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Does Atkins Make a Difference in Non-Capital Cases? Should It?

Paul Marcus

William & Mary Law School, pxmarc@wm.edu

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DOES *ATKINS* MAKE A DIFFERENCE IN NON-CAPITAL CASES? SHOULD IT?

Paul Marcus*

I. AN OVERVIEW

The holding in *Atkins v. Virginia*¹ is clear. The execution of mentally retarded defendants, those people with intellectual disabilities, is unconstitutional. One other feature of the *Atkins* decision is also certain, the reason the Eighth Amendment is violated with the use of the death penalty with such convicted defendants. That is because defendants with intellectual disabilities are to be viewed as less culpable than other defendants.

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.²

In this Article, I take a look at what—if any—impact the *Atkins* rationale and its holding have had in non-capital cases. I examine three areas: confessions (both voluntariness determinations and understanding of Miranda warnings), the ability of those with intellectual disabilities to assist their lawyers in making plea decisions or in creating a defense to criminal prosecutions, and sentencing. These three areas are of genuine significance because they focus on an accused's understanding of the process and also the degree of culpability for the offense.

Let us begin with some thoughts regarding a few of the key underlying matters here. While the *Atkins* majority opinion does not waver on its basic holding and

* Haynes Professor of Law, William & Mary Law School. With many thanks to Mary Sue Backus, Jeff Bellin, John Blume, and Adam Gershowitz for their thoughtful comments.

¹ 536 U.S. 304 (2002).

² *Id.* at 318 (footnote omitted). The terminology has now been changed, so that “intellectual disability” is used in place of “mentally retarded.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

rationale, more than a dozen years later the answers to a number of important questions coming from the decision remain in doubt. As several articles in this symposium issue show, we really do not know which capital defendants are to be seen as sufficiently intellectually deficient to be covered by the *Atkins* ruling, what procedures are to be used in making that determination, and which standards must be applied. More to the point for my purpose here, there is an awful lot of basic information out there that is, at best, uncertain.

As two contributors to our symposium have laid out, the *Atkins* Court used a three-prong clinical definition of mental retardation:

The first prong of the definition is that an individual must exhibit significantly subaverage intellectual functioning. The second prong requires that the individual experience significant limitations in adaptive functioning, which is measured by categories that relate to everyday living experiences in a typical (i.e., non-institutional) community environment. The third prong requires that these limitations must have manifested before the person reached the age of eighteen.³

This definition is based on those given by the American Association on Intellectual and Developmental Disabilities—formerly the American Association on Mental Retardation—and by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders.⁴ Numerous other formal or “working” definitions, however, surfaced.⁵ Moreover, the procedures used to apply the definitions varied

³ John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 629 (2009) (footnote omitted).

⁴ See John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 690–91 (2009) (explaining that the Supreme Court has embraced clinical definitions of “mentally retarded” from these sources).

⁵ See, for instance, these statements:

- “An offender with very significant subaverage general intellectual functioning existing concurrently with the substantial deficits in adaptive behavior is referred to within this part as a seriously mentally retarded offender.” ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-9.1(c) (1986).
- “‘Mentally retarded’ means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.” GA. CODE ANN. § 17-7-131(a)(3) (2014).
- “Persons with mental retardation are usually defined as those with an IQ below 70, but practically speaking, such persons can be described with fair accuracy as having a childlike quality of thinking, coupled with slowness in learning new material. Mentally retarded persons have little long-term perspective and little ability to understand the consequence of their actions. They are usually followers and are easily manipulated.” Joan R. Petersilia, *Criminal Justice Policies*

greatly, leaving the Supreme Court to finally step in this past year to attempt to sort through at least the process to be used to identify those who are intellectually disabled.

The defendant in *Hall v. Florida*⁶ was convicted in 1981 of a 1978 murder and sentenced to death.⁷ On a later appeal in 1999, the Florida Supreme Court wrote that “there is no doubt that the Defendant has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment”⁸ Relying on language in *Atkins* that indicated IQ scores under “approximately 70” usually indicate retardation,⁹ the Florida legislature passed a law establishing a firm rule that lawyers for defendants claiming to be mentally retarded had to show an IQ of 70 or below for their clients.¹⁰ In a 2012 opinion, the state high court ruled that Hall

Toward the Mentally Retarded Are Unjust and Waste Money, RAND CORP. (1997), http://www.rand.org/pubs/research_briefs/RB4011/index1.html.

Even some judges tried their hand at crafting workable definitions. Here is one, from the Texas Court of Criminal Appeals, with seven evidentiary factors which fact finders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others’ interests?
- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Ex parte Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004). For good overviews of the various definitions, see Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855 (2012), and Jacqueline Gonzales, Comment, *Improving the Handling of Mentally Retarded Defendants in the Criminal Justice System*, 17 TEX. WESLEYAN L. REV. 143 (2011).

⁶ 134 S. Ct. 1986 (2014).

⁷ *Id.* at 1990.

⁸ *Hall v. State*, 742 So. 2d 225, 229 (Fla. 1999).

⁹ *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002) (citing THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42–43 (4th ed. text rev. 2000)).

¹⁰ FLA. STAT. § 921.137(1) (2012):

Imposition of the death sentence upon a defendant with mental retardation prohibited.—

could be executed because his IQ had been measured at various times as 71, 73, and 80,¹¹ and that “Florida, while not unique in its use of a bright-line cutoff score of 70, is not in the majority, although there is no clear national consensus.”¹²

The United States Supreme Court rejected the bright-line cutoff.¹³ While the Court split 5–4 on the ultimate holding in *Hall*,¹⁴ all nine Justices emphasized the continued viability of the *Atkins* ruling. To be sure, the only question before the Court was

(1) As used in this section, the term “mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term “significantly subaverage general intellectual functioning,” for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities.

This phrase “performance that is two or more standard deviations from the mean score on a standardized intelligence test” was held by the Florida Supreme Court to be an IQ cutoff of 70. *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007) (A “strict cutoff of an IQ score of 70 [is needed] in order to establish significantly subaverage intellectual functioning.”).

¹¹ *Hall v. State*, 109 So. 3d 704, 707 (Fla. 2012).

¹² *Id.* at 714 (Pariente, J., concurring).

¹³ A decision handed down just months before the Supreme Court ruling demonstrates just how difficult the application of a bright-line *Atkins* standard had become. In *O’Neal v. Bagley*, 728 F.3d 552 (6th Cir. 2013), *amended by* 743 F.3d 1010 (6th Cir. 2013), the defendant was sentenced to death. He claimed, on a habeas corpus review, that he was “mentally retarded and therefore ineligible for execution under *Atkins*.” *Id.* at 562. He relied heavily on the fact that he had scored below 70 on three different IQ tests. *Id.* The majority of the court, giving considerable deference to the state judges with a habeas review, rejected the claim noting that IQ scores are just “‘one of the many factors that need to be considered’ in ‘mak[ing] a final determination of this issue.’” *Id.* at 563 (alteration in original) (quoting *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002)). O’Neal, the majority decided, could not carry the burden of rebutting the presumed correctness of the state court’s decision. *Id.* at 558–59. The dissenter sharply disagreed:

Implicit in the opinion of my colleagues in the majority is the suggestion that they would reach a different conclusion if they did not have to “defer” to the state court’s “findings.” My view is that the state court’s opinion, based mainly on its reliance on its presumption, is a finding so far out of the mainstream of scientific opinion—indeed, directly contrary to scientific opinion—as to deserve no deference. Moreover, the Supreme Court opinion in *Atkins*, as quoted above, appears to say that presuming normality from one IQ test of 71 is improper when the “cut off” of mental retardation is considered to be 75. A state court opinion that defies both modern scientific opinion and applicable language in *Atkins* deserves no deference.

Id. at 566–67 (Merritt, J., dissenting); *see also In re Campbell*, 750 F.3d 523 (5th Cir. 2014) (habeas petition finding defendant ineligible for execution under *Atkins*).

¹⁴ Justice Kennedy wrote the majority opinion. Justice Alito, joined by the Chief Justice and Justices Scalia and Thomas, dissented.

“how intellectual disability must be defined in order to implement these [constitutional] principles and the holding of *Atkins*.”¹⁵

The majority found that Florida’s sharp cutoff point violated the constitution and was contrary to *Atkins*.

Intellectual disability is a condition, not a number . . . Courts must recognize, as does the medical community, that the IQ test is imprecise . . . [I]n using these scores to assess a defendant’s eligibility for the death penalty, a State must afford these test scores that same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.¹⁶

Even in light of *Hall*, knowledgeable people may not be able to reach a consensus on the precise definition or standard to be used. Still, one would think that there ought to be some agreement as to the number of individuals in the U.S. criminal justice system who are covered by whatever definition is used. That turns out not to be the case.

Extensive research has shown that there are no reliable numbers out there; at best we have some educated guesses. Many experienced professionals write that in terms of *all* crimes committed in our nation, less than one percent—probably well less than one percent—are acts that are suitable to be viewed as capital crimes, an area where some numbers are available.¹⁷ If the question is how many individuals with intellectual disabilities commit non-capital crimes, or are incarcerated, the most

¹⁵ *Hall v. Florida*, 134 S. Ct. 1986, 1988 (2014) (citation omitted).

¹⁶ *Id.* at 1993. The majority explained further:

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida’s rule misconstrues the Court’s statements in *Atkins* that intellectually [sic] disability is characterized by an IQ of “approximately 70.” Florida’s rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida’s law not only contradicts the test’s own design but also bars an essential part of a sentencing court’s inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

Id. at 2001 (citation omitted).

¹⁷ As of January 1, 2014, there are 3,070 people on death row in the U.S. *See Death Row Inmates by State*, DEATH PENALTY INFO. CENTER (Jan. 1, 2014), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>. “[M]ore than 99 percent of criminal defendants . . . do not face a death sentence . . .” Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1189 (2009).

educated guesses look something like these: “[T]he best available data suggest that at least forty-five thousand, and perhaps more than two hundred thousand, mentally retarded people currently are imprisoned in the United States.”¹⁸ Or, it could be that, the range is something like “4% to 10%” of the prison population.¹⁹ Or, by region, there are a bit less than 3% of the incarcerated population in one area of the nation versus more than 24% in another.²⁰ Or, the best that could be said is that there are more than 14% of those incarcerated in the U.S. who are intellectually disabled;²¹ but those figures are likely low because they may count only those in prison, and not those in jail or out on probation.²² In short, as one observer noted with exasperation more than fifteen years ago:

No one knows the exact number of MR housed in jail or prison, or on probation or parole. Such statistics are not maintained for any of these populations, and only for the prison population have national estimates been attempted. In fact, all available data on the prevalence rates or characteristics of persons with MR or DD within the criminal justice system must be viewed with extreme caution. Despite universal agreement that individuals with MR are not handled appropriately in the justice system, little

¹⁸ Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 504 (2002).

