ATKINS AFTERMATH: IDENTIFYING MENTALLY RETARDED OFFENDERS AND EXCLUDING THEM FROM EXECUTION

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I. INTRODUCTION

In 1989, in *Penry v. Lynaugh*,[1] a five-Justice majority of the United States Supreme Court (the "Court") held that the execution of mentally retarded offenders was not categorically barred by the Eighth Amendment's cruel and unusual punishment prohibition.[2] In 2002, however, a six-member majority reached the opposite conclusion regarding this issue.[3] In *Atkins v. Virginia*,[4] the Court held that the Eighth Amendment *does* categorically bar the execution of mentally retarded offenders. Although many of the factual and legal arguments presented in these cases were identical, a key distinguishing factor was the number of states that had enacted legislative bans on the execution of mentally retarded offenders in the period following the *Penry* decision. This legislative activity supported the Court's conclusion in *Atkins* that the death penalty is no longer a constitutionally permissible punishment for mentally retarded offenders.[5]

In this connection, at the time of the *Penry* decision, only Congress and two states had adopted categorical prohibitions of the execution of mentally retarded offenders.[6]

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

2. *Id.* at 330-35; *id.* at 351 (Scalia, J., concurring in part and dissenting in part); *see, e.g.*, EMILY FABRYCKI REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION (1993); Peter K.M. Chan, Note, *Eighth Amendment—The Death Penalty and the Mentally Retarded Criminal: Fairness, Culpability, and Death*, 80 J. CRIM. L. & CRIMINOLOGY 1211 (1990); Virginia G. Wilson, Note, Penry v. Lynaugh: *Mentally Retarded Defendants and the Death Penalty*, 34 ST. LOUIS U. L.J. 345 (1990). *See generally* Susan M. Boland, *Walking the Edge of Death: An Annotated Bibliography on Juveniles, the Mentally Ill, the Mentally Retarded and the Death Penalty*, 21 N. ILL. U. L. REV. 131, 219-39 (2001).

3. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

4. *Id.*; *see, e.g.*, Mitchel A. Brim, *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 SW. U. L. REV. 275 (2003); Carol S. Steiker, Commentary, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475 (2002); John F. Romano, Note, *Kinder, Gentler, and More Capricious: The Death Penalty after* Atkins v. Virginia, 77 ST. JOHN'S L. REV. 123 (2003); Eli Velasquez, Note and Comment, *The Shaping of an American Consensus Against the Execution of Mentally Retarded Criminals: A Case Note on* Atkins v. Virginia, 24 WHITTIER L. REV. 955 (2003).

5. *Compare Atkins*, 536 U.S. at 311-21; *id.* at 339-54 (Scalia, J., dissenting), *with Penry*, 492 U.S. at 328-40; *id.* at 342-49 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part); *id.* at 351 (Scalia, J., concurring in part and dissenting in part).

6. *See* 21 U.S.C.A. § 848 (West 1999); GA. CODE ANN. § 17-7-131 (Harrison 1998); MD. CODE ANN., CRIM. LAW § 2-202 (2002). The current version of all statutes is used in this Article unless otherwise noted. Due to the recency of the enactment of the post-*Atkins* legislation, electronic source material and session law materials are utilized regarding this legislation, as needed. *See, e.g., infra* note 9.

By the time of the *Atkins* decision, sixteen additional states had enacted legislative bans and implementing procedures.[7] In *Atkins*, the Court entrusted to the states the task of adopting appropriate mechanisms to implement the constitutional prohibition of the execution of mentally retarded offenders.[8] Since *Atkins*, ten of the remaining twenty capital punishment states have legislatively or judicially adopted procedures to implement the categorical exclusion from execution.[9]

The ultimate scope of the Court's holding in *Atkins* will be affected by the manner in which states define mental retardation for purposes of the constitutional exclusion, identify the appropriate fact finder regarding and timing of the mental retardation determination, assign the burden of proof and standard of proof concerning mental retardation, and identify post-conviction review opportunities. After reviewing the *Penry* and *Atkins* decisions, this Article examines the procedures adopted by the states before and after *Atkins* to identify mentally retarded offenders and exclude them from execution. It also analyzes the legal principles governing and practical considerations influencing the adoption of these procedures, before recommending procedures which best comport with the spirit of the *Atkins* holding. The Article also addresses other implementation issues resulting from the recognition of the constitutional ban.

II. FROM *PENRY* TO *ATKINS*: IDENTIFYING THE CONSTITUTIONAL DISTINCTION

A. Penry—*No Constitutional Bar to the Execution of Mentally Retarded Offenders*

In *Penry*, the Court addressed the case of a mentally retarded offender who was twenty-two at the time of the crime, but whose ability to learn and knowledge ("mental age") were consistent with that of a six-and-a-half year-old and whose ability to function in the world ("social maturity") was that of a nine or ten year-old. Penry's intelligence quotient ("IQ") scores over the years ranged between fifty and sixty-three.[10] Nevertheless, Penry was found competent to stand trial and the jury rejected his insanity defense,

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7. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); ARK. CODE ANN. § 5-4-618 (Michie 1997); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KAN. STAT. ANN. § 21-4623 (1995); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MO. ANN. STAT. § 565.030 (West Supp. 2003); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002); *see also* 18 U.S.C.A. § 3596 (West 2000).

8. *Atkins*, 536 U.S. at 317.

9. *See* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002); IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030); Foster v. State, 848 So. 2d 172 (Miss. 2003); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Murphy v. State, 54 P.3d 556 (Okla. Crim. App. 2002). The Louisiana Supreme Court developed an interim procedure before the legislature acted. *See* State v. Williams, 831 So. 2d 835 (La. 2002).

10. This evidence was introduced at Penry's pretrial competency hearing. *Penry*, 492 U.S. at 307-08. At trial, Penry introduced psychiatric testimony that he suffered from organic brain damage and "moderate retardation" and testimony from his mother about his inability to learn in school. Government psychiatrists agreed that Penry had "extremely limited mental ability," but disagreed about the extent and causes of his mental limitations and further concluded that he had characteristics associated with an antisocial personality. *Id.* at 308-10.

convicted him of capital murder, and answered punishment questions regarding his deliberation, response to provocation, and continuing threat to society which resulted in a death sentence under Texas procedure.[11] At his trial, on direct appeal, and in his federal collateral review proceedings, Penry unsuccessfully raised the claim that execution of a mentally retarded offender like himself was prohibited under the Eighth Amendment.[12] The Court granted certiorari to determine whether the Eighth Amendment prohibits the execution of a person with the "reasoning capacity of a seven year old."[13]

Because Penry's claim reached the Court through the collateral review process, the Court initially had to determine whether Penry's claim sought a "new rule,"[14] the announcement and application of which the Court had significantly restricted in collateral review cases in *Teague v. Lane*.[15] The Court determined that the holding Penry sought would indeed require the establishment of a "new rule," not dictated by precedent at the time Penry's conviction became final and imposing a new obligation on the states and federal government.[16] However, the Court unanimously determined that Penry's claim could be considered and applied retroactively to defendants on collateral review because it satisfied one of the exceptions the Court had established to the nonretroactivity doctrine in *Teague*.[17]

On the merits of Penry's claim, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White, Kennedy, and Scalia, noted that the Eighth Amendment prohibited punishments considered "cruel and unusual" as of the adoption of the Bill of Rights, as well as those currently so considered under the "evolving standards of decency that mark the progress of a maturing society" concept utilized by the Court in its Eighth Amendment jurisprudence.[18] In determining such evolving standards, the Court had previously considered objective evidence—the "clearest and most reliable" of which was the legislation enacted by American legislatures, as well as data regarding the action of sentencing juries.[19]

Although the Court concluded that "idiots" and "lunatics" were not subject to punishment for their criminal acts at common law, it determined that neither of these terms encompassed mentally retarded offenders comparable to Penry. The term "idiot" referred

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11. *Id.* at 308-11.

12. *Id.* at 310-13; *see* Penry v. Lynaugh, 832 F.2d 915, 918 (5th Cir. 1987); Penry v. State, 691 S.W.2d 636, 654-55 (Tex. Crim. App. 1985).

13. *Penry*, 492 U.S. at 345 n.1 (Brennan, J., concurring in part and dissenting in part); *see id.* at 313; *id.* at 336 (opinion of O'Connor, J.). The Court also granted certiorari to determine whether Penry had been unconstitutionally sentenced to death because the trial court's instructions did not adequately allow the sentencing jury to consider and give effect to Penry's mitigating evidence, including that concerning mental retardation. *See id.* at 310-13.

14. *Id.* at 329-30.

15. 489 U.S. 288, 299-310 (1989) (plurality opinion).

16. *Penry*, 492 U.S. at 329.

17. In *Penry*, the Court gave majority status to the nonretroactivity principles established in the plurality opinion in *Teague* and extended them to capital cases. *See id.* at 313-14; *id.* at 350-51 (Scalia, J., concurring in part and dissenting in part). The Court also interpreted the *Teague* exception to nonretroactivity concerning new rules that place conduct beyond the government's power to punish to also include new rules that prohibit a "certain category of punishment for a class of defendants because of their status or offense." *Id.* at 330. Penry's claim which, if successful, would categorically preclude execution of mentally retarded offenders such as himself would thus qualify under this exception to the *Teague* nonretroactivity rule. *Id.* at 329-30; *id.* at 341-42 (Brennan, J., concurring in part and dissenting in part); *id.* at 349-50 (Stevens, J., concurring in part and dissenting in part); *id.* at 350-51 (Scalia, J., concurring in part and dissenting in part).

18. *Id.* at 330-31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); *see id.* at 351 (Scalia, J., concurring in part and dissenting in part).

19. *Id.* at 331.

to individuals manifesting, from birth, a total absence of reason or understanding, or an inability to distinguish between good and evil. The term "lunatic" referred to persons with a "partial derangement" of intellectual capabilities with a restoration of capabilities at "uncertain" intervals.[20] In contemporary practice, the circumstances of such persons were addressed through the requirement of criminal competency and the availability of the insanity defense, as well as the previously recognized constitutional prohibition of the execution of insane offenders.[21] Moreover, these common law terms would only arguably apply to a person within the "severe" or "profound" contemporary categories of mental retardation, rather than the "mild" or "moderate" categories.[22] Given Penry's less extreme level of mental retardation, the finding as to his criminal competency, and the jury's rejection of his insanity defense, he (and presumably other offenders like him) would not fall within the common law prohibition of criminal punishment for "idiots" and "lunatics."[23]

The Court next assessed the proffered "objective" evidence of an emerging national consensus against the execution of mentally retarded offenders reflective of the evolving standards of American society. The Court found that the statutory prohibition of the execution of mentally retarded offenders enacted by Congress and two states,[24] even when added to the fourteen states which prohibited capital punishment entirely, fell short of the evidence of national consensus in support of the categorical exclusions from execution previously addressed regarding insane offenders and offenders younger than sixteen at the time of the crime.[25] Penry offered no evidence as to relevant responses of sentencing juries and prosecutors regarding the execution of mentally retarded offenders. The Court found the proffered results of public opinion polls and resolutions of professional organizations insufficient evidence of a national consensus. Thus, although mental retardation was clearly a factor that could reduce or mitigate an offender's culpability for a capital offense, the Court was unable to conclude that a national consensus against the execution of mentally retarded offenders had been established which would warrant the requested categorical exclusion from capital punishment.[26]

In a portion of the opinion reflecting only her views, Justice O'Connor also evaluated Penry's claim under the proportionality and punishment purpose standards utilized by the Court in previous cases considering categorical exclusions from the death penalty.[27] On the evidence presented, however, she was unable to conclude that mentally

20. *Id.* at 331-32.

21. *Id.* at 332-33; *see* Ford v. Wainwright, 477 U.S. 399 (1986) (prohibiting the execution of insane offenders).

22. *Penry*, 492 U.S. at 332-33; *see id.* at 308 n.1 (referring to the classifications of mental retardation established by the American Association on Mental Deficiency (now Retardation) based on IQ scores: "mild" (between fifty to fifty-five and approximately seventy), "moderate" (between thirty-five to forty and fifty to fifty-five), "severe" (between twenty to twenty-five and thirty-five to forty), and "profound" (below twenty or twenty-five) in AM. ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 13 (8th ed. 1983)).

23. *Id.* at 333. *But see* Eric L. Shwartz, Comment, Penry v. Lynaugh: *"Idiocy" and the Framers' Intent Doctrine*, 16 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 315 (1990) (contending that Penry would have been considered an "idiot" based on relevant authorities).

24. *See* 21 U.S.C.A. § 848 (West 1999); GA. CODE ANN. § 17-7-131 (Harrison 1998); MD. CODE ANN., CRIM. LAW § 2-202 (2002).

25. *Penry*, 492 U.S. at 334; *see* Thompson v. Oklahoma, 487 U.S. 815, 826-33 (1988) (plurality opinion) (addressing young offenders); *Ford*, 477 U.S. at 408-10 (addressing insane offenders).

26. *Penry*, 492 U.S. at 334-35; *see id.* at 340 (opinion of O'Connor, J.).

27. *Id.* at 335-36 (opinion of O'Connor, J.); *see, e.g.*, Tison v. Arizona, 481 U.S. 137, 150-58 (1987); Enmund v. Florida, 458 U.S. 782, 797-801 (1982); Gregg v. Georgia, 428 U.S. 153, 182-87 (1976) (joint

retarded offenders comparable to Penry, *as a class*, and without individualized consideration of their particular circumstances, lacked sufficient culpability to make a death sentence a proportionate punishment or to serve the punishment goal of retribution.[28]

Although they agreed with the conceptual framework of Justice O'Connor's proportionality and punishment purpose analysis, Justices Brennan, Marshall, Blackmun, and Stevens disagreed with the result of her analysis. Justice Brennan, joined by Justice Marshall, concluded that *all* offenders clinically defined as mentally retarded had insufficient intelligence and adaptive behavioral skills to provide a level of culpability proportionate to a death sentence or to further the punishment goals of retribution or deterrence. They further concluded that the individualized sentencing mechanisms designed to consider mitigating evidence during capital punishment proceedings were inadequate to prevent mentally retarded offenders with limited culpability from nevertheless being sentenced to death.[29] Although he agreed with Justice O'Connor's presentation of the competing arguments, Justice Stevens, joined by Justice Blackmun, concluded that execution of mentally retarded offenders was unconstitutional.[30]

B. Atkins*—The Execution of Mentally Retarded Offenders Is Constitutionally Prohibited*

The Court revisited its *Penry* holding thirteen years later in *Atkins v. Virginia*.[31] *Atkins* involved a murder committed by an offender who, according to defense evidence, had an IQ of fifty-nine, a "mental age" between nine and twelve, and a limited capacity for adaptive behavior—all of which placed him in the "mild" range of mental retardation.[32] The government presented evidence that Atkins had at least "average intelligence."[33] In conducting its proportionality review of Atkins' death sentence, a divided Virginia Supreme Court determined that the conflicting evidence of mental retardation did not render the defendant's death sentence excessive or disproportionate to sentences for comparable capital murders in the state.[34] The Court granted Atkins' certiorari petition on the question regarding "[w]hether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment."[35]

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opinion of Stewart, Powell, and Stevens, JJ.). The other members of the *Penry* majority regarding this issue expressly rejected Justice O'Connor's proportionality and punishment purpose analysis and concluded that this analysis had "no place" in the Court's Eighth Amendment jurisprudence. *Penry*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part).

28. *Penry*, 492 U.S. at 335-40 (opinion of O'Connor, J.). Because of its imprecision and other inherent limitations, Justice O'Connor also rejected the notion of establishing a categorical exclusion from the death penalty based on the concept of "mental age." *Id.* at 339-40 (opinion of O'Connor, J.).

29. *Id.* at 343-49 (Brennan, J., concurring in part and dissenting in part).

30. *Id.* at 350 (Stevens, J., concurring in part and dissenting in part). Despite their disagreement with Justice O'Connor regarding the categorical exception issue, Justices Brennan, Marshall, Blackmun, and Stevens agreed with her separate conclusion that the Texas procedure, as applied, provided an inadequate vehicle for capital juries to consider and give effect to Penry's mitigating evidence of mental retardation and abused background. Together, they formed a majority to reverse his death sentence on this basis. *See id.* at 319-28; *id.* at 342 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part). *But see id.* at 352-60 (Scalia, J., concurring in part and dissenting in part).

31. 536 U.S. 304 (2002).

32. *Id.* at 307-09; Atkins v. Commonwealth, 534 S.E.2d 312, 318-21 (Va. 2000), *rev'd sub nom.* Atkins v. Virginia, 536 U.S. 304 (2002); *id.* at 321-24 (Hassell, J., concurring in part and dissenting in part).

33. *Atkins*, 536 U.S. at 309; *Atkins*, 534 S.E.2d at 319.

34. *Atkins*, 534 S.E.2d at 321. *But see id.* at 324 (Hassell, J., concurring in part and dissenting in part); *id.* at 324-35 (Koontz, J., dissenting).

35. Atkins v. Virginia, 534 U.S. 809 (2001). Prior to accepting Atkins' case for review, the Court granted

Most of the legal issues raised in *Atkins* were similar to those presented in *Penry*. Arguments in support of a ban on the execution of mentally retarded offenders focused on the impact of the limited intellectual and behavioral functioning of mentally retarded offenders *as a class*. For example, concerns were raised that an offender's mental retardation decreased the reliability of the outcome in the proceedings and increased the risk of error to a level unacceptable in a capital case. It was argued that the available consideration of mental retardation as a mitigating circumstance in capital sentencing had proven an inadequate vehicle for the consideration of this condition. Finally, the contention was expressed that mental retardation limited these offenders' culpability to a degree that rendered the death penalty a disproportionate and excessive punishment that served no valid penological purpose.[36] Arguments in opposition to the ban expressed support for the current consideration of mental retardation through criminal competency and criminal insanity proceedings as well as through individualized capital sentencing in which the issue of mental retardation was already considered as a mitigating circumstance. In addition, concerns were raised about the unnecessary interference and disruption that a constitutional ban would have on states' administration of the death penalty.[37]

The most critical difference between the *Penry* and *Atkins* arguments concerned the significance attributed to the dramatic increase in the number of states that had enacted bans on the execution of mentally retarded offenders in the intervening years. The parties vigorously debated whether the prohibitions by the federal government and now eighteen states—in addition to the twelve states which totally prohibited capital punishment—represented the "national consensus" against the execution of mentally retarded offenders deemed lacking in *Penry*. The resolution of this debate, in turn, would inform the Court's determination whether the execution of mentally retarded offenders was constitutionally prohibited as cruel and unusual punishment under the "evolving standards of decency" concept embodied in the Court's Eighth Amendment jurisprudence.[38]

Two members of the five-member *Penry* majority (Justices O'Connor and Kennedy) joined *Penry* dissenting Justice Stevens and three Justices who had joined the Court after *Penry* to form a six-member majority that resolved the *Penry* issue with a different result in *Atkins*. In an opinion utilizing a decisional framework reminiscent of several categorical exception capital cases in which he had participated, Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, concluded that the Eighth Amendment *does* constitutionally prohibit capital punishment for mentally retarded offenders.[39]

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a petition for a writ of certiorari on this issue from a North Carolina offender. When the North Carolina legislature subsequently enacted its ban on the execution of mentally retarded offenders, the Court dismissed the petition as moot. On the same day as this dismissal, the Court granted Atkins' certiorari petition. *See* Atkins v. Virginia, 533 U.S. 976 (2001); McCarver v. North Carolina, 533 U.S. 975 (2001); McCarver v. North Carolina, 532 U.S. 941 (2001).

36. *See Atkins*, 536 U.S. at 311-21. National legal, professional, and religious, and international groups filed amicus curiae briefs supporting a constitutional ban. *See id.* at 316 n.21.

37. *See id.* at 348-54 (Scalia, J., dissenting). Supporting briefs were filed by a group of capital punishment states without categorical bans on the execution of mentally retarded offenders and a public interest group. *See* Briefs of Amici Curiae of the States of Alabama, Mississippi, et al. and of Criminal Justice Legal Foundation, Atkins v. Virginia, 536 U.S. 304 (2002) (No.00-8452).

38. *Compare Atkins*, 536 U.S. at 313-16, *with id.* at 341-46 (Scalia, J., dissenting).

39. *See id.* at 306-21; *cf.* Thompson v. Oklahoma, 487 U.S. 815, 826-38 (1988) (plurality opinion); Ford v. Wainwright, 477 U.S. 399, 405-10 (1986); Enmund v. Florida, 458 U.S. 782, 797-801 (1982); Coker v. Georgia, 433 U.S. 584, 592-600 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 182-87 (1976) (joint opinion of Stewart, Powell, Stevens, JJ.).

At the outset, the Court reaffirmed its interpretation, articulated in prior cases, that the Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive" and requires that punishments be "graduated and proportioned" to the offense.[40] Moreover, the determination of the excessive nature of a punishment is judged under the "evolving standards of decency" which currently prevail rather than those prevalent at common law or the adoption of the Bill of Rights. Although proportionality review under these evolving standards is informed by "objective" factors, the "clearest and most reliable" of which is enacted legislation, such objective evidence does not "wholly determine" the constitutional analysis.[41] Rather, the "Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[42] The Court, therefore, began its *Atkins* analysis with a review of the legislative treatment of the death penalty for mentally retarded offenders before considering whether there were reasons to agree or disagree with the "judgment reached by the citizenry and its legislators."[43]

In reviewing the legislative changes during the years since the *Penry* decision, the Court noted not only the number of states that had enacted bans on the execution of mentally retarded offenders, but also the "consistency of the direction" of the legislative changes and the high levels of support for the enactment of the individual statutory prohibitions. Even among capital punishment states without legislative bans, only five such states had executed offenders with known IQs in the mentally retarded range since the *Penry* decision. The Court thus concluded that the practice of executing mentally retarded offenders had become "truly unusual, and it is fair to say that a national consensus has developed against it."[44] The Court further noted that additional evidence, supplied by national professional and religious organizations, polling data, and international authorities, "makes it clear that this legislative judgment [to bar the execution of mentally retarded offenders] reflects a much broader social and professional consensus."[45]

The Court determined that the national consensus it had found against the execution of mentally retarded offenders reflected a judgment about the relative culpability of these offenders and the relationship between mental retardation and the punishment purposes served by the death penalty. It also reflected a concern about the potential for the characteristics of mental retardation to undermine the strength of procedural protections required in capital cases. In this connection, although many of the limitations associated with mental retardation would not by themselves warrant a total exemption from criminal responsibility and punishment, the Court concluded that the impairments inherent in mental retardation nevertheless had the effect of diminishing the personal culpability of *all* mentally retarded offenders. In turn, this reduced personal culpability rendered mentally retarded offenders inappropriate subjects to serve the retributive punishment goals of capital punishment. In addition, the cognitive and behavioral impairments associated with mental retardation prevented the execution of such offenders from significantly serving the capital punishment goal of deterrence. Finally, these same im-

40. *Atkins*, 536 U.S. at 311 & n.7 (citation omitted).
41. *Id.* at 311-12 (citations omitted).
42. *Id.* at 312 (quoting *Coker*, 433 U.S. at 597 (plurality opinion)).
43. *Id.* at 313.
44. *Id.* at 316; *see id.* at 313-16.
45. *Id.* at 316 n.21.

pairments tended to limit the effectiveness of mentally retarded offenders' defenses against the imposition of the death penalty and to increase the risk of wrongful execution.[46]

Thus, the Court's independent evaluation revealed no reason to disagree with the post-*Penry* legislative judgment that the death penalty is not a "suitable" punishment for mentally retarded offenders. The Court therefore concluded that the execution of mentally retarded offenders is a constitutionally "excessive" punishment barred by the Eighth Amendment.[47] As it had done previously regarding the prohibition of the execution of insane offenders, the Court entrusted to the states the responsibility to develop mechanisms to identify mentally retarded capital offenders and to enforce the constitutional ban on their execution.[48]

In two dissenting opinions, Chief Justice Rehnquist and Justices Scalia and Thomas attacked the jurisprudential and factual bases for the majority's holding. In these Justices' view, the determination that a punishment is unconstitutionally cruel and unusual pursuant to the Eighth Amendment is limited to methods and acts of punishment considered cruel and unusual at the time of the adoption of the Bill of Rights and those modes of punishment inconsistent with modern standards of decency. The determination of contemporary standards should be limited to objective criteria, the sole indicators of which should be the "work product of [American] legislatures and sentencing jury determinations" and with primary weight given to enacted legislation. The dissenting Justices expressly rejected the majority's interpretation that the Eighth Amendment prohibits "excessive" punishments as well as cruel and unusual ones.[49]

Using this analysis, the dissenting Justices concluded that execution of "mildly" mentally retarded offenders, such as Atkins, was not considered cruel and unusual at common law. The dissenters then rejected the majority's determination that a national consensus in opposition to the execution of mentally retarded offenders had emerged since *Penry* under the "evolving standards" concept. Basing their determination on the actions of the capital punishment states only, the dissenters concluded that only a minority of these states had adopted bans against these executions and that the recency of the enactments did not establish a settled state of the law. The dissenting Justices rejected, as irrelevant or insignificant measures of contemporary standards, the majority's reliance on the consistency in the direction of post-*Penry* legislative changes, the significant margins by which such legislation had been enacted, and the infrequency with which mentally retarded offenders had been executed in recent years. The dissenting Justices also noted the absence of evidence of the conduct of sentencing juries in support of the majority's finding of a national consensus in this case. These Justices especially criticized and rejected the majority's inclusion of the views of professional and religious organizations, international authorities, and public opinion polls in support of its finding of national consensus against the execution of mentally retarded offenders.[50]

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46. *Id.* at 317-21.

47. *Id.* at 321; *cf.* Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989) (holding that execution of mentally retarded offenders violates Georgia constitution); Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001) (holding that execution of mentally retarded offenders violates Tennessee constitution).

48. *Atkins,* 536 U.S. at 317 (citing Ford v. Wainright, 477 U.S. 399 (1986)).

49. *Id.* at 321-28 (Rehnquist, C.J., dissenting); *id.* at 339-40, 349 (Scalia, J., dissenting).

50. *Id.* at 321-28 (Rehnquist, C.J., dissenting); *id.* at 339-48 (Scalia, J., dissenting).

