

POST-*ATKINS* PROBLEMS WITH ENFORCING THE SUPREME COURT'S BAN ON EXECUTING THE MENTALLY RETARDED

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INTRODUCTION

Over the past century, public acceptance and understanding of mental retardation has grown.¹ Society presently accepts people with disabilities and emphasizes community-based programs that provide the disabled with education and support services.² In the past, however, stereotyping, discrimination, and mistreatment of the mentally retarded was so horrific that the United States Supreme Court described it as “grotesque.”³ The public believed that mental retardation was the “principle source of criminal and immoral behavior in society.”⁴ Consequently, to protect society, the government forced the institutionalization and sterilization of many people with mental retardation.⁵

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¹ V. Stephen Cohen, Comment, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457, 459-60 (1991).

² Seguin Services, *History of Disability Services in the United States*, at <http://www.geocities.com/HotSprings/3594/history.html> (last visited Sept. 20, 2002) (on file with author) [hereinafter *History of Disability Services*].

³ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 454 (1985).

⁴ Cohen, *supra* note 1, at 459. The “Jukes Study,” conducted by Robert Dugdale, linked degenerate behavior by members of the Jukes family to an inherited mental deficiency. *History of Disability Services, supra* note 2. This study, in connection with increasing public awareness of genetics, contributed to the popular view linking “idiocy, pauperism, insanity, and crime” to genetics. *Id.*

⁵ Cohen, *supra* note 1, at 459-60. Protection of society included the idea of protecting the gene pool. *History of Disability Services, supra* note 2. Consequently, by 1926 there were mandatory sterilization laws in twenty-three states, and between 1925 and 1955 the government forced over 50,000 mentally retarded individuals to undergo sterilization. *Id.* In an infamous 1926 decision, the Supreme Court upheld the forced sterilization of a retarded woman stating:

[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory

In the 1950s, society began to realize that there was no link between mental retardation and criminality and attitudes towards mental retardation started to change.⁶ During the next two decades, a government panel on mental retardation focused the public's attention on the mentally retarded and their unique needs.⁷ Parent organizations also demanded that their children be educated in the same schools as non-disabled children.⁸ Finally, in 1977, the United States District Court for the Eastern District of Pennsylvania ruled that, once institutionalized by the state, the mentally retarded have "a constitutional right to be provided with minimally adequate habilitation under the least restrictive conditions consistent with the purpose of the commitment."⁹ Following this landmark decision, a large deinstitutionalization movement across the country led to the development of home and community-based services with a focus on self-determination and individualized support in the least restrictive environment.¹⁰

Simultaneously, the use of the death penalty evolved to limit the sentence of capital punishment to those murders society views as particularly heinous.¹¹ A dramatic reduction occurred in the number and types of crimes punishable by death.¹² From colonial times until the nineteenth century, most states automatically imposed the death penalty for all homicides and for many felonies.¹³ During the

vaccination is broad enough to cover cutting the Fallopian tubes.
Three generations of imbeciles are enough.

Buck v. Bell, 274 U.S. 200, 207 (1927).

⁶ Cohen, *supra* note 1, at 460.

⁷ *Id.*

⁸ *History of Disability Services, supra* note 2.

⁹ Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1319 (E.D. Pa. 1977). The court in *Halderman* found that the United States Constitution required that state institutions provide "such minimally adequate habilitation as will afford a reasonable opportunity for them to acquire and maintain such life skills as are necessary to enable them to cope as effectively as their capacities permit." *Id.* at 1325. The court noted that "involuntarily committed retarded children have a constitutional right 'to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency.'" *Id.* at 1317 (citing *Woe v. Mathews*, 408 F. Supp. 419, 429 (E.D.N.Y. 1976)). The court ordered immediate steps be taken to move the residents from Pennhurst to community facilities that could provide minimally adequate habilitation. *Id.* at 1325.

¹⁰ *History of Disability Services, supra* note 2.

¹¹ Mark Costanzo & Lawrence T. White, *Overview of Death Penalty and Capital Trials*, 50 J. OF SOC. ISSUES 1, 4-5 (1994).

¹² JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 509 (4th ed. 2000).

¹³ *Id.*

nineteenth century, states gradually began restricting the death penalty to first-degree murders, and eventually began allowing the judge or jury to decide when to impose a death sentence.¹⁴

For a brief period of time during the 1970s, the Supreme Court held that the then existing death penalty schemes were unconstitutional.¹⁵ The Supreme Court ultimately affirmed the death penalty,¹⁶ but has repeatedly increased the constitutional limitations on imposing it. The Supreme Court, for example, indicated that it would find unconstitutional death sentences for crimes other than murder.¹⁷ Moreover, the Court also banned the execution of the mentally ill¹⁸ and the execution of those under the age of sixteen at the time the crime was committed.¹⁹

In *Atkins v. Virginia*,²⁰ the trend toward public understanding and acceptance of the mentally retarded and the movement to limit the

¹⁴ *Id.* at 510. First-degree murder is defined as “murder that is willful, deliberate, or premeditated, or that is committed during the course of another serious felony.” BLACK’S LAW DICTIONARY 1038 (7th ed. 1999).

¹⁵ In 1972, in *Furman v. Georgia*, the Supreme Court placed a moratorium on the death penalty, finding that then existing state systems for imposing the death penalty were arbitrary and capricious. 408 U.S. 238, 239 (1972). Following *Furman*, most states enacted new laws to ensure fair and rational imposition of death sentences. See KAPLAN, *supra* note 12, at 512-15. These new state laws followed a scheme of “guided discretion” during the penalty phase that required the trier of fact to weigh certain aggravating factors against any mitigating factors. *Id.*

¹⁶ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). In *Gregg*, the Supreme Court examined the new “guided discretion” schemes and concluded that these statutes solved the problems identified in *Furman*. *Id.* The death penalty was restored, and in 1976 Gary Gilmore became the first person to be executed under the new death penalty statutes. MIKAL GILMORE, SHOT IN THE HEART xi (1993).

¹⁷ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 789 (1982) (holding that the death penalty is excessive punishment for an offender who had not taken, attempted to take, or intended to take a life); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (holding that the imposition of the death penalty for the crime of rape is unconstitutional).

¹⁸ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding that the Eighth Amendment prohibits the execution of the mentally ill).

¹⁹ *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In *Thompson*, a plurality consisting of Justices Steven, Brennan, Marshall, and Blackmun found that the Eighth Amendment prohibited the execution of individuals who were under the age of sixteen at the time the crime was committed. *Id.* at 838. Justice O’Connor concurred in the decision. *Id.* at 848 (O’Connor, J., concurring). Justice O’Connor felt that although it was likely that there was a national consensus forbidding the execution of offenders whose crimes were committed before the age of sixteen, the evidence before the Court was not sufficient to establish such a consensus. *Id.* at 855 (O’Connor, J., concurring). Instead, Justice O’Connor felt that the present statute was unconstitutional because the failure of the legislation to adopt a minimum age did not show the special care and deliberation required under the Eighth Amendment. *Id.* at 858-59 (O’Connor, J., concurring).

²⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002).

use of the death penalty converged. On September 25, 2001, the Supreme Court granted *certiorari* to reconsider whether the execution of the mentally retarded violated the Eighth Amendment.²¹ Applying the “evolving standards of decency test,”²² the Court considered the significant number of states that have banned the execution of mentally retarded offenders, the views of professional and religious organizations, and opinion poll results before concluding that the execution of the mentally retarded constitutes “cruel and unusual punishment.”²³ The Court, however, chose not to adopt a uniform definition of mental retardation.²⁴ Instead, the Court left the task of defining mental retardation to the states.²⁵

Currently, numerous statutory and organizational definitions for mental retardation exist.²⁶ Although most definitions have similar features, variability among statutory definitions is so great that it can result in one state classifying a defendant as mentally retarded while others do not.²⁷ Further, while the use of valid and reliable psychological testing measures is a central feature of the professional organizational definitions of mental retardation, few statutory definitions mandate the use of these readily available testing methods.²⁸ To avoid variability among the states and to ensure the proper identification of mentally retarded defendants, states should adopt both a uniform definition of mental retardation and uniform methods for assessment. Accordingly, state legislatures should adopt the American Association of Mental Retardation’s (the “AAMR”) current definition for mental retardation and require that all assessments include the use of both a full-scale standardized intelligence test and a measurement designed to evaluate adaptive functioning.

This Comment analyzes the Supreme Court’s ban on the execution of mentally retarded defendants, as well as the problems created by the Court’s failure to adopt a uniform standard for determining mental retardation. Part I.A of this Comment reviews

²¹ *Atkins v. Virginia*, 534 U.S. 809 (2001). In 1989, the Supreme Court had previously considered this issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court found that there was no national consensus against executing the mentally retarded and thus held that the practice did not violate the Constitution. *Id.* at 334.

²² See *infra* text accompanying notes 37-41.

²³ *Atkins*, 536 U.S. at 318-21.

²⁴ *Id.* at 317.

²⁵ *Id.*

²⁶ See *infra* PART II.

²⁷ See *infra* PART II.A.

²⁸ *Id.*

the Supreme Court's opinion in *Penry v. Lynaugh*,²⁹ which found no constitutional barriers to the execution of the mentally retarded.³⁰ Part I.B discusses the recent Supreme Court decision in *Atkins v. Virginia*,³¹ which found that it is now "cruel and unusual punishment" to execute a mentally retarded defendant.³² Part II surveys the various statutory and professional definitions of mental retardation. Part III discusses the numerous methods for assessing mental retardation. Specifically, Part III.A will look at various intelligence tests, and Part III.B will examine the testing of adaptive functioning. Part IV analyzes the problems and uncertainty created by the lack of a uniform standard and guidelines for assessment of mental retardation. Finally, Part V concludes that the states should adopt a uniform definition of mental retardation and place guidelines on the method of assessment to avoid the erroneous execution of mentally retarded criminal defendants.³³ Specifically, this part proposes that state legislators adopt the current AAMR definition for mental retardation and impose a statutory requirement that all evaluations utilize both a full-scale, standardized intelligence test and a diagnostic test designed to measure adaptive behaviors.

I. CAPITAL PUNISHMENT OF THE MENTALLY RETARDED AND THE EIGHTH AMENDMENT

The Eighth Amendment prohibits the use of "cruel and unusual punishments."³⁴ The Supreme Court has clearly established that this amendment prohibits the use of punishments considered cruel and unusual at the time the Bill of Rights was drafted.³⁵ Based on these criteria, the Supreme Court has held that the death penalty does not

²⁹ 492 U.S. 302 (1989).

³⁰ *Id.* at 335.

³¹ 536 U.S. 304 (2002).

³² *Id.* at 321.

³³ The scope of this Comment is limited to the problems associated with the failure to identify those individuals who are mentally retarded and therefore should not be eligible for a death sentence. The issue of faking mental retardation is an entirely different and separate issue that will not be addressed. It should be noted that many experts do not believe that defendants will be readily able to fake mental retardation because most definitions require a history of limited intelligence and problems in adaptive functions relating back to childhood. *See, e.g.,* Emily Heller, *Faking Retardation Isn't Likely*, NAT'L L.J. (Jun. 27, 2002), available at <http://www.law.com> (on file with author).

³⁴ U.S. CONST. amend VIII.

