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Alyssa LeDoux

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I. INTRODUCTION

Several serious issues arise when applying the death penalty to the mentally disabled. First, the social purposes served by the death penalty, retribution and deterrence, are questionable when it comes to the mentally disabled.[1] Retribution by execution is reserved for those at the highest level of culpability or the highest level of conscious and depraved guilt.[2] Likewise, execution is viewed as an effective deterrent on cold calculus that is not found in individuals with a mental disability.[3]

Second, challenges the disabled face, such as the tendency to falsely confess, the lesser ability to present a persuasive showing of mitigating factors, the lack of visible remorse, the inability to effectively assist their counsel, and others, compromise effective litigation and expose the

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1. Atkins v. Virginia, 536 U.S. 304, 318–19 (2002).

2. *Id.* at 319.

3. *Id.* at 319–20. The reasoning is that higher severity of punishment will create reluctance in those considering murderous crimes, which requires certain abilities to logically reason, process, understand, and control impulses (abilities lacking in the mentally disabled thereby nullify any deterrent effect). *Id.*

mentally disabled to a higher risk that the death penalty will be imposed erroneously.[4]

For Georgia, *Young v. State*[5] is the most recent case dealing with executing the mentally disabled, adding to what has been a divisive stream of caselaw since the early 70s. Georgia mandated the protection of the mentally disabled early on but imposed the highest standard possible to prove that disability.[6] Over the decades, jurisprudence from the Supreme Court of the United States has made maintaining this standard difficult, but the divided Georgia Supreme Court has held firm.

II. FACTUAL BACKGROUND

Rodney Young broke into his ex-girlfriend's home, bound her son, Gary Jones, to a chair and beat him to death with a hammer and butcher knife, leaving his skull fractured, his eye out of socket, and his body lying in a pool of glass and blood.[7] He was tried and convicted, and in his defense Young claimed guilty but mentally disabled—which would, if found to be true, disqualify him for the death penalty.[8] The jury, however, was not convinced and convicted Young of murder aggravated by burglary and outrageous, inhumane torture showing Young's depravity of mind.[9] The jury sentenced Young to death.[10]

In Georgia, to be found exempt from the death penalty due to mental disability, the defendant needs to establish that mental disability "beyond a reasonable doubt."[11] On appeal to the Georgia Supreme Court, the court reviewed Young's presented testimony from staff at his old high school showing he struggled in high school with academics and sports and attended special education.[12] Young argued in his appeal that the standard of proof, beyond reasonable doubt, is unconstitutionally high and contradicts recent Supreme Court of the United States's decisions meant to protect all mentally disabled from execution.[13] The Georgia Supreme Court affirmed Young's convictions and reinforced the ruling that currently stands in Georgia: the Georgia Constitution does not

4. *Id.* at 320–21.
5. 312 Ga. 71, 860 S.E.2d 746 (2021).
6. *Id.* at 88, 860 S.E.2d at 768–69.
7. *Id.* at 73, 860 S.E.2d at 759.
8. *Id.*
9. *Id.* at 122, 860 S.E.2d at 790.
10. *Id.* at 71, 860 S.E.2d at 758.
11. *Id.* at 74, 860 S.E.2d at 759.
12. *Id.* at 73, 860 S.E.2d at 759.
13. *Id.* at 90–92, 860 S.E.2d at 770–71.

preclude requiring the mentally disabled to prove their disability beyond reasonable doubt.[14]

III. LEGAL BACKGROUND

Criminal prosecution always bears a margin of error that risks either letting the guilty go free or the innocent pay for a crime they did not commit.[15] The Fifth[16] and Fourteenth[17] Amendments to the United States Constitution reflect the preference for the former—that no individual should lose their liberty unless the prosecution has convinced the factfinder of the individual's guilt.[18] The risk of convictions relying on error is protected against by the requirement that the government prove guilt "beyond a reasonable doubt," the highest standard of proof, for all criminal proceedings.[19] Beyond a reasonable doubt indicates that the factfinder should feel the highest degree of confidence in the conviction as opposed to feeling it is either more than likely or just possible.[20]

In addition, the Eighth Amendment[21] declares that no cruel or unusual punishments shall be inflicted.[22] The U.S. Supreme Court in *Weems v. United States*[23] defined cruel and unusual to include usual punishments dealt out excessively or disproportionately to the offense; the law limits

14. *Id.* at 100, 860 S.E.2d at 776.

15. *In re* Winship, 397 U.S. 358, 370–71 (1970).

16. U.S. CONST. amend. V.

17. U.S. CONST. amend. XIV.

18. *Winship*, 397 U.S. at 363–64.

19. *Id.*; Addington v. Texas, 441 U.S. 418, 428 (1979).

20. *See Winship*, 397 U.S. at 363–64. Thus, when evidence indicates criminal guilt it becomes the State's burden to prove it beyond a reasonable doubt and not the individual's burden to prove their innocence. Cheddersingh v. State, 290 Ga. 680, 681, 724 S.E.2d 366, 368–69 (2012).

21. U.S. CONST. amend. VIII.

22. *Id.*

23. 217 U.S. 349 (1910). Since *Weems*, "cruel and unusual" punishment has been fleshed out to include a California statute that criminalized narcotic addiction, statutes mandating life in prison for juveniles and denationalization. The Supreme Court ruled that "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Robinson v. California, 370 U.S. 660, 660 n.1, 666 (1962) (referring to California Health and Safety Code § 11721, which said, "No person shall . . . be addicted to the use of narcotics . . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days . . . in the county jail."); Miller v. Alabama, 567 U.S. 460, 465 (2012) (holding that mandating life in prison for juveniles "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change'"); Trop v. Dulles, 356 U.S. 86, 103 (1958).

cruelties in both degree and kind.[24] Specifically, the Court held that the death penalty in itself is not cruel or unusual but can be if applied to inappropriate circumstances.[25]

A. A Need for Change

In the 1950s, a change in society's views on criminals began to spread nationwide.[26] Awareness of biological, social, and environmental influences revealed that criminal activity is sometimes less culpable, which put into question the deterrent and moral value of the death penalty.[27] At the same time, racial disparity in those being executed became glaringly evident, which confirmed that the kind of arbitrary error the Constitution is against was indeed occurring.[28] The U.S. Supreme Court's decision in *Gregg v. Georgia*[29] held that the death penalty is constitutional so long as states include ways to ensure imposition is never arbitrary or capricious.[30] *Gregg*'s qualification for

24. *Weems*, 217 U.S. at 367, 377.

25. *Weems*, 217 U.S. at 370–71.

26. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 208 (Harvard Univ. Press 2003). As early as the mid-1800s and around the time strange behavior started being attributed to natural maladies of the brain, there existed discomfort and debate about executing the mentally disabled. BANNER, *supra* note 26, at 119.

