

NOTES AND COMMENT

FOLLOWING IN THE FOOTSTEPS OF *FORD*: MENTAL RETARDATION AND CAPITAL PUNISHMENT POST-*ATKINS*

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I. INTRODUCTION

Since the United States Supreme Court held the capital sentence of mentally retarded John Paul Penry to be constitutional in *Penry v. Lynaugh*,¹ the relationship between capital punishment, mental retardation and the Eighth Amendment has been widely debated.² In a long awaited opinion, the Court finally held that the Eighth Amendment categorically prohibits the execution of the mentally retarded.³ In *Atkins v. Virginia*, the Court overruled its holding in *Penry*, and recognized that capital sentences imposed on the mentally retarded constitute cruel and unusual punishment in violation of the Eighth Amendment.⁴ Although this appears to be a victory for the mentally retarded and their advocates, the real effect of the decision will depend largely on how the states apply the *Atkins* holding.

Given *Atkins*' failure to define who should be classified as mentally retarded, many individuals, mainly those with borderline mental impairment,

1. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that the execution of the mentally retarded was not categorically prohibited by the Eighth Amendment).

2. See Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001); EMILY FABRYCK REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 14 (1993).

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

4. See *id.* at 321.

are at risk of not receiving the protections afforded by the Eighth Amendment. This is especially true if the state courts vary in their application of the *Atkins* rule in the same manner they varied in the application of the prohibition on the execution of the mentally ill recognized in *Ford v. Wainwright*.⁵ By examining the arbitrary manner in which *Ford* has been applied over the past two decades, along with the recent decisions interpreting *Atkins*, it becomes apparent that *Atkins* will provide little, if any, additional, meaningful protection to most mentally retarded defendants.

This article will examine the similarities between the *Ford* and *Atkins* decisions as well as the continuing violations of the Eighth Amendment despite state court attempts to follow those holdings. First, it will compare the Supreme Court's failure to adopt a uniform standard in both cases. Next, an examination of the states' interpretation of *Ford* will reveal the arbitrary manner in which it has been applied. Finally, in light of *Ford*'s history and the initial state responses to *Atkins*, this note will show why *Atkins* will provide little additional protection to mentally retarded offenders facing a capital sentence.

The Holdings of Ford and Atkins

Almost two decades before the Supreme Court recognized that the execution of the mentally retarded constituted cruel and unusual punishment,⁶ *Ford* set forth the Eighth Amendment prohibition on the execution of the mentally ill.⁷ In reaching its decision, the *Ford* Court reasoned that society has a long history of prohibiting the imposition of capital sentences on the "insane" and that such a restriction is also embodied within the Eighth Amendment.⁸ Further, the Court also noted that the mentally ill may not comprehend the reasoning or implications of a capital sentence and, therefore, such punishment is not justified.⁹ The Court, however, delegated to the states the task of "developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."¹⁰

5. *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that the Eighth Amendment prohibits the execution of the insane).

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

7. *Ford*, 477 U.S. at 409-10.

8. *Id.* at 406-10.

9. *See id.* at 417.

10. *Id.* at 416-17.

Although the *Ford* holding requires the states to implement adequate safeguards and procedures, no minimum standards were promulgated.¹¹ It appears that the Court was cognizant of the difficulties surrounding classification of mental illness. It recognized “a particularly acute need for guarding against error inheres in a determination that ‘in the present state of the mental sciences is at best a hazardous guess however conscientious.’”¹² The Court also neglected to provide any guidance relating to the applicable standard and burden of proof.¹³ Since the 1986 decision, it has become blatantly apparent that the Court’s failure to define insanity, in combination with the absence of procedural standards, has led to an arbitrary application of the constitutional restrictions¹⁴ and in some instances, state courts’ refusal to even recognize the prohibition.¹⁵

In reaching its decision in *Atkins*, as in *Ford*, the Court reasoned that a national consensus against the execution of the mentally retarded has developed.¹⁶ Similarly, the Court relied on the reduced culpability of mentally retarded offenders¹⁷ and the lack of a deterrence effect when capital sentences are imposed on such offenders.¹⁸ In recognizing the execution of the mentally retarded as cruel and unusual punishment prohibited by the Eighth Amendment, the Court also acknowledged the problem of “determining which offenders are in fact retarded.”¹⁹ Despite its awareness of such difficulties, the Court again declined to promulgate any minimum standards to guide the states

11. *See id.*

12. *Id.* at 412 (citation omitted).

13. *See id.* at 399.

14. *Compare* Rector v. Clark, 923 F.2d 570 (8th Cir. 1991) (holding that although the defendant had a frontal lobotomy and was incompetent under the ABA standards, which require the ability to assist one’s counsel, *Ford*’s competency test had been satisfied), *and* Corcoran v. State, 774 N.E.2d 495 (Ind. 2002) (holding that death was an appropriate sentence for a defendant with schizotypal or paranoid personality disorder under Indiana law), *with* Vargas *ex rel.* Sagastegui v. Lambert, 159 F.3d 1161 (9th Cir. 1998) (remanding capital defendant’s case for a competency hearing based on evidence indicating that his mental condition was deteriorating). In *Corcoran*, although the dissent stated, “I would hold that a seriously mentally ill person is not among those most deserving to be put to death,” 774 N.E.2d at 503 (Rucker, J., dissenting), no reference was made in the dissent to *Ford*. *See id.* at 502-03 (Rucker, J., dissenting).

15. The Supreme Court of South Carolina clearly ignored *Ford* in holding that “while it violates the Eighth Amendment to impose a death sentence on a mentally retarded defendant . . . the imposition of such a sentence upon a mentally ill person is not disproportionate.” *State v. Weik*, No. 25526, 2002 S.C. Lexis 159, at *13 (S.C. Sept. 3, 2002) (citations omitted), *aff’d on reh’g*, 581 S.E.2d 834 (S.C. 2003), *cert. denied*, 123 S. Ct. 2580 (2003).

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

17. *Id.* at 319.

18. *Id.* at 319-20.

