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## An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard To Determine Intellectual Disability In Capital Cases

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## AN EMPIRICAL ASSESSMENT OF GEORGIA'S BEYOND A REASONABLE DOUBT STANDARD TO DETERMINE INTELLECTUAL DISABILITY IN CAPITAL CASES

Lauren Sudeall Lucas\*

### ABSTRACT

In *Atkins v. Virginia*, the Supreme Court held that execution of people with intellectual disabilities violates the Eighth Amendment's prohibition on cruel and unusual punishment. In doing so, the Court explicitly left to the states the question of which procedures would be used to identify such defendants as exempt from the death penalty. More than a decade before *Atkins*, Georgia was the first state to bar execution of people with intellectual disability. Yet, of the states that continue to impose the death penalty as a punishment for capital murder, Georgia is the only state that requires capital defendants to prove their intellectual disability beyond a reasonable doubt at the guilt phase of the trial to be legally exempted from execution.

This article is the first to provide an empirical assessment of Georgia's "guilty but mentally retarded" (GBMR) statute, including its beyond a reasonable doubt standard of proof. In doing so, it fills a critical gap not only in the scholarly literature on the subject, but also for those who continue to litigate the issue. Its analysis reveals that no defendant facing the death penalty in Georgia has ever received a GBMR verdict for malice murder from a jury in the statute's nearly

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\*Assistant Professor, Georgia State University College of Law. For their hard work and perseverance in collecting data on capital cases from across the entire state and tracking such information electronically, I would like to thank graduate research assistants Jobena Hill, Daniel Richardson, and Kaitlyn (Welch) Nigro. Jobena Hill and Darcy Meals also deserve credit for the background research they contributed to this article and their work on the appendix. All of the information included in this article represents the best effort we could make toward painting as clear a picture as possible of how the Georgia statute has applied in practice to capital defendants in jury trials. Gathering that information was a herculean effort spanning multiple years that would not have been possible without the assistance of multiple lawyers, clerks, and court personnel, for which I am incredibly grateful. Last, I would like to thank the editors of the Georgia State University Law Review for their work on the piece, and Dean Steven J. Kaminshine and the Georgia State University College of Law for the resources that made this research possible.

thirty-year existence. Prior to *Atkins*, only one capital defendant had ever received a GBMR jury verdict at trial, in a felony-murder case, by meeting this extremely high standard of proof, thus exempting herself from the death penalty.

The absence of any successful GBMR jury verdict in a malice murder case and the absence of any successful GBMR verdict in any capital case post-*Atkins*, in combination with Georgia's lone status in imposing such a procedure, all contribute to the argument that the beyond a reasonable doubt standard, and the jury's decision regarding intellectual disability in the guilt phase create, in the words of the Court, an "unacceptable risk" that capital defendants with intellectual disability will be executed in violation of the Eighth Amendment.

#### INTRODUCTION

In 2002, the United States Supreme Court declared in *Atkins v. Virginia* that the execution of people with intellectual disability<sup>1</sup> violates the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>2</sup> In doing so, the Court expressly left the procedures to be used in identifying intellectual disability to the states.<sup>3</sup> In the wake of *Atkins*, states developed varying standards for the definition of intellectual disability; the evidence that a sentencer may consider in making the determination whether a capital defendant is intellectually

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1. A note regarding terminology: Both the *Atkins* opinion and the Georgia statute use the language "mentally retarded." In *Hall v. Florida*, the Court acknowledged the change in terminology in the mental health community since its decision in *Atkins* and announced that it would now use the term "intellectual disability." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014). The author also recognizes the stigma attached to the outdated term and does not endorse its use. Except when referring specifically to standards established by legislatures or courts using that language, this article instead uses the term "intellectual disability."

During the 2017-2018 session, the Georgia legislature passed House Bill 343, which would amend the Official Code of Georgia such that all references to "mental retardation" and "mentally retarded" would be changed to reference "intellectual disability." As of April 7, 2017, this bill was awaiting the Governor's signature. See Georgia General Assembly, HB 343, Bill Tracking, <http://legis.ga.gov/legislation/en-us/display/20172018/HB/343>.

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

3. *Id.* at 317 ("As was our approach in *Ford v. Wainwright*, 477 U.S. 399 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'").

disabled; and the procedures, including the standard of proof, by which that determination must be made. Among those states, Georgia stands alone as the only state to require that a defendant claiming constitutional exemption from the death penalty based on intellectual disability, must prove that disability beyond a reasonable doubt at the guilt phase of a capital trial. This article provides, for the first time, an empirical assessment of Georgia's guilty but mentally retarded (GBMR) statute.

Part I provides an overview of the legal backdrop for this project. It reviews the history of the Georgia statute, its accompanying standard of proof, and the legal challenges posed to that standard in both state and federal court. It also highlights other cases suggesting that the following facts—that every other state has refused to adopt such a standard, that not one defendant in Georgia has ever met this standard in a case of malice murder, and that not one defendant has met the standard in any case following the *Atkins* decision—are highly relevant to an analysis of whether Georgia's GBMR statute violates the Eighth Amendment.

Part II introduces the empirical analysis of how capital defendants seeking an exemption on the basis of their intellectual disability in Georgia have fared under the “beyond a reasonable doubt” standard. It describes the immediate need for such a study, illustrated most poignantly by the Warren Hill case, the methodology used in conducting the analysis, and the results of the study. Based on this analysis, and on the best documentation obtainable, the study concludes that no defendant since *Atkins* has successfully proven to a jury in a capital trial that he meets the criteria for intellectual disability. Only one defendant in Georgia in the statute's nearly thirty-year history has been able to successfully prove before a jury that she is intellectually disabled beyond a reasonable doubt.

Part III explores in further detail cases in which the issue of intellectual disability was asserted at the trial level, to illustrate reasons why the Georgia statute has failed in practice to protect those with intellectual disability from the death penalty. Because it has become nearly impossible to prove intellectual disability to a jury at

trial, Georgia's GBMR statute has created the unacceptable risk that defendants with intellectual disability will be executed in violation of the Eighth Amendment.

### *I. GBMR in Georgia: The Legal Landscape*

The Georgia statute creating the procedure by which capital defendants with intellectual disability must prove an exemption from the death penalty, referred to herein as the GBMR statute, has been the subject of considerable litigation and public debate in its nearly thirty-year history. Part I.A provides historical background and an overview of the statute establishing that standard, and Part I.B summarizes the most recent legal challenges to Georgia's beyond a reasonable doubt standard. In Part I.C, the article provides some context as to the current climate regarding challenges to other state procedures used to determine intellectual disability in capital cases and provides a backdrop for why this study, demonstrating the overwhelming inability of capital defendants in Georgia to prove their intellectual disability beyond a reasonable doubt post-*Atkins*, is critical to the constitutional analysis of Georgia's statute.

#### *A. History of the Georgia GBMR Statute*

Although an outlier in imposing such a high standard of proof and in placing the determination of intellectual disability at the guilt phase of the trial, Georgia was also the first state to outlaw execution of people with intellectual disability.<sup>4</sup> The statute was enacted in response to public outrage over the execution of Jerome Bowden, who had an intelligence quotient (IQ) of 59 and could not count to ten.<sup>5</sup> The General Assembly opted to address the issue by tacking an additional option on to the list of possible pleas in Georgia Code section 17-7-131, which governs pleas of insanity and

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4. 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, 1202 (2014).

5. *Id.*; see also Raymond Bonner, *Argument Escalates on Executing Retarded*, N.Y. TIMES (Jul. 23, 2001), <https://nyti.ms/2nXRXEJ> ("The first state to pass a law to protect the mentally retarded was Georgia, largely because of a public outcry following the execution in 1988 of Jerome Bowden.").

incompetency.<sup>6</sup> As amended, the statute offers defendants the option to plead “guilty,” “not guilty,” “not guilty by reason of insanity” (NGRI), “guilty but mentally ill” (GBMI), and “guilty but mentally retarded” (GBMR).<sup>7</sup> Upon receiving a verdict of GBMR, a capital defendant would receive a life sentence.<sup>8</sup> Georgia’s definition of intellectual disability adopted by the legislature closely tracked the definitions established by the American Psychiatric Association (APA) in the Diagnostic and Statistical Manual of Mental Disorders (DSM) and the manual published by the American Association on Intellectual and Developmental Disabilities (AAIDD) (formerly the American Association on Mental Retardation (AAMR)). With only slight variations, each definition outlines three criteria that must be met for a diagnosis of intellectual disability: (1) significantly sub-average intellectual functioning; (2) significant deficits in adaptive behavior; and (3) onset in the developmental period.<sup>9</sup>

One result of the decision to incorporate the issue of intellectual disability into this part of the Georgia Code—and, accordingly, into the finding of guilt—is that the same standard of proof was applied to the finding that a defendant is intellectually disabled. The statute requires a jury to find “beyond a reasonable doubt that the defendant is guilty of the crime charged *and* is mentally retarded.”<sup>10</sup>

A year after the statute was enacted, in the case of *Fleming v. Zant*, the Georgia Supreme Court held that the execution of people with intellectual disability violated the Georgia constitution’s prohibition on cruel and unusual punishment.<sup>11</sup> Son Fleming was tried prior to July 1, 1988, the effective date of the GBMR statute, but sought the benefit of the exemption from the death penalty, as a man with an

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6. O.C.G.A. § 17-7-131 (2016).

7. *Id.* § 17-7-131(b).

8. *Id.* § 17-7-131(j).

9. *See id.* § 17-7-131(a)(3); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 31 (5th ed. 2013) [hereinafter DSM-5]; AM. ASS’N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (11th ed. 2010) [hereinafter AAIDD MANUAL].

10. O.C.G.A. § 17-7-131(c)(3) (emphasis added).

11. *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989). It did so, finding a consensus among Georgia citizens against the execution of those with intellectual disability even after the United States Supreme Court declined to recognize a national consensus. *See Penry v. Lynaugh*, 492 U.S. 302, 339 (1989).

intellectual disability. The Court announced the new constitutional rule under Georgia law as well as a procedure for those defendants, like Fleming, who were tried before the statute's enactment. Under the Court-created procedure, those defendants raising an intellectual disability argument in the post-conviction setting would only bear the lesser "burden of proving retardation by a preponderance of the evidence" before a jury.<sup>12</sup>

At Warren Hill's capital trial in 1991, his lawyers failed to raise the issue of his intellectual disability at trial. In post-conviction proceedings, Hill sought to use the procedure announced in *Fleming* to have his claim of intellectual disability determined under a preponderance of the evidence standard by a jury. The Georgia Supreme Court held in *Turpin v. Hill* that the standards set forth in *Fleming* were "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)" and required Hill to present his intellectual disability claim to the habeas court, subject to a beyond a reasonable doubt standard.<sup>13</sup> Even though the Georgia Supreme Court previously ruled that preponderance of the evidence would suffice for those cases involving offenses preceding the statute's effective date,<sup>14</sup> it declined to find the statute unconstitutional. With its rulings in *Fleming* and *Hill*, the Court, in effect, created a multi-tiered system for consideration of intellectual disability claims in Georgia: defendants whose crimes occurred before July 1, 1988, faced a lower burden of proof than those whose crime occurred after the statute's effective date, who would face the beyond a reasonable doubt burden of proof. For the latter group, those who raised intellectual disability at trial would have their claim decided by a jury at the guilt phase via the GBMR verdict, while defendants who had not raised the claim at trial would have the claim heard on its own—in other words, without being tied to any consideration of culpability—by a judge in post-conviction proceedings.<sup>15</sup>

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12. *Fleming*, 386 S.E.2d at 342–43.

13. *Turpin v. Hill (Hill I)*, 498 S.E.2d 52, 53–54 (Ga. 1998).

14. See *supra* note 12 and accompanying text.

15. *Hill I*, 498 S.E.2d at 53–54. The Georgia Supreme Court rejected equal protection and due

Neither the Georgia legislature nor the Georgia courts made any change to the state's procedure exempting those with intellectual disability from the death penalty following the *Atkins* decision. In light of *Atkins*, however, Warren Hill again challenged the beyond a reasonable doubt standard in the Georgia Supreme Court and gave the court its first opportunity to review the constitutionality of the standard under the federal constitution.<sup>16</sup> In Hill's case, the court below ruled that Georgia's beyond a reasonable doubt standard did not satisfy the constitutional demands of *Atkins* and that Hill should be subject to the *Fleming* procedure. Relying on the *Atkins* Court's delegation to the states to "develop[] appropriate ways to enforce the constitutional restriction," the Georgia Supreme Court reversed and upheld Georgia's beyond a reasonable doubt standard as constitutional.<sup>17</sup> The court likened intellectual disability claims to claims of insanity during the commission of a crime, in which context the United States Supreme Court had upheld the application of a beyond a reasonable doubt standard.<sup>18</sup>

The court again upheld the beyond a reasonable doubt standard in *Stripling v. State*.<sup>19</sup> As in *Hill*, the court compared the burden of proof in intellectual disability claims to that of insanity claims. The Georgia court also emphasized that the Supreme Court in *Atkins* had counted Georgia as "part of the national consensus regarding the treatment of mentally retarded defendants" and it would have been "illogical" to conclude both that Georgia was part of the national consensus supporting the categorical exemption of such defendants from the death penalty while simultaneously imposing a standard that violated the same rule.<sup>20</sup> Last, the court relied upon the fact that other

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process challenges to defendants facing different procedures on the same issue. *Fleming*, 386 S.E.2d at 341.

16. *Head v. Hill (Hill II)*, 587 S.E.2d 613 (Ga. 2003).

17. *Id.* at 620 (quoting *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)).

18. *See Leland v. Oregon*, 343 U.S. 790, 799 (1952) (finding requiring accused to prove claim of insanity beyond a reasonable doubt standard did not violate due process).

19. *Stripling v. State*, 711 S.E.2d 665, 669 (Ga. 2011).

20. *Id.* at 668 (emphasis in original). This analysis should not be given substantial weight, however, as the *Atkins* Court, in mentioning Georgia's and other states' statutes, was simply tallying the number of states that had legislatively exempted those with intellectual disability from capital punishment, not sanctioning any particular state procedure. Florida's statute, too, was mentioned in *Atkins* as among the



states had imposed a standard of proof higher than preponderance of the evidence in adopting a clear and convincing standard and ultimately refused to view the preponderance standard as constitutionally required.<sup>21</sup>

Even so, Georgia is an outlier. Georgia is currently—and has always been—the only state to impose a beyond a reasonable doubt standard in determining intellectual disability in a capital case and the only state that requires that the determination occur in tandem with the jury’s consideration of the defendant’s guilt. Post-*Atkins*, of the thirty-three jurisdictions—thirty-one states, the federal government, and the military—that retain the death penalty, nineteen states apply a “preponderance of the evidence” standard,<sup>22</sup> four states apply a

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first states to exempt those with intellectual disability from the death penalty, but *Hall* made clear that such a “fleeting mention did not signal the Court’s approval of the State’s current understanding of its law.” *Hall v. Florida*, 134 S. Ct. 1986, 1999 (2014). Significantly, the *Atkins* Court did not mention or address Georgia’s beyond a reasonable doubt standard of proof, only citing Georgia’s Code section 17-7-131(j), which exempts those with intellectual disability from the death penalty. *Atkins*, 536 U.S. at 313–14. In addition, on its face, Georgia’s statute could be read so as not to require proof beyond a reasonable doubt on the question of intellectual disability but only on the question of guilt. See O.C.G.A. § 17-7-131(c)(3) (2016) (“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.”) (emphasis added).

