agreed that mental retardation is, in part, also a function of a person's capacity for

Atkins successfully petitioned the United States Supreme Court for a writ of certiorari.[10] The United States Supreme Court held in *Atkins v Virginia*[11] ("*Atkins III*") that, "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."[12] The Court concluded that "a national legislative consensus against the execution of mentally retarded offenders had developed since its decision in *Penry v Lynaugh*."[13] Further, the Court articulated "two reasons consistent with the legislative consensus" that justified the exclusion of the mentally retarded from death eligibility.[14] First, the Court determined that retribution and deterrence, two of the justifications recognized as bases for the death penalty, do not apply to mentally retarded offenders.[15] Second, the Court determined that the reduced capacity of mentally retarded offenders made these offenders more vulnerable to wrongful execution.[16] The Court stated that these offenders are more vulnerable because they are less capable of making a persuasive showing of mitigating evidence; they are less capable of aiding their counsel; they are generally poor witnesses; and utilizing their mental illnesses as a mitigating factor can have an adverse affect on juries—causing them to predict that the mentally retarded offenders will be a future danger.[17] The United States Supreme Court reversed the judgment of the Supreme Court of Virginia and remanded the case for "further proceedings not inconsistent with" its opinion.[18]

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adaptive behavior. *Atkins II*, 534 S.E.2d at 320–21. Both testified that Atkins was able to appreciate the criminality of his conduct and conform his behavior to the requirements of the law. *Id.* at 321.

10. Atkins v. Virginia, 533 U.S. 976, 976 (2001) (mem.) (granting writ of certiorari).

11. 536 U.S. 304 (2002).

12. Atkins v. Virginia, 536 U.S. 304, 321 (2002) [hereinafter *Atkins III*] (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). *See generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117 (2002) (analyzing Atkins v. Virginia, 122 S. Ct. 2242 (2002)).

13. *Atkins IV*, 581 S.E.2d at 515 (citing *Atkins III*, 536 U.S. at 316).

14. *Atkins III*, 536 U.S. at 318.

15. *Id.* at 319.

16. *Id.* at 320–21. In explaining how the justifications relied on for the imposition of the death penalty do not apply to the mentally retarded, the Court stated that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. Additionally, if the goal of deterrence is to give an increased sentence to inhibit criminals from murderous conduct, and mentally retarded defendants suffer from cognitive and behavior impairments, it does not make sense that they could process the possibility of a death sentence and, as a result, use that information to control their behavior. *Id.* at 319–20.

17. *Id.* at 320–21.

18. *Id.* at 321.

II. Holding

On remand, the Supreme Court of Virginia concluded that the United States Supreme Court had not determined whether Atkins was mentally retarded, nor had that determination been made at any point during the prior proceedings.[19] The Supreme Court of Virginia remanded the case "to the circuit court where the sentence of death was imposed by a jury."[20] The court ordered that " 'the circuit court shall empanel a new jury for the sole purpose of making a determination of mental retardation.' "[21]

III. Analysis

The Supreme Court of Virginia found that in *Atkins III*, the United States Supreme Court did not hold that Atkins was mentally retarded.[22] Recalling its opinion in *Atkins II*, the Supreme Court of Virginia noted that the resentencing jury heard conflicting testimony from two forensic clinical psychologists regarding Atkins's mental retardation.[23] Additionally, the Supreme Court of Virginia noted that in *Atkins II* it held that " '[t]he question of Atkins' mental retardation is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony on that issue.' "[24] The Supreme Court of Virginia further noted that the United States Supreme Court did not reverse that portion of its holding.[25]

Acknowledging that the Commonwealth disputed the allegation that Atkins was mentally retarded, the United States Supreme Court in *Atkins III* stated that " '[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.' "[26] The Supreme Court did not articulate what that range of mental retardation is, nor did it define the term "mental retardation."[27] Instead, the Court left to the states the task of developing a means of enforcing the constitutional restriction on the execution of the mentally retarded.[28]

