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The Daryl Atkins Story

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THE DARYL ATKINS STORY

Mark E. Olive*

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INTRODUCTION

This [Atkins] case is a case that is going to be unique in the annals of judicial history.¹

Unique? Whether a person sentenced to death actually will or will not be executed is a roll of the dice. Being in the right place at the right time, having relevant legal developments occur unexpectedly, uncovering (or miraculously receiving) new evidence, and essentially getting in the way of good luck separates executed, death-sentenced inmates from saved ones. In that sense, Daryl Atkins's case is not unique in the annals of judicial history; rather it is emblematic of many of the well-documented ills of capital punishment in this country. Daryl Atkins, at the end, was in the very, very lucky column. His story illustrates the fluky, fortuitous, and frightening circumstances that cause executions to strike like lightning.²

I. RIDING THE COATTAILS OF THE *MCCARVER* LIGHTNING STRIKE

In 1989, the Supreme Court held in *Penry v. Lynaugh*³ that the execution of persons with intellectual disability⁴ did not violate the Eighth Amendment's ban on cruel and unusual punishment.⁵ Thirteen years later, in *Atkins v. Virginia*, the Court changed its mind.⁶ How did Daryl Atkins get in the way of such good fortune?

¹ *Atkins v. Commonwealth*, 631 S.E.2d 93, 99 (Va. 2006) (Judge Prentiss Smiley addressing jurors charged with determining whether Daryl Atkins was a person with intellectual disability).

² *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all of the people convicted . . . many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”) (Stewart, J., concurring) (internal citations omitted); see also Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733, 759 (2014) (“[J]ust as inequality in the selection of the condemned raised important constitutional questions about the sustainability of capital punishment in the pre-*Furman* era, so the prevailing arbitrariness in the distribution of executions among the condemned implicates constitutional concerns. Regulation has shifted, rather than solved, the lightning-like quality of the American death penalty.”).

³ 492 U.S. 302 (1989).

⁴ The term “intellectual disability” is now used in place of “mental retardation.” See Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other mental health experts. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013); see also *Hall v. Florida*, 134 S. Ct. 1986 (2014) (discussing the Court's use of the term “intellectual disability” in place of the term “mental retardation”).

⁵ U.S. CONST. amend. VIII; see *Penry*, 492 U.S. at 305.

⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that “[e]xecutions of mentally retarded criminals are ‘cruel and unusual punishments,’ prohibited by the Eighth Amendment.”).

After *Penry*, the claim that the execution of persons with intellectual disability violated the Constitution fell on deaf ears. On average, three persons a year with intellectual disability were executed until 2001,⁷ when the Supreme Court stunningly decided to address the question again.⁸ But the Court did not initially agree to rehear the question in Daryl Atkins's case; the Court granted a stay of execution, and then the petition for writ of certiorari, in *McCarver v. North Carolina*,⁹ which raised the intellectual disability question.

Mr. Atkins was convicted of murder and sentenced to death in Virginia, but the Virginia Supreme Court ordered a resentencing proceeding.¹⁰ Mr. Atkins was again sentenced to death, and that sentence was affirmed.¹¹ His petition for writ of certiorari with respect to the Virginia Supreme Court's second affirmance was pending in the Supreme Court when the Court granted *McCarver's* certiorari petition.¹²

Mr. Atkins's petition—like so many others after *Penry*—did *not* raise the (apparently) *Penry*-barred intellectual disability issue. However, because the record from Mr. Atkins's resentencing proceeding contained expert testimony that he was a person with intellectual disability, after the *McCarver* grant of certiorari counsel for Mr. Atkins, playing catch-up, immediately filed a supplemental petition for writ of certiorari raising *McCarver's* Eighth Amendment intellectual disability claim.¹³ Mr. Atkins's counsel hoped to have the Court either grant the supplemental petition, or “hold” the petition until *McCarver* was decided.¹⁴

⁷ See Denis Keyes, et al., *People with Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, 40 MENTAL RETARDATION 243, 244 tbl. 1 (2002).

⁸ See Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 9 (2001) (By granting certiorari in *McCarver*, the Supreme Court “stunned developmental disability and anti-death penalty advocates alike.”); Linda Greenhouse, *Justices to Review Issue of Executing Retarded Killers*, N.Y. TIMES, Mar. 27, 2001, at A1, A14 (“The grant of review was a surprise because the [C]ourt had appeared to be moving in small steps on the retardation issue.”).

⁹ 548 S.E.2d 522 (N.C. 2001), *cert. granted*, 532 U.S. 941 (2001).

¹⁰ See *Atkins v. Commonwealth*, 510 S.E.2d 445, 457 (Va. 1999) (affirming Atkins's conviction of capital murder, but requiring resentencing because “[t]he trial court's use of the Commonwealth's [verdict] form resulted in the jury receiving a verdict form which was incomplete and which did not comport with the correct statement of law given to the jury by the trial court in its first instruction”).

¹¹ See *Atkins v. Commonwealth*, 534 S.E.2d 312, 321 (Va. 2000).

¹² Had the Commonwealth not made a mistake in the first capital sentencing proceeding, *Atkins*, 510 S.E.2d at 457, Mr. Atkins's case would likely have been in state post-conviction—or, even more likely, federal habeas corpus—proceedings when certiorari was granted in *McCarver*.

