

DEATH PENALTY & INTELLECTUAL DISABILITY

LEGAL ADVOCACY TOOLKIT



**SOUTHERN
CENTER FOR
HUMAN
RIGHTS**

January
2025



UNDERSTANDING HB 123

THE PROCEDURAL CHANGES IN HB 123 ARE NECESSARY TO PROTECT DEFENDANTS WITH INTELLECTUAL DISABILITY.

WHAT HB 123 DOES

HB 123 makes two important changes to Georgia law regarding the determination of intellectual disability (ID) in capital cases. First, it changes the standard of proof from beyond a reasonable doubt to preponderance of the evidence. Second, it separates the determination of guilt from the determination of intellectual disability. Separating those two determinations is essential to the reform.

Every other state—including Alabama, Texas, Florida, and South Carolina—separates the two determinations, yet they all have active death penalty systems. Georgia would be no different.

1

ID IS IRRELEVANT TO GUILT.

The Supreme Court has said that evidence about the crime is irrelevant to the determination of intellectual disability. Under current law, jurors make two decisions at the same time, 1) whether the defendant is guilty of the crime, and 2) whether the defendant is intellectually disabled.

2

THE OPTIONAL PRETRIAL HEARING WOULD NOT SUBSTANTIALLY SLOW DOWN CAPITAL PROSECUTIONS.

Under the current bill, the pretrial hearing is optional unless the State agrees to it. In other words, the State can object to a hearing, and the court can decline to hold it. Capital cases take several years to bring to trial. There are scores of pretrial hearings in every case on things like jury panels, witness statements, forensic evidence, and competency.

3

THE BILL WOULD AFFECT A SMALL NUMBER OF CASES.

Capital cases involving intellectual disability are an extremely small percentage of criminal cases in Georgia. Since 2015, there have been approximately 160,000 criminal cases in Georgia. **Only about 10 of these cases were capital cases with claims of intellectual disability.**

4

THE LAW IS NOT RETROACTIVE.

The bill **would not apply** to anyone currently on death row. Line 108 explicitly says that the new changes only apply to cases that go to trial “[a]fter July 1, 2025.” The Georgia Supreme Court has also held that procedural changes to Georgia’s intellectual disability law do not apply retroactively. See *Fleming v. Zant*, 259 Ga. 687 (1989).

*The Procedural Changes to HB 123 Are Necessary to
Protect Defendants with Intellectual Disability*

HB 123 makes two important changes to Georgia law regarding the determination of intellectual disability in capital cases. First, it changes the standard of proof from beyond a reasonable doubt to preponderance of the evidence. Second, it separates the determination of guilt from the determination of intellectual disability.

Separating those two determinations is essential to the reform. Every other state—including Alabama, Texas, Florida, and South Carolina—separates the two determinations, yet they all have active death penalty systems. Georgia would be no different.

I. The Supreme Court Has Said that Evidence About the Crime Is Irrelevant to the Determination of Intellectual Disability.

- Under current law, jurors make two decisions at the same time: 1) whether the defendant is guilty of the crime, and 2) whether the defendant is intellectually disabled.
- The new bill would separate the finding of guilt from the finding of intellectual disability.
- This is critical because the U.S. Supreme Court has said that the facts of the crime are irrelevant to whether a person is intellectually disabled. *See Moore v. Texas*, 581 U.S. 1, 9 (2017). As the Court explained, permitting the jury to consider the facts of the crime “creates an unacceptable risk that persons with intellectual disability might be executed.” *Id.* at 17-18.
- In other words, the Supreme Court has made clear that the guilt phase of a capital trial should be focused on one question: whether the defendant committed the crime. Intellectual disability is a sentencing issue, not a guilt phase issue.

