No. 00-8727

In the Supreme Court of the United States

ERNEST PAUL MCCARVER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

MARTHA W. BARNETT
Counsel of Record
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Of Counsel:
ANDREW H. SCHAPIRO
DAVID M. GOSSETT

Counsel for Amicus Curiae *the American Bar Association*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES & LEGISLATIVE MATERIALS

AMERICAN BAR ASSOCIATION MATERIALS

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

MISCELLANEOUS

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has long been a leading voice for the equitable treatment by the criminal justice system of individuals with mental retardation or mental illness. The Section of Criminal Law (now the Criminal Justice Section) first began to investigate the nature of criminal responsibility and the insanity defense in 1935, and the ABA created a "Special Committee on the Rights of the Mentally Ill" in 1945. Among the other constituent ABA organizations that currently focus on legal issues relating to mental disability are the Commission on Mental and Physical Disability Law (originally established in 1973 as the Commission on the Mentally Disabled), the Spe-

---

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

cial Committee on Death Penalty Representation, and the Section of Individual Rights and Responsibilities.

Over the years, the ABA has published numerous books and studies in the mental disability field, including the pioneering study *Mentally Disabled and the Criminal Law* (1970). The ABA has issued several editions of *The Mentally Disabled and the Law* (1st ed. 1961; 2d ed. 1971; 3d expanded ed. 1985), a comprehensive and detailed overview of state laws in a wide variety of areas affecting people with mental disabilities, including criminal justice issues. In 1982, the ABA published *Disabled Persons and the Law: State Legislative Issues*, which included proposed model statutes for the states, with particular attention to individuals with mental retardation. From 1981 to 1984, in collaboration with disability and clinical professional organizations, the ABA conducted an interdisciplinary study of criminal justice issues affecting defendants with mental disabilities, which resulted in the *Criminal Justice Mental Health Standards*. These Standards were formally adopted as ABA policy in 1984, 1987, and 1988, and are now being revised and incorporated into the new third edition of the ABA *Standards for Criminal Justice*. The ABA's Commission on Mental and Physical Disability Law has, since 1976, published the *Mental and Physical Disability Law Reporter*, which canvases and analyzes state and federal cases in the entire area and which remains the most widely respected journal in the field of disability law. Finally, the ABA has submitted numerous briefs to this Court addressing the rights of individuals with mental and physical disabilities.

This broad focus on the treatment of individuals with mental disabilities, and in particular with mental retardation, intersects with the ABA's equally well-established concern that the death penalty be enforced with appropriate procedural protections and in a fair and unbiased fashion. The ABA takes no position on the death penalty as a general matter. However, since this Court upheld the constitutionality of

the death penalty in 1976,[2] the Association has adopted numerous policies concerning the administration and imposition of capital punishment.[3] On February 7, 1989, the ABA House of Delegates adopted Resolution 110, which "urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed." (App. A1.)

The Report submitted to the House of Delegates recommending that Resolution ("*1989 ABA Report*"; see App. A1-A7)[4] is a cogent summary of "several persuasive reasons for a ban on executing people with mental retardation" (App. A5). The Report called such executions a violation of "contemporary standards of decency" (App. A1). Part of the problem with sentencing individuals with mental retardation to death, the Report continued, is the disproportionality of such punishment given that "[t]he disabilities encountered by all persons who are mentally retarded prevent them from achieving [a sufficiently high] level of culpability * * * [h]owever moral blameworthiness is measured or estimated."

---

[2] See *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

[3] See, *e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-1.2 cmt. at 11 (3d ed. 1992) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) ("*ABA Guidelines*") (Guidelines designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases," and to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel"); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 13 (1990).

[4] The Report was initially published at 114 REPORTS OF THE AMERICAN BAR ASS'N 638 (1989).

(App. A5.) The Report concluded that "[t]he current system[s] of mitigation and competence for capital punishment are not adequate to assure that people with mental retardation will not be executed" (App. A3 (citations omitted)), and therefore pressed for a bar on their execution.

The ABA has consistently advocated its opposition to the death penalty for individuals with mental retardation since 1989. For example, in 1997 the ABA's House of Delegates adopted a resolution calling on each state that employs capital punishment to impose a moratorium on executions until, among other things, that state implements procedures to prevent the "execution of mentally retarded persons."[5] A soon-to-be-released report by the Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, reaffirms that "[t]he ABA unconditionally opposes imposition of the death penalty on offenders who are mentally retarded," because, among other reasons, "[i]t is beyond the ability of the criminal justice system adequately to ensure the fairness of such death sentences."[6]

---

[5] ABA Resolution adopted Feb. 3, 1997, *reprinted in* Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 49 (1996).

[6] A copy of this report has been lodged with the Clerk's office. The final report is scheduled to be released in June, 2001, at which point it will be available at *www.abanet.org/irr*. It will be published thereafter in 62 OHIO ST. L.J.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Whatever you think about the death penalty, a system that will take life must first give justice."[7] With these few words, former ABA President John J. Curtin Jr. summarized the ABA's view of the death penalty. The ABA takes no position on the constitutionality or appropriateness of the death penalty as a general matter, but maintains that sentencing individuals with mental retardation to death erodes the integrity of the criminal justice system.

Over the past 12 years — since this Court held, in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), that the Eighth Amendment does not bar the execution of defendants with mental retardation — the ABA has used its unique perspective to analyze the impact of these executions on the criminal justice system. That focus has reinforced the ABA's policy that allowing defendants with mental retardation to be sentenced to death undercuts efforts to ensure that the death penalty is implemented in a fair manner. The purpose of this brief is to highlight some of the numerous concerns that have led the ABA unequivocally to oppose the execution of individuals with mental retardation.

