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## Improving the Handling of Mentally Retarded Defendants in the Criminal Justice System

Jacqueline Gonzales

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# IMPROVING THE HANDLING OF MENTALLY RETARDED DEFENDANTS IN THE CRIMINAL JUSTICE SYSTEM

*By Jacqueline Gonzales*

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## I. INTRODUCTION

Suppose you have a seven-year-old son and he has a six-year-old friend. One day while your son is outside playing, he decides to use the restroom behind the house instead of going inside to the bathroom. While your son is taking care of his business, his friend comes over and touches your son's private parts. Your son and his friend begin to experiment and perform sexual acts on one another. That is when you decide to go outside and check on the children only to find them behind the house performing these acts. You share what happened with the other child's mother and have a little talk with the children warning them about what they did. You, subsequently, write it off to their youth and a lack of understanding of the severity of their actions. But the other child's mother is very upset, and she decides to file charges against your son for sexual assault and indecency with a

child. The police come to your house and arrest your son. While in custody, your son tells the police everything that happened—essentially confessing. He is later brought to trial and sentenced to 100 years imprisonment.

Now ask yourself the following question: if your child was not really a seven-year-old, but rather an adult with the mental capacity of a seven-year-old, could you justify treating him or her as an adult and subjecting him or her to our current justice system simply because of his or her actual age?

This Comment has four substantive sections beginning with a brief introduction about mental retardation. It will address how previous courts have handled mentally retarded defendants and identify emerging trends regarding the execution and punishment of mentally retarded individuals. This Author will then propose changes to the current system for handling mentally retarded defendants including: specialized training for judicial officers and special processing from booking and beyond. Followed by a brief discussion on the costs of implementation, how this system will help, and how the proposed system is different from the current system in place. Establishing a separate court system and minimum standards for the handling of mentally retarded individuals will give them the specialized care they need and result in the most effective punishment.

## II. MENTAL RETARDATION 101

Because persons with mental retardation do not have the same mental capacity as their actual age, the mentally retarded should not be treated as adults in the criminal justice system. Mental Retardation, a developmental disability, ranges from mild to profound. The IQ for an average person is 100,<sup>1</sup> while the IQ range for mentally retarded individuals is between zero and sixty-nine.<sup>2</sup>

When dealing with Mental Retardation, there are four categories or levels of severity: mild, moderate, severe, and profound.<sup>3</sup> Mild mentally retarded people have an IQ range between fifty-two and sixty-nine.<sup>4</sup> They can usually learn up to the sixth-grade level by their late teens and can usually achieve enough social and vocational skills to be self-sufficient in normal daily activities.<sup>5</sup> However, mild mental retardation usually results in an IQ that is equivalent to a third grader and

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1. Audiblox, *IQ Test Scores: The Basics of IQ Score Interpretation*, LEARNING INFO, <http://iq-test.learninginfo.org/iq04.htm> (last visited Aug. 29, 2010).

2. Stephen Brian Sulkes, *Mental Retardation/Intellectual Disability*, MERCK, available at <http://www.merck.com/mmhe/sec23/ch285/ch285a.html> (last modified Oct. 2006).

3. *Id.*

4. *Id.*

5. *Id.*

constitutes a substantial disability.<sup>6</sup> Moderate mental retardation has an IQ range of thirty-six to fifty-one. At this level, the individual's ability to learn higher than elementary-level schoolwork is restricted, but the individual may be able to achieve some self-support by performing unskilled or semiskilled work under limited supervision.<sup>7</sup> Severely mentally retarded individuals have an IQ between twenty and thirty-five, can talk or learn how to communicate, can learn simple health habits, and may be able to partially contribute to self-support under complete supervision.<sup>8</sup> Profound mental retardation has an IQ of nineteen or below. The individual has extreme cognitive limitations and some motor coordination, but very limited self-care, usually requiring continuous nursing care.<sup>9</sup>

Mental retardation affects approximately 3% of the total population<sup>10</sup> and 4–10% of the overall prison population.<sup>11</sup> People with mental retardation struggle in life to do simple daily activities, namely: communicate; live at home or on their own; take care of themselves; make decisions; participate in leisure, social, school, and work activities; and maintain personal hygiene and safety.<sup>12</sup> There are two widely accepted definitions of mental retardation offered by the American Association of Mental Retardation (AAMR) and the American Psychiatric Association (APA). AAMR defines mental retardation as follows:

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 skills 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.<sup>13</sup>

The APA has a similar definition of mental retardation, but it breaks the definition into three criteria:

- A) significantly subaverage general intellectual functioning;
- B) accompanied by significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety;

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6. Deborah Fitzgerald Fowler et al., *Opening the Door: Justice for Defendants with Mental Retardation*, TEX. APPLESEED 8 (2005), [http://www.texasappleseed.net/pdf/hbook\\_MR\\_attorney\\_Opening.pdf](http://www.texasappleseed.net/pdf/hbook_MR_attorney_Opening.pdf).

7. Sulkes, *supra* note 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. Fowler et al., *supra* note 6, at 11.

12. Sulkes, *supra* note 2.

13. *Atkins v. Virginia*, 536 U.S. 304, 309 n.9 (2002).

C) the onset of which must occur before age 18 years.<sup>14</sup>

As evidenced by diminished mental capacity and significantly low IQ levels, individuals with mental retardation require special attention and care, not only in their daily lives, but also within the criminal justice system because they cannot fully understand the ramifications of prosecution.