³⁵ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (finding that "there is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted").

constitute a *per se* violation of the Eighth Amendment.³⁶ In *Gregg*, the Court noted, “the imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England.”³⁷

The constraints of the Eighth Amendment are not limited, however, solely to those practices abhorred at common law.³⁸ In *Trop v. Dulles*,³⁹ Chief Justice Warren wrote that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁰ Under this evolving standards of decency test, a practice is unconstitutional if it violates society’s current prevailing standards of decency.⁴¹ This test has been refined to require that the court make an assessment of contemporary values based upon objective indicia that reflect the public opinion.⁴² Defendants have successfully used this test to challenge the imposition of the death penalty for crimes other than murder,⁴³ and when the defendants are mentally ill⁴⁴ or are younger than sixteen at the time the crime was committed.⁴⁵

Attorneys have also used the evolving standards of decency test to challenge the imposition of a death sentence on mentally retarded offenders. In 1989, attorneys for John Paul Penry unsuccessfully argued that the execution of the mentally retarded violated then existing standards of decency.⁴⁶ Eleven years later the Supreme Court granted *certiorari* in *Atkins v. Virginia*⁴⁷ to revisit this same issue.⁴⁸ Recognizing a shift in public opinion as evidenced by the enactment of many laws prohibiting a capital sentence for a mentally retarded defendant, the Supreme Court found that contemporary values had evolved to the point where the execution of the mentally retarded would violate the Eighth Amendment.⁴⁹

³⁶ *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

³⁷ *Id.* at 176.

³⁸ *Ford*, 477 U.S. at 406.

³⁹ 356 U.S. 86, 101 (1958).

⁴⁰ *Id.* at 101.

⁴¹ *Id.*

⁴² *See, e.g., Gregg*, 428 U.S. at 173.

⁴³ *See, e.g., Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); *Enmund v. Florida*, 458 U.S. 782, 789 (1982).

⁴⁴ *See, e.g., Ford*, 477 U.S. at 399.

⁴⁵ *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁴⁶ *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

⁴⁷ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁸ *Atkins v. Virginia*, 534 U.S. 809 (2001).

⁴⁹ *Atkins*, 536 U.S. at 321.

A. Penry v. Lynaugh

John Paul Penry was twenty-two years old with mild-to-moderate retardation when he killed Pamela Carpenter.⁵⁰ On October 25, 1979, Penry entered Carpenter's home intending to rape her.⁵¹ A struggle ensued, and the victim superficially wounded Penry with a pair of scissors.⁵² Enraged, Penry raped, beat, and stabbed the victim with the scissors.⁵³ Although mortally wounded, Pamela Carpenter survived long enough to describe her assailant to the local sheriff's deputies.⁵⁴ Based upon the victim's description, the police suspected Penry, a recent parolee who had served time for rape.⁵⁵ During questioning, Penry confessed twice, and the police subsequently charged him with capital murder.⁵⁶

Penry's retardation originated from organic brain damage that occurred during and after his breech birth.⁵⁷ Severe abuse by his mother, including repeated vicious blows to his head, exacerbated his brain damage.⁵⁸ He quit school during the first grade and did not learn to print his name until he was thirteen.⁵⁹ During childhood, IQ tests placed Penry's IQ somewhere between fifty and sixty, which corresponds to mild-to-moderate retardation.⁶⁰

Before trial, Penry notified the court of his intention to raise an insanity defense and filed a motion requesting a competency hearing.⁶¹ At the competency hearing, the defense called Dr. Jerome Brown, a clinical psychologist, to testify as to Penry's mental retardation.⁶² He testified that his evaluation revealed Penry to have

⁵⁰ EMILY FABRYCKI REED, *THE PENRY PENALTY: CAPITAL PUNISHMENT AND OFFENDERS WITH MENTAL RETARDATION* 1-2 (1993).

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Penry*, 492 U.S. at 307.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ REED, *supra* note 50, at 1-2.

⁵⁸ *Id.* Penry's mother almost died giving birth to him and suffered a nervous breakdown from the trauma. *Id.* As a result, she was committed to a mental hospital for ten months. *Id.* Upon her release, she returned home and began severely abusing the child she blamed for her problems. *Id.* Over a ten year period, Penry was burned with cigarettes, had his arm broken several times, was locked in his room for long periods of time, and was forced to consume his own feces and urine. *Id.*

⁵⁹ REED, *supra* note 50, at 1-2.

⁶⁰ *Penry*, 492 U.S. at 307-08.

⁶¹ *Penry v. Texas*, 691 S.W.2d 636, 650 (Tex. App. 1985).

⁶² *Id.*

an IQ of fifty-four.⁶³ Further, Dr. Brown stated that Penry had the mental age of a six and a half year old and the social functioning of a nine or ten year old.⁶⁴ Nevertheless, “the jury found Penry competent to stand trial.”⁶⁵

During the guilt phase of the trial, Penry introduced an insanity defense and called Dr. Jose Garcia to testify on his behalf.⁶⁶ Dr. Garcia’s testimony indicated that Penry suffered from moderate retardation and organic brain damage that either was caused at birth or was the result of severe head trauma at an early age.⁶⁷ The doctor testified that this made it “impossible for [Penry] to appreciate the wrongfulness of his conduct or to conform his conduct to the law.”⁶⁸ Penry’s mother testified that he was unable to learn at school, and his sister testified to the abuse he suffered at the hands of his mother.⁶⁹

In response to Penry’s asserted insanity defense, the State introduced two psychiatrists to rebut Dr. Garcia’s testimony.⁷⁰ Dr. Kenneth Vogtberger testified that Penry had the characteristics of antisocial personality⁷¹ and that his low IQ scores underestimated his ability to function.⁷² Dr. Felix Peebles agreed with Dr. Vogtberger’s assessment and testified that he had diagnosed Penry with mental retardation in both 1973 and 1977.⁷³ Both of the State’s experts testified that Penry “was a person of extremely limited mental ability.”⁷⁴

The jury rejected the insanity defense and found Penry guilty of capital murder.⁷⁵ During the penalty phase of the trial, the State again called Dr. Peebles and Dr. Vogtberger to testify.⁷⁶ This time they asserted that should Penry ever be released he posed a high risk

⁶³ *Penry*, 492 U.S. at 308.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Penry*, 492 U.S. at 309.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ The Diagnostic and Statistical Manual of Mental Disorders defines Antisocial Personality Disorder as “a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 706 (4th text rev. 2000). Individuals with this disorder are commonly called psychopaths or sociopaths. *Id.*

⁷² *Penry*, 492 U.S. at 309.

⁷³ *Id.*

⁷⁴ *Id.* at 310.

⁷⁵ *Id.*

⁷⁶ *Penry v. Texas*, 691 S.W.2d at 651.

of future dangerousness and would be “a continuing threat to society.”⁷⁷ Penry’s attorneys “reoffered ‘all of the evidence heretofore given . . . by the witnesses . . .’” and argued that the jury should consider Penry’s mental retardation in assessing punishment.⁷⁸ Nevertheless, the jury sentenced Penry to death.⁷⁹

Penry filed a *writ of habeas corpus* in the United States District Court for the Eastern District of Texas challenging his sentence.⁸⁰ After the district court denied Penry relief, he subsequently appealed to the United States Court of Appeals for the Fifth Circuit.⁸¹ The circuit court affirmed the decision of the lower court.⁸² The United States Supreme Court granted *certiorari* on the issue of whether the execution of mentally retarded offenders constitutes cruel and unusual punishment.⁸³

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Penry*, 492 U.S. at 310. Under the Texas Penal Code at the time of Penry’s trial, the jury decided whether or not a defendant would be sentenced to death depending upon their answers to three questions. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974). Under Article 37.071 (b) of the Texas Code of Criminal Procedure the jury was asked the following questions:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased?

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981). If the jury answered all three of the questions in the affirmative, then the trial court was required to sentence the defendant to death. *Id.* at art. 37.071(c)-(e).

⁸⁰ *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987); *Penry*, 492 U.S. at 312. In part, *Penry* argued that his sentence violated the Eighth Amendment because the trial court did not instruct the jury on how they should consider mitigating circumstances and also because the execution of the mentally retarded constituted cruel and unusual punishment. *Id.*

⁸¹ *Penry*, 492 U.S. at 312.

⁸² *Id.* Although the Court of Appeals questioned whether Penry was given the individualized sentencing required by the Constitution, they ultimately decided that lack of a mitigating instruction did not constitute reversible error. *Id.* The court also rejected the argument that the execution of the mentally retarded qualified as cruel and unusual punishment. *Id.* at 313.

⁸³ *Penry*, 492 U.S. at 313. The Supreme Court also granted *certiorari* to decide whether Penry’s constitutional rights had been violated by the absence of a mitigating instruction to the jury. *Id.* On this issue, a majority consisting of Justices O’Connor, Brennan, Marshall, Blackmun, and Stevens found that the jury was not able to adequately consider all of the mitigating evidence due to both the lack of a mitigating instruction and the use of special issues to determine whether to impose

Before the Court, Penry argued that individuals with mental retardation are not capable of the moral culpability required to justify the imposition of a death sentence.⁸⁴ Further, he argued that there was “an emerging national consensus against executing the mentally retarded.”⁸⁵

A majority of the Court consisting of Chief Justice Rehnquist and Justices O’Connor, White, Scalia, and Kennedy addressed the issue of cruel and unusual punishment under the Eighth Amendment.⁸⁶ The Court noted that the Eighth Amendment applies to both those punishments prohibited at the time the Bill of Rights was adopted and those punishments prohibited by contemporary values.⁸⁷ The Court further noted that to determine the evolving standards of decency it must look to objective evidence, including enacted legislation.⁸⁸

The majority acknowledged a common law prohibition against punishing “idiots” for criminal acts that has evolved into the present day insanity defense.⁸⁹ The Court found that to qualify as “idiots” at common law, defendants would have had to show a complete lack of “capacity to appreciate the wrongfulness of their actions.”⁹⁰ The majority, however, did not find any common law prohibition on executing mentally retarded defendants, such as Penry, who knew that their conduct was wrong and chose not to conform their behavior to the law.⁹¹

the death penalty. *Id.* Based on this part of the decision, Penry’s sentence was invalidated because the Court felt that the jury did not have any way in which they could consider Penry’s mental retardation as a potential mitigating factor. *Id.*

⁸⁴ *Id.* at 328-29.

⁸⁵ *Id.* at 329.

⁸⁶ *Penry*, 492 U.S. at 306, 330-31. In a convoluted decision, Justice O’Connor delivered the opinion for a unanimous Court with respect to Parts I and IV-A, and the opinion of the court with respect to Parts II-A, II-B, III, and IV-B. *Id.* at 306. Parts II-B and III were joined by Justices Brennan, Marshall, Blackmun, and Stevens. *Id.* Parts II-A and IV-B were joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. *Id.* Part IV-C is solely the opinion of Justice O’Connor. *Id.* Justice Brennan, joined by Justice Marshall, filed an opinion concurring in part and dissenting in part. *Id.* Justice Stevens filed an opinion concurring in part and dissenting in part that was joined by Justice Blackmun. *Penry*, 492 U.S. at 306. Justice Scalia also filed an opinion concurring in part and dissenting in part that was joined by Chief Justice Rehnquist and Justices White and Kennedy. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 329. The Court stated that “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Id.*

⁸⁹ *Id.* at 332.

⁹⁰ *Id.* at 333.

⁹¹ *Penry*, 492 U.S. at 333.

