



RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 38

2010-2011

DEFINING INTELLECTUAL DISABILITY: FETAL ALCOHOL SPECTRUM DISORDERS AND CAPITAL PUNISHMENT

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I. Introduction

The Center for Disease Control and Prevention estimates that, for every 1,000 live births in the United States, there are between 0.2 and 1.5 cases of a preventable mental disorder, Fetal Alcohol Syndrome (FAS)¹. However, FAS only represents a small number of patients who fit within a category of debilitating mental conditions known collectively as the Fetal Alcohol Spectrum Disorders (FASD). Scientists estimate that there are at least three times as many cases of FASD as cases of FAS,² but the incidence of FASD is difficult to quantify and likely to be greatly underestimated due to a lack of awareness, problems reporting the disorder, and difficulties in diagnosing the disorder.³ Consider, for example, the case of Stephen Neafcy. Neafcy suffers from FASD, but his condition was not diagnosed until he was forty-three years-old.⁴ In his writing, he compares his brain to an overloaded fusebox and his life up until his diagnosis as being “very frustrating.”⁵ In a passage entitled *A Ray of Hope*, Neafcy wrote:

I was really a person who wanted to do good!! I could not understand what drove me to disappoint those I wanted to be proud of me. I was so lost! It was only after I was diagnosed with FASD that I realized my brain was like a fuse box on overload

¹ Center for Disease Control and Prevention, Fetal Alcohol Spectrum Disorders (FASD’S): Data & Statistics, *available at* <http://www.cdc.gov/ncbddd/fasd/data.html>.

² Paul D. Sampson, Ann P. Streissguth, et. al., *Incidence of Fetal Alcohol Syndrome and Prevalence of Alcohol-Related Neurodevelopmental Disorder*, 56 *TERATOLOGY* 317, 324 (1997), *available at* http://onesci.com/journals/science_journal_112.pdf.

³ Albert E. Chudley, Andrea R. Kilgour, et. al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145 *AM. J. OF MED. GENETICS* 261, 262 (2007) (“The cognitively-impaired individual who has FAS likely has been diagnosed as a child and may have many social security services However, most FASD individuals have an invisible disease, since there may be no growth impairment and few, if any, dimorphic features, and these individuals may not receive a diagnosis until adulthood.”).

⁴ Stephen Neafcy, *A Ray of Hope*, *available at* <http://www.acbr.com/fas/stephen%20Neafcy.htm>.

⁵ *Id.*

without the current flow that healthy brains have, to give me the chance to think before I acted and make a choice. This was taken away from me by the alcohol before I was born. Now where do I go from here?⁶

People who suffer from the different manifestations of FASD struggle with limited intelligence, poor social judgment, impulsivity, the inability to learn from experiences, and trouble understanding social cues; understandably, they oftentimes find themselves in trouble with the law.⁷ This specific form of mental impairment, and mental retardation in general, creates a dilemma for the criminal justice system. When dealing with an intellectually disabled defendant, a court has to consider the defendant's level of moral culpability during sentencing.⁸ Although a guilty party must be punished, their intellectual ability and moral culpability have to be considered before punishment is determined in order to guarantee that justice is served.⁹

In regards to the most severe punishment, the Supreme Court held in *Atkins v. Virginia* that it is unconstitutional to execute a mentally retarded person, but empowered the individual states with the ability to define "mental retardation."¹⁰ Allowing the states to retain the power to define mental retardation for the purposes of executing capital criminals has unintentionally created a potential problem with discrepancies between punishments in different states.¹¹ Furthermore, this delegation of defining power has allowed common misunderstandings about the accuracy of IQ determinations to become a part of legal questions that involve life or death situations¹² and has led to definitions of mental retardation that do not appreciate the uniqueness of Fetal Alcohol Spectrum Disorders.¹³

This note will discuss FASD and how it is overlooked by current definitions of mental retardation in relation to capital punishment. Section II will discuss the *Atkins* case and the reasons why the Supreme Court determined that it was unconstitutional to execute a mentally retarded person. Section III will focus on the case of Brandy Holmes, a woman who suffers from the effects of prenatal alcohol exposure and who has been sentenced to death in Louisiana for her role in the murder of a retired Baptist preacher. Section IV will compare the different state definitions of

⁶ *Id.*

⁷ Amy M. Schonfeld, Sarah N. Mattson, et. al., *Moral Maturity and Delinquency after Prenatal Alcohol Exposure*, 66 J. OF STUDIES ON ALCOHOL 545, 551 (2005).

⁸ See *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (holding that less culpability should be attached to a crime committed by someone with less intelligence, susceptibility to react to emotions, and less capable of understanding the consequences of their actions.).

⁹ See *Id.*

¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹¹ Compare Cal. Pen. Code § 1376 (defining "mentally retarded" as having "sub average general intellectual functioning" and "deficits in adaptive behavior" that "manifested before the age of 18) with Idaho Code § 19-2515A (defining "mentally retarded" as having an IQ of 70 or below as well as "significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.").

¹² See *Timing Of IQ Test Can Be A Life Or Death Matter*, SCIENCE DAILY, Dec. 4, 2003,

<http://www.sciencedaily.com/releases/2003/12/031204073317.htm>; Albert E. Chudley, Andrea R. Kilgour, et. al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145 AM. J. OF MED. GENETICS 261, 262 (2007).

