

The case of Ramiro Hernandez

1. Background and crime.

During his childhood in Nuevo Laredo, state of Tamaulipas, Mr Hernandez suffered constant abuses and severe poverty. His family lived in a cardboard shack next to a rubbish dump on which they would scavenge. His “house” had no running water or electricity and was mice infested. Relatives, neighbors and teachers realized Mr Hernandez's severe intellectual limitations manifested at a young age. He was mercilessly abused by his parents and during third grade was kicked out of school due to his limited functioning. He was victimized by peers and never had someone to help him. He was unable to function as normal children. He could not pile cardboard, count change, run simple errands, dress or bathe himself properly.

Mr Hernandez was, at least on several occasions, very violent. He was convicted in Mexico for manslaughter, a conviction elevated on appeal to murder. While serving the sentence, a prison guard fell asleep, permitting him to simply walk out. Mr Hernandez crossed the U.S. border with the assistance of others and got a job at the ranch of Glen Lich in Kerr County, Texas.

On October 15, 1997, Mr Lich was bludgeoned to death and his wife, Lera, raped. Mr Hernandez was found by the police sleeping at the crime scene, apparently not appreciating the need to scape. After his arrest, the Texas Department of Criminal Justice (TDCJ) administered a brief IQ test in which he scored a 65. In general, an IQ score below 70 is an indication mental retardation. TDCJ then administered another short test to determine whether he should be placed in the Mentally Retarded Offender Program, scoring an 83; however this test was short, outdated, used to classify prisoners, administered by unqualified personnel and resulted in a score that could not be checked because the raw data was destroyed.

2. State Court Proceedings

a) The Trial (Prior to the U.S. Supreme Court's decision in *Atkins v. Virginia* prohibiting the execution of people with mental retardation).

During his trial, his attorney presented limited mitigating evidence that gave no hint of Hernandez's horrific childhood. The lawyer only conducted an “investigation” into his background consisting of two requests that relatives plead for his life and two vague long-distance inquiries for helpful information. Moreover, the defense offered differing diagnoses of two psychiatrists, neither of them informed by the family's social history. A psychologist, Dr Martinez, reported Mr Hernandez's low IQ scores of 54 and 57, but lacking information about his adaptive functioning and childhood, was unable to determine his mental retardation. As a result, the only information the jury had about Mr Hernandez's background was three snippets from the psychiatrists, which they admitted came from Mr Hernandez himself.

The state court determined that Mr Hernandez was competent based on the TDCJ brief placement test, administered after his arrest, and the three snippets from the psychiatrist. He was sentenced to death in 2000.

b) State Post-Conviction Proceedings. (Post-Atkins)

State post-conviction defense attorneys sought a hearing on mental retardation and ineffective assistance to counsel (IAC) derived from the limited mitigating evidence presented at trial. They proffered several IQ test results well within the mental retardation range to show Mr Hernandez's subaverage intellectual functioning as well as affidavits by family members describing Mr Hernandez' childhood and youth to demonstrate his adaptive functioning deficits.

Despite these proffers, the lower state court denied the evidentiary hearing and found that Mr Hernandez was competent and had effective counsel assistance during his trial. The decision was appealed to the Texas Court of Criminal Appeals -the highest criminal court in Texas-which remanded the case to the lower state court only as to the mental retardation issue.

Evidentiary Hearing on the mental retardation issue.

Prior to the hearing on the mental retardation claim, Dr Antonio Puente, who had conducted more than 2,500 mental retardation exams for the Social Security Administration, and was the Project Director for the Spanish translation of the Wechsler Adult Intelligence Scale (WAIS), administered 20 different neuropsychological tests to Mr Hernandez. On the Comprehensive Test of Non-Verbal Intelligence he scored 52, on the Beta III, 64; and on the full-scale Spanish WAIS, he scored 62 using American norms. Even using Mexican norms, which are widely criticized for overstating IQ, Mr Hernandez's IQ score was 70.

Dr Puente also reviewed the results of Dr Martinez's prior testing, which scored in the mental retardation range. Citing multiple independent sources, including results of malingering tests (i.e. tests to determine if Mr. Hernandez was intentionally scoring low on the IQ tests), academic achievement tests, family member's reports on Mr Hernandez's functioning, clinical impressions, and his own experience administering thousands of IQ tests, Dr Puente concluded that Mr Hernandez was not malingering. In addition, Dr Puente looked into the uncontradicted testimony of the three siblings and a neighbor on the extreme adaptive functioning deficits in conceptual, practical and social skills, which Mr Hernandez suffered from young age. Based on the testimony, his clinical evaluation of Mr Hernandez, and his testing, Dr Puente concluded that Mr Hernandez was a person with mental retardation.