In particular, such defendants are far too likely to lack adequate representation, to be convicted and sentenced to death despite being innocent, and to be sentenced to death by fact-finders who do not or cannot give appropriate mitigating weight to the defendants' mental retardation. The criminal justice system is incapable of affording society sufficient assurance that defendants with mental retardation receive adequate representation, because their condition adversely af-

---

[7] *Habeas Corpus Appeals of State Death Sentences, Restrictions: Hearings before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 102d Cong. 447 (1991) (statement of ABA President John J. Curtin Jr.).

fects the defense process. Similarly, individuals with mental retardation are at a significant risk of being convicted and sentenced to death for crimes they did not commit, again as the result of their condition and the myriad ways that condition decreases the likelihood of an effective defense. Furthermore, even after this Court's ruling in *Penry I* (492 U.S. at 328), it remains uniquely difficult to present evidence of mental retardation at the penalty phase and to ensure that it will be considered by the sentencer and given mitigating effect. Only a prohibition against the imposition of the death penalty on individuals with mental retardation will protect the criminal justice system and also be consistent with "contemporary standards of decency" (*1989 ABA Report*, *supra*; App. A1), and the decreased culpability of mentally retarded defendants (*ibid.*; App. A5).

ARGUMENT

Drawing on its experience as an association of lawyers, many of whom confront the death-penalty system on a day-to-day basis as prosecutors and defense attorneys, the ABA adopted its policy opposing the execution of individuals with mental retardation. The unique disability of mental retardation warrants a complete exemption from capital punishment.

I. ALLOWING DEFENDANTS WITH MENTAL RETARDATION TO BE EXECUTED SUBVERTS THE INTEGRITY OF THE ADVERSARIAL SYSTEM.

The ABA has long expressed concern about the prevalence of underfunded and unqualified lawyers in the capital context.[8] These problems unfortunately are magnified many

[8] See, *e.g.*, American Bar Ass'n, *Toward a More Just and Effective System*, *supra*, 40 AM. U. L. REV. at 62-75; Coyne & Entzeroth, *supra*, 4 GEO. J. ON FIGHTING POVERTY at 14-15 (discussing the inadequacy, "inexperience," and "rank incompetence" of many appointed capital defense attorneys); *id.* at 19-21 (detailing state refusals to fund defense counsel for appeals, *certiorari*, or post-

times over in cases involving defendants with mental retardation. See Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense*, *in* RONALD W. CONLEY ET AL., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 97, 99-100 (1992). Even counsel whose performance would otherwise be competent may provide inadequate representation to a person with mental retardation. Defense counsel, prosecutors, and judges all need to recognize, as former Attorney General Richard Thornburgh explained, that "[p]eople with mental retardation cannot be 'processed' exactly like others who come into contact with our criminal justice system because, for them, it may be a system they do not understand or a system that does not understand them." Richard Thornburgh, *Foreword*, *in* CONLEY ET AL., *supra*, at xv, xvi. The reality is that counsel typically have little or no knowledge of mental retardation, and do not recognize the countless ways in which their clients are unable to comprehend, much less deal with, the justice system. The result of this failure can be catastrophic — innocent defendants sentenced to death; important mitigating evidence never presented to juries; and an erosion of confidence in the fairness of our criminal justice system. Nor would attempting to educate counsel solve these problems, for many are inherent in the interaction between the mentally retarded and all the participants in our criminal justice system — defense counsel, prosecutors, judges, and juries.

---

conviction proceedings); *ABA Guidelines*, *supra*, §§ 1.1, 2.1, 5.1-10.1, and commentaries thereto; AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2(c) cmt. at 123 (3d ed. 1993) (calling on "defense counsel in a capital case [to] respond to [the difference in finality in the capital context] by making extraordinary efforts on behalf of the accused.").

A. Imposition of the Death Penalty on Defendants With Mental Retardation Pervasively Undermines The Reliability Of The Justice System.

"The finality of the death penalty requires 'a greater degree of reliability' when it is imposed." *Murray* v. *Giarratano*, 492 U.S. 1, 8-9 (1989) (plurality op. of Rehnquist, C.J.) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978)); see also, *e.g.*, *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality op. of Stewart, J.) ("Because of [the] qualitative difference [between death and a sentence of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). But when individuals with mental retardation stand trial, we lack adequate certainty of guilt and moral culpability for death sentences to be acceptable under the parameters of the Eighth Amendment.

It is well documented that ineffective representation is commonplace in death penalty cases.[9] For this among other reasons, recent studies have shown, two thirds or more of death sentences are eventually reversed on appeal or through post-conviction proceedings[10] — and numerous other cases

---

[9] See, *e.g.*, American Bar Ass'n, *Toward a More Just and Effective System*, *supra*, 40 AM. U. L. REV. at 64-69; Coyne & Entzeroth, *supra*, 4 GEO. J. ON FIGHTING POVERTY at 14-15; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1841-1843 (1994); Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1314-1320 (1997).

[10] See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1849-1850 (2000). The primary reason for reversal at the state post-conviction stage was "egregiously incompetent defense lawyering." *Id*. at 1850.

in which justice was denied slip by, never caught by the system. While neither the exact extent of this problem nor many of its underlying reasons are relevant for present purposes, it is plain that the prevalence of incompetent representation in capital cases is gravely exacerbated when defendants suffer from mental retardation.[11] In cases involving defendants who suffer from mental retardation, there is such a decrease in reliability of conviction and sentence that the result is a criminal justice system in which no one can invest adequate confidence to warrant imposition of the death penalty.