21. *Stripling*, 711 S.E.2d at 668 (finding “persuasive” the fact that “sister states . . . have refused to declare the preponderance of the evidence standard to be constitutionally required”); *id.* at 669 (“Georgia was not alone in defining mental retardation through the use of a heightened standard of proof at the time of *Atkins*, as several states by that time had already established that a defendant must prove mental retardation under a clear and convincing evidence standard.”).

22. Alabama (*Morrow v. State*, 928 So. 2d 315, 323–25 (Ala. Crim. App. 2004) (declining to establish specific procedures for trial courts to evaluate *Atkins* claims, instead adopting the procedures outlined in Rule 32, which governs post-conviction claims)); Arkansas (ARK. CODE ANN. § 5-4-618 (2016)); California (CAL. PENAL CODE § 1376 (West 2016)); Idaho (IDAHO CODE § 19-2515A(3)(i) (2016)); Indiana (*Pruitt v. State*, 834 N.E.2d 90, 99-103 (Ind. 2005) (although IND. CODE ANN. § 35-36-9-4 refers to a clear and convincing standard, the Indiana Supreme Court appeared to deem this standard unconstitutional in *Pruitt*)); Kentucky (KY. REV. STAT. ANN. §§ 532.130, 532.135, 532.140 (West 2016)); Louisiana (LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2016)); Mississippi (*Chase v. State*, 873 So. 2d 1013, 1029 (Miss. 2004)); Missouri (MO. ANN. STAT. § 565.030(4)(1) (West 2016)); Nebraska (NEB. REV. STAT. ANN. § 28-105.01(4) (West 2016)); Nevada (NEV. REV. STAT. ANN. § 174.098(5)(b) (LexisNexis 2016)); Ohio (*State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002)); Pennsylvania (*Commonwealth v. Sanchez*, 36 A.3d 24, 63 (Pa. 2011)); South Carolina (*Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003)); South Dakota (S.D. CODIFIED LAWS § 23A-27A-26.3 (2016)); Tennessee (TENN. CODE ANN. § 39-13-203 (2016)); Texas (*Ex parte Van Alstyne*, 239 S.W.3d 815, 816–23 (Tex. Crim. App. 2007)); Utah (UTAH CODE ANN. § 77-15a-104 (LexisNexis 2016)); Virginia (VA. CODE ANN. § 19.2-264.3:1.1 (2016)); Washington (WASH. REV. CODE ANN. § 10.95.030 (West 2016)). Before Maryland abolished the death penalty, it, too, applied a preponderance of the evidence standard. See *Richardson v. State*, 598 A.2d 1, 3 (Ct. Spec. App. Md. 1991); MD. CRIM. CODE § 2-202 (repealed Oct. 1, 2013).

“clear and convincing evidence” standard,<sup>23</sup> two states apply a “clear and convincing evidence” standard pretrial and a “preponderance of the evidence” standard at sentencing,<sup>24</sup> and seven jurisdictions have not imposed any explicit standard of proof for determining intellectual disability.<sup>25</sup> Not one state has followed Georgia’s statutory scheme in implementing the *Atkins* decision.<sup>26</sup>

In 2013, spurred on by disability advocates and lawyers demanding a change to the statute, the House Judiciary Non-Civil Committee of the Georgia General Assembly held an informational hearing regarding the beyond a reasonable doubt standard, primarily for “educational purposes,” while the legislature was out of session.<sup>27</sup> Testimony provided during the hearing revealed that the conflation of the beyond a reasonable standard and the finding of intellectual disability was a result of careless drafting. While the statute was intended to set the standard for a finding of guilt at “beyond a reasonable doubt,” the decision to merely tack on “mentally retarded” at the end of a sentence inadvertently applied the same standard of proof to that separate finding.<sup>28</sup>

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23. Arizona (ARIZ. REV. STAT. ANN. § 13-753(G) (2016)); Colorado (COLO. REV. STAT. ANN. § 18-1.3-1102 (2016)); Delaware (DEL. CODE ANN. tit. 11 § 4209 (2016)); Florida (FLA. STAT. ANN. § 921.137 (West 2016)). Florida’s procedure for assessing intellectual disability claims was struck down as unconstitutional as applied by the United States Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014), but the Court did not address the standard of proof.

24. North Carolina (N.C. GEN. STAT. ANN. § 15A-2005 (2016)); Oklahoma (OKLA. STAT. tit. 21 § 701.10b (2016)). Under both statutes, during the pretrial determination made by the judge, the defendant is held to a “clear and convincing evidence” standard; during the sentencing phase, where the jury makes the determination, the defendant is held to a “preponderance of the evidence” standard. N.C. GEN. STAT. ANN. § 15A-2005; OKLA. STAT. tit. 21 § 701.10b.

25. Kansas (KAN. STAT. ANN. § 21-6622 (West 2016) (no standard provided by statute)); Montana (no statute or case); New Hampshire (no statute or case); Oregon (no statute or case); Wyoming (no statute or case); United States military (no statute or case); United States federal government (18 U.S.C. § 3596(c) (2012)); see also Jessica Hudson, Kyle Fralick & John A. Sautter, *Lighting but No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures Implementing Atkins v. Virginia*, 55 NAVAL L. REV. 359, 381–85 (2008) (arguing that a pretrial determination of intellectual disability by a preponderance of the evidence would be consistent with Military procedure and practice); 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, 171 n.50 (2015) (explaining that the five states with no explicit standard have executed so few defendants that they may not have faced a claim of intellectual disability).

26. See *infra* Appendix.

27. O’Grady, *supra* note 4, at 1192–93.

28. *Id.* at 1202–03 n.97 (citing testimony of Jack Martin).

### B. *Warren Hill and the Eleventh Circuit*

As noted above, though the GBMR defense was available at the time of his 1991 trial, Warren Hill’s trial attorneys failed to raise the issue of intellectual disability.<sup>29</sup> In state post-conviction proceedings, Hill alleged that he should be exempt from the death penalty due to his intellectual disability and that his trial lawyers were ineffective in failing to present the claim at trial.<sup>30</sup> The Georgia Supreme Court allowed Hill to proceed on his intellectual disability claim in post-conviction proceedings in order “to avoid a miscarriage of justice,” but ordered the habeas court to evaluate it using the beyond a reasonable doubt standard.<sup>31</sup> On remand, the habeas court found that Hill had proven his intellectual functioning deficits beyond a reasonable doubt but could not satisfy the same burden of proof with regard to his adaptive functioning deficits.<sup>32</sup> One month after the court’s order, the United States Supreme Court decided *Atkins*.<sup>33</sup> Hill moved for reconsideration, and the habeas court ruled that in light of *Atkins*, Hill was entitled to a jury’s consideration of intellectual disability<sup>34</sup> using the preponderance of the evidence standard.<sup>35</sup> Specifically, the court ruled that the beyond a reasonable doubt standard “creat[ed] ‘an extremely high likelihood of erroneously executing mentally retarded defendants by placing almost the entire

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29. *Hill I*, 498 S.E.2d 52, 53–54 (Ga. 1998).

30. *Id.*

31. *Id.*

32. Order at 4–6, *Hill v. Head*, No. 94-V-216 (Ga. Super. Ct. Butts Cty. May 13, 2002). The court’s finding that Hill could not meet the second criteria for intellectual disability—deficits in adaptive functioning—relied on, among other things, the fact that Hill had held various jobs and provided for his family—things that people with intellectual disability in the mild range can do. *See, e.g.*, U.S. DEPT. EDUC., NAT’L CTR. FOR SPECIAL EDUC. RESEARCH, THE POST-HIGH SCHOOL OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 8 YEARS AFTER HIGH SCHOOL 55 (2011), <https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf> (noting that 76.2% of people identified as intellectually disabled by the school system had been employed at some point since high school). That people with intellectual disability cannot hold jobs or provide for their family members are among common, and unfounded, stereotypes about this population. AM. ASS’N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER’S GUIDE: INTELLECTUAL DISABILITY 25–26 (11th ed. 2012) [hereinafter AAIDD USER’S GUIDE 2012].

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

34. The court ordered a jury trial in light of the United States Supreme Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Order on Petitioner’s Motion for Reconsideration of Denial of Habeas Corpus Relief at 6, *Hill v. Head*, No. 94-V-216 (Ga. Super. Ct. Butts Cty. Nov. 19, 2002).

35. *Id.* at 13.

risk of error upon the defendant.”<sup>36</sup> The court expressed concern about the beyond a reasonable doubt standard, given Hill’s placement fell within the mild range of intellectual disability, as opposed to the moderate or severe ranges.<sup>37</sup> Thus, the court found Hill’s was an “exceptionally close” case putting him at “special risk” for an erroneous determination.<sup>38</sup> In contrast, the habeas court found that Hill met the criteria for intellectual disability by a preponderance of the evidence.<sup>39</sup> On appeal, the Georgia Supreme Court rejected the habeas court’s adoption of the *Fleming*-like procedure and affirmed its prior, pre-*Atkins* holding that the beyond a reasonable doubt standard applied to all defendants tried after the statute’s effective date.<sup>40</sup>

Warren Hill then turned to the federal courts. Before a divided panel of the United States Court of Appeals for the Eleventh Circuit, Hill prevailed on his claim that Georgia’s beyond a reasonable doubt standard of proof violated the Eighth Amendment’s categorical prohibition of the death penalty for people with intellectual disability, as the standard “necessarily will result in the deaths of mentally retarded individuals.”<sup>41</sup> On rehearing en banc, the Eleventh Circuit reversed, finding that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) the Georgia court’s holding was not “contrary to, or an unreasonable application of, the controlling Supreme Court precedent.”<sup>42</sup> The court emphasized that given the very strict deference due to state court decisions under AEDPA, Hill’s case was the improper vehicle for the court to be considering a constitutional challenge to Georgia’s beyond a reasonable doubt standard of proof:

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36. *Hill v. Schofield (Hill III)*, 608 F.3d 1272, 1275 (11th Cir. 2010) (quoting trial court order), *rev’d en banc*, *Hill v. Humphrey (Hill IV)*, 662 F.3d 1335 (11th Cir. 2011).

37. *Id.*

38. *Id.*

39. Order on Petitioner’s Motion for Reconsideration of Denial of Habeas Corpus Relief at 9, *Hill v. Head*, No. 94-V-216 (Ga. Super. Ct. Butts Cty. Nov. 19, 2002).

40. *Hill II*, 587 S.E.2d 613, 620–21 (Ga. 2003)

41. *Hill III*, 608 F.3d at 1277.

42. *Hill IV*, 662 F.3d at 1360.

If the standard of proof Georgia has adopted for claims of mental retardation is to be declared unconstitutional, it must be done by the Supreme Court in a direct appeal, in an appeal from the decision of a state habeas court, or in an original proceeding filed in the Supreme Court.<sup>43</sup>

In rejecting Hill's claims, the majority took issue with the dissent's finding that Georgia's statute effectively foreclosed *Atkins* relief to capital litigants.<sup>44</sup> The court found:

[N]o evidence in this record to support the proposition that the reasonable doubt standard triggers an unacceptably high error rate for mental retardation claims. Whether a burden of proof scheme will result in an unacceptably high error rate is, in part, an empirical question that we are ill-equipped to measure in the first instance. *There is no data on this question in this record.*<sup>45</sup>

The U.S. Supreme Court denied certiorari review, thereby exhausting Hill's appeals.<sup>46</sup> The State of Georgia scheduled his execution.<sup>47</sup> Seeing the news of Hill's imminent execution, psychologist Thomas Sachy, who had testified for the prosecution in earlier proceedings that Hill did not meet the criteria for intellectual disability, contacted Hill's attorney.<sup>48</sup> Dr. Sachy was concerned that he had made an error in his prior diagnosis due to lack of experience. Upon closer review, he found that Hill did meet the criteria.<sup>49</sup> Dr. Sachy's new determination led two other State experts to reconsider their prior opinions rejecting a diagnosis of intellectual disability for

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43. *Id.* at 1361.

44. *See id.* at 1356.

45. *Id.* (emphasis in original).

46. *Hill v. Humphrey (Hill V)*, 132 S. Ct. 2727 (2012).

47. Press Advisory, Att'y Gen. Samuel S. Olens, Ga. Dept. of Law, Execution Date Set for Warren Lee Hill, Convicted of Murdering a Fellow Prison Inmate (Jan. 16, 2015), <http://law.georgia.gov/press-releases/2015-01-20/execution-date-set-warren-lee-hill-convicted-murdering-fellow-prison>.

48. *In re Hill (Hill VI)*, 715 F.3d 284, 288–89 (11th Cir. 2013).

49. *Id.*

Hill.<sup>50</sup> Now all three State experts agreed that Hill did, in fact, qualify for the diagnosis.<sup>51</sup> Hill filed a successive habeas petition in state court with this new information.<sup>52</sup> Unsuccessful, he again sought federal review, but his claims were rejected.<sup>53</sup> Hill then sought again to file a successive habeas petition in light of the Supreme Court's decision in *Hill v. Florida*.<sup>54</sup> Again, his efforts were unsuccessful.<sup>55</sup> Despite widespread pleas from mental health advocates, the American Bar Association, former President Jimmy Carter, the Vatican, the U.S. delegation of the European Union, and countless others, the Georgia Board of Pardons and Paroles denied clemency.<sup>56</sup> Georgia executed Warren Hill on January 27, 2015, though every mental health expert who evaluated him agreed that he was a man with an intellectual disability.<sup>57</sup>

### *C. Current Arguments Against The Statute—And Why Its Impact Matters*

While *Atkins* left to the states the question of how to implement its prohibition against execution of people with intellectual disability, that opening does not provide the states with license to violate the Eighth Amendment by allowing such death sentences and executions to occur.<sup>58</sup> Georgia's GBMR statute, and its accompanying standard of proof, raise the thorny question whether a procedure ostensibly used to implement *Atkins*'s holding<sup>59</sup> might be so severe, or flawed,

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50. *Id.*

51. *Id.* at 303.

52. *Id.* at 248.

53. *Id.* at 301.

54. *Hill v. Florida*, 134 S. Ct. 1986, 2001 (2014); *In re Hill (Hill VII)*, 777 F.3d 1214, 1221 (11th Cir. 2015).

55. *Hill VII*, 777 F.3d at 1226.

56. Rhonda Cook, *Georgia Executes Intellectually Disabled Man*, ATLANTA J.-CONST. (Jan. 27, 2015, 8:16 PM), <http://www.myajc.com/news/georgia-executes-intellectually-disabled-man/nVPnhYjGDYir3B45jKuF6N/>.

57. *Id.*

58. *Hill IV*, 662 F.3d 1335, 1370 (11th Cir. 2011) (Barkett, J., dissenting) (“[A] State cannot create procedures that effectively eviscerate a substantive constitutional right, but rather ‘must provide procedures which are adequate to safeguard against infringement of [the] constitutionally protected right [.]’” (quoting *Speiser v. Randall*, 357 U.S. 513, 521 (1958))).

59. Although Georgia's statute was enacted before *Atkins* was decided, the *Atkins* Court's decision to leave procedures for implementing its holding to the states has since been used on multiple occasions

that it fails to screen out those who are, under *Atkins*, ineligible for the death penalty.

