

**RECOGNIZING AND CONFRONTING MENTAL
HEALTH ISSUES:**

**ASSESSING AND UNDERSTANDING HOW MENTAL
RETARDATION AFFECTS YOUR CLIENT
AND YOUR CASE**

Presented by:

**Lyn McRaine, PhD
Senior Psychological Examiner
Nashville, Tennessee
615-300-2374**

**Caryll S. Alpert
Assistant Federal Public Defender
Middle District of Tennessee
615-736-5047**

I. Ethical and professional obligations

A. Model Rules of Professional Conduct

Rule 1.4(b): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

“Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity.”
Comment 6.

Rule 1.14, Client With Diminished Capacity: “When a client’s ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

The commentary notes that when a client suffers from diminished mental capacity, it may not be possible to maintain ordinary attorney-client relationship in all respects. Comment 1.

“Disclosure of the client’s diminished capacity could adversely affect the client’s interest. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. . . . The lawyer’s position in such cases is an unavoidably difficult one.” Comment 8.

B. Case Law

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland v. Washington*, 466 U.S. 668, 690-91(1984). Failure to investigate a mental deficiency renders counsel’s assistance ineffective where there is reason to believe the defendant suffers from some mental deficiency, *see Moore v. Johnson*, 194 F.3d 586, 616-17 (5th Cir. 1999), or where there is otherwise reason to believe mental deficiency is an important defense. *See Mauldin v. Wainwright*, 723 F.2d 799, 800 (11th Cir. 1984).

Because a defendant typically makes only a limited appearance before the court, defense counsel is “the sole hope” that a mental deficiency will be brought to the attention of the court. *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

II. Identifying your client's abilities and limitations

A. Mental Illness vs. Mental Retardation:

Mental illness refers to a person's emotions, moods, and thought processes. Mental illness can develop at any time during life and has nothing to do with intellectual skills. It can be temporary and it can be curable. Mental illness is identified and treated by psychiatrists and psychologists.

Mental retardation refers to a below average ability to learn and process information. It is a developmental disorder and has its onset before the age of 18. A person with mental retardation has an IQ < 70 and delayed adaptive skills. Mental retardation is generally a lifelong disability and is not curable. It is identified and treated by psychologists, educators, and vocational specialists.

Mental illness and mental retardation can co-occur in an individual.

B. Definition of Mental Retardation:

Mental retardation manifests itself before the age of 18 and involves significantly below average intellectual functioning combined with limitation in two or more of the following adaptive areas:

- Caring for oneself
- Home living
- Social skills
- Community use
- Self-direction

In order to be diagnosed with mental retardation, a person must have an individually administered intelligence test and an assessment of adaptive skills.

C. Interviewing Families:

When interviewing a client's family to assess whether your client may have mental retardation, there are several areas that should be covered. Deviations in these domains may be, but are not always, suggestive of mental retardation. These areas include, but are not limited to:

- Pregnancy
- Birth
- Family History

- Developmental Milestones
- School Performance

When speaking with a family member, keep in mind that if your client does in fact have mental retardation, his family may not be aware of it, or may be reluctant to acknowledge to his limitations. And, family members may suffer from some of the same limitations as your client.

D. Interviewing Clients:

When conducting an interview with your client, there are several tools that may prove useful. As you interview, attend to how your client expresses himself, whether or not he is able to read and write, and how he understands what you are saying to him. Also keep in mind that many persons with mental retardation are eager to please and may give the answer they think you want to hear. Consider using either or both of these instruments in your interview:

- Client Interview
- Brief Mental Status Exam

E. Looking at school records:

There are often indicators of mental retardation in a client's school records. Look for the following:

- Special education designation
- Type of special education classroom
- Retentions
- Anecdotal notes from teachers
- Standardized group achievement scores
- Grades

III. Tailor attorney-client relationship to client's needs

A. Talking about mental retardation:

It is important to discuss mental retardation with your client before you go into the courtroom to discuss it. Remember that this may be the first time your client has heard this information. It is easier for a client to hear that she 'functions in the range of mental retardation' than that she 'is mentally retarded.' Help the client compare her own rate of learning with that of other persons her age. Emphasize that functioning in the range of mental retardation does not mean she can't learn, just that she may learn more slowly than others and that she may need help getting and holding a job.

