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IN THE SUPREME COURT OF THE UNITED STATES

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DARYL RENARD ATKINS, :  
Petitioner :  
v. : No. 00-8452  
VIRGINIA. :

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Washington, D.C.  
Wednesday, February 20, 2002

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:27 a.m.

APPEARANCES:  
JAMES W. ELLIS, ESQ., Albuquerque, New Mexico; on behalf  
of the Petitioner.  
PAMELA A. RUMPZ, ESQ., Assistant Attorney General,  
Richmond, Virginia; on behalf of the Respondent.

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(11:27 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-8452, Daryl Renard Atkins v. Virginia.

Mr. Ellis.

ORAL ARGUMENT OF JAMES W. ELLIS

ON BEHALF OF THE PETITIONER

MR. ELLIS: Mr. Chief Justice, and may it please the Court:

In 1989, this Court, surveying the already growing evidence from a variety of sources that the people of this country oppose the execution of individuals with mental retardation, observed that that growing sentiment might some day be manifested in legislation, particularly by the States, which this Court identified as the sort of evidence upon which it typically can rely in Eighth Amendment cases.

The evidence is now clear that the American people in every region of the country have reached a consensus on that question. By every measurement and through a course of legislative enactments that is literally unprecedented in the field of capital punishment --

QUESTION: What is your definition of a consensus, Mr. Ellis?

1           MR. ELLIS: Mr. Chief Justice, the -- I would  
2 define consensus -- and this Court had discussed it in  
3 various terms in the cases, but I would distill from the  
4 cases in which the Court has described it that it is when  
5 the American people have reached a settled judgment based  
6 on a --

7           QUESTION: Yes, but I -- that's -- that's a  
8 perfectly sound phrase, but how do we go about figuring  
9 out when that occurs? I mean, how many States must be on  
10 a particular side? Does the population make any  
11 difference? How about those factors?

12          MR. ELLIS: Your Honor, there -- there has never  
13 been a suggestion by this Court that it differentiates  
14 among States with regard to size, and yet obviously  
15 logically if -- if a -- an -- if a collection of statutes  
16 only was found in the smallest of the States or the States  
17 of a single particular region, it would cut against the  
18 evidence that there was a consensus.

19          QUESTION: And -- and how many States out of the  
20 50 do you need, do you think, for -- for a consensus?

21          MR. ELLIS: This Court has never suggested that  
22 there's a particular number in response to that. And when  
23 you look at the cases, both that have found a consensus  
24 and that have not, they vary.

25          QUESTION: Well, but you're saying there is a

1 consensus. So, you must have some figure that you're  
2 submitting to us.

3 MR. ELLIS: I'm -- I'm not submitting on the  
4 basis of a figure, Your Honor. I'm suggesting that read  
5 in their entirety, the Court's cases talking about  
6 consensus seem closer to us to be a -- a totality of the  
7 evidence test but with the requirement that that evidence  
8 across the board have found expression unambiguously in  
9 statutes.

10 QUESTION: Should we not look at legislative  
11 enactments as the surest indicator of what the view of the  
12 -- the particular State is?

13 MR. ELLIS: Yes, Your Honor, I think that you  
14 should, and I took that to be the -- the teaching of this  
15 Court's opinion in the first Penry case.

16 QUESTION: And looking at that, where do we  
17 stand today? We have -- how many States have no death  
18 penalty at all? Is it 12?

19 MR. ELLIS: It's roughly 12.

20 QUESTION: Yes.

21 MR. ELLIS: It in part depends on how Vermont is  
22 counted, but -- but it --

23 QUESTION: And how many States have now enacted  
24 legislation providing that a retarded person may not  
25 suffer the death penalty?

1           MR. ELLIS: There are now 18 States as compared  
2 to the 2 that -- that were on the books or were about to  
3 go on the books, in the case of Maryland, when this Court  
4 decided the Penry case.

5           QUESTION: Of course, not -- not all of those 18  
6 feel so strongly that it is unconstitutional to execute  
7 someone with reduced mental capacity that they are willing  
8 to apply that to people who've already been sentenced.  
9 How many of those 18 States have adopted that law only  
10 prospectively?

11          MR. ELLIS: A number of them. Again, there's a  
12 categorization --

13          QUESTION: I think there's quite a few.

14          MR. ELLIS: We don't have a precise number.

15          QUESTION: And that doesn't -- that doesn't  
16 bespeak such a -- such a intransigent view that this is  
17 unconstitutional. I mean, you say, well, you know, we  
18 won't do it in the future, but this person has already  
19 been tried and convicted, you know, go ahead. Does that  
20 suggest to you that -- that I think it's really  
21 unconstitutional or just that I think it's a good idea in  
22 the future not to do it?

23          MR. ELLIS: I guess I would characterize,  
24 Justice Scalia, the statutes not as having concluded that  
25 the practice was unconstitutional, but instead that it was

1 unacceptable. But that still leaves your point.

2 QUESTION: Well, no, it doesn't. It just says  
3 it's not desirable. That's all the statute suggests, it  
4 seems to me. And I -- I thought when you were talking  
5 about a consensus, you're talking about a consensus that  
6 something is so -- so terrible that it should not be  
7 permitted. And these States are permitting it. They're  
8 just not going to do it in the future.

9 MR. ELLIS: I -- I would respectfully suggest  
10 that they have not reached that judgment. In the bulk of  
11 the States that have prospective only language, that is to  
12 say, some kind of bar -- and it varies among the statutes  
13 to looking backward to cases already decided. In the bulk  
14 of those cases, it was clear that there was no one with  
15 mental retardation currently under sentence of death in  
16 that State. And so, passing a statute that would  
17 encompass people on death row in that State would have  
18 been unnecessary in the view of legislators and might  
19 have --

20 QUESTION: How do we know that? How do we know  
21 that?

22 MR. ELLIS: The -- the discussion in the -- in  
23 State legislatures, there isn't legislative history in  
24 quite the way there is in Congress.

25 QUESTION: Pity.

1 (Laughter.)

2 MR. ELLIS: I was going to say this must be a  
3 source of substantial disappointment.

4 (Laughter.)

5 MR. ELLIS: But -- but what -- what evidence we  
6 have comes from recordings of the debates and, in  
7 particular, journalistic accounts from -- from those  
8 debates. It -- it is clear from those that the -- that  
9 the concern of treating differently people who have been  
10 sentenced to death previously and those who would face a  
11 capital trial prospectively was not a principal concern.  
12 And I'm trying to come up with a State in which it was  
13 known that there was someone who had mental retardation on  
14 death row. The only State in which I might have reached  
15 that conclusion, there had already been a judgment by  
16 another court that the individual involved -- it was in  
17 Arkansas -- didn't have mental retardation.

18 QUESTION: Mr. Ellis, would you -- would you  
19 agree -- you know, I'm not -- assuming I agree that --  
20 that when there is a -- a new consensus that the  
21 Constitution means something it didn't mean before the  
22 Constitution means that new thing, assuming I agree with  
23 that, you -- you must agree that -- that we have to be  
24 very careful about finding new consensuses, don't you?  
25 Because we can't go back.



1           I mean, if we find a consensus here that it is  
2   indeed unconstitutional to execute the mentally retarded  
3   and then it turns out that there are a lot of problems,  
4   that indeed in every case, every capital case, there's  
5   going to be a claim of mental retardation and people come  
6   to believe that in many of these cases you get expert  
7   witnesses -- you can easily get them on -- on both sides  
8   -- people become dissatisfied with that. We won't be able  
9   to go back, will we? Because the evidence of the  
10   consensus is supposed to be legislation, and once we've  
11   decided that you cannot legislate the execution of the  
12   mentally retarded, there can't be any legislation that  
13   enables us to go back. So, we better be very careful  
14   about the national consensus before we come to such a  
15   judgment, don't you think?

