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The Texas-Size Struggle to Implement Atkins v. Virginia

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THE TEXAS-SIZE STRUGGLE TO IMPLEMENT *ATKINS V. VIRGINIA*

I. INTRODUCTION

In *Atkins v. Virginia*,[1] the United States Supreme Court held that the Eighth Amendment's protection against cruel and unusual punishment bars the execution of mentally retarded capital offenders.[2] The Court left the implementation of procedural methods for determining a defendant's competency for death-sentencing purposes up to the states.[3] The Court did give one clear directive in *Atkins*, however. In implementing the ban, the states are to create a scheme that bars the execution of all offenders that "fall within the range of mentally retarded offenders about whom there is a national consensus."[4]

1. Atkins v. Virginia, 536 U.S. 304 (2002).
2. *See id.* at 321.
3. *See id.* at 317.
4. *See id.*

Overall, the majority of states have set forth statutory schemes that provide procedures for identifying such an offender.[5] Out of the thirty-nine states that have capital punishment systems,[6] twenty-six have successfully passed legislation,[7] some with more debate than others.[8] Eighteen of these states had already passed legislation prior to *Atkins*, and eight states followed suit post-*Atkins*.[9] This is not true in Texas, which now finds itself in the minority.[10]

In its effort to exclude the mentally retarded from execution, the Texas Legislature has been marred by continuing debate and inaction.[11] This is despite the fact that Texas leads the nation in the number of executions performed each year[12] and despite consistent effort on the part of the Legislature to implement such a ban, well before *Atkins* and since.[13] Texas's struggle to achieve a consensus within its borders mirrors a debate now occurring at the national level.[14]

The consequences of this continuing failure are not entirely clear. In the absence of legislative action, the Criminal Court of Appeals of Texas has been forced to decide some procedural rules in the context of habeas proceedings—including the definition of mental retardation to be used, the burden of proof and party bearing that burden, and

5. *See id.* at 314–16, 317, n.22.

6. Death Penalty Information Center, *Death Penalty Policy by State*, http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (showing a total of 39 states that implement capital punishment) (last visited Sept. 14, 2007).

7. *See* United States v. Sablan, 461 F. Supp. 2d 1239, 1241 (D. Colo. 2006) (noting that 26 states as of 2006 have adopted procedural mechanisms for implementing *Atkins*).

8. *See Recent Developments in Utah Law*, 2004 UTAH L. REV. 163, 289 (2004) (discussing contentious debate in passage of legislation); *see* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 12–14 (2003).

9. *Sablan*, 461 F. Supp. 2d at 1241.

10. William Lee Hon, *Claims of Mental Retardation in Capital Litigation*, 69 TEX. B.J. 742 (2006).

11. *See id.*

12. As of Dec. 31, 2005, the Department of Justice reports that Texas executed 652 people since 1930, placing it in the number one spot. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online 31st Edition, http://www.albany.edu/sourcebook/tost_6.html#6_n, (Prisoners executed, by jurisdiction, 1930-Dec. 31, 2005 (aggregate), last visited Sept. 13, 2007). *See also* Texas Coalition to Abolish the Death Penalty, Total Number of Offenders Sentenced to Death from each Texas County, http://www.tcadp.org/facts.php#factsi (last updated: November 21, 2005) (showing 281 offenders sentenced to death in Harris County, TX, alone).

13. Hon, *supra* note 10, at 742; Peggy M. Tobolowsky, *Texas and the Mentally Retarded Capital Offender*, 30 T. MARSHALL L. REV. 39, 83–86 (2004).

14. *Compare Sablan*, 461 F. Supp. 2d at 1239–43 (holding that determination of mental retardation should be a pre-trial determination by the court and placing burden of proof on defendant by preponderance of the evidence), *and* United States v. Cisneros, 385 F. Supp. 2d 567, 570–71 (E.D. Va. 2005) (holding that determination of mental retardation should be made by jury in the penalty phase; defendant has the burden of proof by the preponderance of the evidence), *with* New Mexico v. Flores, 93 P.3d 1264, 1269 (N.M. 2004) (holding that defendant may have pre-trial determination and jury deliberation on issue).

whether the applicant is entitled to a jury determination on the issue[15]—but the state's counties have been required to fill in the gaps. As this Comment will later discuss, whether the *Atkins* ban should be implemented as a pre-trial or post-conviction assessment, the appropriate fact-finder to make the decision (court or jury), and whether that fact-finder should be involved in the assessment of the defendant's guilt or innocence remain unanswered questions for each county to decide.

The consequences of leaving these issues for counties to decide are not entirely clear. The lack of a unified statutory design might lead to procedural approaches influenced by county-level political variables, such as the strength of the defense bar, the sitting judge's bias towards the prosecution or defense, and the community's particular approach on crime. Considering the importance of upholding the *Atkins* ban, this potential crazy-quilt of politically-motivated approaches has ramifications that may lead to later constitutional challenges.

This Comment will analyze the persisting area of divide that is responsible for delaying the Texas Legislature's implementation of *Atkins*. First, it will look at how the differing procedural approaches represent the larger political issues in the pro- and anti-death penalty debate surrounding the Texas Legislature's original pre-*Atkins* attempts to implement a ban on the execution of mentally retarded offenders. Additionally, it will provide a high-level overview of bills introduced since *Atkins* was decided, focusing on the most contentious issues that persisted from those attempts. It will also review how the Texas Court of Criminal Appeals has answered some of these issues in the interim. Finally, it will analyze how these various approaches compare to other states that have successfully conquered this issue and will look at how the Supreme Court is likely to determine growing state procedural challenges.

II. The Battle Between the Texas House and Senate

When the Supreme Court decided *Atkins*, many predicted that it would result in a flood of litigation and create major confusion in those states that had not implemented a ban.[16] Varying testing methods, definitions of mental retardation, and differing opinions on what

15. *See Ex parte* Briseno, 135 S.W.3d 1, 8–10, 12 (Tex. Crim. App. 2004) (holding: (1) mental retardation would be defined according to American Association on Mental Retardation and Texas Health and Safety Code § 591.003(13) criteria; (2) applicant was not entitled to jury determination of mental retardation; and (3) applicant had burden of proving mental retardation by a preponderance of the evidence).

16. *See* Ellis, *supra* note 8, at 21 n.38; Tony Mauro, *High Court Considers Cert. in Retardation Claims Cases*, Recorder (S.F.), May 20, 2004, *available at* 5/20/2004 RECORDER-SF 3 (Westlaw).

types of evidence should be allowed in the assessment of competency for execution purposes, make it an area ripe for contention.[17]

Perhaps surprisingly, other states have not seen the same level of debate as Texas—or at least have settled the issues without the level of animosity predicted by many when the Court first handed down its holding in *Atkins*.[18] There are currently only thirteen states that have yet to pass legislation implementing the *Atkins* ban.[19]

In Texas, however, this prediction has been more accurate, for the Texas Legislature has yet to implement a statutory scheme for ensuring that mentally retarded offenders are not executed.[20] But Texas's lack of a statutory ban is not the result of a lack of trying. During five legislative sessions in the ten years prior to *Atkins*, the Texas Legislature made several attempts to design a bill that sets forth procedures for identifying mentally retarded offenders with the purpose of excluding them from death row.[21] And, since the year of the *Atkins* decision, it has attempted to pass a total of fourteen bills, four created in the Texas House and ten created in the Texas Senate, none of which resulted in a legislative plan.[22] Texas's struggle to achieve a consensus within its borders centers around two sides of a debate now emerging nationwide.[23]

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17. *See* Atkins v. Virginia, 536 U.S. 304, 317 (2002).

