



## A Lawyer's Story: The Execution of Elroy Chester

by Susan Orlansky

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When I told this story to my Unitarian Universalist (UU) congregation in June, we titled the talk "My Journey Into a Texas Death Penalty Case" – but that suggests that this is *my* story. It is, however, Elroy's story that I want to tell, and to some extent, the intersection of our stories.

For a UU audience, I can call it a story of the interdependent web – how a very law-abiding white lawyer in Alaska became connected with, responsible for, and ultimately fond of an African-American from Southeast Texas who committed a string of unspeakably ugly crimes.

It is also a story of the inherent worth and dignity of every human being. Elroy Chester taught me that no one is just the worst thing that he ever did. To most of the world, Elroy became defined by his crimes. Elroy was executed on June 12, 2013 because of his crimes. Many cheered when he died. I witnessed his execution, and I cried.

For me as a lawyer, this is also a story of disillusionment with our court system. Elroy Chester was mentally retarded, and according to the US Supreme Court, states may not execute the mentally retarded. Texas has chosen to ignore the standard medical definitions of mental retardation and instead has invented a Texas definition for use in capital cases, which focuses mostly on the facts of the crime. It is only a slight exaggeration to say that, under Texas's definition, if a person can carry out a horrible crime, he's not mentally retarded enough to be spared execution.

Texas is not the only state that cheats in this way, but it is the worst. The Supreme Court has declined repeated opportunities to intervene and thereby has tolerated these end-runs around the constitutional ban on executing the mentally retarded that the Court adopted in 2002.

Elroy Chester was born in May 1969, the 15th of 16 children born to his mother, of whom eight were stillborn or died in infancy. Elroy was named for his father Leroy.

His mother drank during her pregnancy. She was illiterate and signed forms with a simple X. It's likely, if ever she'd been tested, she was mentally retarded. Two of Elroy's sisters are clearly retarded.

(I know that “mentally retarded” is not the politically correct term now, but it’s the term the Supreme Court used when it said mentally retarded people may not be executed, and it’s the term we used when we started our case 10 years ago. I cannot make myself switch now to “intellectually disabled.”)

Elroy grew up in Port Arthur, Texas, on the border of Louisiana. It is a poor, working class town. Elroy’s family was poor even by Port Arthur standards. His father drank and beat his mother and was not regularly employed. But the dad was proud and would not take hand-outs. The house was “raggedy and randoon,” in the words of one of Elroy’s sisters, and rain came in through holes in the roof. Often the family lived without power or running water.

Both genetics and fetal alcohol predispose a baby toward mental retardation. So does growing up in an impoverished environment. Elroy had three strikes against him from the start.

The Port Arthur schools – one branch of the Texas government – recognized Elroy’s disabilities. The school gave him his first IQ test when he was 7, and noted he scored in the mentally retarded range. Elroy was in special education from second grade onward.

The school system’s paperwork, however, labeled Elroy not “MR” for mentally retarded but “LD” for learning disabled. He wasn’t learning disabled. People have a learning disability when their academic achievements are low despite normal or above-average IQ. Elroy’s low achievements matched his low IQ. We don’t know why this mis-labeling occurred. But the erroneous label became a factor later relied on by courts to decide that Elroy was not mentally retarded and thus could be executed.

Due to his intellectual disabilities, Elroy was excused from taking the high school qualifying exam. In this way, he graduated from high school, ranked last of 317.

Elroy started getting in trouble right around the time he finished high school. He had no juvenile criminal record, but he was arrested for burglary just after he turned 18 and he was sent to prison.

The Texas Department of Criminal Justice at that time gave all incoming inmates an IQ test. Elroy scored 68 on the prison’s IQ test – below the 70 cut-off used for diagnosing mental retardation. He scored 57 on a test of adaptive functioning scored on the same scale. He was interviewed by a psychologist and social worker, who noted he could read only small words, could not name all the months of the year, and admitted using a friend to help him make decisions. He was observed by the staff of the prison’s Mentally Retarded Offenders Program for 30 days, and they decided his behavior matched his test scores – he wasn’t faking the test results – and he was admitted into the MROP.