¹³ Idaho Code § 19-2515A. See Timothy E. Moore & Melvyn Green, *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System*, 19 CRIMINAL REPORTS 99, 100 (July, 2004), available at <http://www.faslink.org/FASDCrimRep.pdf>; Albert E. Chudley, Andrea R. Kilgour, et. al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145 AM. J. OF MED. GENETICS 261, 262 (2007).

mental retardation; explain FASD and the unique problems that it poses for courts attempting to follow the *Atkins* decision and the individual state definitions of mental retardation; and suggest that a clearer and more uniform standard for mental retardation should be adopted. Finally, Section V will consider the rationale in the decision to uphold the execution of Brandy Holmes and argue that the procedural considerations on which the Court based its decision ignored the very serious disorder that plagues Brandy Holmes.

II. *Atkins v. Virginia*

In 2002, the Supreme Court in *Atkins v. Virginia* updated its stance on executing the mentally retarded.¹⁴ In *Penry v. Lynaugh*, the Supreme Court had refused to hold that the 8th Amendment protection against cruel and unusual punishment meant that it was unconstitutional to execute mentally retarded persons.¹⁵ A significant factor in this determination was that only two of the states that enforced the death penalty had found that executing a mentally retarded person constituted cruel and unusual punishment.¹⁶ However, by 2002 the standards of decency in the United States had evolved to the point where a majority of states were passing statutes that outlawed the execution of mentally retarded persons and the Court felt that “the consistency of the direction of change” demanded that they hold that executing the intellectually disabled was unconstitutional.¹⁷

Daryl Atkins had been convicted of murdering a man whom he and an accomplice had robbed.¹⁸ During their trial, Atkins and his accomplice told similar stories about what had happened on the night of the murder, but differed on who had actually shot the victim.¹⁹ Atkins has an IQ of fifty-nine and, understandably, had greater difficulty explaining what happened on the night of the murder.²⁰ It was suggested that his inability to convey his account of the events clearly and succinctly influenced the jury’s determination of his guilt.²¹ After reviewing the facts and determining that there was a national consensus that executing a mentally retarded person constituted cruel and unusual punishment, the Court further explained:

Because of their impairments . . . [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistake and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do

¹⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

¹⁵ *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

¹⁶ *Id.* at 334.

¹⁷ *Atkins*, 536 U.S. at 315-316. (The Court also noted that “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. . . . [A]mong those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”).

¹⁸ *Id.* at 307.

¹⁹ *Id.*

²⁰ *Id.* at 309.

²¹ *Id.* at 308.

not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.²²

Furthermore, the Court explained that the limitations on the ability to learn from experience, control impulses, and understand the reactions of others are contrary to the theories of punishment that support the use of the death penalty.²³ According to the Court, the two purposes of imposing the death penalty are retribution and the deterrence of capital crimes.²⁴ If neither of these purposes is achieved by executing a mentally retarded person, then it is a “needless imposition of pain and suffering” that violates the Constitution.²⁵ Whether the purpose of retribution is served depends on the culpability of the offender²⁶ and, as noted above, the Court felt that a mentally retarded person’s limitations diminished their personal culpability.²⁷ Because capital punishment is meant to be reserved for the most heinous crimes, the Court felt that “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”²⁸ As far as deterrence is concerned, the Court held that the purpose of deterrence is to prevent crimes and, accordingly, capital punishment is only a deterrence to murder when the killing was premeditated and deliberate.²⁹ Detering a murderer is difficult when that murderer is mentally retarded because his or her behavioral and cognitive impairments make it unlikely that he or she would be able to comprehend that execution is a punishment for certain actions.³⁰ As a result, the killer would not control his or her conduct based on that possibility.³¹ The Court reasoned further that “[e]xempting the mentally retarded from that punishment will not affect the ‘cold calculus that precedes the decision’ of other potential murderers.”³²

Additionally, the Court cited potential problems with obtaining a fair trial and a higher likelihood of wrongful execution as reasons for exempting intellectually disabled defendants from facing capital punishment.³³ The Court reasoned that the diminished intellectual capacity of a mentally retarded defendant is evidence that they are at risk of facing the death penalty despite factors that would allow for a lighter penalty.³⁴ Due to his or her intellectual constraints, a mentally retarded defendant faces a greater risk of false confessions, limited ability to show mitigating circumstances, diminished capability to assist their counsel, and are typically in danger of being poor witnesses that create unflattering impressions.³⁵

Although the Court was very clear in holding that it is unconstitutional to execute a mentally retarded person, they reserved the power to define and determine mental retardation in the

²² *Id.* at 318.

²³ *Id.* at 319.

²⁴ *Id.*

²⁵ *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

²⁶ *Id.*

²⁷ *Id.* at 318.

²⁸ *Id.* at 319.

²⁹ *Id.*

³⁰ *Id.* at 320.

³¹ *Id.*

³² *Id.* at 319 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

³³ *Id.* at 320-21.

³⁴ *Id.* at 320.

