

Psychological Evaluations for Capital Sentencing Evaluations

A Brief Introduction - U. of R. School of Law
March 22, 2010

Evan S. Nelson, Ph.D., ABPP, CSOTP
esnelson@psylaw.com
www.psylaw.com
804-739-4669

The Psychological Context of the Death Penalty Hearing

- P A death qualified jury – a skewed sample of “peers.” By definition, more conservative.
- P The jury has looked at the pictures, heard the evidence, and they now believe the defendant is a killer.
- P By the time of the capital sentencing phase, the jury identifies with the victims and the prosecutor. Mitigation is at risk to be rejected or viewed as aggravating.

The Psychological Tasks of the Defense Attorney

- P Get to know the defendant personally, see the defendant as a person.
- P Attorney feels like he or she is personally responsible for the life of the defendant (when in fact the defendant's behaviors are the issue).
- P Use those feelings to emotionally present defense arguments to the jury.
- P Try to portray the defendant as a multidimensional person, not just a killer.

The Psychological Tasks of the Prosecutor

- P Do not come to meet or know the defendant - avoid a personal relationship.
- P Use anger at the defendant to motivate one's work as a prosecutor.
- P Portray the defendant as a unidimensional person: a killer.
- P Vilify the individual so that his murderous act is viewed as a reflection of his overall character.

Black-and-White Thinking to Maintain Cognitive Set



The Role of the Expert

Defense Expert: 19.2-264.3:1(A)

“One or more qualified mental health experts to evaluate the defendant and to ***assist the defense in the preparation and presentation of information*** concerning the defendant's history, character, or mental condition.”

Commonwealth's Expert: 19.2-264.3:1(F)

“Expert assistance for the Commonwealth after notice...***[evaluator is to assess] existence or absence of mitigating circumstances*** relating to the defendant's mental condition at the time of the offense.”

The Expert's Report

Statutory Questions to Answer - VA § 19.2-264.3:1(C)

- P (i) Whether the defendant acted under extreme mental or emotional disturbance at the time of the offense.
- P (ii) Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired.
- P (iii) Whether there are any other factors in mitigation relating to the history or character of the defendant's mental condition at the time of the offense.

Functions of a Second Opinion Evaluation

A Process of Deconstruction of the Links between Data and Opinions

P Second opinion on the first expert's mitigation themes.

- ▶ Do they make sense?
- ▶ Are there alternative explanations to the same data? How strong is the evidence connecting the data and the conclusions?

P Assess for mitigation the first expert may have missed.

P “Rebuttal” of mitigation – a fine distinction from proving an aggravating factor

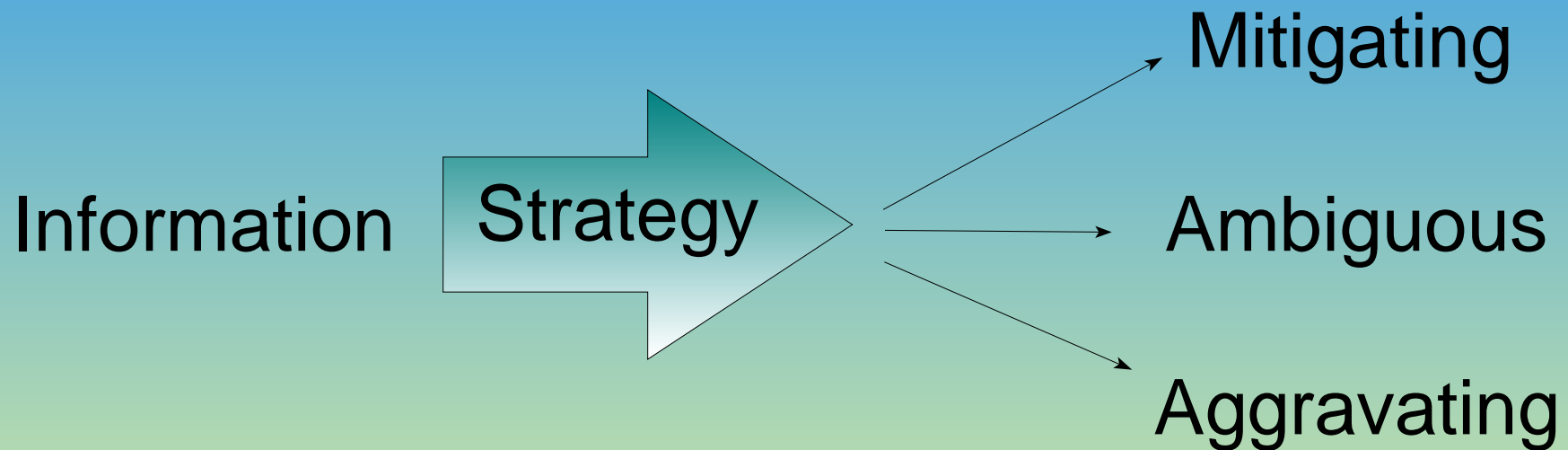
What is Mitigation?

