No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

DARYL RENARD ATKINS,

***Petitioner*,**

v.

COMMONWEALTH OF VIRGINIA,

***Respondent*.**

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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BRIEF FOR PETITIONER

Charle E. Haden
Suite B
2440 West Queen Street
Hampton, VA 23666
(757) 825-0022

James E. Ellis
1117 Stanford Road, NE
Albuquerque, NM 87131-1431
(505) 277-4830

Robert E. Lee*
Mark E. Olive
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
Suite 301
2421 Ivy Road
Charlottesville, VA 22903
(804) 817-2970

*Counsel of Record

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The Virginia Supreme Court's opinion affirming Atkins's conviction of capital murder but requiring resentencing is *Atkins v. Commonwealth*, 510 S.E. 2d 445 (Va. 1999); JA [ ]. Its opinion affirming a second death sentence is *Atkins v. Commonwealth*, 534 S.E. 2d 312 (Va. 2000); JA [ ].

JURISDICTION

The Virginia Supreme Court affirmed Atkins's sentence September 15, 2000 and denied a timely rehearing petition November 3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment, made applicable by the Fourteenth, provides:

"[N]or [shall] cruel and unusual punishments [be] inflicted."

STATEMENT OF THE CASE

1. THE EVIDENCE CONCERNING THE CRIME

In the early morning of August 17, 1996, Eric Nesbitt, an airman from Langley Air Force Base, was abducted from a 7-11 store in Hampton, Virginia. He was robbed of the money in his wallet, driven in his own truck to an ATM and required to withdraw more money, then driven eighteen miles to York County, where he was shot eight times and killed with a semi-automatic handgun.

The body was discovered less than three hours later. With identifying information found on it, investigators learned Nesbitt's bank account number, called the bank, and obtained the videotape of an ATM transaction that had occurred about 12:15 a.m. ([TT 271, 1349-96].) The

tape showed Nesbitt seated in his truck between two young African-American men, one holding a gun. ([TT 1349-96].) Media dissemination of photos from the tape produced several calls to the police identifying the driver of the truck as 26-year-old William Jones. ([TT 276, 281, 304].) One caller said Jones "ran with" an 18-year-old, Daryl Atkins. ([TT 281].) The police obtained Atkins's address from Jones's family ([TT 281]), found Atkins at home, and arrested him ([TT 281]). When Nesbitt's truck was reported at a Newport News motel ([TT 287]), police staked out the motel and arrested Jones there ([TT 288]).

Atkins gave a statement the day of his arrest, admitting his involvement and identifying Jones as the triggerman.[1] Jones declined to make a statement. Jones and Atkins were both indicted for capital murder ([TT 824; TT 12]) – a crime for which, under Virginia law, only the triggerman could be convicted.[2] A year later, Jones, with counsel present, told the authorities he had taken part in Nesbitt's abduction and robbery but blamed Atkins for the shooting. ([TT 796-97].) Jones was allowed to plead guilty to first-degree murder – a plea that made him ineligible for the death penalty ([TT 846]) – with a requirement he testify against Atkins. ([TT 827, 1452].) At the guilt phase of Atkins's trial in 1998, two versions of the crime were accordingly presented. Both versions, Jones's and Atkins's, had features that strain credulity.[3]

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[1] The statement – 31-pages taken over two hours ([TT 307-09]) – was not introduced at trial. It was proffered by the defense but the prosecution objected to it as hearsay. ("Your honor, even Mr. — anyone would understand at the time that they are less culpable and less responsible if they are not the one that pulled the trigger. He knew it then and he knows it now, and his story hasn't changed." ([TT 317].)) The objection was sustained. ([TT 354].)

[2] *Cheng v. Commonwealth*, 240 Va. 26, 42, 393 S.E.2d 599, 607 (1990). See also, *e.g.*, *Lilly v. Commonwealth*, 258 Va. 548, 551-552, 523 S.E.2d 208, 211-12 (1999).

[3] After Atkins's trial, Jones was sentenced on his plea by Atkins's trial judge, who noted that – while it was up to the jury to assess Jones's credibility at the trial – Jones's "testimony . . .

Jones testified that he and Atkins got together at the apartment where Atkins lived with Atkins's father at about 11:30 a.m. on August 16 and spent the day drinking beer and premixed gin and juice, smoking marijuana and watching television while friends dropped by. ([TT 727-288].) When alcohol ran out, those present would pool their money ([TT 731]), and Jones and Atkins would walk to the 7-11 for beer or get a ride to the ABC store for alcohol ([TT 730-31]).[4] The last trip to the 7-11 was about 11:30 p.m. ([TT 732].) Jones had money for beer but Atkins did not and was going to panhandle for it. ([TT 734].) Jones waited nearby while Atkins panhandled, getting change from some people. ([TT 734].) According to Jones, Atkins had a

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[did] not corroborate any of the forensic facts" ([TT 1506]). Although (1) the sentencing guidelines called for a sentence between 24 and 40 years, (2) the prosecution requested leniency because of Jones's assistance in convicting Atkins, and (3) Jones's story at Atkins's trial depicted Jones as a follower in the abduction and robbery of Nesbitt who was totally surprised when Atkins unilaterally slew Nesbitt, the judge sentenced Jones to life imprisonment for the murder, saying he exceeded the guidelines because of the "absolute atrocity of this crime" ([TT 1522]).

[4] Atkins's testimony did not discuss events before the last trip to the 7-11. But when interviewed by court-appointed psychologists for both sides, he concurred with Jones that the two were drinking and smoking marijuana for some time before the offense. ([TT 1261; RT 695].)

gun in his belt. ([TT 733].[5]) Atkins's version was: "Me and William Jones was on the side of the 7-Eleven, and we was planning to rob somebody. And William Jones had the gun." ([TT 937].)

Eric Nesbitt arrived at the 7-11, made purchases, came out of the store, and got into his small purple Nissan truck. Jones's version of what happened next was: "Then Mr. Nesbitt backed out and was getting ready to get on Armistead. But Mr. Atkins whistled at him, so Mr. Nesbitt stopped the truck. Mr. Atkins went to the passenger side and I guess Mr. Nesbitt rolled down the window and they started talking. And then I went around to the driver's side" ([TT 738]); "I just wanted to hear what he was talking about." ([TT 738].) From the driver's side, Jones saw Atkins pointing a gun at Nesbitt and heard Atkins say, "'Let my friend drive'." "So [he] got in and Mr. Nesbitt scooted over to the middle and Mr. Atkins got into the passenger side." ([TT 739].) Jones realized "at that point" that he was involved in a robbery. ([TT 740].)

In Atkins's testimony, the roles were reversed. "Then Eric Nesbitt backed out of the parking lot and was coming out the 7-Eleven parking lot. William Jones waved him down. Then he had a conversation with him. So I came up to the driver, that's where he was at, William Jones." ([TT 937].) "We started chatting for a while, and then William Jones pulled out the gun." ([TT 937-38].) Jones "told me get around." So Atkins "[g]o around in the passenger." ([TT 937-38].) After Atkins got in the passenger side, Jones got in the driver's side, "handed me the gun with both of his hands and I hold the gun. And then William Jones drove off." ([TT 938].)

[5] Both testified that the gun had come from a person named Mark, who visited the apartment that evening. ([TT 730, 937].)

Jones and Atkins agreed that Jones sped off,[6] side-swiping a vehicle and damaging the driver's door of the truck. ([TT 740; 938].) (The accident made it difficult to open the driver's door from the outside, but the door was still easy to open from the inside. ([TT 541; 698; 700.)) Jones and Atkins also agreed that Atkins initially asked Nesbitt for money. Atkins testified: " I asked Mr. Nesbitt did he have any money. Mr. Nesbitt say yes. He handed me his wallet. I looked in his wallet, and it was sixty dollars." ([TT 939; see also TT 741].) Atkins took the money out and handed the wallet back to Nesbitt. ([TT 939].) But Jones and Atkins disagreed about what happened next. Jones implied that they ended up driving to Nesbitt's bank because there "must not have been enough money or something, . . . [so] the subject came up that Mr. Nesbitt had a bank card" ([TT 742]), whereas Atkins said that Jones noticed Nesbitt's "credit card" [sic] and "asked him did he have any more money in the bank," after which: "we rode to the bank" ([TT 939]).

At the bank, as Atkins described it: "Eric Nesbitt took out his credit card. He leaned over William Jones, placed his credit card, you know, in the machine. Then he hit the numbers and then he got the money back."([TT 940].) The withdrawal of $200 was filmed on the ATM's videotape, which shows Jones in the driver's seat, Nesbitt in the middle, and Atkins in the passenger seat with the gun. ([TT 1349-96].)

Jones and Atkins discussed what to do with Nesbitt. Jones testified that Jones suggested tying Nesbitt up ([TT 750]) and Atkins suggested a place in York "near his grandfather's house" ([TT

[6] There is no dispute that throughout the incident, Jones drove the truck. Atkins had failed driver's education twice. ([TT 1537].)

751]).[7] In Atkins's version: "[I]t was a discussion of he was going to tie him up, there was a discussion that me and him was going to tie him up and leave him somewhere. But then William Jones said that he knew a place and he never told me. And he just drove" ([TT. 941]). Jones took the interstate to York, a 35-minute drive ([TT 751]) on a route Jones knew ([TT 754]).[8]

Jones testified that when they got to where Nesbitt was shot, "Mr. Atkins got out. He directed Mr. Nesbitt out." Atkins still had the gun. ([TT 757].) "As soon as Mr. Nesbitt stepped out of the vehicle and probably took two steps, the shooting started." ([TT 757].) Jones said he remained in the truck ([TT 757]) but thought that shots were coming into the vehicle, so: "I had rolled down the window. I tried to get out, and rolled down the window and jumped out . . . on my hands and knees" ([TT 757]), head first, then hands ([TT 800]). He went around the back of the truck,

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[7] Atkins's grandfather did live in the vicinity where Nesbitt's body was later found. ([TT 228, 1481].) The grandfather testified that Atkins had not been to his home in three or four years. ([TT 234].)

