Approved:
Date 10-07-04

MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on March 18, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Lana Gordon - absent

Committee staff present:
Jill Wolters, Revisor of Statutes Office
Jerry Ann Donaldson, Legislative Research Department
Becky Krahl, Legislative Research Department
Connie Burns, Committee Secretary

Conferees appearing before the committee:
Rocky Nichols, KAPS
Kathy Lobb
Tom Laing, Interhab
Steve Schroeder
Sister Therese Bangert
Jane Rhys, KS Council Developmental Disabilities
Kevin O'Connor, KCDAA
Edward Collister, KS Judicial Council
Kerrie Bacon, Kansas Commission on Disabilities Concern

Others attending:
See Attached List.

HB 2439 – Changes the requirements determining mental retardation for purposes of applying the death penalty.

Chairman Loyd opened the hearing on **HB 2439**.

Jerry Ann Donaldson, Legislative Research Department, provided the committee statutes KSA 21-4626 section (6) and KSA 21-4623 section (b) and information on Capital Punishment where the defendant is mentally retarded. The LCC asked the Joint Committee to review 2003 **HB 2349**, which would amend the law on capital punishment where the defendant is mentally retarded. Current Kansas law prohibits sentencing a mentally retarded person to death. (Attachment 1)

Rocky Nichols, Kansas Advocacy and Protective Services, appeared before the committee to amend the bill and substitute **SB 355**, (The Judicial Council version of the bill) in its place, (Attachment 2) Kathy Lobb, Self-Advocate Coalition of Kansas (Attachment 3), Steve Schroeder, University of Kansas (Attachment 4), Jane Rhys, Kansas Council on Developmental Disabilities, (Attachment 5), and Kerrie Bacon, Legislative Liaison Kansas Commission on Disability Concerns. (Attachment 6) requested the Senate version.

Written testimony was submitted in support of the Senate version by Michael Wehmeyer, KUCDD (Attachment 7), Patrick Poull, The Brain Injury Association of Kansas and Greater Kansas City (Attachment 8), H. Rutherford Turnbull, Beach Center on Disability KU (Attachment 9), and Gary Clark, Professor of Special Education KU. (Attachment 10)

Tom Laing, InterHab, the membership of InterHab respectfully requests the support of the bill. (Attachment 11)

Sister Therese Bangert, the Kansas Catholic Conference stands in support of the bill. (Attachment 12)

Kevin O'Connor, KCDAA appeared in opposition and felt the bill is completely unnecessary. A study to look at the impact on past and pending cases has not been done and the bill adds unnecessary layers to the litigation process. (Attachment 13)

Edward Collister, Criminal Law Advisory Committee, Kansas Judicial Council provided information on the U.S. Supreme Court Case *Atkins v. Virginia*. (Attachment 14)

Secretary Pamela Johnson-Betts, Department of Aging submitted written testimony and additional language on cognitive impairment such as dementia and Alzheimer's Disease common in the senior population, but may also be found in younger individuals. These types of disabilities can greatly impair judgment, memory, and behavior in those who suffer from them. It would be good public policy to allow an exemption from the death penalty for such persons. (Attachment 15)

Daniel Martell, Park Dietz & Associates, Inc. provided information on the issue of cognitive disability and specifically the issue of what impact drug abuse plays in I.Q. tests. (Attachment 16)

Chairman Loyd closed the hearing on **HB 2439**.

The meeting was adjourned at 3:28 PM. The next meeting is March 22, 2004.

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE
GUEST LIST

DATE 3-18-04

NAME	REPRESENTING
Ed Collister	Judicial Council
Jim Clarke	KBA
Rocky Nichols	KAPS
Kirk Lowry	KAPS
~~Orval Patton~~	
Kerrie Bacon	Kansas Commission on Disability Concerns
Mark "Wagtle	
Jesse Peterson	
Mike Jennings	KCDAA
Michael White	KCDAA
Kevin O'Connor	KCDAA
Jared Maag	AG's office
S Therese Bangert	KS. Cath. Conf.
Donna Schnowels csj	Amnesty International
Mark Wish	Dept. on Aging
Jeremy S Barclay	KDOC
Jared Maag	Atty Gen.

21-4623

Chapter 21.--CRIMES AND PUNISHMENTS
PART III.--CLASSIFICATION OFCRIMES AND SENTENCING
Part 2.--Prohibited Conduct
Article 46.--SENTENCING

21-4623. Same; persons determined to be mentally retarded. (a) If, under K.S.A. 21-4624 and amendments thereto, the county or district attorney has filed a notice of intent to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death and the defendant is convicted of the crime of capital murder, the defendant's counsel or the warden of the correctional institution or sheriff having custody of the defendant may request a determination by the court of whether the defendant is mentally retarded. If the court determines that there is not sufficient reason to believe that the defendant is mentally retarded, the court shall so find and the defendant shall be sentenced in accordance with K.S.A. 21-4624 through 21-4627, 21-4629 and 21-4631 and amendments thereto. If the court determines that there is sufficient reason to believe that the defendant is mentally retarded, the court shall conduct a hearing to determine whether the defendant is mentally retarded.

(b) At the hearing, the court shall determine whether the defendant is mentally retarded. The court shall order a psychiatric or psychological examination of the defendant. For that purpose, the court shall appoint two licensed physicians or licensed psychologists, or one of each, qualified by training and practice to make such examination, to examine the defendant and report their findings in writing to the judge within 10 days after the order of examination is issued. The defendant shall have the right to present evidence and cross-examine any witnesses at the hearing. No statement made by the defendant in the course of any examination provided for by this section, whether or not the defendant consents to the examination, shall be admitted in evidence against the defendant in any criminal proceeding.

(c) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is not mentally retarded, the defendant shall be sentenced in accordance with K.S.A. 21-4624 through 21-4627, 21-4629 and 21-4631 and amendments thereto.

(d) If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed hereunder.

(e) As used in this section, "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

History: L. 1990, ch. 99, § 3; L. 1994, ch. 252, § 3; July 1.

House Corr & JJ
Attachment 1
3-18-04

21-4626

Chapter 21.--CRIMES AND PUNISHMENTS
PART III.--CLASSIFICATION OFCRIMES AND SENTENCING
Part 2.--Prohibited Conduct
Article 46.--SENTENCING

21-4626. Persons convicted of capital murder; mitigating circumstances. Mitigating circumstances shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under extreme distress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(7) The age of the defendant at the time of the crime.

(8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.

(9) A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

History: L. 1990, ch. 99, § 6; L. 1998, ch. 185, § 2; July 1.

Capital Punishment Where the Defendant is Mentally Retarded

The LCC asked the Committee to review 2003 HB 2349, which would amend the Kansas law on capital punishment where the defendant is mentally retarded. The bill's intent was to respond to the latest U.S. Supreme Court decisions related to this issue.

In 2002, the U.S. Supreme Court concluded the death penalty for mentally retarded defendants was excessive punishment under the Eight Amendment (prohibition of cruel and unusual punishment). *Atkins v. Virginia* (536 US 304) This conclusion, representing a change from a 1989 decision in which the Court found there was insufficient evidence of a national consensus against the execution of mentally retarded persons, was based on construction and application of the Eighth Amendment in light of the nation's "evolving standards of decency."

In addition to staff presentations regarding this issue, the Committee received expert testimony through a video teleconference with University of New Mexico School of Law Professor James Ellis, who successfully argued the *Atkins* case before the U.S. Supreme Court. Professor Ellis also presented his testimony before the Kansas Judicial Council during the fall of 2003, as the Judicial Council was also asked to examine this issue. The presentations by Professor Ellis were made possible in part by Kansas Advocacy and Protective Services (KAPS), of which former Kansas Representative Rocky Nichols is Executive Director. Representative Nichols in 2003 introduced HB 2349 to address changes to conform Kansas law to the *Atkins* decision.

Current Kansas law prohibits sentencing a mentally retarded person to death, which meant the *Atkins* decision's effect in Kansas was more limited than in other states. However, four issues remain for Kansas:

- Timing, or, when defense counsel may raise the mental retardation issue. Under current law the mental retardation issue is raised after the defendant is found guilty of capital murder.

- Definition of mental retardation, i.e., whether the definition is sufficiently refined, as determined by most recent research on the issue.

- Whether a judge or a jury should decide the issue of mental retardation. Under current law, the trial judge determines mental retardation after receiving reports from licensed physicians or psychologists after a hearing.

- Whether the burden of proof standard for mental retardation should be proven by a "preponderance of evidence" or "beyond a reasonable doubt." Current law

requires the "preponderance of the evidence" standard.

Under HB 2349, defense counsel may file a motion requesting the finding that the defendant is not eligible for the death penalty because of mental retardation. This motion is to be filed within 180 days after the prosecution files a notice of intent to seek the death penalty. In other words, under HB 2349 the mental retardation issue is decided before there has been a conviction of capital murder.

HB 2349 also attempts to address the definition of mental retardation. Of the 18 states (Kansas included) that had excluded mentally retarded individuals from the death penalty prior to *Atkins*, 17 define mental retardation in purely clinical terms. The sole exception is Kansas, which appended to the clinical definition "to an extent which impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law" (KSA 21-4623[e]). This appended language was taken from language used in Kansas in the past when Kansas recognized an insanity defense, and some believe this additional language might call the constitutionality of the Kansas statute into question while serving no useful purpose. Also, recent refinements have been made to the clinical definition.

The Kansas Judicial Council has examined in depth the definition issue, including the question of whom should be considered disabled in the sense of applying the *Atkins* decision. Its fall 2003 sessions included testimony that some individuals might have incurred brain injury after the age of 18, which resulted in their otherwise fitting the clinical definition of mental retardation.

Under current Kansas law, the trial judge determines mental retardation after receiving reports from licensed professionals after a hearing. Under HB 2349, the trial judge would continue to make this initial determination but, if the judge does not find the defendant mentally retarded, allows the opportunity for the death penalty jury to "unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation."

Finally, under current law, the burden of proof is proven by "preponderance of the evidence." HB 2349 requires the initial determination of mental retardation by the trial judge to also be by "preponderance of the evidence." However, if the judge does not find the defendant mentally retarded and the issue goes to the death penalty jury, a special verdict question by the death penalty jury requires a finding of no mental retardation "beyond a reasonable doubt." (While the question of whether this "beyond a reasonable doubt" finding is constitutionally required has not been answered directly in mental retardation cases by the U.S. Supreme Court. But in another U.S. Supreme Court case, i.e., *Ring v. Arizona*, the holding was that when something has been deemed to be an element of a crime or its equivalent, the prosecution must carry the burden of persuasion "beyond a reasonable doubt." Analysts have concluded that the question of whether a defendant has mental retardation bears most of the attributes described in the *Ring* case.)

At the time of the last meeting of the Joint Corrections and Juvenile Justice Committee, the Judicial Council had not yet finalized its recommendations.

Recommendation. The Committee recognizes the need to modify Kansas law with respect to capital punishment when the defendant is mentally retarded and supports modification of the law in light of the recent U.S. Supreme Court cases. The Committee wishes to receive the Judicial Council report before making a recommendation on this topic.

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Testimony to the House Corrections and Juvenile Justice Committee
March 18, 2004

Chairman Loyd and members of the Committee:

My name is Rocky Nichols. I am the Executive Director of the Kansas Advocacy and Protective Services (KAPS). KAPS is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, KAPS is the officially designated protection and advocacy organization for Kansans with disabilities. KAPS is a private, 501(c)(3) nonprofit corporation, independent of both state government and disability service providers.

KAPS offers this testimony on the issue of cognitive disabilities and the death penalty. We support the version of the bill endorsed by the Kansas Judicial Council which prohibits imposition of the death penalty for persons with cognitive disabilities. The Judicial Council's version of the bill is contained in SB 355. We ask that you amend HB 2439 and substitute SB 355 (the Judicial Council version of the bill) in its place. KAPS strongly supports this version of the bill. The Kansas Judicial Council bill is important because it will bring our state's death penalty statute into absolute full compliance with the U.S. Supreme Court decision in *Atkins vs. Virginia*, 536 U.S. 304 (2002), and, most importantly, it will ensure that no person with qualifying cognitive disabilities is sentenced to death.

