

**BUT HE DOESN'T *LOOK* RETARDED: CAPITAL JURY
SELECTION FOR THE MENTALLY RETARDED
CLIENT NOT EXCLUDED AFTER
*ATKINS V. VIRGINIA***

*Andrea D. Lyon**

INTRODUCTION

Jury selection in a capital case is a daunting prospect.¹ One has to keep in mind the likelihood of overwhelming negative publicity,² the horrendous nature of the crime,³ the sometimes competing strategies of trial and mitigation,⁴ and general hostility toward capital defendants, who are often minorities, nearly universally impoverished, and frequently viewed at the outset as guilty and bad.⁵ Add to these obstacles trying to select a jury that can listen to and give effect to mitigating circumstances⁶—particularly regarding mental retardation—and a capital defender is facing an enormous challenge.

Although the U.S. Supreme Court held in *Atkins v. Virginia* that it is unconstitutional to execute persons with mental retardation,⁷ the

* Andrea D. Lyon is the Associate Dean for Clinical Programs, a Clinical Professor of Law, and Director of the Center for Justice in Capital Cases at DePaul University College of Law. The author wishes to thank her research assistant, Jennifer Keys, for her invaluable assistance, as well as her former co-worker, Ajitha Reddy, now Deputy Director of the International Human Rights Law Institute at DePaul University College of Law. She also wishes to thank her colleagues, Professors L. Song Richardson and Susan Bandes, for their comments, suggestions, and, most important, their inspiration.

1. *Milton v. Procnier*, 744 F.2d 1091, 1096 (5th Cir. 1984).

2. See Ellen Marrus & Irene Merker Rosenberg, *Roper v. Simmons and Strickland v. Washington: Dancing with Death*, 42 CRIM. L. BULL. 153 (2006); see also Albert W. Alschuler, *Celebrating Great Lawyering*, 4 OHIO ST. J. CRIM. L. 223, 228 (2006) (book review of WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (2006)).

3. See *Irvin v. Dowd*, 366 U.S. 717 (1961) (holding that media coverage created a build up of prejudice so that the jury could not be impartial); see also Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1934 (2006); *Influences on the Jury*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 529, 529 n.1685 (2006).

4. See, e.g., *State ex rel. Shannon v. Tahash*, 121 N.W.2d 59, 60–61 (Minn. 1963).

5. For a discussion of the effect of race on capital sentencing, see Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 60–61 (1990).

6. This is required by *Morgan v. Illinois*, 504 U.S. 719 (1992).

7. 536 U.S. 304, 321 (2002).

Court left it to the states to define mental retardation and to remove those with mental retardation from the pool of death-eligible capital defendants.⁸ History teaches that no set of procedures and policies will remove all capital defendants with mental retardation from that pool⁹ and that attorneys are often left defending them. This Article explores the challenges of jury selection when that is the case.

First, this Article examines the reluctance of some courts to exempt defendants from the death penalty under both the pre-*Atkins* state statutes and under *Atkins* itself.¹⁰ Second, this Article briefly examines jury selection in a capital case.¹¹ Third, it explores the intersection of “death qualification” and hostility to mental health mitigation in addition to the special jury selection challenges defenders face when their clients are mentally retarded.¹² Finally, this Article suggests how courts and capital defenders might approach jury selection when the proposed mitigation includes evidence of mental retardation.¹³ Some suggested voir dire questions are appended.¹⁴

II. THE RELUCTANCE OF SOME COURTS TO EXCLUDE DEFENDANTS WITH MENTAL RETARDATION

This Part describes courts’ unwillingness to place defendants with mental retardation outside the death penalty’s reach. It first details these defendants’ failed attempts to show that their exclusion from capital punishment was proper under pre-*Atkins* state statutes.¹⁵ This Part then illustrates their continued but unsuccessful efforts to be exempted from consideration for the death penalty after the Court’s decision in *Atkins*.¹⁶

A. Pre-*Atkins* Struggles

Prior to *Atkins*, defendants with mental retardation struggled for death penalty exemption under *Atkins*-like state statutes.¹⁷ For example, in *Reams v. State*, the defendant was sentenced to death despite

8. *Id.* at 317.

9. See *Hedrick v. True*, 443 F.3d 342, 372 (4th Cir. 2006) (Gregory, J., dissenting); see also *Hill v. State*, 921 So. 2d 579, 584 (Fla. 2006).

10. See *infra* notes 15–54 and accompanying text.

11. See *infra* notes 55–82 and accompanying text.

12. See *infra* notes 83–91 and accompanying text.

13. See *infra* notes 92–105 and accompanying text.

14. See *infra* Appendix.

15. See *infra* notes 17–40 and accompanying text.

16. See *infra* notes 41–54 and accompanying text.

17. It is impossible to know how many defendants with mental retardation were in fact exempted from the death penalty, either pre- or post-*Atkins*, because appeals from such an exemption are unlikely.