¹⁹ Joan Petersilia, *Unequal Justice? Offenders with Mental Retardation in Prison*, 1 CORRECTIONS MGMT. Q. 33, 37 (1997). The writer notes that, in 1997, there were an “estimated [50,000] U.S. inmates with mental retardation.” *Id.* at 36. In 1997, about 1.7 million Americans were incarcerated in state and federal prisons and jails. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 177613, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997 at 2 (2000), <http://www.bjs.gov/content/pub/pdf/cpus97.pdf>. The population of the U.S. that year was approximately 266 million people. U.S. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PUB. NO. P23-194, 1997 POPULATION PROFILE OF THE UNITED STATES 2 (1998), <http://www.census.gov/prod/3/98pubs/p23-194.pdf>. In 2012 about 1.6 million Americans were incarcerated in state and federal prisons and jails. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, NCJ 242467, PRISONERS IN 2012—ADVANCE COUNTS 1 (2013), <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>. The population of the U.S. that year was approximately 314 million people. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (click “Select a Date”; then select a month and the year 2012).

²⁰ Jeanice Dagher-Margosian, *Representing the Cognitively Disabled Client in a Criminal Case*, DISABILITIES PROJECT NEWS (State Bar of Mich.) Mar. 2006, at 1, 3, <http://www.michbar.org/programs/EAI/pdfs/disabledclient0905.pdf> (“Research shows that between 24.3% (in the southeastern United States) and 2.6% (in the northwestern United States) of the U.S. prison population are mentally retarded.”).

²¹ Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1072 n.22 (2010).

²² Dagher-Margosian, *supra* note 20, at 3.

official attention has been paid to the problem, and basic statistics in every aspect of the problem are lacking.²³

To be sure, there is not even agreement as to the types of crimes such disabled suspects are charged with, or convicted of. Because of the skewed reporting system in this context, one may hear that these defendants commit more serious crimes than the general population.²⁴ This view has been strongly challenged. Indeed, as noted in the 1991 *Report of the President's Commission on Mental Retardation*, that conclusion is misleading because it is based on data from prisons, "which are likely to receive inmates who commit serious crimes. Less serious crimes frequently do not lead to incarceration,"²⁵ or, if they do, it is in jails and not prisons.²⁶

²³ Joan Petersilia, *Justice for All? Offenders with Mental Retardation and the California Corrections System*, 77 PRISON J. 358, 365 (1997). Though Dr. Petersilia—the Co-Director of the Stanford Criminal Justice Center—lamented this evidentiary state of affairs almost two decades ago, that statement rings just as true today. Some more recent works guess at the numbers—not differing much from those guesses found in the 1990s—but none actually relies on empirical research that has been conducted in the new millennium. See, e.g., Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 CRIM. L. BULL. 421, 459 n.184 (2004). See generally JOHN W. PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY: A COMPREHENSIVE REFERENCE MANUAL FOR LAWYERS, JUDGES, AND CRIMINAL JUSTICE PROFESSIONALS (2009) (examining the legal relationships that link criminal justice and mental health).

²⁴ The confusion here may go to the categories of defendants and particular crimes. To be sure, there is evidence that defendants who are mentally ill are more likely than others to commit violent offenses. "Thirty-three percent of federal inmates identified as mentally ill had been convicted of a violent offense, compared to 13 percent of other inmates. In state facilities, 53 percent of mentally ill inmates had been convicted of a violent offense[], compared to 46 percent of other inmates." *The Jailed and Imprisoned Mentally Ill*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/jailed/> (last visited Dec. 1, 2014) (relying on PAULA M. DITTON, U.S. DEP'T OF JUSTICE, NCJ 174463, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999), <http://www.bjs.gov/content/pub/pdf/mhtip.pdf>). However, those who are intellectually disabled are not necessarily mentally ill, though lawyers and judges sometimes inartfully conclude that they are.

²⁵ PRESIDENT'S COMM. ON MENTAL RETARDATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., DHHS PUB. NO. (ACF) 93-21046, REPORT TO THE PRESIDENT: CITIZENS WITH MENTAL RETARDATION AND THE CRIMINAL JUSTICE SYSTEM 5 (1991) [hereinafter REPORT TO THE PRESIDENT].

²⁶ See the comments of Professors Noble and Conley in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 40 (Ronald W. Conley et al. eds., 1992):

Although frequently cited, these data on the frequency of serious crimes committed by persons with mental retardation are misleading. To begin with, as noted by Brown and Courtless (1971), the prisons from which these data are derived house individuals who commit the more serious types of crimes. Offenders with mental retardation who are in local jails or are placed into community diversion programs would generally be expected to have committed much less serious crimes. In

One very real problem here is that many individuals with these intellectual disabilities are not identified as such early in the criminal justice process, or they are never identified. We lawyers and judges are not especially skilled observers in this area, while many of the disabled persons are very adept in “trying to prevent any discovery of their handicap.”²⁷ As former North Carolina Chief Justice James Exum put it: “I suppose I am a pretty good representative of the judiciary because the truth is that judges, by and large, don’t know much about mental retardation.”²⁸ Indeed, even when lawyers and judges do identify the disability, their reaction may not be especially sensitive and thoughtful. Numerous examples abound, but *Hart v. State*²⁹ is a striking recent illustration of a lawyer who seemingly did not raise the disability at trial. The defendant was a nineteen-year-old with a “full scale intelligence quotient of between forty-seven and fifty-two and the mental age of approximately an average six year old.”³⁰ On the advice of counsel, he pleaded guilty to three counts of sexual assault of a child, and two counts of indecency with a child.³¹ Texas involves its juries in the sentencing process.³² The jury sentenced the defendant to thirty years imprisonment on each of the first three counts, and five years on each of the second two. The trial judge ordered the penalties to be served consecutively—a total of 100 years

addition, one would expect the percentage of severe crimes reported among all prison inmates to be greater than among new admissions, since inmates who commit the more severe crimes will usually receive longer prison sentences and over time will represent an increasing proportion of inmates who remain in prison. Consistent with this observation is a report by the Illinois Mentally Retarded and Mentally Ill Offender Task Force (1988), which concluded: “Despite common misconceptions that this population commits the majority of violent felony crimes, in reality the overwhelming majority of offenses committed by persons who are mentally retarded and/or mentally ill are misdemeanors, less serious felonies, and public disturbances.” Similarly, White and Wood (1985, 1986), reporting on a special community program for offenders with mental retardation, noted that over half of the program participants had committed only misdemeanors.

Whatever the actual numbers for adults, the numbers for intellectually challenged juveniles are thought to be considerably higher. See Kathleen A. Murphy, *Lost in Translation: The Right to Competency and the Right to Counsel for Mentally Retarded Children in the Juvenile Justice System*, 51 HOW. L.J. 367, 368 (2008) (“[U]p to 12% of incarcerated children are mentally retarded.”).

²⁷ Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 420–21 (1990).

²⁸ Conley et al., *supra* note 26, at 1.

²⁹ 314 S.W.3d 37 (Tex. App. 2010).

³⁰ *Id.* at 39.

³¹ *Id.*

³² See Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 4 (“Texas defendants . . . may elect to have their sentence assessed by either a judge or jury . . .”).

imprisonment—though the prosecution had not made such a request.³³ There the entire claim was for leniency for sentencing by the jury; the actions of the defense lawyer, as explained by the court on appeal, were baffling:

Even though Hart’s defense was relying on the hope of leniency based on his mental retardation, no evidence was submitted to the jury that used the term “mentally retarded” or any variation of that phrase. Given the speech impediment with which Hart is afflicted, it is impossible to determine how much the fact that Hart’s testimony was disjointed was attributed by the jury to his retarded condition and how much of it the jurors might have determined was due to the speech impediment. Despite this, without any further evidence or testimony introduced to the jury, Hart’s counsel argued during closing argument that Hart was “obviously mentally retarded” and asked the jury to award him community supervision.³⁴

II. THE IMPACT OF *ATKINS*

The difficulties with the application of *Atkins* are readily apparent. What is surprising, however, is that review of reported non-capital cases shows an almost total avoidance of *Atkins*. In three key areas, this result is especially problematic.

A. Confessions

In reading reported decisions involving intellectually disabled criminal defendants, there is little doubt that such defendants confess quite often. That state of affairs might be obvious to the savvy observer, as such suspects can “be overwhelmed by police presence . . . [they] say what they think officers want to hear.”³⁵ They are “significantly more suggestible . . . [there is] a greater eagerness to please the

³³ *Hart*, 314 S.W.3d at 39.

³⁴ *Id.* at 43. One must wonder to what degree this might be related to a lack of resources for indigent defense. The lawyer may seem unsophisticated and inept as to mental disabilities; but she also could have been an overworked court appointed counsel with very little client contact, or no resources for evaluation or expert testimony. Many have made this point effectively. For my take on the matter, with my very able co-author, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006). The argument to apply *Atkins* to non-capital cases will simply not be made in many public defender or court appointed cases because the lawyers may not have the training, the time, or the experts to present this view to the court.

³⁵ See generally Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects*, THE ARC (2009), <http://www.thearc.org/document.doc?id=3664>.

interviewer.”³⁶ This may be true even if the suspects did not actually commit the crime for which they have been arrested. Justice Stevens in *Atkins* referred to a case involving “one mentally retarded person who unwittingly confessed to a crime that he did not commit.”³⁷ I will turn below to the application of the legal standards of Due Process and Miranda; still, it is important to bear in mind here that there are many cases in which the broad matter of intellectually disabled defendants confessing openly without undue persuasion is raised. In such cases the defendant may be “crying and wringing his hands, but stating without prompting what he claims he was earlier told to say.”³⁸ Or the suspect may be “incapable of understanding Miranda warnings . . . frequently answer[ing] questions in a completely irrelevant manner . . . only [able to] express herself at a ‘very simple childish level’ and [unable to] comprehend more than a one-step command.”³⁹ Or that with a mental deficiency, “[h]is foremost desire is to be compliant and to act appropriately, particularly with authority figures . . .”⁴⁰ As one well-known sociologist once put it: “‘Mentally retarded people get through life by being accommodating whenever there is a disagreement. They’ve learned that they are often wrong; for them, agreeing is a way of surviving.’ Eliciting a confession from such people . . . ‘is like taking candy from a baby.’”⁴¹

³⁶ Joan Petersilia, Essay, *Crime Victims with Developmental Disabilities*, 28 CRIM. JUST. & BEHAV. 655, 685 (2001).

