

**MINUTES OF THE  
JUDICIARY INTERIM COMMITTEE**

Wednesday, September 18, 2002 – 9:00 a.m. – Room 403 State Capitol

**Members Present:**

Sen. David L. Gladwell, Senate Chair  
Sen. D. Edgar Allen  
Sen. Millie M. Peterson  
Sen. Michael G. Waddoups  
Rep. Patrice M. Arent  
Rep. Chad E. Bennion  
Rep. Ron Bigelow  
Rep. Katherine M. Bryson  
Rep. Scott Daniels  
Rep. James A. Ferrin  
Rep. Ben C. Ferry  
Rep. Neal B. Hendrickson

Rep. Eric Hutchings  
Rep. Mike Thompson  
Rep. A. Lamont Tyler

**Members Absent:**

Sen. Terry R. Spencer  
Rep. Greg J. Curtis  
Rep. David Ure

**Staff Present:**

Mr. Jerry D. Howe, Research Analyst  
Ms. Susan Creager Allred, Associate General Counsel  
Ms. Cassandra N. Bauman, Legislative Secretary

**Note:** A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us/imaging/history.asp> or by contacting the committee secretary, Glenda Whitney, at 538-1032.

**1. Committee Business**

Chair Gladwell called the meeting to order at 9:16 a.m.

**MOTION:** Sen. Peterson moved to approve the minutes of the June 19, 2002 meeting. The motion passed unanimously with Sen. Waddoups, Rep. Bennion, Rep. Ferry, and Rep. Thompson absent for the vote.

**2. Sentencing in Capital Cases**

Chair Gladwell indicated that the U.S. Supreme Court, in *Atkins v. Virginia*, found the execution of the mentally retarded to be unconstitutional. He indicated that since the opinion was issued, states have been working to conform their statutes to the new standard. Although the legislation that will be presented today has received substantial input, he said, it is not intended that the committee will take action on the legislation at this meeting. Instead, he requested that members of the committee take time to thoroughly understand the issues before a vote is taken.

Mr. Paul Boyden, Director, Statewide Association of Prosecutors, indicated that the Legislature passed H.B. 77, "Criminal Sentencing - Mitigation Amendments" during the 2002 General Session which amended the definition of mental retardation. That definition, he said, is constitutionally deficient under the *Atkins* decision. Mr. Boyden also explained the difficulty in creating an adequate definition of mental retardation that is neither over nor under inclusive.

Mr. Boyden explained that the draft legislation defines mental retardation in a manner consistent with the *Atkins* decision and that the definition has been agreed upon by a subcommittee composed of three prosecutors, three defense attorneys, and various outside individuals. Notwithstanding, he explained that the Legislature will be required to make some policy decisions regarding whether the judge or a jury should decide whether an individual actually meets the statutory definition of mental retardation.

Mr. Boyden indicated that the burden of persuasion is another issue that deserves consideration. He stated that it would be extremely difficult, if not impossible in some cases, for the prosecution to prove that an individual is not mentally retarded. Since the burden to prove mental retardation is so difficult on the prosecution, this draft places the burden on the defense.

Mr. Boyden distributed and explained "Death Penalty Shall Not Be Imposed Upon Any Person With Mental Retardation" and "Mental Retardation Issues in a Capital Homicide Trial" and responded to questions.

Mr. Creighton Horton, Assistant Attorney General, Division Chief, Criminal, stated that the Atkins case raises a number of problems. Mental retardation usually manifests itself prior to adulthood. If an adult experiences some mental deficiency, the deficiency is not a case of mental retardation he said, but some other condition. The problem with the Atkins decision is that it prevents execution for the mental retardation but permits it for other mental deficiencies.

The difficult question becomes, therefore, what is mental retardation, and how should that condition be defined in statutes? The definition in this draft requires the mental retardation to have an onset prior to 18 years of age. He indicated that the more broad the definition of mental retardation, the more likely the definition will meet the legal conditions established in the Atkins decision; but he also explained that the defendant can raise the issue of having a mental condition during trial as a mitigating circumstance. Two other options allowing persons with a mental condition to be excluded from the death penalty include: a judge's decision that the defendant is ineligible for the death penalty, which is not subject to review by the jury; and a person with a mental condition that confesses to a crime, when the confession cannot be supported by substantial additional evidence.

Mr. Richard Mauro, Utah Association of Criminal Defense Lawyers, stated that the definition as defined in the proposed legislation is problematic because in many instances, brain damaged individuals and mentally retarded individuals have the same capacities. So executions of those with mental retardation are prohibited, but execution of those who experience brain trauma, for example, are not prohibited even though the mental capacities of both individuals may be nearly identical. Although Mr. Mauro agreed with Mr. Boyden and Mr. Horton in the fact that the definition of mental retardation should not stray far from the Atkins case, he indicated that the decision does not substantially change the current system. Defense council will continue to investigate a defendant's mental condition and background as always, he said. The decision merely states that, if the individual is mentally retarded, then the individual cannot be executed, regardless of when the individual became mentally retarded. Moreover, he indicated that the burden of persuasion to prove that a defendant is mentally retarded, should be the responsibility of the prosecution, not the defense.

Mr. Richard Schwermer, Administrative Office of the Courts, stated that there are some procedural aspects in the legislation which the constitution authorizes the courts by rule, not the Legislature by statute, to establish. He stated that he is working with Mr. Boyden on the issue and hopes to have resolution shortly.

### **3. Other Items / Adjourn**

**MOTION:** Sen. Peterson moved to adjourn the meeting. The motion passed unanimously.

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Chair Gladwell adjourned the meeting at 10:59 a.m.