19. *Id.* at 317.

in determining which defendants must be classified as mentally retarded in order to satisfy the Eighth Amendment.²⁰ In the *Atkins* holding, the Court announced that it was adopting the same approach it used in *Ford*, where each state is free to develop its own standards and procedures for implementing the new Eighth Amendment restriction.²¹ Although the opinion refers to the definitions of mental retardation advocated by the American Association on Mental Retardation (“AAMR”)²² and the American Psychiatric Association²³ in footnotes, it did not advocate any one universal definition or minimum standard.²⁴ As in *Ford*, the Court also failed to place any limitation on the standard and burden of proof a state may require.²⁵

Both *Ford* and *Atkins* used similar justifications in recognizing the Eighth Amendment restrictions on the execution of the mentally ill and the mentally retarded. Additionally, both opinions entrusted the states with the task of implementing the restrictions as they deemed appropriate.²⁶ However, both opinions also failed to set forth any minimum requirements to ensure that the individuals it sought to protect actually received the rights afforded by the Eighth Amendment. As evidenced by the Court’s approach in *Atkins*, it has apparently failed to recognize the ineffectiveness and arbitrariness of the states’ interpretation of *Ford*.²⁷

II. POST-*FORD* TREATMENT OF MENTALLY ILL DEFENDANTS FACING CAPITAL PUNISHMENT

In order to fully realize the implications of *Atkins*, it is necessary to examine *Ford*’s effects on capital sentencing. In 1986, when *Ford* was decided, “no state in the Union permit[ed] the execution of the insane.”²⁸ Florida, the state where *Ford* was sentenced to death, has a statute that specifically provides for a stay of execution when a person is found to be

20. *See id.*

21. *Id.*

22. *Id.* at 308 n.3, 317 n.22.

23. *Id.*

24. *See id.* at 317.

25. *See id.*

26. *Id.*; *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986).

27. *See* Roberta M. Harding, “Endgame”: *Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment’s Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 113 (1994) (explaining that the problems with *Ford*’s lack of guidance are exacerbated by the increasing number of inmates who are becoming incompetent while on death row).

28. *Ford*, 477 U.S. at 408.

insane.²⁹ Despite the safeguards in place in Florida, as well as in other states, the need nonetheless arose for the Court to “resolve the important issue [of] whether the Eighth Amendment prohibits the execution of the insane”³⁰ Given the Supreme Court’s perceived need to resolve the issue, it follows that the statutes and case law developed by the states provided insufficient protection for the mentally ill. Although the Court found Florida’s statute inadequate to protect the Eighth Amendment rights of the mentally ill, it failed to define what standard must be applied, instead leaving the task to each individual state, which were apparently failing at their previous attempts.³¹

In the years since *Ford* was decided, the states have enacted a wide variety of statutes aimed at preventing the execution of the mentally ill.³² However, due to the Court’s failure to define mental illness or insanity, it is unclear whether individuals receiving capital sentences are receiving the full protection of the Eighth Amendment.³³ Although some states’ legislatures have directly addressed the issue of mental illness,³⁴ others have only enacted statutes dealing with incompetence generally.³⁵ The remaining states have opted to leave the issue to the judiciary, relying only on case law.³⁶ Further, every state provides procedures for dealing with defendants who are incompetent to stand trial,³⁷ but only some have created post-sentencing procedures to assess a condemned inmate’s sanity prior to execution.³⁸ The

29. *Id.* at 412; see FLA. STAT. ANN. § 922.07 (West 2002).

30. *Ford*, 427 U.S. at 405.

31. *Id.* at 416-17.

32. Compare ARIZ. REV. STAT. ANN. § 13-4021 (West 2001) (prohibiting the execution of individuals who, due to mental disease, are unaware of the impending punishment) with CONN. GEN. STAT. ANN. § 54-101 (West 2001) (providing for a stay of execution for individuals who become “insane” while awaiting execution).

33. See Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 338 n.76 (“[I]nsanity’ itself is an imprecise legal construct capable of many definitions.”). See also CAL. PENAL CODE § 26 (West 1999) (establishing that “idiots” are incapable of committing crimes); CONN. GEN. STAT. ANN. § 54-101 (West 2001) (providing an indefinite stay of execution for individuals who become “insane” after sentencing but providing no definition of “insane”).

34. See, e.g., FLA. STAT. ANN. § 3.811-812 (West 1999) (determining sanity at the time of execution based on “whether the prisoner lacks the mental capacity to understand the fact of the pending execution and the reason for it”).

35. See, e.g., ARIZ. REV. STAT. ANN. § 13-4021 (West 2001) (prohibiting the execution of the “mentally incompetent,” which is defined as an unawareness of the impending punishment).

36. See, e.g., *Commonwealth v. Mooki*, 117 A.2d 96 (Pa. 1955) (ruling that the insane may not be tried, sentenced or executed).

37. See, e.g., MD. CODE ANN., CRIM. PROC. § 3-106 (2001) (creating a framework to deal with defendants’ incompetency).

38. See, e.g., COLO. REV. STAT. § 18-1.3-1403 (2002) (providing the filing of a motion raising the

fate of a condemned individual who has been judicially declared mentally ill also varies depending on state law. Some states require a temporary stay of execution until the inmate's sanity is recovered,³⁹ while others automatically commute the capital sentence to life without parole.⁴⁰ Each of these variations has the potential to create an atmosphere where the availability of *Ford* protections become a function of local law.

The variety of approaches to *Ford* taken by the states have resulted in capital sentences being applied arbitrarily. Such arbitrary application of the death penalty arguably violates *Furman v. Georgia*,⁴¹ which has been interpreted to stand for the proposition that the death penalty cannot "be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner."⁴² The disparate treatment received by mentally ill death row inmates has not gone unnoticed. According to one commentator, "the current model contains another notable flaw; namely, that its lack of uniformity possesses the potential to violate not only *Ford*, but also the Eighth Amendment principals embodied in *Furman*"⁴³

The difficulties resulting from the Court's approach in *Atkins* should come as no surprise given *Ford*'s history. The cause of the arbitrary treatment received by mentally ill offenders in capital cases is easily identifiable. The most pronounced problem with the states' mental illness statutes is the use of the terms "incompetence" and "insanity" interchangeably.⁴⁴ The state legislatures may not be entirely to blame, however, as the *Ford* opinion also confuses the terms.⁴⁵ Incompetence has come to be understood as the inability to understand the reason for the capital sentence or its consequences.⁴⁶ This

issue of competency to be executed).

