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LIGHTNING BUT NO THUNDER: THE NEED FOR CLARITY IN MILITARY COURTS REGARDING THE DEFINITION OF MENTAL RETARDATION IN CAPITAL CASES AND FOR PROCEDURES IN IMPLEMENTING *ATKINS v. VIRGINIA*

Lieutenant Jessica Hudson, JAGC, USN
Ensign Kyle Fralick, JAGC, USN
First Lieutenant John A. Sautter, USMC*

I. INTRODUCTION

The rights of the mentally retarded have long been dependent upon the legal system for definition and scope. The judiciary, however, has not always been sympathetic to their plight. In endorsing the eugenic sterilization movement of the 1920's, Justice Holmes stated in *Buck v. Bell*, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind … [t]hree generations of imbeciles are enough."[1] Thankfully, in many ways the United States judicial system has

* Lieutenant Jessica Hudson is presently assigned as Assistant Staff Judge Advocate at National Naval Medical Center, Bethesda, MD J.D., *cum laude*, 2001, Catholic University, Columbus School of Law, Washington, D.C.; B.A. 1998, Luther College, Decorah, Iowa. Her prior duty stations include Appellate Government Division, Office of the Judge Advocate General, Washington, D.C.; Trial Service Office West, Branch Office Whidbey Island; and Amphibious Squadron FIVE.

Ensign Kyle Fralick, JAGC, USN, is a third-year law student at Catholic University, Columbus School of Law, Washington, D.C. ENS Fralick graduated *magna cum laude* from Wayne State University, Detroit, Michigan, with a B.A. in Psychology and a B.S. in Criminal Justice.

First Lieutenant John A. Sautter, USMC, is a third-year law student at Vermont Law School in South Royalton, VT. Lt. Sautter graduated *cum laude* from New York University. He later received his M.A. in history and Ph.D. in political science from the University of Nebraska.

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[1] Buck v. Bell, 274 U.S. 200, 207 (1927). Though *Buck* has since been overturned, the decision represents the epitome of the Court's historical denial of constitutional rights to the mentally impaired.

are enough."[1] Thankfully, in many ways the United States judicial system has come a long way since the days of *Buck*. Modern era court decisions and statutes have been woven together to form a jurisprudence that is designed to protect the constitutional rights of the mentally retarded, not to protect society from the mentally retarded as in the days of *Buck*.[2]

One issue in particular that has confounded the judicial process is the availability of the death penalty for mentally retarded individuals convicted of a capital offense. In *Penry v. Lynaugh* the Supreme Court held that executing an individual with mental retardation was not a violation of the Eighth Amendment to the United States Constitution, which prohibits cruel and unusual punishment.[3] Central to the Court's holding was that the execution of the mentally retarded was not cruel and unusual *per se* because a national consensus toward banning the practice did not exist at the time.[4]

Little more than a decade later in *Atkins v. Virginia*, however, the Supreme Court reversed *Penry*, finding that a national consensus in the prohibition of the execution of mentally retarded defendants did exist and holding that execution of the mentally retarded therefore had become "unusual" within the meaning of the Eighth Amendment.[5] As such, execution of the mentally retarded was prohibited by the United States Constitution.[6] In rendering its decision, the Court did not adopt a definition of mental retardation, but specifically left that task to the individual states.[7] Most states that have a death penalty have codified their own working definitions of mental retardation;[8] however, the federal government has not codified a working

[1] Buck v. Bell, 274 U.S. 200, 207 (1927). Though *Buck* has since been overturned, the decision represents the epitome of the Court's historical denial of constitutional rights to the mentally impaired.

[2] *See*, *e.g.*, City of Cleburne, Texas, et al. v. Cleburne Living Center, Incl, et al., 473 U.S. 432, 438 (1985) (holding that mental retardation cannot be openly discriminated against because it is an immutable characteristic); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, tit. 1, 4 (codified as amended in scattered sections of Title 42 of the U.S.Code, protecting individuals with mental retardation from being discriminated against in employment, education and government services).

[3] Penry v. Lynaugh, 492 U.S. 302 (1989); U.S. CONST., amend. VIII.

[4] *Penry*, 492 U.S. at 335.

[5] Atkins v. Virginia, 536 U.S. 304 (2002).

[6] *Id.*

[7] *Id.* at 317 (noting that states are "left the task of developing appropriate ways to enforce the constitutional restriction upon execution of sentences"); *See also* Schriro v. Smith, 546 U.S. 6 (2005) (reaffirming *Atkins* by holding that states must develop their own legal definition of mental retardation).

[8] *See* Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (Michie 2006); Cal. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. Ann. § 1-1g(a) (West 2007); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. 5/114-15(d) Ann. (West 2007); Ind. Code § 35-36-9-2 (2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art.

definition to be used in the military justice system.[9] Furthermore, there is no legislative or executive provision addressing how the military justice system

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905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

[9]*See* Death Penalty Reform Act of 2007, H.R. 851, 110th Cong. (2007), which was introduced in the House of Representatives on February 6, 2007 by Rep. Louie Gohmert (TX) and was subsequently referred to the Committee on the Judiciary. The bill, as proposed, would not be binding on military courts as it would only amend Title 18 of the United States Code. Nonetheless, the bill would provide a useful guidepost to the regulatory and judicial authorities in the military justice system who will no doubt be implementing many of the same changes in the future. The bill attempts to codify a federal definition of mental retardation.. If passed, Section 4 of the bill would modify Section 3593 of title 18, United States Code, in the following manner:

'(1) In subsection (a)--

'(B) by inserting [*inter alia*] after paragraph (2) the following:

'The notice must be filed a reasonable time before trial or before acceptance by the court of a plea of guilty. The court shall, where necessary to ensure adequate preparation time for the defense, grant a reasonable continuance of the trial. If the government has not filed a notice of intent to seek the death penalty or informed the court that a notice of intent to seek the death penalty will not be filed, the court shall not accept a plea of guilty to an offense described in section 3591 without the concurrence of the government.'; and

'(7) by adding after subsection (a) the following:

'(b) Notice by the Defendant-

'(1) If, as required under subsection (a), the government has filed notice seeking a sentence of death, the defendant shall, a reasonable time before the trial, sign and file with the court, and serve on the attorney for the government, notice setting forth the mitigating factor or factors that the defendant proposes to prove mitigate against imposition of a sentence of death. In any case in which the defendant intends to raise the issue of mental retardation as precluding a sentence of death, the defendant shall, a reasonable time before trial, sign and file with the court, and serve on the attorney for the government, notice of such intent.

'(2) When a defendant makes a claim of mental retardation or intends to rely on evidence of mental impairment, or other mental defect or disease as a mitigating factor under this section, the government shall have the right to an independent mental health examination of the defendant. A mental health examination ordered under this subsection shall be conducted by a licensed or certified psychiatrist, psychologist, neurologist, psychopharmacologist, or other allied mental health professional. If the court finds it appropriate, more than one such professional shall perform the examination. To facilitate the examination, the court may commit the person to be examined for a reasonable period, but not to exceed 30 days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in a suitable facility reasonably close to the court. The director of the

should deal with the procedural aspects of mental retardation in a capital murder case.[10]

In February 2007, the U.S. Navy-Marine Corps Court of Appeals (NMCCA) addressed the issue of mental retardation in *U.S. v. Parker*.[11] In short, the *Parker* decision sparked lightning, but lacked thunder with regards to mental retardation and the death penalty in the military justice system. The court adopted a definition of mental retardation, but, because of the posture of the case, it was unable to address completely some of the more contentious procedural issues surrounding mental retardation and capital murder.[12] While the decision was a step in the right direction, it was only a step and further authoritative action, such as a federal statute, is needed to clarify these issues.[13]

The absence of an authoritative guide poses many problems in relation to how a military trial court should handle an assertion of mental retardation when the accused is charged with a crime that potentially warrants the death penalty. This article will address some of these substantive and procedural issues within the context of the military justice system. The authors first argue in support of

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> facility may apply for a reasonable extension, but not to exceed 15 days upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.
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> '(3) Following the filing of a defendant's notice under this subsection, the court shall, where necessary to ensure adequate preparation time for the government, grant a reasonable continuance of the trial.
>
> '(4) For purposes of this section, a defendant is mentally retarded if, since some point in time prior to age 18, he or she has continuously had an intelligence quotient of 70 or lower and, as a result of that significantly subaverage mental functioning, has since that point in time continuously had a diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others' reactions.'.

[10] A review of the relevant case law did not reveal any decisions by the United States Court of Appeals for the Armed Forces regarding procedural matters for mental retardation claims in capital murder cases since the *Atkins* decision was announced.

[11] United States v. Parker, 65 M.J. 626 (N-M. Ct. Crim. App. 2007).

[12] *Id.* at 629-30 (adopting the definition of mental retardation from the American Association on Intellectual and Development Disabilities (formerly the AAMR): "[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adapative behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.").

[13] While there is no question *Parker* is currently binding authority in the Navy and Marine Corps trial courts, it is not binding authority on the remainder of the military. Thus, it is necessary for Congress, the United States Court of Appeals for the Armed Forces, or the President to adopt or clarify this definition such that the law regarding the execution of the mentally retarded is interpreted and applied consistently and constitutionally not only in the Navy and Marine Corps, but throughout the rest of the military as well.

the definition of mental retardation that the NMCCA adopted in *Parker*. Next, the article proposes solutions to some of the procedural issues surrounding an assertion of mental retardation, including: which party carries the burden of proof, what the standard of proof should be, whether a judge or jury should hear the claim, and whether an assessment of mental retardation should take place before or after trial. Finally, the authors conclude with an appeal for authoritative clarification of these issues in the military from either Congress, the Court of Appeals for the Armed Forces, or the President through his regulatory authority.

II. POST-*ATKINS*: THE NEW MENTAL RETARDATION JURISPRUDENCE

A. Defining Mental Retardation

The military justice system should adopt a definition of mental retardation that follows the national consensus[14] as well as reflects the Supreme Court's decision in *Atkins*.[15] While the Court left the task of defining mental retardation to the individual states, it cited with approval the American Association on Mental Retardation's (AAMR) and the American Psychiatric Association's (APA) definitions of mental retardation.[16] Both of these definitions require the existence of three separate factors: (1) significantly sub-average intellectual functioning;[17] (2) significant limitations in two or more adaptive behavioral skills such as communication, self-care, and self-direction;[18] and (3) onset before the age of eighteen.[19]

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[14] *See* Atkins v. Virginia, 536 U.S. 304, 314-16 (2007)(noting that as of 2002 the Federal Government, as well as eighteen states—Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Mexico, New York, North Carolina, South Dakota, Tennessee, and Washington—prohibited execution of the mentally retarded).

[15] *Id*. at 315 (stating that the definition must encompass all defendants that "fall within the range of mentally retarded offenders about whom there is a national consensus").

[16] *Id.* at 309.

[17] The first prong of this test is intellectual functioning. Some states recognize significant sub-average intellectual functioning where the defendant's intelligence quotient is below seventy. *See e.g.* Ariz. Rev. Stat. Ann. § 13-703.02(F) (2007); Del. Code Ann. tit. 11 § 4209(3)(d)(2) (2007); Ky. Rev. Stat. Ann. § 532.130 (West 2007); Md. Code Ann. Crim. § 2-202(b)(1)(i) (West 2006); Neb. Rev. Stat. § 28-105.01(3) (2006); N.M. Stat. Ann. § 31-20A-2.1 (A) (West 2007); N.C. Gen Stat. § 15A-15-100 (a)(2) (2005); Okla. Stat. tit 10 § 1408(A) (2005); S.D. Codified Laws § 23A-27A-26.2 (2007); Tenn. Code Ann. § 39-13-203(a)(1) (West 2007); and Wash. Rev. Code Ann. § 10.95.030 (2)(c) (West 2007).

