No. 21-782

IN THE

Supreme Court of the United States

RODNEY RENIA YOUNG,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

****CAPITAL CASE****

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF *AMICI CURIAE* ELSA R. ALCALA, DONALD B. AYER, ROBERT J. CLEARY, PATRICK J. FITZGERALD, NORMAN S. FLETCHER, JAMES E.C. PERRY, LARRY THOMPSON, AND BETH WILKINSON IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal and state prosecutors and judges. They include former prosecutors who led some of the most high-profile capital cases in a generation—from the Oklahoma City bombing to the "Unabomber" attacks. They also include former state-court judges who authored opinions concerning the constitutionality of state procedures for establishing intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), including dissents with reasoning later adopted by this Court in *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017). All *amici* are deeply familiar with the workings of the "beyond a reasonable doubt" standard imposed on the government when it seeks to convict individuals in criminal trials.

Amici represent a spectrum of views on the constitutionality and advisability of the death penalty. Nonetheless, *amici* share a strong, unified interest in "preserving public confidence in the fairness of the criminal justice system." *Lockhart v. McCree*, 476 U.S. 162, 174–75 (1986) (citation omitted). *Amici* believe it is critical for States that administer the death penalty to do so with sufficient procedural safeguards to ensure adjudicative accuracy and to protect the rights of the accused. *Amici* are united in agreeing that imposing the beyond-a-reasonable-

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[1] Pursuant to Rule 37.6, *amici* represent that this brief was written by outside counsel for *amici*, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Pursuant to Rule 37.2, *amici* represent that all parties received timely notice of *amici*'s intent to file this brief, and the parties do not oppose the filing of this brief.

doubt standard on capital defendants claiming intellectual disability is unconstitutional.

Elsa R. Alcala served as a judge on the Texas Court of Criminal Appeals from 2011 to 2018. As a member of that court, Judge Alcala authored the dissenting opinion the reasoning of which this Court adopted in invalidating Texas's use of non-scientific factors to assess intellectual disability. *See Ex Parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015), *vacated and remanded sub nom. Moore v. Texas*, 137 S. Ct. 1039 (2017).

Donald B. Ayer served as Deputy Attorney General at the U.S. Department of Justice from 1989 to 1990, as Principal Deputy Solicitor General of the United States from 1986 to 1989, and as U.S. Attorney for the Eastern District of California from 1981 to 1986.

Robert J. Cleary served as U.S. Attorney for the Southern District of Illinois in 2002; U.S. Attorney for the District of New Jersey from 1999 to 2002; First Assistant U.S. Attorney for the District of New Jersey from 1994 to 1999; and Assistant U.S. Attorney for the Southern District of New York from 1987 to 1994, where he also served as Chief of the Major Crimes Unit. Mr. Cleary served as lead prosecutor in the so-called "Unabomber" case of *United States v. Theodore J. Kaczynski*.

Patrick J. Fitzgerald served as U.S. Attorney for the Northern District of Illinois from 2001 to 2012 and as Assistant U.S. Attorney for the Southern District of New York from 1988 to 2001, where he co-founded the Southern District's Organized Crime-Terrorism Unit. As Chief of the Organized Crime-Terrorism Unit, Mr. Fitzgerald prosecuted well-

known terrorists, including trying the capital case against defendants who bombed American embassies in Kenya and Tanzania on behalf of al-Qaeda.

Norman S. Fletcher served on the Supreme Court of Georgia from 1989 to 2005, including as Presiding Justice from 1995 to 2001 and as Chief Justice from 2001 to 2005. Then-Presiding Justice Fletcher authored the dissent in *Jenkins v. State*, 498 S.E.2d 502 (Ga. 1998), in which he concluded that requiring capital defendants to prove intellectual disability beyond a reasonable doubt is unconstitutional.

James E.C. Perry served on the Florida Supreme Court from 2009 to 2016. Justice Perry authored the dissenting opinion the reasoning of which this Court adopted in invalidating Florida's strict IQ cutoff of 70 for a capital defendant's claim of intellectual disability. *See Hall v. State*, 109 So. 3d 704 (Fla. 2012), *rev'd and remanded sub nom. Hall v. Florida*, 572 U.S. 701 (2014).

Larry Thompson served as U.S. Deputy Attorney General from 2001 to 2003. He also served as U.S. Attorney for the Northern District of Georgia from 1982 to 1986, where he led the Southeastern Organized Crime Drug Enforcement Task Force.

Beth Wilkinson served as Assistant U.S. Attorney for the Eastern District of New York, counsel to the Deputy Attorney General, and Principal Deputy of the Terrorism and Violent Crime Section in the Justice Department's Criminal Division. During her tenure at the Justice Department, Ms. Wilkinson served on the team that prosecuted and sought the death penalty for Timothy McVeigh and Terry Nichols

for the bombing of the federal building in Oklahoma City.

INTRODUCTION AND SUMMARY OF ARGUMENT

For centuries, the standard that requires the State to prove criminal liability beyond a reasonable doubt has reflected the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). Yet for over thirty years, Georgia has turned this core principle on its head by requiring capital *defendants* to prove intellectual disability beyond a reasonable doubt in order to avoid their own execution. No other State has ever imposed this steep burden on a capital defendant. And no defendant charged in a capital case of intentional murder has ever satisfied Georgia's standard before a jury. Georgia's novel rule defeats the core purpose of the beyond-a-reasonable-doubt standard and unconstitutionally allows the execution of individuals who are more likely than not intellectually disabled.

Grounded in principles of morality and theology that have guided criminal proceedings for centuries, the beyond-a-reasonable-doubt standard historically has served to preserve human life and liberty. Its assignment to the government for the purpose of establishing criminal guilt aims to minimize the risk of erroneous conviction and punishment. The standard deliberately accepts the risk that some wrongdoers may go unpunished, and it forces the government to bring firmly supported charges and seek fully warranted punishments. It means that prosecutors must convince jurors more than that a fact

is "probably" or even clearly true, as even minor discrepancies in the evidence can result in "reasonable doubt." By holding the government to such an exacting standard, the beyond-a-reasonable-doubt standard promotes public trust and confidence in our criminal justice system.

Georgia's unprecedented rule jarringly subverts the purposes the beyond-a-reasonable-doubt standard has served throughout its history. Rather than err on the side of protecting individual life and liberty, the Georgia rule errs on the side of death and virtually guarantees the execution of intellectually disabled individuals. Indeed, in the more than thirty years since the rule was created, *not one* capital defendant has persuaded a jury of his intellectual disability in a case of intentional murder. That harsh reality is unsurprising, given the nature of intellectual disability. Intellectually disabled persons often have deficits in some areas of adaptive functioning but not others—a mix of strengths and weaknesses—which will almost always create a "conflict in the evidence" sufficient to defeat a finding beyond a reasonable doubt. 2 Georgia Suggested Pattern Jury Instructions – Criminal § 1.20.10 (2021) (defining "reasonable doubt").

This Court's precedents do not permit Georgia's placement of the beyond-a-reasonable-doubt burden on capital defendants who claim intellectual disability. In *Cooper v. Oklahoma,* 517 U.S. 348 (1996), this Court unanimously held that a State may not require a criminal defendant to prove incompetence to stand trial by clear and convincing evidence, recognizing that such a demanding standard violates due process because "a defendant may be put to trial even though it is more likely than not that he

is incompetent." *Id.* at 350. While a State may place some burden on a defendant to prove intellectual disability, several state high courts have correctly held—in conflict with the Supreme Court of Georgia—that *Cooper* prohibits a State from imposing a standard of proof for intellectual disability that would permit the execution of individuals who are "more likely than not" intellectually disabled. There can be no serious question that Georgia's rule does just that: the law has long been clear that, under a beyond-a-reasonable-doubt standard, it is "not sufficient to establish a probability" or that a fact is "more likely to be true than the contrary." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (Mass. 1850).[2]

What is more, there is good reason to believe that Georgia's anomalous rule is—as the statute's co-drafter has publicly testified—simply the result of a drafting error, as the beyond-a-reasonable-doubt standard was never intended to apply to the issue of intellectual disability. In 1988, Georgia became the first State to enact a prohibition on the execution of intellectually disabled persons. *See* 1988 Ga. Laws 1003 § 1, *codified at* Ga. Code Ann. § 17-7-131. To accomplish that result, the statute's drafters simply added "but mentally retarded" after "guilty" to the statute's requirement that guilt be proven beyond a reasonable doubt. *Id.*[3] But as one of the two co-

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[2] *Webster*, though abrogated in part by *Commonwealth v. Russell*, 23 N.E.3d 867 (Mass. 2015), provides the "classic common law definition" of reasonable doubt, Miller W. Shealy, *A Reasonable Doubt About "Reasonable Doubt*," 65 Okla. L. Rev. 225, 234 (2013).

[3] The Georgia Code provides: "The defendant may be found 'guilty but with intellectual disability' 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 with intellectual

drafters of the statute testified at a 2013 hearing, he simply "wasn't thinking clearly enough" in drafting the law—merely intending that intellectually disabled defendants could still be *convicted*, not that they would be required to prove their disability beyond a reasonable doubt to avoid *execution*. App. 5a–6a.[4] As he put it bluntly: "[i]t was sloppy draftsmanship, pure and simple." App. 7a. To *amici*'s knowledge, the State has never disputed that the beyond-a-reasonable-doubt requirement for intellectual disability was the result of this error.

Despite its apparently inadvertent origin, Georgia's one-of-a-kind position has been firmly approved by the Supreme Court of Georgia, even as this Court has reiterated that States may not abridge the *Atkins* right through their own procedural rules. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *Hall v. Florida*, 572 U.S. 701 (2014). Nor has the Georgia legislature shown any willingness to remedy its error and conform its position to those of the other States, all of which employ a less demanding standard of proof. Because Georgia flouts this precedent and the

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disability." Ga. Code Ann. § 17-7-131(c)(3). At the time of its enactment, the statute used the term "mentally retarded" in place of "with intellectual disability."

[4] The appended transcript of an October 24, 2013 hearing before the Judiciary – Non-Civil Committee of the Georgia House of Representatives was prepared by Transperfect Legal Solutions using a recording that appears to have previously been available on the Georgia House of Representatives' public website. *See* Veronica M. O'Grady, Note, *Beyond A Reasonable Doubt: The Constitutionality of Georgia's Burden of Proof in Executing the Mentally Retarded*, 48 Ga. L. Rev. 1189, 1223 n.19 (2014). *Amici* obtained a copy of this recording from Lauren A. Riccardelli, who co-authored *A Value-Critical Policy Analysis of Georgia's Beyond a Reasonable Doubt Standard of Proof of Intellectual Disability*, 30 J. Disability & Policy Stud. 56 (2019).

practice of all other States by continuing to place a beyond-a-reasonable-doubt burden on capital defendants to establish intellectual disability, this Court should grant the petition.

ARGUMENT

I. The Exacting Beyond-A-Reasonable-Doubt Standard, Which Protects Individual Liberty And Allocates The Risk Of Error To The Government, Is Fundamental To Our System of Justice

As this Court explained in *Cooper*, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Cooper*, 517 U.S. at 362 (quoting *Addington v. Texas,* 441 U.S. 418, 423 (1979)). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. Thus, "[t]he 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'" *Cooper*, 517 U.S. at 362 (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 283 (1990)).

The beyond-a-reasonable-doubt standard is the most exacting standard in the American legal system today. *See Addington*, 441 U.S. at 422. As its history, purpose, and function make plain, this standard is properly placed on the government—not a capital defendant asserting a constitutional right—in criminal prosecutions.

A. For Centuries, The Beyond-A-Reasonable-Doubt Standard Has Been Central To Criminal Prosecution In The Anglo-American Legal System

In *Cooper*, this Court explained that "historical practice" and "the relevant common-law traditions of England and this country" inform whether a standard of proof complies with the Due Process Clause. *Cooper*, 517 U.S. at 356. Here, the relevant traditions are clear: throughout its history, the onerous beyond-a-reasonable-doubt standard has been employed almost exclusively as the government's burden in criminal cases. Its use by Georgia here is fundamentally at odds with that practice.

The beyond-a-reasonable-doubt standard "dates at least from our early years as a Nation." *Winship*, 397 U.S. at 361. This Court has observed that the standard appears to have "crystalliz[ed]" by 1798, *id.*, when defense counsel in the so-called Irish Treason Trials successfully advocated for the Court's imposition of the standard on the prosecution. *See, e.g.*, 2 *McCormick on Evidence* § 341 & n.5 (8th ed. Jan. 2020 update); Hon. Jon O. Newman, *Beyond "Reasonable Doubt*," 68 N.Y.U. L. Rev. 979, 981–82 (1993). Earlier still, the term "reasonable doubt" was part of the Boston Massacre trials of March 1770, where John Adams admonished jurors that "if you doubt the prisoner's guilt, never declare him guilty; this is always the rule, especially in cases of life." Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507, 517 (1975) (citation omitted). Counsel for the Crown agreed but added that jurors' doubts must be "reasonable" to acquit—"the earliest recorded

courtroom statement" articulating the beyond-a-reasonable-doubt standard. *Id.* at 517–18.

As this Court has noted, the concept of "reasonable doubt" dates back to "ancient times," *Winship*, 397 U.S. at 361, when jurors' moral and religious concerns with convicting their peers prompted an exacting standard of proof. In the thirteenth century, for example, English jurors were apparently "required to swear to God that they would determine the truth of the matters presented to them," and by virtue of their oath, "'if the jurors are in doubt of the matter and not certain,' then they should acquit." Morano, *supra*, at 510 (citation omitted). This preoccupation with potentially convicting an innocent—and the concomitant requirement that the State satisfy the heightened burden—endured over the centuries, as Christian common-law jurors in England required "assur[ance] that their souls were safe if they voted to condemn the accused." James Q. Whitman, *The Origins of "Reasonable Doubt*," Yale Fac. Scholarship Series 8 (2005).

Throughout its history, the primary aim of the beyond-a-reasonable-doubt standard has been to protect the life and liberty of the criminally accused. In England, the standard responded to a "fearfully bloody [penal] code," under which "[d]eath, without benefit of clergy, was denounced against a multitude of misdoings," such that "[t]he consequences of conviction to the unfortunate prisoner were not only fearful, but they were irremediable." John Wilder May, *Some Rules of Evidence*, 10 Am. L. Rev. 642, 651–52 (1876). Thus, common-law jurors were instructed: "You must be cautious . . . because the issue is life or death to the prisoner." *Id.* at 659 (citation omitted).

Consistent with this history, "the requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 372 (Harlan, J., concurring). As Blackstone put it, "the law holds[ ] that it is better that ten guilty persons escape, than that one innocent suffer." 4 William Blackstone, *Commentaries* *352; *see also* Thomas Starkie, *Law of Evidence* 507 (1824) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned."). And as this Court has further explained, "[a]t the same time by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

As this history demonstrates, the beyond-a-reasonable-doubt standard recognizes that the interests of a criminal defendant "are of such magnitude" that "they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment" of conviction. *Addington*, 441 U.S. at 423. The standard reflects the "basic moral concern" that "we place a high value on human life and liberty for secular and theological reasons." Shealy, *supra*, at 300. This calculus is even more stark in the context of a capital case.