¹³ A supplemental petition is allowed if it calls “attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing.” SUP. CT. R. 15.

¹⁴ The Supreme Court may “hold” a case—take no action on it at all—“until a decision is reached by the Court in a pending case raising identical or similar issues.” STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 340 (10th ed. 2013).

The Court did hold Daryl Atkins's case while counsel for McCarver filed the Brief of Petitioner and eight amici filed briefs in support.¹⁵ But counsel for North Carolina, the North Carolina Attorney General, did not file a brief in response. Two months after the Brief of Petitioner was filed, a new North Carolina statute took effect banning the execution of persons with intellectual disability.¹⁶ The North Carolina Attorney General filed a "suggestion of mootness" in the Supreme Court because Mr. McCarver could now be granted relief under state law.¹⁷

The Supreme Court agreed with the North Carolina Attorney General and dismissed the *McCarver* petition as having been "improvidently granted."¹⁸ Daryl Atkins's supplemental petition, waiting in the queue, was granted the same day.¹⁹ Two things were clear: the Supreme Court was going to decide whether to overrule *Penry*; and Mr. Atkins was very lucky.²⁰

II. LUCK'S HAND IN WINNING *ATKINS*: STATE LEGISLATION, CHANGING WINDS ABOUT INNOCENCE AND THE RISK OF WRONGFUL EXECUTIONS FOR PERSONS WITH INTELLECTUAL DISABILITY, AND JIM ELLIS

A. *The Wave of New Intellectual Disability Statutes*

The Eighth Amendment prohibits punishment against which there is a national consensus.²¹ In *Penry*, the Court found that there was no national consensus against

¹⁵ See Docket Number 00-8727, *McCarver v. North Carolina*, 532 U.S. 941 (2001), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/00-8727.htm>.

¹⁶ 2001 N.C. Sess. 1038, codified at N.C. GEN. STAT. § 15A (2001).

¹⁷ See Docket Number 00-8727, *McCarver*, 532 U.S. 941, *supra* note 15.

¹⁸ *Id.*

¹⁹ *Atkins v. Virginia*, 534 S.E.2d 312 (Va. 2001), *cert. granted*, 533 U.S. 976 (2001).

²⁰ Not only had counsel for Daryl Atkins not raised the intellectual disability issue in his original petition, but also, arguably, the Eighth Amendment issue had not been raised before the Virginia Supreme Court. The Virginia Attorney General in Mr. Atkins's case responded to the supplemental petition for writ of certiorari and argued that, in the Virginia Supreme Court, Atkins had only argued that his intellectual disability was a mitigating factor that under state law would render his execution disproportionate. After the supplemental petition was granted, the Virginia Attorney General moved to dismiss it as having been improvidently granted, again because the claim—that the execution of persons with intellectual disability would violate the Eighth Amendment—had not been raised in the lower court. The Supreme Court does not, indeed, cannot, accept jurisdiction to review a federal constitutional question not decided by a lower state court. See *SHAPIRO ET AL.*, *supra* note 14, at 181. Whatever the merits of the Attorney General's arguments, the Supreme Court refused to dismiss, again, a granted certiorari petition raising the Eighth Amendment claim. It could be argued that the Court was so eager to address the issue it would have done so regardless of the vehicle.

²¹ *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

executing persons with intellectual disability in 1989.²² “The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures,”²³ and with only one state and the Federal Government prohibiting the punishment, there was “insufficient evidence of a national consensus against [it].”²⁴ However, the Court noted that public opposition “may ultimately find expression in legislation”²⁵ and that its decision only looked to statutes “*at present*”²⁶ and “[o]n the record before the Court *today*.”²⁷

“Whether this passage was intended by the Court in 1989 as an indirect invitation to return [to the Court] with another case presenting the issue if further evidence of a national consensus became available or not, some people in the disability community read it that way.”²⁸ Jim Ellis, Distinguished Professor of Law at the University of New Mexico School of Law, has worked on behalf of people with mental disabilities for nearly forty years. He, and other authors, filed an amici brief in *Penry* on behalf of the American Association on Mental Retardation, American Psychological Association, Association for Retarded Citizens of the United States, and eight other advocates for persons with intellectual disability. This brief, and articles by Jim Ellis, were cited and quoted in the *Penry* decision.²⁹

After the *Penry* decision, “Ellis and other advocates began to lobby state legislatures” to pass statutes prohibiting the execution of persons with intellectual disability.³⁰ By the time certiorari was granted in *McCarver*, thirteen states had enacted statutes protecting persons with intellectual disability from the death penalty. When the *McCarver* petition was dismissed and the *Atkins* petition was granted, “five more states had enacted similar statutes.”³¹ These new statutes were necessary for the result in *Atkins*.³² But were they sufficient?

²² *Id.* at 340.

²³ *Id.* at 331.

²⁴ *Id.* at 335; see also James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from Penry to Atkins*, 33 N.M. L. REV. 173, 174 (2003). “[A]t the time of the *Penry* briefing and argument, the evidence of the claimed consensus was limited to the resolutions of professional organizations, a modest amount of political polling results, and enactments by the Congress and the legislature of only one state (Georgia).” By the time *Penry* was decided, Maryland had also passed a law banning the execution of persons with intellectual disability. *Penry*, 492 U.S. at 334 (discussing MD. CODE ANN., art. 27 § 412(f)(1) (1989)).

