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Penal / Chapter 700: "Too Dumb to Die" - Implementing the U.S. Supreme Court's Ban on Executing the Mentally Retarded

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Chapter 700: "Too Dumb to Die"[1]—Implementing the U.S. Supreme Court's Ban on Executing the Mentally Retarded

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Code Sections Affected
Penal Code § 1376 (new).
SB 3 (Burton); 2003 STAT. Ch. 700.

I. INTRODUCTION

On a June day in 2002, Luis Gomez sat in an Imperial County courtroom as jury selection began in the trial against him for the 1998 stabbing death of a fellow inmate.[2] Gomez faced the death penalty for "an assault likely to cause great bodily harm by a prisoner serving a life sentence."[3] The very same day, the U.S. Supreme Court announced its decision in *Atkins v. Virginia* holding that the execution of mentally retarded persons is cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.[4]

Mr. Gomez's attorneys claimed he has an intelligence quotient ("IQ") of 70, and therefore he may be in the group of defendants for whom execution would not be permitted under *Atkins*.[5] However, the *Atkins* decision provided no precise rules for determining whether a defendant is mentally retarded, but instead left to each of the states the task of defining mental retardation and establishing procedures for making that determination.[6] But because legislation that would have given the Gomez court direction failed passage,[7] the judge was left to "craft[] his own procedure."[8]

At the conclusion of the trial in which Gomez was found guilty, the court ordered an intermediate hearing before the jury to determine whether he was mentally retarded.[9] That jury concluded Gomez was not mentally retarded but sentenced him to life in prison without the possibility of parole.[10] Similarly, a

1. Margaret Talbot, *The Executioner's I.Q. Test*, N.Y. TIMES MAG., June 29, 2003.

2. Claude Walbert, *Rules to Die By: In the Absence of State Law Governing the Execution of Retarded Convicts, an Imperial County Judge Has Taken the Initiative*, S.F. DAILY J., Oct. 21, 2002, at 1.

3. *Id.* (referencing California Penal Code section 4500).

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

5. Walbert, *supra* note 2, at 1; *see also Atkins*, 536 U.S. at 309 n.5 (noting that "between [one] and [three] percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition).

6. *Atkins*, 536 U.S. at 317; *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 3, at 6-7 (Feb. 11, 2003) (including the author's statement on the need for the bill).

7. AB 557 (2001) (as amended on Aug. 12, 2002, but not enacted).

8. Walbert, *supra* note 2.

9. *Id.*

10. Jeffrey Anderson, *Judge Will Determine if Defendant Is Retarded*, L.A. DAILY J., Dec. 19, 2002, at 3.

court in Riverside County ordered a jury hearing prior to sentencing for a defendant on trial for killing a police officer in 2001.[11]

By contrast, in a Tulare County case in which Efrain Hernandez was tried for his alleged participation "in a drive-by shooting for the benefit of a criminal gang," the court ordered a pretrial bench hearing to consider Hernandez's claim that he was mentally retarded.[12] The conflicting procedures in Riverside, Imperial and Tulare counties resulted from the absence of legislation implementing the *Atkins* decision.[13] According to one expert, conflicting practices such as these can only worsen the lengthy periods of time involved in enforcing California's death penalty laws.[14]

Chapter 700 was enacted in response to the *Atkins* decision and in order to ensure consistent procedures for determining whether a defendant is mentally retarded.[15] The new law establishes uniform procedures relating to the timing of the mental retardation determination and to resolves questions about how to precisely define mental retardation and which party has the burden of going forward and of proving the claim.[16]

II. LEGAL BACKGROUND: THE MANDATE OF *ATKINS V. VIRGINIA*

A. *Executing Mentally Retarded Persons Is Cruel and Unusual Punishment*

Under the Eighth Amendment to the U.S. Constitution, any criminal sanction that is excessive, or any punishment that is "cruel and unusual," is prohibited.[17] Whether a punishment is excessive or cruel and unusual is judged by currently prevailing standards of decency.[18] In 1989, the U.S. Supreme Court was first presented with the question of whether executing the mentally retarded is constitutionally permissible in *Penry v. Lynaugh*.[19] In *Penry*, the Court upheld executions of the mentally retarded concluding that "[t]he clearest and most

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11. *Id.*

12. *See id.* (reporting on Assistant Presiding Judge Paul Vortmann's ruling that "the court has no jurisdiction to try Efrain Hernandez on capital charges until his eligibility for the death penalty has been determined").

