Atkins v. Virginia: Commutation for the Mentally Retarded?

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**Atkins v. Virginia: Commutation for The Mentally Retarded?**

I. INTRODUCTION

In *Atkins v. Virginia* the United States Supreme Court held that the imposition of the death penalty upon mentally retarded criminal defendants violated the Cruel and Unusual Punishments Clause of the Eighth Amendment and, therefore, was unconstitutional. This decision left the states with the burden of implementing guidelines consistent with the Court’s holding. Currently, South Carolina does not prohibit the execution of the mentally retarded. Consequently, existing law is unconstitutional and will need to be amended to comply with the Court’s ruling.

This Comment examines certain changes in Eighth Amendment jurisprudence concerning capital defendants, particularly some of the problems associated with the response required by the states after Atkins. Further, this Comment proposes guidelines consistent with the Court’s decision for implementation in South Carolina. Part II briefly traces the recent development of procedural and substantive limitations the Eighth Amendment imposes on the use of capital punishment. Part III discusses Atkins and its significance on national

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3. 122 S. Ct. 2252.
4. Id. at 2250. Justice Stevens remarked: “[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.” Id. (quoting Ford v. Wainwright, 477 U.S. 399, 405, 416-17 (1986)).
6. Other limitations, such as due process requirements, although important, are not the primary focus of this Comment. Notably, two different federal district judges recently declared the federal death penalty statute unconstitutional based on due process violations, rather than the Eighth Amendment’s bar against cruel and unusual punishment. See United States v. Fell, 217 F. Supp. 2d 469, 489 (D. Vt. 2002) (invalidating the federal death penalty statute on both the Due Process Clause of the Fifth Amendment and the Confrontation and Cross Examination Clauses of the Sixth Amendment); United States v. Quinones, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002), rev’d, 313 F.3d 49 (2d Cir. 2002).

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and South Carolina death penalty jurisprudence. Part IV describes the current law in South Carolina, poses issues raised by the Atkins mandate, and identifies and comments on minimum due process requirements and discretionary options available to the states. Finally, Part V contains a set of proposed guidelines in response to these discretionary issues.

II. BACKGROUND

A. Capital Punishment in the United States

State-sanctioned executions have been "employed throughout our history," and the Supreme Court has remarked that they do not "violate the constitutional concept of cruelty." Although states are allowed significant leeway in developing and administering criminal punishment schemes, the Supreme Court has decided that constitutional implications of the Eighth Amendment on death penalty jurisprudence authorize the Court to reach decisions concerning the application and scope of the death penalty.

For most of the United States' history, the Supreme Court assumed a limited role when it visited the states' use of capital punishment. Then, in 1972, the Court in Furman v. Georgia invalidated the use of the death penalty as it was then applied by the states. No single rationale in support of invalidation could be delineated from the Court's plurality opinion. However, four years later, the Court reexamined application of the death penalty and upheld its use. In relying principally upon three factors, the Court noted the following unique aspects of the death penalty: 1) its

8. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 319 (1987) ("It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.'") (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).
11. 408 U.S. at 239-40 (holding unconstitutional the then-existing statutory death penalty schemes as violative of both the Eighth and Fourteenth Amendments).
12. Each of the Justices wrote a separate opinion, and only one paragraph within the decision was agreed upon by a five-justice majority. Id.
traditional use as punishment for the crime of murder;\(^1\) 2) its popularity as a criminal sanction;\(^2\) and 3) its contribution in addressing the social goals of retribution and deterrence.\(^3\) Nevertheless, because the Eighth Amendment requires heightened procedural protections to ensure that the substantive limitations are met, the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."\(^4\)

\[\text{B. Death is Different}\]

In interpreting if a particular punishment should be constitutionally foreclosed as an option, the Court has adopted two primary approaches to assist in its analysis. First, a punishment may be cruel and unusual if it was considered such at the time the Framers adopted the Bill of Rights in 1791.\(^5\) However, it is unclear how the Framers viewed the meaning of "cruel and unusual"; it is suggested that modes of punishment commonly carried out during that earlier time were acceptable, and all others were cruel and unusual and thus prohibited.\(^6\) In addition to its traditional use, the Court considers the evolutionary character of punishment.\(^7\) In deciding if a punishment is now cruel and unusual, the Court generally looks toward legislative action\(^8\) prohibiting certain punishments in order to conclude that the practice now violates "evolving standards of decency."\(^9\) Intertwined with these two approaches is the Court's proportionality review of punishments.\(^10\) The Court has stated that any mode of punishment used

\(^{14}\) Id. at 176.

\(^{15}\) Id. at 179 (noting that "it is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction").

\(^{16}\) Id. at 183.

\(^{17}\) Id. at 188.


\(^{19}\) Weems v. United States, 217 U.S. 319, 368 (1910) (remarking that "[o]ther cases have selected certain tyrannical acts of the English monarchs as illustrating the meaning of the [Cruel and Unusual Punishments] clause and the extent of its prohibition").


\(^{21}\) Atkins, 122 S. Ct. at 2247; Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

\(^{22}\) Trop, 356 U.S. at 101 (holding that the scope of the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

“must not be grossly out of proportion to the severity of the crime,” and must be “directly related to the personal culpability of the criminal offender.”

Nevertheless, the use of capital punishment may be eroding to the point that interpretation of the Eighth Amendment’s Cruel and Unusual Punishments Clause eventually may be rendered obsolete. Although Gregg v. Georgia held that the death penalty is not per se unconstitutional, courts have repeatedly remarked that “death is different” and, subsequently, have placed significant procedural and substantive safeguards on capital trials. As such, interpretation and application of the Eighth Amendment have not been static.

Since the Court first struck down the states’ death penalty schemes in 1972, the Court has placed numerous limitations on capital trials based on procedural grounds. For instance, the Court has remarked that the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner,” but instead should be imposed consistently and fairly. When the Court constitutionally restored the death penalty in 1976, it upheld the use of a “bifurcated” system to determine separately the issues of culpability and sentencing and provided that a trier of fact must consider the character of the defendant and the circumstances of the crime when deciding whether to impose the death penalty. Also, the Court has mandated that triers of fact consider relevant mitigating factors, particularly any “compassionate or mitigating factors stemming from the diverse frailties of humankind” to promote “individualized

24. Id.
26. Gregg, 428 U.S. at 177-78.
27. Gardner v. Florida, 430 U.S. 349, 357 (1977) (“[D]eath is a different kind of punishment from any other which may be imposed in this country.”); see also Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (remarking that death is unique in, among other things, its “total irrevocability,” and its “rejection of rehabilitation”).
29. Gregg, 428 U.S. at 188.
30. Id. at 195.
31. Id. at 207.
32. Id. at 195 (remarking that a bifurcated system sufficiently reduces the arbitrary and capricious application of the death penalty).
33. Id at 189, 195.
sentencing” among offenders. In 1978, the Court broadened the “individualized offender” concept by requiring that states permit defendants to submit for consideration all evidence that may mitigate against a death sentence to avoid “the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” The Lockett v. Ohio Court defined a mitigating factor as “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Then, in 1989, the Court held that a jury must have the opportunity to consider mental retardation as a specific mitigating factor.