In recent years, the Court has made clear that its deference to states in *Atkins* was not intended to allow any conceivable state procedure for assessing intellectual disability in capital cases. And, it has demonstrated a willingness to correct states that have taken that license too far. For example, in *Hall v. Florida*, the Court held that, as interpreted by that state's highest court, a Florida law that foreclosed further exploration of a capital defendant's intellectual disability if his IQ score was higher than 70 violated the Eighth Amendment.<sup>60</sup> The Florida Supreme Court interpreted Fla. Stat. § 921.137(1) to mean that “a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.”<sup>61</sup> Of concern to the Court was the fact that a defendant scoring above the mandatory IQ score cutoff of 70 would be precluded—and thus the sentencer precluded from considering—“substantial and weighty evidence of intellectual disability” that the medical community accepts as probative of intellectual disability, including for defendants with an IQ over 70.<sup>62</sup> The Court held that Florida's “rigid rule” “create[d] an *unacceptable risk* that persons with intellectual disability will be executed” and was therefore unconstitutional.<sup>63</sup>

The *Hall* Court also noted that a significant majority of states chose to implement *Atkins* by taking the “standard error of measurement” (SEM) into account in assessing intellectual disability.<sup>64</sup> Because an individual's IQ score on any given exam may fluctuate for various reasons, the Court recognized “the reality that an

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to justify the constitutionality of the Georgia statute. See, e.g., *Hill IV*, 662 F.3d at 1347–48 (explaining that because *Atkins* expressly left the procedures for determining “mental retardation” to the states, it provides no support for Hill's argument that Georgia's standard is unconstitutional). The Court's recent decision in *Hall v. Florida*, discussed below, undermines the viability of this argument.

60. *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014).

61. *Id.* at 1994.

62. *Id.*

63. *Id.* at 1990 (emphasis added).

64. *Id.* at 1995–96.

individual's intellectual functioning cannot be reduced to a single numerical score" and that "an individual's score is best understood as a range of scores on either side of the recorded score."<sup>65</sup> The Court, relying on current professional standards, also emphasized that an individual's adaptive functioning "is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability."<sup>66</sup> In contrast, Florida law was based on an understanding of IQ test scores as fixed and, on that basis, barred from court any other evidence of intellectual disability.<sup>67</sup> The Court viewed the decision by almost every other state to have considered the issue after *Atkins* to reject the strict 70 cutoff as "'objective indicia of society's standards' in the context of the Eighth Amendment" and a conclusion that Florida's standard was neither "proper [n]or humane."<sup>68</sup> In ultimately striking down Florida's standard as unconstitutional, the Court emphasized, "*Atkins* did not give [the States] unfettered discretion to define the full scope of the constitutional protection."<sup>69</sup> The Court also made clear that states must give capital defendants a "fair opportunity" to establish an exemption based on intellectual disability.<sup>70</sup> Georgia stands in a similar position of isolation as the only state to impose a beyond a reasonable doubt standard to determine intellectual disability in the capital context.

In two more recent cases, the Supreme Court has pushed back on overly constraining or improper state court definitions of intellectual disability. In *Brumfield v. Cain*, decided in 2015, the Court held that a Louisiana state court's rejection of the defendant's request for an *Atkins* hearing was based on an "unreasonable determination of the facts" under the federal statute governing review of such claims.<sup>71</sup>

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65. *Id.* at 1995.

66. *Hall*, 134 S. Ct. at 1991. *See* DSM-5, *supra* note 9, at 33 ("The various levels of severity are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required.").

67. *Hall*, 134 S. Ct. at 1988.

68. *Id.* at 1996 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)), 1998.

69. *Id.* at 1989.

70. *Id.* at 2001.

71. *Brumfield v. Cain*, 135 S. Ct. 2269, 2273 (Jun. 8, 2015).



The state court had based its decision in part on the fact that the defendant received an IQ test score of 75, which it believed would preclude a finding of intellectual disability; the Supreme Court held, taking into account the standard error of measurement, that such a score “was entirely consistent with intellectual disability” and did not belie an ultimate determination of the same.<sup>72</sup> The Louisiana court also concluded that the record “failed to raise any question as to Brumfield’s ‘impairment . . . in adaptive skills.’”<sup>73</sup> The Court rejected this argument as well, critiquing the state court’s characterization and interpretation of the evidence in the record.<sup>74</sup>

Just this past term, the Supreme Court decided *Moore v. Texas*, another case addressing the determination of intellectual disability for capital defendants.<sup>75</sup> In denying relief to Moore below, the Texas Court of Criminal Appeals held that the state habeas court, which found Moore’s *Atkins* claim meritorious, erred by relying on current medical standards governing intellectual disability; instead, the Court of Criminal Appeals held, the 1992 definition of intellectual disability adopted in one of its earlier cases should continue to govern *Atkins* claims in Texas death penalty cases.<sup>76</sup> The Supreme Court vacated the decision of the Texas appeals court, holding that the standard on which it relied was an “invention” of the appeals court, “untied to any acknowledged source,” and unsupported by the medical community or the Court’s precedent.<sup>77</sup> Thus, the Court held, it “creat[ed] an unacceptable risk that persons with intellectual disability will be executed.”<sup>78</sup> Citing *Hall*, the Court once again

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72. *Id.* at 2277–78.

73. *Id.* at 2279.

74. *Id.* at 2279–81.

75. *Moore v. Texas*, 137 S. Ct. 1039 (2017) .

76. *Ex parte Moore*, 470 S.W.3d 481, 486–87 (Tex. Crim. App. 2015). The Texas procedure also turns on an analysis of seven court-created factors for assessing a defendant’s adaptive functioning. *Ex parte Briseno*, 135 S.W. 1, 8 (Tex. Crim. App. 2004). These so-called *Briseno* factors, named for the Texas Court of Criminal Appeals’ decision implementing *Atkins*, have no basis in clinical standards. See Stephen Greenspan, *The Briseno Factors*, in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* 219 (Edward A. Polloway ed., 2015).

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

78. *Id.* (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014)).

emphasized that “States have some flexibility, but not ‘unfettered discretion,’ in enforcing *Atkins*’ holding.”<sup>79</sup>

The Court’s decisions in *Hall* and *Moore*, even in light of its instructions in *Atkins*, suggest that when certain procedures are implemented—whether they improperly limit the definition of intellectual disability or the evidence that can be considered in assessing intellectual disability—they create an “unacceptable risk” that some capital defendants may be executed in contravention of the Eighth Amendment’s ban on executing the intellectually disabled.<sup>80</sup> Together, these recent decisions suggest a growing concern with states’ failures to take scientific and medical standards into account in considering intellectual disability in the capital context.

Moreover, a close look at the Court’s decision in *Leland v. Oregon*<sup>81</sup> suggests that Georgia’s statute is constitutionally problematic. The Georgia Supreme Court relied on *Leland*—a case involving Oregon’s beyond a reasonable doubt standard in the context of establishing insanity—in *Stripling*, upholding Georgia’s standard in the context of proving intellectual disability.<sup>82</sup> In *Leland*, Justice Clark wrote:

Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion. While there is an evident distinction between these two rules as to the quantum of proof required, we see no practical difference of such magnitude as to be significant in determining the constitutional question we face here. . . . Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of

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79. *Id.* at 1052–53 (citing *Hall*, 134 S. Ct. at 1998).

80. *Hall*, 134 S. Ct. at 1990.

81. *Leland v. Oregon*, 343 U.S. 790 (1952).

82. *Stripling v. State*, 711 S.E.2d 665, 668 (Ga. 2011).

Rights.<sup>83</sup>

Like Oregon, Georgia is the only state to impose the standard at issue in this article and, as was the case in *Leland*, many other states require only that a defendant prove intellectual disability by a preponderance of the evidence.<sup>84</sup> There are, however, significant differences between the issue in *Leland* and that which is the focus here—to which the data revealed by this study are relevant. First, in *Leland*, the Court appeared to rely on the fact that there was no “practical difference [of any] magnitude” that resulted from the application of a higher standard.<sup>85</sup> The fact that not one defendant has successfully met this standard post-*Atkins*, as demonstrated in Part II below, suggests otherwise in the context of Georgia’s GBMR statute.<sup>86</sup>

Second, unlike the Oregon law, Georgia’s GBMR statute does involve the enforcement of a right included explicitly in the Bill of Rights—the Eighth Amendment’s prohibition on cruel and unusual punishment.<sup>87</sup> In *Leland*, the Court held that because the Oregon law did not implicate such a right, “[w]e are therefore reluctant to interfere with Oregon’s determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice.”<sup>88</sup> As others have pointed out, there is a distinction between variation in the *procedures* used to prove mental retardation, which the *Atkins* Court delegated to the states, and the *results* such procedures produce.<sup>89</sup> And as the *Atkins* Court concluded, “death is not a suitable punishment for a mentally retarded criminal.”<sup>90</sup> To the extent such a high standard of proof results in intellectually disabled defendants

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83. *Leland*, 343 U.S. at 798.

84. See note 22 and accompanying text.

85. *Leland*, 343 U.S. at 798.

86. See *infra* Part II.

87. See O.C.G.A. § 17-7-131 (2016).

88. *Leland*, 343 U.S. at 799.

89. O’Grady, *supra* note 4, at 1219 (“[Warren] Hill’s argument was focused not on the definition or procedure in and of itself, but rather was attacking the constitutionality of the *result* the procedure produces.” (emphasis in original)).

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

being executed in contravention of *Atkins*, the instant case is clearly distinguishable from *Leland*.

The question whether a procedural burden imposed by the state can lead to a constitutional violation—particularly when a fundamental right is at stake—is not a novel one. In *Cooper v. Oklahoma*,<sup>91</sup> the Court held that Oklahoma law requiring a defendant to prove his incompetence to stand trial by clear and convincing evidence violated due process.<sup>92</sup> In so holding, the Court explained, “the State’s power to regulate procedural burdens [i]s subject to proscription under the Due Process Clause if it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”<sup>93</sup> The Court also observed that Oklahoma was an outlier in “[c]ontemporary practice,” as one of only four jurisdictions in the country to require proof of incompetence by a clear and convincing standard.<sup>94</sup> As in *Cooper*, the right implicated by Georgia’s GBMR statute is fundamental; it is the Eighth Amendment’s fundamental prohibition against cruel and unusual punishments—in this case, the right of a capital defendant with an intellectual disability to be exempt from execution.<sup>95</sup> Thus, the question with regard to Georgia’s GBMR statute, as it was in *Cooper*, is whether the “State’s procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right.”<sup>96</sup> Ultimately the Court in *Cooper* concluded that because Oklahoma’s procedural rule allowed the State to try a defendant who was more likely than not incompetent to stand trial, that rule violated due process.<sup>97</sup> By definition, Georgia’s procedural rule for determining whether a capital defendant is intellectually disabled would also allow the execution of a defendant who more likely than

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91. *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

92. *Id.* at 355–56.

93. *Id.* at 367 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)).

94. *Id.* at 360.

95. *Atkins*, 536 U.S. at 307, 321 (holding that the execution of persons with intellectual disability equated to “cruel and unusual punishment” under the Eighth Amendment).

96. *Cooper*, 517 U.S. at 367–68. The State in *Cooper* argued that the clear and convincing standard “provide[d] a reasonable accommodation of the opposing interests of the State and the defendant”; the Court rejected this argument. *Id.* at 355–56.

97. *Id.* at 369.

not, under a preponderance of the evidence standard—or even substantially more likely than not, under a clear and convincing standard—was intellectually disabled. Indeed, Warren Hill was executed though a habeas court found him to have met the criteria for intellectual disability under a preponderance of the evidence standard, as described more fully below.<sup>98</sup> It is worth noting that, in *Cooper*, the State of Oklahoma conceded during oral argument that it could not require a defendant to prove his incompetence beyond a reasonable doubt.<sup>99</sup>

The beyond a reasonable doubt standard imposed by Georgia to determine death eligibility in the context of intellectual disability also stands in tension with the historical principle that “[i]n a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself.”<sup>100</sup> In *Addington v. Texas*, in the context of civil commitment proceedings, the Court recognized that “given the uncertainties of psychiatric diagnosis, [the beyond a reasonable doubt standard of proof] may impose a burden the State cannot meet and thereby erect an unreasonable barrier to needed medical treatment.”<sup>101</sup> As intellectual disability determinations involve similar uncertainties, they, too, are particularly ill-suited to the highest standard of proof in our legal system. The beyond a reasonable doubt standard of proof in Georgia places the likelihood of an erroneous judgment entirely on the defendant—on a question of life or death—and risks an execution in violation of the Eighth Amendment.

Beyond the standard of proof, Georgia also stands alone in its consideration of intellectual disability in conjunction with the guilt phase—another feature of the statute susceptible to constitutional

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98. See *infra* Part II.A.

99. *Cooper*, 517 U.S. at 355 n.7.

100. *Addington v. Texas*, 441 U.S. 418, 423–24 (1979).

101. *Id.* at 432.

challenge. In Georgia, the jury considers a defendant's culpability at the same time it considers whether the defendant meets the criteria for intellectual disability.<sup>102</sup> Unlike an insanity determination, which necessarily depends on the defendant's state of mind at the time of the crime,<sup>103</sup> a defendant's state of mind at the time of the crime is not relevant to the determination of intellectual disability.<sup>104</sup> Generally speaking, intellectual disability is a lifelong, chronic condition.<sup>105</sup> Unlike an insanity determination, in which it is possible for a defendant to be insane at the time of the crime but not necessarily before or after the commission of the crime, a defendant with intellectual disability will have the condition before, during, and after the crime. For the jury to consider both issues in tandem also departs from accepted clinical standards.<sup>106</sup> The AAIDD instructs mental health practitioners not to use prior criminal acts to determine a defendant's level of adaptive functioning for two reasons: "First, there is not enough available information; second, there is a lack of normative information."<sup>107</sup> Courts, too, have followed this consensus in the scientific community that past criminal behavior should have

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102. O.C.G.A. § 17-7-131(c)(3) (2016).

103. See O.C.G.A. § 16-3-2 (2016) ("A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence."); O.C.G.A. § 17-7-131 (providing that the defendant may be found "not guilty by reason of insanity at the time of the crime" if he meets the criteria of Code section 16-3-2 or 16-3-3 at the time of the commission of the crime).

104. See O.C.G.A. § 17-7-131.

105. DSM-5, *supra* note 9, at 39.

106. See generally AM. ASS'N ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, USER'S GUIDE: MENTAL RETARDATION (10th ed. 2007) [hereinafter AAIDD USER'S GUIDE 2007].

107. *Id.* at 22; see also Stephen Greenspan & Harvey N. Switzky, *Lessons from the Atkins Decision for the Next AAMR Manual*, in WHAT IS MENTAL RETARDATION? IDEAS FOR AN EVOLVING DISABILITY IN THE 21<sup>ST</sup> CENTURY 287 (Harvey N. Switzky & Stephen Greenspan eds., 2006). Both the American Board of Professional Neuropsychology and the National Academy of Neuropsychology have issued recommendations that the determination of intellectual disability be made independent of the crime, as "such issues are not consistent with established clinical and scientific procedures for the diagnosis of mental retardation." Letter on Behalf of Board of Directors from Leslie D. Rosenstein, Co-Dir. of Prof'l Affairs and Info. Office, Nat'l Acad. of Neuropsychology (Mar. 18, 2003) (on file with author); Letter from Robert J. McCaffrey, Pres. of Am. Bd. of Prof'l Neuropsychology (Mar. 19, 2003) (on file with author). These professional bodies recognize that the facts of the offense are almost certain to distract the factfinder from considering whether the defendant meets the criteria for intellectual disability and can only serve to bias the process.

little, if any, bearing on the assessment of intellectual disability.<sup>108</sup> The jury's determination of guilt along with a claim of intellectual disability creates a substantial risk that the highly prejudicial evidence concerning the capital crime will distort the jury's decision on intellectual disability.<sup>109</sup>

## II. Study: GBMR in Georgia

The study discussed herein is the first to document, to the extent possible, capital defendants' inability in Georgia to meet the beyond a reasonable doubt standard required to justify exemption from the death penalty on the basis of intellectual disability. Part II.A provides a brief contextual description of the need for such a study,<sup>110</sup> and Part II.B describes the methodology employed in undertaking the project.<sup>111</sup> Part II.C describes the findings from the study, including confirmation, based on the best documentation obtainable over a two-year period of data collection, that no defendant has proven to a jury his intellectual disability beyond a reasonable doubt in the post-*Atkins* period and only one defendant has been able to prove her intellectual disability to a jury beyond a reasonable doubt in the nearly thirty-year history of the statute.<sup>112</sup>

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108. See *Hill v. Anderson*, No. 4:96 CV 00795, 2014 WL 2890416, at \*26 (N.D. Ohio June 25, 2014) (citing *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989)) (“[A] defendant could be intellectually disabled and have sufficient insight and planning ability to deliberately kill.”); *Brumfield v. Cain*, 854 F. Supp. 2d 366, 395–96 (M.D. La. 2012) (“In assessing the weight to be given to criminal facts, this Court lends great credence to the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business.”); *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1346 n.28 (N.D. Ala. 2006).

