How Framing the Issue Can Result in Life or Death: A Look at *Hill v. Humphrey*'s Procedural Undermining of the Constitutional Right of the Intellectually Disabled to Avoid Execution

*Christian A. Rogers**

I. Introduction

The death penalty serves two primary public interests: retribution and deterrence.[1] Retribution is the interest that the offender receives punishment in accordance with the culpability of the offender.[2] Deterrence is the public interest in discouraging potential offenders from committing capital crimes.[3] Implementing the death penalty on the intellectually disabled[4] does not satisfy these interests for at least two reasons.[5] First, society views intellectually disabled offenders as less culpable than offenders without intellectual disabilities.[6] Second, evidence shows that intellectually disabled offenders act more on impulse than on premeditated plans.[7] Because imposing the death penalty on an intellectually disabled offender fails to contribute to the two pri-

* Candidate for Juris Doctor, Florida Coastal School of Law, May 2014.

1 Hill v. Humphrey, 662 F.3d 1335, 1384 (11th Cir. 2011) (en banc) (Martin, J., dissenting) (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

2 *Atkins*, 536 U.S. at 319.

3 *Id.*

4 The opinion of *Hill v. Humphrey* and sources cited therein use variations of the term "mental retardation." *Hill*, 662 F.3d 1335. However, in 2010, Congress adopted Rosa's Law, an act that changes "references in Federal law to mental retardation to references to an intellectual disability, and change[s] references to a mentally retarded individual to references to an individual with an intellectual disability." 124 Stat. 2643 (2010). Accordingly, this Article will primarily use variations of "intellectual disability," but this term may be used interchangeably with variations of "mental retardation." *See infra* Parts II-IV.

5 *See Atkins*, 536 U.S. at 318-21.

6 *Id.* at 315-18. Society generally regards the intellectually disabled as less culpable because they usually have diminished capabilities in understanding and processing information, communicating, learning from experience and mistakes, engaging in logical reasoning, controlling impulses, and understanding other people's reactions. *Id.* at 318.

7 *Id.* at 318, 320; *see supra* notes 5-6.

mary interests, the death penalty for the intellectually disabled "is nothing more than the purposeless and needless imposition of pain and suffering."[8] Accordingly, the imposition of the death penalty on the intellectually disabled violates the Eighth Amendment's protection against cruel and unusual punishment.[9]

The Eleventh Circuit Court in *Hill v. Humphrey* had to decide whether Georgia courts can require that an offender prove beyond a reasonable doubt that he or she is intellectually disabled, rather than by a preponderance of the evidence.[10] The higher beyond-a-reasonable-doubt standard carries the inherent risk that a court will sentence some intellectually disabled offenders to death—violating these offenders' constitutional right against such punishment.[11] Generally speaking, the majority of the court argued that existing habeas corpus law constrains the court's approach to a narrowly construed issue and that it could only overrule Georgia's high standard of proof if the use of that standard violated "clearly established . . . law."[12] The dissenting opinions (and even the concurring opinion) challenged the majority's framing of the issue and argued that habeas corpus law does not bind the court to "clearly established law."[13] Thus, the defendant in *Hill* might have avoided the death penalty had the majority reframed the issue in accordance with the dissenting judges.[14]

---

[8] *Atkins*, 536 U.S. at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).

[9] *See id.* at 311, 321 (quoting U.S. CONST. amend. VIII).

[10] Hill v. Humphrey, 662 F.3d 1335, 1337 (11th Cir. 2011) (en banc).

[11] *Id.* at 1355; *id.* at 1371-72 (Barkett, J., dissenting). Georgia places the majority of this risk on the offender, meaning Georgia believes "it is far better to erroneously execute a mentally retarded person than to erroneously imprison for life one who is not mentally retarded." *Id.* at 1372.

[12] *See id.* at 1337 (majority opinion).

[13] *See id.* at 1365, 1370 (Barkett, J., dissenting); *see also id.* at 1361-63 (Tjoflat, J., concurring).