The proposal to change the death penalty statutes was triggered by a 2002 U.S. Supreme Court case, *Atkins vs. Virginia*, which held that executing a person with mental retardation, the most well known of cognitive disability, was cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

It is also important to note what the Judicial Council's proposal (SB 355) does not do. It does not involve determinations of mental illness, capacity to stand trial, or guilt or innocence. It only involves whether the death penalty can be

imposed on persons with significant cognitive disabilities. The high court found it is unconstitutional to execute a person with significant cognitive disabilities because they have "diminished capacities to undertake 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." The two reasons to execute criminals, retribution and deterrence, are absent when persons with these types of significant intellectual functioning disabilities are being sentenced. *Atkins*, 536 U.S. at 318-319.

The Judicial Council bill (SB 355) is the result of an open, thoughtful, interim study and serious deliberations by the Kansas Judicial Council. It implements several significant improvements in the Kansas death penalty statutes.

1. The decision to base the definition of "cognitive disability" on the nationally accepted definition for mental retardation developed by AAMR (American Association on Mental Retardation) is important. This proposal is also effective because the definition of cognitive disability is not limited by age of onset and thus ensures that persons with cognitive disabilities will not be subjected to the death penalty. It should not matter whether a person's cognitive disability (whether it is mental retardation, traumatic brain injury, or any other cognitive disability) manifests itself prior to age 18. The issue is whether the person's disability creates significant intellectual functioning and adaptive behavior deficits. If so, then the death penalty would be cruel and unusual punishment for that Kansan with a cognitive disability. The key is that if a person has significant cognitive disability that further significantly impacts their intellectual functioning and adaptive behavior, then they do not have the ability to form intent, premeditation and deliberation. "Capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." *Atkins*, 536 U.S. at 319. Kansas public policy should focus on the capacity of the person to function, regardless of any particular term, label or diagnosis. This is a critical point to this debate. By using the AAMR's definition of mental retardation, without an age of onset, the bill ensure Kansas will not put to death anyone who fits the definition of mental retardation, regardless of when the disability was noticed or was incurred. It should not matter whether the mental retardation and significant intellectual functioning disability happened birth, age 12, age 17 by a traumatic brain injury, or age 70 by a traumatic brain injury. What matters is that the person with a disability must meet the definition of mental retardation (which in the bill is two standard deviations below the norm in intellectual functioning and adaptive behavior deficits).

2. This bill will save Kansas taxpayers millions of dollars in death penalty defense expenditures. This bill ensures the opportunity to decide the issue of cognitive disability is before trial, instead of only after trial. Current law has the determination pose conviction. Current law (KSA 21-4624) states that if the "defendant is convicted of the crime of capital murder, the defendant's counsel or the warden of the correctional institution or sheriff having custody of the defendant may request a determination by the court of whether the defendant is mentally retarded." Simply put, considerable time, energy and resources can be saved by making a pretrial determination of ineligibility for the death penalty because of cognitive disability. If the defendant cannot be executed within the bounds of the constitution, the taxpayers have the right to know that up front. KAPS applauds this change.

KAPS believes that the Judicial Council did an incredible job of gathering information and conducting exhaustive legal research in preparing this proposal for your consideration. The Judicial Council worked on this measure with national experts in this field, like Professor James Ellis from the University of New Mexico and Professor Rud Turnbul from the University of Kansas Beach Center on Disability. Professor Ellis has advised the U.S. Supreme Court several times about mental retardation and death penalty issues, and actually successfully argued the Atkins case before the high court. Professor Ellis has offered to be available to this committee by video conference or potentially in person if this committee still has questions after hearing the Judicial Council's version of this bill, however, he believed that the good and deliberative work of Judicial Council speaks for itself.

Also of noteworthy is that the use of cognitive impairment to prevent the imposition of the death penalty should be rare. "It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, . . ." *Atkins v. Virginia*, 536 U.S. 304 at 309, footnote 5. And the intelligence quotient is only half the requirement. The defendant must prove both significant intellectual functioning at least two standard deviations from the norm and limitations in adaptive functioning.

In our opinion, HB 2439's definition of cognitive impairment would not include anyone currently on death row in Kansas. To the best of our knowledge, and upon reasonable investigation, none of the current person's convicted and sentenced to death made a claim of mental retardation under current law. Given the thoroughness of our death penalty defense unit, we believes this would point to no one on death row meeting the cognitive disability definition in SB 355.

The committee should also know that a person who has abused drugs would not meet this definition of cognitive disability simply by the abuse of the drugs. I am attaching the testimony of Daniel A. Martell, a board certified forensic neuropsychologist. Dr. Martell has thoroughly researched this issue and concludes that drug abuse could not cause a significant loss in full-scale intelligence quotient, let alone of the magnitude required to reach two standard deviations from the norm.

This committee should not attempt to change state law to meet the narrowest reading of *Atkins*. Such a tactic would invite appeals and unnecessarily cost taxpayers millions of dollars in defense costs and appeals. This committee should trust the deliberative efforts and experience of the good judges, prosecutors, and attorneys of the Judicial Council. Persons with cognitive impairment, by definition, are simply incapable of forming sufficient intent, premeditation, and lack the full extent of appreciation of the consequences of their conduct to be executed. Kansas should not put people with cognitive disabilities to death.

The question is not whether persons with cognitive disabilities will be held accountable under the law. They will, under SB 355. The question is whether you think persons with cognitive disabilities should be put to death for a crime which they do not have the same culpability as a person without cognitive disability. We don't believe the State should. The American people agree. Eighty two percent of Americans oppose the death penalty for persons with mental retardation, the most well known type of cognitive disability (Gallup Poll, 2002-2003). Even supporters of the death penalty oppose its use for persons with this these cognitive disabilities (Source: Gallup polling found that though 70% of Americans may support the limited use of the death penalty, 82% oppose it for these types of cognitive disabilities).

KAPS supports the Judicial Council's good work and ask you to substitute SB 355 into HB 2439. The Judicial Council has done an effective job at crafting this public policy and KAPS urges the Senate Judiciary Committee to adopt this version of the bill.

(3)

Self-Advocate Coalition of Kansas

DATE: March 18, 2004

TO: Corrections & Juvenile Justice Committee

FROM: Kathy Lobb, Legislative Liaison
Self-Advocate Coalition of Kansas

RE: House Bill 2439

Thank you for the opportunity to comment on House bill 2439.

My name is Kathy Lobb. I am representing the Self-Advocate Coalition of Kansas better known as SACK. SACK is the state wide advocacy group for adults with developmental disabilities. SACK is made up of approximately 20 local advocacy groups across the state. SACK is also a member of the Big Tent Coalition.

I am here to ask you to change HB 2439 to the Senate version, SB355. The senate version contains language from the Judicial Council's recommendations. We feel it is very important to protect people with cognitive disabilities from the death penalty. People with cognitive disabilities will still be held accountable for any crimes they have committed; they just won't face possible execution.

We feel it does not matter what age you are when you acquire a severe cognitive impairment. All people with severely limited cognitive functioning should be protected from the death penalty. We do not want to see the death penalty applied to people who do not understand their rights and have diminished capacity for reason and logic. SB 355 simply places into Kansas law the American Association on Mental Retardation (AAMR) definition of mental retardation.

One of the most important things in SB 355 is that people would have to meet a high standard to prove they have a cognitive disability. It also provides for a preliminary pre-trial determination of cognitive disability. This would protect the state from spending money on a death penalty trial for someone who meets the strict definition required in order be exempt from the death penalty. Again, individuals will still be tried and held accountable for their crimes; they just won't be threatened with death over actions they may not understand.

So please substitute the senate version, SB355 for House Bill 2439. We appreciate your careful consideration of this matter.

Kathy Lobb

Kathy Lobb

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House Corr & JJ
Attachment 3
3-18-04

(4)

The University of Kansas

Schiefelbusch Institute for Life Span Studies

Testimony to the House Corrections and Juvenile Justice Committee
March 18, 2004

By
Stephen R. Schroeder, Ph.D.
Emeritus Director
Schiefelbusch Institute for Life Span Studies, University of Kansas
Kansas Center for Research in Mental Retardation
Kansas Center for Excellence in Developmental Disabilities
Former Editor of Three Leading Journals on Mental Retardation
American Journal on Mental Retardation
MRDD Research Reviews
Research In Developmental Disabilities

Chairman Loyd and Members of the Committee:

I come as a researcher with 40 years of experience in the field of disabilities to support the amendment of HB 2439 and substituting SB 355 in its place. I share the views expressed by Rudd Turnbull in his testimony to the Kansas Supreme Court and Judicial Council on 7 November 2003. I find this a very scholarly summary of the key points, which I will summarize below. A copy of Rudd's testimony is attached for your convenience.

The area of cognitive disability is still an active research area full of many diverse opinions. We are always trying to improve our understanding of all disabilities and to keep pace with our changing knowledge base. But, with respect to opposition to the death penalty for people with cognitive disability, there is consensus on some basic facts:

1. People with mental retardation are over represented in the criminal justice system compared to the population at large.
2. People with mental retardation function at lower levels cognitively and adaptively than the general population. This situation leads to several characteristics which put them at risk in the criminal justice system:
   a. They are easily misled, willing to talk without understanding the consequences of their talking. They are easily susceptible to leading questions.
   b. Many are impulsive and do not understand the implications of lack of self restraint.
   c. They often try to hide their disability to avoid its stigma and to gain acceptance from others.
   d. They often have low self-esteem, trying to please authority figures by telling them what they think is wanted. They often acquiesce to other people they consider influential.

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Central to all of these characteristics is an impaired cognitive inability to organize their thinking and to plan to avoid risky situations. By definition their ability for premeditated crimes or understanding deterrence motives of the death penalty is impaired. For this reason they should not receive the death penalty. There are other ways to shape their behavior, so that they can become accountable for their actions. Many of these behavioral intervention procedures have been researched and have proven successful for many people with cognitive disability.

A final point is that this bill should not only extend to people with mental reatardation whose cognitive disability was discovered before 18 years of age, but also to those with cognitive impairments across the life span. People with stroke, closed head injury, epilepsy, senile dementia and other disorders may sometimes fall into this category and their cognitive disabilities, i.e. IQ and adaptive behavior, are often assessed with the same instruments we use to assess people with mental retardation. In addition, they may receive neurological and neuropsychological tests to try to localize the brain dysfunction. The causes of their cognitive disability may be different, but functionally their behaviors are often similar to those of people with mental retardation and they are largely treated as such.

Thank you.

