

January 2012

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Recommended Citation

John H. Blume, Sheri L. Johnson & Susan E. Millor, *Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial*, 56 N.Y.L. SCH. L. REV. 944 (2011-2012).

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VOLUME 56 | 2011/12

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Convicting Lennie: Mental Retardation, Wrongful Convictions, and the Right to a Fair Trial

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I. INTRODUCTION

“Lennie” refers to Lennie Small, the intellectually disabled character in John Steinbeck’s famous novella *Of Mice and Men*, which tells the story of two Depression-era wandering farmhands, George and Lennie, who dream of getting their own stake and living “off the fat of the land.”¹ Their dream dies hard when Lennie accidentally kills the young, beautiful, and flirtatious wife of a ranch owner’s son and then tries to cover it up because he realizes that he has “done a bad thing.”² George, in turn, kills Lennie to prevent him from being lynched or tried for murder.³

Lennie was doomed because he lived in a fictional world where virtually no one understood the nature and severity of his intellectual disability, and thus people were predisposed to believe that Lennie was a cold-blooded murderer who deserved the ultimate punishment. But how would Lennie fare today—not in Steinbeck’s fictional Depression-era America, but in the twenty-first century and in our current criminal justice system? Is the criminal justice system equipped to fairly treat mentally retarded defendants in the quest for “truth”?

We wish the answer were “yes, of course.” However, if Lennie were arrested for a similar crime today, he would be at an extreme disadvantage. Once arrested, Lennie would (probably) be read his *Miranda* rights,⁴ but he almost certainly would not understand them or be able to clearly invoke his rights. The police would quickly persuade him to waive his rights, and then, using common police interrogation techniques such as positing his guilt as given, playing “good cop/bad cop,” or lying about having an eyewitness, Lennie would eventually (if not quickly) confess, admitting he had done a “bad thing.” The officers would press for details, offering scenarios much more incriminating than the accidental killing that occurred. Lennie might meekly deny any premeditation or intent to kill, but, when pressed or threatened with the death penalty, Lennie would likely agree that he had planned the young woman’s murder. Even if leading questions did not prompt Lennie to admit an intent to kill, the resulting statement almost certainly would omit the exculpatory truth. With Lennie vulnerable, afraid, and placed in a jail cell, more sophisticated inmates would soon realize that Lennie was an easy mark. They might become Lennie’s friend or offer him protection from other inmates. After learning about his case from Lennie or the case documents in Lennie’s cell, they would contact the prosecution claiming that Lennie admitted that he murdered the young woman, and they would agree to testify in exchange for, or in anticipation of, some future benefit.

Lennie would likely be charged with first-degree murder. Lennie’s attorney would be hobbled in his effort to establish that Lennie lacked intent because Lennie’s

1. JOHN STEINBECK, *OF MICE AND MEN* 14 (Penguin Books 1993) (1937).

2. *Id.* at 91.

3. *Id.* at 106.

4. In some police departments, officers are trained to question first and warn later; the unwarned statement is not admissible in the prosecution’s case in chief, but can be used to impeach—and may also encourage a subsequent statement after warnings have been administered, which will then be admissible. *See Missouri v. Seibert*, 542 U.S. 600 (2004).

simple verbal skills would make it hard to gather important facts and details of the crime. Counsel would probably decide that Lennie could not testify—because he would be ripped to shreds and made to look like a liar on cross-examination by a skilled prosecutor. Lennie would just sit there at trial, appearing despondent and aloof. The jury would hold it against him. Relying on Lennie’s confession, his demeanor, and the jailhouse “snitch,” the jury would find Lennie guilty. They would not understand that Lennie never meant to kill the young woman, that it was all just a tragic accident, at worst criminally negligent homicide. Then, in many jurisdictions, Lennie would be sentenced to life, with or without parole. In prison, he would likely frequently incur the wrath of the staff due to his inability to understand written and unwritten prison rules,⁵ and therefore be unlikely to get parole even if his sentence permitted it. Finally, both in jail and in his prison Lennie would be vulnerable to predators in the inmate population.

Readers who think that such a scenario could no longer happen are wrong. Mental retardation is a severe disability, and mentally retarded criminal defendants are at a heightened risk of wrongful conviction because the criminal justice system affords them no greater protection than it does defendants who are not intellectually disabled. To reduce the risk of wrongful conviction for this category of defendants, special procedural protections are necessary. For those readers who are still skeptical, however, let us briefly tell you a true story involving Jerry Frank Townsend.

Mr. Townsend is an African American man with mental retardation. His intelligence quotient (IQ) is in the 50s, and he has the mental capacity of an eight-year-old child.⁶ At the age of twenty-seven, Townsend was working at a carnival in Hallandale Beach, Florida.⁷ Although his intellectual disabilities made life challenging, Townsend held down a job with the support of his family.

Townsend’s life was forever changed, however, when he was arrested in 1979 for raping a pregnant woman in Miami, Florida.⁸ While in custody, Townsend, described by one of his attorneys as an “easy target,”⁹ was interrogated by several police officers. Eager to please, Townsend confessed to more than twenty murders and a number of

5. See Sandra Anderson Garcia & Holly Villareal Steele, *Mentally Retarded Offenders in the Criminal Justice and Mental Retardation Services Systems in Florida: Philosophical, Placement, and Treatment Issues*, 41 ARK. L. REV. 809, 835 (1988) (reporting higher rates of disciplinary infractions).

6. *Know the Cases: Jerry Frank Townsend*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Jerry_Frank_Townsend.php (last visited Oct. 22, 2011) [hereinafter INNOCENCE PROJECT]; see also *Frontline: Requiem for Frank Lee Smith*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/smith/etc/script.html> (last visited Oct. 22, 2011).

7. Ardy Friedberg et al., *Murder Cases to Get a DNA Review*, SUN SENTINEL (Fla.) (Mar. 20, 2001), http://articles.sun-sentinel.com/2001-03-20/news/0103200092_1_dna-evidence-jerry-frank-townsend-barry-scheck.

8. INNOCENCE PROJECT, *supra* note 6.

9. Paula McMahan & Ardy Friedberg, *DNA Clears 21-Year Inmate; Review Reverses 2 Murder Cases; 4 Others Await*, SUN SENTINEL (Fla.), Apr. 28, 2001, at 1A (“‘He was a very easy target,’ said Barbara Heyer, one of the attorneys recently appointed to represent Townsend. ‘In Townsend’s case, he would confess to anything and they had no other evidence against him. That’s very suspect when you have someone who is mentally deficient.’”).

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rapes.¹⁰ Most of the “cases” were never pursued by law enforcement because it quickly became clear that Townsend was not the perpetrator. However, the police did follow up on Townsend’s confessions of several previously unsolved rapes and murders of women in the Miami and Fort Lauderdale areas.¹¹ The police took Townsend to several of these murder scenes and recorded his confessions.¹²

Despite a number of inconsistencies between Townsend’s confessions and the physical evidence, in 1980 a Florida jury convicted Townsend of first-degree murder for the 1973 murders of two Broward County women.¹³ In 1982, while serving his life sentence, Townsend confessed and pled guilty to two additional cold-case murders that occurred in Miami-Dade County in the 1970s.¹⁴ All in all, Townsend’s confessions were used to convict Townsend of six murders and one rape.¹⁵ He was sentenced to seven concurrent life sentences in Florida State prison.¹⁶

Townsend’s exoneration was not the result of a well-functioning criminal justice system, but of serendipity. After another Florida inmate, Frank Lee Smith,¹⁷ was posthumously exonerated, the Broward Sheriff’s Office and the Broward State Attorney’s office initiated a review of DNA evidence in murder cases linked to men on death row or serving life sentences.¹⁸ After serving nearly twenty-two years in prison, Townsend was cleared by DNA evidence for four of the six murder convictions.¹⁹ A

10. *Id.*

11. *Id.*

12. INNOCENCE PROJECT, *supra* note 6.

13. *Id.* Townsend was convicted of the 1973 murders of Naomi Gamble and Barbara Brown in Broward County.

