UNREASONABLE DOUBT: WARREN HILL, AEDPA, AND GEORGIA’S UNCONSTITUTIONAL BURDEN OF PROOF

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“The state of Georgia will execute a mentally retarded man when it carries out the execution of Warren Lee Hill.”

INTRODUCTION

Georgia’s “beyond a reasonable doubt” standard for determining intellectual disability has led to an absurd—and arbitrary—result. A Georgia state court held that defendant Warren Hill was intellectually disabled, yet still sentenced Hill to death. Seven experts—and the court—deemed Hill disabled under a preponderance of the evidence standard. He remains on death row, however, because Georgia’s “preposterous burden of proof” requires that intellectual disability be proved beyond a reasonable doubt, a standard experts have said is nearly impossible to satisfy. It “effectively limits the constitutional right protected in Atkins,” and creates a conditional, not categorical, ban.

It also highlights a deeper problem: the process for determining who faces execution resides in an abyss of arbitrariness where death is not “different,” and “individualized consideration” is illusory. As former Supreme Court Justice John Paul Stevens stated recently

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1 Assistant Professor of Law, Indiana Tech Law School.
2 In re Hill, 715 F.3d 254, 301 (2013).
3 See O.C.G.A. §17-7-131(c)(3) and (j) (1988).
4 See, e.g., Hill v. Humphrey, 662 F.3d 1335, 1341-42 (11th Cir. 2011) (reviewing the state court’s grant of Hill’s habeas petition).
5 715 F.3d 284, 307 (11th Cir. 2013) (Barkett, J., dissenting).
6 662 F.3d at 137475 (Barkett, J., dissenting (“although the state habeas court ultimately found that Hill was probably mentally retarded, it was precluded from granting Atkins relief because Georgia limited this constitutionally guaranteed right to only those individuals who could establish mental retardation beyond any reasonable doubt, a standard that cannot be met when exerts are able to formulate even the slightest basis for disagreement”)).
7 Id. at1367 (Barkett, J., dissenting).
stated, “[a]rbitrariness in the imposition of the death penalty is exactly the type of thing the Constitution prohibits.”

Warren Hill’s case is an example of what has—and will continue—to occur until the death penalty is abolished.

Those “most deserving of execution” do not, for the most part, actually receive the death penalty. Instead, death row inmates often include individuals with alarmingly low IQ scores, and who are indigent, mentally ill, autistic, physically impaired, or innocent.

As Georgia’s standard demonstrates, this is not an accident. In some states, for example, the procedures for determining death eligibility circumvent the constitutional requirements established Atkins and Gideon v. Wainwright and constructively deprive individuals of those rights.

In Florida, for example, the death penalty can be imposed even if the jury’s verdict is not unanimous. Alabama allows judges to override a jury’s recommendation of life imprisonment...

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10 408 U.S. 238 (1972).
12 Roper v. Simmons, 543 U.S. 551, 568 (2005) (in Roper, the Court held that the execution of individuals under the age of eighteen violated the Eighth Amendment).
17 Laura Snodgrass, Brad Justice, Death is Different: Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries, 26 DEV. MENTAL HEALTH 8, 88 (2007) (“there is a disproportionate history of brain injuries found in prisoners, and especially those on death row”).
19 372 U.S. 335 (1963) (In Gideon, the Court held that indigent defendants have a constitutional right to be represented by counsel in criminal cases).
and unilaterally sentence a defendant to death. If death were truly different, however, one judge’s opinion—in defiance of a jury’s recommendation to the contrary—should never make the difference.

Additionally, capital defendants often lack adequate legal representation, in part because public defender systems are woefully underfunded, and the Supreme Court’s decision in *Strickland v. Washington*, has created a nearly insurmountable barrier for those asserting ineffective assistance of counsel claims. As one commentator explains, “[a]lthough courts today universally recognize indigent defendants’ right to state-appointed counsel, underfunding and structural deficiencies that plague public defenders often render that right illusory.” In Georgia, where Warren Hill is scheduled to die, “the test of ineffective assistance of counsel in Georgia is said to be whether counsel can fog a mirror.” Thus, it should not be surprising that former Supreme Court Justice Ruth Bader Ginsburg has “yet to see a death case among the dozen coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”

Of course, the Supreme Court has held that “what a state may not do directly it cannot do indirectly.” But in Georgia and elsewhere, that is precisely what the states are doing, and it is a

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24 *Strickland* sets forth a two-pronged test for ineffective assistance of counsel claims. The defendant must first show that “counsel’s representation fell below an objective standard of reasonableness.” In addition, “[e]ven if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the outcome.” 466 U.S. at 690-93.
28 662 F.3d at 1368 (11th Cir. 2011) (Barkett, J., dissenting).
recipe for systemic inequality and arbitrariness. Furthermore, Congress and the courts have exacerbated this inequality by making it extraordinarily difficult for capital defendants to realize the constitutional protections to which they are entitled, or the individualized consideration that the Supreme Court’s death penalty jurisprudence demands. The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), for example, severely curtails meaningful federal habeas review.29 And the federal courts have applied AEDPA to an unreasonable extreme, thereby eviscerating the fundamental protections that federal habeas review affords. As discussed below, the courts have focused almost exclusively on whether a lower court’s decision is “contrary to clearly established Supreme Court law,”30 instead of on whether it constitutes an “unreasonable application,” of that law.31

