

# NOTES

## 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

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### I. INTRODUCTION

Jerome Holloway is a mentally retarded man in Georgia accused of robbery and murder.<sup>1</sup> With an I.Q. of forty-nine, Holloway's mental age is that of a seven year old.<sup>2</sup> Holloway cannot tell time, does not know what country he lives in, and cannot recite the alphabet.<sup>3</sup> Holloway's attorney described him as a man who is "poor and illiterate and totally without the mental facilities to understand the fate which awaited him."<sup>4</sup> Nonetheless, Holloway confessed to the crimes, although he could not even read his statement.<sup>5</sup> Holloway was sentenced to death.<sup>6</sup> On appeal,

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<sup>1</sup> Human Rights Watch, *Beyond Reason: The Death Penalty and Offenders with Mental Retardation*, 13 HUM. RTS. WATCH 1(G) (2001), available at <http://www.hrw.org/reports/2001/ustat>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Joe Parham, *Condemned Man Called 'Most Retarded Man on Death Row,'* UNITED PRESS INT'L, Oct. 12, 1987, Monday, PM Cycle, Domestic News.

<sup>5</sup> Human Rights Watch, *supra* note 1.

<sup>6</sup> *Id.*

Holloway's lawyers demonstrated Holloway's lack of comprehension by asking whether he assassinated Presidents Lincoln, Kennedy, and Reagan.<sup>7</sup> Holloway replied that he assassinated all three.<sup>8</sup> Holloway was described as "the most retarded man on death row anywhere in the nation."<sup>9</sup> Just hours before his scheduled execution, the Georgia Supreme Court overturned Holloway's sentence due to his lack of mental capacity.<sup>10</sup>

Earl Washington is a mentally retarded man from Virginia with an I.Q. between fifty-seven and sixty-nine.<sup>11</sup> Washington, who has a mental age of ten, "knows 'some,' but not all, of the letters of the alphabet."<sup>12</sup> In 1983, Washington was arrested for a minor assault.<sup>13</sup> During his interrogation, Washington confessed to various other crimes, including a 1982 rape and murder.<sup>14</sup> Despite concluding that most of Washington's confessions were false, the State prosecuted Washington and sentenced him to death.<sup>15</sup> Great weight was given to Washington's confessions.<sup>16</sup> Washington was later exonerated by DNA tests and pardoned in 2000.<sup>17</sup>

In 2002, the United States Supreme Court in *Atkins v. Virginia* held unconstitutional the execution of mentally retarded individuals.<sup>18</sup> The Court did not, however, set forth a definition of mental retardation or a procedural standard by which mental retardation would be decided.<sup>19</sup> The result is a plethora of procedures and definitions that differ from state to state.<sup>20</sup> Ohio and Georgia are two states with vastly different procedures for determining mental retardation. These different procedures may lead to an arbitrary application of *Atkins*, which "arguably violates" *Furman v. Georgia*.<sup>21</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Parham, *supra* note 4.

<sup>10</sup> Human Rights Watch, *supra* note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; see also *Washington v. Commonwealth*, 323 S.E.2d 577 (Va. 1984).

<sup>15</sup> Human Rights Watch, *supra* note 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>19</sup> *Id.* at 317. The Court's decision to leave to the states the task of developing a procedural standard has recently been reaffirmed. See *Schriro v. Smith*, No. 04-1475, 2005 U.S. LEXIS 7652 (Oct. 17, 2005).

<sup>20</sup> See, e.g., *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002) (setting forth procedural framework in Ohio for determining mental retardation); GA. CODE ANN. § 17-7-131 (2005) (setting forth procedural framework in Georgia for determining mental retardation).

<sup>21</sup> *Furman v. Georgia*, 408 U.S. 238 (1972); see *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted

First, Ohio and Georgia have adopted different burdens of proof for establishing mental retardation.<sup>22</sup> Like Ohio, the majority of states require that mental retardation be established by a preponderance of the evidence.<sup>23</sup> By contrast, Georgia is the only state that requires defendants to prove mental retardation beyond a reasonable doubt.<sup>24</sup> Georgia's higher standard of proof causes several problems. For example, Georgia's burden of proving mental retardation is inconsistent with its burden of proving affirmative defenses.<sup>25</sup> Also, the mentally retarded defendant's reduced mental capacity justifies a lower standard of proof.<sup>26</sup> Further, an individual alleging mental retardation may have better success prevailing in Ohio on his or her claim than in Georgia.<sup>27</sup> Such a result is unacceptable because it may result in an arbitrary application of *Atkins*.

Second, while Ohio requires the judge to make the mental retardation determination,<sup>28</sup> Georgia requires the jury to decide the issue.<sup>29</sup> If a jury is biased toward a mentally retarded defendant it does not understand, then allowing that jury to make the retardation determination is inappropriate.<sup>30</sup> It is more appropriate to require the judge, who has more experience making impartial decisions, to determine mental retardation.<sup>31</sup> Ohio and Georgia have each adopted a definition of mental

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in an arbitrary and capricious manner.”); see also Cynthia Orpen, *Following in the Footsteps of Ford: Mental Retardation and Capital Punishment Post-Atkins*, 65 U. PITT. L. REV. 83, 88 (2003) (arguing that the failure of the Supreme Court to set a uniform state standard for determining insanity and mental retardation leads to an arbitrary application of capital sentences, which “arguably violates *Furman*”).

<sup>22</sup> Compare *Lott*, 779 N.E.2d at 1015 (requiring capital defendants prove mental retardation by a “preponderance of the evidence”), with GA. CODE ANN. § 17-7-131(c)(3) (2005) (requiring capital defendants prove mental retardation “beyond a reasonable doubt”).

<sup>23</sup> Orpen, *supra* note 21, at 96.

<sup>24</sup> *Id.* at 96-97.

<sup>25</sup> See Amanda Raines, Note, *Prohibiting the Execution of the Mentally Retarded*, 53 CASE W. RES. L. REV. 171, 198 (2002) (arguing the role of mental retardation will “change from being a mitigating factor to being akin to an affirmative defense”).

<sup>26</sup> Jonathan L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 135 (1996).

<sup>27</sup> See Orpen, *supra* note 21, at 95 (arguing the lack of definite procedural standard for use in determining mental retardation for *Atkins* purposes leads to an “arbitrary and inconsistent application of *Atkins*”).

<sup>28</sup> *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002)

<sup>29</sup> GA. CODE ANN. § 17-7-131(c)(3) (2005).

<sup>30</sup> See, e.g., Bing, *supra* note 26, at 86 (“Juries may actually interpret mental retardation as an aggravating, rather than a mitigating, factor in the decision of whether to impose capital punishment.”); Rebecca Dick-Hurwitz, *Penry v. Lynaugh: The Supreme Court Deals a Fatal Blow to Mentally Retarded Capital Defendants*, 51 U. PITT. L. REV. 699, 723 (1990) (arguing that a jury may see mental retardation as something that may make the defendant more dangerous).

<sup>31</sup> As discussed below, judges are trained to be impartial. See *infra* notes 200-05 and accompanying text.

retardation similar to those adopted by the American Psychiatric Association and the American Association on Mental Retardation.<sup>32</sup> These definitions can help serve as a guide for a national legal definition of mental retardation.

This Note compares Ohio's and Georgia's post-*Atkins* frameworks for determining mental retardation. Ohio's framework offers a fairer application of *Atkins* and should serve as a guide for a national legal standard for use by state trial courts to determine mental retardation. Specifically, Ohio's use of preponderance of the evidence is a more appropriate standard of proof for determining mental retardation because it better reaches the overall goal in *Atkins*.<sup>33</sup> Allowing the judge to make the mental retardation determination protects the alleged mentally retarded defendant from potential jury bias.<sup>34</sup> Because Ohio's and Georgia's definitions of mental retardation are substantially similar and mirror medical definitions of mental retardation, either definition can be adopted as the national standard.<sup>35</sup> The procedures adopted by Ohio, however, weigh heavily in favor of their incorporation into a national standard. Finally, although Ohio provides a better procedural framework, the nature of mental retardation requires implementation of training programs to protect mentally retarded persons accused of crimes.<sup>36</sup>

Part II of this Note discusses the United States Supreme Court's decision in *Atkins v. Virginia*. Part III discusses Ohio's framework for determining mental retardation. Part IV discusses Georgia's framework for determining mental retardation. Part V discusses Ohio's and Georgia's definitions of mental retardation, and compares these definitions to each other and to definitions propounded by medical organizations. Part VI compares Georgia's "beyond a reasonable doubt" standard of proof with Ohio's "preponderance of the evidence" standard and concludes: Ohio's "preponderance" standard is more appropriate for determining mental retardation because it will best follow the purpose of *Atkins*. Part VII evaluates the potential for jury bias when the jury determines mental retardation. Ohio's requirement that the judge determine whether the defendant is mentally retarded for *Atkins* purposes ensures the defendant receives the protections *Atkins* intended to guarantee. Part VIII explains how the different procedures adopted by Ohio and Georgia may lead to an arbitrary application of *Atkins*, and therefore recommends a uniform procedure be adopted to serve as a guide for all states implementing the death penalty. Finally, part IX of this paper provides some recommendations for training procedures in Ohio and Georgia to ensure alleged mentally retarded capital defendants receive *Atkins* protections from the day they are

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<sup>32</sup> See *infra* notes 92-110 and accompanying text; see also *Lott*, 779 N.E.2d at 1014 (defining mental retardation for *Atkins* purposes); GA. CODE ANN. § 17-7-131(j) (2005) (same); AMERICAN ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed. 1992) [hereinafter AAMR]; AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th rev. ed. 2000) [hereinafter DSM-IV-TR].

<sup>33</sup> See *infra* notes 141-92 and accompanying text.

<sup>34</sup> See *infra* notes 193-239 and accompanying text.

<sup>35</sup> See *infra* notes 91-140 and accompanying text.

<sup>36</sup> See *infra* notes 240-46 and accompanying text.

implicated in a crime and are protected against procedural bias resulting from their handicap.

