

A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation

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TABLE OF CONTENTS

INTRODUCTION: THE PURPOSE OF THIS GUIDE	1
PART I	5
1 CLINICAL DEFINITIONS OF MENTAL RETARDATION	7
1.1 <i>Significant Limitations in Intellectual Functioning</i>	7
1.2 <i>Significant Limitations in Adaptive Behavior</i>	8
1.3 <i>Onset Prior to Age 18</i>	10
2 HOW MENTAL RETARDATION AFFECTS PEOPLE WHO HAVE IT	11
2.1 <i>Conceptual Behaviors</i>	12
2.2 <i>Social Behaviors</i>	14
2.3 <i>Practical Behaviors</i>	15
2.4 <i>A Note About “Problem” or “Maladaptive” (or Criminal) Behaviors</i>	16
3 INVESTIGATION: SCREENING FOR MENTAL RETARDATION	18
3.1 <i>A Note About “Risk Factors”</i>	23
3.2 <i>What To Do With Evidence of Mental Retardation Found During the Screening Investigation</i>	25
4 INVESTIGATION: DEVELOPING THE EVIDENCE OF MENTAL RETARDATION	27
4.1 <i>Engaging a Mental Retardation Expert</i>	27
4.2 <i>IQ Testing</i>	27
4.3 <i>Assessing Adaptive Behavior Limitations</i>	29
4.4 <i>Achievement Tests</i>	30
4.5 <i>Onset During the Developmental Period</i>	31
4.6 <i>Selecting Evaluating Experts</i>	31
5 ISSUES CONCERNING THE DIAGNOSIS	33
5.1 <i>IQ Scores Between 70 and 75</i>	33
5.2 <i>Test-Retest Situations</i>	34
5.3 <i>Divergent IQ Score(s)</i>	35
5.4 <i>Questions of Malingering</i>	36
5.5 <i>The Context Within Which Adaptive Behavior Is Assessed</i>	37
5.6 <i>Combination of Strengths and Deficits in Adaptive Behavior</i>	37
5.7 <i>Antisocial Personality Disorder</i>	39
5.8 <i>Putting It All Together and Making the Case That Your Client Has Mental Retardation</i>	41
PART II.....	43
1 ATKINS V. VIRGINIA	45
1.1 <i>Definition of Mental Retardation</i>	46
1.2 <i>Burdens and Standards of Proof</i>	49
1.3 <i>Documentation</i>	51
1.4 <i>Privilege Against Self-Incrimination/Confidentiality of Statements Made During Mental Retardation Examinations</i>	52
1.5 <i>Examinations by Prosecution Experts</i>	53
1.6 <i>Pre-Trial Hearing</i>	53
1.7 <i>Finding During or After Trial</i>	54
2 COMPETENCE TO STAND TRIAL	56
3 WAIVER OF RIGHTS/GUILTY PLEAS.....	60
3.1 <i>Custody and Interrogation</i>	60
3.2 <i>Competence</i>	62
3.3 <i>Voluntariness</i>	62
3.4 <i>Knowing and Intelligent</i>	63
3.5 <i>Guilty Pleas</i>	67
4 COERCED CONFESSIONS	70
5 FALSE CONFESSIONS	73

A Practitioner’s Guide to Defending Capital Clients Who Have Mental Retardation

6	CRIMINAL RESPONSIBILITY	75
6.1	<i>Insanity Defense</i>	75
6.2	<i>Absence of Requisite Mens Rea</i>	77
6.3	<i>Affirmative Defenses (Other than Insanity)</i>	79
6.4	<i>Guilty But Mentally Ill or Mentally Retarded</i>	80
7	CHALLENGES TO PRIOR CONVICTIONS AND UNADJUDICATED CHARGES OFFERED IN AGGRAVATION	81
8	BEHAVIOR/APPEARANCE POST-CRIME OR IN COURTROOM	82
9	CUSTODIAL ADJUSTMENT	83
10	POST-CONVICTION COMPETENCE	84
10.1	<i>Post-Conviction Proceedings</i>	84
10.2	<i>Competence to Be Executed</i>	84
11	CLEMENCY	85
	PART III	87
1	INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION AND CAPITAL PUNISHMENT	89
1.1	<i>Summary</i>	89
2	INTERNATIONAL INSTITUTIONS, LAW AND INSTRUMENTS: OVERVIEW	90
2.1	<i>Background</i>	90
2.2	<i>Institutions</i>	91
2.3	<i>What is International Law: Sources</i>	93
2.4	<i>Treaties</i>	93
2.5	<i>Reservations</i>	94
2.6	<i>Treaties: Interpretation and Application</i>	94
2.7	<i>Customary International Law</i>	95
2.8	<i>Persistent Objector</i>	95
2.9	<i>Resolutions</i>	95
2.10	<i>Jus Cogens</i>	95
2.11	<i>‘Soft’ and ‘Hard’ Law Distinctions</i>	96
3	INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION	97
3.1	<i>Limitations</i>	98
3.2	<i>Main Norms and Instruments</i>	98
3.3	<i>International Practice: Execution of Persons with Mental Retardation is Contrary to the Practice of Virtually All States</i>	100
3.4	<i>International Instruments, Norms and Standards Prohibit the Application of the Death Penalty on Persons with Mental Retardation</i>	100
4	CURRENT DEVELOPMENTS	104
5	INTERNATIONAL AVENUES OF APPEAL AND FORA: REGIONAL BODIES	105
5.1	<i>Organization of American States</i>	105
5.2	<i>Inter-American Commission on Human Rights</i>	105
5.3	<i>The International Court of Justice</i>	112
5.4	<i>The European Union</i>	112
6	CLEMENCY AND INTERNATIONAL INTERVENTION	113
6.1	<i>International Institutions Overview</i>	113
6.2	<i>Criteria for Intervention</i>	114
6.3	<i>Example Case: Daryl Renard Atkins</i>	115

APPENDICES:

Appendix One – A:	AAMR 2002: Adaptive Behavior: Background Questions to Ask Credible Informants	116
Appendix One – B:	DSM-IV-TR: Adaptive Behavior: Background Questions to Ask Credible Informants	123
Appendix Two:	Compilation of State and Federal Statutes	131

INTRODUCTION: THE PURPOSE OF THIS GUIDE

Mental retardation has become a critical issue for those charged with, or convicted of, capital crimes. The Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the execution of prisoners with mental retardation violates the Eighth Amendment's prohibition of cruel and unusual punishment, has placed mental retardation center stage within the criminal justice system. It is imperative that every lawyer defending capital clients understand, and know how to present, evidence of mental retardation.

Mental retardation is now, literally, a question of life or death, correspondingly no one can afford to make the most common mistake we, as lawyers or defense team members, are prone to make. **We cannot allow ourselves to assume, based on our impressions during jailhouse interviews, that a client does not have mental retardation.** Mental retardation, as explained in this guide, does not create the same image for everyone. There is no distinguishing manner in which our clients communicate with us or others, nor is there a particular manner in which they speak, use language, recount experiences, or appear, which can allow us, as lawyers or defense team members, to **discount** mental retardation in the course of an interview.

People with mental retardation have different strengths and different limitations, as do we all. Moreover, people who have mental retardation can often undertake tasks that conflict with our expectations of what those with mental retardation are capable of doing. Some, for example, can use technical or complex vocabulary, even legal terms, appropriately. Some can write coherent letters, others may hold jobs that require a degree of complex behavior, or can obtain and use a commercial driver's license. Some have artistic aptitude, and some can serve as jail trustees. In fact, the catalog of abilities that people with mental retardation possess may be wide-ranging. **Mental retardation, however, is not concerned with a client's strengths and abilities. Rather, it is concerned with the client's limitations.**

Thus, our impressions in connection with a client's abilities in initial interviews – when we know nothing about the client's limitations (which are usually revealed by life history evidence, not in interviews) – cannot serve as a basis for reasonable decision-making with regard to mental retardation. For this reason, **we must investigate the possibility of mental retardation for every client until we have enough independent and reliable information to rule it out.** We cannot conclude that a client does not have mental retardation solely on the basis of jailhouse interviews. If we permit ourselves to do so, we may well make an error and a client may consequently receive a sentence of death.

The purpose of this guide is to help us, as criminal defense lawyers and members of defense teams, develop the knowledge and strategic understanding we need to protect our clients' rights under *Atkins*, and to defend clients who have mental retardation along the entire spectrum of issues that are contingent on the client's intellectual and behavioral

functioning. In keeping with this, the guide has been divided into three sections with accompanying appendices.

PART I ADDRESSES THE EVIDENCE OF MENTAL RETARDATION:

1. What is mental retardation?
2. How does it affect people who have it?
3. What is the investigation necessary to screen for mental retardation?
4. What additional investigation is necessary to establish that a client has mental retardation?
5. What are the commonly recurring issues that must be addressed to establish that a client has mental retardation?

PART II ADDRESSES THE ARRAY OF LEGAL ISSUES THAT NEED TO BE RAISED, OR AT LEAST CONSIDERED, IN REPRESENTING A CLIENT WHO HAS MENTAL RETARDATION IN A DEATH PENALTY PROSECUTION:

1. Eligibility for the death penalty under *Atkins*;
2. Competence to stand trial;
3. Waivers of rights and guilty pleas;
4. Coerced confessions;
5. False confessions;
6. Criminal responsibility – insanity, lack of intent to kill, coercion or domination by others, or imperfect self-defense;
7. Unadjudicated charges and prior convictions that could otherwise be used against the client in the current case;
8. Explaining courtroom behavior that can be highly prejudicial – such as appearing indifferent or disinterested, falling asleep, or getting angry – in a way that diminishes the prejudicial effect of such behavior;
9. Explaining difficulties in the client's adjusting to being in custody;

10. Competence to assist in post-conviction proceedings and competence to be executed; and
11. Clemency in cases in which the judicial process rejects a finding of mental retardation.

PART III ADDRESSES THE ARTICULATION OF INTERNATIONAL LAW, INSTRUMENTS AND NORMS RELATING TO CAPITAL PUNISHMENT AND MENTAL RETARDATION AND THE POSSIBILITIES OF ALTERNATIVE AVENUES OF APPEAL TO THE DOMESTIC U.S. LEGAL SYSTEM:

1. International law and instruments;
2. International institutions;
3. Articulating international arguments in capital cases involving persons with mental retardation;
4. International avenues of appeal and fora;
5. Clemency: international intervention.

APPENDICES :

1. Appendix One – A: AAMR 2002: Adaptive Behavior: Background Questions to Ask Credible Informants
2. Appendix One – B: DSM-IV-TR: Adaptive Behavior: Background Questions to Ask Credible Informants
3. Appendix Two: Compilation of State and Federal Statutes

This guide does not, and cannot, purport to provide all the information required to investigate and prove mental retardation and represent a client who has mental retardation. However, the guide does provide the basic working knowledge needed to represent a capital client with mental retardation throughout the process, from trial through post-conviction proceedings. From this springboard, you will be able to locate other resources and provide each client with the best representation you are capable of providing.

This guide can be downloaded from the Federal Death Penalty Resource Counsel and the Habeas Assistance and Training Project website at: <http://www.capdefnet.org/> and is also available from the International Justice Project.

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PART I

PART I	5
1 CLINICAL DEFINITIONS OF MENTAL RETARDATION	7
1.1 <i>Significant Limitations in Intellectual Functioning</i>	7
1.2 <i>Significant Limitations in Adaptive Behavior</i>	8
1.3 <i>Onset Prior to Age 18</i>	10
2 HOW MENTAL RETARDATION AFFECTS PEOPLE WHO HAVE IT	11
2.1 <i>Conceptual Behaviors</i>	12
2.2 <i>Social Behaviors</i>	14
2.3 <i>Practical Behaviors</i>	15
2.4 <i>A Note About “Problem” or “Maladaptive” (or Criminal) Behaviors</i>	16
3 INVESTIGATION: SCREENING FOR MENTAL RETARDATION	18
3.1 <i>A Note About “Risk Factors”</i>	23
3.2 <i>What To Do With Evidence of Mental Retardation Found During the Screening Investigation</i>	25
4 INVESTIGATION: DEVELOPING THE EVIDENCE OF MENTAL RETARDATION	27
4.1 <i>Engaging a Mental Retardation Expert</i>	27
4.2 <i>IQ Testing</i>	27
4.3 <i>Assessing Adaptive Behavior Limitations</i>	29
4.4 <i>Achievement Tests</i>	30
4.5 <i>Onset During the Developmental Period</i>	31
4.6 <i>Selecting Evaluating Experts</i>	31
5 ISSUES CONCERNING THE DIAGNOSIS	33
5.1 <i>IQ Scores Between 70 and 75</i>	33
5.2 <i>Test-Retest Situations</i>	34
5.3 <i>Divergent IQ Score(s)</i>	35
5.4 <i>Questions of Malingering</i>	36
5.5 <i>The Context Within Which Adaptive Behavior Is Assessed</i>	37
5.6 <i>Combination of Strengths and Deficits in Adaptive Behavior</i>	37
5.7 <i>Antisocial Personality Disorder</i>	39
5.8 <i>Putting It All Together and Making the Case That Your Client Has Mental Retardation</i>	41

1 CLINICAL DEFINITIONS OF MENTAL RETARDATION

Defending a capital client who has mental retardation requires an understanding of the clinical features of mental retardation.

The first task in seeking to understand mental retardation is to review the relevant jurisdiction's statutes and case law defining mental retardation. In the wake of *Atkins*, many states are in the process of adopting statutory definitions of mental retardation for use in capital cases. If the state does not yet have statutory definitions for use in capital or criminal cases, check the statutes providing for services for people with mental retardation. These may provide the definitions that the courts will be inclined to use. However, some of these definitions may be so oriented to providing services, that they are not appropriate for diagnosis in a criminal case. Finally, determine whether the courts in your state have adopted definitions for use in criminal and/or capital cases.

Most cases and statutes have adopted a version of the clinical definitions developed by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), which are mirror images of each other, and constitute the accepted definitions used by mental retardation professionals. Each organization recognizes that mental retardation is a disability characterized by (1) "significant limitations in" (AAMR), or "significantly sub-average" (APA), intellectual functioning; (2) accompanied by "significant limitations" in adaptive "behavior" (AAMR) or "functioning" (APA); (3) the onset of which occur prior to the age of 18. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002) [hereafter, "AAMR 2002"]; APA, *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. Text Rev. 2000) [hereafter, "DSM-IV-TR"].

It is important to remember that any definition of mental retardation – whether statutory, judicial, or clinical – is describing the same disability. The terms of the definitions may vary somewhat, but all are focused on the same group of people with the same disability.

1.1 Significant Limitations in Intellectual Functioning

Intelligence is a general mental ability. It includes reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience. (AAMR 2002, at 51.)

The consensus among mental health professionals is that a full-scale IQ of 70 or below satisfies the requirement of significant limitations in intellectual functioning.¹ However, owing to “variations in test performance, examiner’s behavior, or other undetermined factors”, IQ tests are not considered to be absolutely accurate. *Id.* at 57. Accordingly, a “standard error of measurement” must be taken into account when interpreting the IQ score obtained on any test. The standard error of measurement is the range of IQ scores within which there is a high level of confidence that a person’s “true” IQ resides. *Id.* For the Wechsler Adult Intelligence Scale, Third Edition (“WAIS-III”), the conventional standard error of measurement used is a range of plus or minus five points from the IQ score obtained by a person on the test. *Id.* Thus, obtained IQ scores up to 75 can satisfy the first component of the definition of mental retardation, for the true IQ score of a person who obtains a score of 75 is within the range of 70-80.

1.2 Significant Limitations in Adaptive Behavior

Adaptive behavior or adaptive functioning describes what people are capable of doing with regard to caring for themselves and relating to others in daily living.

The AAMR definition requires that there be “significant limitations ...in adaptive behavior as expressed in conceptual, social, and practical skills.” AAMR 2002, at 1. “Significance” can be established by the limitations in one of the three domains. AAMR 2002, at 74, 77-78. The AAMR manual provides examples of “representative skills” in each of the three domains. Representative **conceptual skills** are listed as language, reading and writing, money concepts, and self-direction. *Id.* at 82. Representative **social skills** are listed as interpersonal, responsibility, self-esteem, gullibility, naiveté, ability to follow rules, obey laws and avoid victimization. *Id.* Representative **practical skills** are listed as activities of daily living, instrumental activities of daily living, occupational skills, and the maintenance of a safe environment. *Id.*

The APA definition requires that there be “significant limitations” in at least two of the following eleven domains:

- Communication;
- Self-care;
- Home living;
- Social/interpersonal skills;
- Use of community resources;
- Self-direction;

¹ The “full-scale” IQ score rather than the various component scores obtained on an IQ test, is used to determine the level of intellectual functioning, because it is deemed the best measure of human intelligence. AAMR 2002, at 51, 55-56.

- Health;
- Safety;
- Functional academics;
- Leisure; and
- Work.

DSM-IV-TR, at 41.²

Four important principles inform the assessment of adaptive behavior.

- First, a person who has mental retardation does not need to demonstrate, and indeed rarely has, deficits in all domains. The AAMR requires deficits in only one of three domains. The APA requires deficits in only two of eleven domains.
- Second, specific limitations in some adaptive skill domains will usually co-exist with strengths in other adaptive skill domains. AAMR 2002, at 1.
- Third, limitations and strengths may often co-exist in the same adaptive skill domain. AAMR 2002, at 8.
- Fourth, the assessment of limitations in adaptive behavior involves examining *limitations*, not *strengths*. James W. Ellis, “Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,” 27 *Mental & Physical Disability Law Reporter* 11, 13 n.29 (January/February 2003). Thus, mental retardation can never be ruled out by determining what a person *can* do – it is what he or she *cannot* do that counts.

² Prior to the present edition of the AAMR manual, the AAMR manual (9th ed.1992) utilized a description of adaptive behavior domains similar to the description of the eleven domains still utilized by the APA. The only difference is that the domain, “social/interpersonal skills,” was called “social skills” in the AAMR manual, the domain “use of community resources,” was called “community use” in the AAMR manual, and the two domains, “health” and “safety,” were combined into a single “health and safety” domain in the AAMR manual. *See* AAMR 1992 manual, at 5.

In 2002, AAMR modified its definition of mental retardation to include the three-domain description of adaptive behavior noted above. The 2002 definition is the following:

Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before the age of 18.

AAMR 2002, at 1.

In summary, every individual with mental retardation is different. Individual differences derive from a person's particular individual limitations, from their environment and from the supports available to them.

1.3 Onset Prior to Age 18

The third component of the definition of mental retardation – sub-average intellectual functioning and deficits in adaptive functioning become apparent before the age of 18 – is derived from the recognition that mental retardation is a **developmental disability**.³ Mental retardation is neither a mental illness nor a medical disorder. It is as much a part of a person's development as secondary sex characteristics, body type or skin color, and is just as permanent and enduring. To satisfy this component of the definition of mental retardation, it is not necessary that there be a diagnosis of mental retardation before the person's 18th birthday. It is only necessary that the limitations in adaptive functioning be apparent before the age of 18, that IQ testing sometime during the person's life reliably establish an IQ of 75 or below, and that there be no intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of 18.⁴ In most cases, an accurate and reliable social history will provide sufficient evidence to show onset during the developmental stage of life.

³ A developmental disability is a disability that appears during the "developmental period," during which a human being is developing to maturity – that is, from birth through at least age 18 and, more likely, the early twenties. *See* note 4, *infra*. There is no fixed etiology for mental retardation. The cause may be genetic, acquired (*i.e.*, from a brain injury or disease), or unknown. Increasingly, the cause of mental retardation in any individual is considered a constellation of "risk factors." *See* Section 3, *infra*. The etiology of mental retardation in an individual is not necessary for the diagnosis – although it may be helpful in making the diagnosis, Section 3, *infra* – because the disability is defined by the individual's dysfunction. As AAMR 2002 explains, "Mental retardation is a disability characterized by impaired functioning. The cause of mental retardation is whatever causes this impaired functioning." *Id.* at 126.

⁴ Some statutes defining mental retardation, for example New Mexico and Nebraska do not have an age of onset requirement. *See* Appendix Two (compilation of state statutes). Others set the age of onset at a later age, for example Maryland at 22. *Id.* It is important, therefore, to review the relevant statutes or case law in your jurisdiction and not to assume that the age of onset is 18. Moreover, current research concerning the maturation of the human brain – some of which suggests that maturation is not complete until a person is in his/her early 20's, *see, e.g.*, Giedd, et al., "Brain Development During Childhood and Adolescence: A Longitudinal MRI Study," 2 *Nature Neuroscience* 861-863 (1999) – may lead to a consensus in the future that the "developmental period" extends beyond age 18. Thus, if you have a client who, except for age of onset, meets the criteria for mental retardation – and s/he is in his/her early twenties – argue that the client has mental retardation and rely on current brain research to challenge the statute's definition of age of onset.

2 HOW MENTAL RETARDATION AFFECTS PEOPLE WHO HAVE IT

Mental retardation affects every aspect of a person's intellectual and social behavior, including:

- How well they learn;
- How much they learn;
- How well they can apply what they learn;
- What they understand;
- What they can do in situations that require problem-solving techniques;
- How well they can conform their behavior to what they know is appropriate;
- How they react to stress and conflict;
- Whether they can reach the goals they set for themselves;
- How well they communicate with other people;
- How well they understand other people's communications;
- Who they are with;
- Who is willing to associate with them;
- What kinds of relationships they form with other people;
- How they interact with other people;
- How well they perform daily activities such as self-care and use of transportation;
- What kind of work they can obtain;
- How long they can keep a job; and
- How well they can keep to a schedule.

For people traditionally classified as having "mild" mental retardation,⁵ mental retardation may not affect every aspect of conceptual, social, and practical behavior. Virtually every capital client who has mental retardation will have mild mental retardation.⁶ People with

⁵ Under the pre-1992 AAMR classification system, individuals with IQ scores between 50-55 and 70 had "mild" retardation. Individuals with scores between 35-40 and 50-55 had "moderate" retardation, those with scores between 20-25 and 35-40 had "severe" retardation, and those with scores below 20 or 25 had "profound" retardation. AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 13 (8th ed. 1983). Beginning with the 9th edition of its manual, in 1992, AAMR discarded the mild-moderate-severe-profound classification system because it was too heavily based upon IQ scores, and because the "mild" classification tended to suggest, quite erroneously, that this level of mental retardation was "not so bad." See AAMR 2002, at 26. However, the APA still utilizes this classification system. DSM-IV-TR, at 42-43.

⁶ Approximately 89 % of persons who have mental retardation are "mildly" retarded. Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423 (1985).

this degree of mental retardation, like everyone else, have strengths and weaknesses. However, mental retardation always affects conceptual, social, and practical functioning in some significant ways. Thus, it is important to understand and explain the limitations that people with mental retardation may have in the conceptual, social, and practical domains.⁷

2.1 Conceptual Behaviors

The “representative skills” in this domain include the use of language, reading and writing, money concepts, and self-direction. AAMR 2002, at 82. The comparable skills areas in the DSM-IV-TR are communication, self-direction, and functional academics.

Impairments in reading, writing, and math skills – functional academics – are almost invariably reflected in poor and failing grades in school. Clients with mental retardation have difficulty keeping up in school and are often “tracked” to the lowest functioning group of students or placed in special education classes. In the lowest tracks or in special education classes, they may appear to do well, receiving higher grades. Slow and faltering reading, when asked to read aloud, and poor reading comprehension are also signs of impairment. Everyday reading tasks such as reading a newspaper, a letter, a label on an item in a grocery store, and public postings, are often extremely challenging. For many, searching for a number in a telephone directory is demanding, if not impossible. Everyday writing tasks are also often impaired. Clients with mental retardation can frequently write simple letters but cannot write anything requiring a greater complexity of expression. They rarely write notes to themselves. Spelling, grammar, sentence structure and use of paragraphs are often rudimentary in nature.

Impairments in mathematical skills are often evidenced by difficulty in buying items in a store, selecting items that are affordable, counting out money and making or obtaining the proper change. The ability to tell time or to determine elapsed time from a clock or watch is often impaired. Using a bus or train schedule may be difficult. Furthermore, maintaining bank accounts, paying bills and using a ruler or measuring tape can be nearly impossible tasks.

Self-direction encompasses a broad range of skills necessary for living independently, channeling emotions, and setting and achieving goals appropriate to one's strengths and limitations. The ability to learn, abstract from what we learn, and apply it in different

⁷ The ensuing discussion of the three domains of adaptive behavior draws upon the work of two extremely knowledgeable mental retardation experts. Dr. James R. Patton, of Austin, Texas, has developed a comprehensive list of background questions to ask of credible informants in assessing adaptive behavior. With Dr. Patton's permission, that list has been attached as Appendices One A and B. Dr. Richard Garnett, of Fort Worth, Texas, has served as an expert in a number of post-*Atkins* Texas cases and has testified in both a teaching and evaluating capacity. Dr. Patton's list of background questions and Dr. Garnett's testimony serve as the basis for the following discussion.

contexts, is critical to self-direction, as is the ability to understand oneself and exercise some control over behavior.

One of the most important components in self-direction is the ability to learn. Impairments in this ability can manifest directly, for example, in simplistic and concrete thinking and in having difficulty comprehending concepts and words. Impairments in the ability to learn and comprehend can also be reflected indirectly in numerous ways. For example, people with mental retardation repeat mistakes more frequently than people with normal intellectual functioning. The ability to avoid repeating mistakes is a function of learning from experience in the abstract – it involves learning from prior mistakes and negative consequences, transferring that learning to similar circumstances, and modifying one's behavior accordingly. This is a difficult process for many people with mental retardation.

Engaging in behaviors that require the integration and application of various pieces of knowledge or skills can be impossible. A client with mental retardation may have been able to learn, for example, the individual skills that are necessary to drive a truck safely and proficiently. However, when asked to pull out onto the highway, drive to a particular location, and back up to a loading dock, the client may not be able to perform one or more of these tasks. Even if the client can drive effectively, he may not know what to do when a change is made in the route he has been taught to drive. The integration of skills and knowledge into a whole is a complex behavior by which a person can adapt to changing conditions and is often beyond the ability of a person with mental retardation.

The ability to engage in goal-directed behavior is also often impaired. Goal-directed behavior requires that we be able to engage in a sequencing process in which we understand that what we do now has consequences and leads to something else and ultimately to a predictable outcome. Clients with mental retardation often are unable to engage in such a process because their ability to sequence – to look ahead, understand how one set of behaviors leads to another, and how a certain sequence of behaviors is necessary to reach a goal – is impaired.

Managing daily life can also be a challenge for clients with mental retardation. Developing and keeping to a schedule, which allows the necessary tasks and responsibilities of daily life to be met in an orderly fashion, requires initiative and considerable integrative thinking. Necessary skills include the ability to identify and keep in mind tasks that need to be completed, project the amount of time needed for each, and organize time in the manner that permits us to accomplish these tasks. Each activity or task must be initiated and completed in a manner that is consistent with the schedule we have set out for ourselves. This can often be difficult for people with mental retardation.

Decision-making with regard to significant matters is another area that requires integrative thinking. It requires an awareness of our goals and desires, an appreciation of the social norms and values that establish the context for our behaviors, and the ability to identify

possible alternative choices and appreciate and evaluate the consequences of those choices. Clients with mental retardation often have difficulty engaging in this process effectively.

One of the hindrances which compounds difficulties in decision-making for clients with mental retardation is that they often do not accurately assess and appreciate their strengths and weaknesses. They are likely to overestimate some of their abilities and to ignore and under-utilize certain strengths. In keeping with this, such clients often do not know to ask for assistance when it is needed.

Impulsive behavior is often a problem for clients with mental retardation. Everyone has impulses – strong emotions or urges that can lead to “unplanned” behavior. The ability to control, defer, redirect, or moderate impulse-driven behavior is impaired in clients with mental retardation.

Communication, another area of conceptual behaviors, also involves the utilization of numerous skills and abilities. The communication process entails engaging in both expressive and receptive behaviors. We listen, we respond, we explore in detail the same subject, or we change subjects – all within the framework of reciprocal consent, which is the core of the communication process. Some skills involve the building blocks of expressive communication, such as word pronunciation, word usage, vocabulary, and syntax. Other skills are more integrative, for example, making sense to and being understood by others, or communicating matters which are essential to well-being, such as feelings and desires. Additionally, receptive communication involves being attentive to and appreciative of what others are expressing. Clients with mental retardation often have difficulties in one or more of these areas.

2.2 Social Behaviors

The “representative skills” in this domain are listed as interpersonal, responsibility, self-esteem, gullibility, naiveté the ability to follow rules, obey laws and avoid victimization. AAMR 2002, at 82. The comparable skills areas in the DSM-IV-TR are, simply, “social skills.”

Interpersonal skills are reflected in the number of close friends a client has, how much time s/he spends in their company, how well s/he gets along with these friends, whether s/he can make new friends easily, and what types of social activities are undertaken. Additional contexts within which to examine social relationships include; school, dating, marriage, family (of origin and from marriage), and work. The core of enduring and meaningful relationships is a give-and-take process in which both partners appreciate the consequences of their actions upon the other, acknowledge these consequences in ways that reinforce the relationship, continue to make it satisfying for each person, and empathize with each other. People with mental retardation often cannot satisfy these dynamics. Their limitations are

reflected in the small number of close friends they have, the ways in which they relate to people, and in which others relate to them, in other social settings.

Responsibility, gullibility, naiveté, and victimization are dimensions of social behavior that are often interconnected. Clients with mental retardation often have difficulty taking charge of a group or being the person who must ensure the completion of the task. They are more often seen as followers than leaders and are easily influenced by others. They can often be manipulated into doing things for others. They are often easily duped. For this reason, they are frequently the object of practical jokes. Such characteristics often lead to clients being victimized both by people who know them and by strangers.

Understandably, low self-esteem is a consequence of these social limitations. Clients with mental retardation often feel that they are worthless, unable to do anything right, friendless, unlovable, and scorned. Self-confidence is a feeling that many have never experienced. Accomplishments are difficult to recall; however, criticism for failure is not. It is often difficult for clients with mental retardation to describe any kind of performance – in their families, school, work, or the community – that they feel good about or for which they were praised.

Finally, social behaviors include following rules and laws. Clients with mental retardation will often have had trouble following rules in school and at home when they were young. Getting in trouble at school for not following rules, even to the extent of being suspended or expelled, is not unusual. Being punished at home for failing to comply with family rules and expectations usually accompanies problems at school. Involvement within the juvenile justice system is frequent, and as adults, clients with mental retardation often have numerous criminal charges and periods of incarceration.

2.3 *Practical Behaviors*

The “representative skills” in this domain include activities of daily living, instrumental activities of daily living, occupational skills, and maintenance of a safe environment. AAMR 2002, at 82. The comparable skills areas in the DSM-IV-TR are self-care, home living, health, safety, use of community resources, and work.

Activities of daily living include self-care behaviors, for example, eating, dressing, toileting, and transferring from one position to another. Most clients are not so impaired that they have trouble with these activities.

The instrumental activities of daily living, or in DSM-IV-TR terminology, home living, health, and use of community resources, involve more complex behaviors. These include preparing meals, housekeeping, using the telephone, using household appliances and basic household tools, performing basic home maintenance, obtaining transportation, managing money, using community resources (e.g., stores, banks, entertainment and recreational

facilities), monitoring personal health, seeking medical assistance as required, taking prescribed medications, and using over-the-counter medications as needed. Clients with mental retardation will often have difficulty with some of these behaviors.

Occupational skills (or in DSM-IV-TR terminology, work) include jobs held, job performance, job terminations, vocational interests, job-seeking/finding abilities, work attitude, work/vocational skills, job training, getting to work on time, and the degree of assistance and supervision needed. Clients with mental retardation will often have difficulty in at least some of these dimensions.

Finally, maintaining safe environments includes properly assessing the risks associated with various activities, taking appropriate precautions, perceiving whether others are at risk, eliminating avoidable risks in a home environment (*e.g.*, keeping household cleaning agents and medications away from children), and following prescribed safety rules at work. Clients with mental retardation will often have difficulty in performing some of these behaviors.

2.4 A Note About “Problem” or “Maladaptive” (or Criminal) Behaviors

As the AAMR explains, “Adaptive behavior is considered to be conceptually different from maladaptive or problem behavior, even though many adaptive behavior scales contain assessments of problem behavior, maladaptive behavior, or emotional competence.” AAMR 2002, at 79. Thus, in looking for evidence of limitations in adaptive behavior, we cannot focus on our client’s past criminal or other “problem” behaviors (*e.g.*, the behaviors that might meet some of the criteria for diagnosing Antisocial Personality Disorder, *see* DSM-IV-TR, at 706⁸). This is not to say that these behaviors are irrelevant to the mental retardation inquiry. The AAMR explains:

⁸These include:

- (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
- (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
- (3) impulsivity or failure to plan ahead
- (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
- (5) reckless disregard for safety of self or others
- (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
- (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

DSM-IV-TR, at 706.

We should also recognize, however, that the function of inappropriate or maladaptive behavior may be to communicate an individual's needs, and in some cases, may even be considered 'adaptive.' Recent research on the function of behavior problems in people with severe disabilities ... demonstrates that such behavior may be an adaptation judged by others to be undesirable, but often representing a response to environmental conditions and, in some cases, a lack of alternative communication skills.

AAMR 2002, at 79.

3 INVESTIGATION: SCREENING FOR MENTAL RETARDATION

Capital clients who have mental retardation are almost always in the highest functioning group of people with mental retardation; that is, those who were formerly considered to have “mild” mental retardation. One of the striking characteristics of people with mild mental retardation is that, without IQ testing and thorough assessment of adaptive functioning, it is difficult for anyone – especially lay people – to determine reliably whether that person has mental retardation. Among people with mild mental retardation, there are no unique physical features, patterns of speech or expression, patterns of activity, mannerisms, thought processes, emotional expressions, or interactive styles that are indicative of mental retardation.

In addition, people with mild mental retardation are adept at “passing,” or masking signs of their disability. For example, by answering questions with “yes”, repeating what others say in a natural conversational style, and looking for the answers in the questions asked of them, people with mild mental retardation are often able to blend in and conceal what is a socially stigmatizing condition. In keeping with this, people with mental retardation will also frequently overrate their skills, either out of honest misapprehension of their abilities⁹ or defensiveness.¹⁰ Overstating academic achievement, physical skills, and intellectual abilities is not uncommon.¹¹ As explained by Ellis and Luckasson, “Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation. Many mental retarded individuals expend considerable energy attempting to avoid this stigma.” Ellis & Luckasson, *supra*, note 6, at 430.¹²

The direct consequence of this deep-seated inclination to appear “normal” is that clients with mental retardation will often go to great lengths to hide their disability even when

⁹ Ringness, “Self-Concepts of Children of Low, Average, and High Intelligence,” 65 Am. J. Mental Deficiency 453, 453 (1961).

¹⁰ Cleland, Patton & Seitz, “The Use of Insult as an Index of Negative Reference Groups,” 72 Am. J. Mental Deficiency 30, 33 (1967) (the most common insults used by people with mental retardation relate to intelligence, indicating that denial of their intellectual limitations is a nearly universal defense).

¹¹ See, e.g., Bialer, “Emotional Disturbance and Mental Retardation: Etiologic and Conceptual Relationships,” in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 68, 79 (F. Menolascino ed. 1970).

¹² Ellis and Luckasson cite the following in support of this observation: “For example, in one study individuals institutionalized for mental retardation attempted to conceal the reason for institutionalization with ‘tales’ of ‘mental illness,’ ‘nerves,’ and even ‘criminal offenses.’ R. Edgerton, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED 148 (1967). See generally J. Dudley, LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED (1983).”

now, under *Atkins*, revelation of it could save their lives. The very condition that makes these clients ineligible for execution makes them unable to appreciate that their lifelong tendency to hide their limitations is, in this context, not in their interest.

Accordingly, to avoid overlooking mental retardation in our clients, it is imperative to proceed with extreme care. It is inadequate to rely upon our own intuitive conclusions – based on our impressions derived from interviews with the clients, letters from the clients, or what others think of them – to rule out mental retardation. **We do not and cannot “know” mental retardation when we see it.** We must undertake a screening procedure for every client.