The heart of the Eighth Amendment also includes permissible substantive limitations, and the Court has responded by narrowing the class of individuals who are eligible for the death penalty. For example, some punishments cannot be inflicted regardless of the heinous nature of the crime committed. In addition, the Court requires the existence of aggravating factors to justify “the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”

Moreover, after the Court sustained the use of capital punishment in 1976, the Court immediately began adopting categorical exclusions from application of the death penalty. For instance, the death penalty is inappropriate for certain crimes, leaving the crime

36. Id. at 604.
37. Penry v. Lynaugh, 492 U.S. 302, 340 (1989). Despite a conservative majority now sitting on the Court, recent decisions have continued to add a plethora of procedural protections as required by other constitutional provisions. See, e.g., Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002) (holding that the constitutional stricture of the right to a trial by jury leaves the factfinder with the decision of determining whether aggravating factors exist in favor of the death penalty); Shafer v. South Carolina, 532 U.S. 36, 51 (2000) (concluding that due process constraints require that a jury be informed that the defendant is ineligible for parole in cases in which the only alternative to a death sentence is life without parole). In South Carolina, this latter decision has since been codified. See 2002 S.C. Acts 278.
38. See, e.g., Weems v. United States, 217 U.S. 319, 370 (1910) (suggesting in dictum that some forms of punishment, such as disemboweling alive or beheading and quartering, constitute cruel and unusual punishment).
39. Zant v. Stephens, 462 U.S. 862, 877 (1983); see also S.C. CODE ANN. § 16-3-20(C)(a)(1)-(11) (Law. Co-op. 2001) (listing specific aggravating circumstances, at least one of which must be proved beyond a reasonable doubt before a death sentence may be imposed).
41. See, e.g., Enmund v. Florida, 458 U.S. 782, 788 (1982) (concluding that the imposition of the death penalty on a non-participant in a felony murder is cruel and unusual punishment), modified, Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that the death penalty was not cruel and unusual in cases involving “major
of murder as the traditional death-eligible crime.\textsuperscript{42} In addition, states cannot enact mandatory death sentencing schemes\textsuperscript{43} or impose the death penalty upon defendants younger than age sixteen.\textsuperscript{44} The Court has also abolished the imposition of the death penalty upon insane persons\textsuperscript{45} because of the "natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity."\textsuperscript{46} The Court in Atkins v. Virginia created yet another categorical exemption when it shifted mental retardation from a mitigating factor that juries were required to consider to an absolute exclusion.\textsuperscript{47} However, before detailing this shift, a discussion of background information on a defendant's mental status is necessary.

\textit{C. Mental Status and the Death Penalty}

Historically, criminal defendants who suffer from varying degrees of mental degradation have enjoyed special status under the law. For instance, "lunatics" and "idiots"\textsuperscript{48} were excluded from the death penalty or from responsibility for the crime itself,\textsuperscript{49} and tests were

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\textsuperscript{42} Murder is the only crime under South Carolina law that is eligible for the death penalty, see S.C. Code Ann. § 16-3-20(A) (Law. Co-op. 1976), and is defined as the "killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (Law. Co-op. 1976). But see State v. Wilson, 685 So. 2d 1063, 1073 (La. 1996) (upholding as constitutional a statute that provides for the imposition of the death penalty on an individual convicted of raping a child less than twelve years of age), cert. denied sub nom. Bethley v. Louisiana, 520 U.S. 1259 (1997).


\textsuperscript{44} Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion); cf. Stanford v. Kentucky, 492 U.S. 361, 369-73 (1989) (holding that the execution of defendants ages sixteen and seventeen is not cruel and unusual and does not violate "evolving standards of decency"). The United States Supreme Court, in a 5-4 decision, recently denied a writ of habeas corpus to enjoin the execution of a defendant who was under the age of eighteen at the time he committed the offense. In re Stanford, 123 S. Ct. 472 (2002). The South Carolina Supreme Court has upheld the imposition of the death penalty upon a defendant who was sixteen at the time the crime was committed. State v. Conyers, 326 S.C. 263, 266, 487 S.E.2d 181, 183 (1997).

\textsuperscript{45} See Ford v. Wainwright, 477 U.S. 399, 416 (1986); see also S.C. Code Ann. § 17-24-10 (Law. Co-op. 2001) (prohibiting execution of persons who are insane at the time of commission of the crime).

\textsuperscript{46} Ford, 477 U.S. at 409.

\textsuperscript{47} 122 S. Ct. 2242, 2251 (2002).

\textsuperscript{48} Penry v. Lynaugh, 492 U.S. 302, 331-32 (defining "idiot" as one "who had a total lack of reason or understanding, or an inability to distinguish between good and evil").

\textsuperscript{49} Id. at 331.
developed over time to distinguish them from “normal” people.\textsuperscript{50} Previously, people falling into either of these two common law categories were likely to be classified as either “profoundly” or “severely” retarded pursuant to the American Association on Mental Retardation’s (AAMR) degree classification\textsuperscript{51} and, accordingly, were exempt from capital punishment.\textsuperscript{52} The AAMR no longer adheres to this system of classification, and individuals falling below the threshold of mental retardation are simply considered mentally retarded.\textsuperscript{53}

Despite special treatment of defendants suffering from mental infirmities, in 1989, the Court refused to recognize mental retardation as a categorical exclusion and held that such executions were not unconstitutional because a “national consensus” had not yet evolved against them.\textsuperscript{54} The Court contended that legislation is the primary source to which it looks to determine whether a practice is cruel and unusual and, at the time, only two states, Georgia and Maryland, had enacted provisions prohibiting the execution of the mentally retarded.\textsuperscript{55} The Court also noted that although “severely” or “profoundly” mentally retarded individuals may be completely relieved from criminal responsibility,\textsuperscript{56} not all who suffer from mental retardation lack the “cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.”\textsuperscript{57} Although the Court did not create a new categorical exemption, it nevertheless required that a jury be allowed to “consider and give effect to any mitigating evidence relevant to a defendant’s background and character or the circumstances of the crime,”\textsuperscript{58} which must include evidence of mental retardation to ensure the death penalty is “the appropriate punishment in a specific case.”\textsuperscript{59}

\begin{flushright}
50. Atkins, 122 S. Ct. at 2260 (Scalia, J., dissenting) (noting tests that included an individual counting “twenty pence” or identifying his mother or father).
51. Penry, 492 U.S. at 333.
52. Id. at 331.
55. Penry, 492 U.S. at 334.
56. Id. at 337.
57. Id. at 338.
58. Id. at 328.
59. Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).
\end{flushright}
III. *Atkins v. Virginia*

Since the Court's decision in *Penry v. Lynaugh*, sixteen additional states have enacted legislation barring the execution of the mentally retarded. With this legislative backdrop, in March 2001 the Supreme Court granted certiorari in a North Carolina case to determine the constitutionality of executing the mentally retarded. However, the Court dismissed the case as moot after North Carolina joined a rapidly-growing number of jurisdictions barring the execution of the mentally retarded. Nevertheless, consideration of the issue became ripe once again in a Virginia case, and the Court granted certiorari to consider *Atkins v. Virginia*.

A. Facts

Daryl Atkins was sentenced to death for the 1996 abduction and murder of Eric Nesbitt. After spending the day drinking alcohol and smoking marijuana, Atkins and a co-defendant abducted Nesbitt from a convenience store and forced him to withdraw money from an automated teller machine. Atkins then shot Nesbitt eight times, killing him. As part of a plea agreement to avoid the death penalty, Atkins' co-defendant testified that Atkins was the triggerman.