[8] For 13 or 14 years up to "a couple of months" before the crime, Jones had lived in Gloucester. ([TT 786].) The turn-off to the murder scene was "just before you go into . . . Gloucester" ([TT 798]) on route 17, a road Jones used to take to get to York County from Gloucester ([TT 787]). Jones drove on route 17 north of the scene five days a week in 1992 while traveling from Williamsburg, where he previously worked, to Gloucester ([TT 844]), and he knew the local landmarks like the jail ([TT 798]), the hospital ([TT 787]), the 7-11 ([TT 798]) and the school ([TT 845]).

aiming "to get the gun away from Mr. Atkins" ([TT 801]), "to stop him from killing Mr. Nesbitt" ([TT 806]). He heard one or two shots before getting out of the truck, then two or three more while rounding the truck. ([TT 760].) When he reached Atkins, they fought for the gun, and Atkins got shot in the leg. ([TT 759, 763, 804].) Atkins dropped the gun and Jones picked it up, touching it for the first time. ([TT 764].) Jones put the gun in the truck, then "climbed in the same way [he] got out . . . from the window of the driver's side." [TT 764].

Atkins's version was that Jones stopped the truck and "told me to get out, me and Eric Nesbitt to switch places. He never said why. So I hand — he told me to hand him the gun. I hand him the gun. I got out first. Eric Nesbitt got out behind me. I got back in. Eric Nesbitt got back in. William Jones still had the gun. He put it in a holster that he had on his belt, a black nylon holster. Then he drove up the street a little more. And then I noticed it was like a fork in the road. So then he stopped and backed up, and then he backed up, parked the car, and he opened up the door. . . . He told Eric Nesbitt to get out. . . . Eric Nesbitt got out." ([TT 943].) Atkins was in the truck, "in the middle" ([TT 944].) "As Eric Nesbitt was getting out, William Jones got out, too. So by the time Eric Nesbitt got out the vehicle, William Jones was there. He had come around the back of the truck. . . . He -- Eric Nesbitt bend over and William Jones told him to get up. And he didn't get up. And then the shooting started." ([TT 944].) Jones did the shooting. Atkins was still in the truck. ([TT 945].) There were a lot of shots. ([TT 945].) After they started, Atkins's "leg was hurting, so I reached down to look at my leg. . . . Then I didn't hear no more shots. And then William Jones got inside the driver's – he came back around, got inside the driver's and took off." ([TT 945-46].) Atkins asked Jones why Jones had shot him, and Jones tried to figure out how he shot Atkins. ([TT 946].) Atkins asked Jones to take him to the hospital "[b]ecause

my leg was hurting." ([TT 946].) Atkins also "asked . . . [Jones] where did he shoot him [Nesbitt] at. He said he shot him in the body." ([TT 947].)

At the hospital, Jones said, Atkins "started to get out. Before he could leave, I asked him for some money. . . . He gave me some money, closed the door, and hopped off." ([TT 767].) Questioned by a nurse about his injury, Atkins told her he had been shot right outside the hospital by a would-be robber. ([TT 412].)[9] His explanation for this lie at trial was that he didn't want her to know "he was involved with a robbery." ([TT 948].) The police were called because the injury involved a gunshot wound, and an officer questioned Atkins. Atkins told this officer he'd been mugged at a park almost two miles away and hopped all the way to the hospital. ([TT 380].) Atkins had been shot twice in the foot. Both bullets entered from the inside of the left ankle ([TT 395-96, 451, 987-88]) and traveled almost straight across. One exited about an inch below the entrance wound. ([TT 987-88].) The other remained lodged in the ankle. ([TT 392].) Atkins was treated and released, and he returned to his father's apartment. After his arrest and confession, the bullet in his ankle was removed in the presence of police ([TT 293]) and found to match two bullets recovered from the victim's body and two recovered from the truck ([TT 557]).

Jones, meanwhile, left the hospital and drove to the King James Motel in Newport News. ([TT 768].) Over several days, he moved from one motel to another and changed his appearance by

[9] As the nurse described Atkins's demeanor: "He was not demanding, . . . as, you know, most people would be. He was not demanding. He was reaching out to me." ([TT 413].) The doctor described Atkins's demeanor as "pleasant and appropriate." ([TT 387].)

cutting all his hair off. ([TT 771].) He left the truck behind the King James, testifying that the keys and gun were in it when he left it. ([TT 768, 769].) The gun was not there when police searched the truck. ([TT 542, 698].)

2. THE EVIDENCE AT ATKINS'S SENTENCING HEARINGS

The jury convicted Atkins of capital murder. ([TT 1064].) At the sentencing phase, the prosecution submitted the exhibits from the guilt phase as evidence of the "vileness" of the crime. ([TT 1168-88].) As evidence of "future dangerousness," it presented records of Atkins's prior felony convictions ([TT 1162]) and the testimony of three of the felony victims. ([TT 1124-48].)[10]

[10] A more complete record of Atkins's prior convictions was presented at resentencing. See note 20 *infra*. At the initial sentencing, the prosecution also presented victim impact evidence from Nesbitt's friend ([TT 1150-52]) and Nesbitt's mother ([TT 1152-61]).

The defense presented one witness, Dr. Evan Nelson, a clinical psychologist with a post-doctoral residency in forensic psychology ([TT 1191]),[11] who had evaluated Atkins before trial ([TT 1193]).[12] Dr. Nelson had administered the WAIS-III intelligence test to Atkins[13] and found that Atkins had a full scale IQ of 59, falling "in the range of being mildly mentally retarded" ([TT 1194]).[14] Dr. Nelson testified he had confirmed the IQ score by looking both at telltales within the test that would reveal "faking" and at independent information about whether Atkins functioned consistently with such a low score (TT 1203-08).[15] He found that Atkins's academic

[11] In addition to his work in court cases, Dr. Nelson performed evaluations for the Social Security Administration to determine eligibility for disability income, including disability based on mental retardation. ([TT 1214].)

[12] Dr. Nelson interviewed Atkins, Atkins's family, and deputies at the jail where Atkins had been incarcerated for the preceding 18 months. He also reviewed Atkins's school records, court records relating to his prior offenses, statements by Atkins and Jones, and investigative reports relating to the current offense. ([TT 1197].)

[13] The Wechsler Adult Intelligence Scales, third revision (known in the profession as the WAIS-III) is a standard intelligence test that has been validated and standardized using sophisticated psychometric methods. As Dr. Nelson explained, "there are standard rules for administering each part of the test. The rules are laid out in a thick manual that tells you precisely how to lay down the stimulus cards, the pictures that somebody might be dealing with, what order to put them in. The precise time limits for the amount of time that an individual had to solve a given problem and get an answer." ([TT 1198].) The test is scored by taking the number of points earned on different subtests, and using a mathematical formula to convert this "raw score" into a "scaled score." The scaled score encompasses a range of raw scores. ALAN S. KAUFMAN & ELIZABETH O. LICHTENBERGER, ESSENTIALS OF WAIS-III ASSESSMENT 60 (1999).

[14] Atkins's score of 59 put him just above the range for "moderate" mental retardation. The line between "moderate" and "mild" retardation is in the zone of 50 to 55. Since the standard error of measurement for IQ testing is five (see AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (text revision, 4th ed. 2000) [hereafter DSM-IV-TR]), Atkins's "true score" is bounded by 54 and 64.

[15] Dr. Nelson's check to assure the validity of the score was routine and not a result of any suspicions particular to Atkins's case. Indeed, as Dr. Nelson testified, "Atkins never claimed any symptoms, never made any effort to present himself or bring up, for example, the term mental retardation in any way, shape, or form. There's no reason to think that this was an

record, his level of functioning at home, and court records describing Atkins as "slow" ([TT 1257]) were all consistent with mental retardation.[16] Atkins's score put him below the lowest one percentile of the population for intelligence. ([TT 1206].)

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active part of his plan, especially when looking at all the school records." ([TT 1244].) Dr. Nelson may have been specially attuned to the issue because of his special expertise on malingering. ([TT 1242].)

[16] Dr. Nelson did not testify specifically about Atkins's deficits in adaptive skills but included some of that information in his report ([TT 1538]), which was admitted into evidence ([TT 1224]). He found that Atkins "had a reduced repertoire of behaviors consistent with a limited intellect. . . ." ([TT 1538].) See note 24 *infra*.

Atkins's academic failure began early. He flunked second grade and was held back ([TT 1209]), the school transcript noting: "work of grade too difficult." ([TT 1209].) He struggled in third grade, getting 5 Cs, 2 Bs and 3 Ss ("satisfactories"). He was "socially promoted" from fourth to fifth grade, meaning that he was moved up without regard for whether he had been able to learn the fourth grade material. His grades in fourth grade were 4 Fs, 3 Ds, 2 Ss. He improved slightly in fifth grade: 2 Fs, 6Ds and 2 Ss. Dr. Nelson had no records for sixth grade. In seventh grade, Atkins got one F, 4 Ds and one C. He was finally referred for testing for special education, but, inexplicably, did not receive it. ([TT 1210].) Instead, he was put in the lowest of three tracks ([TT 1260]) and moved on to eighth grade, where he received all Fs ([TT 1210]). The transcript notes that he did not meet the requirements for promotion to high school. Yet, he was placed in high school. ([TT 1211].)[17] In ninth grade, his average was D+. The first time through tenth grade, it fell to D-. It stayed there in his second try at tenth grade. His sole success in school came in those high-school years when he was placed in a structured environment for slow learners, with a student-teacher ratio of eight to one. Only then was he able to earn some Bs and Cs, and even one A. ([TT 1213].) Atkins left school without graduating .

[17] A memorandum read to Dr. Nelson by the prosecutor at resentencing indicated that the superintendent of the Hampton Schools had instituted a policy of moving failing students to high school but classifying them as "ungraded." ([RT 666].) This explains Atkins's "promotion" and some confusion in the record about what grades he was in after the eighth (see [TT 1211]).

