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October 25, 2005

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State v. Porfirio Jimenez
Docket No. 58,521

Your Honors:

Please accept this letter brief on behalf of the Attorney General, appearing as amicus curiae in this matter. We urge this Court to reverse the Appellate Division's ruling regarding the process for litigating claims of mental retardation in capital cases. The framework that court held to be required under our State Constitution is totally unsupported.

The fact of the matter is that there is broad latitude within which to craft a constitutionally sound process for adjudicating mental retardation claims in the wake of Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002). What shape that framework should take is a policy-level decision that must be left open for the Legislature. However, since there is, as of

yet, no definitive legislative answer, this Court must address the underlying issues on an interim basis, as part of its supervisory power over the criminal justice system. State v. J.M., 182 N.J. 402 (2005); State v. Cook, 179 N.J. 533 (2004). We recommend that the Court exercise that authority in a manner most consistent with what legislative guidance currently exists. That would call for placing the burden of establishing mental retardation on the defense in a pre-trial hearing, with the burden being a preponderance of the evidence. Indeed, that is what the Code of Criminal Justice suggests should be done.

Only last year, this Court had its first occasion to examine the litigation of mental retardation claims in capital cases since Atkins was decided. In State v. Harris III, 181 N.J. 391 (2004), cert. denied, ___ U.S. ___, 125 S.Ct. 2973 (2005), you specifically noted the many options open to the Legislature on implementing Atkins: "Except for the constitutional requirements recognized in this opinion, we express no views in respect of the various proposed methodologies [in pending legislation]; indeed there would appear to be a breadth of legislative prerogative permitted by Atkins." Id. at 522 n. 11 (emphasis added).

That observation came in view of Atkins' express grant of wide discretion to the states on how to procedurally manage the

issue: "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in Ford v. Wainwright, with regard to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.'" 536 U.S. at 317, 122 S.Ct. at 2250. Indeed, in Ford v. Wainwright itself, the Court noted: "We do not suggest that only a full trial on the issue of sanity will suffice to protect the federal interests. . . It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. . . Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided." 477 U.S. 399, 416-17, 106 S.Ct. 2595, 2605 (1986).

We take these observations from this Court and the Supreme Court at face value. Neither sought to artificially abridge the options available to those constitutionally authorized to make the sort of policy-level decisions that assigning burdens and devising procedures necessarily entails. But if the Appellate Division is right, and the heretofore unheard-of "trifurcated"

hearings must be held, at which the State must disprove mental retardation beyond a reasonable doubt at a new, separate hearing dedicated exclusively to that issue (in which the jurors may be non-unanimous, and one juror could thus decide the issue), then this Court was wrong. According to the panel, there is not, and never was, any breadth or flexibility at all as our Constitution somehow requires the most conservative process imaginable.

As the State discusses extensively in its brief to this Court, the Appellate Division is flatly wrong. Neither Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), nor Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), nor Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), have anything to do with this issue under the federal Constitution, much less, of all things, the State Constitution.

That is because, as every other court around the nation has unequivocally found, mental retardation is not an "element" of capital murder for constitutional purposes for the simple reason that it can only result in a decrease in sentence, not an increase. The latter is all that the Apprendi line of cases was concerned with. See In Re Johnson, 334 F.3d 403, 405 (5th Cir. 2003) ("the absence of mental retardation is not an element of the [capital] sentence any more than sanity is an element of an

