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SUSPECTS, DEFENDANTS, AND OFFENDERS WITH MENTAL RETARDATION IN WYOMING

*Diane Courselle, Mark Watt, Donna Sheen**

I. INTRODUCTION

[E]quality does not necessarily mean equal treatment In other words, persons with disabilities must at times be treated differently from others in order to ensure protection of their rights and to ensure an equal opportunity to benefit from services. Persons 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.¹

As the 21st century dawns, the rights of people with disabilities²

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1. Dick Thornburgh, *Foreword* to THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS, at xvi (Ronald W. Conley et al. eds., 1991) [hereinafter CJS & MR] (Dick Thornburgh was the U. S. Attorney General when the Foreword was written, serving from 1988 to 1991.).

2. To respect the personal dignity of people with disabilities, the authors have

are more clearly defined and more widely accepted than ever before. Constitutional protections, federal civil rights laws, especially the Americans with Disabilities Act³ (ADA), and the work of disability organizations and advocates, are changing attitudes about people with disabilities. Despite this progress, areas of discrimination persist. The criminal justice system has often been, and continues to be, a dumping ground for citizens with mental disabilities who society does not adequately support or know what to do with.⁴ Professionals and the media usually focus on individuals with mental illness when discussing the problem.⁵ Undoubtedly, the criminal justice system faces serious and pervasive problems related to people with mental illness, but people with mental retardation, or a combination of mental retardation and mental illness, have unique problems that must be addressed differently.⁶ Society, in general, and the legal system, specifically, often give little attention to people with mental retardation and similar developmental disabilities who encounter the legal system as suspects, defendants, or inmates.⁷ "There is an intuitive sense that the laws, rules, and procedures of the criminal justice system are not developed with these individuals in mind, reducing the likelihood that justice will prevail."⁸

This article focuses much needed attention on the citizens with mental retardation who become involved with the criminal justice system.⁹ In part, it represents a three-year effort by the Wyoming Institute

attempted to use "person first" language throughout the article. Person first language places the person before the disability, acknowledging that he or she is an individual or *person first*. For example, saying "a defendant with mental retardation," rather than "a mentally retarded defendant."

3. 42 U.S.C. §§ 12101-12213 (1994).

4. See generally, James W. Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 416-21 (1985) [hereinafter Ellis & Luckasson]; Jane Nelson Hall, *Correctional Services for Inmates with Mental Retardation*, in CJS & MR, *supra* note 1, at 167-171; R.C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 65, 95, 105, 118, 123 (1983).

5. Ellis & Luckasson, *supra* note 4, at 414-15.

6. See *id.* at 415-16.

7. Similar problems exist for crime victims with mental retardation, but those issues are beyond the scope of this article. See generally, Ruth Luckasson, *People with Mental Retardation as Victims of Crime*, in CJS & MR, *supra* note 1, at 209-20; DICK SOBSEY, VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END OF SILENT ACCEPTANCE? (1994).

8. Russell C. Petrella, *Defendants with Mental Retardation in the Forensic Services System*, in CJS & MR, *supra* note 1, at 79.

9. Differentiation of "mental retardation" and "developmental disorders": For the purposes of this article, the use of the term developmental disabilities is not an accurate reflection of the topic to be addressed. The purpose of this article is to focus on the limited intellect or cognitive functioning most characteristically seen with diagnosed mental retardation. The rubric of "developmental disorders" also includes such disorders

for Disabilities' (WIND) Equal Access to Justice Project, which was funded by the Governor's Planning Council on Developmental Disabilities. The project's primary goal was to increase awareness and provide training so that criminal justice professionals are better equipped to recognize and accommodate the special needs of individuals with mental retardation when they encounter the criminal justice system. In order to do this, the project conducted research in the summer of 1999 identifying inmates with mental retardation currently incarcerated in the Wyoming state prison system, and examining their adjudication processes. This article includes some of the research findings to help demonstrate problems faced by citizens with mental retardation in Wyoming when they encounter the criminal justice system as suspects, defendants, or inmates. In addition, this article provides attorneys with critical information and guidance on issues related to identifying a client's disability, representing a client with mental retardation, dealing with issues of competency and criminal responsibility, and obtaining better sentencing and rehabilitation opportunities for clients with mental retardation in Wyoming. Finally, the article advocates for immediate changes in the way Wyoming addresses people with mental retardation who encounter the criminal justice system.

II. NATURE OF THE PROBLEM

[T]he principle of normalization . . . holds that all individuals with mental retardation must have every possible opportunity to participate in the activities of everyday life, including work, play, travel, learning, shopping, and all other activities we take for granted. It is a principle that has driven this nation's deinstitutionalization efforts Now, most of these persons are with their families, living independently or in group homes - and that is a blessing. But with that blessing have come the inevitable predictions by those who say that as people with mental retardation face the temptations that exist outside structured institutions, their involvement in criminal activity is destined to increase. We must prove such predictions wrong. We cannot free a

as learning disorders, motor skills disorders, communication disorders, and pervasive developmental disorders (including Autistic Disorder, Rett's Disorder, Aspergers, and Child Disintegrative Disorder). Though features of pervasive developmental disorders such as Autistic Disorders may include limited intellectual ability, with other developmental disorders such as Aspergers disorders, the individual may in fact have average to high average intellectual ability. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 77 (4th ed. 1994) [hereinafter DSM-IV]. Consequently, the focus of this article will be on those individuals of marked limited intellectual functioning and throughout the remainder of the article will be referred to as mental retardation.

*significant number of persons with mental retardation from one institution only to see them sent to another—this nation's prison system.*¹⁰

People with mental retardation are generally law-abiding citizens.¹¹ "The best modern evidence suggests that the incidence of criminal behavior among people with mental retardation does not greatly exceed the incidence of criminal behavior among the population as a whole."¹² Those persons with mental retardation who commit crimes do so for the same complicated reasons as any other offender.¹³ Their upbringing, education, and social values instilled since childhood affect their behavior, as does their inability to find a job, association with the wrong crowd, or simple errors in judgment.¹⁴ Yet, at the same time, they are also much more susceptible to the influences of others and much less able to think through and fully understand the consequences of their actions.¹⁵

Whatever their reasons, when people with mental retardation break the law, some consequence is warranted. It is not fair to say that the criminal process is never appropriate because such a paternalistic reaction ignores the personal autonomy of citizens with mental retardation and perpetuates stereotypes of these individuals. However, some citizens with mental retardation are cast adrift, in the name of freedom and personal autonomy (or limited program budgets), without the supports or accommodations they need to survive in this complex society. In order for the criminal justice system to provide these individuals with an equal chance at a fair adjudication and to give them an opportunity for rehabilitation, criminal justice professionals must understand the effects of this disability and recognize the need to establish consequences that appropriately punish and rehabilitate, based on each individual's cognitive abilities.¹⁶

Research indicates that the legal protections of defendants with

10. Thornburgh, in CJS & MR, *supra* note 1, at xvii (emphasis added).

11. *Id.* at xxi.

12. Ellis & Luckasson, *supra* note 4, at 426.

13. Thornburgh, *supra* note 1, at xxi; James G. Exum, Jr. et al., *Points of View—Perspectives on the Judicial, Mental Retardation Services, Law Enforcement, and Corrections Systems*, in CJS & MR, *supra* note 1, at 4-5.

14. Thornburgh, *supra* note 1, at xxi.

15. *Id.*; Exum et al., *supra* note 13, at 4-6.

16. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, REPORT TO THE PRESIDENT: CITIZENS WITH MENTAL RETARDATION AND THE CRIMINAL JUSTICE SYSTEM (1991) [hereinafter REPORT TO THE PRESIDENT].

mental retardation are often compromised.¹⁷ In addition, general attitudes of devaluation, fear, and prejudice toward people with mental retardation permeate the criminal justice system, just as these attitudes permeate society.¹⁸ Judges, attorneys, law enforcement officers, corrections officers, psychologists, and other mental health professionals are given the tremendous responsibility of understanding and accommodating the disability, usually with very little training. They are expected to recognize, diagnose, determine the competency of, and choose appropriate accommodations for all individuals with mental retardation who encounter the criminal justice system. In reality, due to lack of knowledge and training, criminal justice professionals and mental health professionals often (1) miss the disability entirely, (2) confuse mental illness with mental retardation, (3) fail to understand and convey the significance of the disability in the adjudication process, and (4) fail to provide appropriate accommodations, from the time of arrest through adjudication, sentencing, and rehabilitation.¹⁹

A. The Problem from the Accused's Perspective

Individuals with mental retardation are at risk at every step of their involvement with the criminal justice system. As an initial matter, their disability creates a susceptibility to being involved in criminal activity by others who exploit their naiveté.²⁰ Individuals with mental retardation often have difficulty socializing and are overly eager to make and keep a friend, even if that friend sets them up to take the fall.²¹ Their disability may affect their degree of criminal responsibility. It can affect their ability to form the mens rea necessary for a particular criminal offense.²² They may misunderstand the exact nature of the crime, which, in some cases, may negate the specific intent to commit the crime.²³ They may be unable to control their impulsivity and therefore lack even a general intent to commit the act.²⁴ Their disability also may contribute to their apprehension when they do commit crimes. They are less apt to participate in an effective cover up of their crime or to escape while their

17. Richard J. Bonnie, *The Competency of Defendants with Mental Retardation to Assist in Their Own Defense*, in CJS & MR, *supra* note 1, at 97, 99.

18. Ellis & Luckasson, *supra* note 4, at 417 (stating that the notion that mental retardation is somehow linked to criminality, while disproved by research, persists in society).

19. REPORT TO THE PRESIDENT, *supra* note 16, at 3-22.

20. *See infra* notes 114-16 and accompanying text.

21. *See infra* notes 114-16, 270 and accompanying text.

22. *See infra* notes 266-81 and accompanying text.

23. *See infra* notes 271-81 and accompanying text.

24. *See infra* notes 266-81 and accompanying text.

cohorts are able to do so. As a result, they are often the last to leave the scene and the first to get caught.

At the point of arrest, individuals with mental retardation are easily intimidated by, or have an inordinate desire to please, authority figures such as police officers.²⁵ *Miranda* and other rights might be waived even though the individual often does not understand what those rights are or what it means to waive them.²⁶ Inappropriate questioning methods may lead to false confessions or inaccurate accounts of events because mental retardation is characterized by deficits in the ability to comprehend and accurately recall events.²⁷ The suspect with mental retardation's desire to please authority figures, along with susceptibility to suggestion through the use of leading questions and vulnerability to coercive questioning methods, may lead to "confessions" and "statements" that are of questionable reliability.²⁸

An individual with mental retardation may not understand the full consequences of taking the blame, or at least not understand well enough to assess who is to blame. "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."²⁹ Inadequate community supports also contribute to the problem. "This imposes major barriers to effective habilitation and may cause an offender with mental retardation to be imprisoned or institutionalized for lack of a suitable alternative."³⁰ "Defendants with mental retardation often fall through the cracks and receive inappropriate services because neither the criminal justice system nor the mental retardation system wishes to take primary responsibility for them."³¹

B. The Problem from the Criminal Justice System's Perspective

From the perspective of the criminal justice system, there are many facets to the problem of adjudicating, sentencing, and rehabilitating a person with mental retardation. In 1991, the President's Committee on Mental Retardation held a forum titled "Citizens with Mental Retar-

25. See *infra* notes 309-38 and accompanying text.

26. REPORT TO THE PRESIDENT, *supra* note 16, at 8.

27. *Id.*

28. *Id.*

29. Ellis & Luckasson, *supra* note 4, at 430.

30. REPORT TO THE PRESIDENT, *supra* note 16, at 19. See also, Hall, *supra* note 4, at 169 ("One can reasonably infer that some people who would have been in institutions end up in prisons instead.")

31. REPORT TO THE PRESIDENT, *supra* note 16, at 19.

dation and the Criminal Justice System.”³² The forum compiled information on the problems and pitfalls confronting suspects, defendants, and inmates with mental retardation at all stages of the criminal justice process.³³

The threshold problem was identification of the disability. “[I]t seems reasonable to assume that the low rate of referral of defendants with mental retardation for pretrial evaluation does, in fact, reflect a relatively common failure to recognize the ‘existence and magnitude of the disability’ and that underrecognition of the disability compromises the defendants’ constitutional interests.”³⁴ This is attributed partly to criminal justice professionals’ lack of training, which may causes them to miss signs of mental retardation or attribute those signs to a lack of education. An attorney may recognize that there is something wrong with the client but feel that the attorney can simply compensate for this by providing additional guidance or by substituting his or her judgment for the client’s. “[M]any defendants with mental retardation are *identified* and then *unidentified* because it better serves their legal interests.”³⁵ The limited identification is also attributed to the fact that many individuals with mild mental retardation learn to mask their disability and feign understanding to avoid the shame or embarrassment of admitting their confusion and bearing the undesirable social stigma attached to mental retardation.³⁶ Some individuals may also have other issues, such as mental illness, physical disabilities, or substance abuse problems that obscure the existence of the cognitive impairment.³⁷

When an attorney fails to recognize the disability, the client may receive inadequate representation and protection.³⁸ Attorneys are likely to spend less time interviewing clients with mental retardation when more time is really needed.³⁹ Clients with mental retardation are also in no position to monitor their attorney’s performance.⁴⁰ Even when the attorney recognizes the disability, resources available to obtain the appropriate diagnosis or the expert testimony necessary to gain sufficient understanding of the disability’s impact on the individual are usually limited.⁴¹ The attorney may have problems even finding a qualified fo-

32. Albert L. Anderson, *Preface to REPORT TO THE PRESIDENT*, *supra* note 16, at viii.

33. *Id.*

34. Bonnie, *supra* note 18, at 99; Exum, *supra* note 16, at 1-2.

35. Petrella, *supra* note 9, at 80-81.

36. Ellis & Luckasson, *supra* note 4, at 430.

37. *See infra* notes 146-47 and accompanying text.

38. Bonnie, *supra* note 17, at 100.

39. *Id.*

40. *Id.* at 99-100.

41. *See infra* note 172 and accompanying text.

rensic expert.⁴² Many psychologists and other mental health professionals deal exclusively in mental illness and lack the proper training and experience to accurately assess mental retardation. Only professionals with training and experience in the area of mental retardation and forensics are qualified to determine the level of mental retardation and competency to stand trial of a person with mental retardation.⁴³ Even when an attorney is aware of the disability, appropriately accommodating the disability to protect the individual's rights presents additional challenges.

If a defendant with mental retardation is convicted, rehabilitation or habilitation opportunities that accommodate the inmate's level of ability are usually inadequate or nonexistent.⁴⁴ While in prison, inmates with mental retardation are more likely to react to threatening situations with physical actions as opposed to the more difficult verbal or intellectual responses.⁴⁵ They also perform poorly in front of parole boards because of the intense verbal interaction required.⁴⁶ "[T]he inmate with mental retardation does more time, does harder time, gets less out of his time, and is more likely to be returned once released from prison."⁴⁷ Frequently, human service agencies that provide services and assistance to citizens with mental retardation are either not involved with the inmate prior to incarceration or abdicate their responsibility in favor of the correctional agency once the offender with mental retardation becomes involved with the criminal justice system. However, the correction agency usually lacks the knowledge and programming necessary to understand or address the inmate's disability appropriately.

Finally, but perhaps most important, "[t]he legal rules appropriate for defendants mental retardation have been, at best, an afterthought to the considerations for criminal defendants who are mentally ill."⁴⁸ As a result, a person with mental retardation will generally be found competent under present competency standards, because the standards are primarily geared toward characteristics of the person with mental illness.⁴⁹ The standards regarding criminal responsibility are similarly skewed toward the characteristics of mental illness.⁵⁰ In both cases, the standards do not adequately address the varying levels of ability of defendants

42. See *infra* notes 208-11 and accompanying text.

43. See *infra* notes 208-11 and accompanying text.

44. Hall, *supra* note 4, at 168.

45. Exum, *supra* note 15, at 12. See also, *infra* notes 135-36 and accompanying text.

46. Exum, *supra* note 15, at 12.

47. *Id.*

48. Ellis & Luckasson, *supra* note 4, at 415.

49. See *infra* notes 200-06 and accompanying text.

50. See *infra* notes 276-81 and accompanying text.

with mental retardation to understand and appreciate their actions. Many criminal justice professionals also fail to understand that determining competency is only a small part of providing reasonable accommodations to a person with mental retardation or low cognitive functioning. These professionals fail to realize that, as a matter of equal protection, these defendants also should be provided assistance in understanding every step of the judicial process, be assured sentences that accommodate their disability, and provided equal opportunities for rehabilitation.⁵¹

The forum on "Citizens with Mental Retardation and the Criminal Justice System" submitted recommendations in the form of a Report to the President of the United States.⁵² The committee also urged the United States Senate, House of Representatives, state governors, state legislatures, city governments, county commissioners, and heads of departments and agencies at all levels of government seriously to consider the committee's recommendations for addressing problems confronting persons with mental retardation in the criminal justice system.⁵³ The most important message relayed by the forum was that these problems would only be resolved through the cooperative efforts of mental health professionals and criminal justice professionals.⁵⁴

In summary, an attorney representing a defendant with mental retardation or low cognitive functioning, the prosecutor, and the judge must face difficult questions. Does the defendant understand the nature and consequences of the act? Did the defendant understand at the time of the act or only when it was explained later? Can the defendant accurately explain events? Is the defendant's explanation or description tainted by the influence or suggestion of others? Can the defendant understand his or her rights in the legal system, such as *Miranda* rights, the right to a trial, and the right to testify? Can the defendant assist the attorney in his or her defense? Is the defendant assisting the attorney? Was the confession voluntary, knowing, and reliable? Is the defendant competent to stand trial? Is the defendant competent to plead guilty? Is the defendant competent to make the decision to testify? What consideration should the judge or jury give to the disability when deciding guilt? Should the disability be considered a complete or partial defense or a mitigating factor reducing the defendant's culpability? What rights does the offender with mental retardation have to appropriate rehabilitation? Are there alternatives to incarceration that are better able to teach the offender responsible behavior, or should the offender be incarcerated in the same facilities

51. REPORT TO THE PRESIDENT, *supra* note 16, at 23-24, 29, 32-33.

52. *Introduction*, in CJS&MR *supra* note 1, at xxiv-xxvi.

53. REPORT TO THE PRESIDENT, *supra* note 16, at 23.

54. *Id.* at 29.

for the same terms as nonimpaired criminals? Are there any standards to apply in making these decisions?⁵⁵

These questions illustrate the complexity involved in adjudicating a client with mental retardation. Most have no definitive answers. The remainder of this article attempts to tackle at least some of the questions and to provide criminal justice professionals with some of the information and tools they will need to identify and reasonably accommodate a suspect, defendant, client, or inmate with mental retardation. In addition, this article attempts to identify some deficiencies within the current system and to propose some possible solutions.

III. THE SITUATION IN WYOMING

While it is clear that there are serious, nation-wide problems related to the adjudication and rehabilitation of individuals with mental retardation, the critical question addressed by this article is: What problems exist in Wyoming? To help determine this, WIND, in cooperation with the Department of Corrections and with funding from the Governor's Planning Council on Developmental Disabilities, conducted research in the summer of 1999.⁵⁶ The research provided case studies of inmates currently incarcerated in the state prison system. These case studies shed some light on the problems and provide a basis to advocate for changes in Wyoming.

A. Prevalence Rates of Inmates with Mental Retardation

Nationally, there is limited and conflicting information about the number of people with mental retardation in prisons, primarily because few states administer the level of testing and evaluation necessary to accurately diagnose mental retardation.⁵⁷ Some states, including Wyoming, currently administer group tests, followed up with more reliable tests when warranted.⁵⁸ Other states use only group intelligence quotient

55. See *id.* at 1-2.

56. The authors wish to acknowledge the valuable contribution of the research team who conducted this research during the summer of 1999. These researchers were, Gail Zahn, E.Ed, Principal Investigator, Director of Interdisciplinary Training, WIND; Donna Sheen, Project Coordinator; Ginny L. Chidsey, EMMDS, Division of Developmental Disabilities; Mark Watt Ph.D., J.D., private psychologist and attorney; William MacLean, Ph.D., Department Head, University of Wyoming Psychology Department; Monte Miller, Ph.D., Assistant Professor, University of Wyoming Department of Social Work; and Ken Heinlein Ph.D., Director of Research, WIND. The research results are unpublished at this time. Persons interested in the study may contact WIND for further information.

57. Petrella, *supra* note 8, at 83-84.

58. John H. Noble, Jr., & Ronald W. Conley, *Toward an Epidemiology of Relevant*

(IQ) tests.⁵⁹ Still others do no testing at all.⁶⁰ These and other factors make the scope of the problems difficult to determine.⁶¹ National estimates of the prevalence rates of offenders with mental retardation in prisons vary widely, from 9.5% in a 1971 study to a 1985 study that reported survey averages between 2.0% and 6.2% of the nation's prison population, depending on the identification method used.⁶²

The national survey, conducted by Denkowski & Denkowski and published in 1985, looked at individual state's prevalence rates of inmates with mental retardation in state and federal prisons.⁶³ According to the survey, of those states providing prevalence rates based on group and individual testing, Wyoming reported the highest prevalence rate.⁶⁴ The study reported Wyoming's prison population with mental retardation to be 5.3%, or nearly three times the national average.⁶⁵ Research conducted by the WIND Equal Access to Justice Project was not able to gather sufficient reliable data to accurately determine the current prevalence rates in Wyoming prisons, but the project's limited findings do not contradict the 1985 Denkowski study.⁶⁶ Both sources suggest that Wyoming's prevalence rate for inmates with mental retardation continues to be significantly above the national average.

B. Wyoming Case Studies on Inmates with Mental Retardation

WIND's Equal Access to Justice research project examined the adjudication of inmates in Wyoming who were suspected of having mental retardation or low cognitive functioning. During the spring and summer of 1999, project staff began an exploratory study of Wyoming inmates with possible cognitive disabilities in an attempt to determine whether the inmates' disabilities had been recognized and accommodated during adjudica-

Attributes, in CJS & MR, supra note 1, at 29 (citing G.C. Denkowski & K.M. Denkowski, The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation, in 12(1) CRIM. JUSTICE AND BEHAVIOR 53 (1985)). In addition, Department of Corrections personnel confirmed, during the 1999 research, that they continue to administer group testing followed up by individual testing when personnel feel it is necessary.

59. *Id.*

60. *Id.*

61. John J. McGee & Frank J. Menolascino, *The Evaluation of Mental Retardation in the Criminal Justice System, in CJS & MR, supra note 1, at 61-68.*

62. Noble & Conley, *supra note 58, at 29.*

63. *Id.*

64. *Id.*

65. *Id.* (noting Wyoming's diagnosis of mental retardation used only IQ testing with no adaptive behavior scales, which would affect the results, though not significantly).

66. Indeed one of the difficulties encountered in the research done pursuant to this project was the lack of reliable testing information.

tion. Through objective testing and the collection and careful review of selected inmate case histories focusing on the inmates' experiences in the criminal justice system, project researchers hoped to identify existing problems in Wyoming.⁶⁷ The inmates' personal stories provided poignant evidence of some of the problems that exist.

