

## CHAPTER FIVE

### Executing the Mentally Retarded

*I like to clore (color) in my clorel (coloring) book but you all tuck (took) away my clores when you can not hurt no one with a box 24 clores, just in my book.*

Doil Lane, 39-year-old death row inmate, writing to prison administrators<sup>1</sup>

#### I. Introduction

The laws that permit the death penalty require that punishment by death be reserved for the select few individuals who are the most culpable, the most deserving of such ultimate and irreversible punishment. Indeed, the United States Supreme Court has made clear that the decision to impose the death penalty must be “directly related to the personal culpability of the criminal defendant.”<sup>2</sup> In practice, identifying the most culpable offenders is fraught with peril: first, it necessarily involves a subjective assessment of “blameworthiness;” and second, the criminal justice system itself is open to influence by outside factors such as politics, corruption, and racial discrimination, and is further compromised by a lack of expertise in understanding the effects of disease, poverty, and social environments. In short, our society faces severe problems measuring culpability accurately and as a result, we often have failed to reliably identify the most culpable offenders. Nowhere are these systemic failures more obvious than in the capital prosecution of mentally retarded people.

#### II. Mental Retardation and Moral Culpability

*I was never able to discuss the specifics of his legal case with him, but instead we talked a lot about his favorite animals, things he liked to draw, and how he missed being able to see his brothers and sisters.<sup>3</sup>*

Attorney for Mario Marquez,  
executed January 17, 1995

Two essential ingredients of any defendant’s moral culpability are his level of intellectual functioning and his capacity to control and appreciate the wrongfulness of his behavior. In both

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<sup>1</sup> Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

<sup>2</sup> California v. Brown, 479 U.S. 538, 543 (1987).

<sup>3</sup> Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

respects, the mentally retarded defendant is inherently less culpable than his unimpaired counterparts. Mental retardation is a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life. A diagnosis of mental retardation requires three findings: "significantly sub-average general intellectual functioning existing concurrently with impairments in adaptive behavior and manifested during the developmental period."<sup>4</sup> Because of the diminished mental capacity and impaired moral reasoning caused by mental retardation, mentally retarded individuals can never fully be in the class of "most culpable" and therefore deserving of the death penalty. As Steve J. Martin, former general counsel of the Texas prison system, has observed:

How can an individual who by definition has been intellectually impaired since birth ever meet the highest standard of blame required for imposition of the death penalty? It is not a simple question of knowing right from wrong. It is rather an issue of proportionality and equity. Extreme punishments should be reserved for extremely blameworthy acts. . . . [T]he question is not whether the offender knows he did wrong, but whether he knows how wrong he acted.<sup>5</sup>

The second ingredient of moral culpability – the capacity to appreciate the wrongfulness of and control one's behavior – is sorely compromised in mentally retarded defendants. Mentally retarded individuals often cannot foresee the consequences of their actions or adequately comprehend the parallels between the imposition of a penalty on another person and the result that would occur if they committed a similar crime.<sup>6</sup> It is therefore difficult to justify the execution of a mentally retarded person based upon a deterrence rationale.<sup>7</sup>

Retribution is another purported purpose for the death penalty, but this theory assumes that the person punished had full culpability for his actions.<sup>8</sup> A mentally retarded person's ability to control impulsive behavior and to develop moral reasoning is impaired.<sup>9</sup> Such people may commit crimes on impulse without the ability to weigh the consequences of the act or to correct behaviors that have proven harmful in the past.<sup>10</sup> Mentally retarded persons often are

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<sup>4</sup> American Association on Mental Deficiency (now Retardation) (AAMR) CLASSIFICATION IN MENTAL RETARDATION, at 11 (H. Grossman ed. 1983).

<sup>5</sup> Steve J. Martin, *Executing the Mentally Disabled is Wrong*, AUSTIN AM. STATESMAN, May 21, 1999, at A15.

<sup>6</sup> Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 S.W. U. L. REV. 89, 108 (1990). See John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 742 (1988) (stating that the mentally retarded do not have the capacity to premeditate murder in the true sense of the word).

<sup>7</sup> MARY BEIRNE-SMITH, JAMES PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 490 (4th ed. 1994) (reprint of Division on Mental Retardation and Developmental Disabilities of the Council for Exceptional Children's Position Statement) (October 3, 1992) ("If the fact that the commission of a certain act may forfeit life cannot be understood, the death penalty as a deterrent loses meaning.").

<sup>8</sup> See Justice O'Connor's discussion in *Penry v. Lynaugh*, 492 U.S. 302, 335-37 (1989).

<sup>9</sup> Brief for Petitioner by the American Association on Mental Retardation *et al.*, at 7, *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>10</sup> James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV.

unable to distinguish between incidents that are their fault and situations beyond their control.<sup>11</sup> Because mentally retarded defendants cannot understand or control their behavior in the same way that others can, they are far less culpable than others. The retributive value of executing the mentally retarded therefore is greatly diminished.

