

REPRESENTING THE COGNITIVELY DISABLED CLIENT IN A CRIMINAL CASE

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The plight of cognitively disabled criminal defendants has been brought to the jurisprudential forefront in recent years. In a powerful decision, the United States Supreme Court held in Atkins v. Virginia, 536 US 304 (2002), that execution of mentally retarded criminal defendants is excessive and constitutes cruel and unusual punishment. The court observed that where defendants are definitionally mentally retarded, meaning that they have low IQ (subaverage intellectual functioning) along with limitations in adaptive skills, they may be able to tell the difference between right and wrong, and may also be competent to stand trial. However, they may still be unable to learn from experience, engage in logical reasoning, control impulse, and understand the reactions of others. Given these limitations, it is cruel and constitutionally impermissible to impose the death penalty on such individuals; for them, it is not a proportionate penalty, because their culpability for the same acts as high-functioning individuals is lessened.

The Atkins decision provides a new context for lawyers to consider these special circumstances for individuals with mental function issues as they prepare and defend case. Criminal defendants who are cognitively impaired offer a special set of circumstances for the lawyers representing them. Although they are not always easily recognized as disadvantaged, criminal clients who are developmentally disabled or mentally retarded are more likely than the general population to be arrested, convicted, sentenced to prison and victimized in prison. Miles Santamour, *The Offender with Mental Retardation*, The Prison Journal, Spring-Summer, 1986, 3-1

Once in the criminal justice system, these individuals are less likely to receive probation or parole and tend to serve longer sentences. This is largely because they have a difficult time avoiding misconduct violations, as they either cannot comprehend or cannot conform to jail and prison rules. Prisoners with sub-normal intellectual functioning may refuse to work or go to school within the prison setting, for example, because they do not want to engage in tasks which would reveal their disabilities. Denis W. Keyes and William J. Edwards, *Competence Assessment: Some Questions and Answers*, The Champion, May, 1996, 11-12 [hereafter "Keyes and Edwards"].

Research suggests that there is no direct causal connection between intellectual impairment and propensity to commit crimes. ² However, there may be some connection between the way the disability impacts on their own lives and the engaging in conduct which is criminalized. ³ Some observers view this consequence as a secondary disability to the primary

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² The American Association on Mental Retardation defines mental retardation as a disability which is characterized by significant limitations in intellectual functioning and adaptive behavior or skill, manifesting before age 18. IQ score below 70-75 is an important indicator.

³ Many offenders, for example have a "dual diagnosis" of mental illness and intellectual impairment. Researchers estimate, in one study, that 30% of the inmate population which is intellectually impaired also exhibits symptoms of mental illness. Further, the mental retardation may "mask" mental illness, leaving it unidentified. See Orville Endicott, *Persons with Intellectual Disability Who Are Incarcerated for Criminal Offenses: A*

one of mental impairment. See, e.g., Ann Streissguth, Ph.D., Fetal Alcohol Syndrome, (Paul H. Brooks, Baltimore, 1997) 104-110 [hereafter, "Streissguth"]. It is known that individuals affected by developmental disabilities, including mild retardation, are at high risk for arrest and prosecution at some point in their adolescent and adult lives. Research shows a high proportion of developmentally disabled people become involved with the criminal justice system as either juveniles or adults. Longitudinal studies conducted by Dr. Ann Streissguth and colleagues show that individuals with fetal alcohol syndrome and fetal alcohol effect (FAS/FAE) had adaptive skills which were severely impaired, often in the range of children 6 to 9 years old. In one study 58% of the individuals scored in the "significantly maladaptive range", which is much higher than that for individuals with Downs syndrome. Sixty percent of individuals followed in the studies had troubles with the law, with 42% of adults having been incarcerated. A major problem that the studies revealed was difficulty with appropriate sexual behavior. Forty-nine percent of adolescents and adults displayed inappropriate sexual behavior, including sexual advances, sexual touching, and promiscuity. This secondary problem was closely followed by alcohol and drug problems, which were found in 35% of adults and adolescents surveyed.⁴

Some writers note that there is a complex relationship between subnormal functioning and the propensity to commit crimes. Among other things, factors such as "the impaired ability to analyze" and the "inability to recognize crime" create may lead an individual to violate the law at the misdemeanor or felony level. Endicott, *supra*, fn 1, 13. Obviously, many of these people find their way into the criminal justice system as the result of what are often misdemeanor-level offenses. Conversely, however, the misperceptions and myths about cognitively disabled offenders are legion. These offenders are almost universally portrayed as functionally illiterate, aggressive, violent, or promiscuous. Ho, *supra*, 1.

