

The Maldonado Dilemma: Is he or is he not intellectually disabled?

Vidisha Barua Worley, Assistant Professor of Criminal Justice, University of North Texas at Dallas

Abstract

While *Atkins v. Virginia* 536 U.S. 304 (2002) made the execution of the intellectually disabled unconstitutional in the United States of America, it left it up to the states to classify who should qualify as intellectually disabled. In a recent Texas case, *Maldonado v. Thaler* (2009), the defendant, Maldonado, was identified as intellectually disabled by two psychiatrists, but was not diagnosed as such by the state psychiatrist, who albeit conceded he had low intelligence. Given the fact that psychiatry is not a natural science with accurate predictions and results, is it ethical to execute an intellectually disabled person, keeping in spirit with retribution, in the absence of a bright-line rule of the U.S. Supreme Court? This article explores the issue of executing the borderline intellectually disabled who are classified variously by different mental health professionals.

Introduction

It is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.

(Justice Koontz and Justice Hassell dissenting in *Atkins v. Commonwealth of Virginia*, 2000, p. 397)

Taking into consideration the growing national consensus in the consistent flow of state legislations against the execution of the intellectually disabled on the one hand, and a complete absence of legislation supporting such execution on the other hand, the U.S. Supreme Court in 2002 overturned *Penry v. Lynaugh* (1989), and in the landmark decision of *Atkins v. Virginia*, declared the execution of the intellectually disabled unconstitutional as being in violation of the Eight Amendment's cruel and unusual punishment clause. The Supreme Court also reflected upon the positions of various professional organizations like the American Psychological Association (APA) and the American Association of Mental Retardation (AAMR), religious bodies, and the world community in examining the move toward prohibition of capital punishment for the intellectually disabled. While acknowledging the unanimity in protecting the intellectually deficient from the death penalty, the apex Court recognized that the disagreement

lay in determining who the intellectually disabled were. However, just as in the case of the insane, the Court left it up to the individual states to set the criteria.

In *Atkins v. Virginia*, Atkins was found to have an Intelligence Quotient (IQ) score of 59 with the mental level of a child of 9 to 12 and diagnosed mildly intellectually disabled, the IQ range for which is 50-55 to 70-75. In *Maldonado v. Thaler*, the case under study in this article, Maldonado has an IQ of about 60-75 and the mental age of the child of seven or ten, a case very similar to Atkins, yet is found competent for the purpose of the death penalty in Texas, U.S.A. Moreover, the IQ and adaptive behavior tests were conducted in a questionable manner by the state expert. Should the results of dubious tests be accepted and taken into account when deciding on whether an inmate is eligible for the purpose of the death penalty, a penalty that is irrevocable? This article strongly contends that such an approach is wrong. Especially, when the intellectually disabled form only about 2 to 3 per cent of the population. This article explores the various acceptable definitions of intellectual disability, discusses the *Atkins* decision, examines studies that have looked at the standards in various states, and articulates the ethical dilemmas posed by the *Maldonado* decision in light of all the literature and national and international consensus against the execution of the intellectually disabled.

Literature Review

1. Definitions of Intellectual Disability.

Generally defined, intellectual disability is a developmental disability present in about two to three percent of the population, and is identified by a below average level of cognitive ability, a diminished capacity to adjust to one's surroundings and carry out normal daily living activities or possess poor adaptive skills, and an age of onset starting from gestation through 18 years of age (Daily, Ardinger, & Holmes, 2000). The clinical definitions also point to these very deficiencies. According to the Diagnostic and Statistical Manual, Fourth edition, Text Revision (DSM-IV-TR) of the American Psychiatric Association, 2000 (p. 49), intellectual and developmental disability can be diagnosed in a person who has subaverage intelligence (an Intelligence Quotient or IQ of 70 or below); shows simultaneous limitations in adaptive behavior in at least two of the following ten adaptive skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety; and has an age of onset before 18 years (DeMatteo, Marczyk, & Pich, 2007). The APA also noted that intellectual disability in persons with an IQ between 70 and 75 can be diagnosed if accompanied by severe deficits in adaptive behavior (DeMatteo, Marczyk, & Pich, 2007). The American Association of Intellectual and Developmental Disabilities (AAIDD, 2010) also recognizes the three components of intellectual and developmental disability with a slight variation in that it categorizes the adaptive skills into conceptual, social, and practical skills. In England, the term used is learning disability and the World Health Organization defines it as a state of arrested or incomplete development of mind with significant deficiencies in both intellectual and social/adaptive functioning with the onset being in childhood and not as a result

of any disease or accident (Northfield, 2004). According to Northfield (2004), these deficiencies lead to difficulties in several areas like communication, self-care, and health and safety issues.

