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Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants.

Rebecca J. Covarrubias

LIVES IN DEFENSE COUNSEL'S HANDS: THE PROBLEMS AND RESPONSIBILITIES OF DEFENSE COUNSEL REPRESENTING MENTALLY ILL OR MENTALLY RETARDED CAPITAL DEFENDANTS

REBECCA J. COVARRUBIAS*

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* St. Mary's University School of Law, Candidate for J.D., May 2009; Texas A&M University, B.A. Political Science and Sociology, 2006. First, I would like to thank my parents, Baldemar and Susan Covarrubias, for providing me continuous love, support and encouragement throughout my life. Also to my sister, Laura, for always believing that I will succeed and inspiring me to work harder. I would especially like to thank Andrew Carrillo for his unconditional love, guidance, continuous patience and unwavering devotion. A special thank you to all my friends who have provided constant support and encouragement. Finally, thank you to the *Scholar* editors who have worked on my Comment, thank you for your suggestions and guidance in drafting and editing this Comment.

I. INTRODUCTION

On January 2, 1996, Jeffery Lee Wood sat in a parked vehicle while his accomplice robbed a convenience store and fatally shot the store clerk.[1] After the shooting, Wood entered the store, helped remove the store's cash box, safe, and videotape recorder,[2] and then drove the getaway car.[3] For his participation in that offense, Wood was convicted of murder and sentenced to death in March 1998.[4]

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1. News Release, Office of the Attorney Gen. of Tex., Media Advisory: Jeffery Lee Wood Scheduled for Execution (Aug. 15, 2008), *available at* http://www.oag.state.tx.us/oagNews/release.php?id=2602 (describing the extent of Wood's participation in the fatal shooting of a store clerk).

2. *Id.*

> Shortly after 6 a.m. on January 2, 1996, Danny Reneau walked into a Texaco station located near IH-10 in Kerrville and fatally shot store clerk Kriss Keeran with a .22 caliber pistol. Jeffery Lee Wood remained outside in a vehicle that Wood had borrowed from his brother. However, after the shooting, Wood entered the convenience store, and helped Reneau remove the store's safe, cash box, and the videotape recorder connected to the store's security camera. *Id.*

3. *See* Wood v. Quarterman, 572 F. Supp. 2d 814, 816 (W.D. Tex. 2008) (reciting how Wood participated in and drove the getaway car for both armed robberies).

4. *See id.* ("It will suffice to note the evidence at petitioner's trial established petitioner participated in a pair of armed robberies of convenience stores which culminated in the fatal shooting of a store clerk by petitioner's accomplice . . . ."). *See generally* James C. McKinley Jr., *Federal Judge, Chastising the Texas Courts, Orders a Stay of Execution*, N.Y. TIMES, Aug. 22, 2008, at A12 (reporting how Wood was convicted under a Texas law that makes parties to a felony subject to the death penalty if one party commits murder during the course of the offense). Wood did not murder the victim, rather it was his partner who committed the crime. *Id.* Mr. Wood also had mental problems to the extent that certain

On August 14, 2008, fewer than twenty days away before his scheduled execution, Wood filed a motion in a Texas state court "requesting appointment of counsel and appointment of a mental health expert" to help him investigate, develop, and present evidence regarding a claim that he is incompetent to be executed.[5] Wood based his request on two previous U.S. Supreme Court decisions.[6] The first, *Ford v. Wainwright*,[7] held that it is unconstitutional to execute mentally ill defendants.[8] The second, *Panetti v. Quarterman*[9], held that once a capital defendant, who is seeking a stay of execution, makes "a substantial threshold showing of insanity," the defendant must receive certain minimal due process protections.[10] Those due process requirements include, but are not limited to, a right to have an evidentiary hearing and an opportunity to submit expert evidence.[11]

On August 21, 2008, within hours of his scheduled execution, Wood obtained a stay when a federal judge determined that Texas courts had deprived him of his right to assistance of a mental health professional and court-appointed counsel.[12] While never diagnosed with mental retarda-

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courts considered him incompetent to stand trial. *Id*; *See* TEX. PENAL CODE ANN. § 7.02 (Vernon 1974) (holding a person criminally responsible for an offense committed by another person if certain criteria apply).

5. *Wood*, 572 F. Supp. 2d at 816 (stating the petitioner filed an untimely motion to the state court). In that motion, petitioner requested "appointment of counsel and appointment of a mental health expert to assist petitioner in investigation, developing, and presenting evidence supporting a claim that petitioner is currently incompetent to be executed and, thereby, at least temporarily exempt from the death penalty . . . ." *Id.*

6. *Id.* (stating the petitioner based his argument of being exempt from the death penalty on the Supreme Court decisions in *Panetti v. Quarterman* and *Ford v. Wainwright*).

7. 447 U.S. 399 (1986).

8. Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"). Noting that no state currently permits execution of insane persons, the Supreme Court concluded that the restriction upon a state's ability to execute is both ancient and humane. *Id.* at 408–09. Accordingly, "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance," the Eighth Amendment precludes execution of the insane. *Id.* at 410.

9. 127 S. Ct. 2842 (2007).

10. Panetti v. Quarterman, 127 S. Ct. 2842, 2856 (2007) (clarifying how the *Ford* decision requires that capital defendants who have made "a substantial threshold showing of insanity" receive certain minimal protections including a fair hearing, an opportunity to be heard, and "constitutionally acceptable procedure[s]" (quoting Ford v. Wainwright, 477 U.S. 399, 426–27 (1986))).

11. *See id.* at 2856–57 (holding that because the state trial court did not provide Panetti with an evidentiary hearing, or an adequate opportunity to submit expert evidence, Panetti was not afforded the protections afforded under *Ford*).

12. *See* James C. McKinley Jr., *Federal Judge, Chastising the Texas Courts, Orders a Stay of Execution*, N.Y. TIMES, Aug. 22, 2008, at A12 (reporting that Judge Orlando Luis

tion or mental illness, the court concluded that Wood had met a "substantial threshold showing of insanity."[13] The court relied on several facts in making this determination including the fact that Wood had previously been found incompetent to stand trial by one jury; reports which suggested that Wood's intellectual functioning was at the low average range; Wood had narcissistic tendencies and an almost delusional belief that he would be vindicated; and finally that he had suicidal ideas combined with bizarre and paranoid behavior.[14] Wood's evidentiary hearing is scheduled for February or March 2009.[15] This Comment will not explore the validity of Wood's incompetency claim. Instead, the focus is on why Wood was hours away from being executed even though he is mentally ill. This paper will also focus on those who, like Wood, have been sentenced to death despite having a serious mental illness or mental retardation.

Indeed, Wood's situation is not unique. As of January 1, 2008, there were 3309 death row inmates in the United States.[16] The states with the highest number of death row inmates are California, Florida and Texas.[17] Of the death row inmates, it is estimated that as many as twenty-five percent have a serious mental illness.[18] Serious mental illnesses include "major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD),

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Garcia, a federal district judge in San Antonio, granted a stay of execution for at least six months based on Mr. Wood's bizarre statement at his trial, among other factors). It is unconstitutional for the death penalty to be imposed when the defendant has no understanding of the matter at hand. *Id.*

13. *Wood*, 572 F. Supp. 2d at 818.

> Admittedly, the evidence of petitioner's alleged incompetence now before this Court is far from compelling. Petitioner has never been definitively diagnosed with any mental illness. . . . Nonetheless, there are facts properly before this Court which may lend support to the conclusion petitioner has made a "substantial threshold showing of insanity." *Id.*

14. *Id. at* 818–19 (concluding that a stay of execution was warranted based not only on facts alleged in the motion, but also on review of the "records of petitioner's state trial, direct appeal, and state habeas corpus proceedings"); *see* James C. McKinley Jr., *Federal Judge, Chastising the Texas Courts, Orders a Stay of Execution*, N.Y. TIMES, Aug. 22, 2008, at A12 (reporting on the scheduled execution of Jeffrey Lee Wood, halted just hours before the execution).

15. *Wood*, 572 F. Supp. 2d at 823 (W.D. Tex. 2008) ("[C]ounsel for both parties shall advise the Court in writing regarding their respective availability during the months of February and March, 2009 to attend an evidentiary hearing . . . .").

16. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 2 (2008), http://www.deathpenaltyinfo.org/FactSheet.pdf.

17. *Id.* (reporting on the number of death row inmates per state). California has 667 death row inmates, Florida has 397, and Texas has 373. *Id.*

18. James R. Eisenberg, *Forcibly Medicating Death Row Inmates with Mental Illness—An Ethical Dilemma*, BEHAV. HEALTH MGMT., Jan. 1, 2004, at 9 (reporting an estimated twenty-five percent of death row inmates are mentally ill).

and borderline personality disorder."[19] Even after *Ford*, mentally ill individuals are still on death row because identifying mental illness can be difficult for counsel and the courts.[20] Because of this difficulty, defense counsel and courts may overlook a defendant's mental illness and fail to realize that the defendant is entitled to exemption from the death penalty.[21]

The same is possible for mentally retarded capital defendants. Three criteria are most commonly used to define mental retardation: "significantly subaverage intellectual functioning; concurrent and related limitations in two or more adaptive skill areas; and manifestation before age eighteen."[22] According to the World Health Organization, one to three percent of the world's population is mentally retarded.[23] It is currently

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19. National Alliance on Mental Illness, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Feb. 20, 2009) (listing the types of serious mental illnesses).

> Serious mental illnesses include major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD), and borderline personality disorder.
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> . . . .
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> The World Health Organization has reported that four of the [ten] leading causes of disability in the U.S. and other developed countries are mental disorders. By 2020, Major Depressive illness will be the leading cause of disability in the world for women and children.
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> . . . .
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> Without treatment the consequences of mental illness for the individual and society are staggering: unnecessary disability, unemployment, substance abuse, homelessness, inappropriate incarceration, suicide and wasted lives; [t]he economic cost of untreated mental illness is more than 100 billion dollars each year in the United States. *Id.*

20. *See* Andrea Stier & Stephen P. Hinshaw, *Explicit and Implicit Stigma Against Individuals with Mental Illness*, 42 AUSTRAL. PSYCHOLOGIST 106, 106 (2007) (illustrating that the mentally ill try to hide their symptoms). When the mentally ill hide their symptoms, it makes it hard for counsel to identify that their client is mentally ill.

21. *See* Randal I. Goldstein, Note, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927, 928 (2001) (stating that mental illnesses "are difficult to diagnose and are not usually readily apparent"); *see also* Angela F. Epps, *To Pay or Not to Pay, That Is the Question: Should SSI Recipients Be Exempt from Child Support Obligations?*, 34 RUTGERS L.J. 63, 97 (2002) ("Some disabilities, particularly mental illnesses, will not be readily apparent."). Since it is generally difficult to diagnose mental illness, it follows that counsel will also share in this difficulty of identifying their mentally ill clients.

22. ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 8 (2001), http://www.hrw.org/sites/default/files/reports/ustat0301.pdf (elucidating the most common definition of mental retardation). "Mental retardation is a lifelong condition of impaired or incomplete mental development." *Id.* Standardized tests are used during the first step to diagnose and classify a person who may have mental retardation. *Id.*

23. WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2001: MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE 35 (2001), http://www.who.int/whr/2001/en/whr01_en.

estimated that there are between 6.2 and 7.5 million mentally retarded individuals in the United States.[24]

In *Atkins v. Virginia*,[25] the U.S. Supreme Court held the execution of mentally retarded individuals unconstitutional.[26] Before the *Atkins* decision in 2002, at least thirty-five mentally retarded defendants were executed between 1976, when the death penalty was reinstated, and 2001.[27] Despite the protections afforded in *Atkins*, it is possible that mentally retarded individuals, like the mentally ill, will still be executed because recognizing the symptoms of mental retardation can also be extremely difficult.[28]

This Comment will examine the difficulties that counsel and courts have in identifying a defendant's mental illness or mental retardation. The first part of this Comment will review the differences and similarities between mental illness and retardation; address the relevant case law regarding the exemption of the mentally ill and mentally retarded from the death penalty; and then identify the opinions of states, the international community, and organizations regarding the death penalty. The second section of this Comment will examine how counsel ineffectively assist their capital defendants by failing to notice that their client is mentally ill or mentally retarded; failing to raise the issue of the client's mental retardation or mental illness; and failing to present expert testimony regarding their defendant's mental retardation or illness. Finally, the third part of this Comment will provide recommendations to defense counsel and courts to avoid allowing mentally ill and mentally retarded defendants to be sentenced to execution.

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pdf (stating there is an estimated worldwide prevalence of mental retardation of one to three percent). "The prevalence figures vary considerably because of the varying criteria and methods used in the surveys, as well as differences in the age range of the samples." *Id.*

24. ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 8 (2001), http://www.hrw.org/sites/default/files/reports/ustat0301.pdf.

25. 536 U.S. 304 (2002).

26. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the execution of mentally retarded defendants is unconstitutional because it violates the Eighth Amendment).

27. ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 2 (2001), http://www.hrw.org/sites/default/files/reports/ustat0301.pdf.

28. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 530 (1998) ("[O]ften many inmates with mental retardation who are facing the death penalty were not identified as intellectually impaired until after they were sentenced to death.").

II. LEGAL BACKGROUND

A. *Mental Retardation vs. Mental Illness*

1. Mental Retardation

The American Association on Intellectual and Developmental Disabilities (AAIDD)[29] defines mental retardation as a disability originating before the age of eighteen, "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."[30] A person's intellectual functioning is determined by an Intelligence Quotient (IQ) score.[31] According to the AAIDD, an IQ test score of seventy or below indicates that a person suffers from some degree of intellectual impairment.[32] And, according to the AAIDD, an IQ score of seventy to seventy-five may also indicate mental retardation giving account for the "standard error of measurement."[33] Adaptive behavior refers to "the conceptual, social, and practical skills that people have learned to be able to function in

29. *See* American Association on Intellectual and Developmental Disabilities, About Us, http://www.aamr.org/content_1.cfm?navID=2 (last visited Mar. 21, 2009).

30. American Association on Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aamr.org/media/PDFs/AAIDDFAQonID.pdf (last visited Mar. 23, 2009). The AAIDD states that intellectual disability is the current preferred term for disabilities historically referred to as mental retardation. *Id.* However, because the majority of the case law and other authorities cited in this paper refer to this disability as mental retardation, this paper will also continue to use that term for clarity and convenience.

31. *See id.* While the AAIDD definition of mental retardation requires a finding of low IQ score, that is no longer the sole focus of the definition. *See id.* In 1992, the AAIDD departed from identifying mental retardation solely on the basis of an IQ score and changed its definition to include social, environmental and other related considerations. *Id.*

32. *See id.* (noting that an IQ test is an important tool in measuring intellectual functioning and mental capacity for learning, reasoning, and problem solving). An IQ score in the range of sixty to seventy is "approximately the scholastic equivalent of the third grade." ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 9 (2001), http://www.hrw.org/sites/default/files/reports/ustat0301.pdf (explaining that an IQ test is best communicated by referencing what "mental" age someone is at). For example, a person who is said to have the "mental age" of a six-year-old means that he or she would receive the same grade on an IQ score as the average six-year old-child. *Id.*

33. *See* AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (identifying an IQ score below 70-7, as subaverage intellectual functioning); Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203, 1215 (2008) (stating that the AAMR Manuals "refer to an IQ score range of approximately 70 to 75 points, in order to factor in what is referred to as the 'standard error of measurement.'" (footnote omitted)).

their everyday lives" and is assessed by standardized tests evaluating those skills overall or individually.[34]

The American Psychiatric Association (APA) defines mental retardation similarly.[35] The APA publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) which is a "comprehensive classification and reference manual on mental disorders, their manifestations and treatment."[36] The DSM-IV defines mental retardation as characterized by three components: (1) "significantly subaverage intellectual functioning" (2) "with an onset before age 18 years" and (3) "concurrent deficits or impairments in adaptive functioning."[37] The adaptive functioning impairments must fall in at least two of the following skill areas: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety."[38] The "significantly subaverage intellectual

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34. *See* American Association on Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aamr.org/media/PDFs/AAIDDFAQonID.pdf (last visited Mar. 23, 2009) (stating examples of conceptual skills which include "receptive and expressive language, reading and writing, money concepts, [and] self-directions"). Examples of SOCIAL SKILLS include "interpersonal responsibility, self-esteem, gullibility (likelihood of being tricked or manipulated), naiveté, follows rules, obeys laws, [and] avoids victimization." *Id.* Examples of PRACTICAL SKILLS INCLUDE "personal activities of daily living such as eating, dressing, mobility and toileting." *Id.* Practical skills also include the "instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation, and doing housekeeping activities." *Id.*

35. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues,* 27 MENTAL & PHYSICAL DISABILITY L. REP 11, 13 (2003) ("The American Psychiatric Association's formulation [for assessing the existence of mental retardation] follows the 1992 AAMR version closely . . . . "). *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislators and Courts Can Provide Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L REV. 811, 820 (2007) (stating that the AAMR defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior" and as a disability that has developmental onset before the age of eighteen years). The definition sets up a "three prong test: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive behavior, and (3) onset before age eighteen." *Id.* at 821.

36. Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 913 n.15 (2001) (describing the purpose of the DSM-IV put out by the American Psychiatric Association as a guide to mental disorders). Specifically, the DSM-IV provides a definition for mental retardation which includes "subaverage general intellectual functioning" and "limitations in adaptive functioning." *Id.* at 913.

37. MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382–83 (4th ed. 1995) (listing the essential elements of mental retardation).

38. *See id.* at 383.

functioning" is generally indicated by an IQ score of seventy or lower.[39] However, like the AAIDD, the DSM-IV includes, within its definition of mental retardation, individuals with an IQ score in the range of seventy-one to seventy-five if they have also have significant deficits in adaptive functioning.[40]

2. Mental Illness

Mental illness is defined as "any of various conditions characterized by impairment of an individual's normal cognitive, emotional, or behavioral functioning, and caused by social, psychological, biochemical, genetic or other factors."[41] Diagnosing mental illness can be more difficult than diagnosing other general medical disorders since there is no definitive laboratory test or abnormality in the brain tissue that can identify the illness.[42]

Mental illnesses lie on a "continuum of severity."[43] Even though mental disorders are prevalent in the United States population, only one in seventeen Americans has a serious mental illness.[44] Serious mental

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39. *See id.* at 382–83.

40. *See id.* at 383.

> Although the IQ cutoff point for a diagnosis of Mental Retardation is set at 70 (about 2 standard deviations below the mean), it must be recognized that the measurement error associated with standard IQ tests is plus or minus 5 points. Therefore, in some cases a measured IQ of up to 75 could be compatible with a diagnosis of Mental Retardation when the clinical picture is also accompanied by significant impairment in adaptive functioning . . . . *Id.*

41. Stephanie Zywein, *Executing the Insane: A Look at the Death Penalty Schemes in Arkansas, Georgia, and Texas*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 113 (2007) (citing the American Heritage Dictionary of the English Language (4th ed. 2000)). The article delineates the difference between mental illness, retardation, and schizophrenic patients. *Id.*

42. U.S. DEP'T OF HEALTH AND HUMAN SERV., MENTAL HEALTH: A REPORT OF THE *Surgeon General* 44 (1999), http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c2.pdf ("The diagnosis of mental disorders is often believed to be more difficult than diagnosis of somatic, or general medical, disorders, since there is no definitive lesion, laboratory test, or abnormality in brain tissue that can identify the illness."). Mental health disorders are typically referred to as disorders rather than diseases because of the clinical criteria necessary to diagnose mental retardation. *Id.*

43. National Alliance on Mental Illness, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Mar. 21, 2009) (stating that mental illness is a widespread problem in our nation but only six percent of our population lives with a serious mental disorder).

> Mental disorders fall along a continuum of severity. Even though mental disorders are widespread in the population, the main burden of illness is concentrated in a much smaller population – about 6 [%], or 1 in 17 Americans – who suffer from a serious mental illness. It is estimated that mental illness affects 1 in 5 families in America. *Id.*

44. *Id.*

illnesses include "major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post-traumatic stress disorder (PTSD), and borderline personality disorder."[45] The most common mental illnesses experienced by defendants "include bipolar disorder, schizoaffective disorder, schizophrenia, post-traumatic stress disorder, depression and borderline personality disorder."[46]

Mental illness cannot be controlled or overcome by willpower.[47] However, they are treatable.[48] Treatments can include medication as well as "psychosocial treatment such as cognitive behavioral therapy, interpersonal therapy, peer support groups, and other community services."[49] In fact, between seventy and ninety percent of people suffering from severe mental illness experience a significant reduction of symptoms and an im-

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45. *Id.*

46. *See, e.g.*, Death Penalty Information Center, Mental Illness and the Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=782&scid=66 (last visited Mar. 21, 2009) ("Some of the more common illnesses experienced by inmates on death row may include: Bipolar Disorder, Borderline Personality Disorder, Post-Traumatic Stress Disorder, Schizoaffective Disorder, Schizophrenia [and] Suicide"); *see also* American Civil Liberties Union, Mental Illness and the Death Penalty in the United States, http://www.aclu.org/capital/mentalillness/10617pub20050131.html (last visited Mar. 25, 2009) (listing some of the common mental illnesses associated with death row inmates).

47. *See* National Alliance on Mental Illness, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Mar. 21, 2009) ("Mental illnesses are biologically based brain disorders. They cannot be overcome through 'will power' and are not related to a person's 'character' or intelligence.").

> With appropriate effective medication and a wide range of services tailored to their needs, most people who live with serious mental illnesses can significantly reduce the impact of their illness and find a satisfying measure of achievement and independence. A key concept is to develop expertise in developing strategies to manage the illness process. *Id.*

48. *See id.* (explaining how most individuals who suffer from a mental illness can recover through active participation in an individual treatment plan).

> Mental illnesses can affect persons of any age, race, religion, or income. Mental illnesses are not the result of personal weakness, lack of character, or poor upbringing. Mental illnesses are treatable. Most people diagnosed with a serious mental illness can experience relief from their symptoms by actively participating in an individual treatment plan. *Id.*

49. *Id.*

> In addition to medication treatment, psychosocial treatment such as cognitive behavioral therapy, interpersonal therapy, peer support groups, and other community services can also be components of a treatment plan and that assist with recovery. The availability of transportation, diet, exercise, sleep, friends, and meaningful paid or volunteer activities contribute to overall health and wellness, including mental illness recovery. *Id.*

proved quality of life when they receive a "combination of pharmacological and psychosocial treatments and supports."[50]

3. Comparing Mental Retardation and Mental Illness

Mental retardation is not a form of mental illness but rather a unique developmental condition separate from mental illness.[51] To begin, the first difference is that mental retardation can arise at birth or early childhood and must be present by the time an individual turns eighteen years old.[52] However, mental illness can first be experienced in a person's adulthood.[53] Next, the most significant difference between mental illness and mental retardation is that "mentally ill people encounter disturbances in their thought processes and emotions; mentally retarded people have limited abilities to learn."[54] A mentally retarded person, by definition, must have a low IQ whereas in mental illness, intelligence is not a factor.[55] To illustrate, a mentally ill person suffering from a condition such as schizophrenia can have a very high IQ, while a mentally retarded

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50. *Id.*

Mental_Illness.htm (last visited Mar. 21, 2009) ("The best treatments for serious mental illnesses today are highly effective; between 70 and 90 [%] of individuals have significant reduction of symptoms and improved quality of life with a combination of pharmacological and psychosocial treatments and supports.").

51. *See* Aimee Logan, *Who Says So? Defining Cruel and Unusual Punishment by Science, Sentiment, and Consensus*, 35 HASTINGS CONST. L.Q. 195, 197–98 (2008) (stating that "mental illness is caused by bio-psycho-social factors that affect one's behavior and psychological disposition," whereas mental retardation is "caused by various biological, social, behavioral, medical, educational and hereditary factors"). Mental illness and mental retardation are not synonymous, nor a "subset or type of mental illness." *Id.*

52. MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382–83 (4th ed. 1995) (stating that the onset of mental retardation must occur before the individual turns eighteen years old).

53. *See* National Alliance on Mental Illness, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Mar. 21, 2009) (stating that a person can develop a mental illness at any stage in life). "Mental illnesses usually strike individuals in the prime of their lives, often during adolescence and young adulthood. All ages are susceptible, but the young and the old are especially vulnerable." *Id.*

54. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424 (1985) (describing the differences between mentally ill and mentally retarded classifications). "[P]eople of any level of intelligence may be mentally ill." *Id.* at n.53. However, most people who are mentally retarded are not mentally ill. *Id.*

55. *See* MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382–383 (4th ed. 1995) (stating IQ is not a factor in deciding if a person is mentally ill).

person always has a low IQ.[56] Another key difference is that a mentally ill person may improve or even be cured with therapy or medication but mental retardation is a life long disability.[57] However, mentally retarded individuals will continually live with diminished intellectual capacity, although they may be able to slowly acquire additional skills and abilities with age.[58]

While mental retardation is not the same thing as mental illness, this does not mean that a mentally retarded individual cannot suffer from a mental illness.[59] Indeed, mental retardation often "coexists with other mental disorders."[60] In fact, "between twenty to thirty-five percent of all non-institutionalized mentally retarded persons also have some form of mental illness."[61]

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56. ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 17 (2001), http://www.hrw.org/sites/default/files/reports/ustat0301.pdf (explaining that this can happen because mental illness can occur where a person has intact intellectual function except where his or her thinking breaks from reality as with hallucinations).

57. *Id.* ("A person who is mentally ill may improve or be cured with therapy or medication, but mental retardation is a permanent state.").

58. *See* World Health Organization: Regional Office for South-East Asia, What is Mental Retardation?, http://www.searo.who.int/en/Section1174/Section1199/Section1567/Section1825_8084.htm (last visited Mar. 25, 2009) (stating that people with mental retardation will "continue to have diminished intellectual capacity" throughout their life, but for most individuals with mental retardation, the parts of the brain that are not damaged continue to develop); *see also* MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382–83 (4th ed. 1995) ("[B]ecause IQ tends to be relatively stable over time, it is often assumed that Mental Retardation is lifelong. However, improvement in adaptive functioning . . . can result in sufficient improvement in functioning so that a diagnosis of Mental Retardation is no longer appropriate.").

59. *See* Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 915 (2001) ("It is important to recognize that mental retardation is not a form of mental illness. This is not to say a mentally retarded individual might not suffer from some form of mental illness." (footnote omitted)). However, mental retardation is distinct from mental illness in that it is a developmental condition. *Id.*; *see also* MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382 (4th ed. 1995) (explaining that mental retardation often coexists with other mental disorders).

60. *Id.* (noting that mental retardation often coexists with other mental disorders and instructing clinicians to "conduct a thorough psychiatric evaluation to determine whether another coexisting condition is present").

61. Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 915 (2001) (stating the percentage of non-institutionalized persons with mental retardation who also have a mental illness).

B. *Precedent*

1. *Ford v. Wainwright* – Supreme Court Decision on Executing the Mentally Insane

In 1986, the United States Supreme Court held that it is unconstitutional to execute prisoners who are insane at the time of their execution.[62] In *Ford*, the Court reasoned that it was unconstitutional to impose a punishment on an individual whose mental illness prevented him from "comprehending the reason for the penalty or its implications."[63] In making its decision, the Court considered how the nation currently views the death penalty.[64] The Court conducted a survey of states and found that no state permitted the execution of mentally retarded individuals.[65] These findings led the Court to conclude that such punishment was cruel and unusual and, therefore, a violation of the Eighth Amendment under current national standards.[66]

The majority in *Ford* did not provide a definition of "competence," nor did it specify the standards or procedures for evaluating and determining what constitutes mental illness.[67] Instead, the Court left defining mental

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62. *Ford*, 477 U.S. at 409–10 ("[T]his court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."). Though no American jurisdiction has ever permitted execution of the insane, the Court ruled for the first time in its history that the Constitution forbids the practice of executing persons who are insane at the time of execution. *Id.* at 401.

63. *Id.* at 417 (concluding that a Florida statute provided inadequate assurances of reliability in determining whether death row inmates are so mentally ill that they cannot comprehend the nature and reasons for their punishment). According to the Court, putting a mentally ill prisoner to death is, and has always been, morally abhorrent. *Id.*

64. *Id.* at 406 (noting the common law has historically branded execution of mentally ill prisoners "savage and inhuman"). In the United States, forty-one of fifty states have a death penalty, and statutes in twenty-six of those states expressly forbid execution of the insane. *Id.* at 410 n.2. At least four more death penalty states have adopted the common law ban by judicial decision, while still others provide discretionary statutory procedures for suspending punishment in cases where death row inmates have become mentally ill pending execution. *Id.* Four states have no specific procedure governing execution of the mentally ill, but those states have not expressly repudiated the common law rule. *Id.*

65. *Id.* at 409 ("[T]he natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.").

66. *Id.* at 410 (finding that a petitioner's allegation of insanity in a habeas corpus petition would, under the Eighth Amendment, bar his execution).

67. *See generally* Ford, 477 U.S. 399. However, in his concurring opinion, Justice Powell concluded the Eighth Amendment protection against cruel and unusual punishment should be triggered for defendants "who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring). This essentially limited the Court's holding to protecting only those individuals who are psychotic. *See*

illness and retardation to the states.[68] This omission led to the problem of a wide diversity of death penalty state statutes with disparate degrees of protection for the mentally ill.[69]

2. *Penry v. Lynaugh* – Supreme Court Decision on Executing the Mentally Ill

In 1989, the Supreme Court in *Penry v. Lynaugh*[70] held that the Eighth Amendment does not prohibit executions of mentally retarded criminals.[71] Similar to its analysis in *Ford v. Wainwright*, the Supreme Court in *Penry* examined the national consensus on the death penalty, while specifically focusing its analysis on the consensus among state legislatures.[72] At the time of the ruling, only one state specifically outlawed the execution of the mentally retarded and Maryland had enacted legislation barring the execution of the mentally retarded that would take effect a week after the Court handed down its decision.[73] The Court inter-

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Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 355 (2006).

68. *Ford*, 477 U.S. at 416–17 ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."). The Court conceded that prisoners alleging insanity might be required to meet a high threshold showing in order to avoid inundating the courts with unmeritorious claims. *Id.* at 417. The law must afford courts wide latitude in pragmatically limiting these types of claims. *Id.* at 417.

69. *See* Eileen P. Ryan & Sarah B. Berson, *Mental Illness and the Death Penalty*, 25 ST. LOUIS U. PUB. L. REV. 351, 355 (2006) (stating that the Supreme Court's failure to specify standards or procedure for determining mental illness was "an omission that has contributed to the diversity of death penalty statutes and the disparate degrees of protection they afford the mentally ill"); *see also* Dan Malone, *Cruel and Inhumane: Executing the Mentally Ill*, AMNESTY INT'L MAG., Fall 2005, at 20, 23, *available at* http://www.amnestyusa.org/magazine/cruel_and_inhumane_executing_the_mentally_ill.html ("[T]he *Ford* decision left the determination of sanity up to each state and herein lies the heart of the problem.").

70. 492 U.S. 302 (1989).

71. Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that mental retardation may be used as a factor that could lessen a defendant's culpability for a capital offense, but that mental retardation alone cannot be used as an exemption to execution), *abrogated by* Atkins v. Vir., 536 U.S. 304 (2002).

72. *Id.* at 331 ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.").

73. *See id.* at 334 ("Only one State, however, currently bans execution of retarded persons who have been found guilty of a capital offense. Maryland has enacted a similar statute which will take effect on July 1, 1989."); GA. CODE. ANN.§ 17-7-131(j) (2008) (citing the Georgia statute banning the execution of the mentally retarded); MD. ANN. CODE, art. 27, § 412(f)(1)(1989) (banning the execution of mentally retarded people), *repealed by* MD. CODE ANN., CRIM. LAW § 2-202 (West 2002) (prohibiting the imposition of the death sentence upon individuals who were "mentally retarded" at the time such individual committed the act of murder).

preted this as evidence that no national consensus existed on the execution of the mentally retarded and consequently held that the execution of the mentally retarded was constitutional.[74]

While the Court held that the execution of a mentally retarded criminal is constitutionally permissible, it still overturned the defendant's death sentence because Texas did not have the proper mitigating special issues and jury instructions.[75] The Texas special issue asked whether the defendant acted "deliberately and with reasonable expectation that the death of the deceased would result."[76] Since it did not define what "deliberately" meant, the Supreme Court concluded that the jury was unable to give a "reasoned moral response" to the mitigating evidence of the defendant's mental retardation.[77] Essentially, the Court held that it is constitutional to execute the mentally ill "as long as the jury is aware of mitigating factors such as the defendant's mental retardation".[78]

3. *Atkins v. Virginia* – Supreme Court Decision on Executing Mentally Retarded

Daryl Renard Atkins was convicted of armed robbery, abduction, and capital murder based on his involvement in the murder of Eric Nesbitt in 1996.[79] Despite evidence that Atkins was mentally retarded, he was sentenced to death.[80] In 2002, the U.S. Supreme Court held that the execu-

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74. *See Penry*, 492 U.S. at 340 (finding that there was no national consensus for or against the execution of the mentally retarded).

75. *Id.* at 328.

> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. *Id.*

76. *See id.* at 310 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981 and Supp. 1989)).

77. *Id.* at 322 (remarking that jurors may have found that Penry was "less able than a normal adult to control his impulses or evaluate the consequences of his conduct").

78. *See* Jamie Marie Billotte, Note, *Is It Justified? The Death Penalty and Mental, Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333, 336 (1994) ("The court opined that as long as the jury is aware of mitigating factors such as the defendant's mental retardation, a jury's finding of guilt sufficient to warrant death is allowed.").