109. In approving Georgia's bifurcated procedure in capital cases, the Court recognized the high potential for prejudice when the jury decides two distinct legal issues in tandem:

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

*Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

110. See *infra* Part II.A.

111. See *infra* Part II.B.

112. See *infra* Part II.C.

### A. *Need for the Study*

Until now, there has not been a comprehensive empirical assessment of the application of Georgia's GBMR statute in its nearly thirty-year history. The Eleventh Circuit's divided opinion in *Hill v. Humphrey* considering the constitutionality of the statute highlighted the need for such an assessment.<sup>113</sup> In her dissenting opinion from the en banc court's opinion, Judge Rosemary Barkett conducted a review of published Georgia state court cases and identified twenty-two reported murder cases involving intellectual disability claims.<sup>114</sup> Of those cases, she found that only one defendant, Christopher Lewis, had ever "successfully established his mental retardation beyond a reasonable doubt" in post-conviction proceedings before a judge, not a jury.<sup>115</sup>

There are important distinctions between the Lewis case and the cases included in this study. First, in terms of the factfinder, scholars have observed that juries may be "harsher in determinations of intellectual disability [than judges] because—in the context of a horrible crime—judges are more able to set aside their feelings and correctly apply a legal standard than jurors."<sup>116</sup> Second, in terms of the procedural posture, unless trial counsel misses evidence of a defendant's intellectual disability—arguably providing the basis for an ineffective assistance of counsel claim—most defendants will raise a claim of intellectual disability at the trial level before a jury,

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113. Judge Frank Hull, who authored the en banc opinion, also emphasized the lack of empirical data during oral argument. Oral Argument at 8:11, *Hill IV*, 662 F.3d 1335 (11th Cir. 2011) (No. 08-15444) (on file with author) (noting that the court had before it "no empirical data whatsoever with regard to the effect of the burden of proof").

114. *Hill IV*, 662 F.3d 1335, 1375–76, n.18 (11th Cir. 2011) (en banc) (Barkett, J., dissenting). These 22 cases included intellectual disability claims raised in both trial and post-conviction proceedings. In 13 of those cases, the jury rejected a GBMR verdict at trial, including Calvin Wayne Foster, Jerry Heidler, Larry Jenkins, Warren King, William Lyons, Winston Mosher, Willie Palmer, Eric Perkinson, Billy Raulerson, Alphonso Stripling, Jorge Torres, and Marcus Anthony Williams. All but the case of Calvin Wayne Foster are addressed below, as the State did not seek the death penalty against Foster. Research for this article revealed additional cases in which juries rejected GBMR beyond these thirteen, where the result would not have been evident from the published opinion alone, and where published opinions are not yet available.

115. *Hill IV*, 662 F.3d at 1376 n.19 (Barkett, J., dissenting).

116. John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily C. Paavola, *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, 411 (2014).



not a judge. Defendants raising a claim of intellectual disability during post-conviction proceedings will likely have a significant advantage over those attempting to convince a jury during the guilt phase of trial that they are intellectually disabled.

In response to Judge Barkett's analysis, the majority cited several reported decisions, in addition to *Lewis*, purporting to reveal that defendants in Georgia have successfully met the beyond a reasonable doubt burden of proof in establishing claims of intellectual disability.<sup>117</sup> But the majority's analysis was flawed in several respects. First, in only one case cited by the majority, that of Vernessa Marshall, did the jury find the defendant guilty but mentally retarded beyond a reasonable doubt in a death penalty trial—and then only in a case of felony murder.<sup>118</sup> Relying on a Georgia Supreme Court opinion in his codefendant's case, the majority also cited the case of Gary Lee Griffin in Macon County, as a case in which a defendant was successful in meeting the beyond a reasonable doubt standard to show that he was intellectually disabled.<sup>119</sup> In fact, the Georgia Supreme Court's observation that Griffin had been "adjudicated mentally retarded" was factually incorrect. Griffin's intellectual disability was never adjudicated in a contested proceeding before a judge or jury; his case was resolved by plea agreement.<sup>120</sup> The remaining three cases cited by the court—*Chauncey*, *Laster*, and *Moody*—all involved non-capital charges.<sup>121</sup> The fact that defendants in a handful of non-capital cases have successfully obtained GBMR verdicts does not establish the possibility of success in a capital trial—a fundamentally unique proceeding.<sup>122</sup> A GBMR verdict does not differ in any meaningful

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117. *Hill IV*, 662 F.3d at 1357.

118. *Marshall v. State*, 583 S.E.2d 884, 886 (Ga. 2003). Like the dissent, the majority also points to the *Lewis* case as an example of a successful GBMR outcome, but again, the determination that *Lewis* met the criteria for intellectual disability beyond a reasonable doubt occurred in post-conviction proceedings, not before a jury.

119. *Hill IV*, 662 F.3d at 1357 (citing *Walker v. State*, 653 S.E.2d 439 (Ga. 2007)).

120. *Felony or State Misdemeanor Sentence: Plea of Guilty But Mentally Retarded*, *State v. Griffin*, No. 99R-218 (Ga. Super. Ct. Macon Cnty. Aug. 25, 2000).

121. *See Hill IV*, 662 F.3d at 1357. Part III will consider the uniqueness of the Vernessa Marshall case in closer detail. *See infra* Part III.

122. *See Gregg v. Georgia*, 482 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind

way from a guilty verdict in a non-capital felony trial.<sup>123</sup> Prosecutors thus have little reason, if any, to oppose the verdict, and occasionally argue in favor of it. In a death penalty trial, in contrast, the GBMR verdict can mean the difference between a life or death sentence. Second, the majority opinion dismissed the cases cited by the dissent in which a life sentence was ultimately imposed.<sup>124</sup> Ignoring these cases sidesteps the fact that the factfinders in these cases still rejected GBMR verdicts. Whether the defendant ultimately received a life sentence for another reason has no bearing on the question of whether Georgia's statutory procedure adequately protects people with intellectual disability from execution.

Given this incomplete information, this study aims to answer the call in the *Hill* litigation to provide a comprehensive analysis of jury decisions at the trial level when the GBMR option was submitted.<sup>125</sup> This study provides, for the first time, an accounting of how Georgia defendants have been unable to overcome the very high burden of establishing intellectual disability before a jury at the guilt phase of a capital trial—a finding that has never occurred in a case of intentional murder.

### *B. Methodology*

To complement the review of published cases referenced in Judge Barkett's dissenting opinion in *Hill*, this study set out to assess the

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from any other punishment imposed under our system of criminal justice.”). Moreover, the selection of capital jurors based on their willingness to impose the death penalty—a process known as “death qualification”—results in juries more likely to convict than those in non-capital cases. *See, e.g.,* Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 385 (James R. Acker et al. eds., 2003); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 *BUFF. L. REV.* 469, 494–95 (1996); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 *LAW & HUM. BEHAV.* 121 (1984).

123. *See* O.C.G.A. § 17-7-131(g)(1) (2016). While the statute provides that a defendant found to be GBMR, once transferred to the Department of Corrections, “shall be evaluated then treated, if indicated . . . in such manner as is psychiatrically indicated for his or her . . . mental retardation,” in practice, the Department of Corrections evaluates all new prisoners in the same manner. *See* E-mail from Bryan Wilson, Assistant Counsel, Ga. Dep't of Corr. (July 10, 2013) (on file with author).

124. *Hill IV*, 662 F.3d at 1356.

125. *Cf. id.* at 1357 (“[T]he dissent’s focus on only reported appellate decisions skews its analysis.”).

frequency of defendant success in satisfying the beyond a reasonable doubt standard when attempting to establish intellectual disability before a jury at the guilt phase of trial, in contrast to judicial determinations of intellectual disability in post-conviction proceedings.<sup>126</sup>

As there is no official database of capital cases litigated or tried in Georgia, a database of capital cases maintained by the Georgia Capital Defender Office (GCDO) served as a starting point for the dataset.<sup>127</sup> As of July 9, 2014, that spreadsheet included 1,168 cases.<sup>128</sup> GCDO is a part of the Georgia Public Defender Council, the statewide agency responsible for providing constitutionally guaranteed representation to indigent defendants.<sup>129</sup> The database maintained by GCDO included every case death-noticed in Georgia of which GCDO had knowledge, dating as far back as 1976.<sup>130</sup>

Because the GBMR determination is only relevant in cases where guilt was determined in the course of trial, as opposed to those resolved by plea, the database was filtered to isolate only those capital cases that went to trial. Only those cases tried by a jury were selected for analysis, primarily to assess how juries apply the beyond a reasonable doubt standard—given the defendant’s entitlement under the Sixth Amendment to a jury determination of guilt, but also given practical considerations regarding data collection.<sup>131</sup> Additionally, the study omits cases tried before the GBMR statute took effect on July 1, 1988.<sup>132</sup> Any post-conviction remands under

126. The distinction is key in that a capital defendant seeking to prove intellectual disability for the first time at trial faces an even greater hurdle: at trial, a jury considers together a defendant’s guilt and intellectual disability, while a post-conviction determination of intellectual disability is divorced from the jury’s determination of guilt. *See supra* Part II.A.

127. No other state agency maintains such a list. The Capital Defender database included information about all capital cases known to be litigated in Georgia, whether or not the defendant was represented by the Office of the Capital Defender.

128. On file with author.

129. *See Georgia Indigent Defense Act of 2003*, O.C.G.A. § 17-12-1(c) (2016).

130. On file with author.

131. The explicit nature of the jury verdict form—specifying as a binary matter whether GBMR was found or rejected—helps to demonstrate whether GBMR was actually argued and available to the jury as an option, and could therefore provide a clear illustration of the information sought.

132. O.C.G.A. § 17-7-131(j) (2016) (“In the trial of any case in which the death penalty is sought which commences on or after July 1, 1988, should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged

*Fleming v. Zant*<sup>133</sup> were excluded from the study because, as described in Part I.A, defendants tried before the effective date of the Georgia GRMR statute were held to a preponderance of the evidence and not a beyond a reasonable doubt standard.<sup>134</sup> Once filtered to eliminate cases tried by a judge or otherwise resolved—for example, *nolle prossed* or resolved by plea—the resulting number of cases was 379.<sup>135</sup>

Once those cases relevant to the inquiry were isolated, in October 2014, a form letter was sent to the clerk of court in each of Georgia's 159 counties, seeking the following information: (1) confirming that the cases specified in each letter (based on the dataset discussed above, and listed individually for each county) included all of the trials in that county from 1988 to the present in which the District Attorney's office sought the death penalty (regardless of whether or not a death sentence was ultimately imposed); and (2) with respect to each of the above trials, and any that may have been inadvertently excluded, (a) a copy of the jury's verdict form from both the guilt phase and sentencing phase of trial and (b) the formal disposition sheet signed by the judge and reflecting the actual sentence imposed.

Inquiries were sent to court clerks and follow up was conducted on several different occasions for those counties that did not respond initially. Many of the clerks responded that, either as a matter of policy or as a matter of time and resources, they were unable to search for the cases and documentation requested. Therefore,

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but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.”). The decision to include or exclude a case was based on the date of death notice or date of disposition; where the precise date was unclear, the case was included in the relevant dataset. Similarly, where case information was incomplete—for example, if it was initially unclear whether the case was resolved by plea or trial, or whether the death notice had been withdrawn—the case was initially included in the relevant dataset, although it may ultimately have been screened out due to a failure to meet the relevant criteria.

133. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989).

134. *Id.* at 342–43.

135. The initial dataset of capital cases initially believed to have been tried by a jury since 1988 was larger; however, once documentation was received, cases were categorized and additional cases were eliminated as bench trials or as pleas or alternate dispositions, including those that were *nolle prossed*. In the process of obtaining documentation, lawyers or clerks indicated that four additional cases included in this number were resolved by plea, but documentation of the same was not obtainable. This dataset does include cases for which the ultimate means of resolution remains unknown.

graduate research assistants traveled to many of the counties to collect case documentation in person.

In addition to reviewing the documentation obtained in individual cases, extensive searches through online legal databases, such as Westlaw and Lexis, were conducted looking for cases that might suggest that intellectual disability was a factor in the case at trial. These search results were then cross-checked against our own dataset to ensure that this article reviewed all capital cases in which intellectual disability—and thus a possible verdict of GBMR—might have been at issue.

We obtained either the verdict form, disposition sheet, or both forms in all but seventy-four cases.<sup>136</sup> Of those cases, as of the last date confirmed with a court clerk, nineteen cases remained open. Of the remaining fifty-five cases, we were able to obtain some information regarding the sentence imposed from the Georgia Department of Corrections website, county online docket systems, news searches, published opinions, and contact with attorneys who worked on the case or who had direct knowledge of the case. Ultimately, we were able to confirm in all of the seventy-four cases that a GBMR verdict was not returned by the jury.

Five of the fifty-five cases resulted in a verdict of not guilty.<sup>137</sup> We were informed of the verdict in two instances by the court clerk, in two other instances by the online docket, and in the fifth, by the lawyer who tried the case. In the latter case, where we were informed of the verdict by the lawyer, the lawyer also reported that intellectual disability was not an issue in the case.

We determined that of the remaining fifty cases in which neither the verdict form nor the disposition had been obtained, only fourteen defendants ultimately received a life sentence,<sup>138</sup> which is the only

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136. In three other cases, we obtained documentation in the form of orders making clear that the case had been resolved in some way that did not implicate a GBMR verdict. In several cases, the clerk stated that he or she was unable to locate the file.

137. Thus, the vast majority of cases included in the 379 did not involve those cases “where a defendant offers evidence of mental retardation, but also proves he is innocent of the crime.” *Hill IV*, 662 F.3d 1335, 1357 (11th Cir. 2011).

138. As determined from published opinions and offender searches conducted on the Georgia Department of Corrections website: <http://www.dcor.state.ga.us/GDC/Offender/Query>. Offenders were

sentence that would have been imposed if a jury had found the defendant GBMR.<sup>139</sup> Based on conversations with lawyers handling the case and with court clerks, as well as news media accounts, we discovered that in five cases the prosecution ultimately did not seek the death penalty or that intellectual disability was not at issue in the case. In an additional case, the warden's Eleventh Circuit appeal brief revealed that the defendant pled guilty to malice murder in exchange for the State's agreement not to seek the death penalty.<sup>140</sup> In the remaining eight cases, upon closer examination, we learned that four defendants entered guilty pleas—two of which were entered after the date on which we received the original dataset;<sup>141</sup> in three cases, the jury found the defendant guilty, not GBMR, and a life sentence was imposed;<sup>142</sup> and in one additional case, the jury imposed a life without parole sentence at trial.<sup>143</sup>

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located by searching by name and county of conviction.