Cognitive ability or intelligence is measured with the help of IQ tests and a score of 70 or less is usually associated with intellectual disability. An IQ score of up to 75, taking into consideration a standard error of measurement of five points demonstrates "significant limitations in intellectual functioning" (DeMatteo, Marczyk, & Pich, 2007; Luckasson, Schalock, Spitalnik, Spreat, Tasse, & Snell, 2002). There are several IQ tests that are conducted to evaluate the cognitive ability of a patient. IQ tests measure both verbal and non-verbal abilities of an individual (Frumkin, 2006). According to Wechsler(1944), intelligence is a person's capacity to act deliberately, think reasonably, and interact effectively with his surroundings. Stebbins (2007) stated that the measurability of the actual intelligence of a person by the IQ tests is a controversial issue. While measuring a specific functioning ability, these tests may not accurately evaluate a person's bent of mind or future prospects, and may even be influenced by cultural, linguistic, and emotional factors including depression and anxiety (Meany, 2004; Stebbins, 2007). Nevertheless, the Wechsler test (Frumkin, 2006) and the Stanford-Binet Intelligence Scales (SC) are the most commonly used tests with the mean score being 100 (a person of average intelligence) and a score of 70 or below, that is two standard deviations below normal (one standard deviation is 15) demonstrating the presence of intellectual disability (Stebbins, 2007; Blume, Johnson, & Seeds, 2009). In the Wechsler Adult Intelligence Scale -III or WAIS-III test an IQ score is obtained by measuring seven verbal and six non-verbal skill areas (Frumkin, 2006).

Meany (2004), and Blume and colleagues (2009) warn against using a strict cut off point for IQ scores and opine that not taking the standard error of measurement (plus minus five points) into account is against the spirit of the clinical definitions. Moreover, if the same test is repeated too soon by both parties in a capital case, it is likely that there will be a practice effect resulting in better scores on retest (Blume, Johnson, & Seeds, 2009; Bonnie & Gustafson, 2007; Frumkin, 2006). There is also the *Flynn* effect (Flynn, 1987) which basically means that if a person is administered a test that was developed several years earlier, then it is likely to show a false IQ as the intelligence of the general population increases every year and so a test that might be accurate in testing the IQ several years earlier would not do justice later when the intelligence of the general population has increased and the test would be easy for the peers of the person tested and similarly for the assessed individual as well, the score improving by three points every 10 years (Frumkin, 2006). Frumkin (2006) suggested that the *Flynn* effect is something that a psychiatrist conducting the test needs to be aware of even if he or she decides not to adjust the score that might likely be overestimated. Besides, race, culture, language, and the imprecise nature of the tests themselves may also affect the correct determination of intellectual deficiency (Meany, 2004; Frumkin, 2006; Libell, 2007; Blume, et al., 2009).

The second component in the determination of intellectual and developmental disability, adaptive behavior, comprises conceptual, social, and practical skills that enables a person to function every day and adapt to his or her surroundings (DeMatteo, Marczyk, & Pich, 2007;

Luckasson et al., 2002). This can be measured by interviewing people who know the subject well and have had the opportunity to observe him or her on a daily basis, like family members, friends, school teachers. The AAIDD (2010) is coming up with a new Diagnostic Adaptive Behavior Scale to assess adaptive behavior in individuals from 4 to 21 years of age. The diagnosis will be based on face-to-face interviews conducted by professionals like psychologists, social workers or case managers. They would interview adults who have had the opportunity to observe the assessed individual for an extended period of time. According to AAIDD (2010), the adaptive behavior tests will assess conceptual skills (literacy; self-direction; and concepts of number, money, and time), social skills (interpersonal skills, social responsibility, self-esteem, gullibility, naïveté, i.e., wariness, social problem solving, following rules, obeying laws, and avoiding being victimized) and practical skills including activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone. Severe limitations in only one of these skill areas is needed to demonstrate the presence of mental retardation (Blume, et al. 2009a). The AAIDD (2010) also emphasizes that while interviewing, professionals need to take into account factors such as community environment, cultural differences, and linguistic differences in order to understand the behavior and communication skills of the assessed individual.

The third prong, according to the American Psychiatric Association and the AAIDD is that the disability must originate before 18 years of age. This has been cited by the U.S. Supreme Court in *Atkins v. Virginia* (2002). However, the American Psychological Association sets the age of onset prior to 22 years (DeMatteo, Marczyk, & Pich, 2007). Farahany (2009) laments the fate of those who are not classified as intellectually disabled in most states just because they failed to have an age of onset prior to 18 years. This discrepancy among the states which adopt different definitions also add to the growing inconsistency (Libell, 2007).

2. The *Atkins* Decision

Facts and procedural history: Daryl Atkins and William Jones abducted Eric Nesbitt armed with a semiautomatic handgun, robbed him, drove him to an ATM machine, withdrew more money where their actions were recorded by a camera, then took Nesbitt to another location and killed him by shooting him eight times with the handgun. At trial, both Atkins and Jones put the blame on the other for killing Nesbitt. Jones being more coherent, the jury believed his story over Atkins' and found Atkins guilty. At the penalty phase, Atkins' attorney introduced the testimony of Dr. Nelson, a forensic psychologist, who after extensive interviews and evaluation found Atkins to be mildly intellectually disabled with an IQ of 59. The jury nevertheless, sentenced Atkins to death. The Virginia Supreme Court ordered a second sentencing hearing. Dr. Nelson again testified. The state, however presented an expert witness, Dr. Samenow to rebut Dr. Nelson's finding. Dr. Samenow concluded that Atkins was not intellectually disabled. The jury once again sentenced Atkins to death. On appeal, the Virginia Supreme Court, relying on *Penry v. Lynaugh* (1989), affirmed the imposition of the death penalty. In *Penry*, the U.S. Supreme Court had held that a national consensus had not yet been formed to prohibit the execution of the intellectually disabled. The dissent strongly opposed Atkins' death sentence observing that it was excessive to execute a person who had the mental age of a child between 9 and 12 years of age.