offense"); Arbalaez v. State, 898 So.2d 25, 43 (Fla. 2005); Head v. Hill, 277 Ga. 255, 258-59, 587 S.E.2d 613, 619-20 (2003); Pruitt v. State, 834 N.E.2d 90 (Ind. 2005); Bowling v. Commonwealth, 163 S.W.3d 361, 380-82 (Ky. 2005) ("No court that has addressed the issue . . . has held that there is a constitutional right to a jury trial on this issue;" and "[e]very state statute providing a mental retardation exemption from the death penalty places the burden on the defendant to prove that he is mentally retarded, as has every court that has addressed the issue") (emphasis added); State v. Williams, 831 So.2d 835, 860 (La. 2002) (the "Supreme Court would unquestionably look askance" at the notion that in Atkins it created the equivalent of an element of a greater offense); Russell v. State, 849 So.2d 95, 146-48 (Miss. 2003); State v. Flores, 93 P.3d 1264, 1269-71 (N.M. 2004); People v. Smith, 193 Misc.2d 462, 463, 751 N.Y.S.2d 356, 357 (S.Ct. 2002) (rejecting defendant's claim as "tantamount to requiring the prosecution to prove beyond a reasonable doubt the absence of any factor which would render the defendant ineligible for the death penalty. Such is not constitutionally mandated") (emphasis in original); State v. Lott, 97 Ohio St.3d 303, 304-07, 779 N.E.2d 1011, 1014-16 (2002); State v. Were, 2005 Ohio 376 (Ct. App. 2005) (Blakely is not implicated; to require State to

disprove mental retardation beyond reasonable doubt "would be an almost impossible burden. It would be especially difficult when a defendant . . . refused to take any tests or to speak with any professional sent to evaluate him"); Murphy v. State, 54 P.3d 556, 567-69 (Okla. Ct. App. 2002); Franklin v. Maynard, 356 S.C. 276, 279-80, 588 S.E.2d 604, 606 (2003); Commonwealth v. Mitchell, 576 Pa. 258, 274 n.8, 839 A.2d 202, 211 n.8 (2003); Howell v. State, 151 S.W.3d 450, 465-66 (Tenn. 2004), cert. denied, ___ U.S. ___, 125 S.Ct. 1855 (2005); Ex Parte Briseno, 135 S.W.3d 1, 9-11 (Tex. Ct. Crim. App. 2004).

Indeed, if there were any question as to the inapplicability of Apprendi, Ring and Blakely here, the Supreme Court recently put it to rest. In Schriro v. Smith, ___ U.S. ___, 2005 U.S. Lexis 7652 (Oct. 17, 2005), the Court summarily vacated a Ninth Circuit ruling that required the state court to determine the Atkins issue "by jury trial unless the right to a jury is waived by the parties." The Supreme Court unanimously held:

> The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim. Atkins stated in clear terms that "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986); modifications in original).

> States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition. [Ibid.][1]

No mention of Apprendi or Blakely is made in Schriro, because they do not apply. In that regard, it is noteworthy that the Court added that such post-Atkins provisions might be challenged "in their application." Such an Apprendi or Blakely challenge, of course, to this sort of proceeding would be, like in the instant case, a challenge to a procedure on its face, not as applied, and the Supreme Court reversed the Ninth Circuit's finding of facial invalidity.

In that setting, the Appellate Division's reliance on Art. 1, paragraph 9 of the State Constitution as the basis for its holding can only be described as curious. Its decree of a state

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[1] Arizona's statutory procedure calls for a pre-trial hearing (after complete discovery on the issue is exchanged), at which the defense bears the burden of proving mental retardation by clear and convincing evidence and at which the trial judge sits as finder of fact. A.R.S. §13-703.02(G); State v. Canez, 205 Ariz. 620, 626, 74 P.3d 932, 938 (2003), cert. denied, 540 U.S. 1141, 124 S.Ct. 1043 (2004). As the State notes, the petition for certiorari in Schriro specifically challenged the application of the Sixth Amendment to Atkins. (Sb15 n.11).

constitutional right to have the State disprove mental retardation beyond a reasonable doubt at a jury trial relies entirely on the federal constitutional rulings noted above, which have been uniformly held (including now by the United States Supreme Court itself) not to apply. But the panel makes no pretense about doing anything but that. After observing that the answer as to what procedures are required by the United States Constitution has been left open to the states by Atkins, and that the issue may be "as wide open as it appears to be," 380 N.J. Super. at 25, the panel takes this astonishing leap: "we regard the reach of New Jersey's constitution as sufficient to embrace the essential principles of Apprendi, Ring, Blakely, and Booker and to require their application in this Atkins context." 380 N.J. Super. at 44.

