

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

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Adaptive Behavior: Background Questions to Ask Credible Informants (Combined Version)

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 an accompanying appendix.

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. Developing the evidence of 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: why is it important in a domestic context?
2. International institutions;
3. Articulating international arguments in capital cases involving persons with mental retardation;
4. Regional bodies
5. Clemency: international intervention.

APPENDIX

Adaptive Behavior: Background Questions to Ask Credible Informants (Combined Version)

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.

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

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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 civil statutes regulating services for people with mental retardation. These may provide the definitions that the courts will be inclined to use, although it is possible they 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"). Their criteria are substantially the same, and each has three prongs:

1. Intellectual functioning that is significantly limited.
2. Adaptive behavior that is significantly limited.
3. Onset prior to age of 18.

While the defining language varies slightly, as illustrated below, the AAMR and APA are describing a single group of people with the same disability.

The AAMR, the leading professional association concerned with the diagnosis and treatment of mental retardation, uses the following language in its definition:

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

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002) [hereafter, "AAMR 2002"].

The APA, in its *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. Text Rev. 2000) [hereafter, "DSM-IV-TR"], offers the following very similar definition:

[S]ignificantly sub-average intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following three skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-

direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). DSM-IV-TR, at 41.

The DSM-IV-TR is the text relied upon by mental health professionals for the diagnosis of mental disorders. It specifies four categories, or “degrees of severity”, of mental retardation, which reflect increasing levels of intellectual impairment, as indicated by IQ, from mild to profound. It is the “mild” category, the upper range of retardation, that concerns us here. Individuals who function at lower levels are unlikely to enter the criminal justice system.¹

There are many different factors that can, individually or collectively, result in mental retardation, and there is no need to identify any causal factor at all for the diagnosis to be made. Mental retardation “may be seen as the final common pathway of various pathological processes that affect the functioning of the central nervous system.” DSM-IV-TR, 41.

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 to 75 or below—on a standardized, individually administered IQ test—satisfies the requirement of significant limitations in intellectual functioning.² IQ scores are typically rendered with three components: verbal IQ, performance IQ, and full-scale IQ. Because it is deemed the best measure of overall intelligence, it is the full-scale score that is relied upon for assessing mental retardation. *Id.* at 51, 55-56.

¹ It should be noted that the AAMR historically relied on these same categories of severity, but has since abandoned them in favor of a system that classifies individuals in terms of the nature of the “supports” they require. 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 term “mild” was a misnomer, erroneously suggesting that it was not a seriously disabling condition. AAMR 2002, at 26.

² The nature of the IQ test and the manner of its administration (standardized, individually administered) are very important. The “gold standard” instruments for assessing intelligence in the United States are the Wechsler (WAIS and WISC) and Stanford Binet families of tests. Anything else is likely to be a “screening tool” (intended to provide a rough measure of intelligence but not to be relied upon for important decisions) or an alternative test chosen either for ease of administration or to overcome a language or other barrier. Such scores must always be viewed skeptically and never be relied upon to rule out mental retardation. Recorded “IQ scores” obtained, for example, during military service or in institutional settings like schools, hospitals and detention facilities, often are not individually administered, but rather are group measures intended to provide a rough assessment of intelligence.

The reason the upper range of mental retardation is generally set at an IQ level of 70, is to capture in the diagnosis those individuals whose intellectual functioning is two standard deviations below the mean, which is 100 (representing “average” intelligence). An individual with an IQ score of 70 has intellectual functioning lower than 98 percent of the population. Note, however, that it is not 70 but 75 that is used as the dividing line by AAMR and APA. This is necessary to account for what is called the “standard error of measurement,” a principle which applies to all psychological testing.

Owing to “variations in test performance, examiner’s behavior, or other undetermined factors,” IQ and other 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 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.* As indicated by the fact that both the AAMR and the APA factor the standard error of measurement into their definitions, “it is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation.” *Id.* at 57.

For the Wechsler Adult Intelligence Scale, Third Edition (“WAIS-III”), the standard error of measurement 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 70-80.³ For a chart containing the standard errors of measurement for many common IQ tests, see AAMR 2002, 67-71.

Although the upper range of IQ for persons with mental retardation is 70-75, there are many reasons why an individual with mental retardation may nevertheless have recorded IQ scores that are higher. The reasons why such scores do not “disqualify” a client from a mental retardation diagnosis, including the phenomenon known as “the Flynn effect,” are explored in Chapter 5 of this section.

1.2 SIGNIFICANT LIMITATIONS IN ADAPTIVE BEHAVIOR

“Adaptive behavior” (or “adaptive functioning”) is the term used to capture all the skills that are required for an individual to care for him or herself, relate to others, and meet the demands of living in a community. An assessment of adaptive behavior looks at the extent to which an individual can manage for himself in all aspects of life, and includes everything from personal hygiene to managing a budget, to maintaining friendships to exercising appropriate judgment and more. As with IQ, there are norms for adaptive

³ Although some states have tried to establish 70 as a bright-line cutoff for IQ, mental health experts are quite clear that this is inappropriate and measurement error must be accounted for. In the DSM-IV-TR, for example, it is stated twice that “it is possible to diagnose Mental Retardation in individuals with IQ’s between 70 and 75 who exhibit significant deficits in adaptive behavior....” DSM-IV-TR, 41, 48.

behavior, and a diagnosis of mental retardation requires functioning that is substantially below those norms.

AAMR and APA view adaptive behavior in essentially the same way, though they define it somewhat differently. According to AAMR, adaptive behavior breaks down into three skill categories: conceptual, social and practical.

Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.
(AAMR, 2002, at 14.)

A diagnosis of mental retardation under the AAMR standard requires significant limitations in only one of the three domains. Representative, though not exclusive, components of the three domains are elaborated as follows:

- | | |
|--------------------|---|
| Conceptual skills: | Language
Reading and writing
Money concepts
Self-direction |
| Social skills: | Interpersonal
Responsibility
Self-esteem
Gullibility
Naiveté
Follows rules
Obeys rules
Avoids victimization |
| Practical skills: | Personal activities of daily living (e.g., hygiene, feeding oneself, toileting, etc.)
Instrumental activities of daily living (e.g., cooking, housekeeping, taking medications, using a telephone, managing money, using transportation, etc.)
Occupational skills
Maintains safe environments |

AAMR 2002, at 82.

APA says essentially the same thing, but in different terms. “*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.” DSM-IV-TR, at 42. To meet the APA

diagnostic criteria for mental retardation, an individual must demonstrate “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;
- Health;
- Safety;
- Functional academics;
- Leisure; and
- Work.

DSM-IV-TR, at 41.⁴

Three important principles inform the assessment of adaptive behavior.

- First, to qualify for a diagnosis of mental retardation, an individual 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; limitations and strengths may also co-exist in the same adaptive skill domains. AAMR 2002, at 1, 8.
- Third, 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.

In summary, the purpose of the adaptive function prong in the diagnosis of mental retardation is to confirm that the intellectual deficit ascertained through IQ testing has in fact had consequences that are reflected in how the client lives. *Id.* at 18, n. 25. Every individual with mental retardation is different, and some clients with mental retardation present with strengths and capabilities that allow them to function successfully in a variety

⁴ The previous edition of the AAMR manual (9th ed.1992, at 5) utilized a list of adaptive behavior domains virtually identical to those in the DSM-IV-TR.

of ways and to avoid standing out as being disabled. Nevertheless, such areas of strength are never sufficient to rule out a diagnosis of mental retardation.

1.3 ONSET PRIOR TO AGE 18

The third prong of a mental retardation diagnosis—onset before age 18—derives from the recognition that mental retardation is a **developmental disability**.⁵ It is neither a mental illness nor a medical disorder. Onset during the developmental period distinguishes mental retardation from other conditions, such as traumatic brain injury or dementia that might give rise to similar cognitive and behavioral difficulties, but have their onset in adulthood, after the individual has had the opportunity to mature through the milestones of child development without the disabling impact of brain impairment.

To satisfy this component, it is not necessary that the mental retardation was actually identified or formally diagnosed before the person's 18th birthday. It is only necessary that the disability was manifested then: that limitations in adaptive functioning existed before the age of 18, that IQ testing sometime during the person's life has reliably established an IQ of 75 or below, and that there has been no intervening reason, such as a traumatic head injury, for the person's IQ to have diminished since the age of 18.⁶ In most cases, an accurate and reliable social history will provide sufficient evidence to show onset during the developmental stage of life.

A Note about Causation

There is no fixed etiology for mental retardation, and in fact causation cannot be determined in the majority of cases of mild mental retardation. AAMR 2002, at 32. The cause may be genetic, acquired (i.e., from a brain injury or disease or exposure), unknown, or a combination of those and other reasons. Increasingly, the cause of mental retardation in any individual is considered a constellation of "risk factors". See Section 3.1, *infra*. Identifying the etiology of the client's mental retardation is not necessary for the diagnosis, because the disability is defined by the dysfunction itself and not by its cause. Nevertheless, identifying causes or risk factors may be very helpful in establishing a well-

⁵ A developmental disability is a disability that appears during the "developmental period," -- the years 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 6, *infra*.

⁶ Some statutes defining mental retardation, for example New Mexico and Nebraska, do not have an age of onset requirement. Others set an outer limit that is older than 18; for example, Maryland uses age 22. It is important, therefore, to review the relevant statutes or caselaw in your jurisdiction and not to assume that 18 is the required outer limit for onset. Moreover, current research concerning human brain development -- some of which suggests that maturation is not complete until the 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, faced with a client who, except for onset by age 18, meets the criteria for mental retardation, counsel should consider utilizing current research to challenge the statutory age of onset.

supported diagnosis. 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.

2 HOW MENTAL RETARDATION AFFECTS PEOPLE WHO HAVE IT

Virtually every capital client with mental retardation will have what is inaptly referred to as “mild” mental retardation. An individual with an IQ beneath the mild range (55 or below) is so seriously impaired as to be unlikely to be charged with a crime or found competent for trial.⁷ Two things are critical to recognize about mild mental retardation. First, its impact is anything but mild; in fact, the disability dictates and limits an individual’s progress and achievement in profound ways in all areas of life, from childhood to adulthood. Second, because no human condition is more stigmatizing and emotionally painful, individuals with mild mental retardation typically develop numerous ways to “mask,” or cover up, the nature and extent of their disability.

Utilizing the AAMR’s three domains of adaptive behavior, the remainder of this chapter discusses some typical areas of challenge for individuals with mild mental retardation.⁸ Aided with this understanding, the defense team can gently but thoroughly probe the client and those who know him or her, to remove the mask and reveal the difficulties that clarify a mental retardation diagnosis.

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. The term “functional academics” refers to the ways in which reading, math, and other “academic” skills are drawn upon in the real world. All manner of everyday transactions in our industrialized world draw heavily on these abilities, as illustrated below.

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, may be retained to repeat grades or given a “social” pass to the next grade in spite of inadequate achievement, and are often “tracked” to the lowest functioning group of students or placed in special education classes, where they are more likely to have been designated “learning disabled,” or even “emotionally disturbed”

⁷ 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).

⁸ 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 Appendix One. 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.

than “mentally retarded.” In the lowest tracks or in special education classes, they may receive higher grades, either because of greater success with individualized instruction or because their grades in such classes did not reflect an expectation of grade level achievement. Slow and faltering reading, which becomes particularly apparent when asked to read aloud, and poor reading comprehension, are signs of impairment. Everyday tasks, such as reading a newspaper, a letter, a menu, a label on an item in a grocery store, and public postings, maybe challenging. Filling out a job application, or locating a number in a telephone directory may be difficult or impossible. Writing ability will also be diminished. Clients with mental retardation can write simple letters but cannot produce writing requiring complexity of expression. They rarely write notes to themselves. Spelling, grammar, sentence structure and use of paragraphs are likely rudimentary.

Impairments in mathematical skills may be 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. There may be poor understanding of weights and measures and of concepts like fractions (e.g., how many days in a week, weeks in a year, ounces in a pound; how many quarter pounds in a pound). Using a bus or train schedule may be difficult. Furthermore, there may be difficulty maintaining bank accounts, paying bills or using simple tools such as a ruler or measuring tape.

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 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 of self-direction is the ability to learn. Impairments in this ability can manifest directly, for example, in simplistic and concrete thinking and in 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 people with mental retardation.

Successfully completing activities that require the integration and application of various pieces of knowledge or multiple skills will be difficult. A client with mental retardation may be able to learn, for example, the individual skills necessary to drive a truck safely and proficiently. However, when placed in a job where all of the skills need to be utilized, and flexible thinking is required, he may be unable to perform successfully. For example, 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 carry out the whole job. Even if he can drive effectively,

he may not know what to do if a change in the route is required, or if he must vary from the specific route he has been taught to drive. The integration of skills and knowledge into a whole is a complex behavior that requires a person to generalize from the specific, and to adapt to changing conditions; this often exceeds the ability of a person with mental retardation.

The ability to engage in goal-directed behavior is also often impaired. Goal-directed behavior requires the individual to engage in a sequencing process. He must understand that what is done now has consequences that lead to something else, and that ultimately produce a predicted and desired outcome. Clients with mental retardation may be unable to engage in such a process because their ability to anticipate and plan—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 carried out in an orderly fashion requires initiative and considerable integrative thinking. Necessary skills include the ability to identify and keep in mind tasks that must be completed, project the amount of time needed for each, and organize time in the manner that permits these tasks to be accomplished. Each activity or task must be initiated and completed in a manner consistent with the schedule that has been established. This can be difficult or impossible for people with mental retardation.

Decision-making is another area that requires integrative thinking. It requires an awareness of a hierarchy of 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 have difficulty engaging in this process effectively.

One of the deficits that compounds the difficulty of decision-making for clients with mental retardation is that they often do not accurately assess and appreciate their strengths and weaknesses. It is extremely common for a person with mental retardation to overestimate his or her abilities, leading to undesired consequences and failure. In keeping with this, such individuals typically do not recognize the need to ask for assistance to avoid a problem or correct a mistake.

Impulsive behavior is almost always a very serious problem for capital 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. Combined with poor judgment and impaired decision-making, impulsivity can produce devastating results.

Communication, another behavior in the conceptual domain, also involves utilizing numerous skills and abilities. The communication process demands both expressive and

receptive tasks. We listen, we respond, we explore in detail the same subject, or we change subjects—all within a reciprocal framework, which is the core of the communication process. The person with mental retardation may be challenged by the building blocks of expressive communication, such as word pronunciation, word usage, vocabulary, and syntax. Figurative language and abstract concepts, even simple ones, can be difficult to understand. Or difficulties may be 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. While clients with mental retardation may have difficulty in one or more of these areas, it should also be recognized that social conversation may, alternatively, be an area of relative strength. Many people with mental retardation are good conversation partners so long as the substance of the discussion remains concrete as opposed to abstract, and does not exceed their intellectual range.

2.2 SOCIAL BEHAVIORS

The “representative skills” in this domain are 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. The nature of friendships in the client's childhood—were they with same-age peers; was the client valued as an equal or made fun of or treated with derision—may be particularly revealing. 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.

Responsibility, gullibility, naiveté, and victimization are dimensions of social behavior that are often interconnected. Individuals with mental retardation typically act as followers rather than leaders and are easily influenced and taken advantage of by others. 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 they may never have 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. 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 had numerous criminal charges and periods of incarceration.

2.3 PRACTICAL BEHAVIORS

The “representative skills” in this domain include “personal” 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.

Most individuals with mild mental retardation can successfully carry out the basic personal activities of daily living—the self-care behaviors that include such physical tasks as eating, dressing and toileting. They may evidence difficulty, however, in more demanding aspects of these behaviors, such as grooming and selecting clothing that is appropriate for the weather or occasion.

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 aspects 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 are likely to have difficulty in these areas, though they may perform extremely reliably if provided with sufficient training, structure and support.

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 may have difficulty with these behaviors.

3 INVESTIGATION: SCREENING FOR MENTAL RETARDATION

As explained previously, capital clients who have mental retardation are almost always in the highest functioning category—that is, they are classified as having “mild” mental retardation. A striking characteristic of people with mild mental retardation is that, without IQ testing and thorough assessment of adaptive functioning, it would be difficult for anyone—especially a lay person—to determine reliably whether they have 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 their socially stigmatizing condition. In keeping with this, people with mental retardation will also frequently overrate their skills, either due to honest misapprehension of their abilities⁹ or because of 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 mentally 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 now, under *Atkins*, it could save their lives. The very condition that makes these clients

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).”

ineligible for execution makes them unable to appreciate that their lifelong tendency to hide their limitations is, in this context, not in their interest.¹³

Accordingly, to avoid overlooking mental retardation in our clients, it is imperative to proceed with extreme care. It is inadequate to rely upon intuitive conclusions—based on impressions derived from our interviews with the clients, their letters to us, or what others think of them—to rule out mental retardation. Furthermore, we absolutely must not rely on a client's assertions about his or her own skills and abilities. These must always be probed. **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 comprehensive life history of the client 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 considered 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;

¹³ In an effort to move away from the label that has so many stigmatizing associations, the preeminent organization concerned with mental retardation, AAMR, recently voted to change its name to “the American Association on Intellectual and Developmental Disabilities.”

- Grandparents;
- Siblings;
- Knowledgeable extended family members;
- Child care workers;
- Teachers;
- Social service providers;
- Previous health care providers;
- Pastors;
- Friends and schoolmates;
- Neighbors;
- Co-workers and employees;
- Military buddies and commanders;
- Police officers;
- Jail and prison personnel and fellow inmates; and
- Co-perpetrators in criminal offenses.

and analysis of 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 family members—previous paternal and maternal generations, parents and their siblings, siblings and first cousins, and biological children—have mental retardation, learning disabilities, or any neurological or other brain-based disability.*** 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 exploring the extended family, 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 should be gathered for these family members to determine whether they have mental retardation.

b. ***Any abnormal physical findings at birth or shortly thereafter, as well as indications in birth, pre-natal or other records of early or in utero exposure to diseases, alcohol or other substances.*** Counsel should research any: physical abnormality present at birth; unusual health findings during infancy or childhood; experience of head trauma during or after birth; infant or childhood illness; and exposure to infection, disease or toxic substances to assess the possibility of a link to mental retardation. Fetal alcohol syndrome is one of the leading known causes of mental retardation, and the mother's labor and delivery records (typically separate from child birth records) and her records of pre-natal

care should be reviewed carefully. The possibility of fetal exposure to alcohol or drugs should be explored through every possible avenue.

c. ***In the client's developmental history, a failure to meet normal milestones of development—e.g., lifting head, rolling over, smiling, crawling, pulling to stand, standing, walking, toileting, talking; difficulty later in childhood including speech impairments, trouble learning to feed and dress himself, or acquiring motor skills such as tying shoe laces, skipping, riding a bicycle.*** Since mental retardation is a developmental disorder, early signs of delayed development may be associated with mental retardation. Furthermore, physical disabilities frequently derive from brain dysfunction and may be indicative of a problem that affects mental functioning as well.

d. ***School records revealing failing grades, non-promotion, tracking to lowest academic group, placement in special education or an alternative school program, low (below 80) IQ scores, or persistent below grade-level achievement scores; also, school records reflecting behavioral difficulties.*** Children with mental retardation do not perform as well as their peers in school, and most people with mental retardation cannot progress beyond sixth grade skills in academic achievement. DSM-IV-TR, at 43. It should be noted that mental retardation may not be reflected in school performance initially in the earliest elementary years, and the child may keep up until the demands grow too great. As the child ages, s/he may begin to fall behind peers with this gulf widening as time progresses. In addition, children with mental retardation are more likely to have behavioral difficulties such as tantrums and physical aggression, particularly when experiencing frustration. This reflects the combination of impaired communications skills, the strain of cognitive or social demands, and difficulty controlling impulses. 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.¹⁴

¹⁴ 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 every place where old records are stored and volunteer to look for them yourself. Often, "they have been destroyed" means only, "I cannot find them" or "they are in deep storage and it's a lot of trouble." In seeking school records, a member of the defense team should always go personally to the school and to any other location where the records might be lodged and offer to help search until they are found. These documents contain critically important evidence, but because they are almost always a *nuisance* to locate it is very common to receive an initial assertion that they *cannot* be located, followed by a discovery of the records once the defense team has impressed upon the relevant persons the importance of finding them. Sometimes, as well, school records may be found 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. Such interviews, however, are much more productive when supported by reference to documents.

e. ***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 alone, 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 are likely to have had a more low-level role rather than having planned the action. The commission of sex offenses, which results from involvement with a child too young to consent or a social misunderstanding about what is inappropriate, is also not uncommon. Often a more savvy co-defendant will “make a deal”, shifting blame to the person with mental retardation, who may not be quick enough or capable of acting similarly in his own self-interest. This is not to say, of course, that an individual with mental retardation cannot lie. He is unlikely, however, to be a very good or successful liar. Ultimately, to establish a diagnosis of mental retardation and address the challenges raised by the prosecution, it will be essential to have a complete understanding of the facts and circumstances of each and every prior offense. Typically, they will illustrate behavior entirely consistent with mental retardation. In addition, there is a very real likelihood that among them there will be evidence of false confessions and even false convictions.

f. ***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.

g. ***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 may 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 for work, making similar mistakes repeatedly, and acting impulsively. Disciplinary infractions will

often track these same limitations.¹⁵ On the other hand, the client with mental retardation may be well supported by the prison's highly structured environment, the predictability of its routines, and the clarity of expectations, and thus may be a model prisoner.

h. ***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 manifest during military service, resulting in discharge for unsuitability, lack of or extremely slow advancement, or frequent disciplinary charges. Or, again, so long as the demands do not become too complex, the structure, predictability and clarity of the military environment may permit the individual with mental retardation a degree of success and achievement.

i. ***Employment records.*** Clients with mental retardation tend to hold jobs that call for repetitive, often physical labor, rather than jobs that require flexibility, 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, clients do not hold jobs for long periods of time, either because the jobs are temporary or seasonal, or because they are terminated for not showing up on time or not showing up at all. It is imperative, in investigating a client's employment, that the defense team probe beneath the client's assertions about what his job title was and what responsibilities it involved, by asking for a detailed description of what he did, and then asking similar questions of an employer or co-worker. Consistent with their desire to mask the disability and convey an impression of greater competence, clients with mental retardation frequently exaggerate the nature of their responsibilities and quality of their job performance.

j. ***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.

¹⁵ The "unpacking" of disciplinary offenses is especially important for responding to prosecution assertions that such offenses show how our clients are deserving of death.

k. **Records of likely exposure to environmental toxins.** Part of standard life history investigation includes investigation of 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.

l. **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 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.

m. **Medical and mental health records.** For many clients facing capital charges, medical and mental health records are hard to find, or simply unavailable. Medical and mental health care is often not accessible 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?¹⁶
- If the historic IQ scores include full scale scores above 75, is there a reasonable basis for explaining that score (or those scores) away?¹⁷
- Is there evidence of significant limitations in adaptive behavior?
- Do these limitations remain significant when the client's strengths are taken into account?¹⁸
- Can these limitations be dismissed by a prosecution expert as the product of antisocial personality disorder?¹⁹
- Is there evidence that the limitations in intellectual functioning and adaptive behavior were there during the client's developmental period?

¹⁶ See Section 4, *infra*, for how to determine the answer to this question.

¹⁷ 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).

¹⁸ See Section 5, *infra* (examining both strengths and limitations in adaptive behavior).

¹⁹ See Section 5, *infra* (discussing how to meet this concern).

- Do you have any specific reason to fear the administration of a reputable, reliable IQ test by a prosecution expert?²⁰

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 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.

²⁰ 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 recognizing and eliciting evidence of limitations in adaptive behavior and at assessing whether the overall combination of limitations and strengths is indicative of mental retardation.

There is no substitute for this kind of expertise, or "clinical judgment". 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 are the bedrock of diagnosis. The AAMR Users Guide stresses the importance of clinical judgment, defined as "a special type of judgment rooted in a high level of clinical expertise and experiences that emerge directly from extensive data. [...] Clinical judgment is characterized by its being systematic (i.e. organized, sequential, and logical), formal (i.e. explicit and reasoned), and transparent (i.e. apparent and communicated clearly)." Schalock, R. L. et al., (in press), *A User's Guide for AAMR's 2002 Definition, Classification and Systems of Supports: Applications for Clinicians, Educators, Disability Program Managers, and Policy Makers* (AAMR 2006), at 11-12.

The importance of this advice cannot be overstated. Mental retardation experts and mental health experts rarely overlap. Psychiatrists may have studied mental retardation in their training, but most will not have had 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 properly administered by qualified individuals, under suitable conditions, and were correctly scored, the historical scores will be extraordinarily valuable.

If the historical scores do not meet all these criteria – the use of then-current editions of reputable and reliable, tests properly administered by qualified individuals, under suitable conditions, and correctly scored – they have less value and the need for current testing may become greater.²¹

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 effect²² 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 data collected by the defense expert.²³

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.²⁴

²¹ Even if a reputable and reliable IQ test is used, it must be 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 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.

²² See Section 5, *infra*.

²³ Intelligence testing involves the assignment of a score for each task performed by the client (*e.g.*, 0, 1, or 2) and the compilation of these “raw” scores into “scaled” and “standard” scores. Experts may disagree about the number of points a client's answer should be accorded, or they may make simple mistakes of arithmetic in calculating scaled and standard scores.

²⁴ 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

With respect to other psychological testing, the defense team should proceed with great caution and only after consultation with experts and other defense teams who are experienced and knowledgeable in this area. Decisions about which psychological tests are used to assess the client will have far-reaching implications. They may generate information that is both unreliable and unhelpful, and will open wider the door for the prosecution's testing. While various neuropsychological measures may be appropriate to consider, there is no basis for undertaking most other psychological testing, including and especially personality assessment. Instruments such as the Minnesota Multiphasic Personality Inventory (MMPI), the Million Clinical Multiaxial Inventory (MCMI), the Psychopathy Checklist-Revised (PCL-R), and the Rorschach, are not normed for persons with mental retardation and have no place in mental retardation evaluation. The use of instruments to assess malingering is addressed in section 5, *infra*. No matter what a psychologist says about his or her standard practice in an evaluation, not a single test should be administered to a capital client without a specific decision by the defense team that such testing is appropriate.

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 the developmental period, also provide independent and irrefutable corroboration of the client's significant limitations in intellectual functioning. Developing evidence of these limitations is, therefore, the lynchpin of establishing 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; supplemented by (b) clinical judgment in analyzing information that is not captured in existing standardized instruments. The AAMR calls for both. AAMR 2002, at 74-75, 84-86. The DSM-IV-TR suggests that evidence of adaptive function deficits be gathered from "one or more reliable independent sources (e.g., teacher evaluation and educational, developmental, and medical history)," and mentions the availability of standardized scales, but emphasizes that these instruments vary in their reliability and appropriateness for the individual. DSM-IV-TR, at 42.

well as other psychological tests, is Robert A. Spies, Barbara S. Plake, Linda L. Murphy (editors), MENTAL MEASUREMENTS YEARBOOK (Buros Institute, 16th Ed. 2005).

Standardized adaptive behavior measures – such as the AAMR Adaptive Behavior Scale II, Vineland Adaptive Behavior Scales II, Adaptive Behavior Assessment System II, Scales of Independent Behavior-Revised, and Comprehensive Test of Adaptive Behavior-Revised, *see* AAMR 2002, at 77, 88-90 – measure some adaptive behaviors in all three domains, *id.*, at 77. However, “[n]o existing measure of adaptive behavior completely measures all adaptive behavior domains.” *Id.* at 74. This is particularly problematic in the evaluation of individuals with mild, as opposed to more severe, mental retardation, who will require subtler determinations and greater reliance on clinical judgment.

For instance, certain social skills that are influenced by the client's gullibility and naiveté 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 environment 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. It is challenging to perform a “retrospective” assessment of how such a client functioned when he or she lived in the community many years ago, but such evaluations frequently are required in capital cases.

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*. As noted previously, individuals with mental retardation are especially vulnerable to overstating their abilities and exaggerating their competence and achievements. It is therefore essential that any standardized assessment of adaptive behavior be based on information from reliable reporters other than, or in addition to, the client.

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 (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 accurately capture the diagnosis of individuals in the mild range 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 may be reported as the grade level at which particular academic skills are performed: 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: or, alternatively, they may reflect a standard score (where 100 is average, like an IQ test), or a percentile ranking (comparing the individual with students in the same grade on a local or national level).

Achievement test scores have a significant role in the diagnosis of mental retardation. First, they provide important corroboration of IQ. Second, they document some of the adaptive behavior deficits in the conceptual domain (*e.g.*, reading, writing, math skills). Achievement test score generally are expected to fall in a range that is comparable to the client's IQ score.²⁵

As previously noted, people with mental retardation generally do not achieve higher than the sixth grade level in the academic skills measured by achievement tests. If a client's historic achievement test scores were never higher than the sixth grade level of functioning, 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 does raise questions that must be addressed. For such a client, limitations in adaptive behavior, other

²⁵ A learning disability may be diagnosed if achievement scores are significantly lower than IQ. For a fuller discussion of the relationship between learning disabilities and mental retardation, see Section 5.5, *infra*.

than those measured by achievement tests, must be present and well-documented, and IQ scores on reliable tests must consistently be 75 or below.

In addition to the records reflecting school system-wide achievement testing, a client who was evaluated for special education, or who received a psychological evaluation for any reason at all, may have taken individual academic achievement testing as part of the process. Typical instruments include the Wechsler Individual Achievement Test II (WIAT II), the Woodcock Johnson III Tests of Achievement, and the Wide-Range Achievement Test III (WRAT-III). It is critical to keep in mind that such tests have varying degrees of depth and sophistication. For example, the “reading” portion of the WRAT assesses only recognition of individual words, and indicates nothing about the individual’s comprehension. The defense team should work closely with its experts to insure a thorough understanding of the meaning of various test scores and that this information is properly used to illuminate the mental retardation diagnosis.

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 is, however, required 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.²⁶

²⁶ The historic evidence of limitations in adaptive behavior during the developmental period plays an important related role as well. It persuasively refutes the 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

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 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 mental retardation so as to be able to support the diagnosis in testimony, but need not be a 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 the 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, you will need such an expert to make and defend the diagnosis. In such jurisdictions, it is important that you select one – and more typically this will be a clinical psychologist rather than a psychiatrist – who has experience diagnosing mental retardation, and can collaborate – and is accustomed to collaborating – with mental retardation specialists.

the person has mental retardation. Evidence of limitations in adaptive behavior that appear during the developmental period is thus self-authenticating.

5 ISSUES CONCERNING THE DIAGNOSIS

The following sections address issues that commonly arise in the course of litigating a claim relating to mental retardation. Defense teams should be prepared to address all of them.

5.1 IQ SCORES BETWEEN 70 AND 75

As explained, although the cutoff point for mental retardation is generally 70, which represents the point that is two standard deviations below the mean, 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. Both the AAMR and the DSM-IV-TR are unambiguous about this.

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 (SEM) 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.²⁷

²⁷ 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 measurement error. *See, e.g., Ex parte Briseno*, 135 S.W.3d 1, 14 (Tex.Crim.App. February 11, 2004) (disregarding SEM 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). This approach is not supported by science and must be attacked as unfounded in fact. As any psychologist will verify, accounting for the SEM is fundamental. It cannot be ignored without violating the standard of practice in the field. This is plain in the statements of both AAMR and APA:

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). Similarly, the DSM-IV-TR not once, but twice places the upper range of mental retardation at 70-75. "Thus, it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior...." DSM-IV-TR, at 41-42, 48.

5.2 IQ SCORES HIGHER THAN 75: TEST-RETEST SITUATIONS AND THE PRACTICE EFFECT

A "test-retest" situation, implicating what is referred to as "the practice effect," occurs when a client takes a particular IQ test more than once. The absence of novelty usually results in a higher score on the retest. Study of this phenomenon indicates that this increase typically diminishes somewhat over time and varies with 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.* Thus, IQ scores higher than 75 that were obtained on a retest may be fully consistent with a diagnosis of mental retardation.

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.

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.

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.

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 SEM, 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 SEM in the second test administration, Briseno's true IQ score would be expected to fall within the range of 66-85.²⁸ Thus, so long as Briseno in fact scored 85 or lower on the retest, his IQ still fell within the range necessary to establish the sub-average intellectual functioning component of mental retardation.

5.3 IQ SCORES HIGHER THAN 75: THE FLYNN EFFECT

The Flynn effect is significant to capital defense teams because its impact on the accurate interpretation of a client's IQ score can be the difference between life and death. Named for the social scientist who first identified the phenomenon of rising IQ scores, "Flynn effect" refers to the generally accepted principle that collective IQ scores rise in a measurable fashion over time.²⁹ In the United States, on the Stanford-Binet and Wechsler tests, average test scores rise 0.33 points per year. Since the intellectual functioning prong of mental retardation is met by a test score that is two standard deviations below the mean (70, where the mean is 100), in order to accurately calculate the relationship of an individual client's test score to the mean, that score must be adjusted downward 0.33 points for each year since the year the instrument was normed.

Since it can be many years between editions of tests, and since clients are sometimes given outdated editions of tests even after a new version has been published, adjusting for the Flynn effect can be very important.²⁹ Here is an example: the WAIS-III was normed in 1995.³⁰ In 2004, a client is tested and receives a score of 76. When that score is adjusted for the Flynn effect (0.33 x 9 years), the score decreases three points, and is now 73.

²⁸ 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*.

²⁹ A comprehensive discussion of the Flynn effect and the diagnosis of mental retardation in death penalty cases is found in J.Flynn, "Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect," 12 *Psychology, Public Policy, and Law* 170-189 (2006). The article also discusses the possibility that the norms for the WAIS-III are too low, resulting in test scores that are too high—this is evidenced by, among other things, the fact that individuals generally score lower on the Stanford-Binet instrument—thus inflating the score and again moving out of the mental retardation range of IQ individuals who properly belong within it.

²⁹ Particularly in institutional settings, where the organization may wait to exhaust its old supply before ordering new materials—which are, incidentally, quite expensive—it is not uncommon to find that outdated editions of tests were used.

³⁰ Although published in 1997, the instrument was normed in 1995.

Such adjustments must be made for historic IQ scores as well. For example: a client is tested at age eight, in 1975. The examiner uses the WISC, normed in 1947-48, rather than the then recently released WISC-R, published in 1974 (and normed in 1972), and the client receives a score of 75. Since 27.5 years had passed since the norming of the WISC, its norms were 8.25 points out of date (0.33×27.5). The score of 75 should really be 67. Moreover, had the client been tested using the newly published WISC-R, he would have scored 68. J. Flynn, "Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect", 12 *Psychology, Public Policy, and Law* 170, 185 (2006).

Thus, the interpretation of IQ scores should always take into account the Flynn effect and the standard error of measurement, as well as, where applicable, practice effect based on repeated test administration. Prosecution evaluators may assert that it is not standard practice to actually "change" an IQ score to reflect the Flynn effect, but they will not argue that the Flynn effect is irrelevant and should agree that it is proper to take into consideration.³¹

5.4 IQ SCORES HIGHER THAN 75: OTHER REASONS

It is not unusual for a client who is properly diagnosed with mental retardation to have obtained, at some point in the past, an IQ score higher than 75. In addition to evaluating the possibility that this score is inflated due to a test-retest situation or the Flynn effect (see Sections 5.2 and 5.3, *supra*), the defense team should explore other reasons for the higher score. Among the possible explanations are:

- The previous test was not properly administered. The administrator may have been 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, the conditions under which the test was given may have been substantially different from those prescribed. Any variation from standardization compromises the resulting score.
- The previous test was improperly scored. This may mean that the individual items were scored incorrectly (e.g., more points were awarded for a particular item than should have been granted; each scoring decision is governed by specific directions contained in the test manual) or that mathematical errors were made in calculating the IQ score from the underlying scores. Both types of errors are discovered frequently. Wherever possible, the raw data for a disputed test should be obtained and the test carefully rescored by a trusted psychologist or neuropsychologist.

³¹ Dr. Flynn offers this analogy: "Suppose you are coaching an athlete who aspires to qualify for the Olympic high jump. He jumps 6ft 6in., and you assure him that he will qualify. He replies: 'but that was the standard in 1985. Since then, performances have improved, and today, I have to jump 7 feet to qualify. You are judging my performance in terms of the norms of yesterday rather than today.' He would do well to hire a new coach."

- The previous test itself is not a reliable measure of IQ for this purpose. There are numerous instruments that—although they yield “IQ scores”—are not appropriate for diagnosing or ruling out mental retardation, and are used in the field either because a rough measure of cognitive ability is all that is required or because there are other barriers, such as language or disability, that impede the administration of a “gold standard” IQ test. This includes any instrument that is considered a “screening” test, any group-administered instrument, and any abbreviated version of an otherwise reliable instrument. It also includes instruments that are not normed for individuals who have mental retardation. In short, any score that cannot clearly be associated with the name “Stanford-Binet” or “Wechsler” must be viewed skeptically and investigated thoroughly; indeed, even those highly regarded tests are sometimes administered in abbreviated forms that cannot be relied upon in this context.
- The test is an aberration that, although unexplained, cannot be trusted. On occasion, the record contains a score that is inconsistent with all other data, including previous or subsequent IQ scores, achievement testing, school performance, adaptive behavior limitations, and onset during the developmental period. If it cannot be reconciled with the remaining and reliable information about the client, such a score must be deemed an irrelevant anomaly.

5.5 THERE IS NO HISTORY OF SPECIAL EDUCATION, OR THERE IS A DIAGNOSIS OF “LEARNING DISABILITY”

There are a number of reasons why a student with mild mental retardation may never have been identified as needing special education, or may have been diagnosed as having learning disabilities rather than mental retardation.

- Stigma. The term “mental retardation” is applied to an extraordinarily heterogeneous group of individuals whose disabilities manifest across a very wide range. Due to concern that the label will stigmatize and lead to unreasonably low expectations, due to fear of a parent’s negative response, and due to real ignorance about what mild mental retardation is, schools have been reluctant to apply it to students whose IQ is in the upper range for retardation.
- Absence of programs for students with “mild mental retardation.” Most school programs specifically designed to serve students with mental retardation are aimed at individuals functioning below the level of “mild” mental retardation, whose educational needs are more functional and less academic. Few formal “special education” programs target the needs of students with mild mental retardation. As a result, such students instead have frequently been tracked into the lowest achieving classes or into “alternative” schools or programs for “slow learners.”

