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If Your Client Is Mentally Retarded

BY JAMES W. ELLIS AND RUTH LUCKASSON
mentally retarded defendant presents a dilemma for the criminal justice practitioner. The disability is difficult to spot and is often confused with other conditions, such as mental illness. The mentally retarded defendant faces problems at every stage of criminal proceedings; attorneys must address issues of competence and criminal responsibility throughout these proceedings or face the spectre of denied due process. The problem can even be viewed as a life or death matter; recently, several convicts who have been identified as mentally retarded have been executed, and the Supreme Court is considering an Eighth Amendment challenge to the execution of minors. While the parallel to minors is not perfect, characteristics found in many individuals with mental retardation mirror the developmental limitations of minors. Thus, the Court's resolution of the case may suggest a line of analysis applicable to mentally retarded criminal defendants. Thompson v. Oklahoma, 724 P.2d (Okla. Cr. 1986), cert. granted, 107 S. Ct. 1284 (1987). It is, then, crucial for lawyers to be able to recognize the mentally retarded defendant and to understand the condition's impact on a case.

What is mental retardation?

The American Association on Mental Retardation defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." American Association on Mental Deficiency, Classifi-
could proceed accurately no further than the letter G. He hummed the rest of the tune. When asked why a judge should understand mental retardation, Arther answered, “I don’t know that. . . .” Most of the words, you know, I had to listen real close, because, you know, I had to catch on one word, and the next word I have to try to catch on that, and I get lost very quick. . . . It’s not good though. It’s bad. It’s bad to be retarded.” Marcus, “Retarded Killer’s Sentence Fuels Death-Penalty Debate,” The Washington Post, June 23, 1987, at A1, Col. 1.

Several misconceptions about mental retardation are commonly encountered in the criminal justice system. The first is that anyone with an IQ below average is mentally retarded. Part of this misunderstanding may derive from the fact that in an earlier era, persons with IQ scores between 70 and 85 were referred to by mental health professionals as “borderline retarded.” This classification has been abandoned by the field, and individuals who function at this level are no longer considered to be mentally retarded.

As a corollary, many of those people unfamiliar with the condition believe that an individual who is only “mildly” mentally retarded is not very seriously disabled, and requires no special attention from the criminal justice system. The professional classification system does divide mentally retarded persons into four categories: mild, moderate, severe, and profound, but this terminology does not support the conclusion that a “mildly” retarded individual has only a minimal disability. As we have written elsewhere, “Judges and other criminal justice personnel unfamiliar with this classification scheme may find the labels of ‘mild’ and ‘moderate’ to be euphemistic descriptions of individuals at those levels of disability.” Ellis and Luckasson, “Mentally Retarded Criminal Defendants,” 53 George Washington Law Review 414, 423 (1985).

Every person with mental retardation has a substantial disability. As an expert witness testified in a recent capital case in South Carolina, to minimize the effect of “mild” mental retardation is the equivalent of saying that an amputee who has lost only one limb is “mildly amputated.”

Finally, many lawyers and judges confuse mental retardation with mental illness. Mental illness is a diverse group of disorders of emotion and thought processes. Mental retardation, by contrast, is primarily a substantial reduction in the disabled individual’s ability to learn. The confusion of these two conditions often leads criminal justice personnel to seek evaluation or treatment of an individual who is retarded from a mental health professional, such as a psychiatrist. Most mental health professionals have little or no training or experience with people with mental retardation. Referring a mentally retarded defendant to such an inappropriate professional invites a misleading evaluation and fruitless “treatment.”

Getting help

This is not to suggest that mental retardation is extraordinarily difficult for competent experts to identify or address. Qualified mental retardation professionals can determine whether an individual is mentally retarded with less ambiguity than the courts often encounter when mental health experts disagree about a diagnosis of mental illness. And, although mental retardation is a permanent condition that cannot be “cured,” some of the specific effects of the disability can often be overcome by special education or other forms of habilitation by qualified professionals. The ABA Criminal Justice Mental Health Standards refer to the professional training of mental retardation professionals as well as to their roles as scientists, evaluators, consultants and habilitators. Standard 7-1.1. The Standards stress the critical nature of professional training in the field of mental retardation, and suggest the wide range of professional disciplines that might prove important in
individual cases. "Mental retardation professionals are individuals who have undergone extensive, formal post-graduate education and training in identifying specific functional deficits or habilitation needs of persons with mental retardation or a developmental disability. They include special education teachers, speech and language pathologists, audiologists, physical therapists, as well as those psychiatrists, psychologists, clinical social workers, psychiatric nurses, and other mental health professionals who have received the necessary education and training in mental retardation matters. Mental retardation professionals must be licensed or certified to practice if licensure or certification is required." Standard 7-1.1 commentary at 6-7.

Competence

The disabilities of suspects and defendants with mental retardation raise questions about individual competence at several stages of the criminal process. The individual may not understand the situation in which he finds himself and may not be able to give reasonable assistance to counsel.