R

R

R

his low intelligence level.¹⁸ A jury convicted Reams as an accomplice to another man who shot and killed Turner.¹⁹ Reams and his co-defendant, Goodwin, waited for someone to drive up to an ATM.²⁰ The two men approached Turner's car, and Goodwin shot Turner with a .32 revolver.²¹ Reams was only eighteen-years-old when he was sentenced to death.²² In fact, he had the unfortunate distinction of being the youngest man on Arkansas's Death Row.²³ The Arkansas Supreme Court rejected all seven of Reams's contentions on appeal, including that, because he was mentally retarded, his execution would violate the Eighth Amendment, the Fourteenth Amendment, and Arkansas law.²⁴ The court found that Reams's IQ was above 65, which did not entitle him to "the rebuttable presumption of mental retardation" prescribed by law, and the court ruled that it need not address that claim, because Reams had failed to raise mental retardation as an affirmative defense as required by the Arkansas statute.²⁵

Similarly, in *Burgess v. State*, an all-white jury convicted and sentenced Burgess to death for malice murder, three counts of armed robbery, and five counts of kidnapping.²⁶ Burgess and his accomplice, both African American, approached a white couple entering their motel room and forced them to lie down while they rummaged through the room.²⁷ Burgess brandished a gold-plated revolver.²⁸ The accomplice stayed in the room while Burgess went into the room next door.²⁹ When the man in the next room refused to lie on the floor, Burgess fatally shot him in front of his fiancée and her children.³⁰ The fiancée's seven-year-old boy picked Burgess out of a lineup.³¹ Two hotel robberies also involving two African American men, one of whom had a gold-plated revolver, took place during the

18. 909 S.W.2d 324 (Ark. 1995).

19. *Id.* at 326–27.

20. *Id.* at 326.

21. *Id.*

22. *Ark. Teen to be Executed for Gun Death Near ATM*, MEMPHIS COM. APPEAL, Dec. 17, 1993, at A18.

23. Bartholomew Sullivan, *Death Row Has Echols; Appeal Soon: State's 2nd Youngest Awaits Penalty for Child Murders*, MEMPHIS COM. APPEAL, Mar. 23, 1994, at B1.

24. *Reams*, 909 S.W.2d at 326–27 (citing ARK. CODE ANN. § 5-4-618).

25. *Id.* Interestingly, Reams's contention under *Batson v. Kentucky*, 476 U.S. 79 (1986), was also rejected. See *Reams*, 909 S.W.2d at 327–28.

26. 450 S.E.2d 680 (Ga. 1994).

27. *Id.* at 686.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 687.

same period of time.³² Burgess had been paroled from a life sentence for murder only eight months prior to the motel killing.³³

Unsurprisingly, given the egregious nature of the crime, the all-white jury, and the racial overtones of the case, Burgess was sentenced to death, and the Georgia Supreme Court affirmed.³⁴ As required by Georgia law at that time, the defense presented evidence of mental retardation to the jury during the trial on the merits, and the jury was instructed to return a verdict of “guilty but mentally retarded” if it found that the defense had met its burden of proving beyond a reasonable doubt that the defendant was mentally retarded.³⁵ Such a verdict would then preclude death penalty procedures.³⁶ Burgess, whose mother was mentally retarded, had an IQ below 60.³⁷ The jury rejected the guilty but mentally retarded verdict at phase one,³⁸ and the Georgia Supreme Court rejected Burgess’s argument that the jury should have been instructed that it could choose not to impose death if it found by a preponderance of the evidence—rather than beyond a reasonable doubt—that Burgess was mentally retarded.³⁹ Thus, as a general matter, in pre-*Atkins* cases where statutes exempted defendants with mental retardation from execution, not all defendants were excluded at the trial level. Further, defendants who were denied the exemption at the trial level continued to be unsuccessful at the appellate level.⁴⁰

32. *Burgess*, 450 S.E.2d at 687.

33. *Id.*

34. *See id.* at 695–96.

35. *Id.* at 694.

36. *Id.* at 694–95 (citing GA. CODE ANN. § 17-7-131).

37. Bill Torpy, *Potential Jurors Dropped After Being Contacted by Suspect*, ATLANTA J. & CONST., Feb. 4, 1992, at B2.

38. *Burgess*, 450 S.E.2d at 695.

39. *Id.*

40. For example, in *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999), there was a similar holding on the mental retardation issue, although ultimately the court reversed for a new sentencing hearing on other grounds. In that case, the defendant was convicted of murder and felony murder for stabbing an eighty-two-year-old man fifteen times and killing him. *Id.* at 511. Rondon argued that he was ineligible to receive the death penalty, because he fell within the statutory exemption for those with mental retardation. *Id.* at 512. In addition to finding that Rondon was not mentally retarded, the court concluded that the exemption, which had been codified in 1998, could not be applied retroactively to his case. *Id.* (citing IND. CODE ANN. §§ 35-50-2-9, 35-36-9-6). Noting that the Indiana General Assembly specifically mandated a statute of repose for claims of mental retardation in murder cases tried before July 1, 1994, the court rejected Rondon’s argument that the statute must be applied retroactively in order to comport with equal protection, due process, and the prohibition against cruel and unusual punishment. *Id.* at 512–15. Although Rondon was not spared the death penalty because of his claim of mental retardation, the court did remand for a new penalty phase and sentencing hearing based upon ineffective assistance of counsel during the penalty phase. *Id.* at 523.