Notably, a "heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties." *Cooper*, 517 U.S. at 366. In recognition of the liberty interests at stake in criminal

trials, the beyond-a-reasonable-doubt standard historically has assigned nearly all risk of error to the government, rather than the accused. "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." *Addington*, 441 U.S. at 423–24. The standard is thus "indispensable to command the respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364. As this Court explained in *Winship*, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*

Although prosecutors in the United States universally are required to prove criminal guilt beyond a reasonable doubt, *see Winship*, 397 U.S. at 364, defendants sometimes bear the burden of proof as to certain issues. Those issues include, for example, non-constitutional affirmative defenses under state law—which a criminal defendant must prove, in most cases, by a preponderance of the evidence. *See, e.g.*, *Martin v. Ohio*, 480 U.S. 228, 233 (1987) (self-defense); *Patterson v. New York*, 432 U.S. 197, 206 (1977) (extreme emotional distress). Criminal defendants may also bear the burden to prove incompetence to stand trial by a preponderance of the evidence, *see Medina v. California*, 505 U.S. 437, 449 (1992), though not by clear and convincing evidence, *see Cooper*, 517 U.S. at 355–56. In no circumstances, however, has a State required a defendant to prove a constitutional right—such as the right of an intellectually disabled person not to be executed—beyond a reasonable doubt, as Georgia has done here.

B. The Beyond-A-Reasonable-Doubt Standard Is Exacting And Requires Near Certitude

As *amici* have experienced first-hand, the beyond-a-reasonable-doubt standard imposes a very high burden of proof—what this Court has called a standard of "near certitude." *Jackson*, 443 U.S. at 315. As Judge Easterbrook has explained, "[t]he preponderance standard is a more-likely-than-not rule, under which the trier of fact rules for the plaintiff if it thinks the chance greater than 0.5 that the plaintiff is in the right," but the beyond-a-reasonable-doubt standard is "much higher, perhaps 0.9 or better." *Brown v. Bowen*, 847 F.2d 342, 345–46 (7th Cir. 1988) (Easterbrook, J.); *see also* Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 Yale L.J. 1254, 1256 (2013) ("[T]he criminal beyond-a-reasonable-doubt standard is akin to a probability greater than 0.9 or 0.95."). Thus, to prove a matter beyond a reasonable doubt, it is "not sufficient to establish a probability" or that a fact is "more likely to be true than the contrary." *Webster*, 59 Mass. (5 Cush.) at 320. Nor is it sufficient to prove that a defendant is "probably guilty" under a beyond-a-reasonable-doubt standard. *United States v. Hernandez*, 176 F.3d 719, 728 (3d Cir. 1999).

Existing jury instructions—particularly Georgia's—underscore the demanding nature of the beyond-a-reasonable-doubt standard. Under Georgia's pattern jury instructions, a reasonable doubt can arise from "consideration of the evidence, a lack of evidence, *or a conflict in the evidence*." 2 Georgia Suggested Pattern Jury Instructions – Criminal § 1.20.10 (2021) (emphasis added). The beyond-a-reasonable-doubt standard

thus invites parties—normally the defense, but uniquely here the State—to present any potentially "conflict[ing]" evidence and thereby prevent jurors from finding a fact that is likely, or even clearly, true. *Id.*

The practical difficulties of meeting the beyond-a-reasonable-doubt standard ordinarily fulfill its purpose—to protect life and liberty against government overreach. In the case of Georgia's anomalous usage of this standard, however, such difficulties mean that individuals who are likely or even clearly intellectually disabled will be unconstitutionally executed.

II. Requiring Capital Defendants To Prove Intellectual Disability Beyond A Reasonable Doubt To Avoid Execution Violates Both The Core Purpose Of The Standard And This Court's Precedents

By requiring a defendant facing the death penalty to prove intellectual disability beyond a reasonable doubt, Georgia undermines the principles that have supported the beyond-a-reasonable-doubt standard throughout its history. Georgia's rule cannot be reconciled with this Court's precedents, which prohibit imposing such demanding standards on defendants asserting constitutional rights.

A. The Georgia Rule Undermines The Central Aims Of The Beyond-A-Reasonable-Doubt Standard

By placing the burden on a criminal defendant to prove intellectual disability beyond a reasonable doubt to avoid a death sentence, the Georgia rule

subverts the entire purpose and justification of the reasonable doubt standard.

First, rather than err on the side of protecting human life and liberty—as the beyond-a-reasonable-doubt standard has done for centuries when imposed on the prosecution—Georgia's approach virtually guarantees the execution of those who are constitutionally exempt from capital punishment. Indeed, in the more than thirty years since Georgia adopted this approach, not a single capital defendant has met the beyond-a-reasonable-doubt standard before a jury in a case of intentional murder. *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard To Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 582 (2017).[5] By contrast, outside Georgia, studies have shown that claims of intellectual disability—though asserted rarely—succeeded at a rate of at least 33 percent in capital cases from 2000 to 2013. *See* John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual*

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[5] Judges and commentators have located only two cases in which a capital defendant has proven intellectual disability since Georgia adopted its standard, but neither involved a jury's determination of that issue in a case of intentional murder. In *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc), the dissent surveyed published Georgia cases and found that one defendant—Christopher Lewis—had satisfied a judge that he met the standard for intellectual disability in post-conviction proceedings. *See id.* at 1375–76 & n.19 (Barkett, J., dissenting). In addition, Vernessa Marshall apparently established intellectual disability in a case of felony murder, *see Marshall v. State*, 583 S.E.2d 884, 886 (Ga. 2003), a crime that does not involve the "premeditation and deliberation" or "cold calculus" for which the death penalty may provide a deterrent effect, *Atkins*, 536 U.S. at 319 (citations omitted), and which thus provided an underlying basis for the jury's mercy.

Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar, 23 Wm. & Mary Bill Rts. J. 393, 412–413 (Table) (2014).[6] The most straightforward and compelling explanation for this gulf between Georgia and national practice is Georgia's uniquely exacting burden of proof. *Id.*

As these data confirm, Georgia's outlier rule undermines the "transcending value" behind the beyond-a-reasonable-doubt standard—protecting a defendant's life and liberty against undue risk of deprivation. *Winship*, 397 U.S. at 364. "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality op.). Contrary to these fundamental principles, Georgia's rule imposes on defendants an unduly demanding standard in a context where an error "is not susceptible of correction." *Cruzan*, 497 U.S. at 263; *see also* May, *supra*, at 652 (noting the death penalty's "irremediable" nature as inspiring the beyond-a-reasonable-doubt standard at common law). Nothing in the history or tradition of the beyond-a-reasonable-doubt standard supports the limited value Georgia's rule assigns to human life.

Second, Georgia allocates virtually all risk of error to the capital defendant, even though intellectual disability often is not susceptible to proof beyond a reasonable doubt—certainly not by a criminal defendant. This Court has recognized that intelligence diagnostics reflect examiners' "subjective

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[6] Studies have estimated that, at least from the time *Atkins* was decided through 2013, approximately 7.7 percent of defendants in capital cases claimed intellectual disability. *See* Blume et al., *supra*, at 396.

judgment" of an individual's observed behavior, which may indicate deficits in some areas of adaptive functioning but not others. *Hall*, 572 U.S. at 713. These inherent "subtleties and nuances"—as with mental illness—"render certainties virtually beyond reach in most situations." *Addington*, 441 U.S. at 430. Whereas the beyond-a-reasonable-doubt standard is "addressed to specific, knowable facts," determining intellectual disability involves a "subjective analysis . . . filtered through the experience of the diagnostician," which "often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." *Id.*

Real-world examples of the application of Georgia's standard illustrate its inherently problematic nature. Prosecutors have, for instance, defeated capital defendants' efforts to prove intellectual disability by presenting evidence that defendants—including some who could only read at a third-grade level at age seventeen or had spent their childhoods in special education—were also able to obtain driver's licenses, work at fast-food restaurants, or tell right from wrong.[7] None of these factors necessarily disproves intellectual disability—in fact, as noted by the dissenting opinion with which this Court agreed in *Moore*, intellectually disabled persons "are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families." *Ex Parte Moore*, 470 S.W.3d at 537 (Alcala, J., dissenting); *see also Atkins*, 536 U.S. at 318 (noting that intellectually disabled persons "frequently know the difference between right and wrong"). But given the extraordinary burden the beyond-a-reasonable-doubt standard imposes,

[7] *See* Sudeall Lucas, *supra*, at 586–87, 592–93.

Georgia prosecutors can easily create a perceived "conflict in the evidence," thereby putting the beyond-a-reasonable-doubt standard beyond capital defendants' reach. 2 Georgia Suggested Pattern Jury Instructions – Criminal § 1.20.10 (2021).

Third, by permitting the execution of those who are more likely than not intellectually disabled, Georgia undermines public confidence in its criminal justice system. The Georgia rule has consistently fueled well-founded skepticism that Georgia is sentencing intellectually disabled persons to death—even though the "*entire category*" of such individuals is constitutionally exempt from execution. *Moore*, 137 S. Ct. at 1051 (citation omitted); *see, e.g.*, Adam Lamparello, *Unreasonable Doubt: Warren Hill, AEDPA, and Georgia's Unconstitutional Burden of Proof*, Crim. L. Bulletin (June 23, 2015); Timothy R. Saviello, *The Appropriate Standard of Proof for Determining Intellectual Disability in Capital Cases: How High is Too High?*, 20 Berkeley J. Crim. L. 163 (2015). What is more, the Georgia rule appears to have resulted from an acknowledged error in statutory drafting, *see supra* at 7–8, which does nothing to inspire confidence in the administration of criminal justice. *Cf. Hall*, 572 U.S. at 718 (noting that the Florida Legislature "might well have believed that its law would not create a fixed [IQ score] cutoff at 70," which this Court found unconstitutional).

B. The Georgia Rule Violates This Court's Precedents And Conflicts With The Standards Imposed By Every Other State

This Court's precedents not only recognize the unique role of the beyond-a-reasonable-doubt

standard in our legal system, but correctly identify the due process constraints on burdens of proof applied to criminal defendants. By imposing the beyond-a-reasonable-doubt standard where it has no place, Georgia violates these precedents and conflicts with rulings from the high courts of every other State to have considered the appropriate standard for establishing a capital defendant's intellectual disability.

In *Cooper*, this Court unanimously held that an Oklahoma statute requiring a criminal defendant to prove mental incompetence to stand trial by clear and convincing evidence violated the Due Process Clause, considering "both traditional and modern practice and the importance of the constitutional interest at stake." 517 U.S. at 356. The Court found no indication that Oklahoma's standard "ha[d] any roots in prior practice," *id.*, and determined that "[c]ontemporary practice" also provided little support for the standard—at the time, only four States "require[d] the criminal defendant to prove his incompetence by clear and convincing evidence," *id.* at 360. Acknowledging that "important state interests are unquestionably at stake," *id.* at 367, the Court nonetheless emphasized that "the consequences of an erroneous determination of competence are dire," as compared to the more modest consequences for the State, *id.* at 364–65 (internal quotation marks omitted). Ultimately, the Court concluded that a clear-and-convincing-evidence standard would violate due process because "[u]nder that standard a defendant may be put to trial even though it is more likely than not that he is incompetent." *Id.* at 350.

Cooper precludes Georgia from requiring a criminal defendant to prove intellectual disability

beyond a reasonable doubt in order to avoid execution. If anything, the constitutional deficiencies with Georgia's rule are more glaring. Georgia's beyond-a-reasonable-doubt standard is more demanding than the clear-and-convincing-evidence standard rejected in *Cooper*.[8] And whereas the standard in *Cooper* found at least some contemporary support in a handful of other jurisdictions, Georgia's beyond-a-reasonable-doubt standard finds none.

Moreover, the liberty interests are greater here than in *Cooper*, which concerned whether a defendant could be tried. Here, in contrast, the question is one of life or death. The consequences of an erroneous determination are far more "dire" for the defendant facing execution than for the State, which remains able to impose harsh punishment, including life imprisonment. And while the right in *Atkins* was recognized more recently, it is by no means less important than the right not to be tried if incompetent: *Atkins* determines who may live or die as a matter of constitutional law.

While no other State has ever imposed a standard as demanding as Georgia's, the high courts of several other States have correctly invalidated standards greater than a preponderance. The Indiana Supreme Court, for instance, struck down under *Cooper* the State's clear-and-convincing-evidence standard for proving intellectual disability. *See Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005). That court explained that the right of intellectually disabled persons not to be executed is "fundamental," as *Atkins*

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[8] In *Cooper*, Oklahoma tellingly conceded that it could *not* apply a beyond-a-reasonable-doubt standard to claims of incompetence. *Cooper*, 517 U.S. at 355 & n.7.

had "identified that right as grounded in a fundamental principle of justice." *Id.* at 101 (citing *Atkins*, 536 U.S. at 306). Following *Cooper*, the court then determined that "contemporary practice" did not support a clear-and-convincing-evidence standard, and that the State's "interest in seeking justice"—though "important"—was comparatively low, for intellectually disabled defendants "remain subject to punishment for their crimes" yet "face a special risk of wrongful execution" that cannot be corrected. *Id.* at 101–03.

With similar reasoning, the Tennessee Supreme Court invalidated the State's requirement that a defendant prove intellectual disability by clear and convincing evidence in post-conviction proceedings. *See Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). Like the Indiana Supreme Court, the Tennessee Supreme Court found it "clear" that "[intellectually disabled] individuals have a constitutional right not to be executed," and explained that "the risk to the [defendant] of an erroneous outcome is dire, as he would face the death penalty, while the risk to the State is comparatively modest." *Id.* at 465. The court held that, "[j]ust as the Supreme Court held in *Cooper* regarding incompetency, it would violate due process to execute a defendant who is more likely than not [intellectually disabled]." *Id.* at 464–65.

Beyond Indiana and Tennessee, the high courts of every other State to reach the question have agreed that only a standard below reasonable doubt—in most cases, a preponderance—satisfies due process under *Cooper* and *Atkins*. *See, e.g.*, *State v. Williams*, 831 So. 2d 835, 860 (La. 2002) (adopting preponderance standard and noting that "[r]equiring 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," and "in the *Atkins* context, the State may bear the consequences of an erroneous determination that the defendant is mentally retarded . . . far more readily than the defendant"); *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005) (relying on *Cooper* to adopt preponderance standard); *Morrow v. State*, 928 So. 2d 315, 324 n.10 (Ala. Crim. App. 2004) (adopting preponderance standard).

In the decision below, the Supreme Court of Georgia provided no persuasive basis for parting ways with this Court's precedent, the rulings of all other State high courts to reach the question, and every other State's practice. Purporting to distinguish *Cooper*, the court incorrectly relied on *Leland v. Oregon*, 343 U.S. 790 (1952), which upheld an Oregon rule requiring a defendant to prove a state insanity defense beyond a reasonable doubt. *See Young v. State*, 860 S.E.2d 746, 771–74 (Ga. 2021). But this Court has made clear that *Leland* did not concern the standard governing a defendant's *constitutional* rights—to the contrary, this Court "ha[s] not said that the Constitution requires the States to recognize the insanity defense." *Medina*, 505 U.S. at 448–49; *see also Leland*, 343 U.S. at 798 (emphasizing that the defendant had not "sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights"). Moreover, while the court claimed that there is no comparable "historical support . . . for claims of intellectual disability," *Young*, 860 S.E.2d at 772, the court ignored that there is *no* "historical support" at all for Georgia's beyond-a-reasonable-doubt standard

for intellectual disability, which remains unique today.

Rather than face the inescapable conflict between its prior decisions and this Court's precedents, the decision below pointed to unrelated ways in which Georgia could be said to comply with the Constitution—such as "adher[ing] to prevailing clinical definitions of intellectual disability," 860 S.E.2d at 771, and "provid[ing] a right to a full jury trial on the question of intellectual disability," *id.* at 776. Those points say nothing about the constitutionality of Georgia's standard of proof—under which, as noted, *not one* capital defendant charged with intentional murder has persuaded a jury of his intellectual disability in over thirty years. *See supra* § II.A.