Noting the strong dissent and the shift in the state legislations prohibiting the death penalty for the intellectually disabled, the U.S. Supreme Court, once again decided to address this issue.

Deliberation and Decision of the U.S. Supreme Court: The proportionality test is an important aspect of the Eighth Amendment's cruel and unusual punishment clause. While the emphasis is usually on the proportionality between the punishment and the crime, there is a shift in the proportionality test with an increasing recognition of individuals who are less culpable for an offense by virtue of their inherent intellectual deficiencies. Accordingly, Farahany (2009) notes that the Eighth Amendment jurisprudence has had a doctrinal shift in the proportionality test from punishment-to-crime to punishment-to-culpability. This is in keeping with what Chief Justice Warren noted in *Trop v. Dulles* (1958), "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (p. 100-101). In 1989, when the U.S. Supreme Court had last addressed the issue of executing the intellectually disabled, the national consensus had not yet formed, that is the standards of decency had not evolved enough to the point that it could be declared unconstitutional.

However, on revisiting the issue in 2002, the Court looked at the increasing number of state legislations that prohibited the ultimate penalty for the intellectually disabled. Before the *Atkins* decision, the state legislatures of Kentucky, Tennessee, Georgia, Maryland, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York (do not have the death penalty anymore), Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina had abolished the death penalty for the intellectually disabled. There was a move toward such legislations in Virginia, Nevada, and Illinois. A similar Bill in Texas was vetoed by the Governor on technical grounds. Even those states that had the death penalty for the intellectually disabled like New Hampshire and New Jersey, did not actually use them. Moreover, only five executions of intellectually disabled persons with an IQ of less than 70 had taken place since the decision in *Penry*. Accordingly, the *Atkins* Court was convinced that a national consensus had indeed evolved as society has progressed since 1989. The Court also cited the clinical definitions of intellectual disability and acknowledged that the level of culpability of such individuals was less than that of an average adult who could commit crimes after premeditation as opposed to the intellectually disabled who acted more on impulse and were more likely to follow orders than be the initiator of a crime.

Next, considering the twin issues of retribution and deterrence, the Court citing *Enmund v. Florida* (1982) observed that neither of these social goals are served when the intellectually disabled are executed resulting in needless pain and suffering. As the actions of the intellectually disabled are not premeditated, deterrence of similarly placed individuals cannot be achieved. Moreover, being less culpable than the average adult, the purpose of retribution, "just deserts," cannot be obtained by executing the intellectually disabled. The Court also recognized that the diminished intellectual capability of these persons might lead to false confessions. Besides, being less persuasive, poor witnesses, less effective in assisting the counsel, and possessing less remorseful looking demeanors, they might easily be wrongfully convicted, noted the *Atkins*

Court. Accordingly, the U.S. Supreme Court ruled that the death penalty for the intellectually disabled is an excessive penalty and as such, being a cruel and unusual punishment under the Eighth Amendment, is unconstitutional.

As to who are the intellectually disabled, citing the AAMR (1992) and the DSM-IV (2000), the Supreme Court noted that intellectual disability requires proof of three things: “subaverage intellectual functioning,” that is, low IQ scores (approximately 70 or less); a lack of fundamental conceptual, social and practical skills; and an age of onset of before 18 years. The Court refused to draw a bright line rule to identify the intellectually disabled and left it up to the individual states to draw their own standards. That leads to the next section in this article: the varying standards.

3. Who are the intellectually disabled? The Varying Standards

The *Atkins* Court's decision not to define intellectual disability has led to a lack of uniformity in standards among the states (Meany, 2004; Libell, 2007). Since the *Atkins* decision, several studies have looked into the question of who are the intellectually disabled. In one such study conducted by DeMatteo, Marczyk, & Pich (2007), it was found that several states followed the standards laid down by the various clinical definitions. According to DeMatteo, et al. (2007), the states of Delaware, Idaho, North Carolina, North Dakota, and Oklahoma follow the DSM-IV-TR definition of intellectual disability given by the American Psychiatric Association that requires an IQ of 70 or below, coexisting deficits in at least two adaptive skill areas, and age of onset prior to 18 years. Connecticut, Florida, Oregon, Texas, Virginia, and Washington follow the AAMR definition that requires an IQ up to 75, considerable limitations in adaptive functioning, and age of onset before 18 years (DeMatteo, et al., 2007). Texas, however, follows the AAMR definition in conjunction with the rules found in the Texas' Persons with Mental Retardation Act (PMRA), Texas Health and Safety Code Section 591.003(13) as evidenced in the case, *Ex parte Briseno*. Other Texas courts are now following the *Briseno* standard. According to Blume and colleagues (2009), *Briseno* fails to capture the full essence of the clinical definitions as certain factors that focus on strengths rather than weaknesses are used to determine adaptive functioning without reference to the clinical definitions. Maryland follows the definition of the American Psychological Association requiring major deficits in cognitive functioning with an IQ of 70 or two or more standard deviations below the mean, simultaneous limitations in adaptive behavior, and an age of onset before 22 years of age (DeMatteo, et al., 2007).

