HALL V. FLORIDA: THE DEATH OF GEORGIA’S BEYOND A REASONABLE DOUBT STANDARD

Adam Lamparello
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BY ADAM LAMPARELLO*

“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.”

Welcome: We’re Glad Georgia is On Your Mind.

Georgia is on many minds as Warren Hill prepares for a state court hearing to once again begin the process of trying to show that he is intellectually disabled. As Warren Hill continues to flirt with death, one must ask, is Georgia really going to execute someone that nine experts and a lower court twice found to be mentally retarded? The answer is yes, and the Georgia courts do not understand why we are scratching our heads.

The answer is simple: executing an intellectually disabled man is akin to strapping a ten-year old child in the electric chair, which the Court found unconstitutional in Roper v. Simmons because children, unlike adults, cannot appreciate the wrongfulness of their actions or the reasons for their punishments. Indeed, before the Supreme Court decided Hall v. Florida, the State of Florida’s standard for determining death eligibility did to intellectually disabled adults what no state can do to a child. The Florida Supreme Court interpreted §921.137(1) to categorically prohibit defendants who scored above 70 on an IQ test from introducing any evidence of adaptive disability and onset prior to age eighteen, which the Supreme Court and

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* Assistant Professor of Law, Indiana Tech Law School.
3 See Roper, 543 U.S. 551, 575-576 (2005) (holding that it is unconstitutional to impose the death penalty for crimes committed while under the age of eighteen).
4 See id.; see also Hall, 134 S.Ct. 1986 (2014).
medical community include within the three-pronged definition of intellectual disability. In Freddie Hall’s case, Florida’s IQ cutoff statute precluded him from introducing evidence, such as brain damage, severe psychiatric disorders, and a childhood marred by extreme physical abuse that relate to whether Hall was intellectually disabled. The statute relied on a single IQ score without taking into account the Standard Error of Measurement (SEM), which reflects the inherent imprecision of IQ tests. The practical result of barring evidence of adaptive and other disabilities was the execution of intellectually disabled adults who, like children, could not appreciate or understand why they were being strapped in the electric chair or tied to the lethal injection table.

Executing the intellectually disabled serves no purpose other than to vindicate quaint, even biblically inspired, notions that punishments must be proportionate to the crime. The punishment is never proportionate, however, because the intellectually disabled lack the capacity to appreciate the depravity of their crimes or the purposes of their punishment. Put differently, “an eye for an eye” is more like “the blind leading the blind” when the defendant’s perception is

5 See, Atkins v. Virginia, 536 U.S. 304, 318 (2002) (“clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18”).
7 Id. at 1992-1993. Justice Kennedy explained that executing the intellectually disabled does not further the goals of criminal punishment:

[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.” Rehabilitation … is not an applicable rationale for the death penalty. As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a “diminished ability” to “process information, to learn from experience, to engage in logical reasoning, or to control impulses … [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.” Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment. Id. at 1992-1993. (quoting Kennedy v. Louisiana, 554 U.S. 407, 420 (2008); (citing Gregg v. Georgia, 428 U.S. 153 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)) (brackets in original).

8 Hall, 134 S.Ct. at 1992 (“no legitimate penological purpose is served by executing a person with intellectual disability”).
impaired by startling deficits in cognitive and adaptive function. In other words, executing the intellectually disabled is inhumane and shows no regard for the intrinsic value of human life. When one intellectually disabled defendant is executed, all citizens bear the stain of injustice, the taint of unfairness, and the guilt that comes from knowing that the hunger for retribution, not the capacity for reason, won the day. As the Court held in *Hall*, such a practice is cruel. It is unusual. Most certainly, it is unconstitutional.