- Backlash against overdiagnosis. Historically, mental retardation was indiscriminately and inappropriately diagnosed in African American people, and particularly in African American boys. Recognition of this problem, termed “overdiagnosis,” led not only to an obviously needed effort at correction, but to backlash creating incentives to schools to avoid making the diagnosis even where appropriate. In certain school systems, the scrutiny and disapprobation that adhered to a suggestion of mental retardation about an African American student was sufficient to dissuade an educator from making it.
- Expense. Special education programs are more costly than general education. They require smaller classes and specially qualified staff.
- “LD,” meaning “learning disabled,” is now, and has been for some time, the preferred label. Department of Education statistics reflect the number of students diagnosed as “learning disabled” has grown as the number diagnosed with “mental retardation” has decreased. Studies have shown that educators are hesitant to diagnose students with low IQs and learning problems as having mental retardation and more often classify them as having learning disabilities, even if the difference between IQ and achievement which is required for diagnosis of learning disability is lacking. A diagnosis of learning disability is appropriate where there is a wider than anticipated difference between an individual’s IQ and his or her achievement level. Where both IQ and achievement scores are comparably low, then a learning disability diagnosis is inapt, and mental retardation is more likely the problem. It should be noted that a person may have both a learning disability and mild mental retardation (see below).
- The student has a learning disability *and* mental retardation. If an individual’s IQ is in the range of mild mental retardation (up to 70-75), but his or her achievement scores are significantly lower (for example, due to a specific language processing problem), then he or she may have a learning disability as well as mild mental retardation. The key feature of a learning disability is the gap between IQ and achievement. A learning disability prevents a student from achieving at the level of his or her potential, as indicated by IQ. For all of the aforementioned reasons, schools are more likely to choose the “LD” label and avoid mentioning mental retardation.

5.6 QUESTION OF MALINGERING

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)).

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, the defense team nevertheless must be prepared to address the issue, either in making the decision about whether to use a malingering instrument in its own testing of the client, or in deciding how to respond to a prosecution expert's reliance on such an instrument.

First, it is possible the defense expert may suggest using a malingering instrument that assesses whether the client is putting forth good effort in his or her intellectual testing. Typically, these instruments are designed to identify the faking of memory deficits, and are based on the presumption that nearly everyone—even people with intellectual impairments—can answer the test's questions correctly, but that a malingerer will be unaware of this fact and, continuing his or her pattern of deception, will deliberately give "wrong" answers, resulting in a score which will expose him as a faker. Examples of such instruments include the Test of Memory Malingering (TOMM), the Word Memory Test (WMT), the Validity Indicator Profile (VIP), and the Rey 15 Item Visual Memory Test (Rey 15).

While instruments such as these may often be used as part of a neuropsychological test battery, their use in assessing an individual with mental retardation is fraught with problems, including the following: the instrument may require a reading level beyond that of the client, it may not be normed for persons with an IQ in the mental retardation range, or it may yield scores in the malingering range for individuals with low IQ whose incorrect answers reflect cognitive deficits as opposed to feigning. For example, the author of the VIP specifically warns that his instrument should not be relied upon to determine whether a person with mental retardation has put forth good effort in cognitive testing. Frederick, R.I., *Validity Indicator Profile Manual* (1997) (see pertinent excerpt posted on the

publisher's web page at www.pearsonassessments.com/resourceses/vip-retardation.html). No malingering instrument should be utilized without thorough research into its appropriateness for use with the particular client.

The defense must also address the use of malingering instruments in the prosecution's testing. The team should move to preclude use of inappropriate instruments before the prosecution's evaluation takes place, and if this does not succeed, then must use existing research relevant to the instrument's lack of utility in the assessment of mental retardation, as well as the raw data from the particular administration of the instrument, to demonstrate that any negative conclusions it suggests about the client are unreliable.

In addition to instruments specifically designed to assess cognitive malingering, "personality assessment" instruments such as the Minnesota Multiphasic Personality Inventory (MMPI), and the Personality Assessment Inventory (PAI), contain scales rating an individual's "response style" which purport to identify malingering. These instruments are simply inappropriate for a mental retardation evaluation and should not be used. *See* Keyes, D. "Use of the Minnesota Multiphasic Personality Inventory (MMPI) to Identify Malingering Mental Retardation," 42 *Mental Retardation* 151-153 (2004). Another common instrument in psychological assessments is the Structured Interview of Reported Symptoms (SIRS), which assesses malingering of psychiatric symptoms such as hallucinations and delusions. The SIRS manual does not address the issue of mental retardation specifically, however it should be noted that the instrument is not validated for use with individuals below the age of 18. In addition, while the examinee is not required to read the instrument to himself or herself, a fairly high degree of language comprehension is required in order to understand and answer the questions that are asked.

Stakes are high whenever the malingering question is asked. There must, therefore, be careful scrutiny of any instrument that is utilized to arrive at an answer. The most effective means of ruling out malingering will always be by reference to historical data gleaned from the client's social history.

5.7 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 of peers in typical settings in the outside world. This is especially relevant for clients who have been incarcerated, 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.

5.8 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 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. Mental retardation can never be ruled out on the basis of what the client can do well. As Professor Ellis explains:

The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain 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 a person 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 places, obtain assistance from friends, acquire food, shelter and clothing and plan, carry out and occasionally "get away" with crimes – in short, he or she 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 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 an insidious overlooking of limitations in favor of strengths.

5.9 PROTECTING THE CLIENT DURING PROSECUTION TESTING

The defense team has a vital role to play in defending the client and the mental retardation claim in the process of testing by the prosecution's expert. Vigilance begins during the defense testing process, when thoughtful decisions must be made about which instruments to administer, for these will set the parameters of what the prosecution may do. It continues with a comprehensive strategy for ensuring that the government does not exceed these boundaries. As soon as it is clear the prosecution evaluation will be ordered, defense counsel should file a motion seeking protections that will, at a minimum, a) limit the scope of the evaluation; b) provide counsel with notification of the specific tests the prosecution wishes to administer and an opportunity to object; c) limit the scope of the clinical interview and define areas (e.g., the capital offense) that exceed it. The defense team should consider whether it needs to move to preclude (or require) video taping or audio taping (in some instances audio taping has been found helpful; in others it may not be), and also whether to request the presence of defense counsel, the defense expert, or some other member of the team.

5.10 ANTI-SOCIAL 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").
- 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.*
- 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 that cannot be relied upon for avoiding or solving

problems, 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 have impaired social skills and concrete thinking 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 receives a diagnosis of 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 this disability.

5.11 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. The defense team 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

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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 U.S. at 317 (quoting 477 U.S. at 405, 416-17).

Immediately after the *Atkins* decision, courts and legislatures began efforts to implement the Supreme Court's directive to create the means of enforcing the ban on executing those with mental retardation. Many significant issues have arisen in the four years since *Atkins*.

For example:

- Can a definition of mental retardation adopted by a state be challenged on the ground that it fails to adequately encompass the class of persons the Supreme Court intended to capture in *Atkins*?
- Are there burdens and standards of proof adopted by states that fail to meet constitutional requirements?
- Can a claim of mental retardation be rejected on the grounds that the condition was not documented during the developmental period?
- Is adaptive behavior during the development period the focus or is adult adaptive behavior critical?
- Are the parties entitled to discovery to prepare for a mental retardation hearing?
- Is the defendant entitled to expert assistance?
- 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?
- 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?
- Is the defense entitled to be present during an examination of the defendant by a prosecution expert?

- Can courts refuse to consider such things as standard error of measurement when determining the significance of an IQ score?
- Is evidence about the capital offense or other crimes admissible at a mental retardation hearing or trial?
- Is the defendant entitled to a pre-trial judicial determination of the mental retardation question?
- Is the defendant entitled to a jury determination of the mental retardation question if the case is in the pre-trial posture?
- Is the defendant entitled to a jury determination of the mental retardation question if the case is on collateral review?
- What is the showing required to receive an evidentiary hearing on mental retardation when the claim is raised in post-conviction proceedings?
- If there a post-conviction or pre-trial mental retardation trial in front of a jury, must the jury be death qualified?
- What happens if the jury fails to unanimously agree on whether or not the defendant is mentally retarded?
- What type of judicial review is available from a finding that a defendant is or is not mentally retarded?
- When, if ever, does *collateral estoppel* or *res judicata* preclude re-litigation of a finding that a defendant is or is not mentally retarded?
- Can a claim of mental retardation be procedurally defaulted?

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*, 135 S.W.3d 1 (Tex.Crim.App. 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.*, at 6.³³ 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 court or individual fact-finder decides should be protected. *See, e.g., Chase v. State*, 873 So.2d 1013,1027 (Miss. 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.”)

Ultimately, the Texas Court of Criminal Appeals never fully resolved the question of definition. Because both the 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)³⁴ until the Texas Legislature provides an alternative statutory definition. *See also Hall v. State*, 160 S.W.3d 24, 36 (Tex.Crim.App.2004) (under *Briseno* guidelines, “a person is considered mentally retarded if he has these three characteristics: (1) ‘significantly subaverage general intellectual functioning,’ (an IQ of about 70 or below), (2) ‘related limitations in adaptive functioning,’ and (3) onset of the above two characteristics before age eighteen.”)

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.” *In re Briseno*, 135 S.W. 3d at 8. These factors are:

- (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;
- (2) whether the defendant formulates plans or acts impulsively;
- (3) whether the defendant is a follower or a leader;

³³ *See also State v. Scott*, 921 So.2d 904, 959 (La. 2006) (interpreting *Atkins* as holding that executing “some mentally retarded offenders is prohibited by the Eighth Amendment while leaving to the States the task of developing a means of determining which offenders are sufficiently impaired in intellectual functioning and adaptive skills to be exempt from capital punishment.”); *Hall v. Quarterman*, No. 4:06-CV-436-A (N.D. Tex. Aug. 3, 2006) at 10 (state court’s alternative finding that even if Hall were mildly mentally retarded he is not so impaired as to fall under the protection of *Atkins* was not unreasonable); *Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003) (“the Georgia General Assembly . . . remains within constitutional bounds in establishing a procedure for considering alleged mental retardation that limits exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.”)

³⁴ 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.”

- (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 is 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.³⁵ 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. See, e.g., *Pruitt v. State*, 834 N.E.2d 90,108 (Ind. 2005), *cert denied*, 126 S.Ct. 2936 (2006) (finding that although states are free to impose a higher standard, the minimum definition of mental retardation sufficient to meet the national consensus found in *Atkins* must be uniform; *Atkins* requires at least general conformity with the AAMR and DSM-IV definitions); *but see Rodriguez v. Quarterman*, 2006 WL 1900630, *13 (W.D. Tex July 11, 2006) (finding that " the Texas Court of Criminal Appeals' *Briseno* criteria represent an objectively reasonable application of what is admittedly a far-from-crystal-clear federal constitutional standard.")

In *Pruitt v. State*, 834 N.E. 2d 90, the Indiana Supreme Court rejected a constitutional challenge to part of Indiana's mental retardation definition, which requires proof of "significant impairment of adaptive behavior." I.C. § 35-36-9-2. The state supreme court observed that while the Indiana definition differed from that of DSM-IV, it was similar to AAMR's revised definition which calls for "significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive behavior skills." The court therefore concluded that the Indiana standard was "within the range of permissible standards under the Eighth Amendment." *Pruitt v. State*, 834 N.E.2d at 108. The court did go on to find, however, that the trial court had accepted too stringent a test in evaluating the adaptive functioning prong of the mental retardation test. It has utilized a mental health expert's definition that embraced only persons in the bottom ten to twenty-five percent of those meeting the generally accepted clinical standards. The Indiana Supreme Court concluded that "[although variation is permissible, it cannot go to the point of excluding a majority of those who fit clinical definitions." *Id.*, at 110.

³⁵ See, e.g., *Ex Parte Elizalde*, 2006 WL 235036 (Tex.Crim.App. Jan. 30, 2006) (unpublished) (in finding that petitioner failed to make a prima facie showing of mental retardation, concurring judges note that "applicant provides no evidence in the form of medical records, affidavits, or expert testimony to address any of the factors outlined in *Briseno*.")

At the time of publication, Mississippi, like Texas, is without a statute implementing *Atkins*. Faced with numerous death row inmates raising challenges to their sentences under *Atkins*, the Mississippi Supreme Court adopted both a definition of mental retardation for purposes of *Atkins*, as well as a procedure for adjudicating mental retardation claims. Looking to *Atkins* itself, it held that the appropriate definition is from the AAMR and/or from the APA. *Chase v. State*, 873 So.2d 1013,1028; *see also Doss v. State*, 882 So.2d 176, 190 (Miss. 2004) (same); *but see Gray v. State*, 887 So.2d 158, 169 (Miss. 2004) (“[t]his Court has adopted the definition of mental retardation promulgated by the American Psychiatric Association...”); *Wiley v. State*, 890 So.2d 892, 894 (Miss. 2004) (“the standard or definition of mental retardation shall be that enunciated by the Supreme Court in *Atkins*, especially the American Psychiatric Association’s definition of mental retardation.”); *Branch v. State*, 882 So. 2d 36, 50 (Miss. 2004) ([t]his Court has adopted the American Association of Mental Retardation definition of mental retardation.”)

In *Chase*, the court further ruled 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 the administration of the Minnesota Multi Phasic Personality Inventory-II (MMPI-II), “and/or other similar tests.” *Chase v. State*, 873 So.2d at 1028.³⁶ 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*.³⁷

Further, the court in *Chase* held that a defendant may not receive a hearing on a claim of mental retardation unless he files a motion requesting such a hearing, attached to which is “an affidavit from at least one expert [who meets the qualifications set out by the court³⁸], who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient (“IQ”) of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined herein.” *Id.*, at 1029 (footnote omitted).

Another state currently lacking a statute implementing *Atkins* is Alabama. The Alabama Supreme Court adopted what it viewed as the broadest definition of mental retardation

³⁶ 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*, 873 So.2d 1013, 1028 fn. 19.

³⁷ Counsel in other jurisdictions should also consider how to address the question of malingering. In *Goodwin v. State*, ___ S.W.3d ___, 2006 WL 1147691, *9 (Mo. May 2, 2006), for example, the post-conviction court concluded that the failure of petitioner’s post-conviction expert “to test for malingering and depression was below professional requirements for a thorough evaluation.”

³⁸ “Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.” *Chase v. State*, 873 So.2d at 1029.

which is to be employed until the legislature mandates something different. *Ex parte Perkins*, 851 So.2d 453 (Ala.2002). “To satisfy the *Perkins*, test the defendant must exhibit (1) significantly subaverage intellectual functioning--an IQ of 70 or below; (2) significant or substantial deficits in adaptive behavior; and (3) these two deficiencies must have manifested themselves during the developmental years--before the defendant reached the age of 18.” *Davis v. State*, ___ So.2d ___, 2006 WL 510508 *11, (Ala.Crim.App. March 3, 2006).

Yet another state without a post-*Atkins* statute is Pennsylvania. The Pennsylvania Supreme Court in *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005), held that a defendant could establish mental retardation for *Atkins* purposes if he or she met either the DSM-IV or AAMR definition.

New Jersey also has not passed legislation to implement *Atkins*. In *State v. Harris*, 181 N.J. 391, 859 A.2d 364 (N.J. 2004), a case involving a post-conviction petition for relief, the New Jersey Supreme Court did not expressly adopt a definitive definition of mental retardation, but instead noted that the definitions utilized by other states generally conformed to the AAMR and DSM-IV definition. The court did, however, appear to fully embrace the AAMR and DSM-IV-TR understanding that an IQ score of up to 75 could support a diagnosis of mental retardation. *Id.*, at 529-31.

In *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002), the Ohio Supreme Court looked to the clinical definitions of mental retardation discussed in the *Atkins* decision and ruled that defendants had to establish: (1) significantly sub-average intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18.

In *State v. White*, 2005 WL 3556634, *2 n. 3 (Ohio App. Dec. 30, 2005), the Ohio appellate court noted that the AAMR updated the second prong of its mental retardation test in 2002 by regrouping the subtopics into three categories and taking the position that a significant deficit in any one category would satisfy prong two. The potential discrepancy between the newer AAMR definition and the requirements of *Lott* proved inconsequential in the *White* case because both experts concluded the update was a “distinction without a difference” and that the petitioner met both definitions. *Id.* Courts and legislatures could avoid the potential problem of adopting a definition that is later altered by the author of the definition by defining mental retardation in terms of the most current definition of AAMR and/or APA. *See, e.g.*, Ohio Rev. Code 5123.01(P) (Public Welfare Code definition of “a person who is at least moderately mentally retarded” includes reference to “standard measurements as recorded in the most current revision of the manual of terminology and classification in mental retardation published by the American Association on Mental Retardation.”)

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. Some, like the Arizona Revised Statutes, § 13-703.02, include an IQ score that might function as a cutoff. 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, e.g., In re Hawthorne*, 105 P.2d 552, 557 (Cal. 2005) (in rejecting Attorney General’s argument that the court should adopt an IQ of 70 as the upper limit for a prima facie showing of mental retardation, the court notes that “a fixed cutoff is inconsistent with established clinical definitions (citation omitted) and fails to recognize that significantly sub-average intellectual functioning may be established by means other than IQ testing.”); *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005) (consistent with *Atkins*, Pennsylvania Supreme Court refuses to adopt any cut-off I.Q. score “since it is the interaction between limited intellectual functioning and deficiencies in adaptive skills that establish mental retardation.”); *but see Howell v. State*, 151 S.W.3d 450, 459 (Tenn. 2004) (“[W]hile there appears to be no general national consensus regarding the use of numerical I.Q. scores as a factor in determining mental retardation, the use of such scores to establish a bright-line cutoff point for making this determination is not contrary to either the Supreme Court’s holding in *Atkins v. Virginia* or with those definitions of mental retardation adopted by several other states.”)

Permission to file a successor federal habeas petition was denied in *In re Bowling*, 422 F.3d 434, 439 (6th Cir. 2005), based in part on the fact that none of the petitioner’s IQ scores fell below the Kentucky cutoff of 70. Judge Moore dissented, observing that “there appears to be considerable evidence that irrefutable IQ ceilings are inconsistent with current generally-accepted clinical definitions of mental retardation and that any IQ thresholds that are used should take into account factors, such as a test's margin of error, that impact the accuracy of a particular test score.” *Id.*, at 442 (Moore J., dissenting.)

Another potential flaw with the Arizona statute lies in its definition of adaptive behavior. A.R.S. § 13-703.02(K)(1), (K)(2), requires a defendant to show “significant impairment” in “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.” In *State v. Grell*, 135 P.3d 696 (Ariz. 2006), the defendant argued that he had established the requisite significant impairment in adaptive behavior because he presented evidence showing deficits in two of the eleven areas listed in DSM-IV. The Arizona Supreme Court rejected this argument, explaining: “The statute requires an overall assessment of the defendant's ability to meet society's expectations of him. It does not require a finding of mental retardation based solely on proof of specific deficits or deficits in only two areas.” *Id.*, at 709. Again, if a statute is excluding defendants who are considered mentally retarded under accepted clinical definitions, the statute must be challenged as inconsistent with *Atkins*.

In 2006, Oklahoma enacted a statute to implement *Atkins*. 21 Okla. Stat. Ann. § 701.10b. This statute defines “significantly subaverage general intellectual functioning,” the first prong of its definition of mental retardation, as “an intelligence quotient of seventy (70) or below.” The statute further states that “in no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.”

If a mental retardation expert concludes that a defendant meets the clinical criteria for a diagnosis of mental retardation even though the defendant has an IQ score of 76 or above obtained under the conditions described in the Oklahoma statute, counsel must challenge the statute as contrary to *Atkins*.

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 Supreme Court which will resolve what measure should be used to determine mental retardation for purposes of section 1376. *People v. Superior Court (Vidal)*, S134901.

In some states, the statutes require that an IQ test from an approved list be used to establish deficits in intellectual functioning. *See, e.g.*, Va.Code Ann. § 19.2-264.3:1.1(B)(1); Fla. R. Crim. Pro. 3.203. In *Bell v. True*, 413 F.Supp.2d 657, 696 (W.D. Va. 2006), an *Atkins* claim failed in part because the IQ test the petitioner was given was not among those accepted by the Virginia statute. Any failure to adhere to such a statutory requirement obviously needs to have a persuasive explanation.

As discussed in the first section of the manual, IQ scores may be inaccurate for a number of reasons. Where the defendant has an IQ score that appears to disqualify him from a diagnosis of mental retardation, counsel has to investigate the reliability of the test that was given and the conditions under which it was administered. *See, e.g., Walker v. True*, 399 F.3d 315, 323 (4th Cir. 2005) (petitioner attacked reliability of IQ score where test was administered by an inexperienced intern who now conceded that she made errors in the administration and scoring of the test.) In addition counsel must consider the standard measurement error, practice effect and the “Flynn Effect.” Courts and juries will need education on these issues in order to ensure that IQ scores are properly evaluated. *Id.*, at 322-23 (4th Cir. 2005) (district court erred in rejecting *Atkins* claim based on petitioner’s failure to show IQ scores of 70 or below where petitioner alleged that his score of 76 is a qualifying score when Flynn effect and standard error of measurement are taken into consideration); *United States v. Nelson*, 419 F.Supp.2d 891, 898 (E.D. La. 2006) (defense expert explained inflated score by fact that IQ test was given in two sessions instead of one and there likely was practice effect because of similar test given to defendant shortly before IQ test.); *Green v. Johnson*, 431 F.Supp.2d 601 (E.D. Va. 2006) (evidentiary hearing granted on *Atkins* claim after court considers declaration from expert interpreting past IQ scores and explaining standard error of measurement, practice effect and Flynn effect.); *In re Hearn*, 418 F.3d 444, 447 fn. 4 (5th Cir. 2005) (discussing measurement error); *State v. Jimenez*, 880 A.2d 468, 475 (N.J. Super. 2005) (“Because a measurement error of five points in assessing IQ is recognized, a score of 70 in actuality may represent a range of 65 to 75.”); *State v. Dunn*, 831 So.2d 862, 886 fn. 9 (La. 2002) (acknowledging that all IQ tests are “burdened with a range of plus/minus number of IQ points known as the standard error of measurement (SEM).”); 21 Okla. Stat. Ann. § 701.10b (“In determining the intelligence quotient, the standard measurement of error for the test administered shall be taken into account.”); *cf. In re Bowling*, 422 F.3d 434, (6th Cir. 2005) (court rejects petitioner’s argument that five-point margin of error should be applied to IQ scores where petitioner failed to explain source for this methodology.); *Walton v. Johnson*, 440 F.3d 160, 178 (4th Cir. 2006) (en banc) (noting that petitioner failed to explain what “standard error of measurement” was and why it should reduce a particular score to 70 or less.)

In *Ex Parte Briseno*, 135 S.W.3d 1, 14 fn. 53 (Tex. Crim. App. 2004), where the petitioner had obtained IQ scores of 72 and 74 in testing by the defense and prosecution experts, the Texas Court of Criminal Appeals refused to consider a letter explaining how the standard measurement of error applies because it was not properly admitted at the habeas hearing. The court went on to note, however, that even considering the standard deviation, the trial court did not abuse its discretion in finding that Briseno had failed to prove that he suffered from significantly subaverage intellectual functioning. The court explained: “[E]ven if a factfinder applied the statistical standard deviation, there is not enough evidence in this record that proves, by a preponderance of evidence, that applicant's true IQ is lower than 72-74 rather than higher than 72-74.” *Id.* The flaw in this analysis is that it looks solely to the IQ test results rather than considering the petitioner’s actual behavior to shed light on where in the range of scores the petitioner likely fell.

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

(1) 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).³⁹ The constitutionality of this statute does not appear to have been tested as yet.

The federal death penalty statute bars execution of the mentally retarded, but provides neither a definition nor procedures for determining whether a defendant is mentally retarded.⁴⁰ In *United States v. Nelson*, 419 F.Supp.2d 891, 894-95 (E.D. La. 2006), a federal district court concluded “that both the AAMR and DSM-IV-TR definitions reflect a national consensus” so a defendant’s execution would be prohibited if he satisfied either definition. The court further noted that it did not believe the standards conflicted despite some variations. In *United States v. Cisneros*, 385 F.Supp.2d 567, 570 (E.D. Va. 2005), the district court announced that it would use the AAMR definition that was cited by the Supreme Court in the *Atkins* decision.⁴¹

In *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), the Kentucky Supreme Court recently rejected a constitutional challenge to the pre-*Atkins* Kentucky statute which bars execution of the mentally retarded. Bowling had argued the statute failed to comply with *Atkins* because it only exempted from execution defendants found to be “seriously” mentally retarded. Ky. Rev. Stat. 532.140(1). Thus, according to Bowling, the statute impermissibly allowed the execution of the mildly mentally retarded. Bowling’s assertion was found flawed in light of the definition in the statute of the “significantly subaverage general intellectual functioning” criterion as an IQ of 70 or below. This included the “mildly mentally retarded” per DSM-IV and the AAMR.

The Kentucky statute also refers to “substantial deficits in adaptive behavior” in its definition. Ky. Rev. Stat. 32.130. The Kentucky Supreme Court found that “[u]se of the word ‘deficits,’ as opposed to ‘deficit,’ reflects a legislative intent to require ‘two or more deficits,’ in accordance with the definitions formulated by the AAMR and the American Psychiatric Association.” *Id.*, at 370 fn.8.

³⁹ 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.

⁴⁰ “A sentence of death shall not be carried out upon a person who is mentally retarded.” 18 U.S.C. § 3596(c)

⁴¹ “Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Atkins v. Virginia*, 536 U.S. at 308 fn.3.

In the mental retardation statutes, the age of onset required for a finding of mental retardation is usually age 18. *See, e.g.*, Ariz. Rev. Stats. § 13-703.02 (K)(2) (onset of conditions must have “occurred before the defendant reached the age of eighteen”); Ark. Code Ann. § 5-4-618 (a)(1)(A) (onset of condition must be “no later than age eighteen (18)”); Fla. R. Crim. P. 3.203(b) (condition must have “manifested during the period from conception to age 18.”); 21 Okla. Stat. Ann. § 701.10b (“the onset of mental retardation must have been manifested before the defendant attained the age of eighteen (18) years.”) 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.

The Tennessee statute requires a showing by the defendant that mental retardation manifested “during the developmental period, or by eighteen (18) years of age.” Tenn. Code Ann. § 39-13-203(a). In *State v. Strode*, 2006 WL 1626919 (Tenn. Crim. App. June 8, 2006) (unpublished), the Tennessee Court of Criminal Appeals rejected an argument that this statute allowed for mental retardation to be manifested after the age of 18.

For a defendant to meet the third prong of Tennessee Code Annotated section 39-13-203(a), the symptoms of mental retardation must have manifested by the age of eighteen. This conclusion is supported by previous opinions of the Tennessee Supreme Court, as well as the legislative history of this statute, the statutes and case law of other states, and the DSM-IV, which is the main diagnostic manual in the psychiatric field.

2006 WL 1626919, *12; *see also* *Murphy v. State*, 66 P.3d 456, 460 (Okla. Crim. App. 2003) (expressing view that “developmental period” ends prior to age 18.)

Other statutes refer to the developmental period but do not include any specific age. *See, e.g.*, Cal. Penal Code § 1001.20(a)(1); Colo. Rev. Stat. § 18-1.3-1101(2); Ga. Code Ann. § 17-7-131(a)(3); 730 Ill. Comp. Stat. § 5/5-1-13; Ky. Rev. Stat. Ann. § 532.130(2); Nev. Rev. Stat. § 174.098(7); S.C. Code Ann. § 16-3-20.⁴²

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*. *Cf. Rodriguez v. Quarterman*, 2006 WL 1900630, *11 (W.D. Tex. July 11, 2006) (“In view of recent studies suggesting the human brain does not achieve full development until age twenty-five, this cut-off age of 18 for the initial manifestation of ‘mental retardation’ is subject to challenge as arbitrary.”)

⁴² This statute defines mental retardation for purposes of consideration as a mitigating factor. In *Franklin v. Maynard*, 588 S.E.2d 604, 605 (S.C. 2003), the South Carolina Supreme Court adopted the definition for purposes of implementing *Atkins*.

Proving age of onset can be difficult, particularly where there are no reliable IQ tests from the developmental period. That is why evidence of adaptive deficits throughout childhood may be critical to establishing mental retardation. In *State v. Stallings*, 2004 WL 1932869, *1 (Ohio App. Sept. 1, 2004), the mental retardation claim foundered on the age of onset prong of the mental retardation test. Because Stallings had received IQ scores above 70 on several occasions, there was a presumption against mental retardation. He successfully rebutted the presumption, however, as to the intellectual and adaptive functioning prongs of the mental retardation test. Where he failed, in the trial court's view, was establishing that his condition occurred prior to age 18. The only test results from Stallings' youth was an IQ score of 76 when Stallings was 16. One defense expert explained that the standard error of measurement for that particular test was six. Therefore, Stallings' IQ could have been as low as 70 or as high as 82.⁴³ When this same expert was asked whether mental retardation was present prior to the age of 18,⁴⁴ the expert responded, "there's a lot of information that suggests that the deficits were present in the period of development." *Id.*, 2004 WL 1932869, *2. The second defense expert testified that Stallings definitely suffered adaptive deficits before the age of 18 but during cross-examination, when asked about age of onset, the expert admitted that "[n]o one will ever know what [Appellant's] IQ was at that point." 2004 WL 1932869, *3.

In upholding the trial court's denial of relief, the Ohio Court of Appeals acknowledged that both experts testified that Stallings met the mental retardation standard announced by the Ohio Supreme Court. Nevertheless, it offered the following somewhat confusing explanation:

[B]oth [defense experts] admitted that the only IQ test administered to [Stallings] before age 18 indicated that he was not mildly mentally retarded, returning an IQ ranging from 70 to 82 once a standard error measurement is included. Further, the experts indicated that [Stallings] was tested on three prior occasions; the testing when [Stallings] was 16 years old, the testing when [Stallings] was 21 years old, and the testing done at the time of [Stallings's] trial in order to present evidence of mitigating factors. None of the three doctors who had tested [Stallings] prior to [the hearing experts] concluded that [Stallings] was mentally retarded. As a result, we cannot conclude that the trial court acted in an arbitrary, unreasonable or unconscionable manner. The only scientific evidence presented to the trial court indicated that [Stallings's] IQ was above 70. Further, neither expert could state that the onset of [Stallings's] mental retardation was before the age of 18.

2004 WL 1932869, *3; compare *Branch v. State*, 882 So.2d 36, 51 (Miss. 2004) (no prima facie case of mental retardation where defendant had an IQ score of 68 when he was 5-

⁴³ Stallings had also been tested at age 21 with the same results. When tested prior to the mental retardation hearing, Stallings received an IQ score of 74, which the expert who administered the test explained meant that Stallings's IQ could be as high as 78 or as low as 70. A second expert also tested Stallings. A score of 72 was obtained on that test, which represented an IQ score ranging from 68 to 76

⁴⁴ The question makes no sense because the diagnosis of mental retardation requires an onset before the age of 18, under Ohio law.

years-old, but had received an IQ score of 84 at the time of trial and showed no deficits in adaptive functioning; “Under the guidelines of the American Psychiatric Association, [defendant] only meets the third criterion, that consisting of an onset of the manifestation prior to age 18.”)

A claim of mental retardation was rejected in *Conaway v. Polk*, 453 F.3d 567, 591-92 (4th Cir. 2006), despite presentation of an affidavit from an expert reporting that the petitioner recently received an IQ score of 68 and that the expert found him to be mentally retarded. The problem was that the petitioner had consistently achieved an IQ score of 79 or 80 on tests he took before age 18. Fatal to the petitioner's *Atkins* claim was the absence of documentary evidence or an expert opinion that petitioner had an IQ of 70 before he turned 18. It was also noted that the petitioner had never alleged facts calling the reliability of his juvenile IQ scores into question. *Id.*, at 592 fn. 27.

In *Martinez v. State*, 80 P.3d 142 fn.2 (Okla.Crim.App. 2003), the Oklahoma Court of Criminal Appeals expressed the erroneous view that mental retardation must be present at birth, although that mistake was unimportant in that case where the issue was whether the intellectual deficits exhibited by Martinez were the result of brain surgery which took place when Martinez was an adult. *But see Murphy v. State*, 66 P.3d 456, 460 (Okla. Crim. App. 2003) (citing AAMR for proposition that mental retardation appears at birth or during childhood).

In some jurisdictions, 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 statute 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*. *But see Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005) (assuming the definition offered in the Pennsylvania Mental Health and Mental Retardation Act is broader than the one adopted by the court for use with *Atkins* claims, “a broader definition may be appropriate when the diagnosis is for something other than penological interests.”); *Howell v. State*, 151 S.W.3d 450, 458 (Tenn. 2004) (differences in definitions of mental retardation as applied in social services context and exempting defendants from execution “is indicative of a legislative intent to have a different, more restrictive, standard apply to defendants in capital prosecution.”)

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 is mentally retarded 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. Rev. Statues, 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.”); *see also State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002) (a rebuttable presumption of the absence of mental retardation arises if the defendant’s IQ is above 70.); *but see State v. Hughbanks*, 823 N.E.2d 544 (Ohio App. 2004) (under *Lott*, an IQ score is only one measure of intellectual functioning and so an IQ score of 82 did not necessarily preclude a finding of mental retardation.)

In *State v. Arellano*, ___ P.3d ___, 2006 WL 1412884 (Ariz. May 24, 2006), the Arizona Supreme Court ruled that a defendant may establish a rebuttable presumption of mental retardation through IQ scores alone prior to an evidentiary hearing.

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 with statutes utilizing 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. § 921.137⁴⁵; 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). In Oklahoma, there is an initial hearing on the issue in front of the trial court. At that hearing, the defendant bears the burden of establishing mental retardation by clear and convincing evidence. 21 Okla. Stat. Ann. § 701.10b(E). If the trial court finds that the defendant failed to meet this burden, the issue can be raised again at the sentencing phase with the jury. At that point, the burden is lowered to the preponderance of evidence test. 21 Okla. Stat. Ann. § 701.10b(F).

The constitutionality of the clear and convincing evidence burden of proof must be challenged. *See, e.g., Pruitt v. State*, 834 N.E.2d 90 (although pre-*Atkins* statute – Ind. Code § 35-36-9-4 – requires defendant to prove mental retardation by clear and convincing evidence, this standard of proof cannot be applied post-*Atkins*); *see also Cooper v. Oklahoma*, 517 U.S. 348 (1996) (Oklahoma rule requiring criminal defendants to prove incompetence by clear and convincing evidence violates due process.); *Amendments to Florida Rules of Criminal Procedure*, 875 So.2d 563, 566-67 (Fla. 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

⁴⁵ After this statute was enacted, the Florida Supreme Court utilized its power to promulgate procedural rules to issue Fla. R. Crim. Pro. 3.203 to govern mental retardation proceedings in capital cases. This rule is silent on the issue of burden of proof. According to Justice Pariente, this leaves trial courts with the option of applying the clear and convincing evidence standard found in the statute, or declaring it unconstitutional. *Amendments to Florida Rules of Criminal Procedure*, 875 So.2d 563, 567 (Fla. 2004) (Pariente, J., concurring).

led the Florida Supreme Court to omit any burden of proof in rules governing mental retardation proceedings); *but see State v. Grell*, 135 P.3d 696, 705 (Ariz. 2006) (rejecting constitutional challenge to clear and convincing evidence standard); *People v. Vasquez*, 84 P.3d 1019 (Colo. 2004) (same).

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 has been 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; *Ferrell v. Head*, 398 F.Supp.2d 1273, 1295 (N.D. Ga. 2005) (district court unconvinced that burden of proof in Georgia wholly erodes the constitutional prohibition against execution of the mentally retarded). 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*, 135 S.W.3d 1, 12 (Tex.Crim.App. 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); *Hall v. State*, 160 S.W.3d 24, 38 (Tex.Crim.App. 2004) (burden is always upon the defendant to prove mental retardation by a preponderance of the evidence); *Russell v. State*, 849 So.2d 95, 148 (Miss.2003); (applying preponderance of the evidence standard); *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C.2003) (burden is on defendant or post-conviction relief petitioner to prove mental retardation by a preponderance of the evidence) *Commonwealth v. Mitchell*, 839 A.2d 202, 211 fn.8 (Pa. 2003) (finding it appropriate to place burden on defendant to establish mental retardation by a preponderance of the evidence); *Commonwealth v. Miller*, 888 A.2d 624, 631 (Pa. 2005) (in post-conviction proceedings, burden is on petitioner to prove mental retardation by a preponderance of the evidence); *State v. Lott*, 779 N.E.2d 1011, 1014-1016 (Ohio 2002) (in cases at trial, defendants have burden of proving mental retardation by preponderance of evidence; with successive petitions, petitioners have to establish mental retardation by a preponderance of the evidence if *Atkins* claim was filed within 180 days of the *Atkins* decision; otherwise, clear and convincing evidence standard generally applicable to successor petitions would apply); *United States v. Cisneros*, 385 F.Supp.2d 567, 570-71 (E.D. Va. 2005) (in federal death penalty trial, burden was on defendant to prove to jury by a preponderance of the evidence that he was mentally retarded); *Morrow v. State*, 928 So.2d 315, 323 (Ala.Crim.App. 2004) (in absence of statute implementing *Atkins*, petitioner must meet normal burden of proof required in post-conviction proceedings, i.e., he must prove *Atkins* claim by a preponderance of the evidence).

Connecticut, Kansas and Kentucky, in contrast, 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; *but see Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005) (defendant bears burden of establishing mental retardation by a preponderance of the evidence at evidentiary hearing).

There is an argument that under *Ring v. Arizona*, 536 U.S. 584 (2002), the burden of proof must be on the state to prove beyond a reasonable doubt that the defendant is *not* mentally retarded. *Cf. State v. Jimenez*, 880 A.2d 468, 485 (N.J. Super. 2005) (“*In re Winship*, 397 U.S. 358 (1970), together with *Ring*, requires as a matter of due process, that the absence of retardation be established by the State beyond a reasonable doubt.”). Although this argument has been rejected by many courts⁴⁶, until and unless this argument is rejected by the United States Supreme Court, it should continue to be pressed.