## II. THE *ATKINS* DECISION

In *Atkins*, a Virginia state court convicted defendant Daryl Atkins of abduction, capital murder, and armed robbery.<sup>37</sup> He was sentenced to death.<sup>38</sup> Atkins, along with William Jones, abducted, robbed, and killed Eric Nesbitt.<sup>39</sup> At trial, Jones and Atkins each testified the other shot and killed Nesbitt.<sup>40</sup> Jones's testimony was "both more coherent and credible than Atkins'[sic]" and was "obviously credited by the jury and was sufficient to establish Atkins'[sic] guilt."<sup>41</sup> As a result, the State was able to prove two aggravating circumstances against Atkins: Future dangerousness and "vileness of the offense."<sup>42</sup>

At the penalty phase of his trial, Atkins introduced mitigating evidence from a forensic psychologist who testified that Atkins was "mildly mentally retarded."<sup>43</sup> The psychologist based his conclusion on interviews with people acquainted with Atkins, a standard intelligence test that indicated he had an I.Q. of fifty-nine, and a review of his court and school records.<sup>44</sup> The State sought to overcome Atkins' mitigating evidence by presenting testimony from a witness who opined Atkins was of "average intelligence, at least."<sup>45</sup> The State prevailed at its sentencing recommendation and the Virginia jury sentenced him to death.<sup>46</sup>

Atkins appealed his sentence to the Virginia Supreme Court, arguing that he was mentally retarded and, accordingly, could not be sentenced to death.<sup>47</sup> The court rejected Atkins's claim and upheld the death sentence, refusing to reduce the sentence based on his I.Q. score alone, relying principally on the United States Supreme Court's holding in *Penry v. Lynaugh*.<sup>48</sup> The *Penry* Court held the Eighth Amendment does not preclude the execution of individuals solely on the basis of mental retardation.<sup>49</sup> The United States Supreme Court granted certiorari in *Atkins* to

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<sup>37</sup> *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Jones did not receive the death penalty because of a deal struck with the prosecution that permitted him to plead guilty to first-degree murder in exchange for testimony against Atkins. *Id.* at 307 n.1.

<sup>42</sup> *Id.* at 308.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 308-09.

<sup>45</sup> *Id.* at 309.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 310.

<sup>48</sup> *Id.*; *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>49</sup> *Penry*, 492 U.S. at 340.

revisit the issue of whether the execution of mentally retarded individuals violates the Eighth Amendment.<sup>50</sup>

Following the Court's decision in *Penry*, state legislatures began to prohibit the execution of the mentally retarded.<sup>51</sup> This growing "national consensus"<sup>52</sup> against executing mentally retarded individuals "provides powerful evidence [to the Court] that today our society views mentally retarded offenders as categorically less culpable than the average criminal."<sup>53</sup> Also, the execution of the mentally retarded does not further any social purposes served by the death penalty.<sup>54</sup> Specifically, the *Atkins* Court acknowledged the death penalty serves both a retributive and a deterrent purpose.<sup>55</sup> The retributive purpose, however, is not served by executing mentally retarded individuals because "[i]f culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."<sup>56</sup> Likewise, the execution of mentally retarded individuals does not deter others from committing aggravated murder because "[e]xempting the mentally retarded from [the death penalty] will not affect the 'cold calculus that precedes the decision' of other potential murderers."<sup>57</sup> Thus, the *Atkins* Court concluded that the execution of mentally retarded individuals constitutes excessive punishment in violation of the Eighth Amendment, holding that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender."<sup>58</sup>

Although the *Atkins* Court prohibited the execution of the mentally retarded, it did not set forth a procedural standard for determining mental retardation.<sup>59</sup> Instead, the Court left to the states the task of developing appropriate ways to prohibit the execution of the mentally retarded.<sup>60</sup> Similarly, the Court did not develop a definition of mental retardation to guide the states, but instead merely cited several clinical definitions in the footnotes of its opinion.<sup>61</sup> This action is questionable because, although the *Atkins* Court noted the difficulties in "determining which

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<sup>50</sup> *Atkins*, 536 U.S. at 310. Excessive punishments under the Eighth Amendment to the United States Constitution are judged by currently prevailing standards. *Id.* at 311 (citing U.S. CONST. amend. VIII).

<sup>51</sup> *Id.* at 314-15.

<sup>52</sup> *Id.* at 316.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 319.

<sup>55</sup> *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (quoting *Gregg*, 428 U.S. at 186).

<sup>58</sup> *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

<sup>59</sup> *Id.* at 317.

<sup>60</sup> *Id.* at 317 (quoting *Ford*, 477 U.S. at 405, 416-17).

<sup>61</sup> *Id.* at 308 n.3.

offenders are in fact retarded,”<sup>62</sup> it declined to set forth any standards to determine mental retardation.<sup>63</sup> “The Court noted that the only major disagreement regarding the execution of mentally retarded persons, developing a method to determine retardation, was to be left to the states.”<sup>64</sup> This lack of standard created a variety of different procedures in virtually all states that maintain the death penalty.<sup>65</sup> In fact, “[i]n many cases, especially those involving borderline mental retardation, the defendant’s fate will depend, in large part, on the state in which his [or her] trial is held.”<sup>66</sup> These different procedures risk denying Eighth Amendment protections to the approximately 360 mentally retarded death row inmates in the United States.<sup>67</sup> Two such states, Ohio and Georgia, have vastly different schemes for determining mental retardation. These two schemes demonstrate the uncertainty left to the states by, and the inconsistency resulting from, the Court’s decision in *Atkins*.

### III. OHIO’S PROCEDURE FOR DETERMINING MENTAL RETARDATION

Ohio did not prohibit the execution of mentally retarded individuals until after *Atkins v. Virginia*.<sup>68</sup> In *State v. Lott*, the Ohio Supreme Court promulgated a standard for use by trial courts in determining when a capital defendant is mentally retarded and thus cannot be executed pursuant to *Atkins*.<sup>69</sup> Defendant Gregory Lott was convicted of aggravated murder and was sentenced to death.<sup>70</sup> On appeal to the Ohio Supreme Court, Lott moved to vacate his death sentence, alleging he was mentally retarded.<sup>71</sup> After setting forth the standard for hearing *Atkins* claims, the

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<sup>62</sup> *Id.* at 317.

<sup>63</sup> Orpen, *supra* note 21, at 86-87.

<sup>64</sup> Tiffany A. Mann, Note, *The Supreme Court Exempts Another Class from the Death Penalty: Mentally Retarded Offenders* – *Atkins v. Virginia*, 4 LOY. J. PUB. INT. L. 77, 89 (2003).

<sup>65</sup> See Orpen, *supra* note 21, at 96 (citing state statutes that prohibit the execution of the mentally retarded); see also ARIZ. REV. STAT. ANN. § 13-703.02(G) (2005); ARK. CODE ANN. § 5-4-618(C) (West 2005); COLO. REV. STAT. ANN. § 18-1.3-1102 (2005); CONN. GEN. STAT. ANN. § 53a-46a(h)(2) (West 2004); FLA. STAT. ANN. § 921.137(2) (West 2005); GA. CODE ANN. § 17-7-131(j) (2005); IND. CODE ANN. § 35-36-9-6 (West 2005); KAN. STAT. ANN. § 21-4623(d) (2005); KY REV. STAT. ANN. § 532.140 (LexisNexis 2004); MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(ii) (LexisNexis 2005); MO. ANN. STAT. § 565.030(4)(1) (West 2005); NEB. REV. STAT. ANN. § 28-105.01(2) (LexisNexis 2005); N.M. STAT. ANN. § 31-20A-2.1(B) (LexisNexis 2005); N.Y. CRIM. PROC. LAW § 400.27(12)(c) (Consol. 2005); S.D. CODIFIED LAWS § 23A-27A-26.3 (2005); TENN. CODE ANN. § 39-13-203(b) (2005); WASH. REV. CODE ANN. § 10.95.030(2) (West 2005); *Lott*, 779 N.E.2d 1011.

<sup>66</sup> Orpen, *supra* note 21, at 102.

<sup>67</sup> Mann, *supra* note 64, at 93; Orpen, *supra* note 21, at 83-84;

<sup>68</sup> *State v. Lott*, 779 N.E.2d 1011, 1011 (Ohio 2002).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1013.

<sup>71</sup> *Id.*

court remanded the case to the trial court to determine whether Lott was mentally retarded.<sup>72</sup>

For *Atkins* purposes, a capital defendant in Ohio is mentally retarded when he or she has: “(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset [of mental retardation] before the age of 18.”<sup>73</sup> There is a rebuttable presumption that a defendant is not mentally retarded if his or her I.Q. is above seventy.<sup>74</sup>

Ohio’s procedure for determining mental retardation requires capital defendants currently awaiting trial to raise mental retardation prior to trial.<sup>75</sup> In Ohio, it is the trial *judge* rather than the jury who reviews the evidence and determines whether the defendant is mentally retarded.<sup>76</sup> The trial judge must determine whether the defendant proved his or her mental retardation by a “preponderance of the evidence.”<sup>77</sup> Ohio also permits those defendants already sentenced to death to file within 180 days of the *Lott* opinion a petition for post-conviction relief raising an *Atkins* claim.<sup>78</sup>

#### IV. GEORGIA’S PROCEDURE FOR DETERMINING MENTAL RETARDATION

Unlike Ohio, Georgia has statutorily prohibited the execution of mentally retarded individuals since 1988.<sup>79</sup> Under the statute, a capital defendant in Georgia is mentally retarded if he or she has “significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.”<sup>80</sup>

Also unlike Ohio, the determination of a Georgia capital defendant’s mental retardation is made by the trial *jury* rather than the trial judge.<sup>81</sup> The jury must find the defendant to be mentally retarded “beyond a reasonable doubt.”<sup>82</sup> The method by which this determination is made is similar to an insanity inquiry: If the jury finds

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<sup>72</sup> *Id.* at 1016.

<sup>73</sup> *Id.* at 1014.

<sup>74</sup> *Id.* at 1014. This presumption has in the past been rebutted. *See infra* note 185 and accompanying text.

<sup>75</sup> *Id.* at 1016.

<sup>76</sup> *Id.* at 1015.

<sup>77</sup> *Id.* at 1015-16.

<sup>78</sup> *Id.* at 1016. This *Atkins* claim will satisfy the timing requirements for a petition for post-conviction relief set forth in OHIO REV. CODE ANN. § 2953.23(A)(1)(b) because “the Supreme Court has recognized a new federal right applying retroactively to convicted defendants facing the death penalty.” *Lott*, 779 N.E.2d. at 1015.