³⁷ *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) (citing Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Day of Suspense*, WASH. POST, Jan. 15, 1994, at A1); see also *State v. Edwards*, 11 A.3d 116, 131 (Conn. 2011):

It is well established that people with mental illness and mental deficiencies are more prone than others to confess falsely, either because of an inordinate desire to accommodate and agree with authority figures or because they are unable to cope with the psychological intensity of the police interrogation, which frequently includes the use of sophisticated ploys and techniques designed to weaken the suspect’s resolve.

³⁸ *Singletary v. Fischer*, 365 F.Supp. 2d 328, 333 (E.D.N.Y. 2005) (The interrogator was a prosecuting attorney, and the defendant had an IQ of between 60 and 70.); see also *State v. Cumber*, 387 N.W.2d 291, 294 (Wis. Ct. App. 1986) (Defendant had subnormal intelligence and was confused, upset, and crying during the interrogation with the officer.).

³⁹ *People v. Braggs*, 810 N.E.2d 472, 478–79, 487–88 (Ill. 2003) (Defendant had an IQ of 54 and could give only “simple answers to direct questions and really did not provide a narrative of information.”); see also *State v. Lopez*, 476 S. E. 2d 227, 235 (W. Va. 1996) (Defendant had the mental capacity of a five-year-old and was unable to understand the right of silence.).

⁴⁰ *Bailey v. Commonwealth*, 194 S.W.3d 296, 301 (Ky. 2006) (“[E]ven though he likely does not understand the substance of what is being told to him.”); see also *State v. Rettenberger*, 984 P.2d 1009, 1019 (Utah 1999) (Defendant had a below-average IQ, suffered from various disorders, and was “particularly vulnerable to psychological manipulation.”).

⁴¹ Jill Smolowe, *Untrue Confessions: Mentally Impaired Suspects Sometimes Make False Admissions. Is Girvies Davis About to Die for One?*, TIME, May 22, 1995, at 51. See generally Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 633 (2006).

The troubling aspects of confessions here come up chiefly in two ways which are related, but ultimately distinct: a due process voluntariness claim and a Miranda waiver issue.

1. Voluntariness

As noted above, individuals with learning disabilities often may not fully understand the interrogation process and may go out of their way to cooperate with the police, placing themselves in extremely difficult situations.⁴² Two experienced researchers—one in special education, the other in psychology—discussed three key personality traits which lead to these results:

Because individuals with mental retardation frequently experience repeated failures in social and academic settings, they often display “outer directed” behavior, relying more on social and linguistic cues provided by others than on their own problem-solving abilities A second characteristic . . . is the strong desire to please others, particularly those in authority An additional response bias common with this population is acquiescence.⁴³

One law enforcement organization described in forceful terms the giving of highly incriminating statements by mentally retarded suspects: “It is easy to see that ‘persons with mental retardation are not a major problem for police, but the police may be a major problem for mentally retarded persons.’”⁴⁴

The question to consider here is whether there are many reported cases in which these individuals have confessed and the confessions have been found to be involuntary and thus subject to exclusion relying on *Atkins*. The answer to that question is no. In fact, after an exhaustive search of the reported cases, my research team could find relatively few reported cases in which such incriminating statements have been thrown out. Perhaps, though, this is not surprising, in light of the Supreme Court’s decision in *Colorado v. Connelly*.⁴⁵ There, in a prosecution involving a suspect in a psychotic state of mind at the time of the interrogation, the majority Justices found that this person who was suffering from chronic schizophrenia could not claim the

⁴² See Smolowe, *supra* note 41.

⁴³ Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants With Mental Retardation*, MENTAL RETARDATION, June 1999, at 212, 212–13; see also G.H. Gudjonsson, *Theoretical and Empirical Aspects of Interrogative Suggestibility*, in SUGGESTION AND SUGGESTIBILITY 135, 141 (V.A. Gheorghiu et al. eds., 1989) (discussing correlations of personality traits).

⁴⁴ Donna M. Praiss, Note, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 AM. J.L. & MED. 431, 442 (1989) (quoting INTERNATIONAL ASS’N OF CHIEFS OF POLICE, INC., TRAINING KEY 353, at 2 (1985)).

⁴⁵ 479 U.S. 157 (1986).

protection of the Due Process Clause.⁴⁶ The key constitutional question, according to the Court, was whether the police coerced a statement.⁴⁷ “Absent police conduct causally related to the confession” a voluntariness assertion will fail.⁴⁸ The state and federal courts have been careful in following this holding:

- “[A] defendant’s mental state *alone*’ is insufficient to ‘render a confession constitutionally involuntary.’”⁴⁹
- “The mere showing that a defendant who has confessed to a crime may have some mental disability is an insufficient basis upon which to exclude the defendant’s statement.”⁵⁰
- “[A] defendant’s mental disability and use of drugs at the time of a confession are also considered, but those factors do not necessarily render a confession involuntary.”⁵¹
- There are no *per se* rules against admitting the confession of a mentally challenged person.⁵²

The *Connelly* opinion did not conclude that the defendant’s mental ability was irrelevant to the voluntariness determination, only that by itself the mental disability would not be determinative.⁵³ That is, if some coercion by the police is found, courts may consider whether the resulting confession was voluntarily offered in light of the defendant’s mental illness or ability. Some cases have looked carefully to the relationship of the mental ability to the coercion and concluded that due process has been violated. Such cases are, however, relatively few in number.⁵⁴ Moreover, virtually

⁴⁶ *Id.* at 161, 167.

⁴⁷ *Id.* at 164.

⁴⁸ *Id.* As explained in *Dye v. Commonwealth*, 411 S.W.3d 227 (Ky. 2013), “the threshold question to a voluntariness analysis is the presence or absence of coercive [improper] police activity: ‘coercive police activity is a necessary predicate to the finding that a confession is not [voluntary] within the meaning of the Due Process Clause of the Fourteenth Amendment.’” For a good discussion of this aspect of the Supreme Court’s ruling, see generally Paul T. Hourihan, Note, *Earl Washington’s Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471 (1995).

⁴⁹ *State v. Maestas*, 272 P.3d 769, 777–78 (Utah Ct. App. 2012).

⁵⁰ *Barrett v. State*, 709 S.E.2d 816, 819 (Ga. 2011).

⁵¹ *State v. Young*, 243 P.3d 172, 177 (Wash. Ct. App. 2010) (internal citation omitted).

⁵² *Harden v. State*, 59 So. 3d 594, 605 (Miss. 2011).

⁵³ *Connelly*, 479 U.S. at 165.

⁵⁴ One of the more prominent of the older decisions on point is *Smith v. Duckworth*, 910 F.2d 1492 (7th Cir. 1990), where the court wrote:

We recognize of course that mental instability is not itself sufficient to make a confession involuntary. The Supreme Court has made clear that the voluntariness of a confession does not hinge on a criminal defendant’s mental state. Instead, the voluntariness of a confession depends on the level of police coercion. Nonetheless, while a finding of involuntariness cannot be predicated solely upon Smith’s mental instability, his mental state is relevant “to the extent it made him more susceptible to mentally coercive police tactics.”

none of the reported decisions on either side of the argument choose to discuss or even mention *Atkins*. Rather the judges refer to the importance of considering low intelligence, but rarely is it *the*, or even *a*, deciding factor. This statement from the Second Circuit is typical: “Relevant factors include . . . the accused’s age, his lack of education or low intelligence, the failure to give Miranda warnings, the length of detention, the nature of the interrogation, and any use of physical punishment.”⁵⁵

Perhaps the most notable exception to the pessimistic view of the law regarding voluntariness comes from a case decided just as this Article was being written. In a broad and thoughtful opinion by the Ninth Circuit *en banc*, the court focused on just the right concerns with a review of the voluntariness question in a case involving a defendant with an intellectual disability.⁵⁶ In *United States v. Preston*, the court found that the confession of the defendant, an intellectually disabled eighteen-year-old, was involuntary.⁵⁷ The crime involved was extremely serious—abusive sexual contact—and the judges looked to the totality of circumstances in making their determination.⁵⁸ Key to the decision, however, was the emphasis placed on the

Id. at 1497 (internal citations omitted); see also *United States v. Chrismon*, 965 F.2d 1465, 1469 (7th Cir. 1992) (“A diminished mental state is only relevant to the voluntariness inquiry if it made mental or physical coercion by the police more effective.”).

Of course, even if the judge determines that the statement is admissible as not having been coerced, a jury may still consider evidence on point. See *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (“[A] defendant’s case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.”). Evidence can include expert testimony on the question of whether the statement should carry much weight in light of the defendant’s low intelligence and police actions. For a thoughtful treatment of the matter, see *Hannon v. State*, 84 P.3d 320, 349–51 (Wyo. 2004).

⁵⁵ *United States v. Siddiqui*, 699 F.3d 690, 707 (2d Cir. 2012). The defendant in *Siddiqui* was a suspected terrorist who was shot during capture. *Id.* at 696. She was interrogated during her hospital stay and she confessed. *Id.* at 697. The court held the confession was voluntarily given. *Id.* at 707. “Although Siddiqui was at times in pain and medicated, she was coherent, lucid, and able to carry on a conversation.” *Id.* at 706. More on point, perhaps, is *Commonwealth v. Wallen*, 619 N.E.2d 365, 367 (Mass. App. Ct. 1993):

Nothing appears from the record to indicate that the defendant was unable to understand any of the procedures. While the judge found that the defendant has an I.Q. between sixty and seventy, attained only third or fourth grade reading and writing levels, and is able to recognize few words of more than three syllables, he also found he could read newspapers and write letters.

For a discussion of cases in which the courts have been more sympathetic to the claim of involuntariness with defendants having low mental capacities, see Marcus, *supra* note 41, at 633.

⁵⁶ *United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014) (*en banc*).

⁵⁷ *Id.* at 1008, 1010.

⁵⁸ To elicit this confession, the police, among other tactics, repeatedly presented Preston with the choice of confessing to a heinous crime or to a less heinous crime; rejected his denials of guilt; instructed him on

suspect's low intelligence, an IQ of 65, and the fact that the investigating officers were aware of this from the start of the interrogation.⁵⁹ In discussing the basic standards of analysis with a voluntariness claim,⁶⁰ the decision focused on the need for the law to regard the significance of the disability of the defendant.