39. See, e.g., GA. CODE ANN. § 17-10-71 (1997) (creating procedures to schedule a new execution date for inmates who have regained competency).

40. See, e.g., MD. CODE ANN., CORR. SERV. § 3-904 (1999). Maryland law defines "incompetent" as being "the state of mind of an inmate who, as a result of a mental disorder . . . lacks awareness . . . of the fact of the inmate's impending execution." *Id.* § 3-904(a)(2)(i). Should the inmate be found incompetent, the death sentence must be commuted to life without parole. *Id.* § 904(h)(2).

41. *Furman v. Georgia*, 408 U.S. 238 (1972).

42. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); see Harding, *supra* note 27, at 126 ("The lack of a uniform competency-to-execute plan undermines the constitutional administration of the death penalty.").

43. Harding, *supra* note 27, at 117.

44. See *id.* at 117-19 (discussing state competency standards).

45. "The Court also uses the terms insanity and incompetence imprecisely. While an 'insane' defendant may also be incompetent, there is no necessary link between the two doctrines." Hall, *supra* note 33, at 338 n.76.

46. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (recognizing that justice requires the inability of the mentally ill defendant to comprehend the implications of a capital sentence).

is similar to the standard employed to determine a defendant's competency to stand trial.⁴⁷ Some forms of mental illness, however, are too complex and varied to simply be categorized as "incompetence."⁴⁸ While the incompetency model may be appropriate for assessing a defendant's ability to stand trial, it is ill-suited for implementing *Ford's* Eighth Amendment prohibition.

Due to the blurring of these terms, it is questionable whether the states that have enacted incompetency statutes are truly protecting the mentally ill as mandated by *Ford*.⁴⁹ According to Professor Roberta Harding:

The plan's simplicity is problematic because it ignores the intrinsic complexity of the general issue posed in defining a constitutional competency-to-execute plan. In turn, this consequence enables states to avoid confronting and tackling the difficult issues inherent in ensuring that a mentally incompetent condemned inmate is not executed in violation of the Eighth Amendment.⁵⁰

It is readily identifiable how the discrepancies between incompetence and insanity statutes can lead to an arbitrary application of *Ford*. A schizophrenic inmate in a state such as Connecticut will be issued a stay of execution upon a determination by the court that he is suffering from insanity.⁵¹ The same inmate in a state such as Colorado, with a general incompetency statute, may be deemed fit for execution despite the schizophrenia.⁵² Given the nature of

47. In order to be deemed competent to stand trial, a defendant must have the ability to meaningfully consult with counsel and to comprehend the proceedings against him or her. *Dusky v. United States*, 362 U.S. 402 (1960).

48. For example, schizophrenia is characterized by two or more of the following symptoms, each of which must be present for a "significant portion of time during a one month period": (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly disorganized or catatonic behavior; and (5) negative symptoms such as affective flattening, alogia or avolition. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 285 (4th ed. 1994) [hereinafter DSM IV]. Paranoid type schizophrenia is defined as: A) "preoccupation with one or more delusions or frequently auditory hallucinations" and B) "[n]one of the following is prominent: disorganized speech, disorganized or . . . catatonic behavior or flat or inappropriate affect." *Id.* at 287. While a condemned inmate may be suffering from schizophrenia, he may still have some comprehension of his impending execution, as a diagnosis of schizophrenia does not require delusions in every area of life.

49. See Ptolemy H. Taylor, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045, 1053 (1992) (discussing the problematic nature of defining competency).

50. See Harding, *supra* note 27, at 117.

51. CONN. GEN. STAT. ANN. § 54-101 (West 2001) (declaring that upon the determination by the majority of a panel of three psychiatrists that an individual is *insane*, the court shall order a stay of execution) (emphasis added). See also DSM IV, *supra* note 48, at 274-89 (defining and describing schizophrenia).

52. "'Mentally incompetent to be executed' means that, due to a mental disease or defect, a person who has been sentenced to death is presently unaware that he or she is to be punished for the crime of murder or that the impending punishment for that crime is death." COLO. REV. STAT. § 18-1.3-1401(2) (2002); *cf.* DSM IV, *supra* note 48, at 285-86 (describing the diagnostic criteria for schizophrenia).

schizophrenia, as with many other mental illnesses, it is possible that the condemned individual will have some understanding of his impending execution while at the same time suffering severe mental illness.⁵³ Under a general incompetency statute, he would be ineligible for the exemption from execution provided by *Ford*.

Despite the legislative and judicial efforts to deal with mentally ill individuals facing a capital sentence, *Ford*'s lack of specificity repeatedly has led to an arbitrary application of the holding,⁵⁴ and even the execution of several mentally ill prisoners.⁵⁵ A Texas case, *Hamilton v. Texas*, provides an illustration of *Ford*'s total failure to provide Eighth Amendment protection to a mentally ill inmate facing execution.⁵⁶ In *Hamilton*, a mentally ill man was found not competent to represent himself during his appeal,⁵⁷ yet he was executed nonetheless because he was adjudicated competent following a non-adversarial hearing held shortly before his scheduled execution date.⁵⁸ The procedures employed by the Texas court in *Hamilton* are directly contrary to the language of *Ford*: "The stakes are high and the 'evidence' will always be imprecise. It is all the more important that the *adversary* presentation of relevant information be as unrestricted as possible."⁵⁹ Similarly, procedural mechanisms also hinder the full application of *Ford*. In *Scott v. Mitchell*, the Sixth Circuit acknowledged a condemned inmate's severe mental illness, yet refused to issue a stay based on the defendant's Eighth Amendment claim, concluding that it was procedurally barred.⁶⁰

As courts continue to apply *Ford*, it becomes increasingly apparent that the decision did not provide sufficient guidance to the states, and therefore

53. See DSM IV, *supra* note 48, at 285; see also *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002) (upholding capital sentence despite consensus from experts that Corcoran was schizophrenic); *State v. Weik*, No. 25526, 2002 S.C. LEXIS 159 (S.C. Sept. 3, 2002) (upholding capital sentence of inmate suffering from schizophrenia).

54. Compare *Rector v. Clark*, 923 F.2d 570 (8th Cir. 1991), and *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002), with *Vargas ex rel. Sagastegui v. Lambert*, 159 F.3d 1161 (9th Cir. 1998).