18. *See* Mauro, *supra* note 16 (quoting James Ellis as stating, "The pitched battles that everyone expected after *Atkins* haven't happened.").

19. *See* Death Penalty Information Center, *supra* note 6; *Sablan*, 461 F. Supp. 2d at 1241 (noting that twenty-six states as of 2006 have adopted procedural mechanisms for implementing *Atkins*).

20. Hon, *supra* note 10, at 742.

21. Tobolowsky, *supra* note 13, at 39, 83–86.

22. *See generally* Texas Legislature Online, http://www.capitol.state.tx.us (follow "Text Search" hyperlink; choose "78(R) – 2003" for Legislature; type "'death penalty' 'retardation'" in the "with all of the words" search box; click the "Search" button) [hereinafter 78th Legislature, Regular Session] (showing five bills—S.B. 163, S.B. 389, S.B. 332, H.B. 614, H.B. 664— introduced during the 78th regular session) (last visited Oct. 13, 2007); Texas Legislature Online, http://www.capitol.state.tx.us (follow "Text Search" hyperlink; choose "78(1) – 2003" for Legislature; type "'death penalty' 'mental retardation'" in the "with all of the words" search box; click the "Search" button) [hereinafter 78th Legislature, First Called Session] (showing four bills—S.B. 57, H.B. 18, S.B. 13, S.B. 14—introduced during the first special session called by the 78th Legislature) (last visited Oct. 13, 2007); Texas Legislature Online, http://www.capitol.state.tx.us (follow "Text Search" hyperlink; choose "79(R) – 2005" for Legislature; type "'death penalty' 'mental retardation'" in the "with all of the words" search box; click the "Search" button) [hereinafter 79th Legislature, Regular Session] (showing four such bills—S.B. 231, S.B. 85, S.B. 65, H.B. 419—introduced during the 2005 79th Legislature's regular session) (last visited Oct. 12, 2007); Texas Legislature Online, http://www.capitol.state.tx.us (follow "Text Search" hyperlink; choose "80(R) – 2007" for Legislature; type "'death penalty' 'mental retardation'" in the "with all of the words" search box; click the "Search" button) [hereinafter 80th Legislature, Regular Session] (showing one bill, S.B. 249, proposed during the 80th Legislature's regular session) (last visited Oct. 12, 2007).

23. Despite the lack of major disagreement in state legislatures, cases challenging state legislative plans show a growing debate that is headed toward the Supreme Court. *Compare* United States v. Sablan, 461 F. Supp. 2d 1239, 1239–43 (D. Colo.

A. *The Real Fight Pre-*Atkins*: The Death Penalty Debate*

In analyzing why the Texas Legislature's attempts to achieve a regulatory scheme have repeatedly stalled, it is perhaps most important to identify possible political motivations behind the various approaches.

Where one falls in the procedural debate may be determined by where one falls in the death penalty debate. Before *Atkins* was decided, whether to implement a ban on the execution of mentally retarded offenders was debated in the context of the anti- or pro-death penalty discourse.[24] As will be discussed in the next section, the pro- and anti-death penalty sides were split not only as to whether there should be a ban, they disagreed on procedural aspects of implementing the ban as well, differing as to the appropriate fact-finder, the type of evidence relevant in making the determination, and the appropriate stage of the trial in which to make the determination. Although it is not clear that the two sides of the *current* procedural debate are so clearly delineated into pro- and anti-death penalty camps, the previous ideological divide may explain why getting a legislative ban into place has been such a battle.

This Comment will next look at how the death penalty debate may have influenced the current *Atkins* procedural fight. First, it will discuss a pre-*Atkins* bill that made it the furthest yet in the history of this state's numerous legislative attempts—all the way to the Governor's desk where it was promptly vetoed. Next, it will review the Texas Legislature's post-*Atkins* attempts to implement a ban, analyzing how the structure of these later attempts may have been influenced by this earlier failure.

1. Pre-Trial vs. Post-Conviction, Jury or Court: Drawing the Persisting Lines with H.B. 236

Ironically, the year before the *Atkins* decision was set forth, the Texas Legislature got the closest to implementing such a ban, in the form of Combined Senate House Bill 236.[25] The debate generated by C.S.H.B. 236 may help in understanding today's polarized positions in the fight to implement a legislative plan for *Atkins*.

In the course of debating this bill, the contentions between the two chambers largely came down to two issues: (1) the appropriate fact-finder involved in determining the presence of mental retardation and

2006) (holding that determination of mental retardation should be a pre-trial determination by the court and placing burden of proof on defendant by preponderance of the evidence), *and* United States v. Cisneros, 385 F. Supp. 2d 567, 570–71 (E.D. Va. 2005) (holding that determination of mental retardation should be made by jury in the penalty phase; defendant has the burden of proof by the preponderance of the evidence), *with* New Mexico v. Flores, 93 P.3d 1264, 1269 (N.M. 2004) (holding that defendant may have pre-trial determination and jury deliberation on issue).

24. *See infra*, Section II.A.1.

25. *See* Tobolowsky, *supra* note 13, at 85.

(2) the point at which the issue should be determined, pre-trial or post-conviction. C.S.H.B. 236 started in the Texas House as a pre-trial measure, allowing the defendant to request a special hearing that would involve only the court in the determination of whether he was a person with mental retardation.[26] In the committee review process, H.B. 236 was amended so that the determination of mental retardation was now a post-conviction procedure, decided by the jury in the sentencing deliberations.[27] The House ultimately passed the bill, but the Texas Senate refused to adopt the measure, amending it so that H.B. 236 was again a pre-trial procedure.[28] After the House refused these amendments, it started the process for convening a combined conference committee to reach agreement on the bill.[29]

On May 2, 2001, the Senate Criminal Justice Committee heard public testimony on the Senate's version of H.B. 236, sponsored and authored by Senator Rodney Ellis.[30] Proponents of the Senate's pre-trial amendment were represented by University of Texas Professor Jordan M. Steiker, Judge Charlie Baird, and Dr. Ollie Seay.[31] Judge Baird argued that a pre-trial determination of mental retardation by the court would be the more efficient process, arguing that an assessment of mental retardation is closely related to existing pre-trial determinations of a defendant's competency to stand trial, and so should be determined at the same time.[32] Both Baird and Steiker further asserted that in cases where the defendant is determined to be mentally retarded, a pre-trial determination would eliminate the most time-consuming and costly part of a capital trial, namely jury selection, and therefore save the State, the victims, and all involved the expense and emotion that a capital trial brings.[33]

Opponents of the ban were represented by Joe Price, then District Attorney for Trinity County; David Weeks, District Attorney for Walker County; and Chuck Noel, Assistant District Attorney for Harris County.[34] Adamant against any ban on the execution of mentally retarded offenders, Joe Price asserted that such a measure would

26. *See* Tex. H.B. 236, 77th Leg., R.S. (2001) (introduced version) [hereinafter Tex. H.B. 236].

