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CONFESSIONS AND THE MENTALLY RETARDED CAPITAL DEFENDANT: CHEATING TO LOSE

BY: SILVIA LINDA SIMPSON

I. INTRODUCTION

The defense of mentally retarded clients presents unique challenges to both defense attorneys and the criminal justice system. Among the challenges for counsel is first, to recognize and understand mental retardation and how it differs from other impairments such as mental illness; and second, to communicate this information to judges and juries, who are also largely ignorant in this area. All in the criminal justice system are likewise challenged to understand the impact of mental retardation on existing doctrines and legal rules. An important example is the law of confessions. The special susceptibilities of the mentally retarded make them especially vulnerable to both intentionally coercive police tactics and inadvertent interrogation techniques. These challenges may stem from problems that are particularly acute in Virginia, if the capital case of Earl Washington is an example. Spurred in part by Washington's case, in which a mentally retarded man, who confessed but was almost certainly innocent, was nearly put to death, this article seeks to assist practitioners in several ways.

First, the article will suggest indicators of mental retardation that should be uncovered in the initial investigation and alert attorneys that mental retardation may be a factor in their case. This is another reason in capital cases that the mitigation investigation, looking to the penalty trial, must begin immediately upon acceptance of the case. Second, the article will discuss the procurement of the number of experts and type of assistance necessary to verify mental retardation and aid in presenting evidence about it at those points in the case where it is highly relevant. Third, the article will outline the importance of many characteristics of the mentally retarded to the law of confessions and discuss how these characteristics interact with the interrogation context to produce unjust results. Finally, the case of Earl Washington and his confession is discussed as a reminder that we all must learn more about mental retardation. This article is merely a glimpse into one of the important areas where mental retardation is legally significant. Upon defense counsel, especially capital defense counsel, falls the primary responsibility for educating himself, judges, jurors, and prosecutors about mental retardation.

II. "SPOTTING THE ISSUE": IDENTIFYING INDICATORS OF MENTAL RETARDATION

The first hurdle in dealing with mental retardation is identifying its presence. A mentally retarded individual's denial of his disability and his well-developed mechanisms to disguise his disability or "pass" make detection of his disability particularly difficult. Therefore, one's own interaction with a client is often not a reliable indicator. While it is always good practice to test a defendant, it is particularly crucial when certain indicators are present. These indicators are usually found in school records which show consistently deficient IQ test performance, poor grades, recommendations for special education, repeated grades, and a general trend of failure. Other helpful indicators also include information from the defendant's family and friends, whose wide range of experience with him over a long period of time may more accurately measure his abilities.

Information helpful to the spotting and documentation of mental deficits can also be found by compiling a comprehensive life history. This collection of data should begin with the conception of the defendant, investigating the mother's pregnancy and whether she used drugs and alcohol during pregnancy, and continue through the defendant's life. Documentation should come from a variety of sources including school records, welfare department records, employment records, juvenile records, and all other court records available, as well as interviews with anyone having a relationship to the defendant. The comprehensive life history should also contain a complete mental and physical medical history, with particular emphasis on any accidents the defendant was involved in, especially those resulting in head injuries or brain damage.[1]

Once mental retardation is suspected, the next step is to request an expert qualified in mental retardation pursuant to either *Ake v. Oklahoma*[2] or the Virginia expert assistance statute, Virginia Code section 19.2-264.3:1,[3] to evaluate the defendant and verify the presence of mental retardation. Given the courts' lack of familiarity with mental retardation as compared with mental illness, special care must be used in ensuring that the court appoints the right kind of expert. While a defendant is not entitled to an expert of his choice under *Ake* nor under 3:1, attorneys are encouraged to provide the court with a list of qualified mental retardation experts from which to select an expert. Once mental retardation is established, expert assistance is essential to challenge both the voluntariness and the reliability of a confession. In this effort, the mental retardation expert educates the court on the special susceptibilities of the mentally retarded that make them especially vulnerable in the interrogation context.

III. MENTAL RETARDATION DEFINED

"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."[4] This definition, promulgated by the American

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[1] This comprehensive collection of data is also critical in formulating a theory of mitigation early in the defense preparation.

[2] 470 U.S. 68 (1985).

[3] Hereinafter "3:1."

[4] American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support* (1992). This definition revises the previous definition of mental retardation: "Mental Retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *American Association on Mental Deficiency, Classification in Mental Retardation* 1 (Herbert J. Grossman ed., 1983) [hereinafter *AAMD, Classification*], *cited in* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 446 (1985); *cited with approval in Penry v. Lynaugh*, 492 U.S. 302 (1989). *See also* case summary of *Penry*, Capital Defense Digest, Vol. 2, No. 1, p. 2 (1989); discussion of *Penry* in Charles F. Castner, *The "Two-Edged" Sword: Mitigation Evidence Used in Aggravation*, Capital Defense Digest, Vol. 5, No. 2, p. 40 (1993). Note that because of its recency this definition may not be the one used in much of the literature.