B. Post-Atkins Struggles

Most post-*Atkins* cases favor the state on purely procedural grounds.⁴¹ By finding defendants' *Atkins* claims procedurally barred, courts have avoided the difficulty of determining if defendants are in fact mentally retarded. Those appellate courts that deal substantively with the issue of mental retardation rarely disturb trial court findings that defendants were not mentally retarded and regularly dismiss *Atkins* claims.⁴²

In *Commonwealth v. Williams*, while the court did not find the defendant's *Atkins* claim procedurally barred, it refused to examine his claim substantively.⁴³ There, a jury found Williams guilty of killing his wife and sentenced him to death.⁴⁴ Williams admitted to cutting up his wife's body with a hacksaw in his basement, and he led police to her body—save for her hands, feet, and head, which were later found

41. See, e.g., *Engram v. State*, 200 S.W.3d 367 (Ark. 2004) (refusing to recall death penalty mandate and reopen case due to finding that the defendant, whose lowest IQ was 76, should have relied upon the pre-*Atkins* statute during trial instead of raising an *Atkins* claim); *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005) (holding that the defendant, who claimed that his IQ was 74, was procedurally barred from raising an *Atkins* claim, because the state had a pre-*Atkins* statute and he did not raise such a claim at trial); see also *In re Hill*, 437 F.3d 1080 (11th Cir. 2006) (finding that the defendant's habeas corpus application, including his *Atkins* claim, was time-barred, because he filed it twenty-nine months after the deadline); *Yeomans v. State*, 898 So. 2d 878 (Ala. Crim. App. 2004) (reviewing a mental retardation claim under plain error review, because the issue was not raised at the trial level and holding that it was not plain error to find that the defendant, whose IQ ranged from 67 to 83, was not mentally retarded); *Bishop v. State*, 882 So. 2d 135 (Miss. 2004) (denying an *Atkins* claim, because the defendant did not meet state requirements for a hearing on the issue of mental retardation; the defendant had only attached a school record and relatives' affidavits discussing his low intelligence instead of the required expert report); *Branch v. State*, 882 So. 2d 36 (Miss. 2004) (finding that an *Atkins* claim was procedurally barred, because it was not raised at trial and concluding that the defendant failed to meet the criteria for mental retardation, despite evidence of an IQ test administered at age five showing that the defendant was mildly mentally retarded).

42. See, e.g., *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006) (rejecting an *Atkins* claim, despite evidence that the defendant scored 68 on an IQ test at age thirty-four, because state law required low intelligence to be shown prior to age eighteen for the defendant to be considered mentally retarded); *Coulter v. State*, 227 S.W.3d 904 (Ark. 2006) (denying the defendant's petition to recall death sentence mandate, because testimony offered at trial showed that his IQ was 94); *Gray v. State*, 887 So. 2d 158 (Miss. 2004) (denying the defendant's *Atkins* claim and holding that he was not entitled to a hearing on the issue of mental retardation based on a psychology report that showed that the defendant had an IQ of 80); *Mitchell v. State*, 886 So. 2d 704 (Miss. 2004) (finding that the defendant's *Atkins* claim was without merit, because he served in the military, attended college for one semester, and was deemed of average intelligence during a two-hour interview with a clinical psychologist); *Ochoa v. State*, 136 P.3d 661 (Okla. Crim. App. 2006) (refusing to disturb the jury's finding that the defendant was not mentally retarded at the time of the trial, despite evidence that the defendant's IQ was lower at the time the crime was committed than at the time of trial and evidence that the defendant learned to read and write while incarcerated).

43. 854 A.2d 440 (Pa. 2004).

44. *Id.* at 442–43.

buried in a salvage yard.⁴⁵ Although the court noted that the issue of Williams's mental retardation was never litigated at trial and recognized that the trial court record could not be used to determine the issue, it concluded that Williams's death sentence should be affirmed, because it was "not the product of passion, prejudice, or any other arbitrary factor."⁴⁶ As of 2007, Williams was still on Death Row in Pennsylvania.⁴⁷

In *Ex parte Simpson*, the appellate court affirmed the trial court's finding that there was no cognizable claim of mental retardation, despite testimony by a defense expert that the defendant was borderline mentally retarded.⁴⁸ In that case, a jury convicted the defendant and sentenced him to death for burglarizing and killing an eighty-four-year-old widow.⁴⁹ Simpson, who was twenty at the time, was assisted by his sixteen-year-old wife, his thirteen-year-old cousin, and his younger brother.⁵⁰ The group bound the widow with duct tape and put her in the trunk of her car after she caught them burglarizing her home.⁵¹ After driving around with the widow in the trunk for an afternoon while they smoked formaldehyde-laced marijuana cigarettes, they drove to a river, tied the widow's legs to a cinder block, beat her with a shovel, and threw her into the river.⁵²

After the state court failed to hold an evidentiary hearing and relied instead on the written record in denying Simpson state habeas corpus relief, Simpson tried to submit more evidence into the record—primarily the testimony and report of a psychologist who had found that Simpson was mentally retarded.⁵³ Noting the trial court's finding that the psychologist's affidavit was untimely filed, unpersuasive, and should not be considered, the appellate court concluded that the trial

45. *Id.* at 444; see also Michael A. Fuoco, *Husband Held for Trial in Stabbing Death of Wife*, PITTSBURGH POST-GAZETTE, Feb. 1, 2000, at B3.

46. *Williams*, 854 A.2d at 449.

47. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 57 (Winter 2007), http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf.

48. 136 S.W.3d 660 (Tex. Crim. App. 2004).

49. *Id.* at 661.

50. *Id.* at 661–62.

51. *Id.* at 662.

52. *Id.*

53. *Id.* at 662–63. Dr. Windel Dickerson found that Simpson was mildly mentally retarded and filed his conclusion in an affidavit and videotaped statement. *Id.* at 662. At the age of fourteen, Simpson's IQ was 71, but, a year later, he received a score of 78. *Id.* at 664. A state-hired psychiatrist concluded that Simpson was not mentally retarded but instead had an antisocial personality disorder. *Id.* at 665.