79. *Atkins*, 536 U.S. at 307 ("Petitioner, Daryl Renard Atkins, was convicted of abduction, armed robbery, and capital murder and sentenced to death.").

80. *Id.* at 308–09 (stating that Atkins was sentenced to death even after the presentation of evidence regarding his mental retardation).

tion of any individual with mental retardation violates the Eighth Amendment prohibition on cruel and unusual punishment.[81]

The Supreme Court held that the implementation of the *Atkins* decision does not prohibit states from holding the mentally retarded accountable for their crimes, but only exempts them from execution.[82] The Court's holding created a categorical exemption from the death penalty for mentally retarded individuals.[83] The Court reached this conclusion by conducting a survey of state legislatures to ascertain the national consensus on the death penalty, as it had done in *Penry* and *Ford*.[84] Since *Penry*, eighteen of the thirty states that allowed the death penalty enacted legislation specifically prohibiting the death penalty for people with mental retardation.[85] The Court also found that not a single state had legislation moving away from the national consensus by reinstating the death penalty for the mentally retarded.[86] The Court concluded from its survey

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81. *Id.* at 321–22 (holding that the execution of mentally retarded defendants is cruel and unusual punishment and violates the Eighth Amendment).

82. *See id.* at 305.

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

See also Graham Baker, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature*, 9 SCHOLAR 237, 245 (2007) ("*Atkins* did not prohibit states from holding mentally retarded offenders criminally accountable; it removed from the available sentencing options the most severe criminal sanction.").

83. *Atkins*, 536 U.S. at 318 ("[T]he mentally retarded should be categorically excluded from execution."); *see* Stephanie Zywein, *Executing the Insane: A Look at Death Penalty Schemes in Arkansas, Georgia and Texas,* 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 99 (2007). ("Further, the Court stated that the imposition of the death penalty on a mentally retarded person failed to serve two main purposes of capital punishment: retribution and deterrence of capital crimes.").

84. *Atkins*, 536 U.S. at 314–16 (noting that national consensus on the death penalty had significantly changed since *Penry*, and that many state legislatures had begun to address the issue of executing the mentally retarded).

85. *See id.* at 314–16 (summarizing the survey the Court made concerning state statutory changes concerning the execution of the mentally retarded); *see also* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislators and Courts Can Provide Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L REV. 811, 812 (2007) ("Between *Penry* and *Atkins*, eighteen states enacted legislation specifically banning the death penalty for people with mental retardation, and similar bills were passed by at least one house of the legislature in at least three other states.").

86. *Atkins*, 536 U.S. at 315–16.

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons and the complete ab-

that in the thirteen years since *Penry*, national consensus had shifted against the execution of the mentally retarded.[87] While the court noted specific state legislation, it stated that the number of states that enacted legislation was not as significant as the "consistency of the direction of change."[88]

Furthermore, the Court did not base its decision solely on national consensus;[89] it also based its holding on two other primary issues.[90] First, the Court determined that imposing the death sentence on a mentally retarded individual violates the Eighth Amendment's prohibition against cruel and unusual punishment.[91] The Court reasoned that punishing mentally retarded criminals with execution does not satisfy the traditional justifications of the death penalty— retribution and deterrence.[92] Second, the Court reasoned that the reduced capacity of mentally retarded offenders makes them ineligible for the death penalty because, due to a variety of factors, they are at a high risk of wrongful execution.[93]

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sence of States passing legislation reinstating the power to conduct such executions provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. *Id.*

87. *Id.* at 316 (stating that the practice of executing the mentally retarded has become "truly unusual" and that it is "fair to say that a national consensus has developed against it").

88. *See id.* at 315 ("It is not so much the number of these States that is significant but the consistency of the direction of change.").

89. *See* Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 287 (2006).

By the time of *Atkins v. Virginia*, the Supreme Court concluded that enough had changed with regard to the standards of decency that it would now hold unconstitutional the execution of people with mental retardation. But its holding was not based solely on the many additional state laws barring such executions. *Id.*

90. Ronald S. Honberg, *The Injustice of Imposing Death Sentences on People with Severe Mental Illnesses*, 54 CATH. U. L. REV. 1153, 1158 (2005) (stating that in *Atkins,* the Court first considered "whether the traditional justifications for the death penalty, retribution and deterrence, applied in cases of mental retardation" and second, considered the potentially adverse impact of mental retardation on the fairness of capital proceedings).

91. *Atkins*, 536 U.S. at 321 (writing for the majority, Justice Stevens determined that in light of "evolving standards of decency," it would be excessive to punish a mentally retarded defendant with capital punishment).

92. *Id.* at 318–19 ("Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering,'" and hence an unconstitutional punishment.'" (citing Enmund v. Florida, 458 U.S. 782, 798 (1982))).

93. *Id.* at 320–21 (noting that the increased risk of false confessions, the defendants' probable difficulty in communicating with counsel, and the likelihood that they are poor witnesses to testify on their own behalf, subjected them to "a special risk of wrongful execution"); *see* John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing:* Atkins, *The Volitionally Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 107 (2003) ("The Court noted that due to their impairments those with mental retardation 'have diminished

Finally, it is important to note that the *Atkins* decision did not provide a definition of "mentally ill" or "mentally retarded" for the states to follow.[94] Instead, like its decision in *Ford*, the Court directed the states to create their own definitions of mental retardation.[95] But, while the Court explicitly left it to the states to determine how to define mental retardation, it tacitly provided two methods of defining mental retardation by referencing the AAIDD and APA definitions of mental retardation.[96]

The *Ford* and *Atkins* decisions left it up to the states to decide crucial definitions with regard to mentally ill and mentally retarded defendants.[97] *Ford* left states the burden of deciding what constitutes "incompetence for execution" of the mentally ill defendants.[98] *Atkins* left states the burden of deciding what constitutes mental retardation.[99]

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capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.'").

94. *See Atkins*, 536 U.S. at 317 ("As was our approach in *Ford* v. *Wainwright*, with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (citing Ford v. Wainwright, 477 U.S. 399, 416–17 (1986))).

95. *See id.* (leaving the states to determine their own definition of mental retardation, and noting that current statutory definitions of mental retardation tend to conform to clinical definitions of mental retardation).

96. *See* Lois A. Weithorn, *Conceptual Hurdles to the Application of* Atkins v. Virginia, 59 HASTINGS L.J. 1203, 1209 (2008) (stating that by introducing the AAIDD and APA definitions of mental retardation, the Court tacitly signaled that it approved of the use of these definitions of mental retardation).

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

97. *Atkins*, 536 U.S. at 317 (restating the holding in *Ford* that the Court would once again "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"); Ford v. Wainwright, 477 U.S. 399, 416–17 (1986) (leaving it to the states to decide what constitutes insanity and to develop methods to enforce the Eighth Amendment restriction against executing the mentally ill).

98. *Ford*, 477 U.S. at 416–17.

99. *Atkins*, 536 U.S. at 316 n.21.

C. *Evolving Public Consensus on Executing Mentally Ill & Mentally Retarded Defendants*

1. State Legislation

In the United States, there are currently thirty-six states that have the death penalty.[100] After the *Atkins* decision, eight states passed legislation in conformity with the ruling.[101] Of the eighteen states mentioned in *Atkins*, seventeen of them determine if a defendant has mental retardation solely by using the clinical criteria from the AAIDD and the APA.[102]

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100. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2008), http://www.deathpenaltyinfo.org/FactSheet.pdf (listing the states that have the death penalty). The states that have the death penalty are Alabama, Florida, Louisiana, New Hampshire, South Carolina, Wyoming, Arizona, Georgia, Maryland, New Mexico, South Dakota, Arkansas, Idaho, Mississippi, North Carolina, Tennessee, California, Illinois, Missouri, Ohio, Texas, Colorado, Indiana, Montana, Oklahoma, Utah, Connecticut, Kansas, Nebraska, Oregon, Virginia, Delaware, Kentucky, Nevada, Pennsylvania, and Washington. *Id.*

101. *See* CAL. PENAL CODE § 1376(c)(1), (d)(1) (West 2004) (exempting mentally retarded defendants from execution while allowing non-capital punishments to be enforced against mentally retarded defendants); IDAHO CODE ANN. § 19-2515A(3) (2006) (maintaining that if a court finds that a defendant's IQ qualifies them as being mentally retarded under the definition in Idaho the defendant will not be subjected to the death penalty); 725 ILL. COMP. STAT. ANN. 5/114-15(e)-(f) (West 2003) (exempting mentally retarded defendants from execution and if the defendant's mental disability does not meet the level of "mental retardation" as defined by the statute the defendant can still use evidence of his mental retardation as mitigating evidence during sentencing); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2007) (exempting mentally retarded defendants from the death penalty); NEV. REV. STAT. § 174.098(6) (2005) (requiring that after certain procedures are followed, if a defendant is found to be mentally retarded the court will strike the motion to seek the death penalty); UTAH CODE ANN. § 77-15a-101 (2003) (exempting mentally retarded defendants and those with sub-average intellectual functioning from execution when certain conditions are met); *see also* Death Penalty Information Center, States that Have Changed Their Statutes to Comply with the Supreme Court's Decision in *Atkins v. Virginia*, http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited Mar. 21, 2009) (listing California, Delaware, Idaho, Illinois, Louisiana, Nevada, Utah, and Virginia as states that have changed their statutes to comply with the *Atkins* decision); *see also* Nigel Beail & William J. Edwards, *Rigidity and Flexibility in Diagnosing Mental Retardation in Capital Cases*, 42 Mental Retardation No. 6, 480 (2004) (discussing the Supreme Court ruling in *Atkins* and how "after the *Atkins* decision, another [seven] states passed legislation to conform to the United States Supreme Court ruling"). Several people argue that the same benefits extended to those who are mentally retarded should be extended to people who "demonstrate the same vulnerabilities regardless of whether they qualify for the label of mental retardation." *Id.*

102. *See* Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislators and Courts Can Provide Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. RICH. L REV. 811, 819 (2007) ("Of the eighteen state statutes mentioned in *Atkins*, seventeen of them use exclusively clinical criteria drawn from these definitions."). "The Kansas statute defined being mentally retarded as 'having significantly subaverage general intellectual functioning . . . to

2. European Consensus

There is an international trend away from imposing the death penalty for all types of crimes and all types of defendants.[103] In fact, as of 2007, the death penalty has been abolished, in law or in practice, by 138 countries.[104] The European Union has abolished the death penalty and the United Nations created a resolution calling for a moratorium on executions,[105] which was supported by eighty-seven governments from all over the world.[106] The countries with the highest death penalty rates are China, Iran, Saudi Arabia, Pakistan and the United States of America.[107]

Additionally, it appears that the United States is a minority in the international community when it comes to executing mentally retarded de-

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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,' using the Model Penal Code's criteria for the insanity defense." *Id.*

103. *See* AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS IN 2008, at 5 (2008), http://www.amnestyusa.org/abolish/annual_report/DeathSentencesExecutions2008.pdf (reporting that over two-thirds of the world's countries have now essentially abolished the death penalty); *see also* Am. Civil Liberties Union, How the Death Penalty Weakens U.S. International Interests 5 (2004), http://www.aclu.org/capital/intl/10619pub20041209.html (follow "Download" hyperlink) (noting how the United States' European allies are displeased with American law regarding the death penalty).

> French President Jacques Chirac criticized the United States before the U.N. Human Rights Commission, saying, "What can be said of the execution of minors or of persons suffering from mental deficiencies? I call for a worldwide abolition of the death penalty, the first step of which would be a general moratorium." *Id.*

104. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS IN 2008, at 8 (2008), http://www.amnestyusa.org/abolish/annual_report/DeathSentencesExecutions2008.pdf (stating that a total of 138 countries are abolitionist states that have abolished the death penalty, either in law or in practice).

105. AM. CIVIL LIBERTIES UNION, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 3 (2004), http://www.aclu.org/capital/intl/10619pub20041209.html (follow "Download" hyperlink) (providing an example of how the European Union compelled the Russians into abolishment of the death penalty). "The Council of Europe and the European Union have made abolition of the death penalty a condition of membership." *Id.*

106. *See* Dorean M. Koenig, *International Reaction to Death Penalty Practices in the United States*, 28 HUM. RTS. Q. 14, 15 (2001).

> United Nations (UN) Secretary General Kofi Annan has endorsed the call for a moratorium on executions. The UN General Assembly has adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, acknowledging a worldwide effort to abolish capital punishment for all purposes and obligating each state party to take all necessary measures to abolish the death penalty within its jurisdiction. *Id.*

107. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS IN 2008, at 5 (2008), http://www.amnestyusa.org/abolish/annual_report/DeathSentencesExecutions2008.pdf (reporting that in 2008, ninety-three percent of all known executions occurred in five countries: China, Iran, Saudi Arabia, Pakistan and the United States).

fendants, as only three countries, the United states being one of them, have reportedly executed mentally retarded defendants since 1995.[108] Many countries have protested against the United States' executions of mentally retarded defendants.[109] Indeed, fifteen countries of the European Union filed a brief on behalf of Mr. Atkins, stating that the practice of executing mentally retarded offenders was in opposition with the world's view and caused friction between the United States and other countries.[110]

3. Organization Consensus

Before *Atkins*, several organizations opposed the death penalty of the mentally retarded.[111] In *Atkins*, the Supreme Court noted that the American Psychological Association (now the newly formed AAIDD),

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108. Linda Greenhouse, *The Supreme Court: The Death Penalty; Citing 'National Consensus,' Justices Bar Death Penalty for Retarded Defendants,* N.Y. TIMES, June 21, 2002, at A1 ("Amnesty International reported that since 1995, only three countries were reported to have executed mentally retarded people: Kyrgyzstan, Japan and the United States, which the organization said had executed 35 mentally retarded defendants since the court allowed states to reinstate the death penalty in 1976.").

109. *See* AM. CIVIL LIBERTIES UNION, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 1 (2004), http://www.aclu.org/capital/intl/10619pub20041209.html (follow "Download" hyperlink) ("Europeans and other allies find such U.S. practices as the execution of juvenile offenders, the mentally ill, and the mentally retarded to be particularly repugnant."). Also, more than 162 French officials sent a letter to the U.S. Congress asking for a moratorium on the death penalty citing that it was profoundly affecting the relationship between France and the United States. *Id.* at 7.

110. *See* Linda Greenhouse, *The Supreme Court: The Death Penalty; Citing 'National Consensus,' Justices Bar Death Penalty for Retarded Defendants,* N.Y. TIMES, June 21, 2002, at A1.

> The 15 countries of the European Union filed a brief on behalf of Mr. Atkins, as did a group of senior American diplomats who told the court that the practice of executing retarded offenders was out of step with much of the world and was a source of friction between the United States and other countries. *Id.*

In addition to this letter, there have been numerous other times that foreign countries have pleaded with the United States to end the death penalty. *Id.*; *see also* AM. CIVIL LIBERTIES UNION, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 8 (2004), http://www.aclu.org/capital/intl/10619pub20041209.html (follow "Download" hyperlink) (illustrating the European Union's attempts to convince the U.S. Congress, and then Texas Governor George W. Bush, to stop executions or face the possibility that it could hurt economic relations). "After describing the strong opposition in Europe to the death penalty, the letter noted the officials' concern that 'the almost universal repugnance' felt in other countries for the continued application of the death penalty in the United States could have economic consequences." AM. CIVIL LIBERTIES UNION, HOW THE DEATH PENALTY WEAKENS U.S. INTERNATIONAL INTERESTS 8 (2004), http://www.aclu.org/capital/intl/10619pub20041209.html (follow "Download" hyperlink).

111. *See Atkins*, 536 U.S. at 316 n.21 (noting that several organizations oppose the death penalty).

European Union, and religious communities representing the Christian, Jewish, Muslim, Catholic and Buddhist traditions all oppose the death penalty for the mentally retarded.[112]

After *Ford* and *Atkins,* scholars in the psychology and legal fields began advocating for a categorical exemption for mentally ill individuals similar to that created in *Atkins.*[113] In addition, professional mental health organizations are largely opposed to the practice of executing mentally ill offenders.[114] For example, in 2004, the APA released a position statement asserting that defendants should not be sentenced to death or executed if, "at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law".[115]

The American Bar Association has also been involved in the national dialogue about executing the mentally ill and they have created a proposal for legislatures and the nation to follow.[116] The ABA's proposal embraces the language of the American Association of Mental Retardation and the American Psychiatric Associate's Diagnostic and Statistical Manual of Mental Disorders.[117] Amnesty International[118] has also been in-

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112. *Id.* (citing various position statements and briefs stating the positions of organizations opposed to the death penalty).

