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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 12-10882, Hall v. Florida.

5 Mr. Waxman.

6 ORAL ARGUMENT OF SETH P. WAXMAN

7 ON BEHALF OF THE PETITIONER

8 MR. WAXMAN: Mr. Chief Justice, and may it
9 please the Court:

10 In Atkins v. Virginia, this Court held that
11 the Constitution bars executing persons with mental
12 retardation; that is, persons with significantly
13 subaverage intellectual function concurrent with
14 deficits in adaptive behavior with an onset before the
15 age of 18.

16 Because of the standard error of measurement
17 that's inherent in IQ tests, it is universally accepted
18 that persons with obtained scores of 71 to 75 can and
19 often do have mental retardation when those three prongs
20 are met. The statistical error of measurement or SEM is
21 that --

22 JUSTICE SOTOMAYOR: Mr. Waxman, a line has
23 to be drawn somewhere.

24 And we did say in Atkins that we would leave
25 it up to the States to determine the standards for this

1 issue. So what's the rule we announce today? We tell
2 them 70 is not okay, but 75 would be? I'm not quite
3 sure. How would you announce the rule?

4 MR. WAXMAN: Let me first take -- take some
5 issue, with all due respect, with your characterization
6 of Atkins. What this Court said in Atkins is not that
7 we leave it to the States to establish the standards for
8 the clinical condition of mental retardation.

9 What you said, quoting Ford, is, "We leave
10 it to the States to -- we leave to the States the task
11 of developing appropriate ways to enforce the
12 constitutional restriction that we announce."

13 The rule that we advocate is -- and the only
14 real question presented in this case is just this: If a
15 State conditions the opportunity to demonstrate mental
16 retardation on obtained IQ test scores, it cannot ignore
17 the measurement error that is inherent in those scores
18 that is a feature, statistical feature of the test
19 instrument itself.

20 JUSTICE SCALIA: But -- but we didn't -- we
21 didn't base our decision in Atkins upon a study of what
22 the American Psychiatric Association and other medical
23 associations considered to be mental retardation. We
24 based it on what -- what was the general rule that
25 States had adopted. And a large number of States had

1 adopted 70 as the criterion. I mean, the criterion is
2 what do the American people think is the level of mental
3 retardation that should make it impossible to impose the
4 death penalty.

5 We didn't look for the answer to that
6 question to the APA or any of the other medical
7 associations. We looked to what the States did.

8 Now, what has changed in what the States do?
9 Anything?

10 MR. WAXMAN: Justice Scalia, I have -- I
11 would like to respond with four points, and I hope
12 desperately I'll remember them.

13 First of all, what this Court said was, this
14 Court -- number one, it made clear, as it has reiterated
15 in Miller v. Alabama and Graham v. Florida, that while a
16 consensus or a perceived consensus among the States is
17 important, the ultimate test is this Court's conclusion
18 about what the Eighth Amendment does or doesn't allow.

19 In making that determination at page 318 of
20 this Court's opinion in Atkins, this Court, after
21 reciting in Footnote 3 the virtually identical clinical
22 definitions of mental retardation, and in Footnote 5,
23 pointing out that 70 to 75 is the established cutoff for
24 mental retardation, this Court said the following:
25 Quote, "Clinical definitions of mental retardation

1 require" -- and it recited the three tests. "Because of
2 their impairments, mentally retarded persons by
3 definition" -- that is by the clinical definition --
4 "have diminished capacities to understand" -- and it
5 recited all the other disabilities that made the
6 imposition of the death penalty for persons with that --
7 excuse me -- with that clinical condition
8 unconstitutional.

9 Now, as to what the States did, the Court
10 did refer to, I believe, 18 State statutes. Not a
11 single one of those State statutes and not a single
12 decision of the highest court of any State or any court
13 in any State applied 70 or two standard deviations from
14 the mean without reference to the SEM.

15 The only statute that addressed it in 2002,
16 when this Court decided Atkins, was Arizona, which
17 expressly provided that the SEM must be taken into
18 account in evaluating the -- an obtained IQ test score.

19 JUSTICE SCALIA: The SEM being -- being what
20 and -- and established by whom?

21 MR. WAXMAN: The standard error of
22 measurement, which is established by the creators of the
23 test. It is not something that clinicians dream up.
24 It's not something that is decided by the AAIDD or the
25 American Psychiatric Association. It is inherent in the

1 test. And all clinicians are told -- both professional
2 associations make clear, because it is simply a
3 statistical fact, it must be taken into account such
4 that an obtained IQ test score is actually the result of
5 an obtained IQ test score, is a test band that accounts
6 for the standard.

7 JUSTICE SCALIA: For what purpose do they
8 establish these scores? Is it for the purpose of
9 determining who is so incapable of -- of controlling his
10 actions that he shouldn't be subject to the death
11 penalty? Is that -- is that what they're looking for
12 when they establish 70 to 75? What are they looking
13 for?

14 MR. WAXMAN: Well, what they're -- they are
15 looking for -- I mean, intelligence tests supply a -- I
16 mean, they weren't created for the definition of --
17 clinical definition of mental retardation. They were
18 created as a -- in order to determine a proxy for true
19 intellectual function. And therefore --

20 JUSTICE SCALIA: Right.

21 MR. WAXMAN: -- a true IQ test score -- I
22 mean, the general clinical --

23 JUSTICE SCALIA: I'm not talking about IQ
24 tests in general. I'm talking about why do they pick --
25 they used to pick 70. Now they pick between 70 and 75

1 as the upper limit. What are -- upper limit for what?
2 I assume it is for people who would profit from medical
3 treatment. Isn't that it?

4 MR. WAXMAN: There are many reasons why a
5 person's IQ, that is, a person's intelligent --
6 intellectual functioning, may be important for a whole
7 variety of reasons, medical, psychological,
8 developmental, and as a component of the clinical
9 condition of mental retardation, the Eighth Amendment.
10 Now, what intellectual --

11 JUSTICE GINSBURG: Mr. Waxman, could we just
12 clarify one thing, that what you refer to as the SEM,
13 that is not limited to IQ of 70, 75. That's across the
14 board.

15 MR. WAXMAN: I mean, the -- the concept, the
16 statistical concept of a standard error of measurement
17 has -- applies to all forms of testing.

18 JUSTICE GINSBURG: So it has nothing to do
19 with the death penalty and mental retardation --

20 MR. WAXMAN: No. I mean, I'm sure that, you
21 know, when Archimedes announced his principle based on
22 experimental -- his experimental observations, he also
23 recognized the -- essentially the standard error of
24 measurement.

25 JUSTICE ALITO: May I come back to a

1 question? May I come back to something similar to what
2 Justice Sotomayor started out with. In your view, does
3 the Constitution establish a State to establish any hard
4 cutoff? Let's say 76. Can it do that?

5 MR. WAXMAN: I think it can because that
6 falls -- because the standard definition of prong one,
7 that is, intellectual functioning, is two or more
8 standard deviations below the mean.