The life and death of Mario Marquez dramatically illustrate these points. Abandoned by his family and by the same State that would later execute him, Mario Marquez was never able to develop normally either mentally or emotionally. Mario had an I.Q. of between 62 and 66.<sup>12</sup> Doctors explained that because of his mental retardation, Mr. Marquez had a very limited ability to adapt, to think abstractly, to reason, to control impulses, to learn from experience, or to understand the consequences of his behavior.<sup>13</sup> Dr. Sparks Veasey, Medical Director of the Bexar County Jail, found that Mario responded to questions just as "a child would probably answer them."<sup>14</sup> These problems demonstrate the very real possibility that a mentally retarded person may be convicted of a criminal offense, and sentenced to death, in a proceeding in which he or she is a virtual non-participant.

Because of his mental retardation, Mario was a target of abuse. His father would beat him because he was slow tying his shoes, because he was not able to read or do his school lessons well, and because he could not respond to his father's call as quickly as the other children.<sup>15</sup> Mario was beaten on his head and face with sticks, whips, and two-by-fours.<sup>16</sup> Mario's father would even tie Mario's hands to a tree and beat him with a horse whip until he passed out; his mother would then revive him by wiping his face and nose with a rag soaked in alcohol.<sup>17</sup>

Mario received no assistance from the education system or from social services despite the fact that school testing at age nine showed he had an I.Q. of 62 and a mental age of five years.<sup>18</sup> During his schooling, he was placed on the side of the room with those who could not read - these children were given books to color and no attempt was made to teach them.<sup>19</sup>

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414, 429-30 (1985) (arguing that some mentally retarded persons have incomplete or immature concepts of blameworthiness and causation).

<sup>11</sup> *Id.*

<sup>12</sup> Clemency Petition for Mario Marquez, Exhibit 28, Pretrial Mental Status Examination.

<sup>13</sup> *Id.*, Exhibit 25, Testimony of Dr. John R. Bateman, at 41-54, 70-72.

<sup>14</sup> *Id.*, Exhibit 28, Pretrial Mental Status Exam, at 20.

<sup>15</sup> *Id.*, Exhibit 32, Testimony of neighbor Gonzales, at 38.

<sup>16</sup> *Id.*, Exhibit 31, Testimony of Mario Marquez's mother, Virginia Marquez, post-trial state court evidentiary hearing, at 91-93.

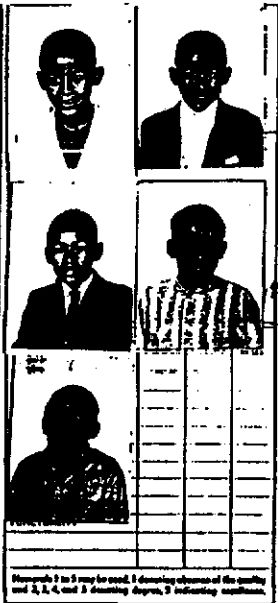
<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, Exhibit B (citing summary of records for 1964-1975 from Wichita Public School Division of Public Services dated July 23, 1975).

<sup>19</sup> *Id.*, Exhibit 31, Testimony of Mario Marquez's mother, Virginia Marquez, post-trial state court evidentiary hearing, at 4.

NAME: Mario Marquez SEX: Male  
 AGE: 9 DATE OF BIRTH: 1/17/65 PARENT OR GUARDIAN: Mario Marquez NATIONALITY: Ameg OCCUPATION: Student  
 ADDRESS: 11111 PHONE: 444 SCHOOL ENTERED FROM:  DATE OF ENTR: 9/7/69 AGE AT ENTR: 6

CUMULATIVE RECORD OF RESULTS FROM STANDARDIZED ACHIEVEMENT TESTS										
DATE GIVEN	GRADE	SCHOOL	NAME OF TEST	INSTR	FORM	CHRON AGE	TEST SCORE	PSYC AGE	I. Q.	EDUC GRADE
			HARDEY HARRIS HUNDRED ELEMENTARY BLUE LEVEL FORM C	DA		69/70				
			ARITH REAS							
			ARITH CONC							
			ARITH COMP							
			LANG COMP							
			READ COMP							
			READ VOCAL							
			ARIT							
			TOTAL READ	4.4	30		3.1	4		



Mario Marquez's 1964 school records, noting that he has an I.Q. of 62; a chronological age of nine years, three months; and a mental age of five years, ten months.

CUMULATIVE RECORD OF RESULTS FROM INTELLIGENCE TESTS										
DATE GIVEN	GRADE	SCHOOL	NAME OF TEST	FORM	CHRON AGE	TEST SCORE	MENTAL AGE	%ILE RANK	I. Q.	
7-18-69	1	Princeton	Binet	2-11	9-3	5-10			62	Y...

EXTRA-CURRICULAR ACHIEVEMENTS				
ORGANIZATION	HONOR CONFERRED OR WON	OFFICE HELD	CLASS	DATE

Figure 1: School records of Mario Marquez, executed January 17, 1995.

