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VA. CODE ANN. § 8.01-654.2
VA. CODE ANN. § 18.2-10
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I. Introduction

In *Atkins v. Virginia*,[1] the United States Supreme Court held that the imposition of the death penalty on the mentally retarded constitutes cruel and unusual punishment under the Eighth Amendment.[2] In response to the Court's decision, state legislatures were forced to evaluate whether their statutes complied with the *Atkins* mandate. In response to *Atkins*, the Virginia General Assembly passed legislation that amended Virginia Code Sections 18.2-10, 19.2-175, 19.2-264.3:1, and 19.2-264.4.[3] This legislation also added Sections 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3 to the Virginia Code.[4] The legislation has been returned to the General Assembly with gubernatorial amendments.[5]

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* H.D. 1923, 2003 Gen. Assem., Reg. Sess. (Va. 2003) (amending VA. CODE ANN. §§ 18.2-10, 19.2-175, 19.2-264.3:1, and 19.2-264.4 and codifying VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3). This case note will refer to the amended statutes as §§ 18.2-10, 19.2-175, 19.2-264.3:1, and 19.2-264.4. The newly codified statutes will be referred to as §§ 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2, and 19.2-264.3:3.

1. 122 S. Ct. 2242 (2002).

2. Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (stating that in light of our " 'evolving standards of decency' " the imposition of the death penalty on the mentally retarded is excessive and violates the Eighth Amendment).

3. *See* H.D. 1923, 2003 Gen. Assem., Reg. Sess. (Va. 2003). Virginia Code Sections 19.2-175 and 19.2-264.3:1 were minimally altered and will not be discussed further in this statute note.

4. *See id.*

5. **Caveat: This note is based on the legislation as amended by Governor Warner on March 24, 2003.**

II. Discussion

A. Section 8.01-654.2

Virginia Code Section 8.01-654.2 sets forth the procedure for those defendants who have a claim of mental retardation, but who were sentenced to death prior to the effective date of this legislation.[6] A defendant shall, either in his direct appeal or in his petition for a writ of habeas corpus, allege the factual basis for a claim of mental retardation.[7] If the Supreme Court of Virginia determines that the claim is not frivolous, it must remand the claim to the circuit court for a hearing on the mental retardation issue.[8] In the case of a defendant who has completed a direct appeal and a state habeas proceeding, his only available remedy will be in federal court.[9]

B. Section 18.2-10

Under Virginia Code Section 18.2-10(a), the punishment of death only may be imposed if "the person so convicted was 16 years of age or older at the time of the offense and is not determined to be mentally retarded pursuant to Section 19.2-264.3:1.1."[10]

C. Section 19.2-264.3:1.1

In *Atkins*, the Court left open the definition of mental retardation.[11] Section 19.2-264.3:1.1(A) sets forth the definition for mental retardation as amended by Governor Warner.[12] The proposed definition is 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.[13]

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6. § 8.01-654.2.

7. *Id.*

8. *Id.*

9. *Id.*

10. § 18.2-10(a). Current Virginia Code Section 18.2-10(a) does not mention mental retardation. VA. CODE ANN. § 18.2-10(a) (Michie Supp. 2002).

11. *See Atkins*, 122 S. Ct. at 2250 (allowing the states to determine how to enforce the constitutional restriction on the execution of the mentally retarded). *See generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117 (2002) (analyzing *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)).

12. *See* § 19.2-264.3:1.1(A).

13. *Id.*

Section 19.2-264.3:1.1(B) dictates the testing procedures used to determine if an individual falls within this definition of mental retardation.[14] This testing must include at least one generally accepted standardized measure that is appropriate for the "particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors."[15] In addition, a defendant's adaptive behavior assessment must be based upon "multiple sources of information."[16] Finally, a defendant's developmental origin shall also be assessed.[17]