9 JUSTICE ALITO: All right. If it can do
10 that -- oh, I'm sorry.

11 MR. WAXMAN: I'm sorry. Let me just -- let
12 me just explain. And because -- if -- if a State is
13 using an obtained IQ test score as a proxy for true
14 intellectual function, it has to take into account the
15 standard error of measurement. And therefore, States
16 like Mississippi and Oklahoma that, in fact, establish a
17 cutoff of 75, in our view, is constitutional as this
18 Court announced the class of individuals in
19 Atkins because --

20 CHIEF JUSTICE ROBERTS: So that's just
21 saying -- I'm sorry. When you say the standard error of
22 measuring, you're talking about a degree of confidence,
23 right?

24 MR. WAXMAN: Correct.

25 CHIEF JUSTICE ROBERTS: And your submission

1 is that you need to have a 95 percent degree of
2 confidence. That's what -- that's what the 5 gives you
3 or do I have the numbers wrong?

4 MR. WAXMAN: Well --

5 CHIEF JUSTICE ROBERTS: I thought the
6 standard --

7 MR. WAXMAN: The -- on a test that is normed
8 at 100 --

9 CHIEF JUSTICE ROBERTS: Right.

10 MR. WAXMAN: -- 70 is two standard
11 deviations below the mean. If there is a -- the
12 standard error of measurement -- and it's not -- this is
13 not my submission. This is the universal --

14 CHIEF JUSTICE ROBERTS: I know. I'm just
15 trying to figure out what it means.

16 MR. WAXMAN: That's exactly -- what it means
17 is that someone, for example, with an I -- an obtained
18 IQ test score of 71, as Mr. Hall received, has a 95
19 percent probability --

20 CHIEF JUSTICE ROBERTS: Okay.

21 MR. WAXMAN: -- that his score will be
22 between 76 --

23 CHIEF JUSTICE ROBERTS: So why is 95
24 percent? Where does that come from?

25 MR. WAXMAN: That -- that is --

1 CHIEF JUSTICE ROBERTS: -- under Atkins?
2 Why -- why are you picking 95 percent? Why isn't it
3 90 percent?

4 MR. WAXMAN: I'm not doing any picking.

5 CHIEF JUSTICE ROBERTS: Why did the other --
6 why did the -- the organizations pick 95 percent.

7 MR. WAXMAN: It's been 95 -- it's been two
8 standard error of -- two SEMs, which is 95 percent, for
9 decades and decades, and this Court recognized that
10 consensus, that universal consensus, in footnote 5 in
11 its opinion in --

12 JUSTICE ALITO: Which party has the burden
13 of persuasion on the issue of IQ and what is the
14 standard?

15 MR. WAXMAN: So it varies from State to
16 State.

17 JUSTICE ALITO: I mean, what -- what does
18 the Eighth Amendment require? Does the Eighth Amendment
19 permit a State to assign to the defendant the burden of
20 persuasion on -- on IQ, IQ above 75? Can they assign
21 that burden of -- above 70? Can they assign that to the
22 defendant, and if they can what is the standard of proof
23 that the defendant has to meet?

24 MR. WAXMAN: So I -- the short answer is, I
25 believe, what I will come to is yes, so that you see

1 where I'm going. But we believe that it is entirely
2 constitutional for the State to assign the burden of
3 proving mental retardation on the defendant. And
4 insofar as the clinical definition recognized by this
5 Court in Atkins is a three-part conjunctive test, I
6 think it's fair to say that a logical consequence of
7 that is that as to every component the burden may
8 constitutionally be placed on the defendant.

9 Now, the burden with respect to prong one is
10 the burden of proving significantly subaverage
11 intellectual functioning, of which a true IQ score is a
12 probabilistic piece of evidence. I don't think --

13 JUSTICE ALITO: Why can't the State -- you
14 told me that the State can establish a hard cutoff. And
15 you told me that a State can assign the burden to the
16 defendant.

17 Now, in the case of someone who scores 75,
18 is it not the case that there's roughly -- there's no
19 more than a 2.5 percent chance that that person's real
20 IQ is 70. So how does that square with any burden of
21 proof that might be -- any standard of proof that might
22 be assigned on that -- on that point? That's what I
23 don't understand about your argument.

24 MR. WAXMAN: I think -- let me see if I can
25 explain this. First of all, we're talking -- I mean,

1 this is a man who has a 71.

2 JUSTICE ALITO: No, I understand.

3 MR. WAXMAN: Okay.

4 JUSTICE ALITO: But I'm talking about the
5 general issue. Just hypothetically --

6 MR. WAXMAN: As -- as to the general issue,
7 let me -- let me -- let me state it this way: The whole
8 idea behind measurement error is that you can't make a
9 valid judgment that somebody doesn't have a true score
10 of 70 or below if the obtained score is within the
11 measurement error. And even more fundamental than that,
12 the -- your question suggests and the State's suggestion
13 suggests that diagnosing mental retardation, which is
14 the constitutional inquiry, is just a probabilistic
15 inquiry into a person's, quote, "true" IQ score. But
16 true IQ scores themselves are a statistical concept.
17 It's the score that you would get on a hypothetical test
18 that had no measurement error. But true -- and this is
19 my point -- true IQ is not the same as intellectual
20 function and IQ tests themselves, however perfect they
21 may be, don't perfectly capture a person's intellectual
22 function, which is why --

23 JUSTICE ALITO: I understand that argument.
24 But that doesn't seem to me consistent with your point
25 that a State can establish a hard cutoff. 76, that's

1 the end. You get a 76 on an IQ test, that's the end of
2 the inquiry. The person does not -- does not -- does
3 not qualify under Atkins.

4 MR. WAXMAN: So I -- what I'm -- this --
5 this would not be a standard I would endorse, but I
6 believe that in light of the consensus test that all
7 professional organizations apply that was recognized in
8 Atkins, a score that is above the standard error of
9 measurement of two standard deviations above the mean
10 would be okay. But the point -- the converse point it
11 seems to me is not true, which is we know for a fact
12 that many, many people who obtain test scores of 71 to
13 75, in fact, have mental retardation.

14 And if I just may point out that in this
15 case, there were six experts who fully examined Mr.
16 Hall or supervised a full examination of Mr. Hall. They
17 were cognizant of the IQ test scores that he had
18 received. And each one of them opined without
19 hesitation that he had mental retardation, functional
20 mental retardation, significant --

21 JUSTICE GINSBURG: Retrospectively.

22 MR. WAXMAN: Excuse me?

23 JUSTICE GINSBURG: The district court did
24 make a finding that he did not show adaptive behavior,
25 and the district court said that that was so because all

1 of those experts that you've referred to were speaking
2 retrospectively. There was no evidence of what the
3 defendant's current condition was. That was -- I think
4 it's in the Joint Appendix --

5 MR. WAXMAN: That is correct, Justice
6 Ginsburg. Now, the State trial court ruled that it
7 would not accept evidence as to prongs two and three,
8 but it did allow Mr. Hall's lawyers to make a proffer
9 pursuant to the State's -- the State's agreement that
10 there could be a proffer in some expeditious manner.
11 And that's at Joint Appendix 158.

12 We -- one of the two grounds that we
13 appealed to the Florida Supreme Court on, in addition to
14 the hard cutoff at 70, was the fact that in fact an
15 expeditious proffer did not in fact permit us to put on
16 all of our evidence about prongs two and three. And the
17 Florida Supreme Court, and this is page 125 of the Joint
18 Appendix, said: We don't need to consider that question
19 because we uphold the rule in Cherry.

