# EXHIBIT E

DEATH PENALTY CASE

No. 07-20232

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAR 28 2007
CHARLES R. FULBRUGE III
CLERK

In re MICHAEL WAYNE RICHARD
Petitioner.

SECOND MOTION FOR AUTHORIZATION
TO FILE SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE.

U.S. COURT OF APPEALS
RECEIVED
MAR 28 2007
NEW ORLEANS, LA.

Leslie M. Ribnik
P.O. Box 271507
Houston, Texas 77277
713.665.0771
713.592.6073 (Fax)
ribnik@swbell.net
Federal Bar No. 12673
Texas Bar No. 16826330

Petitioner Michael Wayne Richard asks this Court for authorization to file the attached successive habeas corpus application in the United States District Court for the Southern District of Texas.[1] Mr. Richard wishes to raise the following claim:

I. Execution of the petitioner, a mentally retarded man, is barred by the Eighth Amendment to the United States constitution and the standard s of *Atkins v. Virginia.*

Mr. Richard can make a *prima facie* showing that his *Atkins* claims meet the requirements for filing a successive petition under 28 U.S.C. § 2244(b)(2)(A).

**I.**

On March 28, 2001, Counsel was appointed by the United States District Court for the Southern District of Texas (Houston Division)for purposes of preparing, filing, and litigating an application for a post-conviction writ of *habeas corpus*.

On December 22, 2002, the federal District Court denied *habeas corpus* relief and a Certificate of Appealability.

On April 14, 2003, on appeal to this court, Applicant filed an Application for Issuance of a Certificate of Appealability.

---

[1] Section 2244(b)(3)(A) requires Mr. Richard to move this Court for authorization to file a successive application in the district court. This Court must determine whether the successive application satisfies the criteria of § 2244(b)(2). 28 U.S.C. § 2244(b)(3)(C). Thus, Mr. Richard has attached his successive application to this motion so that this Court may review it and make the § 2244(b)(3)(C) determination. *See* Appendix A.

On June 20, 2003, Applicant filed in the 182nd district Court of Harris County, Texas, and in the Texas Court of Criminal Appeals a subsequent Application for Postconviction Writ of *Habeas Corpus* (Cause No. 456221-B) stating an Eight Amendment *prima facie Atkins* claim for relief. On the same day, Applicant filed in this court his Motion for Authorization to File Successive Petition for Writ of *Habeas Corpus* raising a *prima facie Atkins* mental retardation claim for relief. Attached to the motion was Applicant's successive petition stating a *prima facie* claim of mental retardation. Also, on the same day, Applicant filed his successive petition in the federal District Court in Houston, Texas.

On June 27, 2003, this court denied Applicant's Application for Issuance of a Certificate of Appealability.

On July 14, 2003, Petitioner filed a motion to abate Consideration of Successive Petition for Writ of *Habeas Corpus*.

On July 17, 2003, this court granted the motion to abate consideration of the successive petition ordering petitioner to refile his application within seven calendar days of completing exhaustion of state remedies.

On October 8, 2003, the Texas Court of Criminal Appeals remanded the case to the trial court for consideration of the *Atkins* claim.

On December 29, 2006, the trial court concluded an evidentiary hearing in

Cause No. 456221-B. The Court executed findings of fact and conclusions of law and the case was returned to the Court of Criminal Appeals.

On March 21, 2007, the Court of Criminal Appeals denied *habeas corpus* relief.

## II.

## MR. RICHARD'S CLAIMS SATISFY THE REQUIREMENTS, IN 28 U.S.C. § 2244(b)(2)(A), FOR FILING A SUCCESSIVE HABEAS CORPUS APPLICATION.

Section 2244(b)(2), states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the application shows the claim relies on a new rule of constitutional law, made retroactive on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2).

On June 20, 2002, the Supreme Court banned the execution of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002). It is beyond cavil that this prohibition was a new rule made retroactive to cases on collateral review. *See Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002); *see also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Mr. Richard's *Atkins* claim has not been considered by the federal courts. Because *Atkins* gave rise to a new rule of law that applies retroactively to cases on collateral review, Mr. Richard should be authorized to

file the attached successive petition in the district court.

While the language of 28 U.S.C. § 2244(b)(2) makes no reference whatsoever as to any requirement of proof of the underlying claim raised in a successive application, it appears to leave evaluation of the merits of a successive claim to the district court; and in this instance, does not require a determination of the merits of applicant's underlying claim of mental retardation. The inquiry to be conducted by this court at this juncture should be limited to whether Applicant has shown that he has never before presented his *Atkins* claim and whether the claim relies on a previously unavailable new rule of constitutional law made retroactive to cases on collateral review. The record in this case clearly shows both requirements are satisfied.

## CONCLUSION

ACCORDINGLY, Mr. Richard asks this Court to:

1. Find that he has made a prima facie showing that he meets the requirements for filing a successive habeas petition and grant him authorization to file the attached habeas corpus application in the United States District Court for the Southern District of Texas;

2. Grant such other relief as law and justice require.

Respectfully submitted,

Leslie M. Ribnik
P. O. Box 271507
Houston, Texas 77277
713.665.0771
713.592.6073
ribnik@swbell.net
Federal bar No. 12673
Texas Bar No. 16826330

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2007, a true and correct copy of the foregoing motion was served by United State Postal Service Certified Mail, Return Receipt Requested upon the Office of the Attorney General of Texas, Capitol Litigation Division, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

Leslie M. Ribnik

# APPENDIX A

# APPENDIX A

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

| | | |
|---|---|---|
| **MICHAEL WAYNE RICHARD,** | § | |
| | § | |
| **Petitioner,** | § | |
| | § | |
| | § | |
| **-VS-** | § | **CAUSE NO. ____________** |
| | § | |
| | § | |
| **NATHANIEL QUARTERMAN,** | § | |
| **Director, Texas Department of** | § | |
| **Criminal Justice, Institutional Division,** | § | |
| | § | |
| **Respondent.** | § | |

## SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS


LESLIE M. RIBNIK
State Bar No. 16826330
Federal Bar No. 12673
P.O. Box 271507
Houston, Texas 77277
713.665.0771 (office)
713.592.6073 (fax)
ribnik@swbell.net (e-mail)

ATTORNEY FOR PETITIONER
MICHAEL WAYNE RICHARD

## SUBJECT INDEX

INDEX OF AUTHORITIES ........ ii

Cases ........ ii

Statutes and Rules ........ iii

Learned Treatises ........ iv

STATEMENT OF JURISDICTION ........ 1

IDENTIFICATION OF PARTIES ........ 1

PROCEEDINGS TO DATE ........ 2

QUESTIONS FOR REVIEW ........ 5

GROUND FOR HABEAS CORPUS RELIEF ........ 6

VERIFICATION ........ 36

CERTIFICATE OF SERVICE ........ 36

## INDEX OF AUTHORITIES

CASES

*Arave v. Creech*, 507 U.S. 463 (1993) .......... 29

*Atkins v. Virginia, 536 U.S. 304 (2002)*.......... 4, 7, 15

*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) .......... 6,15,21,22

*Eddings v. Oklahoma*, 455 U.S. 104 (1982) .......... 18,19,21,22

*Enmund v. Florida*, 458 U.S. 782, 799 (1982) ..........17,18

*Ex parte Tennard*, 960 S.W.2d 57 (Tex. Crim. App. 1997) ..........6

*Ford v. Wainwright*, 477 U.S. 399 (1986) ..........18,23

*Franklin v. Lynaugh*, 492 U.S. 302 (1989) ..........6,15,17,18,21,22,23,24,27,28,29,30,32

*Gregg v. Georgia*, 428 U.S. 153 (1976) ..........17

*Penry v. Lynaugh*, 492 U.S. 302, (1989)..........6,15,17,18,21,22,23,24,27,28,29,30,32

*Richard v. State*, 842 S.W.2d 279 (Tex. Crim. App. 1992) ..........2,13

*Richard v. State*, No. 72,193 (Tex. Crim.App. June 18, 1997) ..........2

*Richard v. Texas*, ___U.S.___, 118 S.Ct. 2376 (1998) ..........2

*Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) ..........20

*Stanford v. Kentucky*, 492 U.S. 361 (1989) ..........31

*Thompson v. Oklahoma*, 487 U.S. 815 (1988)..........17,18,21,22,29

*Tison v. Arizona*, 481 U.S. 137 (1987) ..........17,18,23

*Zant v. Stephens*, 462 U.S. 862, 877-78 (1983) ..........29

STATUTES AND RULES

U.S. CONST. amend. VII .......... 4

28 U.S.C. Sec. 2241(c)(3) .......... 1

28 U.S.C. 2254 .......... 1

21 U.S.C. § 848(l) (1988) .......... 30

18 U.S.C. § 3596(c) (1994) .......... 30

2001 Ariz. Sess. Laws 260; ARK. CODE ANN. § 5-4-618 (Michie 1993) .......... 30

COLO. REV. STAT. ANN. § 16-9-403 (West 1993) .......... 30

2001 Conn. Acts 151 (Reg. Sess.) .......... 30

2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7-131(j) (1988) .......... 30

