Florida Law Review

Volume 55 | Issue 2 Article 5

April 2003

Constitutional Law: Preserving Jury Determinations in an Eighth Amendment Analysis

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CONSTITUTIONAL LAW: PRESERVING JURY DETERMINATIONS IN AN EIGHTH AMENDMENT ANALYSIS

Atkins v. Virginia, 122 S. Ct. 2242 (2002)

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A Virginia jury convicted Petitioner[1] of capital murder and sentenced him to death.[2] Petitioner challenged the sentence, asserting that he was mentally retarded[3] and thus could not receive the death penalty.[4] On appeal, the Virginia Supreme Court affirmed both the conviction and the death sentence.[5] It concluded that the issue of mental retardation was a factual question that should be considered and determined by the jury and not the court.[6] The Virginia Supreme Court further held that it was not willing to commute Petitioner's sentence merely because of his low IQ score.[7] The United States Supreme Court granted certiorari,[8] and in reversing the Virginia Supreme Court decision, HELD, that execution of mentally retarded offenders is cruel and unusual punishment in violation of the Eighth Amendment.[9]

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* For my parents, Michael and Patti Keating.

1. Petitioner, armed with an automatic firearm, abducted the victim, robbed him, then took him to an isolated location where the victim was shot eight times and killed. Atkins v. Virginia, 122 S. Ct. 2242, 2244 (2002).

2. Atkins v. Commonwealth, 510 S.E.2d 445, 453 (Va. 1999), *aff'd*, 534 S.E.2d 312 (Va. 2000), *rev'd sub nom.* Atkins v. Virginia, 122 S. Ct. 2242 (2002). To impose the death penalty, the jury had to find the existence of either one or both aggravating circumstances—future dangerousness and vileness of crime—beyond a reasonable doubt. *Id.* at 451-52. At sentencing, the jury looked to prior felony convictions and pictures of the victim's body. *Id.* at 451.

3. *Id.* at 451. An expert testified that Petitioner's full scale IQ was 59, which fell into range of mild mental retardation. *Id.* The expert conceded, however, that Petitioner was competent to stand trial and could appreciate the nature of his crime and control himself. *Id.*

4. Atkins v. Commonwealth, 534 S.E.2d 312, 318 (Va. 2000), *rev'd sub nom.* Atkins v. Virginia, 122 S. Ct. 2242 (2002). Petitioner argued that the death penalty had not been imposed on any defendant in Virginia with an IQ score as low as his. *Id.*

5. *Id.* at 314. The Virginia Supreme Court initially ordered a re-sentencing because the first sentencing court used a misleading verdict form. *Id.*

6. *Id.* at 320. The Court noted that the experts could not agree on Petitioner's mental status. *Id.* However, the Court still concluded that it was the responsibility of the jury to assess the credibility of the witnesses and to determine the weight to be afforded to the evidence. *Id.*

7. *Id.* at 319. In Virginia, mental retardation is one factor that may be considered in mitigation of capital murder. *Id.* at 320.

8. Atkins v. Virginia, 122 S. Ct. 2242, 2246 (2002).

9. *See id.* at 2252.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment.[10] In defining cruel and unusual punishment, courts have traditionally not confined its meaning to the "barbarous" methods generally outlawed at the inception of the Bill of Rights,[11] but have interpreted the Amendment to recognize the currently prevailing standards of decency that evolve and mark the progress of a maturing society.[12] In *Coker v. Georgia*,[13] the Supreme Court recognized three factors that determine society's prevailing standards of decency and guide an Eighth Amendment analysis.[14]

In *Coker*, Petitioner was sentenced to death for the rape of an adult woman.[15] In reviewing the constitutionality of the death sentence, the Court sought to discern contemporary values concerning its appropriateness by analyzing three guiding factors.[16] Those factors included examining legislative judgments, jury determinations, and the Court's own judgment on the matter.[17] In applying these factors to the circumstances in *Coker*, the Court noted the widespread legislative rejection of death as an appropriate punishment for the crime of rape.[18] In fact, Georgia proved to be the only state that provided for such a punishment.[19] The Court then analyzed sentencing jury decisions and determined that nine out of ten juries in Georgia had not imposed the death penalty for rape convictions.[20] Despite the objective evidence provided by legislative judgments and jury determinations, the Court further recognized that these factors did not wholly determine the controversy.[21]

In acknowledging the third guiding factor, the Court stated that the Constitution contemplates that in the end the Court's own judgment would be brought to bear on the question of the acceptability of the death penalty

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10. U.S. CONST. amend. VIII. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

11. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 171 (1976); Weems v. United States, 217 U.S. 349, 368-75 (1910).