20 JUSTICE GINSBURG: Well, what -- there was
21 nothing that limited you to the retrospective proof.
22 The -- the trial judge asked a simple question, how did
23 the defendant adapt in prison, and quotes one expert as
24 saying: "Well, I didn't test for that. I don't know
25 why I didn't do it." And that same expert said that he

1 had, in fact, done it in other cases.

2 MR. WAXMAN: You're correct. Part of the
3 expeditious proffer -- the expeditious proffer was
4 limited to the testimony of two of -- I believe actually
5 only one of the experts who examined him and did the
6 adaptive testing function, and that expert did say that
7 he didn't test in prison.

8 Now, as -- there is, again, a universal
9 professional consensus that adaptive functioning is
10 tested by adaptive functioning in the real world, not
11 adaptive functioning that occurs on -- after 35 years on
12 death row.

13 And, in fact, we also know to a clinical
14 certainty that because mental retardation is a condition
15 that is both developmental and not transient, that is,
16 there has to be an onset -- demonstrated onset during
17 the developmental period, but one doesn't emerge from
18 the condition of mental retardation, unlike, for
19 example, mental illness.

20 JUSTICE KENNEDY: If you talk about the
21 condition of mental disability that's involved here, I
22 want to go back to something you've said in response to
23 Justice Scalia. The question was along the line of what
24 does it mean to have a disorder under the DSM.
25 Obviously, one thing it means is that the scholars can

1 talk about it; that they can all focus on the same
2 subject.

3 Does it have any meaning other than that,
4 that it -- it is an objective index, an objective
5 characterization that certain people have a certain
6 mental condition? Is -- is that what it means?

7 MR. WAXMAN: That's exactly what it means,
8 Justice Kennedy. What it means is, it is a -- as this
9 Court recognized, it is a clinical condition, unlike,
10 for example, insanity or competence. That the
11 clinical --

12 JUSTICE KENNEDY: Is -- is there -- is there
13 any evidence that society in general gives substantial
14 deference to the psychiatric profession in this respect?
15 Are there any studies on that or is there anything we
16 can look to to see that that's true or not true?

17 MR. WAXMAN: I -- I'm actually not aware of
18 anything that suggests that one -- that society doesn't
19 look to professional evaluations to do this. And, in
20 fact, if one looks only at Florida's system, Florida
21 uses mental retardation as a determinant for things
22 other than the death penalty. It uses the existence of
23 the condition for educational remediation, vocational
24 rehabilitation and everything. And in those instances,
25 as we point out in our brief, the -- the Florida --

1 Florida does apply the standard error of measurement.

2 And indeed --

3 JUSTICE KENNEDY: We have later in the week
4 an argument about economic theories. And it's a little
5 different because in that case, the Court -- it's the
6 Court's own jurisprudence and we have not said, as we
7 have in Atkins, that it's up to the State. But do you
8 think we defer to psychiatric -- psychologists and
9 psychiatrists any more than we -- or any less than we do
10 to economists?

11 MR. WAXMAN: Oh, I think it has to be much,
12 much, more because, as this Court pointed out, this is a
13 clinical condition. It's a condition that can only be
14 appropriately diagnosed by professionals.

15 JUSTICE KAGAN: Mister --

16 JUSTICE SCALIA: They change -- they changed
17 their mind, counsel. This APA is the same organization
18 that once said that homosexuality was a -- was a mental
19 disability and now says it's perfectly normal. They
20 change their minds.

21 MR. WAXMAN: Justice Scalia --

22 JUSTICE SCALIA: And they have changed their
23 minds as to whether 70 or 75 is the -- is the new
24 test -- for for mental retardation.

25 MR. WAXMAN: The latter is not true. The --

1 the standard -- two things that are not in dispute in
2 this case. We're only here talking about prong one,
3 which is significantly subaverage intellectual
4 functioning and nothing else. And everyone agrees, all
5 the States agree, they all agreed at the time Atkins was
6 decided, that their -- that the clinical definition is
7 defined by three elements and that the first element,
8 significantly subaverage intellectual functioning is
9 defined as a person whose intellectual function is two
10 or more standard deviations below the mean intellectual
11 functioning of contemporary society.

12 JUSTICE KAGAN: Mr. Waxman, can I take you
13 back to a question that the Chief Justice asked?
14 Because the Chief Justice said, you know, where does
15 this SEM come from. And it is the test maker's
16 determination that this is the margin of error that
17 gives you a 95 percent confidence.

18 I guess the question here or one question
19 here is why do we have a 95 percent -- why do we need a
20 95 percent confidence level?

21 And you could say it either way. You could
22 say, gosh, we're putting somebody to death, we should --
23 we should have a 100 percent confidence level. Or you
24 could say, as I take it Justice Alito -- Justice Alito's
25 point was, well, look, the burden of proof is on the

1 defendant here anyway, so a 95 percent confidence level
2 seems awfully high. We should, you know, ration it down
3 to 80 percent.

4 So why for this purpose do we have to go
5 with the test maker's determination that 5 is what gives
6 you a 95 percent confidence level?

7 MR. WAXMAN: So the fact that two SEMs gives
8 you a 95 percent confidence level is just the
9 statistical fact. I take your question to be, well, why
10 does -- you know, why do clinicians and professional
11 associations use that?

12 JUSTICE KAGAN: Well -- and that's not
13 really my question.

14 MR. WAXMAN: Oh, I see.

15 JUSTICE KAGAN: I understand why they might
16 use it for a wide variety of purposes. The question is:
17 Why does their determination that it's useful for a wide
18 variety of purposes to have a 95 percent confidence
19 level, why is the State stuck with that for this
20 purpose?

21 MR. WAXMAN: Because the whole -- and this
22 goes to the reason that they use it. The reason that
23 they use it is because of the inherent imprecision in
24 testing in general, but in particular testing for the
25 presence of something like relative intellectual

1 functioning.

2 There are so many -- it is so common for
3 people who, for a variety of reasons, obtain a 71 or 72,
4 in fact, to have mental retardation and because evidence
5 of -- an evaluation of intellectual function involves
6 clinically much more than a test score. I mean, look
7 what happened in this case. All of the IQ tests that
8 were administered, all of the Wechsler tests, were
9 accompanied, because they fell within the standard error
10 of measurement, they were accompanied by the
11 administration of further intelligence testing for
12 confirmatory purposes.

13 JUSTICE BREYER: Is that what you want?
14 That is, I go back to Justice Sotomayor's question.
15 Start monkeying around with 95 percent. It's all over
16 the law. I mean, 95 percent is a classical measure by
17 scientists of when they have confidence that the fact
18 that the regression analysis seems to establish is in
19 fact a fact.

20 MR. WAXMAN: Yes.

21 JUSTICE BREYER: That is in tort law. That
22 is in whether jury trials are -- are discriminating
23 because they don't have black people on the jury. It's
24 all over the law. So I assume that we -- you're not
25 asking us to muck around with that number because I

1 don't know what the consequences would be. And if
2 you're not, here's how we reduce it. You give the same
3 test six times and now we've reduced it from 5 percent,
4 if he's above 70 all the time, to maybe one -- one
5 one-hundredth of one percent. Is that what you want to
6 have happen?

