

**BEYOND REASON:  
The Death Penalty and Offenders with Mental Retardation**

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Should a civilized society levy its most extreme punishment against someone who cannot fully understand it? Against someone who could not help his own lawyers defend him? Against someone who may have confessed to “help out” the police, not realizing he’s just helped himself to the death chamber?

--*Dallas Morning News*<sup>1</sup>

## I. SUMMARY AND RECOMMENDATIONS

Since the death penalty was reinstated in 1976, at least thirty-five people with mental retardation have been executed in the United States.<sup>2</sup> The exact number of people with this disability who are on death row awaiting execution is not known; experts believe there may be two or three hundred. Because of their mental retardation, these men and women cannot understand fully what they did wrong and many cannot even comprehend the punishment that awaits them. While they have the bodies of adults, in crucial ways their mental function is more like that of children. Twenty-five states, nevertheless, permit capital punishment for offenders with mental retardation. The U.S. Supreme Court has ruled that the execution of persons with mental retardation is not cruel and unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution.

In recent years, a growing public revulsion against executing persons with mental retardation has emerged in opinion surveys and political initiatives. Polls consistently show that a clear majority of American people -- including many who support the death penalty -- believe it is wrong to subject those with mental retardation to the ultimate state-sanctioned punishment.<sup>3</sup> Thirteen states and the federal government have passed legislation prohibiting the execution of offenders with mental retardation and, as of February this year, efforts are underway in seven states to obtain similar legislation.<sup>4</sup>

The case of Johnny Paul Penry exemplifies for many Americans the injustice of imposing capital punishment on persons with mental retardation and the failure of the U.S. legal system to recognize their unique vulnerabilities.

*A difficult breach birth left Johnny Paul Penry with organic brain damage, which was compounded during infancy and early childhood by his mother’s brutal beatings. A paranoid schizophrenic herself, she hit her son on the head, broke his arms several times, dipped him in scalding water, burned him with cigarette butts, and forced him to eat his own feces and drink*

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<sup>1</sup> Editorial, November 22, 1998, commenting on the case of Johnny Paul Penry.

<sup>2</sup> See Denis Keyes, William Edwards, and Robert Perske, “People with Mental Retardation and Dying, Legally,” 35 *Mental Retardation* 1 (February, 1997). A list of defendants with mental retardation executed in the United States since 1976, as updated by The Death Penalty Information Center, can be found at [www.deathpenaltyinfo.org/dpicmr](http://www.deathpenaltyinfo.org/dpicmr). William Edwards, an attorney with the Office of the Capital Collateral Counsel in Florida and an expert in the death penalty and people with developmental disabilities, has identified at least nine other persons to add to the list. Human Rights Watch telephone interview with William Edwards, February 6, 2001.

<sup>3</sup> For example, a poll by the *Houston Chronicle* found that nationwide, among people who otherwise support the death penalty, only 16 percent said they would support the execution of a person with mental retardation. Steven Brewer and Mike Tolson, “A deadly distinction,” *Houston Chronicle*, February 6, 2001. A July 2000 poll by the Behavior Research Center found that 71 percent of the people polled in Arizona opposed the death penalty for those with mental retardation; a July 2000 poll by the *Charlotte Observer* found that 64 percent of people polled in North and South Carolina said people with mental retardation should be exempted from the death penalty. These and other poll results are available at [www.deathpenaltyinfo.org/polls](http://www.deathpenaltyinfo.org/polls), visited February 5, 2001. In a California poll, only 19 percent of those polled supported the execution of persons with mental retardation. See Dan Smith, “Death Penalty Supported in State,” *Sacramento Bee*, March 14, 1997. Public opposition to executing persons with mental retardation is not new: over a decade ago, a national Harris poll found 70 percent of Americans polled rejected such executions. See, Sandra Torry, “High Court to Decide Whether Mentally Deficient Criminals Can Get the Death Sentence,” *Washington Post*, January 11, 1989.

<sup>4</sup> Arizona, Florida, Missouri, Nevada, North Carolina, Oklahoma, and Texas.

*urine. She routinely locked him in his room without food, water, or sanitary facilities for twelve to fourteen hours at a time, then beat him when he could not help defecating in his room.*

*Johnny Paul Penry dropped out of first grade, and as an adult his mental age is still comparable to the average six and a half-year-old child. His I.Q. has been measured between 50 and the low sixties. (The average I.Q. is 100). His aunt spent a year just trying to teach him to sign his name.*

*In 1979, Penry was accused of the murder of Pamela Mosely Carpenter in Livingston, Texas, and he confessed to the police. Although he could not read or write, name the days of the week or months of the year, count to one hundred, say how many nickels are in a dime, or name the President of the United States, Penry was sentenced to death by a Texas jury. Ruling on Penry's appeal, the U. S. Supreme Court held in 1989 that the U.S. Constitution did not prohibit the execution of persons with mental retardation. It overturned Penry's sentence and ordered a retrial, however, because the jury's instructions did not permit it to give effect to the mitigating evidence of Penry's mental retardation and childhood abuse. At Penry's second trial, the judge presented the jury with essentially the same flawed sentencing instructions as at the first trial and Penry was sentenced to death once more. The Supreme Court has stayed his execution pending consideration of his appeal. Oral argument in his case is scheduled for March 27, 2001.*

In keeping with international human rights standards, Human Rights Watch opposes capital punishment in all circumstances as inherently cruel and as a violation of the right to life and of the fundamental dignity all human beings possess. Executing offenders who have mental retardation is particularly unconscionable. In 1999 and 2000, the U.N. Commission on Human Rights adopted resolutions urging nations with the death penalty not to impose it “on a person suffering from any form of mental disorder,” a term that includes both the mentally ill and people with mental retardation.<sup>5</sup> The United States may be the only constitutional democracy whose law expressly permits the execution of persons whose cognitive development has been limited by mental retardation and that carries out such executions.

Even most supporters of capital punishment recognize that the ultimate penalty loses whatever moral legitimacy it may have if it is levied on people with mental retardation. The death penalty is supposed to be restricted to those few criminals who are guilty of the worst crimes of violence and who are the most blameworthy. But persons with mental retardation, by virtue of their disability, do not qualify as among the most culpable offenders. They have a lifelong limited ability to reason and to navigate in the world. They have grave difficulties with communication, learning, logic, strategic thinking and planning. They have problems with judgment, memory, attention, and with understanding consequences or abstract concepts. Whatever their degree of retardation, they have difficulty learning from experience and understanding causality. In all these respects they differ, crucially, from adults who do not have their disability.

A few people with mental retardation will commit acts of terrible violence. None, however, is capable of mature, calculated evil. Accountability can be achieved, and public safety protected, without putting offenders with mental retardation to death. Indeed, none of the penological goals set forth by death-penalty proponents requires the execution of offenders with mental retardation.

- Because the death penalty is disproportionately severe given the diminished culpability of those who have mental retardation, it does not serve the goal of retribution and the imposition of “just deserts.”
- Such executions do not necessarily deter others from committing capital crimes. Persons with mental retardation are not deterred, because their disability prevents them from assessing

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<sup>5</sup> U.N. Commission on Human Rights resolution, “Question of the death penalty,” E/CN.4/RES/1999/61, para. 3(e), adopted April 28, 1999; U.N. Commission on Human Rights resolution, “The Question of the death penalty,” E/CN.4/RES/2000/65, para. 3(e), adopted April 27, 2000.

potential outcomes from different courses of action. And excluding the mentally retarded from execution would not reduce whatever deterrent effect the death penalty may have for potential offenders who do not have mental disabilities: they would remain at risk of execution.

- To ensure public safety, it is sufficient that dangerous mentally retarded persons be securely confined; state-sanctioned executions are not necessary to “incapacitate” them.

The arbitrariness, unfairness and high risk of error in capital prosecutions in the United States has been documented extensively. The risk of a miscarriage of justice is especially acute for poor defendants, who are often represented by inexperienced, badly paid, overworked court-appointed attorneys unable or unwilling to mount an effective defense.<sup>6</sup> Like the vast majority of prisoners on death row, most -- if not all -- of the persons with mental retardation who have been sentenced to death are poor.

Moreover, offenders with mental retardation are additionally and deeply vulnerable in capital trials because their disability makes it hard for them to comprehend abstract legal concepts or to assist in their own defense. Indeed, from the moment of arrest a suspect with mental retardation is likely to relinquish key legal protections. Being characteristically suggestible and eager to please persons in authority, and unable to cope with stressful situations, many detainees with mental retardation waive their right to remain silent; some even make false confessions.

*Earl Washington, a former farmhand from Culpepper, Virginia, is a man with mental retardation whose I.Q. has been assessed variously at 57 and 69. He knows “some” but not all of the letters of the alphabet. He is eager to please, easily suggestible, easily confused.*

*In 1983, Washington was questioned by police after he was arrested for a minor assault. During his lengthy interrogation he confessed to various crimes, including the 1982 rape and murder of a young woman, Rebecca Williams. The police concluded that most of his other “confessions” were false, but on the basis of a confession that had been full of factual errors, Washington was prosecuted in the Williams case. Despite his mental retardation, the trial court found that he had voluntarily waived his right to remain silent and that his confession was valid. After a three-day trial, he was sentenced to death. The jurors later said they had placed great weight on his confession in deciding to convict.*

*A series of DNA tests ultimately proved that Earl Washington was innocent of the murder that brought him within days of execution. In October 2000, Gov. Jim Gilmore of Virginia pardoned Washington. He was released from prison on February 12, 2001.*

Defendants with mental retardation are uniquely disadvantaged in their ability to contribute to their own defense; indeed, even those with the good fortune to have competent attorneys often unknowingly undermine their own interests. Their unreliable memories and suggestibility impede their ability to help their lawyers develop the facts of the case. Unable to understand the proceedings, they may alienate juries by smiling, sleeping, or staring in court, giving a false impression of callousness or lack of remorse. And, as people with mental retardation are often ashamed of their limitations, some seek to hide their condition from their lawyers, not understanding that mental retardation is relevant to their defense.

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<sup>6</sup> See generally, James Liebman et al., “A Broken System: Error Rates in Capital Cases, 1973-1995,” available on the web at <http://justice.policy.net/jpreport/index.html>. See also “Defense called lacking for death row indigents: But system supporters say most attorneys effective,” *Dallas Morning News*, September 10, 2000, reporting that of 461 death row inmates in Texas, fully one quarter had been represented by attorneys who had been reprimanded, placed on probation, suspended, or disbarred by the Texas Bar Association.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. This has been interpreted to include punishment that is disproportionate to the gravity of the offense and the defendant's moral culpability, and imposes purposeless pain and suffering. In 1984, the U.S. Supreme Court held that executing the insane violates the Eighth Amendment because they are incapable of fully comprehending their crimes or why they are being punished. Similarly, in 1988, the court held that the Eighth Amendment forbids imposing a death sentence on someone for a crime he or she committed before the age of sixteen. The court recognized that because children have less ability to control their impulses, are more easily influenced by others, and have less ability to understand abstract moral and intellectual concepts than adults, they cannot be deemed to act with the degree of culpability that can justify the ultimate penalty of death.

In the 1989 case of *Penry v. Lynaugh*, however, the Supreme Court failed to extend this reasoning to protect offenders with mental retardation. At the time, only two states had legislation expressly excluding persons with mental retardation from the death penalty. Citing "insufficient proof of a national consensus against executing mentally retarded people convicted of capital offenses,"<sup>7</sup> the sharply divided court refused to create a constitutional prohibition on such executions. The court ruled, however, that juries must be able to consider retardation as a possible mitigating factor in sentencing.

In practice, offenders with mental retardation are sentenced to death even when juries consider their mental impairment as a mitigating factor. Prosecutors confronting murders that have inflamed the local community often seek the death penalty regardless of whether the accused has a mental disability. Many prosecutors are genuinely unaware of the nature of mental retardation; others refuse to accept its full significance and its effect on culpability. Sentencers -- in most cases juries -- all too often agree with the prosecutors' insistence that the death penalty is warranted despite evidence of mental retardation.

With this report, Human Rights Watch seeks to support efforts to end the senseless cruelty of executing adults whose minds function like those of children. We do not attempt to offer a comprehensive analysis of the practical and doctrinal issues presented by the criminal prosecution of defendants with mental disabilities, or even of such prosecutions in capital cases. Rather, this report sets forth a few of the compelling arguments against imposing capital punishment on persons with mental retardation. We present some of the attributes of mental retardation, highlight some of the unique vulnerabilities that persons with this disability have when they encounter the U.S. criminal justice system, and tell the stories of some of the people with mental retardation who have been caught up in what the late Supreme Court Justice Harry Blackmun famously termed "the machinery of death."

Some of the people profiled in this report have committed terrible crimes; others were innocent, including some who made false confessions to the police. Although their degree of retardation varies, they all share a childlike inability to fully understand and competently navigate the world. The Supreme Court ruled, in *Penry*, that the nation's "standard of decency" had not evolved sufficiently to warrant a constitutional ban on executing people such as these -- a sad commentary on a nation that holds itself up as a champion of human rights, but perhaps an impetus to make the changes that decency requires.

## **Recommendations**

Until capital punishment is completely abolished in the United States, offenders with mental retardation should be exempted from a sentence of death or execution. All participants in the criminal justice system should use their authority, expertise, and discretion to ensure capital punishment is not levied on persons whose cognitive, social, and moral development has been limited by mental retardation.

### ***To State Legislatures:***

- Adopt legislation prohibiting the imposition of death sentences against or execution of people with mental retardation. Such legislation should ensure that all defendants charged with capital

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<sup>7</sup> *Penry v. Lynaugh*, 492 U.S. 302, 395 (1989).

crimes are psychologically assessed to determine whether they suffer from mental retardation or other mental disabilities; lay out pre-trial procedures for adjudicating disputed claims of mental retardation; and permit capital defendants to raise the issue of mental retardation at any time prior to sentencing and/or execution.

- Strengthen laws and procedures to ensure that all capital defendants have competent, experienced counsel. In particular, take steps to ensure that defendants with mental retardation are represented by counsel with experience in representing people with this disability.
- Create a legislative presumption against the validity of waivers of “Miranda” rights -- the right to remain silent and the right to have attorney present during questioning -- by suspects who have mental retardation and who confess without benefit of the advice of counsel.
- Ensure that indigent defendants with mental retardation have access to free and adequate counsel in all post-conviction proceedings as well as during their initial trials.
- Allocate adequate funds to enable defense teams working with capital defendants to investigate their clients’ mental health status and obtain comprehensive psychological tests.
- To ensure fairness, continually and conscientiously monitor the process for imposing death sentences in all capital cases.

***To Police Investigators:***

- Implement training and sensitivity programs for police officers who may come into contact with people who have mental retardation in the course of their duties. Training should include information on how to identify mental retardation and on special accommodations that should be made to respect the rights of people with this disability.
- Develop, adapt and follow special protocols for police interrogations of people with mental retardation. Ensure that an individual being questioned truly understands his or her Miranda rights and recognize that “yes” or “no” answers may not indicate genuine comprehension of complex issues such as rights and waivers.

***To Prosecutors:***

- Become familiar with the characteristics of persons with mental retardation.
- Participate in the identification of mentally retarded people caught up in the criminal justice system and assist in ensuring respect for their rights.
- Give mental retardation appropriate mitigating weight in plea negotiations and sentencing requests. Refrain from seeking the death penalty for offenders with mental disabilities.
- Use as expert witnesses on the question of a defendant’s mental retardation only professionals specially trained and experienced in the testing and diagnosis of mental retardation.

***To Defense Counsel:***

- Become familiar with the characteristics of persons with mental retardation, and pay special attention to any indication that a client may have this disability.

- Seek funds for and hire experts in the specialized field of mental retardation to evaluate clients and educate the court and jury about the special issues presented by a defendant with mental retardation.
- Ensure that all clients understand the significance and complexity of the criminal justice system by carefully explaining all aspects of the system and testing the client's understanding by asking questions. Should a client exhibit signs of difficulty or incomprehension, seek a comprehensive mental health examination by a qualified professional with expertise in mental retardation.
- When necessary, ensure that juries are made aware that unusual behavior -- such as smiling, sleeping, or staring in the courtroom -- is often a characteristic of people with mental retardation who do not fully comprehend the nature and significance of legal proceedings, and not a sign of callousness or lack of remorse.

***To Judges:***

- Keep an up-to-date list of local agencies able to provide information and assistance when questions arise about defendants with mental retardation.
- Insist on mental health evaluations in all cases where there is any question of the defendant's cognitive abilities, including his or her ability to comprehend the proceedings or to assist in his or her own defense. Assist in ensuring that the funds necessary for such investigation and evaluation are provided to ensure that the defendant's right to an adequate defense is respected.
- Recognize that experts in mental retardation are needed to accurately evaluate and diagnose defendants who may have mental retardation. Ensure that experts for both sides possess the necessary qualifications, skills, and experiences to identify mental retardation.
- Take care to ensure that all capital defendants, especially those with mental retardation, are adequately represented by counsel experienced in capital cases. Appoint counsel promptly and allocate sufficient funds for investigation and mental health evaluation as needed for indigent defendants. Take steps to ensure that appointed counsel are experienced and knowledgeable about defending people with mental retardation.
- Carefully and conscientiously evaluate waivers of rights by defendants who may have mental retardation. Before reaching a finding on the validity of waivers, examine the defendant's ability to comprehend the full range of implications of waiver decisions. Be aware that "yes" and "no" answers may not indicate genuine understanding of complex concepts.
- Consider inherently suspect and undertake a particularly careful inquiry before accepting the validity of a waiver of the right against self-incrimination by a defendant with mental retardation who confessed without the advice of counsel.
- In sentencing, consider alternatives to prison for offenders with mental retardation, such as placement in specialized programs. When incarceration is required, the offender's mental disabilities should be taken into consideration and confinement should be in a safe, habilitative setting.

*To Governors and Other Clemency Authorities:*

- Ensure that no offender with mental retardation is executed. Exercise legal authority to grant clemency and to commute the sentence of any capital defendant with mental retardation who had been sentenced to death.
- Support legislation to exempt persons with mental retardation from capital punishment.

*To Mental Health Professionals Working in the Criminal Justice System:*

- Become familiar with the characteristics of mental retardation. Assist in identifying defendants with mental retardation, and ensuring that they receive access to appropriate services. If necessary, seek assistance from professionals trained in identifying and evaluation claims of retardation.

*To Mental Health Professionals and Experts in Mental Retardation Working outside of the Criminal Justice System:*

- Develop outreach programs to educate criminal justice professionals about mental retardation.

## II. MENTAL RETARDATION: AN OVERVIEW

People with mental retardation in the U.S., currently estimated to number between 6.2 and 7.5 million, have historically been victimized both by their disability and by public prejudice and ignorance.<sup>8</sup> In recent decades there have been significant gains in understanding the nature of the condition, in the provision of education and other services that meet the unique needs of those who are mentally retarded, and in the willingness of the public to accord them the respect and rights they deserve as human beings and citizens. Nevertheless, misunderstanding of the unique nature and implications of mental retardation remains widespread. When a person with mental retardation confronts the criminal justice system, they are uniquely unable to take advantage of legal safeguards and to protect their constitutional rights.

### **What is mental retardation?**

Mental retardation is a lifelong condition of impaired or incomplete mental development. According to the most widely used definition of mental retardation, it is characterized by three criteria: significantly subaverage intellectual functioning; concurrent and related limitations in two or more adaptive skill areas; and manifestation before age eighteen.<sup>9</sup> The first step for diagnosing and classifying a person as having mental retardation is for a qualified person to give one or more standardized intelligence tests and a standardized adaptive skills test on an individual basis.

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<sup>8</sup> See the analysis of the prevalence of retardation by the Arc, at [www.thearc.org/faqs/mrqa.html](http://www.thearc.org/faqs/mrqa.html). The Arc is a national organization representing people with mental retardation and their families.

<sup>9</sup> American Association on Mental Retardation (AAMR), "Definition of Mental Retardation," available at [www.aamr.org/policies/faqmentalretardation.html](http://www.aamr.org/policies/faqmentalretardation.html), visited September 15, 2000. For the most part, statutes prohibiting the execution of persons with mental retardation adopt a version of this AAMR definition. Seven states and the federal government do not specify an I.Q. level in their definition, making this an issue for the court to determine based on expert testimony. Two state statutes say that an I.Q. of 70 or below "shall be presumptive evidence of mental retardation," thus leaving open the possibility that a person whose I.Q. is above 70 may also, through expert testimony, establish his or her mental retardation.