113. *See* Stephanie Zywein, *Executing the Insane: A Look at Death Penalty Schemes in Arkansas, Georgia and Texas,* 12 SUFFOLK J. TRIAL & APP. ADVOC. 93, 99 (2007) ("Following the *Ford* and *Atkins* decisions, scholars in both the legal and psychology fields began to advocate for a similar categorical exemption for mentally ill individuals.").

114. *See* Helen Shin, Note, *Is the Death of the Death Penalty Near? The Impact of* Atkins *and* Roper *on the Future of Capital Punishment for Mentally Ill Defendants,* 76 FORDHAM L. REV. 465, 508 (2007) ("Among professional mental health organizations, there is abundant evidence that they are opposed to the practice of imposing the death penalty on mentally ill offenders."). For example, the American Psychiatric Association believes that if it is shown that the offender suffers from a mental disability that does not allow him or her to appreciate the nature and consequences of the crime, rationally judge the nature of his or her conduct, or mold his or her conduct to align with the law, then the death penalty cannot be rightly asserted. *Id.*

115. Am. Psychiatric Ass'n, Diminished Responsibility in Capital Sentencing: Position Statement (2004), http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx.

116. *See* American Bar Association, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities,* 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668 (2006) (stating in the preamble of the recommendation that the purpose of the recommendation is to "urge each jurisdiction that imposes capital punishment to implement" their recommended policies and procedures).

117. Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations,* 54 CATH. U. L. REV. 1133, 1334 (2005) (stating that the recommendation embraces the language of the AAIDD and APA which both

strumental in the debate about the execution of the mentally ill and has stated that the execution of the mentally ill or the "insane" is prohibited by international law.[119]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Although the *Ford* and *Atkins* decisions have mandated that mentally ill and mentally retarded defendants are exempt from the death penalty,[120] the Supreme Court did not dictate in either case when states should provide defendants with a mental health or competency evaluation.[121] As a result, states across the nation vary as to when they will hear

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commonly agree that mental retardation must start before the age of eighteen but differ with respect to how the adaptive part of the definition is worded). The AAIDD states that mental retardation is "characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills." *Id.* The APA characterizes mental retardation as a person exhibiting "significantly subaverage intellectual functioning (defined as an IQ of approximately 70 or below) and 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." *Id.* (citing MICHAEL B. FIRST, ALLEN FRANCES & HAROLD A. PINCUS, THE ESSENTIAL COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 382–83 (4th ed. 1995)).

118. AMNESTY INT'L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS 10 (2006), http://www.amnesty.org/en/library/asset/AMR51/002/2006/en/dom-AMR51002200 6en.pdf (providing a description of Amnesty International's mission). Similar to its positions with juvenile and mentally retarded offenders, Amnesty International seeks to protect the mentally ill offenders from receiving the death penalty. *Id.* Amnesty International also supports narrowing the extent of the death penalty as it implicates progress towards abolition. *Id.* "[T]he organization will continue to seek to persuade all proponents of the death penalty . . . to change their minds and drop their support for any judicial killing at all." *Id.*

119. Amnesty International, The Death Penalty Disregards Mental Illness, http:// www.amnestyusa.org/abolish/mental_illness.html (last visited Mar. 29, 2009) ("The execution of those with mental illness or 'the insane' is clearly prohibited by international law"). Amnesty International also points out that "virtually every country in the world prohibits the execution of people with mental illness." *Id.*

120. *Ford*, 477 U.S. at 409–10 (holding that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that because of "evolving standards of decency," mentally retarded defendants are categorically exempt from the death penalty).

121. *See* Cynthia A. Orpen, Comment, *Following in the Footsteps of* Ford*: Mental Retardation and Capital Punishment Post-*Atkins, 65 U. PITT. L. REV. 83, 95 (2003) (pointing out the procedural disparities that exist when it comes to capital sentencing guidelines for people with mental disabilities). "*Atkins* neglected to set forth any requirements on how or when the issue of mental retardation is to be decided in a capital case." *Id. See generally* Ford, 477 U.S. 399 (holding only that the execution of the severely mentally ill is unconstitutional, while not stating when or how that decision should be made by the courts).

a defendant's claim with regard to mental retardation or illness.[122] Numerous states require a defendant to raise his mental retardation issue at a pre-trial hearing.[123] Other states address the defendant's mental retardation issue during the sentencing phase of trial,[124] or after the trial but before the sentencing phase.[125] In some states, once the prosecutor files

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122. *See* Cynthia A. Orpen, Comment, *Following in the Footsteps of* Ford*: Mental Retardation and Capital Punishment Post-*Atkins, 65 U. PITT. L. REV. 83, 95–96 (2003) (stating how the Supreme Court's failure to set requirements on how or when the issue of mental retardation is to be raised resulted in variations among the states). Some states hear the defendant's mental retardation at a pre-trial hearing, some at the sentencing phase of trial, and some before the sentencing phase but after the trial. *Id.*

123. *E.g.*, ARK. CODE ANN. § 5-4-618(d)(1) (West 1997) ("A defendant on trial for capital murder shall raise the special sentencing provision of mental retardation by motion prior to trial."); COLO. REV. STAT. § 18-1.3-1102 (2002) (stating that a defendant may allege that he or she is mentally retarded, but must file such a motion ninety days prior to trial); IND. CODE ANN. § 35-36-9-3(a)-(b) (West 2002) ("The defendant may file a petition alleging that the defendant is an individual with mental retardation. The petition must be filed no later than twenty (20) days before the omnibus date."); KAN. STAT. ANN. § 21-4623(a) (1994) (stating the issue of mental retardation can be brought by the county or district attorney's filing of a notice to request a separate sentencing hearing to determine whether the capital murder defendant should be sentenced to death); KY. REV. STAT. ANN. § 532.135 (West 1999) (stating that the determination of whether or not a defendant will classify as mentally retarded has to be completed pretrial). N.M. STAT. ANN. §31-20A-2.1(2002) ("Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding . . . ."); N.C. GEN. STAT. ANN. § 15A-2005(c) (West 2008) (stating that once there is a motion of the defendant "supported by appropriate affidavits, the court may order a pretrial hearing to determine if the defendant is mentally retarded"); S.D. CODIFIED LAWS § 23A-27A-26.3 (West 2008) (discussing the procedures for a defendant to allege mental retardation at the commission of an offense).

124. *See* Richardson v. Maryland, 598 A.2d 1, 3-4 (Md. Ct. Spec. App. 1991) (holding that mental retardation is properly determined by the trier of fact at the sentencing stage of the proceedings, rather than pre-trial or even pre-sentencing hearings); GA. CODE ANN. § 17-7-131(c)(3) (West 1997) (stating that the determination of mental retardation occurs by the jury during the sentencing phase of trial); WASH. REV. CODE ANN. § 10.95.030(2) (West 2002) (stating that after a special sentencing proceeding, if "the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death" unless the defendant is mentally retarded).

125. *See* KAN. STAT. ANN. § 21-4623(c)-(d) (1994) (stating that after a defendant is convicted of capital murder, if the prosecutor files a notice of intent to seek the death penalty, the defendant's counsel may request a hearing on the defendant's mental retardation). "If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder." *Id.*; MO. STAT. ANN § 565.030.4 (West Supp. 2003) (claiming that the purpose of having a separate case to determine whether a defendant is mentally retarded from that of the actual trial is to allow a jury to hear evidence that is relevant and necessary to accurately decide punishment without being prejudiced by this information at the guilt or innocence portion of a trial); NEB. REV. STAT. § 28-105.01(5) (Supp. 2002) (stating that

his "intent to seek the death penalty," the defendant is appointed "a prescreening psychological expert to determine the defendant's IQ."[126]

In all but the last method, the burden is on the defendant, via his attorney, to raise the issue of the defendant's mental incompetency or retardation. This is where the problem lies. As this Comment will illustrate, both mentally retarded and mentally ill defendants face adversity in raising the issue of their mental health because of ineffective assistance of counsel.

A. *Counsel's Obligation to Investigate Mental Health Issues & Present Mitigation Evidence*

Criminal defendants have a right to effective assistance of counsel.[127] Rendering effective counsel requires attorneys to investigate into mitigating evidence and failure to do so can result in a finding that counsel acted ineffectively in assisting their clients.[128] In *Strickland v. Washington*, the U.S. Supreme Court placed the burden on counsel to make reasonable investigations into mitigating evidence or to "make a reasonable decision that makes particular investigations unnecessary."[129] Particularly, with regard to a death sentence, *Strickland* holds that a defendant must show "first, that counsel's performance was deficient, and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial."[130] The *Strickland* case spoke broadly about counsel's duty

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if a "jury renders a verdict finding the existence of one or more aggravating circumstances" and the defendant waives the right to a jury determination of the alleged aggravating circumstances, the court, upon a motion of the defense requesting a ruling that the death sentence be prohibited, must hold a hearing on the defendant's mental retardation); N.M. STAT. ANN. § 31-20A-2.1(c) (West 2000) (mandating that a trial court review the issue of a capital defendant's mental retardation "upon the motion of the defense requesting a ruling that the penalty of death be precluded" and "prior to conducting the sentencing proceeding").

126. ARIZ. REV. STAT. ANN. § 13-703.02(B) (2003) ("If the state files a notice of intent to seek the death penalty, the court, unless the defendant objects, shall appoint a prescreening psychological expert in order to determine the defendant's intelligence quotient using current community, nationally and culturally accepted intelligence testing procedures.").

127. U.S. CONST. amend. VI (stating that a defendant has to right to "Assistance of Counsel for his defense"); *see* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

128. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) (holding that counsel "has a duty to reasonably investigate or to make reasonable decisions that make investigation unnecessary").

129. *Id.*

130. *Id.* at 669 (holding that the defendant in a death sentence case must show that counsel's performance was deficient and that deficiency prejudiced the defense leaving the defendant without a chance for a fair trial).

to investigate into mitigating circumstances and did not specifically elaborate on counsel's duty to investigate into the defendant's mental health.[131] However, other Supreme Court cases provide guidance with regard to counsel's duty to investigate mitigating evidence. Particularly, the Supreme Court has recognized that in a capital case, counsel has a duty to investigate into what mitigating evidence is available.[132] The Supreme Court has also held that counsel's investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[133] Based on the U.S. Supreme Court's holdings, it is clear that *Strickland* encompasses investigating into the defendant's mental health because mental health is a mitigating factor that could prevent the imposition of the death penalty on a defendant,[134] and the Court held that counsel has the duty to investigate.[135]

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131. *Id.* at 691 (commenting on counsel's duty to reasonably investigate). The Court further noted that in any ineffectiveness case, a decision by counsel not to investigate must be directly assessed for reasonableness in all the circumstances and the Court will give great deference to counsel's judgments. *Id.* However, in *Strickland,* one of the defendant's claims for ineffective assistance of counsel was that counsel unreasonably failed to raise the issue of his mental illness. *Id.* at 676. The Court found that counsel was not ineffective in choosing not to raise this issue because reports at the trial court did not indicate a major mental illness and that while the defendant was chronically depressed because of his economic situation, the defendant "was not under the influence of extreme mental or emotional disturbance." *Id.*

132. *See* Williams v. Taylor, 529 U.S. 362, 396 (2000) (finding counsel ineffective for not thoroughly conducting a background investigation on the defendant).

133. Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (quoting AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 93 (1989), http://www.abanet.org/deathpenalty/resources/docs/1989Guidelines.pdf)). The Supreme Court went on to say "[i]n evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable.*" *Id.* at 511.

134. *See Ford*, 477 U.S. at 409–10 (holding the "Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants are categorically exempt from the death penalty).

135. *Strickland*, 466 U.S. at 705 (Brennan, J. dissenting) (referring to the broad duty of counsel to investigate into any mitigating evidence in their defendant's case). In his concurring in part and dissenting in part opinion, Justice Brennan stressed the importance of counsel to investigate into mitigating evidence in death penalty cases. *Id.* Justice Brennan explained that because death penalty cases are so different from all other punishments, it requires a higher degree of reliability and the sentencer, in capital cases, shall be permit-

Furthermore, subsequent cases explicitly address an attorney's duty to reasonably investigate into a defendant's mental health. In *Moore v. Johnson*[136], the Fifth Circuit Court of Appeals held that counsel's failure to investigate a mental deficiency when there was reason to believe the defendant suffered from a mental deficiency, rendered the counsel's assistance ineffective.[137] Similarly, the Eleventh Circuit Court of Appeals held that counsel was ineffective where there was otherwise reason to believe mental deficiency was an important defense and counsel did not raise it as a defense.[138] Essentially, this case law demonstrates that defense counsel will ultimately decide whether a mental deficiency will be brought to the attention of the court.[139]

This is a problem because many inmates diagnosed with mental retardation who are facing the death penalty were not identified as having a mental deficiency until after they were sentenced to death[140] and five to ten percent of people on death row have a serious mental illness.[141]

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ted to consider all relevant mitigating factors. *Id.* This makes counsel's duty to investigate supremely important in death penalty cases. *Id.* at 706.

136. 194 F.3d 586 (5th Cr. 1999).

137. Moore v. Johnson, 194 F.3d 586, 621 (5th Cir. 1999) (stating that counsel was ineffective in investigating into Moore's background). Moore's background included childhood abuse, "tortured family background" and mental impairment. *Id.* at 602, 616–17.

138. *See* Mauldin v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984) (stating that attorney failed to effectively assist the defendant because the attorney failed to "have his client examined by a psychiatric expert" and failed to fully investigate the defendant's medical history).

139. *See* Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990) (stating that the trial court relies on counsel to bring up the defendant's mental status).

140. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 529–30 (1998) (emphasizing that clues about the defendant such as apathy toward defense decisions, obvious misunderstanding or misjudgment, difficulty explaining important and relevant elements, deferment to authority figures, and an inability to communicate accurate or detailed information merits an investigation by counsel into the possible existence of mental retardation). "By not presenting information that their defendant has mental retardation, defense lawyers are ignoring a vital piece of information." *Id.* at 530.

141. American Civil Liberties Union, Mental Illness and the Death Penalty in the United States, http://www.aclu.org/capital/mentalillness/10617pub20050131.html (last visited Mar. 30, 2009) (estimating that five to ten percent of inmates on death row have a severe mental illness). "Over 60 people diagnosed as mentally ill or with mental retardation have been executed in the United States since 1983." *Id.* Most of the damaged brains of death row inmates are "due to illness or trauma, and most were victims of vicious beatings and sexual abuse as children." *Id.*; See AMNESTY INT'L, USA: THE EXECUTION OF MENTALLY ILL OFFENDERS 9 (2006), http://www.amnesty.org/en/library/asset/AMR51/002/2006/en/dom-AMR510022006en.pdf. ("The National Association of Mental Health has estimated that [5] to 10[%] of the U.S. death row population have serious mental illness.").

B. *Causes of Ineffective Assistance of Counsel*

There are two primary causes for counsel's failure to identify their client's mental retardation: first, the mentally retarded or ill defendants often mask their symptoms and second, defense counsel often make significant errors in judgment.

1. Defendants Mask Their Symptoms

a. Mentally Retarded Defendant's "Cloak of Competency"

Mentally retarded defendants often mask their symptoms by using a "cloak of competency."[142] The "cloak of competency" is a term used to refer to individuals suffering from mental retardation who have learned to hide their disability through various adaptations and masking skills.[143] Essentially, the cloak of competency is a method that individuals will use to make them appear more competent than they are.[144] For example, a person with mental retardation will try to hide that he or she cannot read or do basic arithmetic and take menial jobs that do not require higher conceptual thinking.[145] The cloak of competency is exacerbated by the fact that "most people with mental retardation are not so profoundly disabled that their condition is readily apparent."[146] This makes it difficult for attorneys to discover that their client has mental retardation.[147] Essentially, what the cloak of competency does in a judicial setting is it creates the problem of "cheating to lose." Cheating to lose is the idea that

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The largest study of mental illness in homicide offenders occurred in Sweden, and it concluded that one out of five homicide offenders suffered from mental illness. *Id.*

142. Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http:// www.abanet.org/irr/hr/summer01/fellner.html ("Many people who have cognitive impairments go to great lengths to mask them, wrapping themselves in a 'cloak of competence.'").

143. *See id.* (stating how the cloak of competence can be used by mentally retarded individuals to hide their disability).

144. *See* Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 23 (2001) (stating that the mentally retarded will use a cloak of competency to try to appear more competent than they are). Individuals may also try use the cloak of competence to "deny any history of difficulty in school, or fail to reveal any lack of understanding of papers presented to them." *Id.*

145. *See* Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http:// www.abanet.org/irr/hr/summer01/fellner.html.

146. *Id.* ("Most people with mental retardation are not so profoundly disabled that their condition is readily apparent; except in special cases such as Down's syndrome, they do not look different from anyone else.").