27. *See id.* (House Committee Report); Tobolowsky, *supra* note 13, at 85.

28. Tobolowsky, *supra* note 13, at 85.

29. *Id.*

30. *See generally* Audio file: Hearing on H.B. 236 Before the Sen. Comm. On Crim. Justice 77th Leg. R.S. (May 2, 2001), *available at* http://www.senate.state.tx.us/avarchive/?yr=2001&lim=150 (audio file available for download, click on link "May 02", relevant portion found at 2:13:47—4:09:33) [hereinafter Hearing on H.B. 236].

31. *See id.*, testimony of Judge Charlie Baird beginning at 2:19:50, testimony of Professor Jordan M. Steiker beginning at 2:23:29, testimony of Dr. Ollie Seay, Psychologist, beginning at 2:36:25.

32. *See id.* at 2:21:10, 22:22:50.

33. *See id.* at 2:21:20 (statement of Judge Charlie Baird); *see also id.* at 2:24:40 (statement of Professor Jordan M. Steiker).

34. *See id.*, testimony of David P. Weeks beginning at 2:51:20, testimony of Chuck Noel beginning at 2:58:00, and testimony of Joe Price beginning at 3:02:47.

bring new opportunity to other classes of defendants that might assert ineligibility, such as those that are mentally ill, thereby presenting a slippery slope to the abolition of the death penalty.[35] All district attorneys testifying argued against a pre-trial procedure, countering that requiring a determination at such a stage would actually be less efficient.[36] They argued that evidence of the crime itself was relevant to an assessment of a defendant's possible mental retardation, stating that evidence of a defendant's decision-making and planning process is relevant to general intellectual functioning and adaptive skills.[37] Therefore, these opponents argued, a pre-trial procedure would result in a double capital trial of sorts, requiring the victim's family members to endure the painful process of hearing the details of the crime in-depth for a second time.[38]

A second major point of contention between the two chambers in debating H.B. 236 was designating the appropriate fact-finder that would make the determination of whether the offender was mentally retarded. The original version of the bill that passed the House designated the convicting jury as fact-finder, but the Senate amended this so that only the court made the decision, pre-trial.[39] In the May hearing on H.B. 236, Professor Steiker argued that the convicting jury would be too emotionally invested and would likely be tempted to reduce the issue to a mitigating factor—weighing it against other aggravating factors that show the defendant should be executed, instead of treating it as a categorical ban.[40] They argued that this would result in allowing the jury to effectively nullify the legislative intent behind the bill.[41] Dr. Seay further argued that determinations of mental retardation are too complex for jurors to understand, as they lacked the background and training needed to make a medical decision such as an assessment of mental retardation.[42] Proponents of a post-conviction procedure countered that jurors are frequently required to decide complex technical and medical issues based on expert testimony, and

35. *See id.* at 3:03:30 to 3:04:20.

36. *See id.* at 2:55:29 (statement of David P. Weeks); *see also id.* at 2:58:05 (statement of Chuck Noel); 3:10:35 (statement of Joe Price).

37. *See id.* at 2:55:29 (statement of David P. Weeks); *see also id.* at 2:58:05 (statement of Chuck Noel); 3:10:35 (statement of Joe Price).

38. *See id.* at 2:55:29 (statement of David P. Weeks); *see also id.* at 2:58:05 (statement of Chuck Noel); 3:10:35 (statement of Joe Price).

39. Tobolowsky, *supra* note 13, at 85.

40. *See* Hearing on H.B. 236, *supra* note 30, at 2:23:50; *see also* 2:15:30 (statement of Senator Rodney Ellis (statement beginning at 2:14:47)); 2:20:35 (statement of Judge Charlie Baird).

41. *See id.* at 2:15:30 (statement of Senator Rodney Ellis); 2:20:35 (statement of Judge Charlie Baird); *see also id.* at 2:23:50 (statement of Professor Jordan M. Steiker).

42. *See id.* at 2:39:33 (statement of Dr. Ollie Seay).

a jury trial is allowed for the same assessment of mental retardation under the Persons with Mental Retardation Act.[43]

2. The Attempted Compromise: A Hybrid Bill

What ultimately emerged was a compromise measure. A jury determination of the defendant's possible mental retardation at the sentencing phase of the trial remained, but for those defendants that were determined to have normal intelligence, a post-sentencing review by the convicting court was added.[44] If the court found that the defendant was a person with mental retardation, it would result in a life sentence, regardless of the jury's previous finding.[45] C.S.H.B 236 was passed by the Legislature, but was vetoed by Governor Rick Perry.[46]

For Governor Perry, the issue came down to protecting the jury's status. He stated specific policy concerns of having two fact-finders deciding the issue on potentially different evidence, stating that this would undermine the integrity of the jury process.[47] Asserting that the bill sent a message that juries are trusted when they determine that the convicted offender is a person with mental retardation but are not trusted when they come to the opposite conclusion, Perry called this an "inconsistent message."[48] In the eighteen years the Legislature has attempted to implement a ban on the execution of mentally retarded capital offenders, this has been the only bill to make it to the Governor's desk.[49]

B. *The Post-*Atkins *Debate: Same Song, Different Verse*

1. A Rally Cry Falling Flat

Texas's first regular legislative session after *Atkins* was probably the busiest with regard to implementing the constitutional ban on the execution of mentally retarded offenders.[50] During 2003's regular session, there was a total of two House bills and three Senate bills[51] sponsored to address this issue, two of them being companion bills

43. *See id.* at 2:54:38 (statement provided by David P. Weeks).

44. Tobolowsky, *supra* note 13, at 85–86; *see also* Tex. H.B. 236, *supra* note 26.

45. Tobolowsky, *supra* note 13, at 86.

46. *Id.*

47. *Id.*; Gaiutra Bahadur, *Texas Governor Vetoes Execution Ban for Retarded*, PALM BEACH POST, June 16, 2001, at 3A, *available at* 2001 WLNR 1614100 (Westlaw).

48. Bahadur, *supra* note 47, at 3A.

49. *See* Hon, *supra* note 10, at 742; *see also* Tobolowsky, *supra* note 13, at 83–86 (discussing legislative attempts from 1993 to 2001).

50. *Compare* 78th Legislature, Regular Session, *supra* note 22 (showing five bills introduced between the senate and house); *and* 78th Legislature, First Called Session, *supra* note 22 (showing four bills introduced between the senate and the house), *with* 79th Legislature, Regular Session, *supra* note 22 (showing four applicable bills—three in the senate and one in the house, *and* 80th Legislature, Regular Session, *supra* note 22 (showing only one bill introduced, S.B. 249).