In every capital case, a complete life history of our clients must be developed. This is the essential investigation for identifying and developing any mitigation evidence. **A full history should be taken to ensure that every possibility is examined rather than allowing the client to selectively provide information that they consider to be most useful.**

Only through a thorough gathering of records such as:

- Maternal, paternal, and sibling medical records;
- Pregnancy and birth records;
- Medical and mental health records;
- School records;
- Social welfare agency records;
- Social security records;
- Military and employment records;
- Juvenile and criminal records;
- Neighborhood or other relevant local environmental toxin reports; and
- Records reflecting community dysfunction (such as incidents of violence and prevalence of drug-dealing in the neighborhood);

interviewing of scores of people such as:

- Parents;
- Grandparents;
- Siblings;
- Knowledgeable extended family members;
- Child care workers;
- Teachers;
- Social service providers;
- Previous health care providers;
- Pastors;

- Friends;
- Coworkers;
- Military buddies and commanders;
- Police officers;
- Jail and prison personnel and fellow inmates; and
- Co-perpetrators in criminal offenses;

and the careful analysis of all this information, can a complete life history be developed.

In the course of developing and analyzing our client's life history, we must look for evidence that suggests the need for further investigation of possible mental retardation. This includes:

a. ***Any possibility that the client's other family members – previous paternal and maternal generations, parents and their siblings, siblings and first cousins, and biological children – have mental retardation.*** Genetic disorders that produce mental retardation can be passed on from one generation to the next. If other family members have mental retardation, sometimes their disability is known, sometimes it is not. Thus, in collecting history concerning other family members, look for accounts of any family member thought of as “slow,” who had repeated failures in school, who failed to complete high school (or whatever level of school completion is the norm in the community), who has trouble reading or writing, or who receives social security disability payments for “mental handicaps.” Additional records need to be gathered for these family members to determine whether they have mental retardation.

b. ***In the client's developmental history, a persistent failure to meet normal milestones of development – e.g., lifting head, rolling over, smiling, crawling, pulling to stand, standing, walking, toileting, talking.*** Since mental retardation is a developmental disorder, early signs of delayed development may be associated with mental retardation.

c. ***School records revealing persistent failing grades, more than one non-promotion, tracking to lowest academic groups in schools where tracking is or was done, placement in special education, low (below 80) IQ scores, or persistent below grade-level achievement scores.*** Children with mental retardation do not always perform as well as their peers in school. In fact, most people with mental retardation cannot progress beyond sixth grade skills in academic achievement: DSM-IV-TR, at 43. One should note that mental retardation may not be reflected in school performance initially in the elementary years. Instead, as the child ages s/he may begin to fall behind their peers and continue to do so as time progresses. If placed in the lowest academic track or in special education, children with mental retardation may begin to achieve better grades, including A's and B's. Some entire schools may be composed of children who have learning problems, behavioral problems, or other disadvantages in learning. Therefore, to understand school records

accurately, one should be fully aware of the school environment, context and additional factors relating to the schools our clients attended.¹³

d. ***Arrests, dispositions.*** Many clients with mental retardation will have had numerous prior arrests for relatively minor offenses, sometimes resulting in dismissal, sometimes in adjudication. If the offenses were committed single-handedly, they will often be property crimes (and often similar types of property crimes), or assaults (frequently associated with a perceived threat from the victim). If the offenses were committed with others, clients with mental retardation invariably will have played a more low-level action role rather than a role at a planning or command (“mastermind”) level. The commission of sex offenses, resulting from social misunderstanding about what is inappropriate, is also not uncommon.

e. ***Juvenile records revealing persistent involvement in the juvenile system over a relatively long period of time.*** Clients with mental retardation have often been committed to the juvenile system. Commitment usually occurs because of frequent arrests, failing to attend school, or running away from home. Juvenile records will often show a revolving door history, in which the client gradually makes progress during a commitment, is eventually released, almost immediately fails to meet the post-release requirements of supervision or counseling, re-offends, and is then re-committed.

f. ***Prison records.*** Clients with mental retardation commonly have prior adult offenses and periods of incarceration. Classification records usually contain IQ scores and educational achievement test scores. Depending on the tests utilized, and the manner in which the tests are administered, low scores may suggest mental retardation. Because testing may be unreliable, however, low or high scores should not be taken as accurate assessments of intellectual functioning until the reliability of the tests, their administration, and their scoring is determined. During incarcerations, most prisoners are channeled into work programs, vocational training programs, academic programs, and various counseling programs. Prison records usually have detailed records of a prisoner's performance and progress in such programs. For clients with mental retardation, these records will often reveal limitations in adaptive functioning – for example, not learning effectively, not performing work tasks properly or efficiently, being able to perform only the simplest tasks rather than the whole range of tasks within a job classification, persistently showing up late

¹³ School records are sometimes difficult to find. Often the first response of school record custodians is “They have been destroyed.” Do not be deterred. Find out if there are old records somewhere else that you can go through. Often “they have been destroyed” means only, “I cannot find them.” Sometimes, as well, school records may be found somewhere outside the school system – having been obtained by other agencies dealing with your client, such as juvenile authorities, probation officers, and jails and prisons. At worst, try to reconstruct school records through interviews with teachers, guidance counselors, family members, and classmates.

for work, making similar mistakes repeatedly, and acting impulsively. Disciplinary infractions will often track these same limitations.¹⁴

g. ***Military records.*** People with mental retardation may have served in the military. Military IQ testing has not always been reliable, and a pre-military school record that shows marginally satisfactory performance, even if in special education or the lowest academic tracks, may be sufficient to permit acceptance into the military (active service or national guard/reserves). Military records, like prison records, reflect fairly thorough assessments of performance and behavior during basic training and duty assignments thereafter. Limitations in adaptive functioning may well manifest during military service, resulting in discharge for unsuitability, lack of or extremely slow advancement, or frequent disciplinary charges.

h. ***Employment records.*** Clients with mental retardation tend to hold jobs that call for repetitive, physical labor, rather than jobs that require the exercise of judgment, the use of academic skills (math, reading, writing) or applied academic skills (such as measuring, timing, scheduling, sorting by words or numbers), the exercise of independent choice or initiative, or the supervision of others. Often our clients do not hold jobs for long periods of time, either because the jobs are temporary or seasonal, or because our clients are terminated for not showing up on time or not showing up at all.

i. ***Social Security records.*** The Social Security Administration maintains earnings records for any period of employment with an employer who reports earnings and makes periodic payments into the social security system (which should be all employers who pay wages to employees). Earnings records can reveal that the client failed to maintain employment with the same employer for very long, held numerous short-term jobs, held relatively few jobs, and was paid low wages. All these factors are consistent with many people, especially poor people, who have mental retardation. On occasion, social security disability records will show that a client has been diagnosed with mental retardation and has been provided with disability payments.

j. ***Records of likely exposure to environmental toxins.*** Part of standard life history investigation includes investigation into possible exposure to environmental toxins, such as lead, mercury, and pesticides. These and other environmental toxins can cause brain damage in children, which can produce mental retardation.

k. ***Social welfare agency records.*** Social welfare agencies – child protective services, welfare departments, public health departments, and private non-profit agencies addressing problems associated with poverty – may have relevant records. In particular, one should look for the client's parental dysfunction, which may have led to temporary or permanent loss of custody of the client and/or siblings, or investigations into problems that

¹⁴ The “unpacking” of disciplinary offenses is especially important for responding to prosecution assertions that such offenses show how our clients are deserving of death.

could have led to the loss of custody. Parental dysfunction is not only a risk factor for mental retardation (*see infra*), but also may be indicative of limitations in parental intellectual and adaptive functioning.

1. ***Medical and mental health records.*** For many clients facing capital charges, medical and mental health records are hard to find, or are simply unavailable. Medical and mental health care is often not available to our clients or their families. Mental health records are more likely to exist if our clients were “problem children” who were taken into the state school system (for children with mental retardation), or into the juvenile system, through which mental retardation may have been diagnosed or in some way documented. State mental health/mental retardation agency records should always be searched for any record of a client, his or her parents, or his or her siblings. Parental dysfunction is particularly important. Thus, it is imperative to ensure that the parents are included in such searches.

3.1 A Note About “Risk Factors”

The 2002 AAMR manual discusses numerous “risk factors” – “biomedical, social, behavioral, [and] educational” – that are frequently associated with mental retardation. A “risk factor may be present, but by itself does not cause mental retardation.” *Id.* at 126. What is clear is that “the impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the presence of several risk factors that interact over time.” *Id.* Because of the correlation between risk factors and mental retardation, it is important to identify any risk factors in your client’s history. Risk factors are categorized by the stage of development in which they are likely to have an effect in the development of your client. *See* AAMR 2002, at 127 (Table 8.1).

The prenatal period is the time from conception to approximately three months before birth. The risk factors during this period are most likely to be documented in the client’s and/or his/her parents’ medical records, mental health/mental retardation records, and social welfare agency records. They are also likely to emerge during interviews with people knowledgeable about the client’s family. These risk factors are the following:

Biomedical	Social	Behavioral	Educational
chromosomal disorders	poverty	parental drug abuse	parental cognitive disability without supports
single-gene disorders	maternal malnutrition	parental alcohol abuse	lack of preparation for parenthood
syndromes	domestic violence	parental smoking	
metabolic disorders	lack of access to prenatal care	parental immaturity	
cerebral dysgenesis			
maternal illness			
parental age			

The perinatal period is from approximately three months before, to one month after, birth. The risk factors during this period are most likely to be documented in the same records and by the same people as the factors during the prenatal period. The risk factors during this period are the following:

Biomedical	Social	Behavioral	Educational
prematurity	lack of access to birth care	parental rejection of caretaking	lack of medical referral for intervention services at discharge
birth injury		parental abandonment of child	
neonatal disorders			

The final category of risk factors, **postnatal risk factors**, are less likely to be documented in the medical and mental health records of the client or his/her family members, unless the client has suffered certain acute or chronic medical conditions that demand some sort of treatment. **Postnatal risk factors may come into play any time after the client's birth and during the developmental period.** Any of these factors, in combination with other risk factors, may cause mental retardation, and are likely to be discovered in the investigation of any client's life history. Social welfare agency records, school records, juvenile records, as well as interviews of people with direct knowledge of the client and his/her family are likely sources of information. These risk factors include the following:

Biomedical	Social	Behavioral	Educational
traumatic brain injury	impaired child-caregiver	child abuse and neglect	impaired parenting
malnutrition	lack of adequate stimulation	domestic violence	delayed diagnosis
meningoencephalitis	family poverty	inadequate safety measures	inadequate early intervention services
seizure disorders	chronic illness in the family	social deprivation	inadequate special education services
degenerative disorders	institutionalization	difficult child behaviors	inadequate family support

3.2 What To Do With Evidence of Mental Retardation Found During the Screening Investigation

Once you have conducted the screening investigation described here, and you have uncovered evidence consistent with your client having mental retardation, there are two possible avenues to pursue. The first is to use what has been uncovered to try to negotiate a plea bargain, which removes capital punishment as a sentencing option. The second is to move to the next stage of investigation, in which the evidence is fully developed, thus assisting in the determination of whether mental retardation is a viable basis for defending your client against the death penalty, and for challenging other aspects of the prosecution’s case and the trial proceedings.

There is a potential disadvantage to approaching the prosecutor with evidence of your client’s mental retardation before you have completed the investigation necessary to prove that your client has mental retardation. The prosecutor will be given early discovery and may, as part of the negotiation process, insist that a prosecution expert test your client. On the other hand, there is a profound advantage for your client if the prosecutor is persuaded to remove the death penalty from the case. To determine whether this option is worth pursuing, you need to consider the following factors:

- Does the evidence meet all three (or two, depending on your jurisdiction) diagnostic criteria?
- Are the historic full scale IQ scores consistently 75 or lower?

- Is at least one of the historic IQ scores that is 75 or lower derived from a reputable, reliable test that was properly administered?¹⁵
- If the historic IQ scores include full scale scores above 75, is there a reasonable basis for explaining that score (or those scores) away?¹⁶
- Is there evidence of significant limitations in adaptive behavior?
- Do these limitations remain significant when the client's strengths are taken into account?¹⁷
- Can these limitations be dismissed by a prosecution expert as the product of antisocial personality disorder?¹⁸
- Is there evidence that the limitations in intellectual functioning and adaptive behavior were there during the client's developmental period?
- Do you have any specific reason to fear the administration of a reputable, reliable IQ test by a prosecution expert?¹⁹

Your answers to these questions will help you decide whether to take the risk of going to the prosecutor without your case being fully developed.

If the decision is to not to approach the prosecutor, or if alternatively the prosecutor rejects your appeal to drop the death penalty, you now need to move on to the next stage of investigation.

¹⁵ See Section 4, *infra*, for how to determine the answer to this question.

¹⁶ See Section 4, *infra* (test not properly administered, test not reliable because it was a group screening test, test not normed for individuals who have mental retardation, test out of line with consistently low grade level performance on achievement tests), and Section 5, *infra* (test inflated by practice effect, standard error of measurement for test in question is greater than 5 points).

¹⁷ See Section 5, *infra* (examining both strengths and limitations in adaptive behavior).

¹⁸ See Section 5, *infra* (discussing how to meet this concern).

¹⁹ By "specific reason," we mean a reason other than the generalized fear that any time a prosecution expert examines one of our clients, that expert will find some way to disagree with what we proffer. You need to consider this factor, because an invitation to the prosecutor to take death out of the case is likely to provoke an evaluation of your client by a prosecution expert.

4 INVESTIGATION: DEVELOPING THE EVIDENCE OF MENTAL RETARDATION

This level of investigation will allow you to determine whether mental retardation is a viable basis for defending your client against the death penalty and for challenging other aspects of the prosecution's case and the trial proceedings.

4.1 Engaging a Mental Retardation Expert

One of the first steps in this level of investigation is to engage the services of a mental retardation expert. People who are experts in mental retardation come from a variety of educational backgrounds such as psychology, education, social work, or law. What all have in common is a wealth of experience in working with people who have mental retardation. Their experience will usually include diagnosis, but will also often include designing and providing services to people with mental retardation. Their assistance is critical because they are adept at understanding and assessing limitations in adaptive behavior and at assessing whether the overall picture of adaptive behavior – both limitations and strengths – is indicative of mental retardation.

There is no substitute for this kind of expertise. Although good clinical psychologists or neuropsychologists will be needed for IQ testing, they will rarely be experts in mental retardation. Accordingly, they generally will not have the ability to discern, from the client's life history, the crucial features of significant limitations in adaptive behavior that is the bedrock of diagnosis.

The importance of this advice cannot be overstated. Mental retardation experts and mental health experts rarely overlap. Most psychiatrists will have studied mental retardation in their training, but most will not have had relevant experience in diagnosing or providing services for people with mental retardation. Similarly, most psychologists lack relevant experience. They can offer IQ testing services but, unless they have demonstrable experience and expertise in diagnosing and working with people with mental retardation, they cannot fill the need for a mental retardation expert. Even if you have confidence in a particular psychiatrist or psychologist because of their high-quality work for a mentally ill client in another case, do not use them (except for, perhaps, the psychologist for IQ testing).

4.2 IQ Testing

The issue of whether to conduct IQ testing can be problematic if the life history investigation reveals IQ scores consistent with mental retardation. If the client's historical

record includes IQ testing with then-current editions of reputable and reliable instruments – for example, the Wechsler Intelligence Scale for Children (WISC), the Wechsler Adult Intelligence Scale (WAIS), the Stanford-Binet Intelligence Scale, the Kaufman Assessment Battery for Children – and investigation reveals that the tests were administered by qualified individuals, under suitable conditions, and were scored properly, the historical scores will be extraordinarily valuable.

If the historical scores do not meet all these criteria – the use of then-current editions of tests, and the use of reputable and reliable tests, administered by qualified individuals, under suitable conditions, and properly scored – they have less value and the need for current testing may become greater.²⁰

In any event, current testing should always be given serious consideration. In most cases, the prosecution will ask for access to the client to conduct an IQ test. In such circumstances, it may be advantageous for a defense expert to administer the test first. This may make prosecution testing unnecessary and impractical, because the well-established practice effect²¹ of repeated intelligence testing may give rise to an inaccurately inflated score that the prosecution expert cannot rely on. This requires the prosecution expert to rely on the testing conducted by the defense expert, or at least to rely on the raw scores collected by the defense expert.²²

If testing is conducted, the test instrument that is used must be one of the most reputable and reliable instruments. In *Atkins*, the Court referred to the WAIS-III as “the standard instrument in the United States for assessing intellectual functioning.” 536 U.S. at 309 n.5. The WAIS-III and Stanford-Binet-IV are the most reputable and reliable test instruments available.²³

²⁰ Even if a reputable and reliable IQ test is administered, it must be or have been administered under the proper conditions by a properly trained test administrator – *e.g.*, in a relatively quiet isolated space free from distraction, with a table or desk that allows ample room for the test materials, with the subject and administrator able to pass materials back and forth and to see each other and be able to communicate freely, and with the time available as prescribed by the test protocol. Every reliable IQ test requires individual administration. No “group” test (administered to a group of people) can yield reliable results.

²¹ See Section 5, *infra*.

²² Intelligence testing involves the assignment of a raw score for each task performed by the client (*e.g.*, 0, 1, or 2) and the compilation of these scores into scaled scores.

²³ Be particularly wary of tests not normed, or that are otherwise inappropriate, for people with mental retardation, such as the Revised Beta. High scores on tests such as the Revised Beta are likely unreliable, as are scores of 70 or lower. Consult with your mental retardation expert and psychologist about the reliability of historical tests as well as the choice of tests for current administration. A good reference on IQ tests, as well as other psychological tests, is Barbara S. Plake, James C. Impara, Robert A. Spies, Barbara S. Pale (editors), *MENTAL MEASUREMENTS YEARBOOK* (Buros Institute, 15th Ed. 2003).

4.3 *Assessing Adaptive Behavior Limitations*

At the outset, it is important to remember that the assessment of adaptive behavior limitations is not only necessary, but crucial to the diagnosis of mental retardation. Without a clinical conclusion that your client has significant limitations in adaptive behavior, s/he will not be found to have mental retardation. Cases have been lost because the evaluation focused solely on the IQ, even though there was available evidence of limitations in adaptive behavior. Limitations in adaptive behavior, manifested during your client's development period, also provide independent and irrefutable corroboration of his/her significant limitations in intellectual functioning. Developing evidence of these limitations is, therefore, the lynchpin of proving that your client has mental retardation.

The assessment of adaptive behavior involves two methodologies: (a) the use of standardized adaptive behavior measures normed on the general population, including people with disabilities and people without disabilities; and (b) the use of clinical judgment in analyzing multiple additional sources of data. The AAMR calls for the use of both methodologies. AAMR 2002, at 74-75, 85-86.

Standardized adaptive behavior measures – such as the AAMR Adaptive Behavior Scale-School and Community, Vineland Adaptive Behavior Scales, Scales of Independent Living-Revised, and Comprehensive Test of Adaptive Behavior-Revised, *see* AAMR 2002, at 77, 88-90 – measure some adaptive behaviors in all three domains of adaptive behavior, *id.*, at 77. However, “[n]o existing measure of adaptive behavior completely measures all adaptive behavior domains.” *Id.* at 74. Certain social skills that are influenced by the client's gullibility and naiveté, for example, are not covered on any standardized measure of adaptive behavior. *Id.* at 74, 84. Other adaptive skills are inadequately addressed in standardized measures, owing to the particular community environment that the client has lived in for significant portions of his/her life. *Id.* at 83, 86. For example, there is no standardized adaptive behavior measure for people who have been incarcerated for years on death row, or even in a general prison population.

For these reasons, AAMR recommends that data from other sources be utilized in addition to the data obtained from a standardized measure of adaptive behavior:

Just as standardized measures of intelligence do not fully reflect what is considered to be intellectual capacity; it is unlikely that a single standardized measure of adaptive behavior can adequately represent an individual's ability to adapt to the everyday demands of living independently....

The addition of different sources of data provides a basis for more informed professional judgment by providing a context within which to evaluate the meaning of a score obtained from a standardized measure of adaptive behavior. This approach is the preferred option to the sole reliance on a single measure of adaptive skills and to a single evaluator or rater.

AAMR 2002, at 75, 86.

In our clients' cases, the additional data will be derived from the comprehensive life history investigation that is addressed in Section 3, *supra*.²⁴

One further point as regards standardized measures of adaptive behavior should be noted. These measures are scored on a scale similar to IQ tests, so that two or more standard deviations below the mean (the mean is generally a score of 100) is the measure of "significance" in diagnosing the adaptive behavior limitations component of mental retardation. The AAMR manual explains that this threshold is met *either* by the score on one of three domains (conceptual, social, practical) being two or more standard deviations below the mean, *or* by the total score on an instrument that measures all three domains being two or more standard deviations below the mean. AAMR 2002, at 74, 77-78. This principle is necessary to continue to include people who were formerly classified as having mild mental retardation within the diagnosis of mental retardation:

[S]imulation studies have demonstrated that the probability of a person scoring two standard deviations below the mean on more than one domain would be so low that almost no one with an IQ in the upper mental retardation range would be identified as having mental retardation.

Id. at 78.

4.4 Achievement Tests

Achievement tests are measures of academic learning that are routinely given during the course of most children's school careers in the United States. Scores are typically reported as the grade level at which particular academic skills are performed. Thus, for example, a client's reading ability may have been measured at the level of a third grader when s/he was in the sixth grade.

Achievement test scores have a significant role in the diagnosis of mental retardation. First, they provide important corroboration of IQ levels. Second, they document some of the adaptive behavior deficits in the conceptual domain (*e.g.*, reading, writing, math skills).

As previously noted, most people with mental retardation cannot achieve higher than the sixth grade level in the academic skills measured by achievement tests. If your client's historic achievement test scores were never higher than the sixth grade level of functioning,

²⁴ As we noted in Section 3, at notes 9-12 and accompanying text, clients with mental retardation are peculiarly vulnerable to overstating their abilities. Utilization of information from the life history investigation, most of which is derived from sources other than the client, thus overcomes the need for determining whether the client is providing reliable information. For this same reason, the sources of the information that is used in standardized adaptive behavior measures should be someone other than the client.

this is powerful corroboration of the validity of IQ scores at 75 or below, and of the significance of the adaptive behavior limitations directly measured by achievement tests. If, on the other hand, the historic achievement test scores are consistently higher than the sixth grade level of functioning, this does not rule out mental retardation, but it can raise questions. For such a client, limitations in adaptive behavior, other than those measured by achievement tests, must be present and well-documented, and IQ scores on reliable tests must consistently be 75 or below.

4.5 Onset During the Developmental Period

Onset during the development period, the third diagnostic element of mental retardation, is relatively straightforward. It requires that the signs of mental retardation – significantly sub-average intellectual functioning and significant limitations in adaptive functioning – be apparent before the client's 18th birthday. However, some confusion may arise about how these signs must be "apparent."

A measured IQ score of 75 or below prior to age 18, or a diagnosis of mental retardation prior to age 18 is not required to fulfill the element of onset during the development period. Obviously, such facts are immensely helpful in proving mental retardation, but they are not essential.

It does however, require that the disabling effects of mental retardation manifest in the client's adaptive behavior prior to age 18. The significant limitations in adaptive behavior that are characteristic of mental retardation must be apparent during the developmental period.

This reemphasizes the absolute necessity of developing a comprehensive life history of the client. While some items in the standardized measures of adaptive behavior will examine behaviors retrospectively, during the developmental period, many items will examine present-day functioning. Thus, the source of the most critical evidence of limitations in adaptive behavior will be the life history.²⁵

4.6 Selecting Evaluating Experts

You will likely need two evaluating experts: a mental retardation specialist and a clinical psychologist. We have discussed the mental retardation specialist above. Since many

²⁵ The historic evidence of limitations in adaptive behavior during the developmental period plays an important, related role as well. It provides a very persuasive refutation of any accusation or insinuation of malingering. See Section 5. No one lives through the developmental period of his or her life trying to appear to have the limitations in adaptive behavior that would lead a court years later in a capital prosecution to determine that the person has mental retardation. Evidence of limitations in adaptive behavior that appear during the developmental period is thus self-authenticating.

mental retardation specialists do not perform psychological testing, a good clinical psychologist is often needed to conduct the intelligence testing. (The other “test,” the standardized measure of adaptive behavior, will usually be administered by the mental retardation specialist in the course of assessing limitations in adaptive behavior.) The psychologist needs to have familiarity with the diagnosis of mental retardation so as to be able to support the diagnosis of mental retardation in testimony, but need not be a mental retardation specialist.

For purposes of later testimony in an evidentiary hearing, it is imperative that prior to engaging the services of the two experts their licensing status is determined. Most clinical psychologists will be licensed in the state in which they practice. If this expert is from out of state, s/he may need to be associated with a local licensed clinical psychologist to perform the necessary intelligence testing and assessment (much like out-of-state, *pro hac vice* counsel needs to be associated with local counsel to represent someone). Mental retardation experts often are not licensed as clinical psychologists, either because they are not clinical psychologists or, though they are, they do not have a practice in clinical psychology. However, they may be licensed under other specialties that permit them to diagnose mental retardation. The critical matter is that the mental retardation specialist be able, under applicable state licensing laws, to diagnose mental retardation, because it is preferable for this expert to make and defend the diagnosis. If, in your jurisdiction, only licensed clinical psychologists or psychiatrists can diagnose mental retardation, your clinical psychologist may need to make and defend the diagnosis. In such jurisdictions, it is important that you select a clinical psychologist who has experience in diagnosing mental retardation and can collaborate – and is accustomed to collaborating – with mental retardation specialists in diagnosing mental retardation.

5 ISSUES CONCERNING THE DIAGNOSIS

In the course of litigating any claim which requires you to establish that your client has mental retardation, issues concerning the diagnosis will frequently arise. The most frequently-recurring issues are addressed here.

5.1 *IQ Scores Between 70 and 75*

As already explained, even though the cutoff IQ score for mental retardation is generally 70, because of the five point measurement error in the WAIS-III and most other tests, a score up to 75 meets the significantly sub-average intellectual functioning element of the diagnosis of mental retardation.

The standard error of measurement must be accounted for in the administration of an IQ test for the following reasons:

[T]est measures themselves are imperfect and can introduce an element of error to test scores. In the absence of perfect reliability, a person's score on a test will likely vary somewhat across evaluations, even when no true underlying change has occurred. The less reliable a test, the more the retest scores are likely to deviate from original scores due to random fluctuations in measurement. This source of error is termed *measurement error* and is reflected by the *standard error of measurement* (SEM). The SEM of a test is inversely related to the reliability of the test and pertains to the theoretical distribution of random variations in observed test scores around an individual's true score.

Lineweaver, T., and Chelune, G.J., "Use of the WAIS-III and WMS-III in the Context of Serial Assessments: Interpreting Reliable and Meaningful Change," in David S. Tulsky (ed.), *CLINICAL INTERPRETATION OF THE WAIS-III AND WMS-III* 312 (2003).

For the WAIS-III, one of the most reliable IQ tests, the standard error of measurement is five points, meaning that if the test were administered to the same individual 100 times without any practice effect improving the score (which is impossible), 95 times out of 100 the person's full scale IQ score would fall in the range of plus or minus five points from the score initially obtained.²⁶

²⁶ The standard error of measurement for the WAIS-III is between 1.98 and 2.58, depending on the age of the person tested. AAMR 2002, at 61. However, if only one standard error of measurement is utilized there is only a 66% probability that the true IQ score resides in this range. *Id.* at 57. If two standard errors of measurement are utilized, there is a 95% probability that the true IQ score resides in this range. *Id.* The 95% confidence level is the standard confidence level that is utilized in assessing intelligence in the diagnosis of mental retardation. *Id.* at 58-59. Accordingly, the convention is that, for the WAIS-III, the standard error of measurement is plus or minus five points.

Despite these principles, courts have been inclined to disregard measurement error if the client's obtained IQ score is between 70 and 75, finding that the client's IQ is above the cutoff for sub-average intellectual functioning. Where two successive test administrations produce scores in the 70-75 range, there is a greater propensity to disregard, *See, e.g., Ex parte Briseno*, ___ S.W.3d ___, 2004 WL 244826 *6-7 (Tex.Crim.App. February 11, 2004) (disregarding standard measurement error altogether and accepting that the "true" score is within the range of 72-74 established by the two scores obtained on WAIS-III administrations one year apart).

The above inclination is not supported by any science and must be attacked as unfounded in fact. As the "black letter" rule of the AAMR sets forth:

In the 2002 AAMR system, the 'intellectual functioning' criteria for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the SEM for the specific assessment instruments used and the instruments' strengths and limitations.

AAMR 2002, at 58 (emphasis supplied).

5.2 *Test-Retest Situations*

A "test-retest" situation, or "serial assessment," occurs any time a client is again given the same IQ test. There is a known "practice effect" in such a situation – usually resulting in a higher full scale score on the retest – that diminishes over time and varies with other demographic variables such as the client's age, education, and gender. Basso, M.R., Carona, F.D., Lowery, N., & Axelrod, B.N., "Practice Effects on the WAIS-III Across 3- and 6-Month Intervals," 16(1) *The Clinical Neuropsychologist* 57-63 (2002). The average practice effect for the WAIS-III is 4.51 points, and that effect does not appear to be reduced significantly by longer test intervals. *Id.*

In a test-retest situation, not only must the practice effect be taken into account when interpreting the score on the retest, the standard error of measurement must *also* be accounted for. The standard error of measurement still applies in connection with the second test. As explained in Lineweaver, T., and Chelune, G.J., "Use of the WAIS-III and WMS-III in the Context of Serial Assessments: Interpreting Reliable and Meaningful Change," *supra*, at 312:

In the context of serial evaluations, simple difference scores are particularly vulnerable to the influence of measurement error. Difference scores, in essence, combine the measurement error associated with scores from each of the two evaluations, and thereby magnify the impact of measurement error on test results. Thus, in order to interpret the clinical significance of change scores, they must be interpreted in light of their measurement errors.

An example helps to illustrate these important principles. In the *Briseno* case, referred to *supra*, on the first WAIS-III, Briseno obtained a full scale score of 72. Taking into account

the standard measurement error, Briseno's true IQ score fell within the range of 67-77, thus satisfying the sub-average intellectual functioning component of mental retardation. Taking into account *both* the practice effect *and* the standard measurement error in the second test administration, Briseno's true IQ score fell within the range of 66-85.²⁷ Thus, so long as Briseno's retest score was 85 or lower, his IQ score still fell within the range necessary to establish the sub-average intellectual functioning component of mental retardation.

5.3 *Divergent IQ Score(s)*

In some cases, a client who has mental retardation will, sometime in the past, have obtained an IQ score higher than 75. In such cases, it must be determined how that could have occurred. If the client does have mental retardation, there will be an explanation. Among the possible explanations are:

- The previous test was not properly administered, because the administrator was inadequately trained or failed to follow the prescribed test protocol (*e.g.*, giving the client subtle assistance, too much time, an inappropriate chance to correct answers), or because the conditions during which the test was given were substantially different from the prescribed conditions (leading the administrator, for example, to compromise the test-giving or -scoring protocol).
- The previous test was improperly scored.
- The previous test itself was not reliable, because it was an outdated version of an otherwise reliable test (on which scores tend to be inflated), because it was a group screening test, because it was a test not normed for individuals who have mental retardation, or because it was an unreliable test with a large standard error of measurement.
- The score in question was inflated by practice effect.
- The test is out of line with consistently low grade level performance on achievement tests and with all other IQ scores – in short, the test is an aberration that cannot otherwise be explained but that has no relevance because it is inconsistent with all other data, including other IQ test scores, achievement tests, adaptive behavior limitations, and onset during the client's developmental period.

²⁷ These data are not reported in the Texas Court of Criminal Appeals' opinion, referred to *supra*, but can be obtained, if needed, from Richard Burr. They originate from a report prepared by Dr. Gordon Chelune, one of the co-authors of the chapter authored by Lineweaver and Chelune in *Clinical Interpretation of the WAIS-III and WMS-III, supra*.

5.4 *Questions of Malingering*

The “accepted definition of malingering is the deliberate fabrication or gross exaggeration of psychological or physical symptoms to achieve a recognized external goal.” Richard Rogers & Daniel W. Shuman, *Conducting Insanity Evaluations* 91 (2d ed. 2000) [hereafter “Rogers & Shuman”] (citing the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1994)).

Questions of malingering occasionally arise with respect to IQ test scores in assessing mental retardation. On earlier editions of the WAIS (WAIS and WAIS-R), research has shown that the WAIS test data “are not effective at the detection of malingering.” Rogers & Shuman, at 114. As of the publication date of Rogers & Shuman, the WAIS-III had not been evaluated “with respect to cognitive feigning.” *Id.* at 115.

Neither Rogers and Shuman, nor other researchers, have found a need to explore the question of malingering in mental retardation, because the limitations in adaptive behavior, which must appear before age 18, are not matters that can be fabricated or exaggerated. As they explain, “The feigning of mental retardation will be de-emphasized; school records and past achievement tests often provide important corroborative data about spurious reports of mental retardation.” *Id.* at 105. Furthermore, as noted by Professor James W. Ellis in “Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,” 27 *Mental & Physical Disability Law Reporter* 11, 13-14 (January/February 2003):

The issue of malingering, which has received considerable attention in the clinical literature regarding mental illness, has not proven to be a practical problem in the assessment of individuals who may have mental retardation. But any concerns that an individual could somehow manage to feign cognitive impairment, undetected by clinical evaluators, should be dispelled by the fact that such deception would have had to begin during the individual's childhood. There are no reports in the clinical literature indicating that this is a practical problem in the assessment of individuals who are thought to have mental retardation.

(Footnote omitted).

Even though there is no need to test separately for malingering in mental retardation cases, Rogers and Shuman note that it is useful, in conjunction with intelligence testing, to additionally test with “specialized measures that focus on bogus memory deficits.” Rogers & Shuman, at 105. Such tests are likely to detect any intent on the part of the patient to exaggerate intellectual deficits. *Id.*

Tests, such as the Rey 15 Item test and the Test of Memory Malingering, *id.* at 109 Table 5.3, operate on the principle called the “floor effect,” which presumes that nearly everyone can

answer the items on the test but that malingerers will not know this and, in keeping with their strategy, will incorrectly answer some items.²⁸

5.5 The Context Within Which Adaptive Behavior Is Assessed

AAMR 2002 makes a subtle but important point about the evaluation of adaptive behavior:

One would assume that adaptive behavior is evaluated in relation to contexts typical of the individual's age peers. However, in some cases, typical behavior is observed in 'atypical' environments, such as residential or educational programs that primarily serve people with disabilities. This disconnect must be taken into account in the clinical interpretation of scores.

Id. at 86.

Thus, in the past a client may have functioned relatively well at a residential home, precisely because s/he was not required to tackle the life challenges that would be faced outside such a setting – getting to work on time, making change, paying bills, planning ahead, etc. This passage makes clear that the assessment of adaptive functioning must be undertaken on the basis of skills required by peers in typical settings within the outside world. This is especially relevant for clients who have been incarcerated before, and who appeared to adapt to the tempo and demands of prison life without any significant problems or limitations. Such a structured environment is “atypical” in that it does not require a high level of adaptive functioning. Functioning without significant limitations in such an environment does not mean that the client does not possess significant limitations in adaptive behavior.

5.6 Combination of Strengths and Deficits in Adaptive Behavior

One of the five fundamental assumptions underlying the current understanding of mental retardation is that “[w]ithin an individual, limitations often coexist with strengths.” AAMR 2002, at 1.

This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in

²⁸ It is important to note that the Minnesota Multiphasic Personality Inventory (MMPI), now in its second edition (MMPI-2) – which may be useful for detecting malingering in some people – is decidedly not useful or appropriate for assessing malingering in people who have mental retardation. See Keyes, “Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation,” 42 *Mental Retardation* 151-153 (2004).

some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.

Id. at 8.

This fundamental assumption is why, as we have noted previously, the assessment of adaptive behavior for purposes of diagnosis must be focused on the client's limitations rather than strengths. Evaluating the significance of limitations within the client, calls for an overall assessment of strengths and limitations. However, limitations in adaptive behavior cannot be ruled out by focusing solely or primarily on what the client can do well. As Professor Ellis explains:

The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain focused on the individual's limitations, rather than any skills he or she may also possess. AAMR and other clinical experts emphasize that the presence of skills cannot preclude the appropriate diagnosis of mental retardation. In the most recent edition, the definition of mental retardation is prominently accompanied by the admonition that 'Within an individual, limitations often *coexist* with strengths.' AAMR, MENTAL RETARDATION (2002), *supra* note 21, at 1 (emphasis supplied). *Accord* AAMR, MENTAL RETARDATION (1992), *supra* note 20, at 1 ('Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities.'). The skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying. The sole purpose of the adaptive prong of the definition for the criminal justice system is to ascertain that the measured intellectual impairment has had real-life consequences. Thus, the presence of confirming deficits must be the diagnostician's focus.

