

INSANITY, INCOMPETENCY AND MENTAL RETARDATION

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CHAPTER 9

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TABLE OF CONTENTS

I. INSANITY..... 1

 A. The Statute..... 1

 B. Lessons Learned From High Profile Cases..... 2

 C. Case law of Interest..... 3

 D. Legislative Possibilities —Legal Realities 3

 E. Less Than Insane? 3

II. COMPETENCY 4

 A. Juvenile Competency 4

 B. Adult Competency 4

 C. Competency Examination..... 5

 D. License Qualifications 5

 E. Involuntary Medication 5

 1. Sell v. United States..... 6

 2. Involuntary medication, Art. 46B..... 6

III. MENTAL RETARDATION..... 7

 A. Atkins v. Virginia 7

 B. AAMR Definition:..... 8

 C. Limitations in Intellectual Functioning..... 8

 D. Degrees of Impairment 9

 E. Limitations in Adaptive Behavior 10

 F. Recognizing the Person with Mental Retardation 10

 G. The Texas Response to *Atkins* 11

 H. Extending Atkins to the Mentally Ill 12

IV. CONCLUSION..... 12

APPENDIX A 13

APPENDIX B 15

INSANTIY, INCOMPETENCY AND MENTAL RETARDATION

INTRODUCTION

In many criminal cases the lawyer, whether the prosecutor representing the State of Texas or the defense lawyer who is representing the accused, will be required to confront issues of mental health. It would be wise for counsel to assume that there is a mental health issue in the case unless it is proven otherwise. This paper will discuss the affirmative defense of insanity, issues relating to competency, as well as mental retardation. These are different issues, but can often be seen together or work together. Understanding them will allow counsel to provide a more humane and effective service to the client.

It is important to understand that mental illness and mental retardation, while both indicating mental impairments, are significantly different. Those who are insane generally suffer from one or more mental illnesses. However, the person with mental retardation can also be mentally ill. The person with mental retardation can be so impaired as to not know that his conduct is wrong and therefore insane, just as is a person who does not know his conduct is wrong because of a psychosis. A person with mental retardation or mental illness can still be competent to stand trial or can be not competent to stand trial as a result of either mental retardation, mental illness or both.

I. INSANITY

A. The Statute

The defense of insanity is found in Tex.Penal Code Section 8.01 which provides:

- (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
- (b) The term “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The Texas statute focuses on the “cognitive prong” of mental capacity, i.e. did the accused know that his conduct was wrong. “This exclusive focus on an accused person’s cognitive capacity has been widely criticized by the courts, by psychiatrists and other mental health professionals, and by the legal profession. A serious mental illness may leave an individual’s intellectual understanding and cognitive capacity relatively unimpaired, but can still affect the

person’s emotions and reason to such a degree that the individual cannot completely control his or her behavior.¹

While the defense of insanity was established in §8.01 of the Texas Penal Code, counsel must look to Art. 46.03 of Texas Code of Criminal Procedure to see how the defense is raised and considered. This statute provides the following guidance:

- (1) It is not enough to merely raise the defense. The evidence must support it and not “nibble at the edges” of the defense. Defense counsel should have the language of the statute at hand and have the expert witness(s) firmly establish that the accused, within a reasonable degree of medical certainty, (a) was suffering from a severe mental disease or defect at the time of the incident and (b) did not know that his/or her conduct was wrong. Please see Attached Appendix A for sample direct examination of mental health witness for the defense.
- (2) The jury is given three (3) options on its verdict form: (a) guilty, (b) not guilty or (c) not guilty by reason of insanity.
- (3) The defendant has the burden of persuasion on the affirmative defense by a preponderance of the evidence.
- (4) A person found NGRI is acquitted “and may not be a person charged with a criminal offense” although the defendant may actually be confined for a period longer than if a guilty verdict was returned.
- (5) Defense counsel *must* file notice at a pre-trial hearing, 10 days before trial or when incompetency is raised, whichever is earliest. Failure to file notice can result in evidence being excluded unless good cause is shown.
- (6) The court may, *sua sponte*, or upon motion by either counsel appoint disinterested experts in mental illness and mental retardation.
- (7) The court can order the accused to be examined. If the accused is on bond and refuses to be examined, confinement for up to 21 days can be ordered.
- (8) The appointed expert is to report to the court (with copies to both counsel) within 30 days of appointment.
- (9) The defense can request funding for its own expert by statute and case law.²

¹Brian D. Shannon and Daniel H. Benson, Texas Criminal Procedure & The Offender with Mental Illness: An Analysis & guide, Second Edition, *National Association for the Mentally Ill* (1999).

² *Ake v. Oklahoma*, 470 U.S. 68 (1985) and *DeFreece v.*

- (10) Separate reports can be submitted on competency to stand trial

An instruction on the insanity defense will only be submitted to the jury if it is supported by competent evidence. Merely raising the evidence is not enough. Defense counsel should make sure that the expert witnesses use the magic language of the statute so that evidence is admitted that the client was (1) suffering from a severe mental disease or defect and (2) did not know that his/or her conduct was wrong. While an expert witness will be able to provide an opinion as to whether or not the accused (1) suffered from a severe mental disease or defect and (2) whether or not the accused knew the conduct was wrong, the witness will not likely be allowed to provide an opinion as to whether or not the accused was insane or insane.³

B. Lessons Learned From High Profile Cases

National attention has been focused on Texas in recent years because of three high profile cases in which the insanity defense was raised. The people accused in these cases were Andrea Yates in Harris County, Deanna Laney in Smith County and Lisa Diaz in Collin County. As a result of the excellent representation that was provided to Ms. Yates by George Parnham and Wendell Odom, to Ms. Laney by F.R. "Buck" Files and team and by Robert Udashen to Lisa Diaz, several best practice tips have been developed that were outlined in a paper presented by Mr. Files at a recent seminar.⁴ These tips are paraphrased as follows and include:

1. When appointed or hired on a case, call one or more lawyers who have experience in this area.
2. Make contact with the client early and often. The impaired client will need constant assurances from the lawyer and team members. The client's mental state makes him or her particularly vulnerable.
3. Choose a co-counsel and choose team members who can work together.
4. Begin to put the team together immediately, beginning with a mitigation specialist. If the client is indigent, seek funding from the court for the assistance you need.⁵

5. Consider having a psychiatrist see the client immediately so that symptoms of psychosis can be identified and noted. Also consider having the early sessions videotaped while the client is in a mental condition more closely resembling his or/ her state at the time of the alleged offense.
6. Obtain the best experts that you possibly can. Ask colleagues and other professionals for referrals. However, remember that it is the lawyer who controls the defense and not the mental health professional.
7. Learn the vocabulary of the experts and then learn to explain the concepts in layperson terms so that a jury will understand.
8. Develop a strategy for dealing with the media. Consider a "gag order" or a Restrictive and Protective Order to maintain some control over those who would like to comment on your case (and the mental health of your client).
9. Assume that every person in the jail is a potential witness for the state
10. Coordinate the expert's technology needs with the court. Will the expert need to use Powerpoint during testimony? Will the court allow its use?
11. Anticipate that the evidence will show that the defendant acted on a number of occasions in a manner that is consistent with sanity. This erratic behavior is to be expected and is not fatal to the defense.
12. Anticipate that the jury state will want the least educated jury that it can select.
13. Anticipate that in a capital eligible case the state will seek death in order to seat a "death qualified" jury, and therefore jurors who may be less accepting of an insanity defense.
14. Recognize the mental health needs of the client and that he/or she will need a mental health professional for treatment. This person should not be the consulting expert or a testifying expert as their objectives are different.

The defense of insanity is raised in less than 4% of all criminal cases and is successful in about 1%. This would mean that it is successfully raised in 2 of every 5,000 criminal cases.⁶

The plight of the accused who does raise the insanity defense is further complicated by the fact that the jurors are not advised of the consequences of a not

State, 848, S.W.2d 150 (Tex.Crim.App. 1993).

³ *Mitten v. State*, 79 S.W. 3d 751 (Tex.Civ. App. — Corpus Christi, 2002).

