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HELP WANTED: STATES LEFT WITH THE DAUNTING TASK OF APPLYING THE *ATKINS* HOLDING FOR THE EXEMPTION OF MENTALLY RETARDED DEFENDANTS FROM THE DEATH PENALTY

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I. INTRODUCTION

In its decision in *Atkins v. Virginia*, the United States Supreme Court ruled the execution of a mentally retarded defendant who has committed a capital crime is unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.¹ The Court left to the individual states the obligation to determine how to apply the holding of *Atkins*.² Because of this, the states differ on the definition of mental retardation, which party bears the burden of proof, the standard of proof to be applied, and when the determination of retardation should be made. Leaving the states to their own

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¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

² *Id.*

devices has denied some defendants full protection under the Eighth Amendment. It is not necessary to enact a standard mental retardation definition, because there are case-by-case details that should be taken into consideration in proving the existence of mental retardation of that individual defendant; however, states should enact laws that uphold the Court's holding in *Atkins* by establishing that (1) the defendant bears the burden of proof; (2) the standard of proof be preponderance of the evidence, and (3) the determination of mental retardation must be made prior to trial.

II. INTRODUCTION TO THE DEATH PENALTY AND HOW IT APPLIES TO THE MENTALLY RETARDED

The United States Supreme Court has continuously expressed that "death is different" when it comes to deciding death penalty appeals.³ Since 1976, 1,350 people have been executed in the United States.⁴ From 1976 to 2002, of those executed, at least forty-four were defendants with mental retardation.⁵ In fact, it was not until 2002 that the United States Supreme Court acknowledged that mental retardation limits a defendant's culpability to a degree that renders the death penalty cruel and unusual under the Eighth Amendment to the United States Constitution.⁶

In its 2002 landmark, *Atkins v. Virginia*, the Supreme Court ruled that it was unconstitutional to execute a mentally retarded defendant.⁷ Unfortunately, in its decision, the Supreme Court failed to advise the states which burden of proof standard should be used in determining a defendant's

³ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

⁴ Death Penalty Info. Ctr., *Number of Executions by State And Region Since 1976*, DEATHPENALTYINFO.ORG (last visited April 5, 2013), <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>.

⁵ Death Penalty Info. Ctr., *List of Defendants With Mental Retardation Executed In The United States*, DEATHPENALTYINFO.ORG, <http://www.deathpenaltyinfo.org/list-defendants-mental-retardation-executed-united-states> (last visited April 5, 2013).

⁶ *Atkins*, 536 U.S. at 321; Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders And Excluding Them From Execution*, 30 J. LEGIS. 77, 82 (2003).

⁷ *Atkins*, 536 U.S. at 321.

alleged mental retardation.⁸ The Supreme Court's failure to define the standard of proof to apply and which party bears the burden of proof, has denied mentally retarded capital defendants equal protection and due process rights under the Fourteenth Amendment. Chillingly, the failure by United States Supreme Court to establish a standard of proof means the difference between the defendant's life and death.⁹

Therefore, states should enact laws treating allegations of mental retardation as an affirmative defense, so like in other affirmative defense cases, the defendant bears the burden of proof. The states should further pass legislation standardizing the proof required to be introduced by a capital defendant. The standard of proof the states should adopt would be the preponderance of the evidence standard. The preponderance of the evidence standard would afford all capital defendants alleging mental retardation protection under the United States Constitution.

The United States Supreme Court also failed to set forth in the *Atkins* decision when the determination as to a defendant's alleged mental retardation should be made, causing inefficiency both in time and expense. Further, it creates bias in the judicial system in some states. The states, therefore, should uphold the United States Supreme Court decision in *Atkins* and require that the determination as to a defendant's mental retardation be made prior to trial. Such a procedure would be more likely to lead to a fair trial for mentally retarded defendants and create an efficient judicial process.

While the United States Supreme Court has righted the wrong illustrated in the 1976 decision in *Penry v. Lynaugh*, it did not provide practical recommendations to the states when applying *Atkins*, and therefore the states should endorse the *Atkins* holding to its fullest and intended effect so that mentally retarded defendants convicted of a capital crime are not denied their afforded protection under the United States Constitution.

⁸ James Gerard Eftink, et al, *Mental Retardation As A Bar To The Death Penalty: Who Bears The Burden of Proof?*, 75 MO. L. REV. 537, 568 (2010).

⁹ *Id.*

III. THE EXECUTION OF MENTALLY RETARDED PRIOR TO THE DECISION IN *ATKINS V. VIRGINIA* WAS BASED ON A "NATIONAL CONSENSUS"

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment; however, whether or not it was intended by its founders, the amendment has been dynamic because its scope has been manipulated based on society's progression.¹⁰ When the Supreme Court reviewed the case of *Penry v. Lynaugh*, one of the factors the Court seriously considered in determining whether the execution of a mentally retarded man was unconstitutionally cruel and unusual was society's evolving standard of decency.¹¹

John Paul Penry was charged with the 1979 brutal rape, beating, and fatal stabbing with a pair of scissors of a woman in Texas.¹² Penry, who had been on parole for another rape conviction at the time he committed the murder, was found competent to stand trial even though he was found to be "mildly to moderately retarded" and had "the mental age of a six-and-a-half year old."¹³ At his trial, doctors testified that Penry suffered from organic brain damage likely caused at birth and had an IQ at the time of trial of fifty-four.¹⁴ Penry, who was twenty-two years old at the time he committed the crime, had not only the mental age of a six-and-a-half year old child, but also the social maturity of a nine or ten-year-old child.¹⁵ Still, the jury found Penry competent to stand trial, convicted him, and sentenced him to death.¹⁶

¹⁰ Donald E. d'Entremont, *Constitutional Law-Defendant's Mental Retardation Does Not Preclude Imposition of the Death Penalty As Long As the Sentencer Considers All Relevant Mitigating Evidence-Penry v. Lynaugh*, 109 S. Ct. 2934 (1989), 24 SUFFOLK U. L. REV. 221, 224 (1990) [hereinafter *d'Entremont*].