One important point to remember in regard to the burden of proof is that the prosecution cannot defeat a claim of mental retardation by showing that the defendant functions without substantial deficits in skill areas the defendant does not claim to have limitations in. As the Oklahoma Court of Criminal Appeals found in *Lambert v. State*, 126 P.3d 646 (Okla.Crim.App. 2005):

Unless a defendant's evidence of particular limitations is specifically contradicted by evidence that he does not have those limitations, then the defendant's burden is met no matter what evidence the State might offer that he has no deficits in other skill areas.

Id., at 651.⁴⁷

⁴⁶ See, e.g., *State v. Grell*, 135 P.3d 696, 702 (Ariz. 2006) (rejecting argument that it is unconstitutional to place burden of proving mental retardation on the defendant.); *Ochoa v. State*, ___ P.3d ___, 2006 WL 1421895 (Okla.Crim.App. May 25, 2006) (refusing to hold that State bears the burden of persuasion by the beyond a reasonable doubt standard that the petitioner is not mentally retarded); *Howell v. State*, ___ P.3d ___, 2006 WL 1788452, *11 (Okla.Crim.App. June 29, 2006) (“the holdings in *Ring* and *Apprendi* . . . do not require the State to prove the lack of mental retardation beyond a reasonable doubt.”); *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005) (rejecting argument that after *Atkins*, the absence of mental retardation is now an element of capital murder that, under *Ring*, the jury must consider and find beyond a reasonable doubt.); *Bowling v. Commonwealth*, 163 S.W.3d 361, 379-80 (Ky 2005) (same); *Winston v. Commonwealth*, 604 S.E.2d 21, 50 (Va. 2004) (same); *State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004) (same); *Morrison v. State*, 583 S.E.2d 873, 878 (Ga. 2003) (same); *In re Johnson*, 334 F.3d 403, 405 (5th Cir.2003) (“neither *Apprendi* and *Ring* nor *Atkins* renders the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt.”); *People v. Smith*, 751 N.Y.S.2d 356 (N.Y.Sup.Ct.2002) (rejecting argument prosecution is required by *Atkins* and *Ring* to affirmatively prove defendant is not mentally retarded at sentencing phase of capital murder trial); *State v. Williams*, 831 So.2d 835, 860 n. 35 (La. 2002) (absence of mental retardation does not operate as functional equivalent of an element of a greater offense); *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003) (same); *Howell v. State*, 151 S.W.3d 450, 465 (Tenn. 2004) (same); *State v. Laney*, 627 S.E.2d 726, 731-32 (S.C. 2006) (same); *Russell v. State*, 849 So.2d 95, 148 (Miss. 2003) (“*Ring* has no application to an *Atkins* determination.”)

⁴⁷ This decision preceded Oklahoma's enactment of a statute implementing *Atkins*. The Oklahoma Court of Criminal Appeals had adopted a definition of mental retardation and procedures for litigating mental retardation claims that it applied prior to the legislature's action. There is nothing in the new statute that would undermine the holding in this case.

The court in *Lambert* also rejected the notion that providing alternative explanations for why the defendant suffered significant limitations in adaptive functioning could rebut the defendant's claim of mental retardation. "An alternative explanation for an agreed condition is not a negation of that condition. By accepting Lambert's assertions that he had limitations in [four enumerated] skill areas, the State failed to contradict his claims." *Id.*, at 653. The Oklahoma Court of Criminal Appeals was crystal clear on this key point: "A defendant must show he has significant limitations in adaptive functioning, but is not required to show that mental retardation is the cause of his limitations in these skill areas."

Id., at 651.

Some states have threshold requirements that must be met in order to get a full hearing on a claim of mental retardation. These requirements may be statutory or judicially created. The statutes of New York and South Dakota, for example, require a showing that there is "reasonable cause to believe that the defendant [is][was] mentally retarded." N.Y.Crim. Proc. Law § 400.27(12)(a); S.D. Codified Laws § 23A.27A-26.1. The Kansas statute requires a showing that "there is sufficient reason to believe that the defendant is mentally retarded." Kan. Stat. Ann. § 21-4623(a). The Virginia statute governing habeas petitions by death row inmates requires a hearing unless the claim is deemed "frivolous." Va.Code Ann. § 8.01-654.2. In California, a defendant cannot obtain a hearing on mental retardation unless he or she submits a declaration by a qualified expert stating his or her opinion that the defendant is mentally retarded. Cal. Penal Code § 1376(b)(1); *see also Chase v. State*, 873 So.2d 1013, 1029 (Miss. 2004) (defendant may not receive mental retardation hearing without providing affidavit from expert opining that defendant has combined IQ of 75 or below).

In Oklahoma, a defendant must provide a pre-trial notice of intent to raise mental retardation. 21 Okla. Stat. Ann. § 701.10b(D). This notice "shall include a brief but detailed statement specifying the witnesses, nature and type of evidence to be introduced. The notice must demonstrate sufficient facts that demonstrate a good-faith belief as to the mental retardation of the defendant." *Id.*

Defense counsel must be sure to demand the resources necessary to make whatever threshold showing is required and to make a complete record of any impediments to meeting the threshold.

1.3 DOCUMENTATION AND TEMPORAL ISSUES

As discussed in the first part of this Guide, the clinical definitions of mental retardation require a showing that the condition manifested or originated during the developmental period, generally defined as prior to age 18. This has created some confusion about the relevance of evidence concerning IQ results obtained after age 18 and the significance of adult behavior. In addition, some of the statutes require the defendant to prove that he or she was mentally retarded at the time of the capital offense. *See, e.g.*, Ark. Code Ann. § 5-4-618(b); Conn. Gen. Stat. § 53a-46a(h); *See also In re Bowling*, 422 F.3d 434, 436 (6th Cir. 2005) (in addressing Kentucky death row inmate's request for permission to file a

successor habeas petition raising an *Atkins* claim, court characterizes the issue as whether the inmate was mentally retarded at the time of the capital offense.) Further, under the Arizona statute, the definition of mental retardation includes *current* impairment in adaptive functioning. A.R.S. § 13-703.02(K); *see also State v. Grell*, 135 P.3d 696, 707 (Ariz. 2006) (noting that assessments based on recent interviews with the defendant are persuasive because Arizona requires that the defendant suffer current impairments in adaptive functioning.) Also creating some confusion are requirements in some states that mental retardation be “documented” or otherwise recognized during the developmental period. *See, e.g.*, Col. Rev. Stat. § 18-1.3-1101; Mo. Rev. Stat. § 565.030.6.

Counsel must work carefully with his or her mental retardation expert(s) to ensure that the evidence relevant to a clinical diagnosis of mental retardation is amassed. Counsel further must be prepared to challenge any definition or evidentiary requirement that does not comport with accepted clinical practice.

Courts have been expressing divergent views on some of the temporal issues discussed above. Justice Rucker of the Indiana Supreme Court dissented from the majority's rejection of a mental retardation claim in *Pruitt v. State*, 834 N.E.2d 90, 123-126. In Rucker's view, the defendant had shown mental retardation by a preponderance of the evidence. He criticized the majority for relying on evidence of IQ scores that Pruitt received after the developmental period, defined as ending at age 22 in Indiana. Because a defendant must establish that his or her “significantly subaverage intellectual functioning” manifested before the person became twenty-two years of age, Rucker disregarded the later IQ scores. For the same reason Rucker concluded the majority erred in looking to adaptive behavior after age 22, such as job performance as an adult.

In contrast, in *Rodriguez v. Quarterman*, 2006 WL 1900630, *14, the district court criticized the petitioner's experts for looking at historical information and “disregarding virtually all available information regarding petitioner's mental health *after* petitioner reached age 18, including information regarding petitioner's *current* intellectual functioning and adaptive skills behavior.”

The petitioner in *Ochoa v. State*, 136 P.3d 661, 666 (Okla.Crim.App. 2006) argued that the trial court erred in refusing to instruct the jury that it had to determine whether he was mentally retarded at the time of the crime, rather than whether he was presently mentally retarded. Evidence at trial showed that Ochoa had lower IQ scores prior to incarceration. Having learned to read and write in prison likely contributed to his enhanced performance. The Oklahoma Court of Criminal Appeals rejected Ochoa's argument, concluding that an increase in skills suggested that Ochoa was not mentally retarded in the first place. It further explained:

We do not dispute the fact that a mentally retarded person can learn. However, a person who can learn beyond the accepted clinical definitions of mental retardation do not fall within the definition of those persons who may avoid execution due to mental retardation. . . . The jury was properly

instructed it must find Ochoa “is” mentally retarded, as opposed to finding that he “was” mentally retarded at the time of the crime.

Id.

In *State v. Strode*, 2006 WL 1626919 (Tenn.Crim.App. June 8, 2006) (unpublished), the Tennessee Court of Criminal Appeals reversed the trial court's finding that Strode had established his mental retardation. Although the defense and prosecution experts had agreed that Strode had a full scale IQ of 69 when he was tested prior to trial, the four IQ scores Strode had received before he turned 18 were all above 70. This was deemed fatal to his claim of mental retardation. *See also Black v. State*, 2005 WL 2662577 (Tenn.Crim.App. Oct. 19, 2005) (where IQ scores before age of 18 were above 70, mental retardation claim fails despite more recent IQ scores below 70.)

The appellate court also criticized the trial court's reliance on the recollections of Strode's adoptive mother about Strode's adaptive deficits from age eleven until fourteen. The court observed that few fourteen-year-olds are capable of living on their own, and many do not pay close attention to personal hygiene. The court appeared to find more probative that Strode had shown an “ability to care for himself, work and obtain a driver's license as an adult.” *State v. Strode*, 2006 WL 1626919, *15.

The Kentucky Supreme Court in *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky 2005), rejected the argument that the critical issue under *Atkins* is whether the inmate is mentally retarded at the time of execution. The court observed: “If diminished personal culpability is the rationale for not executing a mentally retarded offender, logic dictates that the diminished culpability exist at the time of the offense, not necessarily at the time of the execution.” *Id.*, at 376. It then found “nothing unconstitutional or contrary to *Atkins* in the requirement in KRS 532, 135 that mental retardation be determined prior to trial.” *Id.*, at 377.

In *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004), the Arkansas Supreme Court repeatedly emphasized that the state statute barring execution of the mentally retarded, section 5-4-618, “clearly provides that no defendant with mental retardation *at the time of committing* capital murder shall be sentenced to death.” *Id.*, at 356 (emphasis in original). It then criticized the defendant for presenting evidence of his IQ from an evaluation conducted when the defendant was age 15 instead of “submitting evidence demonstrating mental retardation at the time of the offense . . .” *Id.*⁴⁸

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

⁴⁸ This was not the sole basis for affirming the denial of the defendant's mental retardation claim. The court also noted that the prosecution expert successfully rebutted the presumption that the defendant was mentally retarded, which had arisen as a result of an IQ score of 65 when the defendant was fifteen-years-old.

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: and counsel cannot find such documentation, 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. *See, e.g. Foster v. State*, ___ So.2d ___, 2006 WL 721571, *8 (Fla. March 23, 2006) (in denying claim of mental retardation, post-conviction court noted that “[i]n school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded.”); *Rodriguez v. Quarterman*, 2006 WL 1900630, *13 n. 73 (district court finds that public schools at relevant time “had a pecuniary interest in identifying students who qualified for special education services or who were mentally retarded” and so “the failure of any of petitioner's teachers or school officials to refer petitioner for testing or evaluation to determine whether petitioner was either mentally retarded or eligible to receive special education services is highly significant.”); *Ex Parte Briseno*, 135 S.W.3d 1, 16-17 (Tex.Crim.App. 2004) (finding it “highly significant” that petitioner's voluminous juvenile records contained no indication from any source that any person thought petitioner might be mentally retarded.); *but see In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) (Higginbotham, J., concurring) (“While now vital school records, scant as they are, do not use the term ‘retarded,’ that is not worth much, given the wide practice of social promotions and the reluctance of school officials’ use of the stigmatizing term ‘retarded.’”)

In *Williams v. Dretke*, 2005 WL 1676801 (S.D. Tex. July 15, 2005), the district court criticized the Texas Court of Criminal Appeals's analysis of Williams's *Atkins* claim. The state court had ruled that Williams failed to make a prima facie showing of mental retardation because Williams did not present a specific diagnosis of mental retardation prior to the age of 18. Williams had, however, “undeniably presented evidence of a full-scale IQ in the mildly retarded range that was so identified by testing before he turned 18, and of significant deficits in adaptive functioning before age 18.” *Id.*, 2005 WL 1676801, *6. According to the district court, “[t]he Court of Criminal Appeals' insistence on the

incantation of the specific phrase 'mentally retarded' in light of substantial evidence that Williams met a clinical definition of mental retardation was simply unreasonable." *Id.*

In *Hedrick v. True*, 443 F.3d 342, 367 n. 2 (4th Cir. 2006), the Fourth Circuit reiterated that "a habeas petitioner is not required to submit an IQ score of 70 or less from a test taken before he turned the age of eighteen." On the other hand, the petitioner "must allege that his intellectual functioning would have fallen below this standard before he turned the age of eighteen." *Id.*, citing Va.Code Ann. §§ 19.2-264.3:1.1(A),(B)(3).

The Missouri mental retardation statute requires a defendant to establish mental retardation that is "manifested and documented before eighteen years of age." Mo. Rev. Stat. § 565.030.6. In finding that a Missouri death row inmate was not entitled to relief on his *Atkins* claim, the Missouri Supreme Court in *Goodwin v. State*, ___ S.W.3d ___, 2006 WL 1147691 (Mo. May 2, 2006), noted, among other things, that all of the IQ scores received by Goodwin prior to the age of 18 indicated that he was not retarded. Given the absence of "documented evidence of retardation prior to age 18," Goodwin could not establish mental retardation by a preponderance of the evidence. *Id.*, at 2006 WL 1147691, *8. This was true even though Goodwin presented an expert opinion that he was mentally retarded. In finding Goodwin's reliance on his post-conviction expert unavailing, the court observed that the expert's "testimony results from his examination and diagnosis of Goodwin when he was 34 years old. He ignored that section 565.030.6 requires that mental retardation be 'manifested and documented' by the age of 18." *Id.*, at 2006 WL 1147691, *9.⁴⁹

Part of the definition of mental retardation adopted by the Oklahoma Court of Criminal Appeals before the legislature enacted a statute implementing *Atkins* was "manifestation before the age of 18." The Oklahoma Court of Criminal Appeals has explained that this poses a fact question intended to establish that the first signs of mental retardation appeared and were recognized before the defendant turned eighteen.

Lay opinion and poor school records may be considered. Thus, a defendant need not, necessarily, introduce an intelligent quotient test administered before the age of eighteen or a medical opinion given before the age of eighteen in order to prove his or her mental retardation manifested before the age of eighteen, although such proof would surely be the more credible of that fact.

Murphy v. State, 54 P.3d at 567 fn. 19.⁵⁰

Several complaints about how this prong has been interpreted have arisen since the *Murphy* decision. In *Hooks v. State*, 126 P.3d 636, 641 (Okla.Crim.App. 2005), the petitioner complained that the instructions given to the jury required him to prove that his subaverage intellectual condition was actually recognized as mental retardation and diagnosed prior to

⁴⁹ Two additional reasons were given for discounting the new expert's opinion: (1) his testimony was found by the motion court to be incredible; and (2) the motion court held that the new expert was not qualified.

⁵⁰ Because the statutory definition of mental retardation is essentially the same – "mental retardation must have manifested before the defendant attained the age of eighteen (18) years" – the prior case law on the judicial definition likely applies to the new statute.

age 18. This, he argued, was more restrictive than *Murphy's* requirement of showing that the mental disability was observed by someone when the defendant was a juvenile, and also a tougher standard than existed in other states. The Oklahoma Court of Criminal Appeals declined to reach the merits of the argument, pointing out that Hooks had in fact presented evidence that his disability was both recognized and diagnosed as mild mental retardation before he was eighteen.⁵¹

In *Pickens v. State*, 126 P.3d 612 (Okla.Crim.App. 2005), the prosecution's expert had attempted to make much of the fact that there was no documentation showing a "determination" that Pickens was mentally retarded when he was in school. The Oklahoma Court of Criminal Appeals dismissed the prosecution expert's testimony on this point as "specious" given evidence presented by Pickens showing that he had been identified by the public schools as "EMH" – Educable Mentally Handicapped – the term that was used to identify mentally retarded students at the relevant time. *Id.*, at 618. As this case demonstrates, a comprehensive investigation into the relevant school system's practices may be necessary to develop the showing of mental retardation. School records on their face can be extremely misleading, as was the case in *Pickens*. They showed that Pickens successfully graduated from high school with a GPA of 2.70. Former teachers explained, however, that the grades he received were based on his Individualized Education Program, not as compared to other students in mainstream classes. Also, Pickens's class rank of 125 of 328 was not an accurate ranking as it included mainstream students who were graded in a complete different manner.

The petitioner in *Myers v. State*, 130 P.3d 262 (Okla.Crim.App. 2005), argued that the jury instructions created a higher burden than the state law standard by requiring that mental retardation have been "present and known" before age 18, as opposed to having "manifested" before that age. The court of appeals disagreed, stating:

[T]he words "present and known" are words of common everyday understanding that do not require a level of proof above that required to prove that a condition "manifested" itself. "Known" as it relates to the jury instruction used in this case does not require a scientific finding or a medical diagnosis. (Citation omitted.) The retardation has only to have been perceived or recognized by someone before the defendant reached the age of 18. The court's instruction accurately stated the applicable law and therefore we find that the district court did not abuse its discretion in giving this uniform instruction.

Id., at 269.

As noted above, to the extent that a court imposes a requirement on the defendant that is inconsistent with clinical definitions of mental retardation or accepted practices for rendering a diagnosis, counsel must argue that the requirement violates *Atkins*.

⁵¹ In spite of this evidence, and evidence that Hooks was placed in educable mentally handicapped classes by fifth grade, the jury found that Hooks had not proved his mental retardation. The Oklahoma Court of Criminal Appeals affirmed. Even where there is documentation of mental retardation at the relevant age, counsel obviously cannot rely on such evidence alone.

1.4 DISCOVERY AND EXPERT ASSISTANCE

Some mental retardation statutes include discovery provisions. In Idaho, for example, the parties are required to turn over written synopses of expert witnesses's findings, or a written report. The trial court is also authorized to order depositions of the experts. *Id.* Code § 19-2515A(2)(b). In Louisiana, once the defendant raises mental retardation under La. Code Crim. Proc. art. 905.5.1, the defendant is required to turn over the following materials provided the state makes an appropriate request:

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 kinds reviewed by any defense expert in forming the basis of his opinion that the defendant is mentally retarded.

La. Code Crim. Proc. art. 905.5.1(D). If the defendant fails to comply with an order requiring production of such materials, upon motion by the prosecution the court is not to hold a pretrial hearing on the question of mental retardation nor instruct the jury about the prohibition on executing mentally retarded defendants.

The Oklahoma Court of Criminal Appeals has ruled that both parties are entitled to complete discovery on the issue of mental retardation. *Blonner v. State*, 127 P.3d 1135, 1140 (Okla.Crim.App. 2006) (pre-trial jury determination). In *State v. Hughbanks*, 792 N.E.2d 1081 (Ohio App. 2003), the appellate court held that where a post-conviction petitioner demonstrated substantive grounds for relief on his *Atkins* claim, he was entitled to discovery to assist him in presenting the claims. *See also State v. Carter*, 813 N.E.2d 78, 82 (Ohio App. 2004) (“Carter was entitled to discovery to develop his claim, including the experts necessary to aid in that discovery and to assist in presenting the claim, if the petition and its supporting evidentiary material demonstrated substantive grounds for relief.”)

One issue that has come up repeatedly is the right to resources to develop a mental retardation claim. Certainly in jurisdictions like California and Mississippi where expert opinions are required before a hearing on the issue will even be ordered, funding will be necessary before the claim is even raised. In states with lower requirements for a prima facie showing of mental retardation, expert assistance will certainly be required in order to prove the claim. Counsel must make a clear record where the court is denying the resources needed to establish the defendant's mental retardation. Even where counsel is convinced that a request will be denied, the demand for resources must be made or the defendant may later find himself precluded from developing additional evidentiary support for the claim. *See e.g.*, 28 U.S.C. § 2254(e)(2) (federal habeas petitioner not entitled to an evidentiary hearing in most instances if he or his counsel failed to develop the facts in state court.) By not requesting resources, later courts are likely to blame the defendant for the inadequate record.

That conflicting evidence exists concerning whether the defendant is mentally retarded should not preclude funding for assistance in developing the claim. In *Morris v. State*, ____

So.2d ___, 2005 WL 3118817, *19 (Ala.Crim.App. Nov. 23, 2005), for example, the Alabama Court of Criminal Appeals found that the defendant was entitled to “appointment of a mental-health expert who could assist Morris in the preparation and presentation of his claim of mental retardation” where the trial court’s experts offered conflicting opinions about whether or not Morris was mentally retarded. *See also Burgess v. State*, ___ So.2d ___, 2005 WL 2402672, *14 (Ala.Crim.App. Nov. 23, 2005) (acknowledging that following the *Atkins* decision, “there may be instances when a mental-health expert is necessary in a post-conviction proceeding challenging a death sentence.”)

In *State v. Bays*, 824 N.E.2d 167 (Ohio App. 2005), a case involving an *Atkins* claim raised in a successor petition for post-conviction relief, the appellate court ruled that the trial court had abused its discretion when it denied the petitioner’s request for funding for a mental health expert. The trial court’s refusal to authorize funding was premised on the fact that the two mental health experts who testified at the penalty phase of Bays’s pre-*Atkins* capital trial had opined that his IQ was above 70, placing him in the borderline range of intelligence just above mental retardation. The court of appeals pointed out, however, that “[t]he expert testimony offered at Bays’s mitigation hearing was not presented or developed to establish Bays’s mental retardation status for purposes of *Atkins*, using the test adopted in *Lott*.” *Id.*, at 171. Although there was a rebuttable presumption under *Lott* that Bays was not mentally retarded if his IQ was above 70, the court found that Bays “must be allowed access to the resources that might permit him to rebut the presumption, in view of the fact that he is an indigent defendant with significant, documented cognitive deficits, as shown by his school records and the testimony [of the experts at the penalty phase].” *Id.*, at 171-172.

In *State v. Hughbanks*, 792 N.E.2d 1081 (Ohio App. 2003), the Ohio Court of Appeals found that the petitioner had demonstrated substantive grounds for relief on his *Atkins* claim despite the fact that at the pre-*Atkins* trial a mental health expert testified that the petitioner had a full-scale IQ of 82. The court of appeals pointed out that the trial testimony had been offered to probe the issue of mental illness, not mental retardation as an exemption to execution. In addition, petitioner now presented social security records showing that he received benefits as a result, among other things, of a diagnosis of mental retardation. This diagnosis emerged from a clinical interview and testing which disclosed adaptive deficits and a full-scale IQ of 73. On this record, the appeals court ruled that the petitioner was entitled to funding for a mental health expert to pursue his claim.

Another Ohio appellate court found that the trial court abused its discretion in denying the petitioner’s request for expert assistance for his *Atkins* claim. *State v. Lorraine*, 2005 WL 1208119 (Ohio App. 11 Dist. May 20, 2005) (unpublished). The appellate court criticized the lower court for relying on the petitioner’s pre-*Atkins* case in mitigation in deciding that the petitioner was not now entitled to expert assistance to establish his ineligibility for the death penalty. The court pointed out that when the prior evidence was presented, it was for a different purpose. And although petitioner’s evidentiary showing included an IQ score of 73, which is above the rebuttable presumption score of 70 as pronounced by the Ohio Supreme Court, the score “provides only a singular piece of evidence as to Lorraine’s mental capacity, and is not dispositive of the issue of mental retardation for *Atkins*

purposes.” *Id.*, 2005 WL 1208119, *3; *See also State v. Waddy*, 2006 WL 1530117 (Ohio App. June 6, 2006) (unpublished) (petitioner was entitled to expert assistance in proving his mental retardation claim despite the fact that all known IQ scores were above 70 and the most recent score was 83. Court looks to documentation suggesting below average intellectual functioning that was apparent prior to age 18, as well as evidence suggesting limitations in social and conceptual skills.)

After finding that the petitioner had made a colorable claim of mental retardation, and that the state court's rejection of the claim was based on an unreasonable determination of the facts before it, a Texas district court granted funds to a death row inmate for expert assistance in proving mental retardation. *Williams v. Dretke*, 2005 WL 1676801, *6 (S.D. Tex. July 15, 2005). In contrast, the federal district court in *Simpson v. Dretke*, 2006 WL 887384 (E.D. Tex. March 27, 2006), denied funding to a Texas death row inmate who wanted to obtain expert assistance to support his *Atkins* claim. Simpson had previously presented the claim in state post-conviction proceedings although the state court declined to consider some of his supporting evidence on the ground that it was untimely. After refusing to give Simpson an evidentiary hearing on the claim, the state court denied the claim on the merits. In light of that merits ruling, the federal district court concluded the claim fell under 28 U.S.C. § 2254(d)(2), which precluded any federal court from granting relief on the claim unless the state court adjudication of the claim resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Given that this statute limited the federal court to consideration of the same evidence that was in front of the state court, the district court found that Simpson was precluded from presenting new supporting evidence in federal court. Fifth Circuit precedent did leave open the possibility of consideration of new evidence if there were significant defects in the state court's adjudicative process. *Valdez v. Cockrell*, 274 F.3d 941, 948 (5th Cir.2001), *cert. denied* 537 U.S. 883 (2002). Because the district court had yet to review the record or the arguments of the parties, it could not find at this time that funding was appropriate.

The United States Supreme Court has yet to decide whether the restrictions of § 2254(d) apply where new evidence has been introduced in the federal court. *See, e.g., Holland v. Jackson*, 124 S.Ct. 2736 (2004) (per curiam) (noting that some federal courts of appeal apply de novo review when new evidence is admitted in federal court and assuming *arguendo* that this approach is correct.) Counsel should aggressively argue that the de novo review approach is indeed correct, and that such an approach clearly permits funding in federal court in order to develop additional support for the *Atkins* claim without a preliminary showing that the state court's ruling was unreasonable.

In cases where the Texas Court of Criminal Appeals summarily denied *Atkins* claims as an “abuse of the writ,” a ruling premised on the alleged failure to state a prima facie case, petitioners have been granted funding in federal court to further develop the claim. *See, e.g., Morris v. Dretke*, 413 F.3d 484, 489 (5th Cir. 2005) (district court granted petitioner's request for funding for expert and investigative services for proving *Atkins* claim raised in successor petition); *Rivera v. Dretke*, 2006 WL 870927 (S.D.Tex. March 31, 2006) (district

court considers evidence of mental retardation that was developed in federal court in finding that petitioner is mentally retarded).

On the other hand, where the Fifth Circuit had previously ruled the petitioner failed to make a prima facie showing of mental retardation, it concluded the district court did not abuse its discretion in denying authorization for funding to pursue IQ testing. *Campbell v. Dretke*, 117 Fed.Appx. 946, 959 (5th Cir. 2004). This non-precedential ruling appears inconsistent with *In re Hearn*, 376 F.3d 447 (5th Cir. 2004), where the Fifth Circuit recognized it was appropriate to provide a death row inmate with the tools needed to construct a prima facie case.

In *State v. Harris*, 181 N.J. 391, 859 A.2d 364 (N.J. 2004), a case involving a pre-*Atkins* trial, the trial court ruled that it would only hear testimony on the *Atkins* claim from its court appointed expert. The New Jersey Supreme Court found on appeal that “it would be violative of due process to deprive a capital defendant of the opportunity to present evidence, including expert testimony, to support a *bona fide* claim of mental retardation.” *Id.*, at 527. No due process violation occurred here, however, because no *bona fide* showing of mental retardation had been made.

In the present matter, we combed the record for some evidence to support defendant's bare assertion that a psychological evaluation is needed to determine whether he has mental retardation. The record, including the opinion of defendant's own expert at the penalty phase, provides no support for his claim that a psychological examination is necessary; indeed, the record speaks against his claim.

* * *

Indeed, defendant has not provided any affidavit from a qualified psychologist who reviewed defendant's childhood records and his letters and who concluded that it is even an open question as to whether defendant has mental retardation. Without a reasonable basis for defendant's request for a psychological examination, we conclude that he is not entitled to a hearing on his claim of mental retardation.

Id., at 533.

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. *See, e.g.*, Fla. R. Crim. P. 3.203(c)(2) (“The court shall appoint an expert chosen by the state attorney if the state attorney so requests.”); La. Code Crim. Proc. Art. 905.5.1(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.”) In the absence of statutory directives, some courts have

ruled that the prosecution is entitled to have the defendant examined by an expert. *See, e.g., State ex rel. Lane v. Bass*, 87 P.3d 629, 633 (Okla.Crim.App. 2004), *rev'd in part on other grounds, Blonner v. State*, 127 P.3d 1135 (Okla.Crim.App. 2006).

If the prosecution requests an examination by an expert of its choosing, counsel must be prepared to fight for appropriate limitations. In *Centeno v. Superior Court*, 11 Cal.Rptr.3d 533 (Cal.App. 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 18.” The mental retardation examination must be limited in its scope to the question of mental retardation. Therefore, 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., at 544-45 (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.

Counsel must also bear in mind “practice effect,” discussed in the first part of this Guide. It is well established that it is inappropriate for an expert to administer a test recently used on the defendant by another mental health expert. *See e.g., Rivera v. Dretke*, 2006 WL 870927, *12 (S.D.Tex. March 31, 2006) (acknowledging that “[c]ommonly accepted scientific principles preclude later testing” by another expert); *Hall v. State*, 160 S.W.3d 24, 30 fn. 14 (Tex.Crim.App. 2004) (prosecution expert was unable to conduct his own IQ testing because of practice effect).

In preparing for the *Atkins* hearing, gaining an understanding of the tests utilized by the State's expert(s) is of critical importance. This was evidenced dramatically in *Salazar v. State*, 126 P.3d 625 (Okla.Crim.App. 2005). In that case, the petitioner's attorney received the prosecution experts' test data during discovery. One test given by expert Dr. John Call was something called the "Blackwell Memory Test." Petitioner's counsel did not know what kind of test this was and conducted no inquiry about it. At the trial, Dr. Call opined that petitioner was malingering and viciously attacked the findings of petitioner's experts. One expert was accused by Dr. Call of being unethical because he utilized a test with norms petitioner purportedly did not fall within. Another expert's findings were dismissed by Dr. Call on the ground that the expert used a non-standardized malingering test, something Dr. Call claimed he would never do himself. This practice made all of the expert's findings suspect, according to Dr. Call. The jury ultimately found that petitioner failed to prove he was mentally retarded.

While on appeal, petitioner's attorneys discovered that the "Blackwell Memory Test" administered by Dr. Call had been created by him and was non-standardized. Following a remand to determine whether information about the test was fairly characterized as newly discovered, the Oklahoma Court of Criminal Appeals ruled that petitioner's attorney had rendered ineffective assistance in his handling of Dr. Call.

We cannot fathom, in a case which boiled down to a battle of experts, why Petitioner's counsel failed to research the tests Dr. Call performed on Petitioner to confirm the origins of and the scientific validity of those tests before Petitioner's mental retardation hearing. The raw data was provided to counsel prior to the mental retardation jury trial. The evidence was discoverable with due diligence--that is clear from another attorney's discovery of the information in a separate and unrelated proceeding.

Id., at 634. Because Dr. Call's testimony was critical to the government's case, shown in part by responses on post-trial juror questionnaires, petitioner was prejudiced by counsel's failure to expose Dr. Call's use of a non-standardized test. Having lost confidence in the jury's verdict, the Oklahoma Court of Criminal Appeals vacated the death sentence and modified the sentence to life imprisonment without the possibility of parole.

In overturning the jury's finding that the petitioner was not mentally retarded in *Lambert v. State*, 126 P.3d 646, the Oklahoma Court of Criminal Appeals commented on the qualifications of Dr. Call, who was also the prosecution's expert in that case. Dr. Call had not seen a mentally retarded patient in a clinical setting for fifteen years. Further, none of the classes, seminars or publications in his "extensive" CV related to the area of mental retardation. And yet Dr. Call since 2002 made a specialty of examining capital defendants for mental retardation. *Id.*, at 651-52 & n. 16. This is exactly the type of information counsel will want to elicit during cross-examination of the prosecution witnesses.

The prosecution expert's testimony about malingering in *United States v. Nelson*, 419 F.Supp.2d 891 (E.D. La. 2006), was called into question by the district court given the fact that the expert administered the test designed to detect malingering one month after he had

given the IQ test to the defendant. Further, the defense experts testified that malingering instruments are of limited use for individuals with lower IQs because they have never been tested on a normative sample of mentally retarded individuals. *Id.*, at 902. Thus, in the defense experts' view, a determination about whether the defendant was malingering had to be based on clinical judgment.

Some statutes expressly delineate the type of expert that must be used in the mental retardation determination. Counsel should be sure to investigate whether the prosecution's expert satisfies the requirements. In *Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006), for example, the Virginia Supreme Court found prejudicial error in the admission of testimony by a prosecution expert who did not meet the statutory requirements. *Cf. State v. Grell*, 135 P.3d 696, 708 (Ariz. 2006) (on remand for mental retardation determination, trial court did not abuse its discretion in permitting testimony by a psychiatrist, rather than a psychologist as required by statute, where the expert appeared to be qualified to diagnosis mental retardation and the statute was enacted following the expert's evaluation of the defendant).⁵²

If the defendant refuses to cooperate with a prosecution expert, there may be sanctions. In *State v. Grell*, 135 P.3d 696, 707-08 (Ariz. 2006), the Arizona Supreme Court found no abuse of discretion in the trial court's ruling precluding a defense expert from testifying about adaptive behavior where the defendant was interviewed by that expert but then refused to cooperate with the prosecution expert. *See also* Fla. R. Crim. P. 3.203(c)(5) (providing various options for trial court to employ should defendant refuse to cooperate with court-appointed experts or state experts).

The sanctions are especially severe in Louisiana. Under La. Code Crim. Pro. art. 905.5.1(G), if the defendant refuses to submit to or fully cooperate with prosecution experts, "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." In *State v. Turner*, ___ So.2d ___, 2006 WL 1883374 (La. July 10, 2006), the Louisiana Supreme Court rejected a vagueness challenge to the mental retardation statute based on its failure to define "fully cooperate" in the sanctions section. *Turner* had complained that the language did not provide adequate notice of what behavior was prohibited. The court concluded that it was a premature challenge given *Turner's* failure to establish vagueness as it pertained to his conduct. The court also noted that prosecution experts under this section were required to be licensed by the Louisiana State Board of Examiners. Because of this, the court believed it could be "safely presumed such an expert can differentiate between an inability to cooperate, which may be expected from a person who is mentally retarded, from a failure to cooperate, which could be expected from a malingerer attempting to use the mental retardation

⁵² A.R.S. § 13-703.02(K)(3) defines a "psychological expert" as "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." Section 32-2071 requires a "doctoral degree" from an accredited program in any of several areas of psychology. The program must include hundreds of hours of supervised training. A.R.S. § 32-2071(D). Among the required subjects of study are "interviewing and the administration [,] scoring and interpretation of psychological test batteries for the diagnosis of cognitive abilities and personality functioning." A.R.S. § 32-2071(A)(4)(g).

exclusion from capital punishment.” As for Turner’s complaint that the sanction was unduly severe and would result in the denial of the right to compulsory process, the court concluded the contention was not ripe for adjudication given that the sanction had not been invoked.

If a defendant refuses to cooperate with a court-appointed or prosecution expert, defense must be prepared to make a showing that the defendant’s actions were the result of his or her mental retardation or other mental health issues thereby rendering the sanctions inappropriate.

1.6 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 by specifying 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 (Cal. App. 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.” *Id.*, at 544. 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.

In *State v. Turner*, ___ So.2d ___, 2006 WL 1883374 (La. July 10, 2006), the Louisiana Supreme Court reversed the trial court's finding that the mental retardation statute violated due process by requiring a defendant to waive his Fifth Amendment right against self-incrimination in order to exercise his Eighth Amendment right not to be executed. The provision at issue, paragraph E of La. Code Crim. Proc. Art. 905.5.1, provides:

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.

The state supreme court found that "the trial court erred in its analysis by reading the statute broadly to interpret it as requiring a defendant to reveal privileged communications with his attorney as well as requiring him to waive his Fifth Amendment privilege against self-incrimination." Instead, the court concluded the provision "was comparable to the waiver of the doctor-patient privilege by a defendant pleading not guilty by reason of insanity."

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 testimony at a hearing to suppress evidence under the Fourth Amendment may not be admitted against him in the guilt trial).

1.7 PRESENCE AT MENTAL RETARDATION EVALUATION

Many defense attorneys want to be present when the defendant is evaluated, whether by his or her own expert, a court-appointed expert, or a prosecution expert. Some statutes deal with this directly. In Florida, for example, attorneys for either side may be present during examinations conducted by court-appointed experts. Fla. R. Crim. P. 3.203(c)(4). In South Dakota, defense counsel and the prosecutor have the right to be present at an examination of the defendant by the prosecution's expert. S.D. Codified Laws § 23A-27A-26.5. Most often, however, there is no governing statute and defense counsel will have to litigate the right to be present. In deciding whether to pursue this, counsel must consider whether this will result in the prosecution seeking to be present at defense examinations.

There are a number of cases where physical presence has been disallowed but the defense

has been offered the opportunity to have the examination videotaped. *See also* S.D. Codified Laws § 23A-27A-26.5 (mandating videotaping of evaluation conducted by prosecution expert.) Where that is offered, defense counsel must carefully consider whether that is an acceptable substitute or whether videotaping poses dangers that outweigh the potential benefits. Jurors and judges often harbor stereotypes of mentally retarded individuals. A defendant's appearance on the videotape could be significantly misleading to a lay person. This is true also for an audiotape.

In *United States v. Nelson*, 419 F.Supp.2d 891 (E.D. La. 2006), the administration of an IQ test by the prosecution expert was videotaped with positive results. The district court was able to view the actual testing which corroborated the defense expert's opinion that the resulting IQ score was artificially inflated because of practice effect.

