



ST. MARY'S
UNIVERSITY

The Scholar: St. Mary's Law Review on Race
and Social Justice

Volume 9 | Number 2

Article 3

12-1-2007

Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature.

Graham Baker

Follow this and additional works at: <https://commons.stmarytx.edu/thescholar>



Part of the [Criminal Law Commons](#)

Recommended Citation

Graham Baker, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature.*, 9 THE SCHOLAR (2007).

Available at: <https://commons.stmarytx.edu/thescholar/vol9/iss2/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in The Scholar: St. Mary's Law Review on Race and Social Justice by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

NOTE

DEFINING AND DETERMINING RETARDATION IN TEXAS CAPITAL MURDER DEFENDANTS: A PROPOSAL TO THE TEXAS LEGISLATURE

GRAHAM BAKER*

I. Introduction	238
II. <i>Atkins v. Virginia</i>	242
A. The Facts	242
B. The Holding	245
C. First Impressions in <i>Ex parte Briseno</i>	248
III. Jury Instructions and the Modern Death Penalty	250
A. Procedural Remedies Resuscitate Death Penalty	250
B. Texas Trial and Error	253
1. <i>Penry I</i>	253
2. <i>Penry II</i>	255
3. <i>Penry III</i> and Mitigation Today	256
IV. Determining Mental State in Texas	259
A. Insanity	259
B. Competence	261
C. Mental Retardation	263
D. The Trouble with Bright Lines	265
E. The Texas Proposals	267
V. Closing Argument for Legislative Guidance	269
A. The Legislature Must Make the Law for Texas	269
B. A Proposal Based on Current Texas Practices	271
1. Mental Retardation Is More Than a Mitigating Issue	271

* Candidate for Juris Doctor, May 2007, St. Mary's University School of Law. I wish to thank my wife and sons for their love and encouragement during the family's journey through law school.

2. Mental Retardation Is a Constitutional Question Suited to Pretrial Determination	272
3. Conclusion	273

I. INTRODUCTION

Texas statutes do not properly protect the mentally retarded convicted murderer from lethal injection, even though the United States Supreme Court declared in *Atkins v. Virginia*¹ that execution of persons with mental retardation constitutes cruel and unusual punishment under the Eighth Amendment.² The Court held in *Atkins* that a national consensus exists³ against executing persons who, despite meeting the law's standards for criminal responsibility,⁴ possess certain developmental disabilities in reasoning, impulse control, and judgment that indicate a diminished moral culpability.⁵ The Court reasoned that in the thirteen years since it affirmed the right of states to execute the mentally retarded in *Penry v. Lynaugh*,⁶ a sufficient number of states outlawed such executions as to create the national consensus, thus rendering the executions cruel and unusual.⁷ *Atkins* did not, however, define mental retardation and instead

1. 536 U.S. 304 (2002).

2. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of mentally retarded persons violates the Eighth Amendment prohibition against cruel and unusual punishment); U.S. CONST. amend. VIII.

3. *Id.* at 304, 307, 313–14. In declining to hold execution of mentally retarded persons unconstitutional thirteen years earlier in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court noted that perhaps one day a national consensus of opinion against the practice could persuade the Court to revisit its Eighth Amendment rationale; only Georgia and Maryland at that time prohibited the practice in 1989. Sixteen states enacted similar bans in the interim, including Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington. *Id.* at 314–15.

4. *See id.* at 306 (stating unequivocally that mentally retarded offenders who possess criminal culpability “should be tried and punished”).

5. *See id.* (explaining that mentally retarded offenders act with less culpability due to their impairments).

6. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302 (1989) (refusing to hold execution of mentally retarded persons in violation of the Eighth Amendment prohibition against cruel and unusual punishment). Justice O'Connor wrote that mental retardation may lessen the offender's culpability as a mitigating factor, but no sufficient evidence existed to demonstrate that mental retardation always indicates diminished culpability, and that no consensus existed in the nation to suggest that practice was widely regarded as cruel and unusual. *Id.*

7. *Atkins v. Virginia*, 536 U.S. at 316 (“The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”).

directed states to enact their own methods for finding a defendant mentally retarded.⁸

Without statutory guidance, courts must make critical determinations for adjudicating mental retardation claims, including: selection of an acceptable definition of mental retardation; whether to answer the question of mental retardation before or after trial; and whether the court or the jury should make the determination.⁹ Competing bills in the Texas legislature have proposed a variety of answers that merit discussion. One bill would require the jury to consider mental retardation among the several aggravating special issues and mitigating circumstances it must weigh in the guilt phase of the trial.¹⁰ Another bill relies on existing statutory framework to permit a defendant to prove mental retardation prior to

8. *See id.* at 317 (anticipating differences of opinion regarding which mentally retarded offenders possess diminished culpability to merit exemption from the death penalty; therefore leaving “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences” (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986))). In *Ford*, the Court held that execution of the insane violated the Eighth Amendment. *See id.* at 399; *see also* *Schriro v. Smith*, 126 S. Ct. 7 (2005) (reaffirming its holding in *Atkins v. Virginia* that states must develop their own methods of adjudicating claims of mental retardation, notwithstanding constitutional challenges to the adopted procedures). The Court reversed the decision of the United States Court of Appeals for the Ninth Circuit, in which that court ordered Arizona to hold a post-conviction jury trial for a convicted murderer alleging in his habeas corpus petition that he suffered mental retardation and therefore could not be executed, because Arizona must be permitted to develop its own statutory guidelines. *Id.*

9. *See, e.g.,* *Penry v. Texas (Penry III)*, 178 S.W.3d 782 (Tex. Crim. App. 2005) (holding that instruction to jury that if it did not find defendant mentally retarded, it should weigh any other mitigating issues, reasonably precluded jurors from considering relevant mitigating evidence of mental impairment because the words ‘any other’ could have misled jurors to believe they should look to other issues); *Ex parte Briseno*, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004) (adopting the definition of mental retardation promulgated by the American Association on Mental Retardation and prescribed by the Texas Health and Safety Code § 591.003(13), denying the applicant’s claimed right to a post-conviction jury trial to determine mental retardation, holding that applicant had burden of proof to demonstrate mental retardation by a preponderance of the evidence, and that applicant failed to prove mental retardation); *Hall v. Texas*, 160 S.W.3d 24 (Tex. Crim. App. 2004) (affirming trial court determinations prior to and following the decision in *Atkins v. Virginia* that defendant was not mentally retarded and thus eligible for the death penalty); *Ex parte Simpson*, 136 S.W.3d 660 (Tex. Crim. App. 2004) (holding that applicant’s habeas writ relied almost entirely on testimony from trial at which his mental retardation claim was fully litigated, and therefore the habeas judge was not required to hold a live evidentiary hearing to consider evidence of mental retardation).

10. *See* Tex. H.B. 419, 79th Leg., R.S. (2005) (proposing to amend the Texas Code of Criminal Procedure article 37.071 to require capital jury to answer in the punishment phase whether convicted murderer is mentally retarded). Texas House Bill 419 did not receive a hearing in 2005, but it passed the House in 2003 as Tex. H.B. 614, 78th Leg., R.S. (2003). The Texas District and County Attorneys Association (TDCAA) drafted the bill. E-mail from Shannon Edmonds, Director of Governmental Relations, TDCAA, to Graham

trial in the same manner as a defendant asserting incompetence or insanity.¹¹ The latter bill offers Texas the best chance to comport with *Atkins*.

Without guidance by the Texas Legislature, the Texas Court of Criminal Appeals has been forced to offer leadership. The court, in *Ex parte Briseno*,¹² adopted a widely-accepted definition of mental retardation and modified it with a number of evidentiary considerations which the court regarded as probative in determining one's level of criminal culpability.¹³ *Ex parte Briseno* upheld the trial court's authority to act as finder of fact¹⁴ to determine whether a defendant has proven his mental retardation by a preponderance of the evidence.¹⁵ A defendant who claims

Baker, Candidate for Juris Doctor, 2007, St. Mary's University School of Law (Oct. 13, 2005, 13:54:00 CST) (on file with author).

11. See Tex. S.B. 231, 79th Leg., R.S. (2005) (proposing to create pretrial procedure in the Texas Code of Criminal Procedure for the determination of mental retardation similar to the current procedures for considering claims of insanity and incompetence). S.B. 231 has been refiled in the 80th Legislative Session as S.B. 249. Tex. S.B. 249, 80th Leg., R.S. (2007).

12. 135 S.W.3d 1, 8 (Tex. Crim. App. 2004) ("Until the Texas Legislature provides an alternative statutory definition of 'mental retardation' for use in capital sentencing, we will follow the AAMR or section 159.003(13) criteria in addressing *Atkins* mental retardation claims.").

13. See *Ex parte Briseno*, 135 S.W.3d 1, 5-12 (Tex. Crim. App. 2004) (providing guidance to courts making a variety of dispositions on mental retardation claims for relief under *Atkins v. Virginia*, ranging from the pretrial level to petitions for habeas relief); see also *Commonwealth v. Miller*, 888 A.2d 624, 633 (Pa. 2005) (Eakin, J., concurring) (lamenting the failure of Pennsylvania lawmakers to enact a definition of mental retardation); cf. *Ex parte Jordan*, 758 S.W.2d 250, 251-52 (Tex. Crim. App. 1988) (guiding Texas courts in determining sanity under *Ford v. Wainwright* when the Texas legislature had not yet enacted a statute to enforce the United States Supreme Court prohibition against the execution of the insane).

14. See *Ex parte Briseno*, 135 S.W.3d at 11 n.42 (ruling against the applicant's claim that he was entitled to a jury determination of mental retardation). The applicant asserted that his mental retardation defense was analogous to a repealed Texas statute that prescribed pretrial insanity procedure and thus warranted similar adjudication. *Id.* The Ohio Supreme Court, similarly without statutory guidance on *Atkins v. Virginia*, ruled in favor of a judicial determination of mental retardation in *Ohio v. Lott*, 779 N.E. 1011, 1015 (Ohio 2002), comparing the procedure to that state's existing method of competency determination in which the court, not the jury, is the factfinder. By contrast, Oklahoma's highest criminal court held in *Murphy v. Oklahoma*, 54 P.3d 556, 558 (Okla. Crim. App. 2002), absent statute to the contrary, the determination of mental retardation should be made by the sentencing jury.

15. See *Ex parte Briseno*, 135 S.W.3d at 12 n.44 (holding that the defendant must prove his mental retardation by a preponderance of the evidence, likewise proposed by Tex. H.B. 614, 78th Leg., R.S. (2003), joining the company of Arkansas, Idaho, Illinois, Louisiana, Missouri, Nebraska, New Mexico, South Dakota, Tennessee, Utah, Virginia, and Washington); see also *Cross v. Texas*, 446 S.W.2d 314 (Tex. Crim. App. 1969) (holding that capital murder defendant has burden to prove by preponderance of the evidence that

exemption from the death penalty under *Atkins* must prove that his mental retardation is sufficient to warrant a finding of diminished culpability.¹⁶ The result is a trial in which the defense attempts to convince the jury that the retarded defendant lacks the cognitive ability to learn from his mistakes, while the prosecutor uses the same evidence to explain why this makes the defendant a future danger.¹⁷ The result is, therefore, absurd: a mentally retarded defendant can be executed for being mentally retarded if the fact finder concludes the evidence of impairment is aggravating instead of mitigating. Therefore, it is critical that mental retardation be determined or ruled out in a pretrial setting. It should be noted that the Texas legislature has recently amended the Penal Code to include life without parole for convicted murderers.¹⁸ Thus, Texas can now permanently incapacitate a murderer, determined by the jury to be a future danger, without execution.

