MENTAL RETARDATION AND THE DEATH PENALTY: A GUIDE TO STATE LEGISLATIVE ISSUES

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The interest in State Legislatures in the topic of mental retardation and the death penalty has obviously heightened with the United States Supreme Court's decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (June 20, 2002). The purpose of this document is to provide legislators and advocates with guidance in implementing the *Atkins* decision, so that each State's death penalty legislation is in full compliance with constitutional requirements.

In formulating these recommendations, principal attention is focused, of course, on the Supreme Court's *Atkins* decision itself. But there are three other major considerations worthy of careful consideration. First, it is worth considering the experience of States that have already worked with legislation in this area. Several of the States have had statutes in effect for more than a decade, and their experience merits attention, particularly on questions that affect ease of implementation in the criminal justice system. Second, developments in the field of mental retardation, particularly on questions of definition and clinical evaluation have been canvassed and incorporated. Finally, attention has been paid to other decisions by the Supreme Court that have been issued since the earlier State statutes were enacted, most prominently, *Cooper v. Oklahoma*, 517 U.S. 348 (1996), and *Ring v. Arizona*, 122 S.Ct. 2428 (June 24, 2002), on the issues of burdens of persuasion and the role of juries. These decisions create constitutional concerns in this area, even in some of the States that already had statutes enacted prior to *Atkins*.

Some of these constitutional questions have answers that are quite clear. Others are issues for which the ultimate judicial resolution is more doubtful. This Legislative Guide attempts to analyze these different issues, and where there is room for doubt, to offer alternative legislative approaches. It is anticipated that legislators will want to address these questions both from the perspective of fidelity to constitutional principles and also from concern to avoid unnecessarily imperiling judgments in subsequent litigation where issues can be anticipated and resolved in advance.

I. BACKGROUND: THE SUPREME COURT'S DECISION IN *ATKINS*

In *Atkins v. Virginia*, 122 S.Ct. 2242 (June 20, 2002), the Supreme Court held that the execution of any individual with mental retardation violated the Eighth Amendment's prohibition on cruel and unusual punishment.

But the Court had begun its consideration of mental retardation and the death penalty thirteen years earlier, in *Penry v. Lynaugh*.[1] In that case, a majority of the Justices held that although there was evidence (particularly in the form of public opinion surveys and resolutions by professional organizations) of a national consensus against executing anyone with mental retardation, the form of that evidence was an inadequate basis for a constitutional prohibition. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."[2]

At the time that *Penry* was before the Court, two States and the Congress had enacted laws prohibiting the execution of people with mental retardation. In the next dozen years, sixteen more States enacted such statutes. Following those enactments, the Court agreed to reconsider the issue in the *Atkins* case.[3]

The Court in *Atkins* began by noting that the Eighth Amendment prohibits "excessive" punishments as well as those that are cruel and unusual.[4] It also observed that the issue of whether a punishment was excessive could be illuminated by the way in which State legislatures had addressed it. But the ultimate judgment of assessing a punishment, as well as the nation's attitudes toward it, rests with the Court itself. "Thus, in cases involving a consensus, our own judgment is brought to bear by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[5]

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[1] 492 U.S. 302 (1989).

[2] *Id.* at 335. Four of the Justices in *Penry* believed there was an adequate basis for invalidating the practice because of the reduced culpability of people with mental retardation. *Id.* at 341 (Justices Brennan and Marshall); *id.* at 349 (Justices Stevens and Blackmun).

[3] The Court initially agreed to hear the issue in the case of *McCarver v. North Carolina*, No.00-8727. When that case was rendered moot, the Court accepted the *Atkins* case. See *infra* note 70.

[4] 122 S.Ct. at 2246.

[5] *Id.* at 2247-48 (internal citation omitted).

The Court then surveyed the evidence from the State legislatures, including the number of enactments in the years since *Penry*, the margins by which the laws passed, legislative activity in States that had not yet completed action on the issue, and the report of the Governor of Illinois' recent commission on the death penalty.[6]

The *Atkins* opinion turned next to the public policy justifications offered in support of capital punishment, and the extent to which they applied to individuals with mental retardation. The Court concluded that the execution of persons with mental retardation would not "measurably contribute[]" to either deterrence or retribution in the criminal justice system.[7] Although the principal focus in the Court's opinion (as in the State legislatures) was on the culpability of defendants who had mental retardation, the Court also noted concerns about both factual innocence and the appropriateness of the death penalty. "Mentally retarded defendants in the aggregate face a special risk of wrongful execution."[8]

The opinion of the Court concluded that: "Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude 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."[9]

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[6] REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (April, 2002). In a footnote, the Court also took note of other indicators of public opinion that appeared to confirm the consensus found in State legislation, including positions taken by professional organizations, religious bodies, international organizations, and surveys of public opinion. "Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue." 122 S.Ct. at 1249-50 n.21.

[7] 122 S.Ct. at 2251.

[8] *Id.* at 2252.

[9] *Id.* (internal quotations omitted) Three members of the Court – Chief Justice Rehnquist and Justices Scalia and Thomas – dissented from the Court's opinion. The Chief Justice's dissent objected to the majority's methodology in ascertaining a national consensus, and was particularly critical of the footnote in the Court's opinion that discussed professional organizations, public opinion surveys, and the views of other nations. *Id.* at 2252-59. Justice Scalia's dissent was similarly critical of the majority's methodology, which he found to be inconsistent with the Court's precedents. *Id*. at 2259-68.

II. SUBSTANTIVE PROTECTION FOR DEFENDANTS WITH MENTAL RETARDATION

The inapplicability of the death penalty to people with mental retardation was resolved by the Supreme Court's holding in *Atkins* that the Eighth Amendment prohibits the execution of any such individual. Nevertheless, the issue should be addressed by State legislation.

One reason for a declaration that such executions violate State law is to make clear that such an execution is unacceptable regardless of the circumstances of timing. Several of the States that had enacted statutes prior to *Atkins* included a provision that the law would only apply to prosecutions subsequent to the law's effective date.[10] Other State laws were silent on the subject.[11] North Carolina's statute explicitly applied to both prospective cases and those that might be challenged by individuals already under a death sentence, and provided separate procedures for the retrospective cases. [12]

North Carolina's approach of addressing both prospective and retrospective cases has much to commend it. It will avoid (or at least reduce) extensive litigation about the procedures to be employed in both classes of cases.

In addition to whatever procedures the State chooses to adopt for both retrospective and prospective cases, the Legislature can assure clarity by including a simple provision that prohibits the execution of *any* individual with mental retardation. Language similar to that of the Federal statute[13] will accomplish this substantive protection. (Later sections of this Guide will address the procedural issues.)

All States that have capital punishment should pass legislation that protects people with mental retardation from the death penalty.

