STATE V. GRELL: PLACING THE BURDEN ON DEFENDANTS TO PROVE MENTAL RETARDATION IN CAPITAL CASES

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INTRODUCTION

In determining eligibility for the death penalty, Arizona law requires defendants who have scored 70 or below on an IQ test to prove mental retardation by clear and convincing evidence.[1] In *State v. Grell*,[2] the Arizona Supreme Court addressed the question of whether placing such a burden on a defendant is unconstitutional in light of the U.S. Supreme Court's decision in *Atkins v. Virginia*,[3] which held that the execution of a mentally retarded criminal defendant constitutes cruel and unusual punishment, in violation of the Eighth Amendment of the U.S. Constitution. Emphasizing that *Atkins* allows states to develop appropriate ways to enforce this constitutional restriction, the court held in a 4 to 1 decision that Arizona may place the burden on the defendant to prove mental retardation,[4] and that the clear and convincing standard withstands constitutional scrutiny.[5] The court further held that a jury determination of mental retardation is not required.[6]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Grell's Crime and Trial

On December 2, 1999, Shawn Grell picked up his two-year-old daughter from daycare and drove with her to Mesa, Arizona.[7] They drove around for several hours, during which time Grell purchased beer, a plastic gas container, and a gallon of gas.[8] He then drove to a remote area in Mesa, laid his daughter on the

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1. ARIZ. REV. STAT. ANN. § 13-703.02(G) (2006). If the court finds that the defendant has an IQ of 65 or below, a rebuttable presumption of mental retardation arises. *Id.*
2. State v. Grell (*Grell II*), 135 P.3d 696 (Ariz. 2006).
3. 536 U.S. 304 (2002).
4. *Grell II*, 135 P.3d at 701–02.
5. *Id.* at 705.
6. *Id.* at 706.
7. State v. Grell (*Grell I*), 66 P.3d 1234, 1235 (Ariz. 2003).
8. *Id.*

ground in a drainage ditch, and poured gasoline over her.[9] He lit a match and set her on fire.[10] She walked several feet while engulfed in flames, then collapsed face down and died from smoke inhalation and severe burns.[11] After making sure the fire had gone out, Grell purchased beer at a convenience store, where he told a worker that he had "seen some kids light a dog on fire in the nearby desert."[12] Later that night, Grell contacted the police to notify them that he had killed his daughter.[13] Additionally, Grell revealed the body's location.[14]

Grell, charged with first degree murder and child abuse, waived his right to a jury trial but attempted to preserve the right for purposes of sentencing.[15] In September 2000, Grell was convicted of first degree murder but acquitted of child abuse.[16] Grell asked that a jury be empanelled for the sentencing phase, but despite his earlier attempt to preserve the right, the motion was denied.[17] During the combined aggravation and penalty phase hearing, the court concluded that Grell's crime was committed in a "heinous, cruel, or depraved manner."[18] Grell argued mental impairment, mental retardation, and a cognitive disorder as mitigation evidence; however, the court found no substantial mitigation and sentenced him to death.[19]

B. The United States Supreme Court Weighs in on the Execution of Mentally Retarded Defendants: Atkins v. Virginia

While the parties prepared for appeal, the U.S. Supreme Court issued an opinion addressing mental retardation in capital cases.[20] In *Atkins v. Virginia*,[21] the Court rejected the idea that executing mentally retarded defendants did not per se violate the Eighth Amendment as long as the defendant was permitted to present evidence of mental retardation as mitigation, instead holding that "the execution of mentally retarded criminals" violates the Eighth Amendment.[22] Writing for the majority, Justice Stevens emphasized the trend in state legislation prohibiting the execution of mentally retarded defendants, and held that "[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."[23] Justice Stevens also addressed the deterrent and retributive

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. State v. Grell (*Grell II*), 135 P.3d 696, 698 (Ariz. 2006).
16. *Id.*
17. *Id.*
18. *Id.* at 699.
19. *Id.* at 699–700. The court found that there was "no credible evidence" to conclude that Grell suffered from a cognitive disorder caused by brain damage, and that the State demonstrated that Grell had adequate adaptive skills despite his low IQ scores. *Id.* at 699.
20. *Id.* at 700.
21. 536 U.S. 304 (2002).
22. *Id.* at 321.
23. *Id.* at 313–16.

