

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. Procunier*, 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).