Dr. Nelson found that "limited intellect has been a part of Daryl his entire life. . . . He is a slow learner and has been since as soon as we could start to take measure in second grade." ([TT 1211].) As Dr. Nelson explained, people with mental retardation "are slow to learn and . . . it starts to affect their social functioning." ([TT 1213].) They "start turning to peer relations as their primary way of feeling good . . . like they are mastering and doing something in their life because they are not going to make it in the academic sphere." ([TT 1214].) With peers, "people who are mentally retarded are not leaders. They tend to fall into groups because they can't make good decisions on their own. And when you look at their behavior patterns when they do things in groups, they look like they're doing better and when they do things on their own, they tend to do things in a fairly inept way." ([TT 1214].)[18] Atkins's limited intellect would result in "reduced judgments and reduced understanding of the world in general around him compared to others." ([TT 1267].) Whether or not a retarded person is literate, "it's harder to reason, it's harder to learn any kind of new information or skill." ([TT 1214].)[19]

[18] As an example, Dr. Nelson noted that Atkins's "successful" robberies "are all ones where he has the help of other people. The time that he tries to do it by himself, he doesn't get to the robbery part." ([TT 1267].) The only victim shot was the victim of the attempted robbery, when Atkins was alone, so the group may also have served as an inhibiting factor. ([TT 1269].)

[19] Dr. Nelson testified that Atkins had several risk factors for being a danger to others if he lived in society – (1) his age ([TT 1217]); (2) his prior history of violence ([TT 1219]); (3) his substance abuse ([TT 1226]), which court records indicated began in eighth grade ([TT 1280]); and (4) the fact that he did not live with both his parents continuously until the age of 16 ([TT 1227]) – but that Atkins would be a very low risk in a prison environment where substances were difficult to obtain, where he would be subject to prison control and discipline, and where he would live in a structured environment. ("[H]e does well in jail and prison" because of the level of supervision there. "As a retarded individual, he needs additional supervision to do better. When you leave him on his own, he does things that are just plain, old-fashioned dumb." ([TT 1269].)) Dr. Nelson found that Atkins's behavior in jail in the eighteen months between arrest and trial corroborated this opinion. ([TT 1226].) "The issue here is that he is a mildly retarded individual who in the community has access to drugs and a lack of structure. And that explains a

The jury sentenced Atkins to death. On appeal, the Virginia Supreme Court affirmed Atkins's conviction but reversed for resentencing because of a misleading verdict form. (*Atkins v. Commonwealth*, 510 S.E. 2d 445 (Va. 1999).)

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lot of how he gets involved in those violent behaviors. But within the structure of the jail and prison environment, his access to drugs is extremely poor. The structure that a retarded person needs to keep them thinking straightly and knowing the rules, knowing what to do has been imposed and his behavior is very good." ([TT 1226].)

At resentencing, the prosecution called the medical examiner ([RT 464-85]) and investigating officer ([RT 445-63]) who had testified at the guilt phase of the original trial; and it again introduced the autopsy and other guilt-phase exhibits and the videotape of the ATM transaction to prove "vileness." Its "future-dangerousness" evidence again consisted of disposition orders from Atkins's prior convictions ([RT 493]) and testimony from some of the victims of the underlying offenses ([RT 414-21, 428-44]).[20] It also presented victim-impact testimony by

[20] Atkins had been involved in six prior incidents, resulting in convictions of 21 felonies. One of the incidents occurred when Atkins was 13 years old and was convicted of breaking and entering and petty larceny. ([RT 978].) Four years later, at seventeen, he was convicted of two

counts of grand larceny for stealing from two other boys, and he received a sentence of 120 days incarceration, to be served on weekends. ([RT 984].) Then, between late April and mid-August of 1996, he committed two robberies, an attempted robbery, and a burglary. He confessed to all of these incidents at the time he was arrested for Nesbitt's murder, and he was convicted of them largely on the basis of those confessions. ([TT 322, 324, 1571; RT 539.])

As described at sentencing and re-sentencing, in the first of the incidents – on April 29, 1996 – four friends were robbed at gunpoint near a phone booth. ([TT 1124-25, RT 495, 500, 503].) There were four robbers, including Atkins. Atkins did not have the gun. ([TT 1127, RT 496].) At one point, Atkins asked one of the victims "what. . . [he] was looking at." When the victim didn't answer, Atkins hit him on the head with a bottle. ([TT 1125, RT 496].) The bottle bounced off the victim's head. ([RT 496].) The victim, who was not injured, got up to go after Atkins, and Atkins ran away. ([TT 1125, 1133, RT 496, 500].) The incident resulted in eight felony convictions for Atkins. ([RT 987, 991-1002].) Two months later – in early June – a pizza deliveryman was robbed at gunpoint by four people, including Atkins. ([TT 1137, RT 512].) Atkins did not have the gun. ([RT 518].) After the victim's pockets were emptied, two of the robbers ran away ([TT 1138]), while a third got behind the wheel of the victim's car and drove off with the gunman and the victim ([TT 1138, RT 518]). Atkins was one of the two who ran. The incident resulted in four felony convictions for Atkins. ([RT 1009-18].) In the final incident

Nesbitt's mother and co-workers. ([RT 396-413].)

– in early August – Atkins alone approached a woman as she was backing her lawnmower into her shed. Atkins came up next to her and held a gun to her head. After some conversation which she could not recall, he ordered her around to the front of the house, hit her with the pistol and knocked her down, helped her up, then walked away around to her driveway. ([TT 1147, RT 521-22].) She stood in front of the house watching him go. Then he came back toward her, shot her in the stomach, and left. ([TT 1147-48; RT 523].) He was convicted of attempted robbery and three other felonies. ([TT 1460-67; RT 989, 1005, 1019-22].)

The defense presented three witnesses: Atkins's father, grandmother, and Dr. Nelson. Atkins's father testified about his divorce from Atkins's mother when Atkins was eight years old ([RT 544-48]); about Atkins's enrollment in a "skill center" program because of failing grades in high school ([RT 546]); and about the father's regular prison visits with Atkins after Atkins's initial trial ([RT 551]). He described his son as "a follower," and his own uneasiness about having William Jones around his son. ([RT 556-57].)[21] Atkins's grandmother testified to her limited contact with Atkins before the offense and her consistent visitation since. ([RT 558-66].)

[21] Atkins's father had no specific knowledge of the trouble Atkins was getting into since Atkins moved in with his father three or four months before the murder of Nesbitt. ([RT 556-57].) The father worked the second shift at the shipyard, from 4:00 p.m. to midnight, leaving Atkins home alone. ([RT 549].)

Dr. Nelson again testified to Atkins's IQ of 59. ([RT 590].)[22] He detailed the procedure and professional standards for diagnosing mental retardation. As he explained, a diagnostician must obtain an IQ score through testing with a currently validated test,[23] following the prescribed protocols for that test ([RT 582-90]), and must also determine through independent investigation whether the person being examined has demonstrated deficits in adaptive skills ([RT 594]). Dr. Nelson had reviewed Atkins's educational and family history and had found out that Atkins displayed "a number of deficits compared to what you'd expect an 18-year-old to be able to do on his own." ([RT 595].) In fact, Atkins showed a "lack of success in pretty much every domain of his life." ([RT 595].)[24]

Dr. Nelson summarized Atkins's grades in school (see pp. - *supra*) and his performance on standardized achievement tests. Atkins always fell below the twentieth percentile, and his scores grew progressively worse "falling behind his grade level in terms of his ability to read, write and do math. . . . [H]is academic skills aren't keeping pace with everybody else." ([RT 653].) "The fact that it started back in elementary school is an indication. There are some people that hit their teenage years and just stop trying. But the fact that he's having problems with focusing, with

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[22] Dr. Nelson did not perform further testing after Atkins's initial sentencing, but he did continue to examine Atkins's functioning, reviewing institutional records for the period of incarceration since Atkins's first trial. ([RT 600].)

[23] Dr. Nelson noted that the WAIS-III, which he used to test Atkins's IQ ([RT 578]), is the test most frequently cited in federal disability laws and state laws for identifying who has mental retardation. ([RT 579].)

[24] Dr. Nelson's oral testimony did not develop the specifics of Atkins's deficits, but his written report – which was admitted into evidence ([RT 671]) – cited Atkins's inability to do his own laundry, prepare meals for himself, live on his own, and perform "other basic life skills that most defendants his age have mastered" ([TT 1538]). The prosecution did not cross-examine Dr. Nelson on his conclusion that Atkins had substantial deficits in basic life skills.

attention, with getting good grades starting as early as first grade, and is consistent all the way through, is what suggests mental retardation as compared to somebody who is just a teenager who is rebelling against the system." ([RT 653].)

Dr. Nelson explained that as a general rule, and as regards Daryl Atkins specifically, people with mental retardation "are just not good in social relations. They often end up either bunching up with kids who are a lot younger than them, because that's where they are emotionally, or they end up affiliating with people who are a lot older than them and they are going along with the crowd . . . in part because they want to fit in and in part because their own ability to apply social reasoning and make more independent decisions is impaired." ([RT 598].) "As a rule, people [with Atkins's IQ] are more likely to be followers [than leaders]. You're more likely to see these folks in offenses that involve groups of people and going along with the crowd." ([RT 611].)[25] Overall, Dr. Nelson explained, people with mental retardation "are just slow learners. . . . That means a lot of different things. It means that it is harder for them to succeed in school and they are quicker to get frustrated. It means it's harder for them to do just about anything in life, whether it's to get a job or work out a relationship, benefit from the feedback of a supervisor or the teacher, and they just don't get as far." ([RT 599].)[26]

In rebuttal, the State presented the testimony of Dr. Stanton Samenow. Dr. Samenow testified that in his opinion, Atkins was of "average intelligence, at least" ([RT 687].) He formed this

[25] There was nothing in the information Dr. Nelson had obtained about Atkins's background to indicate that Atkins was ever a leader. ([RT 611].)

[26] Finally, Dr. Nelson testified again to Atkins's low risk for violence in a prison setting ([RT 599-607), while acknowledging that Atkins would have a high risk for violence in the community outside of prison. ([RT 626-628].)

opinion on the basis of two interviews with Atkins ([RT 684]), a review of Atkins's school records ([RT 693]), and interviews with correctional staff. He did not administer an intelligence test to Atkins, nor did he interview anyone who had any information about Atkins's functioning outside of custody or before the present offense. ([RT 735-36].)