These principles have particular application where, as here, the individual interrogated is of unusually low intelligence. "What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal." So, although low intelligence does not categorically make a confession involuntary, it is "relevant . . . in establishing a setting" in which police coercion may overcome the will of a suspect. The American Bar Association's Criminal Justice Mental Health Standards summarize this point well: "Official conduct that does not constitute impermissible coercion when employed with nondisabled persons may impair the voluntariness of the statements of persons who are mentally ill or mentally retarded."⁶¹

While the judges certainly did take into account the various techniques used by the police here, there can be little doubt that the determinative factor as to voluntariness was the intellectual disability of the defendant.

We begin with "[c]onsideration of [Preston's] reduced mental capacity," a factor that is "critical because it [may] render[] him more susceptible to subtle forms of coercion." . . .

The types of deception used here, which primarily related to considerations extrinsic to the suspect's guilt or innocence, are particularly problematic when used on a person with an intellectual disability "Because of their cognitive deficits and

the responses they would accept; and fed him the details of the crime to which they wanted him to confess.

Id. at 1010.

⁵⁹ Preston's mother said that a doctor told her that Preston had a "small brain, like a five-year-old." Psychological evaluations conducted during the course of this litigation show that Preston has "exceptionally limited linguistic ability," and "significant problems with verbal communication and comprehension." The district court found that he had "deficits in general linguistic and academic skills and low IQ."

Id.

⁶⁰ *Id.* at 1017 (citing *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990)).

⁶¹ *Id.* at 1016–17 (internal citations omitted).

limited social skills, the mentally retarded . . . often lack the ability to appreciate the seriousness of a situation.” “Under interrogation, they are not likely to understand that the police detective who appears to be friendly is really their adversary or to comprehend the long-term consequences of making an incriminating statement.” They fail “to understand the context in which interrogation occurs, the legal consequences embedded in the rules or the significance of confessing.” In particular, research shows that the intellectually disabled are “significantly more likely . . . to believe the suspect will be allowed to go home after making a confession” to a serious crime. So being told falsely that, after a confession, one could simply “move on,” or that the confession would be kept confidential, is likely to have a considerably greater impact on a person with serious intellectual impairments, such as Preston, than on an individual of normal intelligence.⁶²

The Ninth Circuit’s analysis would seemingly be required when viewed under the *Atkins* ruling. The court did not give the defendant any sort of free pass on the issue of voluntariness. It did, however, emphasize the fact of his intellectual disability quite appropriately in making the necessary determination. Would that other courts follow this approach.

2. Waiver of *Miranda*

We come now to an area where the disconnect between mental health professionals and judges could not be more stark: the ability of individuals with low intelligence to understand their *Miranda* rights. To be blunt about this, often judges appear to be somewhat dismissive of attorneys’ claims focusing on the low intelligence of their clients. Judges often find a valid waiver because of the judicial reliance on other circumstances such as experience of the defendants in the criminal justice system, and the apparent understanding of the warnings by the suspects. This occurs even when professionals in the field strongly caution against just such reliance on surrounding circumstances.

As written by Justice O’Connor for the Court, a valid waiver requires an evaluation of two elements.⁶³ That second element—unlike what was seen above with the due process analysis under *Colorado v. Connelly*⁶⁴—does not require any sort of government coercion:

⁶² *Id.* at 1020, 1026–27 (internal citations omitted).

⁶³ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

⁶⁴ *See generally* *Colorado v. Connelly*, 479 U.S. 157 (1986).

Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Miranda* holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deceptions. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.⁶⁵

The waiver issue has surfaced repeatedly throughout the life of *Miranda*, for almost five decades. Real questions continue to be raised as to whether those even with average intelligence truly understand the warnings. The most recent research casts doubt on that optimistic view of such understanding. “While the general public and criminal attorneys may implicitly believe that ‘everyone knows their *Miranda* rights,’ the current findings raise questions whether this knowledge is cursory—or even illusory—for a significant number of criminal defendants and their educated counterparts.”⁶⁶

Such research, however, is rarely cited by trial or appeals courts in determining the validity of a waiver by a suspect with an intellectual disability, though the issue is often raised. Rather, the usual statement looks something like this: “[A]lthough a defendant’s subnormal IQ is a factor to consider in determining the voluntariness of a waiver of rights, subnormal IQ does not eliminate the possibility of a voluntary

⁶⁵ *Moran*, 475 U.S. at 421 (internal citations omitted). As one thoughtful commentator observed:

Although the *Miranda* process focuses primarily on factual understanding of the words of the warning, a waiver of rights also involves the ability to make rational decisions and to appreciate the consequences of relinquishing them. Simply understanding the abstract words of a *Miranda* warning may not enable a person to exercise the rights effectively.

Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 43 (2006). For an excellent discussion of the mental health professionals’ understanding of the waiver matter, as discussed further below, see generally Solomon M. Fulero & Caroline Everington, *Mental Retardation, Competency to Waive Miranda Rights, and False Confessions*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 163 (G. Daniel Lassiter ed., 2004).

⁶⁶ Richard Rogers et al., “Everyone Knows Their *Miranda* Rights”: *Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL’Y & L. 300, 317 (2010).

waiver.”⁶⁷ And, if other circumstances are present, judges will rely on those circumstances—age, educational level, experience, etc.⁶⁸—to find a waiver to be proper. In attempting to give a balanced view of the caselaw, I should note that my research team was able to locate cases deeming the intellectually disabled defendant’s waiver insufficient.⁶⁹ It was, however, *far* easier to find cases in which the waivers by such defendants were viewed as constitutionally adequate. Consider, for instance, these representative cases allowing for the waiver of rights. The first comes from the North Carolina Court of Appeals, in 2012. There the defendant, with an IQ of 68, was seen to have properly waived, with much emphasis placed on his prior experience:

The record reveals defendant was familiar with the criminal justice system, having four prior convictions, two of which were felony offenses. . . . In addition, although there is evidence in the record documenting defendant’s limited mental capacity, the record in no way indicates defendant was confused at any time during the custodial interrogation, that he did not understand any

⁶⁷ *People v. Creamer*, 492 N.E.2d 923, 928 (Ill. App. Ct. 1986). The defendant had an IQ of 60; his waiver was held to be valid, with “the trial court specifically [finding] that the defendant was not confused concerning his right to an attorney.” *Id.* at 926, 928.

⁶⁸ For an excellent discussion, see Cloud et al., *supra* note 18. The court in *State v. Lawrence*, No. W-2013-00549-CCA-R9-CD, 2014 WL 280385, slip op. at 5, explained:

Among the circumstances courts have considered are the defendant’s age, background, level of functioning, reading and writing skills, prior experience with the criminal justice system, demeanor, responsiveness to questioning, possible malingering, and the manner, detail, and language in which the *Miranda* rights are explained. As a result, courts tend to reach results that are somewhat fact-specific.

⁶⁹ *See, e.g.*, *United States v. Jennings*, 491 F. Supp. 2d 1072, 1078 (M.D. Ala. 2007) (The testimony of the expert mental health professional, unrebutted, was that the defendant “did not understand his *Miranda* rights, or the consequences of waiving them, at the time of his waivers.”); *People v. Daniels*, 908 N.E.2d 1104, 1130–33 (Ill. App. Ct. 2009) (Interviews with defendant demonstrated overwhelmingly that she did not understand the difference between “remain” and “silent” in her *Miranda* warnings, and did not comprehend that she was not required to waive her right to remain silent.); *Bailey v. Commonwealth*, 194 S.W.3d 296, 303 (Ky. 2006):

Moreover, the nature and substance of Bailey’s responses made clear that he was seriously mentally deficient. Bailey referred to an attorney as “an atturnity”; he responded that a “vagina” is “where a girl goes to the bathroom”; he was unable to accurately relay his *Miranda* rights mere minutes after Bruner had explained them; he had difficulty following directions to write a two-digit number on a piece of paper; he was unable to write his name in cursive; he wavered for several minutes when asked his year of birth; he understood his right to counsel as meaning that he was “in trouble.”

of the rights as they were read to him, or that he was unable to comprehend the ramifications of his statements. Indeed, “evidence of the defendant’s below-average intelligence and his previous psychological problems do not compel suppression of the statement.”⁷⁰

Having an expert testify that the defendant seemed to understand *some* of the *Miranda* warnings moved the court in another very recent state case.

At the suppression hearing, Dr. Weinstein testified that he administered the Spanish version of the IQ tests to Albarran, that he determined from the results of those tests that Albarran’s IQ was 71, and that it was his opinion that Albarran was mildly mentally retarded. He admitted on cross-examination that Albarran was depressed and that that would affect his IQ scores. He further testified that Albarran did, in fact, understand some of the *Miranda* rights. The State presented evidence indicating that Albarran was the manager of a restaurant and regularly conducted business without trouble. Further, each right set out in *Miranda* was read to Albarran separately and after each right was read, Albarran was asked if he understood that particular right.⁷¹

In a 2013 decision, this court looked to information beyond expert opinion in accepting the waiver of the defendant, a person with an IQ of 67:

The inquiry about a defendant’s ability to understand *Miranda* is not limited to expert opinion. Courts are able to consider many sources of information, not only expert testimony, in making the determination as to whether a mildly mentally retarded person is capable of understanding and waiving the *Miranda* rights. For example, testimony from the interviewing government agents is evidence that may help satisfy the burden of proving understanding As noted above, the expert opinions were, at best, mixed on the issue of defendant’s capacity to understand and waive his *Miranda* rights. The officers testified that they were convinced that defendant understood his rights and chose to waive them.⁷²

⁷⁰ State v. Robinson, 729 S.E.2d 88, 97 (N.C. Ct. App. 2012) (internal citations omitted).

⁷¹ Albarran v. State, 96 So. 3d 131, 153–54 (Ala. Crim. App. 2011) (internal citation omitted), *cert. denied*, 96 So. 3d 216 (Ala. 2012) and *cert. denied*, 133 S. Ct. 657 (2012).

⁷² State v. Grady, 108 So. 3d 845, 852 (La. Ct. App. 2013).

This brief cataloguing is not offered to suggest that it is a rarity for a court in the reported decisions to find invalid the waiver of a person with an intelligence disability. Certainly such cases can be located as indicated above.⁷³ Yet, in reviewing the reported cases from both state and federal courts, it became clear that findings of invalidity are the exception rather than the rule even with defendants of extremely low intelligence. Is the low level of intelligence important, and do the courts look to that low level? Yes it is, and of course the courts do. Still, one is struck that with other circumstances present—and there are always other circumstances present—intellectual disability is yet again not the determinative factor.⁷⁴ And, once more, the cases simply do not even mention either the holding or the rationale of the Supreme Court in *Atkins*.

