

# VIRGINIA STATE CRIME COMMISSION

## 2016 Annual Report:

*Capital Cases:*

*“Mental Retardation”*

*Terminology*



# Capital Cases: “Mental Retardation” Terminology

## Executive Summary

In April 2016, Delegate Dave Albo sent a letter to the Crime Commission requesting that the Commission review the use of the term “mental retardation” in Virginia’s capital murder statutes and whether that term could be replaced with the term “intellectual disability.” In order to determine the feasibility of changing the term, staff reviewed relevant statutes in Virginia and in other states with capital punishment, as well as case law to determine whether any legal challenges were raised contending that a change in the terminology altered the substantive definition of the condition.

In 2002, the United States Supreme Court ruled in the case of Atkins v. Virginia that the execution of a “mentally retarded” defendant was excessive punishment in violation of the Eighth Amendment. In response to the Atkins decision, the Virginia legislature made a number of modifications to Virginia’s capital murder statutes in 2003. Following these 2003 amendments, a defendant asserting a claim of mental retardation is required to show by a preponderance of the evidence that he has a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior.

In 2012, the terms “mental retardation” and “mental deficiency” were replaced throughout the Code of Virginia with the term “intellectual disability” or some variation of that term. However, these amendments did not apply to the use of the term “mental retardation” in the capital murder statutes.

In the 2014 case of Hall v. Florida, the U.S. Supreme Court held that a Florida death penalty statute which required a defendant to show an IQ score of 70 or below before any additional evidence of intellectual or functional disability would be permitted violated the Eighth Amendment. In Hall, the Court specifically noted that: “[p]revious opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”

As part of the study, staff reviewed other states’ terminology. In the 30 states, including Virginia, where the death penalty option existed, a total of 16 states changed terminology from “mental retardation” to “intellectual disability” between 2009 and 2016. An additional nine states, including Virginia, continue to use the “mental retardation” terminology. The other five states vary in the use of the terminology.

Staff further examined case law in the 16 states that changed their terminology from “mental retardation” to “intellectual disability.” Staff was unable to locate any decisions raising a specific claim that changing the terminology from “mental retardation” to “intellectual disability” altered the definition of the condition.

While Massachusetts law does not allow for the death penalty, staff did locate a decision from that jurisdiction which addressed a challenge to the change in terminology. In the 2015 case of Commonwealth v. St. Louis, a claim was raised alleging that a 2010 amendment to the terminology of the statute prohibiting indecent assault and battery on a “person with intellectual disability” rendered the statute unconstitutionally vague. The Court found that the definition was sufficiently clear and definite and that the “...Legislature’s intent was merely to change the nomenclature and not the substance of the statute.”

Presently, the definition of “mentally retarded” under Va. Code § 19.2-264.3:1.1 is exactly the same as the definition of “intellectual disability” under Va. Code § 37.2-100. Changing the term “mental retardation” to the term “intellectual disability” should not impact any of Virginia’s currently pending capital cases because there would not be a substantive change to the legal definition of the term. A defendant challenging Virginia’s capital murder statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.

The Crime Commission reviewed study findings at its October and November meetings and directed staff to draft legislation. As a result of the study, the Crime Commission unanimously endorsed the following recommendation, with the inclusion of the second enactment clause, at its December meeting:

**Recommendation 1:** The term “mental retardation” should be replaced with the term “intellectual disability” in Virginia’s capital murder statutes.

- These changes will apply to Va. Code §§ 8.01-654.2; 18.2-10; 19.2-264.3:1.1; 19.2-264.3:1.2, and 19.2-264.3:3.
- Should a second enactment clause be included in the legislation, stating that the change in term is not to be construed as a change to Virginia’s substantive law?

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Senator Janet D. Howell introduced Senate Bill 1352 and Delegate Patrick A. Hope introduced House Bill 1882. Both bills passed and were signed by the Governor.

## Background

In April 2016, Delegate Dave Albo sent a letter to the Crime Commission requesting that the Commission review the use of the term “mental retardation” in Virginia’s capital murder statutes and whether that term could be replaced with the term “intellectual disability.” In order to determine the feasibility of changing the term, staff reviewed relevant statutes in Virginia and in other states with capital punishment, as well as case law to determine whether any legal challenges were raised contending that a change in the terminology altered the substantive definition of the condition.