### III. BACKGROUND ON MENTAL CAPACITY

A number of arguments exist for not taking mental capacity into consideration in court proceedings. When determining competency to stand trial and sentencing, the Author has heard some people argue that mentally retarded individuals should be responsible for their actions if they are going to try and fit into society. In other words, if they are going to live normal lives in society, then they need to abide by society's rules. Others argue courts should not consider mental retardation because it is too easy for defendants to work the system by faking a disability.<sup>15</sup> Mental capacity is also not taken into account because mentally retarded defendants tend to use a "cloak of competency," which prevents the outside world from knowing about their disabilities.<sup>16</sup> In addition, mentally retarded individuals have a number of other character traits, which hide their disability from authoritative figures in the criminal justice system.<sup>17</sup> These character traits include basic life skills that the general population takes for granted, and which make persons with mental retardation vulnerable in the criminal justice system.<sup>18</sup> The following is a discussion of cases, which evidence the change in the criminal justice system toward persons with mental retardation, and a brief discussion of these character traits.

#### A. Case Examples Showing Prior and Current Treatment of Mentally Retarded Defendants

##### 1. *Texas v. Aaron Hart*

The Sixth Judicial District Court of Lamar County, Texas recently decided the case of *Texas v. Hart*.<sup>19</sup> This case involved sexual assault and indecency with a child. In fact, the hypothetical at the beginning

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14. *Id.*

15. Holly T. Sharp, Note, *Determining Mental Retardation in Capital Defendants: Using a Strict IQ Cut-off Number Will Allow the Execution of Many That Atkins Intended to Spare*, 12 JONES L. REV. 227, 245-46 (2008).

16. Fowler et al., *supra* note 6, at 12.

17. *See id.* at 11-12.

18. *See Mental Retardation and the Death Penalty*, ACLU (Sept. 4, 2003), <http://www.aclu.org/capital-punishment/mental-retardation-and-death-penalty> (stating that the stigma attached to mental retardation leads those with the disability to disguise it, even from lawyers, which can then lead to legally detrimental outcomes).

19. *State v. Hart*, No. 22924 (6th Dist. Ct., Lamar County, Tex. Feb. 11, 2009).

of this Comment is based on the facts of *Texas v. Hart*.<sup>20</sup> On the day the incident occurred, Hart went to a neighbor's house to mow the lawn; this was not the first time the victim's grandmother hired Hart to mow her yard.<sup>21</sup> When the victim, Timothy, got home from school, he went into the backyard to play and began following Hart around as he mowed.<sup>22</sup> When the grandmother came back from the restroom, Timothy was gone.<sup>23</sup> After checking by the back door she went outside to find him.<sup>24</sup> She then heard Hart and Timothy talking by the shed.<sup>25</sup> When she saw them, Timothy was sitting on the side of the shed next to Hart, who was allegedly trying to pull up his pants.<sup>26</sup> At this point, the grandmother took Timothy inside to talk to him.<sup>27</sup> Hart then walked in, asked if Timothy's father was going to be mad at him, and asked if he was in trouble.<sup>28</sup> To this she replied, "Get your lawn mower and go home."<sup>29</sup> Hart walked out the door; then Hart came right back in and asked if he could finish mowing.<sup>30</sup> She again told him to get his belongings and go home.<sup>31</sup> At this point, Hart got his belongings and went home; but, a short time later, Timothy came to his grandmother and said Hart was at his window.<sup>32</sup> When she looked, Hart was back in the yard mowing.<sup>33</sup>

When the police officer arrived at the grandmother's house, Timothy's stepmother said that the boy across the street had fondled Timothy.<sup>34</sup> When the officer spoke with Hart, Hart initially told him that Timothy pulled Hart's pants down.<sup>35</sup> On his way to the police station, Hart "kept saying he was sorry, he just wanted to go home, he didn't want to go to jail, and he wouldn't do it again."<sup>36</sup> Hart also told the officer he and the boy were using the restroom behind the shed. He said that Timothy pinched and touched his penis, and that, although he was playing, he told Timothy to "suck my dick," and Timothy did.<sup>37</sup> When Timothy was interviewed, and asked to describe

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20. *See id.*

21. Appellant's Brief at 7, *Hart v. State*, 314 S.W.3d 37 (Tex. App.—Texarkana 2010, no pet. h.) (No. 06-09-00049-CR).

22. *Id.* at 7–8.

23. *Id.* at 8.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* During the grandmother's testimony, she stated when Hart was outside Timothy's window he was just trying to finish mowing. *Id.*

34. *Id.* at 9.