27 Mental & Physical Disability Law Reporter, *supra*, at 13 n.29.

One of the most insidious ways that this principle is violated by prosecution witnesses is in declaring that your client has "street smarts" and, therefore, no significant limitations in adaptive behavior. Many of our clients do have something that might be referred to (with many negative connotations) as "street smarts." The client may be able to get to where they want to be, obtain assistance from friends when needed, acquire food, shelter and clothing and plan, carry out and occasionally "get away" with crimes – in short, they can survive. The behaviors required to undertake the above tasks are, in a sense, "strengths" in that they are somewhat adaptive. An unskilled or biased evaluator might find such skills especially significant because they involve coping in settings that most educated, middle class people (such as psychologists or lawyers) would find hostile, unfamiliar and daunting. However, viewing such survival skills as necessarily meaning that a person is "street smart" **rather than** impaired, reveals a significant error. Such an assumption overlooks a

basic question: Why are people consigned to this kind of life in the first place? Is it because they cannot read or perform simple math well enough to obtain a job that pays a living wage? Is it because they cannot cope with even the most minor of conflicts, becoming angry or frustrated, consequently leaving their job as soon as anyone criticizes their performance? Is it because they cannot conform to the demands of a work schedule; are they unable to plan, unable to get enough sleep or even unable to get up each morning at the same time and actually get to work? Is it because they cannot learn how to perform the series of tasks required to maintain and operate a machine which would allow them to obtain more gainful employment?

“Street smarts” are thus analogous to the maladaptive behavior that AAMR 2002 declares cannot be used to establish limitations in adaptive behavior, but often point to significant (and legitimate) limitations in adaptive behavior:

[T]he function of inappropriate, or maladaptive, behavior may be to communicate an individual's needs, and in some cases, may even be considered 'adaptive.' Recent research on the function of behavior problems in people with severe disabilities ... demonstrates that such behavior may be an adaptation judged by others to be undesirable, but often representing a response to environmental conditions and, in some cases, a lack of alternative communication skills.

AAMR 2002, at 79.

Therefore, having “street smarts” may evidence some strengths in adaptive behavior, but such abilities merely divert attention from the significant limitations that our clients have in other domains of adaptive functioning. The reliance on a client's “street smarts” to declare that s/he does not have mental retardation is nothing more than the process of overlooking limitations in favor of strengths.

5.7 *Antisocial Personality Disorder*

There is some overlap between the disabling behaviors associated with mental retardation and the signs of Antisocial Personality Disorder (APD):

- People with mental retardation are often impulsive, as are people with APD. *See* DSM-IV-TR, at 706 (diagnostic criteria for APD, including, “impulsivity or failure to plan ahead”).²⁹
- People with mental retardation may have difficulty maintaining safe environments, which might in some circumstances be seen as similar to another diagnostic criterion for APD – “reckless disregard for safety of self or others.” *Id.*

²⁹The diagnostic criteria for APD are set out *supra* in footnote 6.

- People with mental retardation may have difficulty securing and maintaining employment and paying their bills or meeting other financial obligations, which might be seen as similar to another diagnostic criterion for APD – “consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.” *Id.*
- People with mental retardation may frequently get into fights for a number of reasons related to their limitations, for example, an inability to restrain impulses, vulnerability to victimization and marginalization, poor communication skills, and sensitivity to accusations of being stupid. The resulting behavior might be seen as similar to another diagnostic criterion for APD – “irritability and aggressiveness, as indicated by repeated physical fights or assaults.” *Id.*
- People with mental retardation may often have impaired social skills, which can result in their not being sensitive to, or trying to ameliorate hurtful things done or said to others. This impaired behavior might be seen as similar to another diagnostic criterion for APD – “lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.” *Id.*
- Finally, given their tendency to repeat mistakes, some people with mental retardation may fall into a pattern of repeating petty crimes such as shoplifting or minor breaking and entering offenses, and with this appear to meet one other diagnostic criterion for APD – “failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.” *Id.*

This overlap provides fertile ground for prosecutors and their experts to transform limitations in adaptive behavior to evidence of APD **instead of** mental retardation. If this happens in your case, it can be countered in two ways. First, by careful and thorough examination of the facts, a knowledgeable mental retardation expert can often factually differentiate limitations in adaptive behavior from behaviors that seem on the surface to meet similar APD criteria. Second, even if your client is diagnosed with APD, it in *no manner excludes* the diagnosis of mental retardation. As the APA has explained in the DSM-IV-TR, at 47,

The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made whenever the diagnostic criteria are met, regardless of and in addition to the presence of another disorder.

Even if your client has APD, if the diagnostic criteria for mental retardation have been met, s/he also has mental retardation and is entitled to the protection of *Atkins* and other

constitutional and procedural safeguards that become applicable because of his or her disability.

5.8 Putting It All Together and Making the Case That Your Client Has Mental Retardation

It is tempting to believe that you will be able to establish that your client has mental retardation once you have an IQ score of 75 or lower on a reliable test. **Nothing could be further from the truth.** Establishing, beyond effective prosecution challenge, that your client has mental retardation is a heavy burden, especially now that the consequences in a capital case are so enormous. Defense counsel (and defense experts) must anticipate that the prosecution will attack and seek to minimize even seemingly conclusive evidence of mental retardation, as well as to divert the court's attention from the facts that actually establish whether a defendant does or does not have this disability.

To make the best case that a client has mental retardation, it is imperative to integrate every factual detail of the client's life into a story about the life of a disabled person, whose disability has affected and constrained every facet of his or her life. To do this, it is necessary to present not only the hard data from tests and records, but also the more qualitative evidence of human experience – the small stories and incidents that, together, weave the tapestry of the client's life, and reveal a person with mental retardation. Within this tapestry, there will be strengths and abilities, but there will always be limitations: failed perceptions; failed relationships with friends who gradually withdraw; repeated mistakes; impulses that are naively acted upon without constraint; vulnerability to mere suggestion by others; victimization by more calculating peers; inability to keep track of time, places and promises; the inability to obtain a job; to keep or advance within a job; the inability to plan for the future and obtain goals; feeling distressed when treated as stupid; the pain of isolation and loneliness. The client's story cannot be a dry, clinical presentation of a "disorder." It has to be an emotional presentation of a life limited in the particular ways that mental retardation limits – diminishing (though not eliminating) the wonder and possibility of being human.

By presenting the case in this manner, counsel may be able to guard against the biased assumption that because the client committed a murder, he must be malingering, "street smart," antisocial or fully cognizant of his actions. It is only if this is achieved, that *Atkins* will show its true value as a vital precedent in excluding the death penalty and saving the lives of defendants with mental retardation.

PART II

PART II.....	43
1 ATKINS V. VIRGINIA	45
1.1 <i>Definition of Mental Retardation</i>	46
1.2 <i>Burdens and Standards of Proof</i>	49
1.3 <i>Documentation</i>	51
1.4 <i>Privilege Against Self-Incrimination/Confidentiality of Statements Made During Mental Retardation Examinations</i>	52
1.5 <i>Examinations by Prosecution Experts</i>	53
1.6 <i>Pre-Trial Hearing</i>	53
1.7 <i>Finding During or After Trial</i>	54
2 COMPETENCE TO STAND TRIAL	56
3 WAIVER OF RIGHTS/GUILTY PLEAS.....	60
3.1 <i>Custody and Interrogation</i>	60
3.2 <i>Competence</i>	62
3.3 <i>Voluntariness</i>	62
3.4 <i>Knowing and Intelligent</i>	63
3.5 <i>Guilty Pleas</i>	67
4 COERCED CONFESSIONS	70
5 FALSE CONFESSIONS	73
6 CRIMINAL RESPONSIBILITY	75
6.1 <i>Insanity Defense</i>	75
6.2 <i>Absence of Requisite Mens Rea</i>	77
6.3 <i>Affirmative Defenses (Other than Insanity)</i>	79
6.4 <i>Guilty But Mentally Ill or Mentally Retarded</i>	80
7 CHALLENGES TO PRIOR CONVICTIONS AND UNADJUDICATED CHARGES OFFERED IN AGGRAVATION	81
8 BEHAVIOR/APPEARANCE POST-CRIME OR IN COURTROOM.....	82
9 CUSTODIAL ADJUSTMENT.....	83
10 POST-CONVICTION COMPETENCE.....	84
10.1 <i>Post-Conviction Proceedings</i>	84
10.2 <i>Competence to Be Executed</i>	84
11 CLEMENCY	85

1 *ATKINS V. VIRGINIA*

Although the Supreme Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of a mentally retarded defendant is prohibited by the Eighth Amendment, it neither adopted a single definition of mental retardation nor proscribed procedures for implementing the decision. Instead, the Court followed its approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), which prohibited the execution of a prisoner who is insane, and left "to the State [s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Atkins v. Virginia*, 536 at 317 (quoting 477 U.S. at 405, 416-17).

As states attempt to implement *Atkins*, many issues may arise. For example:

- Does the definition of mental retardation adopted by a state fail to adequately encompass the class of persons the Supreme Court intended to capture in *Atkins*?
- Do the burdens and standards of proof comply with constitutional requirements?
- Is the state entitled to have its own expert examine the defendant, and, if so, are there limits on the permissible scope of the examination?
- Does the statute or court order require/permit repeated testing, thereby rendering the scores of questionable reliability?
- Is the defendant entitled to a jury determination of the mental retardation question?
- Is the defendant entitled to a pre-trial judicial determination of the mental retardation question?
- Can statements made by the defendant during the course of a mental retardation examination/hearing be used against the defendant at either the guilt or sentencing phase of the trial?
- Can a claim of mental retardation be rejected on the ground that the condition was not documented during the developmental period?

In the post-*Atkins* years, litigation can be expected around these and other questions.

1.1 Definition of Mental Retardation

Although the United States Supreme Court did not adopt a single definition of mental retardation, the Supreme Court made approving references to the definitions employed by DSM-IV and the AAMR. See Part I of the manual for a complete description of these definitions. If a state court adopts or employs an overly restrictive definition of mental retardation, counsel must argue that this violates *Atkins*.

Texas provides an example of this. At the time of publication, the Texas legislature has been unable to pass a statute implementing *Atkins*. Because of the large number of death row inmates with pending *Atkins*-based claims, the Texas Court of Criminal Appeals stepped into the void and adopted temporary judicial guidelines for handling such claims. *In re Briseno*, ___ S.W.3d ___, 2004 WL 244826 (Tex.Crim.App. Feb. 11, 2004). In its opinion, the court framed the question of appropriate definition as follows: "We . . . must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty." *Id.*, 2004 WL 244826, * 3. This is a flawed view of the freedom provided to the states by the Supreme Court in *Atkins* and must be opposed as inconsistent with *Atkins*' clear prohibition of the execution of *all* mentally retarded defendants, not just a subset a state decides its citizens are willing to protect. See, e.g., *Chase v. State*, ___ So.2d ___, 2004 WL 1118688, *12 (Miss. May 20, 2004) (after reviewing majority opinion and dissents, Mississippi Supreme Court concludes that "the *Atkins* majority granted Eighth Amendment protection from execution to all mentally retarded persons.")

Despite this pronouncement regarding the appropriate source for a definition, the Texas Court of Criminal Appeals never actually resolved the question of definition. Because both parties, as well as the trial court, had utilized the AAMR definition, the appellate court concluded it would follow that definition, or the one contained in the Texas Health and Safety Code section 591.003(13)¹, until the Texas Legislature provides an alternative statutory definition.

Regarding the adaptive functioning prong of the mental retardation definition, the Texas Court of Criminal Appeals went on to identify some "evidentiary factors" it believed "factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder." *Id.*, 2004 WL 244826, *4. These factors were:

- (1) whether those who knew the defendant best during his developmental stage thought he was mentally retarded at the time and, if so, acted in accordance with that determination;

¹ This includes the following definitions: 'Mental retardation' means significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.' "'Sub-average general intellectual functioning' refers to measured intelligence on standardized psychometric instruments of two or more standard deviations below the age-group mean for the tests used." "'Adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."

- (2) whether the defendant formulates plans or acts impulsively;
- (3) whether the defendant is a follower or a leader;
- (4) whether the defendant's conduct in response to external stimuli is rational and appropriate, even if not socially acceptable;
- (5) whether the defendant is able to respond coherently and rationally to oral or written questions or whether his responses wander from subject to subject;
- (6) whether the defendant able to hide facts or lie effectively to protect his or others' interests; and
- (7) "Putting aside any heinousness or gruesomeness surrounding the capital offense, whether the commission of that offense required forethought, planning, and complex execution of purpose."

Counsel litigating in Texas are obviously well advised to develop evidentiary support for these factors. Counsel should also be prepared, however, to attack the use of the factors if they are undermining the showing of mental retardation. As discussed in the first part of the manual, adaptive functioning has a specific meaning in the context of mental retardation. Nothing in the *Atkins* decision provides states with a free rein to concoct definitions that exclude persons who would be found mentally retarded in other contexts or jurisdictions.

At the time of publication, Mississippi, like Texas, is without a statute implementing *Atkins*. Faced with numerous death row inmates raising challenges to their convictions under *Atkins*, the Mississippi Supreme Court adopted both a definition of mental retardation for purposes of *Atkins*, as well as a procedure for implementing the decision. Looking to *Atkins* itself, it held that the appropriate definition is from the AAMR and/or from the APA. *Chase v. State*, ___ So.2d ___, 2004 WL 1118688, *13. It further ruled, however, that a defendant cannot be adjudged mentally retarded under the Eighth Amendment without an opinion from a mental retardation expert that the defendant is not malingering, as demonstrated through administration of the Minnesota Multi Phasic Personality Inventory-II (MMPI-II), "and/or other similar tests." *Id.*² If a mental retardation expert concludes that the MMPI-II or other such "testing," is unnecessary and/or inappropriate in order to render a diagnosis of mental retardation, counsel must challenge this judicially created testing requirement as unconstitutional under *Atkins*.

² In an earlier decision, the Mississippi Supreme Court had expressly required that the MMPI-II be administered. *Foster v. State*, 848 So.2d 172, 175 (Miss. 2003). In *Chase*, the Mississippi Supreme Court "clarif[ied] its position by stating that the expert should use the MMPI-II, and/or any other tests and procedures permitted under the Mississippi Rules of Evidence, and deemed necessary to assist the expert and the trial court in forming an opinion as to whether the defendant is malingering." *Chase v. State*, 2004 WL 1118688, *13 fn. 19.

Many states do have statutes that expressly deal with mental retardation and capital punishment. The definitions of mental retardation that have been adopted by the various states do vary to some degree. Appendix Two includes the statutes in existence at the time of publication. Some, like the Arizona Revised Statutes, § 13-703.02, include an IQ score that might function as a cut off. Under that law, mental retardation is generally defined as “a condition based on a mental deficit that involves significantly sub-average general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.” The statute then further defines “significantly sub-average general intellectual functioning” to mean “a full scale intelligence quotient of seventy or lower,” but “[t]he court in determining the intelligence quotient shall take into account the margin of error for the test administered.” *See also* Idaho § 19-2515A (1)(b) (“Significantly sub-average general intellectual functioning’ means an intelligence quotient of seventy (70) or below.”)

Arizona mandates that an IQ test be administered in every case where a notice to seek the death penalty is filed. If the prescreening psychological expert determines that the defendant's IQ is higher than 75, “the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation.” If the prescreening psychological expert determines that the defendant's intelligence quotient is 75 or less, one or more additional experts are to be appointed in order to determine whether the defendant has mental retardation. If the subsequent examinations result in test scores above 70, taking into account the margin of error for the test administered, the notice of intent to seek the death penalty will not be dismissed.

If this statute, or ones like it, function to exempt from protection defendants who have viable claims of mental retardation, it must be challenged as irreconcilable with *Atkins v. Virginia*. *See also Chase v. State*, ___ So.2d ___, 2004 WL 1118688, *14 (Miss. May 20, 2004) (defendant may not receive mental retardation hearing without providing affidavit from expert opining that defendant has combined IQ of 75 or below.)

Other statutes do not include any specific numbers, and instead rely on a more general definition of mental retardation. The California statute, for example, simply states that “‘mentally retarded’ means the condition of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of eighteen.” California Penal Code § 1376. At the time of publication, there is a case pending in the California Court of Appeal which raises the questions, among others, what constitutes mental retardation for purposes of Pen. Code § 1376, and what constitutes adaptive behavior for purposes of the statute. *People v. Vidal*, F045226 (5th App. Dist.).

Utah has a rather unique statute, which defines mental retardation for purposes of an exemption from execution as:

the defendant has significant sub-average general intellectual functioning that results in and exists concurrently with significant deficiencies *in adaptive functioning that exist primarily in the areas of reasoning or*

impulse control, or in both of these areas; and (2) the sub-average general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

Utah Code Ann. § 77-15a-102 (emphasis added).³

As discussed above regarding the evidentiary factors created by the Texas Court of Criminal Appeals, counsel must bring an Eighth Amendment challenge to any statute or court decision that adopts a definition of mental retardation that is more narrow than that which is accepted by mental health professionals nationally.

The age of onset required for a finding of mental retardation is usually age 18. *See, e.g.*, Arizona § 13-703.02 (K)(2) (onset of conditions must have “occurred before the defendant reached the age of eighteen”); Arkansas § 5-4-618 (a)(1)(A) (onset of condition must be “no later than age eighteen (18)”). Some statutes, however, use the age of 22. *See, e.g.*, Indiana Code 35-36-9-2; Md. Crim. L. Code Ann. § 2-202(b); Utah Code Ann. § 77-15a-102.

Where counsel has a client whose intellectual impairment arguably developed after age 18, but the relevant statute requires an onset before that age, counsel should look to recent scientific studies indicating that the developmental period in fact extends beyond age 18. If the client's impairment falls within the newly recognized developmental period, this information can be utilized to argue that the client does fit an accepted definition of mental retardation, and the statutory limitation is therefore unconstitutional under *Atkins*.

In some states, such as Louisiana, there is a different definition of mental retardation in the statute implementing *Atkins* (La. Code Crim. Pro. § 905.5.1), than in the statutes which provide for government services for the mentally retarded (La. Rev. Stat. § 28:381.) While the *Atkins*-based statute requires that the condition manifest itself prior to age 18, the services-related statute recognizes the developmental period as lasting up to age 22. Counsel should be prepared to challenge the less protective standard as inconsistent with *Atkins*.

1.2 Burdens and Standards of Proof

A number of the statutes include some type of presumption. In Arizona, for example, there is a rebuttable presumption that the defendant has mental retardation if the trial court determines that the defendant's IQ is 65 or lower. Ariz. Rev. Stat. § 13-703.02(G). *See also* Ark. Code Ann. § 5-4-618 (a)(2) (“There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.”); Ill.

³ Another statute provides exemption from execution for those falling under a more commonly accepted definition of mental retardation but only where “the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.” Utah Code Ann. § 77-15a-101.

Rev. Statutes, ch. 5, § 114-15(d) (“An intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation.”); Neb. Rev. Stat. § 28-105.01(3) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.”); New Mexico Stat. Ann. § 31-20A-2.1(A) (“An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.”); South Dakota Codified Laws Ann. § 23A-27A-26.2 (“An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant sub-average general intellectual functioning.”)

As for the ultimate burden and standard of proof regarding mental retardation, the statutes vary. The Arizona statute, for example, places the burden on the defendant to establish his mental retardation by clear and convincing evidence. Ariz. Rev. Stat. § 13-703.02(G). Other states that utilize the clear and convincing standard of proof are Colorado, Delaware, Florida, and Indiana. See Colo. Rev. Stat. § 18-1.3-1102(2); Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.137; and Ind. Code § 35-36-9-4. If a North Carolina defendant seeks a pretrial judicial ruling on the question of mental retardation, the burden of proof is also on the defendant to establish mental retardation by clear and convincing evidence. N.C. Gen. Stat. § 15A-2005(c).

The constitutionality of the clear and convincing evidence burden of proof must be challenged. See, e.g., *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (Oklahoma rule requiring criminal defendants to prove incompetence by clear and convincing evidence violates due process.); see also *Amendments to Florida Rules of Criminal Procedure*, ___ So.2d ___, 2004 WL 1119477, *2-3 (Fla. May 20, 2004) (Pariente, J., concurring) (suggesting to Legislature that it amend the burden of proof in light of *Atkins* and explaining that potential constitutional problems with the statutory standard may have led the Florida Supreme Court to omit any burden of proof in rules implementing Fla. Stat. Ann. § 921.137).

The Georgia statute, which preceded *Atkins*, is alone in requiring that the jury or judge find that mental retardation was established beyond a reasonable doubt. Ga. Code Ann. 17-7-131(c)(3). A constitutional challenge to this standard of proof was rejected by the Georgia Supreme Court. *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003); see also *Head v. Stripling*, 590 S.E.2d 122 (Ga. 2003), *cert. denied* May 24, 2004. Counsel must nevertheless continue to press the constitutional argument.

In most jurisdictions, mental retardation must be established by a preponderance of the evidence. See Ark. Code Ann. § 5-4-618(c); California Penal Code § 1376(b)(3); Idaho Code § 19-2515A; Ill. Rev. Stat. ch. 5, § 114-15(b); La. Code Crim. Pro. § 905.5.1(C)(1); Md. Crim. L. Code Ann. § 2-202(b)(2)(ii); Mo. Rev. Stat. § 565.030; Neb. Rev. Stat. § 28-105.01; Nev. Stat. § 174.098(5)(b); N.M. Stat. Ann. § 31-20A-2.1; N.Y. Crim. Pro. Consol. Law § 400.27(12)(a); S.D. Codified Laws § 23A-27A-26.3; Tenn. Code Ann. § 39-13-203; Utah Code Ann. § 77-15a-104; Va. Code Ann. § 19.2-264.3:1.1; Wash. Rev. Code § 10.95.030; N.C. Gen. Stat. § 15A-2005(f) (where mental retardation is raised before the sentencing jury, the defendant has the burden of proving that condition by a preponderance

of the evidence); *see also In re Briseno*, ___ S.W.3d ___, 2004 WL 244826, *5 (Tex. Crim. App. Feb. 11, 2004) (in post-conviction *Atkins*-based proceedings, the defendant bears the burden of proof of establishing that he is mentally retarded by a preponderance of the evidence).

In contrast, Connecticut, Kansas and Kentucky do not have a statutory burden or standard of proof. Conn. Gen. Stat. § 53a-46a; Kan. Stat. Ann. § 21-4623 and Ky. Rev. Stat. Ann. § 532.135.

There is an argument that under *Ring v. Arizona*, 536 U.S. 584 (2002), the burden must be on the state to prove beyond a reasonable doubt that the defendant is *not* mentally retarded. Although this argument has been rejected by some courts, until and unless this argument is rejected by the United States Supreme Court, it should be pressed in every jurisdiction.

1.3 Documentation

The Colorado statute requires mental retardation to have been documented during the developmental period. Col. Rev. Stat. § 18-1.3-1101. The precise meaning of this statutory requirement is not clear. It may be interpreted as simply requiring the defendant to document through a current evaluation that the condition was present during the developmental period. This is the interpretation that should be pressed. On the other hand, it could be interpreted as requiring counsel to obtain documentation that was actually prepared during the developmental period that indicates the presence of mental retardation, for example, an IQ score of 65 received by the defendant at age 11. If the latter view prevails, counsel must be prepared to challenge the statute as inconsistent with *Atkins*, and be ready to proffer expert testimony showing that the mental health community does not recognize such a requirement prior to rendering a diagnosis of mental retardation.

The statute does allow the documentation requirement to be excused upon the showing of extraordinary circumstances. What constitutes “extraordinary circumstances” is not further described. Counsel without the required documentation should obviously seek to provide a persuasive explanation for the absence of evidence, in addition to challenging the requirement as unconstitutional under *Atkins*. If the defendant is from a foreign country, for example, this might explain the absence of records suggesting mental retardation during the developmental period. Alternatively, the defendant may have grown up in a jurisdiction where IQ testing was enjoined due to alleged biases in the testing. *See, e.g., Larry P. v. Riles, et al.*, 793 F.2d 969 (9th Cir. 1984).

Even where there is no express requirement of documentation during the developmental period, many courts and jurors assume, as a practical matter, that mental retardation would have been identified at the very least by the schools. Counsel must always be prepared to explain why the condition went unrecognized if supporting documentation in the defendant's background records does not exist.

1.4 Privilege Against Self-Incrimination/Confidentiality of Statements Made During Mental Retardation Examinations

At least one of the mental retardation statutes addresses the issue of whether a defendant may invoke the privilege against self-incrimination during a mental retardation examination. In Colorado, “[t]he defendant shall have a privilege against self-incrimination that may be invoked prior to or during the course of an evaluation under this section. A defendant's failure to cooperate with the evaluators or other personnel conducting the evaluation may be admissible in the defendant's mental retardation hearing.” Colo. Rev. Stat. § 18-1.3-1104 (3).

Other statutes address this potentially thorny issue in a different manner. They specify when, if at all, statements made by a defendant during a mental retardation examination may be admitted into evidence. The Kansas law, for example, provides: “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.” Kan. Stat. Ann. § 21-4623 (b). The California statute, in contrast, provides that a statement made by a defendant during a court-ordered examination is inadmissible in the guilt phase of the trial. Cal. Pen. Code § 1376(b)(2).

In *Centeno v. Superior Court*, 11 Cal.Rptr.3d 533, 2004 WL 585916 (Cal. App. March 25, 2004), an appellate court recently rejected the argument that a capital defendant was entitled to unqualified judicial immunity for statements made to an expert in a court-ordered examination. It concluded that an “application for a mental retardation hearing is a tactical voluntary decision made by a competent defendant with the advice of counsel.” 2004 WL 585916, *7. Thus, in the appellate court’s view, the defendant voluntarily placed his mental state at issue, thereby waiving his Fifth and Sixth Amendment rights. The implication of this, of course, is that a mentally retarded defendant may choose whether or not to raise an *Atkins*-based defense to death eligibility. Indeed, the California appellate court stated “a defendant may withdraw the claim if he or she concludes it is in his or her best interest to do so.” *Id.*; cf. *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003) (petitioner who had raised genuine issue of mental retardation could not thereafter waive the issue). It is arguable, however, that an attorney has an absolute duty to raise mental retardation irrespective of the defendant’s wishes. Furthermore, because it is counsel’s obligation to do so, irrespective of the defendant’s wishes, it is not correct to impute waivers of Fifth and Sixth Amendment rights.

Counsel should aggressively argue that any statements made in the course of a mental retardation examination may not be used by the prosecution for any purpose other than the mental retardation determination. See, e.g., *Simmons v. United States*, 390 U.S. 377 (1968) (finding it intolerable to require a defendant to surrender one constitutional right in order to assert another, and therefore ruling that a defendant’s testify at a hearing to suppress evidence under the Fourth Amendment may not be admitted against him in the guilt trial).

1.5 Examinations by Prosecution Experts

Many of the statutes expressly permit the prosecution to request an examination of the defendant by his or her own expert. If such an examination is requested, counsel must be prepared to fight for appropriate limitations. In *Centeno v. Superior Court*, 2004 WL 585916 (Cal. App. March 25, 2004), for example, the trial court indicated that the prosecution expert would be prohibited from probing the events of the charged crimes. In order to obtain a similar restriction, counsel may need to proffer an explanation from a mental retardation expert as to why an inquiry into the crime facts would not be necessary or appropriate in order to determine whether the defendant is mentally retarded.

What the trial court in the *Centeno* case would not do was restrict the tests the prosecution expert could administer. This was rightly found by the appellate court to constitute error. The appellate court explained:

[W]hen mental retardation for *Atkins* purposes is the issue, the tests to be conducted by prosecution experts must be reasonably related to a determination of whether the defendant has a “significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of eighteen.” The mental retardation examination must be limited in its scope to the question of mental retardation. Thus, if requested, the prosecution must, as it was required to do in this case, submit a list of proposed tests to be considered by the defendant so that any objections may be raised before testing begins. Then, upon a defense objection to specific proposed prosecution tests, the trial court must make a threshold determination that the tests bear some reasonable relation to measuring mental retardation, including factors that might confound or explain the testing, such as malingering. Otherwise, there is a danger that defendants will be improperly subjected to mental examinations beyond the scope of the precise issue they have tendered and their resulting waiver of constitutional rights.

Id., 2004 WL 585916, *8 (citations omitted.) In *Centeno*, the case was remanded to the trial court for a determination of whether certain tests, such as those designed to assess psychopathic antisocial personality disorders, could properly be administered to the defendant by the government expert. Counsel will need to work closely with his or her mental retardation expert in order to successfully object to inappropriate and potentially harmful testing.

1.6 Pre-Trial Hearing

Many statutes require a pretrial hearing by a judge to determine whether the defendant is mentally retarded. See, e.g., Ariz. Rev. Stat. § 13-703.02 (G) (“the trial court shall hold a hearing to determine if the defendant has mental retardation”); Ark. Code Ann. § 5-4-618 (d)(2) (“Prior to trial, the court shall determine if the defendant is mentally retarded”); Colo.

Rev. Stat. § 18-1.3-1102(2) (trial court to conduct a hearing on mental retardation motion no later than ten days prior to trial).

Other statutes give the defendant the option of a pre-trial hearing before a judge or choosing to have a later jury determination. *See, e.g.*, Cal. Pen. Code § 1376 (b)(1) (“At the request of the defendant, the court shall conduct the hearing without a jury prior to the commencement of the trial.”); N.Y. Crim. Pro. Consol. Law § 400.27(12)(e). Other statutes allow a pretrial judicial determination of mental retardation only if both parties agree. *See, e.g.*, La. Code Crim. Pro. § 905.5.1 (C) (“If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.”); Mo. Rev. Stat. § 565.030, subsection 5 (“Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial”)

Finally, some statutes do not provide the defendant with the option of a pretrial determination of the mental retardation question. *See, e.g.*, Ga. Code Ann. 17-7-131; Conn. Gen. Stat. § 53a-46a(h); Va. Code Ann. § 19.2-264.3:1.1

If counsel believes that a pre-trial judicial hearing would be preferable to a determination by a judge or jury that has found the defendant guilty of capital murder, counsel should argue that a hearing is constitutionally required. *See, e.g., Jackson v. Denno*, 378 U.S. 368 (1964) (issue of voluntariness of confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence). *cf. State v. Flores*, ___ P.3d ___, 2004 WL 1636356 (N.M. June 3, 2004) (rejecting argument that pretrial determination is constitutionally required, but reading statute “flexibly” and concluding a pretrial hearing is permitted by statute and then ordering it for all cases.)

And where a pretrial hearing is conducted, and the ruling is adverse to the defendant, counsel may still argue that the defendant retains the right to a jury ruling on the mental retardation issue under *Ring v. Arizona* and/or the Eighth Amendment. *Cf. State v. Flores*, ___ P.3d ___, 2004 WL 1636356 (N.M. June 3, 2004) (ruling that defendant is entitled to submit mental retardation question to jury even after adverse finding by trial court.) Any purported waiver of the right to a jury determination should be challenged as unconstitutional. *See, e.g., Simmons v. United States*, 390 U.S. 377 (1968) (it is intolerable to require a defendant to surrender one constitutional right in order to assert another.)

1.7 Finding During or After Trial

Where there is a pretrial finding that a defendant is not mentally retarded, some statutes expressly permit the defendant to raise the issue anew in front of the sentencing jury. Ark. Code Ann. § 5-4-618(d)(2)(A) (“If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial.”); La. Code Crim. Pro. § 905.5.1 (C) (2) (“Any pretrial determination by the judge that a defendant is not mentally

retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury pursuant to this Section.”); Mo. Rev. Stat. § 565.030, subsection 5 (“Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.”)

In Georgia, the mental retardation question is resolved by the jury during the guilt phase. Ga. Code Ann. 17-7-131. Other statutes require that the mental retardation determination be made by the jury at the time of sentencing, unless a jury is waived. *See, e.g.*, Conn. Gen. Stat. § 53a-46a(h); Va. Code Ann. § 19.2-264.3:1.1. As noted above, counsel in such a jurisdiction may wish to argue that a pre-trial determination by a judge is constitutionally required.

Where the jury is required to make the finding, often the statute is silent on the consequences of a hung jury on the mental retardation question. Counsel should argue that the failure of the jury to agree precludes consideration of the death penalty. *See, e.g., State v. Flores*, ___ P.3d ___, 2004 WL 1636356 (N.M. June 3, 2004) (if the jury is unable to unanimously agree, defendant receives a life sentence); *see also Lambert v. State*, 71 P.3d 30 (Okla. Crim. App. 2003)

A number of states require the judge to make the finding on mental retardation either following the conviction of capital murder or as part of the sentencing process. *See, e.g.*, Kan. Stat. Ann. § 21-4623; Del. Code Ann. § 4209(d); Fla. Stat. Ann. § 921.137(4)⁴; Neb. Rev. Stat. § 28-105.01(4). In Delaware, evidence of mental retardation is presented during the sentencing phase, but it is the judge that makes the finding on the existence or non-existence of mental retardation prior to imposing sentence. Del. Code Ann. tit. 11, § 4209(d). Again, counsel may wish to argue for a pre-trial determination. Furthermore, there is an argument that a jury determination is required under *Ring v. Arizona*, 536 U.S. 584 (2002), which held that a defendant is entitled to a jury finding on any fact that increases the maximum authorized punishment. Note, however, that a number of courts have rejected this argument, at least as applied to post-conviction proceedings. *See, e.g., Ex Parte Briseno*, ___ S.W.2d ___, 2004 WL 244826, *5 (Tex.Crim.App. Feb. 11, 2004); *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003). Where there is an adverse ruling on the question of mental retardation by a judge pretrial, counsel must consider whether to demand a jury finding on the question pursuant to *Ring*.

⁴ On May 20, 2004, the Florida Supreme Court issued amendments to Florida's Rules of Criminal Procedure relating to Fla. Stat. Ann. § 921.137(4), that are to become effective October 1, 2004. These new rules require a pre-trial judicial ruling on the mental retardation question. *See Amendments to Florida Rules of Criminal Procedure*, ___ So.2d ___, 2004 WL 1119477, *4 fn. 5 (Fla. May 20, 2004) (Cantero, J., concurring) (discussing why a pre-trial ruling is preferable and explaining that Florida Supreme Court has power to enact rules of criminal procedure that override statutory procedures.)

2 COMPETENCE TO STAND TRIAL

The Due Process Clause of the Fourteenth Amendment precludes the trial of a person “whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The test is “whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-- and . . . a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 375, 402 (1960); *see also Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) (competency “requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.”) “Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.” *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring).

If the evidence in the record establishes a bona fide doubt in regard to the defendant’s competence, the trial court has a *sua sponte* duty to conduct a hearing on the issue. *Pate v. Robinson*, 383 U.S. 375 (1966). Although the defendant’s demeanor may be relevant to the ultimate competency determination, it cannot be relied upon to dispense with a hearing if other evidence raises doubts about the defendant’s ability to understand the charges and/or assist counsel. *Id.* at 386.

While the Constitution permits a state to place the burden on the defendant to establish competency by a preponderance of the evidence (*Medina v. California*, 505 U.S. 437 (1992)), it precludes a state from requiring a defendant to prove incompetence by clear and convincing evidence. *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Some jurisdictions have more defendant-protective rules than required by the Constitution. *See, e.g., State v. Garfoot*, 558 N.W.2d 626, 628 (Wisc. 1997) (where defendant places competency to stand trial at issue, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is capable of understanding the fundamental nature of the trial process and of meaningfully assisting his or her counsel.)

It is well recognized that mental retardation may impair a defendant’s ability to meet the competency requirements. Although the mere fact that a defendant has significantly sub-average intelligence is generally deemed insufficient to establish incompetence to stand trial⁵, “a defendant may be incompetent based on retardation alone if the condition is so

⁵ *See, e.g., Commonwealth v. Melton*, 351 A.2d 221 (Pa. 1976) (IQ of 69 alone did not give rise to reason to doubt defendant's competency); *People v. McNeal*, 419 N.E.2d 460 (Ill. App. 1981) (IQ of 61 reported in the context of expert testimony that defendant was competent did not give rise to bona fide doubt of defendant's competence); *People v. Jackson*, 414 N.E.2d 1175 (Ill. App. 1980) (IQ of 51 and the defendant's refusal to talk to counsel or appear in court was insufficient to raise bona fide doubt as to competence).

severe as to render him incapable of functioning in critical areas.” *State v. Garfoot*, 558 N.W.2d at 632 (Wisc. 1997). With less extreme mental retardation, the traditional competency test is employed.

Even where a mentally retarded defendant is able to comprehend the charges against him and convey relevant information to counsel during out-of-court discussions, the trial process itself often is too complicated for a mentally retarded defendant to keep pace with. Counsel with a client who has significant intellectual deficits must ensure that the competency examiners take into consideration the defendant's capacity to assist in his own defense during an actual trial. Additionally, where a mentally retarded defendant is determined to be competent before the start of trial, counsel should be alert to indications during trial that the pretrial ruling was in error. Courts recognize that competency is an ongoing process. *See, e.g., Drope v. Missouri*, 420 U.S. at 181 (“a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.”)

