CHAPTER THIRTEEN
MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Mental Retardation

In 2002 in Atkins v. Virginia, the U.S. Supreme Court held that the application of the death penalty to persons with mental retardation violates the Eighth Amendment prohibition on cruel and unusual punishment. However, Atkins did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate has mental retardation. Without a sound definition and clear procedures, the execution of persons with mental retardation remains possible.

In an effort to assist capital jurisdictions in determining who meets the criteria of mental retardation, the ABA adopted a resolution opposing the execution or sentencing to death of any person who, at the time of the offense, “had significant limitation in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or traumatic brain injury.” The ABA policy reflects language adopted by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders.

Unfortunately, some states do not define mental retardation in accordance with these commonly accepted definitions. Moreover, some states impose upper limits on the intelligence quotient

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1 While “intellectual disability” is gaining currency as the preferred term to describe the same condition known as mental retardation, the ABA Assessment Reports will continue to use the term mental retardation until the term “intellectual disability” is more fully integrated into the legal system. See FAQ on Intellectual Disability, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited Aug. 27, 2013). For example, mental retardation is more commonly used in death penalty jurisprudence in such definitive decisions as Atkins v. Virginia, 536 U.S. 304 (2002). ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty.

2 Atkins, 536 U.S. at 304.


4 For example, the AAIDD defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18.” FAQ on Intellectual Disability, supra note 1. The DSM defines a person as mentally retarded if, before the age of eighteen, s/he exhibits “significantly subaverage intellectual functioning and concurrent deficits or impairments in present adaptive functioning.” DSM, supra note 3, at 39.
(IQ) score necessary to prove mental retardation that are lower than the range that is commonly accepted by psychologists and other mental retardation experts (approximately seventy to seventy-five or below). In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. In some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence. Accordingly, a great deal of additional work is required to make the Atkins holding a reality.

The ABA resolution also encompasses dementia and traumatic brain injury; disabilities functionally equivalent to mental retardation, but that typically manifest after age eighteen. While these disabilities are not expressly covered in Atkins, the ABA opposes the application of the death penalty to any person who suffered from significant limitations in intellectual functioning and adaptive behavior at the time of the offense, regardless of the cause of the disability.

Mental Illness

In Atkins, the Court held that offenders with mental retardation are less culpable than other offenders because of their “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 the reactions of others.” In the ABA’s view, this same reasoning must logically extend to persons suffering from a severe mental disability or disorder that significantly impairs their cognitive or volitional functioning at the time of the capital offense.

In 2006, the ABA adopted a policy opposing imposition of the death penalty on persons who, at the time of the offense, suffered from a severe mental disability or disorder that affected (1) their capacity to appreciate the nature, consequences or wrongfulness of their conduct; (2) their ability to exercise rational judgment in relation to their conduct; or (3) their capacity to conform their conduct to the requirements of the law.

Mental Illness after Sentencing

Concerns about a prisoner’s mental competence and suitability for execution also arise long after the prisoner has been sentenced to death. Almost 13% of all prisoners executed in the modern death penalty era have been “volunteers,” or prisoners who elected to forgo all available appeals. Approximately 88% of these volunteers suffered from a mental illness. When a prisoner seeks to forgo or terminate post-conviction proceedings, jurisdictions should implement procedures that will ensure that the prisoner fully understands the consequences of that decision, and that the prisoner’s decision is not the product of his/her mental illness or disability.

5 Atkins, 536 U.S. at 318.
8 Id. at 962.
Given the irreparable consequence that flow from a death row inmate’s decision to waive his/her appeals, the ABA also opposes execution of prisoners whose mental disorders or disabilities significantly impair their capacity (1) to make rational decisions with regard to post-conviction proceedings; (2) to assist counsel in those proceedings; or (3) when facing an impending execution, to appreciate the nature and purpose of the punishment or reason for its imposition.

Irrespective of a state’s law on the application of the death penalty to offenders with mental retardation or mental illness, mental disabilities and disorders can affect every stage of a capital trial. Evidence of mental illness is relevant to the defendant’s competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, defense attorney, or jury is misinformed about the nature of mental illness and its relevance to the defendant’s culpability and life experience, tragic consequences often follow for the defendant.

Juries often mistakenly treat mental illness as an aggravating circumstance rather than a mitigating factor in capital cases. States, in turn, have often failed to monitor or correct such unintended and unfair results. For example, a state’s capital sentencing statute may provide a list of mitigating factors that implicate mental illness, such as whether the defendant was under “extreme mental or emotional disturbance” or whether the defendant had the capacity to “appreciate the criminality (wrongfulness) of his conduct” at the time of the offense. However, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. One study found specifically that jurors’ consideration of “extreme mental or emotional disturbance” in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weights against a capital defendant when it is considered in the context of determining “future dangerousness,” a criterion for imposing the death penalty in some jurisdictions. One study showed that a judge’s instructions on future dangerousness led mock jurors to believe that the death penalty was mandatory for mentally ill defendants. This perception unquestionably affects decisions in capital cases. In addition, the medication some mentally ill defendants receive during trial often causes them to appear detached and unremorseful. This, too, can lead jurors to impose a sentence of death.

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9 State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under “extreme mental or emotional disturbance” at the time of the offense; (2) whether “the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication”; and (3) whether “the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct.” MODEL PENAL CODE § 210.6(1)(f) (1962). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, Group Gives Up Death Penalty Work, N.Y. TIMES, Jan. 5, 2010, at A11.
I. Factual Discussion: Texas Overview

A. Mental Retardation in Death Penalty Cases

In 2002, the U.S. Supreme Court held, in Atkins v. Virginia, that executing persons with mental retardation violates the Eighth Amendment’s prohibition on cruel and unusual punishment.\(^\text{10}\) The Court, however, allowed the individual states to decide the procedure for determining whether an offender has mental retardation and thus cannot be subject to the death penalty.\(^\text{11}\)

Texas has not enacted a statute prohibiting the death penalty for persons with mental retardation.\(^\text{12}\) In the 2004 case *Ex parte Briseno*, however, the Texas Court of Criminal Appeals established “temporary judicial guidelines” to be used in addressing claims of mental retardation.\(^\text{13}\) The court defined mental retardation as “a disability characterized by: (1) ‘significantly subaverage’ general intellectual functioning; (2) accompanied by ‘related’ limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.”\(^\text{14}\)

While this definition is based on the clinical criteria established by the American Association on Intellectual and Developmental Disabilities (AAIDD), the court also described seven non-clinical factors—later known as the *Briseno* factors—to be used to determine whether a person has mental retardation:

1. Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
2. Has the person formulated plans and carried them through or is his conduct impulsive?
3. Does his conduct show leadership or does it show that he is led around by others?
4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
6. Can the person hide facts or lie effectively in his own or others’ interests?
7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?\(^\text{15}\)

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\(^{11}\) See id.

\(^{12}\) Legislative proposals in 1999 and 2001 to ban the application of the death penalty to mentally retarded persons failed to become law. *Dozens of Bills Run Out of Time: Most of the Measures Passed in One Chamber but Never Made It to the Floor in the Other*, FT. WORTH STAR-TELEGRAm, May 27, 1999, at 3; Paul Duggan, *Tex. Ban on Executing Retarded Is Rejected*, WASH. POST, June 18, 2001, at A2.

\(^{13}\) *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

\(^{14}\) Id. at 7. (citing AM. ASS’N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS* 5 (9th ed. 1992)).

\(^{15}\) Id. at 8–9.
1. Determinations of Mental Retardation at Trial

At trial, the defendant bears the burden of proving mental retardation by a preponderance of the evidence. Because Texas has not enacted a mental retardation statute, there are few other established rules and procedures governing the determination of whether a capital defendant has mental retardation. The determination of a defendant’s mental retardation is not required to take place at a particular time during the capital proceeding; rather, the decision is at the discretion of the trial court. In general, it appears most Texas trial courts have opted to allow the jury to determine whether the defendant has mental retardation during penalty phase deliberations.

2. Determinations of Mental Retardation in State Habeas Corpus Proceedings

Texas statutory law permits a death row inmate to file a subsequent application for a writ of habeas corpus if the current claims and issues have not been and could not have been presented in a previous application “because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.” Under this provision, a death row inmate whose state habeas claims were exhausted before the U.S. Supreme Court’s Atkins decision may raise a mental retardation claim in a subsequent habeas application.

The inmate’s application must allege “sufficient specific facts” supporting his/her mental retardation claim. If the inmate meets this standard, the trial court will consider the claim on the merits. As with trial-level claims of mental retardation, the inmate must prove mental retardation by a preponderance of the evidence. However, the mental retardation determination must be made by the trial court, not a jury.

Texas applies a different standard for habeas corpus applicants who were convicted after the Atkins decision and thus could have raised a mental retardation claim in a prior proceeding. Such inmates must demonstrate in their application “sufficient specific facts” that, if true, would establish ‘by clear and convincing evidence’ that no rational fact finder would fail to find him mentally retarded.”

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18 Renée Feltz, Cracked, TEX. OBSERVER, Jan. 5, 2010, http://www.texasobserver.org/cracked/ (last visited Aug. 27, 2013) (noting that the practice in Texas is for the jury to determine whether a defendant has mental retardation during penalty phase deliberations). See also, e.g., Neal v. State, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008); Williams, 270 S.W.3d at 132; Gallo, 239 S.W.3d at 770; Hunter, 243 S.W.3d at 667.
22 TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (2013).
23 Briseno, 135 S.W.3d at 12.
24 Id. at 11.
B. Evidence of Mental Illness During Capital Sentencing Proceedings

1. Mental Condition as Evidence of Future Dangerousness

Texas statutory law provides that, in the penalty phase of a capital murder trial, the jury must determine that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” before it can sentence the defendant to death.\(^{26}\) To prove this “future dangerousness” requirement, the Texas Court of Criminal Appeals has held that “psychiatric evidence” is relevant factor for the jury to consider “when determining whether the defendant will pose a continuing threat of violence to society.”\(^ {27}\) Thus, mental health experts often testify for the prosecution in Texas death penalty cases on the issue of future dangerousness.\(^ {28}\)

2. Mental Condition Evidence in Mitigation of Punishment

The U.S. Supreme Court has held that the trier of fact in the sentencing phase of a capital trial must be permitted to consider “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”\(^ {29}\) While Texas permits evidence of mental disability and mental illness to be presented as mitigating evidence during the penalty phase of a capital trial, jurors are not required to be instructed on the manner by which mental health evidence should be considered.\(^ {30}\) Instead, one of the three special issues that capital jurors must answer in sentencing phase deliberations requires them to consider “[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.”\(^ {31}\) While this instruction does not expressly mention mental condition, it provides a means for jurors to consider mitigation generally.

Prior versions of Texas’s capital sentencing procedure, however, did not include this special issue, and thus capital jurors did not have a vehicle to consider mitigating evidence, in particular evidence related to the defendant’s mental condition and background.\(^ {32}\) In the 1989 case *Penry v. Lynaugh (Penry I)*, the U.S. Supreme Court invalidated Texas’s capital sentencing scheme as unconstitutional because the three special issues upon which jurors were instructed at the time did not include an instruction related to the consideration of mitigating evidence.\(^ {33}\) The Court

\(^{26}\) TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(e) (2013).
\(^{31}\) TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).
\(^{32}\) For further discussion of this issue, see Chapter Eight on State Post-conviction Proceedings, Recommendations #9 and #10.
specifically found that the second of the three special issues did “not provide a vehicle for the jury to give mitigating effect to [the defendant’s] evidence of mental retardation and childhood abuse.”

In 1991, the Texas Legislature amended the capital sentencing statute so that jurors must be instructed on mitigating evidence. Before this statutory change was enacted, Texas courts provided capital jurors with a supplemental jury instruction in an attempt to comport with the requirements of Penry I. The supplemental instruction required jurors to give a “negative finding” to one of the special sentencing issues if they found that the mitigating evidence justified a life sentence. In the 2001 case Penry v. Johnson (Penry II), the U.S. Supreme Court held that this procedure also did not give the jury an adequate vehicle to give effect to mitigating evidence. The Court noted that because the jurors were still instructed on the pre-Penry I special issues, “the jury charge as a whole [was] internally contradictory, and placed law-abiding jurors in an impossible situation.” In order to give effect to mitigation, jurors were forced to ignore the very special issues on which they were instructed.

C. Competency

1. Competency to Stand Trial

In Dusky v. United States, the U.S. Supreme Court held that a defendant is mentally incompetent and thus cannot be tried for a criminal offense if s/he lacks “sufficient present ability to consult with [his/her] counsel with a reasonable degree of rational understanding” or does not have “a rational as well as factual understanding of the proceedings.”

Texas statutory law provides that a defendant is incompetent to stand trial if s/he lacks “(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings.” However,
a defendant is “presumed competent” to stand trial “unless proved incompetent by a
preponderance of the evidence.”

The defense, prosecution, or trial court on its own motion may raise the issue of the defendant’s
competency to stand trial. If the issue is raised, the court must “determine by informal inquiry
whether there is some evidence from any source that would support a finding that the defendant
may be incompetent to stand trial.”

If the court finds such evidence, it must stay the trial proceedings and “order a[ ] [mental]
examination . . . to determine whether the defendant is incompetent to stand trial.” The court
must also “appoint one or more disinterested expert[]” psychiatrists or psychologists to examine
the defendant. These experts must meet certain qualification standards prescribed by statute,
such as having specialized training in forensic examinations. After performing an evaluation of
the defendant, the expert must submit a detailed report to the trial court.

Once the examinations are complete, the court must hold a trial on the question of the
defendant’s competency unless “(1) neither party’s counsel requests a trial on the issue of
incompetency; (2) neither party’s counsel opposes a finding of incompetency; and (3) the court
does not, on its own motion, determine that a trial is necessary to determine incompetency.”
A jury is required to make the competency determination if so requested by either party or on the
trial court’s own motion. Otherwise, the issue will be decided by the trial judge.

If the defendant is found incompetent to stand trial, the court may release him/her on bail or
order him/her to be committed to a mental health facility. Assuming the defendant is
committed, s/he will be confined for 120 days for the purposes of treatment and restoration of
competency. During this period, the defendant may be forcibly medicated if the court so orders.
At the end of this restoration period, the defendant must be returned to court for a new

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43 TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).
44 TEX. CODE CRIM. PROC. ANN. art. 46B.004(a) (2013).
45 TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (2013).
46 TEX. CODE CRIM. PROC. ANN. art. 46B.004(d) (2013). However, “[i]f the issue of the defendant’s
incompetency to stand trial is raised after the trial on the merits begins, the court may determine the issue at any
time before” the defendant is sentenced, and need not stay the proceedings, TEX. CODE CRIM. PROC. ANN. art.
46B.005(d) (2013). “If the determination is delayed until after the return of a verdict, the court shall make the
determination as soon as reasonably possible after the return.” Id.
47 TEX. CODE CRIM. PROC. ANN. art. 46B.005(a) (2013).
48 TEX. CODE CRIM. PROC. ANN. art. 46B.021(b) (2013).
49 TEX. CODE CRIM. PROC. ANN. art. 46B.022 (2013). The court may appoint a non-qualified expert “only if exigent
circumstances require the court to base the appointment on professional training or experience of the expert
that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be
possessed by a psychiatrist or psychologist who meets the requirements.” Id. art. 46B.022(c) (2012).
50 TEX. CODE CRIM. PROC. ANN. art. 46B.025 (2013).
51 TEX. CODE CRIM. PROC. ANN. art. 46B.051(b)–(c) (2013).
52 TEX. CODE CRIM. PROC. ANN. art. 46B.051(a) (2013). This must be a separate jury from the jury that
determines the defendant’s guilt of the charged crime. TEX. CODE CRIM. PROC. ANN. art. 46B.051(c) (2013).
53 TEX. CODE CRIM. PROC. ANN. art. 46B.051(b) (2013).
54 TEX. CODE CRIM. PROC. ANN. art. 46B.071(a) (2013).
55 TEX. CODE CRIM. PROC. ANN. art. 46B.073 (2013).
56 TEX. CODE CRIM. PROC. ANN. art. 46B.086(b)–(c) (2013).
competency determination.  

A defendant is entitled to court-appointed counsel during competency proceedings.  

2. Competency to Be Executed

The U.S. Supreme Court has held that it is unconstitutional to execute a death row inmate “whose mental illness prevents him from comprehending the reasons for the penalty or its implications.” Furthermore, the state must grant a fair evidentiary hearing to the inmate once “a substantial threshold showing of” incompetency is made. The hearing must provide “an opportunity to submit evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.”

Texas statutory law defines an incompetent inmate as one who does not understand “(1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed.” The inmate bears the burden of proving s/he is incompetent by a preponderance of the evidence.

