School of Law
UNIVERSITY OF GEORGIA

Prepare.
Connect.
Lead.

Georgia Law Review

Volume 57 | Number 2 Article 6

3-9-2023

Unacceptable Risk: The Failure of Georgia's "Guilty but Intellectually Disabled" Statute and a Call for Change

Logan Purvis
University of Georgia School of Law, logan.purvis25@uga.edu

Follow this and additional works at: https://digitalcommons.law.uga.edu/glr

Part of the Criminal Law Commons, and the Disability Law Commons

Recommended Citation

Purvis, Logan (2023) "Unacceptable Risk: The Failure of Georgia's "Guilty but Intellectually Disabled" Statute and a Call for Change," *Georgia Law Review*: Vol. 57: No. 2, Article 6.
Available at: https://digitalcommons.law.uga.edu/glr/vol57/iss2/6

This Note is brought to you for free and open access by Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Georgia Law Review by an authorized editor of Digital Commons @ University of Georgia School of Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.

Unacceptable Risk: The Failure of Georgia's "Guilty but Intellectually Disabled" Statute and a Call for Change

Cover Page Footnote
* J.D. Candidate, 2023, University of Georgia School of Law; B.A., 2018, University of Georgia. I would like to express my sincere gratitude to Professor Curtis Nesset for his support and guidance throughout the writing of this Note.

This note is available in Georgia Law Review: https://digitalcommons.law.uga.edu/glr/vol57/iss2/6

UNACCEPTABLE RISK: THE FAILURE OF GEORGIA'S "GUILTY BUT INTELLECTUALLY DISABLED" STATUTE AND A CALL FOR CHANGE

Logan Purvis[*]

In 1988, Georgia became the first state in the nation to prohibit the execution of intellectually disabled criminal defendants. At the time, this groundbreaking action played a critical role in shaping the national debate surrounding the criminal justice system's treatment of this group of individuals, culminating in the United States Supreme Court's own prohibition in 2002. A drafting error in Georgia's statute, however, created a highly prejudicial process for determining intellectual disability, all but ensuring that the law's protections are unattainable for those who seek it. Despite this error, Georgia's process has remained the same since the statute's enactment with little consideration of reform. This Note sheds light on Georgia's highly prejudicial law and argues for a change that balances the concerns of those favoring the status quo with the rights of intellectually disabled defendants in capital offense cases.

[*] J.D. Candidate, 2023, University of Georgia School of Law; B.A., 2018, University of Georgia. I would like to express my sincere gratitude to Professor Curtis Nesset for his support and guidance throughout the writing of this Note.

Published by Digital Commons @ University of Georgia School of Law, 2022

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

TABLE OF CONTENTS

I. INTRODUCTION 743

II. BACKGROUND 747
A. GEORGIA LEADS THE WAY 747
B. *PENRY*, *ATKINS*, AND AN EMERGING NATIONAL CONSENSUS 752

III. FULFILLING THE COURT'S MANDATE 755
A. PROPERLY DEFINING "INTELLECTUAL DISABILITY" ... 756
1. Hall v. Florida 758
2. Moore v. Texas 759
B. PROPERLY DETERMINING "INTELLECTUAL DISABILITY" 760

IV. PROBLEMS AND ARGUMENTS 762
A. GEORGIA'S LAW IN PRACTICE 762
1. Burden of Proof 763
2. Stage of Trial 766
3. The Factfinder 767
B. RETAINING THE STATUS QUO 768

V. A WAY FORWARD 771

VI. CONCLUSION 777

I. INTRODUCTION

Rodney Young, Kevin Scott, and Michael Coleman share many similarities. Each has a well-known and well-documented intellectual disability,[1] as evidenced by testimony from specialists, family members, friends, and former teachers.[2] Their cognitive capabilities are diminished, and their capacities to learn are impaired.[3] Young, who has an intelligence quotient (I.Q.) between 60–69, was repeatedly placed in special education classes throughout his time in school, where he was taught at, and never surpassed, a reading level comparable to that of a third or fourth grader.[4] Scott, who was also enrolled in special education classes, has scored as low as a 48 on I.Q. tests, with more recent administrations returning scores of 78.[5] Coleman, although placed on a general education track, had a long history of school troubles: he failed the first, second, third, and seventh grades, with teachers describing his eventual advancement as a "social promotion."[6] Repeated tests placed his I.Q. score at or around 73.[7] For each, doing

---

[1] The currently accepted language to describe the group of people discussed in this Note is "intellectually disabled." *See infra* note 51. The phrase "mentally retarded," however, is commonly used in older judicial opinions, state statutes, and publications. As such, both terms are used throughout this Note and are given the same meaning.

[2] *See* Brief for Appellant at 168–71, 175–95, Young v. State, 860 S.E.2d 746 (Ga. 2021) (No. S21P0078) (detailing Young's intellectual disability); Brief for Appellant at 12, 14, Scott v. State, 878 So. 2d 933 (Miss. 2004) (No. 99-DP-00317-SCT) (stating Scott's cognitive impairments); Coleman v. State, 341 S.W.3d 221, 227–30 (Tenn. 2011) (reviewing evidence of Coleman's intellectual disability).

[3] *See, e.g.*, Bill Rankin, *Georgia Supreme Court Reaffirms Conviction, Sentence for Death Row Inmate*, ATLANTA J.-CONST. (June 1, 2021), https://www.ajc.com/news/georgia-news/high-court-to-be-asked-to-overturn-intellectual-disability-threshold/ZB6RYRIDFBCVHAEPYSZI7L7TCU/ ("He was held back in the fourth grade and took special education classes in high school."); *Coleman*, 341 S.W.3d at 228 ("Michael is lacking in both his academic knowledge and his awareness of his environment.").

[4] *See* Brief for Appellant, *Young*, *supra* note 2, at 14–15 (explaining Young's placement in special education courses due to his low I.Q. scores).

[5] *See* Brief for Appellant, *Scott*, *supra* note 2, at 12, 14 nn.9–10 (detailing Scott's I.Q. scores); *see also* State v. Scott, 233 So. 3d 253, 258 (Miss. 2017) (mentioning the testimony of Scott's special education teacher).

[6] *Coleman*, 341 S.W.3d at 228–29.

[7] *See* Coleman v. State, No. W2007-02767-CCA-R3-PD, 2010 WL 118696, at *4 (Tenn. Crim. App. Jan. 13, 2010), *aff'd in part, vacated in part*, 341 S.W.3d 221 (Tenn. 2011) (stating that Coleman's scores "pile up around 73").

simple things, tasks easily carried out by typically functioning adults, does not come easy; acting properly in a given scenario, engaging in normal social interactions, and controlling emotions and impulsive behaviors can be difficult endeavors.[8]

Unfortunately, their similarities do not stop there. Each of these men have—at different times and through unrelated events—been charged and convicted of murder: Young in 2008, Scott in 1995, and Coleman in 1979.[9] While the specific facts of each case vary greatly, the actions carried out share a common thread: all three amounted to capital murder, a charge carrying with it the possibility of execution.[10]

Despite all of the similarities and parallels between the lives of these individuals, one key difference has resulted in divergent conclusions to their stories: the individuals' varying state citizenships and those states' respective laws governing intellectually disabled capital defendants. Coleman, a citizen of Tennessee, and Scott, hailing from Mississippi, each received a sentence of life imprisonment, despite prosecutors' insistence on the death penalty.[11] Young, a citizen of Georgia, is the only one of these

---

[8] *See, e.g.*, Brief for Appellant, *Young*, *supra* note 2, at 187 (detailing Young's social limitations); *Coleman*, 341 S.W.3d at 228 ("He seems to have difficulty comprehending and assessing situations and therefore may make inappropriate judgments."); Brief for Appellant, *Scott*, *supra* note 2, at 7 ("In layman's term, he is not playing with a full deck. His elevator doesn't stop at all floors.").

[9] *See Young*, 860 S.E.2d 758 (Ga. 2021), *cert. denied*, 142 S. Ct. 1206 (2022) (describing Young's charges); *see also Coleman*, 341 S.W.3d at 224–25 (describing Coleman's charges); *Scott*, 233 So. 3d at 256 (detailing Scott's charges).

[10] The elements which give rise to the distinction between the offenses of murder and *capital* murder vary amongst the states, but generally require—in addition to a finding of guilt for the underlying charge—the existence of one or more "aggravating" factors. In Georgia, for example, carrying out one's murder in an especially depraved or wantonly vile manner, knowingly creating an increased risk of death to more than one person, or carrying out one's murder simultaneously with certain additional crimes are three of the twelve potential aggravating circumstances giving rise to the increased sentence. O.C.G.A. § 17-10-30(b)(2), (3), (7) (2017).

[11] *See Scott*, 233 So. 3d at 256 (affirming the trial order vacating Scott's death sentence due to intellectual disability); *Coleman*, 341 S.W.3d at 258 (remanding Coleman's case for a ruling on the merits). Coleman's subsequent challenge to his sentence was dismissed by the parole board, and he is currently serving his life sentence. *See* Coleman v. Tenn. Bd. of Parole, M2016-00410-COA-R3-CV, 2016 WL 6248027, at *1 (Tenn. Ct. App. Oct. 25, 2016) (dismissing a challenge to the Tennessee Board of Parole's denial of Coleman's parole for lack of subject matter jurisdiction).

three men to receive the highest and ultimate punishment possible in the American criminal justice system—the death sentence.[12] He currently sits on death row, awaiting his execution date.[13]

Given the similarities in each individual's intellectual level and the nature of the crimes carried out, one might find their disparate sentences troubling. After all, the death penalty is and has long been employed as a means of criminal punishment in Georgia, Tennessee, and Mississippi.[14] A look at each state's respective criminal laws provides the source of this disparity.

In Mississippi and Tennessee, when a criminal defendant claims to be intellectually disabled, the court holds a pretrial hearing to determine and rule on the matter.[15] In both states, if the court finds by a preponderance of the evidence that the defendant is intellectually disabled, the trial proceeds as normal, but the death penalty is precluded from being considered during the trial's sentencing phase.[16] In Georgia, the process looks quite different—

[12] *See Young*, 860 S.E.2d at 758 (affirming Young's death sentence); *see also* Rankin, *supra* note 3 (discussing Young's sentence and the arguments raised before the Georgia Supreme Court).