A Psychological Perspective to Earn Partial Forgiveness

- P An explanation of *why* the offense happened - understanding (often) reduces anger.
- P An explanation that reduces the culpability of the defendant.
- P Information about the defendant-victim relationship that reduces the defendant's culpability.
- P Information that humanizes the defendant and makes him more likeable.
- P A reason to see this murder as different from others.

A Conceptual Model of Mitigation

Mitigation is information presented in a strategic fashion to reduce the likelihood of a death sentence and increase the likelihood of a life sentence.



*The value of information is affected by the use of strategy.
Mitigation begins with the voir dire of the jury pool.*

Judicial Reasons for Departure from Sentencing Guidelines for Homicide

Mitigation

- P Minimal circumstances/facts of the case
- P Offender and victim are related or friends
- P Offender has good potential for rehabilitation
- P Plea agreement

Aggravation

- P No reason given
- P Aggravating circumstances/flagrancy of offense
- P Offender knew of victim's vulnerability
- P Extreme violence or severe victim injury
- P Offender has drug or alcohol problem
- P Offender shows no remorse
- P Jury sentence

Potentially Mitigating Factors Set Forth in VA Code Sections

19.2-264.4(B): A Source of Ideas for Mitigation

- P Age of offender (youthful or old)
- P Relationship of offender-victim; victim consented to the behavior involved in the offense
- P First time offender
- P History, character, or mental condition
- P Extreme mental disturbance which affected reasoning or ability to control oneself
- P No prior record / future dangerousness issues
- P Potential for rehabilitation
- P Mental Retardation: an *exclusionary* factor; what of low IQ?

Working with the Expert

- P Provide all offense-related records.
- P Gather background information.
- P Get the defendant's arrest history, and determine the unadjudicated conduct; list the aggravators.
- P Coordinate with the expert whether the doctor or the defense attorneys will be gathering records and interviewing witnesses.

Typical Background Records

- P Birth
- P Pediatrician
- P Physicians' & hospitalization records of any sort
- P Mental health and substance abuse records: outpatient and inpatient
- P Schools
- P Academic programs
- P Group homes
- P Detention, jail, and prison records
- P Probation/Parole
- P Family member's records?
- P Any other agency that kept printed records

Records Issues Unique to Second Opinion Evaluations

- P 21 day notice - only calls for *notice*. So:
 - ▶ Ask the prosecutor to get the court to order a date for the defense expert's report to be submitted.
 - ▶ Ask the prosecutor to get the court order immediate surrender of records from the defense.
- P Only accept records that are available in discovery. Do NOT accept "confidential" undiscoverable records that you cannot reveal.
- P The exchange of psyc records - expert-to-expert or via attorneys?

Protection for the Defendant

Their Statements Cannot be Used Against Them, but the Expert's Inferences and Opinions Can Be Used in Rebuttal

§ 19.2-264.3:3. Limitations on use of statements or disclosure by defendant during evaluations.