Focusing on reasonableness would facilitate consideration a law’s broader purposes, rather than focusing on the narrower issue of whether a lower court’s decision violated black-letter law. Indeed, if the Eleventh Circuit had focused on reasonableness, Warren Hill would not be on death row, because a categorical ban on executing the intellectually disabled implicitly proscribes state laws, like Georgia’s, that make the ban anything but categorical. Such laws lead to arbitrariness of the most unconstitutional kind, where those who are not “deemed particularly deserving of death,”32 are more likely to receive that sentence. Neither Atkins nor the

30 Bruce v. Terhune, 376 F.3d 950, 954 (9th Cir. 2004).
31 Id. (citations omitted); see also Terhune, 376 F.3d at 953 (“[a] decision involves an ‘unreasonable application’ of federal law if ‘the state court identifies the correct governing legal principle ... but unreasonably applies that principle to the facts of the prisoner's case’”) (internal citations omitted).
Constitution countenance this result, which is antithetical to the “fundamental fairness [that is] essential to the very concept of justice.”

Some of the Supreme Court’s current and former members agree. Justice Sandra Day O’Connor acknowledged that, if “statistics are any indication, the system may well be allowing some innocent defendants to be executed.” Justices Byron White and Potter Stewart stated that the death penalty was “wantonly and freakishly imposed,” while Justice William Brennan famously vowed that he would never affirm a death sentence. Justice Ginsburg flatly stated that “[p]eople who are well represented at trial do not get the death penalty.”

Ultimately, Warren Hill’s case is not just about injustice of executing those who are intellectually disabled. It is a microcosm of the arbitrariness that time has proven to be neither fixable nor consistent with the “evolving standards of decency that mark the progress of a maturing society.” Georgia’s death penalty scheme has already been found unconstitutional once, and its reasonable doubt standard should likewise meet its constitutional demise.

Otherwise, Warren Hill—an intellectually disabled man—will be executed. If that happens, “the reverberations of injustice [will not be] so easily confined,” because the resulting

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33 Lisenba v. California, 314 U.S. 219, 236 (1941) (in Lisenba, the Court upheld a death sentence despite the fact that the defendant was held for over 24 hours and deprived of sleep and food before the confession was made).
36 See Corinna Barrett Lainm Deciding Death, 57 DUKE L. J. 1, 63 (2007).
39 See Furman v. Georgia, 408 U.S. 238 (1972) (holding that the death penalty violated the Eighth Amendment because it was, among other things, disproportionately imposed on minorities and vested judges and juries with nearly unfettered discretion).
40 McCleskey v. Kemp, 481 U.S. 279, 344-45 (1987) (Brennan, J., dissenting) (in McCleskey, the Court upheld a Georgia death sentence despite a study concluding that the death penalty in Georgia had a disproportionate racial impact).
unfairness will be impossible to ignore. As time has proven, the only way to ensure that “death is different” is to bury the death penalty, as the Court once said, “in the graveyard of the forgotten past.”

PART II

UNREASONABLE—AND UNCONSTITUTIONAL—DOUBT IN THE WARREN HILL CASE

In Atkins, the Supreme Court held that a national consensus existed to support a finding that the execution of intellectually disabled defendants violated the Eighth Amendment. It “reflect[ed] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.” As the Atkins Court noted, intellectually disabled adults “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” In fact, “some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.”

Of course, while these factors do not “warrant an exemption from criminal sanctions … they do diminish … personal culpability,” and support “a categorical rule making such offenders ineligible for the death penalty.” In so holding, the Atkins Court recognized that the Constitution “places a substantive restriction on the State's power to take the life of a mentally

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41 Application of Gault, 387 U.S. 1, 32 (1967) (holding that juveniles are entitled to due process protections in delinquency proceedings).
42 536 U.S. at 321 (Consistent with the definitions set forth in scientific literature, the Court held that intellectual disability has three distinct features: (1) subaverage intellectual functioning; (2) significant limitations in adaptive skills such as communication, self-care, and self-direction; and (3) onset before the age of 18). Id. at 318; see also U.S. Const., amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).
43 536 U.S. at 317.
44 Id.
45 Id. at 318.
46 Id. (The Court also found that the social purposes of capital punishment—retribution and deterrence—were not furthered by imposing the death penalty on mentally retarded offenders). Id. at 319.
47 Id. at 320.
retarded offender.” 48 The Court did not, however, specify the processes by which to determine intellectual disability. Instead, it left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” 49

Georgia has interpreted this language in a manner that undermines Atkins’ substantive restriction, and AEDPA has likewise made it difficult for intellectually disabled defendants to enforce Atkins’ categorical ban. In Warren Hill’s case, for example, the Eleventh Circuit relied on AEDPA to eviscerate meaningful habeas review.