The Court’s decision in *Hall* also dooms Georgia’s statute, which requires defendants to prove intellectual disability beyond a reasonable doubt. *Hall* also saves Warren Hill. The critical aspect of *Hall* is the Court’s requirement that the law must account for the inherent imprecision in psychological testing, and not base life and death decisions on artificial but statistically insignificant distinctions in intellectual functioning.9 The Court recognized that IQ scores are approximations, not conclusive determinations, and that individuals with IQ scores in the same range have essentially the same level of intelligence. Thus, a one or two point difference in IQ does not reveal meaningful differences in cognitive functioning. Furthermore, without considering adaptive disability and age of onset, an IQ score cannot be the basis upon which to make conclusive determinations about whether a defendant is intellectually disabled.10

Prior to *Hall*, however, a single digit made all the difference between life and death in Florida. The Supreme Court was correct to overturn the Florida Supreme Court, and now it should set its sights on Georgia, where the standard for demonstrating intellectual disability results in an equal, if not greater injustice. Unlike Florida, in Georgia defendants can introduce evidence on all three prongs of intellectual disability.11 If court determines a defendant is

9 Id. at 1995-1996.
10 Id. In fact, even a consistent IQ score is not, in itself, conclusive evidence of a defendant’s intellectual functioning. Id. at 1996.
intellectually disabled by a preponderance of the evidence, however, Georgia still kills that defendant. The absurdity of this statute is reflected in the very purpose of the reasonable doubt standard, which is to protect defendants from wrongful convictions.\footnote{See 
\textit{Santosky v. Kramer}, 455 U.S. 745, 765 (1982) (quoting \textit{In re Winship}, 397 U.S. 358, 363 (1970)) (emphasis added).} Georgia flips this standard on its head to facilitate wrongful—and unjust—executions.\footnote{See O.C.G.A. 17-7-131 (2010).} Scientific and psychological assessments, however, reflect probabilities, not certainties, and use imprecise, not exact, methods. Thus, by requiring defendants to meet a standard that even science cannot, particularly where the evidence shows that a defendant is more than likely, or probably disabled, Georgia executes intellectually disabled defendants in violation of \textit{Atkins} and “evolving standards of decency that mark progress of a maturing society.”\footnote{Hall, 134 S.Ct. at 1992 (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958)); see also U.S. Const., Amend VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).}

Georgia’s standard for determining intellectual disability is itself intellectually disabled—and dishonest. It is about as reliable as the O.J. Simpson verdict and about as fair as putting a black man on trial for murder of a white woman before an all-white jury in Mississippi. Of course, Warren Hill and the black defendant have one thing in common: they stand no chance in a justice system where the color of one’s skin matters more than guilt or innocence. Of course, O.J. Simpson’s not guilty verdict resulted in part because his race mattered more than his guilt or innocence. Simply stated, in Hill’s case, race leads to a grave injustice. In Simpson’s case, it also led to a grave injustice. That’s the problem: when the focus is on race, no matter how noble one’s intentions, we lost sight of the fact that justice should be blind.

Warren Hill’s case gives the Court a chance to apply \textit{Hill} and put an end to Georgia’s unconstitutional statute and the barbaric practice of executing the intellectually disabled.
II.

HALL V. FLORIDA: THE COURT’S REASONING

Freddie Hall and Warren Hill share something in common. First, trial courts have deemed both defendants intellectually disabled. Nonetheless, Hall faced execution before the Supreme Court intervened. Hill, however, remains on death row.\textsuperscript{15} It is time for the Supreme Court to intervene again, and hold that states cannot so easily circumvent constitutional rights—or common decency.

A. THE FLORIDA SUPREME COURT’S DECISION UPHOLDING THE IQ CUTOFF

The background to Hall’s case is troubling. In 1991, a trial declared that Hall was intellectually disabled.\textsuperscript{16} Nearly twenty years later, however, the same trial court reached the opposite result. During that period, the Florida legislature enacted §921.137, which on its face mirrored the three-part definition adopted in \textit{Atkins}.\textsuperscript{17} The Florida Supreme Court, however, interpreted §921.137 to bar evidence on two out of the three intellectual disability prongs (adaptive disability and early onset), if a defendant scored above 70 on an IQ test.\textsuperscript{18} In its view, “the failure to establish any one element will end the inquiry.”\textsuperscript{19} For Hall, it did end the inquiry.