[14] *See id.* at 1370 (Barkett, J., dissenting); *id.* at 1378 (Wilson, J., dissenting); *id.* at 1384 (Martin, J., dissenting).

II. BACKGROUND

A. Legal Background of Hill v. Humphrey

In 1988, Georgia became the first state to pass a statute prohibiting the execution of intellectually disabled offenders.[15] The statute requires the fact finder to determine beyond a reasonable doubt whether the defendant is intellectually disabled.[16] If the fact finder thus determines that the defendant is guilty of the crime but intellectually disabled, then the defendant avoids the possibility of receiving the death penalty.[17] In 1989, the United States Supreme Court recognized that Georgia, up to that time, was the only state to ban execution of the intellectually disabled.[18] That Court, however, held that the Eighth Amendment did not prohibit executing the intellectually disabled.[19] The United States Supreme Court did not recognize the prohibition of executing the intellectually disabled as a constitutional right until 2002, in *Atkins v. Virginia*, when the Court overruled the 1989 decision.[20] In *Atkins*, the Court declared that executing the intellectually disabled violates the Eighth Amendment's "cruel and unusual punishment" clause.[21]

Although the Court in *Atkins* recognized the death penalty exception for the intellectually disabled, the Court did not establish definitive procedural or substantive guidelines for determining whether a

---

15 *Id.* at 1338 (majority opinion).

16 GA. CODE ANN. § 17-7-131(c)(3) (West 2011) ("The defendant may be found 'guilty but mentally retarded' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded."). "'Mentally retarded' means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." *Id.* § 17-7-131(a)(3).

17 *Id.* § 17-7-131(j) ("In the trial of any case in which the death penalty is sought[,] . . . should the judge find in accepting a plea of guilty but mentally retarded or the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.").

18 *Hill*, 662 F.3d at 1339 (citing Penry v. Lynaugh, 492 U.S. 302, 334 (1989)).

19 *Id.* at 1338-39 (citing *Penry*, 492 U.S. at 305).

20 *Id.* at 1339. *See generally* Atkins v. Virginia, 536 U.S. 304 (2002) (granting intellectually disabled offenders protection from execution pursuant to the Eighth Amendment).

21 *Atkins*, 536 U.S. at 307, 321.

person falls within the exception.[22] For purposes of establishing a general test for determining intellectual disability, *Atkins* highlighted three common requirements.[23] First, intellectual disability is associated with "significantly subaverage intellectual functioning."[24] Second, the significantly subaverage intellectual functioning coexists with related limitations in two or more "adaptive skill areas."[25] Third, signs of intellectual disability must appear before the age of eighteen.[26]

As for other procedural guidelines, the Court in *Atkins* remained silent and gave states the task of developing appropriate ways to enforce the constitutional right.[27] Thus, states are free to determine which burden of proof defendants face when establishing that they have an intellectual disability.[28]

B. Facts and Procedural History of Hill v. Humphrey

Hill has traveled through a long series of appeals and habeas petitions.[29] The facts leading up to the current case involve the defendant Warren Lee Hill, Jr. ("Hill"), who was imprisoned for life after killing his girlfriend.[30] While imprisoned, Hill used a nail-studded

---

[22] *Hill*, 662 F.3d at 1339-40 (citing Bobby v. Bies, 556 U.S. 825, 831 (2009)).

[23] *Atkins*, 536 U.S. at 308 n.3, 317 n.22. The Court's requirements for determining intellectual disability are consistent with descriptions from the American Association on Mental Retardation and the American Psychiatric Association. *Id.* These requirements are also reflected in Georgia's statutory definition of "mentally retarded." *See* GA. CODE ANN. § 17-7-131(a)(3) (West 2011).

[24] *Atkins*, 536 U.S. at 308 n.3. "Subaverage intellectual functioning" is typically associated with an IQ score of seventy or lower. *Hill*, 662 F.3d at 1339.