[13] Following the Georgia Supreme Court's affirmance of his conviction, Young petitioned the U.S. Supreme Court for certiorari, and the Court denied the petition on February 25, 2022. *See* Petition for Writ of Certiorari, *Young*, 142 S. Ct. 1206 (No. 21-782); *see also* Bill Rankin, *U.S. Supreme Court Declines to Hear Georgia Death-Penalty Appeal*, ATLANTA J.-CONST. (Feb. 28, 2022), https://www.ajc.com/news/crime/us-supreme-court-declines-to-hear-georgia-death-penalty-appeal/CBW7OX53XNB5JKAJ7YP2IX5Q4Y/ (reporting on the Court's refusal to hear Young's appeal).

[14] For background information on the use of capital punishment throughout each states' history, see *State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 10, 2022).

[15] *See* TENN. CODE ANN. § 39-13-203 (West 2021) (explaining Tennessee's process for determining intellectual disability in capital offense cases); Pruitt v. State, No. W2019-00973-CCA-R3-PD, 2022 WL 1439977, at *12 (Tenn. Crim. App. May 6, 2022) (noting that in Tennessee the "best practice" is "to raise the issue [of intellectual disability] in a pretrial setting" (quoting State v. Pruitt, 415 S.W.3d 180, 201 (Tenn. 2013))); Chase v. State, 873 So. 2d 1013, 1029 (Miss. 2004) (explaining Mississippi's requirements for determining intellectual disability). It should be noted that both Coleman and Scott's cases occurred after the U.S. Supreme Court's ruling in *Atkins*, and both individuals received protection through post-conviction relief processes. *See generally* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of intellectually disabled defendants violates the Eighth Amendment).

[16] *See* TENN. CODE ANN. § 39-13-203 (providing the definition and procedure for evaluating claims of intellectual disability); *Chase*, 873 So. 2d at 1029 ("At the conclusion of the hearing, the trial court must determine whether the defendant has established, by a preponderance of the evidence, that the defendant is mentally retarded.").

not only different from Mississippi and Tennessee, but also from every other state in the nation that makes use of the death penalty.[17] When a capital defendant in Georgia claims to have an intellectual disability, the trier of fact determines whether the defendant is intellectually disabled at the guilt stage of trial after all evidence pertaining to the underlying criminal act has been presented and reviewed.[18] Furthermore, just as the prosecution must prove to the jury—beyond a reasonable doubt—that the defendant has committed the crime for which he[19] has been charged, the defendant must also prove—beyond a reasonable doubt—that he is intellectually disabled.[20] As one might guess, subjecting claims of intellectual disability to the nation's highest and most onerous evidentiary standard and requiring the factfinder to make that determination during the guilt stage of trial has proven insurmountable for defendants.[21] Rodney Young's case was no exception.[22]

This Note proposes much-needed changes to Georgia's current law for determining whether an individual is intellectually disabled and, therefore, ineligible for the death penalty. Part II reviews Georgia's history with regard to disabled criminal defendants and details the Supreme Court's subsequent ban on the execution of

---

[17] *See* Adam Liptak, *Language Mistake in Georgia Death Penalty Law Creates a Daunting Hurdle,* N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/us/politics/supreme-court-death-penalty-intellectual-disability.html (describing Georgia's law as "unique in the nation").

[18] *See* O.C.G.A. § 17-7-131 (2017) (governing the process for determining whether a defendant is intellectually disabled).

[19] He/him pronouns are used throughout this Note when describing hypothetical defendants to reflect the gender disparity in capital punishment. As of 2021, there have been only 575 documented instances of women receiving a death sentence, accounting for just 3.6% of total executions. *Executions of Women*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/women/executions-of-women (last visited Jan. 17, 2022).

[20] *See* O.C.G.A. § 17-7-131 (2017) (providing that a jury must make the determination beyond a reasonable doubt).

[21] *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases,* 33 GA. ST. U. L. REV. 553, 574–77 (2017) [hereinafter Lucas, *Empirical Assessment*] (revealing that no defendant charged with intentional murder has received a jury verdict of guilty but intellectually disabled).

[22] *See supra* note 3.

these individuals, along with the reasoning for that ban. Part III examines the Court's guidance, or lack thereof, for states to follow in ensuring that these defendants are protected and explores the definitional and procedural aspects used to properly identify defendants with intellectual disabilities. Part IV examines how Georgia's chosen procedure is overly prejudicial to this class of defendants and explores the reasons allowing for the law's continuity. Part V proposes changes to the state's current law, which seek to balance the concerns of those opposed to change with the rights of those seeking an intellectual disability determination, ensuring that the process fulfills the statute's original purpose—to prevent the execution of intellectually disabled Georgians.

II. BACKGROUND

To better understand Georgia's "guilty but intellectually disabled" law and its uniquely burdensome process, it is important first to discuss historical developments in the use of capital punishment as it relates to those with intellectual disabilities, both on a state and national level.

A. GEORGIA LEADS THE WAY

For better *and* for worse, Georgia's criminal justice system has long been an outlier in its treatment of the intellectually disabled.[23] Despite contemporary criticism for its hardline approach,[24] Georgia became the first state in the nation to take legislative action prohibiting the execution of these individuals, doing so years before

---

[23] *See* Liptak, *supra* note 17 (noting that Georgia became the first state to ban the execution of intellectually disabled defendants in 1988 but that "almost every other state" utilizes a preponderance of the evidence standard in contrast to Georgia).

[24] *See, e.g.*, Press Release, ACLU Cap. Punishment Project, ACLU Statement on Georgia Supreme Court's Decision in Rodney Young Case (June 1, 2021), https://acluga.org/aclu-statement-on-georgia-supreme-courts-decision-in-rodney-young-case/ (criticizing Georgia's "uniquely high and onerous" burden to establish an intellectual disability in court); *Georgia Supreme Court Asked to Overturn "Nearly Impossible" Evidentiary Burden of Proving Intellectual Disability*, DEATH PENALTY INFO. CTR. (Mar. 26, 2021) https://deathpenaltyinfo.org/news/georgia-supreme-court-asked-to-overturn-nearly-impossible-evidentiary-burden-of-proving-intellectual-disability (describing Georgia's standard as "unmeetable").

the Supreme Court would hand down its own prohibition.[25] This change in Georgia was prompted in large part by the state's controversial execution of Jerome Bowden, a man with a 59 I.Q. score and an inability to count past the number ten.[26] Despite Bowden's clear cognitive deficiencies, the Georgia Board of Pardons and Paroles allowed his execution to move forward, declaring that he "knew right from wrong."[27]

The resulting outcry spurred the Georgia General Assembly into action during its 1988 legislative session,[28] resulting in the amendment of Georgia Code Section 17-7-131, which governs pleas of incompetence and insanity.[29] At the time, criminal defendants were given four potential pleas from which to choose: (1) guilty; (2) not guilty; (3) not guilty by reason of insanity; or (4) guilty but mentally ill.[30] Under the amended statute, the assembly added a fifth option to the list—"[g]uilty but mentally retarded."[31] The change was signed into law by then-Governor Joe Frank Harris, marking a seemingly progressive shift in Georgia's treatment of intellectually disabled criminal defendants.[32] Under the revised

---

[25] *See* C. Christie, *CRIMINAL PROCEDURE Mental Retardation: Provide Plea and Procedure for Pleas Made Subsequent to Conviction and Sentence,* 5 GA. ST. U. L. REV. 358, 361–64 (1988) [hereinafter Christie, *Criminal Procedure*] (providing a detailed overview of Georgia's enactment of the nation's first guilty but intellectually disabled statute).

[26] *See* Bowden v. Francis, 733 F.2d 740, 743 (11th Cir. 1984) (upholding Bowden's death sentence); Raymond Bonner, *Argument Escalates on Executing Retarded*, N.Y. TIMES (July 23, 2001), https://www.nytimes.com/2001/07/23/us/argument-escalates-on-executing-retarded.html (reporting on public backlash to the execution of intellectually disabled individuals and detailing the case of Jerome Bowden).

[27] Bonner, *supra* note 26.

[28] Members of the Georgia General Assembly attempted to pass legislation during the final weeks of the 1987 term, but they ultimately failed to advance their bill beyond the House Committee on Judiciary. Christie, *Criminal Procedure*, *supra* note 25, at 361. Following the legislative session, the committee conducted hearings on the matter, allowing committee members to learn Jerome Bowden's story and take action the following session. *See id.* (detailing the accounts heard by the House Subcommittee on Criminal Law and Procedure).

[29] O.C.G.A § 17-7-131 (2017).

[30] *Id.* § 17-7-131(b)(1). It is important to note that mental illness, insanity, and intellectual disability are distinct concepts with different definitions under the Georgia Code. *See id.* § 17-7-131(a) (defining the different conditions for purposes of the statute).

[31] *Id.* § 17-7-131.

[32] *See Georgia to Bar Executions of Retarded Killers*, N.Y. TIMES, Apr. 12, 1988, at A26 (reporting the date on which then-Governor Harris signed the bill into law and providing a

statute, individuals found to be "mentally retarded" were precluded from receiving a death sentence, instead receiving a maximum punishment of life imprisonment.[33]

Importantly, however, the statute as originally drafted stated: "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*."[34] The wording of the provision's latter half lies at the heart of the issues that followed its enactment. What was originally intended to prevent the execution of intellectually disabled defendants—found guilty beyond a reasonable doubt—of committing capital murder, instead produced a system all but guaranteeing the inability of individuals to prove their disability.[35] Former State Representative Jack Martin, one of the amendment's drafters, has made no secret of this, stating on the record that the statute was the product of "*sloppy* draftsmanship, pure and simple," and accepting blame for the resulting error.[36] Due to this error, as interpreted and repeatedly upheld by the Georgia Supreme Court, the trier of fact must simultaneously determine both a defendant's guilt and claim of intellectual disability beyond a reasonable doubt, the highest standard of proof.[37]

A year after the statute's enactment, the Georgia Supreme Court took up the case *Fleming v. Zant*.[38] Son Fleming, convicted of the 1977 murder of a police officer and sentenced to death, sought the

---

quote from the ACLU characterizing the law as "progressive" and an additional statement from Georgia Attorney General Michael Bowers characterizing the law as "a step forward").

