BEYOND A REASONABLE DOUBT: THE CONSTITUTIONALITY OF GEORGIA'S BURDEN OF PROOF IN EXECUTING THE MENTALLY RETARDED

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> "[T]he state may still execute people who are in all probability mentally retarded. The State may execute people who are more than likely mentally retarded. The State may even execute people who are almost certainly mentally retarded. Only if a mentally retarded person succeeds in proving their retardation *beyond a reasonable doubt* will his or her execution be halted."[1]

> "The idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness."[2]

I. INTRODUCTION

Almost no one disagrees with the statement that Warren Lee Hill, Jr. is "mentally retarded,"[3] not even the state court judge in Hill's case.[4] In fact, Hill has a level of functioning that is shared with only 3% of the population.[5] And although both the Georgia and United States Constitutions categorically prohibit the execution of the mentally retarded,[6] the state of Georgia has maintained that Hill will be executed simply because Hill cannot

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[1] Head v. Hill, 587 S.E.2d 613, 630 (Ga. 2003) (Sears, J., dissenting) (emphasis added).

[2] *In re* Hill, 715 F.3d 284, 302 (11th Cir. 2013) (Barkett, J., dissenting).

[3] The term "mental retardation" has been largely superseded by the term "intellectual disability." However, the former phraseology will be used in this Note as the statutes and caselaw use the phrase "mental retardation."

[4] *See* Kate Brumback, *Ga. to Review Tough Death Penalty Provision*, USA TODAY (Oct. 19, 2013), http://www.usatoday.com/story/news/nation/2013/10/19/ga-to-review-tough-death-penalty-provision/3028519/ (stating that "a state court judge concluded that Hill was probably mentally disabled" and given such a determination, in most other states this would be enough to render the death penalty inapplicable).

[5] Brief for Appellee at *5, Head v. Hill, 587 S.E.2d 613 (Ga. 2003) (No. S03A0559), 2003 WL 23278512, at *5 (referencing AM. ASS'N OF MENTAL RETARDATION (AAMR), MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 14 (9th ed. 1992)).

[6] Fleming v. Zant, 386 S.E.2d 339, 340 (1989) (stating that in light of the apparent societal consensus against executing the mentally retarded, such an execution would constitute cruel and unusual punishment under the Georgia Constitution); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding the execution of the mentally retarded constitutes a violation of the Eighth Amendment).

prove to a jury that he is mentally retarded *beyond a reasonable doubt*.[7]

Over the past twenty years, Hill has filed numerous appeals, exhausting all direct appeals, state habeas petitions, and even federal habeas petitions.[8] But the state courts, federal district courts, and the Eleventh Circuit have refused to commute Hill's sentence to life in prison despite the undisputed, unqualified ban on the execution of mentally retarded defendants. Most of these rulings have relied on a technical line of reasoning that would ultimately render the execution of Hill permissible while simultaneously being construed as consistent with Supreme Court precedent deeming such executions *unconstitutional*.[9] These decisions have turned on the fact that *Atkins v. Virginia*—after

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[7] The Georgia Code permits a jury to find a defendant guilty but mentally retarded, if the fact-finder "finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded." O.C.G.A. § 17-7-131(c)(3) (2013). The relevant portions of section 17-7-131 for this Note state:

> (a) For purposes of this Code section, the term:
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> . . . .
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> (3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.
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> . . . .
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> (c) In all criminal trials in any of the courts of this state wherein an accused shall contend that he was insane or otherwise mentally incompetent under the law at the time the act or acts charged against him were committed, the trial judge shall instruct the jury that they may consider, in addition to verdicts of "guilty" and "not guilty," the additional verdicts of "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill at the time of the crime," and "guilty but mentally retarded."
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> . . . .
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> (3) The defendant may be found "guilty but mentally retarded" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.
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> . . . .
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> (j) In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

[8] *See infra* Part II.E.

[9] *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (explaining that the execution of a mentally retarded offender would violate the Eight Amendment).

holding that the Constitution prohibits these executions[10]—unambiguously left the task of determining the procedural and definitional contours of implementing the ban to the states.[11] Thus, courts have enforced Georgia's "beyond a reasonable doubt" standard as it's chosen method of implementing *Atkins*, even though these "constitutional" means threaten the unconstitutional result: the execution of mentally retarded persons.[12] As such, the courts have held that although there necessarily will be an unconstitutional result due to this "beyond a reasonable doubt standard" (i.e., mentally retarded defendants who cannot reach this bar will inevitably be put to death), this result is arrived at by "constitutional means" because of the rationale that Georgia is just *defining* mental retardation pursuant to the *Atkins* directive that states choose the definition and procedures for ensuring the ban.

The Supreme Court has declined to provide relief for Hill,[13] and thereby prevented Hill's case from being heard in the only courtroom left that could undo the state court determination. By denying certiorari, the Court has tacitly approved of the Eleventh Circuit's reasoning that the "Antiterrorism and Effective Death Penalty Act"[14] prevents federal courts from intervening in this instance.[15] The Court's inaction justifies the concern that "even an execution that would clearly violate the Constitution somehow cannot be stopped."[16]

Hill's plight has spawned a nation-wide protest.[17] Several articles and interest groups have since surfaced, demanding a

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[10] *Id.*

[11] *Id.* at 317.

[12] *See infra* Part III.

[13] *In re* Hill, 134 S. Ct. 118 (2013) (denying a petition for writ of habeas corpus).

[14] 28 U.S.C. § 2254 (2012). This Act is commonly referred to as the "AEDPA." The AEDPA will be discussed in Part III of this Note.

[15] *See generally In re* Hill, 715 F.3d 284 (11th Cir. 2013) (vacating the conditional story of execution).

[16] Brian Evans, *Supreme Court Rejects Warren Hill Petition*, AMNESTY INTERNATIONAL USA BLOG (Oct. 7, 2013), http://blog.amnestyusa.org/us/breaking-supreme-court-rejects-warren-hill-petition/.

[17] *See, e.g.*, Martin Clancy, *Supreme Court vs. Warren Lee Hill: Column*, USA TODAY (Sept. 29, 2013), http://www.usatoday.com/story/opinion/2013/09/29/warren-hill-supreme-court-disabled-murder-column/2892171/ (explaining that there is "no doubt [Hill] is intellectually disabled and should be protected from execution"); Huffington Post News for Warren Lee Hill, HUFFINGTON POST, http://www.huffingtonpost.com/news/warren-lee-hill (listing current articles regarding Warren Lee Hill, Jr.); Matt Kwong, *Warren Hill, Mentally Disabled Man, Tests America's Harshest Execution Law*, CBC NEWS (Oct. 23, 2013), http://www.cbc.ca/news/world/warren-hill-mentally-disabled-man-tests-america-s-harshest-execution-law-1.2187681

change in the Georgia statute.[18] In response, the House Judiciary Non-Civil Committee for the Georgia General Assembly held an out-of-session informational hearing regarding the "beyond a reasonable doubt" standard.[19] However, Rep. Rich Golick, Chairman of the Committee who presided over the hearing, made it clear that the hearing was solely for "educational purposes."[20] It remains unclear whether the legislature will do anything at all to alter the standard.

This Note considers whether the application of the "beyond a reasonable doubt" standard in determining whether a defendant is mentally retarded violates the Georgia and United States Constitutions.[21] Part II of this Note discusses the history and development of the constitutional ban on executing the mentally retarded. It also identifies those questions left for the states to decide and describes how Georgia has interpreted its responsibilities in implementing the ban. Part II returns to Hill's case as an example of the conflict created by Georgia's implementation of the constitutional standard. Part III then analyzes the constitutionality of Georgia's "beyond a reasonable doubt" standard by critiquing the arguments propounded by the Georgia Supreme Court and the Eleventh Circuit in the *Hill* cases. This Note concludes that the application of Georgia's standard *is* unconstitutional and that the Georgia General Assembly should amend the statute to ensure the rights of mentally retarded defendants are protected as required by law. Such a change would

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("Hill's case, however, has persuaded Georgia's lawmakers to study whether their burden of proof for mentally disabled death-row inmates is too harsh."); Richard Wolf, *Supreme Court Won't Stop Execution for Mental Incapacity*, USA TODAY (Oct. 7, 2013), http://www.usatoday.com/story/news/nation/2013/10/07/supreme-court-death-penalty-mental-retardation/2924709/ (discussing now Hill's case has "galvanized the nation's disability community").

[18] *See, e.g.*, ALL ABOUT DEVELOPMENTAL DISABILITIES, http://aadd.org/ (last visited June 10, 2014); GA. ASS'N CRIM. DEF. LAW., http://gacdl.memberlodge.org/ (last visited June 10, 2014); GA. COUNCIL ON DEVELOPMENTAL DISABILITIES, http://www.gcdd.org/ (last visited June 10, 2014).

[19] The Burden of Proof Requirement for Determining Mental Retardation as it Relates to the Administration of the Death Penalty: Hearing Before H. Comm. on the Judiciary (Non-Civil), 2013 Out of Session (Ga. 2013), *available at* http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx (click on the "10.24.13" hyperlink and the video will download) [hereinafter Hearing].

[20] *Id.* (statement of Rep. Rich Golick, Chairman, Comm. on the Judiciary (Non-Civil)).

[21] For brevity's sake, this Note will refer to "the application of the 'beyond a reasonable doubt' standard in the context of executing the mentally retarded" as "the standard." This Note does not challenge the "beyond a reasonable doubt" standard *generally*, but asks only whether the *application* of the standard *in this context* is unconstitutional.

ensure that no other defendant faces Hill's paradox of possessing a clear constitutional right that somehow no court will enforce.

II. BACKGROUND

To assess the constitutionality of Georgia's "beyond a reasonable doubt" standard, it is necessary to discuss the historical relationship between the death penalty and mentally retarded defendants that ultimately culminated in the Supreme Court's holding in *Atkins* that the Constitution prohibits the execution of the mentally retarded.[22] The *Atkins* holding and the issues it left open provide an essential framework for analyzing Georgia's standard. Finally, an in-depth examination of Georgia's precedent and history in this area is essential prior to any discussion about the constitutionality of Georgia's standard.