[25] *Atkins*, 536 U.S. at 308 n.3. "Adaptive skill areas" include "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Id.*

[26] *Id.*

[27] *Id.* at 317; *see also Bobby*, 556 U.S. at 831 (expressing that *Atkins* did not provide definitive guidelines for defining intellectual disability).

[28] *Atkins*, 536 U.S. at 317. Currently in Georgia, in order to obtain the constitutional right to avoid execution, a defendant must prove beyond a reasonable doubt that he or she is intellectually disabled. *See* § 17-7-131(a)(3).

[29] *See Hill*, 662 F.3d at 1340-43 (relating the procedural history and facts of Hill's case).

[30] *Id.* at 1340.

board to beat a fellow inmate to death.[31] In the 1991 trial for the murder of the inmate, the jury convicted Hill of murder, which resulted in a death sentence.[32] In 1993, Hill appealed to the Georgia Supreme Court, which affirmed the conviction and death sentence.[33] Hill did not assert that he was intellectually disabled in either of these cases.[34]

In 1994, Hill once again failed to make an intellectual-disability claim in his state habeas petition.[35] In fact, Hill did not claim that he was intellectually disabled until five years after his 1991 murder trial when he amended the initial state habeas petition.[36] After this amendment, the state habeas court granted the petition but limited it to a jury trial using a *preponderance-of-the-evidence standard* for determining whether Hill was intellectually disabled.[37] The State appealed this decision, and the Georgia Supreme Court reversed and remanded the case for a determination (without the use of a jury) of whether Hill could establish *beyond a reasonable doubt* that he was intellectually disabled.[38] The state habeas court applied the three-part test of intellectual disability from *Atkins* and determined that Hill could establish, beyond a reasonable doubt, that his intellectual functioning was significantly subaverage.[39] However, Hill could not establish "beyond a reasonable doubt that he had impairments in 'adaptive behavior.'"[40] Accordingly,

---

31 *Id.* (noting the board was a sink leg located in the prison bathroom).

32 *Id.* (stating the jury's findings and sentence were unanimous).

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* Due to Hill's delay in raising the intellectual-disability claim, Hill's case was procedurally defaulted. *Id.* at 1340 n.5. However, because Hill's sentence involved the death penalty, the court found that the petition fell under Georgia's "miscarriage of justice exception to procedural default rules." *Id.*

39 *Id.* at 1341. Several evaluations showed that Hill had a range of IQ from sixty-nine to seventy-seven. *Id.* at 1341 n.7.

40 *Id.* at 1341. The habeas court did not discuss the third prong of the intellectual-disability test. *Id.* In considering Hill's "adaptive behavior," the state court considered Hill's "(1) extensive work history and 'apparent ability to function well in such employment,' (2) disciplined savings plans to purchase cars and motorcycles, (3) military service, (4) social life, (5) weak but sufficient writing skills, (6) ability to care for himself in home living except in periods of stress, and (7) health problems with seizures." *Id.*

the habeas court denied Hill's petition.[41]

In 2002, Hill moved for reconsideration of the habeas court's denial because of the recently (at that time) decided *Atkins* case.[42] The state habeas court held once again that the preponderance-of-the-evidence standard should apply.[43] The State appealed, and the Georgia Supreme Court once again reversed, finding, among other things, that Hill must prove his intellectual disability using the beyond-a-reasonable-doubt standard.[44] Although, upon remand, the state habeas court again found that Hill did not establish his intellectual disability using the beyond-a-reasonable-doubt standard, the court mentioned that it would determine that Hill was intellectually disabled using the preponderance-of-the-evidence standard.[45] In 2004, Hill filed yet another habeas petition, alleging that Georgia's beyond-a-reasonable-doubt standard violated his right under the Eighth Amendment.[46] The district court denied Hill's request, and Hill appealed.[47] The Eleventh Circuit Court of Appeals allowed an en banc rehearing, thus resulting in the case at issue, *Hill v. Humphrey*.[48]

III. ANALYSIS

Writing for the majority, Judge Hull first argued that the court must follow habeas corpus law and overturn Georgia's burden of proof requirement only if that burden violated clearly established law.[49] Second, he argued that no clearly established law exists that identifies the appropriate standard of proof for enforcing the Eighth Amendment pro-

41 *Id.* at 1340.

