Chapter 24

Too Dumb to Die: Mental Retardation Meets the Death Penalty*

R. Kim McKinzey

Abstract

In Atkins v. Virginia (2002), the US Supreme Court held that executing the mentally retarded is unconstitutional. In a capital, death penalty case, a hearing must therefore be held sometime before sentencing or trial to determine whether or not the defendant is mentally retarded. An Atkins case study is presented, wherein the issues involved are discussed. These issues include: timing of the hearing, burden of proof, malingering, data gathering, and measurements of intelligence and adaptivity.

The author has also prepared an update summarizing subsequent developments. This can be found at http://wpe.info/papers_table.html

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On the 16th of August 1996, Daryl Renard Atkins kidnapped, robbed, and shot Eric Nesbitt. Atkins was convicted of a capital crime, and the case went to the mitigation (penalty) phase[24.1], where the jury considered a defense claim of mental retardation.

According to the eventual US Supreme Court decision ("Atkins v Va.," 2002)[24.2], Evan Nelson, Ph.D.,[24.3] a defense psychologist, testified that Atkins has mild mental retardation, citing a Wechsler Adult Intelligence Scale, third edition (WAIS-III[24.4]) Full Scale Intelligence Quotient (FSIQ) of 59.[24.5] While an adaptation measure was not used, a review of Atkins' history showed a "lack of success in pretty much every domain of his life" (Judge Scalia's dissent, p. 2, quoting Dr. Nelson's testimony).

* Like many other chapters in this book, this article has, for some time, been available at http://wpe.info/papers_table.html

After an appeal, a second mitigation/sentencing jury was assembled, and Dr. Nelson repeated his testimony. This time, Stanton Samenow, Ph.D.[24.6], a prosecution psychologist, disputed the claim, arguing (without the use of an IQ test) that Atkins was of average intelligence. Atkins' poor academic performance was due to his choosing not to attend, an early symptom of his Antisocial Personality Disorder (APD[24.7]). The second jury also sentenced Atkins to death, perhaps because they also heard of his 16 prior convictions for robbery, attempted robbery, abduction, gun use, and maiming, including graphic descriptions from former victims, one of whom was pistol-whipped and shot.[24.8]

In the required appeals, the appellate judges preferred Dr. Nelson's opinion. Citing the then predominating US Supreme Court's decision on the topic ("Penry v Lynaugh," 1989) the majority of the Virginia Supreme Court[24.9] thought Atkins acceptable for execution. Two dissenting judges (Justices Hassell and Koontz) thought Dr. Samenow's opinion was "incredulous as a matter of law" and argued that Atkins should be spared execution solely due to his mental retardation. On 20th June 2002, the US Supreme Court reversed itself, and decided that the time had come to end the execution of people with Mental Retardation (MR), finding it an "excessive," "cruel and unusual punishment" and in violation of the Constitution's Eight Amendment[24.10].

Clinical definitions of mental retardation require not only subaverage intellectual functioning[24.11], but also significant limitations in adaptive skills such as communication, self-care, and self-direction that become manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption for criminal sanctions, but they do diminish their personal culpability. (page 13)

The opinion offered no other guidelines on the many resultant issues: "We leave to the State(s) the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." (page 12)

Naturally, the condemned across the country began appealing their sentences. If a person on death row has MR, the sentence must be converted – but, to what? Life Without Parole (LWOP)? Life? Something else? And who qualifies for this life-saving diagnosis? Just those with a pre-crime diagnosis? How about those who developed MR after the crime?

As Atkins made clear, the judicial finding that a person has MR is obviously quite different from the diagnosis of MR. Theoretically, mental health professionals make diagnoses based on the combination of the scientific literature and the condition of the patient, while triers-of-fact (TOF) must consider only the testimony of the diagnosing professionals. If the latter disagree, the conflict must be resolved by the TOF. For that to happen, testimony must be heard in a hearing.

Who is the TOF? A judge? Federal or State? Appellate or trial? A jury convened to decide? Are they to be Death-Qualified? Who can be witnesses? Anyone, or just professionals qualified to diagnose MR? Who are those professionals, and what qualifies them to diagnose a life-saving condition?