27. *Id.* at 208–09.

28. *Id.* at 228–30; *Addington*, 441 U.S. at 425; *Winship*, 397 U.S. at 363–364. Courts were put under immense pressure from other countries, the National Association for the Advancement of Colored People, Legal Defense and Education Fund, the American Civil Liberties Union state legislation, juries refusing to consider execution, and an unusually high number of habeas corpus petitions. BANNER, *supra* note 26, at 242, 244–48. Capital punishment was openly opposed by famous intellectuals, politicians, and religious organizations. *Id.* at 240, 241–42. Due to the pressure on the courts and public movements, executions halted and, in *Furman v. Georgia*, the U.S. Supreme Court finally addressed the possibility of executions being random, sentenced with inappropriate motives, and violating the Eighth Amendment. Furman v. Georgia, 408 U.S. 238, 239–40, 256, 305, 310 (1972). The Court held that the way the death penalty was being carried out constituted cruel and unusual punishment and invalidated the arbitrary application of forty states' death penalty statutes. *Id.* at 305, 312; *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline (last visited Nov. 18, 2021). In reaction to the *Furman* ruling, most states passed new death penalty statutes laying out factors to be weighed and other more appropriate criteria to reduce the risk of error. Gregg v. Georgia, 428 U.S. 153, 179–81 (1976). *Gregg v. Georgia* eventually put an end to the ten-year moratorium. *The History of the Death Penalty: A Timeline*, *supra* note 28.

29. 428 U.S. 153 (1976).

30. *Id.* at 188, 197–98 (upholding a Georgia law that mandated individual consideration of each crime and criminal's circumstances before a jury can sentence an individual to death).

states required courts lower the risk by taking mental disability into account when considering the death penalty.[31]

B. Legislative and Judicial Response

A decade later, the public was outraged by the execution of Jerome Bowden, a convict from Georgia with an IQ of sixty-five.[32] The jury convicted Bowden of murder aggravated by armed robbery, aggravated assault, and burglary.[33] Bowden's IQ tested at fifty-nine as a teenager and testimony revealed limited mental abilities throughout his life.[34] Public backlash demonstrated serious societal discomfort with the state executing someone who appeared so clearly mentally disabled, which caused Georgia to become the first state to outlaw execution of the mentally disabled in 1988.[35] Other states followed suit and the Anti-Drug Abuse Act of 1988 (the Act)[36] included a national standard barring the death sentence for certain mentally disabled people.

In 1989, the U.S. Supreme Court addressed the death sentence for the mentally disabled for the first time since the Act.[37] The defendant, Johnny Penry, had the mental age of a six-year-old and the learning ability of a nine or ten-year-old, and was sentenced to death for beating, raping, and stabbing Pamela Carpenter in Texas.[38] Penry was diagnosed as a child with organic brain damage and had an IQ somewhere between fifty and sixty-three, which manifested in substantial difficulty learning as a child.[39] Doctors testified that at the time of the crime his mental disability made it virtually impossible for him to understand the

31. *Id.* at 164, 193–95 n.44.

32. Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High is Too High?*, 20 BERKELEY J. CRIM. L. 163, 165, 168 (2015); Bowden v. State, 239 Ga. 821, 238 S.E.2d. 905 (1977).

33. *Bowden*, 239 Ga. at 821, 238 S.E.2d at 907.

34. Saviello, *supra* note 32, at 166.

35. *Id.* at 168, 169 n.35 (citing Bill Montgomery, *Who Shall Die? The Death Penalty's Last Appal–Retarded Man's Execution Stirred Protest Worldwide – Case of Jerome Bowden Discomfits Conscience*, ATL.J. AND ATL. CONST., October 13 1986, at A1) ("Virtually all of the press coverage described Jerome Bowden as 'retarded' and the Atlanta Journal Constitution, Atlanta's major newspaper, referred to him as 'retarded' in virtually every article they wrote about his case and execution."); O.C.G.A. § 17-7-131(c)(3) (2017); 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, 556 (2017).

36. Anti-Drug Abuse Act of 1988, Pub. L. 690, § 7001(l), 102 Stat. 4181 (protecting individuals who, as a result of mental disability, are unable to understand the proceedings or cannot recognize the unlawfulness of their act); *Atkins*, 356 U.S. at 313–14.

37. Penry v. Lynaugh, 492 U.S. 302, 307 (1989).

38. *Id.* at 307–08.

39. *Id.*

wrongfulness of his actions or to conform them to the law.[40] A jury sentenced Penry to death.[41] Despite proof of organic brain damage, the Court held it was not enough to constitute cruel and unusual punishment simply because he was mentally disabled, and affirmed his sentence.[42]

The same year the U.S. Supreme Court held in *Penry v. Lynaugh*[43] that the U.S. Constitution did not protect the mentally disabled from the death penalty, the Georgia Supreme Court held in *Fleming v. Zant*[44] that while the federal Constitution (and caselaw at the time) represented the minimum protection states must afford their citizens, the Georgia Constitution could offer more.[45] Additionally, the Georgia court stated that the new state legislation in Georgia was the clearest evidence of a consensus in Georgia that executing the mentally disabled does not contribute to the acceptable goals of capital punishment.[46] Son Fleming had been sentenced to death for murdering a police officer, but Fleming had previously applied for and been granted social security disability benefits for psychosis and organic brain damage.[47] The *Fleming* case, the first claim of guilty but mentally disabled death penalty case since the new Georgia legislation, prevented the execution of Fleming, holding that he was protected from cruel and unusual punishment as newly stated under the Georgia Constitution.[48]

C. A New Standard

In 2002, the U.S. Supreme Court tackled the *Penry* question again—whether execution of a mentally disabled individual qualified as cruel and unusual punishment.[49] Daryl Atkins was sentenced to death after his conviction for abduction, armed robbery, and capital murder.[50] Atkins and his associates abducted Eric Nesbitt at gunpoint and forced him to withdraw cash from an automated teller machine before shooting him to

40. *Id.* at 308–09.

41. *Id.* at 311.

42. *Id.* at 340. Though Penry was not found to have met the criteria, the Court agreed that a defendant's background and character are important considerations "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Id.* at 319.

43. 492 U.S. 302 (1989).

44. 259 Ga. 687, 386 S.E.2d 339 (1989).

45. *Young*, 312 Ga. at 87, 860 S.E.2d at 768.

46. Fleming v. Zant, 259 Ga. 687, 689–90, 386 S.E.2d 339, 341–42 (1989).

47. *Id.* at 687, 386 S.E.2d at 340.

48. *Id.* at 691, 386 S.E.2d at 343.