IND. CODE ANN. § 35-36-9-6 (Michie 1994) .......... 30

KAN. STAT. ANN. § 21-4623 (1994) .......... 30

KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990) .......... 30

MD. ANN. CODE art. 27, § 412(g) (1989) .......... 30

2001 Mo. Laws 267 .......... 30

NEB. REV. STAT. § 28-105.01 (1998 & Suppl. 2000) .......... 30

N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991) .......... 30

N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995) .......... 30

2001 N.C. Sess. Laws 346 .......... 30

S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000) .......... 30

TENN. CODE ANN. § 39-13-203 (1990) ........................................................................30

WASH. REV. CODE ANN. § 10.95.030(2) (West 1993) ..................................................30

LEARNED TREATISES

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed.1992) ..........................................................................................5,7,15,16,19,20,21,22

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4TH ed., text rev. 2000) ("DSM-IV-TR")..................................................5,6,7,15

James M. Bebko & Helen Luhaorg, The Development of Strategy Use and Metacognitive Processing in Mental Retardation: Some Sources of Difficulty in JACOB A. BURACK, ROBERT M. HODAPP & EDWARD ZIGLER, eds. HANDBOOK OF MENTAL RETARDATION AND DEVELOPMENT 382, 384-95 (1998).........................................................................25

MARY BEIRNE-SMITH, JAMES R. PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 216 (1994) ...............................................................................................16

Judith Cockram, Robert Jackson & Rod Underwood, People with an Intellectual Disability and the Criminal Justice System: The Family Perspective, 23 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 41 (1998).......................................................................................................26

RONALD W. CONLEY, RUTH LUCKASSON & GEORGE N. BOUTHILET, eds., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (1992)...................................................................................................24

JAMES R. DUDLEY, CONFRONTING THE STIGMA IN THEIR LIVES: HELPING PEOPLE WITH A MENTAL RETARDATION LABEL (1997) ........................................................................26

James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414 (1985)..............................................................................16

Anne E. Fowler, Language in Mental Retardation: Associations with and Dissociations from General Cognition in BURACK HANDBOOK at 290 ..................................................................25

Richard M. Gargiulo & Janet A. Sulick, Moral Judgment in Retarded and Nonretarded School Age Children, 99 J. PSYCHOL. 23 (1978) ......................................................................17

Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1564 (1998) .......... 32

L. W. Heal & C. K. Sigelman, Response Biases in Interviews of Individuals with Limited Mental Ability, 39 J. INTELLECTUAL DISABILITY RESEARCH 331 (1995) .......... 25

Josephine C. Jenkinson, Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities, 104 AM. J. MENTAL RETARDATION 320 (1999) .......... 16,19,20

Rachel Levy-Shiff, Peri Kedem & Zamira Sevillia, Ego Identity in Mentally Retarded Adolescents, 94 AM. J. MENTAL RETARDATION 541, 547 (1990) .......... 16,21

Richard L. Luftig & Ronald E. Johnson, Identification and Recall of Structurally Important Units in Prose by Mentally Retarded Learners, 86 AM.J. MENTAL DEFICIENCY 495, 501(1982) .......... 25

Johnny L. Matson & Virginia E. Fee, Social Skills Difficulties Among Persons With Mental Retardation, in HANDBOOK OF MENTAL RETARDATION 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991) .......... 16

CECIL D. MERCER & MARTHA E. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977) .......... 25

A J. Merighi, M. Edison & Edward Zigler, The Role of Motivational Factors in the Functioning of Mentally Retarded Individuals in R. M. HODAPP, J. A. BURACK, & EDWARD ZIGLER, eds., ISSUES IN PPROACH TO MENTAL RETARDATION 114 (1990) .......... 25

Joan E. Perry & Dennis Krebs, Role-Taking, Moral Development, and Mental Retardation, 136 J. GENETIC PSYCHOL. 95 (1980) .......... 17

JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Free Press ed. 1997. .......... 21

Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanel & Carol J. Schoenrock, When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons, 19 MENTAL RETARDATION 53 (1981) .......... 25

Carol Steiker & 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 & CONTEMP. PROBS. 89, 98-104 (Autumn 1998)............................20

Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 194, 195 (1997)....................................................................................................................16,25

Harvey N. Switzky, Individual Differences in Personality and Motivational Systems in Persons with Mental Retardation, in ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY, AND RESEARCH 343, 346 (William E. MacLean, Jr., ed., 1997)....................................16

S.E. Szivos & E. Griffiths, Group Processes in Coming to Terms with a Mentally Retarded Identity, 28 MENTAL RETARDATION 333 (1990) .......................................................................26

Michael L. Wehmeyer & Kathy Kelchner, Interpersonal Cognitive Problem-Solving Skills of Individuals with Mental Retardation, 29 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 265, 267 (1994) .......................................................................20

Thomas L. Whitman, Self Regulation and Mental Retardation, 94 AM. J. MENTAL RETARDATION 347 (1990)..........................................................................................................16,20

**TO UNITED STATES DISTRICT JUDGE:**

**COMES NOW, MICHAEL WAYNE RICHARD,** Petitioner herein, by and through his Attorney of Record, Leslie M. Ribnik, and Pursuant to 28 U.S.C. Sec. 2254 files this petition for writ of habeas corpus.

## STATEMENT OF JURISDICTION

Petitioner is currently being illegally restrained of his liberty under a sentence of death pursuant to the judgment in Cause No. 456621 in the 182nd Judicial District of Harris County, Texas, at the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, by the Director of said department.

This Court has jurisdiction pursuant to 28 U.S.C. Secs. 2241(c)(3) and 2254.

## IDENTIFICATION OF PARTIES

The parties to this action are:

(1) Michael Wayne Richard, Petitioner;

(2) Nathaniel Quarterman, in his official capacity as Director of the Texas Department of Criminal Justice, Respondent. Mr. Quarterman may be served with process through his attorney, Mr. Baxter Morgan, Assistant Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711-2548.

## PROCEEDINGS TO DATE

In August, 1987, Petitioner was convicted and sentenced to death for the capital offense of murder in the course of committing burglary, in Cause No.456621 in the 182nd District Court of Harris County, Texas.

In 1992, the Texas court of Criminal Appeals reversed the judgment of the trial court and remanded the cause for a new trial.

In June, 1995, Petitioner was convicted by a jury of the offense of capital murder on a plea of not guilty. The jury assessed punishment at death.

On June 18, 1997, the Texas Court of Criminal Appeals affirmed the conviction in an unpublished decision in *Richard v. State*, No. 72,193 (Tex. Crim. App. June 18, 1997)(not designated for publication).

On April 1, 1998, Petitioner filed his petition for writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. Art.11.071 (Vernon Supp. 1997).

The trial court did not conduct an evidentiary hearing.

On July 3, 1998, the United States Supreme Court denied Petitioner's petition for writ of certiorari in *Richard v. Texas*, ___U.S.___, 118 S.Ct. 2376, 141 L.Ed.2d 743 (1998).

On February 7, 2001, The Texas Court of Criminal Appeals denied habeas relief.

On February 2, 2002, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston, Division.

On December 31, 2002, the U.S. District Court denied habeas relief and denied a certificate of appealability on Mr. Richard's claims.

On January 24, 2003, Mr. Richard filed his Notice of Appeal.

On April 14, 2003, Mr. Richard, on appeal to the United States Court of Appeals for the Fifth Circuit, filed an application for Issuance of a Certificate of Appealability.

On June 20, 2003, Mr. Richard filed in the 182nd district Court of Harris County, Texas, and in the Texas Court of Criminal Appeals a subsequent Application for Postconviction Writ of *Habeas Corpus* (Cause No. 456221-B) stating an Eight Amendment *prima facie Atkins* claim for relief. On the same day, Petitioner filed in the United States Court of Appeals for the Fifth Circuit his Motion for Authorization to File Successive Petition for Writ of *Habeas Corpus* raising a *prima facie Atkins* mental retardation claim for relief. Attached to the motion was Applicant's successive petition stating a *prima facie* claim of mental retardation. Also, on the same day, Applicant filed his successive petition in the federal District Court in Houston, Texas.