At base, the Georgia rule fundamentally misapplies the beyond-a-reasonable-doubt standard. A drafting error cannot, and should not, overcome centuries of law, morality, and theology. Georgia unconstitutionally permits the execution of individuals who are more likely than not—or even clearly—intellectually disabled. Regardless of one's views of capital punishment, the Georgia rule cannot be squared with this Court's precedent, and it has now created an unnecessary split among the States. This Court should grant the petition and bring Georgia into conformity with controlling precedent and the law of every other State.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Date: December 23, 2021

APPENDIX

APPENDIX

TRANSCRIPT OF HEARING BEFORE THE
JUDICIARY – NON-CIVIL COMMITTEE

GEORGIA HOUSE OF REPRESENTATIVES
113TH CONG.

OCTOBER 24, 2013

REP RICH GOLICK: … this morning. This is in informational hearing. This isn't to examine any particular piece of legislation. There is no particular piece of legislation before us today. This is an informational hearing for the committee to look at the issue of the burden that a criminal defendant must meet in order to serve mental retardation, the term used in the Georgia code. The main impetus for the hearing is the fact that Georgia is the only state in the Union, it's the committee's understanding that Georgia is the only state in the nation, that requires the defendant to meet a burden of beyond a reasonable doubt in order to assert mental retardation. That doesn't mean that the state's, Georgia's, approach is necessarily wrong. It doesn't mean that it's necessarily right. It just is the type of circumstance when you are taking a unique approach in the nation, it's probably a good idea on any issue for the committee to take a step back and examine what our approach is, why we're taking that approach, to hear from both sides of the issue—those who would advocate change and those who would advocate no change—to take all the information in, get educated and consider all viewpoints, and then to act accordingly or not. Nothing more, nothing less. The object for us here is to get better educated by noon or 12:30, than we are right now on the issue, to hear all sides and to step back and to consider all the information that we've been given. So, I hope that's clear. If there's any misunderstanding on the part of any entity or any individuals that we are somehow looking at the death penalty in general, that would be a wrong assumption. The death penalty in the state of Georgia is well established law, and that's not going to change any time soon, I would think. Again, we're

looking at the verry narrow issue as described just a minute ago. What I think we'll do is we'll – we have several organizations and some individuals signed up to speak. I think that we'll do, members of the committee, is we'll naturally go ahead and call on those individuals and entities who are advocating a change. We'll ask them in gen – this is the general plea of please be as brief as you can, although we understand that there are many layers of information that go along with this subject matter, and so, we understand that some time has to be taken to give us proper context. And, of course, as always, and I think most important, is for the committee to be given the opportunity to ask Q&A, to have Q&A after each presentation, to engage in a dialogue. I think that just fosters better education, especially on this issue. And then, we'll have those entities, organizations, who would be in opposition to those advocating change come after them for an opposing or varying viewpoint, and go through the same, as we do in this committee off and on on every issue. So, with that, let me go ahead and start off and ask Sandy Michaels and Jack Martin with the Georgia Association of Criminal Defense Lawyers to come forward. Good morning. Welcome.

JACK MARTIN: Good morning, Mr. Chairman.

SANDY MICHAELS: Good morning.

JACK MARTIN: Mr. Chairman, members of the committee, I'm Jack Martin. This is Sandy Michaels. We are here representing the Georgia –

[OVERLAY]

the Georgia Association of Criminal Defense Lawyers. I have to confess this. One of the reasons we are here today with the problem may be partly my fault. Back in 1988 when this statute was first—by the way, that's 25 years ago, and I was thinking about that the other day, and I didn't realize I'd be around here for that long—but in 25 years ago in 1988, a couple of things happened in Georgia. There was the execution of Jerome Bowden, who everybody knew was mentally retarded. The parole board did not stop that execution, and there was polls that were done by the Georgia state that indicated that though 75 percent of Georgians supported the death penalty, 66 percent of Georgians did not support it for the mentally retarded. By the way, I'm going to use the phrase "mentally retarded" throughout. Mentally retarded is not the accepted phrase among mental health professionals today. It's "intellectual disability." The phrase "mental retarded," as you all know, we all know has been too often used as a insult, as a phrase to denigrate people to make them feel bad, to insult them as an epithet almost. So, we don't use that word. But a lot of the words that's used in this area are really euphemisms -- "intellectual disability" or "mental retardation." And I'll use "mental retardation" because that's what's used in the code and is

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used in the case law. The exact same standards under the psychological associations and psychiatric associations apply to mental – intellectual disabilities, mental retardation. They are interchangeable, but that is the phrase that's used most commonly now. But I'll use the word "mental

retardation" because that's what we have in the law and that's what's in the code. I don't mean anything bad by that, but that's what we're using. By the -- So, what happened was, there was a consensus among the legislature, including the Attorney General Mike Bowers at that time, who as you well know is the attorney general who was most responsible for imposing or to supporting the death penalty convictions that had been imposed. Came together and decided we needed to do something about this in Georgia. And at the same time, and if I give too much detail, but I think it's helpful to know the history of how we came to where we are. There was a case called Ford versus Wainwright that the Supreme Court had passed, and Ford versus Wainwright provided that you couldn't execute somebody who did not understand why they were being executed because of mental illness. So, and the Supreme Court allowed – said the states had to come up with their own procedure. So, at the same time that we were coming up with a procedure in Georgia to implement Ford versus Wainwright, the idea of doing something about executing the mentally retarded came up, and there were a lot of proposals that were thrown out, back and forth. And toward the end of the session, as all of you know, we were trying to get something passed. Things were rushed, and Joe Drolet who used to be the lobbyist for the prosecutors from the Fulton County District Attorney's office and I, on behalf of Georgia's Association of Criminal Defense Lawyers sat down in this room. Well, it was before we had this lovely desk now, but – and we sat down in this room and said, "Well, how can we – what's the easiest way to do this?" And we said, "What we'll do is we'll attach to the 'guilty but mentally ill' statute." which had been

expanded now at that time to be both 'guilty but mentally ill' and 'guilty but mentally retarded.' And we put at the very end of that statute that you couldn't execute somebody who was found to be retarded. And that's what the law is to this day, for more than 25 years. That small little one sentence—and also, it provided that this would apply to cases after July 1 of 1988 -- is the law of Georgia. And that passed. The reason I say I was at fault, I wasn't thinking clearly enough, nor was Joe and I, I think, because the mentally retarded, guilty but mentally retarded and guilty but mentally ill statute was meant to be this. After a lot of controversy about the insanity defense, which actually grew out of the attempted assassination of President Reagan and the issue in the -- when he got – [PH] Chapman was, you know, was mentally ill. The idea was to tighten insanity, and the idea was to say, okay, you're guilty but you're mentally ill. And all that means is you'll be punished just like any other defendant, but they will get services from the department – whoever the Department of Human Resources whatever it might be at that time, so that these people would get some help—mentally retarded people and mentally ill people—but they would not avoid being convicted. They would not get an insanity plea. We gave the jury one more option in those cases where a person was clearly mentally ill but not legally insane. That statute and its burden of proof says you have to find the person guilty beyond a reasonable doubt, because you don't want somebody to be punished unless they're guilty beyond a reasonable doubt and mentally retarded. Where I dropped the ball, where Joe Drolet and I dropped the ball is we didn't want to make clear that in the death penalty case, it wasn't

meant to be that mentally he had to be guilty beyond a reasonable doubt, but also that mental retardation had to be proved beyond a reasonable doubt. It was sloppy draftsmanship, pure and simple. I don't think anybody intended that to happen, but if you look at the statute, that's the way it reads, and that became the law of Georgia. Interestingly enough, Georgia was the first state, the very first state to outlaw the execution of the mentally retarded. And because of that, ultimately, the United States Supreme Court held – I'll get to that briefly in a second. I don't want to be too much detailed, but I think it's helpful for you guys to know the history of all this. So, what happens is after that statute's passed, the Georgia Supreme Court in the case called Fleming, and I've given a memo to all of you—I hope you have it—that outlines the history of all this and gives you case cites if you want to refer to them in the [PH] interim on this. But the Fleming case—I guess I'm up to Paragraph Three [INDISCERNIBLE].

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In the Fleming case, the Georgia Supreme Court said, okay, the legislature has held that we shouldn't execute the mentally retarded. Sixty-five percent of Georgians—I think is it the figure—66 percent of Georgians opposed that. We believed there is a consensus against the execution of the mentally retarded so that under the Georgia constitution—not just the statute, but under the Georgia constitution, the cruel and unusual punishment provision, you can't execute the mentally retarded. Interestingly enough, they had a problem then. They had the statute only applied to cases after – tried after July 1 of 1988, but there were people who

were clearly mentally retarded who were on death row who hadn't gotten the benefit of that statute. Now we had a constitutional prohibition against executing the mentally retarded. How do we deal with these people who didn't get the benefit of the statute? And what they said is we'll have a hearing. First of all, on a h—state habeas, a judge has to find that there is a prima facie case, a reasonable case to believe they're mentally retarded, and you have to have at least one mental health professional who has given that diagnosis. And if you have that, it's a little bit like in medical malpractice, you had to have that affidavit from that medical person before you could go forward. And then, you had a hearing, a jury trial solely on the question of mental retardation. And interestingly enough, the Georgia Supreme Court said the burden of proof in that hearing would be by a preponderance of the evidence more likely than not, as opposed to beyond a reasonable doubt. And those hearings, called Fleming hearings or Foster hearings of two cases went on for years, and some people were found to be mentally retarded, some were not, in those hearings, But it was odd that if you were tried after the statute, you had a burden of proof beyond reasonable doubt. It was just the constitutional revision from Priors, it was by preponderance of the evidence. That ultimately came to a head in a case called Burgess, State versus Burgess, which I was the appellant lawyer and the trial lawyer in that case. And in that case, we argued that that was an equal protection problem. You can't have two burdens of proof. The Georgia Supreme Court declined to hold that. They said that, "We're gonna hold that." So, we've had for years now these two burdens of proof in these cases, and it's been an odd situation throughout. Ultimately, in Atkins

versus Virginia, that was in 2002, the United States Supreme Court finally weighed in. Before that time, there had been a case called Penry versus Lynaugh, and Penry had said you can raise mental retardation in the sentencing phase of a capital case, but it wasn't an absolute bar to the death penalty. In Atkins versus Virginia, they reversed that decision. And in Atkins versus Virginia, they said, well, there's now been an increasing consensus against the execution of the mentally retarded. And by the way, Georgia – it mentions Georgia was the first state to do that. So, the Georgia statute ultimately led, in part, to the Atkins making a national prohibition against the death penalty. Unfortunately, in Atkins, the Supreme Court said we'll leave to the states how you're going to implement this, and different states have come up with different ways of doing this. Some states and the federal government do it in a pretrial hearing. Georgia has this odd procedure where you have to – it is tried during the guilt/innocence phase of the trial, and the burden of proof, as the Chairman said, is beyond a reasonable doubt, which is the only state that has such a high burden. So, Georgia became was the leader on this in 1988, and now we're at the back of the bus. I mean, we are behind everybody.

REP RICH GOLICK: To clarify one point of that—procedurally, when exactly does that happen during the guilt/innocent? I mean -

JACK MARTIN: It is an odd procedure, and I've tried these cases. I've tried them both in federal court and in state court. What happens is, you're trying a case and you've got two issues before the jury. One is whether the defendant is guilty. That has to be proven beyond a reasonable doubt, of course.

But at the same time, while you're trying the case, to say, "Okay, he didn't do it" or you know whatever the defense might be, self-defense, whatever the defense might be, you're saying, "and by the way, he's also mentally retarded."

REP RICH GOLICK: So, that's a dual track argument during –

[OVERLAY]

for guilt or innocence is –

[OVERLAY]

JACK MARTIN: Yeah, it's a very awkward procedure.

REP RICH GOLICK: And the jury makes the determination on mentally – on mental retardation, as it's called – as it says in –

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JACK MARTIN: Not only do you try the case, who shot who, whatever happened at the event, but you're also having psychiatrists, psychologists come in. The history – you have to prove—and cut me off if I'm being – giving you too much detail, but the definition of mental retardation requires basically three things—

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and this is accepted across the country. One, low IQ, low intellectual ability, which is generally – well, not generally, is generally is an IQ of 70 or below. Now there's a standard error of measurement in there of five points. So, someone could have an IQ as high as 75 and still meet the 70. You have to have substantial deficits in the adaptive

behavior. And what that means is just have problems in your life. It might be anything that's adaptive behavior, of dealing with the world, deficits in that. And this is the key, it all has to occur prior to age 18 in the developmental period. So, unless this is observed long before the person has been tried on the crime, before he was 18—often, you'll have special education evaluations, you'll have defects evaluations, you'll have those types of things showing that this was observed long before age 18. It's hard to fake this right because you have to prove it occurred long before the crime occurred, right? It was observed long before the crime occurred. So, it's a very – that's, that's the test. So, while you're trying the case on guilt/innocent, you're also trying all this stuff in the middle of it all, and it's – it's just very, very awkward. And it's and it was a poorly conceived idea from the very beginning, which I take responsibility for. The --

REP RICH GOLICK: And just to be clear, it's your – it's the jury that makes the determination on mental retardation.

JACK MARTIN: Oh yeah, it's the jury. The jury. Now, a lot of states and the federal government—and you could argue about this and we could talk about this as we go forward—have a procedure where the it's initially a judicial determination. The judge sits and you hear evidence. You have what they call an Atkins hearing. And the - And he - that's what's happened in the federal government. And you have a hearing, and the judge says, okay, I find – and it's by a preponderance of evidence, I find the person is mentally retarded. Therefore, the case goes forward as a non-death case. Or, "I don't find him mentally retarded" and it goes

forward as a death penalty case. The issue of mental retardation, as I mentioned before, is always something that the jury can consider in mitigation because as Georgia is, and as most states, pretty much anything is open for the defense to put in, in, in mitigation. So, the judge says, "No, I don't find that he's mentally retarded," but the jury can always consider that maybe it's a close question. You know, and sometimes jury's say, the close question, and one juror might think, it's close enough for me to think that he or she may be mentally retarded, so I'm not going to give the death penalty. But it's not an absolute bar at that point. It's just a consideration for the jury. That's you know – that's one way of doing it. So, now we've gotten to this point where we are the only state that has this terribly awkward way of doing this, and a statute that wasn't designed to be dealing with the question of whether we're going to prohibit the execution of somebody, but a statute that was designed solely for the purpose of whether someone who is convicted and sentenced is going to get mental health treatment in while they're incarcerated. And we have this burden of proof. Let's think about it. We mentioned this in the memo and actually the Eleventh Circuit has mentioned this. The reason we have the proof beyond a reasonable doubt is we made the political judgement because liberty and life is so important in this country, that even though somebody who might be likely guilty, we're not going to sentence them to the penitentiary unless we're sure beyond a reasonable doubt. The reverse is here. What we're saying by putting this high a standard of preponderance of evidence on the defendant who's mentally retarded, we're saying, you know, we're going to go ahead and execute people who are likely,

more likely than not mentally retarded. We're going to do that because we're going to put this standard of beyond a reasonable doubt, which means we have to be absolutely certain before we give that. So, so we have to admit the policy of this burden of proof from the long history is that we're saying, okay, we're okay with executing a few mentally retarded people. I just don't think that's right. I don't think that's what we really believe. And also, you have to remember, the mentally retarded—and I've handled these cases—come to these cases in a terrific disadvantage to start with. They're not as able to help you find witnesses, not as able to – they are easily misled during the interrogation process.