Stephen A. Schroeder

Kansas Supreme Court and Judicial Council: Capital Punishment and Persons with Mental Retardation

H. Rutherford Turnbull, III

Co-director, Beach Center on Disability
Professor of Special Education
Former Courtesy Professor of Law
Former President, American Association on Mental Retardation
Former Chairman, American Bar Association Commission on Disability Law
Chairman, Board of Trustees, Judge David L. Bazelon Center on Mental Health Law

7 November 2003

I. Atkins v. Virginia (2002)

A. Holds capital punishment to be cruel and unusual for defendants with mental retardation.

B. Defines mental retardation as a disability of significant impairments in intellectual disability, in adaptive behavior, and as manifested by the age of 18. This definition is consistent with the long-standing definition of mental retardation, including those of the American Association on Mental Retardation and American Psychiatric Association. For example, it is consistent with the 1992 AAMR definition

1. Significantly subaverage intellectual functioning

   a. f.n. 5 cites APA: 1 to 3 % of population have IQ between 70 and 75 or lower (typical cutoff score)

   b. opinion notes that only five states have executed individuals with known IQ below 70 since *Penry* (1989) (establishes IQ 70 [to 75] as high range for classification into mental retardation)

2. Related limitations in two of 10 areas of adaptive behavior (now obsolete under AAMR's 2002 approach)

3. Manifestation during developmental period (before 18)

C. Defines mental retardation consistently with 2000 APA/DSM-IV definition

1. Significantly subaverage intellectual functioning (IQ 70)

2. Significant limitations in two of 10 areas of adaptive behavior

3. Onset before age 18

D. Itemizes three major areas of impairment

1. Reasoning

2. Judgment

3. Control of impulses

E. Recognizes that individuals with mental retardation have varying abilities, but all of them function below a certain ceiling that is the definition. Also recognizes that the doctrines of incompetence to stand trial, insanity defenses, etc. will not suffice to protect individuals with metal retardation; that is so because those individuals frequently are competent to stand trial and are responsible for their crimes. But, because they have mental retardation, they cannot be executed: they have such significantly impaired intellectual and adaptive behavior that their blameworthiness does not meet the constitutional standard for execution and their execution does not serve the twin purposes of capital punishment, namely, deterrence and retribution. Specifically, they have the following disabilities that are important in the criminal justice system's interaction with them:

1. understand and process information (e.g., *Miranda* warning)

2. communicate (e.g., assist counsel in defense)

3. abstract from mistakes and learn from experience (e.g., understand consequences of own and others' behavior)

4. engage in logical reasoning (e.g., understand deterrent and retribution as elements of capital punishment)

5. control impulses (e.g., refrain from crime though knowing that an action is wrong); often act on impulse rather than pursuant to premeditated plan

6. understand the reactions of others (e.g., tendency to please those in authority, as in police interrogations); in group settings, followers rather than leaders

F. Notes common risks in criminal justice system:

1. possibility of false confessions exists

2. lesser ability exists to make persuasive showing of mitigation

3. is less able to give meaningful assistance to counsel

4. is typically a poor witnesses

5. demeanor may create impression of lack of remorse

II. **Atkins "Got it Right": The Current AAMR Definition** (Mental Retardation: Definition, Classification, and Systems of Support [2002])

A. Significant limitations in both intellectual functioning, and

B. Adaptive behavior as expressed in conceptual, social, and practical adaptive skills, and

C. Originates before age 18

D. "Intelligence"

1. is a general mental capability

2. includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, learning from experience

3. is best represented by IQ scores from appropriate assessment instruments

4. consists of approximately two standard deviations below the mean (mean is 100, mental retardation occurs at about IQ 70-75)

5. mental retardation occurs in about 2.28 – 3.00 % of the entire population (2 million people out of 280 million)

E. "Adaptive Behavior"

1. is the collection of conceptual, social, and practical skills learned by people in order to function in everyday life (note shift to three general areas instead of 2 of 10 specific areas; all three must be present; *Atkins* cited 1992 definition [2 of 10] but the AAMR approach [each of three types of skills must be impaired] has changed)

2. consists of limitations that affect daily life and ability to respond to life changes and environmental demands

3. has variable relevance (diagnosis, classification, or planning supports – classification includes classification into capital-punishment eligibility)

4. is best represented by performance that is at least two standard deviations below the mean as assessed by scales/assessments

5. depends on "expression" – that is, on how a person performs (person does not know how to perform the skill, does not know when to use a skill, or is not motivated to perform or learn the skill)

6. is exemplified in "conceptual skills" – reading and expressive language, reading and writing, money concepts, self-direction

7. is exemplified in "social skills" – interpersonal, responsibility, self-esteem, gullibility, naiveté, following rules, obeying laws, avoiding victimization

8. is exemplified in "practical skills" – eating, dressing, mobility, toileting, preparing meals, taking medications, using the telephone, managing money, using transportation, doing household chores

III. The Presence of Mental Retardation Affects Every Stage of the Criminal Justice System and Negatively Affects the Following Stages:

A. Pre-trial (arrest, decision to prosecute)

B. Trial (ability to assist in defense)

C. Guilt or Innocence (verdict phase)

D. Post-trial (sentencing phase)

E. Punishment (execution/application of sentence)

IV. Particular Aspects of Mental Retardation Related to the Stages

A. Greater likelihood of responding to coercion or pressure than non-retarded

B. Susceptibility to leading questions and false information (increases as ability decreases)

C. Lack of complete understanding of *Miranda* warnings; more likely to waive right against self-incrimination; do not understand substantive portions of the warning (silence, use of statements in court, right to attorney, right to appointed attorney); do not understand concept of "self-incrimination"

D. More likely to be "outward directed" and rely on social and language cues of others than on own problem-solving abilities

E. Stronger desire to please, especially those in authority; more apt to give socially desirable answers

F. More likely to answer "yes" regardless of appropriateness of the answer; more likely to be acquiescent, especially as the linguistic difficulty of the question increases (more conceptual, less understood)

V. Accepted Assessment Instruments

A. Intelligence

1. Wechsler Intelligence Scale for Children – III ("WISC III")
2. Wechsler Adult Intelligence Scale – III ("WAIS-III")
3. Stanford-Binet IV
4. Cognitive Assessment System
5. Kaufman Assessment Battery for Children

B. Adaptive Behavior

1. Vineland Adaptive Behavior Scales
2. AAMR Adaptive Behavior Scales
3. Scales of Independent Behavior-Revised
4. Comprehensive Test of Adaptive Behavior – Revised
5. Adaptive Behavior Assessment System

C. Susceptibility

1. Gudjonsson Suggestibility Scale (1984, 1992) – applied to those with mental retardation in England (1993, 1995) and demonstrates higher degrees of susceptibility
2. Grisso's Comprehension of Miranda Rights (1981, 1986) – applied to those with mental retardation in USA and demonstrates significant reduction of comprehension (1995) and higher propensity to confess erroneously (1999)

VI. Courts' Roles and Resources

A. List of national, state, and local agencies that provide information and assistance when questions arise about defendants' mental retardation (e.g., American Association on Mental Retardation, The Arc, and TASH)

B. Require proper evaluations when questions arise in any of the stages of the system – note that the evaluator must be qualified (training, skill, experience) and the instruments/assessments that the evaluator uses must be professionally defensible

C. Assure competency of counsel – note that knowledge about mental retardation specifically; general knowledge about disability or even mental illness/emotional-behavioral disabilities does not necessarily qualify counsel

D. Assure competency of counsel – capital cases' uniqueness

E. Scrutinize waivers of rights, especially Miranda and other self-incrimination rights

F. Adhere to applicable ABA Criminal Justice Standards (if they still exist)

G. Consider diversions and, if incarceration, place (safety)

VII. Resources (for the above)

A. American Association on Mental Retardation (2002). *Mental Retardation: Definition, Classification, and Systems of Supports.* Author: Washington, DC

B. *Mental Retardation* (1999) – several articles, including one cited in *Atkins*

C. *Beyond Reason* (2001). Human Rights Watch. http://www.hrw.org/reports/2001/ustat/ustat0301.htm

D. AAMR has a Kansas Chapter, c/o Susan Palmer at The Beach Center, 864-0270; The Arc has an active chapter in Douglas County, c/o Barbara Bishop, 749-0121; and TASH has a Kansas affiliation, c/o Joan Houghton at The Beach Center, 864-7600.

E. See also Ks. Developmental Disabilities Planning Council, c/o Jane Rhys, 296-2608.

F: Kansas Supreme Court and Judicial Council
HRT III, 06 Nov 03

Kansas Council on Developmental Disabilities

KATHLEEN SEBELIUS, Governor
DAVE HEDERSTEDT, Chairperson
JANE RHYS, Ph. D., Executive Director

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"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

March 18, 2004

Room 241-N

Mr. Chairperson, Members of the Committee, my name is Jane Rhys and I represent the Kansas Council on Developmental Disabilities. I am in support of House Bill 2439 an act excluding persons who have mental retardation from the death penalty.

The Kansas Council is federally mandated and federally funded under the Developmental Disabilities Assistance and Bill of Rights Act of 2000, we receive no state funds. It is composed of individuals appointed by the Governor, including representatives of the major agencies who provide services for individuals with developmental disabilities. At least 60 percent of the membership consists of individuals who are persons with developmental disabilities or their immediate relatives. Our mission is to advocate for individuals with developmental disabilities to receive adequate supports to make choices about where they live, work, and learn.

We presented to an Interim Committee as well as the Judicial Council on this issue and appreciate the time they took to study all the ramifications. Based on our study of the issue as well as input from many experts, we urge you to carefully review Senate Bill 355 and substitute it, through amendment, for HB 2439. This bill is one that the State of Kansas can be proud of enacting. The Council firmly believes that people who have cognitive disabilities, regardless of how and when that disability occurred, should not be executed. In addition, the version of the bill as endorsed by the Kansas Judicial Council is important because it will bring our state's death penalty statute into full compliance with the U.S. Supreme Court decision in *Atkins vs. Virginia,* 536 U.S. 304 (2002).

Our understanding is that the purpose of the death penalty is to exact justice in the form of punishment and retribution, and to act as a deterrent from future criminal acts. Given this purpose, we do not believe

that people with cognitive disabilities should be subjected to the ultimate penalty. This does not mean we believe there should be no punishment. People with cognitive disabilities should be punished when they break the law, and they should be held responsible for their actions. However, the death penalty would not be considered an appropriate punishment based on the facts of their disability (i.e. they function at lower levels, both adaptively and intellectually, are often impulsive, resulting in acts that people of average abilities could refrain from). I have attached some information regarding people with cognitive disabilities, for your information.

SB 355 does not interfere with current statutes regarding determinations of mental illness, capacity to stand trial, or guilt or innocence. It only involves individuals who have a significant cognitive disability at the time the act was committed. The Judicial Council did not act lightly or with haste. They conducted a thorough study with nationally recognized experts such as Professor James Ellis from the University of New Mexico and Professor Rud Turnbull from the University of Kansas Beach Center on Disability. Professor Ellis has advised the U.S. Supreme Court several times about mental retardation and death penalty issues, and successfully argued the *Atkins* case before the high court. We believe that the Judicial Council, with assistance from several noted authorities, created excellent public policy in this area for Kansas. The Council therefore strongly urges you to give it your full consideration and recommend passage to the full House of Representatives.

We appreciate your time and attention to this issue and I would be happy to answer any questions you may have.

Jane Rhys, Executive Director
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DEFINITION OF MENTAL RETARDATION

Mental retardation is not something you have, like blue eyes, or a bad heart. Nor is it something you are, like short, or thin.

It is not a medical disorder, nor a mental disorder.

Mental retardation is a particular state of functioning that begins in childhood and is characterized by limitation in both intelligence and adaptive skills.

Mental retardation reflects the "fit" between the capabilities of individuals and the structure and expectations of their environment.

The AAMR Definition of Mental Retardation

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

This disability originates before age 18.

Five Assumptions Essential to the Application of the Definition

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.

3. Within an individual, limitations often coexist with strengths.

4. An important purpose of describing limitations is to develop a profile of needed supports.

5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve.

Founded in 1876, AAMR is an international multidisciplinary association of professionals. The Association has had responsibility for defining mental retardation since 1921.

American Association on Mental Retardation

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Fact Sheet:
Frequently Asked Questions About Mental Retardation

Where can I find detailed information about the 2002 AAMR definition of mental retardation?

The newly released 10th edition of Mental Retardation: Definition, Classification, and Systems of Supports discusses the 2002 AAMR definition and classification system in great detail. It presents the latest thinking about mental retardation and includes important tools and strategies to determine if an individual has mental retardation along with detailed information about developing a personal plan of individualized supports. It is available from AAMR through the Website.

What is the official AAMR definition of mental retardation?

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before the age of 18. A complete and accurate understanding of mental retardation involves realizing that mental retardation refers to a particular state of functioning that begins in childhood, has many dimensions, and is affected positively by individualized supports. As a model of functioning, it includes the contexts and environment within which the person functions and interacts and requires a multidimensional and ecological approach that reflects the interaction of the individual with the environment, and the outcomes of that interaction with regards to independence, relationships, societal contributions, participation in school and community, and personal well being.

What factors must be considered when determining if a person has mental retardation and developing an individualized support plan?

When using the AAMR definition, classification and systems of supports professionals and other team members must:

1. Evaluate limitations in present functioning within the context of the individual's age peers and culture;
2. Take into account the individual's cultural and linguistic differences as well as communication, sensory, motor, and behavioral factors;
3. Recognize that within an individual limitations often coexist with strengths;
4. Describe limitations so that an individualized plan of needed supports can be developed; and
5. Provide appropriate personalized supports to improve the functioning of a person with mental retardation.

What is a disability?

A disability refers to personal limitations that represent a substantial disadvantage when attempting to function in society. A disability should be considered within the context of the environment, personal factors, and the need for individualized supports.