On June 27, 2003, the Court of Appeals denied Applicant's Application for Issuance of a Certificate of Appealability.

On July 14, 2003, Petitioner filed in the Court of Appeals a motion to abate Consideration of Successive Petition for Writ of *Habeas Corpus*.

On July 17, 2003, the Court of appeals granted the motion to abate consideration of the successive petition ordering petitioner to refile his application within seven calendar days of completing exhaustion of state remedies.

On October 8, 2003, the Texas Court of Criminal Appeals remanded the case to the trial court for consideration of the *Atkins* claim.

On December 29, 2006, the trial court concluded an evidentiary hearing in Cause No. 456221-B. The Court executed findings of fact and conclusions of law and the case was returned to the Court of Criminal Appeals.

On March 21, 2007, the Court of Criminal Appeals denied *habeas corpus* relief.

## QUESTIONS FOR REVIEW

Petitioner raises the following grounds for review:

1. Whether the Eighth Amendment to the United States Constitution and *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242 (2002), prohibits the execution of Petitioner, a mentally retarded man?

## FIRST GROUND FOR HABEAS CORPUS RELIEF

## EXECUTION OF PETITIONER, A MENTALLY RETARDED MAN, IS BARRED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE STANDARDS OF ATKINS V. VIRGINIA

### I.

### STANDARD OF REVIEW

### A.

### The Standard for Determining Mental Retardation

The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an I.Q. of approximately 70 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen. AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter AAMR, MENTAL RETARDATION]. The Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") employs a definition that is nearly identical.[1] Each of the three elements is an essential

---

[1] The DSM-IV-TR defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

component of a professional diagnosis of mental retardation. The Supreme Court has expressly relied on the AAMR's three-prong definition of mental retardation, *Penry v. Lynaugh,* 492 U.S. 302, 307-09, n.1 (1989) ("Penry I"), as has this Court. *Ex parte Tennard,* 960 S.W.2d 57, 60-61 (Tex. Crim. App. 1997).

The crux of the clinical assessment of mental retardation is measuring the magnitude of the individual's intellectual impairment. To be classified as mentally retarded, an individual must be found to be functioning at the very lowest intellectual level encountered in the general population, as measured by standardized intelligence tests. The intellectual functioning of any individual with mental retardation will fall within the lowest three percent of the entire population.[2] Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

The second requirement serves to confirm the reality of the psychometric measurement of the individual's severe impairment. The impairment must be observed to have "real-world" effects on the individual's life functioning. As the Supreme Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV-TR 42 – assures that the diagnosis applies only to persons with

---

DISORDERS 41 (4TH ed., text rev. 2000) ("DSM-IV-TR").

[2] See, e.g., Amici Curiae Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in McCarver v. North Carolina, No. 00-8727, at 7 ("studies invariably put the number [of people with mental retardation] at less than 3% of the general population, usually in the 1% to 3% range"); DSM-IV-TR 46 ("The prevalence rate of Mental Retardation has been estimated at approximately 1%.").

an actual, functional disability. *See* AAMR, MENTAL RETARDATION 38. Previous versions of the definition of mental retardation expressed this requirement in terms of "deficits in adaptive behavior," *see Penry I,* 492 U.S. at 308 n.1 (citing an earlier edition of the AAMR's classification manual), while more recent formulations employ the terms "related limitations" in "adaptive skill areas." AAMR, MENTAL RETARDATION 5; see DSM-IV-TR 42. Both sets of terms reflect the same concept: that the impairment in intellectual ability must have an actual impact on everyday functioning.

The third defined requirement is that the disabling condition must have manifested itself during the developmental period of life, before the individual reaches the age of eighteen. Requiring the disability to have occurred at birth or during childhood means that the individual's mental development during his or her crucial early years was affected by the impairment of the brain's ability to function. This element of the definition is derived from the understanding of modern neuroscience about the way the brain develops and the implications of its arrested development for cognitive impairment. See AAMR, MENTAL RETARDATION 16-18. In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he or she also had it during childhood, significantly reducing the ability to learn and gain an understanding of the world during life's formative years.

## II.

## Factual Background

### Michael Wayne Richard is Mentally Retarded.

In both the 1985 trial, defense counsel during both the guilt-innocence and punishment stages of trial put on testimony and evidence showing mental retardation. Counsel presented substantial evidence of mental retardation. This evidence showed that: (1) Applicant's I.Q. measured 62, well below 70; (2) he had significant limitations in his adaptive functioning; and

(3) he manifested these diagnostic features at an early age.

A.

**Intellectual Functioning**

Applicant has significant subaverage intellectual functioning. On December 16, 1986, and May 15, 1987, psychologist Jerome B. Brown, Ph.D.,[3] interviewed and examined Mr. Richard pursuant to a court order for the purposes of determining competency to stand trial and sanity. A battery of psychological tests were administered by Dr. Brown, including a mental status examination, the Rohrshach Technique, Memory for Designs Test, the Wide Range Achievement Test, and the Ammons IQ Test (which is readily comparable to the Wechsler Intelligence Scale for Children (WIC-III) and the Wechsler Adult Intelligence Scale -Revised (WAIS-R). Dr. Brown reported that Applicant had an I.Q. of 62, placing him in the "upper limits of the mentally defective range." (App. A). He also reported, "[e]stimates of reading ability place this individual in the upper third grade level (3.9)." Dr. Brown testified accordingly at trial that Applicant proved to have "an IQ score of 62, which places him in the upper limits of the mentally defective range." He explained that "[an] IQ below 69 or 70 is obtained only by about three percent of the population and is considered quite low." [Statement of Facts (1987) VII, 1030: 12-24]. He went on to testify that Applicant fell into the category of the "educable mentally retarded," meaning Applicant "would only be able to learn fairly unskilled or, at best, semiskilled kinds of jobs."[Statement of Facts (1987) VII, 1033:10-20]. Furthermore, he testified that Applicant's "Memory is generally poor [and] [t]hat's consistent with his lower intellectual ability." [Statement of Facts (1987) VII, 1033:20-23]. Dr. Brown also testified that Applicant

---

[3]Dr. Brown is the same psychologist who testified at the competency hearing in *Penry I.*

was functionally illiterate, "mean[ing] he does not read and write well enough to operate independently in the world around us. [Statement of Facts (1987) VII, 1108:3 -21].

**B.**

**Adaptive Functioning**

Mr. Richard also clearly meets the second prong of the definition of mental retardation: He suffers from significant concurrent impairments in intellectual ability that have an actual impact on his everyday functioning. The records also reveal that Mr. Richard suffers from profound deficits in other areas of adaptive functioning which contribute directly to his inability to cope with life's day-to-day demands.

Psychiatrist Fred Fason, M.D., testified at trial that he had diagnosed Mr. Richard as a "sociopathic personality, antisocial type," or to use the DSM-3 term for it, "antisocial reaction" (also, formerly referred to as "psychopathic behavior"). [Punishment Statement of Facts (1987) X 180:19-22; 181:6-9]. More in particular, he further testified, in relevant part, that those with a sociopathic personality:

> were individuals that appeared to be rational when you talked to them, but their behavior patterns through life were self-destructive and irrational: [Punishment Statement of Facts (1987), X 181:15-18}.
>
> Gratitude is not an emotion that is very consistent with sociopathic personality or antisocial responses. They tend to be manipulative, they tend not to have their behavior much influenced by guilt or shame and at time not even influenced very much with the consequences of the behavior. They are notoriously self-defeating in the pattern of their lives . . . {T}hese individuals who are very narcissistic or self-centered individuals and by that I mean they have big egos, so to speak, in lay terminology. They feel entitled to whatever it is they want. {Punishment Statement of Facts (1987), X 181:25 – 182:14].

In this narcissistic development can be either primary narcissism, which is kind of where all of us are when we are babies. We feel like we're the center of the world and entitled to what we get. Most of us around the age of 2 and a half or 3 discover that our mothers take care of us because they love us, not because they have to and we make a transition from seeing ourselves as a center of the earth to viewing ourselves as dependent upon our parents for loving and caring and attention. The sociopathic personality either, or the narcissistic individual, either does not make the transition from primarily narcissism to relating to others with love and what's called primary narcissism. If a person never made the transition or at times they will make the transition and they will experience love and gratitude and later trauma in their lives of one sort of another will cause them to regress back to this primitive narcissistic position where they will consider what they want and their egos to be the most important things in the world and that they are entitled to whatever they want. [Punishment Statement of Facts (1987), X 183:3 – 184:1].