1. Research Methodology

The Wyoming Department of Corrections played an integral part in the research project, working diligently, with limited resources, to provide the initial information requested. The Department first conducted a file review of all inmates in the Wyoming prison system to identify inmates with possible IQ's of eighty or below. It then sought these inmates' initial consent to participate in the research. Next, the Department provided the research team with access to each consenting inmate's corrections file, for review by a researcher before scheduling inmate interviews. The files provided information about the crime(s) the inmate committed; the plea; actions taken by the inmate's attorney, the prosecutor, and the judge; information gathered in the presentence investigations; results of evaluations or assessments; and disciplinary reports during the inmate's incarceration.

The Department initially identified sixty-five men, out of a total in-state population of 944 male inmates. The researchers encountered problems with the IQ scores used by the Department in identifying the subjects for the study. Five of the male subjects did not have recorded IQ scores. For some of the inmates identified, the file contained an IQ score but not the name of the IQ test used to obtain the score or the date the test was administered. On still others, the test used was no longer considered to provide a valid IQ score. The Department identified five female inmates with possible cognitive impairments out of a total population of 144 inmates at the Wyoming Women's Center at the time. Similar problems with IQ scores existed here. Three inmates had IQ scores in their file, but no further information as to the date or name of the test. Two inmates had no IQ score available, the Department apparently based its identification of these two women solely on educational testing and/or factors not available in the inmate's file. Despite the fact that many IQ scores were unverified, they provided the best information available to identify inmates with mental retardation currently incarcerated in Wyoming. The scores were used only to identify the subjects for the research and as a comparator to our test results.

67. Because the research focused on inmates who had been convicted and imprisoned, the results had a built-in negative bias. The studied population was almost certain to be unsatisfied with its treatment by the criminal justice system. We acknowledge that the focus on persons already convicted, while presenting a manageable, easily testable sample, did not provide information about persons whose mental disabilities were identified early on, and, perhaps as a result, were able to achieve more favorable results.

Of the sixty-five men and five women initially identified, seven men declined to participate in the research from the outset. Thirteen men were unable to participate, either because of their current location or for disciplinary reasons. All five women agreed to participate at the initial stage. The research team then reviewed a total of fifty inmate files, forty-five men and five women. The research team began at the smaller, minimum-security male facilities⁶⁸ by reviewing the files and then interviewing the eight men identified in these locations. One man was subsequently excluded from the results because of questionable testing validity.⁶⁹ The research team interviewed all five of the women identified, but two women were subsequently excluded from the data compilations due to testing protocol violations.⁷⁰ At the Wyoming State Penitentiary, the research team chose to interview the twenty-four inmates with either no IQ scores or the lowest IQ scores. The researchers could not interview all of the remaining subjects because of time and resource constraints. Of these twenty-four, all initially agreed to be interviewed, however, three withdrew after the interview and testing had begun. The data compilations do not include these incomplete results. This left thirty-one inmates in the study out of the initial seventy inmates identified.

After the research team reviewed the files, the Department arranged the time and place of interviews with each of the selected inmates. Each inmate then met with an interviewer who (1) administered the Competency Assessment for Standing Trial—Mental Retardation (CAST-MR),⁷¹ (2)

68. The Wyoming State Honor Farm in Riverton and the Honor Conservation Camp in Newcastle are the minimum-security facilities for male inmates.

69. English was the inmate's second language, and as a result, the tests administered by the researcher were not considered valid.

70. A subsequent review of the standardized test results revealed a protocol departure in the administration of the test, making the results questionable and invalid for purposes of the research.

71. CAROLINE T. EVERINGTON & RUTH LUCKASSON, *CAST-MR TEST MANUAL* (1992). The CAST-MR is a test used by forensic evaluators to assist them in determining whether or not an adult defendant with mental retardation is competent to stand trial. "The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR) is the first validated instrument designed to provide information on competence to stand trial in adults with mental retardation. The instrument consists primarily of multiple-choice questions to be administered to the defendant in an interview situation." *Id.* at 2-3. CAST-MR is divided into three sections that address the basic elements of the *Dusky* criteria. *Dusky v. United States*, 362 U.S. 402 (1960). The three different sections measure the defendant's knowledge of the major aspects of the criminal justice process; their understanding of the client-attorney relationship; and their ability to discuss facts concerning the incident in a coherent manner and to understand the relationship between the alleged facts in the case and the subsequent arrest and charges. The CAST-MR is designed for use by forensic evaluators (or someone who has a least one year of professional experience working with persons with mental retardation

conducted a comprehensive personal interview, including questions about the inmate's family, education, employment, and recollections about his or her most recent adjudication, and (3) administered the Peabody Picture Vocabulary Test—Revised (PPVT-R).⁷² In a few instances, the interviewers also obtained permission from the inmate and contacted other people to supplement and clarify information provided by the inmate.

The CAST-MR was given for two reasons: first, to help determine if there was a question of competency for the inmate; and second, to assess the ease and effectiveness of using a simple test, such as the CAST-MR, to help attorneys prescreen new clients to identify possible mental retardation earlier in the adjudication process.⁷³ The test also provided researchers their first opportunity to observe an inmate's ability to comprehend and explain his or her adjudication process. Next, the researcher asked in-depth questions about the inmate's life prior to incarceration. This portion of the interview provided further evidence of the inmate's cognitive abilities and identified services and supports the inmate may have had in the community. The researcher also asked the inmate to relay everything he or she could remember about interactions with police, his or her attorney, and the court, and to explain how he or she perceived these events. Finally, the researcher administered the PPVT-R to correlate with reported IQ scores.⁷⁴ Results of the PPVT-R further reinforced the research team's conclusion that the unverified IQ scores provided by the Department were not reliable.

and one course in psychometrics or standardized testing from an accredited college) who can use their professional judgment to interpret the results for the purpose of making a recommendation about a client's competence to stand trial in a particular case. The CAST-MR manual presents norms for comparing obtained scores for each client. The CAST-MR has demonstrated highly significant internal and test-retest reliability. In regards to criterion validity (i.e. does the test measure what it claims to), "classification 'hit rates' of the CAST-MR total and section scores were found to vary between 79 and 100 percent for the samples that were tested." EVERINGTON & LUCKASSON, *supra* at 26.

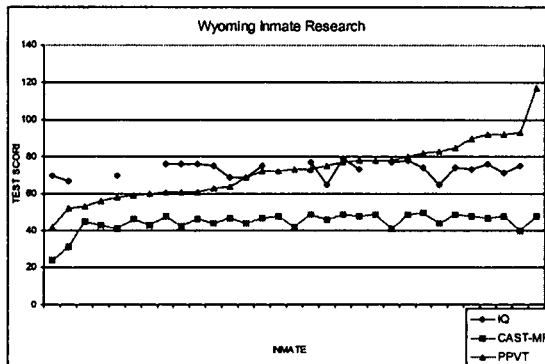
72. The PPVT-R is a test of receptive language functioning and is highly correlated with IQ. LLOYD M. DUNN & LEOTA M. DUNN, PPVT-R, (1981). The use of the PPVT-R may be justified for research purposes. However, "it is recommended that broad based measures of intellectual functioning be used for forensic purposes." Margaret K. Michel, et. Al., *The Abilities of Children with Mental Retardation to Remember Personal Experiences: Implications for Testimony*, 29(3) J. CLINICAL CHILD PSYCHOL. 453, at 461 (2000).

73. Members of the project team ultimately decided that encouraging attorneys to use the CAST-MR as a screening device themselves was not a good idea. The attorney's use of the test would likely bias a later competency assessment by a psychologist using the same or a similar instrument.

74. This test measures receptive language functioning and is highly correlated with IQ.

2. Test Findings

The results of the testing are displayed in the graph below. The inmates are organized in order of their PPVT-R test scores, from lowest to highest. The chart demonstrates the lack of correlation between the Department's reported IQ scores and the PPVT-R scores determined by the researchers. (Gaps in IQ data represent inmates with no IQ score available.)



The PPVT-R scores correlated well with the CAST-MR scores obtained. The two lowest scoring inmates on the PPVT-R also scored very low on the CAST-MR, raising serious questions of competency for both. File reviews of these two inmates indicated that the lowest scoring inmate had been sent for a competency evaluation prior to his adjudication and was found competent to proceed. The second-lowest scoring inmate's file contained no indication that his attorney or the court had questioned his competence prior to adjudication, nor was there any indication that criminal justice professionals involved in his adjudication ever suspected him of having a serious cognitive impairment. Only three of the inmates included in the study had any indication in their files that a competency assessment was done during the adjudication process. While the file review is not definitive proof that criminal justice professionals failed to recognize the cognitive impairment, it seems to substantiate the concern that criminal justice professionals, and especially defense attorneys, often fail to recognize a defendant's mental retardation.

3. Interview Findings

Most inmates were very willing to cooperate and enjoyed the opportunity to talk about themselves, but they were generally not able to provide many details of their arrest and adjudication. To varying degrees, at least 50% of the inmates interviewed provided confusing, repetitive, or contradictory information, which is suggestive of a cognitive impairment. Most seemed to have limited memories or difficulties in expressing themselves.

One inmate explained:

He told the cop that I took a stereo . . . and I asked my lawyer, my lawyer to go back over to ask the court, ah to have the cops go back over there and check this out. . . he judge (judge's name omitted) . . . that there wasn't, ah, that he couldn't order that to be done. So they, he, Judge (name omitted) . . . the one sends to me up here and I was trying to fight it but every time I do, I get, I get turned around on it.⁷⁵

The inmate's confused and limited responses are consistent with the memory problems and limited understanding typical of mental retardation.⁷⁶ Well over half of the inmates indicated in some way that they learned what they knew about how the criminal justice system works while in prison, not from their attorney or the judge during their adjudication.

The attorney spent a little bit of time with me, uh, explaining—but at the time I really didn't . . . I didn't really. . . I understand the law a lot better now than when I did then. I didn't really understand the law a whole lot then. And, well I knew, I knew there was right and I knew there was wrong, but as far as law goes, that's about it.⁷⁷

A few expressed a fear of or dislike for their attorney, while a few seemed pleased with their attorney. One inmate commented "she did the best she can."⁷⁸ Approximately half made spontaneous references that indicated that they felt coerced or pressured into accepting a plea agreement. They also remembered only general information, such as, that their attorneys told them what sentence they could receive, and that they should take the deal. Only two of the inmates included in the study actually went to trial.

Most inmates reported extremely limited contact with their attorneys. They remembered seeing their attorney only for a few minutes before the court hearings or only during hearings and did not recall their attorney asking them many questions. Four inmates also claimed they remembered spending a long time in jail before getting an attorney. "I waited forty-five days and I went into the court and the judge then asked

75. Inmate Interview. The interviews were conducted during the summer of 1999 and remain unpublished and confidential.

76. See *infra* notes 94-104, 123-27 and accompanying text.

77. Inmate Interview.

78. Inmate Interview.

me if I wanted a lawyer and I said yah."⁷⁹ One told the interviewer he had to fill out forms in order to request an attorney, and was not able to do that until someone helped him. Well over half of the inmates interviewed either said they could not read, could not read well, or it appeared to the interviewer that they had significant difficulties reading.

Of the inmates interviewed, thirteen made statements consistent with attempting to hide, minimize or downplay their inabilities as a lack of education, a learning disability, or simply disinterest. This demonstrated that, even in prison, some persons with mental retardation were unwilling to admit or were unaware of their cognitive problems.⁸⁰ Five inmates were refreshingly candid about their disability. "Some people call me retarded because, you know, I'm a slow learner, and you know, I can't comprehend something to what I read."⁸¹

One inmate's comments suggested that her attorney recognized her disability but did not know how to accommodate it.

It's pretty fuzzy, but then there is some clear parts, uhh, I remember that she would get frustrated with me and I'd get frustrated too. And she'd ask me to repeat something that she said and I remember repeating, but in her view it was like I wasn't comprehending what she was saying.⁸²

One inmate discussed growing up in an institution. He reported spending almost thirty years in the institution before it was discovered that he was not impaired enough to remain in the care of the institution or to receive services in the community based on state guidelines. Subsequent follow-up by researchers confirmed that this inmate had recently reapplied for community services through the Medicaid Home and Community Based Waiver, the primary source of assistance for individuals with mental retardation in the State, and did not qualify for the assistance, based on current State standards. However, at the time of the interview, this inmate was serving his third sentence for burglary. His record shows a cycle of release and re-offense, generally within three months. He also reports receiving a number of "Greyhound extraditions" following minor problems such as public intoxication or vagrancy.⁸³ The defendant recognizes his predicament but feels helpless to change it.

79. Inmate Interview.

80. See *infra* notes 118-22 and accompanying text for discussion of propensity of some persons with mental retardation to "mask" their disabilities.

81. Inmate interview.

82. Inmate interview.

83. According to one prosecutor, the term "Greyhound extradition" essentially

I know when I get out of here, I'll be, I don't want to be homeless and I don't want to be homeless anymore. You know, pray that when I get out, and I mess up, I don't want to come back to prison So I need (begins to cry), I want to see if I can DVR or something here in Wyoming.⁸⁴

At least one-third of the inmates' criminal history showed a clear cyclical pattern with the seriousness of the offense escalating over time. Sixteen of the inmates had some type of substance-abuse problem. Almost all had a significant number of prior offenses, which is consistent with inmates in general. However, while it is not unusual to find an escalating pattern in habitual criminals, the inmates identified by the research had extremely short intervals between offenses, indicating they lacked the ability to transition successfully from prison to release. Many offended again immediately after being released. This is consistent with many studies that suggest incarceration leaves inmates with mental retardation worse off rather than rehabilitated.⁸⁵

Research shows that without consistent opportunity to practice, individuals with mental retardation often lose their already limited life skills fairly quickly.⁸⁶ During incarceration they must adapt to a highly structured setting with very little room for choice. When released, they are often overwhelmed by the choices and responsibilities that are suddenly thrust back upon them. One inmate even reported deliberately committing a crime to get caught and sent back to jail.

The research confirmed that Wyoming, like much of the nation, experiences problems due to failure to identify, accommodate, and provide appropriate rehabilitation for inmates with mental retardation. These inmates are not likely to break the cycle of re-offense without intervention.⁸⁷

means a plea agreement where the court dismisses the charge or agrees to a sentence the individual to "time served," provided the individual leaves the community. This is apparently more common when the defendant appears to have a mental illness or mental retardation. The solution is especially hard on someone with mental retardation who is placed in an unfamiliar situation, with no assistance.

84. Inmate Interview. By saying DVR, the inmate was apparently referring to his understanding of what services he had previously received. DVR probably referred to the Division of Vocational Rehabilitation.

85. Ellis & Luckasson, *supra* note 4, at 482.

86. *Id.*

87. *See infra* notes 366-75 and accompanying text.

IV. RECOGNIZING MENTAL RETARDATION

For the defendant with mental retardation and his or her attorney, the defendant's disability will present difficult issues and options at virtually every step in the criminal justice system. As a result, it is important that the attorney be able to identify the client's disability as early as possible. One commentator expresses the problem as follows:

If, in practice, the threshold of competency for defendants with mental retardation is set relatively low, the fairness of adjudication in cases involving minimally competent defendants depends largely upon the ability and inclination *of the attorney* to recognize and compensate for the client's limitations. In this sense, enhanced competence of attorneys is necessary to ensure adequate representation of marginally competent clients with mental retardation.⁸⁸

What follows is a guide for attorneys to address some of the problems that may arise when representing defendants with mental retardation, and some suggestions on where to look for help in confronting those problems.

First, it is important to remember that individuals with mental retardation are just that, individuals. Lumping these individuals into a stereotypical group is one of the most frequent reasons why attorneys fail to identify mental retardation in their clients with that disability. Identifying the disability involves much more than determining an intelligence quotient.⁸⁹ This section provides information designed to help attorneys evaluate their clients and recognize characteristics often shared by individuals with mental retardation. A word of caution, however: An attorney should remember that it does not matter if the client displays only some of the characteristics, he or she may still have mental retardation. An attorney must thoroughly check into the client's background, in addition to conscientiously looking for these characteristics, in order to successfully identify the majority of clients with mental retardation.

A. Using the DSM-IV Definition of Mental Retardation

Recognizing and understanding mental retardation or low cognitive functioning begins with understanding how psychologists diagnose the condition. The definition of mental retardation in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) requires: (1) signifi-

88. Bonnie, *supra* note 17, at 99.

89. DSM-IV, *supra* note 9, at 41.

cantly subaverage general intellectual functioning (measured by an IQ of about seventy or below); accompanied by (2) significant limitations in the person's present adaptive functioning in two or more of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety; and (3) onset before age eighteen.⁹⁰ While a trained professional must make the actual diagnosis of mental retardation, knowing the definition of mental retardation can help an attorney understand and recognize signs of mental retardation that he or she might otherwise miss.

Mental retardation requires onset of the condition prior to the age of eighteen because an essential characteristic of mental retardation involves diminished developmental growth. The causes of mental retardation, in addition to head injury in childhood, can be due to a variety of genetic factors, injury in utero, or environmental factors such as lead poisoning or Fetal Alcohol Syndrome.⁹¹ A child of normal intelligence who suffers a head injury at the age of ten and loses cognitive ability as a result of that injury would be classified as having mental retardation because the head injury has stunted his/her developmental growth. Conversely, an adult who suffers a head injury that affects his or her cognitive abilities, is defined as suffering from dementia due to head injury. This is because they had already reached the adult developmental stages.

Mental health professionals may miss a diagnosis of mental retardation if they do not have specific training, significant records, and psychological test data to evaluate. Given the diagnostic difficulties which may be experienced by mental health professionals, it is hardly surprising that attorneys fail to identify this disability. Individuals with mental retardation who attempt to cover up their disability further compound the diagnostic problem. An attorney may discount the limitations of an individual with mental retardation as a product of lack of education, social/cultural factors, or anxiety. Sensitivity to the characteristics of mental retardation and the ways in which they may be manifested should enable the attorney at least to recognize when more testing is necessary.

90. *Id.* The American Association on Mental Retardation (AAMR) definition has expanded the time frame to permit a diagnosis of mental retardation when onset is as late as twenty-two years old. AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSTIC AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION (J.W. Jacobson & J.A. Mulick eds., 1996). For purposes of this article age eighteen will be used.

91. MANUAL OF DIAGNOSTIC AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION, *supra* note 90, at 68.

B. Characteristics of Mental Retardation

A 1985 article entitled *Mentally Retarded Criminal Defendants*, written by nationally recognized experts on the study of defendants with mental retardation, James E. Ellis and Ruth A. Luckasson, describes some typical characteristics of people with mental retardation.⁹² Other sources were combined with those provided by Ellis and Luckasson and are detailed below.⁹³ Actively looking for these characteristics can help inexperienced criminal justice professionals who might otherwise miss a cognitive impairment. These characteristics are broken into categories including: (1) communication and memory reliability, (2) impulsivity and attention, (3) moral development, (4) denial of disability, (5) lack of knowledge of basic facts, (6) motivation, and (7) rigidity.

1. Communication and Memory-Reliability

"Many mentally retarded people have limited communication skills."⁹⁴ These limitations affect both "expressive" and "receptive" communications.⁹⁵ Limitations on "receptive" communication affect a person ability to understand questions; limitations on "expressive" communication may cause the person to have difficulties verbalizing an answer.⁹⁶ In either case, such limitations may lead the individual to respond to questions with an inappropriate answer, a garbled or confused answer, or no response at all.⁹⁷ In addition, "[e]ven when a person with mental retardation can verbalize effectively, memory will often be impaired,"⁹⁸ and there is a serious risk of impairing their accurate response or even planting false memories by questioning in inappropriate ways.⁹⁹

Communication and memory-reliability can be affected by "biased responding," which is essentially answering based on what the person with mental retardation thinks the questioner wants them to say.¹⁰⁰ Use of leading questions that suggest the desired answer, closed questions that require "yes" or "no" answers or an (a), (b), or (c) response may unduly affect the person's answer. So too may complicated or

92. Ellis & Luckasson, *supra* note 4, at 427.

93. Other sources include McGee & Menolascino, *supra* note 61, at 57-61; Brief of Amici Curiae American Association on Mental Retardation et al., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (No. 87-6177), *reprinted in CJS & MR, supra* note 1, at 262-265 [hereinafter Brief of Amici Curiae].

94. Ellis & Luckasson, 1985, *supra* note 5, at 428.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See *infra* notes 298-309 and accompanying text.

100. Ellis & Luckasson, *supra* note 4, at 428.

multipart questions that confuse the person. Inappropriate questioning methods significantly decrease the accuracy and completeness of the answers given by a person with mental retardation.¹⁰¹ Studies on children with mental retardation have show that open-ended questions yield more accurate, though less complete information.¹⁰²

The authority of a police officer, attorney, or judge may also unduly affect the person's response.¹⁰³ The person may be unable to resist the urge to answer questions beyond their knowledge or ability so as not to disappoint his or her questioner.¹⁰⁴ The use of leading and closed questions by an authority figure may lead the person with mental retardation to assume the questioner is correct, especially if the person has an incomplete or confused memory of the events.

2. Impulsivity and Attention

Often poor impulse control, or "impulsivity," and inattention are traits of the individual with mental retardation. These characteristics appear related to problems people with mental retardation encounter with attention span, attention focus, and selectivity in the attention process.¹⁰⁵ "Such an impairment in the area of impulsivity is, of course, directly relevant to the level of an individual's ability to conform his conduct to the law's requirements and therefore to the degree of a defendant's culpability."¹⁰⁶ A defendant with mental retardation may have difficulty attending to questions and may become frustrated if pushed too hard.¹⁰⁷ "[T]he 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."¹⁰⁸

3. Moral Development

People with mental retardation often have incomplete or immature concepts of blameworthiness and causation.¹⁰⁹ "The ability to make moral judgments flows from the ability to transcend the self and to see

101. *Id.*

102. *See* Michel et al., *supra* note 72, at 454.

103. *Id.*

104. *Id.*

105. Brief of Amici Curiae, *supra* note 93, at 263; Ellis & Luckasson, *supra* note 4, at 429.

106. Brief of Amici Curiae, *supra* note 93, at 263.

107. An emerging consensus indicates that increased levels of stress are associated negatively with memory performance. Michel et al., *supra* note 72, at 461.

108. Ellis & Luckasson, *supra* note 4, at 429.

109. *Id.*

the impact of behaviors and interactions as they relate to 'the other.'"¹¹⁰ Moral development begins with the concept of concrete, consequence-based judgments and the governance by an outside authority (i.e. parents).¹¹¹ Full moral development takes into account the consequences of an action not just for actor, but more abstract concepts such as how others will be affected by the action.¹¹² "[M]ental retardation limits an individual's ability to reach full moral reasoning ability," making it difficult for him or her to think abstractly.¹¹³ Persons with mental retardation often do not progress beyond their reliance on an outside authority to tell them "right" from "wrong."¹¹⁴ "If there is no external authority available, the individual is left floundering in a hostile and confusing world."¹¹⁵ This need for external guidance is one of the reasons that such an individual is so easily swayed by someone he or she perceives as being in a position of authority, even if that person is a criminal.¹¹⁶ Relying on external guidance may also cause such as individual to unquestioningly agree with statements made by a person in a position of authority, such as law enforcement or the attorney.¹¹⁷

4. Denial of Disability

Individuals may attempt to present themselves as more competent than they are, deny any history of difficulty in school, or fail to reveal any lack of understanding of papers presented to them.¹¹⁸ This denial of the disability or "cloak of competence" is a fairly well recognized phenomenon often attributed to either a desire to avoid the negative stigma of the disability or to the person's unreasonable estimate of his or her own ability.¹¹⁹ Either way, it is important for an attorney to remember that mental retardation is not always a disability that the client will admit to openly.¹²⁰ Many individuals with mental retardation will expend a great deal of effort trying to hide their disability to appear normal.¹²¹ This façade may be as simple as a well-rehearsed smile and nod when confused, or a belligerent response to difficult questions meant to discourage the questioner. The facade may also be a more elaborate tale or

110. McGee & Menolascino, *supra* note 61, at 60.

111. *Id.*

112. *Id.*

113. Brief of Amici Curiae, *supra* note 93, at 264.

114. McGee & Menolascino, *supra* note 61, at 60.

115. *Id.*

116. Ellis & Luckasson, *supra* note 4, at 431-32.

117. *Id.*

118. *Id.* at 428-32.