In response, the state proffered affidavits from trial counsel stating that Mr Hernandez was normal, despite the often incomprehensible request forms written by him. The only expert who testified that Mr Hernandez did not have mental retardation was Dr Richard

Coons who had never administered or even scored an IQ test, had never spoken to Mr Hernandez, or interviewed any person related to him. Dr Coons could not read the protocols from the IQ test because he could not speak Spanish, and did not seek the assistance of someone who did, and could not even state the clinical definition of mental retardation. With respect to Mr Hernandez's IQ scores, Dr Coons testified that a psychologist with whom he consulted thought that some of the protocols might have been incorrectly scored, but admitted that the psychologist's review was limited by the psychologist's inability to speak Spanish. Dr Coons also stated that Mr Hernandez might be malingering to avoid the death penalty, although he admitted that malingering or lack of motivation, if present, were not extremely important factors.

On the adaptive functioning deficits of Mr Hernandez, Dr Coons indicated that they were "normal" for his "cultural group" although he had no independent knowledge of that group and his generalization did not address the higher functioning of Hernandez's siblings. Dr Coons concluded that Mr Hernandez was not mentally retarded but malingering to avoid death penalty.

After hearing both parties, the state court issued an order finding that Mr Hernandez was not mentally retarded. First, the court rejected his multiple IQ scores in the 50's and low 60's as a product of malingering, finding more reliable a single score of 83 on a prison-administered rough screening instrument. The court's order discussed neither the multiple sources of invalidity of the prison-administered tests, nor did it discuss Dr Puentes' reasoning for rejecting the possibility of malingering on the valid tests. Second, regarding the adaptive functioning deficits of Mr Hernandez, the court relied on Dr Coons' testimony, stating that Mr Hernandez' membership to his "cultural group" explained his low communication skills, self-care, house living, social skills, community use, self-direction, health and safety. Moreover, the court mentioned Mr Hernandez's previous criminal conduct and considered that his illegal entry into the United States and his ability to obtain employment were evidence of his adaption to function in society. Finally, on the third criterion for mental retardation, juvenile onset, the court's order stated that there was no "credible evidence that any mental retardation manifested during the developmental period".

Mr Hernandez' counsel appealed this lower court's decision to the Texas Court of Criminal Appeals, which affirmed it without opinion.

3. Federal Court Habeas Proceedings

A. Federal habeas before a federal district court

On federal habeas, attorneys for Mr Hernandez sought two hearings to review the state court's decision on mental retardation and effective counsel assistance at trial. The federal district court denied the two hearings and permitted Hernandez to appeal only the claims related to mental retardation to the 5th Circuit Court of Appeals.

B. Federal habeas before the Fifth Circuit Court

a. Fifth Circuit opinion on Mr Hernandez' mental retardation (Atkins claim)

The Fifth Circuit upheld the state court 's determination that Mr Hernandez was not mentally retarded, finding it not contradictory to, and not involving an unreasonable application of *Atkins v. Virginia* when it departed from accepted clinical standards concerning the assessment of subaverage intellectual functioning and adaptive functioning deficits. The Fifth Circuit did not correct the lowers courts' reliance on Mr Hernandez' national origin and native language to deny his *Atkins* claim, despite the use of race and national origin to increase a defendant's punishment would clearly violate the equal protection clause of the Fourteenth Amendment.

4. Petition for writ of certiorari

Hernandez sought review of all lower court decisions in the U.S. Supreme Court in December 2013. Last week, the Supreme Court declined to review the case.

5. The State of Texas has scheduled Mr Hernandez's execution for April 9, 2014

During the past few weeks, Hernandez's counsel filed a petition for clemency with the Texas Board of Pardons and Paroles, as well as a successor petition for state habeas corpus. Both petitions were denied. In addition, a federal district court judge issued a stay of Mr Hernandez's execution until the state authorities present information on the suppliers of lethal substances that would be used at the execution. The motion was granted but later reversed on appeal.