[18] As defined by the American Psychiatric Association (APA), adaptive behavioral skills, or adaptive functioning, refers to "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental

Since *Atkins*, the AAMR released a more concise definition involving the same three-prong test:
Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.[20]

The preceding definition is a model of what the military system should adopt as a definition of mental retardation because it represents a national consensus as defined under *Atkins*.[21] First, at least twenty-one of the thirty-eight states currently permitting the death penalty have adopted this three-prong definition.[22] The Supreme Court considered the codification of the three-prong definition in each state as an important step in achieving a national consensus.[23] However, as Justice Stevens alluded to in *Atkins*, it is not so much the number of states that adopted a definition of mental retardation which indicates a national consensus, but more how these definitions correspond in a "uniform manner" to the AAMR definition.[24]

Retardation." Am. Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 42 (4th ed. 2000) [hereinafter "DSM-IV"]. The American Association of Mental Retardation (AAMR) points out that an assessment of adaptive functioning "must be considered within the context of community environments typical of the individual's age, peers, and culture." The American Association of Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 1 (10th ed. 2002) [hereinafter "MENTAL RETARDATION"].

[19] DSM-IV, *supra* note 18, at 39; MENTAL RETARDATION, *supra* note 18, at 1.

[20] MENTAL RETARDATION, *supra* note 18, at 8.

[21] *See* United States v. Parker, 65 M.J. 626, 629 (N-M. Ct. Crim. App. 2007)(noting that out of the twenty-six states with statutes defining mental retardation, twenty-four have adopted some variant of the definition); *see also* Atkins v. Virginia, 536 U.S. 304, 315 (2007)(suggesting that the codification of the three prong definition by state legislatures can measure national consensus); Ford v. Wainwright, 477 U.S. 399, 408 n.2 (1986) (using the national consensus theory to show that out of forty-one death-penalty states, none allowed the execution of the insane and twenty-six had explicit statutes requiring suspension of the execution of a legally incompetent person).

[22] *See* Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (Michie 2006); Cal. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. Ann. § 1-1g(a) (West 2007); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15(d) (West 2007); Ind. Code § 35-36-9-2 (2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

[23] *Atkins* at 317.

[24] *Id.*

Furthermore, in states that have not codified the three-prong definition outright, the courts have adopted similar definitions.[25] For example, the Pennsylvania Supreme Court cited the APA and the AAMR definitions in defining mental retardation under the guidelines set forth in *Atkins*.[26] The Court recognized that both definitions provided that a low IQ score is not in itself sufficient to classify a person as mentally retarded and therefore took careful note to also include adaptive behavior and onset prior to the age of eighteen in its definition.[27] In doing so, the Court ultimately crafted a definition consistent with the APA and AAMR definitions.[28] Whether by statute or by judicial opinion, a majority of states have adopted the three-prong formulation for determining whether a defendant is mentally retarded, making this formulation the most widely accepted definition of the disability.[29]

B. Problems with Defining Mental Retardation

1. Testing: The Need for a Comprehensive Test

Testing for mental retardation presents a host of problems in the context of a capital murder case. One of the most glaring is attempting to use intellectual functioning as a short cut to diagnosing mental retardation.[30] The AAMR cautions that determinations of mental retardation cannot be based solely on the results of an IQ test, but must include an evaluation of adaptive behavior[31] *and* the onset of the disposition before the age of eighteen.[32]

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[25] *See, e.g.*, Commonwealth v. Miller, 888 A.2d 624 (Pa. 2005).
[26] *Id.* at 630.
[27] *Id.*
[28] *See id.* at 630; MENTAL RETARDATION, *supra* note 18, at 8; DSM-IV, *supra* note 18, at 39.
[29] Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001) (showing the construction of a national consensus that includes the three part definition to exempt mentally retarded criminals from capital punishment). *But see* N.M. Stat. Ann. § 31-20A-2.1 (West 2007); and Neb. Rev. Stat. § 28-105.01 (2006). Both New Mexico and Nebraska have adopted definitions that are different from the APA and AAMR definitions and define mental retardation using a two-prong rubric involving intellectual functioning and adaptive behavior with an IQ of 70 or below as creating a presumption of mental retardation. In addition, neither state requires proof of onset of mental retardation prior to age eighteen. These two exceptions aside, however, the national consensus overwhelmingly supports the three-prong definition.
[30] Tomoe Kanaya, Matthew H. Scullin, and Stephen J. Ceci, *The Flynn Effect and U.S. Policies: The impact of rising IQ scores on American Society via mental retardation Diagnoses*, 58 AMERICAN PSYCHOLOGIST, 778-790 (2003) (noting some of the problems of using intelligence testing in schools and in the military as a basis to diagnose mental retardation); MENTAL RETARDATION, *supra* note 18, at 59 (noting that there is much disagreement over what the proper intelligence test should be from the many that are available).
[31] Adaptive behavior describes how effectively individuals cope with the demands of life and how they meet the standards of personal independence expected of someone of similar age, socioeconomic background, and community setting. *See* MENTAL RETARDATION, *supra* note 18.

According to the AAMR, it is clear that there is no fixed cutoff point intended for diagnosing mental retardation.[33] The definitions promulgated by the AAMR and the DSM-IV both specify consideration of adaptive behavior skills and the use of clinical judgment.[34] In fact, the DSM-IV states that "mental retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning."[35] The adaptive behavior component is an important part of the three-prong test to ensure that the individual is not just a poor test-taker, but is truly disabled.[36] Finally, the third prong, age of onset, distinguishes mental retardation from other forms of brain damage that may have occurred later in life, such as organic brain disorder.[37]

The notion that the IQ test in isolation should be conclusive as to the determination of the existence of mental retardation is too limited.[38] The multi-factor approach is a superior indicator concerning the existence of mental retardation.[39] While IQ tests are one of several factors that need to be considered in diagnosing the existence of mental retardation, as the majority of states have determined, IQ tests standing alone are not sufficient to make a final determination concerning the existence of the disability.[40]

2. No Clear Line

There is no clear line as to where mental retardation begins and where it ends.[41] Mental retardation is an incremental disorder that exists on a

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[32] *See* MENTAL RETARDATION, *supra* note 18, at 51-52 (stating that "reliance on a general functioning IQ score has been heatedly contested by some researchers").
[33] MENTAL RETARDATION, *supra* note 18 at 57.
[34] *See* MENTAL RETARDATION, *supra* note 18, at 81; DSM-IV, *supra* note 18 at 41.
[35] DSM-IV, *supra* note 18, at 41-42.
[36] *See* James W. Ellis, *Special Feature- Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 14 (2003).
[37] *Id*. at 9.
[38] *See* MENTAL RETARDATION, *supra* note 18, at 51.
[39] *See* MENTAL RETARDATION, *supra* note 18, at 10-11 (discussing the five factor model used to diagnose and classify an individual as mentally retarded, and why the five factors are necessary).
[40] *See* Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (Michie 2006); Cal. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. § 1-1g(a) (2006); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann, § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15(d) (West 2007); Ind. Code Ann. § 35-36-9-2 (2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (Law. Co-op. 2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte Briseno*, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).
[41] *See* Graham Baker, Note, *Defining and Determining Retardation in Texas Capital Murder*

continuum between being mentally deficient and normal.[42] Eighty-five percent of mentally retarded individuals are in a middle ground where they have an incremental deficiency below a level that makes them normal, but not so low as to necessarily hinder their participation in society.[43] This grey area exists between IQ levels of sixty-five and seventy-five, or generally five points above and below the generally accepted cut-off of seventy.[44]

In addition, among those who work with mentally retarded individuals there could be a conflict to diagnose the disorder before the age of eighteen.[45] On the one hand, social workers and school officials want to extend the benefits that society will bestow on those diagnosed with mental retardation.[46] On the other hand, they do not want to prevent students from participating in social or school activities, a likely result of a determination that the student is mentally retarded.[47]

The decision to diagnose an individual before the age of eighteen also becomes more dubious when school testing is involved. Many school districts have a financial interest in keeping the number of mentally retarded students low so as to avoid the costly procedures and requirements under federal law for the

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Defendants: A Proposal to the Texas Legislature, 9 SCHOLAR 237, 249 (2007) (discussing the problem of false positive identification of the disorder to assure that any individual who might need assistance will benefit from programs designed to help the mentally retarded).

[42] DSM-IV, *supra* note 18, at 43. The manual notes that eighty-five percent of those labeled retarded were members of the mildest form of the disorder. These mildly retarded individuals could achieve a sixth-grade level of education by their late teens and have the ability to provide a minimum self-support with assistance from professionals.

[43] DSM-IV, *supra* note 18, at 43.

[44] *See* Jonathan L. Bing, Note, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59, 67-68 (1996) (discussing the demarcation of an IQ of seventy as mentally retarded).

[45] *Id.* at 67 (describing the dilemma facing school psychologists when a student's test results indicate an IQ that hovers just above or just below seventy).

[46] *Id*.

[47] *Id*. *See e.g.* Charles County, Maryland, Public Schools, http://www2.ccboe.com/psychdept/bap.cfm (last visited Sept. 25, 2007)(providing the two-fold mission statement for the Psychological Services Department's Behavioral Adjustment Program for students with emotional and behavioral disabilities: to "[p]rovide a therapeutic and highly structured self contained setting for students with difficulty accessing the academic curriculum *in the regular education setting* due to emotional/behavior dysregulation" and to "provide opportunities and support to those students who are able to maintain appropriate behavior and *return to the regular education setting.*")(emphasis added); Charles County, Maryland, Public Schools, http://www2.ccboe.com/psychdept/learning_disabilities.cfm (last visited Sept. 25, 2007)(addressing what schools can do to help students with learning disabilities, stating that "[t]he student may need small group activities, classroom modifications, and/or a special program."); and *see generally* Virginia Department of Education, A Parent's Guide to Special Education (2001), http://www.doe.virginia.gov/VDOE/Instruction/ Sped/parent_guide.pdf (providing state policies for evaluation of children with various disabilities, including mental retardation, and the special education process for students not likely to be able participate in the regular education setting).

receipt of federal funds.[48] Moreover, even assuming that the district complies with the federal mandates, the funds received are often inadequate to cover the additional expenses of educating mentally retarded children.[49] This may prompt school districts to classify students who are only marginally mentally retarded as "learning impaired" or as having some other learning deficiency that does not qualify as a disability under federal law such that the extra costs can be avoided.[50] Thus, the conflicting interests may very well encumber a proper diagnosis of mental retardation before the age of eighteen in school districts where funding is inadequate to cover the additional cost of educating a mentally retarded child.

