A Defendant Must Prove That Mental Retardation Existed Before the Age of Eighteen in Order to Be Protected From the Death Penalty: *Commonwealth v. Vandivner*

CRIMINAL LAW AND PROCEDURE-CAPITAL PUNISHMENT OF MENTALLY RETARDED-PENNSYLVANIA – The Supreme Court of Pennsylvania affirmed the death sentence of mentally deficient appellant because appellant failed to prove mental retardation existed before he was eighteen years old.

Commonwealth v. Vandivner, 962 A.2d 1170 (Pa. 2009).

I. THE *VANDIVNER* DECISION

On July 5, 2004, some time between 8:30 and 9:00 p.m., appellant James W. Vandivner ("Vandivner") entered the home of Michelle Cable ("Cable") through the back door.[1] As Vandivner walked through the house, he came upon Larry Newman ("Newman"), a family friend.[2] When Vandivner asked Newman where Cable was, Newman pointed towards the front door.[3] Vandivner opened the door and walked into the sun porch.[4] On the outside steps leading to the porch, Vandivner encountered Cable and her son, Billy Cable ("Billy").[5] When Vandivner pointed the gun at Cable, Billy quickly jumped on him and attempted to disarm him.[6] Vandivner was able to keep control of the gun and pointed it at Newman's head,[7] then quickly approached Cable with his gun in hand and verbally threatened to kill her.[8] He pulled Cable by her hair and shot her in the head.[9] Vandivner then shot Billy in the neck and fled the scene.[10] Vandivner was charged with first-degree murder, criminal attempt to commit criminal homicide, and aggravated assault.[11]

Before his trial, Vandivner filed a petition to bar the death penalty, arguing that he was mentally retarded and that his adaptive skills were significantly limited.[12] He contended he was

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1. Commonwealth v. Vandivner, 962 A.2d 1170,1173 (Pa. 2009). Michelle resided with her daughter, Jessica Cable. *Vandivner*, 962 A.2d at 1173.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Vandivner*, 962 A.2d at 1173.
7. *Id.*
8. *Id.* at 1174.
9. *Id.* As Cable fell to the ground, Vandivner said, "[t]here, you bitch, I said I was going to kill you." *Id.*
10. *Vandivner*, 962 A.2d at 1174.
11. *Id.* at 1174.
12. *Id.*

protected under the rule established in *Atkins v. Virginia,*[13] such that the execution of mentally retarded defendants constitutes cruel and unusual punishment.[14] The trial court conducted a four-day hearing to determine whether the death penalty violated Vandivner's constitutional right to protection from cruel and unusual punishment.[15] At the hearing, the defendant presented the testimony of two expert and several lay witnesses, and the Commonwealth offered the testimony of a psychiatrist, as well as a Pennsylvania Department of Transportation official.[16]

The trial court ruled that Vandivner failed to meet his burden of proof such that his alleged mental retardation existed before he reached the age of eighteen, required in order for a mentally retarded defendant to avoid the death penalty pursuant to *Commonwealth v. Miller.*[17] Consequently, Vandivner's petition was denied.[18] Following a jury trial, the defendant was found guilty of first-degree murder and sentenced to death.[19] The Supreme Court of Pennsylvania granted his direct appeal.[20]

On appeal, Vandivner raised eight issues; three concerned his petition to prohibit a sentence of death.[21] First, Vandivner contended the trial court erred in determining that Vandivner failed to satisfy each part of the three-prong test adopted in *Miller*.[22] There, the court held that in order for a defendant to be deemed mentally retarded, he must show (1) he possesses limited intellectual functioning; (2) his conceptual, social, and practical skills are significantly limited; and (3) the age of onset was before age eighteen.[23]

Second, Vandivner argued the trial court erred in refusing to allow the testimony of a mental retardation expert during his hearing.[24] Vandivner contended that because such an expert never testified, the trial court did not have any basis for determining whether Vandivner's adaptive abilities were similar to those of a mildly mentally retarded person.[25]