12. Trop v. Dulles, 356 U.S. 86, 100-101 (1958). The Court remarked: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

13. 433 U.S. 584 (1977).

14. *See id.* at 592-97.

15. *See id.* at 587-91. While serving sentences for murder, rape, kidnapping, and aggravated assault, Petitioner escaped from prison and entered victims' home.

16. *See id.* at 593-97.

17. *See id.*

18. *See id.* at 593-95. The Court noted that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape." *Id.* at 593.

19. *Id.* at 595-96. Florida, Mississippi, and Tennessee also authorize the death sentence for rape convictions, but only when the victim is a child. *Id.* at 595.

20. *Id.* at 597.

21. *Id.*

under the Eighth Amendment.[22] In applying this subjective factor, the Court agreed with the determination of state legislatures and sentencing juries and concluded that death was indeed a disproportionate punishment for the crime of rape.[23]

Of the three guiding factors acknowledged in *Coker,* the role of the sentencing jury was most influential in guiding the Court's decision in *Ford v. Wainwright.*[24] In *Ford,* the Petitioner was convicted of capital murder and sentenced to death.[25] After spending a few years in prison, Petitioner claimed he was insane and that his execution would violate the Eighth Amendment.[26] The Court did agree that the Constitution prohibited execution of insane offenders.[27] However, the Court left to the state the task of developing appropriate ways to enforce this constitutional restriction.[28] The only limitation the Court imposed on a state was that the factfinding procedure afford a full and fair hearing.[29]

Petitioner subsequently challenged the procedural adequacy of the Florida statute that allowed the imposition of the death penalty despite evidence of his insanity.[30] Florida's procedure of imposing the death penalty occurred mostly in the executive branch and provided the Governor with nearly total discretion in warranting death sentences.[31] In finding Florida's procedure inadequate,[32] the Court reasoned that the executive branch could not possess the neutrality that was necessary for reliability in the factfinding process of a capital trial.[33] The Court concluded that the required neutrality should come from the jury, after

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22. *Id.*

23. *Id.*

24. 477 U.S. 399 (1986).

25. *Id.* at 401.

26. *See id.* at 410.

27. *Id.* The Court asserted that the prohibition of executing the insane has had a strong hold in jurisprudence today and centuries ago in England. *Id.* at 409. The Court further suggested that "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.* at 410.

28. *Id.* at 416-17.

29. *See id.* at 411. The Court afforded much deference to states when it concluded that merely legitimate considerations would satisfy the procedural safeguards of the factfinding process. *Id.* at 416-17.

30. *See id.* at 410.

31. *See id.* at 412. The Florida procedure for determining the competency of a condemned inmate was as follows: the Governor appointed a panel of three psychiatrists to evaluate the inmate in a single meeting; each psychiatrist then submitted a written report to the Governor; then, the Governor, alone, decided whether the execution should be upheld. *Id.* at 403-04.

32. *Id.* at 416-18.

33. *Id.* at 416. The Court recognized that in capital proceedings generally, "factfinding procedures aspire to a heightened standard of reliability." *Id.* at 411.

considering expert opinions and mitigating factors concerning the mental state of an offender.[34]

The Supreme Court again had the opportunity to analyze the factfinding process and its effectiveness in assessing appropriate punishment, in light of an offender's mental state, in *Penry v. Lynaugh*.[35] In *Penry*, the Court re-enforced the importance of jury determinations when it addressed the constitutionality of executing mentally retarded offenders.[36] While the Court in *Penry* recognized that legislation enacted by elected officials was the clearest and most reliable objective evidence of contemporary values,[37] the Court's decision rested on the notion of jury competency.[38]

Petitioner, convicted of capital murder,[39] challenged his death sentence and asserted that it was cruel and unusual punishment to execute a mentally retarded person with a reasoning capacity of a seven-year-old.[40] Petitioner argued that there was "an emerging national consensus against [the] execution of the mentally retarded, reflecting . . . 'evolving standards of decency.'"[41] The Court dismissed Petitioner's argument and noted that the two states prohibiting such an execution did not constitute a national consensus.[42] After noting that most state legislatures provided for the execution of mentally retarded offenders,[43] the Court ended its analysis by shifting focus to the competency of juries.[44] The Court concluded that so long as juries could consider and give effect to evidence of mental retardation,[45] an individualized determination of culpability and the

34. *See id.* at 414. The Court recognized the importance of the jury specifically in resolving differences in expert opinion since experts often disagree widely and frequently on what constitutes mental illness. *Id.*

35. 492 U.S. 302 (1989).