51. 78th Legislature, Regular Session, *supra* note 22.

that were identical—H.B. 614 and S.B. 332.[52] H.B. 614 made it the farthest, getting passed by the House on April 30, 2003, but it ultimately died in the Senate.[53] Out of the four special sessions in 2003, only the first brought forth an additional three bills from the Senate and one bill from the House, all to no avail.[54] The next regular legislative session in 2005 brought five bills between the House and the Senate; all ultimately died in committee.[55] As of the writing of this Comment, the Texas Legislature has just started its 80th regular session, and to date there is one bill being sponsored by the Senate that proposes a statutory plan for the implementation of *Atkins*.[56]

2. Pre-Trial vs. Post-Conviction, Jury or Court: The Texas Legislature Digs Its Trenches

Post-*Atkins*, competing bills in both chambers continue to differ along the same two procedural sticking points that were heavily debated in the Texas Legislature's adoption of H.B. 236: (1) the stage of the trial in which to make the determination and (2) the fact-finder involved in making the determination.

The fall-out from the near-hit with C.S.H.B. 236 was evident, however. Perhaps as a result of that bill's failure, the Texas House tried a slightly different version in the next regular session, in the form of H.B. 614. Unlike C.S.H.B. 236, which allowed for a post-verdict court review of the mental retardation issue, H.B. 614 eliminated this judicial review, providing only for a deliberation by the convicting jury at the punishment phase.[57] In contrast, other approaches kept the jury as the primary fact-finder, but with a new twist: separately empaneled for the determination, either pre-trial or post-verdict. S.B. 163, for example, proposed by the Senate in the 78th regular session, provided for a pre-trial determination by a separately impaneled jury deliberat-

52. *See generally*, Tex. H.B. 614, 78th Leg., R.S. (2003) [hereinafter Tex. H.B. 614]; Tex. S.B. 332, 78th Leg., R.S. (2003) [hereinafter Tex. S.B. 332].

53. *See generally* Tex. H.B. 614, *supra* note 52 (showing H.B. 614's stalled progress once sent to Senate).

54. *See generally* TLO–78(1) History for H.B. 18, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=781&Bill=HB18 (last visited Oct. 24, 2007); Tex. S.B. 57, 78th Leg., 1st C.S. (2003) [hereinafter Tex. S.B. 57] (showing S.B. 57's death in committee and companion bill H.B. 18); Tex. S.B. 14, 78th Leg., 1st C.S. (2003) [hereinafter Tex. S.B. 14], *see* Tex. S.B. 13, 78th Leg., 1st C.S. (2003) [hereinafter Tex. S.B. 13].

55. *See generally* Tex. S.B. 65, 79th Leg., R.S. (2005) (showing identical companion bill H.B. 419 and S.B. 65's death in committee) [hereinafter Tex. S.B. 65]; TLO–79(R), History for S.B. 85, 79th Leg., R.S. (2005) (showing its death in committee); TLO–79(R) History for S.B. 231, 79th Leg., R.S. (2005), http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=SB231 (showing its death in committee) (last visited Oct.28, 2007); *see generally* Tex. H.B. 419, 79th Leg., R.S. (2005) (showing identical companion bill S.B. 65 and H.B. 419's death in committee) [hereinafter Tex. H.B. 419].

56. *See generally* 80th Legislature, Regular Session, *supra* note 22.

57. Tex. H.B. 614, *supra* note 52.

ing just that issue, and barred that jury from being able to subsequently decide the defendant's guilt in the case.[58]

But in the Texas House, a consensus has emerged: the overwhelming support has been behind involving the death-qualified sentencing jury in the decision.[59] In fact, the Texas House seems firmly married to this idea, as almost all its proposals since 2002 have not strayed from this scheme.[60]

When looking at just the Texas Senate on this issue, however, there is not such a strong consensus behind allowing the *convicting* jury to decide whether the defendant is a person with mental retardation. In fact, in the Texas Senate, this appears to be a minority view. Significantly, out of the ten Senate bills proposed since 2002, only three designate the fact-finder as the convicting jury.[61] This is not a sign of the Senate's distrust of the jury in its ability to make this type of decision, however. Instead, the primary legislative approach that has emerged in the Texas Senate since *Atkins* is to designate as the appropriate fact-finder a *separate* jury, impaneled solely to determine the defendant's guilt or innocence, whether pre-trial or post-conviction. More specifically, in the sessions since *Atkins*, the Texas Senate has drafted four pre-trial proposals and three post-sentencing schemes—all involving a newly impaneled jury to determine whether the defendant is mentally retarded.[62]

What can be concluded is that the majority of the Texas Senate does not trust the convicting jury to make an objective decision on this matter after having heard the evidence of the crime in question. For example, the Senate's pre-trial bills all expressly excluded the separately impaneled jury from engaging in later deliberations during the guilt phase of the trial.[63] Alternatively, the post-sentencing schemes required the defendant to petition the court to hear the issue upon sentence of death by the (now dismissed) convicting jury.[64] Upon the showing of enough evidence to create an issue, the post-sentencing bills required the court to set up a new jury to determine the question

58. Tex. S.B. 163, 78th Leg., R.S. (2003) [hereinafter Tex. S.B. 163].

59. *See generally* Tex. H.B. 664, 78th Leg., R.S. (2003) [hereinafter Tex. H.B. 664]; Tex. H.B. 614, *supra* note 52; Tex. H.B. 18, 78th Leg., 1st C.S. (2003) [hereinafter Tex. H.B. 18]; Tex. H.B. 419, *supra* note 55.

60. Tex. H.B. 614, *supra* note 52; Tex. H.B. 419, *supra* note 55; Tex. H.B. 18, *supra* note 59; Tex. H.B. 664, *supra* note 59.

61. Tex. S.B. 332, *supra* note 52; Tex. S.B. 57, *supra* note 54; Tex. S.B. 65, *supra* note 55.

62. Tex. S.B. 389, 78th Leg., R.S. (2003) [hereinafter Tex. S.B. 389]; Tex. S.B. 85, 79th Leg., R.S. (2005) [hereinafter Tex. S.B. 85]; Tex. S.B. 231, 79th Leg., R.S. (2005) [hereinafter S.B. 231]; Tex. S.B. 249, 80th Leg., R.S. (2007) [hereinafter Tex. S.B. 249]; Tex. S.B. 163, *supra* note 58; Tex. S.B. 14, *supra* note 54; Tex. S.B. 13, *supra* note 54.

63. Tex. S.B. 13, *supra* note 54; Tex. S.B. 163, *supra* note 58; Tex. S.B. 85, *supra* note 62.

64. Tex. S.B. 14, *supra* note 54; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

of whether the defendant is a person with mental retardation.[65] Obviously, inherent in this setup is that this post-sentencing jury can make no further deliberations once its findings are complete.