13. *See The* Atkins *Debate*, CAPITAL CONNECTION (Jud. Council of Cal., Admin. Off. of the Cts., Sacramento), Jan. 2003, at 3 (quoting Larry Brown, Executive Director, California District Attorneys Association, on the need for a law to implement the *Atkins* decision).

14. *Id.*

15. *See* Letter from John L. Burton, Senate President pro Tempore and author of Chapter 700, to Members of the California Assembly (Aug. 27, 2003) (requesting support for the legislation enacting Chapter 700 and discussing the need for the legislation) (on file with the *McGeorge Law Review*).

16. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 3, at 5-6 (Feb. 11, 2003) (describing the provisions of Chapter 700).

17. *See* U.S. CONST. amend. VIII, § 1 (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

18. Atkins v. Virginia, 536 U.S. 304, 311-12 (2002).

19. Penry v. Lynaugh, 492 U.S. 302 (1989).

reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[20] At that time, only sixteen states and the federal government prohibited those executions or prohibited executions entirely.[21] As a result, the Court held that there was not enough evidence to conclude that a national consensus had emerged against the execution of the mentally retarded.[22]

In the fifteen years following the Court's holding in *Penry*, sixteen states have enacted legislation to exempt the mentally retarded from execution.[23] The *Atkins* Court also pointed out that it is significant that states have acted to prohibit executing the mentally retarded at a time when anti-crime legislation is far more popular than "providing protections for persons guilty of violent crimes."[24] In addition, even in those states that allow mentally retarded persons to be executed, the Court pointed out that such executions are rare.[25] The Court then concluded that "it is fair to say that a national consensus" against putting a retarded person to death had emerged.[26] Despite the apparent consensus that has developed against executing mentally retarded persons convicted of murder, however, the Court pointed out that no consensus has emerged on which offenders are in fact retarded.[27] Therefore, the Court left to the states "'the task of developing appropriate ways to enforce the constitutional restriction[s]'" set forth in the decision, including determining which defendants would meet the criteria for mental retardation.[28]

B. Mental Retardation Defined

While the *Atkins* decision did not provide a precise definition of mental retardation, the Court noted that statutory definitions generally conform to the clinical definitions developed by the American Association on Mental Retardation ("AAMR").[29] In 1983, 1992 and 2002, the AAMR developed and refined three versions of a mental retardation definition.[30] Although there were three versions,

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20. *Id.* at 331.

21. Cynthia Han, *"Evolving Standards of Decency": Legislative and Judicial Developments Leading to* Atkins v. Virginia, 9 GEO. J. ON POVERTY L. & POL'Y 469, 470 (2002).

22. *Id.*

23. *See Atkins*, 536 U.S. at 314-15 (indicating that Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Kansas, Kentucky, Missouri, Nebraska, New Mexico, North Carolina, South Dakota, Tennessee, and Washington, all enacted laws prohibiting executions of mentally retarded offenders).

24. *Id.* at 315-16.

25. *Id.* at 316.

26. *Id.*

27. *Id.* at 317.

28. *Id.* (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)).

29. *Id.* at 308 n.3, 317 n.22.

30. In 1983, the AAMR defined mental retardation as follows: "Mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, 5-6 (n.d.) (citing AMERICAN ASSOCIATION ON MENTAL DEFICIENCY,

there are elements common to all three definitions: (1) substantial intellectual impairment; (2) inability to adapt to everyday life; and (3) manifestation of the disability prior to adulthood.[31] Under the first prong—general intellectual functioning—a mentally retarded person must be impaired to the extent that it places that person in the bottom two percent of the general population as measured by performance on a standard intelligence test.[32] The Court in *Atkins* noted that an IQ score of between seventy and seventy-five is "typically considered the cutoff IQ score for the intellectual functioning prong. . . ."[33] However, a majority of state statutes do not include a numerical benchmark and instead follow the more general definition of the AAMR.[34]

The second prong of the mental retardation definition requires that the defendant's intellectual impairment exist concurrently with deficits in adaptive behavior.[35] Thus, the intellectual impairment must result in "real-world" disabilities in that person's life activities.[36] The Court in *Atkins* explained how the merger of the first and second prongs of the mental retardation definition relates to criminal culpability:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills. . . . Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of

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CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983)). The 1992 definition, cited in *Atkins*, 536 U.S. at 308 n.3, is as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (Ruth Luckasson ed., 9th ed. 1992).