How our State Constitution applies to give a more expansive right than that afforded under the United States Constitution in this context is never mentioned. That is because there simply is no principled basis for a state constitutional ruling like the one reached below. The panel completely overlooks the fact that "caution is required" in extending state constitutional protections beyond the federal counterpart. Planned Parenthood of Cent. New Jersey v. Farmer, 165 N.J. 609, 620 (2000); State v.

Hunt, 91 N.J. 338, 344-45 (1982). Our courts "endeavor to harmonize our interpretation of the State Constitution with federal law." State v. Tucker, 137 N.J. 259, 291 (1994). This presumption of non-divergence exists for good reason: "Divergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same." State v. Hunt, 91 N.J. at 345. Accordingly, these factors should be examined in deciding if the state Constitution provides for a result different from the federal Constitution: (1) textual language, (2) legislative history, (3) pre-existing state law, (4) structural difference between the federal and state constitutions, (5) matters of particular state interest, (6) state traditions, and (7) public attitudes. Joye v. Hunterdon Central Bd. of Educ., 176 N.J. 568, 607-08 (2003); State v. Stanton, 176 N.J. 75, 89-90 (2003); State v. Muhammad, 145 N.J. 23, 41 (1996); State v. Hunt, 91 N.J. at 364-67 (Handler, J., concurring).

None of these factors justify the entirely new process envisioned, and the panel makes no attempt to show otherwise. But if the panel below is correct, it even follows that had New Jersey enacted pre-Atkins legislation prohibiting the execution

of mentally retarded defendants, and that legislation obliged a defendant to show mental retardation by a preponderance of the evidence before a trial judge, that law would somehow be invalid under our State Constitution, but solely by virtue of Apprendi, Ring, and Blakely. That makes no sense. It smacks of the sort of ruling that Justice Handler warned of in his seminal Hunt concurrence, in which he saw "a danger . . . in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere." Id. at 361. Indeed, in all of this Court's recent rulings concerning the right to jury trial, it has spoken exclusively in terms of the Sixth Amendment, never once the state analog. See State v. Natale II, 184 N.J. 458 (2005); State v. Abdullah, 184 N.J. 497 (2005); State v. Franklin, 184 N.J. 516 (2005); State v. Stanton, 176 N.J. 75 (2003).[2] In Stanton, the Court relied on the Hunt criteria to reject the notion that the State

[2] Interestingly, a review of the briefs filed by the defendants in Natale II, Franklin, and Abdullah in this Court reveals that they never even invoked our State Constitution, but instead framed their Blakely and Apprendi arguments solely in federal constitutional terms, relying entirely on the Sixth Amendment. No doubt this reflects the fact that Apprendi held that our state precedent had not been sufficiently protective of defendant's Sixth Amendment right. That ruling is irreconcilable with the notion that the State Constitution confers greater protection than the federal.

Constitution provided a greater right to jury trial than the federal. Id. at 89-90.

In any event, and because Apprendi and Blakely do not apply (either as federal or state constitutional mandates), there is no need to address the constitutionality of the process for adjudicating mental retardation claims at this time. Placing burdens on defendants to affirmatively prove something that is non-elemental is plainly constitutional so long as it does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Medina v. California, 505 U.S. 437, 446, 112 S.Ct. 2572, 2577 (1992) (upholding placing burden on defense to prove incompetence by preponderance of evidence); Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977) (upholding placing burden on defense to prove affirmative defense of extreme emotional disturbance). Several examples of this are found in the Code. See N.J.S.A. 2C:4-1 (requiring defense to prove insanity by preponderance of evidence); N.J.S.A. 2C:5-1d (requiring defendants claiming renunciation to prove it by preponderance of evidence); N.J.S.A. 2C:2-8d (requiring defendants to prove involuntary intoxication by clear and convincing evidence); N.J.S.A. 2C:2-4c (requiring defendants to prove ignorance or mistake of law by clear and

convincing evidence).

