No. 87-6177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY PAUL PENRY,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICAN ASSOCIATION ON MENTAL RETARDATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES, NATIONAL ASSOCIATION OF SUPERINTENDENTS OF PUBLIC RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED, MENTAL HEALTH LAW PROJECT, AND NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION ON MENTAL RETARDATION, *ET AL.* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici curiae are professional and voluntary associations interested in people with mental retardation. They represent a broad spectrum of viewpoints within the field of mental retardation.[1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), previously named the Amer-

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[1] The Petitioner and Respondent in this case have consented to the filing of this brief.

ican Association on Mental Deficiency, is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation and has appeared before this Court as *amicus curiae* in cases such as *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Bowen v. American Hospital Association*, 476 U.S. 610 (1986).

THE AMERICAN PSYCHOLOGICAL ASSOCIATION (APA) is a nonprofit, scientific and professional organization. With over 70,000 members, it is the major association of psychologists in the United States. This case is of special interest to the APA Division on Mental Retardation, as well as thousands of other APA members who are engaged in scholarly research and the development of people with mental retardation.

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES (ARC) is a national voluntary association of parents, families and friends of people with mental retardation, along with members who have mental retardation. ARC, which has a national membership of over 160,000 people organized in some 1,300 local and state-wide chapters, is directed and led by active volunteer parents.

THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS (TASH) is an organization of over 8,000 teachers, researchers, administrators, parents, medical personnel, and other professionals dedicated to making appropriate education and services available to persons who experience severe disabilities.

THE AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED (AAUAP) is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of more than 10,000 mental health professionals, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes, and treatment of mental disabilities, including mental retardation.

THE NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC. (NYSARC) is a state-wide organization of 65 chapters and 53,000 members, including parents and others concerned with the needs of people who have mental retardation. NYSARC provides services to 25,000 clients on a daily basis and is also an advocacy organization. (NYSARC is not affiliated with the Association for Retarded Citizens of the United States.)

THE NATIONAL ASSOCIATION OF PRIVATE RESIDENTIAL RESOURCES represents approximately 650 agencies in 49 states and the District of Columbia that together provide residential services to more than 40,000 people with mental retardation and other developmental disabilities. Members offer a full range of residential services in a variety of settings designed to enhance the development and independence of those served.

THE NATIONAL ASSOCIATION OF SUPERINTENDENTS OF PUBLIC RESIDENTIAL FACILITIES FOR THE MENTALLY RETARDED is composed of approximately 200 directors of public facilities which serve people with mental retardation.

THE MENTAL HEALTH LAW PROJECT is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, including *Addington v. Texas*, *O'Connor v. Donaldson*, and *Bowen v. City of New York*. It has participated as *amicus curiae* in this Court in more than a dozen additional cases.

THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS represents Protection and Advocacy systems in 50 states and six territories, created pursuant to Section 113 of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6042 (Supp. II 1982). These agencies have the statutory mandate to advocate for the rights of persons with developmental disabilities, including mental retardation.

Amici agree with Petitioner that he is entitled to a reversal on the first question on which certiorari was granted, because the Texas system does not allow jurors to give adequate consideration to mental retardation as a mitigating factor, but *amici* will limit this brief to an analysis of whether the execution of a person with mental retardation is invariably a violation of the Eighth Amendment, as applied to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Eighth Amendment limits the imposition of the death penalty to those defendants whose blameworthiness is proportional to society's most extreme and irrevocable sanction. This Court has held death to be a disproportionate punishment where the characteristics of the offense or of the offender did not match the high level of culpability required by the Constitution.

Capital defendants who have mental retardation lack this constitutionally required level of blameworthiness. The effects of their disability in the areas of cognitive impairment, moral reasoning, control of impulsivity, and the ability to understand basic relationships between cause and effect make it impossible for them to possess that level of culpability essential in capital cases.

The execution of a person with mental retardation, such as Johnny Paul Penry, cannot serve any valid penological purpose, and as a result it is "nothing more than the purposeless and needless imposition of pain and suf-

fering." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Such an execution offends modern standards of decency.