119. Ellis & Luckasson, *supra* note 4, at n.83.

120. *Id.* at 430-31.

121. *Id.* at 430.

bragging about their actions. "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."¹²²

5. Lack of Knowledge

A person with mental retardation will know less than a person without mental retardation.¹²³ This is exacerbated by a special education system that often segregates students with mental retardation.¹²⁴ As a result, students with mental retardation often lack exposure to academic subjects and social mores that other students typically see or learn about during their education.¹²⁵ This exclusion carries a price. It leaves the person with mental retardation with a naïve concept of much of society and a basic lack of knowledge that will hamper his or her ability to cope in our complex society.¹²⁶ It is important to avoid reading a more complex meaning into a client's words or actions and to remember that the "cloak of competence" may be deflecting an attorney's superficial attempts to test the client's abilities.¹²⁷ For example, a client may use legal jargon and claim to have experience with the system but have no real understanding of the concepts he or she is using.

6. Motivation

People with mental retardation may appear to have very little motivation, or they may appear to have an inordinate desire to please a person in authority.¹²⁸ The former may be an indication that they have very little faith in their ability to do what they are being asked, and so do not even try because they do not wish to fail.¹²⁹ This apparent lack of motivation may result from a feeling of resignation or "learned helplessness" after experiencing a number of failures or it may result from a feeling that they lack a sense of control. The latter desire to please authority is also a common motivation.¹³⁰ This may stem from the immature moral development which causes them to look for external guidance on right and wrong, even when seeking approval requires giving what they feel is an incorrect answer.¹³¹ In some cases, this behavior is described as "cheating to lose," in other words, accepting blame so that

122. *Id.*

123. *Id.* at 431.

124. *Id.*

125. *Id.*

126. *Id.*

127. McGee & Menolascino, *supra* note 61, at 62.

128. Ellis & Luckasson, *supra* note 4, at 431.

129. *Id.* at 432.

130. *Id.*

131. *Id.*

others will not be angry.¹³² "This 'outer directed' behavior means that many people with mental retardation will be particularly vulnerable to suggestion, whether intentional or unintentional, by authority figures or high-status peers."¹³³

7. Rigidity

People with mental retardation frequently exhibit a certain amount of rigidity, especially when they are in new or slightly different situations than they are used to.¹³⁴

[S]ubstantial intellectual deficits are aggravated by intellectual rigidity, which is often demonstrated by an impaired ability to learn from mistakes and a pattern of persisting in behaviors even after they have proven counterproductive or unsuccessful. . . . One feature of this rigidity is that a person who has mental retardation often cannot independently generate in his mind a sufficient range of behaviors from which to select an action appropriate to the situation he faces (particularly a stressful situation).¹³⁵

Faced with the new or different situations, their minds are unable to properly analyze and respond in the flexible manner that the minds of most adults can.¹³⁶ The rigidity may express itself in aggressive behavior or the person may simply shut down and refuse to interact or communicate further.¹³⁷

All or some of these characteristics may or may not be present in any one individual. It is important to remember that mental retardation is an individualized condition. The fact that a person only has one or a few of the typical characteristics should not stop an attorney from requesting a forensic evaluation by a qualified professional. In addition, attorneys are cautioned not to overlook or discount these characteristics simply because the client has been diagnosed with other conditions, such as op-

132. Kevin P. Weis, Note, *Confessions of Mentally Retarded Juveniles and the Validity of Miranda Rights Waivers*, 37 BRANDEIS L.J. 117, 126-27 (1998). "According to Ellis and Luckasson, some persons have pled guilty for crimes they did not commit because they believed blame must be assigned to someone. And, others eagerly assume blame, thinking it will make their accusers like them." ROBERT PERSKE, *UNEQUAL JUSTICE?* 20 (1991) (citing Ellis & Luckasson, *supra* note 4, at 429-30).

133. Ellis & Luckasson, 1985, *supra* note 4, at 432.

134. McGee & Menolascino, *supra* note 61, at 58.

135. Brief of Amici Curiae, *supra* note 93, at 263.

136. McGee & Menolascino, *supra* note 61, at 59.

137. *Id.* at 58.

positional defiant disorder, obsessive compulsive disorder, or substance abuse, that may share some of the same characteristics.

C. *Confusing Mental Retardation and Mental Illness*

In addition to understanding the characteristics of mental retardation, attorneys also must be careful not to confuse mental retardation with mental illness. This is one of the more persistent problems which interferes with the early recognition of mental retardation. Without specific training, it is easy to believe that mental retardation and mental illness are closely related problems with similar symptoms or indicia. Though mental retardation is defined in the DSM-IV as a disorder, it is not a "mental illness."¹³⁸ A mental illness is synonymous with psychopathology, such as schizophrenia, bipolar disorder, depression, and post traumatic stress disorder, which encompass emotional/psychological issues.¹³⁹ In contrast, mental retardation refers to cognitive, intellectual, and adaptive deficits.¹⁴⁰ Consequently, mental retardation and borderline intellectual functioning are rated on Axis II of the DSM-IV five axes of classification.¹⁴¹ Axis II is reserved for prominent maladaptive personality disorders and mental retardation.¹⁴² Axis I is reserved for the "more florid" mental disorders mentioned above.¹⁴³

Mental retardation is not an illness; it is a cognitive disability that varies in nature and severity from person to person, and an essential characteristic is that it limits the person's ability to process and learn information. With the exception of conditions such as microencephaly, Fetal Alcohol Syndrome, and Down Syndrome, there are often no physical characteristics with which to identify persons with mental retardation. "Mental retardation is a learning deficiency rather than a thinking disorder; the irrationality, paranoia and delusions that can indicate mental illness and which are related to criminality are not indicators of mental retardation."¹⁴⁴

Mental retardation is life-long; a person with mental retardation cannot be "restored" to competence or normalcy. Mental illness, on the other hand, may be temporary, cyclical, or episodic and competence or normalcy may be "restorable." Mental illness can often be treated with

138. DSM-IV, *supra* note 9, at 25-26.

139. *Id.*

140. *Id.* at 26-27.

141. *Id.*

142. *Id.*

143. *Id.* at 25-26.

144. Ellis & Luckasson, *supra* note 4, at 427.

medication and psychotherapy. Mental retardation requires services and supports in order for the person to gain or maintain life skills, while mental illness generally requires treatment in the form of counseling or medication. Society tends to view people with mental retardation as helpless, while viewing people with mental illness as dangerous and unpredictable. Mental retardation is a disability that is difficult to feign. Mental retardation is immune to malingering if a complete history is available to the diagnostician.¹⁴⁵ Any individual can usurp the validity of any intellectual test by not trying their best. However, as the diagnosis of mental retardation requires a history of onset prior to the age of eighteen, an individual can not fake school records or other indicators of historically significant subaverage performance. In contrast, mental illness can be feigned.

Despite the distinction, it is certainly possible that a person with mental retardation may also have a dual diagnosis. This would indicate that a person with mental retardation also has another mental disorder, such as depression, attention deficit hyperactivity disorder, or phobia. Diagnosis of another mental disorder among people with mental retardation requires considerable expertise. An evaluator must have a high level of training with which to identify the persons with mental retardation and another mental disorder.¹⁴⁶ In persons with a dual diagnosis, the other mental disorder may mask or hinder diagnosis of the mental retardation.¹⁴⁷

D. The Initial Client Interview

In order for an attorney to recognize characteristics of mental retardation, and to respond appropriately, the initial client interview must be viewed as a critical event. Attorneys with little time and heavy caseloads are often inclined, at the first meeting with a client, to jump right to the incident giving rise to the criminal charges. Such an approach, however, is likely to enable the client to mask a mental disability so that it escapes the attorney's notice. The attorney may miss characteristics which would suggest that the client has a disability. In addition, such an approach may have a tendency to provide the attorney with a skewed perception of the events at issue. A client with mental retarda-

145. In the DSM-IV, "malingering" is defined as "[t]he intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives such as . . . evading criminal prosecution or obtaining drugs." DSM-IV, *supra* note 9, at 683.

146. The unique problems that confront defendants who have such a dual diagnosis is beyond the scope of this article.

147. McGee & Menolascino, *supra* note 61, at 61.

tion is susceptible to suggestion, and may also, in eagerness to please a perceived authority figure, provide the answers he or she believes the attorney wants to hear, rather than sticking to the actual events. If the attorney wants to receive good, reliable information from a client with mental retardation, the interview process will take much more time and patience.

An interviewing technique, which can be helpful regardless of whether the client has a disability, is to begin by gathering some general background information about the client—family history, education, work history, any medical or psychological problems, and prior legal experiences. For any client, this part of the interview can be invaluable in establishing the foundation of a successful attorney-client relationship; the client will perceive that the attorney views him or her as something more than just a case number and a set of criminal charges. With a client who has mental retardation, the attorney may discover facts that may indicate a disability that needs to be investigated further.

For example, a client's history of failing to maintain a job and moving from place to place may indicate impairment of adaptive functioning in a number of the categories listed in the DSM-IV definition of mental retardation.¹⁴⁸ The client's unsettled life could have something to do with poor communication skills, inability to independently manage a home, difficulty in handling social or interpersonal situations, trouble with self-direction, poor functional academic skills, or simply an inability to manage a job. Recognizing problems in more than one of the ten areas of adaptive functioning is a critical step in recognizing the disability.

If the client has difficulty recalling and recounting basic personal information, or coherently responding to basic questions, that too may be a sign of a mental retardation.¹⁴⁹ These difficulties also may appear when discussing the events in question. If the client has difficulty remembering the occurrence, focusing on details about the occurrence, or providing a coherent account, this may be a sign of mental retardation as well.¹⁵⁰

E. Background Investigation

Because mental retardation requires a history of onset before age eighteen, the attorney must get information about a client's background.

148. See *supra* note 91 and accompanying text.

149. See *supra* notes 94-104 and accompanying text.

150. See *supra* notes 94-104 and accompanying text.

First, the attorney should talk with the client's family and friends about the individual. Are they aware of any previous diagnosis of mental retardation, low cognitive scores, learning disabilities, or other learning problems during school? The attorney should ask family and friends to describe how the client managed his day-to-day life and find out whether, and to what extent, the client relied on others to meet his or her basic needs. Second, school records, when available, are one of the best ways to definitively identify the disability. Schools have a responsibility to identify and serve individuals with cognitive disabilities through the Individuals with Disabilities Education Act (IDEA).¹⁵¹ If the person is younger, the school may still have records, or the parents may have saved school records. The attorney should not simply take the client's word for how he or she did at school. The client may not even realize that he or she did not graduate from high school. Special education students often receive a certificate of completion at the end of their school years and they may not be aware of the difference between that and a diploma. The client also may be trying to hide the disability.

F. Accommodating the Disability within the Attorney-Client Relationship

Regardless of whether the attorney challenges the defendant's competence or the defendant enters a plea of not guilty by reason of mental deficiency, and regardless of whether the defendant pleads guilty or goes to trial, the importance of identifying a potential mental disability and taking appropriate measures to accommodate that disability cannot be underestimated.

If the attorney fails to employ discerning interview techniques to offset the well-documented tendency of persons with mental retardation to attempt to conceal their disability, important facts are likely to be masked or distorted. Clients 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. Only attorneys who have had specialized training or experience in representing clients with mental retardation are likely to be aware of these problems. For others, the risk of unwittingly inadequate representation is serious.¹⁵²

Most attorneys lack the specialized training and experience necessary for

151. 20 U.S.C. §§ 1400-1487 (2000).

152. Bonnie, *supra* note 17, at 100.

effective communication with and representation of a defendant with mental retardation. The Wyoming Rules of Professional Conduct attempt to provide some guidance to attorneys representing clients with mental disabilities,¹⁵³ but that guidance is of limited usefulness in the criminal justice context.

When a client with mental retardation is facing criminal charges that may result in grave consequences, the dilemma for the attorney is particularly acute. On the one hand, there is the desire to accommodate the autonomous choices of individuals with disabilities and enhance their ability to make decisions affecting their own lives.

On the other hand, there is also a commonly felt need to protect the individuals with substantial mental disabilities from the adverse consequences of potentially unwise, ill-informed, or incompetently made decisions. Each of these two impulses is a fully understandable and reasonable concern, and yet each may be the source of abuse of persons with disabilities. And of necessity, the implementation of these goals can coexist with one another only in tension.¹⁵⁴

Unfortunately, there is no simple solution to this dilemma. At a minimum, however, awareness of the tension and awareness of how certain actions by an attorney can further one goal and thwart the other is a step in the right direction.¹⁵⁵

The Wyoming Rules of Professional Conduct, like the ABA Rules of Professional Conduct, are laudably based on "a model of client-centered lawyering that encourages active client participation."¹⁵⁶ Rule 1.14(a) of the Wyoming Rules of Professional Conduct advises that "[w]hen a client's ability to make adequately considered decisions in

153. WYO. RULES OF PROF'L CONDUCT R. 1.14 (LEXIS 2000).

154. James W. Ellis, *Decisions By and For People With Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 VILL. L. REV. 1779, 1779 (1992).

155. For more in-depth discussions of the ethical and practical dilemmas which may confront an attorney who represents a client with a mental disability, see, e.g., Christopher Slobogin and Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients With Mental Disability*, 68 FORDHAM L. REV. 1581 (2000); James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529 (1998); Richard J. Bonnie et. al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubtful Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48 (1996).

156. Stanley S. Herr, *Capacity for and Consent to Legal Representation*, in AMERICAN ASSOCIATION ON MENTAL RETARDATION, A GUIDE TO CONSENT 79 (Robert D. Dinnerstein et al. eds., 1999).

connection with the representation is impaired . . . the attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client."¹⁵⁷ "To state this goal is to glimpse the ethical dilemmas and patience required to initiate and maintain a good attorney-client relationship with a client with cognitive limitations."¹⁵⁸ Neither the rule nor the comments provide much concrete guidance about how to achieve this goal. Comment 1 points out that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."¹⁵⁹ This is certainly true of many criminal defendants with mental retardation. Comment 2 does nothing more concrete than convey the platitude that "[t]he fact that a client suffers a disability does not diminish the attorney's obligation to treat the client with attention and respect," and to maintain communication with the client about representation.¹⁶⁰

The Wyoming Rules of Professional Conduct highlight the autonomy interest of a person with mental retardation within the attorney-client relationship. The tendency of some attorneys to take a paternalistic approach and assume that the attorney can and should alone decide what is in the best interests of the client with mental retardation,¹⁶¹ violates the spirit of the ethical rules. This tendency is usually not the product of any evil intent but may well result from a failure even to identify the client's cognitive limitations. A busy attorney with a client who readily accepts direction and presents few, if any, client control problems may not be inclined to probe more deeply to discover the disability.¹⁶² "[E]ven when the client has capacity, some attorneys may minimize participation of their clients or relegate them to ministerial tasks."¹⁶³

157. WYO. RULES OF PROF'L CONDUCT R. 1.14(a)

158. Herr, *supra* note 156, at 79.

159. WYO. RULES OF PROF'L CONDUCT R. 1.14(a), cmt. 1 (LEXIS 2000).

160. *Id.* at 1.14(a), cmt. 2.

161. For example, an expert who planned to testify that, based on her evaluation of the defendant, the defendant was incompetent to stand trial, found herself subjected to extreme hostility from the defendant's counsel. Counsel made clear that "he was perfectly content with the mental state of his client, that he preferred for the client to defer decisions to him, and that he did not need his client's assistance in the preparation of a defense." Petrella, *supra* note 8, at 80.

162. "Unlike mentally typical adults, it cannot be assumed that mentally retarded adults understand the standard explanations of ordinary procedures or activities, nor can it be assumed that they have chosen to acquiesce in a proposal merely because they do not voice an objection." Ellis, *supra* note 154, at 1791. Making those assumptions, however, can make it easy for an attorney to resolve what might otherwise become a difficult, time-consuming case.

163. Herr, *supra* note 156, at 90 (citing A. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L. J. 769, 851 (1992)).

Comment 3 to Wyoming Rule 1.14 addresses situations in which the attorney might consider seeking appointment of another legal representative or guardian to make decisions for the client, and the need for sensitivity and professional judgment in making the decision whether such appointment is in the client's best interest.¹⁶⁴ This Comment has little applicability for the client facing criminal charges. An accused's decision whether to plead guilty or pursue a trial, the decision whether to proceed with counsel, and the decision whether or not to testify, will only be upheld if the court is satisfied that the decision is the personal, informed and voluntary decision *of the accused*. Such decisions cannot be made by proxy.¹⁶⁵

Finally, Comment 4 notes that "disclosure of the client's disability can adversely affect the client's interest. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is unavoidably a difficult one. The lawyer may seek guidance from an appropriate diagnostician."¹⁶⁶

The section of this article that follows will help provide some suggestions about when to seek guidance, who qualifies as an "appropri-

164. The Wyoming Rules of Professional Conduct provides:

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyers should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

WYO. RULES OF PROF'L CONDUCT R. 1.14(a), cmt. 3. It is quite apparent that this comment is of little utility for an attorney who is representing a criminal defendant with a disability. Rule 1.14(a), comment 4, applies to those situations in which an attorney represents a guardian of a person with a disability, and this is irrelevant in the criminal justice context.

165. See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (stating that waiver of rights must be personally made by the defendant, and must be knowing and voluntary); *Boykin v. Alabama*, 395 U.S. 238 (1969) (stating that decision to plead guilty must be knowing and voluntary); FED. R. CRIM. P. 11 (stating that court must make certain inquiries of the defendant personally before accepting guilty plea); WYO. R. CRIM. P. 11 (stating that court must make certain inquiries of the defendant personally before accepting guilty plea); *Faretta v. California*, 422 U.S. 806 (1975) (stating that waiver of right to counsel must be knowing and intelligent); *Rock v. Arkansas*, 483 U.S. 44 (1987) (stating that right to testify is a fundamental right of the accused); *Herdt v. State*, 891 P.2d 793, 797 (Wyo. 1995) (stating that right to testify is a fundamental right of the accused).

166. WYO. RULES OF PROF'L CONDUCT R. 1.14(a), cmt. 4 (LEXIS 2000).

ate diagnostician" for a client with mental retardation, and some of the issues and concerns that should factor into the decision-making process about whether, or to what degree to "rais[e] the question of disability."¹⁶⁷ In addition, the section that follows includes some recommendations for accommodating the disability.

Persons with IQs around fifty routinely have been found competent to participate in criminal proceedings.¹⁶⁸ So, regardless of an attorney's concerns about a client's competence, the practical reality is that most defendants with mental retardation will be deemed competent. Therefore, attorneys must develop strategies for dealing with the complicated issues that invariably will arise.¹⁶⁹ Frequently, when an evaluator has deemed a defendant marginally competent, the attorney will be admonished that by carefully and patiently explaining matters to the client, the client should remain competent to proceed. Of course, the attorney usually lacks any training or specific skills in communicating with a client with mental retardation, and thus may be unable to communicate in a manner that the client understands. Effective attorney-client communication, however, is essential for confronting the many difficult issues that are likely to arise—whether the client is competent to proceed; whether the client is criminally responsible; and, whether the client can assist with and make critical decisions about his or her own defense. Without effective communication, each of these issues can become a minefield.

If at any step in the process the attorney finds him or herself unable to effectively communicate with the client, the best answer is to ask for help. The attorney should consult a psychologist or other mental health professional who can advise about interview techniques or strategies that may make for more effective communication. Other attorneys who have more experience with representing clients with mental retardation are another source of guidance. In some cases, communications with

167. *Id.* Many Wyoming attorneys might be surprised to learn that, as of 1995, Wyoming was among thirty-three states identified by the ABA Commission on Mental and Physical Disability Law as having "disability-related entities." Herr, *supra* note 156, at 90 n.3.

168. Deborah B. Dove, Annotation, *Competency to Stand Trial of Criminal Defendants Diagnosed as "Mentally Retarded"—Modern Cases*, 23 A.L.R. 4th 493 (1983). See also *infra* notes 177-202 and accompanying text.

169. Further complicating matters, the more serious the charged crimes, the more likely the evaluators and the courts will be to find the accused competent to defend against them. When less serious charges are at issue, courts and prosecutors appear far more willing to forego the ordinary criminal justice process and to seek alternative methods of behavior control.

the client may be so difficult that the attorney may even need professional help with the interview process.

Outside professional help can be used without sacrificing confidentiality but must be undertaken with care. For example, just as an attorney may communicate with a client through an interpreter without sacrificing confidentiality, so too should an attorney be able to use an outside professional to facilitate communication with a client with mental retardation.¹⁷⁰ Of course, this communication process will involve more than mere interpretation—it will involve restatement of the attorney's advice or proposals in more understandable terms, and it will involve measures designed to ensure the client's understanding. Thus, if an attorney decides that he or she needs a professional interpreter/communicator in order to give the client the fullest possible involvement in his or her criminal justice process, the professional should have sufficient forensic training to be able to accurately "translate" the legal principles. The interpreter's role, however, must be made clear from the outset. If the interpreter also engages in evaluating the defendant, that professional's notes could be subject to discovery if the defendant's mental condition is put at issue at trial.¹⁷¹ Also, the attorney must

170. Wyoming does not have a specific statute or rule defining the scope of the attorney-client privilege, but recognizes all common law privileges. WYO. R. EVID. 501. Nearly forty years ago, Wigmore described the scope of the common law attorney-client privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. ed. 1961). He also noted that the privilege may extend to agents of the attorney: "The assistance of these agents being indispensable to [the attorney's] work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all who act as the attorney's agents." *Id.* § 2301. This should extend to third persons necessary to the attorney's ability to provide legal services, including interpreters.

171. See *Trusky v. State*, 7 P.3d 5, 9-11 (Wyo. 2000) (requiring disclosure of clinical social workers notes prepared when evaluating the defendant). In *Trusky*, the disclosure was required because (1) the defendant put her mental condition at issue, and (2) the social worker was to testify as a defense expert at trial. *Id.* These principles would apply to any professional who evaluates the defendant and becomes a witness at trial. If the expert's role is simply to assist the attorney in understanding how to deal with the client, and in understanding the psychological aspects of a proposed defense, and the expert is not expected to testify at trial, communications with that expert should be privileged. See, e.g., *Lanari v. People*, 827 P.2d 495 (Colo. 1992); *Houston v. State*, 609 P.2d 789 (Alaska 1979). Some courts have held, however, that if the defendant's mental state is put at issue, communications with a psychologist or psychiatrist hired by counsel are not privileged, even if defense did not intend to call the expert as a witness. Austin

make clear that the attorney is the advisor, and the interpreter's role is simply to facilitate communication, not to tell the attorney or client what to do.