Here, therefore, there is nothing rooted in tradition or history that requires any particular process in this context. When that is taken in tandem with the inapplicability of Apprendi and Blakely, it follows that there is no need to immediately grasp at the Constitution as a basis for a ruling. Indeed, that would be exactly the wrong approach. This Court has often stated that "'a court should not reach and determine a constitutional issue unless absolutely imperative in the disposition of [the] litigation.'" Bell v. Stafford Twp., 110 N.J. 384, 391 (1988) (quoting Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971)); citing Ahto v. Weaver, 39 N.J. 418, 428 (1963).

That rule of restraint is especially pertinent here. To freeze out the Legislature by forever setting in the stone of a constitutional mandate a particular process, while several bills are actually pending on this very issue (and which all envision a process that could not be more different from the one imposed below), seems particularly ill advised. That is not the sort of "comity" to a coordinate branch this Court has emphasized, State v. Loftin, 157 N.J. 253, 285 (1999), especially when the Court noted only last year the wide range of options available to the Legislature.

We respectfully submit that a more suitable course is for this Court to exercise its supervisory power over the criminal justice system as an interim measure. Other courts from around the country have done so in this area. See, e.g., Murphy v. State, 54 P.3d at 557 ("the task falls upon this Court to develop standards to guide those affected [by Atkins] until the other branches of government can reach a meeting of the minds on this issue"); State v. Williams, 831 So.2d at 858 (providing instructions to trial courts on how to treat the Atkins issue procedurally "[i]n the interim between this opinion and legislative action on the subject"); Franklin v. Maynard, 356 S.C. at 278 n.1, 588 S.E.2d at 605 n.1 (establishing procedures for litigating Atkins claims while "[t]he legislature is presently considering a Bill defining mental retardation and establishing procedures for implementing the Atkins decision").[3]

Until the Legislature takes definitive action, there are several issues this Court must decide. First is the definition

[3] It is interesting in that regard that in Atkins, the Supreme Court noted the absence of legislative action in New Jersey on this issue and ventured a reason why: "Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States." 536 U.S. at 316, 122 S.Ct. at 2249. Surely, if this Court crafts interim procedures, its doing so might provide impetus for legislative action.

of what exactly constitutes "mental retardation." As the panel below notes, the parties do not dispute the propriety of the definition provided by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") (4th Ed. 2000). That requires evidence of significantly subaverage general intellectual functioning (Criterion A), accompanied by significant limitations in adaptive functioning in at least two enumerated skill areas (Criterion B), and onset before the age of eighteen years (Criterion C). 380 N.J. Super. at 12-13. The Attorney General agrees that that definition is appropriate. See Atkins, 536 U.S. at 317 n. 22, 122 S.Ct. at 2250 n.22; State v. Harris III, 181 N.J. at 528-30.

The next issue for this Court's determination is assigning the burden of proving mental retardation, and determining what that burden is. In exercising its supervisory power, this Court must attempt to adhere to the will of the Legislature as closely as possible. See, e.g., State v. Natale II, 184 N.J. at 485-89 (in remedying constitutional defect in Code's sentencing provisions, Court attempts to fashion remedy most compatible with legislative will). Thus, the analysis must be guided by N.J.S.A. 2C:1-13d. That section provides:

> When the application of the code depends upon the finding of a fact which is not an element

> of an offense, unless the code otherwise provides:
>
> (1) The burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and
>
> (2) The fact must be proved to the satisfaction of the court or jury, as the case may be. [Ibid. (emphasis added)].[4]