This note proposes a satisfactory solution to the *Atkins* question by demonstrating why a pretrial determination of mental retardation using existing procedures for determinations of competency¹⁹ and sanity²⁰ best serves Texas criminal justice interests. This note examines key developments in Eighth Amendment jurisprudence, the Texas death penalty, and current Texas law regarding offenders with impairments. Part II examines the holding in *Atkins* as well as subsequent developments in Texas and federal courts. Part III reviews the federal and Texas death penalty jurisprudence following the U.S. Supreme Court's ban on the death pen-

he was insane at time of offense did not deprive him of procedural or substantive due process).

16. See *Atkins v. Virginia*, 536 U.S. 304, 305–18 (2002) (holding that mentally retarded offenders, while perhaps knowing right from wrong, often cannot learn from mistakes, reason logically, or control their impulses, and therefore their deficiencies diminish personal culpability).

17. See Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 349–50 (2002) (observing that juries can be forced to determine whether a piece of evidence is mitigating, aggravating, or both).

18. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2005) (creating a sentence of life without parole sentence for persons convicted capital murderers, while removing the sentence of life with the eligibility for parole). Defendants convicted of capital murder and sentenced under the amended penal code, therefore, will be sentenced to lethal injection or life without parole to ensure they will remain imprisoned for the balance of their lives. *Id.*

19. See TEX. CODE CRIM. PROC. ANN. art. 46B.005 (Vernon 2005) (determining whether defendant is competent to proceed with trial).

20. See *id.* at art. 46C (repealing TEX. CODE CRIM. PROC. ANN. art. 46.03 and establishing new procedures for the insanity defense). The new insanity defense procedures conform to the existing procedures for determining competency. *Id.*; cf. *id.* at art. 46B.005 (presenting the existing procedures for determining competency).

alty in 1972,²¹ including an analysis of the several tests of the Texas death penalty that focus on the jury instructions given in capital cases. Part IV analyzes the current Texas statutes regarding findings of insanity and incompetence in defendants and suggests how they might apply to the determination of mental retardation. Finally, this note urges the Texas legislature to act and offers suggestions that would ensure the state's justice system preserves the rights and dignity of bona fide mentally retarded offenders without denying Texas citizens the expectation that convicted murderers will be permanently incapacitated.²²

II. *ATKINS v. VIRGINIA*

A. *The Facts*

Daryl Renard Atkins and a second defendant, William Jones, kidnapped their victim, robbed him, drove him to an automated teller machine where they forced him to withdraw more money, then finally drove him to a secluded location and shot him eight times.²³ The state indicted both men for capital murder.²⁴ Jones, however, escaped the death penalty by agreeing to testify against Atkins.²⁵ Each accused the other of shooting the victim, and the jury believed Jones' story.²⁶ A jury convicted Atkins of armed robbery, abduction, and capital murder.²⁷

In the penalty phase of his trial, Atkins relied solely on the testimony of a forensic psychologist who concluded that Atkins suffered mild mental retardation.²⁸ The psychologist based his conclusion on a review of school records, interviews with persons familiar with Atkins, and an intelligence test indicating an IQ of fifty-nine.²⁹ The state proved aggra-

21. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (holding that death penalty would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth amendments). Note that the Court consolidated two cases for its decision, the other being *Branch v. Texas*, 408 U.S. 238 (1972), previously upheld by the Texas Court of Criminal Appeals at *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969) *vacated in part*, 408 U.S. 238 (1972) (affirming the death sentence for an African-American man convicted of raping a widowed white woman).

22. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2005).

23. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

24. *Id.* at 307 n.1.

25. *Id.*

26. *Id.* at 307–08.

27. *Id.* at 307.

28. See *Atkins v. Virginia*, 536 U.S. at 309 n.3 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42–43 (4th ed. 2000), available at www.PsychiatryOnline.com, in which mild mental retardation is characterized in persons with an IQ of 50–55 to 70).

29. See *Atkins v. Virginia*, 536 U.S. at 308–09 (stating the procedures used by the defense's psychologist to determine whether Atkins suffered mental retardation).

vating factors: future dangerousness³⁰ and the “vileness of the offense.”³¹ Atkins’ prior felony convictions and the testimony of his earlier robbery victims demonstrated his future dangerousness.³² The trial record included photos of the deceased victim’s body accompanied by the autopsy report, thus illustrating the vileness component.³³ The jury sentenced Atkins to death.³⁴

At a second sentencing hearing following a procedural remand,³⁵ the psychologist testified again. Virginia this time offered an expert rebuttal witness who disputed Atkins’ claim of mental retardation.³⁶ The State’s expert interviewed Atkins rather than administer an IQ test; he also reviewed the defendant’s school records and spoke with Atkins’ jailers.³⁷ The State’s expert stated that Atkins earned terrible grades in school not because he was retarded but simply because he “chose to pay attention sometimes, not to pay attention others, and did poorly because he did not want to do what he was required to do.”³⁸ He concluded that Atkins possessed at least average intelligence.³⁹ Significantly, both experts testified that Atkins understood his conduct was criminal and that shooting

30. *Id.* at 308; *see also* TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon 2005) (charging jurors in the punishment phase of a capital trial to consider whether “the defendant would commit criminal acts of violence that would constitute a continuing threat to society”). Expert testimony may be considered to predict whether a person will, in the future, continue to present a danger to society. *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983).

31. *Atkins v. Virginia*, 536 U.S. at 308. Texas capital jurors typically do not receive a special instruction on vileness, although a similar instruction remains in effect for murders committed prior to Sept. 1, 1991. *See* TEX. CODE CRIM. PROC. ANN. art. 37.0711(b)(3) (Vernon 2005) (charging jurors to consider whether the offense was unreasonable).

32. *Atkins v. Virginia*, 536 U.S. at 308.

33. *Id.*

34. *Id.* at 309.

35. *See Atkins v. Commonwealth*, 510 S.E.2d 445, 456–57 (Va. 1999) (remanding for new punishment phase trial because the state’s jury verdict form did not allow jury to impose a life sentence if the state failed to prove neither vileness nor future dangerousness beyond a reasonable doubt).

36. *Atkins v. Virginia*, 536 U.S. at 309. The prosecution’s expert, Dr. Stanton Samenow, diagnosed antisocial personality disorder. *Id.*

37. *Id.* at 309 n.6.

38. *Id.*

39. *See Atkins v. Commonwealth*, 534 S.E.2d, 323 (Hassell, J., dissenting) (quoting prosecution’s expert witness, Dr. Stanton Samenow, who found the defendant possessed average intelligence). Dr. Samenow testified that in his interview with the defendant, Atkins knew the Governor of Virginia’s name and was aware that the son of former President Kennedy died in an airplane. *Id.* at 322. Two judges dissented in the upholding of Atkins’ death sentence, declaring Dr. Samenow’s testimony “incredulous as a matter of law.” *Id.* at 323. “It is common knowledge that many children as young as eight years old are capable of relating the same historical facts that the defendant described and possess a vocabulary similar to the defendant’s vocabulary.” *Id.* at 324.

his victim was wrong.⁴⁰ The trial jury did not find that Atkins' IQ score mitigated his culpability.⁴¹

Atkins appealed for commutation of his death sentence to life imprisonment based on his mental retardation.⁴² Virginia did not then prohibit execution of the mentally retarded;⁴³ the State simply listed retardation as one of several mitigating factors the jury could consider.⁴⁴ Atkins argued that the Commonwealth had never executed anyone with an IQ score as low as his.⁴⁵ The Virginia Supreme Court rejected the argument, unwilling to commute the death sentence “merely because of his IQ score.”⁴⁶ The jury had already declined to find Atkins' low IQ a mitigating circumstance.⁴⁷ “[I]t is the function of the factfinder, not this [c]ourt, to determine the weight that should be accorded to expert testimony on that issue,” the court declared.⁴⁸

40. *Id.* at 321 (majority opinion). The test of whether a defendant knew his conduct was wrong is typical in tests for insanity. *See, e.g.*, TEX. PENAL CODE ANN. § 8.01 (Vernon 1994) (providing an affirmative defense if mental defect or disease caused him to not know his conduct was wrong, and stipulating that the defect cannot be manifested solely by continued criminal or antisocial conduct); *United States v. Massa*, 804 F.2d 1020, 1022–23 (E.D. Mo. 1986) (holding that a defendant is not responsible for criminal conduct if they are insane “as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law” (citing MODEL PENAL CODE § 4.01 (Final Draft 1962))). The Court reasoned that mentally retarded offenders often understand right from wrong, but their impairments render them less culpable (as opposed to the complete lack of culpability that accompanies a finding of insanity). *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

41. *Atkins v. Commonwealth*, 534 S.E.2d at 320.

42. *Id.* at 318.

43. *See Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 311–12 (1989) (holding that the Eighth Amendment ban on cruel and unusual punishment did not prohibit the execution of mentally retarded offenders, but that juries must have the opportunity to contemplate and give effect to a defendant's evidence of mental impairment that would merit a sentence less than death).

44. VA. CODE ANN. § 19.2-264.4(B)(iv) (West 2005).

45. *Atkins v. Commonwealth*, 534 S.E.2d at 318. Dr. Evan Stuart Nelson, a forensic clinical psychologist, assessed Atkins' IQ score at fifty-nine using the Wechsler Adult Intelligence Scale-III (WAIS-III), indicating that Atkins was mildly mentally retarded. *See id.* at 319 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 40 (4th ed. 1994), available at www.PsychiatryOnline.com).

46. *Atkins v. Commonwealth*, 534 S.E.2d at 321.

47. *See id.* at 320 (citing precedent in *Yeatts v. Commonwealth*, 410 S.E.2d 254, 268 (Va. 1991), in which a jury declined to find defendant's IQ score of seventy a mitigating factor to warrant a lesser sentence).

48. *See id.* (relying on *Saunders v. Commonwealth*, 406 S.E.2d 39, 43 (Va. 1991)) to uphold the decision of the jury to assign weight to the experts' testimony).

B. *The Holding*

Execution of mentally retarded persons, under *Penry I* (1989), did not violate the Eighth Amendment prohibition against cruel and unusual punishment under the accepted standards at the time of the drafting of the Constitution⁴⁹ or under the evolving standards of decency test articulated in *Trop v. Dulles*.⁵⁰ Thirteen years later in *Atkins*, the Supreme Court reversed its *Penry I* decision.⁵¹ Writing for the 6-3 majority,⁵² Justice Stevens wrote:

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.⁵³

Atkins did not prohibit states from holding mentally retarded offenders criminally accountable; it removed from the available sentencing options the most severe criminal sanction.⁵⁴ The Court reasoned that in the thirteen years since *Penry I*, the national consensus had shifted against execution of the mentally retarded.⁵⁵ For evidence of the evolving national

49. See *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 330–33 (1989) (finding insufficient cause to hold that execution of mentally retarded persons violates the Eighth Amendment prohibition against cruel and unusual punishment). Justice O'Connor wrote that "idiot" and "lunatics," as recognized by the common law in 1789, would have been exempted from the death penalty. *Id.* at 330. Those persons today, however, would be deemed either insane and thus without moral blameworthiness or incompetent due to their lack of present understanding of the proceedings against them. *Id.* at 332.

50. 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion) (holding that the Eighth Amendment prohibition against cruel and unusual punishment draws its meaning from the "evolving standards of decency that mark the progress of a maturing society"). Chief Justice Warren suggested that the word *unusual* could be distinguished from the word *cruel* inasmuch as *unusual* would signify something not generally done. *Id.* at 101 n.32. In *Penry v. Lynaugh*, Justice Scalia wrote that an Eighth Amendment inquiry must consider both elements of *cruel and unusual* and therefore it is not enough to find the punishment cruel without regard to society's approval. *Penry I*, 492 U.S. at 351 (Scalia, J., concurring in part and dissenting in part).