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They are people who often more often than not in these cases committed the crime with somebody else who was not mentally retarded, because one of the features of being mentally retarded is you're easily influenced by others. So, they already – you already come to these cases with a terrific disability, and then you go and impose on that the additional onerous standard of proof beyond a reasonable doubt. This has been controversial for several years now in the federal court. One of the problems with the way these things are litigated is when they tightened up the rules of habeas corpus in federal court, in order to get relief on a federal habeas case, you have to prove that the state court's procedure was a direct violation of not a reasonable application of settled supreme court law. There is no settled supreme court law about procedures. Therefore, even though the Supreme Court may—and they may someday—take a case that's a direct appeal

or an appeal of a state habeas where you don't have that limited – I know I'm getting really in the weeds now, but that, that, that burden. The Supreme Court may answer this question, but I'm willing to get into it so far, some indication that they're now starting to think about maybe getting into this. Because just think about it, if it is unconstitutional to execute the mentally retarded, you can't create a state procedure that makes it virtually impossible to prove that. It means it makes the right of the prohibition meaningless or diminishes it.

REP RICH GOLICK: Mr. Martin, can we – can we shift to questions, if that's alright?

JACK MARTIN: Oh yeah. I should have said, any time anybody wanted to interrupt me, please, with a question.

REP RICH GOLICK: I don't like interrupting, but you did spark a thought, and that goes to a couple of questions, and I'm sure they'll be others. And I'm sure there'll be others.

JACK MARTIN: I'll answer that one first.

REP RICH GOLICK: The first one has to go to the Florida case that's pending right now. I understand Florida's approach. That's before the U.S. Supreme Court. I understand that Florida's approach goes to the IQ threshold of 70.

JACK MARTIN: Right.

REP RICH GOLICK: Give or take. I don't know if there's give or take written into their –

[OVERLAY]

JACK MARTIN: There is no give and take, and that's the whole question because – go ahead.

REP RICH GOLICK: I guess the question is, and I don't know if it's – and it's patently unfair for me to you know to ask you to look in a crystal ball for anyone, frankly. Is, is it your sense from the line of cases that you've obviously very familiar with, I mean, is there a sense that there may be an opportunity for the court to go ahead and use that as a vehicle for a more expansive decision on the greater overhanging issue, or is it more of a narrow analysis as relates just to the Florida facts? My sense, given recent history, is that'll it'll be a very narrowly tailored decision, but –

JACK MARTIN: This Supreme Court in particular is, because of its ideological makeup, tends to find the most narrow way of ruling on things. Yes, I'll briefly tell the committee what what's before the Supreme Court. Geor-- Florida, as I said before, is well established that an IQ of 70 or below is one of the thresholds for mental retardation. And by the way, I'll say this, that's a significant deficit, 70 or below IQ. And we're talking about people who have a significant deficit in intellectual ability. Two standard deviations below the mean, it's significant. So you, but if we took an IQ test of everybody here, you wouldn't get the same IQ if you had several different tests. You wouldn't get the same IQ. I mean IQ is a range, and what, what the standard rule of a measure of error is five points. If you got a hundred IQ, your IQ could be as low as 95, it could be as high as 105. That's just the standard error because the tests are not that precise, and the from time to time you'll get different scores.

More people, if you've got several IQ scores, you'll get maybe – in these cases, you'll get a 66 or a 68 or maybe a 73, and all those are well within the range of mental retardation, because five points above 70 could be a 70, five points below could be a 70. But 70 could be as low as 65 actually. But so –

REP RICH GOLICK: Let me redirect you back to the question.

JACK MARTIN: But Florida said, you have to have a 70. If you have one test, one point above 70 in a test, any test, then that doesn't satisfy their definition of mental retardation.

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So, the issue before the Supreme Court is whether can you create a definition of mental retardation that is not the standard definition and create one that basically defeats your mental retardation claim by improperly defining it. So is so, I think that goes more to the definition of. It was be as if a state said, okay, we say mental retardation is 80 or below, before or it's a lower figure, 60 or below. So, the Supreme Court is indicating you can't tinker with the definition of mental retardation. I think that's what they're saying. Or a better way of putting it, we're willing to to we're willing to decide whether or not you can tinker with it, because that's all they said and I haven't ruled on it. Whereas –

REP RICH GOLICK: One other question.

JACK MARTIN: - Whereas this is, we're talking more about a burden of proof, which is a different type of thing.

REP RICH GOLICK: One other question. This goes to the procedural dynamics of the burden itself and meeting the burden. My assumption is—I don't practice in this area, and I don't think anyone in this, obviously is related to the death penalty, but of course as it relates to the standard – excuse me, the burden of proof to prove mental retardation as it's termed in the code, it goes to any crime.

JACK MARTIN: Sure.

REP RICH GOLICK: Not just to the death penalty. It's just an external standpoint. There's been much more attention paid to – as it relates to administration of the death penalty. That said, from a procedural standpoint, my assumption is, this ends up becoming a battle of the experts in court as to whether or not this individual is mentally retarded as defined in the code or not. I mean, it's not as if the jury is going to be sitting there with the level of expertise that you know that the experts have, nor frankly that I think a judge would, even a judge who's been around the block a few thousand times and has tried death penalty cases in the past. I'd be hesitant – I think most people would – to assign a level of expertise even to the judge, even if it were the judge making that decision, which we understand they're not, the jury is, from your testimony. If it comes down, assuming that it comes down to a battle with the experts, my assumption is—and this is something that I assume that the prosecutors would want to go ahead and address as well—if you have even just the slightest distinction, the slightest disagreement about one point, I mean just one – one I'm not going to say minor disagreement because I don't think there's

anything minor in that type of analysis. But if you have even just the slightest disagreement, that, it and by definition creates reasonable doubt.

JACK MARTIN: Precisely.

REP RICH GOLICK: I mean, unless you have – I don't want to be simplistic about this, certainly, but unless you have two panels of experts, one on the prosecution side and one on the defense side both looking at each other, nodding their heads and just agreeing, yes, we both totally agree on every single point; unless that occurs, almost by definition you're going to have reasonable doubt. Even if it's on a secondary—if that's the right word—

JACK MARTIN: Right

REP RICH GOLICK: as it relates to the diagnosis of that individual. And again, I would ask the prosecutors at their time to go ahead and address that. As a practical matter, is that a fair statement?

JACK MARTIN: Yeah, and let me tell you why I think that the burden is so bad. Say, you had five –

REP RICH GOLICK: Can the burden be met as a practical matter?

JACK MARTIN: Right. Say you had five psychiatrists or psychologists, four of whom say, "He's clearly mentally retarded." There's nothing – he's treated as mentally, he's been in special education. You call in special education teachers who say, "Yes, he was diagnosed as mentally retarded as a 13-year-old." You bring all those people in and it's clear to everyone on this committee that this person is likely mentally retarded, and the state comes up with

somebody, or maybe a test that wasn't properly administered—and I've had this happen—where what happens is sometimes people trying to help somebody see their potential and they will given an IQ test not following the instructions but prompting the person to give the answers, which is improper because you're trying to standardize these things. You get that one person who gives a sound reasonable, sound scientific say, "Well, he's not really retarded." Right? So, what you've got there is a situation where all of us here would probably agree he's mentally retarded and ought to not be executed under the constitution of the United States and of this state. But because they were able to find one person who will say this, that's enough to create a reasonable doubt, right? And that, to me, is gets to the heart of the problem, because you can always – I mean, we're all – I guess I shouldn't be quite this cynical, but we're all enough lawyers to know that if you search long and far enough, you can probably

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find an expert that will say something. And if you can find that one expert to say that, and he says that, or she says that, despite the overwhelming evidence of mental retardation, going back to – this is – I'll tell you how you win these cases. You come in and you bring in schoolteachers. You bring in not these therapists, not these people who do the tests after the fact. You bring in schoolteachers who say, "Yes, I knew him as an eight-year-old, he couldn't read and write," "I knew him as a 10-year-old, he could never" – a mildly retarded person can probably read and write up to the grade level of sixth grade. "He couldn't get past sixth grade." You bring his

school records, and you see he did okay, sort of was passed until the sixth grade or the fourth or fifth grade and he hits the wall and doesn't go any further. I mean, all of that evidence is there, overwhelming evidence, and that's what really tells. And you have the special ed teacher tell us about helping this person, all before he was 18. And then, the state may come up with some person who gives an IQ test. Maybe it was improperly administered, maybe it wasn't. I'm not going to get into that. It says, "Okay, we got a 76"—one point too high—and they say, okay, that's a – that's a – that's a reasonable doubt enough. I mean, that's what's the problem with these cases. And by the way, it's not perfectly accurate, but what we're talking about—and these are a lot of euphemisms—a mildly retarded person is operating pretty much like a someone in the sixth grade, a 12-year-old, a 10, 11, 12-year-old, and we don't execute 12-year-olds. We shouldn't execute mentally retarded people.

REP RICH GOLICK: Let me ask you one other follow up question, and it's also a question – a practical consideration but in another area. If hypothetically the burden were to be changed, wouldn't we see as a practical matter a floodgate of litigation coming from individuals who had been convicted under the old approach – the older approach, the previous approach, who seek – would be seeking relief under any new approaches, a practical and administrative matter for our courts? It's – I'm presuming that we would see a ton of litigation come forward. Is that a legitimate fear or not?

[OVERLAY]

JACK MARTIN: I knew that would be

the argument, the argument that the prosecution would probably make, and this is the truth.

[OVERLAY]

REP RICH GOLICK: [PH] Well, I'm me.

JACK MARTIN: Okay, you. Yeah. And it's always a fear, it's the truth. I'll give you two responses. One is—and we can provide this to the committee—there are – is a handful or less of the number of people, approximately 100 people on death row in Georgia, who have anywhere close to a legitimate mental retardation thing. For example, someone who actually raised it during trial and lost, right, under the standard of beyond a reasonable doubt. Those would be the handful of people that even could make an arguable claim. There are already people – there's some people already in the – on death row who are awaiting what I call the Fleming hearing, which is one of people who actually were convicted before '88 who still haven't had a hearing on it, who under current law have the preponderance of the evidence. So, those people, we don't even worry about those people. So, those are the people who probably have the most legitimate. That's one answer. The one answer, yes, there might be a few, not a flood.

REP RICH GOLICK: But we're – but we're not just talking about individuals involved in capital cases, we're talking about anybody who would have sought to assert that in any criminal case.

JACK MARTIN: Well no, I don't think so, because the prohibition only applies to capital cases. I'm not, we're not alleging that the – that the standard of proof in a normal felony case for whether you get mental health treatment, which is all that's –

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REP RICH GOLICK: The burden for meeting mental retardation.

JACK MARTIN: That has to be proved beyond all reasonable doubt. So what? We have no, no, no fight, no dog in that fight. I'll mention one other thing, and this – you remember Gideon versus Wainwright, there was the famous case in which the United States Supreme Court held about Florida that they had to give right to counsel. And the attorney general argued in that case about the right to counsel. He said, well, you know, if you demand right to counsel, then they'll be a floodgate of people complaining about the fact they didn't have counsel. That's a more real problem. And the response by the Supreme Court was—I forget which justice this is—so, what you're saying is that there are people now in jail in Florida who are there unconstitutionally because they didn't have a lawyer. That's what you're saying, and we should just forget about that. If there are a few people—a few—relatively few people that deserve

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a second bite at this because of the onerous standard of beyond reasonable doubt, and we establish a Fleming type hearing, which is what it would be, you would have a new trial solely on that issue, not on guilt/innocence. You're going to go to jail for life at the minimum, but solely on that issue. Then so be it. That ought to be what we ought to do. If it's unconstitutional to execute under the Georgia constitution, the United States constitution, not to execute a mentally retarded person and they didn't

get a fair hearing on that at their trial, then we shouldn't be worried that those people can get back into court and we can correct that error. Just like what happened in Florida, we shouldn't be worried about people who were unconstitutionally convicted having a second shot. So – and I can give the committee names of the precise number of people, and I've been assured—I don't have it with me today—it's a handful, maybe four or five that would be likely making that claim. So, I think the floodgate argument has two problems. One, it's not true, and two, it's the right thing to do to give those people another shot.

REP RICH GOLICK: Look I just need to flesh that out a little bit more. I mean we're – in the conversation that counsel and I had yesterday, we couldn't – that wouldn't be a – couldn't be confined to just capital cases, could it?

JILL: Well, the current section that Mr. Martin is referring to is subsection (j). In subsection (c)(3) with respect to the verdicts that can be reached in cases where insanity or mental retardation is, is located, it says the defendant may be found guilty but mentally retarded if the jury or court finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. So, the problem is, the current structure allows the burden of beyond a reasonable doubt in that sentence to apply to guilt and to mental retardation. So, obviously, there is no bill pending, but one way to, if you only wanted the burden of proof to be beyond a reasonable doubt on non-death penalty cases, that would also have to be changed. But the general—and the reason I say this is because there have been bills before to change the burden of proof to preponderance, is a

restructuring of that sentence. So, does the beyond a reasonable doubt always apply to guilt/innocence but doesn't apply to the mental retardation. Otherwise, the easiest fix is to say mental retardation, whether you're shoplifting or whether you're committing a large crime, the proof should be the same.

JACK MARTIN: There would be no big issue about doing that, by a preponderance of the evidence regarding people getting mental health treatment. One proposal we've been throwing around is, is not to tinker with the guilty, but mentally retarded statute or the guilty but mentally ill statute, but to provide a provision at the end of the – this is what the federal law did—at the end of the death penalty statute which says that in the sentencing phase of the trial where a death penalty is sought, the finder of fact finds – if the finder of fact finds by a preponderance of the evidence that the person is mentally retarded as defined by the code, then no death penalty can be imposed. We've got specific language we can give the committee to look at. That's one way of doing it. I, I, I don't – the other way is to say in (j), at the very end, is to make clear that in that situation, the burden of proof would be by a preponderance of evidence. There's three or four ways to skin the cat, and all of which we can talk about. You know if I had my wish list, I would create a pretrial provision, a pretrial procedure like the federal courts have. But I guess what I'm saying, and Jill too, is that I think there's ways to get there without creating that problem.

REP RICH GOLICK: I think we need further discussion on that from how it applies to other crimes and our ability to section off the death penalty

case or not. I'm presuming it'd be an equal protection problem, but I don't want to get bogged down with that right now. Mr. Pak.

REP B.J. PAK: In capital cases, isn't mental retardation to the extent that you have evidence, can that come in as the – I would imagine every case would have some testimony from experts, from schoolteachers about mental retardation in an effort to at least negate mens rae. Am I right about that?

JACK MARTIN: No. I mean, very rarely do you really have a credible case on mental retardation. Now, you raise all sorts of mental illnesses sometimes, but not mental retardation. Mental

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retardation is a pretty structured definition, and you've got to meet those three standards pretty clearly. It's not very – it's not very – I don't know what word flexible in that regard. So, unless you have an IQ score of 75 or below, which means 70 or below, you're wasting your breath.

REP B.J. PAK: Practically speaking, that evidence always gets presented, right? In cases when you have – anyone that has an IQ, any one of the three prongs.

JACK MARTIN: No.

REP B.J. PAK: You wouldn't present that?

JACK MARTIN: Well, yeah.

REP B.J. PAK: As a defense lawyer,

really?