According to DeMatteo, et al. (2007), the rest of the 36 states either use elements of all the three clinical definitions without providing any operational definition or defining only one or two of the elements, and some using only two of the elements with no specific age of onset. Some states presume intellectual disability based on a certain IQ score as a cut-off point, while Kansas although following the AAMR definition, additionally requires that the intellectual disability must severely blight a person's ability to appreciate the criminality of his or her behavior or make it difficult for the person to conform to law¹ (Blume, Johnson, & Seeds, 2009;

¹ Kansas Statute Annotated 21-4634(f)

DeMatteo, et al., 2007). DeMatteo and colleagues (2007) analyzing the legislations of 37 of the 38 death penalty states, concluded that only 11 states have definitions that follow the clinical definitions, the remaining 26 states use definitions that are not very well defined, and Kansas uses an additional requirement of understanding the criminality of one's actions which is usually a requirement in an insanity defense. As such, the finding highlights the lack of uniformity and the varying standards in defining intellectual disability across the country.

The definitional disparity is not the only disturbing ramification of the *Atkins* decision. The procedural aspect of determining intellectual disability, at which stage should it take place and whether by a judge or a jury, was not clarified either leading to the conclusion that the protection of the intellectually disabled will be inconsistent on this ground as well (Orpen, 2003; Duvall & Morris, 2006; DeMatteo, et al., 2007). Ellis (2003) argues that under *Ring v. Arizona* (2002), it must be jurors who decide whether a defendant is intellectually disabled or not when it relates to death penalty cases. Courts are not always in agreement with this argument (Reardon, O'Neil, & Levett, 2007; *Head v. Hill*, 2003, *State v. Flores*, 2002). Twenty states have decided that a judge should make the determination of intellectual disability: Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington (Blume, et al., 2009). Out of the five states, Connecticut, Georgia, Louisiana, Maryland, and Oklahoma that allow a jury determination, a defendant may waive the right to a jury in Connecticut and Georgia, and the parties may decide to go for a judicial determination in Louisiana (Blume, et al., 2009). While in California, a defendant may either choose a judge or a jury determination² (Reardon, et al., 2007), in Arkansas, Missouri, New York, North Carolina, South Carolina, Tennessee, and Virginia, the defendant can either have two independent determinations or have a judicial review of a jury determination (Blume, et al., 2009).

The burden of proof is usually on the defendant with the standard of proof being either clear or convincing evidence or a preponderance of evidence in most states which is a fairly low standard (Reardon, et al., 2007), except in Georgia where the standard of proof is beyond a reasonable doubt (Blume, et al., 2009). The stage at which the intellectual disability determination should be made is also a controversial issue as knowledge of the seriousness of the crime may affect the impartial determination of intellectual disability that could reduce the culpability (Blume, et al., 2009). In most states, the determination is made before the guilt phase to avoid incurring the costs of a capital trial; in others it is made before the sentencing phase (New Jersey); and in still others, at the sentencing phase (Virginia, South Carolina) (Reardon, et al., 2007).

According to a study conducted by Blume and colleagues (2009a), so far, out of more than 3000 death row inmates nationwide, 234, that is seven percent have filed an *Atkins* claim and 38 percent of these have succeeded, negating Justice Scalia's fear in his dissenting opinion of *Atkins* (2002) that the decision would lead to a flooding of frivolous petitions. However, the rate of success varies among states. The authors found that while in North Carolina, the success rate

² California Penal Code § 1376

of *Atkins* claim petitions was 80 percent, in Alabama, it was only 12 percent. The authors attributed this to more funding for post-conviction litigation available in North Carolina and a more restrictive definition of intellectual disability in Alabama with a strict cut-off for IQ and a focus on the subject's strengths rather than limitations. Blume et al. (2009a) next examined the disparity in decisions based on the three prongs of the definition of intellectual disability: cognitive, adaptive, and age of onset. They found that while 56 percent of the claims lost on multiple prongs, 17 percent lost only on the basis of prong one and another 17 percent only on prong two, while only 1.4 percent, that is only two cases lost for failing to have an age of onset prior to 18 years. These decisions are again a result of the standards varying from state to state.

The Maldonado Dilemma

Facts and procedural history: Cruz C. Saucedo was murdered during the course of a robbery. Saucedo was bound with an electric cord in his home and was shot twice in the head with a .45-caliber semi-automatic weapon. The police recovered some marijuana from the apartment. Several months later, Maldonado was arrested for a bank robbery. While in custody, the police received information about Maldonado's involvement in Saucedo's murder. When interrogated, Maldonado confessed. He stated that armed with a .45 caliber pistol, he went to Saucedo's apartment with another man, Felix, because Felix wanted to borrow an AK-47 from Saucedo, while Maldonado wanted to borrow a pistol. When Saucedo refused to loan these items, Felix bound his hands with an electric cord, and asked him where he had hidden the pistol and some marijuana. Saucedo told Felix where the items were, and he retrieved them. Felix then ordered Maldonado to kill Saucedo and so Maldonado, following Felix's orders, shot him three times in the head. Maldonado was charged with capital murder during the course of a robbery by the state of Texas. He was convicted of capital murder and sentenced to death by a jury. Maldonado appealed.