It is clear from the videotapes of Dr. Thompson's test administration that Nelson remembered the test, and there was absolutely no novelty for Nelson associated with certain sub-tests. For instance, Nelson, at different junctures, asked for blocks and cards, clearly anticipating the sub-tests. At one point, before instructions were given, Nelson looked at the test materials and then asked Dr. Thompson if he supposed to "do as many as I can in time, right?" Thompson, Tr. 136. This is significant because part of what is being tested in the WAIS-III is how the subject receives, perceives, and responds to instructions concerning a novel task, thus challenging the subject's ability to listen to the tester, process information, and perform accordingly. Swanson, Tr. 198. The length of time to process instructions is also being tested. Swanson, Tr. 199. Thus, the fact that Nelson clearly remembered certain sub-tests would have contributed to elevated scores, by perhaps six points. Swanson, Tr. 201. For this reason, Dr. Thompson's credibility is somewhat undermined because he states in his report only that practice effect is not commonly found in mentally retarded individuals, and in his testimony, unequivocally denied that there were indications of a practice effect, in spite of the fact that Nelson unquestionably remembered parts of the test. Thompson, Tr. 34.

Id., at 898-99. In addition, the district court's review of the videotape caused it to question the prosecution expert's contention that the defendant had been malingering. *Id.*, at 902.

1.8 EVIDENTIARY ISSUES

What evidence may be presented at an *Atkins* hearing has been the source of numerous opinions and continuing litigation. One question that has come up is whether a fact-finder may only consider test scores in determining whether a defendant suffers from significantly sub-average intellectual functioning. In *Pruitt v. State*, 834 N.E.2d 90, 104, the Indiana Supreme Court held that the trial court did not err in considering other evidence of mental capacity, such as the defendant's ability to support himself and fill out work applications, in finding that Pruitt had failed to establish that he suffered from significant subaverage

intellectual functioning. Notably, however, some of Pruitt's test scores supported a finding of mental retardation while others did not. The non-testing evidence was essentially used to determine which of the inconsistent scores was more likely accurate.

Also an issue is whether a fact-finder is bound by uncontested expert opinion. The appellate court in *State v. White*, 2005 WL 3556634 (Ohio App. Dec. 30, 2006), rejected an argument that the trial court had erred by discounting the opinions of both the state's and the defendant's expert on the issue of adaptive skills deficits and relying instead of lay witness testimony. In such instances, counsel must make a clear record about why this is inappropriate if the lay witness testimony does not undermine the factual foundation for the experts' opinions. Put another way, if qualified experts agree that certain behavior is consistent with mental retardation, it would violate *Atkins* to find that same behavior foreclosed a finding of mental retardation.

Frequently raised is the issue of what, if any, evidence about the capital offense or other crimes can be considered by the trier of fact. Another disputed area of evidence involves testimony about a defendant's behavior in prison.

In *Blonner v. State*, 127 P.3d 1135, 1141, the Oklahoma Court of Criminal Appeals ruled:

Evidence relating to the crime with which the defendant is charged is not admissible unless that evidence is specifically relevant to refute the defendant's evidence of mental retardation. Evidence relating to other crimes is admissible only to the extent it is relevant to refute the defendant's evidence of mental retardation.

See also Lambert v. State, 71 P.3d 30, 31 (“The jury should not hear evidence of the crimes for which Lambert was convicted, unless particular facts of the case are relevant to the issue of mental retardation. Any such evidence should be narrowly confined to that issue. The jury should not hear evidence in aggravation or mitigation of the murders for which Lambert was convicted, or any victim impact evidence.”); *Hooks v. State*, 126 P.3d 636, 644 (“Reciting the facts of particular crimes will seldom be relevant to the issue of mental retardation, but may well confuse and inflame the jury.”); *In re Hawthorne*, 105 P.2d 552, 559 (Cal. 2005) (“Evidence relating to the underlying crimes shall be admissible only to the extent relevant on [the] question [of mental retardation].”); *but see Ex Parte Taylor*, 2006 WL 234854 (Tex.Crim.App. Feb. 1, 2006) (unpublished) (in denying claim of mental retardation, trial court “also focused on [petitioner’s] actions in the days leading up to the murder, on the evening of the murder itself, and the days following the murder in assessing his level of adaptive functioning.”); *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003) (“evidence of a defendant’s crimes in a mental retardation trial may be admissible as probative evidence of the defendant’s intelligence if that evidence demonstrates his mental ability and adaptive skills, or is otherwise relevant to the question of whether he is mentally retarded.”); *State v. Brown*, 907 So.2d 1, 32 (La. 2005) (claim of mental retardation is undermined by defendant’s “intact survival mentality,” as shown by his destruction of trace evidence, sanitizing his house, and successfully eluding police apprehension for 82 days.)

The Oklahoma Court of Criminal Appeals has found evidence of prior crimes to be relevant on some occasions. In *Hooks*, for example, evidence that Hooks had run a prostitution ring was deemed relevant to the question of whether he was mentally retarded. The court explained:

The State introduced evidence that Hooks employed several women as prostitutes. In the course of that employment, he rented apartments, purchased food and other supplies, oversaw the women's activities, required that they give him their earnings, took responsibility for that money, and enforced rules regarding behavior, housecleaning, and personal hygiene. All this directly bears on Hooks's mental abilities. While experts agree that mentally retarded people can commit crimes, categories of crime differ. On one hand, individual acts of violent crime, such as armed robbery or rape, require little or no abstract thought or complex planning. By contrast, running a prostitution ring over a period of several years resembles engagement in a continuing criminal enterprise. This requires a level of abstract thought, coupled with the ability to carry out plans, which might be beyond the capabilities of a mentally retarded person.

Hooks v. State, 126 P.3d at 644.

In contrast, in *Lambert v. State*, 126 P.3d 646, the Oklahoma Court of Criminal Appeals found that the trial court erred by admitting extensive evidence about the petitioner's criminal activities, some of which was not relevant to the question of mental retardation and some of which was more prejudicial than probative.⁵³ The appeals court further explained that because a defendant is only required to show limitations in adaptive functioning in two of nine areas, the prosecution must attempt to negate the defendant's evidence on the specific areas he claims to be deficient in. *Id.*, at 656. Put another way, evidence that defendant functions well in areas other than those he or she has put at issue is irrelevant to the question of mental retardation.

In *Lambert*, the appeals court rejected the prosecution's contention that evidence of Lambert's crimes was relevant because it showed that he had chosen a life of crime. The court of appeals responded:

This argument suggests that the prosecution itself was confused regarding the purpose of this proceeding. Lambert's chosen profession would only be relevant to the issue of mental retardation if it were something a mentally retarded person could not do. However, all the experts testified that mentally retarded people can and do commit crimes. Lambert's alleged choice of a life of crime shows he is a bad person, without resolving the

⁵³ "When balancing a claim that particular facts of a crime are relevant to the issue of mental retardation, a trial court must still consider whether its probative value is 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.'" *Lambert v. State*, 126 P.3d at 655, quoting 12 O.S.Supp.2003, § 2403.

issue of mental retardation. This argument could only confuse the issues in the case and mislead the jury.

Id., at 656.⁵⁴

The Oklahoma Court of Criminal Appeals further condemned the prosecutor's argument that the evidence of Lambert's criminal history established that he was "street smart," thereby precluding a finding of mental retardation. The court observed: "No evidence in the record supports the assertion that mildly mentally retarded persons cannot be 'street smart' and survive outside an institution." *Id.*

The prosecutor in *Lambert* also sought to defeat the mental retardation claim by presenting evidence that Lambert had previously pled guilty to "home invasion" and that mental retardation had not been raised in that proceeding. The Oklahoma Court of Criminal Appeals responded: "Whether previous counsel entering a guilty plea in a non-capital case chose to bring up mental retardation is not relevant to any issue in these proceedings." *Id.* The Oklahoma Court of Criminal Appeals also condemned the admission of evidence by the prosecution concerning personality tests taken by Lambert and psychiatric diagnoses he had received other than mental retardation, such as "conduct disorder" and "dysocial disorder." The court explained:

Mental retardation and mental illness are separate issues. It is possible to be mentally retarded and mentally ill. Lambert has not claimed to be mentally ill, and evidence of mental problems did not make the issue of his mental retardation more or less likely. Prosecutors used this information to argue that Lambert's adaptive functioning limitations were caused by something other than mental retardation. However, in doing so, they accepted Lambert's claims of adaptive functioning limitations. . . . This evidence, offered as an alternative to explain Lambert's limitations, was irrelevant. Its only possible relevance could have been if prosecutors used evidence of mental problems to argue that Lambert had no limitations in adaptive functioning. The record suggests this was an argument prosecutors could not make. Evidence of mental problems and other psychological testing should not have been admitted.

Id., at 659; *but see State v. Burke*, 2005 WL 3557641 *10 (Ohio App. Dec. 30, 2005) (defendant "must prove that significant adaptive limitations more likely than not result from mental retardation."); *In re Bowling*, 422 F.3d 434, 438 (6th Cir. 2005) (noting that deficits in adaptive functioning described by witnesses could be explained by other known psychological diagnoses including attention deficit hyperactivity disorder, alcohol abuse, and a personality disorder.) Counsel is likely to need strong expert testimony to convince

⁵⁴ *But see United States v. Webster*, 421 F.3d 308, 313 (5th Cir. 2005) (in affirming finding that petitioner failed to establish mental retardation, the appeals court noted that the evidence reflected that petitioner "adapted to the criminal life he chose and has illustrated the ability to communicate with others, care for himself, have social interaction with others, live within the confines of the 'home' he has been in since he was sixteen, use community resources within this home, read, write, and perform some rudimentary math.")

the fact-finder why the *Lambert* analysis is clinically accurate and why rulings in cases like *Burke* and *Bowling* are erroneous.

In a case involving a post-conviction mental retardation trial, the Oklahoma Court of Criminal Appeals rejected an argument that it was error for the jury to have been informed that the petitioner had been convicted of an undisclosed crime and was presently in custody. *Ochoa v. State*, ___ P.3d ___, 2006 WL 1421895, __ (Okla.Crim.App. May 25, 2006). The court did not believe that knowledge of these facts would create the same prejudicial effect as information about the capital crime and death sentence. The court did find error, however, in the trial court's decision to have Ochoa wear a shock sleeve where the record indicated that the trial court was taking a precautionary measure rather than responding to actual behavior that needed control. Reversal was not required because Ochoa failed to establish prejudice. Even assuming the jury could see the shock sleeve, this would not have been more prejudicial than viewing Ochoa in jail clothes which occurred after Ochoa refused to wear civilian clothing.

The Oklahoma Court of Criminal Appeals found no error in *Howell v. State*, ___ P.3d ___, 2006 WL 1788452 (Okla.Crim.App. June 29, 2006), when the prosecutor asked a police officer whether he had questioned Howell's mental functioning at any time during his investigation, and whether it had ever occurred to the officer that Howell was mentally retarded. The appeals court found that the officer's observations about Howell's ability to communicate were relevant and his lay opinion was admissible.⁵⁵ Nor was there error when a witness who previously prosecuted Howell was asked if anyone had expressed concern before Howell testified in that proceeding. The jury could infer from this that Howell's prior attorney concluded he was a competent witness, which was relevant to the questions of sub-average intellect and limitations in adaptive functioning. There was also no abuse of discretion in the admission of letters written by Howell to his co-defendant and former spouse, which were offered to show Howell's "ability to communicate, to understand and engage in logical reasoning, to show he understood the consequences of his actions and had the ability to learn from his mistakes, and to show he did not have deficits in social and interpersonal skills." 2006 WL 1788452, *5. As for evidence of Howell's use of profanity, this was properly admitted because "the way he phrased his answers showed his contempt for the process and were demonstrative of his attitude and understanding of the proceedings." *Id.* Also properly admitted was Howell's testimony from his capital trial about his involvement in a cocaine drug ring. The testimony "reflected his ability to respond directly to his counsel's questions and his responses were coherent and showed he could think and respond logically." 2006 WL 1788452, *7. In addition, the testimony demonstrated Howell's "ability to think rationally, to follow instructions, and to be responsible for large sums of money and drugs." *Id.* On the other

⁵⁵ This is not the only time investigating officers have been called in mental retardation proceedings. In *Pickens v. State*, 126 P.3d 612 (Okla.Crim.App. 2005), a former sheriff testified that Pickens asked no questions when advised of his Miranda rights, lied during the interrogation, made up an alibi, and eventually provided a story that matched the evidence. In this witness's view, Pickens had no difficulty with communicating. A former deputy testified that he transported Pickens on a number of occasions during which the two had "real intelligent conversation." *Id.*, at 619. The deputy further reported that Pickens had a neat appearance when being transported to court. Such evidence was deemed insufficient to refute the significant evidence of adaptive deficits presented by Pickens.

hand, Howell's testimony about specific drug deals leading up to his meeting with the victim should not have been admitted since it suggested that "serious criminal conduct followed." *Id.*

Also admitted was a videotape of a portion of the prosecution's cross-examination of Howell at his capital trial. The beginning of the videotape was deemed relevant by the Oklahoma Court of Criminal Appeals because it allowed the jury to see Howell's demeanor as well as how he communicated with the prosecutor. This was important because Howell had waived his presence at the mental retardation trial so this videotape provided the only opportunity for the jury to view Howell. The court did find that some of the videotape should not have been shown to the jury in light of the direct examination it had heard. There was enough mention of the victim and Howell's conduct after the killing for the jury to piece together what happened, something it should not have been told about. 2006 WL 1788452, *8.

Finally, the Oklahoma Court of Criminal Appeals approved of the admission of Howell's testimony from an in camera hearing where he expressed dissatisfaction with his attorneys and the manner in which the State was handling his court proceedings. This evidence was relevant in that it showed that Howell "could understand and process information, communicate, engage in logical reasoning and understand the reactions of others." 2006 WL 1788452, *9.

The prosecution in *United States v. Nelson*, 419 F.Supp.2d 891 (E.D. La. 2006) was permitted to present testimony from past crime victims during the hearing on mental retardation. Their testimony was to illustrate Nelson's purported leadership role in the crimes, suggesting adaptive functioning above the mentally retarded level. The district court, however, responded to the evidence as follows: (1) some of it actually indicated that Nelson was not functioning at a high level; and (2) the court agreed with a defense expert's explanation that the testimony had "limited relevance to the mental retardation diagnosis because it is isolated, in contrast to the recurring patterns which emerge from all of the records in this case and which indicate a low level of adaptive functioning." *Id.*, at 902. Needless to say, where the prosecution attempts to utilize criminal acts to defeat a claim of mental retardation, the defense experts must be prepared to address it in their testimony.

In *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003), the Georgia Supreme Court found no abuse of discretion in admission of evidence about the petitioner's crimes where the evidence showed "an ability to plan, think and adapt in a manner inconsistent with Morrison's claim that he is mentally retarded." Further, a confession by the petitioner was "relevant to his intellectual abilities because it reveal[ed] that he can read and write, that he attended school until the ninth grade, and that he understood his rights." *Id.* Further, in describing the crime and his plan to escape he used "language consistent with average intelligence." *Id.* Crime scene photographs, which showed the restraints the petitioner attempted to use on a victim "illustrated the resourcefulness displayed by [Morrison] to accomplish his criminal purposes." *Id.*, at 877.

In *State v. Arellano*, ___ P.3d ___, 2006 WL 1412884 (Ariz. May 24, 2006), the Arizona

Supreme Court reversed a ruling by the trial court precluding testimony by prison employees about the defendants's adaptive behavior in prison. Looking to the Arizona statute, the Arizona Supreme Court ruled that "a trial court may consider post-age-eighteen adaptive behavior to evaluate mental retardation" even though the statute requires an onset of the defendant's intellectual and adaptive behavior deficits prior to age eighteen. *Id.*, at 2006 WL 1412884, *5. In the state supreme court's view, "[e]vidence of post-age-eighteen adaptive behavior skills or deficiencies" could be relevant to a determination of mental retardation. *Id.* The Arizona Supreme Court noted two other courts that have permitted similar evidence: "*Pickens v. State*, 126 P.3d 612, 617 (Okla.Crim.App.2005) (corrections personnel testified about defendant's communication deficits, noting that "things had to be explained to [him] more than once, in 'simpler' terms, and multi-syllabic words confused him"); *Ex parte Briseno*, 135 S.W.3d 1, 18 (Tex.Crim.App.2004) (four Texas Department of Criminal Justice officers testified at an *Atkins* hearing about Briseno's communication skills and that they 'saw him reading magazines and filling out commissary forms appropriately').⁵⁶ The Arizona Supreme Court did acknowledge the warning by the AAMR, through its amicus brief, that "non-expert observations 'receive little or no weight from clinical experts if they are made in the context of atypical environments (such as prison).'" *State v. Arellano*, 2006 WL 1412884,*5 n.3 (quoting from AAMR Amicus Brief). But that goes to the weight of the prison employees's testimony, not to admissibility.

It is extremely common for prosecutors to utilize jail or prison employees in attempting to defeat claims of mental retardation. *See, e.g., United States v. Webster*, 421 F.3d 308, 313 n. 15 (5th Cir. 2005) (court relies in part on testimony by prison guards and inmates in concluding that petitioner failed to establish mental retardation.); *Hall v. State*, 160 S.W.3d 24, 34-35 (Tex. Crim. App. 2004) (state presents affidavits from five prison guards in effort to refute claim of mental retardation); *Moore v. Quarterman*, 454 F.3d 484, 489 (5th Cir. 2006) (state called four correctional officers who indicated that petitioner communicated well and successfully interacted with others). Counsel in most cases will want to keep the testimony out, making the arguments rejected in the *Arellano* case. If that is unsuccessful, counsel will need to both present expert testimony explaining why positive adaptation in prison is unremarkable, and be ready to challenge the reliability of the lay observations. Materials purportedly written by a defendant must be carefully reviewed to determine whether another source may have been responsible for preparing them. Otherwise, they may be successfully used by the prosecution to demonstrate the absence of mental retardation. *See, e.g., Hall v. State*, 160 S.W.3d 24, 32 (Tex. Crim. App. 2004) (court finds relevant an allegedly well drafted pro se motion to remove counsel that was filed at time of trial and the trial court believed showed that defendant was "pretty bright"); *but see Ex Parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004) (petitioner's "coherent" pro se brief on direct appeal did not defeat claim of mental retardation; court notes it is common knowledge that there are "writ writers" in prison who will write pleadings for other inmates); *In re Hearn*, 376 F.3d 447, 455 fn. 9 (5th Cir. 2004) (majority of three-judge panel refuses to find petitioner's colorable claim of mental retardation underlined by a hearsay evidence of a long, personalized request for a pen pal on a web site.); *Brown v.*

⁵⁶ See also *Ex Parte Taylor*, 2006 WL 234854 (Tex.Crim.App. Feb. 1, 2006) (unpublished) (petitioner's behavior while incarcerated is considered in assessing adaptive functioning.)

State, ___ So.2d ___, 2006 WL 1125007, *35 (Ala.Crim.App. 2006) (court does not give weight to testimony that the defendant filed a federal lawsuit because it “acknowledges that this lawsuit may have been drafted by another inmate acting as a ‘jailhouse lawyer.’”); *Morrow v. State*, 928 So.2d 315 (Ala.Crim.App. 2004) (court rejects government’s contention that certain pro se filings established defendant’s ability to read, write and process information given that nothing in the record showed who actually drafted the motions.)

In *Lambert v. State*, 126 P.3d 646, for example, the prosecution presented testimony from prison employees who had frequent, albeit brief, contact with Lambert when they picked up his requisition slips. They opined that Lambert was not retarded. The defense was able to establish, however, that the prison employees did not know who actually filled out the forms or whether Lambert read the books he requested. In addition, the defense called former cellmates who explained that they had filled out the forms and that the books were intended for other inmates since Lambert did not read books. Prison employees also testified that they had little or no trouble communicating with Lambert and that he appeared to understand the prison routine and what was expected of him. The Oklahoma Court of Criminal Appeals observed, though, that none of the witnesses testified to “long or complex conversations which required an exchange of ideas or feelings.” *Id.*, at 652. In addition, “all of the expert witnesses agreed that mentally retarded persons adapt very well to institutional settings such as prison, and are unlikely to exhibit problems with impulse control in those settings.” *Id.*; *cf. Tarver v. State*, ___ So.2d ___, 2004 WL 362352, *9 (Ala.Crim.App. Nov. 23, 2005) (Cobb, J., concurring in part and dissenting in part.) (Justice dissenting on denial of *Atkins* claim criticizes circuit court’s reliance on testimony of prison guard about petitioner reading the sports page and his ability to read and write simple notes where experts explained that petitioner was functionally illiterate but might mimic reading a newspaper to mask his deficits.)

Even where writings were in fact produced by the defendant, they should be examined to determine whether they do show a level of functioning above mental retardation as claimed by the prosecution. In *Pickens v. State*, 126 P.3d 612 (Okla.Crim.App. 2005), the prosecution sought to refute the mental retardation claim in part by pointing to institutional forms filled out by Pickens requesting medical assistance, as well as letters he wrote to the trial court after his incarceration. The appellate court’s review of the forms revealed that they “used simple words and terms.” The court found it unsurprising that a person such as Pickens who was described as having communication skills at a third and sixth grade level was able to complete them. As for the letters to the court, they did include longer words and demonstrated an ability to express concern about his attorney and an understanding of the legal process. After noting the absence of evidence that the letters were prepared without some assistance, the court concluded:

While these letters and requests have some value and show Pickens could exercise the normal fluency expected of an early adolescent child, could print, could express concern over his health in the simplest of terms, could express concern about his pending legal matters, and could utilize services available in a structured prison environment, this evidence did not disprove

or diminish the other significant evidence of his sub-average intellectual functioning.

Id., at 618.

Another common issue is whether the defendant may present evidence of the “Flynn effect,” and standard margins of error in contesting the accuracy of an IQ score. The Fourth Circuit has found that evidence of the Flynn effect should be considered. *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005) (4th Cir. 2005) (district court erred in rejecting *Atkins* claim based on petitioner’s failure to show IQ scores of 70 or below where petitioner alleged that his score of 76 is a qualifying score when Flynn effect and standard error of measurement are taken into consideration). An Ohio appellate court concluded that a trial court must consider evidence presented about the Flynn effect, but the trial court would not be bound to conclude that the Flynn effect was a factor in the defendant’s IQ score. *State v. Burke*, 2005 WL 3557641 *13 (Ohio App. Dec. 30, 2005). In reaching this conclusion, the court observed that the AAMR “a leading authority on the definition of mental retardation, does not suggest that an IQ score must reflect adjustment for the Flynn effect.” *Id.* As for margin of error, the AAMR states that “any IQ score must be adjusted to account for measurement error depending on the test given.” *Id.* Thus, the Ohio appellate court found that “standard measurement error must be considered in determining an individual’s IQ score.” *Id.*

In contrast, the Kentucky and Tennessee Supreme Courts have found that margin of error evidence or evidence about IQ score inflation is not admissible. *Bowling v. Commonwealth*, 163 S.W.3d 361, 375 (Ky 2005) (finding that General Assembly chose not to expand the mental retardation ceiling by requiring consideration of margin of error or “Flynn effect” and instead chose a bright-line cutoff ceiling of an IQ of 70); *Howell v. State*, 151 S.W.3d 450, 458 (statute with cutoff at 70 should not be interpreted to make allowances for measurement error or other circumstances where defendant with IQ over seventy could be considered mentally retarded.) Counsel must argue that it violates *Atkins* to preclude evidence that is recognized as relevant to a mental retardation diagnosis by clinical experts.

Another recurring issue is what type of expert can testify. Many statutes have specific requirements. As discussed above, in the subsection on prosecution experts, the Virginia Supreme Court in *Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006), found reversible error in the admission of testimony from a prosecution expert who did not meet the statutory qualifications. *Id.*, at 99. Under Virginia’s mental retardation statute, Code § 19.2-264.3:1.2(A), a mental health expert had to be “skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior.” The prosecution expert conceded that he had never administered an adaptive behavior instrument and therefore it was error to permit him to testify. The court went on to clarify, however, that it was not holding that an expert meeting the statutory qualifications was required to actually administer a standardized measure of adaptive behavior to the defendant in order to testify about mental retardation. It explained:

[I]f an expert, skilled in administering, scoring and interpreting standardized

measures of adaptive behavior, determines in his or her opinion that such a test is not appropriate for a particular defendant or that administering a standardized measure of adaptive behavior is not feasible, the expert can still testify as to the defendant's mental retardation and explain why a measure of adaptive behavior was not administered to the defendant. The decision about which tests to administer to a defendant and the manner in which they are given goes to the weight to be accorded an expert's opinion regarding mental retardation, not to the admissibility of the opinion.

Id., at 98-99.

For this reason, the fact that the prosecution expert failed to administer an IQ test in accordance with accepted professional norms would not have disqualified him from testifying. *Id.*, at 99 fn. 6.

The court also ruled in that case that the trial court did not abuse its discretion in precluding Atkins from calling an expert in the field of pediatrics and genetics. This was because

the most that [the expert] could opine within a reasonable degree of medical probability was that Atkins' physical abnormalities are risk factors that could lead to developmental and cognitive disabilities. Such an opinion was speculative and without an adequate factual foundation.

Id., at 101.

The Fifth Circuit in *In re Hearn*, 418 F.3d 444 (5th Cir. 2005), rejected the state's argument that the opinion of one of the petitioner's experts could not be relied upon in determining whether petitioner made a prima facie case of mental retardation. Texas had looked to the Texas Person's With Mental Retardation Act which provides that mental retardation may only be diagnosed by "a physician or psychologist licensed in this state or certified by the [Texas Department of Mental Health and Mental Retardation]." Tex. Health & Safety Code Ann. § 591.003(16). The court of appeals pointed out that when the Texas Court of Criminal Appeals set out procedures for litigating *Atkins* claims, it did not either expressly or implicitly incorporate the provisions of the statute above.

1.9 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); Fla. R. Crim. Pro. 3.203 (defendant makes pretrial motion and trial court conducts hearing prior to trial); Ind. Code § 35-36-9-5 (same); 21 Okla. Stat. Ann. § 701.10b(E).

One statute allows a defendant to seek a pretrial judicial ruling on mental retardation, or receive a judicial ruling sometime after the guilty verdict. N.Y. Crim. Pro. Consol. Law § 400.27(12). 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.”) Some 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

Where there is no statute prescribing the procedures for deciding the question of mental retardation, some courts have announced rules. In *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002), the Ohio Supreme Court ruled that a judge, not a jury, is to decide the mental retardation issue whether it is raised before trial or post-conviction. And where it is raised in the trial context, the hearing should be conducted similarly to a competency determination.

In *Morrow v. State*, 928 So.2d 315, 324 (Ala.Crim.App.2004), the Alabama Court of Criminal Appeals encouraged “trial courts to resolve[] mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial.” Similarly, the South Carolina Supreme Court announced in *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003), that the trial judge is to make the mental retardation determination pre-trial.

The federal death penalty statute is silent as to when the mental retardation determination should be made. In *United States v. Nelson*, 419 F.Supp.2d 891, 894 (E.D. La. 2006), a district court recently found “that overriding practical considerations dictate that the *Atkins* issue be resolved up front.”

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); *but see State v. Flores*, 93 P.3d 1264, 1267 (N.M. 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.); *State v. Turner*, ___ So.2d ___, 2006 WL 1883374 (La. July 10,

2006) (rejecting argument that Louisiana statute violates due process and the Eighth Amendment by requiring jury finding on mental retardation.) And where a pre-trial 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 mental retardation either as a matter of state law or under *Ring v. Arizona*, 536 U.S. 584 (2002) (a defendant is entitled to a jury finding on any fact that increases the maximum authorized punishment)⁵⁶ and/or the Eighth and Fourteenth Amendment requirement of heightened reliability in capital cases. *See, e.g., Beck v. Alabama*, 447 U.S. 625 (1980) (procedural rules that tend to diminish reliability of capital guilt or sentencing determinations are invalid); *State v. Jimenez*, 880 A.2d 468, 484-85 (N.J. Super. 2005) (under state constitution, defendant has a right to a jury determination as to whether he is mentally retarded); *see also, Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003) (where trial court makes pre-trial ruling that defendant is *not* mentally retarded, jury is not to be informed of this finding and if jury finds mental retardation mitigating factor during sentencing phase, a death sentence may not be imposed.); *State v. Flores*, 93 P.3d 1264, 1267 (N.M. 2004) (defendant is entitled to submit mental retardation question to jury even after adverse finding by trial court.); *People v. Smith*, 193 Misc.2d 538, 753 N.Y.S.2d 809 (N.Y. S.Ct. 2002) (although state statute provides for judicial determination of mental retardation, portion of statute that states that mental retardation at time of crime is a mitigating factor was unconstitutional after *Atkins* and remedy was to instruct jury during sentencing proceeding that a sentence of death was precluded if jury found defendant mentally retarded by a preponderance of the evidence). Any purported waiver of the right to a jury determination of mental retardation 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.)

⁵⁶ *But see Schriro v. Smith*, 126 S.Ct. 7 (2005) (per curiam) (summarily reversing federal court of appeals decision ordering Arizona to have jury resolve mental retardation question, noting that Arizona has not yet had the opportunity to apply its chosen procedure); *State v. Grell*, 135 P.3d 696, 702 (Ariz. 2006) (*Ring v. Arizona* does not require that a jury determine beyond a reasonable doubt that the defendant is not mentally retarded, and there is no constitutional requirement that the jury revisit the question of mental retardation after there has been a pretrial ruling on the question by a judge); *Russell v. State*, 849 So.2d 95, 148 (Miss. 2003) (“[w]e find that not being mentally retarded is not an aggravating factor necessary for imposition of the death penalty, and *Ring* has no application to an *Atkins* determination.”); *United States v. Webster*, 392 F.3d 787, 792 (5th Cir. 2004) (“*Ring*, even if retroactive, does not render the absence of mental retardation an element of the sentence that is constitutionally required to be determined by a jury”); *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005) (defendant “has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded.”); *State v. Laney*, 627 S.E.2d 726, 731-732 (S.C. 2006) (threshold mental retardation determination need not be made by jury under *Ring*); *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003) (“the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring*”); *Howell v. State*, 151 S.W.3d 450, 465 (Tenn. 2004) (mental retardation does not have to be decided by jury); *Walker v. True*, 399 F.3d 315, 326 (4th Cir.2005) (rejecting claim that *Ring* requires a jury determination of mental retardation); *State v. Were*, 2005 WL 267671, *9 (Ohio App. Feb. 4, 2005) (rejecting arguments that a jury finding on mental retardation is required under *Blakely* and that jury should have been instructed that a death sentence was precluded should it find defendant was mentally retarded.); *Beckworth v. State*, ___ So.2d ___, 2005 WL 2046331, *16 (Ala.Crim.App. 2005) (capital defendant not entitled to jury determination on question of mental retardation); *Pruitt v. State*, 834 N.E.2d 90, 113 (“the Sixth Amendment is not in play with regard to the pretrial determination of mental retardation in death sentence cases.”); *Ex Parte Briseno*, 135 S.W.2d 1, 11 (Tex.Crim.App. 2004) (habeas petitioner not entitled to jury determination of mental retardation); *Head v. Hill*, 587 S.E.2d 613, 620 (Ga. 2003) (same).

1.10 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.”); N.C.G.S. § 15A-2005(e) (if trial court makes pretrial determination that defendant is not mentally retarded, defendant may still seek a jury determination of mental retardation during the sentencing hearing.); 21 Okla. Stat. Ann. § 701.10b(F) (providing for jury determination of mental retardation question if trial court resolves issue adversely to defendant in pre-trial hearing).⁵⁷ As discussed in the prior section, some courts in other jurisdictions have ruled that revisiting the mental retardation finding in the sentencing phase is allowed. *But see Bowling v. Commonwealth*, 163 S.W.3d 361, 380-81 (Ky. 2005) (Kentucky statute exempting mentally retarded defendant's from execution requires pretrial judicial determination and does not afford a death-eligible defendant the right to present the issue to a jury in the event of an adverse determination by the trial judge.)

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. Maryland's intermediate appellate court has construed a Maryland rule of court to require that the issue be decided by the sentencing jury. *Richardson v. State*, 598 A.2d 1, 3-4 (1991) (construing Md. Rule 4-343(h)), *aff'd*, 630 A.2d 238 (1993). An appellate court in New Jersey, a state lacking a statute implementing *Atkins*, has ruled that the mental retardation determination should be made by the jury immediately after the defendant is convicted in the guilt phase. *State v. Jimenez*, 880 A.2d 468, 485 (N.J. Super. 2005). Because the federal death penalty statute is silent on the timing of the mental retardation determination, in *United States v. Cisneros*, 385 F.Supp.2d 567, 571 (E.D. Va. 2005), the district court determined that the mental retardation decision would be made by the jury during its sentencing deliberations. As noted above, where a pre-trial judicial hearing is not mandated by statute or case law, counsel may wish to argue that a pre-trial determination by a judge is constitutionally required and/or preferable for reasons of judicial economy.

⁵⁷ This statute overrules *Blonner v. State*, 127 P.3d 1135, 1140 (Okla.Crim.App. 2006), which held that the mental retardation jury trial was to occur prior to the capital trial

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); 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 under *Jackson v. Denno* and/or a jury determination pursuant to *Ring v. Arizona* and/or the Eighth and Fourteenth Amendment.

1.11 DIRECT APPEAL

When *Atkins* was issued, courts and legislatures had to address how to implement the decision in cases pending on direct appeal from pre-*Atkins* trials. The cases below are illustrative of the procedures that have been adopted, as well as revealing about the type of evidence courts have placed emphasis on in addressing mental retardation claims. Counsel must be prepared to refute false assumptions made by courts (and jurors) about the significance of evidence purportedly undermining a finding of mental retardation.

For cases that were pending on direct appeal at the time the Supreme Court announced the *Atkins* decision, some courts decided to remand for evidentiary hearings in the trial court where there was significant evidence of mental retardation in the trial record. In Louisiana for example, in *State v. Williams*, 831 So.2d 835, 857 (La. 2002),⁵⁸ the Louisiana Supreme Court remanded the case for a hearing on mental retardation in light of the following: (1) Williams was 16 years of age at the time of the murder,⁵⁹ still within the “developmental stage” by any definition of that term; (2) Williams would not be 22 years of age until 2003, still within the development stage by a Louisiana statutory definition of mental retardation; (3) Williams had an IQ within the range used in the diagnosis of mental retardation; (4) Williams suffered from lead poisoning as an infant and had numerous mental health commitments prior to the age of 15; (5) Williams was enrolled in “special ed” classes; and (6) the issue of mental retardation had not been put before the fact finder under *Atkins* restriction on the death penalty. *See also State v. Dunn*, 831 So.2d 862 (La. 2002) (where defendant presented uncontradicted expert testimony that he was mentally retarded at his pre-*Atkins* trial, case is remanded for evidentiary hearing on the issue despite evidence in record that defendant received college credits for courses taken in prison and had been successfully employed for a period of time.⁶⁰); *Morrow v. State*, 928 So.2d 315 (Ala.Crim.App. 2004) (remand for an evidentiary hearing on mental retardation where

⁵⁸ The Louisiana Supreme Court also set forth procedures for post-*Atkins* mental retardation determinations, and adopted a definition of mental retardation from an existing statute that was unrelated to capital trials. Following the *Williams* decision, the Louisiana legislature enacted new statutes implementing *Atkins* that replaced the *Williams* procedures and definition.

⁵⁹ The subsequent Supreme Court decision in *Roper v. Simmons*, 543 U.S. 551 (2005), exempted Williams from execution based on his age.

⁶⁰ The Louisiana Supreme Court observed that the record did not indicate the content of the college course or what Dunn’s responsibilities were at his job. Counsel litigating a mental retardation claim needs to carefully investigate educational and employment history to ensure that what might appear to rebut a finding of mental retardation might actually support it. Counsel will need to know what was required of the defendant and what the defendant was actually able to achieve.

record included IQ scores of 64 and 67 during developmental period, screening test administered at time of trial indicated mental retardation, and expert testimony suggested adaptive deficits in a number of areas; that defendant had a history of employment and the circumstances surrounding the capital offense suggested no mental retardation did not defeat need for hearing); *Skaggs v. Commonwealth*, ___ S.W.3d ___, 2005 WL 2314073 (Ky. Sept. 22, 2005) (remand for evidentiary hearing where certified clinical psychologist opined at trial that defendant was mentally retarded and prosecution expert came to a contrary conclusion; although 1991 IQ score of 73 is above the maximum of 70 required by state law, school records indicated that defendant's IQ was measured at 64 on an unspecified date.)

In Florida, the state supreme court adopted a new court rule following *Atkins* that permitted defendants who were appealing the denial of a post-conviction relief petition to raise an *Atkins* claim. Fl. R. Crim. Proc. § 3.203(d)(4)(E).⁶¹ In *Thomas v. State*, 894 So.2d 126, 137 (Fla. 2004), the defendant raised mental retardation in his direct appeal. The Florida Supreme Court interpreted this as an invocation of § 3.203(d)(4)(E), and remanded to the circuit court for a determination of mental retardation.⁶²

The Arizona Supreme Court has remanded cases for mental retardation determinations even where the trial court, pre-*Atkins*, expressly found that mental retardation had not been established. *State v. Grell*, 66 P.3d 1234 (Az. 2003); *State v. Canez*, 74 P.3d 932 (Az. 2003). The state supreme court explained in the *Grell* case:

Although Grell presented testimony from two experts, and the State responded in kind, the adversarial procedure by which Grell's mental retardation was considered differed in nature and scope from the process created by the legislature in A.R.S. § 13-703.02, which contemplates a more thorough examination by experts selected by the trial judge, in consultation with the parties. Under the statute, mental retardation is considered individually, and not as one variable among many in the mitigation formula.

Due process demands that Grell's mental retardation claim receive a hearing at which the court considers the constitutional principles announced in *Atkins*. Thus, we remand to the trial court to redetermine whether Grell is mentally retarded and therefore ineligible to receive the death penalty.

State v. Grell, 66 P.3d at 1240.