There are a number of special instruments designed to assess competency to stand trial. For example, there is a 13-point checklist known as the "McGarry Scale" or "Competency to Stand Trial Instrument." *See, e.g., State v. Benton*, 759 S.W.2d 427, 430 n.2 (Tenn. Crim. App. 1988) (noting that expert utilized a version of the McGarry Scale); *State v. Garfoot* (observing that many courts and experts rely on the McGarry Scale). There is at least one standardized instrument designed to assess whether a mentally retarded defendant is competent to stand trial: the Competence Assessment to Stand Trial for Defendants with Mental Retardation (CAST*MR). The CAST*MR is “widely-used.” *Stanley v. Lazaroff*, 2003 WL 22290187 (6th Cir. Oct. 3, 2003). Counsel litigating the competency of a mentally retarded defendant needs to be conversant with all of the relevant tests in order to ensure that an appropriate examination is conducted. Counsel should also insist that the competency evaluation take into account the likely complexity of a capital trial.

There are numerous instances where courts have recognized that mentally retarded defendants were not competent to stand trial. In *State v. Rogers*, 419 So.2d 840 (La. 1982), for example, the Louisiana Supreme Court reversed a trial court's finding that a mentally retarded defendant, who had been charged with aggravated rape, was competent to stand trial. Although the three psychiatrists who evaluated Rogers agreed that he was mentally retarded, they disagreed about the severity of his disability. Two of the psychiatrists opined that Rogers was not competent to proceed. In finding to the contrary, the trial court relied entirely on the testimony of the third psychiatrist who found, somewhat equivocally, that Rogers had the mental capacity necessary for trial.

After reviewing the record, the Louisiana Supreme Court concluded that the trial court's ultimate ruling was clearly erroneous. Notably, the third psychiatrist provided little factual support for his opinions about the defendant's abilities. Further, the basis for his opinion was simply his “interaction” with Rogers during a one-hour interview, and that Rogers was able to recall the following: his phone number; the city block number at his mother's house where he resided; his place of employment; his involvement in an automobile accident in 1970 or 1971; and that he had dropped out of school in the eighth grade. In contrast, one of the other two psychiatrists administered an intelligence test to Rogers, and also

questioned him using a judicial commitment check list and another check list recommended by the Academy of Law and Psychiatry. This led him to conclude that Rogers was unable to comprehend that nonconsensual sex was wrong. Further, Rogers could not understand the defenses of alibi or insanity, and could not grasp his legal rights. Rogers' memory problems, according to this expert, impaired his ability to provide relevant information to defense counsel. In addition, the expert commented on Rogers' appearance during court proceedings, where he seemed to be listening for only one tenth of the time. The third expert had, among other things, asked indirect questions of Rogers in order to estimate his judgment and intelligence. She ultimately concluded that Rogers was unable to recall facts to assist in his defense, to maintain a consistent defense, to make critical decisions during trial or to testify effectively in his own defense.

On this record, the Louisiana Supreme Court concluded that Rogers had not been competent to proceed. As this case demonstrates, the proper focus of the competency examination must be on the concepts and tasks relevant to the capital trial, rather than on abstract skill levels or knowledge.

In *State v. Benton*, 759 S.W.2d 427 (Tenn. Crim. App. 1988), an appellate court found that a mentally retarded defendant, who had been convicted of aggravated rape and aggravated sexual assault, had been incompetent to stand trial. The defendant, who had a full-scale IQ of 47, was described by the Tennessee Court of Criminal Appeals as an individual "whose body functions as a forty-three-year-old man and whose mind functions as a five-year-old child . . ." *Id.* at 429. Shockingly, he had been found competent by the trial judge despite unanimous expert testimony indicating that he was unable to comprehend the charges against him or to assist in his defense. *See also State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (trial court erred in finding defendant competent to stand trial where all three mental health experts consistently testified that, because of her moderate mental retardation, the defendant possessed no appreciable understanding of the judicial proceedings. The mere fact that the defendant was able to appreciate that the charged behavior was wrong did not render her competent to stand trial.); *State v. Garfoot*, 558 N.W.2d 626 (Wisc. 1997) (affirming finding by trial court that a defendant with an IQ of 64 could not meaningfully assist counsel); *State v. Caralluzzo*, 49 N.J. 152 (N.J. 1967) (defendants with mental age of about six years old were incompetent to stand trial.)⁶

At least one commentator has speculated that when dealing with mentally retarded defendants, "forensic and judicial practice probably tilt toward findings of competence in marginal cases." Richard J. Bonnie, "The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense," 81 J.Crim. L. & Criminology 419, 422 (1990). This is because, according to Bonnie, a mentally retarded defendant who is found incompetent to stand trial is unlikely to be later "restored" to competency. Thus, an incompetency finding would be, in essence, a definitive bar to adjudication. This possibility of bias in the competency determination may be enhanced in a capital case, where the severity of the crime provides pressure for a conviction and harsh punishment.

⁶ For additional cases finding mentally retarded defendants incompetent to stand trial, *see* "Competency to Stand Trial of Criminal Defendant Diagnosed as 'Mentally Retarded' Modern Cases," 23 ALR4th 493.

Counsel should be sure to investigate the prior histories of the examiners, as well as the judge, regarding competency findings. A prior finding of incompetence in a less serious case with a similarly impaired defendant could be used to show bias if the capital defendant is deemed competent.

3 WAIVER OF RIGHTS/GUILTY PLEAS

In order for a defendant to effectively waive his or her constitutional rights, the defendant must be competent, and the waiver must be intelligent and voluntary. Further, under *Miranda v. Arizona*, 384 U.S. 436 (1966), a statement of a defendant may not be admitted at trial if it was taken during custodial interrogation, and the defendant had not first been warned of his right to remain silent and his right to have counsel present during the questioning. If the defendant challenges the admissibility of a statement, the burden is on the prosecution to prove, by a preponderance of the evidence, that the waiver of rights was knowing, intelligent and voluntary. *Lego v. Twomey*, 404 U.S. 477 (1972).

3.1 *Custody and Interrogation*

The determination of whether a defendant is “in custody” for Miranda purposes involves “[t]wo discrete inquiries . . . : first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a *reasonable person* have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (emphasis added); *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (“the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.”)

In *People v. Braggs*, ___ N.E.2d ___, 2003 WL 22967264 (Ill. Dec. 18, 2003), a homicide case involving a mentally retarded defendant, the Court determined that the appropriate inquiry was whether a reasonable person *suffering from similar limitations* as the defendant would have felt free to leave. The Court explained:

If, as is the case, we are concerned with what a reasonable person “in the defendant's shoes” (citation omitted) would have thought about his or her freedom of action, the reasonable person we envision must at least wear comparable footwear; otherwise, we ought to simply abandon the legal charade that the defendant's characteristics, perspective and perception matter at all.

2003 WL 22967264, *9.

Unfortunately, this holding relied heavily on a Ninth Circuit decision involving a juvenile defendant that was subsequently reversed by the United States Supreme Court. *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir.2002), *reversed*; *Yarborough v. Alvarado*, 316 F.3d 841 (2003).

There is a string of cases supporting the Ninth Circuit's analysis. *See also State v. Jason L.*, 2 P.3d 856, 863 (2000) (characteristics such as whether the person being questioned is a child or an adult are objective and relevant to the question of whether a reasonable person would feel free to terminate questioning and leave); *Ramirez v. State*, 739 So.2d 568, 574

(Fla.1999) (applying "reasonable juvenile" standard to determine whether defendant would have believed he was in custody at the time of the interrogation); *In re D.A.R.*, 73 S.W.3d 505, 511 (Tex.Ct.App.2002) ("We believe the facts here establish that a reasonable thirteen-year-old would have believed he was in custody"); *In re Loreda*, 865 P.2d 1312, 1315 (1993) (custodial question entailed inquiry into what a reasonable person of the child's age, knowledge and experience would have thought); *In re Robert H.*, 599 N.Y.S.2d 621, 623 (1993) ("[A] reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene"); *In re J.W.*, 654 N.E.2d 517 (1995) ("Although J.W. had not been formally arrested . . . a reasonable 14-year-old person would have been entitled to believe . . . he was in police custody and not free to leave.")

The Illinois Supreme Court then reasoned:

The same rationale that requires modification of the reasonable person standard to take into account the general characteristics of juveniles also militates in favor of such a modification where the mentally retarded are concerned. . . . Just as they are more susceptible to police coercion during a custodial interrogation, the mentally retarded are also more susceptible to the impression that they are, in fact, in custody in the first instance.

2003 WL 22967264, *10.

Looking to the facts of the case, the court had no doubt "that a reasonable person with defendant's mental capacity would have believed he or she was in custody and not free to leave the police station." *Id.*; but see *United States v. Macklin*, 900 F.2d 948, 949-951 (6th Cir. 1990) (a reasonable person test, rather than a subjective test, is appropriate to determine whether a mildly mentally retarded suspect was in custody.)

The Supreme Court's decision in *Alvarado* calls into question whether the Illinois Supreme Court's refined "reasonable person" approach remains viable, at least as a matter of federal constitutional law.

The second requirement for *Miranda* to apply is that "interrogation" occur. Interrogation for purposes of *Miranda* includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). If the police are aware of a suspect's "unusual susceptibility to a particular form of persuasion" (*id.* 302 n.8), that is relevant to determining whether interrogation occurred. See also *People v. Hardy*, 636 N.Y.S.2d 459 (Supreme Court App. Div. 1996) (noting defendant's "limited mental capacity" in finding that mentally retarded defendant was interrogated within meaning of *Miranda*.) If "interrogation" is at issue, counsel will need to investigate whether the officers who questioned the defendant had reason to know of his intellectual disabilities.

3.2 *Competence*

For many years there was a debate over whether a finding of competence to stand trial necessarily resolved the question of whether a defendant was competent to plead guilty and/or waive his or her right to counsel. The Supreme Court addressed that question in *Godinez v. Moran*, 509 U.S. 389 (1993), and rejected the view that a higher competence standard applies for waiving rights than for simply standing trial.

For further discussion of competence, see the section above on competency to stand trial.

3.3 *Voluntariness*

In *Colorado v. Connelly*, 479 U.S. 157 (1986), a case *not* involving mental retardation, the Supreme Court ruled that a waiver of Miranda rights was not involuntary under the Due Process Clause simply because the defendant's mental state precluded the exercise of free will. The Court explained: "The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id.* at 170.

Although mental retardation probably cannot itself render a waiver "involuntary," it can impact the determination of whether or not the police actions were coercive. "In considering the voluntariness of a confession, [a] court must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will." *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980) (en banc). A mentally retarded defendant may not be able to withstand the same types of interrogation techniques against which a defendant of average intelligence would be expected to hold his own. As one commentator explained, "[b]y virtue of their cognitive limitations, individuals with mental retardation tend to be more 'suggestible,' and therefore are more vulnerable to the pressures that interrogating police officers can be expected to exert in their efforts to obtain confessions." Suzanne Lustig, "Searching for Equal Justice: Criminal Defendants With Mental Retardation," *New Jersey Lawyer*, 35 (July 1995). Further, "[w]hen a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession into question." *United States v. Brown*, 66 F.3d 124, 126-127 (6th Cir. 1995), quoting *United States v. Sablotny*, 21 F.3d 747, 751 (7th Cir.1994); see also *State v. Mortley*, 532 N.W.2d 498, 502 (Iowa 1995) (in a case involving a defendant with an IQ of 66, the court notes that the knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion is considered in determining whether waiver or rights was voluntary); *State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (in finding a confession involuntary, the court notes the presence during interrogation of government agent who should have been aware of mentally retarded defendant's limitations).

See the next section on Coerced Confessions for a complete discussion of confessions that are involuntary due to coercion.

3.4 Knowing and Intelligent

In order to effect an intelligent and knowing waiver of constitutional rights, a defendant must have “a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Patterson v. Illinois*, 487 U.S. 285, 292 (1988), quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, “including the background, experience, and conduct of the accused.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Even where a confession is not coerced, it may still be subject to suppression if the defendant's waiver of rights prior to the incriminating statements was not knowing and intelligent. See, e.g., *People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990); Berger, “Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections,” 49 U.Pitt.L.Rev. 1007, 1018-19, 1042-54 (1988) (intelligent knowledge remains separate Miranda waiver requirement in addition to voluntariness); Note, “Constitutional Protection of Confessions Made by Mentally Retarded Defendants,” 14 Am.J.L.Med. 431, 433-36, 448-58 (1989) (intelligent knowledge remains separate Miranda waiver requirement); Note, “*Colorado v. Connelly*: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary,” 33 Vill.L.Rev. 895, 907, 920-22 (1988) (intelligent knowledge is separate requirement for admissibility of confession).

It has been observed that the mentally retarded are “less likely to understand their Miranda rights and the consequences of waiving them, giving rise to concerns about the knowing intelligence of their waivers.” Paul T. Hourihan, “Earl Washington's Confession: Mental Retardation and the Law of Confessions,” 81 Va. L.Rev. 1471, 1492 (1995); see also *State v. Rosales*, 2002 WL 31516389, (Ohio App. May 07, 2002) (“lack of mental acuity can interfere with an accused's ability to give a knowing and intelligent waiver of his Miranda rights.”)

While there may be a level of deficiency so profound that the defendant is simply unable to make a knowing and intelligent waiver, the defendant's mental retardation is almost always simply one of the factors to be considered as part of the totality of the circumstances. See, e.g., *Fairchild v. Lockhart*, 744 F.Supp. 1429, 1453 (E.D.Ark.1989) (“no single factor, such as IQ, is necessarily determinative in deciding whether a person was capable of knowingly and intelligently waiving, and do [sic] so waive, the constitutional rights embraced in the Miranda rubric.”); *Harner v. State*, 997 S.W.2d 695, 699 (Tex. App. - Texarkana 1999) (“Evidence of mental retardation and mental impairment is a factor to be considered by the court in determining from the totality of the circumstances whether the accused voluntarily and knowingly waived his rights prior to confessing.”); *State v. Benton*, 759 S.W.2d 427, 431 (Tenn. Crim. App. 1988) (“no single factor such as age, education, or

even mental retardation is conclusive on the waiver issue.”); *State v. Rossiter*, 623 N.E.2d 645 (Ohio App. 1993) (an accused who is mildly mentally retarded is not *per se* incapable of waiving constitutional rights); *cf. State v. Mortley*, 532 N.W.2d 498, 503 (Iowa 1995) (“when it is clear the mental deficiency deprives the defendant of the *ability* to comprehend the meaning and effect of confessing, the confession is inadmissible.”)

In determining whether a waiver of rights was knowing and intelligent, an interrogating officer's ignorance of the defendant's impairments is irrelevant. *Commonwealth v. Daniels*, 321 N.E.2d 822, 827 n.5 (Mass. Supreme Judicial Court 1975) (a defendant's “capacity to make a knowing and intelligent waiver of his rights is unrelated to the existence or absence of police knowledge of his mental capacity.”); *cf. Rice v. Cooper*, 148 F.3d 747, 750 (7th Cir. 1998) (waiver of Miranda rights would not be valid if it should be apparent to officers that mental retardation precludes the suspect from understanding the rights); *State v. Rossiter*, 623 N.E.2d 645, 650 (Ohio App. 1993) (“Law enforcement officers questioning suspects they find to be “slow” must take extra precautions to ensure that any waiver of rights is done knowingly and with a full awareness both of the nature of the right being waived and of the consequences of the decision to abandon it.”)

There are numerous cases where it was recognized that a mentally retarded defendant could not have executed a valid waiver. For example, in *State v. Raiford*, 846 So.2d 913 (La. App. 2003), a mentally retarded defendant's waiver of Miranda rights was found to be invalid due to his likely inability to understand his constitutional rights. As one expert explained, the defendant, whose IQ was found to be somewhere between 55 and 72, lacked the necessary working memory to absorb information and the abstract reasoning ability to think about the information he did retain. Notably, two of the experts who evaluated the defendant believed it was possible for him to understand and effectively waive his rights if they were presented in a simpler fashion. However, because the interrogating officer persisted in utilizing legal jargon, even when the defendant indicated confusion, the defendant was not able to comprehend what he was being told and asked to do. As this case demonstrates, it is important to look at the precise language used by the interrogators, as well as the defendant's responses, in assessing whether the defendant actually understood his rights and what he was agreeing to forego.

The Tennessee Supreme Court has recognized that mentally retarded defendants “present additional challenges for the courts because they may be less likely to understand the implications of a waiver.” *State v. Blackstock*, 19 S.W. 3d 200, 208 (Tenn. 2000), citing *United States v. Murgas*, 967 F.Supp. 695, 706 (N.D.N.Y.1997). In *Blackstock*, the state supreme court reversed the lower courts' rulings that the mentally retarded defendant's waiver of his Miranda rights was knowing and intelligent. In reaching this conclusion, the court looked both to testimony about the defendant's mental limitations, as well as to the circumstances of the interrogation where the defendant had difficulty in expressing himself, misspelled his own name on the waiver form, and was unable to provide his social security number. The fact that the defendant had not comprehended his rights was further shown by his continued detention in jail for two weeks following his arrest, even though his conservator was an attorney, and the defendant had the funds to post bail. *See also People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990) (trial court properly suppressed confession of

defendant after finding that the defendant's "subnormal intelligence" precluded a knowing and intelligent waiver of his Miranda rights.); *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) (defendant with IQ between 65 and 69 did not knowingly and intelligently waive his rights); *State v. Benton*, 759 S.W.2d 427, 432 (Tenn. Crim. App. 1988) (defendant with full scale IQ of 47 "was unable to rationally and intelligently grasp the concept of waiver as posing a profoundly critical choice"); *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972) (district court erred in finding valid waiver of rights where uncontradicted testimony by teachers and others indicated that mentally retarded defendants were incapable of understanding their options or the consequences of their choices); *State v. Anderson*, 379 So.2d 735 (La. 1980) (mentally retarded 17-year-old with an IQ between 50 and 69 did not understand his rights and did not appreciate the possible consequences of waiving them, and thus was incapable of knowingly and intelligently waiving his Miranda rights, and his confession should have been suppressed.) *State v. Rossiter*, 623 N.E.2d 645 (Ohio App. 1993) (record supported lower court's finding that defendant with IQ of 65 did not have an awareness both of the nature of his rights, and of the consequences of waiving those rights).

The importance of expert testimony on the issue of a mentally retarded defendant's ability to understand his rights was highlighted in *Commonwealth v. Daniels*, 321 N.E.2d 822 (Mass. Supreme Judicial Court 1975). Although the record in the case did not provide a basis for finding that the defendant's confession should have been suppressed as a matter of constitutional law, the appellate court nevertheless used its state law powers to reverse the conviction after concluding that a new trial was required as a matter of justice. It explained:

We have arrived at our view that there should be a new trial because no evidence was presented at the voir dire or at the trial to aid the trier of fact in evaluating the impact of custodial interrogation on Daniels in these circumstances. He might be more suggestible and subject to intimidation than a person of normal intelligence. He might not be able to understand the consequences of his right to a lawyer or his right to remain silent. He might be inclined to state that he understands even when he does not. Many of Daniels's statements that he understood his rights were simple 'yes's' or 'yeah's,' and not reassuring explanations of his asserted comprehension. (Citation omitted.) Furthermore, the police officers testified that Daniels had difficulty understanding their explanations of his rights. On this record, in which the only evidence that Daniels committed the crime came from his confession and his admissions, a substantial injustice may have been done to him because of the absence of expert testimony on the crucial issues of voluntariness and waiver. We do not know enough about intelligence quotients (I.Q.) and mental retardation to rule conclusively on this question. Yet we do know enough to believe the matter needs further analysis.

(Footnote omitted.)

Id. at 827-828. For examples of expert testimony on this issue, see *State v. Mortley*, 532 N.W.2d 498, 502 (Iowa 1995) (in finding Miranda waiver invalid, court relied on testimony of psychologists who had substantial familiarity with mentally retarded defendant's intellectual development over the years); *People v. Bernasco*, 562 N.E.2d 958 (Ill. 1990) (psychologist testified that defendant could not understand certain Miranda terminology, and that he would probably have agreed to almost anything said to him if doing so would end his interrogation); *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981) (record contained uncontradicted testimony of a psychologist that it was unlikely Henry could have understood the complex waivers and their consequences.)

Oftentimes the waiver process involves the defendant first expressing confusion about his rights as they are read to him. After receiving additional explanations from the officer, the defendant then claims to understand. It is extremely common, however, for mentally retarded individuals to feign comprehension.⁷ Thus, as recognized by the Iowa Supreme Court, the fact that Miranda warnings were "exhaustively" laid out fails to establish that the defendant "understood the basic concept of waiver and the immediate and ultimate consequences of confessing." *State v. Mortley* 532 N.W.2d at 503.

In a recent empirical study of how well mentally retarded persons are able to comprehend Miranda warnings, the authors found that "[f]or mentally retarded people, the Miranda warnings are words without meaning." Morgan Cloud, "Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects," 69 U. Chi. L. Rev. 495 (2002). The data from the study provided the disturbing following suggestion:

that the number of people to whom the Miranda warnings are meaningless is much larger than previously acknowledged within the criminal justice system. The warnings are incomprehensible not merely to those suffering the most severe retardation, as many judicial opinions assume. They also are incomprehensible to people whose mental retardation is classified as mild, as well as some people whose "intelligence quotient" (IQ) scores exceed 70, the number typically used to demarcate mental retardation.

Id. at 501. Further, the data suggested that the "'totalities' analysis employed by the courts is incapable of identifying suspects competent to understand the Miranda warnings." *Id.* at 502.

Counsel should carefully review and utilize studies, such as the one conducted by Cloud, in order to effectively challenge the validity of a waiver of rights by a mentally retarded defendant.

⁷ See, e.g., *State v. Mortley* 532 N.W.2d at 502, where the treating psychologist stated: "When [the defendant] is asked if he understands something, he will almost automatically respond affirmatively--'Yes, I understand that.' And a lot of times the case is that he doesn't understand that, and he's kind of embarrassed to admit a lack of knowledge...."

For a more complete list of cases where mental retardation has been found to preclude a valid waiver of rights, see "Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession," 8 A.L.R.4th 16 (1981 & Supp.1999).

3.5 *Guilty Pleas*

As noted above, the Supreme Court in *Godinez v. Moran*, 509 U.S. 389 (1993), rejected the view that a higher competence standard applies for pleading guilty than for standing trial. It acknowledged, however, that a valid guilty plea requires more than simply competence:

A finding that a defendant is competent to stand trial . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. *Parke v. Raley*, 506 U.S. 20, 28 -29 (1992) (guilty plea); *Faretta, supra*, at 835 (waiver of counsel). In this sense, there is a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

Id. at 401-402.

It is constitutional error for a trial court to accept a guilty plea without an affirmative showing that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea is not considered intelligent where the accused does not understand the nature of the constitutional protections that he is waiving, *see Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938), or because he has such an incomplete understanding of the charges that the plea cannot constitute an intelligent admission of guilt. *Henderson v. Morgan*, 426 U.S. 637, 645 n. 13 (1976).

Regarding the defendant's understanding of his constitutional rights, see the section above on knowing and intelligent waivers. As for the second situation, the *Henderson* case is illustrative. *Henderson* involved a mentally retarded defendant who was charged with first degree murder. The defendant had entered the bedroom of his employer intending to collect his wages. When the employer awoke and began screaming, the defendant stabbed her with the knife he had brought with him. After Henderson's attorneys unsuccessfully attempted to have the charge reduced to manslaughter, Henderson accepted their advice to plead guilty to second degree murder. In habeas corpus proceedings, the guilty plea was found to be involuntary because no one had explained to the defendant that intent was an element of second degree murder. The Court acknowledged that it was probably fair to presume in a typical case, defense counsel had explained the nature of the offense to the defendant in sufficient detail to provide the accused with notice of what he was being asked to admit. Here, however, the attorneys testified that they had not informed the defendant of the intent element of second degree murder, having decided that the defendant would not be interested in such details. This oversight by defense counsel was apparently due to the

defendant's "unusually low mental capacity." Because intent was a critical element of the crime to which the defendant had pleaded guilty, the plea could not stand.

Similarly, in *Gaddy v. Linahan*, 780 F.2d 935 (11th Cir. 1986), the federal court was concerned that a mentally retarded defendant had not been adequately informed about the elements of malice murder prior to pleading guilty. The court explained that while "a rote reading of the indictment or charging document may be sufficient to put a defendant on notice of the elements of the charge in some circumstances (citation omitted), it is inadequate *when the defendant has minimal intelligence*, the charge is complex, and the sentence to be imposed is substantial." *Id.* at 945 (emphasis added). In addition, "conclusory responses by a defendant and his counsel to a court's inquiry into whether the defendant 'understands' the charge is not sufficient to establish that the defendant actually has knowledge and understanding, *particularly when he possesses minimal intelligence.*" *Id.* (emphasis added); *see also United States v. Masthers*, 539 F.2d 721, 728-29 (D.C. Cir. 1976)⁸ (recognizing that the standard colloquy for determining whether a guilty plea is knowing and voluntary may be inadequate in cases where the defendant is mentally retarded.) On the record before it, the court in *Gaddy* was unable to find that the plea was knowing and intelligent. While the defendant did discuss the facts of the crime with his attorney, and the attorney then arrived at the conclusion that the defendant was liable for malice murder based on his presence at the time of the killing, it was unclear what information about the charges was conveyed to the defendant. At the time of the plea, there was no discussion about the elements of malice murder. Given the defendant's "lack of intelligence, his expressed confusion [during the plea colloquy], the complexity of the case, and the extraordinary consequences of pleading guilty to malice murder," the court found that "a more thorough explanation of the nature of the crime and its elements was required to satisfy the tenets of due process." *Id.* at 946. The case was remanded for an evidentiary hearing to determine "what, if any, information [defendant] received and understood, prior to pleading guilty, concerning the elements of malice murder." *Id.*

These cases demonstrate a frequent problem with representing mentally retarded defendants. Because of their limitations, counsel may withhold information rather than taking the extra time needed to ensure that the defendant is fully apprised of, and able to comprehend, the nature of the charges and the legal options.

Another danger with mentally retarded defendants is that a plea will be arranged on the basis of an attorney's misunderstanding about the facts of the crime. It is well documented that mentally retarded individuals tend to bias their responses towards what they believe an authority figure wants to hear. *See, e.g., James W. Ellis and Ruth A. Luckasson, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. L. Rev. 414, 428 (1985).* In the most extreme situation, this may result in a completely false confession, a topic discussed in more detail below. In a less dramatic situation, a mentally retarded defendant may confirm a version of the crime that defense counsel hypothesizes, rather than provide his own

⁸ *Masthers'* holding that the competency standard for pleading guilty is more exacting than the standard for competency to stand trial was overruled in *Godinez v. Moran*, 509 U.S. 389, 395 n. 5, 396-402 (1993).

account of what happened. The distorted story may be devoid of defenses that would be available had the interviewer been more practiced in questioning mentally retarded individuals.

Because mentally retarded individuals are often predisposed to answer questions in a way that is designed to conceal their lack of understanding, “even when [their] language and communication abilities appear to be normal, the questioner should give extra attention to determining whether the answers are reliable.” *Id.* at 428. “[I]n cases involving defendants with subnormal intelligence, special precautions are required to offset the many factors which propel the system toward efficient outcomes rather than reliable ones.” Bonnie, “The Competence of Criminal Defendants With Mental Retardation to Participate in Their Own Defense,” 81 *J. Crim. L. & Criminology* 419, 439 (1990).

4 COERCED CONFESSIONS

A criminal conviction founded in whole or in part upon an involuntary confession violates the Due Process Clause. *Rogers v. Richmond*, 365 U.S. 534. This is true regardless of the truth or falsity of the confession. *Id.* “A defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.” *Jackson v. Denno*, 378 U.S. 368, 380 (1964). Where an involuntary confession was admitted at trial, reversal is required unless the government can establish that the jury’s consideration of the confession was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

In assessing whether a confession was coerced, thereby rendering it involuntary, courts look to the totality of circumstances, consideration being given to both the details of the interrogation and the characteristics of the accused. One unquestionably relevant characteristic is mental retardation. *See, e.g., Fikes v. Alabama*, 352 U.S. 191, 198 (1957) (considering low intelligence of defendant as one factor supporting finding that confession was involuntary); *Smith v. State*, 779 S.W.2d 417, 429 n. 8 (Tex. Crim. App. 1989) (evidence of mental retardation and mental deficiency is a factor, but not determinative, in ascertaining the voluntariness of a confession); *State v. Davis*, 780 P.2d 807 (Ore. 1989) (intelligence of accused is one factor to consider in determining whether confession was voluntary); *People v. Cipriano*, 429 N.W.2d 781 (1988) (recognizing intelligence level as one factor that a trial court should consider in determining whether a statement is voluntary).

On the other hand, “while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry.” *Colorado v. Connelly*, 479 U.S. 157, 165 (1986). Instead, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Id.* at 167.

Although mental retardation does not in and of itself prevent voluntary interrogations and confessions,⁹ it is well known that “mentally retarded people may be less likely to withstand police coercion or pressure due to their limited communication skills, their predisposition to answer questions so as to please the questioner rather than to answer the question accurately, and their tendency to be submissive.” *Van Tran v. State*, 66 S.W.3d

⁹ *See, e.g., Vasquez v. State*, 163 Tex.Crim. 16, 288 S.W.2d 100, 108-09 (1956) (a confession is not inadmissible merely because the defendant, who is not insane, is of less than normal intelligence); *State v. Davis*, 780 P.2d 807 (1989), rev. den. 787 P.2d 888 (1990) (trial court's reliance on defendant's "dull normal" intelligence level to find confession involuntary was misplaced); *State v. Hickam*, 692 P.2d 672 (1984) (court concluded that defendant's statements were voluntary and rejected his argument that, "because he is mentally retarded, his will to resist was overcome by the mere fact of questioning itself"); *Flowers v. State*, 461 S.E.2d 533 (Ga. 1995) (expert testimony that defendant's mental age was eight years was insufficient in and of itself to establish that confession was involuntary).

790, 806 (Tenn. 2001), quoting Lyn Entzeroth, "Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty," 52 Ala. L.Rev. 911, 917 (2001); *see also* Mary D. Bicknell, "Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts," 43 Okla. L.Rev. 357, 362 (1990) ("[T]he mentally retarded individual is particularly vulnerable to any police coercion used in obtaining confession."); *United States ex rel. Rush v. Ziegele*, 474 F.2d 1356 (3rd Cir. 1973) (low mental capacity is important in determining what amount of coercion would render a confession involuntary); *Roark v. State*, 644 N.E.2d 565 (Ind. 1994) (recognizing that a person's mental condition is relevant to the issue of susceptibility to police coercion).

There are many cases where confessions have been found to be involuntary in part because of the defendant's limited intelligence. In *Reck v. Pate*, 367 U.S. 433 (1961), for example, the defendant's "youth, *his subnormal intelligence*, and his lack of previous experience with the police" were important considerations in assessing whether "overbearing police tactics" were coercive. *Id.* at 442 (emphasis added). The fact that the defendant had "at least borderline mental retardation," (*id.* at 443) made the totality of coercive circumstances even more aggravated. Similarly, in *Culombe v. Connecticut*, 367 U.S. 568, 625 (1961), a mentally retarded defendant's confession was found to be involuntary. Justice Frankfurter, who announced the judgment of the Court, noted that the defendant's "mental equipment," which rendered him "suggestible and subject to intimidation," lessened his powers of resistance to the prolonged, systematic interrogation. The fact that Culombe had a criminal record was not seen to add to his ability to withstand coercive behaviors given his mental limitations. Rather, the "value" of Culombe's "considerable criminal experience . . . as a school for toughening his resistance, [had to] be duly discounted in light of his subnormal mental capacities." *Id.* at 625 fn. 85.

In *State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002), the following set of circumstances were found to render a confession involuntary: an employee of Department of Children's Services was present during the interrogation, the mentally retarded defendant trusted this employee, the employee should have been aware of defendant's limitations, the questions posed to defendant were suggestive, and one officer offered defendant a cookie during the interview. *See also State v. Benton*, 759 S.W.2d 427, 432 (Tenn. Crim. App. 1988) (confession of mentally retarded defendant found involuntary where the defendant was taken into custody, transported in a law enforcement vehicle to the Sheriff's Department, and subjected to questioning in spite of his retardation and the expressed desire of his father to be with him during the interrogation.); *Aguilar v. State*, 751 P.2d 178 (N.M. 1988) (in finding that a confession was involuntary, court took into consideration that defendant, due to subnormal intelligence (IQ of 70) and mental illness, unquestionably had difficulty in appreciating the meaning of the assurances given to him by the interrogator and in distinguishing whether a deal had been made.); *Prince v. State*, 584 So.2d 889 (Ala. Crim. App. 1991), *abrogated in part on other grounds*, *McLeod v. State*, 718 So.2d 727 (Ala. 1998) (where defendant's initial statements were deemed involuntary due to police officer's improper inducements and false statements, the Court found that a three day interval before defendant's next inculpatory statements did not

negate the effect of the officer's previous actions in part because of testimony concerning defendant's limited intellectual functioning.)

For additional cases on coerced confessions, see "Mental Subnormality Of Accused As Affecting Voluntariness Or Admissibility Of Confession," 8 ALR4TH 16.

5 FALSE CONFESSIONS

In *Atkins v. Virginia*, 536 U.S. at 320 (2002), one of the justifications for banning the execution of mentally retarded defendants was the heightened risk such defendants face of having their underlying conviction premised on a false confession. There are many documented cases of mentally retarded individuals confessing to crimes they in fact did not commit. See, e.g., Richard Leo & Richard Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 J. Crim. L. & Criminology 429 (1998); see also Richard Conti, "The Psychology of False Confessions," 2 J. of Credibility Assessment and Witness Psychology 14, 25 (1999) (observing that mentally retarded individuals, like children, are likely more at risk for providing false confessions.)

In any case with a defendant of sub-average intelligence who has confessed, counsel must take special care in assessing the accuracy of the defendant's statements.

In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Supreme Court held that criminal defendants have the right to present to the trier of fact evidence concerning the circumstances in which a confession was made in order for the jury to be able to judge the credibility of the confession. This right exists even where the confession has been found to be "voluntary." In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002), the Kentucky Supreme Court found a violation of *Crane* where a mentally retarded defendant was precluded from presenting evidence that he confessed only after being informed that he had failed a polygraph examination. Although state law generally precluded references to polygraph results, the Kentucky Supreme Court found that "the defendant's right to present a defense trump[ed] [the court's] desire to inoculate trial proceedings against evidence of dubious scientific value." *Id.* at 39.

The crux of Appellant's defense is that he was coerced and coached into a confession by the interrogation techniques--including the use of a polygraph examination--employed by Lt. Payton and Det. Kearney. Appellant contends that when the investigating officers informed him that he had failed the polygraph examination and that he had lied to Lt. Payton in the process, he--*in large part because of his limited intellectual capabilities . . .*--confessed to a crime he did not commit. By preventing Appellant from making any reference to the polygraph examination, the trial court pulled the proverbial rug out from under Appellant's defense and left Appellant unable to present the jury with the factual circumstances that he alleged caused him to confess falsely.

Id. (emphasis added.)

In addition, the Kentucky Supreme Court concluded that the trial court erred in excluding testimony from a mental health expert as to her opinion that the defendant's limited mental capacity could have caused him to confess falsely to a crime that he did not commit. The

trial court erroneously excluded the testimony on the ground that it went to the ultimate issue in the case, that is, the defendant's guilt or innocence. The court remanded the case for reconsideration of whether the testimony was sufficiently relevant and reliable for admission. *See also Holloman v. Commonwealth*, 37 S.W.3d 764, 767 (Ky. 2001) (evidence that defendant was prone to manipulation, suggestion, and intimidation because of his mental retardation "should not have been excluded on the basis of relevancy because it was permissible evidence bearing directly on the reliability of his statements."); *Pritchett v. Commonwealth*, 557 S.E.2d 205, 208 (2002) (psychiatric testimony connecting mental retardation and false confessions "presented information on subjects unfamiliar to jury that would assist it in determining the reliability of [the defendant's] confession.")

