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Effective Capital Representation of the Mentally Retarded Defendant

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I. Introduction

Since 1976, when the United States Supreme Court reinstated the death penalty, thirty-five men known to be mentally retarded have been executed in the United States.[1] Both opponents of capital punishment and members of the disability community hoped that the 1989 United States Supreme Court decision in *Penry v. Lynaugh*[2] would make sweeping changes in policies governing the execution of the mentally retarded.[3] Thus, it was somewhat unexpected when the Court made relatively minor clarifications and few substantive changes to existing law regarding the execution of individuals with mental retardation.[4] Nevertheless, the changes that were made did make a difference, particularly the ruling that jurors must consider mental retardation as a mitigating factor when deciding whether to impose the death penalty.[5] However, the Court, reasoning that it is up to a jury to decide which evidence should be considered as mitigation, did not

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* J.D. Candidate, May 2001, Washington & Lee University School of Law; B.A., St. Louis University. Thank you Swami for all the blessings you have granted me, especially Venkat, my family and my friends. Thank you also to Professor Roger Groot and all the members of the Virginia Capital Case Clearinghouse.

1. *See Death Penalty Information Center, Mental Retardation and the Death Penalty* (visited Jan. 20, 2001) <http:// www.deathpenaltyinfo.org>.

2. 492 U.S. 302 (1989).

3. *See* Penry v. Lynaugh, 492 U.S. 302 (1989). *See generally* EMILY F. REED, THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION (1993).

4. *See Penry*, 492 U.S. at 304-05 (holding that while mental retardation must be given full consideration as mitigating evidence, the execution of mentally retarded capital defendants was not unconstitutional). In a surprising move however, the Supreme Court recently granted certiorari in a North Carolina case to consider whether executing mentally retarded criminals violates the Constitution and thus, whether *Penry* should be reversed. *See* Charles Lane, *High Court to Review Executing Retarded, Decision May Reflect Changes in State Laws on Mentally Disabled*, WASH. POST, Mar. 27, 2001, at A01, *available in* 2001 WL 17616018.

5. *See Penry* 492 U.S. at 322-23 (requiring that the jury must be able to "consider and give effect to" the defendant's mitigating evidence of organic brain damage, moderate retardation, and disadvantaged background).

issue any guidelines.[6] Recently, the Court again granted certiorari in Penry's case, but it remains to be seen whether such guidelines will be provided.[7] The issue on appeal in this case ("*Penry II*") is the constitutionality of the mitigating circumstances instructions given during the penalty phase of Penry's second trial.[8] Regardless of the decision in *Penry II*, it remains crucial for defense lawyers to educate themselves, the courts, and most importantly, juries about the impact of mental retardation upon the defendant. This is particularly important in Virginia, one of the twenty-five states that still permit the execution of the mentally retarded.[9]

The defense of mentally retarded clients presents unique challenges both for defense attorneys and for the criminal justice system. Among these challenges is learning to recognize and understand mental retardation and communicating this information to judges and juries. Many inmates on death row were not identified as intellectually impaired until after they were sentenced to death because of their counsels' failure to identify the defendants' mental retardation.[10] Mental retardation is often not explored as a mitigating factor because lawyers either do not discover that their defendants are seriously disabled or they do not realize that early identification of a defendant's mental retardation may be crucial to the disposition of the

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6. *Id.* at 315, 319 (commenting that the relief Penry sought did not impose a new obligation on the State and reaffirming the constitutional mandate of an individualized assessment of the appropriateness of the death penalty); *see* Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (stating that the "state may not by statute preclude the sentencer from considering any mitigating factor [and] neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (concluding that the juror can consider any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a mitigating factor).

7. *See* Penry v. Johnson, 215 F.3d 504 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3353 (U.S. Nov. 27, 2000) (No. 00-6677).

8. *See generally* Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since* Penry *and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996) (providing an in-depth analysis on how the Supreme Court may come down in its second look at Penry's case).

9. *Id.* at 114 (discussing successful legislative attempts in 13 states to prohibit the execution of the mentally retarded since the decision in *Penry*, Virginia not being one of them).

10. *See* Dennis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENT. & PHYS. DIS. L. REP. 529, 530 (1998) (outlining some of the reasons why counsel may ignore the possible existence of mental retardation, for example, the fact that defendants may try to hide their disabilities and that lawyers may assume that retardation is an "obvious disability," which can be detected quickly and easily); ROBERT PERSKE, UNEQUAL JUSTICE?: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 17, 41 (1991) (listing reasons why some defense counsel may think their defendant is not retarded, for example, "he doesn't drool . . . he can drive a car . . . I asked him and his family and they all denied it").

case.[11] In order to address the issue of mental retardation competently and effectively, defense counsel must understand the wide range of mental health issues relevant to capital cases, recognize and identify the multitude of symptoms that the defendant may exhibit, and determine how the client's mental retardation may have influenced his behavior at the time of the alleged offense. The defense lawyer's understanding of the implications of a defendant's mental retardation on both the defendant and the alleged crime is crucial to ensure that the defendant gets fair and adequate representation.[12]

This article will explore the definitional considerations, characteristics, and concerns related to the representation of mentally retarded criminal defendants. Essential procedures, including the gathering of documentation and preparation of experts, will also be addressed. Finally, this article will provide suggestions for lawyers on how to present mitigation evidence in order to educate courts and juries about the effects of mental retardation on the entire case – from the commission of the crime through arrest, interrogation, trial, and sentencing.

II. Mental Retardation Defined

To represent a mentally retarded defendant adequately, counsel and other members of the defense team must become students of mental health issues.[13] This includes understanding the elements and effects of mental

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11. *See* Keyes et al., *supra* note 10, at 530.

12. Defense counsel should also be aware that in recent cases courts have found trial counsel ineffective for failing to investigate and present evidence about the defendant's mental retardation. *See, e.g.*, Rompilla v. Horn, No. CIV.A.99-737, 2000 WL 964750, *14 (E.D. Pa. July 11, 2000) (determining that defendant was entitled to habeas corpus relief on his claim that trial counsel was ineffective for failing to inquire into and present evidence about defendant's alcoholism, mental retardation, cognitive impairments, and organic brain damage); Valdez v. Johnson, 93 F. Supp. 2d 769, 787 (S.D. Tex. 1999) (finding trial counsel ineffective for failing to conduct a reasonable investigation into Valdez's background and failing to present evidence of Valdez's childhood history of physical and emotional abuse, borderline intelligence, impaired judgment, and poor social skills); Rondon v. Indiana, 711 N.E.2d 506, 522 (Ind. 1999) (reversing defendant's sentence because he received ineffective assistance of counsel at the penalty phase of his trial, based on trial counsel's failure to present mitigating evidence of his background, childhood, and mental health); *see also* Williams v. Taylor, 120 S. Ct. 1495, 1504 (2000) (holding that the Supreme Court of Virginia misinterpreted an amendment to the Antiterrorism and Effective Death Penalty Act when it incorrectly ruled that a capital murder defendant with mental disabilities who did not show that trial counsel's deficient performance had prejudiced him could not obtain habeas corpus relief on his ineffective assistance claims); Jeremy P. White, Case Note, 13 CAP. DEF. J.123 (2000) (analyzing Williams v. Taylor, 120 S.Ct. 1495 (2000)).

13. Excellent starting places in Virginia are local Community Services Boards (CSBs). Addresses and contact information can be found at the web site for the Virginia Department

retardation and amassing a new vocabulary which will allow them to present complicated medical and psychological issues in a comprehensible manner to the judge and jury.