To raise a claim of incompetency for execution, a Texas death row inmate must file a motion in the trial court after his/her execution date has been set “clearly set[ting] forth alleged facts in support of the assertion that [s/he] is presently incompetent to be executed.” The trial court must then determine whether the inmate has “raised a substantial doubt of [his/her] competency.” If the trial court finds that the inmate meets this standard, “the court shall order at least two mental health experts to examine” the inmate. The court will determine the inmate’s competency based on the experts’ reports and any other evidence presented.

On appeal of the trial court’s decision, the Texas Court of Criminal Appeals must determine whether “to adopt the trial court’s order, findings, or recommendations” and “whether any existing execution date should be withdrawn and a stay of execution issued.”

57 TEX. CODE CRIM. PROC. ANN. art. 46B.084 (2013). The court may also find that the defendant’s competency has been restored prior to the 120-day period and without a hearing in certain circumstances. TEX. CODE CRIM. PROC. ANN. art. 46B.0755 (2013).
58 TEX. CODE CRIM. PROC. ANN. art. 46B.084(c) (2013).
59 TEX. CODE CRIM. PROC. ANN. art. 46B.006 (2013).
61 Panetti, 551 U.S. at 950 (quoting Ford v. Wainwright, 477 U.S. at 426, 427 (1986)).
62 Id. at 949–50 (quoting Ford, 477 U.S. at 427).
63 TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (2013).
64 TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).
65 TEX. CODE CRIM. PROC. ANN. art. 46.05(c) (2013).
66 TEX. CODE CRIM. PROC. ANN. art. 46.05(d) (2013). If the inmate was previously found to be competent under the Texas statute, however, s/he will be presumed competent “unless [s/he] makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to [his/her] competency to be executed.”
67 TEX. CODE CRIM. PROC. ANN. art. 46.05(e) (2013).
68 TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).
69 TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).
Criminal Appeals determines that the inmate is competent, “the court may set an execution date as otherwise provided by law.”  If the Court of Criminal Appeals grants a stay of execution, “the trial court periodically shall order that the [inmate] be reexamined by mental health experts to determine whether [s/he] is no longer incompetent to be executed.”

3. Other Competency Issues

Texas law also permits courts to consider a defendant’s mental illness or disability as it relates to other issues of competency.

In determining whether a defendant was competent under state law to waive his/her Miranda rights or confess to a crime, the trial court may consider evidence that the defendant “was mentally retarded and may not have ‘knowingly, intelligently and voluntarily’ waived his/[her] rights” or that s/he “lacked the mental capacity to understand his/[her] rights.” However, “mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible.”

Before finding that a defendant has competently waived his/her right to counsel, the trial court must inform the defendant about “the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.” However, the Texas Court of Criminal Appeals has held that the trial court is not required to inquire into an accused’s “age, education, background or previous mental health history in every instance.”

A defendant’s guilty plea will be “presumed competent[ . . .] unless proved incompetent by a preponderance of the evidence.” The court must find the defendant incompetent to plead guilty if s/he lacks either “(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against” him/her.

D. Mental Conditions Affecting Criminal Liability

A defendant is not guilty by reason of insanity under Texas law if “at the time of the conduct charged, the [defendant], as a result of severe mental disease or defect, did not know that his conduct was wrong.” However, “mental disease or defect’ does not include an abnormality

70 TEX. CODE CRIM. PROC. ANN. art. 46.05(n) (2013).
71 TEX. CODE CRIM. PROC. ANN. art. 46.05(m) (2013).
73 Id. at 173.
74 Faretta v. California, 422 U.S. 806, 835 (1975) (internal quotation marks omitted).
76 TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).
77 TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (2013).
78 TEX. PENAL CODE ANN. § 8.01(a) (2013).
manifested only by repeated criminal or otherwise antisocial conduct.\(^{79}\) Texas also does not recognize the defense of diminished capacity.\(^{80}\)

\(^{79}\) TEX. PENAL CODE ANN. § 8.01(b) (2013).

\(^{80}\) Ruffin v. State, 270 S.W.3d 586, 593 (Tex. Crim. App. 2008). In some jurisdictions, diminished capacity permits a defendant to present evidence of mental illness or mental disability to prove that s/he was incapable of specific intent or premeditation. See, e.g., State v. Walkup, 220 S.W.3d 748, 750–51 (Mo. banc 2007).
II. ANALYSIS: MENTAL RETARDATION

A. Recommendation #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.

In 2002, the U.S. Supreme Court held in Atkins v. Virginia that the application of the death penalty to persons with mental retardation violates the Eighth Amendment’s ban on cruel and unusual punishment.\(^{81}\) Texas, however, has not enacted a statute prohibiting the death penalty for persons with mental retardation despite this constitutional mandate. This is especially troublesome given the frequency of death sentences and executions in Texas as compared to the other ten states that have not enacted statutes.\(^{82}\) In 2012, for instance, Texas executed the same number of death row inmates as the ten other states combined.\(^{83}\)

Legislative proposals that would have banned the practice have not been enacted. In 1999, a bill prohibiting the execution of those with mental retardation passed the Texas Senate but was never considered by the House of Representatives.\(^{84}\) Two years later, a bill passed both houses of the Texas Legislature but was vetoed by the governor.\(^{85}\) In 2013, another bill to erect a statutory framework to determine whether a defendant has mental retardation was introduced in the Texas Legislature.\(^{86}\) Among the current provisions of the bill, a defendant could raise the issue of his/her alleged mental retardation—and thus ineligibility for the death penalty—before trial.\(^{87}\) As of August 2013, however, the bill is still pending and has not been adopted by the Texas legislature.

Because no law governs the application of the death penalty to persons with mental retardation in Texas, the Court of Criminal Appeals in 2004 established “temporary judicial guidelines” for


\(^{83}\) Execution List 2012, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2012 (listing fifteen for both).

\(^{84}\) Dozens of Bills Run Out of Time: Most of the Measures Passed in One Chamber but Never Made It to the Floor in the Other, supra note 12.

\(^{85}\) Duggan, supra note 12. Explaining the veto, Governor Rick Perry stated that the proposed law “basically tells the citizens of this state, ‘We don’t trust you.’” Id.


\(^{87}\) Id.
addressing Atkins claims in Ex parte Briseno. While the court stated that its decision was designed to resolve mental retardation claims only during the “legislative interregnum” before the enactment of a mental retardation statute, such a statute was never enacted, and the definition of mental retardation provided in Briseno is still in effect.

Texas’s Definition of Mental Retardation

While the Atkins Court referenced the AAIDD definition of mental retardation in its analysis, it left the individual states with the “task of developing appropriate ways to enforce” the prohibition on executing persons with mental retardation. The AAIDD, founded in 1876, is “the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities.” The AAIDD’s definition of mental retardation, now referred to as “intellectual disability,” is drafted by a team of psychologists, medical doctors, educators, and other experts.

The AAIDD and Texas definitions of mental retardation are divided into three components: intellectual functioning, adaptive behavior, and age of onset. The AAIDD defines mental retardation, as “a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and that] originates before the age of 18.”

The Briseno court held that Texas “will follow [the AAIDD definition of mental retardation] . . . in addressing Atkins mental retardation claims.” Specifically, the court referred to the AAIDD’s definition as it existed in 2004, and defined mental retardation as “a disability characterized by: (1) ‘significantly subaverage’ general intellectual functioning; (2) accompanied by ‘related’ limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.” The court further noted that the Texas Health and Safety Code similarly defined mental retardation as “significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.”

However, the Briseno court also questioned whether, even in light of Atkins, “there [is], and should [] be, a ‘mental retardation’ bright-line exemption from our state’s maximum statutory punishment.” The court indicated that Lennie, the slow-witted fictional character in John Steinbeck’s Of Mice and Men, would likely be exempted from the death penalty under Texas

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89 See id.
91 About Us, supra note 3.
93 FAQ on Intellectual Disability, supra note 1.
94 Briseno, 135 S.W.3d at 8. The AAIDD was known as The American Association on Mental Retardation (AAMR) until 2007. About Us, supra note 3. Accordingly, Briseno, which was decided in 2004, refers to the organization as the AAMR.
95 Briseno, 135 S.W.3d at 7. (citing AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).
96 Id. (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003(13)).
97 Id. at 6.
law, but other persons with mental retardation might not be. Moreover, as discussed below, many aspects of Texas’s mental retardation standard deviate from the AAIDD definition, despite the court’s endorsement of the AAIDD standard. In particular, the Texas Court of Criminal Appeals’ interpretation of the adaptive behavior component diverges significantly from the AAIDD standard.

**Intellectual Functioning Component**

The AAIDD definition of mental retardation does not require a particular intelligence quotient (IQ) test score to demonstrate a significant limitation in intellectual functioning. While the AAIDD notes that “limitations in intellectual functioning are generally thought to be present if an individual has an IQ test score of approximately 70 or below[,] IQ scores must always be considered in light of the standard error of measurement, appropriateness, and consistency with administration guidelines.” Specifically, “[s]ince the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75.” Moreover, mental retardation evaluations are too complex to rely on a single IQ score.

Other factors may also decrease the reliability of an individual IQ test score. The Flynn Effect, for instance, is a phenomenon recognized by the AAIDD whereby average scores on an IQ test artificially increase over time. For example, while the average score on an IQ test known as the WAIS-III was 100 when the test was developed in 1995, the average score increased to 103 in 2005. Thus, a person who scored a seventy-three on this test in 2005 might have an actual IQ of seventy. According to the AAIDD, “best practices require recognition of a potential Flynn Effect when older editions of an intelligence test . . . are used in the assessment or

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98 Id. (citing John Steinbeck, Of Mice and Men (1937)).
99 See infra notes 119–182 and accompanying text.
101 Id.
102 See James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, 27 Mental & Physical Disability L. Rep. 11, 20 n.22 (2003) (noting that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation’’); Am. Ass’n on Mental Retardation, Mental Retardation: Definition, Classification, & Systems of Supports 5 (9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.’’); Am. Ass’n on Mental Deficiency, Classification in Mental Retardation 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.’’); Am. Psychiatric Ass’n, Diagnostic & Statistical Manual of Mental Disorders 41 (text rev. 4th ed. 2000) (“It is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.’’).
104 Id.
105 Id.
interpretation of an IQ score.”

Another phenomenon, the practice effect, causes an “artificial increase in IQ scores when the same [test] is readministered within a short time interval.” The AAIDD states that it is “established clinical practice” to “avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee’s true intelligence.”

Finally, for an IQ test to be considered a valid measure of intellectual functioning, it must be “an individually administered, standardized instrument,” as opposed to “[s]hort forms of screening tests” or group-administered IQ exams.

In Brisenso, the Texas Court of Criminal Appeals held that “significantly subaverage intellectual functioning’ is defined as an IQ of about 70 or below.” In a subsequent case, the court indicated that a score of seventy may not be absolutely necessary to establish mental retardation, but the court’s precise holding remains unclear. The court stated that “the assessment of ‘about 70 or below’ is flexible,” but also stated that this score “represent[s] a rough ceiling, above which a finding of mental retardation in the capital context is precluded.”

The court has acknowledged the standard error of measurement, noting that “[t]here is ‘a measurement error of approximately 5 points in assessing IQ,’ which may vary from instrument to instrument.” The Court of Criminal Appeals has also recognized that the practice effect may artificially inflate an IQ score. In one case, for instance, the court acknowledged that an IQ score of seventy-seven might have been invalid because the same test had been administered eleven months earlier.

The Court of Criminal Appeals has not, however, recognized the Flynn Effect. Although the AAIDD has stated that the Flynn Effect must be considered when evaluating an IQ score, the court has referred to it as an “unexamined scientific concept.”

Furthermore, in some death penalty prosecutions, Texas prosecutors have hired experts who have employed scientifically invalid and unaccepted methods to determine that a defendant’s actual IQ is higher than his/her test scores reflect. The methodology used by one such expert, who testified for the prosecution on the issue of mental retardation in several Texas death penalty cases, has been directly criticized by the AAIDD. By accepting testimony from alleged
experts who deviate from accepted clinical practices, Texas increases the risk that persons who meet the clinical definition of mental retardation will be executed. This issue is discussed further in Mental Illness Recommendation #4.\textsuperscript{118}

\textit{Adaptive Behavior Component}

1. AAIDD

In addition to intellectual limitations, the AAIDD definition of mental retardation requires “significant limitations in . . . adaptive behavior, which covers a range of everyday social and practical skills.”\textsuperscript{119} Whereas the intellectual functioning component of mental retardation relates to a person’s academic skills, adaptive behavior skills reflect one’s capacity to perform everyday tasks and to conform to social norms.\textsuperscript{120} Because adaptive behavior is a separate component of mental retardation, a person with an IQ below seventy might not be considered mentally retarded if s/he does not also exhibit deficiencies in adaptive skills. The current AAIDD definition divides adaptive behavior skills into three categories:

1. Conceptual skills—language and literacy; money, time, and number concepts; and self-direction

2. Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules, obey laws, and avoid being victimized

3. Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone\textsuperscript{121}

Under AAIDD standards, a person suffers from significant limitations in adaptive behavior if s/he performs “at least 2 standard deviations below the mean of either (a) one of the [aforementioned] three types of adaptive behavior . . . ; or (b) an overall score on a standardized measure of conceptual, social, and practical skills.”\textsuperscript{122} An older AAIDD definition, in effect at the time of the \textit{Atkins} and \textit{Briseno} decisions, required the person to demonstrate adaptive behavior limitations in two out of ten more specific categories: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.\textsuperscript{123}
2. **Briseno Factors**

With respect to adaptive behavior limitations, Texas’s definition of mental retardation differs significantly from the AAIDD standard and other clinical definitions. Although the Texas Court of Criminal Appeals’ *Briseno* decision requires the defendant to demonstrate adaptive behavior limitations to prove that s/he has mental retardation, the court’s decision does not discuss or analyze adaptive behavior with reference to the adaptive behavior categories established by the AAIDD. Instead, the court adopted seven factors—referred to as the *Briseno* factors in subsequent cases—to assess whether the defendant suffers from adaptive functioning limitations:

1. Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
2. Has the person formulated plans and carried them through or is his conduct impulsive?
3. Does his conduct show leadership or does it show that he is led around by others?
4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
6. Can the person hide facts or lie effectively in his own or others’ interests?
7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

The *Briseno* factors were created by the Court of Criminal Appeals without reference to the AAIDD definition or any other scientifically-accepted method for assessing mental retardation. The *Briseno* court indicated that these factors should be used to determine whether a defendant suffers from a personality disorder rather than mental retardation. However, subsequent Court of Criminal Appeals’ decisions have expanded their application, holding that the factors may be used to assess adaptive behavior without reference to personality disorders or other mental illnesses.

The *Briseno* factors create an especially high risk that a defendant with mental retardation will be executed because, in many ways, they contradict established methods for diagnosing mental retardation. The AAIDD itself has criticized the *Briseno* factors as “depart[ing] from a clinical assessment or diagnosis, especially as related to evaluating the adaptive behavior criteria” and having “no basis of support in the clinical literature or in the understanding of mental retardation.

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124 *See Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).*
125 Id. at 8–9.
126 *See id.* The court cites no authority to provide support for use of the factors in diagnosing mental retardation.
127 *Id.*
128 E.g., *Ex parte Woods, 296 S.W.3d 587, 589 (Tex. Crim. App. 2009).* Notably, the *Woods* opinion quotes directly from *Briseno* but omits any reference to personality disorders. *Id.*
by experienced professionals in the field.”\textsuperscript{129} Instead, the factors are based on “preconceived notions of what mental retardation looks like to the lay person.”\textsuperscript{130} Notably, there are few similarities between the \textit{Briseno} factors and the types of abilities that the AAIDD lists as relevant to considering adaptive behavior skills.\textsuperscript{131}

For instance, many of the \textit{Briseno} factors depart from the AAIDD and other clinical definitions by focusing on a defendant’s adaptive strengths rather than his/her limitations.\textsuperscript{132} The factors ask if the defendant can do such things as “hide facts or lie effectively in his own or others’ interests” and “respon[de] to external stimuli [in a] rational and appropriate” manner. Under the AAIDD definition of adaptive behavior deficits, however, the focus is on the subject’s adaptive limitations. The AAIDD requires significant limitations in only one of three adaptive skill categories to be diagnosed as mentally retarded;\textsuperscript{133} thus, a capital defendant could possess significant adaptive strengths in a variety of areas and still meet the clinical definition of mental retardation. As the AAIDD has described, “individuals with [mental retardation] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills.”\textsuperscript{134}

In addition, the \textit{Briseno} factors consider whether untrained laypersons, such as family and friends, believed the defendant to have mental retardation.\textsuperscript{135} While laypersons may be able to provide descriptions of the defendant’s behavior that are relevant to a mental retardation diagnosis, they are not qualified to make this diagnosis themselves, as they may not be aware of the range of tasks that a person with mental retardation can competently perform. Moreover, one of the factors asks whether “the commission of th[e] [capital] offense require[d] forethought, planning, and complex execution of purpose.”\textsuperscript{136} By focusing on a particular event in the defendant’s life, the \textit{Briseno} factors may diminish other life events that more accurately reflect the defendant’s skills. The AAIDD states that an adaptive behavior assessment should consider the person’s “typical” behavior, “rather than what the individual can do or could do.”\textsuperscript{137} A defendant’s behavior during the commission of a crime, even if it demonstrates some level of sophistication, may not be representative of his/her typical abilities and conduct.

