
FEDERAL HABEAS CORPUS — DEATH PENALTY — ELEVENTH CIRCUIT REJECTS CHALLENGE TO GEORGIA’S “BEYOND A REASONABLE DOUBT” STANDARD FOR DEFENDANTS’ MENTAL RETARDATION CLAIMS. — *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc).

In 2002, the Supreme Court held in *Atkins v. Virginia*¹ that a “national consensus ha[d] developed against” executing the mentally retarded² and that continuing the practice would violate the Eighth Amendment.³ Recognizing the potential disagreement among jurisdictions as to what would constitute mental retardation,⁴ the Court tasked the states with determining how best to implement the constitutional imperative not to execute the mentally retarded.⁵

Georgia currently imposes the toughest burden of proof on defendants⁶: they must prove mental retardation beyond a reasonable doubt.⁷ Recently, in *Hill v. Humphrey*,⁸ the Eleventh Circuit held that the Georgia standard was not an unreasonable application of the federal law established in *Atkins*.⁹ The holding illustrates a recent trend among federal courts: interpreting the Antiterrorism and Effective Death Penalty Act of 1996¹⁰ (AEDPA) as imposing a practically insurmountable burden on criminal defendants seeking habeas relief.¹¹ This hyper-deferential posture poses a particularly significant barrier to potentially mentally retarded defendants, like the one in *Humphrey*, who stand to lose the constitutional rights that *Atkins* was meant to protect.

In 1990, while incarcerated for murder, Warren Lee Hill killed a fellow inmate, a crime for which he was sentenced to death.¹² After

¹ 536 U.S. 304 (2002).

² *Id.* at 316.

³ *Id.* at 321 (concluding that such a punishment was unconstitutionally “excessive”).

⁴ This comment recognizes that the term “mentally retarded” is arguably stigmatizing. Indeed, this comment applauds recent federal legislation that replaces the phrase. See Rosa’s Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010). However, given that the Supreme Court, lower courts, and much of the literature continue to use this phrase, this comment will do so as well.

⁵ See *Atkins*, 536 U.S. at 317.

⁶ See Brief of Amici Curiae on the Constitutionality of Requiring a Defendant Facing the Death Penalty to Prove Mental Retardation Beyond a Reasonable Doubt at 8–9 & n.5, *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003) (No. S03A0559), 2003 WL 23278509, at *8–9 & n.5.

⁷ GA. CODE ANN. § 17-7-131(c)(3) (2011).

⁸ 662 F.3d 1335 (11th Cir. 2011) (en banc).

⁹ *Id.* at 1338.

¹⁰ Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

¹¹ See, e.g., David Rubenstein, Comment, *AEDPA’s Ratchet: Invoking the Miranda Right to Counsel After the Antiterrorism and Effective Death Penalty Act*, 86 WASH. L. REV. 905, 925–26 (2011) (detailing the Roberts Court’s recent strengthening of the already-strict AEDPA standard).

¹² *Humphrey*, 662 F.3d at 1340.

losing an initial appeal, in which he did not raise mental retardation claims,¹³ Hill filed a state habeas petition that included such assertions.¹⁴ The state habeas court found that Hill had not proved, beyond a reasonable doubt, that he met the state's mental retardation criteria and thus denied his petition.¹⁵

After *Atkins*, Hill asked the state habeas court to reconsider his case. The court granted the motion and decided that his mental retardation claim should be evaluated under a preponderance of the evidence standard; applying that standard, the court found Hill mentally retarded.¹⁶ The state appealed, and the Georgia Supreme Court reversed, finding that "Georgia's reasonable doubt standard was constitutionally acceptable for mental retardation claims."¹⁷ The court noted that such a procedural hurdle reflected a carefully calibrated balance determined by the state assembly, and it was inclined to defer to the legislature's judgment.¹⁸ In response, Hill filed a federal habeas petition, claiming that the Georgia burden of proof ran afoul of *Atkins*'s Eighth Amendment prohibition on executing the mentally retarded.¹⁹ After the federal district court denied relief, a divided Eleventh Circuit panel found in Hill's favor, deciding that Georgia's standard of review eviscerated *Atkins*.²⁰ Months later, a majority of the court voted to vacate the panel opinion and rehear the case en banc.²¹