The 1971 Commentary to this provision makes clear that the standard of proof suggested by the language "to the satisfaction of the court or jury" means "at least proof by a preponderance of the evidence but beyond that the issue is left to the courts." State v. XYZ Corp., 119 N.J. 416, 423 (1990). Thus, requiring a defendant to prove mental retardation by a preponderance of the evidence clearly appears to be most in line with the intent of

[4] N.J.S.A. 2C:1-13a does not apply as mental retardation is not an "element of the offense" as defined in N.J.S.A. 2C:1-14h (not conduct forbidden in the crime's definition, nor related to culpability, nor negativing an "excuse" or "justification," as defined in Chapters 2, 3 and 4 of the Code). Nor does N.J.S.A. 2C:1-13b(1) apply, by which the State must disprove "affirmative defenses" beyond a reasonable doubt once evidence of the defense is introduced. That is because mental retardation is not an affirmative defense that "arises under a section of the code" or "a statute other than the code" which so provides. N.J.S.A. 2C:1-13c(1) and (2). Rather, mental retardation is a status that shields a defendant from the death penalty by virtue of the Eighth Amendment, a source external to the Code.

the Legislature as expressed to date.[5]

Indeed, beyond this provision, other examples of legislative will further support the notion that the Court would be acting most in accord with the intent of the Legislature if it requires the defense to bear the burden of proof on this issue. As noted, the Code puts the burden on the defense to prove insanity by a preponderance of the evidence. N.J.S.A. 2C:4-1.[6]

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[5] It is noteworthy that while the three bills designed to implement Atkins now pending in the Legislature differ in certain respects, they are identical in that all three place the burden on the defense to prove mental retardation by a preponderance of the evidence, and all call on that finding to be made by the trial court, not the jury. See S-147 (proposed subsections 2C:11-3g(B)(1) and (2) provide that a death sentence will not be imposed "if the court finds, by a preponderance of the evidence that the defendant is a person with mental retardation"); A-1797 (proposed subsection 2C:11-3g(B)(2) provides for a non-jury hearing at which "the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded"); A-4027 (proposed subsections 2C:11-3g(B)(1) and (2) provide for a non-jury hearing concerning mental retardation, and that a death sentence will not be imposed "if the court finds by a preponderance of the evidence that the defendant is a person with mental retardation"). (See AGa5-6; AGa11; AGa16-17).

[6] It also did the same with respect to claims of diminished capacity. See State v. Oglesby, 122 N.J. 522, 529 (1991). Despite the fact that that provision was declared invalid, see Humanik v. Beyer, 871 F.2d 432 (3d Cir.), cert. denied, 493 U.S. 812, 110 S.Ct. 57 (1989), the fact remains that it stands as a statement of legislative intent. Its invalidity has nothing to do with the propriety of placing the burden of proof on defendants in this context since the issue of whether mental retardation exists so as to bar capital punishment has no application to determining mens rea regarding guilt for the murder itself. But it is ironic that the panel below found

The fact that the Code suggests (and the three pending bills would require) that the defense bear the burden comports with common sense as well, thus explaining why every other state similarly places the burden on the defense. Mental retardation involves an intensive examination of the subject's entire past. That entails a close review of records spanning his or her entire life, whether those records were generated by public or private schools, child study teams, special education facilities, physicians, hospitals, correctional facilities, or various other institutions, often from various locales, other states or, as in this case, other countries, in another language, with completely different educational, medical and psychiatric standards. What is more, records of this type are generally unavailable and protected from outside examination absent a court order or consent of the subject. Therefore, they will be readily available to the defense, but not to the State.

In addition, as the panel below acknowledged, litigation of this claim will frequently focus on evidence of the defendant's adaptive skills, which, like the element concerning general intellectual functioning, will also require a life-spanning

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mental retardation claims more akin to diminished capacity than to insanity, when the Legislature intended that the defense bear the burden of proof on both.

examination of how he or she is, and has been, able to live independently and manage life's basic requirements. As the panel observed, it is "because the difficulty of applying the DSM-IV's adaptive skills factors will in all likelihood lead to divergent views of a defendant's mental capacity" that resolving mental retardation claims will rarely be done with any ease. 380 N.J. Super. at 33.