14. Dave Reynolds, *Townsend Freed After 22 Years*, INCLUSION DAILY EXPRESS, June 18, 2001, <http://www.inclusiondaily.com/news/laws/townsend.htm>. Prosecutors for the Miami-Dade cases told Townsend that they would use his Broward County conviction as leverage to assure he received the death penalty if he pursued these cases to trial. *See also* McMahan & Friedberg, *supra* note 9. Townsend pled guilty to the murders of Catherine Lorraine Moore and Terry Jean Cummings in order to avoid receiving the death penalty. *Id.* (“Townsend’s attorneys in the Miami murders and rape said they recommended that he plead guilty because he could have faced the death penalty.”).

15. McMahan & Friedberg, *supra* note 9.

16. INNOCENCE PROJECT, *supra* note 6.

17. Frank Lee Smith was also serving time for a murder he did not commit. Smith was awaiting his execution on death row for a 1985 murder conviction of a Broward county woman, Shandra Whitehead. In 2000, on appeal, DNA testing was performed on Smith, but he died of cancer awaiting the results, which showed he did not commit the murder. *See* Friedberg et al., *supra* note 7.

18. *Id.* (“The review was spurred by the case of Frank Lee Smith . . . said Chuck Morton, who heads the State Attorney’s Office’s homicide unit. [The Smith case] was the catalyst because we felt badly about that . . . We felt we should go back and look at the DNA, where it is available, to make sure that we got the right person or to exonerate anyone if we got the wrong person.” (alteration in original)).

19. McMahan & Friedberg, *supra* note 9.

Miami judge later reversed Townsend's two remaining murder convictions and remaining rape conviction.²⁰

In 2003, Townsend brought a civil suit against the Broward Sheriff's Office and its deputies for having "fabricated evidence, concealed exculpatory evidence, tampered with witnesses, and coerced a false confession by intimidation and deception from [Townsend], who they knew was a mentally challenged person."²¹ Townsend alleged that detectives took advantage of his disability and pressured him to confess to crimes he did not commit, turning the tape recorder on and off to feed him details of the crimes.²² The merit of these allegations is suggested by the fact that the Broward Sheriff's Office reached a \$2 million settlement with Townsend in 2009.²³

Despite the ordeal of twenty years of wrongful incarceration, Frank Townsend's case ends—relatively—well. But the factors that led to his wrongful incarceration are far from unique, whereas the circumstances that led to his exoneration are much more idiosyncratic. In this article, we discuss the heightened risk of wrongful conviction that individuals with mental retardation face in the criminal justice system and propose a number of procedural protections for mentally retarded criminal defendants to prevent miscarriages of justice like the one that took place in Frank Townsend's case. Part II examines the evidence showing that persons with mental retardation are overrepresented in the criminal justice system. Part III describes both the move toward and the rationale for greater protections for capital charged individuals with mental retardation found in *Atkins v. Virginia*, which held that persons with mental retardation are not eligible for the death penalty.²⁴ Part IV summarizes the characteristics of individuals with mental retardation that heighten the risk of wrongful convictions. Finally, Part V proposes procedures that, if adopted, would help protect vulnerable individuals with mental retardation from being found guilty of crimes they did not commit.

II. MAKING THE EMPIRICAL CASE: OVERREPRESENTATION IN THE RANKS OF THE WRONGFULLY CONVICTED

When we refer to persons with mental retardation in this article we define that group as did the majority in *Atkins* using the generally accepted three-prong definitional test used by both the American Association on Mental Retardation (AAMR), now renamed the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association (APA) in its

20. See Reynolds, *supra* note 14. Circuit Judge Scott Silverman cleared Townsend and ordered his release, saying, "Given the . . . deficiency in the state's evidence, a lack of trust in its evidence including the obtained confession, and in some cases what may very well be Mr. Townsend's outright innocence, it is abundantly clear that he is the victim of an enormous tragedy." *Id.*

21. Paula McMahon, *\$2 Million for Man That DNA Cleared*, SUN SENTINEL (Fla.), Sept. 22, 2009, at 1B (alteration in original).

22. See *id.*

23. *Id.*

24. 536 U.S. 304 (2002).

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Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).²⁵ This test defines mental retardation as a disability characterized by (1) significantly subaverage intellectual functioning; and (2) significant limitations in adaptive behavior or functioning as expressed in conceptual, social, and practical adaptive skills; (3) originating before the age of eighteen.²⁶

The first prong is commonly determined by individually administered IQ tests, and significantly subaverage intellectual functioning is generally understood as an IQ of 70 or below with a five-point margin of error given the standard error of measurement.²⁷ Thus, a person with an IQ of 75 or below would generally meet the first prong. The second prong—the adaptive functioning prong—essentially looks to how the individual functions in the world, and focuses on deficits, not strengths, because both the AAIDD and the APA recognize that strengths often coexist with weaknesses as well as the fact that there is no common pattern of deficits.²⁸ The third prong serves to distinguish mental retardation, which is classified as a developmental disability, from other types of disabilities, such as traumatic brain injury occurring after the age of eighteen.²⁹

It is estimated by the AAMR/AAIDD that persons with mental retardation, or “intellectual disabilities,”³⁰ comprise between 2% and 3% of the general population of the United States.³¹ Yet persons with mental retardation or intellectual disabilities comprise approximately 4% to 10% of the prison population,³² and possibly an even

25. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR].

26. *See infra* note 89.

27. DSM-IV-TR, *supra* note 25, at 41–42.

28. *See id.* at 42.

29. *See id.*

30. The clinical field increasingly employs the term “intellectual disability.” We refer to “mental retardation” because *Atkins* used that term. For a discussion on how the change in terminology within AAIDD involves no change in definition, see Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007).

31. AM. ASS'N ON INTELL. & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010).

32. JOAN PETERSILIA, DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 12 (2000). Petersilia's estimate is relatively conservative. According to Elizabeth Nevins-Saunders:

There is no consensus as to the [total] number of individuals in the criminal justice system who have some degree of mental retardation[; o]ne estimate suggests that . . . as many as forty percent of offenders may have intellectual disabilities [of some degree]. There is not even consensus as to the proportion of people with intellectual disabilities among incarcerated populations[. An earlier] survey of state and federal prison administrators[—who undoubtedly would be undercounting—]reported that approximately 4.2 percent of inmates were mentally retarded and an additional 10.7 percent had learning disabilities.

higher percentage of jail and juvenile facilities populations.³³ This overrepresentation by a factor of three to five is enormous—comparable to racial disparities in the prison population.³⁴ Moreover, while the cause of racial disparities in incarceration is complex, and self-report studies show that these differences are partially explained by differences in offense rates,³⁵

studies of the crime commission rates of people with retardation . . . have shown that while their rates of crime are similar to those of other people, and consist mostly of misdemeanors and less-serious felonies, offenders with developmental disabilities are disproportionately represented in state and local correctional agencies.³⁶

The overrepresentation of persons with mental retardation in prisons and jails, standing alone, does not demonstrate increased vulnerability to *wrongful* conviction. Mental retardation undoubtedly also makes individuals more “vulnerable” to accurate convictions; intellectual limitations undoubtedly render persons with mental retardation more likely to be apprehended, more likely to—accurately—confess, less likely to be able to concoct convincing false alibis or other defenses, and so on. However, the incarceration disparities, read with the exoneration disparities, compel an inference of increased vulnerability to error as well. Persons with mental retardation comprise at least 15% of exonerees.³⁷ Thus, their exoneration rate is about one-and-a-half times that of other inmates—and seven or eight times their proportion in the general population. Moreover, we suspect that the exoneration statistic underestimates the true wrongful conviction disparity—indeed, probably grossly underestimates that

Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation* 2 n.9 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 11-18, 2011) (citations omitted), available at http://lsr.nellco.org/nyu_plltwp/265.