The majority next rejected Penry's argument that there was a national consensus against executing the mentally retarded.⁹² Noting that only two states and the federal government had statutes banning such executions, the Court found insufficient evidence to support the existence of a national consensus.⁹³ The Court also rejected public opinion polls supporting Penry's argument, finding that they provided insufficient evidence of contemporary values.⁹⁴

In a concurrence, Justice O'Connor stated that the courts should consider individualized personal responsibility and not just the presence of mental retardation when determining eligibility for the death penalty.⁹⁵ The Justice found that mental retardation should be only one factor considered in determining culpability.⁹⁶

In dissent, Justice Brennan, joined by Justice Marshall, agreed with Penry's argument that the Eighth Amendment prohibits the execution of the mentally retarded.⁹⁷ The Justice contended that "the impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development . . . limits his or her culpability," thus making the death penalty disproportionate to the crime and, therefore, unconstitutional.⁹⁸ Further, the Justice found the execution of the mentally retarded was also unconstitutional because it does not contribute to the penal goals of deterrence and retribution.⁹⁹

⁹² *Id.* at 333-34.

⁹³ *Id.* at 334. At the time of *Penry*, Georgia and Maryland were the only states that had statutes banning the execution of a person who is mentally retarded. *Id.* The federal Anti-Drug Abuse Act of 1988 also prohibited the execution of mentally retarded offenders. *Id.*

The Court contrasted this situation to that in *Ford v. Wainwright*, where the Court acknowledged there is a national consensus against executing mentally ill offenders, and to *Thompson v. Oklahoma*, where the Court found a national consensus against executing defendants who were younger than sixteen at the time they committed their crimes. *Id.* The Court noted that at the time of *Ford* no states allowed the execution of insane offenders and twenty-six states had statutes that suspended the execution of offenders who became insane following sentencing. *Penry*, 492 U.S. at 334 (citing *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986)). In *Thompson*, the Court noted that eighteen states expressly prohibited the execution of offenders younger than sixteen. *Id.* (citing *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988)).

⁹⁴ *Penry*, 492 U.S. at 335. The Court noted that the sentiment expressed in those polls may ultimately be reflected in legislation and that such legislation would be a reliable indicator of contemporary values. *Id.*

⁹⁵ *Id.* at 338 (O'Connor, J., concurring).

⁹⁶ *Penry*, 492 U.S. at 338 (O'Connor, J., concurring).

⁹⁷ *Id.* at 341 (Brennan, J., dissenting).

⁹⁸ *Id.* at 346 (Brennan, J., dissenting).

⁹⁹ *Id.* at 348 (Brennan, J., dissenting).

B. Legislative Response to Penry

Following *Penry*, the legislative landscape underwent dramatic changes.¹⁰⁰ In 1989, at the time of the *Penry* decision, only the federal government, Georgia, and Maryland had statutes prohibiting the execution of mentally retarded offenders.¹⁰¹ In the years that followed, fifteen states passed legislation prohibiting the death penalty for mentally disabled offenders.¹⁰² When one considers these eighteen states in conjunction with the twelve states that do not have the death penalty, more than half of the states have banned the execution of a mentally retarded offender.¹⁰³

In April of 1990, less than a year after *Penry* was decided, both Tennessee and Kentucky passed legislation to stop the executions of mentally retarded offenders.¹⁰⁴ Arkansas, Colorado, New Mexico, and Washington soon followed.¹⁰⁵ In 1994 and 1995, Kansas and New York, respectively, re-instated the death penalty but specifically excluded the mentally retarded.¹⁰⁶ By 2001, Arizona, Connecticut, Florida, Missouri, Nebraska, and South Dakota also banned the execution of the mentally retarded.¹⁰⁷

Much to the surprise of death penalty opponents, in March of 2001, the Supreme Court granted *certiorari* in the case of *McCarver v.*

¹⁰⁰ *Atkins v. Virginia*, 536 U.S. 304, 314 (2002).

¹⁰¹ *See Penry*, 492 U.S. at 334 (citing GA. CODE ANN. § 17-7-131 (1988)); MD. CODE ANN., CRIM. LAW § 2-202(1) (2002). Maryland's statute was enacted prior to *Penry*, but did not take effect until one week after the decision was handed down. *Penry*, 492 U.S. at 334.

¹⁰² *See* ARIZ. REV. STAT. § 13-703.02 (2001); ARK. CODE ANN. § 5-4-618 (Michie 2001); COLO. REV. STAT. § 16-9-401(2) (2001); CONN. GEN. STAT. § 1-1g (2001); FLA. STAT. ANN. § 921.137 (West 2002); IND. CODE ANN. § 35-36-9-1 (Michie 2002); KY. REV. STAT. ANN. § 532.130 (Michie 2001); MO. REV. STAT. § 565.030 (2001); NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2001); WASH. REV. CODE § 10.95.030 (2002).

¹⁰³ Lindsay Raphael, Note and Comment, *Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded Can No Longer Be Tolerated*, 26 NOVA L. REV. 269, 299 (2001).

¹⁰⁴ *See* KY. REV. STAT. ANN. § 532.130 (Michie 1990); TENN. CODE ANN. § 39-13-203 (1990).

¹⁰⁵ *See* ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. § 16-9-401(2) (1993); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); WASH. REV. CODE § 10.95.030 (1993).

¹⁰⁶ *See* KY. REV. STAT. ANN. § 532.130 (Michie 1994); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995).

¹⁰⁷ *See* ARIZ. REV. STAT. § 13-703.02 (2001); CONN. GEN. STAT. § 1-1g (2001); FLA. STAT. ANN. § 921.137 (West 2001); MO. REV. STAT. § 565.030 (2001); NEB. REV. STAT. § 28-105.01 (1998); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000).

*North Carolina*¹⁰⁸ to revisit the constitutionality of executing mentally retarded criminals.¹⁰⁹ Ernest P. McCarver was convicted of first-degree murder and robbery with a dangerous weapon and sentenced to death despite having an IQ of sixty-seven.¹¹⁰ However, before the Supreme Court could hear the *McCarver* case, it became moot when the North Carolina legislature passed a new statute prohibiting the execution of mentally retarded offenders.¹¹¹ On September 25, 2001, the Supreme Court dismissed *McCarver*,¹¹² and granted *certiorari* to address the same question in *Atkins v. Virginia*.¹¹³

C. *Atkins v. Virginia*

On August 16, 1996, Daryl Renard Atkins and William Jones kidnapped Eric Nesbitt at gunpoint, forced him to withdraw money from an ATM, and then shot him eight times.¹¹⁴ Atkins was convicted of capital murder, and the state argued for a death sentence based upon future dangerousness and the “vileness of the offense.”¹¹⁵

During the penalty phase of the trial, the defense expert, Dr. Evan Nelson, testified that Atkins was mildly retarded with an IQ of fifty-nine.¹¹⁶ Dr. Nelson based his testimony on interviews with Atkins, his family, and jail personnel; an examination of school and court

¹⁰⁸ 533 U.S. 975 (2001).

¹⁰⁹ Charles Lane, *High Court to Review Executing Retarded; Decision May Reflect Changes in State Laws on Mentally Disabled*, THE WASH. POST, Mar. 27, 2001, at A1. Opponents had been campaigning against imposing the death penalty on mentally retarded offenders, but did not believe the Court would revisit this issue again so soon after their 1989 ruling in *Penry*. *Id.*

¹¹⁰ *State v. McCarver*, 462 S.E.2d 25, 31 (N.C. 1995).

¹¹¹ N.C. GEN. STAT. § 15A-2005 (2001).

¹¹² *McCarver v. North Carolina*, 533 U.S. 975 (2001).

¹¹³ *Atkins v. Virginia*, 534 U.S. 809 (2001).

¹¹⁴ Frank Green, *High Court to Tackle Execution Case; Arguments to Center on Mental Disability*, THE RICHMOND TIMES-DISPATCH, Feb. 17, 2002, at A1; *see also* Frank Green, *ATM Photos Identified Atkins, Jones; Victim Played Basketball, Ran Track and was Eagle Scout*, THE RICHMOND TIMES-DISPATCH, Feb. 17, 2002, at A8.

The state indicted both Atkins and Jones for capital murder, however, Jones made a deal to testify against Atkins in exchange for life imprisonment. *Atkins*, 536 U.S. at 308 n.1. At Atkins' trial, both Atkins and Jones testified that it was the other who actually shot and killed Nesbitt. *Id.* at 307. As one newspaper noted, when the jury was given a choice between believing Atkins, who “bumbled on the witness stand,” and Jones, who was smart enough not to talk to detectives and to cut a deal, Jones was the easy choice. Sara Catania, *Who Should Die*, L.A. WKLY., June 28, 2002, at 20.

¹¹⁵ *Atkins*, 536 U.S. at 307-08. To support these two aggravating factors, the State offered evidence of Atkins' prior felony convictions, testimony from earlier victims, and pictures of Nesbitt's body. *Id.* at 308.

¹¹⁶ *Id.* at 308-09.

records; and the administration of a full-scale intelligence test.¹¹⁷ The psychologist explained that Atkins' IQ score fell into the bottom one percent for intelligence and, in his opinion, Atkins always had limited intelligence and was not currently malingering.¹¹⁸ The State offered no rebuttal.¹¹⁹

The jury sentenced Atkins to death,¹²⁰ but because of problems with the verdict form, the Virginia Supreme Court ordered a new sentencing hearing.¹²¹ Dr. Nelson repeated his testimony at the new hearing and this time the State offered a rebuttal witness.¹²² Dr. Stanton Samenow testified that Atkins was not retarded, but instead suffered from antisocial personality disorder.¹²³ The jury once again sentenced Atkins to death.¹²⁴

Based upon *Penry*, the Virginia courts upheld Atkins' death sentence.¹²⁵ Because of the "dramatic shift in the state legislative landscape," the United States Supreme Court granted *certiorari* to revisit the issue of the constitutionality of executing the mentally retarded.¹²⁶

Justice Stevens, writing for the majority, began the decision by reviewing the Eighth Amendment's prohibition on cruel and unusual punishment and the evolving standards of decency test.¹²⁷ The majority concluded that, under this test, it must look at current legislation, representing the judgment of the citizens, when deciding this issue.¹²⁸

The majority found that the legislative landscape had

¹¹⁷ *Id.* at 309 n.4.

¹¹⁸ *Id.* at 309 n.5. Dr. Nelson testified that he had conducted over forty forensic evaluations of capital defendants and Atkins was only the second defendant he had diagnosed with mental retardation. *Id.* Further, based upon his evaluation, he did not believe that the low IQ score was the result of malingering, an aberrational test score, or the result of an invalid test. *Atkins*, 536 U.S. at 309 n.5.

¹¹⁹ *Id.* at 309.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* Dr. Samenow's evaluation was based upon two interviews with Atkins, interviews with jail personnel, and a review of school records. *Atkins*, 536 U.S. at 309 n.6. Dr. Samenow never administered an intelligence test. *Id.* His only testing consisted of asking Atkins several questions from an outdated version of an IQ test. *Id.* Dr. Samenow attributed Atkins' terrible academic performance to a failure to pay attention and a lack of motivation. *Id.*

¹²⁴ *Id.* at 309.

¹²⁵ *Id.* at 310.

¹²⁶ *Atkins*, 536 U.S. at 310; *see also* *Atkins v. Virginia*, 534 U.S. 809 (2001).

¹²⁷ *Atkins*, 536 U.S. at 311-12.