The reality is that mentally retarded offenders are finding their way into the criminal justice system in high numbers. Their circumstances are complex and often misunderstood. The purpose of this article is to discuss some of the characteristics present with this population of offenders and to encourage further discussion of options in preparing these cases.

Continuing Trend. As more people with mental retardation move out of institutions and into the community, as is the current trend, their susceptibility to becoming involved in the criminal justice system as victims or suspects of a crime may increase dramatically. Individuals with this disability are frequently used by other criminals to assist in law-breaking activities without understanding their involvement in a crime or the consequences of their involvement. They may be bullied or intimidated into participating in criminal activity.⁵

Literature Review, 9-12 (report prepared for The Correctional Services of Canada, March, 1991) [hereafter, "Endicott"]. Substance abuse also factors into problematic diagnoses for cognitively disabled offenders. In a Florida study, approximately 40 % of mentally retarded defendants in a forensic correctional program also had experienced alcohol or drug abuse. Taiping Ho, *Complex Issues About Mentally Retarded Defendants*, 1-3. (report prepared for the International Encyclopedia of Justice Studies, www.iejs.com/Mental Health/Mentally Retarded Defendants, October 2003) [hereafter, "Ho"]

⁴ Id.

⁵ An example is a defendant arrested for drug dealing; his involvement could be limited to renting the apartment where co-defendants deal drugs, or could include such things as looking out or delivering packages as instructed.

They may also have a deep need to be accepted and may agree to help with criminal activities in order to gain friendship. Robin LaDue and Tom Dunne, *Legal Issues and FAS, The Challenge of Fetal Alcohol Syndrome*, (University of Washington Press, 1997), 146-147 [hereafter "LaDue and Dunne"].

CHARACTERISTICS: A developmental disability is a condition diagnosed in childhood or adolescence, which constitutes a substantial disability to the affected individual. It is most often attributable to mental retardation or related conditions which include cerebral palsy, epilepsy, autism or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior, (which include such things as communication, certain kinds of reasoning, self-care, social skills, community interaction, work, and functional academics). See e.g., DSM-IV, 37-85. Conditions such Fetal Alcohol Syndrome, Attention Deficit Disorder, and Autism may also be diagnosed in individuals with sub-normal intellectual functioning. These functions are measured by a qualified professional using clinical observation in conjunction with intelligence, competency, and adaptive skills testing.

Developmentally disabled and retarded people are impaired in one or more spheres of mental functioning. These are commonly identified as the perceptual, memory, and judgment modalities. If these functions are impaired, it affects the general ability to process and retain information. This client population is frequently unable to reason abstractly. Memory is often impaired, as is the ability to relate cause and effect. Verbal skills are negatively affected, although many individuals sound and appear to function at a higher cognitive level than they actually do. Adaptive functions are also affected, and individuals may be limited in accomplishing daily tasks. Social interaction may also be impaired, with the age level of social functioning being much younger than the actual chronological age of the client. See Streissguth, *supra*. The client may also not perceive and observe appropriate social boundaries.

RELEVANCE TO CRIMINAL DEFENSE: Research shows that between 24.3% (in the southeastern United States) and 2.6% (in the northwestern United States) of the US prison population are mentally retarded. Endicott, *supra* fn 1, 8, [citing Bertram Brown and Thomas Courtless, *The Mentally Retarded Offender*, (Washington: National Institute of Mental Health, Center for Crime and Delinquency, 1971)]. These figures do not include jail incarceration, residential programs, or probation. They also do not include other developmental disabilities such as Attention Deficit Disorder, Fetal Alcohol Syndrome, and other learning disabilities. This information is viewed in context as follows: if a client has a full scale IQ of 62, this means that he or she is in approximately the 1st percentile comparison with others his age.^{6, 7} When other developmental disabilities are factored in, the number of incarcerated individuals so affected is obviously very high.