147. *See id.* (stating that as a result of the cloak of competency, defense counsel often do not realize that their clients are mentally retarded).

the defendant's use of the cloak of competency actually hinders him in his trial rather than helps him.[148]

Also adding to the problem of the cloak of competency is the fact that "most laypersons underestimate the possible existence of mental retardation, thinking that anyone with mental retardation is virtually incapable of almost any self-care," finding it hard to believe that mentally retarded individuals can "drive, work, take the bus, and perform simple tasks with relative ease."[149] Unfortunately, with regard to understanding mental retardation, many attorneys could be considered laypersons because few attorneys have a background in evaluating or testing mental retardation[150] and rarely consider that mentally retarded individuals will try to hide their disability.[151]

The phenomenon of the cloak of competency was illustrated in a 2007 Texas case, *Hunter v. State*.[152] In *Hunter,* the testifying psychologist explained how the defendant wore a cloak of competency to mask his symptoms of mental retardation and hide his deficits in adaptive and intellectual functioning.[153] The psychologist pointed out that as part of the defendant's cloak of competency, the defendant denied ever attend-

148. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 530 (1998) (stating that the cloak of competency creates the "cheating to lose" problem where the "defendant with mental retardation deflects attention from his or her disabilities rather than bringing it to the attention of his or her lawyer or the court"). In an attempt to maintain the image of "normal," some defendants with mental disabilities will go to great lengths to keep quiet, agree with others, and hide their disability "while failing to appreciate the disadvantages of hiding [them]." *Id.*

149. *See id.* (adding that many lay persons think that people's mental disabilities would be "obvious"). Due to this false belief, defendants who suffer from mild retardation "present the greatest obstacle to lawyers, the criminal justice system, and even their own defense." *Id.*

150. *See* LaJuana Davis, *Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROCESS 297, 307 (2003) (advocating for the increased use of experts to help identify and test for developmental disabilities by stating that "few judges, court personnel, lawmakers, or lawyers have any background in mental retardation evaluations or testing protocols").

151. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 530 (1998) (stating that lawyers, judges, and jurists rarely consider that people with mental retardation will try to hide their disability). "Defendants who have mental retardation are often characterized as quiet and cooperative. By attempting to 'look like' persons of average ability, they are masking their disabilities because of the associated stigma of retardation." *Id.*

152. 243 S.W.3d 664, 668 (Tex. Crim. App. 2007).

153. Hunter v. State, 243 S.W.3d 664, 668 (Tex. Crim. App. 2007) ("Garnett explained that appellant wears a 'cloak of competence' that masks his deficits in intellectual functioning and adaptive behavior.").

ing special education classes.[154] The defendant also told the psychologist that "he had learned to use a computer in prison, but he actually had taken only a basic keyboarding class," and had stated that he could "fix things at home" when in reality all he would do is tighten a loose doorknob.[155]

b. Mentally Ill Defendants Masking of Symptoms

Similar to the mentally retarded defendant's use of the cloak of competency, mentally ill defendants may also mask their illness.[156] Mentally ill individuals often choose to hide their symptoms because of the stigma associated with their illness.[157] Their fear of stigmatization is not unfounded because harsh stigmatization of the mentally ill occurs throughout the world.[158] While masking their symptoms protects them from the stigmatization they fear, as with the cloak of competency, this masking can make it difficult for attorneys to identify that their clients have a mental illness.[159]

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154. *Id.* at 670 (exemplifying tactics the accused utilized to cover his condition).

155. *Id.* (reporting on the psychologist's observations on the defendant's use of the cloak of competency).

156. *See* Andrea Stier & Stephen P. Hinshaw, *Explicit and Implicit Stigma Against Individuals with Mental Illness*, 42 AUSTRAL. PSYCHOLOGIST 106, 108 (2007) ("In their attempts to avoid detection and discrimination, individuals who possess a concealable stigma may expend a large amount of energy to hide characteristics that might identify them as belonging to the stigmatized category, and such mental efforts may backfire at personal and social levels."). Attempting to conceal one's mental illness can inhibit "intimacy, friendship, support, and likeability," and thus enhance the symptoms that individual is attempting to hide. *Id.*

157. *See id.* at 106 (stating that the mentally ill will try to avoid being labeled as mentally ill to avoid discrimination).

158. *Id.* (reporting that mental illness is harshly stigmatized across nations and cultures).

159. *See* MARIA KARRAS, EMILY MCCARRON, ABIGAIL GRAY & SAM ARDASINSKI, ON THE EDGE OF JUSTICE: THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW 115 (2006), http://xml.lawfoundation.net.au/ljf/site/articleIDs/CB05FD97AAF2458CCA25718E00014293/$file/EdgeOfJustice.pdf (expressing the need for attorneys to know whether their clients suffer from a mental illness).

> "Consultations for this study indicate that if a person does not disclose that they [sic] have a mental illness, it may be difficult for legal service providers to identify that a person has a mental illness. Several legal and non-legal service providers suggested that this may be because it is not overtly apparent that a person has an illness." *Id.* (footnote omitted). "Legal service providers may not always be able to identify that a client has a mental illness, which may result in a person not receiving the time, assistance and understanding they need to resolve their legal issue." *Id*; *see also* Randal I. Goldstein, Note, *Mental Illness in the Workplace After* Sutton v. United Air Lines, 86 CORNELL L. REV. 927, 928 (2001) (stating that mental illnesses "are difficult to diagnose and are not usually readily apparent").

Adding to the probability that counsel will have difficulty discovering their client's mental illness is the fact that, like mental retardation, mental illnesses are not always readily apparent at the outset.[160] Even severe mental illnesses like schizophrenia will not consistently present symptoms and may manifest at different times throughout the illness.[161] This creates a unique problem for attorneys dealing with a mentally ill defendant versus a mentally retarded defendant. Attorneys representing a mentally ill individual have an added factor that could prevent them from discovering the illness that does not exist with mental retardation. Counsel may not discover a defendant's mental retardation because the client is hiding the symptoms or because the attorney does not know how to identify the symptoms. However, with mental illness, the attorney may not discover the mental illness for an added third reason, that the mental illness is not manifested at the moment.

2. Counsel's Error in Judgment

Counsel becoming alert to their client's mental health is the first hurdle that defendants must cross in alerting the courts to their retardation or illness. After counsel is aware, then the defendants also face the risk that their attorneys will fail to raise the issue of their retardation because of the attorney's negligence or incompetence. The following cases are examples of counsel failing to raise the issue of their client's mental illness or retardation

a. Counsel's Failure to Investigate

In *Jells v. Mitchell*[162], defendant Jells was sentenced, in 1987, to twenty-five years imprisonment for kidnapping and sentenced to death for murder.[163] In 2008, the Sixth Circuit Court of Appeals found that counsel

160. *See id.* (discussing ways in which a mentally ill individual can prevent discrimination commonly associated with stereotypical attitudes and stating that mental illnesses "are difficult to diagnose and are not usually readily apparent"); *see also* Angela F. Epps, *To Pay or Not to Pay, That Is the Question: Should SSI Recipients Be Exempt from Child Support Obligations*?, 34 RUTGERS L.J. 63, 97 (2002) ("Some disabilities, particularly mental illnesses, will not be readily apparent.").

161. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) ("[E]ven in cases of severe mental illness such as schizophrenia, symptoms are not actively present or observable all the time; at different times over the course of the illness, symptoms spontaneously remit, even when clients are not medicated."). Those mental problems that are less easily identified include thoughts of suicide, eating disorders and depression. *Id.*

162. 538 F.3d 478 (6th Cir. 2008).

163. Jells v. Mitchell, 538 F.3d 478, 486 (6th Cir. 2008) (describing the procedural history in which Jells was sentenced to imprisonment for kidnapping charges and sentenced to death for an aggravated felony murder charge).

was ineffective for failing to investigate into mitigating evidence with regard to Jells's mental health.[164] Counsel had failed to conduct an extensive investigation with family members resulting in counsel not discovering the significant abuse Jells suffered as a child.[165] Counsel also did not obtain a psychological report prior to trial, and "failed to obtain accessible school records-reports that would demonstrate that Jells had mental impairments, including learning difficulties that led to disruptions in the classroom and an extremely low reading level."[166]

The court found that counsel's limited investigation into the client's home and academic background was insufficient and that "counsel's awareness of Jells's unstable home environment and academic difficulties should have alerted them that further investigation by a mitigation specialist might prove[ ] fruitful."[167] Essentially, this court held that once an attorney uncovers evidence indicating a possibility of mental illness or retardation the attorney must investigate further and not abandon that potential mitigating evidence.

In *Brownlee v. Hayle*[168], defense counsel was also found ineffective for failing to investigate into mitigation evidence regarding the defendant's borderline mental retardation, psychiatric disorders and history of drug and alcohol abuse.[169] In Brownlee, the defendant was convicted of murder and sentenced to death.[170] The Supreme Court of Alabama found that while his conviction was correct, he was denied effective assistance of

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164. *Id.* at 494 (holding that counsel was ineffective for failing to use a mitigation specialist). Counsel had requested one but "never followed through on their request by formally involving her in the case." *Id.*

165. *Id.* at 493.

> Jells's counsel interviewed only three family members, neglecting to speak with many other family members who had lived with Jells and were available. When speaking with the family members they did contact, their inquiry was brief and they failed to ask sufficiently probing questions; as a result they failed to discover the abuse that Jells received from his mother's live-in boyfriend and his stepfather. *Id.*

166. *Id.* (listing the failures of counsel and finding that those failures made counsel ineffective). Not only did Jells's counsel not consult a mitigating specialist, but they also failed to gather "the evidence that such a specialist would typically collect." *Id.* at 494.

167. *Id.* at 496 (stating that counsel's limited investigation into the defendant's home life should have alerted them that further investigation was necessary when they found out that that the defendant had an unstable childhood and academic difficulties). The court held that their limited investigation was a failure by counsel to fulfill their duty to investigate. *Id.*

168. 309 F.3d 1043 (11th Cir. 2002).

169. Brownlee v. Haley, 306 F.3d 1043, 1045–46 (11th Cir. 2002).

170. *Id.* at 1045 ("Virgil Lee Brownlee appeals the district court's denial of his petition for a writ of habeas corpus challenging both his 1987 conviction for the murder of Lathen Aaron Dodd and the death sentence imposed as a result of that conviction by the Circuit Court for Jefferson County, Alabama.").

counsel in the sentencing phase; therefore, the court ordered a remand of the case with instructions to issue a writ vacating Brownlee's death sentence.[171] During the sentencing phase of trial, Brownlee's defense counsel presented no evidence and only offered a brief closing argument.[172] In fact, at the first sentencing hearing, defense counsel assumed that the defendant would be found guilty and just asked the jury not to sentence him to death.[173] Counsel did not have any evidence in their hands about Brownlee's mental retardation and mental illness because they did not investigate, and therefore, had little material available to help their client.

In the second sentencing hearing for Brownlee, the judge suggested to counsel that they should contact a clinical psychologist and request an examination of Brownlee.[174] Counsel contacted the psychologist and presented his testimony during the second sentencing trial.[175] The psychologist testified that Brownlee had "a mixed substance abuse disorder," combined with a "mixed personality disorder, and borderline intellectual functioning" with an IQ of 70, all of which classified Brownlee as mentally impaired.[176] The psychologist also testified that Brownlee suffered from "hypnagogic hallucinations," which consist of "experiences right before you fall asleep or right upon awakening of seeing threatening

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171. *Id.* at 1045–46.

> Although we agree with the district court that the underlying conviction was constitutionally firm, Brownlee plainly received ineffective assistance of counsel at sentencing in light of his attorneys' failure to investigate, obtain, or present to the jury any evidence in mitigation of the death penalty, violating the Sixth Amendment to the Constitution. Accordingly, we reverse the district court's order regarding sentencing and remand the case with instructions to issue a writ vacating Brownlee's death sentence. *Id.*

172. *Id.* at 1051 ("At the sentencing hearing before the jury, Brownlee's counsel presented no evidence. Instead, each of his lawyers offered only a very brief closing argument.").

173. *Id.* at 1051–52 (reporting on the brief closing arguments of counsel). Counsel stated, "I am not going to rehash or go back over the trial. You have obviously resolved the issue of guilt against us. I am simply standing up here before you at this time to ask for Virgil Brownlee's life." *Id.* Counsel also told the jury that the other defendant in the case was not receiving the death penalty and asked for the jury to spare Brownlee's life because he is human. *Id.*

174. *Brownlee*, 306 F.3d at 1052 ("Prior to the second phase of the sentencing proceeding, Judge Hard suggested that defense counsel contact Dr. William Beidleman, a clinical psychologist, to conduct an examination of Brownlee.").

175. *Id.* ("At the February 24, 1987 judicial sentencing hearing, the defense presented Dr. Beidleman and two of Brownlee's sisters as witnesses.").

176. *Id.* (stating that the psychologist, Dr. Beidleman, classified the defendant as having borderline intellectual functioning, "which is out of the retarded range, but still impaired").

figures or animals."[177] He also observed physical symptoms that may have indicated that Brownlee suffered from psychosis.[178] After presenting the psychologist's testimony, defense counsel presented the testimony of Brownlee's two sisters; they stated defendant was taken to a psychiatric hospital after leaving the military; had seizures when he was around twenty years old; and had a history of harming himself, including jumping out of windows, and cutting himself on his chest.[179] After the presentation of all this testimony, the trial court found that there were not mitigating factors and sentenced Brownlee to death.[180]

Brownlee then filed an ineffective assistance of counsel claim asserting that his counsel failed to prepare adequately during the sentencing phase of his trial.[181] The Supreme Court of Alabama found that the failure of counsel to investigate into the mitigating evidence of the defendant's mental illness and retardation caused them to be unable to present any evidence to the jury.[182] The court found that counsel's failure to investigate prevented the jury from considering anything about his "borderline mental retardation, his schizotypal personality disorder, his antisocial personality disorder, his many drug and alcohol dependencies, or his history of seizures."[183] It therefore reversed and remanded the case, in-

177. *Id.* ("Based on Brownlee's statements and interviews with Brownlee's sisters, Dr. Beidleman reported that Brownlee had seen visions and suffered from 'hypnagogic hallucinations,' which consist of 'experiences right before you fall asleep or right upon awakening of seeing threatening figures or animals.'").

178. *Id.* (stating that Dr. Beidleman observed the defendant's "physical complaints such as hot flashes in the chest, which 'were sort of strange and often go along with psychosis.'"). While noting all these symptoms, the psychologist did state that it was possible that Brownlee exaggerated his symptoms in order to be seen in a negative light. *Id.*

179. *Brownlee*, 309 F.3d at 1053 (reporting how one of the defendant's sisters testified that her brother had seizures and would try to hurt himself which "included forcing family members out of the apartment and harming himself by jumping out the window and cutting himself in the chest"). In fact, Brownlee may have exhibited suicidal tendencies because "[b]efore trying to harm himself, Brownlee complained about headaches and said that 'he couldn't take the pain anymore.'" *Id.*

180. *Id.* (stating how the trial court found aggravating factors but not mitigating factors with regard to Brownlee's conviction of murder).

181. *Id.* at 1051 (stating that the defendant argued ineffective assistance of counsel because his counsel failed to prepare adequately for the guilt/innocence phase of his trial). Brownlee also asserted that his counsel failed "by committing various unprofessional errors during that proceeding." *Id.*

182. *Id.* at 1067 ("Because counsel's failure to investigate, obtain, or present *any* evidence of mitigating circumstances to the sentencing jury constituted ineffective assistance of counsel, Brownlee is entitled to habeas corpus relief and a new sentencing proceeding consistent with the Sixth Amendment's command that a defendant receive the effective assistance of counsel.").

183. *Id.* at 1074.

structing the district court to grant the writ of habeas corpus vacating Brownlee's death sentence.[184]

In *Jells* and *Brownlee*, counsel's failures to investigate prevented them from discovering vital evidence on the defendant's mental illness and retardation and lead to subsequent failure in failing to introduce key expert witness testimony. This leads to the next critical error that defense counsel make when representing their capital defendants: neglecting to utilize experts and present their testimony in court.

b. Counsel's Failure to Utilize Experts

In *Jells,* counsel was also found ineffective for failing to call a mitigation expert.[185] In *Jells*, the Sixth Circuit found that while counsel does not have an obligation to hire a mitigation expert, counsel does have an obligation to investigate the possible mitigation evidence.[186] However, the court then found that in Ohio, for counsel to be found competent in a capital case, they must present, in court, the mitigation evidence that "would present a sympathetic picture of the defendant's family, social, and psychological background."[187] Effectively, the court found that counsel should have introduced the expert's testimony regarding the defendant's mental health in order to adequately represent the capital defendant.

In *Head v. Thomason*[188], the defendant, Gary Chad Thomason, "shot and killed the homeowner who came upon him while he was burglarizing

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In this case, counsel's absolute failure to investigate, obtain, or present any evidence, let alone the powerful, concrete, and specific mitigating evidence that was available, prevented the jurors from hearing anything at all about the defendant before them. An individualized sentence, as required by the law, was therefore impossible. Instead, the jury was asked to decide Virgil Brownlee's fate without hearing anything about his borderline mental retardation, his schizotypal personality disorder, his antisocial personality disorder, his many drug and alcohol dependencies, or his history of seizures. *Id.*

184. *Brownlee*, 306 F.3d at 1080.