⁴ F.R. Files, Jr., "Laney and Insanity Defense 101", *Capital and Mental Health Seminar*, Texas Criminal Defense Lawyers Association, Houston, Texas February 23-25, 2005.

⁵ Tex.C.Crim.P. Art. 26.05 and 26.052

⁶ Thomas G. Gutheil, "A Confusion of Tongues: Competence, Insanity, Psychiatry and the Law", 50 *Psychiatric Services*, 767, 773 (1999).

guilty by reason of insanity verdict. “The Court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the consequences to the defendant if a verdict of not guilty by reason of insanity is returned.”⁸

Why do we give jurors such awesome responsibility yet insist that they be kept in the dark as to the consequences of their decisions?

C. Case law of Interest

“The Court does not indicate that states must make the insanity defense available. *Foucha v. Louisiana*, 504 U.S. 71, 88-89.

The Constitution does not prohibit placing the burden on a defendant to prove insanity beyond a reasonable doubt. *Leland v. Oregon*, 343 U.S. 790 (1952).

If a prior determination of insanity has been made, in a subsequent proceeding where insanity is once again an issue, insanity is presumed and the state is then required to prove beyond a reasonable doubt that the person was sane at the time of the commission of the offense. *Riley v. State*, 830 S.W. 2d 584, 585 (Tex.Crim.App. 1992).

Is the test “morally wrong” or “legally wrong”? The jury is not given a definition, but is to interpret the word according to its common meaning. *Asbacher v. State*, 61 S.W. 3d 532, 539 (Tex. App.—San Antonio, 2001). *Resendiz v. State*, 112, S.W. 3d 541 (Tex. Crim. App. 2003).

Sixth Amendment does not guarantee defense counsel the right to be present at exam by court appointed expert. *Heflin v. State*, 640 S.W. 2d 58 (Tex.Civ.App.—Austin, 1982).

State is not required to offer evidence of sanity in order to rebut the evidence offered by the accused. *Graham v. State*, 566 S.W. 2d 941 (Tex.Crim.App. 1978).

D. Legislative Possibilities —Legal Realities

As noted above, there are a number of complaints about the restrictive nature of the Texas Insanity Statute. Some possible amendments to §8.01 focus on the wording used in the statute and include those suggested by:

The Model Penal Code which has as its elements the following:

- disease or defect of the mind
- accused lacked the substantial capacity to appreciate the criminality of his conduct; or

- lacked substantial capacity to conform his conduct to the requirement of the law.

The American Law Institute (ALI) version contains the follows elements:

- mental disease or defect
- lacks substantial capacity
- appreciate the wrongfulness of the conduct; or
- conform one’s conduct to the requirements of the law.

Several bill were submitted to the legislature in during 2005. However, the “word on the street” soon after the legislature began was that nothing would be done to change the current law.

While §8.01 does not contain the “volitional prong” that is suggested by many, i.e. could the accused conform his conduct to the requirements of the law”, there is one possibility for the creative defense counsel. Section 6.01 of the Texas Penal Code provides:

- (a) A person commits an offense only if he voluntarily engages in conduct....

The current case law says that “voluntarily” means the absence of accidental act, omission or possession.⁹ However, the a question remains as to whether or not a person who is unable to conform his conduct to the requirements of the law actually engages in a voluntary act.

E. Less Than Insane?

What happens when the client’s mental illness does not rise to the level of insanity? Can this less than insane mental illness be presented only as punishment phase evidence? The answer is “no”. A defendant in a murder case has been allowed to offer evidence as to the condition of his mind at the time of the offense pursuant to Tex.C.Crim.P. Art. 38.36.

The Court of Criminal Appeals, while acknowledging that Texas does not recognize a defense of diminished capacity, has held that relevant evidence of mental illness can be offered in cases during the guilt/innocence phase of a trial to negate the mens rea as alleged by the State of Texas. *Jackson v. State*, 160 S.W. 3d 568 (Tex.Crim.App. 2005). The challenge for defense counsel is to make this evidence relevant to some defensive issue, including any applicable lesser included offenses.

⁸Tex.C.Crim.P. Art. 46.03§1(e).

⁹ *Alford v. State*, 866 S.W. 2d 619, 624 n.8 (Tex.Crim.App. 1993).

II. COMPETENCY

While competency to stand trial is the competency issue that counsel most often addresses, competency is actually something that should be considered at all phases of the representation. The competency issues would include competency to understand Miranda rights; competency to waive Miranda; competency to give a voluntary statement; competency to be arraigned, competency to stand trial; competency to be sentenced; and competency to be executed.

A. Juvenile Competency

Competency of an adult to stand trial will be the focus of this paper. It should be noted however that Section 55.31 of the Texas Family Code contains specific provisions relating to a juvenile's Fitness to Proceed. This section provides:

A child alleged by petition or found to have engaged in delinquent conduct or conduct indicating a need for supervision who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.

B. Adult Competency

Texas Code of Criminal Procedure Art. 46.02 has been replaced by a new Article 46B that was effective January, 2004. A flow chart that was provided by Shannon T. Edmonds for a mental health program is attached.¹¹

The rewrite of the incompetency procedures was the result of a 16-member Task Force created by SB 553 from the previous 77th regular session of the legislature. The Task Force was chaired by Senator Robert Duncan and Representative Patricia Gray. Keith S. Hampton represented the defense bar on the Task Force. The changes were meant to raise the standards for competency evaluations, preclude the misuse of information derived from the defendant during the examination for competency, eliminate the need for "pick up" juries, and provide procedures for forced medication as a last resort for those who have had their competency restored, but who refuse to take medication necessary to maintain competency.

Significant Changes in the law

- The new Article 46B repeals Article 46.02, but does not change the traditional standard for incompetency;
- No expert may evaluate an accused suspected of incompetency before the appointment of counsel;²⁶ THIS IS A SIGNIFICANT IMPROVEMENT.
- The forensic expert must have all relevant data, which the parties must make available by order of the court;
- The statements of the accused and derivative evidence are inadmissible at the trial on the merits of the offense charged;
- Specific qualification requirements for mental health professionals appointed to examine and provide opinions;
- Reports from examining professionals must specifically address the issues involved. In the determination of competency to stand trial. If the report says that the accused is not competent, the report will not address sanity at the time of the offense. Any opinion as to sanity at the time of the offense must be contained in a report that is separate from that containing opinion as to competency.
- The report will address whether the accused is mentally ill or mentally retarded, when applicable.
- The Accused can have appointed an expert of his choice.
- The appointed experts cannot be involved in both treatment and evaluation. This avoids an inherent conflict in the function of a treating physician and an evaluating physician. If the Court's response is "we don't have that many in the area, we can't abide by the law, that is the government's problem, not that of defense counsel or the client.
- The Accused has the right to counsel during restorative proceedings.

Counsel may consider applying for the appointment of a guardian of the person in such cases. The guardian will become an essential party to the criminal proceedings, should sit at counsel table throughout. Will it make it that much more difficult for the state to kill someone for whom the same state has approved the appointment of a guardian?

The issue of competency to stand trial can be "suggested" by either party or the court.¹²

¹¹ "Thinking Forensically", Capacity for Justice, September 21st-24th, 2004, Austin, Texas.

²⁶ Tex.C.Crim.P. 46B.006

¹² Tex.C.Crim.P. 46B.004(a)

Competency can be raised at any time prior to sentencing.¹³ When the issue is raised, the court will conduct an informal inquiry.¹⁴ If no evidence of incompetency is found, then the criminal proceedings will resume. If, however, the court finds “some evidence” that the accused is not competent, the court will order an evaluation.¹⁵ Reports are to be submitted by one or more experts within 30 days.¹⁶ If the issue is contested, a hearing is held, with the decision to be made by a jury, if requested by either party or the court, *sua sponte*.¹⁷ This is not the same jury that will determine the guilt or innocence of the accused. The accused is presumed to be competent unless he is found to be incompetent by a preponderance of the evidence.¹⁸

If the judge or jury finds that the accused is incompetent to stand trial, the accused is the subject of an “initial commitment”.¹⁹ The commitment may be one where the accused is released on bail or is subject to an outpatient commitment with no stated time for restoration of competency.²⁰ The accused can also be subjected to an inpatient commitment in a maximum security unit or a facility as directed by the local MHMRA.²¹ There is a provision for restoration within 120 days with one possible extension of 60 days.²² At the expiration of that time, the accused is returned to court for a Restoration Determination.²³ If the determination is contested, the issue will be determined by the judge unless either party, or the court, requests a jury. If competency is found to be restored, then criminal proceedings will resume. If he is found to be incompetent, then the court will provide for an extended commitment.