The mental deficits discussed above (and throughout this paper) manifest themselves as problems which put them at high risk of involvement with the criminal justice system. The client may be impulsive and unable to learn from past experience. He or she may be

6 Information from Dr. Steven Miller, Detroit, Michigan.

7 In many individuals, these conditions impair mental functioning but individuals may not have lower intelligence.

uncommonly trusting of others and willingly enter discussions which result in incriminating statements. Also, the childlike nature which is characteristic of many mentally impaired people causes them to be very vulnerable to intimidation. Law enforcement officers typically take advantage of the vulnerability to coerce confessions and other inculpatory information. See Keyes and Edwards, *supra*; LaDue and Dunne, *supra*, 146-148; J.W. Ellis and R.A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 George Washington Law Review 414 (1985).

SPECIAL PROBLEMS: Disadvantages faced by mentally retarded citizens in the criminal justice system include that they :

- do not want disability to be recognized (and try to cover it up)
- do not understand rights (but pretend to understand)
- understand commands
- are often overwhelmed by police presence
- may act upset at being detained and/or try to run away
- may say what they others want to hear, try to please the questioner
- often have difficulty describing facts or details of offense
- maybe the first to leave the scene of the crime, and the first to get caught
- may be confused about who is responsible for the crime and "confess" even though they are innocent. ⁸

Defense concerns include arrest and confession, legal competency to waive rights, mitigation of charges, and sentencing in light of a defendant's impaired mental functioning.

ARREST AND INTERROGATION: False admissions and confessions are an enormous problem in cases involving cognitively disabled defendants. Almost invariably, these individuals are interviewed police without an attorney present. Due to a desire to please others, and often having a very trusting nature, retarded and developmentally disabled people often disadvantage themselves. Upon arrest, individuals with mental retardation usually answer affirmatively when asked if they understand their rights, even when they do not understand, in order to gain approval or to hide their disability. ⁹ Once these rights are waived, courts almost universally uphold the waiver as valid, even where it is challenged on the basis of a client's lack of understanding. All that must be shown is that the warnings were given and that the defendant answered police questions after being given the warnings by police questioners.¹⁰ Case after case demonstrates that this is not a difficult standard for the State to meet. See, e.g., People v Daoud, *supra*, n. 11. In fact, it is uncertain that mentally retarded individuals understand their Miranda rights and what it means to waive them. ^{11, 12} If,

⁸ Leigh Ann Reynolds, "People with Mental Retardation in the Criminal Justice System", ARC factsheet, The Arc of the U.S., Arlington, Texas.

⁹ *Id.* Note: the problem is exacerbated in Michigan because police are not required to document their interrogations by either audio or video recordings, even where suspects are of subaverage intelligence. People v. Fike, 228 Mich App 178, 182-183 (1998).

¹⁰ George C. Thomas III, *Separated at Birth But Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 Mich L Rev 1081, 1082 (2001).

¹¹ Miranda v. Arizona, 384 US 436 (1966).

¹² Michigan law is not necessarily in accord. For example, in People v Daoud, 462 Mich 621 (2000) the defendant had a delusional belief that God would set him free if he confessed to the murder of his mother.

in fact, a person does not understand these rights, the same person cannot understand the consequences of abandoning their protections. Accordingly, Miranda rights cannot be voluntarily, knowingly and intelligently waived. See Johnson v Zerbst, 304 US 458 (1938) [determination based on circumstances of waiver of rights].

In recent years, studies have posed a more probing question: what if an individual hears the words of the Miranda warnings but has no conception of what they mean? In a comprehensive empirical study conducted in 2002, findings indicated that the efficacy of Miranda warnings, when given to a range of retarded subjects, was severely undermined. The study was conducted based upon interviews with 49 individuals with mild to profound retardation. The interviews were 1-2 hours long and tested three components: vocabulary, warnings and concepts, all as they relate to the prophylactic Miranda warnings. 13

The data showed, unmistakably, that retardation is the single factor which prevents comprehension of Fifth and Sixth Amendment protections, far exceeding the effect of lack of prior police contact, education, age, race, gender, and prior experience with the warnings. The authors state that the "mentally retarded subjects simply did not understand the Miranda warnings" and could not execute valid waivers of these rights. This was true even for the 22% of subjects possessing IQ's in the range of 71 to 88, which is subaverage but not below the IQ score of 70, used as the cutoff score for a retarded individual. 14 The study included these individuals to round out the sample, which probably exaggerates the effectiveness of these warnings on retarded subjects. The data showed that "Miranda warnings are surprisingly ineffective, even for many people who are not mentally retarded but are of below average intelligence", as well as those whose IQ's fall below 70: 15