### Virginia’s Response to Atkins v. Virginia

In 2002, the United States Supreme Court ruled in the case of Atkins v. Virginia that the execution of a “mentally retarded” defendant was excessive punishment in violation of the Eighth Amendment.<sup>1</sup> In its opinion, the Court relied on the definition of “mental retardation” as promulgated by the *American Association of Mental Retardation* and the *American Psychiatric Association*. “Mental retardation” was characterized by “significantly sub-average intellectual functioning...with related limitations in...applicable adaptive skills areas.”<sup>2</sup> The Supreme Court ultimately allowed states to craft their own definition of mental retardation to enforce the constitutional restrictions of Atkins.<sup>3</sup>

In response to the Atkins decision, the Virginia legislature made a number of modifications to Virginia’s capital murder statutes in 2003:<sup>4</sup>

- Virginia Code § 18.2-10(a) was amended to specify that no one who is “mentally retarded” can be sentenced to death.
- Virginia Code § 19.2-264.3:1.1 was enacted to (i) define “mentally retarded” for purposes of capital murder sentencing, (ii) set forth requirements for the assessments to determine “mental retardation”, and (iii) provide the procedure by which a judge or jury determines this fact.
- Virginia Code §§ 19.2-264.3:1.2 and 19.2-264.3:3 were enacted to provide expert assistance to an indigent defendant when the issue of that defendant’s mental retardation would be relevant in a capital proceeding.
- Virginia Code § 19.2-264.3:1.2 also required that a defendant seeking to assert a claim of mental retardation provide notice of such claim to the Commonwealth’s Attorney. If such notice is provided, the Commonwealth has the right to have a second evaluation performed by a separate expert.
- Virginia Code § 8.01-654.2 was amended to apply to all capital defendants whose death sentences became final in Circuit Court before April 29, 2003. It provides that mental retardation claims may be raised in the Supreme Court of Virginia on either a direct appeal or in a *habeas corpus* petition. If the defendant has completed both his direct appeal and his *habeas corpus* proceeding, “his sole remedy shall lie in federal court.”

Following these 2003 amendments, a defendant asserting a claim of mental retardation is required to show by a preponderance of the evidence that he has a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior.<sup>5</sup>

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<sup>1</sup> 536 U.S. 304.

<sup>2</sup> *Id.* at 308 (see footnote 3).

<sup>3</sup> *Id.* at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

<sup>4</sup> 2003 Va. Acts ch. 1031, 1040.

<sup>5</sup> Va. Code § 19.2-264.3:1.1 (2016).

## Evolution of Terminology Changes

At the time of the 2003 enactments, the term “mental retardation,” or some similar variation, was used throughout the Code of Virginia. The term “mental retardation” was used in the former Title 37.1 (Institutions for the Mentally Ill; Mental Health Generally), although the definition used in that title was slightly different. In 2005, Title 37.1 was recodified into Title 37.2 (Behavioral Health and Developmental Services) and the definition of “mental retardation” was amended.<sup>6</sup> Following these 2005 amendments, the definition of “mentally retarded” under Va. Code § 19.2-264.3:1.1 and “mental retardation” under Va. Code § 37.2-100 were identical.

Beginning around 2002, the mental health community and developmental psychologists around the country began to gradually favor the term “disability” over “retardation.”<sup>7</sup> In 2007, the *American Association on Mental Retardation*, the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities, changed its name to the *American Association on Intellectual and Developmental Disabilities*. Further, in 2010, the U.S. Congress passed and the President signed “Rosa’s Law,” which deleted the phrase “mental retardation” and its variants from certain education, labor and health statutes and replaced the term with “intellectual disability” or some variation thereof.<sup>8</sup>

In 2012, the terms “mental retardation” and “mental deficiency,” along with variations thereof, were replaced throughout the Code of Virginia with the term “intellectual disability” or some variation of that term.<sup>9</sup> However, these amendments did not apply to the use of the term “mental retardation” in Virginia’s capital murder statutes.

In 2013, the *American Psychiatric Association* released the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.<sup>10</sup> In the DSM-5, the term “mental retardation” was replaced with the term “intellectual disability (intellectual developmental disorder).”