Again, ironically, Elroy suffered a labeling problem that would haunt him in the decades that followed. The prison psychologist labeled him not mentally retarded but "BIF" or borderline intellectual functioning, the category for people whose IQ is between 70 and 85. The BIF label was wrong. The director of the MROP later was appalled to discover that the erroneous label would be considered evidence that Elroy was not mentally retarded. Elroy was in and out of jail from the age of 18 onward. In the early years, his crime was burglary. In 1997, when he was released from one of his stints in prison, he broke into a house and stole a gun. After that, he was a dangerous burglar. Before, he tried to get into homes where no one was present. With the gun in hand, he felt more powerful and did not care. He broke into houses and found people present – and he shot and killed them. He killed a total of five people. He shot and wounded others. He sexually assaulted three people.

I don't want to belabor the offenses. There's no question there's a string of them. Some involved some simple planning. All left broken hearts and wounded lives in the wreckage.

The crime spree went on for six months, terrorizing the community.

Elroy's final crime involved walking into an unlocked house where a teenaged mom was alone with her toddler. Elroy forced her to hand over some costume jewelry, and he sexually assaulted her. He assaulted her sister and her boyfriend when they came home unexpectedly.

The girls' uncle came to the house to check on them, as he often did when their mother was working and they were home alone. Surprised a second time, Elroy met the man at the doorway and shot him. He ran out. He had no escape plan. He went to his father's house, where he was living, and the police, who by that time had put different clues together, found and arrested him within a couple of hours.

Over the next few days, Elroy confessed, I think, to every unsolved crime in Port Arthur. He was probably guilty of most of them.

Elroy was given an appointed lawyer. The lawyer wasn't awful, but he never developed any rapport or trust with Elroy. So even when the lawyer had good ideas, Elroy didn't want to listen to them.

Elroy pled guilty to the murder of the uncle. The only issue for the jury to decide was whether he should be sentenced to death or to life in prison. In 1998, mental retardation was not an exemption from the death penalty.

To try to persuade the jury to spare Elroy's life, Elroy's lawyer presented a psychologist who had evaluated Elroy, and who testified that Elroy was mentally retarded, and also that he was mentally ill and very dangerous.

Elroy instructed his lawyer not to call any other witnesses on his behalf. Elroy wasn't thinking straight. He was mad at his lawyer because he thought the lawyer cried during testimony from the girls whose uncle was killed. Elroy ignored his lawyer's advice not to testify. He gave a frightening and rambling rant and threatened the jury with imaginary homeboys.

The prosecutor didn't present any witness to testify that Elroy was not mentally retarded. He just called police and victims and families of victims to describe all of Elroy's crimes. In the prosecutor's closing argument, he told jurors that they could decide that Elroy was retarded and that that was a reason to give him a death sentence.

The jury took 11 minutes to decide Elroy should be sentenced to die.

Elroy was given other lawyers for appeals. His new lawyers raised a good argument that states shouldn't be allowed to execute the mentally retarded. Elroy's case was still in the federal court in 2002 when the Supreme Court decided the case that declared that states may not execute the mentally retarded.

Elroy had one year from that decision to go back to the state courts and argue he was mentally retarded and ineligible to be executed. But under the Constitution, Texas did not have to provide him a lawyer to present this argument. So he sat on death row and the clock ticked.

Now we switch to Anchorage. In 2002, I read an article that suggested that lawyers in non-death penalty states should offer to help represent defendants in death penalty states that don't appoint counsel for postconviction claims. I'd never before thought about inmates on death row without lawyers or about how I personally could help one of those inmates.

The article referred to a small project of the American Bar Association that recruits attorneys to represent death row inmates. I spoke with my law partner, Jeff Feldman. We called the Capital Representation Project in early June 2003. The ABA told us about a couple of people who needed lawyers. We settled on Elroy Chester's case because there was only one issue legally available: the mental retardation claim. Elroy's case seemed to us -- naively in retrospect -- to be a relatively straightforward, one-issue case that might not be too hard for death penalty newbies.

We worked the case for exactly 10 years and two days from the day we said yes until the day Elroy was executed. We received some money for expenses, and some money (in federal court) for our attorney time, but most of the time and most of the expenses were our firm's contributions. The value of donated attorney time and expenses totaled almost \$500,000.