⁶¹ "If a death sentenced prisoner has filed a motion for postconviction relief and that motion has been ruled on by the circuit court and an appeal is pending on or before October 1, 2004, the prisoner may file a motion in the supreme court to relinquish jurisdiction to the circuit court for a determination of mental retardation within 60 days from October 1, 2004. The motion to relinquish jurisdiction shall contain a copy of the motion to establish mental retardation as a bar to execution, which shall be raised as a successive rule 3.851 motion, and shall contain a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded."

⁶² During the penalty phase, Thomas had presented a mental health expert who testified that Thomas had a full scale IQ of 61, which fell in the range of mild mental retardation. The expert also testified that Thomas had been placed in special education classes and had occupational impairments and speech problems. *Thomas v. State*, 894 So.2d at 131.

In many more instances, courts have looked to the trial record and found that no remand was necessary or rejected post-*Atkins* arguments that the record established mental retardation. *See, e.g., State v. Tate*, 851 So.2d 921, 942 (La. 2003) (no remand where defense expert testified at trial that defendant with IQ of 75 was not mentally retarded under state definition.); *Ex parte Perkins*, 851 So.2d 453 (Ala. 2002) (on remand from United States Supreme Court for reconsideration in light of *Atkins*, no hearing necessary where record showed the defendant had a full-scale IQ of 76 as an adult, he had obtained his GED in prison and completed community college courses there, his intellectual functioning had *declined* as he aged due to alcohol abuse, he had been married for ten years, and he had maintained a job as an electrician for a short period.); *Snyder v. State*, 893 So.2d 488 (Ala.Crim.App. 2003) (finding no evidence in the record of mental retardation and noting that defendant even owned his own business at the time of the capital offense); *Adams v. State*, ___ So.2d ___, 2003 WL 22026043, *56 fn.9 (Ala.Crim.App.2003), *rev'd in part on other grounds*, 2005 WL 3506662 (Ala. Dec. 23, 2005) (record did not support finding of mental retardation where defendant was in high school at time of murders, had held several jobs prior to arrest, and had told probation officer that he had been a camp counselor). Obviously counsel needs to carefully investigate all representations made by the defendant about his or her accomplishments. As discussed in Section 1 of this guide, mentally retarded individuals often attempt to mask their disabilities. This may include exaggerating or even fabricating past acts; *Bryant v. State*, ___ So.2d ___, 2003 WL 1424026 (Ala.Crim.App. 2003) (no evidence of mental retardation where record showed IQ score of 85); *Turner v. State*, 924 So.2d 737, 784 fn. 12 (Ala.Crim.App. 2003) (*Atkins* not implicated where defendant denied mental problems and he appeared to be educated and reasonably articulate); *Stephens v. State*, ___ So.2d ___, 2005 WL 1925720 (Ala.Crim.App. 2005), *rev'd on other grounds*, 2006 WL 2089894 (Ala. July 28, 2006) (defendant not mentally retarded where record showed defendant had an IQ of 77, he completed high school, he had a commercial driver's license and had performed successfully as a qualified truck driver, he was married, he had fathered three children, and he was a caring father.); *Peraita v. State*, 897 So.2d 1161, 1207 (Ala.Crim.App. 2003) (trial record did not demonstrate defendant was exempt from execution where it showed only an IQ score of 75 obtained at age 19, defendant had been in several learning disability classes, and defendant had a history of criminal activity.); *Yeomans v. State*, 898 So.2d 878, 901-02 (Ala.Crim.App. 2004) (mental retardation not established where record showed IQ scores of 67, 78, 83, 72, testimony by an expert that the defendant was functioning in borderline level of intelligence, grades of A's and B's during the year defendant was not in special education, enrollment in shop and driver's education in eleventh grade, steady employment as an adult, more than one marriage, fathering and raising of several children, and efforts to teach his children right from wrong.⁶³); *McGowan v. State*, ___ So.2d ___, 2003 WL 22928607, *57-58 (Ala.Crim.App.2003), (remand not required where record showed the defendant had a full-scale IQ of 76 as an adult, he had been married twice, he had fathered a child, he had maintained construction jobs in numerous states, he owned a mechanic shop, and he took classes in prison in order to obtain his high school diploma.); *Lewis v.*

⁶³ That the defendant knew right from wrong clearly does not defeat a claim of mental retardation. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (noting that mentally retarded individuals "frequently know the difference between right and wrong".) Further, mentally retarded individuals often marry and procreate. Thus, reliance on marriage and having children to show adaptive functioning is questionable.

State, 889 So.2d 623 (Ala.Crim.App. 2003) (remand not necessary where record showed an IQ score of 58 received when the defendant was 33 years old but the expert who administered the test in question concluded the scores achieved were below defendant's actual abilities, another expert testified that defendant's intellectual functioning was actually above average, earlier testing placed defendant in the average range of intelligence and showed he had a 12th grade reading level, defendant had received a GED and completed some college, defendant had been married and fathered a child, defendant had held various jobs including working as a mechanic, and the nature and circumstances of the capital offense, including defendant's articulate and detailed police statement, did not support a finding of mental retardation.); *Calhoun v. State*, 932 So.2d 923, 978 (Ala.Crim.App. 2005) (no finding of mental retardation where record showed defendant had received IQ scores of 66 and 58 on two different tests but in each instance the expert who had administered the test opined that the defendant had been malingering, defendant had a four year marriage and continued relationship with his son after he divorced, defendant was employed throughout his adult life, and defendant held a job as a concrete finisher at the time of the capital crime.); *Stallworth v. State*, 868 So.2d 1128 (Ala.Crim.App. 2001) (remand not required where record showed that although defendant received a verbal IQ score of 78 on the WAIS-R at the time of trial, the expert who evaluated defendant specifically stated he was not mentally retarded but was instead in the upper range of borderline intelligence, defendant received a full scale IQ score of 77 when the complete WAIS-R was administered two months later,⁶⁴ an expert opined that defendant was in the borderline range of mental retardation even though he had qualified for special education services in school, as well as vocational rehabilitative services, defendant had worked most of his adult life, being employed as a cook, a brick mason and as a landscaper, defendant had maintained a long-term relationship, as well as fathered a child, and although defendant was unemployed at the time of trial, he had qualified for food stamps.); *Ex Parte Smith*, ___ So.2d ___, 2003 WL 1145475 (Ala. 2003) (defendant not entitled to remand for evidentiary hearing even though record included expert testimony that defendant was mildly mentally retarded with an IQ of 72 and his IQ had been measured at 66 at age 12 where the defense expert failed to take into consideration significant facts that undermined his opinion, the state's expert was unable to diagnosis mental retardation, defendant had an ongoing year-long relationship with his girlfriend and they planned to have children, defendant was working a construction job at the time of the murders and had been able to hold various other jobs, defendant was involved in an interstate illegal-drug enterprise, and circumstances surrounding the capital offense indicated that defendant did not suffer from deficits in his adaptive behavior.); *Brown v. State*, ___ So.2d ___, 2006 WL 1125007 (Ala.Crim.App. 2006) (defendant not exempt from execution based on record showing IQ score of 76, extremely unruly conduct during trial, evidence indicating defendant suffered from psychotic and delusional episodes, expert opinion that defendant's intellectual functioning was higher at the time of trial than indicated by the 76 IQ score, a report describing the defendant as a likeable child who enjoyed sports, board games and playing cards, evidence that defendant had maintained successful relationships with foster parents and with an aunt, receipt of B's and one C in 8th grade, expert testimony that defendant exhibited malingering behavior, evidence that the defendant could pick the locks of his handcuffs and jail cell, reports that defendant had

⁶⁴ There is no mention in the decision of practice effect.

learned to swallow and regurgitate razor blades without injury to himself, testimony by prison guards that defendant could control himself when he wanted to, testimony that defendant bragged that he got way with things by getting sent to mental facilities, and evidence that defendant had maintained a number of jobs and had one significant relationship with a female.); *Scott v. State*, 878 So.2d 933 (Miss. 2004) (trial record did not support a remand for a hearing on mental retardation where expert testified that although defendant obtained an IQ score of 60 on the test he administered, he further opined that defendant functioned in the range of borderline retardation.)⁶⁵; *Emmett v. Commonwealth*, 569 S.E.2d 39, 47 fn. 2 (Va. 2002) (sua sponte reviewing pre-*Atkins* record to determine whether the new bar to execution had been implicated and finding it had not given evidence that defendant received a high school equivalency diploma, attended a community college, and was regularly employed during his adult life.); *Johnson v. Commonwealth*, 591 S.E.2d 47, 75 (Va. 2004), *vacated on other grounds*, 544 U.S. 901 (2005) (defendant's claim of mental retardation was "frivolous"⁶⁶ where record showed that defendant had received IQ scores of 75 and 78 and his own expert witness at trial had testified that he was not mentally retarded.); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 56 fn. 8 (Va. 2002) (rejecting an *Atkins* claim where petitioner's IQ scores were 77 and 82 and where the evaluating psychiatrist opined that petitioner's intelligence was "roughly below average.")

In Pennsylvania, the state supreme court has deferred addressing claims of mental retardation raised in direct appeals from pre-*Atkins* trials. The court has ruled that the claims are better suited for resolution in post-conviction proceedings. *Commonwealth v. Mitchell*, 839 A.2d 202, 211 (Pa.2003); *Commonwealth v. Williams*, 854 A.2d 440, 449 (Pa. 2004).

1.12 STATE POST-CONVICTION PROCEEDINGS

Where capital convictions were final at the time of *Atkins*, courts have unanimously found that the decision has retroactive effect. *But see* Va. Code Ann. § 8.01-654.2 (inmates having already completed direct appeal and state habeas proceedings have no remedy for *Atkins* claim in state court.) Post-*Atkins*, courts have had to address the procedures to be applied and how to handle cases where post-conviction proceedings were in progress when

⁶⁵ The court did hold, however, that Scott would be entitled to a hearing if he submitted an affidavit meeting the requirements of *Chase v. State*, 873 So.2d 1013 (Miss. 2004), with an application for post-conviction relief.

⁶⁶ The defendant had been resentenced to death prior to the *Atkins* decision. A statute in effect at the time of his appeal required him to present his claim of mental retardation in the appeal along with factual allegations supporting the claim. 8.01-654.2. The Virginia Supreme Court was required to review the claim and remand it to the circuit court unless it concluded the claim was frivolous.

Atkins was decided. As with the direct appeal cases, the cases below set forth the procedures that have been developed, and also provide some insight into how the courts are weighing different types of evidence in implementing *Atkins*.

In Arizona, the post-*Atkins* mental retardation statute applies to all capital sentencing and resentencing proceedings. The state supreme court has found that includes post-conviction proceedings. *State v. Arellano*, ___ P.3d ___, 2006 WL 1412884, *2 (Ariz. May 24, 2006). In contrast, California's post-*Atkins* statute does not include procedures for litigating post-conviction mental retardation claims. In *In re Hawthorne*, 105 P.2d 552 (Cal. 2005), the California Supreme Court ruled that most of the statutory procedures for determining mental retardation pre-trial apply equally when an *Atkins* claim is raised in a state habeas petition. The exception is the provision allowing a defendant to have the capital jury resolve the issue. The California Supreme Court ruled that a judge will decide whether a defendant has proven mental retardation. To state a prima facie claim for relief, the habeas petition must contain "a declaration by a qualified expert stating his or her opinion that the [petitioner] is mentally retarded" Cal. Penal Code § 1376, subd. (b)(1). Further, the expert's declaration "must explain the basis for the assessment of mental retardation in light of the statutory standard." *In re Hawthorne*, 105 P.3d at 556. Having satisfied this standard, Hawthorne's case was transferred to the trial court for a hearing on his *Atkins* claim.

In *Johnson v. State*, 102 S.W.3d 535 (Mo. 2003), the Missouri Supreme Court addressed an *Atkins* claim raised in a state post-conviction petition. Although the Missouri statute exempting the mentally retarded from execution was technically inapplicable to Johnson's case because his crime occurred before its effective date, the court held "as a bright-line test that a defendant that can prove mental retardation by a preponderance of the evidence, as set out in section 565.030.6, shall not be subject to the death penalty." *Id.*, at 540. Looking to the record, the court found "that reasonable minds could differ as to Movant's mental abilities." *Id.*, at 540. Even though Johnson had IQ scores of 84, an expert who did not testify at his pre-*Atkins* trial indicated that Johnson's IQ was as low as 70. This same expert found defective adaptive skills "such as communication, self-care, social life, social and interpersonal development, self-direction, and use of community resources." *Id.*, at 541. Because "incomplete evidence of Movant's mental capacity was presented" at trial, and "because Movant's mental capabilities are questionable," the Missouri Supreme Court remanded to the lower court with orders to set aside the death sentence and order a new penalty phase hearing.

In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Tennessee Supreme Court ruled that a death row inmate seeking to reopen post-conviction proceedings could receive an evidentiary hearing on his claim of mental retardation provided he asserted a "colorable claim," which is defined as "a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn.Sup.Ct.R. 28 § 2(H). This was true even though normally a petitioner seeking to reopen could receive a hearing only if it appeared that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner was entitled to have his sentence reduced. Tenn.Code Ann. § 40-30-117(a)(4). Because the mental

retardation claim had not been available to Howell during trial or his initial post-conviction proceedings, the Tennessee Supreme Court found that applying the higher standard “would be fundamentally unfair and a violation of due process.” *Howell v. State*, 151 S.W.3d at 463.

The court went on to find that Howell had made a colorable claim, despite the fact that his scores on the WAIS-III were above the cutoff score of the Tennessee mental retardation statute. The court observed that the statute “does not provide a clear directive regarding which particular test or testing method is to be used.” *Id.*, at 459. Although the WAIS-III was recognized as the standard instrument in the *Atkins* decision, there was nothing in the record to indicate that the other tests administered to Howell, which resulted in lower scores, were not accurate I.Q. tests.⁶⁷

The Pennsylvania Supreme Court in *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005), reversed a grant of post-conviction relief on an *Atkins* claim where the trial court failed to hold an evidentiary hearing. In the decision, the state supreme court announced the procedures that would apply in post-conviction proceedings involving *Atkins* claims. The court ruled that the Post Conviction Relief Act (PCRA) judge would be the one to decide whether the petitioner had proved mental retardation by a preponderance of the evidence. An evidentiary hearing was deemed necessary here because the evidence of mental retardation was equivocal and had been developed in a different context.

As a matter of statutory construction, the Virginia Supreme Court ruled that a death row inmate who raised mental retardation in his state habeas petition pursuant to a transitional statute⁶⁸ was entitled to a jury trial on the issue. *Burns v. Warden*, 609 S.E.2d 608 (Va. 2005). The court looked to the provision clearly allowing for a jury trial in cases where mental retardation was raised for the first time on direct appeal and found it applied equally where the claim was raised in a habeas petition.

The Oklahoma Court of Criminal Appeals in *Murphy v. State*, 54 P.3d 556 (Okla.Crim.App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006), limited the circumstances under which a death row inmate could raise an *Atkins* claim. It held:

For pending capital appeals and inmates who may file applications for post-conviction relief to address this issue, the issue of mental retardation is preserved in the following circumstances: in those cases where evidence of the defendant's mental retardation was introduced at trial and/or the defendant either (1) received an instruction that his or her mental retardation was a mitigating factor for the jury to consider, (2) appealed his death sentence and therein raised the claim that the execution of the mentally retarded was cruel and unusual punishment under the

⁶⁷ The other tests were the Stanford-Binet and the Comprehensive Test of Nonverbal Intelligence.

⁶⁸ Va. Code § 8.01-654.2 (providing vehicle to raise mental retardation claim for those inmates on direct appeal or in state habeas proceedings at the time the new law barring execution of the mentally retarded was enacted.)

Eighth Amendment to the U.S. Constitution (or a substantially similar claim relating to his or her mental retardation), or (3) raised a claim of ineffective assistance of counsel, on appeal or in a previous post-conviction application, in which he or she asserted trial counsel or appellate counsel failed to raise the claim that the execution of the mentally retarded was cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. In such cases, the defendant's counsel shall file either an application for post-conviction relief, if the defendant's case is not pending in this Court, or an application with this Court in a pending appeal seeking a remand to the appropriate District Court for an evidentiary hearing to determine whether or not sufficient evidence of the defendant's mental retardation exists in order for the matter to be remanded for resentencing, as ordered below.

Id., at 569. At Murphy's pre-*Atkins* trial, evidence had been presented that he had scored in the mildly mentally retarded range on an IQ test and his school records indicated he was "educable mentally handicapped," which was described as being the equivalent to being mildly mentally retarded. The court found this evidence justified a remand to the lower court.

Following the remand, the Oklahoma Court of Criminal Appeals in *Murphy v. State*, 66 P.3d 456, 458 (Okla.Crim.App. 2003), explained that the question of "sufficient evidence" to justify a jury trial on mental retardation "is essentially the legal equivalent of a defendant making a *prima facie* showing of mental retardation with his or her evidence." The appellate court then ruled that the lower court's finding that Murphy had not made such a showing was not clearly erroneous.⁶⁹ Murphy subsequently filed another petition for post-conviction relief, again alleging that he was mentally retarded. The Oklahoma Court of Criminal Appeals reversed itself and ruled that sufficient evidence had been presented by Murphy to raise a fact question to be resolved by a jury. *Murphy v. State*, 124 P.3d 1198, 1208 (Okla.Crim.App. 2005).

When the Oklahoma Court of Criminal Appeals remands a case to the lower court pursuant to *Murphy v. State*, 54 P.3d 556 (Okla.Crim.App. 2002), the lower court is charged with determining if the petitioner raised sufficient evidence of mental retardation for the issue to be decided by a jury. *Martinez v. State*, 80 P.3d 142 (Okla.Crim.App. 2003). "Sufficient evidence" simply means enough evidence to create a fact question. "[I]n most instances, when the State feels obligated to bring forth contradicting and rebutting evidence in a *Murphy* remanded evidentiary hearing, a question of fact has already been established." *Id.* Concluding that the petitioner had met this test, the case was remanded for a jury trial on mental retardation.

⁶⁹ The lower court found, among other things, that Murphy's alcoholism directly impacted the IQ score of 67 he received before trial; that the test administered was not reliable due to the jail conditions, its incompleteness, recent alcohol use, and lack of confidence in the test expressed by the test administrator; a later complete IQ test which was given to Murphy demonstrated an IQ of 80; and elementary school testing did not demonstrate mental retardation.

In *Bowling v. Commonwealth*, 163 S.W.3d 361, 384 (Ky. 2005), a case in post-conviction posture, the Kentucky Supreme Court held that “to be entitled to an evidentiary hearing on a claim of entitlement to the mental retardation exemption provided by KRS 532.140(1), a defendant must produce some evidence creating a doubt as to whether he is mentally retarded.” Because Bowling’s various IQ scores showed he could not meet the “significantly subaverage intellectual functioning” prong of the Kentucky mental retardation test, he was not entitled to an evidentiary hearing.⁷⁰

The petitioner in *Ex Parte Elizalde*, 2006 WL 235036 (Tex. Crim. App. Jan. 30, 2006) (unpublished), failed to make a prima facie showing of mental retardation, according to the Texas Court of Criminal Appeals. Although he had received a score of 60 on a Beta II screening test given by the prison, he also received a score of 96 on the Culture Fair test, which was given to Elizalde to verify the screening test score. Elizalde did allege that he received poor grades in school but, according to the court, he “failed to present even a minimal case of adaptive behavioral deficits.”

In *Hall v. State*, 160 S.W.3d 24 (Tex.Crim.App. 2004), where significant evidence of mental retardation had been presented at Hall’s pre-*Atkins* trial, and additional affidavits supporting an *Atkins* claim were presented in habeas proceedings, Hall was still not provided with an evidentiary hearing on his claim. Instead, the trial court resolved the claim against Hall on a paper record and the Texas Court of Criminal Appeals affirmed. Justice Price, joined by Justice Cochran, concurred noting that generally a trial court will need to hold a live hearing to resolve a contested *Atkins* claim. *Id.*, at 40 (Price, J., concurring.) Justices Johnson and Holcomb dissented, concluding that an evidentiary hearing was necessary to properly adjudicate the claim.

Similarly, in *Ex Parte Simpson*, 136 S.W.3d 660 (Tex.Crim.App. 2004), substantial evidence of mental retardation had been presented at the pre-*Atkins* trial and the *Atkins* claim raised in a habeas petition was resolved without an evidentiary hearing. The appeals court explained why this was proper as follows:

Applicant's habeas writ relies almost exclusively upon that extensive testimony. Although it is advisable to have an evidentiary hearing to determine mental-retardation claims raised for the first time in post-*Atkins* habeas applications, it is not necessary where, as here, the habeas applicant relies primarily upon trial testimony. In this case, both sides had an opportunity to fully develop the pertinent facts at trial, and the habeas judge had an opportunity to assess the credibility and demeanor of the witnesses when he presided over the trial. Although the discrete fact of mental retardation was not an ultimate issue at the capital-murder trial, the punishment phase testimony fully developed that contested fact.

Id., at 663 (footnote omitted).

⁷⁰ The IQ scores from Bowling’s childhood were 84 and 79. At the time of trial, his IQ was measured at 86 and 87. Even if the court were permitted to apply a five-point margin of error and a three-point “Flynn effect,” which it earlier concluded it could not, Bowling’s claim of mental retardation failed.

In Texas, if a death row inmate has previously filed a state habeas petition, a successor petition raising an *Atkins* claim will be denied as an abuse of the writ if the Texas Court of Criminal Appeals concludes that the petition failed to state a prima facie case for relief. *Moreno v. Dretke*, 450 F.3d 158, 162 (5th Cir. 2006). Federal courts have been split on the issue of whether this is a procedural or merits ruling, a distinction that is important for purposes of the review available in federal court. *Id.*, at 165 fn.3.

A number of death row inmates in Arkansas have been sent back from federal courts to exhaust mental retardation claims that were raised in federal habeas proceedings for the first time after the *Atkins* decision. Thus far, the prisoners have been unsuccessful in getting merits review of the claim in state court. In *Coulter v. State*, ___ S.W.3d ___, 2006 WL 301082 (Ark. Feb. 9, 2006), for example, the petitioner moved in the Arkansas Supreme Court for recall of the mandate or, in the alternative, for a writ of *coram nobis*. The recall of the mandate would have permitted Coulter to raise his *Atkins* claim in a new petition for post-conviction relief. In denying Coulter's request, the Arkansas Supreme Court noted, among other things, that Coulter had the opportunity during his state post-conviction proceedings to raise mental retardation under a pre-*Atkins* statute which barred the execution of the mentally retarded. Coulter failed to do so. In addition, the court pointed out that Coulter failed to meet the rebuttable presumption of mental retardation, which is an IQ score of 65 or less. Further, during his trial, there was testimony that his IQ was 94, which was substantially above the "statutory threshold."

In *Engram v. State*, ___ S.W.3d ___, 2004 WL 2904678 (Ark. Dec. 16, 2004), the Arkansas Supreme Court also denied a motion to recall the mandate for purposes of asserting an *Atkins* claim. Like in the *Coulter* case, at the time of trial Engram could have availed himself of the Arkansas statute exempting the mentally retarded from execution. The Arkansas Supreme Court also noted that during pre-trial competency proceedings Engram had offered no evidence indicating mental retardation. Further, the expert called by the State testified that Engram's I.Q. was between 76 and 86 and offered the opinion that Engram was not mentally retarded.

Following the *Atkins* decision, the Mississippi Supreme Court allowed a number of death row inmates to proceed with *Atkins* claims in post-conviction proceedings. *See, e.g., Russell v. State*, 849 So.2d 95 (Miss.2003) (in pre-*Chase* decision, petitioner was entitled to proceed on *Atkins* claim where he was found by one doctor to have a full scale IQ of 68, even though another doctor testified that petitioner's IQ was 76, and that he was not retarded.); *Goodin v. State*, 856 So.2d 267, 277-78 (Miss.2003) (in pre-*Chase* case, allowing petitioner to proceed on *Atkins* issue where pre-trial IQ scores ranged from fifty to sixty-five despite evidence that petitioner had not done as well as he was capable of doing on the IQ tests and argument that his behavior during the capital crime and on the witness stand undermined his claim of mental retardation.); *Foster v. State*, 848 So.2d 172, 174 (Miss.2003) (petitioner granted leave to proceed on *Atkins* claim where he provided evidence of a recent IQ score of 62 and a psychiatrist stated that the score was "consistent with a diagnosis of mental retardation.")

In 2004, the Mississippi Supreme Court added a new requirement for death row inmates

seeking a post-conviction hearing on an *Atkins* claim. In *Chase v. State*, 873 So.2d 1013 (Miss. 2004), it held that a petitioner may not receive a hearing on a claim of mental retardation unless he files a motion requesting such a hearing, attached to which is “an affidavit from at least one expert [who meets the qualifications set out by the court⁷¹], who opines, to a reasonable degree of certainty, that: (1) the defendant has a combined Intelligence Quotient (“IQ”) of 75 or below, and; (2) in the opinion of the expert, there is a reasonable basis to believe that, upon further testing, the defendant will be found to be mentally retarded, as defined herein.” *Id.*, at 660. See also *Conner v. State*, 904 So.2d 105 (Miss. 2004) (finding petitioner entitled to an evidentiary hearing after he submitted an affidavit from Dr. Mark Zimmerman opining that petitioner had a combined IQ of 65, and that there was a reasonable basis to believe that upon further testing petitioner would be found to be mentally retarded.); *Doss v. State*, 882 So.2d 176 (Miss. 2004) (petitioner entitled to an evidentiary hearing on *Atkins* claim where he submitted an evaluation from Dr. Gelbort finding his full-scale IQ to be 71, which qualified him for a diagnosis of mental retardation as to intellectual functioning, and an affidavit from Dr. Merikangas opining that a prior report suggested mental retardation);⁷² *Brown v. State*, 875 So.2d 202 (Miss. 2004) (petitioner granted permission to file successor post-conviction petition raising *Atkins* claim where he provided an affidavit from Dr. Marsha Little, who recalled that petitioner had an IQ in the lower 70's and opined that petitioner was mentally retarded at the time of the crime and that further testing would support her conclusion.); *Snow v. State*, 875 So.2d 188 (Miss. 2004) (petitioner allowed to pursue *Atkins* claim where he presented an affidavit from Dr. Goff reporting that petitioner has received scores of 70, 67, 73, and 65 on various IQ tests, and opining based on his review of records that petitioner had sub-average intellectual functioning and significant deficits in adaptive functioning; further opining to a reasonable degree of psychological certainty that petitioner is mentally retarded.); *Carr v. State*, 873 So.2d 991 (Miss. 2004) (where expert testified in pre-*Atkins* trial that petitioner was mildly mentally retarded, petitioner was entitled to raise an *Atkins* claim in post-conviction proceedings); *Smith v. State*, 877 So.2d 369, 385 (Miss. 2004) (in decision issued same day as *Chase*, petitioner granted permission to raise *Atkins* claim where petitioner had obtained an IQ score of 75 at age 13 and he presented affidavit from psychologist who stated that the “limited educational records available for review at this time indicate that Mr. Smith's IQ has been found in the borderline mentally retarded range. This finding combined with his poor school performance support a hypothesis of the presence of neuro-cognitive or mental impairments in Mr. Smith.”); *Neal v. State*, 873 So.2d 1010 (Miss. 2004) (petitioner entitled to a hearing on his *Atkins* claim raised in a successor petition, not relief, even though record showed petitioner was declared to be mentally retarded as early as ten years of age by the Lawrence County Youth Court, he was again diagnosed as mentally retarded at ages 12 and 15, and affidavits from family

⁷¹ “Such expert must be a licensed psychologist or psychiatrist, qualified as an expert in the field of assessing mental retardation, and further qualified as an expert in the administration and interpretation of tests, and in the evaluation of persons, for purposes of determining mental retardation.” *Chase v. State*, 873 So.2d at 660.

⁷² Although there is no indication that Doss was given the MMPI-II to test for malingering, Dr. Gelbort's evaluation did note that the IQ score he obtained was consistent with prior scores, thereby indicating that Doss put forth appropriate effort on the IQ test. That the family history Dr. Merikangas relied upon differed from that previously reported by the family was something to be explored at the evidentiary hearing, not grounds for summarily denying the claim.

members, teachers, and employees at state institutions discussed his lack of adaptive functioning.)

In quite a few other cases, petitioners have been denied permission to proceed with claims of mental retardation. *See, e.g., Branch v. State*, 882 So.2d 36, 51 (Miss.2004) (defendant with an IQ of 84 at age twenty-two failed to make a prima facie showing that he was mentally retarded even though assessment at age five had shown an IQ of 68); *Gray v. State*, 887 So.2d 158, 169 (Miss. 2004) (petitioner not entitled to an evidentiary hearing on claim of mental retardation brought in petition for post-conviction relief where petitioner “provide[d] neither affidavits of experts opining his mental retardation, nor [was] there any qualified opinion contained in the trial record” and school records and affidavits failed to demonstrate mental retardation); *Mitchell v. State*, 886 So.2d 704 (Miss. 2004) (court summarily rejects *Atkins* claim brought in petition for post-conviction relief where petitioner served four years in the military, attended college at Mississippi Valley State University for one semester, a clinical psychologist previously opined that petitioner “had at least average intellectual functioning,” and petitioner failed to produce an expert opinion that he has an IQ of 75 or below and that there is a reasonable basis to believe that further testing would show he is mentally retarded.); *Jordon v. State*, 918 So.2d 636, 661 (Miss. 2005) (denying petitioner’s request for an evidentiary hearing on *Atkins* claim where petitioner failed to submit affidavit or records showing an IQ of less than 76 and provided no evidence that he completed the MMPI-II.); *Bishop v. State*, 882 So.2d 135 (Miss. 2004) (denying hearing where petitioner supported *Atkins* claims with school records and affidavits from family members but there was no evidence of a qualified opinion that petitioner was mentally retarded); *Berry v. State*, 882 So.2d 157 (Miss. 2004) (denying hearing where petitioner failed to provide the required expert affidavit and instead relied on: (1) affidavits from family and friends about his intellectual deficits and placement in special education; (2) standardized test scores from when petitioner was 13 years old showing an IQ of 72; and (3) Department of Corrections records noting that he was considered to be mentally retarded during a certain period. Further, testimony from the first and second sentencing proceedings contained opinions that petitioner was not mentally retarded.)

Even where a petitioner has technically complied with the requirements for an evidentiary hearing set forth in *Chase*, a hearing will not necessarily be granted. In *Wiley v. State*, 890 So.2d 892 (Miss. 2004), the Mississippi Supreme Court expanded on the procedure it would use in determining whether further proceedings were in order concerning an *Atkins* claim and announced that it would consider the entire record before deciding whether to grant an evidentiary hearing. *Id.*, at 897. In the *Wiley* case, Wiley had presented an affidavit from Dr. Daniel Grant. Dr. Grant had tested Wiley and obtained a full scale IQ score of 68, satisfying the subaverage intellectual functioning prong of the mental retardation test. Dr. Grant further opined that Wiley met the other two diagnostic criteria. Prior testing of Wiley, also when he was an adult, had resulted in IQ scores of 73 and 78. The expert who administered those tests concluded that Wiley was within the borderline mentally retarded range.

Wiley also presented the court with school records showing poor performance, which he

asserted established an onset of mental retardation prior to age 18. The Mississippi Supreme Court scrutinized the records and found that Wiley's poor performance was correlated with his attendance. When he was not frequently absent he did better in school. In addition, the court observed that the records provided no indication that Wiley had been placed in special education classes.

Perhaps more troublesome to the claim of mental retardation were affidavits and reports that had previously been submitted to the court in support of different claims for relief. These affidavits by Wiley's friends and relatives asserted that Wiley

was a good husband, father, son and grandson, that he was a good, reliable worker with steady employment at various employers, that he performed household maintenance, repaired automobiles, babysat children, ran errands, supported his family and did numerous other things. Wiley was also in the Army until injuring his leg and getting honorably discharged.

Id., at 896. The court agreed with the State's argument that the depiction of Wiley from his family and friends was inconsistent with mental retardation. Also problematic was Wiley's failure to assert that he was given any type of malingering test at the time of his evaluation by Dr. Grant. The court ultimately concluded:

We find that Wiley's school records are not sufficient to establish mental retardation. Further, we find that the overwhelming weight of the evidence resolves the issue of borderline intelligence and shows that Wiley was not mentally retarded before age 18. The record shows that Wiley was a normal, productive citizen, who was never characterized as "mentally retarded" until such time as being mentally retarded became critically important in the realm of post-conviction.

Id., at 898.

Similarly, in *Hughes v. State*, 892 So.2d 203 (Miss. 2004), the Mississippi Supreme Court conceded that the *Chase* criteria had been met. Nevertheless, a hearing was denied because "the evidence in the record . . . overwhelmingly belies the assertions that Hughes is mentally retarded." *Id.*, at 216. Like Wiley, Hughes had supported his claim of mental retardation with an affidavit from Dr. Daniel Grant. Dr. Grant had tested Hughes post-trial and obtained a full scale IQ score of 64. Dr. Grant opined that Hughes lacked normal adaptive skills and that his condition set in prior to age 18. As support for the latter proposition, Dr. Grant relied on Hughes's failing grades in high school. In finding this showing insufficient, the Mississippi Supreme Court noted: (1) Hughes had received a full scale IQ score of 81 at the time of trial; (2) the record did not show that Hughes was ever in special education classes; and (3) the record indicated that Hughes was "a conscientious and reliable employee." *Id.*, at 215. The court also noted that Dr. Grant had previously submitted a similar affidavit for Wiley. *Cf. Howell v. State*, 151 S.W.3d 450 (Tenn. 2004) (petitioner made a colorable claim of mental retardation through an affidavit by Dr. Daniel Grant.)

The Missouri Supreme Court also denied an evidentiary hearing on an *Atkins* claim in *Goodwin v. State*, ___ S.W.3d ___, 2006 WL 1147691 (Mo. May 2, 2006). Despite the post-conviction allegations, the Missouri Supreme Court concluded that the claim was refuted by the trial record where three mental health experts opined that Goodwin was of borderline intelligence, not mentally retarded. It also pointed out that none of the eight IQ scores Goodwin received on intelligence tests administered over a period of twenty years indicated mental retardation. In fact, only one of the scores, a 72, was within the five-point margin of error attributed to the Wechsler scale.

In contrast, in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), a case involving a post-conviction motion to vacate, the Ohio Supreme Court remanded for an evidentiary hearing on mental retardation despite the fact that only one out of six available IQ scores received by Lott placed him in the mentally retarded range. The court found that “[w]hether Lott is mentally retarded is a disputed factual issue, which we believe is best resolved in the trial court. The defense should have the opportunity to present additional evidence on Lott's mental retardation before a final decision is made.” *Id.*, at 1014; *see also State v. Lorraine*, 2005 WL 1208119 (Ohio App. 11 Dist. May 20, 2005) (petitioner entitled to a hearing on *Atkins* claim based on evidence at sentencing phase of an IQ score of 73 when petitioner was in sixth grade and testimony concerning his lack of personal and social skills.); *State v. Waddy*, 2006 WL 1530117 (Ohio App. June 6, 2006) (petitioner was entitled to expert assistance and an evidentiary hearing on his *Atkins* claim despite the fact that all known IQ scores were above 70 and the most recent score was 83. Court looked to documentation suggesting below average intellectual functioning that was apparent prior to age 18, as well as evidence suggesting limitations in social and conceptual skills.); *State v. Hughbanks*, 792 N.E.2d 1081 (Ohio App. 2003) (petitioner was entitled to expert assistance, discovery and an evidentiary hearing on *Atkins* claim despite testimony at pre-*Atkins* trial that he had a full-scale IQ of 82, and the Ohio Supreme Court on direct appeal found “no evidence that Hughbanks [was] mentally retarded,” where petitioner presented records showing that he received social security benefits based on a diagnosis of mental retardation supported by a full-scale IQ score of 73 and indications of adaptive deficits); *State v. Carter*, 813 N.E.2d 78 (Ohio App. 2004) (petitioner entitled to a hearing and expert assistance where petitioner's full scale IQ was found to be 76 at time of trial, the mitigation expert had concluded that petitioner was borderline mentally retarded, Social Security records indicated petitioner received benefits due to mental retardation, and a psychologist with expertise in mental retardation opined that strong indications of mental retardation warranted further testing.); *Pickens v. State*, 126 P.3d 612, 616 (Okla.Crim.App. 2005) (a defendant need show only one IQ score of 70 or below on a contemporary IQ test to ‘get his foot in the door’ and claim ineligibility for the death penalty by reason of mental retardation; additional scores above 70 are irrelevant.)

In *State v. Lorraine*, 2005 WL 1208119, *7 (Ohio App. 11 Dist. May 20, 2005)(unpublished), an Ohio appellate court agreed with the petitioner's contention that a “capital defendant is entitled to the appointment of two certified attorneys when an *Atkins* claim is raised for the first time in a postconviction petition.” 2005 WL 1208119; *see also State v. Burke*, 2005 WL 3557641 *10 (Ohio App. Dec. 30, 2005) (unpublished) (reversing

denial of successive petition raising *Atkins* claim where only one attorney had been appointed to represent petitioner at the hearing).

Shortly after the *Atkins* decision, the Illinois Supreme Court sua sponte remanded a case for an evidentiary hearing on mental retardation. *People v. Pulliam*, 794 N.E.2d 214 (Ill. 2002). At the pre-*Atkins* trial, the defense and prosecution experts had disagreed about whether Pulliam was mildly mentally retarded. Even though there was no claim in Pulliam's post-conviction relief petition claiming mental retardation barred her execution, and Pulliam did not request supplemental briefing after *Atkins* was announced, the state supreme court concluded that interests of judicial economy favored an immediate remand to address the issue.

In some appeals from pre-*Atkins* denials of post-conviction relief, the Alabama Court of Criminal Appeals sua sponte considered whether the evidence in the record implicated *Atkins*. See, e.g., *McWilliams v. State*, 897 So.2d 437, 457 (Ala.Crim.App. 2004), *overruled on other grounds by Ex Parte Jenkins*, 2005 WL 796809 (Ala. April 8, 2005) (*Atkins* no bar to execution where record showed petitioner had been married and fathered two children; high school personnel remembered petitioner as being intellectually capable; petitioner held various jobs in the food industry and had worked on an oil rig; and petitioner had been in the United States Army.); *Jenkins v. State*, ___ So.2d ___, 2004 WL 362360 (Ala.Crim.App. 2004), *rev'd in part on other grounds*, 2005 WL 796809 (Ala. April 8, 2005) (death sentence did not violate *Atkins* where record indicated petitioner had an IQ of 76 and there was evidence that petitioner maintained relationships with other individuals and that he been employed by three different companies.)