A. THE WARREN HILL CASE—THE STATE HABEAS PETITION

While serving a life sentence for the murder of his girlfriend, Warren Hill murdered a fellow inmate with a nail-studded board. 50 A jury unanimously sentenced Hill to death, and the Georgia Supreme Court affirmed (Hill I). 51

Several years later, Hill filed a state habeas petition alleging that he was mentally retarded, and that Georgia’s beyond-a-reasonable-doubt standard 52 violated the Eighth Amendment. 53 The state court granted the petition, holding that the preponderance of the evidence should be applied, and ordering a jury trial to determine if Hill was mentally retarded. 54 The Georgia Supreme Court reversed (Hill II), holding that Georgia’s reasonable doubt standard

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48 Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)) (holding that the insane cannot be executed).
49 536 U.S. at 321. In Bobby v. Bies, the Court re-iterated that Atkins did not “provide definitive procedural or substantive guides for determining when a person who claims mental retardation ‘will be so impaired as to fall within Atkins’ compass.’” 556 U.S. 825, 830 (2009) (citation omitted).
51 Id. at 772.
52 See O.C.G.A. §17-7-131.
54 Id. at 53 (citing Fleming v. Zant, 386 S.E.2d 339 (1989)).
was constitutional, and that it applied to all defendants, including Hill, who were convicted after it became effective.\textsuperscript{55}

On remand, the state court initially denied the petition, but reconsidered after the Court decided \textit{Atkins}.\textsuperscript{56} The court then granted the petition and, in light of \textit{Atkins}, again applied the preponderance standard.\textsuperscript{57} The court found that Hill was mentally retarded under this standard,\textsuperscript{58} but did not alter its earlier holding that Hill was not mentally retarded under the reasonable doubt standard.\textsuperscript{59}

The Georgia Supreme Court again reversed \textit{(Hill III)}, again holding that Georgia’s reasonable doubt standard complied with \textit{Atkins} and therefore must be applied to Hill’s mental retardation claim.\textsuperscript{60} On remand, the state court held that, while Hill \textit{was} mentally retarded, he could not demonstrate mental retardation under Georgia’s heightened standard. Thus, the petition was denied.\textsuperscript{61}

\textbf{B. THE FIRST FEDERAL HABEAS PETITION AND THE ELEVENTH CIRCUIT’S RULING UNDER AEDPA}

Hill then sought federal habeas relief pursuant to 28 U.S.C. §2254.\textsuperscript{62} The Middle District of Georgia denied the petition, but a panel of the Eleventh Circuit reversed.\textsuperscript{63} The Eleventh Circuit then vacated the panel’s decision, and in \textit{Hill v. Humphrey},\textsuperscript{64} an \textit{en banc} court reviewed

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 52-54. (O.C.G.A. §17-7-131(c)(3) was enacted in 1988).
\item \textsuperscript{56} \textit{Hill}, 662 F.3d 1335, 1341-42 (reviewing the background and procedural history).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 1341.
\item \textsuperscript{60} \textit{Id.} at 1342 (citing \textit{Head v. Hill}, 587 S.E.2d 613, 620-22 (2003)); see also Stripling v. \textit{State}, 711 S.E.2d 665, 668 (2011) (reiterating that Georgia’s beyond-a-reasonable-doubt standard is constitutional).
\item \textsuperscript{61} 662 F.3d at 1342.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{Id.} at 1342-43 (citing \textit{Hill v. Schofield}, 608 F.3d 1272 (11th Cir. 2010)), vacated by \textit{Hill v. Schofield}, 625 F.3d 1313 (11th Cir. 2010)) (en banc).
\item \textsuperscript{64} 662 F.3d at 1342-43.
\end{itemize}
the Georgia Supreme Court’s decision in Hill III.\textsuperscript{65} The Eleventh Circuit held that the reasonable doubt standard did not violate the Eighth Amendment.\textsuperscript{66}

1. THE MAJORITY OPINION

The Eleventh Circuit emphasized the fact that Congress, when enacting AEDPA, “restricted federal review to whether the state court’s decision is ‘contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’”\textsuperscript{67} Thus, its reviewing authority was “greatly circumscribed and … highly deferential to the state courts.”\textsuperscript{68} In the majority’s view, even a “strong case for relief does not mean that the state court’s contrary conclusion was unreasonable.”\textsuperscript{69} Rather, its role was to guard against “extreme malfunctions in the state criminal justice systems,”\textsuperscript{70} and not act as a “means of error correction.”\textsuperscript{71} As the majority stated, “[i]f this standard is difficult to meet, that is because it was meant to be.”\textsuperscript{72}

Not surprisingly, the Eleventh Circuit held that Georgia’s burden of proof satisfied this standard, and denied relief. Specifically, “it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been \textit{squarely established} by [the] Court.”\textsuperscript{73} Atkins “made no reference to, much less reached a holding on, the burden of proof”\textsuperscript{74} and “expressly left the procedures for doing so to the

\textsuperscript{65} 587 S.E.2d 613, 620-22 (2003).
\textsuperscript{66} 662 F.3d at 1360-61.
\textsuperscript{67} Id. at 1337 (quoting 28 U.S.C. §2254 (d)(1)).
\textsuperscript{68} 662 F.3d at 1343 (quoting \textit{Payne v. Allen}, 539 F.3d 1297, 1312 (11th Cir. 2008)).
\textsuperscript{69} 662 F.3d at 1343.
\textsuperscript{70} Id. at 1347.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 1345.
\textsuperscript{73} Id. (emphasis added).
\textsuperscript{74} Id.
Consequently, as long as “faiminded jurists could disagree,” about the wisdom of a particular law, it would be “wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant’s mental retardation.”