A. PAVING THE ROAD TO *ATKINS* AND THE CONSTITUTIONAL BAN ON EXECUTING THE MENTALLY RETARDED

In 1989, the Supreme Court of the United States first tackled whether the Eighth Amendment barred the execution of a defendant who is mentally retarded in *Penry v. Lynaugh*.[23] Testimony at the pretrial competency hearing and at trial demonstrated that the defendant, Penry, was mentally retarded;[24] despite this, Penry was convicted of capital murder and sentenced to death.[25] In his petition for certiorari Penry argued that executing someone who was mentally retarded constitutes cruel and unusual punishment.[26] Penry contended that those who are mentally retarded do not possess the requisite level of moral culpability that renders the death penalty justifiable.[27] Penry further alleged "an emerging national consensus against executing

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[22] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[23] 492 U.S. 302, 313 (1989).

[24] The Supreme Court, in quoting the American Association on Mental Retardation (AAMR), defined persons who are mentally retarded as having " 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.' " *Id.* at 308 n.1. The Court also noted that, according to the AAMR, persons with IQs of 70 and below were considered to fall into this category. *Id.* Testimony showed that Penry had an IQ in the low 50s and the mental age of a six and a half year old at the time of trial. *Id.* at 308.

[25] *Id.* at 310.

[26] *Id.* at 328–29.

[27] *Id.*

the mentally retarded."[28] The Court agreed that the prohibition on cruel and unusual punishment does encompass "evolving standards of decency,"[29] but it did not find sufficient evidence of an "emerging national consensus" against executing the mentally retarded.[30] At that time, only one state had enacted legislation to ban the execution of the mentally retarded and only one other state had passed a statute with a similar ban that had yet to go into effect.[31]

Given the lack of evidence of an evolving consensus against executing a mentally retarded person and due to other problems related to the diverse capacities of persons of all levels of mental retardation,[32] the Court held that the Eighth Amendment did not include a blanket prohibition on the execution of mentally retarded persons.[33] However, the Supreme Court left the door open for a challenge when the national climate had changed such that there was an emerging national trend.[34] The Court also held that juries must be allowed to consider mental retardation as a mitigating factor in determining a sentence.[35] Because Penry's sentencing instructions did not allow the jury to consider his mental disability as a mitigating factor, the Court vacated Penry's sentence.[36]

State legislators responded quickly to the Supreme Court's unwillingness to recognize a categorical ban on the execution of the mentally retarded. In 1990, the Tennessee and Kentucky

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[28] *Id.* at 329.

[29] *Id.* at 330–31. The Court found that in determining what these "evolving standards" included, the courts must look to objective evidence of how society currently viewed a particular punishment, and the best evidence of these views could be found in legislation and data about sentencing juries. *Id.* at 331.

[30] *Id.* at 335.

[31] *Id.* at 334. *See* O.C.G.A. § 17-7-131(j) (2013) (prohibiting the death sentence for those instances where the defendant is pleading guilty but mentally retarded or where a jury determines the defendant is guilty but is also mentally retarded); MD. CODE ANN., art. 27 § 412(f)(3)–(g)(1) (repealed 2002). Maryland has since abolished the death penalty in its entirety, effective October 1, 2013. 2013 Md. Laws c. 156, § 3, eff. Oct. 1, 2013.

[32] *Penry*, 492 U.S. at 338–39.

[33] *Id.* at 340.

[34] *Id.* ("While a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of society,' there is insufficient evidence of such a consensus today.").

[35] *Id.* at 337–38. Specifically, the Court held, "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination whether 'death is the appropriate punishment' can be made in each particular case." *Id.* at 340.

[36] *Id.* at 328, 340.

legislatures implemented prohibitions on the execution of the mentally retarded.[37] In the years between 1991 and 2000, nine more states followed suit and passed similar statutes.[38] In 2001 alone, five more states enacted similar legislation.[39] By the time of *Atkins*, eighteen states had passed statutes banning the execution of mentally retarded persons.

B. *ATKINS V. VIRGINIA*: EXECUTING THE MENTALLY RETARDED VIOLATES THE EIGHTH AMENDMENT

In 2002, thirteen years after *Penry*, the Supreme Court revisited the constitutionality of executing the mentally retarded in *Atkins*.[40] This time, the Court held categorically that execution of mentally retarded persons constituted cruel and unusual punishment in violation of the Eighth Amendment.[41]

In 1996, Daryl Atkins and William Jones abducted, robbed, and murdered Eric Nesbitt.[42] During the guilt and innocence phase of the trial, Atkins did not introduce any evidence regarding his mental retardation nor did he raise the insanity defense; instead, he alleged that it was Jones who killed the victim.[43] Seemingly on the strength of Jones's testimony,[44] Atkins was convicted of armed robbery, kidnapping, and capital murder.[45] During the sentencing phase, the State introduced two aggravating factors—future dangerousness[46] and the "vileness of the offense"—in order to

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[37] TENN. CODE ANN. § 39-13-203 (1990); KY. REV. STAT. ANN. §§ 532.130, 532.135, 532.140 (1990).

[38] ARK. CODE ANN. § 5-4-618 (1993); 2002 Colo. Leg. Serv. 318 (West); IND. CODE §§ 35-36-9-2 to 35-36-9-6 (1994); KAN. STAT. ANN. § 21-4623 (1994) (repealed by Laws 2010, ch. 136, § 307, eff. July 1, 2011); NEB. REV. STAT. § 28-105.01 (1998); N.M. STAT. ANN. § 31-20A-2.1 (1992) (repealed by L. 2009, Ch. 11, § 5, eff. July 1, 2009); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); S.D. CODIFIED LAWS § 23A-27A-26.1 (2000); WASH. REV. CODE § 10.95.030 (1993).

[39] ARIZ. REV. STAT. § 13-703.02 (2001) (renumbered as § 13-753); CONN. GEN. STAT. § 53a-46a (West 2001); FLA. STAT. § 921.137 (West 2001); MO. REV. STAT. § 565.030 (2001); N.C. GEN. STAT. § 15A-2005 (2001).

[40] Atkins v. Virginia, 536 U.S. 304 (2002).

[41] *Id.* at 321.

[42] *Id.* at 307.

[43] *Id.*

[44] Jones testified against Atkins at trial as part of a plea deal. *Id.* at 307 n.1. Atkins also testified at trial, however his testimony was not only incoherent, but was also inconsistent with the initial statement he gave to the police. *Id.* at 307 n.2. Jones, on the other hand, did not initially provide the police with any statements. *Id.*

[45] *Id.* at 307.

[46] Atkins had prior felony convictions for assault and robbery. *Id.* at 308.

establish the eligibility for the death penalty.[47] In response, Atkins put on one witness: a psychologist who testified that Atkins was mildly retarded.[48] The jury sentenced Atkins to death.[49]

Atkins appealed to the Virginia Supreme Court, arguing that he was ineligible for the death penalty because he was mentally retarded.[50] The court, following *Penry*, rejected this argument and refused to commute his sentence "merely because of his IQ score."[51] The United States Supreme Court granted certiorari in order to address the issue of executing the mentally retarded.[52]

Like *Penry* before it, the *Atkins* Court emphasized that the scope of the Eighth Amendment's ban depended on evolving standards of decency.[53] The Court noted that this standard must be based on objective evidence, as shown by (1) legislative enactments and (2) the Court's own judgment on the implications of the Eighth Amendment in this arena.[54]

As to the first prong, the Court noted the flurry of state bans that arose in the years after *Penry*.[55] The Court noted that the majority of death penalty states did not explicitly prohibit the execution of the mentally retarded, but found it persuasive that all states who entertained legislative bans passed them with overwhelming approval.[56] Furthermore, in jurisdictions where there was no such prohibition, the Court found the actual exercise

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[47] *Id.*

[48] *Id.* In making this determination, the psychologist relied on interviews with those who knew Atkins (including family members and previous doctors), school and court records, and an IQ test administered by the witness demonstrating that Atkins had an IQ of 59. *Id.* at 308 & n.4.

[49] *Id.* at 309.

[50] *Id.* at 310. Note, it appears that Atkins argued that given his IQ of 59, he could not be executed, citing the fact that no one of that low an IQ had been put to death in Virginia. Atkins v. Commonwealth of Virginia, 534 S.E.2d 312, 318 (Va. 2000). The Virginia Supreme Court disagreed, citing to *Penry* to support the idea that the execution of someone who may be mentally retarded is not prohibited under the Constitution. *Id.* at 319.

[51] *Atkins*, 536 U.S. at 321.

[52] *Id.* at 310.

[53] *Id.* at 311–12 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (internal quotation marks omitted)).

[54] *Id.* at 312–13. The Court added that in exercising its "own judgment," the Court should ask whether there is any reason to disagree with societal or legislative perspectives on banning executions of the mentally retarded. *Id.* at 313.

[55] *Id.* at 313–15.

[56] *Id.* at 315–16. The Court found this trend impressive given the national support of anticrime legislation at the time. *Id.*

of such executions to be increasingly uncommon.[57] Thus, the Court found sufficient evidence to conclude that the national consensus was against executing the mentally retarded.[58]

The Court then brought its own judgment to bear on the issue. Focusing first on the meaning of "mentally retarded," the Court looked to clinical definitions, which require "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18."[59] The Court reasoned that while the diminished capacity to learn from mistakes, engage in logical reasoning, or control impulses—all hallmark consequences of mental retardation—may not render someone incompetent to stand trial or unable to understand right from wrong, these "deficiencies . . . do diminish their personal culpability."[60]

Given this clinically accepted understanding of mental retardation, the Court supplied two additional reasons to categorically prohibit the execution of the mentally retarded: the lack of justification for using the death penalty for these defendants[61] and the increased risk of such defendants receiving the death penalty without a ban.[62] First, the Court reasoned that the traditional justifications for imposing the death penalty—deterrence and retribution—did not apply in cases involving mentally retarded defendants.[63] Under the theory of retribution, or the desire that an offender get his "just desserts," the harshness of the punishment directly corresponds with the offender's level of culpability.[64] The Court's precedent dictated that only the most depraved murderers merit the death penalty under this theory.[65] If an "average murderer" with an "average" amount of culpability would not merit the death penalty, then someone who is mentally

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[57] *Id.* at 316.