ARGUMENT

I. THE DISABILITIES THAT ACCOMPANY MENTAL RETARDATION ARE DIRECTLY RELEVANT TO THE ISSUE OF CRIMINAL RESPONSIBILITY AND TO THE CHOICE OF PUNISHMENT FOR THOSE CONVICTED OF CRIMES.

A. Mental Retardation Is A Substantial Disability Which Impairs An Individual's Capacity To Understand And Control His Actions.

Every individual who has mental retardation experiences a substantial disability in cognitive ability and adaptive behavior. The universally accepted definition requires that any person who is classified as mentally retarded must have "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" and requires that the disability must have been "manifested during the developmental period." American Association on Mental Deficiency [now Retardation], *Classification in Mental Retardation* 1 (H. Grossman ed. 1983) (hereafter cited as "AAMR, *Classification*"). This means that a mentally retarded individual's measured intelligence is at least two standard deviations below the average person's.[2]

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[2] General intellectual functioning is measured by IQ tests, and to be classified as having mental retardation, a person generally must score below 70 (depending on which test is employed). The average IQ for the overall population is 100; more than 97 percent of all persons score above 70.

Persons with IQ scores between 70 and 85 are sometimes erroneously described as having "borderline retardation," but this classification has long since been abandoned by professionals in the field. AAMR, *Classification* at 6. Individuals with IQ scores in the 70s and 80s, while not mentally retarded, do have reduced cognitive ability, although the reduction is not as severe as for those who have

People with mental retardation are capable of learning, working, and living in their communities. *See generally* J. Conroy & V. Bradley, *Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (1985); *Systematic Instruction of Persons with Severe Handicaps* (M. Snell 3d ed. 1987). Special educators and other professionals have made substantial advances in developing techniques to assist people with mental retardation, and legislatures have acted to attempt to assist such individuals. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (1985). But advances in our capacity to help people with this disability do not change the reality that mental retardation is a substantial disability and that people who have mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne*, 473 U.S. at 442.

This reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation. Among the many substantial intellectual impairments resulting from mental retardation, the most serious occur in logical reasoning, strategic thinking, and foresight. Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982). The ability to anticipate consequences is a skill requiring intellectual and developmental ability. White, *Critical Influences in the Origins of Competence*, 21 Merrill-Palmer Q. 243, 246 (1975). A defendant in a

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mental retardation. Mental disability that falls short of mental retardation should be considered as a mitigating circumstance at the penalty phase of capital trials, just as the youth of a person who is 19 or 20 should be considered. *See, e.g., Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987); *see also Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959) (chronological age of 15 not enough to preclude death penalty, but an IQ of 80 tips the balance to require life imprisonment).

capital case whose understanding of causation and ability to predict consequences are substantially limited by mental retardation lacks an essential ingredient of culpability.

The problems caused by a mentally retarded defendant's substantial 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. *See generally* K. Lewin, *A Dynamic Theory of Personality* (1936); S. Sarason, *Psychological Problems in Mental Deficiency* (3d ed. 1959); Rueda & Zucker, *Persuasive Communication Among Moderately Retarded and Nonretarded Children*, 19 Educ. & Training Ment. Retarded 125 (1984). 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).

A related consequence of mental retardation is impairment in the ability to control impulsivity. *See* S. Kirk & J. Gallagher, *Educating Exceptional Children* 144 (1983); Litrownik, Freitas, & Franzini, *Self-Regulation in Mentally Retarded Children: Assessment and Training of Self-Monitoring Skills*, 82 Am. J. Ment. Defic. 499 (1978); Mahoney & Mahoney, *Self Control Techniques with the Mentally Retarded*, 42 Exceptional Children 338 (1976). This appears to be related to problems that people with mental retardation encounter in attention span, attention focus, and selectivity in the attention process. *See generally* C. Mercer & M. Snell, *Learning Theory Research in Mental Retardation* 94-141 (1977). 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.