During the first penalty phase, Dr. Nelson, a forensic psychologist, testified on behalf of the defense that Atkins was "mildly mentally retarded," basing his opinion upon interviews with people who knew Atkins, a review of school and court records, and administration of the Wechsler Adult Intelligence Scales test. The test indicated that Atkins possessed an IQ score of fifty-nine. The defense expert concluded that Atkins' score placed him in the less than one percentile of the general population, making him eligible to receive Social Security disability income. He further stated that the

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65. Atkins, 122 S. Ct. at 2244. Atkins' first death sentence was overturned in 1999 because of a defective jury verdict form, but a second jury subsequently sentenced him to death. Id. at 2259 (Scalia, J., dissenting).
66. Id. at 2244.
67. Id.
68. Id. n.1.
69. Id. at 2245.
70. Atkins, 122 S. Ct. at 2245.
71. Id. at 2245 n.5.
score was not an "aberration, malingered result, or invalid test score."\textsuperscript{72}

Dr. Nelson testified again for the defense during the second penalty phase.\textsuperscript{73} However, the prosecution offered a rebuttal witness, Dr. Samenow, who testified that Atkins was not mentally retarded and concluded that Atkins possessed "average intelligence, at least" and suffered from antisocial personality disorder.\textsuperscript{74} His opinion was based on two interviews with Atkins, interviews with correctional staff, and a review of school records.\textsuperscript{75} Although he did not administer an IQ test, he did pose questions from the 1972 version of the Wechsler Memory Scale.\textsuperscript{76} Dr. Samenow blamed Atkins’ poor academic record on Atkins’ willful refusal to perform in school.\textsuperscript{77}

\textbf{B. Reasoning}

Overruling \textit{Penry v. Lynaugh}’s holding from just thirteen years ago,\textsuperscript{78} Justice Stevens, writing for the 6-3 majority, held that the imposition of the death penalty upon mentally retarded defendants violated the Cruel and Unusual Punishments Clause of the United States Constitution and, therefore, was unconstitutional.\textsuperscript{79} In rejecting the "right and wrong" standard,\textsuperscript{80} the majority created a new categorical exemption to the death penalty.\textsuperscript{81}

The Court principally based its reasoning on an emerging legislative trend of prohibitions against such executions.\textsuperscript{82} The legislative action by sixteen additional states\textsuperscript{83} since the Court’s decision in \textit{Penry},\textsuperscript{84} as well as the United States’ increasingly isolated position toward the use of the death penalty in these situations,\textsuperscript{85} reflected the “evolving standards of decency that mark the progress of

\begin{itemize}
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 2246.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at 2246 n.6.
\item \textsuperscript{76} Atkins, 122 S. Ct. at 2246 n.6.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} 492 U.S. 302 (1989).
\item \textsuperscript{79} Atkins, 122 S. Ct. at 2252.
\item \textsuperscript{80} Id. at 2250 (noting defendants with mental retardation “frequently know the difference between right and wrong and are competent to stand trial”).
\item \textsuperscript{81} Id. at 2251.
\item \textsuperscript{82} Id. at 2248-50.
\item \textsuperscript{83} Id. at 2248-49.
\item \textsuperscript{84} 492 U.S. 302 (1989).
\item \textsuperscript{85} Atkins, 122 S. Ct. at 2250 n.21.
\end{itemize}
a maturing society” against such executions. Because of the numerous legislative prohibitions, especially in light of the well-known popularity of anticrime legislation, the Court held execution of the mentally retarded “truly unusual.” The Court reinforced its decision by citing public opinion polls and amici briefs from groups such as the American Psychological Association, the United States Catholic Conference, and other groups that expressed moral sentiment against executing the mentally retarded. The Court noted the “world community” overwhelmingly disfavored such practices.

The Court also included other reasons why such executions should be barred. First, it stated that the mentally retarded do not act with the same level of “moral culpability” because of their inability to control their reasoning, judgment, or impulses. The Court explained that two objectives of the death penalty—retribution and deterrence—do not apply to individuals with diminished intellectual functioning. The retributive aspect of the death penalty, which is ensuring that “only the most deserving of execution are put to death,” is not served when the individual suffers from diminished culpability because an individual receiving “just deserts” depends on his level of culpability. Also, the deterrence goal is not furthered because individuals who lack the cognitive capacity to develop the “cold calculus that precedes the decision” of premeditated murder will not be sufficiently able to alter their conduct in order to conform their behavior to the law.

Further, the Court noted that a mentally retarded defendant’s “reduced capacity” may leave the defendant vulnerable to “false confessions” or to the death penalty being imposed in spite of evidence of mental retardation. A jury may be inclined to impose the death penalty because of the defendant’s mental status. Justice Stevens referred to this possibility as a “two-edged sword,” resulting from the inappropriate effect caused by a defendant’s smiling or perceived lack of remorse while in the presence of the jurors or by a supposed threat

86. Id. at 2247 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)). Justice Stevens noted that it was “not so much the number of these States that is significant, but the consistency of the direction of change.” Id. at 2249 (emphasis added).
87. Id.
88. Id. at 2249 n.21.
89. Id. at 2250 n.21.
90. Atkins, 122 S. Ct. at 2244.
91. Id. at 2252.
92. Id. at 2251.
93. Id.
94. Id. (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).
95. Id. at 2251.
96. Atkins, 122 S. Ct. at 2252.
97. Id. at 2251.
of future danger. Also, the Court stated that a defendant’s disabled communication with counsel would impede the adequacy and quality of representation.

Relying on deference to statutory schemes barring the execution of the mentally retarded, along with the inability of such practices to fulfill the goals of retribution and deterrence, the Court held such executions to be “excessive” and, therefore, violative of the Eighth Amendment. The Court reversed Atkins’ death sentence and remanded the case to the state court for re-sentencing in light of its opinion.

C. Dissenting Opinions

Chief Justice Rehnquist dissented in a separate opinion, in which Justice Scalia joined, challenging the majority’s reliance on international laws and opinion. He criticized the use of polling data and stated that the majority was “seriously mistaken” in its reliance on foreign laws and views of religious and professional organizations.

Justice Scalia, in an opinion in which Chief Justice Rehnquist and Justice Thomas joined, also rejected the Court’s reliance on public opinion polls and its holding founded upon deference to national and international consensus. He stated that the majority was allowing its personal views to be substituted for the popular will of the states as evidenced by legislation rejecting an exemption for the mentally retarded. Justice Scalia questioned the majority’s “trend” analysis because twenty of the thirty-eight death penalty states continued to allow the execution of the mentally retarded. Further, he cautioned that once the Court took the step in prohibiting the execution of the mentally retarded, the states were “locked in” and

98. *Id.* at 2252.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Atkins*, 122 S. Ct. at 2252.
103. *Id.* at 2256.
104. *Id.* at 2259. Disagreeing vehemently with the majority, Justice Scalia also read a summary of his opinion from the bench. Jeff Blumenthal et al., *Death Penalty Ruling Nets Varied Reactions*, THE LEGAL INTELLIGENCER, June 21, 2002, at WL 7/15/2002 Legal Intelligencer 1.
105. *Atkins*, 122 S. Ct. at 2264.
106. *Id.* at 2261.
107. *Id.* at 2264.
108. *Id.* at 2259.
109. *Id.* at 2261.
there could be no turning back in finding such executions constitutional.\textsuperscript{110}

\textbf{D. Significance of Atkins}

\textit{1. Generally}

In creating another categorical exclusion from capital punishment, \textit{Atkins} mandates that a defendant may not be sentenced to death if he or she meets the prosecuting state's definition of mentally retarded.\textsuperscript{111} As a result, executions of some inmates may be delayed, and other inmates will no longer face the death penalty at all.