## ***Subaverage intellectual functioning***

Intelligence quotient (I.Q.) tests are designed to measure intellectual functioning. An I.Q. score provides a rough numerical assessment of an individual's present level of mental functioning in comparison with that of others. The vast majority of people in the United States have I.Q.s between 80 and 120, with an I.Q. of 100 considered average. To be diagnosed as having mental retardation, a person must have an I.Q. below 70-75, i.e. *significantly* below average. If a person scores below 70 on a properly administered and scored I.Q. test, he or she is in the bottom 2 percent of the American population<sup>10</sup> and meets the first condition necessary to be defined as having mental retardation.

Although all persons with mental retardation have significantly impaired mental development, their intellectual level can vary considerably. An estimated 89 percent of all people with retardation have I.Q.s in the 51-70 range. An I.Q. in the 60 to 70 range is approximately the scholastic equivalent to the third grade.<sup>11</sup>

For the lay person or non-specialist, the significance of a low I.Q. is often best communicated through the imprecise but nonetheless descriptive reference to "mental age." When a person is said to have a mental age of six, this means he or she received the same number of correct responses on a standardized I.Q. test as the average six year old child.

- Earl Washington, who confessed to a murder he did not commit, has an I.Q. of 69 and a mental age of ten. That is, he cannot perform intellectual tasks beyond the capacity of a typical ten-year-old.
- Jerome Holloway, whose death sentence was ultimately reduced in the face of overwhelming evidence that he had been unable to comprehend the proceedings against him, has an I.Q. of 49 and a mental age of seven.<sup>12</sup>
- Luis Mata, executed in 1996, had an I.Q. of 68-70. According to a psychologist who evaluated Mata, "his ability to express himself and his ability to recognize the meaning of common words were at the level of a nine- to ten-year-old child...He lacked basic understanding of familiar processes. He did not know the function of the stomach, where the sun sets, nor why stamps are needed on letters...Arithmetic abilities were limited to addition and subtraction with the help of concrete aids such as fingers."<sup>13</sup>

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<sup>10</sup> The Arc, "When People with Mental Retardation go to Court," available at [www.the.arc.org/court/html](http://www.the.arc.org/court/html), visited September 10, 2000. (The Arc was previously called the Association of Retarded Citizens.) See also Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation* (Lanham, Md.: University Press of America, 1993), p. 14.

<sup>11</sup> See George S. Baroff, *Mental Retardation: Nature, Cause and Management*, 3rd ed. (Philadelphia, Pa.: Brunner-Routledge, 1999).

<sup>12</sup> The intellectual capacity of children was historically the benchmark for assessing the extent of retardation. In 1910, the American Association on Mental Deficiency identified the three "levels of impairment" characterizing the "feebleminded": there were "*idiots*," people "whose development is arrested at the level of a 2 year old"; "*imbeciles*," people "whose development is equivalent to that of a 2 to 7 year old at maturity"; and "*morons*," people "whose mental development is equivalent to that of a 7 to 12 year old at maturity." Fred J. Biasini, et al., "Mental Retardation: A Symptom And A Syndrome," in S. Netherton, D. Holmes, & C. E. Walker, eds., *Comprehensive Textbook of Child and Adolescent Disorders* (New York: Oxford University Press, 2000); also available at [www.uab.edu/cogdev/mentreta.htm](http://www.uab.edu/cogdev/mentreta.htm). The terminology entered common discourse as epithets reflecting the country's shameful history of prejudice and mistreatment of people with mental retardation. The punitive, exclusionary, and racist historical manipulation of the concept of "mental retardation" are addressed in Robert Perske, *Deadly Innocence?* (Nashville: Abingdon Press, 1995); Stephen Jay Gould, *The Mismeasure of Man* (New York: WW Norton, 1981); and J. David Smith, *Minds Made Feeble* (Austin: Pro-Ed, Inc., 1985).

<sup>13</sup> Patricia Perez-Arce, Ph.D., "Neuropsychological evaluation of Luis Mata," January 27, 1992 (on file at Human Rights Watch).

The threshold I.Q. level for a diagnosis of mental retardation has been progressively lowered over the years, in part because of awareness of the damaging social prejudice suffered by those labeled “retarded.” In 1959, the American Association on Mental Deficiency set 85 as the I.Q. below which a person was considered to be retarded.<sup>14</sup> In 1992, the renamed American Association on Mental Retardation lowered the mental retardation “ceiling” to an I.Q. of 70-75,<sup>15</sup> but many mental health specialists argue that people with I.Q.s of up to 80 may also have mental retardation.<sup>16</sup> Flexibility in the I.Q. standard is important because tests given at different times may show slight variations due to differences in the tests and because of testing error -- the standard error measurement on I.Q. tests is generally three to five points.

### ***Limitations in adaptive skills***

Mental retardation entails significant limitations in two or more of the basic skill areas necessary to cope with the requirements of everyday life, e.g. communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Although there are significant variations among those with mental retardation, in terms of their ability to function and their skill levels, all have significant limitations in their “effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group.”<sup>17</sup> For instance, an adult with mental retardation may have trouble driving a car, following directions, participating in hobbies or work of any complexity, or behaving in socially appropriate ways. He or she may have trouble sitting or standing still, or may smile constantly and inappropriately. Limitations in everyday coping skills may be more or less severe, ranging from individuals who can live alone with intermittent support, to individuals who require extensive hands-on assistance and guidance, to individuals who require constant supervision and care. For most people with mental retardation, limited adaptive skills make ordinary life extremely difficult unless a caring family or social support system exists to provide assistance and structure.

Offenders with mental retardation who have been convicted of committing capital crimes typically grew up poor and without networks of special support and services -- often without even a supportive, loving family. They functioned as best they could without professional assistance, often required to fend for themselves while still teenagers. If they were able to work, it was at basic menial tasks.

- Billy Dwayne White, executed in Texas in 1992, had an I.Q. of 66. After being hired as a kitchen dishwasher he was fired when he could not learn to operate the dishwasher. Family members reported that “if one told Billy exactly what to do and took him to the place where it was to be done [he] could do some work. If he were left on his own and not specifically guided, he could not do it.”<sup>18</sup>

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<sup>14</sup> See Biasini, “Mental Retardation.” See also R.C. Sheerenberger, *A History of Mental Retardation* (Baltimore: Brookes Publishing Co., 1983).

<sup>15</sup> American Association on Mental Retardation, *Mental retardation: Definition, classification, and systems of supports* (Washington, D.C.: American Association on Mental Retardation, 1992).

<sup>16</sup> With the upper ceiling on mental retardation reduced from an I.Q. of 85 to an I.Q. of 70, far fewer Americans are today diagnosed as “mentally retarded” than before. Although the lower I.Q. ceiling for mental retardation was agreed upon in part to avoid applying stigmatizing labels to so many people whose intelligence was below average, the changed I.Q. ceiling ironically had the effect of cutting off from social services such as special education many people who would have otherwise benefited from the extra support. Scholars have emphasized that because of the possibility of testing error, a person with an I.Q. of up to 75 should be considered “retarded” if the diagnosis is necessary to ensure access to special education or other assistance. See, e.g., H. J. Grossman, ed., *Manual on Terminology in Mental Retardation* (Washington, D. C.: American Association on Mental Deficiency, 1977).

<sup>17</sup> H.J. Grossman, ed. *Classification in Mental Retardation* (Washington D.C.: AAMR, 1983), p. 11.

<sup>18</sup> In Re Billy Dwayne White, Petition for Clemency and Request for Reprieve, April 22, p. 6 (on file at Human Rights Watch).

- Johnny Paul Penry, on death row in Texas, with an I.Q. measured variously between 50 and the low sixties, at one point worked greasing the bearings of cart wheels. “I was good at this,” he told an interviewer proudly.<sup>19</sup>

### ***Manifestation before the age of eighteen***

Mental retardation is present from childhood. It can be caused by any condition which impairs development of the brain before, during, or after birth. The causes are numerous: hereditary factors; genetic abnormalities (e.g. Down’s syndrome); poor prenatal care; infections during pregnancy; abnormal delivery; illness during infancy; toxic substances (e.g. consumption of alcohol by the pregnant mother; exposure of the child to lead, mercury or other environmental toxins); physical abuse; and malnutrition, among others. Regardless of the cause, part of the definition of mental retardation is that it manifests itself during an individual’s developmental period, usually deemed to be birth through age eighteen. Many psychiatrists argue that the age before which signs of retardation must become manifest should be raised from eighteen to twenty-two, to reflect the difficulties in obtaining accurate age records for many people with this disability and the differing rates at which people develop.<sup>20</sup>

An ordinary adult cannot suddenly “become” mentally retarded. An adult may, for reasons related to accident or illness, suffer a catastrophic loss in intellectual functioning and adaptive skills, but this would not make him or her “mentally retarded,” since by definition mental retardation starts during childhood. One implication of this is that mental retardation is virtually impossible for an adult to fake: when evaluating whether an adult is mentally retarded, testers look not only at I.Q. test results, but also at school reports, childhood test records, and other evidence that would show whether his or her intellectual and adaptive problems developed during childhood.

Early diagnosis can help the person with mental retardation obtain access to appropriate special education, training, clinical programs, and social services during important developmental years -- as well as through life. With help from family, social workers, teachers, and friends, many mentally retarded people succeed in simple jobs, maintain their own households, marry, and give birth to children of normal intelligence.<sup>21</sup> But, although support and services can improve the life functioning and opportunities for a person with retardation, they cannot cure the condition. There is no “cure” for mental retardation.

### **Characteristics and Significance of Mental Retardation**

Although mental retardation of any degree has profound implications for a person’s cognitive and social development, it is a condition which in many cases is not readily apparent. While some of the mentally retarded, such as those whose retardation is caused by Down’s syndrome or fetal alcohol syndrome, have characteristically distinctive facial features, most cannot be identified by their physical appearance alone. Unless their cognitive impairment is unusually severe (e.g. an I.Q. below 40), persons with mental retardation may be thought of as “slow” but the full extent of their impairment is often not readily appreciated, particularly by people who have limited contact with or knowledge of them, including police, prosecutors, judges, and other participants in the criminal justice system. Many capital offenders with mental retardation did not have their condition diagnosed until trial or during post-conviction proceedings.

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<sup>19</sup> Human Rights Watch interview with Johnny Paul Penry at Ellis Unit, Huntsville, Tex., May 17, 1999.

<sup>20</sup> While most states that prohibit the execution of the mentally retarded use eighteen as the outside age, two states, Maryland and Indiana, set the age at twenty-two.

<sup>21</sup> During the early years of the twentieth century, people with mental retardation suffered from the widespread but erroneous public belief that they were utterly incapable of caring for themselves, potentially dangerous, and “unfit” to reproduce. People with this disability were forced into state institutions and often coercively sterilized -- a practice that was actually upheld by the Supreme Court in *Buck v. Bell*, 274 US 200 (1927).

A person with mental retardation, according to one expert, “is always the least smart person in any group. This leads to fear, dependence and an experience of terrible stigma and devaluation.”<sup>22</sup> Since mentally retarded people are often ashamed of their own retardation, they may go to great lengths to hide their retardation, fooling those with no expertise in the subject. They may wrap themselves in a “cloak of competence,” hiding their disability even from those who want to help them, including their lawyers.<sup>23</sup> Overworked or incompetent lawyers may overlook evidence of retardation and fail to request a psychological evaluation or raise the issue during trial. At times, even competent lawyers who are anxious to help their clients may fail to identify their clients’ retardation or may be unable to access funds for a psychological evaluation.

- Oliver Cruz, who was executed in Texas on August 9, 2000, had an I.Q. that was measured variously at 64 and 76. Cruz nonetheless insisted to reporters that, although he was perhaps “slow in reading, slow in learning,” he was not mentally retarded.<sup>24</sup>
- Mitigation specialist Scharlette Holdman recalled a client who so successfully hid his retardation from his attorneys that he allowed them to sign him up for college-level calculus classes, which he could not comprehend. He had gone through much of his schooling allowing his younger sister to complete his homework for him. When he was given papers to read in connection to his case, he would carefully stare at them. If he was asked a substantive question, he usually responded, “I don’t recall.” Only when experts in retardation evaluated him and investigators reviewed his school records and spoke to his family did lawyers discover he had mental retardation and had been considered “slow” since his early childhood.<sup>25</sup>
- Another capital defendant “hid his mental retardation for most of his life by working at a very repetitive job as a switcher on the railroad. He lied about finishing high school. He was actually in special education classes and did not finish the sixth grade. He was drafted into the army and discharged because of his mental retardation. He lied about his service record. He often made things up so that people would not suspect mental retardation.”<sup>26</sup>

The fact that many people with mental retardation can and do live relatively “normal” lives with their families or in the community, coupled with the fact that most of them do not look different from people with average intellectual capabilities, can make it difficult for the public to appreciate the significance of their condition. But, as the late U.S. Supreme Court Justice Brennan noted, “‘Every individual who has mental retardation’ -- irrespective of his or her precise capacities or experiences -- ‘has a substantial disability in cognitive ability and adaptive behavior.’”<sup>27</sup> Like all human beings, people with mental retardation deserve to be treated with dignity and respect, and deserve the chance to live lives that are as normal as possible -- but they also require special acknowledgment of their vulnerabilities and their mental incapacities.

A person with mental retardation will have limitations of a greater or lesser extent in every aspect of cognitive functioning. He or she will have limited abilities to learn (including reading, writing, and arithmetic) and to reason, plan, understand, judge, and discriminate. Mental retardation truncates the capacity to think about intended actions, to consider their possible consequences, and to exercise restraint. One expert has summarized the attributes of mental retardation as follows:

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<sup>22</sup> Human Rights Watch telephone interview with Dr. Ruth Luckasson, Regents Professor of Educational Specialties, University of New Mexico at Albuquerque, N.Mex., June 2, 1999.

<sup>23</sup> For a thorough discussion of the ways in which people with mental retardation struggle to mask their disability, see Robert B. Edgerton, *The Cloak of Competence* (Berkeley, Calif.: University of California Press, 1993).

<sup>24</sup> Raymond Bonner and Sarah Rimer, “Executing the Mentally Retarded Even as Laws Begin to Shift,” *New York Times*, August 7, 2000.

<sup>25</sup> Human Rights Watch telephone interview with Scharlette Holdman, Executive Director, Center of Capital Assistance, San Francisco, Calif., May 31, 1999.

<sup>26</sup> Human Rights Watch telephone interview with Sean O’Brien, Executive Director, Public Interest Litigation Clinic, University of Missouri, Kansas City, Mo., May 13, 1999. Name of defendant withheld at request of attorney.

<sup>27</sup> *Penry v. Lynaugh*, 492 U.S. 302, 345 (Brennan, J. dissenting), quoting from Brief for the AAMR as Amici Curiae at p. 5.

Almost uniformly, individuals with mental retardation have grave difficulties in language and communication. They have problems with attention, memory, intellectual rigidity, and in moral development or moral understanding. They are susceptible to suggestion and readily acquiesce to other adults or authority figures... People with mental retardation have limited knowledge because their impaired intelligence has prevented them from learning very much. They also have grave problems in logic, foresight, planning, strategic thinking, and understanding consequences.<sup>28</sup>

Many of these limitations, of course, characterize children. But while children will outgrow these limitations as their brains develop and mature, people with mental retardation will not.

In limiting a person's cognitive development and ability to learn, mental retardation also limits the ability to understand abstract concepts, including moral concepts. While most defendants with mental retardation who have committed a crime know they have done something wrong, they often cannot explain why the act was wrong.

- At the trial of a man with mental retardation convicted of raping and murdering an 87-year old woman, a clinical psychologist testified that while the defendant could acknowledge that rape was "wrong," he was nonetheless not able to offer any explanation for why. "Pressed for an answer, [the defendant] admitted not receiving 'permission' for the rape... Pressed further, in desperation, he blurted out, 'Maybe it's against her religion!' The jury gasped at such an explanation."<sup>29</sup>

The inability to comprehend abstract concepts may include the inability to fully understand the meaning of "death" or "murder".

- Morris Mason, whose I.Q. was 62-66, was executed in 1985 in Virginia after being convicted of rape and murder. Before his execution, Mason asked one of his legal advisors for advice on what to wear to his funeral.<sup>30</sup>
- Robert Wayne Sawyer, who had mental retardation, was convicted of beating, raping and burning alive a young woman in 1979. At his clemency hearing, the chair of the Louisiana pardons board asked Sawyer if he knew what murder was. Sawyer responded, "That's when the breath leaves your body." In response to a subsequent question he clarified that "it's when you stab someone and the breath leaves the body." When he was then asked what happens if someone is shot, Sawyer answered, "I just don't know."<sup>31</sup>

Since they often face abuse, taunts, and rejection because of their low intelligence, people with mental retardation can be desperate for approval and friendship. Eager to be accepted and eager to please, people with mental retardation are characteristically highly suggestible.

- Earl Washington, whose mental retardation was diagnosed when he was a child, confessed during long police interrogations to a murder that he did not commit. Washington was so suggestible and eager to please, according to a former employer, that "you could get [him] to confess that he

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<sup>28</sup> Ruth Luckasson, "The Death Penalty and the Mentally Retarded," 22 *American Journal of Criminal Law* 276 (1994).

<sup>29</sup> George S. Baroff, "Capital Cases: Why Mental Retardation is 'Mitigating,'" *The Champion* (National Association of Criminal Defense Lawyers, August, 1998), available at <http://209.70.38.3/Champion/articles/98aug02.htm>, visited January 20, 2001.

<sup>30</sup> Robert Perske, *Unequal Justice? What Can Happen When Persons with Retardation or Other Developmental Disabilities Encounter the Criminal Justice System* (Nashville: Abingdon Press, 1991), pp. 100-101.

<sup>31</sup> Human Rights Watch telephone interview with Nicholas Trenticosta, post-conviction attorney for Sawyer, January 24, 2001. Sawyer was executed in 1993.

walked on the moon.” In an effort to show the invalidity of Washington’s confession because of his mental deficiencies, his trial lawyer would “pick a day, any day, and tell Washington that day was [his] birth date...after prodding and cajoling, Washington would accept the false date.”<sup>32</sup>

- As one psychiatrist testified about a capital defendant with an I.Q. of between 35 to 45: “[People with mental retardation try] to go along with people that they suspect are in authority. For example, I asked [the defendant] where we were when I saw him, and he obviously didn’t know, so I asked him if we were in Atlanta and he said ‘Yes, we are in Atlanta.’ In fact, we were in Birmingham, Alabama. I could have said New York and he would have said ‘Sure, New York’....”<sup>33</sup>

Low intelligence and limited adaptive skills also mean that people with mental retardation often miss social “cues” that other adults understand. Their inappropriate social responses can be misinterpreted by people who do not know they have mental retardation or who do not understand the nature of retardation. They may act in ways that seem suspicious, even when they have done nothing wrong. When questioned by police or other authority figures, they often smile inappropriately, fail to remain still when ordered to do so, or act agitated and furtive when they should be calm and polite. Others may fall asleep at the wrong moment.

- Herbert Welcome was convicted of murdering his aunt and her boyfriend in 1981 in Louisiana. Welcome has mental retardation and, according to psychiatric testimony presented at his trial, has a mental age of eight. He smiled incessantly during his capital murder trial, an almost involuntary defense mechanism developed in response to a lifetime of taunts. As his defense attorney noted, “Many people with retardation smile a lot...They are anxious for approval, and have learned that smiling is one way to get [it]. But they don’t have the judgment to know when to smile.”<sup>34</sup> The prosecutor argued that Welcome’s smiles showed that he lacked remorse for his crimes. He was sentenced to death and remains today on death row.
- Both Barry Lee Fairchild, convicted of murder in Arkansas, and Billy Dwayne White, convicted of murder in Texas, slept during their capital trials -- eloquent evidence of the failure of these two men with mental retardation to appreciate the significance of the criminal proceedings against them. Trial counsel were not aware that they had mental retardation. But their tendency to sleep peacefully during their trials helped alert post-conviction lawyers to their mental disability. In the case of White, who snored loudly during the penalty phase of his trial, the prosecutor argued that his conduct indicated his lack of remorse for his crime and his lack of respect for the criminal justice system. Both Fairchild and White were sentenced to death and executed.<sup>35</sup>

## Mental Retardation and Crime

The vast majority of people with mental retardation never break the law.<sup>36</sup> Nevertheless, mentally retarded people may be disproportionately represented in America’s prisons. Although people with mental retardation constitute somewhere between 2.5 and 3 percent of the U.S. population, experts estimate they may

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<sup>32</sup> Tim McGlone, Matthew Dolan, and Bill Sizemore, “A Near-Fatal Injustice,” *Virginian-Pilot*, January 22, 2001.

<sup>33</sup> *Hines. V. State*, 384 So. 2d 1171, 1175 (Ala. Crim. App. 1980).