Moral development is also affected by mental retardation. It is widely accepted by researchers that moral reasoning ability develops in stages, incrementally over time, and is dependent on an individual's intellectual ability and developmental level. J. Piaget, *The Moral Judgment of the Child* (Free Press ed. 1965); Kohlberg, *Moral Stages and Moralization: The Cognitive Developmental Approach*, in *Moral Development and Behavior: Theory, Research and Social Issues* 31 (T. Lickona ed. 1976). Thus, mental retardation limits the ability of individuals to reach full moral reasoning ability. *See* Israely, *The Moral Development of Mentally Retarded Children: Review of the Literature*, 14 J. Moral Educ. 33 (1985); Lind & Smith, *Moral Reasoning and Social Functioning Among Educable Mentally Handicapped Children*, 10 Austl. & N. Zealand J. Developmental Disabilities 209 (1984). This does not mean, of course, that people with mental retardation are immoral or that they should escape responsibility for their actions. But it does mean that where mental retardation has placed an upper limit on a defendant's attainment of full moral reasoning ability, he cannot be held to have that level of culpability that would justify punishment by death.

Nor do *amici* contend that people with mental retardation are unusually likely to commit crimes.[3] Most people with mental retardation are law abiding. A complex mix of environmental influences and individual differences unrelated to intelligence determines whether individuals engage in criminal acts. But those individuals with mental retardation who do commit crimes do so with a limited

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[3] The false belief, widely held in the early years of this century, that mental retardation was a cause of much of society's criminality is now understood to be a result of the eugenics hysteria of that era. Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978); Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 425-26 (1985).

understanding of causes and effects and a reduced ability to govern their own behavior.

A minimal level of cognitive ability and moral reasoning development are necessary for the level of culpability that will satisfy the requirements of the Eighth Amendment in capital cases. Defendants with mental retardation have serious impairments in intellectual and moral reasoning, strategic thinking, and the ability to foresee consequences. The combination of these substantial limitations is directly relevant to the degree of the disabled defendant's moral culpability for his criminal actions.

B. Mental Retardation Has Long Been Recognized As Relevant To The Choice Of Appropriate Punishment For Crime.

For centuries, Anglo-American law has accepted the principle that the degree of criminal culpability of people with mental retardation is reduced by the effect of their disability. The common law exempted "idiots" from criminal responsibility. 4 W. Blackstone, *Commentaries* *24; M. Dalton, *The Countrey Justice* 223 (1619 & photo. reprint 1973). When English law adopted the *M'Naghten* test for insanity, courts almost immediately extended its applicability to mentally retarded defendants. *Regina v. Higginson*, 174 Eng. Rep. 743 (1843). The modern American formulations of the insanity defense almost invariably speak in terms of "mental disease or defect," the latter referring to defendants with mental retardation. *See, e.g.*, 18 U.S.C. § 17(a) (Supp. IV 1986). Similarly, the weight of authority holds that even when it does not constitute a complete defense, a defendant's mental retardation should be taken into account as a mitigating factor in determining an appropriate sentence. *See, e.g., Coleman v. United States*, 357 F.2d 563, 569 (D.C. Cir. 1965); *Thomas v. State*, 97 Tex. Crim. 432, 262 S.W. 84 (1924) (evidence of "a low order of mentality"); *A.B.A. Standards for Criminal Justice* 7-9.3 (1984). *See gen-*

erally Lockett v. Ohio, 438 U.S. 586 (1978) ("mental deficiency" was one of the mitigating factors that had been prescribed by the Ohio statute). Even before this Court held that the Constitution required consideration of mitigating evidence, state appellate courts reduced sentences of death to life imprisonment on the basis of the mitigating effect of a defendant's mental retardation. *E.g. State v. Behler*, 65 Idaho 464, 146 P.2d 338 (1944); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964). *Cf. Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977) (post-*Gregg*).

The reason that mental retardation has been so widely accepted as relevant to the degree of punishment, whether through a finding of nonresponsibility or mitigation, is that courts and legislatures have recognized the disability's relationship to the degree of a defendant's blameworthiness. For example, the Supreme Court of Pennsylvania vacated a death sentence because expert testimony showed that the defendant's subnormal intelligence produced "a smaller range of selectivity as to action than would be had by the average human being" (quoting expert testimony) and meant that the defendant lacked "the ability to think things through to a logical conclusion." *Commonwealth v. Irelan*, 341 Pa. 43, 46, 17 A.2d 897, 898 (1941) (involving a defendant whose mental disability apparently was less severe than actual mental retardation).