Interestingly, an analysis combining both the Texas House and Senate approaches showed a majority of support for a post-conviction approach that requires the death-qualified, convicting jury to make the determination if a pre-trial issue is timely requested by the defendant. Out of the fourteen bills proposed by both chambers since 2003, a total of seven proposed such a procedure, three from the Senate[66] and four from the House.[67]

What is the importance of whether the determination of mental retardation for execution purposes is made pre-trial or post-conviction, by the court or jury? This question will likely be answered by both constitutional and practical constraints inherent in the costs of a capital trial.

a. Deciding the Right Approach

On a national level, court challenges to various state criminal procedure statutes implementing the ban are starting to emerge and largely mirror Texas's ideological struggle.[68] Perhaps not surprisingly, these national challenges largely center around the appropriate fact-finder responsible for the mental retardation determination and the stage in the trial proceedings in which the determination should be made.[69]

i. The Efficiency Argument

The majority of states that have adopted procedures to implement the *Atkins* ban allow the trial court to determine the issue in pre-trial proceedings.[70] As discussed supra, supporters of a pre-trial procedure argue that the cost of a capital trial weighs in favor of determining all

65. Tex. S.B. 14, *supra* note 54; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

66. Tex. S.B. 332, *supra* note 52; Tex. S.B. 57, *supra* note 54; Tex. S.B. 65, *supra* note 55.

67. Tex. H.B. 614, *supra* note 52; Tex. H.B. 419, *supra* note 55; Tex. H.B. 18, *supra* note 59; Tex. H.B. 664, *supra* note 59.

68. *Compare* United States v. Sablan, 461 F. Supp. 2d 1239, 1239–43 (D. Colo. 2006) (holding that determination of mental retardation should be a pre-trial determination by the court and placing burden of proof on defendant by preponderance of the evidence), *and* United States v. Cisneros, 385 F. Supp. 2d 567, 570–71 (E.D. Va. 2005) (holding that determination of mental retardation must be made by jury in the penalty phase, defendant has the burden of proof by the preponderance of the evidence), *with* New Mexico v. Flores, 93 P.3d 1264, 1269 (N.M. 2004) (holding that defendant may have pre-trial determination and jury deliberation on issue).

69. *See* Ellis, *supra* note 8, at 15–19.

70. *Id.* at 25–26; ACLU, *Reasons to Support Pre-Trial Determination Rather than Post-Conviction Determination, available at*: https://www.aclupa.org/issues (last visited Jan. 17, 2007) [hereinafter *Reasons to Support Pre-Trial Determination*].

death-sentencing issues at the beginning.[71] Would this be true for those statutory schemes that set up a separately empaneled jury, however? Requiring more than one jury in a capital trial would likely make it so expensive to pursue capital punishment, that only the state's counties with the most resources could even consider it.

Next, proponents of a pre-trial procedure argue that the court is a more logical fact-finder, as it is involved in deciding competency to stand trial, another pre-trial matter that involves much of the same evidence.[72] This certainly supports efficiency, but still leaves the issue of whether the defendant should have the right to request a jury finding in a pre-trial hearing on the issue, instead of limiting the defendant to just one fact-finder on an issue that will form part of the determination of whether the defendant will face a life or death sentence.

Finally, supporters of a pre-trial procedure argue that in a case in which it was determined that the defendant is a person with mental retardation, that would result in saving money, judicial resources, and the extra emotional stress experienced by the victim's family when going through a capital trial.[73] Of course, as noted supra, whether the family would be spared the emotional pain of a capital trial is contingent on the assessment of mental retardation involving no details of the crime itself.[74] Further, if it was determined in a pre-trial proceeding that the defendant is not a person with mental retardation, the issue of diminished intelligence still would likely remain as a mitigating issue during the trial, requiring the same expert testimony.

ii. The Due Process Argument

But, does due process require that the trial court make an initial determination of whether the defendant is a person with mental retardation? According to Professor James W. Ellis, the attorney who successfully argued *Atkins*, the Supreme Court's decision in *Jackson v. Denno*[75] *provides support for this contention.*[76]

1. *A Defendant's Right to a Pre-Trial Court Determination of Mental Retardation Under* Jackson v. Denno

In *Jackson v. Denno*, the Supreme Court held that the accused is due an initial pre-trial determination by the court on whether a confession was voluntary or involuntary because of the jury's likely difficulty in disregarding the confession if it determined that it was based

71. *See* Ellis, *supra* note 8, at 27 n.66; *see also Reasons to Support Pre-Trial Determination*, *supra* note 72.
72. *See Reasons to Support Pre-Trial Determination*, *supra* note 72.
73. *Id.*
74. *See supra,* Section II.A.1.
75. Jackson v. Denno, 378 U.S. 368 (1964).
76. *See* Ellis, *supra* note 8, at 27.

on truth, but was obtained by coercion.[77] The Court stated that due process of law required the issue of voluntariness to be answered by an "unprejudiced trier" and called it a "pious fiction" to claim that a juror who has heard a confession can ignore it even when he has decided that it was obtained through coercive measures, no matter that it is the juror's duty to do so.[78] Further, the Court held that "the danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court. . . ."[79]

Jackson did not result in a ban on jury deliberation of whether the defendant voluntarily confessed; it simply requires the court to make an initial determination and exclude evidence of the confession if the court finds that it is involuntary.[80] If the court finds the opposite true, the defendant is allowed to bring the issue to the jury for final deliberation.[81] Further, the jury is not allowed to hear evidence that the court has determined the confession was voluntary, as it may be unduly influenced by the court's opinion.[82] The same special initial court determination and subsequent jury determination procedure may be appropriate in capital cases involving the issue of a defendant's possible mental retardation.

Jackson set forth the principle that certain constitutional rights are so important that they cannot be subject to the legal fiction that jury members untrained and unfamiliar with complex issues of the law will be able to ignore their biases when faced with evidence of a defendant's guilt.[83] Admittedly, the risk of jury nullification is present in capital cases involving the issue of a defendant's alleged mental retardation.

Compared to the risk of jury bias in the face of evidence of a confession, it is not as clear that a jury would experience the same bias against a mentally retarded defendant simply because of a finding of guilt. More importantly, *Jackson* seems misapplied, because unlike a jury determining evidence of a confession, a jury reviewing evidence of mental retardation is not using it to determine whether the defendant is guilty or innocent.[84]

What makes an *Atkins* determination different is whether a convicting jury can remain objective and neutral about a decision that would be made after a finding of guilt for a capital crime—a finding often

77. *Jackson*, 378 U.S. at 382.
78. *Id.* at 382 n. 10.
79. *Id.* at 383.
80. *See id.* at 387.
81. *Id.*
82. *See* Ellis, *supra* note 8, at 17.
83. *See Jackson*, 378 U.S. at 382 & n.10.
84. *See generally In re* Johnson, 334 F.3d 403, 405 (5th Cir. 2003) (holding that the absence of mental retardation not an element of a sentence).

based on evidence of a violent event likely to lead to intense emotional feelings on the part of the jurors. The jury may find that the facts relating to the defendant's guilt contaminate its ability to make an impartial determination on the issue.[85] Because the nature of such a case is highly charged, the jurors may understandably feel emotional about the evidence they are hearing, experiencing a range of fear, anger, and rage.[86] Even if a jury member agreed with the *Atkins* principle that mentally retarded capital offenders should be exempt from the death penalty, there might be a risk that he would be tempted to ignore the law based on the facts of the crime at hand—out of sympathy for the victim or the family, or simply based on a sense of retribution.

