Penry Revisited: Is Execution of a Person Who Has Mental Retardation Cruel and Unusual?

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Penry I and *II*

By the narrowest possible margin, the U.S. Supreme Court in 1989 ruled, in *Penry v. Lynaugh* (*Penry I*),[1] that executing a person who has mental retardation does not violate the Eighth Amendment's cruel and unusual punishments proscription.

Four Justices (Brennan, Marshall, Blackmun, and Stevens) were of the opinion that the Constitution bars execution of a person who has mental retardation and voted to reverse the defendant's death sentence. Four others (Rehnquist, White, Scalia, and Kennedy) were of the opposite view and voted to affirm. Justice O'Connor thus was the Court's fulcrum, as she has often been in death penalty cases.

Writing for the Court, Justice O'Connor found "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment" (Ref. 1, p 335).

However, Penry's sentence could not stand, Justice O'Connor concluded, because Texas' then-in force capital sentencing scheme too tightly confined the jury's consideration of mental retardation as mitigation evidence. This, in turn, abridged an adjunct right that has emerged from death penalty jurisprudence: "[I]n capital cases, the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense. . . ." (Ref. 1, p 316).

Specifically, Texas law required the jury to answer three "special issues": (1) whether the murder was deliberate, (2) the defendant's "probabl[e]" future dangerousness, and (3) whether the murder was an unreasonable response to any provocation by the victim. If the jury answered all three questions yes, the sentence was death; if the answer to any was no, the sentence was life imprisonment.

Penry offered extensive evidence that he was mentally retarded. Over the years, his IQ had tested between 50 and 63. An expert who testified at trial measured Penry's IQ at 54 and ascribed to him the mental (cognitive) age of 6½ and the "social maturity . . . of a 9- or 10-year-old" (Ref. 1, p 308). The jury was never instructed that it could consider and give mitigating effect to this evidence in imposing its sentence.

Justice O'Connor found the Texas sentencing scheme constitutionally infirm, because the jury must be free to give independent (and dispositive) weight to any mitigating evidence, including mental retardation: Penry's "mitigating evidence of mental retardation . . . has relevance to his moral culpability beyond the scope of the special issues, and . . . the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment" (Ref. 1, p 322).

The constitutional defect could be remedied, Justice O'Connor declared, simply by "jury instructions defining 'deliberately' [the first 'special issue'] in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his

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personal culpability . . .” (Ref. 1, p 323). The case was remanded for a new sentencing hearing.

Texas did not change its law, nor did the trial court follow Justice O’Connor’s suggestion. Instead, the same three special issues were again put to the (new) sentencing jury but now with a confusing “nullification instruction.” In essence, the jury was enjoined to answer the three special issues truthfully (“. . . your answers . . . should be reflective of your finding as to the personal culpability of the defendant . . . in this case”), but also untruthfully (“If you determine, when giving effect to the mitigating evidence, if any, that a life sentence . . . rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues”).

The case again reached the Supreme Court, *Penry v. Johnson* (*Penry II*),[2] and, not surprisingly, the Court was little pleased with Texas’ response to *Penry I*. Justice O’Connor observed:

> [I]t would have been both logically and ethically impossible for a juror to follow both sets of instructions . . . [J]urors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a “true verdict” (Ref. 2, p 1922).

Penry’s death sentence was thus again reversed (on June 4, 2001). Texas now has a sentencing scheme that appears to comply with *Penry I* (Ref. 2, pp 1923–4), in time for Penry’s third trial on this murder that occurred on October 25, 1979.

McCarver

Meantime, in March 2001, the U.S. Supreme Court granted *certiorari* in *McCarver v. North Carolina*,[3] to reconsider the constitutionality under the Eighth Amendment’s cruel and unusual punishments clause of executing persons who have mental retardation, narrowly upheld in *Penry I*.

McCarver’s brief cited “society’s newly evolved consensus against executing the mentally retarded.” Whereas only two states, Georgia and Maryland, had statutes barring execution of persons who have mental retardation at the time of *Penry I*, by mid-2001 there were 17.

Several *amicus* briefs were filed supporting McCarver’s position. A group of former U.S. embassy chiefs argued that subjecting persons who have mental retardation to the death penalty puts the nation at odds with most of the world, evoking “daily and growing criticism from the international community,”[4] and thereby impeding statecraft. The European Union noted that “since 1995 only three countries in the world are reported to have carried out executions of mentally retarded defendants: Kyrgystan, Japan and the United States.”[5] In a joint brief, the American Psychiatric Association (APA) and the American Academy of Psychiatry and the Law (AAPL) argued that “with respect to the potential blameworthiness that can attach to their actions, children and persons with mental retardation share the same critical characteristic: diminished intellectual and practical capacities compared with non-retarded adults.”[6] An *amicus* brief was filed, too, by the American Bar Association, which has opposed capital punishment for persons with mental retardation since *Penry I*.[7]

Then, in August 2001, North Carolina enacted a statutory ban on execution of persons who have mental retardation, effective retroactively, bringing to 18 (of the 38 states with the death penalty) the number of states that spare persons with mental retardation: Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York (except for murder by a prisoner), North Carolina, South Dakota, Tennessee, and Washington.

