Atkins v. Virginia: Execution of Mentally Retarded Defendants Revisited

Charles L. Scott, MD, and Joan B. Gerbasi, JD, MD

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The Eighth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, prohibits cruel and unusual punishment. The U.S. Supreme Court has interpreted cruel and unusual punishment to include those that are excessive and not graduated and proportioned to the offense[1] and those that do not consider the defendant's degree of criminal culpability.[2] In the case of *Penry v. Lynaugh*,[3] the U.S. Supreme Court addressed whether execution of persons with mental retardation constitutes cruel and unusual punishment.

In 1979, Johnny Paul Penry was arrested for the rape, stabbing, and murder of Pamela Mosely Carpenter. Penry was found competent to stand trial despite testimony from a psychologist that he was mildly to moderately retarded and had the mental age of a six and a half-year-old. Psychological testing indicated that Penry's IQ ranged between 50 and 63. During the guilt phase of the trial, the Texas jury rejected Penry's insanity defense and subsequently sentenced him to death. Penry filed a *habeas corpus* petition in federal district court claiming, among other things, that his death sentence violated the Eighth Amendment because executing a person with mental retardation is cruel and unusual punishment. After Penry's petition was denied by the district court and this decision affirmed by the Fifth Circuit Court of Appeals, Penry appealed to the U.S. Supreme Court.

In a five-to-four decision, the Supreme Court held that the Eighth Amendment to the U.S. Constitution did not categorically prohibit execution of persons with mental retardation. Writing for the *Penry* majority, Justice O'Connor noted that the Eighth Amendment prohibits punishments that run counter to "evolving standards of decency that mark the progress of a maturing society" (Ref. 3, p 330). Justice O'Connor referenced federal and state legislation as "objective evidence" useful in determining how society views the execution of persons with mental retardation. Because only two states prohibited execution of offenders with mental retardation at the time of the *Penry* decision, Justice O'Connor concluded that a national consensus opposing the execution of individuals with mental retardation had not developed. In addition, it was argued that individuals with mental retardation are not capable of acting with sufficient culpability to justify imposition of the death penalty. Justice O'Connor, however, stated that there was insufficient evidence that all offenders with mental retardation lack such capacity.

In contrast, Justice Brennan, who concurred in part and dissented in part, argued that all individuals with mental retardation have limitations regarding their culpability and therefore "the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional" (Ref. 3, p 345). Justice Brennan also noted that execution of persons with mental retardation did not further the penal goals of deterrence or retribution.

Following the 1989 *Penry* ruling, 16 additional states and the federal government passed legislation banning the execution of offenders with mental retardation. On September 25, 2001, the U.S. Supreme Court agreed to hear the case of *Atkins v. Virginia* and to once again rule on whether execution of individuals with mental retardation violates the Eighth Amendment's ban against cruel and unusual

Dr. Scott is Chief of the Forensic Psychiatry Division and Assistant Professor of Clinical Psychiatry and Forensic Psychiatry Residency Training Director, and Dr. Gerbasi is an Assistant Clinical Professor of Psychiatry and Associate Director of the Forensic Psychiatry Residency, University of California, Davis, Sacramento, CA. Address correspondence to: Charles L. Scott, MD, Department of Psychiatry, University of California, Davis Medical Center, 2230 Stockton Blvd., Sacramento, CA 95817. E-mail: charles.scott@ucdmc.ucdavis.edu

punishment. The case was decided on June 20, 2002.[4]

Case Background

On the afternoon of August 16, 1998, Daryl Atkins and his friend William Jones were drinking and smoking marijuana at Atkin's home. Later that evening Atkins and Jones walked to a nearby store to buy more beer. Armed with a semiautomatic handgun, they approached Eric Nesbitt, robbed him of his money, drove him to an automatic teller machine in his pickup truck, and then took him to an isolated location where he was shot eight times in the thorax, abdomen, arms and legs and then died. Atkins and Jones each stated that the other had shot and killed Mr. Nesbitt. Atkins was convicted of abduction, armed robbery, and capital murder.

At the sentencing phase, the state proved two aggravating circumstances: future dangerousness and "vileness of the offense." Dr. Evan Nelson, a forensic psychologist, testified that standard intelligence testing indicated Atkins had an IQ of 59. He concluded that Atkins had mild mental retardation based on the intelligence testing and collateral information from school, court records, and interviews with people who knew Atkins. The jury sentenced Atkins to death, but his sentence was subsequently overturned by the Virginia Supreme Court because of a misleading jury form. At the resentencing phase, Dr. Nelson again testified. However, this time the state introduced testimony from Dr. Stanton Samenow who testified that Atkins had "average intelligence, at least," and issued a diagnosis of Antisocial Personality Disorder. The jury returned a sentence of death.