Similarly, in *Miller v. State*, 770 N.E.2d 763 (Ind. 2002), a murder case involving a mentally retarded defendant who had confessed to the crime, it was found that the defendant's right to present a defense was violated by the trial court's exclusion of expert testimony on false confessions. Among the expert's assertions, which were made outside the presence of the jury, was that the "mentally handicapped are more suggestible and more likely to give a false confession," stating that they are "easier to manipulate," less able to appreciate long-range consequences, easier to persuade to see the facts as asserted by the interrogator, and easier "to get to give both true and false confessions." *Id.* at 772. In finding reversible error, the Indiana Supreme Court determined that the excluded testimony "would have assisted the jury regarding the psychology of relevant aspects of police interrogation and the interrogation of mentally retarded persons, topics outside common knowledge and experience." *Id.* at 774. The error was found to be prejudicial in light of the prosecutor's heavy reliance on the defendant's videotaped statement, and despite evidence that the defendant's fingerprint was found in what appeared to be blood on a plastic bag at the crime scene.

For further cases discussing this topic, see "Admissibility Of Expert Testimony Regarding Reliability Of Accused's Confession Where Accused Allegedly Suffered From Mental Disorder Or Defect At Time Of Confession," 82 ALR5th 591.

6 CRIMINAL RESPONSIBILITY

Under early common law, it was debated whether mentally retarded defendants, or “idiots” as they were then sometimes described, should be fully culpable for criminal actions. One approach to retarded individuals is reflected by *In re State v. Richards*, 39 Conn. 591 (1873), where the court adopted in part Lord Hale’s famous rule which was to the effect that to be responsible for a crime, a defendant must have the capacity and understanding of a normal child of fourteen years. Under this system, attempts were made to equate mentally retarded adult defendants with children, who were not deemed criminally culpable.

In time, this approach yielded to, and was largely replaced by, guilty but mentally ill and insanity defenses, each of which is described below. Thus, in modern times, the mere fact that a defendant harbors a mental age commensurate with that of a child does not absolve a defendant of criminal responsibility. See, e.g., *Brogdon v. Butler*, 824 F.2d 338, 341 (5th Cir. 1987) (“Mental retardation does not constitute insanity or incapacity to know the difference between right and wrong. It is only the latter disability, not the former, that serves as a defense to conviction and also to punishment.”); *State v. Schilling*, 112 Atl. 400 (N.J. 1920) (“The responsibility of an adult charged with commission of a crime is not to be measured by a comparison of his mental ability with that of an infant of twelve years, or in any other way. The true test is, does he appreciate the nature and quality of his act, and that it is wrong? and if he does, he is responsible to the law, without regard to his other mental deficiencies.”); *People v. Farmer*, 87 N.E. 457 (N.Y. 1909) (“That the defendant had an inferior and untrained intellect is indisputable, and that her moral perceptions were of a low order is clear. The jury were not required to pass upon the quality and strength of her intellect, or upon her moral perceptions, except as such questions affect the general question of the defendant’s knowledge, at the time of the homicide, of the nature and quality of the act she was doing. A weak and disordered mind is not excused from the consequences of crime.”)

Under modern law, mental retardation remains important to many complete or partial defenses.

6.1 *Insanity Defense*

Most states retain an insanity defense, even though the Supreme Court has not held that such a defense is constitutionally mandated. *Foucha v. Louisiana*, 504 U.S. 71, 88-89 (“The Court does not indicate that States must make the insanity defense available.”) In *Leland v. State*, 343 U.S. 790 (1952), the Supreme Court ruled that the Constitution does not prohibit placing the burden on a defendant to prove insanity beyond a reasonable doubt. It reached this conclusion despite the fact that the majority of jurisdictions employed a more defendant-protective burden of proof.

In jurisdictions that do permit an insanity defense, mental retardation may be the basis for a finding that the defendant was insane, and therefore not criminally culpable, at the time of the crime. *See, e.g., United States v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976) (“It is accepted in this jurisdiction that mental retardation is a mental defect that will support an insanity defense.”)

The definition of insanity varies among the states. The traditional M’Naghten insanity test asks whether the accused party “was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843). In England, the M’Naghten test has been clarified to mean knowledge that an act is legally wrong. In the United States, it is not clearly resolved whether knowledge that an act is morally wrong suffices to defeat an insanity defense. *State v. Morgan*, 863 So.2d 520, 524 fn. 5 (La. 2004). Some jurisdictions utilizing the M’Naghten test have supplemented it with what is known as the “irresistible impulse” rule, under which a defendant whose mental disease or defect prevents him from controlling his conduct is also not criminally responsible.

The Model Penal Code contains a more defendant-friendly version of the M’Naghten test. First, it changed the requirement of “knowing” to “appreciating.” Second, rather than demanding a complete lack of capacity, it required only that the defendant lack a “substantial capacity” to appreciate the criminality of his conduct. Finally, it added a volitional prong which exonerated defendants who lacked substantial capacity to control their conduct. Model Penal Code § 4.01 cmt. 3 (1985). In the late 1980s, in response to dissatisfaction with highly publicized insanity verdicts, some jurisdictions that had followed the Model Penal Code amended their statutes to eliminate the volitional requirement. According to a recent law review article, seventeen jurisdictions include volitional capacity in their insanity defense.¹⁰ John H. Blume, “Killing the Non-willing,” 55 S.C. L. Rev. 93, 109 (2003). *Compare Kennedy v. Commonwealth*, 2004 WL 41717 (Ky. App. Jan. 9, 2004) (“A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental illness or mental retardation, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.”) and *People v. Jackson*, 2003 WL 22439719 (Mich. App. Oct. 28, 2003) (a jury can find a defendant legally insane, if he is mentally retarded, and lacks the capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law.) with *State v. Kelly*, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (mental retardation “must render the appellant unable to appreciate the nature or wrongfulness of her acts” in order for an insanity defense to succeed).

¹⁰ *See* Ark. Code Ann. § 5-2-312 (Michie 1997); Conn. Gen. Stat. Ann. § 53a-13 (West 2001); Ga. Code Ann. § 16-3-2 (1999); Haw. Rev. Stat. Ann. § 704-400 (Michie 1999); Ky. Rev. Stat. Ann. § 504.020 (Michie 1999); Md. Code Ann., Health-Gen. I § 12-108 (2000); Mich. Comp. Laws Ann. § 768.21a (West 2000); Or. Rev. Stat. § 161.295 (2001); Vt. Stat. Ann. Tit. 13, § 4801 (1998); Wis. Stat. Ann. § 971.15 (West 1998); Wyo. Stat. Ann. § 7-11-304 (Michie 2003); *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); *State v. Cegelis*, 638 A.2d 469 (R.I. 1979); *State v. White*, 270 P.2d 727 (N.M. 1954); *State v. Johnson*, 399 A.2d 469 (R.I. 1979); *Thompson v. Commonwealth*, 70 S.E.2d 284 (Va. 1952); *State v. Meyers*, 222 S.E.2d 300 (W. Va. 1976), overruled on other grounds, 461 S.E.2d 163 (W. Va. 1995).

6.2 *Absence of Requisite Mens Rea*

The Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). Thus, the burden is on the state to establish that the defendant possessed any mens rea element of the charged crime. Further, the defendant’s right to due process includes “the right to a fair opportunity to defend against the State’s accusations,” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), including on the issue of mens rea.

Mental retardation is often relevant to the question of whether or not the defendant harbored the mental state necessary for conviction of the alleged crime. Impulsivity, for example, is a common characteristic of the mentally retarded. Testimony about the defendant’s mental retardation could establish reasonable doubt on elements such as premeditation and deliberation, and specific intent.

Model Penal Code Section 4.02(1) reads as follows: “Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.” Similarly, American Bar Association Standards for Criminal Justice, Standard 7-6.2 states: “Evidence, including expert testimony, concerning the defendant’s mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible.”

Jurisdictions differ as to what evidence may be presented to demonstrate that the defendant did not have the requisite mental state for conviction of the charged crime. In *United States v. Childress*, 58 F.3d 693, 726 (D.C. Cir. 1995), the exclusion of evidence concerning a defendant’s mental retardation was found to constitute error, since such evidence was “potentially material as to whether [the defendant] entertained the specific intent to further the purposes of the [charged] conspiracy . . .” See also *Becksted v. People*, 292 P.2d 189, 194 (Colo. 1956) (“A defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency as bearing upon his capacity to form the specific intent essential to first degree murder.”); *State v. Clokey*, 364 P.2d 159, 165 (Idaho 1961) (a jury may consider evidence tending to show an abnormal mental or nervous condition in determining whether or not the defendant, at the time of the alleged offense, had the specific intent which is an essential ingredient of the crime charged); *People v. Saille*, 820 P.2d 588 (Cal. 1991) (if a crime requires a particular mental state, the Legislature may not deny the defendant the opportunity to prove he did not actually possess that state.); *Hoey v. State*, 536 A.2d 622, 632 n.5 (Md. App. 1988) (disapproving opinion which indicated that a criminal defendant is not entitled to present evidence of his impaired mental condition for the limited purpose of showing the absence of mens rea.); *State v. Hines*, 455 A. 2d 314 (Conn. 1982) (evidence with regard to mental capacity is relevant in any case where specific intent is an essential element of the crime charged.)

Some jurisdictions, on the other hand, preclude expert testimony about a defendant’s mental state unless the defendant raises an insanity defense. See, e.g., *People v. Carpenter*,

627 N.W.2d 276, 285 (Mich. 2001) (“the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent.”); *Kight v. State*, 512 So.2d 922 (Fla. 1987) (evidence of mental retardation was inadmissible during the guilt phase of a first-degree murder case in the absence of a defense of insanity); *Brown v. Trigg*, 791 F.2d 598 (7th Cir. 1986) (trial court did not abuse discretion by excluding evidence of defendant's IQ score, which defendant argued supported her defense that she did not act knowingly); *Funk v. Commonwealth*, 2003 WL 21524686 (Va. App. July 8, 2003) (where defendant sought to establish that his mental retardation rendered him incapable of fully comprehending the fragility of the victim, or the consequences of his conduct, the trial court could not consider expert opinion of the defendant's mental state.); *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985) (the use of expert testimony to show by circumstantial evidence that the requisite specific intent did not in fact exist, infringes upon the factfinder's prerogative to determine the ultimate fact in issue.); *see also State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982) (finding psychiatric evidence inadmissible on the mens rea issue); *State v. Wade*, 375 So.2d 97 (La.1979), *cert. denied* 445 U.S. 971 (1980) (due process is not offended by the Louisiana rule that a defendant cannot rebut evidence of specific intent by presentation of psychiatric testimony without pleading not guilty by reason of insanity.)

The refusal to permit evidence of an impaired mental condition short of insanity has been criticized, and should be challenged as unconstitutional. *See, e.g., Chestnut v. State*, 538 So.2d 820, 828 (Fla. 1989) (Overton, J., dissenting) (the majority holding, namely that expert testimony regarding brain damage may be barred when offered to establish the defendant could not or did not harbor the requisite intent, where evidence of intoxication may be presented on this issue, may violate the equal protection and due process clauses of both the United States and Florida Constitutions because no reasonable classification or distinction to justify different treatment exists.); *State v. Noel*, 133 A. 274, 285 (1926) (“The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient rule to the case of a drunkard, whose mental faculties are disturbed by his own will and conduct, than to the case of a poor demented creature afflicted by the hand of God.”); *State v. Bouwman*, 328 N.W.2d 703, 706 (Minn.1982) (Wahl, J., dissenting) (“A defendant charged with murder in the first degree must be permitted to offer relevant and competent expert psychiatric opinion testimony on the issues of premeditation and specific intent. To hold otherwise would be to violate the defendant's constitutional right to present evidence.”); Joshua Dressler, “Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse,” 75 J. Crim. L. & Criminology 953, 953 n.6 (1984) (due process precludes the exclusion of probative information which directly impacts upon the requisite mens rea; presentation of evidence regarding diminished capacity may also be constitutionally protected pursuant to the Sixth Amendment right to introduce competent and relevant evidence). *Compare Montana v. Egelhoff*, 518 U.S. 37 (1996) (O'Connor, J., dissenting) (statute which precluded jury from considering defendant's intoxicated state in determining whether defendant “purposely” or “knowingly” caused the death of another violated due process) with *Montana v. Egelhoff*, 518 U.S. 37 (1996) (Ginsburg, J., concurring in judgment) (Montana statute did not violate due process because it redefined mens rea element of crime rather than excluded relevant evidence).

Courts that have upheld exclusion of mental impairment evidence often rely on *Fisher v. United States*, 328 U.S. 463 (1946), where the Supreme Court ruled that the District of Columbia was not constitutionally *required* to recognize and instruct on a defense of diminished responsibility. Even assuming the ruling remains good law, it should not be seen to preclude evidence presented to negate the mens rea element of the charged crime. In *Mott v. Stewart*, 2002 WL 31017646 (D. Ariz. Aug. 30, 2002), for example, an Arizona federal court determined that a trial court violated a murder defendant's constitutional right to present a defense when it prevented her from presenting expert testimony about battered woman syndrome (BWS) to negate the element of mens rea and to rebut the state's evidence. The *Mott* case concerned a woman who was accused of child abuse and first-degree murder, after she left her children in the care of her boyfriend, despite knowing he was abusive. The charges involved specific intent crimes of omission based on Mott's failure to protect her children from her boyfriend. In her defense, she sought to present evidence of BWS to negate the mens rea element of the charged offenses, and to rebut the state witnesses' testimony that she had always confronted her boyfriend. In affirming the exclusion of the expert testimony, the state supreme court had relied on *United States v. Fisher*, 328 U.S. 463 (1946). The federal court found *Fisher* distinguishable. There, the question was whether a jurisdiction was required to offer a diminished responsibility defense, which the federal court found to be distinct from presenting testimony to explain the defendant's behavior, and to negate the prosecution's evidence that she had knowingly or intentionally neglected her children.

Therefore, if counsel is prohibited from presenting expert testimony on mental retardation intended to negate the mens rea requirement, constitutional objections should be lodged.

Even in jurisdictions where expert testimony is prohibited, counsel may be able to introduce lay testimony demonstrating such things as the defendant's limited ability to plan, or his tendency to follow others. See, e.g., *State v. Cooley*, 544 N.E.2d 895 (Ohio 1989) (reaffirming rule that psychiatric testimony unrelated to insanity may only be offered at sentencing phase of capital trial, but noting that lay witnesses could testify that defendant was too intoxicated to form specific intent).

For further information on the status of diminished capacity defenses, see 22 A.L.R.3d 1228.

6.3 Affirmative Defenses (Other than Insanity)

Mental retardation may also be relevant to affirmative defenses other than insanity or diminished capacity. For example, in *State v. Davidson*, 2003 WL 151202 (Tenn.Crim.App. Jan. 22, 2003) (unpublished), a homicide case, the Tennessee Court of Criminal Appeals recognized that mental retardation was relevant to the subjective component of self-defense (an honest belief that the danger was real), as well as to the lesser included offense of voluntary manslaughter (whether the killing was actually committed in a state of passion). The defendant had unsuccessfully sought to introduce expert testimony about his mild mental retardation and undifferentiated schizophrenia. As to the defendant's mental retardation, the expert had explained outside the presence of the

jury that mentally retarded individuals "are somewhat slower in terms of their capacity to process information", and that "it is difficult for them to process information quickly." The expert further noted that this type of deficit would be worse in a situation where there is a lot of stress and emotion. The appellate court concluded that such testimony was erroneously excluded, although the error was harmless on the facts of the case.

6.4 *Guilty But Mentally Ill or Mentally Retarded*

A modern development is the verdict of guilty but mentally ill or mentally retarded. What this tends to mean, in jurisdictions that permit such a verdict, is that the defendant's mental impairment will not preclude a conviction, or even lessen the sentence, but will instead require that the defendant receive appropriate treatment while in custody. These laws have been subject to much criticism. *See, e.g.*, Christopher Slobogin, "The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come," 53 *Geo. Wash. L. Rev.* 494 (1985); Comment, "The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle," 10 *Notre Dame J.L. Ethics & Pub. Pol'y* 341 (1996).

7 CHALLENGES TO PRIOR CONVICTIONS AND UNADJUDICATED CHARGES OFFERED IN AGGRAVATION

As discussed above, mentally retarded defendants are at special risk of giving involuntary or false confessions, and making unintelligent waivers of their rights. Additionally, many commentators and experts believe that the criminal justice system under-identifies mentally retarded defendants who are incompetent to stand trial, or who have viable defenses that go unexplored. If a defendant has prior convictions, counsel must carefully review the record to determine whether the convictions were constitutionally flawed, or otherwise unreliable. A death sentence based in part on an invalid prior conviction violates the Eighth Amendment. *Johnson v. Mississippi*, 486 U.S. 578 (1988).

Some states limit challenges to prior convictions. For example in *Garcia v. Superior Court*, 928 P.2d 572 (Cal. 1997), the state supreme court ruled that a criminal defendant may *not* challenge a prior conviction via a motion to strike on the ground of ineffective assistance of counsel in the course of a current prosecution for a *noncapital* offense. Challenges to prior convictions are generally limited to instances where there was a complete denial of counsel. *See also Lackawanna County District Attorney v. Coss*, 532 U.S. 394 (2001) (similar ruling in regard to federal habeas challenge to current sentence based on unconstitutional prior conviction that was the basis for the sentence enhancement.) Notably, however, the California Supreme Court treats capital cases differently. In *People v. Horton*, 906 P.2d 478, 520 (Cal. 1995), the court found that “the special need for reliability in the death penalty context is undermined whenever a prior conviction (upon which a death judgment is based) is tainted by a fatal fundamental constitutional defect.” It therefore held: “[I]n the context of a capital case, a collateral challenge to a prior conviction that has been alleged as a special circumstance may not properly be confined to a claim of Gideon error, but may be based upon at least some other types of *fundamental* constitutional flaws.” *Id.* Similarly, *Coss*, a non-capital case, should not be read to limit challenges to prior convictions used in capital cases.

Where evidence of unadjudicated crimes is offered against a defendant with sub-average intellectual functioning as aggravation, counsel must investigate the circumstances surrounding those crimes as extensively as the capital offense itself. The mens rea issues noted above may be applicable, or the inculpatory statements may be subject to suppression or challenge.

8 BEHAVIOR/APPEARANCE POST-CRIME OR IN COURTROOM

In the *Atkins* decision, the Supreme Court expressly noted that mentally retarded defendants may be unfairly judged during sentencing proceedings because their demeanor “may create an unwarranted impression of lack of remorse for their crimes . . .” *Atkins v. Virginia*, 536 U.S. at 320-21. Counsel may need to present expert testimony that addresses the defendant’s behavior during the trial, as well as descriptions of his demeanor after the crime. This may be particularly important given the frequently misleading portrayal of mentally retarded individuals in films and on television as innocent and excessively loveable.

Another common problem in cases involving mentally retarded defendants is the defendant’s efforts to mask his or her disabilities. For example, the defendant may take copious notes in order to appear to be following and actively participating in the trial. This can lead the jury to wrongly conclude that the defendant is not significantly impaired. To the extent that counsel can control such behaviors, counsel should do so. If counsel cannot prevent the defendant from giving a false impression of intelligence, expert or lay testimony may be necessary to counter the defendant’s actions or appearance.

9 CUSTODIAL ADJUSTMENT

In *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989), the Supreme Court recognized that a mentally retarded defendant may not be as morally culpable as a “normal” adult because mentally retarded individuals are typically less able to control impulses, and to evaluate the consequences of their conduct. Unfortunately, these same characteristics can lead a jury to conclude that a defendant is likely to be dangerous in the future. *Id.* at 323. Thus, evidence of subnormal intelligence can be a “two-edged sword.” *Id.* at 324.

To ensure that subnormal intelligence is not transformed into a factor weighing in favor of a death sentence, counsel should develop and present evidence that will establish that the structured environment of a prison is precisely the type of place in which the defendant can peacefully thrive. *See, e.g., People v. Robertson*, 767 P.2d 1109 (Cal. 1989) (evidence presented of mild mental retardation, along with lay witness testimony demonstrating that the defendant positively adjusted to incarceration).

If counsel is relying upon evidence that the defendant is a “follower” in an effort to reduce culpability for the capital offense or prior crimes, counsel must make special efforts to demonstrate to the sentencer that this characteristic is not likely to render the defendant dangerous in prison. For example, the sentencer may fear that the defendant could become a pawn of violent and manipulative inmates. One possible means of accomplishing this is through evidence of probable conditions of confinement for the defendant. In Texas, for example, there is the Mentally Retarded Offender Program. Under this program mentally retarded inmates are housed separately from other inmates in order to ensure, among other things, protection from prisoners who could manipulate or otherwise abuse the mentally retarded inmates. Counsel must thoroughly investigate the relevant prison system in order to determine whether similar protections would be available.

10 POST-CONVICTION COMPETENCE

A mentally retarded inmate may be unable to assist post-conviction counsel and/or may be incompetent to be executed.

10.1 Post-Conviction Proceedings

At least one Florida death row inmate had been found, pre-*Atkins*, to be incompetent to proceed in post-conviction proceedings due to active psychosis and mental retardation. *Florida Department of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001); cf. *In re Dunkle*, S014200 (Cal. Supreme Court July 24, 2002) (granting motion for appointment of guardian ad litem to incompetent death row inmate for the purpose of preparing and pursuing habeas corpus petition). If mental retardation or sub-average intellectual functioning interferes with the ability of an inmate to assist counsel in litigating challenges to his conviction and sentence, a request to stay proceedings should be considered. See, e.g., *Rohan ex rel. Oscar Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003) (staying federal habeas proceedings pending restoration of competency where counsel for incompetent capital habeas petitioner raised claims that could potentially benefit from the defendant's ability to communicate rationally with counsel).

10.2 Competence to Be Executed

“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.” *Ford v. Wainwright*, 477 U.S. 399, 410. *Ford* was a plurality opinion and it did not resolve what constitutes insanity to be executed. In his concurring opinion, Justice Powell defined the standard for competency to be executed as requiring that the “defendant perceive[] the connection between his crime and his punishment . . .” *Id.* at 422 (conc. opn. Powell, J.). While the full court has yet to define what constitutes competency to be executed, at the very least, the Eighth Amendment bars execution of prisoners who are insane in the sense of being unaware of the punishment they are about to suffer, or why they are to suffer it. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989).

Some states have adopted standards that include a prong for ability to rationally assist counsel, and to identify information calling the conviction and death sentence into doubt. See, e.g., Miss. Code. Ann. § 99-19- 57(2)(b) (1994); *Singleton v. State*, 437 S.E.2d 53, 57-58 (S.C. 1993); *State v. Harris*, 789 P.2d 60, 66 (Wash. 1990). Counsel representing a defendant who is of sub-average intelligence should advocate for this more protective standard, utilizing the abundant materials demonstrating that mentally retarded defendants are at special risk of being wrongfully convicted and receiving an unwarranted death sentence.

11 CLEMENCY

Residual doubt about guilt has been the basis for a number of clemency grants in the modern era.¹¹ Where a defendant with sub-average intelligence is found eligible for the death penalty despite *Atkins*, counsel should invoke any doubts about whether the defendant is in fact mentally retarded and argue that the defendant is similarly situated for all practical purposes to defendants who were spared the death penalty under *Atkins*. In any event, significant mental limitations should be the basis for a finding of lesser moral culpability, and hence make the granting of clemency a possibility.

¹¹ According to the Death Penalty Information Center's website, www.deathpenaltyinfo.org, possible innocence was a reason for clemency in 21 cases since 1976.

PART III

PART III	87
1 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION AND CAPITAL PUNISHMENT	89
1.1 Summary	89
2 INTERNATIONAL INSTITUTIONS, LAW AND INSTRUMENTS: OVERVIEW	90
2.1 Background	90
2.2 Institutions	91
2.3 What is International Law: Sources	93
2.4 Treaties	93
2.5 Reservations	94
2.6 Treaties: Interpretation and Application	94
2.7 Customary International Law	95
2.8 Persistent Objector	95
2.9 Resolutions	95
2.10 Jus Cogens	95
2.11 ‘Soft’ and ‘Hard’ Law Distinctions	96
3 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION	97
3.1 Limitations	98
3.2 Main Norms and Instruments	98
3.3 International Practice: Execution of Persons with Mental Retardation is Contrary to the Practice of Virtually All States	100
3.4 International Instruments, Norms and Standards Prohibit the Application of the Death Penalty on Persons with Mental Retardation	100
4 CURRENT DEVELOPMENTS	104
5 INTERNATIONAL AVENUES OF APPEAL AND FORA: REGIONAL BODIES	105
5.1 Organization of American States	105
5.2 Inter-American Commission on Human Rights	105
5.3 The International Court of Justice	112
5.4 The European Union	112
6 CLEMENCY AND INTERNATIONAL INTERVENTION	113
6.1 International Institutions Overview	113
6.2 Criteria for Intervention	114
6.3 Example Case: Daryl Renard Atkins	115

1 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION AND CAPITAL PUNISHMENT

1.1 Summary

The utilization of capital punishment is not prohibited under international law, however it is an objective of the international community to abolish the use of the death penalty under all circumstances. Until that time, there are restrictions on the categories of persons who are allowed to endure such a punishment; one of these restricted categories is persons with mental retardation. It is essential that counsel and mental disability advocates familiarize themselves with the international legal system, and the laws and norms that protect relevant rights. Articulating these standards may encourage the state to remove the use of capital punishment as a sentencing option.

It should also be noted that the application of international law and human rights standards extends beyond capital punishment and can be articulated in both civil and criminal legal arguments.

The importance of introducing arguments at pre-trial that are available for clients with mental retardation should not be underestimated. Such efforts will provide not only additional arguments against the defendant's execution, but also potentially may open further avenues of appeal.¹ In fact, international arguments should be adduced at all possible levels of appellate litigation and utilized in clemency proceedings.

The following section is rather general in nature, but we feel it will introduce those who are unfamiliar with international law and human rights standards to this burgeoning area of law.²

¹ See, e.g. The Inter-American Commission on Human Rights *infra*.

² See, www.internationaljusticeproject.org for further information.

2 INTERNATIONAL INSTITUTIONS, LAW AND INSTRUMENTS: OVERVIEW

2.1 *Background*

United Nations Charter

The United Nations (UN) Charter is the constituting instrument of the United Nations.³ The UN Charter establishes the organs and bodies of the UN, lays out procedure and delineates the rights and obligations of the Member States. The UN Charter sets forth the four stated purposes of the UN:

- "To practice tolerance and live together in peace with one another as good neighbours, and
- To unite our strength to maintain international peace and security, and
- To ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
- To employ international machinery for the promotion of economic and social advancement of all peoples."

The United Nations Charter alongside the Universal Declaration of Human Rights,⁴ adopted by the General Assembly in 1948, forms the basis of international human rights law. Since then, the UN has gradually expanded human rights law to encompass specific standards for women, children, disabled persons, minorities, migrant workers and other vulnerable groups.

The six principal organs of the United Nations are the: General Assembly,⁵ Security Council,⁶ Economic and Social Council,⁷ Trusteeship Council,⁸ International Court of

³ See <http://www.un.org/aboutun/charter/index.html>

⁴ See <http://www.un.org/Overview/rights.html>

⁵ See <http://www.un.org/ga/55/>

⁶ See <http://www.un.org/Docs/sc/>

⁷ See <http://www.un.org/esa/coordination/ecosoc/>

⁸ See <http://www.un.org/documents/tc.htm>

Justice (ICJ)⁹ and Secretariat.¹⁰ The UN family, however, is much larger, encompassing 15 agencies and several programs and bodies.

In relation to human rights, the most important bodies are The General Assembly, The Economic and Social Council and the International Court of Justice.

2.2 Institutions

The General Assembly

The General Assembly is composed of representatives from all Member States. It is the principal decision-making organization within the United Nations. The significance of the General Assembly's role is noted on its web site: "while the decisions of the Assembly have no legally binding force for Governments, they carry the weight of world opinion on major international issues, as well as the moral authority of the world community."¹¹

The General Assembly is a fundamental component in determining the endeavors undertaken by the UN. However, the Economic and Social Council and the International Court of Justice are the two governmental organs of particular relevance to the issue of capital punishment among its Member States.

The Economic and Social Council

The Economic and Social Council (ECOSOC) concerns itself with an extensive range of issues, including those of employment, health, education, human rights, culture, society and economics. Of particular note is that ECOSOC is "encouraging universal respect for human rights and fundamental freedoms" and that it "issues policy recommendations to the UN system and to Member States".¹²

ECOSOC presides over 14 specialized UN agencies, 10 functional commissions, and 5 regional commissions. 54 member governments belong to ECOSOC. The General Assembly elects these member governments to the ECOSOC, based on requirements pertaining to geographical representation of Member States. The terms of membership last for three years and are set on a staggered basis.

⁹ See <http://www.icj-cij.org/>

¹⁰ See <http://www.un.org/documents/st.htm>

¹¹ United Nations General Assembly, "Background Information", <http://www.un.org/ga/57/about.htm>

¹² United Nations Economic and Social Council, "What ECOSOC Does", <http://www.un.org/esa/coordination/ecosoc/about.htm>.

The Commission on Human Rights

The key ECOSOC committee pertaining to human rights, and thus effecting capital punishment, is the Commission on Human Rights.¹³ It is a subsidiary body of the ECOSOC. The Commission is entrusted with a number of responsibilities. It addresses human rights violations on a global basis, and "[the] promotion and protection of human rights, including the work of the Sub-Commission, treaty bodies and national institutions".¹⁴ Additionally, the Commission contributes to the development of global human rights standards.

The Commission deals with a number of international treaties and is one of the UN organizational bodies that issues resolutions. Treaties that touch upon capital punishment have prompted a great deal of international debate, particularly regarding the execution of juveniles, foreign nationals, and those with mental retardation. The Commission on Human Rights hosts a number of sub-committees that are referred to as working groups.¹⁵

The Sub-Commission on the Promotion and Protection of Human Rights

The Commission on Human Rights also hosts its most important Sub-Commission; the Sub-Commission on the Promotion and Protection of Human Rights.¹⁶ In turn, the Sub-Commission also has its own working groups.

The Sub-Commission's mandate and powers are exemplified in its decisions and actions involving the juvenile death penalty. The Sub-Commission, via Resolution 2000/17, determined that the U.S. reservation to the ICCPR pertaining to the execution of juveniles was invalid and severable from the treaty. "In August 2000, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/17 on the Death Penalty in Relation to Juvenile Offenders. Within this document the Sub-Commission condemned the use of the death penalty against child offenders affirming that such use is "contrary to customary international law."

The International Court of Justice

The International Court of Justice (ICJ), located in The Hague, satisfies the judicial function of the UN. The ICJ resolves existing disputes between States. Additionally, when international agencies pose questions of law to the Court, the ICJ is entrusted to issue advisory opinions to the Security Council and General Assembly.

¹³ See <http://www.unhchr.ch/html/menu2/2/chrintro.htm>

¹⁴ United Nations Commission on Human Rights, "Commission on Human Rights", <http://www.unhchr.ch/html/menu2/2/chrintro.htm>.

¹⁵ See <http://www.unhchr.ch/html/menu2/2/chrwg.htm>

¹⁶ See <http://www.unhchr.ch/html/menu2/2/sc.htm>

The ICJ is composed of 15 judges from different member nations who serve terms of a predetermined duration.

2.3 *What is International Law: Sources*

If international law is to be articulated, it is imperative that one is familiar with Article 38 of the Statute of the International Court of Justice. Article 38 (1) of the Statute of the International Court of Justice provides a list of the sources of international law. This provision is generally accepted as the authoritative guide. Correspondingly, when arguing international law, the sources contained in Article 38 (1) are your guide.

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states. (e.g. treaties)
2. International custom, as evidence of general practice accepted as law.
3. General principles of law recognized by civilized nations.
4. Judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means of determination of law.

2.4 *Treaties*

Treaties may also be referred to as conventions or covenants. Treaties often codify rules of customary law and are of growing importance. They are the major instrument of cooperation in international relations and are often an instrument of change. Treaties, once signed and ratified, are binding on the party. Upon signing an international instrument, the party agrees to bind itself in good faith to ensure that nothing is done which would defeat the object and purpose of the treaty, pending a decision on ratification, if ratification is required. A signature does not however create an obligation to ratify but, once ratified, the treaty becomes binding on the nation. The nation is considered to have consented to be bound.¹⁷

For example the UN Charter is a treaty. Other examples include:

- International Covenant on Civil and Political Rights (ICCPR).¹⁸ Ratified by the United States on 8 June 1992 with a reservation to Art 6(5). The ICCPR is perhaps the most consequential human rights treaty in existence. In fact, the U.S. State Department applauded it as "the most complete and

¹⁷ For ratification status of the principal human rights treaties, see <http://www.unhchr.ch/pdf/report.pdf>

¹⁸ Can be found at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

authoritative articulation of international human rights law that has emerged in the years following World War II."

- Convention on the Rights of the Child,¹⁹ signed by the U.S. in 1995, but not yet ratified. 192 nations have ratified the CRC.

2.5 Reservations

A reservation can be made to a treaty. A reservation is a statement made by a nation, when signing or ratifying a treaty, where it purports to exclude or modify the legal effect of a certain provision of the treaty. For example, when ratifying the ICCPR, the United States made a reservation to Article 6(5). Article 6(5) of the ICCPR explicitly provides:

Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

Upon ratification, the United States' Senate intended to reserve for the United States the right "subject to its Constitutional constraints, to impose capital punishment on any person...including such punishment for crimes committed by persons below eighteen years of age." The United States put forward this reservation in order to permit the various states to continue to execute juvenile offenders. The validity of this reservation is controversial.²⁰

2.6 Treaties: Interpretation and Application

The Vienna Convention on the Law of Treaties (Vienna Convention)²¹ is widely accepted as codifying the customary rules relating to treaty interpretation and application and is acknowledged as the governing international treaty on such matters. This treaty governs, for example, the validity of reservations and the obligation of a State upon signing a treaty to bind itself in good faith to ensure that nothing is done that would defeat the treaty's "object and purpose," pending ratification.

It should be noted that the U.S. has signed but not ratified this treaty. In accordance with the principles of international law and as stated above, the U.S. is obliged however, to bind itself in good faith. The U.S. Department of State has taken the position that the Vienna Convention is the authoritative guide to existing treaty law and procedure.²²

¹⁹ Can be found at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

²⁰ Please contact the IJP for more information and see William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 *Brook.J.Int'l.L.* 277 (1995)

²¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* January 27, 1980. <http://www1.umn.edu/humanrts/instreet/viennaconvention.html>

²² See also, Restatement (Third) of Foreign Relations Law of the United States, Sec. 313(1)(c)(1987).

2.7 Customary International Law

Custom is the second source of international law listed in Article 38 of the Statute of the International Court of Justice. As confirmed by the ICJ in *Nicaragua v. USA (merits)*, *ICJ Rep, 1986, 14 at 97*, custom is constituted of two elements:

- (i) The general practice of nations (objective)
- (ii) 'Accepted as law' (*opinio juris*) (subjective)

An international law norm must satisfy both prongs in order to be deemed legally binding customary international law: the norm must be adhered to in practice by most countries, and those countries that follow the norm must do so because they feel obligated by a sense of legal duty ("*opinio juris*").

Sources of custom are numerous and include diplomatic correspondence; opinions of official legal advisors; press releases from the nation; international and national judicial decisions; treaties; and resolutions. Customary international law is binding on a nation.

2.8 Persistent Objector

As stated above, customary international law is binding upon a nation. A nation-state may however, avoid being bound by a rule of customary international law if it has been a "persistent objector" to the norm or rule. Objection to the norm must be "consistent" and irrespective of disagreement.

2.9 Resolutions

Resolutions are non-binding, but arguably may be reflective of the acceptance of a norm by the international community. Examples of resolutions include the Universal Declaration of Human Rights and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

2.10 Jus Cogens

Under Article 53 of the Vienna Convention on the Law of Treaties, a *jus cogens* norm is: "*a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*"

The Restatement (Third) of the Foreign Relations Law agrees with this standard, asserting that the norm is established where there is acceptance and recognition by a "large majority" of States, even if over dissent by "a very small number of States"²³

In other words, the norm describes such a bare minimum of acceptable behavior that *no* nation State may derogate from it. A nation therefore, cannot contract out of this peremptory norm or assert persistent objector

As the IACHR has described norms of *jus cogens* as those which "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence."²⁴

2.11 'Soft' and 'Hard' Law Distinctions

It is important to be aware that within the international legal framework, international law, norms and standards fall into one of two categories; 'hard' or 'soft' law. 'Soft' law is typically considered to be non-binding, while 'hard' law is considered to be binding. Resolutions generally fall into the 'soft' law category; conversely treaties are considered to be 'hard' law. 'Soft' law instruments are also often referred to as international human rights standards. Correspondingly there is a hierarchical structure to international law instruments and standards. 'Soft' law is seen by some as germane to the process of the formation of customary law.