7 MR. WAXMAN: Well, let me just, as to your
8 latter point --

9 JUSTICE BREYER: Am I right? Am I right in
10 what I said?

11 MR. WAXMAN: You are not right in some of
12 the things you've said.

13 JUSTICE BREYER: Okay.

14 MR. WAXMAN: The last thing you said is not
15 right, which is --

16 JUSTICE BREYER: No, no. Let's go before
17 the last thing.

18 (Laughter.)

19 MR. WAXMAN: Well, the last thing is
20 important.

21 JUSTICE BREYER: I'm not saying it isn't
22 important, but I want -- my thinking to the last thing
23 is dependent on my being right on everything before the
24 last thing. So am I right before the last thing, about
25 how 95 percent --

1 MR. WAXMAN: You are right that 95 percent
2 is just a feature -- is, generally speaking, a feature
3 that is widely adopted as a confidence level, and it is
4 particularly important here because the constitutional
5 guarantee announced in Atkins is against the execution
6 of persons with mental retardation. And --

7 JUSTICE ALITO: On Justice Breyer's last
8 point, before your -- your time expires, because I do
9 think this is important. Is there not another way of
10 proving reliability? Suppose -- what about multiple
11 tests? Suppose someone is given 25 Wechsler tests and
12 24 times the person scores 76 and one time the person
13 scores 72. What would you deal with -- how would you
14 deal with that in a State that has a hard cutoff?

15 MR. WAXMAN: So, this is the last point that
16 I wanted to get to, and I think if you -- that the best
17 thing I can -- before my time runs out, I just want to
18 point you to page 10, Footnote 3 of our reply brief,
19 which cites the Oxford Handbook of, I don't know,
20 Clinical Diagnosis or something, and we've given you the
21 pages. And on those pages, it explains why when you
22 have a situation of somebody who takes more than one
23 test, the appropriate determinant is very much not the
24 average. It is what's called the composite score. And
25 the composite score is different, and, in fact, for

1 people below the mean, below the average, because you
2 have to take into account the fact that regression
3 towards the mean and also, the fact that a person who
4 takes two, three, or four tests, multiple tests, changes
5 the bell curve of standard deviation.

6 So the example that's given in the Oxford
7 Handbook is very similar to this case. There were four
8 tests. They averaged at 72. The composite score, and
9 there's -- there's a -- there's a statistical
10 explanation for how it's arrived at. The composite
11 score is 69, and the standard error of measurement is
12 actually larger using a composite score.

13 So that's why, as to Justice Breyer's last
14 point, simply averaging obtained scores does not, in
15 fact, give you a better handle. Because there are so
16 few people who score significantly below the mean on
17 multiple tests, what clinicians use is a statistical
18 analysis that takes into account the different -- the
19 different calculation of what a standard deviation below
20 the mean is.

21 JUSTICE ALITO: That's not consistent with
22 my understanding of it, but I don't claim that I have a
23 deep understanding of it. But what -- what would be
24 your answer to my hypothetical? Where there are
25 multiple scores that are above the hard cutoff but one

1 that's below -- and I will ask the State the opposite
2 question -- what would you do there?

3 MR. WAXMAN: Well, we know what Florida
4 does, which --

5 JUSTICE ALITO: Well, what does the Eighth
6 Amendment require, in your view?

7 MR. WAXMAN: Well, in our view, the Eighth
8 Amendment requires that if a State chooses to use IQ
9 test scores as a proxy for intellectual functioning
10 rather than a full inquiry into intellectual
11 functioning, it cannot refuse to employ the standard
12 error of measurement that is inherent in the test.

13 JUSTICE GINSBURG: And if it were 76, you
14 would not need to go on to adaptive behavior; is that
15 your view?

16 MR. WAXMAN: Our -- our view is that a State
17 consistent with Atkins could say that if you have no
18 obtained score on a valid, properly administered,
19 up-to-date test that is 70 -- that is below 76, you
20 may -- you may constitutionally be precluded. I think
21 many clinicians would go ahead and do adaptive
22 functioning and other intellectual functioning. But our
23 view is that States like Mississippi and Oklahoma that
24 set 76 as the cutoff do, in fact, comply with Atkins.

25 May I save the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 ORAL ARGUMENT OF ALLEN WINSOR

3 ON BEHALF OF THE RESPONDENT

4 MR. WINSOR: Mr. Chief Justice, and may it
5 please the Court:

6 This Court should affirm the decision of the
7 Florida Supreme Court because it represents a reasonable
8 legislative judgment and one that is fully consistent
9 with Atkins and the Eighth Amendment. I would like to
10 start by responding to your question, Justice Alito,
11 about what -- what do you do with multiple scores. And
12 in fact in this case we're not talking about someone who
13 had one or two IQ scores.

14 When you look at the Wechsler test, which is
15 what the Petitioner contends is the gold standard, he
16 had test scores of 71, 72, 73, 74 and 80. And as we
17 understand, what the Petitioner would have this Court do
18 is to take some of those lower scores and simply
19 subtract 5 points from them. That is not consistent
20 with -- with the materials that he cited in the footnote
21 in his brief. If you look at the example there, they --
22 they do apply some statistical principles to a range of
23 scores, but they do not simply take the lowest score and
24 subtract 5 points from it.

25 And the logic of that, I would submit, is

1 fairly obvious. You couldn't have a situation where,
2 take in this case, you have an -- a low IQ on the
3 Wechsler of 71 and a high IQ on the Wechsler of 80, and
4 say at the same time that there is a 95 percent chance
5 his score is between 75 and 85 and also a 95 percent
6 chance that his score is between 66 and 76.

7 JUSTICE SCALIA: So you want us to decide
8 this case and establish the principle, the -- the very
9 significant principle that where you have a -- a
10 criminal defendant condemned to death for -- for murder
11 whose scores are 71, 72, 73, 74, and 80, that's okay?
12 That's all you're trying to persuade us of?

13 I mean, I'm not very happy having to go
14 through this in all future cases where you have somebody
15 who has 69, 73, 74, 75, and 81. I mean, don't you have
16 some more general principle, other than the particular
17 scores in this case are good enough.

18 MR. WINSOR: Well, we certainly think the
19 particular scores in this case are good enough. But we
20 do; we have a broader principle, which is that when you
21 are dealing with things like mental diagnosis or things
22 in the medical field generally, that there is good
23 reason for this Court to do as it has historically,
24 which is to defer to reasonable legislative judgments.

25 JUSTICE KAGAN: So what --

1 JUSTICE KENNEDY: Well, let -- let me ask
2 you this. Suppose that the American Psychiatric
3 Association and -- and all other professional
4 associations do use the SEM. Suppose that. It seems to
5 me what the State is saying here in declining to use
6 that, is that it declines to follow the standards that
7 are set by the people that designed and administer and
8 interpret the tests.

9 MR. WINSOR: Well, I have two responses to
10 that. One, if the constitutional rule -- which we
11 submit it's not -- but if there were a constitutional
12 rule that the Eighth Amendment required Florida to adopt
13 all kinds of -- of clinical criteria that the APA or the
14 AAIDD --

15 JUSTICE SOTOMAYOR: This is not clinical;
16 this is statistical criteria with the tests you're
17 relying on.

18 MR. WINSOR: Well, there's two parts --

19 JUSTICE SOTOMAYOR: You keep saying
20 clinical, but the SEM is not a clinical judgment. It's
21 a standard error of measurement. That's the test
22 maker's.