[58] *Id.*

[59] *Id.* at 318 (referencing the AARM definition and the American Psychiatric Association's definition, which both included the quoted criteria).

[60] *Id.*

[61] *Id.* at 318–19.

[62] *Id.* at 320.

[63] *Id.* at 319. Unless one or both of these goals are measurably furthered by executing mentally retarded persons, "it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Id.* (internal quotation marks and citations omitted).

[64] *Id.*

[65] *Id.*

retarded, and so has less culpability due to mental limitations, is less likely to "deserve" the death penalty.[66]

The goal of deterrence is likewise not furthered.[67] Deterrence is focused on preventing prospective offenders from committing capital crimes.[68] However, the death penalty "can serve as a deterrent only when murder is the result of premeditation and deliberation."[69] The theory of deterrence rests on the presumption that a harsh punishment creates an incentive against committing capital crimes.[70] The cognitive limitations of a mentally retarded person prevent a "cost-benefit analysis" based on the likely punishment, and so the Court considered deference based on such reasoning to be exceedingly unlikely and unrealistic in the given case.[71] Similarly, the Court considered it unlikely that a ban on executing the mentally retarded would have any counter-deterrent consequences and found that an exception would not impact the effectiveness of the death penalty in deterring those persons who are actually capable of the cost-benefit analysis.[72]

The second justification for the prohibition of executing the mentally retarded was that without a blanket ban, mentally disabled defendants are in fact at a higher risk to have the death penalty imposed upon them simply due to their mental deficiencies.[73] Mentally retarded defendants are more likely to give false confessions, less likely to effectively assist counsel, generally tend to be poor witnesses, and are more likely to be seen as having a propensity for future dangerousness.[74] All of these factors tend to make a death sentence more likely, notwithstanding a defendant's lessened culpability in instances where they are without protections.[75] Based on these judgments

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[66] "Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* (internal quotation marks and citations omitted).

[70] *Id.* at 320.

[71] *Id.*

[72] *Id.* (noting that it is less likely that individuals with cognitive and behavioral impairments will be able to "process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information").

[73] *Id.* at 320–21 ("Mentally retarded defendants in the aggregate face a special risk of wrongful execution.").

[74] *Id.*

[75] *Id.*

and the evolving standards of decency, the Court held that the Eighth Amendment prohibits the execution of mentally retarded defendants.[76]

C. QUESTIONS LEFT OPEN BY *ATKINS* AND THE VARIOUS STATE RESPONSES

After announcing a broad ban on executing the mentally retarded, *Atkins* also left many issues regarding the implementation of the ban open for states to decide.[77] The Court explicitly declined to provide definitional and procedural guidelines in *Atkins*, directing the states to define what it means to be mentally retarded, who gets to determine whether a defendant meets this definition (i.e., the judge or the jury), when the determination should be made (i.e., pretrial, during the guilt or innocence phase, or during sentencing), who has the burden of proving or disproving mental retardation, and how high that burden should be.[78] Given the lack of direction supplied by *Atkins*, these "definitional and procedural attributes of the death penalty exclusion" have varied across state lines.[79]

Those states that have expressly assigned the burden of proof to a party have assigned it to the defendant.[80] As such, the issue of who bears the burden is seemingly well settled across the states. In contrast, states have been less consistent in setting a minimum showing for a defendant to be considered mentally retarded. Among those states that have set a burden of proof, a "clear majority" favors the "preponderance of the evidence" standard.[81] Twenty states explicitly apply the preponderance burden,

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[76] *Id.* at 321.

[77] The Court recognized that among the states, there were varying standards and understandings of what constitutes mental retardation, indicating a lack of national consensus in that area. *Id.* at 317. As such, the Court decided to leave to the individual states the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)).

[78] Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 85 (2003); *see also Atkins*, 536 U.S. at 317 (discussing Court's choice to leave to the states certain decisions to effectuate the ruling).

[79] Tobolowsky, *supra* note 78, at 85.

[80] *Id.* at 118 & n.235 (noting that "Connecticut, Florida, Kansas, Kentucky, Missouri, Nebraska, and New Mexico do not expressly assign the burden of proof, but most of these states include procedures for a defendant to provide notice of or seek a ruling on the mental retardation issue.").

[81] *Id.* at 118–19, nn.236, 238.

pursuant to statute or precedent.[82] Only three states use the "clear and convincing" evidence standard: Arizona, Colorado, and Florida.[83] Neither Connecticut nor Kansas have explicitly set out a burden,[84] and North Carolina and Oklahoma have two different standards depending on who the factfinder is; however, the highest either state requires is only "clear and convincing evidence."[85] Georgia alone sets the highest bar by requiring a defendant to prove mental retardation "beyond a reasonable doubt."[86]

Recently, higher burdens of proof in this area have become increasingly criticized. For instance, in *Pruitt v. State*, the Indiana Supreme Court ruled that placing the burden of proof as high as "clear and convincing evidence" violates a defendant's right to due process.[87] The court relied on *Cooper v. Oklahoma*, wherein the Supreme Court held that placing the burden on the defendant to prove by clear and convincing evidence that he was incompetent to stand trial was unconstitutional.[88] The court in *Pruitt* reasoned that "the defendant's right not to be executed if mentally retarded outweighs the state's interests as a matter of federal constitutional law."[89]

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[82] Morrow v. State, 928 So. 2d 315, 322–23 (Ala. Crim. App. 2004); ARK. CODE ANN. § 5-4-618 (2013); CAL. PENAL CODE § 1376 (2013); IDAHO CODE ANN. § 19-2515A (2013); IND. CODE § 35–36–9-4 (2013); Bowling v. Commonwealth, 163 S.W.3d 361, 502 (Ky. 2005); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2013); Chase v. State, 873 So. 2d 1013, 1028–29 (Miss. 2004); MO. REV. STAT. § 565.030 (2013); NEB. REV. STAT. § 28-105.01 (2013); NEV. REV. STAT. § 174.098 (2013); State v. Lott, 799 N.E.2d 1011, 1015 (Oh. 2002); Commonwealth v. Crawley, 924 A.2d 612, 616 (Pa. 2007); Franklin v. Maynard, 588 S.E.2d 604, 606 (S.C. 2003); S.D. CODIFIED LAWS § 23A-27A-26.3 (2013); TENN. CODE ANN. § 39-13-203(c) (2013); *Ex parte* Briseno, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); UTAH CODE ANN. § 77-15a-104 (2013); VA. CODE ANN. § 19.2-264.3:1.1 (2013); WASH. REV. CODE § 10.95.030 (2013).

[83] ARIZ. REV. STAT. § 13-753 (2013); COLO. REV. STAT. § 18-1.3-1102 (2013); FLA. STAT. § 921.137 (2012).

[84] CONN. GEN. STAT. § 53a-46a (2013); KAN. STAT. ANN. §§ 21-6622, 76-12b01 (2013).

[85] When the factfinder is the judge, both states require the defendant prove mental retardation by clear and convincing evidence. But where the factfinder is the jury, the standard is preponderance of the evidence. N.C. GEN. STAT. § 15A-2005 (2013); OKLA. STAT. ANN. tit. 21 § 701.10b (2013).

[86] O.C.G.A. § 17-7-131 (2013).

[87] 834 N.E.2d 90, 103 (Ind. 2005).

[88] *Id. See generally* Cooper v. Oklahoma, 517 U.S. 348 (1996).

[89] *Pruitt*, 834 N.E.2d at 103.

D. A DISCUSSION OF THE HISTORY OF GEORGIA'S BURDEN OF PROOF IN EXECUTING THE MENTALLY RETARDED

Somewhat surprisingly, given Georgia's inordinately high burden of proof, the Georgia legislature became the first to enact a ban on the execution of the mentally retarded in 1989. The General Assembly was spurred into action in response to public outcry against the execution of Jerome Bowden.[90] The decision to execute Bowden—who had an IQ of 59 and could not even count to ten[91]—was seen as " 'such a hideous occurrence that it shamed the Legislature into passing the retardation law.' "[92] The Georgia General Assembly tackled the issue at the end of drafting what would become Georgia Code section 17-7-131.[93] Interested groups rushed to devise a way to include a ban in the statute,[94] and at the end of the session, proposed that the Assembly simply add "or guilty but mentally retarded" into the list of available pleadings.[95] This resulted in the statute providing for multiple ways to plead on any given case: "guilty," "not guilty," "not guilty by reason of insanity at the time of the crime," "guilty but mentally ill," or "guilty but mentally retarded." By using the same general phraseology as other provisions about insanity and mental illness, this provision changed the individual's potential treatment in prison and provided that the mentally retarded could not be sentenced to death.[96] However, it had the unintended consequence of requiring a jury to find "beyond a reasonable doubt that the defendant is guilty of the crime charged *and* is mentally retarded."[97]

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[90] *See* Hearing, *supra* note 19 (Jack Martin); Raymond Bonner, *Argument Escalates on Executing Retarded*, N.Y. TIMES (July 23, 2001), http://www.nytimes.com/2001/07/23/us/argument-escalates-on-executing-retarded.html?src=pm ("The first state to pass a law to protect the mentally retarded was Georgia, largely because of a public outcry following the execution in 1988 of Jerome Bowden.").

[91] Bonner, *supra* note 90.

[92] *Id.* (quoting August Siemon, an attorney who represented Bowden in his appeals).

[93] *See* Hearing, *supra* note 19 (Jack Martin); O.C.G.A. § 17-7-131 (2013) (defining insanity, mental illness, and mental retardation and delineating the effects each pleading has on sentencing and treatments while incarcerated and on parole).

