

Disabilities Project Newsletter

Representing the Cognitively Disabled Client in a Criminal Case by Jeanice Dagher-Margosian

The purpose of this article is to discuss some of the characteristics of this population of offenders and to encourage further consideration of options in preparing these cases. It is an edited version of a lengthier advocacy piece presented by the author at the State Bar of Michigan Annual Meeting in September of 2005. That article, with extensive supporting authority, can be viewed [online](#).

Introduction

A recent United States Supreme Court decision provides a new context for lawyers as they prepare and defend criminal cases to consider the circumstances of developmentally disabled. Cognitively impaired defendants offer a special set of circumstances for the lawyers representing them. Although they are not always easily recognized as disadvantaged, developmentally disabled people are more likely than the general population to be arrested, convicted, sentenced to prison, and victimized while there. They are frequently used by other criminals to assist in crimes, without understanding their involvement or the consequences. They may be bullied into participating in crimes. They may also have a deep need to be accepted and may agree to participate in crimes in order to gain friendship.

The United States Supreme Court held in *Atkins v Virginia*, 536 US 304 (2002), that execution of mentally retarded criminal defendants is excessive and constitutes cruel and unusual punishment. The Court observed that defendants who are mentally retarded – meaning that they have low IQs and limited in adaptive skills – may be able to distinguish between right and wrong, and may indeed be competent to stand trial. They may still, however, be unable to learn from experience, engage in logical reasoning, control impulse, or understand the reactions of others to their behavior. Given these limitations, it is cruel and unconstitutional to impose the death penalty on such individuals; it is not a proportionate penalty because their culpability for the same acts as high-functioning individuals is lessened. The *Atkins* decision serves as a catalyst to examine the challenges presented by cognitively impaired criminal defendants.

Characteristics

A developmental disability is a condition diagnosed in childhood or adolescence. Disabilities include mental retardation or related conditions like cerebral palsy, epilepsy, autism, or other neurological conditions that result in impairment of general intellectual functioning or adaptive

behaviors. Fetal alcohol syndrome, attention deficit disorder, and autism are also diagnosed in developmental disabilities. These conditions and functional limitations are measured by a qualified professional using clinical observation and intelligence, competency, and adaptive skills testing.

Developmentally disabled and retarded people are impaired in one or more spheres of mental functioning that involve perceptual, memory, and judgment modalities. Their ability to process and retain information is affected. They are frequently unable to reason abstractly. Memory and the ability to relate cause and effect is often impaired. Verbal skills are affected, although many individuals sound and appear to function at a higher cognitive level than they actually do. Adaptive functions and social interaction may be impaired, with the age level of social functioning being much younger than the chronological age of the client.

Relevance to Criminal Defense and Special Problems

Mental deficits put this population at high risk of involvement with the criminal justice system, with research showing that up to 24 percent of this country's prison population is mentally retarded. Special problems faced by this population include an unwillingness to have their disability recognized, a lack of understanding of their rights, difficulty understanding commands, agitation at being detained, a desire to please their questioners, difficulty describing details, and tendency to confess despite innocence.

Special defense concerns for developmentally disabled defendants include their arrest and interrogation, legal competency to waive rights, mitigation of charges, and sentencing. These topics are discussed below.

Arrest and Interrogation

False admissions and confessions are frequent in these cases. Individuals are often interviewed by police without having an attorney present. In order to gain approval or hide their disability, individuals with mental retardation usually answer affirmatively when asked if they understand and waive their rights, even when they do not understand. Courts frequently uphold the waiver as valid even when it is challenged on the basis of a client's lack of understanding because all that must be shown is that the warnings were given and that the defendant answered police questions after being given the warnings. This is not a difficult standard for the state to meet.

It is uncertain whether mentally retarded individuals understand their Miranda rights and what it means to waive them. If a person does not understand these rights, the same person cannot understand the consequences of abandoning their protections. Accordingly, Miranda rights cannot be voluntarily, knowingly, and intelligently waived. See *Johnson v Zerbst*, 304 US 458 (1938). Other problems include the communication abilities of those with cognitive impairments, who often give responses that are misunderstood by police officers and may be untrue. In many cases, answers are obtained by suggestion, leading questions, and confusion by investigators. The confession is often not a recounting of events, but rather mere repetition of statements made by the officer to the suspect. Because memory is impaired or nonexistent in many retarded people, and because they typically try to please those in an authoritative position, they may agree

that something may have happened "because you say it did." Accordingly, retarded defendants are vulnerable to suggestibility in a way that normal-functioning defendants are not. At a minimum, retarded individuals should have a support person, ideally a parent or guardian, with them when they are interviewed. If representation is obtained early enough, no discussion with police will be permitted without counsel.