C. Competency Examination

When the issue of the defendant's competency was raised before or during the trial by evidence from any source, the court may appoint “disinterested qualified experts” to examine him, report on his or her impressions and testify if necessary.²⁴ The accused can request an expert of his own choice. A mental health professional who is involved in the treatment of the accused cannot be appointed to examine him under

this chapter. In order to be appointed, the mental health expert must have certain qualifications:

D. License Qualifications

- (1) certified by the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry;

OR

- (2) certified by the American Board of Professional Psychology in forensic psychology;

AND

Six hours of required continuing education in courses in forensic psychiatry or psychology in either of the reporting periods in the 24 months preceding the appointment.

OR

Experience Qualifications

Twenty-Four (24) hours of specialized forensic training relating to incompetency or insanity evaluations

AND

Pre-January 1, 2005 appointees must have 5 years experience before 1-1-04 in performing criminal forensic evaluations for courts;

Post January 1, 2005 appointees must have at least five (5) years experience before 1-1-04 in performing criminal forensic evaluations for courts;

AND

Eight (8) or more hours of continuing education relating to forensic evaluations within twelve (12) months preceding appointment, with documentation.²⁵ If, under exigent circumstances a specialized expertise is required, an expert who is not qualified can be appointed.

E. Involuntary Medication

When representing a client that may not be competent to stand trial, issues involving medication may arise. Again, counsel may consider the

¹³ Tex.C.Crim.P. 46B.005(d)

¹⁴ Tex.C.Crim.P. 46B.004-.005

¹⁵ Tex.C.Crim.P. 46B.021-.027

¹⁶ Tex.C.Crim.P. 46B.026

¹⁷ Tex.C.Crim.P. 46B.051

¹⁸ Tex.C.Crim.P. 46B.003

¹⁹ Tex.C.Crim.P. 46B.071-.086

²⁰ Tex.C.Crim.P. 46B.072

²¹ Tex.C.Crim.P. 46B.073

²² Tex.C.Crim.P. 46B.081

²³ Tex.C.Crim.P. 46B.084

²⁴ Tex.C.Crim.P. 46B.021

²⁵ Tex.C.Crim.P. 46B.022

application of a guardian to assist with the decisions to medicate or not to medicate. Just because someone has been found to be competent to stand trial does not mean that they are competent to make treatment decisions. It is key that counsel evaluate the issue of competence from the beginning of the client's contact with the criminal justice system and evaluate whether or not he or she was competent at each critical step in the process.

1. Sell v. United States

The United States Supreme Court addressed this issue in 2003²⁷. The Court considered the question of the involuntary medication of a dentist after the U.S. Magistrate found him to be a danger to himself or others. This finding was apparently one of convenience as the District Court found it to be "clearly erroneous", i.e. what will make it easier on the government to prosecute this guy. Before the state can forcibly medicate an accused for the purpose of bringing them to trial, the court must find that treatment is:

- (1) medically appropriate and is substantially likely to render the defendant competent to stand trial; is in the best medical interest of the accused in light of his medical condition and the specific kinds of drugs at issue, including their side effects and levels of success;
- (2) is substantially unlikely to have side effects that may undermine the fairness of the trial, meaning that side effects cannot interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair, and;
- (3) taking account of less intrusive alternatives, is significantly necessary to further important governmental trial related interests. Court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results and must consider less intrusive means for administering the drugs, such as a court order to the defendant backed by the contempt power before considering more intrusive methods, and;
- (4) assuming that the defendant was not dangerous to himself or others, he could not be ordered involuntarily to take anti-psychotic drugs solely to render him competent stand trial without consideration of important questions. These questions

would include trial related side effects and risks of drugs to be used and whether they were likely to undermine fairness of trial and consideration of effect on *important* governmental interest in prosecution by facts that defendant had already been confined in the prison medical center for a long period of time and that his refusal to take anti-psychotic drugs might result in further lengthy confinement

The instances in which medication may be ordered may be rare. The government's interest in bringing to trial an individual accused of a serious crime against the person or serious crime against property is important, but each case must be considered and special circumstances may lessen the importance of that interest. If his refusal to take drugs means that he is going to be confined anyway (mental hospital v. prison) and that a possibly guilty person would not go free or commit other crimes, forced medication would not be indicated. A key point to always remember is that the government's foremost interest is assuring the accused a fair trial.

The *Sell* opinion makes liberal use of the words "substantial" and "significant" and variations thereon. This may be where the battle is fought and arguments can be made in a difficult case.

However, if the accused is dangerous to himself or others, then the "trial considerations" may go by the wayside and forced medication may be necessary for protection. Accordingly, courts will look to these alternative grounds for justification before examining the trial grounds.

2. Involuntary medication, Art. 46B

The 2003 legislature enacted SB 105 which became Art. 46B, in part, to address the situation where a client may be restored to competency while hospitalized, but when he returns to the county he refuses to take his meds and then his condition deteriorates. This statute provides that medications can be administered under the following circumstances:

- (1) client has been restored to competency and the "continuity of care" plan includes the provision of psychotropic medication to maintain competence;
- (2) if the client refuses his meds, director of the jail facilities notifies court;
- (3) a hearing is held with the testimony of at least 2 physicians;
- (4) court finds by clear and convincing evidence:

²⁷ *Sell v. United States*, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)

- (a) the treatment is medically appropriate and the benefits outweigh any potential side effects;
- (b) there is a significant state interest in maintaining the defendant's competence (see *Sell* for a discussion of this issue);
- (c) there is no less intrusive means to maintain that competence;
- (d) the administration of the meds will not unduly prejudice the defendant receiving a fair trial.

These criteria are similar to those outlined in *Sell*, however, the issue in *Sell* was raised before Dr. Sell was restored to competency.

III. MENTAL RETARDATION

A. *Atkins v. Virginia*

It is likely that prosecutors have prosecuted and defense counsel have represented a person with "mild" mental retardation without ever knowing that the accused is impaired. The United States Supreme Court has raised the importance of mental retardation in the death penalty arena with its opinion in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002). While a thorough understanding of mental retardation issues is critical in the capital case, criminal lawyers generally should have an understanding of the person with mental retardation.

So as to understand the implication of mental retardation in the context of criminal law, it is important to review some of the important observations made by the court in *Atkins*:

- The execution of persons with mental retardation would not "measurably contribute" to either deterrence or retribution in the criminal justice system²⁸.
- Mentally retarded defendants, in the aggregate face a special risk of wrongful execution.²⁹
- A punishment is excessive and therefore prohibited by the 8th Amendment if it is not graduated and proportioned to the offense³⁰
- A claim that punishment is excessive is judged by currently prevailing standards of decency.³¹
- The proportionality review performed by the Court should be informed by objective factors to the maximum possible extent.³²

- Fourteen (14) additional states had banned the execution of juveniles since *Penry*. No state had rescinded a ban, and those states that allowed such executions were not carrying them out.
- The same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and as a result control their conduct based upon that information.
- By definition, people with mental retardation have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand other's reactions.
- Their deficiencies do not warrant an exemption from criminal sanctions but diminish their personal culpability.
- A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way.
- In order to determine what is "excessive", we look at the standards of today, not those at the time of the Bloody Assizes or when the Bill of Rights was adopted.
- The basic concept underlying the 8th Amendment is nothing less than the dignity of man. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.
- The Court considered briefs, positions and views from:
 - (a) respected professional organizations like the American Psychological Association, American Association on Mental Retardation;
 - (b) religious communities of all faiths who maintain that execution of people with mental retardation could not be "morally justified", and;
 - (c) other nations that share our Anglo-American heritage and the leading members of the Western European community;

- The task of formulating appropriate ways of enforcing the constitutional restriction upon

²⁸ *Id* at 2251

²⁹ *Id* at 2252

³⁰ *Atkins* citing *Weems v. United States*, 217 U.S. 349, 367 (1910)

³¹ *Atkins* citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)

³² *Atkins* citing *Harmelin v. Michigan*, 501 U.S. 957,1000

(1991)

its execution of sentences is left up to the states.