Since 1976, more than 800 inmates have been executed in the United States,\textsuperscript{112} and it is estimated that as many as forty-four of those were mentally retarded.\textsuperscript{113} The number of inmates currently serving on death row who can plausibly claim mental retardation may be quite large. Empirical studies suggest that as many as three percent of the population at large may suffer from mental retardation,\textsuperscript{114} although that number within the criminal population may be significantly higher.\textsuperscript{115} Currently, more than 3,700 inmates are awaiting execution in the United States,\textsuperscript{116} and as many as 200 of them may suffer from mental retardation.\textsuperscript{117}

Although not explicit, the \textit{Atkins} opinion appears to apply retroactively.\textsuperscript{118} The decision has already demonstrated repercussions

\begin{footnotesize}
\textsuperscript{110} \textit{Id. at 2263.}
\textsuperscript{111} \textit{Atkins, 122 S. Ct. at 2252.}
\textsuperscript{112} Death Penalty Information Center, \textit{Number of Executions by State Since 1976}, \textit{at} http://www.deathpenaltyinfo.org/dpicreg.html (last updated Oct. 9, 2002) [hereinafter DPIC, \textit{Number of Executions}].
\textsuperscript{118} During oral arguments of \textit{Atkins}, a Supreme Court Justice remarked that "[m]aybe the States that haven't made [prohibition against executing the mentally retarded] retroactive haven't gotten up to speed on that once it's -- once we make a declaration of unconstitutionality, it's retrospective." \textit{See United States Supreme Court Official Transcript at 42, Atkins v. Virginia, 122 S. Ct. 2242 (2002) (No. 00-8452).}
\end{footnotesize}
around the country as several executions have been stayed in cases where the inmates raised an Atkins claim.\footnote{After making an Atkins' claim, a Texas inmate's execution was stayed less than four hours before his scheduled execution. Mary Alice Robbins, Some Say Flood of Atkins' Claims Will Slow Executions, TEX. LAW., July 22, 2002, at WL 7/15/2002 Legal Intelligencer 1.} The Supreme Court's decision opened a new avenue of appeal, and, in those states that currently do not bar the execution of the mentally retarded, it will likely spur a significant number of death row inmates to claim mental retardation in order to avoid the death penalty. Inmates are likely to raise claims even if no mental retardation issue was raised in the trial proceedings.

Further, capital defense attorneys at both the trial and appellate levels may raise the issue to protect themselves from disciplinary or malpractice actions. Also, inmates currently awaiting a death penalty trial will probably raise a mental retardation claim to avoid a death sentence and, in some cases, may actually feign mental retardation. However, the American Psychiatric Association argues that successful false claims are unlikely because diagnosis requires onset during the developmental period.\footnote{Brief of American Psychological Association, et al. at 18, McCarver (No. 00-8727).} Nevertheless, the fallout from Atkins likely will result in a flood of appeals and trial claims, overburdening and clogging trial and appellate court dockets as courts attempt to process the huge number of appeals.

2. South Carolina

The Atkins decision named South Carolina as one of five states that have carried out executions of the mentally retarded since the Court's Penry v. Lynaugh\footnote{492 U.S. 302 (1989).} decision.\footnote{Atkins v. Virginia, 122 S. Ct. 2242, 2249 n.20 (2002).} Current South Carolina law treats mental retardation that existed at the time of the crime as merely a mitigating factor;\footnote{S.C. CODE ANN. § 16-3-20(C)(b)(10) (2001).} such an approach is clearly unconstitutional after Atkins. The substantive and procedural aspects of the decision need to be addressed by the South Carolina General Assembly to guarantee that adequate and sufficient safeguards and procedures are put in place to ensure a mentally retarded defendant is not eligible for the death penalty.

The aftermath of Atkins has already been demonstrated in South Carolina. Since the United States Supreme Court first agreed, in 2001, to reconsider executing the mentally retarded,\footnote{See McCarver v. North Carolina, 532 U.S. 941 (2001) (mem.).} the South Carolina
Supreme Court has stayed or continued several capital cases pending decision on the issue. On July 17, 2002, attorneys for seven inmates who either have been sentenced to death or are currently awaiting a death penalty trial filed a petition with the South Carolina Supreme Court, requesting the court to review these cases and to establish substantive and procedural guidelines on the definition of mental retardation and how it is to be determined. On September 19, 2002, the South Carolina Supreme Court granted certiorari, and a response by that court is still pending. Interestingly, on December 4, 2002, several members of the South Carolina House of Representatives introduced a bill that would prohibit execution of the mentally retarded and would establish certain procedures.

The Atkins opinion has particular salience on South Carolina’s application of the death penalty. Since 1976, South Carolina has executed twenty-eight people, and several of those executed allegedly suffered from mental retardation. Currently, seventy-seven people are awaiting execution in South Carolina.

Additionally, the Court noted in Atkins that the existence of retardation may be used as a “two-edged sword” because a jury, instead of viewing retardation as a mitigating factor, may treat it as an aggravating one and impose the death penalty nevertheless because it considers a mentally retarded individual a future danger to society. In his dissent in Penry v. Lyndaugh, Justice Brennan noted such a perspective when he quoted a South Carolina newspaper: “[T]here is

125. For example, the South Carolina Supreme Court granted capital defendant Johnny Ringo Pearson’s motion to continue his trial pending the United States Supreme Court’s review of the constitutionality of executing the mentally retarded. Pearson v. State, No. _____ (S.C. Apr. 16, 2001) (order granting motion to stay) (on file with the Clerk of Court for the South Carolina Supreme Court).


129. DPIC, Number of Executions, supra note 112.


133. Id. at 2251.
all the more reason to execute a killer if he is also . . . retarded. Killers often kill again; [a] retarded killer is more to be feared than a . . . normal killer."¹³⁴

Most importantly, the Court’s decision seriously questions the viability of South Carolina’s “guilty but mentally ill” statute.¹³⁵ The “guilty but mentally ill” statute is an alternative to the traditional “not guilty by reason of insanity” defense, because a jury can choose to reject a defendant’s absolute exculpation for his criminal acts despite a showing of mental illness.¹³⁶ A defendant found to be guilty but mentally ill, unlike one who is found to be insane, is still eligible for the death penalty; as such, not much difference exists in effect between a guilty verdict and a guilty but mentally ill verdict.¹³⁷ The South Carolina Supreme Court has continually upheld the constitutionality of this provision.¹³⁸ However, the court may be signaling a re-thinking in this area in that it recently agreed to rehear an earlier decision upholding the death penalty of a mentally ill person.¹³⁹ It may be argued that the moral culpability reasoning relied