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

52. See *id.* (voting to hold execution of the mentally retarded in violation of the Eighth Amendment prohibition against cruel and unusual punishment were Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.; dissenting were Rehnquist, C.J., and Scalia and Thomas, JJ).

53. *Id.* at 306.

54. See *id.* at 305.

55. See *id.* at 315–16 (indicating that the actions of state legislatures can measure national consensus); *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 334 (1989) (noting that petitioner cited in his brief only one state that had outlawed execution of the mentally

consensus, the Court pointed to the consistent movement of state legislatures against execution of the retarded.⁵⁶ The practice, the Court held, had become truly unusual, in the parlance of the Eighth Amendment, and, therefore, unconstitutional.⁵⁷

Atkins did not rely on the national consensus argument alone. The truly impaired offender, the Court reasoned, could not necessarily be deterred due to his inability to process information or control his conduct.⁵⁸ Nor would the other rationale for the death penalty – retribution – serve honorably where society puts to death “only the most deserving of execution, as opposed to murderers less culpable than others.”⁵⁹ Finally, there

retarded); *see also* *Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986) (polling the national consensus to determine that of the forty-one death-penalty states, none permitted the execution of the insane and twenty-six had explicit statutes requiring suspension of the execution of a legally incompetent person); 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 (2001) (tracking the development of a national consensus to exempt mentally retarded offenders from execution).

56. *Atkins v. Virginia*, 536 U.S. at 314–16 (taking note of the eighteen states explicitly prohibiting execution of the mentally retarded, including Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, Washington, and the federal government). Justice Stevens wrote that the number of states was less significant than the uniform direction of the states in prohibiting the practice. *Id.* at 315. Texas is one of five states, joined by Alabama, Louisiana, South Carolina, and Virginia, which executed a person with an IQ of less than seventy in the same period in which sixteen states outlawed the practice. *Id.* at 316 n.20.

57. *See id.* at 316 n.21 (supporting the theory that the practice had become truly unusual with a comparative recitation of widespread condemnation of the practice among religious organizations and professional groups associated with mental retardation, and the world community); *see also* Christopher L. Chauvin, *Atkins v. Virginia: How Flawed Conclusions Convert Good Intentions into Bad Law*, 65 LA. L. REV. 473, 484–85 (2005).

58. *See Atkins v. Virginia*, 536 U.S. at 320 (explaining that the mentally impaired offender cannot be deterred, and that prohibition of the practice would not lessen the deterrent effect on unimpaired persons who could not, in any even, benefit from the prohibitions); *see generally* *Gregg v. Georgia*, 428 U.S. 153, 155 (1976) (explaining that retribution and deterrence of capital crimes are permissible considerations for legislatures to consider in whether the death penalty is appropriately imposed).

59. *See Atkins v. Virginia*, 536 U.S. at 319 (explaining that the most severe form of retribution is inappropriate where the offender’s crime does not demonstrate “a consciousness materially more ‘depraved’ than that of any person guilty of murder” (quoting *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980))). Justice Stevens wrote that if the average murderer’s culpability does not merit execution, a mentally retarded offender must surely be exempted. *Id.* at 319. Justice Scalia, however, assailed this presumption by insisting that culpability and deservedness of severe retribution depends not so much upon the mental capacity of the offender who can distinguish right from wrong, but also upon the wickedness of the crime. *See id.* at 350–51 (Scalia, J., dissenting). Furthermore, juries continue to send mentally retarded offenders to the death chamber for depraved crimes, prov-

exists the risk that the truly impaired offender may be unable to persuade the factfinder of his mitigating circumstances due to his inappropriate demeanor at trial, for example, or his eagerness to please by making a false confession.⁶⁰ In sum, the Court sought to protect truly mentally retarded offenders from the risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”⁶¹

Not all offenders who claim to suffer mental retardation, however, will be impaired to the degree about which there exists the national consensus of state legislatures.⁶² Mental retardation manifests in degrees of severity.⁶³ Rather than hand down a broadly applicable clinical definition of mental retardation, *Atkins* left to the states the task of defining and determining mental retardation in capital murder defendants.⁶⁴ States must individually determine whether to adopt an existing definition of mental retardation from a handful of similar, accepted characterizations, or cre-

ing that society’s moral outrage occasionally demands retarded offenders be executed. *See id.* at 351; *see also* *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (explaining that capital punishment is, in part, an expression of the community’s moral outrage at grossly offensive conduct).

60. *See Atkins v. Virginia*, 536 U.S. at 320–21 (explaining the particular susceptibility of mentally retarded persons to make confessions regardless of their veracity); *see also* Denis W. Keyes, William J. Edwards & Timothy J. Dering, *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 532 (1998) (describing the vulnerabilities to which the mentally retarded are susceptible, including becoming the scapegoat for an accomplice). *But see Ex parte Briseno*, 135 S.W.3d 1, 13 (Tex. Crim. App. 2004) (declaring a reviewing court’s deference to trial court determinations on mental retardation upon collateral review, especially when founded upon the defendant’s credibility and demeanor).

61. *Atkins v. Virginia*, 536 U.S. at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (explaining that where the nature of the impairment prevents the defendant from presenting his mitigating evidence of the impairment itself or otherwise assist himself in his defense, greater care must be taken to ensure the trial procedure comports with the Eighth and Fourteenth Amendments); *see also* Elaine Cassel, *Justice Deferred, Justice Denied: The Practical Effect of Atkins v. Virginia*, 11 WIDENER L. REV. 51, 55 (2004) (explaining that the criminal defense attorney must overcome the inclination of the judge and the jury to disregard expert psychological testimony and instead trust their instincts or their “gut feeling” about the defendant’s impairment and level of culpability).

62. *See Atkins v. Virginia*, 536 U.S. at 317.

63. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (explaining that persons with mental retardation “range from those whose disability is not immediately evident to those who must be constantly cared for”).

64. *See Atkins v. Virginia*, 536 U.S. at 317 (relying on its earlier decision in *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986), to direct states to adopt their own methods of ensuring that mentally retarded offenders have the opportunity to present their legal issue of exemption from the death penalty in a constitutionally permissible manner).

ate their own, either from whole cloth or by augmenting the present definitions.⁶⁵

C. *First Impressions in Ex parte Briseno*

Defendant Jose Garcia Briseno appealed his death sentence for the 1991 murder of the Dimmit County sheriff, alleging that he suffered mental retardation and thus was ineligible for the death penalty under *Atkins*.⁶⁶ The Texas Court of Criminal Appeals took judicial notice of the fact that while *Atkins* declared a national consensus against executing mentally retarded offenders, the Texas legislature had not enacted legislation to illuminate the state's position on the consensus.⁶⁷ Nevertheless, in the face of mounting writs by condemned murderers following *Atkins*, the *Ex parte Briseno* court offered its own clear guidelines for courts to employ in addressing habeas claims under *Atkins*.⁶⁸

Ex parte Briseno used the definition established by the American Association of Mental Retardation (AAMR), which is codified for use by Texas' state social services.⁶⁹ The AAMR characterizes mental retardation as: 1) significant subaverage intellectual functioning, 2) accompanied by deficiencies in adaptive functioning, all of which 3) occur prior to age 18.⁷⁰ *Ex parte Briseno* specifically declined to endorse as a long-term solution, however, the AAMR definition as a bright-line rule to exempt a category of offenders that would inevitably affect persons just over or under a particular IQ.⁷¹

65. *See id.* (granting states the freedom to devise or adopt a definition of mental retardation, including a definition that considers the defendant's culpability in relation to his impairment).

66. *See Ex parte Briseno*, 135 S.W.3d1 at 5 n.8 (indicating the court's prior experience with providing pre-legislative guidance to the courts in the wake of a Supreme Court prohibition of the death penalty for persons not competent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986) (citing *Ex parte Jordan*, 758 S.W.2d 250 (Tex. Crim. App. 1988))).

67. *Id.* at 5n.9 (judicially establishing procedural guidelines and substantive standards for examining *Atkins* claims "[i]n the absence of a statutory framework to determine mental retardation" (quoting *Ohio v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002))).

68. *See id.* at 5 n.7 (noting the court had remanded thirty-five writs applications to convicting courts because the applicant made a prima facie showing of the possibility of mental retardation).

69. *See id.* at 5 n.7 (acknowledging previous use of American Association on Mental Retardation definition for mental retardation in *Ex parte Tennard*, 960 S.W.3d 57, 60–61 (Tex. Crim. App. 1997), *cert. granted on other grounds sum nom.* *Tennard v. Dretke*, 540 U.S. 945 (2003)).

70. *See* American Association for Mental Retardation, Definition of Mentally Retarded, <http://www.aamr.org/Policies/pdf/definitionofMR.pdf> (last visited Nov. 14, 2006) (explaining the philosophy behind the AAMR's generally accepted definition).

71. *Ex parte Briseno*, 135 S.W.3d at 6.

Ex parte Briseno instead focused attention on the culpability of defendants who just barely slip into the accepted definitions of mental retardation.⁷² The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), for example, classifies eighty-five percent of mentally retarded persons as only mildly mentally retarded.⁷³ Because the DSM-IV indicates that persons diagnosed early with mild mental retardation may learn sufficient adaptive skills to no longer warrant the mental retardation diagnosis, the *Ex parte Briseno* court suggested that the clinical definitions cast a wide net to render more people eligible for social services in the knowledge that persons on the borderline of a mental retardation diagnosis have the best hope for successful treatment and improvement.⁷⁴

The court questioned more than the bright-line IQ test. Experts testifying on either side may offer sharply different views of the defendant's adaptive skills and his ability to function in the community, notwithstanding an IQ test that by itself resolves little.⁷⁵ The *Briseno* court suggested that the court remedy the subjective nature of the state's current health-care-based definition of mental retardation by adding objective questions related to the criminal conduct at issue.⁷⁶ In particular, the defendant in

72. See *id.* at 8 (expressing doubt that the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trial to decide whether execution of a particular person would be constitutionally excessive punishment). The court expressed its belief, too, that most Texans would agree that John Steinbeck's character Lennie, "by virtue of his lack of reasoning ability and adaptive skills" should be exempt from capital punishment. *Id.* at 6 n.19 (referring to JOHN STEINBECK, *OF MICE AND MEN* (1937)). More curiously, the court does not mention Boo Radley. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

73. See *Ex parte Briseno*, 135 S.W.3d at 5 n.14 (citing to AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41 (4th ed. 2000), available at www.PsychiatryOnline.com).

74. See *id.* at 6 (refusing to embrace a broad clinical definition as a suitable definition for factfinders to use in determining mental retardation and the mentally retarded offender's culpability); see also Jonathan Bing, Note, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 67-68 (1996) (demonstrating how advocacy organizations determine the clinical definition of mental retardation by explaining that "[r]aising the IQ level to [seventy-five], according to the AAMR, would have increased the number of false positives, while reducing the number to [sixty-five] may have denied services to those who needed them").

75. See *Ex parte Briseno*, 135 S.W.3d at 8-9 (explaining that determination of mental retardation can, and likely will, involve a battle of experts).

76. See *id.*; TEX. HEALTH & SAFETY CODE ANN. § 591.003(13) (Vernon 2005) (defining mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period"). The definition is more typically used to determine a social service applicant's qualifications for assisted living or state institutional care. See, e.g., *id.* at § 591.001.

