

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

he resisted. On October 13, 1992, an Ohio jury found Mr. Bies guilty of kidnapping, attempted rape, and murder. During the sentencing phase of his trial, Donna Winter, PhD, a licensed clinical psychologist, testified that Mr. Bies had an IQ of 69 and is “mildly to borderline mentally retarded.” This finding was supported by a letter from Myron S. Fridman, PhD, another licensed clinical psychologist whose diagnosis of Mr. Bies was “marginally functioning, mildly mentally retarded.” Mr. Bies argued that his mental retardation was a mitigating factor; nevertheless, on October 30, 1992, the trial court sentenced him to death.

Mr. Bies appealed his conviction and sentence to the Ohio Court of Appeals and eventually to the Ohio Supreme Court. Both courts affirmed the death sentence and held that Mr. Bies was mentally retarded. The state supreme court relied heavily on Dr. Winter’s diagnosis in establishing the latter.

On June 20, 2002, the Supreme Court, in *Atkins v. Virginia*, held that executing the mentally retarded violates the Eighth Amendment’s ban on cruel and unusual punishment. As a result, Mr. Bies challenged his death sentence in a *habeas* petition to federal court.

#### *Ruling and Reasoning*

The Sixth Circuit affirmed the decision of the district court to grant *habeas* relief to Mr. Bies, and held that relitigation of the finding of mental retardation was precluded by the Double Jeopardy Clause of the Constitution. Sixth Circuit Justice Eric Clay opined that Federal *habeas* relief arose from the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA), which protects a state court defendant if the court’s decision “resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” In *Atkins*, the Supreme Court held that executing the mentally retarded violates the Eighth Amendment’s ban on cruel and unusual punishment. The Sixth Circuit reasoned that *Atkins* rendered Mr. Bies constitutionally ineligible for the death penalty.

Regarding the Double Jeopardy Clause, Justice Clay held that the U.S. Supreme Court precedent permits a person to challenge a death sentence under two double jeopardy doctrines. The first is articulated in *Ashe v. Swenson*, 397 U.S. 436 (1970), which held that “when an issue of ultimate fact has once

been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Ashe* applied the collateral estoppel doctrine to the Double Jeopardy Clause. Collateral estoppel (issue preclusion) prevents relitigation of an issue in a suit on a different cause of action involving a party to the first case.

The Sixth Circuit held that Mr. Bies had proved each of the four elements necessary to contend collateral estoppel—that is, he proved that the question of his mental retardation was raised and litigated in the prior proceeding; determination of this issue was necessary to the outcome of that proceeding; the prior proceeding resulted in a final judgment based on the presented facts and application of the law; and the government had a full and fair opportunity to litigate the question of whether Mr. Bies was mentally retarded.

The second doctrine stems from *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). Under *Sattazahn*, once a judge or jury has rejected the death penalty and sentenced the defendant to a life sentence, jeopardy applies to the verdict and sentence.

In *Bies*, the court issued a finding of fact that entitled Mr. Bies to a life sentence based on *Atkins*. On direct appeal of Mr. Bies’ sentence, the Ohio Supreme Court found that Mr. Bies is mentally retarded, according to the clinical definition. Justice Clay opined that this rendered Mr. Bies constitutionally ineligible for the death penalty, amounting to an “acquittal” of the death penalty under *Sattazahn*. Thus, jeopardy applied to the determination that Mr. Bies was mentally retarded.

#### *Discussion*

The double jeopardy rule arises from the Fifth Amendment to the United States Constitution: “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” This clause is intended to limit harassment or oppression by the government in repeated prosecution for the same offense. As explained in *Ashe*: “When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit” (*Ashe*, p 443). This prevents retrial for the same crime after an acquittal or conviction and being punished multiple times for the same offense.

When a court makes a finding of fact that is sufficient to establish legal entitlement to a life sentence,

the Double Jeopardy Clause precludes retrial of the appropriateness of the death penalty. Therefore, when the Ohio Supreme Court entered a finding that Mr. Bies was mentally retarded, that finding barred any future trial regarding whether Mr. Bies could be executed.

Although the Fifth Amendment initially applied only to the federal government, the U.S. Supreme Court has ruled that the Double Jeopardy Clause applies to the states, as well, through the Fourteenth Amendment (*Benton v. Maryland*, 395 U.S. 784 (1969)). Jeopardy attaches in a jury trial once the jury is sworn in. In a nonjury trial, jeopardy attaches at the swearing in of the first witness or once the first evidence is presented.

Another important and related doctrine is collateral estoppel. Collateral estoppel is a situation in which judgment in one case prevents a party to that suit from trying to litigate the issue in another course of legal action. In other words, once decided, the parties are permanently bound by that ruling. This common law doctrine is intended to protect defendants from the inequity of having to defend the same charge repeatedly. To bar relitigation of a charge under the collateral estoppel doctrine, a party must have had full and fair opportunity to litigate it.

*Bies* does not involve the substance of *Atkins* or mental retardation. Following the *Atkins* decision, some states faced the need to review postconviction capital punishment cases in which the question of mental retardation was raised. In affirming the death sentence for Mr. Bies, the Ohio Supreme Court also held that Mr. Bies was mentally retarded. Mr. Bies invoked *Atkins* in an attempt to bar his execution. The federal appeals court for the Sixth Circuit ruled that the Ohio Supreme Court had accepted that Mr. Bies was mentally retarded and that double jeopardy law prohibited Ohio courts from conducting a hearing to determine whether Mr. Bies met the Ohio standard for mental retardation.

#### Subsequent Developments

The State of Ohio is challenging the ruling in an appeal to the U.S. Supreme Court. In January 2009, the Court granted *certiorari*. The Ohio Attorney General's office is presenting three reasons for appeal. First, they contend that the Double Jeopardy Clause's protections attach only following an acquittal from the death penalty (*Arizona v. Rumsey*, 467 U.S. 203 (1984)). Acquittal is a not-guilty verdict or

a failure of the prosecution to prove that the death penalty is appropriate. Because the Ohio state court affirmed conviction and the death penalty, they argue that Double Jeopardy does not apply to this case. Second, the state contends that a postconviction proceeding on the question of mental retardation does not twice put the defendant at jeopardy of additional criminal sanctions. Finally, they maintain that the Sixth District's use of the collateral estoppel doctrine is incorrect, since Mr. Bies' diagnosis of mental retardation was not established as fact, based on the state definition of mental retardation. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the Ohio Supreme Court defined mentally retarded as significantly subaverage intellectual functioning, significant limitations in two or more adaptive skills, and an onset of these disabilities before the age of 18. The state contended that Dr. Winter's diagnosis appeared to rely on Mr. Bies' IQ without an analysis of adaptive skills or functional impairment. Oral arguments are scheduled for April 2009.

## No Duty to Warn, but Common Law Duty of Care

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### Application of the Common Law Duty of Care When a Therapist, With No Duty to Warn, Responds to a Question About Whether the Therapist's Patient Has a Weapon

In *Robinson v. Mount Logan Clinic, LLC*, 182 P.3d 333 (Utah 2008), the Utah Supreme Court reversed the First District Court's ruling that granted summary judgment to the defendant who had asserted that section 78-14a-102 (1) of the Utah Code shields from liability a therapist who erroneously informs a police officer that her patient is not armed.

#### Facts of the Case

A therapist at the Mount Logan Clinic called police to assist her with a patient whom she was treating