49. Atkins v. Virginia, 536 U.S. 304, 307 (2002).

50. *Id.*

death.[51] The forensic psychologist found Atkins mildly mentally disabled with an IQ of fifty-nine.[52] The Court in *Atkins v. Virginia* fully acknowledged the dramatic social and legislative current that had developed over the years and held that these less culpable individuals neither deserved this serious retribution nor would be effectively deterred by it.[53] The Court ruled that due to the "gravity of the concerns expressed by dissenters, and in the light of the dramatic shift in the state legislative landscape[,]" taking the life of mentally disabled person is categorically prohibited.[54]

Georgia courts were heavily involved in the evolution leading up to *Atkins* while simultaneously wrestling with their own state resolutions. However, upon the prohibition in *Atkins*, neither the Georgia legislature nor judiciary made any procedural changes regarding the guilty but mentally disabled plea.[55] Georgia is the only state to set this high of a standard of proof in this context and the only one to have the jury consider mental disability for these purposes in tandem with the consideration of the defendant's guilt.[56] The law states that the jury should find "beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability."[57] In 2013, advocates demanded a change and presented at an informational hearing to the House Judiciary Non-Civil Committee of the Georgia General Assembly, urging that careless drafting—namely, tacking the finding of disability onto the end of a sentence—resulted in the application of the "beyond a reasonable doubt" standard to both guilt and a finding of disability.[58]

The Georgia Supreme Court has held firm, despite continual court splits on the constitutionality of the beyond reasonable doubt threshold to prove mental disability since its inception in Section 17-7-131 of the Official Code of Georgia Annotated. But in 2014, the U.S. Supreme Court made a critical clarification on the categorical prohibition that compromised the Georgia court's previous rationale and opened the question once again, a question the Georgia Supreme Court answered in *Young v. State*.

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51. *Id.*

52. *Id.* at 308–09.

53. *Id.* at 310, 319–20 (2002).

54. *Id.* at 310, 321.

55. Lucas, *supra* note 35, at 559.

56. *Id.* at 560.

57. O.C.G.A. § 17-7-131(c).

58. Lucas, *supra* note 35, at 561; Adam Liptak, *Language Mistake in Georgia Death Penalty Law Creates a Daunting Hurdle*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2022/01/03/us/politics/supreme-court-death-penalty-intellectual-disability.html.

IV. COURT'S RATIONALE

Young is one of many unsuccessful death penalty challenges attempting to strike down the beyond a reasonable doubt standard of proof, but the Georgia court's reasoning behind this decision makes this case more significant to the claim of guilty but mentally disabled in Georgia than any of the challenges before.[59] The last time the Georgia Supreme Court upheld the standard was in *Stripling v. State*.[60] Young argues the standard is unconstitutional and that the *Stripling* ruling is therefore an error which should be rectified through his case.[61] Instead, the court here overrules key parts of *Stripling* while introducing new justifications that reinvent the standard as a new creature, or rather, the same creature on new legs.

The court acknowledged that while Georgia was the first to pass legislation barring the execution of the mentally disabled, it has always been the only state, or one of the very few, to require those prosecuted to convince the jury of a defendant's disability beyond a reasonable doubt.[62] Regardless, the Court determined, Georgia's early involvement showed its inclusion in the creation of the national consensus against executing the mentally disabled, which includes the beyond a reasonable doubt standard.[63]

The trend towards the national consensus the court referred to culminated in *Atkins* with the final termination of executions of any mentally disabled person because of the "dramatic shift in the state legislative landscape" since *Penry* in 1989, the year after Georgia's standard was established.[64] The U.S. Supreme Court established the prohibition, determining that social and political climates demanded it given the charge to "draw . . . meaning from the evolving standards of decency that mark the progress of a maturing society."[65]

Those evolving standards can be traced towards tighter protection for death row candidates with mental disabilities.[66] Policies reducing the

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59. *Young*, 312 Ga. at 88, 860 S.E.2d at 769.

60. 289 Ga. 370, 371, 711 S.E.2d 665, 667 (2011); *Young*, 312 Ga. at 88, 860 S.E.2d at 769.

61. *Young*, 312 Ga. at 87, 90, 860 S.E.2d at 768, 790.

62. *Id.* at 88, 860 S.E.2d at 768–69.

63. *Id.* at 90, 860 S.E.2d at 770.

64. *Atkins*, 536 U.S. at 310.

65. *Trop*, 356 U.S. at 101.

66. According to *Winship*, the beyond a reasonable doubt standard protects the party against whom the proof is offered, which is why it has been an important standard to hold the state to in criminal proceedings. *Winship*, 397 U.S. at 362. However, in Georgia mental disability death penalty cases—where the defendant is attempting to prove mental

risk of execution for the mentally disabled were based completely on the rise of national awareness and rejection of erroneous death penalty sentencing.[67] All the judicial decisions, public movements, and new legislation on this topic since the ideas started even before *Winship* finally rounded out with the recognition that society is no longer comfortable with the risk of executing any mentally disabled person and is willing to risk lessened penalties for more deserving criminals in order to protect that right.[68]

This consensus is what gives ground to Young's complaint. The court did not disagree with the current national values of protecting the mentally disabled, but rather Young's challenge to the efficaciousness of Georgia's implementation.[69] Young made several attempts to show why the court's previous decisions force Georgia out of step with the national consensus interfering with his constitutional right as a mentally disabled

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disability—the standard is ironically used against the defendant to the benefit the State instead. This may suggest that while the standard has been in use since before *Penry*, it is not in line with other states' national consensus toward allotting capital defendants with mental disabilities every possible protection in the law.

67. *Atkins*, 536 U.S. at 321 (deciding the evolving standards of decency compels the conclusion that the death penalty is excessive for the mentally disabled); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (stating that justice requires consideration of character and propensities of the offender); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (stating mandatory death penalty statutes are invalid because they neglect consideration of particular circumstances)); Moore v. Texas, 137 S. Ct. 1039, 1052 (2014) (quoting Hall v. Florida, 572 U.S. 701, 705 (1990) (stating "consensus in the States provides 'objective indicia of society's standards in the context of the Eighth Amendment'")); *Addington*, 441 U.S. at 428 (stating that the use of the beyond reasonable doubt standard in criminal proceedings shows society's concerns to minimize risk of error in sentencing at the risk of letting someone guilty go free).