16           MR. ELLIS: I would agree with you, Justice  
17   Scalia, that as the Court has said in various ways in  
18   several of the cases that the -- that the proponents of  
19   the view that there is a consensus bear an extraordinarily  
20   heavy burden of demonstration. But the particular  
21   concerns that you raise about the possibility that  
22   sentiment might especially in the -- in the presence of  
23   experience enacting a statute swing the other way, while  
24   theoretically possible, is not borne out by the experience  
25   in the 18 States, but in particular in the States that

1 enacted some years ago.

2 QUESTION: Well, but Justice Scalia's basic  
3 premise that it's a one-way ratchet is correct. Is it  
4 not?

5 MR. ELLIS: This Court has not had -- had  
6 occasion to address that in particular. The closest, I  
7 suppose, that it has come is the Court confronting the  
8 ambiguity with regard to the execution of individuals  
9 below the age of 16 and -- and the presumption that the  
10 Court reached in the face of that ambiguity.

11 QUESTION: Well, Mr. Ellis, logically it has to  
12 be a one-way ratchet. Logically it has to be because a  
13 consensus cannot be manifested. States cannot  
14 constitutionally pass any laws allowing the execution of  
15 the mentally retarded once -- once we agree with you that  
16 it's unconstitutional. That is the end of it. We will  
17 never be able to go back because there will never be any  
18 legislation that can reflect a changed consensus.

19 QUESTION: Of course, isn't it true that every  
20 new constitutional holding is a one-way ratchet in exactly  
21 the same way?

22 MR. ELLIS: Not only in the area of the Eighth  
23 Amendment but in others as well. We could all imagine  
24 ways in which dissatisfaction with the ruling might  
25 manifest itself --

1 QUESTION: Mr. Ellis --

2 MR. ELLIS: Yes.

3 QUESTION: -- I guess there's no uniform  
4 determination of when someone should be regarded as  
5 mentally retarded. The standards probably vary somewhat  
6 from State to State, do they not?

7 MR. ELLIS: Justice O'Connor, they vary  
8 remarkably little. The definitions are not framed in  
9 exactly identical forms because often States have adopted  
10 the definition that they employ for disability benefits  
11 purposes or guardianship purposes or commitment.

12 QUESTION: I guess my point is even if this  
13 Court were to say that it's unconstitutional to execute a  
14 person who's mentally retarded, presumably it would still  
15 be open to the State to determine whether that individual  
16 is mentally retarded under the State's definition, or is  
17 there some Federal definition you're asking us to employ?

18 MR. ELLIS: It seems to me that the States would  
19 be free to define mental retardation -- and, as I say,  
20 many use the definition they already have, that their  
21 clinicians are accustomed to -- so long as the definition  
22 they chose carried with it the core principles of the  
23 definition of mental retardation that this Court discussed  
24 in Penry, that is to say, a measured intelligence in the  
25 bottom 2 percent -- in the bottom 2-and-a-half percent of

1 the population or 2 standard deviations below the mean,  
2 plus an impact on the real world functioning of the  
3 individual and as --

4 QUESTION: Well, this -- this actually links up  
5 to the consensus problem if you take -- I don't think a  
6 poll is relevant, but assuming you took a poll and since  
7 you execute the retarded, I think most people would have  
8 in -- in mind an image of mental retardation which doesn't  
9 reflect the sophistication of the DSM which talks about  
10 mild retardation and defines somebody who's mildly  
11 retarded as educable with an IQ of maybe as high as -- in  
12 that range of -- of 70 with -- with some -- with some room  
13 for statistical error. Do the States have some leeway in  
14 defining retardation that's any different than what's in  
15 the DSM?

16 MR. ELLIS: With regard to -- with regard to  
17 details, as I suggested a moment ago, there -- there is  
18 room for some difference, but with regard to the core  
19 principles, which I take to be at the center of -- of your  
20 question, are we describing the same group of people --

21 QUESTION: Yes.

22 MR. ELLIS: -- what we've discovered in the  
23 States is that they've all come to essentially the same  
24 conclusion, which is all the people who fall within the  
25 AAMR or DSM-IV-TR definition are the people that they

1 chose to protect.

2 And going to your earlier point about what  
3 people know about the level of functioning of individuals  
4 with mental retardation -- yes, Your Honor -- there --  
5 other than parents -- parents I'd put aside -- there is, I  
6 think, no group in this country more aware of the variety  
7 among people with mental retardation and the levels of  
8 functioning at each level than State legislators.

9 QUESTION: This -- this goes to the -- where is  
10 the burden of proof in a case like -- supposing your view  
11 is adopted, the State charges capital murder. Is the  
12 burden of proof on the defendant to show that he's  
13 retarded?

14 MR. ELLIS: Yes, Your Honor. Every State that  
15 has enacted a statute has placed the burden on the  
16 defendant, although they have done it in somewhat  
17 different ways.

18 QUESTION: Mr. Ellis, what about this very case?  
19 There was some confusion, but the Virginia Supreme Court  
20 seemed to doubt that this person would qualify as mentally  
21 retarded. If -- if you would prevail, wouldn't there have  
22 to be a remand on that question?

23 MR. ELLIS: Obviously, in our -- we would not be  
24 totally disappointed if this Court were to resolve that  
25 question, but the -- the likelihood and prospect of a

1 remand obviously would be an appropriate response so that  
2 the Virginia courts who did not, in this case, have before  
3 them mental retardation as a legal question that was going  
4 to decide anything -- it was simply an observation in the  
5 course of making --

6 QUESTION: Well, what precisely did the Virginia  
7 Supreme Court say about this defendant and --

8 MR. ELLIS: I -- I think maybe the -- the  
9 Virginia Supreme Court's decision on that can be best  
10 characterized as expressing concern as to whether or not  
11 the individual -- in this case Mr. Atkins -- had mental  
12 retardation because of the testimony of Dr. Samenow that  
13 -- that suggested that there had not been a full  
14 demonstration of the impact of his impairment in his life,  
15 the second prong of the definition --

16 QUESTION: Can you tell me --

17 QUESTION: Mr. Ellis, apart from the consensus  
18 argument and these details, what is the real reason behind  
19 your position? What's wrong with executing the mentally  
20 retarded?

21 MR. ELLIS: In our view, Your Honor, the people  
22 with mental retardation who have both that intellectual  
23 functioning as the core and it has manifested itself in  
24 their life throughout their life -- those individuals in  
25 our view lack the culpability or blame worthiness because

1 their understanding of their actions, their understanding  
2 of the context in which their actions took place --

3 QUESTION: Well, why are they subject to  
4 criminal liability at all then?

5 MR. ELLIS: They are subject to criminal  
6 liability because it isn't our contention that they, for  
7 example, can't tell -- to use the -- the language in -- in  
8 Virginia's defense of insanity, that they can't tell right  
9 from wrong. What we're suggesting -- so, we're not  
10 suggesting they can't be punished. What -- what we're --  
11 what we are contending is that, though they can be  
12 punished, the death penalty is different, and it is  
13 reserved for those whose understanding is sufficiently  
14 clear that the penalty of death can be appropriate.

15 QUESTION: So, nothing wrong with putting a  
16 retarded person -- we know that there's a problem with  
17 definition, but -- in -- in jail for life, solitary. He  
18 can exercise in a cage.