¹³⁵ The “Guilty But Mentally Ill” statute provides, in part:
A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong to recognize his act as being wrong . . . but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.
¹³⁶ See id.
¹³⁷ A defendant found guilty but mentally ill and sentenced to prison time is transferred to a mental health treatment facility until facility staff determine the defendant can be safely integrated into the general prison population. S.C. CODE ANN. § 17-24-70(A) (Law Co-op. 1976).
¹³⁸ See State v. Hornsby, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997) (holding that the statute did not violate the defendant’s due process rights because the statute wasrationally related to the state’s goal of “reduc[ing] the number of defendants being completely relieved of criminal responsibility,” while ensuring that mentally ill defendants received proper mental health care); see also State v. Wilson, 306 S.C. 498, 512, 514, 413 S.E.2d 19, 27, 28 (1992) (upholding the statute on federal and state constitutional grounds despite the fact that a defendant may lack the capacity to conform his behavior in order to comply with the law), cert. denied, 506 U.S. 846 (1992). However, a dissenter in Wilson noted that “[t]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still valid today.” Id. at 517, 413 S.E.2d at 30 (Finney, J., dissenting).
¹³⁹ State v. Weik, No. 25526, 2002 S.C. LEXIS 159 (S.C. Sept. 3, 2002), reh’g granted, 2002 S.C. LEXIS 197 (S.C. Oct. 10, 2002). In Weik the court had found that, although it is unconstitutional to impose the death penalty upon a mentally retarded person in light of Atkins, “the imposition of such a sentence upon a mentally ill person is not disproportionate.” Id. at *13 (citation omitted).
upon by the Atkins Court as a basis for prohibiting the execution of those suffering from diminished culpability would also hold true in the case of a mentally ill defendant.

IV. IMPLEMENTATION OF ATKINS IN SOUTH CAROLINA

A. Current Law in South Carolina

Currently, South Carolina law does not prohibit the execution of the mentally retarded.140 Three years after the Penny v. Lynaugh Court's decision to uphold such executions,141 South Carolina amended its death penalty statute to provide that a jury may consider mental retardation that existed at the time of the crime as merely a mitigating factor for assessing whether to impose the death penalty.142 The statute defines “mental retardation” as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.”143 The statute neither offers a numerical IQ level nor defines “adaptive behavior.”

South Carolina law provides for certain mitigating factors, including mental retardation, which are authorized by statute.144 If a statutory mitigating factor, or any other factor authorized by law, is supported by the evidence, statutory instructions must be charged to the jury in writing for use during its deliberations.145 No “articulated burden” is imposed upon the defendant to prove evidence of mitigating factors.146

After the trial court has initially found evidence to support a finding of mitigation, the defendant may waive the presentation of those factors he wishes the jury not to consider, or he may request the submission of additional statutory mitigating factors supported by the

143. Id. (emphasis added). This definition is consistent with the definition of mental retardation in other South Carolina statutes; see, e.g., S.C. CODE ANN. § 44-20-30(11) (Law. Co-op. 2002) (including the mentally retarded as eligible to receive certain disability services); S.C. CODE ANN. § 44-26-10(11) (Law. Co-op. 2002) (providing for certain rights on behalf of the mentally retarded).
145. S.C. CODE ANN. § 16-3-20(C) (Law Co-op. 2001).
The finding of mitigation by the jury does not need to be unanimous, and the jury is authorized to impose life even without a finding of mitigation. Instructions are not required to charge the jury to "weigh" the aggravating circumstances against any mitigating factors.

Consequently, under current South Carolina law, a mentally retarded defendant could receive the death penalty if any of the listed, statutory aggravating factors are found, and the mental retardation issue is appropriately considered by the trier of fact.

B. Issues Raised by Atkins

In light of Atkins prosecutors will likely not seek the death penalty in cases where strong evidence of mental retardation is presented. Those individuals falling within the borderline of retardation will be the most difficult to decide, and a finding of mental retardation will likely turn on the state's definition of mental retardation.

1. Definition of "Mental Retardation"

The Supreme Court in Atkins left it up to the states to formulate their own definition of mental retardation. Although the Court did not explicitly adopt a particular definition, in a footnote it did rely on a standard used by both the AAMR and the American Psychiatric Association (APA). AAMR's recently reformulated definition provides that mental retardation is a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive

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152. In the 1992 version that the Atkins Court relies upon, AAMR defined mental retardation as "substantial limitations in present functioning ... characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more ... adaptive skill areas." Id. at 2245 n.3 (citing MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (emphasis added). The Court has relied on AAMR's definition in previous cases as well. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 308 n.1 (1989) (citing to AAMR's definition of mental retardation); City of Cleburne v. Cleburne LivingCtr., Inc., 473 U.S. 432, 442 n.9 (1985) (discussing AAMR's classification system of the mentally retarded).
skills.”[153] The APA’s definition is similar, defining mental retardation as “significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two . . . skill areas.”[154] Both definitions require that the onset of mental retardation manifests before age eighteen.[155]

In measuring intellectual functioning, the Wechsler Adult Intelligence Scales test (WAIS-III) is the standard instrument used today to assess cognitive functioning.[156] The individual’s IQ is scored by “adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score.”[157] The scale ranges from 45 to 155, with a mean of 100 indicating average intellectual functioning.[158]

However, determining the defendant’s IQ score is only a starting point. The second part in defining mental retardation is to ascertain whether the individual has difficulty coping with everyday skills.[159] The AAMR defines “adaptive behavior” as “the collection of conceptual, social, and practical skills that people have learned so they can function in their everyday lives,” which includes reading and writing, self-esteem, eating, dressing, taking medication, and managing money.[160] The APA definition lists nine areas of life skills, which include the following: “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.”[161] No one life skill area is singularly important, and the APA provides that a deficiency must exist in at least two of the areas.[162] Most importantly, and consistent with the current definition in South

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153. American Association on Mental Retardation, Definition of Mental Retardation, at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last updated July 29, 2002) [hereinafter AAMR, Definition]. One change in the modified definition was to make more distinct the scope of “limitations in adaptive skill areas” and to specify the “developmental period” age range. See Brief of American Association on Mental Retardation et al. as Amici Curiae in Support of Petitioner at 14 n.18, McCarver v. North Carolina, cert. granted 532 U.S. 941 (2001), and cert. dismissed 533 U.S. 975 (2001) (No. 00-8727).


155. Id. (citations omitted).

156. Id. at 2245 n.5.

157. Id. (citing A. KAUFMAN AND E. LICHTENBERGER, ESSENTIALS OF WAIS-III ASSESSMENT 60 (1999)).

158. Id.

159. AAMR, Definition, supra note 153.

160. Id.


162. Id.
Carolina's death penalty statute, deficient adaptive behavior must accompany subaverage intellectual functioning.\(^{163}\)

Finally, to meet the definition of mentally retarded, subaverage intellectual functioning and the concurrent inability to cope with at least two of the above-named life skill areas must manifest before adulthood, typically before age eighteen.\(^{164}\) However, some jurisdictions have extended the developmental period to age twenty-two.\(^{165}\)

2. Procedural Issues

The \textit{Atkins} Court did not establish any clear standards of proof or other evidentiary issues, leaving it up to the states to develop standards and procedures to determine who is exempt from execution, who bears the burden of proof, at what stage the determination is to be made, and other evidentiary issues.\(^{166}\) Nothing in the Court’s opinion gave any indication of what minimum due process requirements must be satisfied to comport with its decision, and existing specific procedural requirements vary from state to state. The following is a discussion of discretionary procedural areas to be resolved as a result of \textit{Atkins}.