<sup>79</sup> GA. CODE ANN. § 17-7-131(j) (2005); *see also* Morrison v. State, 583 S.E.2d 873, 878 (Ga. 2003) (“*Atkins* only established a federal constitutional prohibition on executing mentally retarded criminals, while Georgia has had its own such prohibition since 1988.”).

<sup>80</sup> § 17-7-131(a)(3).

<sup>81</sup> § 17-7-131(c)(3).

<sup>82</sup> *Id.*

the defendant to be guilty of the crime but also finds the defendant to be mentally retarded, then the jury returns a verdict of “guilty but mentally retarded.”<sup>83</sup> Georgia law mandates the jury be instructed on the “guilty but mentally retarded” verdict where expert testimony indicates the defendant may be mentally retarded.<sup>84</sup>

A defendant in Georgia not raising mental retardation at trial may still do so in a petition for habeas corpus.<sup>85</sup> These habeas claims can be heard and granted under Georgia law which provides that, “[i]n all cases habeas corpus relief shall be granted to avoid a miscarriage of justice.”<sup>86</sup> Initially, defendants filing mental retardation habeas claims arising from trials before the statute’s effective date were only required to prove their mental retardation by a preponderance of the evidence.<sup>87</sup> Currently, however, the preponderance standard is not applicable to mental retardation claims raised after the statute’s effective date.<sup>88</sup> Thus, Georgia defendants raising mental retardation claims either at trial or by habeas corpus petition must now prove beyond a reasonable doubt that they are mentally retarded.<sup>89</sup>

#### V. THE DEFINITIONS OF MENTAL RETARDATION

Before entering into an in-depth comparison of Ohio’s and Georgia’s procedures for determining mental retardation, it is first helpful to evaluate what it means to be mentally retarded. Ohio’s and Georgia’s definitions of mental retardation are substantively similar to each other and also to modern medical definitions. Because both Ohio’s and Georgia’s definitions reflect the modern medical world’s understanding of mental retardation, either could be adopted to supply a legal definition of mental retardation for *Atkins* purposes.

In the United States today, approximately six to seven million persons suffer from mental retardation.<sup>90</sup> A number of factors predispose a person to mental retardation. These factors include heredity, environmental influence, mental disorders, pregnancy and perinatal problems (such as malnutrition or prematurity), early alterations of embryonic development (for example, prenatal damage due to toxins), and general medical conditions acquired during infancy or childhood.<sup>91</sup> Two national medical authorities, the American Psychiatric Association and the American Association on Mental Retardation (AAMR), have offered definitions and analyses

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<sup>83</sup> *Id.*

<sup>84</sup> *See Mack v. State*, 425 S.E.2d 671, 672-73 (Ga. Ct. App. 1992) (awarding a new trial where expert testimony indicated defendant was mentally retarded but the trial court did not instruct the jury that it could consider the verdict of guilty but mentally retarded).

<sup>85</sup> *See, e.g., Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (permitting a defendant to raise by habeas petition a mental retardation claim); *Turpin v. Hill*, 498 S.E.2d 52, 53 (Ga. 1998) (same).

<sup>86</sup> *Turpin*, 498 S.E.2d at 53; GA. CODE ANN. § 9-14-48(d) (2005).

<sup>87</sup> *Fleming*, 386 S.E.2d at 342.

<sup>88</sup> *Turpin*, 498 S.E.2d at 53.

<sup>89</sup> *Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003).

<sup>90</sup> Human Rights Watch, *supra* note 1.

<sup>91</sup> DSM-IV-TR, *supra* note 32, at 45-46.

of what constitutes mental retardation.<sup>92</sup> These two definitions are similar to each other and to Ohio's and Georgia's definitions of mental retardation.

The American Psychiatric Association defines mental retardation as

significantly subaverage general intellectual functioning...that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset must occur before age 18 years.<sup>93</sup>

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Textual Revision (DSM-IV-TR), covers all mental disorders, including mental retardation, for children and adults.<sup>94</sup> The DSM-IV-TR sets forth several "degrees" of severity of mental retardation.<sup>95</sup> Individuals with an I.Q. level of between fifty and fifty-five to approximately seventy have "mild mental retardation."<sup>96</sup> Mild mental retardation is the most common level of retardation.<sup>97</sup> Approximately eighty-five percent of those with mental retardation fall into this category.<sup>98</sup> Individuals with an I.Q. level between thirty-five and forty to fifty and fifty-five have "moderate mental retardation."<sup>99</sup> About ten percent of those with mental retardation suffer from "moderate retardation."<sup>100</sup> Individuals with an I.Q. level between twenty and twenty-five to thirty-five and forty have "severe mental retardation."<sup>101</sup> About three to four percent of those with mental retardation suffer from "severe mental retardation."<sup>102</sup> Approximately one to two percent of mentally retarded persons have an I.Q. below twenty or twenty-five and suffer from "profound mental retardation."<sup>103</sup>

The AAMR defines mental retardation as

substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently

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<sup>92</sup> See *Atkins v. Virginia*, 536 U.S. 304, 309 n.3 (2002) (citing definitions of mental retardation by the American Association on Mental Retardation and the American Psychiatric Association).

<sup>93</sup> DSM-IV-TR, *supra* note 32, at 41.

<sup>94</sup> DSM-IV-TR, *supra* note 32.

<sup>95</sup> *Id.* at 42.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 42.

<sup>100</sup> *Id.* at 43.

<sup>101</sup> *Id.* at 42.

<sup>102</sup> *Id.* at 43.

<sup>103</sup> *Id.* at 42-44.

with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests itself before age 18.<sup>104</sup>

Unlike the DSM-IV-TR, the AAMR does not offer any break down of “degrees” of mental retardation. The two definitions are similar, however, as both contain several common elements.

Common elements in both the DSM-IV-TR and the AAMR definitions of mental retardation include the following: significantly subaverage general intellectual functioning, limitations in two or more adaptive skill areas, and onset before age eighteen.<sup>105</sup> Significantly subaverage general intellectual functioning refers to a low I.Q., usually below seventy or seventy five.<sup>106</sup> The I.Q. is measured by an assessment with one or more of the standardized, individually administered intelligence tests.<sup>107</sup> There is a margin of error in the I.Q. tests of approximately five points.<sup>108</sup> Adaptive skills measure how effectively individuals are able to cope with common demands of everyday life without support, and how well they meet the standards of personal independence expected of one in their age group, community setting, and sociocultural background.<sup>109</sup> These adaptive skill areas include communication, self-care, social skills, self-direction, functional academics, health and safety, home living, leisure, and work.<sup>110</sup> Adaptive skills are evidenced by reliable independent sources such as teacher evaluations, and educational, developmental, and medical history.<sup>111</sup> Defining these adaptive skills, however, has been difficult and has in the past led to challenges of mental retardation diagnoses in criminal cases.<sup>112</sup>

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<sup>104</sup> AAMR, *supra* note 32, at 5.

<sup>105</sup> Compare DSM-IV-TR, *supra* note 32, at 41 (setting forth the definition of mental retardation), with AAMR, *supra* note 32, at 5 (same).

<sup>106</sup> Compare DSM-IV-TR, *supra* note 32, at 41 (stating that an I.Q. of about seventy or below constitutes significantly subaverage intellectual functioning), with AAMR, *supra* note 32, at 5 (“[A]n I.Q. standard score of approximately 70 or 75 or below, based on an assessment that includes one or more individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.”).

<sup>107</sup> DSM-IV-TR, *supra* note 32, at 41. These standardized intelligence tests include the Wechsler Intelligence Scales for Children, third edition, the Kaufman Assessment Battery for Children, and the Stanford-Binet, fourth edition. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Compare DSM-IV-TR, *supra* note 32, at 42 (“[H]ow effectively individuals cope with common life demands and how well they meet standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.”), with AAMR, *supra* note 32, at 6 (“These skill areas are central to successful life functioning and are frequently related to the need for supports for persons with mental retardation.”).

<sup>110</sup> AAMR, *supra* note 32, at 6; DSM-IV-TR, *supra* note 32, at 41.

<sup>111</sup> DSM-IV-TR, *supra* note 32, at 42.

<sup>112</sup> AAMR, *supra* note 32, at 149.

It is important to test individually for mental retardation in order to provide adequate attention to the individual's ethnic, cultural, or linguistic background, each of which may affect test results.<sup>113</sup> I.Q. tests have been criticized by some researchers because they may be biased by minority status or low socioeconomic standing.<sup>114</sup> I.Q. tests still have some value, despite criticism, because they "provide[] the practical benefit of a consistent standard generally accepted by mental health professionals."<sup>115</sup> Further, measuring adaptive skills will supplement I.Q. tests as an indicator of the defendant's mental retardation.<sup>116</sup>

Because mental retardation is manifested initially during the time in which developmental processes are occurring, both the AAMR and the DSM-IV-TR require that mental retardation manifest itself before the age of eighteen.<sup>117</sup> Requiring mental retardation to manifest itself before the age of eighteen serves another less evident purpose: It operates as an intrinsic protection against feigning mental retardation.<sup>118</sup> This is so because individuals seeking to "feign" mental retardation<sup>119</sup> to escape the death penalty will have to show its onset prior to age eighteen. Because mental retardation is often documented at an early age through intelligence tests, it is particularly difficult for a non-mentally retarded individual to show that, at an early age, he or she suffered from mental retardation.<sup>120</sup>

Ohio's and Georgia's definitions of mental retardation are very similar to those propounded by the AAMR and the DSM-IV-TR. Adopting one of these definitions to serve as the legal standard ensures that courts apply *Atkins* consistently and eliminates any possible confusion that may result from utilizing a complex definition of mental retardation.<sup>121</sup> Although many other definitions of mental retardation are similar to Ohio's and Georgia's, differences in statutory wording suggest states with different definitions of mental retardation may undergo a slightly different analysis. For example, Florida defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."<sup>122</sup> Although this definition

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<sup>113</sup> DSM-IV-TR, *supra* note 32, at 46.

<sup>114</sup> Bing, *supra* note 26, at 73-75.

<sup>115</sup> *Id.* at 75.

<sup>116</sup> Lyndsey Sloan, Comment, *Evolving Standards of Decency: The Evolution of a National Consensus Granting the Mentally Retarded Sanctuary*, 31 CAP. U. L. REV. 351, 365 (2003).

<sup>117</sup> AAMR, *supra* note 32, at 16; DSM-IV-TR, *supra* note 32, at 41.