68. *Atkins*, 536 U.S. at 321. In 2005, the Supreme Court interpreted the Eighth and Fourteenth Amendments to forbid imposing the death penalty on children. Roper v. Simmons, 543 U.S. 551, 578–79 (2005). In the deciding case, *Roper v. Simmons*, several teenagers planned to take a life, broke into Shirley Crook's house, duct taped her hands and entire face, drove her to a bridge, and pushed her into the Meramec River where she drowned. *Id.* at 556–57. The instigating teen was charged with aggravated first-degree murder that involved depravity of mind and deemed inhumane and outrageously and wantonly vile. *Id.* at 557. Relying on *Atkins v. Virginia* and the Eighth Amendment, the Court ruled to protect the murderous teen from the death penalty because of the low likelihood that teenagers engage in the sort of cost-benefit analysis that assures the death penalty would be an effective means of deterrence. *Id.* at 571–72. The *Roper* decision repealed *Stanford v. Kentucky*, where the Supreme Court had refused to find a national consensus that the death penalty for sixteen-year-olds was cruel and unusual. *Id.* at 574; Stanford v. Kentucky, 492 U.S. 361, 380 (1989). The Court decided *Stanford* on the same day it decided *Penry*, which denied the mentally disabled categorical exemption from the death penalty. *Roper*, 543 U.S. at 562. Both cases were based on the same consensus that objectively society's standards did not demand an alternative conclusion. *Id.* at 574.

69. *Young*, 312 Ga. at 74, 860 S.E.2d at 759–60.

person.[70] These arguments are discussed in turn below, as well as the court's rationale for its rejection.

A. The Substantive Mistake

Young defended his case first by attacking the substantive aspects of the court's decision about the standard in *Stripling* from 2011 because more recent cases put those decisions in new light.[71] *Atkins* held that because the mentally disabled face a special risk of wrongful execution, death is not a suitable sentence to allow a judge or jury to consider for a mentally disabled criminal.[72] In *Head v. Hill*,[73] the Supreme Court of Georgia held the special risks and limitations suffered by truly mentally disabled persons that the Court in *Atkins* was concerned about do not need more protection.[74] *Hill* also held that those whose mental deficiencies are *significant enough* to be provable beyond a reasonable doubt fit the category protected by *Atkins*.[75] In *Stripling*, the court added that the beyond a reasonable doubt standard is justified because it "served to *define* the *category* of mental [disability,]" which, at the time, was determined to be well within the constitutional purposes of the *Atkins* decision.[76]

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70. *Id.* at 90, 92, 869 S.E.2d at 770–71.

71. *Id.* at 90–91, 860 S.E.2d at 770.

72. *Atkins*, 536 U.S. at 321.

73. 277 Ga. 255, 587 S.E.2d 613 (2003).

74. *Id.* at 262, 587 S.E.2d at 622. The risks of the standard, it held, are sufficiently counterbalanced by Georgia's procedure for demonstrating incompetency to stand trial, which require a showing of incompetence only by a preponderance of the evidence. *Id.* The Court in *Dusky v. United States* held that if the individual is capable of consulting with a lawyer and has a rational understanding of the proceedings, they are competent and the defense of incompetency to stand trial will not protect them. Dusky v. United States, 362 U.S. 402, 402 (1960).

75. *Hill*, 277 Ga. at 262, 587 S.E.2d at 622; *Stripling*, 289 Ga. at 374, 711 S.E.2d at 669. The habeas court determined that because Hill was mildly intellectually disabled, the beyond a reasonable doubt standard created an especially high risk for erroneous execution because the defendant bore almost all the risk of error. Lucas, *supra* note 35, at 562–63. On appeal from a decision to the contrary from the Georgia Supreme Court, the United States Court of Appeals for the Eleventh Circuit agreed with the habeas court, determining that the standard would undoubtably result in the execution of mentally disabled individuals. *Id.* at 563. An en banc hearing reversed that ruling because of the lack of data to support that claim. *Id.* at 563–64. Meanwhile, three of the psychologists who had testified for the prosecution in earlier proceedings reviewed Hill's case again and determined they were wrong about their conclusion of Hill's lack of mental disability. *Id.* at 564–65. Warren Hill was executed January 27, 2015. *Id.* at 565.

76. *Stripling*, 289 Ga. at 373, 711 S.E.2d at 668 (second emphasis added).

However, in 2014, the U.S. Supreme Court clarified the *Atkins* holding in response to Texas and Florida's procedures being too rigid, arbitrary, and failing to protect the mildly mentally disabled. *Moore v. Texas*[77] established that the *Atkins* decision was meant to shield all the mentally disabled from the death penalty and that courts could not define mental disability but rather "must be 'informed by the medical community's diagnostic framework[.]'"[78] The clarification in *Moore* meant that courts using their procedures to define mental disability infringes on constitutional rights against cruel and unusual punishment.[79] Young argued that this clarification undermined the Georgia court's substantive use, as stated in *Stripling*, of the beyond a reasonable doubt standard.[80] The court in *Young* acknowledged all these facts and stated, referring to the offending statements in *Stripling* and *Hill*, "[a]ccordingly, we disapprove anything in our prior decisions suggesting otherwise, particularly those parts of our prior decisions suggesting that 'Georgia's beyond a reasonable doubt standard further served to *define* the category of mental [disability,]'" effectively overruling *Hill* and *Stripling* on this point.[81] But the court's analysis of the substantive mistake ends there.[82]

B. Purely Procedural

In regard to procedural problems with the standard, Young next argued: (1) that the U.S. Supreme Court decisions in *Moore v. Texas* and *Hall v. Florida*[83] require the court's disapproval of more than just how the standard of proof has been applied substantively but the procedural standard itself, and (2) that proving mental disability is more

77. 137 S. Ct. 1039 (2014).

78. *Id.* at 1048.

79. *Id.* at 1044.

80. *Young*, 312 Ga. at 90–91, 860 S.E.2d at 770.

81. *Id.*

82. The court in *Young* disapproved of using the standard substantively to define mental disability, which *Stripling* and *Hill* showed Georgia has been doing even after the *Atkins* decision. *Id.* at 91, 860 S.E.2d at 770. Instead, the court declared that the standard should be used procedurally to provide a construct for the jury to determine if an intellectual disability exists at all, according to the medical community's definition. *Id.* Then, the court stated how procedurally Georgia is in line with *Atkins* because it has used the medical community's definitions in its statutes but neglected mentioning or instructing any changes that need to happen substantively due to the mistaken use of the standard up to that point. *Id.* at 91, 860 S.E.2d at 771. The court therefore determined that the substantive clarifications in *Moore* and *Hall* do not effect Georgia since Georgia procedurally has followed the medical community's definitions. *Id.* at 92, 860 S.E.2d at 771.

83. 572 U.S. 701 (2014).

procedurally analogous to a claim of incompetence to stand trial than insanity and should be treated as such.[84]

Before *Moore*, Texas relied on a seven-factor test of the Texas Court of Criminal Appeals's own creation.[85] The U.S. Supreme Court ruled that findings of mental disability based on the court's invented tests do not sufficiently protect the mentally disabled.[86] Florida law before *Hall* prevented those who wished to present evidence for mental disability unless their IQ tested below seventy, determining that anyone with an IQ higher than seventy automatically could not be considered mentally disabled.[87] The U.S. Supreme Court stated that though the statute

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84. *Young*, 312 Ga. at 92–94 860 S.E.2d at 771, 773; Brief for Appellant at 103–04, Young v. State, 860 S.E.2d 746 (2021) (No. S21P0078).