2008]

JURY SELECTION POST-ATKINS

707

court had not abused its discretion and denied Simpson's mental retardation claim.⁵⁴

III. JURY SELECTION IN A CAPITAL CASE

Jury selection in a capital case is far more complicated and difficult than in a noncapital case.⁵⁵ It is beyond the scope of this Article to fully discuss the negative effects of death qualification or how excluding people opposed to the death penalty increases the likelihood of conviction and of decisional errors.⁵⁶ It is clear, however, that the "process effect" of asking about the death penalty before the question of guilt or innocence has been determined predisposes the jury to believe that the defendant is guilty.⁵⁷

Under *Witherspoon v. Illinois*, the prosecution in a capital case could exclude for cause anyone who would automatically vote against giving the death penalty no matter what the circumstances.⁵⁸ *Adams v. Texas*,⁵⁹ as interpreted in *Wainwright v. Witt*,⁶⁰ relaxed the "automatic" and "unmistakably clear" language of *Witherspoon*'s footnotes 9 and 21 and found that the proper standard for exclusion for cause was whether a prospective juror's views on capital punishment "prevent[ed] or substantially impair[ed]" his ability to fulfill his duties.⁶¹ While this relaxed the rigors of inquiry on one side of the question

54. *Simpson*, 136 S.W.3d at 666–67. It did not help that letters written by Simpson from prison, characterized by the court of appeals as "clear, coherent, and clever," were in the record. *Id.* at 666. For example, in these letters Simpson explained to a cousin how to sneak photographs of his three girlfriends into the prison. *Id.*

55. Some of this Part is drawn from other writings by the author. See ANDREA D. LYON ET AL., ILLINOIS CAPITAL DEFENSE MOTIONS AND JURY INSTRUCTIONS MANUAL (2d ed. 2005); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Andrea D. Lyon, *Defending the Life-or-Death Case*, A.B.A. LITIG. J., Winter 2006, at 45 [hereinafter Lyon, *Life-or-Death Case*].

56. See Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984).

57. See *supra* note 56.

58. 391 U.S. 510, 522 n.21 (1968).

59. 448 U.S. 38 (1980).

60. 469 U.S. 412 (1985).

61. Compare *Witherspoon*, 391 U.S. at 515–16 n.9 ("Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."), and *id.* at 522–23 n.21 ("[N]othing we say today [prevents excluding for cause venirepersons] who made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment" (emphasis in original)), with *Adams*, 448 U.S. at 45 ("[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror" (emphasis added)), and *Witt*, 469 U.S. at 424 ("[The] standard is whether the jurors views would prevent or substantially impair the performance of his duties as a juror" (emphasis added)).

somewhat, it complicated matters, because death qualification became a three-dimensional phenomenon soon after. First, venirepersons who are “substantially impaired” by virtue of their anti-capital punishment views must be identified. Second, those who are substantially impaired by virtue of having pro-capital punishment views must also be identified.⁶² Third, those venirepersons who are substantially impaired in considering lawful mitigating evidence must be identified.⁶³ Inquiry into a prospective juror’s thoughts and feelings on the death penalty is a far more complex process than simply asking whether a juror is for or against capital punishment. It is imperative to discover if the juror generally favors or opposes the concept and can listen to and consider both aggravating and mitigating evidence.

Under the Fourteenth Amendment, capital defendants have the right to an impartial jury for trial and sentencing.⁶⁴ This constitutional guarantee includes the right to an adequate voir dire to permit the identification of unqualified jurors.⁶⁵ Accordingly, voir dire should ascertain sufficient information about prospective jurors’ beliefs and opinions to identify those venirepersons whose minds are so closed by bias that they cannot apply the law as instructed and in accordance with their oath.

Relevant to this discussion is federal courts’ expressed concern about the influence of racial prejudice in capital sentencing. Beginning with *Furman v. Georgia*,⁶⁶ and continuing through *McCleskey v. Kemp*,⁶⁷ the Court has struggled with this issue, acknowledging in *McCleskey* that statistical evidence “indicates a discrepancy that appears to correlate with race.”⁶⁸ While declining to overturn the entire capital sentencing system due to this improper influence, the Court has attempted to tackle the problem in other ways. Principal among them is requiring special procedures in jury selection:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether

62. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that venirepersons must be questioned regarding potentially disqualifying pro-capital punishment views upon request by counsel).

63. *Id.* at 744 n.3 (Scalia, J., dissenting) (“Presumably, under today’s decision a juror who thinks a ‘bad childhood’ is never mitigating must also be excluded.”).

64. *Id.* at 727–28 (majority opinion); see also U.S. CONST. amend. XIV.

65. *Morgan*, 504 U.S. at 729 (majority opinion).

66. 408 U.S. 238 (1972) (plurality opinion).

67. 481 U.S. 279 (1987).