The Texas Court of Criminal Appeals affirmed his conviction and sentence. He filed a habeas corpus petition while the first appeal was still pending. The state habeas court denied all of Maldonado's claims. Maldonado then filed a federal habeas petition. The federal court dismissed the petition without prejudice to allow Maldonado to exhaust all state remedies. Maldonado did not file an appeal with the U.S. Supreme Court. But, he filed a second state habeas petition where he raised three issues: 1) intellectual disability and his exemption from execution under *Atkins v. Virginia*; 2) police violated his Fifth Amendment rights by interrogating him while he had a counsel for the other criminal charge against him; 3) ineffective assistance of counsel at the trial stage as his intellectual disability was not investigated. The Court of Criminal Appeals denied Maldonado's *Atkins* claim. Maldonado filed a third state habeas petition on the intellectual disability issue which was dismissed. Maldonado then filed a second federal habeas petition on September 14, 2007 and raised *inter alia* the intellectual disability issue. The respondent filed a motion for summary judgment.

Deliberation and Decision of the U.S. District Court for the Southern District of Texas, Houston Division:

Definition. The state court had found that Maldonado did not qualify as an intellectually disabled person as he failed to show by a preponderance of evidence that he met all the three requirements laid down in the definition of intellectual disability, deficits in intellectual functioning, limitations in adaptive behavior, and an age of onset prior to 18 years. In the absence of any legislation giving effect to the *Atkins* decision in the state of Texas, the Texas Court of Criminal Appeals in the case of *Ex Parte Briseno* (2004), decided to apply the definition of the American Association of Mental Retardation (AAMR, 1992) in conjunction with the rules found in the Texas' Persons with Mental Retardation Act (PMRA), Texas Health and Safety Code Section 591.003(13). Similar to, yet slightly different from the AAMR definition, the PMRA definition requires "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period" [Texas Health and Safety Code Section 591.003(13)].

In this case, both parties sought the opinions of experts on the issue of Maldonado's intellectual disability. Dr. Weinstein and Dr. Puente, retained by Maldonado, performed neurophysiological tests on him and concluded that he was intellectually disabled. Dr. Denkowski, retained by the state, however, concluded that even though he had low intelligence, he was not intellectually disabled. The court cited *Ake v. Oklahoma* (1985) and *Jones v. U.S.* (1983) to emphasize that psychiatry is not an exact science and that opinions of professionals widely vary. Further, citing *Ex Parte Briseno* (2004) and *Kansas v. Crane* (2002), the court noted that a determination of intellectual disability for the purpose of the Eighth Amendment is not the same as the term being used by psychologists, and such determination should be left up to the finder of fact.

Procedure: Judge or jury trial. Next, the court addressed the issue of whether a judge or a jury should decide whether Maldonado is intellectually disabled or not. In *Ring v. Arizona* (2002), the U.S. Supreme Court ruled that a determination of the sentence of death penalty on the basis of aggravating factors must be made by a jury and not by a judge as it would result in a violation of the defendant's Sixth Amendment right to a jury trial in capital prosecutions. Maldonado cited *Apprendi v. New Jersey* (2000), where the court held that any fact that increased the penalty must be heard by a jury and proved beyond a reasonable doubt for the protection of due process rights of the defendant. Maldonado argued that since a determination of intellectual disability placed him under the protection afforded by *Atkins*, he should be tried by a jury. Citing the Fifth Circuit case of *In re Johnson* (2003), this court noted that intellectual disability like insanity was not an element of capital murder that could aggravate the offense, and so, need not be proved beyond a reasonable doubt by the state. The Fourth Circuit Court of Appeals also held in *Walker v. True* (2005), that a jury determination was not required for an *Atkins* claim. In *Ex Parte Briseno* (2004), the Court of Criminal Appeals of Texas in a state habeas petition hearing, ruled that the applicant was not entitled to a jury determination of intellectual disability and that the burden of proving intellectual deficiency was on the petitioner

by a preponderance of evidence. In *Briseno*, the applicant failed to satisfy the court regarding significant deficits in adaptive functioning.

Maldonado's Intellectual Functioning. Facts undisputed by both parties are that Maldonado, a native Spanish speaker, is not intelligent, is functionally uneducated, and lacks proficiency in the English language. Generally, to show substantial subaverage intelligence, an IQ of 70 would satisfy the requirement but Texas refrained from using 70 as the bright-line rule and called for flexibility. The psychiatrists involved in Maldonado's case, mainly relied on five tests to measure his intelligence. On the WAIS-III test, Maldonado scored 72, on the Spanish version of this test, he scored 83 on the completed verbal portion, on the Comprehensive Test of Nonverbal Intelligence (CTONI), he scored 61, on the Beta-III test, he scored 70, and on the Woodcock-Munoz Bateria-R test, he scored 61.

The court examined the results and procedures of each of the tests that Maldonado took. The WAIS-III was administered by the state doctor, Dr. Denkowski. At first, Dr. Denkowski tried to administer the test in English. When Maldonado clarified that he was not comfortable in English, Dr. Denkowski called for Mr. Dodson, a stand-by state licensed interpreter but not trained in psychology, who translated the questions for Maldonado from English to Spanish. After testing in this manner, it was found that Maldonado had a raw score of 74 each on the verbal and performance portions and a full scale IQ of 72. However, Dr. Denkowski was of the opinion that Maldonado's true score was suppressed because of poor test-taking skills, and cultural and educational factors. As such, he concluded that Maldonado's adult intelligence ranged from 74 to 83, and so did not have significant subaverage intelligence. This testing method is suspect because the use of the translator weakened the test raising questions of validity and reliability, and Dr. Denkowski's concluding scores do not seem to have any scientific basis even though he claimed that cultural and linguistic differences might have artificially suppressed the IQ. Moreover, the translated version was criticized by the other experts as not being cognitively equivalent to the original test. The translator was not conversant with psychology and there were times when the translator revised the questions moving away from the original because Maldonado did not understand them, without consulting Dr. Denkowski. The state habeas court, however, found Dr. Denkowski's score to be valid as the test contained questions that reflected knowledge that could be acquired from education which Maldonado was not equipped to answer because of his poor educational background. Moreover, Maldonado suffered from anxiety which might have suppressed his score. The state court also took into account Maldonado's score on the verbal portion of the WAIS-Espanol conducted by Dr. Weinstein where he scored 83. Maldonado's experts criticized this score as the test was designed for speakers from Puerto Rico while Maldonado was from Mexico.