American law has never held, nor do *amici* contend, that people with mental retardation cannot be held responsible or punished for criminal acts they commit. Some defendants who have mental retardation are entitled to acquittal because the effect of their disability matches the jurisdiction's test for insanity or because they lack the requisite *mens rea*. Other mentally retarded defendants properly can be convicted and subject to appropriate punishment. But mental retardation always involves a substantial impairment that reduces a

defendant's level of blameworthiness and moral culpability for a capital offense.

II. THE DEGREE OF REDUCTION IN MORAL BLAMEWORTHINESS CAUSED BY A DEFENDANT'S MENTAL RETARDATION RENDERS IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL.

A. Punishment By Death Is Reserved For Those Selected On The Basis Of Their Blameworthiness And Moral Guilt.

Unique considerations attend issues that determine which defendants may be put to death. As this Court has observed, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). Therefore, the flexibility that states have in devising appropriate sentences for noncapital cases is more strictly circumscribed in cases which may result in a death sentence.

Under modern capital punishment statutes, only a small minority of those individuals who commit willful criminal homicide are actually sentenced to death. *See Thompson v. Oklahoma*, 108 S. Ct. 2687, 2697 (1988) (plurality opinion). This Court has made clear that States cannot select candidates for the death penalty in an arbitrary or unprincipled fashion or solely on the basis of the offense committed. *Furman v. Georgia*, 408 U.S. 238 (1972); *Sumner v. Shuman*, 107 S. Ct. 2716 (1987). "There must be a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984).

This Court's Eighth Amendment opinions make clear that the decision to impose the death penalty must be "directly related to the personal culpability of the crimi-

nal defendant." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). The Court has reversed death sentences that were based on factors unrelated to the defendant's blameworthiness. *Booth v. Maryland*, 107 S. Ct. 2529 (1987). The degree of a defendant's blameworthiness and moral culpability are thus the key criteria for determining who may be put to death and who may not. *Enmund v. Florida*, 458 U.S. 782 (1982).[4]

A principal component of any defendant's culpability is his mental ability and state of mind at the time of the offense. This Court has observed that:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.

Tison v. Arizona, 107 S. Ct. 1676, 1687 (1987).

The obverse is equally true; a substantial reduction in the purposefulness of a defendant's criminal acts or impairment in his comprehension of them and their consequences must surely indicate that a less severe penalty is warranted. *Cf. Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698-99 (1988) (plurality opinion). As Justice O'Connor has observed, our society long ago agreed "that defendants who commit criminal acts that are attributable to . . . mental problems[] may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected

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[4] *Tison v. Arizona*, 107 S. Ct. 1676 (1987), which distinguished *Enmund*, does not weaken its central holding that a defendant's moral culpability is the key criterion for imposing the death penalty. In *Tison*, the Court found that the defendants' conduct was "sufficient to satisfy the *Enmund* culpability requirement." 107 S. Ct. at 1688.

in Anglo-American jurisprudence." *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring). Mental retardation significantly affects the degree of purposefulness and impairs the comprehension of every defendant who has the disability and commits a capital offense.

B. The Death Penalty Is Disproportionate To The Degree Of Culpability Of Any Defendant With Mental Retardation.

No defendant who has mental retardation is "capable of acting with the degree of culpability that can justify the ultimate penalty." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692 (1988) (plurality opinion).

Amici acknowledge that there is substantial variation among people with mental retardation regarding the degree of their disability and its effect on their reasoning capacity and adaptive behavior. Individuals with IQs in the 50s or 60s differ substantially from persons with IQs in the range of "profound" mental retardation.[5] But this variation would be relevant to the Eighth Amendment issue only if some individuals in the "mild" mental retardation category had such minimal disabilities that they were capable of the level of culpability and moral blameworthiness required for the death penalty. This

[5] The AAMR classification system divides people with mental retardation into four categories: mild, moderate, severe and profound. "Mild" mental retardation includes individuals with IQ scores between approximately 50 or 55 and 70. "Moderate" mental retardation includes those whose IQ scores are between approximately 35 or 40 and 50 or 55. (The precise boundaries depend on the particular intelligence test that is employed.) AAMR, *Classification* at 13. "[C]riminal justice personnel unfamiliar with this classification scheme may find the labels of 'mild' and 'moderate' to be euphemistic descriptions of individuals at those levels of disability." Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 423 (1985). Approximately 89 percent of people who have mental retardation fall within the "mild" mental retardation category.