55. *State v. Weik*, No. 25526, 2002 S.C. LEXIS 159, at *13 (S.C. Sept. 3, 2002) (citations omitted), *aff'd on reh'g*, 581 S.E.2d 834 (S.C. 2003), *cert. denied*, 123 S. Ct. 2580 (2003).

56. *Hamilton ex rel. Smith v. Texas*, 498 U.S. 908, 908 (1990) (denying petition for writ of certiorari).

57. *Id.* at 910-11 (Stevens, J., concurring).

58. *Id.* at 910 (Stevens, J., concurring).

59. *Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (emphasis added).

60. *Scott v. Mitchell*, 250 F.3d 1011, 1012-13 (6th Cir. 2001). "Although Scott was not specifically diagnosed as being schizophrenic until well after he filed his initial petition in 1996, his own pleadings make it clear that he had suffered from severe mental illness for years before that petition was filed." *Id.* at 1013. However, without evidence that he was unable to understand the impending execution, the lower court did not err in refusing to hold a hearing. *Id.* at 1015.

granted little or no additional meaningful protection to mentally ill individuals who have received capital sentences. As long as statutory procedures permit even a small number of mentally ill inmates to be put to death, compliance with *Ford* and the Eighth Amendment cannot be achieved.

III. LIKE *FORD*, THE *ATKINS* DECISION PROVIDED INSUFFICIENT GUIDANCE TO ENSURE MEANINGFUL COMPLIANCE WITH THE EIGHTH AMENDMENT

Like *Ford*, the Court in *Atkins* failed to articulate an adequate standard to ensure that the states will provide mentally retarded defendants the protection of the Eighth Amendment. Variations among the states' definitions of mental retardation create extreme inconsistencies in the determination of whether an offender is recognized as mentally retarded. Similarly, procedural differences increase the unpredictability with which *Atkins* is applied. These difficulties are directly related to the absence of a uniform standard. Such uniformity is necessary to avoid the arbitrary application of capital sentences. The results of these variations can already be observed in state courts' application of *Atkins* to mentally retarded inmates seeking exemption from execution. If these initial decisions are representative of the treatment mentally retarded defendants will receive in the years to come, *Atkins* will have done little more to enforce the Eighth Amendment on behalf of the mentally retarded than *Ford* has done for the mentally ill.

A. *Inconsistencies Among Statutory Definitions of Mental Retardation*

Currently, there is no single, universally accepted definition of mental retardation.⁶¹ In *Atkins*, the Court acknowledged that “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.”⁶² Currently, two often utilized definitions are those of the AAMR⁶³ and the American Psychiatric

61. See, e.g., Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1420-21 (1995). Watkins explains that mental retardation is merely a “descriptive label” that is used to describe individuals with “subnormal intellectual abilities.” *Id.* at 1422-23.

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

63.

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

Association's DSM IV.⁶⁴ Although these standards are similar, both are susceptible to inconsistencies stemming from difficulties inherent in the IQ test that is used,⁶⁵ as well as the individual psychiatrist's approach and assessment.⁶⁶ Additionally, while the AAMR only requires "limitations" in at least two of the listed adaptive skills,⁶⁷ the American Psychiatric Association requires "significant limitations" in two of these areas.⁶⁸ The greatest number of inconsistencies occur, however, as a result of the variations in the way the individual states define mental retardation.

While the state statutes defining mental retardation generally address the three primary components of mental retardation, they vary significantly in their requirements.⁶⁹ The three primary elements of mental retardation most commonly recognized include intelligence level, functional limitations, and

work. Mental retardation manifests before age 18.

AM. ASS'N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (9th ed. 1992) [hereinafter AAMR].

64. Psychiatric manuals state:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

DSM IV, *supra* note 48, at 39.

65. The mental retardation advocates have stated:

IQ testing is not an exact science—IQ tests have proven to be far from foolproof. It has been found that a child's motivation, the choice of IQ test, location where the test is given, attitude or bias on the part of the test-giver, and many hidden variables, may significantly affect the outcome of the test scores. Further, the choice of test used may be critical (Stanford-Binet and Weschler only correlate with each other at the 70% level, thus often identifying different children as retarded).

HOME OF GUIDING HANDS, *Is Level of Mental Retardation Based Solely on IQ*, at http://www.guidinghands.org/faqs/mental_retardation.htm (last visited Oct. 10, 2003).

66. See Watkins, *supra* note 61, at 1423 (explaining that the degree of impairment that is diagnosed can vary depending on the measurement employed as well as the examiner performing the testing). It is not uncommon for an individual to receive two different diagnoses depending on who performs the assessment. *Id.* See also JAMES W. ELLIS, *MENTAL RETARDATION AND THE DEATH PENALTY: A GUIDE TO STATE LEGISLATIVE ISSUES* 10-11 at http://www.aamr.org/Reading_Room/state_legislatures_guide.pdf (last visited Oct. 10, 2003) ("The evaluator (or in some cases, evaluation team) must not only be skilled in the administration and interpretation of psychometric (IQ) tests, but also in the assessment of adaptive behavior and the impact of intellectual impairment in the individual's life.") (footnotes omitted). Ellis also explained: "The expertise of skilled mental disability professionals is crucial to implementing *Atkins*' protections and achieving the goals of the criminal justice system in these cases." *Id.* at 11.

67. AAMR, *supra* note 63, at 5.

68. DSM IV, *supra* note 48, at 39.

69. These inconsistencies existed both prior to the *Atkins* holding as well as at the present time thus providing further evidence that *Atkins* will provide little additional protection to the mentally retarded. For a discussion on current legislation in this area, see Entzeroth, *supra* note 2, at 929-32.

age of onset.⁷⁰ By examining the level of variation within the definition of each of the three elements, it becomes clear that the arbitrary and inconsistent application of *Atkins* is inevitable.⁷¹

First, no uniform definition of “sub-average intelligence” has been agreed upon. Intelligence is most commonly defined in terms of an IQ score.⁷² Some states have developed conclusive presumptions based on a specific score,⁷³ while other states created only a rebuttable presumption.⁷⁴ Several other jurisdictions require a specific IQ score, in combination with the remaining two elements, in order to establish mental retardation.⁷⁵ Still other states have opted to provide no definition of the sub-average intelligence requirement.⁷⁶ Although score specific requirements provide more certainty, strict adherence to IQ requirements can also be problematic, as individuals who score above the statutory limit may still suffer severe impairment.⁷⁷ As Ellis recognized, “IQ scores alone cannot precisely identify the upper boundary of mental retardation.”⁷⁸

70. For an excellent discussion of the inconsistencies among the state statutes see Brief of the States of Alabama, Mississippi, Nevada, South Carolina, and Utah as Amici Curiae in Support of Respondent, at *3-21, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) [hereinafter Amicus Brief] (arguing that the inconsistencies among state statutes evidence the lack of a national consensus against the execution of the mentally retarded).