35. *Id.*

36. *Id.*

37. *Id.*

Hart and the incident, he said Hart was a little boy and that Hart had been looking, kissing, and tasting his "wee-wee." Timothy also alleged that Hart pulled down his own pants so he could touch his "wee-wee" on Timothy's behind.<sup>38</sup>

Hart was eighteen years old at the time of trial, but had been diagnosed as mentally retarded, at the age of five, with an IQ between forty-eight and fifty.<sup>39</sup> Hart was in special education classes throughout his schooling, specifically in LIFE (Living in a Functional Environment) classes.<sup>40</sup> Hart's special education teacher stated he functioned below a first grade level, could not read and write or add and subtract, and could only understand very basic words in conversation.<sup>41</sup> Hart's father testified that Hart does not know how to count money, run bath water, shave, cook, clean his room, or know the difference between his left and right shoe.<sup>42</sup> In addition to these disabilities, Hart continues to play with toys made for five to six year olds, loves cartoons and carries a string in his pocket, which he talks to on a regular basis.<sup>43</sup>

During Hart's trial, his attorney Mr. Massar never informed the jury that Hart was mentally retarded; he instead stated Hart had a learning disability and took special classes in school.<sup>44</sup> Hart's trial attorney never brought in Hart's school records, his high school principal, or his special education teacher.<sup>45</sup> In fact, none of the characteristics this Author just discussed were brought up in court until a new trial hearing.<sup>46</sup>

Upon arrest, Hart made an incriminating statement to the police, and essentially waived his Miranda Rights without even knowing they existed.<sup>47</sup> He then proceeded to make a statement that he wanted to go home because he needed to go back to the neighbor's house to get paid for mowing the lawn.<sup>48</sup> At the new trial hearing, Mr. Massar conceded that he never spoke with the court appointed mental health expert about his findings regarding Hart, and that he simply saw this as a punishment case.<sup>49</sup> Because Mr. Massar took this stance, he was able to coach Hart into pleading guilty at his arraignment.<sup>50</sup> As a re-

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38. *Id.*

39. *Id.* at 4.

40. *Id.* at 4-5.

41. *Id.* at 5.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 5-6.

46. *Id.* at 5.

47. *See id.* at 48.

48. *Id.* at 18.

49. *Id.* at 21-22.

50. *See id.* at 7.

sult, Hart was convicted of sexual assault and indecency with a child, and was sentenced to 100 years to be served consecutively.<sup>51</sup>

On appeal, Hart's new attorney, Mr. Pearson, is primarily arguing ineffective assistance of counsel for:

failure to adequately investigate the case pre-trial given Hart's documented mental retardation; whether this documented mental retardation prevented him from knowingly and intelligently entering guilty pleas; for failure to investigate and seek mental health expert assistance to present this documented mental retardation as mitigation evidence that could be used to reduce his moral culpability; failure to seek mental health expert assistance to determine whether Hart was competent to stand trial; and failure to investigate and challenge the admissibility of Hart's confession based on the grounds that he did not understand and knowingly and voluntarily waived his Fifth Amendment right.<sup>52</sup>

This case was appealed and a new trial was granted. Hart is currently awaiting a new trial date. Hart, legally an adult, but mentally a first grade child, was incarcerated for twenty-two months before posting bond in July 2010.<sup>53</sup> Under the current system, Hart has been punished as an adult, although he is not mentally an adult, and cannot comprehend the severity of his actions.

## 2. *Garnett v. State*

*Garnett v. State* was decided in the Court of Appeals of Maryland in 1993.<sup>54</sup> This case involved Raymond Garnett and the victim, Erica.<sup>55</sup> Garnett was mentally retarded and had an IQ of fifty-two.<sup>56</sup> In late 1990, a friend introduced Garnett, age twenty, to Erica, age thirteen.<sup>57</sup> The two became friends and spoke to each other occasionally on the phone.<sup>58</sup> In February of 1991, Garnett went to Erica's house to borrow the phone so he could get a ride home.<sup>59</sup> It was about nine o'clock in the evening when Garnett arrived.<sup>60</sup> Erica let him in through her bedroom window.<sup>61</sup> Garnett testified she told him to get a ladder and climb up through her window.<sup>62</sup> The two stayed up talking, and later had sexual intercourse.<sup>63</sup> Garnett left early the next

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51. *Id.* at 1-2.

52. *Id.* at 2-4.

53. *Id.* at 5.

54. *See* *Garnett v. State*, 632 A.2d 797 (Md. 1993).

55. *Id.* at 798-99.

56. *Id.* at 798.

57. *Id.* at 798-99.

58. *Id.* at 799.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

morning.<sup>64</sup> In November 1991, Erica gave birth to a baby, and Garnett was the biological father.<sup>65</sup>

Garnett's school guidance counselor, Ms. Parker, "described him as a mildly retarded person who read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others socially at school at the level of someone eleven or twelve years of age."<sup>66</sup> She also said Garnett attended special education classes while in school and, after taunting by classmates, Garnett was home-schooled for a short period of time, because he was afraid to return.<sup>67</sup> Garnett did not understand when he was given job duties, he failed vocational assignments, and he sometimes lost his way to work.<sup>68</sup> Because Garnett was unable to pass Maryland's test for graduation from high school, he received a certificate of attendance instead of a high-school diploma.<sup>69</sup>

Garnett was eventually tried on one count of second-degree rape, which requires having sexual intercourse with a child under fourteen years of age, and there being more than a four-year age difference between the individuals.<sup>70</sup> Garnett's attorney presented evidence at trial that Erica and her friends told Garnett on a number of occasions that she was sixteen years old, and that he acted on that knowledge,<sup>71</sup> which would have quashed the charge.<sup>72</sup> However, the trial court explained that the evidence was immaterial because the law stated there simply had to be proof (1) of sexual intercourse, (2) that Erica was under the age of fourteen, and (3) that Garnett was four years older than her.<sup>73</sup> The law did not allow for a defense.<sup>74</sup> Garnett was convicted of the crime, sentenced to five years of probation, and ordered to pay restitution to Erica and her family.<sup>75</sup>

The defense asked the appellate court to either add a *mens rea* requirement to the statute or recognize an affirmative defense for mistake of victim's age when trying someone under this statute.<sup>76</sup> Garnett's attorney argued that due to his mental capacity, Garnett and Erica essentially functioned at the same level, and he was mentally an adolescent in an adult's body.<sup>77</sup> His attorney also argued that Garnett was not subject to the statute because of his belief that Erica

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64. *Id.*

65. *Id.*

66. *Id.* at 798.