23 MR. WINSOR: Well, that's right, but Justice
24 Kennedy's question as I understood it was how can
25 Florida deviate from what the DSM and what the AAIDD

1 suggest are best practices. And my --

2 JUSTICE SOTOMAYOR: No. This has nothing to
3 do with best practices. It has to do with what the test
4 givers say is the right way to look at their tests.

5 MR. WINSOR: Well, the -- the test measures
6 published the error measurement; but it's the DSM and
7 the AAIDD that are suggesting how many deviations that
8 you should --

9 JUSTICE SOTOMAYOR: No, no. They're not
10 challenging the two standard deviations; they're saying
11 if you are going to preclude functioning abilities and
12 the other two factors of your test based on a score of a
13 test that says it has an SEM of 5, then you have to use
14 the SEM. It's very different. They're not saying you
15 have to take that number and declare that person
16 mentally/intellectually challenged. You just have to
17 apply the other factors.

18 MR. WINSOR: Well, it's a three-prong test,
19 so in any instance you would have to demonstrate the
20 existence of all three prongs. But with respect to the
21 -- the 95 percent interval, that --

22 JUSTICE GINSBURG: Can I stop you there?

23 MR. WINSOR: Yes, certainly.

24 JUSTICE GINSBURG: I thought that you don't
25 have to go to, under your view, you don't have to go to

1 the second and third standards if you -- on the first,
2 it's 70 or below. I thought that adaptive behavior
3 doesn't come into the picture, and onset doesn't come
4 into the picture, if the IQ is above 70.

5 MR. WINSOR: That's correct, Your Honor.
6 There -- it's a three-part test, and the medical
7 community doesn't dispute that and the Petitioner
8 doesn't dispute that, that to achieve a diagnosis of
9 mental retardation you would have to demonstrate that
10 you meet each of the three criteria.

11 JUSTICE BREYER: So what is wrong -- this --
12 there may be agreement among you on this. What the --
13 what Atkins says is there are three parts, as you say.
14 One part is significantly sub-average intellectual
15 functioning. That's the first part. And so what you
16 say is, if it's above a 70 on an IQ test, or a couple of
17 them, that's the end of it. We don't go further. All
18 right. What they say is, I want to tell the jury
19 something, or the judge if the judge is deciding it:
20 "Judge, I have an expert here. Thank you."

21 Expert: "I want to tell you, Your Honor,
22 that that number 70 is subject to error."

23 It could be -- and indeed the State can do
24 the same thing. If it's 68, the number 68 is subject to
25 error. So if somebody measures 68 you could bring in

1 the witness, and you would say 5 percent of the time,
2 it's within 5 points either way.

3 I think that's all they want to do. Now,
4 there could be other ways of going about it, and maybe
5 you would give the same test six times with different
6 questions, and that may not eliminate but it might
7 reduce the possibility of error, or there may be some
8 other way to do it. You call in a psychiatrist and he
9 says okay; or an expert: 72, he's still. We have other
10 ways. We have other ways, not just tests.

11 Now, I think you would do the same thing if
12 you wanted to, on the down side, I guess. And that
13 might lead people not to -- to being executed. You see?
14 And that's their position, though, I think. And they
15 get to do it on the upside. All right, what's wrong
16 with that? It doesn't sound so terrible.

17 And anyway, the Eighth Amendment -- this is
18 a way of enforcing the Eighth Amendment. This doesn't
19 need to be, I don't think, an independent Eighth
20 Amendment violation.

21 But go ahead; that's the kind of question I
22 would love to have some --

23 MR. WINSOR: Sure. Well, what is wrong with
24 that is that substantially, if you raise the limit to 75
25 as Mr. Waxman suggested you could, that doubles --

1 JUSTICE BREYER: It doesn't raise the limit
2 to 75. What it does is it says just what I said, and I
3 don't want to repeat it. When it's there at 70, they
4 call their expert, who informs the decisionmaker just
5 what I said. Now, that would take a little time, maybe
6 15 minutes, maybe a little longer. But that's what they
7 want to do, I think. And -- and why not? I mean, what
8 is so terrible about doing it?

9 MR. WINSOR: What is so terrible about doing
10 it is you would end up increasing the proportion of
11 people, the number of people who would be eligible for a
12 mental retardation finding.

13 JUSTICE BREYER: But only those who in fact
14 are mentally retarded.

15 MR. WINSOR: No. No, Your Honor.

16 JUSTICE BREYER: Because?

17 MR. WINSOR: They're not mentally -- there
18 is no disagreement that 70 is the appropriate threshold
19 here. So this is almost an evidentiary matter. It's a
20 matter of what does it take to prove by clear and
21 convincing evidence, which is a standard of proof that
22 they have as a matter of Florida law. And it's a
23 standard of proof they do not challenge in this case.
24 And all Florida recognizes is that the best measure of
25 your true IQ is your obtained IQ test score. And so for

1 someone who --

2 JUSTICE KAGAN: But, General, the ultimate
3 determination here is whether somebody is mentally
4 retarded; and the IQ test is just a part of that. It's
5 a part of one prong of that ultimate determination. And
6 what your cutoff does is it essentially says the inquiry
7 has to stop there. And the question is how is that at
8 all consistent with anything we ever say when it comes
9 to the death penalty? Because we have this whole line
10 of cases that says when it comes to meting out the death
11 penalty, we actually do individualized consideration,
12 and we allow people to make their best case about why
13 they're not eligible for the death penalty. And
14 essentially what your cutoff does is it stops that in
15 its tracks, as to a person who may or may not even have
16 a true IQ of over 70, and let alone it stops people in
17 their tracks who may not be mentally -- who may be
18 mentally retarded.

19 MR. WINSOR: Well, first, with respect to
20 the mitigation, this is -- this Atkins hearing in
21 Florida is completely separate from the mitigation
22 phase, and so he does still have individualized
23 decisionmaking with respect to whether to -- to have a
24 death sentence, and he's still had an opportunity to
25 present all evidence --

1 JUSTICE KAGAN: But he doesn't have it with
2 respect to this critical question, right? We've said
3 you cannot execute somebody who is mentally retarded;
4 and he says now you are preventing me from showing you
5 that you're mentally retarded, because you have an IQ
6 test, a part of one prong of the three-prong test, you
7 have an IQ test that says that I'm not mentally
8 retarded, but you know, that IQ test may be wrong. It's
9 not -- given that you are not using a margin of error.

10 MR. WINSOR: Well, with respect to the IQ
11 test just being one part of the intellectual functioning
12 prong, that is a very recent development and one of the
13 -- one of the problems we have with the idea of
14 constitutionalizing medical criteria is that it is
15 changing. If you look at the DSM-IV which was in -- in
16 existence at the time of Atkins -- the DSDM-V replaced
17 it last year -- they said that intellectual functioning,
18 the prong was defined by IQ as measured on test scores.