On the basis of this new statute, North Carolina moved for dismissal of *certiorari* in *McCarver* as now moot. The Supreme Court agreed and dismissed *McCarver*, but the very same day granted *certiorari* in *Atkins v. Virginia*,[8] which presents the identical constitutional issue. The *McCarver amici* briefs were all refiled in *Atkins* without substantive change.

Atkins

Daryl Atkins was convicted of murder and sentenced to death for carjacking and shooting a man from whom he had attempted to panhandle some money. On appeal, the Virginia Supreme Court was required by state statute to determine whether Atkins’ death sentence was “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant” (Ref. 8, p 318). Atkins asserted that he was mentally retarded and thus could not be sentenced to death, because the death penalty had not been imposed on any Virginia defendant with an IQ score as low as his.

There was conflicting evidence regarding Atkins’ mental capacity. The defense’s forensic clinical psychologist, Dr. Evan Nelson, examined Atkins and administered the Wechsler Adult Intelligence Scale

III. Atkins' full-scale IQ score was 59, with a verbal IQ score of 64 and a performance IQ score of 60. Dr. Nelson testified that Atkins might have scored two to three points higher had he not been mildly depressed. Dr. Nelson further testified that a diagnosis of mental retardation is not simply a question of IQ score but also involves the inability to function independently. He cited Atkins' poor school performance as meeting this criterion. Atkins had scored below the 20th percentile on every standardized test administered to him, and he steadily deteriorated, in the eighth grade scoring in the 15th percentile and in the 10th grade slumping to the 6th percentile. He was placed in lower-level classes for slow learners, with intensive remedial instruction. Even so, his high school grade point average was 1.26. The IQ score of 59 placed Atkins in the subcategory of mild mental retardation.

The state introduced testimony of its own forensic clinical psychologist, Dr. Stanton Samenow, who sharply disagreed with Dr. Nelson. Dr. Samenow interviewed Atkins twice but did not administer a formal IQ test. Dr. Samenow testified that Atkins had voluntarily chosen not to live independently, insofar as "there was no lack of ability to adapt and to take care of basic needs, certainly" (Ref. 8, p 321). Dr. Samenow concluded that he "found absolutely no evidence other than the IQ score that I knew of . . . indicating that the Defendant was in the least bit mentally retarded" (Ref. 8, p 322, dissenting opinion). In fact, based on Atkins' "sophisticated" vocabulary, robust fund of knowledge, intact memory, and other cognitive attributes, Dr. Samenow felt that "Atkins is of at least average intelligence" (Ref. 8, p 319). Dr. Samenow diagnosed antisocial personality disorder in Atkins, which would account for both a sybaritic lifestyle and the poor school performance, in that numerous school records cited Atkins' lack of motivation, desultory study habits, and ability to do better.

A divided Virginia Supreme Court noted that Dr. Nelson "never identified an area of significant limitation in Atkins' adaptive functioning other than what he termed Atkins' 'academic failure,' " whereas the DSM-IV definition of mental retardation requires impairments in adaptive functioning in two areas.[9] "We are not willing to commute Atkins' sentence of death to life imprisonment," the Court concluded, "merely because of his IQ score. Dr. Nelson and Dr. Samenow agreed that an IQ score is not the sole definitive measure of mental retardation" (Ref. 8, p 321).

The Meaning of Mental Retardation

The strikingly discrepant views of the two experts in Atkins—one giving the defendant an IQ score of approximately 60, the other labeling his intelligence "average . . . , at least" (i.e., 100 or above) (Ref. 8, p 323, dissenting opinion)—presage the difficulties with which the expected ban on executing persons who have mental retardation will be fraught.

The Court appears to have three choices in how to structure a new constitutional rule shielding persons who have mental retardation from the death penalty. First, it could leave the definition of mental retardation to the individual states. Already, the states vary in the numerical IQ cutoffs for mental retardation. Thus, it is constitutionally permissible to execute a person in one state while impermissible to execute that person in the state next door.

Alternatively, the Court could write into the Constitution a uniform number "defining" mental retardation—probably 70—but this is problematic too. There is no single IQ test, and the various tests are far from congruent regarding what specific number represents the conventional "two standard deviations below the mean" cutoff for mental retardation. Indeed, the DSM-IV recognizes that the nature of what we call IQ is such that even a single test (e.g., the most commonly used is Wechsler Adult Intelligence Scale III) does not produce a number valid (or reliable) to within a single integer. The DSM-IV itself cautions: "[T]here is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65 to 75)" (Ref. 9, p 39). This means, of course, that a person with a score of 65, for example, may be not retarded but death penalty exempt, whereas a person with a score of 75 may be retarded but death penalty eligible, not the most seemly fabric for constitutional doctrine. Moreover, if, say, 70 becomes the lifesparing number, one wonders what the distribution of scores will look like around that number, and how this may reflect on forensic psychiatry and forensic psychology, not to mention the law itself. (Already, it is an open secret that eligibility requirements for state mental retardation social services and financial assistance skew scores around 70 downward, to achieve eligibility.)

