

Observations of a Water Boy

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I am not a lawyer, but I am not just an ordinary citizen either. I am a citizen of the free world. Citizens of the free world have powers that ordinary ones do not. I am a volunteer. There is great job security when you volunteer. A guy who lives like this should be married to someone like my wife, that sweet woman, Martha—a woman who will not throw you out of the house for plowing the family funds into so many voluntary efforts.

I have a spirit guide whose name is Gunga Din. Like Rudyard Kipling's half-naked water boy, I scurry here and there on battlefields. I try to give what amounts to a cup of cold water to persons with disabilities and those who fight for them. I try to do things that help to keep them going forward.

Two months ago, the United States Supreme Court banned the execution of persons with mental retardation. It happened in *Atkins v. Virginia* on June 20, 2002. Hundreds of stories can be told about how this remarkable victory happened. There is, however, one that *needs* to be told. It is about a man, a woman, and a bunch of Sherpa guides.

A Legacy of Oliver Wendell Holmes

Almost 20 years ago, in Chicago, Law Professor James Ellis gave a bothersome plenary speech. It was at an annual meeting of the American Association on Mental Retardation. He described how in 1927, in *Buck v. Bell*, Chief Justice Oliver Wendell Holmes proclaimed that persons with mental retardation were “a sap on the strength of the states.” It was upsetting to think that the top judge of the land would make such a statement.

The Turtles

Ellis pointed out then and many times later that the Supreme Court moved forward very slowly—like turtles. Even so, some of us wild-eyed chargers longed to march around the high court building with torches and banners. We wanted to ride those turtles into a new age like Hopalong Cassidy might do it. Ellis, the expert Court watcher, nevertheless, counseled us repeatedly to live with the

slowness, to carefully wait, and watch for each small window of opportunity.

A Groundbreaking Publication

In 1985, Ellis and special education professor and lawyer Ruth Luckasson wrote a powerful 78-page monograph entitled *Mentally Retarded Criminal Defendants*. It became the groundbreaking document of the century. It covered from every angle this crucial issue of persons with mental retardation in the criminal system.

I liked this monograph so much because it set forth for the first time a list of characteristics that persons with mental retardation *may* possess—characteristics that render them utterly vulnerable in police stations and courts. A small number of these characteristics follow:

- Relying on authority figures for solutions to everyday problems
- The desire to please persons in authority
- The inability to abstract from concrete thought
- Watching for clues to answers from interrogators
- Bluffing greater competence than one possesses
- A quickness to take blame
- Short attention span
- Problems with receptive and expressive language

If every police officer, lawyer, and judge knew these propensities and a few others, justice for persons with mental retardation would be richer than it is now.

The Determined Evaluator

In 1976, capital trials involving persons with mental retardation were being cranked up big time. Persons who study those early transcripts will see that Luckasson did many of the evaluations and served often as an expert witness. Her defense presentations were impeccable and down to earth. Even so, prosecutors were not about to hear—really *hear* about mental retardation in a defendant. That, however, never kept her from doing her best.

For example, on March 2, 1993, Luckasson was visibly ill. Nevertheless, she appeared before the Board of Pardons and Paroles in a hearing room at the Louisiana State Penitentiary in Angola, Louisiana. She

presented an honest, rich, and detailed view of Robert Wayne Sawyer and his vulnerabilities. She was warm and caring. Even so, a conservative board voted 3–2 that Sawyer would die 3 days later.

Luckasson needed to get home, but she did not go. She stayed to help the law team with last-minute appeals to the governor. She stayed the extra days until it was clear that she could do no more.

The Groundbreaking Amicus

In 1989, the Supreme Court heard the murder case of Johnny Paul Penry. Penry was a young man who was savaged viciously as a child by a horribly disturbed mother: cigarette burns all over his body, scaldings with boiling water, beatings into unconsciousness, the forced eating of his own fecal matter, the forced drinking of his own urine, attempted drownings in the bathtub, being nicknamed “the little nut” and “the little bastard.” Penry’s mother targeted her son as the single, focused reason for everything that went wrong in her life (Perske, 1991, pp. 63–81). At the time of this murder, he had recently returned from living in the last of many institutions. He rambled aimlessly around Livingston, Texas. He received no follow-up care or support.

One morning at 9:30 with the sun shining brightly, he rode his bicycle to the home of a woman he had met once before—a woman who had been kind to him. They met at the door. The meeting turned violent. The woman stabbed Penry in the back with scissors. He brutally beat her and stabbed her to death with the same scissors. Then he rode his bicycle home.