Notably, the \textit{Briseno} factors are absent from other areas of Texas law where a court or government agency is required to determine if a person has mental retardation. For instance, the Texas Health and Safety Code, which is used to determine whether a disabled person qualifies for certain public services, served as the basis for the \textit{Briseno} decision.\textsuperscript{138} However, the Health and Safety Code definition makes no reference to \textit{Briseno}-like factors, and is instead based on

\textsuperscript{130} Id. at 24.
\textsuperscript{131} See \textit{FAQ on Intellectual Disability}, supra note 1.
\textsuperscript{132} \textit{Ex parte Briseno}, 135 S.W.3d 1, 6–7 (Tex. Crim. App. 2004).
\textsuperscript{133} \textit{FAQ on Intellectual Disability}, supra note 1.
\textsuperscript{134} \textit{INTELLECTUAL DISABILITY}, supra note 103, at 47.
\textsuperscript{135} \textit{Briseno}, 135 S.W.3d at 8.
\textsuperscript{136} \textit{Id.} at 8–9.
\textsuperscript{137} \textit{INTELLECTUAL DISABILITY}, supra note 103, at 47.
\textsuperscript{138} \textit{Briseno}, 135 S.W.3d at 7.
the clinical definition. The Texas Administrative Code also uses the clinical definition of mental retardation to determine whether a student qualifies for special education services.

In cases subsequent to *Briseno*, the Court of Criminal Appeals has clarified that expert testimony is also permitted on the issue of adaptive behavior, and that results of standardized adaptive behavior tests may also be considered by the factfinder. In this context, the court has described the *Briseno* factors as merely “some additional factors that factfinders might also focus upon in weighing evidence as indicative of mental retardation.” However, in many cases the *Briseno* factors have been used to overrule clinical adaptive functioning assessments that indicate the defendant has mental retardation. Consequently, there is a significant risk that persons with mental retardation remain on Texas’s death row, and perhaps have been executed.

a. Elroy Chester

In *Ex parte Chester*, for example, death row inmate Elroy Chester, who had been sentenced to death before the *Atkins* decision, sought state habeas corpus relief on the grounds that he had mental retardation. On appeal of the denial of habeas corpus relief by the trial court, the Texas Court of Criminal Appeals held that Chester had “met his burden in regard to demonstrating significant limitations in intellectual functioning” because three of his four school-age IQ scores were below seventy.

With respect to adaptive behavior, the Court of Criminal Appeals noted that, when Chester was imprisoned for a prior offense, he was administered the Vineland Adaptive Behavior Survey. The Vineland is a standardized measure of adaptive behavior used by clinicians in diagnosing mental retardation. Chester received a score of fifty-seven on the Vineland test and was

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139 TEX. HEALTH & SAFETY CODE ANN. § 591.003(7-a) (2013) (defining “intellectual disability” as “significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period”).

140 19 TEX. ADMIN. CODE § 89.1040(c)(5) (2012) The statute defines a person with mental retardation as one who (A) has been determined to have significantly sub-average intellectual functioning as measured by a standardized, individually administered test of cognitive ability in which the overall test score is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; and (B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.


142 *Gallo*, 239 S.W.3d at 776.


144 *Id.* at *2–3. Chester had scored sixty-five, fifty-nine, seventy-seven, and sixty-nine on his childhood IQ exams.

145 *Id.* at *3.

enrolled in the Mentally Retarded Offender Program while in prison.\textsuperscript{147} At Chester’s state habeas evidentiary hearing on the issue of mental retardation, “even the State’s expert witness[. . .] acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded.”\textsuperscript{148} The Court of Criminal Appeals, however, upheld the trial court’s finding that Chester had not demonstrated significant limitations in adaptive behavior.\textsuperscript{149} The Court relied entirely on the trial court’s findings with respect to the Brisenio factors.\textsuperscript{150} Contrary to the AAIDD definition of mental retardation, the Court’s analysis focused largely on Chester’s adaptive strengths, not the extent of his adaptive weaknesses.\textsuperscript{151}

Moreover, a significant portion of the Court’s analysis was devoted to Chester’s conduct during the commission of the capital crime.\textsuperscript{152} The Court noted, for instance, that Chester had attempted to conceal his crime by wearing a mask and gloves.\textsuperscript{153} As the AAIDD has stated, however, assessment of adaptive skills should be based on typical behavior, not behavior during a specific event.\textsuperscript{154} Even if Chester’s conduct during the offense exhibited some sophistication, it may not have been representative of his usual abilities. Elroy Chester was executed on June 12, 2013.\textsuperscript{155}

b. Juan Lizcano

In Lizcano v. State, defendant Juan Lizcano argued on direct appeal that the jury’s finding that he did not have mental retardation was “against the great weight and preponderance of the evidence.”\textsuperscript{156} Most of Lizcano’s IQ scores were seventy or below, and the Court of Criminal Appeals held that he “clearly satisfied the [intellectual functioning] prong of the mental retardation definition.”\textsuperscript{157} With respect to adaptive behavior, however, the Court held that there was enough evidence to support the jury’s conclusion that Lizcano did not have mental retardation.\textsuperscript{158} The Court did not consider any expert testimony or standardized measures of adaptive behavior in reaching this conclusion.\textsuperscript{159} In fact, the prosecution did not offer any expert testimony at trial.\textsuperscript{160} The Court’s analysis instead focused on the testimony of lay witnesses, many of whom testified that they did not believe Lizcano had mental retardation.\textsuperscript{161} While lay testimony may provide useful examples of a defendant’s behavior, it is of little use without a mental retardation expert who can place these examples in context. The Court also weighed


\textsuperscript{148} Id. at *4–7.

\textsuperscript{149} Id. at *4–9.

\textsuperscript{150} Id.

\textsuperscript{151} Id. at *4–7.


\textsuperscript{154} See INTELLECTUAL DISABILITY, supra note 103, at 47.

\textsuperscript{155} Id. at *11–12.

\textsuperscript{156} Id. at *15.

\textsuperscript{157} Id. at *12–15.

\textsuperscript{158} Id. at *10.
evidence of adaptive strength against evidence of adaptive weaknesses, a practice the AAIDD has stated is improper.

In a dissenting opinion, however, three judges stated that the Lizcano majority “fail[ed] to take diagnostic criteria into account in gauging whether the jury’s rejection of mental retardation is against the great weight and preponderance of the evidence.” Specifically, the majority failed to discuss two experts who testified about Lizcano’s adaptive behavior. The first, “an expert on evaluating mental retardation in native Spanish speakers,” evaluated Lizcano according to the American Psychological Association’s diagnostic criteria and determined that he suffered from adaptive limitations in several areas. A second expert, who also testified with respect to IQ, agreed with the first expert’s findings. The second expert further noted that while Lizcano “possesses some adaptive strengths, this does not negate the evidence of his possessing adaptive deficits since childhood” because “strengths often co-exist with deficits as in all people whether they are mentally retarded or are of normal intelligence.”

c. Marvin Lee Wilson

Another Texas death row inmate, Marvin Lee Wilson, was executed despite significant evidence of mental retardation. Wilson had been sentenced to death in 1998 after he was convicted of murdering a police informant with the help of an accomplice. Following the Supreme Court’s Atkins decision, Wilson filed a state habeas petition with the Texas trial court alleging mental retardation. At the evidentiary hearing, Wilson presented IQ scores ranging from sixty-one to seventy-nine; however, as a federal court later acknowledged, the sixty-one score “was on the Wechsler Adult Intelligence Scale, Third Edition . . ., which is considered the most accurate test instrument, and the other scores were obtained on less accurate tests.”

Wilson also presented the trial court with significant evidence of adaptive behavior limitations. His expert witness “testified that [his] composite score of 44 on the Vineland Adaptive Behavior Skill Test was well within retarded range.” The expert’s determination was supported by “affidavits from friends and family members attesting to his difficulties in written communication and understanding money management concepts, his inability to get along with others and avoid being victimized, and his problems with personal hygiene and maintaining employment.” A childhood friend, for instance, said that Wilson “would put on his belt so

162 Id. at *15.
163 INTELLECTUAL DISABILITY, supra note 103, at 47.
165 Id. at *36 (Price, J., concurring and dissenting).
166 Id. (Price, J., concurring and dissenting). The expert did not administer a standardized adaptive behavior test because such tests are not normed for Spanish speakers such as Lizcano. Id. (Price, J., concurring and dissenting).
167 Id. (Price, J., concurring and dissenting).
168 Id. (Price, J., concurring and dissenting).
169 Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *1 (E.D. Tex. Mar. 31, 2009). Wilson was first tried in 1994 and sentenced to death, but the Texas Court of Criminal Appeals reversed his conviction. He was subsequently retried and sentenced to death again. Id.
170 Id. at *3.
171 Id. at *5.
172 Id. at *8.
173 Id.
tight that it would almost cut off his circulation” and that “[h]e couldn’t even play with simple toys like marbles or tops.”

The prosecution presented no evidence of its own in rebuttal, instead arguing that the Supreme Court’s Atkins decision “was never intended to protect capital murderers [such as Wilson] who commit execution-style killings.”

A federal court later stated in a subsequent proceeding that the evidence presented at Wilson’s mental retardation hearing demonstrated “significant limitations in all three areas of adaptive functioning: the conceptual domain, the social domain, and the practical domain.”

Following the hearing, however, the Texas trial court “did not make explicit findings and reached no explicit conclusion as to whether Wilson had significant limitations in adaptive functioning.” Instead, the court relied on the Briseno factors as a checklist, and applied the factors in place of an adaptive behavior determination. For instance, the court noted that “Wilson was capable of lying and hiding facts when he felt it was in his best interest; and, that the crime at issue showed deliberate forethought, planning, and execution of purpose.” In subsequent federal habeas proceedings, the federal district court was critical of the Texas court’s analysis, but denied relief, noting that federal law requires federal courts to defer to a state court’s factual findings unless those findings are contradicted by clear and convincing evidence. The district court’s denial of relief was later affirmed by the U.S. Court of Appeals for the Fifth Circuit. Marvin Lee Wilson was executed on August 7, 2012.

As these cases demonstrate, the Briseno factors are at odds with the clinical definition of mental retardation. A defendant who exhibits adaptive behavior deficits under the AAIDD definition may nonetheless fail to meet each of the Briseno factor thresholds for mental retardation.

**Age of Onset Component**

The AAIDD definition of mental retardation states that the disability must “originate[] before the age of 18.” According to the AAIDD, “[t]he purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life,” such as brain damage due to malnutrition. The AAIDD, however, specifically warns that mental retardation “does not necessarily have to have been formally identified” before age eighteen for a diagnosis to be valid. Mental retardation might go unnoticed in childhood for a variety of reasons.

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175 Id. at *7–8 (citing 28 U.S.C. § 2254(e)(1)).

176 Id. at *7.

177 Id.

178 Id.

179 Id.

180 Id.

181 Id. at 369, 378 (5th Cir. 2011).


183 FAQ on Intellectual Disability, supra note 1.

184 INTELLECTUAL DISABILITY, supra note 103, at 27.
reasons. For instance, a person with mental retardation from an underprivileged background or from a foreign country might not have access to the mental health screening or educational resources needed to document mental retardation at a young age.\textsuperscript{186}

The definition of mental retardation adopted by the Texas Court of Criminal Appeals conforms to the AAIDD definition with respect to age of onset.\textsuperscript{187} The Assessment Team is not aware of any published cases showing that Texas courts have misunderstood this issue.\textsuperscript{188}

\section*{Conclusion}

While the Texas Court of Criminal Appeals’ stated definition of mental retardation is similar to the AAIDD definition, it substantially deviates from the AAIDD definition in its application. In particular, the \textit{Briseno} factors endorse the use of popular misconceptions about mental retardation as a means to assess adaptive behavior limitations. Although other states have adopted various procedures for determining mental retardation, no other state has adopted non-clinical mental retardation factors similar to those in \textit{Briseno}.\textsuperscript{189} The \textit{Briseno} factors are also absent from other areas of Texas law, where courts and other factfinders are required to determine if a person has mental retardation for the purposes of receiving education and social services.

By allowing the \textit{Briseno} factors to supplement or, in some cases, completely replace clinical judgments, Texas has created an unacceptable risk that persons with mental retardation will receive the death penalty. Accordingly, Texas is not in compliance with Recommendation \#1.

As the U.S. Supreme Court held in \textit{Atkins v. Virginia}, the Eighth Amendment to the U.S. Constitution prohibits the application of the death penalty to persons with mental retardation because “their disabilities in areas of reasoning, judgment, and control of their impulses” prevent them from “act[ing] with the level of moral culpability that characterizes the most serious adult criminal conduct.”\textsuperscript{190} The Court explained that the social purposes of the death penalty—retribution and deterrence—are not served by executing persons with mental retardation.\textsuperscript{191} “The lesser culpability of the mentally retarded offender surely does not merit” the severe form of retribution that the death penalty entails, and the “cognitive and behavioral impairments” of mentally retarded persons “make it less likely that they can process the information” necessary for the death penalty to have a deterrent effect.\textsuperscript{192} Moreover, the Court stated, “mentally retarded

\begin{footnotes}
\item[186] John H. Blume et al., \textit{Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases}, 18 CORNELL J. L. & PUB. POL’Y 689, 730 (2009) (noting that such “tests are not performed for charitable reasons, for instance where institutions do not want to stigmatize a child, or financial reasons, if institutions do not want to pay benefits or have responsibility”).
\item[188] Given that the Texas Court of Criminal Appeals disposes of a large number of capital habeas cases through unpublished summary orders, however, it is possible that courts have erred in the application of the age of onset component. For further discussion on the lack of published orders in Texas capital habeas corpus cases, see Chapter Eight on State Post-conviction Proceedings.
\item[189] Peggy M. Tobolowsky, \textit{A Different Path Taken: Texas Capital Offenders’ Post-Atkins Claims of Mental Retardation}, 39 HASTINGS CONST. L.Q. 1, 142 (2011).
\item[191] Id. at 318–19.
\item[192] Id. at 320.
\end{footnotes}
defendants in the aggregate face a special risk of wrongful execution” because they are more likely to falsely confess, they have more difficulty assisting counsel, and “their demeanor may create an unwarranted impression of lack of remorse for their crimes.” The Court also found that mental retardation “may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”

While the Atkins Court left the individual states with “the task of developing appropriate ways to enforce the constitutional restriction” on executing persons with mental retardation, states have a responsibility to adopt procedures that ensure that persons with mental retardation are not subject to the death penalty. Texas’s definition of mental retardation, in particular the Briseno factors, not only violates this constitutional mandate but also increases the likelihood that individuals with mental retardation will be executed.

Recommendation

The Assessment Team recommends that the Texas Legislature enact a statute barring the application of the death penalty to persons with mental retardation. The definition of mental retardation should be identical to the AAIDD definition, and the statute should require that determinations of mental retardation be based on accepted clinical criteria. Considerations such as the Briseno factors, which permit commonly-held misapprehensions about mental retardation to trump AAIDD-accepted criteria, should be forbidden.

The 2001 legislation passed by the Texas Legislature but vetoed by the governor, as well as the 2013 legislation—Senate Bill 750, sponsored by Assessment Team member Senator Rodney Ellis—contain several provisions to remedy the ill-effects of the Briseno factors. The definition of mental retardation found in the Health and Safety Code, which is substantially similar to the clinical definition, is contained in the legislation. Each provides for the trial court’s determination of whether the defendant has mental retardation to be based on diagnoses by qualified experts. The 2013 bill also provides for the trial court to conduct a hearing on the issue of mental retardation before trial.

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death-row inmates.