3. Problems With Determining Mental Retardation Using Only an Individual's Intelligence Quotient (IQ)

There are reasons to believe that even if an individual's IQ is above the minimum threshold to be considered mentally retarded, the individual may nevertheless still be mentally retarded.[51] The "Flynn Effect" and Standard Error of Measurement (SEM) can both cause such false negatives.[52] The Flynn Effect is explained in research conducted by Dr. James Flynn and indicates that IQ test scores must be adjusted to account for cultural IQ gain that occurs when a particular IQ test has not recently been "normed."[53] Dr. Flynn discovered that across cultures, IQs tend to increase over time as a society, in essence, becomes more intelligent and adept to the testing methods.[54] In other words, what would not have been considered a mentally retarded IQ score at one time might five or ten years later be considered as such because the mean IQ for the society would have risen in the interim.[55] Similarly, SEM is a statistical probability that accounts for possible variation in scores that can occur when an individual takes

[48] *See* Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; *see generally* Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975) (also known as the Individuals With Disabilities Education Act) (codified as amended in scattered sections of Title 20 of the U.S. Code).
[49] *See* Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; *see also* EAHCA, *supra* note 48, at 20 U.S.C. §§ 1411-1416 (2007).
[50] *See* Kanaya, Scullin, and Ceci, *supra* note 30, at 778-90; *see also* EAHCA, *supra* note 48, at 20 U.S.C. §§ 1401(3), 1414(b) (2007)(providing the definition for "child with a disability" within the meaning of the Act and providing additional evaluation criteria for determining whether a child is "disabled" within the meaning of the Act respectively).
[51] *See, e.g.,* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*. 12(2) PSYCHOL. PUB. POL'Y & L., 170-189 (2006); *cf.* Joseph Lee Rodgers, *A critique of the Flynn effect: Massive IQ gains, methodological artifacts, or both?* 26(4) INTELLIGENCE, 337-356 (1998) (questioning the validity of Flynn's research methods).
[52] *See generally* James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 PSYCHIATRIC BULL. 171-191 (1987).
[53] *Id.* at 173.
[54] *Id.* at 175.
[55] *Id*.

an IQ test multiple times.[56] The SEM is generally a range of five points above and below the individual's actual IQ score.[57]

Courts that have addressed the Flynn Effect and SEM have held that it is merely to be considered as evidence in determining whether the defendant is mentally retarded.[58] In doing so, they have wisely declined to create a presumption of mental retardation based on mechanically applying the IQ number alone.[59] For example, in *Walton v. Johnson*,[60] the Fourth Circuit Court of Appeals upheld the dismissal of a mental retardation claim where the appellant argued he met Virginia's definition of mentally retardation after the Flynn Effect and SEM were factored into his IQ.[61] Walton had scored a seventy-seven on an IQ test administered a few months before he turned eighteen, but alleged the score should be at most seventy-four as a result of the Flynn Effect and perhaps even lower because of SEM.[62] The trial court dismissed these arguments finding that Walton had failed to allege sufficient facts demonstrating that his intellectual functioning was seventy or less before he turned eighteen.[63] The Fourth Circuit affirmed, opining that Walton was only speculating that the combined influence of the Flynn Effect and SEM would lower his IQ score enough to satisfy Virginia's mental retardation standard.[64] The Court considered these cultural-statistical phenomena as only one of many factors in assessing whether a defendant is mentally retarded in the eyes of the law.[65]

Another reason to support the use of a multi-factor test for mental retardation in capital cases, as opposed to IQ alone, is the risk of an accused cheating or faking in order to achieve a low IQ score, thereby avoiding the death penalty.[66] In his dissent in *Atkins*, Justice Scalia expressed a concern that the decision would result in an onslaught of capital defendants faking mental retardation, or "malingering."[67] However, research suggests that if the three-prong test is used, it is unlikely the defendant can successfully fake symptoms

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[56] *Id.* at 174.
[57] *Id.*
[58] *See e.g.* Walton v. Johnson, 440 F.3d 160 (4th Cir. 2006); *see also* Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005).
[59] *See generally Walton,* 440 F.3d 160; *Bowling*, 163 S.W.3d 361.
[60] *Walton*, 440 F.3d 160.
[61] *Id.* at 177.
[62] *Id.*
[63] *See* Walton v. Johnson, 269 F.Supp.2d 692 (W.D.Va. 2003)(dismissing defendant's mental retardation claim without an evidentiary hearing stating defendant failed to allege sufficient evidence of the claim to merit a hearing on the issue).
[64] *Walton*, 440 F.3d at 178.
[65] *Id*.
[66] Atkins v. Virginia, 536 U.S. 304, 353 (2002)(J. Scalia dissenting).
[67] *Id*.

associated with mental retardation.[68] Indeed, many states which have chosen to define mental retardation using the three-prong test have done so because of the increased effectiveness of the comprehensive approach.[69]

In sum, the military justice system is in need of guidance on how to define mental retardation for purposes of the death penalty. Many states have already addressed this issue and their solutions may prove instructive to the military justice system. An overwhelming number of states, either statutorily or through case law, have adopted a three-prong test for mental retardation developed by the AAMR and suggested by the Supreme Court in *Atkins*. Regardless of which definition is ultimately implemented in the military, however, lawmakers should consider the need for a comprehensive test for mental retardation; the problems associated with inflexible age of onset criteria; and the inexactitudes of IQ testing, namely the Flynn Effect and SEM. Any definition should include thoughtful consideration of these problems.

III. PROCEDURAL PROBLEMS WITH MENTAL RETARDATION IN A CAPITAL CASE: IMPLEMENTING *ATKINS*

In addition to leaving to the states the task of defining mental retardation, the *Atkins* Court also left a number of other questions unresolved for state courts and legislatures.[70] Chief among these are the procedural requirements of implementing and complying with the Court's holding. For instance, at what point should a claim of mental retardation be decided? Who should consider the claim and make the final determination? What should be the standard of proof and who should bear the burdens of production and

[68] *See* Ellis, *supra* note 36, at 9. Indeed, the final prong of the three-prong test ultimately calls for the court to assess information on the accused before their eighteenth birthday. Thus, there would be no way for the accused to manipulate the court's investigation of those records.

[69] *See* Bing, *supra* note 44, at 67 (describing state legislative debates in those states that have codified the AAMR three-prong test into state law); *see also* Ala. Code § 15-24-2 (2005); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code Ann. § 5-4-618 (West 2006); Cal. Pen. Code § 1376 (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1101 (West 2007); Conn. Gen. Stat. § 1-1g(a) (2006); Del. Code Ann. tit. 11 § 4209(a) (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. 5/114-15(d) Ann. (West 2007); Ind. Code Ann. § 35-36-9-2 (West 2007); Ky. Rev. Stat. Ann. § 532.130 (Michie 2006); La. Code Crim. Proc. Ann. art. 905.5.1(D) (2006); Md. Code Ann. Crim. § 2-202(b)(1) (West 2006); Nev. Rev. Stat. Ann. § 174.098 (Michie 2006); Okla. Stat. tit. 10, § 1408 (2005); S.C. Code Ann. § 16-3-20 (Law. Co-op. 2005); Tenn. Code Ann. § 39-13-203 (West 2007); *Ex parte* Briseno, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004) (applying state health code definition to establish capital standard); Utah Code Ann. § 77-15a-102 (West 2007); Va. Code Ann. § 19.2-264.3:1.1(A) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2)(a) (West 2007).

[70] *See, e.g.,* United States v. Nelson, 419 F.Supp.2d 891 (E.D.La. 2006); United States v. Sablan, 461 F.Supp.2d 1239 (D. Colo. 2006); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); *State v. Jimenez*, 908 A.2d 181 (N.J. 2006); Richardson v. State, 598 A.2d 1 (Md. Ct. Spec. App. 1991), *aff'd,* 620 A.2d 238 (Md. 1993); and Chase v. State, 873 So.2d 1013 (Miss. 2004).

persuasion? Of the thirty-eight[71] jurisdictions that currently have the death penalty, no two are exactly alike in their approach to these issues. However, one approach clearly predominates: *Atkins* claims should be considered pretrial by the judge alone and the defendant bears the burden of proving by a preponderance of the evidence that he is mentally retarded as that term is defined under applicable law.[72] The following section considers the constitutional implications, the pragmatic benefits and current military justice practice to conclude the aforementioned approach should be used in the military justice system in implementing *Atkins*.[73]

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[71] A temporary moratorium on the death penalty has been in place in another state since 2002, but the death penalty statute has yet to be repealed although proposals to do so are currently pending. *See* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2002); A.B. 542, 230th Leg., 2007 Reg. Sess. (N.Y. 2007)(proposal to eliminate the death penalty).

[72] *See* Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004); Ark. Code Ann. § 5-4-618 (West 2006); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); Bowling v. Commonwealth, 163 S.W.2d 361, 381 (Ky. 2005)(holding defendant bears the burden of proving mental retardation by a preponderance of the evidence); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Chase v. State, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. § 28-105.01 (2006); State v. Jimenez, 908 A.2d 181 (N.J. 2006); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); State v. Flores, 93 P.3d 1264 (N.M. 2004)(holding that a defendant raising an issue of mental retardation may do so by pretrial motion); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2007); State v. Smith, 893 S.W.2d 908, 916 (Tenn. 1994)(holding that it would be in the interest of the defendant, the state, and the court for the mental retardation issue to be raised pretrial); Utah Code Ann. § 77-15a-104 (West 2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007); and Va. Code Ann. § 19.2-264.3:1.2 (West 2007)(requiring pretrial motion by defense to raise mental retardation issue).

[73] In United States v. Parker*,* 65 M.J. 626, 630 (N-M. Ct. Crim. App. 2007), The Navy-Marine Corps Court of Appeals (NMCCA) held that Parker's mental retardation claim should be considered by the military judge in a limited post-trial evidentiary proceeding called a *Dubay* hearing. United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).(*(recommend citation to Dubay so that the reader understands the origin of Dubay hearings as well)* The court also held that an offender raising an *Atkins* claim had the burden of proving his mental retardation by a preponderance of the evidence. Thus, in the Navy and Marine Corps military justice system, these issues have been partly resolved by *Parker*. The only issue not addressed by the court was when an *Atkins* hearing should be held. The court could not have addressed this question, however, because of the procedural posture of Parker's case. Parker had been found guilty and sentenced to death years before *Atkins* was announced. As a result, pretrial determination would not have been possible. Had the court prospectively held *Atkins* claims were going to be held pretrial, such a holding arguably would have been *dicta* and its authority as precedent would have been questionable. Moreover, as discussed *supra* at note 13, *Parker* is not binding authority on the remainder of the military justice system. Therefore, while the Navy and Marine Corps trial courts have some limited guidance on these issues, it is incomplete, and the remainder of the military has no guidance. As such, authoritative action from Congress, CAAF, or the President is needed to clarify these issues.