When Mario was 12, both parents abandoned him and his younger siblings, leaving Mario as the oldest person in the home. One year later, local authorities came to the household and took the younger children away. Mario was left behind, and from the age of 12 on, he was completely without parental supervision.<sup>20</sup> By the time he became an adult, Mario Marquez was a grown man who functioned as a damaged child.

None of the information about Mr. Marquez's mental retardation or abuse as a child was provided to the jury that sentenced him to death. But after his trial – and after new attorneys had uncovered the evidence of Mario's mental retardation – both the trial judge and the prosecutor said that Mario should not be executed.<sup>21</sup> Mario's appeals attorney, Robert McGlasson, has described the peculiar difficulties representing a person with mental retardation:

At first my interviews with Mr. Marquez were short, fairly one-sided, and not at all interactive in any meaningful sense. Then we had Mario tested and evaluated by various experts in the field of mental health and mental retardation, and I came to understand just how impaired Mario really was. Once I recognized that I needed to approach Mario as I would a five- to seven-year-old child, our communication completely opened up. And I was never able to discuss the specifics of his legal case, but instead we talked a lot about his favorite animals, things he liked to draw, and how he missed being able to see his brothers and sisters.<sup>22</sup>

Mario Marquez was executed on the day Governor George W. Bush was inaugurated. Journalist Ted Koppel watched as Mario was put to death, while a throng of college students from nearby Sam Houston State University celebrated outside. Mr. Marquez's family stood silently nearby.<sup>23</sup> Mr. McGlasson also related his experience with Mario in the final hours and minutes before he was executed:

My experience with Mario's actual execution was probably most akin to that of families of small children who are dying from terminal illnesses. The night of his execution, Mario and I spoke for the last time in a small cell not ten steps from the gurney where he was put to death. Mario's eyes were closed most of the time and he described how he could already see the golden streets and "pearly gates" of Heaven. He said he could hear the angels singing. I asked him what he planned to do when he got to Heaven, and he told me he wanted to be God's gardener and take care of the animals. Minutes later, his body lunging and heaving against the straps holding him down to the gurney, Mario was dead. The unique brutality of the death penalty in Mario's case was devastating for me personally, as I had just witnessed the methodical extermination of someone who

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<sup>20</sup> *Id.*, at Exhibit 32, Testimony of neighbor Gonzales, at 44-46; Exhibit 29, Social History, at 14-15.

<sup>21</sup> Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

<sup>22</sup> Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

<sup>23</sup> Interview with Susan Casey, defense attorney (October 1, 2000).

was, in every relevant sense of the word, a mere child.<sup>24</sup>

### III. Mental Retardation and the Trial Process

Not only do mentally retarded defendants have less moral culpability than their unimpaired counterparts, they also have a limited capacity to participate intelligently in all aspects of the trial process. For example, mentally retarded defendants are particularly susceptible to coercion, reacting readily to both friendly suggestions and intimidation.<sup>25</sup> As a result, when people who suffer from mental retardation are interrogated, they are much more likely to confess to a crime they did not commit or to exaggerate their role in an offense to gain favor with the interrogator or to hide their disability.<sup>26</sup>

Just as mentally retarded defendants are more likely to confess falsely, they also are less able to understand and validly waive constitutional rights. This point is well illustrated in the case of Jerry Lane Jurek, who had a verbal I.Q. of 66 and was "unable to recite the alphabet, give change for a dollar, or say how many weeks there are in a year or what month comes before November."<sup>27</sup> He was arrested at 1:00 a.m., questioned at his home, and taken to a jail at 2:30 a.m., where he was questioned for at least ten hours about the disappearance of a ten-year-old girl.<sup>28</sup> Mr. Jurek did not appear before a magistrate until some 21 hours after his arrest, and nearly three hours after that, Mr. Jurek gave the first of two written confessions, admitting he had killed the missing girl.<sup>29</sup> He was then transferred 20 miles away, only to be brought back to the same jail 12 hours later. After another five hours, Mr. Jurek signed a second written confession in which he admitted that he had made sexual advances toward the victim, making it significantly more likely he would receive the death penalty.<sup>30</sup>

Because of Mr. Jurek's limited intelligence, the articulate nature of the two confessions, and the circumstances surrounding his arrest and interrogation, both of his written confessions initially were found to be involuntary.<sup>31</sup> The Fifth Circuit specifically determined that even though Mr. Jurek might have been advised of his rights, "it is not clear that Jurek would be able to understand the warnings unless they were couched in the simplest language. In the case of a mentally handicapped defendant like Jurek, the actions of the police speak louder than their words, and their actions surely did not suggest that Jurek was entitled to remain silent and to

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<sup>24</sup> Telephone Interview with Robert McGlasson, defense attorney (October 4, 2000).

<sup>25</sup> Miles Santamour & Bernadette West, *The Mentally Retarded Offender: Presentation of the Facts and a Discussion of the Issues*, in *THE RETARDED OFFENDER*, (M. Santamour & D. Watson eds. 1982).