Ex parte Briseno proposed that the factfinder consider the defendant's leadership skills, his ability to plan and execute the crime, or whether he can or did lie to cover up the crime.⁷⁷

The objective questions proposed by the defendant in *Ex parte Briseno* assume that one aspect of cognitive ability is indicative of normal intelligence, as opposed to considering whether the mental retardation contributed to the commission of the act or prevented the offender from resisting the act.⁷⁸ The *Atkins* prohibition on execution is met when the defendant proves mental retardation.⁷⁹ Whether the defendant could successfully plan and execute his crime or knew right from wrong cannot be dispositive of whether he is retarded; *Atkins* acknowledged that mentally retarded offenders can understand right from wrong and that they can be competent to stand trial.⁸⁰ Their impairments, however, render them unable to understand or process information; they often cannot sufficiently or accurately communicate, reason logically, or draw inferences and learn from their mistakes.⁸¹ A subsequent Supreme Court holding clarifies that *Atkins* did not require the defendant to prove that mental retardation caused the act.⁸²

III. JURY INSTRUCTIONS AND THE MODERN DEATH PENALTY

A. *Procedural Remedies Resuscitate Death Penalty*

Modern death penalty jurisprudence emerged in 1972 with *Furman v. Georgia*⁸³ when the Supreme Court halted the death penalty by a 5-4 margin.⁸⁴ Justices Brennan and Marshall wrote that the death penalty was unconstitutional because it violated evolving standards of decency⁸⁵

77. See *Ex parte Briseno*, 135 S.W.3d at 8–9 (proposing objective questions related to the offense as indicators of criminal culpability).

78. See, e.g., MODEL PENAL CODE § 4.01 (Final Draft 1962) (weighing whether offender, at the time of his alleged conduct, and as a result of mental defect or disease, lacked the substantial capacity either understand the wrongfulness of his act or to conduct himself lawfully).

79. See *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (holding the mentally retarded offender less culpable as a matter of law).

80. *Id.* at 318.

81. *Id.*

82. See *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (“Nothing in [*Atkins*] suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered.”).

83. *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that death penalty “would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth amendments”).

84. *Id.*

85. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion) (reversing a lower military court martial sentence to deport and denationalize a dishonorably

and failed to deliver stated penological goals of retribution and deterrence.⁸⁶ A plurality of the Court, however, found that the death penalty, levied without guidance to juries, exposed defendants to a random chance of death and therefore violated the Eighth Amendment.⁸⁷ Thus, the 5-4 vote hinged not on substantive grounds abhorring the death penalty altogether, but on procedural grounds that could be remedied.⁸⁸

Thirty-four states set to work tweaking their death penalty statutes.⁸⁹ A handful of states created a list of crimes for which the death penalty would be mandatory, eliminating the relevance of mitigating evidence.⁹⁰ Such automatic death sentences did not long survive.⁹¹ Most states enacted statutes requiring juries to find aggravating circumstances that warranted a death sentence.⁹² Finally, the judge or jury would weigh the aggravating and mitigating factors to determine whether to execute.⁹³

charged soldier). Chief Justice Warren explained that the Eighth Amendment must “draw its meaning from the evolving standards of decency that mark the progress of maturing society.” *Id.* at 101. *Trop v. Dulles* based its reasoning on *Weems v. United States*. *Id.* at 100–01. *Weems* declared the Eighth Amendment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v. United States*, 217 U.S. 349, 378 (1910).

86. *See Furman v. Georgia*, 408 U.S. at 242–45 (critiquing two justifications for the death penalty).

87. *Id.* at 240–57 (Douglas, J., concurring); *id.* at 306–10 (Stewart, J., concurring); *id.* at 310–14 (White, J., concurring).

88. Shannon D. Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent* 12 (Wake Forest Pub. Law & Legal Theory Research Paper Series, Paper No. 03-12, 2003), available at <http://ssrn.com/abstract=413121>.

89. JAN GÓRECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 15 (1983). When *Furman v. Georgia* came down on June 29, 1972, Texas had forty-five persons on death row and another seven in county jails awaiting transfer. Texas Department of Criminal Justice, *Death Row Facts*, <http://www.tdcj.state.tx.us/stat/drowfacts.htm> (last visited Nov. 1, 2006). Governor Preston Smith commuted all of their sentences to life and cleared death row in March 1973. *Id.*

90. JAN GÓRECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 15 (1983).

91. *See Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating mandatory death sentence scheme that required jurors to ignore their oaths and choose a lesser offense not necessarily indicative of the crime in order to spare a defendant from the death penalty); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating mandatory death sentences in favor of individualized sentencing that considers the offender’s circumstances as well as the crime).

92. *See Roberts v. Louisiana*, 428 U.S. at 356 (1976) (striking down the state’s mandatory death sentence for want of a sentencing proceeding by which the sentencing authority may concentrate on the sentence and weigh some or all mitigating and aggravating circumstances).

93. *But see Ring v. Arizona*, 536 U.S. 584 (2002) (holding that a jury, and not the judge, must determine the aggravating factors that enhance a sentence because they operate “as the functional equivalent of an element of a greater offense” and therefore, the

In 1976, the U.S. Supreme Court voted 7-2 to permit states to levy the death penalty once again with *Gregg v. Georgia*,⁹⁴ upholding state statutes that provided guidance to jurors.⁹⁵ The Court held that public opinion favored the death penalty.⁹⁶

Sixth Amendment demands the aggravating factors be determined by a jury). Whether a jury must determine a defendant's claim of mental retardation under *Virginia v. Atkins* given the holding in *Ring v. Arizona* has been a subject of debate. Because the Supreme Court has stated that *Ring v. Arizona* is not retroactive, habeas applicants seeking relief from bench decisions denying mental retardation have not prevailed by that path. *See, e.g., In re Woods*, 155 F.App'x 132 (5th Cir. 2005) (permitting successive habeas petition relating to mental retardation claim, but denying relief under *Ring v. Arizona* because that decision did not apply retroactively where no new constitutional rule was announced); *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003) (holding that a mental retardation claim, contrary to an aggravating circumstance, is a means by which the defendant may seek to *limit* application of death penalty even in the presence of the statutory elements for the crime and the penalty). However, some observers believe that *Ring v. Arizona* could be interpreted to mean that any determination made by the factfinder constitutes a "functional equivalent" of an aggravating element to a crime, in which case the Sixth Amendment right to jury trial, as well as the state's burden to demonstrate the elements beyond a reasonable doubt would apply. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11-19 (2003); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005) (observing that, if *Ring v. Arizona* is held to apply to mental retardation, the prosecution would have to demonstrate that the defendant *was not* retarded beyond a reasonable doubt). Besides the *Ring v. Arizona* justification, the Eighth Amendment can also be demonstrated to require the government to prove the absence of mental retardation to a jury on a case-by-case basis. *See* Stephen B. Brauerman, *Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty*, 54 AM. U. L. REV. 401 (2004) (arguing that the Constitution requires the state to prove to a jury the absence of retardation beyond a reasonable doubt before sentencing the defendant to death).

94. 428 U.S. 153 (1976) (reestablishing the right of states to levy the death penalty two years after prohibiting it).

95. *Gregg v. Georgia*, 428 U.S. 153 (1976) (reinstating the death penalty in the United States through the Court's finding that limited statutory guidance regarding sentencing factors protected the due process rights of defendants); *see also Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (upholding the Texas capital punishment scheme, reasoning that the second special issue related to future dangerousness permits the jury to consider the defendant's mitigating evidence and, therefore, Texas' first death penalty statute following *Furman v. Georgia* satisfied the Court's prior determination that a jury be allowed to consider mitigating evidence); *Proffitt v. Florida*, 428 U.S. 242, 254 (1976) (finding the Florida death penalty statute constitutional over petitioner's objections that the enumerated mitigating and aggravating circumstance jury instructions are vague, broad, and merely cosmetic to the issue of permitting a jury to consider a lesser sentence).

96. *See Gregg v. Georgia*, 428 U.S. 153, 181 n.25 (1976) (citing public opinion polls indicating that nearly sixty percent of the nation supported capital punishment).

B. *Texas Trial and Error*

Texas opted for something that looked similar to jury discretion, but the state declined to include instructions for the consideration of any mitigating factors during the penalty phase.⁹⁷ The charge required jurors to answer three yes-or-no questions—known as special issues—related to 1) the deliberateness of the crime; 2) whether the defendant killed in response to provocation; and 3) the offender’s future dangerousness.⁹⁸ Affirmative answers to all three special issues condemned the defendant.⁹⁹

1. *Penry I*

In *Penry v. Lynaugh*, the U.S. Supreme Court rejected Texas’ capital sentencing process because it included no mitigation instruction.¹⁰⁰ Johnny Paul Penry in 1979 raped and murdered a young woman in her east Texas home.¹⁰¹ Penry allegedly told police that he plunged a pair of scissors into her chest so that she could not identify him.¹⁰² She lived long enough to do so, and when police arrested him, prosecutors said, Penry initially fabricated a cover story about the cuts he received during the struggle with his victim.¹⁰³

Penry relied on *Ford v. Wainwright*,¹⁰⁴ to argue that the Eighth Amendment prohibition against execution of the mentally incompetent

97. See TEXAS DEFENDER SERVICE, *MINIMIZING RISK: A BLUEPRINT FOR DEATH PENALTY REFORM IN TEXAS* 94–95 (2005) (noting the lack of jury instruction to consider mitigating evidence).

98. See TEX. CODE CRIM. PROC. ANN. art. 37.0711(2)(b)-(c) (Vernon 2004) (remaining in effect for defendants accused of committing a capital murder prior to Sept. 1, 1991).

99. See *Jurek v. Texas*, 428 U.S. at 272–73 (reasoning that the second special issue related to future dangerousness permits the jury to consider the defendant’s mitigating evidence and, therefore, Texas’ first death penalty statute following *Furman v. Georgia* satisfied the Court’s prior determination that a jury be allowed to consider mitigating evidence); see also Shelley Clarke, *A Reasoned Moral Response: Rethinking Texas’ Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 425 (1990) (comparing the Court’s death-penalty jurisprudence to the tale of Goldilocks and the three bears: “complete discretion is too arbitrary [*Furman v. Georgia*, 408 U.S. 238 (1972)], no discretion is just as bad [*Roberts v. Louisiana*, 428 U.S. 325 (1976) and *Woodson v. North Carolina*, 428 U.S. 280 (1976)], but guided discretion is just right [*Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976) and *Jurek v. Texas*, 428 U.S. 262 (1976)].)

100. *Penry v. Lynaugh*, (*Penry I*) 492 U.S. 302 (1989) (declaring Texas’ death-penalty procedure void because it failed to give the jury a vehicle to consider and give effect to mitigating factors presented by the defendant).

101. *Id.* at 307.

102. *Id.*

103. See Interview with Lee Hon, Polk County Assistant Dist. Attorney, in Livingston, Tex. (Oct. 6, 2005). Hon prosecuted Penry in 2002. See *id.*

104. 477 U.S. 399 (1986).

should extend to the mentally retarded.¹⁰⁵ The Court disagreed, holding that the Eighth Amendment, upon its drafting, contemplated only the most severe mental defects of the mind and thereby declining to create a new rule.¹⁰⁶ The Court instead concluded that mental retardation should have been a mitigating factor.¹⁰⁷ The jury could not give effect to the mitigating evidence, however, without discounting the state's powerful evidence of Penry's future dangerousness in its answer to the second special issue.¹⁰⁸ Prosecutors explained how Penry's inability to learn from his mistakes, among other behavioral and cognitive deficits, meant that he would continue to pose a danger to society at large or, in the prison environment, to his guards, nurses, and fellow inmates.¹⁰⁹ The Court voided Texas' death penalty procedure for its failure to give the jury the opportunity to express its "reasoned *moral* response" in its life-or-death deliberations.¹¹⁰

105. See *Penry I*, 492 U.S. at 328–30 (declining to apply the Eighth Amendment to mentally retarded persons as a prohibition against the execution of a certain class of persons (citing *Ford v. Wainwright*, 477 U.S. 399 (1986))).