36. *See id.* at 315-28.

37. *Id.* at 331.

38. *See id.* at 312-21.

39. *Id.* at 307. Petitioner was convicted of capital murder for brutally raping, beating and stabbing his victim to death with a pair of scissors in her home. *Id.*

40. *Id.* at 328-29. Petitioner argued that due to mental deficiencies, mentally retarded offenders do not possess the level of moral culpability sufficient to justify imposing a death sentence.

41. *Id.* at 333-34 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

42. *Id.* at 334.

43. *See id.* The Court determined that only one state prohibited the execution of mentally retarded persons who have been found guilty of a capital offense. *Id.*

44. *See id.* at 335-38.

45. *Id.* at 340. The Court explained that the jury should be provided with a vehicle for expressing its reasoned moral response to mitigating evidence when rendering its sentence. *Id.* at 328.

appropriateness of the death penalty could be made in each particular case.[46]

Unlike the Court in *Penry*, the instant Court did not expressly accord such deference to juries.[47] Instead, the majority focused primarily on two of the three guiding factors expressed in *Coker*: legislative enactments and its own judgment.[48] Furthermore, the instant Court did find enough prohibiting states to constitute a national consensus against executing mentally retarded offenders.[49]

After finding a new national consensus, the instant Court brought to bear its own judgment and proffered two reasons to agree with the legislative consensus.[50] First, the Court expressed serious doubts as to whether the social purposes served by the death penalty—retribution and deterrence—would be satisfied.[51] Second, the Court found that mentally retarded criminals faced a special risk of wrongful execution because of their reduced capacity.[52]

With respect to the principle of retribution, the Court recognized that the severity of the crime necessarily depended on the offender's culpability[53] and that its jurisprudence sought to ensure that only the most deserving of execution are put to death.[54] Unlike *Penry*, the instant Court held that an exemption for the mentally retarded was appropriate due to their lesser culpability.[55] With respect to deterrence,[56] the instant Court concluded that capital punishment could only serve as a deterrent when the murder was the result of deliberation and premeditation.[57] The Court

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46. *Id.* at 340.

47. Atkins v. Virginia, 122 S. Ct. 2242, 2248-52 (2002).

48. *See id.* at 2248. In stating its approach to the instant case, the Court did not mention analyzing jury decisions. *Id.* The Court expressed that it would first review legislative judgment and then it would consider reasons for agreeing or disagreeing with their judgment. *Id.*

49. *Id.* at 2248-49. The Court recognized that since *Penry*, state legislatures across the country began to address the issue of executing mentally retarded offenders. *Id.* The Court further acknowledged the consistency of the direction of change in legislature. *Id.* at 2249. The Court supported its argument by noting that anticrime legislation is more popular than legislation providing protections for guilty offenders and that the large number of states that prohibit executing mentally retarded offenders provides evidence that society views mentally retarded offenders as "less culpable than the average criminal." *Id.* The Court also noted the overwhelming vote in favor of the prohibition in legislatures that have addressed the issue. *Id.*

50. *Id.* at 2251.

51. *See id.*

52. *See id.* at 2251-52.

53. *Id.*

54. *Id.*

55. *See id.*

56. The Court defined the principle of deterrence as "the interest in preventing capital crimes by prospective offenders." *Id.*

57. *Id.* The Court explained that the average criminal remained unprotected by the exemption and would continue to face the threat of death. *Id.*

reasoned that the same behavioral impairments that made mentally retarded offenders less culpable—for example, their diminished ability to control impulses—precluded them from performing the criminal calculus necessary to further the goal of deterrence.[58]