The 2002 AAMR definition is as follows: "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." American Association on Mental Retardation, Definition of Mental Retardation (2002), *available at* http://www.aamr.org/Policies/faq-mental_retardation.shtml (last visited Apr. 17, 2004) (copy on file with the *McGeorge Law Review*).

31. Ellis, *supra* note 30, at 5 (unpublished document on file with the *McGeorge Law Review*).

32. *See id.* at 7 (discussing the limited intellectual functioning prong of the mental retardation diagnosis).

33. 536 U.S. at 309 n.5.

34. Brief of Amici Curiae American Association on Mental Retardation et al. at app. 8a, McCarver v. North Carolina, 533 U.S. 975 (2001). Those states that have specified a particular IQ score in their definitions have not been able to avoid administrative difficulties. *See* Ellis, *supra* note 30, at 7 (noting that those state statutes that specify an IQ score "prove difficult to administer" because "it is simply impossible to exclude consideration of other factors about the testing performed on the individual, nor is it possible to ignore the need for clinical judgment by experienced diagnosticians").

35. *See supra* note 30 (detailing the several mental retardation definitions of the AAMR, which all provide that deficits in intellectual functioning exist "concurrently" with deficits in adaptive skills).

36. Ellis, *supra* note 30, at 8.

> their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[37]

The third and final element of the generally accepted definitions of mental retardation is that the disability be manifest during the developmental period.[38] At the time the *Atkins* decision was announced, both the AAMR and the American Psychiatric Association identified the age cutoff as eighteen.[39] According to the Court, "The purpose of this prong of the definition is to distinguish mental retardation from those forms of . . . brain damage that may occur later in life . . . such as traumatic head injury, dementia caused by disease, or similar conditions."[40] This final prong also helps "to ensure that defendants [cannot] feign mental retardation [after they are] charged with a capital offense."[41] Therefore, the disability must manifest prior to adulthood.

Prior to Chapter 700, the existing statutory definition of mental retardation applied only to cases in which a defendant convicted of a misdemeanor offense was adjudged to be mentally retarded and, therefore, diverted from incarceration into habilitation or rehabilitation.[42] While this definition had not been applied specifically in capital litigation by statute,[43] the definition is identical to the 1983 AAMR definition used in a majority of state statutes that prohibit the execution of the mentally retarded.[44] Both definitions refer to significant subaverage intellectual functioning manifest prior to adulthood, concurrent with adaptive limitations, and neither definition refers to a specific IQ score.[45]

III. CHAPTER 700

Chapter 700 provides that mentally retarded "means the condition of significantly subaverage general intellectual functioning existing concurrently with

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37. *Atkins*, 536 U.S. at 318 (footnote omitted).

38. Ellis, *supra* note 30, at 9.

39. 536 U.S. at 309 n.3.

40. Ellis, *supra* note 30, at 9 (footnote omitted).

41. *Id.* at 10.

42. *See generally* CAL. PENAL CODE §§ 1001.20-1001.34 (West 2003) (defining "mentally retarded" and establishing procedures for determining whether a misdemeanant is retarded and, therefore, eligible for diversion).

43. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 3, at 8-9 (Feb. 11, 2003).

44. *See supra* note 30 (discussing the 1983 AAMR definition of mental retardation).

45. *See* CAL. PENAL CODE § 1001.20 (defining "mentally retarded"); *supra* note 30 (quoting the 1983 definition of mental retardation in its entirety).

deficits in adaptive behavior and manifested before the age of eighteen."[46] Chapter 700 also provides that, in capital cases, after reasonable notice and prior to the trial on the defendant's guilt, the court shall conduct a hearing to determine whether the defendant is mentally retarded.[47] In order to establish the need for such a hearing, the defendant must submit a qualified expert's declaration stating his or her opinion that the defendant is mentally retarded.[48] The defendant's request for a court hearing on mental retardation prior to trial is deemed to waive a jury hearing on the issue of mental retardation.[49] If the defendant does not request that the hearing be conducted prior to trial, the court shall order that a jury hearing be conducted after the trial on guilt but before the defendant is sentenced.[50]