RECOMMENDED STATUTORY LANGUAGE:

No person with mental retardation is eligible for the death penalty.

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10 *E.g.*, KY. REV. STAT. ANN. § 532.140(3) (Banks-Baldwin 2001).

11 *E.g.,* N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002).

12 N.C. GEN. STAT. ANN. §§ 15A-2005, 15A-2006 (West 2002).

13 Federal Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(1) (2000); *see also* COLO. REV. STAT. ANN. § 16-9-403 (1997).

III. DEFINITION OF MENTAL RETARDATION

There is a broad consensus within the field of mental retardation as to the scope of the definition, and that consensus is reflected in the legislation in States passed prior to the *Atkins* decision, and in the Court's opinion itself. Nevertheless, there are minor variations in wording that legislators will want to consider.

The Scope of the Constitutional Protection. The Court's decision in *Atkins* makes clear that its holding extends to all defendants who "fall within the range of mentally retarded offenders about whom there is a national consensus." 122 S.Ct. at 2250. *See also id.* at 2250 n. 22. This means that while States are free to adopt variations in the wording of the definition, *they cannot adopt a definition that encompasses a smaller group of defendants*, nor may they fail to protect any individuals who have mental retardation under the definition embodied in the national consensus.

The Definitions of Professional Organizations. The American Association on Mental Retardation (AAMR) is the principal professional organization in the field, and has propounded (and refined) the definition of mental retardation for many decades. There are three versions of the AAMR definition worthy of consideration in legislating on this topic.

The common elements of the AAMR definitions address the three components of the concept 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. Unless an individual meets all three requirements, he does not fall within the definition of mental retardation. The variations found in the three formulations of the AAMR definition differ only in the wording of how they describe the second component, i.e. the impact on the individual's life. But it is important to emphasize that the various formulations *describe the same group of individuals*, and therefore do not differ in scope in any significant way.

The 1983 AAMR definition. The definition propounded by AAMR (then identified as the American Association on Mental Deficiency) in 1983 forms the basis of the definitions adopted by most of the State legislatures that acted on this topic between the *Penry* decision in 1989 and the *Atkins* decision in 2002:

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.[14]

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[14] American Association on Mental Deficiency, *Classification in Mental Retardation* 11 (Herbert J. Grossman ed., 8th ed. 1983) (hereafter "AAMD*, Classification* (1983)").

The 1992 AAMR definition. AAMR's reformulation of the definition in 1992 was built on the same clinical and conceptual framework, but refined the component of adaptive behavior. The 1992 definition is the one cited by the Supreme Court in *Atkins*,[15] and was adopted by a few State legislatures in the 1990s. It provides:

> 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 18.[16]

The 2002 AAMR definition. The AAMR further refined the definition in 2002. The change from the 1992 version was, once again, modest, and again focused primarily on refining the description of the adaptive skills component:

> 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 18.[17]

Again, it is important to emphasize that these definitions encompass essentially the same group of people. The choice for legislators in selecting one of the definitions therefore involves setting the terms under which clinicians will conduct evaluations of defendants, counsel for the

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[15] 122 S.Ct. at 2245 n.3.

[16] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (Ruth Luckasson ed., 9th ed. 1992) (hereafter AAMR*, Mental Retardation* (1992). The American Psychiatric Association's formulation follows the 1992 AAMR version closely:

> 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). 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.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. Text Revision, 2000) (hereafter "APA*, DSM-IV-TR"*).

[17] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (Ruth Luckasson ed., 10th ed. 2002) (hereafter "AAMR, *Mental Retardation* (2002)"). In addition to providing the current definition of mental retardation and explaining related concepts and terminology, the 2002 edition of this manual provides valuable background on such topics as the history of classification, clinical assessment of people with mental retardation, and an extensive bibliography of references to the clinical literature. AAMR's website is www.aamr.org.

defense and the prosecution will discuss and negotiate prospective cases, and when the cases are not resolved by pleas, the courts will resolve questions concerning a defendant's eligibility for the death penalty.

The clinical components of mental retardation. It may prove helpful to discuss briefly the three components common to all the clinical definitions.

Limited intellectual functioning is the pivotal component of any individual's diagnosis. The definition requires that an individual have an impairment in general intellectual functioning that places him in the lowest category of the general population. As measured by standard psychometric instruments, IQ tests, this requires an individual's measured intelligence to be two standard deviations below the statistical mean. That, in turn, indicates that he or she scores in approximately the bottom 2_ percent of the population.

However, IQ scores alone cannot precisely identify the upper boundary of mental retardation. Generally, mental retardation encompasses everyone with a score of 70 or below. Additionally, it includes some individuals with scores in the low 70s (and even mid-70s), depending on the nature of the testing information.[18] As much as the criminal justice system might prefer to have a hard-and-fast limitation measurable by a single IQ score, it is simply impossible to exclude consideration of other factors about the testing performed on the individual, nor is it possible to ignore the need for clinical judgment by experienced diagnosticians.[19]

As a result, statutes that specify a particular IQ score in their definitions of mental retardation will prove difficult to administer. The absence of such a score has not produced

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[18] The relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation. *See, e.g.,* AAMR, *Mental Retardation* (2002), *supra* note 17, at 57-59 and sources cited therein; AAMR, *Mental Retardation* (1992), *supra* note 16, at 14 ("Mental retardation is characterized by significantly subaverage intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AAMD, *Classification* (1983), *supra* note 14, at 11 ("This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); APA, *DSM-IV-TR*, *supra* note 16, at 41-42 ("Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."). *See generally* American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* (John W. Jacobson & James A. Mulick eds. 1996); National Research Council, *Mental Retardation: Determining Eligibility for Social Security Benefits* 5 (National Academy Press 2002).

[19] This fact is reflected in the *Atkins* decision, where the Court noted that "an IQ between 70 and 75" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 122 S.Ct. at 2245 n.5.

difficulties in the States whose statutory definitions are more general, such as those that follow a version of the AAMR definition.

The *adaptive behavior* component requires that the intellectual impairment have produced real-world disabling effects on the individual's life. The purpose of this element is to ensure that the individual is not merely a poor test-taker, but rather is a truly disabled individual.[20]

Most of the existing State legislation on this topic uses a definition borrowed from the 1983 AAMR definition, and thus describes, in general terms, "concurrent deficits in adaptive behavior."[21] A few of the more recent State enactments have chosen as their model the 1992 AAMR definition, which described this element in terms of "related limitations in adaptive skill areas" and then provided a list of such areas, with the requirement that the individual face limitations in two of the listed areas.[22] The purpose of conceptualizing the behavioral prong of the definition around "limitations in adaptive skill areas" was to focus the attention of diagnosticians more directly on an individual's need for services and supports.[23] While this is important to clinicians working in the service delivery system, it is obviously is less significant for evaluations performed for criminal cases potentially involving capital punishment.