In a similar procedural posture, the petitioner in *Clemons v. State*, ___ So.2d ___, 2003 WL 22047260 (Ala.Crim.App. 2003) invoked *Atkins* on appeal, relying on evidence he had presented in support of his claim that trial counsel was ineffective at the sentencing phase of the trial. The record showed Clemons may have received an IQ score of 58 when he was in the fifth or sixth grade. Other testing showed that Clemons had a full scale IQ of 51, although the accuracy of that assessment was questioned. In addition, a clinical psychologist who had evaluated Clemons before his trial estimated that his intelligence was probably in the range of mildly retarded or borderline. The circuit court had erroneously refused to admit testimony from a clinical neuropsychologist who, according to Clemons's offer of proof, would have testified that Clemons's IQ scores showed his low mental functioning and that due to his poor performance, it had been recommended that Clemons be placed in classes for mentally retarded students. Given this record, the appellate court remanded for further proceedings on both the *Atkins* and the ineffective assistance of counsel claims.⁷³

⁷³ On remand, the circuit court concluded that Clemons was not mentally retarded, a finding that was upheld by the Alabama Court of Criminal Appeals. *Clemons v. State*, ___ So.2d ___, 2003 WL 22047260 (Ala.Crim.App. 2003) (opinion on return from remand). Although Clemons had widely divergent IQ scores ranging from 51-84, the circuit court found that when Clemons made an effort, he consistently tested in the 70-80 range which does not meet the test for significantly subaverage intellectual functioning. The circuit court also held that Clemons failed to establish the required deficits in adaptive functioning. His lack of significant employment history was attributed by the court to lack of motivation. In addition, Clemons claimed to have had numerous relationships with women, which showed he was able to form interpersonal

The petitioner in *Tarver v. State*, ___ So.2d ___, 2004 WL 362352 (Ala.Crim.App. Feb. 27, 2004), was also found to be entitled to a post-*Atkins* hearing on his mental retardation claim where substantial evidence of retardation had been presented in the post-conviction proceedings related to a claim of ineffective assistance of counsel. In addition, in sentencing Tarver to death, the trial court had found as nonstatutory mitigation that Tarver was mentally retarded. Although Tarver had an IQ score of 76, the experts at the earlier post-conviction hearing, including the prosecution's expert, did not believe this defeated a diagnosis of mental retardation.⁷⁴

In a number of other cases where the post-conviction proceedings had preceded the *Atkins* decision, the Alabama Court of Criminal Appeals found no need for a remand for further proceedings. See, e.g., *Lee v. State*, 898 So.2d 790 (Ala.Crim.App. 2003) (no remand required where record showed IQ of 67 when petitioner was 23 years old, an expert concluded petitioner was actually in the low average range with school records suggesting an even higher level of functioning, malingering was suspected, former employer indicated petitioner was a capable and responsible employee who could follow instructions, high school principal claimed that petitioner had been on the advanced track preparing for college and passed the high school exit examination the first time he took it, and family members indicated that any deficits defendant suffered from may have resulted from substance abuse.)

In *State v. Harris*, 181 N.J. 391, 859 A.2d 364 (N.J. 2004), a case involving a petition for post-conviction relief, the New Jersey Supreme Court provided the following explanation about the showing required to be entitled to further development of an *Atkins* claim:

[W]e are not requiring that a defendant on post-conviction review make a *prima facie* showing of mental retardation to warrant a psychological examination and a hearing; we are fully aware that cases arising on post-conviction review will vary in respect of the records developed in prior proceedings. However, we will require that defendant present a reasonable basis to be permitted a hearing to explore further the possibility of mental retardation.

Id., at 528. On the record before it, the New Jersey Supreme Court found that the petitioner failed to provide a reasonable basis for believing he was mentally retarded. Although he had received IQ scores of 72 and 75 on two tests taken during childhood, he had been tested on numerous other occasions and received higher scores. Further, his records

relationships. Further, his post-crime conduct showed that he was a crafty criminal. That he had committed three prior carjackings also refuted the notion that he had significant limitations in adaptive behavior, according to the court. Finally, by fleeing the city after the capital offense via bus, Clemons showed he was able to utilize community resources.

⁷⁴ The circuit court ultimately found that Tarver was not mentally retarded and the Alabama Court of Criminal Appeals affirmed in an unpublished memorandum. See 2004 WL 362352, *7 (Ala.Crim.App. Nov. 23, 2005) (Cobb, J., concurring in part and dissenting in part.) Justice Cobb dissented from this ruling, arguing that the circuit court abused its discretion in making many of its factual findings, particularly when it rejected the testimony of the expert retained by the Alabama Attorney General who found Tarver to be mentally retarded.

reflected a finding by one psychologist that petitioner's intellectual potential was higher than revealed on a test resulting in a 78 IQ score. And a school social worker had written that petitioner's placement in an educable class was because of his "disturbing influence" in regular class, as well as his inability to function on the same level as others. Importantly to the court, the social worker had opined that petitioner could function at a low average level. Perhaps most damning to petitioner's claim was testimony by a defense expert at the pre-*Atkins* penalty phase. The expert, a child psychologist, strongly disagreed with any diagnosis of mildly mentally retarded made when petitioner was a child. He opined that during the relevant time period mentally retarded classes were dumping grounds for children with any kind of behavioral or underachievement problem. *Id.*, at 533.

1.13 FEDERAL HABEAS PROCEEDINGS

The federal courts have also dealt with *Atkins* claims raised by death row inmates. Most often the issue has been whether an inmate who previously presented a federal habeas petition was entitled to file a second petition raising a claim of mental retardation under *Atkins*.⁷⁵ As with the state courts, the federal courts have had to consider when a claim of mental retardation is strong enough for further pursuit. In *In re Holladay*, 331 F.3d 1169 (11th Cir.2003), the Eleventh Circuit held that "in order to make a *prima facie* showing that he is entitled to file a second or successive petition based on [the] Supreme Court's decision in *Atkins*, [the petitioner] . . . must demonstrate that there is a reasonable likelihood that he is in fact mentally retarded." *Id.* at 1173. The court further explained: "[I]f petitioner's proofs, when measured against the entire record in this case, establish a reasonable likelihood that he is in fact mentally retarded, then we are required to grant him leave to file a second or successive habeas petition on the basis of *Atkins*." *Id.* at 1174.

The court ultimately concluded that Alabama death row inmate Glen Holladay was entitled to file a successor petition raising a claim of mental retardation. Holladay had taken numerous I.Q. tests, with results ranging from a score of 49 to 73. He presented evidence from his early school years that indicated he was considered a slow learner and a Department of Human Resources report that denoted him as "barely educable with a Wechsler IQ of 54." *Id.* at 1175. Notably, the trial judge had instructed the jury at the pre-*Atkins* sentencing that it could consider Holladay's mental retardation as a mitigating circumstance. *Id.* The trial court even stated in its judgment that it found Holladay to be "slightly mentally retarded." This evidence sufficed to establish a reasonable likelihood that Holladay was mentally retarded.

In contrast, in *In re Hicks*, 375 F.3d 1237 (11th Cir. 2004), the Eleventh Circuit held that a Georgia death row inmate was not entitled to file a successor federal petition raising an *Atkins* claim. When Hicks had previously raised the claim in state court under a pre-*Atkins*

⁷⁵ Where a state prisoner has had a federal habeas corpus petition adjudicated on the merits, the prisoner can only file a second petition if he or she is granted authorization to do so by the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). The permissible grounds for filing a second petition are extremely narrow, but do include where the United States Supreme Court announces a new rule of constitutional law that is retroactively applicable.

statute banning execution of the mentally retarded, he had presented evidence of an IQ score of 94. Hicks had also presented evidence of a mental health evaluation where the psychiatrist concluded that Hicks had a low average level of intelligence. When a neurologist examined Hicks, he made no finding of mental retardation. In fact, the neurologist noted that Hicks had obtained his GED and college credits while incarcerated. *Id.*, at 1240-41.

Judge Birch dissented from the court's refusal to permit Hicks to raise the *Atkins* claim. Birch pointed out that Hicks had not been able to get a post-*Atkins* mental health evaluation because the state court had refused to grant an expert access to Hicks. *Id.*, at 1241-42 (Birch J., dissenting); *see also Hicks v. Schofield*, 599 S.E.2d 156, 160 (Fletcher, C.J., dissenting) ("A state law procedure that allows a habeas court to deny access to an expert and then dismiss the petition for lack of an expert fails to provide adequate protection for the federal constitutional right.") Birch further noted that the majority ignored an affidavit from a mental health expert explaining why the IQ score of 94 was unreliable. *Id.*, at 1242. And the finding that Hicks merely had low intelligence was based on an expert's estimate, not on the results of an IQ test. Finally, Hicks himself was the source for the alleged GED and college credits received while in custody, information that was not corroborated.⁷⁶

The Fifth Circuit, in *In re Hearn*, 376 F.3d 447 (5th Cir. 2004), held that a Texas death row inmate was entitled to the appointment of counsel under former 18 U.S.C. § 848(q)(4)(B) for purposes of preparing an application for authorization to file a successor habeas petition. Although the *Atkins* decision had been issued by the Supreme Court while Hearn's initial federal habeas petition had been pending, then-existing state law effectively precluded Hearn from litigating the claim at that time.⁷⁷

The appeals court ruled that appointment of counsel was warranted in such circumstances upon a "colorable" showing of mental retardation. *Id.*, at 455. Hearn met this "modest evidentiary threshold" with the following: (1) "school records showing that he failed first grade, and that his marks often hovered in the 50s (or below) despite his regular attendance"; (2) a score on the WAIS-R Short-form test that fell within the upper ranges of scores indicating mild mental retardation, "taking into account its inherent band of error"; (3) a note from prior habeas counsel stating her belief that Hearn was "not very intelligent-maybe below normal"; and (4) trial testimony of a family member demonstrating Hearn's "compromised social skills." *Id.* Although the appeals court did not believe this evidence established a *prima facie* case of mental retardation, the threshold needed for authorization to file an actual petition, Hearn's showing was sufficient to justify the appointment of counsel.

Later, in *In re Hearn*, 418 F.3d 444 (5th Cir. 2005), the appeals court granted Hearn

⁷⁶ Robert Hicks was executed in Georgia on July 1, 2004.

⁷⁷ State prisoners are required to present claims of federal constitutional error to the state court before raising them in federal habeas proceedings. Texas law at the time Hearn's first federal petition was pending precluded state courts from adjudicating claims if federal proceedings were ongoing. To give the state court the opportunity to address the *Atkins* claim, Hearn would have had to have his federal petition dismissed "without prejudice." This would have resulted in a statute of limitations bar to all of his claims except the *Atkins* claim.

permission to file a successor petition raising an *Atkins* claim. In support of his claim, Hearn had presented an expert report providing the etiology of Hearn's mental retardation, Fetal Alcohol Syndrome, although not independently diagnosing mental retardation. A second expert addressed only Hearn's intellectual functioning and made no conclusions regarding whether Hearn was mentally retarded. The final expert interpreted the second expert's findings and offered the opinion that Hearn has significant limitations in intellectual functioning. Based on this expert's own testing, he also found significant limitations in adaptive behavior and that the onset of Hearn's limitations occurred prior to age 18. The expert finally opined that Hearn meets the criteria of mental retardation set forth by the AAMR. Although allowing Hearn to proceed with the claim, the court did note that it found only "slight merit" to Hearn's request given that he received an IQ score of 74. *Id.*, at 447.

The Fifth Circuit denied authorization to file a successor petition in *In re Salazar*, 443 F.3d 430 (5th Cir. 2006), where the applicant failed to present evidence that any professional who ever evaluated him had labeled him mentally retarded. *See also In re Johnson*, 334 F.3d 403 (5th Cir. 2003) (petitioner failed to make prima facie showing of mental retardation with a seventh grade transcript showing he failed all academic courses and letters from a forensic psychologist referring to "multiple areas of concern," a prior evaluation that "did not clearly reflect mental incapacitation," a "belief" that Johnson's verbal intelligence level may be as low as 62-65 and as high as 72-75, and recommending further testing.); *In re Campbell*, 82 Fed. Appx. 349 (5th Cir. 2003) (evidence showing petitioner fit within the four risk factors for mental retardation identified by the AAMR was insufficient to state a prima facie case of mental retardation.)

One issue that has come up where an *Atkins* claim was denied by the state court is what effect the state court's ruling should have on the federal court's decision whether to allow the claim to proceed. In granting authorization to file a successor petition in *In re Wilson*, 442 F.3d 872, 878 (5th Cir. 2006), the Fifth Circuit observed that "the state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether Wilson has made a *prima facie* showing of entitlement to *proceed* with his federal habeas application, which is an inquiry distinct from the burden that Wilson must bear in proving his claim in the district court." *See also In re Woods*, 155 Fed. Appx. 132 (5th Cir. 2005) (granting permission to file successor petition raising *Atkins* claim despite state court finding that petitioner is not mentally retarded).

A Virginia death row inmate received permission to file a successor habeas petition raising an *Atkins* claim only to have the petition dismissed by the district court without an evidentiary hearing. The Fourth Circuit in *Walker v. True*, 399 F.3d 315, 324 (4th Cir. 2005), ruled that this was error where the petitioner had "received IQ scores above and below two standard deviations below the mean and where uncontested expert opinion suggests that he is mentally retarded under the [Commonwealth of Virginia's] definition . . ."

The Fourth Circuit rejected another Virginia death row inmate's argument that he was entitled to a jury trial on his mental retardation claim. *Walker v. True*, 399 F.3d 315 (4th

Cir. 2005). Walker had attempted to invoke a transitional Virginia statute that provided for a jury trial on mental retardation where the defendant was on direct appeal at the time Virginia enacted its statute implementing *Atkins*. The Virginia Supreme Court has found that the right to jury trial also applies to the inmates who were in post-conviction proceedings at the relevant time. The transitional statute made clear, however, that petitioners such as Walker, who had completed state habeas proceedings at the time the statute became effective, had no remedy at all in state court for an *Atkins* claim. Walker argued that he had a right to a jury trial in federal court under the Equal Protection Clause. The Fourth Circuit disagreed, finding the Virginia statute's differentiation between inmates who had completed state habeas review and those who had not was reasonably related to the state's interest in efficiently utilizing its judicial resources. Nor did *Ring v. Arizona* establish an entitlement to a jury trial on mental retardation. *Id.*, at 325-26.

1.14 JURY QUALIFICATION

In *Blonner v. State*, 127 P.3d 1135, 1140, issued before the legislature enacted a statute implementing *Atkins*, the Oklahoma Court of Criminal Appeals ruled that juries impaneled to make findings on mental retardation are not to be death qualified. Although the new statute overrules this as to mental retardation claims brought at trial given that the jury makes its finding on the issue during the sentencing phase, counsel should argue that the ruling still applies in post-conviction jury trials on mental retardation. *But see Atkins v. Commonwealth*, 631 S.E.2d 93, 100 fn. 8 (Va. 2006), discussed below. Further, in post-conviction jury trials on mental retardation, the jury is not to be told about the facts of the capital case. In *Lambert v. State*, 126 P.3d 646, the appeals court observed that “[r]etrospective mental retardation proceedings in a capital case are unlike any other jury proceedings, and require great care in order to avoid overwhelming prejudice to the defendant.” *Id.*, at 653. In that case, the Oklahoma Court of Criminal Appeals found that the trial court's refusal of defense counsel's request for individualized voir dire led directly to a tainted jury panel given a prospective juror's revelation of the facts of the capital crime in the presence of the venire.

Where a post-conviction jury trial on mental retardation is held in Georgia, death qualification has been found to be unnecessary except for perhaps in exceptional circumstances. *State v. Patillo*, 417 S.E.2d 139, 141 fn. 1 (Ga. 1992).

In *Atkins v. Commonwealth*, 631 S.E.2d 93, 100 fn. 8 (Va. 2006), the Virginia Supreme Court found that death qualification is proper for a jury in a post-trial mental retardation proceeding. It arrived at this conclusion because the jurors would be informed that *Atkins* had previously been convicted of capital murder and that a death sentence would be precluded if the jury found him to be mentally retarded. These revelations were themselves deemed appropriate because of the structure of Virginia's mental retardation statute, whereby jurors normally make the mental retardation finding during sentencing and learn through the verdict forms the significance of their finding on the sentence. *But see State v. Patillo*, 417 S.E.2d 139, 141 fn. 1 (in post-conviction mental retardation trial, jury is not to be told that death sentence will be vacated if the jury returns with a finding of mental retardation.)

1.15 UNANIMITY

In jurisdictions where a jury decides the question of mental retardation, in many instances it is unclear what is to happen if the jury cannot reach a unanimous decision. The Oklahoma Court of Criminal Appeals first addressed that issue in *Lambert v. State*, 71 P.3d at 72, and ruled: “If there is no unanimous verdict either finding or rejecting mental retardation, the trial court will resentence Lambert to life imprisonment without parole.” This holding was reaffirmed in *Blonner v. State*, 127 P.3d 1135, 1142. The legislature subsequently enacted 21 Okla. Stat. Ann. § 701.10b(G), however. Under this statute, if the jury fails to agree on whether the defendant is mentally retarded, the jury proceeds to the sentencing determination. For cases involving post-conviction jury trials on mental retardation, counsel should argue that *Lambert* and *Blonner* remain good law on this issue.

The New Mexico Supreme Court has ruled that a defendant will receive a life sentence if the jury is unable to unanimously agree on whether the defendant is mentally retarded. *State v. Flores*, 93 P.3d 1264 (N.M. 2004).

In *United States v. Cisneros*, 385 F.Supp.2d 567 (E.D. Va. 2005), a federal death penalty case, the district court held that the mental retardation determination was to be made by the jury during the penalty phase. A special verdict form would require the jurors to specify the number of jurors, if any, who found that the defendant had established his mental retardation by a preponderance of the evidence. If the jury unanimously found mental retardation, the district court would rule that the defendant was not eligible for the death penalty. If not all jurors agreed, however, the jurors who found mental retardation would be instructed to consider that finding in deciding whether to sentence the defendant to death. *Id.*, at 571.

Where a jury is split on the question of mental retardation, counsel will want to argue that the Eighth and Fourteenth Amendment's requirements of a heightened degree of reliability in capital cases require that a sentence less than death be imposed.

1.16 INSTRUCTIONS

In *Atkins v. Commonwealth*, 631 S.E.2d 93 (Va. 2006), the Virginia Supreme Court ruled that the trial court erred by informing the jury, which was seated solely to determine whether Atkins was mentally retarded, that Atkins had been sentenced to death by a prior jury. “The fact that the jury knew a prior jury had sentenced Atkins to death prejudiced his right to a fair trial on the issue of mental retardation.” *Id.*, at 99. In contrast, the court held it was permissible to tell the jurors that Atkins had been convicted of capital murder, and that he could not receive the death penalty if they found him to be mentally retarded. The court noted that when a mental retardation claim is raised before trial, Virginia's statutes require the jury to decide the issue as part of the sentencing proceeding. Therefore, it is aware of the capital conviction at the time the mental retardation question is answered. And the general verdict forms reveal to the jurors that a finding of mental retardation results in a sentence less than death. Giving Atkins's jury the same information it would have received had the statute been in effect at the time of Atkins's original trial was not

improper. The Virginia Supreme Court ordered that the new venire be informed as follows:

Daryl Atkins had been convicted of the offense of capital murder during the commission of robbery. The United States Supreme Court and the General Assembly of Virginia have determined that a defendant convicted of capital murder, but who is mentally retarded, is not subject to the imposition of the death penalty. It is your duty to determine whether Atkins is mentally retarded.

Id., at 100.

The Georgia statute requires that the jury at trial be informed that a finding of mental retardation will result in the defendant being given over to either the Department of Corrections or the Department of Human Resources. O.S.C.A. §17-7-131(b)(3)(C). In cases that do not fall under the statute, the Georgia Supreme Court has found that the same information should be provided to the jury. *Morrison v. State*, 583 S.E.2d 873, 877 (Ga. 2003). Otherwise, the jury could erroneously conclude that a finding of mental retardation will mean the defendant will escape penal consequences. The court has found no error, however, in the refusal of a trial court to further instruct the jury that a finding of mental retardation would result in a life sentence for the defendant. *Id.*, at 877-78.

In *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005), the Oklahoma Court of Criminal Appeals found that the instructions given to the jury were poorly drafted and likely contributed to the erroneous jury finding that Pickens was not mentally retarded. The instructions provided to the jury “focused *only* on finding ‘that the Defendant is not mentally retarded’ and mentioned nothing about the possibility of finding the defendant mentally retarded.” *Id.*, at 621. This “improperly and unfairly encouraged a jury verdict of not mentally retarded.” *Id.* In addition, the burden of proof instruction that was given was unnecessarily complicated and failed to include the definition of preponderance of the evidence that had previously been adopted by the Oklahoma Court of Criminal Appeals.

In *Blonner v. State*, 127 P.3d 1135, 1141-42 (Okla.Crim.App. 2006), the court set forth specific instructions to be given to juries deciding whether defendants are mentally retarded. Because the instructions do not fully comport with the definition of mental retardation later adopted by the legislature, modification of the instructions will be necessary.

1.17 APPELLATE REVIEW

One question that has come up on a number of occasions is whether either or both parties can immediately appeal a trial court's ruling on mental retardation. Another common issue is the standard of review to apply on appeal.

In *Blonner v. State*, 127 P.3d 1135, 1142, the Oklahoma Court of Criminal Appeals had ruled that either party could appeal an order granting or rejecting a pre-trial claim of mental retardation. The statute later enacted by the legislature forbids this. 21 Okla.Stat. Ann.

701.10b(E) (trial court's pretrial ruling on mental retardation "shall not be the subject of an interlocutory appeal.") If the trial court finds that the defendant failed to prove mental retardation, the issue is presented to the jury during the sentencing phase. 21 Okla.Stat. Ann. 701.10b(F). If the jury finds that the defendant is not mentally retarded and sentences the defendant to death, "the trial court shall make findings of fact and conclusions of law relating to the issue of whether the determination on the issue of mental retardation was made under the influence of passion, prejudice, or any other arbitrary factor." 21 Okla.Stat. Ann. 701.10b(H). Should the trial court find that the determination of mental retardation was not supported by the evidence, the issue can be raised in the Oklahoma Court of Criminal Appeals "for consideration as part of its mandatory sentencing review." *Id.* The standard of review on appeal is "whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the defendant not mentally retarded as defined by this section, giving full deference to the findings of the trier or fact." 21 Okla.Stat. Ann. 701.10b(I)

The Kentucky Supreme Court ruled in *Skaggs v. Commonwealth*, ___ S.W.3d ___, 2005 WL 2314073, *3 (Ky. Sept. 22, 2005), that both parties were entitled to appeal a ruling on mental retardation by the trial court. It went on to limit briefing to a mere ten pages by each side. *Id.*

An interlocutory appeal of a pre-trial finding of mental retardation was allowed in *State v. Strode*, 2006 WL 1626919 (Tenn.Crim.App. June 8, 2006) (unpublished). On appeal, the trial court's factual findings were entitled to a presumption of correctness and could only be overturned if there was a preponderance of evidence contrary to the trial court's findings. Concluding that the defendant had failed to establish mental retardation under the state definition, the trial court's judgment was reversed by the appellate court.

At the time of publication, there is a case pending in the California Supreme Court which will decide whether the prosecution has the right to pretrial review of a trial court's finding of mental retardation. *People v. Superior Court (Vidal)*, S134901. Similarly, in *State v. Dunn*, 831 So.2d 862, 888 n. 11 (La. 2002), the Louisiana Supreme Court remanded for an evidentiary hearing on mental retardation in a post-*Atkins* appeal of a pre-*Atkins* death sentence. In remanding, the court noted that it would be the proper forum for an appeal by the state should the trial court rule that Dunn was mentally retarded.

The Arizona Supreme Court in *State v. Arellano*, ___ P.3d ___, 2006 WL 1412884 (Ariz. May 24, 2006), addressed the question of where a defendant should go to seek review of procedural rulings related to the mental retardation determination. It found that defendants normally should file a special action in the Arizona Court of Appeals. *Id.*, at 2006 WL 1412884, *2. The state supreme court nevertheless exercised jurisdiction over the special action that had been filed directly in that court because issues of statewide importance were involved.

As for the standard of review on appeal, the Arizona Supreme Court in *State v. Grell*, 135 P.3d 696, 709 (Ariz. 2006), applied a clear error standard. *See also Pruitt v. State*, 834 N.E.2d 90, 104 ("Significantly subaverage intellectual functioning" and "substantial

impairment of adaptive behavior” are factual determinations subject to a clearly erroneous standard of appellate review). The Pennsylvania Supreme Court in *Commonwealth v. Miller*, 888 A.2d 624, 629 (Pa. 2005), a case in the post-conviction posture, stated that its review was “limited to whether the findings of the [lower] court are supported by the record and are free from legal error.” The lower court’s decision whether or not to hold an evidentiary hearing on the *Atkins* claim was reviewed for abuse of discretion.

In *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005), the Fifth Circuit rejected the petitioner’s contention that the standard on appellate review to be applied to a mental retardation claim is that of *Jackson v. Virginia*, 443 U.S. 307 (1979). The necessary implication of Webster’s argument was that the government had the burden at trial of proving beyond a reasonable doubt that Webster was *not* mentally retarded, a position soundly rejected by the Fifth Circuit.

The Ohio Court of Appeals has announced in unpublished decisions that it “reviews a trial court’s grant or denial of a petition for post-conviction relief pursuant to *Atkins* under an abuse of discretion standard.” *State v. White*, 2005 WL 3556634, *2 (Ohio App. Dec. 30, 2005); *State v. Stallings*, 2004 WL 1932869, *1 (Ohio App. Sept. 1, 2004). Under Ohio law, abuse of discretion “requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court.” *Id.*

In Florida, the question is “whether competent, substantial evidence” supports the trial court’s finding on a mental retardation claim. *Johnston v. State*, ___ So.2d ___, 2006 WL 1194278 *4 (Fla. May 4, 2006).

When reviewing a claim of mental retardation that was denied at trial, the Arkansas Supreme Court will affirm if the finding that the defendant failed to prove mental retardation “is supported by substantial evidence.” *Anderson v. State*, 163 S.W.3d 333, 356 (Ark. 2004).

In Texas, the standard of review concerning an *Atkins* claim is the same whether on direct appeal or in the habeas context. *Hall v. State*, 160 S.W.3d 24, 38 (Tex.Crim.App. 2004). This is because, according to the Texas Court of Criminal Appeals, the almost total deference given to a trial judge’s determination of facts in the habeas arena is essentially the same as the direct appeal requirement that the evidence be viewed in the light most favorable to the prosecution.

1.18 COLLATERAL ESTOPPEL/RES JUDICATA

There are a number of cases where evidence of mental retardation was presented in pre-*Atkins* proceedings, either as mitigation or for some other purpose. What, if any significance to give to such evidence and/or prior findings on the question of mental retardation has come up a number of times.

The petitioner in *Commonwealth v. Miller*, 888 A.2d 624 (Pa. 2005), for example, had presented evidence of mental retardation during a pre-*Atkins*, post-conviction relief proceeding. The evidence at issue came in during a hearing on Miller's claim that trial counsel performed deficiently in failing to present evidence of organic brain damage, not mental retardation. Post-*Atkins*, Miller argued that the Commonwealth's failure to challenge his mental retardation evidence in the prior proceedings barred the Commonwealth from relitigating the issue under principles of collateral estoppel or res judicata. The Pennsylvania Supreme Court disagreed, finding that the issue of mental retardation for purposes of *Atkins* had not been litigated in the initial post-conviction relief action.

The Arizona Supreme Court in *State v. Grell*, 66 P.3d 1234 (Az. 2003), addressed the significance of a finding by the trial court at a pre-*Atkins* trial that the defendant was not mentally retarded. Because the trial court had considered the mental retardation evidence from the perspective of mitigation, and not as an absolute bar to capital punishment under *Atkins* or the later enacted state statutory bar on executing the mentally retarded, the court concluded that "the trial court simply could not have applied the correct principles during sentencing." *Id.*, at 1240. Therefore, the court held that due process required a remand for an *Atkins* hearing to determine whether the defendant was mentally retarded. *See also State v. Canez*, 74 P.3d 932, 937-38 (Az. 2003) (remanding for *Atkins* hearing despite pre-*Atkins* finding that defendant failed to establish mental retardation).

In *State v. Thomas*, 779 N.E.2d 1017 (Ohio 2002), a case involving a pre-*Atkins* trial, the Ohio Supreme Court concluded that expert testimony that Thomas's IQ was on the cusp of the mildly retarded and low borderline ranges of intellectual functioning did not establish defendant's mental retardation. Indeed, the trial court had even made a finding that the defendant was not mentally retarded. The court further ruled, however:

[I]f defendant has additional information [to present under the new test set forth by the United States Supreme Court in *Atkins v. Virginia*, he is free to file for post-conviction relief under the standards set forth by this court in *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, decided today.

Id., at 1039.

Many other courts have refused to give effect to findings about mental retardation at pre-*Atkins* trials in recognition of the fact that the parties did not have the same incentive in litigating the issue earlier as they do post-*Atkins*. The Alabama Court of Criminal Appeals, for example, refused to give conclusive effect to the trial court's pre-*Atkins* finding that the petitioner was mentally retarded in *Tarver v. State*, ___ So.2d ___, 2004 WL 362352 (Ala.Crim.App. Feb. 27, 2004); *see also Morrow v. State*, 928 So.2d 315 (Ala.Crim.App. 2004) (even though defendant raised pre-*Atkins* claim challenging constitutionality of executing the mentally retarded, trial court's finding that defendant was "mildly retarded or educable mentally retarded" was not conclusive.) The court in *Tarver* did rule, however,

that the finding was something to be considered in the post-*Atkins* mental retardation determination.

On the other hand, many courts have looked to the pre-*Atkins* record to determine that an assertion of mental retardation is foreclosed. The Missouri Supreme Court in *Goodwin v. State*, ___ S.W.3d ___, 2006 WL 1147691, *4 (Mo. May 2, 2006), for example, found that the lower court had erred in granting an evidentiary hearing on Goodwin's *Atkins* claim during post-conviction proceedings given that the claim of mental retardation was "conclusively refuted by the record of the trial." During the capital trial, which appeared to have taken place before Missouri's statute barring execution of the mentally retarded had been enacted, three mental health experts testified, all concurring that Goodwin was not mentally retarded.

Sometimes the State has tried to argue that a failure by an inmate to raise mental retardation as a mitigating factor at a pre-*Atkins* trial barred later consideration of an *Atkins* claim. In *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), the state argued that res judicata precluded the claim of mental retardation raised by Lott in a post-conviction petition. The Ohio Supreme Court found the doctrine inapplicable, explaining:

Admittedly, [Lott] could have raised mental retardation as a mitigating factor during the penalty phase of the trial, but not as a complete bar to the death penalty. Lott also did not have *Atkins*' guidance as to what constitutes mental retardation. Thus, under these circumstances, we hold that res judicata does not bar Lott's claim of mental retardation.

Id., at 1015.

In *State v. Waddy*, 2006 WL 1530117 (Ohio App. June 6, 2006), a case involving a successor petition for post-conviction relief, the trial court found the petitioner's *Atkins* claim was barred by res judicata because the petitioner had raised his mental retardation as a bar to execution in a pre-*Atkins* post-conviction petition. Looking to *Lott*, the appellate court reversed, finding that Waddy similarly did not have the opportunity in the prior proceeding to fully litigate his mental retardation claim as a bar to execution.

The Mississippi Supreme Court in *Smith v. State*, 877 So.2d 369 (Miss. 2004), permitted a death row inmate to raise an *Atkins* claim in post-conviction proceedings despite its holding on direct appeal, made in response to Smith's case in mitigation that "there is no evidence that [petitioner] suffered any mental illness or retardation." *Id.*, at 398, quoting *Smith v. State*, 729 So.2d at 1220. In that case, the evidence of mental retardation presented in post-conviction had not been introduced at trial.

Collateral estoppel may also come up where a defendant is found to be ineligible for the death penalty in one case followed by a capital prosecution for a different murder. After Missouri death row inmate Alis Ben Johns's conviction and death sentence were affirmed on direct appeal, he filed a post-conviction motion raising an *Atkins* claim. The motion court determined that Johns was mentally retarded, a judgment the state did not appeal.

Johns was then charged with first degree murder in a different Missouri county. The Missouri Supreme Court held that the state was bound by the earlier judgment of mental retardation and the state was therefore precluded from seeking the death penalty in the second murder trial. *State ex rel. Johns v. Kay*, 181 S.W.3d 565 (Mo. 2006).

The flip side of this is where a defendant has been found not to be mentally retarded and he seeks to raise the issue again in a separate capital appeal. This occurred in *Myers v. State*, 133 P.3d 312 (Okla.Crim.App. 2006). Myers had been charged with two murders but the cases were severed. In one case, he received a jury trial on his *Atkins* claim. The jury concluded that he failed to establish mental retardation and the Oklahoma Court of Criminal Appeals affirmed. *Myers v. State*, 130 P.3d 262 (Okla.Crim.App. 2005). In the second case, the court held that relitigation of the mental retardation issue was precluded. *Myers v. State*, 133 P.3d at 336.

1.19 PROCEDURAL DEFAULT AND WAIVER

Left unaddressed in the *Atkins* decision was whether a defendant could be precluded from raising a claim of mental retardation as a bar to execution because he failed to present it in accordance with applicable procedural rules or otherwise waived the issue. A number of courts in the years since *Atkins* have found *Atkins* claims procedurally defaulted or waived. Counsel must make every effort to comply with relevant procedural rules or make a record of why compliance is not possible.

The Eighth Circuit in *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005), denied a motion to remand the case to the district court in order for Davis to raise an *Atkins* claim. The appeals court treated the motion as the functional equivalent of a second or successive habeas petition. Because *Atkins* had been decided while Davis's original federal petition was still pending in the district court, the claim had been available then and therefore the court ruled that Davis was precluded from bringing it in a successor petition. *See* 28 U.S.C. § 2244(b)(2)(A).⁷⁸

Similarly, in *Nance v. Norris*, 429 F.3d 809 (8th Cir. 2005), the Eighth Circuit denied the petitioner's request to file a successive habeas petition raising an *Atkins* claim. Although the panel's reasoning is not stated, the dissenting judge indicates that the denial was due to the majority's determination that the claim could have been raised during the initial federal habeas proceedings. As pointed out by the dissent, however, at the time *Atkins* was issued there was binding precedent in the Eighth Circuit that likely would have required dismissal of the entire first federal habeas petition had Nance amended that petition to include an unexhausted *Atkins* claim.⁷⁹ Any subsequent attempt to present the claims contained in the first petition would have been barred by the statute of limitations. *See Duncan v. Walker*, 533 U.S. 167, 172 (2001) (holding that AEDPA's statute of limitations is not tolled during

⁷⁸ This provision allows state prisoners to raise a new claim in a successor federal habeas petition if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable."

⁷⁹ Subsequently, the United States Supreme Court ruled that mixed petitions do not have to be dismissed in such a situation. *Rhines v. Weber*, 544 U.S. 269 (2005).

the pendency of a first habeas petition). The Fifth Circuit, in contrast, has found that an *Atkins* claim was “unavailable” during initial federal proceedings if raising it would have resulted in dismissal of the federal petition with adverse statute of limitations consequences. *In re Brown*, ___ F.3d ___, 2006 WL 2006252, *2 (5th Cir. July 19, 2006). Nance had also been unable to raise his claim in state court as the Arkansas Supreme Court refused to reinvest jurisdiction in the lower court so that it could consider the *Atkins* claim in a petition for writ of error *coram nobis*. *Nance v. State*, 2005 WL 984778 (Ark. April 28, 2005) (unpublished). The state supreme court noted, among other things, that Nance could have raised a claim of mental retardation at the time of trial under a state statute. His failure to do so disentitled him to further relief through *coram nobis*.⁸⁰ *Cf. Noel v. Norris*, 335 F.3d 832, 833 (8th Cir. 2003) (Arnold, J., dissenting) (permission to file successor petition raising *Atkins* claim should have been granted because the federal claim was unavailable at the time of trial and the availability of a similar claim under state law was irrelevant.)

Similarly, in *Engram v. State*, ___ S.W.3d ___, 2004 WL 2904678 (Ark. Dec. 16, 2004), the Arkansas Supreme Court refused to recall the mandate in order to allow Engram to raise an *Atkins* claim. The court pointed out that Engram could have, but did not, move for exemption from execution at time of trial under the pre-*Atkins* state statute.⁸¹ The court rejected Engram’s argument that *Atkins* was somehow different than the state statute, which was subject to traditional waiver rules. The court concluded that *Atkins* left to the States the task of developing the means to enforce the constitutional restriction on executing the mentally retarded and Arkansas’s statute, which Engram failed to comply with, is how Arkansas complies with *Atkins*. The court also rejected Engram’s alternative request that he be permitted to file a new motion for post-conviction relief. The court found that the filing deadline had passed and Engram and his original post-conviction attorney had determined that there were no viable issues to raise. That was the end of the matter since state law did not recognize a mechanism for filing an ineffective assistance of post-conviction counsel claim. Finally, the Arkansas Supreme Court ruled that a petition for habeas corpus was unavailable to Engram. State law only permitted habeas relief where the commitment was invalid on its face, or because the sentencing court lacked jurisdiction. Neither circumstance applied here.

In *Simpson v. Norris*, 2006 WL 1520628 (E.D. Ark. May 30, 2006), a federal district court was presented with an *Atkins* claim that had not been raised at trial or in state post-conviction proceedings. The court found that Simpson was at fault for failing to develop the claim in state court by not invoking the Arkansas mental retardation statute at the time of trial. As a result of this finding, Simpson could only obtain a hearing on his claim if he established by clear and convincing evidence that, but for constitutional error, no fact-

⁸⁰ Eric Nance was executed in Arkansas on November 28, 2005.