<sup>118</sup> Bing, *supra* note 26, at 90.

<sup>119</sup> See *Atkins v. Virginia*, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting); see also *infra* note 178.

<sup>120</sup> Lyn Entzeroth, *Putting the Mentally Retarded Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 916 (2001).

<sup>121</sup> Raines, *supra* note 25, at 197.

<sup>122</sup> FLA. STAT. § 921.137(1) (2005); see also Raines, *supra* note 25, at 197 n.194 (citing Florida and Kansas statutes).

appears in-line with Ohio's and Georgia's definitions, a closer examination reveals a potential for confusion. Florida defines "significantly subaverage general intellectual functioning" as "two or more standard deviations from the mean score on a standardized intelligence test."<sup>123</sup> This definition, different from Ohio's and Georgia's, appears facially more difficult for the average person to understand.<sup>124</sup> Creating a national definition of mental retardation would ensure that all states undergo the same analysis in determining whether a defendant is mentally retarded. Using definitions that are similar to modern medical definitions of mental retardation would ensure that the legal world is in accord with the medical world. Also, requiring a definition of mental retardation that mirrors the medical world's definition would ensure that *Atkins* protections are equally available to all.

As discussed above, Ohio's definition of mental retardation contains the three main elements covered in both the AAMR and the DSM-IV-TR definitions of mental retardation: significantly subaverage intellectual functioning, limitations in two or more adaptive skills, and onset before age eighteen.<sup>125</sup> Ohio creates a rebuttable presumption that a defendant is not mentally retarded if his or her I.Q. is above seventy.<sup>126</sup> Therefore, Ohio's definition of mental retardation acknowledges the problems inherent in I.Q. testing<sup>127</sup> and allows an individual with an I.Q. slightly higher than seventy to rebut the presumption and prove that he or she is mentally retarded.<sup>128</sup> Also, Ohio's definition reflects the DSM-IV-TR and the AAMR assumption that a low I.Q. generally means an I.Q. below seventy or seventy-five.<sup>129</sup> Ohio does not exclude from the death penalty individuals who would otherwise meet its definition of mental retardation but for the fact that their brain injury and adaptive behavior deficits occurred after age eighteen.<sup>130</sup> In one Ohio case, *State v. Stallings*, the defendant raised an *Atkins* claim seeking to escape execution on the grounds that he was mentally retarded.<sup>131</sup> After evidentiary hearings, the trial court denied Stallings's *Atkins* claim because he could not establish by a preponderance of the evidence that the onset of his mental retardation occurred before he reached age

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<sup>123</sup> § 921.137(1). Kansas offers the same definition of "significantly subaverage general intellectual functioning." KAN. STAT. ANN. § 76-12b01(i) (2005) ("Significantly subaverage general intellectual functioning" means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified by the secretary.").

<sup>124</sup> See Raines, *supra* note 25, at 197-98 (arguing that the older definition of mental retardation, like that used by Florida, was difficult for laypersons to understand).

<sup>125</sup> *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002).

<sup>126</sup> *Id.*

<sup>127</sup> See Bing, *supra* note 26, at 75 ("The IQ score should continue to be questioned as an absolute measure of intelligence, but since there is no adequate replacement, it should not be ignored.").

<sup>128</sup> *Lott*, 779 N.E.2d at 1014. This presumption has, in fact, been rebutted. See *infra* note 185 and accompanying text.

<sup>129</sup> AAMR, *supra* note 32, at 5; DSM-IV-TR, *supra* note 32, at 41.

<sup>130</sup> *State v. Stallings*, No. 21969, 2004 Ohio App. LEXIS 4167, at \*3 (Ohio Ct. App. 2004).

<sup>131</sup> *Id.* at \*2.

eighteen.<sup>132</sup> Thus, Ohio's definition of mental retardation follows both the AAMR and the DSM-IV-TR definitions.

Georgia's definition of mental retardation also contains the three main elements of the AAMR and the DSM-IV-TR definitions of mental retardation. There are some notable differences, however, as the Georgia statute does not expressly require a set amount of impairments in adaptive skills (the AAMR, DSM-IV-TR, and Ohio definitions require at least two)<sup>133</sup> and also requires mental retardation to manifest itself during the "developmental period" as opposed to age eighteen.<sup>134</sup> Despite these facial differences, Georgia's definition of mental retardation operates similarly to the AAMR, the DSM-IV-TR, and the Ohio definitions. First, the Georgia Supreme Court has looked for deficiencies in two or more adaptive skills to determine the defendant did not possess the requisite impairments to be mentally retarded.<sup>135</sup> Second, the Georgia Supreme Courts has treated the manifestation of mental retardation during the "developmental period" as occurring before age eighteen.<sup>136</sup> Finally, Georgia courts appear to have adopted the assumption that mental retardation is usually indicated by an I.Q. score below seventy.<sup>137</sup> On the whole, the Georgia definition appears in operation similar to the Ohio, the AAMR, and the DSM-IV-TR definitions of mental retardation. The slight difference in wording, however, between Georgia's definition and the other definitions of mental retardation, may result in confusion in its application. Accordingly, to ensure consistency, only one of these definitions should be utilized as a national definition of mental retardation for *Atkins* purposes.<sup>138</sup>

Overall, the Ohio and Georgia definitions appear to match those offered by the AAMR and the DSM-IV-TR. As such, either of these definitions could be adopted to serve as a national legal definition to guide states in determining mental retardation. Requiring only one definition reduces the possibility of confusion that may result from facially complicated statutes such as Florida's.<sup>139</sup> A uniform

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<sup>132</sup> *Id.* at \*10; *see also* State v. Thomas, 779 N.E.2d 1017, 1038 (Ohio 2002) ("[E]vidence of defendant's mental deficiencies might be traced to his 1981 injury, when [defendant] was in his mid-20s, and would therefore not meet the definition of 'mental retardation' of most states that prohibit execution of the mentally retarded.").

<sup>133</sup> *Lott*, 779 N.E.2d at 1014 (holding that a capital defendant in Ohio alleging that he or she is mentally retarded must show "significant limitations in *two or more* adaptive skills") (emphasis added).

<sup>134</sup> GA. CODE ANN. § 17-7-131(a)(3) (2005).

<sup>135</sup> *See, e.g.*, Foster v. State, 525 S.E.2d 78, 79 (Ga. 2000) (looking to defendant's "interaction with others, his letter writing, newspaper reading, and sports activities" to determine defendant did not meet the statutory definition of mental retardation).

<sup>136</sup> *Id.* at 79 ("Evidence was adduced from which the jury could have found that IQ tests administered to Foster when he was ten and nearly seventeen years old showed that he was not mentally retarded.").

<sup>137</sup> *See, e.g.*, Morrison v. State, 583 S.E.2d 873, 875 (Ga. 2003) ("The generally accepted I.Q. score for an indication of mental retardation is 70 or below.").

<sup>138</sup> Raines, *supra* note 25, at 197.

<sup>139</sup> *See* FLA. STAT. § 921.137(1) (2005); *see also infra* note 258 and accompanying text.

definition also would ensure that all states that impose the death penalty offer *Atkins* protections equally.

#### VI. MENTAL RETARDATION SHOULD BE PROVED BY A PREPONDERANCE OF THE EVIDENCE

“Preponderance of the evidence” is a lower standard of proof than “beyond a reasonable doubt.”<sup>140</sup> Specifically, it is the lowest burden of proof used by American courts.<sup>141</sup> Preponderance of the evidence has been defined as “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.”<sup>142</sup> In other words, preponderance of the evidence translates into “more likely than not.”<sup>143</sup> Conversely, beyond a reasonable doubt has been defined as “the doubt that prevents one from being firmly convinced of a defendant’s guilt, or the belief that there is a real possibility that a defendant is not guilty.”<sup>144</sup> In other words, proof beyond a reasonable doubt translates into “proof to a virtual certainty.”<sup>145</sup> These definitions conform to instructions given to juries by Ohio and Georgia courts.<sup>146</sup> Though usually only applied in civil cases, the preponderance standard is particularly applicable to mental retardation because of the great risk of error; an erroneous finding of “not mentally retarded” results in a death sentence, whereas an erroneous finding of “mentally retarded” results in a life sentence.<sup>147</sup>

Ohio’s use of the preponderance of the evidence standard is the better standard for determining whether a capital defendant is mentally retarded. First, Georgia’s use of the beyond a reasonable doubt standard to determine mental retardation is

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<sup>140</sup> Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251 (2002).

<sup>141</sup> *Id.*

<sup>142</sup> Raines, *supra* note 25, at 198 (quoting BLACK’S LAW DICTIONARY 1201 (7th ed. 1999)).

<sup>143</sup> Clermont & Sherwin, *supra* note 140, at 251.

<sup>144</sup> BLACK’S LAW DICTIONARY 1293 (8th ed. 2004).

<sup>145</sup> Clermont & Sherwin, *supra* note 140, at 251.

<sup>146</sup> See GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS 209.60 (2003) (defining proof by a “preponderance of the evidence”); 4-503 OHIO JURY INSTRUCTIONS § 503.011(5) (2005) (defining proof “beyond a reasonable doubt”); 4-409 OHIO JURY INSTRUCTIONS § 409.60(2) (2005) (defining proof by a “preponderance of the evidence”). The Georgia pattern jury instructions do not appear to define proof “beyond a reasonable doubt.” Although Georgia but not Ohio submits the mental retardation issue to the jury, the instructions provided by both states show general uniformity in defining these burdens of proof.