42 *Id.* at 1341.

43 *Id.*

44 *Id.* at 1342. The Georgia Supreme Court found that Hill could have had a jury trial on his intellectual-disability claim, but he waived the right by failing to raise the claim in his original trial. *Id.* Also, Hill was only entitled to the habeas court (rather than a jury) to assess his intellectual-disability claim. *Id.* The Georgia Supreme Court also held that *Atkins* applies retroactively but gives states the task of developing enforcement procedures. *Id. Atkins* does not identify a standard of proof for intellectual-disability claims. *Id.*

45 *Id.* at 1341-42.

46 *Id.*

47 *Id.*

48 *Id.* at 1343.

49 *Id.*

scription against executing the intellectually disabled.[50] Thus, under the majority's view, Georgia's high standard of proof does not violate clearly established law because no such law exists, and the beyond-a-reasonable-doubt standard is therefore constitutional.[51] In addition to Judge Hull's opinion, as the following analysis demonstrates, one general theme throughout the concurring and dissenting opinions is that the majority improperly framed the issue, incorrectly answered it, or both.[52]

A. The Court is Limited to Habeas Corpus Law Pursuant to AEDPA.

Judge Hull argued that, because Hill appealed to the court for federal habeas relief using the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the court was limited to determining whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law . . . ."[53] The majority emphasized that this standard under AEDPA is purposefully difficult to meet.[54] Applying the AEDPA standard, Judge Hull framed the issue as whether Georgia's decision (that the beyond-a-reasonable-doubt standard for intellectual-disability claims does not violate the Eighth

---

[50] *Id.* at 1347-48.

[51] *Id.* at 1351.

[52] *See id.* at 1362 (Tjoflat, J., concurring); *id.* at 1370 (Barkett, J., dissenting); *id.* at 1378 (Wilson, J., dissenting). For example, Judge Tjoflat argued that Hill's "true claim" is that the State violated his procedural due process rights during a postconviction proceeding and that he is, thus, entitled to habeas relief. *Id.* at 1361 (Tjoflat, J., concurring). Judge Barkett argued that the court sidestepped the proper issue, which he argued should have been whether Georgia's burden of proof "eviscerates" the constitutional right. *Id.* at 1370 (Barkett, J., dissenting). Additionally, Judge Wilson stated that "[t]he majority today not only reaches the wrong answer, it asks the wrong question." *Id.* at 1378 (Wilson, J., dissenting).

[53] *Id.* at 1337 (majority opinion) (citing 28 U.S.C. § 2254(d)(1) (2006)). "Clearly established" law only exists when the Supreme Court has embodied such a law in one of its holdings. *Id.* (citing Thaler v. Haynes, 130 S. Ct. 1171, 1173 (2010)). In addition, the court cannot determine that an application of law is unreasonable unless "no fairminded jurist could agree with that [state] court's decision." *Id.* at 1347 (emphasis omitted) (citation omitted).

[54] *Id.* ("[T]he purpose of AEDPA is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." (quoting Greene v. Fisher, 132 S. Ct. 38, 43 (2011)) (internal quotation marks omitted)).