⁸¹ The dissent maintained that mental retardation had in fact been raised prior to trial, although the issue was never ruled on. At a pre-trial hearing the circuit court asked what the hearing was about and defense counsel responded: “competency, responsibility and IQ to determine whether Mr. Engram is mentally retarded.” *Engram v. State*, ___ S.W.3d ___, 2004 WL 2904678, *8 (Brown, J., dissenting); *9(Thorton, J., dissenting). On the prosecutor’s motion, the circuit court ruled that Engram was competent to stand trial but never resolved whether he was mentally retarded.

finder would have imposed the death penalty.⁸² On the record before the district court, Simpson did not meet that standard.

In *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005), a federal death penalty case, the defendant had unsuccessfully sought to establish his mental retardation at trial under the federal statute barring execution for mentally retarded individuals. 18 U.S.C. § 3596(c). The district court's ruling was upheld on appeal. *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999). In his later post-conviction proceedings, Webster again challenged the district court's finding that he had not established mental retardation. He argued that the claim should be revisited in light of the intervening decision in *Atkins*. The Fifth Circuit ultimately did revisit the claim, but without deciding whether it was required to do so. *Webster*, 421 F.3d at 311.

The Florida Supreme Court held that an *Atkins* claim was procedurally barred in *Hill v. State*, 921 So.2d 579 (Fla. 2006). Under a Florida statute, Hill had until October 1, 2004 to raise the claim and yet did not bring it before the Florida courts until a warrant for his execution was signed in late 2005. That rendered the claim untimely. In addition, the Florida Supreme Court found that the claim could have been raised in a successive motion filed by Hill in 2003 given that his primary evidentiary support for the claim was a 1989 psychological evaluation. Thus, the claim was barred under Florida's successive petition rule.

The Eleventh Circuit also found Hill's *Atkins* claim untimely. *In re Hill*, 437 F.3d 1080 (11th Cir. 2006). Hill filed an application to file a successor habeas petition on January 20, 2006, 31 months after *Atkins* was decided. Although there was a short period of tolling for the time Hill was exhausting the claim in state court that was insufficient to render the claim timely under the statute of limitations applicable to federal habeas petitions filed by state prisoners.

The Georgia Supreme Court in *Turpin v. Hill*, 498 S.E.2d 52 (Ga. 1998), a pre-*Atkins* decision, found that a claim of exemption from execution due to mental retardation was procedurally defaulted where the petitioner failed to invoke the relevant statute at the time of trial. It nevertheless concluded a miscarriage of justice would occur if a mentally retarded individual was put to death so remanded for an evidentiary hearing on the claim. When the lower court ordered a jury trial on the claim in light of *Ring v. Arizona*, 536 U.S. 584 (2002), the Georgia Supreme Court reversed. *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003). Although it concluded that *Ring* had no application to a mental retardation determination, the court alternatively ruled that even if *Ring* were retroactive and mandated a jury trial on the question of mental retardation, this right was waived in this case. The court pointed out that Hill could have had the jury decide if he was mentally retarded during his original trial had he made the appropriate request. By failing to do so, now he was only entitled to have a habeas court decide whether a miscarriage of justice would occur if Hill were executed in light of his alleged mental retardation.

⁸² See 28 U.S.C. § 2254(e)(2), limiting the ability of federal courts to consider evidence that was not presented to the state courts where the petitioner was at fault for not developing the evidence in state proceedings.

The Georgia Supreme Court in *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003), addressed the question of whether a death row inmate who was found entitled to a jury trial on mental retardation could then waive his right to the trial. The court held that the inmate could not. This ruling was limited to cases where the defendant was tried prior to enactment of a state statute barring execution of the mentally retarded. The court expressed no opinion whether a defendant proceeding under the statute could invoke the statutory protection but then waive the right to have the fact-finder resolve the issue.

In *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky.2005), the Kentucky Supreme Court ruled that Bowling had waived his mental retardation claim because he failed to raise it at his trial. Although the trial took place prior to the *Atkins* ruling, Kentucky's statutory ban on executing the seriously mentally retarded was in effect at the time of trial.⁸³ The court went on to hold, however, that if Bowling could prove that he was mentally retarded, he would be actually innocent of the death penalty, and thus the "miscarriage of justice" exception to procedural default would apply. *See Id.* at 372-73.

In *State v. Poindexter*, 608 S.E.2d 761 (N.C. 2005), the North Carolina Supreme Court held that claims of exemption from execution based on mental retardation could only be raised pretrial or at sentencing and that the superior court lacked jurisdiction to consider such a claim presented in a motion for appropriate relief. The court noted that when North Carolina first banned the execution of the mentally retarded, the General Assembly also enacted a one-year window for post-conviction consideration of claims of mental retardation. Because that law expired, mental retardation claims could no longer be included in motions for appropriate relief. Mr. Poindexter was not completely out of luck, however. He received sentencing relief on his ineffective assistance of counsel claim and so would have the opportunity to raise mental retardation at his resentencing.

The Mississippi Supreme Court found an *Atkins* claim procedurally defaulted in *Branch v. State*, 882 So.2d 36, 49 (Miss. 2004), where the defendant could have, but did not, raise the claim in his motion for new trial. Nevertheless, because the claim was raised on appeal, supported by evidence presented in appendices, and this was a capital case, the court addressed the claim on the merits.

In *Ex Parte Simpson*, 136 S.W.3d 660 (Tex.Crim.App. 2004), the Texas Court of Criminal Appeals refused to consider supplementary evidence supporting the *Atkins* claim that petitioner filed in the appellate court after the trial court issued its decision recommending the denial of relief.

In *Wood v. State*, 891 So.2d 398, 413 (Ala.Crim.App. 2003), the Alabama Court of Criminal Appeals found that the petitioner had waived his arguments that the lower court: (1) failed to apply the correct standard in determining whether he was mentally retarded, (2) improperly required him to establish that he is mentally retarded by a higher standard than a preponderance of the evidence, and (3) improperly found that he was not mentally

⁸³ *See also Winston v. Commonwealth*, 604 S.E.2d 21, 51 (2004) (challenges to Virginia mental retardation statute were waived because defendant deliberately declined to raise a claim of mental retardation under the statutory provisions that applied to him and his trial.

retarded. Because the arguments were not raised in the circuit court, they would not be addressed on appeal.

Defendants/petitioners should argue that an *Atkins* claim cannot be waived or procedurally defaulted under the Eighth and Fourteenth Amendments. An exemption from execution is something that a defendant must be entitled to raise at any point in the proceedings.

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); *People v. Ary*, 13 Cal.Rptr.3d 482 (Cal. App. 2004) (mentally retarded defendant in death penalty prosecution was denied his constitutional right to fair trial where trial court failed to *sua sponte* conduct a competency hearing despite substantial evidence that defendant was unable to understand the nature of the proceedings against him or to assist in his defense). 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. *Pate v. Robinson*, 383 U.S. 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 are 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 trial⁸⁴, “a defendant may be incompetent based on retardation alone if the condition is so

⁸⁴ *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

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.”)

It may be that certain accommodations during trial can ensure that the defendant is able to assist counsel during the trial. In *Commonwealth v. Wentworth*, 756 N.E.2d 1199 (Mass. App. 2001), for example, the competency experts recommended such things as frequent breaks, simplified questions, and the presence of one of the experts during the trial to monitor whether the defendant was able to follow the proceedings. These recommendations were apparently adopted and allowed the trial to go forward. *See also State v. Cleary*, 824 A.2d 509 (Vt. 2003) (no error in finding mentally retarded defendant competent contingent on his receiving special accommodations, such as simplified question if he testified, the presence of support people and frequent breaks.)

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),

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).

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 his 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 him 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.)⁸⁵

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. 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.

⁸⁵ 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.

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*, 810 N.E.2d 472 (Ill. 2003), *cert. denied*, *Illinois v. Braggs*, 543 U.S. 1049 (2005), 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.

Id., at 483

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*, 541 U.S. 652 (2003). The reversal, however, was largely premised on the Ninth Circuit's failure to properly apply the standards of the AEDPA, which limits federal habeas relief in cases where the state court reasonably applied existing Supreme Court precedent. The Supreme Court did reject the Ninth Circuit's conclusion that the juvenile defendant's lack of prior law enforcement experience was relevant to the custody determination. The Supreme Court noted, among other things, that in few instances would the interrogating officer be

aware of the suspect's history. In the *Braggs* decision, however, the Illinois Supreme Court recognized that the interrogating officer needed to be aware of the suspect's mental deficiencies in order for it to be a factor in the custody determination, thereby distinguishing *Braggs* from *Alvarado*. *Braggs*, 810 N.E.2d at 482; *see also United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (limited capacity to understand, and other particular personality traits, may be relevant to custody questions where officers are aware of those traits and they influence the actions of the officers.); *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 second requirement for Miranda to apply is that "interrogation" has occurred. 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.⁸⁶ 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

⁸⁶ 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...."

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.

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)⁸⁷ (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

⁸⁷ *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).

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 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; *see also People v. Shanklin*, 814 N.E.2d 139, 143-144 (Ill. App. 2004) (recognizing that mentally retarded defendant “may have answered questions from the court in a way that would avoid exposing his intellectual deficit” and finding that “[w]hen confronted by a defendant who may be mentally retarded, the trial court and both prosecution and defense may not simply rely on affirmative answers to rote questions to conclude the defendant understands the proceedings and the consequences of his plea.”)

“[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 confessor'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,⁸⁸ 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 790, 806 (Tenn. 2001), quoting Lyn Entzeroth, “Putting the Mentally Retarded Criminal

⁸⁸ *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).

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, if not all, states retain some type of 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.”); *Clark v. Arizona*, 126 S.Ct. 2709, 2722 (2006) (“the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice.”) 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.

It has been recognized in some jurisdictions that 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. Some jurisdiction using the M’Naghten test have 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.⁸⁹ 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).

⁸⁹ *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. *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).

The United States Supreme Court recently held that States are free to preclude expert evidence concerning a defendant's cognitive capacity aimed at establishing the defendant lacked the requisite mens rea. *Clark v. Arizona*, 126 S.Ct. 2709 (2006). Such evidence was distinguished from observational testimony, by either lay or expert witnesses, which could include "descriptions of a defendant's tendency to think in a certain way or his behavioral characteristics." *Id.*, at 2726. The Supreme Court concluded the latter type of evidence was admissible under Arizona law and so did not address whether it would violate due process to exclude it.

Thus, 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. Cooney*, 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 DEFENCES (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.⁹⁰ 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.

⁹⁰ 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

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

1.1 WHY IS INTERNATIONAL LAW IMPORTANT IN A DOMESTIC CONTEXT?

The utilization of capital punishment is not prohibited under international law. However the abolition of the use of the death penalty under all circumstances is the ultimate objective of the international community. Until that time, there are restrictions on the categories of persons who are permitted to endure such a punishment; the execution of persons with mental retardation falls within one such restricted category.

It is important that counsel and mental disability advocates familiarize themselves with the international legal system and the laws and norms that protect relevant rights.

Over the last 50 years, humankind has seen substantial developments in both the recognition and importance of international law, particularly in the field of human rights. Although the concept of an international judicial entity is often difficult to comprehend, it became clear in the aftermath of the Second World War that nations could no longer consider themselves as independent entities, isolated from the wider world.

Today, a number of cases being brought before U.S. courts require a sound knowledge of international law. In fact, this development was recently encapsulated by former U.S. Supreme Court Justice Sandra Day O'Connor in a speech at Georgetown Law School. She held that:

“International law is no longer a specialty... Since September 11, 2001, we're reminded some nations don't have the rule of law or (know) that it's the key to liberty.”

In emphasizing the significance of international law within the U.S. judicial system, O'Connor also remarked that the judiciary would be “*negligent*” if it simply disregarded its importance.⁹¹

Consequently, international law should no longer be seen as a foreign concept; it has relevance in domestic courtrooms across the world and as such, at the very least, a basic understanding is required. Whether such law has binding force or not, it can still be an influential authority when considering constitutional and human rights questions. Justice Ruth Bader Ginsburg recently recalled:

“We refer to decisions rendered abroad, it bears repetition, not as controlling authorities, but for their indication, in Judge Wald's words, of “common denominators of basic fairness governing relationships between the governors and the governed” ...

⁹¹ Associated Press, October 27, 2004.

National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own."⁹²

The U.S. Supreme Court, having recently reflected upon international law and context in a number of cases, is becoming increasingly inclined to rely upon it as a supplemental source of consideration. Notwithstanding this development, it is still critical for attorneys to continue to include arguments on the basis of international law and norms. Such practice is essential to keep open all possible avenues of appeal (including, perhaps, to international courts), as well as to preserve both specific arguments and a general approach which could benefit future cases. As with other restricted categories of death penalty litigation, the accumulation of a body of cases evidencing a coherent and consistent line of argument can be useful in setting the stage for future decisions.⁹³

It is important to note 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.

Mindful of the dynamic context within which international law finds itself, we are hopeful this section, which is rather general in nature, will introduce those who are unfamiliar with international law and human rights standards to this burgeoning area of law.⁹⁴

Proviso

Please take note that throughout this section of the resource we suggest potential avenues of legal argument. These are advisory only. Despite this stipulation, we are hopeful that the information which follows will at the very least allow you to begin to consider international law as a supplementary line of reasoning that may bolster legal argument.

⁹² "A decent respect to the Opinions of [Human]kind": *The Value of a Comparative Perspective in Constitutional Adjudication*, Justice Ruth Bader Ginsburg, delivered at the Constitutional Court of South Africa on February 7, 2006. See http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html

⁹³ See, e.g., The Inter-American Commission on Human Rights *infra*.

⁹⁴ See, <http://www.internationaljusticeproject.org> for further information.

2 INTERNATIONAL INSTITUTIONS, LAW AND INSTRUMENTS

2.1 WHAT IS INTERNATIONAL LAW?

Law might be simply described as a body of rules which restrains certain behavior within a society and to some extent reflects the ideas and concerns of the society it protects. The same is true of international law, with the important difference being that its subjects are predominantly States rather than individual citizens.

The apparently “soft” nature of international law can obscure its value, especially if considered within the context of the principal characteristics of domestic law: an established body to legislate or create laws, a hierarchical court system with compulsory jurisdiction to resolve disputes, and an accepted system of enforcement. International law has no legislature, there is no system of courts or executive branch as traditionally understood,⁹⁵ and there is no cohesive system of punishment. Further, it is important to recognize that the international legal structure is more “horizontal” in nature than the vertical hierarchy with which we are familiar in domestic law. Nonetheless, the international community is not without institutions, the most notable being the International Court of Justice (ICJ), the judicial body, and the United Nations (UN), the administrative body, although a wide variety of other bodies make significant contributions within certain fields. There are also a number of regional institutions.

International law is primarily created by international agreement, which establish rules that are binding on all signatories, and custom, which is determined by State practice; practice recognized by the international community as forming a framework of conduct that must be observed.

Contrary to popular belief, international law is observed more often than not: violations are infrequent. However, if a violation does occur it usually generates a great deal of media and political attention. It is important for us to remember that just as rape and murder continue to take place within a domestic society and such occurrences do not invalidate the system, correspondingly, attacks on international legal rules do not negate their authority or necessity.⁹⁶ Accordingly, although international law arguments may seem of limited use in domestic legal settings, they can at the very least lend weight to a legal argument.

Before attempting to understand the finer details of international law, it will be beneficial first to gain some insight into how the International Court of Justice and the United Nations operate, and to detail other institutions within the UN system.

⁹⁵ International courts and tribunals are rapidly proliferating, however. See, e.g., Shaw, M.N., *INTERNATIONAL LAW*, Cambridge University Press, pp. 1011–1012 (5 Ed., 2003); “A Community of Courts: Towards a System of International Criminal Law Enforcement”, Burke-White, W.W., [2002] 24 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 1; and <http://www.pict-pecti.org/>.

⁹⁶ Shaw, M.N, *International Law*, Cambridge University Press p.6, and generally pp.1–13, (5 ed. 2003). For a more academic, theoretical analysis, see further Higgins, R, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT*, Clarendon Press, pp. 1–16.

2.2 INTERNATIONAL INSTITUTIONS

The United Nations

The United Nations (UN) was established on 24 October, 1945 by 51 countries committed to preserving peace through international cooperation and collective security. Today, nearly every nation in the world belongs to the UN: membership totals 192 countries, most recently including Montenegro.

When States become members of the United Nations,⁹⁷ they agree to accept the obligations of the United Nations Charter, an international treaty that sets out basic principles of international relations.

United Nations Charter

The United Nations Charter⁹⁸ (UN Charter) is the founding instrument of the United Nations.⁹⁹ It serves a constitutional function, creating the organs and bodies of the UN, as well as establishing procedure and confirming the rights and obligations of Member States. The UN Charter, alongside the Universal Declaration of Human Rights,¹⁰⁰ adopted by the General Assembly in 1948, forms the basis of modern 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.¹⁰¹

The UN Charter sets forth the four principal purposes of the UN:

- *"To practice tolerance and live together in peace with one another as good neighbors, 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 six principal organs of the United Nations are the General Assembly (GA),¹⁰² Security Council (SC), Economic and Social Council (ECOSOC),¹⁰³ Trusteeship Council,¹⁰⁴

⁹⁷ See, <http://www.un.org/apps/sg/sgstats.asp?nid=2113>

⁹⁸ June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

⁹⁹ Shaw, M.N, *INTERNATIONAL LAW*, Cambridge University Press p.6, and generally pp.1–13, (5 ed. 2003).

¹⁰⁰ See <http://www.un.org/Overview/rights.html> (note: case sensitive).

¹⁰¹ "[W]hat the UN has done in the fields of... *human rights... development of international law*, and *furthering a set of new community values...* constitutes a great legacy. If the international community is so starkly different from that existing before the Second World War, this is primarily due to the UN": Cassese, A, *INTERNATIONAL LAW*, 1 Ed., Oxford University Press, p. 295.

¹⁰² See <http://www.un.org/ga/60/>

International Court of Justice (ICJ)¹⁰⁵ and Secretariat.¹⁰⁶ The newly-established Human Rights Council may come to be considered the seventh.¹⁰⁷ 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, although other agencies may also take a leading role in specific fields.

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."¹⁰⁸

The General Assembly is a fundamental component in determining the activities 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 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".¹⁰⁹ ECOSOC remains concerned with the issue of capital punishment.¹¹⁰

ECOSOC presides over 14 specialized UN agencies, ten functional commissions, and five regional commissions. Fifty four 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.

¹⁰³ See <http://www.un.org/docs/ecosoc/>

¹⁰⁴ See <http://www.un.org/documents/tc.htm>

¹⁰⁵ See <http://www.icj-cij.org/>

¹⁰⁶ See <http://www.un.org/documents/st.htm>

¹⁰⁷ See *infra*.

¹⁰⁸ United Nations General Assembly, "Background Information", <http://www.un.org/ga/57/about.htm>

¹⁰⁹ United Nations Economic and Social Council, "What ECOSOC Does", <http://www.un.org/esa/coordination/ecosoc/about.htm>.

¹¹⁰ See "Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty", Seventh Quinquennial Report of the Secretary-General, E/2005/3, available at <http://www.un.org/docs/ecosoc/documents.asp?id=880>.

The International Court of Justice

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 Court resolves existing disputes between States, and can only decide cases with the consent of both parties. It does not concern itself with the question of enforcing its decision.¹¹¹ The ICJ may also provide the Security Council and the General Assembly with advisory opinions¹¹², answering legal queries posed to the Court by certain international agencies. The Statute of the Court guides the jurisdiction and procedure of the court.¹¹³

The Commission on Human Rights and the Human Rights Council

The principal committee pertaining to human rights, and thus affecting the use of capital punishment, was the Commission on Human Rights,¹¹⁴ a subsidiary of ECOSOC. The Commission was entrusted with a number of responsibilities; addressing 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".¹¹⁵ Additionally, the Commission contributed to the development of global human rights standards.

The Commission's work touched upon a number of international treaties and was one of the UN organizational bodies that issued resolutions. Treaties that refer to capital punishment have prompted much international debate, particularly with regard to the execution of juveniles and those with mental retardation. The Commission on Human Rights hosted a number of sub-committees, referred to as working groups.¹¹⁶

Significantly, on 15 March, 2006, the General Assembly voted to establish a new Human Rights Council, replacing the Commission; the new Council is directly responsible to the General Assembly.¹¹⁷ In addition to assuming the duties of the Commission, the Council will "assume, review, and, where necessary, improve and rationalize all mandates,

¹¹¹ Art. 94 of the UN Charter requires Member States to comply with the decision of the ICJ in any case to which it is a party (see <http://www.un.org/aboutun/charter/index.html>); the ICJ has made clear its own position, saying "[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it": *Nuclear Tests Case (Australia v. France)*, Judgment (Merits), para. 60, at http://www.icj-cij.org/icjwww/icas/iaf/iaf_ijudgment/iaf_ijudgment_19741220.pdf.

¹¹² 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.

¹¹³ The Statute of the Court can be found at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm>

¹¹⁴ See <http://www.unhchr.ch/html/menu2/2/chrintro.htm>

¹¹⁵ United Nations Commission on Human Rights, "Commission on Human Rights", <http://www.unhchr.ch/html/menu2/2/chrintro.htm>.

¹¹⁶ See <http://www.unhchr.ch/html/menu2/2/chrwg.htm>

¹¹⁷ "Assembly Creates New UN Human Rights Council", <http://www.un.org/apps/news/infocusRel.asp?infocusID=114&Body=human%20rights%20council&Body1=>; GA Res. 60/251 "Human Rights Council", at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement>

mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure".¹¹⁸

The Council is composed of 47 Member States, directly elected by the General Assembly, taking into account equitable geographic distribution. Members of the Council serve for a period of three years. A State's contribution to the promotion and protection of human rights is recommended as a factor to be considered in voting. The first elections were held on 9 May 2006.¹¹⁹

The Assembly recommended that ECOSOC request the Commission to conclude its work, and to abolish it on 16 June 2006. The Commission duly concluded its activities on 27 March 2006. The development of the new Council will be viewed by many with great anticipation.¹²⁰

2.3 SOURCES OF INTERNATIONAL LAW

Within a domestic legal system, there is a specific method for determining the nature of a law and its content. However, as we have previously noted, the lack of a traditional legislature, executive or judiciary within the international legal system distinguishes it from the domestic. Accordingly, an attorney seeking to rely on international law arguments is faced with the challenge of first searching for relevant norms, and then discovering whether such propositions amount to legal rules. As a result, the first step of an international law argument typically has to be "foundational", arguing for what the law actually is, before continuing to apply it.¹²¹ Once the practitioner has identified a norm that might be relevant to their case, the best way to lay the foundations is by examining it in the context of the established sources of international law. If the norm was created through one of these sources, or has been impliedly affirmed by them, then the foundations look solid. Wherever possible, it is advantageous for the argument to be based on several sources, if not all of them.¹²² An understanding of the sources of international law and the law of treaties is thus essential. Article 38 (1) of the Statute of the International Court of Justice¹²³ is the starting point with regard to sources.

The Statute of the International Court of Justice

Article 38(1) of the Statute of the ICJ is expressed in terms of the function of the ICJ. However, in providing a list of the sources of international law, Article 38 (1) is generally accepted as the authoritative guide, and provides a basic framework for organizing international legal arguments or research. Most international law falls under the first two

¹¹⁸ GA Res. 60/251 "Human Rights Council" *supra*, at para. 6.

¹¹⁹ See <http://www.un.org/ga/60/elect/hrc/>

¹²⁰ See <http://www.ohchr.org/english/bodies/hrcouncil/>

¹²¹ Higgins, R., PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, Clarendon Press, p. 17.

¹²² N.B. Before citing any document, international instrument or principle, always research and confirm applicability to ensure accuracy.

¹²³ Statute of the International Court of Justice Concluded at San Francisco, 26 June, 1945. Entered into force, 24 October, 1945. 1978 Y.B.U.N. 1052;U.S.T.S. 993,59 Stat.1031; *reprinted in* 1 Weston I.H.2

categories, sometimes under the third; the latter may indicate that a law exists, and may add weight to an argument, but they are rarely conclusive as a single source. Treaties and customary law are considered further below.

Article 38 (1) lists:

- **International Conventions**, *whether general or particular, establishing rules expressly recognized by the contesting States.* (Treaties are the most common examples of this.)
- **International Custom** - *evidence of general practice accepted as law.*
- **General principles of law** *recognized by civilized nations*
- **Judicial decisions and the teaching** *of the most highly qualified publicists of the various nations, as subsidiary means of determination of law.* (This means that in formulating your argument, it is possible to rely on secondary authorities such as judicial precedent or recognized academic opinion. An argument solely advanced on this basis is unlikely to succeed, however.)

It should be noted that while Article 38 (1) has not been *fully* accepted by the United States, it is generally regarded as a definitive guide. Given their consequence, we believe it may be helpful to explore a few of the sources in more detail and examine how they could perhaps be used in practice.

2.4 TREATIES

Treaties are also commonly referred to as *Conventions* (e.g. the Convention on the Rights of the Child) or *Covenants* (e.g. the International Covenant on Civil and Political Rights). In fact, there are a variety of names for legally binding international instruments,¹²⁴ but suffice it to say that, provided the intention to create a legally binding agreement is there, differing names do not change the substance of an instrument.¹²⁵ In many ways, the treaty lawyer's approach recalls the objective analysis of a lawyer considering a contract. The primary definition of a treaty is:

*“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*¹²⁶

¹²⁴ Other, less obvious, terms have included “Compact, Solemn Declaration, Administrative Agreement, Protocol of Decisions, Platform, Concordat, Agreed Minute... Terms of Reference... Joint Declaration”: Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 22.

¹²⁵ “[T]he name does not, in itself, determine the status of the instrument; what is decisive is whether the negotiating states intended the instrument to be (or not to be) legally binding”: Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 20. Note, however, that there are some other international instruments (although fortunately relatively rare in the field of human rights) which are NOT legally binding: see further pp. 20–22, 25.

¹²⁶ Vienna Convention on the Law of Treaties 1969, Art. 2(1)(a). See http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

In practical terms, treaties are concluded by States for any number of purposes. However, in the field of human rights, the primary purpose is generally to provide some form of legal protection from a perceived wrong, and so the provisions clearly reflect the characteristics of a legally binding international agreement. As a result, identifying human rights treaties as treaties is usually relatively straightforward.

As a source of international law, treaties are of growing importance: the last 50 years have seen a significant upsurge in the number of treaties made, and a change in the nature of the obligations introduced. Treaties play a major role in promoting the modernization and development of law. The most basic treaty is an express agreement between parties, which binds only those parties (a classic bilateral treaty).¹²⁷ Treaties are often used to codify, and even reform or update, rules of customary law in accordance with the legal perceptions and inclinations of their drafters. However, where States wish not only to change the law that regulates their own behavior but also to indicate a general rule of law (a frequent occurrence for human rights law), other States may be invited to become parties (a multilateral treaty). In order to give full effect to the purpose of the treaty, such treaties require the participation of a large number of States. If sufficient States accept the principles contained in a treaty as general principles of international law, and act in a manner consistent with this belief, those provisions can become customary law, which will bind all.¹²⁸ In this fashion, treaties act as agents of change, both “crystallizing” existing law and “generating” the new.¹²⁹

A great many international legal disputes are concerned with the validity and interpretation of an international agreement. In essence, all treaties are governed by one set of rules: the law of treaties. The Vienna Convention on the Law of Treaties (VCLT) is not as a whole declaratory of general international law, but a significant number of its articles might be considered so. The provisions of the Convention are normally regarded as an authoritative source.

Although there may be no direct enforcement mechanism for a treaty (unless one is specified or created through the treaty itself), a treaty is invaluable when preparing an international law argument. The political consequences, both internally and externally, of a State party breaching its obligations can often be enough to ensure compliance.

As a general research point, it is prudent to reference the full text of a treaty, just as you would reference a piece of domestic legislation. For independent research purposes, the following two current sites are incredibly useful:

- The website for the United Nations High Commissioner for Human Rights: <http://www.unhchr.ch/>
- The University of Minnesota Law School Human Rights website:

¹²⁷ “[A] treaty only creates law as between the States which are parties to it.”: *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment of 25 May 1926, PCIJ, Series A, no. 7, at 29.

¹²⁸ ...or almost all. See Section 4, *infra*.

¹²⁹ Cassese, A, *INTERNATIONAL LAW*, 1 Ed., Oxford University Press, 2001, pp. 136–138.

<http://www1.umn.edu/humanrts/>

These sites enable you to search for a full range of treaties using keywords. They are also organized by subject matter. A little surfing of the Web will also yield many other useful sites.¹³⁰

2.4.1 What are the Legal Effects of a Treaty?

Externally

A treaty is only binding upon a State in international law when it has both consented to be bound by it, and when the treaty has come into force.¹³¹ The time of a treaty's entry into force is often as much a practical question as a legal one: certain human rights treaties may, for example, only be of utility when a sufficient number of States become parties (e.g. the Rome Statute of the International Criminal Court was concluded in 1998 but only entered into force in 2002, when 60 States had become parties). When relying upon a treaty in legal argument, it is important to confirm that the treaty has entered into force.¹³²

States can express their consent to be bound by treaty in any way they choose.¹³³ The two principal forms, "signing" and "ratifying" treaties, are, however, often confused: it is possible both to sign a treaty in a way that is itself sufficient to express consent to be bound, or to sign "subject to ratification".¹³⁴ For human rights treaties, the latter is far more common. Ratification might best be understood as an "extra step" before the State has given its full consent, often used to provide time for practical difficulties to be resolved (sometimes to comply with domestic law, such as a requirement for parliamentary approval, or perhaps to introduce enabling legislation). It is important to note, however, that ratification itself is a process "on the international plane", distinct from national law:¹³⁵ "[a]lthough parliamentary approval of a treaty may well be required—and be referred to, misleadingly, as 'ratification'—that is a quite different process."¹³⁶ This distinction is particularly important in the case of the United States, as will become apparent below.

¹³⁰ E.g., for general research, the utility of an ordinary search engine like Google (<http://www.google.com>) is not to be overlooked. On the UN, see also <http://www.un.org>, <http://www.icj-cij.org/icjwww/idecisions.htm> and <http://ap.ohchr.org/documents/mainec.aspx>. In this era of Guantanamo Bay and the issues of detention arising from it, perhaps also see <http://www.cicr.org/ihl>.

¹³¹ Vienna Convention on the Law of Treaties, Art. 2(1)(g). Note that, although these are separate processes (often evidently), they can in some circumstances appear to occur simultaneously, where a treaty "enters into force on signature", for example. To avoid doubt, reference to the treaty itself will often clarify the procedure which its parties should follow. See Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 75–76, 81–87.

¹³² On entry into force, see further Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 131–142.

¹³³ Vienna Convention on the Law of Treaties, Art. 11.

¹³⁴ Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 75–76.

¹³⁵ Vienna Convention on the Law of Treaties, Art. 2(1)(b).

¹³⁶ Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 81.

It is clear that when a State signs subject to ratification, the treaty can have no legally binding effect until that ratification has occurred.¹³⁷ Accordingly, the period after a treaty has been signed but before it has been ratified is more or less analogous, in principle if not in substance, to the period when a State has fully consented to be bound by a treaty, but it has not yet come into force. The law treats the obligations of the State in these periods in the same way.

*“Article 18 [of the Vienna Convention on the Law of Treaties] requires a state ‘to refrain from acts which would defeat the object and purpose of a treaty’ before its entry into force for that state. When the treaty is subject to ratification... this obligation lasts until the state has made clear its intention not to become a party. When a state has expressed its consent to be bound, the obligation continues pending entry into force of the treaty, provided this event is ‘not unduly delayed’.”*¹³⁸

Thus, in these circumstances, a State is bound *in good faith*, if not in law, to ensure that nothing is done which would defeat the object and purpose of the treaty, pending a decision on ratification. A signature does not create an obligation to ratify. In fact, the precise extent of the good faith obligation remains a matter of academic debate, although it might reasonably be argued to mean that a State may not act in a way which would invalidate the basic purpose of the treaty.¹³⁹

Example

A State has signed but not yet ratified a treaty banning the use of the death penalty for the mentally ill. It is probably not bound in good faith to refrain from allowing a case to proceed where an individual, despite evidence to the contrary, is held not to be mentally ill, and sentenced to death. It probably would be bound, however, not to enact a law making execution mandatory for capital crimes, regardless of mental health.

Once ratified, of course, the State is considered to have consented to be bound.¹⁴⁰ When making treaty arguments, it is important to check whether the treaty specifies a particular manner for States to become parties, and whether the State relevant to your case has complied.¹⁴¹

¹³⁷ *North Sea Continental Shelf Case*, ICJ Reports, 1969, pp.3, 25; 41 ILR, pp.29, 54.

¹³⁸ Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 93–94.

¹³⁹ See, e.g., Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000m pp. 94–95; McDade, ‘The Interim Obligation between Signature and Ratification’, [1985] NILR pp. 5–47; Rogoff, ‘The International Legal Obligations of Signatories to an Unratified Treaty’, [1980] MAINE LAW REVIEW 263–299.

¹⁴⁰ It is important to note that where a treaty reflects customary international law, non-parties are still bound. Their obligation does not flow from the treaty itself, but because the treaty provisions mirror and/or reaffirm a rule or rules of customary international law.

¹⁴¹ Information on the ratification status of the major human rights treaties may be found at <http://www.unhchr.ch/pdf/report.pdf>.

Internally

Even if a State has complied with the full requirements of international law, and has become a party to a treaty, it still does not mean that the treaty necessarily has effect in domestic law. As States, not biological individuals, are the actors of international law, the classic view has it that only States can enforce international legal obligations. A State can, as a rule, only give its citizens the right to enforce that law by incorporating it into its own, domestic legal system.¹⁴² This is an issue of particular relevance to human rights treaties.

States vary in the way in which they approach this issue. In the United States, the Constitution provides that treaties “shall be the supreme law of the land”,¹⁴³ a clause which the U.S. Supreme Court has also held applicable to executive agreements (see below).¹⁴⁴ However, U.S. law draws a distinction between “self-executing” and “non-self-executing” treaties, only the former are automatically incorporated in domestic law and so provide enforceable right to individuals, while the latter requires enabling legislation.¹⁴⁵

Finally, while discussing the position in U.S. law, it is also worth noting the distinction between “treaties” and “executive agreements”. The U.S. Constitution uses only the term “treaty” for all international instruments, and provides that the President may only ratify a treaty with the “advice and consent” of the U.S. Senate. However, a parallel international instrument, not mentioned in the Constitution at all, known as an “executive agreement” has developed in U.S. law. It is identical to a treaty in every way, recognized by both the U.S. government and the governments of other States, but does not require Senate approval. This distinction is not, perhaps, of significance for most multilateral human rights treaties but is sometimes relevant for certain bilateral instruments. Although the majority of treaties upon which a practitioner may rely in domestic litigation will be the former, bilateral instruments on consular relations may, for example, be “executive agreements”. It is as well, then, to understand both. Certainly, it illustrates why American treaty law is fairly described as “remarkably complex”.¹⁴⁶

¹⁴² Note, however, that although States have, by default, autonomy to choose to assume international obligations to which they do not give full effect in domestic law, this position may slowly be changing. A number of treaties include provisions requiring that States introduce enabling legislation (e.g. Convention on Genocide 1948, Art. 5; ICCPR 1966, Art. 2(2); Convention on Torture 1984, Arts. 4, 5), and recent judicial decisions suggest that *jus cogens* norms (see below) also impliedly require implementation in national law: *Prosecutor v. Furundžija*, Trial Judgment, 1998, paras 148–150, <http://www.un.org/icty/cases-e/index-e.htm>.

¹⁴³ Constitution of the United States of America, Act. VI, s.2.

¹⁴⁴ Shaw, M.N, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, p. 147.

¹⁴⁵ See further Shaw, M.N, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, pp. 147–151; Vazquez, C.M., ‘The Four Doctrines of Self-Executing Treaties’, [1995] 89 AJIL 695; Buergenthal, T, ‘Self-Executing and Non-Self-Executing Treaties in National and International Law’, [1992] 235 HR, IV, p. 303; Paust, J, ‘Self-Executing Treaties’, [1986] 82 AJIL 760; Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 157–161, also See Sloss, D, ‘The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties’, [1999] YALE JOURNAL OF INTERNATIONAL LAW 129.

¹⁴⁶ Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 157–161.

Mindful of the above information, the manner in which a treaty argument is phrased must be adjusted to suit the treaty's legal status. For those treaties which require ratification, but for which ratification is still pending, it remains possible to argue that the state must not act contrary to the object and purpose of the treaty. The fact of a State's signature to the instrument may, in some cases, also be good evidence in support of a customary law argument.¹⁴⁷ A strong international legal argument can be made if a treaty is ratified and in force. For those treaties which are (at least arguably) self-executing, domestic legal arguments may also be raised.

Examples of Treaties

- Charter of the United Nations
- The Geneva Conventions on the Treatment of Prisoners and the Protection of Civilians and the Vienna Convention on Diplomatic Relations.
- The International Covenant on Civil and Political Rights (ICCPR).¹⁴⁸ Ratified by the United States on 8 June 1992 with a reservations. 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 authoritative articulation of international human rights law that has emerged in the years following World War II."
- The Convention on the Rights of the Child (CRC) Convention on the Rights of the Child,¹⁴⁹ signed by the U.S. in 1995, but not yet ratified. One hundred and ninety two nations have ratified the CRC.¹⁵⁰
- The Convention on the Elimination of all forms of Racial Discrimination (CERD)
- The Convention Against Torture (CAT).

The UN keeps a record of the principal human rights treaties, and their ratification status.¹⁵¹

Summary

- Treaties only bind parties which have consented to be bound, and for whom they are in force.
- A State which has signed but not ratified a treaty is not legally bound by it.
- However, by signing an international instrument, a State incurs an obligation to refrain from acts which would defeat the instrument's object and purpose, at least to a certain extent. The matter remains controversial but would be a viable legal argument if required.

¹⁴⁷ "[S]igned but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of the signature": *Qatar v. Bahrain*, 2001, para. 89, see <http://www.icj-cij.org/icjwww/idocket/iqb/iqbframe.htm>. On customary law, see further below.