In the 2014 case of Hall v. Florida, the U.S. Supreme Court held that Florida’s statute defining intellectual disability violated the Eighth Amendment.<sup>11</sup> In its decision, the Court specifically noted that: “Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”<sup>12</sup> Aside from using the term “mentally retarded” to describe the historical context of the case, both the majority and dissent used the term “intellectual disability” throughout the entire opinion.

<sup>6</sup> 2005 Va. Acts ch. 716.

<sup>7</sup> See Schalock, R.L., Luckasson, R.A., & Shogren, K.A. (April 2007). The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability. *Intellectual and Developmental Disabilities*, Vol. 45, No. 2, pp. 116-124.

<sup>8</sup> 111 P.L. 256, 124 Stat. 2643.

<sup>9</sup> 2012 Va. Acts ch. 476, 507.

<sup>10</sup> This manual is popularly known as the DSM-5.

<sup>11</sup> 134 S. Ct. 1986.

<sup>12</sup> *Id.* at 1990.

## Legal Overview – Other States

### Terminology

As part of this study, staff examined the terminology utilized in other states. It should be noted that the 19 states that do not have the death penalty were excluded from the analysis, including: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Additionally, Nebraska was excluded from the analysis because it did not have the death penalty at the time the review was conducted.<sup>13</sup>

For the remaining 30 states, staff examined the terminology used in each state’s capital murder statutes or related punitive statutes and the year in which any change to the terminology was effective. A total of 16 states changed terminology from “mental retardation” to “intellectual disability” between 2009 and 2016. An additional nine states, including Virginia, continue to use the “mental retardation” terminology. The other five states vary in the use of the terms or use other terminology. Table 1 illustrates the terminology used in these 30 states and, if applicable, the year terminology changed.

**Table 1: Capital Murder Statute Terminology Changes**

State	Terminology Amended	Year
Alabama	“Retarded Defendant Act” to “Defendant with Intellectual Disability Act” <sup>14</sup>	2009 <sup>15</sup>
Arizona	“Mental retardation” to “Intellectual disability” <sup>16</sup>	2011 <sup>17</sup>
Arkansas	“Mental retardation” <sup>18</sup>	N/A
California	“Mentally retarded” to “Intellectual disability” <sup>19</sup>	2012 <sup>20</sup>
Colorado	“Mentally retarded” <sup>21</sup>	N/A
Florida	“Mental retardation” to “Intellectual disability” <sup>22</sup>	2013 <sup>23</sup>
Georgia	“Mentally retarded” <sup>24</sup>	N/A

<sup>13</sup> Nebraska presents a unique circumstance. On May 27, 2015, the Nebraska Legislature overrode the Governor’s veto to enact a bill which repealed capital punishment (2015 Neb. Laws 268) in the state. Subsequently, on November 8, 2016, Nebraska voters approved Referendum 426 which repealed this bill and reinstated capital punishment in Nebraska. See <http://electionresults.sos.ne.gov/resultsSW.aspx?text=Race&type=SW&map=CTY>

<sup>14</sup> Ala. Code § 15-24-1 (2016). *But see* Morrow v. State, 928 So. 2d 315, 317 (Ala. Crim. App. 2004). “The Alabama Legislature has not yet enacted legislation defining mental retardation for purposes of implementing Atkins.”

<sup>15</sup> 2009 Ala. Acts 635.

<sup>16</sup> Ariz. Rev. Stat. § 13-753 (LexisNexis 2016).

<sup>17</sup> 2011 Ariz. Sess. Laws 89.

<sup>18</sup> Ark. Code Ann. § 5-4-618 (2016).

<sup>19</sup> Cal. Penal Code § 1376 (West 2016).

<sup>20</sup> 2012 Cal. Stat. 448.

<sup>21</sup> Colo. Rev. Stat. § 18-1.3-1103 (2016).

<sup>22</sup> Fla. R. Crim. P. 3.203 (2016).

<sup>23</sup> In re: Amendments to the Fla. Rules of Crim. Procedure, 132 So. 3d 123 (Fla. 2013).

<sup>24</sup> Ga. Code Ann. § 17-7-131 (2016).