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193 Id. at 320–21.
194 Id. at 321.
197 This issue is discussed further under Recommendation #4, infra.
Law enforcement officers are often the first actors in the criminal justice system to interact with the suspect in the course of an investigation and prosecution. As such, it is important for officers to be trained to recognize signs of mental retardation and mental illness in suspects. In particular, because persons with mental retardation or a mental illness face a special risk of false or coerced confessions, officers who conduct interrogations must be trained to recognize mental retardation and mental illness so that they can use appropriate, non-coercive interrogation techniques on persons with these disabilities.\(^*\)

Texas law enforcement training standards are dictated by the Texas Commission on Law Enforcement Officer Standards and Education. Texas statutory law requires that the Commission’s “minimum curriculum requirements” include a “statewide education and training program on de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments.”\(^*\) Licensed peace officers must complete this training course within two years of obtaining their license.\(^*\) The course materials promulgated by the Commission require officers to be instructed on how to identify a person with mental retardation and mental illness so that they can use appropriate, non-coercive interrogation techniques on persons with these disabilities.\(^*\)

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In addition, Texas law provides for the Commission to establish an optional “Certification of Officers for Mental Health Assignments.”\(^*\) To obtain this certification, an officer must “complete[] a training course administered by the commission on mental health issues and offenders with mental impairments.”\(^*\) The course materials promulgated by the Commission include more detailed information on recognizing mental retardation and mental illnesses than what is included in the basic course that all officers must complete. The officer also must pass an exam administered by the Commission that tests “knowledge and recognition of the

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\(^{198}\) For further discussion on law enforcement training, see Chapter Two on Law Enforcement Identifications and Interrogations.

\(^{199}\) For further discussion of this issue, see Recommendation #6, infra note 273 and accompanying text.


\(^{201}\) TEX. OCC. CODE ANN. § 1701.253(j) (2013).

\(^{202}\) Id. The training program must be completed “not later than the second anniversary of the date the officer is licensed under this chapter or the date the officer applies for an intermediate proficiency certificate, whichever date is earlier.” Id.


\(^{204}\) TEX. OCC. CODE ANN. § 1701.404 (2013). See also 37 TEX. ADMIN. CODE § 221.11 (2013).

\(^{205}\) TEX. OCC. CODE ANN. § 1701.404(b)(2) (2013).

characteristics and symptoms of mental illness, mental retardation, and mental disabilities.” 207  
Most of the officers who complete this course are from Texas’s larger law enforcement 
jurisdictions. 208  

Prosecutor Training 209  

Because prosecutors have broad discretion regarding whether and how to prosecute a capital 
case, it is imperative that they be trained to recognize mental retardation and mental illnesses in 
death penalty-eligible defendants. Prosecutors must be equipped with the knowledge to 
determine whether, based on the defendant’s mental condition, the death penalty is permissible 
or warranted. Moreover, they must be able to recognize evidence of mental impairments and 
ilnesses because such evidence may have mitigating value, and thus must be disclosed to the 
defense under Brady v. Maryland. 210  

Prosecutors also have a duty to ensure that a defendant receives a fair trial and as such, they must be able to recognize when a defendant’s decision to 
waive his/her constitutional rights is a product of the defendant’s mental disability or illness. 

Texas law does not require district attorneys or assistant district attorneys to receive any 
specialized training on recognizing mental retardation in capital defendants and death-row 
inmates. Some prosecutors may, however, elect to attend training programs that are relevant to 
this issue. The Center for American and International Law in Plano, Texas also conducts several 
capital litigation training programs for prosecutors. 211  In 2012, the Center held two such 
trainings, both of which included a session on mental retardation. 212  The Texas District and 
County Attorneys Association holds several training programs every year, but did not offer any 
courses related to recognizing mental retardation or other mental impairments in 2012. 213  The 
Assessment Team was unable to determine the content of these programs and it is unclear how 
many Texas prosecutors have attended such training sessions. 

The Texas Criminal Justice Integrity Unit (TCJIU), founded by the Court of Criminal Appeals in 
2008 to provide training programs for prosecutors, defense attorneys, and judges, also offered 
a two-day course in 2012 on mental health and substance abuse. 214  TCJIU representatives also

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208 Telephone Interview by Mark Pickett with Susan Brundage, Educ. Programs, Tex. Comm’n on Law 
Enforcement Officer Standards and Educ. (Nov. 16, 2012) (on file with author).  
209 For further discussion on the training of prosecutors, see Chapter Five on Prosecutorial Professionalism.  
Aug. 16, 2013).  
212 The Capital Trial Prosecution program included a session called “Confronting Claims of Mental Retardation in 
Capital Litigation” taught by a Texas prosecutor. Capital Trial Prosecution Revised Agenda, CTR. FOR AM. AND INT’L  
Capital Litigation Training for Texas Prosecutors program included a session called “Issues in the Evaluation of 
Possible Mental Retardation in Death Penalty Cases” taught by two psychologists. Capital Litigation Training For 
Texas Prosecutors Agenda, CTR. FOR AM. AND INT’L LAW, available at 
214 Email from Sadie C. Fitzpatrick, Research Att’y for Judge Barbara Hervey, Tex. Ct. of Criminal Appeals, to 
Jennifer Laurin, Chair, Tex. Assessment Team on the Death Penalty (Feb. 15, 2013) (on file with author).
state that they have “developed a comprehensive plan to address other mental health issues in the immediate future.”\textsuperscript{215} However, the exact nature of this training program is unclear, and the Assessment Team could not determine if any prosecutors attended the 2012 training.

**Judicial Training**

Judges may be required to rule on several issues related to mental retardation or mental illness during a capital case, such as competency and the admissibility of mental health expert testimony. Judges may also have to determine whether to raise \textit{sua sponte} an issue of the defendant’s competency if the defendant exhibits signs of mental retardation or mental illness.

The Texas Court of Criminal Appeals’ Rules of Judicial Education require appellate and district court judges to “complete before taking office, or within one year after taking office, at least 30 hours of instruction in the administrative duties of office and substantive, procedural and evidentiary laws.”\textsuperscript{216} Furthermore, each year after taking office, these judges must “complete at least 16 hours of instruction in substantive, procedural and evidentiary laws and court administration.”\textsuperscript{217} The Rules do not mandate any training related to mental retardation or mental illness.\textsuperscript{218} In fulfilling this requirement, however, Texas judges may attend training programs relevant to mental retardation or mental illness.

**Prison Authority Training**

Correctional officers and other prison authorities must be trained to recognize mental retardation and mental illness to ensure that death row inmates receive proper mental health treatment. Moreover, because a defendant’s mental condition may degrade while in prison, correctional officers may be called upon to testify regarding the inmate’s mental state in post-conviction proceedings.

The Texas Department of Criminal Justice requires prospective correctional officers to complete a two hundred hour, five-and-a-half week training course at one of five designated training academies.\textsuperscript{219} This program includes a ninety-minute course on mental health issues.\textsuperscript{220} The course discusses such topics as identifying characteristics of mentally ill and developmentally disabled offenders, accessing mental health services for these offenders, and identifying treatment options.\textsuperscript{221} Officers are also required to complete forty hours of continuing education each year, which typically includes sixty to ninety minutes of coursework on mental health and suicide prevention issues.\textsuperscript{222}

\textsuperscript{215} Id.


\textsuperscript{217} Id.

\textsuperscript{218} Id.


\textsuperscript{220} Telephone Interview by Mark Pickett with Matt Gross, Curriculum Supervisor, Tex. Dep’t Crim. Justice (Nov. 16, 2012) (on file with author).

\textsuperscript{221} Id.

\textsuperscript{222} Id.
Defence counsel training is discussed under Recommendation #3, below.\footnote{See infra notes 226-239 and accompanying text. For further discussion on the training of defense counsel, see Chapter Six on Defense Services.}

Conclusion

Texas requires some, but not all, actors in the criminal justice system to complete training related to recognizing mental retardation. The Assessment Team applauds Texas for requiring law enforcement officers to receive training in this area. However, it is especially important for prosecutors and trial judges to receive training on mental retardation. Prosecutors are directly responsible for deciding whether to pursue the death penalty against a defendant who may have mental retardation, and trial judges must make rulings regarding a defendant’s mental condition that could affect the outcome of a capital trial.

As such, Texas is in partial compliance with Recommendation #2.

Recommendation

The Texas Assessment Team recommends that Texas develop rules requiring all actors in the criminal justice system who are involved in capital cases or who work with death row inmates to receive training on mental retardation relevant to their respective roles in the criminal justice system.

C. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client’s mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

As the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases state, “mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine.”\footnote{ABA, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 957 (2003).} Moreover, a defendant with mental retardation or a mental illness may fundamentally change the lawyer-client relationship, and counsel may need to take special steps to ensure clear communication and client trust.\footnote{See id. at 1008 (“Establishing a relationship of trust with the client is essential both to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel’s advice on important matters such as whether to testify and the advisability of a plea.”).} As such, capital defense counsel must have the training and resources necessary to effectively
recognize, research, and litigate claims of mental retardation and other claims related to mental illnesses and disabilities.

Training and resources are especially important at the trial level, as a defendant who does not raise an available claim at trial may be procedurally barred from raising it on direct appeal or during post-conviction proceedings. If not trained to recognize and litigate these issues, defense counsel may fail to raise a viable claim or may not litigate the claim effectively.

Defense Counsel Training

Texas law does not require capital defense counsel to receive any special training on recognizing or assessing mental retardation or other mental health issues in their clients. The only training requirement relevant to mental health states that counsel must have trial or appellate experience in “the use of and challenges to mental health or forensic expert witnesses.” Thus, appointment list-qualified counsel who are appointed to represent defendants in death penalty cases are not required to complete any special training on mental retardation or other mental health issues.

Some capital and public defender offices, however, may require their attorneys to obtain such training. The Regional Public Defender for Capital Cases (RPDO), which represents capital-charged defendants in trial-level cases in 145 Texas counties, states that at least one attorney assigned to each of its cases is trained to screen clients for the presence of mental retardation or mental illness. The office explained that the training “focuses on identification, investigation and ultimately litigation of [mental retardation] claims.” RPDO also makes voluntary training available to its attorneys on “[m]ental [h]ealth issues, including mental retardation.” The El Paso Public Defender requires its capital-qualified attorneys to receive at least six hours of training every year on issues related to mental retardation and mental illness. The office also has assisted in organizing mental health law conferences.

The Texas Defender Service, which provides assistance to capital trial counsel throughout Texas, trains all of its attorneys on recognizing and litigating claims of mental retardation and mental

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226 For further discussion on training of defense counsel, see Chapter Six on Defense Services.
231 Id.
232 Id. at 5.
234 Id. at 7.
illness. In addition, the Gulf Region Advocacy Center (GRACE), a non-profit law firm in Houston, represents persons charged with capital crimes at trial in Texas. GRACE conducts several training programs, including a “three-day intensive mitigation skills training at least once per year.” Such training should address issues of mental illness and mental retardation.

With respect to the Office of Capital Writs, which represents Texas death row inmates in state habeas proceedings, the Assessment Team was unable to determine the qualification standards for this office’s attorney employees.

Access to Mitigation Specialists, Investigators, and Experts

Access to qualified mental health experts is critical to litigating claims of mental retardation and other claims based on the defendant’s mental status. This is especially true at the trial-level, as the defendant may be barred from presenting the claim in a subsequent proceeding.

Mitigation specialists also serve a crucial role in a capital trial team, especially with respect to claims of mental retardation and other claims based on mental status. A properly-trained mitigation specialist will be able to collect, review, and digest the defendant’s school, medical, and other records to find evidence of mental retardation or mental illness. As these records may be voluminous and complex, only a well-trained mitigation specialist may have the skills necessary to interpret them. A capital defendant’s records in Texas are especially likely to be complex, given that a number Texas’s capital defendants are foreign nationals and relevant records may be in another country and in another language.

Trial

Texas’s statute on the appointment of capital counsel at trial and on direct appeal provides that “[c]ounsel may incur expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred.” While the statute does not specifically require the appointment of mitigation specialists, investigators, or experts, it does provide a procedure for “advance payment of expenses anticipated or reimbursement of expenses

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239 For more information on qualifications of counsel in state habeas proceedings, see Chapter Eight on State Post-conviction Proceedings.
240 For further discussion on access to investigators and experts for defense counsel, see Chapter Six on Defense Services.
241 See generally Toobin, supra note 238 (describing the effect of emphasis on investigation and presentation of mitigating evidence in capital case on the declining rate of death sentences in Texas).
incurred for purposes of investigation or expert testimony.” However, it is unclear the extent to which capital, list-qualified appointed counsel are seeking and obtaining the appointment of mitigation specialists, investigators, and experts to assist with mental retardation claims.

Furthermore, hourly rates paid to investigators and mitigation specialists appointed in capital cases may be too low to recruit qualified professionals for these appointments. In Harris County, for example, the rate is $40 per hour.

With respect to Texas’s capital and public defender officers, RPDO states that it has the resources to provide its clients with qualified mitigation specialists, investigators, and experts. The organization employs on-staff mitigation specialists and investigators to assist counsel in each of its capital cases. The mitigation specialists must complete an annual training program, and they may attend voluntary training programs that cover issues related to mental retardation and mental health.

The El Paso Public Defender also assigns an on-staff mitigation specialist and investigator to each of its capital cases. The mitigation specialist holds a master of social work degree and typically attends the same training programs as capital defense counsel. With respect to experts, the organization states that while “quality is the most important thing we look for,” experts also are selected based on cost of services.

The Texas Defender Service states that it has adequate resources to ensure that its clients receive the assistance of qualified mitigation specialists, experts, and investigators. The organization employs on-staff mitigation specialists, who are trained to screen clients for mental retardation and mental illnesses.

State Habeas Proceedings

As with trial-level proceedings, Texas law allows, but does not guarantee, funding for the appointment of mitigation specialists, investigators, and experts in state habeas proceedings. The trial court may approve funding for such services in its discretion. However, in applications for subsequent habeas writs, the court is not permitted to provide funding for expert services. The Assessment Team was unable to determine whether the Office of Capital Writs

246 Wischkaemper Survey II, supra note 230, at 8.
247 Id. at 2, 11.
248 Id. at 12.
249 Powell Survey II, supra note 233, at 2, 11–12.
250 Id. at 11.
251 Id. at 12.
252 Kase Survey, supra note 235, at 8.
253 Id. at 6.
254 TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(b), (d) (2013).
255 See id.
is typically able to obtain the appointment of qualified mitigation specialists, investigators, and mental health experts.

Conclusion

It appears that some capital defense attorneys receive training relevant to recognizing, investigating, and litigating mental retardation in their clients. However, such training is not required by law. Given that a large number of capital defendants in Texas are represented by appointment list-qualified counsel who are not affiliated with a public or capital defender organization, it is likely that many capital defense attorneys are not adequately trained on issues related to mental retardation. Moreover, while some capital defense counsel have access to qualified mitigation specialists, investigators, and experts, the provision of these experts is not required by law, and no such services are permitted in successive habeas proceedings. Thus, Texas is in partial compliance with Recommendation #3.

Recommendation

Because Texas’s current capital defense system consists of a patchwork of appointed, list-qualified counsel, capital defender offices, and local public defenders, it is critically important for the state to mandate that all capital defense counsel understand how to recognize and investigate claims of mental retardation. Accordingly, Texas should amend its capital defense counsel qualification standards to guarantee that at least one member of the defense team is trained to screen capital clients for mental retardation, mental illness, and other psychological disorders. In addition, Texas should, upon request of defense counsel, require the appointment of investigators, mitigation specialists, and, when reasonably necessary, mental health experts in all capital proceedings.

D. Recommendation #4

For cases commencing after the United States Supreme Court’s decision in Atkins v. Virginia257 or the State’s ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

There are distinct advantages to determining whether a capital defendant has mental retardation in a pretrial hearing. If a defendant is determined to have mental retardation before trial, and thus cannot be subject to the death penalty, the court is spared a long and expensive capital trial. In addition, when the mental retardation issue is resolved pretrial, jurors are not required to decide the issue in the penalty phase of the trial. Studies have shown that jurors’ understanding of mental retardation is often inconsistent with the definition accepted by the AAIDD and mental health experts.258 Furthermore, confusion on mental retardation may be exacerbated when it is presented to jurors in the penalty phase, after they have heard evidence related to the crime itself. As discussed in Mental Retardation Recommendation #1, a mental retardation determination

258 Marcus T. Boccaccini et al., Jury Pool Members’ Beliefs about the Relation between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases, 34 LAW & PSYCHOL. REV. 1, 1–2 (2010).
should be based on a person’s “typical behavior,” not his/her behavior during a specific event. Given that the evidence presented in the guilt phase of the trial relates primarily to the defendant’s conduct during the crime, jurors may give that evidence undue weight when later deciding if the defendant has mental retardation.

While trial judges may also be susceptible to error, their experience ruling on mental health issues in other cases will likely aid them in a mental retardation hearing. Perhaps for these reasons, several jurisdictions have already adopted procedures that grant defendants the right to a pretrial determination of mental retardation.