Perhaps, though, this is being too rough on the judiciary here; maybe the empirical evidence shows that suspects who are intellectually disabled really do understand their rights and knowingly give them up. The evidence, however, is exactly to the contrary. That is, the empirical research—rarely relied upon by the courts in their reported decisions—shows that many individuals simply do not understand the warnings and the significance of waiving their rights.⁷⁵ A non-mental health publication described the base for *Miranda* understanding, in lay person's terms:

⁷³ See Marcus, *supra* note 41, at 633.

⁷⁴ This exchange between psychology Professor George Baroff, former Chief Justice James Exum of the North Carolina Supreme Court, and practicing lawyer Richard Burr of Houston is telling. While the dialogue took place two decades ago, there is little evidence that much has changed since then, except for the *Atkins* decision.

PROFESSOR BAROFF: I have been struck, in the cases I have been involved with, as to how extraordinarily distorted understanding of their Miranda warning has been for people who have confessed to crimes—some of whom have been charged with first degree murder, and some of whom are on death row.

JUDGE EXUM: I think the courts are very concerned with whether people who waive their Miranda rights do so knowingly and understandingly.

MR. BURR: In death penalty cases and in many serious felony prosecutions, confessions have several consequences. If they are complete confessions and found to be credible by the police, they cut short further police investigation. They will cut off consideration of other suspects. They will cause the police to shape the evidence around the person who has confessed. In death cases, if there is a confession, it is the center piece of the State's case.

People with mental retardation don't usually have the ability to argue with the police on their understanding of their Miranda rights. It seems to me that issues concerning the knowing and understanding of Miranda warnings are major and have not been addressed to any major extent by the Courts.

REPORT TO THE PRESIDENT, *supra* note 25, at 37.

⁷⁵ See generally Fulero & Everington, *supra* note 65.

Experts have determined that the Miranda warnings are written at a 7th grade reading level. While a small percentage of individuals at the upper end of functioning of mental retardation (IQ of 60–70) may be able to read at a 6th grade level, most will read at a significantly lower level. This means that even those who are at the upper level of functioning, formerly classified as “mild” mental retardation, will have great difficulty understanding Miranda warnings.⁷⁶

And that difficulty in understanding becomes ever more acute when—as is the usual situation—the warnings are not read by the suspects, but are spoken to the suspects upon arrest or custody by police officers.

The President’s Committee on Mental Retardation echoed this view:

A fundamental right in the American system of justice is that at the point at which a person is arrested, he or she must be notified of Miranda rights, i.e., the right not to answer questions and the right to counsel. This poses particular problems in the case of offenders with mental retardation. A rapid recitation of the Miranda warning, which contains a number of complicated provisions, may be dimly comprehended by the offender or may not be understood at all.⁷⁷

The leading research makes the broad point strongly.

A statistical comparison of the two groups indicated that persons with mental retardation were significantly more likely to receive a score of zero on the Comprehension of Miranda Rights statements. . . .

[I]t is clear that individuals with mental retardation have significant problems in comprehension of the Miranda warning. In fact, significantly more persons with mental [] retardation than without mental retardation . . . did not meet minimum criteria for competence. In addition, significantly more persons with mental retardation did not understand any of the substantive portions of

⁷⁶ TEXAS APPLESEED & HOUS. ENDOWMENT, OPENING THE DOOR: JUSTICE FOR DEFENDANTS WITH MENTAL RETARDATION, A HANDBOOK FOR ATTORNEYS PRACTICING IN TEXAS 15 (2005) [hereinafter OPENING THE DOOR]. “Most individuals with mental retardation attain, at best, a 4th grade level of reading.” *Id.*

⁷⁷ REPORT TO THE PRESIDENT, *supra* note 25, at 8.

this warning . . . suggest[ing] that there is a high likelihood that individuals with mental retardation may not understand the notion of self-incrimination nor the advising role of an attorney in the interrogation process.⁷⁸

How then does one connect the reality of lack of understanding by many suspects to the caution given, above, by the Supreme Court in requiring that “the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it?”⁷⁹ Or, tying that reality of understanding to the *Atkins* opinion’s strong position that “[m]entally retarded persons . . . [b]ecause of their impairments, however, by definition . . . have diminished capacities to understand and process information.”⁸⁰ The sad truth

⁷⁸ Everington & Fulero, *supra* note 43, at 216–17. The research was published in 1999, but more recent work parallels these findings. See Nevins-Saunders, *supra* note 21, at 1091–93; see also Cloud et al., *supra* note 18, at 531 (“Our study reveals that despite a suspect’s prior experience with the police and the warnings, or his age and education, a mentally retarded person will not understand all of the *Miranda* warnings and their legal significance.”).

⁷⁹ *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The Illinois Supreme Court explained further:

If intelligent knowledge in the *Miranda* context means anything, it means the ability to understand the very words used in the warning. It need not mean the ability to understand far-reaching legal and strategic effects of waiving one’s rights, or to appreciate how widely or deeply an interrogation may probe, or to withstand the influence of stress or fancy; but to waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail.

People v. Bernasco, 562 N.E.2d 958, 964 (Ill. 1990); see also *United States v. Gillenwater*, 717 F.3d 1070, 1080 (9th Cir. 2013) (“[There is a] general presumption against waiver of constitutional rights, and the requirement [is] that such waiver be ‘knowing and intentional.’” (footnote omitted)). Of course, the powerful statement as to waiver in *Moran v. Burbine* must be tempered by the Court’s more recent decision in *Berghuis v. Thompkins*, 560 U.S. 370 (2010). There, the majority held that a defendant must invoke the *Miranda* rights “unambiguously.” *Id.* at 381. Waiver was found when the defendant “knowingly and voluntarily” made a statement to the police. *Id.* at 387. The dissent’s response was quite marked:

Today’s decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counter-intuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so.

Id. at 412 (Sotomayor, J., dissenting).

⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). As the Court put it in a non-*Miranda* case, a valid confession must be the product of a “rational intellect and a free will.” *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). Can a waiver be valid, or can a confession be voluntary when the suspect cannot truly understand the import of her statement or the meaning of the officer’s words? It is difficult indeed to give an affirmative answer.

is that no such connection or tie can be made; I agree with the many researchers who have concluded that—in spite of the strong language of the judges and Justices in numerous cases, including *Atkins*—those with learning disabilities and low IQ numbers are at an extreme disadvantage during the interrogation process.

III. ASSISTING COUNSEL: GUILTY PLEAS, TRIALS

The standard for competence to stand trial is not very substantial.⁸¹ An individual with a low level of intelligence seemingly is often able to satisfy the requirement that he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”⁸² Suppose, though, that someone can meet that limited standard.⁸³ Does that person necessarily have sufficient intelligence and understanding to truly assist a lawyer in deciding whether to accept a plea offer, or to aid in planning for a full trial? One commentator has suggested that there really are two forms of

⁸¹ *Dusky v. United States*, 362 U.S. 402, 420 (1960) (per curiam).

⁸² *Id.* at 402; see also *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”).

⁸³ One commentator explained:

The practical result is that even in adult courts, defendants need only display a minimal capacity. These cases give little guidance for lower courts to implement the competency determinations, giving judges a considerable amount of discretion on the matter. *Dusky*’s factual understanding requirement focuses more on the defendant’s *ability* to learn about possible pleas, penalties, and litigation in general, than on whether the information is ever adequately processed and understood. The standard focuses on the defendant’s *ability* and not the actual comprehension of the information. Rational understanding, another requirement under *Dusky*, examines whether the defendant can comprehend the consequences of the trial process, which may become difficult if the defendant is lacking in their factual understanding of the proceedings.

With regard to the third consideration developed in *Dusky/Drope*, whether the defendants can properly assist their attorney, courts often look for three types of abilities. The first examines the defendant’s ability to communicate information to counsel in order to properly prepare a defense. The second requires the defendant to achieve a rational understanding of the attorney’s function and services within the context of the proceedings. The third requires that the defendant possess the ability to decide whether or not to plead guilty or if certain constitutional rights should be asserted. These abilities require a somewhat sophisticated understanding of court proceedings and their implications, as well as the capacity to understand and assist in making strategic legal decisions.

Murphy, *supra* note 26, at 380–81 (footnotes omitted).

competency that ought to be considered by the criminal courts.⁸⁴ The first, as noted above, is whether the defendant can even be tried.⁸⁵ The second, “decisional competency,” is seen as just as important, linking to defense strategies and “rational manipulation of information.”⁸⁶ Here the question is whether the defendant really does have the ability to assist counsel in any meaningful way.⁸⁷ This question is especially pertinent in this context for a few reasons, though not recognized by the courts generally. First, the vast majority of criminal cases are disposed of in negotiation.⁸⁸ Second, the concepts which will be so vital to a plea deal may be particularly difficult for a person of low intelligence to grasp.⁸⁹

⁸⁴ Bonnie, *supra* note 27, at 425–26.

⁸⁵ *Id.* at 424.

⁸⁶ *Id.* at 435.

⁸⁷ *Id.* at 419.

⁸⁸ Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012). The authors estimate—consistent with the language of the Supreme Court—that “about 95 percent of felony convictions follow guilty pleas, and [that] most guilty pleas result from plea bargaining” in both federal and state courts. Other commentators agree. *See, e.g.*, Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51 (2012) (stating ninety percent of criminal defendants waived their right to trial and confessed their guilt in court in the 1960s); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006) (“In the criminal justice systems of the 50 states, over 95 percent of all criminal justice cases are disposed of without a trial, through the entry of a guilty plea.”). This is hardly a recent development. Almost seventy years ago, Justice Frankfurter noted that “most incarcerations are upon pleas of guilty.” *Foster v. Illinois*, 332 U.S. 134, 138 (1947). The guilty plea process has come under increasing scrutiny after the Supreme Court’s decisions in *Lafler v. Cooper*, 132 S. Ct. 1376, 1380 (2012), and *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (holding that counsel must, under the Sixth Amendment, provide effective assistance at the guilty plea negotiation stage). Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595 (2013); *see* Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, and Unpredictable . . . In Pursuit of Perfect Justice”?*, 51 DUQ. L. REV. 735 (2013) (“The cases occasioned doctrinal disagreement about whether the Sixth Amendment offers a cure when a defendant misses out on a favorable plea bargain because his lawyer failed to meet professional standards.”). One commentator nicely explained the tremendous significance of the two decisions:

Though plea bargaining had been acknowledged by the Court as a “critical stage” of the proceedings well before *Padilla*, *Frye*, and *Lafler* were decided, the Court’s recognition of the dominance of plea bargaining means that plea bargaining is not simply one of many critical stages; it is the *only* critical stage.

John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 79 (2013).