Instead, Dr. Samenow picked out some questions from the outdated 1972 version of the Wechsler Memory Scale ([RT 715-16])[27] and some items from the similarities, vocabulary and comprehension subtests of the WAIS-III ([RT 717]),[28] and he asked Atkins to answer those questions in isolation. Through this admittedly unorthodox procedure (see [RT 722-23]), Dr. Samenow learned and told the jury that "in several instances, . . . [Atkins] did give a fuller response [than he had given when Dr. Nelson had administered the complete WAIS-III] indicating that . . . [Atkins] had a better understanding of the word than he had indicated with Dr. Nelson." ([RT 692].)[29] Dr. Samenow also noted Atkins's ability to relate the names of the current

[27] When confronted with the ethical standards of the American Psychological Association forbidding an evaluation to be based on outdated tests such as he had used, Dr. Samenow replied that he was not "doing a full evaluation with testing" ([RT 735]) but just "wanted to know was this man retarded or wasn't he" ([RT 736]).

[28] Dr. Samenow took the questions from Dr. Nelson's raw data, because he did not have copies of the WAIS-III or the manual governing it in his office. ([RT 717].)

[29] These "fuller responses" were elicited by Dr. Samenow's efforts to "push . . . [Atkins] just a little bit to see whether, in fact, perhaps he knew more than he had indicated previously." ([RT 691].) The nature of the pushing was revealed on cross examination:

"Q. Do you know what the query is that you're -- the test says you're supposed to do?

"A. I don't have the booklet in front of me, but I believe you can ask the person to tell you more.

and former Presidents of the United States; Atkins's answer ("Kennedy") to Samenow's question "Who died last week?" (asked the week after the bannerline plane crash), and Atkins's ability to identify "Kennedy" as the son of former President "JFK"; Atkins's knowledge of how many pennies, nickels, dimes and quarters are in a dollar; Atkins' ability to recite that "pi is 3.15"; and Atkins's use of some polysyllabic words.[30] ([RT 687-93].)

"Q. Tell me more about it?

"A. Yes.

"Q. But that's not what you said. You said, 'How else are they alike?'

A. That's absolutely right . . . . I wanted to know if this man knew how the two were alike.

Q. All right. Now, that's not the standard practice and not the instructions –

A. Absolutely not. I was interested here in what this man knew. That was critical.

Q. Doctor, then, if you don't administer this test or these tests in accordance with the instructions, your test results are no good, are they?

A. My test results are perfectly good because the man either knows the answer or he doesn't know the answer. And this man is content with sitting there doing the least, and if you push him a little he comes up with the answer in many cases. That is what I wanted to know." (JA [RT 722-23].)

Compare KAUFMAN & LICHTENBERGER, 25-26:

> "At times, an examinee's response may be too vague or ambiguous to score. When such answers are given, you need to ask the examinee to clarify his or her response. . . . The key is incompleteness or ambiguity. . . . If a completely incorrect answer is spontaneously produced by the examinee, you do not want to query."

[30] Dr. Samenow cited Atkins's vocabulary "and syntax" as evidence of his normal intelligence. ([RT 687].) He gave the following examples: (1) Atkins said his mother "encouraged" him to do better in school. ([RT 687-88].) (2) When Samenow asked how it was to be imprisoned, Atkins replied that "he gets frustrated;" when Samenow then asked, "'What's frustrating?,'" Atkins answered, "'Well, being in here'"; and when Samenow asked, "'Well, what

do you mean?,'" Atkins replied, "'Well, that comes automatic.'" ([RT 688].) (3) When Samenow asked if Atkins thought he was basically a good person, Atkins replied: "Half and half. . . . There's the half that doesn't want to get into trouble, all the positive stuff." ([RT 688].) (4) In answering Samenow's questions about a picture of a boy with a violin, Atkins used the word "orchestra". ([RT 691].) (5) Atkins used terms like "parable," "deja vu," and "being a psychic" correctly ([RT 691-93]) (although Samenow did not quote Atkins's uses of these terms) and also used some sophisticated mathematical vocabulary (as to which, Samenow quoted Atkins as saying: "'I can do math, subtraction, Algebra, Geometry, fractions, decimals, reciprocal fractions. Money, I can count good, add good, but I failed math. I ain't do nothing.'" ([RT 693)).

Regarding Atkins's lifelong academic failure, Dr. Samenow attributed his "terrible" performance ([RT 693]) to a bad "attitude." [RT 694]. Dr. Samenow pointed to teachers' comments about Atkins's lack of concentration, poor study habits, lack of motivation, a constant problem with authority, tardiness, loitering, disciplinary problems ([RT 694]), and concluded: "So this is a person who chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do." ([RT 694].) Dr. Samenow found that Atkins did not have any deficits in adaptive functioning because Atkins told Dr. Samenow how Atkins could clean his clothes and cook chicken. ([RT 341].)[31]

In conclusion, Dr. Samenow testified that Atkins was not mentally retarded ([RT 696-98]; see also [RT 687]); that Atkins was diagnosable as having antisocial personality disorder ([RT 699-700]); and that his antisocial personality disorder indicated that he would be a risk for the future

[31] However, at a later point in his testimony, when opining on Atkins's "future dangerousness," Dr. Samenow noted that Atkins "has an extremely inflated view of himself." ([RT 754].) And in any event, as Dr. Nelson pointed out, it is inappropriate for an evaluator assessing mental retardation to determine the adaptive skills levels of the person being evaluated solely on the bssis of that person's self-reporting. "[H]e could be exaggerating what he can do. It's just like people who are illiterate often say, oh, yeah, I can read that, but they really can't because it's embarrassing to say otherwise."([RT 595.]) "For the most part, folks who are mentally limited overestimate what they can do." ([RT 596].)

([RT 701]). The jury sentenced Atkins to death, and his sentence was affirmed on appeal despite his claims that his retardation made it excessive and violative of the Eighth Amendment (*Atkins v. Commonwealth*, 534 S.E. 2d 312 (Va. 2000)).[32]

SUMMARY OF ARGUMENT

To inflict a death sentence on a person suffering from mental retardation is incompatible with the Eighth Amendment. Mental retardation profoundly limits a defendant's personal culpability for his or her actions. By definition, anyone who has this disability is within the lowest 3 per cent of the population in measured intelligence. That intellectual limitation also causes, by definition, substantial reduction in the individual's ability to cope with everyday life. Impairments in a wide array of areas are the inevitable consequence. But the essence of the disability is that the individual possesses a dramatically constricted understanding of the world. Such a diminished level of comprehension is inconsistent with the degree of culpability that is the necessary predicate for the infliction of the extreme penalty.

The right vouchsafed by *Penry v. Lynaugh* (*Penry I*) to plead mental retardation in mitigation on a case-by-case basis is insufficient to prevent the risk that retarded persons will be sentenced to death despite their lack of the requisite culpability – and even, in some cases despite their innocence – because the characteristics of their condition make them unusually susceptible to mistaken and arbitrary condemnation.

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[32] The way the federal issue was presented on appeal has been described in Petitioner's Reply to Respondent's Motion to dismiss Writ of Certiorari as Improvidently Granted. That motion having been denied, we will not burden the Court with another description.

The American people have reached a clear consensus that the reduced culpability of defendants with mental retardation makes them inappropriate subjects for capital punishment. There is no substantial dissent from this conclusion in any State or region of the country. In dramatic developments in the years since *Penry I*, the legislatures in State after State have also concluded that these defendants can only be protected adequately by a categorical ban on their execution. A consensus whose expression is this clear constitutes a reliable indicator of evolving standards of decency, and commands recognition under the Eighth Amendment.

Because Daryl Atkins is a man with clearly documented mental retardation that has been manifest throughout his life, his sentence of death is a cruel and unusual punishment.

ARGUMENT

I. A PROCEDURE THAT PERMITS THE DEATH PENALTY TO BE INFLICTED ON DEFENDANTS WITH MENTAL RETARDATION DESPITE THEIR DIMINISHED PERSONAL CULPABILITY VIOLATES THE EIGHTH AMENDMENT

A. Mental retardation impairs understanding and functioning in ways that substantially reduce personal culpability

Mental retardation is a distinct and readily diagnosable form of mental disability. The clinical diagnosis of mental retardation requires three distinct findings, involving (1) psychometric verification and measurement of the severity of an individual's cognitive impairment; (2) a clinical determination that the impairment demonstrated by the testing has an actual disabling effect on the individual's ability to function in the everyday world; and (3) documentation that the onset of the disability occurred early in life. The American Association on Mental Retardation has formulated these exacting criteria in

the following terms:

> 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.

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereafter AAMR, MENTAL RETARDATION].[33] Each of the three elements is an essential component of a professional diagnosis of mental retardation.

The crux of the clinical assessment of mental retardation is measuring the magnitude of the individual's intellectual impairment. To be classified as mentally retarded, an individual must be found to be functioning at the very lowest intellectual level encountered in the general population, as measured by standardized intelligence

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[33] The formulation of the definition of mental retardation by the American Psychiatric Association is essentially identical:

> 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.

DSM-IV-TR 41. See also AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (John W. Jacobson & James A.

tests. The intellectual functioning of any individual with mental retardation will fall within the lowest 3 per cent of the whole population.[34] Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

The second requirement serves to confirm the reality of the psychometric measurement of the individual's severe impairment. It is that the impairment must be observed to have "real-world" effects on the individual's life functioning. As this Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV-TR 42 – assures that the diagnosis applies only to persons with an actual, functional disability. See also AAMR, MENTAL RETARDATION 38. Previous versions of the definition of mental retardation expressed this requirement in terms of "deficits in adaptive behavior," see *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989) (citing an earlier edition of the AAMR's classification manual), while more recent formulations employ the terms "related

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Mulick eds., 1996).

[34] See, *e.g., Amici Curiae* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in *McCarver v. North Carolina*, No. 00-8727, at 7 ("studies invariably put the number [of people with mental retardation] at less than 3% of the general population, usually in the 1% to 3% range").

limitations" in "adaptive skill areas." AAMR, MENTAL RETARDATION 5; and see DSM-IV-TR 42. Both sets of terms reflect the same concept: that the impairment in intellectual ability must have an actual impact on everyday functioning.