The en banc Eleventh Circuit affirmed the holding of the district court. Writing for the majority, Judge Hull²² focused on the stringency of the standard of review for AEDPA claims. According to the relevant provisions of the Act, habeas relief should be granted *only* if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."²³ Judge Hull listed ten decisions since 2010 where the Supreme Court had reversed appellate court de-

¹³ *Id.* For the arguments raised on this initial appeal, see *Hill v. State*, 427 S.E.2d 770, 778–79 (Ga. 1993).

¹⁴ Hill's initial habeas petition did not include a mental retardation claim, but several years after filing, he amended the petition to include the claim. See *Humphrey*, 662 F.3d at 1340.

¹⁵ See *id.* at 1341.

¹⁶ See *id.* at 1341–42.

¹⁷ *Id.* at 1342; see also *Head v. Hill*, 587 S.E.2d 613, 619–21 (Ga. 2003).

¹⁸ See *Head*, 587 S.E.2d at 622.

¹⁹ See *Humphrey*, 662 F.3d at 1342.

²⁰ See *Hill v. Schofield*, 608 F.3d 1272, 1283 (11th Cir. 2010) ("[T]he conclusion reached by the Georgia Supreme Court — that the Eighth Amendment protects only those capital offenders whose retardation is 'significant enough' to be proven beyond a reasonable doubt — eviscerates the command of the Eighth Amendment that the mentally retarded shall not be executed . . .").

²¹ *Hill v. Schofield*, 625 F.3d 1313 (11th Cir. 2010).

²² Chief Judge Dubina and Judges Edmondson, Carnes, Pryor, and Black joined Judge Hull.

²³ 28 U.S.C. § 2254(d)(1) (2006).

cisions for being insufficiently deferential to state court determinations.²⁴ She stressed that “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.”²⁵ Synthesizing the Supreme Court’s AEDPA decisions, Judge Hull said that, to prevail, Hill needed to show: (1) that a Supreme Court *holding* clearly established a federal law and (2) that “no fairminded jurist” could have reached the Georgia Supreme Court’s decision.²⁶ In reviewing Hill’s claim, Judge Hull concluded that “*Atkins* simply did not consider or reach the burden of proof issue,”²⁷ and that a reasonable judge could agree with the state court holding.²⁸ She also compared mental retardation to insanity, noting that the Supreme Court deferred to states’ judgments regarding the burden of proof for such matters.²⁹

Judge Hull then addressed the claim that the burden of proof “effectively undermines the *Eighth Amendment substantive right* of the mentally retarded not to be executed.”³⁰ Noting that no Supreme Court decision has ever held that a burden of proof can unconstitutionally limit an Eighth Amendment right, she concluded, “because *Atkins* never said, or even hinted at (much less held)” what standard of proof was required, its holding could not possibly articulate the clearly established law needed for Hill’s petition to succeed.³¹ When confronted with the argument that executing some mentally retarded people inheres in requiring proof of mental retardation beyond a reasonable doubt, Judge Hull replied that all burdens of proof have embedded some assumption of error, and “[t]here is no end to the position that Hill espouses” if he demands eliminating all risk.³² She then dismissed many of the cases on which the dissents relied, especially noting that those cases discussing procedural due process should not apply, for Hill’s case focused only on his *substantive* Eighth Amendment rights.³³ Judge Tjoflat specially concurred in the judgment, concluding on nar-

²⁴ See *Humphrey*, 662 F.3d at 1343.

²⁵ *Id.* at 1345 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011)).

²⁶ See *id.* at 1347 (quoting *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011)).

²⁷ *Id.* at 1348.

²⁸ See *id.* at 1349.