[94] *See* Hearing, *supra* note 19 (Jack Martin).

[95] *See id.*; O.C.G.A. § 17-7-131(c).

[96] *See* Hearing, *supra* note 19 (Jack Martin); O.C.G.A. § 17-7-131(c).

[97] Hearing, *supra* note 19 (Jack Martin) (emphasis added); O.C.G.A. § 17-7-131(c)(3). Martin explains that this was the product of sloppy drafting. While the statute did intend that the burden for finding a defendant guilty be set at "beyond a reasonable doubt," the addition of "mentally retarded" at the end of the same sentenced produced a reading that

Recently, the Supreme Court of Georgia reexamined the "beyond a reasonable doubt" standard in *Stripling v. State*.[98] However, even in light of the ruling in *Atkins*, the court found that the standard did not violate the Georgia or U.S. Constitutions.[99] The court relied heavily on the fact that *Atkins* explicitly stated that the states could define mental retardation and any procedures necessary to comply with its holding.[100] The court also noted that *Atkins* had praised Georgia for being the first state to ban such executions without making any negative comments about the standard.[101] The court then analogized the standard in this context to the Supreme Court ruling in *Leland v. Oregon*,[102] reasoning that mental retardation and insanity "both relieve a guilty person of at least some of the statutory penalty to which he [or she] would otherwise be subject."[103] As such, the court held that Georgia's standard did not violate the Eighth Amendment.[104]

E. WARREN LEE HILL, JR.

Through various state and federal habeas petitions, Warren Lee Hill, Jr. has repeatedly asked both the Georgia Supreme Court and the Eleventh Circuit to reconsider the constitutionality of the "beyond a reasonable doubt" standard in this context. These cases will be discussed in-depth in the subsequent section. However, a brief discussion surrounding the pertinent background is necessary. Warren Lee Hill, Jr. was born in 1960 into an abusive family where Hill's father, an alcoholic, would repeatedly beat his mother in front of young Hill.[105] Hill graduated high school and joined the Navy, but in 1985 suffered a seizure, which lead to a

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required a fact-finder to find mental retardation beyond a reasonable doubt. This was never what the drafters intended.

[98] 711 S.E.2d 665 (Ga. 2011).

[99] *Id.* at 669.

[100] *Id.* at 668.

[101] *Id.* Supposedly, if Georgia's statute was in violation of the *Atkins* ruling because of the standard, the Court would have made mention of the Georgia statute.

[102] 343 U.S. 790 (1952) (holding that a statute requiring a defendant to prove insanity beyond a reasonable doubt does not violate the Federal Due Process Clause).

[103] *Stripling*, 711 S.E.2d at 668 (quoting Head v. Hill, 587 S.E.2d 613, 613 (Ga. 2003)).

[104] *Id.* at 689.

[105] Brief for Appellant, *supra* note 5, at 4.

marked deterioration in his job performance and demeanor.[106] It was during this period of time that Hill killed Myra Wright.[107]

After his conviction, Hill was deemed at risk from the other inmates, but was never deemed violent himself; in fact, Hill never had any disciplinary reports.[108] That is, until one morning in August of 1990, when Hill began beating a fellow inmate, Joseph Handspike, with a board while Handspike slept.[109] Hill attacked the fellow inmate because Handspike had made sexual advances towards Hill the night before, and seemingly because of Hill's adaptive deficits, he reacted violently in a misguided attempt to protect himself.[110] Following this attack, a psychologist, Dr. William E. Dickinson, evaluated Hill in March of 1991.[111] Dr. Dickinson's tests revealed Hill to have an IQ of 77 and evidence of organic brain damage.[112]

Hill was subsequently tried, convicted, and sentenced to death in 1991 for the murder of Handspike; the Georgia Supreme Court denied Hill's appeal.[113] Although Dr. Dickinson testified in his findings as to Hill's intellectual abilities during the sentencing phase of trial,[114] Hill never raised the argument that his mental retardation prohibited his execution at trial or on direct appeal.[115]

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[106] *Id.* at 4–5.

[107] *Id.* at 5.

[108] *Id.* at 5–6.

[109] *Id.* at 2; *see also* Hill v. State, 427 S.E.2d 770, 772 (Ga. 1993) (discussing the details of the crime). Fellow inmates who were there at the time mentioned that they were shocked, as Hill was acting normal right before the attack and (to their knowledge) had no problems with Handspike. Brief for Appellant, *supra* note 5, at 2. An officer also testified that he had never seen Hill bother or start trouble with anyone. *Id.*

[110] Brief for Appellee, *supra* note 5, at 7; Head v. Hill, 587 S.E.2d 613, 625–26 (Ga. 2003) (discussing trial attorney's effectiveness in preparing evidence of the victim's sexual advances on Hill as mitigation).

[111] Brief for Appellee, *supra* note 5, at 6.

[112] *Id.* at *7. The doctor also testified that Hill was in the borderline range of intelligence (very close to mild retardation), and had the functioning level of a fourteen year old. *Id.* Dr. Dickinson also testified that "at the time of the murders of Myra Wright and Joseph Handspike, Warren Hill's capacity to control his behavior was greatly diminished, and that his judgment was significantly impaired," which played a role in both crimes. *Id.* Dr. Dickinson later testified that the score of 77 was inaccurate and misleading, as it portrayed Hill to function at a higher level than he actually could. Turpin v. Hill, 498 S.E.2d 52, 52 n.1 (Ga. 1998).

[113] *Hill*, 427 S.E.2d at 772 n.1.

[114] *Turpin*, 498 S.E.2d at 52 n.10.

[115] As previously mentioned, the Georgia General Assembly enacted the ban on the execution of the mentally retarded in 1988. As such, when Hill was convicted in 1991, Hill could have used this statute to argue that he was eligible only for a life sentence.

However, Hill subsequently filed a writ of habeas corpus alleging that his death sentence violated the Georgia Constitution and further that his counsel was ineffective for not alleging "guilty but mentally retarded" at trial.[116]

In 1998, the Georgia Supreme Court found that the habeas court erroneously applied a standard set forth in *Fleming v. Zant*[117] when it granted Hill's habeas petition.[118] The habeas court erred in employing this lesser standard because *Fleming* applied only to defendants who were convicted *prior to* the enactment of Georgia's statute barring such executions.[119] Although the Georgia Supreme Court found Hill could pursue relief pursuant to the "miscarriage of justice" provision of the habeas statute,[120] the court reversed and remanded with instructions to apply the correct standard laid out in the Georgia Code—namely, that the defendant must prove mental retardation beyond a reasonable doubt.[121]

III. ANALYSIS

Although courts have upheld Georgia's "beyond a reasonable doubt" standard as within Georgia's power to implement *Atkins*, the reasons underpinning these holdings are readily susceptible to criticism. These arguments are seriously flawed, easily countered, and ultimately produce results that are contrary to common sense. A detailed look at the reasoning in each of the *Hill* cases belies the weaknesses inherent in a ruling finding the standard constitutional. Continuing to impose such a stringent burden is contrary to common sense and public sentiment, and moreover, "evolving standards of decency" dictate that Georgia change its "outlier" status and fall more in line with other death penalty states.

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[116] *Turpin*, 498 S.E.2d at 52.

[117] Fleming v. Zant, 386 S.E.2d 339, 342 (Ga. 1989) (holding that on habeas review, if a defendant sentenced to death prior to July 1, 1988 alleges mental retardation as a bar to the death penalty and the court finds the existence of a genuine issue, "a writ shall be granted for the limited purpose of conducting a trial on the issue of retardation only," and at that trial, the defendant will have the burden of proving mental retardation by a preponderance of the evidence).

[118] *Turpin*, 498 S.E.2d at 53.

[119] *Id.* (citing *Fleming*).

[120] *Id.*

[121] *Id.* at 54. *See* O.C.G.A. § 17-7-131(c)(3) (2013).

A. SUBSEQUENT STATE HABEAS PETITION: A DISCUSSION OF *HEAD V. HILL*

On remand from a ruling by the Georgia Supreme Court that Hill could be entitled to relief,[122] the habeas court in May of 2002 found that while Hill had proven beyond a reasonable doubt that he had "significantly subaverage intellectual functioning," he failed to prove beyond a reasonable doubt that he suffered from "impairments in adaptive behavior."[123] These two requirements found in Georgia Code section 17-7-131(a)(3)—intellectual functioning and impairments in adaptive behavior—are derived from the American Association on Intellectual and Developmental Disabilities' (AAIDD) definition of mental retardation.[124] The AAIDD defines "intellectual functioning" as one's level of intelligence or general mental capacity, which can be established through an IQ test.[125] The AAIDD defines "adaptive behavior" as "the collection of conceptional, social, and practical skills that are learned and performed by people in their everyday lives."[126] While impairments in adaptive functioning can be established through standardized measures, this inquiry is significantly more subjective because the doctor determines the impairment after interviewing the defendant and the defendant's family (if possible).[127]

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[122] *Turpin*, 498 S.E.2d at 54; O.C.G.A. § 17-7-131(c)(3).

[123] Head v. Hill, 587 S.E.2d 613, 618 (Ga. 2003). The court referred to Section § 17-7-131(a)(3), which states, " 'Mentally retarded' . . . means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." *Id.* Thus, in order to establish mental retardation, a defendant must prove he or she has *both* subaverage intellectual functioning (generally established through an IQ test) *and* poor adaptive behavior (generally established through more subjective means wherein a doctor meets with and then evaluates the defendant).

[124] *See* Hill v. Schofield, 608 F.3d 1272, 1282 (11th Cir. 2010) (per curiam) ("The legal criteria for this condition are derived from the definitions developed by both the American Association on Mental Retardation (now the American Association on Intellectual and Developmental Disabilities) and the American Psychiatric Association."); O.C.G.A. § 17-7-131(a)(3) (2013).