In addition to rejecting the constitutional relevance of the majority's "excessive" punishment determination, the dissenting Justices also rejected the majority's factual conclusions that the execution of mentally retarded offenders could *never* serve the punishment goals of retribution and deterrence and that juries could not adequately consider mental retardation in their capital sentencing decisions. Finally, the dissenting Justices criticized the Court's "death-is-different" capital punishment jurisprudence generally, and the "arrogance" of the majority's usurpation of legislative and juror prerogatives by its imposition of the ban on the execution of mentally retarded offenders under "constitutional pretext."[51]

C. Atkins *Aftermath—Implementing the Constitutional Mandate*

Despite the seemingly wide sweep of the Court's *Atkins* holding constitutionally barring the execution of mentally retarded offenders, the Court's opinion left many issues regarding the implementation of the constitutional ban unresolved or unaddressed. Rather than dictating the definitional and procedural attributes of the death penalty exclusion, the Court entrusted this responsibility to the states utilizing capital punishment: "As was our approach in *Ford v. Wainright*, with regard to insanity, 'we leave to the States [sic] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'"[52] The manner in which capital punishment states define mental retardation for purposes of the exclusion from the death penalty will obviously have the greatest impact on the actual scope of the Court's holding. States' determination of key procedural aspects of the ban's implementation will also affect the ultimate scope of the ruling: identification of the fact finder regarding mental retardation (i.e., the court, the jury, or both), determination of the timing of the mental retardation finding (e.g., prior to trial, after the guilt determination, or both), and the assignment of the burden of proof and standard of proof. Finally, the manner in which post-conviction review opportunities are provided will determine the impact of the holding on offenders sentenced to death before *Atkins*. Other implementation issues concerning the pre-*Atkins* state bans have already arisen and will continue to emerge (e.g., appellate review of mental retardation findings and claims of ineffective assistance of counsel based on investigation or presentation of evidence regarding an offender's mental retardation). The manner in which all of these issues are addressed will ultimately determine the scope of the Court's prohibition of the execution of mentally retarded offenders in *Atkins*.

Although the Court did not prescribe accompanying definitional and procedural provisions in *Atkins*, jurisdictions are not totally without guidance in these matters. States adopting bans after *Atkins* can learn from the experience of the federal criminal justice system and states with pre-*Atkins* bans. Jurisdictions can utilize the guidance that *was* provided in the *Atkins* opinion, as well as other Court rulings, regarding constitutionally adequate definitional and procedural provisions. Importantly, because of the *Atkins* constitutional prohibition of the execution of mentally retarded offenders, all capital punishment jurisdictions—those with and without pre-*Atkins* bans—must ensure that their procedures to identify mentally retarded offenders and exclude them from

51. *Id.* at 348-54 (Scalia, J., dissenting).
52. *Id.* at 317 (quoting *Ford*, 477 U.S. at 416-17 (plurality opinion)).

execution are adequate to implement the constitutional ban. This Article will recommend procedures that should satisfy this standard.

III. MENTAL RETARDATION FOR PURPOSES OF THE *ATKINS* BAN

It is estimated that 1% to 3% of the general population is mentally retarded.[53] Estimates of the proportion of this country's incarcerated offenders who are mentally retarded range from 2% to 25%.[54] Of the approximately 3,500 offenders currently on "death rows" in America,[55] estimates of the proportion who are mentally retarded range between 4% and 20%,[56] or approximately 140 to 700 offenders. Of the approximately 860 executions since the reinstatement of capital punishment in 1976,[57] estimates of the number of mentally retarded offenders who have been executed range between 18 and 44.[58] As these ranges indicate, the manner in which mental retardation is defined and in which mentally retarded offenders are identified can have a substantial impact on the scope of the *Atkins* holding and its implementation.

In fact, the Court in *Atkins* recognized the importance of the definitional component of its ruling:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. *Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.*[59]

Therefore, the most important task for capital punishment jurisdictions in implementing *Atkins* is to define the "mentally retarded offenders about whom there is a national consensus."[60] Fortunately, this is the area about which the Court provided the greatest

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53. *See* AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 26, 52, 58 (10th ed. 2002) [hereinafter AAMR, 10th ed.]; AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 46 (4th ed., text rev. 2000) [hereinafter APA, DSM-IV-TR]; Am. Ass'n on Mental Retardation, *Fact Sheet: The Death Penalty*, *at* http://www.aamr.org/Policies/faq_death_penalty.shtml (last visited July 5, 2003).

54. *See* REED, *supra* note 2, at 39; Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 63 (1996); Am. Ass'n on Mental Retardation, *supra* note 53; Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, *at* http://www.thearc.org/faqs/crimqa.html (last visited July 5, 2003).

55. *See* Death Penalty Information Center, *Death Row Inmates by State*, *at* http://www.deathpenaltyinfo.org/article.php?scid=9&did=188 (last modified as of July 1, 2003) (indicating 3,517 death row inmates).

56. *See Atkins*, 536 U.S. at 324 n.* (Rehnquist, C.J., dissenting); REED, *supra* note 2, at 39; Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 911 (2001); Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After* Penry v. Johnson, 35 AKRON L. REV. 327, 327 (2002); Steiker, *supra* note 4, at 1478 n.10.

57. *See* Death Penalty Information Center, *Number of Executions by State and Region Since 1976*, *at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=186 (last modified July 2, 2003) (indicating 861 executions since 1976).

58. *See* Entzeroth, *supra* note 56, at 911; Hall, *supra* note 56, at 328; Steiker, *supra* note 4, at 1478 n.10; Am. Ass'n on Mental Retardation, *supra* note 53.

59. *Atkins*, 536 U.S. at 317 (emphasis added).

60. *Id.*

amount of guidance in *Atkins* (and *Penry*) and about which there is a great deal of general consensus among the jurisdictions which have adopted bans on the execution of mentally retarded offenders before and after *Atkins*.

A. Court Guidance Regarding the Definition of Mental Retardation

Although its conclusions in *Penry* and *Atkins* regarding the constitutional prohibition of the execution of mentally retarded offenders were different, in each case, the Court provided a definitional framework for the category of offenders it was addressing. In both cases, the Court significantly relied on the definitional structure concerning mental retardation developed by the American Association on Mental Retardation ("AAMR"), which the *Penry* Court characterized as the "country's oldest and largest organization of professionals working with the mentally retarded."[61] In *Atkins*, the Court also referred to the similar classification structure developed by the American Psychiatric Association ("APA"). These references in *Penry* and *Atkins* not only provide guidance to the states regarding the Court's understanding of the category of offenders covered by its rulings, but also the source material for its understanding.

Although the *Penry* Court members divided five-to-four in declining to recognize a constitutional exclusion from capital punishment for mentally retarded offenders, the Justices unanimously adopted the portion of the majority opinion in which they defined mental retardation by reference to the AAMR classification text:

> Persons who are mentally retarded are described as having "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." To be classified as mentally retarded, a person generally must have an IQ of 70 or below. Under the AAMR classification system, individuals with IQ scores between 50-55 and 70 have "mild" retardation. Individuals with scores between 35-40 and 50-55 have "moderate" retardation. "Severely" retarded people have IQ scores between 20-25 and 35-40, and "profoundly" retarded people have scores below 20 or 25.[62]

In addition, several references were made in the majority opinion, Justice O'Connor's separate portion of the opinion, and the dissenting opinions to the AAMR's definition of mental retardation and to the arguments made and positions taken in the AAMR amicus curiae brief submitted to the Court in the case.[63] In fact, Justice Stevens' dissent, joined by Justice Blackmun, on the merits of the exclusion issue was virtually limited to the statement: "In my judgment, . . . that explication—particularly the summary of the arguments advanced in the Brief for American Association on Mental Retardation et al. as *Amici Curiae*—compels the conclusion that such executions are unconstitutional."[64]

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61. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

62. *Id.* at 308 n.1 (quoting AM. ASS'N ON MENTAL DEFICIENCY, *supra* note 22, at 1, 11, 13).

63. *See id.* at 333, 335; *id.* at 336, 337, 338, 339 (opinion of O'Connor, J.); *id.* at 344-46, 348-49 (Brennan, J., concurring in part and dissenting in part); *id.* at 350 (Stevens, J., concurring in part and dissenting in part).

64. *Id.* at 350 (citation omitted).

The Court again relied on the AAMR's definition of mental retardation in *Atkins*. In explaining defense evidence that Atkins was "mildly mentally retarded,"[65] the Court provided the AAMR's definition of mental retardation, which had been further refined since the *Penry* decision. Although this definition had eliminated the classification system based on IQ score, the Court also provided the similar mental retardation definition adopted by the APA, which still retained the IQ score classifications:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: "*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."
>
> The American Psychiatric Association's definition is similar: "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." "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.[66]

Later in the majority opinion, the Court summarized these definitions of mental retardation: "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[67] Significantly, after noting that not all offenders with mental retardation claims will fall "within the range of mentally retarded offenders about whom there is a national consensus," which consensus the Court had found based largely on the action of state-enacted bans, the Court further noted that the states' "statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in [the quoted definitional material above]."[68] Finally, the Court noted that an IQ "between 70 and 75 or lower" is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."[69]

Thus, in both *Penry* and *Atkins*, the Court made its constitutional rulings regarding mentally retarded offenders with express reference to the clinical definition of mental

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65. *See Atkins*, 536 U.S. at 308.

66. *Id.* at 308 n.3 (quoting AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); APA, DSM-IV-TR, *supra* note 53, at 41, 42-43); *see infra* note 73.

67. *Id.* at 318.

68. *Id.* at 317 & n.22.

69. *Id.* at 309 n.5; *cf. id.* at 316 (referring to infrequent executions of offenders with known IQs less than seventy since *Penry*).

retardation provided by the AAMR (and the parallel definition of the APA in *Atkins*).[70] Mentally retarded offenders who meet this definition certainly appear to be the mentally retarded offenders about whom the Court has determined there is a national consensus. States therefore should ensure that the definitional provisions in their capital punishment exclusion provisions are at least as comprehensive as the clinical definitions referenced by the Court in *Penry* and *Atkins*.

B. State Definitions of Mental Retardation

In fact, most states that have enacted bans on the execution of mentally retarded offenders before and after *Atkins* have followed the Court's lead and have incorporated the above clinical definitions into their legislative definitions of mental retardation. In this connection, most states utilize all three prongs of the clinical definition concerning subaverage intellectual functioning, deficits in adaptive behavior, and manifestation before age eighteen.[71] The states vary somewhat, however, in the degree to which these three elements are further defined in their statutory provisions.

1. Pre-*Atkins* Definitions

As the *Atkins* Court noted, states enacted bans on the execution of mentally retarded offenders at a steady pace following the *Penry* decision, with legislative activity escalating in the period leading up to the *Atkins* decision.[72] As the eighteen pre-*Atkins* states enacted legislation, they often utilized the clinical definition in the current AAMR (or APA) classification text,[73] resulting in some variation in the characterization of the three prongs of the mental retardation definition.[74]

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70. *Cf.* Heller v. Doe, 509 U.S. 312, 321-22 (1993) (referring to the AAMR and APA definitional materials in discussing the nature of mental retardation); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 442 n.9 (1985) (referring to the AAMR definition of mental retardation).

71. *See Atkins*, 536 U.S. at 308 n.3.

72. *See id.* at 313-15.

73. *See supra* text accompanying notes 62, 66. When the AAMR revised its 1983 definition of mental retardation in its 1992 classification text, it modified the element of "significantly subaverage general intellectual functioning" to "significantly subaverage intellectual functioning." It expanded the adaptive skills portion of the definition by reference to deficits in two or more applicable adaptive skills areas. Although the reference age had been identified in accompanying materials in the 1983 text, the AAMR quantified the manifestation prong of the 1992 definition by changing it from the "developmental period" to age eighteen. Accompanying explanatory materials in both versions placed IQ cutoff scores at approximately seventy to seventy-five. In the 1992 text, the AAMR eliminated the classification system within mental retardation based on the IQ score component of the definition (e.g., mild or moderate mental retardation). *See* AAMR, 10th ed., *supra* note 53, at xi-xii, 22. When the APA revised the 1980 edition of its classification manual in 1994, it significantly paralleled the 1992 AAMR definition, essentially differing only in the characterization of the required adaptive behavior deficits as "significant limitations," slight differences in the wording of some of the identified adaptive skill areas, and the retention of the classification system within mental retardation based on IQ score. *See Atkins*, 536 U.S. at 308 n.3; AAMR, 10th ed., *supra* note 53, at 112-15; APA, DSM-IV-TR, *supra* note 53, at 41-49.

74. Although the majority of the states (and the federal system) define mental retardation generally, seven of the eighteen states refer to mental retardation at the time of the crime. *Compare* 18 U.S.C.A. § 3596 (West 2000); 21 U.S.C.A. § 848 (West 1999); ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MO. ANN. STAT. § 565.030 (West Supp. 2003); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002), *with* ARK. CODE ANN. § 5-4-618 (Michie 1997); CONN. GEN. STAT. § 53a-46a (2003); KAN. STAT. ANN. § 21-4623 (1995); MD. CODE ANN.,

Fifteen of the eighteen pre-*Atkins* states adopted a definition of mental retardation in their execution bans incorporating all three prongs of the clinical definition of mental retardation.[75] Two states did not include the manifestation prong in their definitions.[76] The unique definition adopted by Kansas is based only on the intellectual functioning component.[77] The execution exclusion for mentally retarded offenders in the federal legislation does not further define the term at all.[78]

All the pre-*Atkins* states required that a person deemed mentally retarded have significantly subaverage general intellectual functioning or significantly subaverage intellectual functioning, and five of the states did not further define these terms.[79] Nine of the states expressly referred to an IQ score of seventy in their definitions, either establishing such a score as a cutoff for this component of the definition or establishing a presumption in connection with the score.[80] One state established a rebuttable presumption of mental retardation based on an IQ score of sixty-five or below.[81] Two states defined this component in terms of an IQ score two or more standard deviations below the mean for the IQ test administered.[82] Kansas also used this description, but added the unique requirement that an offender's intellectual functioning be at a level which "substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law,"[83] language resembling many criminal insanity definitions. Arizona adopted the most detailed provisions regarding this component, requiring a prescreening examination to determine the IQ of *all* defendants regarding whom the state is seeking the death penalty, procedures for the appointment of qualified experts and the administration of adequate testing procedures, a set of presumptions or

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CRIM. LAW § 2-202 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002). *Compare also* Heller v. Doe, 509 U.S. 312, 323 (1993) (referring to mental retardation as a "permanent, relatively static condition"), *with* APA, DSM-IV-TR, *supra* note 53, at 42, 47 (referring to the possibility of improvement in adaptive skills with appropriate training and opportunities for persons with "mild" mental retardation to a degree that they no longer have the level of adaptive skill impairment required for a diagnosis, rendering mental retardation "not necessarily a lifelong disorder" and also noting that adaptive behavior problems are more likely to improve with remedial efforts than IQ, which remains a "more stable attribute").

75. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); ARK. CODE ANN. § 5-4-618 (Michie 1997); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MD. CODE ANN., CRIM. LAW § 2-202 (2002); MO. ANN. STAT. § 565.030 (West Supp. 2003); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002).

76. *See* NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000).

77. *See* KAN. STAT. ANN. § 21-4623 (1995).

78. *See* 18 U.S.C.A. § 3596 (West 2000); 21 U.S.C.A. § 848 (West 1999).

79. *See* COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); MO. ANN. STAT. § 565.030 (West Supp. 2003); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003) (providing no further definition).

80. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MD. CODE ANN., CRIM. LAW § 2-202 (2002); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002).

81. *See* ARK. CODE ANN. § 5-4-618 (Michie 1997); Jones v. State, 10 S.W.3d 449 (Ark. 2000) (rejecting claim that rebuttable presumption of mental retardation should be at an IQ of seventy, as prescribed by the APA and other states, rather than sixty-five).

82. *See* CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003).

83. KAN. STAT. ANN. §§ 21-4623 (1995); 76-12b01 (1997).

conclusions in favor of and against a finding of mental retardation based on IQ scores equal to or lower than sixty-five and equal to or above seventy-five, and a requirement that the margin of error for the test administered be considered in determining the "full scale intelligence quotient" of seventy or below required for this component of the definition.[84]

Of the seventeen pre-*Atkins* states that included an adaptive skills component in their mental retardation definitions, seven characterized the required deficits in adaptive skills as "significant" or a similar term; nine did not use a qualifying adjective of this type regarding the adaptive skills limitations; and one state used both approaches in its references to adaptive functioning and behavior.[85] Eleven states did not further define the term in their statutes.[86] Four states also included a variation of descriptive language concerning adaptive skills used by the AAMR referring to "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, or social responsibility that are expected for his or her age level and cultural group."[87] Two states adopted the further reference to deficiencies in two or more adaptive skill areas utilized in the more recent AAMR and APA definitions.[88]

Fifteen of the pre-*Atkins* states included in their definitions a requirement that mental retardation manifest itself during the developmental period.[89] Three states did not further define the term in their statutes. Ten states defined this component to require manifestation before age eighteen, as described in the more recent AAMR and APA definitions, and two states defined this component to require manifestation before age twenty-two.[90]

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84. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003).

85. *Compare* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MO. ANN. STAT. § 565.030 (West Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003) (using "significant" or a similar term), *with* CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); MD. CODE ANN., CRIM. LAW § 2-202 (2002); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002) (using no qualifying descriptor), *and* ARK. CODE ANN. § 5-4-618 (Michie 1997) (using both descriptions). *But cf.* KAN. STAT. ANN. § 21-4623 (1995) (including no adaptive skills component in its definition).

86. *See* ARK. CODE ANN. § 5-4-618 (Michie 1997); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MD. CODE ANN., CRIM. LAW § 2-202 (2002); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); *see also* State v. Smith, 893 S.W.2d 908, 917-18 (Tenn. 1994) (interpreting "deficits in adaptive behavior" in its "ordinary sense" in the absence of statutory definition or legislative intent otherwise); *cf.* Rondon v. State, 711 N.E.2d 506, 516 n.14 (Ind. 1999) (declining to adopt APA definition of adaptive behavior, but noting that APA definition may provide "some guidance" as to the type of information useful to determine the statute's adaptive behavior component). *But see Smith*, 893 S.W.2d at 928-30, 933 (Reid, J., concurring in part and dissenting in part; dissenting regarding order denying petition to rehear) (arguing that adaptive behavior has "accepted" meaning in field and legislative history supports AAMR definition of term).

87. AAMR, 10th ed., *supra* note 53, at 22; *see* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); WASH. REV. CODE ANN. § 10.95.030 (West 2002); *see also* APA, DSM-IV-TR, *supra* note 53, at 42 (using similar descriptive language).

88. *See* MO. ANN. STAT. § 565.030 (West Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002); *supra* text accompanying note 66 (containing the more recent AAMR and APA definitions).

89. *See* KAN. STAT. ANN. § 21-4623 (1995); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000) (omitting this component of the clinical definition).

90. *Compare* COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); GA. CODE ANN. § 17-

2. Post-*Atkins* Definitions

Since *Atkins*, legislatures in seven states and the highest appellate courts in three additional states have adopted procedures to identify mentally retarded offenders and exclude them from execution.[91] In drafting their definitions of mental retardation, these states have had the benefit of the Court's guidance in *Penry* and *Atkins*, as well as the experience of the eighteen pre-*Atkins* states.

In addition, the post-*Atkins* states have had the benefit of drafting their definitional provisions in light of the most recent modification of the AAMR mental retardation definition. The AAMR currently defines mental retardation as a "disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[92] While clearly maintaining the same three components of the clinical definition, the AAMR has grouped the specific adaptive skill areas identified in its previous definition into broader adaptive skill areas, which better correspond with the relevant assessment instruments. This broader grouping of adaptive skills areas also corresponds with accompanying material in AAMR's classification text which defines "significant limitations" in adaptive behavior as performance at least two standard deviations below the mean of a standardized instrument in one of the three modified adaptive skill categories or an overall score on a standardized measure of all three areas. Accompanying material in the classification text has also replaced utilization of specific IQ scores in defining the intellectual functioning component with references to performance at least two standard deviations below the mean of an "appropriate" assessment instrument, considering the standard measurement error for the instrument and its strengths and limitations.[93]

All ten post-*Atkins* states utilize all three components of the clinical definition of mental retardation in their state definitions. With regard to the intellectual functioning component, three states do not further define the term; four states utilize an IQ score of seventy in their definitions; one state uses an IQ score of seventy-five; one state uses the two standard deviations from the instrument mean concept; and one state court adopted the mental retardation definition "enunciated by the Supreme Court in *Atkins*, especially the [APA] definition."[94] In terms of their adaptive skills component, six states include

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7-131 (Harrison 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999) (providing no further description), *with* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); ARK. CODE ANN. § 5-4-618 (Michie 1997); CONN. GEN. STAT. § 53a-46a (2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); MO. ANN. STAT. § 565.030 (West Supp. 2003); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); WASH. REV. CODE ANN. § 10.95.030 (West 2002) (using before age eighteen), *and* TENN. CODE ANN. § 39-13-203 (1997) (using the developmental period or by age eighteen), *and* IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); MD. CODE ANN., CRIM. LAW § 2-202 (2002) (using before age twenty-two); *see supra* text accompanying note 66 (including AAMR and APA definitions referring to age eighteen); *see also* AM. PSYCHOLOGICAL ASS'N, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (John W. Jacobson & James A. Mulick eds., 1996) (using age twenty-two in its mental retardation definition).

91. *See supra* note 9.

92. AAMR, 10th ed., *supra* note 53, at 1.

93. *See id.* at 23. *See generally id.* at 19-37, 51-71, 73-91 (describing modifications in the 2002 definition generally and those regarding intellectual functioning and adaptive behavior).

94. *Compare* UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030) (providing no further definition), *with* DEL. CODE ANN. tit.11, § 4209

the further reference to deficits in two of the specific skill areas used in the AAMR and APA definitions referenced in *Atkins*; two states incorporate the broader adaptive skill areas used in the current AAMR definition; one state includes "significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas"; and one state does not further define the term.[95] Finally, eight states require that mental retardation be manifested before age eighteen, one state requires manifestation before age twenty-two, and one state simply requires manifestation during the developmental period.[96]

C. Application and Evidentiary Issues Regarding the Definition of Mental Retardation

The general consensus regarding the three-part clinical definition of mental retardation referenced in *Penry* and *Atkins* and reflected in the state procedural definitions adopted before and after *Atkins* does not eliminate the application and evidentiary issues that accompany utilization of the definition in the identification of mentally retarded offenders excluded from execution by *Atkins*. Although the general consensus regarding the definition suggests an ease of its application, as the manual accompanying the AAMR's current definition relates, mental retardation is a "multidimensional" state of functioning.[97] Just as the Court recognized the AAMR's expertise in *Penry* and *Atkins*,[98]

(Supp. 2002); IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002); Murphy v. State, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002) (using an IQ score of seventy), *and* Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2) (using an IQ score of seventy-five), *and* VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.) (using two standard deviations from the instrument mean), *and* Foster v. State, 848 So. 2d 172, 175 (Miss. 2003) (adopting the *Atkins* definition). *Cf. Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002, as corrected 2003) (using an IQ score of seventy or below in appellate review, although not adopting specific procedures), *cert. denied*, 2003 U.S. LEXIS 6155 (U.S. Oct. 6, 2003); State v. Williams, 831 So. 2d 835, 853-54 (La. 2002) (using the two standard deviations measure in the interim procedure).

95. *Compare* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002); IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2); *Foster*, 848 So. 2d at 175; *Lott*, 779 N.E.2d at 1014; *Murphy*, 54 P.3d at 567-68 (using the skill areas referred to in the clinical definitions cited in *Atkins*), *and* VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2) (Michie, LEXIS through 2003 Reg. Sess.); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1) (using broader adaptive skill areas in the current AAMR definition), *with* Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030) (providing no further definition), *and* UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.) (including the quoted definition and including a contingent ban if there are significant adaptive deficits without the quoted restrictions). *Cf. Perkins*, 851 So. 2d at 456 (providing no further definition in appellate review, although not adopting specific procedures); *Williams*, 831 So. 2d at 854 (referring to specific skill areas in interim procedure).

96. *Compare* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002); IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1); *Foster*, 848 So. 2d at 175; *Lott*, 779 N.E.2d at 1014; *Murphy*, 54 P.3d at 567-68 (using age eighteen), *and* UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.) (using age twenty-two), *with* Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030) (using the developmental period). *Cf. Perkins*, 851 So. 2d at 456 (using age eighteen in appellate review, although not adopting specific procedures); *Williams*, 831 So. 2d at 854 (using age twenty-two in the interim procedure).

97. *See* AAMR, 10th ed., *supra* note 53, at 48. Reflecting this multidimensionality, the AAMR identified five assumptions it deemed essential to the application of its clinical definition of mental retardation:

> 1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
>
> 2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.

states can utilize that expertise in better understanding the underlying aspects of the mental retardation definition and related application issues. Issues concerning the correct application of the term in the health and human services context, in which it is most often used, apply with even greater force when the term determines death penalty eligibility.[99] Thus, if states are to properly implement *Atkins*, they must address these issues in their procedures to identify mentally retarded offenders covered by the *Atkins* ruling.

1. Intellectual Functioning Component

Intelligence in the context of mental retardation pertains to "general mental ability" and includes "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience."[100] Given the centrality of intellectual functioning to the mental retardation definition, its adequate assessment is essential. In the assessment of intellectual functioning, the AAMR requires the use of standardized IQ tests with valid assessment measures and processes, coupled with assessment team member observations and clinical judgment. The AAMR establishes an IQ cutoff for purposes of the intellectual functioning component of mental retardation of at least two standard deviations below the mean of an "appropriate" assessment instrument, considering the standard measurement error for the specific instruments used and the instruments' strengths and limitations.[101] The AAMR has summarized its position concerning the assessment of intellectual functioning, as follows:

> The assessment of intellectual functioning is a task that requires specialized professional training. Assessment data should be reported by an examiner(s) experienced with people who have mental retardation and qualified in terms of professional and state regulations as well as meeting a publisher's guidelines for conducting a thorough, valid psychological evaluation of the individual's intelligence functioning. In some instances, this may require an interdisciplinary evaluation. It is important for evaluators to familiarize themselves with the five assumptions essential to the application of the 2002 definition of mental retardation presented in [*supra* note 97]. Appropriate standardized measures should be determined based upon several individual factors, including the individual's social, linguistic, and cultural background. If necessary, proper adaptations must be made for any motor or sensory limitation.
>
> Although reliance on a general functioning IQ score has been heatedly contested by some researchers, it remains, nonetheless, the measure of human intelligence that continues to garner the most support within the scientific community. If appropriate standardized measures of intelligence are not available (e.g., in some developing

3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

Id. at 1.