The Texas legislature has for two regular sessions, failed to pass any legislation that would give guidance to the courts on how the determination of mental retardation should be made. Defense counsel would want the determination to be made pretrial, by a jury, following the procedure for determining competency to stand trial.³³ Prosecutors and most judges would like the issue to be determined by the same jury that decides the guilt or innocence of the accused and his punishment, if convicted. This would be accomplished by an additional jury instruction during the punishment phase. The problems with this are obvious. How can the same jury that hears of the horrible things that the client has done, fairly and objectively determine if he or she is mentally retarded? The person who is mentally retarded is committing violent criminal acts.

The primary source for information on the issue of mental retardation should be the American Association on Mental Retardation (AAMR) and your local ARC organizations. AAMR has published what most look to as “the bible” in this area and often referred to as the “red book”.³⁴

B. AAMR Definition:

Counsel will likely see several definitions for mental retardation, but these definitions usually contain the same three (3) elements: (i) limitations in intellectual functioning, (ii) limitations in adaptive behavior and (iii) onset before age 18. Specifically, AAMR defines mental retardation as:

“Mental Retardation is a disability characterized by significant limitation both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. This disability originates before age 18”³⁵.

C. Limitations in Intellectual Functioning

Intelligence is viewed as a multifaceted and multi-determined construct that enables an individual to comprehend and deal effectively with the world. The Wechsler scales and the Stanford-Binet are perhaps the two instruments most frequently used to assess intelligence.³⁶ The mean IQ score is 100. Each standard deviation from the mean is = to 15 points.

The full scale score of 70 is often cited as the “cut-off” score in determining who is disabled by limitations in intellectual functioning. Therefore, the person with a full IQ score of 70 falls two (2) standard deviations below the norm of 100.

Standardized tests are common in the field of psychology and so too are such tests relied upon in determining “intelligence”. The IQ score for any particular individual is not a precise number. The gauge of a person’s intelligence is found within a range. Accordingly, if the accused has been given an IQ of 71, counsel should not abandon the notion that the client is mentally retarded. It is perhaps more accurate to say that the client has an IQ that is somewhere between 66 and 76 due to the Standard Error of Measurement inherent in the testing and the degree of confidence that the mental health field needs to have in the IQ determination. Counsel must also consider other factors that might have influenced the validity of the test. Was the test administered by someone who was qualified to do so? Was the standard protocol followed in the administration? Was a current version of the test administered? There is the phenomenon known as the “Flynn Effect” whereby a person today will likely score higher on an outdated version of a test than that same person would on a current version.³⁷ Counsel should consider if there is any language or other bias that might have influenced the test score.

The Wechsler Intelligence Scale for Children-III (WISC-III) is used for individuals whose chronological ages range from 6 years to 16 years, 11 months. The instrument consists of 12 individualized sub-tests and yields three composite scores: Verbal IQ, Performance IQ and Full Scale IQ. The standard error of measurement for the WISC-III Full Scale Score is 3.2. This means that a test administrator can be 95% confident that a child whose tested IQ is 65 has a true IQ score of somewhere between 59 and 71.³⁸

The Wechsler Intelligence Scale-III (WAIS-III) is an individually administered test that was designed to assess the intelligence of individuals ranging in age from 16 years to 89 years. The test features six (6) verbal sub-tests and five (5) perceptual motor sub-tests and yields Verbal IQ scores, Performance IQ scores and Full-Scale IQ scores. The Standard Error of Measurement for the WAIS-III is less than it is for the WISC-III. While we saw that the standard error of measurement (SEM) for the children’s test is 3.2, the SEM for the adult test is roughly 2.3. This means that a test administrator can be 95% confident that an adult,

³³ Tex.C.Crim.P. Art. 46.02B

³⁴ American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports*, 10th Edition, AAMR, Washington, D.C. (2002).

³⁵ *Id* at 1.

³⁶ *Id* at 59.

³⁷ Tomoe Kanaya, Matthew H. Scullin and Stephen J. Ceci, “The Flynn Effect and U.S. Policies”, *American Psychologist*, (October, 2003).

³⁸ *Id* at 61.

whose tested IQ is 65, has a true IQ score of somewhere between roughly 60 and 70.

The Stanford-Binet intelligence scale has been available since the early 1900's.³⁹ The Stanford-Binet-IV is the current edition and is the 4th revision of the scale. This test is based on the theory that intelligence is composed of verbal reasoning ability, quantitative reasoning ability, abstract/visual reasoning ability and short-term memory. These are assessed via 15 subtests. The Stanford-Binet was designed for use with individuals from the age of 2 years to adulthood. The test uses "standard age scores" instead of the Verbal, Performance and Full Scale scores that are seen with the Wechsler Scales. The SEM ranges from 1.60 for adults to 3.58 for young children. When counsel sees the term "Full Scale Score", it is the Wechsler Scales that are being referenced.

Other tests that may be administered to children include the Cognitive Assessment System, and the Kaufman Assessment Battery for Children.⁴⁰

The importance of school records cannot be overemphasized in determining if a person is mentally retarded. If the client is learning disabled, there will often be school records that will demonstrate that the client had special needs while in school. Many people with mental retardation are put into Special Education while attending school. However, the fact that the client was not in Special Ed. does not mean that he or she is not a person with mental retardation. It was a practice for some school districts to deny a special needs designation to a person. Some reasons are (1) the parents did not want their child to be labeled as a special needs child; (2) the school did not want a member of a minority designated as special needs because it did not want money going to minorities when it could be "better spent" on white students; (3) it was more difficult to expel a "problem child" once he was designated as special needs.

Rather than putting someone in Special Education, perhaps the student would be designated as "learning disabled". However, if the student was "learning disabled" in everything but P.E. and lunch, then it is likely that the impairment was more severe than just a learning disability.

D. Degrees of Impairment

A person may be classified as mildly, moderately, severely or profoundly retarded depending on his full scale I.Q. score.⁴⁶ Severely and profoundly retarded people are rarely prosecuted for capital crimes because they are incompetent to stand trial or are legally

insane.⁴⁷ Mildly and moderately retarded people suffer from significant mental disabilities, such as limited communication skills, poor memory, impulsiveness, a short attention span, reduced moral development, a lack of knowledge of the most basic facts that are necessary to function in society, low motivation, suggestibility and a reckless desire to please authority figures.⁴⁸

A person with a mildly retarded I.Q. score may not have the deficits in adaptive behavior beginning at the early developmental period that are required to give a diagnosis of retardation.⁴⁹ Those people are usually given a diagnosis of borderline intellectual functioning.⁵⁰ Some mildly mentally retarded persons are described as borderline mentally retarded because their I.Q. scores are in the same range as a person who has borderline intellectual functioning.⁵¹

Some forensic psychiatrists have testified that a capital defendant with mildly retarded I.Q. scores was not mentally retarded because he had "street smarts." That term has no scientific meaning because it does not exclude a deficit in any specific area of adaptive behavior. The DSM-IV-R definition of mental retardation requires deficits in two or more of the following areas: communication, home living, use of community resources, self-care, self-direction, functional academic skills, social and interpersonal skills, work, leisure, health and safety.

The concept of "mild mental retardation" can be problematic for counsel at trial. While *Atkins* did not distinguish between different degrees of retardation (just as there are no degrees of pregnancy— either you are or you are not), it is sometimes difficult for jurors to avoid equating "mild mental retardation" with "borderline mental retardation" or "not really mentally retarded at all". This is significant in that most, if not all, of the persons with mental retardation who come into contact with the criminal justice system will have

⁴⁷ *Penry v. Lynaugh*, 492 U.S. at 333.