67. *Id.*

68. *Id.* at 798-99.

69. *Id.* at 799.

70. *Id.*

71. *Id.*

72. *Id.* at 800.

73. *Id.* at 799.

74. *Id.*

75. *Id.*

76. *Id.* at 800.

77. *Id.*

was sixteen years old.<sup>78</sup> The act was voluntary because he only went into Erica's bedroom at her invitation; therefore, he would not have been charged with this crime had his actual age matched his mental age, twelve, because he too was under the age of fourteen and within four years of Erica's age.<sup>79</sup>

The opinion of the court addressed scholarly disagreement with the concept of strict criminal liability.<sup>80</sup> For example, professors and casebook authors, Wayne LaFare and Austin Scott, agree that punishing an individual without accounting for his or her state of mind does not reach the desired result and is unjust.<sup>81</sup> They specifically stated:

It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.<sup>82</sup>

The court also pointed out that the Model Penal Code had a minimum culpability requirement when an individual was charged with a strict criminal liability crime.<sup>83</sup> The Model Penal Code even stated that, in the case of strict criminal liability, there was not a defense of mistake or ignorance when the victim was below ten years old, but it allowed these defenses when the victim was over ten years old.<sup>84</sup> European law allowed for mistake of age as a defense to statutory rape.<sup>85</sup> At the time of the case, seven states allowed a mistake of age defense,<sup>86</sup> and the highest appellate courts of four states required an element of *mens rea* when dealing with a victim's age.<sup>87</sup> However, after consideration, the court of appeals affirmed the decision and said the legislature would have to amend the statute if a change was to occur, and individuals in Garnett's situation will have to rely on the discretion of the trial court at sentencing.<sup>88</sup>

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78. *Id.*

79. *Id.*

80. *Id.* at 801.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 802.

86. *Id.*

87. *Id.* at 803.

88. *Id.* at 805.

B. *Common Characteristics Present in the Mentally Retarded,  
Which Carry-over into the Criminal Justice System.*

1. Cloak of Competency

The cloak of competency is a method by which mentally retarded individuals hide their disability.<sup>89</sup> The cloak of competency can be used on a day-to-day basis or in more formal settings.<sup>90</sup> It is used daily when the individual takes menial jobs that do not require him or her to read or write;<sup>91</sup> many mentally retarded persons suffer from illiteracy.<sup>92</sup> When used on a daily basis, this cloak of competency prevents others from identifying this individual as mentally retarded and can make the individual's life a little easier. When individuals are mentally retarded, they sense a stigma in society, and, in most cases, they will do what they can to avoid this stigma.

The cloak of competency is also used in formal settings such as court proceedings; however, in this setting, the cloak of competency hurts the individual more than it helps him or her. These individuals are so used to putting on this cloak of competency that they do not realize the harm it does during court proceedings. In a court proceeding, there is a "cheating to lose problem."<sup>93</sup> "Cheating to lose is the idea that the defendant's use of the cloak of competency actually hinders him in his trial rather than helps him."<sup>94</sup> When the individual uses the cloak of competency in a legal proceeding, it becomes very hard for a layperson to identify the individual as suffering from mental retardation, which means the individual is treated as though he or she is an average person. One reason laypersons do not recognize an individual with mental retardation is because laypersons generally believe that mentally retarded individuals are incapable of taking care of themselves.<sup>95</sup> Because of this stereotype, laypersons and attorneys have difficulty identifying these individuals.<sup>96</sup> Without specialized training or knowledge of the cloak of competency concept, more and more mentally retarded individuals will slip through the judicial system undetected and unprotected.

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89. See ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE* 182-94 (Univ. of Cal. Press 2nd ed. 1993).

90. *Id.*

91. Rebecca Covarrubias, Comment, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 *SCHOLAR* 413, 440 (2009).

92. Fowler et al., *supra* note 6, at 12.

93. Covarrubias, *supra* note 91, at 440.

94. *Id.* at 440-41.

95. *Id.* at 441.

96. *Id.* at 400-11.

## 2. Present Characteristics Causing Vulnerability in the Criminal Justice System

There are a number of characteristics present in both persons with mental retardation and children, which cause vulnerability in the criminal justice system.<sup>97</sup> These characteristics make it hard for laypersons to detect mental retardation.<sup>98</sup> Texas Applesseed's Handbook for Attorneys listed ten of these characteristics.