The formulation in the 2002 AAMR definition appears to be somewhat better suited for forensic evaluations in death penalty cases. That version's requirement that the individual manifest "a disability characterized by significant limitations both in intellectual functioning *and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills*"[24] addresses the principal concerns of the criminal justice system. It requires that the intellectual impairment be manifested in real-world disability in the individual's life, but at the same time focuses on broad categories of adaptive impairment, instead of the service-related skill areas of the 1992 version.[25] As a result, the 2002 version is recommended to legislators.[26]

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[20] In conjunction with the age-of-onset requirement, it also provides a check against any possibility of malingered claims of mental retardation. *See* discussion *infra*.

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[21] *See, e.g.,* TENN. CODE ANN. § 39-13-203(a)(1)-(3) (1997); WASH. REV. CODE ANN. § 10.95.030(2)(a) (West Supp. 2002).

[22] *See, e.g.,* N.C. GEN. STAT. ANN. § 15A-2005(a)(1) (West 2002); MO. ANN. STAT. § 565.030(6) (West 2002).

[23] AAMR, *Mental Retardation* (1992), *supra* note 16, at 15-16.

[24] *See supra* note 4 and accompanying text.

[25] One other important consideration about adaptive behavior merits careful attention, even though it affects implementation rather than the actual drafting of legislation. The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain focused on the individual's *limitations* rather than any skills he or she may also possess. AAMR and other clinical experts emphasize that the presence of skills cannot preclude the appropriate diagnosis of mental retardation. In the most recent edition, the definition of mental retardation is prominently accompanied by the admonition that "Within an individual, limitations *often* coexist with strengths." AAMR, *Mental Retardation* (2002), *supra* note 17, at 1 (emphasis supplied). *Accord* AAMR, *Mental Retardation*

Age of onset is the requirement in many definitions of mental retardation that the disability have manifested during the developmental period. Most states have identified this as age 18.[27] The purpose of this third prong of the definition is to distinguish mental retardation from those forms of brain damage that may occur later in life. (Such later-developing mental impairment could result from causes such as traumatic head injury, dementia caused by disease,[28] or similar conditions.) This distinction is considerably more relevant to clinicians designing habilitation plans and systems of supports for an individual than it is to the criminal justice system, since later-occurring disabilities (assuming that the disability developed during adulthood but prior to the commission of the offense) would involve comparable reduction in culpability for any criminal act.[29]

(1992), *supra* note 16, at 1 ("Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities."). The skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying. The sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences, and thus it is the presence of confirming deficits that must be the diagnostician's focus.

[26] This is not to suggest that States that have already legislated on this topic are required to alter their statutory definition. But where a State is considering new legislation, or is considering amendments on other components such as procedures, legislators might wish to consider adopting the 2002 AAMR definition. Another reason to consider the 2002 version is that it will be the definition with which clinical evaluators, in future cases, will be most familiar. This increasing familiarity and consistency with evaluations performed in other contexts should facilitate evaluations in capital cases as well.

[27] It is not required that an individual have been *tested* with scores indicating mental retardation during the developmental period. Rather there must have been *manifestations* of mental disability, which will more frequently have taken the form of problems in the area of adaptive behavior at an early age. *See* APA, *DSM-IV-TR*, *supra* note 16, at 42 ("Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation.").

[28] *See, e.g.,* APA, *DSM-IV-TR*, *supra* note 16, at 163 (Dementia Due to HIV Disease).

[29] In fact, if there were a capital prosecution of an individual who met the definition of mental retardation *except for the age of onset*, principles of equality likely would require comparable exemption from capital punishment. State Legislatures concerned about the possibility of such cases could easily omit the age of onset requirement from their definition of mental retardation. But even where the statute contains an age of onset provision, other bodies would be well advised to consider arguments regarding comparative culpability. In some States, this could be addressed appropriately by the trial judge in ruling on an individual's eligibility for the death penalty. In other States, it might be addressed on appeal to the State's appellate court, either in performing statutorily mandated review under proportionality provisions, *see, e.g.,* N.J. STAT. ANN. § 2C:11-3e (West 1995), or in interpreting the State Constitution's provisions regarding equal protection or excessive punishments. *See generally Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (State Constitution's punishment provision prohibited execution of a defendant with mental disability comparable to that of defendants protected by prospective-only mental retardation statute). If none of these bodies has ordered relief from a death sentence, it would be an appropriate function of the Governor or other relevant clemency-granting authority to commute the sentence of such an individual to a punishment other than death.

The final consideration regarding age of onset, although it serves no independent purpose regarding a defendant's culpability, is to ensure that defendants may not feign mental retardation once charged with a capital offense. The issue of malingering, which has received considerable attention in the clinical literature regarding mental *illness*,[30] has not proven to be a practical problem in the assessment of individuals who may have mental *retardation*. But any concerns that an individual could somehow manage to feign cognitive impairment, undetected by clinical evaluators, should be dispelled by the fact that such deception would have had to begin during the individual's childhood. There are no reports in the clinical literature indicating that this is a practical problem in the assessment of individuals who are thought to have mental retardation.

Taking all these considerations into account, it is recommended that States consider adopting the 2002 AAMR definition of mental retardation.

RECOMMENDED STATUTORY LANGUAGE:

For purposes of this Statute, "Mental Retardation" is defined as a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Mental Retardation originates before age 18.

IV. CLINICAL EVALUATIONS

Although no specific statutory language is recommended here, the quality of clinical evaluations of a defendant's intellectual functioning will be crucial to the successful implementation of *Atkins*. Although these issues do not appear to require legislative enactment at this time, there are a couple of issues that legislators and other policy planners should keep in mind.

First, *Atkins* implementation will clearly involve compliance with Supreme Court caselaw concerning the role of defense counsel and access to the assistance of clinical experts. The lead case on this subject is *Ake v. Oklahoma*, 470 U.S. 68 (1985). In that case, the Court held that in order to assure "meaningful access to justice,"[31] an indigent capital defendant whose mental condition was at issue was entitled to the assistance of "a competent psychiatrist who will

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[30] *See, e.g.,* RICHARD ROGERS & DANIEL W. SHUMAN, CONDUCTING INSANITY EVALUATIONS 90-120 (2d ed. 2000).

[31] 470 U.S. at 77.

conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[32]

In the context of *Atkins* implementation, the need for professional clinical assistance to defense counsel is even clearer. But unlike *Ake*, which involved the insanity defense, the clinical assistance required will not always (or even very frequently) be from a psychiatrist. Although some psychiatrists have experience in assessing people with mental retardation, most do not.[33] Defense counsel, in the first instance, and ultimately the court, will need an experienced and trained clinician whose expertise is the field of mental retardation. The evaluator (or in some cases, evaluation team) must not only be skilled in the administration and interpretation of psychometric (IQ) tests,[34] but also in the assessment of adaptive behavior and the impact of intellectual impairment in the individual's life.[35] A competent professional assessment will involve more than simply ascertaining an IQ score.[36] It also requires the exercise of experienced clinical judgment in the field of mental retardation.[37] The expertise of skilled mental disability professionals is crucial to implementing *Atkins'* protections and achieving the goals of the criminal justice system in these cases.[38]

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[32] *Id.* at 83.