²⁵ *Penry*, 492 U.S. at 335.

²⁶ *Id.* (emphasis added).

²⁷ *Id.* at 338 (emphasis added).

²⁸ See Ellis, *supra* note 24, at 174–75.

²⁹ 492 U.S. at 333, 336, 337, 338–40.

³⁰ M. Wood, *State-by-State Strategy Propelled Atkins to Success, Ellis Says*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, http://www.law.virginia.edu/html/news/2005_spr/atkins.htm (Mar. 3, 2005).

³¹ Ellis, *supra* note 24, at 175.

³² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“Our independent evaluation of the issue reveals no reason to disagree with the judgment of ‘the legislatures that have recently addressed the matter’. . . .” (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))).

B. DNA, the Proven Unreliability of Sentences of Death, and the Disadvantages Persons with Intellectual Disability Have in the Criminal Justice System

The Court in *Atkins* was not presented with anything significantly new about intellectual disability that was unrepresented or unaddressed in *Penry*.³³ And “[p]ublic sentiment on the issue of mental retardation and the death penalty remained largely unchanged during the period between *Penry* and *Atkins*.”³⁴ Other than the new statutes, had anything else important changed over thirteen years?

Yes. Faith in the reliability of the death penalty process had eroded:

By the late 1980s when . . . *Penry* w[as] decided, support for capital punishment was in the seventy to seventy-nine percent range. Public support for capital punishment reached a modern peak in the mid-1990s, with eighty percent of those polled in 1994 supporting the death penalty.³⁵

Starting in the mid-1990s, however, public support for the death penalty began to slip. Between 1994 and 2001, there was a slow but steady decline in support for capital punishment, with a 2001 poll showing that support had dropped to sixty-five percent. *A major catalyst for the change in public opinion was the increasing recognition that the capital punishment system, which had been touted as the most fair and accurate system imaginable, had in fact led to a series of death sentences for demonstrably innocent individuals.*³⁶

And while there were exonerations in capital cases even well before *Penry*,

it was difficult to develop evidence conclusive enough to persuade the general public that those who were exonerated were indeed innocent. In the 1990s, this began to change with the increased use of post-conviction DNA testing. Through a series of exonerations based on forensic DNA testing, the public began to acknowledge that innocent people were being convicted of crimes and even being sentenced to death.³⁷

Most capital cases, like that of Daryl Atkins, have no biological evidence that can be tested. “Once courts, governors, legislators, and juries came to understand the

³³ Compare *Penry*, 492 U.S. at 336–39, with *Atkins*, 536 U.S. at 317–21.

³⁴ Ellis, *supra* note 24, at 176.

³⁵ James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1649 (2006).

³⁶ *Id.* at 1650 (emphasis added).

³⁷ *Id.* at 1651 (footnotes omitted).

flaws that DNA revealed, however, they became far more receptive to claims of innocence that were not supported by DNA.”³⁸

How did *Atkins* take advantage of this fortuity?

1. The Fact Section of *Atkins*’s Brief—Showing Daryl *Atkins*’s Disability

a. The Killing of Eric Nesbitt—Who Was the Triggerman, Jones or Atkins?

Eric Nesbitt was murdered in York County, Virginia, in 1996.³⁹ He was abducted in his own car, forced to withdraw cash from an ATM, driven into a remote area, and shot and killed.⁴⁰ Daryl *Atkins* and William Jones were charged with the crime.⁴¹

Upon his arrest, Daryl *Atkins* gave a statement admitting his participation in the crime, denying that he had shot Mr. Nesbitt, and stating that Jones had generally been more responsible than *Atkins* for the abduction, robbery, and murder.⁴² Jones did not give a statement upon his arrest.⁴³

Jones and *Atkins* were both indicted for capital murder, a crime for which, under Virginia law, only the triggerman could be convicted and sentenced to death.⁴⁴ A year later, Jones, with counsel present, told authorities that he had taken part in Nesbitt’s abduction and robbery, but blamed *Atkins* for the shooting.⁴⁵ Jones was allowed to plead guilty to first-degree murder, which made him ineligible for the death penalty, with a requirement that he testify against *Atkins*.⁴⁶

Both Jones and *Atkins* testified at *Atkins*’s trial presenting two versions of the crime, *Atkins* testifying that Jones shot the victim and Jones saying that *Atkins* did.⁴⁷ *Atkins* was convicted of capital murder and sentenced to death.⁴⁸

b. Showing Daryl Atkins’s Relative Vulnerability

The fact section of the Brief of Petitioner before the Supreme Court:

uses dialogue extensively to compose, develop, and contrast the two primary characters: petitioner Daryl *Atkins* and co-defendant

³⁸ *Id.* at 1652 (footnotes omitted).

³⁹ Brief for Petitioner at 1, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

⁴⁰ *Id.*

⁴¹ *Id.* at 2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (citing *Cheng v. Commonwealth*, 393 S.E.2d 599, 607 (Va. 1990)).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 2–4.

⁴⁸ *Id.* at 12.