Amendment) contradicts clearly established law.[55] Because, among other things, the issue framed in this way does not specifically address whether the high standard of proof violates the Eighth Amendment, the concurring and dissenting judges disagreed with the majority's framing of the issue.[56]

First, Judge Tjoflat argued in his concurring opinion that the issue, if properly framed, should have been whether Georgia's high standard of proof denies Hill due process of law.[57] This approach demonstrates that Hill's argument was not that he is intellectually disabled; rather, the crux of Hill's argument was that the state postconviction proceeding used an unfair procedure for testing his intellectual-disability claim.[58] Judge Tjoflat supported this approach because "[b]urdens of proof are procedural rules, governed by norms of procedural due process."[59] Because Hill raised the intellectual-disability claim in a state postconviction habeas proceeding, rather than during his criminal trial, Judge Tjoflat argued that Hill failed to meet the basis for habeas relief and that this failure should have been the court's focus.[60]

Judge Barkett, with whom Judges Marcus and Martin joined in dissent, argued that the issue should have been whether the beyond-a-reasonable-doubt standard essentially destroys the substantive constitutional right of intellectually disabled defendants to avoid the death penalty.[61] This, he argued, is because the Court in *Atkins* restricted the

---

55 *Id.* at 1337. Specifically, the court looked to *Atkins* to determine whether that case established law contradicting Georgia's standard of proof for intellectual-disability claims. *Id.* (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)).

56 *See id.* at 1362 (Tjoflat, J., concurring); *id.* at 1370 (Barkett, J., dissenting); *id.* at 1378 (Wilson, J., dissenting); *id.* at 1384 (Martin, J., dissenting).

57 *Id.* at 1362 (Tjoflat, J., concurring).

58 *Id.*

59 *Id.* Judge Tjoflat highlighted that "procedural violations during state post-conviction proceedings are 'issues unrelated to the cause of the petitioner's detention.'" *Id.* at 1363 (quoting Spradley v. Dugger, 825 F.2d 1566, 1568 (11th Cir. 1987)).

60 *Id.* Judge Tjoflat argued that Hill should have instead alleged a due process violation in order to obtain an evidentiary hearing rather than a habeas petition. *Id.*

61 *Id.* at 1370 (Barkett, J., dissenting). Employing the Supreme Court case of *Bailey v. Alabama*, Judge Barkett argued that states cannot interfere with constitutional issues withdrawn from states' authority and that all substantive constitutional rights are out of the states' authority. *Id.* (citing Bailey v. Alabama, 219 U.S. 219, 239 (1911)).

state-enforcement procedures regarding intellectual-disability claims to "appropriate" measures.[62] Under this reading, states do not have complete discretion in developing procedures as the majority suggests.[63] Judge Barkett further asserted that state procedures are unconstitutional if they violate a substantive constitutional right through their "natural operation."[64] Judge Barkett provided a convincing argument that, due to the subjective nature of intellectual-disability diagnoses,[65] the high burden of proof essentially assures that offenders will not be able to prove intellectual disability.[66] Under this view, Georgia's standard is inadequate to safeguard against *Atkins* protection for the intellectually disabled.[67] Thus, Judge Barkett argued that the court should have looked at whether Georgia's procedures violate Hill's constitutional right through their natural operation.[68]

Judge Wilson, with whom Judge Martin joined in dissent, also argued that the majority improperly framed the issue.[69] Judge Wilson suggested that the issue should have been whether it is "beyond fair-minded disagreement" that Georgia's application of the high standard of proof runs contrary to Supreme Court holdings.[70] Using this approach,

---

Thus, Georgia cannot indirectly assure the execution of the intellectually disabled because it cannot directly authorize such executions. *Id.* at 1368.

62 *Id.* at 1368 ("Thus, states have an affirmative duty to 'develop[ ] appropriate ways to enforce' the constitutional right of the mentally retarded." (quoting Atkins v. Virginia, 536 U.S. 304, 317 (2002))).

63 *Id.*

64 *Id.* at 1370-71 (citing Speiser v. Randall, 357 U.S. 513, 521 (1958)); *see also supra* text accompanying note 61.

65 *Hill*, 662 F.3d at 1371. Psychiatric diagnoses of intellectual disability are based on "subtleties and nuances." *Id.* (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).