On three occasions, Hall was given the Wechsler Adult Intelligence Scale, and received scores of 80, 73, and 71, respectively, although the Florida Supreme Court discredited one other test where Hall’s IQ was 69.\textsuperscript{20} These scores precluded Hall from introducing evidence.

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\textsuperscript{16} \textit{Hall}, 109 So.3d at 706.
\textsuperscript{17} Id. at 708.
\textsuperscript{18} Id. at 712 (Pariente, J., concurring). Evidence suggested, however, that the Florida legislature intended the SEM to apply. \textit{See Hall}, 134 S.Ct. at 1994.
\textsuperscript{19} \textit{Hall}, 109 So.3d at 710.
\textsuperscript{20} Id.
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concerning his “lack of ability to adapt or adjust to the requirements of daily life”\textsuperscript{21} to being raised “under the most horrible family circumstances imaginable.”\textsuperscript{22}

In addition, the Florida Supreme Court refused to interpret Hall’s IQ as a range of scores.\textsuperscript{23} The court acknowledged, however, that “while not unique in its use of a bright-line cutoff score of 70, is not in the majority,”\textsuperscript{24} and acknowledged the “concern that in some states Hall would be mentally retarded by those states’ definitions, while in others, like Florida, the bright-line cutoff requires a contrary finding.”\textsuperscript{25} In fact, the Florida Supreme Court conceded that “the United States Supreme Court may determine that a bright-line cutoff is unconstitutional because of the risk of executing an individual who is in fact mentally retarded.”\textsuperscript{26} The court was right, but did nothing to stop Hill’s execution. In his dissent, Justice Perry argued that the majority’s decision led to precisely that result:

The testimony reflects that Hall has an IQ of 60; he suffers from organic brain damage, chronic psychosis, a speech impediment, and a learning disability; he is functionally illiterate; and he has a short-term memory equivalent to that of a first grader. The defense’s four expert witnesses who testified regarding Hall’s mental condition stated that his handicaps would have affected him at the time of the crime. As the trial judge noted in the resentencing order, Freddie Lee Hall was “raised under the most horrible family circumstances imaginable.”\textsuperscript{27}

Despite abundant evidence of intellectual disability, however, the Court held that it “is not at liberty to deviate from the plain language of section 921.137(i),”\textsuperscript{28} which used the conjunctive “and” when enumerating \textit{Atkins}’ three intellectual disability prongs. Too bad the Florida Supreme Court did not feel this way during the 2000 Presidential election. Courts, it seems, can be so fickle. The standard for determining death eligibility should not.

\begin{itemize}
  \item \textsuperscript{21} \textit{Hall}, 134 S.Ct. at 1991.
  \item \textsuperscript{22} \textit{Hall} 109 So.3d at 718.(internal quotations omitted) (Perry, J., dissenting).
  \item \textsuperscript{23} \textit{Id.} at 714-715 (Pariente, J., concurring).
  \item \textsuperscript{24} \textit{Id.}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{Id.} at 715.
  \item \textsuperscript{27} \textit{Id.} at 718 (internal quotations omitted) (Perry, J., dissenting).
  \item \textsuperscript{28} \textit{Id.} at 715.
\end{itemize}
B. THE SUPREME COURT’S DECISION

The Supreme Court granted certiorari and, in a 5-4 decision, reversed. Writing for the majority, Justice Kennedy held that the Florida Supreme Court erred by: (1) failing to take the SEM into account; and (2) refusing to consider evidence of adaptive disability simply because Hall had an IQ above 70.\(^{29}\)