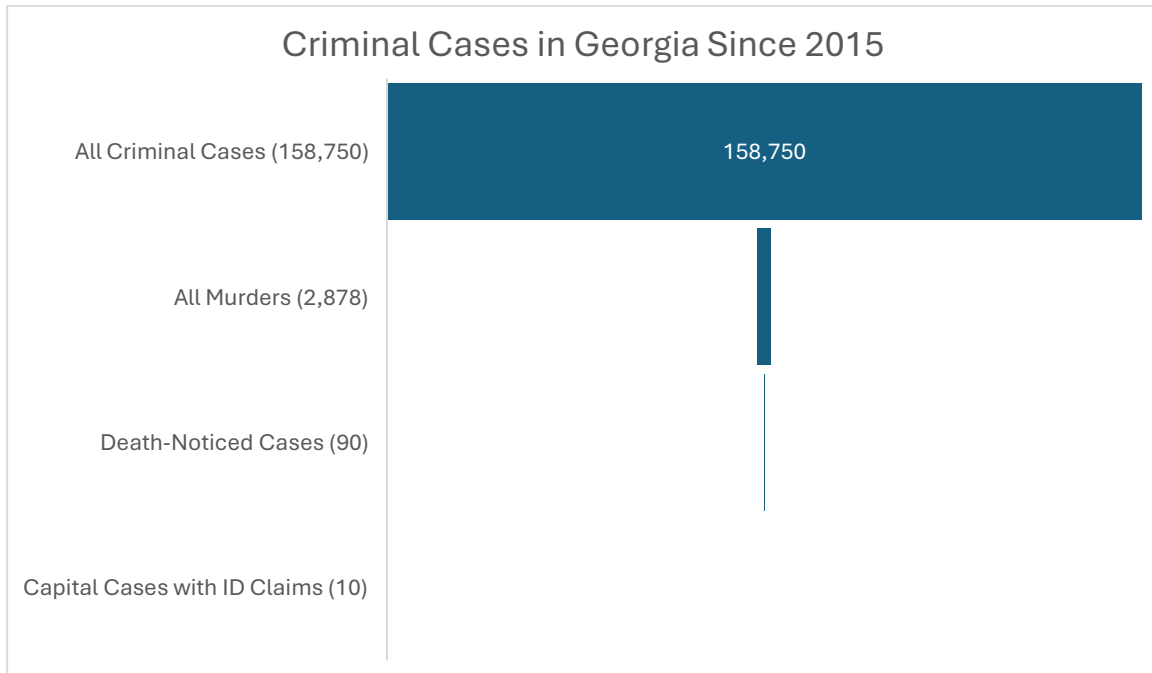
II. The Optional Pretrial Hearing Would Not Substantially Slow Down Capital Prosecutions.

- Under the current bill, the pretrial hearing is optional unless the State agrees to it. *See* Lines 19-22. In other words, the State can object to a hearing, and the court can decline to hold it.
- Even if there is a pretrial hearing, it would not significantly slow down capital cases. Capital cases take several years to bring to trial. There are scores of pretrial hearings in every case, on things like jury panels, witness statements, forensic evidence, and competency.
- Intellectual disability is the *one* issue on which there is never a pretrial hearing. This means that Georgia is offering *less* protection to people with intellectual disability, even though the Supreme Court has said they deserve *more* protection.

*The Procedural Changes to HB 123 Are Necessary to
Protect Defendants with Intellectual Disability*

III. The Bill Would Affect a Small Number of Cases.

- Capital cases involving intellectual disability are an extremely small percentage of criminal cases in Georgia.
- Since 2015, there have been approximately 160,000 criminal cases in Georgia. Only about 10 of these cases were capital cases with claims of intellectual disability:



- In other words, the bill would only affect approximately 0.006% of all criminal cases.
- Even though it is a small number of cases, it is essential that we protect those defendants who are at risk. As the U.S. Supreme Court has said, people with intellectual disability “face a special risk of wrongful execution” because “they have diminished capacities to understand and process information, to communicate . . . [and] to give meaningful assistance to their counsel.” *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002).

IV. The Bill Is Not Retroactive.

- The bill would not apply to anyone currently on death row.
- Line 108 explicitly says that the new changes only apply to cases that go to trial “[a]fter July 1, 2025.”
- The Georgia Supreme Court has also held that procedural changes to Georgia’s intellectual disability law do not apply retroactively. *See Fleming v. Zant*, 259 Ga. 687 (1989) (holding that there are no equal protection or due process violations by applying changes only to those defendants who have not gone to trial).

GEORGIA

AN OUTLIER IN DEATH PENALTY INTELLECTUAL DISABILITY LAW



Georgia law places people with intellectual disabilities at risk of execution more than any other state. Learn how you can help save lives.

What is Intellectual Disability?

In the context of the death penalty, Intellectual disability (ID) is a cognitive disability that lasts for a person's lifetime, affecting decision-making. The onset of the disability occurs in childhood and is characterized by significant limitations in both intellectual functioning and adaptive behavior. It does not include all behavioral health disabilities.

What is the law around ID and the death penalty?

In 2002, the United States Supreme Court ruled in *Atkins v. Virginia* that executing people with ID violates the Eighth Amendment's protection against cruel and unusual punishment. The Court reached this conclusion because there is a national consensus against the execution of people with ID, and because executing people with ID serves no penological purpose.