The most familiar setting in which competence arises is the competence to stand trial. It has long been recognized that some persons with mental retardation may not meet the competence requirements of Dusky v. United States, 362 U.S. 402 (1960). Nevertheless, it is increasingly acknowledged that while competence to stand trial may be raised too frequently for mentally ill defendants, the problem is recognized and raised too seldom for defendants who may be mentally retarded. The current status of forensic evaluation of competence to stand trial reflects this problem. Several assessment instruments exist which are designed for mentally ill defendants, but only one instrument, currently in development, is specifically designed for defendants with mental retardation. The forensic evaluator for a defendant with mental retardation will generally administer tests different from those found in the typical mental illness test battery. If a test is included that was not designed for use with people who have mental retardation, great care must be taken to point out its limitations for this defendant.

Far too often, even when the possibility that a mentally retarded defendant is incompetent is raised, he or she is committed for "treatment" at a mental health facility. It should come as no surprise that when a person with mental retardation is given treatment designed to alleviate mental illness, the retarded individual does not magically become competent to stand trial.

Paradoxically, the prognosis for effecting competence in a defendant whose incompetence results from mental retardation may be particularly hopeful if appropriate professionals are employed. Contrary to the expectations of many courts, it may be easier to effect competence to stand trial in a defendant with mental retardation than it is to "restore" a psychotic individual to competence. The key is the willingness of the court system to make use of the expertise of special educators and other qualified mental retardation professionals. It will often be possible for them to teach the retarded individual those things he needs to know in order to understand the proceedings and assist counsel.

Issues of competence may also arise in other contexts. One is the person's ability to waive Miranda rights and make a confession or statement that can be used at trial. When law enforcement officers accept such statements without valid waiver, they may jeopardize subsequent prosecution. If the defend (Continued on page 45)
tance of responsibility,” a prison term would still be presumed for frauds involving more than $10,000. Moreover, “a defendant who enters a guilty plea is not entitled to a sentencing reduction . . . as a matter of right.” Thus, the risk or length of a prison term is not likely to decrease with a guilty plea. With this decrease in the perceived value of the guilty plea, more white-collar defendants may opt to take their charges to trial. (Theoretically at least, the “acceptance of responsibility” credit is to be given “without regard to whether [the] conviction is based upon a guilty plea or a finding of guilt.”)

The Sentencing Commission interprets Section 235 of the Comprehensive Crime Control Act as permitting a sentencing judge to use the guidelines as of the effective date, regardless of when the crime was committed. Because of possible ex post facto problems, however, the Sentencing Commission has submitted proposed legislation to Congress that would permit application of the guidelines only to crimes committed after the effective date.

Even if the effective date of the guidelines has been (as the Commission desired) delayed for nine months, judges will be asked to use the guidelines in the interim and to report any problems or discrepan-

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dant’s disability is not detected by the time of the trial itself, the individual may be convicted on the basis of improper evidence.

Another context in which questions about competence arise is the plea bargaining process. Serious injustice may result if an incompetent mentally retarded defendant’s guilty plea is accepted. If the handicapped individual succeeds in masking his disability, there may not be anybody in the process with an incentive and opportunity to review whether the defendant really understands the nature and consequences of the bargain.

**Criminal responsibility**

The defense of insanity (or, in the terms of the ABA Standards for Criminal Justice, “mental nonresponsibility”) has always been formulated to include individuals with mental “defects.” Yet the defense is raised much less frequently in cases involving mental retardation than in cases of mental illness. There is reason to believe that this is beginning to change.

Lawyers and mental retardation professionals are increasingly recognizing the extent to which a mentally retarded individual’s handicap may have reduced his understanding of the world and of the consequences of his actions. This may meet the requirements of the insanity defense’s cognitive prong—that the individual did not appreciate the wrongfulness of his conduct.

The defense is available to people with mental retardation regardless of which formulation a particular jurisdiction had adopted. Some mentally retarded defendants, however, may be particularly disadvantaged by the recent abandonment of the defense’s volitional prong, in federal law and in some states, shifting from the American Law Institute’s test to a modified version of the M’Naghten test. Defendants with substantial problems of impulsivity, or poor impulse control, whether resulting from their mental retardation or from the way the individuals have been treated in the past, may present especially persuasive cases concerning their inability to conform their conduct to the law’s requirements.

Problems also arise in those jurisdictions that have adopted “guilty but mentally ill” (GBMI) statutes. Typically, these statutes have been drafted to include defendants with mental retardation within their scope, but the provisions regarding evaluation of the defendant’s mental condition and for disposition following conviction all focus exclusively on mental illness.

**Noncapital sentencing**

It has long been recognized that even where a defendant’s mental illness or mental retardation is insufficient to warrant an acquittal by reason of insanity, it may nevertheless constitute a valid ground for mitigating the punishment imposed. This principle is reflected in ABA Criminal Justice Standard 7-9.3, which provides that “[e]vidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender.”