The Attorney General agrees. And it is on that element of the definition, perhaps even more than intellectual functioning, that cooperation from the defendant, his friends, acquaintances and family (in short, anyone who has known him) will be most essential, to say nothing of school and institutional officials. Obviously, close acquaintances to a capital defendant who have the most relevant knowledge will not be predisposed to be forthcoming to the prosecution, certainly not to the same degree that they will to defense investigators, especially when advised of the consequences of a finding of mental retardation. Therefore, placing the burden on the defendant will best serve the interests of justice as it will increase the reliability of the proceedings and minimize the danger that claims of mental retardation will serve to turn capital litigation into a game.

All this brings to mind Justice O'Connor's observations from

her concurring opinion in Medina v. California. There, she noted the various policy considerations that supported placement of the burden of proof on defendants in demonstrating lack of competence to proceed to trial. They are equally apt here:

> After balancing the equities in this case, I agree with the Court that the burden of proof may constitutionally rest on the defendant. As the dissent points out, the competency determination is based largely on the testimony of psychiatrists. The main concern of the prosecution, of course, is that a defendant will feign incompetence in order to avoid trial. If the burden of proving incompetence rests on the government, a defendant will have less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state. States may therefore decide that a more complete picture of a defendant's competence will be obtained if the defense has the incentive to produce all the evidence in its possession. [Medina v. California, 505 U.S. at 455, 112 S.Ct. at 2582-83 (O'Connor, J., concurring)].

The same dangers of easy fabrication of mental retardation claims were likewise noted in Justice Scalia's dissent in Atkins. They readily serve to explain why the burden need be (and always is, in every jurisdiction) on the defendant making this claim:

> This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game.

> One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association . . . to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), Jones v. United States, 463 U.S. 354, 370 77 L.Ed.2d 694, 103 S.Ct. 3043 and n.20 (1983), the capital defendant who feigns mental retardation risks nothing at all. The mere pendency of the present case has brought us petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded. [Atkins v. Virginia, supra, 536 U.S. at 353-54, 122 S.Ct. at 2267-68 (Scalia, J., dissenting)].

All that is especially true in light of the relatively low threshold a defendant must meet to trigger a hearing dedicated to the issue. As this Court held in Harris III, a defendant need not even make a prima facie showing to warrant a psychological examination and hearing. 181 N.J. at 528. All he need do is "make some showing that he had mental retardation." Id. at 527. One can readily imagine the ease of doing that, what with the assistance of a retained psychiatric expert and social historian to comb through the defendant's records, and interview all who might have pertinent information and will be anxious to assist defendant in avoiding the death penalty. Moreover, any capital defendant will, of course, be highly motivated to malinger on any

post-crime IQ test, unlike the typical IQ test subject, whose every desire is to do well. United States v. Beckford, 962 F.Supp. 748, 762 n.13 (E.D. Va. 1997). Nevertheless, that test may be the only one produced by the defendant and would likely be deemed sufficient to at least meet the production burden as to the intellectual-function element so as to trigger a plenary hearing.

If, on the other hand, the State had the burden to disprove mental retardation (at any level, much less beyond a reasonable doubt) after that low production burden is met, we can readily see the difficulty of satisfying it, since those so willing to help the defense will have every incentive to shut down and refuse to cooperate with State investigators. Indeed, one can well imagine the relative difficulty for the State in extracting similarly relevant information from family, friends and acquaintances who will know that speaking to the prosecution and giving information that might undermine a mental retardation claim could ultimately pave the way to a death sentence for their son, their brother, their friend, their neighbor, their student, or their patient.