66 *Id.* The inherent risk of error with a beyond-a-reasonable-doubt standard coupled with the subtleties and subjective nature of medical retardation diagnoses form a situation in which intellectual-disability claims in Georgia are almost never provable. *Id.*

67 *See id.* Judge Barkett also stated that "Georgia has decided that it is far better to erroneously execute a mentally retarded person than to erroneously imprison for life one who is not mentally retarded." *Id.* at 1372.

68 *Id.* at 1370-71.

69 *Id.* at 1378 (Wilson, J., dissenting) ("The majority not only reaches the wrong answer, it asks the wrong question.").

70 *Id.* Judge Wilson argued that AEDPA "recognizes . . . that even a general standard may be applied in an *unreasonable manner*." *Id.* at 1379 (emphasis added) (quoting Panetti v. Quarterman, 551 U.S. 930, 953 (2007)).

if Hill could demonstrate that Georgia's standard inadequately produces "reasonably correct results" or a process for ascertaining truth, then that procedure represents an "unreasonable application" under AEDPA standards.[71] Judge Wilson argued that Georgia's standard of proof is inadequate in reaching reasonably correct results and that this unreasonable application of procedure should have been the court's focus.[72]

In order to rebut the dissenting opinions and establish that the majority's approach is proper, Judge Hull explained that the Supreme Court has overturned several cases involving the AEDPA standard at issue.[73] His argument is that if the majority fails to strictly apply the AEDPA requirements, any decision the court might produce would be insufficient, and the Supreme Court would necessarily overrule its decision.[74]

B. Reasonable Belief Standard is Not in Violation of Clearly Established Law

Despite the differing proposed issues,[75] the majority decided to grant Hill's habeas petition only if Georgia's decision to uphold the beyond-a-reasonable-doubt standard violated clearly established law.[76] The majority first analyzed *Atkins* to determine whether that Court's decision embodied clear law as to the appropriate burden of proof for intellectual-disability claims.[77] The court found that *Atkins* did not reach a holding regarding the burden of proof or provide definitive guidelines to prove intellectual disability.[78] *Atkins* left the states the responsibility of incorporating appropriate procedures to enforce the constitutional restriction.[79] Judge Hull argued that because *Atkins* does not specifically embody requirements regarding the defendant's burden

---

71 *Id.* at 1380 (citing Ford v. Wainwright, 477 U.S. 399, 423-24 (1986)).

72 *Id.* Judge Wilson agreed with Judge Barkett's analysis that "Georgia's procedures cannot be squared with [*Atkins*]." *Id.* at 1379.

73 *Id.* at 1343 (majority opinion).

74 *See id.* at 1343-47. Judge Hull used nearly five pages of the brief to highlight ten recent AEDPA cases that the Supreme Court overruled. *Id.*

75 *See supra* note 52.

76 *Hill*, 662 F.3d at 1347.

77 *Id.* at 1347-48.

78 *Id.* at 1347-48, 1351-52.

79 *Id.* at 1348.

of proof, *Atkins* does not provide clearly established law on the subject.[80] As such, Georgia's decision cannot be in contradiction to a clearly established law because no such law exists.[81] Thus, according to the majority, Georgia's beyond-a-reasonable-doubt standard cannot be unconstitutional.[82]

In response, Judge Barkett argued that the majority's approach in finding a clearly established law was too narrow.[83] The majority looked to *Atkins* only to determine whether that case established the proper burden of proof.[84] Judge Barkett argued that the majority failed to recognize the broader law that *Atkins* established—that all intellectually disabled offenders are able to avoid the death penalty.[85] Judge Barkett noted that intellectual disability occurs on a spectrum, ranging from mild to severe cases.[86] The importance of this distinction is that the process of determining a person's intellectual disability, especially for the mildly intellectually disabled, is so subjective in nature that a high burden of proof practically bars all intellectual-disability claims.[87] Even trained medical professionals are prone to disagree, especially in cases of mild intellectual disability.[88] Accordingly, intellectual disability is almost never provable beyond a reasonable doubt.[89] Because of the difficulty of proving intellectual disability beyond a reasonable doubt, intellectually disabled offenders bare an extraordinarily high risk of losing

---

80 *Id.* at 1348-49.