¹¹ *Id.* at 224.

¹² *Penry v. Lynaugh*, 492 U.S. 302, 307 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 308.

¹⁶ *Id.*

The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal, determining that the death penalty was not prohibited due to Penry's allegation of being mentally retarded.¹⁷ Penry took his case to the District Court, which denied relief.¹⁸ Thus, Penry appealed to the Court of Appeals for the Fifth Circuit, which affirmed the District Court's judgment.¹⁹

Penry's case finally reached the United States Supreme Court in 1989, to determine, *inter alia*, whether it was cruel and unusual punishment to execute a mentally retarded person.²⁰ Here, Penry argued his mental retardation acted as a mitigating factor, and therefore he should have been sentenced to a penalty less than death.²¹ In a five-to-four decision, the Supreme Court found mental retardation is a factor that may lessen a defendant's culpability for a capital offense, but it could not be concluded in Penry's case that the Eighth Amendment precluded the execution of a mentally retarded person of Penry's ability.²²

In support of its decision, the Supreme Court stated while mental retardation could be considered and given effect as a mitigating factor in sentencing, there was not enough evidence in Penry's specific case to establish a national consensus against execution of the mentally retarded.²³ The Court examined federal and state laws prohibiting such executions, public opinion surveys, and the position of the American Association on Mental Retardation, and found no consensus at the time against executing mentally retarded defendants.²⁴ Therefore, the Court reasoned the states could continue to execute mentally retarded defendants until state legislatures reached a consensus prohibiting such executions.²⁵

¹⁷ Penry v. Texas, 691 S.W.2d 636, 654-55 (Tex. Crim. App. 1985).

¹⁸ Penry, 492 U.S. at 312.

¹⁹ Penry v. Lynaugh, 832 F.2d 915, 926 (5th Cir. 1987), *aff'd in part, rev'd in part*, 492 U.S. 302 (1989) *abrogated by* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

²⁰ Penry, 492 U.S. at 313.

²¹ *Id.* at 315.

²² *Id.* at 340.

²³ *Id.*

²⁴ *d'Entremont*, *supra* note 10, at 226.

²⁵ *Id.*; Linda L. Hinton, *Criminal Law-Imposing the Death Penalty on Capital Defendants Who Are Mentally Retarded Is Not Prohibited by the Eighth Amendment To The Constitution If Instructions To The Jury Allow*

While the state legislatures never did reach a consensus prohibiting such executions, the Supreme Court came to that decision thirteen years after *Penry* when it was asked to decide the case of *Atkins v. Virginia*.

IV. THIRTEEN YEARS AFTER *PENRY*, THE UNITED STATES SUPREME COURT GOT IT RIGHT IN *ATKINS* BY BANNING THE EXECUTION OF MENTALLY RETARDED DEFENDANTS

Thirteen years after the decision not to exclude the mentally retarded from being sentenced to death was reached in *Penry*, the Supreme Court decided that the death penalty could no longer be used against the mentally retarded. In a six-to-three decision, the Supreme Court reasoned in *Atkins v. Virginia*, that executing a mentally retarded person violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁶

Daryl Renard Atkins was convicted in Circuit Court in Virginia of abduction, armed robbery, and capital murder and was facing the death penalty.²⁷ In the penalty phase, the defense relied on testimony from a forensic psychologist who had evaluated Atkins and concluded that he was “mildly mentally retarded” based on interviews with people who knew Atkins, a review of school and court records, and by conducting an intelligence test, which indicated that Atkins had a full scale IQ of fifty-nine.²⁸ The jury sentenced Atkins to death anyway, but the Virginia Supreme Court ordered a second sentencing hearing because the trial court had used a misleading verdict form.²⁹ At the resentencing, the forensic psychologist testified again.³⁰ However, the prosecution presented an expert rebuttal witness who expressed the opinion that Atkins was not mentally retarded, but rather was of “average intelligence, at least,” and diagnosable as having

For The Consideration Of Mental Retardation As Mitigating Factor, 39 DRAKE L. REV. 921, 928-29 (1990).

²⁶ *Atkins*, 536 U.S. at 307.

²⁷ *Id.*

²⁸ *Id.* at 308-09.

²⁹ *Id.* at 309.

³⁰ *Id.*

antisocial personality disorder.³¹ The jury again sentenced Atkins to death.³² The Supreme Court of Virginia affirmed Atkins' death sentence stating it was "not willing to commute Atkins' sentence of death to life imprisonment merely because of his IQ score."³³ Because of the gravity of the concerns of the dissenters to the Virginia Supreme Court's decision, and due to the dramatic shift of the state legislative landscape that occurred since the *Penry* decision, the Supreme Court decided to grant Atkins certiorari.³⁴ Justice Stevens delivered the opinion of the Court stating:

Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are "cruel and unusual punishments" prohibited by the Eighth Amendment to the Federal Constitution.³⁵

³¹ *Id.*

³² *Id.*

³³ *Id.* at 310 (citing *Atkins v. Com.*, 534 S.E.2d 312, 321 (Va. 2000).

³⁴ *Atkins*, 536 U.S. at 310.

³⁵ *Id.* at 306-07.

V. INTERPRETATIONS POST-*ATKINS* BY THE STATES HAVE
RESULTED IN AN UNDERMINING OF THE *ATKINS*
HOLDING

After the decision was handed down in *Atkins*, the individual states were left to decide how to apply the holding to their own death penalty sentences.³⁶ Each state has been left to define mental retardation, to decide the necessary proof in determining whether a defendant is mentally retarded, and to determine whether or not a defendant could be sentenced to the death penalty, because the United States Supreme Court did not create a bright-line rule for any of those factors.³⁷ As a result, no uniform definition of mental retardation has been established.³⁸ Some states, such as Idaho, have applied a definition of mental retardation that is viewed by some as so limiting that it offends a defendant's rights under the United States Constitution.³⁹ In Idaho, mental retardation is based on a fixed IQ number, although experts agree that an IQ number alone does not determine mental retardation.⁴⁰ An Idaho defendant with an IQ of 71 or above could be set to be executed if convicted, even if that defendant could otherwise qualify as being mentally retarded.⁴¹ Other states, such as California, do not specify a certain IQ for determining mental retardation.⁴² Rather, California defines mental retardation as "significantly subaverage [sic] general intellectual functioning

³⁶ Anna M. Hagstrom, *Atkins v. Virginia: An Empty Holding Devoid of Justice for the Mentally Retarded*, 27 LAW & INEQ. 241, 241-42 (2009) [hereinafter *Hagstrom*].