What's the burden of proof, and who has it? If the court, prosecution, and defense can all pay for experts, can all three examine the person? Can a defendant/appellant in this situation be ordered to cooperate? What confidentiality rules apply? Can the results of the examination be used in other hearings?

The Atkins ruling came in the midst of already-ongoing cases, producing more issues. When is the hearing to be held? Pre-trial or mitigation? If a person with MR cannot be executed, can the person still be charged with a capital crime? Does that change the funding of the trial or the requirements for the qualifications of the trial attorneys or the jury's Death Qualification? In the absence of clear legislative and judicial guidelines, can a judge ruling on an issue be sure of not being reversed?[24.12]

The issues confronting the testifying professionals are equally numerous. Do the professionals need any special qualifications? Should they be held to a higher standard in a life-or-death diagnosis? Is there any esoteric literature on the topic? What procedures/tests/measurements should be used? Should those procedures/tests/measurements be held to a higher standard? What if the patient meets one MR standard and not another? And what about the issue of malingering: "One need only to read the definitions of mental retardation…to realize that the symptoms of this condition can readily be feigned." (Justice Scalia's dissent, p. 17).

Into this morass of questions came a capital defendant, Jose Lopez, whose case is presented as an example of how the participants in one California county court trial handled the issues. In the words of Margaret Talbot (Talbot, 29 June 2003), was Lopez "too dumb to die"?

Jose Lopez, A Case Study

Facts of the case. According to the police reports, Jose Lopez[24.13] gathered with five other young (one a minor) men in a rural California town on a summer's day in 2001. They had been feuding with a rival gang, and one of their members had recently been stabbed. Determined to gain revenge, the six men got into a recently stolen car and drove to the assailant's house. Spotting him and two other men on the porch, one of the men in the car opened fire, killing the assailant and wounding one of the other two. The six men drove away, hijacking a truck when the car malfunctioned.

The six men were rapidly identified, and Lopez confessed to being in the car. Some of the other men also confessed, and named Lopez as the driver–although he has no driver's license, he was the best driver amongst them. All agreed he was not the shooter. In his explicit, videotaped confession[24.14], he noted the shooting was pre-meditated: "When we all get together like that, we don't just get together to talk, ya know?" He described the getaway[24.15] route in detail: To orient the detectives, he drew a map, and mentioned as landmarks seven stores, three streets, seven changes of directions, and two stop signs. He calculated the number of bullets used, explaining that 6+6+2=14. He described the three vehicles and two guns involved. He explained how he had driven the truck he had just hijacked to find the now 16-year old mother of his one-year old son,[24.16] with whom he had been living a month prior, and had an emotional fight with her. He gave details of the men's family relations to each other. He became visibly emotional when he realized he had both just confessed and fingered his fellow gang members, and asked for protection from their wrath. There were no obvious problems with his face (dysmorphia), articulation (dysarthria), or vocabulary.

The prosecution decided to bring capital charges against the five adult men, with the remaining minor cooperating with the prosecution. The case was assigned to a county judge and defense attorneys qualified for a capital case.[24.17]

In doing the necessary background investigation[24.18], the defense discovered that the 19 year-old Lopez had had behavioral difficulties for most of his life. More to the point, he had been in Special Education for years, and had his IQ tested twice (see Table 24.1 for a listing of measures and results). Since one of the IQ evaluations suggested Lopez has MR, the defense sought a hearing under Atkins.

Childhood evaluations. Coming from a Mexican immigrant family, Lopez entered school speaking little English. He was kept in Kindergarten an extra year, where he was behaviorally aggressive. At the end of the year, in 1990, he was examined by a Spanish-speaking School Psychologist[24.19], Mr. A, who gave the Wechsler Intelligence Scale for Children, Revised version, Mexican edition (WISC-R-M), Peabody Picture Vocabulary Test, Revised version (PPVT-R), Spanish Woodcock-Johnson, Dos Amigos Verbal Language Scales, and the Spanish version of the PPVT-R (PPVT-R-S). Not surprisingly, Lopez did very badly on all of the English-based tests and much better on all of the Spanish-language tests. His WISC-R-M FSIQ was 91, in the Average range of intellectual functioning. His equivalent PPVT-R-S IQ score was 82, in the Low Average range. Since his academic functioning was well below that of his IQ, he qualified for more intense teaching resources, in the form of Special Education.