71. Brief for Respondent, at 42 n.26, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452) (“The differing approaches utilized by the States highlight the serious problem with using the psychiatric community’s definition of mental retardation to form a constitutional rule.”).

72. See HOME OF GUIDING HANDS, *supra* note 65, ¶ 2.

73. NEB. REV. STAT. § 28-105.01(3) (Supp. 2002) (creating a presumption of mental retardation for individuals with an IQ score under seventy); N.M. STAT. ANN. § 31-20A-2.1(A) (Michie 2000) (creating the same presumption).

74. ARIZ. REV. STAT. ANN. § 13-703.02(G) (West Supp. 2002) (establishing that while an IQ score below seventy is required to prove mental retardation, an IQ score below sixty-five creates a rebuttable presumption); ARK. CODE ANN. § 5-4-618(a)(2) (Michie 1997) (creating a rebuttable presumption of mental retardation for individuals with an IQ score under sixty-five). Cf. S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie Supp. 2003) (creating a presumption that individuals with an IQ score over seventy do not have sub-average intelligence).

75. Six states define sub-average intelligence as an IQ score of seventy or below. ARIZ. REV. STAT. ANN. § 13-703.02(K)(4) (West Supp. 2002) (allowing courts to consider the margin of error); KY. REV. STAT. ANN. § 532.130(2) (Michie 1999); MD. CODE ANN., CRIM. LAW § 2-202(b)(1)(i) (2002); N.C. GEN. STAT. § 15A-2005(a)(1)(a)-(c) (2002); TENN. CODE ANN. § 39-13-203(a)(1)-(3) (1997); WASH. REV. CODE ANN. § 10.95.030(2)(a)-(e) (West 2002). Three states require two or more standard deviations from the mean score. CONN. GEN. STAT. ANN. § 1-1g(b) (West 2000); FLA. STAT. ANN. § 921.137(1) (West Supp. 2003); KAN. STAT. ANN. § 76-12b01(i) (1997).

76. See GA. CODE ANN. § 17-7-131(a)(3) (1997); IND. CODE ANN. § 35-36-9-2 (Michie 1998); MO. ANN. STAT. § 565.039 (West 2000); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney Supp. 2003).

77. See ELLIS, *supra* note 66, at 7; DSM IV, *supra* note 48, at 39-40 (noting that individuals with scores between seventy-one and seventy-five may still be considered retarded).

78. ELLIS, *supra* note 66, at 7.

The next definitional element of mental retardation involves deficits in adaptive behavior.⁷⁹ The definitions adopted in the various statutes differ greatly, with some requiring significant deficits, while others require only limitations.⁸⁰ Given these inconsistencies, a defendant could easily be declared mentally retarded in one state and not in another, depending upon which areas of functioning the impairment has manifested itself.⁸¹

The clearest example of the statutory differences is evidenced by the third requirement, the age of onset of the impairment. Most statutes require the onset to occur during the “developmental period.” However, there is no consensus as to what age range this term encompasses. While several states require an onset of symptoms prior to the age of eighteen,⁸² others use twenty-two as the upper limit.⁸³ Additionally, two states simply require the mental retardation manifest itself during the “developmental period,” but no age limit is promulgated.⁸⁴ Any reference to the developmental period or age of onset is altogether absent from two other states’ statutes.⁸⁵ It hardly seems just that the restriction on cruel and unusual punishment imposed by the Eighth Amendment would permit a mentally impaired individual whose symptoms manifested themselves at age nineteen to be executed in one state while his life would be spared in a neighboring state. If such variations are permissible under the Eighth Amendment, it would imply that the execution of a mentally retarded offender whose symptoms developed at age nineteen is constitutional.⁸⁶ To accept such an arbitrary application of the Eighth Amendment, one must believe that the Court’s reasoning in *Atkins*, recognizing a national consensus against executing the mentally retarded and

79. See AAMR, *supra* note 63, at 5; DSM IV, *supra* note 48, at 39-40.

80. The requirement to show deficits in adaptive functioning varies too greatly for a thorough discussion here. For an in depth comparison of the differences, see Amicus Brief, *supra* note 70, at *9, *12.

81. See *id.*

82. ARIZ. REV. STAT. ANN. § 13-703.02(K)(2) (West Supp. 2002); CONN. GEN. STAT. ANN. § 1-1g(b) (West 2000); FLA. STAT. ANN. § 921.132(1) (West Supp. 2003); KAN. STAT. ANN. § 76-12b01(d) (1997); MO. ANN. STAT. § 565.030.6 (West Supp. 2003); N.Y. CRIM. PROC. LAW § 400.27(12)(e) (McKinney Supp. 2003); N.C. GEN. STAT. § 15A-2005(a)(1)(a) (2001); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203(A)(3) (1997); WASH. REV. CODE ANN. § 10.95.030(2)(e) (West 2002).

83. IND. CODE ANN. § 35-36-9-2 (West 1998); MD. CODE ANN., CRIM. LAW § 2-202(3)(b)(1)(ii) (2002).

84. GA. CODE ANN. § 37-4-2(11) (Supp. 2003); KY REV. STAT. ANN. § 532.130(2) (Michie 1999).

85. NEB. REV. STAT. § 28-105.01 (Supp. 2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2000).

86. Cf. ELLIS, *supra* note 66, at 9 n.29 (discussing the need for exemption from the death penalty where the age of onset requirements are not met).

a reduced level of culpability, is only relevant if the handicap began prior to age eighteen.