is not true. The highest functioning individuals in the "mild" mental retardation category have substantial cognitive and behavioral disabilities. *See* Polloway & Smith, *Changes in Mild Mental Retardation: Population, Programs, and Perspectives*, 50 Exceptional Children 149 (1983); *Lives in Process: Mildly Retarded Adults in a Large City* (R. Edgerton ed. 1984).

Comparison with nonretarded teenagers may illuminate this issue.[6] Most teenagers are of average intelligence,

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[6] The question upon which this Court granted certiorari is framed in terms of "an individual with the reasoning capacity of a seven year old." This is similar to the concept of mental age, a tool used in the field of mental retardation to describe the severity of an individual's disability. Mental age is calculated as the chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation. *See* D. Wechsler, *The Measurement and Appraisal of Adult Intelligence* 24 (4th ed. 1958). The equivalence between nonretarded children and retarded adults is, of course, imprecise. An individual's mental age can simultaneously underestimate and overestimate attributes of the adult to whom it is applied. An adult will have the physical development and some of the interests and experiences of his nondisabled age peers; mental age suggests underestimation in these areas. But mental age substantially overestimates important problem-solving abilities. Mental age markedly overstates the ability of adults with mental retardation to use logic and foresight in solving problems. *See, e.g.*, Spitz & Borys, *Performance of Retarded Adolescents and Nonretarded Children on One- and Two-Bit Logical Problems*, 23 J. Exper. Child Psychol. 415, 428 (1977); Haywood & Switzky, *Intrinsic Motivation and Behavior Effectiveness in Retarded Persons*, 14 Int'l Rev. Research Mental Retard'n 1 (N. Ellis & N. Bray eds. 1986). *See generally* Spitz, *Intellectual Extremes, Mental Age, and the Nature of Human Intelligence*, 28 Merrill-Palmer Q. 167, 178 (1982).

Courts appear to have grasped intuitively the strengths and weaknesses of mental age as an estimation of disability. They have rejected claims that an adult with a mental age below 12 automatically lacks criminal responsibility because children of a similar chronological age are deemed incapable of criminal intent. But courts have frequently used mental age as a shorthand description of an individual's level of reasoning ability when discussing issues

and a minority (as with any age group) have superior intelligence. The common trait of teenagers is relative immaturity (although a few are unusually mature or sophisticated). *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring in the judgment). But their lives have been lived with varying degrees of mental ability, and those varying abilities produce differences in their life experiences. By contrast, people with mental retardation *never* have average, let alone superior, intelligence. The result of this impairment is that their abilities to comprehend concepts such as causation will vary but will never rise above a certain ceiling. The substantial variation among people with mental retardation always occurs below that ceiling. Thus, all persons with mental retardation lack that level of ability that would allow them to be capable of the level of culpability required for the death penalty.

The essence of *amici's* argument is not that jurors, or this Court, should feel sorry for capital defendants with mental retardation and as a result exempt them from the death penalty. Some jurors may reach that conclusion after hearing evidence about a defendant's disability in argument for mitigation. Rather, *amici's* Eighth Amendment argument is wholly different. The nature of mental retardation is sufficiently severe that any person who has that disability and commits a capital offense lacks, by definition, that level of culpability that would allow the state to take his life. Therefore, the case involving people with mental retardation bears no resemblance to hypothetical arguments that "blind people . . . or white-haired grandmothers . . . or mothers of two-year-olds" or "other appealing groups" should be spared from execution. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2721 (1988) (Scalia, J., dissenting). None of these

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such as voluntariness of confessions, competence to stand trial, mitigation, and the insanity defense. *See, e.g., Pickett v. State*, 37 Ala. App. 410, 71 So. 2d 102 (1953).

groups uniformly lacks the ability necessary to achieve the Eighth Amendment's required level of culpability. *Amici's* argument arises not from the "appeal" or sympathetic character of people with mental retardation, but rather from the real and practical effects of their disability.