19 JUSTICE SCALIA: General Winsor, we --

20 MR. WINSOR: Yes.

21 JUSTICE SCALIA: -- we don't allow all
22 factors to be considered, do we? Would -- would the
23 State have been able to refute his assertion of mental
24 retardation by pointing to the fact that he is the one
25 who seized the young woman, who pushed her into a car,

1 who drove the car with his accomplice following in
2 another car, and who killed her, and -- and killed
3 another -- and killed a policeman, too, later, I guess.

4 MR. WINSOR: Yes, sir.

5 JUSTICE SCALIA: Could the State bring that
6 in and say somebody who is mentally retarded enough --
7 so mentally retarded as not to be responsible and not to
8 be subject to the death penalty certainly could not have
9 pulled all of this off. This is not a person who is
10 that mentally retarded, significantly mental -- mentally
11 retarded.

12 Could the State show that --

13 MR. WINSOR: Well, the State certainly --

14 JUSTICE SCALIA: -- in refutation of -- of
15 his mental retardation evidence?

16 MR. WINSOR: Only adaptive functioning is a
17 portion of the test. So there's a three-prong test.
18 The intellectual functioning, which historically has
19 been all about IQ until very recently. And then
20 adaptive functioning talks about how people react in the
21 ordinary world to -- to difficult situations, and some
22 of what you talked about may or may not be relevant to
23 that.

24 But further responding to the earlier
25 question, it's not that Florida is not allowing evidence

1 that you meet prong one. It's that Florida is making a
2 finding that you cannot satisfy prong one and so that's
3 why you don't know the --

4 JUSTICE KENNEDY: But it seems to me that,
5 to follow from Justice Kagan's question, and I think
6 this is a very important question, that we've been
7 talking about here about the -- the inaccuracy, to some
8 extent, of IQ scores, and your rule prevents us from
9 getting a better understanding of whether that IQ score
10 is -- is accurate or not because you -- we cannot even
11 reach the adaptive functioning prong. You prevent it at
12 the outset. And incidentally, you don't prevent it if
13 it's under 65 -- under 70, do you?

14 MR. WINSOR: Well, it's a three-prong test.
15 So you'd have to satisfy all three. But with respect to
16 your question about whether adaptive functioning
17 evidence can affect the reading of the IQ, we submit
18 that's not -- that's not the case. That's why they're
19 discrete inquiries. And so if you have multiple test
20 scores or if you have one test score --

21 JUSTICE KENNEDY: But in very close cases,
22 doesn't it illuminate whether or not the IQ test is
23 exactly as reported or if it is subject to some decrease
24 or increase depending on what the evidence of adaptive
25 functioning shows.

1 MR. WINSOR: No, Your Honor. That would be
2 the position of the modern DSM, but that's a radical
3 departure from where it has been historically. Again,
4 it used to define the intellectual functioning prong as
5 being determined exclusively --

6 JUSTICE KENNEDY: Well, I'll read -- I'll
7 read Atkins again.

8 MR. WINSOR: Yes, sir.

9 JUSTICE KENNEDY: But I thought Atkins
10 did -- did refer to the adaptive functioning.

11 MR. WINSOR: Oh, no. Make no mistake, there
12 is an adaptive functioning inquiry. That's one of the
13 three prongs. And so you have to prove intellectual
14 functioning, you have to prove adaptive functioning.

15 JUSTICE KENNEDY: But that was even under
16 DSM-IV, correct?

17 MR. WINSOR: Oh, yes, sir. That's been a a
18 part -- that's been a part for -- for decades. What is
19 changing is the way the medical community looks at how
20 to measure IQ or what to do with IQ. And so the
21 modern --

22 JUSTICE KAGAN: But, General, at the very
23 least, you give somebody an IQ test, he scores a 71.
24 Now, he might actually have an IQ of 71, or we know from
25 the way these standard margins of error work, he might

1 have an IQ of 69, and you won't let him go to the
2 adaptive behavior prong of the test and show that, you
3 know, and -- and show that he can't function in society
4 in the ways that Atkins seems to care about, as Justice
5 Kennedy says, notwithstanding that this IQ score number
6 might be accurate or might not be.

7 MR. WINSOR: Well, the adaptive functioning
8 is a critical component, but even the guidelines that
9 DSM would agree, that no matter what your deficits are
10 in adaptive functioning, you do not qualify for a mental
11 retardation diagnosis without also showing substantial
12 deficits in intellectual functioning.

13 JUSTICE SOTOMAYOR: Since when -- I know
14 that there's less emphasis now on the IQ test than there
15 was before. But when the IQ test was used, did they
16 always use it as a fixed number or did they always
17 include the SEM as informing the clinical judgment?

18 MR. WINSOR: Oh, the SEM has been -- has
19 been part of the equation, yes. I'm not disputing that.

20 JUSTICE SOTOMAYOR: Since then they have not
21 changed.

22 MR. WINSOR: We're not disputing that, but
23 again --

24 JUSTICE SOTOMAYOR: That's been the same in
25 all medical diagnosis.

1 MR. WINSOR: Well, I think that the -- the
2 application of the SEM has been a component of this for
3 some time. We don't dispute that. We do note that the
4 emphasis on IQ is -- is decreasing and that the medical
5 community is now suggesting that you should rely less
6 and less on IQ and they've changed --

7 JUSTICE SOTOMAYOR: They're not arguing for
8 that. They're just arguing that we should stay where
9 it's always been, which is using the SEM.

10 MR. WINSOR: Well, I think what they're
11 arguing is that you should -- you should do this, you
12 should apply the SEM in the same way that clinicians do
13 because that's the way the clinicians do it. And if you
14 go down that road, then it is very difficult to
15 understand in a principled way where -- where that would
16 stop.

17 JUSTICE ALITO: Is it the case that those
18 who use IQ tests always require a 95 percent confidence
19 level and always must require a 95 percent confidence
20 level? Let's suppose a school on the other end of the
21 IQ scale wants to identify gifted children and they say
22 a child is gifted if the child has an IQ of 130 or
23 above. So they say if you have an obtained score of
24 130, you're in. You're in the gifted child program,
25 even though there is the same percentage that would

1 be -- would be the case with respect to someone with an
2 IQ of 70, that really the person is below 130. Would
3 there be something wrong with their doing that?

4 MR. WINSOR: No, Your Honor.

5 JUSTICE ALITO: Do they -- are there places
6 that do that?

7 MR. WINSOR: Oh, certainly. That's up to
8 the decisionmaker who is relying on the IQ for whatever
9 the purpose he or she is. There is an SEM that's
10 published that's a part of the -- of the test, but the
11 decisionmaker who's relying on an IQ test score, to take
12 your example about someone in a school, they can set
13 that as high or low as they want to, because they might
14 want to be overinclusive, they might want to be
15 particularly restrictive.

16 And that's one of the areas where, what
17 we're dealing with here in the Atkins context is
18 fundamentally different because we have an adversarial
19 process, at least with respect to contested cases. We
20 have a burden of proof, a clear and convincing evidence
21 burden of proof that's not shared in the clinical
22 setting.

23 And so there are a lot of reasons why it's
24 very different to make a diagnosis in a clinical
25 setting, particularly now where the emphasis in the

1 medical community is on providing services or making
2 services available to people where you don't have the
3 same disincentive to be overinclusive that --

4 JUSTICE KAGAN: General.

5 MR. WINSOR: Yes.

6 JUSTICE KAGAN: Could the State change its
7 statute to say we're -- we're now using a threshold of
8 60?

9 MR. WINSOR: Well, the State certainly has
10 substantial leeway. I think the answer to that is yes,
11 although it would be -- it would be more difficult to
12 defend because I think what you'd want to do is go back
13 and look at the consensus that -- that was a part of
14 Atkins, the consensus that supported the decision in
15 Atkins.