What is Intelligence?

Intelligence refers to a general mental capability. It involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly, and learn from experience. Although not perfect, intelligence is represented by Intelligent Quotient (IQ) scores obtained from standardized tests given by a trained professional. In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an IQ test score of approximately 70 or below. An obtained IQ score must always be considered in light of its standard error of measurement, appropriateness, and consistency with administration guidelines. Since the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75. This represents a score approximately 2 standard deviations below the mean, considering the standard error of measurement. It is important to remember, however, that an IQ score is only one aspect in determining if a person has mental retardation. Significant limitations in adaptive behavior skills and evidence that the disability was present before age 18 are two additional elements that are critical in determining if a person has mental retardation.

What is Adaptive Behavior?

Adaptive behavior is the collection of conceptual, social, and practical skills that people have learned so they can function in their everyday lives. Significant limitations in adaptive behavior impact a person's daily life and affect the ability to respond to a particular situation or to the environment.

Limitations in adaptive behavior can be determined by using standardized tests that are normed on the general population including people with disabilities and people without disabilities. On these standardized measures, significant limitations in adaptive behavior are operationally defined as performance that is at least 2 standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical, or (b) an overall score on a standardized measure of conceptual, social, and practical skills.

What are some specific examples of Adaptive Behavior Skills?

Conceptual Skills

Receptive and expressive language
Reading and writing

Money concepts
Self-directions

Social Skills
Interpersonal
Responsibility
Self-esteem
Gullibility (likelihood of being tricked or manipulated)
Naiveté
Follows rules
Obeys laws
Avoids victimization

Practical Skills
Personal activities of daily living such as eating, dressing, mobility and toileting.
Instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation and doing housekeeping activities.
Occupational skills
Maintaining a safe environment

What are supports?

The concept of supports originated about 15 years ago and it has revolutionized the way habilitation and education services are provided to persons with mental retardation. Rather than mold individuals into pre-existing diagnostic categories and force them into existing models of service, the supports approach evaluates the specific needs of the individual and then suggests strategies, services and supports that will optimize individual functioning. The supports approach also recognizes that individual needs and circumstances will change over time. Supports were an innovative aspect of the 1992 AAMR manual and they remain critical in the 2002 system. In 2002, they have been dramatically expanded and improved to reflect significant progress over the last decade.

Supports are defined as the resources and individual strategies necessary to promote the development, education, interests, and personal well-being of a person with mental retardation. Supports can be provided by a parent, friend, teacher, psychologist, doctor or by any appropriate person or agency.

Why are supports important?

Providing individualized supports can improve personal functioning, promote self-determination and societal inclusion, and improve personal well-being of a person with mental retardation. Focusing on supports as the way to improve education,

employment, recreation, and living environments is an important part of person-centered approaches to providing supports to people with mental retardation.

How do you determine what supports are needed?

AAMR recommends that an individual's need for supports be analyzed in at least nine key areas such as human development, teaching and education, home living, community living, employment, health and safety, behavior, social, and protection and advocacy.

What are some specific examples of supports areas and support activities?

Human Development Activities

- Providing physical development opportunities that include eye-hand coordination, fine motor skills, and gross motor activities
- Providing cognitive development opportunities such as using words and images to represent the world and reasoning logically about concrete events
- Providing social and emotional developmental activities to foster trust, autonomy, and initiative

Teaching and Education Activities

- Interacting with trainers and teachers and fellow trainees and students
- Participating in making decisions on training and educational activities
- Learning and using problem-solving strategies
- Using technology for learning
- Learning and using functional academics (reading signs, counting change, etc.)
- Learning and using self-determination skills

Home Living Activities

- Using the restroom/toilet
- Laundering and taking care of clothes
- Preparing and eating food
- Housekeeping and cleaning
- Dressing
- Bathing and taking care of personal hygiene and grooming needs
- Operating home appliances and technology
- Participating in leisure activities within the home

Community Living Activities

- Using transportation
- Participating in recreation and leisure activities
- Going to visit friends and family
- Shopping and purchasing goods
- Interacting with community members
- Using public buildings and settings

Employment Activities
- Learning and using specific job skills
- Interacting with co-workers
- Interacting with supervisors
- Completing work-related tasks with speed and quality
- Changing job assignments
- Accessing and obtaining crisis intervention and assistance

Health and Safety Activities
- Accessing and obtaining therapy services
- Taking medication
- Avoiding health and safety hazards
- Communicating with health care providers
- Accessing emergency services
- Maintaining a nutritious diet
- Maintaining physical health
- Maintaining mental health/emotional well-being

Behavioral Activities
- Learning specific skills or behaviors
- Learning and making appropriate decisions
- Accessing and obtaining mental health treatments
- Accessing and obtaining substance abuse treatments
- Incorporating personal preferences into daily activities
- Maintaining socially appropriate behavior in public
- Controlling anger and aggression

Social Activities
- Socializing within the family
- Participating in recreation and leisure activities
- Making appropriate sexual decisions
- Socializing outside the family
- Making and keeping friends
- Communicating with others about personal needs
- Engaging in loving and intimate relationships
- Offering assistance and assisting others

Protection and Advocacy Activities
- Advocating for self and others
- Managing money and personal finances
- Protecting self from exploitation
- Exercising legal rights and responsibilities
- Belonging to and participating in self-advocacy/support organizations
- Obtaining legal services
- Using banks and cashing checks

Has AAMR always had the same definition of mental retardation?

No. AAMR has updated the definition of mental retardation ten times since 1908. Changes in the definition have occurred when there is new information, or there are changes in clinical practice or breakthroughs in scientific research. The 10th edition of Mental Retardation: Definition, Classification and Systems of Supports contains a comprehensive update to the landmark 1992 system and provides important new information, tools and strategies for the field and for anyone concerned about people with mental retardation.

What are the causes of Mental Retardation?

The causes of mental retardation can be divided into biomedical, social, behavioral, and educational risk factors that interact during the life of an individual and/or across generations from parent to child. Biomedical factors are related to biologic processes, such as genetic disorders or nutrition. Social factors are related to social and family interaction, such as child stimulation and adult responsiveness. Behavioral factors are related to harmful behaviors, such as maternal substance abuse. And educational factors are related to the availability of family and educational supports that promote mental development and increases in adaptive skills. Also, factors present during one generation can influence the outcomes of the next generation. By understanding inter-generational causes, appropriate supports can be used to prevent and reverse the effects of risk factors.

What is the AAMR Mission?

Founded in 1876, AAMR is the world's oldest and largest interdisciplinary organization of professionals concerned about mental retardation. With headquarters in Washington, DC, AAMR has a constituency of more than 50,000 people and an active core membership of 7,500 in the United States and in 55 other countries. The mission of AAMR is to promote progressive policies, sound research, effective practices, and universal rights for people with intellectual disabilities.

American Association on Mental Retardation

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KANSAS

DEPARTMENT OF HUMAN RESOURCES
Jim Garner, Secretary

KATHLEEN SEBELIUS, Governor

Testimony

Before the House Corrections and Juvenile Justice Committee
Thursday, March 18, 2004
Hearing on House Bill 2439

Respectfully submitted by:
Kerrie J. Bacon, Legislative Liaison
Kansas Commission on Disability Concerns
Kansas Department of Human Resources

Thank you, Chairperson Loyd, and members of the Committee. I appreciate the opportunity to testify today regarding H.B. 2439. The Kansas Commission on Disability Concerns (KCDC) is charged with providing information to the Governor, the Legislature, and to State agencies about issues of concern to Kansans with disabilities (K.S.A. 74-6706).

KCDC supports amending HB 2439 and substituting SB 355, as proposed by Kansas Advocacy and Protective Services. K.A.P.S. testimony explains the benefits of making this change.

We would also draw to your attention that the fiscal note for HB2439 states "...BIDS indicates that it is likely that several sections of the bill would be considered unconstitutional, and the costs of constitutional challenges are too speculative to predict." However, SB 355 fiscal note states "The bill was recommended by the Kansas Judicial Council's Criminal Law Advisory Committee which had been requested to study the issue by the 2003 Legislature." SB 355 appears to be constitutionally sound and we encourage your support.

Thank you again for this opportunity to testify.

Written Testimony for Consideration by Kansas House Corrections and Juvenile Justice Committee

March 18, 2004

Chairman Loyd and members of the Committee:

My name is Michael Wehmeyer. I am Executive Director of the Kansas University Center on Developmental Disabilities (KUCDD). The KUCDD is one of 61 federally supported University Centers of Excellence in Developmental Disabilities funded by the U.S. Department of Health and Human Services through the Developmental Disabilities Act to "provide leadership in, advise Federal, State, and community policymakers about, and promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life" (Section D of the DD Act). The University Centers of Excellence are interdisciplinary education, research, and public service units of university or public or not-for-profit entities associated with universities that engage in core functions of pre-service training, community services, research, and dissemination of information pertaining to developmental disabilities. We are part of the HHS funded Developmental Disability Network in Kansas, which includes the KUCDD, the Kansas Council on Developmental Disabilities (KCDD), and Kansas Advocacy and Protective Services (KAPS). I am also an Associate Professor of Special Education at the University of Kansas and Associate Director of the Beach Center on Disability, also at the University of Kansas.

I submit this testimony in support of efforts by KAPS, KCDD, and other agencies to change HB 2439 to the Judicial Council's version of the bill contained in SB 355. I am in agreement with testimony from Professor H. Rutherford Turnbull and evidence submitted to the Kansas Judicial Council by Professor James Ellis that the intent of SB 355 to apply its provisions to people with "cognitive disability," to eliminate the insanity defense language, and to eliminate age-of-onset limitations are "welcome and clinically sound." I believe it is important to emphasize, as presented in testimony by KAPS Executive Director Rocky Nichols, that the sole intent of SB 355 is to prohibit the imposition of the death penalty to persons with significant cognitive disabilities.

As noted in Director Nichols' testimony, the U.S. Supreme Court found in *Atkins vs Virginia* that it is unconstitutional to execute a person with significant cognitive

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disabilities because they have "diminished capacities to undertake 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." It is, in my professional opinion, irrelevant at what age or from what cause that diminished capacity occurs. The use of the term "cognitive disability" ensures that the spirit of *Atkins*, to ensure that people with diminished intellectual or cognitive capacities are not executed, is fulfilled.

I further concur that the standards set by SB 355 with regard to proof of cognitive disability are clinically sound and based on nationally accepted standards and practices. The "two standard deviation below the norm" standard is widely accepted and implemented in the field.

Thank you for your consideration of this important matter.

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Kansas House of Representative
Corrections and Juvenile Justice Committee
March 18, 2004

Chairman Lloyd and members of the committee, my name is Patrick Poull, Chair of the Legislative Committee of he Brain Injury Association of Kansas and Greater Kansas City. We are in support of changing HB 2349 to include the language from Senate Bill 355, regarding persons with a cognitive disability being exempt from the death penalty. Please excuse my inability to meet with you today.

The Brain Injury Association of Kansas and Greater Kansas City represents persons with brain injury and their families, improving lives and creating a better future through prevention, research, education and advocacy. Our association is almost fully self-supporting, through the well known Amy Thompson Run to Daylight and our other fund raising efforts. We reach across the state with effective networks of volunteers and limited staff. The Support Partner Program offers emotional support and information during the early stages of the brain injury experience. Our Resource Coordination Program assists families through the difficult transitions beyond hospitalization. Family and survivor support groups across the state, from Concordia to Wichita, help end the isolation that so many experience.

As has been appropriately stated, "If you've seen one brain injury, you've seen one brain injury." Brain injury imposes a vast range of impacts on survivors and families. Egocentricity, Impulsivity, low frustration tolerance, anxiety, depression, and mood swings are the everyday challenges that some families and individuals confront. While not mental retardation by definition, these sometimes overwhelming impacts have similar effects on a person's ability to control their behavior. Holding a person with a cognitive disability to a different standard than a person with a developmental disability is plainly discriminatory. Brain injury survivors should still be held responsible for their actions. However, the United States Supreme Court has ruled that the facts of their disability prohibit the death penalty for those with a developmental disability. Brain injury survivors with DD-like effects are surely entitled to that same prohibition.