purposes of the death penalty, neither of which, he concluded, is measurably advanced by the execution of mentally retarded defendants.[24] Because mentally retarded offenders have a "diminished ability to understand and process information," they are less morally culpable, and it is therefore unlikely that their execution will serve to deter other similar offenders.[25] Thus, the imposition of the death penalty in this case would amount to "'nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment.'"[26]

Nevertheless, the Court noted that there remains debate as to who would "fall within the range of mentally retarded offenders about whom there is a national consensus."[27] For this reason, the Court decided to allow the States to '"develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[28]

C. The First Appeal

The Arizona Supreme Court issued a decision in *Grell I* affirming Grell's conviction, but ordered the trial court to reevaluate his mental retardation claim in light of *Atkins*.[29] The trial court only considered mental retardation as a possible mitigating circumstance, rather than as a potential bar to execution.[30] The court suggested that the trial court apply Section 13-703.02 of the Arizona Revised Statutes to determine whether Grell is mentally retarded.[31] On remand, the State and the defense stipulated that Grell's IQ was less than 70.[32] Pursuant to Section 13-703.02 of the Arizona Revised Statutes, Grell was required to prove mental retardation by clear and convincing evidence.[33] Grell argued that the standard of proof should be no higher than a preponderance of the evidence because mental retardation is a constitutional bar to execution; however, the court rejected his claim.[34]

Prior to the hearing to determine the extent, if any, of Grell's mental retardation, Grell refused to submit to further examination by a state expert.[35] As a result, the State moved for, and the court granted, the preclusion of any additional evidence provided by Grell's mental health expert.[36] The court, therefore, was forced to rely on the same evidence presented during the first hearing, and

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24. *Id.* at 318–20.
25. *Id.* at 320.
26. *Id.* at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).
27. *Id.* at 317.
28. *Id.* (alteration in original) (quoting Ford v. Wainright, 477 U.S. 399, 416–17 (1986)).
29. State v. Grell (*Grell I*), 66 P.3d 1234, 1240–41 (Ariz. 2003).
30. *Id.* at 1240.
31. *Id.* at 1240–41.
32. State v. Grell (*Grell II*), 135 P.3d 696, 700 (Ariz. 2006).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 700–01.

similarly concluded that Grell failed to prove his mental retardation by clear and convincing evidence.[37]

II. STATES REACT TO *ATKINS*

A. The Standard of Proof in Atkins *Hearings*

Because the U.S. Supreme Court in *Atkins* refrained from specifying the standard to be used in *Atkins* hearings, state courts and legislators have applied different burdens of proof to assess whether a defendant is mentally retarded.[38] Post-*Atkins*, a majority of states apply the preponderance of the evidence standard.[39] Even a majority of the states that had statutes in place prior to the Supreme Court's decision applied the preponderance of the evidence standard.[40]

Prior to *Grell*, two other state supreme courts faced the issue of whether requiring a defendant to prove mental retardation by clear and convincing evidence is constitutional.[41] In *People v. Vasquez*, the Colorado Supreme Court rejected the defendant's claim that *Atkins* prohibited defendants from bearing the burden of proving mental retardation, highlighting that the U.S. Supreme Court left it to the states to decide how to enforce the prohibition.[42] Additionally, the *Vasquez* court noted the U.S. Supreme Court's approval of Georgia's statute, which establishes the beyond a reasonable doubt standard, indicating that Colorado's clear and convincing standard does not violate *Atkins*.[43] The defendant also challenged the clear and convincing evidence standard, arguing that the nature of his right to not be executed is fundamental, and thus, the Colorado statute requiring clear and convincing evidence is unconstitutional.[44] Taking a narrow view of the right at

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37. *Id.* at 701.

38. States have wide latitude to decide how to enforce the constitutional prohibition, and their decisions are subject to review under the Due Process Clause only if they '"offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.* at 702 (alteration in original) (quoting Patterson v. New York, 432 U.S. 197, 201–02 (1977)).