[125] *Definition of Intellectual Disabilities*, AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition#.Us084WRDvLg (last visited June 10, 2014). The AAIDD also mentions that "an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning." *Id.*

[126] *Id.*

[127] *Intellectual Disability*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/mental-health/intellectual-disability (last visited Jan. 8, 2013); *see also Schofield*, 608 F.3d at 1282 (discussing how inquiries into limitations on "adaptive behavior" are "*so* inherently

In order to satisfy these requirements, Hill presented evidence of IQ tests revealing him to be in the range of 70, or mildly mentally retarded.[128] Based on this evidence, the habeas court found that "[t]he experts in this case [including those retained by the State] do not vary to any significant extent in their opinions that Mr. Hill meets the IQ criterion for a diagnosis of mental retardation."[129] In other words, Hill unquestionably satisfied the first requirement to establish mental retardation—the "subaverage intellectual functioning." However, the doctors examining Hill disagreed about whether he had issues with adaptive behavior.[130] This led the court to conclude that Hill had not proven "impairments in adaptive behavior" beyond a reasonable doubt.[131] As a result, the court upheld his death sentence.[132] However, in November of 2002, the habeas court granted Hill's motion for reconsideration and "once again . . . order[ed] a jury trial on the issue of mental retardation, with Hill bearing the burden of proof by a preponderance of the evidence."[133] The habeas court granted Hill's motion and assigned that lower burden in part because Hill had persuaded it that Georgia's "beyond a reasonable doubt" standard was unconstitutional.[134] In light of the *Atkins* decision a few months earlier, the habeas court found that the standard impermissibly hampered the enforcement of the *Atkins* rule.[135]

Hill's victory was short-lived. In 2003, the Georgia Supreme Court disagreed with the habeas court and held the more stringent standard constitutional.[136] In doing so, the court primarily relied on the assumption that the Supreme Court delegated the task of defining and implementing the ban on executions of the mentally retarded to the states. The standard, the court reasoned, was merely the Georgia legislature's chosen method of

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subjective and readily unclear that most cases will result in differences of opinion and divergent conclusions among psychiatric experts").

[128] *Schofield*, 608 F.3d at 1281.

[129] Brief for Appellee, *supra* note 5, at 5.

[130] *Schofield*, 608 F.3d at 1281–82.

[131] Head v. Hill, 587 S.E.2d 613, 618 (Ga. 2003).

[132] *Id.*

[133] *Id.*

[134] *Id.* at 620.

[135] *Id.*

[136] *Id.* at 618–19.

implementation.[137] The court went on to analogize the assessment of claims of mental retardation to an assessment of claims of insanity.[138] Specifically, the court discussed the parallels between *Ford v. Wainwright*—banning the execution of the insane and delegating the task of implementation on procedural and definitional matters to the states[139]—and the *Atkins* ban and delegation of implementation.[140] Applying the precedent of *Mosher v. State*,[141] the court reasoned that mental retardation and insanity were comparable.[142] The court further reasoned that following the Supreme Court's ruling in *Leland v. Oregon*, which permitted a state to require a defendant to prove insanity beyond a reasonable doubt,[143] the standard in the context of mental retardation is similarly constitutional.[144] The court then distinguished Hill's case from that of *Cooper v. Oklahoma*.[145] In *Cooper*, the United States Supreme Court held that a burden of "clear and convincing evidence" was unconstitutional as a determinant competency.[146] The Georgia Supreme Court reasoned that competency involved the fundamental right to not stand trial, but the issue presented in *Hill* instead related to "the procedural burden of proving mental retardation."[147]

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[137] *Id.* at 620. This line of reasoning is subject to much criticism, some of which is discussed in more detail in other parts of this Note. For example, the argument that the "beyond a reasonable doubt" standard is merely part of the chosen definition of mental retardation confuses and misses the true issue. Hill intended to focus on the unconstitutional result of the standard, not whether the imposition of such a procedure was in itself unconstitutional. In almost all the Hill cases, the courts twist the inquiry into a question about the constitutionality of the procedure, either ignoring or minimalizing the unconstitutional result. As subsequent cases dealt with the distinction between the procedure and the result in more detail, this will be discussed *infra* Part III.A.*2*.

[138] The court in *Stripling* drew on this argument as discussed *supra* Part II.E.

[139] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

[140] *Head*, 587 S.E.2d at 620–22.

[141] 491 S.E.2d 348, 352 (Ga. 1997) (reasoning that insanity and mental retardation are governed by O.C.G.A. § 17-7-131, while competency is governed by O.C.G.A. § 17-7-130). The case further reasoned that while in *Cooper* the fundamental right to trial was implicated and impacted by a procedural burden, in cases of mental retardation, the procedural burden only bears on sentencing. *Id.*

[142] *Head*, 587 S.E.2d at 621.

[143] 343 U.S. 790, 799 (1952).

[144] *Head*, 587 S.E.2d at 621 (referencing generally Cooper v. Oklahoma, 517 U.S. 348 (1996)).

[145] *Id.*

[146] *Cooper*, 517 U.S. at 356.

[147] *Head*, 587 S.E.2d at 621.

The Georgia court's comparison of procedural burdens for the defense of insanity to allegations of mental retardation is severely misguided. The constitutional basis supporting *Leland* has not been applied in the context of mental retardation. *Leland* was based entirely on an analysis of due process and Fourteenth Amendment protections. Conversely, examinations of mental retardation and the death penalty are rooted in Eighth Amendment protections. Analogizing the protections afforded by these different constitutional rights is inappropriate for multiple reasons. First, *Leland*'s analysis is not equally applicable in the context of mental retardation. The Court in *Leland* noted that in determining whether a state practice violated the Fourteenth Amendment, an analysis of whether "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" is necessary.[148] However, at the same time the Court decided *Leland*, placing the burden of proof on the defendant to establish insanity "beyond a reasonable doubt" did not present a case in which "is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights."[149] In fact, the Court noted a long history of placing the burden of proving an insanity defense on the defendant.[150] The Court seemingly reasoned that mere differences in the burden of proof for alleging insanity did not specifically implicate or violate any right or traditional notion thought to be fundamental.[151] In other words, because the constitutional challenge in *Leland* involved a right *not* specifically guaranteed by the Bill of Rights or the Supreme Court, the Court was then unwilling to interfere with a state's choice in policy.

In contrast, it is the Eighth Amendment that prohibits the execution of mentally retarded defendants, not the Fourteenth.[152] And this prohibition against "cruel and unusual punishment" *is* a fundamental right rooted in our traditions and guaranteed by the Bill of Rights. So, in the mental retardation context, the *Leland* reasoning would not apply because the Bill of Rights, including the Eighth Amendment, *does* establish the fundamentals of American

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[148] *Leland*, 343 U.S. at 798 (internal quotation marks omitted).
[149] *Id.*
[150] *Id.* at 796–97.
[151] *See id.*
[152] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

law. Thus, when a court addresses whether mentally retarded defendants may be executed, *Leland* should not prevent it from protecting such a right, even if doing so results in the federal government interfering with state policy determinations.

Drawing a parallel between the underlying reasoning permitting the application of the "beyond a reasonable doubt" standard in the context of insanity and the context of mental retardation presents additional hurdles. As stated, the Eighth Amendment includes an assessment not only of traditionally prohibited punishments, but also incorporates "evolving standards of decency."[153] Thus, a legitimate assessment of whether a procedure violates the Eighth Amendment demands a review of the relevant "evolving standards of decency." Thus, even if the *Leland* assessment were capable of providing the answer to the mental retardation issue, consideration of the national changes in notions of justice would still be required. *Leland*, on the contrary, was decided without any consideration of evolving standards—perhaps because *Leland* was issued six years before the Court established the "evolving standards of decency" test.[154] Moreover, *Leland* came more than thirty years before the Court held that the Eighth Amendment prohibited executing the insane and fifty years before the Court held the Eighth Amendment prohibited executing the mentally retarded. These developments fundamentally altered the controlling law and irreparably severed the relationship between *Leland* and mental retardation in the context of capital cases.

It could be argued that *Leland* entered into an examination akin to the "evolving standards of decency" test: the Court refused to dictate policy determinations to the state when sentencing one of its citizens to death in part because it could not definitively say "that [the] policy violate[d] generally accepted concepts of basic standards of justice."[155] Even if *Leland* employed the proper test,

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[153] *See* Ford v. Wainwright, 477 U.S. 399, 405–06 (1986) (discussing how the Eighth Amendment has always prohibited those punishments thought "cruel and unusual" at the time the Bill of Rights was adopted, but also extends to "evolving standards of decency," rendering an inquiry into contemporary values necessary when evaluating Eighth Amendment claims).

[154] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[155] Leland v. Oregon, 343 U.S. 790, 799 (1952).

however, legal precedent and generally accepted notions of justice have shifted so drastically since 1952 that the outcome could come out the other way.[156] Even more tellingly, no state currently requires the defendant to prove insanity beyond a reasonable doubt.[157]

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[156] *See Ford*, 477 U.S. at 405 (noting that since the Court had last looked at a potential prohibition of the death penalty for the insane the "interpretations of the Due Process Clause and the Eighth Amendment ha[d] evolved substantially").