The SEM, and the imprecision of psychological assessments, was critical to the Court’s decision. Justice Kennedy explained that “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.”\(^{30}\) The SEM reflects “the inherent imprecision of these tests,”\(^{31}\) and when applied, it increases the likelihood, known as the confidence level, that an individual’s IQ falls within five points on either side of the score.\(^{32}\) For example, if an individual scores 71 on an IQ test, and reported range is 66 to 76, there is a confidence level of 98% that the individual’s IQ is within that range.\(^{33}\) Narrowing the range to two-and-a-half points on either side (68.5 to 73.5) reduces the confidence level to 68%. If the SEM were not included at all, the result would not be considered reliable or probative of subaverage intellectual functioning. Simply put, “[t]he flaws in Florida’s law are the result of the inherent error in IQ tests themselves,” which reflect “an approximation, not a final and infallible assessment of intellectual functioning.”\(^{34}\)

Thus, because “intellectual disability is a condition, not a number …”\(^{35}\) courts must recognize, as does the medical community, that the IQ test is imprecise.\(^{35}\) Thus, “a State must

\(^{30}\) Id. at 1995 (citing David Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944)).
\(^{31}\) Hall, 134 S.Ct. at 2001.
\(^{32}\) Id. at 1995.
\(^{33}\) Id.
\(^{34}\) Id. at 2000 (citing Amicus Brief of the American Psychological Association, at 24 (“[I]t is standard psychometric practice to report the ‘estimates of relevant reliabilities and standard errors of measurement’ when reporting a test score”); ibid. (the margin of error is “inherent to the accuracy of IQ scores”).
\(^{35}\) Hall, 134 S.Ct. at 2001.
afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number.”

Indeed, “a significant majority of States implement the protections of Atkins by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustment.”

Otherwise, the states would risk “executing a person who suffers from intellectual disability.”

The Florida Supreme Court, however, did the opposite and disregarded “one of the most important concepts in measurement theory.”

Ironically, this precluded a comprehensive analysis of whether Hall was, in fact, mentally disabled:

Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in Atkins that intellectual disability is characterized by an IQ of “approximately 70 … Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test.

Simply put, the Florida Supreme Court's decision misconstrued Atkins and improperly excluded evidence of adaptive functioning in the intellectual disability calculus. Furthermore, the court’s interpretation of §921.137 was inconsistent with “cited definitions of intellectual disability [that], by their express terms, rejected a strict IQ test score cutoff at 70.”

To be sure, Justice Kennedy wrote that “the clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental

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36 Id. (the majority noted that “[t]his calculation provides “objective indicia of society's standards” in the context of the Eighth Amendment.”) (quoting Roper, 543 U.S. at 563).  
37 Hall, 134 S.Ct. at 1999. (“Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior”).  
38 Id. (citing Amicus Brief of American Psychological Association, at 17 (“Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid”).  
40Id. (brackets in original).
The purpose and nearly uniform use of the SEM “provides strong evidence of consensus that our society does not regard this strict cutoff as proper or humane,” and recognizes that “an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist.” Thus, “[f]or professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies … the inquiry would consider factors indicating whether the person had deficits in adaptive functioning,” which includes “evidence of past performance, environment, and upbringing.” Justice Kennedy stated:

By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court’s inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

Indeed, “those persons who meet the “clinical definitions” of intellectual disability “by definition ... 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.” For example, defendants like Hall scoring above 70 on an IQ test could not introduce any evidence “of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and

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41 Id. at 1999 (“[t]he Florida Supreme Court’s decision therefore “goes against the unanimous professional consensus,” that IQ tests as “approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks”).
42 Id. at 1998.
43 Id. at 1994-1995 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 37 (5th ed. 2013)).
44 Hall, 134 S.Ct. at 1998.
45 Id. at 1994-1995.
46 Id. at 1999 (quoting Atkins, 536 U.S. at 318).
testimony regarding past behavior and family circumstances.”\footnote{Hall, 134 S.Ct. at 1994.} Ultimately, the Florida Supreme Court’s decision “misuse[d] IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability.”\footnote{Id. at 2001 (brackets added).}

Most importantly, by prohibiting defendants from presenting such evidence, Florida made it likely, if not certain, that intellectually disabled defendants would face execution:

Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.\footnote{Id. at 1992.}

Ultimately, the “Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.”\footnote{Id. at 1992.} At the very least, this prevents “the execution of a retarded man.”\footnote{In re Hill, 715 F.3d 254, 301 (11th Cir. 2013).} Georgia’s standard does no such thing.

