

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DARYL RENARD ATKINS, :
4 Petitioner :
5 v. : No. 00-8452
6 VIRGINIA. :

7 - - - - -X
8 Washington, D.C.
9 Wednesday, February 20, 2002

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:27 a.m.

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

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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 consensuses 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.)

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