³⁵ *Id.* at 320-21.

individual states.³⁶ Instead of adopting a definition of mental retardation, explaining a multi-step test for determining mental retardation, or even listing a number of factors to consider that could guide the states in their determinations, the Court simply left it to the states to enforce this constitutional limitation on the death penalty.³⁷ The Court did, however, point to clinical definitions of mental retardation from the American Association of Mental Retardation and the American Psychiatric Association.³⁸ Both definitions require (1) sub-average intellectual functioning, and (2) limited adaptive skills in at least two areas of functioning.³⁹

The explanations for overturning *Perry* illustrate rational justifications for exempting mentally retarded defendants. However, by vesting the power to define “mental retardation” in the states and supplying them with definitions to guide this determination, the Court may have inadvertently undermined the larger policy concerns that they clearly expressed in the *Atkins* decision.

III. The Case of Brandy Holmes

On New Year’s Day in 2003, Brandy Aileen Holmes and her boyfriend, Robert Coleman, forcefully entered the home of Julian Brandon, a 70 year-old retired minister, and his 68 year-old wife, Alice.⁴⁰ After the pair entered, they shot Reverend Brandon in the head, demanded that Mrs. Brandon give them credit cards, cash and other valuables, and then shot Mrs. Brandon in the head as well.⁴¹ When the pair discovered that Mr. Brandon appeared to have survived his gunshot wound, they retrieved knives from the kitchen and proceeded to slash and stab Mr. Brandon all over his body.⁴² The victims were discovered four days later by a family friend and the Sheriff’s Office initiated a search for Holmes and Coleman.⁴³ The pair was eventually discovered and questioned by the Sheriff’s Office after nearby residents reported that Holmes “had been bragging about killing an elderly couple . . . [and] was trying to sell their jewelry.”⁴⁴ Holmes admitted to the police, over the course of six statements, that she had been involved in the killing and also revealed that she had returned to the Brandon’s home two days after the incident with her young nephews because she had dreamed that Mrs. Brandon was still alive.⁴⁵ On February 14, 2006, a unanimous jury convicted

³⁶ *Id.* at 317.

³⁷ *Id.*

³⁸ *Id.* at note 22.

³⁹ *Id.* at note 3.

⁴⁰ *Holmes v. Louisiana*, 5 So. 3d 42, 49 (La. 2008).

⁴¹ *Id.*

⁴² *Id.* The defendants “inflicted slashing cuts to Reverend Brandon’s nose and face and stabbing wounds on the top and rear of his head and chest. One of the knives struck Reverend Brandon’s head with such force, it shattered and pieces of the knife were found strewn about the crime scene. The offenders cut Reverend Brandon’s throat several times -- two large cutting wounds went around the entire neck, severing the carotid artery and jugular vein. Six stab wounds, some wounds penetrating as deep as six inches, were also identified in Reverend Brandon’s left upper chest; these wounds went into the chest cavity and involved the heart and lungs resulting in internal bleeding. Another stab wound was found on the right side of the chest; this wound involved the abdomen and liver. In addition, a six-inch knife was found imbedded up to the handle in Reverend Brandon’s back.”

⁴³ *Id.* at 50.

⁴⁴ *Id.*

⁴⁵ *Id.* (In fact, Mrs. Brandon was still alive and, although her nephew claimed that he heard Mrs. Brandon screaming, Holmes and the nephew left her for dead. When she was discovered two days later, Mrs. Brandon was treated for her wound and survived the attack, but, at the time of the trial, she still required around-the clock care).

Holmes of first-degree murder for her role in the killing of Reverend Brandon and, two days later, she was sentenced to death.⁴⁶

During the penalty phase of the trial, the defense argued that Brandy Holmes suffered from Fetal Alcohol Syndrome and that her condition diminished her mental capacity and adversely affected her ability to make decisions.⁴⁷ Brandy Holmes' mother revealed that she had regularly used alcohol while she was pregnant with Holmes' and, in fact, that she named her daughter after her favorite alcoholic drink that she would consume during that pregnancy.⁴⁸ Her mother also testified that, as a child, her daughter had been in special education classes, had been institutionalized, and "had a propensity for eating rocks."⁴⁹ Furthermore, a psychology expert, Dr. Mark Vigan, an expert in psychiatry and addiction disorders, Dr. Richard Williams, and an expert in functional neuroimaging, Dr. James Patterson, testified to Holmes' mental limitations and intellectual disabilities.⁵⁰ Dr. Vigan conducted neuropsychological tests on Brandy Holmes that examined five major areas and, based on these tests, he testified that, although she is responsible for her actions and has a full-scale IQ of 77, Holmes functions mentally at a seventh grade level, suffers from organic brain impairment, lacks empathy for other people, and does not "learn well from her prior punishment."⁵¹ Dr. Vigan described Brandy Holmes as "impulsive" and "emotionally reactive" and explained that she didn't appear to take the proceedings seriously.⁵² Also, Dr. Vigan claimed that Holmes disliked him because he had attempted to convince her to appreciate the seriousness of her situation but that she misinterpreted it as evidence that he wanted her to be executed.⁵³ Similarly, Dr. Williams testified that Holmes "has a diminished capacity for her responsibility" because she suffers from brain damage that was caused by the toxicity of alcohol and, accordingly, "has a diminished capacity in accepting responsibility for her behavior."⁵⁴ Additionally, Dr. Patterson reviewed an MRI scan of Holmes' brain and testified that it revealed significant structural abnormalities that are "consistent with published reports on brain findings in fetal alcohol syndrome."⁵⁵ Despite the expert testimony and other evidence, Brandy Holmes was sentenced to death.⁵⁶

On appeal to the Supreme Court of Louisiana, Brandy Holmes' attorney argued, among other things, that the Court erred by denying a motion that would have labeled Holmes' ineligible for the death penalty, due to her intellectual disability.⁵⁷ The Court relied on La. Code Crim. Proc. Art. 905.5.1, which says that:

⁴⁶ *Id.* at 48.