William Jones, who testifies against Atkins. The story employs testimonial excerpts presented as dialogue to illustrate how the mentally retarded defendant is disadvantaged in litigation. These excerpts demonstrate that the defendant's condition makes it difficult for him to participate effectively in his own defense and to tell his story. This allows another version of events to be privileged over his less coherent story.⁴⁹

The brief does not say that Daryl Atkins's condition disadvantaged him. It shows it. For example, the brief describes how the older Jones, unlike Atkins, did not give a statement upon his arrest but waited a year and then, in the presence of counsel, provided what prosecutors wanted—a statement against Atkins—in return for not being eligible for the death penalty;⁵⁰ quotes Jones's clear, grammatically correct description of being subservient to Atkins during the crime, juxtaposed with Atkins's version which is “convoluted and ungrammatical;”⁵¹ carefully selects quotes in which Atkins “repeats himself, he refers to himself in the third person, and his grammar is poor,” and quotes in which Jones's version is presented in “an active voice with short, grammatically correct sentences;”⁵² and excerpts quotes from Atkins “that reveal Atkins's simple character,” and quotes from Jones which suggest “a self-serving purposefulness and manipulation to his recollections.”⁵³

With two co-defendants pointing the finger at each other as the triggerman, the brief, through “unmediated dialogue,” shows that “[t]he shrewder Jones . . . seems far more capable of directing and shaping the outcome of the story by casting blame and responsibility upon co-defendant Atkins.”⁵⁴

2. The Argument Section of Atkins's Brief—The Risk of Wrongful Executions

Having illustrated that this case involves one slick person and one person with more mental limitations, the *Atkins* brief then did what had not been done in *Penry*, and what the DNA exonerations now required. It argued that a reason not to execute persons with intellectual disability is that their substantial cognitive and behavioral impairments severely hamper them at every stage of the criminal process, and create a special risk of wrongful executions.⁵⁵ This was done in the argument section of the brief.

⁴⁹ Phillip N. Meyer, *Are the Characters in a Death Penalty Brief Like the Characters in a Movie?*, 32 VT. L. REV. 877, 895 (2008).

⁵⁰ *Id.* at 896.

⁵¹ *Id.* at 897.

⁵² *Id.* at 898.

⁵³ *Id.* at 897–98.

⁵⁴ *Id.* at 896.

⁵⁵ Brief for Petitioner, *supra* note 39, at 34.

First, the brief argued that:

Confessions and inculpatory statements made by [intellectually] disabled suspects are particularly problematic regarding not only their voluntariness, but also their reliability. The propensity of many individuals with [intellectual disability] to do whatever is asked of them by figures of authority has been widely documented in the clinical literature, and this has generated well-founded concern about the process by which confessions are obtained.⁵⁶

Second, the brief argued that:

Even more pervasive difficulties are encountered in the representation of defendants with [intellectual disability] at trial. The limitations inherent in a defendant's [intellectual disability] can place substantial obstacles in the way of a fair trial. And in many cases, the defendant's limited ability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one—including defense counsel—discovers the extent of his or her impairment or even that s/he suffers from [intellectual disability].⁵⁷

Third, the brief pointed out that:

Jur[ors] often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with [intellectual disability]. While the physical immaturity and youthful appearance of juvenile defendants call attention to their likely emotional immaturity, the limitations on the cognitive and adaptive skills of individuals with [intellectual disability] are hidden behind the façade of an adult physique. . . . They see a defendant who is not acting in a visibly “remorseful” fashion in the courtroom and they attribute it to callousness or heartlessness. . . . To make matters worse, defendants with [intellectual disability] often behave in ways that are contextually inappropriate, and this may impair their case at trial and sentencing. [Defendants with intellectual disability] frequently smile where others would display gravity; they fall asleep; they stare at jurors. This inappropriate behavior—which is often intended to mask the defendant's lack of understanding of the

⁵⁶ *Id.* at 35 (footnote omitted).

⁵⁷ *Id.* at 35–36 (footnotes omitted).

courtroom proceedings—can convey a false impression of callousness or lack of remorse.⁵⁸

“These various problems combine to produce an unacceptable risk that defendants who have [intellectual disability] and are innocent have been, and will continue to be, sentenced to death. Reports of the [] recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales.”⁵⁹

C. Jim Ellis Argues His First Case—Explains Pertinent Legislative History and the Risks of Wrongful Executions

Jim Ellis, the person most responsible for changing the state-by-state legal landscape between *Penry* and *Atkins*, was asked to argue *Atkins* before the Supreme Court. Luckily he said yes, despite admitting that “[i]t was the first time [he had] ever argued any case in any court.”⁶⁰ Not even his own ticket in a traffic court. Why was that lucky for Mr. Atkins? This was the Supreme Court.

⁵⁸ *Id.* at 36–37.

⁵⁹ *Id.* at 38. As discussed in the brief:

In 1983, Earl Washington, [who was a person with intellectual disability], was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman—as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington’s guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence “would have reached a different conclusion” in his case despite his confession.

Id. (citing Francis X. Clines, *Virginia Man Is Pardoned in a Murder; DNA Is Cited*, N.Y. TIMES, Oct. 3, 2000, at A20.).

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed (under *Ford*) and the question whether execution of an individual with [intellectual disability] was precluded by the Illinois Constitution. During the period of the stay, conclusive evidence establishing Porter’s innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan’s decision to institute a moratorium on the execution of death sentences in Illinois.