98. *See supra* notes 61-70 and accompanying text.

99. *See generally* John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, *in* THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 55 (Ronald W. Conley et al. eds., 1992) (describing evaluation challenges).

100. AAMR, 10th ed., *supra* note 53, at 51.

101. *See id.* at 23.

> countries or when people are observed in cultural settings different from their home countries), the general guideline for consideration of intellectual functioning should be determined by professional clinical judgment and determined to be below the level attained by approximately 97% of individuals (i.e., significantly below average). As further research in this area is reported, a greater degree of precision may emerge that can be applied to this area of concern.[102]

The above material identifies several of the areas of concern in the application of the intellectual functioning component of the mental retardation definition. At the outset, although criticisms of IQ testing range from its alleged racial and cultural insensitivity to its purported fundamental inability to accurately measure intelligence,[103] the AAMR, APA, and American Psychological Association continue to believe that it represents the best current assessment measure of intellectual functioning, as reflected in their definitional materials regarding mental retardation.[104] Assuming that standardized instruments will be used to measure the intellectual functioning component of the mental retardation definition, the question remains as to the most appropriate assessment instruments to use. In *Atkins*, the Court identified the Wechsler Adult Intelligence Scales test (WAIS-III) as the "standard instrument in the United States for assessing intellectual functioning."[105] The referenced Wechsler test, its version for persons under seventeen, and the current Stanford-Binet test (version IV) are the instruments most frequently used to assess intelligence.[106] Because valid assessment depends on an appropriate match between individual characteristics (e.g., linguistic and cultural factors) and the assessment instrument used, however, other assessment instruments may be necessary in individual circumstances. Of course, the most recent version of an assessment instrument with the most updated norms should be used.[107]

The choice of assessment instrument relates directly to the potential IQ cutoff used in any definition of subaverage intellectual functioning. As indicated previously, many states have incorporated a specific IQ cutoff score in their definitions of mental retardation, most often using an IQ of seventy as the cutoff for this component of the mental retardation definition.[108] However, most of these definitions do not acknowledge that each assessment instrument has a standard measurement error,[109] usually between three and five points, and that the standard measurement error is not the same for all instru-

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102. *Id.* at 51-52 (citations omitted).

103. *See, e.g., id.* at 52-56; Bing, *supra* note 54, at 72-75; Jennifer J. van Dulmen-Krantz, Current Public Law and Policy Issue, *The Changing Face of the Death Penalty in America: The Strengths and Weaknesses of* Atkins v. Virginia *and Policy Considerations for States Reacting to the Supreme Court's Eighth Amendment Interpretation*, 24 HAMLINE J. PUB. L. & POL'Y 185, 210-12 (2002); Note, *Implementing* Atkins, 116 HARV. L. REV. 2565, 2573-75 (2003); Amanda M. Raines, Note, *Prohibiting the Execution of the Mentally Retarded*, 53 CASE W. RES. L. REV. 171, 199-201 (2002).

104. *See* AAMR, 10th ed., *supra* note 53, at 23, 51; APA, DSM-IV-TR, *supra* note 53, at 41-42; AM. PSYCHOLOGICAL ASS'N, *supra* note 90, at 13.

105. *Atkins*, 536 U.S. at 309 n.5.

106. *See* AAMR, 10th ed., *supra* note 53, at 58, 59-62; APA, DSM-IV-TR, *supra* note 53, at 41.

107. *See* AAMR, 10th ed., *supra* note 53, at 56-57, 63-66.

108. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4209 (Supp. 2002); KY. REV. STAT. ANN. § 532.130 (Michie 1999).

109. *Compare, e.g.*, ARIZ. REV. STAT. ANN., § 13-703.02 (West Supp. 2003) (requiring consideration of the test "margin of error"), *with, e.g.*, IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.) (containing no reference to measurement error).

ments.[110] Recognizing the impact of the standard measurement error, in the previous AAMR definitions and the current APA definition, the IQ cutoff for mental retardation has been quantified between seventy and seventy-five, as noted by the Court in *Atkins*.[111] To avoid mistaken reliance on and potential misuse of a particular IQ score, especially if it does not include consideration of standard measurement error, the AAMR stated its current IQ cutoff in terms of being at least two standard deviations below the mean of the specific instruments used, considering their particular standard measurement error, strengths, and limitations. The current APA definitional material also refers to the IQ cutoff as being approximately two standard deviations below the mean, with reference to measurement error of approximately five points.[112] Thus, any state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.

Finally, even if the most appropriate assessment instrument is selected and its standard measurement error is acknowledged, accurate assessment ultimately depends on the expertise of the professional administering any instrument and interpreting its results. Not all psychiatrists, psychologists, and other professionals are trained in the administration of these intelligence assessment instruments, especially with mentally retarded populations. Adequate expertise in this regard is essential to an accurate assessment. Moreover, because various biomedical, social, behavioral, and educational predisposing factors may contribute to mental retardation, an interdisciplinary team, or at least access to adequate sources of relevant information, is generally required for a complete assessment.[113]

2. Adaptive Behavior Component

Adaptive behavior refers to the "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives."[114] This component of the mental retardation definition seeks to assess deficits in the *perform-*

110. *See* AAMR, 10th ed., *supra* note 53, at 57-59, 67-71; APA, DSM-IV-TR, *supra* note 53, at 41-42.

111. *See Atkins*, 536 U.S. at 309 n.5; AAMR, 10th ed., *supra* note 53, at 22; APA, DSM-IV-TR, *supra* note 53, at 41-42.

112. *See* AAMR, 10th ed., *supra* note 53, at 23, 57-59; APA, DSM-IV-TR, *supra* note 53, at 41-42; *see also* AM. PSYCHOLOGICAL ASS'N, *supra* note 90, at 13 (defining the intellectual functioning component in terms of an IQ score two or more standard deviations below the mean of an appropriately selected, administered, and interpreted assessment instrument). In its current materials regarding mental retardation, the APA has maintained the classification system within mental retardation based on IQ score: "mild," representing about eighty-five percent of the mentally retarded population, with IQs between fifty to fifty-five and approximately seventy; "moderate," consisting of about ten percent of the mentally retarded population, with IQs between thirty-five to forty and fifty to fifty-five; "severe," representing three to four percent of the mentally retarded population, with IQs between twenty to twenty-five and thirty-five to forty; "profound," consisting of one to two percent of the mentally retarded population, with IQs below twenty or twenty-five; and "severity unspecified," for those presumed to be mentally retarded but whose IQ is not testable with standard instruments. *See* APA, DSM-IV-TR, *supra* note 53, at 42-44. The AAMR eliminated these classifications in its 1992 revision because, inter alia, they were based only on the intellectual functioning component of the definition; mischaracterized the "considerable disadvantage[s]" experienced by those labeled in the "mild" group, the largest category; and were susceptible to incorrect application and misuse by educational and service providers and decision makers in the criminal justice system. *See* AAMR, 10th ed., *supra* note 53, at 22-23, 25-26, 30-37, 207-08. Moreover, for *Atkins* purposes, these distinctions are largely irrelevant because *all* offenders determined to fall within the clinical definition of mental retardation are excluded from execution.

113. *See* AAMR, 10th ed., *supra* note 53, at 51, 66, 93-96, 123-41.

114. *Id.* at 73.

ance of adaptive behavioral skills, even more than in the *acquisition* of such skills.[115] Although the adaptive behavior component has undergone more apparent refinements in the AAMR definitional structure than the intellectual functioning component, again the refinements reflect the AAMR's attempt to define essentially the same population of mentally retarded individuals[116] in the most effective manner for diagnostic, as well as classification and support purposes. In this connection, in its current definition, the AAMR modified the adaptive behavior component of its previous definition (which referred to limitations in two of ten specific adaptive skills areas) to refer to significant limitations in adaptive behavior as expressed in three broader areas of conceptual, social, and practical adaptive skills. The modification resulted from the AAMR's determination that although the specific skill areas might be useful in the design of supports for a mentally retarded person, the broader adaptive skill areas are "more consistent with the structure of existing measures and with the body of research evidence on adaptive behavior."[117]

In turn, the AAMR has determined that "significant limitations" in adaptive behavior for purposes of its mental retardation definition can be established only through the use of "standardized measures normed on the general population" including people with and without disabilities. The term is then defined as performance at least two standard deviations below the mean of "either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills."[118] The definitional requirement of a significant deficit in only one of the three domains is designed to minimize the variance of correlations across domains among the assessment instruments. The requirement of a score two standard deviations below the mean in one domain, however, "will have a sufficiently broad impact on individual functioning as to constitute a general deficit in adaptive behavior."[119] In a more general sense, this definitional approach is also consistent with one of the key assumptions to be utilized in the application of the AAMR's mental retardation definition, i.e., that limitations often coexist with strengths within an individual. Therefore, the presence of a strength in a particular area does not negate the coexistence of a limitation in another area of sufficient significance to establish the adaptive behavior component of the mental retardation definition.[120]

As in the case of intellectual functioning assessment, selection of an appropriate adaptive behavior assessment instrument is essential—both with regard to mentally retarded individuals generally and with regard to any individual characteristics that should be considered in the selection of an assessment instrument. Although many adaptive behavior scales exist, it is important to select an instrument of demonstrated reliability and validity and which has norms based on people with and without disabilities. The

115. *See id.* at 73-74.

116. *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. (ABA) 11, 12-13 (2003) (noting that the 1983, 1992, and 2002 AAMR definitions describe the same group of individuals).

117. AAMR, 10th ed., *supra* note 53, at 73; *see id.* at 76-77, 81-82. Approximately one-third of the pre-*Atkins* states and four-fifths of the post-*Atkins* states have incorporated some version of the AAMR definition of the adaptive behavior component into their legislative definitions, but most of the remaining states have not attempted to further define the term in their statutes. *See supra* notes 85-88, 95 and accompanying text.

118. AAMR, 10th ed., *supra* note 53, at 76.

119. *Id.* at 78.

120. *See supra* note 97.

Vineland Adaptive Behavior Scales, Scales of Independent Behavior, and AAMR Adaptive Behavior Scales have all been used to assess adaptive behavior concerning mental retardation and best practices manuals have been prepared by professional organizations that identify additional appropriate instruments. These assessment instruments also have standard measurement errors that must be considered in determining adaptive behavior cutoff scores. Of course, an accurate assessment requires that professionals have the requisite expertise to administer, score, and interpret any assessment instrument utilized.[121]

Because the adaptive behavior component of mental retardation measures the "skill level a person typically displays when responding to challenges in his or her environment,"[122] assessment test administrators must be particularly sensitive to the impact of factors such as a person's physical condition, opportunities to participate in community life, and sociocultural background on the selection of an appropriate assessment instrument and the interpretation of its results. Rather than placing sole reliance on the result of a particular adaptive skill assessment instrument, use of different sources of data which reflect an individual's adaptive skills is recommended. For example, interviews with family members, teachers, or service providers who are familiar with the individual's typical behavior over an extended period of time in multiple settings can supplement or aid in the interpretation of assessment results.[123] The AAMR cautions, however, that such interviews, observations, and other sources of information about adaptive behavior "can complement, but ordinarily should not replace, standardized measures."[124]

One potential non-standardized source of information of particular interest in the context of mentally retarded capital offenders concerns the facts of the crime itself. Some have argued that the facts of a capital crime are relevant to the adaptive behavior component (or even the intellectual functioning component) of the mental retardation definition; others contend these facts have no such relevance.[125] In reviewing determinations of mental retardation, some appellate courts have noted, without further discussion, expert witness review of an offender's criminal record or interview by police officers, or cross-examination regarding crime facts.[126] In finding that a capital offender was not mentally retarded, one reviewing court specifically noted the nature and circumstances of the capital crime and the defendant's other criminal behavior in finding that he did not have deficits in adaptive behavior.[127] Other reviewing courts, however, have expressed concern about the potential prejudice from the introduction of capital crime facts in the

121. *See* AAMR, 10th ed., *supra* note 53, at 74-75, 79, 81-84, 87-91; APA, DSM-IV-TR, *supra* note 53, at 42.

122. AAMR, 10th ed., *supra* note 53, at 74 (citation omitted).

123. *See id.* at 74-75, 85-87; APA, DSM-IV-TR, *supra* note 53, at 42; Shruti S.B. Desai, *Effective Capital Representation of the Mentally Retarded Defendant*, 13 CAP. DEF. J. 251, 272-75 (2001).

124. AAMR, 10th ed., *supra* note 53, at 84. *Compare* Rogers v. State, 698 N.E.2d 1172, 1177-79 (Ind. 1998) (finding that defendant failed to demonstrate that he did not receive an adequate evaluation because experts based their testimony on review of independent sources of information relating to adaptive skills rather than administering an assessment instrument), *with* State v. Smith, 893 S.W.2d 908, 930 (Tenn. 1994) (Reid, J., concurring in part and dissenting in part) (expressing the need for clinical evaluation in determining adaptive behavior deficits).

125. *Compare, e.g.*, Bill Analysis, S. 3, 2003-2004 Sess. (Cal. 2003), *with, e.g.*, Bill Analysis, S. 51, 2003-2004 Sess. (Cal. 2003).

126. *See Rogers*, 698 N.E.2d at 1178 (noting expert review of defendant's criminal records and videotaped interview with police); State v. Dunn, 831 So. 2d 862, 884 (La. 2002) (noting cross-examination regarding expert's failure to view videotape of the crime or review the police report).

127. *See Ex parte* Smith, No. 1010267, 2003 Ala. LEXIS 79, at *26-29 (Ala. Mar. 14, 2003).

mental retardation determination and have indicated that only narrowly drawn crime facts could be introduced and only if relevant to the mental retardation determination and if their prejudicial impact did not exceed their probative value.[128] Moreover, again it must be emphasized that even crime facts that reflect adaptive strengths do not negate coexisting significant adaptive limitations that may sufficiently establish the adaptive behavior component of the mental retardation definition. This component does not involve a balancing of strengths and weaknesses, but only requires the establishment of significant adaptive deficits.[129]

3. Manifestation During the Developmental Period

The third component of the mental retardation definition requires origination or onset of the disability during the developmental period, which the AAMR, APA, and more than half of the states with ban procedures have defined as the period before age eighteen.[130] Importantly, this component does not require specific testing or a diagnosis prior to that age, but there must be evidence of the manifestation of the disability prior to that age.[131] In the absence of testing conducted during the developmental period, other educational records or familial reports can supply relevant information regarding the disability's onset. In its application in this criminal context, this definitional component provides the added benefit of reducing concern that an offender might feign symptoms of mental retardation to avoid a potential death sentence.[132]

D. Recommendations Concerning the Definition of Mental Retardation and Application Issues

The choice of a mental retardation definition for purposes of implementing the *Atkins* holding is perhaps the easiest part of the development of a state's implementing procedures. In both *Penry* and *Atkins*, the Court has clearly utilized the three-part clinical definition of mental retardation in crafting its rulings concerning the exclusion of mentally retarded offenders from execution. It specifically (and unanimously) referenced the AAMR's 1983 definition in *Penry*. In *Atkins*, the Court specifically referenced the AAMR's 1992 definition and the APA's parallel current (2000) definition before subsequently noting that the states which provided the "national consensus" on the ex-

128. *See* Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991) (requiring balance of probative value and prejudicial impact); Lambert v. State, 71 P.3d 30, 31 (Okla. Crim. App. 2003) (authorizing only narrowly tailored crime evidence if relevant to mental retardation issue and no punishment evidence in collateral review proceeding); *cf.* State v. Patillo, 417 S.E.2d 139, 140-41 (Ga. 1992) (finding that jurors should not be informed of the sentencing consequences of a guilty but mentally retarded verdict). *But cf.* Foster v. State, 525 S.E.2d 78, 79-80 (Ga. 2000) (finding no error from jurors being informed that mental retardation hearing arose out of a criminal proceeding).

129. *See* Ellis, *supra* note 116, at 13 n.29.

130. *See* AAMR, 10th ed., *supra* note 53, at 23; APA, DSM-IV-TR, *supra* note 53, at 41, 47; *supra* notes 89-90, 96 and accompanying text; *cf.* AM. PSYCHOLOGICAL ASS'N, *supra* note 90, at 13 (using age twenty-two).

131. *See* AAMR, 10th ed., *supra* note 53, at 31-32 (noting more recent hesitancy to diagnose students with mental retardation as opposed to "learning disabilities"); Ellis, *supra* note 116, at 13 & n.31 (noting the requirement of manifestation and not testing during the developmental period).

132. *See* Bing, *supra* note 54, at 89-90; Desai, *supra* note 123, at 256, 272-74; *see also* Ellis, *supra* note 116, at 13-14 (noting also that the clinical literature does not indicate assessment problems from individuals feigning mental retardation or malingering).

clusion issue had adopted definitions of mental retardation which "generally conform[ed]" to these clinical definitions.[133] The AAMR's current (2002) definition merely further refines the definition referenced in *Atkins*.

In fact, all of these definitions describe essentially the same group of individuals. They address individuals with significant limitations in intellectual functioning, as reflected in IQ assessments two or more standard deviations below the mean of appropriate assessment instruments with reference to their standard measurement errors and other strengths and limitations, generally corresponding to an IQ score between seventy and seventy-five or below. This intellectual functioning deficit is accompanied by significant limitations in adaptive functioning or behavior. The disability must have originated during the developmental period, i.e., generally prior to age eighteen. It seems clear, therefore, that adoption of any of these clinical definitions would allow a state to identify the mentally retarded offenders whose impairments place them "within the range of mentally retarded offenders about whom there is a national consensus" excluding them from execution.[134]

Although any of the referenced clinical definitions would be adequate to allow compliance with *Atkins*' constitutional mandate, it is recommended that states adopting exclusion procedures in the future or those states revising inadequate existing definitions[135] adopt the current (2002) AAMR definition for several reasons. On a general basis, it represents a definitional refinement based on the most current research in the field by the country's "oldest and largest organization of professionals working with the mentally retarded"[136] and in the judgment of which organization the Court appears to have great confidence in this area. Moreover, the specific refinements incorporated in the 2002 definition are particularly well-suited to its application in this criminal justice context. The current definition's reference to IQ cutoff scores through standard deviation variance in appropriate assessment instruments and with further reference to standard measurement error and the instruments' other strengths and limitations—rather than simple numerical IQ cutoff scores—is more likely to avoid incorrect application of or even misuse of assessment instrument results. The current description of adaptive behavioral limitations in the three broader adaptive skill areas is not only more consistent with widely used assessment instruments and the research supporting them, but is also more consistent with the relevant inquiries in this criminal justice context than the more support system-relevant specific skill areas referenced in the 1992 definition. Moreover, the AAMR's requirement of the utilization of adaptive behavior assessment instruments and specification of requisite standard deviation variance better assures accurate deter-

133. *See* Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) (noting the Court's citing of these clinical definitions "with approval" and that the Court "presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim to be retarded"); *see also supra* notes 61-70 and accompanying text (describing the Court's use of the clinical definitions).

134. *See* Ellis, *supra* note 116, at 12-14; *supra* notes 59 (quoting Atkins v. Virginia, 536 U.S. 304, 317 (2002)), 61-70, 92-93 and accompanying text.

135. Ten capital punishment states do not yet have statutory or judicially established procedures to identify mentally retarded offenders and exclude them from execution. *See supra* notes 7, 9 and *infra* note 373 and accompanying text. Other states, with "underinclusive" definitions of mental retardation, will need to revise their definitions to make them consistent with the class of mentally retarded offenders about whom there is "national consensus," as defined in *Atkins*. *See, e.g.*, KAN. STAT. ANN. § 21-4623 (1995) (limiting its definition to an intellectual functioning component and essentially requiring an individualized lack of culpability finding).

136. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).

minations of this component of the definition. Finally, the consistent definitional quantification of the disability's origination prior to age eighteen not only further categorizes this population for purposes of this criminal justice application, but also reduces concerns about feigned manifestation of the disability. Thus, although any of the above clinical definitions of mental retardation should permit a state's compliance with *Atkins*, the 2002 AAMR definition is best suited for this purpose.[137]

The greater challenge in this area pertains to states' adoption of adequate mechanisms to ensure the availability of the necessary expertise to implement the required assessment of mental retardation for purposes of the constitutional exclusion from execution. As the AAMR notes, this typically requires the "administration of an individualized assessment of intelligence, an individualized assessment of adaptive behavior, and a determination made through review of documents and interviews with relevant observers that the disability was present before the age of 18."[138] Often, clinical judgment is required based on the "clinician's explicit training, direct experience with people who have mental retardation, and familiarity with the person and the person's environment."[139]

Accurate assessment of mental retardation is essential to implementation of *Atkins*' constitutional mandate. However, there are many stereotypes and a corresponding severe lack of knowledge about mental retardation in the general public, the legal profession, and even among those characterized as "experts" by virtue of their professional degrees.[140] For example, in one case, the court-appointed psychiatrist testified that to satisfy the statutory standard clinical definition of mental retardation a person would have an "IQ of less than 50, would not be able to follow directions, handle money, read, or write, and could perform only the most simple and repetitive jobs under supervision" and the court-appointed clinical psychologist described a qualifying person as one who would be "unable to dress himself or herself, not know when to eat or how to cook, and would require the constant care of someone else."[141] These characterizations obviously do not describe the full range of individuals whose limitations are addressed by the

137. *See* Alexis Krulish Dowling, Comment, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773, 802-07 (2003); Ellis, *supra* note 116, at 12-14 (recommending the 2002 AAMR definition); *cf.* Bing, *supra* note 54, at 139-41 (recommending the then current 1992 AAMR definition); *Implementing* Atkins, *supra* note 103, at 2577, 2582-84 (noting differing goals between law and medicine in the adoption of a definition of mental retardation and recommending a non-standardized definition that includes the 1992 and 2002 definitions, in part); Raines, *supra* note 103, at 197-98 (recommending the then current 1992 AAMR definition). The *Atkins* decision has generated considerable attention regarding mentally retarded individuals, in general, and the AAMR's definition, in particular, at a time when the AAMR has acknowledged that the field of mental retardation is continuing to evolve as it gains a more complete understanding of the condition itself. This requires refinement of the language used to define and classify the condition, as in its 2002 text, and even raises the possibility of eventually replacing the term "mental retardation" with an alternative term because of its stigmatizing effect and tendency to oversimplify this complex condition. *See* AAMR, 10th ed., *supra* note 53, at xii-xiii, 197-209. For *Atkins* purposes, however, even if there were such a modification of the labeling term itself, it would not affect the underlying components of the clinical definition upon which the *Atkins* holding was based and regarding which there is wide consensus.

138. AAMR, 10th ed., *supra* note 53, at 93-94.

139. *Id.* at 95. *See generally id.* at 93-96 (concerning clinical judgment); James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 484-93 (1985) (regarding need for expertise in criminal justice context).

140. *See Implementing* Atkins, *supra* note 103, at 2580-81.

141. Rogers v. State, 698 N.E.2d 1172, 1179, 1180 (Ind. 1998); *see* State v. Smith, 893 S.W.2d 908, 930 (Tenn. 1994) (Reid, J., concurring in part and dissenting in part) (describing trial court's apparent lack of understanding of mental retardation criteria).

clinical definition of mental retardation. How then can states assure that those involved in the criminal justice investigation and determination of mental retardation and the "experts" contributing to this process have the necessary expertise to make the mental retardation determination?

State statutory assessment procedures vary considerably. On one end is Arizona's process that requires a prescreening IQ assessment by a psychological expert for *all* defendants regarding whom the state is seeking the death penalty. If the examination reveals an IQ score of seventy-five or less, a subsequent independent assessment of mental retardation by one or more additional psychological experts is required. All of these experts must be state licensed and have at least two years' experience in the testing, evaluation, and diagnosis of mental retardation. The statute requires that each of the subsequent independent experts examines the defendant using "current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures" to determine whether the defendant has mental retardation. The statute also requires the court to consider the "margin of error" for the test administered in determining the defendant's IQ. On the other extreme are several other states that make no statutory mention of the assessment and expert procedures.[142]

Of course, states are not required to statutorily define these procedures, but the development of standardized approaches to the assessment of mental retardation will help ensure an accurate and consistent implementation of the constitutional mandate.[143] Commentator suggestions in this regard include required standards regarding assessment or the required use of specified assessment instruments; the requirement of a minimum level of expertise and ethical standards for those involved in the assessment process, the development of a pool of qualified experts, or the use of professionals already trained in relevant assessment for the state's educational or social services systems; and the requirement of minimum competence for attorneys and judges involved in the determination.[144]

Legal professionals should also be familiar with the application to the determination of mental retardation of the Court's holding in *Ake v. Oklahoma*.[145] The *Ake* Court specifically held that an indigent capital defendant who can make a preliminary showing that his sanity is a "significant factor" in the case (here through presentation of an insanity defense) is, at a minimum, constitutionally entitled to government-provided access to

142. *Compare* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003), *with, e.g.*, MD. CODE ANN., CRIM. LAW § 2-202 (2002).

143. *See* Dowling, *supra* note 137, at 801-10 (raising concerns, including equal protection concerns, about the lack of consistency in definitions and assessment procedures); *cf. Implementing* Atkins, *supra* note 103, at 2580 (describing arbitrariness in mental retardation determinations, including two different determinations involving two similarly situated defendants).

144. *See* Bing, *supra* note 54, at 142-43 (suggesting the use of court-appointed psychologists); Desai, *supra* note 123, at 251 (describing important considerations in the effective capital representation of mentally retarded offenders); Dowling, *supra* note 137, at 802, 807-10 (recommending uniform testing requirements, including specific tests, and guidelines and ethical standards for experts); Dulmen-Krantz, *supra* note 103, at 216-17 (suggesting minimum competence standards regarding mental retardation for attorneys); *Implementing* Atkins, *supra* note 103, at 2584-87 (recommending use of a pool of qualified experts and experts regarding mental retardation from non-criminal fields and the consistent application of the same standardized test throughout the state, as well as basic training regarding mental retardation for judges and lawyers); Ellis, *supra* note 116, at 14 (stressing the importance of adequate clinical evaluations); *cf.* Russell v. State, 849 So. 2d 95, 148 (Miss. 2003) (requiring inclusion of Minnesota Multiphasic Personality Inventory-II testing to detect "malingering").