Despite this consensus, the United States Sentencing Commission failed to permit consideration of mental disability as a mitigating circumstance in many cases. The commission’s new guidelines would allow courts to consider “significantly reduced mental capacity” as a possibly mitigating factor, but only for nonviolent offenses. U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements 5K2.13 (April 13, 1987). This unprecedented limitation, which the commission has not attempted to justify in commentary, apparently means that if a defendant’s mental retardation or mental illness falls short of constituting a complete de-
fense to the charge of a violent crime, it cannot even be considered by the court in determining an appropriate sentence for the disabled offender. This limitation, which was opposed by testimony from the ABA and from mental retardation professional organizations, is likely to be the subject of extensive debate in the coming months.

**The death penalty**

Jurisdictions that have adopted capital punishment must face two important issues regarding mentally retarded defendants charged with capital crimes. One is the possibility that the defendant's mental disability renders him incompetent to be executed. See generally, Ward, "Compeience for Execution: Problems in Law and Psychiatry," 14 Florida State University Law Review 35 (1986). The United States Supreme Court recently held that it violates the Eighth Amendment's prohibition on cruel and unusual punishment to execute a currently incompetent individual. Ford v. Wainwright, 106 S.Ct. 2595 (1986). Although the Ford case dealt with an inmate who was mentally ill (or, as the Court referred to him, "insane"), the ruling clearly applies to any incompetent individual, regardless of the nature of his particular disability. In reformulating their laws to meet the new procedural requirements of Ford, states should take care to describe both mentally ill and mentally retarded convicts as within the law's scope, and should mandate the use of qualified mental retardation professionals to evaluate those convicts whose possible incompetence may be a result of mental retardation. Meanwhile, defense counsel can persuasively argue that Ford applies in any case of mental incompetence, and that the etiology of the incompetence, whether it is caused by mental illness or mental retardation, is irrelevant to the Eighth Amendment challenge.

The broader question is whether it is ever permissible, under the Eighth Amendment and equivalent provisions of state constitutions, to execute a person with mental retardation. Despite the fact that some state statutes fail to list mental disability as a mitigating circumstance, it is unconstitutional to deny a defendant the opportunity to present any relevant information that may be mitigating. See Skipper v. South Carolina, 106 S.Ct. 1669 (1986). As in noncapital cases, mental retardation will always be a relevant mitigating factor.

But the system under which the capital sentencing authority considers possible factors in mitigation may be insufficient to address the effect of a defendant's mental retardation on his offense. Since the decision whether a particular individual should be executed must always rest on the defendant's "blameworthiness" and "personal responsibility and moral guilt," Booth v. Maryland, 107 S.Ct. 2529, 2533-34 (1987), a strong argument can be made that capital punishment should be categorically precluded when the defendant is mentally retarded. Although the effect of some retarded defendant's disabilities will not be sufficient to entitle them to an acquittal on grounds of mental non-responsibility, the reduced understanding of all mentally retarded individuals about the consequences of human actions supports the conclusion that they never have the extraordinary "blameworthiness" that would justify selection as the extraordinarily exceptional case that arguably merits the death penalty. These considerations led the Association for Retarded Citizens and the American Association on Mental Retardation to call for a ban on the death sentence or execution of any mentally retarded person.

The criminal justice system's awareness of defendants with mental retardation is gradually improving. Lawyers and judges must become increasingly sophisticated in their understanding of this disability and its effects if they are to do justice in cases involving mentally retarded defendants. Defense counsel must improve their ability to identify mental retardation and obtain assistance from properly qualified professional experts in the field of mental retardation. Counsel also has an obligation to make appropriate legal arguments to require the criminal justice system to take fairly into account the special disabilities and circumstances of defendants with mental retardation.

**Report to Members**

(Continued from inside front cover)

mer" and a "walk"—one that attempts realistically to protect society from further crimes by a convicted offender.

Even for those that believe in a "tougher" criminal justice system, there surely must be a reasonable limit to the need for harshness. Is a system that is twice as "tough," and more than twice as expensive, now "tough enough"? One would expect that the pressure for longer sentences would have begun to ebb. Instead, the momentum for the expanded use of imprisonment continues unabated. Despite evidence that federal criminal sentences had increased in severity by 32 percent during the previous seven years, last year, Congress enacted sweeping new mandatory minimum sentences for federal drug crimes. And this Spring, the United States Sentencing Commission produced a set of federal sentencing guidelines which, if followed by the federal judiciary, will increase, by the Commission's own estimates, federal prison populations by 71 to 88 percent in five years. The Commission acknowledges that one of its principal objectives was to reduce the number of convicted federal offenders who did not receive a prison sentence.

Policy on criminal sentences is made in this country by officials in all three branches of government: governors and correctional depart-