85. Bobby James Moore shot and killed a store clerk during a robbery and was convicted of murder and sentenced to death. *Moore*, 137 S. Ct. at 1044. As a youth, Moore struggled with basic math, measurements, the telling of time, and reading and writing. *Id.* at 1045. The Texas Court of Criminal Appeals (TCCA) used the guidelines it had established in *Ex Parte* Briseno and determined Moore's execution would not violate the Eighth Amendment. *Id.* at 1044. The TCCA set this *Briseno* standard as an attempt to incorporate the prohibition in *Atkins*. *Id.* at 1046–47. The definition it set departed from the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (DSM) because the clinical definitions include those who are mildly mentally disabled, though not necessarily beyond improvement with professional assistance. *Id.* at 1051. The TCCA suggested there was not a "Texas consensus" among its citizenry that would consider all the same mentally disabled as defined in the DSM as the ones intended to be protected by *Atkins* and opted instead to use the American Association on Mental Retardation (AAMR). *Ex parte* Briseno, 135 S.W.3d 1, 6–7 (Tex. Crim. App. 2004). The AAMR characterizes someone with mental disability as someone with (1) "'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to age of 18." *Id.* at 7. The TCCA paired that definition with seven factors it does not cite from any source for courts to use when weighing the evidence, reasoning that it would help courts navigate the divide between those who are diagnosable and those who are mentally disabled for purposes of the Eighth Amendment. *Id.* at 8–9; *Moore*, 137 S. Ct. at 1046. The *Moore* court ruled, as in *Hall*, that the factors developed in the *Briseno* case created "an unacceptable risk that persons with intellectual disability will be executed" because they were drawn from neither the medical community nor *Atkins*. *Moore*, 137 S. Ct. at 1051, 1053.

86. *Moore*, 137 S. Ct. at 1044.

87. Freddie Lee Hall kidnapped, beat, raped, and murdered Karol Hurst while she was pregnant and then killed Lonnie Coburn at a convenience store soon after. *Hall*, 572 U.S. at 704. Hall's teachers had identified him as mentally disabled, previous counsel compared him to the lawyer's four-year-old daughter, medical professionals testified that he was significantly disabled with the understanding of a toddler, and his family recognized early his slow learning and difficulty talking. *Id.* at 705–06. Despite those facts, Hall's IQ tested at seventy-one and Florida's threshold for intellectual disability was seventy or below to be allowed to present additional evidence of mental disability. *Id.* at 707. On appeal to the U.S. Supreme Court, the Court acknowledged that the Florida statute on its face could be interpreted as consistent with *Atkins* and the views of the medical community. *Id.* at 711.

appeared in line with *Atkins* on its face, it was being interpreted too narrowly and rigidly and, thus, missed the logic of *Atkins'* Eighth Amendment protections.[88]

Nevertheless, the court quickly dismissed Young's first argument in a single paragraph, stating that *Moore* and *Hall* only apply to questions on substantive definitions of intellectual disability.[89] The U.S. Supreme Court in those cases held that courts must substantively define mental disability in adherence to clinical definitions and the court in *Young* states that these cases are, therefore, inapplicable because Georgia "indisputably does[.]"[90]

It is this point where several justices, in both concurrence and dissent, expressed doubt about the logic of the lead opinion of Justice Melton. Presiding Justice Nahmias writes in his concurrence, and on behalf of Justice Boggs and Justice Peterson, that the *Hall* and *Moore* decisions certainly cast doubts on the standard but recognizes that it is dangerous to "evolve" the law based on reasoning from the U.S. Supreme Court rather than its holdings.[91] Justice Bethel dissents and instead agrees with Young's contention that the *Hall* and *Moore* decisions show that the reasoning behind the beyond a reasonable doubt standard in *Stripling* and *Hill* is analogous to the reasoning and procedures that were struck down in Texas and Florida, which now compel a different conclusion here.[92] Justice Melton, however, swiftly disagreed and moved on to the next point.

However, the way the Florida Supreme Court had interpreted it was too narrow to regard the IQ score as dispositive and neglected other significant factors contrary to experts' processes. *Id.* at 711–12. In response to Florida's argument that *Atkins* left to the states the development of appropriate enforcement, a holding shared by *Young*, the Court responded that in fact *Atkins* provided substantial guidance in its logic. *Id.* at 720–21. "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* The U.S. Supreme Court, therefore, struck the Florida statute as unconstitutional in its narrow rigidity. *Id.* at 723.

88. It was not enough of a justification to say that *Atkins* had left procedural and substantive guidelines to the states when Florida's statute threatened to nullify the Eighth Amendment as defined in *Atkins*. *Hall*, 572 U.S. at 711, 720–21.

89. *Young*, 312 Ga. at 92, 860 S.E.2d at 771.

90. *Id.*

91. *Id.* at 126–27, 129, 131, 860 S.E.2d at 793, 795–96 (Nahmias, J., concurring specially).

92. *Id.* at 131, 860 S.E.2d at 796 (Bethel, J., dissenting). Justice Bethel further notes that a juror who was probably or clearly convinced that a person was mentally disabled would still be authorized to join in sentencing them to death. *Id.* at 133, 860 S.E.2d at 797. While recognizing that all risk cannot be eliminated, the highest burden of proof greatly increases the risk and limits the protection to those who suffer profound mental disabilities. *Id.* at 132–33, 860 S.E.2d at 797.

In answer to the second argument, the court maintains its consistency with its previous decisions—namely, that mental disability is more akin to insanity than incompetence to stand trial.[93] The relevant procedural difference between insanity and incompetence to stand trial is that the U.S. Supreme Court held that courts could require the insane to prove their insanity beyond a reasonable doubt without violating the constitution, but could not require those claiming incompetence to prove it by more than by a preponderance of the evidence.[94]

The court analyzed these propositions from two U.S. Supreme Court cases, *Leland v. Oregon*[95] containing the holding on insanity, and *Cooper v. Oklahoma*[96] containing the holding on incompetence to stand trial.[97] The Georgia Supreme Court has held that while both cases are comparable and neither is a perfect fit to guilty but mentally disabled, *Leland* was a better guide.[98] The rights in controversy in both these cases and *Young* are established as constitutional rights to some degree; *Young* and *Cooper* involve rights the Court considers fundamental and *Leland*'s is not a right secured in the Bill of Rights but was an acceptable definition by the Constitution.[99] *Cooper* is comparable in that incompetence to stand trial and guilty but mentally disabled both involve a danger of potentially erroneous sentencing, but *Leland* is comparable in that both insanity and mental disability relieve someone found to be guilty of some amount of the penalty.[100]

Both incompetence and insanity have some historical, though contrasting, basis: incompetence to stand trial has a history of protecting defendants from being required to meet the beyond a reasonable doubt standard; insanity pleas, on the other hand, historically were required to meet a high standard of proof, to "clearly prove" their insanity; mental

93. *Id.* at 96–97, 860 S.E.2d at 774 (majority opinion). Insanity is a defense that eliminates culpability as an element of a crime, meaning, if proved, the defendant would not be found guilty of that crime. Cornell Law School, *Insanity Defense*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/insanity_defense (last visited Sept. 23, 2021). Proof of mental disability still admits guilt to the crime but finds less culpability and so changes a sentence from the death penalty to life in prison. *Id.* A person found incompetent to stand trial simply cannot be tried or convicted. *Id.*

94. *Young*, 312 Ga. at 89, 860 S.E.2d at 769.