19 MR. ELLIS: Nothing in the ruling that we seek  
20 here would preclude the State from imposing the most  
21 serious penalty it has other than the penalty of death.  
22 Most States do. A number of the States that have passed  
23 statutes have explicitly provided in those statutes that  
24 an individual exempted from the death penalty by the  
25 statute will be subjected to -- and then it explicitly

1 says, in some cases, life imprisonment without possibility  
2 of parole, or whatever the heaviest penalty.

3 QUESTION: Should the test be the same as for  
4 executing someone with a mental illness? We -- we have  
5 dealt with that, and -- and with the level of  
6 comprehension that someone must have in order to be  
7 eligible for the death penalty who has mental illness.  
8 Should the test be the same?

9 MR. ELLIS: Your Honor, I believe you're  
10 discussing the Ford issue with regard to competence to be  
11 executed? I read the Ford case as suggesting that whether  
12 the individual had mental illness or mental retardation,  
13 if -- if that individual lacked the understanding as  
14 execution became imminent, that they -- that the State  
15 would be precluded from executing. This --

16 QUESTION: So, is that test not adequate here in  
17 your view?

18 MR. ELLIS: That test, it seems to me, is not  
19 adequate for several reasons. One is that the Ford  
20 holding focuses on a defendant and -- and his mental state  
21 late in the process, as -- as execution is impending. The  
22 mental retardation question, as addressed by the States in  
23 -- in the years since Penry, focuses on the individual's  
24 mental functioning at the time of the crime.

25 QUESTION: What -- what about our -- what about



1 our mental illness cases dealing with the time of the  
2 crime? Why aren't they sufficient to indeed excuse  
3 somebody who couldn't help themselves? You're saying  
4 these people can help themselves. They did know the  
5 difference from right to wrong, but what? They're --  
6 they're slower than others and therefore shouldn't be  
7 executed.

8 MR. ELLIS: Yes. Their -- that their  
9 understanding was, of necessity, limited by their mental  
10 functioning.

11 QUESTION: Their understanding -- I mean, they  
12 have to have known that what they were doing is wrong.

13 MR. ELLIS: In order to be convicted in any of  
14 these States, yes.

15 QUESTION: So, isn't that the only thing that  
16 bears upon culpability?

17 MR. ELLIS: It seems to me, Your Honor, that it  
18 is not because -- because under our system of capital  
19 punishment, as it has been shaped by the decisions by this  
20 Court, we don't say that the death penalty is available  
21 for everyone who can be punished. The Court, through a  
22 variety of mechanisms, including the mitigation system,  
23 has said that among those who can be punished, some can be  
24 punished by death and others not. In a number of those  
25 cases, this Court has reached categorical rules, which is

1     what we seek here.

2                 QUESTION:  Yes, but -- but those rules were  
3     based upon the fact that some people are not as culpable.  
4     Their crime was not as heinous and so forth.  You have to  
5     narrow the category to those people who are really morally  
6     reprehensible.

7                 I do not see the necessary connection between --  
8     between intelligence and moral reprehensibility unless you  
9     truly think that -- I guess the -- I guess the result of  
10    your argument is that there -- that there is more crime  
11    among -- among the mentally retarded because they don't  
12    really understand the consequences of what they're doing.  
13    Is that a demonstrable proposition?  I don't think it is.

14                MR. ELLIS:  It is not, and I think it's untrue.

15                QUESTION:  Yes, I think it's totally untrue.  
16    So, I don't --

17                MR. ELLIS:  So, what we're saying in -- in  
18    response to -- to your question, what we are saying is  
19    that a person who commits an act -- who has mental  
20    retardation, who commits an act which is subject to  
21    punishment, does so within the scope of the limitations  
22    imposed by his disability.  And that may allow him to form  
23    a criminal intent sufficient to satisfy the criminal law  
24    for punishment in general, but in our view and now the  
25    view of -- of the people of the States manifested in these

1 statutes and of the people manifested in the Congress,  
2 those individuals who can be punished, as individuals  
3 under the age of 16 can be punished, cannot be punished by  
4 the penalty of death because, as this Court frequently  
5 reminds, death is different, a different calculus, a  
6 different set of concern. The judgment by the people as  
7 expressed in their legislatures has been these are  
8 individuals for whom we do not want the death penalty  
9 used. It's not --

10 QUESTION: And what is -- what is the reason? I  
11 mean, you -- you -- in responding to Justice Scalia's  
12 question, you -- you point out, well, these people pass  
13 the -- the test of -- of comprehension, which is a  
14 condition of culpability for execution. What test don't  
15 they pass? What is the reason for this emerging  
16 consensus?

17 MR. ELLIS: The principal reason -- and -- and  
18 it has changed a little bit as -- as the -- as the process  
19 has gone on. The original and continuing principal reason  
20 is that people, as expressed through the legislature, have  
21 reached a judgment that someone whose intellect is at this  
22 level and who has grown up with that limitation on their  
23 ability to learn -- because age of onset is part of the  
24 definition of mental retardation as well -- are not  
25 individuals for whom death is an appropriate punishment.

1           QUESTION: No. I realize that that's the  
2 judgment they're reaching, and you want us to recognize  
3 that judgment as now having constitutional significance.  
4 What I want to know is why are they reaching that  
5 judgment? What is the reason that elevates that judgment  
6 to one of constitutional significance?

7           I guess the -- the converse of my question is  
8 we're not here simply to add up numbers and say, oh, when  
9 it gets to 37, the result is different. You're -- you're  
10 asking us to make a different kind of -- of -- draw a  
11 different kind of conclusion. And what I want to know is  
12 what is it behind the judgment of these emerging States as  
13 a reason that should recommend itself to us?

14          MR. ELLIS: And -- and as I said, the principal  
15 focus is on the understanding of people of what the  
16 limitations imposed on people with mental retardation are  
17 and how it affects their comprehension --

18          QUESTION: They know it's wrong but they don't  
19 appreciate how wrong it is?

20          MR. ELLIS: Yes.

21          QUESTION: I mean, is that the idea?

22          MR. ELLIS: It is -- it is that their  
23 understanding of the wrongness of their action may be  
24 incomplete and in a sense immature in the same way or in a  
25 parallel way at least --

1           QUESTION: Mr. Ellis, I thought that you had  
2   said something different in your brief, and it was that  
3   people in this class have diminished capacity when it  
4   comes to the life or death decision. I thought you said  
5   that they will be smiling in the -- and the jury will say,  
6   well, how inappropriate. They're not expressing any  
7   remorse. That they will not be able to communicate as  
8   effectively with their -- their counsel. That it's --  
9   that it's the image of this person when the life/death  
10  decision is made that they give false clues to the trier,  
11  to the jury, and that will disable counsel from  
12  representing such a person on that life/death decision.  
13  You haven't said anything like that in your oral argument.

14           MR. ELLIS: And -- and that was the point I was  
15  adverting -- was adverting to a moment ago, that the  
16  principal reason is, as I've suggested, the shared  
17  understanding of the diminished culpability of people with  
18  mental retardation.

19           But increasingly, especially in the last 3 or 4  
20  years, there has been a second and secondary reason for  
21  enactment of the statutes which is a growing concern that  
22  individuals with mental retardation facing capital charges  
23  present a particularly and uncomfortably large possibility  
24  of wrongful conviction and thus wrongful execution. The  
25  -- the cases in both Virginia and in Illinois over the

1 last few years have made what I acknowledge is a secondary  
2 argument but one which comes up in legislative discussions  
3 with increasing frequency, that -- that in just the way  
4 you were describing, that the process of adjudicating in a  
5 capital case someone who has mental retardation and who's  
6 understanding that -- is that limited may, through a  
7 variety of mechanisms, increase the likelihood of wrongful  
8 conviction and thus unjust execution.