In Texas, the trial court has discretion to determine when during a capital proceeding the court will determine if the defendant has mental retardation. The Court of Criminal Appeals has indicated, however, that it may be preferable for the jury make the determination during penalty phase deliberations. The court reasoned that “the nature of the offense itself may be relevant to a determination of mental retardation; thus, a jury already familiar with the evidence presented at the guilt stage might be especially well prepared to determine mental retardation.”

Moreover, a review of Texas cases indicates that most Texas trial courts have opted to allow the jury to determine whether the defendant has mental retardation during penalty phase deliberations. It appears that the trial court instructs the jury on mental retardation as an additional “special issue” prior to penalty phase deliberations. In one case, for instance, the court instructed the jury as follows: “Do you find, taking into consideration all of the evidence, that the Defendant is a person with mental retardation?”

For the stated reasons, Texas is not in compliance with Recommendation #4.

The Assessment Team recommends that Texas enact a law requiring the issue of mental retardation to be determined before the capital trial provided the defendant can demonstrate some evidence that s/he has mental retardation. The determination of mental retardation should be made by the trial judge unless the defendant requests that a jury be impaneled to decide the issue.

See supra notes 135–137 and accompanying text.

See, e.g., ARIZ. REV. STAT. ANN. § 13-753 (2013) (providing that Arizona capital defendants who score seventy-five or below on a pretrial IQ test are entitled to a pretrial hearing on mental retardation); KY. REV. STAT. ANN. § 532.135(1)-(2) (2012) (providing that when a Kentucky capital defendant raises the issue of mental retardation, the trial court “shall determine whether or not the defendant is a defendant with a serious intellectual disability” at least ten days before the beginning of the trial); State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002) (holding that the question of whether an Ohio capital defendant is mentally retarded should be decided by the trial court “in a manner comparable to a ruling on competency”); FLA. R. CRIM. P. 3.203 (2013) (stating that a Florida capital defendant is entitled to a pretrial determination of mental retardation following the proper defense motion and an examination by at least one qualified expert).


Id.

E.g., Neal v. State, 256 S.W.3d at 272; Williams, 270 S.W.3d at 132; Gallo, 239 S.W.3d at 770; Hunter, 243 S.W.3d at 667. See also Renée Feltz, Cracked, TEX. OBSERVER, Jan. 5, 2010, at 6 (noting that the practice in Texas is for the jury to determine whether a defendant has mental retardation during penalty phase deliberations).

E.g., Gallo, 239 S.W.3d at 770.
This procedure would resemble Texas’s current procedure for determining competency to stand trial. This procedure should not preclude the defendant from offering evidence of mental retardation during the criminal trial.

E. Recommendation #5

Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

The Texas Court of Criminal Appeals has held that the defendant bears the burden of proving mental retardation by a preponderance of the evidence at trial. A death row inmate sentenced before Atkins must also prove by a preponderance of the evidence that s/he has mental retardation during state habeas corpus proceedings.

However, “[f]or the post-Atkins applicant who bypassed the opportunity to raise mental retardation at trial or in an initial writ [of habeas corpus], [Texas statutory law] mandates that his subsequent application ‘contain[ ] sufficient specific facts’ that, if true, would establish ‘by clear and convincing evidence’ that no rational fact finder would fail to find him mentally retarded.” The Court of Criminal Appeals noted that the Texas Legislature adopted this higher standard because “the State’s interest in the finality of its judgments justifies the imposition of higher burdens upon the subsequent applicant who did not avail himself of the opportunity and resources available to him at trial or in an initial writ to raise his claim of mental retardation.”

Notwithstanding the state’s interest in final judgments, imposing this higher burden of proof in certain state habeas proceedings increases the likelihood that a person with mental retardation will be executed. A defendant might have failed to present evidence of his/her mental retardation at trial because that evidence was not readily available, because s/he did not wish to publicly acknowledge his/her disability, or because his/her counsel was ill-equipped to recognize mental retardation or lacked sufficient resources to effectively present the claim at trial. In Texas, there is a special risk that counsel will not recognize a client with mental retardation, as Texas law does not require attorneys who handle capital cases to have any special training related to identifying or litigating mental retardation. While states have a justifiable interest in protecting the finality of judgments in some instances, that interest should not trump the state’s duty to ensure that no person with mental retardation is executed in violation of the U.S. Constitution.

Accordingly, Texas is in partial compliance with Recommendation #5.

267 See TEX. CODE CRIM. PROC. ANN. art. 46B.051 (2013).
271 Id.
272 See supra notes 226–239 and accompanying text.
The Assessment Team recommends that Texas enact a preponderance of the evidence standard for mental retardation claims in all proceedings, including subsequent habeas petitions. A higher standard of proof may be reasonable for other claims in subsequent habeas petitions; however, a higher standard is inappropriate when determining whether a person has mental retardation and thus is categorically ineligible for the death penalty under the Constitution. In these cases, the court’s primary interest should be ensuring that a person with mental retardation is not executed.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Risk of False or Coerced Confessions

The U.S. Supreme Court has observed that “[m]entally retarded defendants . . . face a special risk of wrongful execution” because of the possibility that they will confess to crimes they did not commit. 273 Social science research on the topic confirms this assertion. One study, for instance, found that 50% of study participants with mild mental retardation “could not correctly paraphrase any of the five Miranda components,” compared to less than 1% of the general population. 274 Moreover, because persons with mental retardation are more likely to “change accounts in response to suggestive questioning” and “possess less confidence in their own memories and beliefs,” they are more likely to falsely confess to a crime. 275

Legal Protections from Coerced Confessions

In Miranda v. Arizona, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation. 276 A suspect, however, may waive his/her Miranda rights if the waiver is knowingly and intelligently made. 277

In addition to the requirement that the defendant’s Miranda waiver be knowing and voluntary, the confession itself must be voluntary to be admissible. 278 The U.S. Supreme Court has held that a court must consider the totality of the circumstances to determine whether the defendant’s statements “were the product of his free and rational choice.” 279 However, the Court held in

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275 William C. Follette, Deborah Davis & Richard A. Leo, Mental Health Status and Vulnerability to Police Interrogation Tactics, 22 CRIM. JUST. 42, 49 (2007).
277 Id. at 479.
**Colorado v. Connelly** that “coercive police activity is a necessary predicate to finding that a confession is not ‘voluntary.’”  

Interpreting these cases, the Texas Court of Criminal Appeals held that a defendant must present evidence of “police overreaching,” such as coercive interrogation tactics, to prove that a *Miranda* waiver or confession was involuntary.  

Thus, absent coercive police tactics, a Texas defendant with mental retardation would not be able to challenge the validity of his/her *Miranda* waiver or confession on constitutional grounds.

The Texas Legislature, however, has codified interrogation requirements that are substantially similar to the constitutional *Miranda* and confession voluntariness requirements. In contrast with constitutional claims, voluntariness claims based on the Texas statutes “can be, but need not be, predicated on police overreaching.” Specifically, under the state statute, the defendant may argue that his/her *Miranda* waiver or confession was involuntary because s/he “was mentally retarded and may not have ‘knowingly, intelligently and voluntarily’ waived his[her] rights” or because s/he “lacked the mental capacity to understand his[her] rights.”

The Court of Criminal Appeals has clarified that “mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible.” As such, the court has upheld the admissibility of the confessions of several defendants with IQs in the mentally retarded range. In lieu of ruling such confessions inadmissible, the defendant is entitled to a jury instruction on the voluntariness of his/her confession or *Miranda* waiver. Because the voluntariness claim is based on state law and not the Constitution, however, the trial court must provide only a “general instruction” explaining that “unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof.” The trial court cannot specifically instruct the jury that it should consider the defendant’s alleged mental retardation.

**Texas Law Enforcement Practices**

As discussed in Recommendation #2, Texas requires all law enforcement officers to complete a crisis intervention course related on methods for interacting with persons who have mental retardation or mental illness. In addition, some officers may complete a special certification
program for mental health assignments. However, these training programs do not appear to require any special training specifically related to interrogating or issuing *Miranda* warnings to mentally retarded or mentally ill suspects.

**Conclusion**

Texas has taken some measures to protect persons with mental retardation from false or involuntary *Miranda* waivers and confessions. Texas law allows trial courts to consider a defendant’s mental retardation when deciding whether a confession is admissible. However, Texas law does not require law enforcement officers to follow any special procedures when interrogating a suspect who may have mental retardation. Moreover, while Texas courts will consider a suspect’s mental retardation when evaluating a confession, these confessions are generally found to be admissible. Accordingly, Texas is in partial compliance with Recommendation #6.

**Recommendation**

The Assessment Team recommends that Texas law enforcement agencies adopt policies requiring officers to follow special procedures when interrogating suspects with mental retardation. In developing these policies, law enforcement agencies should consult with psychologists and other experts. In addition, Texas defendants who have presented evidence of mental retardation at trial should be entitled to a jury instruction related to the impact of mental retardation on the voluntariness and veracity of a confession.

**G. Recommendation #7**

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.

The U.S. Supreme Court has noted that capital defendants with mental retardation “face a special risk of wrongful execution” because they are less able “to make a persuasive showing of mitigation in the face of prosecutorial evidence” and “less able to give meaningful assistance to their counsel” at trial. When a defendant with mental retardation waives his/her rights, such as the right to counsel or the right to present mitigating evidence, these risks are magnified, because his/her poor decision-making and communication skills are no longer buffered by the aid of attorneys. Accordingly, defendants with mental retardation should be protected against waivers that are the result of their disability.

**Right to Counsel**

In *Faretta v. California*, the U.S. Supreme Court held that a criminal defendant has the constitutional right to waive his/her right to counsel and proceed pro se, provided the defendant’s

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292 See supra notes 204–208 and accompanying text.

waiver is “knowingly and intelligently” made.\textsuperscript{294} The Court later held in \textit{Indiana v. Edwards}, however, that a trial court may deny a defendant’s request for self-representation and insist upon appointment of counsel for defendants who “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”\textsuperscript{295}

Texas statutory law provides that a “defendant may voluntarily and intelligently waive in writing the right to counsel.”\textsuperscript{296} Interpreting \textit{Faretta}, The Texas Court of Criminal Appeals has held that the decision to waive counsel and represent oneself must be “clearly and unequivocally asserted.”\textsuperscript{297} The trial court must also “inform the defendant about the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.”\textsuperscript{298} However, the court “has no duty to inquire into an accused’s age, education, background or previous mental history in every instance.”\textsuperscript{299} Thus, the trial court is not required to examine evidence of the defendant’s mental retardation before allowing him/her to waive the right to counsel.

\textbf{Right to Trial}

A Texas defendant may waive his/her right to a trial and plead guilty only if “it appears [to the trial court] that the defendant is mentally competent and the plea is free and voluntary.”\textsuperscript{300}

The Texas Court of Criminal Appeals, however, has held that the standard for determining competence to plead guilty is the same as the standard for determining competence to stand trial.\textsuperscript{301} As such, a defendant is “presumed competent” to plead guilty “unless proved incompetent by a preponderance of the evidence.”\textsuperscript{302} The defendant will be considered incompetent if s/he lacks either “(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against” him/her.\textsuperscript{303}

“Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent” to plead guilty.\textsuperscript{304} However, even if the issue is raised by counsel, the court is required to hold only an “informal inquiry” into the defendant’s competency.\textsuperscript{305} The Court of Criminal Appeals has also held that “unless an issue is made of an

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\textsuperscript{294} Faretta v. California, 422 U.S. 806, 835 (1975) (internal quotations omitted).
\textsuperscript{296} TEX. CODE CRIM. PROC. ANN. art. 1.051(f) (West 2013).
\textsuperscript{298} \textit{Id.} (quoting Faretta, 422 U.S. at 835) (internal quotation marks omitted).
\textsuperscript{299} \textit{Id.} (quoting Goffney v. State, 843 S.W.2d 583, 584–85 (Tex. Crim. App. 1992)) (internal quotation marks omitted).
\textsuperscript{300} TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (2013).
\textsuperscript{302} TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).
\textsuperscript{303} TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (2013).
\textsuperscript{304} TEX. CODE CRIM. PROC. ANN. art. 46B.004(a) (2013).
\textsuperscript{305} TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (2013).
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accused’s present insanity or mental competency at the time of the plea the court need not make 
 inquiry or hear evidence on such issue.”  

The Court of Criminal Appeals held, in a non-capital case, that evidence of “at least moderate 
 retardation” is required “to create a bona fide doubt” of the defendant’s competency. This 
 requirement, however, excludes defendants with mild mental retardation from a finding of 
 incompetence. Because approximately eighty-five percent of individuals with mental retardation 
 are in the mildly mentally retarded range, the overwhelming majority of defendants with mental 
 retardation could not be found incompetent to plead guilty under the Texas standard. 

Right to Direct Appeal and Habeas Corpus 

To effectively waive his/her right to direct appeal or state habeas corpus proceedings as part of a 
 plea agreement, the defendant’s waiver must be “made voluntarily, knowingly, and 
 intelligently.” The extent to which Texas courts will consider a defendant’s mental 
 retardation, mental disability, or mental illness when making this determination, however, is 
 unclear. 

Conclusion 

Texas has taken some measures protect defendants with mental retardation from waivers that are 
 the product of their disability. A defendant’s mental retardation, at least in some circumstances, 
 is a factor that will be considered when determining whether a defendant’s waiver is valid. 

Texas’s waiver protections, however, are not sufficient. The trial court is not required to inquire 
 into a defendant’s “mental history” before permitting him/her to waive the right to counsel and 
 proceed pro se. With respect to guilty pleas, the court must only make an “informal inquiry” into 
 the defendant’s competency, and then only if the issue of competency is raised by counsel. 
 Because mental retardation is not necessarily noticeable during a cursory examination by a non-
 expert such as a trial judge, these waiver procedures create an unacceptably high risk that a 
 defendant with mental retardation will waive rights s/he does not fully understand. 
 Furthermore, Texas law appears to state that a person with mild mental retardation is per se 
 competent to plead guilty, absent some other mental impairment or illness. While not all persons 
 with mild mental retardation are necessarily incompetent to plead guilty, Texas should not 
 impose a bright-line cutoff between mild and moderate mental retardation. 

Accordingly, Texas is in partial compliance Recommendation #7. 

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308 DSM, supra note 3, at 41. 
Recommendation

The Assessment Team recommends that Texas amend its waiver procedures to ensure that a defendant’s mental history, including evidence of mental retardation, is fully examined and considered by the trial court before the defendant is allowed to waive his/her rights. To that end, before a capital defendant is permitted to waive his/her right to counsel, trial, direct appeal, or habeas corpus, the trial court should be required to hold a hearing during which the defendant’s mental history, education, and other relevant evidence is considered. In addition, Texas should eliminate the bright-line rule that prevents a person with mild mental retardation from being found incompetent to plead guilty.
III. ANALYSIS: MENTAL ILLNESS

H. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.

As discussed in Mental Retardation Recommendation #2, some of the relevant actors in the Texas criminal justice system receive training relevant to recognizing mental illness in capital defendants and death row inmates. For instance, Texas has enacted mental health training requirements for law enforcement officers. This training, however, is focused on crisis intervention techniques. Judges and prosecutors are not required to receive any training on recognizing mental illness in defendants. Accordingly, Texas is in partial compliance with Recommendation #1.

I. Recommendation #2

During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

As with persons who have mental retardation, the mentally ill face an increased risk of falsely or involuntarily confessing to a crime because they often lack confidence in their own memories and are more susceptible to coercive interrogation tactics.

As discussed in Mental Retardation Recommendation #6, the Texas Court of Criminal Appeals has held that mental illness is a factor to be considered in determining whether a confession or waiver of Miranda rights was voluntary. However, mental impairments are not enough to render a statement inadmissible. Specifically, the Texas Court of Criminal Appeals held that a defendant must present evidence of “police overreaching,” such as coercive interrogation tactics, to prove that a confession or Miranda waiver was involuntary. Thus, a mentally ill suspect cannot establish that a confession or Miranda waiver was involuntary based solely on his/her mental condition.

310 See supra notes 198–222 and accompanying text.
311 See supra notes 198–208 and accompanying text.
312 See supra notes 209–212 and accompanying text.
313 See supra notes 273–275 and accompanying text.
314 Follette, supra note 275, at 48–49.
315 See supra notes 273–290 and accompanying text.
316 See id.
317 Oursbourn v. State, 259 S.W.3d 159, 169–71 (Tex. Crim. App. 2008). By contrast, the U.S. Supreme Court has required coercive police activity only to prove that the confession itself—as opposed to the Miranda waiver—was involuntary. See Colorado v. Connelly, 479 U.S. 157, 167 (1986).
Typically, a defendant will only be entitled to a general instruction to the jury on the requirement that confessions are voluntary. While Texas law enforcement officers are required to complete a training course on mental health issues, this course does not appear to require any training specifically related to interrogating or issuing Miranda warnings to mentally retarded or mentally ill defendants.