1. All too frequently, counsel never realize their client is an individual with mental retardation.[12] Many such defendants actively attempt to mask their disability behind a "cloak of competence"[13] in an unfortunate, but often successful, effort to "pass" with the countless defense attorneys, prosecutors, and judges who lack understanding of mental retardation. As an appellate attorney for mentally retarded capital defendant Limmie Arthur explained after Arthur's impairment was discovered post-trial, "[r]etarded people who function at [his] level are good at one thing and one thing only and that is covering up their disability. * * * A lawyer

---

[11] See, *e.g.*, Richard J. Bonnie, *The Competence of Criminal Defendants With Mental Retardation to Participate In Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 423 (1990).

[12] See, *e.g.*, Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITIES L. REP. 529, 530 (1998) ("[M]any inmates with mental retardation who are facing the death penalty were not identified as intellectually impaired ***until after they were sentenced to death***.") (emphasis added); Bonnie, *Competency of Defendants*, *supra*, at 98.

[13] See Keyes et al., *supra*, 22 MENTAL & PHYSICAL DISABILITIES L. REP. at 530; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-431 (1985).

or prosecutor or judge talking to him is not going to realize that he is talking to a retarded person." Joseph Frazier, *Too Retarded to Die for Crimes? Laws Say No*, L.A. TIMES, Apr. 17, 1988, at 22.

Counsel are also misled by their preconceived notions of mental retardation, which are biased toward the stereotypical Hollywood portrayals of pronounced, physically identifiable examples of this disorder. Thus, when faced with a more typical case, counsel generally do not comprehend that the behavior they are observing is symptomatic of mental retardation and highly significant. See Denis W. Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITIES L. REP. 529, 530 (1998). What lawyers "see" may not seem abnormal to them, because most defendants with mental retardation appear fairly "normal," lacking the "atypical facial features," "obviously different" dress, and other characteristics both "commonly found among people with severe retardation" and expected by untrained observers. *Id*. at 531. The outward manifestations of mental retardation are in most cases far more subtle than counsel and courts expect, and hence more difficult to detect and understand. But though the behavioral signs may be subtle, the impact of mental retardation on the defense of the client and the fairness of the judicial process is, as we discuss below (at pages 10-13), dramatic.

2. Equally well established is the fact that individuals with mental retardation will sometimes confess to crimes they never committed. Ten years ago, then-Attorney General Thornburgh described a hypothetical defendant with mental retardation: "[t]he man who has confessed to something he did not do because he did not understand his *Miranda* rights and because he wanted to please those questioning him" (see Thornburgh, *Foreword*, *supra*, at xv). But such cases are far from hypothetical (see pages 14-16, *infra*), and are a predictable outcome when individuals with mental retardation be-

come enmeshed in our criminal justice system. Individuals with mental retardation often make a concerted effort to please authority figures.[14] In their normal, day-to-day lives this behavior is a harmless or even beneficial coping mechanism. When, however, the authorities whom an individual with mental retardation seeks to please are interrogators set on obtaining a confession, the result can be a tragic miscarriage of justice. Standard 7-5.8 of the ABA's *Criminal Justice Mental Health Standards* therefore admonishes courts to question the reliability and voluntariness of confessions by individuals with mental retardation.[15] Standard 7-5.9 stresses that when such individuals waive rights, such as the *Miranda* rights, such waivers might not be knowing, intelligent, and voluntary. But such warnings have proven to be of little effect when a confession is presented to a judge or jury considering a hideous crime (see pages 14-16, *infra*), especially when no one has successfully diagnosed the existence or extent of the accused's mental retardation.

3. Mental retardation also frequently interferes with the development of a meaningful relationship between client and attorney, and with the ability of counsel to represent the client adequately. For example, "[c]lients with mental retardation tend to act as though they understand their attorneys when they do not, and to bias their responses in favor of what they believe their attorneys want them to say or in the direction of concrete, though inaccurate, responses." Richard J. Bonnie, *The Competence of Criminal Defendants With Mental Retardation to Participate In Their Own Defense*, 81 J.

---

[14] See Ellis & Luckasson, *supra*, 53 GEO. WASH. L. REV. at 431-432; ROBERT PERSKE, UNEQUAL JUSTICE 15-16 (1991).

[15] As the commentary to Standard 7-5.8 explains, "a person with mental retardation may make such a statement because of a mistaken understanding of the facts of an incident or the nature of criminal responsibility." ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-5.8 cmt. at 309 (1989).

CRIM. L. & CRIMINOLOGY 419, 423 (1990). The result is that attorneys may be misled by clients with mental retardation, believing responses that have little or nothing to do with the actual facts of the crime and everything to do with the defendant's mental retardation. Counsel also tend to "spend less time interviewing clients with mental retardation when more time is really needed" because of the ways the client's mental retardation affects his responses. *Ibid*.

Many individuals with mental retardation also find it difficult to recall information that might help an attorney, or have difficulty answering open-ended questions. See Ellis & Luckasson, *supra*, 53 GEO. WASH. L. REV. at 428-429. Similarly, where a client without this disability would be able to assist in his or her own defense, most defendants with mental retardation are hapless bystanders to a process they simply cannot comprehend, "in no position to monitor the attorney's performance even in a superficial way" (Bonnie, *Competence of Criminal Defendants*, *supra*, 81 J. CRIM. L. & CRIMINOLOGY at 423), and unable to provide even a rudimentary check on their attorneys' defense strategy.