9 QUESTION: Counsel is not able to bring that to  
10 the jury's attention --

11 MR. ELLIS: Counsel --

12 QUESTION: -- and say, ladies and gentlemen of  
13 the jury -- in fact, he can bring mental retardation to  
14 the attention of the jury as a basis for the -- for the  
15 jury's deciding not to execute the person, can he not?

16 MR. ELLIS: He clearly can.

17 QUESTION: There's no question that in all  
18 States he can do that.

19 MR. ELLIS: That's right.

20 QUESTION: So, you're saying the jury is not  
21 constitutionally even allowed to -- to be given the  
22 option.

23 And counsel can say to the jury, during this  
24 trial, you -- you may see my client smiling inappropriate  
25 at some points. You should know that this is -- this is

1 because he's mentally retarded. He really doesn't fully  
2 comprehend what is going on here and I ask you not to take  
3 his -- his reactions into account. It seems to me that  
4 would just reaffirm the -- the more he'd smile, the more a  
5 -- the jury would say, boy, this -- this person really  
6 shouldn't be executed. He's not playing with a full deck,  
7 or whatever.

8 MR. ELLIS: There may well be cases in which  
9 that would be effective in guarding against that concern,  
10 but that also backs into the problem this Court observed  
11 in Penry, which is in a case-by-case determination,  
12 particularly in cases in which juries are making the  
13 decision, the mental retardation may in fact be a two-  
14 edged sword, that the -- that the juror, in evaluating  
15 whether or not to impose the penalty of death, may see  
16 mental retardation not only as a mitigating or potentially  
17 mitigating factor, but it may also see it as tied to  
18 prospective dangerousness. That issue is -- is present  
19 everywhere it seems to me. It is particularly present  
20 in --

21 QUESTION: Isn't it present in all cases of  
22 mental illness as well?

23 MR. ELLIS: Is -- is the difficulty of case-by-  
24 case? Yes. It --

25 QUESTION: Your arguments seem to be equally

1 applicable to those who are mentally ill. It's a two-  
2 edged sword in effect.

3 MR. ELLIS: It is but unlike mental -- in the  
4 case of the mental illness, unlike mental retardation,  
5 there has not been a manifestation of a national  
6 consensus, either in legislation or elsewhere, that  
7 suggests the American people have rejected the notion.

8 QUESTION: But the reasons you put forward to us  
9 seem to me remarkably the same.

10 MR. ELLIS: The -- the reasons that I've  
11 offered --

12 QUESTION: Am I right?

13 MR. ELLIS: -- would apply to other defendants  
14 who don't have mental retardation.

15 QUESTION: Right.

16 MR. ELLIS: But -- but they are not so closely  
17 tied to the defining characteristics of a class as they  
18 are here to have produced that consensus.

19 QUESTION: All right. So, come back and tell us  
20 how we know when there's a consensus.

21 MR. ELLIS: Your Honor, it seems to me that I  
22 read this Court's cases as saying that they will -- that  
23 the Court will look to -- that in prospective cases you  
24 will look to a variety of forms of evidence, but that any  
25 proffer of evidence of a consensus which does not have



1 substantial and in one case a discussion of recent  
2 formulation of that consensus into enactments by the  
3 legislature will be viewed with skepticism or impact --

4 QUESTION: How many States still allow the  
5 execution of retarded?

6 MR. ELLIS: Theoretically there -- there could  
7 be 20. There -- there --

8 QUESTION: In how many of those States have  
9 there been executions of retarded people since Penry the  
10 last 20 years? I count two.

11 MR. ELLIS: We -- we cannot be sure but it is  
12 roughly two or three, yes.

13 QUESTION: So, you -- you have less -- less than  
14 half of the States that have capital punishment make an  
15 exception for the mentally retarded, and you say that that  
16 constitutes a consensus. Less than half.

17 MR. ELLIS: Not by itself.

18 QUESTION: I can see the argument that there's a  
19 consensus on the other side since the other side seems to  
20 be in the majority, but you say less than half represents  
21 a consensus.

22 MR. ELLIS: I'm not sure that -- that we could  
23 conclude, for example, that people in the States that  
24 don't have the death penalty approve its imposition or if  
25 they adopted a death penalty would include within the

1 scope of this --

2 QUESTION: But we're looking to legislation, and  
3 -- and we --

4 QUESTION: But you're saying 48 constituted a  
5 consensus.

6 MR. ELLIS: Well, that -- that is another way of  
7 counting. And I don't -- I don't want to slip into what  
8 an amicus on the other side referred to as the counting of  
9 noses. This is a serious business, as this Court has  
10 recognized, and the fact that the Court has not treated  
11 large States differently from small suggests that the  
12 Court is looking at these enactments not only to count up  
13 the jurisdictions that have adopted it, but also to see  
14 whether the process by which they have been enacted is  
15 revealing of a settled moral judgment, in this case a  
16 moral judgment of revulsion --

17 QUESTION: Settled. But we also said in Penry  
18 that -- you know, the argument was made to us that there  
19 was an emerging consensus, and we rejected that. We said  
20 an emerging consensus is not enough. There has to be a  
21 consensus.

22 MR. ELLIS: And our position, on the basis of  
23 what has happened in the 13 years since Penry, is that the  
24 consensus that was then emerging is now manifest, both in  
25 the legislation and in every other indicator we have of

1 public sentiment.

2 I'll reserve --

3 QUESTION: You're not talking about polls if  
4 you're talking about public sentiment, are you?

5 MR. ELLIS: It seems to me, Your Honor, that --  
6 that the polling information, which was quite scanty then  
7 and is now quite full, as suggested in the AAMR amicus  
8 brief in McCarver, is part of the picture.

9 QUESTION: Well, wouldn't you expect if people  
10 feel that way, it would -- it would be manifested in  
11 legislation?

12 MR. ELLIS: And increasingly it is.

13 QUESTION: Yes, but are you saying that somehow  
14 polls are to be considered in addition to legislation?

15 MR. ELLIS: Polls, it seems to me, Your Honor  
16 are a way of -- of viewing the legislation, of seeing  
17 whether or not the consensus the legislation appears to  
18 reveal is in fact --

19 QUESTION: And I take it polls should be  
20 admitted in -- if we're going to talk about polls as  
21 contributing to this discussion, they should be admitted  
22 in the trial court and subject to examination by the other  
23 side. Are any -- have any of yours done that?

24 MR. ELLIS: I -- I don't believe -- I -- I'm  
25 trying to think of a case in which polling has played a

1 part in the trial court, and -- and I believe it has --  
2 none comes to mind. None comes to mind.

3 I'd like to reserve the rest of my time.

4 QUESTION: Very well.

5 Ms. Rumpz. Am I pronouncing your name  
6 correctly?

7 ORAL ARGUMENT OF PAMELA A. RUMPZ

8 ON BEHALF OF THE RESPONDENT

9 MS. RUMPZ: Yes.

10 Thank you, Mr. Chief Justice, and may it please  
11 the Court:

12 What is at stake here is this Court's long-  
13 established jurisprudence of individualized sentencing in  
14 matters of the death penalty. Penry would have -- not  
15 Penry. I'm sorry. Atkins would have this Court removed  
16 from individualized sentencing one whole group of people  
17 based upon one mere factor, and that is their alleged  
18 mental retardation.

19 QUESTION: Well, the position of the  
20 Commonwealth of Virginia is that you can execute the  
21 retarded. Is that correct?