The Andre Thomas case, discussed in more detail under Mental Illness Recommendation #7 below, demonstrates the problems that can arise when special procedures are not used when interrogating a mentally ill suspect. Thomas turned himself in at a local police station after murdering three family members. He had also stabbed himself in the chest in an apparent suicide attempt. Thomas was arrested, taken the hospital, and returned to police custody two days later, at which point he was interrogated.

Thomas told the officers that he wished to waive his Miranda rights. Despite his odd behavior and recent suicide attempt, however, the officers did not take any special steps to be certain that Thomas truly understood his rights. Thomas explained to police that “God had wanted him to [kill his family], that the victims had been evil, that his wife had been a ‘jezebel,’ and that his son had been ‘the anti-Christ.’” The next day, Thomas spoke to police again and told them a similar story and elaborated that he had “cut open [the victims’] chests and ripped their hearts out, and that he stabbed himself in the chest afterwards.” A nurse who observed the interview later testified that Thomas “exhibited some delusional behavior and said nonsensical things during the interview.” While she further testified that Thomas “knew very much what was going on,” the basis for this opinion is unclear, as Thomas had not received a mental evaluation.

Thomas was later sentenced to death and is still on death row. He has been diagnosed with schizophrenia.

Accordingly, Texas is in partial compliance with Recommendation #2.

318 See id.
319 See supra notes 291–292 and accompanying text.
321 Id. at *1.
322 Id. at *2. Police had attempted to interrogate Thomas at the hospital, but stopped when Thomas mentioned that he might want to speak to a lawyer. Id.
323 Id.
324 Id.
325 Id. at *3.
326 Id.
327 Id.
328 See id.
J. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client’s mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

As discussed in Mental Retardation Recommendation #3, Texas capital defense counsel are not required by law to receive training specifically related to recognizing and litigating issues related to mental illness and mental disability. In addition, while Texas law allows for the appointment of mitigation specialists, investigators, and experts, these services are not guaranteed.

Defender organizations such as the Regional Public Defender for Capital Cases (RPDO), the El Paso Public Defender, and the Texas Defender Service have enacted additional training requirements for their attorneys, and employ on-staff mitigation specialists to assist in the development of claims of mental illness. Many capital defendants in Texas, however, are represented by appointment list-qualified attorneys who are in private practice, and thus not subject to these additional standards.

Accordingly, Texas is in partial compliance with Recommendation #3.

K. Recommendation #4

Trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert’s current or past status with the State. Similarly, prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert’s prior status as a witness for the State.

Recommendation #5

Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well-trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough

331 See supra notes 226–239 and accompanying text.
332 See supra notes 240–256 and accompanying text.
evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

Defense Experts

Texas requires capital defense counsel to seek funding for experts from the trial court in an *ex parte* proceeding.\(^{333}\)

**Trial and Direct Appeal**

At trial and on direct appeal, the defense is entitled to seek reimbursement for expenses if they are “reasonably necessary and reasonably incurred.”\(^{334}\) “Advance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony” may be paid directly to the expert.\(^{335}\)

In cases in which the defendant is represented by list-qualified appointed counsel, it is unclear what criteria defense counsel and trial judges are using to request and appoint mental health experts. RPDO, the El Paso Public Defender, and the Texas Defender Service (TDS) state that they are able to obtain adequate funding to provide their clients with the necessary experts.\(^{336}\) In selecting experts, the El Paso Public Defender’s attorneys “try to find experts who recognize funding constraints faced by public defenders, but, ultimately, quality is the most important thing we look for.”\(^{337}\) Similarly, TDS sometimes selects experts “on the basis of cost of services” because of funding limitations.\(^{338}\) It is unclear, however, whether judges have appointed experts based on cost or past status as expert for the state.

**State Habeas Proceedings**

In state habeas proceedings, appointed defense counsel must file an ex parte request for funds with the court “stating the claims of the application to be investigated . . . ; specific facts that suggest that a claim of possible merit may exist; and . . . an itemized list of anticipated expenses for each claim.”\(^{339}\) The court must grant the request if it is “timely and reasonable.”\(^{340}\) Alternately, defense counsel may obtain reimbursement without prior approval if the expenses are “reasonably necessary and reasonably incurred.”\(^{341}\) However, the Texas Office of Capital Writs, which represents many Texas death row inmates in state habeas proceedings, compensates

\(^{333}\) **TEX. CODE CRIM. PROC. ANN.** art. 26.052(h) (2013); see also **TEX. CODE CRIM. PROC. ANN.** art. 11.071 § 3(b), (d) (2013); Kase Interview, supra note 235.

\(^{334}\) **TEX. CODE CRIM. PROC. ANN.** art. 26.052(h) (2013).

\(^{335}\) **TEX. CODE CRIM. PROC. ANN.** art. 26.052(l) (2013).

\(^{336}\) Wischkaemper Survey II, supra note 230, at 9; Powell Survey II, supra note 233, at 8; Kase Survey, supra note 235, at 9.

\(^{337}\) Powell Survey II, supra note 233, at 12.

\(^{338}\) Kase Survey, supra note 235, at 13.

\(^{339}\) **TEX. CODE CRIM. PROC. ANN.** art. 11.071 § 3(b) (2013).

\(^{340}\) **TEX. CODE CRIM. PROC. ANN.** art. 11.071 § 3(c) (2013).

\(^{341}\) **TEX. CODE CRIM. PROC. ANN.** art. 11.071 § 3(d) (2013).
It is unclear whether this funding is sufficient or on what basis experts are selected.

**Prosecution Experts**

Texas law permits prosecutors to select their own mental health experts for use in criminal prosecutions without prior approval from the trial judge. The Assessment Team submitted surveys to several Texas District Attorneys regarding the manner by which prosecution experts are requested and appointed in practice. In response to the question of what criteria and qualifications the prosecutor considers in selecting mental health experts to testify in a capital case, one office responded that it “normally do[es]n’t use experts.” The other responding office stated that it considers “experiences in the field—especially criminal case experience.”

Only two of the twenty-two offices queried responded to the Assessment Team’s survey.

In some capital cases, however, Texas prosecutors have hired mental health experts who offered false or scientifically invalid testimony. This calls into question whether prosecutors have consistently chosen experts based on their qualifications rather than on their willingness to provide favorable testimony.

Most notably, Texas prosecutors repeatedly employed a psychologist, Dr. George Denkowski, who was later investigated and reprimanded by the Texas State Board of Examiners of Psychologists (TSBEP) for using unscientific methods in mental retardation evaluations of capital defendants. Dr. Denkowski applied non-standard and scientifically unrecognized techniques to elevate the IQ and adaptive behavior scores of capital defendants who alleged mental retardation. The American Association on Intellectual and Developmental Disabilities (AAIDD), in its 2010 manual on evaluating mental retardation, “strongly caution[ed] against practices such as those recommended by Denkowski.” In 2011, following an investigation by the TSBEP, Denkowski “agreed not to conduct intellectual disability evaluations in future criminal cases and to pay a fine of $5,500.” Fourteen of the defendants against whom Dr. Denkowski testified, many of them from Harris County, are still on death row, and two others have been executed.

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342 Survey from Brad D. Levenson, Dir., Office of Capital Writs, at 3 (Sept. 19, 2012) (on file with author) [hereinafter Levenson Survey].
343 No provision of Texas law appears to suggest that the prosecution must seek trial court approval of expenses.
344 A copy of the survey is reproduced in the Appendix to this Report. See infra Appendix, Texas Dist. Att’y Survey.
346 Dist. Att’y B Survey Response, provided to Jennifer Laurin, Chair, Tex. Death Penalty Assessment Team, at 9 (Feb. 27, 2013) (on file with author).
347 The Assessment Team agreed to keep confidential the name of any person and District Attorney office responding to the survey.
349 Id.
350 INTELLECTUAL DISABILITY, supra note 103, at 53.
351 Grissom, supra note 348. TSBEP’s complaints against Denkowski were dismissed as part of the agreement. Id.
352 Id.
In one case, Dr. Denkowski was hired by the Harris County District Attorney to testify in death row inmate John Matamoros’s state habeas evidentiary hearing on the issue of mental retardation.\textsuperscript{353} Matamoros had been diagnosed with mental retardation at age fourteen, and his IQ scores placed him in the mentally retarded range with respect to intellectual functioning.\textsuperscript{354} Dr. Denkowski evaluated Matamoros’s adaptive behavior skills using an exam known as the Adaptive Behavior Assessment System (ABAS), which tests the patient in ten AAIDD-recognized skill areas.\textsuperscript{355} Subsequent to scoring the test, however, Dr. Denkowski used his own method to inflate several of Matamoros’s scores.\textsuperscript{356} For example, Dr. Denkowski inflated Matamoros’s self-care skill score “based on Matamoros’s self-reported information that he bit his fingernails to trim them, rather than cutting and filing them as listed on the ABAS.”\textsuperscript{357} Based in part on Dr. Denkowski’s evaluation, the trial court found that Matamoros did not have mental retardation.\textsuperscript{358} In 2011, however, the Texas Court of Criminal Appeals remanded the case to the trial court to be reevaluated in light of Dr. Denkowski’s reprimand by the TSBEP.\textsuperscript{359} As of January 2013, that decision is pending.

The Harris County District Attorney also hired Dr. Denkowski to evaluate capital defendant Virgilio Maldonado for mental retardation in a state habeas proceeding.\textsuperscript{360} Dr. Denkowski used an IQ test and the ABAS (discussed above) to assess Maldonado.\textsuperscript{361} However, because Maldonado was not fluent in English, the tests were actually administered by a court-provided translator who “did not have a background in psychology and had never translated a written psychological instrument before Maldonado’s examination.”\textsuperscript{362} Dr. Denkowski also inflated the IQ and ABAS scores by several points to account for supposed “cultural and educational factors, as well as mild anxiety and depression.”\textsuperscript{363} These upward adjustments “did not result from any statistical formula or established methodology”; rather, they were based on what Dr. Denkowski described as his “clinical judgment.”\textsuperscript{364} Moreover, in scoring the ABAS, Dr. Denkowski “failed to verify Maldonado’s self-reported responses [regarding his skills] by interviewing

\textsuperscript{353} \textit{Ex parte} Matamoros, No. WR–50791–02, 2011 WL 6241295, at *1 (Tex. Crim. App. Dec. 14, 2011). Matamoros was unable to present a mental retardation claim at trial because he was convicted and sentenced prior to the U.S. Supreme Court’s \textit{Atkins} decision that banned the application of the death penalty to the mentally retarded. \textit{Id.}


\textsuperscript{355} \textit{Id.} at *9. For further information on the manner in which adaptive behavior is evaluated, see \textit{supra} notes 119–182 and accompanying text.

\textsuperscript{356} \textit{Id.}

\textsuperscript{357} \textit{Id.}

\textsuperscript{358} \textit{Id.} at *11. The decision was later upheld by the Texas Court of Criminal Appeals and the U.S. District Court for the Southern District of Texas. \textit{Id.}


\textsuperscript{361} Maldonado v. Thaler, 625 F.3d 229, 236 (5th Cir. 2010).

\textsuperscript{362} \textit{Id.} at 236–37

\textsuperscript{363} \textit{Id.} at 258 (internal quotation marks omitted).

\textsuperscript{364} \textit{Id.}
Maldonado’s teachers, relatives, or associates. The AAIDD “caution[s] against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis” of mental retardation because such persons are likely to overstate their abilities. Although the denial of Maldonado’s mental retardation claim was initially upheld in state and federal habeas proceedings, the Texas Court of Criminal Appeals granted Maldonado a new hearing in 2012 because of Dr. Denkowski’s reprimand.

Future Dangerousness Testimony

Texas prosecutors also repeatedly hired a forensic psychiatrist, Dr. Richard Coons, whose methodology was later found to be unreliable by the Texas Court of Criminal Appeals. Dr. Coons testified in over fifty Texas capital cases on the issue of whether the defendant poses a future danger to society. While Dr. Coons has testified that he considers several factors when evaluating future dangerousness, he also stated that he “does not know whether others rely upon [his] method, and he does not know of any psychiatric or psychology books or articles that use his factors.” He further stated that he “knows of no book or article that discusses [future dangerousness] factors or their overlap. He is not aware of any studies in psychiatric journals regarding the accuracy of long-term predictions into future violence in capital murder prosecutions or of any error rates concerning such predictions.” Nor were there “any psychiatric studies which support the making of [future dangerousness] predictions,” and Dr. Coons “has never gone back and obtained records to try to check the accuracy of the ‘future dangerousness’ predictions he has made in the past.” “Based upon the specific problems and omissions” in this methodology, the Texas Court of Criminal Appeals held in Coble v. State that Dr. Coons’ testimony was scientifically unreliable.

Other prosecution experts, including Drs. Clay Griffith and James Grigson, testified in several cases in a manner similar to Dr. Coons. Indeed, as discussed in more detail in Chapter Ten on Capital Jury Instructions, such testimony has generally been the rule rather than the exception.
exception, despite the fact that there is no known reliable methodology for predicting a defendant’s future dangerousness.

Conclusion

Texas has enacted procedures whereby capital defense counsel can obtain the appointment of reasonably necessary mental health experts at trial, on direct appeal, and during state habeas proceedings. However, in several cases, Texas prosecutors have relied on mental health experts who have offered unreliable testimony or used unreliable methods. Thus, Texas is in partial compliance with Recommendations #4 and #5.

Recommendation

The Assessment Team recommends that Texas enact qualification standards for mental health experts in capital cases. Furthermore, as discussed in Chapter Ten on Capital Jury Instructions, Texas should restructure its capital sentencing procedures to abandon altogether the use of the “future dangerousness” special issue. There is no reliable methodology by which a mental health expert can predict an inmate’s proclivity for violence. As such, a purported expert testimony on the issue is likely to be unreliable.

L. Recommendation #6

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Recommendation #7

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one’s conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one’s conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.

Following the U.S. Supreme Court’s decision in Atkins v. Virginia banning the application of the death penalty to persons with mental retardation, the ABA adopted policies recommending

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that the death penalty also be prohibited with respect to (1) persons who suffer from intellectual and adaptive skill limitations as a result of dementia or a traumatic brain injury and (2) persons who suffer from severe mental disorders.\textsuperscript{378} Much as the ban on executing persons with mental retardation was supported by the AAIDD, the proposed bans discussed in these Recommendations are supported by three leading mental health groups: the American Psychiatric Association,\textsuperscript{379} the American Psychological Association,\textsuperscript{380} and the National Institute on Mental Illness.\textsuperscript{381}

These recommendations extend the logic of the \textit{Arkins} decision to a limited group of persons suffering from other disabilities and disorders because the application of the death penalty to these persons is also “inconsistent with both the retributive and deterrent functions of the death penalty.”\textsuperscript{382} Much like persons with mental retardation, these persons lack the impulse control of more culpable murderers and are less likely to be deterred from criminal conduct because of fear of the death penalty.\textsuperscript{383}

Persons with dementia or traumatic brain injuries that cause significant limitations in intellectual functioning and adaptive behavior display the same symptoms as persons with mental retardation; the only difference is that, unlike mental retardation, these disabilities do not necessarily manifest during childhood. In addition, persons with severe mental disorders, such as “schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders,” often suffer from “delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment.”\textsuperscript{384}

\textbf{Texas Law on the Application of the Death Penalty to the Mentally Retarded and Mentally Ill}

As discussed throughout this Chapter, the Texas Court of Criminal Appeals has defined mental retardation in a manner inconsistent with the clinical definition of the term.\textsuperscript{385} Aspects of the Texas definition of mental retardation, in particular the manner by which adaptive behavior

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\textsuperscript{382} ABA, supra note 378, at 5.
\textsuperscript{383} \textit{Id.} at 3–6.
\textsuperscript{384} ABA, supra note 378, at 6.
\textsuperscript{385} \textit{See supra} notes 90–197 and accompanying text.
\end{flushright}
limitations are determined, are such that persons who meet the accepted clinical definition of mental retardation could be executed under Texas law.

Texas also does not prohibit the application of the death penalty to persons whose significant limitations in intellectual functioning and adaptive behavior are the product of a disability other than mental retardation. Although the U.S. Supreme Court’s decision in Atkins v. Virginia prohibits only the execution of persons with mental retardation, traumatic brain injuries and dementia may cause mental limitations that are nearly identical to the limitations caused by mental retardation. The only distinguishing characteristic is age of onset: mental retardation must originate prior to age eighteen, while traumatic brain injuries and dementia may arise at any age.