⁴⁷ *Id.* at 51-52.

⁴⁸ *Id.* at 51.

⁴⁹ *Id.* at 52.

⁵⁰ *Id.* at 51.

⁵¹ *Id.* at 52. (Brandy Holmes had several delinquency adjudications for "carrying a concealed weapon; attempted simple escape; damage to property; possession of stolen property; theft; and unauthorized entry of an inhabited dwelling." Furthermore, as an adult, Holmes "has felony convictions for attempted aggravated escape and aggravated battery. In addition, she has the following misdemeanor convictions: seven counts of simple criminal damage to property; four counts of simple battery; and two counts of battery of a police officer.").

⁵² *Id.* at 58.

⁵³ *Id.*

⁵⁴ *Id.* at 53.

⁵⁵ *Id.* (Dr. Patterson also reviewed PET scan of Holmes' brain and determined that the two scans did show a number of brain abnormalities, but did not show other brain abnormalities that were associated FAS.).

⁵⁶ *Id.* at 48.

⁵⁷ *Id.* at 60-61.

Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the Judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.⁵⁸

Due to the fact that there was no agreement between the state and the defense, the Court found that the trial court had not erred in leaving the determination of Holmes' mental retardation to the jury.⁵⁹

Additionally, pursuant to the Louisiana Code of Criminal Procedure⁶⁰ and the Louisiana Supreme Court rules,⁶¹ the Supreme Court of Louisiana reviewed Holmes' death sentence and considered, among other things, the proportionality of the sentence in relation to the offense and the offender.⁶² Surprisingly, the Court determined that a sentence of death for Brandy Holmes was proportionate because (1) the crime happened in the victim's home; (2) there were multiple victims; and (3) the age of the victims.⁶³ Although the Court stated that they considered the offense and the offender, there appears to be little consideration of Brandy Holmes' intellectual disabilities within this section of the Court's opinion.⁶⁴

IV. Defining Mental Retardation

The most problematic result of the *Atkins* decision was that the Supreme Court reserved the ability to define "mentally retarded" as it pertains to capital punishment in the individual states.⁶⁵ Although they cited two similar definitions, the Supreme Court did not provide definite guidance and apparently assumed that the state's definitions would reflect contemporary definitions of intellectual disability.⁶⁶ This decision appears to have overlooked the very real possibility of disparities between definitions of mental retardation. By not emphasizing the reasoning for finding that executing the mentally handicapped is unconstitutional, the Supreme Court inadvertently allowed states to adopt definitions that may overlook certain individuals with intellectual disabilities who should not face the death penalty.

A. The Various Definitions of "Mentally Retarded"

⁵⁸ LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2010).

⁵⁹ *Holmes*, 5 So. 3d at 61.

⁶⁰ LA. CODE CRIM. PROC. ANN. art. 905.9 (2010) ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.").

⁶¹ La. S. Ct. Rule 28 ("Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine: (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

⁶² *Holmes*, 5 So. 3d at 94.

⁶³ *Id.* at 96-98.

⁶⁴ *See id.*

⁶⁵ *Atkins*, 536 U.S. at 317.

⁶⁶ *Id.*

In *Atkins*, the Court identified two definitions of mental retardation from the American Association of Mental Retardation and the American Psychiatric Association that both contained three criteria to establish a diagnosis of mental retardation.⁶⁷ The definitions characterize mental retardation as (1) sub-average intellectual functioning, coupled with (2) limitations in at least two adaptive skill areas,⁶⁸ all of which must (3) manifest before the age of eighteen years.⁶⁹ Generally speaking, the various definitions of mental retardation amongst the individual states share the same qualities as the two definitions that were cited in the *Atkins* decision. To qualify as mentally retarded, most states require that the defendant demonstrate sub-average intellectual function and limitations with adaptive skills before a certain age.⁷⁰ Although each state is different, a common characteristic amongst the individual definitions is an IQ requirement or guideline.⁷¹ For example, in order to qualify as suffering from “significantly sub average general intellectual functioning,” Arizona requires that a defendant have an IQ of seventy or below.⁷² Conversely, Illinois’ statute does not have an IQ requirement to demonstrate mental retardation, but does state that an IQ of seventy-five or less is “presumptive evidence of mental retardation.”⁷³ Although, on its face, IQ may seem like a suitable measure of whether someone suffers from mental retardation, it is not a fool-proof standard.⁷⁴ Researchers at Cornell University recognized that a failure to make changes to the standard IQ test on a more regular basis may have lead to higher scores for certain test-takers.⁷⁵ Every fifteen to twenty years the IQ tests have to be rewritten to be more difficult than previous tests in order to compensate for changes from generation to generation.⁷⁶ According to the Cornell study, individuals who took an IQ test shortly before the test was rewritten scored higher than they would have if they had taken the newer test.⁷⁷ Thus, “some borderline death row inmates or capital murder defendants who were not classified as mentally retarded in childhood because they took an

⁶⁷ *Id.* at n.3.