<sup>34</sup> Perske, *Unequal Justice*, p. 19. Welcome is also mentally ill. His mental condition deteriorated so severely after he was put on death row that the prosecutor agreed in a hearing before the Louisiana Pardons Board in 1987 that he should not be executed. Human Rights Watch telephone interview with Nicholas Trenticosta, post-conviction counsel for Herbert Welcome, February 21, 2001.

<sup>35</sup> Human Rights Watch interview with Richard Burr and Mandy Welch, counsel for Fairchild and White, Houston, Tex., May 18, 1999. Fairchild was executed in 1995, White in 1992.

<sup>36</sup> See James W. Ellis and Ruth Luckasson, “Mentally Retarded Criminal Defendants,” 53 *George Washington Law Review* 423, 426 (1985).

constitute between 2 and 10 percent of the prison population.<sup>37</sup> The disproportionate number of persons with mental retardation in the incarcerated population most likely reflects the fact that people with this impairment who break the law are more likely to be caught, more likely to confess and be convicted, and less likely to be paroled. It may also be that some of the people with mental retardation who are serving prison sentences are innocent, but they confessed to crimes they did not commit because of their characteristic suggestibility and desire to please authority figures. See Section IV below.

As with people of normal intelligence, many factors can prompt people with mental retardation to commit crimes, including unique personal experiences, poverty, environmental influences and individual characteristics. Attributes common to mental retardation may, in particular cases, also contribute to criminal behavior. The very vulnerabilities that cause problems for people with mental retardation in the most routine daily interactions can, at times, lead to tragic violence.

Many people with mental retardation are picked upon, victimized and humiliated because of their disability. The desire for approval and acceptance and the need for protection can lead a person with mental retardation to do whatever others tell him. People with mental retardation can fall prey when people with greater intelligence decide to take advantage of them, and they become the unwitting tools of others.<sup>38</sup> Many of the cases in which people with mental retardation have committed murder involved other participants -- who did not have mental retardation -- and/or occurred in the context of crimes, often robberies, that were planned or instigated by other people. As one expert in mental retardation has noted, "Most people with mental retardation don't act alone. They are usually dependent. They are never the ringleader or the leader of a gang."<sup>39</sup>

- "Joe,"<sup>40</sup> a mentally retarded man, admired tough-talking local drug dealers and sought to befriend them. One day his drug dealer "friends" gave Joe a gun and instructed him to go into a store and take money from the clerk. They told him, however, "Don't shoot the guy unless you have to." Joe hid for a while, then entered the store, but he forgot his instructions. "He panicked and couldn't remember the plan. He shot the guy and forgot to rob the store."
- Billy Dwayne White, a teenager with mental retardation, allied himself with older men in the neighborhood, one of whom testified: "When Billy started hanging around us he was real scared and timid. We told him that he would have to change. We taught him how to steal. We would get him to do things that were wrong by telling him that he was a coward if he didn't, and that he could only be in our gang if he showed us that he had courage...we could persuade him to do these things because he was easily misled."<sup>41</sup>

People with mental retardation may also engage in criminal behavior because of their characteristically poor impulse control, difficulty with long-term thinking, and difficulty handling stressful and emotionally fraught situations. They may not be able to predict the consequences of their acts or resist a strong emotional response.<sup>42</sup> The homicides committed by people with mental retardation acting alone are almost without exception unplanned, spur of the moment acts of violence in the context of panic, fear, or anger, often committed when another crime, such as a robbery, went wrong. For example, William Smith, I.Q. 65, tried to take money from "old Dan," a

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<sup>37</sup> See, Leigh Ann Davis, "People with Mental Retardation in the Criminal Justice System," available at [www.thearc.org/faqs/crimqa.html](http://www.thearc.org/faqs/crimqa.html), visited September 2, 2000.

<sup>38</sup> According to psychologist and mental retardation expert Dr. Timothy Dering, people with mental retardation are "easy prey for designing others." Human Rights Watch telephone interview with Timothy Dering, June 4, 1999.

<sup>39</sup> Human Rights Watch interview with Timothy Dering. The co-defendants of a person with mental retardation are usually able to better protect their interests in the criminal justice system. According to Dering, "Many times a co-defendant [with normal intelligence] will just roll over. A guy with mental retardation will be left holding the bag. The bright guy cuts a deal because he knows how to get out of it."

<sup>40</sup> Name changed to protect his identity.

<sup>41</sup> Appendix J, In Re Billy Dwayne White, Petition for Clemency and Request for Reprieve, before the Governor of Texas and the Texas Board of Pardons and Paroles, April 16, 1992 (on file at Human Rights Watch).

<sup>42</sup> See Luckasson, "The Death Penalty and the Mentally Retarded".

friendly elderly storekeeper he had known all his life. When Dan resisted, Smith panicked and lashed out, killing him.<sup>43</sup>

Low intellectual skills and limited planning capacities mean that people who have mental retardation are more likely than people of normal intelligence to get caught if they commit crimes. As a result, they make good “fall guys” for more sophisticated criminals. A suspect with mental retardation is also less likely to know how to avoid incriminating himself, hire a lawyer and negotiate a plea.

### Multiple Vulnerabilities

Many, if not most, of the people with mental retardation convicted of capital murder are doubly and triply disadvantaged. In general, America’s prison population is made up disproportionately of poor people, minorities, the mentally ill, and those who were abused as children. Not surprisingly, the mentally retarded people who become enmeshed in the criminal justice system usually share one or more of these characteristics: many of them come from poor families, suffered from severe abuse as children, and/or face mental illness in addition to their retardation.<sup>44</sup>

A history of severe childhood abuse is particularly common among defendants with mental retardation convicted of capital murder. While the relationship between abuse and adult behavior is complex, “strong evidence exists that a person who was abused as a child is at risk of suffering long-term effects that may contribute to his violent behavior as an adult,” particularly if the abuse was severe physical abuse that caused serious injury to the child.<sup>45</sup> The long-term negative effects of childhood abuse may be even greater for people whose cognitive abilities are impaired and whose ability to navigate in the world is already seriously compromised by mental retardation.<sup>46</sup>

- Luis Mata was executed in Arizona in 1996, convicted of rape and murder. Mata suffered organic brain damage from multiple medical traumas and had an I.Q. tested variously between 63 and 70. Mata’s alcoholic father beat all of his sixteen children, but he picked primarily on Luis, subjecting him to constant physical abuse -- kicking him, punching him, and beating him with electrical cords. When Luis Mata was six, he fell off a truck, badly fracturing his skull, but his family was too poor to obtain medical treatment for him. This and other medical traumas may have contributed to his neurological deficits.<sup>47</sup>
- Freddie Lee Hall, with an I.Q. of 60, is on death row in Florida, convicted of killing a young pregnant woman. Hall was one of seventeen children in an impoverished family. As a child, he was “tortured by his mother, sometimes stuffed in a sack and swung over a fire, or tied to the rafters and beaten.” His mother even encouraged neighbors to beat her son, and she buried him in the ground as a “cure” for his asthma.<sup>48</sup>

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<sup>43</sup> Reed, *Penry Penalty*, p. 17. On appeal, Smith’s confession and waiver of Miranda rights were ruled invalid because of his mental retardation.

<sup>44</sup> A high proportion of death row inmates have extensive histories of poverty, abuse, and mental disorders. “The nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical ‘profile.’” Craig Haney, “The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 *Santa Clara Law Review* 547, 580 (1995).

<sup>45</sup> Phyllis L. Crocker, “Childhood Abuse and Adult Murder: Implications for the Death Penalty,” 77 *North Carolina Law Review* 1143, 1158 (1999).

<sup>46</sup> “The degree of risk and the severity of the violent behavior are exacerbated when the abused child, as an adult, has other psychological, neurological, and cognitive impairments.” *Ibid.*, p. 1160.

<sup>47</sup> Patricia Peres-Arce, Ph.D., “Neuropsychological Evaluation of Luis Mata,” January 27, 1992; In Re the Application of Luis M. Mata, Application for Executive Clemency, submitted to the Arizona Board of Executive Clemency (on file at Human Rights Watch).

<sup>48</sup> Ramsey Campbell, “Lawyers Cite Horrors On 2 Sides In Hall Resentencing,” *Orlando Sentinel Tribune*, December 13, 1990. More than twenty years ago, Freddie Lee Hall and a partner, Mack Ruffin Jr., killed a young woman, and then killed a



- Robert Anthony Carter, who had mental retardation, was convicted of a murder committed when he was seventeen and was executed in 1998.<sup>49</sup> One of six children, Carter was abused by both his mother and stepfather, who whipped and beat him with belts and cords. Carter's siblings would be forced to hold him down while his mother beat him. At other times, his mother would wait until Carter was asleep and then begin to whip him. He also suffered from several serious head injuries as a child – including one in which he was hit so hard with a baseball bat on the head that the bat broke.<sup>50</sup>

Many capital defendants with mental retardation also suffer from mental illness. Although the two conditions are often confused, they are different disorders. Mental illness almost always includes disturbance of some sort in emotional life; intellectual functioning may be intact, except where thinking breaks with reality (as in hallucinations). A person who is mentally ill, e.g. who is bipolar or suffers from schizophrenia, can have a very high I.Q., while a mentally retarded person always has a low I.Q. A person who is mentally ill may improve or be cured with therapy or medication, but mental retardation is a permanent state. Finally, mental illness may develop during any stage of life, while mental retardation is manifest by the age of eighteen. The percentage of mentally retarded people who are also mentally ill is not known with any certainty; estimates vary from 10 percent to 40 percent.<sup>51</sup> Persons who suffer from both mental illness and mental retardation are particularly disadvantaged in dealing with the criminal justice system because each condition can compound the effects of the other.

- Nollie Lee Martin, had an I.Q. of 59 and was further mentally impaired as a result of several serious head injuries he had received in childhood. As a child he was physically and sexually abused and came from a family with a history of schizophrenia. His medical history included psychosis, suicidal depression, paranoid delusions, and self-mutilation. After being convicted in 1978 of kidnapping, robbery, and murder in Florida, Martin spent more than thirteen years on death row mostly incoherent and rocking back and forth on the floor of his cell. He required constant medication for his mental illness and hallucinations. He beat his head and fists against the cell wall and would mutilate himself. He was executed in 1992.<sup>52</sup>
- Emile Duhamel was convicted of the aggravated sexual assault and murder of a nine-year-old girl in 1984. He had an I.Q. of 56 and organic brain disease and suffered as well from paranoid schizophrenia and dementia. After a decade of legal proceedings over his competency for execution, Duhamel died in his Texas death row cell in 1998.<sup>53</sup>

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police officer while fleeing from the crime. Ruffin was sentenced to life imprisonment, even though he may have been the one who pulled the trigger -- but Hall, despite his retardation, was given the death sentence in 1978. When his sentence was handed down, his three public defenders wept openly in court. See Peter Wallsten, "Does the State of Florida really need to execute this man?" *St. Petersburg Times*, December 5, 1999; Bill Bond, "Court Performances Can't Be Dismissed," *Orlando Sentinel Tribune*, December 19, 1990; see also Frank Stansfield, "20 Years Of Waiting; Passing Time Takes Its Toll On Murder's Many Victims," *Orlando Sentinel Tribune*, March 22, 1998.

<sup>49</sup> Carter's execution for a crime committed when he was seventeen violated international prohibitions against the execution of youthful offenders. See Article 6 of the International Covenant on Civil and Political Rights.

<sup>50</sup> Affidavit of Dorothy Otnow Lewis, M.D., May 23, 1985 (on file at Human Rights Watch).

<sup>51</sup> See generally Biasini, "A Symptom And a Syndrome."

<sup>52</sup> Information about Nollie Martin was drawn from Chris Lavin, "Videotape of doomed inmate is released," *St. Petersburg Times*, April 29, 1992 and from Amnesty International's "United States of America: Open letter to the President on the death penalty," AI index AMR 51/01/94.

<sup>53</sup> Human Rights Watch interview with Gregory Wiercioch, counsel for Emile Duhamel, Texas Defenders Services, Houston, Tex., May 18, 1999.

### III. CAPITAL PUNISHMENT AND MENTAL RETARDATION: LEGAL STANDARDS

#### International Human Rights Law

The cornerstone of human rights is respect for the inherent dignity of all human beings and the inviolability of the human person.<sup>54</sup> These principles cannot be squared with the death penalty, a form of punishment unique in its cruelty and finality, and a punishment inevitably and universally plagued with arbitrariness, prejudice, and error.

Recognition that the death penalty violates basic human rights has fueled a growing movement to abolish capital punishment around the world. Members of the European Union, for example, are united in their opposition to the death penalty in all circumstances, considering it an “inhuman, medieval form of punishment and as unworthy of modern societies.”<sup>55</sup> Out of the world’s nearly 200 countries, 108 have rejected judicial executions in law or practice.<sup>56</sup> Less than thirty carry out executions in any given year. Although the International Covenant on Civil and Political Rights (ICCPR) does not outlaw capital punishment outright, it specifically prohibits cruel and inhuman punishment and arbitrary executions, and limits capital punishment to “the most serious crimes.” Forty-one countries have signed a Second Optional Protocol to the ICCPR by which they agree not to execute anyone and to take the necessary steps to abolish the death penalty.<sup>57</sup>

The practice of executing people of diminished culpability -- including people with mental retardation -- is particularly abhorrent. In recent years, the U.N. special rapporteur on extrajudicial, summary or arbitrary executions has received reports of the execution of people with mental retardation in only three countries -- Japan, Kyrgyzstan, and the United States.<sup>58</sup>

Authoritative interpretations and applications of the ICCPR have established that respect for basic human rights precludes judicial killing of offenders with mental retardation. Thus, for example, a 1989 United Nations Economic and Social Council (ECOSOC) resolution recommended “eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence.”<sup>59</sup> The U.N. Commission on Human Rights adopted resolutions in 1999 and 2000 urging states that retain the death penalty not to impose it “on a person suffering from any form of mental disorder,” a term that includes both the mentally ill and the mentally retarded.<sup>60</sup>

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<sup>54</sup> Universal Declaration of Human Rights, adopted by U.N. General Assembly Resolution 217A(III), December 10, 1948.

<sup>55</sup> See, e.g., Statement of Rt. Hon. Chris Patten, delivered to European Parliament, October 25, 2000; Declaration by President, European Union, February 8, 2000; and other European Union statements on the death penalty available on the European Union website, [www.european.eu.int](http://www.european.eu.int).

<sup>56</sup> See Death Penalty Information Center website for updated information on the death penalty internationally, [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

<sup>57</sup> U.N. General Assembly, “Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,” G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, A/44/49 (1989), entered into force July 11, 1991.

<sup>58</sup> U.N. Commission on Human Rights, “Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur,” E/CN.4/1997/60, para. 89 (1996); U.N. Commission on Human Rights, “Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur,” E/CN.4/1995/61, para. 380 (1994); U.N. Commission on Crime Prevention and Criminal Justice, “Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty: Report of the Secretary-General,” E/CN.15/1996/19, para. 74, (1996).

<sup>59</sup> U.N. Economic and Social Council resolution 1989/64, “Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty,” ESC/RES/1989/64, adopted May 1989.

<sup>60</sup> U.N. Commission on Human Rights Resolution, “Question of the Death Penalty,” E/CN.4/RES/1999/61, adopted April 28, 1999; U.N. Commission on Human Rights Resolution, “The Question of the death penalty,” E/CN.4/RES/2000/65, adopted April 27, 2000.

The U.N. special rapporteur on extrajudicial, summary, or arbitrary executions has repeatedly criticized the practice of imposing the death penalty on mentally retarded offenders. In 1998, for example, he criticized the United States for executing people with mental retardation in contravention of relevant international standards.<sup>61</sup> In his report, he stated:

Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation, and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility.<sup>62</sup>

The special rapporteur's most recent report urged governments that continue to enforce death penalties "to take immediate steps to bring their domestic legislation and legal practice into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons."<sup>63</sup>

In 1992, the United States became a party to the ICCPR. It entered a reservation to the treaty, however, asserting its authority to use capital punishment to the extent permitted under the U.S. Constitution. The U.S. did agree, however, that it would not execute pregnant women, as prohibited by the ICCPR.

### United States Law

U.S. constitutional law permits the execution of offenders with mental retardation. In the 1989 case of *Penry v. Lynaugh*, the U.S. Supreme Court reviewed the constitutionality of the death sentence of Johnny Paul Penry, a man with mental retardation who was convicted of raping, beating, and fatally stabbing a young woman in Texas. A sharply divided court decided that the execution of persons with mental retardation did not constitute cruel and unusual punishment as prohibited by the Eighth Amendment to the U.S. Constitution.<sup>64</sup> The court reversed Penry's death sentence, however, and ordered a new trial because the judge's instructions to the jury had not permitted it to "consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty."<sup>65</sup>

In deciding on the constitutionality of applying the death penalty to persons with mental retardation, Supreme Court Justice Sandra Day O'Connor, writing for the majority, noted that the Eighth Amendment prohibits punishments that were prohibited historically as well as those that run counter to "evolving standards of decency that mark the progress of a maturing society."<sup>66</sup> Looking primarily to the "objective evidence" of federal and state legislation to ascertain how the nation viewed the execution of persons with mental retardation, Justice O'Connor concluded that "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 states that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus" against such executions.<sup>67</sup> Justice O'Connor also ruled there was insufficient evidence that all persons with mental retardation lack the capacity to act with the degree of culpability associated with the death penalty.<sup>68</sup>

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<sup>61</sup> U.N. Commission on Human Rights, "Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur," E/CN.4/1998/68/Add.3, para. 145 (1998).

<sup>62</sup> *Ibid.*, para. 58.

<sup>63</sup> U.N. Commission on Human Rights, "Extrajudicial, summary or arbitrary executions: Report of the special rapporteur," E/CN.4/2000/3, para. 97 (2000).

<sup>64</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>65</sup> *Ibid.*, 492 U.S. at 328. The jury was to determine whether to impose the death penalty by answering three questions: "Did Penry act deliberately when he murdered Pamela Carpenter? Is there a probability that he will be dangerous in the future? Did he act unreasonably in response to provocation." 492 U.S. at 319.

<sup>66</sup> *Ibid.*, 492 U.S. at 330 (citations omitted).

<sup>67</sup> *Ibid.*, 492 U.S. at 334.

<sup>68</sup> *Ibid.*, 492 U.S. at 336-337.

In a separate opinion, Justice Brennan concurred with Justice O'Connor's analysis of the constitutional flaws in the *Penry* jury's sentencing instructions, but he strongly dissented from her reasoning and conclusion on the broader question of the constitutionality of executing persons with mental retardation. Justice Brennan argued that all persons with mental retardation, by definition, have significant limitations on their intellectual abilities and a reduced ability to function in society. He concluded, "The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional."<sup>69</sup> Justice Brennan also insisted that the consideration of mental retardation as a mitigating factor in sentencing is inadequate to guarantee that a person "who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty."<sup>70</sup>

Justice Brennan argued in addition that the execution of offenders with mental retardation violates the Eighth Amendment because such executions do not measurably further the penal goals of either retribution or deterrence. He reasoned that retribution is not furthered because the death penalty is disproportionate to the culpability of persons with mental disabilities; and, deterrence cannot be furthered because the intellectual impairments of persons with mental retardation preclude their ability to weigh the possibility of the death penalty in calculating different courses of action. As a result, "the execution of mentally retarded individuals is 'nothing more than the purposeless and needless imposition of pain and suffering.'"<sup>71</sup>

Since the *Penry* decision, the number of death penalty states barring the execution of persons with mental retardation has grown to thirteen.<sup>72</sup> (Twelve states prohibit the death penalty for all persons, regardless of mental ability).<sup>73</sup> The U.S. Congress has also prohibited application of the death penalty to federal defendants with mental retardation.<sup>74</sup> Efforts to secure legislation to prohibit the execution of the mentally retarded are currently underway in several additional states, including Florida, Missouri, Nevada, North Carolina, Oklahoma and Texas. Public opinion against executing persons with mental retardation is strong: polls show upwards of 60 percent consistently opposed to such executions.<sup>75</sup>

Today, the two oldest and largest professional organizations working in the area of mental retardation, the Arc and the American Association on Mental Retardation, oppose the execution of persons with mental retardation, as do numerous other mental disability groups.<sup>76</sup> The Arc summarizes its position as follows: "Existing case-by-case determinations of competence to stand trial, criminal responsibility, and mitigating factors at sentencing have proved insufficient to protect the rights of individuals with mental retardation. The presence of

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<sup>69</sup> *Ibid.*, 492 U.S. at 345.

<sup>70</sup> *Ibid.*, 492 U.S. at 346.

<sup>71</sup> *Ibid.*, 492 U.S. at 348 (Brennan, J. dissenting) (citations omitted).

<sup>72</sup> Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, South Dakota, Tennessee, and Washington all prohibit such executions. New York state forbids the execution of the mentally retarded except in the case of a prisoner who commits murder. See Death Penalty Information Center at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), visited February 6, 2001.