Expert assistance often does not come cheap. In *Ake v. Oklahoma*, the U.S. Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the constitution requires that a State provide access to a psychiatrist's assistance on the issue, if the defendant cannot otherwise afford one."¹⁷² Despite that pronouncement, state public defender offices do not have unlimited resources for employing experts. Of necessity, attorneys are forced to establish priorities and be judicious in seeking funds for expert assistance. Creating ties with the advocacy community for people with mental retardation and seeking expertise from non-traditional experts may provide some lower cost alternatives. However, if funds for expert assistance are necessary to ensure that the defendant receives the full benefits of due process, then the attorney should not be shy about insisting on them.

Frequently, interested family members or guardians may take a role in facilitating communication between the defendant and the attorney and may assist the defendant with making decisions about the case. This too is a resource that, when available, must be used with care. While those people most familiar with the defendant may be a great asset in facilitating communication, their non-professional status means that their involvement compromises confidentiality concerns.¹⁷³ In addition, the involvement of family members, however well-intentioned, always presents difficult issues for defense attorneys.

Regardless of the wishes and opinions of the family, the attorney's ultimate responsibility is to the client.¹⁷⁴ Often, an attorney representing a defendant with mental retardation may try to involve the defendant's family in the decision-making process; while this is often laudable, again attorneys cannot ignore ethical issues of client autonomy. Although having the defendant's mother, for example, involved in plea discussions may help the attorney communicate with the client, at

v. Alfred, 788 P.2d 130, 135 (1990); *State v. Bonds*, 653 P.2d 1024 (1982); *People v. Edney*, 350 N.E.2d 400, 385 (1976).

172. See *Ake v. Oklahoma*, 470 U.S. 68, 73-74 (1985); *Britt v. North Carolina*, 404 U.S. 226 (1971) (finding as a matter of equal protection that indigent defendants are entitled to the "basic tools of defense," when others can pay for them at state expense).

173. See *supra* note 170 and accompanying text.

174. AMERICAN ASSOCIATION ON MENTAL RETARDATION, *A GUIDE TO CONSENT* 98 (Robert D. Dinnerstein et al. eds., 1999).

the end of the day the attorney must represent the client's interests, not the interests of the client's mother.

Most clients with mental retardation will not fit the definition of legal incompetence, and some will refuse to admit incompetence, or even a disability, in any event. Just as any other criminal defendant makes decisions for complex reasons, so too may a defendant with mental retardation. Some persons with mental retardation take great pride in their ability to function in society with little or no assistance, and would be loath to admit that they did not understand. For a defendant who has never been diagnosed as having mental retardation, the mere suggestion of the disability can be devastating to the individual's sense of self worth. Defendants in these categories possess a significant level of self-awareness or self-regard which makes a finding of legal incompetence highly unlikely.¹⁷⁵ That does not mean, however, that the disability issue should be ignored entirely.

Most defendants with mental retardation will be best served if the court is aware of and forced to make appropriate accommodations to ensure that the defendant does not wind up being steamrolled by a system he or she does not understand. The attorney must help the client understand that the disability is not something of which to be ashamed, and that insisting on accommodations for that disability is merely a way to make sure that the client gets the same treatment by the court as anyone else. If patiently and carefully done, the attorney has an opportunity to empower his or her client. This also creates opportunities to educate the court and the other actors in the criminal justice system about the need to accommodate persons with mental retardation in terms of communication, modifications of the process, and in terms of considering appropriate sanctions.

One important aspect of accommodating the disability of a client with mental retardation is to make clear in dealings with the client, with other professionals, and with the court, that the attorney does not view mental retardation as a justification for criminal behavior or believe that people with mental retardation, to the extent possible, should not be held to the law. The attorney needs to convey that his or her concern is to effectively communicate with the client, to ensure that the client receives fair treatment in the criminal justice process, and to seek a resolution that is sensitive to the client's particular circumstances. In other words, to ensure that the client receives equal treatment of the laws.

175. See *infra* notes 177-85 and accompanying text.

If, for example, a defendant with mental retardation insists on his or her right to trial, the attorney might want to advocate for modifications of the trial process in order to help the defendant understand the proceedings. These modifications might include reducing the length of trial sessions to accommodate the defendant's limited attention span. The defendant and attorney may require frequent breaks so the attorney can explain to the defendant the testimony that has just been elicited and make sure the defendant understands it. Not only may such accommodations be advisable, they may arguably be required by the ADA.¹⁷⁶ The attorney may also want to explain to the jury why, as a result of the disability, the defendant may display reactions that appear to be inappropriate, such as excessive smiling or inattention.

Perhaps the most important way the attorney can accommodate the client with mental retardation is to make sure that the attorney maintains access to as many resources as possible. Attorneys should share information about their experiences representing defendants with mental retardation and attend available training or continuing legal education programs. The more attorneys are exposed to the issues involved when representing criminal defendants who have mental retardation, the easier those issues will become to spot and to address appropriately. Attorneys also should build ties with the mental health professionals in their communities. By cultivating relationships with community mental health centers, advocates for people with mental retardation, and other professionals, the attorney will have a ready pool of resources when such issues arise.

V. THE LEGAL DETERMINATION OF COMPETENCY AND CRIMINAL RESPONSIBILITY

When a criminal defendant with mental retardation enters the criminal justice system, two legal questions are presented that may not arise with most other defendants: (1) Is the defendant legally competent to be tried, and (2) does the defendant's mental retardation relieve him or her of legal responsibility for the offense. Even though it is rare that a person with mental retardation is deemed incompetent or found not guilty by reason of mental deficiency, it is nonetheless important for

176. Keri K. Gould, *And Equal Participation for All . . . The Americans with Disabilities Act in the Courtroom*, 8 J.L. & HEALTH 123 (1994). "Congress, by enacting the ADA, sought to ameliorate court-related accessibility differentiation by specifically including state and local courthouses within the statute's definition of public services." *Id.* at 132-33. "In a court which will not explore necessary accommodations, it is likely that the functioning capabilities of the person with a disability will be reduced. This most likely will result in an inability to understand, follow, or actively participate in the proceedings." *Id.* at 143.

attorneys to understand the applicable legal standards and their implications for a particular client.

A. *Competency In General*

Wyoming law follows what is referred to as the "Dusky standard" in determining competency to stand trial.¹⁷⁷

No person shall be tried, sentenced, or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to

- (i) Comprehend his position;
- (ii) Understand the nature and object of the proceedings against him;
- (iii) Conduct his defense in a rational manner; and
- (iv) Cooperate with his counsel to the end that any available defense may be interposed.¹⁷⁸

A "mental deficiency" is defined as "a defect attributable to mental retardation, brain damage and learning disabilities."¹⁷⁹ The standards for competence to stand trial are the same as the standards for competency to be sentenced.¹⁸⁰ Regardless of when competency comes into question, all judicial proceedings are suspended until the defendant regains competency, unless it is determined that he or she cannot be restored to competency.¹⁸¹

To determine competency in the state of Wyoming, "a licensed psychiatrist, a licensed physician with forensic training, or a licensed psychologist with forensic training," must conduct the competency evaluation.¹⁸² When necessary, the court may appoint other mental health professionals to assist a psychiatrist or a psychologist in the assessment. Current Wyoming law requires that the competency evaluation address

177. *Dusky v. United States*, 362 U.S. 402 (1960).

178. WYO. STAT. ANN. § 7-11-302(a) (LEXIS 1999).

179. *Id.* § 7-11-301(a)(iii).

180. *Id.* § 7-11-302(a). In addition, the Wyoming Statutes also provide that the defendant must be competent in order to be executed. *Id.* § 7-13-901(a)(v). For a person convicted of a capital offense to be competent to be executed, the person must have "the ability to understand the nature of the death penalty and the reasons it is imposed." *Id.* The procedures for evaluating competence to be executed are similar to those used when evaluating competence to proceed to trial. Wyoming currently is not among the thirteen death penalty states which prohibit execution of persons with mental retardation.

181. *Id.* § 7-11-303(g).

182. *Id.* § 7-11-301 (a)(i).

current competency to stand trial and provide an opinion about the individual's mental status at the time of the offense.¹⁸³ If the trial court finds the defendant incompetent to stand trial, the court must stay the proceedings and commit the accused to a designated facility for a period reasonably necessary to determine if the accused will regain competency.¹⁸⁴ If it does not appear that the accused will regain competency, the accused should not be further detained unless civil proceedings are initiated.¹⁸⁵

The attorney must be aware of the issues regarding allocation of the burden of proof on the issue of competence. While Section 7-11-303 of the Wyoming Statutes Annotated sets forth the procedures for determining an accused's competence to proceed, it is silent regarding the allocation of the burden of proof. The Wyoming Supreme Court has acknowledged "that the question of competency to stand trial 'is a threshold issue, necessary to be resolved to prevent the violation of due process through conviction of a person incompetent to stand trial.'"¹⁸⁶ The court went on to conclude that to best protect an accused's due process rights, "[w]hen there is reasonable cause to believe an accused is unfit to proceed," the burden of proof is allocated to "the party who is seeking to show that the accused is competent to stand trial."¹⁸⁷ Thus, "in a W.S. 7-11-303(f) hearing arising from a contested opinion on competency, the burden of proof by a preponderance of the evidence rests on the party seeking to establish that the accused is competent."¹⁸⁸

While burden of proof questions are rarely outcome determinative,¹⁸⁹ in many cases the question of competence will be an extremely

183. *Id.* § 7-11-303 (c)(ii)(iii). For a discussion of some potential problems created by this requirement, see *infra* notes 193-95 and accompanying text.

184. *Id.* § 7-11-303 (g).

185. *Id.* § 7-11-303 (g)(i).

186. *Loomer v. State*, 768 P.2d 1042, 1045 (Wyo. 1989) (quoting *Hayes v. State*, 599 P.2d 558, 563 (Wyo. 1979)).

187. *Id.* at 1045.

188. *Id.* In this regard, the Wyoming Supreme Court has provided greater due process protections than those required by the U.S. Constitution. See *Medina v. California*, 505 U.S. 437 (1992) (articulating statutory scheme which places on a defendant who challenges his or her competence the burden of proving incompetence by a preponderance of the evidence, does not offend due process); *but see Cooper v. Oklahoma*, 517 U.S. 348 (1996) (articulating statutory scheme which places on a defendant who challenges his or her competence the burden of proving incompetence by clear and convincing evidence, offends due process).

189. "Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of the evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder." *United States v. DiGilio*, 538 F.2d 972, 988 (3rd Cir. 1976).

close call. Not only will there be conflicting expert opinions, the designated examiners will also hold different qualifications.¹⁹⁰ In such cases, an effective attorney will not only argue the evidence, but also will emphasize that it is the State's burden to show competence. If the attorney has obtained a thorough evaluation by an appropriately qualified evaluator, and the State has instead relied on the usual suspects,¹⁹¹ the State may be hard-pressed to meet its burden of proof.

When an attorney suspects or has determined that his or her client has mental retardation, the next step is not automatically to challenge the client's competence to proceed. Each person with mental retardation is unique—there is no “one size fits all” solution for defendants with mental retardation.

One important thing the attorney must understand is the consequence of an incompetence determination for the defendant with mental retardation. The competency statutes provide that if the court finds a defendant incompetent, the defendant ordinarily must be sent off to the state hospital for treatment until he or she becomes competent, or until it is determined that there is no likelihood that the defendant will ever become competent.¹⁹² Because mental retardation, unlike mental illness, is a static condition, generally there is no medication, counseling, or treatment that is likely to render an incompetent defendant with mental retardation competent to stand trial. Thus, an incompetency determination may effectively result in sentencing the client to a lengthy period of hospitalization, which will never help. For a small class of incompetent defendants with mental retardation, a lengthy period of patient education and training might enable them to understand the criminal process enough to become competent. At present, however, the State of Wyoming does not offer any program aimed at teaching the educable defendant with mental retardation about the criminal justice process.

With the only currently available alternative being a permanent determination that the defendant is incompetent, in the marginal cases evaluators are probably more likely to err on the side of finding the defendant competent. For less serious crimes, the attorney also may be confronted with the ironic dilemma that, regardless of the accused's actual competence, the accused may be “better off” if he or she is treated as if competent, and allowed to enter a plea and receive a finite, likely shorter, sentence.

190. See *infra* note 208 and accompanying text.

191. See *infra* note 209-11 and accompanying text.

192. WYO. STAT. ANN. § 7-11-303(g) (LEXIS 1999).

In addition, defense counsel must understand the consequences of a failed challenge of the defendant's competence to proceed. If an accused's competence is challenged, by counsel or the court, the designated examiner is required to evaluate and offer an opinion not only on the issue of competence, but also "[a]n opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental illness or deficiency, lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform to the requirements of law."¹⁹³ First, this suggests that the competency statutes carry an implicit assumption that if the defendant chooses to contest competence, he or she must have engaged in the allegedly criminal conduct. Second, although the defendant's statements made during the evaluation process may not "be admitted in any criminal proceeding then or thereafter pending on any issue other than that of the mental condition of the accused,"¹⁹⁴ the inquiry into criminal responsibility creates a record for both the prosecutor and the court that can be damaging to the defendant. Thus, if the defendant's competence is evaluated, and the court determines that the defendant is competent, the findings in the evaluation may come back to haunt the defendant. The evaluator's findings about the defendant's mental state at the time of the offense may compromise, or inappropriately encourage, plea negotiations. In addition, the defendant's revelations during the competency evaluation process may strengthen the prosecution's case, by leading the prosecution to evidence it might otherwise not have obtained.¹⁹⁵

The attorney, however, is not the only actor in the criminal justice system who has a duty to consider the competence question. Wyoming statutes provide that if there is "reasonable cause to believe that the accused has a mental illness or deficiency making him unfit to proceed," the trial court may, on its own motion, suspend proceedings pending evaluation of the accused.¹⁹⁶ Although the statute is rather awkwardly phrased and suggests that this is merely an option available to the trial court or counsel, principles of due process *mandate* that the trial court make such a motion if sufficient doubt about the accused's competence exists.¹⁹⁷

193. *Id.* § 7-11-303(c)(i)-(iv).

194. *Id.* § 7-11-303(h).

195. This problem should not arise when the examination is performed by a competent, ethical psychologist. The ethical guidelines for forensic psychologists advise them not to reveal such incriminating information obtained during the evaluation. Committee on Ethical Guidelines for Forensic Pathologists, *Specialty Guidelines for Forensic Psychologists*, 15 LAW AND HUMAN BEHAVIOR 6, 662-63 (1991).

196. WYO. STAT. ANN. § 7-11-303(a).

197. See *Pate v. Robinson*, 383 U.S. 375 (1966). If the court makes such a motion, and the accused has opposed placing his or her competence at issue, defense counsel is

In any event, not every defendant with mental retardation is incompetent to stand trial; indeed, most will be found competent to proceed. Competence does not require a sophisticated understanding of the criminal process. The defendant must merely have the capacity to "comprehend his position, understand the nature and the object of the proceedings against him, conduct his defense in a rational manner, and cooperate with his counsel to the end that any available defense may be interposed."¹⁹⁸ In effect, the defendant must understand that he or she is, in fact, "the defendant;" must understand the roles of the various parties in the process—the judge, the prosecutor, and defense counsel—and must have some ability to cooperate with his or her attorney. Most persons with mental retardation can easily meet that standard. Given the efforts in the last three to four decades to mainstream children with mental retardation in schools, and the prevalence of televised trials and trial dramas in popular culture, many defendants with mental retardation have at least some exposure to the machinations of the criminal justice process.¹⁹⁹

Because the threshold for competency to stand trial has historically been very low, there are very few cases in which the individual's mental retardation was cited as the sole reason for them to be found incompetent to stand trial.²⁰⁰ Multiple cases demonstrate that individuals with mental ages of seven or below are incompetent to stand trial.²⁰¹ Individuals with mental ages of eight or above have in instances been found to be incompetent to stand trial if associated with other conditions, such as alcohol intoxication²⁰² or head injury.²⁰³ Individuals who have been diagnosed with "dull or low normal or as having borderline, or mild

put in a difficult position. Counsel owes a duty of candor to the court, but also a duty of loyalty to the client. See also WYO. RULES OF PROF'L CONDUCT R. 3.3 and R. 1.7, cmt. 1. Given the low threshold for competence, the problem rarely presents itself. A defendant with the wherewithal to oppose challenging competence is likely to be deemed competent anyway. For the attorney, however, an option which may preserve relationships with the client and the court is to acknowledge the disability and try to educate the court about ways in which the attorney has been making, and the court should make, accommodations for that disability.

198. WYO. STAT. ANN. § 7-11-302(a)(i)-(iv) (LEXIS 1999); see also *Dusky v. United States*, 363 U.S. 402 (1960).

199. Of course, exposure to court procedures through television dramas and movies also may contribute to misapprehensions about how the criminal justice system actually operates. A person with mental retardation whose only exposure to the criminal process has come through *L.A. Law* or *Law & Order* may have a hard time comprehending why his or her case is not able to be conveniently resolved in an hour.

200. Dove, *supra* note 168, at 17, § 2(a).

201. See *id.* at 40-42.

202. *South v. Slayton*, 336 F. Supp 879 (W.D. Va. 1972).

203. *Pierce v. State*, 293 So. 2d 483 (Ala. Crim. App. 1973).

mental retardation" are generally found to be competent.²⁰⁴ However, if individuals have a second diagnosis which would make communication with their attorney difficult,²⁰⁵ or have a deep personality disorder,²⁰⁶ they are more likely to be considered incompetent.

If, after carefully weighing the options and the potential consequences, the attorney and client decide to put the client's competence at issue, or if the court, on its own motion, does so, a whole host of new problems arise. When raising an issue of competence based on the client's suspected mental retardation, an evaluation is, of course, an essential step for the client's attorney to take. It is important for an attorney to understand what that evaluation entails from the standpoint of the psychologist(s) doing the evaluation and also what the results of the evaluation mean. The psychologist may be asked to determine a client's competence to stand trial and also the client's mental state at the time of the offense. Depending on the circumstances, there may be more than one evaluation with differing opinions. The attorney will have to sort out these opinions and possibly attack one or the other if the attorney does not believe it accurately reflects the client's mental state or condition. This section attempts to provide a detailed description of the process as a reference.

B. Understanding and/or Challenging Competency Evaluations

1. Getting a Good Evaluation

Nearly ten years ago, the President's Committee on Mental Retardation identified the need for more forensic examiners with expertise in mental retardation as opposed to mental illness.²⁰⁷ Today, finding evaluators with the appropriate experience and expertise remains a problem. Few mental health professionals have experience or training regarding issues of mental retardation. On the other hand, those persons with the most experience and training regarding such issues—like persons involved with community-based assisted living centers, or advocates for persons with mental retardation—have no training in forensic evaluation.

To conduct a thorough forensic psychological evaluation of a client with mental retardation would require a licensed psychologist with

204. Dove, *supra* note 168, at 45.

205. State v. Williams, 381 So. 2d 439 (La. 1980) (considering client with a speech handicap); State v. Smith, 471 So. 2d 954 (La. App. 1985) (considering a deaf and mute client).

206. People v. Jordan, 324 N.E.2d 131 (N.Y. 1974).

207. See REPORT TO THE PRESIDENT, *supra* note 16.

specific training and experience in evaluating persons with mental retardation. The psychologist should also be able to demonstrate significant training and experience in forensic issues.²⁰⁸

An evaluation needs to take into account mental retardation's global impact on every dimension of a person's being and identity: rigidity in thinking, perseveration, expressive and receptive language, socialization skills, interactions with others, attention, memory, impulse control, immature or incomplete concept of causation, understanding of the social situation, morality, self-

208. See Committee on Ethical Guidelines for Forensic Pathologists, *supra* note 195. The Wyoming Statutes Annotated define what types of evaluations can be performed by various mental health professionals. The practice of psychology includes, but is not limited to: "Psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes and neuropsychological functioning." WYO STAT. ANN. § 33-27-113(a)(iii)(A) (LEXIS 1999). This is a "practice act," thus only psychologists can conduct psychological evaluations or provide psychological services. They cannot supervise or delegate the work to any one else. Personal communications with the Wyoming Board of Psychologists. Other professions licensed under § 33-38-101 of the Wyoming Statutes Annotated, such as Professional Counselors, Marriage and Family Therapists, Social Workers, and Chemical Dependency Specialists, can conduct "appraisals." These appraisals are defined as "selecting, administering, scoring and interpreting instruments designed to assess an individual's attitudes, abilities, achievements, interests and personal characteristics and the use of methods and techniques for understanding human behavior in relation to coping with, adapting to, or changing life situations. . . ." § 33-38-102(a)(ii)(B). Thus, if a professional licensed under this provision were trained, and experienced, in intellectual assessment and mental retardation, they would be able to conduct a virtually identical evaluation as a psychologist, but could not call it a "psychological evaluation." The primary distinction being that a psychologist is a doctoral level mental health professional (often cited as having more training in the diagnosis and treatment of mental disorders than any other mental health professional, including psychiatrists). Those licensed under § 33-38-101 require a master's degree or less.

Psychiatrists have the advantage of being medical doctors, commanding respect from lay people as operating at the highest level. "Of all mental health professionals, psychiatrists continue to hold the greatest prestige in the criminal justice system—at least among the judiciary." James J. Clark & Edward C. Monahan, *The Mental Health Expert*, CRIM. JUSTICE, Summer 1996, at 5. However, in the Federal Rules of Evidence, psychologists and psychiatrists are given parity in their reports and opinions. See 18 U.S.C. §§ 4241-4247 (1994). Regarding training in the field of mental retardation, "psychiatric trainees have more personal than professional knowledge of mental retardation, and that consultants who care for such 'devalued persons' may have status problems." See Stephen L. Ruedrich, *Psychiatric Consultation to a Residential Facility for the Mentally Retarded*; in 5 PSYCHIATRY, THE STATE OF THE ART (P. Pichot, et. al., eds.). "The shortage of physician's well trained in the field of mental retardation has been well publicized." Leon Cytryn, *The Training of Pediatricians and Psychiatrists in Mental Retardation*; in PSYCHIATRIC APPROACHES TO MENTAL RETARDATION 652 (Frank J. Menolascino, ed., 1970).

concept, suggestibility, biased responding, motivation, problem-solving ability, intelligence quotients, and adaptive behaviors.²⁰⁹

Without an evaluation that provides such a global perspective, the attorney may miss critical issues relevant to competence and relevant to other aspects of criminal responsibility. Because making a useful evaluation is such a complex process, it is important that the evaluation be done by a professional with training and experience in treating people with mental retardation.²¹⁰ Of course, finding an evaluator who can provide such a sophisticated, nuanced assessment of the defendant is a challenge. The challenge, however, is not insurmountable. Most communities have professionals who, for example, evaluate persons with mental retardation for issues regarding eligibility for government benefits. These professionals have ample experience with making individualized assessments of persons with mental retardation.²¹¹

2. Understanding the Evaluation

a. The Significance of IQ Scores

The ability of psychologists to accurately measure intelligence by the use of standardized intellectual assessments has been controversial.²¹² Criticisms of intellectual assessment tools have largely been based upon their being culturally biased, and thus for discriminating based on lowered socio-economic status, race, or ethnicity.²¹³ However, the commonly accepted IQ tests in use by psychologists today have been rigorously researched with norms derived from representative samples of the U.S. population.²¹⁴

All psychological tests can be evaluated according to their degree of validity and how consistent they are in measuring an individual or group of individuals (measures of reliability). When adequately trained psychologists individually administer intellectual assessments with a fair amount of objectivity, IQ scores, upon repeated administration, for the most part, will stay within the standard error of measure-

209. McGee & Menolascino, *supra* note 61, at 58.

210. *Id.* at 65 (citing Ellis & Luckasson, *supra* note 4).