Now, in normal development we made a transition from relating to the world from the point of view of the narcissistic way of relating to the world, to psychoanalytic language of relations or relations of love with others. No, the sociopath either has difficulties, if it's a primary narcissistic disorder that underlays it, has never made this transition of learning to consider other people as being like himself or looking at the world through other people's eyes; if he has made the transition, then there is later trauma that has occurred of a variety of sorts that causes him to regress back to that narcissistic phase of development. [Punishment Statement of Facts (1987), X 186:10 -23].

There are a number of things that can cause the regression back. Abuse is certainly one of them. Coldness can cause it, but there are other conflicts as well that can lead to it and it's not so much what triggers it, it's much like coronary artery, for example, or a heart attack, if you ask me what are all the things that can cause a heart attack in an individual in terms of external stimuli or types of stress, you could go on and on and on and it may be anger, may be exertion, may be diet or a lot of things, but the important thing is the stress occurs and the infarct occurs. The important thing in the antisocial reaction is that the regression back to the narcissistic level occurs. [Punishment Statement of Facts (1987), X 188:4-19].

So, most of us, when we are – have an emotion and we have a desire associated with that emotion, before we act upon it we consider what it says

about us. We consider how it affects others, particularly individuals that we care about and is our conscience and we consider the consequences about our behavior . . . . The sociopathic mind works in a different way. At an early age the essential ingredient that is added to the narcissism of the sociopath is an attitude of saying to themselves . . . [a]nd this is characteristic of almost all sociopathic personal disorders that I interviewed over the last 30 years and this is, if you will, the indulgence of the court, to quote, it is a quote, "Fuck it. I don't care," they say to themselves. [Punishment Statement of Facts (1987), X 192:8 – 193:21].

Now, all of us at one time or another may say that or most of us at

one time or another, we may say it under specific situations. The difference between normal individuals who may say it occasionally and the sociopathic personality disorder is it becomes an ingrained defended characteristic way of dealing with impulses . . . . The sociopath, it's long since been an ingrained automatic way of responding to impulses, so that they quit deliberating each time they get an impulse . . . . After awhile the process becomes unconscious and they don't even thing anymore about the consequences or they don't even thing about how it affects people or what it says about them. They just react and this is the impulsivity of the sociopath and that's why they are in trouble with the law and everything else. [Punishment Statement of Facts (1987), X 194:10 – 195:23].

The sociopathic sina qua non of the character disturbance is it becomes a habitual ingrained way of responding rather than an occasional thing. [{Punishment Statement of Facts (1987), X 212:15-18].

[T]he deliberation about acting upon emotion, the process of deliberation the normal person goes through before we act upon our emotions get short circuited in the psychopath. Now, if the emotion's not there, its – they may think and they may deliberate and they may plan and they may scheme and they may do a lot of things, but when they get the strong emotion that it short circuits the process of deliberation. [Punishment Statement of Facts (1987), X 263:15-25).

Most people in the borderline mentally retarded range, that is an IQ of 60, 75, or 80, manage to function in life by dependency on someone who has a normal intelligence . . . . Individuals who have sociopathic personality disturbance of limited intelligence have especially difficult problems to deal with because of their sociopathic personality disturbance, their difficulties in respecting authority, and have a great deal of difficulty for forming the kind of relationship of someone who becomes like a guide or mentor and they are prone to be rebellious

against that, so, they don't have – very rarely do they have someone like that they can depend upon and lean on for guidance or counsel. . . . the low IQ, in and of itself affects a person's ability to deliberate because of little intelligence, but it doesn't preclude it. The sociopathic element that is added to it makes – when he's under strong emotion or strong desire, he is prone to just react without deliberation and that's because the sociopathic defense of not caring that it's become habitual. So, the deliberation process, under strong emotion, becomes, or strong desire, becomes superfluous to the sociopath. That's why there is self-destructive lives. [Punishment Statement of Facts (1987), X 215:2–

216:24].

In its 1992 decision reversing Mr. Richard's conviction, the Court of Criminal Appeals summarized much of the testimony regarding events and circumstances of his childhood as follows:

> At the punishment phase of trial appellant presented testimony from his mother and one of his three sisters. Their testimony establishes an extensive history of physical and emotional abuse at the hands of appellant's father. When appellant was a child his father worked as a 'long-haul truck driver' transporting grain and livestock. Consequences he 'stay[ed] up on alcohol and drugs,' viz: amphetamines. Appellant's father drank 'every day,' and when drinking, he was violent and quick to anger over trivial matters. Appellant's mother was sent to the hospital an unspecified number of occasions with broken ribs, a broken nose, broken foot and lumps on her head, one where appellant's father had struck her with a .38 caliber pistol. She cataloged her many scars for the jury. Appellant, youngest child, was his mother's favorite, and drew his father's ire for that reason. His father called him a 'punk,' and accused him of having sexual relations with his mother even as a child. When appellant would try to protect his mother, he suffered beatings for his troubles. The authorities would not intervene, considering the situation to be a 'domestic disturbance.'
>
> At times, appellant's father would openly co-habitate with other women, to the shame of his children. Other times he kicked his wife and children out of the house, forcing them to stay with appellant's aunt. Appellant's mother suffered a nervous breakdown when appellant was four or five years old, and was hospitalized for three months. Since that time she has

> been under psychiatric care, suffering from anxiety and depression.
>
> All of the children were beaten from about the age of eight years old. Appellant' father used bull whips, cattle prods and leather belts. Appellant was beaten once with a 'hanger.' Appellant reportedly never cried out during these beatings. His father sexually abused each of his sisters from the age of puberty on. Once he fired a shotgun at one of appellant's sisters when she refused his advances. Appellant was aware of these abuses. He left home for good at fourteen when '[h]is daddy had whopped him with a lead rope and he said he wasn't going see that anymore.' All of his siblings had run away by the age of fifteen. Appellant's brother is an unemployed alcoholic. Two of his sisters are under psychiatric care.
>
> Appellant was a premature baby, and spent the first month of his life in the hospital. When he was finally released, 'he still was sick and we had to put him in the hospital practically every year until he got 6 years.' He has asthma and was allergic to milk. In school appellant was 'slow,' earing D's and F's. He did not make it past the ninth grade, and read without comprehension. His father taught him to steal, directing him to take livestock from rodeos. Not surprisingly, appellant developed into an angry adolescent with a bad temper.

*Richard,* 842 S.W.2d at 281, 282. As the court wrote, "the instance record contains evidence from which a rational jury could infer that appellant's conduct in this case was 'attributable to' his sociopathic personality disorder, which is turn was brought on by trauma emanating from his 'disadvantaged background.' " *Richard,* at 283.

C.

**Manifestation during developmental period of life**

As the Court of Criminal Appeals noted, Mr. Richard did not make it past the ninth grade and earned D's and F's. Mr. Richard's mother, who died in 2002, reported to undersigned counsel that Mr. Richard had been assessed by an expert for the Waller Independent School District as mentally retarded and, beginning the fifth grade, he had been placed in special

education classes; and that he remained in special education until he dropped out of school in the ninth grade. She also reported that Mr. Richard attended school in the Houston Independent School District for The seventh, eighth, and ninth grades. Mr. Richard, when asked by undersigned counsel, also reported that he had been in "special classes" from the fifth grade onward.. Upon investigation by undersigned counsel, it was found that Mr. Richard's school records had been destroyed by both the Waller Independent School District and the Houston Independent School District. The Waller Independent School District had and has a policy of retaining a student's records for eight years past the last date of service to the student except for high school transcripts for students who have graduated from high school. The Houston Independent School District had and has a policy of retaining a student's records for seven years past the last date of service to the student, except for high school transcripts for students who have graduated from high school. Waller Independent School District did maintain special education records past its usual eight years, but sometime during the 1980's, its "old" special education student records were destroyed. Similarly, while Houston Independents School District

did retain the records of special education students past the usual seven years, during or about May, 2001, the special education records more than seven years old were destroyed.

However, from the testimony of Drs. Brown and Fason, (significant portions of which are quoted by the Court of Criminal Appeals in support of its 1995 decision to reverse and remand) and the evidence as summarized by the Court of Criminal Appeals, manifestations of low intelligence and a lack of adaptive skills during Mr. Richard's formative years is apparent. At the very least, it is apparent that his mentally retarded level of intelligence and his manifest

sociopathic personality originates in his earliest and later formative years.