²⁹ See *id.* at 1349–50 (discussing *Leland v. Oregon*, 343 U.S. 790 (1952), which required a defendant making an insanity plea to establish that defense beyond a reasonable doubt, and *Ford v. Wainwright*, 477 U.S. 399 (1986), which set forth an Eighth Amendment ban on executing those deemed incompetent to be put to death, but let states determine how to enforce this dictate).

³⁰ *Id.* at 1351.

³¹ *Id.* at 1352.

³² *Id.* at 1356.

³³ See *id.* at 1358; *id.* at 1360 (asserting the inapplicability of *Panetti v. Quarterman*, 551 U.S. 930 (2007), as that case dealt with state enforcement of a Supreme Court decision containing procedural requirements, as opposed to *Atkins*, which was silent on procedure).

row procedural grounds that the court should not grant Hill's petition, despite disagreeing with much of the majority's analysis.³⁴

Judge Barkett dissented.³⁵ First, she stated that *Atkins* clearly established that executing *any* mentally retarded person violates the Eighth Amendment, but that the Georgia burden of proof "effectively limits the constitutional right protected in *Atkins* to only those who are severely or profoundly mentally retarded."³⁶ Judge Barkett then accused the majority of failing to apply the Supreme Court precedent that "if a State's procedures transgress a substantive constitutional right, 'in their natural operation,' [sic] those procedures are unconstitutional."³⁷ Given the subjectivity inherent in diagnosing mental retardation, Judge Barkett would have held that allocating such a high burden of proof to Hill was contrary to the requirements of *Atkins*.³⁸

Judge Wilson wrote a separate dissent.³⁹ He agreed with the substance of Judge Barkett's opinion but instead would have focused on AEDPA's "unreasonable application" provision as opposed to the "contrary to" language.⁴⁰ Judge Wilson analogized Hill's case to *Panetti v. Quarterman*,⁴¹ which held that the petitioner was entitled to federal habeas review, despite AEDPA deference, because Texas's scant procedure unreasonably applied the Court's requirements for assessing incompetency claims in capital cases.⁴² Similarly, Judge Wilson thought that the Georgia standard was an unreasonable application of *Atkins*, especially considering the subjectivity in finding mental retardation.⁴³

Judge Martin wrote an additional dissent. After noting her support for Judge Barkett's opinion, Judge Martin also expressed her belief that *Panetti* justified ruling in Hill's favor.⁴⁴ She noted that the burden of proof placed on Georgia defendants flouted the Supreme Court's instruction that courts must be especially careful in determining eligibility for the death penalty.⁴⁵

³⁴ *Id.* at 1361–65 (Tjoflat, J., concurring in the judgment). He believed that "the forum in which Hill made his argument is of paramount importance," *id.* at 1362, and that because Hill challenged the burden of proof at a postconviction proceeding, any supposed violations are "unrelated to the cause of [Hill's] detention," [and] . . . they cannot form the basis for habeas relief." *Id.* at 1363 (quoting *Spradley v. Dugger*, 825 F.2d 1566, 1568 (11th Cir. 1987)).

³⁵ She was joined by Judges Marcus and Martin.

³⁶ *Humphrey*, 662 F.3d at 1367 (Barkett, J., dissenting); see also *id.* at 1371 ("[M]ental retardation is almost never provable beyond a reasonable doubt (at least where contested), and the 'risk' of an erroneous determination resulting in a wrongful execution approaches a near certainty.").

³⁷ *Id.* at 1368 (quoting *Bailey v. Alabama*, 219 U.S. 219, 244 (1911)).

³⁸ See *id.* at 1372–78.

³⁹ He was joined by Judge Martin.

⁴⁰ See *Humphrey*, 662 F.3d at 1378 (Wilson, J., dissenting).

⁴¹ 551 U.S. 930 (2007).

⁴² See *id.* at 953–54 (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)).

⁴³ See *Humphrey*, 662 F.3d at 1381 (Wilson, J., dissenting).

⁴⁴ See *id.* at 1382–84 (Martin, J., dissenting).

⁴⁵ See *id.* at 1385.