Both courts and legislatures have generally accepted the definition of retardation put forth by the American Association on Mental Retardation ("AAMR"). The AAMR defines mental retardation as having three elements:

> (1) Significantly subaverage intellectual functioning (measured by a valid, individually administered Intelligent Quotient (IQ) test);
> (2) Existing, concurrent related limitations in at least two of the ten adaptive skill areas (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work); and
> (3) manifestation of the disability must occur during the developmental period - defined at between conception and the person's eighteenth birthday.[14]

A. Intelligence

"Significantly subaverage intellectual functioning" refers to intellectual functioning at or below approximately the third percentile of the general population.[15] The AAMR definitions note that deficits in adaptive skills support a diagnosis of mental retardation in individuals whose Intelligent Quotient (IQ) scores fall between seventy and seventy-five.[16] Mental retardation is generally classified into the following four categories: mild, moder-

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of Mental Health, Mental Retardation and Substance Abuse Services which can be found at <http://www.dmhmrsas.state.va.us/CSB/CSBlist.htm>. The Virginia Capital Case Clearinghouse also has contact information for the Virginia CSBs. Other helpful organizations are the ARC of Virginia <http://www.arcofva.org> and the Disability Resources Monthly, Regional Resources Directory <http://www.disabilityresources.org/VIRGINIA.html>.

14. *See generally* AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (9th ed. 1992) ("AAMR") (defining and categorizing mental retardation and mentally retarded individuals). The American Psychiatric Association's Diagnostic and Statistical Manual also uses a similar definition employing the same three components. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS - FOURTH EDITION ("DSM-IV") (American Psychiatric Association ed., 1994).

15. AAMR, *supra* note 14, at 5.

16. *Id.* The average IQ for the overall population is 100 and more than 97 percent of the population score above 70. *Id.* at 36.

ate, severe, and profound.[17] Mildly retarded individuals have IQ scores ranging between fifty-five to seventy.[18] The mildly retarded are generally capable of functioning at minimal self-support levels and progressing to about a sixth-grade educational level.[19] Approximately eighty-nine percent of all mentally retarded individuals are mildly retarded.[20] Moderately retarded individuals, having IQ scores ranging from forty to fifty-five, generally have great difficulty dealing with social conventions and usually are not capable of progressing beyond the third-grade educational level.[21] Severely retarded individuals, having IQ scores of twenty to forty, comprise only four percent of all mentally retarded individuals and are characterized by poor motor development and severely limited speech.[22] Despite these categories, it should be emphasized (especially because most criminal defendants with mental retardation fall into the mildly retarded category) that mental retardation at all levels is a serious disability that affects every dimension of a person's life.[23]

B. Adaptive Skills

The IQ score is not the sole indicator of mental retardation. Adaptive ability and coping skills must be significantly below average as well. A low IQ score without deficits in adaptive functioning is generally not defined as mental retardation.[24] Adaptive behavior is defined as "significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and standardized scales."[25] This element of mental retardation requires

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17. *Id.* at 14.

18. *Id.*

19. *Id.*

20. John H. Blume, *Representing the Mentally Retarded Defendant in a Capital Trial*, 150 PLI/CRIM. 507, 510 (1989) (discussing the need to have an expert explain that the mildly mentally retarded individual is still substantially disabled but does not have as severe a handicap as does one who is moderately or severely retarded).

21. AAMR, *supra* note 14.

22. *Id.*

23. *See* Fairchild v. Lockhart, 744 F. Supp. 1429, 1435-49 (E.D. Ark. 1989) (relating the testimony of Dr. Ruth Luckasson describing the background, experiences and conduct of the defendant in light of his mental retardation).

24. AAMR, *supra* note 14, at 14.

25. *Id.* at 6. It is important for defense lawyers to remember that their defendants need to have limitations in only two areas of adaptive behavior skills, not all ten. *See id.* at 38-41.

a showing that the intellectual deficit has had a practical effect on the individual's day to day life.[26]

C. *Age of Onset*

The third element, the age of onset of mental retardation, has received conflicting attention from experts. Some have argued that it is an arbitrary requirement because the criminal justice system generally concerns itself with the manifestations and consequences of an individual's handicap and not the date of its origin.[27] Other experts have argued that age of onset is an essential part of the definition, because in addition to intellectual development, a child develops emotionally, socially, morally, and psychologically.[28] Critical developmental periods and related milestones are not completed and the impact of the disability is compounded. "The child is developing a sense of self [and] when a central disability such as a severe intellectual impairment occurs during development, the entire developmental period is negatively affected . . . Personality is affected, self-confidence undermined, social skills and moral reasoning are limited and failures typically are abundant."[29] Proof of this element may also serve to dispel the myth that mental retardation may be feigned by an adult criminal defendant. For this reason, if the defendant is over the age of eighteen at the time of the evaluation, as is usually the case, defense counsel must present evidence to show that a cognitive disability existed prior to the age of eighteen.

D. *Mental Retardation and Mental Illness Distinguished*

The frequent confusion between mental retardation and mental illness results in unfortunate consequences for the criminal defendant. Mental retardation is a developmental disorder that is usually permanent, whereas mental illness does not affect a person's ability to learn and often occurs in a temporary or cyclical fashion.[30] Thus, while an insane person may eventually be cured, the mentally retarded person can never be relieved of his

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26. *Id.* at 15.

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

28. *See generally* Dennis W. Keyes et al., *Mental Retardation and the Death Penalty: Current Status of Exempt Legislation*, 21 MENT. & PHYS. DIS. L. REP. 687 (1997).

29. Keyes et al., *supra* note 10, at 531.

30. *See* Salvador C. Uy, *From the Ashes of* Penry v. Lynaugh*: The Diminished Intent Approach to the Trial and Sentencing of the Mentally Retarded Offender*, 21 COLUM. HUM. RTS. L. REV. 565, 578 (1990) (discussing the differences in the duration between symptoms of retardation and mental illness).

retardation even though his abilities may improve.[31] Additionally, mental retardation and mental illness call for very different treatments. The mentally retarded receive training on how to cope with daily challenges in order to improve adaptive behavior and self-sufficiency, while the mentally ill receive psychotherapy, psychotropic drugs, or a combination of the two.[32] The importance of making this distinction is highlighted by the criminal justice system's failure to understand that the treatment for the mentally ill will do nothing to help a mentally retarded individual unless the individual also suffers from some sort of mental illness.[33] Moreover, mental illness arises from biological disturbances that impair thought processes, but do not necessarily cause low-level intelligence.[34] Mental retardation, on the other hand, does reflect the individual's low intelligence and may result in his inability to control his thoughts and actions regardless of treatment.[35] Although the conditions are dissimilar, the incidence of mental illness among retarded people is estimated to be quite high, between twenty and sixty-four percent.[36] The 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 he can stand trial, the defendant may be declared "sane," but his mental retardation will remain unaffected. This situation is particularly harmful to the defendant because a recorded, official determination of sanity will be available to the prosecutor. However, the retardation may not have been detected, let alone mentioned, in the medical evaluation because most psychiatrists are not trained in areas involving mental retardation.[37]

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31. *See* Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 122 (1990) (comparing and contrasting insanity with mental retardation).

32. *See* Uy, *supra* note 30, at 579 (distinguishing the treatment of mental retardation from that of a mental illness); Donald H. J. Hermann, et al., *Sentencing of the Mentally Retarded Criminal Defendant*, 41 ARK. L. REV. 765, 773 (1988) (stating that unlike mental illness, mental retardation is not responsive to psychotherapy or other psychiatric therapies).

33. Ellis & Luckasson, *supra* note 27, at 424 (stating that the legal rules which focus upon the prospect of curing the mentally ill may not appropriately address the condition of retarded people).

34. Mary D. Bicknell, *Constitutional Law: The Eighth Amendment Does Not Prohibit the Execution of Mentally Retarded Convicts*, 43 OKLA. L. REV. 357, 361 (1990).