After meeting the burden of going forward, the defendant must prove by a preponderance of the evidence that he or she is mentally retarded.[51] If the court finds that the defendant is mentally retarded, Chapter 700 provides that the trial shall "proceed as in any other case in which a sentence of death is not sought by the prosecution."[52] If the defendant is then found guilty of murder in the first degree with a finding of special circumstance, Chapter 700 requires the court to sentence the defendant to life without the possibility of parole.[53] If the court or jury does not find that the defendant is mentally retarded, the trial "shall proceed as in any other case in which a sentence of death is sought by the prosecution."[54]

IV. ANALYSIS OF CHAPTER 700

A. Definition of Mental Retardation

The definition of mental retardation in Chapter 700 follows the AAMR definitions and does not set a specific numerical IQ score to determine whether a defendant is mentally retarded.[55] The absence of a specific IQ score for determining mental retardation has not created difficulties in distinguishing meritorious claims from non-meritorious claims, particularly in those states following a version of the AAMR definition.[56] Nevertheless, opponents of Chapter 700 were initially concerned that, in leaving out a specific numerical benchmark, the

46. CAL. PENAL CODE § 1376(a) (enacted by Chapter 700).

47. *Id.* § 1376(b)(1)-(2); *see also id.* § 190.2 (enumerating the special circumstances of a crime that warrant the imposition of the death penalty or, alternatively, life in prison without the possibility of parole).

48. *Id.* § 1376(b)(1).

49. *Id.*

50. *Id.*

51. *Id.* § 1376(b)(3).

52. *Id.* § 1376(c)(1).

53. *Id.*

54. *Id.* §§ 1376(c)(2), 1376(d)(2).

55. *Id.* § 1376(a); *supra* note 30 (detailing the several AAMR definitions of mental retardation).

56. Ellis, *supra* note 30, at 8.

definition would be overly broad, would ignore benchmarks used by experts, and would lead to some "death penalty defendants . . . attempting to improperly gain advantage under *Atkins*."[57] Proponents pointed out that the intellectual functioning prong is not the sole determination of retardation and must be considered in light of the impact of such functioning on present adaptive ability.[58] Further, because Chapter 700 requires that the impairment be manifest during the developmental period, "any concerns that an individual could somehow manage to feign cognitive impairment, undetected by clinical evaluators, should be dispelled by the fact that such deception would have had to begin during the individual's childhood."[59] Therefore, it is unlikely that Chapter 700's exclusion of an IQ benchmark will make it difficult to distinguish those with mental retardation from those who are not so impaired.

B. *Procedures for Determining Mental Retardation*

Chapter 700 permits the defendant to raise the issue of mental retardation "at a reasonable time prior to commencement of trial. . . ."[60] Perhaps one of the more difficult issues to resolve,[61] opponents heavily criticized the provisions allowing for a pre-trial determination of mental retardation but the author and the chief proponents viewed those provisions as essential.[62] A pre-trial determination of mental retardation seeks to avoid the jury being unduly influenced by facts of the underlying crime that, according to some, are irrelevant to the mental retardation

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57. *See* Letter from David LaBahn, Executive Director, California District Attorneys Association, to Senator John L. Burton, Cal. State Senate (June 17, 2003) [hereinafter LaBahn Letter] (on file with the *McGeorge Law Review*) (stating that Chapter 700 "fails to specify an IQ number as the threshold for determining retardation, despite the fact that the [American Psychiatric Association, Diagnostic Statistical Manual of Mental Disorders IV] used by experts specifies an IQ of 70 or below").

58. *See* Virginia Nolton, Protection and Advocacy, Inc., Testimony before the Assembly Committee on Public Safety (July 2, 2003) (on file with the *McGeorge Law Review*) (discussing the advantages of the definition used in Chapter 700).

59. Ellis, *supra* note 30, at 10.

60. CAL. PENAL CODE § 1376(b)(1) (enacted by Chapter 700).

61. *See* Hudson Sangree, *Defense Bar Cedes Ground in 'Atkins' Bill on Executions*, S.F. DAILY J., July 2, 2003, at 1, 7 (describing the issue of when the mental retardation determination is made as a "major sticking point").