Id. at 38–39 (referring to Eric Zorn, *Questions Persist as Troubled Inmate Faces Electrocution*, CHI. TRIB., Sept. 21, 1998, at 1).

⁶⁰ Wood, *supra* note 30, at 1.

It was lucky because Jim Ellis could, and did, credibly answer any question the justices had about intellectual disability. He could, and did, authoritatively explain that a decision for persons with intellectual disability would affect comparatively few inmates and defendants. He could, and did, explain every state statute, if necessary. He wrote, or helped write, them. And he could directly address why persons with intellectual disability are at special risk for wrongful execution.

This was particularly helpful because states often do not keep the best legislative history when passing statutes.⁶¹ Jim Ellis, and only Jim Ellis, could recite the legislative history. He argued that the principal reason for states passing statutes banning the execution of persons with intellectual disability was “the shared understanding of the diminished culpability of people with [intellectual disability].”⁶²

But increasingly, especially in the last 3 or 4 years, there has been a second and secondary reason for enactment of the statutes which is a growing concern that individuals with mental retardation facing capital charges present a particularly and uncomfortably large possibility of wrongful conviction and thus wrongful execution. The [] cases in both Virginia and in Illinois over the last few years have made what I acknowledge is a secondary argument but one which comes up in legislative discussions with increasing frequency, that . . . the process of adjudicating in a capital case someone who has mental retardation and who’s understanding that—is that limited may, through a variety of mechanisms, increase the likelihood of wrongful conviction and thus unjust execution.⁶³

D. Justice Stevens and the Court’s Independent Judgment—Persons with Intellectual Disability Face a Special Risk of Wrongful Executions

Justice Stevens’s opinion for the Court picked up on the fact section of Atkins’s brief, and recognized the advantage Jones had over Atkins:

Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder, and sentenced to death. At approximately midnight on August 16, 1996, Atkins and William Jones, armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of the money on his person, drove him to an automated

⁶¹ Transcript of Oral Argument at 7, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), http://www.supremecourt.gov/oral_arguments/argument_transcripts/00-8452.pdf.

⁶² *Id.* at 21.

⁶³ *Id.* at 21–22.

teller machine in his pickup truck where cameras recorded their withdrawal of additional cash, then took him to an isolated location where he was shot eight times and killed.⁶⁴

Jones and Atkins both testified in the guilt phase of Atkins' trial.⁶⁵ Each confirmed most of the details in the other's account of the incident, with the important exception that each stated that the other had actually shot and killed Nesbitt. *Jones' testimony, which was both more coherent and credible than Atkins', was obviously credited by the jury and was sufficient to establish Atkins' guilt.*⁶⁶

With respect to the argument section, Justice Stevens did, of course, discuss the "consistency of the direction of change" in state statutes protecting persons with intellectual disability from execution.⁶⁷ But this, and other, evidence of a national consensus against the execution of persons with intellectual disability was the beginning, not the end, of the inquiry. Justice Stevens wrote "the objective evidence, though of great importance, d[oes] not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'"⁶⁸

In the Court's "independent evaluation of the issue,"⁶⁹ persons with intellectual disability face a special risk of wrongful execution. In the first paragraph of *Atkins*, Justice Stevens wrote:

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. *Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.*⁷⁰

⁶⁴ *Atkins*, 536 U.S. at 307.

⁶⁵ *Id.* "Initially, both Jones and Atkins were indicted for capital murder. The prosecution ultimately permitted Jones to plead guilty to first-degree murder in exchange for his testimony against Atkins. As a result of the plea, Jones became ineligible to receive the death penalty." *Id.* at n.1.

⁶⁶ *Id.* (emphasis added). "Highly damaging to the credibility of Atkins's testimony was its substantial inconsistency with the statement he gave to the police upon his arrest. Jones, in contrast, had declined to make an initial statement to the authorities." *Id.* at n.2.

⁶⁷ *Id.* at 315.

⁶⁸ *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

⁶⁹ *Id.* at 321.

⁷⁰ *Id.* at 306–07 (emphasis added).

Justice Stevens later observed “some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”⁷¹ He then concluded:

The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.⁷²

III. THE FINDING THAT DARYL ATKINS IS NOT A PERSON WITH INTELLECTUAL DISABILITY, AND REVERSAL

Many people believe that as a result of the United States Supreme Court’s decision, Daryl Atkins’s death sentence was automatically reduced to life. In fact, after the Supreme Court ruled in *Atkins*, the case was returned to the Virginia court for proceedings “not inconsistent with [the Supreme Court’s] opinion.”⁷³ And while counsel for Daryl Atkins argued before the Virginia Supreme Court that it should reduce Atkins’s sentence to life imprisonment, the court refused.⁷⁴ Instead, the court remanded the

⁷¹ *Id.* at 317.

⁷² *Id.* at 320–21 (citations omitted) (internal quotation marks omitted). The discussion of the special risks of wrongful execution faced by persons with intellectual disability was prominently set out in the body of the *Atkins* opinion. *Id.* at 321. By contrast, the Court considered the views of professional organizations, representatives of religious communities, polling results, and the “world community” “in passing.” *Id.* at 316–17, n.21. See also Ellis, *supra* note 24, at 180. The Court in *Penry* had considered largely the same views of the same professional organizations and the same sorts of polling results. *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989).