\textit{a. Who Should Determine If Retardation Exists?}

In those states that currently prohibit executing the mentally retarded, differences exist in who is to decide if the defendant is mentally retarded. Most states provide that it is a judge who should make the principal determination.\(^{167}\) In contrast, one state, Georgia, has left the issue as a matter properly belonging solely to a jury.\(^{168}\) The jury, acting alone, is to decide if the defendant is mentally retarded,\(^{169}\) and the role of the trial judge is to provide the jury with instructions on how to consider the issue of mental retardation.\(^{170}\)

Still other states provide for a variation and allow both the judge and the jury to contribute to the determination.\(^{171}\) For instance, a judge would initially screen to decide if mental retardation exists, but a jury may also make an independent determination of the issue. This

\(^{163}\) Id.
\(^{164}\) Id.
\(^{166}\) See 122 S. Ct. 2242, 2250 (2002).
\(^{167}\) E.g., KAN. STAT. ANN. § 21-4623(a) (1995).
\(^{168}\) GA. CODE ANN. § 17-7-131(b)(1) (1997).
\(^{169}\) Id.
\(^{171}\) E.g., FLA. STAT. ANN. § 921.137(6) (West 2002).
approach has been advocated by both death row inmates and capital
defense attorneys172 and would follow the traditional state practice of
allowing the judge to make the initial determinations of whether
mental retardation exists, such as is done with constitutionality of
confessions173 and admissibility of expert testimony,174 but then let a
jury ultimately decide the mental retardation issue.175 However, the
South Carolina Attorney General’s Office has rejected this approach,
and has instead proposed a pre-trial hearing procedure in which the
trial judge makes an independent determination of whether mental
retardation exists; therefore, the issue is never presented to a jury.176

Even if the defendant does not serve notice of a mental retardation
claim, a judge nevertheless may order, sua sponte, that a defendant
undergo mental retardation testing.177 Analogous to other mentally-
related determinations, a trial judge has the authority, pursuant to
statutory law, to order a defendant to undergo a psychiatric
examination in order to see if the defendant is competent to stand
trial,178 even if the defendant fails to request such an examination.179

Finally, most states provide that, even if a judge determines that
the defendant is not mentally retarded and, thus, eligible to receive
the death penalty, the defendant is not precluded from submitting evidence
of mental retardation as a mitigating factor during the sentencing
phase.180 However, under Atkins, a determination of retardation by
either the judge, as a pre-trial matter, or a jury would automatically
disqualify the defendant from receiving the death penalty.

Regardless of which approach garners the necessary support, a
proposed approach may have to be drafted in consideration of the
United States Supreme Court’s recent decision of Ring v. Arizona.181

cert. granted Sept. 19, 2002) (on file with the Clerk of Court of the South Carolina
Supreme Court). In effect, this approach offers the defendant “two bites” in avoiding
the death penalty.
175. Brief of Petitioner, Franklin (No. ____).
176. Respondents’ Response to Petition for Writ of Certiorari at 8, Franklin v.
Maynard, No. _____ (S.C. cert. granted Sept. 19, 2002) (on file with the Clerk of Court
for the South Carolina Supreme Court).
(stating that the defendant’s mental competency to stand trial is a “baseline inquiry
by the court”).
180. E.g., N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 2001) (providing that a
finding of no mental retardation “shall not restrict the defendant’s opportunity
to introduce such evidence at the sentencing proceeding or to argue that that evidence
should be given mitigating significance”).
In validating Arizona’s statutory scheme, which provided that only the judge determines the existence of aggravating factors necessary to find the defendant death-eligible, the Ring Court held the provision as violative of the defendant’s Sixth Amendment right to a trial by jury.\(^{182}\) However, it may be argued that Ring’s holding may not apply when assessing a defendant’s mental retardation status because Ring applied narrowly to aggravating factors that may enhance a defendant’s sentence and not to mental status.\(^{183}\) Ring also left in doubt those statutory schemes that allow juries to issue advisory sentences over which the trial judge has discretion to overrule.\(^{184}\)

In addition to the problems that may result from Ring, practical considerations of having a jury solely determine mental retardation need to be considered. For instance, what effect will “bad” evidence have on juries that must decide whether a defendant is mentally retarded and, therefore, not deserving to die for his or her crime?\(^{185}\) Out of an urge to punish, a jury may ignore credible evidence of the defendant’s mental state and find the defendant eligible for the death penalty. Further, additional constitutional strictures required by capital trials, such as expanded voir dire,\(^{186}\) may be easily avoided if the issue is never presented to a jury. For instance, courts may find it necessary to extend voir dire in order to allow a capital defendant to strike prospective jurors who do not believe mental retardation should preclude imposition of the death penalty.

Despite statutes that direct a judge to make the determination, most states also employ a statutory mitigation approach.\(^{187}\) For instance, even though a judge finds that the defendant is not mentally retarded, a defendant may still introduce evidence of his diminished intellectual functioning and offer it for consideration as a mitigating factor against the death penalty.\(^{188}\) In light of case law requiring the jury to consider all relevant mitigating factors,\(^{189}\) a state may be

\(^{182}\) Id. at 2443.

\(^{183}\) Id.

\(^{184}\) Id. n.6.


\(^{186}\) See, e.g., Turner v. Murray, 476 U.S. 28, 36-37 (1986) (requiring states to permit voir dire regarding racial prejudice in capital cases involving interracial crimes).

\(^{187}\) E.g., ARIZ. REV. STAT. ANN. § 13-703.01(G) (West 2002).

\(^{188}\) E.g., N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 2001) (providing that a finding of no mental retardation “shall not restrict the defendant’s opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance”).

obliged to allow a jury to consider the evidentiary support of mental retardation regardless of any statutory language providing otherwise.

b. When Is the Determination to Be Made?

Another crucial issue concerns at what stage of the proceedings the decision of mental retardation is to be made, thereby precluding imposition of the death penalty. This procedure would differ depending on who makes the determination. Assuming the decision is to be made by a judge who is not also acting as the trier of fact, the determination may be made at one of three different stages of the trial.