211. Information about how to locate such experts in your community can be obtained from the State of Wyoming Department of Health's Division of Developmental Disabilities, Wyoming Psychological Association, WIND, or advocacy groups within the community.

212. *See generally*, ELLIOT ROGERS, LITIGATING INTELLIGENCE (1987).

213. *Id.*

214. *See, e.g.*, Wechsler Intelligence Scales, for children and adults, Stanford Binet-IV, and the Kaufman Assessment Battery for Children.

ment. Of the commonly used IQ tests, an average score will fall between ninety and 109 IQ points, with a standard deviation of fifteen points.²¹⁵ Thus, an individual who is two standard deviations below the average would have an IQ score of seventy, which would fall within approximately the second percentile of the general population. The DSM-IV classifies mild mental retardation as falling between two and three standard deviations below the mean, thus with IQ scores between fifty-five and seventy.²¹⁶ Moderate mental retardation is defined as IQ scores between thirty-five and fifty-five; severe mental retardation is defined by IQ scores of twenty-five to thirty-five; and profound mental retardation is defined by IQ scores of below twenty to twenty-five.²¹⁷

Few IQ tests effectively measure below forty-six IQ points without relying heavily on measures of adaptive functioning. The IQ scores of children are subject to change over time until they reach the age of approximately sixteen, and then such scores remain relatively stable through the age range unless there is some other factor affecting an individual's neurological system.²¹⁸ "IQ scores obtained by the age of five were found to correlate highly with adult IQ scores In spite of high test/retest correlations in assessing individuals, it is necessary to conduct frequent and periodic testing if test scores are to be used for guidance and placement decisions."²¹⁹

b. The Importance of Methodology

When the court is confronted with a battle of the experts, it is particularly important for the attorney and the court to be aware of the experts' methodologies and the ability of those methods to produce a reliable evaluation. Several cases have been found where psychologists have relied upon objective psychological testing, and court appointed psychiatrists have given higher estimates of the defendant's ability based upon interviews alone. In one case, a psychologist's objective test indicated an IQ level of thirty-five; the court-appointed psychiatrist, still conceding that the defendant was mentally deficient, stated he appeared capable of assisting in his own defense, and thus was competent to stand

215. Standard deviation is a measure of distance from the average of a group of scores.

216. DSM-IV, *supra* note 9, at 40. Three standard deviations is in the approximate 0.13 percentile of the general population.

217. *Id.*

218. JEROME SATTLER, ASSESSMENT OF CHILDREN 72 (3d ed. 1992).

219. *Id.* at 73.

trial.²²⁰ The trial court opted to accept the latter opinion and, on appeal, the court affirmed a conviction of first-degree murder.²²¹

In *People v. McNeal*,²²² a psychologist assessed the defendant's IQ to be approximately sixty-one, however this was contradicted by the State's psychiatrist who stated in his opinion (which had been formed without the benefit of testing) the defendant's true IQ was between seventy and eighty.²²³ When IQ is not evaluated through objective psychological testing, the variability in IQ scores can range considerably. In *State v. Bennett*,²²⁴ one doctor examined the defendant for only twenty minutes and placed the defendant's IQ in the high eighties or low nineties while another physician, also without the benefit of testing, estimated the defendant's IQ to be between thirty-five and fifty.²²⁵ In declining to order the psychological testing to more firmly determine the defendant's intellectual ability; the trial court dismissed the fifty-five-point discrepancy of the estimated IQ scores, stating:

I would imagine that a person with a college degree or a great deal of education would be of more assistance to counsel in assisting in his defense than a person would be of low educational level and possibly some mental retardation. But within his capabilities, if I understand what the law is, within his capabilities, if he can assist counsel in his defense.²²⁶

However, upon rehearing, the Louisiana Supreme Court stated that "[s]uch a determination begs the crucial question: [W]ere defendant's capabilities sufficient to give him a rational as well as a factual understanding of the proceedings against him and to enable him to consult with counsel with a reasonable degree of rational understanding?"²²⁷ Later the court concluded, "[w]hether defendant's I.Q. is 35 or 90 bears importantly on his ability to stand trial."²²⁸ Thus, the court ruled that the trial court erred in failing to order the additional testing that the defendant's attorney requested.²²⁹

220. *Brown v. State*, 245 So. 2d 68, 70 (Fla. 1971).

221. *Id.* at 75.

222. 419 N.E. 2d 460 (Ill. App. Ct. 1981).

223. *Id.* at 464.

224. 345 So. 2d 1129 (La. 1977).

225. *Id.* at 1132-33.

226. *Id.* at 1133.

227. *Id.* at 1137 (citations omitted).

228. *Id.* at 1138.

229. *Id.* at 1139.

Likewise, in *State v. Hamilton*,²³⁰ once again based upon a twenty minute interview, a physician gave the opinion that the defendant was in the IQ range of forty to sixty; the court found that this opinion was not adequately based upon reasoning and factual information.²³¹ The physician's opinion was in contrast to the opinion of a second physician who reviewed previous psychological testing and other psychiatric reports and determined that the defendant had an IQ of fifty-six. The Louisiana Supreme Court relied upon the second physician's opinion as it was "amply supported by information and reason."²³² However, because Louisiana law at the time required a "sanity commission" to determine competency, the two physicians still did not meet the requirement that the defendant receive his right to a "thorough examination."²³³ Thus, the case was remanded for further proceedings to determine whether the defendant lacked the capacity to understand the proceedings against him or to assist in his defense.²³⁴

As these cases demonstrate, when intelligence is determined without the benefit of individualized, standardized testing, an opinion about the defendant's "IQ" is little more than a guess. While the interview process may give some insight into other aspects of the defendant's adaptive skills, it is not as accurate as testing or testing supplemented with interviews for estimating intelligence or competence.²³⁵

c. The Importance of Considering More than IQ Scores Alone

The DSM-IV definition of mental retardation indicates that IQ scores alone do not determine mental retardation.²³⁶ Individuals must demonstrate significant limitation in what are termed "adaptive living skills"; limitations in these areas are usually determined by interview of family members or care givers who know the individual's level of functioning.²³⁷ The interviews can be supplemented by administering various

230. 373 So. 2d 179 (La. 1979)

231. *Id.* at 181.

232. *Id.* at 183.

233. *Id.*

234. *Id.* at 183-84.

235. A national study on prevalence of mental retardation among juvenile delinquents found that when prevalence of mental retardation and juvenile delinquency was reported by administrators, court records, or "corrections data," the prevalence rate of mental retardation was found at 3.4% to 7.4%. C. Michael Nelson, *Handicapped Defenders in the Criminal Justice System*, in SPECIAL EDUCATION IN THE CRIMINAL JUSTICE SYSTEM 7 (C. Michael Nelson, et. al., eds., 1987). However, when the sources of data were psychologist case files and/or psychometric assessments, the prevalence rate rose from 25% to 30%, respectively. *Id.*

236. See DSM-IV, *supra* note 9, at 39-40.

237. *Id.*

measures of adaptive living skills such as the Vineland Adaptive Behavior Scales or the American Association on Mental Retardation Adaptive Behavior Scale. An individual's abilities in adaptive functioning are an indication of how well the individual copes with routine demands of life and to what degree the individual is able to achieve independence as expected for an individual of his or her age, social/cultural background, or situation in which he or she is living.

The importance of assessing adaptive behavior in addition to an intellectual assessment of mental retardation was dramatically demonstrated by the comparison in a recent article of two defendants who were quite similar.²³⁸ Rogers had an IQ of sixty-nine, Miller had an IQ of sixty-seven. The two men had similar histories of substance abuse and had committed similar crimes.²³⁹ Despite their similarities, Rogers received the death penalty and Miller did not; the different results were largely based upon whether there had been a thorough assessment of adaptive behavior.²⁴⁰ For Miller, the qualitative analysis of his adaptive functioning was probed in-depth. In-depth analysis revealed that factors which might ordinarily have been considered indicia of adaptive functioning, on closer review actually demonstrated significant deficits in adaptive behavior. For example, his work history indicated that he held employment for longer periods only when employed, in a supportive manner, by family members. Though he had a driver's license, he had numerous driving violations. Though the defendant had completed a correspondence Bible study class, further assessment indicated that he was not functioning above the third-grade level. Considerable family history was obtained through a structured inventory of adaptive skills. The inventory was used to substantiate adaptive behavior deficits present during the developmental period. For Rogers, neither the psychologist nor the psychiatrist involved had specific training, nor were able to demonstrate understanding of mental retardation. In spite of the IQs obtained in testing, the psychiatrist expressed the opinion that the defendant did not demonstrate significant sub-average intellectual functioning.²⁴¹

Courts must be educated about the need to look beyond IQ scores and to consider the defendant's actual abilities in relevant areas.

238. Dennis R. Olvera et al., *Mental Retardation and Sentences for Murder: Comparison of Two Recent Court Cases*, 38(3) MENTAL RETARDATION 230 (June 2000). The two cases compared were Rogers v. State, 698 N.E.2d 1172 (Ind. 1998), and Indiana v. Miller, Case No. 49G059508CF110486 (Marion County Super. Ct., Crim. Div. 1998).

239. See Olvera et al., *supra* note 238. Rogers' IQ score is reported in 698 N.E.2d at 1177, and Miller's IQ score was reported in a telephone conversation with Olvera.

240. *Id.* at 230.

241. *Id.*

In *M.D. v. State*,²⁴² the trial court did not rely solely upon an IQ score of forty-eight and the psychologist's opinion that the defendant was likely functioning at a higher level in order to determine competency to stand trial; the court ordered the psychologist to evaluate the defendant's adaptive skills.²⁴³

d. Mental Age

In addition to IQ scores, the attorney may occasionally encounter a reference to "mental age." Mental age is defined as the degree of general mental ability possessed by the average child at a particular chronological age.²⁴⁴ Thus, an individual who is assessed with a mental age of eight is perceived as having the general mental ability of an average eight-year-old child. Because mental growth is not a linear function, the units between mental ages are not consistent. That is, the mental age difference between the ages of two and three is much greater than that between the mental age of twelve and thirteen. By the age of approximately five years, the rate of mental growth begins to decrease; and by the age of thirteen the concept of mental age has little meaning.²⁴⁵ Thus in explaining an adult's intellectual quotient, the use of a mental age provides, in general terms, some understanding of an individual's absolute level of performance.

e. Educating the Court and Advocating for Change

The most sophisticated evaluation will be meaningless if the attorney has not succeeded in educating the court about mental retardation and about the consequences of a finding of incompetence. First, the attorney may have to overcome a court bias in favor of the ordinary court-appointed psychiatrists whose evaluations may be valuable when dealing with defendants with mental illness, but not so valuable for defendants with mental retardation. The court must be educated about the differences between mental illness and mental retardation and about the different experiences of evaluators. The court must also be educated about the limits to the individual defendant's learning abilities. Without an understanding of those limitations, the court might wrongly assume that—like defendants with mental illness—a short stay in the state hospital is all it will take to render the defendant competent. Finally, the court has to be educated about what options are available for the defendant with mental retardation who is found incompetent. The court must be

242. 701 So. 2d 58 (Ala. 1997).

243. *Id.* at 61.

244. SATTLER, *supra* note 218, at 76.

245. *Id.*

made to understand that sending that defendant off to the state hospital will not produce any useful results.

In their recent article comparing the treatment of two capital defendants with mental retardation, Olvera and his co-authors advocate that "[i]n order to assure adequate evaluation of defendants who may have mental retardation at least three major steps need to be taken."²⁴⁶ First, they call for "statutes to be enacted or modified to reflect a need for assessment procedures for mental retardation and document thorough and adequate investigation of all ten adaptive skill areas identified by the definition of mental retardation by the AAMR."²⁴⁷ Second, they call for state advocacy groups for individuals with mental retardation to "activate grass roots campaigns to sensitize members of the legal profession to the issues of mental retardation and its classification."²⁴⁸ Finally, they argue that "[t]he role of assisting the courts in cases where mental retardation is a potential issue must be assumed by individuals with adequate training and experience in mental retardation, not simply abdicated to any licensed health care professional."²⁴⁹ Thus, such expert witnesses for defendants who are asked to assess the defendant's mental retardation "must be prepared to demonstrate that their assessment procedures meet or exceed the standard of practice."²⁵⁰

3. Placement/Treatment Options for the Person Found Incompetent

When a court has found a defendant with mental retardation incompetent, the options currently available in Wyoming are less than ideal. Wyoming's competency statutes provide that "[i]f the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and *the court shall commit him to a designated facility* for such time as the court may order but not to exceed the time reasonably necessary to determine whether there is substantial probability that the accused will regain his fitness to proceed."²⁵¹ When a

246. Olvera et al., *supra* note 238, at 232-33.

247. *Id.* at 233.

248. *Id.*

249. *Id.*

250. *Id.*

251. WYO. STAT. ANN. § 7-11-303(g) (LEXIS 1999) (emphasis added). A "facility" for purposes of Wyoming Statutes Annotated, sections 7-11-301 through 7-11-307, "means the Wyoming state hospital or any other facility designated by the court which can adequately provide for the security, examination or treatment of the accused." *Id.* § 7-11-301(a)(ii). Unfortunately, in Wyoming there is a dearth of other facilities a court can designate for commitment of an incompetent defendant with mental retardation. About the only possible placement is the Wyoming State Training School in Lander. *See id.* §§ 25-5-101 through 25-5-134. Even this option, however, is not always available:

person with mental retardation is found incompetent, no period of commitment is necessary to determine whether that person will regain competence—that person will not. Neither the Wyoming State Hospital, Wyoming State Training School, nor any other Wyoming facility offers the kind of educational programs that could, over time, assist an incompetent defendant with mental retardation in understanding the criminal process.

The Wyoming statutory provisions do not take this into account. After directing the court to commit a defendant who is deemed incompetent to a designated facility, the Wyoming statutes provide:

If it is determined that there is no substantial probability that the accused will regain his fitness to proceed, the accused shall not be retained in a designated facility unless proper civil commitment proceedings have been instituted and held as provided in title 25 of the Wyoming statutes. The continued retention, hospitalization and discharge of the accused shall be the same as for other patients.²⁵²

A person with mental retardation alone, even though legally incompetent to stand trial, is not a likely candidate for civil commitment pursuant to sections 25-10-101 through 25-10-127 of the Wyoming Statutes Annotated providing for the hospitalization of persons with *mental illness*.²⁵³ Nothing in the provisions for involuntary admission of persons with mental retardation to the Wyoming State Training School permits such admission to be at the instigation of the court.²⁵⁴ Thus, the court is without authority to commit a person to the Wyoming State Training School. Moreover, placement at the Wyoming State Training School of persons who have been convicted of a crime is available only under very limited circumstances.²⁵⁵

"A person convicted of a criminal act shall not be admitted to the training school unless the preadmission evaluation indicates that the act was due directly to mental retardation, or that the person can benefit from resident services without penal restrictions." *Id.* § 25-2-114(b).

252. WYO. STAT. ANN. § 7-11-303(g)(i).

253. As noted earlier, mental illness and mental retardation are completely separate and distinct disabilities which present very different symptoms and have very different treatment needs. Unless the person has a dual-diagnosis disability, a person with mental retardation is *not* mentally ill. See notes 138-47 *supra* and accompanying text.

254. Applications for involuntary admission to the Wyoming State Training School may only be made by "a parent, guardian, the superintendent or a social service agency." WYO. STAT. ANN. § 25-5-119(a) (LEXIS 1999).

255. See *supra* note 251.

Because there is often no facility to which to refer an incompetent defendant who has mental retardation, such a person should be eligible for discharge from "a designated facility" immediately after having been found incompetent.²⁵⁶ Section 7-11-303(g)(i) of the Wyoming Statutes Annotated goes on to provide, however, that: "[I]f the accused is discharged, the criminal proceedings shall be resumed, unless the court determines that so much time has elapsed since the commitment of the accused that it would not be appropriate to resume the criminal proceeding."²⁵⁷ This provision, while perhaps appropriate for a defendant with mental illness, who can at some point be restored to competence, makes little sense for the defendant who has mental retardation. It seems clear that these provisions were drafted with the defendant with mental illness, and not persons with mental retardation, in mind.

Florida has created an innovative program to address the needs of defendants with mental retardation who have been found incompetent.²⁵⁸ The Mentally Retarded Defendant Program (MRDP) provided by the State of Florida's developmental services program is under the auspices of the Department of Health and Rehabilitative Services of the State.²⁵⁹ Defendants deemed incompetent to proceed to trial and designated with mental retardation benefit from this program through evaluations and treatment.²⁶⁰ One of the main goals of the MRDP is competency training to enhance defendants' knowledge of court procedures to the level that they are better able to assist in their defense. This program provides individuals with training in daily living skills, communication skills, life management, functional academics, leisure/social skills and antecedence behaviors, and consequences of crime. There is a behavioral component to reduce maladaptive behaviors and teach and/or strengthen skills focusing on socially appropriate behaviors.²⁶¹ The average length of time for completing this competency training program is five months, though individuals are able to remain in the program for up to two

256. For those few persons who can be admitted to the Wyoming State Training School consistent with the provisions of section 25-5-114(b) of the Wyoming Statutes Annotated, this provision is far less problematic. Such a person would only become eligible for discharge from the training school when an interdisciplinary team recommends that "placement in a less restrictive and more therapeutic environment is appropriate for the resident's needs and abilities." *Id.* § 25-5-124(a).

257. *Id.*

258. See William I. Gardner et al., *Treatment of Offenders with Mental Retardation*, in TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 342 (R.M. Wettstein ed., 1998).

259. *Id.*

260. *Id.*

261. *Id.*

years.²⁶² Males found incompetent to stand trial, yet ready to leave the MRDP, who still require a secure setting, are placed in a program within the existing state institution for persons with developmental disabilities.²⁶³ As they progress successfully through that program, and require less strict supervision, they are moved to a non-secure program providing twenty-four hour supervision. The courts maintain jurisdiction in both settings as to whether the individuals may be removed to less restrictive settings or continue placement at either program.²⁶⁴

Wyoming would be well-advised to look to the examples of Florida and other states to improve the placement options for persons found incompetent as a result of mental retardation. Another way to confront the competence problems would be to create more educational opportunities for persons with mental retardation, to promote understanding of the criminal justice system and to promote law-abiding behavior. The considerations that go into creating appropriate alternatives for incompetent defendants are quite similar to those that go into creating appropriate sentencing and habilitation options for offenders with mental retardation.²⁶⁵

C. Mental Retardation and Criminal Responsibility

In addition to the question of the client's competence to stand trial, there is a separate question regarding the criminal responsibility of a defendant with mental retardation. This question focuses on the defendant's understanding and mental state *at the time of the criminal offense*. As set forth by the Wyoming Legislature, "[a] person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."²⁶⁶ The Legislature went on to provide that, for purposes of section 7-11-304(a), mental deficiency means "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality."²⁶⁷ In spite of the national controversy over criminal defendants who claim not to be criminally responsible because of their mental status at the time of the time of the offense,²⁶⁸ research has determined that this defense is rarely

262. *Id.*

263. *Id.*

264. *Id.*

265. See *infra* notes 368-92 and accompanying text.

266. WYO. STAT. ANN. § 7-11-304(a) (LEXIS 1999).

267. *Id.*

268. In some jurisdictions, this defense arises with a plea of Not Guilty by Reason of

used and rarely successful. Approximately 0.05% of Wyoming defendants actually employ the not guilty by reason of mental illness or deficiency plea at trial, and less than 1% of those employing that defense at trial in Wyoming are successful.²⁶⁹ However, mental status at the time of the offense may provide beneficial leverage for a negotiated disposition of a competent defendant who has the potential for such pleas.

For the defendant with mental retardation, the competence and responsibility questions are more closely linked than they are for a defendant with mental illness. A defendant with mental illness might be in full possession of his or her faculties, and possess the capacities necessary for criminal responsibility at the time of the offense, but may later become legally incompetent. Conversely, a defendant with mental illness might commit an offense as a result of untreated mental illness, but through medication or treatment later may become competent to stand trial. The mental state of a defendant with mental retardation is much more static. Although competence and responsibility involve questions about the defendant's ability to understand different matters, the answers should be different only infrequently. If a defendant with mental retardation does not have the capacity to understand his or her own conduct and its consequences, that defendant is also unlikely to understand and be able to participate effectively in the criminal justice process.

But, legal standards for criminal responsibility fail to account for the wide variance of abilities and understandings of persons with mental retardation.

For example, some people with mental retardation are susceptible to being led by others, have a desire to please, and are impulsive. These are factors which may or may not be regarded as affecting the level of criminal responsibility. In cases where people with mental retardation have an impaired understanding of the wrongness of an act, or reduced ability to control their behavior, difficult issues arise in determining the extent to which the effects of mental retardation should be a defense.²⁷⁰

Insanity (NGRI); in others, the defense is "guilty but insane;" in Wyoming, the defense is "not guilty by reason of mental illness or deficiency." WYO. STAT. ANN. § 7-11-304(c) (LEXIS 1999).

269. George Blau et al., *Understanding the use of the insanity defense*, 49 J. CLINICAL PSYCHOL. 435-40 (1993).

270. REPORT TO THE PRESIDENT, *supra* note 16, at 10. Wyoming currently does not recognize diminished capacity as a defense. On the question of criminal responsibility it gives no effect to mental retardation unless the disability entirely exonerates the defendant from responsibility. See *infra* notes 279-81 and text accompanying.

The most serious impairments resulting from mental retardation occur in logical reasoning, strategic thinking, and foresight.²⁷¹ The ability to anticipate consequence is a skill requiring intellectual and developmental ability.²⁷² These impairments are further aggravated by the intellectual rigidity of defendants with mental retardation, which is often demonstrated by impairments in the ability to learn from mistakes and persisting in behaviors which have been proven to be counterproductive or unsuccessful.²⁷³ Thus, the person with mental retardation often cannot independently generate a sufficient range of behaviors from which to select an action appropriate to the situation he faces.²⁷⁴ Impulsivity and moral development also are affected by mental retardation. This implies that, where mental retardation limits a defendant's "attainment of full moral reasoning ability he cannot be held to have that level of culpability."²⁷⁵ "Defendants with mental retardation have serious impairments of intellectual and moral reasoning, strategic thinking, and the ability to foresee consequence. The combination of these substantial limitations is directly relevant to the degree of the disabled defendant's moral culpability for his criminal actions."²⁷⁶ While these limitations ought to be relevant to the defendant's moral culpability, Wyoming law provides little ability to give these limitations any effect.