Association on Mental Retardation (AAMR),[5] has three elements.[6] First, there must be a proven deficit in intellect which is measured by intelligence tests and quantified as an intelligence quotient (IQ) score. The AAMR's definition of mental retardation includes those with an IQ level of 70 to 75 or below.[7] Second, an individual must concurrently suffer impairments in two or more of the listed adaptive skills areas.[8] Adaptive behavior is generally defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales."[9] This impairment to adaptive behavior element requires that the intellectual deficit have some practical effect on the individual's life.[10] In the past, particularly in criminal cases, diagnoses have sometimes been challenged because the concept of adaptive behavior could not be precisely defined. Its extension in this revised definition to ten adaptive skill areas seeks to address this problem.[11] The third element of mental retardation is that mental retardation must manifest itself before the age of eighteen.[12] This requirement is somewhat arbitrary, and some experts endorse disregarding the date of origin. The criminal justice system generally concerns itself with the manifestations and consequences of an individual's handicap and not the date of its origin.[13]

Mental retardation is generally classified into four categories: mild, moderate, severe, and profound.[14] Mildly retarded individuals, who comprise approximately eighty-nine percent of people classified as mentally retarded, have IQ scores ranging between 55 and 70.[15] The mildly retarded are generally capable of functioning at minimal self-support levels and of progressing to about a sixth grade level. Moderately retarded individuals, having IQ scores ranging from 40-55, generally have great difficulty dealing with social conventions and usually are not capable of progressing beyond the second grade level. Severely retarded individuals, who comprise only four percent of all mentally retarded individuals, have IQ scores ranging from 20-40 and are characterized by poor motor development and severely limited speech. Persons with IQ scores between 75 and 85 are sometimes erroneously described as having "borderline retardation," but this classification has long since been abandoned by professionals in the field.[16] Individuals with IQs in this range, while not mentally retarded, do have reduced cognitive ability, although the reduction is not as severe as for those who have mental retardation. Practitioners should note that mental disability that falls short of mental retardation is still relevant when evaluating confessions. Despite these categories, it should be emphasized, especially since most criminal defendants fall into the mildly retarded category, that mental retardation at **all** of its levels is a serious disability that affects every dimension of a person's life in various ways. Even mildly retarded individuals statistically place in the bottom two percent of the population in intelligence.[17]

IV. MENTAL RETARDATION AND MENTAL ILLNESS DISTINGUISHED

Crucial to an understanding of mental retardation is how it contrasts with mental illness. The two are often confused, leading to unfortunate consequences for a criminal defendant. The American Psychiatric Association defines "mental disorder" as "an illness with psychologic or behavioral manifestations and/or impairment in functioning due to a social, psychologic, genetic, physical/ chemical, or biologic disturbance. The disorder is not limited to relations between the person and society. The illness is characterized by symptoms and/or impairment in functioning."[18] The key difference between mental retardation and mental illness is that mental retardation is **not** an illness. Mentally retarded individuals have limited abilities, while mentally ill individuals suffer disturbances in their thought processes and emotions.[19] This contrast between ability and illness signals the correlating temporal distinction between the two. Mental illness is potentially temporary, cyclical, or episodic, while mental retardation involves a permanent impairment.[20] Therefore, legal rules formulated to address mental illness may not be appropriate to deal with the mentally retarded defendant. For example, psychiatric treatment appropriate for a mentally ill person will do nothing to assist a mentally retarded person who is not mentally ill.

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[5] Previously known as the American Association on Mental Deficiency (AAMD).

[6] According to the American Association on Mental Retardation, the following four assumptions are essential to the application of the definition: (1) valid assessment considers cultural and linguistic diversity as well as differences in communication and behavioral factors; (2) the existence of limitations in adaptive skills occurs within the context of community environments typical of the individual's age peers and is indexed to the person's individualized needs for support; (3) specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities; and (4) with appropriate support over a sustained period, the life functioning of the person with mental retardation will generally improve. American Association on Mental Retardation, *supra* note 4.

[7] American Association on Mental Retardation, *supra* note 4. In its new definition, the AAMR formally extended the upper limit to 75, while previously the upper limit was 70 with the caution that it was intended as a guideline and it could be extended upward through IQ 75. Also note that the average IQ for the overall population is 100; more than 97 percent of all persons score above 70.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Ellis & Luckasson, *supra* note 4, at 423. Proof of this element, however, dispels the myth that mental retardation can be "faked" by an adult criminal defendant.

[14] *Id.* Mildly retarded people may be characterized as "educable," and moderately retarded people as "trainable." Evans, *The Lives of Mentally Retarded People* 14 (1983).

[15] Ellis & Luckasson, *supra* note 4, at 422-23. *See, e.g.*, 1 *World Health Organization, System Of International Classification Of Diseases Clinical Modification* 1098-99; American Psychiatric Association *Diagnostic And Statistical Manual Of Mental Disorders* 36 (3rd ed 1980).

[16] *AAMD, Classification, supra* note 4, at 6.

[17] *See* testimony of Dr. Ruth Luckasson in *Fairchild v. Lockhart* 744 F. Supp. 1429, 1435-49 (E.D. Ark. 1989).

[18] Ellis & Luckasson, *supra* note 4, at 423, citing *American Psychiatric Association, Psychiatric Glossary* 89 (5th ed. 1980). The glossary does not separately define "mental illness," providing only a cross reference to "mental disorder."

[19] Ellis & Luckasson, *supra* note 4, at 423.