68. *Id.* at 312.

petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined towards petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.⁶⁹

Similarly, courts engaged in capital jury selection should be concerned with how religion and religious thought affect jurors' decisions about relative moral culpability. As Sunwolf stated, "[o]nce we realize that the law says we are entitled to know the 'scruples' of any juror on any issue relevant to our trial, it is clear that unless we have a working knowledge of religious beliefs, the right to voir dire cannot be competently exercised."⁷⁰

Studies consistently show that attorneys are far more likely to receive good information from jurors when they, rather than trial judges, ask questions.⁷¹ But the U.S. Supreme Court has never held that judges must allow defense counsel to question prospective jurors.⁷² However, in recent years, federal courts and many state courts have begun to recognize the importance of attorney participation in

69. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

70. SUNWOLF, *JURY THINKING* 10 (2005); accord *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) (upholding a prosecutor's peremptory challenge to a Jehovah's witness); *State v. Fuller*, 812 A.2d 389 (N.J. Super. Ct. App. Div. 2002) (holding that having a Muslim sounding name and dressing as a member of the Muslim faith were sufficient reasons for a peremptory challenge); *Casarez v. State*, 913 S.W.2d 468 (Tex. Crim. App. 1995) (en banc) (upholding the exclusion of two jurors who were members of the Pentecostal church). All of these decisions occurred in the context of *Batson* claims on appeal. See *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that the racial use of peremptory challenges is unconstitutional).

71. See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY Standard 15-2.4 (3d ed. 1996); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987); see also Harold v. Corwin, 846 F.2d 1148, 1152-54 (8th Cir. 1988) (Lay, C.J., concurring); *McGill v. Commonwealth*, 391 S.E.2d 597, 600 (Va. Ct. App. 1990); 2 CRIMINAL PRACTICE MANUAL § 52:5 (2007); Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 269-70 (1986); Pam Frasher, Note, *Fulfilling Batson and its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327, 1349-51 (1995).

72. In contrast, some courts have held that constitutional rights are implicated when attorneys are not allowed to participate in voir dire. See, e.g., *Maddux v. State*, 825 S.W.2d 511, 514 (Tex. Ct. App. 1992) ("The right to pose such questions is part of the *right to counsel under . . . the Texas constitution.*" (emphasis added)); see also *State v. Hankins*, 441 N.W.2d 854, 866 (Neb. 1989) ("The defendant . . . has the right to put pertinent questions to prospective jurors . . ."); *Oden v. State*, 90 N.W.2d 356, 358 (Neb. 1958) ("The usual and better practice . . . is to permit counsel to conduct the examination under the direction and supervision of the court."); *Strube v. State*, 739 P.2d 1013, 1016 (Okla. Crim. App. 1987) ("Rule Six, as well as the ABA Standards Relating to Trial Courts, § 2.12 (1976) and the ABA Standards for Trial by Jury, § 15-2.4 (1978), make clear that participation by . . . the defense in voir dire, at least in criminal proceedings, is a right.").

voir dire.⁷³ It may be unwise and unseemly for a trial judge to pull a juror in one direction or another,⁷⁴ for instance, while rehabilitating a juror who is clearly uncertain of his own views or is, perhaps, even dissembling.⁷⁵ More importantly, the judge simply cannot know enough of the facts from the defense's perspective—or indeed the prosecution's perspective—to do a thorough job.⁷⁶

Further, when judges conduct voir dire, they tend to ask leading questions that cause prospective jurors to agree.⁷⁷ For example, it is

73. See, e.g., *United States v. Ible*, 630 F.2d 389, 394–95 (5th Cir. 1980); *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977); see also *supra* note 72. Before the amendment to Illinois Supreme Court Rule 431, a defendant's right to an impartial jury did not include the right to examine jurors himself. *People v. Peebles*, 616 N.E.2d 294, 311 (Ill. 1993). However, the rule now requires judges to allow attorney-conducted voir dire:

The court shall conduct *voir dire* examination of prospective jurors by putting to them questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature of the charges. Questions shall not directly or indirectly concern matters of law or instructions. The court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

ILL. SUP. CT. R. 431(a).

74. For example, in *State v. Biegenwald*, the court found troubling the trial judge's insistence on "guiding" the potential jurors to the "right" answer:

The suggestion in the colloquy that there is a "correct" answer to the open-ended question "what are your views on the death penalty?" is most troubling. Although such an open-ended question is undeniably a proper jumping-off point for death qualification, the vapid response "it depends on the circumstances" in no way reduces the need for additional probing of a venireperson's views on the appropriateness of the sentence of death. The purpose of *voir dire* is not to elicit from a potential juror the correct answer; it is to draw out the potential juror's views, biases, and inclinations and to provide both counsel and the court the opportunity to assess the venireperson's demeanor. We reiterate that *voir dire* should proceed with the conscious object of providing court and counsel alike with sufficient information with which to challenge potential jurors intelligently—whether for cause or peremptorily.

The court's initial open-ended question and variations on the "it depends" response were too often followed by closed-ended, suggestive questions that, not surprisingly, elicited the obvious "correct" response.

594 A.2d 172, 192 (N.J. 1991).

75. Citizens are, unfortunately, not always candid during death qualification. They may be motivated to "get on" or "get off" the jury. See, e.g., *Gray v. Mississippi*, 481 U.S. 648, 676 (1987) (Scalia, J., dissenting) (stating that the "plurality . . . hints that . . . potential jurors may not have been properly excludable for cause because they were merely feigning objections to capital punishment in order to avoid jury service"). Although the dissent argued that "the Constitution certainly permits the exclusion for cause of potential jurors who lie under oath about their views of capital punishment," no one suggests such jurors do not exist. *Id.* at 676–77.

76. See *United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980) ("This court has previously stressed that voir dire examination not conducted by counsel has little meaning.")