The Beta-III test geared toward Hispanics in the United States, in which Maldonado scored 70, was found to be insufficient to test general intelligence by the state court. Maldonado's expert, Dr. Puente, also administered the CTONI, which is also suited to non-English speakers in the U.S. Dr. Puente concluded after all his tests that Maldonado suffered from mild intellectual disability. The state's expert, Dr. Denkowski objected to Dr. Puente's tests.

However, the federal court found these tests to be valid indicators of intelligence. On the Bateria-R test conducted by Dr. Weinstein, Maldonado scored 61 leading Dr. Weinstein to conclude that he was intellectually disabled with the mental age of a child of seven years and ten months. He also emphasized Maldonado's poor adaptive skills to validate the score. The state court found that Maldonado failed to show by a preponderance of evidence that he was intellectually disabled. While the IQ test scores were low, the state court found that Maldonado's behavior in society and in prison did not appear to be that of an intellectually deficient person. While in prison, he taught himself how to read and write and even solve arithmetic problems. The federal court agreed with the finding of the state court. The court's decision was erroneous as the tests clearly showed that his IQ scores satisfied the criterion for intellectual disability. In the one test that he scored 83, the test was incomplete and so the test score should not have been taken into account. The test score provided by the state expert was also erroneous as it was based on estimation rather than the actual test score.

Maldonado's adaptive behavior. Dr. Denkowski, the state expert, administered the Adaptive Behavior Assessment Scale (ABAS) to Maldonado in May 2005. Maldonado's responses showed that he could be intellectually disabled but only by a few points. Taking into account Maldonado's background and lifestyle choices, the state expert found that Maldonado was not intellectually disabled. The results of this test were challenged by the other experts. Not only was the test not in Spanish, it was meant for high-functioning individuals and not for adults of Maldonado's caliber.

Dr. Puente, Maldonado's expert, relied on lay testimony that demonstrated his behavior before he was 18 years old to evaluate his adaptive skills. Maldonado's mother was a prostitute who drank heavily during her pregnancy. As a child he was malnourished, had seizures, was slow to learn and did not stay in school for long. The state court objected to this because the *Briseno* court mentioned that current adult behavior should be reviewed. This article contends that this is going against the very definition of intellectual disability as cited by the U.S. Supreme Court, as the age of onset is considered an important third prong of the definition. The *Briseno* court was wrong and the *Maldonado* court is wrong to follow that precedent. As an adult, Maldonado had to take his drivers' license test several times before he passed. He found employment at his cousin's business as a cashier but was not good at his job. However, he was trustworthy. He would absent himself from work without informing and would stop coming to work altogether if they threatened to fire him. He had one bank account that somebody opened for him and he did not know how to operate it. It was testified that he was a follower. At the prison, Maldonado was well-organized and kept his cell clean. He also filled out prison grievance and medical forms correctly. While his life before 18 years showed deficits in adaptive behavior, his adult life in prison showed several strengths in his adapting to his surroundings. The federal court erroneously considered his adaptive behavior during his adult life and focusing on strengths rather than weaknesses, denied him habeas corpus relief.

Analysis and dilemmas:

Intellectual functioning: "To attempt to define 'intelligence' is to embark on a fruitless philosophical endeavor full of tautological reasoning," wrote Frumkin (2006, p. 53). In Maldonado's case, it is very true with experts from both sides conducting different tests and arriving at different conclusions. The first round of tests including the Bateria-R test, was conducted by Dr. Weinstein, a native Spanish speaker, in Spanish on February 5th and 6th, 2003. He also administered the Spanish version of the WAIS-III test where Maldonado scored 83 on only one completed portion. Dr. Weinstein concluded that Maldonado's cognitive level was that of a child of age seven years and ten months. The next doctor to examine Maldonado was Dr. Denkowski, the state doctor, and he conducted the WAIS-III test on May 23rd and 24th, 2005. He rated Maldonado's performance between 74 and 83 and concluded that he was not intellectually disabled. The third doctor to test Maldonado was Dr. Puente who conducted the CTONI (61) and the Beta-III (70) tests in Spanish on June 27th and 28th, 2006, and concluded that his academic abilities were similar to that of a 10-year-old child or somebody who had four and a half years of education.

It is important to note that *Roper v. Simmons* (2005) made it unconstitutional for juveniles to be executed. Combining the effects of the Atkins decision and the *Roper v. Simmons* decision, it would be wrong to execute someone whose mental level is that of a juvenile as these decisions were aimed at protecting those individuals who are not mature mentally and so unable to appreciate the consequences of their actions. Meany (2004) had expressed the fear that due to lack of uniform standards and tests, even if tests are taken accurately, opposing expert witnesses might use completely different methods to come to conflicting conclusions. This is exactly what happened in Maldonado's case. It is obvious, as pointed out by Meany (2004), that the psychological community is not yet ready to take on the responsibility the *Atkins* decision has placed upon its shoulders.