No statement or disclosure by the defendant made during a competency evaluation performed pursuant to § 19.2-169.1, an evaluation performed pursuant to § 19.2-169.5 to determine sanity at the time of the offense, treatment provided pursuant to § 19.2-169.2 or § 19.2-169.6, a mental condition evaluation performed pursuant to § 19.2-264.3:1 or a mental retardation evaluation performed pursuant to § 19.2-264.3:1.2, and no evidence derived from any such statements or disclosures may be introduced against the defendant at the sentencing phase of a capital murder trial for the purpose of proving the aggravating circumstances specified in § 19.2-264.4. Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense.

Notice of Purpose - 2nd Opinions

A Way of Building Rapport with the Defendant

- P This is a *second opinion*, it might agree or disagree with the first report.
- P This report goes to both sets of attorneys, *including the defense*.
- P The second opinion expert could be called by either side.

Hinderances from the Defense

- P Delay in the provision of records and reports.
 - ▶ To impede the second opinion expert. Get prosecution to ask the judge for a date.
- P Efforts to try to observe the second expert's evaluation.
 - ▶ This is settled in caselaw - no right to observe. Observing defense attorney converts to a witness. It changes the very nature of the evaluation.
 - ▶ No tapes of the defense expert's evaluation.
 - ▶ Might compromise with video / audio taping, but this has pitfalls for everybody. (Fed do this.)

The Defendant Who Won't Cooperate

- P Identify the *reason*, intervene through the correct set of attorneys.
- P If it's because his attorney told him "don't talk to anybody" – talk to defense counsel.
- P If it's because the defense is trying to protect the Fifth Amendment right of the defendant – talk to the prosecutor, see 19.2-263.3:3.
- P If it's because he's incompetent, contact the court.

Before Submitting the Second Opinion Report

- P Make sure you have an updated list of convictions and unadjudicated conduct.
- P Know of any court rulings restricting what prior bad acts can be introduced (e.g., Judge has ruled that an ongoing murder investigation is too prejudicial to be presented in court).
- P **CHECK WITH DEFENSE COUNSEL** to see if they have any new records or witnesses for you.

Common Psychological Tests

- P **MMPI, MACI, PAI, NEO, CPI** -“objective” self-report personality tests with *validity* scales
- P **Rorschach, TAT, Draw-a-Person, Bender-Gestalt** -“subjective” or “projective” personality tests
- P **WAIS, WISC, WASI, SB (Stanford-Binet), KAIT** -*standardized* intelligence tests
 - ▶ IQ < 70 might be Mild Mental Retardation
 - ▶ Deficits in adaptive behavior / independent functioning

A second opinion report should be about the *presence or absence* of mitigation, or in rebuttal to mitigation themes from the defense – it is not meant as aggravation. It should have both negatives and positives about the defendant!

Psychological Dynamics of Working with Attorneys

- P The expert is not an advocate – for either side.
- P Attorneys want validation of their side – social pressure to conceptualize data their way.
- P With 2nd opinions, the expert may be the only “member” of the prosecution team to have met the defendant at length.
- P Attorneys - trying to use the expert as their personal counselor.