Placed in Special Education for first grade, the young Lopez was given help in increasing his English fluency. He passed the grade, and he was taken out of Special Education. Although an indifferent student, he passed each succeeding year. but fell behind again, and was assigned a tutor, in the person of Mr. B, another Spanish-speaking School Psychologist.

In late 1995, a teacher wrote that Lopez "is having difficulty adjusting to an English-only classroom. He becomes easily frustrated and acts out[24.20]… He has spent the majority of his time in in-house suspension." Mr. B wrote that Lopez had "significant behavioral, family, and emotional problems. In terms of his behavioral difficulties, [he] demonstrates oppositional defiance, argumentative and antisocial tendencies." At 12, he had already been expelled for carrying a knife.

The next year did not go better, and Lopez was placed in independent study. At the end of the year (1996), Mr. B again evaluated Lopez's IQ. The WISC-III FSIQ was 55, in the Mildly Mentally Retarded range. However, Mr. B wrote, Lopez was clearly not trying his best, being suspicious, defiant, and impulsive. Mr. B characterized the test results as being "somewhat depressed."

Psychologists have known for decades (Heaton, Smith, Lehman, & Vogt, 1978; Ziskin, 1995) that patients do not always try their best on IQ tests, especially in cases where some benefit or legality is involved. Research efforts to find an accurate method of detecting such malingered performances resulted in many failures. Psychologists took four approaches:

1. They tried to use personality tests that had already established validity measures. This method was rapidly disproven (Heaton et al., 1978).
2. They tried to use their own notions of what constituted a consistent pattern of scores, arguing that they could "just tell" when a given set of scores was faked. This method was eventually disproven (Faust, Hart, & Guilmette, 1988; Faust, Hart, Guilmette, & Arkes, 1988).[24.21]
3. They tried to use stand-alone tests devised especially for detecting neuropsychological faking. Although two of these (McKinzey, 5 April 2003; Tombaugh, 1996) now have acceptable levels of accuracy, their use with patients with MR can only be considered promising (see the Author's Update[24.22] for details on this fast moving area of research). As yet, no one has *clearly* demonstrated that a person attempting to get a deliberately faked IQ score will also fake these stand-alone measures.
4. They tried to devise formulas using the test's own within-test scores to identify faked scores. So far, only two tests have had such within-test formulas cross-validated, the Wechsler Adult Intelligence Scale, Revised & Third versions (WAIS-R & WAIS-III) and the Raven Standard Progressive Matrices. The two WAIS formulas (Mittenberg et al., 2001; Mittenberg, Theroux-Fichera, Zielinski, & Heilbronner, 1995), although promising, have not been fully cross-validated (see the Author's Update for citations and reviews of this rapidly moving area of research). The Raven formula has been cross-validated, and found to have a false negative rate of 29% and false positive rate[24.23] of 2.5-10% (McKinzey, Podd, Krehbiel, & Raven, 1999).

In the first of several counter-intuitive decisions, Mr. B did not increase his rapport with Lopez to obtain a valid IQ score. Instead, he simply observed that Lopez's academic performance was now in line with his tested IQ, and he no longer qualified for any special assistance. Then, Mr. B did not refer Lopez to the local Regional Center, as he was required to do if he thought MR was a reasonable diagnosis.

The next two years did not show any improvement, and Lopez was in Juvenile Hall by 1998. He got a 14-year old teenager pregnant in 1999 and lived with her briefly in 2001. He was arrested soon afterward for the shooting.

The judicial decisions. Faced with few definitive legislative or judicial guidelines, the trial judge decided the Atkins hearing would be pre-trial, himself as TOF, with burden of proof at preponderance (more likely than not). The prosecution was allowed to examine the defendant, which was, counter-intuitively, declined,[24.24] making a variety of issues moot. The court appointed two psychologists to examine the defendant and make recommendations.