139. O.C.G.A. § 17-7-131(j) (2016) (“[S]hould the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.”). Seventeen resulted in death sentences and 19 resulted in life without parole sentences.

140. Brief on Behalf of Respondent/Appellee at 2, *Hardwick v. Lewis*, 35 Fed. Appx. 857 (11th Cir. 2002) (No. 01-15727), 2002 WL32160869.

141. The first defendant was Kiendal Tootle in Tattnell County. See Brief of Appellant at 2, *Berry v. State*, 481 S.E.2d 203 (Ga. 1997) (No. S96A1340), 1996 WL33482275. The second defendant was Shannon Maxwell in Stephens County. See Charlie Bauder, *Toccoa Man Pleads Guilty in 2012 Murder*, WNEG (Feb. 12, 2015),

<http://wnegradio.com/toccoa-man-pleads-guilty-in-2012-murder/>. The third defendant was Wardell Deloun White in Stephens County. See MJ Kneiser, *Suspect in Eastanolle Double Murder Pleads Guilty*, WLHR (Aug. 14, 2015),

<http://www.921wlhr.com/suspect-in-eastanolle-double-murder-pleads-guilty/>. The fourth defendant was Troy Tyree, who was originally sentenced to death. *Tyree v. State*, 418 S.E.2d 16, 17 (Ga. 1992). We learned from his attorney that he pleaded guilty to life with parole after the Georgia Supreme Court reversed his case.

142. The first was that of Johnnie Dee Jones in his second trial in Lincoln County. See Sandy Hodson, *Palmer's Lawyers Still Trying to Move Trial*, AUGUSTA CHRON. (May 19, 1997), [http://old.chronicle.augusta.com/stories/1997/05/19/met\\_208558.shtml](http://old.chronicle.augusta.com/stories/1997/05/19/met_208558.shtml). The second was that of Maurice Fleming in Liberty County. See *Fleming v. State*, 497 S.E.2d 211, 245 n.1 (Ga. 1998). The third was that of William Webster Shields in DeKalb County. See *Shields v. State*, 496 S.E.2d 719, 719 n.1 (Ga. 1998). In Shields's case, the DeKalb County court clerk told us that she could not find him in the system, either on the computer, or in a book with all cases since 1987.

143. The defendant was Clinton Furlow in Spalding County. See *Furlow v. State*, 537 S.E.2d 61, 63 n.1 (Ga. 2000).

### C. Results

The final results of the study confirmed what was thought anecdotally to be true about the impact of Georgia's beyond a reasonable doubt standard in the GBMR context: not one capital defendant in Georgia has successfully obtained a jury verdict of GBMR in a case of intentional murder in the nearly thirty-year history of the exemption. No capital defendant has been found GBMR by a jury at trial in the post-*Atkins* period. Prior to *Atkins*, only one defendant—a woman, Vernessa Marshall in Clarke County—met the standard in a felony-murder case, in other words, murder with no intent to kill, before a jury and thus established that she was exempt from the death penalty under Georgia's statute.<sup>144</sup>

In thirteen cases, GBMR was listed as an option on the jury verdict form, but was not found by the jury.<sup>145</sup> In one of those cases, that of Raymond Burgess of Douglas County, the trial judge identified intellectual disability as a mitigating circumstance,<sup>146</sup> but the jury ultimately found Burgess guilty and sentenced him to death.<sup>147</sup> In one other case, that of Jorge Torres of Evans County, a separate form was

144. *Marshall v. State*, 583 S.E.2d 884, 886 (Ga. 2003).

145. Raymond Burgess, Douglas County (sentenced to death); Robert Fielding, Richmond County (sentenced to life without parole); Adrian Hargrove, Richmond County (sentenced to death); Jerry Heidler, Toombs County (sentenced to death); Garey Kinder, Bibb County (sentenced to life without parole); William Lyons, Monroe County (sentenced to life without parole); Winston Mosher, Camden County (sentenced to life); Eric Perkinson, Bartow County (sentenced to death); Billy Raulerson, Jr., Ware County (tried in Chatham County) (sentenced to death); Bobby Lee Smith, Dougherty County (sentenced to life); Brandon Tarver, Washington County (tried in Toombs County) (sentenced to life without parole); Rodney Young, Newton County (sentenced to death). Jury verdict forms for these cases are on file with the author.

In the case of Warren King, it was unclear from the verdict form alone whether GBMR was an option for the jury. The jury verdict form left blank spaces for the jury to write its verdict as to guilt; with regard to the felony-murder charge, the form specifies that “[i]f the verdict is ‘guilty but mentally retarded’ or ‘guilty’ state the underlying felony.” The jury verdict form for this case is on file with the author. The published opinion also reveals that GBMR was submitted to the jury. *King v. State*, 539 S.E.2d 783, 789 (Ga. 2000). Therefore, this case is included in the count of those in which GBMR was an option but was rejected by the jury.

146. The trial judge also indicated in his report that an examination of the defendant had indicated possible mental retardation and an IQ of 69. Report of the Trial Judge, *State v. Burgess*, No. CR90-1002 (Ga. Super. Ct. Douglas Cty. Feb. 28, 1994).

147. *Burgess v. State*, 450 S.E.2d 680, 686 (Ga. 1994).

submitted to the jury regarding intellectual disability, and the jurors found “[t]hat the defendant is not Mentally Retarded.”<sup>148</sup>

This tally of fourteen cases only includes the most recent verdict and disposition forms, based on the availability of documentation. From an exhaustive search of published opinions and conversations with counsel, four additional cases—those of Larry Jenkins,<sup>149</sup> Marcus Anthony Williams,<sup>150</sup> Willie Palmer,<sup>151</sup> and Alphonso Stripling<sup>152</sup>—in which a jury rejected a finding of GBMR were discovered. In the cases of Palmer,<sup>153</sup> Stripling,<sup>154</sup> and Williams,<sup>155</sup> that verdict was followed by subsequent proceedings.

The number of instances in which GBMR was submitted as an option to the jury is likely higher than was revealed by this study, given limitations in the documentation available for collection in each case.<sup>156</sup> Even with such limitations, however, the study would not have omitted cases in which a jury *found* a defendant to be intellectually disabled beyond a reasonable doubt and thus exempt from the death penalty.<sup>157</sup> Due to inconsistency in the jury verdict

148. Jorge Torres, Evans County (sentenced to life without the possibility of parole). The other option, rejected by the jury, was “[t]hat the defense has established that the defendant is Mentally Retarded beyond a reasonable doubt.” Verdict, *State v. Torres*, No. 98R-147 (Ga. Super. Ct. Evans Cty Feb. 26, 1999).

149. *Jenkins v. State*, 498 S.E.2d 502, 512 (Ga. 1998) (noting that Jenkins argued for a directed verdict on his intellectual disability following the close of the culpability phase).

150. *Williams v. State*, 426 S.E.2d 348, 349 (Ga. 1993) (noting the “defense’s position [at trial] that the defendant is mentally retarded”).

151. *Palmer v. State*, 517 S.E.2d 502, 504–05 (Ga. 1999) (noting that, at trial, Palmer attempted to prove intellectual disability and the jury recommended a sentence of death).

152. *Stripling v. State*, 401 S.E.2d 500, 503–04 (Ga. 1991) (noting that, during the guilt phase of trial, the defense argued intellectual disability, but that the jury concluded that Stripling was not intellectually disabled); *see also* *Head v. Stripling*, 590 S.E.2d 122 (Ga. 2003) (reversing in part lower court’s grant of habeas corpus), *cert. denied*, *Stripling v. Head* 124 U.S. 1070 (2004) (noting that “Stripling’s counsel presented evidence of mental illness and mental retardation” but that the jury “did not find him guilty but mentally ill or guilty but mentally retarded”). Stripling’s case was later resolved by plea and thus was not captured within our filtered sample. Final Disposition, *State v. Stripling*, No. 88CR01091 (Ga. Super. Ct. Douglas Cty Feb. 6, 2013).

153. *Schofield v. Palmer*, 621 S.E.2d 726 (Ga. 2005) (affirming grant of habeas corpus).

154. *Head*, 590 S.E.2d at 122 (Ga. 2003) (reversing in part lower court’s grant of habeas corpus), *cert. denied*, *Stripling v. Head* 124 U.S. 1070 (2004).

155. *Williams*, 426 S.E.2d at 350 (reversed and remanded for further proceedings).

156. For example, it is possible that in some of the cases resulting in death, GBMR was presented as an option and rejected by the jury, yet we were unable to obtain documentation of that fact.

157. These cases would necessarily have resulted in life sentences and all of the cases in which documentation was not received but which did result in life sentences are addressed above in Part II.B.



forms used from county to county, this study was not able to ascertain the precise number of cases in which GBMR was raised and ultimately rejected. For example, in some cases, the jury verdict form did not provide specific options from which to choose—which might include, for example, “guilty” and “guilty but mentally retarded”—but instead included a blank space for the jury to complete with its finding.<sup>158</sup> In the case of Willie Palmer, lawyers explained that GBMR was argued and rejected by the jury in two capital trials—and the published opinion following the earlier trial reveals the same<sup>159</sup>—and yet the GBMR verdict was not submitted as an option on the verdict form that was received from the court from the second trial in 2007.<sup>160</sup> Therefore, without obtaining additional documentation in each case, it is not possible to confirm whether GBMR was never provided to the jury as an option or if it was submitted to but rejected by the jury.<sup>161</sup> The author does not suspect that any GBMR jury findings were missed, however, because any verdict form revealing a jury finding of GBMR could not allow for the same ambiguity.

### III. GBMR in Practice

The absence of a single jury finding of intellectual disability in an intentional murder death penalty case in the nearly three decades of the statutory exemption, and the absence of a single jury finding of intellectual disability in any murder case post-*Atkins*, leaves little question that Georgia’s statute has failed to protect those with intellectual disability from execution as promised, and as required by

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*Cf.* Brad Schrade, *Bartow Murder Trial Will Test Ga. Penalty Law on Retardation*, ATLANTA J.-CONST., Aug. 15, 1999, at C3 (noting that by August of 1999, the GBMR defense had been invoked in 15 death penalty cases that had proceeded to trial—all of which were unsuccessful).

158. *See, e.g.*, Larry Jenkins, Wayne County (tried in Glynn County) (sentenced to life); Leicester Woodall, Jr., Glynn County (sentenced to life).

159. *Palmer v. State*, 517 S.E.2d 502, 505 (Ga. 1999).

160. The second trial has not yet been appealed, so there is no reported decision resulting from that case.

161. Moreover, because Georgia requires intellectual disability to be raised as part of the guilt phase, it may create a conflict for some defense strategies and some, who might have otherwise raised it as part of the penalty phase, may not have raised the GBMR defense as a result. Those cases obviously would not have appeared in this sample even if the defendant(s) did have some degree of intellectual disability, as there was no way of identifying such cases as part of this study.

the U.S. Constitution and Georgia constitution. Highlighting several cases where intellectual disability has been at issue, this section considers some of the practical reasons why Georgia's GBMR verdict has proven, in effect, unattainable.

Almost all *Atkins* claims involve cases of intellectual disability in the mild range.<sup>162</sup> People with intellectual disability do not have any distinguishing physical characteristics or even typical behaviors.<sup>163</sup> Proving a case of mild intellectual disability to a jury beyond a reasonable doubt is especially difficult, given the likelihood that defendants with mild mental retardation will not meet the jurors' "preconceived notions of what mental retardation looks like."<sup>164</sup> Georgia's stringent procedure thus, as Judge Barkett recognized in her dissent in *Hill*, "effectively limits the constitutional right protected in *Atkins* to only those who are severely or profoundly mentally retarded."<sup>165</sup> Prosecutors often suggest to capital juries that a defendant's degree of intellectual disability must be extreme in order to meet this burden of proof.

Several cases demonstrate in stark detail how difficult it is in practice for defendants to meet the standard set forth by Georgia law to prove intellectual disability in a capital case. Alphonso Stripling asserted a GBMR defense at his 1989 trial in Douglas County, the first defendant to raise the defense following the statute's enactment.<sup>166</sup> The defense presented two mental health experts who both agreed that Stripling met the criteria for intellectual disability, with IQ scores of 64 and 68.<sup>167</sup> The prosecution presented an expert

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162. Greenspan & Switzky, *supra* note 107, at 279; Frank M. Gresham, *Interpretation of Intelligence Test Scores in Atkins Cases: Conceptual and Psychometric Issues*, 16 APPLIED NEUROPSYCHOLOGY 91, 92 (2009); J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135, 136 (2009).

163. Olley, *supra* note 162, at 136–37.

164. Gresham, *supra* note 162, at 92.

165. *Hill IV*, 662 F.3d 1335, 1367 (11th Cir. 2011) (Barkett, J., dissenting). Indeed, the Georgia Supreme Court seems to endorse such a result. In rejecting a challenge to the burden of proof after the *Atkins* decision, the Georgia Supreme Court held that Georgia's procedure "remains within constitutional bounds" by "limit[ing] the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt." *Hill II*, 587 S.E.2d 613, 622 (Ga. 2003) (emphasis added).

166. *Stripling v. State*, 401 S.E.2d 500, 502 (Ga. 1991).

167. Order at 4–6, *Stripling v. Head*, No. 95-V-320 (Ga. Super. Ct. Butts Cty. Oct. 17, 2002).

who did not conduct psychological testing of his own, and considered the defense expert's testing to be valid, but testified that it was his "guestimate" that Stripling's intelligence instead fell in the average range.<sup>168</sup> He also opined that Stripling could not meet the criteria for intellectual disability because he could drive and because he held a job as a cook at a fast food restaurant.<sup>169</sup> The jury failed to find intellectual disability in Stripling's case.<sup>170</sup> More than thirty years after his trial and following a remand on the issue of intellectual disability in state habeas proceedings, Stripling ultimately accepted a negotiated plea to life imprisonment without the possibility of parole, without ever successfully proving his intellectual disability to a jury.<sup>171</sup>

Not long after Stripling's trial, Raymond Burgess—one of the defendants identified through the study as failing to meet the standard—also raised the GBMR defense at his capital trial in Douglas County in 1992.<sup>172</sup> Burgess demonstrated a history of IQ scores ranging from 56 to 86, with all but two scores falling below 70, and a contemporary score of 69.<sup>173</sup> Burgess scored a 65 on IQ tests administered to him in the school system in the fifth and sixth grades, and a 56 and a 62 on two different tests the following year.<sup>174</sup> He received a score of 62 on an IQ test administered years later by the Georgia Department of Family and Children Services.<sup>175</sup> He was socially promoted throughout his schooling, and at seventeen years old, was still only reading at a third-grade level.<sup>176</sup> A psychologist retained by the defense was the only mental health expert to express an opinion on Burgess's intellectual disability, and he concluded that

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168. *Id.* at 8.

169. *Id.* at 9. The habeas court recognized that these conclusions were based on inaccurate stereotypes of those with intellectual disability. *Id.*; see also AAIDD MANUAL, *supra* note 9, at 26 (listing and dispelling common stereotypes of people with intellectual disability).

170. *Stripling*, 401 S.E.2d at 502.

171. Plea Agreement, *State v. Stripling*, No. 88-1091 (Ga. Super. Ct. Douglas Cty. Feb. 6, 2013).

172. Transcript of Record at 2926–27, 2929–30, *State v. Burgess*, No. CR90-1002 (Ga. Super. Ct. Douglas Cty. Feb. 3, 1992) [hereinafter *Burgess Transcript*].

173. *Id.*

174. *Id.* at 2926–27.

175. *Id.* at 2927.