III. A RULING THAT THE EIGHTH AMENDMENT BARS THE EXECUTION OF PEOPLE WITH MENTAL RETARDATION IS APPROPRIATE AND NECESSARY.

This Court has held that the death penalty violates the Eighth Amendment if it is disproportionate to the circumstances of the case for which it is prescribed. Most frequently, this is because of characteristics of the offense. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). The death penalty may also be excessive and therefore unconstitutional because of characteristics of the defendant for whom it is proposed. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988).

Although the Court has repeatedly emphasized the importance of individualized determinations of culpability through the system of weighing aggravating and mitigating circumstances, each of these holdings is categorical in nature. It is significant that in each instance, the claim of disproportionality was available in individual cases as an argument for mitigation. The cases reached this Court, and merited its attention, only because the system of considering mitigating circumstances did not invariably preclude the death penalty under the circumstances at issue. Even if most jurors (or most voters or legislators) would conclude, if asked, that the death penalty was inappropriate for non-murdering rapists, peripheral participants in crimes that led to homicides, or children under the age of 16, some trials may still result in a sentence of death under those circumstances. This Court's rulings teach that a function of the Con-

stitution's ban on cruel and unusual punishment is to reflect society's "evolving standards of decency" and to impose them where the system of considering mitigating circumstances in individual cases has failed to reflect those standards by prescribing punishment that is clearly disproportionate to the defendant's culpability.[7]

The possibility that a person with mental retardation could be executed in America has only recently become apparent. The first modern case to receive any substantial publicity was Georgia's execution of Jerome Bowden in 1986, and in that case, the existence and degree of his disability (IQ 65) were not recognized widely in Georgia until after his death. In response to the outrage that many expressed at the spectacle of a person so disabled being executed, Georgia passed a statute banning the execution of people with mental disability. Ga. Code Ann. § 17-7-131(j) (1988 Supp.); *Georgia To Bar Executions of Mentally Retarded Killers*, N.Y. Times, April 12, 1988, at A26, col. 4. Legislatures in other states have not "rendered a considered judgment approving the imposition of capital punishment" on people with mental retardation because the reality of this possibility has not been apparent. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2708 (1988) (O'Connor, J., concurring in the judgment). Polling data strongly indicate that when supporters of the death penalty are asked whether they approve of the execution of people with mental retardation, they oppose

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[7] In each of these cases, the Court has banned the use of the death penalty under the circumstances in question. In his dissenting opinion in *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2712 (1988), Justice Scalia raises the possibility of a rebuttable presumption regarding a defendant's culpability that could be grounded in the Eighth Amendment. *Amici* strongly believe that the Eighth Amendment should be held to preclude any execution of a person with mental retardation, and we are unclear about how such a rebuttable presumption would be structured and implemented. The possibility of such a presumption has not been argued in this case, nor has it been considered by the courts below.

such sentences. Blume & Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Ark. L. Rev. 725, 759-60 (1988) (reporting results of scientific surveys).[8]

Despite the consensus that is now becoming apparent, people with mental retardation may still be sentenced to death. Just as the mitigation system was inadequate to prevent unconstitutionally disproportionate punishment of defendants in *Coker*, *Enmund*, and *Thompson*, Johnny Paul Penry's presence on Death Row demonstrates that the system of considering factors in mitigation cannot be relied upon exclusively to assure that defendants with mental retardation will not be executed.[9] Jurors in an individual case may be confused about the relevance of mental retardation to culpability and may even believe perversely that it should be considered as an aggravating circumstance. *Cf. Miller v. State*, 373 So. 2d 882 (Fla. 1979). Similarly, reviewing appellate courts may misperceive the impact of mental retardation on culpability.

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[8] The identifiable objective indicia of societal opinions on this question, while consistent, are less numerous than those available, for example, on the issue of executing minors. However, this Court has indicated that it looks to objective indicators as part of its own process of deciding whether a punishment is excessive, but that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty" in particular circumstances. *Enmund v. Florida*, 458 U.S. 782, 797 (1982). In the case at bar, the objective indicia are not numerous because the possibility of a person with mental retardation being executed has only recently become clear. Once the prospect becomes clear, the indicia suggest that Americans consistently reject the execution of persons with mental retardation.