³⁷ *Id.* at 242.

³⁸ *Id.*

³⁹ Am. Civil Liberties Union, *Mental Retardation And The Death Penalty*, ACLU.ORG (Sept. 4, 2003), <http://www.aclu.org/capital-punishment/mental-retardation-and-death-penalty> (last visited Oct. 19, 2013) [hereinafter *Mental Retardation And The Death Penalty*].

⁴⁰ See IDAHO CODE ANN. § 19-2515A(1)(b) (West, WestlawNext current through 2013); *Mental Retardation And The Death Penalty*, *supra* note 39.

⁴¹ IDAHO CODE ANN. § 19-2515A(1)(b) (West, WestlawNext current through 2013); *Mental Retardation And The Death Penalty*, *supra* note 39.

⁴² Sara Catania, *Death Row's IQ Divide*, L.A. TIMES OPINION (May 8, 2007), <http://www.latimes.com/news/opinion/commentary/la-oe-catania8may08,0,1060490.story>.

existing concurrently with deficits in adaptive behavior and manifested before the age of 18."⁴³

Inconsistencies also result, depending on when the determination of mental retardation is made.⁴⁴ In Louisiana and Virginia, prosecutors have argued the determination should always be made post-conviction by the same jury that found the defendant guilty.⁴⁵ In Louisiana, the determination of mental retardation can be made pre-trial by a judge but only if the prosecutor agrees the determination be made then, otherwise it is left to sentencing by the jury.⁴⁶ In Virginia, the determination is made by the jury or the judge in non-jury trials during the defendant's sentencing.⁴⁷ However, efficiency in the administration of justice dictates that a pre-trial determination on a defendant's mental retardation would save time and money associated with the prosecution of a death penalty trial.⁴⁸

Additionally, there have been irregularities among the states in establishing the standard of proof necessary to determine whether a defendant should be sentenced to death.⁴⁹ Currently sitting on death row in Georgia is Warren Hill, an inmate with an IQ of 70, who was granted a stay of execution on February 19, 2013, within thirty minutes of his scheduled time to receive a lethal injection.⁵⁰ In 1991, Hill was

⁴³ CAL. PENAL CODE § 1376 (West, West, WestlawNext current with urgency legislation through Ch. 526, except Ch. 352, of 2013 Reg.Sess.).

⁴⁴ *Mental Retardation And The Death Penalty*, *supra* note 39; *see also* John H. Blume et al., *Of Atkins and Men*, 18 CORNELL J.L. & PUB. POL'Y 689, 693 (2009).

⁴⁵ LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1)-(2) (West, WestlawNext current through 2013 Reg Session); VA. CODE ANN. § 19.2-264.3:1.1 (West, WestlawNext current through 2013 Reg. Session); *Mental Retardation And The Death Penalty*, *supra* note 39.

⁴⁶ LA. CODE CRIM. PROC. ANN. ART. 905.5.1(C)(1) (West, WestlawNext current through 2013 Reg. Session); Death Penalty Info. Ctr., *States That Have Changed Their Statutes To Comply With the Supreme Court's Decision in Atkins v. Virginia*, DEATHPENALTYINFO.ORG (last visited Mar. 3, 2013), <http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia>.

⁴⁷ VA. CODE ANN. § 19.2-264.3:1.1 (West, WestlawNext current through 2013 Reg. Session).

⁴⁸ *Mental Retardation and the Death Penalty*, *supra* note 39.

⁴⁹ *Hagstrom*, *supra* note 36, at 266.

⁵⁰ Ed Pilkington, *Georgia Inmate Warren Hill Granted Stay of Execution 30 Minutes Before Lethal Injection*, GUARDIAN.CO.UK,

sentenced to death after he killed his cellmate in prison.⁵¹ Hill was incarcerated at the time for killing his eighteen-year-old girlfriend.⁵² In Georgia, a defendant who alleges intellectual disability for avoiding the death penalty must prove the disability beyond a reasonable doubt.⁵³ Hill was sentenced to the death penalty after he was unable to prove beyond a reasonable doubt that he was mentally retarded.⁵⁴ The beyond a reasonable doubt standard is one in which experts say is almost impossible to achieve when using that standard to assess mental retardations.⁵⁵ Even those doctors who diagnosed Hill with an IQ of 70, which constitutes mild mental retardation, found it impossible to meet this standard.⁵⁶ All three of the doctors who examined Hill have reversed their opinion that Hill had not met the legal definition of “mentally retarded” and that their original evaluation of the Hill was “extremely and unusually rushed.”⁵⁷ Georgia continues to hold capital defendants to the strictest standard of proof to show intellectual disability should preclude the death penalty.⁵⁸ Georgia is an outlier, as twenty-eight of the thirty-

<http://www.guardian.co.uk/world/2013/feb/20/warren-hill-stay-of-execution> (last visited Feb. 20, 2013); Death Penalty Info. Ctr., *Georgia Disabilities Expert Calls for Halt to Execution of Inmate With Mental Retardation*, DEATHPENALTYINFO.ORG, <http://www.deathpenaltyinfo.org/georgia-disabilities-expert-calls-halt-execution-inmate-mental-retardation> (last visited Mar. 3, 2013); Eric Jacobson, *The Supreme Court Must Stop the Execution of Warren Hill*, HUFF POST CRIME, http://www.huffingtonpost.com/eric-jacobson/warren-hill-execution_b_2665094.html (last visited Feb. 11, 2013).