[20] *Id.* The label of mental retardation as "permanent" should be qualified by stating that the consequences of the mental impairment, including deficits in adaptive behavior, may be ameliorated through education and habilitation. *See AAMD, Classification, supra* note 4; *Curative Aspects Of Mental Retardation: Biomedical and Behavioral Advances* (Menolascino et al., eds., 1983). *But cf. Durham v. United States*, 214 F.2d 862, 87[illegible] (D.C. Cir. 1954) (defining "mental defect" as "a condition which is not considered capable of either improving or deteriorating . . . .").

Some mentally retarded individuals are, however, also mentally ill. Studies reveal that the incidence of mental illness among retarded people is approximately thirty percent.[21] This combination of mental illness and retardation creates unique problems in the criminal justice context. For example, if a defendant is institutionalized for the purpose of curing mental illness so that the defendant can stand trial, the defendant will be returned "sane," but will still be retarded. This situation is particularly harmful to the defendant because there will be a recorded, official determination of sanity available to the prosecutor and the real problem of retardation may not even be detected, let alone mentioned in the medical evaluation since most psychiatrists are not trained in areas involving mental retardation.

V. COMMON TRAITS IN MENTALLY RETARDED INDIVIDUALS

While mentally retarded individuals vary widely, certain characteristics frequently occur that have implications on the use of confessions in the criminal justice system. Many mentally retarded people have limited communication or memory skills exhibited by such behavior as unresponsiveness to police or authority figures and confused responses to police questioning. The mentally retarded pose unique challenges because even when a mentally retarded individual's language and communication abilities appear to be normal, the reliability of the answer could still be questionable. Mentally retarded defendants are particularly susceptible to what is sometimes called "biased questioning." "Biased questioning" refers to answering in the affirmative questions regarding behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.[22] The form of a question can play an important role in producing an unreliable response and, therefore, police interrogators may intentionally or inadvertently elicit an inaccurate response through the use of an inappropriate question form.[23] Furthermore, a mentally retarded individual will often **not** refuse to answer questions which are beyond his ability to understand. Again, outward appearance can be deceiving. While a mentally retarded defendant may be able to verbalize effectively, memory will often be impaired because the mentally retarded are unable to determine the importance of various events so that cursory questioning cannot reliably ascertain the facts.[24] Memory impairment also causes mentally retarded individuals to have trouble remembering previous answers to questions so that they may be perceived as lying.

Second, mentally retarded individuals often exhibit a poor attention span which creates problems throughout the criminal justice process. With regard to confessions, mentally retarded defendants may be unable to understand their rights when arrested. People with mental retardation also have problems with moral development which interferes with their comprehension of blame or causation. This inability to distinguish between blameworthy and accidental behavior may lead a mentally retarded individual to confess to a crime that he did not commit because he believes that blame should be assigned to someone and he does not understand the concept of causation, or as is often common with the mentally retarded, he may confess to please his accuser. This phenomenon of confessing to curry favor is termed "cheating to lose."[25]

Mentally retarded individuals can also be characterized by their denial of limitations stemming from their disability illustrated through bragging about their skill, strength or deeds. This "overrating" results in few mentally retarded people revealing their disability when arrested or at other points in the criminal justice process.[26] Given the dangers of biased responses in questioning, this trait can lead to damaging and unreliable confessions. Finally, mentally retarded individuals are strongly motivated by a desire to please authority figures such that they will go to great lengths to seek their approval, even when it requires giving an incorrect answer.[27] This behavior suggests that mentally retarded defendants are particularly vulnerable to suggestions by authority figures, whether intentional or unintentional. Naturally, this behavior presents compelling reliability concerns in the custodial interrogation context.

The mentally retarded individual's desire to deny his disability and please others makes detection of his disability especially difficult. If mental retardation is suspected, the defendant should be tested and a mental health expert with experience in mental retardation should be involved immediately. The involvement of a mental health expert to assist in the preparation for trial is especially crucial in the case of the mentally retarded defendant where his special traits and susceptibilities play an important role in his defense. Early information on the defendant's mental retardation and the use of a mental retardation expert as a defense consultant is critical to the success of pre-trial motions and hearings which shape the outcome of the trial.

VI. THE USE OF EXPERTS

The use of a mental health expert is critical to the defense of mentally retarded capital defendants, especially given the frequent confusion between mental illness and mental retardation and the special characteristics of mental retardation that can lead to unreliable confessions. Before discussing the methods for acquiring a mental health expert, it should be stressed that that an expert in mental retardation is needed. Courts frequently fail to make the distinction between these experts and ordinary psychiatrists and most psychologists are not trained in areas involving mental retardation.

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[21] Ellis & Luckasson, *supra* note 4, at 425, citing Menolascino, *Challenges In Mental Retardation: Progressive Ideology and Services* 126-27 (1977).

[22] Ellis & Luckasson, *supra* note 4, at 428, citing Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Mentally Handicapped: 1 Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58, 58-68 (1974); *see generally* Sigdman, et al., *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 Mental Retardation 53 (1980).