22 MS. RUMPZ: Yes, the retarded individuals who,  
23 like Atkins, were found competent at the time of the  
24 crime, competent at the time of -- to assist his lawyers,  
25 who were found guilty of a premeditated, deliberated, and

1     calculated murder, and who --

2             QUESTION:   So, any person who has criminal  
3     responsibility can be executed no matter how retarded they  
4     are.   That's your position.

5             MS. RUMPZ:   That is the position of the  
6     Commonwealth of Virginia, yes.   And they -- of course, the  
7     jury has to be instructed, in -- in keeping with Penry I,  
8     about the mitigating value of the defendant's mental  
9     retardation.

10            QUESTION:   You -- you would not say no matter  
11    how retarded.   I mean, presumably there's some point at  
12    which the retardation is so severe that the person does  
13    not comprehend what he's doing.

14            MS. RUMPZ:   Exactly, Your Honor, but if --

15            QUESTION:   But short of that, you're saying --

16            MS. RUMPZ:   But short of that, exactly.   But  
17    the --

18            QUESTION:   Then --

19            MS. RUMPZ:   -- the DSM-TR -- IV-TR recognizes  
20    four different categories of mental retardation.   As this  
21    Court noted in Penry, the profoundly or severely retarded  
22    are not likely to face the prospect of punishment, and  
23    they're not really who we're arguing about here today.  
24    We're arguing --

25            QUESTION:   Well, why don't we say the same thing

1 then about -- about children, about young people? So long  
2 as the State can prove the premeditation, the  
3 deliberation, the -- the other requirements of -- of  
4 mental culpability, let them be executed.

5 MS. RUMPZ: But this Court has said that about  
6 16-year-olds in Stanford.

7 QUESTION: Well, let's take 5-year-olds. Would  
8 -- would you argue that 5-year-olds should be executed if  
9 -- if they have deliberated on -- on the act and -- and  
10 otherwise the State can prove the -- the mental element?

11 MS. RUMPZ: I think that that's -- that's  
12 unlikely to happen. But if -- if a person can deliberate  
13 and premeditate and if a person can commit a brutal,  
14 calculated, premeditated murder, and if a person is found  
15 competent at the time he commits that murder and competent  
16 to assist his lawyers at the time of the trial, then we're  
17 not looking at somebody whose culpability is in any way  
18 less than yours or mine.

19 QUESTION: Do you believe there is -- there is  
20 any role at all in -- in the -- in Eighth Amendment  
21 jurisprudence, death penalty jurisprudence I guess, for --  
22 for general rules to the effect that, yes, there may in  
23 some instances, let's say, of retardation be -- be proof  
24 of -- that would at least be enough to get to a jury on  
25 premeditation and -- and deliberation and so on, but that

1 the very fact of -- of retardation makes it unlikely in  
2 most cases that this can be proven and makes the evidence  
3 at least highly debatable, even in those cases that get to  
4 a jury? And therefore, the sensible thing to do in order  
5 to avoid a high risk either of wrong conviction or in the  
6 case of -- of the penalty phase a high risk of -- of  
7 unsound judgments imposing the death penalty, there ought  
8 to be a cutoff point of some sort. There ought to be a  
9 cutoff of the high risk cases from the general rules of  
10 proof. Do you -- do you take the position that there is  
11 no place in -- in death penalty jurisprudence for that  
12 kind of a -- we'll say a high risk cutoff rule?

13 MS. RUMPZ: A high risk cutoff rule of? I'm  
14 sorry. I didn't follow exactly what you were saying.

15 QUESTION: Well, I'm -- I'm assuming that, sure,  
16 there are cases of borderline retardation and so on in  
17 which the -- there would be enough evidence to get to a  
18 jury on the various mental elements for a -- for a capital  
19 sentencing. I'm also assuming that in cases of  
20 retardation, including retardation near the borderline,  
21 that that evidence is -- is highly debatable in most  
22 cases, and it is sufficiently uncertain, it is  
23 sufficiently debatable that there's a high risk that a  
24 jury is going to come to the wrong conclusion. It's going  
25 to say, oh, yes, this person really is the worst of the

1     worst and sentence him in -- in a case in which that  
2     really is not so.

3             And the reason for having a rule saying, we're  
4     going to have a -- a retardation cutoff -- a person who is  
5     retarded will be ineligible for the death penalty -- is to  
6     avoid those high risk cases and avoid the risk, in effect,  
7     of wrong imposition of the death penalty. That's why we  
8     would have such a rule, quite apart from moral judgments  
9     or anything else. I'm just talking about this practical  
10    risk judgment.

11            And my question to you is, do you say that our  
12    death penalty jurisprudence should have no place for such  
13    a -- a risk assessment rule?

14            MS. RUMPZ: That's what individualized  
15    sentencing is. That is the risk assessment rule. That's  
16    what juries --

17            QUESTION: Well, it's -- its very clear that  
18    within the category of those who ought to be subject to  
19    the death penalty, there should be individual assessment.  
20    I'm asking whether you believe that in risky cases there  
21    ought to be rules to eliminate the risk. And I take it  
22    your answer is yes, but I don't want to say that if -- if  
23    I'm being unfair to -- to your position here.

24            MS. RUMPZ: You know, I don't want to play dumb  
25    here, Justice Souter, but I'm afraid I'm not understanding



1     what -- what you're asking me. I think that the risk  
2     assessments that you're talking about play into the -- the  
3     concepts of individualized sentencing under the Eighth  
4     Amendment. The juries make those assessments. The juries  
5     determine whether someone is sufficiently culpable for the  
6     death penalty and they determine whether his mental  
7     retardation is a mitigating factor sufficient to outweigh  
8     giving the -- the defendant the death penalty.

9             QUESTION: Let's assume, because I'd like to get  
10    the answer to Justice Souter's question myself -- let's  
11    assume. You may disagree with it.

12            MS. RUMPZ: Okay.

13            QUESTION: Let's assume that there's a higher  
14    risk of inaccurate determinations by a jury, both for  
15    guilt and -- and penalty, when the person is retarded.  
16    Let's assume that. You may disagree with that, but let's  
17    assume it.

18            MS. RUMPZ: Okay, I'll assume that.

19            QUESTION: Justice -- Justice Souter asked the  
20    question, if there is that risk, is there a place in our  
21    Eighth Amendment jurisprudence for us to take account of  
22    that risk and draw some lines?

23            MS. RUMPZ: No. I -- I think -- if I understand  
24    what you're asking is -- is -- does the Eighth Amendment  
25    provide exemption from the death penalty to a class of

1 persons who may be at a greater risk for an inappropriate  
2 death sentence? I don't think the Eighth Amendment plays  
3 into -- that's what the Eighth Amendment sets up  
4 individualized consideration and individualized sentencing  
5 for.

6 QUESTION: Mr. Rumpz, I -- it's a hard question  
7 to answer because I guess you -- you would need a  
8 definition of what constitutes an inappropriate or  
9 improper death penalty, and we haven't -- we haven't  
10 established any guidelines. We have said you must leave  
11 it to the jury to take into account all mitigating  
12 factors. Whatever the jury considers mitigating it may  
13 allow. In such a scheme, I don't know -- it is  
14 meaningless to talk about an inappropriate death -- death  
15 sentence. There are no criteria. It's up to the jury.  
16 Whatever the jury considers mitigating it may allow.  
17 And --

18 MS. RUMPZ: Exactly.

19 QUESTION: I guess you're talking --

20 QUESTION: There -- there is not a proper or an  
21 improper death -- death sentence.

22 QUESTION: I guess you're talking about a class  
23 of -- you said this class of people -- and I'm not sure  
24 you meant that -- is no less culpable than you or me. But  
25 I thought the class of people we're talking about is a

1 class of people that might simply barely understand what's  
2 going on. Barely. So, they know right from wrong, but  
3 they can't understand anything complicated. They have a  
4 hard time functioning. Their emotions are no more  
5 different than yours nor mine, than anybody's. So, they  
6 feel things strongly. But they won't take in the nature  
7 of the punishment, in all likelihood, and they're quite  
8 capable of following the leader, whoever is the leader  
9 nearby. And therefore, this class of people is different  
10 enough than you, than me, that we wouldn't say they are  
11 similarly culpable. And I guess in 48 of the 50 States,  
12 people have reached that conclusion.