In agreeing with the legislative consensus, the Court also recognized that mentally retarded offenders face a special risk of wrongful execution.[59] The Court attributed this special risk to the possibility of false confessions and the lesser ability of mentally retarded defendants to give meaningful assistance to their attorneys.[60] The Court further noted that mentally retarded defendants were "typically poor witnesses, and their demeanor [could] create an unwarranted impression of lack of remorse."[61] In conclusion, the instant Court determined that its "independent evaluation of the issue reveal[ed] no reason to disagree with the judgment of 'the legislatures that [had] recently addressed the matter.'"[62] Therefore, the instant Court held that the execution of mentally retarded offenders was cruel and unusual punishment in violation of the Eighth Amendment.[63]

In two separate dissents, Chief Justice Rehnquist and Justice Scalia took the majority to task for their apparent disregard of jury determinations as part of the Eighth Amendment analysis.[64] Chief Justice Rehnquist, joined by Justice Scalia, asserted that legislative enactments and sentencing jury determinations should be the sole indicators of contemporary values in Eighth Amendment analysis.[65] Chief Justice Rehnquist further reasoned that juries, by design, were better suited than courts to evaluate and give effect to the complex societal considerations involved in determining an appropriate punishment.[66] Agreeing with Chief Justice Rehnquist, Justice Scalia expressed opposition to the majority's assumption that factfinders were unable to properly account for the deficiencies of the mentally retarded.[67] Justice Scalia was expressly

58. *See id.*

59. *Id.* at 2251-52.

60. *Id.*

61. *Id.* at 2252. The Court agreed with *Penry* when it asserted that "reliance on mental retardation as a mitigating factor [could] be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.*

62. *Id.*

63. *See id.*

64. *See id.* at 2253 (Rehnquist, C.J., dissenting).

65. *Id.*

66. *See id.* at 2253-54 (Rehnquist, C.J., dissenting).

67. *Id.* at 2265 (Scalia, J., dissenting). Justice Scalia asserted that the majority's assumption was unsubstantiated and contradicted the immoral belief that juries play an indispensable role. *Id.*

concerned with the possibility of offenders feigning mental retardation[68] to avoid execution—even though the offender had sufficient culpability to receive the death penalty.[69]

Although Justice Scalia's concerns[70] are important, they may not be valid since the majority may not have effectively disregarded the jury determination factor of an Eighth Amendment analysis. The instant Court kept with precedent and examined two of the three guiding factors acknowledged in *Coker*.[71] It looked to legislative enactments and found a national consensus, and it brought in its own judgment in proffering two reasons to agree with the legislative consensus.[72] In theory, the majority seemed to disregard the indispensable role of the jury, but, in practice, the deference to jury determinations may still retain its important precedential role.

Given the new constitutional restriction upon the execution of the mentally retarded,[73] the instant Court followed the precedent established in *Ford* and left to the states the task of developing appropriate ways to enforce this restriction.[74] Consequently, the majority rule may not be as absolute as the dissent asserted.[75] Although the instant Court prohibited the execution of mentally retarded offenders, it left an important factor for state legislatures to develop: the definition of mental retardation.[76]

The instant Court pointed out that the real disagreement in cases dealing with capital punishment and alleged mental retardation was in determining which offenders were in fact mentally retarded.[77] The instant Court suggested that at least the clinical definition of mental retardation was constitutional.[78] The clinical definition of mental retardation requires

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68. *Id.* at 2267-68 (Scalia, J., dissenting). Justice Scalia compared the result of feigning insanity to that of mental retardation; an insane feigner "risks commitment to a mental institution," while a mentally retarded feigner "risks nothing at all." *Id.* Justice Scalia further noted that the pendency of the case prompted death row inmates claiming mental retardation for the first time. *Id.*

69. *Id.* at 2260 (Scalia, J., dissenting).

70. *See id.* (Scalia, J., dissenting).

71. *See* Coker v. Georgia, 433 U.S. 584, 592-97 (1977).

72. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2248-51 (2002).

73. *See id.* at 2252.

74. *Id.* at 1250; *see also* Ford v. Wainwright, 477 U.S. 399, 416-17 (1986).

75. *See Atkins*, 122 S. Ct. at 2260 (Scalia, J., dissenting). Justice Scalia acknowledged that mental retardation was a central issue at Petitioner's sentencing. *Id.* Justice Scalia further noted that the jury concluded that Petitioner's alleged mental retardation was not sufficient to exempt him from execution in light of the brutality of his crime and his long history of violence. *Id.* Justice Scalia concluded that the majority upset the jury's particularized decision on the basis of a constitutional absolute. *Id.*

76. *See id.* at 2250.

