

ually both the crime and the defendant when determining if death is a fitting punishment. Echoed are the words of Chief Justice Burger:

Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as “the conscience of the community,” juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors [*Furman v. Georgia*, 408 U.S. 238, p 388 (1972)].

In *Gregg v. Georgia*, 428 U.S.153 (1976), the Supreme Court opined that capital punishment does not violate the Eighth and Fourteenth Amendments if safeguards are in place to protect against capricious and arbitrary use of the death penalty. Justice Stewart, writing for the majority in *Gregg*, stated that a judge and jury need “accurate sentencing information” because it “is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die” (*Gregg*, p 190). Thus, mitigating evidence represents not only a right available to defendants, but a safeguard to the state’s vital interest in the constitutional application of its most extreme (and controversial) form of punishment.

In *Schriro v. Landrigan*, Mr. Landrigan refused to allow mitigating testimony to be presented at trial, interfered with his attorney’s efforts to present such information, and asked to “bring [the death sentence] on.” Although the majority cites his behavior and words as evidence of a knowing and intelligent choice, the dissent contextualizes them as indicative of the vital and missing mitigating evidence that ought to have been scrutinized before any sentence of death.

Significant mitigating evidence—evidence that may well have explained respondent’s criminal conduct and unruly behavior at his capital sentencing hearing—was unknown at the time of sentencing. Only years later did respondent learn that he suffers from a serious psychological condition that sheds important light on his earlier actions. The reason why this and other mitigating evidence was unavailable is that respondent’s counsel failed to conduct a constitutionally adequate investigation [*Schriro*, p 1944].

The Court’s present opinion enables a capital defendant to waive the right to present mitigating evidence and to do so even absent a knowing and intelligent decision-making process. This position is seemingly dissonant with the high value and vital role identified for mitigating evidence in prior decisions. The reinstated death penalty, as envisioned in *Gregg v. Georgia*, was based on the addition of new procedures and safeguards to minimize ambiguity in death

sentencing, and mitigating evidence seemingly played an important role in that endeavor. How then can a potentially unknowing and unintelligent waiver of mitigating evidence comport with the Court’s prior rulings in relation to capital punishment? It is difficult to assimilate the Court’s present ruling into the existing case law surrounding mitigating evidence and the death penalty, leaving lower courts the difficult task of synthesizing these various rulings into a workable scheme. As *Chapman v. Commonwealth*, 2007 Ky. LEXIS 178 (Ky. 2007), illustrates, state courts continue to struggle with this difficult issue and would clearly benefit from a well-defined role for mitigating evidence in capital sentencing. It is to be hoped that future opinions will resolve this existing paradox.

## Mental Retardation and the Death Penalty: Addressing Various Questions Regarding an Atkins Claim

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### An Appeals Court Holds That States Must Give a Hearing to Prisoners Who Show A Prima Facie Case of Mental Retardation in Death Penalty Cases

In *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit reviewed the grant of *habeas* relief from a death sentence based on a petitioner’s claim of mental retardation. On appeal, the State of Texas argued that the lower court erred by not dismissing the *habeas* petition as untimely and in ruling that the petitioner was mentally retarded. The court affirmed the finding of mental retardation, but remanded the matter on the question of timeliness.

#### Facts of the Case

In May 1994, Jose Rivera was convicted and sentenced to death for murdering a three-year-old boy in

Texas. After denial of his initial state and federal *habeas* petitions, the court set his execution for August 6, 2003. On June 20, 2003, he filed another state *habeas* petition claiming mental retardation and ineligibility for execution as outlined by the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). Following the dismissal of the state petition, he sought authorization from the Fifth Circuit Court of Appeals to file a successive federal *habeas* petition.

On August 6, 2003, the circuit court denied Mr. Rivera's request, citing the failure to make a *prima facie* case of mental retardation, since it could not consider mental retardation evidence that had not been presented at the state level. Accordingly, on the same day, he filed a state *habeas* petition and presented mental retardation evidence to the state court. After the state court rejected this petition, he again sought authorization to file the federal *habeas* petition, since the Fifth Circuit appellate court could then consider the mental retardation evidence.

On August 6, 2003, the circuit court found that Mr. Rivera had made a *prima facie* case of mental retardation, authorized the successive petition, and stayed his execution. He filed the federal *habeas* petition with the district court on August 11, 2003. The State of Texas moved to dismiss the petition as untimely under the statute of limitation guidelines of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). The district court denied the state's motion and found him to be mentally retarded. The district court's ruling, however, failed to address the timeliness of the petition. Consequently, the state appealed the decision arguing that the district court erred by not dismissing the petition and in finding him mentally retarded.

#### *Ruling and Reasoning*

The Fifth Circuit Court of Appeals reviewed the matter and ruled that Mr. Rivera was mentally retarded, but remanded the case for reconsideration of timeliness of the petition. The circuit court noted that while the statute of limitations of the AEDPA had expired by August 11, 2003, a "court can allow an untimely petition to proceed . . . in extraordinary circumstances." The appellate court further noted that the issues of petition timeliness and his mental retardation blended "inseparably," since the circumstances of timeliness related to whether he was mentally retarded.