33. See Robert Dinerstein, *The Criminal Justice System and Mental Retardation: Defendants and Victims*, 97 AM. J. ON MENTAL RETARDATION 715, 716 (1993) (book review) (“[T]here are virtually no reliable data on the number of inmates with mental retardation in local jails, where arrestees and those convicted of misdemeanors would normally be housed . . .”).
34. *Study Shows Racial Disparity in Prison*, USA TODAY (July 18, 2007, 3:30 PM), http://www.usatoday.com/news/nation/2007-07-18-prison-study_N.htm (reporting that blacks are incarcerated at five times the rate of white Americans, and that Hispanics are incarcerated at twice the rate of non-Hispanic whites).
35. See THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 5–9 (2d ed. 2008), http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.
36. PETERSILIA, *supra* note 32, at 12; see also Michael J. O’Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359, 359 (2005) (“Research has not established a link between MR [mental retardation] and criminal behavior, and this overrepresentation could be due to the increased likelihood of arrest and conviction of those with MR . . . [as they] are more easily caught by police and are more likely to be tricked by police interrogators into confessing . . .”).
37. We arrived at this figure by reviewing data obtained from multiple sources, including: (a) the profiles of exonerated inmates maintained by the Innocence Project and available on their webpage, see *supra* note 6; (b) information compiled by other authors who have examined the causes of wrongful convictions; (c) reported opinions in cases of subsequently exonerated defendants; and (d) information obtained from attorneys who represented exonerees.

disparity—for two reasons: first, it seems likely that wholly innocent persons with mental retardation would be less able to enlist the support of others in securing investigation and legal assistance than would other wholly innocent persons who are incarcerated. And second, we think that Innocence Projects rarely focus on the partially innocent—those defendants who had some factual involvement in the crime(s) of which they were convicted, but were guilty of only some of those crimes, or of a less aggravated crime. Persons with mental retardation are especially likely to fall in that category, as we explain in Part IV below.

III. *ATKINS* AND THE RISK OF WRONGFUL EXECUTION

As noted previously, in *Atkins v. Virginia*, the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of persons with mental retardation.³⁸ After establishing the emergence of a national consensus against executing persons with mental retardation, the Court brought its own judgment to bear on the question of whether a categorical exemption of such persons is reasonable, and offered two justifications that support this exemption.

The first justification offered by the Court was that the twin goals of retribution and deterrence, which serve as a basis and justification for the death penalty, would not be well served by executing an individual with mental retardation.³⁹ Justice Stevens, writing for the Court, reasoned that while the deficiencies of persons with mental retardation do not exempt them from criminal sanctions, these deficiencies do diminish their personal culpability,⁴⁰ which means that the most extreme form of retribution is less warranted. Moreover, because persons with mental retardation are less able to plan and less likely to appreciate consequences in advance of their actions, they are less likely to be deterred by the death penalty, and thus, employing the ultimate punishment of death to them would serve little purpose.⁴¹

The second justification recognized by the Court was that the reduced capacity of offenders with mental retardation places them at a higher risk of wrongful execution.⁴² Justice Stevens’s opinion asserts that this heightened risk of wrongful execution is due to the disadvantages persons with mental retardation face in the criminal justice system,⁴³ and then briefly summarizes the nature of those disadvantages:

The risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty” is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less

38. 536 U.S. 304, 318 (2002).

39. *Id.* at 318–19.

40. *Id.* at 318.

41. *Id.*

42. *Id.* at 320–21.

43. *See id.*

able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.⁴⁴

Justice Stevens concluded that because of the risk of false confessions, difficulties communicating with and assisting counsel, and inappropriate behavior and demeanor, defendants with mental retardation face a “special” risk of wrongful execution.⁴⁵

While we applaud the Court’s decision to prevent persons with mental retardation from being subject to the death penalty (for a variety of reasons), we think it should be obvious that these risks are of concern whether or not the death penalty is at stake. Justice Stevens accurately outlined several factors that heighten the risk of wrongful execution of individuals with mental retardation but failed to recognize that these factors are present in *all* criminal prosecutions, regardless of the nature of the charged offense or the length of the sentence. Thus, persons with mental retardation still, in the words of Stevens, “face a special risk”—though, at least in theory, not for wrongful execution⁴⁶—for wrongful conviction. Therefore, if we are committed to justice for the Lennies of today, we need to build on the foundation laid by *Atkins* walls that will protect not only their lives, but also their freedom.

IV. CAUSES OF THE WRONGFUL CONVICTION OF PERSONS WITH MENTAL RETARDATION

In *Atkins*, the Court alluded to three factors that heighten the risk of wrongful conviction of persons with mental retardation: false confessions, difficulty communicating with counsel, and inappropriate demeanor. Next, we undertake to flesh out those factors and then to add a fourth: exploitation by codefendants and snitches.

A. The Risk of False Confessions

Justice Stevens’s brief assertion that individuals with mental retardation face a higher risk of false confession is, in fact, supported by a variety of empirical evidence. Most compelling is the fact that more than two-thirds of exonerated individuals with mental retardation were wrongfully convicted primarily because of a false confession.⁴⁷ Given the diminished effectiveness of existing procedural protections for persons in this group and their increased susceptibility to police interrogation tactics, the prevalence of false confessions might have been predicted.

44. *Id.* (footnote omitted) (citation omitted).

45. *Id.*

46. See John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689 (2009) (reporting on the frequency of cases in which states deviate from clinical definitions of mental retardation in capital cases).

47. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005) (showing that of the first 200 DNA exonerations in the United States, 69% of exonerated persons with mental disabilities were wrongfully convicted because of false confessions).

In *Miranda v. Arizona*, the U.S. Supreme Court established that criminal suspects had to be provided with certain warnings prior to any police interrogation.⁴⁸ Furthermore, *Miranda* established that a suspect may waive these rights and make a valid statement or confession, so long as the suspect's waiver is made "voluntarily, knowingly and intelligently."⁴⁹ Obviously, *Miranda* protects the voluntariness of confessions by the guilty, but it also functions to protect the innocent from panicked and inept attempts to persuade the authorities of blamelessness, attempts that sometimes backfire. In cases where the person being interrogated is an individual with mental retardation, *Miranda* generally fails both the guilty and the innocent.

Comprehension studies consistently find that individuals with mental retardation have significant difficulty in understanding *Miranda* rights and therefore may lack the competency to waive their *Miranda* rights.⁵⁰ For example, a 2005 study evaluated the *Miranda* rights comprehension of individuals with mental retardation by testing the understanding of the basic meaning of each of the five *Miranda* warning statements on a sample of sixty adults (forty men, twenty women) with diagnoses of mild mental retardation.⁵¹ The study assessed the understanding level by having an examiner read each of the five *Miranda* warnings aloud to the examinee; the examiner then asked the examinee to paraphrase each warning statement.⁵² The results showed that 50% of the sample of individuals with mild mental retardation could not correctly paraphrase *any* of the five *Miranda* components.⁵³ In contrast, when intellectually normal subjects were tested, less than 1% were unable to paraphrase any of the warnings correctly.⁵⁴

Moreover, persons with mental retardation are not only less likely to invoke their *Miranda* rights because they don't understand them, but also less likely to avail themselves of outside sources of understanding and assistance, such as family members and friends. They are more likely to refuse the offer of a phone call—not because they do not want or need assistance but simply because they may not remember any phone numbers, may be unable to read a phone book, or may not even know how to operate the phone.⁵⁵ Thus, they are more likely to face their interrogators alone.

48. 384 U.S. 436, 444 (1966).

49. *Id.*

50. See Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); see also Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212 (1999); Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 LAW & HUM. BEHAV. 533 (1995); O'Connell et al., *supra* note 36.