The importance of the manner in which these three elements are defined is clear. As one commentator noted, “[t]he importance of this definition and inclusion of all elements, especially the first two, is that the prohibition of capital punishment for all persons with mental retardation *per se* hinges on the content of these elements.”⁸⁷ Under the statutes discussed above, the fate of a mentally retarded defendant will depend, in large part, on the jurisdiction where he is tried. Such arbitrary results in the context of capital punishment are prohibited by the Eighth Amendment, as recognized in *Furman*.⁸⁸ Given these discrepancies, it is questionable whether *Atkins* did little more than sanction arbitrary application of the Eighth Amendment.⁸⁹

B. Procedural Inconsistencies Within the Capital Sentencing of Mentally Retarded Offenders

In addition to definitional inconsistencies, many procedural disparities also exist among capital sentencing guidelines for the mentally retarded.⁹⁰ *Atkins* neglected to set forth any requirements on how or when the issue of mental retardation is to be decided in a capital case. It is unclear whether a defendant has the right to present the issue to a jury or whether a judge must decide the question. Further, the Court also failed to provide any limitations on the burden of proof that may be imposed upon a defendant seeking to establish his mental retardation. Finally, no limitations have been placed on the minimum or maximum number of experts a defendant may call to testify. Given the current deviations among capital sentencing statutes, the arbitrary and inconsistent application of *Atkins* is inevitable.

In several states, the applicable statutes provide for a pre-trial hearing in capital cases if the defendant’s mental retardation is placed at issue.⁹¹ If it is determined that the defendant suffers from mental retardation as statutorily

87. REED, *supra* note 2.

88. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

89. See Brief for Respondent, *supra* note 71, at 42 n.26 (discussing difficulties with creating a constitutional rule based on the differing state definitions).

90. See Amicus Brief, *supra* note 70, at 14-21 (discussing the disagreement among the states regarding procedural issues).

91. ARIZ. REV. STAT. ANN. § 13-703.02(G) (West Supp. 2003); ARK. CODE ANN. § 5-4-618(d)(2) (Michie 1997); COLO. REV. STAT. § 18-1.3-1102 (2002); see IND. CODE ANN. § 35-36-9-4(e) (Michie Supp. 2002); KY. REV. STAT. ANN. § 532.135 (Michie 1999); N.C. GEN. STAT. § 15A-2005(c) (1997); S.D. CODIFIED LAWS § 23A-27A-26.3 (Michie Supp. 2003).

defined, the death penalty is no longer a sentencing option.⁹² Other states address the defendant's claim of mental retardation during the sentencing phase of the trial.⁹³ Finally, some states have opted to address the claim after the trial but before sentencing.⁹⁴ Obviously, whether to submit the issue to the jury, if permitted by state law, is a strategic decision to be made by the defense. However, not all mentally retarded defendants will be given this option. For example, if the issue of mental retardation is to be decided during a pre-trial hearing, the defendant will have no choice but to present the issue to the judge. The issue is further complicated when the decision turns primarily on factual issues, as opposed to predominantly legal determinations.⁹⁵ Although the effects of the differing procedures depend on the circumstances of each individual case, the differences nonetheless create inconsistency in the application of *Atkins*.⁹⁶

In a related issue, the burden of proof that the defendant must meet in order to prove mental retardation also varies among the states. Although the majority of states employ the lowest standard, a preponderance of the evidence,⁹⁷ several others mandate a higher burden of clear and convincing evidence.⁹⁸ Under other statutes, no burden of proof has been defined.⁹⁹ Finally, Georgia is the only state to require the defendant to establish his

92. See Amicus Brief, *supra* note 70, at 14-21 (discussing the disagreement among the states regarding procedural issues).

93. GA. CODE ANN. § 17-7-131(c)(3) (1997); TENN. CODE ANN. § 39-13-203(d) (1997); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002).

94. KAN. STAT. ANN. § 21-4623(a) (1995); MO. ANN. STAT. § 565.030(4)-(5) (West Supp. 2003); NEB. REV. STAT. § 28-105.01(5) (Supp. 2002); N.M. STAT. ANN. § 31-20A-2.1(c) (Michie 2000).

95. If the defendant's mental retardation adjudication turns on factual issues, such as the age of onset, the question becomes highly factual and the defendant may desire the question to be answered by a jury of his peers. In a state such as Arizona, however, the factual issues will be resolved by the court at a pretrial hearing. See, e.g., Amicus Brief, *supra* note 70, at 14-21 (discussing the disagreement among the states regarding procedural issues).

96. The full extent of these procedures has yet to become clear due to the small number of capital cases implicating the death penalty that have reached the sentencing phase since June 2002. However, it is not difficult to imagine how a sentencing jury may be unduly influenced by the fact that the defendant has already been convicted of first degree murder.

97. ARK. CODE ANN. § 5-4-618(c) (Michie 1997); MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(ii) (2002); MO. ANN. STAT. § 565.030.4(1) (West Supp. 2003); NEB. REV. STAT. § 28-105.01(5) (Supp. 2002); N.M. STAT. ANN. § 31-20A-2.1(c) (Michie 2000); N.Y. CRIM. PROC. LAW § 400.27(12)(a) (McKinney Supp. 2003); S.D. CODIFIED LAWS § 23A-27A-26.3 (Michie Supp. 2003); TENN. CODE ANN. § 39-13-203(c) (1997); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002).

98. ARIZ. REV. STAT. ANN. § 13-703.02(G) (West Supp. 2003); COLO. REV. STAT. § 18-1.3-1102(2) (2002); FLA. STAT. ANN. § 921.137(4) (West Supp. 2003); IND. CODE ANN. § 35-36-9-4 (b) (1998).

99. CONN. GEN. STAT. ANN. § 53a-46a (West 2000); KAN. STAT. ANN. § 21-4623 (1995); KY. REV. STAT. ANN. § 532.135 (Michie 1999).

mental retardation *beyond a reasonable doubt*.¹⁰⁰ The implications of these different burdens can be drastic, especially for defendants with borderline mental retardation. By requiring a defendant with a mild or borderline impairment to prove his retardation beyond a reasonable doubt, the state is essentially denying *Atkins* protection to those it was intended to protect.