[23] Both "yes-no" questions and more difficult open-ended questions present problems for the mentally retarded criminal defendant. While "yes-no" questions are easiest for a mentally retarded person to answer, their validity is so suspect, given the danger of response bias, that it has been suggested that questioners abandon the use of "yes-no" questioning techniques. Ellis & Luckasson, *supra* note 4, at 428 n.73. *See also Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991), and case summary of *Yeatts*, Capital Defense Digest, Vol. 4, No. 1, p. 20 (1991). *Yeatts* illustrates the dangers of "yes-no" questions where a defendant with an IQ of 70 and a mental age of 12 or 13 in his fourth interview with police was asked directly whether he "killed the woman," and replied, "[n]o, I didn't . . . I mean yeah, I did." At the end of the interview, Yeatts asked investigators for their "handshake." *Id.* at 129, 410 S.E.2d at 259.

[24] Ellis & Luckasson, *supra* note 4, at 428-29.

[25] *Id.* at 430 n.79. *See, e.g., President's Panel On Mental Retardation, Report of the Task Force on Law* 33 (1967); Person, *The Accused Retardate*, 4 Colum. Hum. Rts. L. Rev. 239, 254 (1972). *See generally* Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 Cal. W. L. Rev. 365 (1981).

[26] Ellis & Luckasson, *supra* note 4, at 430.

[27] *Id.* at 430-31.

There is also the possibility of acquiring more than one expert. The Virginia expert assistance statutory language, "the court shall appoint one or more qualified mental health experts" can be used in suppport of this position.[28] An option to requesting more than one qualified mental retardation expert initially is an incremental approach which uses a "rolling *Ake*/3:1 motion." Under this alternative, an attorney initially requests a mental retardation expert who specializes in diagnosing mental retardation to conduct the intelligence tests and evaluations needed to determine whether the defendant suffers a mental deficit. Once mental retardation is established, the next step is to make another *Ake*/3:1 motion for a mental retardation expert to use in the preparation of a defense and to testify at trial.

A. Acquiring an expert under *Ake*

In *Ake v. Oklahoma*[29] the Supreme Court held that where an indigent defendant's sanity will be an issue at trial, the defendant is entitled to a state-funded psychiatrist to conduct an examination and assist in the evaluation and presentation of a defense if the defendant cannot otherwise afford one. The rationale of *Ake* has been extended beyond cases where sanity is at issue.[30] Under *Ake*, the defendant must show that his mental condition will be a significant factor at trial, an expert is necessary for his defense, and that the trial will be unfair without an expert.[31]

While no court has explicitly formulated a checklist of what must be included in an *Ake* motion, the defendant must make a detailed and persuasive showing that an expert is necessary and that without one the defendant will not receive a fair trial.[32] Courts consider factors such as: the type of expert; the type of assistance; name, qualifications, and fees of the expert; the reasonableness of the cost; the objective and subjective bases for the request; the legal necessity; the legal entitlement to defense experts; and the inadequacy of available state experts.[33] Supporting information should be provided for all of these factors.

Seeking an *Ake* expert has several advantages, including that the attorney is forced to develop a theory of mitigation almost as a condition of receiving the appointment of the expert and once appointed, the expert operates as a "defense consultant," assisting in the preparation and presentation of the defendant's case.[34] The mental retardation expert can be particularly valuable as a "defense consultant" given the variety of unique challenges inherent in building a defense for a mentally retarded defendant. The appointment may also benefit courts, given their relative unfamiliarity and confusion regarding mental retardation. Additionally, unlike the Virginia expert assistance statute,[35] under *Ake*, the defendant is not subject to reciprocal examination by the Commonwealth's expert.

Seeking a mental retardation expert under *Ake* also has disadvantages. A detailed, substantiated, and persuasive showing of need is required.[36] Yet, there is no "checklist" detailing a showing that will guarantee entitlement as a matter of law.[37] Finally, *Ake* does not give the defendant the right to appoint an expert of his own choosing, or even to get funds to do so.[38]

B. Acquiring an expert under Virginia Code section 19.2-264.3:1

Unlike the detailed showing required by *Ake*, the Virginia statute requirements are much less stringent. To acquire an expert under Virginia Code section 19.2-264.3:1, a defendant merely has to show that (1) he is charged with or convicted of capital murder, and (2) he is indigent.[39] The major disadvantage of obtaining an expert under 3:1 is that it can expose the defense case in mitigation to pretrial discovery by the Commonwealth. It also compels a capital defendant to waive his Fifth Amendment privilege against self-incrimination by submitting to examination by an expert appointed by the Commonwealth.[40] The defendant may also be compelled to furnish the Commonwealth's experts with statements made by the defendant to his expert or risk being precluded from presenting evidence in mitigation as guaranteed by the Sixth, Eighth and Fourteenth Amendments.[41]

As with *Ake*, 3:1 does not grant defense counsel an expert of her choice. However, the statute does clearly contemplate assistance to a particular defendant regarding his history, character, or mental condition.[42] In the case of suspected mental retardation, only an expert qualified in mental retardation can provide this assistance. As a practical matter, nomination to the court of such an expert by defense counsel will often result in appointment. Investigation of potential mental health experts qualified in mental retardation is especially important with regard to the mentally retarded defendant since courts frequently fail to make the distinction between mental illness and mental retardation and many mental health experts are not trained in areas involving mental retardation.