176. *Id.* at 2929.

Burgess met the relevant criteria.<sup>177</sup> The prosecution did not contest that Burgess had IQ scores below 70 in childhood.<sup>178</sup> The State presented the testimony of a psychologist who had administered IQ tests to Burgess in his teenage years, when he had obtained two scores above 70.<sup>179</sup> This witness did not have an opinion as to Burgess's intellectual disability, instead stating, "obviously retardation is not my area."<sup>180</sup> Invoking stereotypes that people with intellectual disability have distinguishing physical characteristics, the prosecution asked several lay witnesses if Burgess looked or seemed "retarded" to them.<sup>181</sup> In closing, the prosecution suggested that Burgess could not be intellectually disabled because he had filled out an employment application, could "get a job in a competitive market," and, as in Stripling's case, because he had held that job for a time and obtained a driver's license.<sup>182</sup> The prosecution also suggested that the jury was free to disregard the definitions of intellectual disability as provided in the DSM and the AAIDD manuals.<sup>183</sup> The jury rejected a GBMR verdict, and Burgess was sentenced to death.<sup>184</sup> Burgess died of natural causes in 2012, still under a sentence of death.<sup>185</sup>

Eric Perkinson submitted a GBMR defense to his jury in a high-profile capital case tried in Bartow County in 1999.<sup>186</sup> Perkinson's school records supported an intellectual disability diagnosis.<sup>187</sup> The records demonstrated a history of IQ scores below 70, adaptive functioning deficits in the mild range of intellectual disability, and

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177. *Id.* at 4069.

178. Burgess Transcript, *supra* note 172, at 5093–94.

179. *Id.* at 4815.

180. *Id.* at 4843.

181. *Id.* at 5041.

182. *Id.* at 5090, 5094.

183. *Id.* at 5077–78.

184. Burgess v. State, 450 S.E.2d 680, 696 (Ga. 1994).

185. Mitch Sneed, 'Golden Gun' Killer Burgess Dies on Death Row, DOUGLAS CTY. SENTINEL (Sept. 18, 2012), [http://www.douglascountysentinel.com/news/golden-gun-killer-burgess-dies-on-death-row/article\\_903f95a2-eac6-53b0-8c6e-e7cc5cbbb4b.html](http://www.douglascountysentinel.com/news/golden-gun-killer-burgess-dies-on-death-row/article_903f95a2-eac6-53b0-8c6e-e7cc5cbbb4b.html).

186. *Retardation May Be Defense in Trial for Carjack-Murder*, ATHENS BANNER-HERALD (Aug. 24, 1999), [http://onlineathens.com/stories/082499/new\\_0824990015.shtml#.WKNdmrYrJE4](http://onlineathens.com/stories/082499/new_0824990015.shtml#.WKNdmrYrJE4).

187. Transcript of Record at 1881, 1939, 1941, State v. Perkinson, No. CR98-882 (Ga. Super. Ct. Bartow Cty. Aug. 9–28, 1999) [hereinafter Perkinson Transcript].

eventually, a classification in special education.<sup>188</sup> An early childhood IQ score of 78 kept Perkinson out of special education in his early schooling until his teachers referred him for retesting due to his continuing academic struggles.<sup>189</sup> Years before trial, Georgia Regional Hospital, on behalf of the Georgia Department of Human Resources, determined that Perkinson met the criteria for intellectual disability.<sup>190</sup> Both of Perkinson's IQ scores, contemporaneous with trial, were in the low-to-mid 60s.<sup>191</sup> The initial expert hired by the State agreed with the defense expert that Perkinson met the criteria for intellectual disability.<sup>192</sup> The State then sought a continuance in the middle of jury selection to seek the opinion of another expert.<sup>193</sup> The psychologist they hired, employed at Georgia Regional Hospital, agreed that Perkinson's IQ score fell in the low 60s, but suspected Perkinson might not have put forth his best effort during her evaluation.<sup>194</sup> The State also presented the testimony of a psychiatrist, who briefly met with Perkinson and did not conduct additional testing of her own beyond two simple screening instruments.<sup>195</sup> Like the State's psychological expert, the psychiatrist testified she could not rule out that Perkinson met the criteria for intellectual disability, but hypothesized that Perkinson was malingering in his test results.<sup>196</sup> In closing, the prosecution attributed Perkinson's drop in IQ from his two early childhood scores above 70 to his subsequent scores below 70 in adolescence to a result of the onset of conduct disorder, though "[i]t has not been diagnosed

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188. *Id.*

189. *Id.* at 1868, 1876. Perkinson entered special education after additional testing, in which he received a 73 IQ score, but an Adaptive Behavior Scale showed substantial deficits in the intellectual disability range. *Id.* at 1877, 1879–80.

190. *Id.* at 2029.

191. *Id.* at 1937 (scores of 62 on the Kaufman Adult Intelligence Test and 66 on the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) by defense expert Dr. Dennis Herendeen); *Id.* at 1989 (score of 61 on the WAIS-III by State expert Dr. Eilender).

192. Perkinson Transcript, *supra* note 187, at 1904–05.

193. *Id.* at 2132.

194. *Id.* at 1981, 1986–88.

195. *Id.* at 2132–34, 2026.

196. *Id.* at 2003, 2009, 2019.

fully.”<sup>197</sup> Perkinson is still awaiting execution on Georgia’s death row.<sup>198</sup>

Capital defendant Willie Palmer was tried twice to verdict in a Burke County case: initially in 1997 and later in 2007, following a reversal of his conviction and death sentence due to prosecutorial misconduct.<sup>199</sup> Both times the jury rejected a GBMR verdict.<sup>200</sup> At the 1997 trial, the defense presented testimony from a psychologist who had evaluated Palmer in order to make a determination of disability for the Social Security Administration ten years prior to trial.<sup>201</sup> On that IQ test, Palmer scored a 61.<sup>202</sup> Palmer received disability benefits on the basis of this evaluation.<sup>203</sup> This score was highly consistent with Palmer’s IQ score years before from the Burke County School System—67.<sup>204</sup> An expert retained by the defense in connection with Palmer’s capital proceedings agreed that Palmer met the criteria for intellectual disability.<sup>205</sup> That expert administered a contemporary test, on which Palmer scored a 72.<sup>206</sup> The expert found that Palmer met the criteria for intellectual disability.<sup>207</sup> On cross-examination, the prosecution suggested that the cutoff score for intellectual disability was “whatever the jury decides the cut-off is going to be”—given that the statute does not specify a number—and that the jury should “end [its] inquiry” if a defendant scored between

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197. *Id.* at 2105–06. This argument is counter to clinical norms, as the two are also not mutually exclusive. *See, e.g.,* *Brumfield v. Cain*, 135 S. Ct. 2259, 2280 (2015) (questioning the relevance of anti-social personality disorder on the determination of petitioner’s intellectual disability).

198. GA. DEP’T OF CORR., INMATES UNDER DEATH SENTENCE (2017), [http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/death\\_row\\_2017.pdf](http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/death_row_2017.pdf).

199. Anne Marie Kyzer, *Death Row Inmate Seeks New Trial*, TRUE CITIZEN (Mar. 28, 2012), [http://www.thetruecitizen.com/news/2012-03-28/Front\\_Page/Death\\_row\\_inmate\\_seeks\\_new\\_trial.html](http://www.thetruecitizen.com/news/2012-03-28/Front_Page/Death_row_inmate_seeks_new_trial.html); *Georgia Death Penalty Conviction Overturned Because of Prosecutorial Misconduct*, DEATH PENALTY INFO. CTR. (Apr. 4, 2005), <http://www.deathpenaltyinfo.org/node/1404>.

200. *See infra* note 228; *Palmer v. State*, 517 S.E.2d 502, 504, 506 (Ga. 1999) (noting that the jury recommended a death sentence for each malice murder conviction, but also referencing a possible verdict of “guilty but mentally retarded”).

201. Transcript of Record at 1596–97, *State v. Palmer*, No. 96-R-43 (Ga. Super. Ct. Burke Cty. Aug. 13–24, 2007) [hereinafter *Palmer First Trial Transcript*].

202. *Id.* at 1599.

203. *Id.* at 1610.

204. *Id.* at 1605.

205. *Id.* at 1670.

206. *Id.* at 1685–86.

207. *Palmer First Trial Transcript*, *supra* note 201, at 1608.

70 and 80, because then the person would have borderline intellectual functioning, rather than an intellectual disability.<sup>208</sup>

At Palmer's second trial, every expert to opine about his intellectual disability agreed he met the criteria for intellectual disability.<sup>209</sup> As in the first trial, the defense again presented the testimony of the psychologist evaluating Palmer for the Social Security Administration, who found Palmer to be eligible for benefits on the basis of his intellectual disability.<sup>210</sup> The defense also presented the testimony of a forensic psychologist who evaluated Palmer prior to his second trial.<sup>211</sup> During this evaluation, Palmer received a Full Scale IQ score of 63 on the WAIS-III.<sup>212</sup> The psychologist testified that this current score was highly consistent with Palmer's IQ score in high school and his score received in connection with his social security assessment, both obtained decades before.<sup>213</sup> Based on interviews with Palmer and two of his sisters, a review of around thirty-five witness affidavits, school records, and standardized testing, the psychologist also found that Palmer had deficits in eight of the eleven categories of adaptive functioning, as delineated by the DSM at the time,<sup>214</sup> and that the onset of his intellectual disability occurred in the developmental period.<sup>215</sup> At age ten or eleven, Palmer was still unable to put on his shoes on the correct feet without assistance.<sup>216</sup> As a teenager, he was unable to read an analog clock.<sup>217</sup> He could not understand games other children were playing.<sup>218</sup> The expert concluded Palmer met the criteria for intellectual disability under the standard set forth in Georgia's statute, as well as under the standards used by the

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208. *Id.* at 1693, 1696.

209. Transcript of Record at 1981, 2003, *State v. Palmer*, No. 96-R-43 (Ga. Super. Ct. Burke Cty. Aug. 24, 2007) [hereinafter *Palmer Second Trial Transcript*].

210. *Id.* at 1999.

211. *Id.* at 2103, 2106.

212. *Id.* at 2107, 2111.

213. *Id.* at 2111, 2113.

214. *Id.* at 2122.

215. *Palmer Second Trial Transcript*, *supra* note 209, at 2123.

216. *Id.*

217. *Id.*

218. *Id.*

American Psychiatric Association in the DSM and by the AAIDD (known as AAMR at the time of trial).<sup>219</sup> Both psychologists found that Palmer had put forth good effort during the evaluations.<sup>220</sup>

The State did not present any expert testimony in rebuttal.<sup>221</sup> To make its case that Palmer had not met his burden of proving intellectual disability beyond a reasonable doubt, it emphasized that the Georgia statute was not tied to the standards adopted by the APA and AAIDD.<sup>222</sup> The prosecution argued, “the most important thing that you must understand is that what we do in psychology . . . is not necessarily what we do in a courtroom.”<sup>223</sup> The prosecution told the jury that the scores as interpreted in psychology were irrelevant to their determination under Georgia law:

If you want to use a number, use a number. If you don't want to use a number, don't use a number. You can declare somebody with an IQ of 130 mentally retarded in this courtroom today. Or you can declare someone with an IQ of 30 not mentally retarded in this courtroom today.<sup>224</sup>

The jury, in other words, was not only free to ignore, but was encouraged to reject in whole cloth, accepted clinical standards and could interpret the Georgia statute as it pleased.<sup>225</sup> The prosecution then suggested to the jury that its consideration of clinical norms would be an insult to the victims in the case.<sup>226</sup> Unsupported by expert testimony, the prosecution argued that Palmer had antisocial personality disorder and was malingering, despite his consistency in

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219. *Id.* at 2134.

220. *Id.* at 2002 (Dr. Edwin Sperr found Palmer had been “appropriately motivated” during testing); *id.* at 2110 (Palmer passed two tests administered by Dr. Jonathan Venn to assess malingering).

221. Palmer Second Trial Transcript, *supra* note 209, at 2172.

222. *Id.* at 2224, 2226–27.

223. *Id.* at 2220.

224. *Id.* at 2225.

225. *Id.*

226. *Id.* at 2222. The prosecutor argued, “Where does that leave Brenda Jenkins Palmer and Christine Jenkins if you were to take that standard and apply it for forensic purposes? I submit to you that that leaves them and their memories and their legacy and their families without any direction at all.” *Id.*



scores across decades in multiple settings.<sup>227</sup> Though the evidence of Palmer's intellectual disability was uncontradicted by expert testimony, the jury rejected the GBMR verdict.<sup>228</sup> Palmer remains on Georgia's death row today.<sup>229</sup>

Counsel for Warren King argued for a GBMR verdict at his 1999 trial in Appling County.<sup>230</sup> The State's theory was that Warren King was not intellectually disabled, but was simply "not as well educated as he ought to be."<sup>231</sup> The evidence presented on intellectual disability showed that King had a contemporary IQ score of 73, which was consistent with his school records.<sup>232</sup> King had scored a 70 on an IQ test at five years old, repeated several grades, and was in special education throughout his schooling.<sup>233</sup> The State cross-examined the defense psychologist extensively.<sup>234</sup> In rebuttal, the State presented an expert who testified that he was unable to make a determination as to whether King was intellectually disabled.<sup>235</sup> The defense moved for a directed verdict in light of the fact that its expert opinion, that King was intellectually disabled, stood uncontested.<sup>236</sup> The State responded that it had "called into question the accuracy of the testing," leaving a conflict in the evidence.<sup>237</sup> The court denied the motion.<sup>238</sup> The defense urged the jury in closing to find that King was intellectually disabled, as no witness had rebutted its showing that King met the legal standard.<sup>239</sup> The prosecution suggested that King could not be intellectually disabled because he had a driver's

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227. Palmer Second Trial Transcript, *supra* note 209, at 2223–24.

228. *Id.* at 2242.

229. GA. DEP'T OF CORR., *supra* note 198.

230. King v. State, 539 S.E.2d 783, 789 (Ga. 2000).

231. Transcript of Record at 2119, State v. King, No. C94-10-167 (Ga. Super. Ct. Appling Cty. Sept. 14–24, 1998) [hereinafter King Transcript].

232. *Id.* at 2410, 2434.

233. *Id.* at 2480, 2514.

234. *Id.* at 2616–17. The defense later raised the concern with the court that the lengthy cross-examination meant that all the jury would "hear [is] reasonable doubt, reasonable doubt, reasonable doubt." *Id.*

235. *Id.* at 2616.

236. King Transcript, *supra* note 231, at 2619.

237. *Id.* at 2615, 2618.

238. King v. State, 539 S.E.2d 783, 798 (Ga. 2000).

239. King Transcript, *supra* note 231, at 2677.

license (“You do it, any person does it, but not an MR”<sup>240</sup>), could hold a job, knew how to dress appropriately, and knew right from wrong.<sup>241</sup> The prosecution emphasized that King’s current IQ score was above 70, at 73.<sup>242</sup> “Nowhere in [the DSM] does the word 70, 75 appear,” the prosecution argued.<sup>243</sup> Similar to Burgess’s case, the prosecution suggested to the jury that they were free to ignore the clinical definitions of intellectual disability and determine their own definitions of “significant” and “subaverage” intellectual and adaptive functioning.<sup>244</sup> The prosecution criticized the defense expert’s unwillingness to say with 100% certainty that King’s IQ was a specific number, rather than expressed as a range.<sup>245</sup> The jury rejected a GBMR verdict.<sup>246</sup> King remains on death row today.