On appeal to the Supreme Court of Virginia, Atkins argued that he could not be put to death because he is mentally retarded. The Virginia Supreme Court rejected his appeal, relying on the U.S. Supreme Court's previous holding in *Penry v. Lynaugh* that execution of persons with mental retardation did not violate the Eighth Amendment's ban on cruel and unusual punishment.[5] Two justices on the Virginia Supreme Court vigorously dissented and argued that individuals with mental retardation were less culpable for their criminal acts and that the imposition of the death penalty on such offenders represented excessive punishment. The U.S. Supreme Court granted *certiorari* "because of the gravity of the concerns expressed by the dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years" (Ref. 4, p 2246).

The Decision

In a six-to-three decision, the U.S. Supreme Court reversed the judgment of the Virginia Supreme Court and held that execution of persons with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment. Writing for the majority, Justice Stevens noted that claims of excessive punishment prohibited by the Eighth Amendment are judged by "evolving standards of decency that mark the progress of a maturing society" (Ref. 4, p 2247; citing *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958)). In describing how the Court should ascertain society's values, the Court quoted from their ruling in *Penry* that the "clearest and most reliable objective evidence of contemporary values is legislation enacted by the country's legislatures" (Ref. 3, p 331).

The Court reiterated that at the time of the *Penry* ruling, only Georgia and Maryland had passed statutes banning execution of persons with mental retardation. However, since the *Penry* ruling, the federal government and state legislatures in 16 additional states had enacted statutes prohibiting the execution of such persons. Justice Stevens wrote, "It is not so much the number of these States that is significant, but the consistency of the direction of change" (Ref. 4, p 2249). In addition, the Court noted that those states with statutes permitting execution of persons with mental retardation rarely actually execute such individuals. Justice Stevens summarized that "the practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it" (Ref. 4, p 2249). The Court additionally cited *amici curiae* briefs by religious organizations and the European Union and polling data to make the point that recent legislative action reflects a broader "social and professional consensus" (Ref. 4, p 2249, n 21).

The Court recognized that one area of potential disagreement regarding the execution of offenders with mental retardation involved the process by which mental retardation is determined and stated that "not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus" (Ref. 4, p 2250). Citing their approach in *Ford v. Wainwright*[6] with respect to de-

termining competency to be executed, Justice Stevens wrote, "We leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences" (Ref. 4, p 2250).

The Court went on to note that all clinical definitions of mental retardation require that there be subaverage intellectual functioning and significant limitation in adaptive skills and that, because of these impairments, individuals with mental retardation 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" (Ref. 4, p 2250, footnote omitted). The Court stated that these limitations affect the criminal behavior of individuals with mental retardation in that "there is abundant evidence that [these individuals] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability" (Ref. 4, pp 2250–51).

The Court opined that offenders with mental retardation should be excluded from the death penalty for two reasons. First, the Court identified retribution and deterrence as the social purposes served by the death penalty and then reasoned that these goals would not be served by executing offenders with mental retardation. The Court found that the penal principle of retribution would have limited value because individuals with mental retardation are less culpable than the "average murderer" and the concept of retribution requires that the severity of the punishment be matched to the culpability of the offender. With respect to deterrence, the Court characterized offenders with mental retardation as more likely to act impulsively and, as a result, less likely to be deterred from the commission of a murder when compared with individuals who act with premeditation and deliberation.

Second, the Court found that the reduced capacities of defendants with mental retardation could cause them to face a "special risk of wrongful execution" (Ref. 4, p 2252). Evidence of this risk included that individuals with mental retardation are more likely than their counterparts without mental retardation to make false confessions, have difficulty assisting in the presentation of mitigating factors, and have impaired abilities to assist counsel and testify effectively. Finally, the Court expressed concern that juries may be more likely to find the aggravating factor of future dangerousness present if an offender is mentally retarded (Ref. 4, p 2252).

The Dissent

Chief Justice Rehnquist wrote a dissenting opinion that was joined by Justices Thomas and Scalia. Justice Rehnquist criticized the majority's reliance on foreign laws, views of professional and religious organizations, and opinion polls as evidence of a "national consensus" in support of their ruling that execution of persons with mental retardation represents cruel and unusual punishment. He argued that the majority had moved beyond "well-established objective indicators of contemporary values" (Ref. 4, p 2256), which he believed include only legislative enactments and the actions of sentencing juries. Justice Rehnquist opined that because the majority had not relied on the proper evidence, they therefore had not established that there is a national consensus against imposing the death penalty against persons with mental retardation. He stated, "[T]he Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency" (Ref. 4, p 2252).

Justice Scalia wrote a separate dissent that was joined by Justice Thomas and Chief Justice Rehnquist. In his dissent, Justice Scalia pointed out that although 18 of 38 states that permit capital punishment ban the execution of individuals with mental retardation, this number represents only 47 percent, which is less than half. In addition, he observed that only 7 (18%) of the 38 states banned the execution of all individuals with mental retardation. The remainder permitted the execution of offenders with mental retardation who committed crimes or were convicted of crimes before the legislation's effective date. Justice Scalia stated, "That is not a statement of absolute moral repugnance, but one of current preference between two tolerable approaches" (Ref. 4, p 2262). He emphasized that these numbers did not support the conclusion that a national consensus had developed against execution of persons with mental retardation.