The forensic evaluations. Dr. C was retained by the defense. Deeming Lopez's English-language capacity to be adequate, the doctor gave him two IQ tests requiring English fluency, the WAIS-III, which yielded an FSIQ of 67, and the Shipley Institute of Living Scale, which yielded an IQ of 52.

As a check, the doctor also gave the Raven Standard Progressive Matrices, a relatively culture-free IQ test that requires no English ability. The test yielded a standard score of below 70 (to get a more accurate estimate of <70 IQ, another version of the test, the Coloured Progressive Matrices, must be used, which the doctor did not), even when scored correctly (which the doctor did not). For some reason, the doctor did not attend to the manual's instructions (Raven, Raven, & Court, 2000), which require the test-taker to get all of the first three extremely simple items correct before continuing with the test.

More importantly, the doctor also did not attend to the manual's citation of the malingering index for the Raven[24.25]. When scored, this index demonstrated Lopez to be faking his low IQ. Even more importantly, none of the other doctors except the one called by the prosecution noticed this finding either. Dr. C gave no test of adaptation, but noted Lopez's educational problems and deficits in social, interpersonal, and home-living skills. He offered a diagnosis of Mild MR.

Dr. D was appointed by the court. He gave the WAIS-III to Lopez two months after Dr. C gave the same test, and obtained a standard score of 65. He obtained a history of Lopez playing organized baseball at age 12.

Dr. D also gave a test of adaptation, the Vineland Adaptive Behavior Scales (Sparrow, Balla, & Cicchetti, 1984). Such tests use a standardized set of questions and norms to survey the patient's functioning in a variety of areas, such as academics, self-care, communication, safety,

socializing, and misbehavior. The norms compare the patient's scores to those obtained by people with and without MR. Lopez's Vineland scores were all quite low, similar to those obtained by people with MR. Dr. D therefore offered a diagnosis of MR.

Dr. E was appointed by the court. He gave no IQ or adaptive tests of his own, relying instead on those reported by Drs. C and D. He agreed with them in their diagnoses of MR.

The hearing. Drs. C, D, and E were called by the defense, each reporting their conclusions that Lopez was MR. None had heard of the Raven validity formula, and simply pled ignorance when confronted. None changed his opinion when told of the first evaluation and outcome of the Raven formula.

Mr. B was also called by the defense. He now agreed Lopez was MR, pointing to the new IQ testing as confirming his opinion. He further opined that the WISC-R-M produced inflated scores, citing his own experience with the test.

Mr. A was never located for testimony.

Dr. F was called as rebuttal by the prosecution. He opined that Lopez did not meet any definition of MR, pointing to the first evaluation and its two above-70 IQ scores. He noted the faked Raven, the complete lack of previous diagnosis (despite years of psychological attention), and Lopez's normal level of adaptation. He defended the WISC-R-M and PPVT-M, pointing out that no scientific literature existed demonstrating them to yield inflated scores. He also pointed out that the Vineland's norms stop at age 18, and Lopez was 19 when tested. The Vineland is largely self-report, and has no method of detecting misleading, malingered answers.

However, there's a more important problem with the Vineland (and all the other adaptivity scales): They are not properly validated for the task being asked of them.

The Atkins decision requires experts and TOFs to distinguish between people with and without MR who have been accused of a violent crime. Like both Atkins and Lopez, many of these people will have childhood histories of violence and/or willfulness. The current adaptive tests have not been designed to distinguish between willfulness and disability.

Some examples: One Vineland item asks if the patient cleans his room. The item does not distinguish between the patient who does not clean his room because he is too intellectually limited and one who willfully, parasitically, in Lopez' words, "lets my bitch do it." Although one item asks if the patient is dating (which Dr. D decided Lopez did not

do), there is no item for "is sexually active," "is a member of a gang," "drives a car", "can shoot a gun", or "has planned a crime with others".