[33] *See, e.g.,* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 George Wash. L. Rev. 414, 487 (1985) ("[M]ental retardation differs sufficiently from other forms of mental disability that training in mental illness cannot, without more, qualify a physician to provide useful information about a mentally retarded person. Similarly, typical medical school training and the attainment of the academic degree of M.D. cannot, without more, qualify a physician to give expert testimony about mental retardation.").

[34] AAMR, *Mental Retardation* (2002), *supra* note 17, at 51-71; American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* 113-126 (John W. Jacobson & James A. Mulick eds., 1996); John J. McGee & Frank Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System* in *The Criminal Justice System and Mental Retardation: Defendants and Victims* 55, 65-68 (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds. 1992).

[35] *See generally* AAMR, *Mental Retardation* (2002), *supra* note 17, at 73-91.

[36] "Courts should not operate under the illusion that the simple administration of any test will resolve all questions regarding a retarded person's status in a criminal case. Systematic assessment requires the thoughtful selection and administration of valid examination instruments together with careful observation, interviewing, and analysis of all the data by a professional with proper training and experience." Ellis & Luckasson, *supra* note 33, at 487-88.

[37] *See generally* AAMR, *Mental Retardation* (2002), *supra* note 17, at 93-96.

[38] But while the provision of expert assistance to the defense will be essential to any successful implementation of *Atkins*, any fears that the States will face years of protracted "battles of the experts" of the sort associated with the insanity defense are likely to be unfounded. The experience in most States that have had statutory protections for people with mental retardation is that after a year or two, prosecutors, defense counsel, and judges become familiar with mental retardation and professionally competent mental retardation evaluations. And once that familiarization takes place, the number of contested cases is substantially lower than had been anticipated. It is the experience in several of these States that following exploration of defendants' mental impairments, many cases are resolved by pleas.

A final note on the clinical evaluation of these cases may be in order. Determination of which defendants have mental retardation cannot be accomplished by casual examination or impressionistic observations.[39] In *Ake*, the Court observed that the assistance of mental health clinicians is essential in insanity defense cases in order to identify and properly interpret the "elusive and often deceptive" symptoms of mental illness.[40] While the Supreme Court has noted, in another context, some of the differences between mental illness and mental retardation,[41] careful professional evaluations of mental retardation are just as crucial. Although the courts are generally careful about the evaluation of expert testimony,[42] particular care must obviously be taken in cases where a constitutional right is involved, and where the stakes are literally life and death.

V. ADJUDICATION OF NEW CASES

With the possible exception of defining mental retardation, the procedure for the adjudication of new cases has received the greatest attention among State legislators. Within the context of constitutional protections, there are policy considerations that will affect the fair treatment of defendant's claims, the efficient operation of the criminal justice system, and judicial economy.

When the mental retardation issue should be addressed. Most of the States that have enacted legislation have chosen to have the issue addressed, in the first instance, in pretrial proceedings. This makes sense for a number of reasons. Most importantly, if the defendant has mental retardation, and therefore is ineligible for the death penalty, pretrial resolution of the issue

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[39] Courts need to be particularly skeptical of evaluators who purport to be able to perform a clinical diagnosis regarding mental retardation based on isolated factors and abilities. Similarly, the defendant's own account of his skills and abilities is particularly suspect. *See* Caroline Everington & Denis W. Keyes, *Mental Retardation*, 8 *The* FORENSIC EXAMINER 31, 34 (1999) ("Although interviewing the person with mental retardation can provide some information on present and past abilities, such information should always be corroborated with external sources as reliability is questionable….Frequently people with mental retardation do not have accurate estimations of their abilities and often provide distorted versions of past accomplishments.").

[40] 470 U.S. at 80 (quoting *Solesbee v. Balkcom,* 339 U.S. 9, 12 (1950)).

[41] *See Heller v. Doe*, 509 U.S. 312, 322 (1993).

[42] *See generally Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

saves the State the cost of an unnecessary capital trial.[43] (It is universally recognized that capital trials are vastly more expensive to conduct than noncapital trials.)[44]

States already have established rules and timetables for the resolution of pretrial issues in capital cases. The issue of a defendant's mental retardation can be accommodated into that schedule. The statute may require defendant to give notice to the court and to the prosecution of the intention to raise the issue of mental retardation as a bar to capital punishment. The time limits on the filing of such a notice will require some attention, and is a subject on which legislators may appropriately wish to consult both prosecutors and defense counsel in their State as to the practical considerations involved. Two general concerns may influence the setting of this deadline. The deadline should be sufficiently in advance of the date for the hearing on the issue to permit both sides, and particularly the prosecution, to investigate the claim. But the deadline must be late enough in the pretrial period to permit the defense to investigate and determine whether the client may actually have mental retardation. Requiring the defense to submit notification at a premature date may, paradoxically, produce a greater number of claims by defense lawyers who have not yet had a full opportunity to investigate the possibility, but who feel the need to preserve the option of filing such a notice if the investigation bears out the fact of the client's mental disability.[45]

Who should decide the issue in pretrial proceedings. Most of the States that have legislated on this topic have chosen to have the pretrial determination of the defense's claim concerning mental retardation made by a judge, rather than a jury. Having this issue addressed in a bench hearing has worked well in several States that have adopted this approach. Presenting the arguments on this issue to a judge is likely to result in a hearing that is less elaborate and less costly than doing so before a jury.[46]

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[43] In addition, it is the experience of States that have had mental retardation statutes for several years that when the issue of mental retardation has been resolved prior to trial, a considerable number of cases can be resolved by pleas.

[44] Among the many reasons for the significantly higher cost of capital trials are the requirement in many States for more than one defense lawyer in death penalty cases, higher attorney fees for indigent defendants, delays that may result from the requirement in many States that the trial judge appoint counsel with death penalty experience, and the pretrial preparations by both prosecution and defense for the penalty phase of a bifurcated trial.

[45] This last concern is particularly important because of the fact that many individuals who have mental retardation persist in hiding their disability even from their defense counsel. By merely being uncommunicative, clients may be able to hide their disability. *See* James W. Ellis & Ruth A. Luckasson, *supra* note 33, at 430-31. Thus, mental retardation may not be apparent in the early stages of the preparation of the defense, and may only emerge as the individual's background is investigated.