a. *Acquiescence*: When asked a yes/no question, a mentally retarded individual will likely answer yes regardless of the appropriateness of the response as opposed to someone in the general population.<sup>99</sup>

b. *Concrete thinking*: "Persons with mental retardation have difficulty thinking abstractly."<sup>100</sup> For example, when asked to waive their Miranda Rights, a number of these individuals think it literally means to waive their right hands.<sup>101</sup>

c. *Outer-directed behavior*: Due to prior academic and social failures, the individual becomes unsure of his or her answer when asked a question.<sup>102</sup> This causes the individual to look for certain cues, both verbal and non-verbal, and listen to the interviewer's tone of voice, which ultimately influences the individual's response to a given question.<sup>103</sup>

d. *Strong desire to please others*: Because mentally retarded individuals have a strong desire to give a socially desirable response to a question, they will oftentimes give an incorrect answer when they believe the interviewer wanted to hear that response.<sup>104</sup>

e. *Difficulty with social intelligence*: Because these individuals have difficulty determining the motives of other people, they are deceived more often than the general population.<sup>105</sup> For instance, "when they are asked why they confessed to a crime, many individuals with mental retardation respond, 'They told me if I told them I did it, we could all go home.'"<sup>106</sup>

f. *Highly suggestible*: When in an interrogation setting, these individuals tend to be easily coerced because they will likely accept an answer that was suggested to them, rather than refute it and give a non-suggested response.<sup>107</sup>

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97. Fowler et al., *supra* note 6, at 11.

98. *Id.* at 11, 21.

99. *Id.* at 11. A study done in Texas shows that 73% answered yes to the question, "Does it ever snow here in the summer?" *Id.*

100. *Id.*

101. *Id.* at 14.

102. *Id.* at 12.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

g. *Deference to authority figures*: Because “persons with mental retardation are accustomed to being wrong,”<sup>108</sup> they tend to believe authority figures, especially law enforcement or criminal justice professionals, when they are told they committed a crime.<sup>109</sup>

h. *Problems with receptive and expressive language*: Because these persons do not have a very high intellectual capacity, they have trouble expressing themselves and understanding others.<sup>110</sup> They have difficulty with complex sentences and will usually have a better understanding of what is being asked of them if spoken to in simple and clear terms.<sup>111</sup>

i. *Limited memory and impaired recall*: When persons with mental retardation do not think something is important, they have difficulty remembering and recalling it.<sup>112</sup>

j. *Impulsivity and short attention span*: “Persons with mental retardation may have difficulty with attention span and focus.”<sup>113</sup>

As you can see, mentally retarded persons lack some of the basic skills the general population takes for granted; and this lack of skills makes these individuals extremely vulnerable in the criminal justice system, which is full of authoritative figures who simply want to get the individuals on their way to the next step in the process. Special attention is not given to individuals upon arrest, booking and arraignment. This lack of attention, when in conjunction with these characteristics, makes it difficult for these authoritative figures to recognize that a mentally retarded individual, who needs help and special attention, may be right in front of them.

#### IV. EMERGING TRENDS

To date, the American judicial system has not taken a real interest in mentally retarded defendants. Until recently, mentally retarded defendants were thrown into the system just like everyone else and had to fend for themselves.<sup>114</sup> The judicial system does not have any special courts that handle these individuals, nor does it require attorneys, judges, and other law enforcement to complete training or mandatory courses as a prerequisite to represent, prosecute, or handle a mentally retarded defendant.

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108. *Id.*

109. *Id.* (“They may even tell authorities, ‘I don’t remember doing that, but if you say so . . . .’”).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. See Council of State Gov’ts Justice Ctr., *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, OFF. OF JUST. PROGRAMS, vii (2007), [http://www.ojp.usdoj.gov/BJA/pdf/MHC\\_Essential\\_Elements.pdf](http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf).

A. *The Development of Mental Health Courts*

Within the last decade, the Bureau of Justice Assistance (BJA), in coordination with the Substance Abuse and Mental Health Services Administration, has begun developing and funding Mental Health Courts (MHC) in the United States.<sup>115</sup> The United States currently has over 150 of these courts.<sup>116</sup> MHCs have special dockets that handle people with mental illness and, occasionally, an individual who is mentally retarded or has some other mental disability in addition to a mental illness.<sup>117</sup> The courts specifically “employ a problem-solving approach to court processing in lieu of more traditional court procedures for certain defendants with mental illnesses.”<sup>118</sup> The purpose of MHCs is to rehabilitate the individuals and prevent them from re-offending.<sup>119</sup> This is accomplished by the development of:

judicially supervised, community-based treatment plans for each defendant participating in the court, which a team of court staff and mental health professionals design and implement. Regular status hearings are conducted at which treatment plans and other conditions are periodically reviewed for appropriateness. Incentives are offered to reward for adherence to court conditions, and sanctions are imposed on participants who do not adhere to the conditions of participation.<sup>120</sup>

Specifically, the BJA “provides courts with resources to improve clients’ social functioning and link them to employment, housing, treatment, and support services.”<sup>121</sup> The structure of these courts varies: some deal with misdemeanors only, while others handle felony cases.<sup>122</sup>

For example, the Tarrant County Mental Health Court in Fort Worth, Texas, primarily handles non-violent misdemeanor cases, but it will review violent misdemeanor allegations on a case-by-case basis.<sup>123</sup> The Tarrant County court does not handle felony cases because its MHC program only allows a defendant to be in the rehabilitation process for two years—the maximum amount of time allowed when sen-

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115. Bureau of Judicial Assistance, *Mental Health Courts Program*, OFF. OF JUST. PROGRAMS, <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html> (last visited Oct. 7, 2010).