The third definitional requirement is that the disabling condition must have manifested itself during the developmental period of life. Requiring the disability to have occurred at birth or during childhood means that the individual's mental development during his or her crucial early years was affected by the impairment of the brain's ability to function. This element of the definition is derived from the understanding of modern neuroscience about the way the brain develops and the implications of its arrested development for cognitive impairment. See AAMR, MENTAL RETARDATION 16-18. In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he or she also had it during childhood, significantly reducing the ability to learn and gain an understanding of the world during life's formative years.

Because the cognitive impairment is present during the individual's childhood, it has a compounding effect. Negative feedback received in early social development operates to further impair emotional and adaptive growth. Johnny L. Matson & Virginia E. Fee, *Social Skills Difficulties Among Persons With Mental Retardation*, in HANDBOOK OF MENTAL RETARDATION 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); see generally Harvey N. Switzky, *Mental Retardation and the Neglected Construct of Motivation*, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 194, 195 (1997). A "history of failure, social deprivation, and cognitive deficiencies"

leads to "high levels of anxiety regarding . . . [the] ability to cope with . . . life experiences." Harvey N. Switzky, *Individual Differences in Personality and Motivational Systems in Persons with Mental Retardation*, in ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY, AND RESEARCH 343, 346 (William E. MacLean, Jr., ed., 1997). The resulting emotional and behavioral problems cause mentally retarded individuals to display disruptiveness, attention deficit problems, low self-esteem, overactivity, distractibility, and difficulties with interpersonal relationships. MARY BEIRNE-SMITH, JAMES R. PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 216 (1994); see generally Josephine C. Jenkinson, *Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities*, 104 AM. J. MENTAL RETARDATION 320, 321 (1999). Mentally retarded persons often act impulsively, as it is "difficult for them to control, direct, or modify their drives and impulses effectively." Rachel Levy-Shiff, Peri Kedem & Zamira Sevillia, *Ego Identity in Mentally Retarded Adolescents*, 94 AM. J. MENTAL RETARDATION 541, 547 (1990) (noting that behavioral problems are often reported among retarded adolescents); see also, *e.g.*, Thomas L. Whitman, *Self Regulation and Mental Retardation*, 94 AM. J. MENTAL RETARDATION 347, 360 (1990); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985). This interplay between cognitive and adaptive deficiencies during the developmental period impairs moral development as well. AAMR, MENTAL RETARDATION 9, 40. See generally Richard M. Gargiulo & Janet A. Sulick, *Moral Judgment in Retarded and Nonretarded School Age Children*, 99 J. PSYCHOL. 23, 25 (1978) (noting that "cognitive development serves as a mediator of moral judgment"); Joan E. Perry & Dennis Krebs, *Role-Taking, Moral Development, and Mental Retardation*, 136 J.

GENETIC PSYCHOL. 95, 102 (1980).

B. A sentence of death is grossly disproportionate to the personal culpability of defendants afflicted by mental retardation

This Court has repeatedly emphasized the central importance of personal culpability in capital sentencing and has identified four principles to guide the inquiry whether an individual's behavior is sufficiently culpable to warrant a death sentence consistently with the Eighth Amendment's prohibition of "'excessive'" punishments.[35] *First,* the death penalty "takes as its predicate the existence of a fully rational, choosing agent." *Thompson v. Oklahoma*, 487 U.S. 815, 825-26 n.23 (1988). This predicate is grounded in the fundamental principle that "the more purposeful is the criminal conduct, . . . the more seriously it ought to be punished." *Tison v. Arizona*, 481 U.S. 137, 156 (1987). As a result, the death penalty is an appropriate punishment for those who deliberate or act with calculus, *Enmund v. Florida,* 458 U.S. 782, 799 (1982) (internal quotation omitted), but is a disproportionate penalty for those with "an immature, undeveloped ability to reason," *Thompson,* 487 U.S. at 835 n.43 (internal quotation omitted), or those without the capacity to make a fully reasoned choice.

Second, capital punishment is appropriate only for one who has the capacity to "evaluate the consequences of his conduct," *Penry I*, 492 U.S. at 322, both in terms of the consequences of the crime (the likelihood of death; the gravity of loss of life), and in terms of the connection between that crime and the punishment for it. For example, this Court has held that the death penalty is appropriate for a person who "knowingly,

[35] *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (lead opinion).

engage[s] in criminal activities known to carry a grave risk of death," *Tison*, 481 U.S. at 157, and who thus appreciates the causal connection between his criminal act and the death of his victim. Conversely, the Court has said that death is inappropriate for those who "wholly lack[ ] the capacity to appreciate the wrongfulness of their actions," *Penry I*, 492 U.S. at 333 (discussing the common law prohibition on executing "idiots"), or who lack the “comprehension of why . . . [they have] been singled out" for the punishment of death, *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

Third, the punishment of death is sufficiently related to an individual's personal culpability only when he or she can fairly be expected to conform to the behavior of a responsible, mature citizen. Society presumes that individuals are capable of conforming to its basic norms and deserve the fullest measure of punishment if they fail to do so. Nevertheless, there are exceptions to this presumption. Children who commit murder, for example, are not as culpable as adults because they are "less mature and responsible" and often have "less capacity to control their conduct." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 & n.11 (1982) (plurality opinion). Because adolescence is "a time of great . . . stress," and children often lack the tools to manage these stresses adequately, they are "not prepared to assume the full responsibilities" of adulthood. *Thompson*, 487 U.S. at 835 n.42 and at 825. For this reason, "their irresponsible conduct is not as morally reprehensible." *Id*. at 835. So even those minors under the age of 16 who can be convicted of murder cannot constitutionally be sentenced to death.

Finally, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death. *Tison*, 481 U.S. at

149; *Enmund*, 458 U.S. at 801; see *id*. at 798 (“The focus must be *his* culpability . . . .”). On the one hand, the law recognizes that reckless behavior resulting in death – even if the death was "caused" by another – can be sufficiently culpable to warrant the death penalty. *Tison*, 481 U.S. at 157. On the other hand, the law recognizes that a defendant's culpability is diminished – though not extinguished – by the wrongful and negligent conduct of others. Youth crime, for example, "is not exclusively the offender's fault," because it also represents "a failure of family, school and the social system." *Eddings*, 455 U.S. at 115 n. 11 (internal quotation omitted). Similarly, this Court has held that a person is less culpable when, by his or her very nature, s/he is more "susceptible to influence" by others. *Id.* at 115.

In light of these four principles – all tied to the touchstone of "personal culpability" – the Eighth Amendment requires that individuals with mental retardation, like Mr. Atkins, be excluded as a class from the sanction of death:

1. Individuals with mental retardation do not have the same capacity as others to make reasoned choices. The most fundamental feature of mental retardation is impaired intellectual capacity – specifically, a level of intelligence that places the individual at the very bottom of the population in terms of reasoning ability. This impairment affects the most basic skills, such as fact retention, problem solving, and concentration. It also impedes more abstract thought processes, such as the ability to reason and make logical connections (a process requiring transference of information and generalization skills). AAMR, MENTAL RETARDATION 9, 15, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

Reasoned choice of a course of action involves many steps: sustaining a certain

level of attention; focusing on the relevant and avoiding distraction by the irrelevant; assessing the situation correctly (*e.g.*, understanding language and reading social cues); generating a set of alternative possible responses; choosing among them; and then exercising control to act consistently with that choice. The acquisition of these skills is seldom complete until the end of normal childhood, and such skills will ordinarily remain fragmentary at best in a mentally retarded individual. Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. Moreover, the deficits in language and communication that commonly accompany mental retardation may limit the range of responses that a person has, meaning that a person with mental retardation might not, for example, take the ordinary step of asking for more information in response to a puzzling situation. See AAMR, MENTAL RETARDATION 15; Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. For these and other reasons, mentally retarded individuals commonly demonstrate rigid thought processes and "exhibit an inflexible pattern of problem-solving," Michael L. Wehmeyer & Kathy Kelchner, *Interpersonal Cognitive Problem-Solving Skills of Individuals with Mental Retardation*, 29 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 265, 267 (1994), a seeming inability "to realize that similar situations often require similar responses and . . . that dissimilar situations may require different responses." Whitman, 94 AM. J. MENTAL RETARDATION at 348. The death penalty is inappropriate for those who "have [a] reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Justice Powell, concurring).

2. In addition, individuals with mental retardation are less able to appreciate the consequences of their actions. Appreciating consequences involves several discrete steps: considering alternative possible responses; predicting the consequences of each

alternative; evaluating the different consequences (which includes applying abstract standards of principle and values to the predicted consequences); and choosing among the appraised consequences. A mentally retarded individual's decreased ability to reason and understand cause-and-effect impairs his or her ability to take even the simplest of these steps (foreseeing that Y will follow from X, and that Y may cause harm to one or more others, thereby affecting the judgment about X), let alone to follow the more advanced steps or to comprehend the ultimate connection between a harmful act and any resulting punishment. As this Court has noted, "less intelligence" means that an individual "is less able to evaluate the consequences of his or her conduct." *Thompson*, 487 U.S. at 835.

3. Like young children, persons with mental retardation do not possess the requisite levels of maturity and responsibility to make death an appropriate punishment. Because of their impairments in intellectual functioning and their “reduced ability to cope with . . . the everyday world," *Cleburne*, 473 U.S. at 442, persons with mental retardation do not have the same capacity – "the experience, perspective, and judgment," *Eddings*, 455 U.S. at 116 – to navigate life's stresses. Lacking these tools, they are often unable to “control . . . or modify their . . . impulses effectively,” Levy-Shiff *et al.*, 94 AM. J. MENTAL RETARDATION at 547, and, like juveniles, are "much more apt to be motivated by mere emotion." *Thompson*, 487 U.S. at 835. Because the intellectual impairment of those with mental retardation manifests itself during the developmental period, there is often a "chain reaction," with adaptive problems leading to further adaptive problems, see, *e.g.,* Matson & Fee, *Social Skills Difficulties Among Persons With Mental Retardation*, in HANDBOOK OF MENTAL RETARDATION at 471, resulting in

"serious emotional problems," *Eddings*, 455 U.S. at 116, and "arrested emotional development," *Penry I*, 492 U.S. at 324. This cycle traps them in the posture of an "emotionally disturbed . . . [individual] with a disturbed child's immaturity," *Eddings*, 455 U.S. at 116.