International human rights law has developed exponentially over the last 50 years. Despite this, the development of international human rights law pertaining to those with mental disabilities has been somewhat limited. The vast majority of international law, instruments and norms pertaining to mental retardation therefore fall into the 'soft' law category. It is, however, arguable that the prohibition against imposing capital punishment on persons with mental retardation is a customary international law norm.

²³ (Restatement (Third) of Foreign Relations Law, §102, and reporter's note 6 (1986), citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, UN Doc. A/Conf. 39/11 at 471-72).

²⁴ *Domingues v. United States*, Report No. 62/02, Case 12.285, OEA/Ser.L/V/II.116, Doc. 33, October 22, 2002.

3 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION

The United Nations has articulated a body of norms and standards that prohibit the execution of the mentally retarded. These have developed from the more general approach of protecting the defendant from degrading treatment and recognition of the degree of mental ability during trial in the Declaration on the Rights of the Mentally Retarded in 1971; to the more specific approaches in more recent resolutions by the Economic and Social Council²⁵ and General Assembly²⁶. The most significant of these being Safeguard 3, which protects “the insane” from execution. The Safeguard was later clarified by the Economic and Social Council to include elimination of the death penalty for “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution”.²⁷ These have been supported by other United Nations bodies, namely the United Nations Human Rights Commission which has called on countries to observe the Safeguards.²⁸ The United Nations Human Rights Commission has also more recently passed resolutions urging countries which retain the death penalty “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.”²⁹

- The United Nations Economic and Social Council has issued a number of safeguards, in particular Safeguard 3 (ECOSOC Resolution 1984/50, UN Doc

²⁵ *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50, UN Doc E/1984/92 (1984); *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, ECOSOC Res. 1989/64, UN Doc E/1989/91 (1989); and *Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res 1996/15, UN Doc E/CN.15/1996/-15 (1996).

²⁶ *Human Rights in the Administration of Justice*, GA Res. 39/118, UN Doc A/39/700 (1984).

²⁷ UN ECOSOC, *Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty*, ECOSOC Res. 1989/64, UN Doc. E/1989/91 (1989) at 51. ¶ 1(d)

²⁸ *Question of the Death Penalty*, UN Doc. E/CN.4/1997/12 (1997); *Question of the Death Penalty*, UN Doc. E/CN.4/1998/8 (1998).

²⁹ U.N. Commission on Human Rights, *The Question of the Death Penalty*, 54th Sess. Resolution 1998/8, U.N. Doc. E/CN.4/RES/1998/8 (1998); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 55th Sess. Resolution 1999/61, U.N. Doc. E/CN.4/RES/1999/61 (1999); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 56th Sess. Resolution 2000/65, U.N. Doc. E/CN.4/RES/2000/65 (2000); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 57th Sess. Resolution 2001/68, U.N. Doc. E/CN.4/RES/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004).

E/1984/92) that protects the insane from execution. It has been endorsed by the General Assembly as extending to those with mental retardation.

- The United Nations Human Rights Commission has called on countries to observe UN Safeguards.
- Article 3 of the European Convention on Human Rights – prohibits inhuman or degrading punishments. The possibility of the death penalty for a person with mental retardation is potentially in breach of Article 3.

3.1 *Limitations*

- A number of countries, namely, the U.S., Japan, and Kyrgyzstan continue to ignore these standards. Kyrgyzstan has, however, asserted that it does not execute persons with mental retardation.
- Recognition of arguments articulating international provisions and laws can be sporadic within criminal proceedings in the United States. However, support for such arguments is growing, as evidenced by the reference of international consensus in *Atkins*. Indeed, *Atkins* arguably lays out the outline for the articulation of international law in cases involving clients with mental retardation. See, e.g. European Union Amicus Brief filed in support of petitioner in *Atkins*.³⁰

3.2 *Main Norms and Instruments*

- United Nations Economic and Social Council, Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1984/50, UN Doc E/1984/150 (1984)³¹
- United Nations Economic and Social Council, Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res. 1996/15, UN Doc E/CN.15/1996/15 (1996)³²

³⁰ 2001 WL 648609 (U.S.). This can be found at: <http://www.internationaljusticeproject.org/pdfs/emccarver.pdf>, The amicus was originally filed in *McCarver v. North Carolina* 532 U.S. 941, however this case was mooted by subsequent legislation in North Carolina. The U.S. Supreme Court then took up the case of *Atkins*. The amicus was subsequently refiled.

³¹ <http://www1.umn.edu/humanrts/instate/i8sgpr.htm>

³² <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>

- United Nations General Assembly, Human Rights in the Administration of Justice, GA Res. 39/118, UN Doc. A/39/700 (1984)³³
- United Nations General Assembly, Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, A/RES/46/119 (1991), Annex³⁴
- United Nations General Assembly, Declaration on Rights of Disabled Persons, UN Doc A/RES/33447 (XXX) (1975)³⁵
- United Nations General Assembly, Declaration on Rights of Mentally Retarded Persons, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971)³⁶
- United Nations Commission on Crime prevention and Criminal Justice, Report of the Secretary-General, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of Those Facing the Death penalty, UN Doc. E/CN.15/2001/10 (2001)
- Organization of American States, Inter-American Commission on Human Rights, Recommendation of the IACHR for Promotion and Protection of the Rights of the Mentally Ill³⁷
- United Nations General Assembly, Standard Rules on the Equalization of Opportunities for Persons With Disabilities A/RES/48/96 (1995)³⁸
- International Covenant on Civil and Political Rights (ICCPR -152 State parties), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Signed by the United States: October 5, 1977, ratified: June 8, 1992.³⁹

³³ <http://www.un.org/documents/ga/res/39/a39r118.htm>

³⁴ <http://www.un.org/documents/ga/res/46/a46r119.htm>

³⁵ <http://www.unhchr.ch/html/menu3/b/72.htm>

³⁶ http://www.unhchr.ch/html/menu3/b/m_mental.htm

³⁷ <http://www.oas.org/cidh/annualrep/2000eng/chap.6e.htm>

³⁸ <http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/4de80b92356f54ea8025670b00561925?OpenDocument&Highlight=2,A%2FRES%2F48%2F96>

³⁹ http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608, 7 June 1999.⁴⁰

3.3 *International Practice: Execution of Persons with Mental Retardation is Contrary to the Practice of Virtually All States.*

There is growing international consensus against the execution of persons with mental retardation. Since 1995, only three countries in the world have reportedly carried out the execution of a mentally retarded defendant: Japan, Kyrgyzstan, and the United States.⁴¹ The vast majority of the world community has barred the execution of mentally retarded defendants; this has been by their own volition or at the urging of the United Nations or another supra-national body, or by treaty or legislation. Importantly, an overwhelming majority of nations that still allow for the use of capital punishment do in fact limit the imposition of the death penalty in cases where the defendant is mentally retarded. As stated by Rt. Hon. Christopher Patten, such a limitation is out of a conviction that the execution of persons with mental retardation is an “inhuman, medieval form of punishment [that is] unworthy of modern societies.”⁴²

3.4 *International Instruments, Norms and Standards Prohibit the Application of the Death Penalty on Persons with Mental Retardation*

Experts appointed by the United Nations have found that the United States' practice of executing the mentally retarded contravenes international standards and norms. The international standards and norms on mental retardation, the disabled and the handicapped focus on the ways such individuals are treated in general, as well as the ways in which the mentally retarded are regarded within the criminal justice system. All such standards call for humane treatment of mentally retarded persons, and within the criminal justice system, these standards call for adherence with due process of law and protection from degrading treatment.

With the Declaration on the Rights of the Mentally Retarded, adopted in 1971, the United Nations began a long history of advocating on behalf of the retarded, a group that has been too long misunderstood and misrepresented throughout the world.⁴³ The resolution called on nations to recognize the right of the mentally retarded person to protection from

⁴⁰ www.cidh.org

⁴¹ UN Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial. Summary or Arbitrary Executions*, E/CN.4/1997/60 (1996) at ¶ 89.

⁴² Statement of Rt. Hon. Christopher Patten delivered to the European Parliament, October 25, 2000, cited in Human Rights Watch, *United States: Beyond reason, The Death Penalty and Offenders with Mental Retardation* 18, n. 55 (March 2001).

⁴³ See, James W. Ellis and Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985)

degrading treatment, and to assure that, “if prosecuted for any offense, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.”⁴⁴

Subsequent resolutions of the United Nations have made increasingly nuanced distinctions between retarded, disabled and handicapped persons, but all of these resolutions share a common perspective protecting the fundamental human dignity of the mentally retarded person.⁴⁵ Similar actions have been taken at the regional level.⁴⁶ The UN has taken increasingly assertive measures to protect the mentally retarded from execution. These measures began with the Economic and Social Council's 1984 adoption of the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, (protecting, in Safeguard 3, “the insane” from execution).⁴⁷ The Safeguards were endorsed by the General Assembly in the same year.⁴⁸ The Council continued its work five years later by clarifying that Safeguard 3 includes elimination of the death penalty for “persons suffering from

⁴⁴ United Nations General Assembly, *Declaration on the Rights of Mentally Retarded Persons*, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971), at ¶ 6.

⁴⁵ See, e.g., United Nations General Assembly, *Declaration on the Rights of Disabled Persons*, A/RES/33447 (XXX) (1975) (defining disability and recognizing, in its Preamble, “the dignity and worth of the human person”); United Nations General Assembly, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, A/RES/46/119 (1991), Annex (Principle 1.2: “All persons with a mental illness . . . shall be treated with humanity and respect for the inherent dignity of the human person,” and Principle 9.3: “Mental health care shall always be provided in accordance with applicable standards of ethics . . . in the protection of prisoners . . . against torture and other cruel, inhuman or degrading treatment or punishment”); United Nations General Assembly, *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, A/RES/48/96 (1993) (recognizing, in the Preamble, “the dignity and worth of the human person”); World Health Organization, Division of Mental Health and the Prevention of Substance Abuse, *Guidelines for the Promotion of Human Rights of Persons with Mental Health Disorders*, WHO/MNH/MND/95.4 (1996) (containing a list of questions for local government officials on treatment under the Principles for the Protection of Persons with Mental Illness, above).

⁴⁶ See, e.g., Parliamentary Assembly of the Council of Europe, *Recommendation 1235 (1994) on Psychiatry and Human Rights* (noting a body of case-law developed under the European Convention on Human Rights on treatment of persons with mental disorders, as well as observations from the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regarding practices followed in the matter of psychiatric placements of patients); Organization of American States, *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* (8 June 1999) (not yet entered into force, reaffirming “the inherent dignity and equality” of persons with disabilities); Pan American Health Organization/WHO Regional Office for the Americas, *Declaration of Caracas* (14 November 1990) (noting a commitment to defend the human rights of mental patients in accordance with national legislation and international agreements); Organization of American States, Inter-American Commission on Human Rights, *Recommendation of the Inter-American Commission on Human Rights for the Promotion and Protection of the Rights of the Mentally Ill*, 4 April 2001 (calling on Member States of the OAS to establish laws that “guarantee respect for the fundamental freedoms and human rights of persons with mental disability . . . incorporating international standards and the provisions of human rights conventions that protect the mentally ill,” at ¶ 3).

⁴⁷ ECOSOC Res. 1984/50, UN Doc. E/1984/92 (1984)

⁴⁸ UN General Assembly, *Human Rights in the Administration of Justice*, GA Res. 39/118, UN Doc. A/39/700 (1984).

mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”⁴⁹ Finally, in 1996, the Council reiterated its call for full implementation of the Safeguards, in part because of concerns for the lack of protection from the death penalty of those who are mentally retarded.⁵⁰ Since 1997, the United Nations Human Rights Commission has called on countries that maintain the death penalty to observe the UN Safeguards.⁵¹ Since 1999, the resolution has been adopted with additional language urging retentionist countries “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.”⁵²

In addition, since 1982, the UN Commission on Human Rights has appointed a Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, whose mandate has included review of those countries which still apply the death penalty.

The United States, which was a member of the Commission in each of the years in question, consistently voted against the resolution on the death penalty. The express concerns of the United States, however, did not go directly to the issue of the clause about execution of persons with mental disorders.⁵³

The United Nations Human Rights Commission, over the negative vote of the United States, has passed resolutions since 1997 that call on countries that maintain the death penalty to observe UN Safeguards that specifically condemn the death penalty for “persons suffering from mental retardation.” Since 1992, a Special Rapporteur for the UN Human Rights Commission has also explicitly condemned the execution of persons with mental retardation. The United States was criticized further by the Human Rights Committee,

⁴⁹ United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty*, ECOSOC Res. 1989/64, UN Doc. E/1989/91 (1989), at 51, ¶ 1(d).

⁵⁰ United Nations Economic and Social Council, *Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1996/15, UN Doc. E/CN.15/1996/15 (23 July 1996).

⁵¹ UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1997/12 (1997); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1998/8 (1998).

⁵² UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/1999/61 (1999); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/2000/65 (2000); UN Commission on Human Rights, *Question of the Death Penalty*, UN Doc. E/CN.4/2001/68 (2001); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 58th Sess. Resolution 2002/77, U.N. Doc. E/CN.4/RES/2002/77 (2002); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 59th Sess. Resolution 2003/67, U.N. Doc. E/CN.4/RES/2003/67 (2003); U.N. Commission on Human Rights, *The Question of the Death Penalty*, 60th Sess. Resolution 2004/67, U.N. Doc. E/CN.4/RES/2004/67 (2004).

⁵³ See e.g. United Nations, *Press Release, Commission on Human Rights Adopts Ten Resolutions, Measures on the Death Penalty, Impunity, And Other Issues concerning the Promotion and Protection of Human Rights*, 25 April 2001, at 4.

which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), for its lack of protection from the death penalty of the mentally retarded.

There are 152 States that are party to the ICCPR. The ICCPR provides protection from the death penalty of the mentally retarded, although it has been noted that certain countries may not have offered appropriate action. In particular, the United States was criticized after it submitted its first treaty compliance report: “in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded.”⁵⁴

After a special mission to the United States, the only one conducted in this country, Bacre Waly Ndiaye in his capacity as Special Rapporteur for the UN Commission on Human Rights, expressed particular concern in regard to the execution of mentally retarded persons in the United States, concluding that such executions are “in contravention of relevant international standards.”⁵⁵ Finally, at a meeting in November of 2000 of the Organization for Security and Cooperation in Europe, a security organization of 55 countries including the United States, the European Union (EU) noted its concern that executions of the mentally retarded continue to be carried out in the OSCE region. Indeed, the EU itself has presented demarches opposing the execution of several individuals who are mentally retarded or have been diagnosed with serious mental disorders.⁵⁶

⁵⁴ United Nations, Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/79/Add.50; A/50/40 (1995), at ¶ 281.

⁵⁵ U.N. Commission on Human Rights, Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Mission to the United States of America, E/CN.4/1998/68/Add.3 (1998), at ¶ 145.

⁵⁶ See e.g., *EU Demarche to the Honorable Bob Holden, Governor of Missouri, Concerning Mr. Antonio Richardson* (21 Feb. 2001), at <http://www.eurunion.org/legislat/DeathPenalty/Richardson.htm>; *EU Demarche to the Honorable Kenny Guinn, Governor of Nevada, Concerning Mr. Thomas Nevius* (26 March 2001), at <http://www.eurunion.org/legislat/DeathPenalty/NeviusGovLett.htm>; *EU Letter to Governor George W. Bush, Governor of Texas, Concerning Mr. John Paul Penry* (7 Nov. 2000), at <http://www.eurunion.org/legislat/DeathPenalty/Penry.htm>. See Section 6 for further information.

4 CURRENT DEVELOPMENTS

Of note, on December 19, 2001, the United Nations General Assembly, in Resolution 56/168, recognized “the need to advance in the elaboration of an international instrument” and created an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities”. The resolution was enacted out of concern for the “disadvantaged and vulnerable situation faced by six hundred million persons with disabilities around the world...” after being encouraged by “the increasing interest of the international community in the promotion and protection of the rights and dignity of persons with difficulties”.

Clearly, at this point, such a convention remains in the preliminary stages; its parameters have not yet been established. Indeed, at this stage, it is questionable whether such a convention will even be adopted by the United Nations General assembly, and even if adopted, whether it will be signed and ratified by individual countries. Such discussions, however, represent a shift in modern international approaches towards persons with disabilities in codifying accepted norms.

5 INTERNATIONAL AVENUES OF APPEAL AND FORA: REGIONAL BODIES

It is important for U.S. litigators to use both the *Inter-American Commission on Human Rights* of the OAS (which has jurisdiction to hear complaints against the U.S.) and the *International Court of Justice* (where the U.S. has become the object of two complaints). Many domestic lawyers handling death penalty cases are unacquainted with the availability of this and other international mechanisms or are unfamiliar with the rules and procedures of the tribunals.

5.1 *Organization of American States*

The United States is one of 35 members of the *Organization of American States* (OAS), a regional agency created within the meaning of Article 52 of the United Nations Charter. The OAS is an international organization created to achieve an order of peace and justice, promote solidarity and defend their sovereignty, their territorial integrity and their independence (Article 1 of the OAS Charter). The Charter of the OAS, which entered into force in 1951, reaffirms that international law is the standard of conduct of States in their reciprocal relations.

The Inter-American human rights system encompasses the western hemisphere and is one of the two regional systems to have adopted a convention abolishing the death penalty. The other regional system (in Europe) has adopted a similar convention.

The OAS General Assembly has adopted, and OAS Member States have ratified, numerous international instruments that have become the foundation for the promotion and protection of human rights. The Inter-American human rights system recognizes and defines those rights and establishes binding rules of conduct to promote and protect them, while creating organs to monitor their observance (see next sub-section). A number of Latin American nations have abolished the death penalty and the long-term worldwide trend is towards total abolition. Conversely, the membership of the OAS also includes avid supporters of the death penalty including, Jamaica, and the United States of America.

5.2 *Inter-American Commission on Human Rights*

Established in 1959, the Inter-American Commission on Human Rights (IACHR) is the principal organ of the Organization of American States (OAS) charged with promoting the observance and protection of human rights and to act as a consultative organ of the OAS in human rights matters.⁵⁷ The commission is a seven member body based in Washington DC.

⁵⁷ Charter of the OAS, Article 106

Each member is elected by the OAS General Assembly. The United States upon ratifying the Charter of the OAS in 1951, accepted the authority of the Commission.

One of the Commission's functions is to receive and take action on petitions and other communications lodged by any person or group of persons or any non-governmental entity legally recognized in one or more of the Member States of the Organization, alleging violations of human rights. It exercises this jurisdiction in two principal respects. With respect to State Parties to the American Convention on Human Rights, the Commission is mandated to act on petitions containing denunciations or complaints of violations of the Convention by a State Party.⁵⁸ In relation to those Member States of the OAS that are not parties to the American Convention, the Commission has jurisdiction to receive and examine communications that contain complaints of alleged violations of human rights set forth in the American Declaration of the Rights and Duties of Man (the "American Declaration") based upon the ratification by those States of the OAS Charter.⁵⁹ Consistent with this jurisdictional framework, as the United States has not ratified the American Convention on Human Rights, it is subject to the Commissions' competence to receive complaints of violations of the American Declaration.

As discussed below, also within the Commission's competence is the authority under Article 25 of its Rules of Procedure in "serious and urgent cases" to request that States adopt precautionary measures "to prevent irreparable harm to persons." Such measures have been requested, for example, in complaints involving the death penalty where the Commission has asked States to stay an execution until the Commission has an opportunity to study the case and make a recommendation.

The Commission's powers and functions, including its authority to receive and consider individual human rights complaints, are derived from the OAS Charter, the American Declaration the American Convention, the Commission's Statute, and the Commission's Rules of Procedure.

Precautionary Measures

In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative, or at the request of a party, require that the State concerned adopt *precautionary measures* to prevent irreparable harm.

In qualifying cases of extreme gravity and urgency, the Commission issues *precautionary measures* when it becomes necessary to avoid irreparable damage to persons in the matter before them. Upon the issue of these *precautionary measures*, the Commission may, for example, request that the United States preserve the life of the individual in question, pending their investigation of the allegations forwarded in the relevant petition.

⁵⁸ See IACHR Statute, Art. 19

⁵⁹ See IACHR Statute, Art. 20

How is the United States bound by the *precautionary measures* in death penalty cases?

The Commission has found that in death penalty complaints, Member States are subject to an international legal obligation not to proceed with an execution until the Commission has had an opportunity to investigate and decide upon the complaint.⁶⁰

Accordingly, to ignore the granting of *precautionary measures* in a death penalty case causes irreparable damage on the party and thus the case under consideration. For the United States to disregard *precautionary measures* would defeat the purpose of the OAS Charter. When signing international documents, the signing party is obligated not to “defeat the purpose” of the document.

The Exhaustion of Domestic Remedies

The American Convention and the Commission's Rules of Procedure provide that in order for a petition to be considered by the Commission, remedies of the domestic legal system of the State concerned must have been pursued and exhausted in accordance with the generally recognized principles of international law. Therefore, petitioners may not lodge a petition, until all available domestic remedies have been exhausted. **The petition must note that all available domestic remedies have been exhausted. The petition should also note the process by which the claimant exhausted all available domestic remedies.**

Art. 31 of the Rules of Procedure - Exhaustion of Domestic Remedies

1. In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.
2. The provisions of the preceding paragraph shall not apply when:
 - a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;

⁶⁰ Juan Raul Garza v. United States, Case No. 12.243, Report No. 52/01, Annual Report of the IACHR 2000, ¶ 117. Other international tribunals have similarly recognized interim stays of execution as fundamental prerequisites to the efficacy of proceedings pertaining to the imposition of capital punishment. *See e.g.* I/A Court H.R., James *et al.* Case, Order for Provisional Measures of 29 August 1998; Annual Report 1998, p. 317; Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America), Request for the Indication of Provisional Measures, Order of 3 March 1999, I.C.J. General List, N° 104, ¶¶ 22-28; Eur. Court H.R., Ocalan v. Turkey, Indication of Interim Measures Pursuant to Rule 39 of the Rules of the European Court of Human Rights, 30 November 1999; UNHRC, Dante Piandiong and others v. The Philippines, Communication N° 869/1999, U.N. Doc. CCPR/C/70/D/869.1999 (19 October 1999), ¶¶ 5.1-5.4.

- b. the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or,
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.
3. When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.

When must the petition be filed?

As outlined in Article 32 of the Rules of Procedure, the petition must be filed within six months of exhausting available domestic remedies.⁶¹

Who can present a petition?

Article 23 of the Commission's Rules of Procedure provides that "[a]ny person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons". Therefore, a petitioner does not have to be a member of any specific bar and does not even have to be an attorney.

What violations can be claimed?

Article 1 of the Statute of the Inter-American Commission of Human Rights

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:

⁶¹ *Article 32 of the Rules of Procedure*

1. The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies.

2. In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.

- a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
- b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Claims can be filed under Art I of the American Declaration (right to life), Article II (Right to equal protection under the law), Article XVIII (right to a fair trial), and Article XXVI (right to due process).

The Commission's competence is limited to interpreting and applying the human rights instruments of the Inter-American system, although in deciding upon complaints of violations of relevant Inter-American instruments the Commission has held that it may give due regard to other relevant rules of international law applicable to Member States against which complaints of violations of Inter-American instruments are properly lodged – these rules of international law may include the provisions of other prevailing international and regional human rights instruments.⁶² In the event that the Commission finds a Member State responsible for violations of its human rights obligations, the Commission is empowered to make proposal and recommendations with respect to those violations that it deems appropriate.⁶³

Precautionary measures are granted in order to give the Commission time to make a recommendation when a person's life is in imminent danger. **It is imperative to note in a petition that the defendant's life is in imminent danger when filing for precautionary measures.** An attorney will file a brief requesting precautionary measures be installed in his client's case. The Commission will then decide whether to issue the precautionary measure or not. The request for precautionary measures must contain at least a brief description of the facts and issues. The required information is stipulated in Article 28 of the Commission's Rules of Procedure⁶⁴

Why file with the Commission and not the Inter-American Court on Human Rights?

In accordance with Article 62 of the American Convention on Human Right, the contentious jurisdiction of the Inter-American Court of Human Rights is limited to those States that have explicitly recognized the Court's competence to entertain cases concerning the interpretation and application of the provisions of the American Convention in respect of that State. The United States has not recognized the Inter-American Court's jurisdiction

⁶² See e.g. Juan Raul Garza v. United States, Case No. 12.243, Report No. 52/01, Annual Report of the IACHR 2000, ¶¶ 88-89.

⁶³ See IACHR Statute, Art. 4. ADD art 43.

⁶⁴ A sample form that details the type of information required can be found at <http://www.cidh.org/denuncia.eng.htm>. Further information on how to present a petition can be found in an OAS/IACHR resource, Human Rights: How to Present a Petition in the Inter-American System (Organization of American States, Inter-American Commission on Human Rights).

under Article 62 of the American Convention and therefore cannot be the subject of a contentious case before the Court.

Filing a Petition

For ease of application, a standard form to present a petition can be found at <http://www.cidh.org/denuncia.eng.htm>, or in PDF format at <http://www.cidh.oas.org/petitionform.pdf>.

Article 28 outlines the information that is required when filing a petition:

Article 28. Requirements for the consideration of petitions

Petitions addressed to the Commission shall contain the following information:

- a. the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s);
- b. whether the petitioner wishes that his or her identity be withheld from the State;
- c. the address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and email address;
- d. an account of the act or situation that is denounced, specifying the place and date of the alleged violations;
- e. if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
- f. the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated;
- g. compliance with the time period provided for in Article 32 of these Rules of Procedure;
- h. any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and
- i. an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure.

The request can be sent by any means of communication.

Address: Inter-American Commission on Human Rights
1889 F Street, N. W.
Washington, D.C. 20006, USA
Fax: (202) 458-3992
E-mail: cidhoea@oas.org
Internet: <http://www.cidh.oas.org/denuncia.eng.htm>

If Precautionary Measures Are Granted

It is essential to notify the Board/Governor of the granting of precautionary measures by the IACHR. Below is a model letter to use as an outline if precautionary measures are granted in your case.⁶⁵

Re: _____

Dear _____

I am/We are writing on behalf of _____ *. I/We represent Mr/Ms* _____ *in/her petition. In light of the request of the Inter-American Commission on Human Rights on* _____ *(attached hereto), I/we urge you to postpone the execution of Mr/Ms* _____ *until the Commission is able to consider the merits of the case.*

The United States is a member of the Organization of American States (OAS). One of the OAS bodies charged with furthering and ensuring observation of the Inter-American human rights system is the Inter-American Commission on Human Right. The United States, upon ratifying the Charter of the OAS in 1951, accepted the authority of the Commission. The Inter-American Commission on Human Rights makes is extremely clear that the United States, including its component states, should not execute _____ *“before the Commission has an opportunity to examine the allegations of the petition”. If the United States does not heed the request of the Commission, the execution of* _____ *will “emasculate[] the efficacy of the Commission’s process” and it will be “inconsistent with a member state’s fundamental human rights obligations under the OAS Charter and related instruments.” Finally, proceeding with the execution will cause irreparable harm to* _____ *without full review of his/her case.*

I/We thank you for your immediate attention on this matter.

Sincerely,

⁶⁵ Sections of the model letter were taken from a letter written by Constance de la Vega, Professor of Law at the University of San-Francisco.

5.3 *The International Court of Justice*

As stated above, the ICJ satisfies the judicial function of the UN and is located in The Hague in the Netherlands. The ICJ is composed of 15 judges from different member nations who serve terms of a predetermined duration.

The ICJ resolves existing disputes between States. Additionally, when certain designated international agencies pose questions of law to the Court, the ICJ is entrusted to issue advisory opinions to the Security Council and General Assembly.⁶⁶ The Statute of the Court guides the jurisdiction and procedure of the court.⁶⁷

Owing primarily to the fact that only States (Countries) are entitled to apply to and appear before the Court, opportunities to utilize the ICJ are somewhat limited. Therefore the ICJ is unlikely to be a viable avenue of appeal in all but the rarest of cases.⁶⁸

5.4 *The European Union*

The European Union prohibits its members from the use of the death penalty and it is now a precursor to entry to the European Union.⁶⁹ While this covers the imposition of the death penalty on mentally retarded defendants the extradition of defendants to countries that apply the death penalty poses an additional query. While there is no specific ruling on this point, this may be covered by Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading punishment.

There are also other European based organizations that have views on the death penalty in general and include the Organisation for Security and Co-operation in Europe (the "OSCE"). In particular, at a conference organized by the OSCE it was noted with concern that "executions of mentally retarded persons continue in the OSCE region".

⁶⁶ The only bodies at present authorized to request advisory opinions of the Court are five organs of the United Nations and 16 specialized agencies of the United Nations family.

⁶⁷ The Statute of the Court can be found at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>

⁶⁸ For further information, see <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnot.html>

⁶⁹ *Treaty of Amsterdam* Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, *Declaration on the abolition of the death penalty* (2 October 1997), on the Internet at <http://ue.eu.int>

6 CLEMENCY AND INTERNATIONAL INTERVENTION

International arguments should also be presented at the clemency stage. Certain international institutions and Governments may also provide support in the form of letters, or in the case of the European Union, demarches, requesting clemency. Such letters and demarches increase pressure on the decision maker(s), as well as enhancing the legitimacy of such claims. In effect, they can be utilized as a tool of persuasion.

6.1 *International Institutions Overview*

Each of the following institutions has previously provided letters or demarches requesting clemency. Individual nations may also consider intervention in certain cases.

European Union

The European Union is a unique regional international institution. It is composed of 25 Member States.⁷⁰ Although the EU is not a unified State, it has created certain institutional bodies that will speak on behalf of the member nations on areas of economic and human rights interests. These interests were agreed upon by all members upon signing the EU formation treaties. The principal objectives of the EU are: to establish European citizenship, to ensure freedom, security and justice, to promote economic and social progress, and to assert Europe's role in the world.

Abolition of the death penalty is a prerequisite for joining the European Union.⁷¹ The EU is opposed to the death penalty in all cases and accordingly aims at its universal abolition. The EU believes the abolition of the death penalty to contribute to the enhancement of human dignity and the progressive development of human rights. The EU pursues this policy consistently in different international fora such as the United Nations and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty.⁷²

The EU has taken a strong stance against the use of the death penalty in non-member nations and provides demarches requesting clemency in certain categories of capital cases

⁷⁰ Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

⁷¹ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No. 11 prohibits the imposition of the death penalty in peace time. Following on from Protocol No. 6, Protocol No.13 abolishes the death penalty in all circumstances including crimes committed at times of war and imminent danger.

⁷² See European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1998), at www.eurunion.org/legislat/deathPenalty/Guidelines.htm.

including those involving persons with mental retardation, the mentally ill, juveniles and foreign nationals.⁷³

Council of Europe

The Council of Europe, headquartered in Strasbourg, France, is Europe's oldest political organization. Established in 1949 by the Treaty of London, it groups together 45 countries.⁷⁴ In addition it has applications from 2 more countries, and has granted observer status to 5 international entities (the Holy See, the United States, Canada, Japan, and Mexico). The Council of Europe was created in order to defend human rights, parliamentary democracy, and the rule of law. It seeks to develop continent-wide agreements (it has developed 192 legally binding European treaties or conventions) to standardize member countries' social and legal practices, and also seeks to promote awareness of a European identity based on shared values.

The Council of Europe has taken the firm position that everyone's right to life is a basic value and that the abolition of the death penalty is essential to the protection of this right and for the full recognition of the inherent dignity of all human beings. Correspondingly, the Council of Europe provides letters requesting clemency in certain categories of capital cases.⁷⁵

6.2 Criteria for Intervention

If you believe you have a client who fulfills the criteria for mental retardation, please contact the International Justice Project ("IJP"). The IJP advises Governments and international institutions and provides assistance in obtaining intervention letters and demarches. Owing to the complexity of intervention by these institutions and individual nations, documentary evidence such as affidavits and school and medical records are of particular probative value.⁷⁶

⁷³ For examples of demarches and policy statements, see *EU Policy and the Death Penalty* at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm>

⁷⁴ Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom.

⁷⁵ For further information on the Council of Europe, see http://www.coe.int/T/e/Com/about_coe/

⁷⁶ American Association on Mental Retardation (AAMR) 2002 Definition

6.3 Example Case: Daryl Renard Atkins

Daryl Atkins was sentenced to death for the murder of Eric Nesbitt Atkins on August 16, 1996. Atkins presented evidence that his overall IQ test score was 59, his verbal IQ being 64 and his performance IQ 60. Based on these scores, the forensic psychologist for the defense, Dr. Evan Nelson, stated that Atkins fell into the range of being “mildly mentally retarded.” Nelson testified that Atkins did understand the criminal nature of his conduct and that he meets the general criteria for the diagnosis of an antisocial personality disorder.

In addition, Atkins had a strong social history indicating mental retardation. Dr. Nelson testified that Atkins had a limited capacity for adaptive behavior. He pointed to his school records, which showed that he scored below the 20th percentile in almost every standardized test he took. He failed the 2nd and 10th grades. In high school, Atkins was placed in lower-level classes for slow learners and classes with intensive instruction for remedial deficits. His grade point average in high school was 1.26 out of a possible 4.0. Atkins did not graduate from high school. Dr. Nelson testified that Atkins' academic records “are crystal clear that he has been an academic failure since the very beginning.”

The European Union subsequently filed an amicus brief on behalf of Atkins with the U.S. Supreme Court articulating the international law and norms prohibiting the application of the death penalty to those with mental retardation.

It should be noted that this was a particularly strong case and the institutions and Governments are aware that such documentary evidence may simply not exist. This should not dissuade you from contacting the IJP. The IJP can advise you and put your case forward to the various parties for consideration.

APPENDIX ONE – A

ADAPTIVE BEHAVIOR: BACKGROUND QUESTIONS TO ASK CREDIBLE INFORMANTS

AAMR (2002) Version

James R. Patton, Ed.D.
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NB:

- (1) This list of questions is designed to assist in obtaining confirmatory information to support
 - (a) claims that limitations in adaptive behavior exist; and
 - (b) that these behaviors existed prior to age 18.
- (2) The questions included in this list were generated by the author. A similar list according the AAMR (1992) definition was published in *Equal Justice for People with Mental Retardation* (Institute on Disabilities at Temple University, 2002) and appeared in the "*Training Guide for Attorneys*" written by Edwards, Bryen and Murphy.
- (3) The questions are organized according to the adaptive skill areas as suggested in the most recent definition of mental retardation in the AAMR (2002).
- (4) Questions are usually phrased in the present tense. However, it may be necessary to use the past tense for some items.
- (5) It is advisable to have the informant explain their responses on many of the questions and frequently a prompt for doing so is provided. However, other statements may need further explanation. Contextual information (i.e., stories or specific examples) are very useful.
- (6) Substitute the person's name for the symbol "X."

Adaptive Skills

Specific Questions

Conceptual:

Language

(receptive)

- How well does X understand what is said to him/her? (explain)
- How well does X pay attention when someone is speaking to him/her?
- Does X interrupt other people who are speaking to him/her? (explain)

(expressive)

- How well does X pronounce words?
- Does X have any speech problems? (explain)
- How well does X use words when he/she talks?
- Does X have a large vocabulary when he/she speaks?
- How well does X talk using full sentences?
- When X talks, how well do others understand him/her?
- When X talks, does what he/she says make sense? (explain)
- How well does X speak in everyday situations?
- How well does X give directions to someone?
- How well does X talk about current events going on in the community?
- How well does X talk with someone he/she has just met?
- How well does X convey his/her needs?

Reading

- What types of reading material (books, newspapers, magazines) does X like to read?
- How often did X read as a child? As an adolescent? As a adult?
- In general, how well does X read?
- How well does X pronounce the correct sound of letters he/she sees?
- How well does X read specific words?
- How well does X understand what he/she reads?
- How well does X read common, everyday materials?
- How well does X read the newspaper?
- How well does X read his/her mail?
- How well does X read the labels on cans on food or other materials?
- How well does X read notices or flyers that are put in public places?

Writing

- In which situations does X write?
- In general, how well does X write?
- How well does X spell words?

- When X was in school, how well did X do when he/she had to write a paper that included many paragraphs?
- How well does X write sentences? Paragraphs?
- How well does X use writing in his/her everyday life?
- How well does X write a personal letter to someone else?
- How well does X write down a phone message on a piece of paper?
- How well does X write notes to himself/herself?

Math

- In general, how well does X do math?
- Can X count to ten? To one hundred?
- Can X add and subtract numbers?
- Can X multiply and divide numbers?
- Does X understand fractions and decimals?
- When in school, how well did X solve math word problems?
- How well does X use math in his/her everyday life?
- Can X tell time?
- Can X use a calendar?
- Can X understand the times on a bus schedule?
- Can X count money?
- How well does X make change?
- How well does X buy items in stores without assistance?
- Can X pay bills? (explain)
- Does X have a checking and/or savings account?
- If yes, how well does X manage it by himself/herself?
- Can X use a tape measure or ruler?
- Can X use measuring cups for cooking?
- Can X weigh himself/herself accurately?
- Can X use a thermostat?
- How well does X understand the deductions on his/her paystub?