In what was perhaps the most important aspect of its decision, the Eleventh Circuit emphasized that “procedure for determining mental retardation was distinct from the Eighth Amendment issues decided in Atkins.” In his dissent, Judge Barkett vigorously disagreed. The procedure, he argued, was problem.

2. THE DISSENT

In his sharply worded dissent, Judge Barkett held that “[r]equiring proof beyond a reasonable doubt, when applied to the highly subjective determination of mental retardation, eviscerates the Eighth Amendment constitutional right of all mentally retarded offenders not to be executed.” To begin with, the majority’s highly deferential review essentially “permits states to adopt procedures that effectively exclude nearly every mentally retarded offender from the protection of Atkins.” Judge Barkett explained as follows:

This deference requires so detailed and demanding a level of specificity in Supreme Court holdings that it eliminates any federal review whatsoever. Indeed, the State's position, endorsed by the majority, is that Atkins does not preclude the State from setting the bar of proof as high as it wishes or defining mental retardation to include only those persons whose IQ falls below 30, a level which includes only 4% of the mentally retarded, thereby leaving 96% of all recognized mentally retarded persons subject to execution. This cannot be squared with the command of Atkins, which protects all of the mentally retarded from execution—whether their mental retardation is mild or severe. And when a state court

75 Id. at 1348 (quoting Atkins, 536 U.S. at 317).
76 622 F.3d at 1352 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)) (in Yarborough, the Court declined to overturn a state court decision holding that a minor was not in custody during a police interview, and thus did not require Miranda warnings).
77 622 F.3d at 1348 (quoting In re Johnson, 334 F.3d 403, 405 (5th Cir.2003)).
78 622 F.3d at 1352 (emphasis added).
79 Id. at 1365 (Barkett, J., dissenting).
80 Id.
decision eviscerates the substantive constitutional right the Supreme Court has explicitly recognized, it is contrary to that Supreme Court precedent.\(^{81}\)

To be sure, \textit{Atkins} did not give the States “unfettered discretion to establish procedures that through their natural operation will deprive the vast majority of mentally retarded offenders of their Eighth Amendment right not to be executed.”\(^{82}\)

But that is precisely what Georgia’s reasonable doubt standard does, which is “contrary to \textit{Atkins}'s command to protect from execution \textit{all} of the mentally retarded.”\(^{83}\) It narrows the class of mentally retarded offenders who can be executed to those who can show mental retardation beyond a reasonable doubt. Logically, this would include only the most severe cases. This is plainly contrary to \textit{Atkins}, which “extended the Eighth Amendment right to the entire class of mentally retarded, [including] those with mild to profound mental retardation.”\(^{84}\) Put differently, Georgia cannot require “a standard of proof so high that it effectively limits the constitutional right protected in \textit{Atkins} to only those who are severely or profoundly mentally retarded.”\(^{85}\)

Furthermore, AEDPA should not be construed to prohibit such a holding, as “[n]o AEDPA deference is due where preexisting Supreme Court precedent ‘dictate[s]’ a rule or result contrary to the state court's decision.”\(^{86}\) Judge Barkett stated as follows: [A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. \textit{The power to create presumptions is not a means of escape from constitutional restrictions.} And the state may not in this way interfere with matters withdrawn from its authority by the Federal Constitution, or subject an accused to conviction for conduct which it is powerless to proscribe.\(^{87}\)

\(^{81}\) \textit{Id.}\(^{82}\) \textit{Id.} at 1365-66.\(^{83}\) \textit{Id.} (emphasis added).\(^{84}\) \textit{Id.}\(^{85}\) \textit{Id.} at 1367.\(^{86}\) \textit{Id.} at 1366.\(^{87}\) \textit{Id.} at 1368 (Barkett, J., dissenting) (\textit{quotating Bailey v. California} 219 U.S. 219, 239 (1911)) (emphasis added).
As a result, “if a State's procedures transgress a substantive constitutional right, ‘in their natural operation,’ those procedures are unconstitutional.”\textsuperscript{88} This reflects the well-settled principle that “[w]hat the state may not do directly it may not do indirectly.”\textsuperscript{89}

Georgia’s beyond-a-reasonable doubt is an indirect attempt to eviscerate the constitutionally-protected “right that a … mentally retarded … offender has not to be executed.”\textsuperscript{90} In Warren Hill’s case, it is working exactly as planned. The troubling part is that the federal courts are allowing it to happen.

Ultimately, if anything is “embodied in [the] holding” of Atkins,\textsuperscript{91} it is the requirement that states do more, not less, to identify those who should be categorically exempt from the death penalty. Georgia’s rule does not ask whether an individual is intellectually disabled. It asks whether the disability is so severe that it can climb the highest evidentiary mountain available in the criminal law. That is a conditional—not categorical—prohibition on the execution of intellectually disabled individuals. To be sure, the substantive right established in \textit{Atkins} was inextricably linked with the procedures adopted by the states. When those procedures are used to circumvent the right itself, then they are, \textit{ipso facto}, contrary to law.