116. *Id.*

117. *See id.*

118. Council of State Gov’ts Justice Ctr., *supra* note 114.

119. Interview with Bart Miller, Tarrant Cnty. Mental Health Diversion Program, in Fort Worth, Tex. (Sept. 29, 2009).

120. Council of State Gov’ts Justice Ctr., *supra* note 114.

121. Bureau of Judicial Assistance, *supra* note 115.

122. Interview with Bart Miller, *supra* note 119; *see also* Interview with Rainey Webb, Assistant Criminal Dist. Attorney, Tarrant County Criminal Dist. Attorney’s Office, in Fort Worth, Tex. (October 13, 2009).

123. Interview with Rainey Webb, Assistant Criminal Dist. Attorney, Tarrant Cnty. Criminal Dist. Attorney’s Office, in Fort Worth, Tex. (Oct. 13, 2009).

tencing a misdemeanor offense.<sup>124</sup> Once a defendant is deemed eligible to join the program, the court will individualize a nine- to twelve-month step program, which is administered in three-month phases.<sup>125</sup>

Once the program begins, the defendant is required to have monthly meetings with the judge handling the case.<sup>126</sup> During these meetings the judge will praise the defendants for sticking with the program and doing a good job.<sup>127</sup> Absent significant issues during the program, the defendant will usually be released in nine months; however, if issues arise, the judge may require the defendant to participate twelve months or longer, but no longer than the maximum sentence for the crime committed.<sup>128</sup> When the defendant completes his program satisfactorily, his case will be dismissed; but noncompliance will result in the defendant being sent back to the judge for a trial and sentencing on the offense.<sup>129</sup>

### B. *The Dramatic Change in the Legislative Landscape*

In addition to the fairly recent creation of MHCs, in 2002 the United States Supreme Court handed down a controversial decision in *Atkins v. Virginia* regarding the execution of defendants who are mentally retarded. This case overruled the Supreme Court's 1989 decision in *Penry v. Lynaugh*, which stated while "mental retardation is a factor that may lessen a defendant's culpability for a capital offense," the Eighth Amendment's prohibition against cruel and unusual punishment does not preclude a mentally retarded defendant from being sentenced to death solely on the grounds of his mental retardation.<sup>130</sup> The Supreme Court concluded in *Atkins*:

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.

As a result, a mentally retarded defendant cannot be sentenced to death because it constitutes cruel and unusual punishment.<sup>131</sup> Additionally, the Court found "punishment for a crime should be graduated and proportioned to the offense."<sup>132</sup>

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124. *Id.*

125. Interview with Bart Miller, *supra* note 119.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*; see also Interview with Rainey Webb, *supra* note 122.

130. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989), overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002).

131. *Atkins*, 536 U.S. at 306-07, 321.

132. *Id.* at 311.

*Atkins* involved the abduction, armed robbery, and murder of a man by Daryl Atkins and William Jones.<sup>133</sup> During the guilt phase of Atkins's trial, both men testified and alleged the other committed the murder.<sup>134</sup> Jones in this case was not mentally retarded. Atkins, on the other hand, was found to have an IQ of fifty-nine, which falls in the mildly mentally retarded range.<sup>135</sup> After hearing Jones's and Atkins's testimony, Atkins was found guilty of murder.<sup>136</sup> During the penalty phase, the prosecution argued for the death penalty based on "future dangerousness and vileness of the offense."<sup>137</sup> The defense, on the other hand, argued Atkins's mental retardation precluded the death penalty.<sup>138</sup> Relying on the Supreme Court's decision in *Penry*, the majority of the Virginia Supreme Court rejected Atkins's argument, and stated they were "not willing to commute Atkins's sentence of death to life imprisonment merely because of his IQ score."<sup>139</sup>

The United States Supreme Court reviewed this case and arrived at a six to three decision.<sup>140</sup> The court drew its conclusion from the Virginia Supreme Court's dissent, and the "dramatic shift in the state legislative landscape that has occurred in the past 13 years" since *Penry*.<sup>141</sup> The dissent from the Supreme Court of Virginia argued a death sentence is excessive punishment for an individual with a mental age nine to twelve years old.<sup>142</sup> They went on to say:

It is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.<sup>143</sup>

The dramatic shift in the legislative landscape was a direct result of the Supreme Court decision in *Penry* in 1989. In the years following *Penry*, Congress expanded the Federal Death Penalty Act of 1994 by prohibiting the execution or a death sentence for the mentally retarded.<sup>144</sup> Beginning in 1990, several states took a stand regarding this issue and enacted legislation prohibiting this conduct. For instance, from 1990, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, and New York each passed legislation

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133. *Id.* at 307.

134. *Id.*

135. *Id.* at 308–09.

136. *Id.* at 307.

137. *Id.* at 307–08.

138. *Id.* at 308, 310.

139. *Id.* at 310.

140. *See id.* at 321 (Rehnquist, C.J., dissenting).

141. *Id.* at 310 (majority opinion).

142. *Id.*

143. *Id.*

144. *Id.* at 314.

outlawing the execution of mentally retarded defendants.<sup>145</sup> In 1998 Nebraska joined in this prohibition, and then, in 2000 and 2001, six states prohibited this conduct: South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina.<sup>146</sup> Prior to *Penry*, Georgia and Maryland prohibited the execution of the mentally retarded.<sup>147</sup> In addition to the states listed above, others have attempted to legislatively ban the execution of mentally retarded defendants. The Texas Legislature passed a bill making this law, only to be vetoed later by the Governor, and both Virginia and Nevada Legislatures passed a ban on executing the mentally retarded in one house of the legislature.<sup>148</sup> Clearly, there has been a dramatic shift amongst the states regarding their stance on executing persons with mental retardation since the *Penry* decision.