III.\nopener

BEYOND A REASONABLE DOUBT IN GEORGIA: THE NEW IQ CUTOFF

Unlike Florida, Georgia allows all capital defendants to admit evidence of adaptive and other disabilities. Warren Hill demonstrated—and a state court twice found—that he was intellectually disabled.\footnote{See Turpin v. Hill, 498 S.E.2d 52, 53 (Ga. 1998).} In Georgia, however, it does not matter. They execute you anyway. Despite his pronounced disabilities, Warren Hill still sits on death row. If the Supreme Court applies Hall’s reasoning to Georgia’s statute, however, Hill will not die on the lethal injection table.
A. BACKGROUND

Warren Hill’s case is to Georgia what Freddie Lee Hall was to Florida.

In the last fifteen years, Hill has filed three habeas petitions at the federal and state level, arguing that he is intellectually disabled, and that Georgia’s beyond a reasonable doubt standard violates the Eight Amendment. In his first habeas petition, the state trial court, applying a preponderance of the evidence standard, agreed. The Georgia Supreme Court reversed, holding that the reasonable doubt standard did not violate the Eighth Amendment and must be applied to Hill’s intellectual disability claim.

On remand, the state court applied the heightened standard and initially denied the petition. On rehearing, however, which occurred after the Court decided *Atkins*, the court again applied the preponderance standard. For the second time, the court held that Hill was intellectually disabled. Once again, the Georgia Supreme Court reversed, holding that the reasonable doubt standard complied with *Atkins*. On remand, the state court reiterated its finding that Hill was intellectually disabled, but this time, applying the reasonable doubt standard, denied the petition.

Hill’s federal habeas petition was subsequently denied. A three-judge panel of the Eleventh Circuit reversed the district court, but on a rehearing *en banc*, affirmed the denial of the petition. Hill’s second federal habeas petition, which adduced new evidence from experts recanting earlier testimony that Hill was not disabled, was denied by both the district court and

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53 See id. at 53.
54 See id; see also *Hill v. Humphrey*, 662 F.3d 1335, 1341-1342 (11th Cir. 2011) (discussing the complex procedural history).
55 See *Turpin*, 498 S.E.2d at 52-54.
56 See id.
57 See *Hill*, 662 F.3d at 1341-1342.
59 *Hill*, 662 F.3d at 1342-1343 (discussing the lower court proceedings).
60 Id. at 1360-1361.
Eleventh Circuit. Both courts held that the petition was procedurally barred because it presented essentially the same claim, and contravened the Anti-Terrorism and Effective Death Penalty Act’s purpose of ensuring finality in judgments.

Currently, Hill finds himself in the same predicament as Freddie Hall: awaiting execution despite overwhelming evidence that he is intellectually disabled. The Supreme Court should intervene and invalidate Georgia’s reasonable doubt standard for the same reason it found Florida’s IQ cutoff unconstitutional: it employs an unfair and nearly insurmountable standard that facilitates the execution of intellectually disabled defendants.

B. GEORGIA’S STATUTE WILL LEAD TO THE EXECUTION OF AN INTELLECTUALLY DISABLED MAN

Intellectually disabled defendants like Warren Hill will be executed if Georgia’s beyond-a-reasonable-doubt standard is upheld. This standard makes it impossible for all but the most severely ill defendants to demonstrate that they are intellectually disabled. Although Georgia does not base life and death decisions on statistically insignificant distinctions like a one-point difference in IQ, its heightened standard allows courts to disregard distinctions in intellectual functioning that are statistically significant. In so doing, all but the most severely ill defendants will escape execution.