Section 19.2-264.3:1.1(C) states that the mental retardation issue, if properly raised under Section 19.2-264.3:1.2(E), shall be determined by the sentencing jury.[18] Under this provision, the defendant bears the burden of proving by a preponderance of the evidence that he is mentally retarded.[19] Section 19.2-264.3:1.1(D) provides the jury verdict forms for the mental retardation determination.[20] These forms are to be used in addition to the verdict forms found in Section 19.2-264.4(D).[21] The forms in Section 19.2-264.3:1.1(D) first state that the jury has found the defendant guilty.[22] The forms then state whether or not the jury found that the defendant proved by a preponderance of the evidence that he is mentally retarded.[23] If the defendant proves that he is mentally retarded, then the jury can sentence the defendant only to imprisonment for life or imprisonment for life and a monetary fine.[24] Alternatively, if the jury determines that the defendant has not proven that he is mentally retarded, it then moves to the jury forms found in Section 19.2-264.4(D).[25]

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14. § 19.2-264.3:1.1(B).

15. § 19.2-264.3:1.1(B)(1).

16. § 19.2-264.3:1.1(B)(2).

17. § 19.2-264.3:1.1(B)(3). The former President of the American Association of Mental Retardation, James W. Ellis, suggested that states select a procedure that utilizes both IQ testing and a more comprehensive evaluation of the individual. Molly McDonough, *Atkins' Impact: States Need Standard for Determining Who Is Mentally Retarded, Ineligible for Death Sentence*, ABA Journal eReport (Jan. 31, 2003), *at* http://www.abanet.org/journal/ereport/j31mental.html. The Virginia statute, by including both standardized and more comprehensive testing procedures, seems to comply with this suggestion.

18. § 19.2-264.3:1.1(C). In a bench trial, mental retardation shall be determined by the judge during the sentencing proceedings. *Id.*

19. *Id.*

20. §19.2-264.3:1.1(D).

21. *See* § 19.2-264.4(D) (providing jury forms for capital sentencing proceedings).

22. § 19.2-264.3:1.1(D).

23. *Id.*

24. *Id.*

25. *See id.*; § 19.2-264.4(D).

D. Section 19.2-264.3:1.2

In pertinent part, Section 19.2-264.3:1.2 sets forth the means by which a capital defendant obtains the services of a mental health expert to assess whether the defendant is mentally retarded and to assist the defense with the preparation of mental retardation evidence.[26] The report prepared by this expert is protected by the attorney-client privilege.[27] However, a copy of the report must be given to the Commonwealth if the defendant chooses to present evidence of mental retardation at the sentencing proceeding.[28] After the defendant gives notice of intent to present evidence of mental retardation, the Commonwealth has the opportunity to seek the appointment of an expert to evaluate independently the defendant.[29] If the defendant refuses an evaluation by the Commonwealth's expert, the court may exclude the defendant's mental retardation evidence.[30]

E. Section 19.2-264.3:3

No statement or disclosure by the defendant during his mental retardation evaluation, nor any evidence derived from such statement, may be admitted against the defendant at the sentencing hearing "for the purpose of proving the aggravating circumstances . . . ."[31] These statements, however, are admissible under certain circumstances. The prosecution can present evidence of this type in rebuttal if the statements or disclosures are found to be relevant to issues in mitigation raised by the defense.[32]

F. Section 19.2-264.4

The legislature amended Section 19.2-264.4's mitigation provisions.[33] Section 19.2-264.4(B)(iv) previously included "mental retardation" as a mitigator.[34] The legislature amended this mitigation provision to state that "even if § 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant" may still be considered as a mitigator.[35]

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26. *See* § 19.2-264.3:1.2 (outlining the proper procedure for obtaining a mental health expert and providing a time frame for the defendant to give notice of intent to present evidence of mental retardation).

27. § 19.2-264.3:1.2(D).

28. *Id.*

29. § 19.2-264.3:1.2(F).

30. *Id.*

31. § 19.2-264.3:3.

32. *Id.*

33. *See* § 19.2-264.4.

34. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000) (stating that "mental retardation" can be considered a mitigator).

35. § 19.2-264.4(B).