[157] *See* Magwood v. Smith, 791 F.2d 1438, 1446 (11th Cir. 1986) (Alabama) ("We are aware of the distinction between an inquiry into an accused's competency to stand trial and a death row inmate's sanity at the time of execution. The two situations, however, are sufficiently analogous that the standards used to determine competency should provide any necessary instruction for § 15-16-23 purposes."); Smith v. State, 614 P.2d 300, 303 (Alaska 1980) (Alaska) ("The defense must come forth with 'some evidence' supporting the defense of insanity before the burden of proof shifts to the state. The 'some evidence' test requires that there be 'more than a scintilla, but less than that which would compel a reasonable doubt as a matter of law.' "); ARIZ. REV. STAT. ANN. § 13-502(C) (2013) (Arizona) ("The defendant shall prove the defendant's legal insanity by clear and convincing evidence."); Marcyniuk v. State, 373 S.W.3d 243, 251 (Ark. 2010) (Arkansas) ("A defendant bears the burden of proving the affirmative defense of mental disease or defect by a preponderance of the evidence."); People v. Daugherty, 256 P.2d 911, 926 (Cal. 1953) (California) ("[T]he burden is on the defendant to prove insanity by a preponderance of the evidence."); People v. Wright, 648 P.2d 665, 667 (Colo. 1982) (en banc) (Colorado) ("Every criminal defendant is presumed sane, but once any evidence of insanity is introduced at trial, the burden of proof is on the People to prove sanity beyond a reasonable doubt."); CONN. GEN. STAT. § 53a-12(b) (2013) (Connecticut) ("When a defense declared to be an affirmative defense is raised at a trial, the defendant shall have the burden of establishing such defense by a preponderance of the evidence."); Sanders v. State, 585 A.2d 117, 131 (Del. 1990) (Delaware) (while the State is required to prove guilt beyond reasonable doubt before a verdict of "guilty" or "guilty but mentally ill" can be rendered, the defendant has burden of proving insanity by preponderance of the evidence before a verdict of "not guilty by reason of insanity" can be rendered); FLA. STAT. § 775.027(2) (2013) (Florida) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."); Kelley v. State, 509 S.E.2d 110, 112 (Ga. App. 1998) (Georgia) ("Insanity is an affirmative defense which the defendant must prove by a preponderance of the evidence." (internal quotation marks omitted)); State v. Uyesugi, 60 P.3d 843, 857 (Haw. 2002) (Hawai'i) (when claiming the insanity defense the defendant has the burden of proving insanity by a preponderance of the evidence); 720 ILL. COMP. STAT. ANN. 5/6-2(e) (West 2014) (Illinois) ("When the defense of insanity has been presented during the trial, the burden of proof is on the defendant to prove by clear and convincing evidence that the defendant is not guilty by reason of insanity."); IND. CODE § 35-41-4-1(b) (2014) (Indiana) ("[T]he burden of proof is on the defendant to establish the defense of insanity by a preponderance of the evidence."); IOWA CODE § 701.4 (2014) (Iowa) ("If the defense of insanity is raised, the defendant must prove by a preponderance of the evidence."); Brown v. Commonwealth, 934 S.W.2d 242, 247 (Ky. 1996) (Kentucky) ("The standard we adhere to is whether taking this evidence as a whole, it was not clearly unreasonable for any juror to find the defendant was not insane at the time of the incident." (internal quotation marks omitted)); LA. CODE CRIM. PROC. ANN. art. 652 (2014) (Louisiana) ("The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence."); State v. Gurney, 36 A.3d 893, 903 (Me. 2012) (Maine) ("[Insanity] is an affirmative defense that the defendant is required to prove by a preponderance of the evidence."); MD. CODE ANN. CRIM.

PROC. § 3-110(b) (West 2014) (Maryland) ("The defendant has the burden to establish, by a preponderance of the evidence, the defense of not criminally responsible."); Commonwealth v. Berry, 931 N.E.2d 972, 980 (Mass. 2010) (Massachusetts) ("[O]nce a defendant raises the issue of criminal responsibility, the Commonwealth has the burden to prove, beyond a reasonable doubt, that the defendant did not lack the substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law, as a result of a mental disease or defect."); MICH. COMP. LAWS § 6.304(C)(2) (2014) (Michigan) ("[B]y a preponderance of the evidence, the defendant was legally insane at the time of the offense."); Davis v. State, 595 N.W.2d 520, 526 (Minn. 1999) (Minnesota) ("In order to be excused from criminal liability by reason of insanity, a defendant must prove [insanity] by a preponderance of the evidence."); Hawthorne v. State, 883 So. 2d 86, 89 (Miss. 2004) (Mississippi) ("It is presumed that the defendant is sane until there is a reasonable doubt regarding his or her sanity. When such doubt is raised, the State bears the burden of proving the defendant's sanity beyond a reasonable doubt. The determination as to a defendant's sanity is a question to be resolved by the jury, which may accept or reject expert and lay testimony." (internal quotation marks omitted)); MO. ANN. STAT. § 552.030 (2014) (Missouri) ("[T]he jury shall be told that the burden rests upon the accused to show by a preponderance or greater weight of the credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged against the defendant."); NEB. REV. STAT. § 29-2203(1) (2013) (Nebraska) ("[T]he burden shall be upon the defendant to prove the defense of not responsible by reason of insanity by a preponderance of the evidence."); NEV. REV. STAT. ANN. § 174.035 (West 2013) (Nevada) ("Under such a plea or defense [of insanity], the burden of proof is upon the defendant to establish by a preponderance of the evidence."); N.H. REV. STAT. ANN. § 628:2 (2013) (New Hampshire) ("The defendant shall have the burden of proving the defense of insanity by clear and convincing evidence."); N.J. STAT. ANN. § 2C:4-1 (West 2013) (New Jersey) ("Insanity is an affirmative defense which must be proved by a preponderance of the evidence."); State v. Wilson, 514 P.2d 603, 606 (N.M. 1973) (New Mexico) ("In this jurisdiction a defendant, who claims to have been insane at the time of the commission of the offense with which he is charged, must offer evidence tending to show his insanity at the time in order to create a jury question upon this issue."); N.Y. PENAL LAW §§ 40.15, 25.00 (McKinney 2013) (New York) (the former establishing insanity as an affirmative defense and the latter establishing that the defendant has the burden to prove affirmative defenses by a preponderance of the evidence); State v. Jackson, 335 S.E.2d 903, 907 (N.C. Ct. App. 1985) (North Carolina) ("In North Carolina insanity is an affirmative defense; a defendant has the burden of proving his insanity to the satisfaction of the jury." (internal quotation marks omitted)); State v. Johnson, 636 N.W.2d 391, 393–94 (N.D. 2001) (North Dakota) (stating that a defense of mental defect is a "lack of criminal responsibility," but is not an affirmative defense, thus the defendant has no burden to prove it); OHIO REV. CODE ANN. § 2949.29(C) (West 2014) (Ohio) ("[T]he court shall find that the convict is not insane unless the court finds by a preponderance of the evidence that the convict is insane."); Kiser v. State, 782 P.2d 405, 407 (Okla. Crim. 1989) (Oklahoma) ("The initial burden is on the defendant to establish a reasonable doubt as to his sanity. If the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong at the time of the offense." (internal quotation marks omitted)); OR. REV. STAT. §§ 161.305, 161.055(2) (2014) (Oregon) (the former establishing insanity as an affirmative defense and the latter requiring affirmative defenses to be proven by the defendant by a preponderance of the evidence); 18 PA. CONS. STAT. ANN. § 315(a) (West 2014) (Pennsylvania) ("The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to the charged offense when the actor proves by a preponderance of evidence that the actor was legally insane at the time of the commission of the offense."); State v. Capalbo, 433 A.2d 242, 245 (R.I. 1981) (Rhode Island) (requiring the

The analogy between insanity and mental retardation will always be flawed because the very nature and application of the defenses are drastically different. Even discounting the disparate constitutional basis underpinning *Atkins* and *Leland*, the constitutional grounds for excepting mental retardation cases in the death penalty context are lacking in the context of insanity pleas. *Atkins* makes clear that the Constitution requires a mental retardation defense be made available in death penalty cases.[158] In contrast, the Constitution does not mandate that states provide an insanity defense; in fact, several states have abolished the insanity defense.[159] Mental retardation and insanity also provide functionally different defenses. Although both insanity pleas and mental retardation claims "relieve a guilty party of at least some of

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defendant to prove insanity by a preponderance of the evidence); S.C. CODE ANN. § 17-24-10(B) (2014) (South Carolina) ("The defendant has the burden of proving the defense of insanity by a preponderance of the evidence."); S.D. CODIFIED LAWS § 22-5-10 (2014) (South Dakota) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."); TENN. CODE ANN. § 39-11-501(a) (West 2014) (Tennessee) ("The defendant has the burden of proving the defense of insanity by clear and convincing evidence."); TEX. PENAL CODE ANN. §§ 8.01(a), 2.04(d) (West 2014) (Texas) (the former establishing insanity as an affirmative defense and the latter requiring the defendant to prove affirmative defenses by a preponderance of the evidence); VT. STAT. ANN. tit. 13, § 4801(b) (West 2014) (Vermont) ("The defendant shall have the burden of proof in establishing insanity as an affirmative defense by a preponderance of the evidence."); White v. Commonwealth, 616 S.E.2d 49, 52 (Va. Ct. App. 2005) (Virginia) ("Insanity is an affirmative defense that the defendant must establish by a preponderance of the evidence." (internal quotation marks omitted)); WASH. REV. CODE §§ 9A.12.010, 10.77.030 (West 2014) (Washington) ("Insanity is a defense which the defendant must establish by a preponderance of the evidence."); State v. Myers, 222 S.E.2d 300, 302 (W. Va. 1976) (West Virginia) ("The defendant who raises the issue of his insanity at the time of the commission of the act carries the burden of proving that defense by a preponderance of the evidence."); WIS. STAT. § 971.15(3) (2014) (Wisconsin) ("Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence."); WYO. STAT. ANN. § 7-11-305(b) (West 2014) (Wyoming) ("The defendant shall have the burden of . . . proving by the greater weight of evidence that, as a result of mental illness or deficiency, he lacked capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.").

[158] *See supra* Part II.C.

[159] *See* IDAHO CODE ANN. § 18-207 (West 2013) ("Mental condition shall not be a defense to any charge of criminal conduct."); KAN. STAT. ANN. § 21-5209 (West 2013) ("It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense."); MONT. CODE ANN. § 46-14-102 (West 2013) ("Evidence that the defendant suffered from a mental disease or defect or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense."); UTAH CODE ANN. § 76-2-305 (West 2013) (insanity included as part of a general defense negating the requisite mental state).

the statutory penalty to which he would otherwise be subject,"[160] a jury finding of insanity *exonerates* the defendant completely,[161] whereas a finding of mental retardation merely limits the defendant's eligibility for the death penalty without affecting culpability or otherwise mitigating his sentence.[162] Thus, a superficial analogy to *Leland* and insanity pleas falls apart on closer examination.