106. See *id.* 331–32 (reciting common-law treatment of 'idiots' and 'lunatics' as understood by the drafters of the Eighth Amendment meant people so completely divorced from normal senses that today they would be recognized as insane or incompetent, and the Framers did not recognize anything similar to what is understood today as mental retardation); Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 345–46 (2002) (explaining that because the Framers could not have addressed the undiagnosed condition of mental retardation at the drafting the Eighth Amendment, the discussion shifts to whether "evolving standards of decency" will prohibit what was possible then).

107. See *Penry I*, 492 U.S. at 337 (recognizing that mentally retarded persons do not act with the same level of culpability as persons of average intellect and capacity because of serious limitations in such areas as cognitive impairment, impulse control, moral reasoning, and cause and effect); see also *Nebraska v. Hall*, 25 N.W.2d 918, 927 (Neb. 1964) (reducing the defendant's death sentence to life in prison because the defendant was a "low-grade moron or a high-grade imbecile, passive in nature, possessed of a disposition to follow the lead of others," about whom the court believed society had no interest in executing).

108. See *Penry I*, 492 U.S. at 322 (rejecting the prosecution's assertion that the jury could assess and give effect to the mitigating evidence when answering the special issues).

109. *Id.* 323–24 (describing the two-edged sword that Penry's mental retardation presented to the jury).

110. See *id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (holding that the sentence determined in the penalty stage should consider the defendant's character and background as well as the crime); cf. *Barclay v. Florida*, 463 U.S. 939 (1983) (holding that consideration of the State's non-statutory aggravating factors would not violate the United States Constitution if the State established at least one statutory aggravating factor).

2. *Penry II*

Texas adopted a new capital jury charge based on the Court's discussion in *Penry v. Lynaugh* (*Penry I*) that suggested there would be no constitutional infirmity in directing a jury to simply nullify a death-penalty verdict by answering "no" to a special issue on aggravating circumstances that the state proved beyond a reasonable doubt.¹¹¹ Jurors at Penry's retrial received the new instruction directing them to voice their approval of mitigating evidence by answering "no" to one of the special issues:

If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.¹¹²

The Supreme Court held this instruction unconstitutional in Penry's second appearance.¹¹³ Rather than provide a means for the jury to weigh mitigating evidence against aggravating circumstances and recommend a sentence less than death, the Court held, the instruction called for jurors to artificially contradict an otherwise affirmative response to any given special issue in order to short-circuit a death sentence.¹¹⁴ This meant a jury that found the state's evidence persuasive in all of the special issues regarding aggravating circumstances had to determine which special issue it would answer falsely in order to give effect to mitigating evidence.¹¹⁵ Jurors who believed they had a legal and moral responsibility to answer the aggravating special issues truthfully could be dissuaded from making

111. *See id.* at 326–27 (reasoning that a statutory nullification instruction could satisfactorily give jurors the necessary discretion to give effect to a defendant's mitigating evidence). *But see* Shelley Clarke, *A Reasoned Moral Response: Rethinking Texas' Capital Sentencing Statute After Penry v. Lynaugh*, 69 TEX. L. REV. 407, 463 (1990) (predicting that a statutory nullification instruction "is surely the sort of minimal D-minus 'solution' that could sail through the legislature").

112. *Penry v. Johnson* (*Penry II*), 532 U.S. 782, 790–91 (2001).

113. *Penry II*, 532 U.S. 782.

114. *See id.* at 797–98 (holding that the Texas response to *Penry v. Lynaugh* failed to give the jury a more meaningful and substantive procedure with which to give its full, intended effect to the mitigating evidence).

115. *See id.* at 798–99 (explaining that the jury nullification instruction placed law-abiding jurors in an untenable situation).

a false answer to one of the questions even if it believed the defendant should be spared.¹¹⁶

3. *Penry III* and Mitigation Today

Texas capital juries currently answer two special issues related to future dangerousness¹¹⁷ and whether the death was actually caused by the defendant,¹¹⁸ taking into account aggravating and mitigating circumstances.¹¹⁹ The jury charge to consider mitigating factors directs jurors to weigh the circumstances of the offense:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.¹²⁰

Prior to *Atkins*, the Court required that mentally retarded defendants be permitted to offer their mental retardation only as a mitigating factor.¹²¹ This approach did not have the intended affect of shielding mentally retarded defendants from the death penalty. Instead, a skilled prosecutor before an angry jury can portray mental retardation as an aggravating circumstance.¹²² For example, when Walter Bell, Jr. asserted

116. Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 349–50 (2002) (explaining that the instruction leaves the jury to question whether it can falsify its answers to the special issues proven beyond reasonable doubt yet still justifiably believe it is bound legally and morally to answer truthfully the questions posed); see also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 11–12 (1993) (analyzing jury survey data to conclude that confusion exists regarding the weight that should be given mitigating and aggravating circumstances).

117. TEX. CRIM. PRO. CODE ANN. art. 37.071(2)(b)(1) (Vernon 2005).

118. *Id.* at art. 37.071(2)(b)(2).

119. *Id.* at art. 37.071(2)(d)(1).

120. *Id.* at art. 37.071(2)(e)(1).

121. See *Penry I*, 492 U.S. at 327–28.

122. See, e.g., *Tennard v. Dretke*, 542 U.S. 274, 288–89 (2004) (holding that reasonable jurists could have used the evidence of Tennard's low IQ as an aggravating effect in weighing his future dangerousness, and not just as a matter of likely inference from the evidence but because the prosecutor instructed them to do so); see also Michael Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (1994) (arguing that the mitigating evidence causes jurors to distrust mental disability evidence and they are treated more harshly); but cf. *Barclay v. Florida*, 463 U.S. 939 (1983) (permitting jury to consider non-statutory aggravating factors if the state established at least one statutory aggravating factor).

his mental retardation in his capital murder trial, the Jefferson County prosecutor told the jury:

What did the doctors and counselors tell you about mental retardation or people that were on the border? . . . Well, they cause more trouble. They adjust to life on the outside [with] more difficulty . . . and they are more susceptible to be led into committing more crimes. So, if you believe [Bell] is mentally retarded, you have to believe that, too. Folks, you have to believe that somewhere down the road he's going to snap again.¹²³

Before *Atkins*, Bell was sentenced to death, but following *Atkins*, the Texas Court of Criminal Appeals commuted Bell's sentence to life in prison.¹²⁴

Atkins interrupted Penry's third sentencing trial.¹²⁵ Despite Penry's claim of mental retardation, prosecutors urged that his clear thinking, premeditation, and attempts to deceive officers disproved Penry's claim.¹²⁶ The *Penry III* court instructed the jury "that mental retardation is a mitigating factor as a matter of law."¹²⁷ The court instructed the jury that if it found the defendant mentally retarded, it should answer "yes" to the mitigation issue.¹²⁸ If the jury did not find mental retardation, the court explained, it was to "consider whether any other mitigating circumstance" existed.¹²⁹ The jury answered "no" to both; Penry again received the death sentence.¹³⁰

Far removed from the day of *Jurek v. Texas* when a defendant had practically no favorable instruction to rely upon,¹³¹ today's Eighth

123. See David Pasztor, *28 Years on Death Row, Still Alive*, AUSTIN AM.-STATESMAN, Nov. 24, 2003, at A1 (quoting Jefferson County prosecutor in his closing argument in Walter Bell's capital murder trial in 1994).

124. *Ex parte Bell*, 152 S.W.3d 103, 104 (Tex. Crim. App. 2004) (per curiam).

125. *Penry v. Texas (Penry III)*, 178 S.W.3d 782 (Tex. Crim. App. 2005).

126. Interview with Lee Hon, Polk County Assistant Dist. Attorney, in Livingston, Tex. (Oct. 6, 2005). Hon's team, who prosecuted Penry in 2002, told the jury that Penry had watched his victim's house for two weeks after helping deliver an appliance to her home. *Id.* He gained entry to her home, Hon said, by claiming to have returned to be sure everything was in working order. *Id.* Prosecutors told the jury that he confessed to killing her so that she could not identify him. *Id.* Additionally, he explained away a fresh wound by concocting a story about a bicycle accident before later confessing to being injured in the struggle. *Id.* According to Hon, Penry's planning, execution, and fabrication refute mental retardation. *Id.*

127. *Penry III*, 178 S.W.3d at 785.

128. *Id.*

129. *Id.*

130. *Id.*

131. See *Jurek v. Texas*, 428 U.S. at 272–73 (upholding the Texas capital punishment scheme, reasoning that the second special issue related to future dangerousness permits the

Amendment jurisprudence considers what the jury mistakenly “could have understood.”¹³² The Texas Court of Criminal Appeals in *Penry III* reversed and remanded for a new trial on penalty due to the reasonable likelihood that the jury believed that once it had rejected mental retardation, the “any other” language of the jury instruction precluded giving effect to other mental impairments in the defendant’s favor.¹³³ Under Texas code, the court will not reverse the trial court “unless the error appearing from the record is calculated to injure the rights of the defendant, or unless it appears that the defendant has not had a fair and impartial trial.”¹³⁴ The court held the instruction was “calculated to injure the rights of the defendant.”¹³⁵

Judge Cochran, who had previously authored the *Ex parte Briseno* majority opinion, issued a scathing dissent.¹³⁶ Cochran acknowledged the possibility that the jury could have believed it was precluded from considering Penry’s mental impairments as mitigating evidence once it had decided against mental retardation, but she did not find it reasonably likely.¹³⁷ To hold it reasonably likely that the jury did not understand its charge, Cochran wrote, “requires one to assume that they were all mentally slow.”¹³⁸ The trial court’s attempt to conform to *Atkins* via penalty-phase special issue failed.

jury to consider the defendant’s mitigating evidence even if no such explanation was forthcoming from the trial court).

132. See *Boyde v. California*, 494 U.S. 370, 378–79 (1990) (explaining the Court’s recent inquiries and proposed tests related to jury deliberations, including what a jury “could have understood the charge as meaning” (quoting *Francis v. Franklin*, 471 U.S. 307, 315–16 (1985)), or what a juror “‘could’ have done or what he ‘would’ have done” (quoting *California v. Brown*, 479 U.S. 538 (1987)), to whether the jury “‘could have’ drawn an impermissible interpretation from the trial court’s instructions” or whether there exists the “substantial possibility that a jury misunderstood its charge” (quoting *Mills v. Maryland*, 486 U.S. 367, 375–76, 377 (1988))).

133. See *Penry III*, 178 S.W.3d at 785 (explaining that, in light of the overwhelming jurisprudence disfavoring confusing or reasonably misunderstood jury instructions, the trial court’s attempt to conform to *Atkins* failed to protect Penry’s Eighth Amendment right to have both his mental retardation legal question and mental impairment fact questions considered distinctly).

134. *Id.* at (quoting TEX. CODE CRIM. PROC. ANN. art. 36.19).

135. *Id.* (quoting TEX. CODE CRIM. PROC. ANN. art. 36.19).

136. See *id.* at 789 (Cochran, J., dissenting) (writing for Keller, P.J., and Keasler and Hervey, JJ.).

137. See *id.* at 795 (Cochran, J., dissenting) (distinguishing between the possible and the reasonably likely).

138. See *Penry III*, 178 S.W.3d at 797 (Cochran, J., dissenting).

IV. DETERMINING MENTAL STATE IN TEXAS

Current jurisprudence recognizes three doctrines under which the capital defendant's mental status may be examined: insanity, competence, and mental retardation.¹³⁹ Texas provides statutory guidance regarding a defendant's claim of insanity or incompetence. Mental retardation does not yet enjoy such status. An examination of the other two illustrates how the legislature could respond to *Atkins*.