<sup>73</sup> Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin as well as the District of Columbia prohibit the death penalty.

<sup>74</sup> The Anti-Drug-Abuse Amendments Act of 1988 states that a "sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C. §848(1). In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which expanded applicability of the federal death penalty but retained the prohibition on the execution of persons with mental retardation. 18 U.S.C. §3596(c).

<sup>75</sup> See Bonner and Rimer, "Executing the Mentally Retarded." In addition to the polls cited in footnote 3 above, see the results of the sixteen polls included in Denis W. Keyes and William J. Edwards, "Mental Retardation and the Death Penalty: Current Status of Exemptions Legislation," 21 *Mental and Physical Disabilities Law Reporter* 687, 688 (1997).

<sup>76</sup> The AAMR submitted an amicus brief of to the U.S. Supreme Court in *Penry v. Lynaugh* urging a constitutional prohibition on the execution of persons with mental retardation. Ten mental health organizations joined the brief, including the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, and the Mental Health Project.

mental retardation by definition raises so many possibilities of miscommunication, misinformation, and an inadequate defense that the imposition of the death penalty is unacceptable.”<sup>77</sup> The American Bar Association in 1989 adopted a recommendation opposing the execution of persons with mental retardation and calling for legislation banning such executions.<sup>78</sup>

All state-sponsored killings are abhorrent. In addition to all of the reasons for abolishing the death penalty completely, there are at least four justifications for specific legislative prohibitions against the execution of persons with mental retardation: 1) capital trials of the mentally retarded have an even higher than normal risk of the miscarriage of justice; 2) the death penalty is disproportionately severe punishment, and hence unjustifiably cruel, when levied on persons whose mental disability limits their moral culpability; 3) the case by case sentencing process does not ensure that persons with mental retardation will be spared capital punishment; and 4) subjecting the mentally retarded to state-sponsored killing is not necessary to advance the purposes ostensibly served by the death penalty. These justifications are explored in the following chapters.

#### IV. THE MISCARRIAGE OF JUSTICE: MENTAL RETARDATION AND CAPITAL TRIALS

The prosecution and trial of capital defendants in the United States is notoriously flawed by arbitrariness, prejudice, and error. These flaws are magnified when the defendant has mental retardation. By virtue of their disability, people with mental retardation are even less likely than other defendants to be able to protect their legal rights and to secure a fair trial. Even before they run afoul of the law, the intellectual and adaptive deficits of mentally retarded people render them uniquely vulnerable to abuse and exploitation. These vulnerabilities continue to haunt them once they are enmeshed in the criminal justice system.

If a person is so profoundly retarded as to be deemed mentally incompetent he or she will not be required to stand trial. In practice, however, findings of mental incompetence are extremely rare. Once adjudicated as competent to stand trial, a person with mental retardation is deemed capable of understanding the nature and purpose of the legal proceedings and of cooperating, communicating and working with defense counsel. The law does not require specially designed aids or procedures to assist the “mentally competent” person suffering from retardation. Yet even people with less severe degrees of retardation are significantly impaired in their ability to understand and protect their rights and to assist in their own defense.

For example, one attribute of mental retardation is the inability to reason abstractly and to comprehend abstract concepts -- including the most basic concepts relevant to criminal proceedings. Robert Wayne Sawyer -- an offender with mental retardation executed in 1993 -- was asked by a psychiatrist interviewing him to define evidence. “It’s what lawyers put on a yellow pad like the one you’re using,” was the best definition Sawyer could offer. When asked what “reasonable doubt” meant, Sawyer put out his cigarette, pointed to the residual smoke and said, “That smoke ain’t reasonable out, but when it stops, it’s reasonable out.” When asked if he could provide an explanation that did not involve a cigarette, Sawyer said he could not.<sup>79</sup>

#### Waiver of Rights

At various stages in the proceedings against them, criminal suspects face important decisions about whether to waive their constitutional and statutory rights, e.g. the right to refrain from answering police questions, and the right to a trial by jury. Before giving effect to such waivers, the courts are obliged to determine, based on the totality of the circumstances, whether the waiver was voluntary and made with full awareness of the nature of

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<sup>77</sup> See The Arc, “Position Statement on Access to Justice and Fair Treatment under the Criminal Law,” at [www.thearc.org/position-statements.htm](http://www.thearc.org/position-statements.htm), visited February 20, 2001.

<sup>78</sup> See Resolution of the ABA House of Delegates (Feb. 1989). See also American Bar Association, “Q & A’s on the Death Penalty,” December 1999, available at [www.abanet.org/media/deathpenaltyqa](http://www.abanet.org/media/deathpenaltyqa), visited August 23, 2000.

<sup>79</sup> Human Rights Watch telephone interview with Ruth Luckasson, January 29, 2001. Luckasson provided another example of Sawyer’s limited comprehension of basic concepts. When asked to define “grave uncertainty” Sawyer explained that it meant “you dig a grave.”

the right being waived and the consequences of the decision to waive it.<sup>80</sup> The courts, however, frequently accept waivers by people with mental retardation without sufficient regard for the nature of the disability and its impact on such crucial decisions. Many people with mental retardation relinquish critical rights simply because they cannot understand what it means to have a “right,” much less what it means to waive it.

- Eddie Mitchell, a retarded man on death row in Louisiana, waived all his rights during his interrogation. But when an attorney asked him if he had understood what “waiving his rights” meant, Mitchell raised his right hand and waved.<sup>81</sup>

The right against self-incrimination -- either during interrogation or trial -- is protected by the Fifth Amendment to the U.S. Constitution and is recognized as a basic human right by the International Covenant on Civil and Political Rights.<sup>82</sup> The importance of this right cannot be overemphasized, as a confession almost invariably results in a conviction, even without corroborating evidence. To protect the right against self-incrimination, confessions made during police interrogations cannot be admitted into evidence at trial unless the police have given a “Miranda warning,” informing the suspects of the right to remain silent, to have an attorney present and that anything said could be used against them.<sup>83</sup> A suspect may waive these rights, but the waiver is invalid unless it is “knowing, intelligent and voluntary.”<sup>84</sup>

People with mental retardation almost invariably waive their “Miranda” rights and confess to the police without the presence of counsel. Their waivers are necessarily suspect given the characteristics of their disability.

### **“Knowing and intelligent”**

People with mental retardation will ordinarily lack the intellectual capacity to make an informed decision regarding whether to confess without the presence of counsel. Mental retardation often means the defendant cannot understand the seriousness of the situation, cannot identify and assess the ramifications of a confession, and lacks the ability even to understand that he has an option of whether or not to confess. Indeed, a person with even mild retardation may not comprehend the vocabulary used in the standard Miranda warning or the abstract concepts that it embodies.<sup>85</sup> Miranda warnings are written at a seventh-grade level of difficulty; many people with mental retardation in the criminal justice system function at a lower intellectual level and are unable

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<sup>80</sup> See *Colorado v. Connelly*, 479 U.S. 157 (1986); *Edwards v. Arizona*, 451 U.S. 477 (1981).

<sup>81</sup> Human Rights Watch interview with Clive Stafford-Smith, Executive Director, Louisiana Crisis Assistance Center, New Orleans, La., May 19, 1999. Robert Perske, who has written extensively on the fate of mentally retarded offenders in the criminal justice system, notes that some mentally retarded people may think that waiving one’s rights means waving at the “right” rather than at the “wrong,” or has something to do with ocean waves. Human Rights Watch interview with Robert Perske, Darien, Conn., July 11, 1999.

<sup>82</sup> Article 14.3(g), International Covenant on Civil and Political Rights.

<sup>83</sup> The Supreme Court established the constitutional requirement of the warning in *Miranda v. Arizona*, 384 U.S. 436 (1966), and recently affirmed the obligation of the police to expressly provide it in *Dickerson v. U.S.*, 530 U.S. 428 (2000). These warnings (which have come to be known colloquially as “Miranda rights”) are: a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Miranda v. Arizona*, 384 U.S. at 479.

<sup>84</sup> *Miranda v. Arizona*, 384 U.S. at 444.

<sup>85</sup> In a recent study, researchers tested groups of individuals with and without mental retardation on their comprehension of Miranda rights. They found that individuals with mental retardation had significant problems understanding the Miranda warning; that considerably more persons with mental retardation than without did not meet minimum criteria for competence; and that considerably more persons with mental retardation did not understand any of the substantive portions of the warning. Caroline Everington and Solomon Fulero, “Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation,” *37 Mental Retardation* 212 (June, 1999).

to understand the language and meanings of the warning.<sup>86</sup> As James Ellis and Ruth Luckasson, leading experts on mental retardation and the criminal justice system, have noted:

The concepts of what “rights” are, what it means to give them up voluntarily, the notion of the ability to refuse to answer questions asked by a person of great authority, the concept of the subsequent use of incriminating statements, the right to counsel and the right to have the state pay for that counsel, and the idea that the suspect can delay answering questions until a lawyer arrives are all of some abstraction and difficulty. A substantial number of retarded people will not know what one or more of these ideas means. A related difficulty is that the vocabulary of many retarded people is so limited; they may not be able to understand the warning even if they are familiar with its component concepts.<sup>87</sup>

A careful inquiry is needed to determine whether a person with mental retardation does, in fact, comprehend the nature and significance of a waiver of rights. Yet, the police and the courts frequently limit themselves to seeking yes-or-no answers to questions that are themselves abstract -- e.g. asking whether the suspect understands his rights and is willing to waive them.

- Earl Washington waived his Miranda rights and confessed to a murder he did not commit. On appeal, his lawyers challenged the admissibility of his confession, arguing, *inter alia*, that it was not made “knowingly” because of Washington’s mental retardation. The Virginia Supreme Court rejected Washington’s appeal, in part because it believed that a series of “yes sir” responses when Washington was asked if he knew he was waiving his constitutional rights provided “clear indications” of his understanding. When asked specific questions during trial about his understanding of the contents of the waiver, however, it was clear that Washington did not understand what he had signed; indeed, he was not even aware of the meaning of some of the words used in the form.<sup>88</sup>

If the nature and meaning of the Miranda warning are carefully, simply, and clearly explained, some people with retardation may be able to understand it. In practice, however, it is rare for police to do anything other than recite the standard warning. One state court suggested the following general rule: “When expert testimony indicates that a defendant could have intelligently understood the waiver of his constitutional rights only if they were simply and clearly explained, the record must expressly and specifically establish that such an explanation was given.”<sup>89</sup>

### **“Voluntariness”**

The “voluntariness” of confessions by persons with mental retardation is also suspect. Such persons are susceptible to non-physical forms of coercion, pressure and intimidation by the police that people with normal intelligence can more readily withstand.<sup>90</sup> They are less able to handle the stress and fear of a police interrogation, particularly if the questioning is prolonged. They are also less likely to resist the efforts of an apparently “friendly” police questioner. Their characteristic desire to please figures of authority can lead them to do whatever

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<sup>86</sup> See, Solomon Fulero and Caroline Everington, “Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation,” 19 *Law and Human Behavior* 533 (1995); George S. Baroff, *Mental Retardation: Nature, Cause and Management* (Hemisphere Publishing Corporation, 1986).

<sup>87</sup> Ellis and Luckasson, “Mentally Retarded Criminal Defendants,” p. 448 (citations omitted).

<sup>88</sup> Part of the transcript of Washington’s questioning about his Miranda waiver is reproduced in Paul T. Hourihan, “Earl Washington’s Confession, Mental Retardation and the Law of Confessions,” 81 *Virginia Law Review* 1471, 1482 (1995) (citations omitted).

<sup>89</sup> *Hines v. State*, 384 So. 2d 1171, 1181 (Ala. Crim. App. 1980).

<sup>90</sup> The American Bar Association’s Criminal Justice Standards recognize the impact of mental retardation on the voluntariness of confessions. “Official conduct that does not constitute permissible coercion when employed with non-disabled persons may impair the voluntariness of statements of persons who are mentally ill or mentally retarded.” Standard 7-5.8, passed by the ABA House of Delegates on August 10, 1988.

they think necessary to gain approval. It can be almost impossible for them to make a decision to remain silent in the face of police efforts to get them to talk.<sup>91</sup>

The Task Force on Law of the President's Panel on Mental Retardation warned decades ago, in 1963:

[T]he retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures.... Some of the retarded are characterized by a desire to please authority: if a confession will please, it will be gladly given.... It is unlikely that the retarded will see the implications or consequences of his statements in the way a person of normal intelligence will.<sup>92</sup>

Traditionally, in assessing the voluntariness of a confession, the U.S. courts have considered the totality of the circumstances, including both objective factors -- the conduct of police during an interrogation -- and subjective factors, such as the intellectual and emotional characteristics of the suspect. The presence of mental retardation is clearly relevant to the voluntariness inquiry. However, in 1986, in *Colorado v. Connelly*,<sup>93</sup> the U.S. Supreme Court issued a ruling that has been widely interpreted to require proof of official coercion, objectively defined, as a prerequisite to a determination that a waiver of rights and a confession were involuntary. As a result, most federal courts refuse to find a confession invalid simply because a defendant was affected by internal pressures or compulsions which were not a product of objective coercion, or because the defendant was unusually susceptible to psychological pressure.<sup>94</sup> Such an approach effectively discounts the special needs of defendants with mental retardation and fails to provide adequate protection to suspects who, even absent police misconduct, are easily led into making incriminating statements.

The rights of persons with mental retardation would be best protected if no waiver could be provided or confession given absent the presence of a lawyer for the suspect. Indeed, the explanation of the Miranda warning should be provided by the lawyer so that the suspect with mental retardation is not implicitly induced by an apparently concerned and friendly officer into waiving his or her rights. U.S. courts, however, have not insisted on such a requirement.

### **False Confessions**

Innocent people with mental retardation all too often confess to capital crimes they did not commit, simply because they want to give the "right" answer to a police officer, or because they believe that if the police say they did something, they must have done it, even if they do not remember.<sup>95</sup> In a legal system that gives

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<sup>91</sup> See Carol Sigelman et al., "When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons," *Mental Retardation* (April 1981), reporting on the tendency of mentally retarded individuals to respond "yes" to questions regardless of their content.

<sup>92</sup> President's Panel on Mental Retardation: Report of the Task Force on Law, 33 (1963), quoted in Ellis and Luckasson, "Mentally Retarded Criminal Defendants," pp. 414, 451.

<sup>93</sup> *Colorado v. Connelly*, 479 U.S. 157 (1986).

<sup>94</sup> Hourihan, "Earl Washington's Confession," p. 1482.

<sup>95</sup> A survey of clients in the New Jersey Developmentally Disabled Defenders program found that 63% believed that being arrested meant one must be guilty. Suzanne Lustig, "The Hidden Population in the Criminal Justice System: Providing Successful Advocacy Services to Defendants with Mental Retardation," submitted to The President's Committee on Mental Retardation August 7, 1998, p.15, (on file with Human Rights Watch). Ms. Lustig is the Director of the Developmentally Disabled Defenders Program, sponsored by The Arc of New Jersey. As Robert Persketold Human Rights Watch, "people with mental retardation just don't trust their own thinking." Human Rights Watch interview with Robert Perske, Darien, Conn., July 11, 1999.



enormous weight to confessions, even when they are uncorroborated by other evidence, the vulnerability, suggestibility, and eagerness to please of mentally retarded people can place their lives at risk.<sup>96</sup>

Police in the United States are able to use virtually any method short of physical force to obtain a confession from a criminal suspect. They can lie, for instance, falsely claiming that they possess evidence they lack; they can shout angrily and make threats; they can wear a suspect down through bullying and prolonged interrogations. Such tactics can be difficult to withstand, even for people with normal intelligence who are innocent.<sup>97</sup> Numerous suspects with mental retardation, some of whose cases are included in Section VIII of this report, have confessed falsely to capital crimes that were in fact committed by others.

People with mental retardation often try to compensate for their mental and developmental deficits by saying and doing whatever they think will please authority figures -- and they are often highly attuned to the subtle and even not-so-subtle clues their interlocutors may give about what constitutes “the right answer” to a given question. Mentally retarded people may end up making false confessions that the police believe because the confessions contain details that “only the criminal could have known.” The details, however, come from the police. Consider, for instance, this excerpt from the police interrogation of David Vasquez, a Virginia man with mental retardation, who confessed to a crime he did not commit.

Detective 1: Did she tell you to tie her hands behind her back?

Vasquez: Ah, if she did, I did.

Detective 2: Whatcha use?

Vasquez: The ropes?

Detective 2: No, not the ropes. Whatcha use?

Vasquez: Only my belt.

Detective 2: No, not your belt. . . . Remember being out in the sun room, the room that sits out to the back of the house? . . . and what did you cut down? To use?

Vasquez: That, uh, clothesline?

Detective 2: No, it wasn't a clothesline, it was something like a clothesline. What was it? By the window? . . . Think about the venetian blinds, David. Remember cutting the venetian blind cords?

Vasquez: Ah, it's the same as rope.

Detective 2: Yeah.

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Detective 1: Okay, now tell us how it went, David—tell us how you did it.

Vasquez: She told me to grab the knife, and, and, stab her, that's all.

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<sup>96</sup> See generally Note, “Constitutional Protection of Confessions Made by Mentally Retarded Defendants,” 14 *American Journal of Law and Medicine*, 431 (1989); Hourihan, “Earl Washington's Confession.”

<sup>97</sup> See generally Peter Brooks, *Troubling Confessions* (University of Chicago Press, 2000); Donald Connery, ed., *Convicting the Innocent* (Cambridge: Brookline Books, 1996).

Detective 2: (voice raised) David, no, David.

Vasquez: If it did happen, and I did it, and my fingerprints were on it....

Detective 2: (slamming his hand on the table and yelling) You hung her!

Vasquez: What?

Detective 2: You hung her!

Vasquez: Okay, so I hung her....<sup>98</sup>

After confessing, David Vasquez was charged with capital murder in February, 1984. He pled guilty to second-degree murder to avoid the death penalty and received a sentence of thirty-five years for murder and burglary. He was pardoned in 1989 when the true murderer was finally discovered.<sup>99</sup>

Not only can the police be fooled by a false confession from a retarded defendant, but the defendant himself can be fooled. When police deliberately or unconsciously supply crucial details to a suspect with mental retardation, causing him to “confess,” he may come to believe his own false confession—especially after repeating it several times to authority figures who validate its truth. Scharlette Holdman, a mitigation specialist who works for criminal defendants with mental retardation, noted: “After a confession, the person with mental retardation’s memory is contaminated by the police, so you never get at the reality of what events transpired.”<sup>100</sup>

### **Ineffective Assistance of Counsel**

It is well documented that many capital defendants receive inadequate counsel, often because courts appoint attorneys for the indigent who are too inexperienced, overworked, or uninterested to do an effective job.<sup>101</sup> As a result, numerous death penalty cases are marred by serious errors: a recent comprehensive examination of thousands of death penalty cases during the past three decades, undertaken by Columbia University professors at the request of the chair of the Senate Judiciary Committee, found that appeals courts identified prejudicial, reversible errors in sixty-eight percent of all capital cases they reviewed.<sup>102</sup> Aside from deliberate police or prosecutorial misconduct (e.g., withholding exculpatory evidence), the most common cause of serious error in capital cases is “egregiously incompetent” defense lawyers.<sup>103</sup> Similarly, the *Dallas Morning News* reported that of 461 death row inmates in Texas, fully one quarter had been represented by attorneys who had been reprimanded, placed on probation, suspended, or disbarred by the Texas Bar Association.<sup>104</sup>

Effective assistance by trial counsel includes a thorough and diligent investigation into all matters relevant to the determination of guilt or innocence as well as to sentencing, e.g., into mitigating factors. Inadequate investigations for either phase can doom a client. So can a failure to act as a committed, conscientious advocate for the defendant’s life when arguing his case to the jury. All too often, however, mentally retarded defendants are represented by trial attorneys who provide inadequate, even abysmal, representation.

<sup>98</sup> Dana Priest, “At Each Step, Justice Faltered for Virginia Man,” *Washington Post*, July 16, 1989.

<sup>99</sup> *Ibid.*

<sup>100</sup> Human Rights Watch interview with Scharlette Holdman.

<sup>101</sup> See, e.g., Stephen B. Bright, “Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer,” 103 *Yale Law Journal* 1835 (1994).

<sup>102</sup> In cases involving prejudicial error, more than 80 percent of the capital defendants were found by juries or judges to merit sentences less severe than death once the error had been cured, and a full 7 percent of capital defendants in cases involving prejudicial error were later found to be completely innocent. See generally Liebman, et al., “A Broken System.”

<sup>103</sup> *Ibid.*

<sup>104</sup> See *Dallas Morning News*, September 10, 2000.