¹²⁸ *Id.* at 312.

significantly changed since *Perry*.¹²⁹ The Court noted that, based in part on national attention from their earlier decision, sixteen states had enacted legislation banning the execution of mentally retarded offenders and other states were considering similar legislation.¹³⁰ The Court found significant the fact that this legislation was being approved during a time when anticrime legislation was greatly favored over legislation that protects people convicted of violent crimes.¹³¹ Further, the majority also noted that the practice of executing mentally retarded offenders is uncommon, even in those states authorizing such executions.¹³² Based upon these changes, the Court concluded that a national consensus against executing the mentally retarded had developed.¹³³

Justice Stevens acknowledged that there was disagreement regarding which offenders qualify as retarded.¹³⁴ The Court, however, chose not to adopt a national standard for determining mental retardation.¹³⁵ Instead, the Court preferred to “leave to the States the task of developing appropriate ways to enforce the constitutional restriction.”¹³⁶

In addition to finding that the current standards of decency do not allow for the execution of the mentally retarded, the Court also found that death penalty jurisprudence provides two additional reasons to categorically ban the execution of the mentally retarded.¹³⁷ First, the Court found that these executions do not further the goals of retribution and deterrence, and consequently result in the “purposeless and needless imposition of pain and suffering.”¹³⁸

¹²⁹ *Id.* at 314-15.

¹³⁰ *Id.*

¹³¹ *Id.* at 315-16.

¹³² *Id.* at 316.

¹³³ *Atkins*, 536 U.S. at 316. In a footnote, the Court noted that additional evidence shows that the change in legislation “reflects a much broader social and professional consensus.” *Id.* at 316 n.21. *Amici Curiae* Briefs submitted in this case showed that the American Psychological Association, the American Association of Mental Retardation, diverse religious communities, and the world community all opposed the execution of mentally retarded offenders. *Id.*

¹³⁴ *Id.* at 317.

¹³⁵ *Id.*

¹³⁶ *Id.* (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

¹³⁷ *Atkins*, 536 U.S. at 318-19.

¹³⁸ *Id.* at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)). The Court noted that previously in *Gregg v. Georgia*, they found that the death penalty was justified by the social purposes of retribution and deterrence. *Id.* at 318-19 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)). The Court found that “the lesser culpability of the mentally retarded offender . . . does not merit that form of retribution.” *Id.* at 319. The Court also found that the diminished capacity of

Second, the Court recognized that offenders with reduced capacities have an increased risk of unjustifiably receiving the death penalty.¹³⁹ Consequently, although the Court refused to define mental retardation, it found that once a determination of mental retardation was made, execution would be cruel and unusual punishment under the “evolving standards of decency” test.¹⁴⁰

In blistering dissents, both Chief Justice Rehnquist and Justice Scalia criticized the majority’s finding of a national consensus against executing the mentally retarded.¹⁴¹ The dissenters accused the majority of assessing the legislation in such a manner as to create a *post hoc* rationalization for the decision.¹⁴² Further, the dissenters heavily criticized the majority’s use of public opinion polls, and the opinions of professional organizations and religious groups to support its analysis of contemporary social values.¹⁴³ Instead, the dissenters argued that the Court’s inquiry should be limited to legislation and the practices of sentencing juries.¹⁴⁴ These factors, the dissenters argued, do not provide sufficient evidence to support a national consensus against imposing the death penalty on mentally retarded offenders.¹⁴⁵

II. MULTIPLE DEFINITIONS OF MENTAL RETARDATION

Although the Supreme Court banned the execution of the mentally retarded in *Atkins*, it chose not to define mental retardation.¹⁴⁶ Instead, the Court left it to the states to define

mentally retarded defendants makes it unlikely that the possibility of receiving the death penalty would be understood and act as a deterrent. *Id.* at 319-20.

¹³⁹ *Id.* at 320-21. Among the possibilities acknowledged by the Court are the increased risk of false confessions, the fact that mentally retarded defendants are unlikely to be able to assist their attorneys and make poor witnesses, and the fact that a finding of mental retardation may enhance the likelihood of a jury believing in the defendant’s future dangerousness. *Atkins*, 536 U.S. at 320-21.

¹⁴⁰ *Id.* at 321.

¹⁴¹ *Id.* at 328 (Rehnquist, C.J., dissenting); *see also id.* at 341-45 (Scalia, J., dissenting).

¹⁴² *Id.* at 321-22 (Rehnquist, C.J., dissenting); *see also id.* at 346-47 (Scalia, J., dissenting).

¹⁴³ *Atkins*, 536 U.S. at 321-22 (Rehnquist, C.J., dissenting); *see also id.* at 347 (Scalia, J., dissenting) (stating that “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’ must go to its appeal . . . to the views of assorted professional and religious organizations, members of the so-called ‘world community,’ and respondents to opinion polls”).

¹⁴⁴ *Id.* at 322-24 (Rehnquist, C.J., dissenting); *see also id.* at 341-48 (Scalia, J., dissenting).

¹⁴⁵ *Id.* at 322-24 (Rehnquist, C.J., dissenting); *see also id.* at 341-48 (Scalia, J., dissenting).

¹⁴⁶ *Atkins*, 536 U.S. at 317.

retardation for themselves.¹⁴⁷ A survey of current state definitions shows the problems with this approach. There is no uniformity in the states' current definitions of mental retardation, and consequently, someone who is legally retarded in one state may not be in another.¹⁴⁸

A. *Statutory Definitions*

1. IQ Below Sixty-five

Statutes in both Arizona and Arkansas define mental retardation as an IQ below sixty-five and "significant" impairment in adaptive behavior.¹⁴⁹ There are, however, considerable differences between these two statutes.¹⁵⁰ The Arizona statute defines mental retardation as "a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functions" with an onset before the age of eighteen.¹⁵¹ Under this statute, courts hearing capital cases must appoint a licensed psychologist to conduct a prescreening evaluation of the defendant's intelligence.¹⁵² If the prescreening evaluation finds an IQ of seventy-five or less, the defendant is then tested by additional experts nominated by both the State and the defense.¹⁵³ A finding that the defendant has an IQ of sixty-five or lower establishes a rebuttable presumption that the defendant is retarded and therefore ineligible for the death penalty.¹⁵⁴ In addition, if a defendant has an IQ of seventy or lower, he is permitted to establish mental retardation by clear and convincing evidence.¹⁵⁵

By comparison, Arkansas defines mental retardation as both "significantly subaverage general intellectual functioning accompanied by significant deficits or impairments in adaptive functioning" that is apparent by the age of eighteen and "deficits in adaptive behavior."¹⁵⁶ There is a rebuttable presumption that those defendants with an IQ of sixty-five or below are retarded, and therefore ineligible for a death sentence.¹⁵⁷ Under Arkansas law,

¹⁴⁷ *Id.*

¹⁴⁸ *See infra* PART II.A.

¹⁴⁹ ARIZ. REV. STAT. § 13-703.02 (2001); ARK. CODE ANN. § 5-4-618 (Michie 2001).

¹⁵⁰ ARIZ. REV. STAT. § 13-703.02 (2001); ARK. CODE ANN. § 5-4-618 (Michie 2001).

¹⁵¹ ARIZ. REV. STAT. § 13-703.02(k)(2) (2001).

¹⁵² *Id.* § 13-703.02(b) (2001).

¹⁵³ *Id.* § 13-703.02(d) (2001).

¹⁵⁴ *Id.* § 13-703.02(a), (c) (2001).

¹⁵⁵ *Id.* § 13-703.02(c) (2001).

¹⁵⁶ ARK. CODE ANN. § 5-4-618(a)(1) (Michie 2001).

¹⁵⁷ *Id.* § 5-4-618(a)(2) (Michie 2001); ARK. CODE ANN. § 5-4-618(b) (Michie 2001).

however, the state is not required to assess the intelligence of capital defendants—the burden is on the defendant to prove mental retardation by a preponderance of the evidence.¹⁵⁸

2. IQ Below Seventy

Several states have set seventy, rather than sixty-five, as the minimum IQ for the imposition of a death sentence.¹⁵⁹ However, the level of impairment in adaptive behavior required for a determination of mental retardation varies amongst these states.¹⁶⁰ Moreover, some states limit when these deficits must have become apparent,¹⁶¹ while others impose no age requirement for when the impairments must manifest.¹⁶²

Kentucky does not allow for the execution of offenders with “significantly subaverage intellectual functioning” and “substantial deficits in adaptive behavior,” both of which must have manifested during the “developmental period.”¹⁶³ While the statute defines significantly subaverage intelligence as an IQ of seventy or less,¹⁶⁴ there is no explanation as to what constitutes a *substantial* deficit, or at what age the developmental period ends.¹⁶⁵

Maryland, North Carolina, South Dakota, and Tennessee all prohibit the execution of a defendant with subaverage intellectual functioning, as evidenced by an IQ of seventy or below on a standardized intelligence test,¹⁶⁶ and by deficits in adaptive

¹⁵⁸ *Id.* § 5-4-618 (Michie 2001); *see also id.* § 5-4-618(c) (Michie 2001).

¹⁵⁹ KY. REV. STAT. ANN. § 532.130 (Michie 2001); MD. CODE ANN., CRIM. LAW § 2-202(1) (2002); NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2001); WASH. REV. CODE § 10.95.030 (2002).

¹⁶⁰ For example, Kentucky requires “substantial deficits” in adaptive behavior, while Nebraska and New Mexico only require the existence of deficits in adaptive behavior. *Compare* KY. REV. STAT. ANN. § 532.130 (2001), *with* NEB. REV. STAT. § 28-105.01 (2002), *and* N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002).

¹⁶¹ *See, e.g.*, KY. REV. STAT. ANN. § 532.130 (Michie 2001); MD. CODE ANN., CRIM. LAW § 2-202(1) (2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2001).

¹⁶² *See, e.g.*, NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); WASH. REV. CODE § 10.95.030 (2002).

¹⁶³ KY. REV. STAT. ANN. § 532.130(2) (2001). In general, the developmental period is defined as the time between birth and adulthood. *See* ROBERT J. GREGORY, PSYCHOLOGICAL TESTING 232 (3d ed. 2000). There is some variation among definitions as to what age constitutes the end of the developmental period. *See infra* PARTS II.B-D.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ An intelligence test is considered standardized when there is a uniform

functioning.¹⁶⁷ These states also require that the mental retardation manifest before a certain age.¹⁶⁸ In South Dakota, North Carolina, and Tennessee there must be evidence that the deficits in intelligence and adaptive functioning manifested before the age of eighteen.¹⁶⁹ Maryland, however, requires the manifestation of deficits to occur before the age of twenty-two.¹⁷⁰ Consequently, if hypothetical-defendant Sal's deficits manifested at the age of nineteen, he would be considered mentally retarded in Maryland, but not in North Carolina, South Dakota, or Tennessee.

When other states are included in the comparison, the disparity becomes even more apparent. Nebraska, New Mexico, and Washington also prohibit the execution of defendants with subaverage intelligence and deficits in adaptive functioning as evidenced by a score of seventy or less on a reliable intelligence test.¹⁷¹ The legislators in Nebraska, New Mexico, and Washington, however, chose not to set an age limit for the manifestation of these deficits.¹⁷² Therefore, Sal, whose deficits manifested at the age of nineteen, would also be considered retarded in Nebraska, New Mexico, and Washington. Further, if Sal had an IQ of sixty-five and deficits did not manifest until the age of twenty-three, he could be executed in Maryland, North Carolina, South Dakota, and Tennessee, but not in Nebraska, New Mexico, and Washington.

3. No Minimum IQ

In addition to those state statutes that include an IQ score as part of their definition of mental retardation, many other states choose not to set a minimum statutory IQ. Instead, these statutes provide definitions that describe those deficits that qualify as mentally

method of test administration. *See* GREGORY, *supra* note 163, at 30-31. Standardization is important because it eliminates differences amongst different examiners and settings. *Id.* Generally, standardized tests have specific directions governing administration, including the methods of administration, timing, and the proper responses to any questions posed by the test taker. *Id.*

¹⁶⁷ MD. CODE ANN., CRIM. LAW § 2-202(1) (2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie 2002); TENN. CODE ANN. § 39-13-203 (2001).