1 How does Georgia handle ID?

In 1988, well before *Atkins*, Georgia became the first state to prohibit the execution of people with ID. Unfortunately, this law—perhaps due to an oversight during the drafting process—set the standard for establishing ID extremely high while also requiring juries to perform the very difficult task of deciding ID and guilt at the same time.

2 Why is Georgia an outlier?

Standard of Proof: Georgia is the only state in the country that forces people to prove ID beyond a reasonable doubt to avoid execution.

Phase of Litigation: Georgia is also the only state that asks the jury to simultaneously decide guilt and ID. Perhaps as a result, there has never been a finding of ID in a trial involving intentional murder.

3 What is the impact of Georgia ID law?

No one has met Georgia's standard at trial for intentional homicide. The highest standard of proof and confusing legal process renders Georgians with ID at risk of execution, despite this being cruel and unusual punishment.

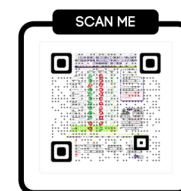
4 Is there a solution?

At minimum, Georgia must (1) lower the standard of proof for ID and (2) allow the determination of ID to be made separately from deliberations about guilt.

5 How can ordinary people help?

- **Write your state representatives.** If you don't already know who your legislators are, you can look them up using your mailing address here: http://openstates.org/find_your_legislator/.
- **Hold a small group** to educate your organization, house of worship, neighbors or community about this issue.
- **Host letter writing or phone banking parties.**
- **Connect** with a local organization.

Get our advocacy resources here.



HOW DOES GEORGIA'S DEATH PENALTY INTELLECTUAL DISABILITY LAW COMPARE TO OTHER KEY STATES?

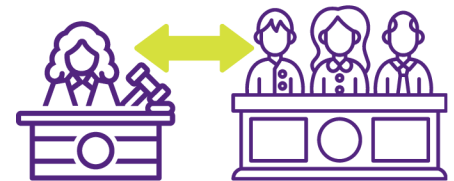
State	Pretrial Determination?	Guilt Phase Determination?	Standard of Proof
Alabama	✓	✗	P
Arkansas	✓	✗	P
Florida	✗	✗	C
Louisiana	✓	✗	P
Mississippi	✓	✗	P
Missouri	✓	✗	P
North Carolina	✓	✗	P C
Oklahoma	✓	✗	P C
South Carolina	✓	✗	P
Tennessee	✓	✗	P
Texas	✗	✗	P
Georgia	✗	✓	B

Phase of Litigation: When is ID determined?

Pretrial Determination: ID is determined before trial begins, based on a hearing by a judge.

Guilt Phase: ID is determined by a jury, while they are deliberating whether a person is guilty or innocent at trial.

Georgia is the only state where the ID determination is made during the guilt phase.



Phase of litigation **matters** because it is very difficult for juries to separate the issue of guilt from the issue of intellectual disability. This means that people who are found guilty are at greater risk of being denied a finding of ID.

STANDARDS OF PROOF: HOW MUCH EVIDENCE IS REQUIRED TO PROVE ID?

B

Beyond a Reasonable Doubt

This is the **HIGHEST** standard of proof in any court. **Georgia is the only state requiring this standard.**

C

Clear & Convincing Evidence

This standard is also very high, requiring a firm belief or conviction that the allegations sought to be proved by the evidence are true.

P

Preponderance of the Evidence

This standard simply requires a finding that a fact is more likely than not true.

P C

Hybrid

Some states permit a standard of Clear & Convincing at pretrial phase and Preponderance of the Evidence at the trial level post-conviction.

GEORGIA: A DANGEROUS OUTLIER IN DEATH PENALTY INTELLECTUAL DISABILITY LAW

Georgia law places people with intellectual disabilities at risk of execution more than any other state. Let's dive deep into the issue and learn how you can help save lives.



OVERVIEW

UNDERSTANDING INTELLECTUAL DISABILITY (ID)

Intellectual disability (ID) is a cognitive disability that lasts for a person's lifetime, affecting decision-making. The onset of the disability **occurs in childhood** and is characterized by significant limitations in both intellectual functioning and adaptive behavior. **It does not include all behavioral health disabilities. In the context of the death penalty, understanding ID is critical.**



GEORGIA'S CURRENT ID LAW

Despite being the first state to prohibit the execution of people with ID in 1988, Georgia's laws are far from perfect. The law—perhaps due to an oversight during the drafting process—**set an extremely high standard for establishing ID extremely high while also requiring juries to perform the very difficult task of deciding ID and guilt at the same time.**

THE IMPACT OF GEORGIA'S ID LAW

Georgia is the only state in the country that forces people to prove ID beyond a reasonable doubt to avoid execution. It is also the only state that asks the jury to simultaneously decide guilt and ID. This has led to there never being a finding of ID in a Georgia trial involving intentional murder. The high standard of proof and confusing legal process renders Georgians with ID at risk of execution, despite this being considered cruel and unusual punishment.