First, a judge may decide if mental retardation exists as a pretrial matter considered with other motions submitted by the attorneys. In those states that provide for a pure judicial determination of the defendant’s mental retardation status, most provide that the decision is a pre-trial issue for the judge.190

Second, several states provide that the trial judge must specify whether the defendant is mentally retarded at a pre-sentencing hearing.191 Under this approach, once a jury has rendered a guilty verdict, but before the sentencing phase begins, the defense may submit a motion raising an Atkins issue. The judge decides the mental retardation claim after both parties have rested their cases. Each case-in-chief would include the presentation of expert testimony in support of or in rebuttal to the claim. If the judge determines that the defendant is in fact mentally retarded, then the state must remove the death penalty from consideration. Finally, a few states provide that the determination is made by the trial court during the sentencing phase of the trial.192

If it is a jury who is to make the determination, resolution of the claim may also occur in one of three ways. First, a separate jury may be impaneled (before or after the guilt phase) to determine only the issue of mental retardation. No facts of the case, or heinous nature of the crime, may be presented so as to prevent the jury from ignoring the merits of the defendant’s claim and deciding the case solely on prejudicial feelings toward the defendant. The issue is to be determined solely by the jury with the trial judge only acting as a gatekeeper in regard to the admissibility of relevant evidence and expert testimony. However, prosecutors are likely to disfavor any exclusion of the facts because it may limit them from showing how

190. E.g., COLO. REV. STAT. ANN. § 16-9-402(1) (West 2001).
191. See KAN. STAT. ANN. § 21-4623(a) and (b) (1994); NEB. REV. STAT. ANN. § 28-105.01(5) (Michie 1998); N.M. STAT. ANN. § 31-20A-2.1(C) (Michie 2001).
192. E.g., ARK. CODE ANN. § 5-4-618(d)(2) (Michie 1987); CONN. GEN. STAT. ANN. § 53a-46a(h)(2) (West 2001).
detailed the planning aspects of the crime are to rebut the defendant’s claim of mental impairment. Further, the option of two separate juries—one to determine if the defendant is mentally retarded and one to decide guilt or innocence—may not be practical given the inefficiency and lack of judicial economy that is perpetuated if the same set of facts must be presented on two separate occasions. Further, due process concerns may be implicated in cases where a defendant wishes to present evidence of mental retardation to show that he or she was incapable of forming the requisite mens rea of the crime charged.193

A second option in cases of jury determinations is to allow the jury to decide if mental retardation exists as a special form of the verdict. For instance, Georgia law provides for a separate “guilty but mentally retarded” verdict option for the jury to consider during the guilt or innocence phase.194

Another alternative approach is to have the jury consider the issue during deliberations in the sentencing phase. Florida law provides that a jury may issue an advisory sentence of death that the judge may or may not accept,195 although this approach may not be valid after the Court’s decision in Ring v. Arizona.196 Finally, nothing should preclude statutory language that permits a defendant to elect to have a judge, instead of a jury, decide the issue upon written agreement by the parties and with the court’s permission.

In adopting either approach, a related issue concerns at what point a defendant is precluded from raising an Atkins claim. Due process concerns may require a flexible approach, such as when a defendant has recently been appointed defense counsel and the counsel does not know the defendant well enough to make a valid claim. However, analogous to the insanity procedures discussed in Ford v. Wainwright,197 a state may be allowed to impose reasonable time limits for raising a claim of mental retardation.

c. Who Bears the Burden of Proof?

Another issue left open to the states is which party should bear the burden of proving a mental retardation claim. Similar to the issues of

193. See, e.g., State v. Cowan, 861 P.2d 884, 888 (Mont. 1993) (providing by statute that such evidence is admissible).
197. See 477 U.S. 399, 417 (noting that “legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided”).
sanity\textsuperscript{198} and competency,\textsuperscript{199} the state should not be required to prove that the defendant did not suffer from mental retardation; in other words, mental retardation should not be presumed. One approach is to allow for a rebuttable presumption of mental retardation when the defendant has tested at a certain threshold level of intellectual functioning as measured by an IQ test.\textsuperscript{200} For example, if the defendant scores a seventy on an IQ test, then the burden would shift to the prosecution to show that the defendant is not mentally retarded. This approach is similar to South Carolina's incompetency procedure whereby, once the defendant is found incompetent, the burden shifts to the prosecution to show that the defendant has been restored to competency.\textsuperscript{201}

\textit{d. What Is the Proper Standard of Proof?}

The majority of states that have already prohibited the execution of the mentally retarded require that mental retardation be shown by a preponderance of the evidence.\textsuperscript{202} Five states have adopted a clear and convincing standard,\textsuperscript{203} while only one state uses the more stringent, beyond a reasonable doubt standard.\textsuperscript{204} In a similar manner, South Carolina law provides that the defendant must show that he or she was either mentally ill\textsuperscript{205} or incompetent by a preponderance of the evidence.\textsuperscript{206}

\begin{itemize}
\item \textsuperscript{198} See S.C. CODE ANN. § 17-24-10(B) (Law Co-op. 2001).
\item \textsuperscript{200} See, e.g., ARK. CODE ANN. § 5-4-618(a)(2) (Michie 1987) (treating an IQ of sixty-five or below as a rebuttable presumption of mental retardation).
\item \textsuperscript{201} State v. Singleton, 313 S.C. 75, 87, 437 S.E.2d 53, 60 (1993).
\item \textsuperscript{202} See, e.g., TENN. CODE ANN. § 39-13-203(c) (1997) (providing that the burden of proof is on the defendant to prove mental retardation by a preponderance of the evidence).
\item \textsuperscript{203} See ARIZ. REV. STAT. ANN. § 13-703.02(G) (West 2002); IND. CODE ANN. § 35-36-9-4(b) (Michie 1998); COLO. REV. STAT. ANN. § 18-1.3-1102 (West 2002); FLA. STAT. ANN. § 921.137(4) (West 2003); N.C. GEN. STAT. § 15A-2005(C) (2001).
\item \textsuperscript{204} See GA. CODE ANN. § 17-7-131(c)(3) (1997); see also Williams v. State, 455 S.E.2d 836, 838 (Ga. 1995) (refusing to invalidate the "beyond a reasonable doubt" standard as violative of due process).
\item \textsuperscript{205} S.C. CODE ANN. § 17-24-20(B) (Law Co-op. 2001).
\item \textsuperscript{206} State v. Nance, 320 S.C. 501, 504, 466 S.E.2d 349, 351 (1996); see also Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (concluding that requiring the defendant to prove incompetence by clear and convincing evidence violates due process).
\end{itemize}
V. RESPONSE AFTER *ATKINS*

A. Proposal

First of all, the state legislature and not the courts should be the proper venue for change, although resolution of the practical implications of the Court’s decision will take place in both the legislatures and courtrooms. However, in crafting a response to *Atkins*, the state legislatures and courts should not cut constitutional corners by erecting procedural barriers to circumvent compliance with the *Atkins* mandate that the capital punishment of the mentally retarded is barred. However, assurances should also be enacted to guard against clearly frivolous claims. One possible approach to counteract unmerited claims is to treat the defendant as waiving a sua sponte judicial inquiry into his mental retardation if he attempts to pursue a clearly frivolous retardation claim.

Following a rigorous pre-trial hearing, it should be the duty of the trial judge to act as the gatekeeper of expert testimony and as the determining authority of whether the defendant is mentally retarded. Similar to judicial authority concerning competency determinations, a judge should be the sole decision-maker as to whether the issue of the existence of mental retardation raises to such a level as to preclude consideration of the death penalty by the trier of fact. Although *Ring v. Arizona* held that it is a jury (or a judge if he or she is acting as the trier of fact) that must find the facts necessary to determine if a defendant is death-eligible, examining a defendant’s mental state is more similar to interpretations used in categorical exclusions, such as incompetency, in which the court makes the determination. In addition, the promotion of judicial economy and the potential for jury bias lend support toward only the judge making the determination. This approach guards against an impassioned jury’s arbitrary findings. Further, if the judge makes the ultimate decision at the outset of the trial that the defendant is mentally retarded, thereby negating the death penalty option, the additional constitutional strictures of a capital trial are avoided. Based on the foregoing reasons, the judge is better able to render an appropriate determination of a defendant’s mental retardation status. Even if a jury has the sole power to assess the defendant’s mental retardation, a judge should possess the discretion