⁶⁸ The skill areas include “communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.” *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., GA. CODE ANN. § 17-7-131 (2010) (“(3) ‘Mentally retarded’ means having significantly sub-average general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.”); ARIZ. REV. STAT. ANN. § 13-753 (2011) (“3. ‘Mental retardation’ means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen. . . . 5. ‘Significantly subaverage general intellectual functioning’ means a full scale intelligence quotient of seventy or lower. The court in determining the intelligence quotient shall take into account the margin of error for the test administered.”); CAL. PENAL CODE § 1376 (2011) (“(a) As used in this section, ‘mentally retarded’ means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.”).

⁷¹ See, e.g., ARIZ. REV. STAT. ANN. § 13-753 (2011) (requiring an IQ of seventy or lower); 725 ILL. COMP. STAT. 5/114-15 (2011) (“(d) In determining whether the defendant is mentally retarded, the mental retardation must have manifested itself by the age of 18. IQ tests and psychometric tests administered to the defendant must be the kind and type recognized by experts in the field of mental retardation. In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work. An intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation.”).

⁷² ARIZ. REV. STAT. ANN. § 13-753 (2011)

⁷³ 725 ILL. COMP. STAT. 5/114-15 (2011).

⁷⁴ See *Timing Of IQ Test Can Be A Life Or Death Matter*, SCIENCE DAILY, Dec. 4, 2003, <http://www.sciencedaily.com/releases/2003/12/031204073317.htm>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

older version of an IQ test might have qualified as retarded if they had taken a more recent test.”⁷⁸ Although this does not mean that IQ is entirely irrelevant, it does demonstrate that it is not as concrete as definitions of mental retardation would suggest. Also, IQ is not terribly reliable or informative in determining or recognizing impulsiveness, gullibility, or inability to conform to social norms. As will be explained later, by requiring a certain IQ score, states are ignoring the very real possibility that certain individuals with FASD or other disorders may be able to meet some intellectual hurdles, but should still be less culpable for their actions than someone with the same IQ.⁷⁹

Additionally, states that have an IQ requirement in order to show sub-average intellectual functioning disregard the fact that IQ alone is not demonstrative of mental retardation. Both definitions that were cited in the *Atkins* decision explained that, by itself, a low IQ score is not sufficient to lead to a classification of mental retardation.⁸⁰ There must also be limitations in adaptive behavior.⁸¹ The Supreme Court of Pennsylvania has recognized this important point and refused to “adopt a cutoff IQ score for determining mental retardation . . . since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”⁸² Under state definitions that have an IQ cutoff, a person who has suffered from significantly impaired adaptive skills in multiple areas throughout their entire life, but who has an IQ that is slightly above the cut-off point would not qualify as mentally retarded. Accordingly, any definition that establishes a strict cut-off point for IQ ignores the inherent balancing test that is necessary for determining a person’s intellectual capacity.

Furthermore, the overwhelming majority of states require that the defendant be able to demonstrate that their mental disabilities be documented before a certain age.⁸³ Although this may be an important classification criteria in the medical profession, within the realm of capital punishment, age requirements pay no attention to the possibility that someone may suffer some other catastrophic injury or the reality that some people will suffer from intellectual disabilities that remain undiagnosed until they are much older. For those people, although they would not necessarily meet the clinical definition of mental retardation, they nonetheless suffer from the limitations that the Supreme Court cited in *Atkins* and should be exempt from capital punishment.

A person who has their intellectual faculties damaged after the age of eighteen could potentially experience similar limitations and symptoms as someone who was born with intellectual disabilities. However, according to a definition of mental retardation that requires that the symptoms manifest before the age of 18, they would still be eligible for the death penalty. This could create problems, for example, where a defendant has suffered a traumatic brain injury.⁸⁴ According to the

⁷⁸ *Id.*

⁷⁹ See Albert E. Chudley et. al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145 AM. J. OF MED. GENETICS 261, 262 (2007); Ann Pytkowicz Streissguth, Jon M. Aase, et. al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 J. OF THE AM. MED. ASSOC. 1961, 1965 (1991).

⁸⁰ *Atkins*, 536 U.S. at 309.

⁸¹ *Id.*

⁸² Commonwealth v. Miller, 585 Pa. 144, 155 (Pa. 2005).

⁸³ LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2010) (“H. (1) ‘Mental retardation’ means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.”); CAL. PENAL CODE § 1376; 725 ILL. COMP. STAT. 5/114-15.

⁸⁴ See Martin J. McMorrow, Brain Injury Association of America, Behavioral Challenges after Brain Injury, available at http://www.biausa.org/_literature_43279/behavioral_challenges.

Brain Injury Association of America, people who suffer traumatic brain injuries can suffer from a range of behavioral problems including “mild personality changes or periods of disorientation to persistent difficulties controlling emotions, lack of inhibition (an inability to block or manage drives and impulses), and generally managing one's behavior.”⁸⁵ Furthermore, “people with milder brain injuries may also experience behavioral problems . . . although these may be more difficult to identify and it is less likely that these individuals will receive organized support related to their difficulties.”⁸⁶ For these people, it is often the case that they are incapable of controlling their behavior or the effects of the brain injury.⁸⁷ Certainly an individual who sustains a traumatic brain injury in their adult life that creates mental disabilities that are similar to someone with organic mental disabilities should be afforded the same protection from unusual punishment. It is possible that there are many disorders or conditions that have yet to be discovered or understood that can create the same situation. Until we unravel all of the intricacies of the human brain, the law's approach should be cautious so that hindsight may be easier to swallow.