35. *Id.* at 362.

36. *See* Ellis & Luckasson, *supra* note 27, at 425 (citing FRANK MENOLASCINO, CHALLENGES IN MENTAL RETARDATION: PROGRESSIVE IDEOLOGY AND SERVICES 126-27 (1977)).

37. *Id.* at 485-86 (asserting that not all experts can effectively assess and detect mental retardation).

E. Understanding the Causes of Mental Retardation

Defense counsel need only establish the existence of mental retardation in the defendant, not the cause,[38] and in many cases of mental retardation a cause cannot be clearly established.[39] However, being aware of the major causes and symptoms of mental retardation can aid counsel in determining the defendant's mental health. Furthermore, if the cause or common symptoms can be readily ascertained, both expert and lay testimony can assist the defense in presenting evidence of mental retardation to the jury.

Defense counsel should first examine the medical records of defendant's parents, especially those of defendant's mother during pregnancy. Medical records may indicate the presence of various birth traumas such as Anoxia, which can cause mental retardation.[40] Anoxia may result when the umbilical cord becomes entangled around the fetus's neck and may also occur later in childhood and adolescence due to choking episodes, near drownings, and use of inhalants.[41] Also vital to the determination of mental health is whether the defendant's mother was exposed to any neurotoxins such as alcohol, drugs, pesticides, lead, or chemical waste during her childbearing years. This is because drugs or alcohol ingested during pregnancy may introduce neurotoxins that cause Fetal Alcohol Syndrome ("FAS") or the partial syndrome, Fetal Alcohol Effects ("FAE"), in the child.[42] FAS is the leading known cause of mental retardation and awareness of its various symptoms can assist one in detecting mental retardation.[43] Most of the

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38. Keyes et al., *supra* note 10, at 534.

39. *See* Donna K. Daily et al., *Identification and Evaluation of Mental Retardation*, AMERICAN FAMILY PHYSICIAN, Feb. 2000 (visited Jan. 20, 2001) <http://www.aafp.org/afp/20000215/1059.html>.

40. Keyes et al., *supra* note 10, at 535.

41. *Id.*

42. *See generally* K. STRARRON ET AL., FETAL ALCOHOL SYNDROME, DIAGNOSIS, EPIDEMOLOGY, PREVENTION, AND TREATMENT (1996). FAE is used to describe the effects on individuals exposed to alcohol in the womb but who exhibit only some of the attributes of FAS and do not fulfill the diagnostic criteria for FAS. *Id.*

43. *See Alcohol and Other Drug-Related Birth Defects, Definitions and Symptoms* (visited Jan. 20, 2001) <http://www.come-over.to/FAS/NCADDfacts.htm>. The symptoms include

> retarded growth, physical defects and deformities, mental retardation, and other abnormalities of brain functioning and behavior. In severe cases, facial deformities are apparent at birth or in early childhood: small eyes, drooping eyelids, a short, upturned nose with a low bridge, flat cheeks, a thin upper lip, low-set ears, a receding chin, a bulging forehead, and an unusually large space between the nose and the mouth. Children with FAS are short and thin, with unusually small heads. They grow slowly and their appetite is poor. Many also have malformed hearts, kidneys, and urinary tracts, poor muscle tone or joint articulation, abnormal curvature of the spine, limited hip motion, undescended testicles,

physical characteristics associated with FAS become less prominent after puberty but the intellectual problems endure and behavioral, emotional, and social problems often become more pronounced with age.[44] Defense counsel should review old medical records and question family members, neighbors, or classmates to determine whether any physical characteristics were evident during childhood. If possible, old photographs should also be located and reviewed.

Genetic disorders such as Down's Syndrome and Fragile X Syndrome may be also indicative of mental retardation.[45] The most common conditions associated with Down's Syndrome include a flat facial profile, small ears, in-curving fifth fingers, thyroid dysfunction, and developmental delay.[46] Symptoms that accompany Fragile X Syndrome include enlarged testicles after puberty, hyper extensible fingers, autistic-like behavior, and excessive clumsiness.[47] A blood test should be conducted if a genetic disorder is suspected.

There are several potential post-natal causes of mental retardation, including but not limited to the following: convulsions and seizures; injuries to the head due to accidents or abuse; whooping cough; measles; chicken pox; and meningitis and encephalitis, which can damage portions of the brain.[48] Lead and mercury poisoning, among other environmental toxins, have been known to cause mental disabilities.[49]

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undeveloped fingerprints, and other physical defects.

The Harvard Mental Health Letter (visited Jan. 20, 2001) <http://www.mentalhealth.com/mag1/p5h-fas1.html>.

44. Alcohol and Other Drug-Related Birth Defects, *supra* note 43. *See generally* A. STREISSGUTH & J. KANTER, THE CHALLENGE OF FETAL ALCOHOL SYNDROME: OVERCOMING SECONDARY DISABILITIES (1997).

45. *See Genetic Causes of Mental Retardation, Can A Person's Genes Cause Mental Retardation?* (visited Jan. 20, 2001) <http://www.thearc.org/faqs/causeq&a.html>.

46. *See* Daily et al., *supra* note 39.

47. *Id.*

48. *See Introduction to Mental Retardation, What are the Causes of Mental Retardation?* (visited Jan. 20 2001) <http://www.thearc.org/faqs/mrqa.html>; Keyes et al., *supra* note 10, at 535. *See generally* THOMAS L. BENNETT, THE NEUROPSYCHOLOGY OF EPILEPSY (1992). For example, Johnny Penry's mental retardation is thought to have been exacerbated by the vicious, relentless beatings he endured at the hands of his mother. *See* Human Rights Watch, *Supreme Court Blocks Texas Execution* (visited Jan. 25, 2001) <http://www.hrw.org/campaigns/deathpenalty>. If defendant has suffered a head injury or if a head injury is suspected, defense counsel should consult sources such as headinjury.com, found at <http://www.headinjury.com>, for more information.

49. *See generally* S. PUESCHEL ET AL., LEAD POISONING IN CHILDHOOD (1996).

Research has also suggested that children in poor families may become mentally retarded because of inadequate medical care, malnutrition, and environmental health hazards.[50] Also, children in economically disadvantaged areas may be deprived of many common cultural and day-to-day experiences provided to other youngsters. This under-stimulation can result in irreversible damage and may serve to exacerbate mental retardation.[51]

III. Behavioral Characteristics of Mental Retardation and the Barriers These Create for the Defendant

Mentally retarded persons, like any other group of individuals, vary enormously in talent, aptitude, personality, achievement, and temperament.[52] Any attempt to describe the mentally retarded as a group risks creating an assumption that all mentally retarded individuals possess the same attributes and mannerisms.[53] However, some characteristics occur with sufficient frequency to merit close attention by defense counsel when identifying and documenting the existence of mental retardation. The mentally retarded individual faces a host of problems in his everyday life that a non-retarded person does not. His intellectual limitations often affect his ability to cope with the ordinary challenges of day-to-day living in the community.[54] Defense counsel must be aware of defendant's impaired communication skills, attention and memory deficits, learning disorders, and limited moral development when working with the defendant during various stages of the capital case. Furthermore, several of these traits may

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50. *See generally* M. Feldman & N. Walton-Allen, *Effects of Maternal Mental Retardation and Poverty on Intellectual, Academic and Behavioral Status of School-Age Children*, 101 AM. J. MENTAL RETARDATION 352 (1997); J. Rojahn et al., *Biological and Environmental Risk for Poor Developmental Outcome of Young Children*, 97 AM. J. MENTAL RETARDATION 702 (1993). Defense counsel should employ creative means in locating information that may indicate the presence of mental retardation. Neighborhood anecdotes or family stories may provide information absent from medical records and internet sites may provide information on the presence of harmful toxins in the defendant's environment. *See, e.g., The United States Environmental Protection Agency* (visited Feb. 20, 2001) <http://www.epa.gov>.