JACK MARTIN: The case law with regards to mens rea on the murder case of malice aforethought in Georgia is you don't have to have much. What – as a defense lawyer in capital cases—and I've tried a bunch of them—where you bring all that in, is in the sentencing phase, in the mitigation. Now, sometimes you'll – what they sometimes call front loading that, to sort of get it out there so that the jury will be thinking about it, but I very seldomly have had a case – . A case – when there's a serious question about mens rae, you don't have a death penalty case. I mean, a true practical matter, I mean, it's a case in which the person killed a person in a deliberate intentional way in which the question of mens rae is just not there. Now if the person is insane—and I've had those cases where the person doesn't know what they're doing—then that's an entirely different subject. But mental retardation – mentally retarded people are not – know right from wrong, but they don't – so they never satisfy that. I mean, one way of thinking about mental retardation is, and I'll finish with, is that a mentally retarded person knows it's wrong to steal. A mentally retarded person knows it's wrong to hurt somebody or to kill somebody or to walk against a red light, but they don't appreciate in a judgmentally way, the difference between those crimes.

REP B.J. PAK: Let me let me ask you, when you, when you, you talked about having to defend against the crime and also present mitigating evidence

JACK MARTIN: Right.

REP B.J. PAK: in the trial phase, and the jury determines, you know, whether somebody is mentally retarded for the purposes of the death penalty, right?

JACK MARTIN: Right.

REP B.J. PAK: How do you do that practically? I'm just asking. Do you send them a special verdict form or –

JACK MARTIN: Right

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REP B.J. PAK: what do you do?

JACK MARTIN: Under current Georgia procedure, you, you yeah, you try the case. If you have a guilt/innocence, a regular guilt/innocence type of defense, and then at the same time, you present what evidence you have of mental retardation, and the jury is given that as a option on the - and there's actually a special instruction that the jury is supposed to be given under – that's in the statute, and the jury has to be given that instruction. And then, the jury comes back and they say either guilty or – they have three choices—guilty, guilty but mentally retarded, or not guilty. And so, they check whichever one they get. When you get to mens –

REP B.J. PAK: Does the defense carry the burden to prove beyond a reasonable doubt in that stage, or does the prosecutor?

JACK MARTIN: Yes— no. You –

REP B.J. PAK: Has there been any challenges based on that?

JACK MARTIN: Yes, in the Burgess

case, we challenged it, and we lost.

REP B.J. PAK: [INDISCERNIBLE]

JACK MARTIN: And the Supreme Court just said, "The statute says what it says." I mean, there are, as you well know, there are certain affirmative defenses that the defense carries the burden on. But maybe I didn't answer your mens rae question. The question of mens rae is a – a mentally retarded person knows it's wrong to kill. It's not like they don't know that or know what they're doing. It's just they don't have the same judgment that we have, the same impulse controls we have, the same understanding of the enormity of that crime that you and I would have.

REP B.J. PAK: The concern that I have is if we were to drop the standard—I don't, I don't know and I don't –

[OVERLAY]

JACK MARTIN: Sure.

REP B.J. PAK: - try death penalty cases. The question is, is the burden – changing that burden, is that going to open the floodgates, so to speak, where it would pretty much it would eliminate any type of capital punishment for those who are actually found guilty but have some type of mental illnesses. I think that's a concern, right? Because that's, that's what previous legislature has passed and have been blessed by the Supreme Court, at least so far.

JACK MARTIN: Right I mean, yeah. Having done a lot of these cases, you run into mental retardation in these cases. You run into it, but you don't run into it in the majority of these cases. It's it's

a – it's a small minority of these cases, which there's a

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legitimate mental retardation claim.

REP B.J. PAK: That's, that's my question. I mean I'm sure there are, and that's fine. The question is, is tinkering with the standard the best way to isolate those legitimate cases versus dropping it so low that we're going to include all these people who probably don't have – they may or may not, I don't know, but that are not legitimate whatnot. So, it turns into a battle of experts and the prosecutors and the state has to spend all this money disproving or whatever theory – I'm just asking, is dropping the standard the best way to do that?

JACK MARTIN: We're only talking about the standard for mental retardation, not mental illness generally. Mental illness –

REP B.J. PAK: No, that's what I'm talking about.

JACK MARTIN: Mental retardation.

REP B.J. PAK: Yes.

JACK MARTIN: All I can tell you is my practical experience. You run into this rarely, you do run into it. I mean, cases have come up and we have those cases. Jerome Bowden was a classic case. And and So, yes, it comes up, but – sorry, but – and maybe I'm missing the point. The felt wisdom of the Georgia Supreme Court, United States Supreme Court in this legislature since 1988 has been we shouldn't execute those people. So, what we need to do is to find a fair way of determining who those people are. Right now,

we have to say, you have to prove it beyond a reasonable doubt. We couldn't you know– that's – [INDISCERNIBLE] answer, but what you're – by doing that, you're saying, but there are a lot of people who are likely, more likely than not—you know, preponderance of the evidence—more likely than not mentally retarded, we're going to be executing. And that given all the other handicaps a mentally retarded person faces in the in the criminal justice, we believe it is an unfair burden. It's not what we intend. If we truly believe it should be unconstitutional, we should have a fair procedure, and more likely more likely than not, is it fair enough?

REP RICH GOLICK: Miss Randall.

MISS RANDALL: Thank you, Mr. Chair. I have a question. If they were to – if we were to adopt the pretrial setting, that pretrial would be solely to determine mental retardation, right?

JACK MARTIN: Yes.

MISS RANDALL: Okay. What other states do it that way, because I think that's a good idea.

JACK MARTIN: I can't give you a precise number, but I do know that Arkansas – is that correct?

SANDY MICHAELS: Yeah.

JACK MARTIN: They do in Arkansas, I know, and they do it in federal government. I've had that I've tried those cases in federal court. I know I can – I can't give you a specific answer. I do know that there are states who do it that way, and I personally believe that's the best way of sorting it out. I can

provide the committee with a specific answer to that.

MISS RANDALL: And one follow-up. Does that current definition of mental retardation, does it take into consideration IQ at all?

JACK MARTIN: Yes.

MISS RANDALL: Okay, and what is that here?

JACK MARTIN: It's subaverage intellectual ability, I think is what the statute says. Mental retardation means significantly subaverage, general intellectual functioning resulting in and associated with impairments in adaptive behavior which manifested during the developmental period.

MISS RANDALL: So, we're not like Florida, we didn't give a number.

JACK MARTIN: No, no. There's no threshold, and all the case law in Georgia and the cases all the cases I've tried used the standard. The associations change their names from time to time, but the standard associations that deal with mental retardation or intellectual deficiency, and the American Psychiatric Association, American Psychological Association all agree on that standard. I mean, that is the widely accepted definition of mental retardation, and it's one that's used day in and day out in our schools in designating special education and everything else. It was it was used throughout the – not just in the criminal justice system.

MISS RANDALL: And one last question, I mean and this is probably a wild scenario, but there are some parents that won't even allow their children

to be tested. They're just, they're in denial, they don't want to accept anything that their child is anything but normal, and say they were able to avoid that, whether by homeschooling or moving them from school to school to keep them from being evaluated. And say this person has a brush with the law, I mean one of these serious things, and they have not been evaluated as mentally retarded. So, you can't go to a school or a special education program that can account for that person being mentally retarded. So, in that case, how do we – how do we proceed?

JACK MARTIN: Like any criminal case, you do the best you can. You find teachers, you find coaches, you find people at church. There's sometimes the Department of Family Services has come in, and you find something somewhere along the line. But you're right, that's a problem. I mean, most people –

MISS RANDALL: And I see it all the time. I work with a lot of youth, and I try to be really visible in my schools and I have parents call me, "Oh, they're trying to say my child is retarded –

JACK MARTIN: Needs special education.

MISS RANDALL: - needs special education". And they just don't want to accept that, even though if you spend any amount of time around that child, you can see that

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You know something's – I'm not clinical, but something's different. You know. And so and I've seen parents, I know one in particular, parents that have moved their child from school to school, and and

they claim that "they're picking on my child". And that's the way they're able to do that. And then, outside of that, I've seen them even go to the point of homeschooling just to keep you know that child from actually being evaluated and and diagnosed properly. So, that's –

JACK MARTIN: That's just an example of the type of difficulty that the defense runs into in these cases of trying to prove mental retardation, and and to put on top of that a high standard of beyond a reasonable doubt. Often school records are lost. Often you can't find the records. And so, there's so many impediments of trying to prove this developmental period aspect. This to put on top of that a beyond reasonable doubt standard is just unfair.

MISS RANDALL: And then the pretrial, if we went to a pretrial situation in dealing with this prior to the criminal proceedings, would how – how bad would that be as far as slowing up the whole case and backlog and all.

JACK MARTIN: It's just the opposite, I think, because what happens is that you sort these cases out early on; is that instead of having to go through a jury trial in which you have to spend weeks perhaps selecting a jury, you can get an impartial judge to look at this early on. And once that's decided, you don't have to have a death penalty trial anymore. You probably won't have any trial anymore. And so, I think it will be a more efficient way. That's what happens in the federal is you sort out these cases early on, find out whether it's legitimate or not, quite frankly. The um, That's my answer. I don't think it's going to be causing any type of more difficult – I mean, one of the other problems with mental retardation in

the mildly mentally retarded area, even though it's a significant deficit, is mildly mentally retarded people used to be called educatable mentally retarded. They can hold down a job, they can get married. They do get married. They can get a driver's license, but they still have a significant deficit. But you have all those – so you're facing all those problems with people not understanding how mentally retarded people act, that that burden of proof makes it just impossible.

MISS RANDALL: Thank you.

REP RICH GOLICK: No further questions. Thank you very much for the presentation. Let me call on Miss Rita Young with All About Developmental Disabilities. Miss Young, in the interest of time, let me ask you to limit your initial comments to about 10 minutes or so, and then we'll open up for Q&A and go from there.

MISS RITA YOUNG: We have a team that is presenting. I will be brief. You will hear from me the least.

REP RICH GOLICK: Okay, I just need a – we do have a a list of folks and I do want to get out by some semblance of in a day.

MISS RITA YOUNG: Absolutely I understand, and I um, we will be as concise as possible, and please feel free to interrupt. I'm Rita Young, Director of Public Policy for All About Developmental Disabilities. And thank you, Chairman Golick, for this opportunity. We understand that this is an informational hearing, and so, we're here today to bring you the science of developmental, or, excuse me, intellectual disability, what you all know it as mental retardation. We know

it as intellectual disability. Again, to Mr. Martin's point, in the law, it says mental retardation, but as professionals, the professionally relevant term is intellectual disability. So, that's what you'll hear us say, and we will explain that in just a little bit. To your point, Chairman Golick, we understand that this is informational only, that we don't have a bill yet. We do – I distributed just a brief handout that I hope you all received. We are interested in a bill, and we're interested in changing the burden of proof. We're interested in changing the burden of proof from beyond a reasonable doubt to with a preponderance of evidence so that we can come in line with the rest of the country is practicing, and specifically our southern states. Mr. Martin went through sort of a historical background, so I won't do that in the essence of time. But I will tell you, on the handout that I've distributed, if you look to our southern states—South Carolina, Alabama, Texas and Virginia—they bear the burden of proof with a preponderance of evidence. So, again, we just want Georgia to come in line with what the rest of our southern states are doing. In the work that we do at AADD, we not only focus on justice in developmental disabilities,

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but we focus on things like post-secondary education, unlocking the waiting list for individuals to receive funding so they can live in their communities rather than in institutions. We have leadership graduates that are state-wide that are interested in justice issues. We realize that individuals with intellectual disability fall through the cracks every day when they encounter the justice

system. I'm a parent of two sons who have autism and intellectual disability. This terrifies me because of the lack of understanding that we have with individuals who have intellectual disability, what you all know it as mental retardation. So, what we wanted to do and is just to be very transparent with you in the mission of our organization all about developmental disabilities. We're not here to abolish a death penalty. We're not here to change the definition of mental retardation to somehow broaden its scope so that other conditions that have nothing to do with the pure mental retardation or intellectual disability are covered. We also believe that people should be held accountable for their crimes, and that we are not we will not be seeking any type of retroactivity if legislation is again enacted or pursued. We wanted again to focus on the science of intellectual disability, what is mental retardation and ID, and then just tell you a little bit about some of the legal aspects of changing this standard of proof. And then, just take your questions. So, with that, I would like to introduce Stacey Ramirez from the Center for Leadership in Disability. She's going to really hone in on again what is mental retardation/intellectual disability. We also have, as supporting presenters, for you all to ask questions, Dr. Dan Crimmins who works with Stacey. He's here, Dr. Crimmins. If you all have questions that are of medical in nature, or you want to ask some more you know significant in-depth questions. We also have Dr. Roy Sanders, who is formerly from the Marcus Institute, now is in private practice as a psychiatrist. So, if you would like to know about the assessments in depth, they are here to answer your questions. Stacey.

STACEY RAMIREZ: Hi. How are you all today? It's an honor to be here to talk with you. So, my part of the team is to talk about the definition of intellectual disabilities, mental retardation that's been used, even closer, it's been used here quite often. So, I wanted us to give ourselves some time to really understand what it is. We are not talking mental health. And I am also a parent of three boys. My middle son has autism. When given that diagnosis of autism, I didn't understand that there was a difference between mental health and an intellectual disability. I had to learn, and I think that that's common in the general public. So, I'd like to give us some time to truly understand what that definition is. So, what is an intellectual disability? It's a significant limitation in intellectual functioning. So, someone earlier asked, does that mean IQ? Yes. Or, adaptive skills. Example of my son, in the morning, to get out of bed and to get into the car and to go to school, he has a checklist that he goes through, adaptive skills. His skills don't help him to just get up, brush your teeth, take a shower, all those things that we do every day. There's adaptive skills, and there need some supports there. So, that's what we're talking about with intellectual ability. So, significant limitations in intellectual functioning and adaptive functioning, and it's onset during the developmental period. If you're in a medical field, that's 18; in service systems, that's 21. It's a continuum. It can be significant, mild, moderate. There's no people that are identical, even with the same diagnosis. They are not going to be identical. Strengths co-occur and there are level of impairment that again, that are mild to profound. The other thing that's important to understand is it is diagnosed by a professional. That in court, I have just

learned that it is the jury—thank you, Rita—the jury that actually decides if this case, in this case if there is a person that has an intellectual disability. My son, others that get this diagnosis are diagnosed by a professional, by a psychiatrist, by a developmental pediatrician, by a psychologist. So, I wanted to talk a little bit about what it means that that intellectual functioning is a perceptional reasoning.

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It's a working memory processing speed and verbal comprehension. So, that's the intellectual. The adaptive skills are those that are conceptual, practical or social skills accepted by a person's age peers. It can be cultural, and that's very important in our conversation. And it can also be community environment. So what I've often been asked what causes and can it be cured? So, what causes intellectual disability? Is there is no one cause. There are risk factors that can be by medical, social, behavioral, educational. It's a time of exposure to those factors and it can be prenatal, perinatal or postnatal. Can it be cured? We're going to keep it a secret from my daddy, but no. Intellectual disability is a lifelong condition. Limitations and functioning can be minimized through educational intervention, environment conditions and supports, the supports and services that the state offers. I want to give you time to ask questions, and let's have a conversation about do we, in this room, truly understand the definition of intellectual disability. And as Rita said, we have supporting experts that can help us as a, as a full committee understand.

REP RICH GOLICK: I see no questions. Do you have any? Mr. Pak?