62. *See, e.g.*, Letter from Les Kleinberg, Legislative Advocate for Bill Lockyer, Attorney General of California, to John Burton, President pro Tempore, California State Senate (Feb. 5, 2003) [hereinafter Kleinberg Letter] (on file with the *McGeorge Law Review*) (opposing Chapter 700 and provisions for a pre-trial determination of mental retardation); John Burton, President pro Tempore, California State Senate, Statement to the Assembly Committee on Public Safety (July 2, 2003) [hereinafter Burton Statement] (on file with the *McGeorge Law Review*) (stating that a pre-trial determination of mental retardation is essential to fairness); Letter from Paul Gerowitz, Executive Director, California Attorneys for Criminal Justice, to John Burton, President pro Tempore, California State Senate (Feb. 3, 2003) [hereinafter Gerowitz Letter] (on file with the *McGeorge Law Review*) (supporting Chapter 700's provision for a pre-trial jury determination of mental retardation based on cost savings and arguing the importance of proceedings that are unbiased by the "horrific nature" of the capital case, which necessarily must occur prior to trial).

determination.[63] The pre-trial procedure is also aimed at avoiding the extraordinary expenses associated with a capital trial if the defendant is determined to be mentally retarded and, therefore, ineligible to be executed.[64] Opponents counter that it is unlikely that any significant savings will result from procedures that determine mental retardation prior to trial.[65] They also argue that the mental retardation determination should be handled in the same manner as proceedings on the defendant's sanity—at the conclusion of the trial on guilt.[66]

However, a pre-trial determination is consistent with the majority of states that enacted laws prohibiting the execution of mentally retarded persons,[67] upon which the Court in *Atkins* relied in concluding that a national consensus had developed against such executions.[68] Furthermore, the Court based its "independent evaluation" of the issue in part on the special risk of wrongful execution that mentally retarded defendants face in the aggregate.[69] The Court stated its concerns as follows:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," [citation omitted] is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of . . . one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.[70]

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63. Burton Statement, *supra* note 62.

64. *See* Gerowitz Letter, *supra* note 62.

> Because of all the preparations that are required for the adequate representation of a person facing a guilt trial and, potentially, a second trial on sentencing, and because of the heightened standards of representation when the death penalty is at stake, capital trials cost the taxpayers substantially more than non-capital murder trials. Determining mental retardation prior to the start of the capital trial will, in cases in which the defendant turns out to be mentally retarded, save the state hundreds of thousands of dollars.

Id.

65. *See* Kleinberg Letter, *supra* note 62, at 1 (stating his belief that Chapter 700's pre-trial mental retardation proceedings would not expedite cases in most circumstances since, even if the defendant is found to be mentally retarded, there will still be proceedings "to try the defendant for murder, conduct any necessary sanity proceedings, and determine whether special circumstances exist" to impose a sentence of life without the possibility of parole).

66. *See* LaBahn Letter, *supra* note 57, at 2 (stating that insanity, not incompetence to stand trial, is the most logical parallel to mental retardation).

67. Ellis, *supra* note 30, at 12.

68. Atkins v. Virginia, 536 U.S. 304, 315-16 (2002).

69. *Id.* at 321.

70. *Id.* at 320-21 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)) (footnote omitted).

Therefore, the Court stated, "impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants."[71] Thus, before such proceedings begin, Chapter 700 permits a pre-trial determination that the defendant is not mentally retarded.[72]

Chapter 700 places on the defendant both the burden of producing evidence of mental retardation[73] and the burden of persuasion by a preponderance of the evidence.[74] Chapter 700 also provides that the decision may be made by the court, sitting without a jury.[75] It is generally recognized that the burden of production is appropriately placed on the defendant, and that the prosecution should not be required to prove that the defendant is not mentally retarded.[76] The fact that Chapter 700 imposes on the defendant the burden of proving mental retardation by a preponderance of the evidence—rather than by the elevated burdens of "clear and convincing evidence" or "beyond a reasonable doubt"—will likely protect it from a constitutional challenge on that basis.[77] However, in a decision announced just four days after *Atkins*, the Court in *Ring v. Arizona* held that any element of an offense, or its "functional equivalent," that could result in the imposition of the death penalty must be decided by a jury and proven by the state beyond a reasonable doubt.[78] In *Ring*, the Court struck down a statute that permitted a defendant convicted in a jury trial to be sentenced to death after further findings are made by the judge in a separate sentencing hearing.[79] Since the question of whether a defendant is mentally retarded is arguably a question of fact that, if proven, could affect whether the punishment of death can be rendered, there is the possibility that *Ring* could apply.[80] Chapter 700 does allow a judge to determine whether a defendant is mentally retarded, but only at the

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71. *Id.* at 306-07.