Self-direction

- How well does X manage his/her day-to-day life?
- Does X make key decision in his/her life? (explain)
- How well does X make changes in his life to correct things that go wrong?
- How well does X know what his/her strengths and weaknesses are?
- How well does X follow his/her own schedule?
- Does X initiate activities on his/her own? (explain)
- Can X make his/her concern known to others?
- Does X know when to ask for assistance?

Social:

Interpersonal

- How many close friends does X have?
- How much time does X spend with his/her friends?
- How well does X get along with his friends?
- Does X make new friends very often? (explain)
- Does X make new friends easily? (explain)
- What types of things do X and his/her friends like to do?
- When in school, how did X get along with his/her classmates?
- When in school, how did X get along with his/her teachers and other school staff?
- How well does X get along with his/her wife/husband?
- How well X gets along with his/her children?
- How well does X get along with his/her girlfriend/boyfriend?
- How well does X get along with his/her co-workers?
- How well does X get along with his boss at work?
- How does X handle problems with his/her relatives? With his/her friends? With his/her co-workers? With his/her boss?
- How would you explain X's anger?
- Does X get angry often?
- Does X get angry easily?
- Does X's anger usually lead quickly to verbal or physical aggression? (explain)
- Does X calm down quickly or does the anger last a long time?
- Does X know how to manage his/her anger?
- Is X able to move on or does he/she hold grudges?

Responsibility

- Do you remember any situations where X was given responsibility to take care of something?
- If yes, can you tell me how X did?
- Was X ever in a position where he/she was the leader of a group or organization?
- How would you explain X's opportunities to be in charge of something or be responsible for something?
- Is X able to follow through with a task until it is completed?

Self-esteem

- In your opinion, how did X feel about himself/herself as a child? As an adolescent? As an adult?
- How confident is X in his/her abilities?
- Has X had experiences where he/she did well and was recognized for doing well? (explain)

- What accomplishment(s) do you think X is most proud of?
- Has X had experiences where he/she did not do well and was criticized for not doing well? (explain)
- How did X feel about his/her performance in school?

Gullibility

- Would you describe X more as a "leader" or a "follower"?
- How much has X been influenced by others when he/she was in school? In the neighborhood? At work? At home? Elsewhere?
- If X is in a gang or other group, what is his/her role?
- Does X associate with persons who are much older than he/she is? Who are much younger than he/she is?
- Can X easily be talked into doing things that others want? (explain)
- Was X ever taken advantage of when X was a child? (explain)
- Does X say what others want him/her to say?

Naiveté

- How easily is X tricked or fooled by others? (explain)
- How well does X understand what others are asking him/her to do?
- Has X ever been accused of doing something when he/she really did not do it?
- Does X get talked into doing things he/she does not want to do? (explain)
- Have others often played jokes on X? (explain)

Follows Rules

- When in school, how well did X behave in his/her classes?
- How well did X follow school rules?
- Did X get into trouble at school for not following the rules? (explain)
- Was X ever suspended or expelled from school? (explain)
- How well did X follow rules at home?
- Was X ever severely punished for not following rules at home?

Obeys laws

- Has X been in trouble with the law in the past?
- In your opinion, what are X's attitudes about obeying the law?

Avoids victimization

- Was X picked on by other students in school or on the school bus? By other children in the neighborhood? By co-workers? By others?
- When X is in situations where he/she might be picked on or taken advantage of, does he/she know how to prevent this from happening? (explain)
- Does X avoid situations where he/she may be picked on or taken advantage of?

Practical:

Activities of Daily Living

In general, how does X deal with common activities that we have to do on an everyday basis such as . . .

- Eating?
- Walking -- moving around?
- Toileting?
- Dressing -- including choosing what clothes to wear?
- Bathing?
- Grooming?
- Doing laundry?

Everyday Life Skills

How well does X do the following daily activities?

- Prepare meals?
- Clean his/her room, apartment, or house?
- Get around in the community (i.e., driving or using public transportation)?
- Keep healthy (physically and mentally)?
- Take prescribed medication?
- Take care of medical emergencies?
- Use the telephone?
- Use leisure time?
- Use household appliances?
- Use basic household tools (e.g., pliers, screwdriver, etc.)?
- Perform basic home maintenance?
- Use resources in the community (e.g., shopping, banking, etc.)

Occupational skills

- Has X had any full-time or part-time jobs? (explain)
- If yes, how has X done in these jobs?
- Does X know what jobs really interest him/her?
- Does X know how to find and apply for a job?
- How has X gotten his/her jobs in the past?
- Does X have the work attitude and general job skills (e.g., showing up on time, can work unsupervised) to keep a job? (explain)
- Has X had any specific job training?
- Has X been able to work well with other people?
- In previous jobs, has X had any special help in doing the job?
- Are you aware of any work ratings X might have received?
- Are you aware of any personnel issues that X might have had on a job?

- Has X ever been fired from a job? (explain)

Maintains Safe Environment

- When X does things that involve risk, does he/she do things to make sure that he/she is safe?
- In X's living situation, is his/her room, apartment, house safe (e.g., dangerous materials are not available to children)
- Does X follow safety precautions at work (e.g., wears a hard hat)?

APPENDIX ONE - B

ADAPTIVE BEHAVIOR: BACKGROUND QUESTIONS TO ASK CREDIBLE INFORMANTS

DSM-IV-TR Version

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- (4) Questions are usually phrased in the present tense. However, it may be necessary to use the past tense for some items.
- (5) It is advisable to have the informant explain their responses on many of the questions and frequently a prompt for doing so is provided. However, other statements may need further explanation. Contextual information (i.e., stories or specific examples) are very useful.
- (6) Substitute the person's name for the symbol "X."

Adaptive Skills

Specific Questions

Communication

Language

(receptive)

- How well does X understand what is said to him/her? (explain)
- How well does X pay attention when someone is speaking to him/her?
- Does X interrupt other people who are speaking to him/her? (explain)

(expressive)

- How well does X pronounce words?
- Does X have any speech problems? (explain)
- How well does X use words when he/she talks?
- Does X have a large vocabulary when he/she speaks?
- How well does X talk using full sentences?
- When X talks, how well do others understand him/her?
- When X talks, does what he/she says make sense? (explain)
- How well does X speak in everyday situations?
- How well does X give directions to someone?
- How well does X talk about current events going on in the community?
- How well does X talk with someone he/she has just met?
- How well does X convey his/her needs?

Functional Academic Skills

Reading

- What types of reading material (books, newspapers, magazines) does X like to read?
- How often did X read as an child? As an adolescent? As an adult?
- In general, how well does X read?
- How well does X say the correct sound of letters he/she sees?
- How well does X read specific words?
- How well does X understand what he/she reads?
- How well does X read common, everyday materials?
- How well does X read the newspaper?
- How well does X read his/her mail?
- How well does X read the labels on cans on food or other materials?
- How well does X read notices or flyers that are put in public places?

Writing

- In which situations does X write?

- In general, how well does X write?
- How well does X spell words?
- When X was in school, how well did X do when he/she had to write a paper that included many paragraphs?
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- How well does X use writing in his/her everyday life?
- How well does X write a personal letter to someone else?
- How well does X write down a phone message on a piece of paper?
- How well does X write notes to himself/herself?

Math

- In general, how well does X do math?
- Can X count to ten? To one hundred?
- Can X add and subtract numbers?
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- Does X understand fractions and decimals?
- When in school, how well did X solve math word problems?
- How well does X use math in his/her everyday life?
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- Can X use a calendar?
- Can X understand the times on a bus schedule?
- Can X count money?
- How well does X make change?
- How well does X buy items in stores without assistance? Can X pay bills? (explain)
- Does X have a checking and/or savings account?
- If yes, how well does X manage it by himself/herself?
- Can X use a tape measure or ruler?
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Self-Direction

- How well does X manage his/her day-to-day life?
- Does X make key decisions in his/her life? (explain)
- How well does X make changes in his life to correct things that did not go right?
- How well does X know what his/her strengths and weaknesses are?
- How well does X follow his/her own schedule?
- Does X initiate activities on his/her own? (explain)
- Can X make his/her concern known to others?

- Does X know when to ask for assistance?

Social & Interpersonal Skills

Interpersonal

- How many close friends does X have?
- How much time does X spend with his/her friends?
- How well does X get along with his/her friends?
- Does X make new friends very often? (explain)
- Does X make new friends easily? (explain)
- What types of things do X and his/her friends like to do?
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- When in school, how did X get along with his/her teachers and other school staff?
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- How well X gets along with his/her children?
- How well does X get along with his/her girlfriend/boyfriend?
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- How does X handle problems with his/her relatives? With his/her friends? With his/her co-workers? With his/her boss?
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- Does X calm down quickly or does the anger last a long time?
- Does X know how to manage his/her anger?
- Is X able to move on or does he/she hold grudges?

Responsibility

- Do you remember any situations where X was given responsibility to take care of something?
- If yes, can you tell me how X did?
- Was X ever in a position where he/she was the leader of a group or organization?
- How would you explain X's opportunities to be in charge of something or be responsible for something?
- Is X able to follow through with a task until it is completed?

Self-esteem

- In your opinion, how did X feel about himself/herself as a child? As an adolescent? As an adult?
- How confident is X in his/her abilities?

- Has X had experiences where he/she did well and was recognized for doing well? (explain)
- What accomplishment(s) do you think X is most proud of?
- Has X had experiences where he/she did not do well and was criticized for not doing well? (explain)
- How did X feel about his/her performance in school?

Gullibility

- Would you describe X more as a "leader" or a "follower"?
- How much has X been influenced by others when he/she was in school? In the neighborhood? At work? At home? Elsewhere?
- If X is in a gang or other group, what is his/her role?
- Does X associate with persons who are much older than he/she is? Who are much younger than he/she is?
- Can X easily be talked into doing things that others want? (explain)
- Was X ever taken advantage of when X was a child? (explain)
- Does X say what others want him/her to say?

Naiveté

- How easily is X tricked or fooled by others? (explain)
- How well does X understand what others are asking him/her to do?
- Has X ever been accused of doing something when he/she really did not do it?
- Does X get talked into doing things he/she does not want to do? (explain)
- Have others often played jokes on X? (explain)

Follows rules

- When in school, how well did X behave in his/her classes?
- How well did X follow school rules?
- Did X get into trouble at school for not following the rules? (explain)
- Was X ever suspended or expelled from school? (explain)
- How well did X follow rules at home?
- Was X ever severely punished for not following rules at home?

Obeys laws

- Has X been in trouble with the law in the past?
- In your opinion, what are X's attitudes about obeying the law?

Avoids victimization

- Was X picked on by other students in school or on the school bus? By other children in the neighborhood? By co-workers? By others?
- When X is in situations where he/she might be picked on or taken advantage of, does he/she know how to prevent this from happening? (explain)

- Does X avoid situations where he/she may be picked on or taken advantage of?

Leisure

- How well does X use his/her free time?
- Does X like to play any sports?
- Does X have any regular hobbies or interests?
- What does X do for entertainment

Self-Care

Activities of Daily Living

In general, how does X deal with common activities that we have to do on an everyday basis such as:

- Eating?
- Walking -- moving around?
- Toileting?
- Dressing -- including choosing what clothes to wear?
- Bathing?
- Grooming?
- Doing laundry?

Home Living

Everyday life skills

How well does X do the following daily activities?

- Prepares meals?
- Cleans his/her room, apartment, or house?
- Uses the telephone?
- Can use household appliances?
- Can use basic household tools (e.g., pliers, screwdriver, etc.)?
- Can perform basic home maintenance?
- Can use resources in the community (e.g., shopping, banking, etc.)

Health

How well does X do the following?

- Keeps healthy -- both physically and mentally?

- Know basic first aid?
- Takes care of medical emergencies?
- Takes prescribed medication?

Safety

Maintains safe environment

- When X does things that involve risk, does he/she do things to make sure that he/she is safe?
- Did X know how to tell if another person was safe or not?
- In X's living situation, is his/her room, apartment, house safe (e.g., dangerous materials are not available to children)
- Does X follow safety precautions at work (e.g., wears a hard hat)?

Use of Community Resources

How well does X do the following?

- Gets around in the neighborhood and community (including driving or using public transportation)?
- Recognizes street signs and local landmarks?
- Knows which agencies can provide help?
- Find and use stores in the neighborhood?
- Did X go to church on a regular basis?
- Did X use public services such as the library?
- Did X participate in any cultural events in the community?

Work

Occupational skills

- Has X had any full-time or part-time jobs? (explain)
- if yes, how has X done in these jobs?
- Does X know what jobs really interest him/her?
- Does X know how to find and apply for a job?
- How has X gotten his/her jobs in the past?
- Does X have a good work attitude?
- Does X have the general job skills (e.g., arriving at work on time, can work unsupervised) to keep a job? (explain)
- Has X had any specific job training?
- Was X able to get to work on time?
- Has X been able to work well with other people?
- In previous jobs, has X had any special help in doing the job?
- Are you aware of any work ratings X might have received?

- Did X work toward promotion in his/her job?
- Are you aware of any personnel issues that X might have had on a job?
- Has X ever been fired from a job? (explain)

APPENDIX TWO

COMPILATION OF STATE & FEDERAL STATUTES

1. ARIZONA	134
2. ARKANSAS.....	136
3. CALIFORNIA	137
4. COLORADO.....	139
5. CONNECTICUT	141
6. DELAWARE.....	143
7. FLORIDA	146
8. GEORGIA	147
9. IDAHO.....	150
10. ILLINOIS.....	152
11. INDIANA	153
12. KANSAS	154
13. KENTUCKY	156
14. LOUISIANA	157
15. MARYLAND	159
16. MISSOURI	159
17. NEBRASKA.....	161
18. NEVADA	162
19. NEW MEXICO	164
20. NEW YORK	164
21. NORTH CAROLINA.....	168
22. SOUTH DAKOTA	169
23. TENNESSEE.....	171
24. UTAH	172
25. VIRGINIA	176
26. WASHINGTON.....	179
27. UNITED STATES.....	180

1. ARIZONA

§ 13-703.02. Mental evaluations of capital defendants; hearing; appeal; prospective application; definitions

A. In any case in which the state files a notice of intent to seek the death penalty, a person who is found to have mental retardation pursuant to this section shall not be sentenced to death but shall be sentenced to life or natural life.

B. If the state files a notice of intent to seek the death penalty, the court shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures. The prescreening psychological expert shall submit a written report of the intelligence quotient determination to the court within ten days of the testing of the defendant.

C. If the prescreening psychological expert determines that the defendant's intelligence quotient is higher than seventy-five, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation. If the prescreening psychological expert determines that the defendant's intelligence quotient is higher than seventy-five, the report shall be sealed by the court and be available only to the defendant. The report shall be released on the motion of any party if the defendant introduces the report in the present case or is convicted of an offense in the present case and the sentence is final. A prescreening determination that the defendant's intelligence quotient is higher than seventy-five does not prevent the defendant from introducing evidence of the defendant's mental retardation or diminished mental capacity as a mitigating factor at the penalty phase of the sentencing proceeding.

D. If the prescreening psychological expert determines that the defendant's intelligence quotient is seventy-five or less, the trial court shall appoint one or more additional psychological experts to independently determine whether the defendant has mental retardation. If the prescreening psychological expert determines that the defendant's intelligence quotient is seventy-five or less, the trial court, within ten days of receiving the written report, shall order the state and the defendant to each nominate three psychological experts, or jointly nominate a single psychological expert. The trial court shall appoint one psychological expert nominated by the state and one psychological expert nominated by the defendant, or a single psychological expert jointly nominated by the state and the defendant, none of whom made the prescreening determination of the defendant's intelligence quotient. The trial court, in its discretion, may appoint an additional psychological expert who was neither nominated by the state nor the defendant, and who did not make the prescreening determination of the defendant's intelligence quotient. Within forty-five days after the trial court orders the state and the defendant to nominate psychological experts, or on the appointment of such experts, whichever is later, the state and the defendant shall provide to the psychological experts

and the court any available records that may be relevant to the defendant's mental retardation status. The court may extend the deadline for providing records on good cause shown by the state or defendant.

E. Not less than twenty days after receipt of the records provided pursuant to subsection D of this section, or twenty days after the expiration of the deadline for providing the records, whichever is later, each psychological expert shall examine the defendant using current community, nationally and culturally accepted physical, developmental, psychological and intelligence testing procedures, for the purpose of determining whether the defendant has mental retardation. Within fifteen days of examining the defendant, each psychological expert shall submit a written report to the trial court that includes the expert's opinion as to whether the defendant has mental retardation.

F. If the scores on all the tests for intelligence quotient administered to the defendant are above seventy, the notice of intent to seek the death penalty shall not be dismissed on the ground that the defendant has mental retardation. This does not preclude the defendant from introducing evidence of the defendant's mental retardation or diminished mental capacity as a mitigating factor at the penalty phase of the sentencing proceeding.

G. No less than thirty days after the psychological experts' reports are submitted to the court and before trial, the trial court shall hold a hearing to determine if the defendant has mental retardation. At the hearing, the defendant has the burden of proving mental retardation by clear and convincing evidence. A determination by the trial court that the defendant's intelligence quotient is sixty-five or lower establishes a rebuttable presumption that the defendant has mental retardation. Nothing in this subsection shall preclude a defendant with an intelligence quotient of seventy or below from proving mental retardation by clear and convincing evidence.

H. If the trial court finds that the defendant has mental retardation, the trial court shall dismiss the intent to seek the death penalty, shall not impose a sentence of death on the defendant if the defendant is convicted of first degree murder and shall dismiss one of the attorneys appointed under rule 6.2, Arizona rules of criminal procedure unless the court finds that there is good cause to retain both attorneys. If the trial court finds that the defendant does not have mental retardation, the court's finding does not prevent the defendant from introducing evidence of the defendant's mental retardation or diminished mental capacity as a mitigating factor at the penalty phase of the sentencing proceeding.

I. Within ten days after the trial court makes a finding on mental retardation, the state or the defendant may file a petition for special action with the Arizona court of appeals pursuant to the rules of procedure for special actions. The filing of the petition for special action is governed by the rules of procedure for special actions, except that the court of appeals shall exercise jurisdiction and decide the merits of the claims raised.

J. This section applies to all capital sentencing proceedings.

K. For the purposes of this section, unless the context otherwise requires:

1. "Adaptive behavior" means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group.
2. "Mental retardation" means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.
3. "Prescreening psychological expert" or "psychological expert" means a psychologist licensed pursuant to title 32, chapter 19.1 with at least two years' experience in the testing, evaluation and diagnosis of mental retardation.
4. "Significantly subaverage general intellectual functioning" means a full scale intelligence quotient of seventy or lower. The court in determining the intelligence quotient shall take into account the margin of error for the test administered.

2. ARKANSAS

§ 5-4-618. Mental retardation.

(a)(1) As used in this section, "mental retardation" means:

- (A) Significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning manifest in the developmental period, but no later than age eighteen (18); and
- (B) Deficits in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

(d) (1) A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial.

(2) Prior to trial, the court shall determine if the defendant is mentally retarded.

- (A) If the court determines that the defendant is not mentally retarded, the defendant may raise the question of mental retardation to the jury for determination de novo during the sentencing phase of the trial.
- (i) At the time the jury retires to decide mitigating and aggravating circumstances, the jury shall be given a special verdict form on mental retardation.
- (ii) If the jury unanimously determines that the defendant was mentally retarded at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.
- (B) If the court determines that the defendant is mentally retarded, then the jury shall not be "death qualified", but the jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.
- (e) However, this section shall not be deemed to require unanimity for consideration of any mitigating circumstance, nor shall this section be deemed to supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.

3. CALIFORNIA

Penal Code § 1376.

- (a) As used in this section, "mentally retarded" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.
- (b) (1) In any case in which the prosecution seeks the death penalty, the defendant may, at a reasonable time prior to the commencement of trial, apply for an order directing that a mental retardation hearing be conducted. Upon the submission of a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded, the court shall order a hearing to determine whether the defendant is mentally retarded. At the request of the defendant, the court shall conduct the hearing without a jury prior to the commencement of the trial. The defendant's request for a court hearing prior to trial shall constitute a waiver of a jury hearing on the issue of mental retardation. If the defendant does not request a court hearing, the court shall order a jury hearing to determine if the defendant is mentally retarded. The jury hearing on mental retardation shall occur at the conclusion of the phase of the trial in which the jury has found the defendant guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true. Except as provided in paragraph (3), the same jury shall make a finding that the defendant is mentally retarded, or that the defendant is not mentally retarded.

(2) For the purposes of the procedures set forth in this section, the court or jury shall decide only the question of the defendant's mental retardation. The defendant shall

present evidence in support of the claim that he or she is mentally retarded. The prosecution shall present its case regarding the issue of whether the defendant is mentally retarded. Each party may offer rebuttal evidence. The court, for good cause in furtherance of justice, may permit either party to reopen its case to present evidence in support of or opposition to the claim of retardation. Nothing in this section shall prohibit the court from making orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is mentally retarded, including, but not limited to, the appointment of, and examination of the defendant by, qualified experts. No statement made by the defendant during an examination ordered by the court shall be admissible in the trial on the defendant's guilt.

(3) At the close of evidence, the prosecution shall make its final argument, and the defendant shall conclude with his or her final argument. The burden of proof shall be on the defense to prove by a preponderance of the evidence that the defendant is mentally retarded. The jury shall return a verdict that either the defendant is mentally retarded or the defendant is not mentally retarded. The verdict of the jury shall be unanimous. In any case in which the jury has been unable to reach a unanimous verdict that the defendant is mentally retarded, and does not reach a unanimous verdict that the defendant is not mentally retarded, the court shall dismiss the jury and order a new jury impaneled to try the issue of mental retardation. The issue of guilt shall not be tried by the new jury.

(c) In the event the hearing is conducted before the court prior to the commencement of the trial, the following shall apply:

(1) If the court finds that the defendant is mentally retarded, the court shall preclude the death penalty and the criminal trial thereafter shall proceed as in any other case in which a sentence of death is not sought by the prosecution. If the defendant is found guilty of murder in the first degree, with a finding that one or more of the special circumstances enumerated in Section 190.2 are true, the court shall sentence the defendant to confinement in the state prison for life without the possibility of parole. The jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation.

(2) If the court finds that the defendant is not mentally retarded, the trial court shall proceed as in any other case in which a sentence of death is sought by the prosecution. The jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation.

(d) In the event the hearing is conducted before the jury after the defendant is found guilty with a finding that one or more of the special circumstances enumerated in Section 190.2 are true, the following shall apply:

(1) If the jury finds that the defendant is mentally retarded, the court shall preclude the death penalty and shall sentence the defendant to confinement in the state prison for life without the possibility of parole.

(2) If the jury finds that the defendant is not mentally retarded, the trial shall proceed as in any other case in which a sentence of death is sought by the prosecution.

(e) In any case in which the defendant has not requested a court hearing as provided in subdivision (b), and has entered a plea of not guilty by reason of insanity under Sections 190.4 and 1026, the hearing on mental retardation shall occur at the conclusion of the sanity trial if the defendant is found sane.

4. COLORADO

§ 18-1.3-1101. Definitions.

As used in this part 11:

(1) "Defendant" means any person charged with a class 1 felony.

(2) "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period. The requirement for documentation may be excused by the court upon a finding that extraordinary circumstances exist.

§ 18-1.3-1102. Pretrial motion by defendant in class 1 felony case - determination whether defendant is mentally retarded - procedure.

(1) Any defendant may file a motion with the trial court in which the defendant may allege that such defendant is a mentally retarded defendant. Such motion shall be filed at least ninety days prior to trial.

(2) The court shall hold a hearing upon any motion filed pursuant to subsection (1) of this section and shall make a determination regarding such motion no later than ten days prior to trial. At such hearing, the defendant shall be permitted to present evidence with regard to such motion and the prosecution shall be permitted to offer evidence in rebuttal. The defendant shall have the burden of proof to show by clear and convincing evidence that such defendant is mentally retarded.

(3) The court shall enter specific findings of fact and conclusions of law regarding whether or not the defendant is a mentally retarded defendant as defined in section 18-1.3-1101.

§ 18-1.3-1103. Mentally retarded defendant - death penalty not imposed thereon.

A sentence of death shall not be imposed upon any defendant who is determined to be a mentally retarded defendant pursuant to section 18-1.3-1102. If any person who is determined to be a mentally retarded defendant is found guilty of a class 1 felony, such defendant shall be sentenced to life imprisonment.

§ 18-1.3-1104. Evaluation and report.

(1) When the defendant files a motion alleging that the defendant is a mentally retarded defendant, the court shall order one or more evaluations of the defendant with regard to such motion.

(2) In ordering an evaluation of the defendant pursuant to subsection (1) of this section, the court shall specify the place where the evaluation is to be conducted and the period of time allocated for the evaluation. In determining the place where the evaluation is to be conducted, the court shall give priority to the place where the defendant is in custody, unless the nature and circumstances of the evaluation requires designation of a different location. The court shall direct one or more psychologists who are recommended by the executive director of the department of human services pursuant to section 27-10.5-139, C.R.S., or his or her designee, to evaluate the defendant. For good cause shown, upon motion of the prosecution or the defendant or upon the court's own motion, the court may order such further or other evaluation as it deems necessary. Nothing in this section shall abridge the right of the defendant to procure an evaluation as provided in section 18-1.3-1105.

(3) The defendant shall have a privilege against self-incrimination that may be invoked prior to or during the course of an evaluation under this section. A defendant's failure to cooperate with the evaluators or other personnel conducting the evaluation may be admissible in the defendant's mental retardation hearing.

(4) To aid in the formation of an opinion as to mental retardation, it is permissible in the course of an evaluation under this section to use statements of the defendant and any other evidence, including but not limited to the circumstances surrounding the commission of the offense as well as the medical and social history of the defendant, in evaluating the defendant.

(5) A written report of the evaluation shall be prepared in triplicate and delivered to the appropriate clerk of the court. The clerk shall furnish a copy of the report to both the prosecuting attorney and the counsel for the defendant.

(6) The report of evaluation shall include, but is not limited to:

(a) The name of each expert who evaluated the defendant;

(b) A description of the nature, content, extent, and results of the evaluation and any tests conducted; and

- (c) Diagnosis and an opinion as to whether the defendant is mentally retarded.
- (7) Nothing in this section shall be construed to preclude the application of section 16-8-109, C.R.S.

§ 18-1.3-1105. Evaluation at insistence of defendant.

(1) If the defendant wishes to be evaluated by an expert in mental retardation of the defendant's choice in connection with the mental retardation hearing under this part 11, the court, upon timely motion, shall order that the evaluator chosen by the defendant be given reasonable opportunity to conduct the evaluation.

(2) Whenever an expert is endorsed as a witness by the defendant, a copy of any report of an evaluation of the defendant shall be furnished to the prosecution within a reasonable time but not less than thirty days prior to the mental retardation hearing.

5. CONNECTICUT

Sec. 1-1g. "Mental retardation", defined.

(a) For the purposes of sections 4a-60, 17a-274, 17a-281, 38a-816, 45a-668 to 45a-684, inclusive, 46a-51, 53a-59a, 53a-60b, 53a-60c and 53a-61a, mental retardation means a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

(b) As used in subsection (a), "general intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for that purpose and standardized on a significantly adequate population and administered by a person or persons formally trained in test administration; "significantly subaverage" means an intelligence quotient more than two standard deviations below the mean for the test; "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group; and "developmental period" means the period of time between birth and the eighteenth birthday.

Sec. 53a-46a. Imposition of sentence for capital felony. Hearing. Special verdict. Mitigating and aggravating factors. Factors barring death sentence.

(a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section.

(b) For the purpose of determining the sentence to be imposed when a defendant is convicted of or pleads guilty to a capital felony, the judge or judges who presided at the

trial or before whom the guilty plea was entered shall conduct a separate hearing to determine the existence of any mitigating factor concerning the defendant's character, background and history, or the nature and circumstances of the crime, and any aggravating factor set forth in subsection (i). Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth in subsection (i) of this section exists or that any factor set forth in subsection (h) exists. Such hearing shall be conducted (1) before the jury which determined the defendant's guilt, or (2) before a jury impaneled for the purpose of such hearing if (A) the defendant was convicted upon a plea of guilty; (B) the defendant was convicted after a trial before three judges as provided in subsection (b) of section 53a-45; or (C) if the jury which determined the defendant's guilt has been discharged by the court for good cause, or (3) before the court, on motion of the defendant and with the approval of the court and the consent of the state.

(c) In such hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence of any mitigating or aggravating factor. Any information relevant to any mitigating factor may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (i) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any mitigating or aggravating factor. The burden of establishing any of the aggravating factors set forth in subsection (i) shall be on the state. The burden of establishing any mitigating factor shall be on the defendant.

(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime, pursuant to subsection (b) of this section, the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death.

(e) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of any factor set forth in subsection (h), the existence of any aggravating factor or factors set forth in subsection (i) and whether any aggravating factor or factors outweigh any mitigating factor or factors found to exist pursuant to subsection (d).

(f) If the jury or, if there is no jury, the court finds that (1) none of the factors set forth in subsection (h) exist, (2) one or more of the aggravating factors set forth in subsection (i) exist and (3) (A) no mitigating factor exists or (B) one or more mitigating factors exist but are outweighed by one or more aggravating factors set forth in subsection (i), the court shall sentence the defendant to death.

(g) If the jury or, if there is no jury, the court finds that (1) any of the factors set forth in subsection (h) exist, or (2) none of the aggravating factors set forth in subsection (i) exists, or (3) one or more of the aggravating factors set forth in subsection (i) exist and one or more mitigating factors exist, but the one or more aggravating factors set forth in subsection (i) do not outweigh the one or more mitigating factors, the court shall impose a sentence of life imprisonment without the possibility of release.

(h) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with mental retardation, as defined in section 1-1g, or (3) the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution, or (4) the defendant was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but the defendant's participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution, or (5) the defendant could not reasonably have foreseen that the defendant's conduct in the course of commission of the offense of which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

* * *

6. DELAWARE

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(a) Punishment for first-degree murder. Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

* * *

(d) Determination of sentence.

(1) If a jury is impaneled, the Court shall discharge that jury after it has reported its findings and recommendation to the Court. A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury is not impaneled, a sentence of death shall not be imposed unless the Court finds beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court. If a jury has not been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the Court, it shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that the defendant was seriously mentally retarded at the time the crime was committed. Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

1. Whether the defendant has a significantly subaverage level of intellectual functioning;

2. Whether the defendant's adaptive behavior is substantially impaired; and

3. Whether the conditions described in sub-subparagraphs (1) and (2) of this subparagraph existed before the defendant became 18 years of age.

b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the State may present relevant and admissible evidence on the issue of the defendant's alleged mental retardation, or in rebuttal thereof. The defendant shall have the burden of proof to demonstrate by clear and convincing evidence that the defendant was seriously mentally retarded at the time of the offense. Evidence presented during the hearing shall be considered by the jury in making its recommendation to the Court pursuant to paragraph (c)(3) of this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. The jury shall not make any recommendation to the Court on the question of whether the defendant was seriously mentally retarded at the time the crime was committed.

c. If the defendant files a motion pursuant to this paragraph claiming serious mental retardation at the time the crime was committed, the Court, in determining the sentence to be imposed, shall make specific findings as to the existence of serious mental retardation at the time the crime was committed. If the Court finds that the defendant has established by clear and convincing evidence that the defendant was seriously mentally retarded at the time the crime was committed, notwithstanding any other provision of this section to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction. If the Court determines that the defendant has failed to establish by clear and convincing evidence that the defendant was seriously mentally retarded at the time the crime was committed, the Court shall proceed to determine the sentence to be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's mental retardation presented during the hearing shall be considered by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

d. When used in this paragraph:

1. "Seriously mentally retarded" or "serious mental retardation" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age;

2. "Significantly subaverage intellectual functioning" means an intelligent quotient of 70 or below obtained by assessment with 1 or more of the

standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning; and

3. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety.

(4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon which its sentence is based. If a jury is impaneled, and if the Court's decision as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist differs from the jury's recommended finding, the Court shall also state with specificity the reasons for its decision not to accept the jury's recommendation.

* * *

This act shall apply to all defendants tried, re-tried, sentenced or re-sentenced after July 15, 2003.

7. FLORIDA

921.137 Imposition of the death sentence upon a mentally retarded defendant prohibited.--

(1) As used in this section, the term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant has mental retardation.

(3) A defendant charged with a capital felony who intends to raise mental retardation as a bar to the death sentence must give notice of such intention in accordance with the rules

of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. If the court finds, by clear and convincing evidence, that the defendant has mental retardation as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise mental retardation as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant has mental retardation. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) The state may appeal, pursuant to s. 924.07, a determination of mental retardation made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death prior to the effective date of this act.

8. GEORGIA

Title 17, Chapter 7, Section 131 (17-7-131)

(a) For purposes of this Code section, the term:

* * *

(3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

- (b) (1) In all cases in which the defense of insanity is interposed, the jury, or the court if tried by it, shall find whether the defendant is:

* * *

(E) Guilty but mentally retarded, but the finding of mental retardation shall be made only in felony cases.

(2) A plea of guilty but mentally ill at the time of the crime or a plea of guilty but mentally retarded shall not be accepted until the defendant has undergone examination by a licensed psychologist or psychiatrist and the court has examined the psychological or psychiatric reports, held a hearing on the issue of the defendant's mental condition, and is satisfied that there is a factual basis that the defendant was mentally ill at the time of the offense or mentally retarded to which the plea is entered.

* * *

(3) In all cases in which the defense of insanity is interposed, the trial judge shall charge the jury, in addition to other appropriate charges, the following:

* * *

(C) I charge you that should you find the defendant guilty but mentally retarded, the defendant will be given over to the Department of Corrections or the Department of Human Resources, as the mental condition of the defendant may warrant.

(c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he was insane or otherwise mentally incompetent under the law at the time the act or acts charged against him were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but mentally retarded."

* * *

(3) The defendant may be found "guilty but mentally retarded" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.

* * *

- (g) (1) Whenever a defendant is found guilty but mentally ill at the time of a felony or guilty but mentally retarded, or enters a plea to that effect that is accepted by the court, the court shall sentence him in the same manner as a defendant found guilty of the offense, except as otherwise provided in subsection (j) of this Code section. A defendant who is found guilty but mentally ill at the time of the felony or guilty but mentally retarded shall be evaluated by a psychiatrist or a licensed psychologist from the Department of Human Resources after sentencing and prior to transfer to a Department of Corrections facility. The Board of Human Resources shall develop appropriate rules and regulations for the implementation of such procedures.
- (2) If the defendant who is found guilty but mentally ill at the time of the felony or guilty but mentally retarded is not in need of immediate hospitalization, as indicated by the evaluation, then the defendant shall be committed to an appropriate penal facility and shall be further evaluated and then treated, within the limits of state funds appropriated therefor, in such manner as is psychiatrically indicated for his mental illness or mental retardation.
- (3) If at any time following the defendant's transfer to a penal facility it is determined that a transfer to the Department of Human Resources is psychiatrically indicated for his mental illness or mental retardation, then the defendant shall be transferred to the Department of Human Resources pursuant to procedures set forth in regulations of the Department of Corrections and the Department of Human Resources.
- (4) If it is determined by the evaluation that the defendant found guilty but mentally ill at the time of the felony or guilty but mentally retarded is in need of immediate hospitalization, then the defendant shall be transferred by the Department of Corrections to a mental health facility designated by the Department of Human Resources in accordance with rules and regulations of such departments.
- (h) If a defendant who is found guilty but mentally ill at the time of a felony or guilty but mentally retarded is placed on probation under the "State-wide Probation Act," Article 2 of Chapter 8 of Title 42, the court may require that the defendant undergo available outpatient medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation. Persons required to receive such services may be charged fees by the provider of the services.
- (i) In any case in which the defense of insanity is interposed or a plea of guilty but mentally ill at the time of the felony or a plea of guilty but mentally retarded is made and an examination is made of the defendant pursuant to Code Section 17-7-130.1 or

paragraph (2) of subsection (b) of this Code section, upon the defendant's being found guilty or guilty but mentally ill at the time of the crime or guilty but mentally retarded, a copy of any such examination report shall be forwarded to the Department of Corrections with the official sentencing document.

(j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

9. IDAHO

§ 19-2515A. IMPOSITION OF DEATH PENALTY UPON MENTALLY RETARDED PERSON PROHIBITED.