Georgia’s standard suffers from the same flaw as Florida’s IQ cutoff statute: it does not account for the inherent imprecision in scientific testing. Since an IQ scores is expressed as a range, and psychological assessments for adaptive disability must be administered and interpreted by an expert, capital defendants can, except in the most extreme cases, only show

61 Id. at 1337.
that they are *probably* or likely* disabled. Put differently, imprecision, makes it difficult, if not
impossible, for most defendants to satisfy the reasonable doubt standard, which the Court defines
as “exclude[ing] any doubt of … guilt that is reasonable,” “a doubt that would cause a reasonable
person to hesitate to act,” and “the truth of the fact to a reasonable and moral certainty.” Given
that intellectual disability claims rest on approximate measures of IQ and subjective, albeit
expert testimony concerning adaptive disability, the likelihood that a defendant can prove
intellectually disabled to a “moral certainty,” or that any doubt is little more than “mere
possibility … bare imagination, or … fanciful conjecture” is close to zero. Thus, the result of
Georgia’s standard is to execute defendants that are likely, or even probably, disabled. That fact
alone should be a reason to pause, not pull the switch. As Warren Hill’s case demonstrates,
Georgia has chosen the latter, defying *Atkins* and the Eight Amendment.

As *Hall* recognized, if the prohibition on executing intellectually disabled defendants is
to mean anything, it must require states to implement evidentiary standards that reflect what a
defendant, considering the imprecision in scientific testing, is reasonably able to prove. By
adopter a reasonable doubt standard, Georgia does the opposite. It leaves no room for
“individualized consideration” because only the most severely disabled defendants will have a
realistic chance to prove intellectual disability beyond a reasonable doubt:

As the trial proceedings in both Atkins's and Hill’s cases demonstrate, it is
apparent that mildly mentally retarded offenders—89% of the universe of all
mentally retarded—face the greatest difficulty in satisfying the standard, and are
at the greatest risk of an erroneous determination that they are not mentally
retarded. In the first place, their IQ score is frequently within an error range of a
non-mentally retarded person. Moreover, with respect to adaptive skills, most
mentally retarded individuals, especially those whose mental retardation is mild,
“present a mixed competence profile … Individuals with mild mental retardation

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64 *Victor*, 511 U.S. at 18 (quoting trial court’s charge to the jury).
may “manifest subtle limitations that are frequently difficult to detect, especially in academic skills, planning, problem solving, and decision making, and social understanding and judgment.”

To be sure, “[n]ot only is the risk of error allocated overwhelmingly to the offender, but it is also enlarged exponentially by the highly subjective nature of the inquiry into mental retardation, making it even clearer that the reasonable doubt standard unquestionably will result in the execution of those offenders that Atkins protects.” Simply put, “[w]here the proof must be beyond a reasonable doubt, common sense tells us that requiring reliance on these unavoidably incomplete and subjective sources of information renders the Atkins claimant’s job a near-impossible task.”

Thus, although Georgia’s statute does not make artificial distinctions based on IQ scores, it fails to make statistically significant distinctions between those who are intellectually disabled and those who are not, and fails to protect defendants who, like Warren Hill, have been deemed intellectually disabled by a preponderance of the evidence. Additionally, Georgia’s use of the reasonable doubt standard distorts its purpose as “a prime instrument for reducing the risk of convictions resting on factual error.” Georgia uses the reasonable doubt standard to increase, not lower, the risk of executing intellectually disabled defendants, and to narrow, not expand the class of defendants who have a realistic chance of proving intellectual disability. In her dissent, Judge Barkett stated:

[T]he 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

66 Hill, 662 F.3d at 1376 (Barkett, J., dissenting) (citations omitted).
67 Id. at 1372.
68 Id. at 1374.
69 See Santosky, 455 U.S. at 765 (quoting In re Winship, 397 U.S. at 363 (emphasis added)).
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 decision eviscerates the substantive constitutional right the Supreme Court has explicitly recognized, it is contrary to that Supreme Court precedent.\(^70\)