REP B.J. PAK: This may be an unfair question, but I'm, I'm trying to get an understanding of kind of how it works in a trial setting. Is the science developed enough to be able to say and opine that beyond a reasonable doubt that this person suffers from a legal term "mental retardation/intellectual disability"?

STACEY RAMIREZ: With the science, I'd love Doctor Sanders to support that. Do you have a microphone?

DR. ROY SANDERS: I'm Dr. Roy Sanders and I am a psychiatrist, but I'm also trained in pediatrics [INDISCERNIBLE]. I'm Dr. Roy Sanders. I'm also a – I am a psychiatrist. I'm trained in child and adolescent psychiatry, and adult psychiatry, as well as addiction psychiatry. I have training in pediatrics and neurology and have a medical degree. My whole life has been spent taking care of people with intellectual disabilities and developmental disabilities. Could you reframe your question for me one more time?

REP B.J. PAK: Certainly. Is the – in your field, is their consensus that we could say that to a reasonable certainty or beyond a reasonable doubt that when you could diagnose someone and go through some tests and say, "This person – can you say beyond reasonable doubt suffers from mental retardation as it's defined in the law."

DR. ROY SANDERS: The issue is that you can't – in medicine, we don't have anything beyond a reasonable doubt. I mean, that's the general consensus –

[OVERLAY]

REP B.J. PAK: What is the strongest kind of conclusion you could reach?

DR. ROY SANDERS: The preponderance of scientific evidence.

REP B.J. PAK: Okay.

DR. ROY SANDERS: And that would be based on objective evidence and based on exam and evaluation over time.

REP B.J. PAK: That's what I wanted to know.

REP RICH GOLICK: I see no further questions. I appreciate your time and your input. We, we have your materials that you dropped off. Oop, Mr. Coomer.

REP CHRISTIAN COOMER: I just want to follow up on that. In court, I've sometimes heard experts refer to something being to a degree of – a reasonable degree of medical certainly or term words to that effect. Can you explain the difference between that and what you just described as a medical preponderance?

STACEY RAMIREZ: Yeah, it's probably more semantics than anything else. Medicine is, in general, a science, and we're always doing evaluations and experiments in terms of trying to figure out what we do and how we go and what happens with that. And so, a degree of medical certainly and preponderance of science generally are the same thing, unless you have a quack that's practicing somewhere who doesn't believe in science. But you know he may have lots of medical certainly but no science behind it. But you want to have a doctor or

MD who has the scientific certainty or reasonable scientific certainty or preponderance of scientific evidence in addition to the medical certainly, or reasonable medical certainly. But again, none of that is ever absolute because in science, as in medicine, there's always that question

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that's hidden back there in the background. And like the presenter was talking about before, you know just in like the chairman was talking about, that just that you know general question brings into question a reasonable doubt.

REP CHRISTIAN COOMER: Well, Mr. Chairman, while it's semantic, I guess it's all you know– the difference between a reasonable doubt and the preponderance of the evidence is also semantic to a sense, but we have to conceptualize these ideas with the words that we use. So, I want to understand, is there a difference between a reasonable degree of medical certainly and a preponderance of scientific evidence, because it may be that the better term to use in the statute is a scientific-based term, if that's what we're trying to get to. But I don't want to use a term that is, as we've already heard, mental retardation and is no longer the term of art in the field. So, we don't want to get hung up on a term of art that may change over time. We have pretty good consistency with what a reasonable doubt means over hundreds of years. That's why I asked the question, because if there's a difference in those, if it's a changing term, then obviously, we don't want to use a changing term in our statute. We may be stuck with legal terminology that doesn't sound exactly like scientific terminology. I'm trying to figure out what

would be best to use.

REP RICH GOLICK: I mean, just speaking for myself, I think we do better to have a consistency in our terminology as long as we've got a very clear idea as to what that actually means. It sounds to me like we've got more certainty in some language that currently exists that may not be the most modern professionally accepted language, but for purposes of the statute and for purposes of the burden, which is the narrow issue we're discussing, we have some level of predictability with that. Whereas, if I'm understanding this correctly, we may have actually less certainly if we were to go with some scientific terminology that doesn't have the precedent that the current terminology in the code does have. That would be a real concern to me to the future. Anything can be discussed. Certainly, I just – you know we're stepping carefully and with a greater sense of caution. But it's a very fair point, very fair point.

TIM SAVIELLO: Chairman, if I may?

FEMALE 6: This is Tim Saviello.

TIM SAVIELLO: I'm next up, and I can actually shed a little light.

REP RICH GOLICK: Let me ask you – I'm going to ask you to please be brief because we do have other speakers.

TIM SAVIELLO: Yes, sir, I understand.

REP RICH GOLICK: Thank you.

TIM SAVIELLO: To answer that point, what you're concerned about is the scientific definition as to what a reasonable degree of medical

certainty, scientific certainty, that sort of thing. And I think we should all back up for a moment and establish some terms so we're clear. The legal evidentiary standard of "beyond a reasonable doubt" or to a "preponderance of clear and convincing evidence" is the standard the trier of fact has to reach in order to decide that a fact has been proven sufficiently. So, in this context, the burden of proving mental retardation under the statute and in virtually every state that deals with this issue, everybody places the burden on the defendant to prove mental retardation. The standard is what is at issue here. Every other state that does this either does it to preponderance, which is the vast majority, and only four other states do it to "clear and convincing" which is a slightly higher burden, Georgia being the only state that has the standard of proof being "beyond a reasonable doubt." But everybody agrees the burden is on the defendant. And those are legal evidentiary terms. The trier of fact then, when considering the evidence that's brought forward in order to reach a conclusion, has the fact been proven, considers testimony from experts. And the experts in the scientific field often count to their opinion, which is what they're giving, their expert opinion in terms of degree of reasonable scientific certainty. So, that's where the trier of fact, the judge or the jury, depending on the jurisdiction and how procedurally it works out, to determine. They consider testimony. "I've reached a reasonable degree of scientific certainty this person is mentally retarded." Trier of fact still has to determine whether that, coupled with everything else, proves to the standard preponderance, clear and convincing, or beyond reasonable doubt. Is that clarified? Okay.

REP CHRISTIAN COOMER: What I was getting at is, if there are ways to make it easier for a jury to make the determination, because if they're essentially having to go into the jury room and check off a box, you know, as a litigator, you want the words on that box to match the words that they heard the witness say.

TIM SAVIELLO: Absolutely.

REP CHRISTIAN COOMER: So, if you can – I'm just kind of thinking sort of maybe the next step down, is there a way to get the right scientific language into code to help juries out? And there may not be a way, and I'm fine with that being a result. I'm just asking the question.

TIM SAVIELLO: Well, I will say that in every other issue that I've come across where scientific testimony is considered for the trier of fact to use in

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considering whether the standard of proof has been met to prove a fact, scientific language doesn't make it into their consideration, doesn't make it into the jury instruction. The jury or the fact finder is instructed, "You must find a preponderance of the evidence to clear and convincing or beyond a reasonable doubt." So, virtually across the board, the standard of proof, that language is consistent in all jurisdictions—federal court, state courts, everywhere. So, I don't think that would be a problem should the committee or should legislature get to writing a statute. I would imagine it would be in that legal terminology. And then, within each trial, the judge will instruct per the usual standard jury instructions

on how to consider scientific testimony.

REP CHRISTIAN COOMER: Thank you. Okay.

REP RICH GOLICK: Mr. Pak?

REP B.J. PAK: Thank you, Mr. Chairman. Professor?

TIM SAVIELLO: Yes.

REP B.J. PAK: I guess my question is, and we're not in court, so I know that in court, expert testimony, regular lay witness testimony are supposed to be weighed the same. But in actuality, we know that we prefer the expert. The question is, is intellectual disability an area where scientists could never get to a consensus where we, as lawyers, view it as that burden could never be met type of thing? For example, if we do DNA, I think most people will say it has a high confidence rate because of the uniqueness of it. But something like diagnosing intellectual disability at a certain level as defined by the legal standard, by wise legislators, not like me, is that something that's impossible to me? I mean, are we having – are we imposing a burden that's just impossible to meet? We could impose a burden that said for a 100 percent accurate that you suffer from a mental – but we don't do that. We know that, right? The question is, is this one of those areas that you're ever going to get a consensus to a level to go beyond a kind of a reasonable doubt to conclude that this person actually suffers a mental retardation as defined by state law?

TIM SAVIELLO: Well, the – historically, the standard "beyond a reasonable doubt" is the

highest standard of proof in any legal system in the world, right? So, in the United States, historically, we have reserved that for proving guilt in a crime because as Mr. Martins mentioned earlier in his presentation, we place an incredibly high value on liberty in our society. And if we as a society are going to take somebody's liberty, that's the standard we have determined to be the highest. Theoretically, we could craft the one that's closer to 100 percent. We could demand actual certainty, but we don't do that as a society. So, backing up then to the question of whether intellectual disability could be proven beyond a reasonable doubt, certainly it could. I mean, any trier of fact, whether that's a judge or a jury, could decide for themselves that it's been proven in this particular case. But interestingly, when you look at the standard of proof, when the standard of proof changes, what you're really doing is reallocating the risk of a misinterpretation or a risk of an erroneous finding. So, if you break it 50/50, so preponderance of the evidence is essentially 51 percent versus 49, if you try to quantify that, then the burden of risk is roughly equally shared. The burden is on the defendant, the standard is preponderance. They have to prove slightly more. So, they bear a little bit more risk. But with "beyond a reasonable doubt," they bear a substantially much greater portion of the risk of an erroneous finding. That is, if the trier of fact makes a mistakes and finds that the person doesn't have an intellectual disability, and then they get executed in violation of the Eighth Amendment. And so, by adjusting the standard of proof, that's really what we're talking about legally. In the academic world, what we look for is standard of proof, that we talk about risk allocation. So, the question becomes, is that

appropriate risk allocation? And I'll keep my comments brief and to the point. I'm not going to reiterate and go over a lot of what Mr. Martin said, and historically he –

REP RICH GOLICK: I really need to just get response to Mr. Pak, and then we do have to move on.

TIM SAVIELLO: Is that sufficient?

REP RICH GOLICK: Yeah.

TIM SAVIELLO: I think we understood. So, I'll just keep it brief, but in terms of academically looking at standard of proof in Georgia compared to where the rest of the nation is, the simple fact of the matter is when Georgia started out in 1987 with this statute, they were an outlier on the front end. Right? They gave statutory protection to folks with mental retardation from execution before the United States Supreme Court did. The federal court was actually a few years in front of Georgia, but otherwise it was the first in the nation to give that statutory protection. Fleming versus Zant came along shortly thereafter and gave constitutional protection under the state constitution followed by Atkins versus Virginia in 2002, 13 years later. What I was asked to do was to, to look at the history and look at how legal analysis is done by the Supreme Court in particular, to predict, if I could, how this will play for our Georgia if the statute isn't changed. And the short answer is, the way United States Supreme Court looks at these issues is through the eyes of evolving standards of decency. That's the conceptual term that they use, and what they do is they look historically at the issue and how the states address it. And so, Atkins versus

Virginia came about in 2002. As Mr. Martin pointed out, they first considered this issue, mental retardation,

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does it violate the Eighth Amendment to execute someone who's mentally retarded 13 years previously and concluded that there was not national consensus around that point. So, in Penry, they didn't find that it violated the Eighth Amendment. In that ensuing 13 years, there was significant movement across the nation all in the same direction, that as a people, we decided that it was unconstitutional, we shouldn't be executing mentally retarded people. The court looks to legislature and they look at statutes that are passed. They look at the degree they're passed, that it's what majority. They look at the language and they look for trends. So, in looking at Georgia statute, should this case come to the Supreme Court on this particular issue, that is the standard of proof under Georgia that the defendant must prove beyond a reasonable doubt they're mentally retarded in order to get protection of the Eighth Amendment under Atkins and under Fleming. Should that case get to the Supreme Court procedurally in a way that they can look at it—and I don't think it has yet. So far, it's come through federal and state habeas issues, where there are procedural bars. So, they haven't had the issue directly in front of them. I think they would look at look at exactly where the nation is. And has been pointed out, Georgia is now—I'm not going to use Mr. Martin's "at the back of the bus" but—Georgia has remained static while the rest of the nation has moved in a particular direction. So, of the rest of the states that deal with this issue statutorily, all but

four, everyone places the burden on the defendant, but the standard, all but four of those states have a standard of preponderance of evidence. Four other states have "clear and convincing" as the standard. And only Georgia has the much higher and the highest standard "beyond a reasonable doubt." And so, I think clearly under the Supreme Court's analysis and the procedure they use when dealing with these issues, there is a trend across the nation towards preponderance of the doubt. The burden will continue to be with the defendant. That's not going to change, but the trend clearly has been towards preponderance. And I think when the Supreme Court gets this issue, should the statute not be changed on a direct appeal case, that is where someone has litigated a decision pretrial, loses, gets the death sentence, raises the issue on appeal and it makes its way to the Supreme Court clear of any procedural problems that come through habeas litigation, then I think they will look at it with that eye.

REP RICH GOLICK: We do need to move on. Appreciate the historical context and thank you for appearing this morning. We call Dawn Alford, the Georgia Council on Developmental Disabilities. Thank you, Deborah.

DAWN ALFORD: Good morning.

REP RICH GOLICK: Good morning, Miss Alford, I apologize. Let me ask you to confine yourself for about 10 minutes so that we can afford time for Q&A.

DAWN ALFORD: Absolutely.

REP RICH GOLICK: Thank you.

DAWN ALFORD: Good morning, Mr. Chairman and fellow committee members. I thank you for giving me the opportunity to speak. My name is Dawn Alford and I am here today to represent the Georgia Council on Developmental Disabilities where I am the planning and policy development specialist. The mission of the Georgia Council on Developmental Disabilities is to bring about social and policy changes that promote opportunities for people with developmental disabilities and their families, to live, learn, work, play and worship in Georgia communities. We have a small staff that carry out the activities of our everyday work, and we are governed by a 27-member board appointed by the governor, and it's comprised of 60 percent individuals with developmental disabilities and their families. Our focus is on developmental disabilities and family. Our focus is on individuals with developmental disabilities and family members, but we also collaborate with our friends and allies in the broader disability community. We value people with developmental disabilities with their own gifts and talents, and as independent contributors to a collaborative community. I'm here today to speak to you about why we at the Georgia Council on Developmental Disabilities believe that the standard of proof for intellectual disability in death penalty cases needs to change. Now I'm sure by now that you've noticed that I, myself, have a disability—a significant one that is visible—but not an intellectual disability. So, the standard of proof for intellectual disability in a death penalty case would not apply to me, nor should it. So then, you may be asking what do I mean by "intellectual disability"?