State	Terminology Amended	Year
Idaho	“Mentally retarded” <sup>25</sup>	N/A
Indiana	“Mental retardation” to “Intellectual disability” <sup>26</sup>	2015 <sup>27</sup>
Kansas	“Mentally retarded” to “A person with intellectual disability” <sup>28</sup>	2012 <sup>29</sup>
Kentucky	“Seriously mentally retarded” to “Serious intellectual disability” <sup>30</sup>	2012 <sup>31</sup>
Louisiana	“Mental retardation” to “Intellectual disability” <sup>32</sup>	2014 <sup>33</sup>
Mississippi	“Person with mental retardation” to “Person with an intellectual disability” <sup>34</sup>	2010 <sup>35</sup>
Missouri	“Mentally retarded” to “Intellectual disability” <sup>36</sup>	2014 <sup>37</sup>
Montana	“Mental disease or defect” to “Mental disease or disorder” <sup>38</sup>	2015 <sup>39</sup>
Nevada	“Mentally retarded” to “Intellectually disabled” <sup>40</sup>	2013 <sup>41</sup>
New Hampshire	Not definitive <sup>42</sup>	N/A
North Carolina	“Mentally retarded” to “Intellectual disability” <sup>43</sup>	2015 <sup>44</sup>
Ohio	Not definitive <sup>45</sup>	N/A
Oklahoma	“Mentally retarded” <sup>46</sup>	N/A
Oregon	“Intellectual disability” <sup>47</sup>	2015

<sup>25</sup> Idaho Code Ann. § 19-2515A (2016).

<sup>26</sup> Ind. Code Ann. § 35-36-2-5(e) (LexisNexis 2016).

<sup>27</sup> 2015 Ind. Acts 117.

<sup>28</sup> Kan. Stat. Ann. § 21-6622 (2016).

<sup>29</sup> 2012 Kan. Sess. Laws 91.

<sup>30</sup> Ky. Rev. Stat. Ann. § 532.140 (LexisNexis 2016).

<sup>31</sup> 2012 Ky. Acts 146.

<sup>32</sup> La. Code Crim. Proc. Ann. art. 905.5.1 (2016).

<sup>33</sup> 2014 La. Acts. 811.

<sup>34</sup> See Miss. Code Ann. § 99-13-1 (2016). The Mississippi legislature amended the terminology in the insanity proceedings statutes. *But see Chase v. State*, 171 So. 3d 463 (Miss. 2015). In Mississippi, the term “mentally retarded” and subsequently the term “intellectual disability” have been defined by case law for purposes of complying with *Atkins*.

<sup>35</sup> 2010 Miss. Gen. Laws 476.

<sup>36</sup> Mo. Rev. Stat. § 565.030 (2016).

<sup>37</sup> 2014 Mo. HB 1064.

<sup>38</sup> Mont. Code Ann. § 46-14-312 (2016).

<sup>39</sup> 2015 Mt. Laws 161.

<sup>40</sup> Nev. Rev. Stat. Ann. § 174.098 (LexisNexis 2016).

<sup>41</sup> 2013 Nev. Stat. 186.

<sup>42</sup> See N.H. Rev. Stat. Ann. § 630:1 (LexisNexis 2016). New Hampshire has a narrow capital murder statute which does not address mental retardation or intellectual disability. According to the Death Penalty Information Center, the last execution in New Hampshire occurred in 1939. See <http://www.deathpenaltyinfo.org/new-hampshire-1>

<sup>43</sup> N.C. Gen. Stat. § 15A-2005 (2016).

<sup>44</sup> 2015 N.C. Sess. Laws 247.

<sup>45</sup> See *State v. Waddy*, 2016 Ohio App. LEXIS 2716 (Ohio Ct. App. 2016). The Court of Appeals of Ohio continues to use the term “mentally retarded.” *But see* Ohio Rev. Code Ann. 2945.371 (LexisNexis 2016). In this statute entitled “Evaluations of defendant’s mental condition at relevant time; separate mental retardation evaluation”, the Ohio legislature substituted the term “mentally retarded” with the term “intellectual disability” within the body of the statute, but did not amend the title of the statute (2015 Ohio HB 158).

<sup>46</sup> Okla. Stat. tit. 21, § 701.10b (2016).