<sup>26</sup> PRESIDENT'S PANEL ON MENTAL RETARDATION REPORT OF THE TASK FORCE ON LAW 33 (1963).

<sup>27</sup> *Jurek v. Estelle*, 593 F.2d 672 (5<sup>th</sup> Cir. 1979), modified by 623 F.2d 929 (5<sup>th</sup> Cir. 1980) (en banc).

<sup>28</sup> *Id.* at 674.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 675-79. On rehearing en banc, however, the Fifth Circuit agreed that the second confession was involuntary, but held that the first confession was voluntary. *Jurek v. Estelle*, 623 F.2d 929 (5<sup>th</sup> Cir. 1980) (en banc).

consult with an attorney.”<sup>32</sup>

Mentally retarded defendants also are substantially more likely than their unimpaired counterparts to misjudge the seriousness of their circumstances. With an I.Q. of only 64 or 76 (depending on which test was used), Oliver Cruz could barely read or write. As a child, Oliver failed the seventh grade three times; when he was an adult, he was rejected by the Army after failing the entrance exam three times. Because Mr. Cruz could not understand how to fill out a job application, he earned money however he could – mowing lawns, cleaning houses, and even taking tickets for a traveling carnival. Twelve years ago, he was convicted of rape and murder and sentenced to die.<sup>33</sup> Mr. Cruz’s accomplice, who had the mental skills to understand the precariousness of his situation, accepted a plea bargain and testified against Mr. Cruz. In exchange for his testimony against Mr. Cruz, this accomplice was sentenced to 65 years imprisonment, with a chance at parole in 17 years.<sup>34</sup> Mr. Cruz, on the other hand, was executed on August 9, 2000.

Finally, mentally retarded defendants may fail to understand the legal proceedings against them and to adequately participate in their own defense, not just because of their limited reasoning capacity, but also because their lawyers do not take the time to explain the different stages of the trial in a manner they can comprehend. For example, because of faulty memory and limited emotional capacity, mentally retarded individuals often cannot recognize or supply their own counsel with the most relevant mitigating information.<sup>35</sup> In addition, few lawyers have received special training regarding issues that may arise with mentally retarded clients,<sup>36</sup> and they often face serious problems communicating with them. As a result, attorneys too often remain ignorant of vital mitigating information and are therefore unable to tell the client’s life story in a compelling way. Such a scenario is not merely unfair, but also presents a serious risk of error.<sup>37</sup>

Like all mentally retarded capital defendants, Doil Lane’s impairment placed him at an insurmountable disadvantage from the time he first became a suspect. Mr. Lane’s I.Q. has been

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<sup>32</sup> Jurek v. Estelle, 593 F.2d 672, 678 (5<sup>th</sup> Cir. 1979).

<sup>33</sup> Raymond Bonner and Sara Rimer, *Oliver Cruz Can Barely Read and Write. He Has an I.Q. of Either 64 or 76*, PITTSBURGH POST-GAZETTE, Aug. 7, 2000, at A3.

<sup>34</sup> *Executing the Retarded*, (editorial) BUFFALO NEWS, Aug. 12, 2000, at C2.

<sup>35</sup> Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 550 (1988) (mentally retarded inmates are often unable to recall details and unable to communicate a complex chain of events).

<sup>36</sup> Joseph P. Shapiro, *Innocent, and Free at Last*, U.S. NEWS, Oct. 9, 1995, at 41 (“Police and defense lawyers are rarely trained to spot mild retardation or the behavior that can produce false confessions.”); *Middleton v. Evatt*, 855 F. Supp. 837, 842 (D.S.C. 1994) (holding that counsel’s reference to the mentally retarded defendant as “dumb” during closing argument did not constitute ineffective assistance of counsel).

<sup>37</sup> M. SANTAMOUR & D. WATSON, *THE RETARDED OFFENDER* (1982); James Ellis and Ruth Luckasson believe many mentally retarded defendants are convicted of crimes they did not commit. See Reid, *Unknowing Punishment*, STUDENT LAWYER 18, 20 (May 1987).