In short, and as Justice O'Connor observed in Medina, the states (and New Jersey is no exception) have every interest in

obtaining as complete a picture of a defendant's claim of mental retardation as is possible, and the most logical way to ensure that complete picture is obtained is to place the burden of proof on the defense. Just as every state has done, as every pending bill does, as N.J.S.A. 2C:1-13d does. That burden should be a preponderance of the evidence.[7]

With all that said, the Attorney General further proposes that such a hearing be convened before trial, with the trial judge acting as finder of fact. Doing so will resolve the Eighth Amendment issue as early into the process as possible, resolving a question the defense will presumably be aware of early into its investigation, and thereby saving the courts and parties much in terms of anxiety and resources, possibly avoiding the protracted mitigation investigation that comes as part of the defense's pre-trial responsibility, possibly avoiding the need to death qualify the jury, possibly obviating the need for the defense to continue with a two-attorney defense team, and also affording the

[7] A higher burden would raise constitutional issues. See Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373 (1996) (holding that Oklahoma's requirement that a defendant prove his incompetency by clear and convincing evidence violates due process). See also Pruitt v. State, 834 N.E.2d 90 (Ind. 2005) (applying Cooper to invalidate that portion of Indiana statute placing burden of proving mental retardation on capital defendant by "clear and convincing evidence," and lowering burden to preponderance of evidence).

prosecution the option of dismissing aggravating factors if it determines the mental retardation claim is credible and warrants that action. Again, all pending bills envision this as the process, and it is permitted under N.J.S.A. 2C:1-13d(2).[8]

Of course, even if the trial judge finds that the defense has not satisfied its burden of proving mental retardation at the hearing, the defense would still be entitled to present all evidence pertaining to the claim to the penalty phase jury as mitigating evidence, if the case proceeds that far. N.J.S.A. 2C:11-3c(5)(a), (d) or (h).

With that process established, the Attorney General also deems it vital that this Court also address and provide guidance on more pragmatic considerations that, in the end, are crucial to a rational process for litigating these claims. Because of the significant scope of the investigation that must be undertaken vis-a-vis mental retardation claims, the Court must set forth time frames within which notice must be given by the defense as to its intent to pursue such a claim, followed by a timetable for discovery. We propose that such notice of intent be given within

[8] Most states make this their process for such claims, either by statute or judicial decision. For a comprehensive catalogue of all such authorities and their varying treatment of the issue, see Bowling v. Commonwealth, 163 S.W.3d 361, 379-80 nn.23-26 (Ky. 2005).

90 days of the return of a capital indictment.

Furthermore, because such an investigation will necessarily focus on aspects of the defendant's past that are contained in records often shielded from outside inspection, this Court must provide uniform direction to trial courts addressing that reality. We propose that the Court direct that at the point when the defense gives notice of its intent to pursue such a claim, trial courts enter orders directing the defendant to submit to examination by the State's expert and to waive any privileges or confidentiality protections afforded by state or federal law regarding any records that may be relevant to the issue of mental retardation, including all medical, psychiatric, psychological, sociological, institutional and educational records and examinations. All such records and examinations must be made available to the State and must be admissible in court in any proceeding in which mental retardation is an issue.

That is because a trial is, at bottom, a search for truth. "Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure." In re Richardson, 31 N.J. 391, 401 (1960); In re Selser, 15 N.J. 391, 401 (1954).

To conclude, this Court must reverse the opinion below since

there is broad latitude within which to craft a constitutionally sound process for adjudicating mental retardation claims in the wake of Atkins v. Virginia. What shape that framework should take must be left open for the Legislature. As an interim measure, this Court should exercise its supervisory authority and follow the will of the Legislature as expressed to date by placing the burden of proof on the defense to prove mental retardation by a preponderance of the evidence at a pre-trial hearing. Timing requirements should also be put into effect for the filing of notice of an intent to pursue such a claim, as well as for discovery and orders waiving confidentiality provisions concerning relevant records.

Respectfully submitted,

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AMICUS CURIAE

By:_____
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DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE BRIEF

OCTOBER 25, 2005