51. *See generally* J. Lawrence Aber et al., *The Impact of Poverty on the Mental Health and Development of Very Young Children, in* HANDBOOK OF INFANT MENTAL HEALTH 113 (Charles H. Zeanah, Jr. ed., 2d ed. 2000).

52. *See* Penry v. Lynaugh, 492 U.S. 302, 308 (1989) (noting that although mentally retarded individuals share some common characteristics, they exhibit varying degrees of mental deficiency); Michael S. Sorgen, *The Classification Process and its Consequences*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 215 (Michael Kindred et al. eds., 1973) (arguing that mentally retarded individuals are diverse).

53. Ellis and Luckasson, *supra* note 27, at 427 (cautioning against the stereotyping of mentally retarded individuals).

54. AAMR, *supra* note 14, at 13.

impose serious disadvantages upon the defendant and therefore must be highlighted by counsel throughout the trial in order to educate the jury and court on the implications they can create.

A. Communication

Mentally retarded individuals often have limited communication, socialization, and functional skills.[55] It would not be unusual, therefore, for a mentally retarded individual to be unresponsive to questions or to provide garbled and confused responses when questioned. Even when the mentally retarded person's language and communication abilities appear to be normal, defense counsel should give extra attention to determine whether the answers are reliable. When faced with coercive situations, mentally retarded persons often feel compelled to answer, even when the questions are beyond their abilities.[56] Many people with mental retardation are predisposed to answering in the affirmative the questions they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited.[57] For example, "yes-no" questions and choosing among pictures are easier to answer than "either-or" questions or open-ended questions.[58]

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55. Keyes et al., *supra* note 10, at 532.

56. *See* Paul T. Hourihan, *Earl Washington's Confessions: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1493 (1995) (stating that the mentally retarded are often "particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation").

57. This is known as "biased responding." *See* Silvia Linda Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, CAP. DEF. DIG., Spring 1994, at 28 (outlining how characteristics of mental retardation operate within the interrogation context to produce unjust results). *See generally* Richard J. 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); Budd, Sigelman & Sigelman, *Exploring the Outer Limits of Response Bias*, 14 SOCIOLOGICAL FOCUS 297 (1981).

58. Sigelman, Winer & Schoenrock, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTALLY RETARDED 120, 123 (1982) (suggesting that choosing among a set of questions or pictures may lead the mentally retarded defendant to the correct or desired answer). In *Washington v. Commonwealth*, the court regarded a series of "yes sir" responses as clear indications of the defendant's understanding. *See* Washington v. Commonwealth, 323 S.E.2d 577, 585 (Va. 1984). A better approach is illustrated by the attitude and awareness of the North Carolina Supreme Court in *State v. Moore*. *See* State v. Moore, 364 S.E.2d 648, 652-56 (N.C. 1988). Because its analysis was informed by an improved understanding of mental retardation, the court in *Moore* found that a series of "Yes, sir" answers by a mentally retarded individual did not mean the same thing as when spoken by a person of normal intelligence. *Id.* at 652-56. Similarly, the United States Court of Appeals for the Fourth Circuit, hearing Washington's habeas petition, noted the importance of Washington's "highly suggestible, easily led" condition. Washington v. Murray, 952 F.2d

Although the yes-no questions are easiest for a retarded person to answer, the validity of the answer is suspect given the nature of response bias.[59] *Yeatts v. Commonwealth*,[60] illustrates the dangers of "yes-no" questions. In that case, the defendant, who had an IQ of seventy and a mental age of twelve or thirteen, was asked in his fourth interview with police whether he "killed the woman," to which he replied, "[n]o I didn't . . . I mean yeah, I did."[61] The form in which the question is asked and the individual conducting the questioning can also directly affect the likelihood of receiving a biased response.[62] Police officers, judges, lawyers, and other authority figures may intentionally or inadvertently cause the susceptible mentally retarded defendant to answer in an inaccurate manner by questioning him in a particular way. Thus, by virtue of their cognitive limitations, mentally retarded individuals tend to be more suggestible and vulnerable to the pressure that interrogating police officers can be expected to exert in their efforts to obtain confessions.[63]

A significant number of retarded people are also unable to understand the vocabulary of the *Miranda* waiver and lack the cognitive ability to grasp its underlying concepts.[64] Because few mentally retarded individuals possess the reasoning ability to discern what information has legal significance and what the consequences of a particular decision may be,[65] an "intelligent

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1472, 1478 n.5 (4th Cir. 1991) (internal quotation marks omitted). *See generally* Simpson, *supra* note 57.

59. For example, in *Washington*, the record reflects that the officers deliberately phrased their questions to elicit the answers they wanted. *Washington*, 323 S.E.2d at 582; *see* Hourihan, *supra* note 56, at 1501 n.225 (recounting a passage from Washington's interrogation); PERSKE, *supra* note 10, at 44 (1991) (citing examples of how answers can be unwittingly mandated by the way the interrogator poses the questions).

60. 410 S.E.2d 254 (Va. 1991).

61. *Yeatts v. Commonwealth*, 410 S.E.2d 254, 259 (Va. 1991) (internal quotation marks omitted).

62. *See* Bing, *supra* note 8, at 387; Bicknell, *supra* note 34, at 362.

63. *See* PERSKE, *supra* note 10, at 15-16 (describing the mentally retarded individual's desire to seek the approval of perceived authority figures).

64. Ellis & Luckasson, *supra* note 27, at 448. This is particularly true of those retarded individuals who have lived isolated from the community and therefore have little information about the workings of the criminal justice system. *Id.* at 450. *See generally* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that any statement resulting from the custodial interrogation of an individual would be presumed involuntary and inadmissible unless the suspect was first provided with warnings by the police).

65. *See* Richard J. Bonnie, *The Competency of Defendants With Mental Retardation to Assist in Their Own Defense, in* THE CRIMINAL SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS 97, 108 (Ronald W. Conley, et al. eds. 1992); Henry v. Dees, 658 F.2d 406, 411 (5th Cir. 1981) (mentally retarded defendant did not separately and independ-

waiver" by a mentally retarded person is simply an oxymoron.[66] For most retarded offenders, the recitation of the *Miranda* card by the law officer is a meaningless exercise. For example, Earl Washington's case amply demonstrated not only that the defendant was unable to understand the written waiver form, but also that he lacked the ability to understand the concept of a waiver, regardless of how many times it was read to him.[67] Unfortunately, many courts are likely to decide that retarded defendants have waived procedural rights when in fact, the defendants never understood those rights.[68]

B. Impulsivity and Attention

Mentally retarded individuals often have problems involving attention span, focus, and selectivity and are described as impulsive or as having poor impulse control.[69] Deficits in attention and impulse control can have important implications at nearly all stages of the criminal justice system from the commission of the offense through the post-sentencing phase. For example, the mentally retarded person may accompany perpetrators or actually commit the crime on impulse without weighing the consequences of the act.[70] When stopped by the police, he might be unable to focus on the alleged crime or appreciate the gravity of his arrest.[71] During trial

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ently waive his constitutional rights because it was unlikely that he understood the complex waivers and their consequences); People v. Bruce, 62 A.2d 1073, 1074 (N.Y. App. Div. 1978) (recounting testimony of a special education teacher that the defendant, who had an IQ of 59, "had a vocabulary of the approximate level of a 10-year-old, and would have difficulty understanding the entire warning form").

66. Ellis & Luckasson, *supra* note 27, at 447 n.176.

67. *See* Hourihan, *supra* note 56, at 1497 (providing an excerpt of Washington's testimony indicating that he did not understand the meaning and implications of the waiver form that he had signed).