If a person with mental retardation is found competent to stand trial, this may mean the person has an understanding of his or her actions, can differentiate right from wrong at some basic level, and can understand what is happening in the adjudication process to some extent. However, it does not necessarily mean that, at the time the act was committed, the person actually understood what was happening and that his or her action was wrong. For example, consider a defendant with mental retardation who was paid to deliver drugs. Assume that, while he was not aware that there were drugs in the package he was paid to deliver, he did understand that drugs were "wrong" and that he should never have anything to do with them. The criminal justice system allows very little leeway for this naivete, primarily because determining the subjective understanding of a person committing a crime is not usually a necessary element of the crime, nor is it generally a desired requirement.

Unless a defendant specifically has entered a plea of not guilty

271. Brief of Amici Curiae, *supra* note 93, at 270-71 (citations omitted).

272. *Id.*

273. See *supra* notes 134-37 and accompanying text.

274. Brief of Amici Curiae, *supra* note 93, at 263.

275. *Id.* at 264. This should not be understood to imply, however, that people with mental retardation are immoral.

276. *Id.* at 265.

by reason of mental illness or deficiency, there is little or no mechanism for presenting evidence of the defendant's mental condition at trial. Section 7-11-304(c) of the Wyoming Statutes Annotated provides that "[e]vidence that a person is not responsible for criminal conduct by reason of mental illness or deficiency is not admissible at the trial of the defendant unless a plea of 'not guilty by reason of mental illness or deficiency' is made."²⁷⁷ Furthermore, the Wyoming Supreme Court has held that a "diminished capacity" defense is not available in Wyoming.²⁷⁸ "Diminished capacity" ordinarily is a defense that, although the defendant does not reach the level necessary to be not guilty by reason of mental deficiency, the defendant's mental deficiency nonetheless prevented the defendant from forming the requisite mens rea for the charged crime.²⁷⁹ The Wyoming Supreme Court held in *Dean v. State* that "the legislature has set forth the standard [in sections 7-11-301 to 7-11-304 of the Wyoming Statutes Annotated] relative to the mental condition which will constitute a defense to a criminal charge. Such standard should not be increased or decreased."²⁸⁰ Thus, if the defendant's mental disability does not render him or her not guilty by reason of mental illness or deficiency, then according to the Wyoming Supreme Court the disability is entirely irrelevant to the defendant's culpability, at least at trial.

Compounding this difficulty, the criminal responsibility statute literally focuses on substantial *capacity*²⁸¹ to understand, as opposed to *actual* understanding. Many persons with mental retardation have the "capacity" to learn and understand, if given enough time and the appropriate education and training. Thus, such persons have the "capacity" to learn what is right and wrong and to learn to act accordingly. Despite

277. WYO. STAT. ANN. § 7-11-304(c) (LEXIS 1999).

278. *Dean v. State*, 668 P.2d 639, 644 (Wyo. 1983) (upholding trial court's rejection of a jury instruction which would have permitted jury to consider whether defendant's mental condition prevented him from acting willfully and with malice as required for first degree arson); *Price v. State*, 807 P.2d 909, 915 (Wyo. 1991) (upholding trial court's refusal to permit psychologist's testimony on whether defendant's obsessive/compulsive mental condition prevented him from forming the specific intent necessary for first degree murder).

279. *Dean*, 668 P.2d at 644.

280. *Price*, 807 P.2d at 915 (footnote omitted). Recently, however, in holding that a defendant was required to provide the prosecution with notes taken by a clinical social worker who performed a psycho-social evaluation of the defendant, the court noted that the defendant had put her mental state at issue "when she asserted an affirmative defense on the basis of *diminished capacity* and battered woman syndrome." *Trusky v. State*, 7 P.3d 5, 10 (Wyo. 2000) (emphasis added). The Court was not confronted in *Trusky* with whether diminished capacity properly may be raised as a defense, so the opinion provides rather a slender reed on which to rest a claim that diminished capacity is again available as a defense.

281. WYO. STAT. ANN. § 7-13-304(a) (emphasis added).

such capacity, if the person has not actually acquired these skills, imposing criminal liability seems inappropriate. Nonetheless, imposing criminal liability in such circumstances is permissible as a matter of Wyoming law.

1. Presenting a Criminal Responsibility Defense

Unlike the threshold issue of competence, the issue of criminal responsibility arises as a defense which is presented at trial and not in a separate proceeding. As an initial matter, evidence in support of this defense is admissible only if the defendant timely enters a plea of "not guilty by reason of mental illness or deficiency" in accordance with Rule 12.2 of the Wyoming Rules of Criminal Procedure.²⁸² This rule requires the defendant to decide whether to pursue such a defense at a very early stage of the proceedings.²⁸³ Because the penalty for failure to timely enter such a plea may be preclusion of evidence of mental illness or deficiency, it may be wise to err on the side of caution and enter the plea as soon as possible.

Once a plea is entered in accordance with Rule 12.2, the trial court is required to order an examination by a "designated examiner."²⁸⁴ It is imperative for counsel to educate the court about the need to designate an examiner who meets the proper criteria for appointment *and* who specializes in evaluation of persons with mental retardation.²⁸⁵ If the court simply sends the defendant off to the Wyoming State Hospital—a facility for treatment of persons with mental illness—the examination will not likely be as useful, accurate, or favorable as an examination done at a facility with professionals specializing in mental retardation.²⁸⁶

282. This rule requires that such a plea be entered at arraignment, or "[f]or good cause shown the court may permit the plea to be entered at a later time." WYO. R. CRIM. P. 12.2(a)

283. If the defendant enters such a plea, and later withdraws it, the plea is not admissible against the defendant in any civil or criminal proceeding. WYO. R. CRIM. P. 12.2(e).

284. WYO. R. CRIM. P. 12.2(c); WYO. STAT. ANN. § 7-11-304(d) (1999 LEXIS). A "designated examiner" is defined as "a licensed psychiatrist, or other physician with forensic training or a licensed psychologist with forensic training." *Id.* § 7-11-301(a)(i).

285. See *supra* notes 208-211 and accompanying text for discussion of the importance of an appropriate evaluation by an appropriate examiner.

286. This is not intended as a slight on the Wyoming State Hospital. Wyoming State Hospital personnel readily acknowledge that their facility is designed for the treatment and evaluation of persons with mental illness, not mental retardation. To the extent possible, the Wyoming State Hospital encourages attorneys and courts to consider alternative sources for evaluating persons with mental retardation. Personal communication with Wyoming State Hospital personnel indicates that they are comfortable substantiating previous diagnoses of mental retardation, but they have no habilitation programs for

The default choice for most judges who order evaluations may be the Wyoming State Hospital, because the Wyoming State Training School, the primary facility in the state specifically charged with "the diagnosis, evaluation, education, training, custody, and care of mentally retarded persons,"²⁸⁷ is not an option available to the court. State law prohibits the training school from admitting persons facing criminal charges.²⁸⁸ If the first examination is faulty, the defense may be compromised from the outset. Even though after the initial evaluation, the defendant and the State have the right to request an examination by "a designated examiner of their own choosing,"²⁸⁹ the initial examiner's report is still available to the court and the State, and may set the tone for how future reports are considered.

Attorneys considering whether to present such a defense may be reluctant to present what they think will appear to the jury as an excuse. There is a perception that many juries resent "excuse" defenses as mere attempts to avoid taking responsibility for one's actions.²⁹⁰ In addition, preparing a defense based on mental illness or deficiency is a difficult, expensive, time-consuming undertaking. Before the attorney can effectively educate the court and the jury about mental retardation and how it is relevant to the particular circumstances of the client's case, the attorney first has to educate him or herself. This requires consulting with qualified professionals who specialize in working with mental retardation. Many attorneys adopt the faulty assumption that any psychologist or mental health professional will know enough about mental retardation to be a useful resource. As noted earlier, this is simply not the case.²⁹¹ The more thorough the attorney's education about the defendant's mental retardation, the better the attorney will be able to assist the trier of fact in assessing the defendant's criminal responsibility.

Effectively educating the court and the jury about mental retardation, then, requires more than just presenting expert testimony from forensic psychologists or mental health professionals. Attorneys should seek to present, and judges should be willing to accept, expertise from less traditional sources: Community caseworkers, those involved with assisted living centers, and family members of the accused can provide

persons with mental retardation.

287. WYO. STAT. ANN. § 25-5-103.

288. *Id.* § 25-5-114(b) ("A person charged with a criminal act shall not be admitted to the training school pending disposition of the charge").

289. *Id.* § 7-11-304(d).

290. See generally ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITIES* (1994).

291. See *supra* notes 208-211 and accompanying text.

the jury with practical information about how mental retardation actually impairs the defendant's functions.²⁹² Expert testimony about IQs and other technical matters will be much more understandable if the jury also receives information about what the defendant actually can or cannot do as a result of the disability.

Painting a clear picture of the defendant's disabilities may include presenting testimony from the defendant. Preparing the defendant for such testimony can be a difficult, time-consuming task. The benefits of letting the jury get to know the defendant and experience first-hand the defendant's abilities and impairments, however, must be weighed against the potential damage that can be done on cross-examination. Persons with mental retardation are particularly susceptible to suggestion and to leading questions.²⁹³ A skilled prosecutor can take advantage of this and elicit all sorts of admissions, whether true or not, on cross-examination. While the decision to testify or not is ultimately the exclusive province of a competent defendant, no defendant should be asked to make that decision without guidance from counsel. If counsel determines that the client's susceptibility to suggestion on cross-examination outweighs the benefits of testifying, counsel should strongly encourage the client not to testify.²⁹⁴

"Once the defendant introduces evidence on the issue of mental responsibility, the burden becomes that of the State to prove beyond a reasonable doubt that the defendant did not, as a result of mental illness or deficiency, lack substantial capacity."²⁹⁵ It is especially important to educate the jury of the onerous burden this places on the State. When the burden requires proof beyond a reasonable doubt, improper allocation or application of that burden may be outcome determinative.

292. Such testimony should be admissible under Rule 702 of the Wyoming Rules of Evidence. The functional abilities and impairments of a particular person with mental retardation are "specialized knowledge" which could "assist the trier of fact to understand the evidence or to determine a fact in issue." WYO. R. EVID. 702. Such persons may be qualified as experts based on their "knowledge, skill, [and] experience." *Id.* Alternatively, the opinions of such persons could be admissible as lay opinion testimony in accordance with Rule 701.

293. Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37(3) MENTAL RETARDATION 212, 213 (1999).

294. Indeed, this is true whether the client's testimony is on the subject of criminal responsibility or on some other issue in the case.

295. *Kind v. State*, 595 P.2d 960, 962-63 (Wyo. 1979).

2. Placement Options for the Person Found Not Guilty by Reason of Mental Deficiency

To some extent a finding of not guilty by reason of mental illness or deficiency, at least theoretically, carries with it the best set of options for a trial judge trying to find an appropriate placement for the defendant with mental retardation. Unlike an ordinary conviction, a finding of not guilty by reason of mental deficiency does not automatically create a presumption that imprisonment is appropriate. Unlike a finding of incompetence, a finding of not guilty by reason of mental deficiency does not automatically indicate a preference for confinement at the Wyoming State Hospital. Depending on whether, and to what extent, the court finds that the person affected by a mental deficiency presents a substantial risk of danger, the court can (1) permit release from custody, (2) release the person on supervision and appoint as supervisor "any person or state, county or local agency which the court considers capable of supervising the person upon release," or (3) commit the person to the Wyoming State Hospital.²⁹⁶ Despite the substantial discretion afforded the court in choosing an appropriate placement, the unfortunate reality is that in Wyoming there are few "state, county or local agenc[ies]" that can or will accept supervision of persons found not guilty by reason of mental illness or deficiency.²⁹⁷ Nonetheless, it is important for defense counsel to remind the court that the Wyoming State Hospital is not the only option and to investigate possible alternative placements.

Of course, many attorneys simply do not know where to begin such a task, and operate under the assumption that the work of finding alternative placements will go unrewarded because the courts are inclined to see the Wyoming State Hospital as the only alternative. An attorney with a heavy workload and plenty of needy clients may not see this as an effective or efficient use of his or her time. If, however, the attorney has been consulting with mental disability professionals from the outset, those professionals can be of great assistance. This article may serve as an impetus for creating additional options. Again, the considerations that go into finding appropriate placements for persons with mental retardation who are deemed not criminally responsible are similar to the considerations that go into creating appropriate sentencing and rehabilitation options for offenders with mental retardation.

VI. "ORDINARY" ADJUDICATION

If, as in most cases, the client with mental retardation is deemed

296. WYO. STAT. ANN. § 7-11-306 (LEXIS 1999).

297. *Id.*

competent, the attorney will have to investigate the case and assist the client in deciding how to proceed. In addition to the communication problems that will arise, the attorney must exercise special care when conducting the factual investigation.

A. *Getting the Story from the Defendant*

Many communication issues will recur throughout the process of working with a criminal defendant with mental retardation. As noted earlier, attorneys must take great care during the interview process to avoid leading the defendant to the story the state wants to tell.²⁹⁸ Every "yes" or "no" answer may cut off avenues to information about the events and a fuller understanding of the client and his or her actions. If the questions are too directed, a client with mental retardation is likely to give the "easy" answer, and may be unlikely to volunteer information that would make the answer something other than a simple "yes" or "no."²⁹⁹ Thus, the attorney may unintentionally suggest a version of events to which the client merely agrees. Asking open ended questions of a client with limited communication skills may certainly present challenges for the attorney, as the answers received may be disjointed, convoluted, or simply incomprehensible. The alternative, however, is to get information that is inaccurate and unreliable. When getting information from the defendant, it is critical for the attorney to find out how the defendant's account can be corroborated.

Studies on children with mental retardation have show that open-ended questions yield more accurate information though less complete.³⁰⁰ While yes/no questions can provide more complete information, they are less accurate.³⁰¹ Some researchers have even suggested that "yes" or "no" questions should be completely avoided when questioning

298. See *supra* notes 146-76 and accompanying text.

299. "Because individuals with mental retardation frequently experience repeated failures in social and academic settings, they often display 'outerdirected' behavior, relying more on social and linguistic cues provided by others than on their own problem-solving abilities." Everington & Fulero, *supra* note 293, at 212-13. Thus, a client with mental retardation will be likely to give the attorney the response he or she thinks the attorney wants to hear. Compounding that problem is that many persons with mental retardation have a response bias toward acquiescence. Studies have demonstrated that "[w]hen asked a yes/no question, the person with mental retardation is significantly more likely to answer 'yes' regardless of the appropriateness of that response." *Id.* at 213. Moreover, "as the linguistic difficulty of the question increases, acquiescence increases." *Id.*

300. See Michel et al., *supra* note 72, at 454.

301. *Id.*

children with mental retardation.³⁰² Interviewers of children with mental retardation,

[s]hould begin with open-ended question, to obtain as many spontaneous responses as possible, and then to proceed to more specific questions. . . . [Y]es/no questions are necessary to obtain complete information, and that responses to yes/no questions can be fairly accurate when presented in a neutral, noncoercive manner and when they are designed to examine alternative hypotheses about the child's experience.³⁰³

The same strategies can be used when interviewing adults with mental retardation. "Interviewers also must understand the differences between [chronological age] and [mental age] and be prepared to adjust their style of questioning to the level of the child's functioning."³⁰⁴ Mental age has been shown to be a better predictor of memory performance than chronological age for children with mental retardation. Generally, children with mental retardation can perform as well as their mental age counterparts.³⁰⁵

B. Evaluating the Defendant's Statements to Law Enforcement

For the same reasons that the defendant's statements to his or her attorney may be inaccurate, the defendant's statements to law enforcement, prior to the attorney's entry into the case, must be carefully evaluated. Standard police interrogation techniques can elicit unreliable information from the suspect with mental retardation. The suspect is likely to try to give answers to please the police authority figure or to agree to an account suggested by the officer because the suspect is unable to articulate a more nuanced account that may be more accurate.³⁰⁶ When representing a defendant with mental retardation, the fact that the police have obtained a "confession" should not automatically lead to the conclusion that the defendant committed the crime charged and that the next step should just be to try to cut as good a deal as possible.

302. *Id.*

303. *Id.* at 461.

304. *Id.*

305. *See id.*; *supra* notes 244-45 and accompanying text.

306. *See supra* notes 128-33 and accompanying text. Much has been written about the "false confession" phenomenon and defendants with mental retardation. *See Weis, supra* note 132; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998). Just as attorneys must be better educated in identifying mental retardation and in communicating with the defendant with a mental disability, so too must law enforcement.

C. *The Miranda Problems*

*Miranda v. Arizona*³⁰⁷ was based in large part on the recognition that even routine custodial police interrogation is inherently coercive. "Because custodial police interrogation, by its very nature, isolates and pressures the individual, [the Court] stated that '[e]ven without employing brutality, the "third degree" or [other] stratagems, . . . custodial interrogation exacts a heavy toll on the weakness of individuals.'"³⁰⁸ For a suspect who has mental retardation, the toll exacted may be even heavier. The Supreme Court has indicated that, even with suspects who have no disability, "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'"³⁰⁹ For the suspect who has mental retardation, the coercion inherent in ordinary custodial interrogation may totally obliterate the line between voluntary and involuntary statements, and giving standard *Miranda* warnings will do little to prevent that potential problem.

The first problem when confronted with a "confession" by a defendant with mental retardation is whether the defendant truly understood his or her *Miranda* rights. Rights are theoretical constructs that are often difficult for a defendant with mental retardation to grasp.³¹⁰ At the point of arrest, persons with mental retardation can be easily intimidated by authority figures such as police officers.³¹¹ They may attempt to appear more competent than they are by stating that they understand their *Miranda* rights.³¹²

Given the structure of *Miranda* warnings used by most police officers, suspects with mental retardation are particularly susceptible to "waiving" their *Miranda* rights regardless of whether they truly understand them. Typically, *Miranda* warnings are given by advising the suspect of each required right, followed by asking if the suspect understands.³¹³ Because many persons with mental retardation are eager to

307. 384 U.S. 436 (1966).

308. *Dickerson v. United States*, 120 S.Ct. 2326, 2331 (2000) (quoting *Miranda*, 384 U.S. at 455).

309. *Id.* (quoting *Miranda*, 384 U.S. at 439).

310. See PERSKE *supra* note 132, at 16-17.

311. See *supra* notes 26-28, 130-33 and accompanying text.

312. See *supra* notes 26-28, 118-22 and accompanying text.

313. Thus, a typical *Miranda* warning would proceed as follows:

- You have the right to remain silent. Do you understand?
- Anything you say can and will be used against you in a court

please others and have a response bias toward acquiescence, the likely answer of a suspect with mental retardation to each of the *Miranda* questions will be "yes."³¹⁴

For a person to waive his or her *Miranda* rights, the waiver must be "knowing and intelligent."³¹⁵ This requires the defendant with mental retardation to "make a rational choice based upon some appreciation of the consequences of the decision."³¹⁶ Consequently "an intelligent waiver by a mentally retarded person is of course an oxymoron."³¹⁷ Indeed, a recent study by Caroline Everington and Solomon Fulero demonstrated that (1) "individuals with mental retardation have significant problems in comprehension of the *Miranda* warning," (2) "significantly more persons with mental retardation [than persons without] did not understand any of the substantive portions of this warning—right to remain silent, potential use of statements in a court proceeding, and the right to an attorney before and during questioning," and, (3) "there is a high likelihood that individuals with mental retardation may not understand the notion of self-incrimination nor the advising role of an attorney in the interrogation process."³¹⁸ Despite this lack of understanding, persons with mental retardation are nonetheless quite likely to answer "yes" to all the *Miranda* questions and wind up unwittingly waiving their rights. One important factor Everington and Fulero point out is that there are now tests available which can help attorneys and forensic psychologists objectively measure a defendant's understanding of the *Miranda* rights and that these tests can be invaluable tools for challenging the "knowing and intelligent" aspect of a *Miranda* waiver.³¹⁹

A few courts have been sensitive to the particular risks of giving ordinary *Miranda* warnings to persons with mental retardation. Confessions by defendants with mental retardation have been held to be inadmissible when it was demonstrated that the defendant was not likely to understand the warning when it was read to them "in a summary fashion

of law. Do you understand?

- You have a right to an attorney. Do you understand?
- If you cannot afford an attorney, one will be provided for you at no cost. Do you understand?
- Now that you have been advised of and understood your rights, do you wish to speak with us?

See generally *Miranda v. Arizona*, 384 U.S. 436, 444, 475 (1966).

314. Everington & Fulero, *supra* note 293 at 212-13; see also *supra* notes 100-04 and accompanying text.

315. 384 U.S. at 444, 475; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

316. *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972).

317. *Ellis & Luckasson*, *supra* note 4, at 447 n.176.

318. *Id.* at 217.

319. *Id.* at 217-18.

without elaboration.”³²⁰ This highlights a need for changes in law enforcement practices regarding how *Miranda* warnings are given. “When suspects are believed to have a disability, efforts should be made to ensure that they understand their rights. This may be better accomplished by having the defendant explain the meaning of the warning and other critical vocabulary in his or her own words rather than through use of questioning techniques that elicit yes/no answers.”³²¹ The lesson for attorneys representing defendants with mental retardation is to look beyond the typical “yes” answers and make a meaningful inquiry about whether the defendant truly understood the questions. Although the U.S. Supreme Court has given little guidance on how to analyze what constitutes a “knowing and intelligent” waiver by a person with mental retardation, that does not mean that this is not an available avenue for attacking waivers of *Miranda* rights.

Waiver of *Miranda* rights must also be voluntary. In *Colorado v. Connelly*, however, the Supreme Court held that the question of voluntariness is solely a question of whether there was improper police coercion.³²² The defendant’s mental impairments, alone, cannot render a confession involuntary.³²³ The Court did acknowledge, however, the interplay between the defendant’s mental condition and the police conduct may render a *Miranda* waiver involuntary: “[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the ‘voluntariness’ calculus.”³²⁴ Since *Connelly*, however, most federal courts have not adopted such a nuanced approach. All but one federal circuit apply an “objective” standard of voluntariness and have rendered *irrelevant* any subjective characteristics of the defendant which might affect susceptibility to coercion; the Seventh Circuit, however, applies a subjective approach that allows consideration of particular characteristics of the defendant that might be relevant to the defendant’s susceptibility to coercion.³²⁵

320. *Toliver v. Gathright*, 501 F. Supp. 148, 150 (E.D. Va. 1980).

321. *Everington & Fulero*, *supra* note 293, at 219.

322. 479 U.S. 157, 167 (1986).

323. *Id.* at 164.

324. *Id.* On a related issue, in *Rhode Island v. Innis*, the Supreme Court, addressing the question whether an officer has engaged in “interrogation”—i.e., “words or actions reasonably likely to evoke an incriminating response”—may depend on whether the officer is aware of “the unusual susceptibility” of a defendant to a particular form of persuasion. 446 U.S. 291, 302 n. 8 (1980).

325. *United States v. Robertson*, 19 F.3d 1318, 1321-22 (10th Cir. 1994); *United States v. Guerrero*, 983 F.2d 1001, 1004 (10th Cir. 1993); *United States v. Rohrbach*, 813 F.2d 142, 144-45 (8th Cir. 1987); *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990).

Defendants with mental retardation are especially vulnerable to non-physical coercion.³²⁶ Thus, there is a compelling need to educate law enforcement and the courts about the inherent suggestibility of typical *Miranda* warnings and other conduct.³²⁷ Given the strong evidence that, for a person with mental retardation, ordinary *Miranda* warnings may be unduly coercive, law enforcement ought to be held to a higher standard when trying to interrogate a person with mental retardation. Law enforcement officers need to be made aware of and held responsible for even the subtly coercive effects of their interrogation procedures.