⁵¹ Huffington Post, *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, HUFF POST CRIME, (Feb. 19, 2013, 11:32 PM), http://www.huffingtonpost.com/2013/02/19/warren-hill-execution-stayed_n_2720700.html [hereinafter *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*].

⁵² *Id.*

⁵³ GA. CODE ANN. § 17-7-131 (West 2015); *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, *supra* note 51.

⁵⁴ *Warren Hill Execution Stayed: Georgia Death Row Inmate Spared in Last Minute Decision*, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

three states with the death penalty use a lower standard for proving mental retardation.⁵⁹

One of those states which require a lower standard of proof for avoiding the death penalty based on mental retardation is Arizona. On January 3, 2013, “after more than 13 years and two trials,” the Arizona Supreme Court ruled that Shawn Grell could not be executed because he was mentally retarded.⁶⁰ Grell’s sentence was reduced to life in prison without possibility of parole for the 1999 murder of his two-year-old daughter by lighting her on fire after dousing her with gasoline.⁶¹ At trial, Grell’s attorneys failed to prove by Arizona’s clear and convincing evidence standard that he was mentally retarded.⁶² But on appeal, the Arizona Supreme Court ruled that Grell was mentally retarded using a lower standard of preponderance of the evidence.⁶³ The Arizona Attorney General’s Office plans to appeal the Arizona Supreme Court’s ruling based on the fact that Grell was not found mentally retarded under the higher legal standard of clear and convincing evidence required by state law, but instead by a standard of preponderance of the evidence.⁶⁴ The Arizona Attorney General intends to seek legislation that would clarify the standard for future cases involving defendants who claim to be mentally retarded since Grell was found mentally retarded by preponderance of the evidence even though the statute in Arizona requires a defendant to

⁵⁹ The New York Times, *An Intolerable Burden of Proof*, THE OPINION PAGES (Nov. 29, 2011), available at http://www.nytimes.com/2011/11/30/opinion/an-intolerable-burden-of-proof.html?_r=0 (last visited Aug. 8, 2012).

⁶⁰ *Arizona v. Grell*, 291 P.3d 350, 357 (Ariz. 2013); Jim Walsh, *Arizona Court Reduces Shawn Grell’s Death Sentence to Life*, AZCENTRAL.COM (Jan. 9, 2013), <http://www.azcentral.com/community/mesa/articles/20130109arizona-court-reduces-shawn-grell-death-sentence-life-brk.html> (hereinafter Walsh).

⁶¹ *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

⁶² *Grell*, 291 P.3d at 351; *Walsh*, *supra* note 60; ARIZ. REV. STAT. ANN. § 13-753(g) (West, WestlawNext legislation effective June 20, 2013 of the First Regular Session of the Fifty-first Legislature).

⁶³ *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60 (“Teachers and school officials were reluctant to label Grell as retarded for fear of angering his mother, referring to behavioral disorders instead when assigning him to special-education classes.”).

⁶⁴ ARIZ. REV. STAT. ANN. § 13-753; *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

prove mental retardation by a clear and convincing evidence standard.⁶⁵

Those defendants on death row prior to the decision in *Atkins* have also met obstacles in appealing their sentences. The Fifth Circuit denied Bruce Webster, an inmate on federal death row for the 1994 kidnapping, rape, and murder of an Arkansas teen, an appeal to prove he was mentally retarded, because he had exhausted his appeals to the point where new evidence to prove his intellectual disability was not allowed unless that new evidence could show that Webster was innocent.⁶⁶ The allegedly weak weight of Webster's new evidence, including three doctors who diagnosed him as mentally retarded, and the fact he had applied for Social Security Disability benefits due to his mental retardation the year prior to the murder he committed, was not the reason for the denial by the Fifth Circuit and affirmation by the United States Supreme Court.⁶⁷ Rather, a 1996 federal criminal law severely limiting the number of appeals an inmate can make stopped Webster from possibly establishing his mental retardation post-*Atkins*.⁶⁸

Even inconsistencies in applying the bare bones ruling of *Atkins* (no death penalty sentence for the mentally retarded) have been felt since its decision was entered. In August 2012, Marvin Wilson, a defendant with an IQ of 61, was executed in Texas.⁶⁹ Generally, an IQ of around 70 or as high as 75

⁶⁵ ARIZ. REV. STAT. ANN. § 13-753; *Grell*, 291 P.3d at 357; *Walsh*, *supra* note 60.

⁶⁶ *United States v. Webster*, 421 F.3d 308, 309 (5th Cir. 2005); Scott Goldstein, *High Court Denies Appeal of Mentally Retarded Man Who Helped Rape, Kill Arlington Teen*, THE DALLAS MORNING NEWS (Dec. 7, 2010, 6:54 AM), <http://www.dallasnews.com/news/community-news/arlington/headlines/20101207-high-court-denies-appeal-of-mentally-retarded-man-who-helped-rape-kill-arlington-teen.ece> [hereinafter *Goldstein*].

⁶⁷ *United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005); *Goldstein*, *supra* note 66.

⁶⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No.104-132, 110 Stat 1214 (1996); *Goldstein*, *supra* note 66.

⁶⁹ David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, U.S. NEWS (Aug. 14, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/08/14/supreme-court-outlawed-executing-mentally-retarded-but-texas-does-it-anyway.html> (last visited Aug. 19, 2012) [hereinafter *Dow*]; Kate Randall, *Texas Executes Mentally Disabled Death Row Prisoner*, WORLD SOCIALIST WEBSITE (Aug. 8, 2012),

indicates limited intellectual functioning.⁷⁰ Texas allowed for the execution of Wilson, convicted of murdering a police informant in 1992, using precedent from the Texas Court of Criminal Appeals decision established in *Ex parte Briseno*.⁷¹ In *Ex parte Briseno*, a mentally retarded defendant was executed because his retardation was deemed to be *mild*.⁷² From this 2004 case, Texas uses a “*Briseno* factors” test to determine mental retardation.⁷³ These “*Briseno* factors” are arguably subjective and stereotypical and without any scientific data to back them up.⁷⁴ These factors include but are not limited to asking people who knew the defendant whether they thought he was “mentally retarded” to whether the crime committed required forethought.⁷⁵

On February 29, 2012, Arizona executed Robert Moorman, who was diagnosed as being mentally retarded and having attended special education classes while in public school.⁷⁶ Moorman was sentenced to death for the 1984 murder of his adoptive mother who he killed while out on a three-day furlough while serving a nine-year prison term for

<http://www.wsws.org/Fen/articles/2012/08/wils-a08.html> (last visited Aug. 19, 2013) [hereinafter *Randall*].

