## Low I.Q. and the Death Penalty

By Morgan Cloud and George Shepherd, February 20, 2002, *The New York Times*

**ATLANTA—** The Supreme Court will be asked today to decide "whether the execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment." The case involves Daryl Atkins, who was sentenced to die in Virginia for a 1996 murder and kidnapping. Mr. Atkins has an I.Q. score of 59, below the score of 70 that is commonly used to identify mental retardation.

The court will consider whether the intellectual limitations caused by mental retardation are so substantial that executing the retarded is punishment that is "cruel and unusual" and unconstitutionally disproportionate to the culpability of mentally retarded offenders. In 1988, the court ruled that imposing the death penalty upon defendants who were younger than 16 when they committed their crimes violated the Eighth Amendment. The court cited teenagers' "inexperience, less education, and less intelligence" as reasons "their irresponsible conduct is not as morally reprehensible as that of an adult."

In death penalty jurisprudence, the key questions often are not about guilt or innocence, but instead whether a person's culpability is great enough to warrant the extraordinary penalty of death. We recently completed a study that sheds light on the intellectual capacities of mentally retarded people to understand the most common legal concepts. Our results support the idea that mentally retarded people as a class, like those younger than 16 as a class, lack sufficient culpability to permit the use of the death penalty.

Researchers in the study tested some four dozen mentally retarded subjects to determine if they could understand the Miranda warnings, including warnings that advise suspects that they have the right to remain silent and that any statements they make may be used against them. The performance of the mentally impaired people was then compared with that of a control group of people of average or above average intelligence.

The results were both striking and discouraging. The great majority of the mentally retarded subjects failed to understand that the words "You have a right to remain silent" mean that a person does not have to speak. This was true even when the vocabulary of the Miranda warnings was simplified. They also failed to comprehend the consequences of confessing. Most of these subjects did not understand that the defense attorney is not the defendant's adversary. In contrast, the vast majority of the non-disabled control group understood the individual words, the warnings and their legal significance.

The impact of retardation on participation in the legal process is substantial. Mentally retarded people are more likely than people with average I.Q.'s to confess, and they are far more likely to confess to crimes they did not commit. When mentally retarded suspects waive their Fifth Amendment rights and confess, their waivers are not, in all likelihood, "knowing and intelligent," as the Supreme Court's decisions have long required.

There is a growing national consensus that the death penalty -- even if appropriate in some circumstances -- may nonetheless be an excessive punishment that violates the Eighth Amendment when inflicted upon those who lack the capacity to evaluate the consequences of their conduct. For this reason, 18 states of the 38 that allow capital punishment have enacted laws prohibiting the execution of the mentally retarded.

When it prohibited execution of adolescents under the age of 16, the Supreme Court suggested that the death penalty should only be imposed on "a fully rational, choosing agent." A person intellectually incapable of understanding the meaning of the most basic warnings given to defendants in the criminal justice system does not meet this standard. Justice is not achieved by executing people who cannot comprehend the most rudimentary legal concepts.

# Justices Hear Florida Case on Measuring Inmates' Mental Disabilities

By ADAM LIPTAK MARCH 3, 2014 *The New York Times*

WASHINGTON — A majority of the Supreme Court seemed skeptical on Monday of how Florida decides who is eligible to be spared the death penalty on account of intellectual disabilities. The state uses an I.Q. of 70 as a rigid cutoff, and several justices suggested that it should take account of a standard margin of error or consider additional factors.

Other justices seemed inclined to allow Florida and other states to decide for themselves how to determine who is "mentally retarded" and so ineligible for execution under the court's 2002 decision in Atkins v.Virginia.

The Atkins decision gave states substantial discretion and only general guidance. It said a finding of intellectual disability requires proof of three things: "subaverage intellectual functioning," meaning low I.Q. scores; a lack of fundamental social and practical skills; and the presence of both conditions before age 18. The court said I.Q. scores under "approximately 70" typically indicate intellectual disability.

As Monday's argument progressed, it became clear that what divided the two groups of justices was more than the particular case. Their disagreement was a larger one about the role of scholarly and professional expertise in the resolution of legal disputes.

"We didn't base our decision in Atkins upon a study of what the American Psychiatric Association and other medical associations considered to be mental retardation," Justice Antonin Scalia said. "We based it on what was the general rule that states had adopted."

Justice Anthony M. Kennedy noted that the court will hear a case on Wednesday involving economic theory.

"Do you think we defer to psychiatrists and psychologists any more or any less than we do to economists?" he asked Seth P. Waxman, a lawyer for the death row inmate in the case, Freddie L. Hall.

Mr. Waxman said the court should defer "much, much, much more" to the first group because, he said, the condition in question "can only be appropriately diagnosed by professionals."

The problem with Florida's rigid cutoff, Mr. Waxman said, is that it does not take into account standard measures of error. That is, he said, not a matter of differences in professional opinion. "It is simply a statistical fact," he said.

Mr. Hall had generally scored slightly above 70 on I.Q. tests. If the standard error measurement was applied, Mr. Waxman said, the true result could be as many as five points lower. He added that a cutoff of 75 would be permissible.

Allen Winsor, Florida's solicitor general, said his state's approach was "a reasonable legislative judgment," one he said was followed in eight states.

But Justice Kennedy said the approach amounted to declining "to follow the standards that are set by the people that designed and administer and interpret the tests."

Justice Stephen G. Breyer suggested that the court could require an expert to explain statistics to the judge or jury deciding whether the inmate had an intellectual disability. "What is so terrible about doing it?" he asked.

Mr. Winsor responded that "what is so terrible about doing it is you would end up increasing the number of people who would be eligible for a mental retardation finding."

"Florida has an interest in ensuring," he said, "that the people who evade execution because of mental retardation are people who are, in fact, mentally retarded."

Justice Kennedy and Justice Elena Kagan said the effect of Florida's approach is to stop consideration of the other two factors in the analysis suggested in the Atkins decision.

The case at issue Monday, Hall v. Florida, No. 12-10882, arose from the 1978 murder of Karol Hurst, who was 21 and seven months pregnant when Mr. Hall and an accomplice forced her into her car in a supermarket parking lot. She was found in a wooded area, where she had been beaten, sexually assaulted and shot.

Mr. Hall was convicted of murdering Ms. Hurst and sentenced to death.

Justice Breyer, who has long been concerned with the constitutionality of keeping inmates on death row indefinitely, noted that Mr. Hall had been on death row "for over 35 years." The justice has not attracted many allies on that particular critique of the American capital justice system, but on Monday Justice Kennedy seemed to join him.

"The last 10 people Florida has executed have spent an average of 24.9 years on death row," Justice Kennedy said. "Do you think that that is consistent with the purposes of the death penalty, and is it consistent with sound administration of the justice system?"

Justice Scalia said the inquiry was misdirected. "General Winsor," he said, "maybe you should ask us that question, inasmuch as most of the delay has been because of rules that we have imposed."