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The American Association on Intellectual and Developmental Disabilities, widely accepted as the leading authority on the definition of intellectual disability, says that intellectual disability is characterized by significant limitations on both intellectual functioning and adaptive behavior. Intellectual functioning or intelligence refers to the general mental capacity for learning, reasoning, problem solving and so on. Adaptive behavior can refer to conceptual skills, for example language and literacy, money, time, social skills (for example, interpersonal skills, personal care, use of a telephone and safety), and also – I apologize. So for, so, clearly, you can see that people with intellectual disabilities are a much smaller segment, of a discreet segment of the greater population of people with disabilities as a whole. Let me also take the time to clarify that also when I use the term "intellectual disability," this is the more widely accepted term, but it has replaced "mental retardation." And as many of the folks have testified today, that is still used in the Georgia criminal code. So, that is what you will hear me say today is "mental retardation." And it is for smaller segment of people with disabilities, that is to say people with intellectual disabilities, aka mental retardation, for which I am here before you today. In Georgia, a defendant is required to prove an intellectual disability beyond a reasonable doubt in order to be exempted from the death penalty. This is an incredibly high burden of proof, higher than other state in the union. That is to say, no other state requires this higher – highest burden of proof beyond a reasonable doubt for establishing the existence of

intellectual disability. This standard of proof puts defendants with intellectual disabilities at extreme risk for execution. Most other states use the standard of proof "preponderance of evidence." Given this, we respectfully request that Georgia change the standard of proof for intellectual disability from "beyond a reasonable doubt" to "preponderance of evidence." And here is just a suggestion on the language change in the official Georgia code. The official Georgia code Section 17-10-45: "If in the sentencing phase of any case in which the death penalty is sought which commences on or after July 1, 2014, the finder of fact finds by a preponderance of the evidence that the defendant has mental retardation as defined in the official Georgia code Section 17-7-131(a)(3). The death penalty shall not be imposed, and the court shall sentence the defendant in accordance with the verdict and the law." At this this time, I'd like to thank you, Mr. Chairman, and the entire committee for hearing my comments. I'd be happy to entertain any questions that you all might have for me, but also please be aware that you all can contact myself or anyone at the Georgia Council on Developmental Disabilities at any time. We'd be happy to work with you on this issue to help you out in any way that we can. Thank you.

REP RICH GOLICK: Thank you. Thank you, Miss Alford, for your testimony this morning. There are no questions, but we want to just thank you for your service on the Council. It is much appreciated and we don't take it for granted.

DAWN ALFORD: Thank you.

REP RICH GOLICK: Thank you. I'll call Mary Boyert with the Roman Catholic Archdiocese of

Atlanta, located, headquartered in Smyrna, Georgia. Just saying. Mary, did you want to come up?

[01:25:00]

MARY BOYERT: Thank you very much, Chairman Golick, and members of the committee. We really appreciate the opportunity to speak before you to give our position on this matter; and we really appreciate your taking the time to look at it in the off time when you don't have to do it. And we really think that speaks highly of you for looking at such a serious matter. And in the interesting of full disclosure, as you said, I represent the Archdiocese of Atlanta as their Respect Life director. And, of course, the Catholic Church takes an interest in a lot of these matters. We have ministries for persons with disability and so on. So, we take a strong interest in this. And in the interest of full disclosure, we would be happy to come before you when you decide to look at ending the death penalty in Georgia, but we understand that that's not what you're doing here today. So but – but we'll be there when that time comes. But we are used to taking a little bit of the apple, bit by bit. But I was appreciative of the opportunity to hear how this all came about, because I wondered why Georgia passed that at that time, and it was very helpful to hear the historical perspective. And from a personal standpoint, I have no one in my family with a developmental disability, but I have had children that have had to be diagnosed with certain other kinds of conditions, namely attention deficit disorder and ADHD, and I know from that experience that these things are very difficult to prove, and it's not like you can take a blood test with diabetes or something. So, we appreciate the opportunity to share

with you that we do feel that because the church is so concerned about those who may be executed, and our concern is that they be given full dignity and they be respected, that we make every effort that we can, as a state, to make sure that we don't put anyone to death, especially if they have the possibility of having such a disability that in legal terms is mental retardation. In the U.S. Supreme Court decision, they said that the purpose of the death penalty is for deterrence, so for retribution. And, in fact, if someone has mental retardation, then that purpose for the death penalty for them will not suffice, because it's not going to help for them to understand that they could be deterred or have retribution. So, we feel that it would be better to change the law. And you know, we don't have the exact wording, but we would be happy to walk through this process and look for supporting evidence that would make it easier for the state to put into place something that would again make it less burdensome and make sure that the person who has these conditions are not executed maybe by mistake or that the state really didn't mean for that to happen. As the Supreme Court said in its decision, "Mentally retarded defendants face a very special risk of wrongful executions." And so, we see persons with mental retardation or development disability as especially vulnerable, and we ask you to consider them and make sure that you do everything you can to protect them. And I'd be happy to answer any questions, but I certainly don't have legal or psychological expertise in this matter.

REP RICH GOLICK: We appreciate that. I don't see any questions, Miss Boyert, but thank you very much for taking the time to be here this

morning.

MARY BOYERT: Thank you.

REP RICH GOLICK: We appreciate it. Call on Miss Melissa Barnes. Miss Barnes, as you're coming up, in the interest of time, if you could confine your comments to about five minutes or so, in case there are any questions.

MISS MELISSA BARNES: I'm going to be short and sweet. Alright. I want to just start by saying having grown up and playing hide and go seek in this capital, I understand the difficult decisions that you have to make as an elected official. So, I want to begin today by thanking you and applauding you for taking on this difficult decision. As long as I can remember, my parents have taught my siblings and I that it is our civic duty to stand up and speak out for those who cannot always advocate for themselves, and that's why I'm here today. During my tenure as an elementary school teacher, I often participated in eligibility meetings for special students who were qualifying for special education under the Individuals with Disabilities Education Act.

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During these sessions, a committee composed of educators, diagnosticians, school psychologists, administrators and parents would examine the eligibility requirements outlined within the law. The Act specified specific standards that must be met for an intellectual disability diagnosis. However, the same intellectual disability diagnosis can often can later be denied by the courts because of the strict burden of proof set forth in the state of Georgia. I suspect that many people who support the

current burden of proof would argue that the majority of individuals with intellectual disabilities know the difference between right and wrong, and I'm not here to dispute that argument. However, one of the common characteristics displayed by individuals with intellectual disabilities is a deficit in reasoning skills. In turn, many of these individuals do not have the foresight to understand the consequences of their actions. Before I continue, I want to make sure that I'm not misunderstood. I believe that individuals with intellectual disabilities should be punished for their crimes. However, sentencing them to death is not the answer. As a college professor, one of the first lessons I teach my future special educators is the importance of looking at each child individually. This ensures that teachers do not make assumptions based on a textbook diagnosis. As the committee continues this process of examining the burden of proof requirement, I encourage you to do the same. Don't set an arbitrary number drawn in the sand. Instead, establish a standard and a protocol that allows for rational decision making by licensed professionals. Allow for an unbiased pretrial hearing where no knowledge of the facts of the case can bias the determination of the defendant having an intellectual disability. Not only does this save the government money that would be spent on a capital case, but it also establishes a procedure that cannot be swayed by evidence in a trial. Today is the first step of ensuring that the most vulnerable citizens in Georgia are protected. Gathering everyone in this room and learning from each other is essential. However, we can't stop here. It is critical that the burden of proof for capital cases be lowered so individuals with intellectual disabilities receive the right they have been given under the law.

REP RICH GOLICK: I see no questions. Thank you for taking the time to be here this morning. I'll call on Mr. Curtis, is it [PH] Feese. Am I saying that correctly? If he's here—Mr. Curtis Feese? Okay. Let me call Chuck Spahos on behalf of the Prosecuting Attorneys Council—Chuck Spahos and Danny Porter, I guess both on behalf of the PAC.

[INDISCERNIBLE]

CHUCK SPAHOS: Danny, you want to go first?

DANNY PORTER: Mr. Chairman, first of all, I'd like to also express my reluctance to use the term "mental retardation" because a member of my family suffers from intellectual disability, and and we have a rule that if any were to use those words in a pejorative sense, we're under directions to take direct action to remedy that. So, I find that term as offensive as anyone else.

REP RICH GOLICK: It is awkward.

DANNY PORTER: But the law does describe it. I'm here on behalf of the District Attorney's Association of Georgia, and we're going to ask Mr. Spahos to give some specifics about other states, and and we'll provide that information to the committee. But I want to first begin by saying that there is no district attorney who is interested – or no district attorney in Georgia who is interested in putting people who suffer from mental retardation to death. I think our efforts in the past have shown that, including the Fleming hearings that were held that Mr. Martin described. There is really no interest in that, but we have concerns as representatives of the system as a whole by the passage of this, or by

changing of the standard of proof in this particular code section. And our caution is to, is to tread carefully because of the law of unintended consequences and what we're concerned about. First of all, I think members of the committee

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have to know that in every felony criminal case in Georgia, there are actually four possible verdicts. There's the verdict of guilty. There's the verdict of not guilty. There's the verdict of guilty but mentally ill; and the verdict of guilty but mentally retarded. Each of those have consequences, not only in capital litigation, but in every form of felony litigation. And I think that's one thing to keep in mind as we go forward, that the assurances and the statements that this will not expand itself out into other litigation, we think are incorrect. We think that, in fact, it's almost inevitable that we're going to run into the situation that we ran into with the Fleming case, which was cases that were already adjudicated, individuals that were already on death row were granted hearings. Some of them are still sitting on death row where hearings haven't been held, and there had to be additional hearings. Imagine that opened up to armed robbers, burglars, every other defendant who might have contemplated offering a defense of intellectual disability or mental retardation in any criminal case. The other thing that we have to be careful of is the comparison between the different states. As you've already heard, Florida adopted when they went to the preponderance of the evidence standard, a very bright line test that determines whether a person is mentally retarded or not. It's based on an IQ test. It's based on an

intellectual development or intellectual disability based on a scientific standard, which was brought up by this group. Georgia does it completely differently. We use those intellectual standards as part of the formula. In other words, jurors who we trust to make decisions about people's guilt and innocence, and who we trust to make decisions about whether people should live or die, are also asked to make decisions about whether or not a defendant has met a burden to prove beyond a reasonable doubt that they suffer from mental retardation. So, the question is, I heard the speaker talk about licensed professionals. We trust some of the most important decisions in the world to juries under a standard of beyond a reasonable doubt. And the Georgia system, allowing a broad spectrum of evidence that includes expert opinion, includes lay witnesses, includes educational history, includes work history, includes in the case of Warren Hill, his military history. All are taken into account before the fact finder can make that decision of whether or not they have proven that they suffer from mental retardation. That's point number one. We're concerned with this system as a whole if we begin to just surrender to the emotional appeal. The second thing is, we believe that as a matter of law, this cannot be limited to death penalty cases. I don't believe that a statute can be crafted, I don't believe that a statute can be written that could survive an equal protection claim that would limit this only to death penalty cases. And therefore, the statement that there are only 10 people on death row that this would apply to is, we think, incorrect. You brought up a point about reasonable doubt and the battle of the experts, and the question was, doesn't an expert who says one thing compared to an expert who says

another automatically create reasonable doubt? And the answer to that question is "no." We have, we have experts testify in criminal cases every day all over this state about a variety of things. We used to have a traveling expert who used to testify that marijuana wasn't really marijuana, it was hemp, and, and that we were prosecuting people for – we were prosecuting people for possessing rope basically. Now the credibility of an expert is just like every other witness. It can be either good or bad, and the fact finder can make that decision. So, we want to be careful to say that, that one expert versus another automatically creates reasonable doubt, when in fact there are credible experts and there are experts that are not worthy of belief; and that's a standard of proof that we deal with every day in criminal cases. The other thing that we're – and I think all of our discomfort with the term "mental retardation" today has illustrated the fact, or one of the facts that we are concerned about here too, is it's not mental retardation anymore. It is not. I think everybody accepts that. But we are concerned as prosecutors with the expansion of the definition

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to include other developmental orders such as autism or other, or other– we don't know where that expansion is going to go, and so, again, we offer caution regarding cracking open a statute that has been litigated, that has been upheld all the way to the United States Supreme Court, has been tested and tried. I guess, my best word is we offer caution and we're prepared to engage in any discussions once a piece of legislation is before us and offer substantive comments. But that would be – I don't want to be

characterized at this point that we're absolutely against any change. We're offering some cautions as a group, and I'm going to turn it over to Mr. Spahos for some numbers and details to give to the committee.

CHUCK SPAHOS: Thank you, Mr. Chairman, members of the committee. Let me just caution the committee or ask the committee to think of it in another light. There's a tendency to concentrate on the single aspect of the standard. And what I'll ask you to do is consider, just as the Georgia Supreme Court and the federal courts have, is Georgia's process--the concept and the process. And if I could, I'll quote the most recent federal ruling in the Hill case. We discussed the Georgia process as to mental retardation and the death penalty, and when evaluated as a whole, it contains substantial procedural protections. The Georgia statute allows the defendant to raise the issue of mental retardation in the guilt phase of a criminal trial and permits a jury to find the defendant guilty but mentally retarded. There's two significant procedural protections here too. The jury does not hear the criminal history, which would be allowed in the later penalty phase at the time they're making this consideration. And also, the jury is not informed that a guilty but mentally retarded verdict would preclude the death penalty. So, there's several aspects of Georgia's approach to this that are not present in other states like Florida and North Carolina that concentrate much more on a single number. Georgia law guarantees the defendant the right not to be sentenced to death except by unanimous verdict with no judicial override possible. A full and fair trial on

his mental retardation claim as part of the guilt phase to present his own experts and all other relevant evidence to cross examine and impeach the state's experts and witnesses, and to have a neutral finder of fact, the jury, decide this issue. It even moves earlier in the process in that you can question the prospective jurors based related to their basis of information and bias, or potential bias on mental retardation. All of that is present in our process, and I ask you to consider the process that has been several times appealed compared to other processes, and that we not concentrate just on that. So, we'll yield to questions. Again, our position is here. We do have a concern when we talk about changing something. We always have the concern about whether it is procedural or substantive, and whether or not it has a retroactive effect. I think we all agree—and Mr. Martin made the point earlier—when this standard was created, it had a retroactive effect. So, we are confident that a changing in the standard would have a retroactive effect because this is most likely a substantive portion of the law that would be changed.

REP RICH GOLICK: Let's just follow up on that, since that's the last statement that you made, and the question of – and this is the practical matter of the question that I asked earlier of Mr. Martin, that, I mean, let's say the standard did change, my assumption is that it would

lead to increased litigation, which is not a reason to not do something, but there is, there is a practical consideration and we have to consider the practical considerations of future litigation that would come if we did change the standard. Others convicted who did not have that opportunity under a

potentially different burden in proving retardation as termed in the statue. And I – I don't think we could limit that to the death penalty. I mean I think more conversation with counsel is inevitable on that issue. The question then becomes, alright, just from a substantive, just from a procedural standpoint, a numbers standpoint, you'd have to get into the number of individuals who are convicted who try to assert mental retardation during the guilt/innocence phase on any on any crime, let alone the death penalty, did not meet the burden of "beyond reasonable doubt."

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If we change the burden, and, well, we want to take advantage of that new burden, not to say that they would be able to necessarily go ahead and prevail, but that doesn't prevent the litigation. The question that I'd have from a pure empirical standpoint is, how many cases are we talking about where the individual did assert that during guilt/innocence, was not successful and then would come back. Now I realized there's some crystal balling that goes along with that, but we don't have a sense empirically what that, what that body of case numbers-wise would be.

CHUCK SPAHOS: I agree with you, but I'm going to ask –

[OVERLAY]

REP RICH GOLICK: - make sense on that?

CHUCK SPAHOS: You do make sense, and what I'm going to ask you to do is expand the

thing to this. We do not believe that it would be limited to just the individuals that raised it and were not successful. We believe it would also be a new remedy available to anybody that there was any evidence of potential mental retardation and that decided not to raise that issue at the time of trial because they did not believe, and the counsel did not believe they could meet the burden. Now that we've changed the burden, they want the second bite of the apple to raise issues and litigate that aspect of it that wasn't litigated before because of the burden. So, I submit that you could potentially open it up even when that was not at issue in the first trial.