68. *See* Colorado v. Connelly, 479 U.S. 157, 170-71 (1986) (holding that defendant must prove police coercion to establish that the waiver of his Miranda rights was invalid); Starr v. Lockhart, 23 F.3d 1280, 1294 (8th Cir. 1994) (holding that retarded defendant's waiver of Miranda rights was valid); Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995) (holding that a defendant's mental retardation did not prevent him from voluntarily waiving his Miranda rights); State v. Stewart, 633 So.2d 925, 929-31 (La. Ct. App. 1994) (finding that evidence supported conclusion that defendant's confession was voluntary, even though he had brain damage, an IQ of 63, and the educational performance level of a third grader); *see also* PERSKE, *supra* note 10, at 21 (citing example where defendant thought Miranda warning was a type of routine speech and did not attach any significance to it).

69. *See* AAMR, *supra* note 14.

70. *See* discussion *infra* Part III.C.

71. *See* PERSKE, *supra* note 10, at 20 (describing the flawed judgment Penry demon-

preparation, the individual would likely be similarly ineffective at focusing on the relevant aspects of the incident or attending to the task of assisting counsel.[72] Mentally retarded individuals also have a significantly limited ability to learn and may not be able to understand more complex levels of planning and strategy formation in order to understand the mechanics of a legal defense.[73] Further, their short and long term memories are often impaired.[74] This is particularly true of events that the individual had not identified as important.[75] Thus, mentally retarded individuals may be unable to determine which information may have legal significance for their cases and be unable to supply counsel with relevant mitigation information. If testifying, the defendants may appear to steer away from certain lines of testimony or may appear obstinate when in fact their attention disability prevents them from responding appropriately.[76]

C. Moral Development

A mentally retarded individual may have incomplete or immature concepts of blameworthiness and causation and may be unable to distinguish between an incident which results from blameworthy behavior and one which results from a situation that is beyond his control.[77] For example, a retarded defendant may plead guilty to a crime that he did not commit because he believes that blame should be assigned to someone and he is unable to understand the concept of causation and his role in the incident.[78] Similarly, some mentally retarded people will eagerly assume blame in an attempt to curry favor with an accuser in a phenomenon known as "cheating to lose."[79] In fact, mentally retarded individuals often become "sidekicks" for the actual perpetrators. On some occasions, defendants with

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strated by using words such as "chicks" and "boogied" when questioned by the police).

72. Bing, *supra* note 8, at 387.

73. Keyes et al., *supra* note 10, at 531.

74. *Id.*

75. *See* Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 550 (1998) (stating that mentally retarded inmates are often unable to recall details and unable to communicate a complex chain of events). *See generally* Luftig and Johnson, *Identification and Recall of Structurally Important Units in Prose by Mentally Retarded Learners*, 86 AM. J. MENTAL DEFICIENCY 495 (1982).

76. *See* Robert L. Hyman, Jr., *Beyond* Penry*: The Remedial Use of the Mentally Retarded Label in Death Penalty Sentencing*, 59 UMKC L. REV. 17, 46 (1990) (stating that the testimony of mentally retarded individuals is apt to be inarticulate and imprecise).

77. Simpson, *supra* note 57, at 30.

78. Suzanne Lusting, *Searching For Equal Justice: Criminal Defendants with Mental Retardation*, N. J. LAW., July 1995, at 32.

79. *See generally* Simpson, *supra* note 57.

mental retardation may have been coerced into aiding with the criminal activity, or may have joined in the activity willingly in order to appear to be part of the gang.[80] When such events occur, co-defendants, hoping to reduce their sentences in a plea agreement, may identify the mentally retarded defendant as the instigator or the trigger man, knowing that he will be less able to defend his actions adequately.

For example, at Walter Correll's capital murder trial, his lawyers did not offer evidence of Correll's estimated IQ level of sixty-eight, which was well within the range of mental disability.[81] Even though his lawyer was aware of a previous head injury and a trauma sustained at birth, no neurological testing was performed to determine whether Correll had brain damage.[82] In addition, Correll's co-defendants testified against him at trial, fingering Correll as the ringleader and actual murderer.[83] Correll was executed on the fourth of January, 1996.[84]

Similarly, at Fred Buchanan's capital murder trial, jurors believed the defendant's testimony that his brother, William James, actually killed the victim and prevented Fred from taking steps to help her.[85] Jurors found Fred Buchanan not guilty of capital murder, robbery, and arson.[86] They were apparently swayed by expert testimony that the defendant, who had an IQ of fifty-three, would be unable to maintain a made-up story.[87]

D. Denial of Disability and Appearance

Many mentally retarded individuals will go to great lengths to hide their disability and will overrate their own skills, either out of a genuine misunderstanding of their own abilities or out of defensiveness about their handicap.[88] Defense counsel should not be surprised if a mentally retarded person brags about how tough he is or how he outsmarted a victim, when

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80. *See* PERSKE, *supra* note 10, at 18 (describing a mentally retarded individual's longing to have friends).

81. *See id.* at 59-60 (recounting Walter Correll's capital murder trial). *See generally* Correll v. Commonwealth, 352 S.E.2d 352 (Va. 1987).

82. *See* PERSKE, *supra* note 10, at 59.

83. *See Correll*, 352 S.E.2d at 355; PERSKE, *supra* note 10, at 59.

84. *See Death Penalty Information Center*, *supra* note 1.

85. Kathy Loan, *Man Acquitted in Slaying, Defendant Cleared in Robbery Murder*, ROANOKE TIMES & WORLD NEWS, Feb. 2, 1995, at A1, *available in* 1995 WL 2619834.

86. *Id.*

87. *Id.*

88. *See* Ringness, *Self-concept of Children of Low, Average and High Intelligence*, 65 AM. J. MENTAL DEFICIENCY 453, 453 (1961).

in fact neither is the case. Overrating is probably closely tied to desperate attempts to reject the stigma of mental retardation.[89] Many mentally retarded individuals expend considerable energy attempting to avoid this stigma.[90] This "masking" may mislead jurors, attorneys, and even mental health professionals.[91] In a similar vein, some mentally retarded people make ill-advised and damaging attempts to enhance their status or deny their disability in the courtroom. For example, Gayland Bradford appeared for his capital murder trial with the outline of a lightning bolt shaved into his sideburns, seemingly announcing to the jury that he was "one dangerous dude."[92] Similarly, in *Tyars v. Finner*,[93] the retarded defendant began to punch the air and yell "pow pow" when he heard the incriminating testimony during the involuntary commitment proceedings on his alleged aggressiveness.[94] The individuals with mental retardation who end up in court usually do not have the stereotypical physical or behavioral characteristics associated with mental retardation and may not meet society's expectations that people with mental retardation look obviously different, slovenly, and odd.[95] These are characteristics commonly found among people with severe retardation, who are often "weeded out" of the criminal justice system.[96] Furthermore, many mentally retarded individuals do not identify themselves as disabled when arrested or at any point during the criminal proceedings.[97] Thus, it is crucial for defense counsel and mental health

89. *See generally* J. DUDLEY, LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED (1983).

90. *See* R. EDGERTON, THE CLOAK OF COMPETENCE, STIGMA IN THE LIVES OF THE MENTALLY RETARDED 217-18 (1967) (commenting that mentally retarded individuals "are often surprisingly clever in their techniques of passing [as normal and] struggle to maintain their self-esteem by hiding their incompetence").

91. *Id.*

92. *See* PERSKE, *supra* note 10, at 20 (recounting examples of the impaired judgment exhibited by the mentally retarded defendant). *See generally* Bradford v. State, 873 S.W.2d 15 (Tex. Crim. App. 1993).