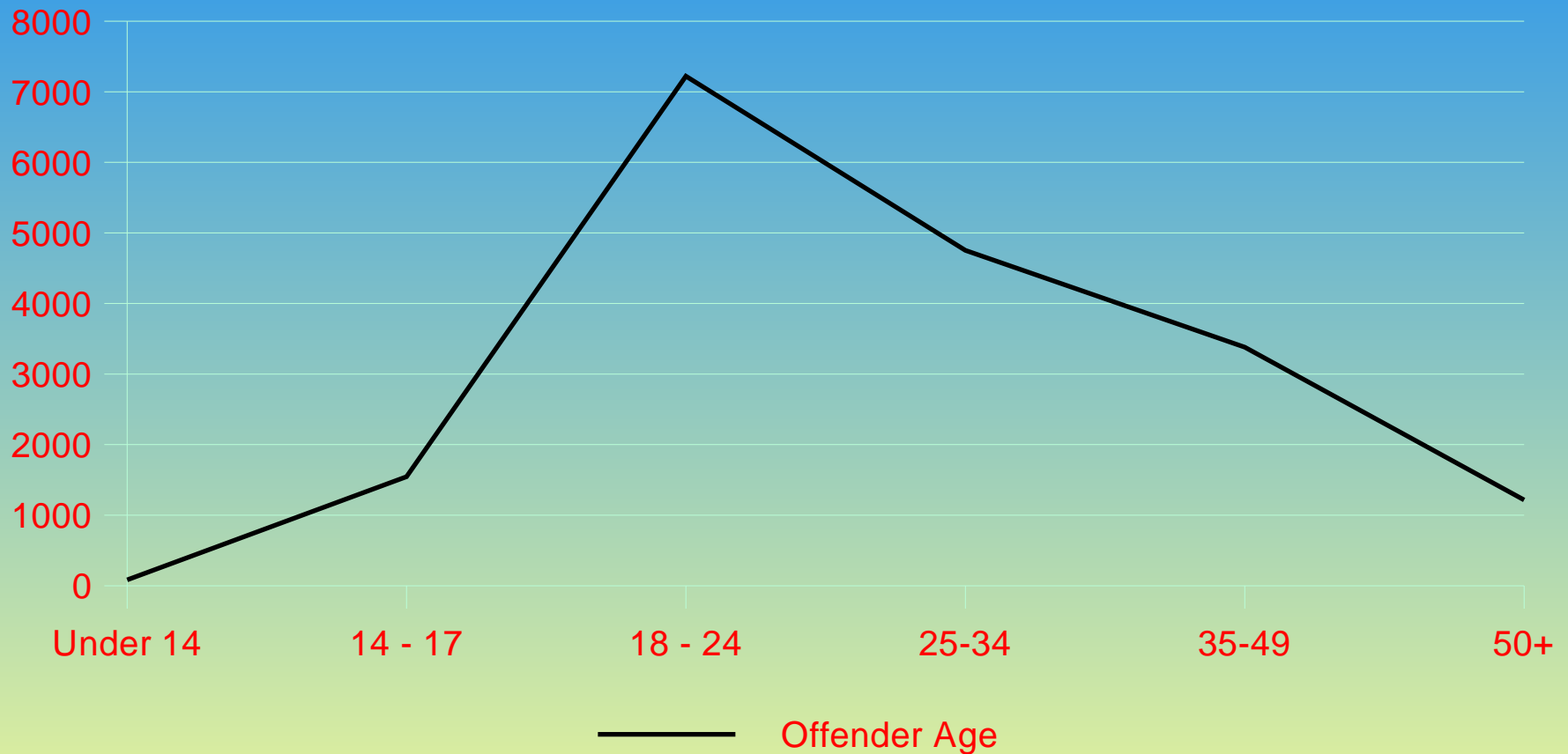
" Here on Death Row there has been some cut backs, but it won't affect you much."

Common Theme #1: Bad Upbringing

*A.K.A. “Blame the Parents”
or “It’s Not His Fault He Turned Out to be a Killer”*

- P Witnesses are family, neighbors, teachers, ministers, Social Service personnel.
- P May show a video of home environment.
- P Emphasize failures of caregivers; sacrifice the reputation of the caregiver.
- P Most effective for younger defendants. After they leave the “orbit” of the family, death-qualified juries expect self-determination.

Homicide Defendants by Age for 2004



Source: <http://www.ojp.usdoj.gov/bjs/homicide/tables/oagetab.htm>

Common Theme #1: Bad Upbringing

Strategic Considerations

- P PRO: This theme can be presented without the expert's testimony, data, and liabilities.
- P PRO: Intuitive to the jury; shifts anger from defendant to his family.
- P CON: If the defendant's violence came from being "damaged" in his childhood, won't that "damage" continue to make him at risk in the future?
- P CON: May need to attack the same family witnesses who were key to the defense case.