Another admitted possibility is that the jury will treat evidence showing the presence of mental retardation only as a mitigating factor, to be weighed against all the other evidence presented for death sentencing purposes, instead of a categorical bar to execution. If the jury treats evidence of mental retardation in this way, it would result in the nullification of the *Atkins* ban.[87]

Although unlikely, there is some concern that it will act as the two-edged sword, possibly leading the jury to believe that the defendant has a greater likelihood of future danger.[88] The Supreme Court alluded to this dynamic in *Atkins*, noting that a defendant with mental retardation may have an inappropriate affect during the trial, possibly resulting in the conclusion that he has a lack of remorse.[89] The Court further stated that such a defendant might not be able to testify to important details, which may also incense the jury in its findings on whether the defendant should be executed.[90]

There is evidence that a juror may actually be less likely to vote for death based on evidence of mental retardation, however.[91] A study conducted in 1998 showed that jurors reported being less likely to vote for death upon the proof of mental retardation.[92] This data is tempered somewhat by data obtained from a slightly different question in the same survey. Out of 16 jurors that actually believed the defendant

85. *See Reasons to Support Pre-Trial Determinations, supra* note 72.

86. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U.L. REV. 26, 65 (2000).

87. *See* Hearing on H.B. 236, *supra* note 30, at 2:15:30 (statement of Senator Rodney Ellis); *see also id.* at 2:20:35 (statement of Judge Charlie Baird); 2:23:50 (statement of Professor Jordan M. Steiker).

88. *See* Tobolowsky, *supra* note 13, at 49–50.

89. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

90. *Id.*

91. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM. L. REV. 1538, 1564, (1998) (arguing that the study of jurors showed that evidence of mental retardation is "highly mitigating")[hereinafter *Aggravation and Mitigation*].

92. *See id* at 1564.

was mentally retarded, seven found that data to be mitigating.[93] Just slightly more than half the respondents, nine jurors, reported they were just as likely to vote for death despite such evidence.[94]

Ultimately, however, this begs the question of why state sentencing schemes should allow convicting juries to determine aggravating and mitigating factors in favor of or against a death sentence—which may include evidence that would relate to defendant's general mental condition—but not allow them to make the ultimate deliberation on the issue of mental retardation. Further, jury deliberations in death sentencing cases are considered as a *safeguard* to ensure the defendant's right to the Eighth Amendment's guarantee against cruel and unusual punishment—as the jury is a part of the special procedural safeguards required when the State is seeking the death penalty.[95]

2. *A Right to a Jury Determination of Mental Retardation Under* Apprendi v. New Jersey *and* Ring v. Arizona

Conversely, does the defendant have a right to a jury decision on whether he is a person with mental retardation? This idea finds some support in two Supreme Court cases, *Apprendi v. New Jersey*,[96] decided in 2000; and *Ring v. Arizona*,[97] decided in 2001; but the majority of courts, including the Texas Court of Criminal Appeals, have declined to extend the holdings in these cases to apply to determinations of mental retardation for death-sentencing purposes.[98]

Under *Apprendi*, the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.[99] *Apprendi's* facts included a hate-crime statute that allowed an increase in sentencing if a judge, post-jury-verdict, found by the preponderance of the evidence that the defendant acted with a specific motive based on the victim's race.[100] New Jersey argued that the statute required the judge to determine only whether a "sentencing factor" existed, not an element of a crime.[101] The Court called the distinction of whether the motive question was a sentencing factor or an element "elusive," and called

93. *See id.*

94. *See id.*

95. Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

96. Apprendi v. New Jersey, 530 U.S. 466 (2000).

97. Ring v. Arizona, 536 U.S. 584 (2002).

98. *Ex parte* Briseno, 135 S.W.3d 1, 4 (Tex. Crim. App. 2004); United States v. Sablan, 461 F. Supp. 2d 1239, 1241 (D. Colo. 2006); New Mexico v. Flores, 93 P.3d 1264, 1267–68 (N.M. 2004).

99. *Apprendi*, 530 U.S. at 476.

100. *Id.* at 468–69.

101. *Id.* at 467.

the State's argument a simple re-labeling of a fact acting as an element required in order to increase the sentence.[102]

The Court stated that the determinative inquiry required is not based on the form of the fact, but instead is based on what effect the fact has in the outcome of the defendant's punishment.[103] Significantly, the Court stated in dicta that such facts are "functional equivalents" of an element to a crime when it exposes the defendant to a greater punishment than authorized by the jury's verdict.[104] Specifically, the Court stated, "if a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element."[105] Accordingly, it found New Jersey's hate crime statutory scheme in violation of the Fifth Amendment's guarantee of due process and the right of a jury trial under the Sixth Amendment.[106]

Under *Ring v. Arizona*, the Supreme Court extended *Apprendi's* holding to capital sentencing schemes.[107] Under *Ring*, capital defendants have the right to have all factual questions that are required in order to impose the death penalty decided by a jury, but limited to the determination of aggravating factors.[108] Specifically, the Court held that if aggravating factors operate as a "functional equivalent" to an element of a crime, the defendant has a right to have those factors determined by a jury beyond a reasonable doubt.[109] Again, the Court held that how those factors are characterized—as factors or elements—is not dispositive to deciding whether they are a "functional equivalent" to an element of a crime requiring the death penalty.[110] The Court stated, "A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." (Emphasis in original.)[111]

Should *Ring* and *Apprendi* be extended to the determination of facts that do not act as enhancements to a sentencing scheme, but instead act as a bar to the death penalty? Based on the language of *Apprendi's* holding alone, it would seem that there is some room for this argument. Facts that show the defendant is *not* a mentally retarded person will increase the chance of the maximum penalty for a capital offense, even though it may not result in a death sentence

102. *See id.* at 492–94.
103. *Id.* at 494.
104. *Id.* at 494 n.19.
105. *Id.* at 521 (Thomas, J., concurring).
106. *Id.* at 497.
107. Ring v. Arizona, 536 U.S. 584, 609 (2002).
108. *Id.*
109. *Id.* at 605.
110. *Id.*
111. *Id.* at 586.

based on that evidence alone.[112] In some cases, though, this may be the ultimate, determinative factor in whether the defendant receives a death sentence. Whether or not the defendant is a person with mental retardation requires the fact-finder to weigh evidence showing its absence and showing its presence, and requires a decision as to the fact of whether or not the defendant is mentally retarded. Applying *Ring* and *Apprendi* in this way shows that evidence proving the absence of mental retardation can be treated as functionally equivalent to an element of a greater offense, and therefore requires a jury finding based on proof beyond a reasonable doubt.

