

# Malingering, mental retardation, and the death penalty

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*Robert L. Heilbronner*

This case is notable for a number of reasons, first because it seems to clearly elucidate the differences between an assessment of malingering of cognitive deficits versus psychiatric symptoms, a distinction that is especially important in criminal cases. Second, it is notable because it represents an unusual situation in which the neuropsychological test results actually helped to spare a defendant's life! This occurrence is rare in forensic settings, even less common than its infrequent occurrence in an acute neurosurgical context.

In March 2003, I presented a talk entitled, "The importance of neuropsychological evidence in capital cases" at the National Legal Aide and Defender Association (NLADA) "Life in the Balance" seminar in Memphis, Tennessee. The talk was fairly well attended, largely by mitigation specialists and public defenders who are on the front lines representing defendants who are facing the death penalty. At the evening reception, I met a social worker from a city in the northwestern part of the U.S. who said that she was involved in a murder case in which she suspected that the defendant may have "brain damage" from a history of head injuries and prominent substance abuse; he was also allegedly under the influence of hallucinogens at the time of the murders. She subsequently introduced me to Attorney S., the lead public defender on the case. He described the case in greater detail, handed me a copy of a newspaper article (see below) describing the murders, and requested that I forward a copy of my CV and fees to him upon my return to Chicago.

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## RECENT LEGAL DECISIONS REGARDING MENTAL RETARDATION AND THE DEATH PENALTY

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Over the last decade, there has been a shift in public opinion regarding the execution of the mentally retarded: the majority of those surveyed did not favor execution of those with mental retardation (Cunningham & Goldstein, 2003). Two landmark U.S. cases reached differing majority opinions on this issue. In *Penry v. Lynbauch* (1989), the U.S. Supreme Court, in a 5 to 4 vote, reasoned that if defendants were "profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions," they would most likely avoid conviction using an insanity defense. At the time, there were no constitutional barriers to executing those with mental retardation, but the U.S. Supreme Court wrote: "The sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making individual determination whether death is appropriate in a particular case."

In *Atkins v. Virginia* (2002), the U.S. Supreme Court reversed itself, forbidding execution of the