B. Establishing a trusting relationship with a client:

You must talk with your client in a way she can understand. Do not make assumptions about what your client knows. Ask open-ended questions and have your client explain things that might otherwise be obvious. Speak slowly and use simple sentences. Do not move from one topic to the next until you are certain that she understands. When possible, use pictures or illustrations. Give specific examples and then use questions to follow up. Watch your client carefully for the 'desire to please' behavior.

C. Other considerations

A client with mental retardation may not be able to discuss the case with you the same way as other clients. Your client may say what he thinks you want to hear. He may have difficulty describing details and facts.

You may need to seek special accommodations in the courtroom to ensure that your client understands the proceedings despite his limitations. For example, you may ask the court to use simple words and phrases instead of complicated legal terms. In hearings involving witness testimony, you may need to request in advance for frequent breaks to review the proceedings with your client.

For a nice overview of considerations for mentally retarded individuals going to court, *see* "When People With Mental Go To Court", found at <http://www.thearc.org/ada/court.html>.

IV. Incorporate client's mental limitations into legal strategies

A. Competency hearing

At any time after the commencement of a prosecution and prior to sentencing, you may move for a hearing to determine the mental competency. A client may be incompetent if suffering from “a mental disease or defect” rendering him “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” 18 U.S.C. §4241(a).

Weigh the costs and benefits of a court finding that your client is incompetent, which potentially could result in a long-term prison hospitalization of your client. *See* 18 U.S.C. §4241(d) and §4246.

For a thoughtful analysis of the distinct competency issues faced with clients who have mental retardation (as opposed to mental illness), see *United States v. Duhon*, 104 F.Supp.2d 663 (W.D. Louis. 2000) (finding defendant with m.r. to be incompetent, despite “successful” participation in a prison competency restoration group)

B. Juvenile transfer to adult status for federal prosecution

Mental disability and cognitive limitations impact several of the six factors which a district court must examine to determine whether a transfer to adult status for federal prosecution is in the interest of justice. The six factors include (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile’s prior delinquency record; (4) the present intellectual and psychological development and maturity of the juvenile; (5) the nature and past treatment efforts and the effect of such efforts; and (6) the availability of programs to treat the juvenile’s behavioral problems. 18 U.S.C. § 5032.

C. Detention and bond considerations:

At a detention hearing, the court must consider both the nature and circumstances of the offense charged, 18 USC § 3142(g)(1), and the history and characteristics of your client, including mental condition, § 3142(g)(3).

D. Suppression issues

A key concern about the voluntariness of a confession is “the intelligence, mental state, or any other factors possessed by the defendant that might make him particularly suggestible, and susceptible to having his will overborne.” *Wilson v. Lawrence County, MO*, 260 F.3d 946 (8th Cir. 2001), *see also*, *Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (mental condition relevant to susceptibility to police coercion).

Compelling empirical data and legal analysis suggest that (1) Miranda warnings are essentially meaningless to people with mental retardation, and (2) current constitutional doctrines under *Miranda* does not effectively ensure the validity of confessions or waivers, by mentally retarded persons. Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff and Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U.Chi.L.Rev. 495 (2002).

E. Plea negotiations

Your client’s diminished cognitive abilities may prevent him from understanding complex terms of a plea agreement. *See, e.g., United States v. Thomas*, 178 Fed. Appx. 935, 937-38 (11th Cir. 2006) (district court struck *Blakely* appeal waiver provision from plea agreement because defendant with low to borderline intellectual functioning could not understand it).

F. Trial considerations

Your client’s mental limitations may negate mens rea requirements or may lead to other potential trial defenses. Consider whether your client’s limited cognitive abilities help support your theory of defense, and whether you need to present expert testimony at trial about your client’s condition. *See, e.g., United States v. Sandoval-Mendoza*, ___ F.3d___, 2006 U.S. App. LEXIS 31815 (9th 12/27/06) (reversing conviction where district court erroneously excluded expert testimony that defendant’s brain tumor rendered defendant unusually vulnerable to inducement; this testimony was highly relevant to defendant’s entrapment defense)

Keep in mind that you must provide pretrial notice to the court and prosecution if you intend “to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of guilt.” Fed. R. Crim. P. 12.2(b)

G. Sentencing

1. There are no limitations on the information the Court may consider at sentencing “concerning the background, character, and conduct of a person convicted of an offense.” 18 U.S.C. § 3661.