⁴⁸ See Ellis & Luckason, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. Univ. L.Rev. 414, 427-32 (1985).

⁴⁹ *Ex parte Tennard*, 960 S.W.2d 57, 60 (Tex. Crim. App. 1997). Some experts believe that an I.Q. score of 75 or lower is sufficient to support the subaverage intellectual functioning element of a diagnosis of mental retardation.

⁵⁰ In *Ex parte Tennard*, an I.Q. score of 67 was insufficient to prove that the defendant was mentally retarded because he presented no expert testimony to show that he had deficits in adaptive behavior starting at an early age. 960 S.W.2d at 60. In *Ramirez v. State*, a defendant with an I.Q. score of 57 was entitled to a *Penry* charge, even though a psychologist E. refused to diagnose him as mentally retarded, 815 S.W.2d at 655, but his I.Q. score was too low to give him a diagnosis of borderline intellectual functioning.

⁵¹ See, e.g., *Williams v. Taylor*, 120 S. Ct. 1495, 1513 (2000); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991).

³⁹ *Id* at page 62.

⁴⁰ *Id* at page 63-64

⁴⁶ See American Association of Mental Deficiency Classification in Mental Retardation at 13.

I.Q. scores in the 65 to 75 range. While historically the mental health field found it helpful to use descriptive terms such as mild, moderate, severe and profound when describing the degrees of retardation, these terms are frowned upon today and have never had any meaning in the courtroom.

The public often has a mental picture of the person with retardation. He is the large, teddy bear-like, simple-minded, easy-going person who does not have a mean bone in his body. While this may be true of many with this disability, it is not uniformly so. People with mental retardation, especially those with “mild” mental retardation, are very capable of committing capital crimes and sometimes do. Beginning with the very first contact with the venire, counsel must work to change that stereotypical view of the disabled, so that when the juror hears of the horrible acts the client is alleged to have committed, the first response is not “No mentally retarded person could possibly do such a horrible act!”

E. Limitations in Adaptive Behavior

Adaptive behavior is the collection of conceptual, social and practical skills that have been learned by people in order to function in their everyday lives.⁴¹ The social history that is performed by a mitigation specialist is critical here as it is in every case. It is the mitigation specialist who may first hear during family interviews that the client was “slow”, “not the sharpest knife in the drawer” or find, while going through school records, that the client was in special education. Perhaps more importantly, the mitigation specialist will find those witnesses who can describe the client’s limitations in adaptive behavior. Look for things such as slowness in tying shoes, inability to cross the street safely, having been used as a scapegoat or stooge by other kids or having been teased by the other kids for being “stupid” or “not getting it”.

There are different types of standardized testing that can be performed to determine limitations in adaptive behavior. These include the AAMR Adaptive Behavior Scale-School and Community, the Vineland Adaptive Behavior Scales, the Scales of Independent Behavior-Revised, and the Comprehensive test of Adaptive Behavior. While tests are certainly important, what may be most persuasive is the testimony from lay witnesses as to the actual limitations that the witness saw in the client’s daily life.

Significant limitations in adaptive behavior are identified by a score of at least two standard deviations below the mean on one of more scores representing conceptual, social or practical skills on a standardized measure of adaptive behavior or on the total score,

taking the standard error of measurement into account⁴².

The Court of Criminal Appeals held that a full scale I.Q. score below 70 is required to establish the sub average general intellectual functioning element,⁴³ but many experts believe that an I.Q. of 75 is the ceiling because of the standard error of measurement that must be taken into account in order to achieve 95% confidence in the score.⁴⁴ The Court of Criminal Appeals also held that a full scale I.Q. score of 68 was not sufficient to support a diagnosis of mental retardation without any evidence of deficits in adaptive behavior before the age of 18.⁴⁵

Counsel must be able to establish the impairment in adaptive behavior if a claim of mental retardation is going to be successful.

F. Recognizing the Person with Mental Retardation

Perhaps the greatest problem that counsel will experience in representing the client with mental retardation is recognizing the disability in the first place. People with retardation are not proud of the fact that they are disabled. The last thing in the world that this person wants is to be seen and thought of as being disabled. The client with “mild mental retardation” will not always be “stigmatized” by the facial features of one who suffers from Downs Syndrome or cerebral palsy, which often cause retardation. With no facial features to provide clues, counsel will often rely on his/or her interaction with the client. “How can this person be mentally retarded, counsel may ask?” Every time that I ask if he understands me he says “yes”. He looks “normal”.

People with mental retardation are often cloaked with a “veil of competence”. This means that they appear to function well, having learned how to avoid those situations that will reveal the disability. This is similar to the person who cannot read. Avoid situations where you might have to read out loud and no one will be the wiser. The person with developmental disabilities may:

- not communicate at age level and have a limited vocabulary;
- have difficulty understanding or answering questions;

⁴² *Id* at page 79

⁴³ *Ex parte McGee*, 817 S.W.2d 77, 80 n.15 (Tex. Crim. App. 1991) (citing *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989)).

⁴⁴ *Wills v. State*, 511 U.S. 1097 n.1 (1994) (Blackmun, J. dissenting from denial of cert.); Ellis and Luckason, *Mentally Retarded Criminal Defendants*, 53 Geo.Wash.L.Rev. 414, 422 n.44 (1985).

⁴⁵ *Stevenson v. State*, 73 S.W.3d 914 (Tex.Crim.App. 2002).

⁴¹ *Id* at page 73

- mimic answers or merely repeat back what he has just heard;
- not be able to describe events clearly in his own words;
- not understand consequences or seriousness of situation;
- be easily led or persuaded by others;
- show a naive eagerness to confess or please;
- act younger than their actual age and display childlike behavior;
- display low frustration tolerance and/or poor impulse control;
- have difficulty staying focused and is easily distracted;
- awkward or poor motor coordination.⁵²

Working with the person with a disability such as mental retardation requires effort and patience. When counsel suspects that the client may suffer from a developmental disability, she should consider the following suggestions:

- try to keep surroundings quiet and free from distractions;
- make eye contact before speaking and say the person's name;
- use simple language, repeat points, speak slowly and clearly without patronizing;
- clearly identify yourself and explain why you are there;
- give one direction or ask one question at a time;
- have the person repeat directions or instructions in their own words;
- ask open ended questions rather than questions that will require a "yes/no" answer;
- be patient with the client while waiting for a response;
- avoid abstract questions on time, sequences and reasons for behavior;
- observe nonverbal behavior, over compliance or resistance;
- be sensitive to their needs but don't treat an adult like a child, even though their functioning may be at a child-like level
- don't be patronizing or insulting. The accused is not a "retard", an imbecile or an idiot. He is a person that is deserving of your compassion and every ounce of your ability to advocate. Always emphasize placing the noun (person) before the disability (mental retardation) and this will encourage the proper attitude.

The person with mental retardation is often anxious to please, especially the friends who want to take advantage of them and the nice police officer who wants to know why your client committed this awful crime. "This nice policeman is from the government and he is here to help me. All I have to do is to tell him what he wants to hear and not only will he be my friend, but we will all get to go home. Yeah, Right! ORYour client might be the only one who is at the scene of the crime. Everyone else had the smarts to "get the hell out of Dodge" except your client who did not understand the seriousness of what the other people just did. OR It is the proverbial "Get Mikey to do it!" Your client is naive, vulnerable, just wants everyone to like him, so he will do anything to get along and to be one of the guys.

G. The Texas Response to *Atkins*¹

As noted above, the Texas legislature has failed to provide any guidance to those who are litigating issues of mental retardation. In *Ex Parte Briseno*, 135 S.W. 3d 1 (Tex.Crim.App. 2004) the Court of Criminal Appeals has provided some guidance to lawyers who are litigating mental retardation in a post conviction proceeding under Tex.C.Crim.P. 11.071. In *Briseno*, the CCA noting the absence of a statutory definition of mental retardation for purposes of *Atkins*, adopted the definitions of "mental retardation" set out by the American Association on Mental Retardation (AAMR), and that contained in section 591.003(13) of the Texas Health and Safety Code. Under the AAMR definition, mental retardation is a disability characterized by: (1) "significantly sub average" general intellectual functioning; (2) accompanied by "related" limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.... [T]he definition under the Texas Health and Safety Code is similar: " 'mental retardation' means significantly sub average intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."