The Brain Injury Association also appreciates SB 355's mandates regarding assessment prior to prosecution. This provision would provide an objective standard upon which prosecution and defense could depend. This would hasten the legal process to the benefit of all.

The Brain Injury Association strongly supports modifying HB 2439 to include the well-reasoned and appropriate provisions of SB 355. We appreciate your thoughtful consideration of this issue.

Please remember our association's "A Piece of the Pie for Everyone" rally next Thursday! I hope to visit with you then.

Sincerely,

Patrick Poull
Chair, Legislative Committee
Brain Injury Association of Kansas and Greater KC
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Summary of Key Points from Turnbull Memoranda and Letters re Death Penalty

The definition of "mental retardation" is scientifically based.

First element refers to IQ (see Turnbull memo of November 7)

Defined as "significantly sub-average intellectual functioning"

Consists of two or more standard deviations below norm

Thus, 70-75 IQ justifies classifying a person as having mental retardation

Easy to determine clinically and accurately through standardized tests

Unable to be "faked" because the clinical tests are so powerful and precise

Various individuals who test an individual for significant sub-average intellectual functioning will usually come to the same conclusion because the tests they use are standardized and subject to very little professional interpretation

Professional organizations concur about definition (Am. Ass'n. on Mental Retardation; Am. Psychiatric Ass'n.)

Second element refers to "significant impairments in adaptive behavior" (see two Turnbull memos of November 7)

Three domains of adaptive behavior are central to definition: conceptual, social, and practical

Significant impairment in one or more of the three qualifies individual as having mental retardation

"Two standard deviations" test associated with IQ does <u>not</u> apply to adaptive behavior

See letter from Jim Ellis and Rud Turnbull, November 24, 2003

Third element applies to age of on-set (before 18) but that element does not apply to the Kansas Judicial Council proposal or to House and Senate bills

The term "cognitive disability" is properly defined in H. 355

Includes proper definition of "significant limitations in intellectual functioning"

Therefore refers to the "two standard deviations" criterion

Includes proper definition of "adaptive behavior"

Sets out the three areas: "conceptual, social, and practical skills"

Properly does not apply any "standard deviation" criterion (see Ellis/Turnbull letter)

Exempts from death penalty those individuals who function as though they have mental retardation but in fact do not precisely qualify as having mental retardation

Includes those who do have mental retardation (age of onset before 18)

Includes those who function as if they have mental retardation but did not acquire those functional limitations before they became 18

By measuring IQ and adaptive behavior, a clinician can determine whether the person has a cognitive limitation that is caused by inherent limitations in IQ and in adaptive behavior, or in acquired limitations (such as through brain injury or aging), instead of by self-induced limitations associated with, for example, the abuse of alcohol or illegal drugs

F: Ks Judicial Council and House Bill 355

Kansas Supreme Court and Judicial Council: Capital Punishment and Persons with Mental Retardation

H. Rutherford Turnbull, III

Co-director, Beach Center on Disability
Professor of Special Education
Former Courtesy Professor of Law
Former President, American Association on Mental Retardation
Former Chairman, American Bar Association Commission on Disability Law
Chairman, Board of Trustees, Judge David L. Bazelon Center on Mental Health Law

7 November 2003

I. Atkins v. Virginia (2002)

A. Holds capital punishment to be cruel and unusual for defendants with mental retardation.

B. Defines mental retardation as a disability of significant impairments in intellectual disability, in adaptive behavior, and as manifested by the age of 18. This definition is consistent with the long-standing definition of mental retardation, including those of the American Association on Mental Retardation and American Psychiatric Association. For example, it is consistent with the 1992 AAMR definition

1. Significantly subaverage intellectual functioning

   a. f.n. 5 cites APA: 1 to 3 % of population have IQ between 70 and 75 or lower (typical cutoff score)

   b. opinion notes that only five states have executed individuals with known IQ below 70 since *Penry* (1989) (establishes IQ 70 [to 75] as high range for classification into mental retardation)

2. Related limitations in two of 10 areas of adaptive behavior (now obsolete under AAMR's 2002 approach)

3. Manifestation during developmental period (before 18)

C. Defines mental retardation consistently with 2000 APA/DSM-IV definition

1. Significantly subaverage intellectual functioning (IQ 70)

2. Significant limitations in two of 10 areas of adaptive behavior

3. Onset before age 18

D. Itemizes three major areas of impairment

1. Reasoning

2. Judgment

3. Control of impulses

E. Recognizes that individuals with mental retardation have varying abilities, but all of them function below a certain ceiling that is the definition. Also recognizes that the doctrines of incompetence to stand trial, insanity defenses, etc. will not suffice to protect individuals with metal retardation; that is so because those individuals frequently are competent to stand trial and are responsible for their crimes. But, because they have mental retardation, they cannot be executed: they have such significantly impaired intellectual and adaptive behavior that their blameworthiness does not meet the constitutional standard for execution and their execution does not serve the twin purposes of capital punishment, namely, deterrence and retribution. Specifically, they have the following disabilities that are important in the criminal justice system's interaction with them:

1. understand and process information (e.g., *Miranda* warning)

2. communicate (e.g., assist counsel in defense)

3. abstract from mistakes and learn from experience (e.g., understand consequences of own and others' behavior)

4. engage in logical reasoning (e.g., understand deterrent and retribution as elements of capital punishment)

5. control impulses (e.g., refrain from crime though knowing that an action is wrong); often act on impulse rather than pursuant to premeditated plan

6. understand the reactions of others (e.g., tendency to please those in authority, as in police interrogations); in group settings, followers rather than leaders

F. Notes common risks in criminal justice system:

1. possibility of false confessions exists

2. lesser ability exists to make persuasive showing of mitigation

3. is less able to give meaningful assistance to counsel

4. is typically a poor witnesses

5. demeanor may create impression of lack of remorse

II. **Atkins "Got it Right": The Current AAMR Definition** (Mental Retardation: Definition, Classification, and Systems of Support [2002])

A. Significant limitations in both intellectual functioning, and

B. Adaptive behavior as expressed in conceptual, social, and practical adaptive skills, and

C. Originates before age 18

D. "Intelligence"

1. is a general mental capability

2. includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, learning from experience

3. is best represented by IQ scores from appropriate assessment instruments

4. consists of approximately two standard deviations below the mean (mean is 100, mental retardation occurs at about IQ 70-75)

5. mental retardation occurs in about 2.28 – 3.00 % of the entire population (2 million people out of 280 million)

E. "Adaptive Behavior"

1. is the collection of conceptual, social, and practical skills learned by people in order to function in everyday life (note shift to three general areas instead of 2 of 10 specific areas; all three must be present; *Atkins* cited 1992 definition [2 of 10] but the AAMR approach [each of three types of skills must be impaired] has changed)

2. consists of limitations that affect daily life and ability to respond to life changes and environmental demands

3. has variable relevance (diagnosis, classification, or planning supports – classification includes classification into capital-punishment eligibility)

4. is best represented by performance that is at least two standard deviations below the mean as assessed by scales/assessments

5. depends on "expression" – that is, on how a person performs (person does not know how to perform the skill, does not know when to use a skill, or is not motivated to perform or learn the skill)

6. is exemplified in "conceptual skills" – reading and expressive language, reading and writing, money concepts, self-direction

7. is exemplified in "social skills" – interpersonal, responsibility, self-esteem, gullibility, naiveté, following rules, obeying laws, avoiding victimization

8. is exemplified in "practical skills" – eating, dressing, mobility, toileting, preparing meals, taking medications, using the telephone, managing money, using transportation, doing household chores

III. The Presence of Mental Retardation Affects Every Stage of the Criminal Justice System and Negatively Affects the Following Stages:

A. Pre-trial (arrest, decision to prosecute)

B. Trial (ability to assist in defense)

C. Guilt or Innocence (verdict phase)

D. Post-trial (sentencing phase)

E. Punishment (execution/application of sentence)

IV. Particular Aspects of Mental Retardation Related to the Stages

A. Greater likelihood of responding to coercion or pressure than non-retarded

B. Susceptibility to leading questions and false information (increases as ability decreases)

C. Lack of complete understanding of *Miranda* warnings; more likely to waive right against self-incrimination; do not understand substantive portions of the warning (silence, use of statements in court, right to attorney, right to appointed attorney); do not understand concept of "self-incrimination"

D. More likely to be "outward directed" and rely on social and language cues of others than on own problem-solving abilities

E. Stronger desire to please, especially those in authority; more apt to give socially desirable answers

F. More likely to answer "yes" regardless of appropriateness of the answer; more likely to be acquiescent, especially as the linguistic difficulty of the question increases (more conceptual, less understood)

V. Accepted Assessment Instruments

A. Intelligence

1. Wechsler Intelligence Scale for Children – III ("WISC III")

2. Wechsler Adult Intelligence Scale – III ("WAIS-III")

3. Stanford-Binet IV

4. Cognitive Assessment System

5. Kaufman Assessment Battery for Children

B. Adaptive Behavior

1. Vineland Adaptive Behavior Scales

2. AAMR Adaptive Behavior Scales

3. Scales of Independent Behavior-Revised

4. Comprehensive Test of Adaptive Behavior – Revised

5. Adaptive Behavior Assessment System

C. Susceptibility

1. Gudjonsson Suggestibility Scale (1984, 1992) – applied to those with mental retardation in England (1993, 1995) and demonstrates higher degrees of susceptibility

2. Grisso's Comprehension of Miranda Rights (1981, 1986) – applied to those with mental retardation in USA and demonstrates significant reduction of comprehension (1995) and higher propensity to confess erroneously (1999)

VI. Courts' Roles and Resources

A. List of national, state, and local agencies that provide information and assistance when questions arise about defendants' mental retardation (e.g., American Association on Mental Retardation, The Arc, and TASH)

B. Require proper evaluations when questions arise in any of the stages of the system – note that the evaluator must be qualified (training, skill, experience) and the instruments/assessments that the evaluator uses must be professionally defensible

C. Assure competency of counsel – note that knowledge about mental retardation specifically; general knowledge about disability or even mental illness/emotional-behavioral disabilities does not necessarily qualify counsel

D. Assure competency of counsel – capital cases' uniqueness

E. Scrutinize waivers of rights, especially Miranda and other self-incrimination rights

F. Adhere to applicable ABA Criminal Justice Standards (if they still exist)

G. Consider diversions and, if incarceration, place (safety)

VII. Resources (for the above)

A. American Association on Mental Retardation (2002). *Mental Retardation: Definition, Classification, and Systems of Supports.* Author: Washington, DC

B. *Mental Retardation* (1999) – several articles, including one cited in *Atkins*

C. *Beyond Reason* (2001). Human Rights Watch. http://www.hrw.org/reports/2001/ustat/ustat0301.htm

D. AAMR has a Kansas Chapter, c/o Susan Palmer at The Beach Center, 864-0270; The Arc has an active chapter in Douglas County, c/o Barbara Bishop, 749-0121; and TASH has a Kansas affiliation, c/o Joan Houghton at The Beach Center, 864-7600.

E. See also Ks. Developmental Disabilities Planning Council, c/o Jane Rhys, 296-2608.

F: Kansas Supreme Court and Judicial Council
HRT III, 06 Nov 03

The University of Kansas

Special Education

Testimony to the House Corrections and Juvenile Justice Committee
March 17, 2004

My name is Gary M. Clark. I am a Professor of Special Education in the Department of Special Education at the University of Kansas. My doctoral area of study at Peabody College for Teachers/Vanderbilt University was in mental retardation and I have been involved with personnel preparation for those working in schools and adult agencies for over 35 years. My particular area of specialization is the transition of youth with disabilities from school to adult living.

I am testifying on the issue before you on the death penalty and how it relates to persons with significant cognitive disabilities. I am supportive of the bill currently endorsed by the Kansas Judicial Council (SB 355) as a substitute bill for HB 2439. It is sufficiently important to ensure that no Kansan with severe cognitive disabilities is ever sentenced to death. Secondarily, it is important that we bring our state's death penalty into full compliance with the 2002 U. S. Supreme Court Atkins decision (Atkins v Virginia, 536 U.S. 304).