⁸⁹ *See* Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W. L. REV. 365, 396 (1981) (stating that mentally retarded people’s tendency to interpret actions in moral absolutes interferes with their reasoning abilities).

After substantial research efforts, my research team could not locate any cases in the 21st century in which a court found a defendant competent to stand trial but because of low intelligence not able to enter a plea or assist her lawyer. Instead the relatively few cases in which the claim is made have judges deciding that once the defendant has been deemed competent to stand trial, she will necessarily be found capable of assisting counsel. Not many cases have explored this matter in depth,⁹⁰ and—after extensive research—none could be found which even mentioned the relevance of *Atkins*. This seems odd, for the Supreme Court has indicated that a plea must be intelligent and knowing with “nothing to indicate that [the defendant is] incompetent or otherwise not in control of his [or her] mental faculties,” is “aware of the nature of the charge[s],” and is “advised by competent counsel.”⁹¹ To be sure, the defendant must have the capacity “to make rational decisions during the course of trial, testify and respond rationally to cross-examination, and withstand the extreme stress of trial situation.”⁹² And, of course, the *Atkins* Court itself understood

⁹⁰ The standard principle is stated in *State v. Zachery*, No. 2004CA00091, 2004 WL 2676321, at *3 (Ohio Ct. App. Nov. 22, 2004) (“The competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial: whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings.” In the case sub judice, following a competency hearing, the trial court found appellant competent to stand trial. Therefore, it would also reason that appellant was competent to enter a guilty plea.”). Many cases make a similar point. See *United States v. Pruitt*, 429 F. App’x 155, 157–58 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 431 (2011); *Snoddy v. United States*, Nos. 2:08-cv-8044-JHH-PWG, 2:07-cr-0069-JHH-PWG, 2012 WL 1745591 (N.D. Ala. Apr. 20, 2012); *Thompson v. State*, 88 So. 3d 312, 321 (Fla. Dist. Ct. App. 2012), *review denied*, 107 So. 3d 407 (2012); *Wills v. State*, 321 S.W.3d 375, 379 (Mo. Ct. App. 2010); *Hobdy v. State*, No. 06-03-00160-CR, 2004 WL 1444648, at *1–*3 (Tex. Ct. App. June 25, 2004). *But see* *People v. Bell*, No. 282545, 2009 WL 723835, at *1–*2 (Mich. Ct. App. Mar. 19, 2009); *Thomas v. State*, 249 S.W.3d 234, 239 (Mo. Ct. App. 2008); *State v. Hartman*, 881 N.E.2d 891, 895–97 (Ohio Ct. App. 2007). For a general discussion, see *Sandoval-Vega v. State*, 384 S.W.3d 508, 514–15 (Ark. 2011).

⁹¹ *Brady v. United States*, 397 U.S. 742, 756 (1970).

⁹² Ira Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W. L. REV. 365, 387 (1981). One especially frank judge—former Chief Justice of the North Carolina Supreme Court Exum—recounted a most difficult event, one that he recalled many years later:

The competency issue, particularly with respect to the guilty plea, is troublesome. I recall when I was on the trial bench that a young defendant wanted to plead guilty. He was represented by counsel. I was going through all of the questions that trial judges ask to ensure that the defendant understands the pleas. The trial judge must make sure that the defendant understands what he is doing when he enters his guilty plea, that he understands that he is waiving certain rights, particularly the right to trial by jury. I asked this defendant if he was willing to waive his right to a jury trial. He said, “Yes, your honor,” and waved

the point in writing that “mentally retarded defendants may be less able to give meaningful assistance to their counsel.”⁹³ The view, then, is that competence to stand trial may be different from being sufficiently capable to communicate with counsel in determining an appropriate plea offer or whether to raise a defense in a trial. The President’s Committee on Mental Retardation stated the matter succinctly: “[A] defendant may be able to assist his or her attorney and stand trial, yet not be competent to plead guilty because of imperfect understanding of the effects of pleading guilty and available alternatives.”⁹⁴ Even after *Atkins*, however, the matter has not been

his hands. Nobody suggested, nor did it occur to me, that he might be mentally retarded.

REPORT TO THE PRESIDENT, *supra* note 25, at 38. This statement by Chief Justice Exum surely gives strong support for one commentator’s proposal of a dialogue with *Miranda* warnings:

This Article proposes a new “dialogue approach” to resolve this tension [ed. warnings versus suspect’s actual awareness] and limit the ambiguity in disputed waivers, especially for vulnerable suspects. The dialogue approach would require suspects to confirm their understanding of the rights and the consequences of the waiver by restating the rights in their own words at the time of the interrogation. In addition, it would require a brief interchange between the police and the suspect about the purpose of rights and the roles of the participants in the interrogation. It changes the *Miranda* waiver process from a one-way presentation to a two-way dialogue.

Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1439 (2012). I applaud this proposal, as this approach would demonstrate with some clarity that individuals with intellectual disabilities might have genuine problems understanding the basic warnings and expressing their views concerning them.

⁹³ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002); *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010) (sentencing juvenile offenders to life in prison without parole for a nonhomicide crime violates the Eighth Amendment).

⁹⁴ REPORT TO THE PRESIDENT, *supra* note 25, at 10; *see also* Joan Petersilia, *Doing Justice? Criminal Offenders with Developmental Disabilities*, 2 CORRECTIONAL MENTAL HEALTH REP. 65 (2001). The argument has never been accepted by the courts, as explained by one thoughtful commentator:

Nevertheless, professional evaluators have struggled with the application of the general competency standards to individual defendants. With a competency standard that speaks in terms of a reasonable degree of rational understanding, the inquiry is by its nature flexible and context dependent. But even though it would seem that there may be degrees of competency, where a defendant is capable of making some decisions, but not others, the Supreme Court has made it clear that competency is an either/or proposition. A defendant is either competent or he is not for all adjudicative proceedings, including the right to waive counsel or to plead guilty.

Mary Sue Backus, *Achieving Fundamental Fairness for Oklahoma’s Juveniles: The Role for Competency in Juvenile Proceedings*, 65 OKLA. L. REV. 41, 46–47 (2012) (citing *Godinez v. Moran*, 509 U.S. 389, 398–401 (1993) (“[W]e reject the notion that competence to plead

explored seriously other than in scholarly works. This is true for the plea process, and also for the trial itself. And, participating in decisions as to the trial may be even more difficult for the defendant with an intellectual disability. “When persons with MR do go to trial, their ability to remember details, locate witnesses, and testify credibly is limited. Defense attorneys believe they make less-than-ideal defendants and are easily manipulated by prosecutors pretending to be on their side.”⁹⁵ I am not suggesting that intellectually disabled defendants could not ever plead guilty. However, in such cases there ought to be a much stronger record as to their understanding of the process and consequences and considerably more involvement by the trial judge to ensure that rights are being protected.

IV. SENTENCING

If there is one area where one would imagine that *Atkins* has likely had a major impact—apart from capital prosecutions—it would seem to be with sentencing. After all, *Atkins* was all about sentencing—albeit in the death penalty context—and the Court was quite explicit in finding that mentally retarded defendants were less culpable than others. “Mentally retarded persons . . . have diminished capacities to understand and process information . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability . . . [T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal.”⁹⁶ Just about everyone working in the field who speaks to the matter seems to believe that the diminished intelligence of the offender ought to be a major factor in determining appropriate sentences.⁹⁷ And I do mean just about everyone here, including:

- The ABA Criminal Justice Section.⁹⁸

guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.”). The conclusion, though, may not be quite so clear in light of the Court’s decision in *Indiana v. Edwards*, 554 U.S. 164 (2008). There the Justices held that the standards for competency to stand trial and competency to represent oneself are not necessarily always the same. *Id.* at 164. In deciding whether an individual could represent herself, a trial judge may “take realistic account of the particular defendant’s mental capacities.” *Id.* at 177. In doing so, the trial judge could determine the strong interest in a fair trial outweighs the usual Sixth Amendment right of self-representation. *Id.* at 178.

⁹⁵ Petersilia, *supra* note 19, at 37.

⁹⁶ *Atkins*, 536 U.S. at 316.

⁹⁷ See *infra* notes 98–100 and accompanying text.

⁹⁸ See CRIMINAL JUSTICE SECTION STANDARDS § 7-9.3 (1989) (“Evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender.”). The ABA commentary strongly recommends that “seriously retarded offenders should be treated in mental retardation facilities instead of correctional institutions” and remarks that “it is inconceivable that profoundly retarded individuals will be subjected

- The President's Committee on Mental Retardation.⁹⁹
- Legal scholars.¹⁰⁰

So why, then, when we actually look at the case law on point do we find, at best, a mixed result, in non-capital cases coming after the Court's holding? There are really relatively few sentencing decisions reported which favor low intelligence defendants.¹⁰¹ It is pretty easy to argue two very different views here as to the reasons for this. On the one hand, sentencing judges have always—to a certain extent—considered intellectual disabilities in sentencing, whether in jurisdictions where they are given free rein, or in places with stringent sentencing guidelines. *Atkins* simply did not change that fact. On the other hand, while *Atkins* may have focused great attention here in sentencing, at least by legal scholars, almost no cases actually mention *Atkins* in the non-capital sentencing arena.¹⁰² And, when they do, it is to note that *Atkins* is limited to death penalty prosecutions.¹⁰³

It is certainly true that mental condition has been viewed as important by both legislators and judges in making sentencing decisions.¹⁰⁴ To use the federal system as illustrative,¹⁰⁵ the point is clear. Congress has stated that an appropriate sentence must

to criminal prosecution, and moderately and severely retarded offenders also are most likely to be screened out at earlier stages of criminal proceedings.” *Id.* at § 7-9.1 cmt. at 470. We could uncover no evidence that the commentators are in fact correct with regard to which offenders are actually subjected to criminal prosecution, and a review of the sentencing decisions would appear to indicate to the contrary. *See infra* note 105. Nor could we find any cases which actually cite to, or rely upon, this ABA recommendation or commentary.

⁹⁹ REPORT TO THE PRESIDENT, *supra* note 25, at 29, recommending that:

[C]ourts always consider mental retardation and its impact as a possible mitigating factor and also consider the effect of alternative dispositions of a case, e.g., confinement, probation, etc., on the individual with mental retardation There [should] be a strong presumption that community correction and probation programs are preferable in the case of offenders with mental retardation.

¹⁰⁰ *See, e.g.,* Barkow, *supra* note 17, at 1145–47; Timothy Cone, *Developing the Eighth Amendment for Those “Least Deserving” of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be “Cruel and Unusual” when Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35 (2004); Nevins-Saunders, *supra* note 21, at 1108. Professor Stephen Morse of the University of Pennsylvania has long argued that such low intelligence offenders are less culpable and ought to be subject to a “guilty but partially responsible” judgment. *See* Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

¹⁰¹ *See infra* notes 105, 111 and accompanying text.