VII. *MIRANDA/EDWARDS* AND THE MENTALLY RETARDED DEFENDANT

In *Miranda v. Arizona*,[43] the Supreme Court mandated that an accused be advised of two fundamental constitutional rights before a custodial interrogation.[44] Surrender of one's *Miranda* rights must be the

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[28] Va. Code Ann. § 19.2-264.3:1(A) (1990).

[29] 470 U.S. 68 (1985). *See* Helen L. Konrad, *Getting the Most and Giving the Least from Virginia's "Mental Mitigation Expert" Statute*, Capital Defense Digest, Vol. 3, No. 2, p. 22 (1991); W. Lawrence Fitch, *Restrictions on the State's Use of Mental Health Experts in Capital Trials*, Capital Defense Digest, Vol. 2, No. 1, p. 21 (1989); Elizabeth P. Murtagh, *Mitigation: The Use of a Mental Health Expert in Capital Trials*, Capital Defense Digest, Vol. 1, No. 2, p. 16 (1989).

[30] *See* Konrad, *supra* note 29.

[31] 470 U.S. 68 (1985).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Va. Code Ann. § 19.2-264.3:1 (1990) (entitlement is limited to indigent defendants in capital cases; *see* section B, *infra*).

[36] *See* Konrad, *supra* note 29.

[37] *Id.*

[38] *Id.* Neither does Va. Code Ann. § 19.2-264.3:1.

[39] Va. Code Ann. § 19.2-264.3:1(A) (1990).

[40] The statute has guarantees purporting to prohibit or limit the use of anything derived from defendant's statements. Va. Code Ann. § 19.2-264.3:1(G) (1990). Unless defense counsel are extremely diligent, however, these provisions may not be enforced. *See, e.g., Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 379 (1993), and case summary of *Stewart*, Capital Defense Digest, Vol. 6, No. 1, p. 21 (1993); *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990), and case summary of *Savino*, Capital Defense Digest, Vol. 3, No. 1, p. 15 (1990).

[41] *See* Konrad, *supra* note 29. *See also* Elizabeth A. Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, Vol. 2, No. 1, p. 24 (1989) (arguing that a defendant may have a right to have counsel present; that preclusion of evidence in any event at a capital penalty trial may be unconstitutional, even if 3:1 is not complied with; and the statute itself prohibits use of the the defendant's statements and limits the Commonwealth's expert).

[42] Va. Code Ann. § 19.2-264.3:1(A) (1990).

[43] 384 U.S. 435 (1966).

[44] The four warnings are really to advise of two constitutional rights: (a) the Fifth Amendment privilege against compelled self incrimination; and (b) the limited Fifth Amendment right to counsel to advise on the exercise of (a).

product of a knowing, intelligent and voluntary waiver.[45] The court must determine, in light of the totality of the circumstances, including not only the details of the interrogation, but also the characteristics of the accused, whether the statement of the accused was the product of an essentially free and unconstrained choice, or whether the accused's will was overcome and his capacity for self-determination critically impaired.[46] The mental retardation of the accused is one factor to consider in making this determination.[47] Furthermore, in *Edwards v. Arizona*[48] the Supreme ourt held that when a suspect invokes his right under *Miranda* to conılt with an attorney prior to interrogation, the suspect "is not subject to ırther interrogation by the authorities until counsel has been made avail-›le to him, unless the accused himself initiates further communication, ‹changes, or conversations with the police."[49]

The relevance of mental retardation to the validity of a confession is ısed on several considerations. First is the increased likelihood that the :tarded person may be particularly susceptible to coercion and pressure ıd, therefore, more likely to give a confession that is not truly voluntary, :., a mentally retarded person is much more likely to be "overborne and s capacity for self-determination critically impaired."[50] Second is the ›ssibility that the suspect will make a false confession out of a desire to ease someone perceived to be an authority figure. Lastly is a concern ıat the retarded suspect does not understand, and may be incapable of ıderstanding, the ramifications of a confession and his right not to con-:ss.[51]

The first issue in applying the special concerns of the mentally :tarded defendant to the context of confessions is whether the retarded ıspect understands the concepts which constitute the warning.[52] The ›ncept of "rights" and what it means to give them up, the idea that one ıs the ability to refuse to answer questions posed by a person of great authority, the notions of subsequent use of incriminating statements, the right to counsel, and the concept that the suspect can delay answering questions until a lawyer arrives are of some abstraction and difficulty, especially when read in summary fashion, without elaboration.[53] **Even mildly retarded individuals are generally unable to comprehend complex ideas without detailed explanation.** Comprehension is further hindered by a mentally retarded person's limited vocabulary. Many retarded people have a vocabulary so limited that they may not be able to understand the warning even if they are familiar with its concepts.[54]

If a mentally retarded defendant's lack of capacity to understand the warnings is not detected at the time the confession is sought, it may work to the serious disadvantage of the defendant by resulting in a damaging confession. The fact that many of the indicators are often not pursued or ignored, combined with the mentally retarded suspect's characteristics, such as a denial of his limitations, makes detection difficult.[55] Common indicators include whether the suspect is literate, the suspect's educational background, indications of confusion and inconsistency, and the scope of a suspect's vocabulary.[56] An issue related to failure to understand rights is failure to understand the adversarial nature of prosecutions and the concepts of trials and their consequences.[57] This may be a factor because many mentally retarded defendants have led a life of isolation.