At a suppression hearing, expert opinion may be presented to explain the mental limitations and functioning of a client that caused the situation. Limitations on verbal and reading ability, trust of authority, and inability to remember events should be explained by an expert witness. If a client has no ability to accurately remember events, it undercuts the reliability of a confession. Similarly, if he has no ability to comprehend the abstract, future-based components of the Miranda warnings, whether he or she had them or was in custody when they were given is irrelevant.

Competency

Criminal defendants may not be tried and may not waive their right to counsel or to trial unless they are competent to do so. Competency requires that a defendant be able to consult with his lawyer with a reasonable degree of understanding in order to assist in his own defense, and that the defendant has a rational and factual understanding of the events taking place against him. A competency evaluation should be considered as early in the process as possible.

Mitigation of Charges

Most crimes committed by mentally retarded individuals are not premeditated or well-planned. Attorneys should consider arguing that the defendant lacks ability to plan the crime or to form intent. To support these arguments, the evaluator's opinion should include an explanation of why the defendant was unable to form the specific intent required for the crime as charged; it may not be inferred.

Sentencing

A defense that fully explains the defendant's limited mental functioning presents the opportunity to argue for mitigation upon sentencing. Intellectually limited defendants might not benefit from prison, might not be rehabilitated in the process, and may in fact learn and repeat the violent behavior they will be exposed to in prison. A better choice may be to allow them to remain in the community within a strictly supervised probation program, including mental health services if appropriate.

Identifying Clients

Many persons affected by mental retardation are mildly affected. They are not conspicuously disabled and have IQs of between 50 and 70. Moderately retarded individuals generally have IQs of between 35 and 55. These two groups comprise the majority of those who come into the criminal justice system. Mildly retarded people often do not want their disability "found out" and mask symptoms to appear to be capable of higher functioning than they actually are. Because

many retarded individuals appear to have higher mental functioning than they actually do, an attorney may not easily recognize a client's disability during interviews. Attorneys must look to unspoken sources of information to identify mental disability. A client's demeanor and presentation are indicative of intellectual ability, as is his or her social history.

Watch your client

When interviewing your client for the first time, look closely at his or her demeanor and mannerisms. Long sentences may pose comprehension problems, due to both memory limitations and problems with abstract language. Additionally, the client's demeanor and body language should be closely observed. Repetitive motions such as rocking, pinching or rubbing a point on the body, or looking away or around the room, can indicate perceptual abnormalities. If your client is unusually compliant it may be an indication of the extraordinarily trusting nature of mentally retarded individuals, including those with fetal alcohol syndrome.

Background

Are your client's parents developmentally disabled? Do his school records show placement in special education or difficulty with classes? Do teachers, relatives, and friends report unusual behavior with respect to concrete thinking and speaking? When interviewing your client, ask about these things to determine whether further testing is needed. It is also helpful to look at labels attached to your client by others to determine whether there is a need for further assessment. Clients may be referred to as "slow" or "child-like," which may indicate that functioning is below average. Does your client have difficulty reasoning abstractly or projecting into the future? Mild retardation is often characterized by thought that is limited to very concrete concepts. How does your client perform routine motor tasks, such as holding a pencil and writing by hand? Subtle differences in these activities may well indicate further assessment is necessary. This can be accomplished by a retained expert or a court-appointed professional pursuant to motion.

Tasks

Can your client remember simple information, such as phone numbers and addresses? Although many individuals can function normally in adaptive activities like riding the bus, holding a job, or driving a car, their memory functions may be well below normal adult levels. In one case, an individual appeared quite normal, even serving in the National Guard for a time. However, when mental retardation was suspected, a review of his social and military history revealed malfunction in tasks requiring normal memory. His military history also showed that he was AWOL over nine times. This was consistent with his social history, which showed that he could not hold a job because he could not get there on time. He regularly got lost while walking in familiar areas. His wife filled out job applications and handled finances. When viewed together, these are all indicators of mild retardation. This was later verified by psychological testing.

Conclusion

An assessment by a mental health professional qualified in diagnosis of developmental disability is a necessity in a case involving an intellectually impaired client. This is because there is still a misapprehension that intellectually disabled citizens are defined by a total incapacity to care from themselves or carry on regular daily activities. What is important to show a court is that intellectually disabled people are not incapable of such activities, but that their mental processes are different. Understanding concepts requires that they be explained in graphic, concrete terms. If a non-native English speaker is a suspect in a criminal case, it is clear that advice of rights must be given in his or her native language, and the trial must be translated throughout. No less is required for those that operate within the world on limited cognitive abilities.

Jeanice Dagher-Margosian is an appellate criminal defense attorney with a special interest in state of mind defense and mental function as it affects the representation of criminal defendants.