[46] The efficiencies of a pretrial bench hearing are even clearer when the alternatives for the pretrial determination by a jury are considered. Serious constitutional concerns would arise if the same jury that will hear the actual trial was involved in resolving this pretrial question, and the assembling of a separate jury would involve substantial costs.

Consequence of the judge's ruling on the mental retardation issue. *If the judge finds that the defendant has mental retardation,* the case should be denominated as noncapital, and in a subsequent trial, the defendant should be eligible for whatever penalty has been designated by the Legislature for the offense with which he is charged, except for the penalty of death.

If the judge finds that the defendant does not have mental retardation, the case may proceed as a capital trial. As several States have recognized, a pretrial ruling on ineligibility for the death penalty because of mental retardation that is adverse to the defense does not preclude raising mental disability in the subsequent trial.[47] Therefore it is crucial, in order to avoid contaminating and undercutting issues properly before the trial jury (including the question of mitigation if the case proceeds to a penalty phase), to prevent any reference to the pretrial proceedings to the jury.

Burden of producing evidence. Clearly, the burden of raising the issue of mental retardation and initially bringing forth some evidence supportive of the contention can and should be placed on the defendant.[48] If the defense fails to raise the issue, the prosecution should not be required to demonstrate that a defendant did *not* have mental retardation.

Burden of persuasion. This is among the most intricate and perplexing constitutional issues involved in this legislation.

All eighteen States that had enacted legislation prior to *Atkins* had placed the burden of persuasion on the defense. Most of the States merely required the defense to demonstrate mental retardation by a "preponderance of the evidence,"[49] but a few placed the burden at "clear and convincing evidence,"[50] and one State required the defense to demonstrate mental retardation "beyond a reasonable doubt."[51]

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47 *See, e.g.,* TENN. CODE ANN § 39-13-203(e) (1997).

48 Among the factors that make it appropriate to assign a burden of producing evidence to the defense are: "whether the pertinent facts were peculiarly within the knowledge of the defendant, whether certain evidence was more readily accessible to one side than to the other, [and] whether in respect of an issue the proof of a negative was required." Barbara E. Bergman & Nancy Hollander, 1 WHARTON'S CRIMINAL EVIDENCE 22-23 (15th ed. 1997).

49 *E.g.,* N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002).

50 *E.g.,* COLO. REV. STAT. ANN. § 16-9-403 (West 1997).

51 GA. CODE ANN. § 17-7-131(c)(3) (1997). Georgia's statute, which was the first to be enacted by any State, grafts the protection for people with mental retardation onto its existing statute providing a verdict form of "guilty but mentally ill." *See generally* McGraw, Farthing-Capowich & Keilitz, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 Vill. L. Rev. 117 (1985). It is noteworthy that when the Georgia Supreme Court found that the execution of any person with mental retardation violated the Georgia Constitution, it assigned the burden to defendants in postconviction cases at the level of preponderance of the evidence. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989).

But those statutes were enacted before the *Atkins* decision, which has changed the constitutional calculus on the issue. Although the States have considerable latitude in allocating the burden of persuasion on affirmative defenses that are discretionary options governed only by State law,[52] the issue is different if the claimed right is derived from the Constitution itself. In *Cooper v. Oklahoma*,[53] a unanimous Supreme Court held that it violated Due Process for a State to assign the burden of persuasion to the defendant on the issue of competence to stand trial at a level of "clear and convincing evidence."

After *Atkins*, it is now clear that defendants with mental retardation have *constitutional* protection from being sentenced to death. The States' ability to restrict that Eighth Amendment right by placing a heavy burden of persuasion on the defendant is therefore constitutionally suspect. The reasoning of *Cooper* seems fully applicable here. Neither contemporary nor historical practices offer sufficient precedent for requiring a defendant to demonstrate his mental retardation at an elevated level of proof. Policy considerations point to the same conclusion. The mentally retarded individual's interest in being punished at a level less than death obviously is at the highest level. The State's interest in the fair implementation of its capital punishment law is considerable, but does not require the allocation of such a heavy evidentiary burden on the defendant.[54] As the Court noted in *Cooper*, "A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties."[55]

After *Atkins* and *Cooper*, it is clearly unconstitutional to assign to the defense the burden of persuasion at an elevated (*i.e.* "clear and convincing evidence" or "beyond a reasonable doubt) level.

States whose laws currently impose such a heightened burden on the defendant should amend their statutes to avoid unnecessary litigation over this constitutional infirmity.

Whether the burden of persuasion can be assigned to the defense at all, even at a "preponderance" level, is a considerably thornier issue. As noted earlier, all the States that acted before *Atkins* placed the burden with the defendant. But because of decisions in the Supreme Court's most recent term, there is some doubt as to whether that allocation is constitutional.

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[52] *See Patterson v. New York*, 432 U.S. 197 (1977).

[53] 517 U.S. 348 (1996).

[54] The Court in *Cooper* rejected Oklahoma's argument that it needed to assign the elevated burden to the defendant out of concern for potential malingering of mental illness to avoid being tried. As noted in the earlier section on the definition of mental retardation, any concerns about malingering are substantially lower than is the case regarding mental illness. See *supra* note 30. And of course, if a defendant were somehow able to successfully feign mental retardation (a success that has no precedents in the clinical literature), he would not avoid punishment altogether, as in *Cooper*, since the State would still have the ability to punish him non-capitally at the highest level provided by State law.

[55] 517 U.S. at 366.

The doubt arises at the intersection of *Atkins* and the Court's most recent decision regarding the right to a jury trial. In *Ring v. Arizona*,[56] the Court held that States are required to afford capital defendants the right to have all factual questions that are necessary preconditions to the death penalty resolved by a jury. Arizona law had provided that judges made the determination regarding the aggravating factors that could lead to a death sentence. "Because Arizona's 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."[57] And where something has been deemed to be an element or its equivalent, the prosecution must carry the burden of persuasion "beyond a reasonable doubt."[58]

It is not absolutely clear whether the post-*Atkins* question of whether a defendant has mental retardation is the "functional equivalent" of an element of the crime,[59] but it certainly bears most of the attributes described in *Ring*.[60] If the issue proves to be a *Ring*-equivalent, then both the Sixth Amendment's right to a jury determination of the issue *and* the State's obligation to carry the burden of persuasion "beyond a reasonable doubt" must apply. States that choose to ignore this very real possibility do so at the peril of having their new statute declared unconstitutional, and risk the necessity of re-trying capital defendants convicted and sentenced under that statute.[61]

States are thus confronted with the dilemma of wishing to resolve the question at a pretrial bench proceeding, for both economic and constitutional reasons,[62] and the need to afford

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56 122 S.Ct. 2428 (June 24, 2002). *Ring* was decided four days after the *Atkins* decision.

57 *Id.* at 2443 (internal quotation omitted).