⁷⁰ Am. Ass’n of Intellectual and Dev’l Disabilities, *Definition of Intellectual Disability*, AIDD.ORG, http://www.aidd.org/content_100.cfm?navID=21.

⁷¹ *Ex parte Briseno*, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004); Dustin Volz, *Court Also Rejects Appeal for Man Scheduled to Die Next Week*, Tucson Sentinen.com (Feb. 29, 2012, 11:31 AM),

http://www.tucsonsentinel.com/local/report/022912_az_executions/man-put-death-after-last-minute-appeals-fail/, David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, U.S.NEWS (Aug. 14, 2012, 4:45 AM),

<http://www.thedailybeast.com/articles/2012/08/14/supreme-court-outlawed-executing-mentally-retarded-but-texas-does-it-anyway.html>.

⁷² *Briseno*, 135 S.W.3d at 18; *Dow*, *supra* note 68.

⁷³ *Briseno*, 135 S.W.3d at 8; *Randall*, *supra* note 68.

⁷⁴ *Briseno*, 135 S.W.3d at 8; *Randall*, *supra* note 68.

⁷⁵ John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 712 (2009).

⁷⁶ Michael Kiefer, *Execution to Conclude Shocking Arizona Murder Case*, NEWS (Feb. 25, 2012, 10:19 PM),

<http://www.azcentral.com/news/articles/20120224arizona-murder-case-execution-moormann.html> [hereinafter *Kiefer*].

the 1984 kidnapping and molesting of a nine-year-old girl.⁷⁷ A defendant in Arizona, by clear and convincing evidence, must prove the criteria of being mentally retarded to avoid the death penalty under *Atkins*.⁷⁸ One doctor witness, who often testifies against inmates, said Moorman was “absolutely” mentally disabled, which would make it illegal for Arizona to execute him because of *Atkins*.⁷⁹ Other doctors said that Moorman’s intellect was just above someone who is legally considered mentally disabled.⁸⁰

Ten years after the *Atkins* decision, Alabama reduced the sentence of one of their longest serving death row inmates because of the defendant’s intellectual disability. Bobby Tarver, convicted in 1982 of murdering a taxi cab driver, had his death sentence overturned by a federal judge because of Tarver’s mental retardation.⁸¹ In 2003, Melanie Anderson’s sentence to the death penalty for the 1994 beating and torture death of her boyfriend’s three-year-old niece was reversed to life in prison after she was deemed mentally retarded.⁸²

VI. STATES SHOULD REQUIRE THAT A DEFENDANT BEAR THE BURDEN OF PROOF IN SHOWING MENTAL RETARDATION AS AN AFFIRMATIVE DEFENSE

Currently, only fourteen of the thirty-three states with the death penalty have enacted statutes shifting the burden of

⁷⁷ *Arizona v. Moorman*, 744 P.2d 679, 681-82 (Ariz. 1987); *Kiefer, supra* note 76 (Moorman’s representatives said he killed his adoptive mother after years of suffering sexual abuse from her).

⁷⁸ ARIZ. REV. STAT. ANN. § 13-753(G); *Arizona v. Grell*, 291 P.3d 350, 352 (Ariz. 2013).

⁷⁹ *Moorman*, 744 P.2d at 688; *Kiefer, supra* note 76.

⁸⁰ *Moorman*, 744 P.2d at 688; *Kiefer, supra* note 76.

⁸¹ *Tarver v. Thomas*, No. 07-00294-CG-B, 2012 WL 4461710, at *20 (S.D. Ala. Sept. 24, 2012); Brendan Kirby, *Judge Changes Sentence of Mobile County’s Longest-Serving Death Row Inmate to Life*, BLOG.AL.COM (Dec. 6, 2012, 3:53 PM), http://blog.al.com/live/2012/12/judge_changes_sentence_of_mobi.html.

⁸² *North Carolina v. Anderson*, 94 CRS 5669, 95 CVR 887 (N.C. Gen. Ct. Justice Superior Ct. Div. July, 29, 2003); Jerry Lankford, *A Look at Capital Punishment and Wilkes County Moratorium on Executions Possible*, THE RECORD (June 11, 2003),

http://www.therecordofwilkes.com/news.asp?edition_number=187&pg=F.

proving mental retardation to the defendant.⁸³ Since the decision in *Atkins*, three states have not set a standard of proof at all, but still require that the defendant prove his or her mental retardation.⁸⁴ Historically, the prosecution bears the burden of proof in criminal cases; however, as to certain defenses, various jurisdictions assign one or more of the burdens to the defense.⁸⁵ When it comes to proving an affirmative defense, federal courts have upheld statutory law requiring the defendant to bear the burden of proof.⁸⁶ A defendant uses an affirmative defense to admit that he has acted in the way in which he has been accused, but that his conduct was justifiable, excusable, or could be mitigated for a particular reason, and therefore should reduce or negate the crime which he has been charged with.⁸⁷ Mental retardation should, therefore, be considered an affirmative defense and shift the burden of proof to the defendant because it is offered by the defendant to excuse or mitigate his actions in an effort to avoid being sentenced to death. In further support that the burden should be borne by the defendant, it should be noted that no state statute currently exists that places the burden on the prosecution to prove that the defendant is not mentally retarded.⁸⁸ Once the states enact legislation placing the burden of proof with the defendant, the question becomes what that standard of proof should be.