At his 1996 trial in Chatham County, on Ware County charges, the jury heard that a defense expert administered five different IQ tests to Billy Raulerson, all of which produced consistent results: four out of five resulted in a score below 70—the one above 70 was a 73.<sup>247</sup> The prosecution’s expert also obtained a score below 70—a 69—when he administered an additional intelligence test to Raulerson.<sup>248</sup> The evidence showed that Raulerson had a history of head injuries, had repeated several grades in school, and had a history of memory and behavioral problems.<sup>249</sup> As in *Burgess*, the prosecution did not present the testimony of an expert who disagreed that Raulerson met the criteria for intellectual disability. The prosecution’s expert testified that he could not make a determination without further information.<sup>250</sup> The prosecution focused on two higher IQ scores, a

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240. *Id.* at 2707.

241. *Id.* at 2718.

242. *Id.* at 2705.

243. *Id.* at 2716.

244. *Id.* at 2716–17. The prosecution challenged the credibility of professional associations, arguing that they change definitions “all the time to fit whatever they want.” *Id.* at 2710–11.

245. King Transcript, *supra* note 231, at 2715.

246. *See* discussion of verdict *supra* note 145.

247. Transcript of Record at 32, 37, 38, 39, 41, 41, 45, State v. Raulerson, No. CR94-2599-C (Ga. Super. Ct. Chatham Cty. Mar. 1, 1996) [hereinafter Raulerson Transcript].

248. *Id.* at 45.

249. *Id.* at 188.

250. *Id.* at 52.

78 and an 83, which Raulerson received during his schooling,<sup>251</sup> and suggested that Raulerson was now scoring lower because he was depressed, had a long history of substance abuse, had suffered a head injury after he was eighteen years old, and therefore would not meet the age of onset criterion of intellectual disability, and was malingering in order to obtain a better outcome in his case.<sup>252</sup> The prosecution argued that any deficits in adaptive behavior could be explained by Raulerson's personal choices, and the fact that some children are raised better than others.<sup>253</sup> As in other cases, the prosecution relied on Raulerson's work history to suggest to the jury that he could not meet the criteria for intellectual disability.<sup>254</sup> The jury rejected a GBMR verdict.<sup>255</sup> Raulerson is still facing execution on Georgia's death row.<sup>256</sup>

William Lyons received a full scale IQ score of 69 on a test administered in connection with his capital proceedings.<sup>257</sup> The defense psychologist testified that this score was consistent with a score of 73, received when Lyons was admitted to Charter Lake Hospital years prior to trial.<sup>258</sup> Lyons was illiterate—a fact he hid from his wife for a long time because he was ashamed.<sup>259</sup> Lyons held the same job for twenty years as a welder and painter assistant.<sup>260</sup> As in *Raulerson*, the prosecution suggested that Lyons's low IQ scores and adaptive functioning deficits could be explained by his substance abuse.<sup>261</sup> The prosecution expert did not interview family members, employers, or school personnel, but ruled out any adaptive functioning deficits, in part, because of Lyons's stable employment

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251. The defense expert considered these scores consistent with Raulerson's current scores, when corrected for outdated norms. *Id.* at 189.

252. *Id.* at 88, 89, 144, 150–51.

253. Raulerson Transcript, *supra* note 247, at 147.

254. *Id.* at 148–49.

255. *See Raulerson v. State*, 491 S.E.2d 791, 795 (Ga. 1997).

256. GA. DEP'T OF CORR., *supra* note 198.

257. Transcript of Record at 1228, *State v. Lyons*, No. 95-CR-18 (Ga. Super. Ct. Monroe Cty. May 20, 1997) [hereinafter Lyons Transcript].

258. *Id.*

259. *Id.* at 1085.

260. *Id.* at 1090–91.

261. *Id.* at 1229.

history.<sup>262</sup> The prosecution suggested in closing that Lyons could not meet the criteria for intellectual disability because he could speak in coherent sentences during his police interrogation: “Nothing retarded about that.”<sup>263</sup> The prosecution countered the evidence of Lyons’s illiteracy with the argument that he was able to sign his name.<sup>264</sup> The prosecution urged the jury to reject the intellectual disability defense because both the defense and prosecution experts testified that Lyons knew the difference between right and wrong.<sup>265</sup> The jury rejected the GBMR verdict; at sentencing, it imposed a life without parole sentence.<sup>266</sup>

Robert Fielding presented the testimony of two psychologists at his 1996 trial in Richmond County in support of a GBMR verdict.<sup>267</sup> The psychologist retained by the defense administered six different IQ measures on Fielding, all of which fell within the range of intellectual disability.<sup>268</sup> Fielding had been placed in special education in school and classified as “retarded.”<sup>269</sup> Psychologist Dr. David Peterson, from Georgia Central State Hospital, originally evaluated Fielding at the State’s request, but was called by the defense at trial.<sup>270</sup> Dr. Peterson had no doubt that Fielding met the criteria for intellectual disability.<sup>271</sup> Prior to trial, the defense asked the court to prevent the State from seeking the death penalty because all mental health experts in the case agreed that Fielding met the criteria for intellectual disability.<sup>272</sup> Opposing the motion, the State argued that the “medical standard [used by the APA and the AAIDD] in no way whatsoever has been adopted by, has not been adhered to, has not been used in legal proceedings with regard to determination

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262. *Id.* at 1235, 1241.

263. Lyons Transcript, *supra* note 257, at 1428.

264. *Id.*

265. *Id.* at 1429.

266. Lyons v. State, 522 S.E.2d 225, 227 (Ga. 1999).

267. Transcript of Record at 19, 50, State v. Fielding, No. 94-RCCR-610 (Ga. Super. Ct. Richmond Cty. Sept. 16–20, 1996) [hereinafter Fielding Transcript].

268. *Id.* at 28.

269. *Id.* at 922–23.

270. *Id.* at 972.

271. *Id.* at 974.

272. *Id.* at 15.

of mental retardation in any way whatsoever.”<sup>273</sup> The court denied the motion.<sup>274</sup> Later before the jury, during its cross-examination of defense expert Dr. Daniel Grant, the State asked if Dr. Grant, in using clinically accepted determinations of intellectual disability—and specifically in considering IQ scores below 70 as falling within the range of intellectual disability—was present to “superimpose a medical standard over a legal standard that contains no numerical value here.”<sup>275</sup> The jury did not find that Fielding was intellectually disabled and returned a guilty verdict.<sup>276</sup> It imposed a sentence of life without parole at the sentencing phase.<sup>277</sup>

Jorge Torres, charged in Long County and tried in Evans County, also asserted a GBMR defense at trial.<sup>278</sup> Torres had been placed in special education in the Philadelphia School system and “diagnosed as mildly mentally retarded.”<sup>279</sup> A defense expert administered several IQ tests with scores ranging from 58 to 65.<sup>280</sup> The expert for the defense concluded that Torres was intellectually disabled.<sup>281</sup> The State’s expert, who had administered a screening test, rather than a comprehensive instrument on intellectual functioning, concluded that Torres did not meet the criteria for intellectual disability.<sup>282</sup> The prosecution, as in many other cases discussed above, highlighted the fact that Torres had a driver’s license, could drive, and could hold a job as evidence that he could not be intellectually disabled.<sup>283</sup> The State also suggested that Torres had manipulated the defense expert’s testing results in an attempt to prove intellectual disability and emphasized the fact that Torres “has received no treatment of any kind or any mental evaluation since grade school.”<sup>284</sup> The jury

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273. Fielding Transcript, *supra* note 267, at 16.

274. *See* Fielding v. State, 602 S.E.2d 597, 599 n.1 (Ga. 2004).

275. Fielding Transcript, *supra* note 267, at 926, 930.

276. *See* Fielding, 602 S.E.2d at 599 n.1.

277. *Id.*

278. Transcript of Record at 44, State v. Torres, No. 98-R-147 (Ga. Super. Ct. Long Cty. Feb. 26, 1999) [hereinafter Torres Transcript].

279. *Id.* at 1143.

280. *Id.* at 1153.

281. *Id.* at 1154.

282. *Id.* at 88.

283. *Id.* at 48.

284. Torres Transcript, *supra* note 278, at 45.

rejected a GBMR verdict.<sup>285</sup> In the sentencing phase, it returned a verdict of life imprisonment without parole.<sup>286</sup>

One must also consider the case of Vernessa Marshall, the one death penalty case in which the jury returned a verdict of GBMR, prior to *Atkins*, with regard to a felony-murder charge, and the singular qualities of that case. Marshall and her boyfriend Demetrius Paul were charged with the intentional murder of Marshall's ten-year-old son Jamario in Clarke County.<sup>287</sup> Jamario died of complications after being struck repeatedly on his bottom by a belt.<sup>288</sup> It was undisputed that Paul inflicted almost all of the injuries against Jamario in an effort to punish him for misbehavior at school, and that Marshall had assisted Paul in holding Jamario down.<sup>289</sup> It is important to note from the outset that the prosecution submitted both malice murder and felony-murder, with cruelty to a child as the underlying felony, charges to the jury, but the jury, rejecting the intent finding required for malice murder, returned a felony-murder verdict.<sup>290</sup> Marshall's defense counsel did not believe that the facts surrounding the death of Marshall's son warranted capital charges in the first place.<sup>291</sup> At trial, counsel urged the jury to find Marshall "guilty but mentally retarded" of involuntary manslaughter, a lesser included offense of malice murder.<sup>292</sup> The jury rejected malice murder, finding Marshall guilty instead of felony murder and finding her "guilty but mentally retarded" beyond a reasonable doubt.<sup>293</sup>

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285. Verdict, *State v. Torres*, No. 98R-147 (Ga. Super. Ct. Evans Cty Feb. 26, 1999).

286. *Id.*

287. Greg Martin, *Marshall Jury Back: Mom Gets Life in Son's Death*, ATHENS BANNER-HERALD (Sept. 22, 1999), [http://onlineathens.com/stories/092299/new\\_marshallguilty.shtml#.WKTUIUbyQug](http://onlineathens.com/stories/092299/new_marshallguilty.shtml#.WKTUIUbyQug); Transcript of Record at 1794–95, *State v. Marshall*, No. SU-98-CR-0290-J (Ga. Super. Ct. Athens-Clarke Cty. Sept. 22, 1999) [hereinafter Marshall Transcript].

288. Marshall Transcript, *supra* note 287, at 1795.

289. *Id.* at 1797, 1799.

290. Order, *State v. Marshall*, No. 98-CR-0290-J (Ga. Super. Ct. Athens-Clarke Cty. Sept. 22, 1999); Verdict, *State v. Marshall*, No. 98-CR-0290-J (Ga. Super. Ct. Athens-Clarke Cty. Sept. 22, 1999).

291. Marshall Transcript, *supra* note 287, at 1808–09.

292. *Id.* at 1817.

293. Verdict, *supra* note 290. In assessing the jury's unique decision in the case, Marshall's gender must also be taken into consideration, as capital jurors are generally much more reluctant to impose a death sentence against women. *Furman v. Georgia*, 408 U.S. 238, 365 (1972) (Marshall, J., concurring) ("There is also overwhelming evidence that the death penalty is employed against men and not women."); Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine*

Marshall's case was exceptional with regard to the prosecution's decision to try the unintentional death of a child as malice murder. In many respects, Vernessa Marshall's case was also exceptional in terms of the evidence of intellectual disability available to the defense. Marshall was classified early in her schooling by the Clarke County School System as a person with an intellectual disability.<sup>294</sup> At ten years old, she was still sucking her thumb and wetting the bed.<sup>295</sup> At trial, the prosecution did not contest that Marshall had developmental delays or that her IQ scores fell within the range of intellectual disability.<sup>296</sup> The two psychologists who testified in the case—one for the defense and one for the court—agreed that Marshall met the criteria for intellectual disability.<sup>297</sup> To rebut Marshall's showing of intellectual disability, the State did not present a psychologist of its own but instead a psychiatrist who conceded that Marshall met the first—significantly subaverage deficits in intellectual functioning—and third—age of onset—criteria of intellectual disability but did not meet the second criterion—deficits in adaptive behavior.<sup>298</sup> The State's expert admitted that she had limitations in her own expertise as it related to intellectual functioning.<sup>299</sup>

Very few cases involving intellectual disability present such a clear evidentiary picture of intellectual disability as Marshall's. In her *Hill* dissent, Judge Barkett observed that intellectual disability “is a medical condition that is diagnosed only through, among other things, a subjective standard that requires experts to assess intellectual functioning and to interpret the meaning of behavior long

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*Sanctuary*, 63 OHIO ST. L.J. 433, 435 (2002) (noting “substantial evidence suggests jury bias in favor of female defendants in capital cases”). Women make up less than 2% of the country's death row population. NAACP LEGAL DEF. AND EDUC. FUND, DEATH ROW U.S.A. 1 (2016), [http://www.naacpldf.org/files/publications/DRUSA\\_Winter\\_2016.pdf](http://www.naacpldf.org/files/publications/DRUSA_Winter_2016.pdf). Only sixteen women have been executed in the United States since the 1976 reinstatement of the death penalty—comprising just over 1% of all executions in that period. *Id.* at 7.

294. Marshall Transcript, *supra* note 287, at 1851.

295. *Id.* at 1813.

296. *Id.* at 1804.

297. *Id.* at 1854, 1856.

298. *Id.* at 1382, 1412–13.

299. *Id.* at 1452.

into the offender's past," making the possibility of mistaken fact-finding under this standard a "near certainty."<sup>300</sup>

Given the subjective nature of the diagnosis, intellectual disability cases are more susceptible to challenge under the beyond a reasonable doubt standard.<sup>301</sup> In clinical practice, mental health experts would typically diagnose intellectual disability to a reasonable degree of medical or professional certainty.<sup>302</sup> They would not be asked to determine that a person meets the diagnosis beyond any reasonable doubt.<sup>303</sup> Though the reasonable degree of medical certainty is used in clinical practice, prosecutors could argue—and jurors could agree—that this level of certainty is insufficient to meet the beyond a reasonable doubt standard of proof.<sup>304</sup> The *Hall* Court held that it "is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."<sup>305</sup> Yet, as shown in the cases discussed above, this is what the beyond a reasonable doubt standard—and prosecutors relying on it—encourage juries to do.<sup>306</sup>

Retrospective diagnoses of intellectual disability, almost always required in the capital context given the nature of the litigation, present obstacles susceptible to challenge by the prosecution under the beyond a reasonable doubt standard.<sup>307</sup> Often, school and other critical records that would have supported a childhood diagnosis of intellectual disability are no longer available.<sup>308</sup> For instance, capital defendant Rodney Young submitted a GBMR defense to the jury in his capital trial in Newton County.<sup>309</sup> Like Marshall, Young had been placed in special education due to his intellectual disability

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300. *Hill IV*, 662 F.3d 1335, 1371–72 (11th Cir. 2011) (en banc) (Barkett, J., dissenting).

301. *Hill IV*, 662 F.3d at 1372.

302. Glenn E. Bradford, *Dissecting Missouri's Requirement of "Reasonable Medical Certainty"*, 57 J. Mo. B. 136, 141 (2001).

303. *Id.*

304. *Hill IV*, 662 F.3d at 1372.

305. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

306. *See supra* notes 166–305 and accompanying text.

307. *See supra* notes 300–304 and accompanying text.

308. *See, e.g., infra* notes 309–314 and accompanying text.