As Judge Barkett later argued, “Georgia will be executing a mentally retarded man because \textit{all} seven mental health experts who have ever evaluated Hill, both the State's and Hill's, now unanimously agree that he is mentally retarded.”\textsuperscript{92} No “fairminded jurists could disagree”\textsuperscript{93} that this violates \textit{Atkins}, and the basic guarantees of due process of law.

\textsuperscript{88} 662 F.3d at 1368 (Barkett, J., dissenting).
\textsuperscript{89} \textit{Id.}
\textsuperscript{90} \textit{In re Hill}, 715 F.3d at 304-05 (Barkett, J., dissenting).
\textsuperscript{91} \textit{Hill}, 662 F.3d at 1337 (quoting Thaler v. Haynes, 559 U.S. 43, 45 (2010)).
\textsuperscript{92} \textit{In re Hill}, 715 F.3d at 301.
\textsuperscript{93} \textit{Hill}, 662 F.3d at 1345 (citing Felker v. Turpin, 518 U.S. 651, 664 (1996)).
PART III

THE SECOND FEDERAL HABEAS PETITION AND THE ELEVENTH CIRCUIT’S FAILURE TO FOCUS ON AEDPA’S UNREASONABleness PRONG

After the Eleventh Circuit’s decision, and shortly before his execution, Hill filed a second state habeas petition, again claiming that he was mentally retarded.94 The state habeas court denied the petition, and the Georgia Supreme Court, relying on its decision in Hill III, barred the claim under res judicata principles.95 Hill subsequently filed a third state habeas petition, arguing that newly discovered evidence, including the testimony of three mental health experts, established that he was mentally retarded beyond a reasonable doubt.96 The experts who had previously testified that Hill was not mentally retarded recanted their testimony and now supported his petition.97

The state court denied Hill’s petition, holding that the claims were procedurally barred, and that the new evidence was not sufficient to show that Hill’s execution would be a miscarriage of justice.98 The Georgia Supreme Court affirmed, after which Hill filed a motion for leave to file a second habeas petition pursuant to 28 U.S.C. 2254.99

A. THE ELEVENTH CIRCUIT’S OPINION

The Eleventh Circuit held that AEDPA barred Hill’s second habeas petition because the claims had already been presented in the first petition.100 The majority emphasized that “[t]he

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94 See In re Hill, 715 F.3d at 288 (discussing Hill’s second state habeas proceedings).
95 Id.
96 Id.
97 Id.
99 715 F.3d at 289.
100 Id. at 287 (On October 5, 2004, Hill filed the first federal habeas petition in the United States District Court for the Middle District of Georgia. The petition claimed that, because Hill had proven mental retardation the Supreme Court’s ruling in Atkins barred his execution).
The central purpose behind the AEDPA was to ensure greater finality of state and federal court judgments in criminal cases, and to that end its provisions greatly restrict the filing of second or successive petitions. The majority relied on 28 U.S.C. § 2244(b)(1), which states that a claim “presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”

The Eleventh Circuit noted that Hill’s first petition argued that he had proven mental retardation based on current diagnostic requirements, and that Georgia’s reasonable doubt standard violated the Eighth and Fourteenth Amendments to the United States Constitution. The second petition asserted that his execution would violate the Constitution, as well as the Atkins holding, although it put forth new evidence, namely, the three experts’ affidavits reversing their prior opinion that Hill was not mentally disabled.

In the majority’s view, the claims were sufficiently similar to warrant preclusion. Hill was arguing “precisely the same thing that he asserted in his initial habeas petition—he is and has always been mentally retarded and his execution would therefore violate the Eighth and Fourteenth Amendments of the United States Constitution under the Supreme Court’s decision in Atkins.” While the new evidence was “in support of the same claim,” it was not “the basis of a new claim.” Factual support for a prior claim, however, does not justify the filing

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101 Id. at 290 (quoting Gilbert v. United States, 640 F.3d 1293, 1310 (11th Cir.2011)) (en banc)).
102 715 F.3d at 290 (emphasis in original).
103 Id. at 291-92. (The Eleventh Circuit also explained that “from the very beginning, Hill has argued that he is mentally retarded within the meaning of OCGA § 17–7–131 et seq., which requires mental retardation to be proven beyond a reasonable doubt”).
104 Id. at 292. (Hill relied on the affidavits of Drs. Sachy, Harris, and Carter, who had previously testified for the State).
105 Id. at 292-93.
106 Id. at 293 (emphasis added).
107 Id. (emphasis added).
of a successive § 2254 petition.”\textsuperscript{108} The majority found that, under § 2244(b)(1), the word “‘claim’ means claim, not evidence or arguments supporting a claim.”\textsuperscript{109}

**B. JUDGE BARKETT’S SECOND DISSENT**

Judge Barkett disagreed with the majority’s position that “a federal court cannot consider Hill's newly discovered and compelling evidence because Congress’s gatekeeping rules under AEDPA preclude us from allowing a mentally retarded person to vindicate his constitutional right to never be put to death.”\textsuperscript{110} Indeed, when enacting AEDPA, “Congress did not ‘los[e] sight of the fact that the ‘writ of habeas corpus plays a vital role in protecting constitutional rights.’”\textsuperscript{111} Furthermore, Congress “cannot have intended to preclude federal habeas relief for an