[33] O.C.G.A § 17-7-131(j) (1988).

[34] *Id.* § 17-7-131 (c)(3) (emphasis added).

[35] *See The Burden of Proof Requirement for Determining Mental Retardation as It Relates to the Administration of the Death Penalty: Hearing Before H. Comm. on Judiciary (Non-Civ.)*, 2013 Out of Sess. 4 (Ga. 2013) (statement of Jack Martin, Georgia Association of Criminal Defense Lawyers) (transcript on file with Georgia Law Review) [hereinafter, Committee Hearing] ("So now we've gotten to this point where we are the only state that has this terribly awkward way of doing this. . . ."). I would like to thank Dr. Lauren Ricciardelli, PhD, MSW, for generously providing a copy of the hearing's transcript.

[36] *Id.* at 3.

[37] *See id.* ("The Georgia Supreme Court declined all that. They said, we're gonna hold that. So we've had for years now these two burdens of proof in these cases. And it's been an odd situation throughout.").

[38] 386 S.E.2d 339 (Ga. 1989).

commutation of his sentence based on his intellectual disability.[39] According to Fleming, the constitutional guarantees of due process and equal protection required retroactive application of the statute, potentially barring his execution.[40] Furthermore, he argued that his sentence violated the prohibitions against cruel and unusual punishment found in both the U.S. and Georgia constitutions.[41] Although the Court rejected his first two claims,[42] it was persuaded by Fleming's third argument.[43] Relying on the General Assembly's recent enactment, the Court declared that "this state's consensus is clear."[44] Georgia's constitution did not prohibit the execution of intellectually disabled offenders per se, yet the Court was convinced that contemporary views placed the execution of these individuals in the category of cruel and unusual punishment and was thus impermissible.[45]

Having reached this conclusion, the Court then laid out the appropriate process for post-conviction determinations of intellectual disability for those defendants sentenced prior to the statute's effective date.[46] Under the announced procedure, where a genuine question of disability existed, courts would hold a limited trial at which the defendant would be required to prove their disability by a preponderance of the evidence.[47] Importantly, as the Court reiterated in the subsequent case *Turpin v. Hill*,[48] this standard was only applicable to those tried prior to the statute's enactment, meaning that defendants in cases occurring after its

---

[39] *See id.* at 340 (describing the nature of Fleming's actions and relief sought).

[40] *See id.* ("Fleming contends that, in spite of the language in the statute giving it prospective application, constitutional guarantees of due process and equal protection require . . . retroactive effect.").

[41] *See id.* at 341 (laying out Fleming's cruel and unusual punishment argument).

[42] *See id.* at 340–41 (rejecting Fleming's due process and equal protection claims, as well as his argument that his sentence was disproportionate under O.C.G.A. § 17-10-35(c)(3)).

[43] *See id.* at 342 ("Thus, although the rest of the nation might not agree, under the Georgia Constitution the execution of the mentally retarded constitutes cruel and unusual punishment.").

[44] *Id.*

[45] *See id.* ("This holding does not mean that the Georgia Constitution prohibits execution of retarded persons per se.").

[46] *See id.* ("[W]e must now apply the Georgia constitutional standard to the case at hand.").

[47] *See id.* at 342–43 (detailing the appropriate process for determining intellectual disability).

[48] 498 S.E.2d 52 (Ga. 1998)

enactment would be held to the statute's beyond a reasonable doubt requirement.[49]

Despite the uniquely burdensome nature of Georgia's statute and admissions of error from its drafters, little has changed—or even been considered—in the thirty-four years since its enactment.[50] In 2017, the Georgia General Assembly passed an amendment changing the statute's language to reflect currently accepted disability-related terminology, officially updating the phrase "mentally retarded" to "with intellectual disability" but retaining the law's substance.[51] Other than this single lexical alteration, documented legislative consideration of the law has been largely limited to just over two hours of discussion, which occurred during a legislative hearing before the Georgia House of Representatives Judicial Non-Civil Committee.[52]

The 2013 hearing featured testimony from both supporters and opponents of the law, including one of its original drafters.[53] Importantly, however, as the committee chairman's opening remarks made clear, the committee held the hearing strictly for informational purposes and not to consider any specific proposals.[54] No substantive changes have been made to the statute since that 2013 hearing, and excepting the 2017 amendment,[55] it remains the same today as when it was first enacted.[56]

---

[49] *See id.* at 53 ("[T]he standards set forth in *Fleming v. Zant* are not applicable to mental retardation claims raised in cases tried after the effective date of O.C.G.A § 17-7-131(c)(3) and (j)." (citation omitted)).

[50] *See infra* Part IV. On February 22, 2022, during the editing of this Note, legislation was introduced in the Georgia House of Representatives to modify Georgia's law. *See* H.B. 1426, 156th Gen. Assemb., Reg. Sess. (Ga. 2022) (providing the text of the bill); *see also HB 1426*, Georgia General Assembly, https://www.legis.ga.gov/legislation/62270 (last visited Aug. 6, 2022) (detailing the bill's sponsors and status).

[51] 2017 Ga. Laws, Act 189, § 2.

[52] *See* Committee Hearing, *supra* note 35, at 1 (documenting that the hearing took place between the hours of 9:30 AM and 11:38 AM).

[53] *See id.* at 1–7 (reproducing the testimony of former State Representative Jack Martin, an original drafter of the law).

[54] *See id.* at 1 ("This is an informational hearing; this isn't to examine any particular piece of legislation.").

[55] *See supra* note 51 (providing the updated statutory language).

[56] *Compare* O.C.G.A. § 17-7-131 (1988), *with* O.C.G.A. § 17-7-131 (2017) (highlighting the statute's continuity) .

B. *PENRY*, *ATKINS*, AND AN EMERGING NATIONAL CONSENSUS

At the same time that Georgia was making strides by passing this groundbreaking legislation, this issue was also playing out at the national level and ultimately made its way to the U.S. Supreme Court in 1989.

In *Penry v. Lynaugh*,[57] the Court considered the fate of Johnny Paul Penry, a twenty-two-year-old convicted of murder and sentenced to death under Texas's capital punishment statute.[58] At his trial, it was ascertained that Penry had an I.Q. in the range of 50–63, equating to an estimated mental age of just six and a half years.[59] The Court determined whether the Eighth Amendment's prohibition against cruel and unusual punishment should categorically bar the execution of individuals deemed "mentally retarded."[60] Writing for the five-justice majority, Justice O'Connor answered in the negative; the Eighth Amendment did not stand in the way of Penry's execution.[61]

In so ruling, the Court explained that actions falling under the Eighth Amendment's prohibitions are not limited to the forms of punishment "condemned by the common law in 1789."[62] To the contrary, the Court must consider evolving standards of decency that "mark the progress of a maturing society."[63] The most reliable and objective evidence of evolving standards, according to the Court, is expressed in the form of laws passed by state legislatures that demonstrate a national consensus on a given issue.[64] To Penry's detriment, the Court was unpersuaded that a national consensus

[57] 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

[58] *See id.* at 307–08 (providing background on Penry's case).

[59] *See id.* (stating that "Penry was tested over the years as having an [I.Q.] between 50 and 63" and estimating his mental age to be six and a half years old).

[60] *See id.* at 307 ("We must also decide whether the Eighth Amendment categorically prohibits Penry's execution because he is mentally retarded.").

[61] *See id.* at 340 ("[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by the virtue of his or her mental retardation alone.").

[62] *Id.* at 330.

[63] *Id.* at 330–31.

[64] *See id.* at 331 ("The clearest and most reliable objective evidence of the contemporary values is the legislation enacted by the country's legislatures.").

existed.[65] Although the majority agreed that mental retardation may be considered as a factor reducing a defendant's culpability for a capital offense,[66] the Court was unwilling to provide blanket coverage through the Eighth Amendment's protections.[67]

Thirteen years later, however, a national consensus had emerged, leading the Supreme Court to reverse course in *Atkins v. Virginia*.[68] In the years following *Penry,* sixteen additional states had followed Georgia's lead in adopting prohibitory legislation.[69] Reviewing these enactments, the Court found significant not only the number of statutes passed but also the "consistency of the direction of change" in which the statutes were oriented—all aimed to protect intellectually disabled defendants.[70] "This consensus," in the Court's view, "reflect[ed] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty."[71]

Accepting this general consensus, the Court then brought its "own judgment . . . to bear,"[72] "by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[73] In doing so, the Court focused its analysis on two factors inapplicable to cases involving typically functioning individuals but readily present for intellectually disabled

---

[65] *See id.* at 334 ("In our view, the two state statutes prohibiting execution of the mentally retarded . . . do not provide sufficient evidence at present of a national consensus.").

[66] *See id.* at 340 ("In sum, mental retardation is a factor that may well lessen a defendant's culpability for a capital offense.").

[67] *See supra* note 61.

[68] 536 U.S. 304 (2002).

[69] *See id.* at 313–15 (detailing the changed statutory landscape between the time of *Penry* and *Atkins*).

[70] *Id.* at 315.

[71] *Id.* at 317.

[72] *Id.* at 312 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)). Although the Court gives objective evidence, in the form of state legislative enactments, significant importance, the Court has articulated that the Constitution ultimately requires that the Justices weigh in on the acceptability of the death penalty. *See id.* (describing the Constitution's requirements for ruling on the death penalty under the Eighth Amendment).

[73] *Id.* at 313.