Given the ways in which *Colorado v. Connelly* limits the ability to challenge the voluntariness of a *Miranda* waiver made by a person with mental retardation, attorneys and courts must be careful not to conflate the knowledge and voluntariness questions.³²⁸ Even if the tendency of a person with mental retardation to acquiesce may not render a *Miranda* waiver involuntary, it may open the door to a challenge that the waiver was *not knowing*. The characteristics of mental retardation may be used to establish that the answers given in waiving *Miranda* were simply inaccurate—they did not reflect any actual meaningful understanding of the *Miranda* rights.

D. The Unreliability Problems

The same factors which make persons with mental retardation particularly susceptible to making unknowing *Miranda* waivers also make such persons likely to cooperate with police interrogation and may make such persons' resulting statements or confessions unreliable. Eagerness to please authorities, desire to succeed in a difficult social situation, acquiescence, and susceptibility to suggestion may combine to make a person with mental retardation particularly susceptible to agree-

326. Ellis & Luckasson, *supra* note 4, at 450.

327. Professor Cassell recently noted that law enforcement officials are taking steps in that direction. He points to an article directed toward law enforcement authorities, written by Fred Inbau, one of the authors of the most widely used police interrogation manual, cautioning that "special protection must be afforded [to persons of below-average intelligence] . . . to minimize the risk of obtaining untruthful admissions due to their vulnerability to suggestive questioning." Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Convictions from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 584-85 and nn.377, 382-83 (1999). Cassell also advocates for police training regarding the special problems confronted by persons with mental retardation during interrogation. *Id.* at 585-87.

328. See *Moran v. Burbine*, 475 U.S. 412 (1986) (for court to conclude that *Miranda* rights were properly made, the "totality of the circumstances" must reveal "both an uncoerced choice and the requisite level of comprehension").

ing to versions of events suggested by a law enforcement interrogator.³²⁹ This should be of concern not just to attorneys for defendants with mental retardation, but also to law enforcement. If law enforcement is able to obtain a false confession from a person with mental retardation, they may prematurely cut off other avenues of investigation, and fail to apprehend the true culprits.³³⁰

Some commentators have suggested that contemporary police interrogation techniques have a dangerous capacity to elicit false confessions, regardless of whether the suspect has mental retardation:

American police are poorly trained about the dangers of interrogation and false confession. Rarely are police officers instructed in how to avoid eliciting confessions, how to understand what causes false confessions, or how to recognize the forms false confessions take or their distinguishing characteristics. Instead, some interrogation manual writers and trainers persist in the unfounded belief that contemporary psychological methods will not cause the innocent to confess.³³¹

When the interrogated suspect has mental retardation, the potential for false confessions increases.

One often cited illustration comes from the case of David Vasquez who confessed and then pled guilty to a rape and murder he did not commit.³³² At the outset of the interrogation, detectives described to Vasquez the rape and murder, by strangulation with a Venetian blind cord, of a woman in Arlington, Virginia. Vasquez initially said he knew nothing about the crime, but then police told him they had found his fingerprints in her apartment (this was in fact not true).³³³ Two excerpts from the recording of the interrogation follow:

Shelton: "Did she tell you to tie her hands behind her back?"

Vasquez: "Ah, if she did, I did."

329. Everington & Fulero, *supra* note 293, at 212; Weis, *supra* note 132, at 126-27; see also *supra* notes 100-04 and accompanying text.

330. But see Paul G. Cassell, *Protecting the Innocent From False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 498 (1998) (cautioning that over-regulation of the interrogation process will lead to "lost confessions"—i.e., a reduced ability to get convictions from, and to convict, the truly guilty.).

331. Leo & Ofshe, *supra* note 306, at 443.

332. PERSKE, *supra* note 132, at 16. After Mr. Vasquez had pled guilty and received a forty-year sentence for the murder, the police later discovered the real murderer. Exactly five years after his encounter with the detectives, Mr. Vasquez received a pardon. *Id.*

333. *Id.*

Carrig: "Whatcha use?"
 Vasquez: "The ropes?"
 Carrig: "No, not the ropes, whatcha use?"
 Vasquez: "Only my belt."
 Carrig: "No, not your belt . . . Remember . . . cutting the Venetian blind cords?"
 Vasquez: "Ah, it's the same as rope."

. . . .

Shelton: "Okay, now tell us how it went, David, tell us how you did it."
 Vasquez: She told me to grab the knife and stab her, that's all."
 Carrig: (raising his voice): "David, no, David."
 Vasquez: "If it did happen, and I did it, and my fingerprints were on it . . ."
 Carrig: (slamming his hand on the table and yelling): "You hung her!"
 Vasquez: "What?"
 Carrig: (shouting) "You hung her!"
 Vasquez: "Okay, so I hung her."³³⁴

Vasquez's interrogation is a graphic illustration of the ease with which a suspect with mental retardation can be led during an interrogation, the susceptibility to suggestion, and the ease with which such a suspect may acquiesce in the version the police want to hear.

Despite the substantial writings regarding the suggestibility of defendants with mental retardation, and the anecdotal evidence about defendants with mental retardation who have been convicted on the basis of false, suggested confessions, the standards for challenging confessions made by defendants with mental retardation remain onerous. In *Connelly*, the Supreme Court also indicated that the question whether a statement, not taken in violation of *Miranda*, is so unreliable as to be inadmissible is *not* a due process question—instead, it is a question which may be relegated to state evidentiary rules.³³⁵

334. *Id.* at 16.

335. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.").

E. *The Importance of Corroboration*

Because a defendant with mental retardation is particularly susceptible to being led into providing an inaccurate account of events, the importance of corroboration cannot be overstated. If the case goes to trial where a possibly unreliable statement is to be admitted with little or no corroboration, the defense should request the opportunity to present expert testimony on the unreliability of the statement. Although courts are often reluctant to accept such testimony,³³⁶ in such a case it may be critical to the defendant's right to present a defense.³³⁷ Courts readily

336. Expert testimony regarding the coerciveness of police interrogation tactics, and the possibilities of false confessions has become an issue only in the last decade or so, as researchers have begun to develop expertise in this area. Indeed, it appears that the first expert testimony on this issue was offered in the late 1980s by Elliot Aronson, a psychology professor, in a California murder prosecution of Bradley Page. *See People v. Page*, 2 Cal. Rptr. 2d 898 (1991). Wyoming has been among those jurisdictions which have been unreceptive to such expert testimony. *See Madrid v. State*, 910 P.2d 1340, 1346-47 (Wyo. 1996) (declining to reach appellant's claim that he should have been permitted to present expert testimony on "False Confession Syndrome," because he failed to make a cogent argument regarding Wyoming law on the issue of admissibility of expert testimony); *Kolb v. State*, 930 P.2d 1238, 1241-42 (Wyo. 1996) (finding that the trial court did not abuse its discretion when, after a hearing, it declined to permit a psychologist's expert testimony on "False Confession Syndrome," on the grounds that it was scientifically unreliable). Defense counsel in *Kolb*, however, appeared to have made a dreadfully inadequate record to support the admissibility of the expert testimony:

The district court noted that Mr. Kolb's expert had conducted no studies nor received formal training in this theory, could identify no seminars that related to "false confession syndrome," and, while the expert referred to one study concerning the psychology of "retracted confessions," even that study was not preserved in the record. At best, the expert had watched one television program which referred to "false confession syndrome."

Id. at 1242. Neither of the Wyoming decisions, however, categorically forbids such testimony. Thus, a properly qualified expert who can demonstrate that his or her opinions are scientifically reliable may well be permitted to testify in Wyoming. While expert testimony about false confessions is not universally accepted, a few federal courts have found that the testimony of certain experts in the field may be admissible in accordance with the test set out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and several state courts have admitted such testimony based on similar principles. *See United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996); *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995); *United States v. Raposos*, 1998 U.S. Dist. LEXIS 19551 (S.D.N.Y. Dec. 14, 1998). *See also State v. Buechler*, 572 N.W.2d 65 (Neb. 1998); *Lenormand v. State*, 1998 Tex. App. LEXIS 7612 (Dec. 9, 1998); *Cassis v. State*, 684 N.E.2d 233 (Ind. App. 1997); *Baldwin v. State*, 482 S.E.2d 1 (N.C. Ct. App. 1997), review dismissed, 492 S.E.2d 354 (N.C. 1997). Even Professor Cassell supports "expert testimony to juries on the peculiar susceptibilities of the retarded to this problem [of false confessions]." Cassell, *supra* note 329, at 586.

337. *See Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (finding violation of the defendant's right to present a defense where defendant was prevented from introducing evidence at trial "about the environment in which the police secured his confession,"

acknowledge that confessions are perceived as extraordinarily damning evidence.³³⁸ Moreover, jurors are likely to believe that someone who was not truly guilty would never confess. If the state's case relies almost exclusively on an uncorroborated confession from a defendant with mental retardation, as a matter of due process the defense deserves the opportunity to demonstrate why the defendant may have done something so counterintuitive as to confess to something he or she did not do.³³⁹

Even in the absence of an incriminating statement or confession, it is important for the defense to investigate with an eye toward seeking corroboration of the defendant's account of events. In doing so, the defense may acquire a more complete picture of the circumstances than the prosecution. Careful investigation may also highlight less obvious issues about intent or coercion that can be of assistance to the defense. Although, as mentioned earlier, Wyoming does not recognize a trial defense of diminished capacity,³⁴⁰ such issues may be highly relevant to sentencing, or may be used for purposes of negotiating a favorable plea.

F. The Guilty Plea Question

In many cases, whether there is a confession or not, there may be little doubt that the defendant with mental retardation committed the charged crime. The question of whether to counsel the defendant then to enter a guilty plea raises another host of issues. In most jurisdictions, the same standard applies to whether the defendant is competent to waive the rights to trial, to confrontation, and the Fifth Amendment privilege, that applies to whether the defendant is competent to stand trial. Although some have argued for a heightened standard for entering a plea,

even though trial court had made pretrial determination that confession was voluntary and admissible). While *Crane* did not address the admissibility of expert testimony, it underscores the importance of giving the jury a full picture of the circumstances under which a confession was made.

338. See *Arizona v. Fulminante*, 499 U.S. 279 (1991):

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."

Id. at 296 (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). See also *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting). Of course, such assumptions about the reliability of an admission by a defendant with mental retardation may be unfounded. See *supra* notes 101-05, 332-37 and accompanying text.

339. See *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

340. See *supra* notes 278-80 and accompanying text.

the U.S. Supreme Court has equated the waiver of fundamental rights that occurs when a defendant pleads guilty with any of the myriad other decisions a defendant might make in the course of a trial.³⁴¹ Many commentators, and the drafters of the ABA Criminal Justice Mental Health Standards, support the position that a defendant with limited intelligence and conceptual ability may not be competent to engage in the reasoned choice among alternatives inherent in pleading guilty, even if that same defendant is competent to stand trial.³⁴²

Any defendant will be permitted to enter a guilty plea only if the court determines that the waiver of rights that accompanies a plea is knowingly and voluntarily made.³⁴³ The acknowledged standard for evaluating the voluntariness of a plea is as follows:

[A] plea of guilty *entered by one fully aware of the direct consequences*, including the value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harass-

341. *Godinez v. Moran*, 509 U.S. 389 (1993) (as a matter of due process, a person competent to stand trial is competent to plead guilty and to waive counsel). Because *Godinez* only addressed the requirements of due process under the U.S. Constitution, states may, as a matter of state law, require that competency to waive constitutional rights be based on demonstration of a higher level of mental functions than that required to stand trial.

342. *Bonnie supra* note 17, at 101. See also Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993); Bruce Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243 (1987). Professor Bonnie, for example, distinguishes between "competence to assist counsel" and "decisional competence," and argues that these different competencies may be required in different settings within the criminal case. See *Bonnie, supra* at 548. Under Bonnie's construct, "legal competence" requires only a rudimentary understanding of the process and the ability to communicate with and assist counsel. "Decisional competency" refers to the ability to make specific decisions about the case. *Id.* at 554-60. One problem with implementing distinct competency "tests" is that it could create situations in which a defendant is competent to stand trial, but because he or she lacks sufficient decision-making ability, is precluded from obtaining benefits other defendants could obtain through plea bargaining. For a more recent discussion of such issues, see Slobogin & Mashburn, *supra* note 155.

343. *Boykin v. Alabama*, 395 U.S. 238, 241 (1969); *Mehring v. State*, 860 P.2d 1101, 1109 (Wyo. 1993). In *Godinez*, the Court explained that competency and waiver present distinct issues governed by different standards:

[T]he focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced.

509 U.S. at 400 n.12.

ment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes).³⁴⁴

This standard, however, fails to take into account the vulnerability, suggestibility, and eagerness to please of some defendants with mental retardation which may affect their ability to make truly rational and voluntary choices about pleading guilty. A defendant with mental retardation who is eager to please authority figures may agree to plead guilty simply because the attorney has suggested it.³⁴⁵ Whether that defendant has made a truly voluntary and reasoned choice among options is far from a certainty. In assessing waiver of trial rights, as with assessing *Miranda* waivers, courts frequently conflate the knowledge and voluntariness requirements. A plea may be voluntary, in the sense that it was not coerced, but may not be the result of a knowing, reasoned choice among alternatives.³⁴⁶

In addition to the accepted standard of voluntariness, Rule 11 of the Wyoming Rules of Criminal Procedure provides trial judges with procedures designed to ensure that they only accept knowing and voluntary pleas.³⁴⁷ The trial judge is required to inquire of the defendant, personally and in open court, in order to determine whether the defendant understands:

1. "The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law and other sanctions which could attend a conviction, including, when applicable, the general nature of any mandatory assessments . . .,"³⁴⁸
2. that the defendant "has the right to be represented by counsel at every stage of the proceeding;"³⁴⁹

344. *Brady v. United States*, 397 U.S. 742, 755 (1970) (citation omitted) (emphasis added).

345. Ellis & Luckasson, *supra* note 4, at 430.

346. See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (finding plea "involuntary" because defendant did not *understand* the intent element of the crime to which he pled guilty).

347. WYO. R. CRIM. P. 11; FED. R. CRIM. P. 11.

348. WYO. R. CRIM. P. 11(b)(1).

349. *Id.* at 11(b)(2).

3. that "[t]he defendant has the right to plead not guilty or to persist in that plea . . . , the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, the right to court process to obtain the testimony of other witnesses, and the right against compelled self-incrimination,"³⁵⁰ that entry of a plea of guilty or nolo contendere amounts to a waiver of the right to trial;³⁵¹
4. that if the defendant is questioned by the court, under oath, about the offense, any false answers can be used in a prosecution for perjury.³⁵²

In addition, the trial judge must inquire of the defendant, personally and in open court, to "determin[e] that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement" and must "inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the state and the defendants or the defendant's attorney."³⁵³

In most cases, the trial judge makes the required inquiry from a prepared script that methodically covers all the required advisements and inquiries. Such procedures are ill-designed, however, for the defendant with mental retardation. Most judges' Rule 11 colloquies are usually little more than a series of "do you understand questions" that are routinely answered with merely "yes" or "no." The same problems with suggestibility and the tendency to give the easy, expected answers may be manifest here.³⁵⁴ In addition, because the colloquy occurs in open court, with all eyes and ears on the defendant, a defendant with mental retardation who may be accustomed to masking his or her disability will not likely admit a lack of understanding.³⁵⁵ Instead, the defendant will more likely give the answer he or she expects that the court wants to hear.

In this regard, trial judges need to be educated. When addressing a defendant with mental retardation, a standard Rule 11 colloquy will likely not provide the information the court needs to make an adequate

350. *Id.* at 11(b)(3).

351. *Id.* at 11(b)(4).

352. *Id.* at 11(b)(5).

353. *Id.* at 11(d).

354. *See supra* notes 299-306 and accompanying text.

355. *See supra* notes 347-52 and accompanying text.

evaluation of whether the defendant's plea is truly knowing, voluntary, and intelligent even though the defendant with mental retardation is especially likely to give all the "right" answers that are required before the plea can be accepted. To truly get a picture of what the defendant knows or understands, the court will have to seek more meaningful feedback from the defendant. For example, after getting the "yes" answer to a question like, "Do you understand that you are giving up your right to confront and cross-examine adverse witnesses,"³⁵⁶ the trial judge should follow up by instructing the defendant, "Tell me what you understand by that."

Given the difficulties in withdrawing a guilty plea once entered,³⁵⁷ it is important that the attorney and the client agree that the plea is, indeed, the course the client wants to pursue. It is also important that the client be made to understand the permanence of such a decision. Some defendants with mental retardation have difficulty grasping the notion of long-term consequences; these defendants must be made to understand that once the plea is entered, there is no backing out later. The attorney must take special care to explain such matters carefully, thoroughly, and understandably.

With any client, the ultimate decision about pleading guilty raises issues of client autonomy. With a client who has mental retardation, those autonomy issues become more complex. Many persons with mental retardation may satisfy the legal standard for competence, in that they can understand the proceedings, but they may lack the decisional competence to weigh the relevant options and reach a decision about what to do.³⁵⁸ Sometimes, the attorney for the defendant with mental retardation may conclude that the best thing that can be done for the client is to use the existence of mental retardation as mitigation to get a more favorable deal from the prosecutor and a reduced sentence from the judge. While that may indeed be in the client's best interest, the attorney should be careful not to be overly patronizing and to impose that decision on the client. By the same token, persons with mental retardation should not be automatically excluded from receiving the benefits of entering a guilty plea simply because they have difficulty making decisions.

356. Even that question should probably be revised. Many defendants with mental retardation will have difficulty grasping such language about "confrontation" of witnesses, or even what it means for a witness to be "adverse." Thus, the questions should be designed to be understandable by persons with limited language skills.

357. See *infra* notes 359-61 and accompanying text.

358. See *supra* notes 343-48 and accompanying text.

The Wyoming Supreme Court has held that when a defendant tries to withdraw a plea on grounds that the plea was not knowingly and voluntarily made, if the defendant has been deemed competent to stand trial, no special weight will be given to the defendant's mental disability.³⁵⁹ In *Schmidt v. State*, the Wyoming Supreme Court indicated that sufficient evidence to establish a defense that the defendant was not guilty by reason of mental illness or defect could constitute a "fair and just reason" to withdraw a guilty plea.³⁶⁰ Even in *Schmidt*, however, the court concluded that refusal to grant withdrawal of the plea was not an abuse of discretion where the trial court found that, at the time of the plea, the defendant was competent to make the choice to plead guilty.³⁶¹

In *McCarthy v. State*,³⁶² the defendant, who suffered from mental illness, made a post-sentence motion to withdraw his no contest plea on the grounds of "manifest injustice."³⁶³ The Supreme Court upheld the denial of the motion to withdraw, making the following explanation:

McCarthy's mental disease was a factor in his case from the beginning . . . [b]ut the record does not show, and McCarthy does not identify, anything which would indicate that his mental condition and medication he was taking played any suspect part in his decision to accept the plea agreement and plead guilty.³⁶⁴

The Court went on to proclaim: "[W]e will refuse to consider the issue of a more lenient standard for an Alford plea because the defendant has a mental disease."³⁶⁵

Given the Wyoming Supreme Court's expressed unwillingness to give special consideration to a defendant's mental disability, the burden falls that much more heavily on defense counsel to accommodate his or

359. *McCarthy v. State*, 945 P.2d 775 (Wyo. 1997).

360. *Schmidt v. State*, 668 P.2d 656, 659-60 (Wyo. 1983).

361. *Id.*

362. 954 P.2d 775 (Wyo. 1997).

363. WYO. R. CRIM. P. 32(d). When a defendant moves to withdraw the plea prior to sentencing, the court may permit withdrawal of the plea for "any fair and just reason." *Id.* When the motion is made after sentencing, the plea may be withdrawn "only to correct manifest injustice." *Id.* McCarthy was charged with first-degree murder, and entered a no contest plea to second-degree murder. In so doing, he avoided the possibility of a life sentence if convicted.

364. *McCarthy*, 945 P.2d at 777.

365. *Id.* at 778 (emphasis added). See also *State v. McDermott*, 962 P.2d 136 (Wyo. 1998) (stating that a plea was not rendered involuntary when the defendant suffered from undiagnosed hyperthyroidism, and felt under tremendous pressure and emotional strain at the time of the plea).

her client's disability, and to balance the difficult ethical and practical issues the situation presents.

VII. SENTENCING, HABILITATION, AND REHABILITATION

*Our final task, then, is to use the criminal justice and social service systems to reach out and respond fully and fairly to the challenge of normalization, rather than leave people with mental retardation to cope alone with a bewildering world.*³⁶⁶

"Persons with even mild mental retardation generally lack the ability to resolve life's complex problems and will require special support across their life spans."³⁶⁷ While prisons are not generally qualified or seen as the appropriate place to provide those supports, they become the default provider if a defendant's disability is missed or given inadequate consideration during sentencing.

A. Recommendations from the President's Committee on Mental Retardation

As in all other aspects of adjudication, the effects of mental retardation should be taken into account in determining the type and severity of punishment and the rehabilitation services that will be offered. "A nation's treatment of criminals is one of the unfailing tests of its civilization."³⁶⁸ The President's Committee on Mental Retardation provided a number of recommendations for ensuring an equal opportunity to receive equivalent punishment and benefit from correctional services.³⁶⁹ Some of these recommendations are that;

1. in accordance with ABA standards, "Courts [should] always consider mental retardation and its impact as a possible mitigating factor, and consider the effect of alternative dispositions of a case, e.g., confinement, probation, etc., on the individual with mental retardation;"³⁷⁰
2. whether the case involves diversion from prison, incarceration in a correctional facility, or community

366 Thornburgh, *supra* note 1, at xviii.

367. McGee & Menolascino, *supra* note 61, at 58-59.

368. A quote from Winston Churchill *reprinted in* C. MICHAEL NELSON ET AL., SPECIAL EDUCATION IN THE CRIMINAL JUSTICE SYSTEM 80 (1987).

369. EPORT TO THE PRESIDENT, *supra* note 16 at 29.

370. *Id*

supports alternatives, the disposition should always be based on Individualized Justice Plans. Both mental retardation and corrections experts should be involved in the preparation of such plans, and the plans should include educational, vocational, and life-skills objectives necessary to acquire skills needed to avoid further criminal behavior;³⁷¹

3. there be a strong presumption toward community-based correction and probation programs;³⁷²
4. capital punishment be prohibited for persons with mental retardation;³⁷³
5. no offender with mental retardation should be sentenced to any program or facility that does not have habilitation programs suitable to his or her needs;³⁷⁴
6. “ ‘Guilty but mentally retarded’ verdicts which provide a basis for indefinite imprisonment not be utilized.”³⁷⁵

B. Sentencing Options and Considerations

Perhaps the most critical aspect of an attorney’s representation of a client with mental retardation or low cognitive functioning is his or her role in advocating for an appropriate sentence. The attorney must gather the recommendations of psychologists, other professionals, and family with special knowledge about the client. Using this information, the attorney should advocate for a sentence that address the client’s unique abilities and limitations and provide a reasonable or equal opportunity for rehabilitation.³⁷⁶ In addition, an attorney should further focus his or

371. *Id*

372. *Id.*

373. *Id.* at 29-30. Capital punishment of people with mental retardation is already prohibited in federal crimes and thirteen states have now enacted laws prohibiting the execution of persons with mental retardation. Wyoming does not currently prohibit capital punishment for offenders with mental retardation. *See supra* note 180. *See generally* Denis W. Keyes & William J. Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 MENTAL & PHYSICAL DISABILITY L. REP. 687 (1997).