The most important issue with regard to mentally retarded defendants involves the voluntariness of the confession. The concern with this requirement is that the defendant's action, either a confession or a waiver of the right to counsel, was the product of coercion.[58] The Supreme Court has warned in *Rhode Island v. Innis*[59] of the "unusual susceptibility of a defendant to a particular form of persuasion." The characteristics of the mentally retarded make them particularly susceptible to coercion. As the President's Panel on Mental Retardation observed:

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[45] *Miranda*, 384 U.S. at 435.

[46] *Yeatts*, 242 Va. 121, 410 S.E.2d 254. *See also* case summary of *'atts*, Capital Defense Digest, Vol. 4, No. 1, p 20 (1991); *Terrell v. ›mmonwealth*, 12 Va. App. 285, 290, 403 S.E.2d 387, 390 (1991).

[47] *Correll v. Commonwealth*, 232 Va. 454, 464, 352 S.E.2d 352, 357 987); *Simpson v. Commonwealth*, 227 Va. 557, 564, 318 S.E.2d 386, '0 (1984); *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 984), *cert. denied*, 471 U.S. 1111 (1985).

[48] 451 U.S. 477 (1981).

[49] *Id.* at 484-85. *See also Yeatts*, 242 Va. 121, 410 S.E.2d 254, and se summary of *Yeatts*, Capital Defense Digest, Vol. 4, No. 1, p. 20 991) (holding that defendant with an IQ of 70 and a mental age of 'elve or thirteen validly initiated discussions with police when he quested that a police investigator he had already spoken with on three ior occasions "come over and talk to [him]" after Yeatts had asked the urt to appoint counsel to represent him). *See also Correll*, 232 Va. 454, i2 S.E.2d 352 (holding confession of defendant with IQ of 68 admissi-:, though he had invoked his right to counsel two days earlier, where fendant "initiated" discussions with the police by stating he wanted to plain the results of his polygraph test and validly waived his rights spite his low intelligence, given his previous dealings with police and *iranda* warnings).

[50] *See supra* note 46 and accompanying text.

[51] Ellis & Luckasson, *supra* note 4, at 446.

[52] It has been suggested that the anxiety some retarded defendants perience upon being arrested may reduce their ability to understand the ırning statement. *Id.* at 448, n.182, citing *Curative Aspects of Mental :tardation: Biomedical and Behavioral Advances*, *supra* note 20, at 185.

[53] Ellis & Luckasson, *supra* note 4, at 448. *See Toliver v. Gathright*, ı1 F. Supp. 148, 150 (E.D. Va. 1980) (finding inadmissible the confes-›n of defendant with IQ of 60 because he was not likely to have understood his rights). *See also Cooper v. Griffin*, 455 F.2d 1142, 1145 (5th Cir. 1972) (finding substantial uncontroverted testimony that the defendant with an IQ of approximately 60 was not capable of meaningfully comprehending the *Miranda* warning).

[54] Ellis & Luckasson, *supra* note 4, at 448.

[55] In Morrow, *A Legal Framework: An Insider's Perspective, Rehabilitation and the Retarded Offender* 60-61 (P. Browning ed. 1976), the author notes that "[a]pparently the question, 'Can you read?' is rarely asked." The mechanisms that a retarded person has used all his life to minimize the stigma that accompanies his disability may make identification of this problem a little more difficult. Morrow depicts a scene in which the defendant, in his desire to please the police officer, makes a statement. The police officer normally writes down the statement, reads it back, says "something to the effect of 'read this over . . . is it right?' and requests the accused's signature. Sometimes the retarded person will appear to read the document to himself, but in fact, will not read it at all." Morrow, *A Legal Framework: An Insider's Perspective, Rehabilitation and the Retarded Offender*, at 60-61, *cited in* Ellis & Luckasson, *supra* note 4, at 449 n.190.

[56] Ellis & Luckasson, *supra* note 4, at 449-50.

[57] Ellis & Luckasson, *supra* note 4, at 450 n.195, noted that while the Supreme Court observed: "This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates his voluntariness," *Oregon v. Elstad*, 470 U.S. 298 (1984), *Elstad* and the decisions it cites involve marginal misunderstandings by defendants who were mentally typical. The "ignorance of the full consequences" of a mentally retarded defendant may be different in kind, not just degree, from those envisioned by the *Elstad* majority.

[58] Ellis & Luckasson, *supra* note 4, at 450.

[59] 446 U.S. 291, 302 n.8 (1980).