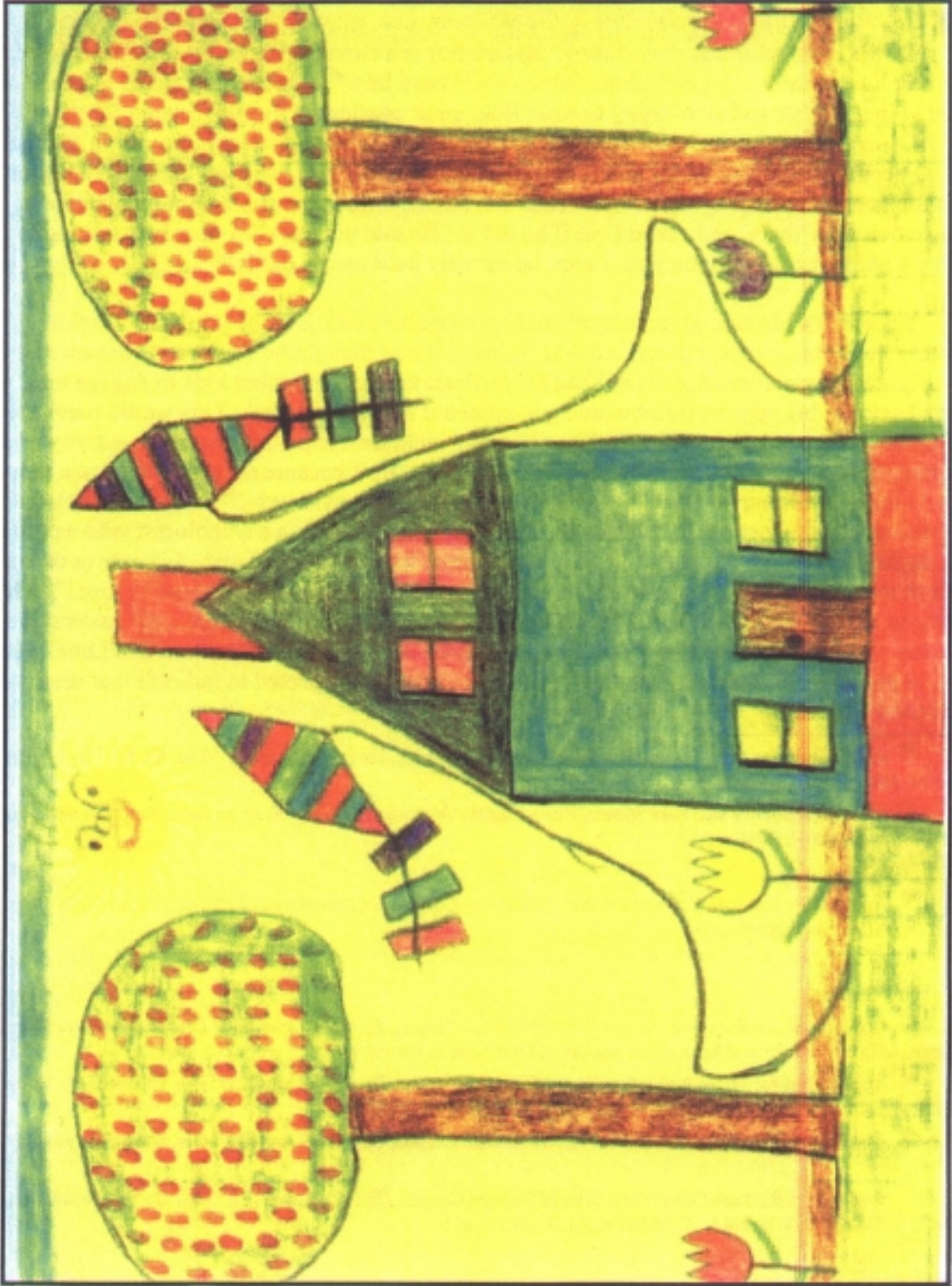


Figure 2: Crayon drawing by death row inmate Doil Lane.



tested at between 62 and 70, and an early psychological test measured his I.Q. at 64.<sup>38</sup> His emotional and intellectual development is that of an eight-year-old.<sup>39</sup> He was convicted of the rape and murder of an eight-year-old girl, with the case against him consisting largely of his own confession.<sup>40</sup>

Doil's childhood was devastating. His mother is a chronic paranoid schizophrenic who "was absolutely filthy . . . [and] almost always had head lice."<sup>41</sup> Doil was sexually abused and forced by his mother and step-father to wear little girls' panties and parade around for them.<sup>42</sup> As Doil's sister explained, Doil was blamed for anything that went wrong at home – a role he came to accept: "He even took the blame for things that I did. He even got blamed for burning down the house. I was playing with matches and started a fire once and he got blamed for it. . . . The firemen were there, and asked Doil if he did it. He said no, but after they kept talking to him for a while, he was saying yes. Later, he actually believed he did it."<sup>43</sup>

Because of his mental retardation and horrific home life, Doil had difficulty making friends. One of his teachers described that "other children thought he was creepy because he was dirty, didn't smell good. . . . Doil had [a] difficult time getting other kids to engage him. He was awkward in his approach and would get excited if he was included. This would inevitably lead to his acting giddy and silly. . . . The children would then expel him from the activity or just shun him, making cruel jokes about him."<sup>44</sup> As a result, Doil became desperate to please those around him. "Anything you would say, he would try to agree with you."<sup>45</sup> This tendency makes him particularly susceptible to suggestion. As Windell Dickerson, a psychologist who examined Doil, explained, "The interrogation of a mentally retarded person like Lane . . . requires care to assure that information obtained from him, truly comes from him, and not through him."<sup>46</sup> Dr. Dickerson elaborated that Doil's limited cognitive abilities prevent him from truly understanding his rights: "In regard to the waiver of his rights under 'Miranda,' an individual like Lane, who is trying to pass [as non-mentally retarded] and cover, could be expected to indicate that they understood something . . . whether this was true or not."<sup>47</sup>

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<sup>38</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit B, Mitigation Report, at 3.