93. 709 F.2d 1274 (9th Cir. 1983).

94. Tyars v. Finner, 709 F.2d 1274, 1277 (9th Cir. 1983).

95. *See generally* EDGERTON, *supra* note 90.

96. For example, Roger Lee Vann was arrested and charged with murder after allegedly beating his 81-year-old father to death. However, in what was called a rare decision, Vann, who had a fifth-grade education and an IQ of 55, was judged incompetent to stand trial and returned to his home in Suffolk, Virginia. Vann fell between the "gaps in the system" because he was found to be mentally retarded and he could not comprehend the charges against him. Yet he could not be committed to a psychiatric hospital because he was not mentally ill. *See* Susie Stoughton, *Retarded Man Freed From Behind Bars*, ROANOKE TIMES & WORLD NEWS, Apr. 29, 1997, at A1, *available in* 1997 WL 7296716.

97. Ellis & Luckasson, *supra* note 27, at 431.

experts to educate juries about the full spectrum of mental retardation, despite the defendant's outward appearance.

IV. Developing a Theory of Mitigation

Evidence of the defendant's mental retardation must not be relegated to mitigation evidence in the penalty phase. In order to provide an adequate defense and a cohesive presentation of the mental retardation issue, every step in the proceedings must be analyzed and portrayed in the light of the defendant's mental retardation. Presenting evidence of mental retardation as early as possible during the trial is known as "front loading" and this technique allows defense counsel to influence the tone of the proceedings and acquaint the jury with the theory of the defense.[98] Front loading the mitigation evidence requires defense counsel to develop a thorough social and medical history of the defendant's mental retardation and incorporate this information into the case strategy and presentation. This process can only be conducted with a team of multi-disciplinary experts and an exhaustive record search and compilation.[99]

A. Use of Experts

The use of a multi-disciplinary team of experts is critical to the defense of mentally retarded capital defendants. This is especially important given the characteristics of mental retardation, the frequent confusion between mental illness and mental retardation, and the fact that most defendants with mental retardation will fall into the category of the mildly mentally retarded. It should be stressed that the experts selected by defense counsel must have experience and training with the mentally retarded and must be able to explain mental retardation to a jury and judge.[100] Defense counsel should always contact a mitigation or mental health expert to determine the existence of mental retardation and complete a social-medical history before requesting the assistance of a psychologist or psychiatrist.[101] Excessive reliance is often placed on psychiatrists and psychologists to assess and

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98. *See* John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION, Nov. 2000, at 67 (describing the importance and process of front loading mitigation in capital cases).

99. *See The Importance of Early and Comprehensive Mitigation Investigations* (visited Jan. 28, 2001) <http://www.nlada.org/p-caprep.htm>.

100. Blume, *supra* note 20, at 511.

101. *See* John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE, Aug. 1995 (visited Jan. 25, 2001) <http://dpa.state.ky.us/~rwheeler/blume/blume.htm>.

evaluate the abilities and weaknesses of a mentally retarded defendant.[102] However, ordinary psychiatrists and most psychologists are not trained in areas involving mental retardation and courts frequently fail to make the distinction between these experts.[103] Affidavits and testimony as to the critical nature of a thorough mental health evaluation must be presented to the court when requesting funds for experts.[104] Being adamant about the need for specialized social history assistance in cases in which the defendant's cultural or ethnic background may impair counsel's ability to obtain accurate and complete information is also important.[105] It is also recommended that the experts must have previously testified in, or had experience with, capital cases. Expert assistance is important both before and during the trial. The mitigation expert is invaluable when evaluating the defendant's background and documenting the existence of mental retardation through interviews and assessments of personal records. Speech, language and memory impairments, physical and motor disabilities, IQ examinations and other tests require a professional evaluation and assessment by various mental health experts.

Defense counsel should work closely with experts to portray to the jury and the court the extent of the defendant's disability and limitations. Experts should discuss the effects that mental retardation has on behavior and decision-making, explain the vulnerable and suggestible nature of a mentally retarded individual, and educate juries about the full spectrum of mental retardation, irrespective of the defendant's appearance or demeanor. It is very important for defense counsel to help "mental health experts state their findings in plain, comprehensible language and common sense terms used by the average person."[106] Defense counsel should also note that jurors, as a general rule, tend to be skeptical of expert witnesses unless other information is presented that supports the expert's opinion.[107] Thus the testimony of lay witnesses, such as defendant's family, friends, teachers or neighbors, should always be presented to augment the testimony of experts. When testimony regarding the defendant's mental retardation is presented from various sources, defense counsel must interlock the testimonies and other relevant evidence to achieve a comprehensible presentation of the mental retardation issue.

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102. *Id.*

103. Keyes, *supra* note 10, at 535.

104. Blume & Leonard, *supra* note 98, at 67.

105. Blume, *supra* note 101.

106. Blume & Leonard, *supra* note 98, at 70.

107. *See generally* Scott Sundby, *The Jury as a Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997).

1. Acquiring an Expert Under Ake

In *Ake v. Oklahoma*,[108] the Supreme Court held that when an indigent defendant's sanity may 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.[109] Under *Ake*, the defendant must show that his mental condition is likely to be a significant factor at trial, that an expert is necessary for his defense, and that the trial will be unfair without expert assistance.[110] "The rationale of *Ake* has been extended beyond cases wherein sanity is at issue."[111]

While no court has explicitly formulated a checklist of what must be included in an *Ake* motion, the defendant must be able to make a detailed and persuasive showing that an expert is necessary and that without one, the defendant will not receive a fair trial. Courts consider numerous factors such as the type of expert, his or her qualifications, fees of the expert and reasonableness of that cost, the objective and subjective bases for the request, the legal necessity, and the inadequacy of the available state experts.[112] Thus, supporting information should be provided for all of these factors.

Seeking an *Ake* expert has several advantages. The attorney is forced to develop a theory of mitigation almost as a condition of receiving appointment of an expert. Once the expert has been appointed, he or she operates as a "defense consultant," assisting in the preparation and presentation of the defendant's case. This is particularly valuable given the variety of unique challenges inherent in building a defense for a mentally retarded defendant. Additionally, unlike section 19.2-264.3:1 of the Virginia Code,[113] the defendant is not subject to reciprocal examination by the Commonwealth's expert under *Ake*.[114] Neither section 19.2-264.3:1 nor *Ake*, however, gives

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108. 470 U.S. 68 (1985).

109. Ake v. Oklahoma, 470 U.S. 68, 74 (1985).

110. *Id.* at 82-83.

111. Helen L. Konrad, *Getting the Most and Giving the Least From Virginia's Mental Mitigation Expert Statute*, CAP. DEF. DIG., Spring 1991, at 22.

112. *See Blume*, *supra* note 101.

113. VA. CODE ANN. § 19.2-264.3:1 (Michie 2000) (discussing expert assistance when defendant's mental condition is relevant to capital sentencing).

114. *See* VA. CODE ANN. § 19.2-264.3:1(D) (Michie 2000) (requiring the defendant to give the Commonwealth the report and results of any evaluation of defendant's mental condition).

the defendant the right to appointment of an expert of his own choosing, or even to receive the funds to do so.[115]

2. Acquiring an Expert under Virginia Code Section 19.2-264.3:1

Unlike the detailed showing required by *Ake*, the Virginia statutory requirements are much less stringent. To acquire an expert under section 19.2-264.3:1 of the Virginia Code, a defendant merely has to show that (1) he is charged with or convicted of capital murder, and (2) he is indigent.[116] Virginia statutory law may be used to acquire more than one expert. Section 19.2-264.3:1 of the Virginia Code states that "the court shall appoint one or more qualified mental health experts."[117] Under this alternative, an attorney can initially request an expert who specializes in diagnosing mental retardation to conduct the research, intelligence tests, and evaluations needed to determine whether the defendant suffers from mental retardation. Once this is established, another motion must be made for an expert to assist in the preparation of a defense and to testify at trial. However, the major disadvantage of obtaining an expert under this section is the potential for exposing the defense mitigation theory in pretrial discovery because of the requirement that all reports of defendant's mental condition must be given to the Commonwealth.[118] 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.[119] 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.[120]

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115. *See Ake*, 470 U.S. at 83 (stating the indigent defendant does not have a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own); VA. CODE ANN. § 19.2-264.3:1(A) (Michie 2000) (stating that the defendant shall not be entitled to a mental health expert of his own choosing or to funds to employ such an expert).