This would twist the Supreme Court's reasoning in *Ring* too much, however. In a footnote, the Court in *Apprendi* foreshadowed the Court's likely holding on this question, as it was careful to differentiate a situation in which a judge determines mitigating factors that weigh against imposing the maximum penalty from the situation where a judge is determining aggravating factors that enhance a sentence:

> If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to the statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.[113]

This is a logical differentiation because evidence of the absence of mental retardation should not be considered as functionally equivalent to an element of a crime. This would be akin to requiring evidence of a certain minimal intelligence in order to be found guilty of a criminal act.[114] While it is true that the lack of intelligence could possibly be found to negate the requisite intent required to be guilty of a crime, the presence of a certain level of intelligence is certainly not evidence that intent in fact existed.

Moreover, facts relating to the absence of mental retardation will not always be outcome determinative in deciding whether a defendant is sentenced with death and therefore are outside the scope of the *Apprendi* and *Ring* holdings. For example, in cases where a capital defendant is not found to be mentally retarded, he may still avoid a death sentence because of other mitigating factors that may exist. Or, perhaps that same defendant did receive a sentence of death, but it

112. *Ex Parte* Briseno, 135 S.W.3d 1, 3 (Tex. Crim. App. 2004); *see also* Stephen B. Brauerman, *Balancing the Burden: The Constitutional Justification for Requiring the Government to Prove the Absence of Mental Retardation Before Imposing the Death Penalty*, 54 AM. U. L. REV. 401, 410–13 (2004).

113. Apprendi v. New Jersey, 530 U.S. 466, 490–91 n.16 (2000).

114. *See In re* Johnson, 334 F.3d 403, 405 (5th Cir. 2003).

was because of the presence of overwhelming aggravating facts. In this way, it is easy to see that facts relating to whether someone is mentally retarded may exempt a defendant from the death penalty—but the absence of mental retardation does not always result in a death sentence.

The majority of courts, including the Texas Criminal Court of Appeals and the United States Court of Appeals for the Fifth Circuit, have held according to this same logic and have declined to extend *Ring's* holding to require a jury determination on the absence of mental retardation.[115] To date, only two states require a jury finding on the issue beyond a reasonable doubt: New Jersey and New Mexico.[116]

3. More Legislative Lines: The Standard of Proof and Party That Bears the Burden

Two important issues in this debate are the appropriate standard of the burden of proof and the party to whom it should be applied.[117] Interestingly, there has been little disagreement in the Texas Legislature as to these questions. All bills set forth by both houses have required the defendant to bear the burden of proving the condition of mental retardation—by a preponderance of the evidence.[118]

In determining this issue in *Ex parte Briseno*, the Texas Court of Criminal Appeals noted this legislative consensus evident in a recent bill attempted by the 78th Texas House, H.B. 614.[119] The Court further noted that the Texas Legislature imposed the burden of proof by a preponderance of the evidence in proving other similar affirmative defenses, such as competency to stand trial, the insanity defense, and competency to be executed.[120] Accordingly, the Court held that applicants have the burden of proving the presence of mental retardation by the preponderance of the evidence in the context of habeas proceedings.[121]

Would imposing a higher burden than preponderance of the evidence survive a constitutional challenge? Georgia, for example, im-

115. *Ex parte* Briseno, 135 S.W.3d at 4; United States v. Sablan, 461 F. Supp. 2d 1239, 1241 (D. Colo. 2006); New Mexico v. Flores, 93 P.3d 1264, 1267–68 (N.M. 2004).

116. Margaret McHugh, *Appeals Court Hands 'IQ Burden' to Prosecution in Accused Killer's Case*, STAR-LEDGER (Newark, NJ), Aug. 18, 2005, *available at* 2005 WLNR 23843301.

117. Ellis, *supra* note 8, at 15 (calling these "among the most intricate and perplexing constitutional issues.").

118. *See generally* Tex. S.B. 332, *supra* note 52; Tex. H.B. 614, *supra* note 52; Tex. S.B. 13, *supra* note 54; Tex. S.B. 14, *supra* note 54; Tex. S.B. 57, *supra* note 54; Tex. S.B. 65, *supra* note 55; Tex. H.B. 419, *supra* note 55; Tex. S.B. 163, *supra* note 58; Tex. H.B. 18, *supra* note 59; Tex. H.B. 664, *supra* note 59; Tex. S.B. 85, *supra* note 62; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

119. *Ex Parte* Briseno, 135 S.W.3d at 12.

120. *Id.*

121. *Id.*

poses a burden of proving mental retardation beyond a reasonable doubt, while a handful of other states impose a burden of clear and convincing evidence.[122] The answer to this issue is likely found in the Supreme Court's decision in *Cooper v. Oklahoma*.[123]

In *Cooper*, the Supreme Court held that a presumption of competence until the defendant proved incompetence by clear and convincing evidence violates due process.[124] The Court noted that the more stringent burden of proof would result in the defendant bearing the risk of a wrong decision.[125] The Court concluded that the burden of proof by the preponderance of the evidence would not result in such a risk, because the majority of cases did not have evidence equally weighing on both sides.[126] The clear and convincing standard of evidence, however, was held to affect a significant number of cases that involved evidence showing that the defendant was more likely than not incompetent.[127] The Court analyzed the outcome of such an error: trying a defendant who is not able to assist in his own defense and who does not understand the meaning of the proceedings against him.[128] The Court called these consequences "dire," as they denied the defendant the constitutional protections in his right against compulsory self-incrimination and his right to waive a jury trial.[129] Ultimately the Court decided that such a standard threatened to destroy the fairness of the trial itself.[130]

Determining mental retardation for purposes of capital sentencing should be treated in the same fashion. Placing the risk of an erroneous decision onto a defendant who has proved the presence of mental retardation by a preponderance of the evidence would, in the case that he was subsequently convicted and sentenced to death, result in the most dire of consequences.

The nature of the evidence in determining the presence of mental retardation further determines the appropriate level of burden that should be imposed. The majority of post-*Atkins* bills[131] defined

122. Pruitt v. Indiana, 834 N.E.2d 90, 102 n.1 (Ind. 2005) (stating, "Georgia requires the defendant to prove his mental retardation beyond a reasonable doubt. In addition to Indiana, Arizona, Colorado, and Florida require the defendant to prove he is mentally retarded by clear and convincing evidence. Arkansas, Maryland, Missouri, Nebraska, New Mexico and Tennessee require proof by the preponderance of the evidence. The federal government, Connecticut, Kansas, and Kentucky do not set a standard of proof.").

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

124. *Id.* at 369.

125. *Id.* at 363–64.