Common Theme #1: Bad Upbringing

The Expert's Contribution at Sentencing

- P Testimony about models of parenting and their impact on development.
- P Pointing to evidence of distorted personality development in the defendant because of his environment.
- P Teaching witness – research on the impact of abuse and neglect (e.g., Cathy Spatz-Widom's data).

Common Theme #2: Mental State

Something wrong with his state of mind at the time of the murder.

- P Defendant's level of intoxication reduced his judgement and self-control, and therefore his culpability.
- P Dynamics of the relationship between the defendant and victim explains the motive, makes it more understandable. Casts the behavior as out-of-character.
- P Mental illness or abnormality reduced judgement, self-control, or ability to accurately comprehend the situation.

Common Theme #2: Mental State

How Common Drugs of Abuse Affect Mental State

- P **Alcohol:** reduced judgement, reduced inhibition (often regret behavior immediately), reduced memory.
- P **Cocaine:** more likely to be aggressive with small provocation, paranoid; sex drive. NO memory loss.
- P **Cocaine + Alcohol = Cocaethylene:** more intense cocaine high, lasts longer. Sex drive and violence.
- P **Marijuana:** mellow, but can be a hallucinogen.
- P **Opiates (heroin, Oxycontin):** mellow and withdrawn when high; desperate when in withdrawal. Memory loss.

The Major Effects of Cocaine¹

- P Euphoria, occasionally dysphoria
- P Increased sense of energy
- P Perception of enhanced mental acuity
- P Increased sensory awareness (sexual, auditory, tactile, visual)
- P Decreased appetite
- P Increased anxiety and suspiciousness
- P Decreased need for sleep
- P Postponement of fatigue
- P Increased self-confidence
- P Delusions, especially paranoid ones
- P Dependence (addiction)
- P Physical symptoms of “fight or flight” response (anxiety, vasoconstriction, increased heart rate)

¹ Adapted from Lowinson et al., Substance Abuse: A Comprehensive Textbook, 1997.

Common Theme #2: Mental State

Common Mental Illness/Condition Mitigators

P Defective brain:

- ▶ Neuropsychological deficit - if can show a link between test data and his behavior *past and present*
- ▶ Neurological tests and neuropsychological tests are not the same.

P Mental illness or personality disorder:

- ▶ Diminishes ability to accurately perceive the situation (e.g., depression, psychosis).
- ▶ Or diminishes self-control.

Common Theme #3: He's Worth Saving

Contributing to the Prison Community

- P Show that the offense behavior is out of character. Vile behavior \neq vile person.
- P Show the good aspects of the defendant. He's got promise:
 - ▶ good IQ
 - ▶ good behavior before adolescence
 - ▶ change in attitude since incarceration
 - ▶ full acceptance of responsibility for the crime
- P Indirect theme: how his death will victimize his family.

A Description of Psychopathy

Psychopathy: “Interpersonally, psychopaths are grandiose, egocentric, manipulative, dominant, forceful, and cold-hearted. Affectively, they display shallow and labile emotions, are unable to form long-lasting bonds to people, principles, or goals, and are lacking in empathy, anxiety, and genuine guilt and remorse. Behaviorally, psychopaths are impulsive and sensation-seeking, and they readily violate social norms.”

(From the first edition of the The Hare PCL-R Manual, p. 3.)

Psychopathy NOT A Strong Risk Factor for Future Dangerousness in Prison

- P PCL-R:2 has moderate correlations with violence in the community, with relatively little drop off for age. Total Score and Factor 2 are the most important.
- P PCL-R:2 has weak correlations with disruptive behavior in prison, and even weaker relationship to violence.
- P Low base rate of prison violence is the issue.