<sup>147</sup> See GA. CODE ANN. § 17-7-131(j) (2005) (requiring a jury who finds a defendant “guilty but mentally retarded” to sentence the defendant to “imprisonment for life”); State v. Lott, 779 N.E.2d 1011, 1016 (Ohio 2002) (remanding to trial court to determine whether the defendant is mentally retarded and cannot be sentenced to death.); see also Raines, *supra* note 25, at 199 (arguing that states should err on the side of caution and adopt a lower standard of proof for use in determining mental retardation).

inconsistent with its burden of proving affirmative defenses.<sup>148</sup> Second, it is better to have a lower standard of proof when dealing with individuals possessing reduced mental capacity.<sup>149</sup> Also, there is no evidence to suggest that non-mentally retarded defendants are able to take advantage of the lower standard of proof in Ohio in order to escape the death penalty.<sup>150</sup> The higher standard of proof could cause inconsistent and arbitrary results; a defendant adjudged mentally retarded in Ohio could be adjudged not mentally retarded in Georgia, which would defeat the purpose of *Atkins*.<sup>151</sup>

The difference of imposing each burden of proof is clear: A Georgia defendant trying to establish his mental retardation beyond a reasonable doubt would have to provide significantly more evidence. For example, he would need more experts to testify as to his mental capacity.<sup>152</sup> This increased burden is unduly harsh particularly because “[i]t is difficult for the mentally retarded defendant to contribute adequately to his [or her] defense, regardless of whether he [or she] has been declared competent by the court.”<sup>153</sup> An Ohio defendant attempting to prove his or her mental retardation by a preponderance of the evidence would only have to show “more-likely-than-not” that he or she is mentally retarded to obtain a life sentence.<sup>154</sup> By contrast, a Georgia defendant would have to show by “virtual certainty” that he or she is mentally retarded to escape the death penalty.<sup>155</sup> Because the mentally retarded have an underdeveloped conception of blameworthiness, a lack of knowledge of basic facts, and increased susceptibility to the influence of authority figures,<sup>156</sup> a lesser standard of proof appears necessary to accommodate retarded individuals.<sup>157</sup> Accordingly, the

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<sup>148</sup> See, e.g., *Chandle v. State*, 198 S.E.2d 289 (Ga. 1973) (holding defendants in Georgia must prove affirmative defenses by a “preponderance of the evidence”); see also *Raines*, *supra* note 25, at 198.

<sup>149</sup> *Bing*, *supra* note 26, at 135; *Raines*, *supra* note 25, at 199.

<sup>150</sup> See *supra* notes 118-20 and accompanying text; see also *infra* notes 178-86 and accompanying text.

<sup>151</sup> See *Orpen*, *supra* note 21, at 95.

<sup>152</sup> See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 489 (1985) (determining mental retardation often requires a “personality assessment, adaptive behavior assessment, moral development examination, speech and language evaluation, motoric functioning evaluation, or academic achievement evaluation – as well as mental retardation forensic evaluations in the indicated legal issues”).

<sup>153</sup> *Bing*, *supra* note 26, at 145; see also *Raines*, *supra* note 25, at 199 (“Because of the nature of mental retardation, it is often more difficult for these offenders to contribute adequately to their defense.”).

<sup>154</sup> *Clermont & Sherwin*, *supra* note 140, at 251.

<sup>155</sup> *Id.*

<sup>156</sup> *Bing*, *supra* note 26, at 72.

<sup>157</sup> See *Raines*, *supra* note 25, at 199 (“[A] lesser standard of proof than reasonable doubt should be used because a higher standard places a greater burden on the mentally retarded defendant.”).

preponderance standard “acknowledges the procedural difficulties mentally retarded people face when they encounter the criminal justice system.”<sup>158</sup>

Georgia’s use of the beyond a reasonable doubt standard of proof is inconsistent with Georgia’s and Ohio’s burdens of proving affirmative defenses.<sup>159</sup> “Affirmative defenses are those in which the defendant admits doing the act charged but seeks to justify, excuse, or mitigate his [or her] conduct.”<sup>160</sup> Defendants in Georgia and Ohio bear the burden of proving an affirmative defense by a preponderance of the evidence.<sup>161</sup> Georgia’s burden of proving mental retardation is thus inconsistent with the burden necessary to prove affirmative defenses. As stated above, a defendant alleging mental retardation has a lessened criminal culpability, which justifies reducing his or her sentence from death to life imprisonment.<sup>162</sup> Similarly, a defendant raising an affirmative defense seeks to “justify, excuse, or mitigate his conduct.”<sup>163</sup> Therefore, it is inconsistent to permit a defendant to prove by a preponderance of the evidence that his or her conduct was justified by way of an affirmative defense, but then to require the same defendant to establish beyond a reasonable doubt that his or her sentence should be reduced because of mental retardation.

As mentioned above, the determination of mental retardation in Georgia works similar to an insanity inquiry: A jury finds the defendant to be “guilty but mentally retarded” if the requisite criteria for establishing mental retardation are deemed to be met.<sup>164</sup> There is, however, an illogical difference between these two inquiries and their respective standards of proof. A Georgia defendant alleging to be insane must show *by a preponderance of the evidence* that he or she did “not have mental capacity to distinguish between right and wrong in relation to [the crime].”<sup>165</sup> If the defendant is successful in his or her insanity claim, the defendant is “committed to a state mental health facility until such time, if ever, that the court is satisfied that he or she should be released pursuant to law.”<sup>166</sup> By contrast, a Georgia defendant with mental retardation must show *beyond a reasonable doubt* that he or she has “significantly subaverage general intellectual functioning resulting in or associated

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<sup>158</sup>Bing, *supra* note 26, at 134-35.

<sup>159</sup> See Raines, *supra* note 25, at 199 (“[M]ental retardation will be an affirmative defense.”).

<sup>160</sup> Carlson v. State, 524 S.E.2d 283, 286 (Ga. Ct. App. 1999).

<sup>161</sup> See OHIO REV. CODE ANN. § 2901.05(A) (West 2005) (stating defendant must prove an affirmative defense by a preponderance of the evidence); Chandle, 198 S.E.2d at 291 (same).

<sup>162</sup> Atkins v. Virginia, 536 U.S. 304, 316 (2002).

<sup>163</sup> Carlson, 524 S.E.2d at 286.

<sup>164</sup> Compare GA. CODE ANN. § 17-7-131(c)(1) (2005) (“The defendant may be found ‘not guilty by reason of insanity at the time of the crime’ if he meets the criteria of Code Section 16-3-2 or 16-3-3 at the time of the commission of the crime.”), with § 17-7-131(c)(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.”).

<sup>165</sup> § 16-3-2 (2005).

<sup>166</sup> § 17-7-131(b)(3)(A).

with impairments in adaptive behavior which manifested during the developmental period.”<sup>167</sup> Thus, the mentally retarded defendant likewise has a diminished culpability but, unlike the insane defendant who seeks to avoid jail, only seeks a reduction in sentence.<sup>168</sup> It is therefore inconsistent for Georgia to require the purported retarded defendant to prove his or her mental retardation beyond a reasonable doubt, and only to require the alleged insane defendant to establish his or her insanity by a preponderance of the evidence.<sup>169</sup> Georgia should lower the burden of proving mental retardation to that necessary for proving insanity.

Georgia’s requirement of proving mental retardation beyond a reasonable doubt is also inconsistent with the burden of proof previously applied by Georgia courts to establish mental retardation.<sup>170</sup> Specifically, defendants alleging mental retardation before the adoption of the statute were only required to prove mental retardation by a preponderance of the evidence.<sup>171</sup> Defendants alleging mental retardation after the effective date of Georgia’s statute, however, must prove mental retardation beyond a reasonable doubt.<sup>172</sup> The result is unfair because “[i]n effect, the [Georgia] court stated that by passing an exemption of the death penalty for the mentally retarded, the legislature meant to make it harder for a mentally retarded defendant to prove his [or her] retardation.”<sup>173</sup>

More pragmatic reasons exist for requiring mental retardation be established by a preponderance of the evidence. Mentally retarded individuals by definition have a reduced mental capacity and have a greater difficulty contributing to their defense than do non-mentally retarded defendants.<sup>174</sup> Also, mentally retarded individuals, as a result of their reduced mental capacity, are more susceptible to police coercion.<sup>175</sup>

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<sup>167</sup> § 17-7-131(a)(3).

<sup>168</sup> See § 17-7-131(j) (2005) (“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.”).

<sup>169</sup> See, e.g., *Durham v. State*, 238 S.E.2d 334, 336 (Ga. 1977) (“The defendant bears the burden of showing, by preponderance of the evidence, that he was not mentally responsible at the time of the alleged crime.”).

<sup>170</sup> *Bing*, *supra* note 26, at 135. Compare *Fleming v. Zant*, 386 S.E.2d 339, 342-43 (Ga. 1988) (holding that defendants who allege mental retardation prior to the effective date of GA. CODE ANN. § 17-7-131 (2005) are required to prove mental retardation by a “preponderance of the evidence”), with *Turpin v. Hill*, 498 S.E.2d 52, 54 (Ga. 1998) (holding that defendants who are tried after the effective date of section 17-7-131 are required to prove mental retardation “beyond a reasonable doubt”).

<sup>171</sup> *Fleming*, 386 S.E.2d at 342-43.

<sup>172</sup> *Turpin*, 498 S.E.2d at 54; § 17-7-131(c)(3).

<sup>173</sup> *Bing*, *supra* note 26, at 135.

<sup>174</sup> *Id.* at 145; *Raines*, *supra* note 25, at 199.

<sup>175</sup> *Entzerth*, *supra* note 120, at 917; *Raines*, *supra* note 25, at 199; see also *Ellis & Luckasson*, *supra* note 152, at 428, 446 (arguing the mentally retarded are predisposed to affirmatively answering questions they find desirable, which can “directly affect the likelihood of receiving a biased response”).

In fact, evidence produced in *Atkins* shows that Atkins's testimony was less credible and coherent, possibly due to diminished mental capacity, than his alleged accomplice, whose testimony "was obviously credited by the jury and was sufficient to establish Atkins'[sic] guilt."<sup>176</sup> As evidenced by *Atkins*, testimony of allegedly mentally retarded defendants may be given less weight than testimony of defendants who do not allege mental retardation.<sup>177</sup> Therefore, the mentally retarded should be afforded safeguards such as a reduced standard of proof to compensate for their intellectual limitations.

One criticism of using the preponderance standard is that non-mentally retarded capital defendants may be successful "feigning" mental retardation to escape the death penalty.<sup>178</sup> Cases in Ohio and Georgia, however, suggest otherwise. For example, the Georgia Supreme Court applied the pre-statutory preponderance standard and found a defendant to be not mentally retarded by a preponderance of the evidence.<sup>179</sup> The court found that I.Q. tests administered to the defendant "showed that he was not mentally retarded [and the lower I.Q. scores] resulted from depression or malingering."<sup>180</sup> The defendant was unsuccessful in proving by a preponderance of the evidence that he was mentally retarded.<sup>181</sup> Thus, it appears unnecessary for Georgia to utilize a higher standard of proof.