Indeed, if “States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.”\(^71\)

That is precisely what happens in Georgia. When evidence of intellectual disability tilts in the defendant’s favor, and makes it more likely than not that a defendant *is* disabled, Georgia still imposes death. Georgia’s statute can be summarized as follows: if you cannot win fairly, then change the rules. The Court should react by saying that if you cannot play by the rules, you cannot execute *anyone*. If you “transgress [the] substantive constitutional right”\(^72\) established in *Atkins*, then you violate the “evolving standards of decency that mark the progress of a maturing society.”\(^73\)

Warren Hill’s case provides the Court with this opportunity. A state trial court held that Hill was mentally disabled—twice—but he still faces execution. Executing Hill is equivalent to watching a ten-year old child take his last breath in the electric chair. In fact, if Florida had gotten its way, it would have executed a man (Freddie Hall) with intellectual functioning described as “at best comparable to the lawyer's 4–year–old daughter”\(^74\) and his “levels of understanding [resembled those] “typically [seen] with toddlers.”\(^75\) The fact that Hill is considered only “mildly mentally retarded”\(^76\) should not mean that he is somehow more deserving of the death penalty or less worthy of protection under *Atkins*. Georgia’s heightened

\(^70\) *Hill*, 662 F.3d at 1365 (Barkett, J., dissenting).
\(^71\) *Hall*, 134 S.Ct. at 1999.
\(^72\) 662 F.3d at 1368 (Barkett, J., dissenting).
\(^73\) *Hall*, 134 S.Ct. at 1992 (*quoting Trop*, 356 U.S. at 100).
\(^74\) *Hall*, 134 S.Ct. at 1991.
\(^75\) *Id.* (brackets added).
\(^76\) *Hill*, 662 F.3d at 1375 (Barkett, J., dissenting).
standard, however, leads to precisely that result. It artificially narrows the class of individuals who are mentally disabled and thus ensures that all but the most severely mentally ill will face execution. For that and other reasons, Hill’s execution, and the reasonable doubt standard, is “fundamentally at odds with the basis for the holding in Atkins,”77 and does not further the penological purposes of the death penalty.

The most troubling aspect of Georgia’s statute is its affront to human dignity, and the stain of injustice that it leaves on all citizens. After all, who we execute says a lot our values as a society. Choosing to execute weak and vulnerable citizens through laws that make it harder for them to prove intellectual disability does not show respect for human life or promote the rule of law. And it does not matter, in Georgia or elsewhere, that an intellectually disabled defendant has committed a heinous crime. What matters how they we treat them. Processes that make it easier to usher intellectually disabled defendants to the gas chamber simply because a crime’s depravity tugs at our retributive instincts shows how easy it is to disregard due process when the desire to quench our thirst for vengeance overcomes reason. Just as Hall vindicated “our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world,”78 the Supreme Court hold that Georgia’s reasonable doubt standard leads to results even Georgians should find unwelcome.

77 Id. at 1384 (Wilson, J., dissenting).
78 Hall, 134 S.Ct. at 2001.
CONCLUSION

In 1988, after Atkins, Georgia became the first state to ban executions of the intellectually disabled. It should also be the first to eliminate procedures that, as a practical matter, execute the intellectually disabled.

What Georgia must answer is why it chooses to execute defendants like Warren Hill, and others who do not appreciate or understand why they are being executed for crimes that, although unspeakable, resulted in substantial part from impaired cognitive functioning and developmental disabilities.79 Until Georgia provides an answer that extends beyond platitudes about justice and quotes something other than the Bible, the fact will remain that executing Warren Hill is as heinous the crimes he committed. The problem is that there is no acceptable answer, except the one that comes from the Supreme Court, holding that Georgia’s standard violates the Eight Amendment.