39. *See, e.g.*, CAL. PENAL CODE § 1369(f) (West 2004); IDAHO CODE ANN. § 19-2515A(3) (2006); LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1) (2007); NEV. REV. STAT. § 174.098(5)(b) (2005); Lambert v. State, 71 P.3d 30, 31–32 (Okla. Crim. App. 2003). Delaware is the only state post-Atkins to enact a statute imposing a clear and convincing burden. *Grell II*, 135 P.3d at 703 n.7 (citing DEL. CODE ANN. tit. 11, § 4209 (2005)).

40. *Grell II*, 135 P.3d at 703 n.7.

41. *See* People v. Vasquez, 84 P.3d 1019 (Colo. 2004); Pruitt v. State, 834 N.E.2d 90 (Ind. 2005).

42. *Vasquez*, 84 P.3d at 1022.

43. *Id.*

44. *Id.* at 1023. The defendant based his claim on the Supreme Court's decision in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which struck down an Oklahoma statute requiring defendants to prove incompetency by clear and convincing evidence, and held that "historical and modern practice as well as the fundamental right at issue . . . prevented Oklahoma from trying a defendant who had demonstrated his incompetence by a preponderance of the evidence." *Vasquez*, 84 P.3d at 1023.

issue, the court concluded that the defendant's risk was merely that of facing a capital trial, and therefore, the statute at issue did not offend the constitution.[45]

The Indiana Supreme Court took a different view on the standard of proof issue in *Pruitt v. State*, holding that the clear and convincing standard is unconstitutional.[46] Unlike the *Vasquez* court, this court closely followed the analysis of *Cooper v. Oklahoma*.[47] It first noted that *Atkins* recognizes the right of a mentally retarded person to not be executed as one rooted in fundamental principles of justice.[48] The court then addressed the importance of the historical and contemporary practice of applying a particular standard of proof, highlighting the fact that Indiana is one of only four states to use the clear and convincing evidence standard.[49] In assessing the fairness of applying such a burden, the court noted that "an erroneous determination as to a defendant's mental retardation would not deny the defendant a fair trial;" however, the risk is significant because mentally retarded defendants may not be capable of presenting a strong case for mitigation.[50] Finally, in comparing the interests of the state and defendant, the court concluded that although the state has a strong interest in seeking justice, that interest is outweighed by a mentally retarded defendant's right not to be executed.[51]

B. Arizona's Process

Prior to the *Atkins* decision, the Arizona legislature enacted Section 13-703.02 of the Arizona Revised Statutes, which established a bifurcated process for determining whether defendants are mentally retarded.[52] The statute requires the court to appoint a prescreening psychological expert in every capital case, unless the defendant objects, to determine the defendant's IQ.[53] If the expert determines that the defendant's IQ is 75 or less, the defendant has the right to be evaluated by at least two psychological experts.[54] If the defendant scores 70 or above on all of the tests, the state may continue with the capital trial, but the defendant has the opportunity to present evidence of mental retardation during the sentencing phase.[55] Otherwise, the statute requires a pretrial hearing at which the defendant has the burden to prove mental retardation by clear and convincing evidence.[56] If

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45. *Id.*
46. 834 N.E.2d at 103.
47. *Id.* at 101–03.
48. *Id.* at 101.
49. *Id.* at 102. The remaining states are Arizona, ARIZ. REV. STAT. ANN. § 13-703.02 (2006), Colorado, COLO. REV. STAT. § 18-1.3-1102(2) (2004), and Florida, FLA. STAT. ANN. § 921.137(4) (West 2006). Only Georgia requires defendants to prove mental retardation beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(c)(3) (2006).
50. *Pruitt*, 834 N.E.2d at 102–03.
51. *Id.* at 103.
52. 2001 ARIZ. LEG. SERV. § 13-703.02 (West).
53. ARIZ. REV. STAT. ANN. § 13-703.02(B) (2006). If a defendant refuses to submit to testing, the defendant waives the right to a pre-trial determination of mental retardation. *Id.*
54. *Id.* § 13-703.02(D).
55. *Id.* § 13-703.02(F).
56. *Id.* § 13-703.02(G).