58 *Id.* at 2439.

59 *See generally Harris v. United States,* 122 S.Ct. 2406, 2410 (2002) ("Yet not all facts affecting the defendant's punishment are elements."). (The *Harris* case, which did not involve capital punishment, was decided on the same day as the *Ring* decision.)

60 "The relevant inquiry is one not of form, but of effect." *Id.* at 2440 (internal quotation omitted). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 2439. The Court even appears to anticipate a legislative change that was occasioned by a Supreme Court decision. "If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element." *Id.* at 2442.

61 One court has already declared one of the pre-*Atkins* statutes unconstitutional as a violation of the Sixth Amendment under *Ring*. *See State v. Flores* N.M. District Court, 5th Judicial Dist, No. CR 99-00028, September 20, 2002.

62 *See supra* notes 43, 44, 46.

defendants the Sixth Amendment rights described in *Ring*. Happily, it is possible to protect both interests, and by doing so, insulate the constitutionality of the statute from challenge.

Two alternative approaches are offered. Each attempts to satisfy the requirements of *Ring* and still preserve the fairest possible evaluation of the defendant's mental disability. The first (Alternative A) begins with a pretrial bench hearing on death eligibility, with a subsequent opportunity for the defense to present the issue to a trial jury. The second (Alternative B) addresses the mental retardation issue in a special pretrial hearing before a separate jury from the one that will ultimately hear the trial.

Under Alternative A, the resolution of this dilemma involves a hybrid procedure, in which the principal determination is made before the judge in a pretrial proceeding, but with the defendant retaining the right, if the pretrial decision on the mental retardation issue is adverse, to present the issue to the trial jury.[63] This follows the model approved by the Supreme Court in a case involving the admissibility of confessions in *Jackson v. Denno*.[64] It also approximates the structure adopted in the recent mental retardation legislation adopted by the North Carolina legislature.[65]

Under this approach, the question of whether a defendant has mental retardation will be addressed, in the first instance, in a pretrial bench proceeding at which the defendant bears the burden of persuasion by a preponderance of the evidence.[66] It is anticipated that most cases will be resolved at this stage. But if the case proceeds to a capital trial, and the defendant is convicted, the defense retains the opportunity to present the issue to the jury in the form of a special verdict prior to the commencement of the penalty phase. This jury consideration would be governed by the constitutional requirements of *Ring v. Arizona.*

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[63] It is essential that the judge's adverse ruling on the motion is not communicated to jurors, out of concern that it could unduly influence their decision regarding a special verdict under *Ring* or their consideration of the defendant's mental disability (even if it does not amount to mental retardation) at the penalty phase. *See supra* note 47.

[64] 378 U.S. 368 (1964). *See also Crane v. Kentucky*, 476 U.S. 683 (1986). Although there is no direct parallel between the subject matter of the *Jackson* confession issue and the *Atkins* question, the bifurcated process lends itself to the resolution of the mental retardation issue.

[65] The primary differences between the model suggested here and the North Carolina legislation relate to the weight of the burden of persuasion. The Legislature in North Carolina did not have the benefit of the subsequent decision in *Ring.*

[66] There remain some constitutional doubts about whether placing the burden of persuasion on the defense is permissible, even when the State will bear the burden at the subsequent jury determination. (In the *Jackson v. Denno* analogy, the burden is on the prosecution at the pretrial stage. *See also Lego v. Twomey,* 404 U.S. 477 (1972).) States may wish to consider placing the burden on the prosecution in the pretrial determination as well, both to protect against constitutional challenge and to further facilitate the efficiency of sorting out noncapital cases before the expense of a capital trial is incurred. Some States may also choose to have this prosecution burden at an elevated level, such as clear and convincing evidence, to more closely approximate the burden the prosecution will face in the jury trial that will follow.

This bifurcated approach to the issue may at first appear awkward to some legislators, and some prosecutors may initially be concerned that it offers the defendant "two bites at the apple." But as in *Jackson*, the bifurcation makes sense because its two prongs address two separate (although factually related) questions. The first, to be addressed by the judge, is the *legal* issue of whether the defendant is a person who is eligible for the death penalty. If the court does not find the defendant death-eligible because of mental retardation, it would be unconstitutional to proceed with a capital trial. The second inquiry, by the jury, is whether the prosecution has demonstrated that the defendant is *factually* an individual upon whom the death penalty may be imposed. Condemning a defendant to death who has properly raised the issue of mental retardation then becomes "contingent on the finding of a *fact*" that is a necessary precondition to a capital sentence.[67]

Under Alternative B, the trial is also bifurcated, but the pretrial determination of a defendant's death eligibility under *Atkins* is before a jury, with the prosecution bearing the burden of persuasion at the level of beyond a reasonable doubt. For a variety of reasons concerning the integrity of jury evaluation of all aspects of the case, it is essential that this pretrial jury be a separate body from the jury that will ultimately hear the case. Under this alternative, a defendant who was unsuccessful on this issue before the pretrial jury would not have an opportunity to re-litigate the issue of death eligibility, but would be free to raise mental disability in the trial on any issue to which it might be relevant, and, if convicted, would be free to offer such evidence as mitigation.

Of the two models, Alternative A would appear to be the more economical approach because it involves the costs attendant to only one jury proceeding. But either alternative would address defendants' rights under both *Atkins* and *Ring*.

It is recommended that States adopt one of the following alternative bifurcated systems for adjudicating a claim that a defendant may have mental retardation.

NOTE: The drafting of procedures for the adjudication of mental retardation cases under either alternative will need to be addressed in the context of particular State's rules for conducting capital trials. The language suggested here can be readily adapted into the capital procedures already in the State's statutes or rules of criminal procedure.

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67 *Ring*, 122 S.Ct. at 2439 (emphasis supplied).

RECOMMENDED STATUTORY LANGUAGE [ALTERNATIVE A]:

If defense counsel has a good faith belief that the defendant in a capital case has mental retardation, counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of mental retardation. Such a motion shall be filed within [time period] after the prosecution files notice of intent to seek the death penalty, unless the information in support of the motion came to counsel's attention at a later date.

Upon receipt of such a motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible mental retardation. Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the court shall find the defendant is not death-eligible if it finds, by a preponderance of the evidence, that the defendant has mental retardation. If the defendant is not death-eligible because of mental retardation, the trial may proceed as a non-capital trial, and, if convicted, the defendant may be sentenced to any penalty available under state law, other than death.

If the court finds that defendant is death-eligible, the case may proceed as a capital trial. The jury shall not be informed of the prior proceedings or the judge's findings concerning the defendant's claim of mental retardation.