A. At What Point Should A Claim of Mental Retardation be Decided?

The determination of mental retardation should be made before trial. The eligibility of an individual to be executed is a constitutional question.[74] Waiting until after trial obscures the constitutional import of the resolution of this issue. In addition, significant resources could be saved with a pretrial determination. Procedures unique to capital cases in the military justice system – such as requirements for notice, proof, and findings of aggravating factors – would be avoided.[75] Additionally, the pleas of the accused could be affected if the death penalty was not available. Finally, while not specifically addressed, existing procedures in the Rules for Courts-Martial (R.C.M.) seem to support pretrial determination of this issue.[76]

Determining whether a capital murder defendant is mentally retarded, and therefore ineligible for the death penalty, is now an issue of constitutional import.[77] Prior to *Atkins* many state sentencing statutes treated mental retardation as only a possible mitigating factor for the sentencing authority.[78] A few jurisdictions still do although the continued constitutionality of such statutes is certainly questionable.[79] Indeed, legislation is pending in most of these jurisdictions that would bring the statutory law in line with *Atkins* either by eliminating the death penalty altogether, eliminating it for the mentally retarded, or adopting procedures more consistent with *Atkins* itself as well as the majority of states.[80] *Atkins* also made mental retardation a question of constitutional law,

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[74] Atkins v. Virginia, 536 U.S. 304 (2002).
[75] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2005).
[76] *See generally* M.C.M. *supra* note 75, R.C.M 905.
[77] *See* Baker, *supra* note 42, at 271 (discussing the constitutional nature of an individual's eligibility for the death penalty).
[78] *See* Penry v. Lynaugh, 492 U.S. 302, 337 (1989)(pointing out that at that time virtually all states with a death penalty statute listed mental infirmity of some type as a mitigating factor).
[79] *See* Mont. Code Ann. § 46-18-301 (2005); Or. Rev. Stat. Ann. § 163.150 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *invalidated by* Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007), Brewer v. Quarterman, 127 S.Ct. 1706 (2007); 42 Pa. Cons. Stat. Ann. § 9711 (West 2007); and N.H. Rev. Stat. Ann. § 630:5 (2007).
[80] *See* S. 447, 110th Cong. § 3 (2007)(proposing the elimination of the death penalty under federal law); Death Penalty Reform Act of 2007, H.R. Res. 851, 110th Cong. (2007)(proposing procedures for determining mental retardation and eligibility for the death penalty); S.B. 306, Mont. 60th Leg. (Mont. 2007)(proposing replacing the death penalty with life imprisonment without the possibility of parole); H.B. 607, 160th Sess. Gen. Ct. (N.H. 2007)(proposal to abolish the death penalty and replace it with life imprisonment without the possibility of parole); H.B. 1094, 66th Gen. Assem., Reg. Sess. (Colo. 2007)(proposing the abolishment of the death penalty); H.B. 2510, 82nd Leg., Reg. Sess. (Kan. 2007)(proposing the abolishment of the death penalty after July, 1 2007), S.B. 222, 82nd Leg., Gen. Sess. (Kan. 2007)(proposing the abolishment of the death penalty after July 1, 2007); S.B. 354, 94th Gen. Assem., Reg. Sess. (Mo. 2007)(proposing the abolishment of the death penalty and replacing it with life in prison without the possibility of parole); S.B. 171, 212th Leg. (N.J. 2007)(abolishing the death penalty and replacing it with life imprisonment without eligibility for parole), A.B. 795, 212th Leg. (N.J. 2007)(proposing the abolishment of the death penalty); A.B. 542,

at least insofar as it relates to the death penalty.[81] As a result, mental retardation is no longer on the same constitutional footing as the ordinary mitigating circumstances still found in the sentencing provisions of nearly all jurisdictions that allow the death penalty.[82] Accordingly, some state courts now treat mental retardation as a threshold constitutional question when, assuming a conviction, the death penalty would be available.[83]

230th Leg. Sess. (N.Y. 2007)(proposal to eliminate the death penalty thereby ensuring compliance with People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2004)), S.B. 319, 230th Leg. Sess. (N.Y. 2007)(proposal to amend the unconstitutional death penalty sentencing statute, but coming short of elimination of the death penalty); H.B. 745, 8th Leg. (Tex. 2007)(proposal to eliminate the death penalty); H.B. 1370, 119th Gen. Assem. (Pa. 2007)(prohibiting the death penalty for mentally retarded and outlining procedures for determining mental retardation), S.B. 751, 119th Gen. Assem. (Pa. 2007)(proposing elimination of the death penalty for the mentally retarded and proposing procedures for determining mental retardation); S.B. 2301, 122nd Leg. Sess. (Miss. 2007)(amending the sentencing procedures in capital cases to prohibit the death penalty for the mentally retarded); H.B. 3336, 74th Leg. Assem. (Or. 2007)(proposing the elimination of the death penalty for the mentally retarded and outlining procedures for making the eligibility determination); H.B. 1826, 51st Leg., 1st Reg. Sess. (Okla. 2007)(proposing a decrease in the burden of proof placed on defendant to prove mental retardation); and S.B. 5787, 60th Leg. (Wash. 2007)(proposing procedural changes to require determination of mental retardation issue pretrial and by defense motion), H.B. 1707, 60th Leg. (Wash. 2007)(proposing procedural changes to require determination of mental retardation issue pretrial by defense motion).

[81] *See Penry,* 492 U.S. at 340 (1989)(holding that execution of the mentally retarded was not cruel and unusual punishment within the meaning of the Eighth Amendment at that time).

[82] *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-703.02 (2007)(defense may raise mental retardation as mitigating evidence during sentencing phase); Ark. Code Ann. § 5-4-618 (West 2006)(if mental retardation ruling is adverse to defendant, issue may be resubmitted as evidence in mitigation during sentencing); Ca. Penal Code § 1376 (West 2007)(defendant may submit mental retardation issue to jury during sentencing); Conn. Gen. Stat. Ann. § 53a-46a (West 2007)(mitigating evidence, including mental competency, is presented during sentencing proceeding after conviction); Del. Code Ann. tit. 11 § 4209 (2007)(mental retardation may be considered as mitigating evidence during sentencing); Kan. Crim. Code Ann. § 21-4623 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1 (2006)(mental retardation will be considered during post-conviction sentencing proceeding unless defendant and state agree to resolve issue at pretrial phase); Md. Code Ann., Crim. Proc. § 4-343 (West 2007)(mental retardation issue considered during post-conviction sentencing proceeding); Mont. Code Ann. § 46-18-301, *et. seq*. (2005)(providing that mental retardation should be considered during sentencing and listing mitigating factors to be considered at the same time); Neb. Rev. Stat. § 28-105.01 (2006)(permits defendant to present mental retardation as mitigating factor); N.H. Rev. Stat. Ann. § 630:5 (2007)(treats mental issues as mitigating factors during sentencing); State v. Jimenez, 908 A.2d 181 (N.J. 2006)(permits defendants to submit mental retardation to the sentencing authority as evidence in mitigation); N.M. Stat. Ann. § 31-20A-2.1 (West 2007)(permits defendants to submit mental retardation issue as evidence in mitigation); Or. Rev. Stat. Ann. § 163.150 (West 2005)(mental capacity is a mitigating factor for consideration by the sentencing authority during sentencing); Wyo. Stat. Ann. § 6-2-102 (2007)(mental status is a mitigating factor during sentencing); and 18 U.S.C. § 3592 (2007)(provides that a defendant may submit issue of mental retardation as mitigating evidence during sentencing).

[83] *See, e.g.,* United States v. Nelson, 419 F.Supp.2d 891, 894 (E.D.La. 2006); State v. Laney, 672 S.E.2d 726, 730 (S.C. 2006)(as a result of *Atkins*, treating mental retardation in capital cases a as threshold question for the judge). *But see* State v. Vela, 721 N.W.2d 631, 638 (Neb. 2006)(reasoning that a claim of mental retardation and ineligibility for the death penalty addresses

Waiting until the post-trial sentencing phase to determine whether an accused is mentally retarded obscures the constitutional import of the issue because it could tend to equate mental retardation with non-constitutional mitigating factors.[84] Furthermore, the risk of wrongful execution is heightened if the mental retardation claim is considered post-trial because a mentally retarded defendant "may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."[85] This danger is particularly acute in those jurisdictions that allow a jury to consider mental retardation at the same time as other evidence in mitigation.[86] Some states have protected against this by separating the post-trial *Atkins* hearing from the normal sentencing hearing,[87] but the surest method to avoid constitutional violations is to have the *Atkins* hearing pretrial and have the judge alone determine whether

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the moral culpability of the defendant such that the hearing is not a "special proceeding"; rather, the hearing is part of the merits portion of the sentencing proceeding)).

[84] *See e.g.* Conn. Gen. Stat. Ann. § 53a-46a (West 2007)(providing a post-conviction hearing in capital cases to "determine the existence of any mitigating factor concerning the defendant's character, background and history, or the nature and circumstances of the crime, and any aggravating factor," but providing, *inter alia*, "[t]the court shall not impose the sentence of death [if] at the time of the offense…the defendant was a person with mental retardation."); Mont. Code Ann. § 46-18-301 (2005)(providing for post-conviction sentencing hearing for consideration of evidence in mitigation when death penalty is possible), Mont. Code Ann. § 46-18-304 (2005)(providing categories of general mitigating evidence that will be considered by the court in the post-conviction hearing); N.H. Rev. Stat. Ann. § 174.098 (2005)(providing general mitigating factors for consideration by the sentencing authority in determining whether a convicted capital defendant will receive the death penalty); Or. Rev. Stat. Ann. § 163.150 (West 2005)(providing for a sentencing hearing following conviction in a capital case such that the court may consider any evidence it "deems relevant" to sentencing); and Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007)(providing a post-conviction hearing in capital murder cases during which "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty."), *invalidated by* Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007)(holding the Texas capital murder statute unconstitutional for failing to allow the sentencing authority to give independent mitigating weight to aspects of the defendant's character that call for a less severe penalty).

[85] *State v. Flores*, 93 P.3d 1264, 1269 (N.M. 2004)(quoting Atkins v. Virginia, 536 U.S. 304, 320-21 (2002)).

[86] *See, e.g.*, Ca. Penal Code § 1376 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); La. Code Crim. Proc. Ann. art. § 905.5.1 (2006); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Va. Code Ann. § 19.2-264.3:1.2 (West 2007); and 18 U.S.C. § 3592 (2007).

[87] *See* Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Fla. Stat. Ann. § 921.137 (West 2007); Kan. Crim. Code Ann. § 21-4623 (West 2006); Mo. Ann. Stat. § 565.030 (West 2007), *held unconstitutional on other grounds by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); Neb. Rev. Stat. § 28-105.01 (2006); State v. Jimenez, 908 A.2d 181 (N.J. 2006); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); and N.Y. Crim. Proc. Law § 400.27(12) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2004).

the accused is mentally retarded.[88] The argument that it is unconstitutional to deny the accused a jury on the mental retardation issue has been roundly rejected as a matter of federal law.[89] As *Atkins* does not require a jury, the accused's Constitutional rights are adequately observed by having the determination of mental retardation done pretrial by a judge.

In addition to the constitutional import, significant practical and economical considerations also favor resolution of this issue as early in the proceedings as possible. For one, determining whether a trial will proceed as a capital case will have important procedural implications.[90] Proceeding as a non-capital case also conserves significant resources by reducing litigation expenses and expediting the overall proceedings.[91]

The conservation of resources resulting from pretrial determination of mental retardation seen in state courts would also be seen in the military justice system. For example, non-capital proceedings obviate the need for basically all of R.C.M. 1004, the military's rule and procedures for when death may be adjudged in a court-martial.[92] Specifically, this avoids the extra litigation and procedures required for capital murder trials in the military such as requiring the Government prove at least one aggravating circumstance beyond a reasonable doubt,[93] special instructions to the members regarding aggravating and mitigating evidence,[94] and special voting procedures for the members.[95] A non-

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[88] *See e.g.*. Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code. Ann. § 5-4-618 (West 2006); Ca. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. § 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ind. Code Ann. § 35-36-9-3 (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Chase v. State, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. Ann. § 174.098 (West 2005); State v. Jimenez, 908 A.2d 181 (N.J. 2006); State v. Flores, 93 P.3d 1264 (N.M. 2004); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2003); State v. Smith, 893 S.W.2d 908, 916 (Tenn. 1994); and Utah Code Ann. § 77-15a-104 (West 2007).

[89] *See* United States v. Ring, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[90] *See, e.g.,* R.C.M., *supra* note 75, Rule 1004.

[91] *See* State v. Flores, 93 P.3d 1264, 1269 (N.M. 2004)(recognizing that a capital murder trial consumes significantly more resources than a non-capital trial and that it would be beneficial to all parties to resolve the question of whether the defendant is eligible for the death penalty as early as possible).