13 All right. Now -- now, that's I take this case.  
14 And I say 48 because I want you to disagree with me so we  
15 can then explore that.

16 (Laughter.)

17 QUESTION: But I thought that that was -- I  
18 mean, there's an argument --

19 MS. RUMPZ: I'll be --

20 QUESTION: But I want you to address, A, I've  
21 tried to make a point maybe they are not so culpable as  
22 you or me. And second, an awful lot of people in the  
23 United States seem to agree with that. In fact, I -- now,  
24 those are the two things I want you to address.

25 MS. RUMPZ: Well, first of all, I think this

1 case is a perfect illustration of the first point, the  
2 first point being that -- that they are. If you are found  
3 competent to stand trial and competent to assist your  
4 lawyers, you are like you and me. Daryl Atkins had a  
5 perfect understanding of the system, knew all about  
6 mitigation evidence, recommended witnesses to testify in  
7 mitigation, was competent to assist his lawyers, said he  
8 wanted his retardation put in front of the jury if it  
9 helped him. He had no deficits in understanding the  
10 system.

11 Moving on to the second point, 18 of the 38  
12 death penalty States have formed or have enacted some sort  
13 -- excuse me -- some sort of laws prohibiting execution of  
14 the mentally retarded. The Commonwealth's position,  
15 however, is that that 18 is -- is not written in stone  
16 because many of the statutes don't provide for retroactive  
17 application. So, you're looking --

18 QUESTION: There was a time -- there was a  
19 time --

20 QUESTION: The -- the question I have on that is  
21 you want to say less than 18.

22 MS. RUMPZ: I -- I sure do.

23 QUESTION: I want to know why not far more than  
24 18, and my reason for that is that in -- of the remaining  
25 20 -- there are two States that have executed retarded

1 people, and they account, I gather, for about 7 percent of  
2 the population. But in the remaining States that haven't  
3 passed this law yet, why would someone feel a need to pass  
4 it?

5 I noticed, which I copied here, that the  
6 Governor of Texas said, I am -- I am going to veto this  
7 law because we do not execute mentally retarded murderers  
8 today. Now -- now, he might have been wrong about that in  
9 Texas. I don't know. But regardless, why would a State  
10 that never even has executions, but they have it on the  
11 books, feel constrained to pass a law?

12 MS. RUMPZ: Well, I -- I think that -- that the  
13 fact that 18 States have done so in the last 13 years --  
14 it doesn't mean that that --

15 QUESTION: Presumably those States were  
16 executing a lot of retarded people, and that's why the  
17 laws were passed.

18 MS. RUMPZ: Well, that's an equally good  
19 assumption.

20 QUESTION: Well, I assume -- an even simpler  
21 assumption is that they were executing people.

22 Let me ask you a kind of a -- a specific example  
23 of Justice Breyer's question. In -- in your calculation,  
24 how do you account for the -- for a State like the one  
25 that I come from that has not executed somebody in over 60

1 years? Do you say, well, that's a State that apparently  
2 approves of executing the retarded? Do you say that's a  
3 State that shouldn't be counted at all? How do you  
4 account for that in your calculus?

5 MS. RUMPZ: I don't know what State you come  
6 from, first of all.

7 (Laughter.)

8 QUESTION: I'm from -- I'm from New Hampshire,  
9 and the last execution was in '38 or '39.

10 MS. RUMPZ: I guess my answer to that is that  
11 this Court has said that societal consensus are formed,  
12 and when you're looking to see whether there is a societal  
13 consensus, you look to the statutes that the -- that the  
14 legislators have passed.

15 QUESTION: But that's what we're asking about,  
16 and Justice Breyer's question, as well as Justice  
17 Souter's, is -- I think must recognize the premise that  
18 one of the great facts of life in American Government is  
19 legislative inertia. Legislatures don't act unless  
20 they're prompted to do so. And a legislature is not going  
21 to just sit down and say, oh, I think it's a good time for  
22 us to pass a -- a bill on -- against executing the  
23 mentally retarded if there's no such person on death row.  
24 Legislatures just don't operate that way.

25 MS. RUMPZ: Or there's no such person -- person

1 on death row who was not competent to -- to commit his  
2 crime, was not competent at the time of his trial, was not  
3 competent to assist his lawyers. There's a difference  
4 there.

5 QUESTION: What -- what do we know, Ms. Rumpz,  
6 about the situation in the States, the 18 States which  
7 have prohibited the execution of the retarded? Had they  
8 just gone through a tremendous number of retarded  
9 executions?

10 MS. RUMPZ: I suspect not.

11 QUESTION: Do we -- is there any -- anything in  
12 the briefs that indicates why these States passed the  
13 legislation that they did?

14 MS. RUMPZ: No, there's not. And -- and I can  
15 speculate that it's a pretty pro -- anti-death penalty  
16 machine out there working, but --

17 QUESTION: Justice Breyer says only two mentally  
18 retarded people have been executed in -- in the last I  
19 don't know what. So, that couldn't explain these 18  
20 States. So, maybe legislatures do enact laws because they  
21 think they're good laws to enact, and maybe that's why the  
22 18 did it.

23 QUESTION: No, no. I said two in -- two, but it  
24 may be a few more. That's what I'm not -- in two States  
25 in those States that haven't enacted the laws. Of course,

1 the ones that have enacted the laws don't have the  
2 executions, and some of them did execute mentally retarded  
3 people before they passed the law.

4 MS. RUMPZ: Well, the Federal Death Penalty  
5 Information Center, if you get on their web site, says  
6 that since Penry was decided in 1989, 25 mentally  
7 retarded --

8 QUESTION: We've gone through those and -- and  
9 tried bit by bit, and most of them are in these States and  
10 then some of them are -- have IQ's of 70 or over. And I  
11 would say in that -- they're -- they're erring on the side  
12 of counting mentally retarded. But if you draw the line  
13 at 70, look below it, you get to the numbers I had.

14 I'm looking to you for giving me the good  
15 numbers and -- and the lawyers. That's why I -- I figured  
16 it out it was two States, but I'm not certain.

17 MS. RUMPZ: I -- I think just because two States  
18 in -- in -- since 1989 have executed mentally retarded  
19 offenders doesn't mean that there aren't mentally retarded  
20 offenders in the pipeline waiting to be -- to become  
21 executed or waiting to go through their appellate process  
22 or -- or coming up to trial. You know and I know that  
23 this is a very slow process. These cases drag on for  
24 years and years, decades. And -- and when you look to a  
25 number like that, you necessarily have to figure in all --



1 QUESTION: Leave it at this, that since Penry --  
2 Penry. There's no consensus. Since Penry, 18 States have  
3 said by law, no. And in the remaining States, we're  
4 pretty sure that two of them, accounting for about 7  
5 percent of the population, have executed mentally retarded  
6 people and maybe double that if you want, triple it. Say  
7 there are 14 percent, 20 percent. Still, isn't that a  
8 consensus? Why not?