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19. *Atkins IV*, 581 S.E.2d at 515.
20. *Id.* at 517.
21. *Id.* (quoting VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2003)).
22. *Id.* at 515.
23. *Id.* (citing *Atkins II*, 534 S.E.2d at 320). The Government's forensic psychologist "sharply disagree[d]" with the defense psychologist's conclusion that Atkins was mildly mentally retarded. *Atkins II*, 534 S.E.2d at 319.
24. *Atkins IV*, 581 S.E.2d. at 515 (quoting *Atkins II*, 534 S.E.2d at 320).
25. *Id.*
26. *Id.* (quoting *Atkins III*, 536 U.S. at 317).
27. *Id.* at 516 (citing *Atkins III*, 536 U.S. at 317).
28. *Id.* (citing *Atkins III*, 536 U.S. at 317).

The Supreme Court of Virginia noted that the critical question with respect to the constitutionality of Atkins's death sentence is whether he suffers from mental retardation.[29] Because the resentencing jury did not resolve the question of Atkins's mental retardation definitively, the Supreme Court of Virginia pointed to the fact that the jury was instructed to consider mitigating evidence.[30] The jury, although presented with Atkins's IQ score, determined that this evidence " 'did not mitigate his culpability for the murder of Nesbitt.' "[31] The court stated that because the factual question of Atkins's mental retardation had never been resolved, it must be considered in light of the Eighth Amendment's prohibition on execution of the mentally retarded.[32]

Although Atkins acknowledged that the Supreme Court did not make a specific factual finding that he was mentally retarded, he argued that the Court did implicitly come to this conclusion.[33] Atkins argued that if the Supreme Court had not made such a finding, he would not have had standing to raise his Eighth Amendment claim and the Supreme Court's decision would have been purely advisory.[34] The Supreme Court of Virginia rejected this view and stated that Atkins had standing to raise a constitutional issue because of the allegations, evidence, and arguments presented to the circuit court and to the Supreme Court of Virginia regarding his mental retardation.[35] The court found that Atkins "demonstrated a 'personal stake in the outcome[,]' thereby 'assur[ing] that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of the constitutional question.' "[36]

The United States Supreme Court in *Atkins III* noted that the remand in Atkins's case shared procedural characteristics with the remand in *Ford v. Wainwright*.[37] In *Ford*, "the Supreme Court held that the Eighth Amendment prohibits a State from executing an insane prisoner."[38] Although the Supreme Court found the State's procedures for determining insanity inadequate, the Court left to " 'the State[s][sic] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' "[39] The *Ford* Court "remanded the proceeding to a federal district court for a *de novo* evidentiary hearing on the

29. *Id.*
30. *Atkins IV*, 581 S.E.2d at 516 (citing *Atkins II*, 534 S.E.2d at 320).
31. *Id.* (quoting *Atkins II*, 534 S.E.2d at 320).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Atkins IV*, 581 S.E.2d at 516 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983)) (alteration in original).
37. *Id.* (citing *Ford*, 477 U.S. at 410).
38. *Id.* (citing *Ford*, 477 U.S. at 410).
39. *Id.* (quoting *Ford*, 477 U.S. at 416–17).

question of the prisoner's competence to be executed."[40] The United States Supreme Court similarly left to the states the implementation of the *Atkins* mandate.[41]

In response to the United States Supreme Court's decision in *Atkins III*, the Virginia General Assembly enacted emergency legislation that is currently in effect.[42] This legislation defines the term "mentally retarded."[43] Additionally, under this legislation, the defendant bears "the burden of proving mental retardation by a preponderance of the evidence."[44]

Virginia Code section 8.01-654.2 requires the Supreme Court of Virginia to consider a claim of mental retardation by a person who was sentenced to death before the enactment of the emergency legislation and to determine whether his claim is frivolous.[45] Upon reviewing the evidence of mental retardation presented at Atkins's resentencing hearing, the Supreme Court of Virginia determined that Atkins's claim was not frivolous.[46] Because Atkins's claim was first made on direct appeal from the resentencing hearing, the Supreme Court of Virginia remanded to the circuit court the question of whether Atkins is mentally retarded and instructed the circuit court to follow the requirements set forth in the General Assembly's emergency legislation.[47]

IV. Application in Virginia

Virginia's new statutory procedures are not sufficient to protect a mentally retarded offender from being sentenced to death. Under the Virginia procedures,

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40. *Id.* (citing *Ford*, 477 U.S. at 418).