77. See Cathy E. Bennett, *Psychological Methods of Jury Selection in the Typical Criminal Case*, CRIM. DEF., Mar.–Apr. 1977, at 11, 17.

common to hear a judge ask, “You can be fair and impartial, can’t you?,” to which the obvious appropriate answer is “yes.”⁷⁸ Few jurors ever dare to disagree. Social science studies suggest that jurors are acutely aware of even the most subtle cues or indications from the judge.⁷⁹ Fearing the court’s disapproval, jurors will usually respond to the judge’s queries in a manner that they believe to be acceptable to the court without actually considering their own personal, honest responses.⁸⁰

One way to elicit information from prospective jurors is to use a written questionnaire. There are certain beliefs or opinions that prospective jurors are willing to write about that they simply would not reveal in the intimidating atmosphere of open court, and a good questionnaire can assist both parties in honing their follow-up questions. A capital prosecution demands that exacting standards be met to ensure that the entire process is fair.⁸¹ As will be discussed more fully in the following Part, the need for highly accurate and complete information about prospective jurors’ attitudes toward mental retardation makes the need for meaningful attorney-conducted voir dire and the use of questionnaires paramount.⁸²

IV. SPECIAL CHALLENGES IN REPRESENTING CLIENTS WITH MENTAL RETARDATION IN CAPITAL JURY SELECTION

Much has been written about the special challenges of representing clients with disabilities,⁸³ and there are particular difficulties associated with representing clients with mental retardation in the criminal

78. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 504 (1965).

79. See Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1 (1982); Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467 (1987); see generally CARL R. ROGERS, *CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICE, IMPLICATIONS, AND THEORY* (1951).

80. Note, *Judges’ Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1275–78 (1975); see also *Quercia v. United States*, 289 U.S. 466, 470 (1933) (noting that “[t]he influence of the trial judge on the jury ‘is necessarily and properly of great weight’ and ‘his lightest word or intimation is received with deference, and may prove controlling’” (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894))).

81. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (“The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in the determination that death is the appropriate punishment’ in any capital case.” (quoting *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring))).

82. See *infra* notes 83–91 and accompanying text.

83. See, e.g., Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989-1990); see also JOHN PARRY, *MENTAL DISABILITY LAW: A PRIMER* 17–18 (5th ed. 1995).

context. First, capital clients may have learned to compensate for a lack of understanding by acting tough.⁸⁴ Defenders who ask clients to make decisions about how to proceed or attempt to explain the consequences of two different choices may get a response to the effect of “F*** a consequence! And f*** you too! I don’t give a s*** about no f***ing consequence!” It is possible that the client is actually angry, but it is equally (or more) likely that the client does not understand the meaning of the word “consequence” and that revealing this vulnerability would not be consistent with his culture and environment. The capital defender should be aware that the client is exhibiting a lack of understanding, not just anger.

Where mental retardation may not be obvious to the defender, who has had the opportunity to interact personally with the client over a long period of time, it must be even less obvious to jurors. Many mistakenly believe that one can merely *look* at a person and tell whether he is mentally retarded.⁸⁵ In fact, many jurors believe that a person with mental retardation looks like someone with Down syndrome or has other facial indicia of his disability, even though this is rarely the case.⁸⁶

Also, as a general matter, death-qualified jurors are hostile to mental health testimony, defenses, and mitigation. Further, death-qualified jurors more willingly accept aggravating circumstances than mitigating factors—many of which involve mental health issues.⁸⁷ Death-qualified jurors are also much less likely to accept the insanity defense,⁸⁸ believing it to be a “loophole allowing too many guilty peo-

84. See, e.g., LaJuana Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 305–07 (2003) (discussing how individuals with mental retardation often mask their disabilities by attempting to look and act like average people); see also Shruti S.B. Desai, *Effective Capital Representation of the Mentally Retarded Defendant*, 13 CAP. DEF. J. 251, 265–66 (2001).

85. Desai, *supra* note 84, at 266–67.

86. Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N.M. L. REV. 315, 334–35 (2003).

87. See James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors’ Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 279 (1988); see also Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 182 (2002) (finding that jurors death-qualified under *Witt* were more likely to endorse aggravators and jurors excluded under *Witt* were more likely to believe nonstatutory mitigators).

88. Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 92 (1984).

ple to go free.”⁸⁹ So, considering capital murder evidence of mental retardation is unsurprisingly difficult for the death-qualified jury.

Death-qualified juries have a tendency to believe that, if you cannot see something, it does not exist.⁹⁰ But merely asking a question about that problem will not prompt venirepersons to reveal their biases, just as one cannot expect to identify racists during voir dire by politely asking them to raise their hands. Few will publicly admit bias, particularly bias that may be quite unconscious.⁹¹ A capital defender has to design questions that will make it safe to reveal these biases. No one wants to be considered unfair—and the safest course is not to speak, not to reveal what one thinks or feels to avoid the possibility of such a label. The challenge for the defender is to ask revelatory questions but not to judge the answer. No one, including the author, is free from bias, and it is important to keep that in mind. The defender does not need assent to her own opinion—gaining such assent from the venire is pointless. Instead, capital defenders need to know what prospective jurors think or feel, what their experiences have been with persons with mental retardation, how they perceive mental health experts, and how they will make decisions about whom to believe if there is conflicting evidence. The only way to find that out is to ask and to listen to the answers.