51. O'Connell et al., *supra* note 36, at 362–63.

52. *Id.* at 363.

53. *Id.* at 366.

54. *Id.* at 367.

55. Cloud et al., *supra* note 50, at 514.

The primary goal of police interrogation is to obtain a confession—more particularly, a confession that will secure a conviction.⁵⁶ A police interrogator's objective, therefore, is to alter the suspect's decisionmaking by increasing the anxiety and despair associated with denying guilt and reducing the anxiety associated with confession.⁵⁷ To elicit confessions or other incriminating statements, police commonly use "maximization" and "minimization" tactics. The former involves conveying to the suspect complete confidence of the suspect's guilt, as well as assurance that all denials will fail. Maximization tactics may include making an accusation, overriding the suspect's objections, and citing evidence, real or fabricated. Maximization is often coupled with minimization of the seriousness of the crime, as well as sympathy and understanding for the reasons the perpetrator committed the crime. Minimization tactics provide the suspect with moral justification by normalizing and minimizing the crime, often suggesting that the interrogator would have behaved similarly. In addition to maximization and minimization, deception, including the making of false assertions, trickery, and prolonged questioning are common.⁵⁸

Thus, if Lennie were arrested in connection with the death of the wife of the ranch owner's son, he would be taken to an isolated, bare interrogation room and left alone to wait. The interrogators, detectives' badges displayed, would enter the room and read Lennie his *Miranda* rights and present him with a printed waiver sheet and pen. Wanting to please the interrogators, whom he sees as authority figures, Lennie will initial and sign the waiver form. Then the interrogation begins. The interrogators will frequently begin with maximization tactics by directly confronting Lennie and telling him they know he is guilty. They will likely tell Lennie that he is not only guilty, but that he is guilty of first-degree murder and that Lennie will likely "ride the needle" or "get the chair" unless he confesses. If Lennie does not then start talking, the officers will tell Lennie the evidence is overwhelming and may even lie about what evidence the police have—falsely claiming to have an eyewitness, a fingerprint, or DNA evidence. The interrogators will ignore Lennie's "I didn't do it," "I didn't mean to do it," or "that is not how it happened" assertions by again telling Lennie that, if he wants to die by going the stoic route, that is fine with them. In the unlikely event that Lennie has not already confessed, the officers will then try a different tactic and shift to the role of a sympathetic and understanding person. The officers switch to minimization techniques and offer the suspect moral justifications and excuses for what Lennie did: "It wasn't your fault, I'm sure you didn't mean to do it—I would have probably done the same thing if I was in your shoes." They may even tell Lennie, "If you just tell me what happened we can all go home." Tempted with the prospect of going home, Lennie may perk up and say, "But I don't really know what happened." Soothingly, an interrogator responds by saying, "Well this is what I think happened; I think you wanted to have sex with her. She said no. You

56. Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6 (2010).

57. *Id.* at 14–15.

58. *See id.* at 12–13, 16–17.

became mad because you thought she was leading you on. And she probably was; she did that with lots of the other guys. You became angry and tried to force yourself on her. She tried to fight and you became even more angry, and then you strangled her and hid the body because you knew you were looking at murder one.” After hearing the interrogator’s rendition of events, Lennie, scared and overwhelmed, answers, “If you say I did it, then I did it, but I don’t think that is what happened. Now can I go home?”

Of course, such a progression can occur with a suspect of normal intelligence, particularly if that person is extremely tired, traumatized, or in some other vulnerable mental or emotional state. But persons with mental retardation are *always* more vulnerable to suggestion and coercion, vulnerabilities that may be exacerbated by exhaustion, trauma, grief, or the like, just as they are in other suspects. Several characteristics of persons with mental retardation create this greater vulnerability.

As a matter of definition, individuals with mental retardation have more limited intellectual ability and thus may not remember facts as well as persons of normal intelligence, particularly when at the time of the occurrence there was no signal that remembering would be crucial.⁵⁹ Consequently, they will often be unable to give an accurate account of their whereabouts or activities—not because they are attempting to hide inculpatory facts, but because they cannot recall the exculpatory truth. Thus, they may be wrongly accused of, and convincingly demonstrated to be, lying. In addition, limited communication skills, which very frequently—though not in every case—are a part of the limitations in adaptive functioning required by the second prong of the definition of mental retardation, often will impair their ability to fully understand questions and adequately answer them.⁶⁰

Persons with mental retardation also characteristically have an abnormally strong desire to please authority figures.⁶¹ In particular, they are more likely to be tricked by leading questions in response to relatively mild negative feedback.⁶² Moreover, motivated by a strong desire to please authority figures, individuals with mental retardation may participate in “biased responding”—that is, answering in the affirmative questions regarding behaviors they believe are desirable and answering in the negative questions regarding behaviors they believe are prohibited.⁶³ Furthermore, individuals with mental retardation are especially vulnerable to such response bias

59. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 428–29 (1985).

60. *Id.* at 431–32 (“[T]he desire to please authority figures does appear to be a powerful motivator.”).

61. *Id.*

62. See Everington & Fulero, *supra* note 50 (showing that people with mild retardation were more likely to yield to leading questions and change their answers in response to mild negative feedback); see also O’Connell et al., *supra* note 36, at 367 (demonstrating that mentally retarded individuals have stronger proclivities to change their answers in response to friendly and encouraging feedback than to unfriendly or neutral feedback).

63. Ellis & Luckasson, *supra* note 59, at 428, 431–32 (“[P]ersons with mental retardation . . . have a particular susceptibility to perceived authority figures and will seek the approval of these individuals even when it requires giving an incorrect answer.”).

when asked questions in a “yes” or “no” format.⁶⁴ Finally, because individuals with mental retardation may have deficiencies in their own moral development, they may confess to a crime they did not commit because they do not understand the concepts of blameworthiness and causation.⁶⁵

B. Difficulties Assisting Counsel

Atkins is equally brief in its assertion that individuals with mental retardation may be less able to understand and give meaningful assistance to their counsel, but also equally correct. As an initial matter, the individual may be hiding his disability. Then, especially if the lawyer is unaware of the disability and/or does not have experience in dealing with individuals with mental retardation, he may have difficulty getting necessary facts and cooperation from his client.

Most individuals with mental retardation deny their disability and hide behind what has been called a “cloak of competence.”⁶⁶ The “cloak of competence” is a defense mechanism often deliberately employed to prevent exposure of a perceivably shameful condition, though sometimes resulting from limited awareness of the extent of the disability.⁶⁷ Except where there are physical manifestations of mental retardation, as in persons with Down syndrome, the lawyer may not be aware of the individual’s disability. If the client is defensive about his disability, the lawyer may think that his client is just being uncooperative. This information gap is obviously detrimental to building an appropriate defense, as well as to preparing for trial. Unfortunately, even if counsel knows of the client’s intellectual disability, he may lack the experience necessary to understand his client’s cognitive limitations and to know how to best communicate with his client. Counsel may expect that he can rely upon his client to accurately remember, identify, and report exculpatory information, but such reliance is completely misplaced when his client has mental retardation. The first obstacle is that “people with mental retardation encode information in an extremely limited manner, and . . . lose[] information at a much faster rate” than their nonretarded peers.⁶⁸ A

64. Carol K. Sigelman et al., *When in Doubt Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53, 56 (1981) (showing that when asked a yes/no question, a person with mental retardation is more likely to provide affirmative answers to absurd question, such as “Does it ever snow here [in Texas] in the summer?”—73% of subjects answered yes).

65. Ellis & Luckasson, *supra* note 59, at 429–30 (“Some mentally retarded people will determine or assign guilt even when a situation is the result of an unforeseeable accident. . . . For example, a defendant with retardation may plead guilty to a crime which he did not commit because he believes that blame should be assigned to someone and he is unable to understand the concept of causation and his role in the incident.”).

66. Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS., no. 3, Summer 2001 at 9, 11, available at <http://www.abanet.org/irt/hr/summer01/fellner.html>; see also GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 325 (1992) (“Persons with a mental handicap see their vulnerabilities as being private and personal. As a consequence, many would not inform the police of their limitations and they may even deliberately attempt to hide them.”).

67. See Ellis & Luckasson, *supra* note 59, at 430.

68. John J. McGee & Frank J. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION 55, 58 (Ronald W. Conley et al. eds., 1992) (citations omitted).

second obstacle is equally significant: “Because few mentally retarded people are able to determine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts.”⁶⁹ These limitations may affect issues as crucial as information establishing an alibi or information suggesting the culpability of third parties.⁷⁰

Even if counsel ascertains the useful information possessed by a defendant with mental retardation, his client’s limited ability to understand questions, instructions, and directions may make it very difficult to prepare him to testify.⁷¹ An additional impediment to effective testimony arises from the difficulty many individuals with mental retardation have with attention span, focus, and communication skills; if called to testify, they may not be able to maintain focus for a long period of time or understand the nature of questioning during cross-examination.⁷² They may not be able to understand subtle questions or the gravity of responding precisely. Easily tricked and confused, a person with mental retardation may not be able to verbalize his thoughts coherently, or worse, he may be nonresponsive on the stand.⁷³ Counsel who understand their clients’ limitations will avoid those risks—but often at the cost of foregoing their clients’ testimony, even when the client does not have a criminal record. That decision, however, may lead the jury to conclude that the reason the defendant is not testifying is because he is guilty.⁷⁴

C. *Inappropriate Demeanor*

The final factor noted in *Atkins* as heightening the risk of wrongful execution for persons with mental retardation is that their demeanor “may create an unwarranted impression of lack of remorse for their crimes.”⁷⁵ Although remorse is generally only significant in the sentencing context, it may play a role in judicial sentencing in

69. Ellis & Luckasson, *supra* note 59, at 428–29.

70. *Id.* at 428 (“Even when a person with mental retardation can verbalize effectively, memory will often be impaired. This is particularly true of events which the individual had not identified as important.”); *see also* Katie R. Williams et al., *Emotion Recognition by Children with Down Syndrome: Investigation of Specific Impairments and Error Patterns*, 110 AM. J. ON MENTAL RETARDATION 378, 390 (2005) (documenting impaired recognition of emotion in one subgroup of persons with mental retardation).

71. Ellis & Luckasson, *supra* note 59, at 428.

72. *Id.* at 429.

73. *Id.* at 428 (“Many mentally retarded people have limited communication skills. . . . [I]t would not be unusual for a mentally retarded individual to be unresponsive . . . or to be able to provide only garbled or confused responses when questioned.”).

74. *See* John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 487 (2008) (discussing the likelihood that juries will infer guilt from the defendant’s failure to take the stand); James E. Beaver & Steven L. Marques, *A Proposal to Modify the Rule on Criminal Conviction Impeachment*, 58 TEMP. L.Q. 585, 609 (1985) (“Jurors expect innocent defendants to respond to false criminal accusations. From silence jurors draw an inference of guilt. The defendant who appears to withhold relevant information is likely to be viewed as guilty.” (footnote omitted)).

75. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

noncapital cases as well as in jury determinations of “deathworthiness.” Moreover, closely related risks of inferences of a defendant’s mental state are present in many guilt determinations of persons with mental retardation.

The consensus among social science researchers is that “[d]evelopmentally disabled people typically lack social skills and have not had the same opportunities or peer group contact so critical in the development of appropriate social behavior that normal individuals have had.”⁷⁶ Moreover, the cognitive limitations of individuals with mental retardation often result in poor impulse control and inattentiveness, which may lead the defendant to be perceived as cold, aloof, and avoidant.⁷⁷ Finally, if a defendant with mental retardation is trying to hide his disability behind a “cloak of competence,” he may adopt a “tough guy” persona by bragging about his physical strength and intellectual prowess—or by assuming posture and expressions that are read as braggadocio.⁷⁸

This kind of demeanor and behavior is obviously detrimental to sentencing decisions, whether capital or noncapital. If a defendant with mental retardation smiles when the witnesses testify to the grisliness of the crime, or if he stares off into space, negative inferences about his moral culpability are likely. Inferences about his guilt are also possible because, among persons with ordinary social skills, such behavior suggests, respectively, pleasure or avoidance, and either one suggests guilt. Moreover, revulsion at a defendant’s pleasure or indifference to another’s suffering may also distract jurors from questions of intent that might otherwise be raised by the defendant’s cognitive impairment, thus leading to erroneous conviction of a greater, as opposed to a lesser, offense. Finally, if the defendant does testify and answers inconsistently, or nervously, or with inappropriate laughter, a jury may determine him to be a liar and convict him even when the prosecution’s evidence of guilt is weak.

D. Vulnerability to Exploitation by Codefendants and Snitches

To the Supreme Court’s three sources of greater likelihood of wrongful conviction, we would add a fourth: vulnerability to exploitation by other criminals. This vulnerability may arise on multiple occasions: at the time of the crime, at arrest, in jail, or at plea bargaining.

People with mental retardation often commonly have poor impulse control, which increases the likelihood that any crime they do commit will be an impulsive one.⁷⁹ In part because of the desire of their caregivers to protect them, persons with mental

76. SARAH F. HAAVIK & KARL A. MENNINGER, II, *SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON* 152 (1981).

77. Ellis & Luckasson, *supra* note 59, at 429 (“[A]t trial the individual may appear deviously to steer away from certain lines of testimony or may appear obstinate when in fact his attention disability prevents him from responding appropriately.”).

78. *Id.* at 430 (“It is therefore not surprising when a mentally retarded person brags about how tough he is or how he outsmarted a victim, when in fact, he accomplished neither feat.”); *see also* ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE* (1967).

79. *See, e.g.*, Ellis & Luckasson, *supra* note 59, at 429; Kim Taylor-Thompson, *States of Mind/States of Development*, 14 *STAN. L. & POLY REV.* 143, 153 (2003) (implying adolescent impulsiveness can minimize their regard for the consequences of their behavior).

retardation have often been taught to be compliant.⁸⁰ Because they have difficulty recognizing social cues, understanding the reactions of others, or comprehending their own role in relation to another,⁸¹ the tendency to be compliant makes persons with mental retardation vulnerable to the manipulation of others with criminal purposes. This vulnerability is increased by their typically poor self-image and low self-esteem, and the consequent drive to be perceived as normal and to be liked.⁸²

Therefore, when a person with mental retardation commits a crime with a person of normal intelligence—or is simply present when a person of normal intelligence commits a crime—it is very likely that the criminal design and greater (if not *sole*) moral responsibility lies with the person who has no intellectual impairment. However, if they are both arrested, the person with mental retardation is far more likely to trust the instructions of the other person—and to take on more than his share of the blame as a result.⁸³ Interestingly, a dysfunctional amygdala predicts such overly trusting behavior, and a significant subset of persons with mental retardation is known to have high levels of atrophy in the amygdala as persons age.⁸⁴

Thus, the same vulnerability to suggestion and compliance with authority that makes persons with mental retardation more likely to falsely confess to crimes they had no role in also makes them more likely to overstate their role in crimes in which they had some part, particularly if a trusted “friend” is urging such an account of the crime. Likewise, when it comes time to make a deal, the person of normal intellectual ability is likely to be the one to turn state’s evidence in exchange for reduced charges. Finally, all of these vulnerabilities together make the defendant with mental retardation a probable target of a “snitch” once he is incarcerated; he is likely to be willing to talk to a snitch, more likely than other defendants to say something incriminating (whether true or not) to the snitch, and less likely to be able to muster convincing evidence that the snitch made it all up.

