

A Joint Statement: Stop the Execution of Persons With Mental Retardation

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An Up-Front Acknowledgement

My heart tells me to do whatever I can to stop the horrific execution of persons with mental retardation in the United States. This urge comes, however, after watching law professor James Ellis spend better than 14 years of his life—giving great energy, enthusiasm, and intellect to this oft-ignored situation. Anything said here comes from sifting through the soil that Ellis plowed. My heart also tells me that by next spring, Jim and all those he attracted to this mission will be witnessing a giant step forward in the criminal justice system's understanding of persons with mental retardation—or an unspeakably horrible setback.

A High Court Surprise

On March 26, 2001, the United States Supreme Court set off a cluster bomb of hope for certain persons with mental retardation—and those who care about what is happening to them. It focused on Ernest Paul McCarver, a man with mental retardation.

North Carolina sought to execute McCarver for a bungled robbery and murder of a cafeteria worker that involved him and a so-called “normal” accomplice. Unfortunately, the normal guy committed suicide before a trial could completely discern who did what during the crime.

Earlier, on March 1, McCarver was 2 hours away from execution when the high court issued a stay. Then, on March 26, the Court announced its plan to hear the case next fall. It also spelled out the central issue that will be argued—and it made my heart leap.

Here is the issue in the Court's own words: “It is time for this court to assess whether American society has changed significantly over the past decade so that the execution of the mentally retarded now violates American standards of decency.”

Violated Standards of Decency?

According to legal parlance, the death penalty is reserved for the very worst of the worst offenders. They are persons who plan and carry out terrible crimes. Later, they are capable of helping their lawyer prepare a defense. They understand court proceedings, and they certainly know the punishment that can follow.

Did it violate American standards of decency to place persons with mental retardation right up there with the most terrible? Does it also shake something within us to know that better than 300 persons with mental retardation are living on death rows and waiting to die?

- When Jerome Bowden was asked why he was going to die, he said, “Because I can't read and write.”
- When Morris Mason was taken away to be executed, he told others on death row that he would be back for the basketball game in the recreation yard.
- Cornelius Singleton thought he was being killed because he once stole some bed sheets off of a clothesline.
- Ricky Rector left his pecan pie on the window sill of his cell so he could eat it after the execution.
- When Robert Sawyer was asked what “reasonable doubt” meant, he crushed his lighted cigarette in an ash tray, pointed to the rising smoke, and said, “it ain't reasonable out.”
- Barry Fairchild believed that the reading of the Miranda warning was some kind of opening devotion.
- On a test, Johnny Penry was shown a picture of a hen and asked to choose from the words “drum, hen, car, or flower.” He chose “drum.”
- Earl Washington Jr. was such a compliant fellow,

a forensic expert testified that if his electric chair malfunctioned, he would gladly get out and help fix it—and then get back in it again. Two months ago Washington walked out of prison a free man. DNA evidence showed that he did not commit the crime for which he was about to die.

- In a now-famous 1935 case, a warden became a close friend of Joe Arridy, and he provided the inmate with toys and coloring books—even a toy train as a present during the last Christmas of his life. When the governor ordered the execution to be carried out, the warden broke down and cried.

So it goes as people with mental retardation go down judicial chutes toward death. Of the 44 who have been executed since 1984 and the estimated 300 on death rows waiting to die, none was as pre-meditating and calculating and culpable as Ted Bundy. I have yet to encounter a person with mental retardation who truly fits in this worst class of all. More and more Americans are shocked when they discover that persons in the lowest 2% of intellectual functioning are being executed with the highest 2% of the worst murderers. They are also shocked when they learn that some did not even understand the punishment they received.

Changing Attitudes

Twelve years ago, the Supreme Court ruled 5–4 in the case of Johnny Penry that it was legal to execute people with mental retardation. Justice Sandra Day O'Connor said so because there was no “societal consensus” forbidding such acts. Only Georgia and Maryland refused to execute individuals with mental retardation at that time.

Now, however, the landscape is changing. Of the 38 states that permit capital punishment, 15 now prohibit the execution of persons with mental retardation. All federal jurisdictions (U.S. Government, U.S. Military, and the District of Columbia) no longer execute them. Of course, the same can be said for the 13 states that prohibit the execution of anybody.

Also, at the time of this writing, 7 states are considering such legislation. If all of them vote for

the prohibition, there will only be 17 states left before every state will never again execute people with mental retardation.

More states are expected to pass such bills, but will there be enough? The Supreme Court will pay close attention to how many states vote for prohibition by the time it hears the *McCarver* case in the fall. Connecticut is one of the states that will vote on this prohibition. Fortunately, both chairmen of the Judiciary Committee staunchly favor the prohibition.

On April 23, 2001, a Quinnipiac University poll showed that 77% of Connecticut residents oppose the death penalty for people with mental retardation. Interestingly, all states are now postponing the scheduled executions of persons with mental retardation until the Court makes its ruling in *McCarver*.

An Opposing Force Looms Large

There is a downside. Every prosecutor and every police association official in Connecticut who spoke before the Judiciary Committee did not want the bill to pass. They have formed a powerful, unified group. They want all people with mental retardation on death row to be killed. This is true for other states as well. Meanwhile, the U.S. Supreme Court is watching—and counting. Its final decision will be with us for a long, long time.

If the Court fails to stop these executions, we can expect a concentrated orgy of killing persons with mental retardation that will be cranked up quickly and powerfully next spring. That is scary.

The following paper comes from a statement to the Joint Arc, AAMR, and AAUAP Governmental Affairs Meeting, Washington, DC, April 30, 2001.

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