<sup>39</sup> Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

<sup>40</sup> *Id.*

<sup>41</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit B, Mitigation Report, at 6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at 5.

<sup>44</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit F, Affidavit of Special Education teacher at Doil Lane's school, at 2.

<sup>45</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit I, Affidavit of Doil Lane's former landlord and employer, at 2.

<sup>46</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit C, at 6.

<sup>47</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit C, affidavit of Windell L. Dickerson, Ph.D., M.D., at 6.

Doil's eagerness to please and lack of real understanding of his rights may help explain why he confessed to the rape and murder of an eight-year-old girl. After he confessed, he climbed into the lap of the Texas Ranger who was interrogating him.<sup>48</sup> Dr. Dickerson "was quite amazed . . . that Lane was sitting in his interrogator[']s lap during at least the final part of his confession. In my experience, even with a mentally retarded defendant, it is all but unheard of for an adult defendant to sit in his interrogator[']s lap. Such behavior is strong evidence of powerful emotional activity inherent in the situation. . . . Powerful emotion is a principal ingredient of individuals being easily led. Mr. Lane is a person who is easily led."<sup>49</sup>

As a result of his mental retardation, Doil's trial attorney described how he "was of little or no help in his defense. He has a very confused thought process when he tries to tell you a story or answer all but the most basic questions."<sup>50</sup> Doil's communication is very difficult to follow, he is unable to speak in complete sentences or string together a sequential narrative.<sup>51</sup> At trial, Mr. Lane asked for a crayon so that he could color pictures. The judge refused to let him have one.<sup>52</sup>

Aware of Doil's confession, and uninformed of the many handicaps Doil faced within the criminal justice system and in life, the jury convicted him of capital murder. Now age 39, Doil still asks for crayons: "I like to clore (color) in my clorel (coloring) book but you all tuck (took) away my clores when you can not hurt no one with a box 24 clores, just in my book."<sup>53</sup> Doil Lane still sits on Texas's death row.

#### IV. An Emerging Consensus on Sparing the Mentally Retarded

For all these reasons, even ardent supporters of the death penalty overwhelmingly oppose its use on the mentally retarded.<sup>54</sup> A 1989 national poll by Louis Harris showed that overall,

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit 2A (affidavit of John Curtis).

<sup>51</sup> Application for Post-Conviction Writ of Habeas Corpus, Ex Parte Lane (22<sup>nd</sup> Dis. Ct. for Hays Cnty.) Exhibit C (affidavit of Windell L. Dickerson, Ph.D., M.D.), at 4.

<sup>52</sup> Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, NEW YORK TIMES, August 7, 2000, at A1.

<sup>53</sup> *Id.*

<sup>54</sup> *For the Record* (Op/Ed), WASHINGTON POST, Oct. 29, 1992, at A30. Although, 86% of Texans polled said Texas should have capital punishment, 73% of the respondents said it should not be used "in cases where the person is mentally retarded." Kathy Fair, *86% of Polled Texans Favor Death Penalty*, HOUSTON CHRON., Nov. 16, 1988. In California, where 75% favor the death penalty, 71% opposed its use on the mentally retarded, according to a 1997 field poll. See Paul Van Slambrouck, *Execution and a Convict's Mental State Testimony Continues this Week as California Weighs Competency of a Death-row Inmate*, CHRISTIAN SCIENCE MONITOR, April 27, 1998, at 1. A Virginia Commonwealth University study found that Virginians favor the death penalty by 64% to 18%. Only 10% of the respondents favored the death penalty for the mentally retarded. See *Cracks Found In Support for Death Penalty; Virginia Study Cites Options for Parole*, WASHINGTON POST, June 30, 1989, at C3.

70% of Americans opposed the execution of persons with mental retardation.<sup>55</sup> Since 1989, 13 states and the federal government have passed laws prohibiting the execution of the mentally retarded.<sup>56</sup> During the federal debate on this topic, sentiment against execution of persons with mental retardation was pronounced. Senator Arlen Specter, a former district attorney, spoke in favor of banning executions of mentally retarded persons.<sup>57</sup> Former President Bush's Committee on Mental Retardation, which included members such as Attorney General Dick Thornburgh, recommended to him that the mentally retarded should not be subject to execution.<sup>58</sup>

All major advocacy organizations in the United States and in Texas that address the special problems and concerns of the mentally retarded unanimously decry the execution of such persons. Perhaps the best formulation of this position is the statement by the American Association on Mental Retardation, the nation's oldest and largest interdisciplinary organization of mental retardation professionals.<sup>59</sup> In this statement, the AAMR outlines how persons with mental retardation are "often treated unfairly by [the criminal justice] system," and notes the system's shortcomings in determining pretrial competence and similar issues because of "the failure of many criminal justice professionals to recognize and understand the nature of mental retardation."<sup>60</sup> For these reasons, the AAMR's position is clear: "[N]o person who is mentally retarded should be sentenced to death or executed."<sup>61</sup>