Hare's PCL-R

A Structured Evaluation of Psychopathy

- P **Glibness/superficial Charm**
- P **Grandiose sense of self-worth**
- P **Need for stimulation/proneness to boredom**
- P **Pathological lying**
- P **Conning/manipulative**
- P **Lack of remorse or guilt**
- P **Shallow affect**
- P **Callous/lack of empathy**
- P **Parasitic lifestyle**
- P **Poor behavioral controls**
- P **Promiscuous sexual behavior**
- P **Early behavior problems**
- P **Lack of realistic, long-term goals**
- P **Impulsivity**
- P **Failure to accept responsibility for own actions**
- P **Many short-term "marital" relationships**
- P **Juvenile delinquency**
- P **Revocation of conditional release**
- P **Criminal versatility**

“Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness”

Prepared by the Texas Defender Service

“Of the 155 inmates examined, including one who was exonerated by the courts after being found to be innocent of the crime, only eight (5%) later engaged in seriously assaultive behavior which resulted in injury requiring treatment more than first-aid. Thirty-one of the 155 inmates (20%) have no records reflecting any disciplinary violations. The remaining 75% of inmates committed disciplinary infractions involving conduct not amounting to serious assaults, including minor infractions such as possessing cash or lotto tickets, food in their cells, or too many sheets. None of the inmates in the study committed another homicide, and only two inmates have been prosecuted for crimes committed while in prison.”*

* Includes executed, death row, and exonerated inmates.

“Future Dangerousness” What is the Baserate?

Cunningham & Reidy, (2008). “Assertions of ‘Future Dangerousness’ at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence,” *Law and Human Behavior*, 32(1), 46 - 63

- P Studied 145 federal inmates serving LWOP, with follow-up as long as 15 years of prison
- P 70% had a disciplinary infraction of any sort
- P 20.7% had assault infractions
- P 9% had serious assaults
- P Problems:
 - ▶ No baserate data for prison inmates overall
 - ▶ No baserate data for death row, but hard to compare that with LWOPs in general population

Future Dangerousness in Prison

GENERALLY PREDICTIVE

- P Young age, being male
- P Bad prior record in structured settings
- P Long arrest history for non-violent offense
- P Small effect for race (unconstitutional to say)

GENERALLY NOT PREDICTIVE

- P Antisocial personality disorder
- P Psychopathy
- P Vileness of the murder, number of victims, remorse, acceptance of responsibility

From the Risk Assessment Scale for Prison (RASAP)

Cunningham & Sorensen, *Assessment*, 13(3), 2006

Increased Risk

- P Age ≤ 30
- P Prior prison commitment
- P Property offense

Decreased Risk

- P Age ≥ 36
- P Education > 9 th
- P Drug offense conviction
- P Life without parole
- P Death row

IMPORTANT CAVEATS: (1) doesn't factor in institutional record from prior prison stays; (2) overestimates violence rates for higher-risk inmates; (3) based on data from one institution

Escapes from Virginia Prisons

Year	Total Escapes	Prison Population
1995	10	23,785
1994	8	20,503
1993	1	NA
1992	4	NA
1991	3	15,182
1990	11	NA
1989	3	NA

From BJS Sourcebook tables: 1995, 6.56 & 6.20; 1994, 6.52 & 6.18; 1992, 6.106 & 6.68; 1991, 6/123. NOTES: (1) Changes in the methods for collecting information about escapes and population varied from year-to-year. (2) This chart reports total escapes for facilities of all levels of security.