The CCA in *Briseno* also held that: (1) *Ring v. Arizona*, 122 S.Ct. 2428 (2002) did not apply to determinations of mental retardation and therefore a defendant was not entitled to a jury determination of the issue; (2) the judge of the convicting court makes the determination in a habeas corpus proceeding; (3) the applicant in a habeas corpus proceeding bears the burden of proving mental retardation by a preponderance of the evidence and likened this to an affirmative defense; (4) a number of evidentiary factors may be considered when making the determination. The court listed seven (7) different factors that focused

⁵² Provided by the ARC of Dallas, (214) 634-9810.

¹ *Atkins v. Virginia*, 536 U.S. 304 (2002)

on the defendant's abilities in commission of the crime and whether or not those who knew him "thought" he was mentally retarded.

The seven (7) factors enunciated by the court are problematic in that the very same definition that the court adopted speaks to limitations in the ability of the accused, not his abilities. Also, those with "mild" mental retardation are often difficult to recognize. Not only do many of them not have the facial features that many associate with mental retardation, but they often hide their impairments.

H. Extending Atkins to the Mentally III

The United States Supreme Court in *Atkins v. Virginia* followed a reasoned approach to find that executing a person who is mentally retarded does not measurably contribute to either deterrence or retribution in the criminal justice system.

The next logical conclusion that follows from the Supreme Court's reasoning is that the same Eighth Amendment is violated when someone who is equally impaired by psychosis, as is the person with mental retardation, is subjected to lethal injection. Attached as Appendix C is a motion that seeks to extend the logic of *Atkins* to those who are similarly impaired by mental illness.

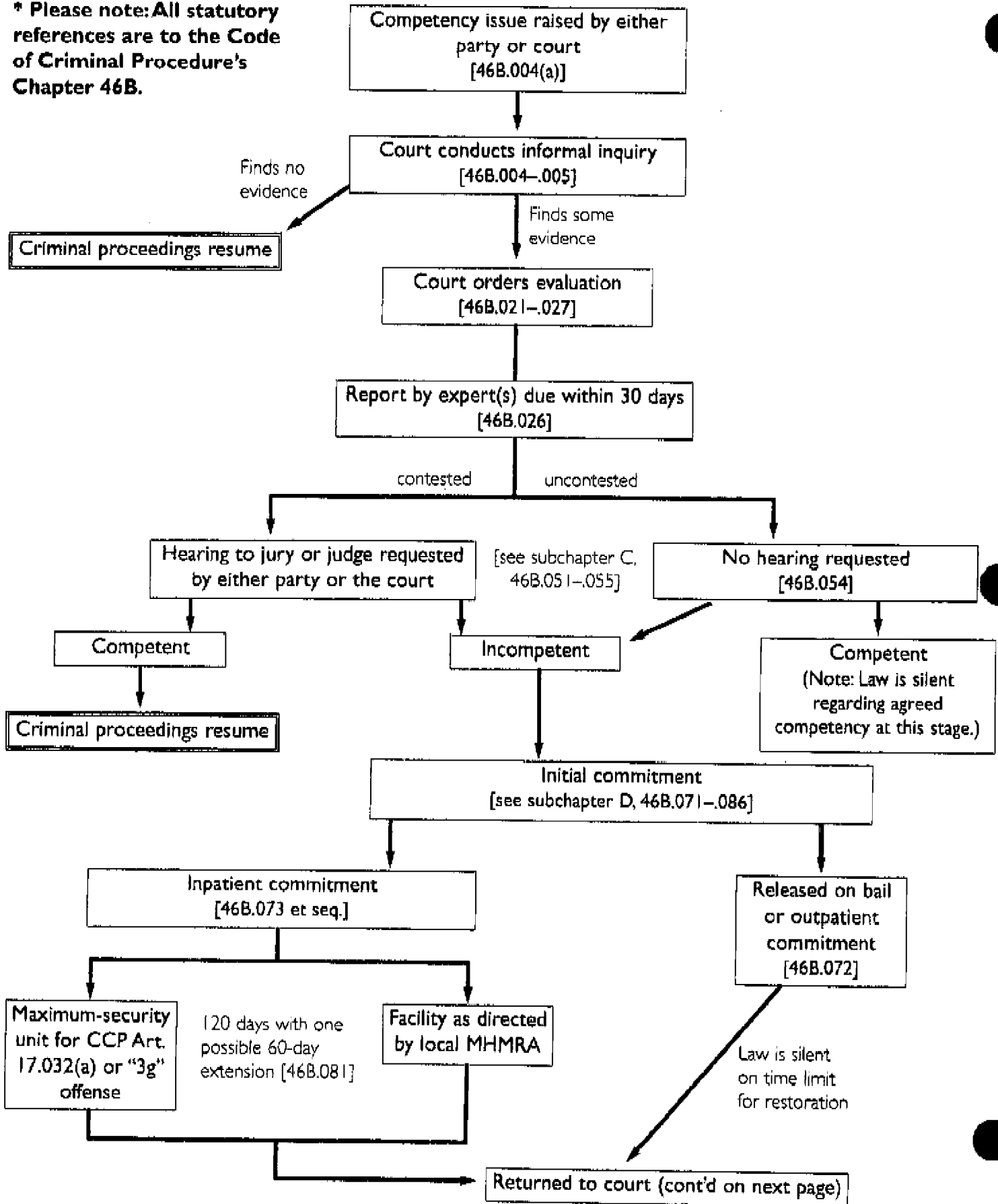
IV. CONCLUSION

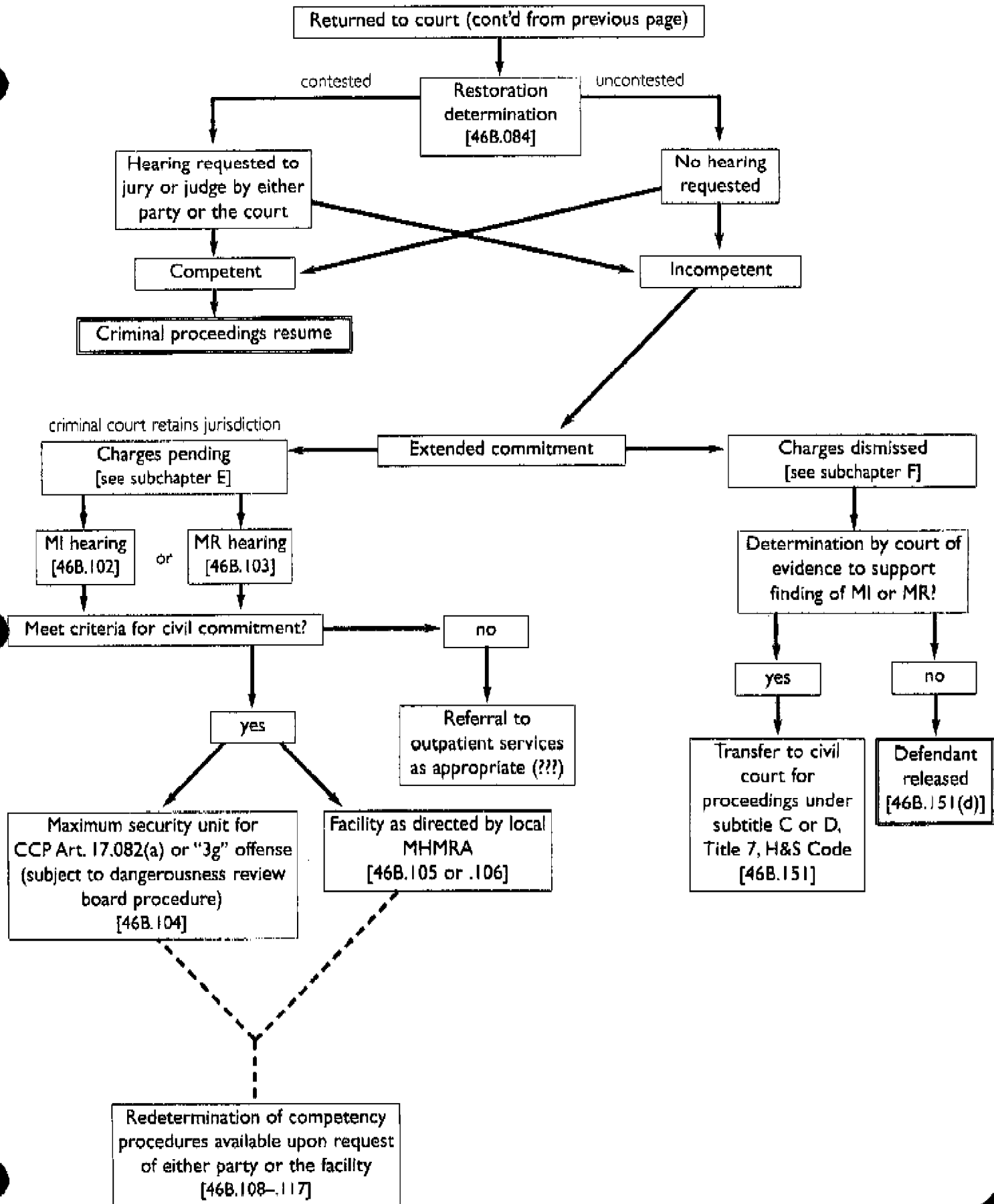
Counsel in a criminal case should anticipate that his client suffers from one or more mental, social or cultural impairments. There is usually an explanation for the client's behavior and that explanation is often found in that part of the client's social history that describes his mental health.