That case, *Penry v. Lynaugh* (1989), became a political case in which the forces for executions in Texas came down hard. The prosecutors got the jury to believe that Penry was faking mental retardation. They did it even though the large pile of his institutional records on the defense counsel’s table contained numerous evaluation reports showing that he was not faking.

Then into the fray came Ellis and Luckasson. As the principal authors, they wrote the Amicus brief that 11 of the nation’s leading mental disability agencies signed. They presented four basic points:

1. Mental retardation is directly relevant to criminal responsibility and the choice of punishment.
2. The reduction of blameworthiness caused by mental retardation makes the death penalty unconstitutional.

3. The execution of persons with mental retardation is cruel and unusual.
4. Executing a person with mental retardation serves no penological purpose.

For the past 13 years, these planks served as the primary template for numerous capital cases involving defendants with mental retardation that followed *Penry*.

Upping the Consensus

The Supreme Court’s 1989 judgment in *Penry* contained, first, a ruling that was not good; second, a ruling with some concessions in it; and third, an interesting observation from Justice Sandra Day O’Connor. First, the Court ruled that the execution of persons with mental retardation was not cruel and unusual punishment.

The second claimed that mental retardation did have to be considered as a mitigating factor before the death penalty could be given. Those serving as in-court observers received this ruling with some tongue-in-cheek. How the prosecutors see a person’s mitigation and how the defense lawyers see it is extremely wide. If both camps gained a little more helpful knowledge about mental retardation, there would be no need for their views to be as wide as they are now. One cannot help but long for that to happen.

Third, an observation by Justice O’Connor perked up the ears of Ellis. The Court Justices concluded that they voted the way they did because Georgia and Maryland were the only death penalty states that banned such executions.

That was all Ellis needed to hear. From 1989 until the present, he worked vigorously at upping the consensus of states that banned the execution of persons with mental retardation. He employed an interesting drill:

1. Contact a death penalty state.
2. Get invited to visit legislators in the state.
3. Be provided with “Sherpa guides.” (Most were volunteers from Arcs.)
4. Sherpas guide him from office to office.
5. Sherpas introduce him in each office.
6. Ellis holds a serious conversation with each legislator.
7. Ellis leaves.

Later, a bill banning the execution of persons with mental retardation was raised, and, surprisingly, many of the legislators who had opposed such a ban, suddenly spoke out in favor of the bill. Consequently, the consensus of death penalty states that

banned such executions kept climbing—right up until the *Atkins* case was heard.

The Superb Argument

Interestingly, the responsibility for arguing *Atkins* before the Supreme Court was placed on the shoulders of Jim Ellis. I think his argument was superb. Earlier, he had constructed a list of talking points. He stayed within those guidelines at all times. He was teased by many curving questions: “What if Osama bin Laden was retarded?” “Isn’t this only a blip on the screen?” “How can we ratch-et up?” “What will the world think of us?”

Ellis could have taken a home-run swing at any of them, but he did not. He stayed in form. His tone of voice was never strained. He remained calm, gentle, and honest. He reflected a strong caring for the persons he represented.

The Non-Press Conference

After major Supreme Court hearings like this one, the arguments seem to flow through the front door of the high court building, down the numerous front steps where lawyers discuss the case again in front of TV and radio interviewers. Sometimes, what they say in front of the cameras is better than what they told the justices.

Ten national and international TV camera set-ups were formed in a large semicircle at the bottom of the steps. A myriad of microphones was taped to a podium—waiting for Ellis. Camera persons sat cross-legged in front of their equipment while the interviewers milled about—waiting for Ellis. They waited . . . and waited. After 20 minutes, one of the crew members went up the steps and into the building to find Ellis. Later she came down the steps and simply said, “The guy has left.” Hearing this, everybody packed up their equipment, lowered the elevated dishes on their vans, and drove off.

I think Ellis said exactly what he wanted to say before the justices—no more and no less. I think he felt no need to rechew the case before the press. I think that when Justice Rehnquist banged his gavel in adjournment, he put a period to all that Ellis wanted to say.

Interesting Confessions

In later correspondence, Ellis shared something with me that I simply cannot keep to myself. He

told me that before *Atkins* he had never argued a court case in his whole life—not in *any* court, not even for so much as a traffic ticket before a justice of the peace. Pondering this feat may help one to sense the intelligence, commitment, and tenacity of this dedicated man.