Moreover, responding to the majority's description of offenders with mental retardation as less culpable, Justice Scalia wrote,

> Who says so? Is there an established correlation between mental acuity and the ability to conform one's conduct to the law in such a rudimentary matter as murder? Are the mentally retarded really more disposed (and hence more likely) to commit willfully cruel and serious crime than others? In my experience, the opposite is true: being childlike generally suggests innocence rather than brutality [Ref. 4, p 2266].

Justice Scalia disagreed strongly with the assumption that the principles of retribution and deterrence would not be served by the execution of offenders with mental retardation. He noted that culpability depended not only on the "mental capacity of the criminal" but also on the depravity of the crime. In response to the majority's argument that offenders with mental retardation are limited in their capacities to aid in compiling mitigating evidence or testify effectively, Justice Scalia responded, "I suppose a similar 'special risk' could be said to exist for just plain stupid people, inarticulate people, even ugly people" (Ref. 4, p 2267). Finally, Justice Scalia expressed concern that the Court's ruling would have a negative impact on death penalty jurisprudence. He wrote, "This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game" (Ref. 4, p 2267). He believed that symptoms of mental retardation could be easily feigned and warned that an increasing number of *habeas corpus* petitions from death row inmates alleging mental retardation were likely.

Discussion

This decision highlights the importance of mental health clinicians' being skilled in understanding, identifying, and diagnosing mental retardation. Offenders with mental retardation or borderline intellectual functioning are not uncommon among death row inmates. For example, Frierson *et al.*[7] reported that 28 percent of their death row sample had IQ scores in the range of borderline intellectual functioning or mental retardation. In addition, in a sample of Mississippi death row inmates, 27 percent had Revised Weschler Adult Intelligence Scale (WAIS-R) verbal IQ scores below 74.[8]

A battle of the experts can be anticipated regarding the diagnosis of mental retardation in the courtroom setting. As such, the mental health clinician conducting evaluations of criminal defendants must be familiar with commonly accepted medical definitions of mental retardation. Generally, mental retardation encompasses individuals with a score of 70 or below on accepted standardized intelligence testing. Although intelligence can be measured by standardized testing, the margin of error of one or two points is substantial under these circumstances.

In addition to an IQ of 70 or below, the DSM-IV requires concurrent deficits or impairments in present adaptive functioning in at least two areas (such as communication, self-care, home living) and onset of such deficits before age 18.[9] The 2002 definition provided by the American Association of Mental Retardation reads: "Mental retardation is a disability characterized by significant limitations in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18."[10] Under both definitions, measurements of adaptive functioning are required to make the diagnosis of mental retardation. How adaptive functioning is reliably and validly measured is another likely area of controversy. Further, the clinician must be familiar with the statutory definition of mental retardation in the governing jurisdiction. The exact IQ score necessary to substantiate mental retardation, the age of onset of cognitive deficits, and the type of professional designated as a qualified examiner vary among the states.

Justice Scalia's concern that capital defendants may malinger as mentally retarded to avoid the death penalty may well be justified. To minimize the risk of successful malingering, the clinician should review collateral records, including school records, employment records, and interviews with persons who know the defendant to determine whether the reported intellectual impairments have actual disabling effects on the individual's life and had an onset before adulthood. Because of this landmark Court decision, the importance of accurately diagnosing mental retardation in capital defendants cannot be overstated. The forensic experts' ultimate findings are not inconsequential; the resultant testimony may literally determine a sentence of life or death.

References

1. Weems v. U.S., 217 U.S. 349 (1909)
2. Enmund v. Florida, 458 U.S. 782, 789–90 (1982)
3. Penry v. Lynaugh, 492 U.S. 302 (1989)

4. Atkins v. Virginia, 536 U.S.304, 122 S.Ct. 2242 (2002)
5. Atkins v. Commonwealth, 534 S.E.2d 312 (Va. 2002)
6. Ford v. Wainwright, 477 U.S. 399 (1986)
7. Frierson RL, Schwarts-Watts DM, Morgan DW, *et al*: Capital versus noncapital murders. J Am Acad Psychiatry Law 26:403–10, 1998
8. Cunningham MD, Vigen MP: Without appointed counsel in capital postconviction proceedings: the self-representation competency of Mississippi death row inmates. Crim Just Behav 26: 293–321, 1999
9. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (ed 4). Washington, DC: Author, 1994, pp. 39–46
10. American Association on Mental Retardation: Mental Retardation: Definition, Classification, and Systems of Supports (ed 10). Edited by Luckasson R. Washington, DC: Author, 2002, p 1