¹⁶⁸ *See* MD. CODE ANN., CRIM. LAW § 2-202(1) (2002); N.C. GEN. STAT. § 15A-2005 (2002); S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie 2002).

¹⁶⁹ S.D. CODIFIED LAWS § 23A-27A-26.2 (Michie 2002); N.C. GEN. STAT. § 15A-2005 (2002); TENN. CODE ANN. § 39-13-203 (2001).

¹⁷⁰ *See* MD. CODE ANN., CRIM. LAW § 2-202(1) (2002).

¹⁷¹ NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); WASH. REV. CODE § 10.95.030 (2002).

¹⁷² *See* NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002); WASH. REV. CODE § 10.95.030 (2002).

retarded for each state.¹⁷³ The statutory definitions range from the standard requirement of subaverage intelligence and deficits in adaptive behavior¹⁷⁴ to Kansas' definition, which requires an inability to appreciate the criminality of one's conduct.¹⁷⁵

In Colorado, Georgia, and Indiana, the statutory definition of mental retardation requires significantly subaverage intelligence that exists concurrently with deficits in adaptive functioning.¹⁷⁶ Colorado requires these requirements to manifest and be documented during the developmental period, which the statute does not define.¹⁷⁷ It does, however, allow the courts to waive the documentation requirement "upon a finding that extraordinary circumstances exist."¹⁷⁸ The Georgia statute has the same manifestation requirements but does not require any documentation showing that the deficits manifested during the developmental period.¹⁷⁹ By comparison, Indiana requires that a court ordered evaluation finds the manifestation occurred before the age of twenty-two.¹⁸⁰

The definitions of mental retardation in Connecticut, Florida, and Missouri are similar, but their statutes provide different definitions for some of the terms used to define mental retardation.¹⁸¹ Connecticut defines subaverage intelligence as "an intelligence quotient more than two standard deviations below the mean for the test," and requires that the test be a standardized intelligence test administered by a person with formal training in its administration.¹⁸² The Connecticut statute then defines adaptive behavior as the "degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group," and the developmental period as the time

¹⁷³ See, e.g. COLO. REV. STAT. § 18-1.3-1101(2) (2002); CONN. GEN. STAT. § 1-1g (2001); FLA. STAT. ANN. § 921.137 (West 2002); GA. CODE ANN. § 17-7-131 (2002); IND. CODE ANN. § 35-36-9-2 (Michie 2002); KAN. STAT. ANN. § 21-4623 (2001); MO. REV. STAT. § 565.030 (2001); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002).

¹⁷⁴ See, e.g. COLO. REV. STAT. § 18-1.3-1101(2) (2002); CONN. GEN. STAT. § 1-1g (2001); FLA. STAT. ANN. § 921.137 (West 2002); GA. CODE ANN. § 17-7-131 (2002); IND. CODE ANN. § 35-36-9-2 (Michie 2002); MO. REV. STAT. § 565.030 (2001); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002).

¹⁷⁵ KAN. STAT. ANN. § 21-4623 (2001).

¹⁷⁶ COLO. REV. STAT. § 18-1.3-1101(2) (2002); GA. CODE ANN. § 17-7-131 (2002); IND. CODE ANN. § 35-36-9-2 (Michie 2002).

¹⁷⁷ COLO. REV. STAT. § 18-1.3-1101(2) (2002).

¹⁷⁸ *Id.*

¹⁷⁹ GA. CODE ANN. § 17-7-131 (2002).

¹⁸⁰ IND. CODE ANN. § 35-36-9-2 (Michie 2002).

¹⁸¹ CONN. GEN. STAT. § 1-1g (2001); FLA. STAT. ANN. § 921.137 (West 2002); MO. REV. STAT. § 565.030 (2001).

¹⁸² CONN. GEN. STAT. § 1-1g (2001).

from birth to eighteen years of age.¹⁸³ Florida's statute is almost identical, but does not specify who may administer the test to a defendant.¹⁸⁴ Missouri does not specify what qualifies as subaverage intellectual functioning, but requires "limitations in two or more adaptive behaviors" defined as "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work" that manifest before the age of eighteen.¹⁸⁵

The definition of mental retardation in the Kansas statute is quite different from all others.¹⁸⁶ Kansas defines mental retardation as subaverage intelligence "to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."¹⁸⁷ Therefore, in Kansas, unlike all other states, a mentally retarded offender can be executed unless, as the result of his mental deficiencies, he cannot understand the criminality of his behavior or conform his behavior to the law.¹⁸⁸

B. The American Association on Mental Retardation's Definition

In addition to the various state statutory definitions of mental retardation, several professional organizations also define mental retardation. The American Association on Mental Retardation (the "AAMR") is an interdisciplinary organization of professionals that focuses on mental retardation.¹⁸⁹ Founded in 1876, the AAMR has defined mental retardation since 1921.¹⁹⁰ The AAMR continually

¹⁸³ *Id.*

¹⁸⁴ FLA. STAT. ANN. § 921.137 (West 2002).

¹⁸⁵ MO. REV. STAT. § 565.030 (2001).

¹⁸⁶ See KAN. STAT. ANN. § 21-4623(e) (2001).

¹⁸⁷ KAN. STAT. ANN. § 21-4623(e) (2001).

¹⁸⁸ *Id.*

¹⁸⁹ American Association of Mental Retardation, *Definition of Mental Retardation*, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Oct. 5, 2002) (on file with author) [hereinafter AAMR 2002].

¹⁹⁰ *Id.* Originally, the organization was entitled "The Association of Medical Officers of American Institutions of Idiotic and Feeble-minded Children." James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 421 n.39 (1985). In 1906, the name of the association was changed to "The American Association for the Study of the Feeble-minded," and in 1933 the name "The American Association on Mental Deficiency" was adopted. *Id.* By 1992, the organization was known by its present name. See generally James W. Ellis, MENTAL RETARDATION AND THE DEATH PENALTY: A GUIDE TO STATE LEGISLATIVE ISSUES 6, available at www.aamr.org/Reading_Room/pdf/state_legislatures_guide.pdf (citing AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (Ruth Luckasson ed., 9th ed. 1992)) (last

revises its definition, and published its latest comprehensive update in 2002.¹⁹¹

Currently, the AAMR defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills,” which manifests before the age of eighteen.¹⁹² When determining mental retardation, professionals must abide by the following guidelines:

1. Evaluate limitations in present functioning within the context of the individual’s age peers and culture;
2. Take into account the individual’s cultural and linguistic differences as well as communication, sensory, motor, and behavioral factors;
3. Recognize that within an individual limitations often coexist with strengths;
4. Describe limitations so that an individualized plan of needed supports can be developed; and
5. Provide appropriate personalized supports to improve the functioning of a person with mental retardation.¹⁹³

The AAMR’s intelligence criterion for diagnosing mental retardation is an IQ score of approximately seventy or below.¹⁹⁴ Based on the standard of error that exists for most intelligence tests, however, the AAMR makes an IQ of seventy-five the cutoff for a diagnosis of mental retardation.¹⁹⁵

visited Mar. 27, 2003) (on file with author).

¹⁹¹ AAMR 2002, *supra* note 189.

In 1983, the AAMR definition of mental retardation was “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) [hereinafter AAMR 1983].

In 1992, the AAMR defined mental retardation as:

substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (Ruth Luckasson ed., 9th ed. 1992) [hereinafter AAMR 1992].

¹⁹² AAMR 2002, *supra* note 189.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Adaptive behavior is defined by the AAMR as “the collection of conceptual, social, and practical skills,” which allow people to function in their everyday lives.¹⁹⁶ The AAMR recommends that limitations in adaptive behavior be assessed by using standardized testing, and defines significant limitations as a score that is two or more standard deviations below the average either on a conceptual, social, or practical sub-test, or on the overall test.¹⁹⁷

The focus of the AAMR definition is on evaluating mental retardation in order to develop an individualized support plan.¹⁹⁸ Supports are the “resources and individual strategies necessary to promote the development, education, interests, and personal well-being” of those with mental retardation.¹⁹⁹ The AAMR definition is based on a premise that the assessment is designed to allow the professional to consider the individual’s limitations in order to create and implement an appropriate treatment plan.²⁰⁰ The definition was not created for classification purposes, but rather is part of a model meant to help each mentally disabled individual function to the best of his or her ability.²⁰¹

C. *Diagnostic and Statistical Manual of Mental Disorders Definition*

The Diagnostic and Statistical Manual of Mental Disorders (the “DSM-IV-TR”) is a uniform and standardized system for the classification and diagnosis of mental disorders.²⁰² The DSM-IV-TR, published by the American Psychiatric Association, is the definitive diagnostic tool for psychologists and psychiatrists.²⁰³ Its classifications are based on a systematic, empirical study of literature reviews, data analysis, and field trials.²⁰⁴ The diagnostic criteria, categories, and

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ AAMR 2002, *supra* note 189.

¹⁹⁹ *Id.* Support areas include providing activities focusing on “human development, teaching and education, home living, community living, employment, health and safety, behavior, sociability, and protection and advocacy.” *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xviii-xxvi (4th text rev. 2000) [hereinafter DSM-IV-TR].

²⁰³ ROBERT C. CARSON ET AL., ABNORMAL PSYCHOLOGY AND MODERN LIFE 8-9 (10th ed. 1998). The Diagnostic and Statistical Manual of Mental Disorders is the “gold standard” for defining mental disorder. *Id.*; *see also* GERALD C. DAVISON & JOHN M. NEALE, ABNORMAL PSYCHOLOGY 59 (6th ed. 1994) (referring to the Diagnostic and Statistical Manual of Mental Disorders as the “current, official diagnostic system widely employed by mental health professionals”).

²⁰⁴ DSM-IV-TR, *supra* note 202, at xxvi-xxx.

descriptions are meant to be used for classification by those individuals with appropriate clinical training and diagnostic experience.²⁰⁵

Based upon the 1992 AAMR definition,²⁰⁶ the DSM-IV-TR diagnostic criteria for mental retardation are:

A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test

B. Concurrent deficits or impairments in present adaptive functioning, . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

C. The onset is before age 18 years.²⁰⁷

The DSM-IV-TR advises that, based upon the measurement error inherent in all testing instruments, an individual whose IQ is between seventy and seventy-five would still qualify as mentally retarded if he or she also exhibited significant deficits in adaptive behavior.²⁰⁸ Conversely, regardless of a low IQ score, mental retardation should not be diagnosed in individuals without deficits in adaptive behavior.²⁰⁹

The DSM-IV-TR defines adaptive functioning as the effectiveness with which an individual can cope with the demands of everyday life and how he compares to the standards of personal independence expected in someone of a comparable age, socio-cultural background, and community.²¹⁰ The Manual calls for evidence of adaptive functioning to be gathered from reliable independent sources.²¹¹ Further, the DSM-IV-TR recommends the administration of one of the available commercial tests used to assess an individual's adaptive functioning.²¹²

D. American Psychological Association's Definition

The American Psychological Association (the "APA") defines

²⁰⁵ *Id.* at xxiv-xxvii.

²⁰⁶ See sources cited *supra* note 191.

²⁰⁷ DSM-IV-TR, *supra* note 202, at 49.

²⁰⁸ *Id.* at 41-42.