V. APPROACHES TO JURY SELECTION WHEN PART OF THE PROPOSED MITIGATION INCLUDES MENTAL RETARDATION

In order to speak effectively with jurors about the many sensitive issues in capital cases, individual, sequestered voir dire is necessary. In the interests of a fair and impartial trial and due process of law as guaranteed by the U.S. Constitution, a searching inquiry must be made of the prospective jurors to uncover any bias that may exist. Such an inquiry should be unfettered by natural human reluctance to admit before fellow jurors that one would be influenced in his verdict by socially unacceptable feelings or viewpoints. Nowhere is this ten-

89. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 *LAW & HUM. BEHAV.* 31, 45 (1984).

90. William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 *CORNELL L. REV.* 1476, 1498–99 (1998) (finding that jurors focused on details of physical evidence and forensic testing).

91. See SUNWOLF, *supra* note 70, at 30–31 (discussing an “implicit association interactive test,” which may reveal a person’s unconscious biases); see also SUNWOLF, *PRACTICAL JURY DYNAMICS: FROM ONE JUROR’S TRIAL PERCEPTIONS TO THE GROUP’S DECISION-MAKING PROCESSES* 162–63 (2004) (noting that, while most jurors’ prejudices are unconscious or unclaimed, they can be easily activated).

dency to give socially acceptable answers more pronounced than when the issue involves potential jurors' attitudes toward capital punishment, mitigation in general, and mental health issues, including mental retardation. Individual, sequestered voir dire permits the parties to uncover the information needed to convince the court to exclude venirepersons for cause.⁹² Indeed, some courts now require individual, sequestered questioning on at least capital punishment related questions.⁹³

After all, it is not only the facts of a case, but also how people *feel* about those facts that count. Needless to say, how jurors feel about the facts is profoundly affected by who they are. The process of jury selection is nearly as important as the results of that selection, particularly in a death penalty case. "Jury selection has three main goals: 1) to elicit information from jurors, 2) to educate jurors on the defense case and defuse the prosecutor's case, and 3) to establish a relationship between the jurors and the defense attorney and his client."⁹⁴ Perhaps the single most important thing a lawyer can do in furtherance of these goals is to listen. Some psychologists refer to this skill as attending behavior, and it includes a relaxed, attentive posture, eye contact, and verbal following.⁹⁵ Verbal following is paying attention to the path that the prospective juror's answers are taking, noticing and following up on gaps in that path, and ensuring that the meanings of words that may be subjective are ascertained. For example, if a juror says he has no experience with mental retardation but then says, "I think they should bring back the short bus at schools though," there is a gap. Is the juror trying to be funny? Is he referring to some incident between a behaviorally disturbed child and his child? The questioner needs to recognize that gap and then ask nonjudgmental and open-ended questions. As previously stated, listening is key.

But listen to what? What questions should the capital defender ask, and how should she ask them? This depends on a number of factors, the most central of which is the theory of the case, including the theory of mitigation. One of the major differences between trial prepara-

92. See Nietzel & Dillehay, *supra* note 79; Nietzel et al., *supra* note 79.

93. In *Ferguson v. Commonwealth*, the court held that "separate examination of jurors or prospective jurors in circumstances of potential prejudice is a matter of procedural policy." 512 S.W.2d 501, 503 (Ky. 1974). The court went on to "suggest to the trial courts that they give thought to the use of separate examination of jurors in appropriate circumstances." *Id.* at 503 n.1. See also *Hovey v. Superior Court*, 616 P.2d 1301, 1354 (Cal. 1980) (stating that, in capital cases, the "portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration").

94. Bennett, *supra* note 77, at 11.

95. ALLEN E. IVEY, *MICROCOUNSELING: INNOVATIONS IN INTERVIEW TRAINING* 35-44 (1971).

tion in a capital case and a noncapital case is that the theory of the case must work with the theory of mitigation.⁹⁶ Some theories of the case flow easily into the sentencing phase. For example, if the defense is insanity, the mitigation presentation will likely be an extension of the defense at trial. If the capital defendant is convicted of felony murder—say in the course of an armed robbery where the victim went for the gun—part of the mitigation may focus on the unintentional nature of the crime.⁹⁷ If the case had a vigorous “wrong guy” defense, the capital defender must face up to the fact that the jury rejected that defense and then present mitigation to the jury out of respect for the awesome challenge facing them—choosing punishment.

In a case where mitigation relies in whole or in part upon evidence of the defendant’s mental retardation, there is an extra challenge—the generally held belief that a person who can stop for a red light, run from a crime, or lie to escape punishment cannot be mentally retarded.⁹⁸ Of course this is not true—most seven-year-olds know to stop for a red light and will try to get out of being punished for a transgression, but society does not hold them to the same behavioral standards as twenty-five-year-olds. The challenge is to find a way to communicate this to a jury, sound out their feelings, and not offend them by patronizing them or, worse, judging their answers.

Jury selection is not the time to lecture. It is the time to learn and gently awaken the jury to certain issues; but the jurors are the center of the process, not the lawyer. The venire should be informed, preferably by the trial judge, that the only good juror is an open and honest one and that some might be great jurors for one case but not for another, simply because they are the products of their life experiences. The attorney should communicate empathy, respect, and congru-

96. See Lyon, *Life-or-Death Case*, *supra* note 55.

97. For example, it is felony murder even if the victim died of a heart attack during an armed robbery, but it is not the cold-blooded “worst of the worst” case one thinks as deserving of the death penalty.

98. The *Atkins* Court explained as follows:

Because of their impairments, however, by definition [persons with mental retardation] 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.

