



**Follow-Up: Capital Cases; “Mental Retardation”
Terminology**
November 10, 2016

Overview



- Study Authorization
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- Challenges to the Term’s Definition
- Virginia’s Definition
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Study Authorization



- In April 2016, Delegate Dave Albo sent a letter to the Crime Commission requesting a review of 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.”

Study Authorization



- Staff was asked to follow up on two issues from the October 2016 meeting:
 1. How many states have changed the terminology in their capital murder statutes from “mental retardation” to “intellectual disability”?
 2. Have there been any legal challenges claiming that a change in the terminology from “mental retardation” to “intellectual disability” also constituted a change in the substantive definition of the terminology?

Terminology in Other States



- 30 states, including Virginia, have the death penalty.
 - 16 states changed terminology from “mental retardation” to “intellectual disability” between 2009 and 2016.
 - 9 states, including Virginia, continue to use the “mental retardation” terminology.
 - 5 states vary in the use of the terms or use other terminology.
- 20 states do not have the death penalty.

Terminology in Other States



- The Texas legislature has not adopted a statutory definition of “mental retardation,” and thus the Court of Criminal Appeals developed a definition.
 - In the 2015 matter of In re Allen, 462 S.W.3d 47 the majority opinion uses the term “intellectual disability” while a concurring opinion uses the term “mental retardation.”
- In 2016, the Ohio legislature substituted the term “intellectual disability” within the body of a statute entitled “Evaluations of defendant’s mental condition at relevant time; separate mental retardation evaluation.”

Challenges to the Term's Definition



- Staff reviewed opinions from the 16 states that changed their terminology from “mental retardation” to “intellectual disability.”
- Staff was unable to locate any decisions containing a specific claim that changing the terminology to “intellectual disability” altered the definition.
- Most of the decisions dealt with whether a defendant’s condition met the substantive definition of an “intellectual disability.”

Challenges to the Term's Definition



- The substantive definition of “mental retardation” or “intellectual disability” could be impacted by the pending matter of Moore v. Texas, which is currently before the United States Supreme Court on the issue of what medical standards to use when determining the existence of an intellectual disability.

Challenges to the Term's Definition



- In 2010, Massachusetts amended its statutes to substitute the term “mentally retarded person” with “person with an intellectual disability.”
- In the 2015 case of Commonwealth v. St. Louis, 473 Mass. 350, the Supreme Judicial Court of Massachusetts addressed a claim of whether the term “intellectual disability” was unconstitutionally vague.
- The court rejected this claim and affirmed the defendant’s convictions.

Challenges to the Term's Definition



In Commonwealth v. St. Louis:

- The defendant was convicted of indecent assault and battery on a person with an intellectual disability.
- The defendant contended that the 2010 amendment from “mentally retarded” to “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.”

Virginia's Definition



- In the 2002 case of *Atkins v. Virginia*, the U.S. Supreme Court looked to the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA) for guidance in defining the term “mental retardation,” but ultimately left it to the states to craft their own definition of the term.
- In 2003, the Virginia legislature enacted Va. Code § 19.2-264.3:1.1 and specifically defined the term “mentally retarded.”

Virginia's Definition



- In 2013, the APA replaced the term “mental retardation” with “intellectual disability” in its DSM-5 publication.
- “DSM-5 emphasizes the need to use both clinical assessment and standardized testing of intelligence when diagnosing intellectual disability, with the severity of impairment based on adaptive functioning rather than IQ test scores alone.” – *APA DSM-5 Intellectual Disability Fact Sheet*

Virginia's Definition



- In the 2014 case of Hall v. Florida, the U.S. Supreme Court held that Florida's bright line rule of an IQ of 70 for determining an intellectual disability violated the Constitution.
- In Hall, the Supreme Court specifically noted:
 - "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."

Virginia's Definition



- The Hall decision raised concerns about how IQ scores were considered in capital cases in Virginia in light of the Virginia Supreme Court's ruling in the 2004 case of Johnson v. Commonwealth, 267 Va. 53, 591 S.E.2d 47.
- In 2015, Va. Code § 19.2-264.3:1.1(B)(1) was amended to specify how the results of IQ tests are to be reported in capital proceedings:
 - "All such measures shall be reported as a range of scores calculated by adding and subtracting the standard error of measurement identified by the test publisher to the defendant's earned score" (2015 Va. Acts Ch. 360).

Virginia's Definition



- Based on this amendment, the procedure in Virginia for determining “mental retardation” comports with the Eighth Amendment and the Hall decision.
- The procedure is also in line with the DSM-5, as the defendant’s IQ score continues to be a consideration in determining whether he has an intellectual disability, but it is not the sole factor in such a determination.

Virginia's Definition



- If Virginia amends the term “mental retardation” to “intellectual disability” in its capital murder statutes, challenges to the definition are possible, however:
 - The Atkins decision left the definition to the states;
 - The Hall decision changed the terminology, but did not alter the definition; and,
 - Virginia’s capital murder statutes are consistent with the holding in Hall and the criteria for an “intellectual disability” under the DSM-5.

Virginia's Definition



- 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.
- Changing the term "mental retardation" to the term "intellectual disability" should not impact any of Virginia's pending capital cases because there would not be a substantive change to the legal definition of the term.

Recommendation



Recommendation:

- 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?



Discussion