Upon reviewing whether Mr. Rivera had presented a *prima facie* case of mental retardation, the circuit court examined the psychiatric report proffered by his defense. The court found that since the expert report considered his prior medical records, school records, and affidavits from his teachers and family members that raised serious concerns about mental retardation, it was unreasonable for the state court to find no *prima facie* case of mental retardation. Thus, the circuit court held that the state court's decision deprived him of a fair opportunity to develop his claim.

In support of this finding, the circuit court highlighted similarities between *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), which limited eligibility for the death penalty by prohibiting the execution of incompetent individuals. According to the circuit court, both cases, while limiting eligibility for the death penalty, failed to provide procedures for states to follow in implementing those limitations.

The circuit court viewed this case in relation to *Atkins*, as analogous to the U.S. Supreme Court's application of *Ford* in *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007). In *Panetti*, a petitioner made substantial showing of incompetence for execution, but the state court failed to provide him with procedures conforming with *Ford*. That failure rendered the state court's decision denying the petitioner's incompetency claim an unreasonable application of established federal law. Comparing *Panetti* to the instant case, the circuit court found that when a petitioner makes a *prima facie* showing of mental retardation, as Mr. Rivera did, a state court's failure to allow an opportunity to develop that claim also represents unreasonable application of established federal law.

Further, the circuit court distinguished this case from its earlier case, *Moreno v. Dretke*, 450 F.3d 158 (5th Cir. 2006), in which it affirmed the dismissal of a *habeas* petition for failure to make a *prima facie* case of mental retardation. In that case, a petitioner submitted an IQ of 64; however, the test administrator cited the poor examination effort by the petitioner and the lack of independent evidence of adaptive deficits except for the petitioner's self-report. Conversely, Mr. Rivera provided stronger evidence of mental retardation, including school and medical records and affidavits by family members and teachers. Accordingly, the circuit court found that there was no error in considering his retardation claim.

Next, the circuit court considered whether the district court had erred in finding that Mr. Rivera was mentally retarded. The circuit court reviewed the three elements necessary to establish mental retardation, as outlined by the Texas state court decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004): a significantly subaverage level of intellectual functioning, related limitations in adaptive functioning, and onset before the age of 18.

The court pointed out that Mr. Rivera had a Wechsler Adult Intelligence Scale III (WAIS-III) score of 68. Texas argued that the test was unreliable in light of cultural factors, since he was bilingual and processed “English and Spanish in competition,” which “dragged down” the WAIS-III score. In rejecting this argument, the circuit court found compelling psychiatric testimony presented to the lower court that he had no difficulties in communicating and that the WAIS-III accounted for bilingual examinees. As such, the circuit court agreed that “the clinician must ultimately make the decision” regarding the circumstances of the administration of the test.

The circuit court also disagreed with the state’s argument that the district court had erred by rejecting Mr. Rivera’s four pre-*Atkins* IQ scores of 70, 85, 92, and 80. Noting that these scores were not from Wechsler tests, but were prison screening tests, the circuit court agreed that correlation with WAIS scoring was questionable. The circuit court found that these scores were not rejected, but were weighed for their significance and lacked “a degree of sufficient reliability to satisfy this Court.”

The circuit court further disagreed with the state’s arguments that Mr. Rivera’s adaptive functioning deficits were due to substance abuse before age 18 and not to mental retardation. The court indicated that mental retardation has numerous etiologies and that since the evidence demonstrated adaptive functioning deficits before age 18, it was plausible that those deficits were due to mental retardation. Consequently, the circuit court held that no error occurred in finding that he was mentally retarded.

*Discussion*

*Rivera* provides an instructive perspective on the challenges facing courts adhering to the prohibition of executing mentally retarded individuals. As stated by the court in *Rivera*, *Atkins* provides a blanket prohibition without providing procedural

guidelines to state courts. As such, state courts must mull over what constitutes mental retardation and re-examine preexisting legislation in the context of *Atkins*. In addition, federal provisions, such as the AEDPA, which limit abuse of *habeas* petitions, may become problematic when applied to mentally retarded petitioners. Given the limited intellectual capabilities of mentally retarded petitioners, it is not difficult to imagine their challenge in adhering to such provisions, even with the assistance of counsel.

*Rivera* also demonstrates the challenge facing courts in defining mental retardation in their respective jurisdictions, especially in states where the legislature has remained silent on the issue. Concerns such as determining the measures that qualify to establish intellectual capacity, as well as the impact of an individual’s specific demographic background on these measures are considered. Further, during determinations of mental retardation, courts must decide what weight should be given to various etiologies, including substance abuse, that affect an individual’s adaptive functioning.

Consequently, forensic psychiatrists must be aware of these various concerns as they navigate the landscape set forth by *Atkins*. Knowledge of the criteria required to establish mental retardation in a particular jurisdiction is critical before offering an opinion on the question. Inevitably, legal objections to mental retardation claims will arise based on an array of issues. Thus, psychiatric reports should consider particular characteristics of the examinee, such as cultural factors and circumstances surrounding IQ testing that may affect the mental retardation claim. As seen in *Rivera*, the psychiatric report is likely to be the linchpin of a mental retardation claim. Careful clinical consideration of these questions may determine whether the mental retardation claim is heard by the courts.

**Sum of Errors and Due Process Owed to Mentally Ill Defendant**

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