185. *Jells*, 538 F.3d at 494 (concluding that Jells's counsel was ineffective for failing to use a mitigation specialist).

186. *Id.* at 495 ("While Jells's counsel did not have a specific obligation to employ a mitigation specialist, they did have an obligation to fully investigate the possible mitigation evidence available."). This evidence helps "determine whether a sentence of death is appropriate." *Id.*

187. *See id.* at 495–96 ("Thus, to provide professionally competent assistance in Ohio capital cases, defense counsel must conduct a reasonably thorough investigation into all possible mitigation evidence that would present a sympathetic picture of the defendant's family, social, and psychological background.").

188. 578 S.E.2d 426 (Ga. 2008).

the victim's home."[189] In 1997, Thomason was convicted and sentenced to death for "malice murder, burglary and possession of a firearm by felon during commission of a burglary."[190] After his conviction, Thomason filed for writ of habeas corpus, which the court denied on all grounds except for the defendant's allegation that he was not afforded the effective assistance of counsel during the sentencing phase of the trial.[191] The warden and Thomason appealed and the Supreme Court of Georgia heard the case. In 2003, the Supreme Court of Georgia held that counsel was ineffective for failing to call experts who could have testified about the mitigating evidence of the defendant's mental health.[192] Counsel neglected to call two mental health experts or present the mitigating evidence related to their findings.[193] One of the experts would have testified about Thomason's low IQ and the other would have testified about Thomason's intellectual impairment, school, medical, and institutional records.[194]

The court stated that trial counsel was aware of the need for expert testimony and had even asked the court for an additional $25,000 for mental health expert assistance but the court denied it.[195] The court held that this denial should have not prevented the attorneys from presenting the expert testimony.[196] Additionally, the court stated that defense counsel should have obtained an affidavit instead or spoken to the expert about reducing his fee.[197] In fact, the expert stated that he would have found ways to make conducting his evaluation cheaper but was never

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189. Head v. Thomason, 578 S.E.2d 426, 428 (Ga. 2003) (describing the events that lead to the criminal trial in this case).

190. *Id.*

191. *Id.* ("[Thomason's] petition was denied on all grounds save one—that he was not afforded the effective assistance of counsel during the sentencing phase of his bench trial because trial counsel failed to investigate Thomason's background adequately and failed to present an effective case in mitigation.").

192. *Id.*

> We conclude, given the importance of mitigating evidence in death penalty cases, that an attorney has not acted reasonably when he fails to call mental health experts he knows have mitigating evidence and explains his failure to present lay mitigation evidence by asserting that he had not experts to call. *Id.*

193. *Id.* at 429–30.

194. *Head*, 578 S.E.2d at 429–30 (stating how the defense counsel knew of two experts who could have testified about the defendant's mental health issues but failed to do so).

195. *Id.* at 430 (stating how counsel "recognized the need for expert testimony").

196. *Id.*

197. *Id.* (noting that there were other means for counsel to introduce the expert's testimony that would not have required spending $25,000, such as contacting the expert and using an affidavit, and that counsel did not do so).

contacted by defense counsel to discuss that possibility.[198] Stressing the importance of mitigating evidence in a death penalty case, the court found counsel ineffective for failing to obtain an affidavit or discuss reducing the expert's costs.[199]

From these two cases, it is evident that courts place a high burden on attorneys to utilize experts. *Jells* held that experts were necessary in order for counsel to adequately represent a mentally retarded defendant[200] and *Head v. Thomason* held that counsel must find ways to obtain expert testimony despite any financial restrictions.[201]

c. Counsel's Failure to Raise the Issue

Even worse than not investigating and or presenting expert testimony is counsel failing to initially raise the issue of the defendant's mental status by neglecting to request a competency evaluation.

In an Illinois case, *People v. Shanklin*[202], the court held that counsel was ineffective for failing to request a hearing on the defendant's mental status.[203] In *Shanklin*, after the defendant entered a guilty plea to attempted murder, it was discovered that there was a pre-sentence report which stated that the defendant had been hospitalized three times for mental health problems as a teenager and that he was mentally retarded and had problems retaining and understanding verbal information.[204]

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198. *Id.* ("The expert noted he could have reduced the cost by utilizing defense team members to conduct interviews rather than conducing them himself and, had he had the materials provided to him by habeas counsel, he would have been able assist in providing evidence in mitigation.").

199. *Head*, 578 S.E.2d at 430 (noting the methods defense counsel should have employed to produce the expert testimony before the court).

200. *Jells*, 538 F.3d at 494 (holding that Jells's counsel was ineffective for failing to use a mitigation specialist).

201. *Head*, 578 S.E.2d at 430 (concluding that an attorney does not act reasonably in a death penalty case when "he fails to call mental health experts he knows have mitigating evidence").

202. 814 N.E.2d 139 (Ill. App. Ct. 2004).

203. People v. Shanklin, 814 N.E.2d 139, 145 (Ill. App. Ct. 2004).

> We find the gist of a constitutional claim was provided by defendant in his allegation that he was unable to understand the nature of the proceedings; he should have had a hearing to determine his fitness to enter a guilty plea, and he received ineffective assistance when defense counsel failed to request such a hearing. *Id.*

204. *Id.* at 143 (stating how the defendant was admitted to a hospital for psychiatric evaluation on three separate occasions as a teenager for violent and disruptive behavior; that defendant had difficulty "receiving and retaining verbal information"; and that he had a low IQ when he was hospitalized).

In making its decision, the court noted the effects of the cloak of competency.[205] The court stated that judges can be confronted by defendants who are attempting to hide their mental disability and how mentally retarded defendants can conceal their lack of comprehension of the trial.[206] Because of this, the court stated that "it is incumbent on the attorney representing a mentally retarded defendant to make this fact known to the trial court and for the trial court to proceed with care in accepting a plea."[207] While the court noted how judges may be affected by the defendant's cloak of competency, it did not give leeway to counsel for the possible effects for the cloak of competency.[208] The judge held that counsel should have had notice, from a mental health report, before the sentencing phase of the trial, of the defendant's mental retardation and therefore, counsel was ineffective for failing to present that mitigating evidence.[209]

Another example of counsel failing to raise the issue is in a 2005 case, *Burt v. Uchtman*.[210] In *Burt v. Uchtman*, the Seventh Circuit Court of Appeals found that counsel was ineffective in assisting a defendant in a capital murder case for failing to raise the issue of the defendant's mental health status by requesting a competency evaluation.[211] At his trial, Burt

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205. *Id.* at 144 ("A judge may be confronted with an individual who will attempt to conceal his mental disability."). While the court did not term this a "cloak of competence," it fits under the definition because the cloak of competence is when a mentally retarded individual tries to conceal his or her disability. *See* Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http:// www.abanet.org/irr/hr/summer01/fellner.html (defining the cloak of competency as a way for mentally retarded individuals to mask their cognitive impairments). For example, individuals may use the cloak of competence to mask their "inability to read or do basic math." *Id.*

206. *People*, 814 N.E.2d at 144 ("A cooperative defendant—particularly one who has been in court before—could conceal his lack of comprehension.").

207. *Id.*

208. *Id.* at 144–45 (holding that defense counsel was ineffective despite the fact that the court noted that the defendant may have been concealing his disability). Again, while the court did not refer to the defendant's efforts to hide his disability as a cloak of competence, it fits that definition because the term cloak of competence refers to an individual's efforts to hide their disability. *See* Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http:// www.abanet.org/irr/hr/ summer01/fellner.html (defining the "cloak of competence" as a technique used by people to mask their mental disability).

209. *Id.* at 144 ("Even if defense counsel had not known of defendant's mental-health history prior to entry of the plea, he was clearly on notice at the time of defendant's sentencing.").

210. 422 F.3d 557 (7th Cir. 2005).

211. Burt v. Uchtman, 422 F.3d 557, 568 (7th Cir. 2005) (concluding that counsel performed deficiently because counsel did not request a renewed fitness hearing for the defendant).

originally plead "not guilty" but then changed his plea to "guilty" despite the advice of his attorneys. His attorneys stated that they spoke with him and advised him against pleading guilty but that he insisted on doing it anyway.[212] The defendant, Burt, was subsequently sentenced to death for the murders of two men.[213]

The court found that defense counsel's action in allowing their defendant to plead guilty without first requesting a competency hearing made counsel ineffective because counsel had notice of the defendant's mental health status.[214] The court held that counsel had notice of Burt's mental health status based on a report they received eight months before trial[215] and based on counsel's own observations of the defendant.[216] The report that counsel received eight months before Burt plead guilty stated that Burt had consistently been on anti-depressant and psychotropic drugs while in pre-trial confinement but yet counsel still failed to request a competency hearing.[217] In fact, Burt had been on powerful psychotropic medication for fourteen months between the time of his arrest and the entering of his plea of guilty.[218] It also stated that Burt was "scared of

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212. *Id.* at 562.

213. *Id.* ("Ronald Burt was sentenced to death for the murders of H. Steven Roy and Kevin Muto.").

214. *Id.* ("We conclude here that in light of the overwhelming evidence of Burt's psychological problems and heavy medication, counsel's failure to request a new competency hearing was deficient performance."). The court made this conclusion based on its finding that "Burt's attorneys were aware of several pieces of information beyond what was available to the trial court that should have alerted them to the need for a new competency hearing." *Id.* at 567.

215. *Id.* at 568 (stating that, eight months before trial, the defendant was examined by a psychologist to determine if he was competent to stand trial, and that while the psychologist report found the defendant competent to stand trial, it left many gaps which should have alerted counsel as to the need to request a competency hearing).

216. *Burt,* 422 F.3d at 567–68 (noting how counsel's observations of the defendant's conduct should have alerted them to the defendant's mental health problems). The court stated that counsel had ample opportunity to observe Burt in and out of the courtroom setting. *Id.* at 568. Counsel also admitted knowing that Burt did not comprehend legal advice and was not acting rationally. *Id.* at 562.

217. *Id.* at 568 ("Counsel should have realized that Dr. Pearson's report left critical questions unanswered because Dr. Pearson failed to consider that Burt was taking multiple psychotropic medications."). The court went on to state that "the report could not have addressed Burt's current psychological condition because of the numerous changes made to his prescriptions in the eight months between the examination and the start of trial." *Id.*

218. *Id.* at 559. Burt was on Doxepein which "affects chemicals in the brain that may become unbalanced and cause depression." *Id.* at 560 n1. Burt was also on Diazepam which "affects chemicals in the brain that may become unbalanced and cause anxiety, seizures and muscle spasms." *Id.* at 560 n2. Burt was also on Imipramine which "affects chemicals in the brain that may become unbalanced and cause depression." *Id.* at 560 n3.

imaginary snakes in his cell."[219]

Counsel's observations also put them on notice of Burt's possible mental illness.[220] First, counsel should have been aware of Burt's mental illness from their own observation that he exhibited "frequent swings of mood" and often "demonstrated belligerent or explosive behavior" in front of counsel.[221] Indeed, one defense counsel even admitted that he knew that Burt probably did not comprehend legal advice and was not acting rationally.[222] Second, and even worse, counsel also knew Burt primarily wanted to plead guilty because he wanted to smoke and he could not smoke at the county jail where he was located whereas he could at the state prison where he would go if he plead guilty.[223] The court stated that Burt's desire to have a cigarette more than defend himself against capital charges should have alerted counsel that he was not acting rationally.[224] Furthermore, the court found that counsel had no tactical reason for not presenting this evidence and was therefore ineffective for not doing so.[225] Based on all this information, the court stated, "when there is a sudden guilty plea with no attempt to seek concessions from the prosecution, [it] may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency."[226]

While the Seventh Circuit found counsel ineffective for failing to request a competency hearing, it also admonished the trial court for not raising the issue sua sponte.[227] The Seventh Circuit opined that the trial court "never should have accepted Burt's guilty plea without first ordering a renewed competency hearing" because the court knew that Burt was taking large doses of powerful psychotropic medications, that Burt

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219. *Id.* at 561 (explaining that before Burt's psychological examination to determine competency, the officials in the prison "refused to dispense his medications because, in Burt's words, they did not want him 'doped up' for the examination").

220. *Id.* (noting that counsel was aware of the defendant's behavior from his actions inside and outside the courtroom).

221. *Burt*, 422 F.3d at 568 (describing counsel's observations of Burt as belligerent, explosive, and violent).

222. *Id.*

223. *Id.* at 567 ("Burt insisted on changing his plea to guilty largely because he was not permitted to smoke in the Stephenson County Jail, and was anxious to return to prison where smoking was permitted.").

224. *Id.* ("That Burt's desire to have a cigarette, in counsel's mind, trumped his desire to defend himself against capital murder charges should have suggested to counsel that Burt was not thinking clearly and not making rational decisions to assist in his defense.").

225. *Id.* at 568 (Neither the respondent nor Burt's former attorneys provided any conceivable tactical reason for counsel's decision not to request a new competency hearing.").

226. *Burt*, 422 F.3d at 565 (citing United States v. Johns, 728 F.2d 953, 956 (7th Cir. 1984)).

227. *Id.* at 566 ("If ever there was a case in which a trial court should have sua sponte ordered a renewed competency hearing, this is the case.").

was having trouble remaining alert and that Burt had a significantly lower than average intelligence.[228] The Seventh Circuit also held that the trial court should have been alerted to Burt's possible incompetency from Burt's unexplained decision to plead guilty against counsel's advice.[229]

In the end, counsel's failure to raise the issue of Burt's mental illness did not result in his death because the Governor of Illinois granted clemency to all death row inmates and his death sentence was commuted to a life imprisonment.[230]

IV. Recommendations to Defense Counsel

What is evident from all the above cases is that there are several ways that counsel can fail to effectively represent their mentally retarded and mentally ill clients. The above cases have also demonstrated that courts play an important role in identifying mentally ill and mentally retarded capital defendants. The next portion of this Comment is dedicated to providing counsel and judges with recommendations on how to prevent mentally ill and mentally retarded defendants from receiving the death penalty in contravention to *Ford* and *Atkins.*

A. *Education*

First, attorneys should educate themselves by becoming aware of the symptoms of mental illness and mental retardation by reading as much as they can about these disabilities.[231] This is extremely important because attorneys do not have extensive training in detecting and working with mentally ill or retarded individuals.[232] A great source of information to

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228. *Id.*

> Dr. Pearson's report made the trial court fully aware that Burt was a man of significantly below average intelligence with a history of psychological problems. The court knew that Burt was taking large doses of powerful psychotropic medications and that Dr. Pearson's report barely mentioned those drugs. The court also knew that at one point during the trial Burt was having such difficulty remaining alert that his attorneys felt compelled to request a continuance. *Id.*

229. *Id.* ("Lastly, Burt's sudden unexplained decision to plead guilty against the advice of counsel when he faced certain eligibility for the death penalty should have caused the court to consider whether he was competent to make that decision.").

230. *Id.* at 559.

231. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 Am. J. Fam. L. 128, 128 (2008) (providing steps to effectively manage mental health problems clients may exhibit). "The first step in effectively managing any type of mental health problem is to recognize that it exists and understand as much as possible." *Id.*

232. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 Champion 25, 25 (2007) ("The criminal defense attorney often does not have extensive background and training . . . regarding how to deal with

start learning about mental retardation is the Diagnostic and Statistical Manual, Fourth Edition, commonly known as DSM-IV[233] and the AAIDD's definitions of mental retardation.[234] To begin learning about mental illness counsel should consult the National Alliance on Mental Illness's website.[235]

Another part of an attorney's education on mental retardation and mental illness should include information about the stereotypes of mental retardation and mental illness. A common stereotype about mental retardation is that it is apparent from a person's physical appearance.[236] In fact, many people assume that mentally retarded people must look like they have Down syndrome for them to really have mental retardation.[237] It is important that counsel realize that this is only a stereotype in order

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clients who have mental illnesses, psychiatric diagnoses, and other impairments."). Attorneys do have extensive training in "law school, continuing education classes, courtrooms and jails," but they lack the expertise of detecting and dealing with mental disorders. *Id.*

233. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (identifying sources for information about mental health disorders and psychological problems). "One of the best sources of information for identifying and understanding the nature of psychological problems is the Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR)." *Id.*

234. *See generally* American Association on Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aamr.org/media/PDFs/AAIDDFAQonID.pdf (last visited Mar. 31, 2009) (providing information on mental retardation).

235. *See* National Alliance on Mental Illness, About Mental Illness, http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm (last visited Mar. 21, 2009) (defining mental illness and providing information regarding mental illnesses).