⁸³ Yamilka M. Rolon, *Mental Retardation And The Death Penalty*, J. AM. ACAD. PSYCHIATRY & L. ONLINE (June 2008), <http://www.jaapl.org/content/36/2/250.full> (hereinafter Rolon).

⁸⁴ *Pruitt v. Indiana*, 834 N.E. 2d 90, 102 (Ind. 2005); Rolon, *supra* note 82.

⁸⁵ 1 JONES ON EVIDENCE § 5:18 (7th ed. 2012).

⁸⁶ Matthew S. Gray, *Proof Issues*, 84 GEO. L.J. 1248, 1252 (1996).

⁸⁷ Scott R. Poe, *Inconsistent Methods for the Adjudication of Alleged Mentally Retarded Individuals: A Comparison of Ohio's and Georgia's Post-Atkins Frameworks for Determining Mental Retardation*, 54 CLEV. ST. L. REV. 405, 421 (2006) [hereinafter *Poe*].

⁸⁸ *Missouri v. Johnson*, 244 S.W.3d 144, 150 (Mo. 2008).

VII. STATE SHOULD REQUIRE THAT A DEFENDANT PROVE MENTAL RETARDATION USING A PREPONDERANCE OF THE EVIDENCE STANDARD TO AVOID UNDERMINING THE HOLDING OF *ATKINS*

Because the United States Supreme Court did not set a standard of proof to be applied by the states in *Atkins*, state legislatures are permitted to enact any or no laws mandating what standard their state will apply as long as it is “appropriate.”⁸⁹

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”⁹⁰

Since the *Atkins* decision, three states with the death penalty have not set a standard of proof.⁹¹ Six states with the death penalty have enacted statutes requiring a preponderance of the evidence standard, with eighteen death penalty states keeping their pre-*Atkins* preponderance of the evidence standard.⁹² Four states with the death penalty require a clear

⁸⁹ Ed Pilkington, *Georgia Lawyers Rush To Save ‘Mentally Retarded’ Death Row Inmate*, THE GUARDIAN (Feb. 17, 2013, 9:56 AM), http://www.guardian.co.uk/world/2013/feb/17/warren-hill-georgia-inmate-execution#cb=f39e0ebe6227d6&origin=http%3A%2F%2Fwww.guardian.co.uk%2Ff3928fdbf733eb8&domain=www.guardian.co.uk&relation=parent&error=unknown_user.

⁹⁰ *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

⁹¹ *Pruitt*, 834 N.E. 2d at 102; Rolon, *supra* note 83.

⁹² *Rolon*, *supra* note 83; The National Judicial College, *Case and Statute References for Mental Retardation*, JUDGES.ORG (last visited April 12, 2013), <http://www.judges.org/capitalcasesresources/bookpdf/appendices/Case%20and%20Statute%20References%20for%20Mental%20Retardation.pdf>; *see* *Smith v. Alabama*, 2007 Ala. LEXIS 91, 32-33 (Ala. May 25, 2007) (citing *Morrow v. Alabama*, 928 So. 2d 315, 323 (Ala. Crim. App. 2004); *see also* *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1341 n.21 (N.D. Ala. 2006)); A.C.A. § 5-4-618(a)(2),(c) (2008); CAL. PEN. CODE. § 1376(b)(3) (2008); COLO. REV. STAT. § 18-1.3-1102(2) (2008); *see also* *Colorado v. Vasquez*,

and convincing evidence standard.⁹³ Only one state with the death penalty, Georgia, requires that a defendant prove mental retardation beyond a reasonable doubt standard.⁹⁴

First, we must look at the standards of proof that fail to uphold the intention of *Atkins* to move toward the correct standard of proof that should rest upon the defendant. Placing a standard of proof of beyond a reasonable doubt upon a defendant is unconstitutional because it makes it almost impossible for those capital defendants with mental retardation from proving their condition.⁹⁵ For example, a capital defendant who alleges mental retardation in Georgia has to introduce more evidence than a capital defendant alleging mental retardation in any other state and that proof must show with “virtual certainty” that the defendant is mentally retarded.⁹⁶ Consequently, doubt can easily be

84 P.3d 1019 (Colo. 2004); DEL. CODE ANN. tit. 11, § 4209(d)(3); IDAHO CODE ANN. § 19-2515A(3) (2008); 725 ILCS 5/114-15(b) (2009); *Bowling v. Kentucky*, 163 S.W.3d 361, 382 (Ky. 2005); LA. CODE CRIM. PROC. Art. 905.5.1(C)(1) (2008); MD. CODE ANN., Crim. Law § 2-202(b)(2)(ii); *see Chase v. Missouri*, 873 So.2d 1013, 1029 (Miss. 2004); MO. REV. ST. § 565.030.4(1) (2008); NEB. REV. STAT. § 28-105.01(4) (2008); NEV. REV. STAT. ANN. § 174.098.5(b) (2008); N.C. GEN. STAT. § 15A-2005(c), (f) (2008) (standard of proof is preponderance of the evidence if determined by a jury, clear and convincing evidence if determined by a court); *Ohio v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002); *Murphy v. Oklahoma*, 54 P.3d 556, 568 (Okla. Crim. App. 2002); *Blonner v. Oklahoma*, 2006 OK CR 1, 6-8 (Okla. Crim. App. 2006); *see Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003); S.D. CODIFIED LAWS § 23A-27A-26.3 (2009); TENN. CODE ANN. § 39-13-203(c) (2008); *Ex Parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); UTAH CODE ANN. § 77-15a-104(11)(a); VA. CODE ANN. § 19.2-264.3:1.1(C); WASH. REV. CODE § 10.95.030(2) (2008).

⁹³ *Rolon, supra* note 83; The National Judicial College, *Case and Statute References for Mental Retardation*, JUDGES.ORG (last visited April 12, 2013),

<http://www.judges.org/capitalcasesresources/bookpdf/appendices/Case%20and%20Statute%20References%20for%20Mental%20Retardation.pdf>; ARIZ. REV. STAT. § 13-703.02(G) (2007); FLA. STAT. ANN. § 921.137(4) (2008); IND. CODE ANN. § 35-36-9-4(b) (2008); N.C. GEN. STAT. § 15A-2005(c), (f) (2008).