When representing an impaired client, counsel can take the easy way out and dismiss the client's annoying or bizarre behavior as the rantings of just another "pain in the rear" client. However, the dedicated and committed lawyer will take another approach. She will take the time, usually with the help of a qualified mitigation specialist, to learn about the client's life that preceded the crime. She will acquire a basic understanding of mental retardation and those mental illnesses that frequently impact her clients. She will apply her understanding of the law in a way that provides the most effective and humane disposition for the client. That is what the Advanced Practice of Criminal law is all about.

New Chapter 46B: Incompetency to Stand Trial

* Please note: All statutory references are to the Code of Criminal Procedure's Chapter 46B.





APPENDIX B

INDICTMENT NO. _____ (12-31-04)

THE STATE OF TEXAS

IN THE DISTRICT COURT OF

vs.

_____ COUNTY, TEXAS

_____ JUDICIAL DISTRICT

MOTION PRECLUDE THE DEATH PENALTY AS A SENTENCING OPTION

(Reduced Capacity Due to Mental Illness)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, _____, Defendant in the above cause, by and through counsel and pursuant to the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article 1, Sections 3,10, 13 & 19 of the Texas Constitution and Tex.C.Crim.Proc. Articles 1.05, 1.051, 15.17, 16.01, 20.17, 26.04 26.052 and would show the court the following:

1. The Defendant has been indicted for the offense of capital murder.

2. The State is seeking the death penalty. The Eight Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case. Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112, 124 L. Ed.2d 306 (1993) and Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This Court and the Court of Criminal Appeals are bound by the law to make certain that a sentence of death is not wantonly or freakishly imposed and that the purposes of Art. 37.071 are accomplished in a constitutional manner. Ellason v. State, 815 S.W. 2d 6565 (Tex.Crim.App. 1991).

3. Those prohibitions embodied within the Eighth Amendment to the United States Constitution

include the prohibition against the infliction of a cruel and unusual punishment. Article 1, Section 13 of the Texas Constitution provides even greater protection in that this section bars the infliction of a “cruel **or** unusual punishment” (emphasis added).

4. The State of Texas has charged that it was **conscious** objective or desire of the Accused to cause the death of _____ and/or that he was **aware** that his conduct was reasonably certain to cause the death of _____.

5. The capacity of the Accused to form a conscious objective or desire is reduced by impairments in his cognitive ability. The cognitive ability of the Accused has been reduced by his mental illness, which has been diagnosed as _____.

This mental illness impairs the cognitive ability of the Accused in the following areas:

(a)

(b)

(c)

6. There are definite correlations between impairments suffered by the mentally ill and those people who are impaired by mental retardation. Mentally retarded offenders have a reduced capacity, which diminishes their personal culpability, and execution of the mentally retarded violates the Eighth Amendment’s prohibition on the infliction of Cruel and Usual Punishment. Atkins v. Virginia, 536 U.S. 304 (2002). The offender with mental retardation suffers from sub-average intellectual functioning and has significant limitations in adaptive skills, they frequently know the difference between right and wrong, are competent to stand trial, but “by definition” they have diminished capacity to understand and process information, to communicate, to abstract from

mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand other's reactions. Their deficiencies do not warrant an exemption from criminal sanctions but diminish their personal culpability. *Id.* at 317-318.

The Supreme Court has found that the death penalty serves the social purposes of retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). Retribution “necessarily depends on the culpability of the offender.” *Atkins*, 536 U.S. at 319. Capital punishment must be limited to a narrow category of offenders whose “extreme culpability makes them ‘the most deserving of execution.’” *Id.*, quoted in *Roper v. Simmons*, 125 S.Ct. 1183, 1194 (2005).

Offenders, whose reasoning capacities render them less than fully culpable for their crimes, are not eligible for the death penalty² because “they do not act with the level of moral culpability that characterizes the most serious adult conduct.” *Atkins*, 536 U.S. at 306. As a result, the Court found that the diminished mental capacity of the mentally retarded, including their disabilities in “areas of reasoning, judgment, and control of impulses,” does not merit the death penalty as appropriate retribution. *Id.*

Additionally, the social purpose of deterrence is not served by executing the mentally retarded. Since the mentally retarded suffer from impairments in their cognitive functioning, they are less likely to be able to process the information that the death penalty is a possible punishment. As a result, the mentally retarded cannot examine their behavior, evaluate the possible punishments, and “control their conduct based upon that information” in the same manner as other adults in society. *Atkins*, 536 U.S. at 320. This inability to conform conduct undermines the identified social purposes of deterrence and makes the execution of persons with mental retardation nothing more than “the purposeless and needless imposition of pain and suffering.” *Enmund v. Florida*, 458 U.S. 782, 798 (1982)

² See e.g., *Roper v. Simmons*, 125 S.Ct. 1183, 1196 (2005) (finding that “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity”); see also *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

(quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The mental illness of the accused has reduced his mental capacity in a way that is as profound (if not more so) than one who is mentally retarded, and therefore, the rationale in Atkins is applicable to those individuals suffering from severe mental illness.

Many scholars, lawyers, and mental health experts have already noted this connection between mental retardation and mental illness. For example, Doctors Victor Scarano and Bryan Liang believe “Atkins opens the door for the same arguments to be brought forward in death penalty cases involving the mentally ill.” Victor R. Scarano & Bryan A. Liang, Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney, 4 HOUS. J. HEALTH L. & POL’Y 285, 310 (2004). After all, the mentally ill suffer from the same diminished capacities, including the inability to control impulses, as those cited by the Court in Atkins. John H. Blume & Sherry L. Johnson, Killing the Non-Willing: Atkins, The Volitionally Incapacitated, and the Death Penalty, 55 S.C. L. REV. 93, 126-27 (2003); Scarano & Liang, supra.

Likewise, Christopher Slobogin argues that “there may not be any plausible reasons for differentiating between the execution of people with mental illness and execution of people with mental retardation.” Christopher Slobogin, What Atkins Could Mean For People With Mental Illness, 33 N.M.L. Review 293, 293 (2003). Slobogin takes this argument a step further, noting that the “the delusions, command hallucinations, and disoriented thought process[es] of those who are mentally ill represent greater dysfunction than that experienced by most ‘mildly’ retarded individuals (the only retarded people likely to commit crime)”. Christopher Slobogin, Mental Illness and the Death Penalty, 1 Cal. Crim. L. Rev. 3, (2000) *available at* <http://www.boalt.org/CCLR/v1/v1sloboginfr.htm>. As a result of these similarities, imposing the death penalty on the mentally ill does not further the social goals of retribution and deterrence.