4. The courtroom demeanor of an individual with mental retardation can also become a prejudicial factor in his or her conviction and sentencing, despite being a direct result of mental retardation rather than demonstrative of a culpable mental state, guilt, or lack of remorse. Thus, the prosecutor in Herbert Welcome's trial "cited Herbert's smiles as evidence that he lacked remorse," even though they simply reflected an overly-well-learned reflex to smile in order to gain the approval of others. See ROBERT PERSKE, UNEQUAL JUSTICE 19 (1991). Johnny Penry "sat at the defense table and drew pictures" while the prosecutor summed up why Penry should be sentenced to die. *Id.* at 21-22. And mentally retarded defendant Anthony Porter, sentenced to death but later determined to be innocent (see page 14, *infra*), "walks into a room slowly, real cool, like some streetwise punk, a smirk on his face, eyes shifting back and forth, as if he's on to some-

thing or in on a big secret" (Eric Zorn, *Questions Persist As Troubled Inmate Faces Execution*, CHI. TRIB., Sept. 21, 1998, at 1 (quotation marks omitted)) — clearly inappropriate behavior from someone accused of a heinous crime. Juries do not understand that this seemingly inculpatory behavior during a capital trial is not the result of callousness, consciousness of guilt or lack of remorse, but merely fairly common and predictable conduct for an individual with mental retardation ***irrespective*** of culpability or "deathworthiness."[16]

The net result of these problems is inevitable: taken together, the behavioral patterns of mentally retarded defendants, the all-too-common deficient performance of defense counsel, and ignorance and misperceptions about mental retardation on the part of all participants in the criminal justice system produce miscarriages of justice. Innocent defendants are convicted and sentenced to die; juries reach death verdicts uninformed about the defendant's mental retardation; and, more generally, counsel are significantly less able to provide competent representation than when representing defendants who do not have this disability. See Bonnie, *Competency of Defendants*, *supra*, at 100.

---

[16] Even when evidence of mental retardation ***is*** presented, that retardation, paradoxically, can ***increase*** the chance of a death sentence after conviction. As Justice O'Connor explained in *Penry I*, evidence of mental retardation is particularly likely to become "a two-edged sword," and support a prosecutor's future dangerousness argument. 492 U.S. at 324. This negative twist to evidence of mental retardation is not present with most other factors that are, by statute or case law, universally designated as mitigating circumstances. One is hard pressed to envision how evidence of a lack of criminal history, residual doubt, youth, or provocation could possibly be considered by the fact-finder to be aggravating.

B. Numerous Defendants With Mental Retardation Have Been Sentenced to Death Despite Their Innocence.

The factors described above have caused numerous individuals with mental retardation to be convicted and sentenced to die for crimes they did not commit:

- Mentally retarded defendant Albert Ronnie Burrell spent 13 years on death row in Louisiana, convicted on the basis of evidence that unraveled after he was sentenced to death.[17]
- Mentally retarded defendant Alejandro Hernandez was freed in 1995, after spending 10 years in prison, some of them on death row, for a crime another person later confessed to committing.[18]
- Mentally retarded defendant Anthony Porter, who at one point came within ***two days*** of execution, was later proven to be innocent by journalism students engaged in a class project. The discovery of Porter's innocence was a key factor in Illinois Governor George Ryan's decision to institute a state-wide moratorium on executions.[19]

Moreover, Attorney General Thornburgh's hypothetical defendant "who has confessed to something he did not do" is prescient of real-life cases of individuals sentenced to die for crimes they did not commit. The case of mentally retarded

---

[17] Burrell's case was the subject of a recent three-part newspaper article, Christopher Baughman & Tom Guarisco, *Justice for None*, THE [BATON ROUGE] ADVOCATE, March 18-20, 2001.

[18] See Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 22; Ted Gregory, *Hernandez Team Ready for a Fight,* CHI. TRIB., Nov. 15, 1995, at 1.

[19] See Maurice Possley, *Gov. Ryan on the Death Penalty*, CHI. TRIB., Dec. 31, 2000, at 1.

defendant Earl Washington, Jr., is a particularly illuminating example of how a suspect's mental retardation can lead to miscarriages of justice. In 1983, Washington confessed to the brutal rape and murder of Rebecca Lynn Williams; based on that confession he was convicted and sentenced to death. In October 2000, DNA testing proved that Washington had not been involved in the crime, despite his confession. Thus, seventeen years after his conviction — almost ten of them spent on Virginia's death row — Washington was pardoned and released.[20]

Indeed, it is not unusual for individuals with mental retardation to give false confessions. Other individuals with mental retardation have confessed to crimes they did not commit and thereafter have pleaded guilty in order to avoid a capital trial. For example, mentally retarded defendant Johnny Lee Wilson was charged with capital murder in Missouri after being coaxed into confessing to a crime by interrogators who fed him the answers that suggested his guilt. Because of that confession Wilson's attorneys pressed him to plead guilty, a plea that was accepted despite serious questions about whether Wilson understood what he was doing.[21] A decade later, Missouri Governor Mel Carnahan pardoned Wilson because of conclusive evidence that another person had committed the crime, and declared "[i]t is evident that the only facts this mentally retarded man knew about this hideous crime were the facts given to him by investigators who felt pressure to solve the case quickly."[22] Similarly, mentally retarded defendant David Vasquez was charged

---

[20] See Brooke A. Masters, *Missteps On Road to Injustice*, WASH. POST, Dec. 1, 2000, at A1.

[21] See Robert P. Sigman, *Victim of 'a horrible injustice'*, KANSAS CITY STAR, June 4, 1995, at K1.