Finally, Vandivner contended that because he was mentally deficient to the same degree as a defendant labeled as mentally retarded, he cannot be executed under the *Atkins* rule.[26] He argued that regardless of when his mental limitations began, he should be ineligible for capital punishment because such punishment would violate his constitutional protection under the

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[13]. 536 U.S. 304 (2002). In *Atkins*, the United States Supreme Court reversed the Virginia Supreme Court's death sentence of appellant on the grounds that the execution of mentally retarded criminals constitutes cruel and unusual punishment, prohibited by the Eighth Amendment. *Id.* at 321.

[14]. *Vandivner*, 962 A.2d at 1174.

[15]. *Id.*

[16]. *Id.* Vandivner, when not incarcerated, maintained employment as a commercial truck driver. *Id.* at 1184.

[17]. 888 A.2d 624 (Pa. 2005).

[18]. *Id.* at 1174.

[19]. *Id.* at 1175. Additionally, the trial court imposed a consecutive sentence of twenty to forty years for the attempted murder of Billy Cable and ten to twenty years for the aggravated assault of Larry Newman. *Id.*

[20]. *Id.* at 1173.

[21]. *Id.* at 1175.

[22]. *Vandivner*, 962 A.2d at 1183.

[23]. *Id.* (citing *Miller*, 888 A.2d at 631). In *Miller*, the court stated that "significant limitations in adoptive behavior are operationally defined as performance that is at least two 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." *Miller*, 888 A.2d at 630-31.

[24]. *Vandivner*, 962 A.2d at 1188.

[25]. *Id.*

[26]. *Id.*

Eighth Amendment.[27]

Chief Justice Castille delivered the opinion of the majority.[28] The court determined Vandivner failed to establish that the onset of his alleged mental retardation occurred before he reached age eighteen, and therefore, he could not claim ineligibility for the death penalty on such a basis.[29] The court found no error in the trial court's analysis or conclusions on this issue.[30]

In *Miller*, the court had held that a defendant may establish mental retardation using either the standard set by the American Association of Mental Retardation or the one set forth by the American Psychiatric Association.[31] Chief Justice Castille noted that these standards share three elements: limited intellectual functioning, significant adaptive limitations, and age of onset.[32]

The court reasoned that Vandivner failed to produce IQ tests from his childhood, and his high school records did not prove that he had been placed in special education classes because of mental retardation.[33] The majority agreed with the trial court that such a placement could have resulted from behavioral problems, rather than from mental retardation, and Vandivner's excessive absences could have been the main reason for his unsatisfactory academic performance overall.[34] Furthermore, the court stated that the purpose of the "age of onset" requirement was to prevent defendants from imitating mental retardation after they are charged with capital crimes.[35] Chief Justice Castille expressed particular concern regarding this issue, noting the Commonwealth's psychiatric expert, Dr. Wright, testified that Vandivner gave a poor effort on the tests he had administered.[36]

Regarding the second issue, the court held the trial court did not abuse its discretion by refusing to appoint an additional expert to provide testimony.[37] The majority stated that any additional testimony concerning Vandivner's mental condition would have been cumulative.[38] Chief Justice Castille recognized that the decision to allow or disallow an expert witness is an evidentiary determination of the trial court and will not be disturbed, absent a clear abuse of discretion.[39] The court stated that because Vandivner's psychological expert, Adam Sedlock, and Dr. Bernstein testified extensively as to their opinions of Vandivner's limited adaptive skills, any additional expert testimony on the defendant's behalf would have been cumulative.[40] The majority then stated that Vandivner was not prejudiced by the trial court's refusal to appoint the expert because the controlling factor was Vandivner's failure to establish the onset of mental retardation by age eighteen, which was unrelated to his adult adaptive behaviors.[41]