V. PROTECTING PERSONS WITH MENTAL RETARDATION IN THE CRIMINAL JUSTICE SYSTEM

Thus, because of their susceptibility to falsely confessing, their impaired ability to assist counsel, the frequency with which their demeanor will be misinterpreted, and their vulnerability to manipulation by suspects, persons with mental retardation face a heightened risk of wrongful conviction. No single solution can eliminate all of

80. Dick Sobsey & Tanis Doe, *Patterns of Sexual Abuse and Assault*, 9 *SEXUALITY & DISABILITY* 243, 252 (1991).

81. McGee & Menolascino, *supra* note 68, at 59.

82. ROSALYN KRAMER MONAT, *SEXUALITY AND THE MENTALLY RETARDED* 8 (1982) (“The mildly mentally retarded are often viewed as having very poor self imagery and self worth.”).

83. See, for example, *Ballou v. Booker*, 777 F.2d 910, 911 (4th Cir. 1985), which is “suggesting that defendant’s confession concerning sexual assault occurred because victim’s parents urged him to make such a statement to police.” Nevins-Saunders, *supra* note 32, at 24 n.121.

84. J.D. Pinter et al., *Amygdala and Hippocampal Volumes in Children with Down Syndrome: A High Resolution MRI Study*, 56 *NEUROLOGY* 972 (2001).

these risks, but several additional procedural protections, in combination, can significantly diminish them.

A. Right to a Hearing on Mental Retardation

Identification of those defendants who have mental retardation is the first step. Any defendant charged with a felony should be provided with the opportunity to prove he has mental retardation. To establish a prima facie showing of mental retardation, the defendant may present evidence such as testimony concerning the defendant's difficulty communicating with counsel, school records showing his enrollment in special education programs, IQ testing results, or an affidavit from the defendant's parents regarding his developmental disabilities. Once a prima facie showing has been made (unless the prosecution concedes the issue) the defendant should be entitled to a pretrial hearing to establish mental retardation. The pretrial hearing should be conducted by a judge, in part because judges are more likely to gain expertise in this determination, and in part because it would be inefficient to empanel a jury to determine this issue as early in the proceedings as would be necessary.

B. Pretrial "Atkins" Hearings to Determine Mental Retardation⁸⁵

The pretrial hearing to establish mental retardation for purposes of eligibility for additional procedural protections would be similar to hearings to establish mental retardation in capital cases pursuant to *Atkins*.⁸⁶ As is true in capital cases, defendants would be required to meet the three-pronged clinical definition of mental retardation established by the AAMR⁸⁷ and the APA in its DSM-IV-TR.⁸⁸ This three-pronged clinical definition, cited with approval in *Atkins*, defines mental retardation as (1) significantly subaverage intellectual functioning; (2) accompanied by significant limitations in adaptive functioning; (3) manifested before the age of eighteen.⁸⁹

85. In many jurisdictions, e.g., South Carolina, a defendant charged with a capital crime who alleges mental retardation is entitled to a pretrial determination of his disability; if the defendant is found to be retarded, the case will proceed noncapitally, and if found not to be retarded, a capital trial will follow. In such jurisdictions, our proposal will mesh easily with existing procedures. In other jurisdictions, e.g., Oklahoma, the mental retardation determination is made after conviction. Such jurisdictions could continue to hold the capital ineligibility determinations after conviction, but would have to add a pretrial determination for the purposes of determining eligibility for additional protections. For a more detailed discussion of state procedures, see John H. Blume et al., *Implementing (or Nullifying) Atkins?: The Impact of State Procedural Choices on Outcome in Capital Cases Where Intellectual Disability Is at Issue* (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 2010-011, 2010), available at <http://ssrn.com/abstract=1670108>.

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

87. AM. ASS'N ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* 5 (9th ed. 1992) [hereinafter AAMR].

88. DSM-IV-TR, *supra* note 25, at 41.

89. The clinical definitions of mental retardation delineated in *Atkins* are as follows:

AAMR: *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas:

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To meet the first prong of the definition, the individual's significantly subaverage intellectual functioning must be demonstrated by a standardized intelligence test which shows a performance that is "approximately two standard deviations below the mean [of an appropriate assessment instrument], considering the standard of error of measurement for the specific assessment instruments used and the instruments' strengths and limitations."⁹⁰ Thus, the first prong may be satisfied by individuals who obtain IQs of 75 and below.⁹¹

To meet the second prong, the individual must experience significant limitations in adaptive skill sets.⁹² The most commonly demonstrated deficits proven by claimants include deficits in functional academics and social skills.⁹³ To prove such deficits, the defendant may call upon teachers, friends, family, and employers to testify.

To establish the third prong, the individual must demonstrate that his disability manifested before the age of eighteen. This can be established by presenting evidence of the individual's social history through school records, medical records, and witness statements from peers and teachers who knew the defendant during childhood and adolescence.⁹⁴

If the defendant establishes, by a preponderance of the evidence, that he is a person with mental retardation under the three-pronged definition approved in *Atkins*, then he would be entitled to the special procedures discussed below.

C. Additional Protections for Felony Defendants with Mental Retardation

1. Providing Counsel or an Advocate with Training in Mental Retardation

Persons with mental retardation would be entitled to a court-appointed advocate who has training and experience in mental retardation. This requirement could be

communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Atkins, 536 U.S. at 309 (quoting AAMR, *supra* note 87, at 5).

APA: The essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Id. (quoting DSM-IV-TR, *supra* note 25, at 41); *see also* Blume et al., *supra* note 46.

90. AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 13, 14, 58, 198 (10th ed. 2002).

91. DSM-IV-TR, *supra* note 25, at 41-42 ("[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

92. *See* adaptive skill sets defined by AAMR, *supra* note 87, and DSM-IV-TR, *supra* note 25. *See also* *Atkins*, 536 U.S. at 308.

93. John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 TENN. L. REV. 625, 634 (2009) (showing that deficits in functional academics and deficits in social skills are the most commonly successful deficits proven in *Atkins* claims).

94. Blume et al., *supra* note 46, at 696.

met by appointing counsel who has experience working with clients with intellectual disabilities, or it could be met by appointing an additional advocate with expertise in mental retardation, such as a legal guardian, psychologist, social worker, or education professional. Because individuals with mental retardation do not comprise a homogeneous group, it is especially important to have professionals who have experience in dealing with a wide spectrum of individuals with mental retardation.⁹⁵ These experienced professionals would work with the defendant with mental retardation and his attorney in indentifying key facts and preparing for trial. They would serve as a part of his defense team and be present at every step of the trial to provide reassurance to the defendant and advice to counsel on how best to work with the defendant.⁹⁶ These experienced professionals could be found in a special unit within the public defender's office, or the work could be contracted out. If the latter, both attorneys and human service professionals would have to be screened for the adequacy of their background.

This provision would have multiple benefits that reduce the risk of wrongful conviction. Communication between lawyer and client would improve, as would access to exculpatory information. Lawyers would be less likely to assume the accuracy of a confession. The determination of whether the client should testify could be more informed, and the client could be better prepared to testify. The possibility of defenses or partial defenses based on mental state would not be ignored. Maybe most importantly, clients would be less likely to plead guilty to offenses they had not committed simply because of their susceptibility to pressure from authority figures.

2. *Creating Safeguards Against the Admissibility of False Confessions*

There is significant evidence in support of the proposition that *all* interrogations of criminal suspects should be videotaped in their entirety.⁹⁷ This measure has been adopted in several states,⁹⁸ but it is not constitutionally required. There are many benefits to video-recording interrogations, including deterrence of coercive police

95. Kenneth J. Weiss et al., Commentary, *Atkins and Clinical Practice*, 32 J. AM. ACAD. PSYCHIATRY & LAW 309, 309 (2004) ("The definition of mental retardation . . . is not etiologically based. . . . Because of its heterogeneity, clinicians skilled in assessment of this population [individuals with mental retardation] must be utilized."); see also Ludwik S. Szymanski & Maija Wilka, *Childhood Disorders: Mental Retardation*, in 1 PSYCHIATRY 687 (Allan Tasman et al. eds., 2d ed. 2003).