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

defendants: the incongruous justifications for the death penalty's use as punishment and the heightened risk of its imposition.[74]

Society's interest in retribution and deterrence provides the primary justifications for states' use of the death penalty as punishment.[75] In situations in which capital punishment would not serve one or both of these underlying justifications, its use would be "nothing more than the purposeless and needless imposition of pain and suffering."[76] With regard to retribution, the Court noted its history of narrow jurisprudence, aiming to preserve the highest form of punishment for only the most deserving of criminals.[77] Those with intellectual disabilities, who thus have a reduced level of culpability, fell short of this level.[78] The Court also emphasized the type of offender that the death penalty is meant to deter: one who premeditates and deliberates before carrying out a murder.[79] With a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," those with intellectual disabilities, in the Court's view, would not be effectively deterred by imposing the death penalty.[80]

Further swaying the Court's decision was its finding that intellectually disabled defendants face a heightened risk of receiving death sentences.[81] Unlike average criminal defendants, those with intellectual disabilities face a number of additional challenges in their interactions with the criminal justice system: they face a greater risk of offering false confessions, frequently have a diminished ability to interact meaningfully with their attorneys, and generally tend to be poor witnesses for themselves.[82] These

---

[74] *See id.* at 318–20 (detailing the differences between typically functioning and intellectually disabled defendants as it relates to the criminal justice system).

[75] *See id.* at 319–20 (discussing the penological purposes of capital punishment).

[76] *Id.* at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

[77] *See id.* ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.").

[78] *See id.* ("[T]he lesser culpability of the mentally retarded offender surely does not merit that form of retribution.").

[79] *See id.* ("[I]t seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" (quoting *Enmund*, 458 U.S. at 799)).

[80] *Id.* at 320.

[81] *See id.* at 320–21 (explaining the increased likelihood of intellectually disabled offenders receiving a death sentence).

[82] *See id.* (detailing the reasons for the increased likelihood of intellectually disabled offenders receiving death sentences).

added challenges, the inapplicability of the death penalty’s underlying purposes, and the evidence of a growing national consensus led the Court to conclude that the Eighth Amendment’s prohibition on cruel and unusual punishment provided a substantive restriction against states’ power to execute capital defendants.[83]

III. FULFILLING THE COURT’S MANDATE

Despite the landmark nature of the *Atkins* decision, its practical implications have been limited. Though announcing a categorical ban on the execution of intellectually disabled defendants, the Court did not provide firm definitional or procedural guidelines for states to follow when implementing that ban.[84] Instead, the Court echoed a position it took in the earlier case *Ford v. Wainwright*,[85] declaring it would “leave to the State[s] the task of developing appropriate ways to enforce the constitutional restrictions upon [their] execution of sentences.”[86] Given the importance of the process for identifying intellectual disabilities to carry out the Court’s mandate, this lack of guidance has led to a predictable result—an inconsistent patchwork of laws across the nation.[87] Accordingly, a review of the differing approaches implemented amongst the states is needed.

---

[83] *See id.* at 321 (“Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such punishment is excessive . . . .” (quoting Ford v. Wainwright, 477 U.S. 399, 407 (1986))).

[84] *See* Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution,* 30 J. LEGIS. 77, 85 (2003) [hereinafter Tobolowsky, Atkins *Aftermath*] (“[T]he Court’s opinion left many issues regarding the implementation of the constitutional ban unresolved or unaddressed.”); *see also* Michael L. Perlin, “*Life Is in Mirrors, Death Disappears”: Giving Life to* Atkins, 33 N.M. L. REV. 315, 331 (2003) [hereinafter Perlin, *Life Is in Mirrors*] (detailing the “pressure points” of the *Atkins* decision).

[85] *See* 477 U.S. 399 (1986) (ruling that execution of those deemed “insane” constitutes cruel and unusual punishment).

[86] *Id.* at 416–17.

[87] *See* Tobolowsky, Atkins *Aftermath, supra* note 84, at 85 (discussing the many questions left open by the *Atkins* Court and the consequences arising from those questions).

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

A. PROPERLY DEFINING "INTELLECTUAL DISABILITY"

As the *Atkins* Court noted, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of . . . offenders about whom there is a national consensus."[88]

Given the imprecise nature of intellectual disabilities and the vast spectrum upon which they manifest, defining which individuals should be immune from capital punishment is often a difficult task.[89] Although stopping short of prescribing any specific definitional framework that must be used, the Court did not leave states entirely without direction.[90] In assessing the merits of Atkins's disability, the Court used, as one of its metrics, the American Association on Mental Retardation's[91] definition, which states:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently 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 before age 18.[92]

This definition cited by the Court provides three key concepts central to the proper identification of intellectual disability: (1) subaverage intellectual functioning; (2) a reduced capacity for

---

[88] *Atkins*, 536 U.S. at 317.

[89] *See* Perlin, *Life Is in Mirrors, supra* note 84, at 333 ("Lawyers have traditionally done a terrible job of being able to identify mental disability . . . .").

[90] *See Atkins*, 536 U.S. at 318 (describing clinical definitions of intellectual disability).

[91] In 2007, after the Court's decision in *Atkins*, the American Association on Mental Retardation changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). *See* Jay Malone, *On Naming and Developmental Disability Month*, ACRL INSIDER (Feb. 23, 2022), https://acrl.ala.org/acrlinsider/on-naming-and-developmental-disability-awareness-month/#:~:text=In%202007%2C%20the%20organization%20that,the%20same%20year%20as%20ALA. Subsequent references to this organization use its updated name.

[92] *Atkins,* 536 U.S. at 308 n.3.

adaptive behavior; and (3) manifestation of one's disability during the developmental period.[93] A closer look at each concept provides a clearer understanding of the types of individuals the *Atkins* Court envisioned its decision encompassing. In reviewing these definitional components, however, it is important to keep in mind that additional factors, such as one's community environment, peer support, and culture, may heavily influence their disability.[94]

According to the AAIDD, the term "intellectual functioning" refers to one's general mental capacity and incorporates traditional characteristics of intelligence, such as one's ability to learn, reason, and problem-solve.[95] Intellectual functioning is most commonly measured through I.Q. tests, with average scores falling within one standard deviation of the mean score of 100.[96] As noted by the Court in *Atkins*, I.Q. scores in the range of 70–75 or below are generally considered the cutoff for whether someone is intellectually disabled under this prong of the definition.[97]

The second definitional component, adaptive behavior, includes a collection of "conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives."[98] Someone with a diminished capacity for adaptive behaviors might, for example, have difficulties maintaining proper personal hygiene, following rules, and adapting to different social environments, or

---

[93] *See id.* at 318 ("[C]linical definitions . . . require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.").

[94] *See* R.L. SCHALOCK, R. LUCKASSON & M.J. TASSÉ, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORT 2 (12th ed. 2021) ("[I]ntellectual functioning is influenced by other human functioning dimensions and by systems of supports.").

[95] *Id.*

[96] *See* LaJuana Davis, *Intelligence Testing and* Atkins*: Considerations for Appellate Courts and Appellate Lawyers*, 5 J. APP. PRAC. & PROC. 297, 299 (2003) [hereinafter Davis, *Intelligence Testing*] (detailing the American Association on Mental Retardation (AAMR) and American Psychiatric Association (APA) definitions of intellectual functioning and placing the mean score at 100).

[97] *See Atkins,* 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an [I.Q.] between 70 and 75 or lower, which is typically considered the cutoff [I.Q.] score for the intellectual function prong of the mental retardation definition.").

[98] SCHALOCK ET AL., *supra* note 94, at 2.

they might struggle to comprehend the value of money or the meaning of time.[99]

The third and final aspect of the AAIDD's definition requires manifestation of one's disability during the developmental period.[100] Although the definition at the time of *Atkins* placed the outer limit of this period at age eighteen,[101] AAIDD's contemporary definition requires onset prior to age twenty-two.[102]

It is important to note that, although the AAIDD is a credible and respected source for information on intellectual disabilities, it is not the only source.[103] The proper definition of intellectual disability is neither singular nor static; it is subject to changes resulting from continued cognitive research and shifting societal norms.[104] It is for this reason that the *Atkins* Court did not dictate that states adhere to the AAIDD definition, or any specific definition for that matter.[105] Rather, the use of a comprehensive and widely accepted clinical definition represents the standard the Court sought for states to follow. Two recent Supreme Court cases have reinforced this view, providing states with a glimpse into the Court's more contemporary view of its original *Atkins* holding.

1. Hall v. Florida. In 2014, the Court in *Hall v. Florida* determined the appropriate weight courts should give to I.Q. tests in determining intellectual disability.[106] Under Florida law, as interpreted by the state's highest court, a threshold I.Q. score of 70 or below was required in order to find a defendant intellectually disabled.[107] If that defendant scored a 71 or above, all further exploration was foreclosed, and the defendant was deemed suitable

---

[99] *See, e.g.*, Brief for Appellant, *Young*, *supra* note 2, at 183–87 (detailing Young's adaptive limitations).

[100] *See* SCHALOCK ET AL., *supra* note 94, at 3 (reviewing the age of onset requirement for intellectual disability).

[101] *See Atkins,* 536 U.S. at 308 n.3 ("The onset must occur before age 18 years . . . .").

[102] *See* SCHALOCK ET AL., *supra* note 94, at 3 (placing the age of onset at twenty-two).

[103] *See, e.g.*, *Atkins,* 536 U.S. at 308 n.3 (providing the APA's definition of intellectual disability and describing it as "similar" to AAIDD's definition).

[104] *See* Davis, *Intelligence Testing*, *supra* note 96, at 302 ("However, the definition of mental retardation will continue to change within the psychological community . . . .").

[105] *See supra* notes 84–87 and accompanying text.

[106] *See* 572 U.S. 701, 712 (2014) ("That strict [I.Q.] test score cutoff of 70 is the issue in this case.").

[107] *See id.* at 704 (describing the Florida law for defining intellectual disability).

for the death penalty.[108] In striking down the state's statutory interpretation, the Court declared that an individual's intellectual functioning "cannot be reduced to a single numerical score."[109] In the Court's view, Florida's law disregarded established medical practice in two important and interrelated ways. First, it took I.Q. scores as final and conclusive evidence as to one's intellectual capacity, even when additional evidence bearing on the determination existed.[110] Second, by reading scores as single, fixed numbers, rather than as a range, the law failed to recognize the imprecision inherent in I.Q. testing.[111] To properly determine a defendant's intellectual capacity, states instead must allow for the admission of additional types of evidence relating to intellectual functioning and adaptive behavior.[112] Such evidence may include medical and behavioral records, school tests and reports, and testimony regarding the defendant's behavioral history.[113]

2. Moore v. Texas. Five years later, in *Moore v. Texas*,[114] the Court provided further guidance when it struck down the Texas Court of Criminal Appeals' use of the so-called *Briseno* factors.[115] These factors, based on the Texas court's adoption of the American Association on Mental Retardation's 1992 intellectual disability definition,[116] failed to comport with contemporarily accepted medical views and were thus, in the Court's view, not permissible.[117]

---

[108] *See id.* (detailing the effect of an I.Q. score above 70).