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27. *Id.* at 1189. The Eighth Amendment provides "Excessive bail shall not be required. . . nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.
28. *Vandivner*, 962 A.2d at 1173.
29. *Id.*
30. *Id.* at 1188.
31. *Vandivner*, 962 A.2d at 1186.
32. *Id.*
33. *Id.*
34. *Id.* A school official offered testimony that Vandivner, during his tenth grade year, missed ninety-two days of school. *Id.* at 1185.
35. *Vandivner*, 962 A.2d at 1187.
36. *Id.* at 1188.
37. *Id.* at 1189.
38. *Id.*
39. *Id.* at 1188.
40. *Vandivner*, 962 A.2d at 1188.
41. *Id.* at 1188-89.

Finally, Chief Justice Castille stated that because there was no prohibition on imposing a death sentence on a defendant who is mentally deficient rather than mentally retarded, Vandivner's claim that his death sentence constituted cruel and unusual punishment must fail.[42] The majority argued that because the United States Supreme Court did not establish a national standard for mental retardation, there was a certain amount of flexibility permitted under the *Atkins* rule.[43] Here, Vandivner failed to offer any case law for barring the execution of defendants who were mentally deficient but did not meet the definition of mentally retarded.[44]

Justice Baer wrote a concurring and dissenting opinion, joined by Justice McCafferty.[45] Justice Baer agreed with the majority concerning the issues raised pertaining to the guilt phase, but disagreed with the finding of mental retardation. Justice Baer opined that the third prong was impossible for Vandivner to satisfy because there was not a structured program at his school to identify his condition.[46] The dissenters argued Vandivner should not be denied protection under the *Miller* rule simply because there were no tests or school records identifying him as mentally retarded.[47] Vandivner and those similarly situated to him were prejudiced by the majority's holding simply because records were not available.[48] Justice Baer noted that Dr. Wright testified that the only way for a defendant to prove the onset of mental retardation before he was eighteen was through objective testing, which Vandivner never had access to as a child. [49]

The dissenting Justices explained neither *Atkins* nor *Miller* required IQ testing to prove the age of onset, and to require such testing redefines the third prong set forth in *Miller*.[50] Justice Baer also stated that pursuant to *Commonwealth v Rainey*,[51] an appellant's burden to prove age of onset is by a preponderance of evidence.[52] Justice Baer argued that Vandivner's expert, Sedlock, concluded that Vandivner's mental retardation existed prior to age eighteen after interviewing Vandivner and his family and reviewing his school records. [53]

The dissenting Justices opined the case should have been remanded to the trial court to determine, without an objective standard and considering all evidence provided by Vandivner and the Commonwealth, whether Vandivner proved mental retardation.[54] Justice Baer went on to suggest that the trial court should analyze the other parts of the *Miller* test so at the next appeal, the court would be able to evaluate whether the reliable evidence establishes mental retardation.[55]

II. THE HISTORY BEHIND THE *VANDIVNER* DECISION

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42. *Id.* at 1189.
43. *Id.*
44. *Id.*
45. *Vandivner*, 962 A.2d at 1190 (Baer, J., dissenting).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Vandivner,* 962 A.2d at 1192 (Baer, J., dissenting).
51. 928 A.2d 215, 242 (Pa. 2007).
52. *Vandivner,* 962 A.2d at 1192 (Baer, J., dissenting).
53. *Id.*at 1191.
54. *Id.*at 1192.
55. *Id.*at 1193.