<sup>47</sup> See *State v. Agee*, 364 P.3d 971 (Or. 2015). Following the *Atkins* decision, the Oregon legislature did not adopt procedures for determining a defendant’s intellectual disability in regard to a capital offense. The issue of a defendant’s intellectual disability was not addressed at the appellate level until 2015. In this case, the Supreme Court of Oregon used

State	Terminology Amended	Year
Pennsylvania	“Mental retardation” <sup>48</sup>	N/A
South Carolina	“Mental retardation” <sup>49</sup>	N/A
South Dakota	“Mentally retarded” <sup>50</sup>	N/A
Tennessee	“Mentally retarded” to “Intellectual disability” <sup>51</sup>	2010 <sup>52</sup>
Texas	Not definitive <sup>53</sup>	N/A
Utah	“Mentally retarded” to “Intellectually disabled” <sup>54</sup>	2016 <sup>55</sup>
Virginia	“Mentally retarded” <sup>56</sup>	N/A
Washington	“Mentally retarded” to “Intellectual disability” <sup>57</sup>	2010 <sup>58</sup>
Wyoming	“Mental deficiency” <sup>59</sup>	2008 <sup>60</sup>

### Challenges to the Term’s Definition

Staff reviewed opinions from the 16 states that specifically changed their statutory terminology from “mental retardation” to “intellectual disability.” Staff was unable to locate any decisions raising a specific claim that changing the terminology from “mental retardation” to “intellectual disability” altered the definition of the condition. The majority of the decisions addressed whether a particular defendant’s condition met the substantive definition of an “intellectual disability.”

Staff expanded the search to include jurisdictions without capital punishment which have specifically changed their statutory terminology from “mental retardation” to “intellectual disability.” Using this expanded search criteria, staff located a relevant decision in Massachusetts which addressed the issue of whether the definition of the concept changed when the terminology was amended.

In the 2015 case of Commonwealth v. St. Louis, the Supreme Court of Massachusetts addressed a claim of whether the term “intellectual disability” was unconstitutionally vague.<sup>61</sup> In 2010, Massachusetts had amended its statutes to substitute the term “person with an intellectual disability” in place of the term “mentally retarded person.” In this

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the term “intellectual disability.”

<sup>48</sup> Pa. R. Crim. P. 844 (2016).

<sup>49</sup> S.C. Code Ann. § 16-3-20 (2016).

<sup>50</sup> S.D. Codified Laws § 23A-27A-26.1 (2016).

<sup>51</sup> Tenn. Code Ann. § 39-13-203 (2016).

<sup>52</sup> 2010 Tenn. Pub. Acts 734.

<sup>53</sup> See In re Allen, 462 S.W.3d 47 (Tex. Crim. App. 2015). The Texas legislature has not adopted a statutory definition of “mental retardation,” and thus the Court of Criminal Appeals of Texas developed a definition through case law. In this decision from the Court of Criminal Appeals of Texas, the majority opinion used the term “intellectually disabled” while a concurring opinion used the term “mental retardation.”

<sup>54</sup> Utah Code Ann. § 77-15a-101 (LexisNexis 2016).

<sup>55</sup> 2016 Utah Laws 115.

<sup>56</sup> Va. Code § 19.2-264.3:1.1 (2016).

<sup>57</sup> Wash. Rev. Code Ann. § 10.95.030 (LexisNexis 2016).

<sup>58</sup> 2010 Wash. Sess. Laws 94.

<sup>59</sup> See Wyo. Stat. Ann. § 7-11-301(a)(iii) (2016). Wyoming uses the term “mental deficiency” to refer to “a defect attributable to intellectual disability, brain damage and cognitive disabilities.”

<sup>60</sup> See 2008 Wyo. Sess. Laws 70. The phrase “intellectual disability” was substituted for “mental retardation.”

