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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

Official

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 SCLIA: -- 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.

Official

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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