> Mental illnesses are medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others, and daily functioning. Just as diabetes is a disorder of the pancreas, mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life. . . . Stigma erodes confidence that mental disorders are real, treatable health conditions. We have allowed stigma and a now unwarranted sense of hopelessness to erect attitudinal, structural and financial barriers to effective treatment and recovery. It is time to take these barriers down. *Id.*

236. *See* Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 712 (2008) ("Many mistakenly believe that one can merely look at a person and tell whether he is mentally retarded.").

237. *See id.* ("In fact, many jurors believe that a person with mental retardation looks like someone with Down syndrome or has other facial indicia of his disability, even though this is rarely the case."). This article focuses on juror's perceptions of the mentally retarded. However, the above quote can be applied to all sorts of lay people including attorneys because they are often uneducated about the signs and symptoms of mental retardation. *See also* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (stating that few attorneys have received training on how to detect and work with mentally retarded cli-

to avoid ignoring their client's mental retardation thereby overlooking the defendant's other symptoms.[238] By realizing that physical appearance is a stereotype and not a necessary indicator of mental retardation, attorneys can look for other clues, including but not limited to "apparent 'slowness,' vagueness in communicating details, and a seemingly poor understanding of the situation."[239] With regard to mental illness, attorneys must confront the stereotype that the mentally ill always present symptoms.[240] By realizing that mental illness symptoms are not always present, counsel can avoid overlooking their client's mental illness.[241] In addition, counsel's awareness that mental illness symptoms vary over the course of time will allow them to consider the fact that the proper legal course to take may vary as well.[242]

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ents). Mental health issues have the potential to significantly affect the outcome of the case and the attorney-client relationship. *Id.*

238. *See id.* (stating that because symptoms of a client's mental disability are not always readily apparent, attorneys should conduct a thorough investigation into their client's background so they do not overlook the client's mental disability). Investigation can include getting the client's medical history and talking to family members or close friends of the client. *Id.*

239. George S. Baroff, *Capital Cases*, 22 CHAMPION 33, 33 (1998) ("Absent physical abnormalities, as in Down syndrome (mongolism), the only clue to retardation may be apparent 'slowness,' vagueness in communicating details, and a seemingly poor understanding of the situation.").

240. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (concluding that symptoms of mental illness are not always readily observable).

> While some forms of mental illness are readily observable (i.e., clients who are talking to themselves, clients who are severely depressed), other forms of mental problems are less obvious (i.e., suicidal thoughts, eating disorders, milder forms of depression and anxiety). In addition, even in cases of severe mental illness, such as schizophrenia, symptoms are not actively present or observable all the time; at different times over the course of the illness, symptoms spontaneously remit, even when clients are not medicated. *Id.*

241. *See id.* (stating that identifying that the client has a mental illness is the first step to addressing and managing the problem of a client's mental disability). Since symptoms of mental illness are not always present, it is a good idea to take a good case history of your client so you can discover if they have a mental illness. *Id.*; *see also* George S. Baroff, *Capital Cases*, 22 CHAMPION 33, 33 (1998) (noting how identifying mental disability is not always possible physically, so defense attorneys should be "alert to the possibility of mental retardation and initiate the diagnostic process by collecting school records and family histories").

242. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (recommending that a client's mental status be continuously monitored).

> [T]he stressful jail setting may exacerbate existing symptoms or cause a predisposed mental health condition to surface. For example, incarceration may exacerbate an underlying long-term depression to the point that the client is suicidal and cannot

B. *Gather Information*

Next, when counsel takes on a capital client, they should gather as much data as possible.[243] The first way to do this is to observe the client and see if the defendant exhibits any detectable symptoms of a mental disability or disorder.[244] However, counsel should not rely solely on his or her own observations because these observations will be insufficient compared to someone that is trained in screening for psychological and mental disorders[245] and attorneys are not trained in how to detect mental disabilities.[246]

Another way of gathering information is to ask a multitude of questions that serve as indicators as to whether a client has a mental disability.[247] In doing so, counsel can directly ask questions to encourage the client in disclosing his or her mental disability.[248] For example, counsel could note the defendant's symptom and ask the client if he or she has seen a doctor or inquire into the client's particular feelings or behavior.[249] Counsel can also ask the defendant other questions such as if the client

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focus on the case or participate in the defense. Critically, a defendant's competency to stand trial is not a fixed state. Rather, it may fluctuate as a function of the course of illness, a response to treatment attempts and effects of medications, and a reaction to his or her legal situation. *Id.*

243. *See id.* ("An attorney should gather as much collateral information as possible to learn more about the client.").

244. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (stating that the first method in detecting a client's mental illness is to observe the client).

245. *See* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B. J. 966, 980 (2006) (stating that habeas counsel should not rely on their own observations of their capital defendants to detect mental disabilities).

246. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 25 (2007) ("The criminal defense attorney often does not have extensive background and training, however, regarding how to deal with clients who have mental illnesses, psychiatric diagnoses, and other impairments.").

247. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008).

248. *See* MARIA KARRAS, EMILY MCCARRON, ABIGAIL GRAY & SAM ARDASINSKI, ON THE EDGE OF JUSTICE: THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW 116 (2006), http://xml.lawfoundation.net.au/ljf/site/articleIDs/CB05FD97AAF2458CCA25718E00014293/$file/EdgeOfJustice.pdf (directing attorneys to ask questions to find out whether the client suffers from a mental illness).

> However, service providers referred to ways in which lawyers can attempt to ascertain whether a person has a mental illness. For example, a case manager suggested that if a legal service provider suspects a client may have a mental illness, they could attempt to encourage the client to disclose their illness. *Id.* (footnote omitted).

249. *See id.* (providing suggestions for how to ask a client about the client's mental condition).

has had any mental problems in the past, or if he or she has any family history of mental disabilities.[250] In addition, attorneys should also ask clients about any medications they may be taking, if they are in therapy or if they experienced any recent emotional or behavioral changes.[251]

Attorneys should also ask questions to the defendant's family members and friends.[252] Counsel's association with family members and friends can also help an attorney build a rapport with the client.[253] More importantly, family members can be a good source of information because they can help defense counsel determine the "accuracy, completeness and veracity of the details provided to counsel by the client."[254] In *Brownlee*, two sisters presented crucial testimony about the defendant's mental health problems.[255] Unlike the psychologist who only met the defendant shortly before testing, the defendant's sisters were able to provide the court with information about the defendant's lifelong struggle with mental illness.[256]

Furthermore, as a part of gathering information, counsel should also obtain information including police records,[257] "social security, disability

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250. 27 AM. JUR. *Trials* § 1 (2008) (offering an outline for counsel to utilize when gathering information for a case involving a mentally ill defendant). "If the client has experienced mental problems in the past, information regarding them may be relevant to the case at hand." *Id.* In addition, it is often possible to find multiple instances of an illness within the same immediate family. *Id.*

251. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008).

252. *See id.* at 129 (asserting that family members may give a better understanding to the psychological status of the client).

253. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) ("This connection with family will assist counsel in building rapport with the client.").

254. *Id.* ("The defense lawyer should attempt to discern the accuracy and completeness of the information conveyed by the client."). "If possible, it is helpful to verify details provided by the client with information supplied by a supportive family member or information gathered by the social work staff of the public defender's office." *Id.*

255. *See Brownlee*, 306 F.3d at 1053 (commenting on how the sisters testified that their brother, the defendant, had seizures when he was around twenty years old and would try to hurt himself which "included forcing family members out of the apartment and harming himself by jumping out the window and cutting himself in the chest").

256. *Id.* at 1052 (detailing how the trial court told defense counsel before the second sentencing phase to contact a psychologist named Dr. William Beidleman). It is evident that the defense counsel only contacted the psychologist after the court told them, only a short period of time before the second sentencing trial. *Id.*

257. *See* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B. J. 966, 980 (2006) ("Habeas corpus counsel must attempt to obtain evidence and information in the possession of the prosecution or law enforcement authorities, including police reports . . . ."); *see also* COUNCIL OF STATE GOV'T, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 75 (2002), http://consensusproject.org/downloads/En-

records, past psychiatric records addressing inpatient treatment, and current jail medical and psychiatric records," substance abuse treatment records and academic records.[258] With regard to mental retardation, accessing pregnancy records, birth records, pediatric records, and hospital records can help in establishing any abnormalities in the defendant's health.[259] These documents could also show when the onset of symptoms began so that the attorney can prove that the onset of mental retardation symptoms started before the age of eighteen.[260] Gathering these documents can help prepare counsel for court as well as prevent them from missing crucial information like the defense counsel did in *Shanklin*.[261] *Shanklin* illustrates the importance of obtaining documentation because the entire problem in *Shanklin* could have been averted had the attorneys

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tire_report.pdf (stating that it is important for an attorney to find important information about a client including police records).

> One of the first actions of defense counsel after appointment should be to identify those clients with severe mental illness. This can be done by interviewing the defendant, and reviewing the police report and the information obtained by the pretrial services program. At least one state, Georgia, has a statute that allows defense attorneys access to state mental health records with the consent of the client. It can also be done by listening to family members or others who may be in a position to provide useful information about the mental health status of the client. *Id.*

258. John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007).

> When the client's competence or mental stability is in doubt, the attorney should attempt to gather information including social security disability records, past psychiatric records addressing inpatient treatment, and current jail medical and psychiatric records. Substance abuse assessment and treatment records are another source of information, as well as information from family members and academic records that highlight a history of learning disabilities. *Id.*

259. *See* Victor R. Scarano & Bryan A. Liang, *Mental Retardation and Criminal Justice:* Atkins*, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285, 304 (2004) (detailing how pregnancy, birth, and pediatric records can help attorneys determine if their client is mentally retarded). Pregnancy records can show prenatal difficulties, whether the mother was on drugs or alcohol during the pregnancy, and whether she suffered any traumas or illnesses during pregnancy. *Id.* Birth records could provide information on the baby's health during the post-delivery period. *Id.* Pediatric records could show how the child grew and developed and "any congenital anomalies or abnormalities." *Id.*

260. *See* American Association on Intellectual and Developmental Disabilities, Frequently Asked Questions on Intellectual Disability and the AAIDD Definition, http://www.aamr.org/media/PDFs/AAIDDFAQonID.pdf (last visited Mar. 31, 2009) (stating that the onset of mental retardation must occur before the individual turns eighteen years old). It follows that since prenatal, birth and pediatric records are each created while a person is a child, that these documents could possibly show the development of mental retardation in an individual while under eighteen years old.

261. *See People*, 814 N.E.2d at 143 (describing how counsel failed to obtain a presentence report indicating the defendant's mental illness and retardation).

investigated and found the pre-sentence report indicating that the defendant had mental illness and retardation.[262] In addition, defense attorneys should also obtain family histories and statements from family members regarding the defendant's mental health.[263] Had the attorneys in *Brownlee* discussed the defendant's mental health problems with his sisters it is likely that counsel would have been alerted to his mental health problems and not have failed to investigate and present that evidence during the sentencing phase of trial.[264]

While imperative, gathering information will probably be difficult and will require patience on the part of counsel. Attorneys must accept that gathering evidence does not have a definitive stopping point because they should monitor their client's competence carefully throughout the relationship.[265] Attorneys must also prepare themselves for the difficulty in obtaining information because their mentally disabled clients may utilize the cloak of competency to hide their disability and might not be forthcoming with information.[266] This is particularly the case with mentally retarded capital defendants who are likely to have learned to compensate for their inability to understand by acting tough.[267] Therefore, it is all the more important when gathering information from defendants that defense counsel remember the phenomena of the cloak of competency as

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262. *See id.* (holding that counsel was ineffective for failing to obtain a pre-sentence report that would have indicated the defendant's mental health problem).

263. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (stating that attorneys should talk to family members as part of their investigation into their client's mental disability); *see also* George S. Baroff, *Capital Cases*, 22 CHAMPION 33, 33 (1998) ("Therefore, defense lawyers must be alert to the possibility of mental retardation and initiate the diagnostic process by collecting school records and family histories.").

264. *See Brownlee*, 306 F.3d at 1070 (holding counsel ineffective for failing to investigate and find mitigating evidence regarding the defendant's mental health problems). Part of the mitigating evidence counsel would have investigated would have included talking with the sisters who could have detailed the defendants troubled history of suffering with mental retardation. *Id.*

265. *See* Thomas K. Byerley, *Focus on Professional Responsibility—Representing the Incompetent or Disabled Client*, 77 MICH. B.J. 1320, 1321 (1998) ("Therefore, when faced with representing a client with a mental disability, the lawyer needs to carefully monitor the client's competence to make the necessary decisions and must take the appropriate corrective action when the lawyer discovers this disability.").

266. *See* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B. J. 966, 971 (2006) (stating that a "client will generally attempt to 'mask' such condition" as mental retardation). While this is a recommendation from the Texas State Bar, it is still good form for attorneys to remember this no matter what state they are in.

267. *See* Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 712 (2008) ("[C]apital clients may have learned to compensate for a lack of understanding by acting tough.").

well as realize that the anger or behavioral problems their client exhibits likely means that the defendant is exhibiting a lack of understanding.[268]

C. *Use Experts*

Counsel should use experts as often as possible because doing so can yield important benefits to the attorney individually. The first benefit is that experts can screen defendants for mental health issues.[269] Second, by using experts, attorneys can better avoid the effects of the cloak of competency.[270] Third, counsel can utilize experts to help them communicate the best course of legal action.[271]

Not only is it important for counsel to use experts for their benefit, they must also utilize experts in the courtroom setting to present evidence on the defendant's mental status as often as possible. If counsel fails to present expert testimony on the defendant's mental disability, they may be found ineffective as the attorneys in Thomason and Jells were.[272] While using experts can be expensive, as noted in Thomason, attorneys should work with the mental health professionals to discover ways to reduce the costs.[273]

Additionally, before employing experts, attorneys should become familiar with the state statutes regarding the use of experts because some states require using certain qualifications of experts. For example, many states require that the psychologist be licensed.[274] Some states require

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268. *See id.* ("The capital defender should be aware that the client is exhibiting a lack of understanding, not just anger.").

269. *See, e.g.*, *Ex parte* Van Alstyne, 239 S.W.3d 815, 822 (Tex. Crim. App. 2007) (stating that the American Bar Association recognizes "the important role of experts in screening defendants for mental health issues, including mental retardation").

270. *See id.* 822–23 ("There is a reason that mental-health experts are important to this process; mildly mentally retarded individuals often learn to disguise their disabilities in a so-called 'cloak of competence.'").

271. JOHN W. PARRY & ERIC Y. DROGIN, MENTAL DISABILITY *Law*, Evidence and *Te*stimony: *A* Comprehensive Reference Manual for Lawyers, Judges and Mental Disability Professionals 43 (ABA Pub. 2007) (stating that experts can help counsel examine the client and can advise counsel on how to best communicate with the client). "Clients who appear to be somewhat limited either intellectually or in their abilities to function may be persons with mental retardation. A lawyer should try to confirm this fact through discussions with the client, inquiries to family members and friends, or medical and social service records." *Id.*

272. *See Head*, 578 S.E.2d at 428 (finding counsel ineffective for failing to use expert evidence of defendant's mental disability); Jells v. Mitchell, 538 F.3d 478, 494 (6th Cir. 2008) (holding that counsel was ineffective for failing to use a mitigation specialist).

273. *See Head*, 578 S.E. 2d at 428 (concluding that the attorney should have found ways to work with the mental health expert in reducing the cost).

274. *See, e.g.*, KAN. STAT. ANN. § 21-4623(b) (1994) (requiring that in a determination as to whether a defendant is mentally retarded, a licensed psychologist or psychiatrist must

that the psychologist be licensed in the state where the court is sitting.[275] Other states require the use of more than one licensed physician or psychologist in examining a defendant.[276]

In addition, in order to obtain the best result when using mental health professionals, counsel should provide the expert with the relevant evidence they have obtained regarding the defendant's background.[277] In Thomason, another one of counsel's failures was failing to give experts information about the defendant.[278] In Thomason, defense counsel knew of two attorneys who had spent time with the defendant but failed to give them material regarding the defendant, as they had promised, which included school, medical, and institutional records.[279] This failure caused defense counsel to be unable to present the mitigation evidence they had amassed because they did not know how to present the evidence without using an expert.[280] Additionally, the importance of sharing information with mental health experts was recognized in a 2002 opinion by the Ninth Circuit Court of Appeals, which found that counsel's failure to use an independent expert and additionally to not give the court's expert infor-

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be used who is qualified and trained to make that assessment); N.C. GEN. STAT. ANN. § 15A-2005(a)(2) (West 2008) (requiring that IQ tests for a capital defendant who is potentially mentally retarded be administered by a licensed psychologist).