309. Transcript of Record at 3319–20, *State v. Young*, No. 2008-CR-1473-3 (Ga. Super. Ct. Newton Cty., Feb. 6, 2012) [hereinafter *Young Transcript*].



throughout his school career, but the school had long ago destroyed the records showing his results on intelligence and adaptive functioning instruments.<sup>310</sup> Without the benefit of the records, Young was only able to present the testimony of teachers and the head of the high school special education department as evidence that Young had met the criteria for intellectual disability.<sup>311</sup> Capitalizing on the fact that the records no longer existed, the prosecution suggested that the teachers' testimony about Young's history in special education was biased because they cared for him, thus planting a seed of doubt for the jury.<sup>312</sup> The jury rejected a GBMR verdict for Young, and he was sentenced to death.<sup>313</sup> Young remains under sentence of death on Georgia's death row.<sup>314</sup> Another obstacle can arise when the school system did not, for whatever reason, classify the defendant as intellectually disabled.<sup>315</sup> In the William Lyons case in Monroe County, the prosecution criticized the defense expert for making a determination of intellectual disability when there were no documented IQ scores before Lyons was eighteen years old.<sup>316</sup> Lyons had attended a segregated school and was socially promoted throughout his schooling.<sup>317</sup> Similarly, in the Raulerson case, the prosecution argued that the failure of the school system to diagnose Raulerson as intellectually disabled was dispositive on the question of intellectual disability.<sup>318</sup>

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310. *Id.*

311. *Id.* at 2847–2992.

312. *Id.* at 3270. The prosecution argued:

I'm not saying you can't just take the teachers' word about it. But remember, the defense has to prove it beyond a reasonable doubt. So if you were to return a verdict that he's guilty but mentally retarded because some teachers said, 20 years ago we thought maybe he had this test that said that, you know, is that proof beyond a reasonable doubt?

*Id.*

313. *Id.* at 3351.

314. GA. DEPT. OF CORR., *supra* note 198.

315. The AAIDD User's Guide informs practitioners to "[r]ecognize that a number of reasons might explain the lack of an earlier, official diagnosis of ID, including," among other things, the many considerations that may prevent a school diagnosis of intellectual disability. AAIDD USER'S GUIDE 2012 *supra* note 32, 20 tbl.3.3.

316. Lyons Transcript, *supra* note 257, at 1129–30.

317. *Id.* at 1157.

318. Raulerson Transcript, *supra* note 247, at 152, 171–72.

Adding to the challenges that often accompany a retrospective diagnosis, family members and other reporters may have trouble recalling a defendant's specific abilities in the developmental period and may be impaired themselves. People with intellectual disability and their family members also tend to mask the person's limitations.<sup>319</sup> For this reason, the AAIDD cautions practitioners to recognize the high risk of error in self-reporting.<sup>320</sup> Yet, state experts routinely evaluate defendants for intellectual disability without speaking to anyone besides the defendant.<sup>321</sup> Prosecutors can then argue that the defendant is malingering.<sup>322</sup> Though the defense expert in the Warren King case had interviewed his sister in conducting his assessment of King's adaptive functioning, the prosecution in closing challenged her as a biased witness and argued that King was malingering.<sup>323</sup>

Though accepted clinical norms exist, many aspects of an intellectual disability evaluation are ripe for challenge by the prosecution under the beyond a reasonable doubt standard.<sup>324</sup> For instance, an IQ score is not a precise number.<sup>325</sup> As the Supreme Court has recognized, established medical practice states that IQ scores should be expressed within a range to account for the standard error of measurement.<sup>326</sup> Mental health professionals must also take other factors into consideration in assessing an individual's intellectual functioning.<sup>327</sup> Georgia prosecutors frequently invoke

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319. Tammy Smith et al., *Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System and Implications for Transition Planning*, 43 EDUC. & TRAINING IN DEVELOPMENTAL DISABILITIES 421, 425 (2008).

320. AAIDD USER'S GUIDE 2007, *supra* note 106, at 21.

321. *See infra* note 323.

322. *Id.*

323. King Transcript, *supra* note 231, at 2701. The prosecution argued, "We don't have adaptive problems from an independent source." *Id.* at 2706.

324. *See Hill IV*, 662 F.3d 1335, 1357 (11th Cir. 2011).

325. Hall v. Florida, 134 S. Ct. 1986, 1995 (2014) ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.").

326. AAIDD MANUAL, *supra* note 9, at 36; DSM-5, *supra* note 9, at 37; *see also* Hall, 134 S. Ct. at 1995; Moore v. Texas, 137 S. Ct. 1039, 1049 (2017).

327. These include the individual's culture and ethnicity, the Flynn Effect (the observation that IQ scores rise in the population over time) and practice effects (how many times and with what frequency an individual has taken a certain test). AAIDD MANUAL, *supra* note 9, at 37-38; AAIDD USER'S GUIDE

arguments about the standard error of measurement to suggest reasonable doubt in intellectual disability cases.<sup>328</sup> The prosecution in Vernessa Marshall’s case made this argument, albeit unsuccessfully: “Doctor Miller[,] who was the defense’s expert[,] found that Ms. Marshall had an IQ of 65. Plus or minus 5 immediately knocks her up to 70. She may or may not meet the criteria.”<sup>329</sup> The prosecution pressed the defense expert extensively in Warren King’s case to give King an IQ score at a level of 100% certainty, and then highlighted in closing the expert’s unwillingness to say with 100% certainty that King’s IQ was one specific number, instead only expressing it as a range, in accordance with clinical norms.<sup>330</sup> The prosecution urged jurors to accept a bright line IQ score cutoff of 70; in other words, suggesting that they should reject a claim of intellectual disability for a defendant with scores over 70.<sup>331</sup> The prosecution in the Raulerson case similarly asked the defense expert to commit to a level of 100% certainty in expressing Raulerson’s range of possible IQ scores.<sup>332</sup> In closing, it suggested that a reasonable doubt existed because “psychologists cannot be sure, cannot be certain of IQ.”<sup>333</sup>

Also clouding the determination are often misconceived notions of what individuals with an intellectual disability can or cannot do.<sup>334</sup> The American Association of Intellectual and Developmental Disabilities has explained that there are a number of incorrect stereotypes—“unsupported by both professionals in the field and published literature”—that can lead to inaccurate legal conclusions.<sup>335</sup> Such incorrect stereotypes may suggest that persons with intellectual disability look and talk differently from others, are completely incompetent, cannot get a driver’s license or drive a car, cannot acquire vocational and social skills necessary to live

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2012, *supra* note 32, at 22–24; AAIDD USER’S GUIDE 2007, *supra* note 106, at 20–21.

328. *See infra* notes 329–333 and accompanying text.

329. Marshall Transcript, *supra* note 287, at 1894.

330. King Transcript, *supra* note 231, at 2453–56, 2500, 2715.

331. *Id.* at 2705.

332. Raulerson Transcript, *supra* note 247, at 128.

333. *Id.* at 143.

334. AAIDD USER’S GUIDE 2012, *supra* note 32, at 25–26.

335. *Id.*

independently, and cannot support a family,<sup>336</sup> as the prosecution insinuated in many of the case examples discussed above.

Imposing such a high standard of proof allows prosecutors to emphasize a defendant's strengths to negate evidence of adaptive functioning deficits, when accepted clinical norms dictate that strengths should not negate weaknesses.<sup>337</sup> Indeed, the Supreme Court expressed disapproval of such a practice in *Moore*.<sup>338</sup> In the Marshall case, for instance, even after conceding that Marshall had developmental delays prior to the age of eighteen and that her IQ scores were within the range of intellectual disability, the prosecution argued that the way Marshall interacted with police in her recorded statement proved that she did not meet the criteria for intellectual disability.<sup>339</sup> The State's argument shows how easy it is for prosecutors to inject doubt into the jury's consideration of intellectual disability:

The State has no burden as to mental retardation. All we have to do—we didn't have to do anything. But by showing the video we could have said hey, y'all saw the video. Does that match what these doctors say? And that's a reasonable doubt. That we have respected professionals differing in this area is a reasonable doubt.<sup>340</sup>

Vernessa Marshall, of course, is not the only capital defendant with intellectual disability to face trial in Georgia since the enactment of the statute in 1988.<sup>341</sup> The many unique circumstances of her case suggest that the jury's finding of intellectual disability beyond a

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336. *Id.*

337. AAIDD MANUAL, *supra* note 9, at 7 (“Within an individual, limitations often coexist with strengths.’ This means that people with ID are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than others.”).

338. *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017) (noting that the Texas Court of Criminal Appeals “overemphasized Moore’s perceived adaptive strengths” in rejecting his intellectual disability claim).

339. Marshall Transcript, *supra* note 287, at 1828–31.

340. *Id.* at 1893.

341. See, e.g., *Ga. Inmate with Intellectual Disability Set to Die Tonight*, CBS NEWS (Apr. 12, 2016, 8:05 AM), <http://www.cbsnews.com/news/georgia-inmate-intellectual-disability-kenneth-fults-execution/>.

reasonable doubt was an anomaly—not proof that the GBMR standard sufficiently protects those with intellectual disability.<sup>342</sup> On a national level, scholars estimate that *Atkins* claims are filed at a rate of 7.7% among death penalty cases.<sup>343</sup> Assuming a similar filing rate in Georgia, one would expect to see claims in approximately twenty-nine of the cases considered in this study.<sup>344</sup>

A precise success rate in Georgia is impossible given the limitations of the dataset as noted above, yet there can be no doubt that Georgia's record is poor on its own, and poor relative to the rest of the country.<sup>345</sup> Considering slightly different data, Blume's research suggested "an overall 'success' rate" of *Atkins* claims across the country from 2002–2013 to be 55%.<sup>346</sup> Blume, too, found that Georgia's success rate in *Atkins* cases was "strikingly low" at 11%.<sup>347</sup> This study, based on a comprehensive review of capital cases tried to a jury from 1988 to 2014 reveals an even lower rate of success in that period, at a rate of 5.0%. This figure uses as a denominator twenty GBMR submissions to the jury—fifteen in which documentation from the study was available, four in which information was obtained from published opinions, and in the case of Willie Palmer's second trial, a discussion with counsel, given that there is not yet a published opinion in the case. As discussed above in Part II, there may have been even more cases in which GBMR was an option but was rejected by the jury, which would further reduce the success rate. The rate of successful GBMR verdicts in death penalty cases post-*Atkins* is zero. The rate of successful GBMR verdicts in a case of malice murder in the entire history of Georgia's GBMR statute is zero.

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342. See Marshall Transcript, *supra* note 287, at 1794–1902.

343. Blume et al., *supra* note 116, at 396. Justice Scalia warned in dissent in *Atkins* that the Court's new constitutional rule exempting people with intellectual disability would open the floodgates to meritless claims. *Atkins v. Virginia*, 536 U.S. 304, 353–54 (2002) (Scalia, J., dissenting). Blume and his co-authors persuasively show that Justice Scalia's fears never materialized. Blume et al., *supra* note 116, at 396.

344. Blume et al., *supra* note 116, at 396.

345. See *id.* at 412.

346. *Id.* at 397. Blume's data on intellectual disability claims comprised of reported decisions and anecdotal information from capital defense practitioners in post-*Atkins* cases, and included post-conviction determinations of intellectual disability not considered in this study. The study did not purport to be a comprehensive analysis of all jury decision-making at the trial level as attempted here.

347. *Id.* at 412.

After decades of litigation challenging the beyond a reasonable doubt standard, Warren Hill was executed on January 27, 2015.<sup>348</sup> At the time of his execution, all mental health experts who had ever evaluated Hill—on both the defense and prosecution sides—agreed that he met the criteria for intellectual disability.<sup>349</sup> Hence Judge Barkett's warning in Hill's case that Georgia's statute "ensures that some, if not many, mentally retarded offenders will be executed in violation of the Eighth Amendment."<sup>350</sup>

### CONCLUSION

From an empirical perspective, we can now say with confidence that not one defendant in Georgia has proven successfully to a jury post-*Atkins* that he is exempt from the death penalty due to intellectual disability. The Georgia procedure's uniquely high standard of proof and consideration of intellectual disability during the guilt phase stand as outliers in the nation, and deny capital defendants "a fair opportunity to show that the Constitution prohibits their execution."<sup>351</sup> With its decisions in *Hall v. Florida* and *Moore v. Texas*, the Supreme Court has reinvigorated its commitment to categorical exemption from the death penalty under the Eighth Amendment for offenders with intellectual disability. Like the Florida procedure found unconstitutional in *Hall*,<sup>352</sup> and the standard applied by the Texas Court of Criminal Appeals to define intellectual disability in *Moore*,<sup>353</sup> Georgia's procedure is out-of-step with the national consensus. While *Atkins* left to the states the task of

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348. Stephanie Gallman, *Georgia Executes Man Despite Disability Claim*, CNN (Jan. 28, 2015, 7:48 AM), <http://www.cnn.com/2015/01/27/us/georgia-inmate-warren-hill-tuesday-execution>.

349. Press Release, Death Penalty Info. Ctr., Georgia Sets Execution Date Despite Unanimous Findings of Mental Retardation and Pending Supreme Court Review (July 8, 2013), <http://www.deathpenaltyinfo.org/documents/DPICillPR.pdf>.

350. *Hill III*, 608 F.3d 1272, 1281 (11th Cir. 2010).

351. *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

352. *Id.* at 1998 ("In summary, every state legislature to have considered the issue after *Atkins*—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.").

353. *Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017) ("The *Briseno* factors are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts.").

implementing procedures to exempt those with an intellectual disability from execution, *Hall* and *Moore* leave no question that a state's discretion has constitutional limits.<sup>354</sup> When given the opportunity, the United States Supreme Court should consider—or the Georgia Supreme Court should reconsider—Georgia's unconstitutional barrier to relief, which makes it all but certain that people with intellectual disabilities, like Warren Hill, will be executed. In the meantime, the Georgia legislature should end its thirty-year failed experiment and enact legislation designed to comply with the Constitution and protect those with intellectual disability from execution.<sup>355</sup>

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354. *Hall*, 134 S. Ct. at 1998 (“*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.”).

355. *See id.* at 2001 (“The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”).

## APPENDIX

<b>State Standard Chart</b>	
<b>State</b>	<b>Standard</b>
<b>Alabama</b>	Preponderance of the evidence
<b>Arizona</b>	Clear & convincing evidence
<b>Arkansas</b>	Preponderance of the evidence
<b>California</b>	Preponderance of the evidence
<b>Colorado</b>	Clear & convincing evidence
<b>Florida</b>	Clear & convincing evidence
<b>Georgia</b>	<b>Beyond a reasonable doubt</b>
<b>Idaho</b>	Preponderance of the evidence
<b>Indiana</b>	Preponderance of the evidence
<b>Kansas</b>	Not specified by statute or case
<b>Kentucky</b>	Preponderance of the evidence
<b>Louisiana</b>	Preponderance of the evidence
<b>Mississippi</b>	Preponderance of the evidence
<b>Missouri</b>	Preponderance of the evidence
<b>Montana</b>	None stated
<b>Nebraska</b>	Preponderance of the evidence
<b>Nevada</b>	Preponderance of the evidence
<b>New Hampshire</b>	None stated
<b>North Carolina</b>	Clear & convincing evidence (pretrial); Preponderance of the evidence (sentencing)
<b>Ohio</b>	Preponderance of the evidence
<b>Oklahoma</b>	Clear & convincing evidence (pretrial); Preponderance of the evidence (sentencing)



<b>Oregon</b>	None stated
<b>Pennsylvania</b>	Preponderance of the evidence
<b>South Carolina</b>	Preponderance of the evidence
<b>South Dakota</b>	Preponderance of the evidence
<b>Tennessee</b>	Preponderance of the evidence
<b>Texas</b>	Preponderance of the evidence
<b>Utah</b>	Preponderance of the evidence
<b>Virginia</b>	Preponderance of the evidence
<b>Washington</b>	Preponderance of the evidence
<b>Wyoming</b>	None stated