¹⁰² *See infra* notes 105–11 and accompanying text.

¹⁰³ *See infra* notes 123–37 and accompanying text.

¹⁰⁴ *See infra* notes 111–23.

¹⁰⁵ I rely here upon federal law. *See infra* note 111. State principles, as reflected in the case law, though, are similar. These recent state cases also follow the federal approach in recognizing the relevance of intellectual disabilities while not using them as much of a mitigating factor generally:

be one which is able “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹⁰⁶ In a recent survey of U.S. District Court Judges, the respondents overwhelmingly indicated that the defendant’s mental condition should be considered in passing sentence.¹⁰⁷ Seventy-nine percent of the judges agreed that both mental condition and diminished capacity are “Ordinarily Relevant to Departure and/or Variance Consideration.”¹⁰⁸ Little is made, however, of low intelligence, though the U.S. Supreme Court has held that “impaired intellectual

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- Commonwealth v. Parsons, 969 A.2d 1259, 1269, 1272 (Pa. Super. Ct. 2009) (In giving a lower sentence, trial judge focused heavily on the defendant’s extremely low IQ—between 50 and 60; reversed on appeal because the judge “unilaterally countermanded the (tougher plea) agreement.”).
 - State v. Burgess, 965 So. 2d 621, 623 (La. Ct. App. 2007) (Defendant’s mental retardation offset at sentencing by other factors, as the defendant “is mildly mentally retarded, [but] he is not so deficient that he is unable to work or maintain a relation with the victim’s mother.”).
 - State v. Valdovinos, 82 P.3d 1167, 1172–73 (Utah Ct. App. 2003) (Despite a showing of low intelligence, defendant’s consecutive sentences for robbery upheld because of violent commission.).
 - State v. White, 792 So. 2d 146, 155 (La. Ct. App. 2001) (Proper sentence of low intelligence offender when the trial judge “took into account the sentencing guidelines and he recited the aggravating and mitigating factors for the record. Thus, he particularized the sentence to the offender and the offense.”).

There are, of course, some notable exceptions—though they are not numerous. Here are two:

- State v. Williams, 870 So. 2d 938, 939 (Fla. Dist. Ct. App. 2004). The state appealed from a sentencing order, arguing that a downward departure of time was not justified. *Id.* The appeals judges strongly supported the trial judge’s decision. *Id.* “There was ample evidence that the defendant suffers from diminished mental capacity as well as significant physical problems. The defendant scored 68 and 70 on his IQ tests. [The defendant] has memory, concentration and attention problems.” *Id.*
- State v. L.V., 979 A.2d 821, 835 (N.J. Super. Ct. App. Div. 2009) (The trial judge exercised his discretion and sentenced the defendant to a higher crime than could have been ordered. The defendant had an IQ of “between forty-four and seventy-five.”). The appeals court found that the trial judge abused his discretion. *Id.* at 835. “Does the interest of justice demand that defendant be sentenced as a third-degree offender? We are clearly convinced that the high standard governing downgrading is met here . . . [D]efendant is a person of very limited intelligence, functioning at a level in school initially below a five-year-old child.” *Id.* (The court went on to discuss other factors such as crimes committed against the defendant as she was growing up).

¹⁰⁶ 18 U.S.C. § 3553(a)(2)(A) (2006).

¹⁰⁷ See U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl. 13 (2010), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf

¹⁰⁸ *Id.*

functioning is inherently mitigating.”¹⁰⁹ This view is only marginally reflected in federal case law.¹¹⁰

To be sure, the emphasis throughout is on mental illness or diminished capacity, not intellectual disability. This point is reflected in the Federal Sentencing Guidelines:

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an

¹⁰⁹ *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (In capital prosecutions, the defendant’s intellectual disability may be relevant to his crime; jury instructions must permit the jury to weigh mental retardation in the defendant’s favor.).

¹¹⁰ Countless decisions show this to be so. *See, e.g.*, *United States v. Vasquez-Cruz*, 692 F.3d 1001, 1008–09 (9th Cir. 2012) (limited mental capacity “probably diminishes his ability to totally function as a person who did not have that type of disability would function,” still sentence within the “heartland” of the guidelines range was reasonable); *United States v. Maxwell*, 664 F.3d 240, 246 (8th Cir. 2011) (district court stated that “if there had been no mental disability at all . . . I would be closer to 280 to 300 months this morning, not the 222 where I ended up under all of the circumstances”); *United States v. Durham*, 645 F.3d 883, 898 (7th Cir. 2011) (“[A] defendant must show why a particular personal characteristic, such as a low IQ, acts as a mitigating factor, as opposed to an aggravating one.”); *United States v. Williams*, 553 F.3d 1073, 1085 (7th Cir. 2009) (sentencing judge “should consider [the defendant’s] actual [intellectual] disability and the combination of his disability with his susceptibility to manipulation.”); *Johnson v. United States*, 26 A.3d 758, 763 (D.C. 2011) (sentencing judges considered the defendant’s intellectual disabilities but concluded that more weight should be given to the dangerous nature of the crimes committed). While the discretion of judges today is markedly less broad than prior to the guidelines regime (even after the Supreme Court decided that they were not to be viewed as mandatory on the district courts, in *United States v. Booker*, 543 U.S. 220, 264 (2005)), that power was never wholly eliminated. For a good overview of the prior broad reach of the federal guidelines, see Louis F. Oberdorfer, *Mandatory Sentencing: One Judge’s Perspective—2002*, 40 AM. CRIM. L. REV. 11 (2003). Judge Oberdorfer, who died in 2013, was a district judge for the District of Columbia. *Id.*

offense under chapter 71, 109A, 110, or 117, of title 18, United States Code [ed. Obscenity or sexual practices.]¹¹¹

Few state statutes in any way specifically mention intellectual disabilities or mental retardation in the criminal justice system.¹¹² However, quite a number of state laws apparently give sentencing judges the option to consider such disability as a mitigating factor in passing sentence.¹¹³ They do not, however, explicitly so state, as in the Hawaii law where judges are directed to view “the nature and circumstances of the offense and the history and characteristics of the defendant,”¹¹⁴ or the Idaho statute which mandates that judges in sentencing look to the defendant’s “mental condition” if it is a “significant factor,”¹¹⁵ or the Montana law which allows judges to bypass the mandatory minimum sentence if the offender’s “mental capacity . . . was significantly impaired, although not so impaired as to constitute a defense to the prosecution.”¹¹⁶ Direct references to intellectual or developmental disabilities are made in related statutes such as those which deal with diversion from prosecution as in California,¹¹⁷ or those which link the disability to the insanity defense as in Maryland¹¹⁸ and Kentucky.¹¹⁹ Such references cannot be found in sentencing statutes.

Two decades ago, concern was expressed by the President’s Committee on Mental Retardation that “the effects of mental retardation have not been regarded

¹¹¹ U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2011). It must be noted that the guidelines only allow for downward departures based on mental condition in the most extreme cases. *Id.* §§ 5H1.3, 5K2.0 cmt. 3(C). Moreover, the Commentary to the section makes clear that “reduced mental capacity” does not involve any sort of *Atkins* intellectual disability, but rather is linked to tests for the insanity defense:

“Significantly reduced mental capacity” means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Id. § 5K2.13 cmt. 1.

¹¹² Many states have sentencing commissions or task forces on sentencing. And, most of those states also have fairly comprehensive sentencing reports. Those reports discuss many important aspects of sentencing such as race, gender, age, mental illness, and recidivism rates. Our research team could not locate a report from a single state which even mentioned intellectual disability.

¹¹³ *See, e.g.*, TENN. CODE ANN. § 40-35-113 (2014).

¹¹⁴ HAW. REV. STAT. § 706-606 (1993).

¹¹⁵ IDAHO CODE ANN. § 19-2523 (2013) (As written, however, this section applies to “Consideration of Mental Illness in Sentencing.”).

¹¹⁶ MONT. CODE ANN. § 46-18-222 (2011).

¹¹⁷ CAL. PENAL CODE § 1001.22 (West 2014).

¹¹⁸ MD. CODE ANN., CRIM. PROC. § 3-109 (West 2013).

¹¹⁹ KY. REV. STAT. ANN. § 504.020 (West 2013). Both Kentucky and Maryland have insanity defense laws which follow the Model Penal Code in finding that the defendant is not responsible if either the traditional cognitive or volitional element cannot be shown.

as a mitigating factor in sentencing many offenders with mental retardation who have been found criminally responsible and competent to stand trial.”¹²⁰ Years later, and after the decision in *Atkins*, it is difficult to see any major changes in the sentencing landscape regarding mentally disabled defendants. That is, the judge’s sentencing discretion is still present, and in most reported cases, the discretion does not seem to be exercised strongly in favor of the mentally challenged offender. While some scholars¹²¹ have been harshly critical of the Supreme Court for not being more actively engaged in this area—apart from capital prosecutions—little judicial or legislative energy seems to have been expended in favor of intellectually disabled defendants in the sentencing context. Indeed, one is struck by how rarely *Atkins* ever appears in the reported cases in the non-death penalty sentencing situation. This is especially

¹²⁰ REPORT TO THE PRESIDENT, *supra* note 25, at 13. The Committee explained further:

The importance of rehabilitation versus other correctional goals varies in the minds of judges and juries when setting or recommending sentences. However, the likelihood that a sentence will give significant weight to a habilitation program for defendants with mental retardation is reduced for three reasons. First, there is a growing emphasis on punishment rather than rehabilitation for all offenders. Second, the effectiveness of rehabilitation for offenders is sometimes questioned despite the existence for a number of successful rehabilitation programs. Third, appropriate community-based correctional rehabilitation services are usually not available for offenders with mental retardation.

Id. at 13–14. Some professionals in the field have written, however, that it may not be in the offender’s best interest to have her intellectual disability brought before the decision maker. The hesitation here is that this factor may tend to increase, rather than decrease, the resulting term of imprisonment or the decision for probation. *See* OPENING THE DOOR, *supra* note 76, at 54 (“[The attorney will] need to consider carefully the decision to raise your client’s mental retardation to the jury [ed., juries in Texas are involved in the sentencing decision]. Some jurors do not understand mental retardation and may believe that ‘mild’ mental retardation is not a substantial disability. Some jurors may not want your client to be in the community on probation, because they believe the myth that persons with mental retardation are more likely to commit crimes. On the other hand, you must remember that failing to raise the issue of your client’s mental retardation may result either in a probated sentence that your client cannot comply with or in a period of incarceration that will further damage your client. As discussed previously, individuals with mental retardation are often victimized in prison.”); *see also* Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1461 (2012) (“[R]elying on a judge or jury’s discretion—particularly unfettered discretion—does not guarantee that justice will be done. Indeed, there may be reason to fear that jurors, or even judges, will sentence more, rather than less, harshly because of the defendant’s mental retardation if they have the option to do so. Some have even argued that people with mental retardation are over-represented in the criminal justice system because key players in the system, including judges and lawyers, are unsure how to ‘deal with this population in a professional manner.’”).