The Texas Association for Retarded Citizens (ARC) similarly condemns the execution of the mentally retarded. In its 1993 position statement, the Texas ARC noted that "people with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with the criminal justice system," creating problems that include an "inability to assist the defense lawyer or . . . to assist in the defense."<sup>62</sup> The Texas ARC further concluded that these problems are "aggravated by ignorance and stereotyped views of mental

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<sup>55</sup> Sandra Torry, *High Court to Hear Case on Retarded Slayer; Ruling Could Decide Whether Mentally Deficient Criminals Can Get the Death Sentence*, WASHINGTON POST, Jan. 11, 1989, at A6.

<sup>56</sup> Chet Brokaw, *Legislature Approves Restriction on Death Penalty*, ASSOCIATED PRESS NEWSWIRE, March 3, 1999. The thirteen states are: Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York (except in cases of murder by a prisoner), South Dakota, Tennessee, and Washington. Death Penalty Information Center, *Mental Retardation and the Death Penalty*, at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited Oct. 1, 2000).

<sup>57</sup> Congressional testimony by Senator Arlen Specter on June 20, 1991 (noting support for ban on execution of persons with mental retardation); *see also* Congressional testimony by Senator Joseph Biden on May 24, 1990 (in favor of banning federal execution of persons with mental retardation and in opposition to an amendment allowing federal execution of persons with mental retardation).

<sup>58</sup> Report by the President's Committee on Mental Retardation *Citizens with Mental Retardation and the Criminal Justice System*, delivered to President George Bush on Aug. 19, 1992 (recommending legislation banning the execution of persons with mental retardation).

<sup>59</sup> American Association on Mental Retardation Resolution on Mental Retardation and the Death Penalty (May 31, 1999) (opposing the execution of persons with mental retardation).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> THE ASSOCIATION FOR RETARDED CITIZENS OF TEXAS POSITION PAPER ON TREATMENT UNDER THE CRIMINAL LAW OF PERSONS WITH MENTAL RETARDATION (1993) (condemning the execution of persons with mental retardation).

retardation held by many professionals in the criminal justice system, as well as citizens called to serve on juries.”<sup>63</sup>

The positions of the AAMR, the national ARC, and the Texas ARC are supported by at least nine other disability organizations throughout the country.<sup>64</sup> These professional and voluntary organizations represent the broadest possible spectrum of viewpoints within the field of mental retardation. The American Bar Association also has adopted a position against executing mentally retarded individuals.<sup>65</sup>

Sadly, the growing national consensus against the execution of mentally retarded people was not sufficiently apparent to help Texas death row inmate Johnny Penry. Johnny Penry’s I.Q. has been measured at between 50 and 63 and he has the reasoning capacity of a 7-year-old.<sup>66</sup> He never got past the first grade, and it took him one year to learn to write his name. He learned to read a few words while in prison, but still is unable to write.<sup>67</sup> Mr. Penry endured horrifying abuse as a child, including suffering torture at the hands of his own mother, who punched him in the mouth as he sat in his highchair, forced him to eat his own bodily wastes, beat him with electrical cords, and locked him in closets.<sup>68</sup>

This appalling evidence aside, the United States Supreme Court in 1989 found insufficient evidence of “a national consensus against execution of the mentally retarded,”<sup>69</sup> and concluded that executing Penry would not violate the Eighth Amendment’s provision against cruel and unusual punishment.<sup>70</sup> At that time, only two of 36 death penalty states prohibited execution of the mentally retarded. Since then, 13 states and the federal government have banned the execution of the mentally retarded.<sup>71</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> They include: the American Psychological Association, the Association for Persons with Severe Handicaps, the American Association of University Affiliated Programs for the Developmentally Disabled, the American Orthopsychiatric Association, the National Association of Private Residential Resources, the New York Association for Retarded Children, the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, the Mental Health Law Project, and the National Association of Protection and Advocacy Systems. Amicus brief in Support of Petitioner in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (opposing the execution of persons with mental retardation joined by all named organizations).

<sup>65</sup> American Bar Association Resolution and Report, adopted by the A.B.A. House of Delegates on February 7, 1989 (finding that execution of persons with mental retardation violates contemporary standards of decency).

<sup>66</sup> Mike Ward, *For Third Time, Killer Avoids Execution; Court Will Hear Case of Johnny Paul Penry, Who Suffers From Mental Retardation*, AUSTIN AM. STATESMAN, Dec. 31, 1999, at B3.

<sup>67</sup> Ed Housewrite, *Texas Weighs Retardation as a Factor in Execution*, DALLAS MORNING NEWS, Aug. 10, 1998, at 1A.

<sup>68</sup> Kathy Walt, *Judges Hear Arguments in Penry Case / Mentally Retarded Man Appeals Death*, HOUSTON CHRONICLE, Feb. 11, 2000, at 33.