It seems more reasonable to compare mental retardation to the context of incompetency. Incompetency, like mental retardation, entails a fundamental right: the right to not stand trial.[163] Additionally, both are claims that the state is required to leave open to defendants (unlike insanity).[164]

Ultimately however, all such arguments failed for Hill. The Georgia Supreme Court in 2003 again reversed the habeas court for applying the "preponderance of the evidence" standard and reinstated the habeas court's ruling that Hill failed to meet his burden and was not entitled to relief.[165]

B. FEDERAL HABEAS CORPUS RELIEF: *HILL V. SCHOFIELD* VERSUS *HILL V. HUMPHREY*

With all state avenues for relief shut to him, Hill filed a writ of federal habeas corpus first in district court—where his petition was denied—and then in the Eleventh Circuit—where his petition was granted—arguing that Georgia's "beyond a reasonable doubt" standard was unconstitutional after *Atkins*.[166] In 2010, a panel of the Eleventh Circuit ultimately held that "because Georgia's requirement of proof beyond a reasonable doubt necessarily will

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[160] Head v. Hill, 587 S.E.2d 613, 621 (Ga. 2003).

[161] *See generally* O.C.G.A. § 17-7-131 (2013). Although, the defendant will not be released, he is also not convicted of a crime. *See id.* § 17-7-131(d) ("Whenever a defendant is found not guilty by reason of insanity at the time of the crime, the court shall retain jurisdiction over the person so acquitted and shall order such person to be detained in a state mental health facility.").

[162] *Id.* § 17-7-131(g)(1) ("Whenever a defendant is found . . . guilty but mentally retarded, or enters a plea to the effect . . . the court shall sentence him or her in the *same manner as a defendant found guilty of the offense*." (emphasis added)).

[163] Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) ("No one questions the existence of the fundamental right the petition invokes. We have repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." (internal quotation marks omitted)).

[164] *Id.*

[165] *Head*, 587 S.E.2d at 619.

[166] Hill v. Schofield, 608 F.3d 1272, 1273–74 (11th Cir. 2010) (per curiam).

result in the execution of the mentally retarded, the Georgia Supreme Court's decision is contrary to the clearly established rule of *Atkins*."[167] Thus, the court found that the application of this standard in the natural course of operation would necessarily violate a constitutional mandate and impermissibly violated Hill's constitutional rights.[168] Finally, Hill was granted relief.

In so finding, the Eleventh Circuit reasoned that, while *Atkins* left open to the states determinations of how best to ensure that the mentally retarded were not executed, "the Court did not give the states unfettered authority to develop procedures that nullify the Eighth Amendment's prohibition."[169] The court also reasoned that when the law requires one party to establish something beyond a reasonable doubt, "it reflects society's desire that the party with the burden should bear the majority of the risk for an erroneous decision."[170]

It is axiomatic that when assigning certain burdens of proof, the legislature is seen as laying out "the degree of confidence our society thinks he should have in the correctness of factual conclusions" in a given case.[171] The Supreme Court has repeatedly stated that "the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."[172]

For example, when attempting to take away a person's liberty (one of the most fundamental rights the Constitution was created to protect), the burden of proof the government must satisfy is beyond a reasonable doubt—the highest the law requires—because society wishes to place the risk of a jury error on the government, and not the individual.[173] In other words, society would rather

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[167] *Id.*

[168] *Id.*

[169] *Id.* at 1277–78. In fact, the Eleventh Circuit pointed out that the Court ordered the states to "develop[ ] appropriate ways to *enforce the constitutional restriction upon [their] execution of sentences*." *Id.* at 1278 (quoting Atkins v. Virginia, 536 U.S. 304, 317 (2002)).

[170] *Id.* at 1278.

[171] Cooper v. Oklahoma, 517 U.S. 348, 363 (1996) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 273 (1990)); *see also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 274 (1990) ("[N]ot only does the standard of proof reflect the importance of a particular adjudication, it also serves as a societal judgment about how the risk of error should be distributed between the litigants.").

[172] *Cooper*, 517 U.S. at 363 (quoting Jacob v. New York City, 315 U.S. 752, 752–53 (1942)).

[173] *See Schofield*, 608 F.3d at 1278 ("Accordingly, when a procedural scheme requires one party to bear the burden of establishing a particular fact by the most stringent standard of proof that our legal system recognizes—beyond a reasonable doubt—it reflects society's

juries incorrectly exonerate the guilty than wrongfully convict the innocent.[174] This decision suggests that an individual's interest in liberty far outweighs any governmental interest in convicting and incarcerating guilty wrongdoers.[175] The government merely has an interest in ensuring that offenders are punished adequately for their crimes (furthering the retributivist goal) and sending a message to the offender and the community as a whole that such behavior will not be tolerated (serving the deterrence goal). These abstract goals pale in comparison to the individual's immediate and weighty goals of maintaining his or her liberty.

The panel correctly reasoned that if this well-established manner of interpreting burden allocation is applied to the statute in question, however, it creates a nonsensical result. Under this interpretation it must be the case that it is more important that someone be executed for a crime—even if the execution violates the Constitution—than that a borderline mentally retarded person (or person somehow pretending to be mentally retarded) escape a sentence of death. Essentially, Georgia has determined that this right to be free from "cruel and unusual punishment" defined in *Atkins* is less important and meaningful than the government's interest in maximizing the number of executions.[176] This is the case even though the Supreme Court has explicitly cautioned courts and legislatures about implementing high burdens of proof in situations where the fact-finding involves psychiatric (or even medical) diagnoses:

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desire that the party with the burden should bear the majority of the risk for an erroneous decision. For example, because individual liberty is extraordinarily valued, we place upon the government the burden of proving a defendant's guilt beyond a reasonable doubt." (referencing *In re* Winship, 397 U.S. 358, 363 (1970))).

[174] *See In re* Winship, 397 U.S. 358, 367 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

[175] Speiser v. Randall, 357 U.S. 357 U.S. 513, 525–26 (1958). The Eleventh Circuit reiterates the words of the Supreme Court of the United States:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Schofield, 608 F.3d at 1279.

[176] *Schofield*, 608 F.3d at 1279. Note the distinction between *convictions*, which would not be barred by the Eighth Amendment, and *executions*.

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient.[177]

These concerns run directly counter to Georgia's standard and its continued enforcement.

The Eleventh Circuit also raised the concerns enumerated in *Atkins* regarding the increased likelihood of these defendants receiving the death penalty erroneously, arguing that Georgia's imposition of the highest burden of proof, "ensur[es] that some, if not many, mentally retarded offenders will be executed in violation of the Eighth Amendment."[178] The unique risk of error in these situations was a crucial component of the Supreme Court's ruling in *Atkins*.[179] As with all capital cases, if the jury should wrongfully find a defendant "not mentally retarded" in these instances, the "consequences . . . are extreme and irredeemable."[180] Thus, Georgia demands that the defendant bear *all* of the risk under the law in situations where the risk is already heightened and the degree of certainty that could be provided by experts is questionable. All of these factors increase the likelihood of "erroneous rejections of retardation claims, which will invariabl[y] lead to wrongful executions."[181]

While the Supreme Court did grant the states the power to decide how to implement the ban, that power cannot be wielded in such a manner as necessarily results in mentally retarded

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[177] Addington v. Texas, 441 U.S. 418, 429–30 (1979).

[178] *Schofield*, 608 F.3d at 1281. "Given the subjectivity that is necessarily involved in this medical diagnosis, which makes complete agreement among the experts a rarity, establishing mental retardation beyond a reasonable doubt for all offenders within the entire range of this classification is rendered a virtual impossibility." *Id.*

[179] *See supra* notes 73–76 and accompanying text.

[180] Head v. Hill, 587 S.E.2d 613, 629 (Ga. 2003) (Sears, J., dissenting).

[181] *Id.* at 629–30.

defendants being executed. The state has a duty to implement procedural safeguards that prevent violations of the Constitution to the extent that it is reasonably possible to do so, especially in situations where the defendant's life is at stake.[182] In this instance, Georgia has failed in its duty.

Following the Eleventh Circuit's panel decision, it finally seemed as though Hill would have his constitutional rights enforced. However, this relief was short lived. On a rehearing *en banc*, the Eleventh Circuit in 2011 reversed its earlier ruling.[183] The court held in *Hill v. Humphrey* that it did not have jurisdiction to grant the writ of habeas under the Antiterrorism and Effective Death Penalty Act (AEDPA).[184] The court found that, because the Supreme Court specifically left the choices regarding implementation open, Georgia's "beyond a reasonable doubt" standard could not be contrary to "clearly established Federal law."[185] While the AEDPA presents a different set of challenges unto itself, the court succinctly discussed several substantive arguments that are undoubtedly subject to critique.[186]

The Eleventh Circuit's opinion in *Humphrey* hinges on the court having defined the constitutional challenge as an attack on the statutory *definition* or *procedure* for proving mental retardation.[187]

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[182] *Schofield*, 608 F.3d at 1279–80 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

[183] Hill v. Humphrey, 662 F.3d 1335, 1338 (11th Cir. 2011) (en banc).

[184] *Id.* at 1337–38. The court found that Hill could not allege that the state standard "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2012).

[185] *Humphrey*, 662 F.3d at 1337–38, 1361.

[186] Arguably, the most compelling argument in *Humphrey* was that the procedure in question was not contrary to "clearly established" law and so did not pass the AEDPA bar. *Id.* The AEDPA mandates that a petition for habeas corpus will not be granted unless the state court proceedings resulted in a decision that is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This essentially prohibits any federal court (including the Supreme Court) from reviewing a case on habeas review under a *de novo* standard. *Humphrey*, 662 F.3d at 1337. This argument contends that in *Atkins* the Court explicitly left it to the states to determine methodology in implementing the ban and so clearly never prohibited any particular standard in this context. However, arguably this case could meet the AEDPA bar, by reasoning that the issue falls under an "unreasonable application of" clear federal law. 28 U.S.C. § 2254(d)(1). This entails the argument that the burden will necessarily result in executions of mentally retarded persons, and as such violates the *Atkins* ban. However, the Eleventh Circuit has found that this line of reasoning does not meet the AEDPA requirements. *Humphrey*, 662 F.3d at 1338.