[9] *Amici* acknowledge that the instant case may not be an ideal vehicle for resolving the Eighth Amendment issue, since the Texas system of jury instructions may give jurors inadequate opportunity to evaluate the relevance of mental retardation as a mitigating circumstance. *See Franklin v. Lynaugh*, 108 S. Ct. 2320, 2333 (1988) (O'Connor, J., concurring in the judgment).

IV. EXECUTION OF A PERSON WITH MENTAL RETARDATION SERVES NO VALID PENOLOGICAL PURPOSE.

The principal reason that *amici* have concluded that execution of a person with mental retardation violates the Eighth Amendment is that it is "grossly out of proportion" to such a defendant's culpability. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). But *Coker* also made clear that a punishment is unconstitutionally excessive if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Id.* The death penalty for people with mental retardation also violates this principle.

This Court has held that retribution is a valid penological purpose, and that in proper cases it can support imposition of the death penalty. But this Court has also concluded that valid exercise of the state's interest in retribution must be related to the degree of the defendant's blameworthiness. *Enmund v. Florida*, 458 U.S. 782, 800 (1982). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona*, 107 S. Ct. 1676, 1683 (1987).

Deterrence has also been recognized as an acceptable purpose for punishment. But the likelihood that an individual with mental retardation would be deterred from committing a capital offense by the prospect of the death penalty is even smaller than was true for teenagers, since some teenagers have above average intelligence. *Cf. Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (plurality opinion). Similarly, removing the small number of capital offenders with mental retardation from the prospect of execution "will not diminish the deterrent value of capital punishment for the vast majority of [nonretarded] potential offenders." *Id. See generally Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (citing

Sir Edward Coke for the proposition that execution of an insane person is "a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others"); *A.B.A. Standards For Criminal Justice* 7-5.6 (1987) (opposing execution of inmates whose incompetence results from either mental illness or mental retardation).

Amici believe that execution of a person with mental retardation is invariably disproportionate to the level of that individual's culpability and is "nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592. Therefore, we believe that this Court should hold that such executions violate the Eighth Amendment's ban on cruel and unusual punishments.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

AMERICAN ASSOCIATION ON MENTAL RETARDATION RESOLUTION ON MENTAL RETARDATION AND THE DEATH PENALTY JANUARY, 1988

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION, the nation's oldest and largest interdisciplinary organization of mental retardation professionals, has long been active in advocating the full protection of the legal rights of persons with mental retardation.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that, archaic stereotypes and prejudices to the contrary notwithstanding, the vast majority of people with mental retardation are not prone to criminal or violent behavior.

WHEREAS, the AMERICAN ASSOCIATION ON MENTAL RETARDATION recognizes that some people with mental retardation become involved with the criminal justice system and are often treated unfairly by that system. This mistreatment often results from the unusual vulnerability of individuals with mental retardation and from the failure of many criminal justice professionals to recognize and understand the nature of mental retardation.

WHEREAS, the United States Supreme Court has made clear that in *all* capital cases the judge or jury must consider any mitigating circumstances which would indicate that the death penalty is inappropriate or unjust. Among these mitigating circumstances are any which would tend to reduce the individual offender's personal culpability and moral blameworthiness for the act he or she committed.

WHEREAS, mental retardation is a substantially disabling condition which may affect an individual's ability to appreciate and understand fully the consequences of actions, and which may impair the individual's ability to conform his or her conduct to the requirements of the law. Thus mental retardation should always be considered to be a mitigating circumstance in selecting an appropriate punishment for a serious offense.

WHEREAS, the current system of permitting judges and juries to determine the relevance of mental retardation as a mitigating circumstance on a case-by-case basis has failed to prevent the unjust sentencing of several mentally retarded persons to death.

AND WHEREAS, the competence of individuals with mental retardation to stand trial or enter a guilty plea, and to face execution are always subject to question, raising serious doubts as to the legality of an execution in any particular case.

THEREFORE the AMERICAN ASSOCIATION ON MENTAL RETARDATION resolves that *no person who is mentally retarded should be sentenced to death or executed.*