[109] *Id.* at 713.

[110] *See id.* at 712 ("It takes an [I.Q.] score as final and conclusive evidence . . . when experts in the field would consider other evidence.").

[111] *See id.* (noting that reliance on a "purportedly scientific measurement" in the form of an I.Q. score fails to recognize that the score is, "on its own terms, imprecise").

[112] *See id.* at 714 (explaining the need for additional types of evidence in determining one's intellectual ability).

[113] *See id.* at 712 (providing examples of the types of "weighty" evidence that must also be considered in addition to I.Q. scores).

[114] 137 S. Ct. 1039 (2017).

[115] *See Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004), *abrogated by* Moore v. Texas, 137 S. Ct. 1039 (2017) (developing factors to use in determining intellectual disability).

[116] *See supra* note 91 and accompanying text.

[117] *See Moore*, 137 S. Ct. at 1052 (describing the *Briseno* factors as an "outlier"). The Texas Court of Criminal Appeals developed the *Briseno* factors in 2004 with the guiding principle of setting the standard at a level in which the average Texan would agree an intellectual disabled individual be protected. As a reference, the Texas court mentioned the character Lennie from Steinbeck's *Of Mice and Men*, and consequently, the *Briseno* factors have

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

In jettisoning the factors' use, the majority noted that the Texas court had failed to "inform itself of the 'medical community's diagnostic framework.'"[118] The *Moore* decision requires, therefore, that states' definitions used to determine one's intellectual capacity must be in line with the currently accepted consensus of the medical community; outdated or improper factors are not to be used.[119] Although the *Atkins* decision provided states with significant discretion to fashion their respective laws, the Court's pronouncements in *Hall* and *Moore* make one thing evident: that discretion is not unfettered.

B. PROPERLY DETERMINING "INTELLECTUAL DISABILITY"

While the Court's decisions have provided states with some, albeit little, guidance as to the definitional aspect of intellectual disability, no similar decision has been handed down with regard to the procedures states are to use in reaching their conclusions. These procedures involve a number of considerations, including: (1) which side bears the burden of proof; (2) at what level should that burden be placed; (3) at what stage of trial should the determination be made; and (4) which party stands in the best position to make that determination.

Regarding which side bears the burden of proof, the consensus is clear: it is the job of the defendant to prove the existence of their intellectual disability.[120] States differ, however, as to how high that burden should be placed.[121] The majority of states have established

---

frequently been referred to as the "Lennie Standard." *See* Alexander H. Updegrove, Michael S. Vaughn & Rolando V. del Carmen, *Intellectual Disability in Capital Cases: Adjusting State Statutes After* Moore v. Texas, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 527, 534 (2018) [hereinafter, Updegrove et al., *Adjusting State Statutes*] (explaining the origin of the *Briseno* factors).

[118] *Moore*, 137 S. Ct. at 1053.

[119] *See id.* (criticizing the Texas Court's use of outdated, non-clinical factors to determine intellectual disability).

[120] *See* Veronica M. O'Grady*, Beyond a Reasonable Doubt: The Constitutionality of Georgia's Burden of Proof in Executing the Mentally Retarded,* 48 GA. L. REV. 1189, 1200 (2014) ("[T]he issue of who bears the burden is seemingly well settled across the states.").

[121] *Compare, e.g.*, ARIZ. REV. STAT. ANN. § 13-753(G) (West 2011) (establishing a "clear and convincing" burden requirement), *with* N.C. GEN. STAT. ANN. § 15A-2005(f) (West 2015) (placing the burden at "preponderance of the evidence").

https://digitalcommons.law.uga.edu/glr/vol57/iss2/6

a preponderance of the evidence standard, requiring a defendant to present evidence sufficient to convince a factfinder that his claim, more likely than not, is true.[122] Other states have settled for the slightly more cumbersome standard of clear and convincing evidence, requiring a defendant to convince the factfinder that the evidence presented is highly and substantially more likely than not to be true.[123] Georgia, once seen as the frontrunner on the matter, now stands alone as the only state to set the standard at "beyond a reasonable doubt,"[124] the highest evidentiary burden used in the American justice system.[125]

States have also developed a myriad of schemes regarding which party should make the determination of intellectual disability as well as when that determination should be made.[126] Some hold a pretrial hearing and require defendants to raise the issue within so many days of the trial's commencement.[127] Others allow pretrial hearings but do not dictate the timing or the stage at which that hearing will occur.[128] On the other end of the spectrum are states that require the determination be made following a finding of guilt but either prior to sentencing[129] or during the sentencing stage itself.[130] Again, Georgia stands amongst a scarce minority as one of

---

[122] *See* Tobolowsky, Atkins *Aftermath*, *supra* note 84, at 118 ("[T]he clear majority of all states that have selected a standard of proof regarding this issue have chosen the preponderance of the evidence standard.").

[123] *See id.* (noting the number of states that have chosen a clear and convincing standard).

[124] O.C.G.A. § 17-7-131(c)(3) (2017).

[125] For background information on the "beyond a reasonable doubt" standard and its history in the American criminal justice system, see generally Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941 (2009) [hereinafter Gallanis, *History of the Criminal Trial*].

[126] *Compare, e.g.*, MO. ANN. STAT. § 565.030(4)(1) (West 2016) (requiring determination at the sentencing stage of trial by the factfinder), *with* NEV. REV. STAT. ANN. § 174.098(1) (West 2015) (allowing for pretrial determination).

[127] *See, e.g.*, IDAHO CODE. ANN. § 19-2515A(2) (West 2006) ("[D]efendant shall give notice to the court and the state . . . at least ninety (90) days in advance of trial.").

[128] *See, e.g.*, State v. Smith, 893 S.W.2d 908, 916 n.2 (Tenn. 1994) ("Neither the [Tennessee] statute itself nor any other statute or law expressly sets forth any procedure for raising the issue of mental retardation . . . .").

[129] *See, e.g.*, NEB. REV. STAT. ANN. § 28-105.01(4) (West 2013) ("[T]he court shall hold a hearing prior to any sentencing determination proceeding . . . .").

[130] *See, e.g.*, MO. ANN. STAT. § 565.030(4) ("The trier shall assess and declare the punishment . . . [i]f the trier finds . . . that the defendant is intellectually disabled.").

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

only two states requiring the determination be made during the guilt stage of trial.[131]

Similarly, the party in charge of making the determination varies among states.[132] Some assign the task explicitly to the court,[133] while others allow either the court or the jury to make the decision.[134] Further still, some states provide defendants with a safety net, allowing for jury determination in the event that the court, after first conducting a pretrial hearing, fails to find the defendant intellectually disabled.[135] Georgia's statute requires the trier of fact to make the determination—almost certainly a jury of one's peers in a trial for capital murder.[136]

IV. PROBLEMS AND ARGUMENTS

A. GEORGIA'S LAW IN PRACTICE

A look at Georgia's attempt to prevent the execution of intellectually disabled defendants is necessary to pinpoint the exact issues with the state's law. To that end, a comprehensive review from 2017 assessed the statute's effectiveness, the findings of which painted a rather grim picture.[137] In over thirty years of the law's

---

[131] *See* O.C.G.A. § 17-7-131(b)(1) (2017) (placing the determination at the guilt stage of trial); WYO. STAT. ANN. § 7-11-305(a) (West 1985) (providing the process for determining intellectual disability and placing the determination at the guilt stage of trial).

[132] *Compare, e.g.*, ARK. CODE ANN. § 5-4-618(d)(2)(A) (West 2019) ("[T]he court shall determine if the defendant has an intellectual disability."), *with* OKLA. STAT. ANN. tit. 21, § 701.10b(E)–(F) (West 2019) (assigning the determination to the court but also reserving the right of the defendant under some circumstances to submit the determination as a special issue to the jury).

[133] *See, e.g.*, NEB. REV. STAT. ANN. § 28-105.01(4) ("If the court finds, by a preponderance of the evidence, that the defendant is a person with an intellectual disability, the death sentence shall not be imposed.").

[134] *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (2014) ("The jury shall try the issue of intellectual disability of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge.").

[135] *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-2005(d) (West 2015) ("The pretrial determination of the court shall not preclude the defendant from raising any legal defense during the trial.").

[136] *See* O.C.G.A. § 17-7-131(c)(3) (stating that the jury, or court acting as trier of facts, is to determine intellectual disability).

[137] *See* Lucas, *Empirical Assessment, supra* note 21, at 575–81 (describing the need for this study and the methodology used to conduct study).

existence, not a single defendant charged with the crime of intentional murder has successfully received the law’s protection.[138] At the time of the study’s publication, researchers found eighteen documented cases in which juries were provided the option to find an intellectual disability, declining its use each time.[139] The law’s complete unattainability raises important questions as to how and why this has occurred, the answer boiling down to three key aspects: the what, the when, and the who. Although these factors are addressed separately below, all three play an interconnected role in the statute’s ineffective application.

1. Burden of Proof. The most apparent—and most consequential—aspect of the law rests in its uniquely high burden of proof, requiring that a defendant prove his intellectual disability beyond a reasonable doubt.[140] In criminal trials, this high burden is generally placed on the prosecution—a requirement that must be met in order to successfully prove a defendant’s guilt.[141] By finding an individual guilty of a crime beyond a reasonable doubt, the jury signals virtual certainty in its decision, finding the existence of no reasonable alternative explanation which could exonerate the defendant of his accused actions.[142]

The presumption of innocence is a hallmark of the American justice system.[143] Placing an exceedingly high bar on the prosecution is understandable, therefore, given the potential for a deprivation of one’s liberty. As a general matter, society is more comfortable with a guilty man’s accidental release than the improper conviction of an innocent man.[144] Georgia’s law flips this

---

[138] *See id.* at 582 (detailing the results of the study).

