



Capital Cases; “Mental Retardation” Terminology

October 3, 2016

Overview



- Study Authorization
- Background
- “Mental Retardation” Terminology
- “Intellectual Disability” Terminology
- Feasibility of Changing the Term
- Recommendation

Study Authorization



- 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”.

Background



- In 2002, the United States Supreme Court ruled in the case of Atkins v. Virginia, 536 U.S. 304, that the execution of a “mentally retarded offender” was excessive punishment in violation of the Eighth Amendment.
 - 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 subaverage intellectual functioning...with related limitations in...applicable adaptive skill areas.”

Background



- In response to the Atkins decision, the Virginia legislature made a number of modifications to Virginia's capital murder statutes in 2003:
 - Va. Code § 18.2-10(a) now specifies that no one who is “mentally retarded” can be sentenced to death.
 - Va. Code § 19.2-264.3:1.1 defines “mentally retarded” for purposes of capital murder sentencing, sets forth requirements for the assessments to determine “mental retardation,” and provides the procedure by which a judge or jury determines this fact.

Background



Capital murder statutes 2003 (cont.):

- Va. 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.
- Va. Code § 19.2-264.3:1.2 also requires that a defendant seeking to assert a claim of mental retardation must provide notice 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.

Background



Capital murder statutes 2003 (cont.):

- Va. Code § 8.01-654.2 applies to all capital defendants whose death sentences became final in the circuit court before April 29, 2003. It specifies that their 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.”

Background



Capital murder statutes 2003 (cont.):

- 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 subaverage intellectual functioning as demonstrated by a standardized IQ test, and significant limitations in adaptive behavior.

“Mental Retardation” Terminology



- At the time of these 2003 enactments, the term “mental retardation,” or some similar variation, was used throughout the Code of Virginia.
- The term “mental retardation” was used in former Title 37.1 (Institutions for the Mentally Ill; Mental Health Generally), although the definition used in that title was slightly different.

“Mental Retardation” Terminology



- In 2005, Title 37.1 was recodified into Title 37.2 (Behavioral Health and Developmental Services) and the definition of “mental retardation” was amended.
- 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.

“Intellectual Disability” Terminology



- Beginning around 2002, the mental health community and developmental psychologists around the country began to gradually favor the term “disability” over “retardation.”
- 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*.

“Intellectual Disability” Terminology



- In 2010, the U.S. Congress passed and the President signed “Rosa’s Law” (111 P.L. 256).
 - This law deleted the phrase “mental retardation” and its variants from certain federal education, labor, and health statutes.
 - That phrase was replaced by the term “intellectual disability” or some variation thereof.

“Intellectual Disability” Terminology



- 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 (2016 Va. Acts ch. 476; 2016 Va. Acts ch. 507).
 - These amendments did not remove or replace the term “mental retardation” in the capital murder statutes.

“Intellectual Disability” Terminology



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

“Intellectual Disability” Terminology



- In Hall v. Florida, 134 S. Ct. 1986 (2014):
 - The U.S. Supreme Court held that Florida’s statute defining intellectual disability violated the Eighth Amendment.
 - Aside from using the term “mental retardation” to describe the historical context of the case, both the majority and the dissent used the term “intellectual disability” throughout the entire opinion.
 - 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.”

Feasibility of Changing the Term



- 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.
- 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.

Feasibility of Changing the Term



- The term “mental retardation” could be changed to “intellectual disability” in the following 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.
 - §19.2-264.3:3. Limitations on use of statements or disclosure by defendant during evaluations.

Feasibility of Changing the Term



- As of September 2016, there are 7 inmates on death row in Virginia in various stages of litigation.
- There is 1 inmate on death row whose sentence was finalized prior to April 29, 2003.
 - William Joseph Burns has a mental retardation claim pending, but he has been found to be incompetent and has not been restored to competence.

Feasibility of Changing the Term



- 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 second enactment clause could also be included in the legislation to reinforce that changing the term is not meant to alter the substantive law.

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