For these people, the words of the warnings literally have no useful meaning. The harsh reality is that for mentally retarded suspects, the Miranda warnings cannot serve the instrumental functions for which they are intended, ensuring that confessions are the product of knowing,

The Court of Appeals held that this did not prevent him from knowingly and intelligently waiving his Miranda rights. Defendant stated that he understood his rights and the fact that his delusions prevented him from applying those rights to his own situation, or appreciating the consequences of his actions, did not render the waiver invalid. The court held that to knowingly waive Miranda rights a suspect need not understand the consequences of his waiver, nor does he need a wise basis for waiving his rights. A suspect need only understand that he does not have to speak, that he has the right to counsel, and that his statements can be used against him at trial.

Another notable Michigan case is People v Cheatham, 453 Mich 1 (1996). The prosecution met its burden of proving that defendant, who had an IQ of 62 and could not read, sufficiently understood and validly waived his Miranda rights. Although a waiver must be knowing and intelligent under the totality of the circumstances, the state need not prove that defendant understood the ramifications of deciding to waive or to exercise his rights.

13 Morgan Cloud, George B. Shepherd, Allison Nodvin Barkorr, and Justin V. Shur, *Words Without Meaning: the Constitution, Confessions, and Mentally Retarded Subjects*, 69 U. Chi. Law Review 495, 531-540 (2002.) Two of the authors are law professors at Emory University, one is an attorney with the United States Department of Justice, and one is a practicing attorney in New York City.

14 Id.

15 Id. 499

intelligent, and voluntary waivers of the right to remain silent, and not the result of the pressures inherent in custodial interrogation.

Based on their findings, the authors propose a bright line rule approaching per se exclusion of all inculpatory statements from mentally retarded defendants: if custodial interrogation produces a confession from a mentally retarded suspect, the confession is inadmissible in subsequent judicial proceedings. This conclusion is based on the findings that the language of the warnings as they are given is meaningless, because these individuals "simply do not understand them."¹⁶

Additional concerns. Other problems exist concomitantly with those discussed above. Among them are the communicative abilities of those with cognitive impairments. Developmentally disabled individuals often give responses which are misunderstood by police officers and in fact may be wholly untrue. This is supported by one study's finding that 66% of intellectually handicapped defendants make inculpatory statements upon arrest. Sandra Garcia and Holly Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues*, 41 *Arkansas Law Review* 809, 833 (1988).

Additionally, in many cases, these answers are obtained by suggestion, leading, and confusion by officers investigating a crime. As a result, mentally impaired individuals are frequently arrested and prosecuted even if they committed no offense.¹⁷ The "confession" introduced against the defendant is often not a recounting of events, but rather mere repetition of statements made by the officer to the suspect. Because memory is impaired or nonexistent in many retarded people, and because they typically try to please those in an authoritative position, they may agree that something "may have happened, because you say it did". Accordingly, retarded defendants are vulnerable to suggestibility in a way that normal-functioning defendants are not. Jurek v. Estelle, 623 F 2d 929, 938 (5th Cir. 1980). See also, Yeatts v. Commonwealth, 410 SE 2d 254 (1991)[Defendant was asked a series of "yes" or "no" questions concerning a murder; in the fourth interview he was asked whether he killed the deceased and said "no, I didn't...I mean, yeah, I did." As he was leaving, he asked to shake the officers' hands].

The need to think in concrete, rather than abstract, terms is also consistently problematic where retarded defendants are interviewed and a confession is extracted. In one case, the client was asked if he would waive his rights. He responded by asking if that is like waving goodbye to someone. As commentators observed, that is exactly what he did. Keyes and Edwards, *supra*.¹⁸

¹⁶ Id. 591.