116. § 19.2-264.3:1(A).

117. *Id.*

118. § 19.2-264.3:1(D).

119. The statute has guarantees purporting to prohibit or limit the use of any information derived from defendant's statements. VA. CODE ANN. § 19.2-264.3:1(G) (Michie 2000); *see also* U.S. CONST. amend. V.

120. *See* Elizabeth A. Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, CAP. DEF. DIG., Spring 1989, at 24 (arguing that a defendant might 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 that the statute itself prohibits use of the defendant's statements and limits the Commonwealth's expert); U.S. CONST. amends. VI, VIII, XIV.

Although section 19.2-264:3:1 does not grant defense counsel an expert of his choice, the statute does clearly contemplate assistance to a particular defendant regarding his history, character, or mental condition.[121] In the case of suspected mental retardation only an expert qualified in mental retardation can provide this assistance. However, defense counsel must be aware that in *Vinson v. Commonwealth*,[122] the Supreme Court of Virginia seemed to promulgate a different standard for non-psychiatric experts by requiring that the defendant proffer his own expert or forfeit assistance all together.[123] In *Vinson*, the trial court denied defense's motion for an expert because counsel had not located and proffered the expert within a day's time of making the motion.[124] The Supreme Court of Virginia upheld the decision and asserted that implicit in the trial court's ruling was the determination that Vinson had failed to make the required showing of need.[125] The court also found that the defendant had a sufficient amount of time to search for an expert witness and that the trial court was not required to conduct its own search.[126]

This decision raises two concerns. First, the ruling seems to indicate that the failure to locate an expert witness is equivalent to a failure to demonstrate the required showing of need. Second, the court's decision appears to place the burden upon defendant to proffer a particular expert and contrasts with the statutory requirements for obtaining a mental health expert. This is obviously a more onerous requirement than that of section 19.2-264.3:1 inasmuch as the onus for securing an expert is on the defendant and not the court. With this in mind, defense counsel should be sure to move for non-psychiatric experts at the earliest opportunity. Such a motion should meticulously outline why the issue for which assistance is requested is significant to the preparation of the defense. The motion should also illustrate specifically how the defendant will be prejudiced in the absence of such assistance. It is important to detail exactly why expert assistance is material to the case, as the Supreme Court of Virginia has made it clear that

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121. *See* § 19.2-264.3:1(A).

122. 522 S.E.2d 170 (Va. 1999).

123. Vinson v. Commonwealth, 522 S.E.2d 170, 175-76 (Va. 1999); *see* Latanya R. White, Case Note, 12 CAP. DEF. J. 443, 446 (2000) (analyzing Vinson v. Commonwealth, 522 S.E.2d 170 (Va. 1999)).

124. Vinson, 522 S.E.2d at 175-76.

125. *Id.* (citing Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996) (holding that an indigent defendant seeking appointment of an expert witness must show that the expert assistance is material to his defense and that lack of such assistance will result in prejudice to the defendant)).

126. *Id.*

a generalized request amounting to a "mere suspicion or hope that favorable evidence will be available" is not sufficient to prevail upon a motion for expert assistance.[127] In addition, counsel should have an expert lined up at the time the motion is filed in order to avoid having the motion denied for failure to proffer an expert in a timely manner.

B. Documenting the Existence of Mental Retardation in the Defendant

As discussed above, it is essential that a complete investigation of the client's social and medical history be done prior to selection of experts to perform various medical examinations and mental health evaluations. Mitigation investigation for a mentally retarded defendant is inevitably a multi-generational inquiry aimed at identifying the genetic dispositions, medical conditions, and social and environmental influences which molded the defendant's life and defined the choices he made.[128] This involves seeking out almost every person who has ever known the defendant and searching for every document that chronicles his life. It also means developing a relationship of trust with the defendant. Initial time with the defendant should not be devoted solely to substantive issues, but also to understanding the nature and extent of his disabilities and how these contribute both to his personal development and to the alleged offense.[129]

1. Interviews

One of the safest ways to communicate with mental retarded individuals is to use clear and simple words in open-ended questions.[130] If possible, defense counsel should have a social worker[131] or an individual with whom the defendant is comfortable to assist him in interpreting the questions and also to ensure that the defendant understands the process. Defense counsel must conduct several interviews with the defendant over a period of time to better understand the individual effect of his mental retardation. It is also

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127. Husske v. Commonwealth, 476 S.E.2d 920, 925-26 (Va. 1999)

128. Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan. 1999 (visited Jan. 28, 2001) <http://209.70.38.3/public.nsf/championarticles/99jan04>.

129. National Legal Aid and Defender Association, *The Importance of Early and Comprehensive Mitigation Investigations* (visited Jan. 29, 2001) <http://www.nlada.org/caprep/ja97/p-mitig.htm>.

130. *See* discussion *supra* Part III.A.

131. Experts in mental health mitigation highly recommend using a qualified social worker both during pre-trial investigations and as an expert witness to assess the accumulated risk factors that contributed to defendant's frailties. *See* Blume & Leonard, *supra* note 98, at 69.

important to keep in mind that the institutional structure and regularity of jail may have an exacerbating effect upon the mentally retarded defendant.[132]

Interviewing family members will also provide insight into the daily functioning of the defendant. However, it is important to keep in mind that family and friends may tend to minimize or deny the mental retardation because of the stigma that attaches to retardation.[133] Interviews with social workers, teachers, special educational teachers, agency caseworkers, school psychologists, counselors, probation officers, ministers, principals and other related educational or social personnel can help formulate and document the defendant's functional limitations, including such areas of adaptive behavior as self-care, social skills, and community standing.[134] Information on possible child abuse may also be gleaned from such interviews. Defense counsel should also request that these individuals testify at trial using actual memories and anecdotes of the defendant's intellectual and adaptive limitations so that the jury will get a picture of the defendant that is both broad and richly detailed.

2. *Documentation*

A key element in social history investigation is the collection of reliable, objective documentation about the defendant and his family.[135] This investigation is exhaustive but "is not complete until the information uncovered becomes redundant and provides no new insight."[136] The search for records should encompass medical, academic, employment, and criminal records.

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132. Blume & Leonard, *supra* note 98, at 64. In an unfamiliar setting, defendants may be even more vulnerable and suggestible than usual and can also find themselves wanting to talk to anyone they can find. Thus, defense counsel must be even more vigilant against the prevalent danger of the jailhouse snitch. If possible, counsel should obtain a court order for defendant to be placed in some form of isolation.

133. National Legal Aid and Defender Association, *supra* note 129.

134. Keyes et al., *supra* note 10, at 533.

135. There are a number of problems to overcome when obtaining records. For instance, some of the necessary records will date back over generations and require a tenacious search. Other records may be located out of state and will require sifting through a bureaucratic system in order to obtain and copy them. To facilitate the record gathering process, counsel should use "broad authorizations for release of confidential information signed by the defendant, parents, siblings, and caretakers." Stetler, *supra* note 128. Detailed records of the defendant's immediate and extended family also must be obtained to explore the prevalence of mental retardation in the family.