The other significant problem with requiring that the intellectual disability manifest before a certain age is that there is no guarantee that the problem will be noticed, diagnosed or treated. For example, in *Commonwealth v. VanDivner*, the Supreme Court of Pennsylvania determined the appellant did not prove his mental impairments had manifested before the age of eighteen despite expert testimony that he functioned within the mild range of mental retardation, was deficient in social skills, read at a second grade level, spelled at a first grade level, had problems with impulse control, and had been enrolled in special education classes until he dropped out of school in the tenth grade.⁸⁸ In determining that there was not enough evidence to show that his disabilities manifested before the age of eighteen, the Court cited the fact that there had been no testing done on Mr. VanDivner before he was eighteen and that, although he had been in special education classes, he could have been placed in those classes simply for behavioral problems.⁸⁹ Certainly the system should take some precautions to protect against abuse from people claiming mental problems that do not actually exist, but the approach in *VanDivner* would essentially require a juvenile with borderline or sub-average intellectual abilities to seek diagnosis of their problem before they reached eighteen years of age. Furthermore, if the already over-burdened school that the youth is attending places the student in special education classes, but fails to specify the reason for that placement as intellectual disability, there still may not be enough proof to legally recognize what could potentially be a very serious problem. Finally, by requiring proof that the disability existed before a certain age, definitions of mental retardation ignore people who have intellectual limitations that go undiagnosed until they are much older. Stephen Neafcy, for example, has suffered from FASD from the time he was born, but did not receive a diagnosis until he was 43-years-old.⁹⁰ Accordingly, the age limitations that may serve some classification purpose in the medical field seem arbitrary when placed in a legal context.

While it is understandable that the Court would want to allow the states to retain some control over how they enforce their laws, this decision created a situation where the majority of states have overlooked characteristics of certain intellectually-challenged people. For those

⁸⁵ *Id.* at 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Commonwealth v. VanDivner*, 962 A.2d 1170, 1184 (Pa. 2009).

⁸⁹ *Id.*

⁹⁰ Stephen Neafcy, *A Ray of Hope*, FASLINK FETAL ALCOHOL DISORDERS SOCIETY, <http://www.acbr.com/fas/stephen%20Neafcy.htm>.

individuals, although they do not fit within these specific clinically-based definitions of mental retardation, they nevertheless struggle with the same problems that the Court cited in *Atkins* as reasons for exempting other individuals from capital punishment. This problem is especially apparent in the case of FASD.

B. Fetal Alcohol Spectrum Disorder and the Limitations of its Victims

Fetal Alcohol Spectrum Disorder is an umbrella term that has been adopted to cover all prenatal alcohol-induced impairments including Alcohol Related Neuro-developmental Disorder (ARND), Fetal Alcohol Effects (FAE), and Fetal Alcohol Syndrome.⁹¹ In order to diagnose a patient with Fetal Alcohol Syndrome, the patient must have “dysmorphic facial features, evidence of brain dysfunction, and prenatal and postnatal growth deficiency in the presence of prenatal alcohol exposure.”⁹² However, prenatal alcohol exposure does not guarantee that person will suffer from fetal alcohol syndrome.⁹³ In addition, the disabilities that accompany prenatal alcohol exposure will vary from person to person.⁹⁴ If a patient does not exhibit the facial features of FAS, then a diagnosis of one of the other disorders within the fetal alcohol spectrum is possible, but there must be evidence of cognitive and behavioral difficulties as well as a maternal history of prenatal alcohol exposure.⁹⁵

People who fall under the umbrella of FASD have many problems including many behavioral problems that would bring them within the class of people that, under the Eighth Amendment, would be ineligible for capital punishment.⁹⁶ Specifically, people with FASD are known to have difficulty understanding social cues, reduced social judgment, an inability to consider the consequences of their actions, poor impulse control, and problems understanding or conforming to social norms.⁹⁷ “Typically they do not make connections between cause and effect, anticipate consequences or take the perspective of another person.”⁹⁸ Interestingly enough, a person afflicted with FASD may still score within the average range on IQ tests, but still struggle with the other limitations of FASD.⁹⁹ One study found that, although they had a wide range of IQ scores, every person with FASD had maladaptive behaviors that were not within the “insignificant” range.¹⁰⁰ Moreover, average IQ scores make it difficult to diagnose these people with mental retardation because they will not meet all three criteria.¹⁰¹ Thus, “[a]lthough FAS is proclaimed to be one of the leading causes of mental retardation in North America, it is estimated that less than 50% meet the current definition of mental retardation.”¹⁰² Due to the potentially misleading nature of IQ scores in

⁹¹ Moore, *supra* note 13, at 99.

⁹² Chudley, *supra* note 3, at 263.

⁹³ *Id.* at 267.

⁹⁴ *Id.*

⁹⁵ *Id.* at 263.

⁹⁶ See Moore, *supra* note 13, at 101; Chudley, *supra* note 3, at 262; Schonfeld, *supra* note 7, at 545; Streissguth, *supra* note 79, at 1961.