¹²¹ In a singularly strong condemnation, one scholar wrote that the “[Supreme] Court’s elaborate set of rules for death and its virtually nonexistent role in overseeing any other criminal sentence” made little sense as a matter of policy. Barkow, *supra* note 17, at 1147.

troubling because the Eighth Amendment applies to all sentencing instances, not simply those involving a death sentence.¹²² To be sure, the most prominent decisions here show how little *Atkins* matters; these cases specifically reference *Atkins* but each—without hesitation—denies its application in the non-capital setting:

- *United States v. Whidbee*.¹²³ The court responded to the defense argument that the lengthy sentence of an intellectually disabled defendant was unconstitutional under *Atkins* by writing that the case “does not support Whidbee’s argument because *Atkins* addressed a capital sentence. Capital sentences are treated differently under the Eighth Amendment. . . . [There is a] ‘qualitative difference between death and all other penalties.’”¹²⁴
- *United States v. Laffoon*.¹²⁵ Rejecting the argument that a mandatory minimum sentence for a firearms conviction violated the Constitution, the court would not apply *Atkins*. “With the exception of a capital sentence, the imposition of a mandatory sentence without consideration of mitigating factors does not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”¹²⁶
- *Joshua v. Adams*.¹²⁷ 25-year-to-life sentence for a person suffering from schizophrenia under the California “Three Strikes” law—for stealing two bottles of alcohol—did not contravene *Atkins*, for that case “dealt with capital sentences and [is] therefore distinguishable. Absent a Supreme Court decision clearly establishing that mental illness renders a non-capital sentence unconstitutional, we are unable to grant Joshua habeas relief.”¹²⁸
- *United States v. Gibbs*.¹²⁹ Life imprisonment for defendant convicted of violent crime could not—under Federal Sentencing Guidelines—be given mitigation due to his intellectual disability; sentence upheld even though the defendant relied heavily on *Atkins*. “*Atkins* involved policy concerns about the death penalty and not generalized sentencing.”¹³⁰

¹²² The courts have often looked to the Cruel and Unusual Punishment Clause in non-capital cases. In one of the most prominent decisions, the Supreme Court in *Hudson v. McMillian*, 503 U.S. 1 (1992), determined that the beating by prison guards of a handcuffed inmate violated the inmate’s Eighth Amendment rights.

¹²³ 307 F. App’x 537 (2d Cir. 2009).

¹²⁴ *Id.* at 538 (citation omitted).

¹²⁵ 145 F. App’x 964 (5th Cir. 2005).

¹²⁶ *Id.* at 965.

¹²⁷ 231 F. App’x 592 (9th Cir. 2007), *cert. denied*, 552 U.S. 1189 (2008).

¹²⁸ *Id.* at 594. The dissent there strongly disagreed: “The Supreme Court’s disproportionality cases, as well as our own jurisprudence interpreting the principle, clearly establish that sentences that are excessive in light of the defendant’s diminished culpability violate the Eighth Amendment. Accordingly, sentencing a schizophrenic man to an indeterminate life sentence for stealing \$62 of alcohol is unconstitutional.” *Id.* at 600 (Ferguson, J., dissenting).

¹²⁹ 237 F. App’x 550 (11th Cir. 2007), *cert. denied*, 552 U.S. 1005 (2008).

¹³⁰ *Id.* at 567.

- *Commonwealth v. Yasipour*.¹³¹ Sentence of 20–40 years on a murder charge allowed in spite of reliance on *Atkins* by defense counsel. “We conclude [*Atkins* is] inapposite because [it concerns] the constitutional limitations on the imposition of the death penalty Appellant, unlike the defendant in *Atkins*, is not subject to a sentence of execution for his crime. Thus, we fail to see how *Atkins* supports Appellant’s position.”¹³²
- *United States v. Moore*.¹³³ The defense counsel contended that a mandatory minimum penalty of 180 months for a convicted felon possessing a firearm was, under *Atkins*, unconstitutional as applied to the defendant, a mentally retarded individual.¹³⁴ Quoting an earlier unpublished opinion,¹³⁵ the court reiterated that “[i]mposing a mandatory minimum sentence on a defendant with limited mental capabilities does not violate the Eighth Amendment ban against cruel and unusual punishment.”¹³⁶ The earlier decision made explicit how little *Atkins* would be involved in a non-capital sentencing prosecution:

Imposing a mandatory minimum sentence on a defendant with limited mental capabilities does not violate the Eighth Amendment ban against cruel and unusual punishment. Tucker relies on the Supreme Court decision in *Atkins v. Virginia*, arguing that imposing a mandatory minimum sentence on a mentally retarded individual is unconstitutional. This reliance is misplaced; the holding in *Atkins* specifically addressed “whether the death penalty should ever be imposed on a mentally retarded criminal.” As such it does not address the present issue.¹³⁷

¹³¹ 957 A.2d 734 (Pa. Super. Ct. 2008).

¹³² *Id.* at 743–44.

¹³³ 643 F.3d 451 (6th Cir. 2011).

¹³⁴ *Id.* at 453–54.

¹³⁵ *United States v. Tucker*, 204 F. App’x 518 (6th Cir. 2006).

¹³⁶ *Moore*, 643 F.3d at 454.

¹³⁷ *Tucker*, 204 F. App’x at 521–22 (citations omitted). This proposition was attacked by Cone:

The relevance of the mental retardation mitigator to the proportionality of a non-capital case sentence cannot be ignored simply by labeling the sentence as “mandatory.” Because the relevance of this mitigator arises as a matter of constitutional law, a mandatory minimum statute cannot make it any less relevant by cutting off its consideration. To the contrary, under the rationale of *Atkins*, when a sentencing judge determines that, as applied to a mentally retarded offender, a statutory mandatory minimum term . . . might be “grossly disproportionate,” that judge has a constitutional duty to consider whether the sentence might violate the Eighth Amendment.

Cone, *supra* note 100, at 43.

This rather dismissive set of decisions appears to be the only sentencing decisions to actually cite and rely upon *Atkins*, albeit to reject the defense argument. One trial court did thoughtfully apply *Atkins* in favor of the defendant in a non-capital sentencing decision. The District Judge in *United States v. Larson*¹³⁸ was persuaded by the defense contention that imposing a mandatory minimum sentence on the defendant who was mentally retarded violated the Eighth Amendment, relying almost entirely on *Atkins*. The court's language is instructive:

Looking to the general purposes Congress intends criminal sentences to serve, and to the *Atkins* Court's recognition that for those purposes to be served, the severity of the punishment must necessarily depend on the offender's culpability

Measured against the Supreme Court's recognition in *Atkins* of the clinical definition of mental retardation, and of the relationship between mental retardation and personal culpability, the description of Joshua that emerges from the trial testimony compels the conclusion that Joshua's deficiencies diminish his personal culpability

Here, sending Joshua to federal prison for five years would not only violate the Eighth Amendment principle identified in *Atkins*, but also would undermine the purposes of punishment Congress has recognized for general intent crimes like those Joshua is charged with violating

[T]he mandatory minimum, which as applied to Joshua[,] violates the punitory principle that the severity of the punishment must correspond to the personal culpability of the defendant.¹³⁹

The court on appeal was not at all moved by the application of *Atkins* to the non-capital setting and summarily vacated the District Judge's ruling, with no substantive explanation.¹⁴⁰ In responding to a related equal protection argument, the appeals court did note that there are "procedural and substantive considerations [which] the legal system already offers developmentally-disabled individuals."¹⁴¹ The judges did not explain what those considerations are.¹⁴²

¹³⁸ 558 F. Supp. 2d 1103 (D. Mont. 2008).

¹³⁹ *Id.* at 1111–13.

¹⁴⁰ *United States v. Larson*, 346 F. App'x 166, 169 (9th Cir. 2009).

¹⁴¹ *Id.*

¹⁴² See also *Welch v. State*, 335 S.W.3d 376 (Tex. App. 2011), where the court set out the reasons why, in this context, the Supreme Court's decision in *Atkins*—and related cases in the death penalty setting—has indicated that:

[A] term of years is different in kind from the death penalty, [and] the Supreme Court has largely deferred to the sentencing schemes devised

The conclusion that *Atkins* seems to play no role in non-capital sentencing should not, perhaps, be wholly surprising. It may be explained by the notion of incapacitation. After all, a disabled defendant spared death under *Atkins* is still imprisoned, likely for the rest of his life. Using the *Atkins* rationale in a non-capital sentencing situation may result in a defendant being imprisoned for a significantly shorter period of time.¹⁴³ True, but if one believes what the Court wrote in *Atkins* about mentally disabled defendants being less culpable than others, such a result should be applauded, not avoided. And, if we are to be serious about the application of *Atkins*, sentencing statutes and guidelines ought to expressly take account of intellectual disabilities, and sentencing judges should also be required to refer specifically to low intelligence of offenders in passing sentences. Such changes would be a welcome recognition of the wisdom of *Atkins* beyond the death penalty prosecution.

CONCLUSION

Without question *Atkins* has had a major impact in capital cases, though creating a rather muddled view of who is to be viewed as intellectually disabled and which procedures are appropriate under the Eighth Amendment. In non-capital cases, however, the picture is very different. Looking at three areas of major importance—interrogation and confessions, assisting counsel, and sentencing—I reach the conclusion that *Atkins* has had virtually no impact at all. In spite of tremendous scientific support for the more careful treatment of offenders with low intelligence, and the Supreme Court's affirmation of that view, it seems as if *Atkins* simply is not considered very much—if at all—in non-death penalty prosecutions.

by the nation's legislatures Unlike challenges in the capital context, the Eighth Amendment does not similarly require individualized sentencing for a term of years. The Supreme Court has drawn the line at death; for all other punishments—even life without parole—mandatory sentencing schemes that preclude the presentation of mitigating evidence are entirely permissible.

Id. at 380 (citations omitted).

¹⁴³ With thanks to my colleague Jeff Bellin for his incisive thoughts here.