

[OPINION]

THE NEXT TASK: WHO IS MENTALLY RETARDED?

by JIM MARCUS

On June 20, the U.S. Supreme Court held that our societal standards of decency have evolved to the point that we consider execution a cruel and unusual punishment for someone who is mentally retarded. The 5-3 decision in *Atkins v. Virginia* is clearly a milestone in the court's death penalty jurisprudence. It was also, however, a recognition of an objective truth: Most people in this country, including about two-thirds of the population in Texas, oppose executing mentally retarded people.

Exempting the mentally retarded from execution makes sense for the same reason we exempt children. People afflicted with mental retardation, as the court noted:

frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they 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.

The same is true of children, which is why when a 6-year-old child brings his father's gun to school and kills a classmate we treat him differently from an adult who commits the same act, although both planned the shooting and knew it was wrong when they did it. The disparity in treatment is not based on an otherwise arbitrary criterion of chronological age; it is premised on the recognition that punishing someone as if they were possessed of average adult intelligence, when they are not, is excessive and cruel.

Tens of thousands of homicides occur in this country every year, yet only a small fraction are prosecuted as capital offenses. Mental retardation affects a small percentage of the population, somewhere between 1 percent and 3 percent. While there is no evidence that mentally retarded people are any more likely to engage in criminal conduct than others, the fact that mentally retarded people have diminished capacities to defend themselves, resist suggestive and/or coercive interrogations, and assist their counsel suggests that they are at greater risk of being wrongly convicted. The "special risk of wrongful execution" was one of the court's rationales in *Atkins* for exempting the mentally retarded from capital punishment. Suffice it to say, it should come as no surprise if the occurrence of mental retardation within Texas prisons — and on Texas' death row — is slightly higher than it is in free society.

Still, we are dealing with a small fraction of the population in a small fraction of prosecutions. Since 1982, Texas has led the nation in executions — we have executed 274 people, more than three times as many as second-place Virginia, which has executed 86 people in the same time period. Texas' total would be reduced by only six people, that we know of, had Texas banned the practice of executing mentally retarded people. Thus, *Atkins* will hardly end capital punishment in this state as we know it.

Nonetheless, some folks are convinced the sky is falling and our criminal courts will soon be brought to a grinding halt by a flood of frivolous petitions from death row prisoners claiming to be mentally retarded. The truth is, however, that starting with Georgia in 1988, many states — and the federal government — banned the execution of the mentally retarded, and the criminal justice systems in those jurisdictions have managed to persevere.

That no commentator I have read has pointed to a jurisdiction in which a ban against executing mentally retarded people posed any problem with the orderly administration of the death penalty is most likely due to the fact that it is simply not that difficult to diagnose mental retardation. As the Supreme Court noted, while the statutory definitions of mental retardation around the nation are not identical, they "generally conform" to those of the American Psychiatric Association (APA) and the American Association of Mental Retardation (AAMR). Texas already has a legal definition of mental retardation, located in the Health and Safety Code, which also conforms to those of the APA and AAMR. A diagnosis of mental retardation, by definition, is based in part on objective criteria that manifest before the age of 18, so mental retardation is not a condition that can be faked.

This is not to say that there is no danger of expensive, frivolous litigation. Take, for example the case of Johnny Paul Penry. In 1966, when Penry was 10 years old, the state of Texas declared him eligible for admission to the State School for the Mentally Retarded. He was later admitted to an institution that was limited, by state law, to people certified as mentally retarded by the Board of Texas State Hospitals and Special Schools. When he was 16, the state of Texas moved for, and obtained, a dismissal of a theft charge against him because his I.Q. was verified as being 49. In a competency hearing in 1990, the prosecutor stated that he would describe Penry as probably mildly mentally retarded. Finally, the U.S. Supreme Court has written that Penry is mentally retarded.

Now the state of Texas says Penry is not mentally retarded. Perhaps he was cured on death row or he has been outwitting the state's doctors, mental health professionals and teachers since age 10. As of this writing, Penry is in the middle of his third sentencing trial. Because he stands convicted of capital murder, there are only two options: life or death. One of those options was just eliminated by the Supreme Court, which was a very real possibility before his trial even started.

The current *Penry* trial also defines the next task facing our lawmakers, which is not how to figure out who is mentally retarded — we already know how to do that. Instead, we need to enact legislation that ensures reliable determinations will be made before a county spends \$200,000 to \$300,000 on the special proceedings that accompany a death penalty trial, only to later determine the defendant was ineligible for the death penalty.

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