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207. A judge has sole authority to determine if the defendant is competent to stand trial. See S.C. CODE ANN. § 44-23-410 (Law Co-op. 1976).
209. See also Harris v. United States, 122 S. Ct. 2406, 2410 (2002) (remarking that “not all facts affecting the defendant’s punishment are elements” of the crime).
to raise the defendant’s mental status in absence of the defense counsel’s failure to do so.\textsuperscript{210} The burden of proof is upon the State to prove that the defendant is guilty beyond a reasonable doubt. However, the burden of proving the existence of mental retardation should be upon the defendant to prove by a preponderance of the evidence that he or she was mentally retarded, as defined in the statute, at the time he or she committed the crime. Further, it should be presumed that the defendant did not suffer from mental retardation. This standard is favored in a pronounced number of jurisdictions\textsuperscript{211} and is in accord with other mental status determinations, such as insanity,\textsuperscript{212} mental illness,\textsuperscript{213} and competency.\textsuperscript{214} However, if the defendant fails to prove retardation by the appropriate standard, nothing should preclude the defendant from submitting his mental state as a mitigating circumstance to be considered by the jury during its deliberations.

\textbf{B. South Carolina House Bill 3165}

On December 9, 2002, several members of the South Carolina House of Representatives pre-filed House Bill 3165, a bill that would, among other things, prohibit the execution of the mentally retarded and establish certain procedures for responding to \textit{Atkins} claims.\textsuperscript{215} Specifically, the bill would require a defendant to prove the existence of mental retardation by clear and convincing evidence.\textsuperscript{216} The determination would be made by a judge at a pre-trial hearing upon the defendant’s own motion.\textsuperscript{217} The bill retains the definition of “mental retardation” as provided in the current death penalty statute, but defines diminished intellectual functioning as “an intelligence quotient of seventy or below,” which appears to establish a non-rebuttable presumption of mental retardation.\textsuperscript{218}

If the defendant is found to suffer from mental retardation, upon conviction he or she would be sentenced to life imprisonment.\textsuperscript{219}

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211. See, e.g., \textit{Tenn. Code Ann.} § 39-13-203(c)(1997) (providing that the “burden of production and persuasion to demonstrate mental retardation ... is upon the defendant”).
212. See \textit{S.C. Code Ann.} § 17-24-10(B) (Law Co-op. 2001).
216. \textit{Id.} The “clear and convincing” standard provided for in the bill’s language may pose constitutional problems as discussed above. \textit{See supra} note 206.
217. H.R. 3165.
218. \textit{Id.} (emphasis added).
219. \textit{Id.}
\end{flushleft}
However, if the judge finds that the defendant is not mentally retarded, the defendant may nevertheless present evidence of “diminished capacity” as a mitigating factor during sentencing. The bill’s language is likely to change substantially as it moves through the political process.

VI. CONCLUSION

The categorical exemption from the death penalty that the United States Supreme Court created in Atkins forms a new substantive constitutional guarantee that is likely to be litigated and refined in the courts for years to come. The South Carolina courts should not intervene in establishing any new substantive guidelines, particularly with respect to cases that have not been litigated, until the legislature has acted. However, this approach may already be defeated because the South Carolina Supreme Court recently granted certiorari to review pending and litigated cases involving Atkins claims.

Notwithstanding the court’s response, the South Carolina General Assembly must quickly take adequate steps to secure compliance with the constitutional strictures of Atkins, while simultaneously ensuring that potential capital defendants cannot manipulate the criminal justice and mental health processes. Any legislation enacted will most likely be challenged in the courts. When that occurs, South Carolina courts should defer to the legislature and refrain from an ad hoc approach in creating constitutional patches to a death penalty scheme that attempts to balance the needs of the criminal justice system with a defendant’s constitutional right to a fair trial. Despite this interaction, the federal courts will have the final word in deciding the application and scope of the Atkins holding and in ensuring that the class of individuals eligible for the death penalty is sufficiently narrowed in order to comply with the U.S. Supreme Court’s holding in Atkins.

Other important issues, such as the effect of Atkins on retroactivity analysis, ex post facto concerns, post-conviction procedures, and habeas corpus issues, do not fall within the purview of this Comment, but will need to be addressed by the legislature, the courts, and constitutional commentators.

Sue Ann Gerald Shannon

220. Id. Although South Carolina does not recognize the doctrine of “diminished capacity,” see Gill v. State, 346 S.C. 209, 220, 552 S.E.2d 26, 32 (2001), the bill would allow the jury to consider whether the defendant had the capacity “to appreciate the criminality of his conduct” or whether he was unable “to conform his conduct to the requirements of law.” H.R. 3165.
Communities have sought other ways to control land uses, and in \textit{Nollan v. California Coastal Commision}\textsuperscript{44} the Court held that, for a conditional building permit to be valid, an "essential nexus" must exist between the condition placed upon the permit and the valid public purpose sought by the condition.\textsuperscript{45} More recently, the Court returned to this issue of conditional permits in \textit{Dolan v. City of Tigard}.\textsuperscript{46} In \textit{Dolan} the Court had no problem finding the essential nexus between the condition and the public purpose involved in the case;\textsuperscript{47} however, a taking was found based on the conclusion that the exactions placed on the landowner did not bear a "rough proportionality" to the impact of the proposed development on the public.\textsuperscript{48}

In \textit{Palazzolo v. Rhode Island}\textsuperscript{49} the Court expressly stated, for the first time, that a takings claim may exist even if the landowner has acquired the property after the given regulation is effective.\textsuperscript{50} In \textit{Palazzolo} the landowner claimed that a restriction on development on or near wetlands passed prior to his purchase of the land effected a taking under the \textit{Lucas} per se exception for the permanent deprivation of all economically viable use of the land.\textsuperscript{51} However, no taking was found because, unlike in \textit{Lucas}, the land retained some developmental value despite the restriction.\textsuperscript{52}

In 2002, the Court refused to apply the categorical rule established in \textit{Lucas} that any permanent regulation depriving a landowner of all economically viable use constitutes a taking.\textsuperscript{53} In \textit{Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency}, the Tahoe Regional Planning Agency enacted two moratoria effecting a thirty-two-month ban on development in order to allow time for the study and creation of a comprehensive land use plan.\textsuperscript{54} Instead, the Court applied the \textit{Penn Central Transportation Co. v. New York City} analysis\textsuperscript{55} and upheld the moratoria because the group challenging them failed to make a claim that they were unconstitutional under the \textit{Penn Central} test.\textsuperscript{56}

\textsuperscript{44} 483 U.S. 825 (1987).
\textsuperscript{45} \textit{Id.} at 837.
\textsuperscript{46} 512 U.S. 374 (1994).
\textsuperscript{47} \textit{Id.} at 387.
\textsuperscript{48} \textit{Id.} at 391, 395.
\textsuperscript{49} 533 U.S. 606 (2001).
\textsuperscript{50} \textit{Id.} at 632.
\textsuperscript{51} \textit{Id.} at 615-16.
\textsuperscript{52} \textit{Id.} at 616.
\textsuperscript{54} \textit{Id.} at 1489.
\textsuperscript{55} See supra notes 40-41 and accompanying text.
\textsuperscript{56} Tahoe-Sierra Pres. Council, Inc., 122 S. Ct. at 1489.