The *Penry* opinion does not mention the risk of wrongful execution faced by persons with intellectual disability. See generally *Penry*, 492 U.S. 302. Between *Penry* and *Atkins*, there was a “dramatic shift” in more than just “the state legislative landscape.” *Atkins*, 536 U.S. at 310; see also *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014).

⁷³ *Atkins*, 536 U.S. at 321.

⁷⁴ *Atkins v. Commonwealth*, 581 S.E.2d 514, 515 (Va. 2003).

case to the trial court to conduct a jury trial on the question of whether Atkins was in fact a person with intellectual disability,⁷⁵ pursuant to a newly enacted Virginia statute intended to address *Atkins* claims.⁷⁶

A jury trial was held on that issue, and the jury found that Mr. Atkins had not proven he was a person with intellectual disability by a preponderance of the evidence.⁷⁷ Atkins appealed that decision and the Virginia Supreme Court reversed the finding of no intellectual disability due to errors committed during the course of the jury trial.⁷⁸ The case was returned to the trial court for a second jury trial on the question of whether Mr. Atkins was a person with intellectual disability.⁷⁹

IV. THE PROOF OF THE PUDDING IS IN THE EATING: MR. ATKINS'S DISABILITY IN FACT MADE HIM VULNERABLE TO A WRONGFUL EXECUTION, AND BY LUCK HE PROVED IT

A. Jones Just Said What He Was Told to Say

The second jury trial on intellectual disability never happened. But Daryl Atkins's sentence was reduced from death to life.⁸⁰ Why?

When this case was remanded, unexpected information was disclosed by a former attorney for William Jones.⁸¹ From the trial in 1996 until the Atkins case was remanded

⁷⁵ *Id.* at 517.

⁷⁶ *See generally* VA. CODE ANN. § 8.01-654.2 (2003); VA. CODE ANN. §§ 19.2-264.3:1.1, -264.3:1.2, -264.3:3 (2003).

⁷⁷ *See Atkins v. Commonwealth*, 631 S.E.2d 93, 95 (Va. 2006). At this stage of the *Atkins* story then, arguably Atkins had not raised the Eighth Amendment claim on direct appeal to the Virginia Supreme Court, had not raised the issue in his original petition for writ of certiorari, and he was not in fact a person with intellectual disability.

⁷⁸ *Id.* at 100. The Virginia Supreme Court found two reasons for reversal. First, the court found that the expert presented by the state who testified that Daryl Atkins was not a person with intellectual disability, Dr. Stanton E. Samenow, was not qualified under the Virginia statute to be an expert at an intellectual disability trial because he was not “skilled in the administration, scoring and interpretation of . . . measures of adaptive behavior.” *Id.* at 97 (quoting VA. CODE ANN. § 19.2-264.3:1.2(A)) (emphasis omitted). As Dr. Samenow testified when asked how many assessments of intellectual disability he had performed during his career, Atkins's “was the ‘[f]irst and last.’” *Id.*

The second reason that the Virginia Supreme Court reversed the finding that Mr. Atkins had not proved his intellectual disability was because the trial court judge instructed the jurors that Atkins had already been “sentenced to the ultimate penalty of death.” *Id.* at 199. Other jurors had already “determined what would happen to him . . . he would be executed,” if he was found not to be a person with intellectual disability. *Id.* “The fact that the jury knew a prior jury had sentenced Atkins to death prejudiced his right to a fair trial on the issue of his [intellectual disability].” *Id.* at 100.

⁷⁹ *Id.* at 95.

⁸⁰ *In re Commonwealth*, 677 S.E.2d 236, 238 (Va. 2009).

⁸¹ *Id.*

for the second jury trial on intellectual disability, Jones's attorneys had been upset by the way the prosecutors, unknown to Atkins's counsel, had privately "coax[ed]" and "led" Jones's testimony.⁸² As the time of Atkins's original trial approached, they asked the Virginia Bar, in a telephone call, whether they could reveal this exculpatory information, and they were told that they could not.⁸³ Ten years later, one of Jones's attorneys, still bothered that what the prosecution had done "was wrong,"⁸⁴ wrote a letter to the Virginia Bar outlining what had occurred and asking whether he could now—long after Jones had been sentenced—reveal what he knew.⁸⁵ The Bar said yes, and he told then-current counsel for Mr. Atkins, who requested a hearing in the matter before the intellectual disability retrial began.⁸⁶

A hearing was conducted before the same judge who had presided over the case from the beginning, Judge Smiley.⁸⁷ At that hearing, Jones's attorney testified that

⁸² Transcript of Hearing at 53, 118, *Commonwealth v. Atkins* (Dec. 13, 2007) (No. CR6R38229-01) [hereinafter Dec. 13, 2007 Transcript].

⁸³ *Id.* at 53.

⁸⁴ *Id.* at 127–28.

⁸⁵ *Id.* at 129–31.

⁸⁶ *Id.* at 57. See generally Dec. 13, 2007 Transcript, *supra* note 82.