After reviewing this uncontroverted evidence, the United States Supreme Court said it is not the number of States that have shifted that is significant; rather it is the consistency of the States in this direction.<sup>149</sup> More specifically the Justices agreed that:

Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.<sup>150</sup>

It is also important to note that the few states which allow the execution of mentally retarded defendants, New Hampshire and New Jersey for example, very rarely engage in this conduct. Even more convincing of this national trend, of the states that allow the execution of the mentally retarded, only five engaged in such executions against a defendant who had an IQ of less than seventy, since the decision in *Penry*.<sup>151</sup>

When the United States Supreme Court examined the shift in state legislation it also reviewed statements from social, religious, and professional organizations that oppose executing mentally retarded defendants.<sup>152</sup> For example, a number of representatives from the Christian, Jewish, Muslim, and Buddhist religious communities filed a joint amicus curiae brief, which argued that, despite different religious views, all the religious communities agree the execution of mentally

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145. *Id.*

146. *Id.* at 314–15.

147. *Id.* at 313–14.

148. *Id.* at 315 & n.16.

149. *Id.* at 315.

150. *Id.* at 315–16.

151. *Id.* at 316.

152. *Id.* at 310, 316 n.21.

retarded persons cannot be morally justified.<sup>153</sup> The Supreme Court even examined a brief from the European Union, which provided evidence of widespread disapproval around the globe for this type of conduct.<sup>154</sup> Finally, before deciding the issue, the Court examined approximately twenty state and national polls indicating that the majority of Americans polled, even those that support the death penalty, believe it is wrong to execute the mentally retarded.<sup>155</sup> When reviewing this evidence, the Court conceded that these factors are not dispositive, but their consistency with the legislative landscape further supports the conclusion that there is a national consensus on this issue among those who have addressed it.<sup>156</sup>

After reviewing all of the evidence, the United States Supreme Court reversed the judgment of the Virginia Supreme Court and remanded the case for further proceedings not inconsistent with its opinion.<sup>157</sup> On remand, a new trial was held solely on the issue of whether Atkins was mentally retarded,<sup>158</sup> and the jury found Atkins did not prove by a preponderance of the evidence his mental retardation.<sup>159</sup> After this finding, Atkins appealed again and the Virginia Supreme Court found a reversible error.<sup>160</sup> At this time, Atkins's case is awaiting a new trial to determine if he is, in fact, mentally retarded.<sup>161</sup>

## V. PROPOSITION

While MHCs are a start, there is a vast difference between a person with a mental illness: namely it can be treated, cured, and controlled with medication; and a person with mental retardation: a condition that cannot be treated, cured, and controlled with medication. This difference makes the MHC ineffective for mentally retarded persons. These individuals need their own court with their own specialized attorneys, judges, and court personnel.

From the cases presented thus far, it is clear that these individuals are unique and require special attention. Their disability makes it difficult for laypersons to detect the existence of the disability itself. In addition to these cases, the characteristics that make these persons vulnerable, and the cloak of competency further prove these individuals are not on the same mental level as the general population, and they do require extra care. This Author proposes a completely separate court for mentally retarded defendants. Furthermore, the state

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153. *Id.* at 316 n.21.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 321.

158. *Atkins v. Commonwealth*, 631 S.E.2d 93, 94 (Va. 2006).

159. *Id.* at 95.

160. *Id.* at 102.

161. *See id.*

bar and police associations should mandate specialized training for attorneys, judges, and police officers, along with additional processing requirements for cases involving a mentally retarded person.

### A. *Specialized Training*

To start, attorneys and judges who will or do engage in prosecuting, defending, and judging mentally retarded defendants should be required to take a Continuing Legal Education Course (CLE) on the warning signs and the proper treatment and handling of the mentally retarded. It is important to know and recognize if someone you are dealing with suffers from mental retardation and what the best course of action should be. As you can see from the characteristics discussed above and the cited cases, these individuals are as vulnerable as children. Most of these individuals are simply children trapped in an adult's body. The majority of the time, they do not know the difference between right and wrong, and will typically do anything an adult tells them to do. This is why special care should be given to them so they can be given a fair and accurate trial, instead of being duped into confessing or doing something they should not.

In addition to the CLE, special education classes should incorporate lessons on what to do if these individuals are ever stopped by a police officer or get in trouble with the law. Although these individuals typically function at an elementary level, teachers should break down the lessons to a level the mentally retarded individual can understand. The lessons should teach the students about their Miranda Rights, and that they should tell the police and an attorney that they have a disability if they get in trouble. The individuals should also learn their disability is not something bad or something they should be embarrassed about. If these persons can come to understand this, their situations will be bettered.

Police officers should be provided with materials explaining the most common myths about the mentally retarded, such as they all will look and talk differently, or they will have an inability to do certain things.<sup>162</sup> In addition to these myths, the officers should be provided with a list of the signs to look for when encountering mentally retarded persons in the population. For instance, mentally retarded individuals typically mimic answers/responses, have awkward or poor motor coordination, frequently laugh or smile at inappropriate times, and cannot communicate at their age level.<sup>163</sup> These officers should also receive a list of questions to ask which will allow them to pinpoint a disability if the individual is trying to conceal it. For example, "Did

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162. See Fowler et al., *supra* note 6, at 8.