<sup>61</sup> 473 Mass. 350.

particular case, the defendant was convicted of indecent assault and battery on a person with an intellectual disability. The defendant contended on appeal that the 2010 amendment rendered that statute unconstitutionally vague. The Court rejected this claim and affirmed the defendant’s convictions. The Court found that the definition was sufficiently clear and definite and that the “...Legislature’s intent was merely to change the nomenclature and not the substance of the statute.”<sup>62</sup>

## Feasibility of Changing the Term

Presently, the definition of “mentally retarded” under Va. Code § 19.2-264.3:1.1 is identical to the definition of “intellectual disability” under Va. Code § 37.2-100. Because the term “mentally retarded” has a specific definition in Va. Code § 19.2-264.3:1.1, the term itself could be replaced with “intellectually disabled” without altering the definition.

The term “mental retardation” could be amended to “intellectual disability” in the following Virginia Code sections:

- § 8.01-654.2. Presentation of claim of mental retardation by person sentenced to death before April 29, 2003;
- § 18.2-10. Punishment for conviction of felony; penalty;
- § 19.2-264.3:1.1. Capital cases; determination of mental retardation;
- § 19.2-264.3:1.2. Expert assistance when issue of defendant’s mental retardation relevant to capital sentencing; and,
- § 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during evaluations.

As of September 2016, there were seven inmates on death row in Virginia.<sup>63</sup> Only one of those inmate’s sentences was finalized prior to April 29, 2003.<sup>64</sup> Changing the term “mental retardation” to the term “intellectual disability” should not impact any of Virginia’s currently pending capital cases because there would not be a substantive change to the legal definition of the term. A defendant would still need to show by a preponderance of the evidence that he had a disability, originating before the age of 18, characterized by significantly sub-average intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior. Further, a second enactment clause could also be included in the legislation to reinforce that changing the terminology is not meant to alter the substantive law.

If Virginia amends the term “mental retardation” to “intellectual disability” in its capital murder statutes, challenges to the definition are possible. If such challenges arise, it would be pertinent to note that the Atkins decision left the definition of “mental retardation” to the states.<sup>65</sup> Approximately 12 years later, the Hall decision changed the

<sup>62</sup> *Id.* at 356.

<sup>63</sup> This figure was provided by the Office of the Attorney General.

<sup>64</sup> William Joseph Burns has a mental retardation claim pending, but he has been found to be incompetent and has not been restored to competence.

<sup>65</sup> 536 U.S. 304, 317 (2002).

terminology, but specifically noted that the definition was not being altered.<sup>66</sup> Furthermore, Virginia’s capital murder statutes are consistent with the holding in Hall and the criteria for an “intellectual disability” under the definition in the DSM-5. A defendant challenging Virginia’s capital murder statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.<sup>67</sup>

## Summary and Conclusion

Currently, the definition of “mentally retarded” under Va. Code § 19.2-264.3:1.1 is identical to the definition of “intellectual disability” under Va. Code § 37.2-100. Amending the term “mental retardation” to the term “intellectual disability” should not impact any of Virginia’s currently pending capital cases because there would not be a substantive change to the legal definition of the term. While challenges to Virginia’s capital murder statutes are possible, a defendant challenging those statutes would have to show that the substantive definition of the concept, not the specific terminology used, violated the Constitution.

The Crime Commission reviewed study findings at its October and November meetings and directed staff to draft legislation. As a result of the study, the Crime Commission unanimously endorsed the following recommendation, with the inclusion of the second enactment clause, at its December meeting:

**Recommendation 1:** The term “mental retardation” should be replaced with the term “intellectual disability” in Virginia’s capital murder statutes.

- These changes will apply to Va. Code §§ 8.01-654.2; 18.2-10; 19.2-264.3:1.1; 19.2-264.3:1.2, and 19.2-264.3:3.
- Should a second enactment clause be included in the legislation, stating that the change in term is not to be construed as a change to Virginia’s substantive law?

Legislation for Recommendation 1 was introduced in both chambers during the 2017 Session of the General Assembly. Senator Janet D. Howell introduced Senate Bill 1352 and Delegate Patrick A. Hope introduced House Bill 1882. Both bills passed and were signed by the Governor.<sup>68</sup>

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<sup>66</sup> 134 S. Ct. 1986, 1990 (2014).

<sup>67</sup> See Moore v. Texas, 137 S. Ct. 1039 (2017), in regard to the use of current medical standards in determining whether an offender is intellectually disabled for purposes of the Eighth Amendment.

<sup>68</sup> 2017 Va. Acts ch. 86, 212.

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