[187] *See generally Humphrey*, 662 F.3d 1335. The Georgia Supreme Court in *Head* also missed the mark and evaluated the procedure as well, but the fact that it was only looking

The opinion essentially reasons that because *Atkins* explicitly permitted each state to define mental retardation however it chose, and Georgia chose to include a requirement that the elements be proven beyond a reasonable doubt, any attack on this definition must fail because the definition was enacted pursuant to Supreme Court mandate.[188] Moreover, because the Supreme Court has specifically declined to provide any guidance to the states in defining or enacting procedures, this particular procedure could not possibly violate constitutional law.[189]

However, this reasoning misses the entire point of this challenge. Hill's argument was focused not on the definition or procedure in and of itself, but rather was attacking the constitutionality of the *result* the procedure produces. Essentially, Hill alleged that while *Atkins* did permit each state to implement the ban in whatever manner it chose, the Georgia standard produces an unconstitutional result, because it necessarily will result in the execution of mentally retarded defendants.

The Eleventh Circuit attempted to deal with this result-oriented argument by stating that the burden of proof establishes what it means to be mentally retarded or, in the eyes of the law, a defendant is not mentally retarded unless he can establish this fact "beyond a reasonable doubt." Folding the burden into a "definitional" framework risks absurd results: if this were the case, then a state could define mental retardation in the most limiting of terms, perhaps restricting it only to severely retarded defendants or deciding a defendant must prove to a mathematical certainty that he is mentally retarded.

The panel also attempted to deal with the argument that the "beyond a reasonable doubt" standard will necessarily result in the execution of defendants who are mentally retarded. The majority ruled that the imposition of *any* burden on the defendant would necessarily create the risk of a violation of *Atkins*.[190] However, the Supreme Court in *Cooper v. Oklahoma*, in invalidating a "clear and convincing evidence" standard, clearly disagreed with the "slippery slope" perspective adopted by the panel.[191] The Court

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at the "definition" or "procedure" implemented by the statute was not as explicit. Head v. Hill, 587 S.E.2d 613, 262 (Ga. 2003).

[188] *See Humphrey*, 662 F.3d at 1348–49.

[189] *Id.*

[190] *Id.* at 1355–56.

[191] 517 U.S. 348, 363–64 (1996).

found that placing a high burden (which of course was not as high as "beyond a reasonable doubt") created an unacceptable risk that a defendant must bear in a situation where the consequences were dire.[192] It reasoned that where an evidentiary standard "affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent" there is reason to find that the state is imposing too significant a risk on the defendant.[193] In this situation, Hill has demonstrated that he is more likely than not mentally retarded.[194] Thus, Hill (and all similarly-situated defendants) falls into such a class and so bears too great a risk. Additionally, in *Cooper*, the Court noted that the unfairness of the rule requiring "clear and convincing evidence" to establish incompetency was compounded by the fact that because an incompetent defendant "lacks the ability to communicate effectively with counsel, he may be unable to exercise other rights deemed essential to a fair trial."[195] That mentally retarded defendants face a similar challenge strengthens this analogy.

The majority in *Humphrey* distinguished Hill's case from the incompetency situation by reasoning that *Cooper* relied on a long tradition of ensuring the right not to stand trial, which it reasoned was inapplicable in the case of retardation.[196] However, as previously and extensively mentioned, the Eighth Amendment inquiry does not rest on notions of tradition, but on an inquiry into evolving standards of decency. And in this instance, Georgia's heavy burden, unintentionally established, has clearly not kept up with the rest of the country's standards in this area.

The majority in *Humphrey* highlighted that in *Ford*, the Court looked at the entire statutory scheme and found it inadequate.[197] The majority in *Humphrey*[198] (and *Head*[199]) reasoned that the

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[192] *Id.*

[193] *Id.*

[194] As discussed above, two separate habeas courts have found that Hill meets the preponderance of evidence standard. Turpin v. Hill, 498 S.E.2d 52, 53 (Ga. 1998); Head v. Hill, 587 S.E.2d 613, 618 (Ga. 2003).

[195] *Cooper*, 517 U.S. at 364.

[196] *Humphrey*, 662 F.3d at 1350.

[197] *See* Ford v. Wainwright, 477 U.S. 399, 416 (1986) (discussing how the Executive branch made the operative determination there, and as such there were virtually no opportunities for the defendant to be heard, to present or challenge evidence, or to seek review).

[198] *Humphrey*, 662 F.3d at 1352–53.

[199] Head v. Hill, 587 S.E.2d 613, 622 (Ga. 2003) ("However, we conclude that the special risks and limitations suffered by truly mentally retarded persons at trial are sufficiently

procedural safeguards already in place, such as pre-trial competency hearings, right to a unanimous jury, right to have a jury determination, and right to present evidence, provided sufficient safeguards against the risk of erroneous determinations of mental retardation, and thereby distinguished *Ford*.

However, section 17-7-131 is less forgiving than the *Humphrey* majority let on. In Georgia, as in most jurisdictions, the defendant bears the burden of establishing mental retardation. However, a jury, rather than a judge, makes the relevant finding of fact, and does so during the guilt and innocence phase.[200] Requiring the jury to juggle highly technical information alongside the facts of a brutal murder can create the risk of confusion and threatens to allow biases from one set of facts to affect another. This is especially significant when jurors are not made aware that retardation does not offer the defendant a "free pass," but merely limits the range of available punishment.[201] Combined with the staggering burden of proof, the flaws of the sentence become even more clear.

Furthermore, the events following the *Humphrey* decision cast doubt on the effectiveness of the other procedural safeguards. Three of the psychiatrists (all presented by the State) who testified that Hill was not mentally retarded in 2000 have since recanted; the doctors now assert that due to recent medical advancements and access to additional records not originally presented to them in 2000, they would now categorize Hill as mentally retarded.[202]

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counterbalanced by the joint safeguards of Georgia's procedure for demonstrating incompetency to stand trial under the preponderance of the evidence standard and mental retardation under the beyond a reasonable doubt standard.").

[200] *See, e.g.*, Rogers v. State, 575 S.E.2d 879, 882 (Ga. 2003).

[201] *Humphrey*, 662 F.3d at 1353.

[202] *See* Brumback, *supra* note 4 (discussing how the State's experts' findings created room for the courts to rule Hill had not met his burden, but these experts have subsequently reconsidered their findings); Clancy, *supra* note 17 (stating that the doctors reconsidered their previous findings in light of newly "unearthed" elementary school records, including IQ tests with a score of 70 and the advancements in science, resulting in a unanimous consensus between all the "experts"); Lincoln Caplan, *Last Chance for Warren Lee Hill*, OPINION PAGES (Feb. 19, 2013), http://takingnote.blogs.nytimes.com/2013/02/19/last-chance-for-warren-lee-hill/?_r=0 (quoting Dr. James Carter—the senior doctor for the State—as finding the 2000 evaluation "extremely and unusually rushed" and that upon "more carefully review[ing] the record in this case, including materials to which [he] did not have access in 2000, such as the testimony of other witnesses . . . and other materials [like new scientific developments]" Dr. Carter stated "that the totality of the evidence establishes that Mr. Hill meets the criteria for mild mental retardation").

With this new evidence, all seven of the psychiatrists who testified have reached a unanimous consensus that Hill is mentally retarded.[203] Despite that revelation, the Eleventh Circuit has denied a rehearing and the admission of the psychiatrists' change in opinion.[204] The twenty plus years in which Hill has battled to avoid execution has ultimately brought no relief.

IV. CONCLUSION

The Supreme Court in *Ford* stated that "[o]nce a substantive right or restriction is recognized in the Constitution . . . its enforcement is in no way confined to the rudimentary process deemed adequate in ages past."[205] Georgia's statutory ban on executing the mentally retarded was the first in this nation, and even predated the national constitutional ban on such executions. But one aspect of that rule—the "beyond a reasonable doubt" standard—has not changed with the times. The standard may have been progressive in its time, but is no longer reasonable today. The evolution of national norms about executing the mentally retarded—from *Penry* requiring that mental retardation be admitted as mitigating evidence, to the Supreme Court's categorical prohibition of such executions in *Atkins*—has made clear that today's "standards of decency" certainly entail a ban on executing the mentally retarded.

However, mentally retarded defendants' rights are still not entirely protected. The *Atkins* directive that states implement the ban by their chosen means has resulted in varying standards across the nation. Georgia stands out among the varied standards as one statutory scheme that falls short of *Atkins*'s goals: it not only inadequately protects these defendants' rights, but actively contributes to their violation.

As evidenced by the *Hill* line of cases, semantic arguments have simultaneously and paradoxically endorsed the execution of a man who is mentally retarded while still remaining faithful to the constitutional ban on such executions. Common sense and sound legal reasoning mandate that such a result cannot stand.

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[203] Clancy, *supra* note 17.
[204] *In re* Hill, 715 F.3d 284, 294–95 (11th Cir. 2013).
[205] Ford v. Wainwright, 477 U.S. 399, 410 (1986).

Georgia's standard, which necessarily results in the execution of mentally retarded defendants, must be unconstitutional.

A closer look at the rationales in each of the *Hill* cases makes apparent that this paradoxical result stems from faulty analogies, skewing of the issue, and intentional avoidances of the true issue at hand. The courts are either intentionally disregarding Hill's constitutional rights, or are permitting procedural technicalities to trump his substantive rights.

Unfortunately Hill may never have this particular right enforced on his behalf. However, his case presents an opportunity for both the Georgia and federal governments to scrutinize the flaws within the statute and change the burden of proof to better align with today's standards of decency and the mandates of the United States Constitution.

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