If the capital trial results in a verdict of guilty to a capital charge, the parties shall be entitled to present evidence to the jury on the issue of whether the defendant has mental retardation. Having heard the evidence and arguments, the jury shall be asked to render a special verdict on the issue of mental retardation. The special verdict shall ask the jury to answer the question: "Do you unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation?" If the jury answers "yes," the case shall proceed to a penalty phase under [state statute regarding penalty phase of capital trials]. If the jury answers the question "no," defendant may be sentenced to any penalty available under state law, other than death.

RECOMMENDED STATUTORY LANGUAGE [ALTERNATIVE B]:

If defense counsel has a good faith belief that the defendant in a capital case has mental retardation, counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of mental retardation. Such a motion shall be filed at least [time period] prior to the date for trial, unless the information in support of the motion came to counsel's attention at a later date.

Upon receipt of such a motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible mental retardation. The hearing shall be conducted before a jury, which shall be specially empanelled for this issue only. Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the jury shall be asked, by special verdict, "Do you unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation?" If the jury finds, beyond a reasonable doubt, that the defendant does not have mental retardation, the case may be certified for a capital trial. Such a trial shall be conducted before a separate jury. The trial jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation, and the defendant shall not be precluded from offering evidence of the defendant's mental disability in the guilt/innocence phase or the penalty phase of the trial.

If the defendant is not eligible for the death penalty because of mental retardation, the trial may proceed as a non-capital trial, and, if convicted, the defendant may be sentenced to any penalty available under state law, other than death.

VI. ADJUDICATION OF POST-CONVICTION CASES

It is clear that the Eighth Amendment protection for individuals with mental retardation announced in *Atkins* applies both to prospective and retrospective cases.[68] Many of the considerations already discussed in the earlier sections concerning prospective cases apply equally to review of post-conviction cases. But States should consider enacting procedural provisions for cases involving individuals already under death sentences.

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[68] Although the *Atkins* decision itself does not address the question of retrospective relief, it is a subject on which the Court had already spoken. In *Penry v. Lynaugh,* 492 U.S. 302 (1989), the Court noted that although another decision, *Teague v. Lane*, 489 U.S. 288 (1989), had placed obstacles to the consideration of "new rules" of constitutional law in habeas corpus actions, "the rule Penry seeks is not a 'new rule' under Teague." 492 U.S. at 315.

The States have the opportunity to create a fair and orderly process for consideration of claims of mental retardation that will mesh with existing State criminal and capital procedures. Although claims that any such procedures violate constitutional protections may be raised in State and Federal courts, the absence of procedures will require individuals judges to design procedures as individual claims of mental retardation arise, creating the potential for inconsistent and incompatible procedures in the various jurisdictions within the State.

Several of the States that legislated on the mental retardation issue prior to *Atkins* were either silent on the issue of retrospective relief or provided that the statute's protection extended only to defendants in new cases. (In two States, the State Supreme Court held that individuals under death sentences that pre-dated the legislative enactment in their States were entitled to equivalent relief under the punishment provisions of the State Constitutions.[69]) Therefore, in a number of the States that have enacted prospective-only legislation prior to *Atkins*, there is reason to enact new legislation that provides procedures for retrospective cases.

Although few of the early enactments addressed the issue of retrospective relief, the North Carolina Legislature did so in 2001.[70] The general outlines of the North Carolina provisions merit consideration by other States.

Availability of a State forum. The centerpiece of the North Carolina approach is provision of a forum in State courts for the resolution of retrospective claims by defendants who may be entitled to relief after *Atkins*. While States obviously cannot prevent review of claimants in Federal court to relief under habeas corpus, providing a remedy at the State level will permit the resolution of most cases under procedures designed to fit within the context of State law. This will provide for a more orderly consideration of both initial claims and appellate review. The ability to manage the consideration of these cases may be particularly important in States with a substantial number of inmates currently under sentence of death.

Time limits for filing petitions for relief. States have an obvious interest in an orderly consideration of claims under this legislation. Requiring inmates currently under a death sentence to file potential claims in a timely and predictable manner obviously assists in the administration of justice.

The determination of the time period within which claims must be filed is somewhat more complex. One consideration arguing for a relatively short time period is to allow the State's

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69 *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989); *Van Tran v. State,* 66 S.W.3d 790 (Tenn. 2001).

70 N.C. GEN. STAT. ANN. §§ 15A-2005, 15A-2006 (West 2002). It was the enactment of this statute, and in particular its provisions regarding retrospective relief, that raised the issue of potential mootness in the then-pending Supreme Court case of *McCarver v. North Carolina*, No. 00-8727. The Attorney General of North Carolina then requested that the Court dismiss the writ of certiorari as improvidently granted. After dismissing the writ in *McCarver*, the Court then granted a writ on the same issue in the *Atkins* case.

criminal justice system to discover the magnitude of the body of cases to be considered. A reasonable time limit also may be thought to prevent dilatory tactics by defendants already under sentence of death.

But, paradoxically, a filing deadline that is too short may frustrate these very goals. Although some cases may have produced trial or post-conviction investigations into the possibility of a defendant's intellectual impairment, other cases may not have been explored thoroughly by counsel prior to *Atkins*. Requiring the filing of petitions on an excessively short deadline may lead some counsel whose clients' cases have not been carefully explored to file within the time limit even though there is incomplete evidence that the defendant may have had mental retardation. (One might speculate that a State that enacted a very short deadline would actually have to adjudicate more cases than if it had provided the opportunity for fuller investigation.)

North Carolina's legislation provided that cases should be filed within 120 days of the enactment of the statute. The language below recommends the somewhat longer period of 180 days. It is hoped that this slightly longer period will reduce the flurry of claims experienced at the end of the time period in 2001 in North Carolina. Permitting a fuller investigation of the cases may assist in their orderly and fair consideration.

Conducting postconviction hearings. The language below recommends the employment of generic State court rules for consideration of postconviction cases. This assumes that the State provides such a forum on other issues, and that it provides for the appointment of counsel in such cases. In those States where those assumptions are not correct, it will be necessary to enact fuller procedural protections for the consideration of *Atkins*-related claims.

The recommended language below also does not address the issue of factual findings made by courts prior to the *Atkins* decision. The cases that will arise in postconviction will vary considerably. In some cases, the issue of potential mental retardation may not have been litigated at all, either because counsel was unaware of the client's mental disability or because of a concern that evidence of mental retardation might be considered a "two-edged sword"[71] whose mitigating significance might be misunderstood by jurors. In other cases, evidence may have been offered regarding the defendant's mental retardation, but with no resolution of the issue required under State law at the time.[72] In a third category will be cases in which some evidence was offered, but counsel lacked the incentive to pursue the issue fully, since it was not dispositive under then-applicable State law. In a final category, there may be cases in which there has been a direct finding by either the judge or jury that the defendant had mental retardation, or even a stipulation

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[71] *Atkins*, 122 S.Ct. at 2252; *Penry*, 492 U.S. at 323-325.