Humphrey provides a stark example of how the Roberts Court's decision to read AEDPA as a nearly insurmountable barrier to claimants like Hill severely restricts the availability of habeas relief. AEDPA's drafters wanted to cabin federal judges' discretion and limit collateral attacks, but the newly stringent standard articulated by the Court renders lower courts too hesitant to review strong constitutional claims. While the consequences of this chilling effect may be far-reaching, they are particularly acute in the mental retardation context, where deference to harsh procedural standards, like Georgia's beyond-a-reasonable-doubt requirement in *Humphrey*, threatens to undermine a nongratuitous, constitutionally protected right.

For a habeas petition to succeed under AEDPA, the claimant must show first that there exists clearly established federal law, as determined by the Supreme Court, and second that the decision against her was contrary to or an unreasonable application of that law.⁴⁶ In finding that Hill did not meet the first prong of this test, Judge Hull relied on *Bobby v. Bies*,⁴⁷ which rearticulated that *Atkins* did not establish specific guidelines for determining mental retardation.⁴⁸ However, while *Bies* encourages deference to state procedures,⁴⁹ such a position does not allow a state to use any approach it wishes; deference has its limits. While *Atkins* might not outline precise procedural requirements, it could clearly establish "what the constitutionally proper burden of proof *cannot* be,"⁵⁰ a possibility the *Humphrey* majority never fully confronts.

The *Atkins* Court's language⁵¹ supports the intuition that the case set a floor below which each state's procedural safeguards could not fall. The Court's direct pronouncement demonstrates particular sensitivity to error in the mental retardation context.⁵² There is potential error not only from judicial factfinders,⁵³ but also from diagnosti-

⁴⁶ See 28 U.S.C. § 2254(d)(1) (2006).

⁴⁷ 129 S. Ct. 2145 (2009); see *Humphrey*, 662 F.3d at 1339–40 (explaining reliance on *Bies*).

⁴⁸ See *Bies*, 129 S. Ct. at 2150.

⁴⁹ See *id.*

⁵⁰ *Humphrey*, 662 F.3d at 1381 (Wilson, J., dissenting); see also Daniel Suleiman, Note, *The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law*, 104 COLUM. L. REV. 426, 456–57 (2004) (explaining that, under *Atkins*, permitting jurisdictional variations "does not imply that every conceivable variation is constitutional").

⁵¹ See *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002) (issuing a "categorical rule," *id.* at 320, barring the execution of the mentally retarded in order "to ensure that only the most deserving of execution are put to death," *id.* at 319).

⁵² See *Humphrey*, 662 F.3d at 1377 (Barkett, J., dissenting) ("This utterly one-sided risk of error is all the more intolerable when the individual right at stake is a question of life or death.").

⁵³ Cf. *id.* at 1355 (majority opinion) (identifying two risks of error in the mental retardation determination, both concerning findings by the trier of fact).

cians,⁵⁴ which could easily lead to “false negatives,” where mentally retarded individuals test as not disabled.⁵⁵ The combination of a high burden of proof and imprecision in mental retardation diagnosis would inevitably create trials in which “disagreement[s] among experts [would] invariably support a finding against the defendant.”⁵⁶ If the inexactness of the determination is an unfortunate but ineluctable truth, then there must be some limit on the stringency of the burden of proof to prevent the execution of potentially mentally retarded defendants.⁵⁷ *Atkins* afforded states discretion in implementation, but the absoluteness of its constitutional holding can also be read to clearly, if not explicitly, establish a law requiring a baseline of procedural protection for defendants like Hill.

If *Atkins* established a federal floor, then the question becomes whether the Georgia burden of proof is an unreasonable application of this law. AEDPA’s history indicates that Congress meant to set a high standard to prevent frivolous habeas petitions and overly liberal habeas grants.⁵⁸ But it also wanted to preserve habeas protection, “not strip prisoners of their right to meaningful review of their federal constitutional claims.”⁵⁹ The congressional debate produced a consensus that federal courts should “continue their longstanding practice of protecting prisoners’ federal constitutional rights where the state courts failed to do so.”⁶⁰

Reflecting this conclusion, the Court’s early interpretation of AEDPA permitted relief for defendants with strong constitutional

⁵⁴ See Douglas Mossman, *Atkins v. Virginia: A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 269 (2003) (“The availability of IQ test scores suggests that mental health professionals can offer courts objective, precise methods for deciding who is . . . impaired enough to receive the death penalty. Yet the numbers that IQ tests generate are far from being perfectly reliable . . .”).