Furthermore, Texas does not forbid death sentences and executions with regard to persons who, at the time of the offense, had a severe mental disorder or disability, even if that person’s mental illness impaired his/her ability to control or understand his/her conduct in a manner similar to that of a person with mental retardation.

Andre Thomas

The Andre Thomas case demonstrates the myriad problems with the treatment of severely mentally ill capital defendants in Texas. In particular, it exhibits the need for Texas to adopt a law prohibiting the application of the death penalty to persons whose severe mental illness, while not rising to the level of legal insanity, makes them less culpable than the typical offender.

Thomas was arrested for the murder of his estranged wife, son, and step-daughter when, shortly after police discovered the victims, he turned himself in at the local police station. One officer later testified that Thomas, who “appeared lethargic and calm, asked, ‘Will I be forgiven?’ and said he had stabbed himself in the chest” in an apparent suicide attempt. Thomas was arrested, taken to the hospital, and returned to police custody two days later, at which point he was interrogated.

Thomas told the officers that he wished to waive his Miranda rights. Despite his odd behavior and recent suicide attempt, however, the officers did not take any special steps to be certain that Thomas truly understood his rights. Thomas explained to police that “God had wanted him to [kill his family], that the victims had been evil, that his wife had been a ‘jezebel,’ and that his son

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387 INTELLECTUAL DISABILITY, supra note 103, at 27 (“The purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life.”)
390 Id. at *1.
391 Id. at *2. Police had attempted to interrogate Thomas at the hospital, but stopped when Thomas mentioned that he might want to speak to a lawyer. Id.
392 Id.
393 Id.
had been ‘the anti-Christ.’” Thomas spoke to police again and told them a similar story and elaborated that he had “he cut open [the victims’] chests and ripped their hearts out, and that he stabbed himself in the chest afterwards.”

Thomas’s bizarre behavior continued after his interrogation. Three days after his second police interview, Thomas, who was alone in his jail cell, “pulled out one of his eyeballs with his hands” while yelling “It’s God’s will.”

Prior to trial, two court-appointed mental health experts found Thomas incompetent to stand trial, and the trial court committed him to the Department of Mental Health for “restoration to competency.” The next month, however, the Department of Mental Health found that Thomas’s competency had been restored, and the trial court ordered the trial to proceed without holding a competency hearing.

At trial, defense counsel argued that Thomas was not guilty by reason of insanity. Evidence indicated that he suffered from schizophrenia, and that he had struggled with severe mental illness throughout his life. At around the age of ten, Thomas “started telling classmates about the voices in his head.” He had also repeatedly tried to kill himself, starting in elementary school. When his wife left him and moved in with another man after four months of marriage, Thomas’s condition worsened. Thomas began to “obsess[] over [the Biblical Book of] Revelation and sometimes duct-taped his mouth shut for days at a time.”

In the three weeks before the murder, Thomas twice attempted to obtain treatment for his illness at local medical clinics. Thomas told medical staff about his Biblical delusions and violent thoughts. Staff attempted to obtain orders to detain him, but by the time the orders were issued, Thomas had left.

Despite this evidence, however, Thomas’s insanity defense did not prevail. To be found not guilty by reason of insanity under Texas law, the defense must prove that “at the time of the conduct charged, the [defendant], as a result of severe mental disease or defect, did not know that his conduct was wrong.” Thus, even if defense counsel proved that Thomas believed his

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394 Id. at *3.
396 Id. at *4.
397 Id. at *13.
398 Id.
399 Id.
402 Grissom, supra note 400.
403 Id.
404 Id.
405 Id.
406 Id.
407 Id.
408 Id.
409 Id.
410 Id.
411 Id.
412 Id.
actions were being directed by God, he would still be guilty under Texas law so long as he knew those actions were wrong. As such, Thomas was convicted and sentenced to death.\(^{409}\)

There is little doubt that Thomas is severely mentally ill and that he was not acting rationally at the time of the murders. As a Texas Court of Criminal Appeals judge noted in a concurring statement denying habeas corpus relief, “there is no dispute that [Thomas] was, in laymen’s terms, ‘crazy’ at the time he killed his wife and the children.”\(^{410}\) However, because “[t]here is [also] no dispute that applicant knew that it was his wife and the children that he was stabbing to death,” his conviction and death sentence were still justified.\(^{411}\) Thomas remains on death row.\(^{412}\)

**Conclusion**

Texas’s definition of mental retardation does not comport with the clinical definition. Moreover, Texas permits the application of the death penalty to the severely mentally ill and disabled. Because Texas’s insanity defense statute imposes strict requirements on the defendant, severely mentally ill persons have little protection from a conviction and death sentence. Under Texas law, a defendant whose criminal conduct was motivated entirely by his/her mental illness is still eligible for the death penalty as long as the person knew that what s/he did was wrong. As a result, a severely mentally ill defendant whose actions were driven by schizophrenic delusions has no claim for relief.

Accordingly, Texas is not in compliance with Recommendations #6 and #7.

**Recommendation**

Texas should prohibit the application of the death penalty on persons who have significant limitations in intellectual functioning and adaptive behavior resulting from dementia or a traumatic brain injury. Texas also should prohibit the application of the death penalty for persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of his/her conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one’s conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.

The law should further require the appointment of qualified mental health experts for a defendant who raises a claim based on this provision of the law. The determination that the defendant suffers from one of the qualifying mental conditions should be based on the diagnoses of

\(^{409}\) *Thomas*, 2008 WL 4531976, at *1.


\(^{411}\) Id.

qualified experts. These laws should also apply retroactively so that severely mentally ill and mentally disabled death row inmates can challenge their death sentences. Current death row inmates should not be treated differently and denied relief simply because their cases arose at an earlier time.

While many death row inmates may have some type of mental disorder, the Assessment Team’s recommendation is carefully tailored to ensure that only persons who suffer from mental retardation-like disabilities and severe mental disorders that significantly impair their ability to control their conduct would be eligible for relief. By enacting this recommendation, Texas will promote the integrity of its capital punishment system by ensuring that only a narrow class of seriously mentally ill and disabled persons are ineligible for the death penalty.

M. Recommendation #8

To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6–7 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant’s subsequent reliance on mental disorder or disability as a mitigating factor.

As the U.S. Supreme Court has noted, capital defendants suffering from disabilities such as mental retardation face a special risk of wrongful execution because the disability “can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.” Moreover, empirical studies have found that jurors are more likely to impose a death sentence when a defendant is mentally ill or emotionally disturbed, irrespective of whether the evidence of mental illness is offered as a mitigating circumstance. Accordingly, it is important for jurors to be fully and adequately instructed on the manner by which a defendant’s mental disorders and disabilities must be considered.

While Texas statutory law imposes certain requirements with respect to capital jury instructions, Texas has not adopted formal pattern jury instructions. Instead, Texas trial courts are broadly required to “deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case.” The prosecution and defense may also request “special charges”

413 Atkins, 536 U.S. at 321.
415 TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).
416 For more information on the manner by which Texas capital juries are instructed, see Chapter Ten on Capital Jury Instructions.
which the court may give or refuse. 418 The Texas Court of Criminal Appeals has urged caution, however, with respect to trial courts’ issuing additional instructions, particularly “if [an] instruction is not derived from the [Texas] code, it is not ‘applicable law’” and, therefore, neither party would be entitled to it. 419 In developing their instructions, Texas courts may rely on unofficial pattern jury instructions, such as those found in Texas Criminal Jury Charges. 420

Texas law does not require capital jurors to be instructed that a mental disorder is a mitigating factor, not an aggravating factor. Nor are trial courts required to instruct jurors that they should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society or that they should distinguish between the defense of insanity and the defendant’s subsequent reliance on a mental disorder or disability as a mitigating factor.

In fact, Texas law does not require any penalty phase capital jury instructions related to the defendant’s mental health or the role it plays in mitigation. 421 Rather, capital jurors are required to receive only a broad instruction on mitigation which asks them to consider

[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed. 422

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418 TEX. CODE CRIM. PROC. ANN. art. 36.15 (2013).

419 See Walters v. State, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007) (finding a requested instruction to be “a marginally ‘improper judicial comment’ because it [was] simply unnecessary and fail[ed] to clarify the law for the jury”). See also Brown v. State, 122 S.W.3d 794, 802 (Tex. Crim. App. 2003) (agreeing that the instruction “intent or knowledge may be inferred by acts done or words spoken […] improperly tells the jury how to consider certain evidence before it,” even though the instruction is “neutral and […] does not pluck out any specific piece of evidence” (internal quotations omitted)). For a full discussion on jury instructions in death penalty cases, see Chapter Ten.


421 See TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).

422 TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013). With respect to mitigation, jurors are further instructed that they “shall consider mitigating evidence to be evidence that [they] might regard as reducing the defendant’s moral blameworthiness.” TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f) (2013).
Texas Criminal Jury Instructions also provide no penalty phase instructions relevant to mental illness and disability.\textsuperscript{423}

Moreover, the Texas Court of Criminal Appeals has held that there is “no constitutional requirement that the jury be charged concerning any particular circumstance alleged to be mitigating,”\textsuperscript{424} nor are capital defendants “entitled to jury instructions specifically informing the jury that certain evidence may be considered” as mitigating evidence.\textsuperscript{425} Thus, even if a capital defendant presents ample evidence of mental illness or disability to the jury, the trial court is not required to give any special instruction on how that evidence is to be considered.

The failure to explain to a capital jury how to give effect to evidence of mental illnesses and disabilities is especially troubling because of Texas’s unique capital sentencing scheme. Texas statutory law dictates that, in penalty phase instructions, the trial court must first ask the jury to determine if the defendant represents a future danger to society; only after deciding unanimously that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”\textsuperscript{426} will the jury consider whether any evidence in mitigation supports a sentence less than death.

The future dangerousness instruction forces the capital defendant’s mental health history to be considered, first and foremost, as evidence in aggravation of punishment. The Texas Court of Criminal Appeals has held that “psychiatric evidence” is a relevant factor for the jury to consider “when determining whether the defendant will pose a continuing threat of violence to society.”\textsuperscript{427} Mental health experts routinely testify for the prosecution in Texas death penalty cases on the issue of future dangerousness,\textsuperscript{428} despite the fact that social scientific research has discredited the ability of experts to assess a defendant’s future danger to society.\textsuperscript{429} As discussed above, one psychiatrist, Dr. Richard Coons, testified in over fifty Texas capital cases regarding future

\begin{footnotesize}
\textsuperscript{423} See BERRY ET AL., supra note 420.
\textsuperscript{426} TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(e) (2013). Of the thirty-three states with the death penalty, Oregon is the only other jurisdiction to employ a capital punishment sentencing procedure like the Texas model. See Stephen Kanter, Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon, 36 WILLAMETTE L. REV. 313, 317-318 (2000). As of July 2012, the Governor of Oregon has maintained a moratorium on executions in the state. Peter Wong, Haugen to Return to Court, STATESMAN J. (Salem, Or.), July 22, 2012, at A1, available at 2012 WLNR 15482882.
\textsuperscript{428} Coble v. State, 330 S.W.3d 253, 299 (Tex. Crim. App. 2010) (Keller, P.J., concurring) (noting that one expert alone had testified on the issue of future dangerousness in more than fifty cases).
\textsuperscript{429} See, e.g., Michael L. Radelet & James W. Marquart, Assessing Nondangerousness During Penalty Phases of Capital Trials, 54 ALB. L. REV. 845, 848–49 (1990) (using data from Texas to show that “dangerousness is vastly over-predicted, and that predictions of nondangerousness are far more accurate than are predictions of dangerousness”); Christopher Slobogin, Dangerousness and Expertise, 133 U. PA. L. REV. 97 (1984); Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana, 28 CRIM. JUST. & BEHAV. 62 (2001). For further examination of the future dangerousness issue, see Chapter Ten on Capital Jury Instructions, Recommendation #5.
\end{footnotesize}
dangerousness before his methodology was deemed flawed by the Court of Criminal Appeals. Nonetheless, expert diagnosis of a mental disorder continues to be used as a justification for a finding of future dangerousness.

Conclusion

Texas law does not require capital jurors to be instructed on the manner by which evidence of mental illness and mental disorder should be considered in the penalty phase of a death penalty case; nor does it appear that trial courts typically provide such instructions. Accordingly, Texas is not in compliance with Recommendation #8.

Recommendation

The Assessment Team recommends that Texas implement capital jury instructions that clearly communicate that a mental disorder or disability is a mitigating factor, not an aggravating factor; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant’s subsequent reliance on a mental disorder or disability as a mitigating factor. For these new instructions to be effective, however, Texas must also remedy the underlying problems in its capital sentencing structure that permit evidence of psychiatric disorders to be used to justify a death sentence. Thus, the Assessment Team reiterates the need for Texas to substantially amend its capital sentencing scheme as described in Chapter Ten on Capital Jury Instructions, Recommendation #5.

N. Recommendation #9

Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant’s perceived demeanor, and that this should not be considered in aggravation.

The U.S. Supreme Court has observed that the courtroom demeanor of capital defendants who have a mental disability such as mental retardation “may create an unwarranted impression of lack of remorse for their crimes,” thereby increasing the chance that they will receive the death penalty. Similarly, a mentally ill defendant’s demeanor may be affected if s/he is taking psychiatric medications.

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430 See supra notes 369–373 and accompanying text. Despite this finding, psychiatric evidence of future dangerousness continues to be admissible in Texas capital cases. See Coble, 330 S.W.3d at 275.
432 Atkins v. Virginia, 536 U.S. 304, 321 (2002). Some jurisdictions allow the trial court to instruct the jury that, because of the defendant’s mental condition, s/he is being administered a prescription medication that may affect his/her courtroom demeanor. See, e.g., FLA. BAR, FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(c)
prescription medication that has mood-altering side effects. Lithium, for instance, which is used to treat bipolar disorder, may cause “[c]onfusion, poor memory, or lack of awareness” in some patients.\textsuperscript{433}

The Ernest Willis case demonstrates the risk that a jury will misinterpret the demeanor-altering effects of medication.\textsuperscript{434} Willis had been involuntarily medicated with antipsychotic drugs by the State during his capital trial for murder by arson, causing him to appear “indifferent” to the proceedings.\textsuperscript{435} During closing arguments in the penalty phase, the prosecution argued that Willis’s courtroom demeanor was evidence of his guilt and future dangerousness.\textsuperscript{436} Willis’s defense counsel were not aware that he had been medicated, and it appears that the jury was not instructed on this fact either.\textsuperscript{437} The jury found Willis guilty and sentenced him to death.\textsuperscript{438}

In subsequent federal proceedings, however, Willis was granted relief on several claims.\textsuperscript{439} Moreover, new evidence indicated that Willis was likely innocent of the crime: another inmate had offered a detailed confession to the murder, and new expert analysis contradicted aspects of the prosecution’s arson theory.\textsuperscript{440} Based on this evidence, the prosecutor elected not to retry Willis, stating that he did not believe Willis was responsible for the fire.\textsuperscript{441} In 2004, Willis was released from prison after seventeen years on death row.\textsuperscript{442}

Texas law does not require a capital jury to be instructed that the defendant is receiving medication for a mental disorder or disability, that this may affect the defendant’s perceived demeanor, and that this should not be considered in aggravation. Nor do the Texas Criminal Jury Instructions include an instruction on this issue.\textsuperscript{443}

For these reasons, Texas is not in compliance with Recommendation #9.


\textsuperscript{434} The myriad of issues that arose in the Willis case are discussed further in Chapter Eight on State Post-conviction Proceedings, Recommendation #4.


\textsuperscript{436} Id. at *4.

\textsuperscript{437} Id. at *5–6.

\textsuperscript{438} Id. at *1–2.

\textsuperscript{439} Id. at *35.

\textsuperscript{440} Id. at *9–10.

\textsuperscript{441} Michael Gracyzk, Death-row Inmate Freed after 17 Years, PHILA. INQUIRER, Oct. 7, 2004, at A19.

\textsuperscript{442} Id.

\textsuperscript{443} See supra note 420.
O. Recommendation #10

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against “waivers” that are the product of their mental disorder or disability. In particular, the jurisdiction should allow a “next friend” acting on a death row inmate’s behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

As with defendants who have mental retardation, there is a risk that the mentally ill will waive their rights due to their mental illness. A study conducted in 2005 found that, of the 106 death row inmates in the United States who waived their appeals and volunteered for the death penalty, at least 77% suffered from a mental illness. Given that there have been twenty-five such death penalty volunteers in Texas, more than in any other state, it is likely that a significant number of Texas death row inmates who chose to waive their appeals also suffered from mental illnesses. As such, it is important for the mentally ill to be protected from waivers that are caused by their disability rather than by a rational choice.