⁹⁷ Moore, *supra* note 13, at 101; Chudley, *supra* note 3, at 262; Schonfeld, *supra* note 7, at 545; Streissguth, *supra* note 79, at 1961.

⁹⁸ Moore, *supra* note 13, at 101.

⁹⁹ Chudley, *supra* note 3 at, 267, Streissguth, *supra* note 79, at 1965 (“The [scores] revealed that failure to consider consequences of action, lack of appropriate initiative, unresponsiveness to subtle social cues, and lack of reciprocal friendships were problems that were characteristic of those patients with FAS-FAE who technically were *not* retarded according to IQ scores.”).

¹⁰⁰ Streissguth, *supra* note 79, at 1965.

¹⁰¹ Chudley, *supra* note 3, at 267.

¹⁰² *Id.* at 262.

people with FASD, the states that have set an IQ cut-off point within their definition of mental retardation will have left some individuals exposed to capital punishment despite a legitimate intellectual disability.

Because of the fluctuation in the IQ scores, and the fact that individuals with FASD lack the facial features of FAS, FASD has been referred to as an “invisible disease.”¹⁰³ However, in addition to the disease being difficult to diagnose, people with FASD learn to adapt and are oftentimes able to hide their disabilities.¹⁰⁴ “[FASD children] learn to exploit nonverbal cues to maintain conversational flow, but their degree of comprehension may be much lower than it appears. They develop a glibness that belies their actual competence.”¹⁰⁵ Thus, they have been described as having “limited insights into their lack of abilities and limitations, and frequently over-represent[ing] their capabilities to others and themselves.”¹⁰⁶ Considering the behavioral problems, the difficulty in diagnosing FASD, the ability of its victims to hide their disorder, and the unknown prevalence of these conditions, it would be reasonable for the justice system to contemplate the limitations of certain definitions of mental retardation and reconsider how they apply capital punishment.

C. Appreciating the Limitations of a Defendant with FASD

As was explained above, people who suffer from FASD oftentimes do not fit the clinical definition of mental retardation due to their IQ scores.¹⁰⁷ However, they still suffer from many behavioral maladies including, but not limited to, impulsivity, difficulty understanding and conforming to social norms, and the inability to appreciate the consequences that their actions might cause.¹⁰⁸ Based on these limitations, it seems unfair that an FASD defendant would not be afforded the same leniency that was afforded to another defendant without balancing very serious self-control problems against a test score that oftentimes is still considerably below average.¹⁰⁹

The Supreme Court, in *Atkins*, specifically mentioned an intellectually challenged defendant’s abilities, or lack thereof, to “process information . . . learn from experience . . . control impulses, and to understand the reactions of others.”¹¹⁰ Furthermore, the Court explained that although this does not excuse their conduct, it does diminish an intellectually challenged defendant’s personal culpability.¹¹¹ Based on this diminished culpability, the Court held that executing these defendants would not serve the purpose of retribution because the lower culpability removed them from the category of the “most heinous offenders.”¹¹² In addition, the Court also explained that a defendant’s limited mental abilities also limited the deterrent effect that capital punishment might serve because mentally retarded defendants are unable to appreciate that it is a possible penalty for their actions.¹¹³ In all of their explanations for exempting mentally retarded defendants from capital punishment, the Court never mentioned any specific IQ cutoff point or an age requirement. Accordingly, definitions

¹⁰³ *Id.*

¹⁰⁴ *See Moore, supra* note 13, at 100.

¹⁰⁵ *Id.*

¹⁰⁶ Chudley, *supra* note 3, at 269.

¹⁰⁷ *Id.* at 262.

¹⁰⁸ Moore, *supra* note 13, at 101; Chudley, *supra* note 3, at 262; Schonfeld, *supra* note 7, at 545; Streissguth, *supra* note 79, at 1961.

¹⁰⁹ *See Streissguth, supra* note 79, at 1965.

¹¹⁰ *Atkins*, 536 U.S. at 318.

¹¹¹ *Id.*

¹¹² *Id.* at 318-19.

¹¹³ *Id.* at 320.

that have strict requirements such as these ignore the heart of the Supreme Court's justification for ruling that these defendants are not eligible for the death penalty.

Limitations that are brought on by prenatal alcohol exposure illustrate the flaw in using the medical definition of mental retardation in these legal contexts. As explained above, individuals with FASD may not fit within the clinical definition of mental retardation, but nonetheless suffer from significant behavioral difficulties.¹¹⁴ It is contrary to the purpose of the *Atkins* decision and the 8th Amendment to impose the death penalty on an individual who is impulsive, does not learn from experience, and cannot appreciate the consequences of their actions because of a potentially misleading and arbitrary score on a standardized test. Certainly their intellectual imperfections remove them from the category of the most heinous offenders. Further their difficulty understanding consequences and controlling their actions limit's the retributive and deterrent effects of execution.¹¹⁵ Because many of the state definitions inadvertently ignore the heart of the reasoning in *Atkins*, they should be reworked with a stronger focus on examining the limitations of the defendants rather than imposing strict scores and age requirements.