[22] See *Wilson* v. *Lawrence County*, 154 F.3d 757, 759 (8th Cir. 1998) (quoting Governor Carnahan's pardon statement).

with capital murder in Virginia after "confessing" to the crime as described to him by his interrogators. He pleaded guilty to second-degree murder to avoid the death penalty, and spent five years in prison before the actual perpetrator was discovered and Vasquez was pardoned.[23]

Mental retardation is the common factor in these examples of justice denied. In each case, it was the defendant's mental retardation, combined with the serious ways in which such retardation undermined the legal process, that almost caused an innocent person to be executed. Without understanding or even knowing about a client's mental retardation, both prosecutors and defense counsel will presume that a confession is reliable. Police and prosecutors may therefore not investigate other leads, and, without the client's active and adequate assistance, defense counsel will have even less ability to discover evidence that might point to another as the guilty party or otherwise lead to a client's acquittal. And without evidence of mental retardation and a sophisticated grasp of its significance, counsel will be hard pressed to convince a jury that a defendant's confession might not be reliable or that his courtroom demeanor might reflect something other than culpability.

C. *Penry I* Does Not Ensure That Evidence of Mental Retardation Will Be Developed In Sentencing Proceedings Or Treated As A Mitigating Factor.

Central to this Court's holding in *Penry I* is that a defendant's mental retardation must receive serious consideration as a mitigating factor.[24] Individuals with mental retardation

---

[23] See Dana Priest, *At Each Step, Justice Faltered for Va. Man*, WASH. POST, July 16, 1989, at A1.

[24] See *Penry I*, 492 U.S. at 322 ("Personal culpability is not solely a function of a defendant's capacity to act "deliberately." * * * Because [a defendant is] mentally retarded * * * and thus less able than a normal adult to control his impulses or to evaluate the con-

have a diminished understanding of cause and effect, the law, and criminal processes; a lessened ability to control their impulses; and less developed moral reasoning.[25] But all too frequently, evidence of the defendant's mental retardation is not presented to the judge and jury; and even when such evidence is presented, it is rarely given appropriate mitigating weight. This systemic problem is again the inevitable consequence of the very nature of mental retardation. The result is predictable and tragic: death sentences for, and executions of, individuals who should not have been sentenced to die.

There are numerous examples of cases in which ***no*** evidence of a defendant's mental retardation was ever provided at the penalty phase, even though subsequent investigation demonstrated that there was ample evidence that should have been introduced. Not infrequently, the failure to present such evidence is caused in one way or another by the defendant's disability. (See pages 9-12, *supra*.) All instances in which evidence of mental retardation is not offered, regardless of cause, constitute grave injustices. Such cases necessarily are fundamentally unfair to individuals with mental retardation and inconsistent with this Court's expectation that a defendant's sentence be based on a "reasoned *moral* response to the defendant's background, character, and crime" (*Penry I*, 492 U.S. at 319 (emphasis in original) (quoting *California* v.

---

sequences of his conduct * * * [jurors] could also conclude that [he or she] was less morally culpable than defendants who have no such excuse * * *.") (internal quotation marks omitted); see also *id.* at 337 (Op. of O'Connor, J.) ("It is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act.") This Court reaffirmed the holding of *Penry I* that evidence of mental retardation must be considered in sentencing in *Penry* v. *Johnson*, No. 00-6677, 2001 WL 589086 (U.S. June 4, 2001) ("*Penry II*").

[25] See Ellis & Luckasson, *supra*, 53 GEO. WASH. L. REV. at 428-432.

Brown, 479 U.S. 538, 545 (1987)) (O'Connor, J., concurring)).

In at least two of the cases discussed above — where an innocent defendant with mental retardation was sentenced to death — the jury was never told of the defendant's mental disability. Anthony Porter's original trial lawyer did not realize that his client was mentally retarded, and so never offered it as a mitigating factor.[26] Similarly, Ronnie Burrell's trial attorneys never raised his mental retardation at trial, even though he "cannot read or write and spent years in a school for the retarded."[27]

Quite apart from cases of actual innocence, in numerous instances judges and juries are never even told of a capital defendant's mental retardation as a mitigating circumstance, let alone educated about that evidence's significance. In these situations, the combination of inadequate defense counsel and the defendant's disability casts doubt on the fundamental fairness of the system:

- Jerome Bowden's execution in 1986 led Georgia to enact the first statute barring the death penalty for individuals with mental retardation. Despite the fact that Bowden was unable to read or count to ten, his trial lawyers presented no evidence of his mental retardation to the jury.[28]
- The jury that sentenced Mario Marquez to death never heard about "his severe childhood abuse, mental retardation, and brain damage." Instead, they saw

---

[26] See Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, at 44 (2001).

[27] See Randy Furst, *Prisoner Looks at Freedom After 13 Years on Death Row*, MINN. STAR TRIB., Jan 1, 2001, at A1.

[28] See Frazier, *Too Retarded to Die*, *supra*, at 22.

a handcuffed and visibly shackled defendant.[29] He was executed in 1995.

- Horace Dunkins was sentenced to death in Alabama, without any evidence of his mental retardation ever being presented to the jury. Shortly before his execution, when facts about his mental retardation became public, a trial juror signed an affidavit stating that she would not have voted for his execution had she known of his mental disability. Dunkins was nonetheless executed in 1989.[30]
- No testimony about Ramon Martinez-Villareal's mental retardation was presented at trial. "The sentencing judge in Martinez-Villareal's case has said he would have given him life in prison if he'd known the severity of his mental problems. In addition, Martinez-Villareal's original prosecutor also has come out against the execution, saying he was unaware of Martinez-Villareal's mental retardation."[31] Martinez-Villareal remains on death row.
- Jerome Holloway signed a murder confession he could not read. After the Georgia Supreme Court vacated his conviction and death sentence because the

---

[29] See Coyne & Entzeroth, *supra*, 4 GEO. J. ON FIGHTING POVERTY at 42.

[30] See Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at 6.