Third, theoretically, the Court could incorporate the full DSM-IV definition of mental retardation, delegating to jurors, based on conflicting expert testimony, the decision of whether a defendant has an IQ of "approximately 70 or below" plus "concurrent deficits or impairments in present adaptive functioning . . . in at least two 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" (Ref. 9) (plus onset before age 18). But the DSM-IV itself sensibly counsels that "[t]he diagnostic categories, criteria, and textual descriptions are meant to be employed by individuals with appropriate clinical training and experience in diagnosis. It is important that DSM-IV not be applied mechanically by untrained individuals [but instead] be informed by clinical judgment . . ." (Ref. 9, p xxiii).

Finally, apart from such administrability concerns, a fundamental philosophical issue lies within the question of whether to execute persons who have mental retardation. Nonresponsibility by reason of insanity or on the basis of youth, of course, are separate issues from mental retardation, but the comparisons are tempting to advocates and judges. The Virginia Supreme Court, for instance, emphasized in *Atkins* that both experts "opined that Atkins was able to appreciate the criminality of his conduct and to conform his behavior to the requirements of the law . . . [and] understood that it was wrong to shoot" the victim (Ref. 8, pp 319, 321). ("Accordingly," said the Court, "we perceive no reason to commute Atkins' sentence of death . . ." (Ref. 8, pp 319, 321). And as cited earlier, the APA-AAPL brief argues that "children and persons with mental retardation share the same critical characteristic: diminished intellectual and practical capacities compared with nonretarded adults."[6]

Those found insane, however, are acquitted and committed for treatment. Children are adjudicated delinquent (not criminally convicted), and arrangements are imposed for rehabilitation. Neither defendants found insane nor children are punished, because they are deemed not responsible. (The Supreme Court has held it unconstitutional to execute a person 15 years old at the time he committed first degree murder, at least where the state's death penalty statute did not specify a minimum age for death penalty eligibility,[10] but permissible to impose the death penalty for a murder committed at age 16, evidently because "no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers".[11] Only Justice O'Connor was in the majority in both cases.)

The logical and practical implications of constructing constitutional doctrine for persons who have mental retardation in part on analogies to defendants found insane and children merit thoughtful consideration. On the one hand, if the U.S. Supreme Court in *Atkins* overturns *Penry I*, the death sentences of the two defendants will be converted to life imprisonment without parole. Yet the trial evidence pointed to a mental age of 6½ for Johnny Paul Penry and of between 9 and 12 for Daryl Renard Atkins. A person under 7 years of age is not subject even to delinquency proceedings, and one 12 years of age or younger can be tried as an adult in only a handful of jurisdictions and would be extraordinarily unlikely to receive a life sentence.

On the other hand, as Justice O'Connor cautioned in *Penry I*, "reliance on mental age to measure the capabilities of a retarded person for purposes of the Eighth Amendment could have a disempowering effect if applied in other areas of the law . . . a mildly mentally retarded person could be denied the opportunity to enter into contracts or to marry by virtue of the fact that he had a 'mental age' of a young child" (Ref. 1, p 340).

Conclusions

The Supreme Court's litmus on whether a practice traduces the Eighth Amendment's ban on cruel and unusual punishments is whether it has come to offend society's "evolving standards of decency." Justice O'Connor concluded her opinion in *Penry I* (in 1989) by remarking: "While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today" (Ref. 1, p 340).

All indications are that "someday" has arrived. In the first place, it would be quite peculiar for the Court to revisit an issue it has previously decided by the thinnest of margins only to announce no change in the law.

In addition, there is the avalanche of state legislation (as well as the parallel international chorus) since *Penry I* that exempts persons who have mental retardation from the death penalty. Five states (Arizona,

Connecticut, Florida, Missouri, and, most recently, North Carolina) enacted such legislation in 2001 alone. (One additional state, Texas, passed a bill in 2001 barring execution of persons who have mental retardation, but it was vetoed by the governor.) Currently, therefore, in 20 of the 38 death penalty states, persons who have mental retardation are eligible for the death penalty, and in 18 they are exempt. Perhaps not a "national consensus," strictly speaking, but an unmistakable trend, given that there were only two states shielding persons who have mental retardation from capital punishment at the time of *Penry I.* (The federal death penalty also exempts persons who have mental retardation.)

Further, the Supreme Court has stayed the scheduled March 2001 execution in Missouri of Antonio Richardson, a person who has mental retardation and was a juvenile at the time of his crime. It is more likely that the justices expect their upcoming *Atkins* decision to resolve Richardson's case, on the mental retardation issue, than that they are eager to dive back into the equally thorny thicket of the death penalty as applied to persons under 18 years of age.

Finally, it is notable that the Court did not waste a single day between losing *McCarver* to mootness and replacing it on the docket with *Atkins* (which was argued on February 22, 2002).

Although a majority of the Court thus appears to see its basic course as quite clear in light of "evolving standards of decency"—overturning *Penry I*—it may find somewhat murky the concomitant task of defining mental retardation for purposes of constitutional doctrine.

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