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ATKINS V. VIRGINIA, 122 S.CT. 2242 (2002)

SUMMARY

HOLDING

The US Supreme Court held in a 6-3 vote that the execution of offenders with mental retardation is unconstitutionally excessive, as prohibited by the Eighth Amendment to the US Constitution banning cruel and unusual punishment.

DECISION OVERVIEW

On June 20th, 2002, overturning their 1989 holding in *Penry v. Lynaugh*¹, the Court recognised a recently established and evolving national consensus that quantifiable behavioural and cognitive limitations diminish the moral culpability of offenders with mental retardation and, consequently, impact their appropriate punishment. Concerning these offenders with mental retardation, the Court specifically stated:

*Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.*²

Although persons with mental retardation will continue to be tried and sentenced, given their limitations, the two penological goals of capital punishment (*retribution* and *deterrence*) are not realised and serve to compound their risk of wrongful execution. The Eighth Amendment succinctly prohibits all excessive punishments.³ It has been interpreted to demand that all punishment should be “graduated and proportioned to the offence”,⁴ thereby preserving the “dignity of man”.⁵ Since excessiveness is judged by “the evolving standards of decency that mark the progress of a maturing society,”⁶ the *Atkins* decision ordered that offenders with mental retardation may not be sentenced to death in any American jurisdiction.

¹ *Penry v. Lynaugh*, 492 U.S. 302 (1989), held that the executions of those with mental retardation was not then a feature (not even an evolving one) of American society, therefore not an excessive punishment, and therefore not cruel and unusual, and therefore not constitutionally proscribed.

² *Atkins v. Virginia*, 122 S.Ct. 2242, 2244 (2002)

³ Amendment VII (1791): “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

⁴ *Weems v. United States*, 217 U.S. 349 (1910), stands as the Court’s authority on interpretation of the Eighth Amendment (in-part mandating proportionality). With specific respect to the excessiveness and required proportionality of the death penalty, however, *Coker v. Georgia*, 433 U.S. 584 (1977), is most relevant.

⁵ *Trop v. Dulles*, 356 U.S. 86 (1958), as delivered by Chief Justice Warren

⁶ *Ibid.*

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DECISION HISTORY

The case was accepted by the US Supreme Court (on appeal from the Virginia Supreme Court) because of the gravity of the dissenters' concerns and a dramatic shift in state legislation on this issue. Daryl Renard Atkins was convicted of abduction, armed robbery, and capital murder. Two aggravating circumstances were proved: future dangerousness and the "vileness of the offence." Defence argument involved the categorical inapplicability of the death penalty for persons with mental retardation, but it did not question the proportionality of the penalty (as applied to Atkins) in comparison to other Virginia punishments. The majority of the Virginia Supreme Court upheld (citing *Penry*) the original capital conviction from the state court of first instance, but a two Justice minority found the sentence excessive as applied to a criminal defendant with a mental age of approximately 9-12 years. While lamenting the potential disrespect accorded to the deficiencies of those with mental retardation, the dissenting Virginia Supreme Court minority highlighted:

By definition, such individuals have substantial limitations not shared by the general population. A moral and civilised society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.⁷

DECISION RATIONALE

Since *Weems v. United States*, 217 U.S. 349 (1910), all punishments (including the death penalty) are excessive and therefore constitutionally prohibited if not "graduated and proportioned to the offence."⁸ Before the *Atkins* decision, primarily *objective factors* were sought to judge a punishment's proportionality. Formerly, state legislation (and often jury sentencing decisions) informed the Court of proportionality and prevailing standards of decency, but did not wholly determine it.⁹ Reserving their right to look beyond objective factors, the Court therein stated:

This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment.¹⁰

Atkins, however, highlighted this uncommon use of the Court's own *subjective valuation* in judging the behaviour of its citizenry and legislators, but also of *unprecedented*

⁷ *Atkins*, 122 at 2246.

⁸ *Weems*, 217 U.S. at 367.

⁹ *Enmund v. Florida* (1982) reserved a controversial right to apply the Court's *subjective judgement* in construing and applying the Eighth Amendment.

¹⁰ *Atkins*, 122 at 2247.

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sources (most notably the European Union’s brief as *Amicus Curiae* in *McCarver v. North Carolina*¹¹), motivating dissents from the other members (*infra*).

OBJECTIVE SOURCES OF CONSIDERATION

A summary of US state legislation banning the execution of persons with mental retardation was presented to substantiate the argument that since the 1989 *Penry* decision, a widespread national consensus has developed forbidding the execution of persons with mental retardation. The Court recognised not only the number of states which have since adopted such categorically-exclusive legislation (16 post-1989, 2 pre-1989¹²), but also the “consistency of the direction of change,” the lack of contrary legislation, the overwhelming voting margin in accepting such legislation, and customary practice in retentionist US states.¹³ This objective evidence sufficiently revealed that the practice is now unusual, and the Court consequently inferred a national consensus, though it deferred to individual states for the inexact determination of who qualifies as disabled by mental retardation. In keeping with their approach to deal with insanity as delineated in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court instructed:

*We leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.*¹⁴

UNPRECEDENTED OBJECTIVE SOURCES OF CONSIDERATION

Notably, at this point in their reasoning, the Court cited “additional evidence [which] makes it clear that this legislative judgment reflects a much broader social and professional consensus.”¹⁵ Specifically in the adjoined footnote, these additional factors’ consistency “with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”¹⁶ Professional organisations, religious groups, “the world community”, and polling data were recognised, and although these unprecedented sources were discounted as “by no means dispositive,” their consistency with legislative evidence supported the Court’s decision. Specifically, it was noted that:

¹¹ The brief was originally submitted to support *McCarver v. North Carolina*, but was attached to *Atkins* when North Carolina passed legislation banning the execution of those with mental retardation, thus, mooted *McCarver*. Ernest McCarver, however, still resides on North Carolina’s death row.

¹² When *Penry* was heard in 1989, 14 states had abolished capital punishment entirely. Simultaneously, the Federal Government plus 2 retentionist states prohibited the executions of those with mental retardation (Georgia & Maryland). Since *Penry*’s time, 16 more retentionist states have prohibited the application of the ultimate penalty to persons who are mentally retarded (Kentucky, Tennessee (1990); New Mexico (1991); Arkansas, Colorado, Washington, Indiana, Kansas (1993-94); New York (1995); Nebraska (1998); South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina (2000-01)).

¹³ *Atkins*, 122 at 2249. Even in remaining retentionist states where executions are common and where those of persons with mental retardation is permitted by statute, only 5 qualifying convicts (with sub-70 IQs) have actually been executed since *Penry* (in Alabama, Texas, Louisiana, South Carolina, Virginia (since 200)).

¹⁴ *Atkins*, 122 at 2249.

¹⁵ *Id.* & n. 21.

¹⁶ *Id.*

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*Within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.*¹⁷

SUBJECTIVE SOURCES OF CONSIDERATION

The two clinical definitions of persons with mental retardation accepted by the Court require “subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18”.¹⁸ These disabilities aggravate those with mental retardation’s diminished ability “to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁹ Thus, they remain subject to criminal sanctions, but with diminished personal culpability (“categorically less [...] than the average criminal”), which undermines the penological purposes of capital punishment as defined by the Court’s capital punishment jurisprudence.²⁰ Moreover, the Court held that the deficiencies of offenders with mental retardation enhance the risk of wrongful execution.

CAPITAL PUNISHMENT’S CATEGORICAL INEFFECTIVENESS

The *retributive* ambitions of capital sanctions were deemed unachievable when applied to those with mental retardation because the ultimate life-depriving punishment must be reserved for those with ultimate personal culpability (the less culpable an offender, the less severe the punishment). The Court has previously reserved capital punishment for only those “materially more depraved” than the ‘normal’ murderer.²¹ Thus, if an ordinary murderer is insufficiently culpable to receive the death penalty, it seems logical that persons with mental retardation (with further reduced moral culpability) should never be eligible for it.

¹⁷ *Brief for The European Union as Amicus Curiae in McCarver v. North Carolina*, O.T. 2001, No. 00-8727.

¹⁸ The most informed definition of the two comes from the *American Association of Mental Retardation* from Mental Retardation: Definition, Classification, and Systems of Supports p 5 (9th ed. 1992): “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.”

¹⁹ *Id.*

²⁰ The Court’s majority noted *retribution* and *deterrence* as the penological purposes of capital punishment. In his dissent, however, Justice Scalia noted that a third stated social purpose (*incapacitation*) was “conveniently ignored” by the majority.

²¹ *Godfrey v. Georgia*, 446 U.S. 420 (1980).

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Furthermore, capital punishment's *deterrent* ambitions were found similarly unrealisable when applicable to persons with mental retardation, given their impaired cognitive understanding and behavioural control. According to the *Atkins* majority, deterrence

works "only when murder is a result of premeditation and deliberation."²² Deterrence theory requires an action's consequence to be understood, and the action itself to be controllable. Since those with mental retardation possess neither ability, the Court concluded that no deterrent effect results from maintaining capital punishment's applicability to them. Asserting the validity of such a categorical exclusion, the Court also noted that the death penalty's deterrent effect upon other criminals rests undiminished despite categorical exclusion of those with mental retardation. The Court specifically pronounced:

*Exempting the mentally retarded from that punishment will not affect the 'cold calculus that precedes the decision' of other potential murderers.*²³

The landmark *Gregg v. Georgia*, 428 U.S. 153 (1976),²⁴ retentionist decision held that criminal sanctions must contribute "measurably" to either retribution or deterrence (or both), or else are deemed excessive and, therefore, constitutionally forbidden.²⁵ Since neither goal is well-served by capital sentences applied to those persons with mental retardation, they were proscribed by the Court in all American jurisdictions.

