

## Defining Mentally Ill and Mentally Retarded

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### **Murder Conviction Reversed Due to Failure of the Court to Define Mentally Ill and Mentally Retarded**

In *Foster v. State*, 646 S.E.2d 838 (Ga. 2008), the Supreme Court of Georgia unanimously reversed a murder conviction because the trial court neglected to define mentally ill and mentally retarded for the jury. Without these definitions, the jury was unable to make an appropriate assessment of these conditions and give proper consideration to the potential verdicts.

#### *Facts of the Case*

On September 27, 2005, Calvin Wayne Foster was arrested and charged with the malice murder of his estranged wife and possession of a firearm during the commission of a crime. The Fosters had been together for eight years. At the time of the offense, they were separated, and Mr. Foster informed police that there had been domestic problems. Once he was in custody, he confessed to the crime.

At the trial, psychologist James Stark, PhD, testified that Mr. Foster had learning disabilities, a mental age of about 14 years, and a history of depression and anxiety. Dr. Stark also testified that Mr. Foster had most likely been temporarily insane and had suffered a “transitory psychotic episode.” Dr. Stark opined that Mr. Foster did not know the difference between right and wrong when he killed his wife. On cross examination, however, the state referenced an earlier evaluation by Dr. Stark, who concluded that Mr. Foster had probably known right from wrong at the time of the offense. A second forensic psychologist opined for the state that Mr. Foster was able to determine right from wrong at the time of the crimes. Neither Dr. Stark nor the state psy-

chologist believed that Mr. Foster was acting on a delusional compulsion.

The jury was instructed to consider five possible verdicts: guilty, not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty but mentally retarded. Insanity was defined as the inability to distinguish right from wrong. The court authorized the jury to find that Mr. Foster failed to prove his insanity by a preponderance of the evidence and that the evidence was sufficient to find him guilty beyond a reasonable doubt. They were not provided, however, with the definitions of the terms mentally ill and mentally retarded. Mr. Foster was convicted and sentenced to life imprisonment for murder and a five-year consecutive term for firearm possession.

#### *Ruling and Reasoning*

On appeal, the state supreme court unanimously reversed the murder conviction. Presiding Justice Carol Hunstein wrote that the fact finder has two responsibilities. First, the jury determines whether the evidence meets the burden of proof to establish that defendant is mentally ill or mentally retarded. They then consider five possible verdicts: guilty, not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty but mentally retarded. By state law, the jury should have been instructed on the definitions and consequences of the five verdicts. The state supreme court found that the trial court had failed to define mentally ill and mentally retarded. The failure to do so is considered a harmless error if there is no evidence to support the omitted verdicts. In this case, there was ample evidence that Mr. Foster had mental retardation, depression, and anxiety. Without the definitions of mental illness and mental retardation, the state supreme court found that the jury was unable to make a proper assessment of whether the evidence met the burden of proof to establish these conditions. Furthermore, the jury was unable to give proper consideration to the potential verdicts of guilty but mentally ill or guilty but mentally retarded. Justice Hunstein opined: “We cannot conclude that the jury was not misled or confused under these circumstances and because the instructions given failed to comply with statutory directives, Mr. Foster’s conviction must be reversed” (*Foster*, p 841).

#### *Discussion*

*Foster v. State* highlights several possible verdicts when juries decide criminal responsibility. Verdicts

that could negate criminal responsibility vary between jurisdictions and require clear instructions to the jury, as psychiatric, legal, and especially mental health law terminology is often opaque to the average person. The jury is responsible for determining whether the defendant established the presence of mental illness or retardation and therefore the ultimate issue of responsibility. To make this decision, the jury must be instructed as to the legal definitions of these conditions. In *Mack v. State*, 425 S.E.2d 671 (Ga. Ct. App. 1992), for example, the verdict was reversed for failure to instruct a jury clearly on an option of guilty but mentally retarded when there was supporting evidence of the diagnosis.

Experts should know the alternative verdicts for their jurisdiction that could negate or mitigate criminal responsibility. In Georgia, for example, the insanity defense requires that the defendant be unable to distinguish right from wrong or suffer from a delusional compulsion in which he acted logically within the deluded state of mind (*Stevens v. State*, 350 S.E.2d 21 (Ga. 1986)).

Furthermore, the role of the expert in providing opinions on diagnosis or criminal responsibility differs between jurisdictions. Several cases have delineated the role of the expert from that of the fact finder. In *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967), the Court emphasized the jury's role in determining responsibility: "Our society has chosen not to give this decision to any professional elite, but rather to 12 lay representatives of the community." To accomplish this, the Court required instruction to the jury to consider all verdict options when a defense of insanity was introduced. In *McDonald v. United States*, 312 F.2d 847 (1962) and *Hawkins v. United States*, 310 F.2d 849 (1962), Judge Bazelon added that the jury also decides whether the evidence presented by the defense meets the legal definition for mental disease or defect:

Whether the defendant had a mental disease which will excuse him from criminal responsibility for his unlawful act is an issue of ultimate fact for the jury. What psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls (*McDonald*, p 851).

This is a legal standard to be applied by the jury to all the evidence, professional and lay, bearing on the defendant's

mental condition . . . . Given this information, under proper instructions, the jury can not only make its own decision as to that ultimate issue but also can decide for itself whether the defendant's act was the product of the mental disease, if one be found to exist (*Hawkins*, pp 851–2).

The more recent case of *Atkins v. Virginia*, 536 U.S. 304 (2002), further addressed mental retardation, leaving it to the states to define the condition. Most states have established a definition similar to the clinical definition of mental retardation in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR): significantly subaverage intellectual functioning with an IQ of 70 or less and impairments in adaptive functioning that manifest before the age of 18.

*Foster v. State* demonstrates and strengthens ongoing precedent. The jury must be given the legal definitions of mental disease and mental retardation, particularly when lay people are responsible for determining whether the evidence meets the burden of proof to establish conditions that determine potential verdicts.

## Atkins Progeny and Double Jeopardy

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### Atkins Progeny Case: Relitigation of the Determination of Mental Retardation Precluded by Double Jeopardy

In *Bies v. Bagley*, 519 F.3d 324 (6th Cir. 2008), the Sixth Circuit Court of Appeals precluded relitigation of the finding of mental retardation based on the Double Jeopardy Clause of the Constitution. They affirmed the decision of the Southern District Court of Ohio that vacated the death sentence of petitioner Michael Bies, in light of the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

#### Facts of the Case

In 1992, Michael Bies and a friend attempted to rape a 10-year-old boy and beat him to death when