The evidence set out in detail *supra* demonstrates that Mr. Richard is mentally retarded. At the very least, it raises a prima facie case that Mr. Richard meets the definition of mental retardation developed by the AAMR and the DSM-IV-TR, and adopted by the Supreme Court and this Fifth Circuit Court of Appeals. Mr Richard's claim in a proposed successive habeas corpus application has not been previously presented in any prior application. The claim relies on *Atkins*, a decision that stated a new, retroactively applicable rule of constitutional law that was previously unavailable to Mr. Richard. And Mr. Richard could be categorized as mentally retarded within the understanding of *Atkins* and *Penry I.*

**III.**

**Argument and Authorities**

The question of whether Mr. Richard is mentally retarded has never been directly addressed or resolved by any jury. The facts and issue of his mental retardation was not raised by his trial counsel in the retrial of the case. However, Mr. Richard raises a *prima facie* case of mental retardation, which is "simply a sufficient showing of possible merit to warrant a fuller explanation by the district court." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985)

**A.**

**<u>Mental retardation impairs understanding and functioning in ways that substantially reduce personal culpability.</u>**

Mental retardation is a distinct and readily diagnosable form of mental disability. Because the cognitive impairment is present during the individual's childhood, it has a compounding effect. Negative feedback received in early social development operates to further

impair emotional and adaptive growth. Johnny L. Matson & Virginia E. Fee, Social Skills Difficulties Among Persons With Mental Retardation, in HANDBOOK OF MENTAL RETARDATION 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); see generally Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 194, 195 (1997). A "history of failure, social deprivation, and cognitive deficiencies" leads to "high levels of anxiety regarding . . . [the] ability to cope with . . . life experiences." Harvey N. Switzky, Individual Differences in Personality and Motivational Systems in Persons with Mental Retardation, in ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY, AND RESEARCH 343, 346 (William E. MacLean, Jr., ed., 1997).

The resulting emotional and behavioral problems cause mentally retarded individuals to display disruptiveness, attention deficit problems, low self-esteem, overactivity, distractibility, and difficulties with interpersonal relationships. MARY BEIRNE-SMITH, JAMES R. PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 216 (1994); see generally Josephine C. Jenkinson, Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities, 104 AM. J. MENTAL RETARDATION 320, 321 (1999). Mentally retarded persons often act impulsively, as it is "difficult for them to control, direct, or modify their drives and impulses effectively." Rachel Levy-Shiff, Peri Kedem & Zamira Sevillia, Ego Identity in Mentally Retarded Adolescents, 94 AM. J. MENTAL RETARDATION 541, 547 (1990) (noting that behavioral problems are often reported among retarded adolescents); see also, e.g., Thomas L. Whitman, Self Regulation and Mental Retardation, 94 AM. J. MENTAL RETARDATION 347, 360 (1990); James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 429 (1985). This interplay between cognitive and adaptive deficiencies during the developmental period impairs moral development as well. AAMR, MENTAL RETARDATION 9, 40; see generally

Richard M. Gargiulo & Janet A. Sulick, Moral Judgment in Retarded and Nonretarded School Age Children, 99 J. PSYCHOL. 23, 25 (1978) (noting that "cognitive development serves as a mediator of moral judgment"); Joan E. Perry & Dennis Krebs, Role-Taking, Moral Development, and Mental Retardation, 136 J. GENETIC PSYCHOL. 95, 102 (1980).

**B.**

**A sentence of death is grossly disproportionate to the personal culpability of defendants afflicted by mental retardation.**

The Supreme Court has repeatedly emphasized the central importance of personal culpability in capital sentencing and has identified four principles to guide the inquiry whether an individual's behavior is sufficiently culpable to warrant a death sentence consistently with the Eighth Amendment's prohibition of "'excessive'" punishments.[4] First, the death penalty "takes as its predicate the existence of a fully rational, choosing agent." *Thompson v. Oklahoma*, 487 U.S. 815, 825-26 n.23 (1988). This predicate is grounded in the fundamental principle that "the more purposeful is the criminal conduct, . . . the more seriously it ought to be punished." *Tison v. Arizona*, 481 U.S. 137, 156 (1987). As a result, the death penalty is an appropriate punishment for those who deliberate or act with calculus, *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (internal quotation omitted), but is a disproportionate penalty for those with "an immature, undeveloped ability to reason," *Thompson*, 487 U.S. at 835 n.43 (internal quotation omitted), or those without the capacity to make a fully reasoned choice.

Second, capital punishment is appropriate only for one who has the capacity to "evaluate the consequences of his conduct," *Penry I*, 492 U.S. at 322, both in terms of the consequences of the crime (the likelihood of death; the gravity of loss of life), and in terms of the connection between that crime and the punishment for it. For example, the Supreme Court has held that the

---

[4] Gregg v. Georgia, 428 U.S. 153, 173 (1976) (lead opinion).

death penalty is appropriate for a person who "knowingly, engage[s] in criminal activities known to carry a grave risk of death," *Tison*, 481 U.S. at 157, and who thus appreciates the causal connection between his criminal act and the death of his victim. Conversely, the Court has said that death is inappropriate for those who "wholly lack[ ] the capacity to appreciate the wrongfulness of their actions," *Penry I*, 492 U.S. at 333 (discussing the common law prohibition on executing "idiots"), or who lack the "comprehension of why . . . [they have] been singled out" for the punishment of death. *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

Third, the punishment of death is sufficiently related to an individual's personal culpability only when he or she can fairly be expected to conform to the behavior of a responsible, mature citizen. Society presumes that individuals are capable of conforming to its basic norms and deserve the fullest measure of punishment if they fail to do so. Nevertheless, there are exceptions to this presumption. Children who commit murder, for example, are not as culpable as adults because they are "less mature and responsible" and often have "less capacity to control their conduct." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 & n.11 (1982) (plurality opinion). Because adolescence is "a time of great . . . stress," and children often lack the tools to manage these stresses adequately, they are "not prepared to assume the full responsibilities" of adulthood. *Thompson*, 487 U.S. at 835 n.42 and at 825. For this reason, "their irresponsible conduct is not as morally reprehensible." *Id.* at 835. Consequently, even those minors under the age of sixteen who can be convicted of murder cannot constitutionally be sentenced to death.

Finally, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death. *Tison*, 481 U.S. at 149; *Enmund*, 458 U.S. at 801; *see id.* at 798 ("The focus must be ***his*** culpability . . . ."). On the one hand, the law recognizes that reckless behavior resulting in death – even if the death was "caused" by another – can be sufficiently culpable to warrant the death penalty. *Tison*, 481 U.S. at 157. On the other

hand, the law recognizes that a defendant's culpability is diminished – though not extinguished – by the wrongful and negligent conduct of others. Youth crime, for example, "is not exclusively the offender's fault," because it also represents "a failure of family, school and the social system." *Eddings*, 455 U.S. at 115 n. 11 (internal quotation omitted). Similarly, the Supreme Court has held that a person is less culpable when, by his very nature, he is more "susceptible to influence" by others. *Id.* at 115.

In light of these four principles – all tied to the touchstone of "personal culpability" – the Eighth Amendment requires that individuals with mental retardation, like Mr. Richard be excluded as a class from the sanction of death:

1. Individuals with mental retardation do not have the same capacity as others to make reasoned choices. The most fundamental feature of mental retardation is impaired intellectual capacity – specifically, a level of intelligence that places the individual at the very bottom of the population in terms of reasoning ability. This impairment affects the most basic skills, such as fact retention, problem solving, and concentration. It also impedes more abstract thought processes, such as the ability to reason and make logical connections (a process requiring transference of information and generalization skills). AAMR, MENTAL RETARDATION 9, 15, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

Reasoned choice of a course of action involves many steps: sustaining a certain level of attention; focusing on the relevant and avoiding distraction by the irrelevant; assessing the situation correctly (e.g., understanding language and reading social cues); generating a set of alternative possible responses; choosing among them; and then exercising control to act consistently with that choice. The acquisition of these skills is seldom complete until the end of normal childhood, and such skills will ordinarily remain fragmentary at best in a mentally retarded individual. Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. Moreover, the

deficits in language and communication that commonly accompany mental retardation may limit the range of responses that a person has, meaning that a person with mental retardation might not, for example, take the ordinary step of asking for more information in response to a puzzling situation. See AAMR, MENTAL RETARDATION 15; Jenkinson,104 AM. J. MENTAL RETARDATION at 321. For these and other reasons, mentally retarded individuals commonly demonstrate rigid thought processes and "exhibit an inflexible pattern of problem-solving," Michael L. Wehmeyer & Kathy Kelchner, Interpersonal Cognitive Problem-Solving Skills of Individuals with Mental Retardation, 29 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 265, 267 (1994), a seeming inability "to realize that similar situations often require similar responses and . . . that dissimilar situations may require different responses." Whitman, 94 AM. J. MENTAL RETARDATION at 348. The death penalty is inappropriate for those who "have [a] reduced capacity for considered choice." *Skipper v. South Carolina,* 476 U.S. 1, 13 (1986) (Powell, J., concurring).