⁸⁷ See generally Dec. 13, 2007 Transcript, *supra* note 82. An added wrinkle in this convoluted procedural history is what happened before this hearing occurred. As two dissenting judges in the Virginia Supreme Court later described it:

Subsequent to the remand in *Atkins V* [ordering a second intellectual disability jury trial], Atkins filed a "Motion to Impose Life Sentence Based Upon Newly-Discovered Evidence of *Brady* and *Napue* Violations." The Circuit Court entered an order certifying an interlocutory appeal pursuant to Code § 8.01-670.1 and requesting this Court to decide whether, upon remand pursuant to Code § 8.01-654.2, the Circuit Court was "prohibited or restricted from exercising jurisdiction to hear" Atkins' motion and order an appropriate remedy. In addition, Atkins petitioned for a writ of mandamus, requesting this Court to direct the Circuit Court to hear and decide his motion.

This Court entered an order refusing the interlocutory appeal on the basis that Code § 8.01-670.1 is inapplicable in a criminal case. The order contained the following mandate:

The [C]ircuit [C]ourt is directed to proceed with this criminal case. Such proceeding is *confined to* the terms of the mandate issued by the Court on October 18, 2006 remanding this case to the [C]ircuit [C]ourt for *a jury determination of whether Atkins is mentally retarded*. (Emphasis added.). The order also summarily dismissed Atkins' petition for a writ of mandamus.

Instead of conducting the mandated hearing to determine whether Atkins is mentally retarded, the Circuit Court granted Atkins' motion,

when Jones met with prosecutors and “began to describe the position of the individuals and the firing of the shots, . . . [a prosecutor] reached over and stopped the tape recorder.”⁸⁸ The prosecutor said to Jones’s attorney, “do you see we’ve got a problem here?”⁸⁹ This meant that “his testimony was not going to be consistent with what the Commonwealth wanted to present.”⁹⁰ The prosecutor “then told Jones that the story he had . . . just told did not agree with the physical evidence.”⁹¹ The prosecutor then “led [Jones] back through the incident” and in this rendition the bullets entered the victim in such a way as to match up with Atkins shooting the victim.⁹² “I believe she was telling him what she wanted . . . what she knew the answers needed to have been,” Jones’s attorney said.⁹³ “The tape was turned [back] on and this version was recorded.”⁹⁴

B. A Life Sentence Is Imposed—Proof of Who the Triggerman Was Evaporated

Because the changes in Jones’s testimony made him significantly less credible, and Jones’s testimony was the only evidence that Mr. Atkins was the triggerman, Judge Smiley concluded he had to “commute” Mr. Atkins’s sentence to life.⁹⁵ The Commonwealth sought review of this result in the Virginia Supreme Court, and that Court summarized reasons for Judge Smiley’s actions:

A critical issue in Atkins’ original capital murder trial was whether Atkins or his accomplice, William Jones, murdered the victim, because only the triggerman may receive the death penalty under the facts and circumstances of this case. On August 6, 1997, the Commonwealth’s Attorney and certain law enforcement personnel met with Jones and his attorney to prepare Jones for Atkins’ capital murder trial. This session was recorded with an audiotape recorder. At some point during the three-hour trial preparation session,

finding the Commonwealth had withheld exculpatory evidence in violation of *Brady v. Maryland*.

In re Commonwealth, 677 S.E.2d 236, 245 (Va. 2009) (Kinser & Lemons, J.J., dissenting) (alterations in original) (internal citations omitted).

⁸⁸ Dec. 13, 2007 Transcript, *supra* note 82, at 98.

⁸⁹ *Id.* at 99.

⁹⁰ *Id.* at 103.

⁹¹ *Id.* at 125.

⁹² *Id.*

⁹³ *Id.* at 170.

⁹⁴ *Id.* at 125. A month later, Judge Smiley found that the recording was stopped for about sixteen minutes during which there was “role-playing” and “chairs that were assembled to resemble the posture of Nesbitt, Atkins, and Jones on the Crawford Road murder,” after which “Mr. Jones’ story, his version of the facts, did change.” Transcript of Hearing at 297, *Commonwealth v. Atkins* (Jan. 17, 2008) (No. CR06R38229-01) [hereinafter Jan. 17, 2008 Transcript].

⁹⁵ Jan. 17, 2008 Transcript, *supra* note 94, at 118, 294, 303.

the Commonwealth's Attorney turned the audiotape recorder off for sixteen minutes because the Commonwealth's Attorney thought Jones' testimony was not "'going to do [the Commonwealth's case] any good.'"

During the sixteen-minute interval that was not recorded, the Commonwealth's Attorney, law enforcement officers, and Jones "acted out" the events related to the murder of Nesbitt. Jones' initial version of the facts changed after the rehearsed and coached unrecorded reenactment of the murder.

The circuit court found that the Commonwealth's Attorney had "coached" Jones after the Commonwealth's Attorney realized that Jones' initial version of the facts regarding the capital murder would be "problematic" to the Commonwealth. The circuit court found that Jones "changed his story. He modified his story.

The circuit court stated in its final judgment order that:

"[T]he Office of the Commonwealth Attorney for York County and the City of Poquoson improperly suppressed exculpatory evidence from the August 6, 1997 interview of William Jones, in violation of *Brady v. Maryland*, and that the suppressed information probably would have affected the outcome of Daryl Atkins' trial had it been revealed to Atkins' counsel in 1998."