Jeff and I flew to Texas three times in 2003-04. The first was to meet the client at the prison, and to meet some of his family and to talk to his former attorney. Then we went to appear in court for a 5-minute hearing, just to establish that we were serious about the case. In April 2004 we had a week-long trial on whether Elroy was mentally retarded. Meanwhile, we'd hired a psychologist and an investigator. For witnesses, we had two of Elroy's sisters, one of his teachers, the psychologist we'd hired, and the former director of the MROP. Our witnesses did well. But we lost the case. The judge decided that Elroy was not mentally retarded. He relied mostly on the evidence of Elroy's crimes.

During the next eight years, we appealed through the state court system and lost at every step. We petitioned the US Supreme Court to review the case, and the Court was not interested. We then worked our way through the federal court system – district court and Fifth Circuit Court of Appeals. We lost, and lost again. In the Fifth Circuit, we got a 2-1 decision against us. The dissent thoughtfully explained everything that was wrong in the way Texas approached the case. But that didn't do Elroy any good. We petitioned the Supreme Court a second time, and lost again. We were out of courts.

The DA went to the judge and asked for an execution date. We got the order in the mail; it scheduled Elroy's execution for 6 pm on April 23. Unexpectedly, about a week before that date, Elroy received a postponement until June 12 because the DA realized that the death warrant was signed by the wrong judge.

I wrote a clemency petition. Predictably, it was denied.

During the last week before the execution, we had a flurry of new legal filings. I learned of a lecture by Judge Edith Jones, one of the Fifth Circuit judges who ruled against Elroy. Among other things, she said she believes that it disserves the mentally retarded to exempt them from the death penalty because it denies them the opportunity to come face to face with God knowing they are about to die. She talked by name about a number of cases she'd decided, including Elroy's. There were racist overtones as well. It did not seem as if a mentally retarded black man, like Elroy, could get an impartial decision from her.

A group of individuals and organizations in Texas filed a complaint of judicial misconduct against Judge Jones. I used their complaint as the basis for a motion to set aside the appellate decision and to ask to have the appeal re-decided by a new group of three judges, all of whom are clearly impartial. I asked for a stay of the execution to allow the new judges time to consider the case.

By a 2-1 vote (overruling Judge Jones), the judges in Elroy's case agreed that the motion for a stay and the motion to set aside the earlier decision should

be referred to a different group of three judges. I had a moment of hope that the execution might be delayed. But 21 hours after being appointed, the three new judges issued a decision stating they had reviewed the entire 10-year history of the case and concluded that the appeal had been correctly decided. The decision, issued on the morning of the date set for execution, allowed the execution to proceed.

By then, I was in Texas. With the execution scheduled for Wednesday, I had left home early on Monday, arriving in Texas Monday evening, so I could visit at the prison on Tuesday. An inmate about to be executed gets extra visiting on that day, and I wanted to make sure Elroy was not alone.

A dedicated team of my colleagues, at computers in Alaska, California, and Texas, handled the last-minute legal work. They filed our third petition for certiorari to the Supreme Court within hours of the Fifth Circuit's decision. The Supreme Court denied the petition at 5:57 pm Texas time. Elroy was executed a half-hour later.

I was there at the end because I believe that no one should die alone. Elroy's sisters cared about him, but he did not want them to witness his death. To be present was the last service I could offer my client.

Elroy met his end with enormous courage and dignity. He appreciated that we went down fighting and never gave up trying to make the courts treat him right. In his final words, he apologized to the families of his victims, wished love to his family, and thanked his lawyers. I watched his body jerk suddenly and go still.

My overwhelming thought in that moment was the pointlessness of his death. I understand the human desire for vengeance and why people might want him to die. But I cannot imagine that anyone actually felt better the next day knowing that Elroy Chester was not still living on death row.

I'd like to believe that Elroy's death, all of our work, and all of my tears are not in vain. Friends suggest the image of a rock being worn away by drops of water. This case was hopefully a drop that helped erode the rock of capital punishment. Maybe telling this story can be another drop. Someone else will be inspired to represent a death row inmate, to try to save one life, or to work harder to abolish the death penalty for everyone.

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Distributed by *Unitarian Universalists for Alternatives to the Death Penalty*

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