A. *Insanity*

In contrast to competence and mental retardation, insanity is an exculpatory defense; the defendant who proves insanity is typically acquitted.¹⁴⁰ The insanity defense inquires into the defendant's state of mind at the time of the murder.¹⁴¹ To prove his insanity, the defendant must show that he did not know "the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."¹⁴² This so-called *M'Naghten* test was the standard for insanity for more than a century, and it remains the foundation of the insanity defense, but modern scholarship suggests that certain mentally ill defendants may understand their crimes at some intellectual level yet remain unable to conform their behavior to the law.¹⁴³

Because the defendant, due to mental defect, could not have purposefully formed the criminal state of mind for criminal responsibility to attach to the defendant, punishment serves no useful purpose.¹⁴⁴ Furthermore, the Supreme Court has held that the insane offender can-

139. See Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 329 (2002) (delineating three mental conditions recognized in the law as diminishing a person's blameworthiness or present accountability).

140. See *id.* at 329–30 (reciting historical precedent for society's interests in recognizing the insanity defense).

141. MODEL PENAL CODE § 4.01 (Final Draft 1962).

142. *United States v. Freeman*, 357 F.2d 606, 608 n.3 (2d Cir. 1966) (quoting *M'Naghten's Case*, 8 Eng. Rep. 718 (1843)). "[T]o establish a defence [sic] on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused as laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

143. See *id.* at 608 n.3 (explaining the development of the rule of "irresistible impulse" to augment *M'Naghten*, whereby a defendant may be somehow powerless to obey the law and conform his conduct to the law even when he knows the conduct is unlawful).

144. Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 329–30 (2002).

not be effectively deterred in the mentally ill state or even be held culpable.¹⁴⁵

The Texas legislature reformed the insanity defense statute in 2005, conforming the process used by experts to determine sanity to the standards used in determining competency. The legislature also strengthened the post-acquittal procedures for persons found not guilty by reason of insanity by including specific release standards regarding post-release monitoring under the watch of the criminal court system.¹⁴⁶ The same expert may be appointed to perform both analyses and submit separate reports on the issues.¹⁴⁷ The code requires the finder of fact, as determined by the defendant, to consider whether the prosecution has proven beyond a reasonable doubt that the defendant committed the act alleged, and whether the defendant has proven by a preponderance of the evidence that he was insane during the commission of the act.¹⁴⁸ A finding of “not guilty by reason of insanity” (NGRI) results in acquittal.¹⁴⁹ A defendant found NGRI of a violent crime remains in the jurisdiction of the court despite acquittal for a period that cannot exceed the maximum period the defendant could have been sentenced had he been convicted.¹⁵⁰

Neither the court nor any party may tell the jury of the consequences to the defendant following an NGRI acquittal.¹⁵¹ At least one commentator has suggested that this proscription prejudices the jury against the defense.¹⁵² While it is no doubt true that jurors may wonder what will become of the defendant who wins an NGRI acquittal, the evidence of

145. See *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding that a death penalty that cannot deter or exact retribution due to the defendant’s incapacity can only cause “the purposeless and needless imposition of pain and suffering” and is therefore unconstitutional (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977))); see also *Fisher v. United States*, 328 U.S. 463, 484 (1946) (explaining that capital punishment serves as a deterrent only when the murder is the product of premeditation and deliberation).

146. TEX. CRIM. PRO. CODE ANN. art. 46C.158 (Vernon 2005).

147. *Id.* at art. 46C.103.

148. *Id.* at art. 46C.153.

149. *Id.* at art. 46C.155.

150. *Id.* at art. 46C.158. This raises the question of whether a person charged with capital murder may be confined for life in an institutional setting without adjudication to determine guilt. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2005) (creating a sentence of life without parole sentence for persons convicted capital murderers, while removing the sentence of life with the eligibility for parole). *But cf.* *O’Connor v. Donaldson*, 422 U.S. 563 (1975) (holding there exists no constitutional basis for confining mentally ill persons involuntarily if they are not dangerous and can live independently).

151. TEX. CRIM. PRO. CODE ANN. art. 46C.154 (Vernon 2005).

152. See Alison J. Meyers, Comment, *Mentally Ill and Mentally Retarded Defendants in Texas May Get a Chance at Justice; Recommendations to the Task Force Created by Tex. S.B. 553, 7th Leg., R.S. (2001)*, 43 S. TEX. L. REV. 1233, 1256–57 (2002) (advocating Texas’

this is admittedly not conclusive.¹⁵³ It is possible that jurors often believe that institutionalization is insufficient. It is equally possible that jurors are more easily moved toward NGRI acquittal when reassured that the violent offender will remain in the jurisdiction of the court during the institutionalization for as long as the court could imprison him.¹⁵⁴

B. Competence

While insanity examines the defendant's state of mind at the commission of the crime, the question of competence asks whether the defendant can understand the trial proceedings and aid in his own defense.¹⁵⁵ Therefore, the defendant who is unable or unwilling to plead insanity may have his competence considered as a legal issue.¹⁵⁶ The inquiry into one's competence finds root in the Constitution's due process requirements as well as the Sixth Amendment right to effective counsel.¹⁵⁷ If the defendant cannot aid his attorney in his defense, the court may never

adoption of the American Bar Association recommendation that courts inform jurors of the consequences of their verdicts).

153. *See id.* (suggesting the possibility that juries fear the imminent release of the mentally ill offender); *see also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 5 (1993) (quantifying juror concern about the mentally ill offender's future dangerousness).

154. *See* TEX. CODE CRIM. PROC. ANN. art. 46C.158 (Vernon 2005). Because the Texas legislature has enacted life without parole, it is theoretically possible that a person deemed violent or dangerous could live the balance of his life in a mental institution, under the jurisdiction of the criminal courts, without trial. *See* TEX. PENAL CODE ANN. § 12.31 (Vernon 2005) (creating a sentence of life without parole sentence for persons convicted capital murderers, while removing the sentence of life with the eligibility for parole). *But cf.* O'Connor v. Donaldson, 422 U.S. 563 (1975).

155. *See* Roberta M. Harding, "Endgame": *Competency and the Execution Of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 109–13 (1994) (explaining the historical foundations behind society's generally held belief that it is uncharitable to dispatch an offender into another world (quoting *Ford v. Wainwright* 477 U.S. 399, 407 (1986))).

156. *See* *Drope v. Missouri*, 420 U.S. 162 (1975) (reversing conviction where defendant's evidence of competence was not given sufficient weight during trial, but declining to order the trial court to reconsider upon retrial evidence of whether defendant was competent at his first trial because the test consider sufficient *present* ability); *see* *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) ("[T]he test [for competency] must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and whether he has a rational as well as factual understanding of the proceedings against him.") (alteration in original).

157. *See* Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993) (explaining the application of modern clinical competence determinations in criminal defendants).

learn of potentially exculpatory evidence.¹⁵⁸ Second, if the defendant does not understand the case against him or is otherwise impaired, the punishment loses both its moral force and its deterrent effect.¹⁵⁹ An incompetent defendant may not be executed.¹⁶⁰

The Texas Code of Criminal Procedure guides the trial court in determinations of a defendant's competence.¹⁶¹ Any party, including the court, may raise the issue of competence at any time.¹⁶² The Code's provisions include a pre-trial hearing of competency before the defendant's choice of the trial judge or a jury.¹⁶³ The jury must be different from the jury seated for the guilt phase.¹⁶⁴ The Code makes provision for court-appointed expert evaluation and the affirmation of the defendant's Fifth Amendment¹⁶⁵ right against compelled self-incrimination regarding the defendant's statements during the evaluation.¹⁶⁶

Interestingly, the Code already contemplates mental retardation inasmuch as it instructs the examining expert to consider whether the defendant has mental illness or mental retardation and whether the affliction affects his ability to aid in his defense.¹⁶⁷ A person who is determined incompetent may be released on bail or committed to a mental health facility, including a maximum-security facility for violent offenders, for restoration of competency.¹⁶⁸ When the defendant eventually is returned to court following completion of initial court-ordered treatment, the court may order extended commitment, or if ruled competent, may proceed with trial.¹⁶⁹ The Code also permits the State to declare the mentally retarded offender incompetent, dismiss the charges against him, and commit him to long-term institutional care.¹⁷⁰

158. Cf. *Atkins v. Virginia*, 536 U.S. at 304, 320–21 (2002) (explaining the possibility that a mentally impaired defendant cannot raise a satisfactory defense).

159. See Kacie McCoy Daugherty, Comment, *Synthetic Sanity: The Ethics and Legality of Using Psychotropic Medications to Render Death Row Inmates Competent for Execution*, 17 J. CONTEMP. HEALTH L. & POL'Y 715, 718–19 (2001) (arguing that executing incompetent persons does not deter others).

160. *Ford v. Wainwright*, 477 U.S. 399 (1986).

161. TEX. CRIM. PROC. CODE ANN. art. 46B (Vernon 2005).

162. *Id.* at art. 46B.004.

163. *Id.* at art. 46B.051.

164. *Id.* at art. 46B.051(c).

165. U.S. CONST. amend. V.

166. TEX. CRIM. PROC. CODE ANN. art. 46B.007 (Vernon 2005).

167. *Id.* at art. 46B.024(1), 46B.024(3).

168. *Id.* at art. 46B.073.

169. *Id.* at art. 46B.084.

170. *Id.* at art. 46B.151.

C. *Mental Retardation*

Mental retardation does not absolve the offender; it exempts him from the death penalty.¹⁷¹ Mental retardation, unlike the insanity defense or incompetence, is not temporary.¹⁷² The mentally retarded offender was under the influence of his condition at the time of the act, just as he will be at the time of his trial and punishment; therefore, the typical judicial and clinical procedures and their motivations for restoration of competency do not apply.¹⁷³ Similarly, just as insanity and incompetence moot the retributive and deterrent effects of the death penalty, the calculus is obviously the same for mentally retarded offenders, providing the basis for *Atkins* to establish judicial recognition of the mentally retarded as a class of offenders deserving of Eighth Amendment protection.¹⁷⁴ Not all mentally retarded offenders, however, must be held less culpable.¹⁷⁵

Among the three mental states treated by Texas law, mental retardation is the only defense based on a clinical diagnosis of mental defect.¹⁷⁶ The American Association for Mental Retardation (“AAMR”) stipulates that retardation is neither a medical disorder, nor a mental disorder, but rather a “state of functioning” begun in childhood that “reflects the fit between the capabilities of individuals and the structure and expectations of their environment.”¹⁷⁷ The AAMR definition includes “significant

171. *Atkins v. Virginia*, 536 U.S. 304 (2002) (demonstrating mentally incompetent persons, as opposed to insane persons, can be convicted of crimes, but not penalized with death).

172. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 424–25 (1985) (explaining that significant consequences for the criminal defendants and the justice system flow from the differences between retardation and mental illness). Mental illness is often temporary, cyclical, or episodic, but mental retardation is permanent. *Id.*

173. See *Id.* (noting that if competency restoration procedures are imposed on the mentally retarded defendant, lifelong confinement may result); see, e.g., *Jones v. United States*, 463 U.S. 354, 361–70 (1983) (holding the Constitution permits the government to confine an insanity acquittee to a mental health facility until he has regained sanity).

174. 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, 287 (2004) (guiding defense counsel in determining trial strategy for the mentally impaired offender).

175. *Atkins v. Virginia*, 536 U.S. at 317 (2004).

176. Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 334–35 (2002) (explaining that legislatures have relied heavily on modern definitions of mental retardation in exempting mentally retarded persons from the death penalty).