145. 470 U.S. 68 (1985).

a "competent [mental health professional] who will conduct an appropriate examination and assist in evaluation, preparation, and presentation" of the issue.[146] However, *Ake*'s rationale—the expert's value to the accurate determination of the mental health-related issue and the unacceptable risk of error in the determination of the issue without such assistance[147]—applies with equal force to the mental retardation determination. Thus, states should anticipate the application of the *Ake* holding to the determination of mental retardation and incorporate its requirements into their procedures.[148]

As the foregoing discussion regarding the determination of mental retardation demonstrates, its assessment requires a clinically rigorous evaluation. At a minimum, states should ensure that nationally accepted and proven assessment instruments, appropriately matched to relevant individual characteristics of an offender, are utilized in the evaluation of an offender's intellectual and adaptive behavioral functioning. Statewide guidelines in this regard are advisable to ensure consistency and minimum standards in the selection of assessment instruments.[149]

The process for the appointment of experts regarding the mental retardation determination should be standardized and should incorporate *Ake* requirements regarding defense access to expert assistance. Professionals involved in the assessment process and presentation of evidence concerning it should have demonstrated experience and expertise regarding the evaluation and assessment process itself and its administration and interpretation concerning mentally retarded individuals. Again, statewide guidelines or establishment of minimum standards in this area would help identify a pool of experts qualified to participate in the determination of mental retardation for *Atkins* purposes.[150] Such a pool of experts can clearly include professionals from a state's educational or social services systems if they routinely assess mental retardation using clinical definitions comparable to those adopted by a state.[151]

Judges and attorneys who handle capital cases should be trained to recognize symptoms of mental retardation which might otherwise not be apparent because of their own lack of knowledge or an offender's failure to disclose his disability.[152] Finally, all those involved in the determination of mental retardation should have a thorough understanding of all the components of the clinical definition adopted and the manner in which

146. *Id.* at 82-83.

147. *See id.* at 79-82.

148. *See* Bing, *supra* note 54, at 143-44; Desai, *supra* note 123, at 267-68; *Implementing* Atkins, *supra* note 103, at 2578 n.87; Ellis, *supra* note 116, at 14. *See generally* Powell v. Collins, 328 F.3d 268, 281-88 (6th Cir. 2003) (finding *Ake* violation from trial court's denial of motion for expert assistance regarding mental history and condition, including mental retardation, and generally reviewing case law applying *Ake*); Hunter v. Commonwealth, 869 S.W.2d 719, 721-25 (Ky. 1994) (finding that trial court's denial of continuance to obtain mental health examination of capital defendant, including symptoms of mental retardation which could exclude him from the death penalty, was abuse of discretion under *Ake* and state law).

149. *See* FLA. STAT. ANN. § 921.137 (West Supp. 2003) (identifying a state social services agency to adopt rules to specify the "standardized intelligence tests" to be used in the determination of the intellectual functioning component); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.) (specifying assessment and expert criteria).

150. *See* ARIZONA REV. STAT. ANN. § 13-703.02 (West Supp. 2002) (establishing minimum qualifications for experts); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.) (establishing criteria for and expert contracting requirements regarding the examination process).

151. *See* AAMR, 10th ed., *supra* note 53, at 99-121 (describing other classification systems that can potentially relate to a mental retardation determination).

152. *See* Bing, *supra* note 54, at 82-86; Desai, *supra* note 123, at 260-67; Ellis, *supra* note 116, at 15 n.50 (describing behavioral characteristics associated with mental retardation which may mask recognition of the condition or complicate dealing with it in a criminal justice context).

these components are appropriately evaluated. Because implementation of the constitutional exclusion from execution depends on an accurate determination of mental retardation, any failures in the assessment and evaluation process that increase the risk of error in this determination are unacceptable.[153]

IV. THE FACT FINDER REGARDING AND THE TIMING OF THE MENTAL RETARDATION DETERMINATION

In contrast to the substantial guidance the Court provided in *Atkins* concerning the clinical definition of mental retardation and the resultant category of mentally retarded offenders covered by the constitutional ban on execution, the Court provided virtually no guidance regarding the procedures required to identify such offenders and exclude them from execution. For example, although the Court noted that the states which had adopted bans on the execution of mentally retarded offenders—and which formed the basis for its determination of national consensus—had adopted definitions of mental retardation that "generally conform[ed]" to the clinical definitions it had discussed, the Court did not mention the specific procedures these states had adopted to implement these definitions in their ban processes.[154] Instead, the Court simply left to the states the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[155]

Two central considerations in this regard are the identification of the fact finder regarding mental retardation and the timing of the determination in the criminal process. The available fact finder choices are the court, the jury, or both. The timing of the mental retardation decision can be prior to trial, as part of the guilt phase proceeding, or in connection with the punishment phase following an offender's conviction for a capital crime. Although the Court provided little guidance in *Atkins* regarding these issues, Court decisions in other areas, general legal principles, and practical considerations can help inform the development of a state's procedures in these areas. Further guidance is provided by the experience of the states that have adopted ban procedures before and after *Atkins*. Although the *Atkins* Court did not prescribe specific procedures required to implement the constitutional ban, adopted procedures must be adequate to carry out

153. *Cf.* Ake v. Oklahoma, 470 U.S. 68, 76-83 (1985) (including balancing of defendant and government interests, probable value of the safeguard sought, and risk of erroneous deprivation of the affected interest if the safeguard is not provided).

154. *See* Atkins v. Virginia, 536 U.S. 304, 313-16, 317 & n.22 (2002). As the Virginia Supreme Court noted in the *Atkins* remand, the Court did not even state "whether the issue of mental retardation is a question of fact or law." Atkins v. Commonwealth, 581 S.E.2d 514, 515 (Va. 2003). Reviewing courts have varied in their characterizations of the mental retardation determination as a question of law or fact. Regardless of the label attached to it, it requires the resolution of facts to determine whether they satisfy the legal definition of mental retardation, the legal effect of which can be an exclusion from capital punishment. *See* United States v. Webster, 162 F.3d 308, 352 (5th Cir. 1998) (characterizing determination as a factual finding); Rogers v. State, 698 N.E.2d 1172, 1180 (Ind. 1998) (noting that mental retardation is a factual determination); State v. Dunn, 831 So. 2d 862, 887 (La. 2002) (characterizing determination as "factual/legal" in that factual evidence is used to make legal determination of mental retardation); State v. Williams, 831 So. 2d 835, 859 (La. 2002) (noting that trial court, not experts, must make ultimate determination of mental retardation); Richardson v. State, 598 A.2d 1, 3 (Md. Ct. Spec. App. 1991), *aff'd*, 630 A.2d 238 (Md. 1993) (finding that issue is a question of fact); *Atkins*, 581 S.E.2d at 515 (characterizing issue as factual one); *cf.* Ellis, *supra* note 116, at 16 (finding the issue involves both questions of law and fact).

155. *Atkins*, 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) (plurality opinion)).

Atkins' "constitutional restriction upon [states'] execution of sentences."[156] This section reviews the above factors before making a recommendation, consistent with the constitutional mandate, regarding the optimal fact finder concerning the mental retardation decision and the timing of the decision.

A. Legal and Practical Considerations

The identification of the fact finder regarding and the timing of the mental retardation determination should bear some relationship to the nature of the determination itself. In this regard, the *Atkins* mental retardation determination has been alternatively compared to two other mental health-related criminal justice determinations: a criminal competency determination, frequently a judicial determination prior to the criminal proceedings, and a determination of criminal insanity, most often a jury determination (in contested cases) operating as an affirmative defense which follows an initial determination of guilt on the underlying crime.[157] Given the nature and effect of the mental retardation determination for *Atkins* purposes, the comparison to criminal competency proceedings appears more appropriate. A criminal competency proceeding requires an assessment of whether proffered facts satisfy the legal standard of criminal competency which, in turn, determines a defendant's "eligibility" for the prosecution process to proceed—without regard to any individualized assessment of the defendant's culpability for the underlying crime. On the other hand, the very determination of the facts necessary to satisfy the legal standard of criminal insanity requires an express individualized assessment of culpability for the underlying crime and an individualized absolution from such culpability on prescribed mental health grounds and their relationship to individual culpability.[158]

In a manner similar to a competency determination, an *Atkins* proceeding requires an assessment of whether proffered facts satisfy the legal definition of mental retardation adopted which, in turn, automatically determines a capital defendant's eligibility for or exclusion from the death penalty—again without regard to any individualized assessment of the defendant's culpability for the underlying crime. In this connection, the *Atkins* Court explicitly found, as part of its findings regarding national consensus, that "our society views mentally retarded offenders as *categorically less culpable* than the average offender."[159] Unlike the role that evidence of mental retardation plays as a mitigating factor balanced against aggravating factors in a capital sentencing determination of the requisite individualized culpability necessary for the imposition of a death sentence,[160] the *Atkins* mental retardation determination simply removes a defendant from that determination because the Court has already made the determination that a mentally retarded offender lacks the requisite culpability to be executed. In this connection, men-

156. *Id.*

157. *Compare Williams*, 831 So. 2d at 858 (comparing determination to procedure regarding pretrial competency hearings), *with id.* at 861 (Victory, J., concurring in part and dissenting in part) (comparing determination to criminal insanity determinations by jury); *see* State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002) (suggesting that the mental retardation proceedings be conducted by the court in a "manner comparable to a ruling on competency").

158. *See* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 557-61 (1994) (distinguishing between criminal competency and criminal insanity).

159. *Atkins*, 536 U.S. at 316 (emphasis added).

160. *See* Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989).

tal retardation is not a sentencing issue—it is an *eligibility* for sentencing issue. Viewed in this way, a judicial pretrial determination of whether proffered facts satisfy the legal definition of mental retardation and thus whether a case may proceed as a capital prosecution appears very similar to a judicial pretrial determination of whether proffered facts satisfy the legal standard of criminal competency and thus whether a criminal prosecution may proceed.[161]

Some have suggested, however, that the Court's recent rulings in *Apprendi v. New Jersey*[162] and *Ring v. Arizona*[163] may require a jury determination of the mental retardation issue. In *Apprendi*, the Court addressed a state offender's due process challenge to a "hate crimes" provision which allowed a factual finding of requisite biased purpose by a trial judge, by a preponderance of the evidence, to increase the maximum prison sentence for an underlying offense from ten to twenty years.[164] In reaching its holding, the Court concluded that the bias finding effectively served as an "element" of the crime because the factual finding concerning it "expose[d] the defendant to a greater punishment than that authorized by the jury's guilty verdict" on the underlying offense. The Court contrasted this circumstance with an aggravating or mitigating "sentencing factor" supporting a specific sentence *within* the range authorized by the jury's finding of guilt regarding a particular crime.[165] Consequently, the Court sustained the defendant's due process challenge and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[166]

Only days after the *Atkins* decision, the Court applied its *Apprendi* holding in *Ring* to the Arizona capital sentencing system which authorized a judicial finding of fact (beyond a reasonable doubt) regarding the presence of statutory aggravating circumstances required for the imposition of a death sentence. Without the judicial finding of at least one statutory aggravating circumstance, a capital defendant could only be sentenced to a term of life imprisonment based on the jury's guilty verdict on the underlying capital crime. The defendant challenged the state system as violative of the Sixth Amendment jury trial guarantee, as incorporated through the Fourteenth Amendment's due process provision.[167] Although it had previously upheld the Arizona system, the Court found that its prior holding was "irreconcilable" with *Apprendi*'s reasoning and that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[168] The Court concluded that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."[169]

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161. *Cf.* Sue Ann Gerald Shannon, Comment, Atkins v. Virginia: *Commutation for the Mentally Retarded?*, 54 S.C. L. REV. 809, 833 (2003) (analogizing to judicial authority regarding competency determinations).

162. 530 U.S. 466 (2000).

163. 536 U.S. 584 (2002).

164. *See Apprendi*, 530 U.S. at 468.

165. *Id. at* 494 & n.19; *see id.* at 476-90, 492-95; *id.* at 501 (Thomas, J., concurring) (distinguishing a "crime" which "includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)").

166. *Id.* at 490.

167. *See Ring*, 536 U.S. at 588, 592-97, 603.

168. *Id.* at 589.

169. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494); *cf.* Harris v. United States, 536 U.S. 545, 549-50, 556,

Some have questioned whether the Court's holdings in *Apprendi* and *Ring* require a jury's determination of mental retardation for *Atkins* purposes because a finding that a defendant is *not* mentally retarded subjects him to the increased potential punishment of death. A careful reading of these decisions, however, confirms that neither requires a jury determination of mental retardation for *Atkins* purposes. At the outset, unlike the bias finding in *Apprendi* and the aggravating circumstance finding in *Ring* which reflect a defendant's increased culpability (and hence bring the prospect of greater punishment), it is clear that the *Atkins* Court held that a finding of mental retardation reflected a defendant's reduced culpability which served to mitigate his potential punishment.[170] In *Apprendi*, the Court carefully distinguished between the punishment enhancing facts that required a jury determination and government proof beyond a reasonable doubt and punishment reducing facts that did not:

> [T]he principal dissent ignores the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation. If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the Judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. *Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.*[171]

Moreover, in *Ring*, the defendant did not even make a Sixth Amendment claim regarding mitigating circumstances[172] and thus the holding requiring jury determination of the aggravating circumstances at issue would not support such a requirement concerning the mitigating factor of mental retardation. Finally, if the *Apprendi-Ring* analogy were found applicable to the mental retardation determination (i.e., if the *absence* of mental retardation were viewed as an *Apprendi* element of the crime), presumably these decisions would compel not only a jury determination of the issue, but also government proof beyond a reasonable doubt (and perhaps notice through indictment) for *every* capital offender.[173]

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568 (2002) (noting that not "all facts affecting the defendant's punishment are elements" and finding that judicial fact finding supporting judicial imposition of a statutorily increased *minimum* punishment was not subject to the *Apprendi* holding and thus indictment allegation, jury submission, and government proof beyond a reasonable doubt were not required).

170. *See* Atkins v. Virginia, 536 U.S. 304, 316, 317-21 (2002).

171. *Apprendi*, 530 U.S. at 490 n.16 (emphasis added) (citations omitted).

172. *See Ring*, 536 U.S. at 597 n.4.

173. Although the *Ring* holding regarding the punishment enhancing fact at issue specifically addressed the Sixth Amendment jury trial guarantee, it did not need to address the standard of proof issue because the Arizona statute itself required a judicial finding of proof of the aggravating factor beyond a reasonable doubt (with an implicit burden of proof on the government regarding the aggravating factor). *See Ring*, 536 U.S. at 588-97. In *Apprendi*, the Court made clear that the Sixth Amendment guarantees included not only an opportunity for a jury trial, but also government proof beyond a reasonable doubt of every fact which served as an "element" to potentially increase the maximum penalty for the underlying crime. *See Apprendi*, 530 U.S. at 468, 475-77; *cf. id.* at 485 n.12 (cautioning against a state's mischaracterization or manipulation of "elemental" facts to avoid its corresponding Sixth Amendment obligations).

The *Apprendi* and *Ring* defendants did not raise a due process challenge to the omission in their indictments of the penalty enhancing "elements" (recognizing that the federal constitutional presentment or

There is no suggestion in *Atkins* (announced just days before *Ring*) that such a procedure is necessary, or even desirable, for the determination of mental retardation in this context. Not surprisingly, the courts that have addressed this issue have consistently determined that the finding of the absence of mental retardation is not an *Apprendi-Ring* fact requiring a jury determination or government proof beyond a reasonable doubt.[174] As the Louisiana Supreme Court observed,

> The Supreme Court would unquestionably look askance at a suggestion that in *Atkins* it had acted as a super legislature imposing on all of the states with capital punishment the requirement that they prove as an aggravating circumstance that the defendant has normal intelligence and adaptive function. *Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates "as the functional equivalent of an element of a greater offense."[175]

Thus, it does not appear that the Court's holdings in *Apprendi* and *Ring* require a jury determination regarding the *Atkins* mental retardation issue.

Concerns have also been raised about the impact of a jury determination on the accuracy of the mental retardation determination, especially if it is made in conjunction with punishment proceedings following a jury's conviction of a defendant for a capital crime. The Court itself noted in *Atkins* that "some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards."[176] It recognized the "reduced capacity" of mentally retarded offenders as an additional justification for their categorical exclusion from execution.[177]

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty" is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating fac-

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indictment requirements had not been incorporated within the Fourteenth Amendment due process provisions). *See Ring*, 536 U.S. at 597 n.4; *Apprendi*, 530 U.S. at 477 n.3. The *Apprendi* Court noted, however, that its holding had been "foreshadowed" by an observation made in Jones v. United States, 526 U.S. 227 (1999), construing a similar challenge to the federal carjacking statute, that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *See Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6). Following the *Apprendi-Ring* analogy to its logical conclusion, if a state constitutionally or statutorily required a grand jury indictment for the prosecution of capital crimes, grand jury proof of the absence of mental retardation and inclusion of this "elemental" fact in *every* capital indictment would be required. Even if a state did not require the indictment process for its capital cases, the allegation of the absence of mental retardation would need to be included in the prosecution's capital charging documents pursuant to this *Apprendi-Ring* analogy.

174. *See In re* Johnson, 334 F.3d 403, 404-05 (5th Cir. 2003); State v. Williams, 831 So. 2d 835, 860 (La. 2002); Russell v. State, 849 So. 2d 95, 146-48 (Miss. 2003); People v. Smith, 751 N.Y.S.2d 356, 357 (N.Y. Sup. Ct. 2002). *But cf.* Murphy v. State, 54 P.3d 556, 576 (Okla. Crim. App. 2002) (Chapel, J., concurring in result) (noting that proposed opportunity for jury to make de novo determination after an adverse judicial finding is consistent with *Ring*). *Compare Implementing* Atkins, *supra* note 103, at 2583 n.120; Shannon, *supra* note 161, at 828-29, 833 (suggesting that *Ring* does not govern the mental retardation finding), *with* Ellis, *supra* note 116, at 16 (noting uncertainty about *Ring*'s application to the mental retardation finding, but similarity to factor addressed in *Ring*), *and* Kristen F. Grunewald, Case Note, Atkins v. Virginia, *122 S. Ct. 2242 (2002)*, 15 CAP. DEF. J. 117, 124 (2002) (finding that absence of mental retardation is a *Ring* "element").

175. *Williams*, 831 So. 2d at 860 (quoting *Ring*, 536 U.S. at 609).

176. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

177. *Id.* at 320.

> tors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.[178]

These concerns related to the general accuracy of the capital sentencing procedure based on characteristics of mental retardation also relate to the specific mental retardation determination itself. Some judges and commentators feel that these concerns may be more pronounced if a jury rather than a judge is the fact finder.[179] Moreover, placing the *Atkins* mental retardation determination within the punishment proceeding could be confusing to jurors who might misconstrue it as interrelated with the culpability issues before them or otherwise to be balanced with or against such issues.[180] Juror determination of mental retardation during punishment proceedings also could be tainted by its consideration in conjunction with heinous crime facts and punishment evidence unrelated to the mental retardation determination regarding intellectual functioning and adaptive behavior deficits.[181] Thus, entrusting the judge with the fact finding responsi-

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178. *Id.* at 320-21 (citations omitted); *see* Bing, *supra* note 54, at 82-89; Desai, *supra* note 123, at 260-67; Ellis & Luckasson, *supra* note 139, at 427-32 (describing behavioral characteristics associated with mental retardation which may complicate dealing with it in a criminal justice context).

179. *See, e.g.*, Jenkins v. State, 498 S.E.2d 502, 518-19 (Ga. 1998) (Fletcher, P.J., dissenting) (finding that requested pretrial determination, rather than required jury determination during guilt phase, would "prevent[] confusion, reduce[] prejudice, and may vastly simplify the trial of the case"); Shannon, *supra* note 161, at 829, 833 (raising concern about juror bias); *cf.* Bing, *supra* note 54, at 141 n.593 (raising concern about a death-qualified jury making the mental retardation determination). *But cf. Atkins*, 536 U.S. at 354 (Scalia, J., dissenting) (expressing confidence in jurors' ability to address mental retardation as a "guilt-reducing" factor without the need for the Court's categorical exclusion).

180. *See* Richardson v. State, 630 A.2d 238, 243-44 (Md. 1993) (describing how state procedure attempts to separate the determination, during the punishment proceeding, of mental retardation as a death eligibility factor from consideration as a mitigating factor); *Implementing* Atkins, *supra* note 103, at 2583 n.120 (noting potential juror confusion); *cf. supra* notes 159-61 and accompanying text (discussing the fact that an *Atkins* mental retardation determination does not involve an individualized culpability determination, but only a death eligibility determination). *See generally* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011 (2001) (reviewing capital juror interviews describing blurring of guilt and punishment issues).

181. *See* State v. Patillo, 417 S.E.2d 139, 140-41 (Ga. 1992) (finding that witnesses in a mental retardation proceeding generally should not be examined in a way to inject sentencing issues into the proceeding); Murphy v. State, 54 P.3d 556, 575-77 (Okla. Crim. App. 2002) (Chapel, J., concurring in result) (expressing concern about jurors in punishment phase determination of mental retardation being tainted by death penalty-related evidence that "can only improperly appeal to jurors' emotions and passions"); Bing, *supra* note 54, at 142 (raising concern about juror prejudice against the defendant); *cf.* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (describing interviews of capital jurors regarding sentencing determinations). *But see* People v. Smith, 751 N.Y.S.2d 356, 357 (N.Y. Sup. Ct. 2002) (concerns raised regarding unreliable or biased jury determination of mental retardation based upon "pure unsubstantiated speculation"); *but cf.* Ake v. Oklahoma, 470 U.S. 68, 80-82 (1985) (describing use of experts to assist jurors in fact finding regarding criminal insanity).

Reviewing courts have varied in their positions regarding whether the facts of the capital crime are relevant to the determination of mental retardation at all or, at least, whether the presentation of such facts must be narrowly tailored to the mental retardation issue and their probative value balanced against their prejudicial impact. *See supra* notes 125-29 and accompanying text. Whatever the position taken, however, it is clear that placing the mental retardation determination during the capital jury's punishment proceedings would expose the jurors to a variety of prejudicial punishment evidence not relevant to the mental retardation determination.

bility regarding mental retardation could reduce or eliminate these accuracy-reducing concerns and potentially heighten accuracy by the court's familiarity with expert testimony generally and the ability to gain expertise in its consideration regarding mental retardation specifically.[182]

Finally, it has been suggested that a pretrial determination of mental retardation by the court would be more efficient and less costly than a jury resolution of the issue. It is contended that a judge's pretrial determination that a defendant is mentally retarded will avoid the significant costs associated with a capital trial proceeding, such as more extensive jury selection procedures and attorney representation.[183] However, the efficiency and cost reduction arguments only apply if a defendant is found mentally retarded in a pretrial proceeding. If the defendant is not found mentally retarded prior to trial, some (or all) of the pretrial evidence could be introduced again at a punishment proceeding upon conviction to establish or rebut mental retardation as a factor mitigating punishment,[184] and would thereby potentially extend the proceedings rather than shorten them.[185]

B. States' Identification of the Fact Finder Regarding and Timing of the Mental Retardation Determination

Unlike in the case of the mental retardation definition, neither *Atkins* nor other legal or practical considerations *compel* the states' selection, from the range of available choices, of a specific fact finder regarding and timing of the mental retardation determination. Perhaps, as a result, states have demonstrated greater variety in making these

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182. In reviewing the adequacy of state procedures to implement the constitutional ban on the execution of insane offenders recognized in *Ford v. Wainwright*, 477 U.S. 399 (1986), it was noted:

> The adequacy of a state-court procedure [for federal habeas corpus review purposes] is largely a function of the circumstances and the interests at stake. In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.
>
> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations.

Id. at 411-12 (plurality opinion) (citations omitted); *cf.* Melissa E. Whitman, *Communicating with Capital Juries: How Life Versus Death Decisions Are Made, What Persuades, and How to Most Effectively Communicate the Need for a Verdict of Life*, 11 CAP. DEF. J. 263, 276-78 (1999) (describing studies regarding capital jury decision making, including discussion of jurors' negative perceptions of defense expert witnesses); *supra* text accompanying note 152 (recommending training for judges and attorneys regarding mental retardation).

183. *See* State v. Williams, 831 So.2d 835, 860 (La. 2002); Bing, *supra* note 54, at 141; Shannon, *supra* note 161, at 829, 833; Ellis, *supra* note 116, at 14-15.

184. *See* Bing, *supra* note 54, at 145-46.

185. Some states with pretrial procedures also allow an interlocutory appeal of the mental retardation determination, which would also delay the proceedings. *See, e.g.*, ARIZ. REV. STAT. ANN.§ 13-703.02 (West Supp. 2003); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030). *But see* Bing, *supra* note 54, at 146 (suggesting that review of a mental retardation determination occur in a post-conviction rather than interlocutory appeal to avoid delay in the trial proceedings).

choices. Again, states that are establishing or revising *Atkins* procedures can benefit from the experiences of other capital punishment states in this regard.

1. Pre-*Atkins* States

Of the eighteen pre-*Atkins* states, all eighteen require or authorize the trial court to make the mental retardation determination in specified circumstances and ten states require or authorize the determination to be made prior to trial.[186] More specifically, five states require the trial court to make a pretrial determination of mental retardation.[187] In one additional state, the timing of the trial court's determination is not specified, but the state's supreme court permits and has encouraged defendants to raise the issue by pretrial motion.[188] Three states require or authorize the trial court to determine the mental retardation issue prior to trial and if the court does not find that the defendant is mentally retarded, the defendant can seek a de novo determination of the issue by the jury in the punishment phase of the proceedings.[189] One state authorizes a trial court determination of mental retardation either before trial or through a post-guilt verdict hearing conducted by the court separately or contemporaneously with the punishment proceeding.[190] Georgia, the first state to prohibit execution of mentally retarded offenders, has a unique procedure which requires the trial court to conduct a pretrial hearing to ensure there is a "factual basis" for a defendant's plea of "guilty but mentally retarded"; this plea is resolved by the jury, or the court acting as trier of fact, at the guilt stage of the proceeding.[191] In three states, the trial court makes the mental retardation finding after conviction, but before sentencing for the capital crime.[192] In two states, the jury, or court, as sentencer, makes the mental retardation finding during the sentencing proceeding.[193] In one state, the trial court conducts a hearing to determine mental retardation after the advisory jury has recommended a death sentence.[194] Finally, in one state, the timing of the trial court's determination is not stated.[195] No implementing procedure is specified in the federal statute.[196]

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186. *See infra* notes 187-95 and accompanying text. Most of these states also include provisions specifying how and when the defendant can raise the mental retardation issue. *See infra* notes 187-95; *see also infra* notes 198-202 (regarding post-*Atkins* states).

187. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 18-1.3-1102 (West Pamp. 2003); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003).

188. *See* TENN. CODE ANN. § 39-13-203 (1997); State v. Smith, 893 S.W.2d 908, 916 & n.2 (Tenn. 1994).

189. *See* ARK. CODE ANN. § 5-4-618 (Michie 1997) (requiring pretrial determination); MO. ANN. STAT. § 565.030 (West Supp. 2003) (authorizing pretrial determination with parties' and court's agreement); N.C. GEN. STAT. § 15A-2005 (2002) (authorizing pretrial determination on defendant's motion and requiring such with government's consent).

190. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003) (allowing a defendant to seek the court's mental retardation determination either pretrial or after conviction).

191. *See* GA. CODE ANN. § 17-7-131 (Harrison 1998); Jenkins v. State, 498 S.E.2d 502, 509 (Ga. 1998) (upholding trial court denial of request for separate trial regarding mental retardation because state statute requires determination during guilt phase). *But see id.* at 518-19 (Fletcher, P.J., dissenting) (describing merits of a pretrial determination of mental retardation).

192. *See* KAN. STAT. ANN. § 21-4623 (1995); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000).

193. *See* CONN. GEN. STAT. § 53a-46a (2003); MD. CODE ANN., CRIM. LAW §§ 2-202, -303 (2002); Richardson v. State, 630 A.2d 238, 241-44 (Md. 1993) (construing procedural operation of statute).

194. *See* FLA. STAT. ANN. § 921.137 (West Supp. 2003).

195. *See* WASH. REV. CODE ANN. § 10.95.030 (West 2002).

196. *See* 18 U.S.C.A. § 3596 (West 2000); 21 U.S.C.A. § 848 (West 1999); United States v. Webster, 162

2. Post-*Atkins* States

Of the ten states that have legislatively or judicially developed procedures regarding the mental retardation determination since *Atkins*, all ten require or authorize the trial court to make the determination in specified circumstances and seven of the nine states with applicable procedures require or authorize the determination to be made before trial.[197] Five states require or authorize the trial court to make a pretrial determination of mental retardation.[198] In one state, the trial court is authorized to determine mental retardation before trial (by agreement of the parties) and if the court finds that the defendant is not mentally retarded, the defendant can raise the issue again to the jury during the sentencing proceeding.[199] In one state, if the issue is not resolved before trial, the sentencer (court or jury) determines the issue during the punishment proceeding.[200] In one state, the guilt fact finder (court or jury) determines mental retardation during the sentencing proceeding.[201] In one state, the trial court makes factual findings regarding mental retardation after the punishment hearing as part of its determination of sentence.[202]

C. Recommendations Concerning the Fact Finder Regarding and the Timing of the Mental Retardation Determination

As the above discussion reflects, neither *Atkins* nor other controlling legal principles compel the selection of a specific fact finder regarding mental retardation or require that the determination be made at a specific point in the adjudication process. On balance, however, a pretrial determination regarding mental retardation by the court is recommended as the optimal process[203] for several reasons. At the outset, it is most consistent

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F.3d 308, 351-53 (5th Cir. 1998) (finding no plain error in the trial court's sua sponte entry of its factual finding concerning mental retardation after entering a death sentence).

197. *See infra* notes 198-202 and accompanying text. Mississippi has only judicially developed a collateral review procedure in which the court makes the mental retardation finding. *See* Foster v. State, 848 So. 2d 172, 175 (Miss. 2003).

198. *See* IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030); *cf.* Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2) (including defendant option in specified circumstances of raising the mental retardation issue at "aggravation and mitigation" rather than "eligibility"); State v. Lott, 779 N.E.2d 1011 (Ohio 2002). Although the procedure the Ohio Supreme Court developed in *Lott* was in the context of a collateral review case, the court also stated that the procedure would apply to capital cases pending trial and to claims of mental retardation raised at trial. The appellate court did not explicitly dictate the timing of the trial court's mental retardation determination in these circumstances. However, by stating that a "trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency," at the very least the trial court is authorized, if not required, to make the determination prior to trial. *See id.* at 1014-16.

199. *See* Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1); *cf.* State v. Williams, 831 So. 2d 835, 860-61 (La. 2002) (requiring pretrial determination by the court in the interim procedure).

200. *See* Murphy v. State, 54 P.3d 556, 567-69 (Okla. Crim. App. 2002) (including opportunity for court post-sentencing hearing review if jury does not find mental retardation). *But see id.* at 575-77 (Chapel, J., concurring in result) (criticizing complexity and other features of prescribed procedure and recommending pretrial court determination with opportunity for de novo review of adverse determination by jury after conviction, but prior to consideration of punishment evidence); *id.* at 572 (Johnson, V.P.J., concurring in part and dissenting in part) (agreeing with the procedure recommended by Judge Chapel).

201. *See* VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.).

202. *See* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002).

203. *See* Bing, *supra* note 54, at 141-42; Shannon, *supra* note 161, at 833-34 (suggesting pretrial court determination); *cf.* Ellis, *supra* note 116, at 16-17 (suggesting, to avoid *Ring* concerns, pretrial court determi-

with the nature of the determination, as defined by *Atkins*. The Court in *Atkins* has converted mental retardation from a factor to be considered solely as part of an individualized assessment of requisite offender culpability for capital punishment to a factor determining death penalty eligibility. By making a categorical assessment that mentally retarded offenders as a class have insufficient culpability to be sentenced to death, the *Atkins* Court has removed all individualized culpability issues from the determination and has narrowed the determinative issues to simply an offender's satisfaction of the adopted clinical definition of mental retardation. Unlike the determination of criminal insanity and other culpability-related matters often entrusted to a jury, this narrowed issue of mental retardation itself is the type of threshold issue most often committed to the court.[204]

Moreover, a pretrial resolution by the court seems most likely to avoid the accuracy-diminishing concerns expressed by the *Atkins* Court regarding adjudicatory proceedings involving mentally retarded offenders. Such concerns would be especially pronounced in procedures in which the mental retardation determination is made during or after punishment proceedings in which the fact finder has been exposed to a variety of prejudicial guilt and punishment evidence unrelated to the mental retardation determination.[205] Any procedure that could not sufficiently ensure the accuracy of the mental retardation determination could risk being deemed inadequate to "enforce the constitutional restriction [*Atkins* placed upon states'] execution of sentences."[206] Thus, a pretrial determination of mental retardation by the court is most consistent with the spirit of the *Atkins* holding and most likely to achieve its intended purpose of excluding mentally retarded offenders from execution.[207]

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nation with opportunity for de novo consideration of adverse result by jury after guilt determination, but before sentencing proceeding, or pretrial determination by a separate jury which will not adjudicate guilt).

204. *See supra* notes 157-61 and accompanying text. This mental retardation determination is also similar to the requirement of a "judicial evaluation of [a defendant's] claim of insanity before [a death] sentence can be executed." Atkins v. Virginia, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting) (citing Ford v. Wainwright, 477 U.S. 399, 410-11 (1986) (plurality opinion)).

205. *See supra* notes 176-82 and accompanying text.

206. *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-17 (plurality opinion)). In entrusting to the states the task of developing appropriate mechanisms to carry out the constitutional ban on the execution of insane offenders, the *Ford* opinion identified the "lodestar of any effort to devise a procedure [as] the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination." *Ford*, 477 U.S. at 417 (plurality opinion); *see id.* at 410-12.

207. One commentator has suggested that although the *Atkins* Court has not specified a fact finder for the mental retardation determination, it "seems to lean in favor of the judge." *Implementing* Atkins, *supra* note 103, at 2583 n.120.

> One argument in favor of what appears to be the *Atkins* Court's preference for the judge as factfinder involves an examination of the decision's context. The fact that *Atkins* comes as an additional layer of protection on top of *Penry v. Lynaugh*, 492 U.S. 302 (1989), which insisted that juries be permitted to consider mental retardation as a mitigator, suggests that mental retardation should be removed from the typical balancing process in sentencing. As a substantive restriction on capital punishment, the determination of mental retardation requires procedural protections greater than what *Penry* demands. To place it in the same mix as the aggravators and mitigators analyzed as part of the jury's sentencing determination runs the risk that the jury will not recognize its mandatory nature and will instead balance it against other factors.

Id.

Some have also supported a pretrial judicial determination of mental retardation on cost and efficiency grounds. As discussed, *supra* notes 183-85 and accompanying text, reduced costs and greater efficiency can be assumed if the court makes an uncontested finding of mental retardation in pretrial proceedings, but such a result is not the only possible outcome of a pretrial proceeding. Moreover, although certainly desirable, cost and efficiency should not be the ultimate determinants of the satisfaction of this constitutional imperative.

This conclusion is also supported by the fact that the majority of states that have adopted procedures to identify mentally retarded offenders and exclude them from execution have chosen to require or authorize the court to make the mental retardation determination prior to trial. All twenty-eight states with legislative or judicial procedures require or authorize the court to make the mental retardation determination in specified circumstances. Seventeen of the twenty-seven states with applicable procedures require or authorize the mental retardation determination to be made prior to trial.[208] This support by states—adopting procedures before and after *Atkins*—for the availability of a pretrial opportunity for the court to resolve the mental retardation issue further suggests the merit of this approach.

Finally, although some states have chosen to provide both a pretrial court resolution of the mental retardation issue and a de novo determination by the jury if the court does not find mental retardation,[209] such a dual determination opportunity is not required to assure the accuracy of the determination.[210] Of course, if the trial court does not find a defendant is mentally retarded in a pretrial proceeding for purposes of the *Atkins* exclusion, the defendant would nevertheless be able to present evidence concerning mental retardation during any punishment proceeding as a mitigating circumstance[211] and several states explicitly provide for this in their statutes.[212]

V. THE BURDEN OF PROOF AND THE STANDARD OF PROOF REGARDING THE MENTAL RETARDATION DETERMINATION

The identification of the burden of proof and standard of proof regarding the mental retardation determination is as important to the resolution of this issue as the selection of the fact finder and timing of the determination. The potential choices in these additional areas are obvious. The burden of proof regarding mental retardation is assigned to either the defendant or the government and the potential standards of proof are preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.[213]

208. *See supra* notes 186-202 and accompanying text.

209. *See supra* notes 189, 199 and accompanying text.

210. Accuracy in the court's determination of mental retardation can be assured through the opportunity for appellate review of the determination—either through an interlocutory appeal or following the imposition of a death sentence. *See, e.g.*, WASH. REV. CODE ANN. § 10.95.130 (West 2002) (describing mandatory appellate review of mental retardation determination); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030) (including interlocutory appeal procedure and mandatory review following imposition of a death sentence); State v. Williams, 831 So. 2d 835 (La. 2002) (reviewing mental retardation issue raised in direct appeal); Johnson v. State, 102 S.W.3d 535 (Mo. 2003) (reviewing mental retardation determination in context of request for collateral relief); *see infra* notes 314-28 and accompanying text (describing appellate review of mental retardation findings).

211. *See* Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989); *supra* note 30.

212. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); TENN. CODE ANN. § 39-13-203 (1997); *see also* Rogers v. State, 698 N.E.2d 1172, 1181 (Ind. 1998) (noting that although trial court did not find defendant mentally retarded in pretrial determination for purposes of statutory exclusion, court considered evidence of mental retardation as significant mitigating factor in rejecting jury recommendation of death sentence).

213. *See* JOHN W. STRONG, MCCORMICK ON EVIDENCE 508-18 (5th ed. 1999) (describing burden of proof and standard of proof). The discussion in this section focuses on the ultimate burden of proof rather than the initial burden of production, associated with the raising of the mental retardation issue. Although the court (or presumably any party) could sua sponte raise the mental retardation issue, most states that have explicitly addressed the issue have included some type of notice provision through which the defendant raises the mental retardation issue and which triggers the opportunity for or requirement of a clinical examination of the defendant. *See, e.g.*, FLA. STAT. ANN. § 921.137 (West Supp. 2003); KY. REV. STAT. ANN. § 532.135 (Michie1999); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art.

The *Atkins* Court did not specify what selections from these choices would be required to implement the constitutional ban on the execution of mentally retarded offenders. Once again, however, other Court decisions and the actions of the implementing states can provide some guidance in this regard for states attempting to carry out the requisites of the *Atkins* holding. These considerations inform the recommendations regarding the selection of the burden and standard of proof that conclude this section.

A. Court Guidance Regarding Selection of the Burden and Standard of Proof Requirements

Although the *Atkins* Court did not specify a particular required burden or standard of proof concerning the mental retardation determination, the Court's holding clearly did give the determination itself constitutional significance. As a result, as in the case of the selection of the fact finder and timing of the determination, all procedures chosen to implement the constitutional ban on the execution of mentally retarded offenders should further the achievement of accuracy in the determination.[214] As was noted regarding procedures to implement the constitutional ban on the execution of insane offenders recognized in *Ford v. Wainwright*,[215] not only must such procedures achieve a "degree of reliability required for the protection of any constitutional interest,"[216] but, in the capital context, they must also further the "clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution."[217] It is with recognition of this heightened need for accuracy in the implementation of the constitutional interest in excluding mentally retarded offenders from execution, that other Court decisions regarding appropriate burdens and standards of proof must be considered.[218]

The Court's holding in *Patterson v. New York*[219] can provide some guidance regarding the appropriate selection of the burden of proof concerning the mental retardation determination. In *Patterson*, the Court considered a due process challenge to New York's assignment to the defendant of the burden of proof to establish "extreme emotional disturbance." Proof of this circumstance served as an affirmative defense to a charge of second-degree murder in order to reduce the charge to manslaughter.[220] In addressing the defendant's claim, the Court characterized the challenged affirmative defense as a "mitigating circumstance" and an expanded version of the common law "heat of passion" defense. The Court further noted that the burden of proof regarding the

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905.5.1). Assigning to the defendant the burden of raising the mental retardation issue and initially producing some evidence in support of it is appropriate. *See* Ellis, *supra* note 116, at 15.

214. *See supra* notes 176-82 and accompanying text.

215. 477 U.S. 399 (1986).

216. *Id.* at 413 (plurality opinion).

217. *Id.* at 418 (plurality opinion).

218. In reviewing challenges to the constitutional adequacy of states' selection of burdens and standards of proof in implementing their criminal law and procedure, the Court has expressed some general deference to states' selections. *See, e.g.*, Medina v. California, 505 U.S. 437, 445-46 (1992) (reviewing burden and standard of proof); Patterson v. New York, 432 U.S. 197, 201-02 (1977) (reviewing burden of proof). The Court's due process review of such selections nevertheless necessitates a determination whether the procedures—when challenged—violate constitutionally required principles of "fundamental fairness." *See Medina*, 505 U.S. at 448.

219. 432 U.S. at 197.

220. See *id.* at 198-201. Although the *Patterson* Court directly addressed the state's allocation of the burden of proof, the Court also noted that the defendant was required to establish this affirmative defense by a preponderance of the evidence standard of proof. *See id.* at 200.

common law version of the defense "as well as other affirmative defenses—indeed, 'all . . . circumstances of justification, excuse or alleviation'—rested on the defendant."[221] Although there had been some deviation in modern times from the application of this common law principle, the Court declined to constitutionally require government proof of the "non-existence of all affirmative defenses."[222] As long as a state maintains its obligation to prove beyond a reasonable doubt all the elements of the underlying crime,

> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.[223]

Although the *Patterson* Court rejected a due process challenge to the procedures to implement a state-established affirmative defense, the Court in *Medina v. California*[224] applied the *Patterson* analytical approach to its review of burden and standard of proof allocations concerning constitutionally required criminal competency. The defendant in *Medina* had raised a due process challenge to California law, pursuant to which a defendant's competency was presumed and the burden of proof was placed on the defendant to establish criminal incompetency by a preponderance of the evidence.[225] In determining whether the State's placement of these proof burdens "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[226] the Court first looked at historical practice regarding the placement of the competency proof burdens and found it inconclusive. The Court next considered whether the procedures violated any established principle of "fundamental fairness" in operation. In this regard, the Court found that the California proof allocation would affect only a "narrow class" of competency determinations where the evidence is in "equipoise," i.e., the evidence in favor of and against an incompetency finding is evenly balanced.[227] The Court concluded that the state had satisfied due process concerns by providing defendants access to competency evaluation procedures and a "reasonable opportunity" to prove their incompetency. The Court further concluded that there was no additional constitutional requirement that the state "assume the burden of vindicating the

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221. *Id.* at 202 (citations omitted).

222. *Id.* at 210; *see id.* at 202-11. *But see id.* at 210-11 (indicating the existence of "constitutional limitations" on states' inappropriate reallocation of burdens of proof to avoid governmental proof obligations); *id.* at 223 (Powell, J., dissenting) (warning against inappropriate shifting of burdens of proof as a result of Court's holding).

223. *Id.* at 209; *see* Rivera v. Delaware, 429 U.S. 877 (1976) (dismissing challenge to state statute requiring defendant proof of insanity defense by a preponderance of the evidence); Leland v. Oregon, 343 U.S. 790 (1952) (rejecting due process challenge to state statute requiring defendant proof of insanity defense beyond a reasonable doubt). *But see Patterson*, 432 U.S. at 226 (Powell, J., dissenting) (stating that due process requires government proof beyond a reasonable doubt of factors that make a "substantial difference in punishment and stigma"); Mullaney v. Wilbur, 421 U.S. 684 (1975) (finding due process violation in statute that required a defendant to rebut statutory presumption of malice aforethought by proof of "heat of passion" evidence and thus improperly shifted proof burden regarding an element of the charged offense).

224. 505 U.S. 437 (1992).

225. *See id.* at 439-46.

226. *Id.* at 446 (quoting *Patterson*, 432 U.S. at 202).

227. *See id.* at 446-49.

defendant's constitutional right [not to be tried while incompetent] by persuading the trier of fact that the defendant is competent to stand trial."[228]

Subsequently in *Cooper v. Oklahoma*,[229] however, the Court unanimously held that Oklahoma's requirement that a defendant prove his incompetency by the clear and convincing evidence standard violated due process. At the outset, the Court distinguished the procedure it had upheld in *Medina* (which affected only the small class of cases in which the evidence was evenly balanced under the preponderance of the evidence standard at issue) from Oklahoma's utilization of the clear and convincing evidence standard which necessarily meant that a defendant could establish that he was more likely than not incompetent and still not satisfy his evidentiary burden under this heightened standard.[230] Moreover, neither historical nor modern practice supported the "fundamental" nature of Oklahoma's procedure. Indeed, the fact that only three other states currently used the clear and convincing evidence standard regarding competency suggested that its use *offended* a deeply rooted principle of justice.[231]

In addition, the Court found that Oklahoma's heightened evidentiary standard failed to exhibit "fundamental fairness" in operation. Rather than protecting the fundamental right of an incompetent defendant not to stand trial, the Oklahoma standard imposed a "significant risk" that a defendant would be erroneously found competent. Because the exercise of the remainder of his trial-related constitutional rights is dependent upon criminal competency, the consequences of an erroneous competency determination are "dire" for a defendant. To the contrary, the Court found that the risk of an erroneous competency determination to the state is "modest." While acknowledging that the challenges inherent in the competency determination might warrant the placement of the burden of proof on its proponent, the Court found that they did not justify the "additional onus" of an "especially high" standard of proof.[232]

> A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties. In cases in which competence is at issue, we perceive no sound basis for allocating to the criminal defendant the large share of the risk which accompanies a clear and convincing evidence standard. We assume that questions of competence will arise in a range of cases including not only those in which one side will prevail with relative ease, but also those in which it is more likely than not that the defendant is incompetent but the evidence is insufficiently strong to satisfy a clear and convincing standard. While important state interests are unquestionably at stake, in these latter cases the defendant's fundamental right to be tried only while compe-

228. *Id.* at 449; *see id.* at 451. *But see id.* at 457-68 (Blackmun, J., dissenting) (rejecting Court's analytical approach and finding that procedures to protect fundamental right of competency must be adequate and that government should bear risk of erroneous determination through assumption of burden of proof). *See generally* Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of* Medina v. California *and the Supreme Court's New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817 (1993).

229. 517 U.S. 348 (1996).

230. *See id.* at 353-56.

231. *See id.* at 356-62.

232. *See id.* at 362-66.

> tent outweighs the State's interest in the efficient operation of its criminal justice system.[233]

Although acknowledging its traditional deference to states' development of their criminal procedural laws, the unanimous Court concluded that Oklahoma's requirement that a defendant prove his incompetency by clear and convincing evidence was insufficiently protective of the constitutional right of an incompetent defendant not to stand trial, that it offended a "fundamental" principle of justice, and that it thus violated due process.[234]

*B. Pre-*Atkins *and Post-*Atkins *States*

The holdings of *Patterson*, *Medina*, and *Cooper* suggest that it would be constitutionally permissible to assign the defendant the burden of proof to establish his mental retardation, but by a standard of proof no higher than preponderance of the evidence. In fact, this is the approach taken by the majority of states that have legislatively enacted or judicially implemented bans before and after *Atkins*. All of the states that have expressly assigned a burden of proof regarding mental retardation have assigned this burden to the defendant.[235]

Although there was somewhat greater variety among the pre-*Atkins* states, the clear majority of all states that have selected a standard of proof regarding this issue have chosen the preponderance of the evidence standard. Among the pre-*Atkins* states, nine selected the preponderance of the evidence standard, four selected the clear and convincing evidence standard, one state used both of these standards (depending on the fact finder), and three states did not explicitly define the applicable standard of proof.[236]

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233. *Id.* at 366-67.

234. *See id.* at 367-68. In a portion of the *Walton v. Arizona*, 497 U.S. 639 (1990), decision that probably was not overruled by *Ring v. Arizona*, 536 U.S. 584 (2002), the Court narrowly upheld the Arizona capital sentencing procedure which assigned the defendant the burden to prove the existence of "mitigating circumstances sufficiently substantial to call for leniency" by a preponderance of the evidence. *See Walton*, 497 U.S. at 649-51 (plurality opinion); *id.* at 656-74 (Scalia, J., concurring in part and concurring in judgment) (finding that the defendant's challenge regarding mitigating circumstances failed to state an Eighth Amendment violation based on his rejection of the Court's mitigating circumstances capital jurisprudence). *But see id.* at 677-90 (Blackmun, J., dissenting) (finding that Arizona's procedure unconstitutionally restricted consideration of mitigating circumstances).

235. *See supra* note 7 (identifying pre-*Atkins* states; Connecticut, Florida, Kansas, Kentucky, Missouri, Nebraska, and New Mexico do not expressly assign the burden of proof, but most of these states include procedures for a defendant to provide notice of or seek a ruling on the mental retardation issue), *see supra* note 9 (identifying post-*Atkins* states; Idaho does not expressly assign the burden of proof, but does include a procedure for a defendant to provide notice of the intention to raise the mental retardation issue and to seek a hearing). *See also* Lott v. State, 779 N.E.2d 1011, 1015-16 (Ohio 2002) (placing burden of proof on defendant does not violate due process, citing *Medina* rationale). *But see* Ellis, *supra* note 116, at 16-17 (questioning whether the burden of proof can be placed on the defendant as a result of the *Ring* decision concerning proof of facts that increase the maximum punishment for an offense).

236. *Compare* ARK. CODE ANN. § 5-4-618 (Michie 1997); MD. CODE ANN., CRIM. LAW § 2-202 (2002); MO. ANN. STAT. § 565.030 (West Supp. 2003); NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); S.D. CODIFIED LAWS §§ 23A-27A-26.1 to .7 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002) (adopting preponderance standard), *with* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998) (adopting clear and convincing evidence standard), *and* N.C. GEN. STAT. § 15A-2005 (2002) (adopting clear and convincing evidence standard for pretrial court determination and preponderance standard for any subsequent jury determination), *and* CONN. GEN. STAT. § 53a-46a (2003); KAN. STAT. ANN. § 21-4623 (1995); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999) (not expressly defining the standard of proof).

Although Georgia alone adopted a beyond a reasonable doubt standard in its statutory "guilty but mentally retarded" plea procedure, the Georgia Supreme Court adopted a preponderance of the evidence standard for claims of mental retardation raised on collateral review.[237] Among the post-*Atkins* states, drafting their procedures to implement a constitutionally protected right rather than a state-created protection, nine states have adopted a preponderance of the evidence standard and one state selected the clear and convincing evidence standard.[238] The federal statute does not incorporate a burden or standard of proof concerning its exclusion.[239]

C. Recommendations Concerning the Burden and Standard of Proof Regarding Mental Retardation

Utilizing the rationale articulated by a unanimous Court in *Cooper* (and consistent with the holdings in *Medina* and *Patterson*), it is recommended that, for purposes of the *Atkins* exclusion from execution, states assign the defendant the burden of proof to establish mental retardation by a preponderance of the evidence standard of proof.[240] Because of the inherent nature of the mental retardation determination, the proof necessary

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The Indiana Supreme Court rejected a defendant's challenge, based on *Cooper*, to the state's requirement that a defendant prove mental retardation by clear and convincing evidence for purposes of the state exclusion from execution. The appellate court distinguished *Cooper* by finding that its holding addressed a constitutional interest central to "fundamental" justice principles whereas the Indiana procedure only affected state-selected sentence eligibility, not constitutionally constrained by the then applicable *Penry* holding. *See* Rogers v. State, 698 N.E.2d 1172, 1174-76 (Ind. 1998). The constitutional status that *Atkins* subsequently attached to this sentence eligibility issue undercuts the state court's rationale for distinguishing *Cooper* and upholding the clear and convincing evidence standard. *See* Ellis, *supra* note 116, at 15.