41. *Id.* at 515.

42. *Atkins IV*, 581 S.E.2d. at 517; *see also* VA. CODE ANN. §§ 8.01-654.2, 18.2-10, 19.2-175, 19.2-264.3:1, 19.2-264.3:1.1, 19.2-264.3:1.2, 19.2-264.3:3, and 19.2-264.4 (Michie Supp. 2003) (setting forth the statutory procedures for determining mental retardation in capital cases).

43. *Atkins IV*, 581 S.E.2d at 517 (citing VA. CODE ANN. § 19.2-264.3:1.1(A)). The Virginia legislature defined mental retardation as follows:

> "Mentally retarded" means a disability, originating before the age of 18 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.

Id. at 517 (quoting VA. CODE ANN. § 19.2-264.3:1.1(A)).

44. *Id.* at 517; *see* VA. CODE ANN. § 19.2-264.3:1.1(C) (stating that "the defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence").

45. *Atkins IV*, 581 S.E.2d at 517; *see* VA. CODE ANN. § 8.01-654.2 (stating the procedures for presentation of a claim of mental retardation by a person sentenced to death before April 29, 2003).

46. *Atkins IV*, 581 S.E.2d at 517.

47. *Id.*

the defendant bears the burden of proving mental retardation by a preponderance of the evidence.[48] Because mental retardation, if proven, can prohibit the state from imposing death on a capital defendant, the burden should fall on the government to prove the absence of retardation before a defendant becomes death eligible. Lack of mental retardation should, therefore, to be treated as an element under *Ring v Arizona*.[49] In *Tison v Arizona*[50] and *Enmund v Florida*,[51] the Supreme Court articulated the minimum Eighth Amendment mens rea and actus reus that the defendant must have shown during the commission of the charged crime in order to be sentenced to death.[52] In the federal death penalty system, the *Enmund* and *Tison* factors act as a gateway through which the government must pass in order to reach jury consideration on the issue of death.[53] The Supreme Court's holding in *Atkins*, using the logic of *Enmund* and *Tison*, should have created Virginia's first gateway factor.[54] In Virginia, mental retardation should be treated just as the *Enmund* and *Tison* factors are treated in the federal system. The government should have the burden of proving non-mental retardation beyond a reasonable doubt before the jury may consider the death penalty.[55] We invite practitioners to contact the Virginia Capital Case Clearinghouse with issues related to mental retardation in capital cases.[56]

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48. *See* VA. CODE ANN. § 19.2-264.3:1.1(C) (placing the burden of proving mental retardation on the defendant).

49. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that because enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury).

50. 481 U.S. 137 (1987).

51. 458 U.S. 782 (1982).

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

53. *See* 18 U.S.C. § 3591(a) (2000) (requiring a defendant to have acted intentionally in the commission of the requisite crime to be eligible for death); 21 U.S.C. § 848(n) (2000) (listing the federal aggravating factors that must be alleged to seek a death sentence).

54. *See* VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (subsuming the *Tison* issue because "willful, deliberate, and premeditated killing" is an element of capital murder in Virginia); VA CODE ANN. § 18.2-18 (Michie Supp. 2003) (subsuming the *Enmund* actus reus requirement by setting forth the limited circumstances under which a principal in the second degree or an accessory before the fact may be charged with capital murder).

55. For a more thorough analysis of the logic applied herein see Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117, 123–24 (2002) (analyzing Atkins v. Virginia, 122 S. Ct. 2242 (2002)).

56. Contact the Virginia Capital Case Clearinghouse at (540) 458-8557.