Atkins v. Virginia, 536 U.S. 304, 318 (2002).

ence.⁹⁹ Unfortunately, attorneys often employ techniques that have closing effects.¹⁰⁰ Closing effects are exactly what they sound like: they hinder communication and prevent learning what the true opinions and feelings of the prospective juror are.¹⁰¹

Carl Rogers tells us that each person has worth and dignity in his own right.¹⁰² This is an important attitude to have in voir dire so that the questioner's responses are empathic, not judgmental. For instance, suppose the case involves the use of a handgun (an issue that has enormous emotional response from the citizenry), and, when the attorney asks a juror about his feelings about handguns, he states that "Handguns are why there is so much crime." If the questioner's response is "so you're against handguns," the questioner has labeled the juror and judged him. Whether the judgment is good or bad is irrelevant, because the other jurors have seen this and it is likely to make them uncomfortable. This response is also problematic, because it leaves no room for the juror to respond. A response like "I get the feeling that handguns make you feel afraid or nervous, am I right?" is much more likely to get information, and the attorney will not have judged and possibly cut off communication with this potential juror.

Good manners are also very important, and the questioner should not be too familiar with a prospective juror.¹⁰³ While we are in a first-name society these days, this should not extend to the jurors. In addition, while one must rely to some extent on the demographic data one has (for instance, knowledge of a prospective juror's neighborhood), stereotypes are dangerous. Perhaps because of the pressure of having to screen a large number of people in so short a time, many attorneys

99. There are four ways to do this. The first is self-disclosure. Jurors will feel more comfortable telling you what they feel if you give them permission to by talking about how you feel (briefly, or you will get stopped by the judge or prosecutor). The second method of effective juror-centered voir dire is the use of open-ended questions accompanied by open body language. Jurors have no trouble hearing what the "right" answer is if they are asked close-ended questions or asked with the questioner's opinion obviously displayed in voice or manner. The third method is reflection. This means reflecting back to jurors what the questioner perceives them to be feeling, thus giving jurors assurance that the questioner is listening and giving them permission to continue to speak. If it is not clear what jurors are feeling or thinking, the fourth method, clarification, should be employed. Attorneys should not think that because they mean one thing by a certain word or phrase that jurors think the same thing. *See* Bennett, *supra* note 77, at 16-17.

100. They include (1) close-ended questions; (2) false reassurance (telling jurors not to feel what they feel); (3) advice (which makes jurors feel belittled or condescended); and (4) interpretation (analysis of jurors' behavior). *Id.* at 17-19.

101. *See id.*

102. *See generally* ROGERS, *supra* note 79.

103. JOHN BRADY, *THE CRAFT OF INTERVIEWING* 49 (1976) ("The interviewer should try to build an atmosphere of mutual trust and respect, or risk ruptured communication.").

2008]

JURY SELECTION POST-ATKINS

717

during voir dire rely upon hunches, jumping to conclusions that have little or no basis in fact.¹⁰⁴

It is important to ask the prospective jurors simple and clear questions about their conceptions of mental retardation and if they see a difference between legal responsibility and moral culpability.¹⁰⁵ Similarly, attorneys should not follow up the wrong answer with a corrective leading question, such as “if the judge told you that a person can be mentally retarded without it showing physically and that mental retardation is mitigation, could you follow that instruction?” Questions like this only get assent, not information. A better follow up would be “Sometimes things can be seen with the naked eye, and sometimes they cannot. Can you think of some examples where that might be true?” Then, assuming that the juror can think of some examples, his answer will help the attorney make decisions on how to proceed.

CONCLUSION

If the questioner does a good job of asking open-ended, nonjudgmental questions, it should be possible to ferret out prospective jurors’ biases and misconceptions. This will allow the capital defender to intelligently exercise peremptory challenges, make cogent strikes for cause, and, most importantly, communicate effectively with those who have the client’s life in their hands.

104. Richard Fear explains as follows:

Many [people], for example, have a temptation to classify people according to physical appearance. [An attorney] may jump to the conclusion that the man with the square jaw is a person with great determination, [that someone] with red hair has a hot temper, or that the individual with eyes set rather close together is not to be trusted. Many studies, of course, have shown that such conclusions have not the slightest validity.

RICHARD A. FEAR, *THE EVALUATION INTERVIEW* 35 (1973) (alterations in original).

105. *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002).

APPENDIX

Sample Questionnaire for Jurors Regarding Mental Retardation

1. Have you, or has someone close to you, ever known a person with mental retardation? ___Yes ___No

a) If your answer was yes, can you please tell us about that person and what his or her relationship is to you?

b) If your answer was no, can you please tell us what you know about mental retardation?

2. Do you think mental retardation shows on a person's face?

___Yes ___No

Please explain your answer:

3. Do you think some people are more responsible for their actions than others? ___Yes ___No

Why do you feel the way that you do?

4. Have you heard the term "abuse excuse"? ___Yes ___No

If your answer was yes, what does that phrase mean to you?

2008]

JURY SELECTION POST-ATKINS

719

5. Why do you think some people express more emotion than others?

6. Have you ever had the occasion to work with or professionally consult a mental health professional (psychiatrist, psychologist, social worker, or other counselor)? ___Yes ___No

a) If your answer was yes, please explain.

b) If your answer was no, what are your thoughts or feelings about people who do consult mental health professionals?

720

DEPAUL LAW REVIEW

[Vol. 57:701