18 USC §3553 *requires* the court to consider, among other factors:

- The nature and circumstances of the offense
- The history and characteristics of the offender
- The need for sentence imposed to provide just punishment
- The need for sentence imposed to provide defendant with needed educational or vocational training. . . in the most effective manner

2. Incarceration puts a person with mental retardation at risk

Unusual susceptibility to abuse by other inmates may be grounds for a downward departure. Koon v. United States, 518 U.S. 81, 111-12 (1996); *see United States v. Mena*, 968 F.Supp. 115 (E.D. NY 1997) (departing downward because mentally retarded defendant would be vulnerable to attack while incarcerated)

Individuals with mental retardation may be vulnerable to exploitation by others e.g., being physically and sexually abused.” DSM-IV § 319, “Associated descriptive features and mental disorders.”

3. The U.S. Sentencing Guidelines incorporate factors that may relate to client’s mental limitations:

§ 5K2.12: Coercion or duress not amounting to a complete defense can be grounds for a departure.

§ 5K2.13: Diminished capacity departure may be appropriate where the defendant had a significantly reduced mental capacity, and her reduced mental capacity contributed substantially to the commission of the offense. *See, e.g., United States v. Cockett*, 330 F.3d 706 (6th Cir. 2003) (upholding downward departure based on diminished capacity, despite a jury finding of guilt); *United States v. Jones*, 42 Fed. Appx. 879 (7th Cir. 2002) (remanding because district court erroneously suggested that mental retardation never provides basis for §5K2.13 departure; also noting that defendant with IQ of 54 who “is subject to being used, taken advantage of, by others” provides compelling case for departure)

Even if a defendant is not eligible for a §5K2.13 departure, his mental deficits may still remove his case from the heartland of cases and qualify for a downward departure. *See United States v. Allen*, 250 F.Supp.2d 317 (S.D. NY 2003) (granting departure in drug and gun case)¹

4. The United States Supreme Court recognizes that mental retardation reduces personal culpability:

“Mentally retarded persons. . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . often act on impulse rather than pursuant to a premeditated plan, and . . . are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” Atkins v. Virginia, 122 S.Ct. 2242 (2002); Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (O’Connor, J., concurring) (mental retardation may render a defendant less morally culpable than defendants who have no such excuse).

¹ Keep in mind (and remind the court when appropriate) that “while the Guidelines remain important, they are now just one of the numerous factors that a district court must consider when sentencing a defendant. . . Once the appropriate guideline range is calculated, the district court throws this ingredient into the Section 3553(a) mix. Considering, as Booker requires, all of the relevant Section 3553(a) factors, including the guideline range, the district court then imposes a sentence.” United States v. McBride, 434 F.3d 370 (6th Cir. 2006)

ATTACHMENTS

FAMILY INTERVIEW

Client: _____
Facility: _____
Date: _____
Interviewer: _____
Interviewee: _____

1. How are you related to my client?
2. What can you tell me about the pregnancy? Was there prenatal care? Did his mother use drugs, alcohol, or cigarettes? Was there any illness or accident?
3. Was he a term birth? How much did he weigh? How long was he in the hospital?
4. Are there any family members with mental retardation or mental illness? Did his parents and siblings graduate from high school? What do they do now?
5. Did he meet his developmental milestones on time?

Walking?	_____	8-16 months
Talking?	_____	12-24 months
Toilet Training?	_____	24-36 months

6. How was his school experience? Has he ever repeated a grade?
7. Was he in special education? What kind of class?
8. What kinds of grades did he make? What did his teachers say about him?
9. Did he have trouble learning to read or write?
10. Did he graduate?
11. Has he ever had a job?
12. I am going to list some things and I want you to tell me if they are easy or hard for him to do:
 - looking up a phone number
 - writing a check
 - shopping for groceries
 - making change
 - telling time on a clock with hands

- naming the days of the week
- paying attention to what people are saying
- reading a bus schedule
- following a recipe
- understanding what people are saying
- reading
- washing clothes
- learning new phone numbers

CLIENT INTERVIEW

Client: _____
Facility: _____
Date: _____
Interviewer: _____
Interviewee: _____

1. When and where were you born?
2. Do you know anything about your mother's pregnancy or about your birth?
3. What kind of kid were you? Did you get in trouble a lot or did you stay out of trouble?
4. Who did you live with when you were growing up?
5. Who do you live with now?
6. Tell me about your parents and your siblings. What do they do?
7. How about the rest of your family – grandparents, cousins, aunts. Are they in good health? Do they have any problems?
8. Where did you go to school?
9. Did you repeat a grade?
10. Did you go to special education classes?
11. What is the highest grade you finished?
12. How was your behavior while you were in school?
13. Do you remember learning to read and write? Was it hard or easy?
14. How is your health? Do you take any medicine? Have you ever? Do you hear and see well?
15. Have you ever been in the hospital? Have you ever been in an accident or had a head injury?
16. Have you ever seen a psychiatrist or a psychologist? What did they tell you?