- During the capital trial of Larry Jones, his lawyer did not present Jones's age at the time of the crime (seventeen) or his retardation (an I. Q. of 41 or lower) as mitigating factors. The lawyer also did not make any closing arguments, leaving Jones, who had the mental age of a three- to five-year-old, to present his own. Jones was found guilty and sentenced to death.<sup>105</sup> Ultimately, a court found that Larry Jones had not received effective assistance of counsel: as the court stated, Jones's lawyer "presented no proof to the jury of [the] mitigating factors of age and mental disability. He presented no mitigating circumstances at all. When the prosecution rested, he rested....Defense counsel either neglected or ignored critical matters of mitigation at the point when the jury was to decide whether to sentence Jones to death.... [T]his failure was professionally unreasonable, and it was prejudicial to the defendant in that there is a reasonable probability that had this evidence been presented, the jury would have concluded that death was not warranted."<sup>106</sup>
- Robert Sawyer, executed in Louisiana in 1993, was also represented by defense counsel who did nothing to prepare for the penalty phase of Sawyer's trial. For example, he made no effort to uncover – and hence never presented to the jury -- readily available evidence that Sawyer was mentally retarded, had been adjudicated incompetent on two prior occasions, had severe organic brain damage, had been a patient in four mental health facilities, had been left motherless as an infant by his mother's suicide, and as a child suffered beatings by a father described as sadistic by other members of the family.<sup>107</sup>
- Robert Anthony Carter's lawyer made a closing statement at his trial that was largely unintelligible, unfocused, and contained remarkably prejudicial comments. He asked the jury to give Carter the consideration of life "even though he doesn't deserve a great deal of consideration." He also told the jury that they could go either way in this case (i.e. grant life or the death penalty) "and your consciences would be clear." Although this lawyer acknowledged after the trial that Carter's childlike behavior possibly suggested some form of mental impairment, he had not attempted to obtain medical records for Carter or investigate his family history, nor did he request funds from the court for a psychological examination of Carter. Carter was, in fact, mentally retarded and seriously brain-damaged and had a childhood history of brutal physical abuse.<sup>108</sup>

Sadly, these cases are not unique.<sup>109</sup> The U.S. Supreme Court has ruled that every defendant has the right to receive "reasonably effective" counsel and is entitled to a new trial or sentencing procedure if the counsel's poor performance prejudiced his or her defense.<sup>110</sup> But, in practice, many cases of ineffective assistance of counsel go unremedied.<sup>111</sup> Courts, unfortunately, are reluctant to overturn sentences on the basis of poor lawyer

<sup>105</sup> Reed, *Penry Penalty*, p. 115; *Jones v. State*, 381 So. 2d 983 (Miss. 1980); *Jones v. Thigpen*, 788 F. 2d 1101 (5th Cir., 1986).

<sup>106</sup> *Jones v. Thigpen*, 788 F. 2d 1101 (5th Cir., 1986).

<sup>107</sup> Petition for Writ of Habeas Corpus, In Re Robert Wayne Sawyer, Oct. 8, 1990. The U.S. Supreme Court affirmed the lower federal courts' denial of Sawyer's habeas petition in *Sawyer v. Whitley*, 505 U.S. 333 (1992).

<sup>108</sup> Brief of Petitioner-Appellant and Reply Brief of Petitioner-Appellant, *Robert Anthony Carter v. Johnson*, (1996) (on file at Human Rights Watch).

<sup>109</sup> See generally Alisia St. Florian, "Fifth Amendment, Miranda Waiver And Fourteenth Amendment Voluntariness Doctrine In Cases Of Mentally Retarded And Mentally Ill Criminal Defendants," 4 *Suffolk J. Trial & App. Adv.* 271 (1999) and Kevin P. Weis, "Confessions Of Mentally Retarded Juveniles and The Validity Of Miranda Rights Waiver," 37 *Brandeis Law Journal.* 117 (1998). See also *People v. Perez*, 592 N.E. 2d 984 (Ill. 1992).

<sup>110</sup> "First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose [sic] result is reliable." *Strickland v. Washington*, 466 US 668, 686, (1984). To prove prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.*, at p. 694.

<sup>111</sup> See Annotation: "Propriety of Imposing Capital Punishment on Mentally Retarded Individuals," 20 *A .L.R* 5<sup>th</sup> 177 (citing cases in which counsel failed to present mitigating evidence of retardation). Regarding ineffective assistance of counsel for capital defendants generally, see Bright, "Counsel for the Poor."

performance. It is troubling enough that capital defendants can pay with their life for their counsel's failings; it is particularly intolerable that defendants with mental retardation who have no ability to evaluate their counsel's performance can pay the same price.

The special vulnerabilities of people with mental retardation make it critically important for them to have experienced, committed counsel. But these same vulnerabilities can make it harder for even the best of counsel to function effectively. Offenders with mental retardation often cannot assist their lawyers in preparing their defense as a defendant with normal intelligence could do. For example, people with mental retardation typically find it difficult to recall information that might help an attorney -- in part because of problems with memory, in part because they are not able to conceptualize what information might be helpful. The trial lawyer for Johnny Paul Penry, for example, told Human Rights Watch that Penry was unable to answer open-ended questions about his activities on the day of the murder for which he was ultimately convicted. If asked leading questions, Penry would provide inconsistent yes or no responses depending on how the questions were formulated and what Penry apparently believed his attorney wanted him to say.<sup>112</sup>

## V. MENTAL RETARDATION AND CRIMINAL CULPABILITY

An adult with mental retardation who commits a murder should be held legally accountable (assuming the retardation is not so profound as to render him or her incompetent to stand trial). But punishment must be proportionate to both the seriousness of the crime and the defendant's degree of moral culpability.<sup>113</sup>

Although there are different degrees of mental retardation, in all cases the condition entails serious limitations on the ability to appreciate the consequences and gravity of one's actions and to exercise mature control over one's conduct. An offender with mental retardation should thus never be placed in the category of the most culpable offenders for whom the death penalty is ostensibly reserved.

Categorical exemptions to the death penalty have precedent. In ruling that executing the insane violates the Eighth Amendment's prohibition on cruel and unusual punishment, the U.S. Supreme Court stated:

For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this nation...Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction [against executing a prisoner who is insane] finds enforcement in the Eighth Amendment.<sup>114</sup>

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<sup>112</sup> Human Rights Watch telephone interview with John Wright, October 11, 2000.

<sup>113</sup> *Tison v. Arizona*, 481 U.S. 137 (1987).

<sup>114</sup> *Ford v. Wainwright*, 477 U.S. 390, 410 (1986). *Ford* addressed the question of whether the Eighth Amendment prohibits the execution of a defendant who has been convicted and sentenced to death but is insane at the time the execution is to occur. U.S. law, drawing on longstanding legal tradition, has held that if a person is determined to be mentally incompetent before trial, he or she cannot be tried at all until competence is regained. Mental illness can also give rise to a finding of "not guilty by reason of insanity."

The U.S. Supreme Court has also ruled that the execution of offenders who committed their crimes before they were sixteen years old violates the Eighth Amendment.<sup>115</sup> The court acknowledged that less culpability attaches to a crime committed by a juvenile than to a comparable crime committed by an adult because children lack the experience, perspective, judgment, and intelligence of adults and have less capacity to control their conduct and to think in long-range terms. Given the inherently diminished moral culpability of children, the court held that the imposition of capital punishment for their conduct would be “nothing more than the purposeless and needless imposition of pain and suffering.”<sup>116</sup>

Human Rights Watch believes that the moral indefensibility of executing a child extends equally to someone who, by virtue of his or her retardation, has cognitive abilities and moral comprehension similar to that of a child. As one state court judge noted in his dissent from a decision permitting the execution of a defendant with mental retardation: “It is incompatible with...a sense of decency and it is morally indefensible...to kill someone who thinks, reasons and operates at the level of a third grader. Executing such a man is comparable to executing an eight-year-old boy.”<sup>117</sup>

## VI. MENTAL RETARDATION AND THE INDIVIDUALIZED DETERMINATION OF PUNISHMENT

In capital punishment cases, the jury must make an individualized determination of the appropriate sentence, considering factors that mitigate or aggravate the defendant’s culpability.<sup>118</sup> When the Supreme Court ruled in *Penry* that the execution of the mentally retarded was not forbidden by the U.S. Constitution, it left to juries the responsibility to determine whether defendants with mental retardation who had been convicted of committing capital crimes should receive death sentences in light of the mitigating or aggravating factors present in each case. In so doing, the court accepted the risk that some people with mental retardation and, hence, with insufficient culpability, might be executed.<sup>119</sup> As the late Supreme Court Justice William Brennan noted in his *Penry* dissent:

The consideration of mental retardation as a mitigating factor is inadequate to guarantee...that an individual who is not fully blameworthy for his or her crime because of a mental disability does not receive the death penalty...The sentencer is free to weigh a mentally retarded offender’s relative lack of culpability against the heinousness of the crime and other aggravating factors and to decide that even the most retarded and irresponsible of offenders should die.<sup>120</sup>

Indeed, offenders with mental retardation are often sentenced to death even when their defense counsel presents evidence of their disability to the jury. Our research suggests there are many reasons why the sentencing process leads to the imposition of death sentences on defendants with mental retardation. First, as noted above, few participants in criminal justice process -- including prosecutors, judges, defense attorneys, and juries -- understand the nature and significance of mental retardation.

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<sup>115</sup> *Thompson v. Oklahoma*, 487 U.S. 815 (1988). International human rights law, however, forbids the execution of any person who was under the age of eighteen when the crime was committed. International Covenant on Civil and Political Rights, Art.6(5); The Convention on the Rights of the Child, Art.37(a). Of the thirty-eight U.S. states that permit the death penalty, fifteen prohibit executing any person who was under the age of eighteen when the crime was committed. Another four set the minimum age at seventeen. Death Penalty Information Center, “Juveniles,” available at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), visited August 24, 2000.

<sup>116</sup> *Thompson v. Oklahoma*, 487 U.S. at 838.

<sup>117</sup> *Lambert v. State*, 984 P.2d 221 (Okla. Crim. App. 1999) (Chapel, P.J., dissenting); *cert. denied*, 528 U.S. 1087 (2000). Judge Chapel dissented from the court’s majority opinion approving the execution of a mentally retarded man convicted of murder. The defendant could not make change, spelled no better than a seven-year-old, read at a third-grade level, and had an I.Q. of 68. According to Judge Chapel, the defendant’s mental retardation had limited his ability to work or survive.

<sup>118</sup> In some cases the sentencer is a judge.

<sup>119</sup> Carol Steiker and Jordan Steiker, “Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA’s Resolutions concerning the Execution of Juveniles and Persons with Mental Retardation,” 61 *Law & Contemporary Problems* 89 (1998).

<sup>120</sup> *Penry v. Lynaugh*, 492 U.S. at 346 (Brennan, J. dissenting).

Second, prosecutors are all too often more concerned with the professional or political ramifications of obtaining a “victory” -- a death sentence -- than with giving serious consideration to the ways mental retardation has affected the defendant’s comprehension and conduct. Faced with pressure from the community and the victim’s family, prosecutors do not want to appear to countenance an “excuse” or to let an offender “off too easy.” During trials they vigorously challenge the existence of mental retardation as well as minimize its significance.<sup>121</sup> They suggest that while a defendant may “technically” be considered retarded, he nonetheless has “street smarts,” is “smart” enough to do the crime, and hence should receive the highest penalty. Prosecutors have also argued that the fact that a defendant may not be very smart makes him more dangerous and that this is an additional reason to impose the death penalty.

Third, judges are also at fault. They too are often ignorant about mental retardation, do not allow defense attorneys to present evidence of mental retardation adequately during a trial’s penalty phase, or give juries confusing or incorrect instructions about mental retardation as a mitigating factor.

Fourth, when prosecutors insist on seeking the death penalty for mentally retarded offenders, jurors all too often comply. As James Ellis, a law professor and expert on mental retardation and the criminal justice system, has noted, “There’s some kind of disconnect between people’s moral understanding and the way the system of imposing the death penalty actually works.”<sup>122</sup> Faced with terrible crimes, jurors can fail to appreciate the difference between guilt and culpability and do not want to “condone” a murder. They see a defendant who looks normal, is not manifestly “crazy,” and they do not grasp the profound yet subtle ways a person with retardation is limited in his capacity to understand the world around him and to act appropriately. They see a defendant who is not acting “remorseful” in the courtroom and they think it is because he is callous and heartless rather than understanding that a person with mental retardation may not fully comprehend what is happening. Finally, jurors can see mental retardation as an aggravating factor, i.e. they believe it portends the defendant’s future dangerousness, and they are worried that if given a prison sentence he will one day be released to society and commit another violent crime. For many jurors, the aggravating factor of “future dangerousness” outweighs the mitigating factor of reduced culpability.

When the U.S. Supreme Court refused -- in the *Penry* decision -- to create a categorical exemption from the death penalty for persons with mental retardation, it left open the possibility that in individual cases a death sentence imposed on such a defendant might nevertheless violate the Eighth Amendment’s ban on cruel and usual punishment. We are not, however, aware of cases subsequent to *Penry* in which a court has so ruled. Although courts have ordered retrials on Eighth Amendment grounds, they have done so when juries were not instructed to consider the potentially mitigating effects of a defendant’s mental retardation. They have not otherwise overturned juries’ decisions to impose death sentences on such defendants on Eighth Amendment grounds.

## VII. MENTAL RETARDATION AND THE PURPOSES OF CAPITAL PUNISHMENT

The central purposes of the death penalty, according to its proponents, are retribution, deterrence, and incapacitation.<sup>123</sup> None justifies the execution of persons with mental retardation.

For the goal of retribution to be satisfied, an offender must “deserve” his punishment because he chose to commit a crime and knew what he was doing. As the U.S. Supreme Court has stated, “The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal

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<sup>121</sup> For an overview of strategies prosecutors may use when prosecuting a defendant with mental retardation, see William J. Edwards, “How to Demystify the Prosecution’s Efforts of Minimizing the Severity of Your Client’s Mental Retardation,” presented at the State Bar of South Dakota Criminal Law Continuing Legal Education course on October 9, 1998 (on file at Human Rights Watch).

<sup>122</sup> Mike Tolson, “Death sentence heightens debate over executing retarded,” *Houston Chronicle*, February 12, 1995.

<sup>123</sup> See generally Edward Miller, “Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales,” 43 *Rutgers Law Review* 15 (1990).

offender."<sup>124</sup> But since mental retardation precludes the high moral blameworthiness that is supposed to be a prerequisite of capital punishment, executing an offender with mental retardation cannot be justified as giving him his "just deserts."

Imposing the death penalty on persons with mental retardation is also not necessary to advance the putative goal of deterrence.<sup>125</sup> People with that disability are generally unable to anticipate consequences of their actions and assess their options; there is no basis for believing their eligibility for the death penalty deters their commission of capital crimes. If offenders with mental retardation were excluded from capital punishment, other offenders would still be liable to the death penalty.

Finally, the death penalty is not the only means available to society to incapacitate people who pose a danger to society. Secure confinement of dangerous mentally retarded offenders adequately protects public safety.

## VIII. DEFENDANTS WITH MENTAL RETARDATION: THEIR STORIES

This section introduces some of the human beings whose lives are at stake in the debate about whether the mentally retarded should be subjected to the death penalty. Indeed, for some of the people profiled here, it is already too late. We have not attempted to provide complete individual profiles or comprehensive reviews of the long and complex histories of their prosecutions, trials, and subsequent appeals. Rather, we have sought to highlight examples of how capital prosecution of offenders with mental retardation offends principles of justice and basic standards of decency.

### **Limmie Arthur**

Limmie Arthur was the seventeenth of eighteen children born to a poor South Carolina sharecropper family.<sup>126</sup> His I.Q. is 66, he functions at the level of a ten-to-twelve year old, and his intellectual abilities are that of a seven-year-old.<sup>127</sup> On New Year's Eve 1984, "he drank a bottle of whisky with a neighbor, stole the man's Social Security payment, then killed him with an ax."<sup>128</sup> Arthur then panicked and ran home to his parents' house, leaving his bloodstained shirt behind.

After Limmie Arthur arrived home, he hid in the attic, terrified by his own act. When the police came, he was still hiding in the attic. They found him with ease, though, because his feet were sticking out. Like a child, Arthur had assumed that if he could not see the police, they would not be able to see him. He forgot about his feet.

Arthur was tried, convicted, and sentenced to death in 1985, after a trial in which his mental disability went unrecognized, even by his own attorney. In a hearing on an unrelated matter, Arthur's retardation was uncovered. According to one of Arthur's appeals attorneys, "Retarded people who function at [Arthur's] level are good at one thing and one thing only and that is covering up their disability...A lawyer or prosecutor or judge talking to him is not going to realize that he is talking to a retarded person."<sup>129</sup> At a resentencing hearing ordered

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<sup>124</sup> *Tison v. Arizona*, 481 U.S. 137, 149 (1987).

<sup>125</sup> There is no empirical evidence that the existence of the death penalty has any deterrence effect; to the contrary, there is considerable evidence that it has no such effect. For example, as a recent *New York Times* analysis of state homicide rates revealed during the last 20 years, the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty. See, Raymond Bonner and Ford Fessenden, "Absence of Executions: A Special Report," *New York Times*, September 22, 2000. See also, Jon Sorensen, et al., "Capital punishment and Deterrence: Examining the Effect of Executions on Murder in Texas," *Crime and Delinquency*, (October, 1999), pp. 481-493.

<sup>126</sup> General background information from Human Rights Watch telephone interview with John Blume, counsel for Arthur, June 1, 1999.

<sup>127</sup> John Blume and David Bruck, "Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis," 41 *Arkansas Law Review* 726 (1988).

<sup>128</sup> David Stout, "The Lawyers of Death Row," *New York Times*, February 14, 1988.

<sup>129</sup> Joseph Frazier, "Too Retarded to Die for Crimes? Laws Say No," *Los Angeles Times*, April 17, 1988.

by the South Carolina Supreme Court, extensive evidence of Arthur's life long mental retardation was presented, including school records, testimony from former teachers, and the results of psychological evaluations.<sup>130</sup> When an expert in mental retardation examined Arthur, she found him to be "a childlike man with a strong desire to conceal his retardation by pretending to be able to read and perform other skilled tasks he identifies with non-retarded people." When she asked Arthur to recite the alphabet, he "began to sing the nursery rhyme of the ABCs. Halfway through he got stuck and could not remember the rest of the letters. He then hummed the rest of the tune."<sup>131</sup>

Arthur himself was convinced that he had been sentenced to death because he could not read. While on death row, he diligently tried to learn to read with the hopes of eventually obtaining his general equivalency diploma. He thought he would get a reprieve if he was successful.<sup>132</sup>

The South Carolina Supreme Court ultimately ruled that that Limmie Arthur had not "knowingly or voluntarily" waived his right to a jury trial, and it overturned his death sentence.<sup>133</sup> Prosecutors agreed to accept a term of life imprisonment instead of trying him again.

### **Jerome Bowden**

Jerome Bowden was a small, undernourished twenty-four-year-old when he was accused of robbing and murdering a fifty-five-year-old Georgia woman and badly beating her bedridden mother.<sup>134</sup> Bowden's I.Q. was measured at 59, and he could not count to ten. His mental age was approximately nine.

Neighbors described Bowden "soft-spoken, pleasant, optimistic, and always smiling."<sup>135</sup> One neighbor said:

Before I knew [Bowden], I heard boys talking about him in the neighborhood, calling him crazy and retarded. People used to tease him, but it didn't seem to bother him. He didn't understand. He thought they were paying him a compliment.... He would get lost and wander around for a long time.... One time he took some money from [his employer], but it seems like someone may have put him up to it, because he didn't seem to know what he was doing. He didn't try to hide it. I don't think he meant to keep it. I think maybe he just forgot to turn it in, because he was just standing around with it in his pocket when they came looking for it. This is why I don't think he made the decision by himself. He was easily influenced by others.<sup>136</sup>

Bowden's sister, Josephine, recalled that "Jerome's mind just used to come and go." Once, while mowing his sister's lawn, the mower ran out of gas; Bowden filled the gas tank with water, then wandered off.<sup>137</sup> When he was not working, Bowden would often just sit on his bed and rock himself back and forth for hours on end.<sup>138</sup>

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<sup>130</sup> *State v. Arthur*, 374 S.E. 2d 291, 293-194. (S.C. 1988); Human Rights Watch telephone interview with David Bruck, counsel for Arthur, February 26, 2001. Evidence of Arthur's retardation is detailed in Brief of Appellant, *State v. Arthur*, December 21, 1987 (on file at Human Rights Watch).

<sup>131</sup> Human Rights Watch interview with Ruth Luckasson, January 29, 2001. See also, *South Carolina v. Arthur*, Appellant's Brief, in the Supreme Court of South Carolina, December, 1987, p. 12-13.