Ohio courts have also effectively used the preponderance standard. In one case, a defendant with an I.Q. of sixty-nine could not prove by a preponderance of the evidence that he was mentally retarded.<sup>182</sup> In so finding, the court relied on the defendant's writings and lack of significant limitations in adaptive skills.<sup>183</sup> In another Ohio case, by contrast, a defendant with an I.Q. over seventy was able to overcome the rebuttable presumption<sup>184</sup> and prove by a preponderance of the evidence that he was mentally retarded.<sup>185</sup> To find the defendant mentally retarded, the court relied on evidence showing the defendant's subaverage intellectual functioning and significant limitations in two or more adaptive skills that occurred

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<sup>176</sup> *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

<sup>177</sup> *Id.* at 307.

<sup>178</sup> Matthew Debbis, Note, *The Cruel and Unusual Punishment Clause of the Eighth Amendment Prohibits the Execution of Mentally Retarded Defendants: Atkins v. Virginia*, 41 DUQ. L. REV. 811, 824 (2003); *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting). Justice Scalia argued that unlike insane capital defendants who, upon a finding of insanity, risk spending time in a mental institution until he or she is cured, "the capital defendant who feigns mental retardation risks nothing at all." *Id.* Justice Scalia's criticism is also applicable to a reduced standard of proof; a reduced standard of proof offers greater opportunity for capital defendants to "feign" mental retardation to avoid the death sentence.

<sup>179</sup> *Foster v. State*, 525 S.E.2d 78, 79 (Ga. 2000).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *State v. Were*, No. C-030485, 2005 Ohio App. LEXIS 348, at \*30 (Ohio Ct. App. Feb. 4, 2005).

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* note 75 and accompanying text.

<sup>185</sup> *State v. Gumm*, No. B-9205608, slip op. at 1 (Ohio Ct. Com. Pl. Aug. 9, 2005).

before defendant reached age eighteen.<sup>186</sup> Thus, Ohio does not appear to allow non-mentally retarded defendants who allege mental retardation to escape the death penalty.

Ohio and Georgia cases demonstrate that requiring defendants to prove mental retardation by a preponderance of the evidence is more appropriate. In these states, courts work carefully to ensure that a defendant is mentally retarded before reducing the sentence.<sup>187</sup> Case law in Ohio and Georgia suggests that the preponderance of the evidence standard is sufficient to prevent a capital defendant from “feigning” mental retardation in order to escape the death penalty.<sup>188</sup> Even if an individual is incorrectly adjudged to be mentally retarded, arguably “[i]t is better to incorrectly find that a person is mentally retarded and impose a lesser penalty than to execute someone who is incorrectly found to be not retarded.”<sup>189</sup>

Because of the different standards of proof, it is possible that the same defendant could be found mentally retarded in Ohio but not in Georgia.<sup>190</sup> In other words, a defendant may succeed in proving his or her mental retardation by a preponderance of the evidence, but he may be unable to prove his mental retardation beyond a reasonable doubt. The Georgia defendant, though adjudged mentally retarded in Ohio, may still be put to death. This works contrary to *Atkins*, which aims to prohibit the execution of *all* mentally retarded capital defendants, not just those defendants that all states agree are mentally retarded.<sup>191</sup>

#### VII. ALLOWING THE JURY TO DETERMINE MENTAL RETARDATION CREATES A RISK OF BIAS

Jurors may be biased toward a capital defendant, and an allegation of mental retardation potentially exacerbates this bias. Jurors, who are unfamiliar with the law and its application, may ignore the court’s instructions and instead “impose distinctive rules and procedures that mix various aspects of weighing, matching, and moralizing.”<sup>192</sup> Further, a capital jury may disregard statutory aggravating and mitigating sentencing guidelines and instead base guilt purely on what it subjectively thinks appropriate.<sup>193</sup> In fact, one study found that forty percent of “capital jurors

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<sup>186</sup> *Id.* at 6-9.

<sup>187</sup> It is noteworthy that Were was unable to prove he was mentally retarded by a “preponderance of the evidence” even in the absence of the rebuttable presumption that he was not mentally retarded. *Were*, 2005 LEXIS 348, at \*30. Compare this with Gumm who was able to overcome the rebuttable presumption and prove by a “preponderance of the evidence” he was mentally retarded. *Gumm*, slip op. at 1.

<sup>188</sup> See *supra* notes 178-81 and accompanying text.

<sup>189</sup> Raines, *supra* note 25, at 199.

<sup>190</sup> See Orpen, *supra* note 21, at 95.

<sup>191</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>192</sup> William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1073 (1995).

<sup>193</sup> *Id.* at 1074. One study reported that a majority of jurors (thirty-five out of fifty-four) were influenced little or not at all by statutory aggravating and mitigating guidelines. *Id.* The most common aggravator in the study was “a presumption of death as the appropriate punishment as indicated by ‘the view that death was to be the punishment for first degree

believed that they were required to impose the death penalty if they found that the crime was heinous, vile, or depraved, and [thirty percent] thought that the death penalty was required if they found that the defendant would be dangerous in the future.”<sup>194</sup> Indeed, capital jurors are often concerned that the capital defendant will cause harm to others in the future.<sup>195</sup> Because jurors may already be predisposed to bias toward the capital defendant,<sup>196</sup> it is necessary to examine how this bias may affect the capital defendant alleging mental retardation.

A question *Atkins* left unanswered is whether the defendant alleging mental retardation has a right to have a judge or a jury decide the issue.<sup>197</sup> Ohio’s and Georgia’s *Atkins* procedures offer different answers to this question. Ohio requires the judge to determine whether the defendant is mentally retarded for *Atkins* purposes.<sup>198</sup> By contrast, Georgia requires the jury to determine whether the defendant is mentally retarded.<sup>199</sup> Although the judge may harbor some bias toward the alleged mentally retarded defendant, the jury presents a greater risk of biasing the defendant. A judge is trained<sup>200</sup> to be impartial, and takes an oath to that effect.<sup>201</sup> Likewise, the jury is required to give an oath pledging impartiality<sup>202</sup> and may be subject to removal for cause.<sup>203</sup> Jurors, however, unlike judges, do not regularly<sup>204</sup>

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murder, or at least that death was presumed appropriate unless [the] defendant could persuade the jury otherwise.” *Id.*

<sup>194</sup> *Id.* at 1091. This study was based on three to four hour interviews with eighty to one hundred twenty capital jurors from several states. *Id.* at 1043.

<sup>195</sup> Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998).

<sup>196</sup> The author takes no general stance on jury bias at capital trials. The purpose of this information is to suggest that juries *may* be biased toward capital defendants, and this potential for bias increases dramatically with a mental retardation claim.

<sup>197</sup> Orpen, *supra* note 21, at 95.

<sup>198</sup> *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002).

<sup>199</sup> GA. CODE ANN. § 17-7-131(c)(3).

<sup>200</sup> Pursuant to its ethical rules, Ohio has set up a judicial college to “[p]rovide a comprehensive program of continuing education for the judges . . . of [Ohio].” SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY OF OHIO R. V § 1(B)(2), *available at* <http://www.sconet.state.oh.us/Rules/government/#rulev>.

<sup>201</sup> *See* OHIO REV. CODE ANN. § 3.23 (2005) (setting forth oath of office for judges); *see also* OHIO REV. CODE ANN. § 107.05 (2005) (“A judge of a court of record . . . or judge of a county court, shall be ineligible to perform any duty pertaining to his office until he presents to the proper official a legal certificate of his election or appointment, and receives from the governor a commission to fill such office.”). Thus, the judge must receive support from the governor of Ohio before he or she can perform his or her duties as judge. *See Id.*

<sup>202</sup> GA. CODE ANN. § 15-12-138 (2005) (“Each panel of the trial jury shall take the following oath: ‘You shall well and truly try each case submitted to you during the present term and a true verdict give, according to the law as given you in charge and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God.’”).

<sup>203</sup> GA. CODE ANN. § 15-12-164 (2005).

weigh facts impartially and are usually not skilled in the law.<sup>205</sup> Because of the judge's training and experience with the law, it is less likely the judge will succumb to bias on a particularly sensitive issue such as mental retardation. Thus, Ohio's mandate that the judge determine mental retardation is most appropriate here because the jury has a greater risk of biasing the defendant and making an incorrect determination of the defendant's retardation.

Mentally retarded individuals behave in a variety of different ways. They do not have specific personality or behavioral features.<sup>206</sup> They may be passive, placid, dependant, or aggressive and impulsive.<sup>207</sup> In other words, their retardation may be difficult to recognize or distinguish. Mentally retarded individuals may alienate juries by smiling, sleeping, or staring in court, which may give the jury "a false impression of callousness or lack of remorse."<sup>208</sup> It is therefore entirely possible that jurors may misunderstand the mentally retarded defendant and fail to appreciate the difference between guilt and culpability. Jurors

see a defendant who looks normal, is not manifestly "crazy," and they do not grasp for the profound yet subtle ways a person with retardation is limited in his capacity to understand the world around him and to act appropriately. They see a defendant who is not acting "remorseful" in the courtroom and they think it is because he is callous and heartless rather than understanding that a person with mental retardation may not fully comprehend what is happening. Finally, jurors can see mental retardation as an aggravating factor, i.e. they believe it portends that the defendant's future dangerousness, and they are worried that if given a prison sentence he will one day be released to society and commit another violent crime.<sup>209</sup>

The jury's preexisting bias toward a capital defendant may have a heightened impact on a capital defendant alleging mental retardation. This bias may be deep-seeded, as evidenced by the fact that the mentally retarded in the past have been

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<sup>204</sup> See GA. CODE ANN. § 15-12-3 (2005) ("No person shall be compellable to serve on the grand or trial jury of the superior court or on any jury in other courts for more than four weeks in any year."). Unlike the judge who sits for an elected term of years, the jury sits only for a few weeks.

<sup>205</sup> See Christopher Slobogin, *Is Atkins the Antithesis or Apotheosis of AntiDiscrimination Principles?: Sorting Out the Groupwide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1011, 1107 (2004) (arguing that capital juries "often treat mental disorder not as a mitigating circumstance (as the law requires) but as an aggravating circumstance supporting imposition of the death penalty"); see also Bing, *supra* note 26, at 89 ("Jurors may deem the defendant's retardation irrelevant if he is declared competent to stand trial."); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 39 (2000) (reporting that some jurors believe they could only consider a mitigating factor if it was included in the state's death penalty statute).

<sup>206</sup> DSM-IV-TR, *supra* note 32, at 44.