The Dissenters - Thomas, Scalia and Rehnquist

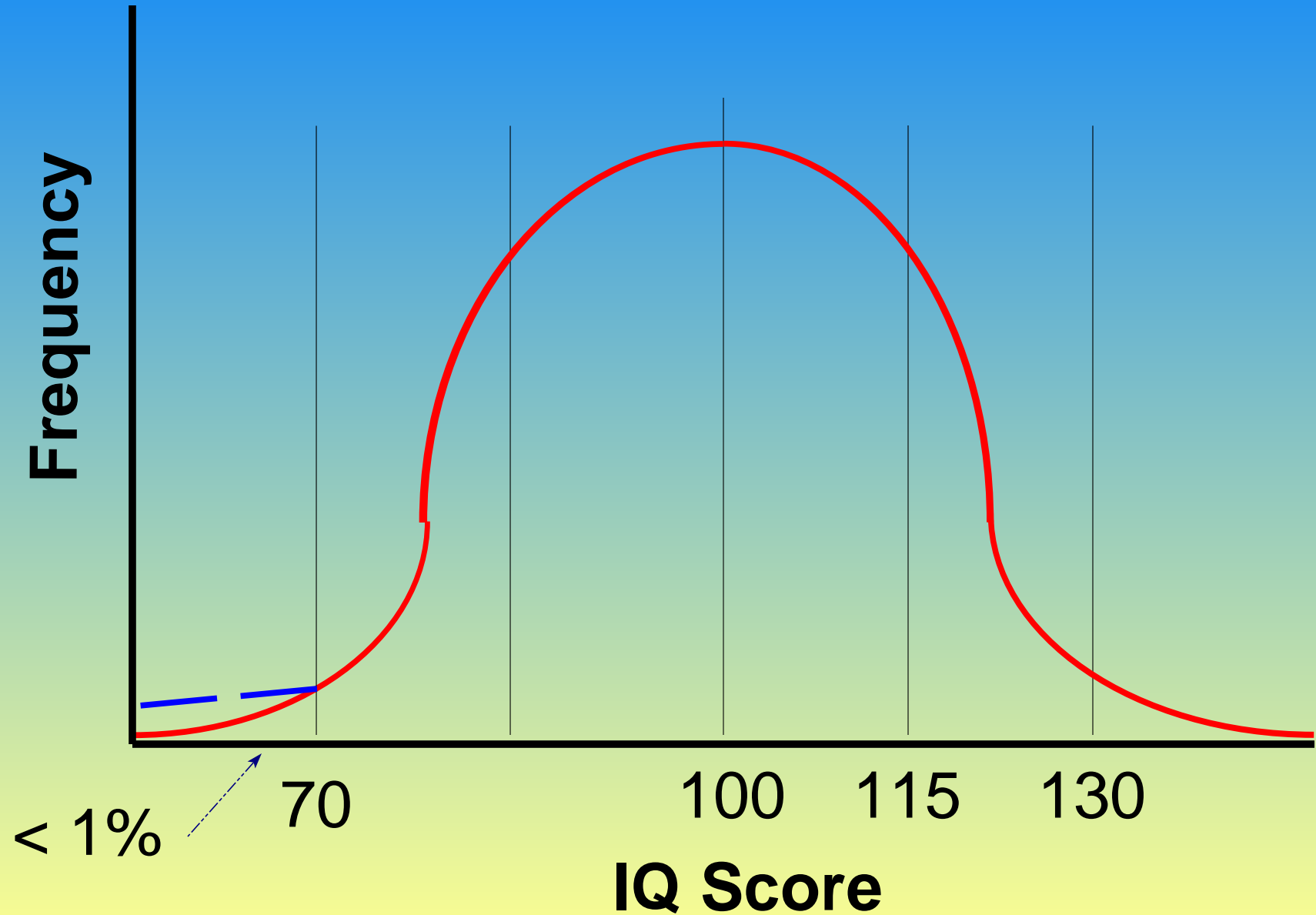


Atkins v. Virginia

Mentally Retarded Defendants Cannot be Executed

- P Changed because of “evolving standards of decency that mark the progress of a maturing society.”
- P Executing the mentally ill cannot be shown to meet the goals of retribution and deterrence
- P MR defendants:
 - ▶ Less likely to understand punishment
 - ▶ Less socially adept, may not understand full wrongfulness
 - ▶ More prone to false confession, or being led on the witness stand
 - ▶ May not express remorse as well due to communication deficits

What is “Significantly Subaverage” IQ?



Mental Retardation: Definitions

VA Code 19.2-264.3:1.1

"Mentally retarded" means a disability, **originating before the age of 18 years**, characterized concurrently by

(i) **significantly subaverage intellectual functioning** as demonstrated by performance on **a standardized measure of intellectual functioning** administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and

(ii) significant limitations in **adaptive behavior** as expressed in conceptual, social and practical adaptive skills."