2. In addition, individuals with mental retardation are less able to appreciate the consequences of their actions. Appreciating consequences involves several discrete steps: considering alternative possible responses; predicting the consequences of each alternative; evaluating the different consequences (which includes applying abstract standards of principle and values to the predicted consequences); and choosing among the appraised consequences. A mentally retarded individual's decreased ability to reason and understand cause-and-effect impairs his or her ability to take even the simplest of these steps (foreseeing that Y will follow from X, and that Y may cause harm to one or more others, thereby affecting the judgment about X), let alone to follow the more advanced steps or to comprehend the ultimate connection between a harmful act and any resulting punishment. As the Supreme Court has noted, "less intelligence" means that an individual "is less able to evaluate the consequences of his or her

conduct." *Thompson,* 487 U.S. at 835.

3. Like young children, persons with mental retardation do not possess the requisite levels of maturity and responsibility to make death an appropriate punishment. Because of their impairments in intellectual functioning and their "reduced ability to cope with . . . the everyday world," *Clebourne,* 473 U.S. at 442, persons with mental retardation do not have the same capacity – "the experience, perspective, and judgment," *Eddings,* 455 U.S. at 116 – to navigate life's stresses. Lacking these tools, they are often unable to "control . . . or modify their . . . impulses effectively," Levy-Shiff et al., 94 AM. J. MENTAL RETARDATION at 547, and, like juveniles, are "much more apt to be motivated by mere emotion." *Thompson,* 487 U.S. at 835. Because the intellectual impairment of those with mental retardation manifests itself during the developmental period, there is often a "chain reaction," with adaptive problems leading to further adaptive problems, see, e.g., Matson & Fee, Social Skills Difficulties Among Persons With Mental Retardation, in HANDBOOK OF MENTAL RETARDATION at 471, resulting in "serious emotional problems," *Eddings*, 455 U.S. at 116, and "arrested emotional development," *Penry I*, 492 U.S. at 324. This cycle traps them in the posture of an "emotionally disturbed . . . [individual] with a disturbed child's immaturity." *Eddings*, 455 U.S. at 116.

As with children, the moral reasoning of individuals with mental retardation is only partially developed: The significantly sub-average intellectual functioning that is a defining characteristic of mental retardation translates into serious impairments of moral understanding. See AAMR, MENTAL RETARDATION 9, 40. Underlying the growth of moral reasoning is not only the ability to learn and retain information, but also the ability to think abstractly instead of concretely. The development of abstract thinking and moral reasoning occurs in adolescence. See, e.g., JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 27-29, 96-98 (Free Press ed. 1997). When a toddler misbehaves, we respond with concrete commands (e.g., "Don't hit."). We

save lower-level abstractions (e.g., "We have a rule against hitting.") for somewhat older children. See id. at 27-29, 178-85. A young child might understand the lower-level abstraction that there are things called rules and they are not to be broken, but will not be able to reason about rules (e.g., "There is a rule against hitting, which is really a rule about not hurting people, so doing other things that hurt people is also off limits."). *See id.* at 27-29, 89, 134. Once moral reasoning has developed, a person can recognize that there are rules, and also principles underlying those rules, embodying values against which rules might be measured. *See id.* at 27-29, 95. Only at this stage of moral development does an individual function as an independent moral being, responding to his or her own developed system of morals, and not merely submitting to the authority of another. *See generally id.* But this stage is beyond what those with mental retardation can achieve. See AAMR, MENTAL RETARDATION 9, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

4. Finally, persons who have mental retardation do not possess the requisite level of individual culpability to warrant death. Due to their impairments, mentally retarded individuals are "susceptible to influence." *Eddings*, 455 U.S. at 115. More importantly, the intellectual impairment of adults with mental retardation is permanent, immutable, and beyond the individual's control. *See Cleburne*, 473 U.S. at 442. While the adaptive behavior of mentally retarded individuals can improve, *Penry I*, 492 U.S. at 338 – indeed, mentally retarded individuals often do well in structured environments – the possibility for improvement is largely, if not entirely, outside their control. It depends on educational and support services, which their familial, social, and economic circumstances may or may not make possible and actually deliver. From this standpoint, individuals with mental retardation simply do not possess the level of responsibility for their own destiny that is the Eighth Amendment predicate for the punishment of death, a penalty that sums up an individual's life and declares it forfeit.

C.

**Executing individuals with mental retardation serves no legitimate penal objective.**

Not only is the death penalty always out of proportion to the culpability of persons with mental retardation, but death for such persons does not – and cannot – comport with the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." *Thompson*, 487 U.S. at 836 (internal quotations and citation omitted). As the Supreme Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot reason through the consequences of actions or understand the link between his or her actions and the ordained punishment. See, e.g., *id.* at 837. The inability to imagine and assess competing courses of action is a core aspect of mental retardation. This limitation dramatically reduces the ability of mentally retarded persons to engage in the sort of self-controlled reasoning process that makes deterrence a real constraining force. Nor can removing persons with mental retardation from the universe of those who are subject to execution conceivably reduce any deterrent effect the death penalty may have on the rest of the population. *See Ford*, 477 U.S. at 407.

Similarly, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149; see *Ford*, 477 U.S. at 409 ("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"). Given the diminished level of personal culpability of defendants with mental retardation, executing them cannot fulfill the goal of retribution. Thus, it "is nothing more than the purposeless and needless imposition of pain and suffering," *Penry I*, 492 U.S. at 335, in violation of the Eighth Amendment.

D.

**The system of case-by-case determination in capital cases has not protected defendants with mental retardation from improvident death sentences.**

As experience since *Penry I* has demonstrated, several factors heighten the risk that the death penalty may be imposed on persons with mental retardation despite *Penry's* assurance that they can plead their disability in mitigation. These factors include (a) the breakdown in procedural protections that results from a defendant's possession of the cognitive and behavioral impairments characteristic of mental retardation; and (b) jurors' lack of experience with, and faulty stereotypes regarding, persons with mental retardation, coupled with the potential for prosecutors to exploit such ignorance or stereotypes. The upshot is an inherently unreasonable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Oklahoma*, 438 U.S. 586, 605 (1978) (plurality opinion); see generally Carol Steiker & 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 & CONTEMP. PROBS. 89, 98-104 (Autumn 1998).

Breakdown of procedural protections. The substantial cognitive and behavioral impairments that are at the core of mental retardation severely hamper a retarded defendant at every stage of the criminal process. See generally RONALD W. CONLEY, RUTH LUCKASSON & GEORGE N. BOUTHILET, eds., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (1992). These handicaps are so pervasive and so insidious that they undermine confidence that a death sentence imposed on such a defendant was the product of a fair procedure that adequately weighed the mitigating effects of his or her mental retardation. In an alarming number of cases that have come to light since *Penry I*, even the reliability of the guilty verdict has been put in doubt.

In many cases, these problems begin during the investigative phase, and in particular with the questioning of suspects who have mental retardation. Confessions and inculpatory statements made by mentally disabled suspects are particularly problematic regarding not only their

voluntariness, but also their reliability. The propensity of many individuals with mental retardation to do whatever is asked of them by figures of authority has been widely documented in the clinical literature,[5] and this has generated well-founded concern about the process by which confessions are obtained. See, e.g., AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standards 7-5.8 through 7-5.10 (1989), and accompanying Commentary.

Even more pervasive difficulties are encountered in the representation of defendants with mental retardation at trial. The limitations inherent in a defendant's mental retardation can place substantial obstacles in the way of a fair trial.[6] And in many cases, the defendant's limited ability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one – including defense counsel – discovers the extent of her

---

[5] See, e.g., L. W. Heal & C. K. Sigelman, Response Biases in Interviews of Individuals with Limited Mental Ability, 39 J. INTELLECTUAL DISABILITY RESEARCH 331 (1995); Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanel & Carol J. Schoenrock, When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons, 19 MENTAL RETARDATION 53 (1981).