⁹⁴ *Rolon, supra* note 83; O.C.G.A. § 17-7-131(c)(3) (2008)

⁹⁵ Andrew Cohen, *Executing The Mentally Retarded: The Night The Lights Went Out In Georgia*, THE ATLANTIC (Feb. 13, 2013, 11:54 AM), <http://www.theatlantic.com/national/archive/2013/02/executing-the-mentally-retarded-the-night-the-lights-went-out-in-georgia/273088/>.

⁹⁶ *Poe, supra* note 87, at 420.

introduced by expert testimony and an effective opposing expert can raise doubt enough to sentence a defendant to death who would otherwise be considered mentally retarded.⁹⁷ The United States Supreme Court has never “suggested much less held, that a burden of proof standard on its own can so wholly burden an Eighth Amendment right as to eviscerate or deny that right.”⁹⁸ Because of their disabilities in areas of reasoning, judgment, and control of their impulses, the mentally retarded do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.⁹⁹ Requiring such a high standard of proof such as Georgia’s standard denies a capital defendant protection and due process and undermines the *Atkins* holding.

Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.”¹⁰⁰ At least one state has found that a clear and convincing evidence standard placed on a defendant trying to prove mental retardation is unconstitutional under *Atkins*.¹⁰¹ In *Pruitt v. State*, the Supreme Court of Indiana reasoned that assigning the clear and convincing evidence standard to a defendant to prove his allegation of mental retardation in avoiding a sentence of death was a violation of the Eighth Amendment because “the defendant’s right not to be executed if mentally retarded outweighs the state’s interest as a matter of federal constitutional law.”¹⁰² The Indiana Supreme Court analogized the *Pruitt* case with *Cooper v. Oklahoma*, which found that requiring a defendant to prove his competence to stand trial by a clear and convincing evidence standard was a violation of his right to due process.¹⁰³

In *Cooper v. Oklahoma*, the United States Supreme Court unanimously decided that a defendant did not have to prove his competency to stand trial by a clear and convincing

⁹⁷ The New York Times, *An Intolerable Burden of Proof*, THE OPINION PAGES (Nov. 29, 2011), http://www.nytimes.com/2011/11/30/opinion/an-intolerable-burden-of-proof.html?_r=0.

⁹⁸ *Id.*

⁹⁹ *Atkins*, 536 U.S. at 306.

¹⁰⁰ BLACK’S LAW DICTIONARY, (9th ed. 2009).

¹⁰¹ *Pruitt*, 834 N.E.2d at 103.

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Cooper v. Oklahoma*, 517 U.S. 348, 369 (1996)).

standard because it was too high of a burden.¹⁰⁴ The Court reasoned that assigning a burden of clear and convincing evidence to the defendant places a “significant risk of an erroneous determination that the defendant is competent.”¹⁰⁵ Further, the Court found that a clear and convincing evidence standard allocates a large share of the risk to the defendant.¹⁰⁶ The Court reasoned the clear and convincing evidence standard was such a harsh standard that it violates a defendant’s right to due process of law and that the standard assigned should be a preponderance of the evidence standard.¹⁰⁷ While the *Cooper* case was to determine competency to stand trial, it should still be looked to for guidance in deciding the standard to assign a capital defendant alleging mental retardation because the issues are analogous.

The “more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.”¹⁰⁸ To avoid an erroneous decision being made in a decision as important as life or death of a defendant, states should require that at a maximum the standard of proof assigned to a capital defendant alleging an affirmative defense of mental retardation is the standard of preponderance of the evidence. A standard of preponderance of the evidence means “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”¹⁰⁹ Currently, the majority of states that have enacted legislation requiring the capital defendant prove their mental retardation by a certain burden of proof have chosen that burden to be by a preponderance of the evidence.¹¹⁰

States should treat a determination of mental retardation similar to the United States Supreme Court’s

¹⁰⁴ *Cooper*, 517 U.S. at 369.

¹⁰⁵ *Id.* at 363.

¹⁰⁶ *Id.* at 366.

¹⁰⁷ *Id.*

¹⁰⁸ *Cruzan by Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 283 (1990).

¹⁰⁹ BLACK’S LAW DICTIONARY (9th ed. 2009).

¹¹⁰ Mary Hollingsworth, *State v. Grell: Placing the Burden on Defendants to Prove Mental Retardation in Capital Cases*, 49 ARIZ. L. REV. 775, 778 (2007).

treatment of competency for trial and require that the standard of proof that a capital defendant must prove be by a preponderance of evidence.¹¹¹ The argument for this treatment is: the risk to a capital defendant who must meet a burden higher than preponderance of the evidence is dire, whereas the risk to the state is modest.¹¹²

When the burden of proof is at the lower standard of preponderance of the evidence, success by capital defendants claiming mental retardation is not frequent, which illustrates that a preponderance of the evidence standard is not just a “free pass” for a capital defendant alleging mental retardation trying to avoid the death penalty.¹¹³ For example, in Virginia, which requires a capital defendant prove mental retardation by a preponderance of the evidence, the success rate is zero percent for the six capital defendants who have alleged mental retardation to avoid the death penalty.¹¹⁴ Similarly, Alabama, which has a preponderance of the evidence standard, has only a twelve percent success rate for the twenty-six capital defendants who have alleged mental retardation to avoid the death penalty.¹¹⁵

Therefore, subjecting a capital defendant to prove an allegation of mental retardation at any standard higher than preponderance of the evidence would shift the allocation of risk, and would be dire for the defendant’s defense. All states with the death penalty should refine their legislation by joining the majority of states and mandate that the standard of proof be preponderance of the evidence to avoid deflating the *Atkins* holding.

¹¹¹ *Cooper*, 517 U.S. at 355.

¹¹² *Id.* at 364-65.