237. *Compare* GA. CODE ANN. § 17-7-131 (Harrison 1998), *with* Fleming v. Zant, 386 S.E.2d 339, 342-43 (Ga. 1989) (adopting collateral review procedure after finding that execution of mentally retarded offenders violates state constitution). *See* Mosher v. State, 491 S.E.2d 348, 351-53 (Ga. 1997) (noting *Penry* in distinguishing the *Cooper* rationale and upholding the beyond a reasonable doubt standard regarding the "guilty but mentally retarded" plea). *But see* Jenkins v. State, 498 S.E.2d 502, 516-19 (Ga. 1998) (Fletcher, P.J., dissenting) (finding that preponderance of the evidence rather than beyond a reasonable doubt is the appropriate proof standard, based on the application of the *Cooper* rationale).

238. *See* IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2); Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030); State v. Williams, 831 So. 2d 835, 861 (La. 2002); Foster v. State, 848 So. 2d 172, 175 (Miss. 2003); *Lott*, 779 N.E.2d at 1015; Murphy v. State, 54 P.3d 556, 568 (Okla. Crim. App. 2002) (adopting preponderance standard). In selecting the preponderance of the evidence standard, the Louisiana Supreme Court specifically referenced and applied the *Cooper* rationale. *See Williams*, 831 So. 2d at 859-60. The Oklahoma Court of Criminal Appeals selected the preponderance standard as the most appropriate despite the selection of the clear and convincing evidence standard in legislation previously vetoed by the governor. *See Murphy*, 54 P.3d at 568. *But see* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002) (adopting clear and convincing evidence standard); *Lott*, 779 N.E.2d at 1015-16 (restricting collateral review claims not filed within prescribed time period to clear and convincing evidence standard otherwise utilized for applicable collateral review claims).

239. *See* 18 U.S.C.A. § 3596 (West 2000); 21 U.S.C.A. § 848 (West 1999).

240. *See* Cooper v. Oklahoma, 517 U.S. 348 (1996); Medina v. California, 505 U.S. 437 (1992); Patterson v. New York, 432 U.S. 197 (1977); *Jenkins*, 498 S.E.2d at 516-19 (Fletcher, P.J., dissenting); *Williams*, 831 So. 2d at 859-60; *Lott*, 779 N.E.2d at 1015-16; Bing, *supra* note 54, at 144-45; *Implementing* Atkins, *supra* note 103, at 2586 n.132; Raines, *supra* note 103, at 199-200; Shannon, *supra* note 161, at 831-34; Ellis, *supra* note 116, at 15 (providing support for recommendation, directly or indirectly). *But see* Ellis, *supra* note 116, at 16-17 (suggesting government burden to prove absence of mental retardation beyond a reasonable doubt may be required by *Ring*).

to establish it, and its clear mitigating character, it is permissible to assign the defendant the burden of proving facts that will exempt him from execution.[241]

However, the standard of proof should be no higher than preponderance of the evidence, for several reasons. First, this standard is consistent with the historical treatment of evidentiary standards pertaining to related mental health issues, as described in *Cooper*. This standard is also consistent with the weight of the specific contemporary practice regarding the implementation of the *Atkins* constitutional exemption, especially by post-*Atkins* states. Moreover, a proof standard higher than preponderance of the evidence would unacceptably increase the risk of error in the mental retardation determination by allowing someone who is "more likely than not" mentally retarded to nevertheless be deemed eligible for the death penalty, in violation of the *Atkins* constitutional ban. As in *Cooper*, the preponderance of the evidence proof standard appropriately allocates the risk of error, recognizing that the consequences to the defendant from an erroneous determination (i.e., death penalty eligibility) significantly outweigh the consequences to the government (i.e., generally limitation of punishment to life imprisonment). As a result, the defendant should not be allocated the "larger share" of the risk of error in the mental retardation determination that would accompany a standard of proof higher than preponderance of the evidence. Finally, this standard of proof is necessary to adequately safeguard the important constitutional right being protected (i.e., the constitutional exclusion of mentally retarded offenders from execution). Just as the unanimous Court concluded in *Cooper* regarding the competency determination, the standard of proof regarding mental retardation for *Atkins* purposes should be no higher than preponderance of the evidence.[242] This standard will not only provide the necessary reliability to protect the constitutional right at issue, but will also further the "clear need for trustworthiness in any factual finding that will prevent or permit [a defendant's constitutional exclusion from execution]."[243]

VI. POST-CONVICTION REVIEW OF *ATKINS* CLAIMS

Of the approximately 3,500 offenders currently under sentence of death in this country, estimates of the proportion who are mentally retarded range between 4% and 20%,[244] or approximately 140 to 700 offenders. Thus, the retroactivity of the *Atkins* ban on the execution of mentally retarded offenders represents a critical issue for a significant number of capital offenders currently awaiting execution. Only a few of the eighteen pre-*Atkins* states had made their statutory bans retroactive. Most of the pre-*Atkins* states had either expressly applied their ban statutes prospectively or were silent on the issue.[245] Of course, the twenty capital punishment states without bans prior to *Atkins* had no specific provisions for the post-conviction review of the mental retardation issue.

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241. *See supra* notes 213-35 and accompanying text.

242. *See supra* notes 213-39 and accompanying text.

243. Ford v. Wainwright, 477 U.S. 399, 413, 418 (1986) (plurality opinion).

244. *See supra* notes 55-56 and accompanying text.

245. *Compare* NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.); N.C. GEN. STAT. §§ 15A-2005, -2006 (2002) (providing retroactive application for claims filed within prescribed time period), *with, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); FLA. STAT. ANN. § 921.137 (West Supp. 2003) (providing prospective application), *and, e.g.*, CONN. GEN. STAT. § 53a-46a (2003); WASH. REV. CODE ANN. § 10.95.030 (West 2002) (omitting reference to retroactivity). *Cf.* Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989); Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001) (providing for retroactive application of holding that execution of mentally

Although the *Atkins* decision did not expressly include a retroactivity discussion, such a discussion was not necessary because the Court had previously unanimously addressed the retroactive application of a constitutional ban on the execution of mentally retarded offenders in its resolution of the *Penry* case. Penry's claim had reached the Court through the collateral review process. Therefore, as a threshold matter, the Court had to determine whether Penry's claim sought a "new rule," the announcement and application of which the Court had previously significantly restricted in collateral review cases. The Court determined that the holding Penry sought would indeed require the establishment of a "new rule," not dictated by precedent at the time Penry's conviction became final and imposing a new obligation on the states and federal government. Nevertheless, the Court unanimously determined that Penry's claim could be considered and applied retroactively to defendants on collateral review because it satisfied one of the exceptions to the nonretroactivity doctrine which the Court had recognized, i.e., the ruling would constitutionally prohibit a category of punishment for a class of defendants based on their status or offense.[246] Although the *Penry* Court declined to establish the requested constitutional ban, the unanimous Court's retroactivity conclusion regarding the execution exclusion itself applies to the constitutional ban the Court ultimately recognized in *Atkins*.[247]

Thus, mentally retarded offenders sentenced to death in states without statutory or judicial ban procedures, in states in which they were sentenced prior to the enactment or implementation of such procedures, and, presumably, in states with procedures insufficient to address (or incorrectly applied to) the category of mentally retarded offenders excluded from execution by *Atkins*, may be able to present claims regarding their mental retardation on collateral review—both through state *and* federal habeas corpus proceedings.[248] It is therefore important for states (and the federal justice system) to adopt appropriate collateral review mechanisms to make the mental retardation determination in applicable cases. This section reviews how the states and federal courts have addressed the post-conviction review of *Atkins* claims before making recommendations in this regard.

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retarded offenders violates state constitution).

246. *See supra* notes 13-17 and accompanying text. Because the *Atkins* case reached the Court through the direct appeal process rather than through collateral review, the Court could announce its "new rule" without referencing this retroactivity analysis as a threshold matter, as had been required in *Penry*.

247. As one Justice noted during the *Atkins* oral argument, "Maybe the States that haven't made it retroactive haven't gotten up to speed on that once it's— once we make a declaration of unconstitutionality, it's retrospective." Oral Argument at 42, Atkins v. Virginia, 536 U.S. 304 (2002) (No. 00-8452); *see* Ellis, *supra* note 116, at 17. Federal and state courts that have addressed the issue, including those in states which had enacted prospective ban statutes, have acknowledged the retroactive application of the *Atkins* holding constitutionally excluding mentally retarded offenders from execution. *Compare, e.g.*, Bell v. Cockrell, 310 F.3d 330, 332 (5th Cir. 2002); Hill v. Anderson, 300 F.3d 679, 681 (6th Cir. 2002) (reflecting federal court interpretation), *with, e.g.*, State v. Williams, 831 So. 2d 835, 851 n.21 (La. 2002); State v. Lott, 779 N.E.2d 1011, 1014-15 (Ohio 2002) (reflecting interpretation of states without pre-*Atkins* bans), *and, e.g.*, State v. Grell, 66 P.3d 1234, 1240-41 (Ariz. 2003); Johnson v. State, 102 S.W.3d 535, 539 n.12 (Mo. 2003) (applying *Atkins* retroactively despite prospective only state bans).

248. *See supra* note 247 and accompanying text. Because *Atkins* established a federal constitutional prohibition of the execution of mentally retarded offenders, this prohibition is enforceable by state capital offenders through federal as well as state habeas corpus proceedings. *See infra* notes 279-301 and accompanying text. Although this section principally addresses the collateral review process, many of the principles discussed also apply to post-conviction cases still in the direct review process. *See, e.g., infra* notes 253-54, 262-64 and accompanying text; *cf.* Ellis, *supra* note 116, at 19 (recommending the establishment of clemency procedures regarding *Atkins* claims).

A. State Post-Conviction Review of Atkins *Claims*

In the period since the *Atkins* ban on the execution of mentally retarded offenders was announced, states have begun to address a variety of issues related to the post-conviction review of *Atkins* claims. These issues include threshold considerations of an offender's potential procedural default or waiver of his *Atkins* claim due to the failure to adequately raise the claim previously or the potential limitation on the raising of an *Atkins* claim through a successive habeas corpus petition.[249] Assuming an offender is procedurally able to raise an *Atkins* claim on collateral review, there may be additional threshold evidentiary standards that must be satisfied prior to obtaining review. With the satisfaction of any preliminary evidentiary showing, issues remain concerning the scope of the hearing provided and the nature of the mental retardation determination on collateral review.

State courts that have thus far addressed potential procedural default and successive petition obstacles to *Atkins* claims have tended to overcome these obstacles, often finding that the *Atkins* ruling satisfies an exception to these bars to collateral review.[250] In this connection, Georgia, the state with the oldest statutory ban and a ban pursuant to its state constitution of almost the same duration, has had the longest experience with potentially defaulted claims. The Georgia Supreme Court has held that a mental retardation claim can be made for the first time in a habeas corpus petition pursuant to the "miscarriage of justice" exception to its procedural default principle.[251] Similarly, the Ohio Supreme Court concluded that the *Atkins* decision satisfies an exception to its statutory restriction on successive habeas corpus petitions, i.e., Court decisions recognizing a new federal right that applies retroactively to persons asserting the claim in a successive petition.[252] The same analysis which resulted in the *Penry* Court's retroactivity holding seems likely to permit *Atkins* claims to avoid procedural default and successive petition bars to collateral review.[253]

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249. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1151-56 (2d ed. 1992) (regarding state writs).

250. *See, e.g.*, State v. Edwards, 841 So. 2d 768 (La. 2003) (addressing *Atkins* issue raised for the first time in post-conviction proceedings); Foster v. State, 848 So. 2d 172, 175 (Miss. 2003) (finding that *Atkins* is an "intervening decision" that renders timeliness and successive application bars inapplicable); *cf.* Bradford v. Cockrell, No. 3:00-CV-2709-P, 2002 U.S. Dist. LEXIS 21898, at *3,10 (N.D. Tex. Nov. 8, 2002, as corrected Jan. 14, 2003) (noting state concession that offender would be able to assert *Atkins* claim through successive petition under state law). *But see Foster*, 848 So. 2d at 176 (Smith, P.J., concurring in part and dissenting in part) (finding the *Atkins* claim procedurally barred and that *Atkins* does not satisfy the "intervening decision" exception).

251. *See* Head v. Ferrell, 554 S.E.2d 155, 166 (Ga. 2001); Turpin v. Hill, 498 S.E.2d 52, 53 (Ga. 1998); *see also* Rogers v. State, 575 S.E.2d 879, 881 (Ga. 2003) (stating that adjudication of mental retardation to determine death penalty eligibility is constitutionally required whenever it is challenged or otherwise in question).

252. *See* State v. Lott, 779 N.E.2d 1011, 1014-15 (Ohio 2002).

253. At least two states, however, have taken a somewhat narrower view regarding these threshold issues. Although avoiding a waiver finding in the case before it, the Oklahoma Court of Criminal Appeals has required that the mental retardation issue have been preserved in previously tried cases in at least one of several specified ways at trial or by prior appeal or collateral review. *See* Murphy v. State, 54 P.3d 556, 566, 569 (Okla. Crim. App. 2002). *But see id.* at 575 (Chapel, J., concurring in result) (finding majority's issue preservation dicta contrary to "plain language" of state collateral review statute, not compliant with the "letter or spirit" of *Atkins* or the legislature's will, and unlikely to survive constitutional challenge in federal court); *id.* at 572 (Johnson, V.P.J., concurring in part and dissenting in part) (finding that *Atkins* claims not subject to waiver doctrine).

In addition, in its post-*Atkins* ban statute, Virginia limits the raising of an *Atkins* claim by offenders sentenced to death before the effective date of the legislation. It allows the presentation of this claim by offenders still eligible for or involved in the direct appeal or collateral review processes. However, if an offender

Even though *Atkins* claims are not likely to be procedurally barred from all consideration on collateral review, most states have declined to require full collateral review of an *Atkins* claim without some preliminary showing of a factual basis for the claim. As one state supreme court noted, "We hasten to point out that not everyone faced with a death penalty sentence will automatically be entitled to a post-*Atkins* hearing. It will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation."[254] Some courts have implemented predicate statutory evidentiary requirements also stated in general terms, including a demonstration that the claim is "not frivolous"[255] or that there is a "substantial showing that a defendant's constitutional rights have been violated."[256] Other courts have further identified the predicate evidentiary requirements concerning a mental retardation claim by requiring "sufficient credible evidence" that includes at least one expert diagnosis of mental retardation[257] or a "prima facie" showing of all three components of the mental retardation definition.[258] Thus, it appears that some type of predicate showing reflecting a factual basis for an *Atkins* claim will be required before a more complete evidentiary determination is authorized on collateral review.[259]

Assuming that such a showing is made, most reviewing courts have then authorized an evidentiary hearing with a de novo determination of mental retardation in instances in which no such determination has previously been made.[260] This procedure is consistent with the remand for a de novo evidentiary determination of "competence to be executed" which the Court ordered following its recognition of the constitutional prohibition of the execution of insane offenders in *Ford v. Wainwright*.[261] Interestingly, the Virginia Supreme Court, upon receiving the remand of Atkins' case from the Court, recognized the procedural similarity of the remanded case to that in *Ford*. This reviewing court noted

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has completed these processes prior to the enactment of the state ban legislation, he is not entitled to file any additional state habeas corpus petitions and his "sole remedy shall lie in federal court." VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.).

254. State v. Williams, 831 So. 2d 835, 857 (La. 2002) (requiring evidentiary hearing in direct appeal case and quoted in part in *Edwards*, 841 So. 2d at 768, a collateral review case).

255. Atkins v. Commonwealth, 581 S.E.2d 514, 517 (Va. 2003) (applying the standard stated in post-*Atkins* ban statute, VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.)).

256. People v. Pulliam, 794 N.E.2d 214, 224-25 (Ill. 2002) (applying evidentiary standard from state collateral review statute).

257. *See* Rogers v. State, 575 S.E.2d 879, 881 (Ga. 2003); Fleming v. Zant, 386 S.E.2d 339, 342 (Ga. 1989).

258. *See* Murphy v. State, 66 P.3d 456, 458 (Okla. Crim. App. 2003). *But see id.* at 461 (Johnson, P.J., specially concurring) (requiring prima facie showing regarding any of three components to trigger evidentiary hearing); *id.* at 462 (Chapel, J., dissenting) (requiring prima facie showing regarding any of the three components).

259. *Compare* Russell v. State, 849 So. 2d 95, 148 (Miss. 2003) (finding that conflicting record evidence of mental retardation warranted post-conviction evidentiary hearing), *with* State v. Tate, 851 So. 2d 921, 942 (La. 2003) (finding insufficient record evidence to warrant post-conviction evidentiary hearing based on defense expert testimony that defendant is not mentally retarded).

260. *See, e.g.*, Wood v. State, No. CR-01-0700, 2003 Ala. Crim. App. 115, at * 27-28 (Ala. Crim. App. Apr. 25, 2003); *Pulliam*,794 N.E.2d at 236-37; *Russell*, 849 So. 2d at 149; *Murphy*, 54 P.3d at 570. *But see, e.g.*, Fairchild v. Norris, 876 S.W.2d 588, 589-91 (Ark. 1994) (finding no right to evidentiary hearing pursuant to state ban because of prior determination of lack of mental retardation in context of *Miranda* waiver issue); *but cf., e.g., Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002, as corrected 2003) (rejecting remand for resentencing in direct appeal case because trial record evidence did not "create any inference" of mental retardation), *cert. denied*, 2003 U.S. LEXIS 6155 (U.S. Oct. 6, 2003).

261. *See* 477 U.S. 399, 418 (1986) (plurality opinion); *id.* at 423-25, 427 (Powell, J., concurring in part and concurring in judgment) (finding federal de novo evidentiary determination on collateral review necessary because of inadequacy of state determination of issue).

that conflicting evidence of mental retardation in the record had been considered by the jury in connection with its mitigating evidence determination during sentencing, by the state supreme court itself in conducting its proportionality review on appeal, and by the Court in ultimately fashioning its constitutional holding. However, the court concluded that the "controverted factual question" whether Atkins is mentally retarded had never been "resolved" in any of these proceedings. Finding that the mental retardation issue had been sufficiently raised to warrant further proceedings, the state supreme court remanded the Atkins case for a de novo hearing on the "sole issue" of Atkins' mental retardation, pursuant to the state's post-*Atkins* statutory ban procedures.[262]

Similarly, other reviewing courts have authorized such a de novo proceeding even in circumstances in which there has been a fair amount of evidence concerning mental retardation in the trial record. In determining that a post-conviction evidentiary hearing was required to determine the offender's mental retardation, despite the presence of evidence regarding mental retardation in the record, the Louisiana Supreme Court summarized the rationale for authorizing a de novo proceeding in such circumstances.

> The United States Supreme Court [in *Atkins*] essentially altered the rules and altered a relevant fact after the trial. The State and the defense are both put in the impossible position of arguing whether a fact was established—i.e., whether the defendant is mentally retarded—when that fact was simply not an issue which a fact finder was called upon to decide. A fact that was marginally relevant when this case was tried (whether the defendant is mentally retarded) became a fact which could determine the sentence to be imposed after the trial. The State and defense gallantly attempt to argue from this record; however, their efforts must fail because the significance of the issue of mental retardation was drastically changed after the trial as a result of *Atkins*. The relevance of whether or not this defendant is mentally retarded has increased exponentially. Neither the State nor defense was required to anticipate this change.
>
> The defense was not called upon to exert time, energy, and effort in marshaling proof of mental retardation at the trial. Defendant needed only to establish diminished capacity as a mitigating factor. There was no obligation to prove mental retardation, which after the trial became a bar to the death penalty. Nevertheless, although the defendant was not called upon to offer proof of mental retardation, the defendant did offer evidence of mental retardation.
>
> It would be patently unjust to conclude from this record that the defendant failed to prove a fact which the defense was not called upon to prove at the time of the trial. Because the burden of proof of establishing mental retardation is imposed on the defendant [under the state's post-*Atkins* procedure], the defendant must be afforded the opportunity to meet that burden in a case such as this in which an expert testified without contradiction [the offender] is mentally retarded and his IQ is very close to

262. *See* Atkins v. Commonwealth, 581 S.E.2d 514 (Va. 2003). Although the *Atkins* remand involves a post-sentencing mental retardation determination during the direct appeal process, the court's own comparison to the *Ford* collateral review case reflects the applicability of its conclusion regarding the necessity of a de novo mental retardation determination to such a determination during the collateral review process.

> that which would indicate mental retardation. We reiterate that a defendant is not entitled to a post-*Atkins* hearing regarding mental retardation merely upon request.
>
> Furthermore, neither the State nor the defendant had any guidance as to the proper definition, criteria, and procedure to utilize in determining when one is mentally retarded such that the death penalty could not be imposed. Based on the record in this case, this court lacks sufficient factual evidence to make the legal determination of whether or not the defendant is mentally retarded. This factual/legal determination must be made following a hearing during which the court will be guided by evaluation and diagnosis made by those with expertise in diagnosing mental retardation.[263]

Applying this rationale explicitly or implicitly, reviewing courts have tended to grant de novo evidentiary hearings regarding the mental retardation determination after the establishment of the predicate factual basis.[264]

Once a court has authorized an evidentiary hearing regarding mental retardation on collateral review,[265] the mental retardation determination itself is generally made using the same definition of mental retardation as if the determination were being made during the trial process. With respect to the identification of the fact finder and burden and standard of proof, states that have addressed the issue have either adopted the same or a modified version of the procedures used in the trial phase determination of mental retardation, or have adopted the procedures in their applicable general collateral review provisions.[266]

Only four of the pre-*Atkins* states had statutory provisions or judicial rulings that authorized and addressed the retroactive application of their state bans on the execution of mentally retarded offenders. Both Nebraska and North Carolina authorized offenders sentenced to death prior to the enactment of their statutory bans to raise the mental retardation issue through a motion filed within a prescribed time period following the effective date of their statutes.[267] The Nebraska procedure used the same mental retarda-

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263. State v. Dunn, 831 So. 2d 862, 886-87 (La. 2002) (noting the above in a direct appeal case tried before *Atkins* and the adoption of the state's post-*Atkins* ban procedure); *see* State v. Dunn, 847 So. 2d 1183, 1183 (La. 2003) (finding that predicate showing of mental retardation had been satisfied and ordering evidentiary hearing regarding mental retardation).

264. *See* Johnson v. State, 102 S.W.3d 535, 541 (Mo. 2003); State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002) (articulating similar considerations in authorizing evidentiary hearings in collateral review cases); *see also* State v. Grell, 66 P.3d 1234, 1239-41 (Ariz. 2003) (noting similar rationale in direct appeal case); *supra* note 260 (citing additional cases concerning the authorization of a de novo evidentiary hearing).

265. Despite the tendency of reviewing courts to authorize such evidentiary hearings, these courts have engaged in little discussion concerning the general procedural safeguards accompanying these collateral proceedings. *See, e.g.*, Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991) (requiring appointed counsel and other trial-related rights during collateral review of mental retardation for state constitutional ban purposes); Lambert v. State, 71 P.3d 30, 31-32 (Okla. Crim. App. 2003) (applying trial-related rights and describing other hearing procedures). Presumably, the procedural protections that apply to collateral review of state capital cases generally apply to these evidentiary hearings regarding mental retardation. In this context, one procedural protection of particular note is whether the applicable state collateral review procedure provides for appointment of an attorney for an indigent offender. If such an offender has counsel during state habeas corpus proceedings appointed pursuant to an appointment system that meets specified criteria, more restrictive federal habeas corpus provisions apply. *See* 18 U.S.C.A. §§ 2261-2266 (West Supp. 2003).

266. *See infra* notes 267-77 and accompanying text.

267. *See* NEB. REV. STAT. § 28-105.01 (2001 Cum. Supp.), *amended by* NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.) (allowing verified motions brought within 120 days of the statute's July 15, 1998, effective date); N.C. GEN. STAT. §§ 15A-2005, -2006 (2002) (allowing motions filed within 120 days of the statute's October 1, 2001, effective date or within 120 days of the imposition of a death sentence for a trial in progress on that date and expressly expiring October 1, 2002). Both of these time periods regarding the state statutory

tion definition, fact finder, and proof requirements for its collateral review hearing as for its trial phase determination.[268] The North Carolina post-conviction statute adopted the same mental retardation definition as the trial phase statute, but incorporated the procedural and hearing provisions of its general "motion for appropriate relief" process. This resulted in a collateral proceeding in which the court determined mental retardation and in which the defendant had the burden of proof by a preponderance of the evidence. This varied from the statutory pretrial court determination based on defendant proof by clear and convincing evidence with the opportunity for a jury de novo determination based on defendant proof by the preponderance standard.[269]

In implementing their state constitutional bans on the execution of mentally retarded offenders, the Georgia and Tennessee Supreme Courts prescribed collateral review procedures for their bans' retroactive application. The non-time limited Georgia process adopted the definitional and defendant proof burden of the statutory trial phase procedure, but adopted a preponderance proof standard rather than the statutory beyond a reasonable doubt standard and required (rather than authorized) jury fact finding.[270] Using the definitional provisions of its statutory ban, the prescribed Tennessee collateral process incorporated its "motion to reopen" collateral review procedures.[271]

Supreme courts in two additional pre-*Atkins* states have authorized post-conviction evidentiary hearings to determine mental retardation following *Atkins*. The Arizona Supreme Court instructed the trial court on remand to use *Atkins* "as a guide" and to follow the state's statutory ban procedures (enacted after this offender's sentencing) to the degree possible in the "post-trial posture" of the case.[272] After noting the prospective nature of its statutory ban, the Missouri Supreme Court stated, "Nonetheless, in light of *Atkins*, this Court holds as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in [the statutory ban procedure], shall not be subject to the death penalty."[273]

Not surprisingly, most of the states that have enacted statutory or adopted judicial ban procedures since *Atkins* have addressed the post-conviction consideration of *Atkins* claims of mental retardation.[274] In their statutory provisions, three states have required

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bans have obviously expired. The question remains whether their expiration would preclude collateral claims pursuant to the *Atkins* federal constitutional ban. Language in the current version of the Nebraska statute, amended after *Atkins*, indicates that a capital offender sentenced after the statute's effective date could seek a mental retardation determination prior to any subsequent sentencing hearing. *See* NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.).

268. *See* NEB. REV. STAT. § 28-105.01 (2001 Cum. Supp.), *amended by* NEB. REV. STAT. § 28-105.01 (2003 Cum. Supp.).