In 1986, the Supreme Court of the United States held in *Ford v. Wainwright*[56] that the Eighth Amendment did not exempt mentally retarded criminals from capital punishment.[57] The majority reasoned the purpose of the Eighth Amendment was only to apply to those punishments considered cruel and unusual at the time the Bill of Rights was adopted in 1789.[58]

Three years later, the Supreme Court revisited the issue in *Penry v. Lynaugh.*[59] In *Penry*, the Supreme Court granted *certiorari* to resolve the issue of whether executing a mentally retarded defendant with Penry's reasoning ability constituted cruel and unusual punishment.[60] In *Penry*, the Court added that the prohibitions of the Eighth Amendment were not limited to those punishments barred by common law in 1789.[61] The protection from cruel and unusual punishments also extended to "the evolving standards of decency that mark the progress of a maturing society."[62] The majority argued that the most reliable evidence of a consensus would be the legislation enacted across the country.[63] In 1989, Georgia had a statute banning the execution of mentally retarded defendants found guilty of a capital crime, and Maryland had enacted a statute which was not yet in effect.[64]

The Court, however, stated that these two state statutes barring the execution of mentally retarded defendants, even when combined with the fourteen states that do not enforce capital punishment at all, did not provide sufficient evidence of a national consensus.[65] The Court held that while mental retardation may be considered a mitigating factor for a defendant's culpability for a capital crime, the Eighth Amendment does not prohibit the execution of a mentally retarded defendant convicted of a capital offense.[66]

In light of the deliberations by the American people, legislatures, scholars, and judges following the *Penry* decision, in 2002 the Supreme Court decided to reconsider whether the executions of mentally retarded criminals constituted cruel and unusual punishment in *Atkins v. Virginia.*[67] Atkins was convicted of abduction, armed robbery, and capital murder and sentenced to death.[68] During the sentencing phase, Atkins presented as an expert witness Dr. Nelson, a forensic psychologist, who testified that Atkins had an IQ of fifty-nine, which rendered him

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[56]. 477 U.S. 399 (1986).

[57]. *Id.* Ford was convicted of murder in a 1974 and was sentenced to death. *Id.* at 401. In early 1982, Ford began to show unusual changes in behavior. *Id.* at 402. Letters to various people suggested a delusion that he had become a targeted victim of a conspiracy by the Klu Klux Klan and others, which was designed to make him commit suicide. *Id.*

[58]. *Id.* at 405.

[59]. 492 U.S. 302 (1989). Penry confessed to beating, raping, and stabbing Pamela Carpenter with a pair of scissors at her home in Lexington, Texas. *Penry*, 492 U.S. at 307. He was charged with capital murder. *Id.*

[60]. *Id.* Penry was sentenced to death in a Texas state court. *Id.* at 302. The United States District Court for the Eastern District of Texas denied his petition for writ of *habeas corpus*. *Id.* The United States Court of Appeals for the Fifth Circuit affirmed. *Penry*, 492 U.S. at 302.

[61]. *Id.* at 330 (internal citations omitted).

[62]. *Penry*, at 330-31 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[63]. *Id.* at 332.

[64]. *Id.* at 334.

[65]. *Id.*

[66]. *Id.* at 339.

[67]. 536 U.S. 304 (2002).

[68]. *Atkins*, 536 U.S. at 307. Around midnight on August 16, 1996, Atkins and William Jones, armed with handguns, abducted the victim and robbed him, took him to an automated teller machine, where cameras recorded their withdrawal of cash. *Id.* Atkins and Jones then took the victim to a remote location and shot him eight times. *Id.*

"mildly mentally retarded."[69] The Supreme Court of Virginia rejected Atkins' contention that he could not be executed because he was mentally retarded and affirmed the death sentence imposed by the trial court.[70] In reaching its decision, the Virginia Supreme Court relied on the holding in *Penry*.[71] In considering the changes in the legislative landscape that had occurred since *Penry*, the United States Supreme Court granted *certiorari* to reconsider the issue.[72]

Justice Stevens, writing for the six-justice majority, stated that the Court was not convinced that capital punishment for mentally retarded defendants would promote the deterrent or the retributive purposes of the death penalty, and thus, such punishment was excessive.[73] The Court noted that many state legislatures had enacted statutes barring the execution of mentally retarded defendants after *Penry*.[74] The Court also noted that although some states still allowed the execution of mentally retarded criminals in 2006, such executions were rare.[75] The majority also found that when Congress passed the Federal Death Penalty Act of 1994,[76] it included a provision that exempted mentally retarded defendants from capital punishment.[77] Thus, the Court concluded that there was national consensus against the execution of mentally retarded defendants.[78] The Court, however, left to the individual states the task of determining the standard for what constitutes mental retardation.[79]