the trial court finds that the defendant has an IQ of 65 or below, the statute creates a rebuttable presumption of mental retardation.[57] For defendants with an IQ of less than 70, a trial court's finding of mental retardation will result in the dismissal of the intent to seek the death penalty.[58] If the defendant fails to make a showing of mental retardation, he may still introduce evidence of mental retardation as a mitigating factor.[59]

III. THE DECISION OF THE ARIZONA SUPREME COURT

Following the path of a minority of states, the Arizona Supreme Court held that the clear and convincing evidence standard imposed by Section 13-703.02 of the Arizona Revised Statutes is constitutional.[60] Justice Bales, however, disagreed with the majority's conclusion regarding this standard of proof.[61] Using the *Cooper* analysis followed in *Pruitt*, Justice Bales argued that the clear and convincing standard significantly increases the likelihood of erroneous determinations of no mental retardation. Because a mentally retarded defendant's right to not be executed clearly outweighs the interests of the State, Justice Bales concluded that Arizona's standard should be held unconstitutional.[62]

A. The Majority Decision

Writing for the majority, Justice Berch first addressed Grell's argument that the State should bear the burden of proving his mental retardation.[63] Noting that the U.S. Supreme Court in *Atkins* allowed the states to implement appropriate procedures for enforcing the prohibition, the court observed that "the procedures developed must comport with the constitution."[64] The court compared the requirement of proving mental retardation to that of an affirmative defense, since both "serve[] to relieve or mitigate a defendant's criminal responsibility."[65] On a number of occasions, the U.S. Supreme Court has held that a state may place the burden of proving an affirmative defense on the defendant because the defendant is in a better position to access necessary information regarding his condition.[66] In concluding that imposing the burden on the defendant to prove mental retardation is constitutional, the court also noted that only New Jersey has placed this burden on the state.[67]

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57. *Id.*
58. *Id.* § 13-703.02(H).
59. *Id.*
60. State v. Grell (*Grell II*), 135 P.3d 696, 705 (Ariz. 2006).
61. *Id.* at 710 (Bales, J. concurring in part and dissenting in part).
62. *Id.* at 713–14.
63. *Id.* at 701.
64. *Id.* at 701–02.
65. *Id.* at 702. One such example is the affirmative defense of insanity. In Arizona, a defendant must prove insanity by clear and convincing evidence. ARIZ. REV. STAT. ANN. § 13-502(C) (2006).
66. *Grell II*, 135 P.3d at 702 (citing Medina v. California, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring); Patterson v. New York, 432 U.S. 197 (1977)).
67. *Grell II*, 135 P.3d at 702 (citing State v. Jimenez, 880 A.2d 468, 484 (N.J. Super. Ct. App. Div. 2005)). The court noted that in the case of New Jersey, the court

The court then considered the clear and convincing standard, ultimately concluding that requiring defendants to meet that standard does not violate the Constitution.[68] The court quickly noted that a majority of states have selected the preponderance of the evidence standard for determining mental retardation.[69] The court stated that "[w]e might have done so as well, were there no Arizona statute already in place."[70] However, Section 13-703.02 of the Arizona Revised Statutes was enacted prior to the U.S. Supreme Court's decision.[71] Thus, the question was whether retaining this standard is permissible in light of *Atkins*.

In debating this issue, the court described in great detail the aspects of the Arizona statute that are meant to protect defendants who may be mentally retarded.[72] The court noted that the statute's bifurcated process not only provides the defendant the opportunity to prove mental retardation during a pretrial hearing, but also allows him to present evidence to the jury in mitigation if he is unable to meet the burden of proof in the pretrial hearing.[73] Comparing the similar processes established in Colorado and Indiana, the court agreed with the Colorado Supreme Court's analysis in *Vasquez*, in which the court "stressed . . . [that] the defendant's risk at a pretrial hearing is not death, but a capital trial."[74] The court found that the process in place adequately protects those about whom there is a national consensus against execution and provides all other mentally retarded defendants with the possibility of avoiding a capital trial through the pretrial hearing.[75] The court further noted that the more stringent standard is justified due to the risk that the state may not be able to impose the death penalty on a defendant later discovered to be malingering.[76]