The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. "Cheating to lose," allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. It is unlikely that a retarded person will see the implications or consequences of his statements in the way a person of normal intelligence will.[60]

A. Battling the "Prior Experience with the Criminal Justice System" Myth

The unfamiliarity of most courts with mental retardation and its implications is evident in the courts' responses to mentally retarded defendants, especially in the area of confessions. In a string of cases the Virginia courts have relied on the mentally retarded defendants' "prior dealings with the police and *Miranda*"[61] or the defendant's "street sense"[62] to find that the mentally retarded defendant knowingly, intelligently, and voluntarily waived his rights.[63] These conclusions negate the very permanence that defines mental retardation and distinguishes it from its only slightly less misunderstood counterpart, mental illness. Mental retardation is characterized by limited **ability**, so that a series of repetitive experiences do not improve the capacity of the mentally retarded defendant. Repetitive exposure to warnings could teach a mentally retarded individual some familiarity with the litany but repetitive exposure, particularly in a person who has mental retardation, is not going to create understanding.[64] Understanding, to the extent it exists at all on something as complex as *Miranda* warnings, would have to be the result of sustained training and treatment by qualified individuals using special education methods.[65]

The appreciation of this truth is further complicated by the mentally retarded individual's desire to please authority and his constant attempt to deny his disability. The mentally retarded individual's well-developed mechanisms to deny it and avoid the stigma that accompanies his disability present a dangerous facade to the police and the court, causing them to overlook the individual's disability and treat him no differently than they would treat an ordinary defendant. The courts have a particularly difficult time grasping the concept that someone would confess to a crime he did not commit.[66] However, the mentally retarded are characterized by their tendency to confess to crimes they did not commit.[67] This characteristic often stems from a sense of responsibility for things that go wrong, which is nurtured by a life full of failures.

This myth that a mentally retarded defendant is capable of giving a knowing, intelligent and voluntary waiver because of his previous experience with the criminal justice system illustrates the special difficulties associated with defending a mentally retarded individual and emphasizes the need to acquire a mental health expert with experience in mental retardation early in the litigation process. Not only is mental retardation highly susceptible to being confused with the more familiar characteristics of mental illness, but also many of the character traits of the mentally retarded cloak the defendant's underlying condition, making courts skeptical of the individual's condition.

VIII. *WASHINGTON v. MURRAY*: A DRAMATIC VIRGINIA EXAMPLE

Earl Washington's story[68] most poignantly illustrates the criminal justice system's failure to address the unusual susceptibilities of mentally retarded defendants in the police interrogation context. Washington, a black man with an IQ of 69, was convicted of the rape and capital murder of Rebecca Lynn Williams largely based on his confession; the Supreme Court of Virginia affirmed the conviction on direct appeal.[69] The district court denied Washington's federal habeas *Strickland v. Washington*[70] ineffective assistance of counsel claim based on his attorney's failure to introduce exculpatory forensic evidence, but the Fourth Circuit Court of Appeals remanded.[71] The district court on remand again found that Washington had not received ineffective assistance of counsel and the Court of Appeals affirmed, holding that although counsel had

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[60] Ellis & Luckasson, *supra* note 4, at 451-52; *President's Panel on Mental Retardation, Report of the Task Force on Law* 33 (1963).

[61] *See Washington*, 228 Va. 535, 323 S.E.2d 577 (defendant with IQ of 69 but prior experience in dealing with the criminal justice system was found to have knowingly, intelligently, and voluntarily waived his rights); *Correll*, 232 Va. at 464, 352 S.E.2d at 357 (defendant with IQ of 68 found to have made a knowing and intelligent waiver of his rights based on a number of prior dealings with the police and *Miranda* warnings).

[62] *Simpson*, 227 Va. at 564, 318 S.E.2d at 390 (defendant with an IQ of 78 but with "too much street sense to confess to something he had not done" was capable of understanding his rights and intelligently waiving them).

[63] *See also United States v. Glover*, 596 F.2d 857, 866 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979) (waiver valid because of defendant's prior experience with police even though his IQ of 67 was in bottom one percentile of society), further illustrating that courts grossly misconstrue the relevance of "street sense" to confessions of the mentally retarded.

[64] *Fairchild*, 744 F. Supp. at 1435-49 (testimony of Dr. Ruth Luckasson).

[65] *Id.*

[66] *See Terrell*, 12 Va. App. at 292, 403 S.E.2d at 391 (concluding that confession of defendant with IQ of 71-75 was admissible despite deceptive remarks by police since the police remarks were not such to cause an innocent person to falsely confess). *See also Simpson*, 227 Va. at 564, 318 S.E.2d at 390 (finding confession of defendant with IQ of 78 admissible because he had "too much street sense to confess to something he had not done").

[67] *See* discussion of *Washington infra,* and case summary of *Washington*, Capital Defense Digest, this issue, pointing out that Earl Washington likewise confessed to other crimes which the police determined he could not have committed.

[68] 4 F.3d 1285 (4th Cir. 1993). *See also* case summary of *Washington*, Capital Defense Digest, this issue. Also note that the governor has since commuted Earl Washington's sentence to life in prison based on exculpatory DNA evidence.

[69] *Washington*, 228 Va. 535, 323 S.E.2d 577, *cert. denied*, 471 U.S. 1111.

[70] 466 U.S. 668 (1984) (establishing a two-prong standard of review of ineffective assistance of counsel claims with a performance prong considering "whether counsel's assistance was reasonable considering all the circumstances" and a prejudice prong measuring whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.")