77. *Id.*

78. *See id.* at 2250 n.22 (noting that statutory definitions of mental retardation generally conform to the clinical definition).

not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as social skills, self-direction and communication.[79] While the instant Court set out this definition as a guideline,[80] albeit in a footnote, its focus seemed to be on the end—mentally retarded offenders should not be executed[81]—and not the means—how a state determines that an offender is in fact mentally retarded.[82]

Justice Scalia worried that the majority decision would turn a capital trial into a game since symptoms of mental retardation could readily be feigned.[83] Justice Scalia was further concerned with questionable mentally retarded offenders escaping a deserved execution despite possessing the requisite culpability.[84] Had the majority declared that IQ was the sole indicator of mental retardation, Justice Scalia's concerns may not have been exaggerated. Such a standard would have heightened the importance of expert witness testimony and left the jury with little discretion to impose an appropriate, individualized punishment once the expert determined that the offender's IQ coincided with mental retardation.[85] However, the majority authorized the inclusion of the adaptive skills criterion which gives the factfinder discretion to make appropriate, individualized decisions,[86] just as the Court in *Penry* and *Ford* would require.[87]

Accordingly, Justice Scalia's second concern may have been exaggerated.[88] In applying the clinical definition of mental retardation, the

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79. *See id.* at 2245 n.3. The American Psychiatris Association defines mental retardation as follows:

> [S]ignificantly 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).

Id.

80. *See id.* at 2250.

81. *See id.* at 2252 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist criticized the majority for its "post hoc rationalization [of its] subjectively preferred result." *Id.*

82. *See id.* at 2250. The Court only stated that it would leave to the state the task of developing appropriate ways to enforce the constitutional restriction.

83. *Id.* at 2267 (Scalia, J., dissenting).

84. *Id.* at 2260 (Scalia, J., dissenting).

85. Justice Scalia recognized the difficulty in defining mental illness but was confident that the jury "play[s] an indispensable role" in such matters. *See id.* (Scalia, J., dissenting).

86. *See id.* at 2250.

87. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989); Ford v. Wainwright, 477 U.S. 399, 414 (1986).

88. *See Atkins*, 122 S. Ct. at 2260 (Scalia, J., dissenting).

fact-finder could easily find that an offender, while having the requisite low IQ (Criterion A), is not significantly limited in two or more of the adaptive skills areas (Criterion B).[89] A finding of at least two significant limitations in certain adaptive skills areas seems hardly a strict guideline; the fact-finder may find that while the questionable mentally retarded offender does exhibit limitations in a few of the adaptive skills areas, those limitations are not *significant* enough to satisfy the second criterion.[90] As a result, according to the clinical definitions, the offender is not mentally retarded and may constitutionally receive the death penalty.[91]

Despite Justice Scalia's concerns, the jury determination factor still guides Eighth Amendment analysis.[92] While the instant Court did not expressly address the importance of jury determinations, the jury remains inherently involved in the analysis of this new constitutional restriction.[93] Because the jury is so intimately involved with a particular case and is so connected with societal views, it remains in the best position to characterize a sympathetic offender as mentally retarded or, in the alternative, to characterize a distrusting, culpable offender as not mentally retarded.[94] After *Atkins v. Virginia*, the traditional common law approach of determining guilt[95] endures—a jury maintains its fundamental role in Eighth Amendment analysis.

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89. *See id.* at 2245 n.3.

90. *See id.*

91. *See id.* at 2252. The Court only held that the execution of mentally retarded offenders was unconstitutional. *See id.*

92. *See id.* at 2250 (acknowledging that the instant Court left the States with discretion to enforce the constitutional restriction).

93. *See id.* The instant Court acknowledged that not all people who claim to be mentally retarded are so impaired as to exempt them from execution. *Id.*

94. *See id.* at 2253 (Rehnquist, C.J., dissenting).

95. *See id.* at 2267-68 (Scalia, J., dissenting). Despite Justice Scalia's concerns about the ramifications of the majority opinion, Matthew Hale's endorsement of the common law's traditional method for taking account of guilt remains accurate. *Id.* Matthew Hale's endorsement is as follows:

> [Determination of a person's incapacity] is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses . . . .
>
> Yet the law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses . . ., and by the inspection and direction of the judge.

Id. at 2268 (Scalia, J., dissenting) (quoting 1 HALE, PLEAS OF THE CROWN 32-33 (1st Am. ed. 1847)).