The authors of one adaptive test, the Adaptive Behavior Assessment System (ABAS) (Harrison & Oakland, 2000) asked a simple question: How accurate was the ABAS? They compared scores of people (5-18 years old) with Mild MR and those without MR, with and without serious childhood misbehavior. Using a variety of comparisons and decision rules, they found 32% of their *normal* sample could be mislabled as MR, while 50% of the people with Mild MR got normal scores (see Table 5.31, page 89). Adults (ages 17-72) without MR were misclassified 17% of the time (see. Table 5.31, page 90). Children (ages 6-21) without MR but with behavior disorders were misclassified 73% of the time (see Table 5.33, page 93). Those with emotional disturbances (ages 5-18) were misclassified 70% of the time. There were no samples of the parasitic, willfully self-indulgent impulsive lifestyles typical of people with Antisocial Personality Disorder.

No one has even asked if the Vineland has similar misclassification rates.

The ruling. The judge decided the defendant had met his burden, and the prosecution was prevented from pursuing the death penalty.

Discussion

Atkins hearings will take predictable courses. The defense experts will find ways of explaining away normal IQs and adaptive functioning and produce scores in the MR range. The prosecution experts will deride the new test scores and argue the defendant is merely a malingering crook. After a battle of experts, the judge will utilize a terrible calculus: If the judge rules the defendant has MR, the matter ends without appeal, and much money is saved by avoiding a death penalty trial. If the judge rules the defendant does not have MR, the ruling automatically becomes appealable and a long series of state and federal judges will feel free to override the finding. Using juries to make the decision will produce more MR decisions but raise far more questions about selection. Will the jury be Death Qualified? Can it include people with MR ? People with MR in the family? People with professional experience working with MR? Each trial will require a long series of appellate cases to resolve.

It will take another decade for psychologists to improve their tools enough to be adequate. In an Atkins decision, a one point difference

between two scores is life or death! The issues of accuracy rates and malingering formulas will dog tests of both IQ and adaptivity.

As yet unexplored is the issue of interview source. Adaptivity test scores differ with who is answering the questions (and probably who is asking them). What will a defendant's mother say when the prosecution's expert asks if the defendant cleaned his room? Will she remember what she told the defense's expert?

What a situation for a mother!

Table 24.1. *Lopez' Test Results*

Administrator	Date	Test	Score	Range
Mr. A	5/90	WISC-R-M FSIQ	91	Average
		PPVT-R Spanish	82	Low Average
Mr. B	6/96	WISC-III FSIQ	55	Mild MR
Dr. C	9/02	WAIS-III FSIQ	67	Mild MR
		Raven	<70	Mild MR
		Shipley ILS	52	Mild MR
Dr. D	11/02	WAIS-III	65	Mild MR

Note. Date of birth: 1/83. Date of shooting: 7/01. Scores are Standard, mean = 100, SD = 15. Mr. A & B are Spanish-speaking, MA-level school psychologists. Drs. C & D are Ph.D.-level clinical psychologists. WISC-R-M is the Wechsler Intelligence Scale for Children, Revised, Mexican edition. WISC-III is the WISC, third edition. WAIS-III is the Wechsler Adult Intelligence Scale, third edition. FSIQ is the Full Scale Intelligence Quotient. PPVT-R Spanish is the Peabody Picture Vocabulary Test, Revised, Spanish version. Raven is the Raven Standard Progressive Matrices. Shipley ILS is the Shipley Institute of Living Scale.

Notes

24.1 In those US states with the death penalty, the defendant must first be convicted of a killing accompanied by an additional felony (Special Circumstances, or Aggravating Factors), such as a related killing or robbery. The case then enters the penalty (or mitigation) phase, wherein the same jury (which are specially screened for their willingness to recommend death, so called Death Qualification) then hears of *any* factors that might lessen (mitigate) the horrendousness of the crime. If any such factors are found, the jury may recommend Life Without Parole (LWOP) instead of death. Examples of such factors are mental retardation, dementia, youth, lack of previous record, childhood abuse, relative lack of culpability

24.2 The opinion can be downloaded at: http://www.supremecourtus.gov/opinions/01slipopinion.html

24.3 According to his website (http://www.psylaw.com/dr_enelson.htm), Dr. Nelson obtained his doctorate from the Univ. of North Carolina in 1991. He worked for the forensic unit of a state hospital for three years before going into private practice, specializing in legal referrals. He has published on informed consent in insanity trials.