[139] *Id.*

[140] *See, e.g.*, Committee Hearing, *supra* note 35, at 4, 5 (acknowledging Georgia’s onerous standard).

[141] *See* Gallanis, *History of the Criminal Trial*, *supra* note 125, at 941–42 (describing the prosecution’s burden to satisfy the reasonable doubt standard as one of the “hallmarks of [American] criminal law”).

[142] *See* Committee Hearing, *supra* note 35, at 4 (detailing the significance of a finding of guilt beyond a reasonable doubt).

[143] *See* Gallanis, *History of the Criminal Trial, supra* note 125, at 941–42 (“[Americans] take pride in the presumption of innocence and in the rule that the defendant must be acquitted if the prosecution does not establish the facts of guilt beyond a reasonable doubt.”).

[144] *See* Committee Hearing, *supra* note 35, at 4 (“The *reason* we have proof beyond a reasonable doubt is we made the political judgment because life and liberty is so important

view on its head, effectively signaling the state's preference for the accidental execution of an intellectually disabled man over the accidental reduction of his sentence based on an undeserving intellectual disability determination.[145]

A look at several cases throughout the history of Georgia's law highlights the impact of its rigorous evidentiary burden. Take, for example, the 1989 case of Alphonso Stripling, the first defendant to raise the recently enacted defense.[146] Stripling, with an I.Q. in the range of 64–68, presented two mental health experts, both of whom agreed that he met the necessary requirements to be defined as intellectually disabled.[147] In response, the prosecution presented its own expert, who had not taken part in Stripling's evaluation and agreed that the defense experts' testing was valid.[148] Despite this, the expert testified that, in his "guestimate," Stripling's intellectual level was "in the average range."[149] Important to the expert's judgment were the facts that Stripling had a job and the ability to drive.[150] The jury returned a guilty verdict, finding that Stripling had no intellectual disability under the law.[151]

The subsequent trials of Warren King,[152] Raymond Burgess,[153] and Eric Perkinson[154] offer further examples. King, whose attorneys admitted evidence of his low I.Q. scores, repetition of multiple grades, and related history of special education enrollment, in

---

in this country . . . [that] we're not going to sentence them . . . unless we're sure beyond a reasonable doubt.").

[145] *See id.* ("[S]o we're saying we're *okay* with executing a few mentally retarded people.").

[146] *See* Stripling v. State, 401 S.E.2d 500, 502 (Ga. 1991) ("At the trial of the case in chief, Stripling contended he was insane, mentally ill and mentally retarded."); *see also* Lucas, *Empirical Assessment*, *supra* note 21, at 585 (explaining that Stripling was the first defendant to use the newly available intellectual disability defense).

[147] *See Stripling*, 401 S.E.2d at 503 (providing Stripling's I.Q. scores and detailing the testimony of both expert witnesses retained by defense counsel).

[148] *See id.* (reviewing the state's expert witness and noting his lack of involvement in administering Stripling's tests).

[149] Lucas, *Empirical Assessment*, *supra* note 21, at 585–86.

[150] *See id.* (stating the reasons the prosecution's expert witness believed Stripling did not meet the criteria for an intellectual disability classification).

[151] *See Stripling*, 401 S.E.2d at 502 (providing the verdict reached in Stripling's jury trial that was affirmed on subsequent appeals).

[152] State v. King, No. C94-10-167 (Ga. Super. Ct. Appling Cnty. Sept. 14–24, 1998).

[153] State v. Burgess, No. CR90-1002 (Ga. Super. Ct. Douglas Cnty. Feb. 3, 1992).

[154] State v. Perkinson, No. CR98-882 (Ga. Super. Ct. Bartow Cnty. Aug. 9–28, 1999).

addition to expert testimony, was unable to prove his intellectual disability beyond a reasonable doubt.[155] Rather, the jury sided with the prosecution, who argued that King was simply "not as well educated as he ought to be."[156] Burgess, who had scored a 65 on I.Q. tests administered during his years in the fifth and sixth grades and a 69 on contemporary tests and whose reading level at age seventeen was comparable to that of a third grader, also failed to satisfy the beyond a reasonable doubt standard.[157] The expert presented by his counsel, the only mental health expert called to testify, concluded that Burgess met the relevant criteria to be intellectually disabled.[158] The jury, however, sided with the prosecution, who had invoked stereotypes at trial by asking lay witnesses if Burgess "looked or seemed 'retarded' to them."[159] Similarly, Perkinson submitted school records at his trial that supported a finding of intellectual disability, showing a history of I.Q. scores below 70, adaptive functioning deficits, and placement in special education courses.[160] Before trial, the State was forced to seek a continuance after its initial expert agreed with the defense that Perkinson was indeed intellectually disabled.[161] Despite the subsequent expert's testimony that Perkinson's intellectual disability could not be ruled out, the jury found the prosecution's argument compelling, declining to return a finding of intellectual disability.[162]

These four cases, although providing only a limited glimpse at attempts to raise an intellectual disability defense, demonstrate the inherent and unacceptable risk Georgia's heightened standard has created. To quote Eleventh Circuit Judge Adalberto Jordan: "Given that intellectual disability disputes will always involve conflicting

---

[155] *See* King v. State, 539 S.E.2d 783, 788–89 (Ga. 2000) (describing the evidence provided for the intellectually disabled defense and the jury's verdict in King's trial).

[156] Lucas, *Empirical Assessment*, *supra* note 21, at 592.

[157] *See id.* at 586 (detailing Burgess's I.Q. levels and education history).

[158] *See id.* at 586–87 (stating the expert witness's findings).

[159] *Id.* at 587.

[160] *See id.* at 587–88 (detailing Perkinson's intellectual disability and educational history).

[161] *See id.* at 588 (describing the continuance sought during jury selection).

[162] *See id.* at 589 ("Perkinson is still awaiting execution on Georgia's death row.").

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

expert testimony, there will always be a basis for rejecting an intellectual disability claim."[163]

2. Stage of Trial. The stage of trial at which a defendant's intellectual disability is determined provides another problematic aspect to Georgia's statute. It is important to reiterate that the guilty but intellectually disabled defense, pursuant to O.C.G.A. Section 17-7-131(j), is only applicable in capital offense cases—those cases in which the death penalty may be sought as a potential sentence.[164] Accordingly, the alleged crimes at issue tend to include gruesome and revolting actions. To highlight this point, one need look no further than the case of Rodney Young.[165] In carrying out his murder of Gary Jones, Young tied Jones to a chair and mortally beat him, using a butcher knife and hammer as his weapons of choice.[166] Police found Jones with multiple fractures to his skull, a dislodged eyeball, and cuts on his neck and face.[167] Sadly, this scene is not unique, as similarly grotesque details are commonplace in capital murder cases.[168] Therefore, when a defendant alleges to be intellectually disabled, the jury will not make its decision against a blank slate; instead, the decision will be made after hours or even days of similarly horrendous details being admitted into evidence.[169] Jurors will have seen and heard testimony from witnesses and experts, illustrations, photos, and other physical evidence taken from the crime scene, which will surely remain vivid in their minds. Following exposure to these details, it is an understandably difficult task for jurors to consider rendering a verdict that—while in no way exonerates a defendant from his crimes—signals a reduction of his

[163] Raulerson v. Warden, 928 F.3d 987, 1016 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part).

[164] *See* O.C.G.A. § 17-7-131(j) (detailing that only in "case[s] in which the death penalty is sought" may the guilty but intellectually disabled defense be used).

[165] Young v. State, 860 S.E.2d 746 (Ga. 2021).

[166] *See id.* at 759 ("A bloody butcher knife and a bloody hammer were found next to [Jones's] body.").

[167] *See id.* (describing the extent of injuries sustained by Jones).

[168] *See, e.g.*, Head v. Hill, 587 S.E.2d 613, 618 (Ga. 2003) (describing a mortal beating of a fellow inmate inflicted by a person claiming mental retardation in a death penalty case); Stripling v. State, 401 S.E.2d 500, 502 (Ga. 1991) (recounting a double homicide and armed robbery by an individual claiming mental retardation in a death penalty case).

[169] *See* Committee Hearing, *supra* note 35, at 4 (noting Georgia's "awkward" procedure of requiring jury determination at the guilt stage of trial).

culpability in carrying out that crime and results in a reduced sentence.

Furthermore, Georgia's statute places an additional and highly prejudicial hurdle for defendants seeking classification as intellectually disabled, a class of defendants widely recognized as starting from a disadvantage.[170] While attempting to prove his innocence, the defendant is simultaneously given the added responsibility of presenting evidence to demonstrate his intellectual disability effectively.[171] This requirement results in a foreseeable split in attention and resources, hampering the defendant's ability to present a full and effective case.[172]

3. The Factfinder. Entrusting jurors to determine the merits of a defendant's claim provides the third problematic aspect of Georgia's statute. As recognized by the Supreme Court, those with intellectual disabilities tend to make poor defendants.[173] To better understand why this is, it is important to acknowledge the exact type of individuals frequently involved in these cases: individuals with *mild* intellectual disabilities.[174]

In Georgia, as in other states, when questions exist regarding a defendant's mental state, the court holds a pretrial competency hearing to ensure that the defendant both understands the nature of the proceedings against him and is capable of consulting with his attorneys.[175] The threshold for competency is quite low and is "easily met in most cases," as recognized by the Georgia Supreme Court.[176]

---

[170] *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002) (describing the intellectually disabled as poor witnesses and explaining why); *see also* Committee Hearing, *supra* note 35, at 4 ("[T]he mentally retarded . . . come to these cases with a terrific disadvantage to start with.").

[171] *See* Committee Hearing, *supra* note 35, at 4 ("[S]o while you're trying the case on guilt/innocence, you're also trying all this stuff in the middle of it all. And it's just very, very awkward.").

[172] *See id.* (explaining the additional burden of Georgia's law on an effective defense).

[173] *See supra* note 82 and accompanying text.