⁵⁵ See John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 697 (2009).

⁵⁶ Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 726 (2008).

⁵⁷ See *Humphrey*, 662 F.3d at 1365 (Barkett, J., dissenting) (claiming that procedural protections cannot fall below a certain threshold and still “square[] with the command of *Atkins*”). Some contemporary scholars concluded that *Atkins* implicitly limited the permissible standard of proof for mental retardation claims. See, e.g., Peggy M. Tobolowsky, *Atkins Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 120 (2003) (“[T]he standard of proof should be no higher than preponderance of the evidence.”); Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2586 n.132 (2003) (“[I]t seems doubtful that the Court would actually permit a state to place on defendants a burden of proof higher than preponderance.”).

⁵⁸ See 142 CONG. REC. 7550 (1996) (statement of Sen. Hatch) (“The habeas reform proposal contained in [AEDPA] will end the ability of those heinous criminals . . . to delay the imposition of their sentence.”); *id.* at 7559 (“[O]ne of the biggest problems [is] loony judges in the Federal courts who basically will grant a habeas corpus petition for any reason at all.”).

⁵⁹ Claudia Wilner, Note, *“We Would Not Defer to That Which Did Not Exist”: AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. REV. 1442, 1459 (2002).

⁶⁰ *Id.*

claims. In *Williams v. Taylor*,⁶¹ the Court held that federal courts should review claims under AEDPA to determine whether a state court's application of clearly established federal law was *objectively* unreasonable, not whether *any* reasonable jurist could agree with the state court decision.⁶² But comparing more recent AEDPA holdings to *Williams* reveals the degree to which the Roberts Court has reinterpreted AEDPA. Just last year, the Court held that AEDPA "stops short of imposing a *complete* bar on federal court relitigation of claims It preserves authority to issue the writ in cases where there is *no possibility* fairminded jurists could disagree"⁶³ This language took the high bar for federal habeas relief and made it nearly unreachable. The Court has also started wielding the Act more frequently against criminal defendants. From 1996 to 2005, the Court rejected twenty-seven habeas petitions,⁶⁴ but "[i]n 2010–11 alone, the Supreme Court . . . reversed circuit appellate courts in ten decisions for not adhering to AEDPA's requirements."⁶⁵ To the extent that the judge-driven hardening of the AEDPA standard breeds federal court reluctance to overturn state court decisions, it may lead to constitutionally questionable outcomes,⁶⁶ and *Humphrey* is a prime example.

Applying the *Williams* AEDPA standard of review rather than the Roberts Court's approach could have enabled Judge Hull to find the Georgia Supreme Court's decision objectively unreasonable. Key to the initial rejection of Hill's petition was the assertion that "a mental retardation claim is comparable to a claim of insanity."⁶⁷ But an analogy to insanity cases is inapposite. While the Supreme Court has never ruled on states' ability to abolish the insanity defense, precedent in-

⁶¹ 529 U.S. 362 (2000).

⁶² See *id.* at 409–10; see also Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 491–92 (2007) ("Congress did not intend to foreclose relief, the Court noted [in *Williams*], simply because a single state or federal jurist had previously applied precedent in a manner consistent with the state decision.").

⁶³ *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (emphasis added) (citation omitted); see also *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398–99 (2011); *Premo v. Moore*, 131 S. Ct. 733, 739–40 (2011); Sean D. O'Brien, *Greene v. Fisher: Will the AEDPA Trump Uniformity and Equity in Constitutional Decision Making?*, 6 CHARLESTON L. REV. 107, 129 (2011) ("The Court's recent habeas opinions express a clear desire to get federal courts out of the habeas business . . .").

⁶⁴ See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 277 (2006).