<sup>132</sup> Human Rights Watch interview with Ruth Luckasson, January 29, 2001.

<sup>133</sup> "Death sentence voided," *Washington Post*, November 15, 1988.

<sup>134</sup> Reed, *Penry Penalty*, p. 84.

<sup>135</sup> *Ibid.*

<sup>136</sup> Perske, *Unequal Justice*, p. 31.

<sup>137</sup> *Ibid.*, quoting from the Application of Jerome Bowden for a 90-Day Stay of Execution and for Commutation of his Sentence of Death, submitted to the Georgia Board of Pardons and Paroles.

<sup>138</sup> *Bowden v. Francis*, 733 F.2d 740, 747 (11<sup>th</sup> Cir. 1984).



When Jerome Bowden heard from his sister that the police had been looking for him, he went to them to find out how he could help. They confronted him about the crime, and he denied any involvement, but eventually he broke down, confessed, and signed a written statement acknowledging his guilt.<sup>139</sup> James Graves, a sixteen-year-old boy, implicated Bowden in the crime; beyond Graves's statement and Bowden's confession, no physical evidence linked Bowden directly to the crime, although a great deal of evidence incriminated Graves.

Bowden denied that he had played a role in the murder. When asked why he had made a false confession, Bowden struggled to find an answer: "Well, that I don't know. Only thing that I knew, since Detective Myles had told me this here.... Had told me about could help me, that he could, you know, which I knew that confessing to something you didn't take part in was—if you confess to something that you didn't do, as if you did it, because you are saying that you did."<sup>140</sup> Apparently Detective Myles promised Bowden that he would help him stay out of the electric chair if he confessed. When his clemency attorney later asked him if he had even read his "confession" before signing it, Bowden said, "I tried."<sup>141</sup>

Although Jerome Bowden could hardly read and could not count to ten, his trial lawyers did not raise his retardation during his defense.<sup>142</sup> He was convicted of murder and sentenced to death. When the state granted a last-minute, ninety-day stay of execution to have his mental capacity evaluated, Bowden's lawyers rushed to his cell with the news, but Bowden did not understand the meaning of a "stay." He asked his attorney if the stay meant he could watch television that night.<sup>143</sup> "Jerome has no real concept of death," his attorney ruefully concluded.<sup>144</sup>

During the stay of execution, Irwin Knopf, a psychologist from Emory University, gave Bowden another I.Q. test at the request of the State Board of Pardons and Paroles. This time Bowden scored 65, higher than on his previous tests but still clearly within the definition of mental retardation. Knopf nonetheless concluded that Bowden was not sufficiently disabled to merit clemency.

Bowden's lawyers were devastated. Bowden, in contrast, was proud of his performance on the I.Q. test: "I tried real hard," he told his lawyers. "I did the best I could."<sup>145</sup>

Relying entirely on Knopf's test, the State Board of Pardons and Paroles refused to grant clemency for Jerome Bowden. Bowden was "scared," his lawyers said, but he told an interviewer that he was "going off to live on a little cloud," and he hoped a guard who had befriended him "would live on a cloud near him someday."<sup>146</sup>

Despite a public outcry, Bowden was executed on June 4, 1986. The public outcry surrounding his execution led Georgia to become the first state in the U.S. to prohibit the execution of people with mental retardation.<sup>147</sup>

## **Oliver Cruz**

Oliver Cruz was convicted of raping and murdering a young woman, Kelly Donovan, in 1988.<sup>148</sup> Despite uncontroverted evidence at trial of his mental retardation, troubled family and emotional history, a Texas jury sentenced sentenced him to death.

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<sup>139</sup> *Bowden v. State*, 239 Ga. 821 (1977).

<sup>140</sup> See testimony of Jerome Bowden at his December 6, 1976 trial (on file with Human Rights Watch).

<sup>141</sup> Joseph Frazier, "Too Retarded."

<sup>142</sup> *Ibid.*

<sup>143</sup> Editorial, *Atlanta Journal and Constitution*, June 21, 1996.

<sup>144</sup> Perske, *Unequal Justice*, p. 31, quoting from Application of Jerome Bowden.

<sup>145</sup> *Ibid.*, p. 33.

<sup>146</sup> Frazier, "Too Retarded."

<sup>147</sup> Reed, *Penry Penalty*, p. 86.

<sup>148</sup> Information about Oliver Cruz comes from Human Rights Watch telephone interview with Jeffrey Pokorak, post-conviction counsel for Cruz, February 25, 2001; *Cruz v. Johnson*, Petition for Writ of Certiorari to the United States (on file Human Rights Watch

Cruz was one of five children; his mother's common law marriage ended while he was a child because of his father's excessive alcohol and drug use. His mother had a history of mental illness, was repeatedly hospitalized for depression, and was diagnosed as having chronic schizophrenia. As a young man, Cruz had been committed to a psychiatric hospital.

School testing while Cruz was a child established his mental retardation. As an adult, his I.Q. was tested at 64. He was functionally illiterate, reading and writing below the third grade level. He dropped out of school after failing seventh grade three times. He supported himself with menial work and odd jobs because he could not understand how to fill out a job application. Cruz also suffered from severe dependency on drugs and alcohol; indeed, he was severely intoxicated at the time of his crime.

Like many people with mental retardation who commit crimes, Oliver Cruz did not act alone. An older man who was not mentally disabled, Jerry Kemplin, also participated. Kemplin, however, pleaded guilty and received a sixty-five year sentence in return for testifying against Cruz.

When interrogated by the police, Cruz waived his Miranda rights and confessed. The trial court ruled the waiver was valid, even though Cruz had limited understanding of the legal concepts in the warning. At trial, the police investigator who obtained the waiver testified that Cruz "had difficulty reading aloud some of the words written on the Miranda warnings. [He] realized that [Cruz] had no understanding of some of the terms and had to explain them to him at length."<sup>149</sup> The psychologist who tested Cruz testified that the concept of "waiving rights" was beyond Cruz's comprehension.

The prosecutor did not contest Cruz's mental retardation. Rather, the prosecutor argued at sentencing that his mental retardation was an aggravating factor that warranted the death penalty:

The Defense may tell you that, you know, he is not very smart. And they may try to show you that this should be some mitigation of punishment...But the main issue that you have to look at, does the fact that the defendant was intoxicated or the fact that he may not be very smart, does that make him any less dangerous? Does that make him any less of a threat to the rest of society...And I would submit to you that it doesn't make him any less dangerous. I would submit to you, it's the opposite. It makes him in fact, more dangerous. It's part of the outlook of Oliver Cruz that makes him what he is. And that's not going to change. And society cannot take the chance of having him on the streets again, or having him out in prison where there's other people that associate with him, also, for their safety.<sup>150</sup>

In post-conviction proceedings, Cruz's attorneys challenged the instructions given to the jury in his case, arguing they did not permit the jury to give adequate consideration to the mitigating evidence of Cruz's mental retardation. When the case reached the federal court of appeals, the court ruled that Cruz was not entitled to special instructions on mitigation because during his trial he had not established a causal link between his low intelligence and his crime.

On August 9, 2000, the Supreme Court refused to hear the case, rejecting Cruz's petition for a writ of certiorari and denying his application for a stay of execution.<sup>151</sup> Oliver Cruz was executed that evening.

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at Human Rights Watch); In Re Oliver David Cruz, Petition for a Reprieve of Execution, Before the Texas Board of Pardon and Paroles, (on file at Human Rights Watch); Bonner and Rimer, "Executing the Mentally Retarded."

<sup>149</sup> Petition for Reprieve of Execution, p. 9.

<sup>150</sup> Petition for Certiorari, p. 7, quoting from trial transcript.

<sup>151</sup> *Cruz v. Johnson*, 121 S.Ct. 11 (2000).

## Tony Tyrone Dixon

Born to a thirteen-year-old mother, Tony Tyrone Dixon's troubled life has been marked by his mental retardation and violence. His I.Q. tested at 65 and he spent his youth in and out of mental health programs. He committed six felonies before, at age seventeen, murdering Elizabeth Peavy in Houston in 1994 while stealing her car.<sup>152</sup> At the time of the crime, he was living in a group home for mentally impaired teens.

At Dixon's trial, the crux of his defense was that he was a mentally deficient, easily swayed youth with the intellectual ability of a kindergartener, a youth who was incapable of foreseeing or fully comprehending the consequences of his impulsive actions. He knew right from wrong, but could not use reason to choose one or the other. Dixon's limited comprehension was demonstrated during his videotaped confession. After Dixon recounted what he had done, the homicide detective questioning him explained that he was accused of a capital crime and that death could be the punishment. With a childlike failure to understand his situation, Dixon said he was ready to go home and repeatedly asked if he could leave.<sup>153</sup> According to one of his attorneys, "[Tony Dixon] may be able to understand information, but to take it with him and use it in the real world, that gets lost with Tony...He has what one psychologist described as 'an inability to transfer information.' Without exception, all the people who knew Tony said he did not understand consequences."<sup>154</sup> Dixon told a psychologist who evaluated him that he knew that shooting Peavy might hurt her but he thought she would "stay back alive" as people do who are shot on television.<sup>155</sup>

The prosecutor insists Dixon is smarter than the psychological testing indicated: "There is a certain measure of street smarts that you can't measure on those standard examinations...[Dixon] clearly has strong survival skills and can engage in criminal conduct and operated with a predator's mind on the streets..."<sup>156</sup> During the trial, the prosecutor insisted that, whether in spite of or because of his mental deficiencies, Dixon was a violent dangerous man. He told the jury: "I submit to you that Tony Dixon has what it takes to make the decisions that scare you to death when you're on the street" and that a sentence of life could mean Dixon would be released after 40 years in prison and would return to the streets "as a predator."<sup>157</sup> The jury apparently agreed with the prosecutor's contention that Dixon was too dangerous to live. He was convicted and sentenced to death.<sup>158</sup>

Interviewed on death row in 1999, Dixon could not remember the name of the lawyer who was handling his appeal. He could not explain the nature or grounds of current legal efforts on his behalf; he knew his case was "something like Penry's" (referring to fellow Texas death row inmate Johnny Paul Penry) although he did not know why.<sup>159</sup>

## Emile Pierre Duhamel

Emile Pierre Duhamel<sup>160</sup> was an alcoholic vagrant with mental retardation (I.Q. 56) and severe mental illness -- he suffered from paranoid schizophrenia, serious depression, and dementia. He had been arrested and

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<sup>152</sup> See Tolson, "Death Sentence Heightens"; Robert Stanton, "Retarded Teen Guilty of Murder," *Houston Post*, February 4, 1995; wire reports, *Fort Worth Star-Telegram*, February 10, 1995.

<sup>153</sup> Jennifer Liebraum, "Trial to begin in slaying of popular dentist," *Houston Chronicle*, January 30, 1995.

<sup>154</sup> Tolson, "Death sentence heightens debate."

<sup>155</sup> John Makeig, "Retarded teen convicted in killing dentist for car," *Houston Chronicle*, February 4, 1995.

<sup>156</sup> Tolson, "Death sentence heightens debate."

<sup>157</sup> Jennifer Liebraum, "Dentist's murderer gets death penalty," *Houston Chronicle*, February 9, 1995.

<sup>158</sup> Because he committed his crime when he was seventeen years old, Dixon's sentence violates international human rights law. See Article 6 (5) of the ICCPR ("sentence of death shall not be imposed for crimes committed by persons below eighteen years of age").

<sup>159</sup> Human Rights Watch interview with Tony Tyrone Dixon at Ellis Unit, Huntsville Tex., May 17, 1999.

<sup>160</sup> Information on Emile Duhamel from Human Rights Watch interview with Greg Wiercioch. See also, *Duhamel v. Scott*, Petition for Writ of Habeas Corpus and Motion for Stay of Execution and For an Evidentiary Hearing," filed September 26, 1995 (on file at Human Rights Watch). Extensive information and documentation on Duhamel's case is available at

convicted for various crimes several times before he was arrested in 1984 for sexually assaulting and strangling to death a nine-year-old girl in a field in Harlingen, Texas.

At a competency proceeding prior to trial, a psychiatrist testified that Duhamel was not competent to stand trial. The prosecution presented the testimony of two jail guards and a nurse who said Duhamel appeared normal to them. He was found competent. Duhamel's court-appointed attorneys presented no evidence of his mental impairments at either the guilt/innocence or sentencing phase of his trial and they put on no witnesses. Nor did they challenge the voluntariness of his confession or whether he had made a knowing and intelligent waiver of his Fifth Amendment rights. Duhamel was convicted and sentenced to death.

A federal district court found trial counsel constitutionally ineffective for failing to develop and present mitigating evidence. The U.S. Court of Appeals for the Fifth Circuit, however, reversed that decision. It ruled Duhamel had failed to establish a reasonable probability that the jury would have been persuaded by mitigating evidence to sentence him to life imprisonment rather than to death, given the brutality of the murder, the age of the victim, and Duhamel's prior criminal record.<sup>161</sup>

On death row, Duhamel's mental condition deteriorated. He was plagued by visual and auditory hallucinations, was increasingly delusional and his paranoia prevented him from working with attorneys representing him in post-conviction proceedings. In 1996, with an execution date pending, Duhamel's attorneys conducted a tape-recorded interview of him through the bars of his prison cell.<sup>162</sup> The interview offered such powerful evidence of Duhamel's mental condition that the Attorney General of Texas agreed to a stay of execution and the need for a hearing to evaluate his current mental status. During the interview, although his execution was scheduled and imminent, Duhamel insisted that he had no need for his attorneys' services, as he would be released shortly. His lawyers attempted to make him understand that this was not the case and that they needed his cooperation:

Lawyer: Emile? Do you know that you have an execution date?  
Duhamel: No, I don't.  
Lawyer: For January twenty-fourth.  
Duhamel: No, I don't. No, I don't. No, you don't.

Emile insisted that he had "already been executed."

Lawyer: You have? When did that happen?  
Duhamel: When that happened? When I got released from Harlingen to Huntsville.  
Lawyer 2: What does it mean to be executed?  
Duhamel: Executed means put to sleep.  
Lawyer 2: And?  
Duhamel: And take the crystals away from you.

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[www.lonestar.texas.net/~acohen](http://www.lonestar.texas.net/~acohen). Voluminous documentation on Duhamel's mental condition was provided to Human Rights Watch by his counsel and is on file at Human Rights Watch.

<sup>161</sup> *Duhamel v. Collins*, 955 F.2d 962 (5<sup>th</sup> Cir. 1992).

<sup>162</sup> Because Duhamel refused to leave his cell for legal visits, the attorney obtained a court order allowing Duhamel to interview him in front of the cell.

Lawyer: What crystals are these?

Duhamel: Crystals of life.

Lawyer: Uh huh. And you say you've already been executed once?

Duhamel: [After some intervening conversation]: Yeah, I already been executed. They already executed me one time.

Lawyer: Well, how did they do that? How are you here now?

Duhamel: They take the crystals out of me in Brownsville. There's a hospital there— [Emile tries to explain the crystals].

Lawyer: ... I don't understand, though. When you're executed though, you die. Do you know what that means, when you die?

Duhamel: I know when you die.

Lawyer: What does that mean? Can you tell me?

Duhamel: When you die, you come back to life again though.

Lawyer: Uh huh. Well, how do you come back to life?

Duhamel: You've got five life terms.

Lawyer: You've got five life terms?

Duhamel: Yeah, everybody's got five life terms. So, I've got five life terms.

Lawyer: How many do you have left?

Duhamel: I have four.<sup>163</sup>

On July 9, 1998 Emile Duhamel died in prison of natural causes with his competency for execution still unresolved.

### **Jerome Holloway**

Jerome Holloway was known for years as “the most retarded man on death row anywhere in the nation.” He does not know the year he was born, and is incapable of relating basic autobiographical details. He cannot tell time, recite the alphabet, make change, or identify the country he lives in.

His I.Q. was measured at 49, the mental age of a seven-year-old.<sup>164</sup> As Dr. Brad Fisher, director of the Criminal Justice Resource Center, stated, “A person with an I.Q. of 49 is someone you don't expect is going to be able to make change for a dollar bill, someone who can't even follow directions through town, or understand

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<sup>163</sup> Transcript of interview of Emile Duhamel, provided by Gregory Wiercioch, on file with Human Rights Watch and available on the web at <http://lonestar.texas.net/~acohen/transcript1.html>.

<sup>164</sup> Reed, *Penry Penalty*, p. 119; Joe Parham, “Condemned Man Called Most Retarded On Death Row,” *United Press International*, October 12, 1987.

abstract terms.... Jerome does not have the capacity to understand the court process and what attorneys are arguing and how it relates to his own future.”<sup>165</sup>

In 1986, Holloway was accused of the robbery and murder of an elderly woman in Georgia, a neighbor and a friend of his mother’s. He confessed to the crime, signing a statement that he was unable to read. He attempted to plead guilty, but the judge rejected the plea on the grounds that Holloway could not comprehend it. Despite this, Holloway was not given a competency hearing and was denied a psychiatric evaluation.<sup>166</sup> He was sentenced to death.

When new lawyers appealed his death sentence, they brought Holloway to the witness stand to illustrate his suggestibility and lack of comprehension:

Attorney: Jerome, did you assassinate President Lincoln?

Holloway: Yes.

Attorney: Did you assassinate President Kennedy?

Holloway: Yes.

Attorney: Did you assassinate President Reagan?

Holloway: Yes.<sup>167</sup>

In 1987, hours before Holloway’s scheduled execution, the Georgia Supreme Court overturned the sentence, citing his lack of comprehension of the court proceedings. The prosecution ultimately agreed to reduce Holloway’s sentence to two life terms.<sup>168</sup>

## **Doil Lane**

In 1980, an eight-year-old girl, Bertha Martinez, was raped, stabbed, and strangled to death in San Marcos, Texas. The case lay unsolved for eleven years until Doil Lane was identified in 1991 as a suspect in the 1990 rape and murder of a nine-year-old girl, Nancy S., in Wichita, Kansas, and he was questioned by the local police. Over a several month period following that initial contact, Lane had numerous conversations with the police, often at his instigation, during which he -- according to the police -- alternately confessed and denied all involvement in Nancy S.’s death.<sup>169</sup> Eventually, the police began to regard Lane as a serious suspect, and they arranged a formal interrogation session. During that interrogation, Lane confessed to both the murder of Nancy S. and to that of Martinez. He was taken into custody, and the next day interrogated again, this time in the presence of Texas police as well. On both days, Lane waived his Miranda rights. During his confession, sometimes crying, sometimes babbling incoherently, Lane said his stepfather and he raped the girl in the presence of his mother, and that his stepfather stabbed her and forced Lane to strangle her. Lane said his stepfather forced him to commit the crime by telling him that if he did not, he would “shoot me and put me in the trash can.”<sup>170</sup>

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<sup>165</sup> Parham, “Condemned Man.”

<sup>166</sup> *Holloway v. State*, 361 S.E.2d 794 (Ga. 1987); Reed, *Penry Penalty*, pp. 119-120.

<sup>167</sup> Perske, *Unequal Justice*, p. 18.

<sup>168</sup> Reed, *Penry Penalty*, p. 111; Parham, “Condemned Man.”

<sup>169</sup> Lane’s prolonged and bizarre series of interactions with the police -- including one in which he invited the police to come eat cantaloupe with him at his house -- are detailed in *Kansas v. Lane*, 940 P.2d 422 (Kan. 1997).

<sup>170</sup> Debbie Hiott, “Jurors hear Lane’s 1991 confession in 8-year-old’s death,” *Austin American-Statesman*, February 9, 1994. Lane’s stepfather and mother were indicted as co-defendants but the charges were subsequently dropped. The stepfather died in January 1994; Lane’s mother is in a mental health facility. Debbie Hiott, “Lane sentenced to death for murder of 8-year-old girl,” *Austin American-Statesman*, February 17, 1994.