[174] *See Atkins,* 536 U.S. at 308 n.3 ("'Mild' mental retardation is typically used to describe people with an [I.Q.] level of 50–55 to approximately 70."); *see also* Young v. State*,* 860 S.E.2d 746, 797 (Ga. 2021) (Bethel, J., dissenting) ("But as the Supreme Court has determined, the Eighth and Fourteenth Amendments must afford protection to an offender whose disability is less obvious or profound.").

[175] *See* Sims v. State, 614 S.E.2d 73, 75 (Ga. 2005) (explaining the test for determining competency).

[176] *Id.* at 76.

Thus, among the class of intellectually disabled defendants, only those with the most severe forms of disabilities will be precluded from standing trial.[177] Those making it past the competency stage tend to have more mild disabilities and likely will not comport with a layperson's preconceived ideas of what it means to be intellectually disabled and how exactly manifestation of that disability should appear.[178]

It is a common, yet mistaken belief that appearances alone can be determinative of one's intellectual ability.[179] If a defendant lacks distinctive facial indicia, such as those characteristics seen in individuals with Down's Syndrome, jurors are likely to improperly disregard their claims, despite the inaccuracy of these views.[180] Furthermore, behaviors common amongst those with intellectual disabilities create a strong risk of jury alienation.[181] Having blank expressions, smiling, staring into space, and many other potential behaviors may give rise to the mistaken belief that the defendant lacks remorse and compassion or, worse yet, is happy with what happened to the victim.[182]

B. RETAINING THE STATUS QUO

Despite these critical defects, Georgia's Guilty but Intellectually Disabled statute has managed to weather the storm for over three decades.[183] Accordingly, any effort to reform the law must look beyond its flaws and take into account the reasons that have allowed for its prolonged continuity. Since its passage, substantive

---

[177] *See id.* at 76–77 (noting the minimal nature of the requirements to be deemed "competent" to stand trial).

[178] *See* Andrea D. Lyon, *But He Doesn't Look Retarded: Capital Jury Selection for the Mentally Retarded Client Not Excluded After* Atkins v. Virginia, 57 DEPAUL L. REV. 701, 712 (2008) [hereinafter Lyon, *But He Doesn't Look Retarded*] ("In fact, many jurors believe that a person with mental retardation looks like someone with Down syndrome or has other facial indicia of his disability, even though this is rarely the case.").

[179] *See id.* at 713 ("Death-qualified juries have a tendency to believe that, if you cannot see something, it does not exist.").

[180] *See supra* note 178 and accompanying text.

[181] *See* Perlin, *Life Is in Mirrors, supra* note 84, at 334 (explaining why intellectually disabled defendants face an increased likelihood of jury alienation).

[182] *See id.* (detailing characteristics of mental retardation that give rise to negative impressions from jurors).

[183] *See supra* section II.A.

considerations of the statute's merits have been relatively limited.[184] The 2013 legislative hearing, however, paints a comprehensive picture of the arguments advanced in favor of retaining the law's current form.[185] It should be noted that, although legislators discussed various changes to the law's procedural aspects during this hearing, the discourse focused particularly on Georgia's uniquely onerous burden of proof.[186]

In response to the various organizations and individuals who highlighted the law's many issues, the hearing featured testimony from representatives of the Prosecuting Attorneys' Council of Georgia, who made their pitch for retaining the status quo.[187] In large part, their arguments can be summed up by the age-old saying that it's "better to stick with the devil you know than the devil you don't." Warning of the potential unintended consequences stemming from any modification to the statute, testifying representatives urged committee members to "tread carefully."[188] One consequence which received heavy focus was the potential for a floodgate of litigation.[189] As the concern goes, any change to the law will allow for those previously tried and convicted of a capital offense to seek a new trial.[190] This argument is rooted in Georgia's so-called pipeline rule, under which substantive changes to the state's criminal code apply retroactively.[191]

---

[184] *See supra* note 52.

[185] *See* Committee Hearing, *supra* note 35, at 3–4 (discussing Georgia's unique burden of proof for determining intellectual disability in capital offense cases).

[186] *See id.* at 1 ("This is an informational hearing . . . to look at the issue of the burden that a criminal defendant must meet in order to assert mental retardation . . . .").

[187] *See id.* at 13–19 (testimony of members of the Prosecuting Attorney's Council of Georgia).

[188] *Id.* at 14.

[189] *See id.* at 5 ("[W]ouldn't we see as a practical matter, a floodgate of litigation coming from individuals who had been convicted under the previous approach . . . ?"); *see also id.* at 14 ("[S]tatements that this will not expand itself out into other litigation, we think are incorrect.").

[190] *See id.* at 7 (explaining the floodgate argument).

[191] *See* Luke v. Battle, 565 S.E.2d 816, 819 (Ga. 2002) ("[A] new rule of substantive criminal law must be applied retroactively to cases on collateral review . . . ."). Importantly, this rule only applies to substantive, as opposed to procedural, changes in the state's criminal law. *See id.* at 817 ("Under the pipeline rule, a new rule of criminal procedure generally applies only to those cases on direct review or not yet final . . . .").

Furthermore, the group raised concerns regarding the potential for non-intellectually disabled defendants to take advantage of any proposed changes to the law, resulting in undeserving avoidance of the death penalty.[192] By retreating from the current standard of proof, supporters of this argument fear that jurors could become susceptible to emotional appeals made by defendants.[193] In a similar vein, the group highlighted the inherently imprecise nature of intellectual disabilities, which frequently results in conflicting expert testimony: under a reduced burden of proof, these conflicts may improperly give rise to a jury finding in favor of the defendant.[194]

Supporters of the current law were not on the defensive for the entire hearing, however. They also used their testimony to point out several purportedly beneficial aspects of Georgia's process, arguing that the law provides "substantial procedural protections" that other states' laws do not.[195] First, by making the determination of intellectual disability during the guilt stage of trial, as argued, it is guaranteed that a defendant may only be sentenced to death by the unanimous verdict of a neutral jury without the possibility of judicial override.[196] Under the law, defendants are afforded the opportunity to introduce a broad array of evidence, including testimony from lay witnesses and experts as well as education and work history, and to cross-examine and impeach witnesses put forth by the state.[197] Because of this, supporters argue, jurors are better able to make a fully informed decision on the merits of the defendant's claim.[198] Second, two significant procedural protections

---

[192] *See* Committee Hearing, *supra* note 35, at 7 (asking whether tinkering with the standard is the best way to isolate legitimate cases and expressing concern that a lowered burden will provide an opening for unworthy defendants).

[193] *See id.* at 14 ("We're concerned with the system as a whole if we begin to just *surrender* to the emotional appeal.").

[194] *See id.* at 15 ("Now, the credibility of an expert is just like every other witness. It can be either good or bad and then the fact finder can make that decision. So, we want to be careful to say that one expert versus another automatically creates reasonable doubt . . . .").

[195] *Id.*

[196] *See id.* ("Georgia law guarantees the defendant the right not to be sentenced to death except by unanimous verdict, with no judicial override possible . . . .").

[197] *See id.* (detailing the extent of evidence admissible under the current system).

[198] *See id.* (concluding that the broad admissibility of evidence allows the jury to make informed decision).

Purvis: "Intellectually Disabled" Statute

of the current law were noted: jurors do not hear about any of the defendant's prior criminal conduct and are not informed that a finding of guilty but intellectually disabled will preclude imposition of the death penalty.[199]

V. A WAY FORWARD

Georgia's passage of the first guilty but intellectually disabled statute was an important advancement in the state's criminal law and played an instrumental role in shaping the national debate surrounding the execution of intellectually disabled capital defendants.[200] For these efforts, the state should be lauded. The state's chosen statute, however, left marred by a drafting error, is a source of embarrassment for Georgia, underscored not least by the complete lack of similarity to any other state's approach.[201] It is time to correct this error and redeem the state's reputation. While the vast majority of contemporary criticism has focused exclusively on one specific aspect of the state's statute—its unique burden of proof—the state must take additional measures to properly mitigate the unacceptable risk of executing intellectually disabled defendants.

What follows is a series of recommendations Georgia lawmakers should consider in refashioning the state's ineffectual law.[202] These recommendations include a reduction in the burden of proof, a court-mandated determination, and a pretrial hearing at which the determination should be made. Together, these changes provide defendants with the fairest and most neutral process for evaluating claims of intellectual disability while also addressing the concerns of those disfavoring change.

Any effective reform must start with a reduction in the requisite standard of proof from beyond a reasonable doubt to a preponderance of the evidence.[203] This reduction admittedly

---

[199] *See id.* (detailing "significant procedural protections" provided within the law).

[200] *See supra* notes 25, 69–70.

[201] *See supra* notes 34–36 and accompanying text.

[202] *See supra* notes 138–139.

[203] *See* Tobolowsky, Atkins *Aftermath, supra* note 84, at 119–20 (explaining why the preponderance standard is consistent with the historical treatment of evidentiary standards and detailing the risk associated with higher standards).

Published by Digital Commons @ University of Georgia School of Law, 2022

contributes to central source of concern for those opposed to the law's change: the increased likelihood of defendants receiving verdicts of guilty but intellectually disabled and thus escaping the death penalty.[204] The second proposed change, which assigns the task of determination to the judge, however, should remedy any associated fears. It should be noted that the success of any updated law is not to be measured by ability of *all* defendants who raise a claim to avoid imposition of a death sentence. To the contrary, successful reform merely requires that the resulting law provide defendants with a fair and neutral process through which one's intellectual disability claim can be evaluated; sufficient evidence speaking to one's intellectual functioning, adaptive behavior, and onset during the developmental period must still exist in order for any claim to succeed.[205]

As previous sections of this Note demonstrate, the task of identifying one's intellectual disability and whether that disability places the individual within the range of offenders "about [which] there is a national consensus"[206] is complex and imprecise.[207] For that reason, conflicting judgments are commonplace, even amongst individuals regarded as experts in conducting evaluations.[208] Accordingly, the requirement of proof beyond a reasonable doubt is an inappropriate standard because there will almost always be evidence sufficient enough to prevent a finding to this degree of certainty.[209]

In addition, because of the complex and conflicting nature of this evidence, requiring jurors to rule on the matter increases the likelihood that other factors, such as those details pertaining to the underlying crime, will have an influence on how jurors ultimately

---

[204] *See supra* notes 192–193.