177. See American Association for Mental Retardation, *Definition of Mental Retardation*, http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Nov. 1, 2006) (explaining that individuals may be assessed in comparison with other persons of their age and culture).

limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills” with onset before the age of eighteen.¹⁷⁸ The Texas Health and Safety Code reflects the AAMR emphasis on behavioral adaptations: “‘Mental retardation’ means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.”¹⁷⁹

The prevailing definitions of mental retardation agree that an IQ of seventy signifies a likelihood of retardation.¹⁸⁰ IQ is only one consideration of mental retardation, and it should not be considered dispositive in the criminal justice setting, as *Ex parte Briseno* instructed when it declined to accept as gospel that a person who barely tips the scale of clinical mental retardation should win exemption from the death penalty.¹⁸¹ In recent years, the AAMR, as well as the American Psychiatric Association, have amended their definitions of mental retardation to

178. See American Association for Mental Retardation, Definition of Mental Retardation, http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Nov. 1, 2006) (describing the factors considered to diagnose mental retardation, including comprehensive lists of adaptive behavior skills and support behaviors considered by clinicians).

179. TEX. HEALTH & SAFETY CODE § 591.003(13) (Vernon 2005).

180. See Jonathan L. Bing, Note, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 67–68 (1996) (explaining that experts arrived at an IQ of seventy as a flexible standard designed to allow persons with IQs above seventy with special needs to be diagnosed with retardation, while excluding persons sub-seventy IQs if the comprehensive psychological judgment did not indicate mental retardation); American Association for Mental Retardation, Definition of Mental Retardation, http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Nov. 1, 2006) (explaining that because the standard margin of error on most IQ tests is nearly five points, the upper range may climb to an IQ of seventy-five).

181. See *Ex parte Briseno*, 135 S.W.3d 1, 6–8 (Tex. Crim. App. 2004) (refusing to endorse a definition of mental impairment or mental retardation that exonerates a person based solely or significantly on IQ). To further distance the measure of culpability from a clinical score, the court proposed a list of objective questions to address the defendant’s connection to the crime:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others’ interests?

minimize the importance of IQ as a factor in diagnosis and emphasize adaptive behavior.¹⁸²

D. *The Trouble with Bright Lines*

To illustrate why Texas legislators and courts may find it undesirable to adopt a bright-line IQ number, consider the Supreme Court's holding in *Roper v. Simmons*,¹⁸³ in which the Court determined that a person who was under eighteen years old when he committed a capital murder could not be executed.¹⁸⁴ *Roper* overruled *Stanford v. Kentucky*,¹⁸⁵ in which the Court previously upheld the execution of sixteen and seventeen-year-old murderers.¹⁸⁶

-Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Id. at 8–9; see also Peggy M. Tobolowsky, *Texas and the Mentally Retarded Capital Offender*, 30 T. MARSHALL L. REV. 39, 112 (2004) (noting that at the same time *Ex parte Briseno* offered an objective set of questions, it announced it would grant “almost total deference” to trial court factual findings upon collateral review (quoting *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004))).

182. See Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 69 (1996) (explaining that the DSM-IV incorporated the AAMR's new, behavior-oriented definition into its own literature). Since 1908, the AAMR has amended the way mental retardation is defined ten times. American Association for Mental Retardation, *Definition of Mental Retardation*, http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Nov. 1, 2006).

183. 543 U.S. 551 (2005).

184. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of persons who were under eighteen years old when they committed a capital crime, based in part because “the evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence [*Atkins v. Virginia*, 536 U.S. 304] held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded”); see also *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding by a plurality that the Eighth Amendment prohibited capital punishment when offender committed his crime before the age of sixteen, noting that thirty states banned execution of fifteen year olds); see generally Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311 (2005) (analyzing the Court's emerging interest in reconsidering various applications of the death penalty under its “evolving standards of decency” test).

185. 492 U.S. 361 (1989).

186. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that execution of sixteen and seventeen year olds did not violate evolving standards of decency and therefore did not violate the Eighth Amendment). The Court handed down *Stanford v. Kentucky* in the same year it handed down *Penry v. Lynaugh*, basing its opinion again on the lack of national consensus. *Id.*

At the age of seventeen, Christopher Simmons told his friends he wanted to murder someone.¹⁸⁷ Soon thereafter he broke into a home, bound and gagged the woman of the house while her husband was away, and threw her from a bridge, where she drowned.¹⁸⁸ Simmons told his friends he was forced to kill her because she had saw his face.¹⁸⁹

In *Roper*, the Court again cited national consensus¹⁹⁰ in support of its decision that offenders at Simmons' age are less culpable for murder than their eighteen-year-old accomplices.¹⁹¹ In other words, a gunshot on either side of the stroke of midnight could be the determining factor whether a capital murderer gets life or death. Seventeen-year-old murderers in Texas now enjoy blanket immunity, regardless of their adaptive behaviors, level of maturity, or leadership abilities.¹⁹² Yet, a capital murder defendant with an IQ of sixty-nine may or may not meet the requirements for a diagnosis of mental retardation.¹⁹³

187. *Roper*, 543 U.S. at 556.

188. *Id.* at 556–57.

189. *Id.* at 557; see also Interview with Lee Hon, Polk County Assistant Dist. Attorney, in Livingston, Tex. (Oct. 6, 2005). Prosecutor Lee Hon reported that Penry confessed to killing his victim so that she could not identify him. *Id.*

190. Cf. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002). But see Robin M. A. Weeks, Note, *Comparing Children to the Mentally Retarded: How the Decision in Atkins v. Virginia Will Affect the Execution of Juvenile Offenders*, 17 *BYU J. PUB. L.* 451, 478–79 (2003) (asking whether the Court would reverse its bans on capital punishment based on national consensus if the national consensus dissolved or shifted).

191. See *Roper*, 543 U.S. at 599–600 (O'Connor, J., dissenting) (writing that an especially depraved seventeen year old murderer may be just as culpable as many adult offenders who merit the death penalty, thus “[i]t follows that a legislature may reasonably conclude that at least *some* 17-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, that capital punishment may be warranted in an appropriate case”).

192. See TEX. PENAL CODE ANN. § 12.31 (Vernon 2005) (amending the penal code to raise the minimum age of eligibility for the death penalty from seventeen to eighteen years of age). It is interesting to note that Tex. S.B. 60 as initially drafted provided a vehicle for the creation of a statutory life-without-parole alternative to the death penalty. *Id.* as filed Nov. 8, 2004. The Court handed down *Roper v. Simmons* during the legislative session and the legislature responded swiftly, adopting Rep. Harold Dutton's amendment to comply with *Roper* on May 24, 2005. <http://www.capitol.state.tx.us/data/docmodel/79r/amndtext/pdf/SB00060225.pdf>. In the time since the Court decided *Atkins v. Virginia*, the Texas legislature has convened in two 150-day regular sessions (in 2003 and 2005) and six special sessions. Texas Legislature Online History, <http://www.capitol.state.tx.us>.

193. See Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 59, 67–68 (1996) (explaining that experts arrived at an IQ of seventy as a flexible standard designed to allow persons with IQs above seventy with special needs to be diagnosed with retardation, while excluding persons sub-seventy IQs if the comprehensive psychological judgment did not indicate mental retardation); American Association for Mental Retardation, Definition of Mental Retardation, <http://www.aamr.org/Policies/>

E. *The Texas Proposals*

Texas legislators in 2005 took even less official notice of the issue than in recent years.¹⁹⁴ Previous sessions witnessed more activity on the subject, and interest has declined. In 2001, prior to *Atkins*, Governor Rick Perry vetoed a bill that would have permitted the defense to evade a jury's death sentence by convincing two experts and the trial judge that the jury verdict was erroneous as to the defendant's mental retardation.¹⁹⁵

In 2003, a bill that would have made mental retardation a mitigating issue for consideration by the jury in the penalty phase passed the Texas House, but did not receive favorable treatment in the Senate.¹⁹⁶ Drafted by the Texas District and County Attorney's Association (TDCAA), the bill would have required the court to submit the question as a separate special issue during the punishment phase.¹⁹⁷ TDCAA believes that mental retardation should be treated as a "punishment issue" to be resolved by the jury during the consideration of the special issues.¹⁹⁸ Because the mentally retarded remain eligible for prosecution and

faq_mental_retardation.shtml (last visited Nov. 1, 2006) (explaining that because the standard margin of error on most IQ tests is nearly five points, the upper range may climb to an IQ of seventy-five).

194. See Tex. H.B. 419, 79th Leg., R.S. (2005) (proposing a unique mental retardation mitigation instruction in the penalty phase). Authored by House Criminal Jurisprudence Chairman Representative Terry Keel, the bill was referred to that committee on Feb. 3, 2005, never to be heard from again. Texas Legislature Online, <http://www.capitol.state.tx.us/> (last visited Nov. 1, 2006). Senator Todd Staples sponsored companion legislation in the Senate in the form of Tex. S.B. 65, 79th Leg., R.S. (2005). *Id.*; Tex. S.B. 231, 79th Leg., R.S. (2005) (proposing a pretrial determination of mental retardation in conformity with existing statutes for pretrial determination of other constitutionally protected classes of mental impairments). Authored by Senator Rodney Ellis, this bill, too, was forgotten in the Senate Criminal Justice Committee. Texas Legislature Online, <http://www.capitol.state.tx.us/> (last visited Jan. 3, 2005). Senator Eliot Shapleigh, Leticia Van De Putte, and Mario Gallegos signed on as co-authors. *Id.*

195. See Veto Message of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001) (rejecting an interlocutory procedure that would have permitted a judge to reverse a jury's determination of retardation based on the opinion of experts not connected with the trial).

196. See Tex. H.B. 614, 78th Leg., R.S. (2003) (proposing a unique mental retardation mitigation instruction in the penalty phase). The House of Representatives approved the bill on April 30, 2003, but the Senate declined to assign it to committee or otherwise give it consideration. Texas Legislature Online, <http://www.capitol.state.tx.us/> (last visited Jan. 3, 2005). It was reintroduced in 2005 as Tex. H.B. 419, 79th Leg., R.S. (2005). *Id.*

197. Email from Shannon Edmonds, Director of Governmental Relations, Texas District and County Attorneys Ass'n (Oct. 13, 2005 13:54:00CST) (on file with author).

198. See Texas District and County Attorneys Association, Potential Jury Instructions on Mental Retardation (unpublished communication to TDCAA membership) (on file with author) (proposing to determine defendant's raised issue of mental retardation in punishment phase).

sentencing, TDCAA claims that an additional yes-or-no special issue question could adequately determine whether the person was mentally retarded and thus eligible for execution.¹⁹⁹ TDCAA has concluded that mental retardation may thus be distinguished from the pretrial legal determination of competency to stand trial and insanity.²⁰⁰

TDCAA's proposal is problematic in light of the recent decision in *Penry v. Texas*.²⁰¹ The court held that the jury's negative finding of mental retardation hindered its ability to properly distinguish and consider the separate mitigating issue of mental impairment.²⁰² The legislature may, of course, conclude that Texas House Bill No. 419 satisfactorily separates the two questions.²⁰³ The risk, on the other hand, is that the proximity of the separate issues of mental retardation and mental impairment will continue to frustrate trial verdicts by raising questions of their reliability or accuracy.²⁰⁴

A bill supporting pretrial litigation of the issue fared no better in the most recent Texas legislature.²⁰⁵ Texas Senate Bill No. 231 mimicked existing Texas code related to competency and sanity hearings, including procedures for consideration by the defendant's choice of pretrial

199. *See id.* (asserting that special issue question on mental retardation satisfies the requirement of *Atkins*).

200. *See id.* (making distinction between mental retardation issue and pretrial determinations of incompetence and insanity).

201. *See Penry III*, 178 S.W.3d at 788 (holding that mitigation instruction on mental retardation reasonably could have precluded jurors from considering relevant mitigating evidence of mental impairment). *But see* Timothy S. Hall, *Legal Fictions and Moral Reasoning: Capital Punishment and the Mentally Retarded Defendant After Penry v. Johnson*, 35 AKRON L. REV. 327, 367 (2002) (concluding that separate penalty phase instructions on mental retardation and mitigating circumstances provide the jury with the opportunity to make a reasoned moral response).