As with children, the moral reasoning of individuals with mental retardation is only partially developed: The significantly subaverage intellectual functioning that is a defining characteristic of mental retardation translates into serious impairments of moral understanding. See AAMR, MENTAL RETARDATION 9, 40. Underlying the growth of moral reasoning is not only the ability to learn and retain information, but also the ability to think abstractly instead of concretely. The development of abstract thinking and moral reasoning occurs in adolescence. See, *e.g.*, JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 27-29, 96-98 (Free Press ed. 1997). When a toddler misbehaves, we respond with concrete commands (*e.g.*, "Don't hit."). We save lower-level abstractions (*e.g.*, "We have a rule against hitting.") for somewhat older children. See *id*. at 27-29, 178-85. A young child might understand the lower-level abstraction that there are things called rules and they are not to be broken, but will not be able to reason about rules *(e.g.*, "There is a rule against hitting, which is really a rule about not hurting people, so doing other things that hurt people is also off limits."). See *id*. at 27-29, 89, 134. Once moral reasoning has developed, a person can recognize that there are rules, and also principles underlying those rules, embodying values against which rules might be measured. See *id*. at 27-29, 95. Only at this stage of moral development does an individual function as an independent moral being, responding to his or her own developed system of morals, and not merely submitting to the authority of another. See

generally *id*. But this stage is beyond what those with mental retardation can achieve. See AAMR, MENTAL RETARDATION 9, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

4. Finally, persons who have mental retardation do not possess the requisite level of individual culpability to warrant death. Due to their impairments, mentally retarded individuals are "susceptible to influence." *Eddings*, 455 U.S. at 115. More importantly, the intellectual impairment of adults with mental retardation is permanent, immutable, and beyond the individual's control. See *Cleburne*, 473 U.S. at 442. While the adaptive behavior of mentally retarded individuals can improve, *Penry I*, 492 U.S. at 338 – indeed, mentally retarded individuals often do well in structured environments – the possibility for improvement is largely, if not entirely, outside their control. It depends on educational and support services, which their familial, social, and economic circumstances may or may not make possible and actually deliver. From this standpoint, individuals with mental retardation simply do not possess the level of responsibility for their own destiny that is the Eighth Amendment predicate for the punishment of death, a penalty that sums up an individual's life and declares it forfeit.

C. Executing individuals with mental retardation serves no legitimate penal objective

Not only is the death penalty always out of proportion to the culpability of persons with mental retardation, but death for such persons does not – and cannot – comport with the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." *Thompson*, 487 U.S. at 836

(internal quotations and citation omitted). As this Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot reason through the consequences of actions or understand the link between his or her actions and the ordained punishment. See, *e.g., id.* at 837. The inability to imagine and assess competing courses of action is a core aspect of mental retardation. This limitation dramatically reduces the ability of mentally retarded persons to engage in the sort of self-controlled reasoning process that makes deterrence a real constraining force. Nor can removing persons with mental retardation from the universe of those who are subject to execution conceivably reduce any deterrent effect the death penalty may have on the rest of the population. See *Ford*, 477 U.S. at 407.

Similarly, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149; see also *Ford*, 477 U.S. at 409 ("we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"). Given the diminished level of personal culpability of defendants with mental retardation, executing them cannot fulfill the goal of retribution. Thus, it "is nothing more than the purposeless and needless imposition of pain and suffering," *Penry I*, 492 U.S. at 335, in violation of the Eighth Amendment.

D. The system of case-by-case determination in capital cases has not protected defendants with mental retardation from improvident death sentences

As experience since *Penry I* has demonstrated, several factors heighten the risk that the death penalty may be imposed on persons with mental retardation despite *Penry*'s assurance that

they can plead their disability in mitigation. These factors include (a) the breakdown in procedural protections that results from a defendant's possession of the cognitive and behavioral impairments characteristic of mental retardation; and (b) jurors' lack of experience with, and faulty stereotypes regarding, persons with mental retardation, coupled with the potential for prosecutors to exploit such ignorance or stereotypes. The upshot is an inherently unreasonable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). See generally Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89, 98-104 (Autumn 1998).

Breakdown of procedural protections. The substantial cognitive and behavioral impairments that are at the core of mental retardation severely hamper a retarded defendant at every stage of the criminal process. See generally RONALD W. CONLEY, RUTH LUCKASSON & GEORGE N. BOUTHILET, eds., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (1992). These handicaps are so pervasive and so insidious that they undermine confidence that a death sentence imposed on such a defendant was the product of a fair procedure that adequately weighed the mitigating effects of his or her mental retardation. In an alarming number of cases that have come to light since *Penry I*, even the reliability of the guilty verdict has been put in doubt.

In many cases, these problems begin during the investigative phase, and in particular with the questioning of suspects who have mental retardation. Confessions and inculpatory statements made by mentally disabled suspects are particularly problematic regarding not only

their voluntariness, but also their reliability. The propensity of many individuals with mental retardation to do whatever is asked of them by figures of authority has been widely documented in the clinical literature,[36] and this has generated well-founded concern about the process by which confessions are obtained. See, *e.g.*, AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standards 7-5.8 through 7-5.10 (1989), and accompanying Commentary.

[36] See, *e.g.*, L. W. Heal & C. K. Sigelman, *Response Biases in Interviews of Individuals with Limited Mental Ability*, 39 J. INTELLECTUAL DISABILITY RESEARCH 331 (1995); Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanel & Carol J. Schoenrock*, When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1981).

Even more pervasive difficulties are encountered in the representation of defendants with mental retardation at trial. The limitations inherent in a defendant's mental retardation can place substantial obstacles in the way of a fair trial.[37] And in many cases, the defendant's limited

[37] The relevant limitations are abundantly documented in the clinical literature on mental retardation. They include **deficits in memory**, see, *e.g.,* CECIL D. MERCER & MARTHA E. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977); James M. Bebko & Helen Luhaorg, *The Development of Strategy Use and Metacognitive Processing in Mental Retardation: Some Sources of Difficulty* in JACOB A. BURACK, ROBERT M. HODAPP & EDWARD ZIGLER, eds. HANDBOOK OF MENTAL RETARDATION AND DEVELOPMENT 382, 384-95 (1998) (hereafter BURACK HANDBOOK); Richard L. Luftig & Ronald E. Johnson, *Identification and Recall of Structurally Important Units in Prose by Mentally Retarded Learners*, 86 AM.J. MENTAL DEFICIENCY 495, 501(1982); **deficits in receptive and expressive language skills**, see, *e.g.,* Anne E. Fowler, *Language in Mental Retardation: Associations with and Dissociations*

ability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one – including defense counsel – discovers the extent of his or her impairment or even that s/he suffers from mental retardation.[38] This tragically misguided instinct, which occurs in case after case, thwarts counsel's ability to explain,

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from General Cognition in BURACK HANDBOOK at 290; **inattention and impulsivity**, see, *e.g.*, Whitman, 94 AM. J. MENTAL RETARDATION at 347; Johnny L. Matson & Virginia E. Fee, in HANDBOOK OF MENTAL RETARDATION 468; and **problems regarding motivation**, see, *e.g.*, J. Merighi, M. Edison & Edward Zigler, *The Role of Motivational Factors in the Functioning of Mentally Retarded Individuals* in R. M. HODAPP, J. A. BURACK, & EDWARD ZIGLER, eds., ISSUES IN THE DEVELOPMENTAL APPROACH TO MENTAL RETARDATION 114 (1990); Jenkinson, 104 AM. J. MENTAL RETARDATION at 321-28; Harvey N. Switzky, *Mental Retardation and the Neglected Construct of Motivation,* 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITY 194 (1997).

[38] This phenomenon, too, has been fully documented in the clinical literature. See*, e.g.*, JAMES R. DUDLEY, CONFRONTING THE STIGMA IN THEIR LIVES: HELPING PEOPLE WITH A MENTAL RETARDATION LABEL (1997); Judith Cockram, Robert Jackson & Rod Underwood, *People with an Intellectual Disability and the Criminal Justice System: The Family Perspective,* 23 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 41 (1998); S.E. Szivos & E. Griffiths, *Group Processes in Coming to Terms with a Mentally Retarded Identity,* 28 MENTAL RETARDATION 333 (1990).

and the jury's opportunity to consider, the significance of a defendant's mental retardation.

Jurors' unfamiliarity. Juries often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation. While the physical immaturity and youthful appearance of juvenile defendants call attention to their likely emotional immaturity, the limitations on the cognitive and adaptive skills of individuals with mental retardation are hidden behind the façade of an adult physique. Apart from individuals with Down's Syndrome or some similar condition that results in distinctive facial features – rarely encountered in capital cases – mentally retarded defendants cannot be identified by their physical appearance alone. Jurors see someone who looks normal, who is not manifestly 'crazy,' and they do not grasp the profound yet subtle ways a person with retardation is limited in his or her capacity to understand the world and to act appropriately. They see a defendant who is not acting in a visibly "remorseful" fashion in the courtroom and they attribute it to callousness or heartlessness, rather than understanding that a person with mental retardation may have no real comprehension of what is going on.

To make matters worse, defendants with mental retardation often behave in ways that are contextually inappropriate, and this may impair their case at trial and sentencing. Mentally retarded defendants frequently smile where others would display gravity; they fall asleep; they stare at jurors. This inappropriate behavior – which is often intended to mask the defendant's lack of understanding of the courtroom proceedings – can convey a false impression of callousness or lack of remorse. The prosecution can, and often does, use this behavior against the defendant with mental retardation. The prosecution also may exploit defendants' mental retardation by arguing that their pronounced deficit in intelligence makes them more dangerous, and that this is

an additional reason to impose the death penalty. See, *e.g.*, *Penry I*, 492 U.S. at 323; Steiker & Steiker, 61 LAW & CONTEMP. PROBS. at 101-02. Prosecutors have no difficulty in exploiting common stereotypes of mentally retarded individuals, characterizing them as "subhuman" and "without self-control." Jurors may be unable to escape the grip of such prejudicial images when they have had no occasion to encounter people with mental retardation under the circumstances of ordinary living and to overcome the stereotypes that make “the mentally retarded” an unfamiliar, alien, and repellent group.