With regard to the proposal to include persons with significant cognitive deficits whenever they occur at any age, I am in agreement with such a proposal. If a person is cognitively impaired to the extent that his/her performance on tests of cognitive ability is significantly below average, it should make no difference as to the age of the person when the intellectual loss occurred. Traumatic brain injury is a good example of this. Other examples include significant loss of functioning due to loss of oxygen, severe forms of spinal meningitis, encephalitis, strokes, or senile dementia.

The basic issues in terms of right and wrong under the law are affected by a person's

ability to reason, have knowledge and understanding of social expectations (including knowledge and understanding of the law), or ability to demonstrate competence in basic life demands. Intelligence testing and measures of socially adaptive behavior are and have been the professionally acceptable ways to assess a person's competence levels in the areas of reasoning, knowing social expectations, and comprehension. These measures are typically highly stable over time. Highly qualified examiners know what to look for with regard to unreliable responses and how to confirm a valid assessment.

Mental retardation is not mental illness, although a mentally retarded person can have mental health problems. The secondary disability may exacerbate the individual's judgment, but it is what we refer to as a dual-diagnosis. Professional examiners have ways of determining whether a person has both disabilities or only one.

I urge your support of SB 355 amendment to HB 2439 as it gives Kansans the most current access to a humane and just decision regarding punishment for a death penalty crime.

Joseph R. Pearson Hall 1122 - W. Campus Road, Room 521 – Lawrence, KS 66045-3101
Phone - (785) 864-4954 – Fax: (785) 864-4149

InterHab
The Resource Network for Kansans with Disabilities

700 SW Jackson, Suite 803, Topeka, KS 66603-3737 phone 785/235-5103, tty 785/235-5190, fax 785/235-0020 interhab@interhab.org www.interhab.org

March 18th, 2004

TO: Corrections and Juvenile Justice Committee

FR: Tom Laing, Executive Director

RE: House Bill 2439

Chairperson Loyd and members of the committee, thank you for the opportunity to speak to you today. My name is Tom Laing and I am the Executive Director of InterHab. Our membership is comprised of more than 40 community-based providers of services for persons with developmental disabilities across Kansas. Our members are involved in promoting the rights and protecting the interests of these vulnerable Kansans every day, and they are united in their support of the measures contained within HB 2439.

Not one member of InterHab is interested in circumventing the process of justice, nor are they interested in a less than full prosecution of those who commit society's most despicable crimes. What they are asking for is that society, through its laws, recognize that those who meet 2488's definition of "mentally retarded" often hold diminished capacities to:

- *Understand and process information,*
- *Communicate with others,*
- *Engage in logical reasoning,*
- *Control impulses,*
- *Understand the reactions of others,*
- *Plan and premeditate a heinous crime,*
- *Understand the serious cause and effect of such actions.*

As such, their punishment should not be excessive and disproportionate, nor cruel and unusual. It is important to note that persons who meet the bill's definition of "mentally retarded" may also have other diminished capacities, such as:

- *A diminished capacity to understand their Constitutional Rights.*
- *A diminished capacity to help their lawyer prepare a defense.*
- *A diminished capacity to understand court proceedings.*
- *A diminished capacity to understand the punishment they have received.*

The United States Supreme Court ruled in 2002 on this issue *(Atkins v. Virginia, Case No. 00-8452)* and came to the conclusion that the death penalty was excessive in capital cases involving those who were determined to be "mentally retarded". As such, the Court ruled that executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment of the United States Constitution.

Also noteworthy is that Justice Stephens, delivering the opinion of the majority of the Court, chose to quote Chief Justice Warren's interpretation of the underpinning of the Eight Amendment.

"The basic concept underlying the Eight Amendment is nothing less than the dignity of man… The amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

The membership of InterHab believes the same. Our society's growing standard of decency to fellow humans has advanced beyond a stage in which capital punishment of those with a developmental disability could be seen as anything other than a crime of even greater magnitude.

In preparing this testimony, we conferred with Robert Perske, a nationally known expert on persons with mental retardation and the death penalty. Mr. Perske is a published author of several books, among them *Unequal Justice* and *Deadly Innocence*, both dealing with executions of persons with mental retardation. His books contain some of the following real-life vignettes:

- *When Morris Mason was taken for execution, he turned to a worker and said, "You tell Roger (another death row inmate) when I get back, I'm gonna show him I can play basketball as good as he can."*

- *Barry Fairchild believed that the Miranda warning was some kind of opening devotion before the interrogation began.*

- *When Sammy Rafter finally got to see his father – after 10 hours of interrogation – he said, "Dad, you'll be proud of me. I helped them solve the case."*

- *Johnny Lee Wilson believed that if he said what the police wanted him to say, they would get off his back and he could go home. Missouri Governor Mel Carnahan pardoned Wilson after studying this young man's coerced false confession.*

- *Joe Arridy became a close friend of the warden. The warden provided Arridy with toys and coloring books. He even gave Arridy a toy train as a present during the last Christmas of his life. When the governor called*

and ordered the warden to carry out the execution, the warden broke down and cried.

I've attached a document from Mr. Perske, an abridgement from the book *Unequal Justice*, which outlines some of what can happen when a person with a developmental disability encounters the criminal justice system. I encourage you to read it and consider its implications on today's topic.

In closing, the membership of InterHab respectfully requests your support of HB 2439.

Thank you.

The Police Interrogation of Persons with Mental Retardation and Other Cognitive Disabilities[1]

~by Robert Perske

When persons with disabilities get arrested, the outcomes are usually fair. There is a danger, however that some persons will confess to crimes they did not commit. Police officers can profit from discussions with persons having disabilities and their helpers. The following outline of personal characteristics – taken from actual cases – may serve as conversation starters.

1. **Relying on Authority Figures for Solutions to Everyday Problems.** Zest comes from solving everyday problems. Some persons, however, may not be so good at figuring out what to say and do in certain situations. So they look for authority figures who appear to have the answers. That is why many persons with disabilities respect police officers and seek them out as friends.

2. **The Desire to Please Persons in Authority.** There is a need to stay on the good side of those who help us survive in the community. That is why some persons in an intense interrogation session will say, "If you say I did it, then I guess I did it – even though I can't remember doing it."

3. **The Inability to Abstract from Concrete Thought.** Some persons may waive their Miranda rights because they can only grasp the words in concrete terms. After all, everyone should "wave at the right" in a police station and never "wave at the wrong." Some are unable to grasp the abstract thought that Miranda is based on a person's Constitutional rights as a citizen.

4. **Watching for Clues from the Interrogator.** Some persons look closely at faces and listen for emphasis placed on certain words – trying to sense what an officer wants him or her to say.

5. **The Longing for Friends.** Some persons hunger for friends who won't shy away from them because of their disability. Almost all would love to have a police officer as a good friend.

6. **Relating Best with Children or Older Persons.** When some persons are shunned by those of their own age, they often try to befriend others who are much younger or more aged.

7. **The Plea Bargaining of Accomplices.** The hunger for friends can get some persons hooked up with an unsavory friend. Then, when both get apprehended for a crime, the so-called normal suspect plea-bargains for a lesser sentence by testifying against the person with the disability.

8. **Bluffing Greater Competence Than One Possesses.** Most of us try to appear smarter than we really are. An untrained officer can easily reinforce this "cloak of competence" and use it against us.

9. **An All-Too-Pleasant Façade.** Smiling is a way of getting approval from others. An officer might see an overuse of grinning as a lack of remorse.

10. **Abhorrence for the term Mental Retardation.** This label wounds some of us so deeply, we'll do almost anything to disconnect from it. If a prosecutor argues that we are not retarded in order to convict us, we may be quick to agree.

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[1] An Abridgement from Perske, R. UNEQUAL JUSTICE: What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System. Nashville: Abingdon Press, 1991.

11. **Real Memory Gaps.** Some people with disabilities have real historical blind spots – not the faked "selective memories" crafty people exhibit on the witness stand. Some may even hide these lapses of memory by latching onto and believing things others told them about a crime.

12. **A Quickness to Take Blame.** Even if a tragedy is an "act of God" or an unforeseeable accident, some of us may feel that someone must be held responsible. Some of us may even take the blame, thinking the interrogating officer will like us more if we do.

13. **Impaired Judgment.** Unlike crafty animals with anti-social tendencies, some persons will quickly do and say odd things that will make it easy for officer to pin crimes on them.

14. **An Inability to Understand Court Proceedings, to Assist in One's Own Defense and to Understand the Punishment.** In spite of their cloaks of competence, some may be completely unaware of the legal implications of their situation.

15. **Problems with Receptive and Expressive Language.** Some persons will not understand what the officer is asking them. If the officer punishes them too hard, their response system may shut down, and the officer may perceive this silence as a sassy defiance.

16. **Short Attention Span.** Although sights and sounds will strike an officer's sensing mechanisms, he is able to concentrate on a few and tune out the rest. On the other hand, some persons with disabilities may not focus as well. They may be distracted by numerous noises in a police station – even a noisy fan, or the sound of voices in another room.

17. **Uncontrolled Impulses.** Most persons experience a myriad of impulses. Even so, they usually act on only a few healthy ones and keep the others in check. Some persons, however, may not be able to control their impulses so effectively. They may give in to the urge to confess to a crime they did not commit in order to escape the pressures of an interrogation.

18. **An Unsteady Gait and Struggling Speech.** Those with motor disabilities like cerebral palsy may be excellent receivers of sights and sounds and ideas. When they try to respond, however, the impulses sent to their muscles appear to have been dispatched by a madman. Arms may flail and heads may bob. Consequently, they must exert tremendous energy trying to shape words they want to voice.

19. **Seeing Persons with Disabilities as Less Than Human.** Suppose an officer feels great pressure to solve a two-year-old crime and he has two prime suspects – a local bank officer and a person with mental disabilities. Which would be the easiest to lean on? Seeing any persona as a "fringe person" or without dignity can lead to serious prosecutorial mischief.

20. **Exhaustion and the Surrender of All Defenses.** If interrogating officers keep persons with certain disabilities under pressure for long periods of time, they can break them down and get them to say anything. Almost all of the persons with mental disabilities that I have worked with during my career would confess to a crime they did not commit after four or five hours of intense police interrogation.

Robert Perske is also the author of "Deadly Innocence" (Abingdon, 1995) and "Circles of Friends" (Abingdon, 1988). Contacts: 159 Hollow Tree Road, Darien, Connecticut 06820, Phone: (203) 655-4135, Fax: (203) 655-0635

Kansas Catholic Conference

6301 ANTIOCH • MERRIAM, KANSAS 66202 • PHONE/FAX 913-722-6633 • WWW.KSCATHCONF.ORG

Committee on Corrections and Juvenile Justice
Testimony on HB2439
March 18, 2003
Sister Therese Bangert

The Kansas Catholic Conference stands in support of HB2439. In doing so we join the United States Conference of Catholic Bishops (USCCB) in their work and their words against the execution of those persons who have mental retardation. Because of the concern about execution of those persons with mental retardation, in October 2000 the USCCB filed an amicus brief with the Supreme Court in McCarver v. North Carolina. Twelve faith organizations signed this amicus. The brief was subsquently transferred into the Atkins case with which HB 2439 is concerned.

Quote from Introduction of McCarver:
"Interest of Amici
Representatives of widely diverse religious communities in the United States -- reflecting Christian, Jewish, Muslim, and Buddhist traditions -- unite here as amici curiae on behalf of the Petitioner. These amici have differing views about the death penalty as a whole. Some object to it in principle, opposing it at all times and in all circumstances; others do not. Notwithstanding complex and often highly nuanced differences in theology and moral outlook, all of these amici share a conviction that the execution of persons with mental retardation cannot be morally justified. In our view, such executions violate the standards of decency of American society and the Eighth Amendment guarantee against cruel and unusual punishment."

If you have an interest in reading this brief

1. Go to www.usccb.org.
2. Click on Departments.
3. Click on General Counsel
4. Click on McCarver.

Please consider HB2439 favorable for passage.

House Corr & JJ
Attachment 12
3-18-04

Kansas County & District Attorneys Association

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www.kcdaa.org

Thank you for the opportunity to address the Committee.

The Kansas County and District Attorneys Association strongly opposes HB2439.