Turning to Grell's claim that a jury must make a finding of mental retardation, the court concluded that Grell's reliance on *Ring v. Arizona* (*Ring II*)[77]

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treated mental retardation like a "capital trigger," which the state must prove beyond a reasonable doubt. *Id.* The Arizona Supreme Court rejected this reasoning because "the absence of mental retardation is neither an aggravating factor nor an element of the capital offense under Arizona law." *Id.* In 2006, the New Jersey Supreme Court reversed the Superior Court Appellate Division's holding in *Jimenez*, and adopted a new standard that requires a defendant prove by a preponderance of the evidence that he or she is mentally retarded. State v. Jimemez, 908 A.2d 181, 191–92 (N.J. 2006).

68. *Grell II*, 135 P.3d at 705.

69. *Id.* at 703.

70. *Id.*

71. *Id.*

72. *Id.* at 703–04.

73. *Id.* (citing ARIZ. REV. STAT. ANN. § 13-703.02 (2006)).

74. *Id.* at 704.

75. *Id.*

76. *Id.* at 705. The court distinguished between defendants feigning incompetence and mental retardation, emphasizing that the former are sent to a mental health facility for examination, where they will often either be "restored to competency or discovered to be malingering. In the event of either occurrence, the defendant is subject to trial and punishment." *Id.* In contrast, the court noted that a defendant found to be mentally retarded "may never suffer the punishment of execution, even if he is later discovered to have been malingering." *Id.*

77. 536 U.S. 584 (2002).

and *Apprendi v. New Jersey*,[78] both of which "require that a jury find all functional elements of a crime and all non-admitted facts except prior convictions that increase the sentence above the presumptive sentence," was misplaced.[79] The absence of mental retardation is neither the "functional equivalent of an element of the crime" nor a "fact that *increases* the available penalty."[80] The court further noted that the U.S. Supreme Court has indicated that *Atkins* does not require a jury to make a determination of mental retardation.[81] Moreover, the court disagreed with Grell's application of *Enmund/Tison*.[82] The court noted that the U.S. Supreme Court specifically held that *Enmund/Tison* findings do not require a jury determination. Further, a jury determination would be more logical for *Enmund/Tison* findings since they "are based on evidence of participation in a crime and intent."[83] Conversely, proof of mental retardation requires consideration of evidence that is typically within the hands of the defendant.[84] In holding that the trial court did not err in concluding that a jury determination was not required, the court stated that under *Atkins* such a requirement is neither prohibited nor required.[85]

The court also held that the trial court did not abuse its discretion by precluding a defense expert as a sanction for Grell's refusal to cooperate with the State's third mental health expert.[86] The trial court had concluded that the defense should not be permitted to benefit from a new expert when Grell's behavior prevented the State from being on equal footing.[87] Although the stakes were particularly high because this was a capital trial, the court concluded that a reversal was not warranted.[88]

B. Justice Bales's Opinion

While Justice Bales agreed with the majority that a state may place the burden of proving mental retardation on the defendant, he wrote separately to address his concerns regarding the clear and convincing evidence standard

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78. 530 U.S. 466 (2000).
79. *Grell II*, 135 P.3d at 706.
80. *Id.*
81. *Id.* (citing Schriro v. Smith, 546 U.S. 6 (2005)).
82. *Enmund/Tison* findings refer to specific determinations of culpability that must be made for a felony murder defendant to be eligible for the death penalty. In *Enmund*, the Supreme Court held that where the defendant's participation in the felony murder is attenuated and there is no proof that the defendant had any culpable mental state, the death penalty is excessive retribution for the defendant's crimes. From *Enmund* came a two-part test focusing on the defendant's level of participation and culpable mental state. Enmund v. Florida, 458 U.S. 782, 800–01 (1982). In *Tison*, the Supreme Court held that a finding that the defendant was a major participant in the felony committed, combined with a finding of reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. Tison v. Arizona, 481 U.S. 137, 158 (1987).
83. *Grell II*, 135 P.3d at 707.
84. *Id.*
85. *Id.*
86. *Id.* at 708.
87. *Id.* at 707.
88. *Id.* at 708.

