Atkins Test to Exclude Intellectually Disabled from Execution Withstands Challenges by State Courts

by The Honorable Joseph A. Migliozzi Jr. and Cara Sylvester

The following is a summary of an article to be published in Volume 30 of the Regent University Law Review *by Judge Migliozzi and Ashley Hughes.*

Since the landmark decision in the case of *Atkins v. Virginia*,[1] the issue surrounding the execution of intellectually disabled defendants has not ceased to fill courtroom dockets around the country. As a result of the United States Supreme Court's ruling in 2002, persons determined to be intellectually disabled are barred from execution consistent with the "evolving standards of decency." However, there have been recurrent challenges to the test that was established in *Atkins* for states to follow in determining whether a defendant is intellectually disabled. In the December 2016 issue of *Virginia Lawyer*, it was written that mental health remains a significant and growing problem around the country, and that appears to be supported by the number of challenges to *Atkins*.[2]

The *Atkins* case arose out of a robbery and murder that occurred in late 1996 in Virginia. Having been charged as the triggerman following testimony by his co-defendant, Daryl Atkins was convicted of capital murder and sentenced to death. The issue of Atkins' mental health was unsuccessfully argued before the Supreme Court of Virginia on two occasions, despite dissenting opinions by Justices Hassell and Koontz who believed that Atkins' IQ of 59 and other life factors were proof that he suffered from mental retardation. While it

may have appeared that the battle had been lost for Atkins in Virginia courts, the United States Supreme Court granted certiorari based on the "gravity of the concerns expressed by the dissenters and…the dramatic shift in the state legislative landscape that has occurred in the past 13 years."[3]

Justice Stevens delivered the majority opinion in a 6–3 decision that held execution of intellectually disabled persons violated the Eighth Amendment prohibition against cruel and unusual punishment. The Court found that there existed a "consistency of the direction of change," whereby an increasing number of states enacted legislation prohibiting the execution of mentally retarded individuals.[4] Additionally, the court distinguished the two penological purposes of the death penalty — retribution and deterrence — which would be rendered ineffective by the execution of the intellectually disabled.[5] Most importantly, the Court adopted a test derived from a legislative consensus accepting the clinical definition of mental retardation. To be classified as intellectually disabled the defendant must have (1) subaverage intellectual functioning with (2) significant limitation in adaptive skills (3) manifest before the age of 18.[6]

This formula for assessing mental retardation was to be the minimum standard applied by state courts and it was also made clear that states had been deferred the authority to adopt their own statutory procedures for implementing this constitutional restriction.[7] In the cases that have followed *Atkins*, the Supreme Court has had to strike the right balance between state discretion on the one hand and implementing the fundamental criteria originally opined in *Atkins* on the other.

The first challenge heard in the US Supreme Court relating to the three-stage test set out in *Atkins* presented itself in the case of *Hall v Florida*.[8] Freddie Lee Hall was convicted of two counts of murder committed during a robbery and abduction and was eventually sentenced to death for one of the murders. Throughout the appellate process, extensive mitigating evidence was presented of his inability to adapt or adjust to daily life since childhood — he was beaten, hanged, and burned routinely by his abusive family. Even as an adult, Hall was unable to care for himself or hold a simple job and ultimately was determined to have an IQ of 71. Nonetheless, Hall's appeal to the Supreme Court of Florida was unsuccessful since Florida's statutory evaluation for mental retardation required that "Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability."[9] Since Hall's recorded IQ was 71, the Florida Court rejected his claim of mental retardation under *Atkins*. The United States Supreme Court granted certiorari in the *Hall* case to clarify whether Florida can "execute a man because he scored a 71 instead of a 70 on an IQ test."[10] Florida held that a "person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred for presenting other evidence that would show his faculties are limited."[11] Ultimately, the Supreme Court was faced with the challenge of whether a "strict IQ test score cutoff"[12] was constitutional.

In a 5–4 ruling, the Supreme Court decided that the Florida's bright-line cut-off of 70 was unconstitutional.[13] In his majority opinion, Justice Kennedy relied in a large part on the clinical definitions and practices within psychiatric professional communities. First, there was an emphasis placed on an accepted practice among psychiatric professionals that IQ scores were not a fixed number but include a standard error of measurement. This means that "an individual's score is best understood as a range of scores on either side of the recorded score."[14] The purpose of including this range is to account for the inherent imprecision of the IQ tests, including "practice from earlier tests; the environment or location of the test."[15] Secondly, the Florida legislation incorrectly took an "IQ score as final and conclusive evidence of a defendant's intellectual capability."[16] The court opined that it was necessary to look beyond just the IQ score as it "bars an essential part of a sentencing court's inquiry into adaptive functioning."[17] Therefore, for a state to determine that a standardized score irrefutably determines an individual's mental status defies accepted psychiatric practice as well as the "evolving standards of decency."

In his dissenting opinion, Justice Alito highlighted the shortcomings of the somewhat arbitrary term "evolving standards of decency" — particularly the degree of influence medical societies had in the court's opinion compared to that of American society. They also challenged the majority's use of the term

consensus when there had been at least nine other states, as of 2014, that had a similar statute to that of Florida.[18]

In September 2016, Hall's sentence of death was commuted to life in prison.