275. *See, e.g.,* LA. CODE CRIM. PROC. ANN. art. 905.5.1(F) (2007) (requiring that the psychologist or psychiatrist who conducts the examination of the defendant be licensed by the state). "When a defendant makes a claim of mental retardation under this Article, the state shall have the right to an independent psychological and psychiatric examination of the defendant. A psychologist conducting such examination must be licensed by the Louisiana State Board of Examiners of Psychologists." *Id.*

276. *See, e.g.,* KAN. STAT. ANN. § 21-4623(b) (1994) (requiring that when a court is determining if a defendant is mentally retarded, the court must order an examination of the defendant by qualified professionals). "For that purpose, the court shall appoint two licensed physicians or licensed psychologists, or one of each, qualified by training and practice to make such examination, to examine the defendant and report their findings in writing to the judge within 10 days after the order of examination is issued." *Id.*

277. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (describing the need for attorneys to share relevant information regarding a defendant's mental health with qualified experts).

278. *Head*, 578 S.E.2d at 430 (recognizing how defense counsel failed to provide two mental health experts necessary information and relevant materials needed to assess the client's condition).

279. *Id.* (stating how defense counsel failed to provide a psychiatrist relevant school, medical, and institutional records, "as well as information about the crime for a forensic evaluation").

280. *Id.* (stating that defense counsel did not call any expert to present mitigation evidence and that defense counsel did not present any mitigating evidence at trial "because counsel did not know how to do it without an expert.").

mation, the defense counsel failed in presenting mitigating evidence of the defendant's possible brain damage and epilepsy.[281]

D. *Request a Competency Evaluation*

Finally, and most importantly, counsel should request a competency evaluation whenever there exists a "good faith doubt about the client's competence."[282] In *Burt v. Uchtman*, defense counsel not only had a "good faith doubt," they had an actual awareness that their defendant had mental health problems.[283] This awareness should have lead them to request a competency evaluation, but they failed to do so, leading to the Seventh Circuit finding counsel ineffective in representing their defendant.[284]

Counsel and courts should also request a competency evaluation when the client asks to present him or herself pro se.[285] The American Bar Association (ABA) recommends that the representation of capital defendants be limited to licensed attorneys, who have "demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases" and who have extensive training in areas such as "presentation of rebuttal of scientific evidence and development in mental health fields and other relevant areas of forensic and biological science."[286]

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281. Pizzuto v. Arave, 280 F.3d 949, 988 (9th Cir. 2002).

> By failing to request an independent expert and not giving the court's expert pertinent information, defense counsel lost the opportunity to share this understanding with the court in aid of presenting mitigation. Instead, the court heard overwhelmingly aggravating circumstances that contributed directly to the court's decision to impose the death penalty. This important mental health evidence alters the balance of mitigating and aggravating circumstances and its absence at sentencing significantly undermines confidence in the outcome. *Id.*

282. John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) ("Refer for a competency to stand trial evaluation whenever the attorney has a 'good faith doubt' about the client's competence . . . . ").

283. *Burt*, 422 F.3d at 567 (stating that the defense counsel had knowledge of information outside the scope of the trial court that should have caused them to look into a competency hearing).

284. *Id.* at 568 (holding that counsel performed deficiently by not requesting a renewed fitness hearing for the defendant).

285. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) ("Refer for competency evaluation when the client has a history of mental illness and wishes to represent himself or herself *pro se*.").

286. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 35 (rev. ed. 2003), http://www.nacdl.org/sl_docs.nsf/issues/ABADPGuidelines/$FILE/ABA_DPGuidelines2003.pdf (noting that de-

On March 23, 2008 the U.S. Supreme Court held, in *Indiana v. Edwards*[287], that a mentally ill defendant could be required by the State to use trial counsel.[288] In that case, the defendant, Edwards, requested to represent himself but the state trial court did not want to allow him to do so because it noted that he had severe mental schizophrenia.[289] The U.S. Supreme Court found that the states have a right to insist that mentally ill defendants use trial counsel and asserted that "[n]o trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."[290]

Panetti v. Quarterman is an example of an unfair trial as the result of allowing a mentally ill defendant to represent himself. In *Panetti*, defendant, Scott Panetti was convicted of murder and sentenced to death after he represented himself pro se, and despite evidence of his mental illness.[291] While representing himself, Panetti wore a purple cowboy costume,[292] rambled incoherently, gestured threateningly at jurors, went into

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fense attorneys for capital defendants should have a "license or permission to practice in the jurisdiction," and have "demonstrate[d] a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases and satisfied the training requirements in Guideline 8.1"). *See generally* Gabrielle Banks, *Murder Suspect Acts as His Own Lawyer: Rarity in Capital Cases Experts Say*, PITTSBURGH POST-GAZETTE (PA), Jan. 24, 2008, at B1 (reporting on Mr. Patrick Stollar's decision to legally defend himself without the help of an attorney in a death penalty case).

> The American Bar Association guidelines for taking on a death penalty case, the standard used by the U.S. Supreme Court and more than 50 states and federal courts, recommend hiring a licensed attorney with a commitment to "zealous advocacy," oral advocacy skills, complex negotiations and writing skills, expertise in fingerprinting ballistics, forensic pathology and DNA evidence, aptitude in presenting mental health evidence and trial advocacy skills, including jury selection, cross examination of witnesses, opening statements and closing arguments. *Id.*

287. 128 S. Ct. 2379 (2008).

288. Indiana v. Edwards, 128 S. Ct. 2379, 2379 (2008) (stating the trial court denied Edward's self-representation request).

289. *Id.* ("Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards suffered from schizophrenia and concluded that, although it appeared he was competent to stand trial, he was not competent to defend himself at trial.").

290. *Id.* at 2387 (citing Massey v. Moore, 348 U.S. 105, 108 (1954)) (reflecting on the need for fairness in trials and that no trial can be fair when a mentally ill defendant represents himself).

291. *Panetti*, 127 S. Ct. at 2848 (reporting how the defendant Scott Louis Panetti was "convicted and sentenced to death in a Texas state court"). Panetti was convicted despite evidence presented in trial court, and his own erratic behavior in trial court that indicated that he suffered from schizophrenia and severe mental illnesses. *Id.*

292. *See* Todd J. Gillman & Diane Jennings, *Justices Block Execution of Texas Killer: Death for Schizophrenic Is Cruel and Unusual, Supreme Court Rules*, DALLAS MORNING NEWS, June 29, 2007, at A12 (reporting on how Panetti wore a purple cowboy costume, among other idiosyncratic acts while he represented himself).

trances, nodded off, and tried to subpoena people like Jesus Christ and John F. Kennedy.[293] After being sentenced to death, Panetti appealed and his case eventually went to the U.S. Supreme Court,[294] which found that the state court failed to provide defendant the procedures guaranteed by *Ford*.[295] The Supreme Court also found that Panetti's mental illness should have been considered in determining whether he was competent to be executed.[296] Upon remand of the case by the Supreme Court, the U.S. District Court for the Western District of Texas found Panetti competent to be executed.[297] To comply with the spirit of *Edwards*, which held that a state could require a mentally ill defendant to use counsel, and to prevent debacles like *Panetti*, counsel and courts should raise the issue of a defendant's mental illness so that a state can require the defendant to use trial counsel.

V. CONCLUSION

Remember the story of Jeffery Lee Wood described earlier and how he narrowly escaped his execution? Now it is clear why he may have come so close to the execution chamber. Either his attorneys in his murder trial did not recognize that he suffered from a mental illness or his attorneys did know about his mental illness; either way, they made incompetent decisions that caused them to fail to raise the issue of Wood's mental illness.[298] Ultimately, Wood's trial attorneys left him in a precarious state, subject to execution, even though he is mentally ill. While there is no guarantee that the court would have found Wood mentally ill and that he qualified for protections under *Ford,* he should have at least had the

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293. *See* Ralph Blumenthal, *Insanity Issue Lingers as Texas Execution Is Set*, N.Y. TIMES, Feb. 4, 2004, at A12 (reporting on how Scott Panetti acted when he represented himself). The Texas Court of Criminal Appeals determined that the main issue in the case was not whether he was competent to handle his own case, but rather the issue was whether he was "competent to choose the endeavor." *Id.*

294. *Panetti*, 127 S. Ct. at 2849–50.

295. *Id.* at 2856 (reciting the protections given by *Ford* and holding that the state court did not afford Panetti those protections).

296. *Id.* at 2862 (holding that Panetti's argument that his severe mental illness should prevent him from being executed should have been considered). "Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered." *Id.*

297. Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at *37 (W.D. Tex. Mar. 26, 2008) (holding that despite Panetti's mental illness, Panetti had a "factual and rational understanding of his crime" and his impending death, and is therefore competent to be executed).

298. Wood v. State, 18 S.W.3d 642, 651 n.9 (Tex. Crim. App. 2000) (noting that appellant did not make any argument that he was subject to any exclusions, including not making an argument that he should be excluded for mental health reasons).

chance to make that argument at his murder trial. Fortunately for Wood, now that he has raised the issue, he has a chance to escape the death penalty if the court finds that he is both mentally ill *and* unable to comprehend the reason for his death sentence.[299]

For future capital defendants, it is imperative that their counsel avoid the mistakes that past counselors have made. This Comment illustrated how there are two primary causes for a defense counsel's failure to adequately represent their mentally ill or mentally retarded client. First, counsel may fall into the trap of believing their client's use of the cloak of competency or masking of their disability.[300] The mentally ill and mentally retarded often try to mask and hide their symptoms so that they can better cope in today's society.[301] While perhaps helping them cope in society, the defendant's masking or use of the cloak of competency is detrimental to capital defendants, as they are hiding from their attorneys the one fact that might save their life. The defendant's masking of symptoms is not the only cause of counsel's errors. Defense counsel also make significant errors in judgment.

Defense counsel make significant errors in judgment in three primary ways: first, by failing to investigate into the defendant's mental health; second, by failing to utilize experts; and third by failing to request a competency hearing. In *Jells*, counsel was found to be ineffective for failing to conduct an investigation into the capital defendant's history of abuse and academic difficulties.[302] In *Brownlee,* defense counsel failed to investi-

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299. *See Ford*, 477 U.S. at 417 (explicitly recognizing the unconstitutionality of executing a person who is so mentally ill or retarded that he cannot comprehend the reasons for his punishment or the finality of his fate). If Wood is found insane, he must be afforded the protections in *Ford* and will be exempt from execution.

300. *See* Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http://www.abanet.org/irr/hr/summer01/fellner.html (stating how a defendant's use of the cloak of competency can cause defense counsel to fail to realize that their client is mentally retarded). Defense counsel "see a defendant who is not manifestly 'crazy,' and they do not grasp the profound yet subtle ways a person with retardation is limited in his or her capacity to understand the world around him or her and to act appropriately." *Id.*

301. *See id.* (stating how the mentally retarded will go to "great lengths" to try to hide their disability by using a cloak of competence); *see also* Andrea Stier & Stephen P. Hinshaw, *Explicit and Implicit Stigma Against Individuals with Mental Illness*, 42 AUSTRAL. PSYCHOLOGIST 106, 106 (2007) (stating that the mentally ill try to hide their disability to avoid stigmatization).

302. *See Jells*, 538 F.3d at 496 (holding that counsel's limited investigation into the defendant's home mitigating factors such as an unstable childhood and academic difficulties led counsel to be found ineffective). Generally, counsel has discretion whether to utilize a mitigation specialist and to determine if further mitigating evidence is unnecessary, but they have a duty to conduct an investigation into the background prior to mitigation hearing. *Id.*

gate into their capital defendant's low IQ, hallucinations and symptoms of psychosis; thus, counsel was ultimately found ineffective.[303]

The second error in judgment, failing to utilize experts, was demonstrated in *Jells* and *Head v. Thomason.* In those cases, the courts placed the burden on attorneys to find and utilize experts,[304] and *Head v. Thomason* held that counsel must do so even if the court denies further funding by finding innovative methods to reduce costs of the mental health expert.[305]

The third error in judgment, failing to request a competency hearing, was demonstrated in *Shanklin* and *Burt.* In *Shanklin*, counsel failed to request a competency hearing despite their knowledge that the defendant was mentally retarded.[306] The court found that while the defendant may have used the cloak of competency to mask his symptoms, counsel was still ineffective for failing to raise the issue of the defendant's mental retardation.[307] In *Burt,* counsel was found ineffective for failing to request a competency hearing because counsel had notice of the defendant's mental illness, including the use of anti-depressants, psychotropic drugs, and being scared of imaginary snakes in his cell.[308]

To avoid falling into the trap of the cloak of competency and making significant errors in judgment, counsel must first realize that their defendant may be mentally ill or mentally retarded. To make this realization, counsel should educate themselves on the signs, symptoms and stereotypes of mental retardation. To learn about the symptoms of mental illness and retardation, counsel should consult the DSM-IV and the

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303. *Brownlee*, 306 F.3d at 1045 (holding that counsel's failure to investigate into any mitigation evidence of the defendant's mental health problem clearly made counsel ineffective).

304. *See Jells*, 538 F.3d at 494 (concluding counsel was ineffective in failing to use a mitigation expert); Head v. Thomason, 578 S.E.2d 426, 430 (Ga. 2003) (concluding that counsel should have called an expert to be effective).

305. *Head*, 578 S.E.2d at 430 (requiring counsel to find innovative means to reduce costs of mental health experts and requiring counsel to present expert testimony).

306. *Id.* (holding that defense counsel was ineffective for failing to raise the issue of the defendant's mental retardation).

307. *Id.* at 144 (holding that defense counsel was ineffective despite the fact that the court noted the defendant may have been concealing his disability). Again, while the court did not refer to the defendant's efforts to hide his disability as a "cloak of competence," it fits that definition because the term "cloak of competence" refers to an individual's efforts to hide his or her disability. *See* Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation,* 28 HUM. RTS. 9, 11 (2001), *available at* http:// www.abanet.org/irr/hr/summer01/fellner.html (defining the "cloak of competence" as a method used by mentally retarded to hide their disability).

308. *Burt*, 422 F.3d at 567 (describing counsel's ineffectiveness in having various pieces of vital information regarding their client's mental health which should have alerted them to the need for a new competency hearing).

AAIDD's definitions.[309] In educating themselves about the stereotypes of mental illnesses, counsel should realize that for both mentally ill and mentally retarded capital defendants, it will not always be physically apparent that the defendant suffers from one of these conditions.[310] By learning about this stereotype, defense counsel can be alert to the fact that they will need to do investigation into their client's history; counsel will also know to ask questions to their client to elicit answers that may indicate if he or she has a mental illness or mental retardation.[311]

Next, defense counsel should gather as much information as possible about the defendant's history including police reports, medical records, birth records, pediatric records and hospital records.[312] In gathering evidence, counsel should also consult with family members and investigate about the defendant's possible history of mental retardation or mental illness.[313] Finally, counsel should request a competency hearing when-

309. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (identifying sources useful to attorneys in researching mental illness). "One of the best sources of information for identifying and understanding the nature of psychological problems is the Diagnostic and Statistical Manual, Fourth Edition, Text Revision (DSM-IV-TR)." *Id.*

310. *See* Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 712 (2008) ("Many mistakenly believe that one can merely look at a person and tell whether he or she is mentally retarded."); *see also* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (warning that the defendant's mental illness "may fluctuate as a function of the course of illness, a response to treatment attempts and effects of medications, and a reaction to his or her legal situation.").

311. *See* Sherri Bourg Carter, *Representing Mentally and Emotionally Disturbed Clients in Family Law Practice*, 22.3 AM. J. FAM. L. 128, 128 (2008) (stating that taking a client history can help identify the client's mental illness); *see also* George S. Baroff, *Capital Cases*, 22 CHAMPION 33, 33 (1998) ("Absent physical abnormalities, as in Down syndrome (mongolism), the only clue to retardation may be apparent 'slowness,' vagueness in communicating details, and a seemingly poor understanding of the situation").

312. *See* State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B. J. 966, 980 (2006) (stating that a habeas corpus counsel has a duty to obtain information from the prosecution as well as law enforcement authorities); *see also* COUNCIL OF STATE GOV'T, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT 75 (2002), http://consensusproject.org/downloads/Entire_report.pdf (stating that an attorney should first find all of the client's information). *See also* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (recommending that an attorney should gather "social security disability records, past psychiatric records addressing inpatient treatment, and current jail, medical and psychiatric records").

313. *See* John Matthew Fabian & Elizabeth Kelley, *How to Deal with Difficult Clients from a Mental Health Perspective*, 31 CHAMPION 25, 26 (2007) (advising that a defense lawyer should speak with the defendant's family members to obtain information and confirm details of the defendant's assertions).

ever they have a good faith doubt about the defendant's mental health status and especially when the capital defendant requests to represent himself or herself without using counsel.[314]

Overall, counsel has a heavy burden when representing mentally ill and mentally retarded defendants. And, it is a burden that should not be taken lightly. It is up to defense counsel to recognize the defendant's mental health status, conduct an investigation into the defendant's mental health history and request the vital mental health evaluation that could save the defendant's life. As evidenced by Jeffery Lee Wood and the other capital defendants mentioned in this Comment, their lives are literally in counsel's hands.

314. *See id.* (recommending that counsel request a competency evaluation when they reasonably suspect that their client is mentally ill and wants to represent himself or herself pro se).