²⁰⁹ *Id.* at 42.

²¹⁰ *Id.*

²¹¹ *Id.* Examples of reliable independent sources include teacher evaluations, and school and medical histories. *Id.*

²¹² DSM-IV-TR, *supra* note 202, at 42.

mental retardation as “(a) significant limitations in general intellectual functioning; (b) significant limitations in adaptive functioning which exist concurrently; and (c) onset of intellectual and adaptive limitations before the age of 22 years.”²¹³ The APA notes that this definition is essentially analogous with the current DSM-IV-TR definition and with an earlier AAMR definition.²¹⁴

The APA definition instructs that “significant limitations in intellectual functioning” should be determined based upon a score that is two or more standard deviations below the mean on a valid and “comprehensive, individual measure of intelligence that is administered in a standardized format and interpreted by a qualified practitioner.”²¹⁵ Similarly, “significant limitations in adaptive functioning” should be determined through the use of “a valid and comprehensive, individual measure of adaptive behavior.”²¹⁶ A diagnosis of mental retardation requires that these limitations originate before the age of twenty-two.²¹⁷ The APA stresses that all three of these criteria must be met before an individual can be diagnosed with mental retardation.²¹⁸

III. METHODS OF ASSESSING MENTAL RETARDATION

Mental retardation assessments generally are conducted by trained individuals, including psychiatrists, psychologists, and social workers, and involve both the use of appropriate psychological tests and in-depth clinical evaluations.²¹⁹ The majority of these assessments are conducted on children for identification and evaluation of mental retardation.²²⁰ In death penalty cases, however, the evaluation of adult criminal defendants is conducted for use in the legal system.²²¹

²¹³ AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (John W. Jacobson & James A. Mulick eds., 1996) [hereinafter APA].

²¹⁴ *Id.* at 2.

²¹⁵ *Id.* at 13.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 14.

²¹⁹ See APA, *supra* note 213, at 113.

²²⁰ See generally DSM-IV-TR, *supra* note 202, at xviii-xxvi (categorizing mental retardation as a “Disorder Usually First Diagnosed in Infancy, Childhood, or Adolescence”); JEROME SATTLER, ASSESSMENT OF CHILDREN 651 (3d ed. 1992) (discussing the importance of evaluating mentally retarded children so that appropriate remedial action can be taken).

²²¹ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 308-09 (2002); *Penry v. Lynaugh*, 492 U.S. 302, 307-09 (1989).

In general, psychological testing consists of following a standardized procedure to sample and categorize behavior.²²² Although the formats of these tests vary widely, most use standardized testing procedures and defined scoring methods and, generally, results are determined by comparing the test taker's scores against existing norms or standards.²²³ Most psychological tests are released only to qualified persons because an erroneous score from an unqualified examiner can cause harm, the previewing of test questions renders the test invalid, and the leaking of the test's content to the general public would destroy the test's effectiveness.²²⁴

A. *Intelligence Testing*

Historically, individual intelligence tests measured a broad range of skills in order to estimate a person's general intelligence.²²⁵ Modern intelligence tests have continued to assess intelligence by testing a wide variety of skills.²²⁶ Most modern intelligence tests consist of numerous subtests from which the subject's overall intelligence score is ultimately derived.²²⁷ The most common full-scale, standardized intelligence tests used to assess individual adult intelligence levels are the Weschler Adult Intelligence Scale-III and the Stanford-Binet: Fourth Edition.²²⁸

The Weschler Adult Intelligence Scale-III (the "WAIS-III") is one of the most widely used individualized intelligence tests.²²⁹ The test uses fourteen subtests to assess Full-Scale, Verbal, and Performance Intelligence.²³⁰ Scores on the individual subtests are converted into

²²² GREGORY, *supra* note 163, at 30-32.

²²³ *Id.*

²²⁴ *Id.* at 39-40.

²²⁵ *Id.* at 30-32.

²²⁶ *Id.* at 34.

²²⁷ *Id.*

²²⁸ GREGORY, *supra* note 163, at 177.

²²⁹ ROGER PIERANGELO & GEORGE GIULIANI, SPECIAL EDUCATOR'S COMPLETE GUIDE TO 109 DIAGNOSTIC TESTS 32 (1998).

²³⁰ GREGORY, *supra* note 163, at 187. Full Scale IQ is an individual's overall score on the WAIS-III. *See id.* Although there are fourteen subtests, object assembly has become optional and is only used if necessary to replace another subtest. *Id.* at 187. Of the thirteen main subtests, eleven must be completed in order to compute the subject's Full Scale IQ. *Id.*

Verbal IQ analyzes "auditory input and vocal output." PIERANGELO & GIULIANI, *supra* note 229, at 32. The subtests for computation of Verbal IQ are Vocabulary, Similarities, Arithmetic, Digit Span, Information, and Comprehension. *Id.* at 32-33. These subtests measure numerous abilities including attention, concentration, learning ability, reasoning skills, and memory. *Id.*

Performance IQ refers to an individual's ability to perform tasks that measure

scaled scores, averaged, and then converted into an IQ score.²³¹ The subject's IQ score is normed based upon a mean IQ score of one hundred with a standard deviation of fifteen points.²³² Representing only 2.2% of the population, an individual whose IQ score is below seventy is considered Intellectually Deficient.²³³

The WAIS-III was standardized on a large sample of adults carefully stratified to match the population figures from the 1995 United States Census.²³⁴ The test has exceptional reliability²³⁵ and validity.²³⁶ Other strengths of the WAIS-III are that its scores highly correlate with academic achievement and the test is "well organized and easy to use."²³⁷ Some experts, however, have criticized the WAIS-III, arguing that some questions have a cultural bias and, below an IQ of forty, the test does not provide distinguishable levels of retardation.²³⁸

In contrast, the Stanford-Binet: Fourth Edition (the "SB:FE") is

"visual input and vocal or motoric output." *Id.* at 32. The Performance IQ subtests are Picture Completion, Digit Symbol-Coding, Block Design, Matrix Reasoning, and Picture Arrangement. *Id.* at 33. Some of the abilities measured by these subtests are visual perception, visual discrimination, attention to detail, and speed in learning tasks. *Id.*

²³¹ PIERANGELO & GIULIANI, *supra* note 229, at 109.

²³² GREGORY, *supra* note 163, at 187-88. IQ scores obtained on the WAIS-III are classified as follows:

IQ Range	Classification	Percent Included
130 and over	Very Superior	2.2
120-129	Superior	6.7
110-119	High Average	16.1
90-109	Average	50.0
80-89	Low Average	16.1
70-79	Borderline	6.7
69 and below	Intellectually Deficient	2.2

PIERANGELO & GIULIANI, *supra* note 229, at 109.

²³³ PIERANGELO & GIULIANI, *supra* note 229, at 34. The WAIS-III category of Intellectually Deficient refers to anyone scoring below a score of seventy on the test. *Id.* An individual scoring in that category has "significantly subaverage intellectual functioning." See DSM-IV-TR, *supra* note 202, at 41.

²³⁴ GREGORY, *supra* note 222, at 188. The sample, consisting of 2,450 adults, was carefully stratified on the variables of race, sex, education, and geographic region. *Id.*

²³⁵ *Id.* at 189; see also PIERANGELO & GIULIANI, *supra* note 229, at 47. Reliability is a measure of the test's consistency measured by the ability to replicate results. *Id.* at 75.

²³⁶ GREGORY, *supra* note 163, at 189-90; see also PIERANGELO & GIULIANI, *supra* note 229, at 47. Validity is the extent to which a test measures what it purports to measure. *Id.* at 96.

²³⁷ PIERANGELO & GIULIANI, *supra* note 229, at 47.

²³⁸ *Id.* at 48.

based upon a hierarchical model of intelligence that is tested through the use of various subtests.²³⁹ The SB:FE contains fifteen subtests, which measure Verbal Reasoning, Quantitative Reasoning, Abstract/Visual Reasoning, and Short Term Memory.²⁴⁰ The examiner totals the scores in these four areas and converts them to a composite IQ score.²⁴¹ The examiner then compares the composite IQ score against a mean of one hundred with a standard deviation of sixteen.²⁴² The SB:FE classifies a subject with an IQ of sixty-seven or below as mentally retarded.²⁴³

The developers of the SB:FE standardized the test on a sample of over five thousand subjects selected to be representative of the population in the 1980 United States Census.²⁴⁴ The test is representative of the target population and, for the most part, has a high reliability.²⁴⁵ While the SB:FE is a valid test of intellectual ability,²⁴⁶ it has several weaknesses.²⁴⁷ These include the lack of uniformity in composite scores among age groups and the fact that the SB:FE suggests time limits but does not require that they be enforced.²⁴⁸ Additionally, to lower testing time, the SB:FE allows the examiner to administer shortened versions of the individual subtests and this may result in a reduction of the test's reliability.²⁴⁹ Also problematic is the fact that SB:FE composite IQ scores have been found to be higher than the comparative WAIS-III IQ scores by an average of seven points.²⁵⁰

²³⁹ GREGORY, *supra* note 163, at 193.

²⁴⁰ PIERANGELO & GIULIANI, *supra* note 229, at 52-53. The Verbal Reasoning Subtests are Vocabulary, Comprehension, Absurdities, and Verbal Relations. *Id.* Quantitative Reasoning is tested through the Quantitative, Number Series, and Equation Building Subtests. *Id.* The Abstract/Visual Reasoning Subtests are Pattern Analysis, Copying, Matrices, and Paper Folding and Cutting. *Id.* Finally, the subtests of Bead Memory, Memory for Sentences, Memory for Digits, and Memory for Objects test Short-Term Memory. *Id.*

²⁴¹ *Id.* at 53.

²⁴² PIERANGELO & GIULIANI, *supra* note 229, at 53.

²⁴³ *Id.*

²⁴⁴ GREGORY, *supra* note 163, at 194. The sample was chosen to represent the same "geographic region, community size, ethnic group, age, and sex" as the census population. *Id.*

²⁴⁵ *Id.* at 196. The reliability of the Memory for Objects subtest is only fair, but the composite score reliability is exceptional. *Id.*

²⁴⁶ *Id.* at 197.

²⁴⁷ PIERANGELO & GIULIANI, *supra* note 229, at 54.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ GREGORY, *supra* note 163, at 198. This means that, on average, an individual with a WAIS-III IQ score of 100 will be assessed at an IQ of 107 on the SB:FE. *Id.* This can be problematic because it can lead to very different diagnostic impressions.

B. Testing Adaptive Functioning

An assessment of adaptive behavior is an evaluation of how well individuals “meet the standards of personal independence and social responsibility” expected for their age and cultural background.²⁵¹ Diagnostic assessment instruments that measure functional ability in many areas—including communication, self-care, and social skills—are used to evaluate adaptive behavior.²⁵² The subject, or a third party who is familiar with the subject, provides the information needed to make the assessment.²⁵³ The AAMR Adaptive Behavior Scale and the Camelot Behavioral Checklist are both well-known measures of adaptive behavior.²⁵⁴

The AAMR Adaptive Behavior Scale (the “ABS-RC:2”) was designed to measure “an individual’s strengths and weaknesses among adaptive domains and factors.”²⁵⁵ The norm-referenced test relies on many different factors to provide a percentile score.²⁵⁶ Described as “a psychometric tour de force that borders on overkill,” the ABS-RC:2 is both reliable and valid.²⁵⁷ The test is an excellent measure of an individual’s adaptive behavior levels.²⁵⁸

The Camelot Behavioral Checklist also evaluates the adaptive behavior in adults.²⁵⁹ The test consists of almost four hundred behavior descriptions grouped into domains and subdomains.²⁶⁰ The domain scores are converted to norm-referenced percentiles that indicate the individual’s level of functioning.²⁶¹ The test has excellent

Id. It is unclear whether this is the result of the SB:FE intelligence score being too high or the WISC-III intelligence score being too low. *Id.*

²⁵¹ PIERANGELO & GIULIANI, *supra* note 229, at 195.