[92] *See generally* R.C.M., *supra*, note 75.

[93] *See* R.C.M., *supra* note 75, Rule 1004(b)(2). Rule 1004(b)(2):

> "In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule."

[94] *See* R.C.M., *supra* note 75, Rule 1004(b)(6). Rule 1004(b)(6):

capital murder trial may also eliminate the possibility of mandatory review by the Court of Appeals for the Armed Forces[96] as well as the necessity of Presidential approval before the sentence is carried out.[97] Thus, early determination of eligibility for the death penalty results in less litigation, simplified trial procedures for the court as well as the members, and avoids the possibility of protracted appellate review and sentence execution. This results in conservation of precious judicial, military, and government resources.

Pretrial determination of the availability of the death penalty could also conserve resources by its effect on the pleas of the accused. For instance, if the accused and the prosecuting authority know that the death penalty is not available, pretrial guilty pleas would be more likely in those cases where the guilt of the accused is not seriously in doubt. This is particularly beneficial to the military justice system, since it will not accept a guilty plea from an accused for an offense punishable by death.[98] Thus, a pretrial determination of mental retardation would then avoid those capital murder trials that proceed only as an opportunity for the accused to avoid the death penalty or, as in the military justice system, because a guilty plea by the accused will not be accepted. This approach would also be consistent with the Rules for Courts-Martial, which require the resolution of certain pretrial motions prior to the entering of pleas.[99]

> In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

[95] *See* R.C.M., *supra* note 75, Rule 1004(b)(7). Rule 1004(b)(7):

> In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases . . . In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

[96] *See* R.C.M., *supra* note 75, Rule 1204(a)(1). Rule 1204(a)(1). "Under such rules as it may prescribe, the Court of Appeals for the Armed Forces shall review the record in all cases . . . In which the sentence, as affirmed by the Court of Criminal Appeals, extends to death."

[97] *See* R.C.M., *supra* note 75, Rule 1207. Rule 1207. "No part of a court-martial sentence extending to death may be executed until approved by the President."

[98] *See* R.C.M., *supra* note 75, Rule 910(a)(1). Rule 910(a)(1):

> An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. *A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial*. (emphasis added)

[99] *See* R.C.M., *supra* note 75, Rule 905(b). Rule 905(b):

Finally, pretrial determination is consistent with current military justice practice. In the military justice system, "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial."[100] The language of R.C.M. 905(b) is permissive in that an accused *may* bring such a motion during the pretrial phase. However, the permissiveness of the rule is limited by R.C.M. 905(e), which states that failure to bring a pretrial motion before the entering of pleas constitutes waiver on that issue.[101] Thus, for all practical purposes, an accused ordinarily must raise by pretrial motion any issues capable of resolution at that stage.[102] Although this rule does not specifically incorporate the mental retardation issue, the issue fits squarely within the language and is congruent with the rule's overall purpose, which, among other things, is to focus and expedite the trial process.

The question of whether an accused is mentally retarded, and therefore ineligible for the death penalty, is an issue capable of pretrial determination within the meaning of R.C.M. 905.[103] It does not require any inquiry into the guilt of the accused. Whether an accused was mentally retarded at the time of the alleged acts is not a defense to the crime. Rather, it is a question of status and, ultimately, eligibility for the death penalty. This is a distinct legal concept from insanity or lack of responsibility as a result of mental incompetency, both of which are affirmative defenses to the crime itself and, therefore, necessarily require an inquiry into the guilt or innocence of the accused.[104] As such, it is

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> The following must be raised before a plea is entered…Defenses or objections based on defects in the charges or specifications…Motions to suppress evidence…Motions for discovery under R.C.M. 701 or for production of witnesses or evidence…Motions for severance of charges or accused or …. Objections based on denial or request of individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

[100] *Id.*

[101] *See* R.C.M., *supra* note 75, Rule 905(e). Rule 905(e):

> Failure by a party to raise defense or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defense, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case, and, unless otherwise provided for in this Manual, failure to do so shall constitute waiver.

[102] *See also* 10 U.S.C. § 839(a) (2007)(providing that a military judge may conduct hearings pretrial, and at other stages as needed, without members, in order to resolve issues relating to such things as motions, procedure, or pleas).

[103] R.C.M., *supra* note 75, Rule 905.

[104] *See* R.C.M., *supra* note 75, Rule 916(k)(1). Rule 916(k)(1):

> It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of severe mental disease or defect, was

evident why many courts have drawn parallels between mental competency to stand trial and eligibility for the death penalty when mental retardation is claimed.[105] Both are factual inquiries into the legal status of an accused that are separate and apart from his guilt or innocence for the crimes alleged. Both are constitutionally based: mental competency to stand trial in the Due Process Clause of the Fifth and Fourteenth Amendments[106] and the prohibition of the execution of the mentally retarded in the Eighth Amendment's proscription of cruel and unusual punishment.[107] The resolution of each also has potentially profound impacts on the trial. If the accused is found mentally incompetent, no trial is held.[108] Similarly, but with somewhat less dramatic consequences, if the

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unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

[105] *See* State v. Flores, 93 P.3d 1264, 1268-69 (N.M. 2004)(holding that it would be "incongruous" to require separate hearings at separate times for mental competency to stand trial and mental retardation when both issues are triggered by defense motion, involve similar issues of fact, and are governed by the same burden of persuasion); State v. Williams, 831 So. 2d 835, 858 (La. 2002)(treating mental retardation the same as mental incompetence and placing the burden of proof by a preponderance of the evidence on the defendant), *overruled on other grounds by* 936 So.2d 89; Franklin v. Maynard, 588 S.E. 2d 604, 606 (S.C. 2003)(relying on mental competency precedent in that jurisdiction in setting the standard of proof for mental retardation at preponderance of the evidence and placing that burden on the defendant); United States v. Sablan, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006)(citing *Williams* and *Maynard* in setting proof of mental retardation by preponderance of the evidence and placing the burden on the defendant); and United States v. Nelson, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(noting that mental retardation for purposes of eligibility for the death penalty is a threshold issue somewhat analogous to competency).

[106] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see also* Cooper v. Oklahoma, 517 U.S. 348, 354 (1996)("[w]e have repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process")(quoting Medina v. California, 505 U.S. 437, 453 (1992))(internal quotation marks omitted).

[107] U.S. CONST. amend. VIII; *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002)("[c]onstruing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender.")(quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))(internal quotation marks omitted).

[108] In Cooper v. Oklahoma, 517 U.S. 348, 354 (1996)(quoting Dusky v. United States, 362 U.S. 402 (1960)), the Supreme Court repeated the general test of competence that a criminal defendant must satisfy in order to stand trial: "[a] defendant may not be put to trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him.") (internal quotation marks omitted). *See also* R.C.M., *supra* note 75, Rule 909(a) ("[n]o person may be brought to trial by court-martial if that person is presently suffering from mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case."); R.C.M., *supra*, note 75, Rule 706 (providing that a mental examination of an accused may be ordered if at any time it appears to counsel for either side, the military judge, a member, any investigating officer or the convening authority, that the accused lacked mental responsibility for the offense charged or lacks capacity to stand trial). While the proposed three-part test for mental retardation, *see* R.C.M. *supra* note 18 and accompanying text, and the test for mental competence to stand trial share some legal and procedural similarities, they are separate and distinct inquires. The extent to which a defendant that satisfies the definition of mental retardation thereby also

accused is found to be mentally retarded, the death penalty cannot be sought and the case proceeds as a non-capital murder trial.

In sum, determining whether the accused is ineligible for the death penalty as a result of mental retardation is an issue best suited for pretrial determination. Pretrial determination ensures the accused's constitutional right to be free from cruel and unusual punishment is not confounded with non-constitutional evidence in mitigation. Pretrial determination also encourages procedural and economic conservation of resources by rendering the subsequent trial non-capital and potentially avoiding trial all together in some cases by encouraging pleas. Finally, the military justice system appears to favor early resolution of this issue as well.

B. Burden of Proof

1. Who Should Bear the Burden of Proof: Government or Accused?

The burden of proof should be on the accused to show that they suffer from mental retardation. Such placement is consistent with military and federal law as the accused has better access to the evidence required to prove mental retardation. In addition, there is a clear national consensus in placing this burden on the accused.

First, placing the burden of proving mental retardation on the accused is consistent with the treatment of motions generally and the specific treatment of mental capacity and mental responsibility in the Uniform Code of Military Justice[109] and the Rules for Courts-Martial.[110] Moreover, neither *Atkins*[111] nor

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demonstrates a lack of mental capacity to stand trial is a question beyond the scope of the present discussion.

[109] *See generally* 10 U.S.C § 850(a) (2007)(explaining procedure and requirements for the defense of lack of mental responsibility).

[110] *See*: R.C.M., *supra* note 75, 905(c)(2)(A). Rule 905(c)(2)(A):

> Except as otherwise provided for in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party;

R.C.M., *supra* note 75, 909(b). Rule 909(b):

> A person is presumed to have the capacity to stand trial unless the contrary is established;

R.C.M., *supra* note 75, Rule 916(k)(3)(A). Rule 916(k)(3)(A):

> The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of alleged offense.

[111] United States v. Webster, 421 F.3d 308, 311 (5th Cir. 2005).

the Federal Death Penalty Act[112] requires the Government to prove the absence of mental retardation before it seeks the death penalty.

Second, the burden of production should fall on the Defense because the accused has the most knowledge regarding his condition and his medical history is certainly more accessible to the Defense than the Government. By contrast, imposing the burden of production on the Government is impractical and the information may be impossible for the Government to obtain, as it could implicate privacy concerns of the accused. Because the defendant has superior access to the evidence to prove his mental retardation, it is not inappropriate to place the burden on him to do so.[113] In the military system, the Government is in no better position to prove mental retardation that the prosecuting authority in any other jurisdiction.[114]

For example, one of the three prongs of the definition of mental retardation is onset before a certain age, commonly eighteen.[115] The accused has better information regarding the history of his condition and better access to friends and family who knew him before he turned eighteen. Placing the burden on the Government would require an accused to produce for the Government evidence that might otherwise be privileged, an impossible burden for the Government to carry.[116]

Finally, the assignment of the burden of proof to the accused is consistent with the overwhelming precedent from the states that have statutorily acted to prohibit the execution of mentally retarded persons either prior to or following *Atkins*.[117] Even where state legislators have not acted statutorily, the

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[112] The Federal Death Penalty Act is codified at 18 U.S.C. §§ 3591-3598 (2007). *See generally* 18 U.S.C. § 3593 (2007); United States v. Webster, 421 F.3d 308, 311 (5th Cir. 2005).

[113] *See* Medina v. California, 505 U.S. 437, 455 (1992)(O'Connor, J., concurring).

[114] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 302 (2005)(providing the general rule that information obtained regarding the accused during a hearing under R.C.M. 706 cannot be offered into evidence for guilt purposes); and MIL. R. EVID. 513 (granting the accused privileges relating to mental examinations and confidential information shared with a psychotherapist); *but see* National Defense Authorization Act of 1993, Pub. L. 102-484, tit. V, subsec. E, sec. 546, 106 Stat. 2315 (1993)(known as the "Boxer Amendment," which permits a commanding officer to order a mental health evaluation of a service member.) *See also* Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004)(placing the burden on the defense to prove mental retardation); Ariz. Rev. Stat. Ann. § 13-703.03 (2007)(defense bears the burden of proving mental retardation); Ill. Comp. Stat. Ann. 5/114-15 (West 2007)(placing the burden of proving mental retardation on the defense); Bowling v. Commonwealth, 163 S.W.3d 361, 381 (Ky. 2005)(placing the burden of proving mental retardation on the defendant); and Nev. Rev. Stat. Ann. § 174.098 (West 2005)(defense bears the burden of proving mental retardation).