[6] The relevant limitations are abundantly documented in the clinical literature on mental retardation. They include deficits in memory, see, e.g., CECIL D. MERCER & MARTHA E. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977); James M. Bebko & Helen Luhaorg, The Development of Strategy Use and Metacognitive Processing in Mental Retardation: Some Sources of Difficulty in JACOB A. BURACK, ROBERT M. HODAPP & EDWARD ZIGLER, eds. HANDBOOK OF MENTAL RETARDATION AND DEVELOPMENT 382, 384-95 (1998) (hereafter BURACK HANDBOOK); Richard L. Luftig & Ronald E. Johnson, Identification and Recall of Structurally Important Units in Prose by Mentally Retarded Learners, 86 AM.J. MENTAL DEFICIENCY 495, 501(1982); deficits in receptive and expressive language skills, see, e.g., Anne E. Fowler, Language in Mental Retardation: Associations with and Dissociations from General Cognition in BURACK HANDBOOK at 290; inattention and impulsivity, see, e.g., Whitman, 94 AM. J. MENTAL RETARDATION at 347; Johnny L. Matson & Virginia E. Fee, in HANDBOOK OF MENTAL RETARDATION 468; and problems regarding motivation, see, e.g., J. Merighi, M. Edison & Edward Zigler, The Role of Motivational Factors in the Functioning of Mentally Retarded Individuals in R. M. HODAPP, J. A. BURACK, & EDWARD ZIGLER, eds., ISSUES IN THE DEVELOPMENTAL APPROACH TO MENTAL RETARDATION 114 (1990); Jenkinson, 104 AM. J. MENTAL RETARDATION at 321-28; Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITY 194 (1997).

impairment or even that she suffers from mental retardation.[7] This tragically misguided instinct, which occurs in case after case, thwarts counsel's ability to explain, and the jury's opportunity to consider, the significance of a defendant's mental retardation.

Jurors' unfamiliarity. Juries often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation. While the physical immaturity and youthful appearance of juvenile defendants call attention to their likely emotional immaturity, the limitations on the cognitive and adaptive skills of individuals with mental retardation are hidden behind the facade of an adult physique. Apart from individuals with Down's Syndrome or some similar condition that results in distinctive facial features – rarely encountered in capital cases – mentally retarded defendants cannot be identified by their physical appearance alone. Jurors see someone who looks normal, who 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 and to act appropriately. They see a defendant who is not acting in a visibly "remorseful" fashion in the courtroom and they attribute it to callousness or heartlessness, rather than understanding that a person with mental retardation may have no real comprehension of what is going on.

To make matters worse, defendants with mental retardation often behave in ways that are contextually inappropriate, and this may impair their case at trial and sentencing. Mentally retarded defendants frequently smile where others would display gravity; they fall asleep; they stare at jurors. This inappropriate behavior – which is often intended to mask the defendant's lack of understanding of the courtroom proceedings – can convey a false impression of

[7] This phenomenon, too, has been fully documented in the clinical literature. See, e.g., JAMES R. DUDLEY, CONFRONTING THE STIGMA IN THEIR LIVES: HELPING PEOPLE WITH A MENTAL RETARDATION LABEL (1997); Judith Cockram, Robert Jackson & Rod Underwood, People with an Intellectual Disability and the Criminal Justice System: The Family Perspective, 23 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 41 (1998); S.E. Szivos & E. Griffiths, Group Processes in Coming to Terms with a Mentally Retarded Identity, 28 MENTAL RETARDATION 333 (1990).

callousness or lack of remorse. The prosecution can, and often does, use this behavior against the defendant with mental retardation. The prosecution also may exploit defendants' mental retardation by arguing that their pronounced deficit in intelligence makes them more dangerous, and that this is an additional reason to impose the death penalty. See, e.g., *Penry I*, 492 U.S. at 323; Steiker & Steiker, 61 LAW & CONTEMP. PROBS. at 101-02. Prosecutors have no difficulty in exploiting common stereotypes of mentally retarded individuals, characterizing them as "subhuman" and "without self-control." Jurors may be unable to escape the grip of such prejudicial images when they have had no occasion to encounter people with mental retardation under the circumstances of ordinary living and to overcome the stereotypes that make "the mentally retarded" an unfamiliar, alien, and repellent group.

The unreliability of the process. These various problems combine to produce an unacceptable risk that defendants who have mental retardation and are innocent have been, and will continue to be, sentenced to death. Reports of the recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales.

In 1983, Earl Washington, who has mental retardation, was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman – as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington's guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence "would have reached a different conclusion" in his case despite his

confession.[8]

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed (under *Ford*) and the question whether execution of an individual with mental retardation was precluded by the Illinois Constitution. During the period of the stay, conclusive evidence establishing Porter's innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan's decision to institute a moratorium on the execution of death sentences in Illinois.[9]

The arbitrariness of the process. The Supreme Court in *Penry I* optimistically assumed that juries would be able to make reliable sorting decisions among defendants with mental retardation, culling the more culpable from those whose disabilities precluded a determination that they were the "worst of the worst," deserving only of death. But the experience of the last decade belies that forecast. Instead, case-by-case administration of the death penalty has turned on factors other than juries' "reasoned ***moral*** response to the defendant's background, character, and crime." *Franklin v. Lynaugh,* 487 U.S. 164, 184 (1988) (Justice O'Connor, concurring) (internal quotation omitted).

Where there is a grave risk that the death penalty will be meted out irrationally among a particular subclass of capital defendants, not only "in spite of factors which may call for a less

---

[8] See Francis X. Clines, Virginia Man Is Pardoned in a Murder; DNA Is Cited, N.Y. Times, Oct. 3, 2000, at A20.

[9] See generally Eric Zorn, Questions Persist as Troubled Inmate Faces Electrocution, Chi. Trib., Sept. 21, 1998, at 1. While Washington and Porter were sentenced to death before the Supreme Court's decision in Penry I, the fact that neither man received postconviction relief in the wake of that decision indicates that the capital sentencing processes employed in Virginia and Illinois already comported with the safeguards required by the Court in Penry I, and therefore that such procedures did not eliminate the risk of executing an innocent man with mental retardation.

severe penalty," *Lockett,* 438 U.S. at 605, but also in ignorance of realities which may cast unperceived doubts upon some defendants' guilt, the exclusion of that category from the pool of constitutionally death-eligible defendants serves a critical "narrowing" function. *See Zant v. Stephens,* 462 U.S. 862, 877-78 (1983); *Arave v. Creech,* 507 U.S. 463, 475-78 (1993). It is also necessary to prevent the random and infrequent application of the death penalty within the subclass. Juries do not generally sentence mentally retarded defendants to death when the jurors understand the defendant's disabilities or the moral issue at stake. They do so fortuitously, largely as a consequence of the difficulties that some retarded defendants and their lawyers have in getting the jurors to see the defendant as she is. "[T]he infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying [the Court's] judgment in *Furman* . . . that the death penalty [when] . . . administered in unguided fashion, was unconstitutional." *Thompson,* 487 U.S. at 831 (citations omitted). Only a categorical rule can avert the demonstrated danger that death is being meted out in such an unconstitutional manner to persons with mental retardation.

**E.**
**<u>Executing persons with mental retardation offends "evolving standards of decency."</u>**

When the Supreme Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. *See Penry I,* 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against execution of the mentally retarded may someday emerge reflecting . . . 'evolving standards of decency.'" *Id.* at 340.

That day has arrived. Much has occurred since the Supreme Court decided *Penry I.* The great weight of evidence now demonstrates that American society overwhelmingly opposes the execution of persons with mental retardation, and that this national consensus is shared by nearly every other society in the world. The emergent national consensus is most immediately evident

in the actions of state legislatures, which, the Court has said, provide "[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two States – Georgia and Maryland – and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In little more than a decade, that number of States has grown nine-fold.

The first new enactments came in legislative sessions immediately after the Supreme Court's *Penry I* decision called attention to the issue. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. Between 1991 and 2000, nine more States – New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, and South Dakota – passed such statutes. (This roster includes both of the States that enacted the death penalty anew after many years without it.) In 2001, no fewer than five States – Arizona, Missouri, Florida, Connecticut, and North Carolina – have enacted statutes to prevent the execution of persons with mental retardation.[10] This brings the current total of States to eighteen,[11] plus the federal government.[12] When these eighteen States

---

[10] It was, of course, the enactment of legislation with retrospective effect that led this Court to dismiss the writ in McCarver v. North Carolina, No. 00-8727, as improvidently granted. 122 S.Ct. 22 (2001).