The unreliability of the process. These various problems combine to produce an unacceptable risk that defendants who have mental retardation and are innocent have been, and will continue to be, sentenced to death. Reports of the recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales.

In 1983, Earl Washington, who has mental retardation, was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman – as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington's guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence "would have reached a different conclusion" in his case despite his

confession.[39]

[39] See Francis X. Clines, *Virginia Man Is Pardoned in a Murder; DNA Is Cited*, N.Y. Times, Oct. 3, 2000, at A20.

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed (under *Ford*) and the question whether execution of an individual with mental retardation was precluded by the Illinois Constitution. During the period of the stay, conclusive evidence establishing Porter's innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan's decision to institute a moratorium on the execution of death sentences in Illinois.[40]

The arbitrariness of the process. This Court in *Penry I* optimistically assumed that juries would be able to make reliable sorting decisions among defendants with mental retardation, culling the more culpable from those whose disabilities precluded a determination that they were

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[40] See generally, Eric Zorn, *Questions Persist as Troubled Inmate Faces Electrocution*, Chi. Trib., Sept. 21, 1998, at 1.

While Washington and Porter were sentenced to death before this Court's decision in *Penry I*, the fact that neither man received postconviction relief in the wake of that decision indicates that the capital sentencing processes employed in Virginia and Illinois already comported with the safeguards required by this Court in *Penry I*, and therefore that such procedures did not eliminate the risk of executing an innocent man with mental retardation.

the “worst of the worst,” deserving only of death. But the experience of the last decade belies that forecast. Instead, case-by-case administration of the death penalty has turned on factors other than juries' "reasoned *moral* response to the defendant's background, character, and crime." *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (Justice O'Connor, concurring) (internal quotation omitted).

Where there is a grave risk that the death penalty will be meted out irrationally among a particular subclass of capital defendants, not only “in spite of factors which may call for a less severe penalty," *Lockett*, 438 U.S. at 605, but also in ignorance of realities which may cast unperceived doubts upon some defendants' guilt, the exclusion of that category from the pool of constitutionally death-eligible defendants serves a critical "narrowing" function. See *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983); *Arave v. Creech*, 507 U.S. 463, 475-78 (1993). It is also necessary to prevent the random and infrequent application of the death penalty within the subclass. Juries do not generally sentence mentally retarded defendants to death when the jurors understand the defendant's disabilities or the moral issue at stake. See note 49 *infra*. They do so fortuitously, largely as a consequence of the difficulties that some retarded defendants and their lawyers have in getting the jurors to see the defendant as s/he is. "[T]he infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying [the Court's] judgment in *Furman* . . . that the death penalty [when] . . . administered in unguided fashion, was unconstitutional." *Thompson*, 487 U.S. at 831 (citations omitted). Only a categorical rule can avert the demonstrated danger that death is being meted out in such an unconstitutional manner to persons with mental retardation.

II. EXECUTING PERSONS WITH MENTAL RETARDATION OFFENDS

"EVOLVING STANDARDS OF DECENCY"

When the Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. See *Penry I*, 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against execution of the mentally retarded may someday emerge reflecting . . . 'evolving standards of decency . . . .' " *Id.* at 340.

That day has arrived. Much has occurred since this Court decided *Penry I*. The great weight of evidence now demonstrates that American society overwhelmingly opposes the execution of persons with mental retardation, and that this national consensus is shared by nearly every other society in the world.

The emergent national consensus is most immediately evident in the actions of state legislatures, which, the Court has said, provide "[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two States – Georgia and Maryland – and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In little more than a decade, that number of States has grown nine-fold.

The first new enactments came in legislative sessions immediately after the Court's *Penry I* decision called attention to the issue. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. Between 1991 and 2000, nine more States – New Mexico, Arkansas, Colorado,

Washington, Indiana, Kansas, New York, Nebraska, and South Dakota – passed such statutes. (This roster includes both of the States that enacted the death penalty anew after many years without it.) In 2001, no fewer than five States – Arizona, Missouri, Florida, Connecticut, and North Carolina – have enacted statutes to prevent the execution of persons with mental retardation.[41] This brings the current total of States to eighteen,[42] plus the federaal government.[43] When these eighteen States are added to the twelve States that do not have the death penalty,[44] it is evident that the statutes in

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[41] It was, of course, the enactment of legislation with retrospective effect that led this Court to dismiss the writ in *McCarver v. North Carolina*, No. 00-8727, as improvidently granted. 122 S.Ct. 22 (2001).

[42] 2001 Ariz. Sess. Laws 260; ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7-131(j) (1988); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); MD. ANN. CODE art. 27, § 412(g) (1989); 2001 Mo. Laws 267; NEB. REV. STAT. § 28-105.01 (1998 & Suppl. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); 2001 N.C. Sess. Laws 346; S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

[43] Federal Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988); Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994). (The first of these statutes preceded this Court's decision in *Penry I*, while the second was subsequent to it.)

[44] We recognize that in *dicta* this Court has cast doubt upon the relevance of States that do not have the death penalty when surveying jurisdictions to ascertain whether there is a national consensus regarding a particular capital-sentencing practice. See *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989). We respectfully suggest that it would be inappropriate to exclude the people of those States from any national consideration of whether it is acceptable to execute an individual with mental retardation. All public opinion polling, both state and national, indicates a broad and widespread national consensus against executing anyone with mental retardation. See, *e.g.*, Dan Parker, *Most Texans Support Death Penalty*, Corpus Christi Caller-Times, March 2, 2001, at A1 (66% oppose consideration of the death penalty for defendants with mental retardation; 17% support). There is no reason to suspect that the people of Maine or Hawaii, for example, share that view less fully than the people of Georgia or Florida. And with regard to this particular issue, there is also some evidence about the sentiment in States without

the death penalty in the form of bills in their legislatures proposing reinstatement of the penalty. During recent efforts to restore the death penalty in several States, the proponents of the bills drafted them with explicit provisions that the penalty would not be imposed on individuals with mental retardation. See, *e.g.,* Iowa H.F. 2, 76th Gen. Assem. (1995); Mass. H.B. 4003, 2001 Gen. Court, Reg. Sess. (2001); Minn. H.F. 4136, 81st Leg. Sess. (2000). This is fully consistent with the fact that both of the States that have reinstituted the death penalty since *Penry I*, Kansas

only a minority of States now allow the possibility of executing an individual with mental retardation.[45] And on the world-wide stage, the few jurisdictions in the United States that

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and New York, have included provisions to protect defendants with mental retardation.

[45] It would be erroneous to assume that the people of the twenty States which have not yet enacted a statutory ban on executing individuals with mental retardation *approve* such executions. In two of those States, Texas and Illinois, the legislatures passed bills protecting people with mental retardation but the bills were vetoed by their governors after opponents argued forcefully that the legislation was unnecessary because mentally retarded individuals were not being executed in the State now. See, *e.g.*, Mike Tolson, *A Deadly Distinction Part IV:*

continue to execute mentally retarded persons now stand all but alone.[46]

Death Penalty Reforms Sought, Houston Chronicle, Feb. 7, 2001, at A1 ("'We don't execute mentally retarded people,' [Harris County District Attorney Chuck] Rosenthal said."); Veto Message, H.B. 236, *Tex. House J.*, 77th Sess., at 5215 (2001) ("This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers today."). In a third state, Oregon, the legislature passed a bill which was intended to protect people with mental retardation from the death penalty, but because the language of its final version failed to accomplish that goal, it was vetoed by Governor Roberts (at the request of disability advocates). Governor's Message, *Senate J.*, 1st. Legis. Sess., at SJ-218 (Or. 1993) ("The original intent of Senate Bill 640 was to exempt mentally retarded individuals from the death penalty. I wholeheartedly support this goal.") There is no evidence of widespread support for the use of the death penalty in such cases in *any* State.

[46] Among countries that have the death penalty, the practice of executing defendants with mental retardation is essentially unknown in the Twenty-First Century. Recent reports of the information put before this Court in the *McCarver* briefs indicating that only the United States, Japan, and Kyrgyzstan still allowed the execution of persons with mental retardation stimulated a published response by Kyrgyzstan's Ambassador to the United States declaring that such executions are no longer permitted in his country. Baktybek Abdrisaev, *Penalties in Kyrgyzstan*,

N.Y. TIMES, June 30, 2001, at A14 (Letter to the Editor). And numerous international and regional intergovernmental bodies have passed resolutions and other statements expressing strong opposition to the execution of any individuals who have mental retardation. See *Amicus Curiae* Brief of the European Union in *McCarver v. North Carolina*, No. 00-8727; *Amici Curiae* Brief of Diplomats Morton Abramowitz, *et al.* in *id.*

These enactments by Congress and the legislatures in State after State accurately reflect the consensus among the American people on this subject.[47] That consensus is also revealed in public opinion polls and in the positions taken by relevant organizations in both the mental retardation and legal fields.[48] Such nonlegislative evidence of the consensus is even more abundant now than it was in 1989.[49]

Of course, the Court in *Penry I* expressed concern not only about the quantity of the evidence then available but also about its form. In particular, legislation was identified as "an objective indicator of contemporary values upon which we can rely." 492 U.S. at 335. But there can no longer be doubt about whether the public sentiment "may ultimately find expression in legislation." *Id.* The remarkable events of the last

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[47] It is also worth noting that since this Court's decision in *Penry I*, no state has affirmatively legislated that the death penalty *is* appropriately imposed on persons with mental retardation. *Cf. Thompson*, 487 U.S. 815, 849 (Justice O'Connor, concurring) ("[Where] such a large majority of the state legislatures has unambiguously outlawed capital punishment for 15 year-olds and where no legislature in this country has affirmatively and unequivocally endorsed this practice, strong counterevidence would be required to [demonstrate] that a national consensus against this practice does not exist.").

[48] See, *e.g.*, *Amici Curiae* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in *McCarver v. North Carolina*, No. 00-8727; *Amici Curiae* Brief of American Association on Mental Retardation *et al.* in *id.*; *Amici Curiae* Brief of American Bar Association in *id*.