[115] DSM-IV, *supra* note 18 at 39; MENTAL RETARDATION, *supra* note 18 at 1.

[116] *See e.g.* MIL. R. EVID. 513, *supra* note 114.

[117] *See* Ariz. Rev. Stat. § 13-703.02(G) (2007); Ark. Code Ann. § 5-4-618(c) (West 2006); Cal. Penal Code § 1376(b)(3) (West 2007); Colo. Rev. Stat. Ann. 18-1.3-1102 (West 2007); Del. Code Ann. tit.

courts have placed this burden on the accused.[118] No state places the burden of proving the absence of mental retardation on the Government.[119]

2. What is the Proper Standard of Proof?

The proper standard of proof required to demonstrate mental retardation in capital cases is preponderance of the evidence. There is no national consensus on this aspect of *Atkins*, but the clear weight of authority is behind a preponderance of the evidence standard. In arriving at this lower standard, many jurisdictions have appropriately analogized to the jurisprudence on mental competency to stand trial for support. The preponderance of the evidence standard is also consistent with the Rules for Courts-Martial, which utilize the lower standard for most pretrial motions.

The majority of states place the burden on capital defendants to prove by a preponderance of the evidence that they are mentally retarded.[120] Seven

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11 § 4209(d)(3)(2007); Fla. Stat. Ann. § 921.137(4) (West 2007); Idaho Code Ann. § 19-2515A(3) (2007); 725 Ill. Comp. Stat. 5/114-15(b) (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1(C) (2006); Mo. Ann. Stat. § 565.030(4)(1)(West 2007), *invalidated by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) ; Neb. Rev. Stat. § 28-105.01(5)(2006); Nev. Rev. Stat. Ann. § 174.098 (5)(b) (West 2005); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); N.Y. Crim. Proc. Law § 400.27(12)(A) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2004) ; N.C. Gen. Stat. Ann. § 15A-15-100(c) (West 2007); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (2007); Utah Code Ann. § 77-15a-104(12)(a) (West 2007); Va. Code Ann. § 19.2-264.3:1.1(C) (West 2007); and Wash. Rev. Code Ann. § 10.95.030(2) (West 2007).

[118] *See* Morrow v. State, 928 So.2d 315 (Ala Crim. App. 2004); United States v. Cobb, 742 A.2d 1 (Conn. 1999); Bowling v. Commonwealth, 163 S.W.3d 361, 381 (Ky. 2005); Richardson v. State, 620 A.2d 238, 240 (Md. 1993); State v. Jimenez, 908 A.2d 181 (N.J. 2006); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); United States v. Nelson, 419 F.Supp.2d 891, 894 (E.D.La. 2006); and United States v. Sablan, 461 F.Supp.2d 1239, 1243 (D.Colo. 2006).

[119] The New Jersey Superior Court, Appellate Division, in State v. Jimenez, 880 A.2d 468, 485 (N.J. Super. Ct. App. Div. 2005), placed the burden on the state to prove the absence of mental retardation beyond a reasonable doubt, but this approach was roundly rejected by the New Jersey Supreme Court. State v. Jimenez, 980 A.2d 181 (N.J. 2006)(reversing the New Jersey Superior Court, Appellate Division, and placing the burden to prove mental retardation on the defendant and setting that burden at a preponderance of the evidence).

[120] *See* Ark. Code Ann. § 5-4-618(c) (West 2006); Cal. Penal Code § 1376(b)(3) (West 2007); Idaho Code Ann. § 19-2515A(3) (2007); 725 Ill. Comp. Stat. 5/114-15(b) (West 2007); La. Code Crim. Proc. Art. 905.5.1(C) (2006); Mo. Rev. Stat. § 565.030(4)(1) (2003); Neb. Rev. Stat. § 28-105.01(5)(2006); Nev. Rev. Stat. Ann. § 174.098 (5)(b) (2005); N.M. Stat. Ann. § 31-20A-2.1 (West 2007); N.Y. Crim. Proc. Law § 400.27(12)(A) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (N.Y. 2005)(placing a temporary moratorium on the sentencing or imposition of the death penalty because of an unconstitutional deadlocked jury instruction in the state death penalty statute); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2007); Utah Code Ann. § 77-15a-104(12)(a) (West 2007); Va. Code Ann. § 19.2-264.3:1.1(C) (West

states require proof of mental retardation by clear and convincing evidence;[121] however, the national trend is towards the lower standard. Evincing this trend is a recent decision from the Indiana Supreme Court finding unconstitutional the clear and convincing standard[122] as well as legislation proposed in Oklahoma that would lower the standard in that state to preponderance of the evidence.[123] Congress is also moving in that direction having recently proposed similar legislation.[124] Even in jurisdictions which still consider mental retardation as only a mitigating factor during sentencing, the majority currently use, or have proposed, the preponderance of the evidence standard.[125] Only one state requires proof of mental retardation beyond a reasonable doubt.[126] Finally, where the burden has not been determined by statute, both state[127] and federal

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2007); Wash. Rev. Code Ann. § 10.95.030(2) (West 2007); and 18 U.S.C. §§ 3592-3, 3596(c) (2007).

[121] *See* Ariz. Rev. Stat.Ann. § 13-703.02(G) (2007); Colo. Rev. Stat. Ann. 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209(d)(3) (2007); Fla. Stat. § 921.137(4) (2007); N.C. Gen. Stat. Ann. § 15A-15-100(c) (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007), *invalidated by* Pruit v. State, 834 N.E.2d 90 (Ind. 2005); and Okla. Stat. Ann. tit. 21 § 701.10b (West 2007).

[122] *See* Pruitt v. State, 834 N.E.2d 90 (Ind. 2005)(holding Ind. Code Ann. § 35-36-9-4 unconstitutional insofar as it requires the defendant to prove mental retardation by clear and convincing evidence).

[123] *See* H.B. 1826, 51st Leg., 1st Reg. Sess. (Okla. 2007)(proposing a decrease in the burden of proof required to demonstrate mental retardation from clear and convincing to preponderance of the evidence).

[124] *See* Death Penalty Reform Act of 2007, H.R. 851, 110th Cong. § 4 (2007)(proposing procedures for determining eligibility for the death penalty including requiring the defendant to prove mental retardation by a preponderance of the "information").

[125] *See* Mo. Ann. Stat. 565.030 (West 2007), *held unconstitutional on other grounds by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003); N.H. Rev. Stat. Ann. § 630:5 (2007); and H.B. 1370, 119th Gen. Assem. (Pa. 2007), S.B. 751, 119th Gen. Assem. (Pa. 2007).

[126] *See* Ga. Code Ann. § 17-7-131 (West 2006); Burgess v. State, 450 S.E.2d 680, 692 (Ga. 1994)(mental retardation must be found beyond a reasonable doubt for a jury to return a verdict of 'guilty, but mentally retarded'); King v. State, 539 S.E.2d 783, 798 (Ga. 2000)(approving the evaluation of mental retardation claim during the guilt/innocence phase of trial and finding 'beyond a reasonable doubt' standard for proof of mental retardation to be constitutional).

[127] *See* Morrow v State, 928 So.2d 315 (Ala. Crim. App. 2004)(noting the absence of legislation for procedure implementing Atkins and the necessity of the court to fashion some procedures, including requiring proof of mental retardation by a preponderance of the evidence, until the legislature does so); Pruitt v. State, 834 N.E.2d 90 (Ind. 2005)(finding unconstitutional a state statute that required defendant to prove mental retardation by clear and convincing evidence because such a standard was too great); Bowling v. Commonwealth, 163 S.W.3d 361, 381 (Ky. 2005)(holding that the defendant bears the burden of proving mental retardation by a preponderance of the evidence); Richardson v. State, 598 A.2d 1, (Md. Ct. Spec. App. 1991)(holding the burden of proof for mental retardation is preponderance of the evidence), aff'd 620 A.2d 238 (Md. 1993); Chase v. State, 873 So.2d 1013 (Miss. 2004); State v. Jimenez, 908 A.2d 181 (N.J. 2006)(pointing out the state legislature has not promulgated rules or procedures for implementing *Atkins* and in adopting such procedures holding the defendant bears the burden of proving mental retardation by a preponderance of the evidence); State v. Lott, 779 N.E.2d 1011 (Ohio 2002)(noting an absence of statutory framework for implementing *Atkins* and placing the burden on the defendant to prove mental retardation by a preponderance of the evidence); and Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003).

district courts[128] have taken the liberty in doing so and overwhelmingly determined the appropriate standard to be preponderance of the evidence. Thus, while not yet amounting to a national consensus, the clear majority of jurisdictions have found preponderance of the evidence is the correct evidentiary standard for evaluating claims of mental retardation in capital cases.

In finding that the defendant bears the burden of proving he is mentally retarded by a preponderance of the evidence, many courts have analogized to the jurisprudence surrounding mental competency to stand trial.[129] Much of this jurisprudence is based on *Cooper v. Oklahoma,* where the Supreme Court struck down as unconstitutional a state statute that required a defendant prove he was not competent to stand trial by clear and convincing evidence.[130] The Court stated:

> A heightened standard does not decrease the risk of error, but simply reallocates the risk between the parties. In cases in which competence is at issue, we perceive no sound basis for allocating to the criminal defendant the large share of the risk that accompanies a clear and convincing evidence standard.[131]

This reasoning applies equally as well to the issue of mental retardation and eligibility for the death penalty. Arguably, the finding in *Atkins* that executing the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment does not share the same "deep roots in our common law heritage"[132] as the prohibition against subjecting the mentally incompetent to

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[128] *See* United States v. Nelson, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(accepting the stipulation by both parties that the burden of proof of mental retardation is preponderance of the evidence); and United States v. Sablan, 461 F.Supp.2d 1238, 1243 (D.Colo. 2006)(finding resolution of the mental retardation issue analogous to determination of mental competency to stand trial and therefore applying a preponderance of the evidence standard).

[129] *See* State v. Flores, 93 P.3d 1264, 1268-69 (N.M. 2004)(analogizing to hearings on mental competency to stand trial in developing procedures for *Atkins* hearings); State v. Lott*,* 779 N.E.2d 1011, 1015 (Ohio 2002)("a trial court's ruling on mental retardation should be conducted in a manner comparable to a ruling on competency [to stand trial]"); State v. Williams, 831 So. 2d 835, 858 (La. 2002)(treating mental retardation the same as mental incompetence and placing the burden of proof by a preponderance of the evidence on the defendant), *overruled on other grounds by* State v. Turner*,* 936 So.2d 89; Franklin v. Maynard, 588 S.E. 2d 604, 606 (S.C. 2003)(relying on mental competency precedent in that jurisdiction in setting the standard of proof for mental retardation at preponderance of the evidence and placing that burden on the defendant); United States v. Sablan, 461 F. Supp. 2d 1239, 1242 (D. Colo. 2006)(citing *Williams* and *Maynard* in setting proof of mental retardation by preponderance of the evidence and placing the burden on the defendant); and United States v. Nelson, 419 F.Supp.2d 891, 894 (E.D.La. 2006)(noting mental retardation for purposes of eligibility for the death penalty is a threshold issue somewhat analogous to competency).

[130] Cooper v. Oklahoma, 517 U.S. 348 (1996).

[131] *Id*. at 366-67 (quoting Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990)).