9 MS. RUMPZ: Well, I -- I guess I'd go back to  
10 what Justice Scalia said in one of his opinions is that  
11 that may very well just be that juries and prosecutors and  
12 society believes that the death penalty ought to be  
13 imposed on the mentally retarded less often.

14 QUESTION: Ms. Rumpz, if we stayed just with the  
15 18 plus the 12 that don't have the death penalty, then we  
16 get up to what?

17 MS. RUMPZ: 30.

18 QUESTION: Three-fifths of all the States. We  
19 get enough to, for example, block a filibuster in the  
20 Senate. That's a super majority. Why isn't that -- why  
21 doesn't that suffice?

22 MS. RUMPZ: For two reasons. First of all, I  
23 don't think you can count 18 as 18 because in some of  
24 those States, you can execute the mentally retarded.

25 QUESTION: Now, there was a time in this Court

1 -- it wasn't all that long ago -- when this Court was  
2 making prospective declarations of unconstitutionality,  
3 this case and all future cases, not past cases. Maybe the  
4 States that haven't made it retroactive haven't gotten up  
5 to speed on that once it's -- once we make a declaration  
6 of unconstitutionality, it's retrospective.

7 MS. RUMPZ: Even given that, New York has in its  
8 statute specifically that people who commit murders, while  
9 in prison, can be executed even if they're mentally  
10 retarded. So, you have to take New York from the list.  
11 Mentally retarded offenders can be executed in New York.

12 Second of all, I don't think you can add the 12  
13 non-death penalty States and -- to -- to a number of death  
14 penalty States to try to form a societal consensus.

15 QUESTION: Why not?

16 MS. RUMPZ: Well, because they may have some  
17 bearing on whether there's a consensus against the death  
18 penalty altogether.

19 QUESTION: Right, and it includes that. I can't  
20 imagine that you would say you couldn't count those  
21 States.

22 MS. RUMPZ: Well, Wisconsin tomorrow may decide  
23 to adopt a death penalty statute, and if they do, they'll  
24 have to affirmatively legislate a number of things.  
25 They'll have to pick an age where it can be imposed.

1 They'll have to decide whether they're weighing or non-  
2 weighing. They'll have to decide whether they're going to  
3 have a provision to execute the mentally retarded. All of  
4 those things have to be considered by the State  
5 legislature, and I don't think we can presume --

6 QUESTION: Let me try this another way. Do you  
7 -- do you concede that if there is a consensus, whatever  
8 that means, then this Court should make the determination  
9 that we're asked to make here?

10 MS. RUMPZ: No.

11 QUESTION: You don't agree that if there's a  
12 consensus, then the Eighth Amendment would bar it.

13 MS. RUMPZ: No. And -- and I think that --

14 QUESTION: This Court said that might, indeed,  
15 be the law in Penry, but you say we were wrong there.

16 MS. RUMPZ: No. I -- I refer the Court to  
17 Spaziano v. Florida where the -- where the Court said you  
18 don't just nose count. You -- you have to look at the  
19 whole -- the whole picture, and just because sister States  
20 decide to do one thing or not do other things doesn't  
21 necessarily bind the -- the -- this Court and the other  
22 States.

23 QUESTION: But you do not even accept the notion  
24 that if there is a consensus and we find there is, that  
25 that answers the question. I take it you do not accept

1     that.

2                 MS. RUMPZ:  I think that Spaziano says  
3     different.

4                 QUESTION:  Well, do you accept the view that  
5     there is in fact an evolutionary element in Eighth  
6     Amendment jurisprudence, that in fact it does change as --  
7     as societal notions of reasonableness in terms of cruelty  
8     change?

9                 MS. RUMPZ:  Well, this Court has said that there  
10    -- that there is.

11                QUESTION:  That's the answer.  You don't have to  
12    agree with it.  The Court said that.  That's the position  
13    I'm in too.

14                (Laughter.)

15                QUESTION:  So, you -- you accept that as the  
16    framework that we are supposed to be working in.  You  
17    submit your case on the basis of that framework.

18                MS. RUMPZ:  That's what -- that's what this  
19    Court said in Penry.

20                QUESTION:  May I ask another question on a  
21    little different line?  I think there's been sort of a  
22    consensus in the argument here that the number of  
23    executions of the mentally retarded is rather small.

24                MS. RUMPZ:  Yes.

25                QUESTION:  And does not that reflect the fact

1 that juries generally are reluctant to execute the  
2 mentally retarded, to impose the death penalty on the  
3 mentally retarded?

4 MS. RUMPZ: I -- I don't know that that reflects  
5 that. That -- that could reflect a number of things.  
6 That could -- that could reflect mitigation versus non-  
7 mitigation. It could reflect -- the brief of the --

8 QUESTION: Well, if -- if it is true, isn't --  
9 is that not one of the facts on which the Court relied in  
10 the rape case, holding that the crime of rape could not be  
11 -- command the death penalty?

12 MS. RUMPZ: Exactly. This Court looks at the  
13 laws and the application of the laws.

14 QUESTION: And the -- and the number of juries  
15 that refuse to impose the death penalty. And so, that's  
16 part of the consensus is what the juries have done as well  
17 as what State legislatures have done. Is that not right?

18 MS. RUMPZ: That is exactly right. But I don't  
19 think that you can infer that because there are X many of  
20 -- of juries who have given sentences to mentally retarded  
21 that that means juries are -- are reluctant to do it.

22 QUESTION: There are very few executions of  
23 women in the United States. There have been for many  
24 years. Do you think we should make an exception to the  
25 death penalty for women?

1 MS. RUMPZ: Absolutely not.

2 QUESTION: Because juries so rarely impose it?

3 QUESTION: No, but it is -- it is part of our

4 law. And I read you a sentence out of Coker against

5 Georgia. It is true that in the vast majority of cases,

6 at least 9 out of 10, juries have not imposed the death

7 sentence. And that was one of the reasons why the Court

8 held that the death sentence was unconstitutional. Is

9 that not correct?

10 MS. RUMPZ: Well, I think that the fact that

11 we're here arguing this case today is proof that juries

12 do, in fact, give the death penalty to mentally retarded

13 people. They -- they gave it -- the Commonwealth's brief

14 is -- is -- got two or three pages of cases where --

15 QUESTION: No. The point isn't that they never

16 do. It's the point that they rarely do.

17 MS. RUMPZ: And the fact that they rarely do,

18 like I said earlier, could mean that juries believe, just

19 as Atkins' team believes, that it -- that it should be

20 rarely imposed.

21 QUESTION: Well, it -- it also may represent a

22 jury's belief that it is a mitigating circumstance of such

23 force that they should be spared the death penalty.

24 QUESTION: Of course.

25 MS. RUMPZ: And I agree. And in this case, the

1 jury was specifically told about Atkins' mental  
2 retardation. Two doctors testified about it at length,  
3 and two different sentencing juries, after hearing from  
4 Atkins' expert witness, and after hearing the vile nature  
5 of his crime and about his 25 prior felonies, 24 jurors  
6 gave him the death sentence.

7 QUESTION: Ms. Rumpz, in making this cruel and  
8 unusual decision -- this is an issue that's come up  
9 before, but does what the rest of the world think about  
10 executing the mentally retarded -- should that have any  
11 relevance at all? I mean, we have, since the time we said  
12 we don't look to the rest of the world, been supporters of  
13 international human rights tribunals in -- for the former  
14 Yugoslavia, for the former Rwanda. But is it still, would  
15 you say, just irrelevant that most of the rest of the  
16 world thinks that mentally retarded people -- because it's  
17 inhuman to execute them?