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 295. The Court also held that Hill’s petition did not meet the requirements of 28 U.S.C. § 2244(b)(2), which requires reliance on a new rule of constitutional law that was previously unavailable, or on a factual predicate that could not have been discovered previously. The Eleventh Circuit held that Hill’s claim relied on cases, such as Atkins, that were included in the first petition, and that the newly discovered evidence “does not establish that, “but for constitutional error, no reasonable factfinder would have found [Hill] guilty of the underlying offense.”” Hill had not “pointed to any newly discovered facts that establish, or even could possibly establish, his innocence of the underlying offense of murder.”\textsuperscript{109} Thus, while acknowledging the dissent “with care and caution” the Court held that it was “required … to apply the rules of AEDPA and, more particularly, the stringent rules found in § 2244(b)(1) and (b)(2).” Id. at 295-96, 299 (quoting 28 U.S.C. 2244(b)(2)(B)(i)(emphasis in original).

\textsuperscript{110} 715 F.3d at 302 (Barkett, J., dissenting) (citing 28 U.S.C. § 2244(b)(2)(B)(ii); 28 U.S.C. § 2244(b)(1)). 28 U.S.C. § 2244(b)(1) prevents courts from hearing “[a] claim presented in a second or successive habeas corpus application ... that was presented in a prior application[.]” Judge Barkett argued that Hill’s second habeas petition involved a separate issue:

Hill argued in his prior federal habeas petition that his execution would violate the Eighth Amendment, \textit{not} because he could establish the fact of his mental retardation beyond a reasonable doubt, but because Georgia's legal standard of proof of beyond a reasonable doubt was contrary to or an unreasonable application of \textit{Atkins} where the state habeas court had found him to be mentally retarded by a preponderance of the evidence. When his prior federal petition is considered in its entirety it is clear that Hill's argument was limited to a challenge to Georgia's insuperably high burden of proof for mental retardation. This court's (now-vacated) panel opinion also confirms that the \textit{only} claim before this Court was the purely legal claim of whether Georgia's standard of proof was an unreasonable application of or contrary to \textit{Atkins}. 715 F.3d at 306.

\textsuperscript{111} 715 F.3d at 306 (Barkett, J., dissenting) (quoting \textit{Holland v. Florida}, 560 U.S. 631, 644 (2010)) (holding that the time for filing a habeas petition could be extended if counsel’s representation was grossly negligent).
individual who is constitutionally ineligible for execution.”112 Atkins, he argued, made Hill ineligible:

It simply cannot be that Congress would have intended AEDPA to preclude a federal court from hearing the claim of a … mentally retarded offender who obtains, albeit after the conclusion of his prior federal habeas proceedings, irrefutable proof that his status constitutionally bars his execution forever … AEDPA's requirements should not be construed to require the unconstitutional execution of a mentally retarded offender who, by presenting evidence that virtually guarantees that he can establish his mental retardation, is able to satisfy even the preposterous burden of proof Georgia demands. If the Supreme Court means that the mentally retarded cannot be constitutionally executed, and Hill has now shown beyond any reasonable doubt that he is mentally retarded, a congressional act cannot be applied to trump Hill's constitutional right not to be executed113

Accordingly, “no procedural hurdle, even AEDPA's bars to filing a second or successive habeas application, can be constitutionally enforced when doing so will eviscerate the constitutionally-protected right that a juvenile, mentally retarded, or insane offender has not to be executed.”114 In fact, the Supreme Court “has refused to construe AEDPA in a way that would undermine the “equitable principles [which] have traditionally governed the substantive law of habeas corpus.”115

Such an interpretation would have the “perverse consequence”116 of making “a federal court … acquiesce to, even condone, a state's insistence on carrying out the unconstitutional execution of a mentally retarded person.”117

112 715 F.3d at 306.
113 Id. at 307 (Barkett, J., dissenting); see also Hill, 662 F.3d at 1362 (allowing a second Ford claim because the first Ford claim was unripe).
114 715 F.3d at 304-05 (Barkett, J., dissenting).
115 Id. at 306 (Barkett, J., dissenting) (quoting Holland, 560 U.S. at 643 (internal citation and quotation marks omitted); see also Panetti v. Quarterman, 551 U.S. 930, 947 (2007) (defendants who are sentenced to death may not be executed if they do not understand the reasons for their execution); Herrera v. Collins, 506 U.S. 390, 402 (1993) (“federal habeas courts act in their historic capacity—to assure that the habeas petitioner is not being held in violation of his or her federal constitutional rights”).
116 715 F.3d at 305 (Barkett, J., dissenting).
117 Id.
The idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness. Just as we have recognized that a petitioner who “in fact has a freestanding actual innocence claim ... would be entitled to have all his procedural defaults excused as a matter of course under the fundamental miscarriage of justice exception ... I see no reason not to accord the same consideration to one who has a freestanding claim that he is, in fact and in law, categorically exempt from execution.”