1) The bill is completely unnecessary. Despite arguments to the contrary, the United States Supreme Court decision in Atkins v, Virginia, does not require any action by the Kansas Legislature. No action is required because the laws of the State of Kansas forbid the execution of the mentally retarded. In fact, the United States Supreme Court noted our statute in the Atkins decision. The Supreme Court in Atkins did not define mental retardation and expressly left to the states the determination of who is mentally retarded. The Court noted the existing clinical definitions of retardation as used by mental health professionals. Most states have adopted all or part of the clinical definitions of mental retardation in crafting a LEGAL definition. Any argument that Atkins requires a change in Kansas law is disingenuous.

I have done a great deal of research into states' responses to the Atkins Decision. In addition to legal research, I have spoken with prosecutors and representatives of District and County Attorney Associations from across the Country. I have discussed the matter with the lawyers directly involved with the Atkins case. The Atkins case is currently being litigated in the Commonwealth of Virginia after the Virginia General Assembly, in response to Atkins, enacted legislation defining mental retardation and setting up procedures to have the issue determined in Virginia capital murder cases and state habeas matters. The State of Texas has not yet made changes to Texas state law and the Atkins decision *does* require a change in Texas.

2) Study of the impact on past and pending cases has not been done. The "studies" that have been done have been conducted by biased individuals and or groups that have their own agenda. The committees that have "studied" the issue did not fairly represent all views and opinions. Prosecutors with experience in capital murder litigation were not consulted or their opinions were ignored.

3) The bill adds unnecessary layers to the litigation process. The inclusion of the unnecessary layers is a clear sign that those with experience in capital murder litigation were not consulted. For example, a jury question regarding mental retardation is not required by law and may inhibit a defendant's ability to present mental retardation evidence in mitigation. This question requires proof of a negative beyond a reasonable doubt. This is unduly burdensome and is not required by Atkins.

REPORT OF THE JUDICIAL COUNCIL CRIMINAL LAW ADVISORY COMMITTEE ON 2003 HB 2349 AND *ATKINS V. VIRGINIA*

Approved by the Kansas Judicial Council
December 5, 2003

REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
DECEMBER 5, 2003

Background

On June 20, 2002, the United States Supreme Court decided the case of *Atkins v. Virginia*, 536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002). The Supreme Court held that capital punishment of those with mental retardation is cruel and unusual punishment under the Eighth Amendment. The full opinion is attached hereto as Appendix A, p.16.[1]

In response, HB 2349 (amending K.S.A. 21-4623 to ensure compliance with *Atkins* and attached hereto as Appendix B, p. 42) was introduced in the 2003 legislative session, but was not heard.[2] The legislature requested that the Judicial Council study the issue, and the Judicial Council assigned the study to the Criminal Law Advisory Committee. The members of the Judicial Council Criminal Law Advisory Committee are: Hon. Michael Malone, Lawrence, Kansas, Acting Chair; Prof. Ellen Byers, Carbondale, Kansas; James W. Clark, Lawrence, Kansas; Edward G. Collister, Lawrence, Kansas; Jim D. Garner, Topeka, Kansas; Patrick M. Lewis, Olathe, Kansas; Steven L. Opat, Junction City, Kansas; Debra S. Peterson, Wichita, Kansas; Loren L. Taylor, Kansas City, Kansas; Ron Wurtz, Topeka, Kansas; and Steven R. Zinn, Topeka, Kansas. Honorable Marla J. Luckert, Topeka, Kansas, Chair of the Criminal Law Advisory Committee, did not participate in the study because it related to the death penalty.

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[1] The Appendix is available for viewing in the Judicial Council office.

[2] An identical bill, HB 2439, was also introduced in 2003, and also failed to reach hearing. For simplicity, this report will refer only to the first bill introduced, HB 2349.

History of HB 2349

The *Atkins* case was argued to the U.S. Supreme Court by Prof. James Ellis of the University of New Mexico School of Law. After the Supreme Court issued its opinion, holding that it is unconstitutional to execute people with mental retardation, Prof. Ellis wrote an article to assist states with drafting legislation to comply with *Atkins*. See Ellis, James W., *Mental Retardation and The Death Penalty: A Guide to State Legislative Issues*, attached hereto as Appendix C, p. 45.

The 2003 bills amending K.S.A. 21-4623 were initiated by former Rep. Rocky Nichols, who is now the Executive Director of Kansas Advocacy & Protective Services, Inc. (KAPS). Former Rep. Nichols consulted with Prof. Ellis about Kansas' statute, and Prof. Ellis made specific suggestions for changes he believed should be made to K.S.A. 21-4623. The changes suggested in Prof. Ellis' February 7, 2003 letter to former Rep. Nichols, attached hereto at p. 70 as Appendix D, were incorporated into HB 2349.

Committee Review of HB 2349

The Committee first met on October 10, 2003. Prof. Ellis attended the meeting to explain his views of how K.S.A. 21-4623 should be changed to conform with *Atkins*. Prof. Ellis' visit to Topeka was sponsored by KAPS, and former Rep. Nichols also attended the October meeting. Prof. Ellis outlined for the Committee his concerns with Kansas' current statute, including why he recommended the changes set forth in HB 2349.

1. Definition of "Mentally Retarded"

Prof. Ellis' primary concern with the current statute is the definition of "mentally retarded" as set

forth in K.S.A. 21-4623(e):

> As used in this section, "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.

The U.S. Supreme Court did not define "mentally retarded" in the *Atkins* opinion, although it did reference the clinical definitions of both the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. *Atkins*, 536 U.S. 308, n. 3 (Appendix A, p.18). Although the specific definition is left to the States, the Court makes clear that there is a "national consensus" regarding who is and who is not retarded:

> "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' *Id.*, at 405, 416-417."
>
> *Atkins,* 536 U.S. at 317 (Appendix A, p. 22)

The footnote to the above quote states that "[t]he statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n.3, *supra*." *Id.* at n.22.

Prof. Ellis sees two potential problems with Kansas' definition. First, since it is so different from the other states, it could be argued that the definition does not conform to the "national consensus" and its constitutionality could be called into question on that basis. At the time *Atkins* was decided, eighteen states had adopted legislation prohibiting the execution of mentally retarded persons. Of those eighteen States, seventeen define "mentally retarded" in purely clinical terms, generally using either the 1983 or 1992

versions of AAMR's definition of "mentally retarded."[3] Kansas stands alone in its use of a definition that combines the clinical definition of mental retardation with some requirement of a "causal link" as is used for the defense of insanity. In addition to being outside the national consensus, Prof. Ellis also believes that Kansas' current definition could be challenged as being unconstitutional on its face or as applied. To the extent that the current definition could be read to require a defendant to prove some causal link in addition to proving mental retardation, Prof. Ellis finds it questionable whether the definition passes constitutional muster. Prof. Ellis stated that removing the causation clause would be sufficient to cure the constitutional infirmity, but also recommended updating the clinical definition with AAMR's most recent (2002) definition. The most important reason for this change is that "it is the definition that Kansas' clinicians will be using in other contexts as they perform evaluations and provide services to people with mental retardation. If the capital punishment statute were to adopt the same terminology, it would enhance the ability of mental disability professionals to evaluate defendants and compare their findings in the same terms that they employ in other settings." See Appendix D, p. 71.

2. Committee Review of the Definition Issue

From the beginning, the Committee was in agreement that the second half of the current definition, which seemed to come from the insanity defense, should be deleted. However, the Committee had many concerns about whether and how the clinical portion of the definition should be changed. In order to better understand the clinical terms and the differences between the evolving AAMR definitions, the Committee invited Prof. Rud Turnbull to the Committee meeting of November 7, 2003. Prof. Turnbull is the Chairman of the Special Education Department at the University of Kansas and the current President of AAMR. He

[3] AAMR also updated its definition to the current version in 2002.

earned a J.D. from the University of Maryland Law School and an L.L.M. from Harvard Law School.

Prof. Turnbull explained that, in spite of the fact that the AAMR has changed its definition of "mentally retarded" three times in the last twenty years, the group of people to whom the definition applies has not changed. The updatings reflect progress in assessment tools and testing instruments that continue to refine the subjective nature of the definition. In spite of several updates to the AAMR definition, the 1983, 1992 and 2002 versions all consist of a three prong test: 1) substantial intellectual impairment; 2) impact of that impairment on everyday life; and 3) appearance of the disability at birth or during the person's childhood. A person must meet all three requirements in order to fall within the definition of mental retardation. "The variations found in the three formulations of the AAMR definition differ only in the wording of how they describe the second component, i.e. the impact on the individual's life. But it is important to emphasize that the various formulations *describe the same group of individuals,* and therefore do not differ in scope in any significant way." See Appendix D hereto, Ellis, James W., *Mental Retardation and The Death Penalty: A Guide to State Legislative Issues*, Appendix C, p.49 (Emphasis in original).

The Committee struggled with the "age of onset" issue. For purposes of the AAMR, the definition of "mentally retarded" necessarily includes a requirement that the disability manifest itself before the age of 18 because mental retardation is a developmental disability, affecting the way and extent to which a child's cognitive abilities are formed.[4] Also, services needed by someone who has never developed a normal level of cognitive ability are very different than those required by people who have had normal

[4] The age of onset is a rather arbitrary number, being 18 in some states and 22 in others. It is believed that the specific age may have been in part established to correspond with the age at which mentally retarded children were no longer eligible to receive services in the public school systems.

intelligence and then lost it, and AAMR specifically supports and advocates for people with the former type of disability. However, other types of cognitive impairments share similar characteristics to mental retardation and are equally impairing, although some of these impairments may first appear at any age. [5] The Committee was concerned that people with these other kinds of impairments would not meet the definition and would still be subject to capital punishment, even though in terms of "culpability," there was very little difference between them and mentally retarded people. Prof. Ellis had informed the Committee that a few states that had changed their laws "post-*Atkins*" had chosen not to include an age of onset provision in their definition of mentally retarded. The Committee was not satisfied with this option because if the impaired defendant satisfied the definition of mentally retarded, but was in fact not mentally retarded, it could be argued the protections were not intended to apply to him.

The Committee was unanimous in its desire to amend the definition in K.S.A. 21-4623 so that it would apply to all persons having a cognitive impairment such that they met the first two prongs of the three prong AAMR definition of mentally retarded. The Committee chose to substitute the words "cognitive disability" for mentally retarded to make clear that the class of people protected from capital punishment in Kansas is larger than the class of mentally retarded people.

3. Time of Hearing

Prof. Ellis also suggested that K.S.A. 21-4623 be amended to provide for a hearing on the issue of cognitive disability prior to trial. He gave two reasons for this suggestion. First, there may be a

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[5] Cognitive disabilities which may have a similar functional impact as mental retardation, retardation, except as to the time of occurrence of the disability include: 1) traumatic brain injury; 2) organically caused brain injury, such as by stroke, encephalitis, meningitis, Alzheimer's, etc.; 3) extensive exposure to lead or other toxic material; and 4) true mental retardation that is not discovered until after the age of 18. *See Appendix E, p. 73, November 7, 2003 Memo from former Rep. Nichols at KAPS to the Committee.*

constitutional due process issue inherent in a system where the determination of cognitive disability is not made until after conviction of a capital offense. If a conviction is rendered by a death-qualified jury, the deck may be stacked against the defendant in such a way that a fair determination of cognitive disability would be impossible. Also, from a public policy standpoint, it simply makes sense to make the determination pretrial. "[C}apital trials are extremely costly endeavors, both in financial and human terms, for everyone involved. If a defendant has [cognitive disability], and is therefore ineligible for the death penalty, it is far preferable to make that judgment *before* those costs of a capital trial have been incurred. In addition, it is the experience of States that provide for pretrial determinations and that have had their statutes for several years, that a substantial portion of the cases can, in fact, be resolved by guilty pleas." See Appendix D, p. 72. The Committee unanimously agree with Prof. Ellis on this point.

In his visit on October 10, Prof. Ellis raised another issue that could expose Kansas to litigation and appeals. He suggests that if a judge determines that a defendant is death eligible prior to trial, and the defendant is then convicted, States would be wise to have a process in place by which the defendant could present evidence of the disability to a jury. See Appendix C, p. 60.