The timing of the hearing and burden of proof are only two examples of the conflicting requirements among the states. There are far more differences, too numerous to review within this article.¹⁰¹ However, even considering only these two areas, it is easy to see how some mentally retarded defendants will receive the protection of *Atkins*, while others will be denied access to their rights by the statutory procedures their state has chosen to enact. Like the varying definitions of mental retardation, these procedural inconsistencies create a system where the arbitrary and capricious application of *Atkins* is inevitable.

C. *Post-Atkins Decisions Involving Mentally Retarded Defendants and Capital Punishment*

Although courts are still in the early stages of implementing *Atkins*, the inconsistencies of their application are already apparent.¹⁰² Many of these cases arise in states with no existing statutes to deal with mentally retarded defendants in capital cases. However, even those states with pre-existing bans on execution of the mentally retarded are struggling with the implications of *Atkins*. Issues surrounding burden of proof, appellate procedure, and classification and diagnosis are all being reconsidered in light of *Atkins*.¹⁰³ These initial cases will likely determine the treatment of mentally retarded defendants far into the future. Even at this early stage, similarities to post-

100. GA. CODE ANN. § 17-1-131(c)(3) (1997).

101. For example, Pennsylvania is currently considering legislation which would allow a defendant to request a pre-trial hearing on the issue and also permit the defendant to raise the issue of mental retardation at both the trial and sentencing phases in the event that the court ruled against him or her at the hearing. See PA. SENATE BILL 26, Reg. Sess. 2003.

102. Despite the recency of *Atkins*, the courts have been flooded with appeals from death row inmates, many of whom may have been overlooked by the pre-*Atkins* mental retardation statutes and case law. Note that many of these statutes are identical to those in effect today, as evidenced by the dates the statutes were enacted.

103. See Amicus Brief, *supra* note 70, at 14-21 (discussing the procedural variations among the states).

Ford decisions, such as inconsistencies and arbitrary application, are readily apparent.¹⁰⁴

Oklahoma is among the states whose legislature has yet to address the issue of capital sentencing for the mentally retarded.¹⁰⁵ Shortly after *Atkins*, the Oklahoma Court of Criminal Appeals was given the opportunity to interpret the decision in a Post-Conviction Relief appeal filed in *Murphy v. State* by a mildly mentally retarded inmate who had been sentenced to death.¹⁰⁶ The court opted to set forth its own procedures until “other branches of government can reach a meeting of the minds on this issue.”¹⁰⁷ In addition to defining mental retardation,¹⁰⁸ the court adopted a “preponderance of the evidence” theory.¹⁰⁹ The court then determined that in future trials, claims of mental retardation will be determined at the sentencing phase, with a provision for a “post-judgment *Atkins* hearing” to review the jury decision.¹¹⁰ Individuals who have already been sentenced to death may seek relief under *Atkins* only if the issue of mental retardation has previously been raised.¹¹¹

104. See, e.g., Taylor, *supra* note 49; Scott v. Mitchell, 250 F.3d 1011-13 (6th Cir. 2001) (refusing to grant a stay of execution, holding that the mental illness claim was procedurally barred).

105. Oklahoma law does, however, provide that mentally retarded individuals are not capable of committing crimes if, at the time of the act, he or she was “incapable of knowing its wrongfulness.” OKLA. STAT. ANN. tit. 21, § 152(3) (West 2002).

106. *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002), *cert. denied*, 123 S. Ct. 1795 (2003).

107. *Id.* at 567.

108. *Id.* at 567-68. The court in *Murphy* stated:

A person is ‘mentally retarded’: (1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) The mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.

Id. at 567-68. Cf. AAMR, *supra* note 63, at 5; DSM IV, *supra* note 48, at 39-40. The court further prohibited defendants with an IQ over seventy from raising the issue. *Murphy*, 54 P.3d at 568.

109. *Murphy*, 54 P.3d at 568.

110. *Id.*

111. *Id.* at 569. The court set forth three circumstances where an application for post-conviction relief under *Atkins* may be sought:

In those cases where evidence of the defendant's mental retardation was introduced at trial and/or the defendant either (1) received an instruction that his or her mental retardation was a mitigating factor for the jury to consider, (2) appealed his death sentence and therein raised the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution (or a substantially similar claim relating to his or her mental retardation), or (3) raised a claim of ineffective assistance of counsel, on appeal or in a previous post-conviction application, in which he or she asserted trial counsel or appellate counsel failed to raise the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth

Murphy's case was ultimately remanded to the district court for an evidentiary hearing.¹¹²

While the newly announced rules in Oklahoma appear to comply with *Atkins*, the concurrence recognized potential difficulties for defendants with borderline mental retardation under the court's holding.¹¹³ First, the court mandated that an IQ score of seventy or below must be the result of a "contemporary scientifically recognized" IQ test.¹¹⁴ "Contemporary" is defined as a test conducted after the crime was committed or "one that may be understood by contemporary standards."¹¹⁵ "Taken as a whole, the definition appears to require proof of mental retardation both before (manifest before age eighteen) and after (contemporary test) the crime occurred."¹¹⁶ In his concurrence, Judge Chapel also expressed concern with the seventy or below test score requirement.¹¹⁷ "A person who is virtually unable to function but has a test score of 71 may not claim to be ineligible for the death penalty by mental retardation."¹¹⁸ He described the majority's opinion as "follow[ing] the letter, but not the spirit of *Atkins*."¹¹⁹ Finally, there is also a concern over transient or indigent defendants with no school records to establish the onset prior to age eighteen.¹²⁰ As the Oklahoma arrangement illustrates, merely creating standards and procedures to address mental retardation among capital offenders will not necessarily fulfill the requirements of the Eighth Amendment. Instead, the system must be designed to ensure that all mentally retarded individuals facing a capital sentence may invoke their constitutional rights.

These criticisms of the Oklahoma approach are applicable to the standards used in many states, whether legislatively enacted or judicially created. The Louisiana Supreme Court, which also lacked legislative

Amendment to the U.S. Constitution.

Id.

112. *See id.* at 570.

113. *Id.* at 573-74 (Chapel, J., concurring in result).

114. *Id.* at 573 (Chapel, J., concurring in result).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 573-74. Judge Chapel also discusses the possibility that if a defendant has a score over seventy on one test and a score below seventy on another, the court may preclude him from raising an *Atkins* claim. *Id.* at 574.