Another major challenge to the *Atkins* test was presented to the United States Supreme Court in the case of *Moore v Texas*.[19] Although Texas was not one of the states mentioned by Justice Kennedy as having a similar statutory scheme to Florida for identifying intellectually disabled persons, the method that they had employed post-Atkins for diagnosing the intellectually disabled drew the attention of the Supreme Court in 2016. The case originated from a murder during an armed robbery which occurred in 1980. Bobby James Moore was convicted of capital murder at the age of 20, sentenced to death and for the next 30 years remained on death row. During this time, Moore challenged his sentence on the grounds of intellectual disability. The Texas Habeas Court received testimony from Moore's family on petition for relief pursuant to *Atkins* that Moore had adaptive behavioral deficits as a youth and further testimony from mental health experts. Subsequently, the Habeas Court recommended that the Texas Court of Criminal Appeals (CCA) reduce his sentence to life in prison and in doing so relied upon the DSM-V and the American Association of Intellectual and Developmental Disabilities (AAIDD-11).[20] However, the CCA emphasized that in diagnosing intellectual disability, it was necessary to use the standards that had been adopted by Texas in an earlier case *Ex Parte Briseno* (2004)[21] and consequently denied Moore's habeas relief.

The majority opinion concludes by asserting that while states have some flexibility in enforcing the constitutional restrictions set out in Atkins, there is not unfettered discretion as it would risk that the judgment in Atkins would "become a nullity and the Eighth Amendment's protection of human dignity would not become a reality."

The CCA justified its reliance on the *Briseno* standards citing *Atkins* and its holding that the "decision to modify the legal standard for intellectual disability in the capital sentencing context rests with this Court."[22] According to the CCA, Moore failed the second prong of the *Atkins* test as his academic and social difficulties were deemed not related to deficits in intellectual functioning. For example, Moore's poor grades in school resulted from his changing schools multiple times, drug abuse, absenteeism, and racial harassment.[23] The court also noted that Moore's socially adaptive strengths were more relevant than any perceived deficits as he could support himself on the streets and was able to earn money by mowing lawns and playing pool.[24]

The United States Supreme Court granted certiorari in the *Moore* case to address Texas's reliance on outdated and professionally unaccepted standards for evaluating the limitations in adaptive skills. In delivering the majority opinion, Justice Ginsburg highlighted the recurring theme in both *Hall* and *Atkins,* that "to enforce the Constitution's protection of human dignity… we look to the evolving standards of decency that mark the progress of a maturing society."[25] The opinion highlights three main issues regarding the Texas court's assessment of Moore for intellectual functioning. First, the court confirmed the legitimacy of applying the standard error of measure to Moore's IQ of 74, the "lower end of Moore's score falls at or below 70 [so] the CCA had to move on to consider Moore's adaptive functioning."[26] Yet, Ginsburg goes on to critique Texas for overemphasizing Moore's adaptive strengths, overcoming the considerable objective evidence of Moore's adaptive behavioral deficits.[27] Finally, the Court challenged Texas's reliance on *Briseno* factors as they were based on lay perceptions of intellectual disability and were not universally relied upon by Texas in all cases of diagnosing an intellectual disability (e.g. diagnosing juveniles). Ginsburg stated that "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake."[28]

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work" resulting in a ruling against Moore that was pervasively infected.[30] By relying on an outdated 1992 definition of intellectual disability from the American Association on Mental Retardation (AAMR), they had focused on Moore's adaptive strengths and not his deficits, whereas the medical community were much more concerned with adaptive deficits when assessing adaptive functioning. In February of this year, the Supreme Court vacated the Texas court's ruling and remanded the case for further proceedings.[31] In the dissenting opinion, Chief Justice Roberts stated that the majority had confused the roles of the clinicians and the justices, writing that "clinicians, not judges should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."[32]

Atkins marked a significant turning point for American jurisprudence on the constitutionality of the death penalty. In keeping with the evolving standards of decency, the United States Supreme Court barred the execution of persons who are determined to be intellectually disabled and identified a clinical standard for states to follow in making this determination. While there have been challenges to this test from states as they try to reconcile existing laws with *Atkins*, the three-part test has withstood these challenges and currently remains unchanged: (1) subaverage intellectual functioning with (2) significant limitations in adaptive skills (3) which manifest before age 18. The Supreme Court has guided states in each of its post-*Atkins* rulings to conform their intellectual disability assessments to a standard of fairness and decency.

Endnotes

1 *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
2 Judge Migliozzi and Densia Muhametaj, *Mental Health Courts on the Rise*, Virginia Lawyer, December 2016, at 16.
3 *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).
4 *Id*. at 315-16.
5 *Id*. at 318-19.
6 *Id*. at 318.
7 *Id*. at 321.
8 *Hall v. Florida*, 134 S. Ct. 1986, 1991 (2014).
9 *Id*. at 1992.
10 *Id*. at 2001.
11 *Id*. at 1994.
12 *Id*. at 1998.
13 *Id*. at 1990.
14 *Id*. at 1995.
15 *Id*.
16 *Id*.
17 *Id*. at 2001.
18 *Id*. at 2002.
19 *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017).
20 *Id*. at 1046.
21 *Ex parte Briseno*, 135 S.W. 3d 1, 8-9 (Tex. Crim. App. 2004). From *Briseno*, Texas adopted the following criteria for diagnosing mental disabilities: (a) Did his family, friends, teachers, and employers believe the defendant was mentally retarded at that time; (b) Is the defendant's conduct impulsive; (c) Does defendant's conduct show leadership or is he is a follower; (d) Is defendant's conduct in response to external stimuli rational and appropriate; (e) Does defendant respond coherently and rationally to oral or written questions or do his responses random; (f) Can the defendant hide facts or lie effectively in his own or others' interests; and (g) Did the offense committed require forethought, planning, and complex execution of purpose?
22 *Ex parte Moore*, 470 S.W.3d 481, 487 (Tex. Crim. App. 2015).
23 *Id*. at 1045.
24 *Id*. at 1047.
25 *Id*. at 1048.
26 *Id*. at 1049.
27 *Id*. at 1050.
28 *Id*. at 1052.
29 *Id*. at 1053.
30 *Id*.
31 *Id*.
32 *Id*. at 1054 (Roberts, C.J., dissenting).

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