[71] *Washington v. Murray (Washington I)*, 952 F.2d 1472 (4th Cir. 1991).

failed the performance prong of the *Strickland* ineffective assistance of counsel test, the defendant had failed to show the requisite degree of prejudice caused by the failure.[72] Washington's confession was instrumental in the court's determination that "the prosecution still had a strong case" had the forensic evidence been introduced and, therefore, the prejudice prong was not met.[73] Despite numerous discrepancies in Washington's confession, the Court of Appeals affirmed the state court's decision in a pretrial suppression hearing that Washington had knowingly, intelligently, and voluntarily waived his *Miranda* rights before making the confession.[74]

The unusual susceptibilities of a mentally retarded defendant are illustrated by Washington's confession which occurred over a two day period and was in response to specific questions and suggestions (later reduced to written form), rather than as a volunteered narrative.[75] Washington's confession contained numerous original factual errors including the race of the victim, the injury inflicted, the absence of any others at the crime scene (two children were present), and the location of the victim's apartment—all later corrected by further questions and suggestions.[76] Washington also confessed to other crimes which the police determined he could not have committed, illustrating the special dangers surrounding mentally retarded individuals' tendencies to confess to crimes they did not commit. The Court of Appeals nevertheless relied on the confessions as the main basis of affirmance despite expert medical testimony, offered at state habeas, that Washington's psychological state was such that he was highly suggestible, "easily led," and that "out of his need to please and his relative incapacity to determine what is socially and personally appropriate, he relies on cues given by others and reflexive affability."[77]

Washington's case illustrates the courts' unfamiliarity with mental retardation and the continued confusion between it and mental illness. Moreover, it emphasizes the need to get a mental retardation expert involved in the preparation of the case early. At Washington's pretrial hearing to suppress the confession, the court found that he had the capacity to make a knowing and intelligent waiver of his rights based on his two previous encounters with the criminal justice system and *Miranda* as a juvenile.[78] This reliance on Washington's repetitive exposure to warnings contradicts established knowledge that while repetitive exposure to warnings could teach a mentally retarded individual a familiarity with the litany, repetitive exposure in a person who has mental retardation is **not** going to create understanding. Furthermore, at trial the Commonwealth's expert testified that Washington had the "capacity to appreciate the nature, character and consequences of his acts and the difference between right and wrong," obviously confusing the test for insanity with that for retardation.[79]

IX. CONCLUSION

The unique characteristics of mental retardation make it hard to identify. Therefore, one's own interaction with a client often is not a reliable indicator. It is always a good policy to test a defendant, especially when certain indicators are present such as school records which show consistently deficient IQ test performance, poor grades, recommendations for special education, repeated grades, and a general trend of failure. Attorneys can also rely on information from family and friends who have a wide range of experience with the defendant over a long period of time and are better able to measure his abilities.

Once mental retardation is suspected, an expert qualified in mental retardation is crucial. Given the courts' lack of familiarity and confusion regarding the distinctions between mental retardation and mental illness, special measures should be taken to ensure that the expert appointed is one qualified in mental retardation. Although a defendant is not entitled to an expert of his choice under *Ake* nor under 3:1, attorneys may provide the court with a list of qualified mental retardation experts to assist in appointing a qualified expert and stress to the court the critical nature of acquiring the right kind expert assistance.

Expert assistance is especially valuable in the effort to convince the court that the special susceptibilities of the mentally retarded make them particularly vulnerable to both intentionally coercive police tactics and inadvertent interrogation techniques. In this effort, experts are used to illustrate the characteristics of the mentally retarded that challenge both the voluntariness and the reliability of a confession. These include his desire to please authority and acquiesce to authority figures; his denial of disability and the well-developed mechanisms the mentally retarded use to disguise their disability or "pass"; and the tendency of the mentally retarded to confess to crimes they did not commit.

Finally, attorneys should be ready to confront the Virginia courts' willingness to accept the repeated exposure or "street smarts" fallacy regarding a mentally retarded individual's ability to understand his rights after repeated exposure. The permanence of mental retardation as a limitation of ability that cannot be cured must be stressed to courts. The most effective method to use in persuading the courts is the testimony of qualified mental retardation experts emphasizing to the courts that while repeated exposure may improve familiarity it does **not** create understanding. The injustice of cases like that of Earl Washington dictates that attorneys and the courts make a greater effort to understand the legal implications of mental retardation, especially with regard to to the capital defendant.

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[72] *Washington v. Murray (Washington II)*, 4 F.3d 1285 (4th Cir. 1993).

[73] *Id.* at 1290. The court concluded that even had the forensic evidence been introduced, the prosecution had a strong case based solely on Washington's confession and with his admitted ownership of a shirt linked to the crime scene. However, although Washington admitted ownership of the shirt, laboratory reports showed that hairs in the shirt were consistent with the hair of James Pendleton, the original suspect. *See Washington I*, 952 F.2d at 1478-79 for a full discussion of the contradictory evidence surrounding the shirt.

[74] *Washington II*, 4 F.3d at 1290.

[75] *Washington I*, 952 F.2d at 1478 n.5. *See also supra* note 23, discussing the dangers of suggestive questions.

[76] *Washington I*, 952 F. 2d at 1478 n.5.

[77] *Id.*

[78] *Washington*, 228 Va. at 546, 323 S.E.2d at 584, *cert. denied*, 471 U.S. 1111.

[79] *Id.* at 546, 323 S.E.2d at 585.