**Supreme Court to Consider Legal Standard Drawn From ‘Of Mice and Men’**

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WASHINGTON — In 2002, the Supreme Court barred the execution of the intellectually disabled. But it gave states a lot of leeway to decide just who was, in the language of the day, “mentally retarded.”

Texas took a creative approach, adopting what one judge there later called “the Lennie standard.” That sounds like a reference to an august precedent, but it is not. The Lennie in question is Lennie Small, the dim, hulking farmhand in John Steinbeck’s “Of Mice and Men.”

The Lennie in question is fictional.

Still, Judge Cathy Cochran of the Texas Court of Criminal Appeals wrote in 2004 that Lennie should be a legal touchstone.

“Most Texas citizens might agree that Steinbeck’s Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt” from the death penalty, she wrote. “But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty?”

Judge Cochran, who later said she had reread “all of Steinbeck” in the 1960s while living above Cannery Row in Monterey, Calif., listed seven factors that could spare someone like Lennie, whose rash killing of a young woman was seemingly accidental.

For instance: “Has the person formulated plans and carried them through, or is his conduct impulsive?”

And: “Can the person hide facts or lie effectively?”

This fall, in Moore v. Texas, No. 15-797, the United States Supreme Court will consider whether the Court of Criminal Appeals, Texas’ highest court for criminal matters, went astray last year in upholding the death sentence of Bobby J. Moore based in part on outdated medical criteria and in part on the Lennie standard.

Mr. Moore killed James McCarble, a 70-year-old grocery clerk, during a robbery in 1980 in Houston.

No one disputes that Mr. Moore is at least mentally challenged or, as a psychologist testifying for the prosecution put it at a 2014 hearing, that he most likely “suffers from borderline intellectual functioning.”

Mr. Moore reached his teenage years without understanding how to tell time, the days of the week or the relationship between subtraction and addition. His I.Q. has been measured as high as 78 and as low as 57, averaging around 70. On the other hand, the psychologist testified, the young Bobby Moore had shown skill at mowing lawns and playing pool.

The state judge who heard this evidence, relying on current medical standards on intellectual disability, concluded that executing Mr. Moore would violate the Eighth Amendment’s ban on cruel and unusual punishment.

But the Court of Criminal Appeals reversed the ruling, saying the judge had made a mistake in “employing the definition of intellectual disability presently used.”

Under medical standards from 1992, endorsed in Judge Cochran’s 2004 opinion, Mr. Moore was not intellectually disabled, the appeals court said. The court added that the seven factors listed in the 2004 opinion weighed heavily against Mr. Moore. He had, for instance, worn a wig during the robbery and tried to hide his shotgun in two plastic bags, which prosecutors said was evidence of forethought and planning.

In dissent, Judge Elsa Alcala said the 1992 medical standards used by the majority were “outdated and erroneous.” As for the seven factors, she wrote, “The Lennie standard does not meet the requirements of the federal Constitution.”

“I would set forth a standard,” Judge Alcala wrote, “that does not include any reference to a fictional character.”

In a brief, Ken Paxton, the state’s attorney general, defended the seven factors, though without mentioning Lennie. He also urged the Supreme Court to let judges and juries, rather than medical professionals, decide who should be spared the death penalty.

That echoed a 2014 dissent from Justice Samuel A. Alito Jr., who said it was a bad idea to rely on the shifting views of medical experts to decide who must be spared execution based on intellectual disability. The majority in that case, Hall v. Florida, struck down Florida’s I.Q. score cutoff of 70 as too rigid.

In doing so, Justice Alito wrote, the majority had effectively overruled the part of its 2002 Atkins v. Virginia decision that allowed states to use their own definitions of intellectual disability, and instead imposed “the evolving standards of professional societies, most notably the American Psychiatric Association.

An article last year in the Yale Law Journal presented an intriguing alternative to the evolving standards that bothered Justice Alito. Drawing on historical materials, Michael Clemente, then a law student at Yale and now a law clerk for a federal judge, demonstrated that the original understanding of the Eighth Amendment, based on English common law, barred the execution of people whose mental abilities were below those of an ordinary child of 14.

Such a standard, steeped in originalism, a mode of constitutional interpretation embraced by Justice Clarence Thomas and the late Justice Antonin Scalia, would seem to spare both Mr. Moore and Lennie. On the other hand, it is not clear that Lennie himself would have escaped execution under Texas’ Lennie standard. He did, for instance, try to conceal his crime, hiding his victim’s body.

In a 1937 interview with The New York Times, John Steinbeck said he had based Lennie on a man who had killed a ranch foreman but was shown leniency. “Lennie was a real person,” Mr. Steinbeck said. “He’s in an insane asylum in California right now.”

Seventy-five years later, Mr. Steinbeck’s son Thomas heard about Texas’ Lennie standard.

“The character of Lennie was never intended to be used to diagnose a medical condition like intellectual disability,” Thomas Steinbeck, who died this month, said in a 2012 statement. “I find the whole premise to be insulting, outrageous, ridiculous and profoundly tragic.”

“I am certain that if my father, John Steinbeck, were here, he would be deeply angry and ashamed to see his work used in this way,” he said. “And the last thing you ever wanted to do was to make John Steinbeck angry.”