¹⁷ Richard Ofshe, a well-known researcher and lecturer on interrogation techniques, has said that extracting a confession from a mentally retarded suspect is like "taking candy from a baby." Jonathon Bing, *Protecting the Mentally Retarded From Capital Punishment: State Efforts Since Perry and Recommendations for the Future*, XXII:1 *NYU Review of Law and Social Change*, 59, 83, fn 151 (1996), quoting Jill Smolowe, *Untrue Confessions: Mentally Impaired Suspects Sometimes Make False Admissions*, Time, May 22, 1995, at 51.

¹⁸ That a defendant's sub-normal mental functioning rendered him or her incapable of making a knowing waiver of constitutional rights is admittedly not an easy argument to make. See e.g., People v. Cheatham, *supra*, n.11. However, language in the opinion is worth noting. Justice Mallett wrote emphatically that individuals with impaired mental abilities individuals must truly understand the plain meaning of required warnings against self-incrimination and the right to counsel.

Obviously, if representation is obtained by such a person early enough, no discussion with police will be permitted without counsel. At a minimum, retarded individuals should have a support person, ideally a parent or guardian, with them when they are interviewed. At a suppression hearing, expert opinion may be presented to explain the mental limitations and functioning of an intellectually disabled client. Limitations on verbal ability, reading ability (affected persons will often sign confessions without reading them because of the desire to "mask" their disabilities), trust of authority, and inability to remember events should be things that are explained by an expert witness. If a client has no ability to accurately remember events, it undercuts the reliability of a confession. Similarly, if he or she has no ability to comprehend the abstract, future-based components of the Miranda warnings, whether he or she had them, or was in custody when they were given, is irrelevant.

COMPETENCY: Competency assessment should be considered pre-trial with developmentally disabled and retarded clients. In Godinez v. Moran, 509 US 389; 113 S Ct 2680; 125 L Ed 321 (1993), the Supreme Court held that criminal defendants may not be tried, and may not waive their right to counsel or to trial (guilty plea) unless they are competent to do so. Competency requires that a defendant be able to consult with his or her lawyer " with a reasonable degree of understanding" in order to assist in his or her own defense, and that the defendant have a rational and factual understanding of the events taking place against him or her. 113 S Ct 2685. If fundamental trial rights are waived, they must be waived competently; this requires that the waiver be knowing and voluntary. 113 S Ct 2687. Again, this is not possible if the client cannot understand the rights being waived.

Although clients may be able to answer "yes-no" questions, they frequently do not have a genuine understanding of legal proceedings against them. If this can be established, a finding of incompetency may result. See LaDue and Dunne, 151-154 [cites a case example in which a juvenile defendant with an IQ showing mild mental retardation was questioned by a judge using open-ended questions while entering a plea of guilty to burglary. As the judge

I write separately to emphasize that the requirement that a waiver of *Miranda* rights be knowingly and intelligently made means that the officers securing the waiver must explain those rights in plain, simple English, or in non-English, or whatever may be required to assure that the individual waiving his rights truly understands.

This defendant, with an IQ suggestive of mental retardation, apparently did understand the nature and consequences of the rights waived. **However, I am deeply troubled by the possibility that the decision we reach today could be interpreted as endorsing the standard *Miranda* litany as sufficient when securing a waiver from individuals with impaired or "below normal" abilities.** Id., 58-59. (Emphasis added.)

Other courts have also questioned the constitutionality of finding confessions admissible where a suspect has subnormal intellectual functioning. See e.g., Smith v. Kemp, 664 F Supp 500, 504-505 (Ga., 1987) [confession should have been suppressed where defendant, who had IQ of 65, was not shown to have knowingly and intelligently waived Miranda rights]; Commonwealth v. Daniels, 321 NE 2d 822, 826-828 (Mass, 1975) [where defendants have subnormal mental capacity, special care must be taken in scrutinizing the record because police methods of custodial interrogation that are constitutionally adequate for persons of normal intelligence may not be adequate when used with persons having limited intelligence]; State v. Cumber, 387 NW 2d 291,294 (Wisconsin, 1986) [subnormal intelligence was important factor in affirming lower court suppression of incriminating statement]. It bears repeating that an improper waiver of *Miranda* rights may result in a confession which is coerced by police and therefore inadmissible. However, it may also result in a confession or inculpatory statement which is plainly not knowing and intelligent. Either result is a violation of constitutional protections against self-incrimination.

questioned him about the alleged crime and the proceedings against him, he could not answer even elementary questions correctly, even though he had been found competent earlier by a psychologist. The charges were dismissed].