[31] Jon Burstein, *Solomon Bill Bans Execution of the Retarded*, ARIZ. DAILY STAR, March 24, 1999, at 1A. There is also some question whether Martinez-Villareal actually committed the murder of which he was convicted, or was instead merely an accomplice to felony murder. See Howard Fischer, *Execution Date for Mexican Advances Federal Appeal*, ARIZ. DAILY STAR, Feb. 26, 1999, at 2B.

lower court had not held a competency hearing,[32] the prosecution agreed not to seek another death sentence — at least in part because of Holloway's mental retardation.[33]

- Limmie Arthur was convicted and sentenced to die after a trial in which his mental disability went unrecognized, even by his own attorney.[34] After his trial, Arthur "believed that he was sentenced to death because he couldn't read[, and] diligently tried to learn so he could earn his GED because he thought he would get a reprieve if he was successful."[35] When his mental retardation became known, the South Carolina Supreme Court overturned his death sentence, ruling that he had not voluntarily waived his right to a jury trial.[36] Prosecutors then agreed to accept a term of life imprisonment.[37]

These cases highlight just some of the ways in which our system of capital punishment fails to safeguard against wrongful convictions, wrongful death sentences, and wrongful executions of the mentally retarded. First, the instances discussed above represent only that subset of cases in which, at some point in time, a defendant's mental retardation was discovered — not the countless other cases in which no such fortuitous revelation occurred. Second, many defendants with mental retardation are represented by incompetent defense counsel, who fail to perform even rudimentary tasks adequately. Third, in some number of cases under the cur-

---

[32] See *Holloway* v. *State*, 361 S.E.2d 794 (Ga. 1987).

[33] See EMILY FABRYCKI REED, THE PENRY PENALTY 120 (1993).

[34] See Frazier, *Too Retarded to Die*, *supra*, at 22.

[35] See REED, *supra*, at 15.

[36] See *State* v. *Arthur*, 374 S.E.2d 291 (S.C. 1988).

[37] Human Rights Watch, *Beyond Reason*, *supra*, at 32.

rent system even competent counsel may be choosing not to present evidence of mental retardation because of the tendency such evidence has to act as a two-edged sword (see *Penry I*, 492 U.S. at 324). Fourth, defendants with mental retardation may be actively trying to hide their mental disability (see pages 9-10, *supra*), and thus even competent counsel may not realize that they represent such individuals. This veneer of normality regularly leads counsel not to present critical evidence of mental retardation ***even where*** that counsel otherwise is competent, attentive, and provided with adequate resources to undertake a capital defense.

A critical aspect of many of the cases discussed above is that once these individuals' mental retardation became known, many involved in their initial sentencing considered those sentences to be unjust. Holloway and Arthur have been removed from death row (see page 20, *supra*). While Martinez-Villareal remains on death row, the original prosecutor and judge have stated that they oppose his execution (see page 19, *supra*). Had Dunkins' mental retardation been mentioned at trial, at least one juror would not have voted for a death sentence (see page 19, *supra*). And the outcry over Bowden's execution was sufficient to lead the Georgia legislature to pass the first statutory bar to all such executions.

Thus, when evidence of mental retardation is found, even years later, it commonly alters the views of those involved in a defendant's sentencing. All too frequently, however, for the reasons discussed above, evidence of mental retardation is not presented at either phase of capital trials.

II. ONLY PROHIBITION OF CAPITAL PUNISHMENT FOR INDIVIDUALS WITH MENTAL RETARDATION WILL PROTECT SOCIETY'S INTEREST IN A FAIR CRIMINAL JUSTICE SYSTEM AND ACCORD WITH CONTEMPORARY STANDARDS OF DECENCY.

The ABA first pressed for a ban on the execution of individuals with mental retardation in 1989. Such executions violate "contemporary standards of decency" (*1989 ABA Report*; App. A1), and are inherently disproportionate to the culpability of such defendants (*ibid.*; App. A5). Furthermore, the criminal justice system simply cannot adequately "ensure the fairness of * * * death sentences [for mentally retarded defendants]." *Death Without Justice*, *supra*.

This brief has not attempted to address all or even many of the numerous reasons why the basic concerns of the Eighth Amendment cannot be satisfied without excluding persons with mental retardation, as a class, from capital punishment. Instead, in Part I, we have illustrated some of the miscarriages of justice that have occurred to mentally retarded defendants under the current system. And these disastrous outcomes will continue to occur unless the present scheme is changed.

As this Court has said, "[t]he finality of the death penalty requires 'a greater degree of reliability' when it is imposed." *Murray*, 492 U.S. at 8-9 (plurality op. of Rehnquist, C.J.) (quoting *Lockett*, 438 U.S. at 604). The very nature of this mental disability is such, however, that greater reliability in the administration of justice cannot be achieved as long as individuals with mental retardation are subject to the death penalty.[38] False confessions, uninvestigated leads, mitigating

[38] While a categorical prohibition will not prevent defendants with mental retardation from attempting to mask their condition, such a prohibition will serve as an incentive to defense counsel to investi-

evidence never presented, the wrong individuals convicted, and individuals improperly sentenced to die are inevitable outcomes.

Given the examples discussed in this brief, it is unsurprising that more and more states have acted to bar the execution of mentally retarded defendants: Fourteen states and the federal government have now enacted legislation prohibiting the death penalty for such defendants.[39] Similarly, at least 100 countries now bar, by treaty or legislation, the execution of persons with mental retardation.[40] Of the remaining nations, all but three — Kyrgyzstan, Japan, and the United States — avoid such executions as a matter of practice.[41] Thus there is

---

gate more fully whether their clients suffer from mental retardation. Furthermore, the unfortunate reality of masking in no way undercuts the other substantial reasons that warrant interpreting the Eighth Amendment to preclude the execution of individuals with mental retardation.