¹¹³ Kenneth Williams, *Most Deserving Of Death? An Analysis Of The Supreme Court’s Death Penalty Jurisprudence*, (last visited April 5, 2013), available at

<http://books.google.com/books?id=nAxAOUWyacUC&pg=PA100&lpg=PA100&dq=mentally+retarded+states+preponderance&source=bl&ots=WTEvuCtXqP&sig=j4XANVEpcPCjQeVDvnOUuvLS7zk&hl=en&sa=X&ei=iwBiUbiFJJHM9ATPyoDYBQ&ved=0CDwQ6AEwAg#v=onepage&q=mentally%20retarded%20states%20preponderance&f=false>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

VIII. STATES SHOULD ENACT STATUTORY LAW REQUIRING THAT THE DETERMINATION OF A DEFENDANT'S ALLEGED MENTAL RETARDATION BE DECIDED PRIOR TO THE TRIAL COMMENCING

The determination of whether a capital defendant is mentally retarded by the standard of preponderance of the evidence should be made prior to trial. This would eliminate any bias that may occur by the factfinder if the determination was made after the guilt phase and to encourage efficiency of resources, time, and expense. Mental retardation is a "threshold issue that determines whether a defendant is eligible for capital punishment at all."¹¹⁶ Currently, in many states, the same jury that finds a defendant guilty during the guilt phase of the trial decides whether to impose the death penalty by considering any aggravating or mitigating factors.¹¹⁷ Consideration of a capital defendant's mental retardation during the penalty phase, in addition to being made by the same jury that found a defendant guilty during the guilt phase, can cause a higher risk of wrongful execution, because "[m]entally retarded defendant[s] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."¹¹⁸ While the determination of a mental retardation includes fact-finding, mental retardation itself "is not the functional equivalent of an element of a crime;" therefore, determination by a jury is not constitutionally required under the Sixth Amendment of the United States Constitution and may be left to the judge to decide prior to trial.¹¹⁹

Proceeding as a noncapital case conserves significant resources by reducing litigation expenses and expediting the

¹¹⁶ Howell v. Tennessee, 151 S.W.3d 450, 465 (Tenn. 2004).

¹¹⁷ *Id.*

¹¹⁸ Jessica Hudson, et al., *Lightning but No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing Atkins v. Virginia*, 55 NAVAL L. REV. 359, 374 (2008) (citing *Flores*, 93 P.3d at 1269 (quoting *Atkins*, 536 U.S. at 320-21)) [hereinafter *Hudson*].

¹¹⁹ *Grell*, 135 P.3d at 706.

overall proceedings.¹²⁰ Trying a capital defendant is more time consuming, expensive, and leads to a greater use of state legal resources because the government must avoid errors, which could prove fatal, in trying a death penalty case.¹²¹ Allowing a trial judge to issue a pre-trial determination as to a capital defendant's mental retardation is "economical in terms of the time and cost that might be saved by avoiding a capital trial."¹²² In light of that fact, "every effort must be made to avoid a death-penalty trial, as early in the proceedings as possible, where capital punishment is precluded as a matter of law."¹²³ Additionally, should a determination of mental retardation be made by the judge prior to trial, an otherwise capital defendant could decide to plea, thus expediting the judicial process.¹²⁴

Therefore, to provide full constitutional protection to a capital defendant and to encourage efficiency of the criminal system in applying *Atkins*, the states should enact legislation

¹²⁰ See *New Mexico v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004) (recognizing that a capital murder trial consumes significantly more resources than a non-capital trial and that it would be beneficial to all parties to resolve the question of whether the defendant is eligible for the death penalty as early as possible); *Hudson*, *supra* note 118, at 391.

¹²¹ Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 574 (2005).

¹²² *Pennsylvania v. Sanchez*, 36 A.3d 24, 80 (Pa. 2011) *cert. denied*, 133 S. Ct. 122 (2012).

¹²³ *Id.*; *Flores*, 93 P.3d at 1269; see *Atkins*, 536 U.S. at 320 (categorically prohibiting the execution of mentally retarded offenders). By placing the mental retardation determination in the hands of the judge for a pretrial decision, "significant resources [could be] saved in terms of trial preparation, motion practice, voir dire, trial time, mitigation research, etc.," if the defendant is found to have mental retardation. *United States v. Nelson*, 419 F.Supp.2d 891, 893 (E.D. La. 2006); see also *Morrow v. Alabama*, 928 So.2d 315, 324 (Ala. Crim. App. 2004) (stating that pretrial *Atkins* determination by the court spares the parties from "the onerous burden of a futile bifurcated capital sentencing procedure") (quoting *Louisiana v. Williams*, 831 So.2d 835, 860 (La. 2002), *superseded by statute as stated in Louisiana v. Turner*, 936 So.2d 89, 103 (La. 2006)); *Hudson*, *supra* note 118, at 390 (noting the economic benefits of having a judge resolve *Atkins* claims pretrial).

¹²⁴ *Hudson*, *supra* note 118, at 372.

that leaves determination of a capital defendant's alleged mental retardation to the judge prior to the guilt phase.

IX. CONCLUSION

The United States Supreme Court condemned the execution of mentally retarded capital defendants in *Atkins* because it studied the national consensus, which illustrated that the goals of the criminal justice system cannot be met by a person, who because of his mental limitations, cannot understand the consequences or wrongfulness of his actions. Because the Supreme Court left it to the states to apply the *Atkins* holding, the states should enact certain laws to protect the Court's intention of not violating a capital defendant's Eighth and Fourteenth Amendment rights under the United States Constitution. States should enact legislation that (1) shifts the burden of proof to the defendant because an allegation of mental retardation is an affirmative defense that should be borne by the defense, (2) sets a standard of preponderance of the evidence as the maximum standard of proof a capital defendant must meet to prove mental retardation because any higher standard of proof would unfairly allocate an erroneous risk to the defense that could mean death for someone who would otherwise be exempted from the death penalty, and (3) requires the determination of mental retardation be made prior to the penalty phase to encourage efficiency in time and expenses and to discourage bias. Justice requires no less.