All offenders are culpable, but there are varying degrees of culpability. Our legal system and our society deal with these differences in culpability by meeting out different punishments for

different individuals, ensuring that “only the most deserving of execution are put to death,” Atkins, 536 U.S. at 319. As a result, the societal value of retribution “necessarily depends on the culpability of the offender,” Id.

In Atkins, the Supreme Court concluded that mentally retarded offenders are categorically lacking in moral blameworthiness because of their cognitive limitations and inability to control impulses. These characterizations of diminished culpability are also applicable to those who suffer from mental illness because the mentally ill exhibit disabilities in reason and impulse control. Blume & Johnson, supra, at 126-27; Scarano & Liang, supra. Indeed, “[f]or those with mental illness, the activities and vagaries of life are often difficult and may lead to unacceptable social behaviors, resulting in the commission of illegal acts.” Scarano & Liang, supra, at 311. Therefore, a mentally ill person is not as mentally culpable as the average-minded murderer because of his dysfunction. And, as per the analysis in Atkins, if the mental culpability of an average murderer is insufficient to impose the death penalty, then such a punishment imposed on a less mentally culpable person is not merited, particularly when that person suffers from the same disabilities as the categorically-excluded mentally retarded offenders. Atkins, 536 U.S. at 319.

Likewise, the execution of the mentally ill does not serve the societal goal of deterrence. The mentally ill are unlikely to control their behavior based upon the knowledge that the death penalty is a possible punishment for their behavior because they have “great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior. Slobogin, What Atkins Could Mean For People With Mental Illness, supra, at 304. Therefore, much like adolescents, who are categorically exempt from the death penalty, persons with mental illness are not likely to make the “kind of cost-benefit analysis that attaches any weight to the possibility of execution.” Thompson v. Okalahoma, 487 U.S.815, 837 (1988). Furthermore, “just as it is for mentally retarded offenders, the ‘cold calculus’ of cost and benefit is ‘at the opposite end of the spectrum from behavior’” for offenders with mental illness. Atkins, 536 U.S. at 319-20 citing Gregg, 428 U.S. at 186 quoted in

Blume & Johnson, supra, at 129. Thus, both logic and Supreme Court precedent dictate the conclusion that the death penalty cannot serve a deterrent purpose when applied to offenders with mental illness.

In Lockett v. Ohio, 438 U.S. 586, 605 (1978), the Supreme Court acknowledged the impossibility of creating a perfect procedure for imposing the death penalty. Nevertheless, the Court determined that mitigating circumstances, which may call for a less severe punishment, must be considered by the jury in order to satisfy the requirements of the 8th and 14th amendments. In Atkins, the court considered the fact that “mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes,” Atkins, 536 U.S. at 320-21.

Mentally ill offenders face similar obstacles. Severe mental illness, like significant cognitive impairments, sharply constricts a defendant’s ability to “give meaningful assistance to counsel.” Blume & Johnson, supra, at 130. Mentally ill offenders often do not trust counsel and therefore, refuse to help them prepare the case. Id. Likewise, the mentally ill offender is not helpful regarding facts of the crime. And, perhaps most importantly, mentally ill defendants are often unable to conform their conduct to the “requirements of courtroom decorum and procedure.” Id. Thus, they are “typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” Atkins, 536 U.S. 304, 320-21 (2002) quoted in Blume & Johnson, supra, at 130.

Atkins also illustrates that mental retardation as a mitigating fact may actually be used as an aggravating factor of future dangerousness, which may make the defendant more likely to receive a death sentence. Mentally ill defendants face the exact same risks. Mental illness, like youth and mental retardation, is universally considered a mitigating fact for sentencing. Slobogin, What Atkins Could Mean For People With Mental Illness, supra, at 312. “[I]mpaired intellectual functioning” is inherently mitigating and, therefore, meets the

definition of ‘constitutionally relevant’ mitigating evidence. Tennard v. Dretke, 124 S.Ct. 2562, 2569-72 (2004), cited in Perry v. State, ____ S.W.3d ____ (Tex. Crim. App. (2004)).

However, similarly to mental retardation, mental illness may actually be used as an aggravating fact in order to show future dangerousness. Slobogin, What Atkins Could Mean For People With Mental Illness, *supra*, at 313. For example, research shows that “despite the fact that offenders with serious disorders are not more likely to re-offend than the general offender population, the public tends to equate mental disorder with dangerousness.” Christopher Slobogin, Is Atkins the Antithesis or Apotheosis of Anti-Discrimination Principles?: Sorting out the Groupwide Effects of Exempting People with Mental Retardation from the Death Penalty, 55 ALA. L. REV. 1101, 1107. In this way, mental illness can be a “two-edged sword,” engendering greater fear of future violence. Atkins, 536 U.S. at 321, *quoted in* Blume & Johnson, *supra*, at 131. Since the Supreme Court has deemed this risk too great for the mentally retarded, then it must be as great for the mentally ill, who share numerous characteristics with the mentally retarded.

7. A punishment is excessive and therefore prohibited by the Eighth Amendment if it is not graduated and proportioned to the offense. Weems v. United States, 217 U.S. 349, 367 (1910). A claim that punishment is excessive is judged by currently prevailing standards of decency. Trop v. Dulles, 356 U.S. 86, 100-101 (1958). The proportionality review should be informed by objective factors to the maximum possible extent. Harmelin v. Michigan, 501 U.S. 957, 1000 (1991). Objective factors that were considered by the Supreme Court in Atkins include the “broader social and professional consensus” Atkins, 536 U.S. at 316 n.21. as indicated by briefs and positions of the American Psychological Association and positions of religious communities of all faiths. Also to be considered are the views of “respected professional organizations and other nations that share our Anglo-American heritage and by leading members of the Western European

Community. Thompson v. Oklahoma, 487 U.S. at 830-831 cited in Atkins, 536 U.S. at 316 n.21.

The positions of those groups to whom the United States Supreme Court has mandated this Court to consider are:

(a) The American Psychological Association: It has asked that each jurisdiction that imposes the death penalty to stop until current deficiencies such as death penalty prosecutions involving persons with serious mental illnesses are ameliorated. See:

<http://www.apa.org/pi/deathpenalty.html>

(b) The American Bar Association: The ABA has called for a temporary moratorium of the death penalty “unless and until states could ensure the fair and impartial administration of the death penalty.” The ABA also opposes the execution of the mentally retarded and of juveniles in all circumstances. See: <http://www.abanet.org/media/deathpenaltyqa.html>.

(c) The American Psychiatric Association: Opposes the imposition of the death penalty “if at the time of the offense, [the defendant] had a severe mental disorder or disability that specifically impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct, (b) to exercise rational judgment in relation to their conduct, or (c) to conform their conduct to the requirements of the law.” See:

http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf

(d) The Western European Community and other members of the International Community. For example, The European Union opposed the death penalty in all circumstances. See:

<http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.htm>

(e) and others (counsel should include other organizations that have taken stands on execution of the mentally ill.

In addition to these organizations, almost every mental health association in the United States has published a policy statement addressing the issue of the execution of mentally ill offenders, and “all of those organization advocate either an outright ban on executing all mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented.” Blume & Johnson, supra, at 121.

8. The determination of what is “excessive” is made by viewing the standards of today, “not those at the time of the Bloody Assizes or when the Bill of Rights was adopted. The basic concept underlying the 8th Amendment is nothing less than the dignity of man —The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Atkins 536 U.S. at 311.

9. The execution of one who is mentally ill violates the dignity of man generally, this Accused and this Court, specifically. The execution of one whose personal culpability is diminished by mental illness is just as excessive and offensive and executing one whose personal culpability is reduced by mental retardation.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that this Court preclude the death penalty as a sentencing option in this case.

Respectfully submitted on this the _____ day of _____, 200____.

By: _____

COUNSEL FOR THE ACCUSED

State Bar No. _____

Address: _____

Telephone: () -

CO-COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to counsel for the State by hand-delivery of a copy of same this the ____ day of _____, 2003.