119. *Id.*

120. *Id.* at 575 (Chapel, J., concurring in the result). "The defendant would be precluded from raising mental retardation even with an IQ of 56, tested near the time of the crime, and a showing of little or no ability to function according to the enumerated categories." *Id.*

guidance, was more cognizant of the difficulties surrounding the classification of mental retardation and consequently created a more comprehensive model.¹²¹ Louisiana was faced with its first post-*Atkins* appeal in *State v. Williams*, where a twenty-one year old with an IQ of sixty-eight challenged his capital sentence.¹²² In selecting the appropriate definition of mental retardation, the court reviewed the classifications utilized by various sources.¹²³ The court adopted a definition similar to that of Oklahoma, however, the requirements are slightly relaxed.¹²⁴ Under the Louisiana model, the developmental period is extended by four years to age twenty-two.¹²⁵ Additionally, the court recognized the inconsistencies that may be present among IQ assessments,¹²⁶ thus eliminating some of the potential difficulties with the Oklahoma approach. While the Louisiana model is not flawless, it does avoid some of the problems arising from Oklahoma's strict test that allows little room for individual differences. As a result of Louisiana's approach, more mentally retarded defendants in its courts will receive the rights intended by *Atkins*.

Even more troublesome than the judicially created standards is the refusal of appellate courts to create any guidelines to assist trial courts in implementing *Atkins*. At least one state court has refused to provide any guidance in the absence of legislative action.¹²⁷ The Illinois Supreme Court was confronted with the issues surrounding *Atkins* in *People v. Pulliam*, a Post-Conviction Relief appeal filed by a mildly mentally retarded inmate.¹²⁸ Although the court recognized that Pulliam was entitled to have her case remanded for an evidentiary hearing to address her claim of mental

121. See *State v. Williams*, 831 So. 2d 835 (La. 2002); *State v. Dunn*, 831 So. 2d 862 (La. 2002).

122. *Williams*, 831 So. 2d 835.

123. *Id.* at 852-53. Among the classifications reviewed were those of the American Psychiatric Association's DSM IV and the AAMR's Mental Retardation: Definition, Classification and Systems of Supports, 10th edition, which became available post-*Atkins*, as well as various other state statutes. *Id.*

124. Compare *Williams*, 831 So. 2d at 854 and *Murphy*, 54 P.3d at 567-68.

125. *Williams*, 831 So. 2d at 854.

126. See *id.* at 853-54 n.26. "Regardless of the standard deviation used, the assessment of intellectual functioning through the primary reliance on IQ tests must be tempered with attention to possible errors in measurement. Errors of measurement as well as true changes in performance outcome should be considered in interpreting IQ test results." *Id.* See also *State v. Dunn*, 831 So. 2d 862, 885 (La. 2002) (noting that although the defendant had an IQ of seventy-one, "IQ standing alone cannot be used to determine whether one is mentally retarded . . .").

127. See *People v. Pulliam*, 794 N.E.2d 214 (Ill. 2002).

128. *Id.* at 218-19.

retardation, it chose not to provide any guidance to the lower court.¹²⁹ The opinion states:

The appropriate remedy here is simply a remand for a hearing under *Atkins*. It would not be appropriate for this court to usurp the authority of the legislature by fashioning procedural and substantive standards in relation to the *Atkins* hearing. Such matters are best left to the determination of the legislature following discussion and debate. The legislature may choose to eventually adopt procedural standards to govern *Atkins* issues that arise prior to conviction and sentence. We recognize that the circuit courts will have to conduct these hearings, at least for the time being, without definitive guidance from the legislature or from this court. In the meantime, we will review all such cases, including post-conviction cases, to ensure that due process standards have been satisfied.¹³⁰

Such an approach creates numerous potential dangers for the mentally retarded, as neither the court nor the legislature has created any procedural safeguards.

Although there are both benefits and difficulties with the various courts' approaches, none provide a suitable substitute for a uniform approach. The difficulties that have been prevalent in the history of *Ford* will inevitably continue with *Atkins*, despite the prohibition on the arbitrary application of the death penalty.

IV. CONCLUSION

While *Atkins* surely will provide reprieve for some mentally retarded defendants facing a sentence of death, others needlessly will be denied its intended protection. This is not the first Eighth Amendment right recognized by the Court to receive such arbitrary and capricious application in state courts.¹³¹ However, instead of correcting the problems created by *Ford*, apparently the Court has condoned them by adopting the same approach in *Atkins*. The difficulties presented by the *Ford* holding have manifested themselves to a degree such that the consequences cannot be ignored. The state courts' capricious application of *Ford* surely has alerted the Court to the need for more definitive standards in such cases. Given the similarities between the *Ford* and *Atkins* holdings, the fate of *Atkins* was surely predictable.

129. *Id.* at 237.

130. *Id.*

131. *See, e.g., supra* note 60.

The application of the death penalty to mentally retarded defendants not only violates *Atkins* and the Eighth Amendment, such application also violates the principles set forth in *Furman*, which prohibits the arbitrary and capricious application of the death penalty.¹³² In many cases, especially those involving borderline mental retardation, the defendant's fate will depend, in large part, on the state in which his trial is held. Ironically, it is those defendants with mild to moderate mental retardation that are most in need of *Atkins* protection, as the more severely mentally retarded defendants are not likely to be competent to stand trial. Because the meaning of the Eighth Amendment does not change from state to state, the restrictions mandated by the Eighth Amendment must likewise receive uniform application.

Solving these problems will not be easy. Clearly, the best solution to the dilemmas in both *Ford* and *Atkins* would be for the Supreme Court to reconsider the issues and promulgate clear standards and guidelines that all states would be required to follow. However, the Court is unlikely to take such action in the near future. Several scholars have provided content suggestions and drafted model legislative provisions intended to guide state legislatures in creating relevant statutes,¹³³ however such suggestions will only be effective if the governing bodies recognize the problems and choose to take corrective measures. Even in the event that several of the states were to revise their current statutes, many inconsistencies are likely to still exist.

132. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); see also *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

133. See, e.g., REED, *supra* note 2, at 249-51; ELLIS, *supra* note 66, at 10.