Protection from Waivers

While the trial court may consider a defendant’s mental illness when determining whether an inmate is competent to waive his/her rights, the court is not required to make a formal inquiry into the defendant’s mental history under any circumstances. Thus, there is a risk that mental illnesses and impairments that are not immediately apparent will go unnoticed, allowing mentally ill defendants to waive rights they do not fully understand.

In one recent non-capital case, Chadwick v. State, the Texas Court of Criminal Appeals applied the U.S. Supreme Court’s decision in Indiana v. Edwards to allow a trial court to deny the defendant’s request to represent himself. In that case, the defendant outwardly displayed his mental illness by making bizarre statements in court, obviating the need for the trial court to conduct a deeper inquiry into his mental health.

In other cases, however, courts have conducted a limited inquiry of the defendant’s mental state before allowing the defendant to waive one or more constitutional rights. A 2012 review of Texas death row volunteers who sought to waive their right to appeal or collateral review found that “[i]n some cases, no mental health expert was consulted” and that “[t]wo prisoners were

444 See supra note 293 and accompanying text.
445 Blume, supra note 7, at 962.
447 See supra notes 293–309 and accompanying text.
449 See id. At one point during a pretrial hearing, the defendant told his attorney, “May Yaweh curse you till the end and may I put an eternal indictment on you and I will prosecute you to eternity.” Id.
simply asked by the judge whether they had a history of mental illness.” In many cases, the court “relied heavily on interviews with the prisoner [instead of mental health experts], including for the prisoner’s mental health history.”

For instance, Christopher Swift, a death row inmate who suffered from auditory hallucinations, was permitted to waive his appeals after he wrote a letter to the Texas Court of Criminal Appeals stating that he “had been manipulated into giving an interview [to a mental health expert] which could potentially destroy my chances of foregoing an appeal(s).” Swift had told the expert that he still suffered from hallucinations, but he informed the court that “[s]ince that time and thanks be to God and my Christian friends who have encouraged me so, I have been freed completely from these voices.” Swift was executed in 2007 after only twenty-one months on death row.

Next Friend Petitions

Next friend petitions provide a means to protect a mentally ill or disabled inmate from waiving his/her post-conviction rights. Under federal law, for instance, a third party may have standing as a next friend to file a post-conviction petition for federal habeas corpus relief if the purported next friend can demonstrate that (1) the inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief; and (2) s/he is “truly dedicated to the best interests of the person on whose behalf [s/]he seeks to litigate.” It is in the federal court’s discretion as to whether a next friend may be appointed to pursue post-conviction relief on behalf of an incompetent death row inmate.

Texas does not expressly permit a next friend to act on a death row inmate’s behalf in state habeas proceedings. While Texas statutory law provides that next friends or guardians ad litem may be appointed to represent “[m]inors, lunatics, idiots, or persons non compos mentis who have no legal guardian” in civil proceedings, it does not appear that there is a similar provision for criminal proceedings.

Conclusion

Texas has enacted some procedures to protect persons with mental disorders and disabilities from waivers that are the product of their mental disorder or disability. However, those
procedures, in many instances, are inadequate. Moreover, Texas does not expressly permit next friends to represent death row inmates in state habeas proceedings. Thus, Texas is in partial compliance with Recommendation #10.

Recommendation

The Assessment Team recommends that Texas enact protections against waivers that are the product of mental disability or defect, as discussed in Mental Retardation Recommendation #7 above. In addition, Texas should develop a procedure that permits a next friend to act on a mentally impaired death row inmate’s behalf in state habeas proceedings. This procedure could be modeled on existing federal law.

P. Recommendation #11

The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel in connection with such proceedings, and the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner’s sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future.

Claims raised in post-conviction proceedings, such as ineffective assistance of counsel and prosecutorial misconduct, are often complicated and factually intensive. Thus, in order to effectively litigate post-conviction claims, the inmate must be able to communicate relevant facts to his/her attorney. When a death row inmate’s mental illness or disability prevents such communication, proceedings should be stayed or tolled until the inmate is able to adequately assist with his/her case.

Texas law does not require state habeas proceedings to be stayed due to an inmate’s mental disorder or disability. While the Texas Court of Criminal Appeals has the power to hold habeas proceedings in abeyance, it has never done so because an inmate lacked the mental capacity to assist counsel.

Moreover, Texas’s capital habeas procedure imposes short filing periods, which may be especially burdensome on mentally ill or mentally disabled inmates who cannot effectively assist their attorneys. The habeas application “must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel . . . or not later than the 45th day after the date the state’s original brief is filed on direct appeal with the court of criminal appeals,

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459 See supra notes 293–309 and accompanying text.
460See TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013).
whichever date is later." The trial court may grant the inmate an extension or excuse a late filing upon a showing of “good cause.” However, it does not appear that extensions or late filings have been permitted due to an inmate’s mental illness or mental disorder.

For these reasons, Texas is not in compliance with Recommendation #11. The Assessment Team recommends that Texas amend its capital state habeas statute to require the trial court to stay habeas proceedings upon a finding that the inmate has a mental disorder or disability that significantly impairs his/her capacity to understand or communicate pertinent information, or otherwise to assist counsel.

Q. Recommendation #12

The jurisdiction should provide that a death row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction’s and death sentence’s validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.

Historical Background on Competency for Execution

In 1986, the U.S. Supreme Court held in Ford v. Wainwright that it is unconstitutional to execute an insane death row inmate who is not aware of his/her impending execution and the reasons for it. However, the Court revisited the issue in a 2007 case arising out of Texas, Panetti v. Quarterman, due to several deficiencies in the procedures used by Texas courts to determine an inmate’s competency for execution.

The death row inmate, Scott Panetti, had previously filed a motion in a Texas trial court, pursuant to Texas statutory law, alleging he was incompetent to be executed due to mental illness. The trial court denied the motion without a hearing. Panetti appealed the ruling to the Texas Court of Criminal Appeals; however, the court held that it did not have the statutory authority to review the trial court’s decision unless the trial court had found the inmate to be incapacitated.

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462 TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) (2013).
463 TEX. CODE CRIM. PROC. ANN. art. 11.071 §§ 4(b), 4A(b) (2013).
467 Id. at 937–38 (citing TEX. CODE CRIM. PROC. ANN. art. 46.05). The motion was filed shortly after his execution date was set by the trial court. Id.
468 Id. at 938.
incompetent following a hearing. The federal district court subsequently granted Panetti a stay of execution to “allow the state court a reasonable period of time to consider the evidence of [his] current mental state.”

When Panetti returned to the state trial court, the trial judge refused to provide defense counsel with funding to hire its own mental health experts, and instead appointed its own experts without consulting counsel. The court-appointed experts determined, in their evaluations, that Panetti was competent to be executed and that his symptoms were malingered. Relying on these evaluations, the trial court denied Panetti’s claim without an evidentiary hearing.

In reviewing this procedure, however, the U.S. Supreme Court found several flaws. As a result, the Court reaffirmed that Ford requires the trial court to grant a fair evidentiary hearing to the inmate once “a substantial threshold showing of insanity is made.” The hearing must provide “an opportunity to submit evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination.” The Court also clarified the standard for determining an inmate’s competency: rather than simply being aware of his/her impending execution, the inmate must have a “rational understanding” of the reasons for it.

Texas Law on Competency for Execution

The Texas statute governing competency for execution has not been substantively amended since the Panetti decision. After an execution date has been set, the death row inmate must file a motion in the trial court “clearly setting forth alleged facts in support of the assertion that he is presently incompetent to be executed.” The motion must be supported by “affidavits, records, or other evidence.” Based on this information, the trial court must determine whether the inmate has “raised a substantial doubt” of his/her competency. If the inmate was previously found to be competent under the Texas statute, however, he will be presumed competent “unless he makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to his competency to be executed.”

471 Id. at 939.
472 Id. at 940.
473 Id.
474 Id. at 949 (quoting Ford v. Wainwright, 477 U.S. at 426, 424 (1986).
475 Id. at 949–50 (quoting Ford, 477 U.S. at 427).
476 Id. at 959 (emphasis added). The U.S. Supreme Court remanded Panetti’s case for a determination of his competency. Id. at 962. Subsequently, the federal district court found him competent to be executed. Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at *37 (W.D. Tex. Mar. 26, 2008).
477 A 2007 amendment to the statute consisted of minor changes not relevant to this discussion. Compare TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013) with TEX. CODE CRIM. PROC. ANN. art. 46.05 (2006). See also Green v. State, 374 S.W.3d 434, 443 (Tex. Crim. App. 2012) (“No relevant changes to [Texas’s execution competency statute] were made after Panetti”).
478 TEX. CODE CRIM. PROC. ANN. art. 46.05(c) (2013).
479 Id.
480 TEX. CODE CRIM. PROC. ANN. art. 46.05(d) (2013).
481 TEX. CODE CRIM. PROC. ANN. art. 46.05(e) (2013).
If the trial court finds that the inmate has made a threshold showing of incompetency, “the court shall order at least two mental health experts to examine” the inmate.\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).} The court must then determine the inmate’s competency based on these experts’ reports, “the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing.”\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).} The statute defines an incompetent inmate as one who “does not understand . . . that he or she is to be executed and that the execution is imminent; and . . . the reason he or she is being executed.”\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (2013).} The inmate bears the burden of proving that s/he is incompetent by a preponderance of the evidence.\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).}

Following the trial court’s determination of the inmate’s competency and “on motion of a party,” the Texas Court of Criminal Appeals must determine whether “to adopt the trial court’s order, findings, or recommendations” and “whether any existing execution date should be withdrawn and a stay of execution issued.”\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(l) (2013).} If the Court of Criminal Appeals determines that the inmate is not incompetent, “the trial court may set an execution date as otherwise provided by law.”\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(m) (2013).} On the other hand, if the Court of Criminal Appeals grants a stay of execution, “the trial court periodically shall order that the inmate be reexamined by mental health experts to determine whether he is no longer incompetent to be executed.”\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(n) (2013).}

The language of the Texas statute fails to comport with \textit{Panetti}. While the statute mentions a “competency hearing,” it does not state that an inmate is entitled to a hearing after making a threshold showing of incompetency.\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).} Nor does the statute explain what evidence the inmate is entitled to present during the competency hearing. Moreover, while \textit{Panetti} arguably entitles the inmate the right to funds to hire independent mental health experts,\footnote{See TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013).} the Texas statute provides only for experts to be appointed by the court.\footnote{Panetti v. Quarterman, 551 U.S. 930, 949–50 (2007) (noting a right to “submit evidence and argument from the prisoner’s counsel, including expert psychiatric evidence that may differ from the State’s own psychiatric examination”).} Finally, the competency standard in the Texas statute does not require the inmate to have a \textit{rational} understanding of the reasons for his/her execution.\footnote{TEX. CODE CRIM. PROC. ANN. Art. 46.05(f) (2012).} Because of some of these deficiencies, a federal district court found the Texas statute to be unconstitutional in 2008.\footnote{TEX. CODE CRIM. PROC. ANN. Art. 46.05(h) (2012).} This court further observed that the Texas system, which “requires an insane person to first make ‘a substantial showing’ of his own lack of mental capacity without the assistance of counsel or a mental health expert, in order to obtain such assistance is, by definition, an insane system.”\footnote{Wood v. Quarterman, 572 F. Supp. 2d 814, 817–18 (W.D. Tex. 2008), vacated on other grounds by Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011).}
In a post-*Panetti* case, however, the Texas Court of Criminal Appeals held the competency statute to be constitutional. The court found that *Panetti* requires only that the inmate be entitled to “(1) a constitutionally adequate opportunity to be heard, and (2) an ‘adequate opportunity to submit expert evidence in response.’” While the court did not examine the discrepancies between the statute’s competency standard and the standard articulated in *Panetti*, it applied the *Panetti* standard in its analysis. The court did not find that *Panetti* requires the appointment of independent experts to assist defense counsel.

**Marcus Druery**

The Marcus Druery case highlights problems with Texas’s method to determine competency for execution. Druery was sentenced to death in 2003 for a robbery and murder in Brazos County. While on death row, however, Druery’s behavior became erratic. He told prison officials that “his cell had been wired and voices were giving him orders to act out and question certain aspects of his trial.” Druery also sent a letter to the Brazos County District Court requesting a stay of execution because a reality television star “need[ed] to be questioned properly” about his case and alleging that he is “one of the last surviving males of God’s lineage.” Prison psychiatrists and a neuropsychologist hired by defense attorneys diagnosed Druery with schizophrenia. The defense neuropsychologist further stated that while Druery “has a factual awareness that an execution date has been scheduled for the crime for which he was tried, he does not believe that he will be executed because of his illogical, fixed and firmly held delusional belief system.”

In 2012, this evidence was presented to the trial court in a motion for a hearing on Druery’s competency to be executed. The trial court, however, ruled that a competency hearing was not necessary and denied the motion. Furthermore, because the court ruled that Druery did not make a “substantial showing” of incompetency, it did not appoint mental health experts to examine him.

A few days after the trial court’s order, the Texas Court of Criminal Appeals “determined that further review [of Druery’s competency] is necessary” and issued a stay of execution.

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496 Id. at *4 (quoting *Panetti* v. Quarterman, 551 U.S. 930, 951 (2007)).
497 Id. at *7.
498 See id. at *4. In this specific case, however, the inmate was provided with expert assistance. Id.
500 Id.
501 Id.
502 Id.
503 Id.
504 Id.
506 *Id. See also* TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).
the Texas competency statute, however, a trial court’s decision to refuse a competency hearing is not considered reviewable on appeal.\footnote{TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013); Ex parte Panetti, No. 74868, 2004 WL 231461, at *1 Tex. Crim. App. Jan. 28, 2004) (citing Ex parte Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000)).}

Persons have been executed in Texas despite evidence of serious mental illness.\footnote{Marc Bookman, 13 Men Condemned to Die Despite Severe Mental Illness, MOTHER JONES (Feb. 12, 2013), http://www.motherjones.com/politics/2013/01/death-penalty-cases-mental-illness-clemency (identifying seven men in Texas who have been executed or who are currently on death row despite suffering from serious mental illness).} At least five persons who suffered from severe mental disorders, including paranoid schizophrenia, have been executed in Texas since the U.S. Supreme Court reinstated the death penalty in 1976.\footnote{Id.} One of these men, for instance, believed that supernatural intervention would prevent his execution; another was executed despite the fact that the Texas Board of Pardons and Parole recommended that the governor grant clemency.\footnote{Id.}

Conclusion

Although Texas has enacted a statute outlining procedures for determining whether an inmate is competent to be executed, that statute has several significant shortcomings. It requires the inmate to present substantial evidence of incompetency before mental health experts are appointed, effectively requiring the inmate to prove s/he suffers from a mental disorder before being granted resources to investigate that disorder. Even if experts are appointed, the experts are selected by the trial court without requiring input from defense counsel. The statute also fails to describe when, if ever, an inmate is entitled to a hearing on the issue of competency. Texas law also does not provide that when a finding of incompetence is made after challenges to the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence shall be reduced to life in prison.

Finally, the Texas statute’s competency definition does not comport with the definitions supported by the ABA or mandated by Panetti. While the Texas Court of Criminal Appeals has required courts to apply the Panetti standard notwithstanding the statutory definition, the statute may cause confusion among trial courts attempting to determine an inmate’s competency. Accordingly, Texas is in partial compliance with Recommendation #12.

Recommendation

Texas law must be amended in order to comport with Panetti to ensure than any inmate facing execution possesses a rational understanding of the reason for imposition of the death penalty in his/her case. Moreover, the statute should provide that mental health experts must be appointed automatically when the inmate seeks to raise a competency claim shortly before his/her execution. The expert(s) should be selected by the court with input from defense counsel. The inmate should not be required to demonstrate evidence of incompetence before receiving the benefit of expert assistance. If, after the expert evaluation, the inmate can demonstrate a “substantial doubt” as to his/her competency under the Panetti standard, the court should be
required to hold an evidentiary hearing on the issue. After the hearing, the court should issue a written order detailing its findings of fact and conclusions of law.

R. Recommendation #13

Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.

The extent to which Texas has developed and disseminated best practices for the treatment of mentally ill individuals is unclear. The Houston Police Department has established a Mental Health Unit for “responding to individuals in serious mental health crises.”\(^{512}\) The unit is composed of Crisis Intervention Team (CIT) officers, who receive forty hours of specialized crisis intervention training.\(^{513}\) The department has also established a Crisis Intervention Response Team, which includes a “licensed mental health clinician from the Mental Health Mental Retardation Authority” to assist CIT officers.\(^{514}\) Currently, the Houston Police Department is assisting in the development of a statewide CIT program.\(^{515}\)

The Assessment Team applauds the Houston Police Department for developing this program. However, because the extent to which this and other programs have been adopted statewide is unclear, the Team is unable to determine whether Texas is in compliance with Recommendation #13.

\(^{515}\) *Id.*