<sup>69</sup> *Penry*, 492 U.S. at 340. The Court came to this conclusion despite public opinion evidence presented by Mr. Penry that 73% of Texans, 71% of Floridians, and 66% of Georgians opposed the death penalty for the mentally retarded. *Id.* at 334.

<sup>70</sup> *Id.*, at 331.

<sup>71</sup> *See supra*, at n. 56.



## V. Execution of Mentally Retarded Defendants in Texas

Since the death penalty was reinstated in 1976, Texas has executed six men who were mentally retarded and has sentenced numerous others to die.<sup>72</sup> Astonishingly, however, Texas Governor George W. Bush claimed on August 9, 2000 that Texas does *not* execute mentally retarded people.<sup>73</sup> He made this statement even though he had opposed the bill that would have ended the practice.<sup>74</sup> In the most recent legislative session, a bill banning the execution of the mentally retarded passed the Texas Senate. Despite significant bi-partisan support, the House failed to act on it.<sup>75</sup> The bill was killed, in part, by the last minute maneuvering of Texas Court of Criminal Appeals Chief Judge Mike McCormick. Although Judge McCormick denied that he lobbied against the bill, he acknowledged that he “talk[ed] to some law makers about a ‘bad provision’ in the bill.” He also personally called on Governor Bush to urge him to oppose the bill.<sup>76</sup>

Interestingly, Judge McCormick expressed concern that defendants would be able to fake retardation, which serves to highlight how mental retardation is misunderstood by the judiciary. Because Judge McCormick aired his beliefs behind closed doors, rather than participating in the extensive public committee hearings that preceded the passage of the bill in the Texas Senate, there was no opportunity for proponents of the law to explain that mentally retarded individuals cannot, and do not, fake or exaggerate their disability. On the contrary, these men and women routinely try to overcompensate for or conceal their limited cognitive abilities.<sup>77</sup> Even within hours of being executed, one mentally retarded inmate in Georgia regretted that he could not score better on his I.Q. test.<sup>78</sup> In addition, because a diagnosis of mental retardation requires that the impairment be manifested during the developmental period of a person’s childhood, a defendant who had no documented history of developmental impairment could not be diagnosed as mentally retarded.<sup>79</sup> Finally, the other death penalty states which prohibit the execution of

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<sup>72</sup> John W. Gonzalez, Polly Ross Hughes, *Despite Records, Bush Denies Mentally Retarded Executed*, HOUSTON CHRONICLE, August 10, 2000, at 1.

<sup>73</sup> *Id.*

<sup>74</sup> *Dozens of Bills Run Out of Time*, THE FORT WORTH STAR-TELEGRAM, May, 27, 1999, at 3.

<sup>75</sup> Terrence Stutz, *Senate Backs Execution Restriction: Bush Opposes Bill to Ban Death Penalty for Mentally Retarded*, DALLAS MORNING NEWS, May 19, 1999, at 23A; *Dozens of Bills Run Out of Time*, THE FORT WORTH STAR-TELEGRAM, May 27, 1999, at 3.

<sup>76</sup> Janet Elliot, *McCormick Critical of Ban on Death Sentences for Retarded*, TEXAS LAWYER, May 31, 1999, at 4. Judge McCormick was also critical of a bill that required that an inmate be mentally competent to be executed, which the U.S. Supreme Court has held to be required by the Constitution. *See id.*

<sup>77</sup> DAVID L. WESTLING, INTRODUCTION TO MENTAL RETARDATION 57 (1986).

<sup>78</sup> ROBERT PERSKE, UNEQUAL JUSTICE: WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM 33 (1991) (reporting that Jerome Bowden, the man whose execution prompted Georgia to ban capital punishment of the mentally retarded, told his lawyers a few hours before his death that, when taking his I.Q. test, “I tried real hard. I did the best that I could.”).

<sup>79</sup> Jonathan Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996); Robert C. Owen, Meredith Martin Rountree & Raoul Schonemann, *Judge’s Concerns Over Bill Unwarranted*, TEXAS LAWYER, May 31, 1999 (“By incorporating the definition that Texas law presently employs for other purposes, [the bill] would have precluded a finding of ‘mental retardation’ unless the defendant showed that he suffered from a profound adaptive

mentally retarded defendants have reported no undue interference by those laws with their ability to seek and enforce death sentences in otherwise appropriate cases.

## **VI. Conclusion**

Executing mentally retarded people does not serve the purposes of the criminal justice system and violates society's standards of decency. Because of their unique cognitive, developmental, and moral impairments, mentally retarded individuals can never attain the level of culpability for which the punishment of death is warranted. Moreover, because of their handicaps, mentally retarded persons are extremely ill-equipped to navigate the criminal justice system. The result is an especially serious risk of unjust convictions, death sentences, and executions.

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dysfunction and cognitive impairment (as evidenced, but not conclusively demonstrated, by very low I.Q. test scores) long before his capital offense.”).