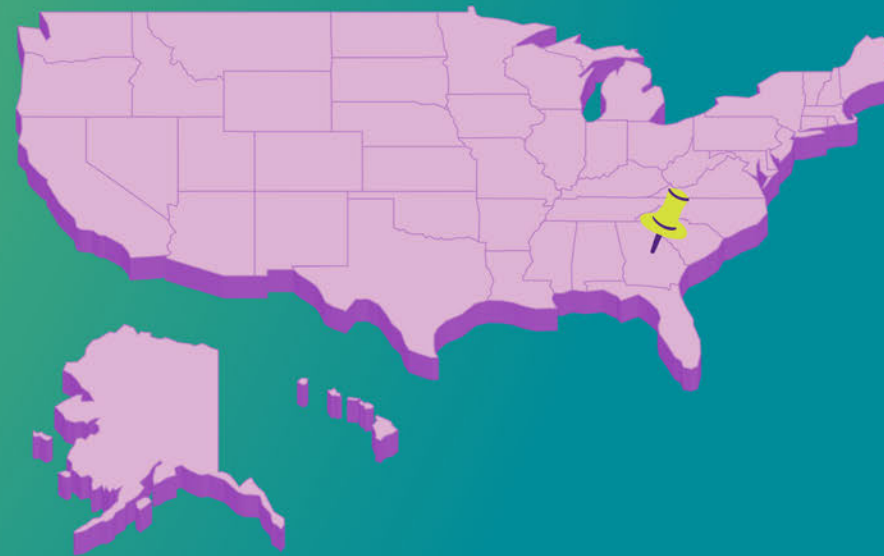
**COMPARING GEORGIA'S
DEATH PENALTY
INTELLECTUAL DISABILITY
LAW TO OTHER KEY STATES**



PHASE OF LITIGATION
When is ID Determined?



In most states, ID is determined before the trial begins, based on a hearing by a judge. Georgia, however, is the only state where the ID determination is made during the guilt phase.



When comparing Georgia to other states like Missouri, Louisiana, Mississippi, Tennessee, Florida, North Carolina, Oklahoma, Texas, Alabama, Arkansas, and South Carolina, we can clearly see that **Georgia stands alone.**

The phase of litigation matters because it is tough for juries to separate the issue of guilt from the issue of intellectual disability. This means that people who are found guilty are at greater risk of being denied a finding of ID.

2

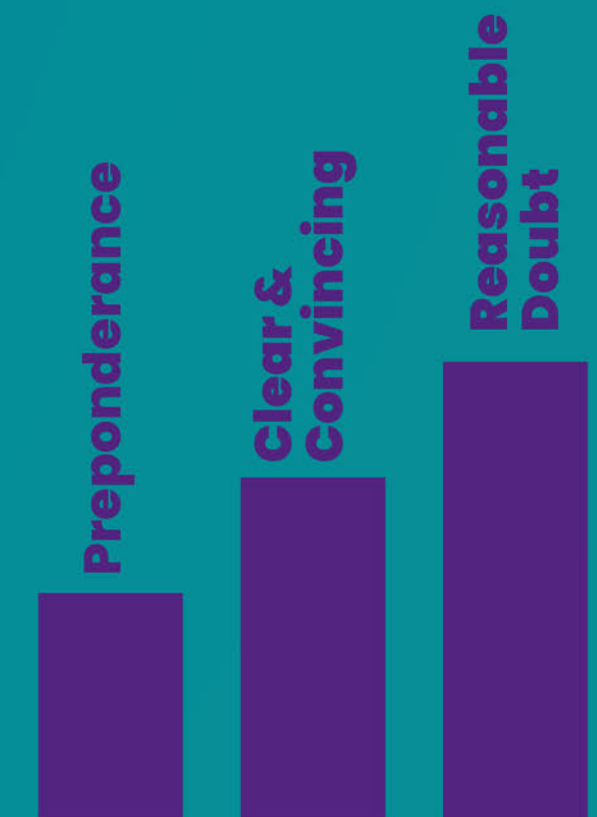
STANDARD OF PROOF
**How much evidence is
required?**

WHAT IS THE STANDARD OF PROOF IN GEORGIA?

Georgia is the only state requiring the highest standard of proof to establish ID, which is "beyond a reasonable doubt."