Stated simply, Hill’s claim “cannot be subject to AEDPA's restrictions when doing so will ensure that the U.S. Constitution is violated.” And executing Warren Hill would be a plain violation of Atkins considering “the unanimity of all experts that Hill is mentally retarded, he can prove his mental retardation beyond a reasonable doubt and, thus, conclusively establish that his execution would be unconstitutional, even under Georgia's unreasonable standard.

The dissent got it right. To say that AEDPA is only intended to remedy “extreme malfunctions in the state criminal justice systems,” and not to be a “means of error correction,” is to say that, while Georgia’s standard may be arbitrary, it is not arbitrary enough. If death is truly different, however, then arbitrariness cannot be tolerated, unless Atkins is understood to protect only the profoundly mentally exempt from the death penalty, while leaving the mild or moderately retarded in a sea of pre-Atkins uncertainty. Certainly, this is not the case.

This interpretation of AEDPA makes it the federal equivalent to state laws, like Georgia’s, that rely on procedures to “transgress a substantive constitutional right.” Like the

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118 Id. (quoting Mize v. Hall, 532 F.3d 1184, 1195 n. 9 (11th Cir.2008)).
119 715 F.3d at 306; see also In re Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting) ("[c]laims of freestanding actual innocence of the underlying offense and categorical ineligibility for the death penalty, as here in Hill's case, “do not fit neatly into the narrow procedural confines delimited by AEDPA”).
120 715 F.3d at 303 (Barkett, J., dissenting).
121 622 F.3d at 1347.
122 Id.
states, however, Congress “may not do directly what it may not do indirectly.”

Allowing the execution of Hill, who the courts—and seven experts—have deemed mentally retarded, is worse than an extreme malfunction. It is a travesty of justice that no civilized society should tolerate.

C. THE MISAPPLICATION OF AEDPA

AEDPA didn’t turn judges into puppets, or prohibit courts from engaging in principled habeas review. In fact, it allows courts to grant habeas relief when decisions involve the “unreasonable application” of clearly established federal law. The Eleventh Circuit’s narrow focus on whether the lower court decisions were “contrary to” clearly established law neglected the second part of that provision. That led the majority on a narrow search for Atkins’ black-letter law, and precluded a meaningful discussion of what a categorical ban means—and what process it requires. The conclusion resulting from such an inquiry would have been that Georgia’s reasonable doubt standard is an unreasonable—and indefensible—application of Atkins. Georgia’s “preposterous burden of proof” cannot result in the execution of those that Atkins says it cannot execute. That is unreasonable under any sensible reading of AEDPA.

Furthermore, is less about a search for truth and more about a desire to circumvent its constitutional requirements under Atkins and the Eighth Amendment. Atkins’ categorical ban, however, requires the opposite. It stands for the proposition that, if there is any doubt, states should err on the side of caution. It is better to adopt procedures that might inadvertently spare individuals who are not mentally retarded, than to have procedures that fail to spare those who

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123 Id.
125 Id.
126 715 F.3d at 307 (Barkett, J., dissenting).
are mentally retarded, and are exempt from the death penalty. Georgia’s scheme does not strike this—or any—balance.127

D. THE HILL CASE, ARBITRARINESS, AND ABOLITION

Warren Hill’s case illustrates the arbitrariness with which the death penalty is administered. It was arbitrariness that led the Court, in Furman v. Georgia,128 to hold that the death penalty was unconstitutional. The Court was concerned with the “unfettered discretion judges or juries had in imposing capital punishment which disproportionately resulted in the poor, sick, uneducated and unpopular members of society being sentenced to death.”129

In fact, Judge Barkett hinted that the problems in Hill’s cases illustrated broader problems with the death penalty. Quoting Justice Thurgood Marshall’s concurring opinion in Furman, he stated as follows:

127 The inherent imperfections in intelligence testing reveal the problems with Georgia’s standard. Jeffrey Usman, Capital Punishment, Cultural Competency, and Litigating Intellectual Disability, 42 U. MEM. L. REV. 855, 897, fn. 208 (citing David C. Dematteo, et al., Forensic Mental Health Assessments in Death Penalty Cases 169, 183 (2011); Steven Rubenzer, DWI, 27-JUN CHAMPION 40, 42 (2003); John H. Blume Sheri Lynn Johnson, Christopher Seeds, 18 CORNELL J.L. & PUB. POL’Y 689, 699 (2009) If Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases, 18 CORNELL J.L. & PUB. POL’Y 689 (“there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75”). These scholars explain as follows:

The Flynn effect, for example, that an individual’s IQ score rises 0.3 points per year, thus leading to artificially inflated scores. Furthermore, IQ is reported as a fairly broad range, rather than an exact number, to account for the standard error of measurement. The range itself is then “used to calculate a confidence interval, which is a band of scores around the observed IQ score in which the individual's true IQ score is most likely to fall.” The confidence interval, however, are based on probability, with standard IQ tests typically reported 95% confidence that an IQ score falls with a particular range. Finally, the practice effect recognizes that repeated administrations of or preparation for an IQ will inflate scores. If, for example, a state defines sub-average intellectual functioning as an IQ of 70 or below, a 73 on the Wechsler Intelligence Scale for Adults will be reported as a range, with 95% confidence, that the test taker’s actual IQ is between 68 and 78. If the standard for proving mental retardation is beyond a reasonable doubt, it is easy to see how the imprecision in IQ tests makes such a showing nearly impossible. Id.