374. REPORT TO THE PRESIDENT, *supra* note 16 at 31.

375. *Id.*

376. The Wyoming Constitution provides that “The penal code shall be framed on the humane principles of reformation and prevention.” WYO. CONST. art. I, § 15. In its Strategic Plan for 1999-2004, the Department of Corrections states as its mission: “The

her advocacy on a comprehensive approach that involves both the criminal justice system and the mental retardation service system.³⁷⁷ The attorney should also keep in mind that “[t]he most effective (re)habilitation programs for most offenders with mental retardation are those provided in the community.”³⁷⁸ “Ideally, these programs include training, counseling, and other services designated in an individualized plan designed to meet the needs of each offender.”³⁷⁹

“It is imperative to recognize that most individuals in correctional facilities will eventually be released and that they must be prepared to become law abiding, productive, and relatively independent upon leaving prison.”³⁸⁰ Once a person with mental retardation who is found to be competent has been convicted of an offense, except one punishable by death or life imprisonment, the available sentencing options include: (1) a fine, (2) imprisonment, and/or (3) probation.³⁸¹ In addition, when probation is available, the court can order ordinary probation,³⁸² intensive supervised probation,³⁸³ or probation to be served, at least in part, at a Community Corrections Center.³⁸⁴ When considering where in this universe of options to place a convicted defendant with mental retardation, the courts must be aware that any option must take into account both the need to punish and the need to accommodate and habilitate the defendant.

Any of these options has potential drawbacks for a person with mental retardation. Probation of any variety usually requires the defendant to strictly comply with instructions, meet reporting requirements, and have the ability to be self-supporting. Because even a minor violation of the probation terms can result in the defendant being sent to prison, probation without any accommodation for the disability will likely place the defendant in a position in which he or she is destined to fail. Prison, too, has substantial drawbacks. Most persons with mental retardation have difficulty adjusting to new social situations. The prison presents not just a new social situation but a highly stressful one. A offender with mental retardation, sent off to prison with no support or as-

Wyoming Department of Corrections contributes to public safety by exercising reasonable, safe, secure, and humane management, while actively providing offenders opportunities to become law abiding citizens.”

377. REPORT TO THE PRESIDENT, *supra* note 16, at 31.

378. *Introduction, CJS & MR, supra* note 52, at xxiii.

379. *Id.*

380. REPORT TO THE PRESIDENT, *supra* note 16, at 30.

381. *See* WYO. STAT. ANN. § 7-13-301; §§ 6-10-101 to 104 (LEXIS 1999).

382. *Id.* §§ 7-13-302 to -305.

383. *Id.* §§ 7-13-1101 to -1107.

384. *Id.* §§ 7-18-101 to -115.

sistance in making this difficult transition, may be easily victimized or may find him or herself in constant "trouble" because the inmate lacks the skills to avoid conflict, or acts out in frustration and anger, hoping to mask the disability by passing as a "tough guy."³⁸⁵

An individual with mental retardation may commit an offense so serious or dangerous that the court concludes incarceration is the only option. Regardless of the severity of the crime, the court and the Department of Corrections must still consider the person's disability to ensure that he or she is treated equally. It has been estimated that fewer than 10% of the inmates with mental retardation receive services such as correctional education and training opportunities for delinquent and criminal offenders within the prison environment.³⁸⁶ Offenders with mental retardation recidivate more quickly and frequently than do non-retarded offenders.³⁸⁷ Thus, without reasonable accommodations for their disability, which are required by the ADA, offenders with mental retardation will serve longer prison sentences and will likely not be successful on probation or parole without special help or programs.

A randomly selected group from a general prison population of seventeen to nineteen-year-old inmates with mental retardation was compared with a group without retardation matched in age and sex.³⁸⁸ The comparison revealed that the group with mental retardation received a significantly higher number of disciplinary reports than the group without retardation.³⁸⁹ These included reports for hygiene violations, non-compliance with authority, assaults involving other inmates, and assaults on correctional officers.³⁹⁰ Inmates with mental retardation received approximately three times as many disciplinary reports for offenses related to personal hygiene and non-compliant behavior; they were reported for assaulting inmates and correctional personnel more than twice as often as inmates without retardation.³⁹¹

The rehabilitation model of dealing with offenders is based upon the premise that the inmate once was able to demonstrate socially appropriate behavior and survival skills for functioning independently in soci-

385. See *supra* notes 121-22 and accompanying text.

386. *Introduction, supra* note 52, at xxiii.

387. See Gardner et al., *supra* note 258, at 329.

388. Craig Smith et al., *Prison Adjustment of Youthful Inmates With Mental Retardation*, 28 MENTAL RETARDATION 177, 178 (June 1990).

389. *Id.* at 179.

390. *Id.*

391. *Id.*

ety.³⁹² However, the inmate with mental retardation has probably been chronically disadvantaged in learning and demonstrating independent living skills and, likely, never obtained an adequate level of such independence. Thus, programs must focus on the educative or skill development (habilitation) to provide the inmate with mental retardation with those personal, social, vocational and economic skills necessary to obtain independence and to encourage respect for the law abiding behavior expected by the community in which they live.

1. Model Programs

A study of a prison system in South Carolina designed for offenders with mental retardation has indicated a significant decrease in the recidivism rate for inmates discharged or paroled from this program.³⁹³ Special services in this program included special education, life skills and vocational training, recreation counseling, and pre-release services.³⁹⁴ The objectives of these services were to focus on increasing interpersonal skills, clarifying values, increasing socialization skills, work related skills, and resolving emotional conflicts.³⁹⁵

Other states have also created innovative sentencing alternatives for defendants with mental retardation. Wood and White present "an exemplary" probation and parole model in Lancaster County, Pennsylvania, which focuses on offenders with mental retardation who have an average IQ of approximately sixty-six.³⁹⁶ Using a joint systems approach to dealing with such offenders, a recidivism rate of 5% was obtained compared with an estimated national rate of over 60%.³⁹⁷ The success of the model was related to:

1. The joint systems approach between criminal justice and mental health/mental retardation professionals.
2. The focus on offenders with mental retardation and a low client/staff ratio.
3. Maintenance of intensive supervision.

392. *Introduction, supra* note 52, at xxiii.

393. Hall, *supra* note 4, at 181.

394. *Id.* at 182.

395. *Id.*

396. See Gardner et al., *supra* note 258, at 343.

397. J.R. Wood & D.L. White, *A Model for Habilitation and Prevention for Offenders with Mental Retardation, in CJS & MR, supra* note 1, at 162.

4. The focus on the program being the clients being held responsible for and accountable for all their behaviors in all aspects of their home, work and community relationship.³⁹⁸

In summary, Gardner et al. emphasized that all treatment programs for offenders with mental retardation should (1) be diagnostically based, (2) reflect habilitation rather than rehabilitation, and (3) be designed to teach personal responsibility for one's actions.³⁹⁹ In order to do this, it is crucial to understand the particular individual's level of functioning and life experiences.

2. Individualized Approach

An individualized approach to addressing mental retardation is not a new concept. It is seen in a variety of disability services, from the Individuals with Disabilities Education Act, which requires an Individualized Education Program (IEP) for students with mental retardation,⁴⁰⁰ to Medicaid Home and Community Based Waiver Programs, which require an Individualized Service Plan (ISP) for clients with mental retardation who receive support in the community.⁴⁰¹

Many states have already adopted this individualized approach to ensure reasonable accommodations in the criminal justice system.⁴⁰² Typically the individualized approach will create or establish a "program" linked to various mental health professionals, criminal justice professionals, and relevant governmental agency representatives, much like the multi-disciplinary team approach which is used in the Wyoming juvenile court system.⁴⁰³ This "program" is then charged with developing recommendations for the court. This may occur before or after adjudication, depending on the program. Some states refer to this process as creating an "Individual Justice Plan" (IJP).⁴⁰⁴

While the approaches to providing individualized planning vary widely from state to state, many have developed systematic approaches which have at least two common characteristics. First, they involve for-

398. Gardner et al., *supra* note 258, at 344.

399. *Id.* at 355.

400. *See supra* note 151 and accompanying text.

401. *See generally*, WYO. STAT. ANN. § 42-2-401 (LEXIS 1999).

402. *See, e.g.*, Suzanne Lustig, *Collected Works*, in ARC OF NEW JERSEY PROGRAM PAMPHLETS (2000).

403. WYO. STAT. ANN. § 14-6-201.

404. *See, e.g.*, Suzanne Lustig, *Collected Works*, in ARC OF NEW JERSEY PROGRAM PAMPHLETS (2000).

mulating a recommendation for punishment that is appropriate to that particular individual's culpability and level of functioning. Second, most approaches attempt to identify necessary habilitation or rehabilitation specific to that particular individual's unique situation and abilities. Some states also identify specific programs, providers, and methods of providing the necessary rehabilitation.⁴⁰⁵ Other states have developed separate criminal justice or correctional systems for dealing with individuals with mental retardation or others who need special accommodations.⁴⁰⁶ Wyoming currently has no systematic approach to the problem of accommodating offenders with mental retardation.

When the court finds a defendant with mental retardation competent to proceed and then guilty of the crime, the presentence investigation should focus heavily on the individual's present level of functioning. This information is critical when determining the sentence. The majority of research and policy literature in this area strongly supports and advocates for joint efforts. In Wyoming, this would involve the Department of Corrections, which has expertise in general rehabilitation and confinement of inmates, and the Department of Health, Division of Developmental Disabilities, which has expertise in habilitating and supporting citizens with mental retardation in both community and institutional settings.

3. The American with Disabilities Act⁴⁰⁷

In *Pennsylvania Department of Corrections v. Yeskey*,⁴⁰⁸ the U.S. Supreme Court ruled that the ADA clearly applies to inmates in state correctional institutions.⁴⁰⁹ Under the ADA, a qualified individual with a disability refers to "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."⁴¹⁰ Prior to *Yeskey*, disagreement remained as to whether a state penal institution constitutes a "public entity." Even applying basic rules of statutory interpretation to determine the intent of Congress, lower courts disagreed over whether Congress meant for the ADA to apply to state prisons.⁴¹¹ However, in *Yeskey*, Justice Scalia stated that "state prisons fall squarely

405. *Id.*

406. *See, e.g.*, TEX. GOV'T CODE ANN. § § 499.102, 501.006, 501.056, 501.113 (Vernon 1999); FLA. STAT. ANN. § 916.107 (West 2000).

407. 42 U.S.C. §§ 12101-12213 (1994).

408. 524 U.S. 206 (1998).

409. *Id.* at 213.

410. 42 U.S.C. § 12131(2).

411. *See, e.g.*, *Fennell v. Simmons*, 951 F. Supp. 706, 707-12 (N.D. Oh. 1997).

within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of the state or states or local government.'"⁴¹² It is beyond the scope of this article to thoroughly review the ADA or the possible implications of the *Yeskey* decision on issues such as interference with state sovereignty.⁴¹³ *Yeskey* does, however, have important implications for inmates with mental retardation.

The Court recognized in *Yeskey* that modern prisons provide many activities, services, and educational and vocational programs which may benefit inmates.⁴¹⁴ Prison educational and rehabilitation programs enable inmates who complete such programs to be released earlier on parole or to have their sentences reduced. Thus, exclusion from such programs based upon disability such as mental retardation may violate the ADA. For example, a New York State prison was found to have violated the ADA where, among other things, over fifty hearing impaired and deaf inmates were explicitly excluded in the prison program services manual from a variety of academic and vocational programs.⁴¹⁵

Based on the court's decision in *Yeskey*, a District Court in the Ninth Circuit recently heard a class action brought against the California prison system, which included inmates with mental retardation.⁴¹⁶ The court held that the prison "regularly, consistently and as a matter of routine practice fails to make its programs, services and activities accessible to members of the Plaintiff class."⁴¹⁷ After *Yeskey*, Wyoming correctional services must also provide reasonable accommodations and access to programs to Wyoming inmates with mental retardation.

4. Reasonable Accommodation

When attempting to provide legally required reasonable accommodations, it is not always easy to identify the appropriate accommodations for a person with mental retardation. Necessary accommodations can vary greatly depending on the specific situation and the degree of impairment. The following section identifies some of the accommoda-

412. *Yeskey*, 524 U.S. at 210 (quoting 42 U.S.C. § 12131(1)(B)).

413. Thorough discussions of those issues are readily available elsewhere. See, e.g. Sandra J. Carnahan, *The Americans with Disabilities Act in State Correctional Institutions*, 27 CAP. U.L. REV. 291 (1999).

414. *Yeskey*, 524 U.S. at 210.

415. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1044-48 (S.D.N.Y. 1995).

416. *Armstrong v. Davis*, No. C 94-02307 (N.D. Cal. 2000).

417. *Id.*

tions that can and should be made in typical sentencing and rehabilitation situations.

When the court or other criminal justice professionals consider sentencing options which accommodate the disability of mental retardation, emphasis should be placed first, on maintaining the life skills the convicted person already has and second, on helping the person acquire the additional skills he or she will need to replace the illegal or antisocial behaviors that got the person into trouble in the first place. Changes in the normal routine for an individual with mental retardation create a risk that the individual will lose critical life skills. For example, if a person with mental retardation lives independently in his or her own home, then is sentenced to a correctional facility, the move may jeopardize the person's ability to independently maintain a home and job upon release because the person may lose critical skills during incarceration. Though the intent is to rehabilitate, it may backfire and leave the person even less able to cope and more likely to re-offend.

"An individual with mental retardation might behave quite well in a structured setting but, when placed in a different environment, will often not be able to use what he or she has previously learned. This is especially true in stressful or frustrating moments."⁴¹⁸ In light of these facts, removing the offender from his or her home, or transferring the offender from one facility to another, should only be done when absolutely necessary. It would also be wise to ask that the person have extra assistance during transitions, until the person learns the new rules and routines, to avoid problems.

Losing life skills through disuse is a common but avoidable manifestation of mental retardation. To help avoid the loss, it is important to determine the individual's present level of functioning and the individual's ability to adapt and change to a new situation before deciding on the sentence or other disposition. After determining present abilities, the next step is to determine what life skills and behaviors the person needs to obtain through the rehabilitation process. If the person has developed a pattern of stealing for his own subsistence, then it is critical that the person's rehabilitation focus on gaining skills to support him or herself legally. If instead, the person was being taken advantage of by others and stole to gain a friend's acceptance, then a more critical focus of rehabilitation would be to develop appropriate social supports and

418. McGee & Menolascino, *supra* note 61, at 58-59.

recreational opportunities that will teach the person to choose appropriate friends and recreational opportunities.⁴¹⁹

Substance abuse problems are also common among persons with mental retardation, primarily because of their low self-esteem and their frustration with constantly encountering a world that does not always make sense.⁴²⁰ However, in order to be effective, substance abuse programs for persons with mental retardation must be different from typical programs. The programs must be geared to address the issues surrounding dependency at the more concrete and behavioral level of understanding of persons with mental retardation. Typical group substance abuse programs are often too abstract to provide any real help to the person with mental retardation.

Another critical problem involves communication and ensuring that the person with mental retardation understands certain situations or expectations. Whether in community-based programs, such as intensive probation, or supervised community placement; or in a more restrictive setting such as prison, the individual should be provided adequate assistance to ensure that he or she understands what their rights are, what they can and cannot do, and the consequences. For example, in a disciplinary hearing for an infraction, the person might be provided with someone to explain and assist them in participating fully in the process. Expectations or rules should be based on that particular individual's abilities, rather than a generalized rule applied to everyone. For example, if may be a requirement of probation that the person works. For the inmate with mental retardation this requirement might need the additional accommodation of someone assisting the person in getting to work on time or providing supported employment services to the person while on the job.

C. Services Currently Available in Wyoming

All states have governmental agencies that provide varying lev-

419. Wood & White, *supra* note 397, at 157.

One of the social skills most lacking among clients in Lancaster Special Offenders Services is that of knowing how to use their free time Without the benefit of recreational activities, most offenders are trapped into spending time with the people with whom, and in the places where, they got into trouble. By developing social skills and self-confidence and learning specific recreational behaviors, many offenders find they enjoy activities in life that they were afraid to attempt previously.

Id.

420. *See id.*

els of service and support to citizens with disabilities. In Wyoming, this agency is primarily the Department of Health, and more specifically two divisions within the Department: the Division of Developmental Disabilities, and the Division of Behavioral Health. The Division of Vocational Rehabilitation in the Department of Employment also provides services. The Division of Behavioral Health helps citizens with mental illness or substance abuse problems, so it would be appropriate to involve them if the offender has a dual diagnosis of mental retardation *and* mental illness or substance abuse. In addition, federal programs can sometimes help; SSI⁴²¹ and SSDI⁴²² can provide an income for the offender at times. While it is beyond the scope of this article to provide detailed information on all of the services that exist and the necessary qualifications to receive these services, the following is a brief overview of possible options an attorney can further explore when appropriate.

1. Medicaid Home and Community Based Waiver (HCBS)⁴²³

The Division of Developmental Disabilities oversees this federal-state Medicaid program which can provide comprehensive services to qualifying citizens. Wyoming Medicaid Rules, Chapter 34, explains HCBS services as those allowing the “elderly, disabled, and chronically mentally ill who would otherwise be placed in an institution,” to live in the community. A “disabled adult” is defined in section 35-20-102(a)(vi) of the Wyoming Statutes Annotated as “any person eighteen (18) years of age or older who is unable unassisted to properly manage and take care of himself or his property as a result of infirmities of advanced age, physical or mental disability, or the use of alcohol or controlled substances.”

The Division of Developmental Disabilities can provide guidance on procedures for applying for these services. The application process includes an evaluation provided by the Division in order to determine eligibility. Unfortunately, because of limited funding, an eligible individual may be placed on a waiting list for services. While Wyoming has done better than many states in minimizing this wait time, there is usually at least some delay. Because individuals are not eligible for services while incarcerated,⁴²⁴ eligibility determination could be complicated further if the person with developmental disabilities is in jail awaiting the disposition of his case or in prison awaiting release after serving his sen-

421. 42 U.S.C. § 404 (2000).

422. 42 U.S.C. § 1381a.

423. Wyoming Medicaid Rules, 34 Home or Community-Based Waiver Services §§ 1-17 (Wyo. Dept. of Health 1995).

424. 42 U.S.C. § 1382(e)(1)(A).

tence. However, because of the high recidivism rates and difficulties in transitions,⁴²⁵ if the person qualifies for HCBS services, it is critical to assure that those services are in place immediately upon release or that the person has a family member or friend who will help him or her in the interim. Once available, the program develops an Individualized Service Plan or ISP that establishes in detail the logistics of the services and supports that are needed.

2. Job Training and Supported Employment

Another option for assisting a client with mental retardation is the services of the Division of Vocational Rehabilitation (DVR).⁴²⁶ These services also begin with an evaluation process and the development of an Individualized Written Rehabilitation Plan or IWRP.⁴²⁷ These services can provide comprehensive help in finding and keeping a job and includes supported employment services such as job coaching, intensive job training, and follow-up services. However, the rules provide for the withdrawal of services if the client does not cooperate.⁴²⁸ It would not be surprising to find that some individuals with mental retardation, especially those already convicted of a crime, are also found to be uncooperative. In order to avoid withdrawal of these critical services, an attorney might need to intervene on behalf of a client, asking an evaluator to recommend reasonable ADA accommodations that the Division should make in order for the client to be able to obtain or retain these services.

3. SSI or SSDI

An attorney would also be wise to determine whether the client is receiving or has received either Social Security type of disability benefit, SSI or SSDI.⁴²⁹ SSI and SSDI eligibility is also determined when applying for HCBS Waiver services. However, these benefits cease during periods of incarceration so it may be necessary to help a client reapply upon release. The steps involved in applying for the benefits can be daunting even to an attorney. One can imagine how difficult it is for a person with mental retardation. One inmate interviewed by the project reported that before his conviction he tried to get disability benefits, but had to move frequently and finally gave up because it was too hard to

425. See *supra* note 85 and accompanying text.

426. Division of Vocational Rehabilitation Rules, 1 General §§ 1-9 (Wyo. Dept. of Employment 1994).

427. *Id.* § 9(u).

428. *Id.* § 8(e).

429. See *supra* notes 421-22 and accompanying text.

figure out how to change his address for payment. An attorney may also consider the option of a representative payee who could manage the benefits for an individual who cannot do it for him or her self. The problem here is that, if the person with mental retardation is in trouble with the law, he likely does not have a good support system of friends and family who could be trusted to help.

4. Specialized Programs for Offenders

In addition, there are a number of specialized programs around the state that provide services to some offenders and individuals with mental retardation. These programs provide varying programs of rehabilitation and some are designed to address specific types of maladaptive behavior. Unfortunately, courts are often not aware of them and if the person is not identified, they can not be diverted to the more appropriate program. Information on these specialized programs can be obtained from the Division of Developmental Disabilities.

VIII. CONCLUSION

The suspect, defendant, or offender with mental retardation faces a number of difficult challenges when he or she becomes involved in the criminal justice system. Due to the unique characteristics of the disability and the lack of training and knowledge on the part of criminal justice professionals, these individuals are likely to run into serious problems at every step of the criminal process. They are susceptible to prejudicial contacts with law enforcement at arrest. They face serious risks of inadequate representation by their attorney due to their limited ability to understand and monitor their position and their attorney's actions. The disability is likely to be overlooked until after adjudication, leaving them without an invaluable evaluation by a professional experienced in diagnosing mental retardation and explaining its impact on the individuals' behavior. Once adjudicated, they continue to be plagued by the problems of inadequate training. Corrections officers, probation and parole officers, and parole boards often fail to understand and accommodate the disability, which in turn leads to unsuccessful rehabilitation efforts and the perpetuation of an ever tightening cycle of release and re-offense. Increasing the training and expertise of criminal justice professionals can help break this cycle.

Wyoming's high prevalence rates may be at least partially due to a lack of appropriate alternatives to incarceration in the State, which leaves the court with very limited choices when sentencing these individuals. The State should first examine the services and supports cur-

rently available within both the corrections systems and social services system and then establish a better coordination of habilitation and rehabilitation services through rulemaking or legislation. This could be accomplished by enacting legislation that requires the Department of Health to develop programs designed to identify and divert persons with developmental disabilities (and mental illness) from incarceration through the provision of less restrictive community supports. The legislation should further mandate a cooperative effort between the Department of Corrections and the Department of Health to work cooperatively in addressing the habilitation needs of offenders and potential offenders identified by the courts.

Prison overcrowding has become a national epidemic to which Wyoming is not immune. Money currently expended in continuing to perpetuate the cycle of release and re-offense for offenders with mental retardation could be better spent by more cost effective and less drastic measures such as providing supervision, habilitation, and support in a community setting. When such options are not possible due to the nature or severity of the offense the State should provide for an extended transition back into the community at the end of the sentence. With this accommodation of the disability, the offender with mental retardation will have a chance to succeed and break the cycle.

Continuing an uncoordinated approach will end up costing the State in the long run through increased costs of crime and extended periods of incarceration for the offender with mental retardation.