²⁵² *Id.* An examiner should focus on “communication, community use, self-direction, health and safety, functional academics, self-care, home living, social skills, leisure, and work.” *Id.*

²⁵³ *Id.* The required information can be obtained from a parent, former teachers, direct service providers, or correctional facility employees. *Id.*

²⁵⁴ GREGORY, *supra* note 163, at 236-37. Although there are many instruments that test adaptive behavior, these two are appropriate for both adult populations and for diagnosis purposes. *Id.* Other scales can only be used on children or for remedial purposes. *Id.*

²⁵⁵ PIERANGELO & GIULIANI, *supra* note 229, at 196.

²⁵⁶ *Id.* The test was normed on a sample of over 4,000 developmentally disabled individuals from forty-three states. GREGORY, *supra* note 163, at 236.

²⁵⁷ GREGORY, *supra* note 163, at 236.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 237.

²⁶⁰ *Id.* The behavior descriptions include items such as “pours liquids,’ ‘waxes floors,’ ‘can boil food,’ and ‘can do stapling jobs.’” *Id.*

²⁶¹ *Id.* The instrument was normed on a sample of 624 developmentally disabled individuals. GREGORY, *supra* note 163, at 237.

reliability and its scores highly correlate with IQ scores obtained on the WISC-III and the SB:FE.²⁶²

IV. ANALYSIS

While the Supreme Court has found the execution of the mentally retarded to be unconstitutional, the Court's decision not to set a standard for mental retardation is problematic. The wide disparity in the current state definitions of mental retardation already results in "significant differences as to exactly who it is that is included under the protective umbrella of prohibition."²⁶³ Further, the absence of uniform testing requirements often results in opposing expert witnesses using drastically different testing methods to come to contradictory conclusions.²⁶⁴

Even a cursory examination of current statutory definitions reveals the necessity of implementing a uniform statutory definition and mandatory assessment guidelines.²⁶⁵ To that end, the AAMR definition is best suited for determining mental retardation in criminal populations.²⁶⁶ Moreover, because the field of psychology accepts these testing methods for determining intelligence and adaptive functioning, state legislators should also accept them.²⁶⁷ Statutes should require that intelligence be assessed using either the WAIS-III or the SB:FE, and that adaptive functioning be measured through the use of the AAMR Adaptive Behavior Scale or the Camelot Behavioral Checklist.²⁶⁸

A. *The Absence of a Uniform Definition of Mental Retardation*

The circumstances surrounding the crimes committed by Son H. Fleming and Horace F. Dunkins are similar.²⁶⁹ Both defendants "committed notoriously brutal crimes and were classified as 'mildly retarded,' possessing IQs just below seventy."²⁷⁰ Both were black

²⁶² *Id.*

²⁶³ Respondent's Brief at 40, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

²⁶⁴ See *supra* notes 116-24 and accompanying text.

²⁶⁵ See *supra* PART II.A.

²⁶⁶ See *infra* notes 292-306 and accompanying text.

²⁶⁷ See *supra* PART III.

²⁶⁸ *Id.*

²⁶⁹ Charles-Edward Anderson, *Low-IQ Murderers: States seek executions of mentally retarded convicts*, 75 A.B.A. J. 26, 26 (1989).

²⁷⁰ *Id.* Horrace Dunkins was convicted for the rape, torture, and murder of a young mother of four. REED, *supra* note 50, at 88. The victim was murdered outside of her home where her children were sleeping. *Id.* She was stabbed sixty-six times and left tied to a tree where her husband found her when he returned from work in

defendants convicted of capital murder by juries who were uninformed of their mental retardation.²⁷¹ More importantly, following the Supreme Court's decision in *Penry*, Fleming and Dunkins were the first mentally retarded offenders scheduled for execution.²⁷² Fleming lived because he was on death row in Georgia, while Dunkins died because he had the misfortune of committing his crime in Alabama.²⁷³

While this example occurred prior to the Supreme Court's ban on the execution of the mentally retarded, today it would still be possible for Alabama to execute Dunkins regardless of Georgia's treatment of a similarly situated offender. If Alabama adopts a mental retardation statute requiring an IQ of sixty-five or less, as is the standard in both Arizona and Arkansas, then Dunkins would still be eligible for the death penalty today.²⁷⁴ If Arizona sets the minimum IQ at seventy, like Nebraska and New Mexico, then Dunkins would live.²⁷⁵ Moreover, Alabama could adopt the same statute as Georgia, and still execute Dunkins.²⁷⁶ If, like Georgia's statute, the new Alabama statute does not set a minimum IQ then the issue of Dunkins' mental retardation would rest on whether or not the Alabama court believed him to be retarded—the Georgia courts' treatment of a virtually identical prisoner would not carry any

the morning. *Id.* at 89. Dunkins, who never finished high school, was functionally illiterate and had the mental status of a ten-to-twelve-year old. *Id.*

Son H. Fleming was sentenced to death for the murder of a small town police chief. Peter Applebome, *2 States Grapple with Issues of Executing Retarded Men*, N.Y. TIMES, July 13, 1989, at A12. The police chief had stopped a car driven by Fleming, unaware that Fleming and two accomplices had just committed a robbery. *Id.* They murdered the police chief and dumped his body in a swamp. *Id.* Approximately eleven years prior to the murder, Fleming, who had never learned to read or write, had received a shotgun blast to his face causing him to lose almost all of his mental capacities. REED, *supra* note 50, at 128.

²⁷¹ Applebome, *supra* note 270, at A12.

²⁷² *Id.*

²⁷³ REED, *supra* note 50, at 88-89. Fleming had his death sentence vacated because, unlike Alabama, Georgia law did not allow for the execution of mentally retarded offenders. *Id.*

Dunkins' execution received national attention because the electric chair failed to kill him on the first attempt. Peter Applebome, *2 Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at 1. Blaming human error for the failure, the state reported that the switch had to be thrown a second time before Dunkins could be declared dead. *Id.*

²⁷⁴ See ARIZ. REV. STAT. § 13-703.02 (2001); ARK. CODE ANN. § 5-4-618 (Michie 2001).

²⁷⁵ See NEB. REV. STAT. § 28-105.01 (2002); N.M. STAT. ANN. § 31-20A-2.1 (Michie 2002).

²⁷⁶ See GA. CODE ANN. § 17-7-131 (2002).

weight.²⁷⁷

Similarly, the fate of Eddie Mitchell, a death row inmate in Louisiana, depends on how the Louisiana legislature or courts define mental retardation.²⁷⁸ Following an unsuccessful attempt to borrow money from his victim, Mitchell killed the man when he struck him in the head with a stick.²⁷⁹ When questioned by the police, Mitchell waived his right to counsel and confessed to the crime.²⁸⁰ Ultimately, a jury sentenced him to death.²⁸¹

Eddie Mitchell has an IQ of sixty-six.²⁸² As a child, he had to repeat several grades, and his classmates mocked him for his stupidity.²⁸³ When he dropped out of school, he was eighteen and in the eighth grade.²⁸⁴ Mitchell's intellectual capacities are so impaired that he was unable to learn how to play baseball and his Cub Scout master reports, "on the rare occasions when he actually caught the ball, 'he would just hold on to it, maybe kiss it, but never throw it on.'"²⁸⁵ Mitchell's fate is in the hands of the Louisiana legislature and courts, and turns on how they choose to define mental retardation. If Louisiana chooses to set the minimum IQ for mental retardation at sixty-five, Mitchell will still be executed. A minimum IQ of seventy, however, means that Mitchell will live.

These cases illustrate the problem with the absence of a uniform definition for mental retardation. The AAMR, DSM-IV-TR, and APA definitions all provide a similar standard for the assessment of mental retardation.²⁸⁶ Consequently, the decision as to which definition to adopt is really a matter of which is the most suitable for codification and application in a criminal law context.

The APA definition is substantially similar to the DSM-IV-TR

²⁷⁷ See *id.*

²⁷⁸ Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation* § VII, at <http://www.hrw.org/reports/2001/ustat/ustat0301-07.htm> (March 20, 2001) (on file with author).

²⁷⁹ Louisiana v. Mitchell, 674 So. 2d 250, 253 (La. 1996).

²⁸⁰ *Id.* It has been reported that Mitchell believed that waiving his rights meant to wave his right hand. Human Rights Watch, *supra* note 278.

²⁸¹ Mitchell, 674 So. 2d at 252.

²⁸² Human Rights Watch, *supra* note 278.

²⁸³ *Id.* Mitchell had to repeat the first grade twice and the sixth grade three times. *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* In part of a statement provided to his attorneys, in large childish letters, Mitchell wrote, "I love to shop in the store. I like ice cream very. Smile. I like horse. I like food to eat. Yes I like cat, and dog." *Id.*

²⁸⁶ See *supra* PART II.B-D.

definition with the exception of the required age of onset.²⁸⁷ The APA specifies that the mental disability must have manifested prior to age twenty-two, while the DSM-IV-TR and the AAMR require the presence of symptoms before the age of eighteen.²⁸⁸ The purpose of this age requirement is to ensure that the mental retardation developed during the developmental period, as opposed to forms of brain damage that occur later in life.²⁸⁹

In a criminal law setting, the age requirement serves the added purpose of “ensur[ing] that defendants may not feign mental retardation once charged with a capital offense.”²⁹⁰ Under this standard, faking cognitive impairment following an arrest would not be sufficient for a diagnosis because the offender’s symptoms would need to have been observed prior to the specified age.²⁹¹ Given that malingering is a concern whenever you are dealing with a criminal population, both the AAMR and the DSM-IV-TR definitions are better suited to this population than the APA definition with its higher age limit.²⁹²

The AAMR is “the principal professional organization in the field of mental retardation.”²⁹³ The AAMR’s definition of mental retardation has influenced courts,²⁹⁴ legislatures,²⁹⁵ and the DSM-IV

²⁸⁷ Compare APA, *supra* note 213, at 113, with DSM-IV-TR, *supra* note 202, at 49.

²⁸⁸ Compare APA, *supra* note 213, at 113, with DSM-IV-TR, *supra* note 202, at 49, and AAMR 2002, *supra* note 189. The requirement that symptoms be present should not be mistaken for a requirement that the individual be diagnosed before the age of eighteen. See DSM-IV-TR, *supra* note 202, at 42; see also AAMR 2002, *supra* note 189. The DSM-IV-TR and the AAMR definitions do not require a diagnosis before the individual reaches the age of majority. *Id.* Instead, they require that the individual exhibited signs and symptoms supported by evidence such as a review of school records, interviews with the subject and others, a review of medical records, and any other available evidence concerning the subject’s mental abilities before the age of eighteen. *Id.*

²⁸⁹ James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* 9, available at http://www.aamr.org/Reading_Room/pdf/state_legislatures_guide.pdf (last visited Mar. 27, 2003) (on file with author). While brain injuries occurring later in life can impair cognitive functions, the impairments caused by such injuries do not fall within the definition of mental retardation. *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Ellis & Luckasson, *supra* note 190, at 421.

²⁹⁴ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443 (1985); see also *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989); *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002).