III. Analysis

In its *Atkins* legislation, the Virginia legislature set forth a broad definition of mental retardation.[36] The American Association of Mental Retardation's definitions of mental retardation consistently focus on three components of mental retardation: "(1) substantial intellectual impairment; (2) impact of that impairment on everyday life of the individual; and (3) appearance of the disability at birth or during the person's childhood."[37] The Virginia statutory definition encompasses each of these three components.[38] The *Atkins* legislation also includes testing procedures that allow for a full evaluation of a defendant's intellectual capacity.[39] The testing procedures for evaluating a defendant's mental retardation claim do not depend entirely on a standardized test, thus allowing for a more comprehensive evaluation of a defendant.[40]

When counsel realizes that mental retardation may be an issue at the sentencing hearing, he must move for the appointment of a mental health expert and demonstrate that the defendant is unable to pay for such expert assistance.[41] Under Section 19.2-264.3:1.2, counsel must give the Commonwealth notice that he plans to present expert testimony regarding the defendant's mental retardation at least twenty-one days before trial.[42] This timing provision requires defense counsel to consider a sentencing hearing strategy prior to the defendant's conviction. If counsel fails to meet this requirement, the defendant may be barred from presenting mental retardation evidence at the sentencing hearing.[43]

The *Atkins* legislation amended the mitigation provision of 19.2-264.4(B) so that subaverage intellectual functioning can still be considered at the sentencing hearing.[44] If a defendant does not meet the Virginia definition of mental retardation, his level of intellectual functioning can still be considered in mitigation.[45] Therefore, counsel should develop and prepare evidence for both purposes: (1) to trigger the Eighth Amendment bar on the execution of the mentally retarded; and (2) to use subaverage intellectual functioning as a mitigator.[46]

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36. *See* § 19.2-264.3:1.1.

37. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2002), *at* http://www.aamr.org/Reading-Room/pdf/state_legislatures_guide.pdf.

38. *See* § 19.2-264.3:1.1.

39. *See* McDonough, *supra* note 17.

40. *See id.*

41. § 19.2-264.3:1.2(A).

42. § 19.2-264.3:1.2(E).

43. *See id.* (allowing the court to bar the defendant from presenting evidence of mental retardation if he does not provide adequate notice of his intent to present such evidence).

44. *See* § 19.2-264.4(B) (permitting a defendant's subaverage intellectual functioning to be considered in mitigation).

45. *Id.*

46. *See id.*

In the *Atkins* legislation, the Virginia legislature failed to acknowledge the implications of *Ring v. Arizona*[47] on *Atkins*.[48] In *Ring*, the United States Supreme Court held that aggravating factors are elements of the offense.[49] The Sixth Amendment requires that a jury find these aggravators beyond a reasonable doubt.[50] Under *Ring*, any "factor" that makes the defendant death eligible functions as an element of the offense which must be found by the jury beyond a reasonable doubt.[51] The absence of mental retardation is such a "factor." The absence of mental retardation, therefore, constitutes an element of death eligibility that must be proven beyond a reasonable doubt by the prosecution before the jury can consider death. Section 19.2-264.3:1.1(C), in contrast, places the burden of proving mental retardation by a preponderance of the evidence on the defendant at the sentencing proceeding.[52] Section 19.2-264.3:1.1(C) and the verdict forms in Section 19.2-264.3:1.1(D) are unconstitutional.[53]

IV. Conclusion

In its effort to comply with the Supreme Court's decision in *Atkins*, the Virginia legislature added and amended provisions of the Virginia Code. Under this legislation, counsel first must obtain the services of a mental health expert. Second, counsel should make the appropriate motions raising the issue of mental retardation. Third, counsel must challenge the *Atkins* legislation as unconstitutional because it improperly places the burden of persuasion on the defendant. The Virginia legislature successfully addressed several critical issues, but failed to provide the level of protection for defendants mandated by *Ring*. Capital defense attorneys should familiarize themselves with the new procedures and consider the range of possible issues that they create.

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47. 122 S. Ct. 2428 (2002).

48. *See* Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002) (holding that the Sixth Amendment requires that a jury find beyond a reasonable doubt every factor that functions as an element of a greater offense).

49. *Id.*

50. *Id.*

51. *Id.*

52. § 19.2-264.3:1.1(C).

53. *See id.*; § 19.2-264.3:1.1(D).