<sup>207</sup> *Id.*

<sup>208</sup> Human Rights Watch, *supra* note 1.

<sup>209</sup> *Id.*

referred to as “idiots” and were often sterilized and segregated from society.<sup>210</sup> The mentally retarded were in the past believed to be more criminally dangerous than non-retarded persons.<sup>211</sup> Although mental health professionals have rejected these stereotypes,<sup>212</sup> they may linger in jurors’ minds and can play a role in sentencing and determining guilt. There is an assumption that mental disorders create an increased risk that the person will harm himself, herself or others.<sup>213</sup> In fact, in a recent survey, participants “reported less competence and increased expectations of violence if they labeled the . . . person as having a mental illness.”<sup>214</sup> Also, the mentally retarded face hostility, condescension, and stereotyping both at school and at work.<sup>215</sup> These stereotypes also make themselves public on television, as “what passes for humor on television programs such as ‘Saturday Night Live’ often consists of the presentation of demeaning stereotypes of children and adults with mental retardation . . . .”<sup>216</sup>

Jurors typically show little mercy in making a sentencing recommendation if the capital defendant shows no remorse.<sup>217</sup> As discussed above, the mentally retarded often do not understand the proceedings transpiring around them,<sup>218</sup> they have poor attention span and focus,<sup>219</sup> and they often attempt to prevent discovery of their handicap.<sup>220</sup> Such behavior may appear to a jury as lack of remorse, when instead it is a side effect of the defendant’s mental handicap. Thus, the juror, who may be unfamiliar with the behaviors characteristic of mental retardation may fail to recognize retardation and accordingly fail to find the defendant “guilty but mentally retarded,” leaving open the possibility of a death sentence.<sup>221</sup> One scholar has stated

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<sup>210</sup> Ellis & Luckasson, *supra* note 152, at 416, 419 (“The measures alarmists thought necessary to prevent the corrosion of society by the presumed criminality of retarded people included the sterilization of all ‘feeble-minded’ people and their permanent segregation from society.”).

<sup>211</sup> *Id.* at 419.

<sup>212</sup> *Id.* at 420.

<sup>213</sup> Bernice A. Pescosolido et al., *The Public’s View of the Competence, Dangerousness, and the Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH 1339, 1339 (1999).

<sup>214</sup> *Id.* at 1343. Although mental illness differs from mental retardation, it is important to note that the public, including jurors, are often unaware of the differences between mental illness and mental retardation. See Bing, *supra* note 26, at 87 (“Jurors are unlikely to have a full grasp of mental retardation, including the difference between this condition and mental illness.”).

<sup>215</sup> Mark C. Weber, *The Americans with Disability Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, 398 (2000).

<sup>216</sup> *Id.* at 398-99.

<sup>217</sup> Garvey, *supra* note 195, at 1539.

<sup>218</sup> Human Rights Watch, *supra* note 1.

<sup>219</sup> Ellis & Luckasson, *supra* note 152, at 429.

<sup>220</sup> *Id.* at 429-30.

that, “[s]imply put, there is a grave risk that juries do not understand the issues [of mental retardation] well enough to make the life and death decision required of them. Mental retardation remains, to most people, a mysterious affliction.”<sup>222</sup>

Some jurors also believe mental retardation makes the capital defendant more dangerous.<sup>223</sup> For example, one juror explained, “[i]t appears to us that there is all the more reason to execute a killer if he is also. . . retarded. Killers often kill again; [a] retarded killer is more to be feared than a . . . normal killer. There is also far less possibility of his ever becoming a useful citizen.”<sup>224</sup> Although Georgia jurors are required to determine mental retardation at the penalty phase of trial, if the jurors reject the “guilty but mentally retarded” verdict,<sup>225</sup> mental retardation becomes nothing more than a mitigating circumstance that the jury can give little weight.<sup>226</sup> Juries at the sentencing phase may treat mental retardation as an aggravating circumstance rather than a mitigating factor.<sup>227</sup> The jury thus could, because of want of proof or even bias, refuse to find the defendant “guilty but mentally retarded,” choose to give little weight to the defendant’s retardation as a mitigating factor, and sentence him or her to death.

Though evidence suggests that some jurors may be biased, not all are. Many jurors may weigh aggravating and mitigating evidence pursuant to statutory

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<sup>221</sup> Although a defendant raising an *Atkins* claim will be telegraphing to the jury that he may be mentally retarded, the jury, uneducated in the medical field, may disregard, or fail to understand the retardation claim and attribute the defendant’s behavior to his criminality.

<sup>222</sup> Dick-Hurwitz, *supra* note 30, at 723-24.

<sup>223</sup> See Slobogin, *supra* note 205, at 1107 (“Research clearly shows that, despite the fact that offenders with serious disorders are no more likely to reoffend [sic] than the general offender population, the public tends to equate mental disorder with dangerousness.”); Pescosolido et al., *supra* note 213, at 1341, cites a study in which “[a]lmost 17% of the sample indicated that even the ‘troubled person’ was either very or somewhat likely to do something violent toward others. That percentage rose to 33.3% for the depression vignette and to more than 60% for the schizophrenia vignette.” *Id.* Although mental illness and mental retardation are different disorders, the public, including jurors, are often unable to ascertain the difference. See Bing, *supra* note 26, at 87 (“Jurors are unlikely to have a full grasp of mental retardation, including the difference between this condition and mental illness.”); see also Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENT. HEALTH & PHYS. DIS. L. REP. 667, 667 n.16 (2000) (noting “the boundaries between [mental retardation and mental illness] are ill-defined and considerable overlap can exist”).

<sup>224</sup> Jamie M. Billotte, Note, *Is it Justified? - The Death Penalty and Mental Retardation*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 333, 344 (1994) (quoting *Upholding Law and Order*, HARTSVILLE MESSENGER, June 24, 1987, at 5B). Although this was stated pre-*Atkins*, a juror today with similar feelings could choose to ignore the “guilty but mentally retarded” verdict and vote for death out of feelings that the mentally retarded defendant, because of his or her retardation, may act out violently in the future.

<sup>225</sup> Bing, *supra* note 26, at 89 (“Jurors may deem the defendant’s retardation irrelevant if he is declared competent to stand trial.”).

<sup>226</sup> *Burgess v. State*, 450 S.E.2d 680, 695 (Ga. 1994).

<sup>227</sup> Bing, *supra* note 26, at 86; see also, Slobogin, *supra* note 205, at 1107 (“Capital sentencing juries...often treat mental disorder not as a mitigating circumstance (as the law requires) but as an aggravating circumstance supporting the imposition of the death penalty.”).

guidelines.<sup>228</sup> Further, many jurors who believe a defendant to be mentally retarded have reported feeling sympathy or pity for the defendant.<sup>229</sup> The more a juror reported feeling sympathy or pity for the defendant, the more likely the juror was to cast his or her vote at the start of deliberations for a life sentence.<sup>230</sup> Most jurors relying on feelings of sympathy or pity to make their first vote usually stick with that vote.<sup>231</sup> Thus, some jurors may obey statutory edict and, although they did not find the defendant “guilty but mentally retarded,” allow the defendant’s mental retardation as a mitigating factor to weigh in favor of a life sentence.<sup>232</sup>

There are also protections available in the *voir dire* process for Georgia capital defendants alleging mental retardation. Georgia permits the individual examination of jurors in capital cases.<sup>233</sup> This examination may include questioning jurors on preexisting opinions of guilt or innocence toward the defendant and on prejudice or bias toward the defendant.<sup>234</sup> Jurors who may be biased towards the defendant may be excused for cause.<sup>235</sup> The trial court has authority to control the scope of *voir dire*, and can thus control the questioning to ensure prospective jurors will not be biased towards the alleged mentally retarded capital defendant.<sup>236</sup> Although the court may exercise these safeguards by questioning jurors during *voir dire*, it is difficult to remove a juror for cause. Indeed,

a venireman cannot be excluded for cause unless he makes it unmistakably clear that (1) his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant’s *guilt*, or that (2) he would automatically vote against the imposition of the death penalty in the case regardless of the evidence that might be developed at trial.<sup>237</sup>

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<sup>228</sup> Bowers, *supra* note 192, at 1073.

<sup>229</sup> Garvey, *supra* note 205, at 57.

<sup>230</sup> *Id.* at 62.

<sup>231</sup> *Id.* at 66.

<sup>232</sup> Although in Georgia the judge has discretion to determine the length of sentence during the sentencing phase, if the jury recommends a life sentence, the judge must abide by the jury’s decision. See GA. CODE ANN. § 17-10-31 (2005) (“Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance *and* recommends the death sentence in its verdict, the court *shall* not sentence the defendant to death.”) (emphasis added).

<sup>233</sup> GA. CODE ANN. § 15-12-133 (2005).

<sup>234</sup> GA. CODE ANN. § 15-12-164(a)(1)-(2) (2005).

<sup>235</sup> § 15-12-164(d); see also *Fults v. State*, 548 S.E.2d 315, 320 (Ga. 2001) (“A prospective juror who holds some opinion about the guilt of a criminal defendant need be excused only when it is shown that the opinion is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence and the charge of the trial court.”).

<sup>236</sup> See *Lawler v. State*, 576 S.E.2d 841, 848 (Ga. 2003) (“The scope of *voir dire* is largely left to the trial court’s discretion, and it is not error for the trial court to exclude *voir dire* questions that do not deal directly with the juror’s responsibilities in the case.”).

<sup>237</sup> *Redd v. State*, 252 S.E.2d 383, 385 (Ga. 1979).

Given the certainty necessary to remove a juror for cause, it appears possible for a juror to harbor feelings of bias toward the mentally retarded that may not warrant his or her exclusion from the jury. Thus, despite the safeguards available in the selection of a capital jury to protect against bias, it appears possible for some lingering bias to slip through and affect the juror's decision. Accordingly, the judge, who has training and experience to weigh and apply the law impartially,<sup>238</sup> should make the determination on mental retardation.

Notwithstanding the fact that some jurors may correctly weigh the defendant's mental retardation, because some jurors will react to stereotypes about mental retardation and allow these stereotypes to bias their judgment, the judge, and not the jury, should make the mental retardation determination. The risk that some jurors may be biased enough by their ignorance of mental retardation is sufficient to remove the retardation determination to the judge. For all of the foregoing reasons, Ohio's requirement that the judge make the mental retardation determination is more appropriate and results in a more consistent application of *Atkins*.