[11] 2001 Ariz. Sess. Laws 260; ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7-131(j) (1988); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); MD. ANN. CODE art. 27, § 412(g) (1989); 2001 Mo. Laws 267; NEB. REV. STAT. § 28-105.01 (1998 & Suppl. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); 2001 N.C. Sess. Laws 346; S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

[12] Federal Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988); Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994). (The first of these statutes preceded this Court's decision in Penry I, while the second was subsequent to it.)

are added to the twelve States that do not have the death penalty,[13] it is evident that the statutes in only a minority of States now allow the possibility of executing an individual with mental retardation.[14] And on the world-wide stage, the few jurisdictions in the United States that

---

[13] In dicta the Supreme Court has cast doubt upon the relevance of States that do not have the death penalty when surveying jurisdictions to ascertain whether there is a national consensus regarding a particular capital-sentencing practice: See Stanford v. Kentucky, 492 U.S. 361, 370 n.2 (1989). However, it would be inappropriate to exclude the people of those States from any national consideration of whether it is acceptable to execute an individual with mental retardation. All public opinion polling, both state and national, indicates a broad and widespread national consensus against executing anyone with mental retardation. See, e.g., Dan Parker, Most Texans Support Death Penalty, Corpus Christi Caller-Times, March 2, 2001, at A1 (66% oppose consideration of the death penalty for defendants with mental retardation; 17% support). There is no reason to suspect that the people of Maine or Hawaii, for example, share that view less fully than the people of Georgia or Florida. And with regard to this particular issue, there is also some evidence about the sentiment in States without the death penalty in the form of bills in their legislatures proposing reinstatement of the penalty. During recent efforts to restore the death penalty in several States, the proponents of the bills drafted them with explicit provisions that the penalty would not be imposed on individuals with mental retardation. See, e.g., Iowa H.F. 2, 76th Gen. Assem. (1995); Mass. H.B. 4003, 2001 Gen. Court, Reg. Sess. (2001); Minn. H.F. 4136, 81st Leg. Sess. (2000). This is fully consistent with the fact that both of the States that have reinstituted the death penalty since Penry I, Kansas and New York, have included provisions to protect defendants with mental retardation.

[14] It would be erroneous to assume that the people of the twenty States which have not yet enacted a statutory ban on executing individuals with mental retardation ***approve*** such executions. In two of those States, Texas and Illinois, the legislatures passed bills protecting people with mental retardation but the bills were vetoed by their governors after opponents argued forcefully that the legislation was unnecessary because mentally retarded individuals were not being executed in the State now. See, e.g., Mike Tolson, A Deadly Distinction Part IV: Death Penalty Reforms Sought, Houston Chronicle, Feb. 7, 2001, at A1 ("'We don't execute mentally retarded people,' [Harris County District Attorney Chuck] Rosenthal said."); Veto Message, H.B. 236, Tex. House J., 77th Sess., at 5215 (2001) ("This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers today."). In a third state, Oregon, the legislature passed a bill which was intended to protect people with mental retardation from the death penalty, but because the language of its final version failed to accomplish that goal, it was vetoed by Governor Roberts (at the request of disability advocates). Governor's Message, Senate J., 1st Legis. Sess., at SJ-218 (Or. 1993) ("The original intent of Senate Bill 640 was to exempt mentally retarded individuals from the death penalty. I wholeheartedly support this goal.") There is no evidence of widespread support for the use of the death penalty in such cases in ***any*** State.

continue to execute mentally retarded persons now stand all but alone.[15]

These enactments by Congress and the legislatures in State after State accurately reflect the consensus among the American people on this subject.[16] That consensus is also revealed in public opinion polls and in the positions taken by relevant organizations in both the mental retardation and legal fields.[17] Such nonlegislative evidence of the consensus is even more abundant now than it was in 1989.[18]

Of course, the Supreme Court in *Penry I* expressed concern not only about the quantity of

---

[15] Among countries that have the death penalty, the practice of executing defendants with mental retardation is essentially unknown in the 21st century. Recent reports of the information put before the Supreme Court in the McCarver briefs indicating that only the United States, Japan, and Kyrgyzstan still allowed the execution of persons with mental retardation stimulated a published response by Kyrgyzstan's Ambassador to the United States declaring that such executions are no longer permitted in his country. Baktybek Abdrisaev, Penalties in Kyrgyzstan, N.Y. TIMES, June 30, 2001, at A14 (Letter to the Editor). And numerous international and regional intergovernmental bodies have passed resolutions and other statements expressing strong opposition to the execution of any individuals who have mental retardation. See Amicus Curiae Brief of the European Union in McCarver v. North Carolina, No. 00-8727; Amici Curiae Brief of Diplomats Morton Abramowitz, *et al.* in id.

[16] It is also worth noting that since Penry I, no state has affirmatively legislated that the death penalty *is* appropriately imposed on persons with mental retardation. Cf. Thompson, 487 U.S. 815, 849 (Justice O'Connor, concurring) ("[Where] such a large majority of the state legislatures has unambiguously outlawed capital punishment for 15 year-olds and where no legislature in this country has affirmatively and unequivocally endorsed this practice, strong counterevidence would be required to [demonstrate] that a national consensus against this practice does not exist.").

[17] See, e.g., Amici Curiae Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in McCarver v. North Carolina, No. 00-8727; Amici Curiae Brief of American Association on Mental Retardation et al. in id.; Amici Curiae Brief of American Bar Association in id.

[18] In discerning the society's evolving standards of decency, the Supreme Court has sometimes considered the conduct of sentencing juries. Analyses of juries' performance in this area is particularly difficult to conduct systematically because juries are not ordinarily required to return special verdicts or specific findings of mitigating circumstances. But the available evidence from social science studies about juror attitudes is fully consistent with the recent legislative developments. See, e.g., Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1564 (1998) (reporting mental retardation as among the most powerful mitigating factors).

the evidence then available but also about its form. In particular, legislation was identified as "an objective indicator of contemporary values upon which we can rely." 492 U.S. at 335. But there can no longer be doubt about whether the public sentiment "may ultimately find expression in legislation." Id. The remarkable events of the last dozen years have answered that question.[19]

## III.

## PRAYER FOR RELIEF

Applicant's limited intellectual functioning as reflected in his IQ score has been a daily fact of his entire life. It is excessive and disproportionate to inflict a sentence of death upon such a person, whose ability to reason and make judgments, to function as a fully mature and responsible adult, is impaired by a disability beyond his control and not of his choosing. Execution of the mentally retarded violates the Eighth Amendment.

The legal basis of the instant claim was not previously available at the time Applicant filed his initial application. Accordingly, this Court should:

1. Grant relief by issuing a writ of *habeas corpus*; and
2. Grant such other relief as law and justice require.

---

[19] The consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty. In Penry I, the Court speculated that the group of people ineligible for execution at common law might roughly correspond to the more recent subcategories of "severe" or "profound" mental retardation. 492 U.S. at 333. While there may be ambiguity about where the boundary was drawn two centuries ago, there is none regarding the modern consensus: that dichotomy has commended itself to no modern authority. Since Penry I, not a single state legislature or foreign jurisdiction addressing the issue of the death penalty has adopted a provision that would treat individuals with "severe" and "profound" mental retardation differently from others who have mental retardation. It should also be noted that the taxonomy of "mild/moderate/severe/profound," which merely restated IQ scores in categorical form, has been abandoned by the American Association on Mental Retardation and replaced with categories that focus more directly on an individual's practical impairment and service needs. AAMR, MENTAL RETARDATION 34.

Respectfully submitted,

Leslie M. Ribnik
Texas Bar No. 16826330
P. O. Box 271507
Houston, Texas 77277
713.665.0771 (O)
713.592.6073 (F)

ATTORNEY FOR APPLICANT
MICHAEL WAYNE RICHARD

## VERIFICATION

BEFORE ME, the undersigned authority, appeared Leslie M. Ribnik, a person known to me, and after being duly worn, did then and there state the following:

> "My name is Leslie M. Ribnik. I am the attorney of Record for the petitioner in the instant cause. I prepared the Petition for Writ of Habeas Corpus in the instant cause. The facts contained therein are true and correct to the best of my knowledge and belief. The documents attached hereto as exhibits are true and correct copies of the originals."

Leslie M. Ribnik

SWORN AND SUBSCRIBED before me on this the 27th day of March, 2007.

NOTARY PUBLIC, in and for
The State of Texas

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served on the State by mailing via the United States Postal Service by Certified Mail, Return Receipt Requested, to the Capital Litigation Division, Office of the Attorney General, P.O. box 12548, Capitol Station, Austin, Texas 78711-2548, on this the 27th of March, 2007.

Leslie M. Ribnik