> "The doubt arises at the intersection of *Atkins* and the Court's most recent decision regarding the right to a jury trial. In Ring v. Arizona [122 S.Ct. 2428 (June 24, 2002)], the Court held that States are required to afford capital defendants the right to have all factual questions that are necessary preconditions to the death penalty resolved by a jury. Arizona law had provided that judges made the determination regarding the aggravating factors that could lead to a death sentence. 'Because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.' [Id. at 2443 (internal quotation omitted).] And where something has been deemed to be an element or its equivalent, the prosecution must carry the burden of persuasion 'beyond a reasonable doubt.' [*Id.* at 2439].

> It is not absolutely clear whether the post-*Atkins* question of whether a defendant has mental retardation is the 'functional equivalent' of an element of the crime, [citation omitted], but it certainly bears most of the attributes described in *Ring*. [citation omitted] If the issue proves to be a *Ring*-equivalent, then both the Sixth Amendment's right to a jury determination of the issue *and* the State's obligation to carry the burden of persuasion 'beyond a reasonable doubt' must apply. States that choose to ignore this very real possibility do so at the peril of having their new statute declared unconstitutional, and risk the necessity of re-trying capital defendants convicted and sentenced under that statute.

See Appendix C, pp. 59-60 (emphasis in original).

The Committee engaged in lengthy discussion on this issue, ultimately agreeing with Prof. Ellis that, even though it not yet completely clear whether *Ring* will apply to this situation, it is wiser to write the statute as if it does to insulate Kansas from potential litigation and appeals.

4. Retrospective Application of *Atkins*

Because *Atkins* found that mentally retarded persons have a constitutional right not to receive the death penalty, it is necessary to write into the statute provisions for any cases involving individuals already under death sentences. The Committee vigorously debated this section, ultimately drafting something quite different than what was proposed by Prof. Ellis and which then appeared in HB 2349. The Committee did not find proposed Sec. 3 of HB 2349 to be a workable process. They also believe that additional safeguards are necessary since they have extended the *Atkins* case beyond the mentally retarded. While anyone who is mentally retarded and has received a death sentence would be able to attack that sentence on constitutional grounds, the Committee's proposed statute also extends protection to other cognitively disabled defendants who do not at this time possess a constitutional right regarding the death penalty.

5. Amendments to K.S.A. 21-4634

Although not mentioned in the original HB 2349, it was brought to the Committee's attention that K.S.A. 21-4634 also contains provisions regarding "mentally retarded" defendants. The Committee has changed the term to "cognitive disability" and amended the definition to correspond with that contained in K.S.A. 21-4623. The Committee has not had a chance to talk together about the other provisions of the statute. However, two thoughtful comments that were e-mailed by Committee members warrant consideration by the Council and are attached hereto as Appendix G, pp. 75-76.

New Challenge for Courts: How to Define Retardation

Hundreds of Capital Cases in the Balance

By ADAM LIPTAK

YORKTOWN, Va. — Almost two years ago, in a case brought on behalf of Daryl R. Atkins, a Virginia death-row inmate with an I.Q. of 59, the United States Supreme Court banned the execution of the mentally retarded. But the ruling has, so far, been of no help to Mr. Atkins.

That is because the Supreme Court did not decide whether Mr. Atkins falls within accepted definitions of retardation. Nor did it give judges and legislators much guidance on how the ban should be applied in other cases.

In hundreds of cases around the country — in challenges brought by people on death row and in new prosecutions — courts are struggling with questions left open by the Atkins decision: Who qualifies as retarded? Who decides whether a defendant is retarded, a judge or a jury? Should this decision come before or at a capital trial?

"We're all on brand-new ground here," Eileen M. Addison, the lead prosecutor in the Atkins case, said in an interview in her sunny office in the quiet, modern courthouse here. "They gave us no guidance whatsoever."

Soon, a jury in a nearby courtroom will decide whether Mr. Atkins is retarded. Its answer will determine whether he receives a life sentence or the death penalty for his role in a 1996 murder.

No one disputes that Mr. Atkins's I.Q. score is in the lowest 1 percent of the population. But Ms. Addison said this should not spare him.

"I do not believe that the truly mentally retarded commit these kinds of crimes," Ms. Addison, the commonwealth's attorney here, said.

Defense lawyers and people who oppose the death penalty disagree.

Richard Dieter, the executive director of the Death Penalty Information Center, a research and advocacy group that opposes capital punishment, estimates that 300 of the 3,500 people on death row in the United States are mentally retarded under the commonly accepted standard.

Jurors in Mr. Atkins's case will very likely hear from mental health experts, teachers, family members, classmates and, perhaps, victims of some of the 16 other felonies, including robbery, abduction and maiming, that Mr. Atkins was convicted of committing.

At a sentencing hearing in Mr. Atkins's capital murder case in 2000, Stanton E. Samenow, a clinical psychologist who testified for the prosecution, conceded that the defendant's I.Q. score was very low. But he said that other evidence showed that Mr. Atkins is "of average intelligence, at least."

Dr. Samenow based his assessment on Mr. Atkins's knowledge of history, including that John F. Kennedy was the president in 1961, and on his vocabulary, which Dr. Samenow said included the words "orchestra," "decimal" and "parable." Dr. Samenow is expected to testify at Mr. Atkins's new hearing.

Judge Prentis Smiley Jr. of Circuit Court here has ruled that jurors will not be excluded if they oppose the death penalty, though that is normally a requirement in capital trials. He has reserved judgment about what sorts of evidence the jury may hear.

In 1996, Mr. Atkins and another man abducted Eric Nesbitt, robbed him, forced him to withdraw money from an automated teller machine and then shot him eight times, killing him. Mr. Atkins's accomplice, William Jones, received a life sentence after testifying against Mr. Atkins.

Ms. Addison said that the jury should consider how the crime was carried out, because it demonstrated sophisticated planning. She said Mr. Atkins's ability to load and to work a gun, to recognize an A.T.M. card and to direct Mr. Nesbitt to withdraw money and to identify a remote area in which to kill him all proved he is not retarded.

Last month, the Texas Court of Criminal Appeals, the state's highest court for criminal matters, endorsed that approach.

It said defendants on death row must prove, among other things, that their "adaptive functioning" is limited. Among the ways to judge that, the court ruled, is by examining whether the crime required "forethought, planning and complex execution of purpose."

Defense lawyers say mixing the facts of the crime with the retardation decision prejudices their clients.

"If a person has been convicted of a capital crime," Jim Marcus, the executive director of the Texas Defender Service, said, "basically they're going to be not mentally retarded under the court's reasoning."

Seven states have enacted laws following the Atkins decision, according to the Death Penalty Information Center. The Texas Legislature has not yet acted. The laws typically require proof of low intelligence — sometimes an I.Q. below 70 or 75 — and difficulty in various aspects of living independently.

The first factor is generally proved through tests interpreted by

Who is retarded? Who decides? A Supreme Court ruling offers no answers.

experts, the second by lay people who have observed the defendant.

In 2000, Dr. Samenow gave Mr. Atkins a mixed review.

"Mr. Atkins never lived independently," Dr. Samenow said. "However, he told me he was able to wash his clothes." In addition, Dr. Samenow said, "he gave me his recipe for cooking chicken."

Defining the criteria for retardation is only part of the puzzle that courts and legislatures are trying to solve. They have also taken varying approaches to the question of whose job it is to apply the criteria and at what point.

James W. Ellis, a law professor at the University of New Mexico and an expert in mental retardation and the death penalty, said that in new prosecutions, most states call for pretrial hearings on the question involving only judges. But a few states fold the retardation determination into the capital trial and rely on the jury to make the decision. Virginia, for instance, withholds the determination until the sentencing phase and commits the decision to the jury.

In Mr. Atkins's case, Judge Smiley has ruled that he must prove that he is retarded by the ordinary civil standard of a preponderance of the evidence, meaning the jury has to find only that it is more likely than not that he is retarded.

Most states use this approach. But five states use a higher standard, requiring defendants to prove they are retarded with clear and convincing evidence.

And the Georgia Supreme Court ruled that an even more stringent standard must be used. Defendants there are required to prove to a jury that they are mentally retarded beyond a reasonable doubt.

Ms. Addison said Mr. Atkins cannot prevail under any standard.

"He's no Rhodes scholar," she said. "But he is not mentally retarded, either."

National Report
The New York Times
DAY, MARCH 14 2002

KANSAS

PAMEL JOHNSON-BETTS, SECRETARY

DEPARTMENT ON AGING

KATHLEEN SEBELIUS, GOVERNOR

March 18, 2004

The Honorable Ward Loyd
Chairman, Corrections and Juvenile Justice
Kansas Statehouse, Room 427-S
Topeka, Kansas 66612

Dear Chairman Loyd:

The mission of the Kansas Department on Aging is to "ensure the security, dignity and independence of Kansas seniors."

As Secretary of Aging, I ask that the committee consider including language in House Bill 2349 that would not only exempt individuals who have mental retardation from being executed under the death penalty laws in Kansas, but also protect individuals, regardless of age, who have cognitive impairments, such as dementia and Alzheimer's Disease from execution.

Cognitive impairment such as dementia and Alzheimer's Disease are fairly common in our senior population, but may also be found in younger individuals. These types of disabilities can greatly impair judgment, memory, and behavior in those who suffer from them. It would be good public policy to allow an exemption from the death penalty for such persons in HB 2349.

Thank you for the opportunity to comment on HB 2349. Please feel free to contact me if you have further questions or comments at 296-5222. Thank you very much.

Sincerely,

Pamela Johnson-Betts
Secretary

cc: Kathy Greenlee
Traci Ward
Lana Walsh

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BY ELECTRONIC MAIL

March 16, 2004

Rocky Nichols
Executive Director
Kansas Advocacy and Protective Service (KAPS)

RE: Testimony Regarding Drug Abuse and IQ

Dear Mr. Nichols,

You have asked that I provide written testimony regarding the issue of cognitive disability, and specifically the issue of what impact drug abuse plays in I.Q. tests. I understand that my testimony will be presented at the Kansas House of Representatives' Corrections and Juvenile Justice Committee hearing on March 18, 2004.

By way of background, I am a forensic neuropsychologist, licensed in both New York and California. I am also Board Certified in Forensic Psychology by the American Board of Forensic Psychology, a specialty board of the American Board of Professional Psychology. My professional forensic practice is national in scope. I have testified approximately 150 times in over 25 states, predominantly as an expert for the prosecution. My curriculum vita is attached.

Within the scope of my education, training, and experience in forensic practice, I have had extensive exposure to the issues of mental retardation. This has included treating and evaluating patients in a major metropolitan forensic hospital over a period of eight years, as well as evaluating patients for criminal cases in private practice over the past decade. Of particular relevance to the pending legislation, I have significant experience with capital litigation, and have consulted on numerous cases involving mental retardation and the death penalty.

You have asked that I respond to the lay assertion that an individual could potentially "fry" his or her brain with street drugs, rendering themselves so brain damaged as a result of voluntary intoxication as to be "cognitively disabled" pursuant to the definition contained in Senate Bill No. 355.

I have never seen or heard of such as case in my professional forensic practice. I have assiduously searched the professional literature using both the American Psychological Association's PsycINFO database and the National Library of Medicine's Association's MEDLINE database, and can find no scientific literature or case report that has established a connection between substance abuse and such a profound loss of intelligence. In fact the opposite appears to be true. Of the few studies that have addressed the issue, no significant loss of Full-Scale I.Q. is generally reported.

The single most neurotoxic substance of abuse is the solvent toluene, commonly found in paint thinner. Though this substance has been shown to have some impact on I.Q., no findings show that it causes "significant limitations" in intellectual functioning, defined in SB 355 as meaning two or more standard deviations below the norm. Other drugs of abuse, including marijuana, cocaine, methamphetamine, and LSD are believed to be less neurotoxic than toluene. This includes studies of individuals characterized as "ploydrug" abusers, who routinely abuse multiple drugs in combination.

I hope this testimony proves useful to the legislators as they consider the Kansas standard.

Sincerely,

Daniel A. Martell, Ph.D., ABPP
Clinical Assistant Professor of Psychiatry & Biobehavioral Sciences,
Neuropsychiatric Institute and Hospital,
U.C.L.A. School of Medicine