Ellis did, however, submit to intense preparation. In a letter he said:

So this was an occasion to try to pick up, rather quickly, a new skill set. My colleagues here and at the NAACP Legal Defense Fund in New York were extraordinarily generous in putting me through daily practice sessions that I came to view as ritual beatings. But they were absolutely essential for a rookie.

No Blue Lagoon

After a breakthrough victory such as *Atkins*, there is a tendency to rejoice and relax. In her many conversations with colleagues, Sister Helen Prejean, author of *Dead Man Walking*, says, “It’s like finding The Blue Lagoon. We float in the warm water of the victory. We lounge on the shore. We get high on the past accomplishment.” Then Sister Helen tightens her face like a coin purse, looks fiercely into the eyes of her colleagues, and says, “There are no blue lagoons.”

She is right. The powerful forces who want persons with mental retardation dead have not rolled over and given up. In 20 death penalty states, prosecutors are preparing for vigorous court battles over who really has mental retardation and who does not. Their view is different from the one held by those of us who work with and care about persons with mental retardation. We must be ready.

Ellis knows that. Because he does, we can sense him working feverishly on new drills. Some possibilities:

1. Focus on more than the 7300 inmates now on death row.
2. Find those with mental retardation who have never been discovered.
3. Get to mental retardation evaluators fast; help them to become credible forensic experts.
4. Get to mental illness evaluators fast; help them to gain a down-to-earth feel for mental retardation.
5. Get to lawyers fast; provide them with the latest knowledge on mental retardation.

Why so fast? The courts will soon be lumbering over hundreds of these cases. There is no time to waste.

Opportunities for Volunteers—More Than Ever Before

Due to the direction and spirit of Ellis and Luckasson, there are hundreds of opportunities on many levels for volunteers who long to serve as Sherpa guides and Gunga Dins in the noble battles that are about to begin. To be sure, there is something admirable about academic achievements and good performance ratings on one's present job. There is more to a good life than this. There is a need to take some free time and walk on the wild side of noble changes like the ones these two leaders and earlier Sherpa guides have taken.

Life is more than staring for long hours at a computer screen doing the job, then going home and sitting on a couch before another screen until bedtime. Anyone who gets caught up in the mission to stop the judicial killing of persons we work with and care about cannot help but discover a more zestful existence.

Opportunities will spring up in every state to value, support, and do whatever it takes to supply the cool water that can keep everyone moving forward—and quickly. That cool water may even need to be transubstantiated into a kick in the pants of those who remain unfeeling, inept, and lackadaisical about those we know who are dying so unfairly.

In this forthcoming battle, one never needs to be told what specifically to do. One only needs to become aware of these awful executions, watch the forward movements others are taking—and listen to his or her own heart. Anyone doing these things will see hundreds of good opportunities for them to take or reject.

Please see that what is being attempted here amounts to only a foot in the door of a humongous problem. We must keep expanding our expertise until it embraces all persons with disabilities who encounter the criminal justice system. When that happens, our courts will be exceedingly more than they are now.

I end this paper with some quick recollections of a few of many persons who would still be alive if *Atkins* had come earlier.

Robert Wayne Sawyer. Evaluator Luckasson asked him what was meant by “reasonable doubt.” He crushed his cigarette in an ashtray, pointed to the residual smoke, and said, “It ain’t reasonable out.”

Jerome Bowden. His sister testified how he had

been cutting her lawn. When the mower ran out of gas, he took the garden hose and filled the tank with water.

Barry Fairchild. He believed that the reading of his Miranda warning was an opening devotion the interrogators used before getting down to work.

Walter Correll. Although he had a strong alibi, two admittedly inept lawyers became frustrated and gave up developing a vigorous defense. They did it because when they came to talk about the case, he curled up in a corner and cried.

Morris Mason. As he was being taken away and prepared for execution, he talked about being back for the basketball game later in the yard.

Ricky Rector. He left his pecan pie on the windowsill of his cell. He planned to eat it after the execution.

Cornelius Singleton. He believed he was being executed because much earlier he had stolen some bed sheets off of a clothesline.

Joe Arridy. He was discovered among the nameless hundreds who were executed before the Supreme Court's suspension of executions from 1972 to 1976. In 1937 to 1939, Warden Roy Best broke the rules and fought to save Joe's life. He filled Joe's cell with magazines and coloring books. He gave Joe a toy train on the last Christmas of his life. When the governor called and ordered the warden to kill Arridy, it was said that he broke down and cried (Perske, 1995).

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