202. *See Penry III*, 178 S.W.3d at 788 (holding that mitigation instruction on mental retardation reasonably could have precluded jurors from considering relevant mitigating evidence of mental impairment).

203. *See Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (holding states free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty").

204. *See Boyde v. California*, 494 U.S. at 380 (1990) ("[T]he proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way that prevents the consideration of constitutionally relevant evidence."); Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them from Execution*, 30 J. LEGIS. 77, 112–13 (2003) (suggesting that states relying on sentencing phase determinations of mental retardation face the possibility of challenge based on questions of reliability and accuracy).

205. Tex. S.B. 231, 79th Leg., R.S. (2005) (proposing a pretrial determination of mental retardation in conformity with existing statutes for pretrial determination of other constitutionally protected classes of mental impairments).

factfinder.²⁰⁶ The finding would be subject to appeal, and a negative finding would not preclude the defendant from introducing evidence of mental retardation at his sentencing.²⁰⁷ A demonstrated IQ of seventy or below would create a rebuttable presumption of mental retardation.²⁰⁸ Under Texas Senate Bill No. 231, the defendant would bear the burden of proof by a preponderance of the evidence.²⁰⁹

V. CLOSING ARGUMENT FOR LEGISLATIVE GUIDANCE

A. *The Legislature Must Make the Law for Texas*

The law of the land is clear: execution of the mentally retarded constitutes “cruel and unusual punishment” under the Eighth Amendment.²¹⁰ While the Constitution clearly presupposes the death penalty,²¹¹ the Constitution also limits its application.²¹² The Texas legislature, in turn, must express its will regarding adjudication of mental retardation claims in Texas.²¹³ Its continuing reticence to make a determination on the issue leaves district courts without statutory guidance.²¹⁴ Federal courts considering habeas corpus petitions from the state’s death row also depend on state statutes.²¹⁵ Notwithstanding the failure of the court’s special-issue jury instruction in *Penry v. Texas*, the legislature has broad discretion to define mental retardation for Texas courts.²¹⁶

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

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

211. *See* U.S. CONST. amend. V (declaring citizens shall not be “deprived of life, liberty, or property, without due process”) (emphasis added).

212. *But see* Daniel Nickel, *Constitutional Law: Retarded Justice: The Supreme Court’s Subjective Standards for Capital Punishment of the Mentally Retarded*, 56 OKLA. L. REV. 879, 926 (2003) (criticizing the *Atkins* decision’s determination that execution of the mildly mentally retarded could be construed as cruel and unusual punishment, and accusing “the Court of acting as a legislature for the people”).

213. *See Atkins v. Virginia*, 536 U.S. at 317 (“[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

214. *See Ex parte Briseno*, 135 S.W.3d1 at 4–5 (clarifying that it does not normally make law, but that it must fill the legislature’s void because “‘justice delayed is justice denied’ to the inmate, to the victims and their families, and to society at large”).

215. *See, e.g., In re Woods*, 155 F.App’x 132, 135–36 (5th Cir. 2005) (granting petitioner permission to seek federal habeas relief from his Texas death sentence based on his claim that he is mentally retarded and ineligible for execution under *Atkins*).

216. *See Atkins v. Virginia*, 536 U.S. at 317 (anticipating disagreement among the states regarding the substantive and procedural issues inherent in effecting the Court’s holding and thus ordering them to create their own solutions); *Schriro v. Smith*, 126 S. Ct. 7, 8 (2005) (affirming that the states must create their own procedures for ensuring that

Perhaps the legislature believes that courts will continue to adjudicate the claims of the mentally retarded by forcing the mentally retarded to either allege insanity or incompetence in order to access statutory pretrial procedures or simply rely on mitigating evidence. Johnny Paul Perry has never persuaded a jury to find him mentally retarded or sufficiently mentally impaired to spare his life. The appellate courts have consistently found Texas solutions to the issue to be legally impaired and unjust.

In his veto message to Texas House Bill No. 236, Governor Perry wrote, “[w]e don’t execute mentally retarded murderers today.”²¹⁷ But the mentally retarded offender is not necessarily insane at the commission of the offense; nor is he necessarily unable to assist counsel in his own defense at trial and therefore incompetent.²¹⁸ Existing Texas law does not address the mentally retarded defendant in a constitutionally adequate manner because insanity law and competence law do not address the unique needs of those offenders. The mentally retarded defendant in Texas, while ostensibly enjoying the protection of the Eighth Amendment, is presently denied the equal protection of procedures designed to benefit other classes of mentally impaired persons whose impairments render them ineligible for Texas’ ultimate penalty.²¹⁹

mentally retarded persons are not executed; *see also* *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“In this circumstance, the theory and utility of our federalism are revealed, for the [s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”); *cf.* *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986) (leaving to the states the responsibility of creating procedures to prohibit the execution of the insane).

217. *See* Veto Message of Gov. Perry, Tex. H.B. 236, 77th Leg., R.S. (2001), available at www.lrl.state.tx.us/scanned/vetoe/77/hb236.pdf (declaring that adequate safeguards exist in Texas to ensure that mentally retarded persons are not executed). The governor indicated that existing procedures for determining insanity and incompetence, as well as the provisions for mitigating circumstances, already protect the mentally retarded defendant. *Id.*

218. *See generally* Denis W. Keyes, William J. Edwards & Timothy J. Dering, *Mitigating Mental Retardation in Capital Cases: Finding the “Invisible” Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 529, 537 (1998) (explaining that some mentally retarded offenders may not receive the proper defense because either their attorneys do not understand their defect or the courts apply incorrect procedures); Bryan A. Liang & Victor R. Scarano, *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, 287 (2004) (suggesting strategies for attorneys defending mentally impaired defendants).

219. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them from Execution*, 30 J. LEGIS. 77, 112–13 (2003) (making the case that mental retardation should be determined at the pretrial phase in order to determine death penalty eligibility).

B. *A Proposal Based on Current Texas Practices*

1. Mental Retardation Is More Than a Mitigating Issue

The legislature should avoid placing the defendant's mental retardation issue in the punishment phase of a capital trial. Courts have found this practice problematic in several states.²²⁰ The evidence the defense introduces to prove mental retardation has been shown to influence the jury's perception of future dangerousness. Death-penalty jurors spend days or weeks in voir dire answering questions regarding whether they have religious or moral objections to the death penalty.²²¹ Jurors come to believe that their primary task is not to determine guilt or innocence, but whether to impose a life sentence or the death penalty on a convicted murderer.²²² With the guilt determined, jurors who have considered the autopsy report, bloody photographs, and the testimony of the victim's loved ones while the retarded defendant sat smiling or disinterested²²³ will have a difficult time ruling favorably on a defendant's claim of a constitutionally mandated legal exception to the death penalty.²²⁴ It is not small or unsequential irony that Johnny Paul Penry lives today because the Supreme Court and the Texas Court of Criminal Appeals have held repeatedly against the state's persistent failed attempts to shoehorn into the jury instructions some iteration of the same mitigating issue question. Texas House Bill No. 419 or another attempt to resolve the legal question of constitutional exemption from the death penalty in a jury box filled with autopsy photos will only compound the failure.²²⁵

220. See *Penry III*, 178 S.W.3d at 785 (holding that jury instructions regarding difference between mental retardation and mental impairment led to confusion); *New Mexico v. Flores*, 124 P.3d 1175, 1184–85 (N.M. App. 2005) (holding that the court, not the jury, must make the determination of competency); *Louisiana v. Turner*, 936 So.2d 89, 103 (La. 2006) (holding that a capital jury is not the proper guarantor of the mentally retarded defendant's Constitutional exemption from the death penalty).

221. See Justice John Paul Stevens, Speech to the ABA Annual Meeting Chicago, Aug. 6, 2005 http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html (speaking candidly about his general opposition to the states' application of the death penalty).

222. See *id.* (describing the tedious process involved in selecting a death penalty jury, and the normal result).

223. See generally *Atkins v. Virginia*, 536 U.S. 304 (2002) (characterization of mentally incompetent defendants, such as *Atkins*, does not resonate with jurors very well).

224. See William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 40–41, 51–52 (1987).

225. See *Penry I*, 492 U.S. at 341 (Brennan, J., dissenting) (expressing concern that evidence of mental retardation is too easily outweighed by other factors regarding culpability); Lisa Odom, *Jumping on the Bandwagon: The United States Supreme Court Prohibits the Execution of Mentally Retarded Persons in Atkins v. Virginia*, 31 PEPP. L. REV. 875, 882 n.46 (2004) (“The problem is that the death penalty is reserved for only the most heinous

2. Mental Retardation Is a Constitutional Question Suited to Pretrial Determination

Atkins changed mental retardation from a mitigating circumstance to be considered in the light of the other evidence as instructed by Texas' sentencing procedure, to a determination of death penalty eligibility in the same manner as competence or insanity.²²⁶ In light of *Atkins*, the legislature should conform the determination of mental retardation to the existing, proven procedures for findings of competency and insanity. This would represent a logical continuation of the legislature's work in 2005, in which it conformed the insanity defense framework to that of competency determinations for the purpose of uniformity in procedure,²²⁷ as well as improvements in the qualifications and appointment of experts.²²⁸

This pretrial method properly permits the judge or pretrial jury to weigh the legal issue of whether the defendant is constitutionally eligible for the death penalty. Most states commit this question to a judicial determination.²²⁹ If the defendant is mentally retarded, he is ineligible for the death penalty.²³⁰ If the capital trial proceeds, the jury must then consider as a fact question whether the state can execute the offender.²³¹ The pretrial approach is far more likely to withstand constitutional challenge.

Texas should also adopt into the Code of Criminal Procedure a definition of mental retardation that reflects the current advances in the field.

of crimes and therefore the judge or jury considers the mental retardation of the perpetrator in light of the heinousness of the offense, which has an emotionally powerful effect.”)

226. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 112–13 (2003) (making the case that mental retardation should be determined at the pretrial phase in order to determine death penalty eligibility).

227. See TEX. CODE CRIM. PROC. § 46C (Vernon 2006) (repealing TEX. CODE CRIM. PROC. § 46.03 and establishing new procedures for the insanity defense, including qualifications for experts).

228. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 69 (1985) (holding that expert testimony was crucial to defendant's insanity defense); see also James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 491 (1985) (explaining that while *Ake v. Oklahoma* discussed only the insanity defense, a similar conclusion could be reached on mental retardation). Due process would be denied by requiring a mentally retarded defendant to assert his defense without the assistance of a competent professional trained and experienced in the appropriate discipline. *Id.*

229. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 112–13 (2003).

230. See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 11–19 (2003) (suggesting pretrial determination of mental retardation).

231. See *id.* (recommending jury question on mental retardation only after pretrial determination is adverse to the defendant).

By adopting a commonly accepted definition, the legislature would give the courts access to the greatest number of experts already trained in the field. Furthermore, by referring to the AAMR definition in *Atkins*, the Court offered guidance as to the category of retarded persons about whom there exists a national consensus.²³² Texas should refrain from adopting an IQ test as a rigorous measure of retardation. As *Briseno* explained, IQ scores do not indicate culpability.²³³

3. Conclusion

The Texas legislature must prescribe an *Atkins* procedure. Round trips between Texas' death row and the appellate courts would more likely come to an end if the legislature would establish a pretrial determination for mental retardation that separates the legal issue of death penalty eligibility and the fact issue of mitigating circumstances. If the legislature again delays proper legislation on this issue, more defendants and more victims' families will have been denied the opportunity of justice, in whichever form they seek it.

232. Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding them from Execution*, 30 J. LEGIS. 77, 112–113 (2003).

233. See *Ex parte Briseno*, 135 S.W.3d1 at 5–6 (reasoning that the diagnosis of “mild mental retardation” is intended to cast a wide net around a class of persons too broad to have been intended in the national consensus described by *Atkins*).