16 But I think before making a decision on 60
17 as a threshold or some other number, you'd want to look
18 at the whole picture --

19 JUSTICE KAGAN: Well, I guess I don't
20 understand it. You have to explain that to me a little
21 bit.

22 MR. WINSOR: Sure.

23 JUSTICE KAGAN: Because I thought that the
24 70 was -- is very longstanding. Everybody has agreed
25 that it's -- it's 70 for many, many decades. Maybe --

1 maybe forever. So how could a State -- if the State --
2 why could the State say no to that? What would you look
3 at?

4 MR. WINSOR: Well, I think you'd look at,
5 again, at the -- the special interest at issue in Atkins
6 and -- and the fact that the State may need to be more
7 restrictive because of the -- the malingering and -- and
8 incentives that inmates would have to -- to score lower
9 than they -- than they would ordinarily perform at, that
10 you wouldn't have in a clinical setting or you wouldn't
11 have in -- necessarily in a school setting where people
12 are always trying to perform --

13 JUSTICE SOTOMAYOR: That's why you have the
14 other two prongs.

15 MR. WINSOR: I'm sorry?

16 JUSTICE SOTOMAYOR: That's why you have the
17 other two prongs.

18 MR. WINSOR: Well, you have -- you certainly
19 have --

20 JUSTICE SOTOMAYOR: And at every juncture
21 when you have a fixed cutoff, you have the ability to
22 defeat the other two prongs, but you're stopping them on
23 a test based on a test score that has a margin of error
24 recognized by the designers of the test.

25 MR. WINSOR: Well, we're not stopping them

1 from putting on -- all we're stopping is the
2 consideration of the other prongs when it's clear that
3 the first prong can't be -- can't be satisfied. So I
4 think there's been, in the briefing, this idea that it
5 necessarily has to be sequenced a certain way, and it
6 doesn't. If someone came in and it were undisputed that
7 he could not satisfy the adaptive functioning prong, for
8 example, then you wouldn't necessarily have to look at
9 IQ. So --

10 JUSTICE BREYER: Can you --

11 JUSTICE KENNEDY: Please, I --

12 MR. WINSOR: Yes, sir.

13 JUSTICE KENNEDY: Then I misunderstand the
14 case. I thought the Florida court held, in effect, my
15 words, that the IQ was a threshold in order to make this
16 inquiry, and if you had 70 -- over 70, you could not
17 make a showing. But please correct me if I'm wrong.

18 MR. WINSOR: No, that -- that's -- that's
19 correct. And what happened in this case was there was
20 a -- a motion in limine by the State recognizing that
21 the -- that the IQ scores that were at issue here were
22 all above 70. And so it was sort of an ordinary
23 evidentiary motion, you know, if you had a different
24 case where you had to prove causation of damages if
25 there was no evidence --

1 JUSTICE KENNEDY: So you do not get -- if
2 you do not satisfy prong one, you do not get to prongs
3 two or three, period. Right?

4 MR. WINSOR: That's right, Your Honor. But
5 by the same token, if you don't satisfy prong two, you
6 wouldn't get to prong three and -- and so on. So
7 it's -- the evidentiary ruling was certainly a -- simply
8 a recognition that you have to satisfy.

9 JUSTICE BREYER: What happens if right now,
10 today, under the law of Florida a similar case and there
11 is an IQ score of 71, and the prosecutor points out to
12 the judge that that's higher than 70. And the defense
13 lawyer says: Your Honor, I would like to bring in my
14 test expert here who will explain to you that, even
15 though this test did show 71, there is some fairly small
16 but significant probability of error, and it could in
17 fact be as high as 76, and he would like to explain to
18 you that that's the situation. And therefore, can I
19 have him testify.

20 Does the judge have to let him testify or
21 not?

22 MR. WINSOR: If I understand the
23 hypothetical correctly, you have one test score of -- of
24 71, and so without an attained test score of 70 or
25 below, he would not.

1 JUSTICE BREYER: All right. So then --

2 MR. WINSOR: But he would have --

3 JUSTICE BREYER: So then this is a dispute
4 in the case. They would like to present that expert,
5 you would say no?

6 MR. WINSOR: That's right.

7 JUSTICE BREYER: Okay. That brings me
8 back to my -- I just want to be sure.

9 MR. WINSOR: Yes. But --

10 JUSTICE BREYER: Then we get to my first
11 question, which I won't repeat, and this man has been on
12 death row for over 35 years, I take it?

13 MR. WINSOR: Yes, sir. 1978 was the -- was
14 the -- was the act.

15 JUSTICE SCALIA: He didn't raise mental
16 retardation until 10 years after his first conviction;
17 isn't that right?

18 MR. WINSOR: That's right, Your Honor.
19 He -- he raised it in the Hitchcock setting in the late
20 '80s and then went back and had some of the same
21 evidence that he's relying on --

22 JUSTICE SCALIA: How has it gone on this
23 long? 1978 is when he killed this woman.

24 MR. WINSOR: There have been a number of
25 appeals in this case. There have been a number of

1 issues raised, and there was a -- but yes, there is --

2 JUSTICE KENNEDY: But -- but, General --

3 MR. WINSOR: Yes, sir.

4 JUSTICE KENNEDY: The -- the last ten people
5 Florida has executed have spent an average of 24.9 years
6 on death row.

7 Do you think that that is consistent with
8 the purposes of the death penalty, and is -- is it
9 consistent with sound administration of the justice
10 system?

11 MR. WINSOR: Well, I certainly think it's
12 consistent with the Constitution, and I think that there
13 are obvious --

14 JUSTICE KENNEDY: That wasn't my question.

15 MR. WINSOR: Oh, I'm sorry, I apologize.

16 JUSTICE KENNEDY: Is it consistent with
17 the -- with the purposes that the death penalty is
18 designed to serve, and is it consistent with an orderly
19 administration of justice?

20 MR. WINSOR: It's consistent with the --
21 with the --

22 JUSTICE KENNEDY: Go ahead.

23 MR. WINSOR: It is consistent with the
24 purposes of the death penalty certainly.

25 JUSTICE SCALIA: General Winsor, maybe you

1 should ask us --

2 JUSTICE KENNEDY: Well --

3 JUSTICE SCALIA: -- that question,
4 inasmuch --

5 JUSTICE KENNEDY: Well --

6 JUSTICE SCALIA: -- as most of the delay has
7 been because of rules that we have imposed.

8 JUSTICE KENNEDY: Well, let -- let -- let me
9 ask -- ask this. Of course most of the delay is at
10 the hands of the defendant.

11 In this case it was 5 years before there was
12 a hearing on the -- on the Atkins question. Has the
13 attorney general of Florida suggested to the legislature
14 any -- any measures, any provisions, any statutes, to
15 expedite the consideration of these cases.

16 MR. WINSOR: Your Honor, there was a statute
17 enacted last session, last spring, that is -- it's
18 called the Timely Justice Act, that addresses a number
19 of issues that you raise, and it's presently being
20 challenged in front of the Florida Supreme Court.