[132] *Id*. at 355.

criminal trial.[133] Nonetheless, the constitutional implications of the issue as a result of *Atkins*, together with the overwhelming concurrence of the states, suggests the "constitutional interest at stake"[134] in the execution of the mentally retarded is of the same order of magnitude as the requirement of competency to stand trial. In building upon of the language of the Supreme Court in *Cooper*, the Louisiana Supreme Court reasoned in *State v. Williams*:

> Requiring a defendant to prove by clear and convincing evidence he is exempt from capital punishment by reason of mental retardation would significantly increase the risk of an erroneous determination that he is not mentally retarded. Clearly, in the *Atkins* context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded (life imprisonment at hard labor) far more readily than the defendant of an erroneous determination that he is not mentally retarded.[135]

Thus, the procedural and evidentiary aspects of determining mental competency to stand trial prove to be useful guideposts in the implementation of *Atkins*.[136]

Furthermore, this approach is consistent with current military justice practice. For example, the burden of proof on any factual issue necessary to decide a pretrial motion is preponderance of the evidence.[137] In addition, as required by *Cooper*, the military justice evidentiary standard required to prove an accused is not mentally competent to stand trial is preponderance of the evidence.[138] Therefore, uniformity in practice would dictate that in the military

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[133] *See id*. at 353-56 (reviewing the historical roots of the requirement that a defendant be competent to stand trial and the relatively low standard of proof that has traditionally been required of defendants to demonstrate they are not competent to stand trial).

[134] *Id*. at 356.

[135] State v. Williams, 831 So.2d 835, 860 (La. 2002), *overruled on other grounds by* State v. Turner, 936 So.2d 89 (La. 2006). *See also* State v. Jimenez, 908 A.2d 181, 193 (N.J. 2006)(Albin, J. dissenting)(arguing for a preponderance of the evidence standard because the stakes in a capital case are considerably higher than an ordinary criminal case and errors should be resolved in favor of defendants).

[136] *See, e.g.,* State v. Flores, 93 P.3d 1264, 1268-69 (N.M. 2004)(holding that it would be "incongruous" to require separate hearings at separate times for mental competency to stand trial and mental retardation when both issues are triggered by defense motion, involve similar issues of fact, and are governed by the same burden of persuasion. In addition, "[s]tatutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardships, or injustice.").

[137] *See* R.C.M., *supra* note 75, Rule 905(c)(1). Rule 905(c)(1):

> Unless otherwise provided for in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

[138] *See* R.C.M., *supra* note 75, Rule 909(e)(2). Rule 909(e)(2):

justice system, proof of mental retardation should be by a preponderance of the evidence.

In sum, the burden of proof should be placed on the accused to prove mental retardation by a preponderance of the evidence. The accused has better access to the evidence required to prove mental retardation, there is a clear national consensus in placing this burden on the accused, and such placement is consistent with similar factual and procedural areas of the law, such as mental competence to stand trial. Finally, this standard is in accord with current military practice and procedure.

C. Judge or Jury: Who Should be the Finder of Fact?

The military judge, and not the members, should decide if the accused is mentally retarded.[139] The Constitution does not require that a jury hear an accused's mental retardation claim. The majority of state legislators and courts have also determined that whether an accused is mentally retarded is a question best suited for a judge rather than a jury. Moreover, having a judge alone hear the mental retardation claim is more efficient and practical than having a jury hear it. This approach is also consistent with current practice in the military justice system, which requires the military judge to determine certain issues before trial, such as mental competency.

> Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

[139] Generally, expert testimony of some form is required to assist the finder of fact during an *Atkins* hearing. Some states appoint an expert and some require the defendant, the state, or both to present the expert witnesses. *See e.g.* Idaho Code. Ann. § 19-2515A(2) (2007)(requiring the defendant to produce an expert to testify as to defendant's mental retardation); 725 Ill. Comp. Stat. Ann 5/114-15(b) (West 2007)(providing that the court may appoint an expert in mental retardation and that the defense and state may also present expert testimony on the issue); La. Code Crim. Proc. Ann. art. 905.5.1 (2006)(defendant may present an expert, but the State may produce its own, independent expert if it so chooses); Nev. Rev. Stat. Ann. § 174.098 (West 2005)(defendant claiming mental retardation must submit to evaluation by an expert of the prosecution's choosing, but at the hearing the defendant may present expert testimony and cross-examine the state's expert); Utah Code Ann. § 77-15a-104 (West 2007)(if a capital defendant raises a claim of mental retardation, the court shall appoint at least two mental health experts to evaluate and submit reports to the court regarding the defendant's mental health); and Va. Code Ann § 19.2-264.3:1.2 (West 2007)(the defendant raising a mental retardation ordinarily must present expert testimony to substantiate the claim, but in the expert must meet certain criteria and the court may appoint such an expert if the defendant is unable to afford it).

The Constitution does not require that a jury hear an *Atkins* claim.[140] Central to understanding the jurisprudence surrounding this issue is the Supreme Court's ruling in *Ring v. Arizona*.[141] The Supreme Court held in *Ring* that capital murder defendants are entitled to a jury determination of any fact that increases their maximum punishments.[142] Subsequent to *Ring*, the majority of courts explicitly held that the decision does not render the absence of mental retardation the functional equivalent of an element of capital murder.[143] Although determining whether a defendant is mental retarded does indeed involve fact-finding, it is not the functional equivalent of an element of the crime.[144] It has nothing to do with the acts that make up the crime itself or the defendant's mental state while committing the crime, facts the Government must traditionally prove. As a result, *Ring* does not require a jury find the absence of mental retardation.[145] As the Louisiana Supreme Court has observed, "*Atkins* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the absence of which operates as the functional equivalent of an element of a greater offense."[146]

In addition, nothing in the *Ring* progeny requires that a jury find the absence of mental retardation. In *Walker v. True*, the Fourth Circuit rejected a claim that *Ring* requires a jury determination of mental retardation, reasoning that "an increase in a defendant's sentence is not predicated on the outcome of the mental retardation determination; only a decrease."[147] Similarly, the Fifth

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[140] Ring v. Arizona, 536 U.S. 584 (2002).
[141] *Id*.
[142] *Id*. at 609.
[143] *See also* Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt); State v. Flores, 93 P.3d 1264, 1267 (N.M. 2004)(following *Aprendi* and *Ring* in distinguishing aggravating factors from mitigating factors, such as mental retardation in this case, when placing on defendants the burden to prove mental retardation); Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003)(reasoning that *Ring* did not establish a requirement that a jury consider mental retardation in the capital murder context); Bowling v. Commonwealth, 163 S.W.3d 361, 377 (Ky. 2005)(relying on *Ring* in rejecting appellant's argument that having a judge consider his mental retardation claim, as opposed to a jury, violated his Sixth Amendment right to trial by jury); Berry v. State, 882 So.2d 157, 174 (Miss. 2004)(citing *Apprendi* in rejecting petitioners argument that his mental retardation claim must be submitted to a jury); and State v. Laney, 672 S.E.2d 726, 730 (S.C. 2006)(analyzing *Ring* and distinguishing between statutory aggravating factors, which require a jury, and mitigating factors, such as mental retardation in the *Atkins* context, which do not require a jury).
[144] *See In re* Johnson, 334 F.3d 403, 405 (5th Cir. 2003) (holding that defendant was not entitled to a jury determination of mental retardation because mental retardation was not the functional equivalent of an element of capital murder that the state had to prove beyond a reasonable doubt).
[145] *See*, *e.g*., Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005); *Ex Parte* Briseno, 135 S.W.3d 1, 10 (Tex. Crim. App. 2004); Winston v. Commonwealth, 604 S.E.2d 21, 50 (Va. 2004); State v. Flores, 93 P.3d 1264, 1267 (N.M. 2004); and Head v. Hill, 587 S.E.2d 613, 620 (Ga. 2003).
[146] State v. Williams, 831 So.2d 835, 860 (La. 2002)(quoting Ring v. Arizona, 536 U.S. 584 (2002))(internal quotation marks omitted).
[147] Walker v. True, 339 F.3d 315, 326 (4th Cir. 2005).

Circuit has stated, "the absence of mental retardation is not an element of the sentence any more than sanity is an element of the offense."[148] The Supreme Court has also signaled that a jury need not decide the issue of mental retardation.[149]

Furthermore, most state legislatures have concluded that resolution of the mental retardation issue by the court is appropriate. Twenty-one states with statutes in place assign to the trial judge the determination of whether a defendant is mentally retarded.[150] Another two states currently have legislative proposals that would do the same.[151] In four states the judge has been assigned this responsibility as a matter of case law.[152] Thirteen states, including the federal government, have a hybrid system where the determination of the mental retardation issue will turn on whether the defendant decides to waive trial by jury, waive sentencing by jury, or to submit the issue post-trial as evidence in mitigation during sentencing.[153] In addition, three states give defendants the

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[148] *In re* Johnson, 334 F.3d at 405; *see also* State v. Williams, 831 So.2d 835 (La. 2002); and Russell v. State, 849 So.2d 95 (Miss. 2003).

[149] *See* Schriro v. Smith, 546 U.S. 6, 8-9 (2005). When the Ninth Circuit suspended federal *habeas* proceedings, and ordered a state jury trial on the issue of mental retardation, the Supreme Court summarily reversed the decision, implicitly rejecting the conclusion that *Atkins* requires a jury trial.

[150] *See* Ariz. Rev. Stat. Ann. § 13-703.02(G) (2007); Ark. Code. Ann. § 5-4-618 (West 2006); Colo. Rev. Stat. Ann. 18-1.3-1102(3) (West 2007); Del. Code Ann. tit. 11 § 4209(d)(3)(C) (2007); Fla. Stat. § 921.137(4) (2007); Idaho Code Ann. § 19-2515A(3) (2007); 725 Ill. Comp. Stat. 5/114-15(b) (West 2007); Ind. Code § 35-36-9-4 (2007); Kan. Stat. Ann. § 21-4623(b) (2007); Ky. Rev. Stat. Ann. 532.135 (West 2006); Mont. Code Ann. § 46-18-301 (2005); Neb. Rev. Stat. § 28-105.01(4) (2006); Nev. Rev. Stat. 174.098(6) (2005); N.M. Stat. Ann. § 31-20A-2.1(C) (West 2007); N.Y. Crim. Proc. Law § 400.27 (12)(a) (McKinney 2007), *invalidated by* People v. LaValle, 783 N.Y.S.2d 485 (finding state death penalty sentencing statute unconstitutional on other grounds); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2007); Utah Code Ann. §§ 77-15a-101-106 (West 2007); and Wash. Rev. Code Ann. § 10.95.030 (West 2007).

[151] *See* H.B. 1370, 119th Gen. Assem. (Pa. 2007); S.B. 751, 119th Gen. Assem. (Pa. 2007); and H.B. 3336, 74th Legis. Assem. (Or. 2007).

[152] *See* Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004); Chase v. State, 873 So.2d 1013 (Miss. 2004); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); and Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003).