136. National Legal Aid and Defender Association, *supra* note 129 (citing Lee Norton, *Capital Cases: Mitigation Investigations*, THE CHAMPION, May 1992, at 44).

a. Medical Records

Records of the defendant's childhood injuries and diseases should be thoroughly researched and investigated. Medical records may have documented conditions that could be related to mental retardation, such as seizures, developmental disorders, or episodic vomiting.[137] Medical records are also useful as the physical characteristics of FAS are most prominent in childhood and early adolescence. This category includes birth records and certificates of the defendant and his siblings, family medical records, psychiatric and psychological records of defendant and his extended family, and his family's drug and alcohol history, especially those of the defendant's mother during her pregnancy.[138] The defense team must also search the medical records of defendant's extended family members, such as aunts and uncles, to determine whether or not they were sterilized during the Virginia eugenics movement.[139] If so, their mental retardation can be traced through the family tree to the defendant.

b. Academic Records

Academic records should include transcripts of grades, retentions, promotions, teacher comments, and attendance records. School records of the defendant's siblings must also be obtained. Contacting defendant's teachers may provide additional information.[140] If the defendant received special education, he will probably have psycho-educational reports in his files.[141] All scores and data on the defendant's childhood academic capabilities and social functioning should be obtained. While these reports are usually found in school records, family members or school authorities may recall other, independent psychological or educational evaluations.

c. Employment Records

Defendant's employment records, including evaluations, job assignment, and pay scale should be reviewed carefully for any evidence of prob-

137. *See* Donna K. Daily et al., *Identification and Evaluation of Mental Retardation*, AMERICAN FAMILY PHYSICIAN, Feb. 2000 (visited Jan. 20, 2001) <http://www.aafp.org/afp/20000215/1059.html>.

138. National Legal Aid and Defender Association, *supra* note 129.

139. *See generally* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH. L. & POL'Y 1 (1996).

140. *See* Blume, *supra* note 20, at 510 (relating the testimony of a teacher who gave defendant a passing grade in writing even though defendant was not able to write his own name).

141. The Education for All Handicapped Children's Act mandates careful documentation of special education services, thus records for younger defendants will likely exist at the school district's record offices, or at the State Department of Education. *See* The Education for All Handicapped Children's Act, 20 U.S.C. § 1400 (1975).

lems related to adaptive behavioral functioning.[142] Any history of terminations should be closely examined to find the reason for the dismissal because it may indicate that defendant is unable to pay attention to and follow instructions.

d. Criminal Records

Defense counsel should investigate the defendant's criminal history and should review all relevant reports. This includes corrections records, parole records, juvenile placement, and any jail or prison sentences.[143] Relevant co-defendant records should also be obtained if possible in order to determine with whom defendant keeps company and their roles in previous offenses. The defense team should also review all typed, written, or recorded confessions or statements with the utmost scrutiny.[144]

C. Presenting the Evidence to the Jury

Once defense counsel has collected the necessary information, he should integrate relevant portions of the evidence into *every* aspect of the trial. Evidence of mental retardation "that comes as a surprise to jurors will be seen as a last ditch effort . . . to avoid the consequences of the crime."[145] It is crucial to avoid sharp distinctions between the guilt and sentencing phases of the trial.[146] Defense counsel should use the voir dire process and opening statements to educate the jurors about defendant's mental retardation and the effects of this disability. Voir dire must also be used to explore jurors' attitudes towards mental retardation. Prospective jurors who are not willing to give meaningful consideration to mental retardation as a mitigating factor should be disqualified from sitting on the jury.[147] Throughout the trial, defense counsel should clearly and systematically establish how mental retardation affected all the aspects of the case, events leading up to the crime itself, the investigation, arrest and even how the defendant appears in the courtroom.[148] Thus, when jurors hear from experts that, for example, defendant was not able to understand the *Miranda* warnings, or was susceptible to police coercion, or could not have masterminded a complex crime,

142. National Legal Aid and Defender Association, *supra* note 129.
143. *Id.*
144. *See* discussion *supra* Part III.A.
145. Blume & Leonard, *supra* note 98, at 67.
146. *Id.*
147. *Id.* at 68 (citing Morgan v. Illinois, 504 U.S. 719 (1992)).
148. Keyes et. al., *supra* note 10, at 535.

they will have been exposed previously to the underlying concepts of the testimony.[149]

If a guilty verdict is returned, defense counsel must ensure that evidence of mental retardation is not presented in a manner attempting to excuse the crime. Expert and lay testimony in the sentencing phase must portray "a disability which inspires compassion, but neither justification nor excuse for the capital crime."[150] Experts must also explain in common sense, persuasive, and concrete terms how the world looks to a mentally retarded individual.[151] The evidence must be integrated to show how the various factors of mental retardation came together to bring the defendant to the point of committing the murder. Research has shown that when jurors are convinced that a defendant had significant mental limitations and was acting under an extreme mental condition or emotional disturbance, they are more inclined to show mercy and recommend a life sentence.[152] The use of chronologies or time-lines is highly recommended as an effective way of showing how defendant's mental retardation has affected him throughout his life.[153] When statutory aggravating circumstances are put forward by the Commonwealth, defense counsel must present evidence of the defendant's mental retardation to recast motive and intent and to assert defendant's humanity.[154] Rebuttal of prior offenses must also be consistent with the theme of mental retardation. When left unexplained, defendant's prior convictions serve as evidence of future dangerousness; thus, defense counsel must rebut testimony of prior convictions and unadjudicated acts by demonstrating how the characteristics of defendant's mental retardation influenced the earlier offenses.[155] By maintaining a consistent theme of mitigation throughout the trial and using skill and creativity, defense counsel can

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149. *Id.* This is particularly important in light of *Pritchett v. Commonwealth*, in which the Court of Appeals of Virginia held that the trial court did not abuse its discretion in excluding expert testimony that concluded that the mildly retarded defendant was highly susceptible to his interrogators and probably "just went along with what they said." Pritchett v. Commonwealth, No. 1430-99-3, 2000 WL 1808506, at *4-5 (Va. Ct. App. Dec. 12, 2000).

150. Russell Stetler, *Mental Disabilities and Mitigation*, THE CHAMPION, Apr. 1999 (visited Jan. 30 2001) <http://209.70.38.3/public.nsf/ChampionArticles/99apr10>.

151. *See* Blume, *supra* note 101.

152. *See generally* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998).

153. National Legal Aid and Defender Association, *supra* note 129.

154. *See* Blume & Leonard, *supra* note 98, at 68 (recounting a trial in which defense counsel demonstrated that the victim's aggressive response to the defendant's demand for money resulted from a panicked response conditioned by years of childhood abuse).

155. *Id.*

successfully make mental retardation a reality for the jury so that they can understand its devastating and disastrous effects on the defendant.

V. Conclusion

People with mental retardation, whether guilty or innocent of the crimes of which they are accused, are shockingly defenseless when involved with the criminal justice system. The difficulties that they face are exacerbated by misunderstandings about the nature and effects of mental retardation. The legal community has the responsibility to educate itself on how the capacity of persons with mental retardation to "reason, understand moral issues, . . . make decisions and . . . protect their own legal rights"[156] is undermined and limited by their retardation. In a capital case, defense counsel must always explore the possibility that the defendant may be mentally retarded. This article has addressed how defense counsel can determine if the defendant is mentally retarded and incorporate the disabling nature of mental retardation into the case strategy and presentation. The task involves an exhaustive process, but is critical to ensure that the mentally retarded defendant receives the best possible defense against the death sentence.

156. Peter Appleborne, *2 States Grapple With Issue of Executing Retarded Men*, N.Y. TIMES, July 13, 1989, at § 1.