126. *Id.*

127. *Id.* at 364.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See generally* Tex. S.B. 332, *supra* note 52; Tex. H.B. 614, *supra* note 52; Tex. S.B. 13, *supra* note 54; Tex. S.B. 14, *supra* note 54; Tex. S.B. 57, *supra* note 54; Tex. S.B. 65, *supra* note 55; Tex. H.B. 419, *supra* note 55; Tex. S.B. 163, *supra* note 58; Tex.

mental retardation as a person "determined by a physician or psychologist . . . to have significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates in the developmental period."[132] What type of evidence is relevant in determining "significantly sub-average intellectual functioning that is concurrent with deficits in adaptive behavior" is subject to debate. As mentioned previously, there is strong support for including evidence of the crime itself to be admissible for the purposes of making this assessment. Notably, the majority of Texas House bills allowed prosecutors to present evidence of the crime itself in order to prove the presence or absence of mental retardation.[133] Only three of the Senate bills had provisions that allow this type of evidence; however, those that did not allow it, did not explicitly bar it either.[134]

The majority of post-*Atkins* bills introduced by both the Senate and the House had a provision that creates a presumption of mental retardation if the defendant has an I.Q. score of 70 or lower.[135] Creating a presumption of mental retardation based on an I.Q. score has been controversial because such scores are based on data that is notoriously subjective and subject to doubt.[136] Alternatively, imposing a burden on a defendant to prove the presence of mental retardation beyond a reasonable doubt would likely make I.Q. scores too easy for the prosecution to use to introduce doubt. Repeated testing of a defendant often results in gradually increasing scores, possibly because the defendant becomes more familiar with the test.[137] For this reason, most states require a particular I.Q. score to provide some sort of concrete

H.B. 18, *supra* note 59; Tex. H.B. 664, *supra* note 59; Tex. S.B. 85, *supra* note 62; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

132. The bills incorporated a similar definition set forth by § 591.003 of the Heath and Safety Code. TEX. HEALTH SAFETY CODE ANN. § 591.003 (Vernon 2006).

133. Tex. H.B. 614, *supra* note 52; Tex. H.B. 419, *supra* note 55; Tex. H.B. 18, *supra* note 59.

134. Tex. S.B. 332, *supra* note 52 (allowing evidence of offense in question in mental retardation determination); Tex. S.B. 13, *supra* note 54; Tex. S.B. 14, *supra* note 54; Tex. S.B. 57, *supra* note 54 (allowing evidence regarding mental retardation to include evidence of offense in question); Tex. S.B. 65, *supra* note 55 (allowing evidence of the crime itself to be presented to trial jury to determine presence of mental retardation); Tex. S.B. 163, *supra* note 58; Tex. S.B. 85, *supra* note 62; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

135. Tex. S.B. 332, *supra* note 52; Tex. H.B. 614, *supra* note 52; Tex. S.B. 57, *supra* note 54; Tex. S.B. 13, *supra* note 54; Tex. S.B. 14, *supra* note 54; Tex. S.B. 65, *supra* note 55; Tex. H.B. 419, *supra* note 55; Tex. S.B. 163, *supra* note 58; Tex. H.B. 18, *supra* note 59; Tex. H.B. 664, *supra* note 59; Tex. S.B. 85, *supra* note 62; Tex. S.B. 231, *supra* note 62; Tex. S.B. 249, *supra* note 62; Tex. S.B. 389, *supra* note 62.

136. Elaine Cassel, *Justice Deferred, Justice Denied: The Practical Effect of* Atkins v. Virginia, 11 WIDNER L. REV. 51, 55 (2004); Scott E. Sundy, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1126 (1997).

137. See Elaine Cassel, *Executing the Mentally Ill and the Mentally Retarded: Three Key Recent Cases from Texas and Virginia Show How States Can Evade the Supreme Court's Death Penalty Rulings*, FINDLAW, June 22, 2006, http://writ.news.findlaw.com/cassel/20060622.html.

data, but also require additional testing that shows other factors that may be impairing a particular defendant's judgment or culpability due to mental retardation.

The Court of Criminal Appeals of Texas noted the problematic nature of such evidence in *Briseno*, stating, "The adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases."[138]

The Court further stated:

> The defense expert sees the glass half-empty, the State's expert sees the glass half-full. Both experts relied upon the same evidence and objective data to support their conclusions, yet the defense expert diagnosed mental retardation while the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder.[139]

Therefore, given the subjective nature of the evidence and potential confusion to the fact-finder in these cases, there might be a higher risk in these cases of an erroneous conclusion. Further, imposing a burden higher than a preponderance of the evidence proves the absence or existence of mental retardation weighs against requiring any level of proof higher than a preponderance of the evidence.

But, should the burden of proof be placed on the defendant? This is still somewhat up for debate.[140] The Supreme Court has answered this question in the context of determining competency for trial purposes, in *Medina v. California*.[141] In *Medina*, the Court held that due process is not violated by placing the burden upon the defendant, as it would give him incentive to produce all evidence possible in the proceedings determining the issue.[142] The Court reasoned that giving the defendant such incentive would result in a truer picture of his competency and therefore would result in greater protections for him.[143]

III. Conclusion

Before *Atkins*, Texas led the country in the number of mentally retarded offenders executed, which gave it a reputation for supporting the execution of mentally retarded offenders, despite its efforts to enact a ban.[144] In 2001, after Governor Perry vetoed C.S.H.B. 236, one of the bill's sponsors, Democratic Senator Rodney Ellis, publicly

138. *Ex Parte* Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004).

139. *Id.* at 13.

140. *See* Ellis, *supra* note 8, at 15–16 (calling this question a "considerably thornier issue.").

141. Medina v. California, 505 U.S. 437 (1992).

142. *Id.* at 446, 455 (O'Connor, J., concurring).

143. *Id.* at 455.

144. Deathpenaltyinfo.org, Execution Database (showing nationwide number of defendants executed with evidence of mental retardation since 1977), http://www.deathpenaltyinfo.org/executions.php; (last visited Sept. 16, 2007); Fact Check from State Senator Rodney Ellis, Mentally Retarded Offenders Executed in Texas,

stated his disappointment at Texas's missed chance to make an important statement, arguing that Texas would appear "not only . . . bloodthirsty, but foolish."[145] He further predicted the state would find itself forced to enact a ban by the Supreme Court and expressed embarrassment at the state's missed opportunity to take a "strong moral stand."[146]

Texas's current lag behind other states to pass legislation does not help its reputation in this area. Texas now finds itself still trying to close this issue three legislative sessions after *Atkins* was decided. Now in its 80th Legislative Session, the Senate has proposed one new bill creating a procedure to bar the execution of mentally retarded offenders, SB 249.[147] It is difficult to know if this session will be the one that brings the momentum needed to move a bill to the Governor's desk for signing.

Considering how politically charged getting a ban has been in the Texas Legislature, it seems likely that county politics will drive this issue in the state courts as well. Lacking a "winner" in this fight will very likely result in a county-by-county patchwork quilt of procedural approaches that represent the local political majority's approach to implementing the ban.

Sarah Gail Tuthill

May 30, 2001, http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr01/f053001a.htm.

145. Statement of Senator Rodney Ellis, *Ellis Statement on Veto of Ban on Death Penalty of Mentally Retarded*, June 17, 2001, http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr01/p061701a.htm.

146. *Id.*

147. Tex. S.B. 249, *supra* note 22.