21 But I would like to talk about the 95 --

22 JUSTICE KAGAN: General, can I just ask --

23 MR. WINSOR: Certainly.

24 JUSTICE KAGAN: -- why you have this policy?

25 MR. WINSOR: I'm sorry?

1 JUSTICE KAGAN: Why you have the policy. I
2 mean, is it administrative convenience? Just tell me
3 why you have the policy.

4 MR. WINSOR: Well, the people of Florida
5 have decided that the death penalty is an appropriate
6 punishment for the most horrific crimes, like the crime
7 at issue.

8 JUSTICE KAGAN: No, no, no. Why you have
9 the 70 threshold.

10 MR. WINSOR: Well, that -- that's what I was
11 getting at. And that -- and so Florida has an interest
12 in ensuring that the people who evade execution because
13 of mental retardation are people who are, in fact,
14 mentally retarded. And if we apply the rule that the
15 Petitioner has suggested, it would double the number of
16 people who are eligible for the -- for the punish -- or
17 for the -- for the exemption. And that's inconsistent
18 with Florida's purposes of -- of the death penalty.

19 JUSTICE KAGAN: Well, that's just to say
20 that it would double the number of people eligible, but
21 some of them may be mentally retarded. I mean,
22 presumably we want accurate decisionmaking with respect
23 to this question, don't we?

24 MR. WINSOR: Well, there -- there -- we do
25 certainly. And they are not mentally retarded if they

1 don't have an IQ of 70 or below. And that's a -- that's
2 a position that Petitioner doesn't -- doesn't challenge.

3 JUSTICE KAGAN: Who are not mentally
4 retarded if they don't have an IQ score of 70 or below?
5 I mean, you -- you don't believe that yourself, right?
6 This is a tool to decide whether somebody is mentally
7 retarded, and it's a tool that functions in one prong of
8 a three-prong test.

9 MR. WINSOR: It is the first prong. The IQ
10 threshold is the first prong. So -- no matter what your
11 adaptive deficits are, you must demonstrate -- and,
12 again, here in this adversary setting, you must
13 demonstrate by clear and convincing evidence that you
14 have an IQ of 70 or below.

15 And what we believe is that if you say,
16 Well, there is a 95 percent chance that my IQ is
17 somewhere between, say, 68 and 78, that you have not
18 satisfied that first prong.

19 And I would like to talk about the 95
20 percent confidence interval, because it is not the case
21 that you have, say, with a 72 a 95 percent chance that
22 your IQ is 70 or below. In fact, it's a very small
23 chance.

24 What the -- what the confidence interval
25 measures is that you have a 95 percent chance that your

1 true IQ is within five points of the measured thing, the
2 measured IQ, but it's not that you would have an equal
3 chance of having a 66, a 67, a 68. It falls under the
4 bell curve.

5 And so if you take the test over and over
6 again, you are going to score near the -- near the peak
7 of that bell curve most of the time, which is where your
8 true IQ would be. And at the outer ends of that 95
9 percent threshold are very, very small likelihoods that
10 you -- that that's your true IQ.

11 And -- and then with each additional test
12 you take, the odds -- that -- that's above 70, the odds
13 would go down.

14 And so it's simply not the case that you can
15 say, Well, he has a 72 so he has satisfied or even might
16 have satisfied the first prong because, as a statistical
17 matter, every -- well, as a factual matter, every
18 Wechsler test he has taken that was admitted into
19 evidence was over 70. He had a 71, a 72, 73, 74, and an
20 80.

21 And so if you want to apply statistics to
22 it, you would have to look and say, well, what are
23 the -- what are the odds that with that group of
24 testing, that his true IQ is under 70?

25 Now, is it possible? Certainly it is

1 possible that it's over 100. You know, you can exceed
2 beyond the 95 percent confidence interval.

3 And nobody disputes that -- that the true IQ
4 is something that is incapable of being measured or
5 incapable of -- and -- but -- but the IQ test is what
6 the community has, and it's the most objective of the
7 three prongs, which is why we believe it's particularly
8 important to focus on because it's the most objective
9 test that we have.

10 JUSTICE GINSBURG: How many States retain
11 that practice with a rigid 70 cutoff?

12 MR. WINSOR: Your Honor, by our count there
13 are eight States that have both a hard cutoff and a --
14 and a 70 or two standard deviations, which approximates
15 to the same thing, that has been expressly recognized by
16 the States. There are a number of other States that
17 have statutes similar to Florida's, but that have not
18 been interpreted one way or the other that -- that we
19 may or may not --

20 JUSTICE SOTOMAYOR: Of those eight, how many
21 actually have a fixed cutoff and how many have a SEM? I
22 thought it was only four that didn't have consideration.

23 MR. WINSOR: No, no. Those eight, Your
24 Honor, all have a fixed cutoff of 70 or two standard --
25 two standard deviations.

1 JUSTICE SOTOMAYOR: But by judicial
2 decision, they've considered -- well, we -- that --
3 that's something that --

4 MR. WINSOR: In -- in most of the instances,
5 Your Honor, they have done what Florida has done, which
6 is they've had a statute that then was interpreted by
7 the -- by the courts.

8 So we --

9 JUSTICE SOTOMAYOR: Exactly. That's what
10 I'm saying. Only four have it interpreted without the
11 SEM.

12 MR. WINSOR: I'm -- I apologize.

13 JUSTICE SOTOMAYOR: I thought only four had
14 interpreted without using the SEM?

15 MR. WINSOR: Had interpreted their statutes
16 without using the SEM?

17 JUSTICE SOTOMAYOR: Only four, like Florida.

18 MR. WINSOR: No, Your Honor, we have eight.
19 We have Alabama, Florida, Idaho, Kansas, Kentucky, North
20 Carolina, and Virginia, and Maryland, which has repealed
21 the death penalty, but -- but that was their standard
22 when they have it.

23 We would ask respectfully that the Court
24 affirm the Florida Supreme Court.

25 CHIEF JUSTICE ROBERTS: Thank you, General.

1 Mr. Waxman, you have a minute remaining.

2 REBUTTAL ARGUMENT OF SETH WAXMAN

3 ON BEHALF OF THE PETITIONER

4 MR. WAXMAN: In State v. Cherry, which is
5 the -- the Florida Supreme Court decision that
6 established this rule that if you -- if your lowest
7 score or your only score is 71, you are out, and that
8 applies whether you take one test or multiple tests --
9 here I'm quoting from the Supreme Court's decision in
10 Cherry, that, quote, "It is a universally accepted
11 given, that is that the SEM is a universally accepted
12 given, and as such should logically be considered in
13 determining whether a defendant has mental retardation."

14 What the Court said was: We have to read
15 the plain meaning of the Florida statute and the Florida
16 statute says two standard deviations.

17 The notion that the Florida legislature or
18 the -- may I finish my sentence -- the Florida
19 legislature or the people of Florida have made a
20 considered decision not to account for the SEM is
21 baseless and is belied by the -- the legislative report
22 that accompanies the statute which said 70 to 75.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Waxman, counsel.

1 The case is submitted.

2 (Whereupon, at 11:02 a.m., the case in the
3 above-entitled matter was submitted.)

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