128 408 U.S. 238 (1972).
129 In re Hill, 715 F.3d at 304 (Barkett, J., dissenting).
It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.  

And it is happening in various other contexts relating to the death penalty. In response to the Supreme Court’s holding in Gideon, states have woefully underfunded their public defender systems. Notwithstanding, courts have “upheld convictions of indigent defendants in the face of legitimate concerns regarding [the] court appointed attorney.” As one scholar points out, the “right to effective assistance of counsel often gets overlooked in death penalty cases,” even where attorneys have fallen asleep, used drugs, or smelled of alcohol. But the Supreme Court, in the sixteen years following its decision in Strickland, found not a single case of ineffective assistance of counsel.

In Florida, juries need not be unanimous in order to sentence someone to death. In Alabama, Delaware, and Florida, a judge may override a jury recommendation of life imprisonment, and unilaterally sentence a defendant to death. The judicial override, which has drawn criticism from two Supreme Court Justices, is prevalent in Alabama “due to the election of … trial judges, who campaign to appear “tough on crime,” demonstrating their support of

130 408 U.S. at 366 (Marshall, J., concurring).
132 Id.
133 Id.
134 Id. (citing Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985)); Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993)); see also Stephen Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 ANN. SURV. AM. L. 783, 789 (1999).
the death penalty and ability to impose it effectively.”

In 2008, for example, thirty percent of Alabama’s death sentences were imposed by judicial override, and since 1976, have accounted for eighty-four death sentences.

Of course, it goes without saying that individuals who are actually innocent have been and are currently scheduled to be executed. One study revealed “serious and geographically dispersed error pervades the capital punishment machinery.” Since Gregg v. Georgia was decided, 120 people have been released from death row based on actual or likely innocence. In addition, Connecticut is the only state that prohibits the execution of mentally ill offenders, while others only allow mental illness to serve as a mitigating factor at sentencing. One study estimates that five to ten percent of death row inmates have serious mental illnesses. These statistics demonstrate that Warren Hill’s case is not unique, and Georgia’s statute is not anomalous. These are symptoms of a much larger—and permanent—problem with the death penalty: arbitrariness.

For the last fifty years since Furman placed a moratorium on the death penalty, we have aspired to, but never realized, a fair process for selecting those who are among the most worthy of the death penalty. Furman’s attempt to create a system of guided discretion, where juries carefully weighed aggravating and mitigating factors, has not made the death penalty fairer. It has confirmed, as Justice Brennan warned in Furman, that the death penalty is arbitrarily

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137 Heery, supra note 137, at 380-81.
138 Liebman et al., supra note 18, at 1850.
applied and characterized by injustice. It is not surprising that, after *Furman*, Justice Brennan believed that the death penalty “was, in all circumstances, cruel and unusual punishment and therefore unconstitutional in any form.” He predicted that it would remain arbitrary. He was right.

Justice Brennan wanted “standardization, rational reviewability, and federal supervisory power over the death penalty system in the United States.” With the enactment of AEDPA, however, and decisions like *Hill* and *Harris*, and it is doubtful that more supervision would be effective. After all, Congress’s version of standardization was to enact AEDPA and thereby curtail the principled exercise of judicial review. States like Georgia and Texas, by enacting a high burden of proof and inadequately funding public defender systems, have shown no commitment to fundamental fairness. And the federal courts, like the Eleventh Circuit, have used AEDPA as an excuse to uphold gravely unjust sentences.

In so doing, the categorical rules established in cases like *Atkins* and *Gideon* have ceased to become rules at all. They are ideals. At most, they are guides, which some states have interpreted as a license to do more of the same, and to be no different than they were before. Moreover, the Court’s post-*Strickland* jurisprudence enables the states to do just that—pledge fidelity to due process before that process becomes a proxy for arbitrariness. The realities will not end until the Court places a second—and permanent—moratorium on the death penalty. As *Atkins* reveals, a piecemeal approach will not work, and as Georgia’s beyond a reasonable doubt demonstrates, arbitrariness remains a staple of the American death penalty.

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142 Pokorak, *supra* note 22, at 271.
143 *Id.*
144 *Id.*
CONCLUSION

No civilized society can justify the execution of a man like Warren Hill. Should he be executed, it will be a damning statement on American jurisprudence. In *McCleskey*, Justice Brennan stated as follows:

It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. . . . The Court's decision today will not change what attorneys in Georgia tell other Warren McCleskeys about their chances of execution. Nothing will soften the harsh message they must convey, nor alter the prospect that race undoubtedly will continue to be a topic of discussion. McCleskey's evidence will not have obtained judicial acceptance, but that will not affect what is said on death row. However many criticisms of today's decision may be rendered, these painful conversations will serve as the most eloquent dissents of all.

Justice Brennan’s view “represented the ultimate hope for death penalty defense attorneys: his was the voice of the possible speaking to the patient and perseverant.” The time will arrive when the Court puts a merciful end to the death penalty. The longer we wait, however, the longer the line of tragic injustices that will lie in the death penalty’s wake.

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146 Id. at 344-45 (Brennan, J., dissenting).
147 Id.