⁶⁵ *Humphrey*, 662 F.3d at 1343.

⁶⁶ See *Stone v. Powell*, 428 U.S. 465, 515–33 (1976) (Brennan, J., dissenting) (detailing the essential role of federal habeas review to ensure that state courts uphold constitutional rights); Erwin Chemerinsky, *Closing the Courthouse Doors: October Term 2010*, 14 GREEN BAG 2d 375, 383–84 (2011) (suggesting recent habeas precedent may stifle legitimate constitutional claims).

⁶⁷ *Humphrey*, 662 F.3d at 1349 (quoting *Head v. Hill*, 587 S.E.2d 613, 621 (Ga. 2003)) (internal quotation marks omitted). The court in *Head* analogized Hill's case to *Leland v. Oregon*, 343 U.S. 790 (1952), which allowed a "beyond a reasonable doubt" standard for an insanity defense. *Head*, 587 S.E.2d at 621.

dicates such a defense may not be constitutionally required,⁶⁸ and thus gratuitous⁶⁹ — meaning states can eliminate or limit it.⁷⁰ *Atkins*, however, made mentally retarded defendants' exemption from execution constitutionally guaranteed.⁷¹ While a "fairminded jurist could agree with"⁷² the comparison of mental retardation to insanity,⁷³ the *Humphrey* majority's decision to collapse mental retardation and insanity into a single analysis — without reference to constitutional implications — may meet *Williams*'s standard of objective unreasonableness.⁷⁴

Atkins makes clear that it is the role of states to "enforce the constitutional restriction"⁷⁵ on executing the mentally retarded, but Georgia is not the only state to significantly limit the substantive right that that decision guarantees.⁷⁶ This development reflects a disturbing trend, a trend significantly compounded by federal courts' hesitation to engage with the substance of habeas claims. When the *Atkins* Court wrote about sensitivity to "evolving standards of decency,"⁷⁷ it placed the judiciary in a position to protect some of society's most vulnerable from the most permanent of punishments. But the recent extreme federal deference to state death penalty decisions, epitomized by *Humphrey* and motivated by the Supreme Court's increasingly stringent AEDPA standard, threatens to subvert the decency that the Court espoused.

⁶⁸ Cf. *Clark v. Arizona*, 548 U.S. 735, 742 (2006) (upholding a state's narrow insanity statute).

⁶⁹ For examples of courts understanding insanity as a gratuitous defense, see *State v. Delling*, 267 P.3d 709, 711 (Idaho 2011), and *State v. Bethel*, 66 P.3d 840, 851 (Kan. 2003). The logic underlying the distinction between gratuitous and nongratuitous defenses is that, with respect to the former, if a state provides an affirmative defense that it need not provide under the Constitution, then it can set its own procedures (within reason) for determining the facts necessary to prove that defense. See *Patterson v. New York*, 432 U.S. 197, 206–10 (1977).

⁷⁰ See Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1312–13 (1977).

⁷¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁷² *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (referring to the standard for AEDPA review).

⁷³ See *Mosher v. State*, 491 S.E.2d 348, 352 (Ga. 1997) (analogizing between mental illness and mental retardation).

⁷⁴ Cf. *Henry v. Poole*, 409 F.3d 48, 71 (2d Cir. 2005) (deciding to grant petitioner's habeas claim because the state court's decision was "an objectively unreasonable application of federal law even if . . . some reasonable jurists would reach a contrary conclusion").

⁷⁵ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (emphasis added) (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)).

⁷⁶ Texas, for example, uses a mental retardation test that "significantly departs from those employed by professionals in the field." Steiker & Steiker, *supra* note 56, at 727. This stringent standard has noticeably circumscribed the number of defendants found mentally retarded. See Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 145 (2011) ("The fact that the Texas *Atkins* results fall below, and even substantially below, the projected estimates of Texas mentally retarded death row offenders . . . must raise questions regarding whether Texas's path in implementing *Atkins* complies with the *Atkins* mandate.").

⁷⁷ *Atkins*, 536 U.S. at 312 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).