Also as seen from previous studies on these IQ tests, if tests are repeated or taken too soon, there is a likelihood of practice effects. While the first test was pristine, even though there is a reasonable gap between the tests, it is likely that Maldonado got better at taking the WAIS-III test, and so scored better. However, the tests conducted in 2006 show consistently poor scores affirming the conclusion that he might be mildly intellectually disabled. Moreover, the *Flynn* effect could also come into play. It is possible that the WAIS-III that came into effect in 1997 was developed several years earlier as speculated by Frumkin (2006). In that case, it is likely that Maldonado's score might have been made spurious by the *Flynn* effect. The *Flynn* effect opines that the IQ of the general population increases by three points every ten years. If that is the case, then Maldonado's score might be artificially high on a test that was developed several years earlier, and may not have been a true reflection of his intellectual disability.

Adaptive behavior: Maldonado was administered the Adaptive Behavior Assessment Scale (ABAS) in 2005. According to Frumkin (2006), this test suffers from several deficiencies. This test needs to be administered to people who know the defendant rather than the defendant himself. However, Frumkin (2006) pointed out that while family members might be biased toward the subject and say things that might show him to be intellectually disabled, correctional

officers might try to give statements that might demonstrate that the subject is not intellectually disabled. This is what happened in the case of Maldonado. While family members commented about his deficits before he was 18 years old, his life and childhood in Mexico, people from the correctional setting made him out to be an intelligent and well-organized person with no signs of intellectual disability. In a situation like this, where the reliability of the informants are in question, how is the presence of intellectual disability to be correctly determined? When it is a question about the death penalty, this article suggests that a decision should be made in favor of the plaintiff and his life be spared rather than wrongly execute him. According to the AAMR (2002), in determining intellectual disability, the focus should be on the weaknesses rather than the absence of strengths (Blume et al. 2009a) . Moreover, adaptive functioning is to be determined by one's adjustment to the community environment and not a prison setting with legal constraints (Blume, et al., 2009a). In their study, Blume and colleagues (2009a) found that 30 percent of the losing cases mistakenly relied on the defendant's behavior in the prison. They also found, just as in the case of Maldonado, that in 16 percent of losing cases, the courts found that the defendants had adapted well to the prison life (kept his cell clean and was well-organized), got educated in prison (Maldonado also learned to read, write, and compute arithmetic problems) and in 15 percent of the losing cases as in Maldonado's case, the courts relied on the testimony of correctional officers. In light of these findings, it can be said that the determination of Maldonado's intellectual disability was skewed at best.

Handling of money is one of the adaptive skills that has been presented in Maldonado's case by both sides. While it is shown that Maldonado worked as a cashier at his cousin's business and was trustworthy, it is pointed out that his job was never satisfactory and, so, he could not get the title of a manager. In the same token, regarding his personal finances, somebody else established his bank account and he did not know how to deposit or take out money from the account. An adult of average intelligence should be able to perform such tasks with relative ease. The focus again, according to AAMR (2002), should be on the weaknesses rather than the absence of strengths, but the court failed to take these into account.

The *Atkins* Court specifically acknowledged that the level of culpability for the intellectually disabled was less than an average adult who could commit crimes after premeditation. They acted more on impulse and were more likely to follow orders than be the initiator of a crime. In Maldonado's case, the manner in which the crime was committed clearly shows that he was the follower rather than the initiator. He shot his victim on the orders of another man, Felix, who had in fact initiated the whole crime. Such instances support the argument that Maldonado could very well be intellectually deficient and is easily led to a life of crime by others.

Frumkin (2006) objects to the checklist method of the ABAS as the defendant might give distorted responses or feign intellectual disability. In fact, faking intellectual disability by the defendant is a concern that was voiced by Justice Scalia in his dissenting opinion in *Atkins* (2002) as well as by several scholars (Meany, 2004; Fabian, 2006; Libell, 2007; Blume et al., 2009a). However, other commentators note that malingering is hard for intellectually disabled

defendants and when done can be effectively assessed by mental health experts who administer these tests (Mossman, 2003; Blume et al., 2009a). Further, objecting to the checklist format, Frumkin (2006, p. 58) opines that such a test is more a "screening" mechanism rather than a "comprehensive" examination of adaptive behavior.

As far as the testimony of experts in courts is concerned, the *Frye* (1923) test was the standard used before the Federal Rules of Evidence (1975) came into existence. According to *Frye*, an expert testimony is satisfactory if it is based on generally acceptable standards in the scientific world. The ABAS might meet the *Frye* standard. However, Texas follows the later *Daubert* (1993) standard which is based on Rule 702 of the Federal Rules of Evidence (1975). Rule 702 of the Federal Rules of Evidence states that an expert may testify based on scientific, technical or specialized knowledge to assist the trier of fact if the testimony is based on sufficient facts and data are derived from reliable principles and methods and the expert has applied these reliably to the case at hand. According to the *Daubert* standard, general acceptance is not a necessary condition to admit expert scientific testimony under the Federal Rules of Evidence. It is for the trial judge to decide the relevance and reliability of the scientific information. The application of both Rule 702 of the Federal Rules of Evidence and the *Daubert* standard entail that the expert follow proper scientific methods to arrive at the opinion to assist the trier of fact, here the judge. In the case of Maldonado, the state's expert adjusted the score of the scientific tests, the WAIS-III for intelligence and the ABAS for adaptive behavior, exercising his own experience and judgment. Even though he mentioned that the scores might have been artificially suppressed due to cultural and linguistic barriers, he gives no scientific reason as to how he arrived at the scores he did which are more approximations than accurate. The judge, considering the opinion of the state expert in conjunction with the statements of the correctional personnel, found Maldonado to be not intellectually deficient. This article argues that the opinion of the state expert is inadmissible under *Daubert* as the scores of the tests were adjusted without proper scientific reasoning and based on a hunch.