In a dissenting opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the decision was not supported by the text or history of the Eighth Amendment, but rather that the majority opinion was based on the personal views of the members of the Court.[80] Justice Scalia argued that the Court erroneously concluded that a national consensus existed.[81] The dissenting Justices noted that less than half of the states that impose capital punishment had enacted legislation that barred mentally retarded defendants from being sentenced to capital punishment.[82]

The Supreme Court of Pennsylvania was called on to address how the *Atkins* rule should be applied in *Commonwealth v. Miller*.[83] Miller was convicted of two counts of first degree murder and sentenced to death.[84] The trial court denied Miller's post-sentence motion, and the Pennsylvania Supreme Court affirmed the death sentences.[85] Among six mitigating

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69. *Id.* at 308-09.
70. *Atkins*, 536 U.S. at 310.
71. *Id.*
72. *Id.*
73. *Id.* at 321.
74. *Id.*
75. *Atkins* 536 U.S. at 321.
76. 18 U.S.C. §§ 3591-3598.
77. *Atkins* 536 U.S. at 314. This statute provided: "A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it as imposed on that person." 18 U.S.C. at § 3596(c).
78. *Atkins,* 536 U.S. at 316.
79. *Id.* at 317.
80. *Id.* at 337-38. (Scalia, J. dissenting).
81. *Id.*
82. *Id.*
83. 888 A.2d 624 (Pa. 2005).
84. *Id.*
85. *Id.* On December 13, 1995, the Governor signed a warrant of execution. *Id.* at 626. In early March 1996, the Governor signed a second warrant of execution, which the Pennsylvania Supreme Court stayed. *Id.* The court then appointed counsel to allow Miller to pursue collateral relief under the Post Conviction Relief Act

circumstances the jury found applicable to both murders, two were that Miller had a low mental intelligence and suffered from mental illness.[86] The jury, however, found that two aggravating circumstances present for each victim outweighed the six mitigating circumstances.[87]

On August 19, 2002, Miller filed his second petition under the Post Conviction Relief Act[88] (PCRA), seeking exemption under the holding of *Atkins*.[89] After reviewing the trial court record, as well as the record for the first PCRA proceeding, the PCRA court concluded that Miller had proven, by a preponderance of evidence, that his IQ was, at most, between seventy and seventy-five, which placed him in the mild mental retardation range.[90] The court vacated Miller's death sentences and ordered consecutive life sentences.[91]

The Commonwealth appealed the decision of the PCRA Court.[92] The Commonwealth contended it must be allowed an opportunity to examine Miller and determine whether he was mentally retarded and therefore protected under the *Atkins* rule.[93] Miller argued that the Commonwealth must adopt, at least, either the definition provided by the American Association of Mental Retardation (AAMR) or the American Psychiatric Association (APA) because those definitions were used in *Atkins.*[94] However, Miller contended that states could adopt a more inclusive standard, such as the definition set forth in the Pennsylvania Health and Mental Retardation Act.[95]

Writing for the majority, Chief Justice Cappy noted that both definitions, AAMR and APA, included three concepts: (1) limited intellectual functioning; (2) significant adaptive limitations; and (3) age of onset.[96] The majority stated that according to both the AAMR and the Diagnostic and Statistical Manuel of Mental Disorders (DSM-IV)'s definitions of mental retardation, a low IQ score is not alone sufficient to label a person as mentally retarded.[97] Additionally, the defendant must show significant limitations of his or her adaptive behavior.[98] Adaptive behavior refers to the combination of conceptual, social, and practical skills that people develop in order to function in their daily lives.[99] The Court held that a defendant may prove his