24.4 A note on test names: Tests (and sometimes content) must be updated every few years. The second generation of the test is then designated as 2, II, or Revised, with the third generation designated as III. This can sometimes be misleading: in the case of the WAIS, the third edition is actually the fourth version, having been preceded by the Wechsler Bellevue.

24.5 Dr. Nelson concluded that this score was not an "aberration, malingered result, or invalid," since Atkins' limited intellect had been consistently present his entire life. See Atkins v Virginia, footnote 5.

24.6 According to his website (http://www.samenow.com), Dr. Samenow got his doctorate from the Univ. Michigan in 1968. For eight years, he worked with Samuel Yochelson, producing an important text on *The Criminal Personality*. He went into private practice in 1978, focusing on legal referrals. He published *Inside the Criminal Mind* in 1984, *Before It's Too Late in 1989, Straight Talk About Criminals* in 1998, and *In the Best Interest of the Child* in 2002.

24.7 The definition of APD can be found in DSM-IV-TR (American Psychiatric Association, 2000), or http://www.behavenet.com/capsules/disorders/antisocialpd.htm

24.8 While relevant, the issues of death-qualification of juries and victim impact statements are well beyond the scope of this paper.

24.9 The Virginia opinions can be found at: http://www.courts.state.va.us/scndex.htm

24.10 The US Constitution's full text can be found at: http://www.archives.gov/exhibit_hall/charters_of_freedom/constitution/constitution.html

24.11 All of the several MR definitions require measured IQ to be about two standard deviations below the measure's mean. For most tests, the cutoff is about 70, with mean 100 and Average IQ being 90-110.

24.12 The American Association on Mental Retardation (AAMR) has a website offering a variety of opinion papers on some of these issues: http://www.aamr.org

24.13 Although the case materials are now public record, the name has been changed for privacy. Jose Lopez is meant to be the Hispanic version of John Doe.

24.14 Lopez waived his Miranda rights. No hearing was held to determine his competency to do so. While relevant, the literature on competency to waive Miranda is beyond the scope of this paper. The literature on false confession is not relevant to *this* case study.

24.15 When the gang finished their getaway, the only member with a car balked at taking the rest home, since they wouldn't contribute gas money.

24.16 The mother of this then-14 year old pregnant girl was not charged with failure to protect.

24.17 For the CA guidelines on such attorney qualifications: http://www.courtinfo.ca.gov/rules/titlefour/title4-13.htm

24.18 For guidelines on doing such a background investigation, see: http://www.criminaljustice.org/public.nsf/941a6d5b3ad55cd485256b05008143fd/bee3ff4450880bb485256704006793eb?OpenDocument

24.19 CA School Psychologists are Master's level psychologists not allowed to practice independently. For details of their duties, see: http://www-gse.berkeley.edu/program/sp/html/what_is_a_school_psych_.html

24.20 "Acting out" is a euphemism for rule-breaking misbehavior.

24.21 I foresee this argument becoming the method of choice for psychologists unwilling to use validated methods. It will appear when the defendant's IQ scores are close to each other on multiple testing. The psychologist will argue, sans scientific proof, that malingerers simply cannot manage to get such consistent results.

24.22 http://wpe.info/vault/td2/tdtdau.pdf

24.23 The false negative rate refers to the percentage of the time the condition being tested for (e.g., malingering), is missed. The false positive rate refers to the percentage of the time the condition being tested for is falsely detected in people without the condition. For more test accuracy definitions, see: http://wpe.info/2x2table.pdf

24.24 The reasons the prosecution might decline to examine the defendant are beyond the scope of this article.

24.25 The discerning reader will notice that I have not reported Lopez' scores on the WAIS-III index. When this index is, in my opinion, adequately cross-validated, I will add the outcome in the Author's Update.

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