The problem lies inherently in the fact that psychiatry is not an exact science and there should be room for errors both ways. In such a situation, the big ethical predicament is when there is a false negative, and a person who is actually intellectually disabled, and so unfit for execution as per *Atkins v. Virginia*, is given the death penalty. There should be more caution exercised when it comes to the issue of the ultimate irrevocable penalty of death. Death is different, and it should be treated as such. It is much better to have a false positive where a person who is not mentally retarded escapes the death penalty, than to execute those who have an intellectual disability and thus, engage in acts that have been declared unconstitutional in light of the evolving standards of decency. Even disregarding the hypothetical possibility of a false negative or a false positive, the fact remains that Maldonado's intellectual disability was spotted in his childhood by his family members and teacher before the age of 18, thus fulfilling a major requirement to establish the presence of intellectual deficiency that the age of onset be before 18 years. In such a case, it was clearly wrong for the Texas court to admit the statements of the prison officials who have become familiar with Maldonado only in his adult life.

Policy Implications and Conclusion

In conclusion, it can be said that *Atkins v. Virginia* (2002) was a progressive decision aimed at protecting a class of people, the intellectually disabled who form about 2 to 3 percent of the general population. This decision was ripe and the U.S. Supreme Court acted in consonance with the national and international community on the issue. It is true that the decision left a lot of unresolved issues that have led to its varying application in the death penalty states. Having said that, it is important that states recognize the benevolent spirit of the *Atkins* decision and attempt to liberally identify intellectually disabled death row inmates so that wrongfully punishing such individuals can be avoided. As has been seen from the literature review, there has not been a flooding of frivolous *Atkins* claim petitions which goes to show that this small subset of the population needs to be afforded the protection that the Supreme Court has rightfully bestowed.

The blight of a cruel and unusual punishment can be evaded by states by not adhering to strict cut-off scores for IQ tests, not basing their judgments on biased statements by correctional personnel, examining adaptive skills in the community instead of in a prison which is most often done, and focusing on the weaknesses rather than the strengths of the subject. The earlier AAMR definition required the finding of weaknesses in two out of 10 skill areas and the current AAIDD definition requires the presence of deficits in only one out of the three skill areas. This goes on to show that the threshold for finding intellectual disability is very low and based on finding only a limited number of deficits even if the person is functional in other areas. The most important factor to be determined in cases like Maldonado's is to not undermine the age at which the problem surfaced as the clinical definitions cited by the U.S. Supreme Court clearly mention the age of onset of 18 years. While in exceptional cases, the age of onset can be different for traumatic brain injury cases, this was not the case with Maldonado. So, the basic rule of the age of onset of 18 years should have been taken into account by the courts.

Keeping these cautionary measures in mind, policymakers in Texas and other death penalty states should give equal importance to the age of onset as they do to IQ tests, and adaptive behavior interviews. Moreover, although the standard of proof, by preponderance of evidence, in Texas is quite minimal and should be easy to satisfy in genuine cases, this was made difficult by the fact that relevant information like observations of family and teachers in Maldonado's childhood was not given much weight but the statements of correctional officers based on Maldonado's behavior in adult life and in a prison setting were given preference. This made it difficult for Maldonado to show by a preponderance of evidence that he was intellectually disabled. Disregarding the results of the IQ tests taken by Maldonado's experts also made it hard for Maldonado to make his case a convincing one. Given that the *Atkins* court itself cited clinical definitions in the determination of intellectual disability in death penalty cases, courts should be more generous and cautious in their judgment and determination of intellectual disability and steer away from erroneously making unethical decisions. While the U.S. Supreme Court has laid down the basic standard with respect to the execution of the intellectually

deficient, lowering of the standard by the states will only lead to a violation of the Eighth Amendment's cruel and unusual punishment clause, thus, leading to unconstitutional executions.

In the end, this article suggests that policymakers should give weight to all the three prongs of the clinical definitions of intellectual disability, cognitive, adaptive, and age of onset of 18 years; not adhere to strict cut-off points for IQ scores; not evaluate adaptive behavior in a correctional or artificial setting; not look into adjustments made in adult life; and evaluate a subject's adaptive behavior in the community by interviewing people who knew the subject during his or her childhood till the subject was 18 years of age to see if the intellectual disability had set in any time during that time. With the force of two U.S. Supreme Court decisions, *Atkins v. Virginia* and *Roper v. Simmons*, this article emphatically recommends that individuals with the mental age of a juvenile, who form only about 2 to 3 percent of the general population should be afforded much more protection. If the courts keep abreast of the latest research, the lives of many Maldonados can be saved!

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