REP RICH GOLICK: We need to get more—not for now, but later on—we need to get our arms around a little bit tighter on the ability to section off death penalty as opposed to every other crime. It doesn't-- it seems to me on the surface that we would not be able to do that constitutionally, but I reserve the right to be wrong, and we need to get educated better on that. On the battle of the experts, and to Mr. Porter's point before, I understand that, you know, there are experts and there are experts, but I think what we were discussing earlier really went to the assumption that if you've got a particular issue, a particular matter, I think we're really presuming the ultra bona fides of particular experts on the defense side and on the side of the state clashing, you know. There's no quackery in there. They're bona fide solid experts, solid as a rock, and they just happen to disagree on a point. If those, you know let's say two and two, those four experts go ahead and have that legitimate professional disagreement based on what they believe to be you know the truth, you know, to a

reasonable medical certainty or whatever the standard is, everybody comes from somewhere, right? They're going to have their opinions. If they even disagree on a minor point—"minor" in heavy, bold quotes—that's really what we were talking about, not the crazy you know hemp you know–

[OVERLAY]

DANNY PORTER: Right, and I use that as an extreme example, but again, utilizing my experience, just like Mr. Martin did. I've argued these cases, and in a sense, I can tell you that from my experience with these cases, a true mental retardation claim is not usually something that's a bone of contention. I mean, we don't try death penalty cases, or at least I don't try death penalty cases. Where I can look at the empirical evidence, including the test results and including the witnesses' testimony and say, "That person even potentially could be eligible for the defense." But it's a I think the point I'm making is, it doesn't just come down to a – these cases don't practically just come down to a battle of experts. They're not usually decided in that way. They're decided based on the evidence the Georgia procedure allows in, which is referred to in the statute as "the other evidence." That's where we've talked about – you've heard every witness talk about school records, job history, military history. Those are the things that I think have the compelling effect on jurors. I mean, you bring two equally qualified doctors in and one says "yes" and one says "no," I think juries kind of just wash it, to tell you the truth. I mean, I've never seen –

[OVERLAY]

REP RICH GOLICK: And that would be human nature, I mean, to look at something else.

DANNY PORTER: And I think that's where you really – the advantage to the Georgia procedure is the broad range of evidence that we currently authorize to be brought into the factfinder's decision as opposed to some of the states where it's really limited. It's one thing or another. And I think Georgia avoids that even with a reasonable doubt standard, just the way we avoid it in having a reasonable doubt standard in guilt or innocence. We have battles of experts and I think juries look at other factors.

REP RICH GOLICK: Mr. Pak.

REP B.J. PAK: Thank you, Mr. Chairman. Just to follow up on your point about the number of cases,

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wouldn't, wouldn't those cases be limited by the amount of time, that passage. Because, I mean, if you look at it, if you don't raise it, you get plain error review, right? So, if you've had – there's no record of it whatsoever, it's just going to be like you know plain error, plain error so dismissed.

DANNY PORTER: At least my opinion would be that certainly the 114 that we have on death row all would at least try and raise it. Which …But it's hard to say, and that's why we urge caution as we move down this path, there is a statute in Georgia that says that if you don't raise your raise your complaint on a habeas complaint within four years of conviction, that you've waived it. But here, we believe

that the legislature, by changing it, will have created a new substantial right, or a new substantive right which may start the clock over again. So, I think the argument could be made that if we were to go in and this were determined to be a substantive right, that the argument would be, "I didn't have that right before, I couldn't have waived it, I couldn't have let the time run out on me." And that –

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REP B.J. PAK: But couldn't we – since this is a statutory creature, couldn't we define it as procedural?

DANNY PORTER: Well But the problem is that you may run into the – you run into the same thing that they ran into in the Fleming case. There was a statutory remedy. The Supreme Court then took up the issue on the constitutionality of it, which then created a constitutional remedy where all those cases had to go back and be litigated. Even though – even though the legislature tried to limit it, once you sort of – I don't see it as a far leap for the Supreme Court to say, well, the legislature has changed the statute, therefore, we find as a matter of evolving standards of decency, the Georgia Supreme Court, to say, as a matter of evolving standards of decency that preponderance of the evidence should apply as a constitutional matter. It's not a far jump from one to the next.

REP B.J. PAK: That'd be pretty hard to do since they already blessed the higher standard. I don't see how that –

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DANNY PORTER: I mean, I can only tell you, I tried a case in – the last –

[OVERLAY]

REP B.J. PAK: But we're talking semantics. I guess we'll look at that. One question about – Mr. Martin brought an interesting point about the pretrial procedure in terms of tweaking the process. What is the Prosecuting Attorneys Council position on perhaps making that determination, having that defense available pretrial?

DANNY PORTER: I think at this point, we'd have to see what the proposal was. I mean, we're here to just provide information, and I think until we have some hard language, it's hard to –

REP B.J. PAK: Well, let's just take an example, since you're here, how about the federal system?

DANNY PORTER: The concern that I have is the same, is that it would be easier to describe mandating a hearing under the current statute to a pretrial hearing and determination as a procedural matter rather than as a substantive right. But that's what I see is one advantage to it, there is the – it requires an additional jury trial just like a special plea of insanity would require. So, there may not be a judicial economy argument because you'd essentially have to have two jury trials.

REP B.J. PAK: Um, okay. I'm just not familiar with – I guess we could talk offline about that and educate me on the process. One last thing about the –

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DANNY PORTER: But it would require you – have to have two – it would seem to me, right now, the same jury that determines guilt, determines whether or not the person is mentally retarded under the standard. The only way you could do it pretrial, unless you're just going to have judges do it, unless you just remove the jury, you'd almost have to have two juries. It'd have to almost be two separate proceedings.

REP B.J. PAK: Couldn't the prosecutor move for a in limine curing to exclude that defense if, in fact, it can't produce any evidence to show the three-pronged definition.

DANNY PORTER: We can't— we can't move – we can't move to exclude it in the penalty phase for the death penalty case, because any evidence of mitigation is admissible in the penalty phase, and that's one of the other sort of statements is that this is not only admissible in Georgia to determine guilt or innocence, but it is also admissible in the penalty phase. We can't exclude it in that. I don't believe you can, if the defendant files the appropriate notice – notices and follows the procedure or allowing examinations by the state's expert,

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I don't think you can exclude it, because it has to be weighed by the jury. I don't think you can –

REP B.J. PAK: Just in the guilt and –

DANNY PORTER: There's no threshold, there's no sort of you got – in the guilt\innocence phase, there's no threshold. Once the notice is filed,

they're pretty much allowed to put up any evidence they believe will carry their burden for them.

REP B.J. PAK: One comment and I'm done, Mr. Chairman. I think that the code revision committee, Chairman Hill and Representative Andy Welsh and myself are looking at changing the mental retardation in the code, except for the criminal code, into intellectual disabilities. You may not know, there's a great work going on to try to change that. I bring that up because you point that out. Thank you.

REP RICH GOLICK: Miss Randall.

MISS RANDALL: I was just trying to get an idea of what you all are suggesting, because the you know thought of this opening up a can of worms, I don't think that we should even consider that, because when you know better, you should do better. And some of these – a lot of our codes have not been updated you know in many, many years, and are, in fact, antiquated. But one of my questions also went to the pretrial consideration. If that was the – if we move to a pretrial situation, couldn't that be a place where the determination could make for the mental retardation – could that be done just by a judge and not by a so-called jury trial? I mean would – or even a judge and maybe a couple of panelists of professional folks that usually make these determinations? I mean, is that something that could –

CHUCK SPAHOS: I mean, procedurally, could you change that? Certainly, you could. I submit to you that when you get everybody involved in that, that deals with these cases, I think you're going to see reluctancy to take it out of any one of 12 jurors could hold that up as opposed to just the judge deciding. So,

you may be making a step backwards in the flexibility now that's present because that's what they would have to convince is one juror to buy that, and it could potentially tie the whole trial up. So, now you're going to a judge making that decision by themselves.

MISS RANDALL: Yeah, but I don't know if I feel more comfortable with a judge that will have access to research and – and professional, you know, folks to help rather than, you know, maybe a homemaker, a gardener, you know, 12 folks. You know where I'm going. I think I feel more comfortable with a judge making that, that decision alone. Let me ask you another thing. No one really mentioned autism very much, and I know that – that's a source of impaired judgment as well, that has only been a big topic of discussion the last 10, 15 years, that people actually start talking about it with a name to it. And I'd just like to kind of see what you all think about when expanding the definition or changing the definition that they're working on, what are your thoughts on that.

CHUCK SPAHOS: I want to go back to your first question as far as what are we suggesting? And I think the answer to that right now is caution. We don't have a specific proposal to give to this committee or to the legislature about what we think would be the best solution to this issue. So, that's an easy question to answer right now. We're only suggesting that the committee think about these issues as we move forward, and we're prepared to –

MISS RANDALL: I think that goes without –

CHUCK SPAHOS: Right, but as far as

what we know—and frankly I've learned this from some of the previous speakers—is that mental retardation is defined very specifically in our code with a three-pronged test that determines whether or not a person is mentally retarded. But if you move to the definition of intellectual disability, then you, broaden, by nature, you broaden the understanding of what that means to include autism. Now the folks at all about mental disabilities, they have told us and they have told you that they don't want to move in that direction. They're not looking to change the definition, but I'm not sure – I'm not sure that that can be done if once we start to use words like "intellectual disability," then to a scientific certainty, that includes other disorders.

MISS RANDALL: Right.

CHUCK SPAHOS: So,

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that's a policy decision that I think we're going to – that's going to have to be worked on as we go forward.

REP RICH GOLICK: Any further questions? Mr. Coomer?

REP CHRISTIAN COOMER: Thank you, Mr. Chairman. My question really frankly doesn't doesn't address anything that you all talked about. I want to ask you about a comment that I read in the memorandum provided by the GACDL witnesses. And I don't know if you have it in front of you. I'll just read it to you. It's Paragraph 11. It says that some Georgia district attorneys have voluntarily moved to a preponderance of evidence standard

because of their concerns about future court decisions. Can you give us any light on that? Are you aware of some district attorneys that are ignoring the statute in Georgia?

CHUCK SPAHOS: I am aware of a case that Fred Wright tried in his circuit where they agreed in that case to a lower standard.

REP CHRISTIAN COOMER: What circuit was that?

CHUCK SPAHOS: [PH] The Maugey circuit. That case was tried to a jury. The jury was charged to the lower standard, and the defendant was – did receive a death sentence in that case.

REP CHRISTIAN COOMER: So that….

CHUCK SPAHOS: If Fred was here to tell you right now, this is exactly what he said when he told this story to us lately at a meeting. He thinks that the jury does not pay much attention to that standard, and they consider whether or not the defendant is mentally retarded, and that's why he agreed in that particular case to do that, because the evidence was clear that the defendant was not mentally retarded.

REP CHRISTIAN COOMER: Thank you.

DANNY PORTER: That and that's the only instance that we're aware of, because this was pretty thoroughly discussed at our last meeting. That's the only instance that we're aware of.

REP CHRISTIAN COOMER: I was just going to say, as a legislator and an attorney who's been a prosecutor and a defense attorney, frankly it's

kind of a – it sends off sirens and bright lights and bells and whistles and everything else when I see DAs ignoring the law and creating their own standards for their cases.

CHUCK SPAHOS: Well, I mean, I'll defend that in that there's aspects of the criminal procedure that take place every day by consent of both parties, and that that's what this was, was a procedural aspect of it where both the defendant in that case and the state's attorney made the decision to—and both agreed—to doing something different.

REP CHRISTIAN COOMER: I understand that, and yesterday, I got a little bit – little bit of a thrashing by the chairman because I started talking about separation of power issues. And just as adamant as I am that we ought not invade the judiciary, I don't think the judiciary ought to make the statute as it goes.

REP RICH GOLICK: That wasn't even close to a thrashing.

REP CHRISTIAN COOMER: Thank you, Mr. Chairman.

REP RICH GOLICK: Very different subject matter. And while we're talking about the DAs, and let me offer an observation, Mr. Spahos, and I wouldn't bring this up were it not just such a glaring example of maybe how not to engage in a public discourse. I read an article where the leadership of the DA's Association—I'm going to go ahead and direct this to you, not to Mr. Porter or Mr. Poston, but directly to you as their, one of their representatives, although I understand you did not make this comment, that the district attorneys don't believe that

you change a law. The quote is, the district attorneys don't believe that you change a law for no reason, and in this case, the law appears to be working. Where has a jury done a disservice, why are we putting all our eggs in the defendant's basket and forgetting there's a victim? My sense is that the leader of the DA's Association who made that comment, current leader of the DA's Association, maybe didn't understand that this is an informational hearing, and that rather breathless, uninformed and frankly misleading comment really didn't do anything but go ahead and undermine the credibility of the organization. I would ask you to remind that individual—not Mr. Porter, because Mr. Porter, you know, has been around the block a few hundred times and understands the work that we've done in this committee, including the Crime Victim's Restitution Act in 2005, and the Crime Victim's Bill of Rights in 2009, I think it was. So, we're not putting any eggs in any basket. We're gathering information. That's our charge. That's what we're supposed to do, and then act accordingly or not. So, my sense is that if the question had been posed to Mr. Porter, it would have been a much more measured productive response

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rather than the one that we have here.

DANNY PORTER: That's not always a guarantee –

[OVERLAY] [LAUGHTER]

REP RICH GOLICK: There are no guarantees, but I'll go ahead, and I'll say it's more likely than not. How about that? More likely than not, and I say that with deep respect. But you know I think

it's important for any organization, whether it's on the advocacy side or on the opposition side, and that's where we are in this particular issue, to engage in a productive, positive dialogue that's based on facts rather than making misleading statements like that. You need not respond if you don't want to. You're more than welcome to, but it's just sort of some constructive coaching for the future.

CHUCK SPAHOS: Certainly, Mr. Chairman, you know me well enough to know now I'm not going to miss an opportunity to respond. As a former elected prosecutor, I have unfortunately, in the past, been posed certain questions by members of the press, answered that, and then it was quoted in such a light that maybe it was over-breadth to what I was trying to accomplish in the statement, and I submit that that may very well be the circumstance of Mr. Wright's comments. That being said, I think we've displayed here today more the approach that you, that you suggest appropriate, and that we agree is appropriate.

REP RICH GOLICK: Thank you. I appreciate it. I don't want to beat a dead horse about that by any stretch, but you know this is a serious matter, and I think it's important for individuals in leadership position, especially among those within the DA's Association to make their public comments based on the facts; and maybe before you know – before you know drawing and firing, maybe pick up a phone and make sure that they've got their facts straight. That's always a good personal time out for all of us in the future. So, with that, is there anyone else who has not been heard who would like to be heard on this issue? I think in the very beginning, it

was my hope that I expressed that we be more educated than we were at 9:30 this morning, and I think we are on this issue, and I think we've got a lot to think about. I appreciate the time and the energy and the passion and the constructive comments that have come from both sides of the issue. And we'll take what we've learned, trying to learn some more. We'll be inevitably following up with some follow up questions offline to make sure we've got our head around the facts, and then to consider next steps in light of all the information that we've gotten. And I would actively encourage any interested party or constituency if they wanted, to go ahead and submit additional information for the entire committee's consideration. Obviously, everybody's not here today. To please not hesitate to do so. We'd rather have more information rather than less. So, with that, we're adjourned. Thank you very much.

I, Anders Nelson, hereby certify that the document "Transcript of Hearing Before the Judiciary – Non-Civil Committee" is, to the best of my knowledge and belief, a true and accurate transcription from English to English.

Anders Nelson

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Anders Nelson
Project Manager

December 22, 2021