269. *See* N.C. GEN. STAT. §§ 15A-1420, -2005, -2006 (2002); State v. Walters, 561 S.E.2d 892 (N.C. 2002) (allowing motion for appropriate relief and ordering remand to trial court for determination of mental retardation).

270. *See* Fleming v. Zant, 386 S.E.2d 339, 342-43 (Ga. 1989); *see also* Rogers v. State, 575 S.E.2d 879, 881-82 (Ga. 2003); Zant v. Foster, 406 S.E.2d 74, 76 (Ga. 1991).

271. *See* Van Tran v. State, 66 S.W.3d 790, 794, 811-12 (Tenn. 2001) (providing for trial court hearing and defendant proof of allegations, but also including a one-year filing period from the date of the ruling establishing the constitutional right). The *Atkins* ruling might create an additional time period for filing these claims.

272. *See* State v. Grell, 66 P.3d 1234, 1241 (Ariz. 2003).

273. Johnson v. State, 102 S.W.3d 535, 540 (Mo. 2003). The reviewing court remanded the case for a "new penalty phase hearing." The court's language left unclear whether the statutory opportunity for the trial court to resolve the issue would be available, as well as a de novo determination of an adverse finding by the jury during a punishment phase proceeding. The standard of proof in the court's opinion is the same as in the statute. *See id.* at 541; *see also* MO. ANN. STAT. § 565.030 (West Supp. 2003).

274. *Cf.* Act of June 27, 2003, 2003 La. Act 698, 2003 La. HB 1017 (to be codified at LA. CODE CRIM. PROC. ANN. art. 905.5.1) (omitting collateral procedure in statute, but procedure provided in state supreme

that their trial phase procedures regarding the mental retardation determination be used in post-conviction determinations.[275] In their statutes, two states have generally incorporated the procedures of their applicable post-conviction remedies for any mental retardation collateral review.[276] The highest appellate courts in four states have adopted the definitional and procedural provisions described previously in this Article in the context of the resolution of a post-conviction case or have otherwise indicated the application of the adopted procedure to cases on collateral review.[277]

Thus, at this point, only approximately fifteen (of the thirty-eight) capital punishment states have significantly addressed the post-conviction procedures that will be required to determine mental retardation for *Atkins* purposes. These states have generally demonstrated a willingness to consider *Atkins* claims on collateral review, finding exceptions to otherwise applicable procedural bars and successive petition barriers. However, the states have usually required a predicate showing of a factual basis for a mental retardation claim before authorizing an evidentiary hearing on the claim. Once this showing has been made, most states that have addressed the matter have authorized a de novo evidentiary determination of mental retardation. In this evidentiary proceeding, courts either use the trial phase procedures for determining mental retardation or the procedures generally applicable to post-conviction relief in the state.[278]

B. Federal Collateral Review of Atkins *Claims*

Mentally retarded state offenders not only have a potential *Atkins* claim which can be pursued through state habeas corpus proceedings, but they also have a potential claim that can be addressed through federal habeas corpus review.[279] Because the *Atkins* claim

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court decision described *infra* note 277 and accompanying text). *But see* UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.) (omitting collateral procedure).

275. *See* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002) (requiring use in all cases "tried, re-tried, sentenced, or re-sentenced" after statute's effective date); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.) (requiring use in available post-conviction proceedings); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030) (requiring use in motions to set aside penalty if no prior determination of mental retardation has been made under statute).

276. *See* IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.) (incorporating general procedures and time limits regarding capital cases); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2) (adopting statutory definitional provision, requiring petition's filing within 180 days of statute's effective date or of supreme court's mandate setting execution date, and otherwise adopting general post-conviction relief procedures); *cf.* People v. Pulliam, 794 N.E.2d 214, 237 (Ill. 2002) (deferring to legislature to adopt post-conviction procedure regarding mental retardation claims, leaving trial courts without definitive guidance in the interim regarding procedures for these and pre-conviction claims, and reserving role to review all such cases for due process compliance).

277. *See* State v. Williams, 831 So. 2d 835, 851 n.21, 858 & n.33, 859-62 (La. 2002) (establishing interim procedure with court fact finder, offender proof burden, and preponderance standard applicable to post-conviction cases, which presumably still applies in the absence of superseding statutory post-conviction provisions); Foster v. State, 848 So. 2d 172, 175 (Miss. 2003) (identifying post-conviction procedure); State v. Lott, 779 N.E.2d 1011, 1013-16 (Ohio 2002) (establishing pre- and post-conviction procedure and specifying lower standard of proof for *Atkins* successive petition claims filed within 180 days of decision than available under general post-conviction procedures); Murphy v. State, 54 P.3d 556 (Okla. Crim. App. 2002) (establishing pre- and post-conviction procedures); *cf. Ex parte* Perkins, 851 So. 2d 453, 456 (Ala. 2002, as corrected 2003) (identifying mental retardation definition for post-conviction review purposes), *cert. denied*, 2003 U.S. LEXIS 6155 (U.S. Oct. 6, 2003).

278. *See supra* notes 249-77 and accompanying text. This section describes the availability of and procedural framework for state collateral review of *Atkins* claims. Appellate court review of the determination of these claims on the merits is described in Section VII. of this Article.

279. This section addresses potential federal habeas corpus relief for state offenders, who represent the vast

is premised on federal constitutional law, it satisfies a basic jurisdictional requirement for federal habeas corpus relief regarding claims by state offenders.[280] However, state prisoner access to federal habeas corpus relief has been severely restricted since the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA")[281] in 1996. The AEDPA provisions themselves, and as foreshadowed by and interpreted by the Court, establish several barriers to state offenders seeking federal habeas corpus relief.[282]

At the outset, offenders must generally file their federal habeas corpus claims within one year after the judgment being challenged becomes final on direct review. This limitations period is tolled during the pendency of state post-conviction or collateral proceedings regarding the claim and can be equitably tolled for other reasons.[283] Prior to filing a claim for federal habeas corpus relief, state prisoners must fully exhaust all available state remedies for redress of their claim.[284] If an offender fails to raise or waives a claim at the state level such that it is deemed procedurally defaulted, federal habeas corpus relief will generally not be afforded to the offender if the state ruling constitutes an "adequate and independent" basis for resolution of the claim unless the offender can establish "cause" for his failure to previously raise the claim and "prejudice" if the claim is not heard.[285] Successive federal habeas corpus petitions are generally barred regarding the same claim unless an offender can establish that his initial claim was dismissed on technical grounds (e.g., a failure to exhaust state claims).[286] Successive habeas corpus petitions can be raised regarding different claims only if the offender can establish "cause" for his failure to previously raise the claim and "prejudice" if the claim is not heard. In addition, the nature of claims cognizable on a successive petition is further restricted by the AEDPA.[287]

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majority of capital offenders in this country. Of course, mentally retarded offenders who are prosecuted in the federal criminal justice system also have access to federal habeas corpus relief. *See* 28 U.S.C.A. § 2255 (West Supp. 2003). Neither Congress nor the federal courts have thus far established any specific procedures to address *Atkins* claims raised by federal prisoners through habeas corpus proceedings.

280. *See* 28 U.S.C.A. §§ 2241, 2254 (West 1994 & Supp. 2003).

281. Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (1996).

282. *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOGOBIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 968-1026 (4th ed. 2000) (describing federal habeas corpus).

283. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003); *see also* Warren v. Lewis, 206 F. Supp. 2d 917, 920 (M.D. Tenn. 2002) (describing equitable tolling). In the AEDPA, Congress also enacted special collateral provisions in capital cases applicable to states which provide counsel (satisfying specified criteria) for capital offenders in their state collateral proceedings. These provisions include a filing time period as short as 180 days from the applicable starting points. Thus far, few states have adopted appointed counsel systems that qualify for the application of these provisions. *See* 28 U.S.C.A. §§ 2261-2266 (West Supp. 2003); *see also, e.g.*, Tucker v. Catoe, 221 F.3d 600, 603-05 (4th Cir. 2000) (finding that state does not qualify for application of these provisions).

284. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp. 2003). *See generally* Rodriguez v. Cockrell, Civ. No. SA-00-CA-443-EP, 2003 U.S. Dist. LEXIS 6408, at *12-24 (W.D. Tex. Mar. 31, 2003) (describing exhaustion requirements).

285. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 750 (1991); Murray v. Carrier, 477 U.S. 478, 488-92 (1986).

286. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003); Stewart v. Martinez-Villareal, 523 U.S. 637, 644-46 (1998).

287. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003); McCleskey v. Zant, 499 U.S. 467 (1991). An offender seeking to file a successive habeas corpus petition must first seek approval in the applicable federal appellate court and make a "prima facie" showing that he satisfies the AEDPA's filing requirements. Even if the appellate court authorizes the filing, the trial court must also ensure that the statutory requirements have been satisfied before addressing the merits of the claim. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003).

Assuming a state offender overcomes these procedural barriers to federal habeas corpus review, the review itself is limited to a determination whether the challenged state court action was contrary to or involved an unreasonable application of clearly established federal law, as reflected in Court decisions, or whether the action was based on an unreasonable determination of facts in light of evidence presented in the state court proceeding.[288] As discussed in the *Penry* case, federal courts cannot establish "new rules" of law through the collateral review process, unless they fall within narrow exceptions.[289] In the resolution of a federal habeas corpus claim, state court factual findings are presumed to be correct—unless the offender establishes otherwise by clear and convincing evidence. The right to an evidentiary hearing is limited unless the offender can establish specified grounds for the failure to develop facts in the state proceedings. Although there is no federal constitutional right to appointed counsel regarding habeas corpus proceedings, the AEDPA permits a federal court to appoint counsel for an indigent offender.[290]

As this brief description of the complex federal habeas corpus process makes clear, state offenders pursuing *Atkins* claims through federal habeas corpus proceedings face many procedural and substantive hurdles to obtaining federal court relief. Their pursuit of such relief is aided by the fact that the *Atkins* Court's establishment of a "new rule" of constitutional law which has retroactive application serves as an exception to some of the described procedural bars to obtaining federal review. For example, the one-year limitations period should run from the date of the *Atkins* decision, i.e., June 20, 2002. Although this time period has now expired, an individual offender's limitation period may have been tolled or could be extended for other reasons authorized under the AEDPA, e.g., pursuit of post-*Atkins* state collateral relief.[291] In addition, the *Atkins* "new rule" should also satisfy necessary "cause" and "prejudice" requirements to excuse a procedural default or successive petition bar to federal relief, and may also make an offender eligible for an evidentiary hearing on his claim.[292] Finally, an offender's claim which attempts to establish his "actual innocence" is also an exception to the procedural default bar. In the context of a death sentence, actual innocence includes a showing, by clear and convincing evidence, of a circumstance that would render an offender ineligible for the death penalty.[293] As a result of *Atkins*, such a showing of mental retardation should qualify for this exception.[294]

Although several offenders have filed federal habeas corpus petitions asserting *Atkins* claims, federal courts have thus far generally deferred to the states to address these claims initially. One federal appellate court referred to the "welter of uncertainty" cre-

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288. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp. 2003); Williams v. Taylor, 529 U.S. 362, 402-13 (2000); *cf. id.* at 379-90 (plurality opinion).

289. *See* Penry v. Lynaugh, 492 U.S. 302, 329-30 (1989) (applying Teague v. Lane, 489 U.S. 288, 299-310 (1989) (plurality opinion)).

290. *See* 28 U.S.C.A. § 2254 (West 1994 & Supp. 2003); *cf.* Murray v. Giarratano, 492 U.S. 1 (1989).

291. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003); Atkins v. Virginia, 536 U.S. 304 (2002).

292. *See* 28 U.S.C.A. §§ 2244, 2254 (West 1994 & Supp. 2003); *cf.* Coleman v. Thompson, 501 U.S. 722, 750 (1991).

293. *See* Sawyer v. Whitley, 505 U.S. 333 (1992); *cf.* 28 U.S.C.A. § 2264 (West Supp. 2003) (omitting actual innocence as an exception to the procedural default rules in the special capital provisions for eligible states, as described in *supra* note 283).

294. An "actual innocence" claim exception also applies to the limitations on successive petitions and evidentiary hearings if the factual predicate to the claim could not have been discovered "through the exercise of due diligence." *See* 28 U.S.C.A. §§ 2244, 2254 (West 1994 & Supp. 2003).

ated by the *Atkins* decision as a result of its failure to "conclusively" define mental retardation or to provide "guidance" as to its application to prisoners already sentenced to death. As a result of the Court's delegation to the states of the establishment of appropriate mechanisms to enforce the *Atkins* Court's holding,

> [I]nferior federal courts have no useful role to play until and unless following *Atkins*, a death sentence is reaffirmed or again imposed on [the offender] by the state courts. Just how the state courts will implement *Atkins*, we cannot say. Clearly, however, the state must be given the first opportunity to apply the Supreme Court's holding in order to insure consistency among state institutions and procedures and to adjust its prosecutorial strategy to the hitherto unforeseen new rule.[295]

Implementing this sentiment, as well as the AEDPA exhaustion requirements, several federal courts have dismissed *Atkins* claims without prejudice so that offenders can pursue initial relief on these claims through the state courts.[296]

On the other hand, a few appellate courts have authorized the filing of successive habeas corpus petitions that raise *Atkins* claims.[297] In these cases, the courts have concluded that the *Atkins* ruling satisfies the exception to the successive petition bar for previously unavailable "new" rules of constitutional law made retroactive to cases on collateral review. Based on the materials submitted in support of the application, these courts have also been able to determine that the offender has made a "prima facie" or "sufficient showing of possible merit to warrant a fuller exploration by the district court."[298] As one court stated with regard to *Atkins* claims,

> [G]iven the Supreme Court's recent flat prohibition against executing the mentally retarded, [we] hold that if petitioner's proofs, when measured against the entire record in this case, establish a reasonable likelihood that he is in fact mentally retarded, then we are required to grant him leave to file a second or successive habeas petition on the basis of *Atkins*.[299]

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295. Bell v. Cockrell, 310 F.3d 330, 332-33 (5th Cir. 2002); *see* Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002); *cf.* Walker v. True, 67 Fed. Appx. 758, 770-71 (4th Cir. 2003) (acknowledging appropriateness of allowing states to resolve *Atkins* claims prior to federal courts).

296. *See, e.g.*, Thompson v. Crosby, 320 F.3d 1228, 1229-30 (11th Cir. 2003); *Hill*, 300 F.3d at 683; Bradford v. Cockrell, No. 3:00-CV-2709-P, 2002 U.S. Dist. LEXIS 21898, at *11-12 (N.D. Tex. Nov. 8, 2002, as corrected Jan. 14, 2003); *see also* Smith v. Cockrell, 311 F.3d 661, 685 (5th Cir. 2002) (declining to address unexhausted *Atkins* claim raised for the first time on appeal); *cf.* Tennard v. Cockrell, 317 F.3d 476, 477 (5th Cir. 2003) (declining to address *Atkins* claim unless raised by the offender).

A few courts that have dismissed *Atkins* claims on exhaustion grounds have addressed concerns about the potential expiration of the applicable limitations period prior to offenders' completion of the state process and return to federal court. One court noted that the limitations period for filing an *Atkins* claim would expire one year after the decision, but would be tolled during the pendency of any state court post-conviction or collateral proceeding. *See Bradford*, 2002 U.S. Dist. LEXIS 21898, at *10 n.7 (citing 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003)). Another court referred to the doctrine of "equitable" tolling to avoid any "pernicious" results from application of the exhaustion principles. *See* Rodriguez v. Cockrell, Civ. No. SA-00-CA-443-EP, 2003 U.S. Dist. LEXIS 6408, at *28 (W.D. Tex. Mar. 31, 2003).

297. *See Walker*, 67 Fed. Appx. at 770-71; *In re* Morris, 328 F.3d 739, 740-41 (5th Cir. 2003). *But see In re* Johnson, 334 F.3d 403, 404-05 (5th Cir. 2003).

298. *See In re* Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003) (quoting Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997)); *cf. Walker*, 67 Fed. Appx. at 771 n.10 (finding that appellate court need not consider factual predicate of claim to address authorization motion to file successive petition)

299. *Holladay*, 331 F.3d at 1174.

Under the AEDPA, the granting by an appellate court of authorization to an offender to file his successive claim simply permits the filing to undergo a second procedural review by a federal trial court before it addresses the merits of the claim.[300]

These initial post-*Atkins* cases provide an indication of the manner in which federal courts will likely address the filing of *Atkins* claims. It appears that federal courts will require state offenders to exhaust their available state court remedies before seeking federal habeas corpus relief. It also appears that the *Atkins* ruling will qualify as the type of "new rule" which will serve as an exception to the successive petition bar, and presumably any "cause" and "prejudice" requirements. Some predicate showing of mental retardation will likely be required for the filing of a successive petition, with a higher degree of proof required to successfully challenge any state court factual determination concerning mental retardation, legal application of *Atkins*, or substantiation of a claim of "'actual innocence' of the death sentence" based on mental retardation. Given the status of federal court collateral review of *Atkins* claims thus far, the manner in which the federal courts will ultimately determine these claims on the merits remains to be seen.[301]

C. Recommendations Regarding Post-Conviction Review of Atkins *Claims*

At the outset, it is recommended that state legislatures codify their post-conviction and collateral review procedures regarding offenders for whom no previous mental retardation determination for *Atkins* purposes has been made.[302] Such legislation will provide guidance to trial courts and help ensure consistency in appellate review.[303] In this regard, states should incorporate as many of the procedures utilized in the substantive trial phase determination of mental retardation as are applicable in a post-conviction context, e.g., the mental retardation definition itself, the identification of the fact finder, and the selection of the burden of proof and standard of proof.[304]

From a procedural standpoint, states may be able to incorporate the provisions of their general post-conviction and collateral review statutes if they offer an adequate framework for implementing the *Atkins* constitutional ban on execution, but certain aspects of the *Atkins* claim may require separate procedural provisions.[305] The first decision that a state must make is whether to establish a limitations period for the filing of an *Atkins* claim on collateral review. Although Georgia appears to have no time limits in this regard,[306] state interests in finality support the establishment of a reasonable limitations period. Given the uncertainty over the implementation of the *Atkins* mandate, states should select a statutory limitations period for the filing of *Atkins* claims that runs

300. *See* 28 U.S.C.A. § 2244 (West 1994 & Supp. 2003).

301. *See supra* notes 279-300 and accompanying text.

302. These offenders could include mentally retarded offenders sentenced to death in states without statutory or judicial procedures to determine mental retardation, in states in which they were sentenced to death before the enactment or implementation of such procedures, and, potentially, in states with procedures insufficient to address (or incorrectly applied to) the category of mentally retarded offenders excluded from execution by *Atkins*. For offenders who have received a trial phase mental retardation determination, pursuant to a procedure which is adequate for *Atkins* purposes, presumably a state's regular collateral review procedures would apply.

303. *See generally* Ellis, *supra* note 116, at 17-19 (suggesting the adoption of post-conviction procedures for *Atkins* claims).

304. *See supra* notes 268, 272, 275, 277 and accompanying text (describing states that have adopted this approach).

305. *See supra* notes 269, 276 and accompanying text (describing states that have used this approach).

306. *See supra* note 270 and accompanying text (describing Georgia collateral review procedure).

from the enactment of the collateral review provisions rather than from the date of the *Atkins* decision. In order to provide an adequate opportunity for an offender to raise an *Atkins* claim, the limitations period should be no shorter than six months and need be no longer than one year.[307]

If the *Atkins* ruling itself does not otherwise satisfy exceptions to any applicable state procedural bar or successive petition restrictions, such restrictions should be waived for *Atkins* claims in circumstances in which there has been no prior mental retardation determination or opportunity for such.[308] Although there should be no automatic right to an evidentiary post-conviction hearing regarding mental retardation, any predicate evidentiary requirements should be reasonable, e.g., permitting the use of record evidence or affidavits to establish a factual basis for the claim.[309] Once an offender is able to make such a predicate showing of mental retardation, he should be entitled to a de novo evidentiary hearing in which his *Atkins* claim of mental retardation can be determined. As appellate courts have noted, *Atkins* "altered the rules" regarding and the importance of the mental retardation determination. Therefore, post-conviction review courts should not make mental retardation determinations for death sentence eligibility purposes on incomplete record evidence of mental retardation, especially if it was offered and argued for other purposes at trial.[310] Expert assistance, comparable to that available for a trial phase mental retardation determination or required pursuant to *Ake*, should be available. Finally, indigent offenders should have the statutory right to appointed counsel for these proceedings.[311]

These recommended procedures may be more extensive than a state's general post-conviction and collateral review procedures. However, the *Atkins* Court's directive that the states develop "appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"[312] applies to the post-conviction stages as well as the trial phase of the proceedings. The recommended post-conviction and collateral procedures are necessary to implement the constitutional prohibition of the execution of mentally retarded offenders. Moreover, an adequate state post-conviction review process to determine an *Atkins* claim is ultimately in a state's interest—the more complete the state court process, the greater deference it will receive under the AEDPA upon federal collateral review.[313]

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307. *Cf.* Ellis, *supra* note 116, at 18; *supra* notes 267, 276 and accompanying text (describing limitations period).

308. *See supra* notes 250-53 and accompanying text.

309. *See supra* notes 254-59 and accompanying text.

310. *See supra* notes 260-64 and accompanying text.

311. *See supra* note 265; *see also* Ake v. Oklahoma, 470 U.S. 68, 74-83 (1985). *But see* Gorby v. State, 819 So. 2d 664, 679-80 (Fla. 2002) (rejecting claim that offender was denied adequate resources to present mental retardation claim in post-conviction proceeding). Again, a state's adoption of an appointed counsel system that meets the federal criteria should make the state eligible for the more restrictive federal habeas corpus provisions available in capital cases. *See* 28 U.S.C.A. §§ 2261-2266 (West Supp. 2003).

312. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (citation omitted).

313. *See supra* notes 279-301 and accompanying text (describing federal collateral review generally and regarding *Atkins* claims). As one federal court noted in responding to an offender's concerns about the potential adequacy of state procedures to address *Atkins* claims,

> [T]his Court is unwilling to conclude in advance that the state courts will refuse to develop appropriate ways to enforce this constitutional restriction upon its [sic] execution of death sentences. Even so, this does not preclude a subsequent review in this Court. Once a state has first addressed this question, federal courts retain the power to determine if the manner in which it has resolved such a claim comports with the requirements of due process.

Bradford v. Cockrell, No. 3:00-CV-2709-P, 2002 U.S. Dist. LEXIS 21898, at *14 (N.D. Tex. Nov. 8, 2002, as

VII. APPLICATION ISSUES AND OTHER CHALLENGES REGARDING *ATKINS* CLAIMS

Even as the substantive standards regarding the implementation of the constitutional prohibition of the execution of mentally retarded offenders continue to develop, courts are addressing a variety of application issues and other challenges concerning *Atkins* claims. These include appellate court review of mental retardation determinations made pursuant to *Atkins* or state statutory bans, claims of ineffective assistance of counsel concerning the investigation and presentation of mental retardation evidence, and various other claimed application errors. In addition, some courts have addressed—and likely will increasingly address—challenges to the substantive state ban provisions themselves. This section discusses these issues and predicts some likely trends.

A. Appellate Review of Mental Retardation Determinations

States have thus far provided for the appellate review of mental retardation determinations made pursuant to *Atkins* or state bans in various ways. Some states have incorporated provisions concerning appeals of the mental retardation determination in their statutory or judicial ban procedures. In this regard, two states authorize an interlocutory appeal of a pretrial mental retardation determination by either the defendant or the state.[314] Six states expressly authorize the state to appeal a determination of a capital defendant's mental retardation.[315] One state provides for an appeal of the mental retardation determination by the defendant or state after sentencing.[316] Two states include a review of mental retardation generally or of the specific mental retardation determination in their mandatory appellate review provisions regarding capital cases.[317] Of course, even without express statutory authorization, appellate courts have reviewed offender challenges to the sufficiency of adverse mental retardation determinations as part of the direct or post-conviction appellate review process.[318]

In reviewing challenges to mental retardation determinations, appellate courts have adopted various standards of review.[319] Courts have adopted standards which uphold

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corrected Jan. 14, 2003) (citations omitted).

314. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030).

315. *See* FLA. STAT. ANN. § 921.137 (West Supp. 2003); N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003); S.D. CODIFIED LAWS § 23A-27A-26.4 (Michie Supp. 2003); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.); Act of Nov. 19, 2003, 2003 Ill. SB 472 (to be codified at 725 ILL. COMP. STAT. 5/114-15, 5/122-2.2); State v. Dunn, 831 So. 2d 862, 888 n.11 (La. 2002) (depending on the timing of the mental retardation determination in the particular state, this may be an interlocutory or post-conviction or post-sentencing appeal).

316. *See* TENN. CODE ANN. § 39-13-203 (1997).

317. *See* WASH. REV. CODE ANN. § 10.95.130 (West 2002); Act of May 21, 2003, 2003 Nev. Stat. 137, 2003 Nev. AB 15 (to be codified at NEV. REV. STAT. 174, 175.554, 177.015, 177.055, 200.030); *cf.* Murphy v. State, 54 P.3d 556, 569 (Okla. Crim. App. 2002) (permitting concerns about the mental retardation determination to be included as issues in the court's mandatory sentence review in death penalty cases and including the court in other aspects of the mental retardation determination).

318. *See, e.g.*, Rondon v. State, 711 N.E.2d 506 (Ind. 1999).

319. A few state courts have also addressed whether and how they should consider mental retardation claims raised for the first time on appeal, with varying results. *Compare* State v. Grell, 66 P.3d 1234, 1238-41 (Ariz. 2003) (considering previously unavailable *Atkins* claim and remanding for evidentiary hearing on mental retardation), *with* Reams v. State, 909 S.W.2d 324, 326-27 (Ark. 1995) (declining to address constitutional and statutory ban claims regarding mental retardation raised for the first time on appeal). As in the case of post-*Atkins* post-conviction and collateral review challenges (*see supra* notes 250-53 and accompanying text), state appellate courts will presumably be unlikely to assert waiver bars to mental retardation claims raised for

mental retardation determinations if they are "supported by the record"[320] or by "substantial evidence"[321] or unless they represent an abuse of discretion[322] or are clearly erroneous.[323] Utilizing such standards, appellate courts have thus far generally upheld challenged court (or jury) determinations that an offender is *not* mentally retarded under state provisions or the new constitutional exclusion from execution.[324]

Of course, the cases that typically reach appellate courts for review of a mental retardation determination are those in which the determination has been contested by the state and the evidence is in dispute. For example, one state supreme court upheld a trial court finding that the defendant was not mentally retarded in a case in which three of four experts found the defendant had satisfied the intellectual functioning component of the statutory mental retardation definition, but only one of the experts determined that the defendant had satisfied the adaptive behavior component.[325] In upholding a trial court finding rejecting mental retardation in a case in which conflicting IQ scores of sixty-six and seventy-two had been presented, another state supreme court stated, "We reject [the defendant's] suggestion that the Trial Court was obligated to accept the score of 66 over the score of 72 or to 'reduce' these scores by the possible three-point margin of error or 'average' them together in some way."[326] Finally, as one state supreme court succinctly summarized, "The . . . court heard the evidence and chose to believe the tes-

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the first time on appeal, at least regarding those claims previously unavailable to an offender under *Atkins* or a state statutory ban.