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(PCRA), which was denied by the PCRA court. *Miller*, 888 A.2d at 626. The Pennsylvania Supreme Court affirmed the PCRA courts order. *Id.*

86. *Id.* The other mitigating circumstances were that Miller was the victim of child abuse; was neglected by his family and society; suffered from psychological trauma caused by neglect; and had alcohol abuse problems. *Id.*

87. *Id.* For one victim, the jury found that Miller had committed a killing while in perpetration of a felony, and that Miller had a significant history of felony convictions. *Id.* For the second victim, the jury found that Miller had been convicted of another murder committed before or at the time of the murder at issue. *Miller*, 888 A.2d at 626.

88. 42 Pa.C.S. §§9541-9546.

89. *Id.* at 626.

90. *Id.* at 632.

91. *Id.* at 625.

92. *Id.* at 627.

93. *Miller,* 888 A.2d at 627.

94. *Id.* at 628.

95. *Id.* The definition in the statute states "mental retardation means subaverage general intellectual functioning which originates during the developmental period and is associated with impairment of one or more of the following: (1) maturation, (2) learning, and (3) social adjustment." 50 P.S. § 4102.

96. *Id.* at 630.

97. *Id.*

98. *Id.*

99. *Id.*

or her mental retardation using either system.[100] Also, either party may call qualified experts to testify to mental retardation under either standard.[101] In light of this, the Court declined to adopt a cutoff IQ score for determining mental retardation in Pennsylvania.[102]

Therefore, the majority concluded that the PCRA court abused its discretion in failing to hold an evidentiary hearing when there was no relevant evidence offered to show Miller was mentally retarded under the *Atkins* rule.[103] The court remanded the case for further proceedings in order to give both parties a full and fair opportunity to assert their positions under the court established standard.[104]

In his concurring opinion, Justice Eakin stated that setting standards for determining the mental retardation of a defendant in a capital case is a legislative matter and that he hoped the Pennsylvania Legislature would act on this matter without further delay.[105]

III. AN ANALYSIS OF THE *VANDIVNER* DECISION

The Court's holding in *Vandivner* reaffirms the three-prong test adopted by the Court in *Miller*. Regarding Vandivner's first claim, that he met all three parts of the test, the court was sound in its reasoning that Vandivner had failed to satisfy the third prong. Vandivner had the burden to prove by a preponderance of the evidence that his mental retardation existed prior to age eighteen. Vandivner did not produce any evidence of IQ testing, nor did he provide any school or psychological records to prove mental retardation exited before he reached eighteen years of age. However, Justice Baer wrote a compelling dissent, which the majority acknowledged, arguing that the Court had developed an impossible standard for Vandivner and those similarly situated to satisfy this requirement when no formal testing is available to them.[106] As the majority noted, however, IQ testing is not the sole basis in determining whether a defendant proves mental retardation by the age of eighteen. Alternative evidence such as school records can be used to satisfy this requirement. Therefore, while it may be more difficult, the standard is not impossible for those who do not have access to formal IQ testing.

In its analysis, the majority considered that Vandivner had maintained full-time employment as a truck driver.[107] The majority also logically reasoned that Vandivner missed ninety-two days of school during his tenth grade year of school, and this may have been the primary reason for his poor academic performance. The court did not state that objective testing is required in order to prove age of onset.[108] It simply stated that the trial court did not err in assessing the evidence presented and noted that the trial court considered school records, which did not suggest that Vandivner was retarded.[109] Considering that Vandivner had the burden to prove by a preponderance of evidence that his mental retardation existed before he reached age

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100. *Miller,* 888 A.2d at 631.
101. *Id.*
102. *Id.*
103. *Id.* at 633.
104. *Id.* The Supreme Court of Pennsylvania reaffirmed its decision in Commonwealth v. Crawley, 924 A.2d 612 (Pa. 2007).
105. *Miller,* 888 A.2d at 633. (Eakin, J., concurring).
106. *Vandivner*, 962 A.2d at 1186.
107. *Id.* at 1184. A Pennsylvania Department of Transportation witness testified that Vandivner passed the requisite license test. In order to pass, test takers must answer correctly eighty percent of the seventy questions. *Id.*
108. *Id.* at 1187.
109. *Id.*

eighteen, the trial court, as the majority noted, did not err in reaching the conclusion that Vandivner did not meet this requirement.