[72] This would be true, for example, where evidence of mental retardation was offered in mitigation at the penalty phase of a trial, but where jurors were not required to specify whether they found an individual mitigation claim to have been proven.

to that fact by the prosecution. Only in this final category of cases would a court, reconsidering the case following *Atkins,* appropriately grant the petition without requiring fuller exploration of proffered evidence regarding the defendant's mental disability.

Burden of persuasion. Traditionally, the burden of persuasion in postconviction cases rests with the applicant by a preponderance of the evidence. Although some of the considerations discussed in the earlier section on hearings in new cases raise some constitutional questions about the appropriateness of ever placing the burden of persuasion on the defendant on this issue, the language below makes no recommendation regarding transferring the burden of persuasion to the State.[73]

States should enact laws to provide for the fair and orderly consideration of post-conviction claims by defendants who claim to have mental retardation.

RECOMMENDED STATUTORY LANGUAGE:

In cases in which the defendant has been convicted of first-degree murder, sentenced to death, and is in custody pending execution of the sentence of death, the following procedures apply:

Notwithstanding any other provision of law or rule of court, a defendant may seek appropriate relief from the defendant's death sentence upon the ground that the defendant was an individual with mental retardation at the time of the commission of the capital offense.

A motion seeking appropriate relief from a death sentence on the ground that the defendant was an individual with mental retardation shall be filed:

- **(a) within 180 days of the effective date of this Act; or**
- **(b) within 180 days of the imposition of the sentence of death if the trial was in progress at the time of the enactment of this Act. For purposes of this section, a trial is considered to be in progress if the process of jury selection has begun.**

The petition seeking relief from a sentence of death under this section shall be in substantial compliance with the [State's rules for petitions for relief in capital cases]. Upon receipt of a petition under this section, the court shall invite a response from the [prosecution] [Attorney General]. Following briefing form the parties, the court shall conduct a hearing on the petition in compliance with [the State's rules for post-conviction proceedings].

Findings by a trial court under this section that a defendant either is or is not entitled to relief may be appealed to the [State's highest court].

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[73] Obviously, if a State were to place the burden on postconviction petitioners at a level heavier than a preponderance of the evidence, much graver constitutional issues would come into play. Assigning a burden on petitioner at the "clear and convincing" level or higher is *not* acceptable.

VII. CLEMENCY

It is fervently to be hoped that the preceding provisions will suffice to prevent the execution of any individual with mental retardation. But experience teaches that sometimes the machinery of the criminal justice system works imperfectly, and for any number of reasons, an individual with mental retardation might end up on Death Row, facing the prospect of execution. Such an execution would, of course, violate the Eighth Amendment.

Clemency has long been justified as a last opportunity to prevent unjust punishment. "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[74]

Even before the Supreme Court's decision in *Atkins*, in several instances clemency has been exercised to prevent the execution of individuals with mental retardation.[75]

State laws vary widely on the subject of clemency. In many States, the Governor (or some other body) has plenary authority to grant clemency.[76] In other States, the authority to prevent the

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[74] *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993); *see also Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 278 (1998) ("a significant, traditionally available remedy for preventing miscarriages of justice when judicial process was exhausted.").

[75] Although it is difficult to research gubernatorial actions fully, it is clear that there is substantial precedent for granting clemency on the basis of a defendant's mental retardation. On January 10, 1991, Governor Richard Celeste of Ohio commuted the death sentence of Debra Brown, Elizabeth Green, Leonard Jenkins, and Donald Maurer to life imprisonment with no parole eligibility. In each instance, the defendant's mental impairment was a key factor in the Governor's decision. (Information about Governor Celeste's clemency decisions can be obtained from the Ohio Public Defender Commission, 8 E. Long Street, Columbus, Ohio 43215.) In 1959, Governor Michael DiSalle of Ohio prevented the execution of Lewis Niday on the grounds of the defendant's mental retardation. *See* K. MOORE, PARDONS 140 (1989) (citing M. DISALLE, & G. BLOCHMAN, THE POWER OF LIFE AND DEATH (1965). And although the record is less clear, it appears that mental retardation combined with traumatic mental illness constituted the grounds for California Governor Pat Brown's commutation of the death sentence of Vernon Atchley in 1961. *See* E. BROWN & D. ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 80 (1989). Similarly, it appears that mental retardation was a principal reason for Governor Nelson Rockefeller's action in the case of Salvatore Agron in the early 1960s. *See* Ringold, *The Dynamics of Executive Clemency*, 52 A.B.A. J. 240, 242 (1966). In 1969, California Governor Ronald Reagan granted clemency to Calvin Thomas on the basis of his "record of epilepsy and brain damage." B. BOYARSKY, RONALD REAGAN: HIS LIFE AND RISE TO THE PRESIDENCY 189 (1981). More recently, Missouri Governor Mel Carnahan commuted the death sentence of Bobby Shaw, based on Mr. Shaw's mental retardation. Statement from the Governor on Bobby Lewis Shaw & Charles Mathenia, June 2, 1993. At the same time, Governor Carnahan granted a 60-day stay of execution to Charles Mathenia to investigate whether he was an individual with mental retardation, and ultimately Mr. Mathenia was found incompetent to be executed because of his mental retardation. Two of the best known cases of clemency involved inmates with mental retardation who were on Death Row – Anthony Porter in Illinois and Earl Washington in Virginia – although each was granted clemency when it was demonstrated that he was factually innocent of the crime for which he had been convicted. See Eric Zorn, *Questions Persist as Troubled Inmate Faces Execution*, Chi. Trib., Sept. 21,1998, at 1; Francis X. Clines, *Virginia Man is Pardoned in Murder; DNA Is Cited,* N.Y. Times, Oct. 3, 2000, at A20. It is impossible to determine how many other clemency decisions have been based on mental retardation.

execution of a capital sentence may be more circumscribed.[77] Particularly in those States where there are limitations on the exercise of the clemency authority, it is essential for the Legislature to make clear that providing clemency for an individual who is discovered to have mental retardation is not only lawful, but also is to be expected.

States should enact legislation authorizing clemency for individuals with mental retardation.

RECOMMENDED STATUTORY LANGUAGE:

Notwithstanding any other provision of State law, the [Governor] [Board of Pardons and Paroles] shall have full authority to grant clemency and commute a capital sentence to a noncapital sentence for any inmate whom the [Governor] [Board of Pardons and Paroles] determines to have mental retardation.

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[76] *E.g.,* MO. ANN. STAT. § 552.070 (West 2002).

[77] For an analysis of the various States' approaches to clemency see NATIONAL GOVERNORS' ASSN. CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIVIL CONFINEMENT 413 (1999). *See generally* Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency,* 74 CHI.-KENT L. REV. 1501 (2000).