95. 343 U.S. 790 (1952).

96. 517 U.S. 348 (1996); Raulerson v. Warden, 928 F.3d 987, 1013 (11th Cir. 2019).

97. *Young*, 312 Ga. at 92–93, 860 S.E.2d at 771.

98. *Id.*

99. *Id.* at 93, 96, 860 S.E.2d at 772, 773–74; *Cooper*, 517 U.S. at 355 (holding that trying someone who is incompetent offends fundamental principles of justice rooted deep in traditions and the conscience of the people).

100. *Young*, 312 Ga. at 93, 96–97, 860 S.E.2d at 772, 774.

disability is a relatively new plea without direct historical cues either way.[101] Another quality all three share is that the number of states requiring defendants to establish them beyond a reasonable doubt is very small. Oregon was, at the time of *Leland*, the only state to require the highest burden of proof for insanity and Oklahoma is only one of four states to require the highest burden of proof for incompetence to stand trial.[102] The difference, however, is that the U.S. Supreme Court found the near uniformity in standards of proof in incompetence cases to be indicative of the traditions and conscience of the people and thus did not allow the Oklahoma courts to depart from them.[103] But in *Leland*, the Court held that the low number was perhaps worth considering but not dispositive and that the mere existence of wiser or fairer methods does not make Oregon's method a violation of due process rights.[104]

Despite Young's urging that *Cooper* is the more appropriate case, the court in *Young* determined that *Leland* is simply more comparable and persuasive than *Cooper* and held, as the Court in *Leland* did, that a requirement to prove mental disability beyond a reasonable doubt does not violate nationally accepted concepts of basic standards of justice.[105]

C. Left to the States

Superseding the court's analysis of *Cooper* and *Leland* is the proposition from *Atkins* that the court intentionally "'l[eft] to the State(s) the task of developing appropriate ways to enforce the [federal] constitutional restriction'" thus the court concludes it is within Georgia's

101. *Id.* at 93–95, 860 S.E.2d at 772–73 (stating "the supervisory authority over the federal courts, requir[e] an acquittal in federal prosecutions whenever 'there is reasonable doubt whether [the defendant] was capable in law of committing the crime'"). *Leland* relies on the words "clearly proved" from the *M'Naghten* case (the seminal *M'Naghten* case establishes a widely used insanity test) and language from a supervisory authority which interprets the standard to mean beyond reasonable doubt. *Leland*, 343 U.S. at 796 (quoting M'Naghten 10 Cl. & Fin 200 (H.L.,1843)). The quoted language from *M'Naghten* goes on to describe such persons that are to be judged under the standard as being so insane as to not understand the character or gravity of their actions. *Id.* The Oregon Supreme Court held that the test's purpose is to determine whether the criminal is so diseased that they could not form a plan or the intent to kill. *Id.* at 795. These are the same type of criteria described in the Anti-Drug Abuse Act in 1988, which allowed the death of Johnny Penry. Anti-Drug Abuse Act of 1988, 102 Stat. 4181, 4390. In contrast, the *Atkins* case relaxed the criteria of inclusion in the protected group with mental disabilities and requires states to develop procedural tests to ensure that every degree of mentally disabled individuals are in fact protected. *Atkins*, 536 U.S. at 321.

102. *Young*, 312 Ga. at 93, 95, 860 S.E.2d at 772–73; *Raulerson*, 928 F.3d at 1013–14.

103. *Young*, 312 Ga. at 93–94, 860 S.E.2d at 772.

104. *Id.* at 95–96, 860 S.E.2d at 773.

105. *Id.* at 92–93, 96, 860 S.E.2d at 771, 773.

discretion to develop procedures that ensure the mentally disabled are being properly identified and protected from the death penalty.[106]

This proposition is quoted in *Atkins* from *Ford v. Wainwright*,[107] a death penalty case from 1986. Here the court in *Young* demonstrated that the beyond a reasonable doubt standard fits into this criterion with, for the first time since this standard has been in dispute, an in-depth discussion on *Ford*.[108] Though the quoted language from *Ford*, which *Atkins* quoted to allow the states to develop procedures themselves, is only agreed to by a plurality, the court determined the reasoning behind the statement would still support the conclusion made here.[109]

Alvin Ford was examined, per state policy, by three psychiatrists together for thirty minutes each in front of the Governor, his counsel, and the State's counsel; all three psychiatrists gave their analyses to the Governor, who made the decision on whether Ford was competent.[110] The Court said this method failed to protect Ford's constitutional interests by any stretch.[111] But, even in light of Florida's failure, the Court still left the task of developing proper procedures to the states.[112] Because Georgia's procedures are not, according to the court in *Young*, remotely as grievous and its procedures more restricted, it reasons the U.S. Supreme Court would still agree here to continue to allow Georgia to expect the mentally disabled to prove their disability beyond a reasonable doubt.[113]

A standard of proof is not mentioned in *Ford*, but given that the Court was aware of the risk to the mentally disabled and the fact that the Governor was unrestrained in whatever standard they were employing, the court in Young reasons that the Court in *Ford* would have included

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106. *Id.* at 97, 860 S.E.2d at 774.

107. 477 U.S. 399, 399, 416 (1986). "If the states were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* would become a nullity and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 572 U.S. at 720–21. *Ford* came at a time ten years after the moratorium ended and almost two decades before *Atkins* when death sentencing was at one of its all-time peaks and no legislation yet existed protecting the mentally disabled from execution at all. *The History of the Death Penalty: A Timeline*, DEATH PENALTY INFORMATION CENTER https://deathpenaltyinfo.org/stories/history-of-the-death-penalty-timeline (last visited Nov. 18, 2021); *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFORMATION CENTER (Dec. 14, 2018), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report.

108. *Young*, 312 Ga. at 97–100, 860 S.E.2d at 774–77.