320. *See* Bottoson v. State, 813 So. 2d 31, 33 (Fla.), *cert. denied*, 536 U.S. 962 (2002).

321. *See* Rankin v. State, 948 S.W.2d 397, 403 (Ark. 1997).

322. *See Rondon*, 711 N.E.2d at 516.

323. *See* United States v. Webster, 162 F.3d 308, 352-53 (5th Cir. 1998); *cf.* Murphy v. State, 66 P.3d 456, 458 (Okla. Crim. App. 2003) (using standard in upholding trial court determination that offender had not established predicate showing of mental retardation to entitle him to full evidentiary hearing). In the absence of a statutory ban, Alabama has been addressing *Atkins* claims raised for the first time on appeal with a "plain error" standard of review. Utilizing this standard and the "most liberal" definitions of mental retardation, the state appellate courts have reviewed the record regarding mental retardation evidence in such cases to determine whether to remand for an evidentiary hearing or resentencing. *Compare Ex parte* Smith, No. 1010267, 2003 Ala. LEXIS 79 (Ala. Mar. 14, 2003); *Ex parte* Perkins, 851 So. 2d 453 (Ala. 2002, as corrected 2003) (finding record evidence does not support remand for resentencing), *cert. denied*, 2003 U.S. LEXIS 6155 (U.S. Oct. 6, 2003), *with* Wood v. State, No. CR-01-0700, 2003 Ala. Crim. App. LEXIS 115 (Ala. Crim. App. Apr. 25, 2003) (remanding case for evidentiary hearing in light of erroneously excluded evidence and resultant incomplete record regarding mental retardation).

324. *See, e.g., Webster*, 162 F.3d at 352-53; *Bottoson*, 813 So.2d at 33-34; Head v. Ferrell, 554 S.E.2d 155, 166-67 (Ga. 2001); Foster v. State, 525 S.E.2d 78, 79 (Ga. 2000); State v. Smith, 893 S.W.2d 908, 918, 933 (Tenn. 1994); *cf.* Jenkins v. State, 498 S.E.2d 502, 512 (Ga. 1998) (upholding denial of directed verdict regarding mental retardation because evidence was disputed and conflicting). *But cf.* Crook v. State, 813 So. 2d 68, 70-78 (Fla. 2002) (vacating death sentence because trial court rejected uncontroverted evidence of defendant's borderline mental retardation in weighing capital punishment evidence, and noting enactment of prospective legislative ban).

Appellate courts have also generally found record evidence of mental retardation insufficient to disturb a death sentence when examined as part of a mandatory mental retardation, disproportionality, or independent sentence review required in capital cases. *See, e.g.*, State v. Lynch, 787 N.E.2d 1185, 1216-17 (Ohio 2003) (conducting independent sentence evaluation); Emmett v. Commonwealth, 569 S.E.2d 39, 47 n.2 (Va. 2002), *cert. denied*, 123 S. Ct. 1586 (2003) (conducting proportionality and other mandatory review); State v. Elledge, 26 P.3d 271, 284-85 (Wash. 2001) (conducting mandatory mental retardation review); *cf.* State v. Bone, 550 S.E.2d 482, 497-98 (N.C. 2001), *cert. denied*, 535 U.S. 940 (2002) (finding record mental retardation evidence insufficient under proportionality review, but finding made without prejudice to pursuit of post-conviction relief under new state ban statute); State v. Thomas, 779 N.E.2d 1017, 1037-39 (Ohio 2002), *cert. denied*, 123 S. Ct. 2295 (2003) (finding record evidence insufficient to disturb death sentence in sentence review, but inviting offender to present additional evidence to satisfy *Atkins* standards in seeking post-conviction relief).

325. *See* Rogers v. State, 698 N.E.2d 1172, 1176-81 (Ind. 1998).

326. *Rankin*, 948 S.W.2d at 404.

timony of the State's expert rather than the testimony of [the defendant's] experts, and found that [the defendant] is not mentally retarded. The . . . court did not abuse its discretion."[327] On the other hand, appellate courts have noted instances in which trial courts have determined that a defendant is mentally retarded and have precluded the death penalty as a sentencing option.[328]

These appellate cases illustrate the importance of a complete evidentiary presentation regarding mental retardation—by both the defendant and the government—to ensure that the fact finder will have an adequate basis on which to make a mental retardation determination for *Atkins* purposes. Under the review standards adopted, appellate courts are likely to give substantial deference to the mental retardation determinations made.[329]

B. Ineffective Assistance of Counsel Claims

Although there has been limited appellate and post-conviction scrutiny thus far, it can be expected that claims of ineffective assistance of counsel regarding the investigation and presentation of mental retardation evidence for purposes of the *Atkins* ban will increase. Moreover, given the independent constitutional status of these claims, they will be subject to review both in state court proceedings and through federal collateral review.[330] Although reviewing courts have not yet addressed many of these claims in the post-*Atkins* context, the Court's general standards for such review were established almost twenty years ago in *Strickland v. Washington*:[331]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[332]

Further amplifying these standards, the *Strickland* Court noted that the alleged deficient performance must fall below an "objective standard of reasonableness." The prejudice component requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[333]

Providing some guidance regarding the application of this stringent standard in the *Atkins* context are two recent Court decisions finding counsel was constitutionally ineffective due to the failure to adequately investigate or present, inter alia, mitigating evidence of mental retardation or deficiency in a capital case. In *Williams v. Taylor*,[334] the

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327. *Rondon*, 711 N.E.2d at 516.

328. *See* Miller v. State, 770 N.E.2d 763, 766 & n.3 (Ind. 2002) (concerning offender with current intellectual functioning of sixty-seven which was consistent with developmental period measurement); State v. Powell, 56 P.3d 189, 191 (Kan. 2002); Richardson v. State, 630 A.2d 238, 243 (Md. 1993) (omitting factual basis).

329. *See supra* notes 319-28 and accompanying text.

330. *See supra* notes 279-301 and accompanying text.

331. 466 U.S. 668, 687 (1984).

332. *Id.*

333. *Id.* at 688, 694.

334. 529 U.S. 362 (2000).

Court identified counsel's failure to introduce available mitigating evidence that the defendant was "borderline mentally retarded" as one of the factors that established counsel's deficient performance and contributed to the prejudice the defendant suffered in the resultant weighing of aggravating and mitigating capital punishment evidence.[335] Similarly, in *Wiggins v. Smith*,[336] the Court also identified counsel's failure to present mitigating evidence of the defendant's "diminished mental capacities," including IQ test results of seventy-nine, as contributing to the prejudice the defendant suffered in the weighing of capital punishment evidence.[337] In this case, the Court rejected the proffered justification that counsel's failure to investigate and present available mitigating evidence represented a tactical judgment of trial strategy and reaffirmed the *Strickland* standard in this regard:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[338]

Although neither the *Williams* nor the *Wiggins* holding of ineffective assistance of counsel was based solely on the omitted mental health evidence, the contributory role that the failure to present this evidence played in the satisfaction of the stringent *Strickland* standard, especially applied in the context of limited federal collateral review, reflects the powerful effect such evidence can have in the weighing of aggravating and mitigating capital punishment evidence.[339] In the future, when counsel's alleged deficient performance in the investigation and presentation of mental retardation evidence is considered in the context of an *Atkins* or statutory ban claim, the resulting prejudice from any deficiency established should be even more apparent and any claimed justification based on trial strategy less compelling.[340]

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335. *See id.* at 395-98.

336. 123 S. Ct. 2527 (2003).

337. *See id.* at 2536, 2542-43.

338. *Id.* at 2535 (quoting *Strickland*, 466 U.S. at 690-91); *see id.* at 2535-36.

339. *Compare* Powell v. Collins, 328 F.3d 268, 290-94 (6th Cir. 2003); Brownlee v. Haley, 306 F.3d 1043, 1067-75 (11th Cir. 2002); Sanford v. State, 25 S.W.3d 414, 419-22 (Ark. 2000); Rondon v. State, 711 N.E.2d 506, 520-22 (Ind. 1999) (finding ineffective assistance claim established, inter alia, based on counsel's failure to adequately investigate or present mitigating evidence of mental retardation or deficiency), *with* Hubbard v. Haley, 317 F.3d 1245, 1260-61 (11th Cir. 2003); Smith v. Cockrell, 311 F.3d 661, 668-77 (5th Cir. 2002); Cockrell v. Cockrell, Civ. No. SA-99-CA-1119-FB, 2003 U.S. Dist. LEXIS 6433, at *62-72 (W.D. Tex. Mar. 31, 2003) (finding that counsel's failure to investigate or present mitigating evidence of mental retardation either did not satisfy deficient performance or prejudice component of *Strickland* standard or both).

340. Courts have already begun to recognize the "particular significance" of ineffective assistance of counsel claims regarding mental retardation evidence in light of *Atkins*. *See Brownlee*, 306 F.3d at 1073; *see also Powell*, 328 F.3d at 294. *But see* Smith, 311 F.3d at 664 (declining to consider *Atkins* claim raised for the first time on appeal or to refer to it in ineffective assistance of counsel discussion). A federal trial judge considered one of the few ineffective assistance claims directly related to an execution ban based on mental retardation. In this collateral review case, the judge found "reasonable" the state court's determination that trial counsel was not ineffective for not pursuing a mental retardation ban hearing for an offender and that the offender had not shown prejudice by not having the hearing. Although the lawyer had scheduled the ban hearing, the offender

C. Miscellaneous Application Errors

In addition to challenges to procedural and evidentiary sufficiency and counsel ineffectiveness,[341] offenders have alleged a variety of miscellaneous application errors in their challenges of death sentences imposed despite the presentation of evidence of mental retardation. For example, one reviewing court upheld a trial court's denial of a motion to change the venue of a mental retardation hearing, in the absence of an offender's showing of prejudice from the hearing's location.[342] This court also found no abuse of discretion in the scope of the cross-examination of the defense expert permitted by the trial court.[343] Another appellate court found no error in the trial court's restriction of voir dire questioning concerning whether potential jurors felt that a mentally retarded defendant should get a harsher sentence than a defendant of "normal" intelligence. The defendant had been allowed to ask relevant questions regarding bias toward mentally impaired persons, but the appellate court found that the challenged questioning was irrelevant because an offender found mentally retarded could not be executed pursuant to the state ban and would automatically receive a sentence of life imprisonment.[344]

On the other hand, one state supreme court found that the trial court had abused its discretion by failing to grant a requested defense continuance to obtain an expert examination of a defendant who manifested evidence, inter alia, of mental retardation. Among the factors that the appellate court considered in concluding that the trial court action constituted reversible error was the fact that the results of the examination could be used in determining whether the defendant was ineligible for the death penalty under the state ban.[345] Another state supreme court found that the trial court had abused its discretion by refusing to admit testimony of proffered lay witnesses relating to the adaptive behavior component of mental retardation. However, because the appellate court concluded that the state's execution ban applied prospectively and did not apply to the defendant, the reviewing court found that the error did not affect the defendant's "substantial" rights and hence did not constitute reversible error.[346]

The variety and number of these application error claims can be expected to increase as the number of mental retardation determinations increases following *Atkins*. Of course, these few cases do not establish a definitive trend regarding the manner in which reviewing courts will address these application error claims. Once again, however, *Atkins* has altered the dispositive nature of the mental retardation determination, expanding its role from that of a mitigating circumstance to an absolute bar to the death penalty.

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had an IQ of seventy-one, and a defense expert had concluded that the offender was mentally retarded, counsel was concerned that he could not establish the deficits in his client's adaptive behavior required for the state execution ban. He advised his client that he would risk the imposition of the death penalty if he went to trial. The offender entered a guilty plea before the scheduled ban hearing that resulted in the imposition of two consecutive life sentences. The federal judge found that the state court's conclusion that counsel's performance was not constitutionally deficient did not satisfy the standards for federal collateral relief. *See* Warren v. Lewis, 206 F. Supp. 2d 917, 923-24 (M.D. Tenn. 2002); *cf. Sanford*, 25 S.W.3d at 419 (rejecting ineffective assistance claim based on counsel failure to contend that offender's mental retardation rendered execution unconstitutional, under heightened appellate standard due to failure to raise issue below and resultant inability to conclusively demonstrate entitlement to statutory execution exclusion).

341. *See supra* notes 314-40 and *infra* notes 348-53 and accompanying text.

342. *See* Foster v. State, 525 S.E.2d 78, 79 (Ga. 2000).

343. *See id.* at 80-81.

344. *See* Raulerson v. State, 491 S.E.2d 791, 800 (Ga. 1997).

345. *See* Hunter v. Commonwealth, 869 S.W.2d 719, 720-25 (Ky. 1994).

346. *See* Rondon v. State, 711 N.E.2d 506, 516-17 (Ind. 1999).

When post-*Atkins* reviewing courts are determining whether an application error has occurred and, if so, whether it is harmless or reversible, the determinative nature of a mental retardation finding in terms of death sentence eligibility may cause more application errors both to be found and to be deemed reversible.[347]

D. Challenges to the Adequacy of the Procedures to Determine Mental Retardation

Prior to *Atkins*, state appellate courts had rejected several challenges to mental retardation definitions and accompanying determination procedures under their state execution bans. For example, the Arkansas Supreme Court rejected a contention that the statutory rebuttable presumption of mental retardation should be set at an IQ level of seventy rather than sixty-five.[348] The Tennessee Supreme Court determined that the statute's undefined adaptive behavior component should be interpreted in its "ordinary sense."[349] The Georgia Supreme Court rejected the need for a separate mental retardation trial and upheld that state's statutory provision authorizing a determination of mental retardation during the guilt phase of the trial.[350] Similarly, the highest Maryland appellate court concluded that the state statute did not include a pretrial determination of mental retardation, but rather contemplated that the trier of fact would consider the issue after finding an offender's guilt, but before weighing the aggravating and mitigating punishment evidence.[351] The Georgia Supreme Court upheld placing the burden of proof regarding mental retardation on the defendant and requiring proof beyond a reasonable doubt.[352] Finally, the Indiana Supreme Court upheld its state statute's use of the clear and convincing evidence standard of proof regarding the mental retardation determination.[353]

As is abundantly clear, however, *Atkins* "changed the landscape of death penalty jurisprudence."[354] Definitions and procedures that were adequate for a mental retardation determination for purposes of a state execution ban are not necessarily adequate for the enforcement of the *Atkins* constitutional execution ban.[355] As a result, several states may find themselves facing post-*Atkins* challenges either to their definitional provisions or implementing procedures or both or they may choose to proactively revise their ban definitions or procedures to avoid potential challenges.

As noted previously, the *Atkins* Court gave the greatest guidance regarding the category of mentally retarded offenders concerning whom there is a national consensus

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347. *See id.* (finding the absence of applicable ban legislation central to finding of no reversible error).

348. *See* Jones v. State, 10 S.W.3d 449, 456-57 (Ark. 2000).

349. *See* State v. Smith, 893 S.W.2d 908, 917-18 (Tenn. 1994). *But see id.* at 928-30, 933 (Reid, J., concurring in part and dissenting in part; dissenting regarding order denying petition to rehear) (arguing that the term has an accepted meaning in the field and legislative history supports the AAMR definition of the term).

350. *See* Jenkins v. State, 498 S.E.2d 502, 509 (Ga. 1998). *But see id.* at 518-19 (Fletcher, P.J., dissenting) (arguing for a pretrial resolution of the issue).

351. *See* Richardson v. State, 630 A.2d 238, 242-44 (Md. 1993) (affirming Richardson v. State, 598 A.2d 1, 3-4 (Md. Ct. Spec. App. 1991)); *cf.* United States v. Webster, 162 F.3d 308, 351-52 (5th Cir. 1998) (finding no plain error from trial court's determination of mental retardation, as opposed to jury determination, in absence of express statutory direction).

352. *See Jenkins*, 498 S.E.2d at 513. *But see id.* at 516-18 (Fletcher, P.J., dissenting) (arguing for a preponderance of the evidence proof standard).

353. *See* Rogers v. State, 698 N.E.2d 1172, 1174-76 (Ind. 1998).

354. State v. Grell, 66 P.3d 1234, 1240 (Ariz. 2003).

355. *See supra* notes 219-34 and accompanying text (comparing procedural protections adequate to enforce a state established affirmative defense and those required to enforce a constitutional right).

prohibiting their execution by referencing the clinical mental retardation definitions of the AAMR and APA.[356] As one court noted, "[W]hen discussing retardation in *Atkins*, the Supreme Court cited with approval psychologists' and psychiatrists' 'clinical definitions of mental retardation,' and presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim to be retarded."[357] Although most states use some variation of these clinical definitions in their state procedures, a few states have adopted definitional provisions which appear narrower in scope than those referenced by the *Atkins* Court.[358] For example, the Kansas and Utah definitions appear to limit their state bans to a smaller subset of mentally retarded persons than the clinical definition.[359] In addition, states that use a rigid IQ cutoff score of seventy for the intellectual functioning component may be excluding some individuals otherwise falling within the accepted clinical definition.[360] Although states may choose to use a mental retardation definition that is *more* inclusive than that referenced in *Atkins*, they risk challenge through the use of less inclusive definitions.[361]

Although the *Atkins* Court was not as directive regarding the elements of a constitutionally sufficient procedure to identify these appropriately defined mentally retarded offenders, the constitutional status which the Court gave to the execution exclusion requires that implementing procedures must be adequate to ensure the accuracy and reliability of the mental retardation determination.[362] In this regard, it is likely constitutionally acceptable to place the burden of proof regarding mental retardation on the defendant[363] and to permit either the court or jury (or both) to make a mental retardation finding.[364]

However, the few states which authorize a trial jury to make the *only* determination of mental retardation during the guilt or punishment phase may face challenges based on concerns about the accuracy and reliability of the determination.[365] In addition, the mi-

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356. *See supra* notes 59-70 and accompanying text (describing clinical definitions referenced in *Atkins*, as well as *Penry*).

357. Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002).

358. *See supra* notes 71-96 and accompanying text (describing state mental retardation definitions).

359. *See* KAN. STAT. ANN. §§ 21-4623 (1995), 76-12b01 (1997) (limiting mental retardation to significantly subaverage general intellectual functioning "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law"); UTAH CODE ANN. §§ 77-15a-101 to -106, 77-18a-1 (LEXIS through 2003 1st Sp. Sess.) (restricting adaptive functioning deficiencies to those that "exist primarily in the areas of reasoning or impulse control, or in both of these areas").

360. *See* DEL. CODE ANN. tit.11, § 4209 (Supp. 2002); IDAHO CODE § 19-2515A (Michie, LEXIS through 2003 Sess.); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999); MD. CODE ANN., CRIM. LAW § 2-202 (2002); N.C. GEN. STAT. § 15A-2005 (2002); TENN. CODE ANN. § 39-13-203 (1997); WASH. REV. CODE ANN. § 10.95.030 (West 2002).

361. For example, some states extend the developmental period to the age of twenty-two as opposed to the age of eighteen as referenced in *Atkins*. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 2-202 (2002). On the other hand, the ban procedure enacted by New York expressly excluded mentally retarded inmates convicted of a capital crime. *See* N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 2003). At least one state court has recognized that this limitation cannot survive after *Atkins*. *See* People v. Smith, 753 N.Y.S.2d 809, 811 (N.Y. Sup. Ct. 2002).

362. *See supra* note 182 (describing the importance of procedures that can achieve accuracy and reliability in the determination of facts necessary to secure a constitutional right, especially in the capital context).

363. *See supra* notes 219-28, 235 and accompanying text (regarding permissible burden of proof).

364. *See supra* notes 157-75 and accompanying text (regarding the permissible fact finder).

365. *See* CONN. GEN. STAT. § 53a-46a (2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); MD. CODE ANN., CRIM. LAW § 2-202 (2002); VA. CODE ANN. §§ 8.01-654.2, 19.2-264.3:1.1 to :1.2 (Michie, LEXIS through 2003 Reg. Sess.); *supra* notes 179-82 and accompanying text (describing accuracy and reliability concerns).

nority of states which require a defendant to establish mental retardation by a standard of proof higher than preponderance of the evidence[366] face possible challenge based on the rationale of *Cooper v. Oklahoma*.[367] Finally, jurisdictions with undefined or inadequately defined definitional and procedural provisions[368] risk equal protection or due process challenges based on the inconsistent application and implementation of the *Atkins* constitutional ban on execution.[369] Although the *Atkins* Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,"[370] state and federal courts remain available to determine the constitutional appropriateness of the enforcement mechanisms selected.[371]

VIII. CONCLUSION

The *Atkins* Court clearly held that the execution of mentally retarded offenders is constitutionally prohibited.[372] In the aftermath of *Atkins*, however, much work to implement the Court's holding remains to be done. States without statutory or judicially established ban procedures must adopt such mechanisms.[373] States that have existing ban definitions or procedures now inadequate in light of *Atkins* need to revise their provisions.[374] Reviewing courts need to continue to interpret and ensure the appropriate implementation of all procedures adopted.[375]

In the end, the ultimate scope of the *Atkins* Court's holding will depend on the manner in which states define mental retardation for purposes of the constitutional exclusion and establish procedures to exclude mentally retarded offenders from execution. This Article recommends that states adopt the 2002 AAMR definition of mental retardation in their ban provisions, as well as adequate assessment and evaluation requirements to implement this definition.[376] It is further recommended that states adopt an implementing procedure in which the trial court makes a pretrial determination of mental retardation in a proceeding in which the defendant has the burden of proof to establish his men-

366. *See* ARIZ. REV. STAT. ANN. § 13-703.02 (West Supp. 2003); COLO. REV. STAT. ANN. §§ 18-1.3-1101 to -1105 (West Pamp. 2003); DEL. CODE ANN. tit.11, § 4209 (Supp. 2002); FLA. STAT. ANN. § 921.137 (West Supp. 2003); GA. CODE ANN. § 17-7-131 (Harrison 1998); IND. CODE ANN. §§ 35-36-9-1 to -7 (Michie 1998); *cf.* N.C. GEN. STAT. § 15A-2005 (2002) (regarding pretrial determination only).

367. 517 U.S. 348 (1996); *see supra* notes 229-34 and accompanying text (describing Court's rationale for decision).

368. *See, e.g.*, 18 U.S.C.A. § 3596 (West 2000); KY. REV. STAT. ANN. §§ 532.130, .135, .140 (Michie 1999).

369. *See* Dowling, *supra* note 137, at 788-93, 802-810; Dulmen-Krantz, *supra* note 103, at 200-07, 214-16; *Implementing* Atkins, *supra* note 103, at 2580-81 (suggesting equal protection or due process concerns based on inconsistency in provisions and their application within and across states).

370. Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) (plurality opinion)).

371. *See supra* notes 249-353 and accompanying text (describing judicial review proceedings).

372. *See Atkins*, 536 U.S. at 321.

373. As of the writing of this Article, over a year after the *Atkins* decision, ten of the thirty-eight capital punishment states do not yet have statutory or judicially established procedures to identify mentally retarded offenders and exclude them from execution: Alabama, California, Montana, New Hampshire, New Jersey, Oregon, Pennsylvania, South Carolina, Texas, and Wyoming. California and Texas together account for approximately 30% of the current death row population. Collectively, these ten states hold over 45% of the current death row population. *See* Death Penalty Information Center, *Death Row Inmates by State*, *at* http://www.deathpenaltyinfo.org/article.php?scid=9&did=188 (last modified as of July 1, 2003).

374. *See supra* notes 359-61, 365-69 and accompanying text.

375. *See supra* notes 314-47 and accompanying text.

376. *See supra* notes 133-53 and accompanying text.

tal retardation by a preponderance of the evidence.[377] Finally, it is recommended that jurisdictions also codify their post-conviction procedures in a manner that provides a meaningful opportunity for offenders for whom no mental retardation finding for *Atkins* purposes has been made to establish their ineligibility for execution and to provide meaningful review of the issue in other cases.[378] These recommended procedures appear the most likely to accurately identify mentally retarded offenders and exclude them from execution, thereby rendering them the most consistent with the spirit of the *Atkins* holding.*

377. *See supra* notes 203-12, 240-43 and accompanying text.

378. *See supra* notes 302-313 and accompanying text.

* Prior to the publication of this Article, two additional capital punishment states—California and South Carolina—adopted procedures to implement the *Atkins* ban on the execution of mentally retarded offenders. The California legislation defines mental retardation as the "condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." Act of Oct. 8, 2003, Stats. 2003 ch. 700, 2003 Cal. SB 3 (to be codified at CAL. PENAL CODE § 1376). The state's procedure permits a capital defendant to raise the issue prior to trial and, upon the submission of an expert declaration supporting a mental retardation finding, requires a hearing on the matter. The defendant can request a pretrial hearing by the court to determine the issue. Otherwise, the issue is determined by the jury after the trial's guilt phase. The defendant bears the burden of proof on the issue by a preponderance of the evidence. *See id.*

The South Carolina Supreme Court adopted the existing statutory definition of mental retardation in its interim procedure: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Franklin v. Maynard, Op. No. 25747, 2003 S.C. LEXIS 269, at *3 (S.C. Nov. 3, 2003). In this state's procedure, the trial court determines the issue in a pretrial hearing in which the defendant bears the burden of proof by a preponderance of the evidence. The appellate court also acknowledged *Atkins*' retroactive application and indicated that offenders sentenced to death prior to *Atkins* can utilize existing post-conviction relief procedures to pursue *Atkins* claims. In such proceedings, the offender must establish mental retardation by a preponderance of the evidence. *See id.* at *3-6.