81 *Id.*

82 *Id.* at 1360-61.

83 *See id.* at 1365-66 (Barkett, J., dissenting) (arguing that the clearly established law is that "no State is constitutionally permitted to execute mentally retarded offenders").

84 *See id.* at 1365.

85 *See id.*

86 *Id.* at 1366-67 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442 n.9 (1985)).

87 *Id.* at 1371-72. Because the defendant in *Atkins* belonged to the mildly intellectually disabled class, Judge Barkett argued that the Court clearly extended the protection to all intellectually disabled, regardless of severity. *Id.* at 1365-66. Judge Barkett also noted that the mildly intellectually disabled compose the largest class of intellectually disabled individuals at eighty-nine percent and are the most likely to reach criminal sentencing in need of the *Atkins* protection. *Id.* at 1375. Judge Barkett further argued that the "natural operation" of the high burden of proof is that it shifts most of the risk of error to the burdened party. *Id.* at 1370-72.

88 *Id.* at 1374.

89 *Id.* at 1375.

their constitutional right.[90] Judge Barkett further argued that this risk is even more egregious because the right at issue is a matter of life or death.[91]

Judge Hull denied that the risk for the intellectually disabled is as one-sided as Judge Barkett (and Hill) claimed.[92] Judge Hull explained that any burden of proof carries some risk of error and such risks are two-sided.[93] For example, Judge Hull explained that the court could conclude that Hill "is mentally retarded when, in fact, he is not."[94] Or, the court could find that Hill "is not mentally retarded when, in fact, he is."[95] Judge Hull asserted that although the preponderance-of-the-evidence standard has a lesser risk of error for one side, a risk for the other side still exists.[96] In contrast, Judge Barkett's argument recognized that putting a person's life at risk is incompatible with the Eighth Amendment when, although some factors may exist that call for a less severe penalty, such mitigating factors are not followed.[97]

In his dissenting opinion, Judge Martin agreed that the majority's approach was too narrow.[98] He argued that, although *Atkins* did not specifically establish a standard of proof for intellectual-disability cases, the application of the beyond-a-reasonable-doubt standard for intellectual-disability claims is incompatible with *Atkins*.[99] Judge Martin pointed out that the state habeas court already found that Hill could prove his intellectual disability using a preponderance-of-the-evidence standard, thus showing that he is more likely than not intellectually dis-

---

90 *See id.* at 1375-77.

91 *Id.* at 1377.

92 *Id.* at 1354-56 (majority opinion).

93 *See id.* at 1355.

94 *Id.*

95 *Id.*

96 *See id.*

97 *Id.* at 1377 n.22. "When the choice is between life and death, th[e] risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* (Barkett, J., dissenting) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion)).

98 *See id.* at 1382-85 (Martin, J., dissenting).

99 *Id.* at 1384.

abled.[100] Judge Martin further argued that executing a prisoner who is more likely than not intellectually disabled does not serve the social interests of the death penalty (i.e., deterrence and retribution) and thus falls within the protection of *Atkins*.[101]

Judge Hull stated that the majority's approach was not too narrow because it evaluated the burden of proof along with the entirety of Georgia's procedure rather than in isolation.[102] The majority noted that Georgia (1) requires a unanimous verdict for imposing a death penalty, (2) provides a full trial on intellectual disability as part of the capital trial with a neutral fact finder that is uninformed that the defendant might face the death penalty, (3) allows intellectually disabled offenders the opportunity to introduce evidence and expert testimony, (4) gives the defendant the opportunity to cross-examine the State's experts, (5) provides access to question prospective jurors, and (6) gives opportunity to appeal any intellectual-disability judgment.[103] Under Judge Hull's view, these procedures, alongside the standard of proof, demonstrate that the procedures are generally fair.[104] Thus, Judge Hull believed that the framing of the issue and analysis were properly within the requirements of AEDPA, yet broad enough to account for the functionality of the standard of proof.[105]

IV. CONCLUSION

Although the majority recognized the limitations of its decision in light of AEDPA standards,[106] the majority's analysis is either insufficient on one hand or improper on the other. The court could have rejected Hill's petition because his claim failed to meet the proper basis of

---

100 *Id.* at 1384-85. Judge Martin also highlighted that because the defendant's life is on the line, such a risk of executing an intellectually disabled defendant is intolerable. *Id.* at 1385 (citing Beck v. Alabama, 447 U.S. 625, 637 (1980)).