#### VIII. THE DIFFERENCES IN PROCEDURES LEAD TO AN ARBITRARY APPLICATION OF *ATKINS*

The death penalty may not be applied under sentencing procedures that "create[] a substantial risk that it would be inflicted in an arbitrary and capricious manner."<sup>239</sup> Because of Ohio's and Georgia's different procedures for determining mental retardation, there is a great risk that *Atkins* protections will be arbitrarily applied.<sup>240</sup> The procedural differences in Ohio and Georgia "increase the unpredictability with which *Atkins* is applied."<sup>241</sup> For example, as discussed above, a defendant may be successful in proving his or her mental retardation by a preponderance of the evidence, but he or she may be unable to prove his or her retardation beyond a reasonable doubt.<sup>242</sup> Also, a Georgia juror may possess bias toward the alleged retarded defendant, and that bias may prevent a finding of retardation.<sup>243</sup> In other words, a defendant in Ohio may be found mentally retarded but the same defendant in Georgia may not. This is the essence of an arbitrary application of *Atkins*; "the availability of [*Atkins*] protections become a function of local law."<sup>244</sup>

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<sup>238</sup> By statute, "[t]he oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding." OHIO REV. CODE ANN. § 3.23 (2005).

<sup>239</sup> *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

<sup>240</sup> See Orpen, *supra* note 21, at 88 (arguing that the failure of the Supreme Court to set a uniform state standard for determining insanity and mental retardation leads to an arbitrary application of capital sentences, which "arguably violates *Furman*").

<sup>241</sup> *Id.* at 91.

<sup>242</sup> See *supra* notes 191-92 and accompanying text.

<sup>243</sup> See *supra* Part VII.

<sup>244</sup> Orpen, *supra* note 21, at 88.

A uniform national procedure and definition of mental retardation is necessary to ensure that *Atkins* is not applied arbitrarily.<sup>245</sup> The Ohio procedure, as has been shown to best offer *Atkins* protections, should serve as a national legal procedure for determining mental retardation for *Atkins* purposes. Because both the Ohio and Georgia definitions are substantively similar to the definitions offered by medical authorities, either could be used as the legal definition of mental retardation. Using one of these definitions will ensure states determine mental retardation consistently.

#### IX. RECOMMENDED PROTECTIONS FOR THE MENTALLY RETARDED

The mentally retarded are at an acute risk of wrongful sentencing, particularly because of bias and misunderstanding of their disorder. Because the mentally retarded often attempt to hide their disability,<sup>246</sup> attorneys may be genuinely unaware of a defendant's mental retardation and may fail to raise the issue or to request much needed experts to prove the defendant's claim.<sup>247</sup> Also, the mentally retarded are susceptible to police coercion during interrogation.<sup>248</sup> It is thus necessary that some training procedures be implemented to protect the rights of the mentally retarded.<sup>249</sup>

Ohio and Georgia do not offer much training to police, judges, or attorneys. In Ohio, the "Peace Officer Training Academy" (POTA) offers a variety of training classes for peace officers, including a class on "Dealing with the Mentally Ill in a Crisis."<sup>250</sup> This, however, appears to be the extent of Ohio training programs available to police officers; there is no mandatory training required for police officers to identify mentally retarded criminal offenders. The Ohio Public Defender's Office makes available on its website sample motions for attorneys representing mentally retarded defendants who may be sentenced to death.<sup>251</sup> The office does not make available any training classes or programs for representing the mentally retarded.<sup>252</sup> Likewise, Georgia, at its Public Defender's Office website, offers some assistance to attorneys representing mentally impaired individuals and to family and friends of the mentally impaired.<sup>253</sup>

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<sup>245</sup> *Id.* at 91.

<sup>246</sup> See John Blume & David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK. L. REV. 725, 734 (1988) (stating that because mentally retarded persons are often able to mask their intellectual limitations, they are "often thought to be 'stupid,' 'a little slow,' 'dumb,' or 'uncooperative' rather than mentally retarded").

<sup>247</sup> Human Rights Watch, *supra* note 1.

<sup>248</sup> Ellis & Luckasson, *supra* note 152, at 428.

<sup>249</sup> See Human Rights Watch, *supra* note 1 (recommending training programs for police, prosecutors, defense attorneys, and judges).

<sup>250</sup> Ohio Attorney Gen., POTA Online Course Catalog, <http://www.ag.state.oh.us/le/training/catalog/CourseCatalog.asp> (last visited Apr. 27, 2006). Topics at this class include an introduction to mental and psychiatric illnesses and mental retardation. *Id.*

<sup>251</sup> See Office of the Ohio Public Defender, Mental Retardation Motions, [http://opd.ohio.gov/Mental/Mental\\_Claims\\_mainpage.htm](http://opd.ohio.gov/Mental/Mental_Claims_mainpage.htm) (last visited Feb. 11, 2006).

<sup>252</sup> See *Id.*

<sup>253</sup> See Debra J. Blum, GEORGIA PUBLIC DEFENDER STANDARDS COUNSEL, WHEN SOMEONE WITH MENTAL ILLNESS IS ARRESTED IN GEORGIA (2003), <http://www.gpdsc.com/omha->

To protect the rights of mentally retarded defendants, Georgia and Ohio should offer mandatory training programs to death penalty attorneys and police officers. The mandatory training for death penalty attorneys would better enable them to communicate with their mentally retarded clients and assist in their defense.<sup>254</sup> Further, this training would enable attorneys to recognize mental retardation early on and challenge waivers of procedural rights that their client may have never understood.<sup>255</sup> The mandatory training for police officers would better equip them to identify mental retardation and enable them to utilize this training when questioning mentally retarded defendants.<sup>256</sup> This training will help protect the rights of mentally retarded individuals and ensure that their retardation is recognized early in the criminal process such that they are afforded all the protections granted by *Atkins*.

#### X. CONCLUSION

Ohio's procedure for determining mental retardation is superior to Georgia's and should serve as the basis for a national mental retardation legal procedure. Ohio and Georgia offer substantially similar definitions of mental retardation and either could be used as a national legal definition of mental retardation. Ohio and Georgia have vastly different procedures for determining mental retardation. Ohio's procedure affords the best opportunity for the defendant to receive the protections of *Atkins*. To prevent an arbitrary application of *Atkins*, it is important that Ohio's procedure, and Ohio's or Georgia's definition, be adopted to serve as national legal standard for use in determining mental retardation.

Ohio's use of the "preponderance of the evidence" standard to prove mental retardation is a more appropriate standard of proof because it better meets the overall goal of *Atkins*. There are great differences between requiring a defendant to show he or she is mentally retarded by a preponderance of the evidence than requiring a defendant to show he or she is mentally retarded beyond a reasonable doubt. A mentally retarded defendant's low intellectual functioning suggests that requiring him or her to prove mental retardation by a preponderance of the evidence is best suited to his or her unique needs.<sup>257</sup> As shown above, it is clear that requiring

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resources-handbook.pdf. Georgia Public Defender Standards Council, Mental Health Advocate: Seminar Calendar, <http://www.gpdsc.com/omha-resources-seminars.htm> (last visited Feb. 11, 2006) (listing OMHA Mental Health Seminar on May 19, 2005).

<sup>254</sup> Bing, *supra* note 26, at 84-86.

<sup>255</sup> Bing, *supra* note 26, at 82; *see also* State v. McCollum, 433 S.E.2d 144, 160 (N.C. 1993) (holding that a finding of mental retardation in North Carolina is no bar to a knowing and intelligent waiver of Miranda rights where the defendant appeared to understand instructions and signed a waiver form, even though the defendant had an I.Q. score between 61 and 69 and a mental age of 8 to 10 years); Livingston v. State, 444 S.E.2d 748, 754 (Ga. 1994) (finding valid a mentally retarded defendant's confession because there was no police coercion).

<sup>256</sup> Bing, *supra* note 26, at 72 (noting that mentally retarded persons have "an increased susceptibility to the influence of authority figures"); *see also* Ellis & Luckasson, *supra* note 152, at 428-29 ("Because few mentally retarded people are able to determine what information might have legal significance for their case, spontaneous memory and cursory questioning cannot reliably ascertain all the facts.").

<sup>257</sup> *See* Bing, *supra* note 26, at 134-35; *see also* Ellis & Luckasson, *supra* note 152, at 428; Entzeroth, *supra* note 120, at 917.

mentally retarded capital defendants to prove mental retardation by a preponderance of the evidence will best meet the goal of *Atkins* by effectively ensuring that mentally retarded capital defendants do not face the death penalty.

Ohio's requirement that a judge determine mental retardation is more appropriate than Georgia's requirement that a jury make such a determination because of the greater risk for jury bias. Requiring the judge to make the retardation determination provides the greatest opportunity to minimize bias. Thus, Ohio's requirement that the judge determine mental retardation should be adopted into a national legal procedure for determining mental retardation.

The definitions of mental retardation proffered by Ohio and Georgia mirror those offered by medical authorities. Other state definitions of mental retardation are more complex in their language, and may create confusion in their application.<sup>258</sup> Either Ohio or Georgia's definition of mental retardation should be adopted to serve as the national legal standard for *Atkins* purposes because both reflect the modern medical world's understanding of mental retardation. Adopting either of these definitions will also help ensure that *Atkins* is applied consistently in all states implementing the death penalty.

A uniform procedure and definition for *Atkins* claims is necessary to ensure that all retarded persons receive the protections of *Atkins*. Absent a national standard, as Ohio's and Georgia's different procedures show, *Atkins* protections become a function of state law and vary depending on the jurisdiction in which one is tried.<sup>259</sup> A national standard is, therefore, necessary to ensure that *Atkins* is not arbitrarily applied.

SCOTT R. POE\*

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<sup>258</sup> See *supra* note 124 and accompanying text; see also FLA. STAT. ANN. § 921.137(1) (West 2005) (defining mental retardation); Raines, *supra* note 25, at 197-98 (arguing that the 1983 definition of mental retardation, like that used by Florida, is difficult for laypersons to understand).

<sup>259</sup> Orpen, *supra* note 21, at 88.

\*J.D. expected, May 2007, Cleveland State University, Cleveland-Marshall College of Law. The author would like to thank Associate Dean Phyllis L. Crocker for her assistance in the writing of this note. Any errors are entirely the author's.