[49] In discerning the society's evolving standards of decency, the Court has sometimes considered the conduct of sentencing juries. Analyses of juries' performance in this area is particularly difficult to conduct systematically because juries are not ordinarily required to return special verdicts or specific findings of mitigating circumstances. But the available evidence from social science studies about juror attitudes is fully consistent with the recent legislative developments. See, *e.g.*, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1564 (1998) (reporting mental retardation as among the most powerful mitigating factors).

dozen years have answered that question.[50]

III. A SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE FOR DARYL ATKINS BECAUSE OF HIS MENTAL RETARDATION

Daryl Atkins's IQ of 59 places him in the lowest one percentile of the population for intelligence. ([TT 1206].) "[L]imited intellect has been a part of Daryl his entire life. . . ." ([TT 1211].) It is excessive and disproportionate to inflict a sentence of death upon such a person, whose ability to reason and make judgments, to function as a fully mature and responsible adult,

[50] The consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty. In *Penry I*, the Court speculated that the group of people ineligible for execution at common law might roughly correspond to the more recent subcategories of "severe" or "profound" mental retardation. 492 U.S. at 333. While there may be ambiguity about where the boundary was drawn two centuries ago, there is none regarding the modern consensus: that dichotomy has commended itself to no modern authority. Since *Penry I*, not a single state legislature or foreign jurisdiction addressing the issue of the death penalty has adopted a provision that would treat individuals with "severe" and "profound" mental retardation differently from others who have mental retardation. It should also be noted that the taxonomy of "mild/moderate/severe/profound," which merely restated IQ scores in categorical form, has been abandoned by the American Association on Mental Retardation and replaced with categories that focus more directly on an individual's practical impairment and service needs. AAMR, MENTAL RETARDATION 34.

is impaired by a disability beyond his control and not of his choosing.

In finding that this death sentence was not excessive and disproportionate, the majority opinion of the Virginia Supreme Court never clearly states its view of Daryl Atkins's mental condition. It says that "the jury . . . heard extensive, but conflicting, testimony from Dr. Nelson and Dr. Samenow regarding Atkins' mental retardation" (JA [ ]); 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" (JA [ ]); but that "[b]ecause Atkins asserts that he cannot be sentenced to death due to his alleged mental retardation, we must consider, as part of our proportionality review, the same evidence heard by the jury regarding Atkins' mental capacity" (JA [ ]). In discussing that evidence, the majority appears to accept the validity of Dr Nelson's finding, based upon Atkins's WAIS-III test results, that Atkins had a full-scale IQ of 59;[51] it makes no ultimate choice between the

[51] See JA [ ]: "In conducting the mandated proportionality review and examining the records accumulated pursuant to Code § 17.1-313(E), we do not find a capital murder case in which testimony indicated that a defendant had a full scale IQ as low as 59." It does note that "Dr. Nelson . . . acknowledged that Atkins might have scored two or three points higher if he had not been mildly depressed when Dr. Nelson administered the test" (JA [ ]), but those two or three points would not have effected any change in Dr. Nelson's diagnosis or in the location of Atkins's full-scale IQ score as well down into the range universally accepted as characteristic of mental retardation; and the majority opinion does not reflect any other doubts about the 59 IQ score.

conclusions of Dr. Nelson and Dr. Samenow (see JA [ ]), but it seems to say that because Dr. Nelson "never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' 'academic failure' (JA [ ]), the majority was more impressed by Dr. Samenow's conclusion – based upon Atkins's self reported abilities to do laundry and cook chicken – that Atkins showed "'no lack of ability to adapt'" [JA [ ]).

The short answer to this is that Dr. Nelson did not "identify" other specific areas in which Atkins's adaptive functioning was deficient because he found and testified that Atkins demonstrated a "lack of success in pretty much every domain of his life" ([RT 595]), and the prosecution did not cross-examine him on that general finding. Dr. Nelson's report, which was admitted into evidence ([RT 671]), recounted that the information which Dr. Nelson had obtained from family members and school records substantiated that Atkins "could not do his own laundry, [and] rarely was able to cook meals for himself," as well as lacking "other basic life skills that most defendants his age have mastered" ([TT 1538]). Dr. Samenow's contrary conclusions about Atkins's abilities in the laundry room and the kitchen flouted a rudimentary canon of evaluation in possible cases of mental retardation: not to accept the subject's own appraisal of his or her competencies, since these are likely to be inflated.[52] As for the rest of Dr. Samenow's opinions about Atkins, they are simply beyond the pale. Evaluations of mental

[52] "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." Caroline Everington & Denis W. Keyes, *Mental Retardation*, 8 THE FORENSIC EXAMINER 31, 34 (1999). See also note 31 *supra*.

retardation must be based on a thorough and competent examination, following standard protocols and procedures.[53] Dr. Samenow's rogue approach to evaluating Daryl Atkins[54] does not come close to satisfying that requirement.[55] Justices Hassell and Koontz, dissenting on this

[53] "One of the strengths of a standardized test such as the WAIS-III is that it is able to provide scores that represent an individual's performance compared with other individuals of about the same age. However, to obtain results that are comparable to national norms, one must be careful to adhere to the same administration and scoring procedures that were used during the standardization of the test." KAUFMAN & LICHTENBERGER 15. See also, *e.g.*, LEWIS R. AIKEN, ASSESSMENT OF INTELLECTUAL FUNCTIONING 57 (1987); ANNE ANASTASI, PSYCHOLOGICAL TESTING 24 (5th ed. 1982); JERRY J. SWEET, ed., FORENSIC NEUROPSYCHOLOGY: FUNDAMENTALS AND PRACTICE 15 (1999).

[54] See text and notes at notes 27-29 *supra*. Moreover, Dr. Samenow used the very deficits that are typical of people with mental retardation to deny the presence of the disability. He chose to see as volitional, rather than as symptomatic (see note 37 *supra*), Daryl Atkins's lack of understanding of the gravity of the crime, inability to express deep remorse ([RT 701]), lack of motivation, lack of concentration and the specific misbehaviors he exhibited in school (*e.g.*, inattentiveness, tardiness, loitering). ([RT 694].)

[55] For example, Dr. Samenow purports to dismiss the overwhelming evidence of Atkins's mental retardation by reporting a few vocabulary words which Dr. Samenow speculates that individuals with mental retardation would not know. *As a general category*, language usage does correlate moderately with general cognitive ability, but proficiency in various language skills can coexist with documented mental retardation. See Deborah L. Coates & Peter M. Vietze, *Cultural Considerations in Assessment, Diagnosis and Intervention,* in AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 243, 250 (John W. Jacobson & James A Mulick eds., 1996). Functional language skills involve several domains, including syntax (the way words are combined in sentences or phrases), morphology (knowledge and use of basic linguistic units), phonology (production of speech sounds), speech acts (use of speech), conversation (speech acts in social context) and discourse (interactive discussion), in addition to lexicon (vocabulary). Catherine E. Snow & Barbara Alexander Pan, *Ways of Analyzing the Spontaneous Speech of Children with Mental Retardation: The Value of Cross-Domain Analyses*, 19 INTERNATIONAL REV. RESEARCH IN MENTAL RETARDATION 163 (1993). Studies indicate that individuals with mental retardation in the range of Mr. Atkins's are likely to have less impairment in the domains of lexicon and speech act and more substantial deficits in the more complex areas of morphology and syntax. *Id.* A preoccupation with vocabulary, even if vocabulary is systematically measured rather than gauged by the kind of idiosyncratic, patchwork observation employed by Dr. Samenow, cannot properly serve as a substitute for full clinical evaluation of mental retardation. See, *e.g.,* James K. Maxwell & Fred Wise, *PPVT IQ Validity in Adults: A Measure of Vocabulary, Not of*

point below, rightly found it altogether unbelievable that "Dr. Samenow, who did not administer a complete IQ test to the defendant and admittedly asked the defendant questions based upon bits and pieces of outdated tests to supposedly evaluate the defendant, would opine that this defendant possesses at least average intelligence." (JA [ ].)

Nothing about Daryl Atkins was "at least average." His growth throughout childhood was stunted by his inability to learn like other children. His understanding of the world around him was circumscribed by acute disability. Putting such a person to death offends the Eighth Amendment.

CONCLUSION

The judgment of the Virginia Supreme Court should be reversed.

Respectfully submitted,

Charle E. Haden
Suite B
2440 West Queen Street
Hampton, VA 23666
(757) 825-0022

James E. Ellis
1117 Stanford Road, NE
Albuquerque, NM 87131-1431
(505) 277-4830

Robert E. Lee*
Mark E. Olive
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
Suite 301
2421 Ivy Road
Charlottesville, VA 22903
(804) 817-2970

*Counsel of Record

Intelligence, 40 J. CLINICAL PSYCHOLOGY 1048 (1984); Barbara B. Fazio, Judith R. Johnston & Laurie Brandl, *Relation Between Mental Age and Vocabulary Development Among Children with Mild Mental Retardation*, 97 AM. J. MENTAL RETARDATION 541 (1993).

No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

DARYL RENARD ATKINS,
Petitioner-Appellant,

V.

COMMONWEALTH OF VIRGINIA
Respondent-Appellee.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court. I further certify that on November 29, 2001, I caused an electronic version of this document to be sent to the Clerk's Office of the Supreme Court of the United States, 1 First Street, N.E., Washington, D.C., 20543, (202) 479-3000, and to Cockle Printing, 2311 Douglas Street, Omaha, Nebraska, 68102, (402) 342-2831, and faxed a version of the brief to Pamela A. Rumpz, Esq., Assistant Attorney General, 900 East Main Street, Sixth Floor, Richmond, VA 23219, (804) 786-0142.

Charles E. Hayden
Suite B
2440 West Queen Street
Hampton, VA 23666
(757) 825-0022

James E. Ellis
1117 Stanford Road, NE
Albuquerque, NM 87131-1431
(505) 277-4830

Robert E. Lee*
Mark E. Olive
VIRGINIA CAPITAL REPRESENTATION
RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, VA 22903
(434) 817-2970

*Counsel of Record