At the conclusion of the two-day evidentiary hearing, the circuit court set aside Atkins' sentence of death and imposed a sentence of life imprisonment without the possibility of parole "based on the newly discovered evidence of a *Brady* violation."⁹⁶

C. The Final Fortuity—No Jurisdiction to Review a Decision Entered Without(?) Jurisdiction

The manner in which the Commonwealth sought review of Judge Smiley's "commutation" was by filing a petition for writ of mandamus and for a writ of prohibition in the Virginia Supreme Court, seeking to compel Judge Smiley to vacate his commutation and instead do what he had been directed to do by the Virginia Supreme

⁹⁶ *In re* Commonwealth, 677 S.E.2d 236, 238 (Va. 2009) (alterations in original) (internal citation omitted).

Court, i.e., preside over a second jury trial on the issue of intellectual disability.⁹⁷ The Commonwealth had cogent arguments, accepted by two justices of the Virginia Supreme Court. Mandamus—ordering Judge Smiley to conduct an intellectual disability hearing—was proper because “[p]ursuant to our mandates, the Circuit Court had no discretion to refuse to conduct the [intellectual disability] hearing; the duty of the Circuit Court to do so was purely ministerial. . . . We directed the Circuit Court to do so, but it refused to obey our mandates.”⁹⁸ With respect to the writ of prohibition—the Commonwealth “asked that the Circuit Court be prohibited ‘from enforcing [its] . . . pre-[intellectual disability re-]trial order . . . reducing the sentence of death imposed by the jury’ Because the Circuit Court exceeded its jurisdiction when it entertained Atkins’s *Brady* motion and then entered the order setting aside his death sentence, thereby rendering the order void ab initio,” a writ of prohibition was required.⁹⁹ The majority of the Virginia Supreme Court, however, ordered that it lacked jurisdiction to review Judge Smiley’s commutation.¹⁰⁰

Arguments and holdings about jurisdiction thus ended the *Atkins* litigation with a life sentence.¹⁰¹ The dissenters believed Judge Smiley was powerless to ignore the Virginia Supreme Court; the majority said it was impotent to stop him.¹⁰²

CONCLUSION

How lucky is Daryl Atkins? It could be said that:

- He did not raise the claim, upon which he later won in the Supreme Court, in the Virginia Supreme Court;
- He did not raise the claim, upon which he later won in the Supreme Court, in his initial petition for writ of certiorari;
- He would not have had certiorari granted in the Supreme Court without the efforts of counsel for Mr. McCarver;
- His case would not have been pending in the United States Supreme Court when the *McCarver* petition was granted and later dismissed had he not been granted a resentencing by the Virginia Supreme Court;
- He would not have won in the Supreme Court had it not been for exonerations based upon DNA in the 1990s;

⁹⁷ *Id.* at 237; *id.* at 245, 254 (Kinser & Lemons, J.J., dissenting).

⁹⁸ *Id.* at 246, 253–54.

⁹⁹ *Id.* at 254.

¹⁰⁰ *Id.* at 239.

¹⁰¹ *Id.* at 245 (Kinser & Lemons, J.J., dissenting).

¹⁰² *Id.* at 244. Judge Smiley—who presided over the *Atkins* case from pillar to post (trial and sentencing, resentencing, and two remands for an intellectual disability determination)—passed away before the Virginia Supreme Court’s Order effectively upheld his, at best, unusual manner of imposing a life sentence on Daryl Atkins. *Id.* at 237 n.1.

- He was found by a jury not to be a person with intellectual disability (Mr. Atkins did not receive *Atkins* relief) but he was awarded a second jury trial on intellectual disability by the Virginia Supreme Court, which meant he would once again appear before Judge Smiley;
- An honest attorney with nothing to gain revealed what he knew about the prosecutors coaching William Jones and Jones changing his story to make Mr. Atkins the triggerman;
- Judge Smiley was ordered to conduct the second jury trial on intellectual disability, and he did not do that;
- Judge Smiley, who sentenced Mr. Atkins to death twice, literally “commuted” that sentence to life; and
- The Virginia Supreme Court held that it did not have jurisdiction to review that “commutation,” which itself was entered without jurisdiction.

All in all, Mr. Atkins is *very* lucky to be alive.¹⁰³ Anyone who is sentenced to death in this country is lucky to get out of that sentence alive. When they do, it is because of prosecutorial misconduct (as here), juror misconduct,¹⁰⁴ and/or bad lawyering.¹⁰⁵ It is because their case got delayed for one reason or another and new law and/or new facts then developed. Utter fortuities frequently. Freakish.

More than likely, at the end, Daryl Atkins was not executed, and the Virginia Supreme Court did not reverse Judge Smiley’s jurisdictionally challenged commutation, because it would just be extremely embarrassing, even vindictive, for Virginia to execute the person who established *Atkins* relief for countless other individuals. . . . oh, and who was framed.

¹⁰³ “Today, only a small number of states execute a significant percentage of their condemned. At the top end, Virginia and Texas have managed to convert more than half of their death sentences into executions; together they have carried out 620 executions in the modern era, close to half of the executions carried out nationwide (1369) during this period.” Steiker & Steiker, *supra* note 2, at 755 (footnote omitted).

¹⁰⁴ See generally *Williams v. Taylor*, 529 U.S. 420 (2000).

¹⁰⁵ See generally *Porter v. McCollum*, 558 U.S. 30 (2009).