109. *Id.* at 98, 860 S.E.2d at 775 (discussing the difficulties *Ford* and *Atkins* pose).

110. *Ford*, 477 U.S. at 412–13.

111. *Id.* at 413.

112. *Id.* at 416–17; *Young*, 312 Ga. at 99, 860 S.E.2d at 775.

113. *Young*, 312 Ga. at 98, 100, 860 S.E.2d at 775–76.

restrictions on a standard of proof if it thought it were necessary to avoid results like *Ford*.[114] The *Ford* concurring opinion asserted that the blanket of freedom was too much and that courts should be bound by some procedures, for example an impartial board that can receive evidence and perform their own examinations.[115]

Overall, the court in *Young* concludes that the task at hand is not to judge the wisdom of the beyond a reasonable doubt standard of proof from a policy perspective, but to determine if Georgia's use of the standard is unconstitutional.[116] Because Young failed to show otherwise, the judgment below was affirmed and the beyond a reasonable doubt standard of proof for mentally disabled defendants facing the death penalty still stands.[117]

V. IMPLICATIONS

Current procedures in Georgia present a similar risk of error to the mentally disabled as in Texas and Florida before the ruling of *Moore* and *Hall*. And, like both *Moore* and *Hall*, when Young appeals to the U.S. Supreme Court,[118] there is a reasonable chance the Court will overturn the Georgia Supreme Court's decision in order to ensure the mandated protection of the mentally disabled.

If the appeal fails, Georgia will continue to be the most difficult state for a capital defendant with a mental disability to claim a constitutional right to not be executed and, therefore, the state most likely to execute the mentally disabled. Most states set a preponderance of the evidence standard and a few set the bar at clear and convincing.[119] Georgia is the only state that has the beyond a reasonable doubt standard imposed on the defendant to prove mental disability.[120] Throughout the challenges to Georgia's standard of proof over the years, the dissents continue to echo the point that the standard is insurmountable and thus not protecting

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114. *Id*. at 99–100, 860 S.E.2d at 775–76. As mentioned above, *Ford* was before any legislation on the issue at all. Though there would have been plenty of public discussion at this time no state had yet established any mandate, let alone a standard of proof, to debate or a consensus on which to use or which standards could have damaging effects.

115. *Ford*, 477 U.S. at 427.

116. *Young*, 312 Ga. at 100, 860 S.E.2d at 776.

117. *Id*.

118. *ACLU Statement on Georgia Supreme Court's Decision In Rodney Young Case*, AMERICAN CIVIL LIBERTIES UNION (June 1, 2021), https://www.aclu.org/press-releases/aclu-statement-georgia-supreme-courts-decision-rodney-young-case; Petition for Writ of Certiorari, *Young v. State*, 312 Ga. 71, 860 S.E.2d 746 (Nov. 24, 2021).

119. *Raulerson*, 928 F.3d at 1013–14.

120. *Id*. at 1013; Petition for Writ of Certiorari, *supra* note 118, at 25.

anyone and infringing on the categorical prohibition of *Atkins*.[121] Those fears have been confirmed.

Since the statute's enactment and until at least 2019, not one single capital defendant convicted of intentional murder has successfully proved their mental disability beyond a reasonable doubt to protect them from the death penalty.[122] In contrast, 55% of capital defendants nationally who attempt to prove mental disability under *Atkins* succeed.[123] This discrepancy reveals the reality of the standard's effect on Georgia's at-risk population targeted by *Atkins*.

These results are analogous to the dangers presented in *Moore* and *Hall*, which led to their overruling. After those rulings, the average number of death sentences per year in both Texas and Florida have been cut by more than half. Florida sentenced on average fifteen people a year to death up to 2014, the year *Hall* was decided. After 2014, that average dropped to six. In Texas, death sentences fluctuated a bit but averaged at about nine per year, dropping to four after 2014.[124] While attributability of the drops to the judicial shields for the mentally disabled is not conclusive based on available data, there exists a correlation indicative of a strong, reasonable inference.[125]

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121. *Stripling*, 289 Ga. at 377, 711 S.E.2d at 671 (Benham, J., dissenting); *Hill*, 277 Ga. at 272–73, 587 S.E.2d at 629 (Sears, J., dissenting); *Young*, 312 Ga. at 132, 860 S.E.2d at 797 (Bethel, J., dissenting); *Raulerson*, 928 F.3d at 1009 (Jordan, J., concurring in part and dissenting in part).

122. Lucas, *supra* note 35, at 582; *Raulerson*, 928 F.3d at 1009 (Jordan, J., concurring in part and dissenting in part); Liptak, *supra* note 58.

123. *Raulerson*, 928 F.3d at 1018 (Jordan, J., concurring in part and dissenting in part) (citing John H. Blume, et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM & MARY BILL RTS. J. 393, 397 (2014)).

124. *Death Sentences in the United States Since 1977*, DEATH PENALTY INFORMATION CENTER https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year (last visited Nov. 18 2021). There are likely many factors at play with these declines, but homicides in both Texas and Florida have only increased since 2014, so it is not likely be attributable to fewer capital crimes. *National Center for Healthcare Statistics*, CENTERS FOR DISEASE CONTROL (Feb. 16, 2021), https://www.cdc.gov/nchs/pressroom/sosmap/homicide_mortality/homicide.htm.

125. Trends in national statistical data unquestionably show the evolving standards of society about the death penalty generally, but they may also suggest a correlation between the death penalty and mental disability and possibly, and more disturbingly, that the mentally disabled have made up a significant portion of those being sentenced to death—and not just in Texas and Florida. There is a large drop between 1999–2001 and since then a steady decline nationwide. While it is unclear whether the drops around the time of *Atkins* are due to the *Atkins* decision or other factors, it is likely to at least be a contributor. To show the comparison in average sentencing and when precisely they trend down or drop, the numbers below will reflect the number of people sentenced to death for the five years

Overruling *Young* would allow similar effects on Georgia law as Texas and Florida underwent as they realigned with *Atkins*. [126] Though Georgia's numbers are not as high as either Texas or Florida and its noncompliance with *Atkins* more difficult to spot, the inconsistency is still reflected in the numbers and its legal implications are effectively the

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before (1998–2002) verses after (2003–2007) *Atkins* per state. Illinois: 7, 8, 9, 1, 6 vs. 2, 4, 1, 3, 3. Indiana: 3, 2, 2, 0, 4 vs. 1, 0, 1, 0, 0. Pennsylvania: 12, 15, 12, 6, 9 vs. 6, 5, 7, 4, 6. Florida: 25, 20, 20, 15, 10 vs. 11, 9, 15, 18, 21. Louisiana: 9, 10, 9, 2, 7 vs. 1, 6, 4, 3, 1. Arkansas: 4, 5, 3, 2, 0 vs. 0, 2, 2, 0, 2. North Carolina: 20, 24, 18, 14, 7 vs. 6, 4, 6, 5, 3. Tennessee: 4, 6, 4, 3, 4, vs. 6, 3, 2, 1, 1. Texas: 39, 43, 31, 24, 14 vs. 29, 23, 14, 11, 14. California: 31, 43, 31, 24, 14 vs. 19, 11, 23, 17, 10. Virginia: 9, 7, 8, 4, 3 vs. 6, 2, 1, 2, 1. New Mexico has not sentenced anyone since 2002, the year of *Atkins*, New York since 2003, and New Jersey and Wyoming since 2004.