96. The advice of such experts would also be valuable in marginal cases where the defendant does not quite meet the definition of mental retardation but has significant intellectual impairments. One might hope that over time, lawyers would come to consult such professionals even in marginal cases after seeing how useful they were with clients found to be mentally retarded.

97. See Kassin et al., *supra* note 56, at 25 (recommending that "all custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator"); see also Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 217 (2011) (discussing that "electronically recording investigations and making the record available to all parties" would increase the transparency of the investigatory process).

98. Alaska, Minnesota, Illinois, Maine, New Mexico, New Jersey, Wisconsin, North Carolina, and the District of Columbia require recordings of custodial interrogations in some circumstances. Kassin et al., *supra* note 56, at 26.

tactics in drawing out confessions and the provision of an objective means for a judge and jury to understand the circumstances that may have led to a confession.⁹⁹ Interestingly, this may as often inure to the benefit of the prosecution as to the benefit of the defendant; it nips in the bud false allegations of coercion, deception, and faulty police recollection. While it does not consistently advantage either side, it does consistently promote accuracy. But because error, suggestibility, and confusion are so much more frequent when the defendant has mental retardation, even states that do not uniformly videotape confessions should do so when the defendant has mental retardation. Videotaping will deter conscious coercion on the part of police officers, and it will illuminate unintentional pressure and suggestions by providing an accurate portrayal of the demeanor of the client, as well as the information conveyed by the accused and the pressures exerted by interrogators. These videotaped recordings will allow judge and jury to better determine the credibility and voluntariness of confessions made by the suspect with mental retardation.¹⁰⁰

If an interrogation of a person with mental retardation is not recorded and incriminating statements are elicited—as might easily happen in ignorance when police are unaware of his impairment—we would deem any resulting statement inadmissible unless the defendant waived his *Miranda* rights in the presence of counsel. This measure will deter interrogators from either deliberately or inadvertently coercing individuals with mental retardation into waiving their *Miranda* rights, and it will lessen the likelihood that suggestive comments and leading questions will go unnoticed.

Even videotaped confessions, particularly of persons with mental retardation, may be unreliable. Due to their cognitive limitations, persons with mental retardation confess falsely regardless of the interrogation techniques used. Thus the statement may simply be not true. This suggests the desirability of some form of assurance that the confession is accurate. Although the Due Process Clause does not require a showing of reliability,¹⁰¹ many jurisdictions respond to the risk of false confessions either by preconditioning admissibility upon some form of evidence that the confession is reliable¹⁰² or by precluding conviction in the absence of corroboration.¹⁰³ Whatever the general desirability of such rules, we think that confessions by persons

99. *Id.*

100. *Id.* at 27 (explaining that when interrogations are video-recorded and the camera is placed at a perspective that captures a balanced view of both suspect and interrogator, juries “make more informed attributions of voluntariness and guilt”); see G. Daniel Lassiter et al., *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867, 867 (2002).

101. See *Colorado v. Connelly*, 49 U.S. 157, 166–67 (1986).

102. The corroboration of confessions is not a new phenomenon. In fact, in 1954 the Supreme Court established a trustworthiness rule in *Opper v. United States*. This rule requires that the prosecution may not introduce a confession unless it provides “substantial independent evidence which would tend to establish the trustworthiness of the statement.” *Opper v. United States*, 348 U.S. 84, 93 (1954); see also Kassin et al., *supra* note 56, at 10 (discussing the corroboration rules for confession evidence).

103. The *corpus delicti* (“body of the crime”) rule is the best-known example of such a rule, but it is limited to murder cases. See Kassin et al., *supra* note 56, at 10.

with mental retardation should be considered presumptively unreliable unless supported by sufficient corroborating evidence. Therefore, the admissibility of even videotaped confessions should require sufficient and independent corroborating evidence for the confession to be admitted at trial as evidence. Examples of sufficient corroborating evidence include forensic evidence such as DNA, eyewitness identification, or independent facts from the suspect that could only be known by someone intimately connected with the crime.

A focus on protecting the constitutional rights of persons with mental retardation might also lead to a requirement that specially appointed counsel be present throughout the interrogation process of persons with mental retardation, since so often such persons do not knowingly waive their rights. We think the evidence is compelling that most confessions obtained from persons with mental retardation are not the product of knowing and voluntary waivers, and consequently, often should be suppressed on constitutional grounds. However, our focus here is wrongful conviction, and if the interrogation is both videotaped in its entirety and supported by sufficient corroborating evidence, we think that the interest in accuracy is sufficiently accommodated even in the absence of counsel.

3. *Assuring the Reliability of Informant Testimony*

Jailhouse informants, like confessions, are unreliable under the best of circumstances, because they have ulterior motives for offering information to police. Informants may trade information in exchange for more lenient sentences or for greater protection and benefits within the prison walls.¹⁰⁴ Although at times informant testimony may be legitimate, very often it is completely fabricated.¹⁰⁵ Not surprisingly, false informant testimony is one of the leading causes of wrongful convictions in capital cases.¹⁰⁶

104. Death row exoneree Ron Williamson, who is not a person with mental retardation, provides a prototypical example. In 1988, Williamson was wrongfully convicted of the murder of Debra Sue Carter. When trying Williamson, the prosecution relied heavily on the testimony of jailhouse informant Terri Holland, who testified that she heard Williamson confessing to the murder of Carter. Convinced, the jury sentenced Williamson to death. Holland was in jail on her third felony conviction for writing bad checks, and although she denied that she received any compensation for her testimony, her charges were dealt with very leniently. DNA evidence exonerated Williamson after he served eleven years for a crime he did not commit. See JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 163–203 (2001).

105. Leslie Vernon White, a prolific jailhouse snitch, provided fabricated informant testimony in over forty cases. In one interview White discussed the typical “snitching” process, as follows:

Informants will swarm to a hot case . . . and the first one there will organize a “booking.” That is the term for incriminating admissions that the first inmate will claim to have heard from the target. Then the first snitch will recruit a second one to back up the story about hearing a confession. This corroborates the primary snitch, and allows the second one to “get in the car”—the metaphor for cutting short a jail stay by snitching.

Id. at 166–67.

106. Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 *GOLDEN GATE U. L. REV.* 107, 107 (2006) (discussing findings of Northwestern University Law

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In response to the threat of false informant testimony, some countries such as Canada have placed limits on the use of informant testimony at trial. In Canada, a trial judge may consider various factors to determine the credibility of a jailhouse informant's testimony and may exclude it if he finds it unreliable.¹⁰⁷ Even if it is admitted, the judge may give the jury a warning about accepting a jailhouse informant's testimony as credible.¹⁰⁸ At least one American jurisdiction has placed similar limitations on informant testimony; an Illinois statute requires that a trial court conduct a "reliability inquiry" when evaluating in-custody informant testimony, at which the state must prove reliability by a preponderance of the evidence.¹⁰⁹

The admission of informant testimony without corroborating evidence places all innocent individuals at risk of wrongful conviction. The risk, however, is greater for individuals with mental retardation for several reasons. First, because of their propensity to trust, persons with mental retardation are less likely to be cautious about speaking to and being seen in the presence of known snitches, thereby providing an opportunity for snitching; second, persons with mental retardation are less likely to have the recall to provide evidence that a snitch has lied or the capability of testifying as persuasively as the snitch does; and third, persons with mental retardation are more vulnerable because they are more likely to have falsely confessed, and the double whammy of a false confession and a snitch virtually assures conviction.

School's Center on Wrongful Convictions that 45.9% of documented wrongful capital convictions have been traced to false informant testimony, "making 'snitches the leading cause of wrongful convictions in U.S. capital cases'" (citation omitted)).