[39] See Paul Duggan, *Texas Legislators Review Use of Death Penalty*, WASH. POST, May 14, 2001, at A3.

[40] See William J. Edwards, *Execution of People With Mental Retardation: A Violation of National and Customary International Law*, 38 MENTAL RETARDATION 173, 175 (2000).

[41] See, *e.g.*, Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 517 (1997) (noting reports from the United States and Japan); U.N. COMMISSION ON HUMAN RIGHTS, EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS: REPORT BY THE SPECIAL RAPPORTEUR, U.N. Doc. E/CN.4/1997/60, paras. 89 and 90 (1996) (noting reports from the United States and Kyrgyzstan); U.N. COMMISSION ON HUMAN RIGHTS, EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS: REPORT BY THE SPECIAL RAPPORTEUR, U.N. Doc. E/CN.4/1995/61, para. 380 (1994) (noting reports from the United States and Japan); U.N. COMMISSION ON CRIME PREVENTION AND CRIMINAL JUSTICE, CAPITAL PUNISHMENT AND IMPLEMENTATION OF THE SAFEGUARDS GUARANTEEING THE PROTECTION OF THE RIGHTS OF THOSE FACING THE DEATH PENALTY: REPORT OF THE

an emerging consensus of nations as well to prohibit the execution of persons with mental retardation.[42]

Even though many of the mentally retarded defendants discussed in this brief were never executed — some who were innocent have been released, and some have been removed from death row — the system as it presently functions fails to assure fundamental fairness. The defendants discussed here are merely those whose circumstances, through fortuity, were brought to light. Unfortunately the very nature of mental retardation makes other similar miscarriages of justice inevitable. Recognition that the Constitution bars the execution of the mentally retarded is the only means available to protect the defendants of whose plight we may otherwise never learn until it is too late.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the Eighth Amendment should be held to prohibit the imposition or execution of a death sentence upon any individual with mental retardation, including Ernest McCarver.

SECRETARY-GENERAL, U.N. Doc. E/CN.15/1996/19, paras. 73 and 74 (1996) (noting reports from the United States and Japan).

[42] See Edwards, *Execution of People With Mental Retardation*, *supra*, 38 MENTAL RETARDATION at 176.

Respectfully Submitted.

MARTHA W. BARNETT
Counsel of Record
President
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Of Counsel:
ANDREW H. SCHAPIRO
DAVID M. GOSSETT

APPENDIX: 1989 AMERICAN BAR ASSOCIATION RESOLUTION

BE IT RESOLVED, That the American Bar Association urges that no person with mental retardation, as now defined by the American Association on Mental Retardation, should be sentenced to death or executed; and

BE IT FURTHER RESOLVED, That the American Bar Association supports enactment of legislation barring the execution of defendants with mental retardation.

(Adopted by A.B.A. House of Delegates, February 7, 1989)

REPORT

Executing a person with mental retardation violates contemporary standards of decency. It is a practice opposed by professional associations in the field of mental disability and by a majority of supporters of the death penalty. It is disproportionate to the individual's level of personal culpability and serves no valid penological purpose. Regardless of the outcome of constitutional litigation on this issue, it is a practice which the American Bar Association should disapprove.

The ABA's Recommendation would bar the execution of any defendant who is mentally retarded. It parallels the position that the ABA has taken for years in opposition to the execution of individuals for actions committed while they were minors.

The universally accepted definition of mental retardation is that established by the American Association on Mental Retardation (AAMR):

> Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.[1]

"Significantly subaverage general intellectual functioning" is defined as an IQ of 70 or below.[2] This means that to fall within the professionally accepted definition of mental retardation, an individual's intelligence quotient must be 70 or below, the mental disability must exist concurrently with behavioral difficulties, and this disability must have occurred before the age of 18.

(Persons with IQ scores between 70 and 85, who are sometimes described by laypeople as "borderline retarded," are not within the definition of mental retardation. Such individuals have a substantial mental disability that should be considered as a mitigating circumstance in capital cases, but they are not mentally retarded within the AAMR definition, and are not with the scope of the proposed ABA recommendation.)

The burden of persuasion on whether a defendant is mentally retarded should be on the defendant.

In an earlier era in our history, people with mental retardation were thought to be unusually prone to criminal acts and were believed to be responsible for the majority of crimes in our society.[3] These attitudes have long since been

---

[1] American Association on Mental Retardation [previously "Deficiency"], CLASSIFICATION IN MENTAL RETARDATION 1 (H. Grossman ed. 1983).

[2] *Id.*

[3] Five Justices of the U.S. Supreme Court have referred to the history of mistreatment of people with mental retardation in this country as "grotesque." *City of Cleburne* v. *Cleburne Living Cen-*

proven false.[4] The era of eugenic sterilization and eugenic segregation are long since past. People with mental retardation are not abnormally prone to criminality or violence.

When people with mental retardation do commit crimes, they should generally be held responsible for their conduct. But, as the Supreme Court has repeatedly observed, "death is different." The specter of a person with mental retardation on Death Row is deeply disturbing to most Americans.

As in the case of capital punishment and minors, there is widespread public sentiment for banning the execution of any person with mental retardation. Scientific polling data indicate that a majority of Americans, even in states that strongly support capital punishment, oppose its imposition on defendants with mental retardation.[5]

The current system of mitigation, (see *ABA Standards for Criminal Justice* 7-9.3), and competence for capital punishment, (see *ABA Standards for Criminal Justice* 7-5.6), are not adequate to assure that people with mental retardation will not be executed. Approximately five of the 101 individuals executed since *Gregg* v. *Georgia* have been mentally

---

ter, 105 S. Ct. 3249, 3262 (1985) (Stevens, J., concurring), 105 S. Ct. at 3266 (Marshall, J., concurring in part and dissenting in part).