[205] *See supra* section III.A.

[206] Atkins v. Virginia, 536 U.S. 304, 317 (2002).

[207] *See* Lyon, *But He Doesn't Look Retarded*, *supra* note 178, at 711–13 (detailing the difficult nature of intellectual disability determination).

[208] *See supra* section IV.A.*1*.

[209] *See* Raulerson v. Warden, 928 F.3d 987, 1016 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part) ("Given that intellectual disability disputes will always involve conflicting expert testimony, there will always be a basis for rejecting an intellectual disability claim.").

decide.[210] This impact, coupled with the biases and preconceived notions common amongst lay jurors with regard to those with intellectual disabilities,[211] make the jury an unacceptably risky party for weighing this evidence.[212] Instead, the job should be given to the most neutral party and the one that is most skilled at evaluating close and contested evidence—the judge.[213] This change not only reduces potential biases and lowers the risk of extraneous factors impacting the determination but also safeguards against the fear of any unmerited intellectual disability determinations stemming from the reduced burden of proof.[214]

Furthermore, the determination should be made at a hearing held prior to the commencement of trial and for the sole purpose of evaluating one's intellectual disability claim. This change would bring Georgia in line with other states, the majority of which also make use of pretrial determination.[215] Importantly, advancing the time in which the determination is made would not only benefit defendants raising claims through the creation of a more equitable process but also provide benefits to the state.

As an initial matter, it is critical to reiterate the distinction between claims of insanity and mental illness and claims of intellectual disability. Pursuant to O.C.G.A. Section 17-7-131(b), claims of insanity and mental illness require a finding of one's underlying condition at the time in which the crime was carried

---

[210] *See* Perlin, *Life in Mirrors, supra* note 84, at 338 (detailing extraneous factors that may influence the factfinder's decision); Brooke Amos, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use When Determining Mental Retardation,* 14 J. GENDER RACE & JUST. 469, 493 (2011) ("It follows common reasoning that people want to punish individuals who commit heinous crimes, and when it comes to the death penalty, many people become influenced by the nature of the crime . . . .").

[211] *See* Lyon, *But He Doesn't Look Retarded*, *supra* note 178, at 712–13 (detailing jury bias with regard to intellectually disabled defendants).

[212] *See* Tobolowsky, Atkins *Aftermath, supra* note 84, at 109 (explaining why determination by jurors can be "confusing").

[213] *See id.* at 109–10 ("Thus, entrusting the judge with the fact finding responsibility regarding mental retardation could reduce or eliminate these accuracy-reducing concerns and potentially heighten accuracy by the court's familiarity with expert testimony generally and the ability to gain expertise in its consideration regarding mental retardation specifically.").

[214] *See id.* (providing reasons for heightened accuracy when determination is made by judges as opposed to juries).

[215] *See id.* at 111 (detailing the majority approaches to intellectual disability determination and the use of pretrial hearings).

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

out.[216] Accordingly, for these claims, the factfinder must conduct an individualized assessment of the defendant, the facts of the underlying crime, and the ways in which those facts may act to reduce the defendant's culpability *in that moment*.[217] Claims of intellectual disability, on the other hand, require evidence wholly independent of the underlying crime.[218] Further, a ruling on these claims merely determines one's eligibility for the death penalty, it does not weigh their culpability in carrying out the underlying murder.[219] Therefore, while the evaluation of insanity and mental illness claims at trial is appropriate and necessary, the inclusion of intellectual disability claims in a similar category and the determination of those claims during the guilt phase of trial is not.[220]

Moreover, under the timing of the current system, defendants are unfairly prejudiced by the placement of an additional hurdle at trial.[221] In requiring a defendant to simultaneously put forth an effective defense while producing evidence to successfully argue his disability, resources, attention, and effort are foreseeably split. Those claiming to have an intellectual disability are particularly hampered by the negative impact of this burden as, by and large, this class of defendants is recognized as starting from a disadvantage.[222] Many in this class are also unable to afford devoted counsel and must instead rely on public defenders and other sources of free or reduced-cost legal assistance, sources of representation

---

[216] *See* O.C.G.A. §§ 17-7-131(b)(2)–(2.1) (2017) (governing claims of insanity and mental illness and requiring the existence of these conditions "at the time of the crime").

[217] *See* Tobolowsky, Atkins *Aftermath, supra* note 84, at 105 (explaining the difference between insanity and intellectual disability and detailing the reasons for pretrial determination).

[218] *See supra* section III.A.

[219] *See* Tobolowsky, Atkins *Aftermath, supra* note 84, at 105 (explaining why the ruling on one's mental retardation does not implicate facts of the underlying crime).

[220] *See id.* ("Given the nature and effect of the mental retardation determination for *Atkins* purposes, the comparison to criminal competency proceedings appears more appropriate.").

[221] *See* Committee Hearing, *supra* note 35, at 4 ("[S]o while you're trying the case on guilt/innocence, you're also trying all this stuff in the middle of it all. And it's just very, very awkward.").

[222] *See* Atkins v. Virginia, 536 U.S. 304, 320–21 (highlighting the added burdens faced by mentally retarded criminal defendants).

already overburdened by burgeoning caseloads, inadequate funding, and limited resources.[223]

By allowing for a pretrial hearing, these defendants and their counsel will be able to focus on one issue at a time, putting forth the best case supported by the best evidence at each stage of trial. Additionally, in ruling on one's intellectual disability prior to the admission of testimony, photos, videos, and other physical evidence in the underlying murder, the factfinder—most preferably a judge—will be given the ability to rule on a blank slate. The defendant's claim can be evaluated on merit alone without the risk of prejudice stemming from the gruesome details that are likely to remain vivid in the factfinder's mind, whether judge or juror.

Pretrial determination also comes with its share of benefits for the state, primarily in the form of increased efficiency and reduced costs.[224] Under the current system, a full capital trial is required, even in the event that a defendant is ultimately found to be intellectually disabled. This requires the added costs and time associated with a capital trial in addition to needing a death-qualified jury.[225] While reforms to Georgia's law certainly will not guarantee the finding of one's intellectual disability in every case, these changes will produce a system allowing for a fair determination on the issue. Accordingly, in those cases where a defendant's claim succeeds, the issue of capital punishment will be disposed of at the outset. The subsequent trial will require fewer resources, will likely be resolved in a shorter period of time, and will allow the parties to focus on a narrower set of issues. Furthermore, the selection of a death-qualified jury will not be necessary,

---

[223] *See* Updegrove et al., *Adjusting State Statutes*, *supra* note 117, at 529 (detailing the inadequate representation of intellectually disabled criminal defendants); *see also* Tobolowsky, Atkins *Aftermath, supra* note 84, at 86 (providing statistics on the heightened percentage of individuals with intellectual disabilities currently incarcerated).

[224] *See id.* at 547 ("Requiring judges to make determinations of intellectual disability during pretrial hearings would conserve court resources.").

[225] Although the exact costs and duration of capital offense trials varies greatly, studies consistently find that these trials are costlier than when the death penalty is not sought. For an overview of state studies detailing the heightened costs associated with capital offense trials, see *State Studies on Monetary Costs*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/costs/summary-of-states-death-penalty (last visited Sept. 11, 2022).

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

expanding the potential pool of citizens from which the ultimate jury can be acquired.[226]

A central argument proffered against changing Georgia's law stems from fears of a floodgate of litigation.[227] Those who subscribe to this belief worry that each of the now forty-one individuals on Georgia's death row[228] will attempt to appeal their sentences, overburdening the state's courts.[229] This argument, however, overlooks the extent and duration of the evidence required to raise even a colorable claim of intellectual disability because these claims cannot be created out of thin air—they must be accompanied by a history of documented evidence speaking to the matter.[230]

Moreover, the logic of this very argument itself provides a persuasive justification for reaching the opposite conclusion. By increasing the potential for disposing of a defendant's intellectual disability claim and thus precluding imposition of the death penalty, reforming the current law may very well reduce the prolific and time-consuming appeals process required in capital offense cases. Take the case of Alphonso Stripling, for example. Originally convicted of murder in 1989, Stripling's sentence and the associated question of intellectual disability produced a flurry of appeals, the most recent of which occurred in 2011.[231] The same can be said for Raymond Burgess, who has appealed his 1992 murder conviction as recently as 2012.[232]

---

[226] Under the requirements of the state's current law, jurors selected for trial must be "death-qualified," meaning they are not strictly opposed to capital punishment but also do not believe the death penalty should be imposed in all cases of capital murder. *See generally* Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J., 113 (2016) (providing an explanation of death-qualified jurors).

[227] *See supra* note 191 and accompanying text.

[228] *See History of the Death Penalty*, DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/georgia (last visited Feb. 7, 2023) (providing the current number of inmates on death row).

[229] *See* Committee Hearing, *supra* note 35, at 5 (detailing concerns associated with the "floodgate" argument).

[230] *See supra* section III.A.

[231] *See* Stripling v. State, 711 S.E.2d 665, 670–71 (Ga. 2011) (denying Stripling's claim for relief).

[232] *See* Burgess v. Terry, 478 F. App'x 597, 600–01 (11th Cir. 2012) (denying Burgess's claim for relief).

VI. CONCLUSION

The world looks quite different today than it did when the Georgia General Assembly enacted the nation's first guilty but intellectually disabled statute in 1988. Yet, for all of the many changes that have occurred, that same statute—without any substantive modifications—has remained on the books and repeatedly been upheld by the state's highest court. Consequently, what was once considered a progressive and groundbreaking move at its inception has, for years, placed the state of Georgia behind the times and behind the rest of the nation. Recent developments in the case of Rodney Young demonstrate that a judicial remedy to this issue is not in sight. Accordingly, now is the time for legislative action. Georgia must reverse course, correct the drafting error that has produced inherent negative consequences in the law as written, and eliminate the unacceptable risk of executing intellectually disabled defendants.

Georgia Law Review, Vol. 57, No. 2 [2022], Art. 6

https://digitalcommons.law.uga.edu/glr/vol57/iss2/6