approved by the majority.[89] Justice Bales was particularly concerned with the majority's failure to address the constitutionality of executing a person who can prove mental retardation by a preponderance of the evidence, but cannot meet the higher clear and convincing standard.[90] He remarked that Arizona's statute was enacted prior to *Atkins* and does not "reflect a legislative effort to adopt a statute in light of the constitutional prohibition."[91] Justice Bales criticized the majority's conclusion that Section 13-703.02 of the Arizona Revised Statutes sufficiently protects mentally retarded defendants by requiring a pretrial hearing, and that the risk a defendant potentially faces from "'an adverse determination' under the clear and convincing standard" is limited by the opportunity to present evidence in mitigation.[92] He noted that the pretrial hearing is the only chance that a mentally retarded defendant has to avoid a capital trial.[93] If a defendant is forced to rely on mitigation, he is at the mercy of the jurors, each of whom "makes his or her own decision whether the defendant has proven any mitigating facts and how such facts should be valued."[94] Justice Bales concluded that the majority could not rely on mitigation because *Atkins* made clear that the process was "insufficient to protect the constitutional rights of the mentally retarded."[95]

Justice Bales also disagreed with the majority's reasoning that the clear and convincing standard is constitutional because the U.S. Supreme Court has permitted states to develop appropriate procedures for determining mental retardation.[96] He argued that the Arizona statute may not protect defendants falling within the national consensus, let alone those who are more likely than not mentally retarded, but who cannot make the showing based on the higher standard.[97] Even defendants with an IQ of 65 or below still have the burden of persuasion; therefore, if the state presents evidence to rebut the presumption of mental retardation, the defendant must still meet the higher standard.[98] Justice Bales highlighted the fact that *Atkins* prohibits the execution of all mentally retarded defendants, not just those who are severely retarded.[99]

Like the court in *Pruitt v. State*, Justice Bales applied the U.S. Supreme Court's reasoning in *Cooper*.[100] Specifically, he applied the framework for balancing the interests of the state and defendant "to assess the fundamental fairness of requiring the defendant to prove [mental retardation] by clear and

89. *Id.* at 710 (Bales, J., concurring in part and dissenting in part).
90. *Id.* at 711 ("Thus, the real issue here, which the majority does not directly confront, is whether the State can constitutionally execute those defendants who prove they are more likely than not mentally retarded but cannot meet the clear and convincing standard under A.R.S. § 13-703.02(G).").
91. *Id.*
92. *Id.* (quoting *id.* at 704).
93. *Id.* at 711.
94. *Id.*
95. *Id.* at 712.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 712–13.
100. *Id.* at 713–14.

convincing evidence."[101] Using this framework, he emphasized the significant risk faced by defendants who can only prove mental retardation by a preponderance of the evidence.[102] For the State, an incorrect determination of mental retardation simply would result in the imposition a life sentence rather than the death penalty.[103] Justice Bales noted the comment made by the State's counsel, who "acknowledged that the State does not have any 'particular interest' in executing those defendants who can establish their mental retardation by a preponderance but not by clear and convincing evidence."[104] Given the interests at stake, he concluded that the defendant's right to not be executed clearly outweighs the interests of the State, and therefore, the clear and convincing standard is unconstitutional.[105]

CONCLUSION

In *State v. Grell*, the Arizona Supreme Court held that placing the burden on defendants to prove mental retardation by clear and convincing evidence does not violate the federal Constitution. In deciding this way, Arizona remains among a minority of states that use a standard more stringent than the preponderance of the evidence standard. As Justice Bales warned, this approach is unlikely to provide mentally retarded defendants, particularly those with mild mental retardation, the sort of protection envisaged by the U.S. Supreme Court in *Atkins*.

101. *Id.* at 713.
102. *Id.* at 713–14.
103. *Id.* at 714.
104. *Id.*
105. *Id.*