²⁹⁵ See, e.g., GA. CODE ANN. § 17-7-131 (2002); KY. REV. STAT. ANN. § 532.130 (Michie 1990); N.C. GEN. STAT. § 15A-2005 (2001); S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000).

definition.²⁹⁶ As the AAMR's definition has changed, similar changes appeared in both newly drafted statutes,²⁹⁷ and the DSM definitions.²⁹⁸ In all likelihood, the next version of the DSM will once again mirror the current AAMR definition of mental retardation.²⁹⁹

Additionally, the current AAMR definition is more appropriate for the evaluation of mental retardation in criminal defendants than the DSM-IV-TR definition. The DSM-IV-TR definition describes the adaptive behavior component as "concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."³⁰⁰ The purpose of this conceptualization of adaptive behavior is to determine "how effectively individuals cope with common life demands," so as to establish the individual's needs for services and supports.³⁰¹

The AAMR definition is also concerned with the identification of mental retardation in order to develop personalized plans with individualized supports.³⁰² Still, the wording of the current AAMR definition is better suited for evaluations of defendants facing the death penalty.³⁰³ The AAMR definition now requires that deficits manifest "in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."³⁰⁴ This definition requires that the disability "be manifested in real-world disability in the individual's life" and

²⁹⁶ See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 36 (3d 1980) [hereinafter DSM-III]; DSM-IV-TR, *supra* note 202, at 49.

²⁹⁷ Compare AAMR 1983, *supra* note 191, at 11, and AAMR 1992, *supra* note 191, at 3, with GA. CODE ANN. § 17-7-131 (2002), KY. REV. STAT. ANN. § 532.130 (Michie 1990), N.C. GEN. STAT. § 15A-2005 (2001), and S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000).

²⁹⁸ Compare AAMR 1983, *supra* note 191, at 11, and AAMR 1992, *supra* note 191, at 3, with DSM-III, *supra* note 296, at 36, and DSM-IV-TR, *supra* note 202, at 49. The DSM has consistently revised its definition as the AAMR definition has been revised. Compare AAMR 1983, *supra* note 191, at 11, and AAMR 1992, *supra* note 191, at 3, with DSM-III, *supra* note 296, at 36, and DSM-IV-TR, *supra* note 202, at 49.

²⁹⁹ Compare AAMR 1983, *supra* note 191, at 11, and AAMR 1992, *supra* note 191, at 3, with DSM-III, *supra* note 296, at 36, and DSM-IV-TR, *supra* note 202, at 49. The latest revision of the DSM containing its present definition of mental retardation occurred in 2000, prior to the 2002 AAMR revision. DSM-IV-TR, *supra* note 202, at xxix. The next full revision of the DSM is not expected for several years, but it follows that the DSM-V will most likely adopt the current AAMR definition. *Id.*

³⁰⁰ DSM-IV-TR, *supra* note 202, at 49.

³⁰¹ *Id.* at 42.

³⁰² AAMR 2002, *supra* note 189.

³⁰³ Ellis, *supra* note 289, at 8.

³⁰⁴ AAMR 2002, *supra* note 189.

“focuses on broad categories of adaptive impairment,” rather than “service related skill areas.”³⁰⁵ It is the presence of a “real-world disability” and not the formulation of a treatment plan that is of importance to the judicial system.³⁰⁶

The DSM-IV-TR definition exists as part of a uniform and standardized system utilized by practitioners to classify and diagnose mental retardation.³⁰⁷ Consequently, the DSM-IV-TR definition provides a clear systematic approach for diagnosing mental retardation.³⁰⁸ Conversely, the AAMR created its definition to help identify those with mental retardation in order to develop a personal plan with individualized supports.³⁰⁹ Nonetheless, in light of the current AAMR definition’s better applicability in the criminal context, as well as the trend among prior legislatures in codifying AAMR definitions, the current AAMR definition provides the best standard for assessing the mental retardation of offenders facing a possible death sentence.

B. The Lack of Uniform Testing Requirements

Due in part to variable methods of assessing mental retardation prosecution and defense witnesses often come to opposing conclusions regarding a defendant’s mental capacity. In *Atkins*, the defense expert, Dr. Evan Nelson, concluded that Atkins was mentally retarded following test results from a full-scale WAIS-III intelligence test; interviews with Atkins, his family, and correctional officers; and a review of school records, court records, and police reports.³¹⁰ Dr. Nelson validated Atkins’ low IQ score by looking at both “tell tales within the test that would reveal ‘faking,’” and independent information that confirmed Atkins’ life long low level of functioning.³¹¹ In comparison, the expert for the prosecution concluded that Atkins was of average intelligence without administering an intelligence test.³¹² Dr. Stanton Samenow simply

³⁰⁵ Ellis, *supra* note 289, at 8.

³⁰⁶ *Id.*

³⁰⁷ DSM-IV-TR, *supra* note 202, at xxiv-xxvi.

³⁰⁸ *Id.* at 49. The 1992 AAMR definition upon which the DSM-IV-TR definition is based specifies that the purpose of this definition of adaptive behavior is to aid clinicians in determining the level of support and services required by the individual. AAMR 1992, *supra* note 191, at 15-16.

³⁰⁹ See *supra* PART II.B. The AAMR definition describes the concept of supports as a method of evaluating the needs of an individual and then adopting strategies, services, and supports that will address those needs. AAMR 2002, *supra* note 189.

³¹⁰ Petitioner’s Brief at 9-10, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452).

³¹¹ *Id.*

³¹² *Id.* at 17-19.

asked Atkins a few questions taken from an outdated intelligence test, reviewed his school records, and interviewed the correctional staff.³¹³ When confronted about his use of an outdated test, “Dr. Samenow replied that he was not ‘doing a full evaluation with testing.’”³¹⁴ It is egregious that the State’s witness did not utilize any of the various appropriate intelligence tests before providing such crucial and important testimony.

Although best illustrated by *Atkins*, this discrepancy also existed during the cases of both Oliver Cruz and Ernest McCarver. When the state of Texas executed Oliver Cruz on Aug 9, 2000,³¹⁵ defense experts classified Cruz as retarded based upon his IQ of sixty-four and his history of difficulties.³¹⁶ Conversely, the state acknowledged that Cruz was not “very smart,”³¹⁷ but prosecutors refused to acknowledge his retardation because he had once scored in the low average range on an intelligence test.³¹⁸ Lawyers for Ernest McCarver argue that repeated scores on intelligence tests showed mental retardation, while the prosecution disputes that finding based in part on the assertion that McCarver carefully planned a murder.³¹⁹

The American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct (the “APA Ethics Code”) provides standards of professional conduct for psychologists.³²⁰ Although the APA Ethics Code was written specifically for APA members, the code is often applied by state boards and courts to others practicing in the field of psychology.³²¹ The APA Ethics Code clearly states that psychologists who perform evaluations for the courts must base their assessments “on information . . . sufficient to provide appropriate substantiation for their findings.”³²² Further, psychologists may not

³¹³ *Id.*

³¹⁴ *Id.* Dr. Samenow was confronted with the American Psychological Association’s ethical standards, which prohibit testing using outdated tests. *Id.*

³¹⁵ Human Rights Watch, *supra* note 278. The State of Texas executed Oliver Cruz for the brutal rape and murder of a twenty-four year-old woman. *Id.*

³¹⁶ Raymond Bonner & Sara Rimmer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1.

³¹⁷ *Id.*

³¹⁸ Alicia Montgomery, *Too Slow for Death Row?*, SALON.COM (Aug. 9, 2000), available at LEXIS, News Library, News Group File, All.

³¹⁹ Anne Saker, *Execution Dates Set for Three Murderers*, THE NEWS AND OBSERVER, Oct. 13, 2001, at A3. McCarver was sentenced to death for the 1987 stabbing of a fellow cafeteria worker. *Id.*

³²⁰ American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, in ETHICAL CONFLICTS IN PSYCHOLOGY 6 (Donald N. Bersoff ed., 1995) [hereinafter APA Ethics Code].

³²¹ *Id.*

³²² *Id.* at 22.

base their evaluations on tests and measures that are outdated and, therefore, obsolete.³²³

The APA has also created the Specialty Guidelines for Forensic Psychologists (the “Specialty Guidelines”).³²⁴ The Specialty Guidelines are an aspirational model for psychologists acting as experts for the judicial system.³²⁵ They provide that forensic psychologists have an obligation to know and use current and acceptable standards of evaluation.³²⁶ Moreover, the Specialty Guidelines require that forensic psychologists must “make every reasonable effort” to conduct an adequate examination and should avoid providing testimony “about the psychological characteristics of particular individuals when they have not had an opportunity to conduct an examination of the individual adequate to the scope of the statements, opinions, or conclusions”³²⁷

Under these guidelines, the evaluation performed by Dr. Samenow was wholly inadequate to support his conclusions and blatantly unethical. The APA Ethics Code and the Specialty Guidelines require that psychologists, who assess mental retardation for the courts, do a thorough evaluation that includes the use of all available up-to-date testing methods.³²⁸ The diagnosis of mental retardation “cannot be accomplished by casual examination or impressionistic observations.”³²⁹ A competent evaluation must involve both the skilled administration of a standardized intelligence test and a thorough assessment of adaptive behavior.³³⁰ Legislators should require the application of these standards to all expert testimony regarding whether or not a death eligible defendant is mentally retarded.

There are valid and reliable psychological tests for determining

³²³ *Id.* at 13.

³²⁴ Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, in *ETHICAL CONFLICTS IN PSYCHOLOGY* 441 (Donald N. Bersoff ed., 1995) [hereinafter *Specialty Guidelines*].

³²⁵ *Id.* The Specialty Guidelines were created by the American Psychology-Law Division and Division 41 of the American Psychological Society and have been endorsed by the American Academy of Forensic Science. *Id.* The Guidelines have not been formally adopted by the APA and therefore are only an aspirational model for professional conduct. *Id.*

³²⁶ *Id.* at 445.

³²⁷ *Id.* at 447.

³²⁸ APA Ethics Code, *supra* note 320, at 22; *see also* Specialty Guidelines, *supra* note 324, at 445.

³²⁹ Ellis, *supra* note 289, at 11.

³³⁰ *Id.*

both intelligence and adaptive functioning.³³¹ Both the WAIS-III and the SB:FE are extremely reliable individual intelligence tests, and the AAMR Adaptive Behavior Scale and the Camelot Behavioral Checklist are validated measures of adaptive behavior.³³² Evaluations of a defendant's mental capacity determines whether he or she will live or die, and as such, state statutes should require that expert witnesses utilize appropriate methods of testing.

CONCLUSION

Currently, states use several different definitions of and accepted procedures for testing and assessing mental retardation. This lack of uniformity is problematic because, as a practical matter, whether or not an individual is retarded will depend upon which state he is in.³³³ Therefore, even though the Supreme Court has banned the execution of the mentally retarded, someone who is not death eligible in one state because of mental retardation can still be executed in another state. This will result in the arbitrary imposition of the death penalty.³³⁴

Consequently, to avoid this problem, state legislatures should all adopt the current AAMR definition as the standard for determining mental retardation. Further, they should require that the evaluation be done by an expert who bases his assessment on both a full-scale, standardized individual intelligence test and a diagnostic assessment instrument for adaptive behaviors.

³³¹ See *supra* PART III.

³³² See *supra* PART III.A.

³³³ See *supra* PART IV.

³³⁴ In *Furman v. Georgia*, the Supreme Court declared that any systems for imposing the death penalty that are arbitrary and capricious are unconstitutional. 408 U.S. 238, 239 (1972).