ENHANCED RISK

Finally, owing to this proven "reduced capacity" of offenders with mental retardation, the Court noted that these offenders face enhanced risk of wrongful execution and specifically identified numerous risk-enhancing characteristics. It was asserted that persons with mental retardation rely on authority figures and work hard to please them. Given this fact and the political pressures of policing, interrogator-coerced false confessions remain a sad reality confronting suspects with mental retardation. Moreover, given their poor memory, uncontrolled impulses, and impaired judgement, they are unfortunately poor assistance to their counsel (especially as a witness). Furthermore, their potential incomprehension of the gravity of the situation may result in an unintended demeanour of remorselessness and contributes to an unconvincing nature when arguing mitigation. Similarly, as cited thirteen years ago in *Penry*, mental retardation can also serve as a "double-edged sword ... enhancing the likelihood that the aggravating factor of future dangerousness will be found by the jury."²⁶ After informed consideration of such characteristics, the Court found that sufficient existence of special risks of wrongful

²² *Atkins*, 122 at 2251.

²³ *Id.*

²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976), recognised the constitutional validity of capital punishment but required numerous safeguards for its non-capricious use (including bifurcated guilt/penalty trials, no mandatory capital sentences, proportionality review, and statutory lists of aggravating/mitigating factors)

²⁵ If not measurably contributing to one or both goals, *Gregg* stated that capital punishment "is nothing more than the purposeless and needless imposition of pain and suffering".

²⁶ *Atkins*, 122 at 2252.

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 executions (despite supposed procedural protections) contributed to the categorical-exclusion justification.

DISSENTING OPINION – REHNQUIST, C.J.

Chief Justice Rehnquist found the majority opinion to be “a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”²⁷ Rehnquist took issue with the unprecedented use of the subjective sources (“foreign laws, the views of professional and religious organizations, and opinion polls”) and found such judicial activism to be antithetical to considerations of federalism. In his opinion, criminal sentencing should remain questions of legislative policy, untouched by the judiciary, because legislatures alone (i.e. not the courts) “respond to the will and consequently the moral values of the people.”²⁸ Continuing with this ‘separation of powers’ argument, he questioned the complete lack of reference to jury sentencing decisions, considering them to be “a reliable, though secondary source of contemporary values.”²⁹ Taken together:

*No across-the-board consensus has developed through the workings of normal democratic processes in the laboratories of the States.*³⁰

Though he accepted that previous decisions “have looked to the climate of international opinion ... to reinforce a conclusion regarding evolving standards of decency,” he bemoaned the now-overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), rejection that “the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite” (emphasising that “*American* conceptions of decency ... are dispositive”).³¹ His opinion concluded:

*For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.*³²

DISSENTING OPINION – SCALIA, J.

Justice Scalia criticized the Court’s decision stating, “Seldom has the opinion of this Court rested so obviously upon nothing but the personal views of its members.”³³ Consistent with his ‘dead-document’ approach to constitutional interpretation, he noted

²⁷ *Id.*

²⁸ *Id.* at 2253.

²⁹ *Id.* at 2255.

³⁰ *Id.* The Justices’ conscious use of grammar betrays their insular federalist perspective. Throughout their decisions and dissents, individual US states are capitalised. Elsewhere in international instruments, ‘States’ usually refer to sovereign nations, and ‘states’ to their sub-components.

³¹ *Id.* at 2254.

³² *Id.*

³³ *Id.* at 2269.

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that Eighth Amendment jurisprudence requires a punishment to be deemed as “cruel and unusual” if it either: (i) was considered cruel and unusual when the Bill of Rights was passed (1791); or (ii) is inconsistent with modern standards of decency as evinced by

objective indicia (principally state legislation).³⁴ He also stated that the “mildly mentally retarded” would certainly have been executed in 1791, though he noted the Court made no contrary pretence.³⁵

He proceeded to question the validity of the “evolving trend” of state legislation upon which the Court’s majority opinion was founded. He specifically accused the Court of paying “lip-service to these precedents [of not imposing the Court’s subjective opinions] as it miraculously extracts a ‘national consensus’.”³⁶ He specifically contested that eighteen states (47% of the 38 retentionist states) adequately revealed any consensus (“embarrassingly feeble”, he called their evidence).³⁷ Scalia dismissed the relative voting record as irrelevant, and he pointed to a number of statutory conditions in the proscribing statutes, thereby questioning the validity of the majority’s claim that eighteen states have actually categorically outlawed such executions. Moreover, he considered the statutes’ infancy (see dates of statute passage in footnote 7 – an average of 6.8 years) as further reason to question their sensibility, and he warned of relying on short trends to deduce consensus. Justice Scalia also stated that:

*Equally irrelevant are the practices of the world community whose notions of justice are (thankfully) not always those of our people.*³⁸

He afforded no relevance to extra-American sources of consideration (giving this argument his “Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’”).³⁹ Continuing on, he stated that mental retardation could be “feigned,” and the enhanced risk of wrongful execution was “laughable.”⁴⁰

³⁴ *Id.* at 2260.

³⁵ *Id.*

³⁶ *Id.* at 2261.

³⁷ *Id.* at 2262.

³⁸ *Id.* at 2264.

³⁹ *Id.*

⁴⁰ *Id.* at 2267.