18 MS. RUMPZ: This Court has said previously that  
19 the notions of other countries and the notions of other  
20 lands cannot play the deciding factor in what --

21 QUESTION: Not deciding. I asked you if it was  
22 relevant.

23 MS. RUMPZ: Well, it is relevant in -- as  
24 Justice Scalia said in one of his opinions, to determine  
25 whether our practice is a historical accident or not. But

1     it certainly is not relevant in deciding the Eighth  
2     Amendment principle.

3             QUESTION: Most of the world would not execute  
4     rocket scientists. Isn't that right? Including the  
5     European Union?

6             MS. RUMPZ: Most of the --

7             QUESTION: Would not execute rocket scientists.

8             MS. RUMPZ: Yes, the majority of -- of the -- of  
9     the planet --

10            QUESTION: So, we should abolish the death  
11     penalty --

12            MS. RUMPZ: -- is opposed --

13            QUESTION: -- if that's -- if that's to be a --

14            QUESTION: I asked if it was relevant.

15            MS. RUMPZ: And -- and --

16            QUESTION: I didn't ask if it was dispositive.

17            MS. RUMPZ: It's not dispositive, and it is  
18     relevant once the Eighth Amendment principle has already  
19     been established. It's not relevant in establishing  
20     whether something is cruel and unusual.

21            QUESTION: Why do you need it after it's been  
22     established?

23            QUESTION: You don't.

24            MS. RUMPZ: You don't. You -- you look -- you  
25     look after the fact to see whether -- I guess my answer I



1 guess is it's not relevant.

2 QUESTION: That's what I thought.

3 MS. RUMPZ: It's not relevant.

4 QUESTION: I was going to -- I did not have a  
5 chance to ask petitioner's counsel because his rebuttal  
6 time was running up, but it's important to me. Mentally  
7 retarded people constitute about 1 percent of the general  
8 population. I've looked through the briefs and just could  
9 not find -- are there any statistics that you know that  
10 tell us what the prison population percentage of mentally  
11 retarded people are? What is the mentally retarded  
12 population of the criminal system generally? Do you know?

13 MS. RUMPZ: I don't know, and it -- there --

14 QUESTION: Would it be the same as the general  
15 population or higher?

16 MS. RUMPZ: I -- I couldn't speculate. We don't  
17 know and it's not in this record what the -- what the  
18 prison population of mentally retarded people --

19 QUESTION: What is the status of the legislation  
20 in Virginia on this point now?

21 MS. RUMPZ: It was -- it didn't pass the House.

22 QUESTION: It passed one house but not the  
23 other?

24 MS. RUMPZ: Passed -- bicameral legislature --  
25 Virginia. Passed the Senate, didn't get out of the House.

1 QUESTION: Was it voted on in the House?

2 MS. RUMPZ: I don't know.

3 QUESTION: I thought it wasn't voted on.

4 MS. RUMPZ: I don't believe it was voted on. I  
5 think it was -- it was -- it died in a committee I think.  
6 I'm not positive about that. I was actually here when  
7 they did that, and I wasn't -- I know that it -- it didn't  
8 get past the House side of the -- of the General Assembly.

9 To -- to sum up, the national consensus issue is  
10 the key issue here today, and this Court needs to -- as --  
11 as the earlier argument or the earlier comments were, the  
12 Court needs to recognize as, Justice O'Connor, you  
13 recognized in Thompson and, Justice Scalia, you mentioned  
14 today, any decision this Court makes regarding this issue  
15 is irreversible. It is likely irreversible.

16 These States who have enacted these laws, these  
17 18 States that have enacted these laws, the longest one  
18 has been on the books for 13 years. Some of them have  
19 been on the books for less than a year. On average,  
20 they've been on the books for an average of 5 years.

21 Well, a national consensus has to be broad,  
22 clear, and enduring. Certainly statutes with an average  
23 age of 5 years don't establish an enduring national  
24 consensus against something. That's a blip in the radar  
25 screen of public opinion, or to borrow from Justice

1     Scalia, it's a pendulum swing in public opinion. Now,  
2     these State legislatures may decide in 2 years --

3             QUESTION: How can you say it's a pendulum swing  
4     when it's all in the same direction? I thought a pendulum  
5     went back and forth.

6             (Laughter.)

7             MS. RUMPZ: It's a pendulum swing one way.

8             QUESTION: It only goes in one direction at a  
9     time, doesn't it?

10            (Laughter.)

11            MS. RUMPZ: But -- but my point is this practice  
12     has been allowed since the Bill of Rights was adopted in  
13     1789, and we have 18 States, some of which can't decide in  
14     between themselves whether the mentally retarded should or  
15     shouldn't be executed, with an average age of 5 years.  
16     Now, certainly 5 years is insufficient to determine  
17     whether there is an enduring national consensus against  
18     something. These States, as somebody recognized here  
19     earlier, may determine in 2 or 3 years that this is an  
20     experiment that just didn't work.

21            QUESTION: Well, do you accept that there's a  
22     consensus and want to argue it's just not enduring? Or  
23     what is it you're arguing?

24            MS. RUMPZ: No. I -- I think there's not a  
25     consensus, first of all, and my backup position is if

1     there is a consensus, it certainly isn't one of an  
2     enduring nature. I don't think 18, even if you say all 18  
3     of the States and ignore the retrospective/prospective --  
4     I don't know 18 out of 38 is a consensus. It's not even a  
5     majority, let alone a consensus.

6             But even putting aside that for the matter, you  
7     -- even if you put that aside, we don't anything that's  
8     enduring. We don't have anything that shows that the  
9     long-term public opinion is against execution of the  
10    mentally retarded. We have a blip in the radar screen of  
11    public opinion which may change in 2 years. It may change  
12    in 3 years.

13            If Osama bin Laden was brought back to the  
14    United States tomorrow, found to be mentally retarded and  
15    not being able to -- to be executed, public opinion would  
16    change, and there would be -- the blip in the radar screen  
17    would go away and the public opinion would be something  
18    different. But if this Court were to constitutionalize  
19    the prohibition, the public wouldn't have any opportunity  
20    to change their mind.

21            And as this Court has said before, the States  
22    are laboratories. The States are laboratories for novel  
23    social experimentation. Well, this experiment is just  
24    beginning. This Court -- this -- there's -- there's --  
25    this Court should not call a halt to an experiment that

1 has been on average for 5 years, especially when, as  
2 Justice O'Connor, you recognized in -- in Thompson, that  
3 halt could be irreversible.

4 And if there are no further questions.

5 QUESTION: Thank you, Ms. Rumpz.

6 Mr. Ellis, you have a little less than a minute  
7 left.

8 REBUTTAL ARGUMENT OF JAMES W. ELLIS

9 ON BEHALF OF THE PETITIONER

10 MR. ELLIS: I'll endeavor to answer a couple of  
11 the questions that this Court has raised.

12 First, with regard to Justice Kennedy's question  
13 about prison population, we don't have a reliable  
14 statistic. There is some indication, especially for very  
15 low level crimes, that there may be a higher level of  
16 people with mental retardation than in the general  
17 population.

18 With regard to the States, Spaziano, it seems to  
19 me is a very important case here because it says we're not  
20 simply counting up States. We're seeing whether the  
21 States have reached a moral judgment, have reached a  
22 conclusion that the -- in this case, the understanding of  
23 people with mental retardation, their ability to control  
24 their behavior, their understanding of the context in  
25 which they behave, the maturity and responsibility with

1     which they reach moral judgments is -- makes the death  
2     penalty unacceptable.

3             CHIEF JUSTICE REHNQUIST:   Thank you, Mr. Ellis.

4             The case is submitted.

5             (Whereupon, at 12:28 p.m., the case in the  
6     above-entitled matter was submitted.)