After 2014, the year of both *Moore* and *Hall*, fourteen of the twenty-nine states that still had the death penalty appear to have been significantly impacted by those decisions. Florida, Washington, Oregon, Pennsylvania, Louisiana, Mississippi, North Carolina, Texas, and Washington all see significant drops in sentencing. This correlation is more noticeable and suggestive than the declines after *Atkins*. Again, to show the drops in average as well as the correlation to the year of *Moore* and *Hall* the numbers below will show averages as well as decisions 2011–2014 verses 2015–2018. Pennsylvania dropped from sentencing an average of 5 people per year to 1.3 (4, 6, 4, 4, vs. 2, 1, 2, 1.) Louisiana dropped from 2.75 per year to .3 (5, 2, 0, 3 vs. 1, 0, 0, 1.) Mississippi dropped from 2 per year to .83 (1, 2, 2, 1, vs. 1, 0, 1, 2.) North Carolina dropped from 3.1 to .6 (3, 0, 1, 3 vs. 0, 1, 0, 0.) Oregon has only sentenced one person since 2014. South Dakota, Kentucky, Indiana, and Connecticut have not sentenced anyone since that year, Washington since the year before, and Delaware since the year after. All states drop in sentencing during the 2000s, though not all appear as clearly correlated with those two decisions.

The national total of those sentenced has decreased almost every year since 1998. Since *Atkins* the number of people sentenced per year decreases at an average of thirteen less each year—in 2015, after *Hall* and *Moore*, it dropped by twenty-four. The most significant drops occurred between 1999 and 2001, right before *Atkins*, from 279 sentenced in 1999 and only 153 in 2001. This suggests not only justification for the Court in *Atkins* taking its cues from society but also that there were obviously other impactful factors besides society's views on mental disability that have taken effect. None the less, the correlations to years of significant decisions tightening protection for the mentally disabled are hard to ignore.

This data is significant because it suggests that the mentally disabled were indeed being sentenced to death before and still after *Atkins* and that changes like *Moore* and *Hall* are actually efficacious in appropriately protecting some from the death penalty. And further, this data suggests that some states implementation of *Atkins* still allowed for sentencing many mentally disabled to death despite their claim to not disturb *Atkins's* direction. Thus, merely applying *Atkins* without the subsequent clarifications may not be enough to protect the mentally disabled. It is unnervingly likely that the states whose decline in sentencing after *Moore* and *Hall* were previously sentencing people with mental disabilities; after those decisions there were simply fewer capital defendants left who were eligible. DEATH PENALTY INFORMATION CENTER*, supra* note 124.

126. Incidentally, Texas has a "preponderance of the evidence" standard, set by the same case the seven-factor test originated from, and Florida has a "clear and convincing" standard. *Ex Parte* Briseno, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004); Fla. Stat. Ann § 921.137(4) (2021).

same—that is, providing insufficient barriers against executing the mentally disabled. Even with fewer death sentences, over thirty years without protecting one capital defendant is telling.

Why does it make a difference if the numbers are all going down anyways? It goes without saying that to those individuals it matters a great deal. But beyond that there is no security that if the trend reversed, as it has in the past, the mentally disabled would still be guaranteed their constitutional right because the changes in Georgia's numbers are not attributable to legislation or caselaw.[127] There are not droves of capital defendants congesting death row as in the 90s, but as no legal protection in Georgia has been heightened for them since the 80s, the mentally disabled cannot rely on state law for protection.[128] Though Georgia's sentencing per year has declined steadily with the rest of the country, it is not because of the protection from the law but in spite of it.

Regardless of how the numbers play out, this burden of proof on capital defendants is out of line with national consensus and does not reflect the changes mandated by *Atkins*. Being rid of the procedural blockade could encourage more capital defendants who suffer with mental disabilities to receive the appropriate punishment for their crimes; accuracy will improve, and Georgia can join the 55% of the rest of the country and the beyond reasonable doubt standard can instead be retired to function in the way it was intended.[129]

While the *Young* plurality dismisses this comparison because Georgia has always relied on prevailing clinical standards to define mental disability unlike *Moore* and *Hall*, this argument is obviously only partially true, given that it admitted that at one time it was using this standard of proof to "further served to define" the category.[130] Regardless, the data shows that the statute is not functioning as *Atkins* had intended.

Many believe Georgia is almost certainly executing some mentally disabled in its attempt to ensure 100% proof positive of a diagnosis experts agree is "exceedingly, [and] perhaps uniquely, ill-suited to proof

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127. *The Death Penalty in 2018: Year End Report*, DEATH PENALTY INFORMATION CENTER (Dec. 14, 2018), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2018-year-end-report.

128. *Id*.

129. Petition for Writ of Certiorari, *supra* note 118, at 25–26.

130. Where previously this court sided with the defense that the beyond reasonable doubt standard "served to define the category of mental disability" it here rejects that defense and instead accepts that the standard serves as a "way to enforce" the constitutional restriction. Either way, there is little evidence to show the standard will not perform the same function it has since the 80s. *Stripling*, 289 Ga. at 373, 711 S.E.2d at 668; *Young*, 312 Ga. at 91–92, 860 S.E.2d at 771.

beyond a reasonable doubt."[131] And further, that if a higher court does not overrule the decision in *Young*, the beyond reasonable doubt standard will become solidified in law and Georgia will remain in a state of tortured irony as it easily condemns those it professes to protect with a standard itself that will never die.

131. Brief for Appellant at 97, Young v. State, 312 Ga. 71, 860 S.E.2d 746 (2021) (No. S21P0078). "Given that intellectual disability disputes will always involve conflicting expert testimony, there will always be a basis for rejecting an intellectual disability claim." *Raulerson*, 928 F.3d at 1016 (Jordan, J., concurring in part and dissenting in part).

> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician.

Addington, 441 U.S. at 430. "[T]he highly subjective nature of the inquiry into mental retardation, mak[es] it even clearer that the reasonable doubt standard unquestionably will result in the execution of those offenders that *Atkins* protects." Hill v. Humphrey, 662 F.3d 1335, 1372 (11th Cir. 2011) (Barkett, J., Marcus, J., and Martin, J., dissenting).