[4] Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEORGE WASHINGTON LAW REVIEW 414, 416-21 (1985); Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Casual Link?*, 10 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 172 (1978).

[5] See, *e.g.*, Gamino, "73% in Texas Poll Oppose Executing Retarded Inmates," AUSTIN AMERICAN-STATESMAN, November 15, 1988; Cambridge Survey Research, Inc., *Attitudes in the State of Florida on the Death Penalty: A Public Opinion Survey* 7, 61 (1986); Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARKANSAS LAW REVIEW 725, 759-60 (1988).

retarded. The only case to achieve substantial local publicity about the defendant's mental disability was the execution of Jerome Bowden in Georgia in 1986. It is significant that the George legislature, at its next session, passed a new statute effectively outlawing the execution of people with mental retardation.[6]

Congress has passed a similar measure in the capital punishment provision of the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690). On September 8, 1988, the House of Representatives considered an amendment by Representative Sander Levin of Michigan, which provided "A sentence of death shall not be carried out upon a person who is mentally retarded." The amendment was supported in floor speeches by Representatives George Gekas of Pennsylvania, Judd Gregg of New Hampshire, Arthur Ravenel of South Carolina, and Steve Bartlett of Texas. This represents the widest possible spectrum of political opinion in the House, from liberal Democrats to conservative Republicans. The amendment passed by a unanimous voice vote.[7] On October 14, an identically worded amendment passed unanimously in the Senate. President Reagan signed the legislation containing the amendment.

Professionals and others with direct interest in people with mental retardation have reached the same conclusion. The American Association on Mental Retardation, the oldest and largest professional organization in the field, opposes the death penalty for persons with mental retardation. AAMR's

---

[6] Ga. Code Ann. § 17-1-131 (j) (1988 Supp.). "Georgia To Bar Executions of Mentally Retarded Killers," NEW YORK TIMES, April 12, 1988, at A26, Col. 4.

[7] Congressional Record, September 8, 1988, at H 7282 through H 7283 (daily ed.). See generally Congressional Record, August 11, 1988, at S 11606 through S 11607 (daily ed.) (Statement of Senator Paul Simon).

amicus brief in *Penry* v. *Lynaugh* (No. 87-6177) has been joined by ten other mental disability groups, including the American Psychological Association, the Association for Retarded Citizens of the United States, the Association for Persons with Severe Handicaps, the American Orthopsychiatric Association, the National Association of Private Residential Resources, and the National Association of Superintendents of Public Residential Facilities for the Mentally Retarded.

There are several persuasive reasons for a ban on executing people with mental retardation. One derives from the Supreme Court's Eighth Amendment doctrine of proportionality. States may execute only those persons whose culpability and moral blameworthiness are proportional to the punishment.[8] The disabilities encountered by all persons who are mentally retarded prevent them from achieving that level of culpability. However moral blameworthiness is measured or estimated, people with mental retardation are never in the top one or two percent of defendants convicted of murder in the level of their personal culpability. This argument is made more fully in AAMR's *amicus* brief in *Penry* v. *Lynaugh*.

The strength of the proportionality argument is indicated by the fact that *no adult with mental retardation has a mental age higher than 12*.[9]

In addition, the Court has held that "[t]here must be a valid penological reason for choosing from among the many

---

[8] *Tison* v. *Arizona*, 107 S. Ct. 1676, 1687 (1987); *Booth* v. *Maryland*, 107 S. Ct. 2529 (1987); *California* v. *Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring); *Enmund* v. *Florida*, 458 U.S. 782 (1982).

[9] AAMR, CLASSIFICATION IN MENTAL RETARDATION 33 (H. Grossman ed. 1983). Cf. *Thompson* v. *Oklahoma*, 108 S. Ct. 2687 (1988) (barring the execution of a defendant for an act committed before the chronological age of 16).

criminal defendants the few who are sentenced to death."[10] The Court has identified two only such objectives – retribution and deterrence. The Justices have held that retribution must be related to the individual's level of personal responsibility,[11] and thus the analysis parallels the proportionality doctrine. And the likelihood that a mentally retarded individual will be deterred from a criminal act because he knows that persons with this disability may be executed, or the possibility that a mentally typical person will be deterred by the spectacle of the execution of a mentally retarded defendant are hardly sufficiently plausible to justify the punishment.

The U.S. Supreme Court has granted certiorari in the case of *Penry* v. *Lynaugh* on the issue of whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the execution of a defendant with mental retardation. The *Penry* case also involves the issue of appropriate jury instructions on the issue of mitigation, and there is some likelihood, as a result, that the Court will not reach the Eighth Amendment issue in this case.

Whatever the ultimate resolution of the Eighth Amendment issue, it is important for the American Bar Association to take a policy position in support of a ban on executing mentally retarded defendants. States with capital punishment will soon face the question of executing mentally retarded individuals. Their legislatures will have before them the resolutions of the other relevant professional organizations, as well as the recent enactments by Congress and the Georgia legislature. The position of the ABA on whether such an execution is consistent with contemporary standards of justice would be most important to their deliberations.

---

[10] *Spaziano* v. *Florida*, 468 U.S. 447, 460 n.7 (1984).

[11] *Enmund* v. *Florida*, 458 U.S. 782, 800 (1982).

As it did in the case of juveniles, the American Bar Association should make clear that a modern and enlightened system of justice cannot tolerate the execution of an individual with mental retardation.

Respectfully submitted,

Terence F. McCarthy
Chairperson, Criminal Justice Section

Clifford D. Stromberg
Chairperson, Individual Rights and Responsibilities Section

February 1989