Intellectual Disability: The Death Penalty and Atkins v. Virginia: Not the Solution, but the Beginning of the Solution . . . and the Beat Goes On! (Part I)

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In an article entitled A Judicial Perspective on Issues Impacting the Trial Courts Related to Fetal Alcohol Spectrum Disorders, which I co-authored with the Hon. Susan S. Carlson (2011), we ad-dressed cases that discussed the relationship of FASD and the Eighth Amendment to the United States Constitution. We pointed out that the court recognized that the Constitution requires constant re-evaluation of what constitutes "cruel and unusual punishment" based on the evolving standards of decency that mark the progress of a maturing society. In this regard, the U.S. Supreme Court has applied the Eighth Amendment to cases involving intellectual disabilities (I.D) (formerly known as mental retardation), and those who are under the age of 18 but do not suffer from intel-lectual disabilities.

With this recognition, it is important to trace the development of the law in this area of our constitu-tional jurisprudence prior to the implementation of the Diagnostic and Statistical Manual, DSM-5, American Psychiatric Association (2013). Until 1989, children could be executed for capital crimes in some states. This practice dated back to 1642 under the American Common Law. In 1989, the United States Supreme Court ruled that juveniles under the age of 16 could not be executed (Thompson v. Oklahoma, 1989). In 1998, the court extended the prohibition to 16-year-olds (Stan-ford v. Kentucky, 1998), In 2005, in the landmark case of Roper v. Simmons, (2005), the U.S. Supreme Court barred juveniles under the age of 18 from being executed.

The case law dealing with M.R. followed a similar tortuous path. At common law, which we inher-ited from England, idiots and imbeciles could not be executed. In 1989, the same day it decided the Stanford case, supra, the United States Supreme Court ruled that execution is not automatically forbidden for persons with mental retardation (Penry v. Lynaugh, 1989). Thirteen years later, this same court ruled that persons with mental retardation cannot be executed (Atkins v. Virginia, 2002). Unfortunately, the court left it to the individual states to establish their own method for implementing and enforcing its ruling, rather than constructing a uniform definition for the states to follow.

The Atkins court's holding regarding mental retardation was based on Atkins' full-scale IQ testing at 59 and his adaptive behavioral deficits (p. 305, fn. 5). However, what followed was that some states have yet to establish a definition for M.R. or I.D., and other states have legislated definitions that vary significantly from state to state so that a person who would be subject to being sentenced to death in one state would not be so exposed to the death penalty in another state. This situation was and is inconsistent with the requirements of Atkins, supra. The full-scale IQ qualification for a finding of mental retardation or intellectual disability has ranged from state to state from below 65 to 75. One state has presumed mental retardation if it is 70 or below, one has followed the Ameri-can Association for Mentally Retarded (AAMR) definition, and 16 have not had a full-scale re-quirement. The states that have not had a full scale IQ requirement rely on overall functioning, which may be closer in sync with Atkins, supra, and in fact, some of these state have an onset of M.R. before age 18 requirement while one state has set it at age 22, while four states do not define an age cut-off for the developmental period, and four appear to be open-ended as to this element. In addition, at least one state's definition was interpreted by its Supreme Court to require evidence establishing that the defendant's full-scale IQ was within the definition of mental retardation before the trial court could even admit and consider evidence of adaptive behavioral deficits.

With regard to other issues that are relevant to the Eighth Amendment protection against cruel and unusual punishment and worth considering in the context discussed above, the United States Su-preme Court decided in 2010 that juveniles convicted as adults for non-death penalty crimes cannot be sentenced to life in prison without the possibility of parole (Graham v. Florida, 2010), and in 2011, the court ruled in Miller v. Alabama that the same constitutional prohibition applies to juve-niles convicted of capital crimes.

There are a number of additional cases that merit reference for future discussion of the topic at hand. Blakely v. Washington (2004) and Woodward v. Alabama, 571 U.S. _____ (2013), are two of those cases. In Blakely, the U.S. Supreme Court limited the authority of trial judges to impose exceptional sentences above the standard range in states that have established sentencing ranges to consideration of prior criminal convictions and held that exceptional sentences based on other ag-gravating circumstances or factors can only be imposed by a jury finding beyond a reasonable doubt as to the proof of the aggravating circumstances or factors. In the Woodward case, supra, the Supreme Court refused to consider a Writ of Certiorari challenging the authority of trial judges to overrule a jury verdict calling for life in prison and then sentencing the defendant to death in capital cases. Justice Sotomayor, joined by Justice Breyer, wrote a dissent to the court's refusal to hear the issue on its merits. It is unprecedented for opinions to be published when the court summarily re-fuses to accept a case for consideration of the issues presented.

For purposes of setting the stage for the ". . . and the Beat Goes On!" Part II article to follow, I want to quote the final paragraph in the Wartnik and Carlson article (p. 116) identified at the begin-ning of Part I,

> *Ultimately . . . it seems appropriate for the court to come to grips with the fact that many states have not followed the United States Supreme Court's di-rective to come up with a rule that will give life and substance to the Atkins rul-ing and that is consistent with the court's dictates. This means the court may have to establish a bright line rule for what constitutes mental retardation. The alternative is that defendants with the same profile (those with FASD) will live or die depending on where they committed their crime(s).*

In Part II, I will discuss and analyze Atkins and its progeny in the forensic context. Stay tuned!

References

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Author Biography:

Anthony P. Wartnik served as a trial judge in the State of Washington for 34 years from 1971 to 2005. He started dealing with cases involving FAS and FAE in the mid-1990s, chaired his court's multi-disciplinary task force on the creation of protocols for evaluating competency to stand trial of youth with organic brain damage and chaired the Governor's Advisory Panel on FAS/FAE. Fol-lowing retirement in January 2005, Judge Wartnik served as a consultant to the Fetal Alcohol and Drug Unit (FADU) at the University of Washington School of Medicine. He is nationally and in-ternationally recognized as an expert on FASD and the law, has authored and co-authored numer-ous published articles and book chapters, and serves as an adjunct professor for graduate students at Concordia University, St. Paul in Minnesota.