MITIGATION OF CHARGES: Most crimes committed by mentally retarded individuals are not premeditated or well-planned. This is due to limited abstract thinking ability, as discussed above in combination with the impulsivity that many of these clients are also affected by. Thus, attorneys can argue that a defendant lacks the ability to plan the crime or to form intent due to a mental impairment.¹⁹ It may also be arguable that the defendant did not intend to commit the crime when it pertains to property, i.e., the defendant was instructed by others to take something, or where he or she is charged with aiding and abetting a property crime. To support these arguments, the evaluator's opinion should have within it an articulated explanation of why the defendant was unable to form the specific intent required for the crime as charged; it may not be inferred. LaDue and Dunne, 146.

SENTENCING: Obviously, a defense which explains fully the defendant's limited mental functioning presents the opportunity to argue for mitigation on sentencing. Intellectually limited defendants will not benefit from prison. They will arguably not be "rehabilitated" because in many cases, they will not have a complete or accurate memory of why they are there. There is also an inability to relate cause and effect in most retarded individuals, or those with developmental disabilities such as FAS or ADHD. Due to the impairment in the ability to conceptualize time, they may not understand that the sentence is directly related to their own personal history and the characteristics of the crime. Prosecutors may try to argue that these are reasons to sentence the defendant to a longer sentence since "dangerousness" is a continuing possibility. However, since intellectually-limited people generally learn in a concrete fashion, there is a real argument that if they are in prison where they are exposed to violence and assault regularly, they are likely to repeat this behavior upon release. Thus the better choice is to allow them to remain in the community within a strictly supervised program of probation.

These realities were eloquently articulated in an opinion by Judge C. Cunliffe Barnett of British Columbia, Canada. He was faced with sentencing Ida, a native American affected by FAS and retardation who was alcoholic, impulsive, and repeatedly involved in fights. Rather than sentencing her to prison, he decided to sentence her to a very structured program of probation with substance abuse programming and medical follow-up. In so deciding, he wrote:

I do not mean to suggest that Ida should not be held responsible and sentenced for her actions. That is not the law in Canada and she clearly is capable of seriously threatening the safety and well-being of other persons. A judicial response is rightly demanded...But what might be a fair, reasonable and constructive response? **It is, I believe simply obscene to suggest that**

¹⁹ An example: a defendant was charged with a predatory rape, breaking a front window and assaulting a woman as she lay in bed. The assailant tormented her by drawing a hunting knife up and down the insides of her thighs, very slowly, barely grazing the skin. The person charged and convicted of the crime had been in special education throughout school due to a closed head injury when he was 6. He had very little dexterity, as was evidenced by his unreadable handwriting. Interviews revealed that he had trouble with times and dates and a very limited memory. This defendant is someone who had limited planning ability, and dubious ability to carry out a crime of this type. Further, due to his motor limitations, it is questionable that he could have completed the acts as reported by the complainant.

a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person who has, indeed, committed an offense for which some sanction must follow. That is not justice. That is unthinking retribution. If it were inflicted upon Ida she could not fully comprehend it or possibly learn from it.

See Judge C. Cunliffe Barnett, *A Judicial Perspective on FAS*, The Challenge of Fetal Alcohol Syndrome, (University of Washington Press, 1997), 138. See also, People v. Wybrecht, 222 Mich App 160, 176-184 (1997), dissent, Judge T.G. Kavanagh.

IDENTIFYING CLIENTS: Many persons affected by mental retardation are *mildly* affected. They are not conspicuously disabled and have IQ's of between 50 and 70. Moderately retarded individuals generally have IQ's of 35-55. DSM-IV, 40-41]. These two groups comprise the obvious majority of those who come into the criminal justice system. Mildly retarded people often do not want their disability "found out" and mask symptoms to appear to be capable of higher functioning than they actually are. Because many retarded individuals appear to have higher mental functioning than they actually do, a person's disability is often not easily recognized by attorneys interviewing affected clients. ²⁰ Attorneys must look to unspoken sources of information in order to identify mental disability. The client's demeanor and presentation are indicative of intellectual ability, as is his social history.