72. *See supra* Part III and accompanying text (describing the provisions of Chapter 700 that permit the defendant to request a pre-trial determination of mental retardation).

73. CAL. PENAL CODE § 1376(b)(2) (enacted by Chapter 700).

74. *Id.* § 1376(b)(3).

75. *Id.* § 1376(b)(1).

76. *See* Ellis, *supra* note 30, at 14 & n.48 (quoting BARBARA E. BERGMAN & NANCY HOLLANDER, 1 WHARTON'S CRIMINAL EVIDENCE 22-23 (15th ed. 1997)) (stating that the burden of raising the issue of mental retardation clearly should rest with the defense and noting factors such as "whether the pertinent facts [are] peculiarly within the knowledge of the defendant, . . . more readily accessible, . . . and whether, [as here,] the proof of a negative was required").

77. *See id.* at 14-15 (suggesting that since the prohibition on executing the mentally retarded is derived from a constitutional right, placing an elevated burden of proof on the defendant is constitutionally suspect based on the Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996)).

78. Ring v. Arizona, 536 U.S. 584 (2002).

79. *Id.*

80. *See id.* at 602 (stating that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt"); *see also* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 3 at 10-11 (Feb. 11, 2003) (discussing the effect of *Ring v. Arizona* on capital cases in which the defendant alleges mental retardation).

defendant's request, which constitutes a waiver of a jury hearing.[81] However, since the defendant bears the burden of proving mental retardation by a preponderance of the evidence, the new law could violate the requirement that it be proven by the state beyond a reasonable doubt.[82]

V. CONCLUSION

Chapter 700 was enacted in response to the Supreme Court's holding in *Atkins v. Virginia* that executions of mentally retarded persons is cruel and unusual punishment in violation of the Eighth Amendment.[83] While Chapter 700 responds to the *Atkins* decision by defining mental retardation and establishing procedures for making that determination, there remain questions about whether the definition will allow courts to adequately distinguish a defendant's meritorious claim of retardation from those defendants whose mental condition does not merit the protections of *Atkins*.[84] However, it is unlikely that the definition of mental retardation provided for in Chapter 700 will allow defendants who are not mentally impaired to escape execution.[85] The procedures established in the new law will likely protect mentally retarded defendants from wrongful execution, while possibly also avoiding the expense of capital trials where the defendant is found to be mentally retarded.[86] However, these procedures may be subject to future constitutional challenge.[87]

Unlike prior legislative attempts to prohibit the execution of the mentally retarded, Chapter 700 does not specifically provide for post-conviction procedures for determining whether a person awaiting execution is mentally retarded.[88] Appellate courts are left to resolve these cases through existing habeas corpus procedures, but the courts can now look to Chapter 700's definition of mental retardation in deciding those cases.

While Chapter 700 will undoubtedly prevent the execution of those defendants who meet the required criteria for mental retardation, those who are perhaps equally mentally impaired by, for example, brain damage as an adult or attention deficit hyperactivity disorder will continue to face California's execution chamber should they be convicted of a capital offense.[89] Some have suggested that

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81. CAL. PENAL CODE § 1376(b)(1) (enacted by Chapter 700).

82. *See* Gerowitz Letter, *supra* note 62 (arguing that the *Ring* decision imposes on the prosecution the burden of proving the defendant is not mentally retarded).

83. *Supra* Part II.A.

84. *Supra* Part IV.

85. *Supra* Part IV.

86. *Supra* Part IV.

87. *Supra* Part IV.

88. *See, e.g.*, AB 557 (2001) (as amended on Aug. 12, 2002, but not enacted) (providing that "persons under sentence of death at the time [the statute] take[s] effect" may raise claims of mental retardation through a petition for a writ of habeas corpus).

89. *See* Talbot, *supra* note 1 (discussing those with mental impairments not covered by *Atkins*).

future courts will have to consider whether these equally disabling mental conditions deserve the protections afforded by *Atkins*.[90] Until then, Chapter 700 allows courts in California to now uniformly apply *Atkins* to protect those who are "too dumb to die."[91]

90. *Id.*
91. *Id.*