insanity should be used in capital punishment cases, and what process must be afforded to the defendant to prove his incapacity. Although the court below had found that it was sufficient to establish competency that a defendant know that he is to be executed and the reason why, the Court in *Panetti* rejected these criteria, and sent the case back to the lower court for it to consider whether the defendant had a rational understanding of the reasons the state gave for an execution, and how that reflected on his competency.[151] The Court also found that the failure of the state to provide the defendant an adequate opportunity to respond to the findings of two court-appointed mental health experts violated due process.[152]

In 1989, when first confronted with the issue of whether execution of the mentally retarded is constitutional, the Court found "insufficient evidence of a national consensus against executing mentally retarded people."[153] In 2002, however, the Court in *Atkins v. Virginia*[154] noted that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against it.[155] In 1989, only two states and the Federal Government prohibited execution of the mentally retarded while allowing executions generally. By 2002, an additional 16 states had prohibited execution of the mentally retarded, and no states had reinstated the power. But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[156]

The Court's "own evaluation of the issue" reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—applies with full force to mentally retarded offenders. Retribution necessarily depends on the culpability of the offender, yet mental retardation reduces cul-

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[151] 127 S. Ct. at 2862. In *Panetti*, the defendant, despite apparent mental problems, was found to understand both his imminent execution and the fact that the State of Texas intended to execute him for having murdered his mother-in-law and father-in-law. It was argued, however, that defendant, suffering from delusions, believed that the stated reason for his execution was a "sham" and that the state wanted to execute him to "stop him from preaching."

[152] 127 S. Ct. at 2858.

[153] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). Although unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment," id. at 335, the Court noted that, because of the requirement of individualized consideration of culpability, a retarded defendant is entitled to an instruction that the jury may consider and give mitigating effect to evidence of retardation or a background of abuse. Id. at 328. *See also* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[154] 536 U.S. 304 (2002). *Atkins* was 6–3 decision by Justice Stevens.

[155] 536 U.S. at 314, 316.

[156] 536 U.S. at 315.