Lane was extradited to Texas where he was tried for the murder of Bertha Martinez. The jury deliberated less than one hour before finding him guilty, less than two hours before deciding on a sentence of death. The principal evidence against him was his confession. DNA testing was inconclusive.<sup>171</sup> Lane's post-conviction attorney believes the confession may have been false, the result of police feeding facts to a highly suggestible man with mental retardation and a lifelong fascination with "firetrucks and policemen."<sup>172</sup>

Whether or not Lane's confession is true, there is no question he has serious cognitive impairments. As a child, he spent years as a resident of a special school in Texas for mentally disabled students. His I.Q. has tested between 62 and 70. His mental deficiencies are so obvious that the report by the Kansas police officer who first interviewed him noted Lane seemed "mentally retarded."<sup>173</sup> The former chief psychologist of the Texas Division of Criminal Justice assessed his intelligence in 1998 and concluded he had mental retardation. When his police interrogation was over, Lane -- a thirty-year-old -- climbed into the interrogating officer's lap.<sup>174</sup> At his trial in Texas, Lane asked the judge for crayons so that he could color pictures. The judge denied the request.<sup>175</sup>

On appeal, Lane's counsel challenged the admissibility of his confession. Despite Lane's low I.Q. and his child-like behavior, the trial court concluded that Lane was capable of understanding his Miranda rights and that his confessions were voluntary. The appellate court agreed.<sup>176</sup>

Doil Lane, now 39, is on death row in Texas, while legal proceedings in his case continue. He is still trying to get his crayons: "I like to clore [color] in my clorel [coloring] book but you all tuck away my clores when you can't hurt no one with a box of 24 clores, just in my book," he wrote in plaintive protest.<sup>177</sup>

### **Ramon Martinez-Villareal**

Ramon Martinez-Villareal has been on death row since 1983, convicted of the murder of a rancher and a ranch hand.<sup>178</sup> He does not know how old he is, although his current lawyer believes he may be in his mid-fifties. He comes from rural Mexico, and his family recalls that he did not walk or talk until he was five and was never able to learn the use of even simple tools such as hoes and shovels. In addition to being retarded -- Martinez-Villareal has an I.Q. of 50 -- he is mentally ill, probably schizophrenic.

Martinez-Villareal, a Mexican national who speaks no English, was never informed of his Vienna Convention right to contact the Mexican consulate when he was arrested in the U.S., and he ultimately got a trial lawyer who spoke no Spanish.<sup>179</sup> Because of his retardation, compounded by the language barrier, he had trouble understanding what was happening to him during his interrogation and trial. When he was told, during his

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<sup>171</sup> Lane was subsequently returned to Kansas and was tried and convicted for the murder of Nancy S. He was then returned to the custody of Texas.

<sup>172</sup> Human Rights Watch telephone interview with William Allison, post-conviction counsel for Lane, Austin, Tex., February 26, 2001.

<sup>173</sup> Ibid.

<sup>174</sup> Monica Polanco, "40 years probing criminal minds, Williamson Sheriff Ready for a Change." *Austin American Statesman*, July 31 2000. William Allison points out that the fact that a "crusty, old Texas ranger" who would never permit a grown man to sit in his lap let Lane do, so showed the policeman's awareness of Lane's mental condition. Human Rights Watch interview with William Allison.

<sup>175</sup> Bonner and Rimer, "Executing the Mentally Retarded."

<sup>176</sup> *Kansas v. Lane*, 940 P.2d 422 (Kan. 1997).

<sup>177</sup> Bonner and Rimer, "Executing the Mentally Retarded."

<sup>178</sup> Background information on Ramon Martinez-Villareal from Human Right Watch telephone interview with Sean O'Brien, attorney for Martinez-Villareal, April 29, 1999.

<sup>179</sup> Frank Murray, "U.S. Argues World Court Can't Halt Va. Execution" *Washington Times*, April 14, 1998. Vienna Convention on Consular Relations and Optional Protocols, U.N.T.S. Nos. 8638-8640, vol. 596, pp. 262-512, April 24, 1963. Article 36 of the Convention requires that foreign nationals detained in member states be notified of their right to communicate with their consular officials. The U.S. ratified the Vienna Convention in 1969. Leigh Marjamaa, "Death Row Debate: Mexico Fights to Protect Citizens in U.S. Prisons," *The News*, June 14, 1998.

interrogation, that he had the right to remain silent, and was asked by the interpreter if he understood that right, he replied, "Yes, I must be silent."<sup>180</sup>

When he was arrested, Martinez-Villareal was wearing a new pair of boots, which the police took from him. Barely comprehending his situation, he focused on the one aspect he understood: his new boots had been taken. He asked repeatedly for his boots, unable to understand that something more serious was at stake. This childlike focus on the concrete is typical of those with mental retardation. During the trial -- at which Martinez-Villareal could not tell the difference between the spectators and the jury -- the prosecutors cited his obsession with his boots as evidence of his callous attitude toward his crime. Also, like many people with mental retardation, Martinez-Villareal tended to smile incessantly and inappropriately; during his trial, he frequently bestowed wide smiles on the victim's family. This too was used by the prosecutor as evidence of his cold-bloodedness, while in reality it showed how little he understood his situation.<sup>181</sup>

Martinez-Villareal's lawyer presented no expert testimony about his retardation during his trial. The two people of normal intelligence who were also involved in the crime were never prosecuted; they claimed Martinez-Villareal alone was to blame.<sup>182</sup> He was sentenced to death despite his insistence that he took no part in the crime.<sup>183</sup>

Since then, Martinez-Villareal's new attorneys have appealed to Arizona's clemency board, presenting evidence of his retardation and other mental problems. His extreme disability made even this evidence-gathering difficult, however. Martinez-Villareal was incapable of comprehending the legal issues at stake or helping his lawyers make important choices. He was even frightened by the psychologist who came to test him, saying, "The doctor's mad at me because I don't know the answers. When I don't know, he gets mad!"<sup>184</sup> The trial judge who originally sentenced Martinez-Villareal to death has subsequently testified that if he had known of his mental impairments, he would not have imposed the death penalty. The state's attorney who prosecuted him has said that he would never have sought the death penalty if he had known how mentally impaired he was. Nonetheless, he remains on death row.

### **Morris Odell Mason**

Morris Mason, a man burdened by mental retardation (I.Q. 62-66) and mentally illness, murdered an elderly woman during "an alcoholic rampage."<sup>185</sup> A paranoid schizophrenic with a mental age of eight, Morris Mason had been in and out of mental hospitals for much of his life and had a history of violent acts. When he was twenty-one, he began to hear voices in his head ordering him to "do things, break things, tear things, and destroy things."<sup>186</sup>

Not sane or mentally competent enough to stop himself from hurting others, Mason was nonetheless just sane enough and just intelligent enough to know that he was out of control. In the week before the killing, he had twice sought help from his parole officer for his uncontrollable drinking and drug abuse. The day before the crime, he had asked to be placed in a halfway house, but no openings were available.<sup>187</sup>

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<sup>180</sup> Human Rights Watch interview with Sean O'Brien, April 29, 1999.

<sup>181</sup> Ibid.

<sup>182</sup> *Arizona v. Martinez-Villareal*, 702 P.2d. 670, 673 (Ariz. 1985).

<sup>183</sup> Ibid.; see also Bonner and Rimer, "Executing the Mentally Retarded."

<sup>184</sup> Human Rights Watch interview with Sean O'Brien, April 29, 1999.

<sup>185</sup> Michael Ross, "Don't Execute Mentally Disturbed Killers," *The Humanist*, January 1999.

<sup>186</sup> Forensic Unit Diagnostic Staff Conference report, Virginia Department of Mental Health and Mental Retardation, November 28, 1975, (on file with Human Rights Watch). See also Reed, *Penry Penalty*, p. 81.

<sup>187</sup> Ross, "Don't Execute."



After Mason was charged with murder, a state psychiatrist who interviewed him found him “seemingly uncaring as to his fate. He offers no complaints and seems to have no full association [sic] of the gravity of his situation.”<sup>188</sup>

Morris Mason was executed June 1985. He had so little conception of death that he asked advisors what he should wear to his own funeral, and said cheerfully, on his way to the execution chamber, that a visitor should tell a fellow inmate that “when I get back, I’m gonna show him I can play basketball as good as he can.”<sup>189</sup>

## **Luis Mata**

Luis Mata<sup>190</sup> was born with an abnormally large head, the result of damage during the birthing process. His family saw his swollen head as a sign that his birth would bring bad luck.

Luis Mata and his fifteen siblings often went hungry as children. “Malnourishment was a daily fact of life.”<sup>191</sup> The children were also beaten viciously by their alcoholic father. Luis, in particular, suffered his father’s wrath: he was beaten with electric cords, kicked, and punched. At age six, Luis fell from a wagon and fractured his skull. His head swelled “like a balloon,” but his impoverished family sought no medical treatment for him.<sup>192</sup> After his fall his behavior became increasingly odd and unpredictable: he “began to have seizures like a jumping bean.”<sup>193</sup> He talked to himself and spoke of visits from space aliens.<sup>194</sup>

“Luis also seemed a lot dumber after the accident,” his sister recalled. Luis had to repeat first grade three times.<sup>195</sup> A psychiatrist who examined him when he was an adult reported that “his ability to express himself and... to recognize the meaning of common words were at the level of a nine- to ten-year-old child.”<sup>196</sup> He did not understand the difference between north and south or east and west, or the number of weeks in a year.<sup>197</sup> His I.Q. was measured at variously at 63 to 70.

Luis Mata and his brother Alonzo were arrested in 1977 as suspects in the rape and murder of Debra Lee Lopez in Arizona. Both Luis and Alonzo told the police that it was Luis who cut Lopez’ throat, almost severing her head. There was no physical evidence linking Luis to the crime. Both brothers were convicted after trial and sentenced to death; after a resentencing hearing, Luis was again sentenced to death and Alonzo received a life sentence.<sup>198</sup>

During Luis Mata’s sentencing hearings, his lawyer did not present evidence about Mata’s mental retardation or his abused childhood.<sup>199</sup> The lawyer who handled his post-conviction proceedings did not conduct any investigation into Mata’s background, contact his trial counsel or family members, or obtain assistance from

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<sup>188</sup> Case note by M. Maurice Ryans, M.D., Chief of Service, Forensic Unit, Virginia Department Mental Health and Mental Retardation, June 23, 1978, (on file with Human Rights Watch).

<sup>189</sup> “Executing Mentally Impaired Prisoners is Unjust and Cruel,” *Dallas Morning News*, November 22, 1998.

<sup>190</sup> General information about Luis Mata provided by Jeffrey Kirchmeier, counsel for Luis Mata. Human Rights Watch telephone interview with Jeffrey Kirchmeier, May 25, 1999.

<sup>191</sup> Declaration of Dr. Timothy Dering, psychologist, January 11, 1992, (on file with Human Rights Watch).

<sup>192</sup> See generally Affidavit of Michael Bayless, June 28, 1995, (on file with Human Rights Watch); see also Affidavit of Richard I. Lanyon, psychologist, August 13, 1993, (on file with Human Rights Watch).

<sup>193</sup> Declaration of Dering.

<sup>194</sup> Pamela Manson, “Death Row Appeal cites Brain Damage; Violent Childhood Described,” *Arizona Republic*, July 3, 1995.

<sup>195</sup> Declaration of Clemente Mata, sister of Luis Mata, Exhibit 11, In Re Luis Mata, Application for Executive Clemency, Before the Arizona Board of Executive Clemency, (copy on file with Human Rights Watch).

<sup>196</sup> Peres-Arce, “Neuropsychological Evaluation.”

<sup>197</sup> See declaration of Dering.

<sup>198</sup> See In Re the Application of Luis M. Mata, Application for Executive Clemency, submitted to the Arizona Board of Executive Clemency.

<sup>199</sup> Luis Mata, like many people, fought hard to keep his retardation a secret. One of his attorneys said ruefully, “I had no idea [he was mentally retarded]... He would talk about ‘habeas’ and read the briefs. Later, I realized he used words without knowing what they meant.” Human Rights Watch interview with Jeffrey Kirchmeier.

mental health experts.<sup>200</sup> New attorneys subsequently developed extensive evidence of Luis Mata's mental retardation and childhood abuse. After reviewing this new evidence, the prosecutor from his trial filed an affidavit saying that he no longer believed Luis Mata was sufficiently culpable to merit the ultimate punishment: "Had I known this information, I would not have requested or pursued a death sentence for Luis Mata."<sup>201</sup> Nonetheless, the courts refused to consider the new evidence on procedural grounds -- ignoring the prejudice to Mata from his earlier attorneys' poor work. Indeed, the Supreme Court of Arizona said the evidence was not "new" because Luis Mata himself had known about his condition and his past, and the court faulted Mata for not having come forward with it!<sup>202</sup>

Shortly before Luis Mata was scheduled to die, his brother Alonzo confessed that he was solely responsible for Lopez' rape and murder and that Luis had taken the blame to protect him. A witness who had been present during a portion of the crime agreed that Luis had not taken part in the rape and murder. The Arizona Board of Executive Clemency nonetheless refused to recommend a reprieve of execution. Luis Mata was executed on December 21, 1996.<sup>203</sup>

### **Eddie Mitchell**

Eddie Mitchell, I.Q. 66, was born in 1970.<sup>204</sup> His mental deficiencies were obvious from his early childhood: in first grade, which he failed once, his classmates would mock him, calling him "stupid" and "retarded." He stayed in sixth grade for three years and when he finally dropped out of school at age eighteen, he was still in eighth grade. His middle school principal recalled that "he couldn't understand lessons, couldn't respond... The other kids would giggle and laugh at him."<sup>205</sup> Mitchell could not even learn to play baseball: his cub scout master remembers that on the rare occasions when he actually caught the ball, "he would just hold on to it, maybe kiss it, but never throw it on." His intellectual level as an adult was manifest in a statement he provided to his attorneys, written in large, childish letters: "I love to shop in the store. I like ice cream very. Smile. I like horse. I like food to eat. Yes I like cat, and dog. I love animal very much. God love you very very much. The Lord is come back real soon. God bless you. Smile God love you."<sup>206</sup>

In 1992, Eddie Mitchell got into a quarrel with Paul Guillory, a sixty-seven-year-old relative for whom he had worked on and off. According to the police, Mitchell thought Guillory owed him money, and when Guillory would not pay, Eddie picked up a stick and hit him over the head, causing his death. When interrogated by the police, Eddie waived his rights and confessed, apologizing for the incident. Although even the chief police officer on the case testified that he did not believe Eddie Mitchell had intended to kill Guillory, Louisiana prosecutors sought and obtained the death penalty.

In Mitchell's post-conviction appeals, the judge ruled that while Eddie Mitchell could not be expected to represent himself, no funds were available for counsel. This ruling left Mitchell, who thought "waiving rights" meant waving his right hand,<sup>207</sup> and whose writing skills are that of a small child, in the ludicrous position of

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<sup>200</sup> Luis Mata Application for Executive Clemency, p. 24.

<sup>201</sup> Manson, "Death Row."

<sup>202</sup> *State v. Mata*, 609 P.2d 48 (Ariz. 1980).

<sup>203</sup> Death Penalty Information Center.

<sup>204</sup> General background information on Eddie Mitchell from Human Rights Watch interviews with Clive Stafford-Smith and Emily Bolton of the Louisiana Crisis Assistance Center, May 19, 1999; May 21, 1999 respectively. See also *State of Louisiana v. Eddie Mitchell*, Brief Amicus Curiae of the Louisiana Public Defender's Association in Support of Eddie Mitchell's Request that this Court Grant Supervisory Writs and Hear Full Argument on Whether a Mentally Retarded Person who is Condemned to Death May be Denied Counsel and Funds for His Release, filed September 18, 1998, Case 98 KP 2445, Louisiana Supreme Court.

<sup>205</sup> Affidavit of Ivory Bellony, March 28, 1997 (on file at Human Rights Watch).

<sup>206</sup> Document on file at Human Rights Watch.

<sup>207</sup> When an attorney from the Louisiana Crisis Assistance Center asked Mitchell if he had understood what "waiving his rights" meant, Mitchell raised his right hand and waved. Human Rights Watch interview with Emily Bolton.

potentially having to represent himself in court if he wishes to go through the legally complex process of appealing his death sentence.

Eddie Mitchell remains on death row in Louisiana. Pro bono lawyers are currently fighting for his right to receive free court-appointed counsel in his appeals.

### **Johnny Paul Penry**

Johnny Paul Penry's problems started when he was born. A difficult breach birth left him with organic brain damage, and this initial damage was compounded during his early childhood by his mother's brutal beatings. She hit him on the head, broke his arms several times, burned him with cigarette butts, and forced him to eat his own feces and drink urine.<sup>208</sup> She threatened to cut his penis off if he kept wetting the bed.<sup>209</sup> His family's neighbors recalled hearing "terrible, terrible screams" coming from the Penry house every afternoon. "They weren't like a two-year-old crying or even a baby crying," said one neighbor. "They were horrible screams, terrified screams [that] would just go on and on."<sup>210</sup>

When he went to school, Penry could not learn; he dropped out of first grade, and when he reached adulthood his mental age was still "comparable to the average second-grader's."<sup>211</sup> His aunt spent a year just trying to teach him to sign his name.<sup>212</sup> As an adolescent, he was unable to recite the alphabet and could not count.<sup>213</sup>

As Johnny's mother beat her defenseless child, she sometimes screamed that she loved him.<sup>214</sup> Violent "love" was all Penry was taught, and when he was twenty-one he was convicted of rape. The woman he raped testified that although she was terrified by Penry's attack, she felt sorry for him, too. Penry was paroled after that rape. A report from the Texas Rehabilitation Commission warned that he had "very poor coordination between body drives and intellectual control.... He also tends to be very defensive and may tend to protect himself from anticipation [of] hurt from others through aggressive acts."<sup>215</sup>

In 1979, Johnny Penry was accused of the murder and rape of twenty-two-year-old Pamela Mosely Carpenter in Livingston, Texas, and he confessed to the police. It is difficult to piece together the sequence of events that led Penry to kill Carpenter: what seems certain is that Penry entered Carpenter's house and frightened her. When she tried to defend herself by attacking him with a pair of scissors, Penry beat Carpenter violently and stabbed her in the chest with the scissors, killing her.<sup>216</sup> The police claimed that Penry entered the house in order to commit murder and rape. It is equally possible, however, that Penry entered Carpenter's house with no intention of harming her but that, when Carpenter reacted with terror, Penry panicked himself and events quickly spiraled out of control.<sup>217</sup>

During his trial, "it became clear [that Penry] couldn't read or write.... He couldn't name the days of the week or the months of the year, couldn't count to 100, couldn't say how many nickels were in a dime or name the

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<sup>208</sup> There is extensive information on Penry's case in the published court decisions and numerous press accounts. Good summaries of Penry's mental retardation and childhood history are also provided in Request for Clemency or Reprieve for Johnny Paul Penry, December 13, 2000, filed with Texas Board of Pardon and Paroles, p. 4, (on file with Human Rights Watch); also see generally Petition for Writ of Habeas Corpus, No. H-97-CV-04094, S.D. Tex., March 2, 1998, (on file with Human Rights Watch). See also Reed, *Penry Penalty* and Perske, *Unequal Justice*..

<sup>209</sup> Petition for Writ of Habeas Corpus, p. 9.

<sup>210</sup> Penry Request for Clemency, p. 9; *Ibid.*, Perske, *Unequal Justice*, p. 63; Penry Petition for Writ of Habeas Corpus, p. 9.

<sup>211</sup> Reed, *Penry Penalty*, p. 2; see also *Penry v. Lynaugh*, 492 U.S. 302, 307, 309 (1989).

<sup>212</sup> Perske, *Unequal Justice*, p. 65.

<sup>213</sup> Penry Petition for Writ of Habeas Corpus, p. 9.

<sup>214</sup> Perske, *Unequal Justice*, p. 63.

<sup>215</sup> *Ibid.*, p. 64.

<sup>216</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989).

<sup>217</sup> *Ibid.*

President of the United States.”<sup>218</sup> Nonetheless, a Texas jury sentenced him to death. They were not instructed to consider his retardation as a mitigating factor, however, and in 1989 in *Penry v. Lynaugh* the U.S. Supreme Court overturned his sentence. “In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry’s mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its ‘reasoned moral response’ to that evidence in rendering its sentencing decision.”<sup>219</sup> The Supreme Court ordered a retrial.

During the retrial, his lawyers pointed out that Penry’s I.Q. measured between 50 and the low sixties. Other Texas death row inmates testified that they had “never known a man... that wanted friends more than Johnny did.” Penry was so suggestible that reporters could “get him to say almost anything they wanted to hear.” But two prosecution experts denied that Penry was seriously retarded; one, a former chief psychologist for the Texas prison system, argued that his one-time, unrepeatable score of 72 on an old verbal I.Q. test “shows his potential” (despite the fact that Penry’s average combined I.Q. score on multiple tests administered between his childhood and the age of twenty was in the low fifties). The other expert claimed Penry was faking his retardation; after two examinations that took up a combined total of twenty-three minutes, he diagnosed Penry as someone with an I.Q. between “mild and dull normal.”<sup>220</sup>

The judge then presented the jury with essentially the same set of instructions that led the Supreme Court to overturn the results in the first trial, and Johnny Penry was sentenced to death once more.