The case of Brandy Holmes could have potentially been the opportunity for the Supreme Court to evaluate how mental retardation definitions are formulated. Initially, there were indicia of a problem with Holmes when her mother admitted drinking heavily during her pregnancy, that Holmes was in special education classes throughout school, and that Brandy ate rocks as a child.¹¹⁶ These facts are compounded by the mother's admission that she in fact named her daughter after her favorite drink that she would consume while pregnant.¹¹⁷ The extent of Brandy Holmes' current condition was also detailed by the multiple medical experts.¹¹⁸ During the penalty phase of her trial, experts testified that Brandy Holmes had an IQ of 77, operated at a seventh grade level, lacked empathy, did not learn from her mistakes, was impulsive, and did not appreciate the severity of her situation.¹¹⁹ Additionally, all three experts testified that she suffered from brain damage. One expert called her brain damage organic, another reported that it was caused by alcohol, and a third described an MRI of her brain as being consistent with that of a person with FAS.¹²⁰ Despite her limitations and handicaps, Holmes was still sentenced to death for her role in the murder of Reverend Brandon.¹²¹ If the Supreme Court had granted certiorari in *Holmes*, they would have been able to consider the severe limitations that FASD places on individuals and seen that, although it produces people with the same litany of problems that exempted Daryl Atkins, the victims of this condition do not fit within the inappropriate and rigid definitions that states generally have adopted. Holmes' case is an excellent example of a flaw that is inherent in these definitions. A more fluid approach that considered the specific limitations of each defendant and how they affect the culpability of that defendant and whether, with their disabilities, capital punishment would serve its stated purposes.

¹¹⁴ Chudley, *supra* note 3, at 267; Streissguth, *supra* note 79, at 1965.

¹¹⁵ See generally *Atkins*, 536 U.S. at 318-20; Chudley, *supra* note 3; Streissguth, *supra* note 79.

¹¹⁶ *Holmes*, 5 So. 3d at 52.

¹¹⁷ *Id.* at 51.

¹¹⁸ *Id.* at 52-58.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 48.

V. The Louisiana Supreme Court's Procedural Argument

Remarkably, the Supreme Court of Louisiana hardly even considered the evidence of Brandy Holmes' mental impairments in their decision to uphold her death sentence.¹²² Before the trial even began, Holmes' attorneys produced the expert testimony to attempt to show that her condition made her ineligible for the death penalty.¹²³ However, the Supreme Court pointed out that, according to Louisiana criminal procedure, the issue of mental retardation is supposed to be argued before the jury during the capital sentencing phase and can only be argued in front of the judge before the trial if both sides agree to such a stipulation.¹²⁴ Thus, the Supreme Court of Louisiana is hanging their decision to not consider her mental handicap on a point of procedure instead of considering the Constitutionality of the act. Aside from the obvious concern about placing a minor procedural point over the supreme law of the land, such blind adherence to procedure may leave FASD patients in danger of being overlooked.

As mentioned earlier, FAS and its progeny often create people with serious Limitations, though they can manage to adapt and conceal their disorders.¹²⁵ These people have "limited insight[] into their lack of abilities and limitations" and "frequently over-represent their capabilities to others and themselves."¹²⁶ Furthermore, they "learn to exploit nonverbal cues to maintain conversational flow, but their degree of comprehension may be much lower than it appears."¹²⁷ This all leads to "a glibness that belies their actual competence."¹²⁸ In many situations people with FASD are unaware that they suffer from any disorder or that it would even be relevant to their defense. With all of these problems, it becomes increasingly difficult for an attorney to comprehend the limitations of his or her client in order to provide adequate representation. Certainly these limitations should be considered in the process of adjudication and be accounted for in order to protect these individuals from having to endure yet another unfair disadvantage.

In the case of Brandy Holmes, her attorneys were aware of her problem prior to trial and attempted to seek consideration of her mental limitations, but failed to adhere to the procedural requirements.¹²⁹ However, under the laws of the state, the Supreme Court of Louisiana also was forced to review the proportionality of imposing the death sentence and could have taken that opportunity to consider the claims that Holmes met the definition of mental retardation and should be spared under the *Atkins* decision.¹³⁰ Despite this opportunity, the majority ignored this very serious question and focused solely on the aggravating factors of her crime.¹³¹ There were two dissenting judges who felt that the issue of Holmes' mental limitation should have been considered and worried that post-conviction relief would not be adequate.¹³² In the future, if courts take the majority's approach of preferring procedure over substance, *Atkins* may be in jeopardy of becoming meaningless to many worthy defendants who suffer the effects of prenatal alcohol exposure.

¹²² *See id.* at 95.

¹²³ *Id.* at 60.

¹²⁴ *Id.* at 61.

¹²⁵ *See* Chudley, *supra* note 3, at 269; Moore, *supra* note 13, at 100.

¹²⁶ Chudley, *supra* note 3, at 269.

¹²⁷ Moore, *supra* note 13, at 100.

¹²⁸ *Id.*

¹²⁹ *Holmes*, 5 So. 3d at 61.

¹³⁰ *Holmes*, 5 So. 3d at 94.

¹³¹ *Id.* at 94-99.

¹³² *Id.* at 99-101.

VI. Conclusion

What we know about the brain, mental capacity and intelligence is constantly changing. Thus, as we learn more about these disorders and other mental limitations, it is possible that we will realize that there have been many people who may not have been able to understand the consequences of their actions or exactly what was about to happen to them. Accordingly, the justice system should take precautions to prevent punishment that may be looked upon unfavorably in the future.