163. See *id.* at 21.

you ever take remedial reading or math classes; do you drive; do you receive SSI?"<sup>164</sup>

### B. *Booking and Beyond*

Upon booking, or at the minimum, prior to trial, all persons should undergo a competency evaluation to determine if they have a mental disability requiring transfer to the special court. Having a mental retardation expert on hand at the court is ideal. Most states have a Mental Health and Mental Retardation Agency that can be of great assistance in this process.

It is also necessary to require counsel to gather all public records, including but not limited to: criminal, social security, school, and psychological records. The Defense Counsel should also be required to talk with the defendant's family and friends and determine his or her limitations.

In addition to these suggestions, courts should be allowed to take into consideration mental capacity when sentencing individuals. As seen in the cited cases, establishing *mens rea* is a difficult task when dealing with persons suffering from mental retardation. If the individual lacks the culpable mental state, he or she should not be held to the highest standard. It is suggested that courts treat these individuals according to their mental age and not their actual age because in reality they do not function at their actual age. This Author suggests these persons receive treatment as juveniles. The juvenile justice system makes the effort to rehabilitate and prevent a future criminal altercation, and not to lock the adolescent up and throw away the key. When the mentally retarded and juveniles commit crimes, they are better served by rehabilitation because they will not learn from application of the retributive or preventative theory of criminal punishment. As noted above by LaFave and Scott, "it is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy."<sup>165</sup> This is not to say, when a truly heinous crime is committed, a mentally retarded individual should not be punished. In situations as those, even the juvenile justice system will try the adolescent as an adult.

### C. *The Costs of Implementation*

The Office of Justice Programs, BJA has developed a plan to obtain funding for MHCs and as a result,<sup>166</sup> this Author recommends that this same office develop a plan to obtain funding for mental retarda-

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164. *Id.* at 22.

165. *Garnett v. State*, 632 A.2d 797, 801 (Md. 1993).

166. Bureau of Judicial Assistance, *supra* note 115.

tion courts.<sup>167</sup> With regard to the specialized training for judicial officers, this Author believes the training will not be an additional expense above and beyond what the judicial officer is expected to pay to meet his or her CLE requirement for the year. Police officer materials can be distributed during officer training and should only require a two to three page handout disputing the common myths associated with mentally retarded persons, the common warning signs that the officer is dealing with a person suffering from mental retardation, and a list of questions to help identify one of these individuals. The local police department should pay for these handouts. In addition to the aforementioned expenses, the competency evaluations on all individuals booked will be an added expense; however, the judicial system will expend less money providing this service at the outset than it would if the individual becomes a repeat offender or appeals a verdict to a higher court. Overall there will be significant costs, but in the long run the costs will pay off greatly not only for the judicial system, but for mentally retarded individuals as well.

D. *Why a Separate Court System Will Help and How it is Different from the Current System*

As previously discussed, individuals with mental retardation have a significantly lower IQ than the average population and are well aware of the social stigma regarding their disability. Because of their mental capacity and desire/need to use the cloak of competency to prevent public condemnation, these individuals cannot receive the same experience in the criminal justice system as a member of the general population. As a result of these societal conditions and other common characteristics present in individuals with mental retardation, specialized courts are a necessity. These mental retardation courts will not only provide mentally retarded individuals with the care and attention they need, they also allow them to receive a fair and just punishment that is efficient and effective. Deterrence by incarceration, or the threat thereof, is not going to work with these individuals, as evidenced in *Hart* when Hart tells the police officer he needs to go back to the neighbor's house to get paid for mowing.<sup>168</sup> A program specifically designed to rehabilitate and teach will be much more effective than the options available in a traditional court setting.

This proposed court is different from the current system because it is not focused on deterrence and traditional punishment per se; it is focused on rehabilitation and education. The goal is to prevent the

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167. See Amy Watson et al., *Mental Health Courts and the Complex Issue of Mentally Ill Offenders*, 52 *PSYCHIATRIC SERVICES* 477, 479 (2001) (stating "[t]he initial experiences of the court suggest that there are serious service gaps in the community, such as a lack of treatment for persons with dual disorders and a lack of transitional housing").

168. Appellant's Brief, *supra* note 21, at 18.

person from re-offending, and, at the same time, teach him or her skills that will help them succeed. A system based on the juvenile justice system and the MHC is ideal. This will allow an adult trapped in a child's body to receive the punishment any other person at that mental age would receive. The punishment will not be excessive or unfair; however, in cases of truly heinous crimes, persons with mental retardation should be held to a higher standard—that of an adult.

## VI. CONCLUSION

As you can see, a number of issues contribute to the ineffective assistance and handling of mentally retarded individuals. If certain building blocks are put into place, these individuals will be rehabilitated and handled in a more effective and efficient manner. This change will take time, and progress is already being made and proving effective in the mental illness arena. Because of the large number of the population with mental retardation, and the change in the legislative landscape over the last few decades, this Author believes it is time for those who have a relative or friend who is affected by mental retardation to take a stand and fight for better treatment and specialized handling of these defendants in the criminal justice system.

Now that you have reviewed all of the evidence presented in this Comment, please ask yourself one more time: If your child was not really a seven year-old, but rather an adult with a mental capacity of a seven year-old, could you justify treating him or her as an adult and subjecting them to our current justice system, simply because of his or her actual age?