17. Have you ever had a job? What kind of job would you like to do?
18. Do you have a group of friends? What do you like to do for fun?
19. How is your mood? Are you usually happy or sad? Do you get angry easily or does it take a lot to get you upset?
20. Tell me three things about yourself that you are proud of.
21. Tell me three things about yourself that you wish you could change.
22. I am going to list some things and I want you to tell me if they are easy or hard for you to do:
 - looking up a phone number
 - writing a check
 - shopping for groceries
 - making change
 - telling time on a clock with hands
 - naming the days of the week
 - paying attention to what people are saying
 - reading a bus schedule
 - following a recipe
 - understanding what people are saying
 - reading
 - washing clothes
 - learning new phone numbers

McRaine
2007

BRIEF MENTAL STATUS EXAM

Client: _____
Facility: _____
Date: _____
Interviewer: _____

1. What is your name? When were you born? How old are you?
2. What year is it? Month? Date? Day?
3. What is the name of the city you are in? State? County? Facility?
4. Who is the President of the United States? Who was the President before him?
5. What are two major news events that have happened in the last month?
6. What is your mother's name?
7. Repeat the names of these three items: car, apple, horse.
8. *Point to your watch and say – “What is this?”*
9. *Hold up a pencil and say – “What is this?”*
10. *Ask the interviewee to count backwards from 100 by 7. Stop after five answers. (100 – 93 – 86 – 79 – 72)*
11. What does this saying mean: Too many cooks spoil the broth?
12. *Ask the interviewee to recall the objects mentioned above.*
13. Name the months of the year.

McRaine
2007

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA)	
)	
)	No.
v.)	JUDGE
JUAN GOMEZ)	

NOTICE OF EXPERT EVIDENCE OF A MENTAL CONDITION

Through counsel and pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure and Local Criminal Rule 16(c), defendant Juan Gomez provides notice that he intends to present evidence at trial relating to the mental condition of Mr. Gomez that bears on the issue of guilt. Specifically, Mr. Gomez will present evidence that he has Cognitive Disorder NOS, likely arising from brain damage incurred as a child, and that Mr. Gomez has Borderline Intellectual Functioning.

The defendant will present this evidence in order to negate the elements of the offense. The defendant is not presenting this evidence in support of an insanity defense.

Rule 12.2(b) indicates that the defendant must provide notice to the government within the time provided for filing pretrial motions or at any later time that the Court sets. The Court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders. In this case, counsel for Mr. Gomez had not been able to confirm his condition until a professional evaluation was conducted during the week of February 17, 2006. Due the enormous difficulty in locating and hiring a suitable expert who is bilingual and can administer examinations in Spanish, and to the unexpected illness of the first medical expert initially identified to evaluate Mr. Gomez, defense counsel did not obtain a full evaluation and

results from an expert until this past week. For these reasons, the defendant submits there is good cause to allow Mr. Gomez to file this notice at present time, after the pretrial motions deadline. Mr. Gomez has no objection to the Court granting additional trial preparation time based on the filing of this notice.

Respectfully submitted,

CARYLL S. ALPERT
Attorney for Juan Gomez
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

UNITED STATES OF AMERICA)	
)	
)	No.
v.)	JUDGE
JUAN GOMEZ)	

NOTICE FROM DEFENDANT GOMEZ
REGARDING ACCOMMODATIONS IN COURT PROCEEDINGS

Defendant Juan Gomez previously filed notice pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure and Local Criminal Rule 16(c) of his intent to present evidence at trial relating to the mental condition of defendant Gomez that bears on the issue of guilt. Mr. Gomez has provided to the government a copy of the psychological evaluation and will provide a copy of the evaluation to the Court under seal.

Mr. Gomez does not assert that he is legally insane or legally incompetent. However, defense counsel does wish to bring to the Court’s attention that Mr. Gomez has cognitive limitations and that certain accommodations have been recommended for the trial proceedings. Specifically, as reflected on in the “Competency” section on page 8 of the psychological evaluation, Mr. Gomez will need certain provisions, including a personal interpreter, and periodic breaks so that counsel will be able to ensure that Mr. Gomez understands what is occurring in court.

Respectfully submitted,

CARYLL S. ALPERT
Assistant Federal Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047