107. Such factors include confirmatory or corroborating evidence and the importance of the informer's testimony to the Crown's case. See Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 767 (2002).

108. *Id.*; see also *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 (Can.). The Supreme Court of Canada's decision in *Vetrovec* established a flexible rule by which a trial Judge may warn the jury of the lack of reliability concerning a jailhouse informant's testimony: "What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness." *Id.* at 831.

109. Natapoff, *supra* note 106, at 113-14; see also 725 ILL. COMP. STAT. 5/115-21(c) (2010). The following are factors considered:

- (1) the complete criminal history of the informant;
- (2) any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant;
- (3) the statements made by the accused;
- (4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
- (5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the recantation, and the names of the persons who were present at the recantation;
- (6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and
- (7) any other information relevant to the informant's credibility.

Id.

Therefore, unless there is clear and convincing evidence corroborating the informant's testimony, it should be inadmissible against a person with mental retardation.¹¹⁰

4. *Assuring the Reliability of Codefendant Testimony*

Codefendants, like informants, have strong ulterior motives to inculcate the defendant. As has often been observed, the decision whether or not to cooperate poses a "prisoners' dilemma": if both codefendants remain silent, they are both better off; if both talk to the authorities, both are worse off; and if one talks but the other does not, the one who talks is much better off and the one who does not is much worse off. When two individuals, one of whom is a person with mental retardation, are suspected of involvement in a crime, the risk is high that the person who has mental retardation will receive more than his fair share of the blame. That is, the more mentally adept codefendant will rush to enter into a plea agreement with the prosecution to shift the culpability from himself onto the vulnerable individual with mental retardation, whereas the more trusting person with mental retardation will not want to rat out his "friend" even if the "friend" was the instigator of the criminal activity, or even when he has enlisted the person with mental retardation as an unwitting participant in a crime. For example, in the *Atkins* case, two men—one, Daryl Atkins, a person with significant cognitive limitations—were indicted for the abduction, armed robbery, and slaying of Eric Nesbitt.¹¹¹ Although initially both were indicted for capital murder, Atkins's codefendant, William Jones, made a deal with the prosecution so that he would not face the death penalty.¹¹² Jones agreed to plead guilty to first-degree murder in exchange for his testimony against Atkins, testimony that identified Atkins as the shooter.¹¹³ Although both Atkins and Jones testified, Jones's testimony was "both more coherent and credible than Atkins'" and, consequently, it was sufficient to establish Atkins's guilt.¹¹⁴ Ultimately, however, after the remand from the Supreme Court, prosecutorial misconduct in withholding evidence that impeached Jones's story came to light, which led to a life sentence for Atkins.¹¹⁵

To prevent miscarriages of justice brought about by the exploitation of the weaknesses of one codefendant, limits should be placed on plea bargaining in the shadow of mental retardation. We propose that someone other than the prosecutor, such as an independent commission or a judge, should have to approve the prosecution's decision to enter into a plea bargain with the codefendant of a person

110. Cf. DWYER ET AL., *supra* note 104, at 355 (advocating more generally that "jurisdictions should set up a high-level screening committee of prosecutors to vet the jailhouse snitch/informant's testimony and all the attendant circumstances before permitting it to be used at trial").

111. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

112. *Id.* at 307 n.1.

113. *Id.*

114. *Id.* at 307.

115. *See generally* *In re Virginia*, 677 S.E.2d 236 (Va. 2009) (denying writ of mandamus after trial court's decision to commute Atkins's sentence to life imprisonment).

with intellectual disabilities. Just as in determining the reliability of informant testimony, we would also require that there be clear and convincing evidence that the plea bargain accorded with the relative moral culpability of the two parties.

5. *Informing the Jury of Heightened Risks of Error*

Expert testimony tailored to the specific case concerning sources of unreliability relevant to mental retardation is already often permitted. Most commonly, testimony on the greater suggestibility of persons with mental retardation is often permitted both at pretrial hearings on the admissibility of confessions and before the jury. When mens rea is an issue, testimony concerning the greater likelihood that a person with mental retardation would be unaware of the risk he created is appropriate, as might be testimony concerning the defendant's susceptibility to coercion when a duress defense is raised. The admissibility of this testimony requires no reform, though there might be disputes about the proper application of evidentiary rules in some cases. We note here, however, that obtaining experts is not always easy and is virtually never cheap, so in some cases expert testimony will not be available. When it is not, defense lawyers should request, and judges should give, instructions tailored to the specific risks of error present in that case. Thus, for example, when the confession of a defendant with mental retardation is admitted, the jury should be instructed that persons with mental retardation (1) are more susceptible to police interrogation; (2) falsely confess at higher rates than persons without an intellectual disability; and (3) are generally impaired in ways that both increase typical tendencies to please authority figures, such as police interrogators, and increase the likelihood that they will accept blame for actions they may not have committed.

6. *Altering Pertinent Burdens of Proof*

Finally, states should consider altering some burdens of proof where the presence of mental retardation either makes it less likely that the defendant is in fact guilty of the crime with which he is charged, or makes it less likely that he could demonstrate his innocence if he is in fact innocent. The targets of such a change will vary from state to state, but a prime example of the first justification for altering the burden of proof for defendants with mental retardation is the law of felony murder. Felony murder implies malice sufficient to prove murder from the mental state necessary to commit a felony. The rule has often been criticized as theoretically wrong in every application,¹¹⁶ but it is particularly unjust where the defendant, due to cognitive impairments, not only *did* not but *could* not apprehend the risk of death his actions created. In jurisdictions with a felony murder rule, it would be a great step toward justice, not to mention compassion, to require the state to prove a state of mind that warrants a conviction of murder, at least where the defendant is mentally retarded and, therefore, much less likely to be as morally culpable as an intentional murderer.

116. Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008).

Likewise, placing the burden of proof of affirmative defenses on persons with mental retardation is unjust, though not because the justification or excuse is more likely to be present if the defendant has mental retardation. Rather, defendants with mental retardation, regardless of the merits of their defense, will often be so impaired in their ability to recall and/or persuasively demonstrate facts that meet the requirements of that defense that they will fail to meet the burden of proof simply because of their disability. To ask a person with mental retardation to recall the facts necessary to establish self-defense, duress, or necessity, and to be able to testify persuasively enough meet the burden of proof, asks more than most persons with mental retardation can do—even when they in fact were justified in the actions they took. We think that requiring the prosecution to shoulder the burden of proof here is more likely to lead to accurate determinations of guilt.

VI. CONCLUSION

In this article we have argued for a number of procedural protections to safeguard mentally retarded defendants against the heightened risk of wrongful conviction, i.e., providing counsel or an advocate with training in mental retardation, creating safeguards against the admissibility of false confessions, assuring the reliability of informant and codefendant testimony, informing the jury of the heightened risk of error and altering current burdens of proof. The careful reader will have noted that we have not claimed that these procedural protections are mandated by the U.S. Constitution or, for that matter, by any other existing legal requirement. Such a reader would also observe that these procedural protections, while designed to provide an interlocking safety net for defendants with mental retardation, could be adopted individually. We have elected to sketch several procedural protections rather than defend one or another as the most crucial. Each one aims at ameliorating particular risks that lead to wrongful convictions of persons with mental retardation, and we hope that some states will study and adopt one or more of them. Of course, even a jurisdiction that has adopted all of our proposals might not prevent the wrongful conviction of all persons with mental retardation. In part, this is because even persons of normal intelligence are wrongfully convicted; and in part this is because the range of impairments experienced by persons with mental retardation is great and it is difficult to respond to all of the impairments that impact the wrongful conviction rate. However, for any criminal justice system committed to protecting the Lennies of the world against the *heightened* risk of being found guilty of crimes they did not commit, these procedures are a necessary beginning.