Watch your client: When interviewing your client for the first time, look closely at his or her demeanor and mannerisms. Individuals with mental retardation may not be able to synthesize information unless it is presented in concrete, literal language. Long sentences may pose problems in comprehension, due to both memory limitations and problems with abstract language. Attorneys should note difficulty remembering times and dates, or other simple information, like addresses and phone numbers. Additionally, the demeanor and body language of the client should be observed closely. Repetitive motions such as rocking, pinching a point on one's body, rubbing at a point on the body, not looking at the interviewer but away, or around the room can indicate perceptual abnormalities. If a client is unusually compliant and wanting to please the interviewer, it may be an indication of the extraordinarily trusting nature of mentally retarded individuals, including those with FAS or FAE.

Background. Are the client's parents developmentally disabled? Do his school records show placement in special education or difficulty with classes? Do relatives report teachers, relatives, friends report unusual-seeming behaviors with respect to concrete thinking and speaking? When interviewing the client, attorneys should ask about these things to determine whether further testing is needed. It is also helpful to look at labels attached to your client by probation officers, corrections personnel to determine whether there is a need for further assessment. Clients may be referred to as "slow", "child-like", "not the brightest bulb in the

²⁰ The author acknowledges the extremely useful information provided by Arlene Winn, teacher consultant in special education, Washtenaw Intermediate School District, 3/216/05. The author also acknowledges very useful information received from William Edwards, Esq, in a telephone conversation, 3/5/98. Some of the above information discussed in his presentation entitled "Advanced Interviewing Skills -- Clients with Mental Retardation, presented to the National Legal Aid and Defender Association in March, 1998.

socket", or other labels which may indicate functioning which is subaverage. ²¹ Does the client have difficulty reasoning abstractly, or projecting into the future? Mild retardation is often characterized by thought which is limited to very concrete concepts. Additionally, how does the client perform routine motor tasks, such as holding a pencil and writing by hand? Subtle differences in these activities may well indicate further assessment is necessary. This can be accomplished by a retained expert, or by a court-appointed professional pursuant to motion. ²²

Tasks. Can the client remember simple information, such as phone numbers, addresses? Although many individuals can function normally in adaptive activities like riding the bus, holding a job, or driving a car, their memory functions may be well below normal adult levels. In one case, an individual appeared quite normal, even serving in the National Guard for a time. However, when mental retardation was suspected, a review of his social and military history revealed malfunction in tasks requiring normal memory. He could not remember his phone number without writing it down. His military history also showed that he was AWOL over nine times. This was consistent with his social history, which showed that he could not hold a job because he could not get there on time. He regularly got lost while walking in familiar areas. His wife filled out job applications and handled finances. When viewed together, these are all indicators of mild retardation. This was later verified by psychological testing. See fn 2.

CONCLUSION. An assessment by a mental health professional qualified in diagnosis of developmental disability is a necessity in a case involving an intellectually impaired client. This is because there is still a misapprehension among the bar and the public generally, that intellectually disabled citizens are defined by a total incapacity to care for themselves or carry on any regular daily activities (have a job, shop for groceries, etc). See n.1. What is important to show a court is that intellectually disabled people are not incapable of such activities, but that their mental processes are different. Understanding concepts requires that they be explained in a way particularly accessible to them, i.e., in graphic, concrete terms. If a non-native English speaker is a suspect in a criminal case, it is clear that advice of rights must be given in his or her native language, and the trial must be translated throughout. No less is required for those that operate within the world relying on limited cognitive abilities.

If, on the other hand, the client's understanding of his or her rights cannot be achieved, or the client cannot make a connection between actions that caused the State to pursue criminal sanctions and can never understand why he or she is imprisoned, there is a real argument that justice, if it is to have any meaning, requires an alternative result. For courts to do otherwise in these cases is a silent condonation of continuing the "unthinking retribution" which has been imposed on far too many up until this time.

21 For an extremely helpful generally discussion, see John H. Blume and Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, <http://dpa.state.ky.us/library/advocate/jan02/mentalh.html>.

22 Due process requires a court-appointed expert for an indigent defendant where the defendant demonstrates to the trial judge that mental functioning is a significant issue at trial and that he or she is unable to afford retention of expert support. *Ake v Oklahoma*, 470 US 68 (1985).