(1) As used in this section:

(a) "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intelligence functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.

(b) "Significantly subaverage general intellectual functioning" means an intelligence quotient of seventy (70) or below.

(2) In any case in which the state has provided notice of an intent to seek the death penalty pursuant to section 18-4004A, Idaho Code, and where the defendant intends to claim that he is mentally retarded and call expert witnesses concerning such issue, the defendant shall give notice to the court and the state of such intention at least ninety (90) days in advance of trial, or such other period as justice may require, and shall apply for an order directing that a mental retardation hearing be conducted. Upon receipt of such application, the court shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded; provided however, that no court shall, over the objection of any party, receive the evidence of any expert witness on the issue of mental retardation unless such evidence is fully subject to the adversarial process in at least the following particulars:

(a) If a defendant fails to provide notice as required in this subsection, an expert witness shall not be permitted to testify until such time as the state has a complete opportunity to consider the substance of such testimony and prepare for rebuttal through such opposing experts as the state may choose.

(b) A party who expects to call an expert witness to testify on the issue of mental retardation shall, on a schedule to be set by the court, furnish to the opposing party a written synopsis of the findings of such expert or a copy of a written report. The court may authorize the taking of depositions to inquire further into the substance of such synopsis or report.

(c) Raising the issue of mental retardation shall constitute a waiver of any privilege that might otherwise be interposed to bar the production of evidence on the subject and, upon request, the court shall order that the state's experts shall have access to the defendant in such cases for the purpose of having its own experts conduct an examination in preparation for any legal proceeding at which the defendant's mental retardation may be in issue.

(d) The court is authorized to appoint at least one (1) expert at public expense upon a showing by an indigent defendant that there is a need to inquire into questions of the defendant's mental retardation. The defendant shall pay the costs of examination if he is financially able. The determination of ability to pay shall be made in accordance with chapter 8, title 19, Idaho Code. The report of the examination shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(e) If an examination cannot be conducted by reason of the unwillingness of the defendant to cooperate with either a court-appointed examiner or with any state expert, the examiner or expert shall so advise the court in writing and include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental retardation. The court may consider the defendant's lack of cooperation for its effect on the credibility of the defendant's mental retardation claim.

(3) If the court finds by a preponderance of the evidence that the defendant is mentally retarded, the death penalty shall not be imposed. The jury shall not be informed of the mental retardation hearing or the court's findings concerning the defendant's claim of mental retardation.

(4) In the event of a conviction of first-degree murder of a person who has been found to be mentally retarded pursuant to subsections (2) and (3) of this section, a special sentencing proceeding shall be held promptly to determine whether the state has proven beyond a reasonable doubt the existence of any of the statutory aggravating circumstances set forth in subsections 19-2515(9)(a) through (j), Idaho Code.

(a) The special sentencing proceeding shall be conducted before a jury unless a jury is waived by the defendant with the consent of the prosecuting attorney.

(i) If the defendant's guilt was determined by a jury verdict, the same jury shall hear the special sentencing proceeding; provided however, that if it is impracticable to reconvene the same jury to hear the special sentencing proceeding due to an insufficient number of jurors, the trial court may dismiss that jury and convene a new jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code.

(ii) If the defendant's guilt was determined by a plea of guilty or by a decision of the trial court sitting without a jury, or if a retrial of the special sentencing proceeding is necessary for any reason including, but not limited to, a mistrial in a previous special sentencing proceeding or as a consequence of a remand from an appellate court, the trial

court shall impanel a jury of twelve (12) persons, plus alternate jurors as the trial court deems necessary pursuant to section 19-1904, Idaho Code, unless such jury is waived.

(iii) If a special sentencing proceeding is conducted before a newly impaneled jury, the state and the defense may present evidence to inform the jury of the nature and circumstances of the murder for which the defendant was convicted. The newly impaneled jury shall be instructed that the defendant has previously been found guilty of first-degree murder and that the jury's purpose is limited to making findings relevant for sentencing.

(b) At the special sentencing proceeding, the state and the defendant shall be entitled to present all evidence relevant to the determination of whether or not a statutory aggravating circumstance has been proven beyond a reasonable doubt. Disclosure of evidence to be relied on in the sentencing proceeding shall be made in accordance with Idaho criminal rule 16. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing.

(c) If a unanimous jury, or the court if a jury is waived, finds the existence of a statutory aggravating circumstance beyond a reasonable doubt, the court shall impose a fixed life sentence. If a unanimous jury, or the court if a jury is waived, does not find the existence of a statutory aggravating circumstance beyond a reasonable doubt, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the defendant shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service.

(5) Nothing in this section is intended to alter the application of any rule of evidence or limit or extend the right of any party to assert any claim or defense otherwise available to that party.

(6) Any remedy available by post-conviction procedure or habeas corpus shall be pursued according to the procedures and time limits set forth in section 19-2719, Idaho Code.

10. ILLINOIS

§ 114-15. Mental retardation.

(a) In a first degree murder case in which the State seeks the death penalty as an appropriate sentence, any party may raise the issue of the defendant's mental retardation by motion. A defendant wishing to raise the issue of his or her mental retardation shall provide written notice to the State and the court as soon as the defendant reasonably believes such issue will be raised.

(b) The issue of the defendant's mental retardation shall be determined in a pretrial hearing. The court shall be the fact finder on the issue of the defendant's mental retardation and shall determine the issue by a preponderance of evidence in which the moving party has the burden of proof. The court may appoint an expert in the field of mental retardation. The defendant and the State may offer experts from the field of

mental retardation. The court shall determine admissibility of evidence and qualification as an expert.

(c) If after a plea of guilty to first degree murder, or a finding of guilty of first degree murder in a bench trial, or a verdict of guilty for first degree murder in a jury trial, or on a matter remanded from the Supreme Court for sentencing for first degree murder, and the State seeks the death penalty as an appropriate sentence, the defendant may raise the issue of defendant's mental retardation not at eligibility but at aggravation and mitigation. The defendant and the State may offer experts from the field of mental retardation. The court shall determine admissibility of evidence and qualification as an expert.

(d) In determining whether the defendant is mentally retarded, the mental retardation must have manifested itself by the age of 18. IQ tests and psychometric tests administered to the defendant must be the kind and type recognized by experts in the field of mental retardation. In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work. An intelligence quotient (IQ) of 75 or below is presumptive evidence of mental retardation.

(e) Evidence of mental retardation that did not result in disqualifying the case as a capital case, may be introduced as evidence in mitigation during a capital sentencing hearing. A failure of the court to determine that the defendant is mentally retarded does not preclude the court during trial from allowing evidence relating to mental disability should the court deem it appropriate.

(f) If the court determines at a pretrial hearing or after remand that a capital defendant is mentally retarded, and the State does not appeal pursuant to Supreme Court Rule 604, the case shall no longer be considered a capital case and the procedural guidelines established for capital cases shall no longer be applicable to the defendant. In that case, the defendant shall be sentenced under the sentencing provisions of Chapter V of the Unified Code of Corrections.

11. INDIANA

Indiana Code 35-36-9-2. "Mentally retarded individual" defined

Sec. 2. As used in this chapter, "mentally retarded individual" means an individual who, before becoming twenty-two (22) years of age, manifests:

- (1) significantly subaverage intellectual functioning; and
- (2) substantial impairment of adaptive behavior; that is documented in a court ordered evaluative report.

Indiana Code 35-36-9-3. Petition alleging mental retardation; filing

Sec. 3. (a) The defendant may file a petition alleging that the defendant is a mentally retarded individual.

(b) The petition must be filed not later than twenty (20) days before the omnibus date.

(c) Whenever the defendant files a petition under this section, the court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

(1) Whether the defendant has a significantly subaverage level of intellectual functioning.

(2) Whether the defendant's adaptive behavior is substantially impaired.

(3) Whether the conditions described in subdivisions (1) and (2) existed before the defendant became twenty-two (22) years of age.

Indiana Code 35-36-9-4. Hearing on petition

Sec. 4. (a) The court shall conduct a hearing on the petition under this chapter.

(b) At the hearing, the defendant must prove by clear and convincing evidence that the defendant is a mentally retarded individual.

Indiana Code 35-36-9-5. Determination within ten days of trial

Sec. 5. Not later than ten (10) days before the initial trial date, the court shall determine whether the defendant is a mentally retarded individual based on the evidence set forth at the hearing under section 4 of this chapter. The court shall articulate findings supporting the court's determination under this section.

Indiana Code 35-36-9-6. Dismissal of death sentence charges against mentally retarded individual

Sec. 6. If the court determines that the defendant is a mentally retarded individual under section 5 of this chapter, the part of the state's charging instrument filed under IC 35-50-2-9(a) that seeks a death sentence against the defendant shall be dismissed.

Indiana Code 35-36-9-7. Sentencing of mentally retarded individual convicted of murder

Sec. 7. If a defendant who is determined to be a mentally retarded individual under this chapter is convicted of murder, the court shall sentence the defendant under IC 35-50-2-3(a).

12. KANSAS

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.

76-12b01. Definitions. When used in this act:

(a) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community.

* * *

(d) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.

* * *

(i) "Significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary.

13. KENTUCKY

532.130 Definitions for KRS 532.135 and 532.140.

(1) An adult, or a minor under eighteen (18) years of age who may be tried as an adult, convicted of a crime and subject to sentencing, is referred to in KRS 532.135 and 532.140 as a defendant.

(2) A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is referred to in KRS 532.135 and 532.140 as a seriously mentally retarded defendant. "Significantly subaverage general intellectual functioning" is defined as an intelligence quotient (I.Q.) of seventy (70) or below.

532.135 Determination by court that defendant is mentally retarded.

(1) At least thirty (30) days before trial, the defendant shall file a motion with the trial court wherein the defendant may allege that he is a seriously mentally retarded defendant and present evidence with regard thereto. The Commonwealth may offer evidence in rebuttal.

(2) At least ten (10) days before the beginning of the trial, the court shall determine whether or not the defendant is a seriously mentally retarded defendant in accordance with the definition in KRS 532.130.

(3) The decision of the court shall be placed in the record.

(4) The pretrial determination of the trial court shall not preclude the defendant from raising any legal defense during the trial. If it is determined the defendant is a seriously mentally retarded offender, he shall be sentenced as provided in KRS 532.140.

532.140 Mentally retarded offender not subject to execution -- Authorized sentences.

(1) KRS 532.010, 532.025, and 532.030 to the contrary notwithstanding, no offender who has been determined to be a seriously mentally retarded offender under the provisions of KRS 532.135, shall be subject to execution. The same procedure as required in KRS 532.025 and 532.030 shall be utilized in determining the sentence of the seriously mentally retarded offender under the provisions of KRS 532.135 and 532.140.

(2) The provisions of KRS 532.135 and 532.140 do not preclude the sentencing of a seriously mentally retarded offender to any other sentence authorized by KRS 532.010, 532.025, or 532.030 for a crime which is a capital offense.

(3) The provisions of KRS 532.135 and 532.140 shall apply only to trials commenced after July 13, 1990.

14. LOUISIANA

Code Criminal Procedure 905.5.1. Mental retardation

- A. Notwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death.
- B. Any capital defendant who claims to be mentally retarded shall file written notice thereof within the time period for filing of pretrial motions as provided by Code of Criminal Procedure Article 521.
- C. (1) Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.
- (2) Any pretrial determination by the judge that a defendant is not mentally retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury pursuant to this Section.
- D. Once the issue of mental retardation is raised by the defendant, and upon written motion of the district attorney, the defendant shall provide the state, within time limits set by the court, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any defense expert in forming the basis of his opinion that the defendant is mentally retarded.
- E. By filing a notice relative to a claim of mental retardation under this Article, the defendant waives all claims of confidentiality and privilege to, and is deemed to have consented to the release of, any and all medical, correctional, educational, and military records, raw data, tests, test scores, notes, behavioral observations, reports, evaluations, expert opinions, and any other such information of any kind or other records relevant or necessary to an examination or determination under this Article.
- F. When a defendant makes a claim of mental retardation under this Article, the state shall have the right to an independent psychological and psychiatric examination of the defendant. A psychologist conducting such examination must be licensed by the Louisiana State Board of Examiners of Psychologists. If the state exercises this right, and upon written motion of the defendant, the state shall provide the defendant, within time limits set by the court, any and all medical, correctional, educational, and military

records, and all raw data, tests, test scores, notes, behavioral observations, reports, evaluations, and any other information of any kind reviewed by any state expert in forming the basis of his opinion that the defendant is not mentally retarded. If the state fails to comply with any such order, the court may impose sanctions as provided by Article 729.5.

G. If the defendant making a claim of mental retardation fails to comply with any order issued pursuant to Paragraph D of this Article, or refuses to submit to or fully cooperate in any examination by experts for the state pursuant to either Paragraph D or F of this Article, upon motion by the district attorney, the court shall neither conduct a pretrial hearing concerning the issue of mental retardation nor instruct the jury of the prohibition of executing mentally retarded defendants.

H. (1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

(2) A diagnosis of one or more of the following conditions does not necessarily constitute mental retardation:

- (a) Autism.
- (b) Behavioral disorders.
- (c) Cerebral palsy and other motor deficits.
- (d) Difficulty in adjusting to school.
- (e) Emotional disturbance.
- (f) Emotional stress in home or school.
- (g) Environmental, cultural, or economic disadvantage.
- (h) Epilepsy and other seizure disorders.
- (i) Lack of educational opportunities.
- (j) Learning disabilities.
- (k) Mental illness.
- (l) Neurological disorders.
- (m) Organic brain damage occurring after age eighteen.
- (n) Other handicapping conditions.
- (o) Personality disorders.
- (p) Sensory impairments.
- (q) Speech and language disorders.
- (r) A temporary crisis situation.
- (s) Traumatic brain damage occurring after age eighteen.

15. MARYLAND

Code of Criminal Law § 2-202.

* * *

(b) (1) In this subsection, a defendant is "mentally retarded" if:

(i) the defendant had significantly below average intellectual functioning, as shown by an intelligence quotient of 70 or below on an individually administered intelligence quotient test and an impairment in adaptive behavior; and

(ii) the mental retardation was manifested before the age of 22 years.

(2) A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole subject to the requirements of § 2-203(1) of this subtitle or imprisonment for life, if the defendant:

(i) was under the age of 18 years at the time of the murder; or

(ii) proves by a preponderance of the evidence that at the time of the murder the defendant was mentally retarded.

16. MISSOURI

Trial procedure, first degree murder.

565.030.

1. Where murder in the first degree is charged but not submitted or where the state waives the death penalty, the submission to the trier and all subsequent proceedings in the case shall proceed as in all other criminal cases with a single stage trial in which guilt and punishment are submitted together.

2. Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage. If an offense is charged other than murder in the first degree in a count together with a count of murder in the first degree, the trial judge shall assess punishment on any such offense according to law, after the defendant is found guilty of such offense and after he finds the defendant to be a prior offender pursuant to chapter 558, RSMo.

3. If murder in the first degree is submitted and the death penalty was not waived but the trier finds the defendant guilty of a lesser homicide, a second stage of the trial shall

proceed at which the only issue shall be the punishment to be assessed and declared. No further evidence shall be received. If the trier is a jury it shall be instructed on the law. The attorneys may then argue as in other criminal cases the issue of punishment, after which the trier shall assess and declare the punishment as in all other criminal cases.

4. If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

- (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
- (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
- (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
- (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.

5. Upon written agreement of the parties and with leave of the court, the issue of the defendant's mental retardation may be taken up by the court and decided prior to trial without prejudicing the defendant's right to have the issue submitted to the trier of fact as provided in subsection 4 of this section.

6. As used in this section, the terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

7. The provisions of this section shall only govern offenses committed on or after August 28, 2001.

17. NEBRASKA

28-105.01

Death penalty imposition; restriction on person under eighteen years; restriction on person with mental retardation; sentencing procedure.

(1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.

(3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

(4) If (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall hold a hearing prior to any sentencing determination proceeding as provided in section 29-2521 upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing determination proceeding as provided in section 29-2521 or to argue that such evidence should be given mitigating significance.

18. NEVADA

Nevada Revised Statutes 174.098 Motion to declare that defendant is mentally retarded:
When authorized; procedure.

1. A defendant who is charged with murder of the first degree in a case in which the death penalty is sought may, not less than 10 days before the date set for trial, file a motion to declare that he is mentally retarded.

2. If a defendant files a motion pursuant to this section, the court must:

(a) Stay the proceedings pending a decision on the issue of mental retardation; and

(b) Hold a hearing within a reasonable time before the trial to determine whether the defendant is mentally retarded.

3. The court shall order the defendant to:

(a) Provide evidence which demonstrates that the defendant is mentally retarded not less than 30 days before the date set for a hearing conducted pursuant to subsection 2; and

(b) Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is mentally retarded at least 15 days before the date set for a hearing pursuant to subsection 2.

4. For the purpose of the hearing conducted pursuant to subsection 2, there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection 3.

5. At a hearing conducted pursuant to subsection 2:

(a) The court must allow the defendant and the prosecution to present evidence and conduct a cross-examination of any witness concerning whether the defendant is mentally retarded; and

(b) The defendant has the burden of proving by a preponderance of the evidence that he is mentally retarded.

6. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is mentally retarded, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed to the Supreme Court pursuant to NRS 177.015.

7. For the purposes of this section, "mentally retarded" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

Nevada Revised Statutes 175.554 Death penalty cases: Instructions to jury; determinations; findings and verdict; hearing to set aside sentence of defendant alleged to be mentally retarded. In cases in which the death penalty is sought:

1. The court shall instruct the jury at the end of the penalty hearing, and shall include in its instructions the aggravating circumstances alleged by the prosecution upon which evidence has been presented during the trial or at the hearing. The court shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing.

2. The jury shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the defendant should be sentenced to imprisonment for a definite term of 50 years, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.

3. The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

4. If a jury imposes a sentence of death, the jury shall render a written verdict signed by the foreman. The verdict must designate the aggravating circumstance or circumstances which were found beyond a reasonable doubt, and must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

5. If a sentence of death is imposed and a prior determination regarding mental retardation has not been made pursuant to NRS 174.098, the defendant may file a motion to set aside the penalty on the grounds that the defendant is mentally retarded. If such a motion is filed, the court shall conduct a hearing on that issue in the manner set forth in NRS 174.098. If the court determines pursuant to such a hearing that the defendant is mentally retarded, it shall set aside the sentence of death and order a new penalty hearing to be conducted. Either party may appeal such a determination to the Supreme Court pursuant to NRS 177.015.

19. NEW MEXICO

31-20A-2.1. Prohibition against capital punishment of mentally retarded persons; presentencing hearing.

A. As used in this section, "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

B. The penalty of death shall not be imposed on any person who is mentally retarded.

C. Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding under Section 31-20A-3 NMSA 1978. If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. A ruling by the court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance. If the sentencing proceeding is conducted before a jury, the jury shall not be informed of any ruling denying a defendant's motion under this section.

20. NEW YORK

Criminal Procedure § 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

* * *

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first

degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual

functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted,

the district attorney shall schedule a time and place for the examination, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

* * *

21. NORTH CAROLINA

§ 15A-2005. Mentally retarded defendants; death sentence prohibited.

(a) (1) The following definitions apply in this section:

a. Mentally retarded. - Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.

b. Significant limitations in adaptive functioning. - Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

c. Significantly subaverage general intellectual functioning. - An intelligence quotient of 70 or below.

(2) The defendant has the burden of proving significantly subaverage general intellectual functioning, significant limitations in adaptive functioning, and that mental retardation was manifested before the age of 18. An intelligence quotient of 70 or below on an individually administered, scientifically recognized standardized intelligence quotient test administered by a licensed psychiatrist or psychologist is evidence of significantly subaverage general intellectual functioning; however, it is not sufficient, without evidence of significant limitations in adaptive functioning and without evidence of manifestation before the age of 18, to establish that the defendant is mentally retarded.

(b) Notwithstanding any provision of law to the contrary, no defendant who is mentally retarded shall be sentenced to death.

(c) Upon motion of the defendant, supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded. The court shall order such a hearing with the consent of the State. The defendant has the burden of production and persuasion to demonstrate mental retardation by clear and convincing evidence. If the court determines the defendant to be mentally retarded, the court shall declare the case noncapital, and the State may not seek the death penalty against the defendant.

(d) The pretrial determination of the court shall not preclude the defendant from raising any legal defense during the trial.

(e) If the court does not find the defendant to be mentally retarded in the pretrial proceeding, upon the introduction of evidence of the defendant's mental retardation during the sentencing hearing, the court shall submit a special issue to the jury as to whether the defendant is mentally retarded as defined in this section. This special issue

shall be considered and answered by the jury prior to the consideration of aggravating or mitigating factors and the determination of sentence. If the jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment.

(f) The defendant has the burden of production and persuasion to demonstrate mental retardation to the jury by a preponderance of the evidence.

(g) If the jury determines that the defendant is not mentally retarded as defined by this section, the jury may consider any evidence of mental retardation presented during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence.

(h) The provisions of this section do not preclude the sentencing of a mentally retarded offender to any other sentence authorized by G.S. 14-17 for the crime of murder in the first degree. (2001-346, s. 1.)

22. SOUTH DAKOTA

§ 23A-27A-26.1. Death penalty not to be imposed on person mentally retarded when crime committed.

Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.

§ 23A-27A-26.2. Mental retardation defined.

As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning.

§ 23A-27A-26.3. Procedures for establishing mental retardation of defendant.

Not later than ninety days prior to the commencement of trial, the defendant may upon a motion alleging reasonable cause to believe the defendant was mentally retarded at the time of the commission of the offense, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded. If the court finds after the hearing that the

defendant was not mentally retarded at the time of the commission of the offense, the court shall, prior to commencement of trial, enter an order so stating, but nothing in this paragraph precludes the defendant from presenting mitigating evidence of mental retardation at the sentencing phase of the trial. If the court finds after the hearing that the defendant established mental retardation by a preponderance of the evidence, the court shall prior to commencement of trial, enter an order so stating. Unless the order is reversed on appeal, a separate sentencing proceeding under this section may not be conducted if the defendant is thereafter convicted of murder in the first degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole.

§ 23A-27A-26.4. Appeal by state.

If the court enters an order pursuant to § 23A-27A-26.3 finding that the defendant was mentally retarded at the time of the commission of the offense, the state may appeal as of right from the order. Upon entering such an order, the court shall afford the state a reasonable period of time, which may not be less than ten days, to determine whether to take an appeal from the order finding that the defendant was mentally retarded. The taking of an appeal by the state stays the effectiveness of the court's order and any order fixing a date for trial.

§ 23A-27A-26.5. Examination of defendant by state -- Videotaped recording -- Defendant's statements inadmissible except as to mental retardation.

If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant. Counsel for the state and the defendant have the right to be present at the examination. A videotaped recording of the examination shall be made available to the defendant and the state's attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an examination pursuant to an order issued in accordance with this section, any statement made by the defendant for the purpose of the examination is inadmissible in evidence against the defendant in any criminal action or proceeding on every issue other than that of whether the defendant was mentally retarded at the time of the commission of the offense, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

§ 23A-27A-26.6. Applicability of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive.

The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, apply only to offenses alleged to have been committed by the defendant after July 1, 2000.

23. TENNESSEE

39-13-203. Mentally retarded defendants - Death sentence prohibited.

(a) As used in this section, "mental retardation" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.

(c) The burden of production and persuasion to demonstrate mental retardation by a preponderance of the evidence is upon the defendant. The determination of whether the defendant was mentally retarded at the time of the offense of first degree murder shall be made by the court.

(d) If the court determines that the defendant was a person with mental retardation at the time of the offense, and if the trier of fact finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. The provisions of § 39-13-207 shall govern such sentencing proceeding.

(e) If the issue of mental retardation is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).

(f) The determination by the trier of fact that the defendant is not mentally retarded shall not be appealable by interlocutory appeal but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

24. UTAH

§ 77-15a-101. Mentally retarded defendant not subject to death penalty -- Defendant with subaverage functioning not subject to death penalty if confession not corroborated.

(1) A defendant who is found by the court to be mentally retarded as defined in Section 77-15a-102 is not subject to the death penalty.

(2) A defendant who does not meet the definition of mental retardation under Section 77-15a-102 is not subject to the death penalty if:

(a) the defendant has significantly subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning;

(b) the functioning described in Subsection (2)(a) is manifested prior to age 22; and

(c) the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.

§ 77-15a-102. "Mentally retarded" defined.

As used in this chapter, a defendant is "mentally retarded" if:

(1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and

(2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

§ 77-15a-103. Court may raise issue of mental retardation at any time.

The court in which a capital charge is pending may raise the issue of the defendant's mental retardation at any time. If raised by the court, counsel for each party shall be allowed to address the issue of mental retardation.

§ 77-15a-104. Hearing -- Notice -- Stay of proceeding -- Examinations of defendant -- Scope of examination -- Report -- Procedures.

(1) (a) If a defendant proposes to offer evidence concerning or argue that he qualifies for an exemption from the death penalty under Subsection 77-15a-101(1) or (2), the defendant shall file and serve the prosecuting attorney with written notice of his intention as soon as practicable, but not fewer than 60 days before trial.

(b) If the defendant wishes to claim the exemption provided in Subsection 77-15a-101(2), the defendant shall file and serve the prosecuting attorney with written notice of his intention as soon as practicable, but not fewer than 60 days before trial.

(2) When notice is given under Subsection (1), the court raises the issue, or a motion is filed regarding Section 77-15a-101, the court may stay all proceedings in order to address the issue.

(3) (a) The court shall order the Department of Human Services to appoint at least two mental health experts to examine the defendant and report to the court. The experts:

- (i) may not be involved in the current treatment of the defendant; and
- (ii) shall have expertise in mental retardation assessment.

(b) Upon appointment of the experts, the defendant or other party as directed by the court shall provide information and materials to the examiners relevant to a determination of the defendant's mental retardation, including copies of the charging document, arrest or incident reports pertaining to the charged offense, known criminal history information, and known prior mental health evaluations and treatments.

(c) The court may make the necessary orders to provide the information listed in Subsection (3)(b) to the examiners.

(d) The court may provide in its order appointing the examiners that custodians of mental health records pertaining to the defendant shall provide those records to the examiners without the need for consent of the defendant or further order of the court.

(e) Prior to examining the defendant, examiners shall specifically advise the defendant of the limits of confidentiality as provided under Section 77-15a-106.

(4) During any examinations under Subsection (3), unless the court directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(5) The experts shall in the conduct of their examinations and in their reports to the court consider and address:

- (a) whether the defendant is mentally retarded as defined in Section 77-15a-102;
- (b) the degree of any mental retardation the expert finds to exist;
- (c) whether the defendant has the mental deficiencies specified in Subsection 77-15a-101(2); and
- (d) the degree of any mental deficiencies the expert finds to exist.

(6) (a) The experts examining the defendant shall provide written reports to the court, the prosecution, and the defense within 60 days of the receipt of the court's order, unless the expert submits to the court a written request for additional time in accordance with Subsection (6)(c).

(b) The reports shall provide to the court and to prosecution and defense counsel the examiners' written opinions concerning the mental retardation of the defendant.

(c) If an examiner requests of the court additional time, the examiner shall provide the report to the court and counsel within 90 days from the receipt of the court's order unless, for

good cause shown, the court authorizes an additional period of time to complete the examination and provide the report.

(7) Any written report submitted by an expert shall:

- (a) identify the specific matters referred for evaluation;
- (b) describe the procedures, techniques, and tests used in the examination and the purpose or purposes for each;
- (c) state the expert's clinical observations, findings, and opinions; and
- (d) identify the sources of information used by the expert and present the basis for the expert's clinical findings and opinions.

(8) Within 30 days after receipt of the report from the Department of Human Services, but not later than five days before hearing, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of witnesses the prosecuting attorney proposes to call in rebuttal.

(9) (a) Except pursuant to Section 77-15a-105, this chapter does not prevent any party from producing any other testimony as to the mental condition of the defendant.

(b) Expert witnesses who are not appointed by the court are not entitled to compensation under Subsection (10).

(10)(a) Expenses of examinations of the defendant ordered by the court under this section shall be paid by the Department of Human Services.

(b) Travel expenses associated with any court-ordered examination that are incurred by the defendant shall be charged by the Department of Human Services to the county where prosecution is commenced.

(11)(a) When the report is received, the court shall set a date for a hearing to determine if the exemption under Section 77-15a-101 applies. The hearing shall be held and the judge shall make the determination within a reasonable time prior to jury selection.

(b) Prosecution and defense counsel may subpoena to testify at the hearing any person or organization appointed by the Department of Human Services to conduct the examination and any independent examiner.

(c) The court may call any examiner to testify at the hearing who is not called by the parties. If the court calls an examiner, counsel for the parties may cross-examine that examiner.

(12)(a) A defendant is presumed to be not mentally retarded unless the court, by a preponderance of the evidence, finds the defendant to be mentally retarded. The burden of proof is upon the proponent of mental retardation at the hearing.

(b) A finding of mental retardation does not operate as an adjudication of mental retardation for any purpose other than exempting the person from a sentence of death in the case before the court.

(13)(a) The defendant is presumed not to possess the mental deficiencies listed in Subsection 77-15a-101(2) unless the court, by a preponderance of the evidence, finds that the defendant has significant subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning and that this functioning was manifested prior to age 22. The burden of proof is upon the proponent of that proposition.

(b) If the court finds by a preponderance of the evidence that the defendant has significant subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning and that this functioning was manifested prior to age 22, then the burden is upon the state to establish that any confession by the defendant which the state intends to introduce into evidence is supported by substantial evidence independent of the confession.

(14)(a) If the court finds the defendant mentally retarded, it shall issue an order:

(i) containing findings of fact and conclusions of law, and addressing each of the factors in Subsections (5)(a) and (b); and

(ii) stating that the death penalty is not a sentencing option in the case before the court.

(b) If the court finds by a preponderance of the evidence that the defendant possesses the mental deficiencies listed in Subsection 77-15a-101(2) and that the state

fails to establish that any confession is supported by substantial evidence independent of the confession, the state may proceed with its case and:

(i) introduce the confession into evidence, and the death penalty will not be a sentencing option in the case; or

(ii) not introduce into evidence any confession or the fruits of a confession that the court has found is not supported by substantial evidence independent of the confession, and the death penalty will be a sentencing option in the case.

(c) (i) A finding by the court regarding whether the defendant qualifies for an exemption under Section 77-15a-101 is a final determination of that issue for purposes of this chapter.

(ii) The following questions may not be submitted to the jury by instruction, special verdict, argument, or other means:

(A) whether the defendant is mentally retarded for purposes of this chapter; and

(B) whether the defendant possesses the mental deficiencies specified in Subsection 77-15a-101(2).

(iii) This chapter does not prevent the defendant from submitting evidence of retardation or other mental deficiency to establish a mental condition as a mitigating circumstance under Section 76-3-207.

(15) A ruling by the court that the defendant is exempt from the death penalty may be appealed by the state pursuant to Subsection 77-18a-1(2)(h).

(16) Failure to comply with this section does not result in the dismissal of criminal charges.

§ 77-15a-105. Defendant's wilful failure to cooperate -- Expert testimony regarding retardation is barred.

(1) If the defendant files notice, raises the issue, or intends to present evidence or make an argument that the defendant is exempt from the death penalty under this chapter, the defendant shall make himself available and fully cooperate in any examination by mental health experts appointed by the Department of Human Services and any other independent examiners for the defense or the prosecution.

(2) If the defendant wilfully fails to make himself available and fully cooperate in the examination, and that failure is established to the satisfaction of the court, the defendant is barred from presenting expert testimony relating to any exemption from the death penalty under this chapter.

§ 77-15a-106. Limitations on admitting mental retardation examination evidence.

(1) The following may not be admitted into evidence against the defendant in any criminal proceeding, except as provided in Subsection (2):

(a) any statement made by the defendant in the course of any mental examination conducted under this chapter, whether the examination is with or without the consent of the defendant, and any testimony by the expert based upon the defendant's statement; and

(b) any other fruits of the defendant's statement under Subsection (1)(a).

(2) Evidence under Subsection (1) may be admitted on an issue regarding a mental condition on which the defendant has introduced evidence.

25. VIRGINIA

§ 19.2-264.3:1.1. Capital cases; determination of mental retardation.

A. As used in this section and § 19.2-264.3:1.2, the following definition applies:

"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.

B. Assessments of mental retardation under this section and § 19.2-264.3:1.2 shall conform to the following requirements:

1. Assessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors. Testing of intellectual functioning shall be carried out in conformity with accepted professional practice, and whenever indicated, the assessment shall include information from multiple sources. The Commissioner of Mental Health, Mental Retardation and Substance Abuse Services shall maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.

2. Assessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records. The assessment shall include at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible. In reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant's history and characteristics and the context of the assessment.

3. Assessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing and appropriate for the particular defendant being assessed, including, whenever available, educational, social service, medical records, prior disability assessments, parental or caregiver reports, and other collateral data, recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards.

C. In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.

In any case in which the offense may be punishable by death and is tried before a judge, the issue of mental retardation, if raised by the defendant in accordance with the notice provisions of subsection E of § 19.2-264.3:1.2, shall be determined by the judge as part of the sentencing proceeding required by § 19.2-264.4.

The defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence.

D. The verdict of the jury, if the issue of mental retardation is raised, shall be in writing, and, in addition to the forms specified in § 19.2-264.4, shall include one of the following forms:

(1) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory language of the offense charged), and that the defendant has proven by a preponderance of the evidence that he is mentally retarded, fix his punishment at (i) imprisonment for life or (ii) imprisonment for life and a fine of \$_____.

Signed _____ foreman"

or

(2) "We the jury, on the issue joined, having found the defendant guilty of (here set out the statutory language of the offense charged) find that the defendant has not proven by a preponderance of the evidence that he is mentally retarded.

Signed _____ foreman"

§ 19.2-264.3:1.2. Expert assistance when issue of defendant's mental retardation relevant to capital sentencing.

A. Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to assess whether or not the defendant is mentally retarded and to assist the defense in the preparation and presentation of information concerning the defendant's mental retardation. The mental health expert appointed pursuant to this section shall be (a) a psychiatrist, a clinical psychologist or an individual with a doctorate degree in clinical psychology, (b) skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior and (c) qualified by experience and by specialized training, approved by the Commissioner of Mental Health, Mental

Retardation and Substance Abuse Services, to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert.

B. Evaluations performed pursuant to subsection A may be combined with evaluations performed pursuant to §§ 19.2-169.1, 19.2-169.5, or § 19.2-264.3:1.

C. The expert appointed pursuant to subsection A shall submit to the attorney for the defendant a report assessing whether the defendant is mentally retarded. The report shall include the expert's opinion as to whether the defendant is mentally retarded.

D. The report described in subsection C shall be sent solely to the attorney for the defendant and shall be protected by the attorney-client privilege. However, the Commonwealth shall be given a copy of the report, the results of any other evaluation of the defendant's mental retardation and copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation, after the attorney for the defendant gives notice of an intent to present evidence of mental retardation pursuant to subsection E.

E. In any case in which a defendant charged with capital murder intends, in the event of conviction, to present testimony of an expert witness to support a claim that he is mentally retarded, he or his attorney shall give notice in writing to the attorney for the Commonwealth, at least 21 days before trial, of his intention to present such testimony. In the event that such notice is not given and the defendant tenders testimony by an expert witness at the sentencing phase of the trial, then the court may, in its discretion, upon objection of the Commonwealth, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence.

F. 1. If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of the defendant's mental retardation, the court shall appoint one or more qualified experts to perform such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's experts could result in exclusion of the defendant's expert evidence. The qualification of the experts shall be governed by subsection A. The attorney for the Commonwealth shall be responsible for providing the experts the information specified in subsection C of § 19.2-169.5. After performing their evaluation, the experts shall report their findings and opinions and provide copies of psychiatric, psychological, medical or other records obtained during the course of the evaluation to the attorneys for the Commonwealth and the defense.

2. If the court finds, after hearing evidence presented by the parties, out of the presence of the jury, that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

26. WASHINGTON

Revised Code of Washington § 10.95.030. Sentences for aggravated first degree murder.

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person was mentally retarded at the time the crime was committed, under the definition of mental retardation set forth in (a) of this subsection. A diagnosis of mental retardation shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of mental retardation. The defense must establish mental retardation by a preponderance of the evidence and the court must make a finding as to the existence of mental retardation.

(a) "Mentally retarded" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.

(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.

(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

(e) "Developmental period" means the period of time between conception and the eighteenth birthday.

27. UNITED STATES

18 U.S.C. section 3596. Implementation of a sentence of death

* * *

(c) Mental Capacity. - 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 was imposed on that person.