101 *Id.* at 1384; *see supra* Part I.

102 *Hill*, 662 F.3d at 1353 (majority opinion).

103 *Id.*

104 *Id.*

105 *See id.* at 1343, 1353, 1360-61.

106 *See id.* at 1360-61.

habeas relief.[107] However, the court chose to define whether the beyond-a-reasonable-doubt standard or the preponderance-of-the-evidence standard is appropriate for intellectual-disability cases.[108] In doing so, it failed to dive into the depths of necessary analysis. For example, the majority recognized the importance of analyzing the burden of proof in light of Georgia's full procedure but failed to analyze the practical effects of the procedure taken as a whole.[109] Even if a defendant has the full benefit of Georgia's procedural process, (i.e., ability to raise intellectual-disability claims early on and to cross-examine the State's witnesses, etc.), the defendant still has to prove beyond a reasonable doubt something that, by its very nature, is practically impossible to prove.[110]

Judge Barkett demonstrated the reality that upholding the beyond-a-reasonable-doubt standard only serves to eviscerate rather than enforce the constitutional right.[111] The majority failed to recognize, or at least incorporate into its analysis, the highly subjective nature of diagnosing intellectual disability, especially for contested cases where the defendant is "mildly" intellectually disabled.[112] Accordingly, the majority unnecessarily adopted[113] an extraordinarily high burden, which future Georgia cases will rarely meet.[114] Because of foreseeably differing subjective analyses and because a defendant's life is at stake, the court should have erred on the side of preserving the constitutional protection as the dissenting judges suggested.[115]

Other factors seemed to have influenced the majority decision. First, the majority highlighted on multiple occasions that Hill had several opportunities to claim intellectual disability, but he failed to do

---

107 *Id.* at 1363 (Tjoflat, J., concurring). Judge Tjoflat argued that Hill should have, instead, alleged a due process violation in order to obtain an evidentiary hearing rather than a habeas petition. *Id.*

108 *See id.* at 1360-61 (majority opinion).

109 *See supra* Part III.A.

110 *Hill*, 662 F.3d at 1374-75 (Barkett, J., dissenting).

111 *Id.* at 1377.

112 *See id.* at 1374-77.

113 See *supra* note 105 and accompanying text.

114 *See Hill*, 662 F.3d at 1375-76 (citing twenty-two Georgia cases adjudicating intellectual-disability claims; only one defendant was successful).

115 *See id.* at 1381-85 (Martin, J., dissenting).

so.[116] Also, Judge Hull commented that while imprisoned for murder, "Hill continued to kill."[117] Taking these two factors together suggests that the majority was less than sympathetic to Hill's case. Perhaps if the defendant acted earlier or was less murderous, the majority would have been more sympathetic to the defendant's claim and broadened the scope of the issue to reflect the concerns of the dissenting opinions.[118] The combination of an unsympathetic majority coupled with the strict AEDPA requirements and fear of reversal[119] seems to have led the majority to decide not to risk the possibility of the Supreme Court overruling the case for a defendant that was, in its view, less than deserving.[120]

116 *Id.* at 1337-38, 1340-43 (majority opinion).

117 *Id.* at 1340.

118 *See supra* note 52.

119 *See Hill*, 662 F.3d at 1343. Judge Hull emphasizes AEDPA's strict nature and high threshold. *See supra* note 74.

120 *See Hill*, 662 F.3d. at 1360-61.