As the majority stated, one purpose of the age of onset requirement is to keep defendants from feigning mental retardation after they are charged with a capital offense.[110] Here, there was such a concern because Dr. Wright testified that Vandivner gave a poor effort on administered tests.[111] The dissenting opinion was valid in the argument that Vandivner did not have the opportunities to prove his mental retardation through objective testing. As Justice Baer noted, the supervisor of special education for Vandivner's school district testified that, at the time Vandivner was attending school, there were not formalized evaluation procedures for placing students in special education class.[112] However, the trial court considered school records, which did not show that he was placed into any special education classes because of mental retardation.[113] Also, Justice Baer stated that Vandivner's family members' testimony asserted that his mental retardation existed before he was eighteen years old.[114] This part of Justice Baer's dissent is unpersuasive because the testimony of a defendant's family cannot reasonably be the basis for concluding that defendant was mentally retarded and therefore exempt from capital punishment. Such a witness cannot reasonably be expected to make an objective and credible analysis of her brother's mental condition, knowing that her brother may be put to death if the court finds that he did not have a certain mental capacity.

Vandivner's second contention, that the trial court erred in refusing to allow testimony of a mental retardation expert, and thus, the court had no basis for determining whether his adaptive abilities were similar to those of mildly mentally retarded persons, seems to be without merit. The court could not disturb the ruling of the trial court unless there was a clear abuse of discretion.[115] As the majority correctly noted, Vandivner could not have been prejudiced by the trial court's decision not to appoint his requested expert because the determining factor was that Vandivner failed to prove the onset of mental retardation before he was eighteen years old. The age of onset requirement is unrelated to adaptive behaviors.[116]

Regarding the third issue Vandivner raised on appeal, the majority was contradictory in its rationale. The Supreme Court stated in *Atkins* that not all defendants claiming to be mentally retarded fall within the protected class, about whom there is a national consensus against capital punishment.[117] Here, the Court stated that because there is no national consensus for prohibiting execution of defendants like Vandivner and those similarly situated, he was not protected under the *Atkins* rule. However, the flexibility given by the Supreme Court to the states supports Vandivner's argument to make exceptions for those defendants of similar ability. The court chose not to deviate from the three-prong test established in *Miller*, which was logical. Had the Court chosen to label Vandivner mentally retarded, the class of protected defendants would expand very quickly.

Vandivner is a significant decision because it reaffirms that in order to be protected under the *Atkins* rule, a defendant must satisfy all three parts of the *Miller* test. On July 22, 2009, Vandivner filed a petition for re-argument, arguing that the court erred in holding that case law

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110. *Id.*
111. *Id.* at 1188.
112. *Id.* at 1192. (Baer, J., dissenting).
113. *Vandivner*, 962 A.2d at 1185.
114. *Id.* at 1191. (Baer, J., dissenting).
115. *Id.* at 1188.
116. *Id.* at 1188-89.
117. *Atkins*, 536 U.S. at 317.

finding a national consensus against mentally retarded persons did not apply to people who were mentally deficient to the same extent as mentally retarded persons.[118] Vandivner also contended the court's statutory review of the penalty verdict for passion, prejudice or any other arbitrary factor, overlooked Vandivner's proof of two of three prongs for mental retardation to the trial court.[119] The court denied Vandivner's application for re-argument.[120]

William Grant

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[118]. Commonwealth v. Vandivner, Pa. LEXIS 1387 (Pa. 2009).
[119]. *Id.*
[120]. *Id.*