The Supreme Court decision in Penry’s case led Texas legislators to revise the state’s capital sentencing scheme, giving jurors greater latitude to consider a wide range of mitigating factors during sentencing. But ironically, Penry’s retrial took place before these legislative changes went into effect, so he could not benefit from them. He remains on death row today, where he “spends his days coloring with crayons and looking at comic books he cannot read.”<sup>221</sup> His most recent execution date of November 16, 2000 was stayed by the U.S. Supreme Court pending consideration of his appeal challenging the jury instructions in his second trial. Oral argument in his case is scheduled for March 27, 2001.

### **Anthony Porter**

Anthony Porter<sup>222</sup> seemed to many like a stereotypical criminal: “[He] seems to think he’s pretty slick. He walks into a room slowly, real cool, like some streetwise punk, a smirk on his face, eyes shifting back and forth.”<sup>223</sup> Although he claimed he was innocent, Porter struck his Illinois jury as someone every bit mean enough to have committed the brutal murder with which he was charged, the 1982 slaying of a young Chicago couple. Porter’s original trial lawyer did not realize that his client had severe mental retardation and so never raised this as a possible mitigating factor. The jury convicted Porter, and the judge sentenced him to death.

Porter was so frightened and belligerent that he opposed having his lawyers file for clemency: “He thought that when your lawyer gets tired of working, he files this petition and then they come and get you to kill you. He would get enraged when [filing a clemency petition] was mentioned.”<sup>224</sup>

In 1998, Anthony Porter was forty-eight hours away from execution when his lawyers persuaded the Illinois Supreme Court to grant a stay while they gathered further evidence of his mental retardation. Porter could

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<sup>218</sup> *Ibid.*, p. 65; see also Raymond Bonner and Sarah Rimer, “Mentally Retarded Man Facing Texas Execution Draws Wide Attention,” *New York Times*, November 12, 2000.

<sup>219</sup> See *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989).

<sup>220</sup> Perske, *Unequal Justice*, pp. 68, 71

<sup>221</sup> Bonner and Rimer, “Mentally Retarded.”

<sup>222</sup> General information about Anthony Porter from Human Rights Watch telephone interview with Daniel Sanders, attorney for Anthony Porter, May 5, 1999.

<sup>223</sup> Eric Zorn, “Questions Persist as Troubled Inmate Faces Electrocution,” *Chicago Tribune*, September 21, 1998, describing the reaction Washington’s defense experts initially had to him.

<sup>224</sup> Human Rights Watch interview with Daniel Sanders.

not help his lawyers, could not “describe facts,” or “deal with abstractions.”<sup>225</sup> When the psychiatric expert obtained by the defense started his examination, Porter asked him a preliminary question: “What’s execution?” he wanted to know. The examining psychologist “explained that he was to be put to death and that was why he was on death row. [Anthony’s] eyes grew wide, and he said, ‘Oh my gosh!’” The psychologist concluded that Porter was clearly incompetent and unfit to be executed. His I.Q. measured only 51.<sup>226</sup>

The prosecutor’s office appeared to think Porter was somehow “faking” his retardation. According to the *Chicago Tribune*, the prosecutor had no sympathy for Porter’s plight: he “sneer[ed]” that Porter’s I.Q. score was ‘conveniently’ four points lower than the score of the person with the lowest I.Q. executed in the U.S. in recent decades.<sup>227</sup>

For Porter, that low I.Q. score was more than just convenient. It saved his life, and ultimately set him free. Although the courts granted a stay solely in order for the investigation into Porter’s retardation to proceed, the story bought Porter just enough time for a group of journalism students at Northwestern University to prove conclusively that he was innocent. Porter was released from prison in 1999 after spending sixteen years on death row.

Illinois Gov. George Ryan was shaken by the near-execution of an innocent man: “Anthony... was, I think, mentally incompetent, had a very low I.Q., had no business being on death row,” he told CNN in September 2000. When Gov. Ryan, a long-time death penalty supporter, realized that Porter’s case was far from atypical, he instituted a state moratorium on the death penalty, saying “I have grave concern’s about our state’s shameful record of convicting innocent people and putting them on death row.” Illinois had executed twelve people since reinstating the death penalty in 1977. During the same period, ten Illinois death row prisoners were found to be innocent.<sup>228</sup>

### **Earl Washington, Jr.**

Earl Washington, Jr. grew up extremely poor in rural Virginia, one of five children in a family marked by parental drinking and violence.<sup>229</sup> As a child, he was diagnosed as brain-damaged and mentally retarded. He attended special education classes and dropped out of school at fifteen after failing all his courses. A teacher made “what would become a prophetic observation: ‘[Washington] is very easily led. He tries to do what is asked, but has no idea what is expected of him.’”<sup>230</sup> Testing placed his I.Q. variously at 57 and 69.<sup>231</sup> He knows “some,” but not all, of the letters of the alphabet.<sup>232</sup> Washington worked as a farmhand, and his employers noticed his extreme suggestibility. As one stated, “[Washington] was going to agree with whatever you said. Sometimes he knew what you were talking about. Sometimes he didn’t.”<sup>233</sup>

In 1983, he was picked up by police for shooting his brother-in-law in the foot during a quarrel -- charges that were eventually dropped.<sup>234</sup> But while in police custody, he waived his Miranda rights and after a lengthy interrogation, confessed not only to the incident involving his brother-in law but to five other crimes, including a

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<sup>225</sup> Ibid.

<sup>226</sup> Adriana Colindres, “Death Row Dilemma,” *State Journal-Register*, Springfield, Ill., October 4, 1998.

<sup>227</sup> Zorn, “Questions persist.”

<sup>228</sup> CNN, “Struggle to be Normal, Part 4: Criminal Justice,” October 2, 1994.

<sup>229</sup> General background information on Earl Washington from Human Rights Watch telephone interview with Gerald Zerkin, attorney for Washington, May 13, 1999. A detailed review of his case is presented in McGlone, et al, “A Near-Fatal Injustice.”

<sup>230</sup> Ibid.

<sup>231</sup> Ted Koppel, “Crime and Punishment - A Matter of Life and Death,” ABC News Nightline, September 14, 2000; Jim Dwyer, “Testing the Rush to Death Row,” *New York Daily News*, September 7, 2000.

<sup>232</sup> CNN, “Struggle.”

<sup>233</sup> Tim McGlone, et al., “A Near-Fatal Justice.”

<sup>234</sup> Dwyer, “Testing the Rush.”

break-in down the street, a burglary on another street nearby, a recent rape -- and, eventually, the 1992 the stabbing murder of a young woman, Rebecca Williams.<sup>235</sup>

In his “confession,” his trial lawyers said, “Earl on more than ten to fifteen occasions simply uttered the words either yes or no.”<sup>236</sup> Most of his “confessions” didn’t check out: he had the facts all wrong, and eyewitnesses said he wasn’t the perpetrator. The police eventually acknowledged that Washington could not possibly have committed most of the crimes he had admitted to. But police were less willing to let go of Earl’s confession in the Williams case, which had gone unsolved for a year.<sup>237</sup>

They insisted on Washington’s guilt despite various odd aspects of the information volunteered. Washington, for instance, told the police that Rebecca Williams, his supposed victim, was black, although she was in fact white. He described her as “short” although she was 5’ 8”. He said he kicked in the door, which was found undamaged. He said he stabbed her two or three times, rather than the thirty-eight times she was actually stabbed. And he said she was alone, although Williams’s two small children were present.<sup>238</sup>

Washington later recanted his confession, insisting that he had not committed the crime.<sup>239</sup> He said, “I guess I just agreed with whatever [the police] told me, that’s what I agreed. Whatever they said, I agreed with, I guess.”<sup>240</sup> One of Washington’s defense attorneys told journalists that in his view, Washington, an African-American in a southern town, had “found that the way to get by in his community as a mentally challenged black man was [to say] ‘Yes, sir.’ ‘Yes, Sir,’ is an easy answer for him. It means he’s pleased his interrogator.”<sup>241</sup> In an interview with Human Rights Watch, Washington’s lawyer elaborated: “Earl Washington developed a coping mechanism of pleasing authority figures. When police let him know what they wanted, he gave them that. He didn’t see the danger.”<sup>242</sup>

Despite Washington’s mental retardation, the trial court found that he had voluntarily waived his Miranda rights and that his confession was valid -- even though the court knew that he had been found to be innocent of virtually everything else he had “confessed” to doing.<sup>243</sup> After a three-day trial -- in which the prosecutors did not reveal to the jury Washington’s various false confessions -- Earl Washington was sentenced to death.

Subsequent appeals to state and federal courts were all denied, despite newly discovered forensic evidence that showed the seminal fluid found at the crime scene could not have been Washington’s.<sup>244</sup> In 1993,

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<sup>235</sup> *Ibid.*; see also *Washington v. Virginia*, 323 S.E. 2d. 577 (1984), *cert. denied*, 471 US 1111 (1985), *rev’d* on other grounds.

<sup>236</sup> *Ibid.*; also Koppel, “Crime and Punishment.”

<sup>237</sup> Koppel, “Crime and Punishment.”

<sup>238</sup> Dwyer, “Testing the Rush”; Perske, *Unequal Justice*, p. 55; Hourhian, “Earl Washington’s Confession,” p. 1502.

<sup>239</sup> When reporters asked him why he had volunteered so many details to the police, Washington struggled to find words:

Reporter: Why did you tell them she was black?

Washington: I don't know. I didn't--I didn't see a picture of her in the newspaper where she got killed or nothing. I just figured she was black.

Reporter: You figured she was black?

Washington: Yes, sir.

Reporter: Without knowing what her color was?

Washington: Yes, sir.

Reporter: Do you normally tell people things you think they want to hear?

Washington: At times, yes, sir.

Reporter: Do you? Why do you do that?

Washington: I don't know.

BBC interview with Washington, cited in Koppel, “Crime and Punishment.”

<sup>240</sup> CNN, “Struggle.”

<sup>241</sup> Koppel, “Crime and Punishment.”

<sup>242</sup> Human Rights Watch telephone interview with Gerald Zerkin, attorney for Earl Washington, May 13, 1999.

<sup>243</sup> *Washington v. Virginia*, 323 S.E. 2d. 577 (Va. 1984), *cert. denied*, 471 US 1111 (1985), *rev’d* on other grounds.

<sup>244</sup> Washington had type O blood while semen found at the crime scene contained type A. Washington’s trial lawyer had been unaware of this evidence and so never presented it at trial. McGlone, et al., “A Near-Fatal Justice.”

new DNA tests were performed on the blood and semen found on the victim, and the results did not match Earl Washington's DNA. Gov. Wilder of Virginia nevertheless refused to overturn Washington's conviction, arguing that perhaps Washington had had an accomplice (despite the victim's dying words, in which she said her assailant had been alone),<sup>245</sup> but on his last day in office he did reduce Washington's sentence to life in prison.

In 2000, a new series of DNA tests ordered by Virginia's current governor, Jim Gilmore, showed once again that there was no trace of Washington's blood or semen at the crime scene.<sup>246</sup> After eighteen years in prison, including nine and a half on death row, Washington received a pardon from Gov. Gilmore declaring him innocent of the murder that brought him within days of execution. He was released from prison on February 12, 2001.

## Terry Williams

Terry Williams,<sup>247</sup> I.Q. 69, was born with fetal alcohol syndrome. Before his birth, his mother "drank herself into a stupor every day from Thursday to Monday," one of Williams's former advocates told Human Rights Watch. "Both of his parents were bootleggers," and eventually "they were arrested and charged with criminal child neglect. The police report is enough to make you ill. Kids were naked, hungry and there was feces and urine on the floor."<sup>248</sup>

One morning in 1985 in Danville, Virginia, a neighbor found the dead body of textile-worker Harris Stone after Stone had been out drinking. Stone's blood-alcohol count was measured at 0.41, more than five times higher than the point at which a motorist is declared legally drunk. The police concluded that Stone had died of alcohol poisoning. Eight months later, however, Terry Williams wrote an anonymous letter to the police, explaining that he had hit Stone in the chest with a gardening tool and robbed him of \$3.<sup>249</sup> An autopsy was performed, and Stone was found to have broken ribs and a perforated lung.<sup>250</sup> When the police eventually traced the letter to Terry Williams and interrogated him, he "confessed, recanted, and then confessed again." He later told his lawyers, however, that his letter had been about a dream he had had and that his confession had only been about his dream.<sup>251</sup>

Despite the peculiar circumstances of Stone's death, Williams was charged with capital murder, and the prosecution used his confession as the key evidence of his guilt. Williams's trial attorney did not tell the jury about his mental retardation or his abused childhood, and he did not bother to return the phone calls of an accountant who offered to serve as a character witness for Williams. Defense counsel also told the jury in his closing arguments that Williams's alleged crime "defies logic" and that he could not think of "any great, earth-shattering, moving reason" why the jury should spare Williams' life.<sup>252</sup>

Terry Williams was found guilty and sentenced to death. Ultimately, the American Bar Association asked a Washington, D.C. law firm to represent Williams pro bono in his post-conviction appeals. His new lawyers appealed his death sentence, arguing that Williams had been denied effective assistance of counsel.<sup>253</sup> Ultimately, the U.S. Supreme Court agreed, finding in a 6-3 opinion that Williams could not have received a fair trial.

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<sup>245</sup> Ibid.

<sup>246</sup> CNN, "Struggle."

<sup>247</sup> General background information about Terry Williams from Human Rights Watch telephone interviews with Linda Tarlow, a former lawyer for Terry Williams, May 6, 1999 and October 6, 2000.

<sup>248</sup> Human Rights Watch interviews with Linda Tarlow.

<sup>249</sup> Frank Green, "Death Row Veteran's Life Spared," *Richmond Times Dispatch*, November 15, 2000.

<sup>250</sup> Brooke Masters, "Deal Gets Inmate off Death Row; U.S. High Court Intervened, citing Virginia Man's Deplorable Defense." *Washington Post*, November 15, 2000.

<sup>251</sup> Human Rights Watch interviews with Linda Tarlow.

<sup>252</sup> Masters, "Deal."

<sup>253</sup> Human Rights Watch interviews with Linda Tarlow.

Williams's fetal alcohol syndrome and borderline intelligence made it difficult for his new lawyers in their efforts to represent him. "He can't understand any abstraction, can't make a budget, can't understand how things in state court can have an impact later," one of his former attorneys told Human Rights Watch. Williams "answers questions and makes decisions based on your tone of voice and facial expressions.... He's so incredibly suggestible."<sup>254</sup>

After the Supreme Court decision, however, Terry Williams's lawyers were able to reach an agreement with the state to avoid a full resentencing trial. In the November 2000 plea agreement, Williams pled guilty and accepted life in prison without the possibility of parole in exchange for the state's agreement to forgo the death penalty. He remains in prison, but has been moved off death row. One of his attorneys relates that he "is very happy to have the increased freedom and human contact of life off of the row."<sup>255</sup>

### **Johnny Lee Wilson**

Twenty-year-old Johnny Lee Wilson lived with his mother and grandmother in Missouri when he was accused by police of brutally murdering seventy-nine-year-old Pauline Martz, a friend of his grandmother. Wilson, whose I.Q. was under 70,<sup>256</sup> had no criminal record; he worked intermittently as a handyman and janitor, mowing lawns and helping out. At first he insisted to police that he had been with his mother during the time the crime was committed.

The police kept up their interrogation, telling Wilson that if he confessed "we can all go home." Wilson thought they meant that he, too, could return home.<sup>257</sup> The police told him that they were his friends and wanted to help him:

- Officer: And you know, this [the murder case] isn't the end of the world for anybody . . . And so, you got a problem. And you need help. And we're the people that can get that done, John.
- Wilson: Uh huh.
- Officer: Rather than go through all this, John, rather than put you through the punishment, Steve and I, we want to help you tonight. We don't want you to be drug all through this. If there's something we can do tonight to help you, that's what we want to do.

As the interrogation continued, with the police insisting on his guilt, Wilson's conviction of his own innocence began to waver:

- Officer: ....You better start figuring out what's going to happen to John Wilson. That's what you better do.
- Wilson: Uh huh.
- Officer: ..... We've got the circumstantial evidence of you knowing about it before anybody else. We've got a case made. Doesn't it look to you like someone would be convinced that you did it based on what I just told you?

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<sup>254</sup> Ibid.

<sup>255</sup> Human Rights Watch telephone interview with Dinah S. Leventhal, lawyer for Terry Williams, January 2, 2001.

<sup>256</sup> 20/20, ABC News, "An Innocent Man - Retarded Man Wrongfully Imprisoned," March 3, 1995.

<sup>257</sup> Perske, *Unequal Justice*, p. 44, citing *Wilson v. Missouri*, Appellant's Reply Brief, Supreme Court of Missouri, Case No. 73285, pp. 10-12.



Wilson: Yeah.

Officer: It sure does.

Wilson: I'll be glad to take a lie detector test.

Officer: You can see why we think that, right? Huh? You can see why we think that? You can't hardly blame us for thinking that, can you?

Wilson: Uh hum.

The police finally broke Wilson's resistance, and they began to coax details of the crime from him. The police asked about the color of the shirt worn by the victim, for instance:

Wilson: I'd say it was white, kind of white or bluish blouse.

Investigator: Okay, how about bluish? I'll go for that.

Wilson: Yeah.

Investigator: How about blueish-green, maybe.

Wilson: Yeah.

The police knew that the victim's ankles had been bound with both rope and duct tape, and they tried to get Wilson to admit to knowing this incriminating detail:

Officer: What besides, what besides a rope was around her ankles? Something else. This is another test. I know. And you know. Just think. Come on, John.

Wilson: I'm thinking.

Investigator: What are some things that could be used?

Wilson: Handcuffs, I think.

Investigator: No. No. Wrong guess. What are some things you could tie somebody up with?

Wilson: Rope is all that he had, but-

Officer: That tells me something, John. That tells me something. That tells me something. I told you it's important that you be straight with me. You took the tape up there.

Wilson: Huh?

Officer: You took the tape up there, didn't you? <sup>258</sup>

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<sup>258</sup> Robert P. Sigman, "Victim Of 'A Horrible Injustice'; So Far, Attempts To Help Johnny Lee Wilson Have Failed," *Kansas City Star*, June 4, 1995. The article reproduces extensive portions of the interrogation transcript.

Although there was no other physical evidence linking him to the crime,<sup>259</sup> Johnny Lee Wilson was charged with capital murder after his “confession.”<sup>260</sup> He pled guilty to avoid the death penalty, and he was sentenced to life in prison. Although Wilson clearly had little understanding of what a “guilty plea” meant,<sup>261</sup> several courts upheld the “voluntariness” of his guilty plea.<sup>262</sup>

Evidence ultimately emerged supporting Wilson’s alibi, and another man, who had been a suspect from the beginning, confessed to the crime.<sup>263</sup> It turned out that the police and prosecution had withheld evidence that would have cleared Wilson.<sup>264</sup> In 1998, Johnny Wilson was pardoned by Missouri Gov. Mel Carnahan, who said: “We have locked up an innocent, retarded man who is not guilty of the crime of which he is accused.”<sup>265</sup> Johnny Wilson had spent almost a decade in prison before his pardon.<sup>266</sup>

## IX. ACKNOWLEDGMENTS

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<sup>259</sup> Interestingly, police found a stun gun at the crime scene. When they confronted Wilson with the stun gun, he had no reaction, and seemed bewildered. When police asked him to tell them what the stun gun was for, he suggested that it might be an electric razor. See Perske, *Unequal Justice*, p. 46.

<sup>260</sup> Although confessions are notoriously unreliable, juries and judges tend to find them extremely damning, and convict even when there is no evidence to corroborate the confession. See generally Peter Brooks, *Troubling Confessions* (Chicago: University of Chicago Press, 2000).

<sup>261</sup> See dissent by Judge Blackmar in *Wilson v. State*, 813 S.W.2d 833, 846 (Mo. 1991): “The transcript raises substantial questions about whether the plea was voluntarily and intelligently made. When asked why he was pleading guilty, the movant twice replied, ‘I don’t know.’ When the judge responded at some length that these responses were not adequate the movant replied, ‘I don’t understand what you’re saying.’ At this point many judges would have suggested that the proceedings be suspended so that the movant could consult with counsel. This judge, however, kept the movant on the carpet and asked a long series of questions, almost all calling for yes or no answers.”

<sup>262</sup> See *Wilson v. State*, 813 S.W.2d 833, 846 (Mo. 1991).

<sup>263</sup> Human Rights Watch interview with Sean O’Brien, April 29, 1999.

<sup>264</sup> Perske, *Unequal Justice*, p. 44-48.

<sup>265</sup> *Wilson v. Lawrence County*, 154 F.3d 757, 759, (8<sup>th</sup> Cir.1998). Gov. Mel Carnahan also said, “As a result of an intense investigation conducted by my office, I have decided to issue a pardon to Johnny Lee Wilson because it is clear he did not commit the crime for which he has been incarcerated.”

<sup>266</sup> “Wrongful Incarceration,” *National Law Journal*, September 7, 1998.