[153] *See* Ca. Penal Code § 1376 (West 2007)(judge will determine mental retardation issue pretrial unless defendant requests post-trial determination by a jury during sentencing); Conn. Gen. Stat. Ann. § 53a-46a (West 2007)(determination of the mental retardation generally occurs before the jury that convicted, but the jury may be waived by the defendant leaving the issue for the judge); Ga. Code Ann. § 17-7-131 (West 2006)(jury will decide mental retardation issue unless defendant waives jury in which case the judge will decide the issue); La. Code. Crim. Proc. Ann. art. 905.5.1 (2006)(determination of mental retardation issue will be before the jury during post-conviction sentencing unless the defendant and State agree to pretrial determination by the court alone); Md. Code Ann., Crim. Proc. § 4-343 (West 2007)(the jury which convicts will decide the mental retardation issue during sentencing unless defendant waives the jury in which case the judge will make the determination); Mo. Ann. Stat. § 565.030 (West 2007)(whichever was the trier of fact during the guilt phase of trial will determine the mental retardation issue), *invalidated by* State v. Whitfield, 107 S.W.3d 253 (Mo. 2003)(holding the state capital murder sentencing statute

option to raise mental retardation before the jury if the judge initially finds they are not mentally retarded.[154]

Of the states that determine mental retardation before trial, many of their statutes were enacted in response to *Atkins*, presumably recognizing that consideration of the defendant's mental retardation by the judge was the most practical solution.[155] Many courts have also recognized the practical and economic benefits of resolving an *Atkins* claim by the judge in a pretrial hearing.[156] For example, significant resources could be saved in terms of "trial

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unconstitutional on other grounds); N.H. Rev. Stat. Ann. § 630:5 (2007)(mitigating factors in capital murder sentencing are determined by the jury that convicted unless the jury is waived by the defendant); N.J. Stat. Ann. § 2C:44-1 (West 2007)(for basic sentencing procedures); State v. Jimenez, 908 A.2d 181 (N.J. 2006)(the jury will decide the mental retardation issue unless the defendant raises it pretrial in which case it will be resolved by the court alone); Or. Rev. Stat. Ann. § 163.150 (West 2005)(jury which convicts will also determine mental retardation issue unless jury is waived by the defendant); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007)(jury which convicted determines mental retardation issue), *invalidated by* Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007), Brewer v. Quarterman, 127 S.Ct. 1706 (2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007)(judge will determine mental retardation if trial was by judge or jury if trial was by jury); Wyo. Stat. Ann. § 6-2-102 (2007)(mental retardation issue will be determined by judge if trial was by judge or jury if trial was by jury); and 18 U.S.C. § 3593(b)(2007)(determination of mental retardation will be decided by the jury that convicted, by the judge if the jury was waived or if the defendant chooses to waive sentencing by jury).

[154] *See* Ark. Code Ann. § 5-4-618 (d)(2)(A) (West 2006)(if pretrial determination by trial court is unfavorable to defendant, defendant can demand de novo determination by jury); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007)(if pretrial determination is unfavorable to defendant, mental retardation issue may be submitted to the jury during trial or as mitigating evidence during sentencing phase); and Okla. Stat. Ann. tit. 21 § 701.10b (West 2007)(if pretrial determination is unfavorable to the defendant issue may be submitted for the jury's consideration during trial).

[155] *See*, *e.g.*, Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Nev. Rev. Stat. Ann. § 174.098 (2005); and Utah Code Ann. § 77-15a-104 (West 2007).

[156] *See*, *e.g.,* Morrow v. State, 928 So.2d 315, 324 (Ala. Crim. App. 2004)("[t]he better practice under *Atkins* is reflected by the procedure of such states as Indiana and Missouri, where *the court* makes a pretrial determination of whether the defendant is mentally retarded and *thereby spares both the State and the defendant the onerous burden of a futile bifurcated capital sentencing proceeding*")(quoting, State v. Williams, 831 So.2d 835, 860 (La. 2002))(quotation marks in original)(emphasis added); United States v. Nelson, 419 F.Supp.2d 891, 893 (E.D.La. 2006)(finding that overriding practical considerations–such as the saving of significant resources in terms of trial preparation, motions practice, voir dire, trial time, mitigation research, etc.–dictate that the *Atkins* issue be resolved up front by the trial judge); United States v. Sablan, 461 F.Supp.2d 1239, 1241 (D.Colo. 2006)(implicitly finding that pretrial determination of an Atkins claim by the trial judge is more practical than leaving the question for the jury); and State v. Williams, 831 So.2d 835, 860 (La. 2002)(noting that having the judge consider the *Atkins* claim pretrial avoids the onerous burden of a second post-trial penalty phase), *abrogated by* State v. Turner, 936 So.2d 89 (La. 2006)(noting that *Williams* was decided in the interim between *Atkins* and the state legislature's enactment of procedures for hearing *Atkins* claims and that *Williams* was superseded in part by subsequent legislation that also provided defendants the option to have their *Atkins* hearing post-trial where the jury was the decider of fact).

preparation, motion practice, voir dire, trial time, mitigation research, etc."[157] The benefits of having a judge hear an *Atkins* claim, as opposed to a jury, are difficult, if not impossible, to extrapolate from the benefits of having the *Atkins* hearing pretrial. Indeed, the benefits of a pretrial hearing are partially due to the absence of a jury and partially due to the fact the hearing is *before* the trial. This is particularly true for pretrial *Atkins* hearings, the outcome of which could drastically transform the subsequent proceedings. It is conceivable that a jury could be impaneled pretrial just to hear an *Atkins* claim, but that would detract from at least part of the benefit of deciding some issues before trial where a jury is not ordinarily impaneled to adjudicate facts which will be dispositive at trial. Moreover, not a single state statute or state court approves this type of unusual procedure. Those states that provide the defendant a jury on the issue of mental retardation unanimously require the jury to consider the claim *after* the trial has concluded.[158] This averts the possibility of the court going through the time and expense of selecting and impaneling a jury to hear the *Atkins* claim only to have the case subsequently dismissed or a plea agreement reached such that the trial is never held. In such a situation, it would have been much more efficient to simply have the judge alone consider the *Atkins* claim during the course of considering all the other pretrial motions that inevitably will be filed with the court.

Furthermore, in those states that leave determination of mental retardation to the jury, it is generally because state law provides the defendant with a right to request a jury on the issue or the legislature decided to shoehorn *Atkins* procedures into pre-*Atkins* capital murder sentencing statutes, not because it is more practical or efficient than having the judge decide the issue.[159] Thus, the question of whether mental retardation is for the judge or jury to decide often turns on whether there is state law that entitles the defendant to a jury on the

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[157] United States v. Nelson, 419 F.Supp.2d 891, 893 (E.D.La. 2006).

[158] *See*, *e.g.*, Cal. Penal Code § 1376 (West 2007); Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Ga. Code Ann. § 17-7-131 (West 2006)(based on Georgia's unique treatment of mental retardation as a quasi-affirmative defense, the issue is not generally considered post-trial, but is usually litigated at trial and, in any event, not before trial); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Md. Code Ann., Crim. Law § 2-303 (West 2007); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Mo. Ann. Stat. § 565.030 (West 2007); Neb. Rev. Stat. § 28-105.01; N.H. Rev. Stat. Ann. § 630:5 (2007); N.J. Stat. Ann. § 2C:44-1 (West 2007); Or. Rev. Stat. Ann. § 163.159 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *found unconstitutional on other grounds by Abdul-Kabir v. Quarterman*, 127 S.Ct. 1654 (2007), Brewer v. Quarterman, 127 S.Ct. 1706 (2007); Va. Code Ann. § 19.2-264.3:1.1 (West 2007); and Wyo. Stat. Ann. § 6-2-102 (2007).

[159] *See e.g.*, Conn. Gen. Stat. Ann. § 53a-46a (West 2007); Ga. Code Ann. § 17-7-131 (West 2006); Md. Code Ann., Crim. Law § 2-303 (West 2007); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); Mo. Ann. Stat. § 565.030 (West 2007); Neb. Rev. Stat. § 28-105.01; N.H. Rev. Stat. Ann. § 630:5 (2007); N.J. Stat. Ann. § 2C:44-1 (West 2007); Or. Rev. Stat. Ann. § 163.159 (West 2005); Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 2007), *found unconstitutional on other grounds by* Abdul-Kabir v. Quarterman, 127 S.Ct. 1654 (2007), Brewer v. Quarterman, 127 S.Ct. 1706 (2007); and Wyo. Stat. Ann. § 6-2-102 (2007).

issue or mental retardation is handled in the context of pre-*Atkins* sentencing statutes. If not, the majority of jurisdictions have recognized the practical and economic advantages of having a judge alone decide the *Atkins* claim in a pretrial hearing and therefore require defendants to raise the claim by pretrial motion.

Finally, having the military judge decide whether an accused is mentally retarded rather than the members is consistent with procedure in similar areas of military justice practice. For example, all pretrial motions, including those related to the mental capacity or mental responsibility of the accused,[160] are decided by the military judge.[161] In addition, determination of the accused's mental capacity to stand trial after referral of charges is an "interlocutory question of fact"[162] for the military judge.[163] Thus, current military justice practice and procedure suggests an *Atkins* claim is a question better suited for the military judge than the members.[164]

In sum, federal law does not require an accused be provided a jury for his *Atkins* hearing. The majority of states also do not require that a jury consider the issue. In those states where a jury is required, it is generally because *Atkins* was incorporated into an existing legislative framework, not because the legislature expressly found it more beneficial to have a jury rather than a judge

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[160] *See* R.C.M., *supra* note 75, Rule 906(b)(14). Rule 906(b)(14). "The following may be requested by motion for appropriate relief . . . Motions relating to mental capacity or responsibility of the accused."

[161] *See* R.C.M., *supra* note 75, Rule 905(a). Rule 905(a):

> A motion is an application to the *military judge* for particular relief (emphasis added); and Uniform Code of Military Justice, 10 U.S.C. § 839(a) (2007)(providing that a military judge may conduct hearings pretrial, and at other stages as needed, without members, in order to resolve issues relating to such things as motions, procedure, or pleas).

[162] *See* R.C.M., *supra* note 75, Rule 909(e)(1). Rule 909(e)(1). "The mental capacity of the accused is an interlocutory question of fact."

[163] *See* R.C.M., *supra* note 75, Rule 909(d). Rule 909(d):

> After referral [of charges], the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes than an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

[164] It should also be noted that a pretrial finding by a judge does not preclude the defendant from presenting the mental retardation claim as evidence in mitigation to the sentencing authority in most jurisdictions. Even post-*Atkins* most state statutes still provide defendants the right to present evidence of general mental defect as a mitigating circumstance. *See supra* note 78. Some states take it one step further even and offer defendants the opportunity to present the mental retardation claim to a sentencing jury *de novo* where the judge has already found the defendant is not mentally retarded. *See supra* note 154.

decide the issue. Indeed, it is more practical to have the judge hear the *Atkins* claim rather than impaneling a jury for that purpose. This approach is also consistent with current military justice practice. For these reasons, the military judge should decide an accused's *Atkins* claim in the military justice system.

IV. CONCLUSION

In this article the authors have attempted to clarify many of the substantive and procedural issues surrounding mental retardation and its effect on capital murder trials. In short, it is the authors' contention that the military justice system is in need of official guidance. Mental retardation is an important issue that should be clarified before any capital murder case is undertaken. In order to avoid unnecessary confusion or delay in the processing of an accused raising an *Atkins* claim, and to ensure the rights of the accused are observed to the extent required by law, the military needs guidance from Congress, the Court of Appeals for the Armed Forces, or the President through his regulatory authority.

The important substantive and procedural issues discussed can be summed up in two basic principles. First, military courts in the future should adopt the AAMR three-prong definition of mental retardation as the appropriate standard to be applied. Second, the accused in the military justice system should be provided a pretrial hearing for the adjudication of his mental retardation claim. This hearing should be presided over by a military judge alone, and the accused should bear the burden of proof by a preponderance of the evidence. Authoritative action is necessary to implement these principles in the military justice system.

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