¹⁴⁸ Can be found at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

¹⁴⁹ Can be found at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>

¹⁵⁰ Note: the SFRY ratified the CRC in 1990/1991 before the break-up. Serbia and Montenegro was considered to have succeeded to the obligations in 2001 (see again <http://www.ohchr.org/english/countries/ratification/11.htm>). See also as general reference, see p. 875 Shaw.

¹⁵¹ See <http://www.unhchr.ch/pdf/report.pdf> or

<http://www.ohchr.org/english/countries/ratification/index.htm>

- A signature does not create an obligation to ratify.
- Even when seeking to rely on a treaty to which a state is a party and which is in force, it is important to check whether domestic enabling legislation is required to provide individually enforceable rights.

2.4.2 *Interpretation and Applications of Treaties*

Like the common law of contract, the majority of disputes concerning treaties relate to their validity and/or interpretation. The law of treaties is based in customary law, but a significant proportion has been encapsulated within the Vienna Convention on the Law of Treaties.¹⁵² Although some sections of the VCLT remain controversial, it does provide a good outline of the principles, and is typically regarded as a primary source. It 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.

The Vienna Convention on the Law of Treaties (VCLT)¹⁵³ is widely accepted as codifying the customary rules relating to treaty interpretation and application. Although not without controversial aspects, it is the governing international treaty on such matters. One of the most notable areas of contention upon which the VCLT sheds light is the validity of reservations, and the obligation of a State upon signing a treaty to bind itself in good faith pending ratification.

It should be noted that the U.S. has signed but not ratified the Vienna Convention on the Law of Treaties. In accordance with the principles of international law, as stated above, it may be obliged, however, to bind itself in good faith. The U.S. Department of State has taken the position that the treaty is the authoritative guide to existing treaty law and procedure. See also, Restatement (Third) of Foreign Relations Law of the United States, Sec. 313(1)(c)(1987).

2.5 RESOLUTIONS

It is important to understand that resolutions of international organizations are not treaties and are not usually binding upon a nation. However, a resolution does serve to encapsulate the general acceptance by the international community of an international norm and as discussed below, can constitute positive evidence of State practice for the purpose of demonstrating customary international law.

¹⁵² Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* January 27, 1980. See <http://www1.umn.edu/humanrts/instree/viennaconvention.html>

¹⁵³ Vienna Convention on the Law of Treaties. Concluded at Vienna, 23 May, 1969. Entered into force, 27 January, 1988. 1155 U.N.T.S 331; 1969 U.N.J.Y.B. 140; *reprinted in* 8 I.L.M. 679 (1969) & 1 Weston I.E.1.

Examples of resolutions include the Universal Declaration of Human Rights and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

2.6 RESERVATIONS

In the process of becoming party to a treaty, either upon signature or ratification, States can attach “reservations”; pronouncements which purport to exclude or modify the legal effect of certain provisions.¹⁵⁴ For example, when ratifying the International Covenant on Civil and Political Rights, the United States made a reservation to Article 6(5), which 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.

The United States put forward this reservation in order to permit various U.S. States to continue to execute juvenile offenders.¹⁵⁵ The *validity* of this particular reservation was extremely controversial.¹⁵⁶

This example neatly illustrates the fundamental problem posed by reservations, and the reason why they continue to be contentious, particularly in the area of human rights.¹⁵⁷ Why should a State be allowed to “contract out” of an instrument which it has accepted as legally binding upon it? The short answer is that without reservations very few multilateral treaties would ever be successful because all the parties involved would be required to agree on all points, however, through the mechanism of the reservation, each State can accept the treaty as a whole, but can “opt out” of provisions with which it disagrees.¹⁵⁸ This of course, does risk making the law significantly less effective as well as particularly complex. The VCLT has attempted to introduce a consistent regime for this area of law,¹⁵⁹ yet the practice of States since it has come into force reveals anything but. The International Law Commission, the body of experts which advises on international legal reform, remains actively involved in this area.¹⁶⁰

¹⁵⁴ Vienna Convention on the Law of Treaties, Art. 2(1)(d)

¹⁵⁵ Note that the United States may no longer execute juveniles following the landmark ruling by the Supreme Court in *Roper v Simmons* 543 U.S. 551, 125 S.Ct. 1183 (2005) which decided that executing juveniles violated the Eighth Amendment ban on cruel and unusual punishment.

¹⁵⁶ See Schabas, W, ‘Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?’ [1995] 21 BROOK.J.INT’L.L 277.

¹⁵⁷ See Gardner, J.P., HUMAN RIGHTS AS GENERAL NORMS AND A STATE’S RIGHT TO OPT OUT: RESERVATIONS AND OBJECTIONS TO HUMAN RIGHTS CONVENTIONS, BIICL, 1997; Schabas, W, ‘Reservations to Human Rights Treaties: Time for Innovation and Reform’, [1994] CANADIAN YBIL 39; Higgins, R, ‘The United Nations: Still A Force for Peace’ [1989] MODERN LAW REVIEW 1, at 11–18.

¹⁵⁸ See Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, p. 107, and more generally, pp. 100–101, 104–130.

¹⁵⁹ Vienna Convention on the Law of Treaties, Arts. 19–23.

¹⁶⁰ See, e.g., International Law Commission, REPORT ON THE WORK OF ITS 57TH SESSION, 2005, A/60/10, p. 140, at <http://untreaty.un.org/ilc/reports/2005/2005report.htm>

2.6.1 *When is a Reservation Invalid?*

As a rule of thumb, a reservation is invalid when it runs contrary to the *object and purpose* of the treaty, or when the treaty itself expressly excludes the possibility of all reservations, or some types of reservations.¹⁶¹ The Statute of the International Criminal Court is an example of a treaty to which reservations may not be attached under any circumstances;¹⁶² the Second Optional Protocol to the ICCPR is an example of a treaty which has a “partial” exclusion of reservations.¹⁶³ An example of a reservation that has failed for being contrary to the object and purpose of a treaty has deliberately not been offered in this section as practice in this area is confused, and the precise application of the rule uncertain. The U.S. reservation to the ICCPR discussed above received objections from no less than 11 European States on the grounds that it was incompatible with the treaty’s object and purpose, yet it still appeared to remain valid.¹⁶⁴

Despite these confusions, it can be argued that a reservation worded so vaguely that its precise application cannot be reasonably understood, or that its application could be read so widely as to defeat the object and purpose of the treaty, is also likely to be invalid on the grounds of ambiguity.

2.7 WHAT IS THE DIFFERENCE BETWEEN A RESERVATION AND A DECLARATION?

A reservation is a statement restricting the legal effect of a certain part of a treaty; if valid, it alters the treaty so far as that party is concerned. A declaration, on the other hand, is a statement (often political) of how a State actually understands the treaty. A declaration gives some indication as to how the treaty will be interpreted by that nation, but, of itself, generally has no binding effect.¹⁶⁵

2.8 CUSTOMARY INTERNATIONAL LAW

Customary international law has been referred to as the “oldest and original source of international law.”¹⁶⁶ Custom is a dynamic source of law, particularly important for its broad scope. Being an inevitable consequence of the sum of their actions, States may not always realize that they are creating a new rule of law: custom has been described as

¹⁶¹ Vienna Convention on the Law of Treaties, Art. 19; this rule, however, almost certainly subsists in customary law too.

¹⁶² Statute of the International Criminal Court 1998, Art. 120, see <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁶³ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, Art. 2, see <http://www.ohchr.org/english/law/ccpr-death.htm>.

¹⁶⁴ The Human Rights Committee (the ICCPR’s “treaty body”) has offered a useful starting point for the analysis of the validity of a purported reservation to a human rights treaty: General Comment No. 24, at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/69c55b086f72957ec12563ed004ecf7a?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/69c55b086f72957ec12563ed004ecf7a?Opendocument).

¹⁶⁵ See Aust, A, MODERN TREATY LAW AND PRACTICE, Cambridge University Press, 2000, pp. 101–103.

¹⁶⁶ Steiner, H, & Alston, P, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (2000), p. 69.

“unconscious and unintentional lawmaking”.¹⁶⁷ Whereas treaties bind only those States which are party to them, a rule of customary law binds all (with the exception of “persistent objectors”). For these reasons, customary law can be of particular value to the international litigator, where it can be brought to bear.

The existence of customary law can be deduced from the practice of States. As confirmed by the ICJ in *Nicaragua v. USA (Merits)*,¹⁶⁸ custom comprises two main elements:

- (i) The general practice of nations (objective)
- (ii) ... which is ‘accepted as law’ (also known as *opinio juris*) (subjective)

The requirement of the first element is logical, and its nature easily understood. Since customary law is founded on the practice of States, what States actually do is significant. The test is high, however, and practice must have a certain consistency.¹⁶⁹

The second element, however, is less easy to define in simple terms. *Opinio juris* in essence means that a State must act under what it perceives to be a legal obligation for its practice to be evidence of a rule of customary international law. However, a State does not always limit its practice to what is required by law: it may act in goodwill, or in hope of some perceived advantage. In other words, one can not identify *opinio juris* behind every instance of state practice. Secondly, even leaving that difficulty aside, at what level should the test be set? The ICJ has held that:

*Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinio juris...”*¹⁷⁰

This would seem to suggest that the State has to believe that the law as constituted at that moment requires a certain action or inaction. However, it is equally clear that customary law can evolve. In such cases it is not possible for *opinio juris* to be straightforwardly measured at this highest level: a State would have to comply with the law in order to demonstrate that the law is in fact different; a virtual impossibility. Instead, the best answer is to say that the level at which *opinio juris* is measured varies to a certain extent upon the amount of supporting State practice.¹⁷¹ In other words, the two elements of customary law, practice and *opinio juris*, are related in some manner. This is a tricky concept, but it

¹⁶⁷ Kelsen, H, PRINCIPLES OF INTERNATIONAL LAW, 1952, pp. 307–308.

¹⁶⁸ ICJ Reports 14, at 97, available at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>.

¹⁶⁹ “State practice, including that of States whose interests are specially affected, should... [be] both extensive and virtually uniform.”: *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, ICJ Reps, para. 74.

¹⁷⁰ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States) of America*, 1986, para. 207, at http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf. See also *North Sea Continental Shelf Cases* [1969] ICJ Reps, p. 44.

¹⁷¹ See further, Shaw, M, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, pp. 82–83.

illustrates the essential flexibility and complexity of customary law. It reflects the vagaries of the real world.

Evidence of custom is numerous, particularly for State practice, and can come in almost any form.¹⁷² It can, and often does, include diplomatic correspondence; opinions of official legal advisors; press releases from the nation; international and national judicial decisions; treaties; and resolutions. Obviously, the value of these sources varies and much depends upon the circumstances. A good rule of thumb, however, is to say that “state practice covers any act or statements by a state from which views about customary law may be inferred.”¹⁷³

Evidence of *opinio juris* is likely to be found in the same type of materials, but analyzed instead for insights into why the State acted in the way that it did. For obvious reasons, this is often a more difficult task. It is possible, however, that if one of the elements is proved with great consistency, the other element may not need to be satisfied to the same extent.¹⁷⁴ State practice which is universal, or almost so, may itself be grounds for inferring that States feel themselves obliged to act in a uniform way, for example¹⁷⁵.

Summary

- A purported norm must satisfy prongs (i) and (ii) in order to be recognised as customary international law: the norm must be adhered to in practice by most relevant¹⁷⁶ countries and those countries that follow the norm must do so because they feel obligated by a sense of legal duty ("*opinio juris*").
- Customary international law is binding on a nation.

2.9 PERSISTENT OBJECTOR

A State may avoid being bound by customary international law if it has been a “persistent objector” to a particular rule or norm. This objection must be “consistent” and irrespective of disagreement. This is a common argument raised by an opposing party in litigation if you have established a relevant rule of customary law. However, if one looks back at the

¹⁷² Shaw, M, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, pp. 77–80.

¹⁷³ Akehurst, M, ‘Custom as a Source of International Law’, [1974-75] 47 BYIL 1, at 10.

¹⁷⁴ See Kirgis, F.L., ‘Custom on a Sliding Scale’ [1987] 81(1) AJIL 146.

¹⁷⁵ See, e.g., the Dissenting Opinion of Judge Tanaka in the *North Sea Continental Shelf Cases* [1969] ICJ Reps. 3, at 176, finding in that case that there was “no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice.”

¹⁷⁶ Custom does not require uniform practice: it recognizes, for example, that the practice of landlocked states may not be particularly telling with regard to maritime law, and also the possibility of local custom, on which see Shaw, M, INTERNATIONAL LAW, Cambridge University Press, 5 Ed., 2003, pp. 87–88.

practice of a State, it is sometimes the case that the argument can be countered due to a lack of consistency. Even a short break in practice may be sufficient.¹⁷⁷

2.10 GENERAL PRINCIPLES OF INTERNATIONAL LAW

In any system of law a situation may arise where the court realizes that there is no authority covering a specific point. International law recognizes this in part by the inclusion of the provision "the general principles of law recognized by civilized nations" as seen in Article 38 (1) of the ICJ Statute. General principles allow international lawyers to connect on themes drawn from national law, the relative influence of such a principle being a product to a large extent of the number of domestic legal systems which recognize it. Accordingly, the Anglo-American traditions of the common law are an important general principle of international law.

2.11 JUS COGENS

While each source of international law is valuable, they generally take priority on the basis of time: a recent treaty will "trump" a purely historic custom, a change in state practice will lead to a new customary norm replacing an old discarded treaty, and so on. However, some international laws are protected, such that they cannot be supplanted in this fashion. They are known as norms of *jus cogens*, or "peremptory" norms of international law.

Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty will be void "if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". A similar rule exists with regard to customary law.

The article also offers a useful definition of a *jus cogens* norm as:

"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 a *jus cogens* 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."¹⁷⁸

In *Domingues v United States*, the Inter-American Commission of Human Rights described a *jus cogens* norm as deriving its status:

¹⁷⁷ See further Stein, T, 'The Approach of the Different Drummer: the Principle of the Persistent Objector in International Law' [1985] 26 HARVARD INTERNATIONAL LAW JOURNAL 457; Charney, J, 'The Persistent Objector Rule and the Development of Customary International Law', [1985] 56 BYIL 1.

¹⁷⁸ 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.

*"from fundamental values held by the international community" and "violations of such pre-emptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition, or acquiescence."*¹⁷⁹

The *jus cogen* norm describes such a bare minimum of acceptable behavior that *no* State may derogate from it. It is argued, therefore, that a nation cannot contract out of this peremptory norm or assert its "persistent objector" status as a defense.¹⁸⁰

It has been asserted that the prohibitions of slavery, the unlawful use of force, genocide, piracy and perhaps torture are *jus cogens* norms. The list is small, but not closed, although the test is high.¹⁸¹ Accordingly, a *jus cogens* argument is possibly the most difficult to articulate with success, especially as there is a school of academic thought which denies the existence of *jus cogens* for human rights norms entirely. Nevertheless, at the very least, as with all international legal arguments, it may well be worth articulating as a supplemental line of reasoning. Indeed, a *jus cogens* argument was asserted in *Roper v Simmons*.¹⁸²

2.12 'SOFT' AND 'HARD' LAW DISTINCTIONS

Finally, it is useful to note two key pieces of terminology, frequently used in discussion of the international legal regime. International law, norms and standards are generally said to fall into one of two categories: 'hard' or 'soft' law. 'Soft' law is technically non-binding or binding yet particularly controversial, while 'hard' law is considered to be unmistakably binding. In light of the above pages, you will see for yourself the usefulness of these

¹⁷⁹ *Domingues v United States* Report No. 62/02, para. 85, Inter-Am. Cm. H.R. (2002) (available at <http://www.cidh.org/annualrep/2002eng/usa.12285.htm>).

¹⁸⁰ Of note, there are alternative arguments on this particular issue, for the relationship between *jus cogens* and the persistent objector-rule, see Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985) 1, at 14 note 81; .M. Danilenko, *Law-Making in the International Community* (1993), at 234 (arguing in favour of persistent objection even for *jus cogens* norms); Tomuschat, 'Obligations Arising for States without or against Their Will', 241 *RdC* (1993-IV) 195, at 284 *et seq.* (arguing against the application of the rule in case of *jus cogens*)

¹⁸¹ See, generally, Cassese, A, *INTERNATIONAL LAW*, Oxford University Press, 1 Ed., 2001, pp. 138–148.

¹⁸² For additional information and list of briefs filed, see <http://www.internationaljusticeproject.org/juvCSimmons.cfm#briefs>

concepts. 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". 'Soft' law is seen by some as germane to the process of the formation of customary law. Correspondingly, notions of "hard" and "soft" law lend a sort of hierarchical structure to international law. In constructing an argument, "hard" law appears to be most useful at first glance (perhaps particularly to a national lawyer, for whom it may seem more familiar); however, in the areas of contention—where litigation almost always arises—it is difficult to put together a comprehensive submission without using "soft" law sources as evidence of the way the law might be developing. A blend of the two can be a powerful combination.

3 INTERNATIONAL LAW, NORMS AND INSTRUMENTS PERTAINING TO MENTAL RETARDATION

The United Nations, on behalf of the international community, has articulated a body of authority restricting the use of the death penalty, and ultimately prohibiting the execution of those with mental retardation. The various norms and standards established seem to show a progression from the general, e.g. the Declaration on the Rights of the Mentally Retarded in 1971, which *inter alia*, protects the defendant from degrading treatment and requires recognition of the degree of mental ability during trial, to the more specific, e.g. recent resolutions by the Economic and Social Council and General Assembly.¹⁸³ Of the latter, the most significant resolution is ECOSOC Resolution 1984/50, UN Doc E/1984/92), which sets out the important “Safeguard 3”. See further information on this point in Section 3.4. The remainder of this section provides a brief survey of the extent and content of international norms relevant to mental retardation, providing a basis for research on specific legal arguments.

3.1 LIMITATIONS

- A number of countries, namely, the U.S., Japan, and Kyrgyzstan continue to ignore international standards protecting those with mental retardation from the death penalty. Kyrgyzstan has, however, asserted that it does not execute persons with mental retardation.¹⁸⁴
- In the United States the recognition of arguments based on international law or international standards is sporadic within criminal proceedings. However, support for such arguments does seem to be growing, as evidenced by the reference to international consensus in the US Supreme Court's decision in *Atkins*. Indeed, *Atkins* arguably lays out the framework 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*.¹⁸⁵

¹⁸³ ECOSOC: *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, ECOSOC Res. 1984/50, UN Doc E/1984/92 (1984); 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); and *Implementation of the Safeguards Guaranteeing Protection of Rights of Those Facing the Death Penalty*, Res. 1996/15, UN Doc E/CN.15/1996/-15 (1996). General Assembly: *Human Rights in the Administration of Justice*, GA Res. 39/118, UN Doc A/39/700 (1984).

¹⁸⁴ U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1997/60 (1996) at para. 89; U.N. Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, E/CN.4/1996/61 (1996), at para. 380.

¹⁸⁵ 2001 WL 648609 (U.S.). See <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 re-filed.

3.2 MAIN NORMS AND INSTRUMENTS

- United Nations Economic and Social Council, Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, Report by the Secretary-General, UN Doc E/2005/3 (2005)¹⁸⁶
- 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)¹⁸⁷
- United Nations General Assembly, Human Rights in the Administration of Justice, GA Res. 39/118, UN Doc. A/39/700 (1984)¹⁸⁸
- 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), Annex¹⁸⁹
- United Nations General Assembly, Declaration on Rights of Disabled Persons, UN Doc A/RES/33447 (XXX) (1975)¹⁹⁰
- United Nations General Assembly, Declaration on Rights of Mentally Retarded Persons, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971)¹⁹¹
- Organization of American States, Inter-American Commission on Human Rights, Recommendation of the IACHR for Promotion and Protection of the Rights of the Mentally Ill¹⁹²
- United Nations General Assembly, Standard Rules on the Equalization of Opportunities for Persons With Disabilities A/RES/48/96 (1993)¹⁹³
- International Covenant on Civil and Political Rights (ICCPR -156 State parties), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316

¹⁸⁶ See <http://www.un.org/docs/ecosoc/documents.asp?id=880>.

¹⁸⁷ See <http://www.un.org/documents/ecosoc/res/1996/eres1996-15.htm>

¹⁸⁸ See <http://www.un.org/documents/ga/res/39/a39r118.htm>

¹⁸⁹ See <http://www.un.org/documents/ga/res/46/a46r119.htm>

¹⁹⁰ See <http://www.unhchr.ch/html/menu3/b/72.htm>

¹⁹¹ See http://www.unhchr.ch/html/menu3/b/m_mental.htm

¹⁹² See <http://www.cidh.oas.org/annualrep/2000eng/chap.6e.htm>.

¹⁹³ See

<http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/4de80b92356f54ea8025670b00561925?OpenDocument&Highlight=2,A%2FRES%2F48%2F96>. These Rules remain authoritative as UN bodies continue to work in this area of law: see, e.g., U.N. Commission on Human Rights, *Human rights of persons with disabilities*, 61st Sess. Resolution 2005/65, U.N. Doc. E/CN.4/RES/2005/65 (2005).

(1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Signed by the United States: October 5, 1977, ratified: June 8, 1992.¹⁹⁴

- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, AG/RES. 1608, 7 June 1999.¹⁹⁵

3.3 INTERNATIONAL PRACTICE: EXECUTION OF PERSONS WITH MENTAL RETARDATION IS CONTRARY TO THE PRACTICE OF VIRTUALLY ALL STATES.

There is a growing international consensus against the execution of persons with mental retardation. Certainly, recent years show very few states to have acted inconsistently with this position. As detailed above, Japan, Kyrgyzstan, and the United States have reportedly carried out such executions.¹⁹⁶ The vast majority of the world community, largely of its own volition, but also at the urging of various international bodies, including the UN, has enacted legislation, or taken other steps to prohibit the practice. Importantly, this position has not just been adopted by states which prohibit the death penalty in general, but of those nations which do still allow for the use of capital punishment, an overwhelming majority nonetheless proscribes its imposition upon those defendants with mental retardation. Such a clear trend may well indicate that, rather than a political fad subject to change, the international community's stance flows from a near-universal conviction that the execution of persons with mental retardation is an "inhuman, medieval form of punishment unworthy or modern societies".¹⁹⁷

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 those with mental retardation 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 those with mental retardation are regarded within the criminal justice system. All such standards call for humane treatment of persons with mental retardation, and within the criminal justice system, these standards call for adherence to the due process of law and protection from degrading treatment.

¹⁹⁴ See <http://www.ohchr.org/english/countries/ratification/4.htm>.

¹⁹⁵ See <http://www.cidh.org/basicos/disability.htm>.

¹⁹⁶ UN Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions*, E/CN.4/1997/60 (1996) at para. 89.

¹⁹⁷ 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).

With the Declaration on the Rights of the Mentally Retarded, adopted in 1971, the United Nations began a long process of advocacy on behalf of those with mental retardation, a group that has long been misunderstood and misrepresented across the world.¹⁹⁸ The associated resolution called on nations to recognize the right of the person with mental retardation to be protected against 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.”¹⁹⁹

Although subsequent UN resolutions have drawn increasingly fine distinctions between retarded, disabled and handicapped persons, the common intention to protect the fundamental human dignity of persons with mental retardation can be easily discerned.²⁰⁰ A number of regional instruments reflect a similar concern.²⁰¹

In recent years, the UN has taken increasingly assertive measures to protect those with mental retardation from execution, most notably in ECOSOC'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).²⁰² The Safeguards were

¹⁹⁸ See, James W. Ellis and Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985)

¹⁹⁹ United Nations General Assembly, *Declaration on the Rights of Mentally Retarded Persons*, GA Resolution 2856 (XXVI), UN Doc. A/8429 (1971), at ¶ 6.

²⁰⁰ 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).

²⁰¹ 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).

²⁰² ECOSOC Res. 1984/50, UN Doc. E/1984/92 (1984).

endorsed by the General Assembly in the same year.²⁰³ Five years later, ECOSOC clarified its use of the term “insane” in Safeguard 3 to include “persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.”²⁰⁴ In 1996, ECOSOC reiterated its call for full implementation of the Safeguards, at least in part due to continued concern over the lack of protection from the death penalty afforded to those who are mentally retarded.²⁰⁵ Since 1997, the United Nations Human Rights Commission has called on countries that maintain the death penalty to observe the UN Safeguards in the *Question of the Death Penalty*²⁰⁶ and since 1999, this 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.”²⁰⁷

As a member of the Commission on Human Rights in each of the years in which it took action, the US consistently voted against resolutions on the death penalty. The express concerns of the United States, however, did not go directly to the issue of the clause concerning the execution of persons with mental disorders.²⁰⁸ Nevertheless, over the negative vote of the United States, the resolutions that called on countries that maintain the death penalty to observe UN Safeguards that specifically condemn the death penalty for “persons suffering from mental retardation” passed.

The United States has been criticized by the Human Rights Committee, the body which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), for its failure to protect those with mental retardation from the death penalty. At the time of writing, there are 156 States that are party to the ICCPR.²⁰⁹ The ICCPR itself prohibits the use of the death penalty on those with mental retardation; given the large number of parties which have ratified the treaty, this is a significant additional example of

²⁰³ UN General Assembly, *Human Rights in the Administration of Justice*, GA Res. 39/118, UN Doc. A/39/700 (1984).

²⁰⁴ 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).

²⁰⁵ 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).

²⁰⁶ 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).

²⁰⁷ 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). With wording amended to include “mental or intellectual disabilities”, see also U.N. Commission on Human Rights, *The Question of the Death Penalty*, 61st Sess. Resolution 2005/59, U.N. Doc. E/CN.4/RES/2005/59 (2005).

²⁰⁸ 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.

²⁰⁹ Seen at, <http://www.ohchr.org/english/countries/ratification/4.htm>

State practice. It has been noted, however, that certain countries may not have taken appropriate action in compliance with these obligations under the treaty, including the US: “in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded.”(sic)²¹⁰

Additionally, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution (appointed by the UN Commission on Human Rights since 1982; the Rapporteur's mandate has included review of those countries which still apply the death penalty) has articulated his concern with regard to the execution of persons with mental retardation, with express reference to the US.²¹¹

Regional organizations have demonstrated similar concern with the issue. It was considered most recently by the Organization for Security and Cooperation in Europe (OSCE), a regional security organization of 55 nations, including the US. At the OSCE meeting in November, 2000, the European Union noted its concern that the execution of those with mental retardation continues to be carried out within the OSCE region. The EU itself has been actively involved with this issue for some time. Over the years it has presented a number of demarches opposing the execution of several individuals with mental retardation or those who have been diagnosed with serious mental disorders.²¹²

²¹⁰ 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; see <http://www.unhchr.ch/tbs/doc.nsf>

²¹¹ 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.

²¹² 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>.

4 RECENT 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”.

In August, 2006 discussions were taking place to sort out the remaining differences in the 33-article draft convention. Such discussions represent a shift in modern international approaches towards persons with disabilities in codifying accepted norms. If the negotiations succeed, the convention can be formally adopted by the General Assembly at its next session and then it will be opened for signature and ratification.

5 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, if feasible, the *International Court of Justice* (where the U.S. has become the object of complaints). Although international measures to promote the protection of human rights are important, many initiatives have been introduced at regional level. Many domestic lawyers are unacquainted with the availability of international mechanisms or are unfamiliar with the rules and procedures of the tribunals; therefore, this section gives a brief overview of the principal organizations involved, beginning with the organization of most relevance to cases in the jurisdiction of the United States, the OAS.

5.1 ORGANIZATION OF AMERICAN STATES

The United States is one of the 35 members of the Organization of American States (OAS),²¹³ 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 the sovereignty, territorial integrity and independence of the American States that established the OAS through the Charter (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 is one of two regional systems to have adopted a convention abolishing the death penalty (Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty).²¹⁴ The Council of Europe is the other, having adopted a similar convention.²¹⁵

The 35 American States have adopted numerous international instruments that have become the foundation for the regional structure 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, while creating organs to monitor their observance. 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.

²¹³ See <http://www.oas.org>

²¹⁴ See <http://www.cidh.oas.org/Basicos/basic7.htm>

²¹⁵ Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, available at <http://www1.umn.edu/humanrts/euro/z25prot6.html>. Also see Smith, pp. 209-210. Note that the Arab Charter on HR, although not prohibiting the death penalty, places certain restrictions on it (Arts 10-12) which exclude juveniles, pregnant women, and mothers with children less than two. Similar provisions exist in Art. 2 of the Convention of the Commonwealth of Independent States.

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.²¹⁶ The Commission is a seven member body based in Washington DC. Each member is elected by the OAS General Assembly. The United States upon ratifying the Charter of the OAS in 1951 became a Member State of the Organization and subsequently became subject to the Commission's authority upon the creation of the IACHR's creation in 1959.

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.²¹⁷ 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.²¹⁸ 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, 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

As provided for under Article 25 of the Commission's Rules of Procedure, in serious and urgent cases, and whenever necessary according to the information available, the

²¹⁶ Charter of the OAS, Article 106. See <http://www.oas.org/juridico/English/charter>.

²¹⁷ See IACHR Statute, Art. 19. (See <http://www.cidh.oas.org/Basicos/basic15.htm>)

²¹⁸ See IACHR Statute, Art. 20

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.

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.²¹⁹

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

²¹⁹ Juan Raul Garza v. United States, Case No. 12.243, Report No. 52/01, Annual Report of the IACHR 2000, ¶ 117. See <http://www.cidh.oas.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm> 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 “The LaGrand Case” (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 - <http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>; 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.

- 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;
 - 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.²²⁰

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

²²⁰ *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.

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:
 - 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.²²¹ 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.²²²

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 Procedure.²²³

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

²²¹ 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.

²²² See IACHR Statute, Art. 4. ADD art 43.

²²³ 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).

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 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. 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.

5.3 THE INTERNATIONAL COURT OF JUSTICE

As stated above, the ICJ satisfies the judicial function of the UN. Owing to the fact that only nations 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.²²⁴

²²⁴ For further information, see <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>

6 CLEMENCY AND INTERNATIONAL INTERVENTION

International arguments should also be presented at the clemency stage. Certain international institutions and Governments may 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.²²⁵ 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.

The European Union prohibits its members from the use of the death penalty as a punishment; in fact, it is now a precursor to entry to the European Union.²²⁶ While this covers the imposition of the death penalty for defendants with mental retardation the extradition of defendants to countries that apply the death penalty poses an additional question. 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. 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

²²⁵ 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. Bulgaria and Romania are likely to join in the near future, although the date is uncertain. The targeted date of accession for Bulgaria and Romania is January, 2006. Such a move would potentially bring the number of EU member-states to 27.

²²⁶ *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>. See generally http://ec.europa.eu/comm/external_relations/human_rights/adp/index.htm

and the Council of Europe, as well as through bilateral contacts with many countries that retain the death penalty.²²⁷

There are also other European based organizations that have views on the death penalty in general and include the Organization 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".

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 including those involving persons with mental retardation, the mentally ill, juveniles and foreign nationals.²²⁸

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 46 countries.²²⁹ In addition it has applications from 2 more countries, and has granted observer status to five 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 (to date, it has developed 200 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.²³⁰

6.2 CRITERIA FOR INTERVENTION

If you believe you have a client who fulfils the criteria for mental retardation, please contact the International Justice Project ("IJP"). The IJP advises Governments and

²²⁷ See European Union, *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1998), at <http://www.eurunion.org/legislat/deathPenalty/Guidelines.htm>.

²²⁸ For examples of demarches and policy statements, see *EU Policy and the Death Penalty* at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm>

²²⁹ 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, Monaco, 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. Additionally, an application for membership from Bélarus is currently pending.

²³⁰ For further information on the Council of Europe, see http://www.coe.int/T/e/Com/about_coe/

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.²³¹

Please note that strict criteria are followed in all cases and consideration of intervention is not guaranteed.

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.

²³¹ American Association on Mental Retardation (AAMR) 2002 Definition

APPENDIX

ADAPTIVE BEHAVIOR: BACKGROUND QUESTIONS TO ASK CREDIBLE INFORMANTS (COMBINED VERSION)

Updated: September, 2006

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NB:

- (1) This list of questions is designed to assist in obtaining confirming 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, organized according to the AAMR (1992) definition, was published in *Equal Justice for People with Mental Retardation* (Institute on Disabilities at Temple University, 2002) appearing in the "*Training Guide for Attorneys*" written by Edwards, Bryen and Murphy.
- (3) The questions are organized according to **11 adaptive skill areas**. These 11 areas can be accessed in such a way to be used by any definition of mental retardation that one has to use. The adaptive skill areas for two major professional sources are provided below.

AAMR (2002):	conceptual, social, practical
DSM-IV-TR (2002):	communication, functional academic skills, self-direction, social and interpersonal skills, leisure, self-care, home living, health, safety, use of community resources, work

(NB: AAMR (1992) has ten adaptive skills areas and is virtually the same as DSM-IV-TR, except for the area of "health and safety" which is combined.

- (4) Questions are phrased usually 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, as some statements may need further explanation. Frequently a prompt for requesting more detailed information is provided.
- (6) **Contextual information** (i.e., stories or specific examples) is extremely useful and should be obtained whenever possible.
- (7) Substitute the person's name for the symbol "X."

Conceptual Adaptive Skills:

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)
- Can X follow multi-step directions given to him orally?
- Does X understand humor (e.g., jokes, funny stories) that others say?

(expressive)

- Does X speak to others on a regular basis?
- Does X have any speech problems? (explain)
- How well does X use words when he/she speaks?
- Does X have trouble finding the right word for things?
- Does X have a large vocabulary when he/she speaks?
- How well does X speak using full sentences?
- When X speaks, do others have problems understanding what he/she is saying? (explain)
- When X speaks, does what he/she says make sense? (explain)
- How well does X...
 - give directions to someone?
 - talk about current events going on in the community?
 - talk with someone he/she has just met?
 - convey his/her needs?
 - Talk on the phone?

Functional Academic Skills

Reading

- What types of reading material (books, newspapers, magazines) did/does X like to read? [details, specific examples]
- How often did X read as a 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...
 - the newspaper?
 - mail or other notes written for him/her?

labels on cans of food or other materials?
notices or flyers that are put in public places?
menus in unfamiliar restaurants?
applications and other formal documents?
signs in the community?

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 to write...
 - a personal letter to someone else?
 - down a phone message on a piece of paper?
 - notes to himself/herself?
 - information on an application?

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?
- Can X...
 - tell time? [traditional clock, digital]
 - use a calendar?
 - understand the times on a bus schedule?
 - recognize and count money?
 - make change?
 - understand how much change he/she should get back?
 - buy items in stores without assistance? With assistance?
 - pay bills? (explain)
 - manage a checking and/or savings account?
 - understand the information on a pay stub?
 - use a tape measure or ruler?
 - use measuring cups for cooking?
 - weigh himself/herself accurately?
 - use a thermostat in a house or an apartment?

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 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 Adaptive Skills:

Social and 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 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?
 - teachers and administrators?
 - other school staff?
- How well does X get along with his/her...
 - wife/husband?
 - children?
 - girlfriend/boyfriend?
 - persons in the neighborhood?
 - co-workers?
 - supervisor/boss at work?
- How does X handle problems with his/her...
 - relatives?
 - friends?
 - co-workers?
 - 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

- Was X ever taken advantage of when X was... (explain, examples)
child?
adolescent?
adult?
- Can X easily be talked into doing things others want? (explain)
- 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?
- Does X say what others want him/her to say?
- Would you describe X more as a "leader" or a "follower"?

Naiveté

- How easily is X tricked or fooled by others? (explain)
- How well does X understand what others are asking him/her to do- especially when he/she could get into trouble?
- Has X ever been accused of doing something when he/she really did not do it?

- Have others often played jokes on X? (explain)
- Did people make fun of X and he/she did not know it?

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?
- Did X ever have problems following rules in settings outside of the home (e.g., on a sports team or participating at a community center)?

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 sports?
- Does X have any regular hobbies or interests?
- What does X do for entertainment?
- Does X understand the rules and procedures of various games?
- Can X keep score when playing certain games?
- Does X learn a new game, sport, or other activity easily?

Practical Adaptive Skills

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 . . . (explore each in detail)
 - 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? (details)
 - Prepares meals?
 - planning a meal (identifying and obtaining materials, etc.)
 - preparing the meal (reading recipe, etc.)
 - cleaning up afterwards (knows where things go, etc.)
 - Cleans his/her room, apartment, or house?
 - sweeps, vacuums, etc.
 - keeps room organized
 - Uses the telephone?
 - finds the number in a phone book
 - places a call
 - answers a call
 - knows how to find and use a public phone
 - Can use household appliances?
 - kitchen: stove, oven, microwave, toaster, etc.
 - house: washing machine, dryer, air-conditioning, etc.
 - Can do laundry?
 - organizes/sorts cloths
 - uses appropriate detergent, etc.
 - Can use basic household tools (e.g., pliers, screwdriver, etc.)?
 - Can perform basic home maintenance? (e.g. change filters of furnace, change light bulbs, batteries in smoke detector, leaks, toilet malfunctions, etc.)
 - Knows how to get household problems repaired by someone else?

Health

- How well does X do the following?
 - keeps healthy – both physically and mentally?
 - knows basic first aid?
 - knows how to treat day-to-day ailments such as a headache?

knows who to call in the event of a medical emergency?
takes prescribed medications as directed and in a timely fashion?

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?
 - Finds and uses stores in the neighborhood?
- Can X use resources in the community such as... (details)
 - grocery store
 - department store (clothing, other items)
 - restaurant (fast food, sit-down, take-out)
 - gas station/quick stop
 - bank
 - post office
 - recreational facilities
 - government offices (social security, etc.)
 - other public services (library, etc.)
- Did X go to church on a regular basis?
- 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 have any specific job/vocational training?
- Does X know how to find and apply for a job?
- How has X gotten his/her jobs in the past?
has assistance been required?

- How did X complete the job application?
- Was an interview required -- if so, how did it go?
- Does X have a good work attitude?
- Does X have the following general job skills: (explain)
 - Arrived at work on time,
 - get along with co-workers
 - followed the directives of his/her supervisor or boss
 - could work without assistance, support, or social help
 - understood employment policies

- How did X do on the jobs he/she has had?
- 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)