OTHER STANDARDS OF PROOF

- **"PREPONDERANCE OF THE EVIDENCE"** requires a finding that a fact is more likely than not true.
- **"CLEAR & CONVINCING"** requires a firm belief or conviction that the allegations sought to be proved by the evidence are true.
- **SOME STATES USE A HYBRID MODEL** which permits a standard of clear & convincing at the pretrial phase and preponderance of the evidence at the trial level.





THE WAY FORWARD

URGE GEORGIA LEGISLATORS TO

- 1. LOWER THE STANDARD OF PROOF FOR ID; AND**
- 2. SEPARATE THE DETERMINATION OF ID FROM DELIBERATIONS
ABOUT GUILT.**

ACT



WRITE TO YOUR STATE REPRESENTATIVES. LOOK THEM UP USING YOUR MAILING ADDRESS AT [HTTPS://PLURALPOLICY.COM/FIND-YOUR-LEGISLATOR/](https://pluralpolicy.com/find-your-legislator/)



HOST PHONE BANKING OR LETTER WRITING PARTIES TO REACH OUT TO LEGISLATORS.



CONNECT WITH A LOCAL ORGANIZATION TO FIND OUT HOW YOU CAN CONTRIBUTE MORE EFFECTIVELY. TOGETHER, WE CAN BRING ABOUT CHANGE.

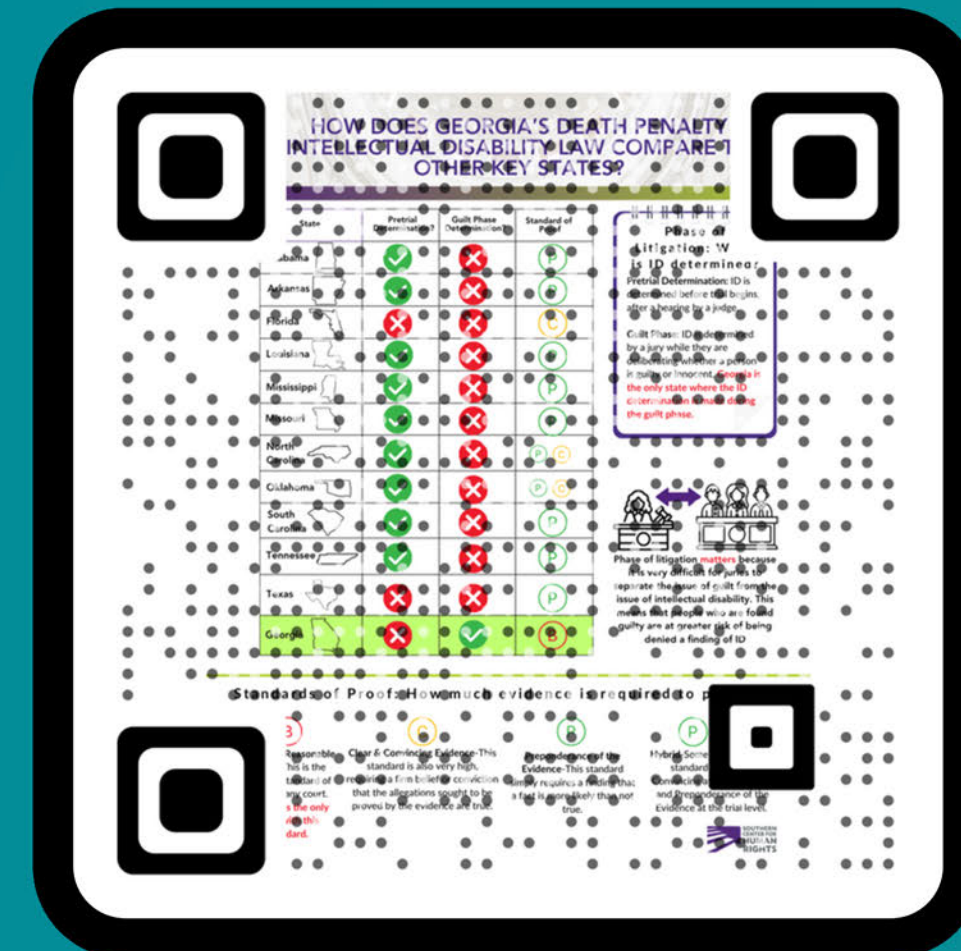


HOST A SMALL GROUP TO EDUCATE YOUR ORGANIZATION, HOUSE OF WORSHIP, NEIGHBORS, OR COMMUNITY ABOUT THIS ISSUE.

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MYTHS & FACTS: GEORGIA'S DEATH PENALTY AND INTELLECTUAL DISABILITY REFORM

Clarify common misconceptions about potential changes to Georgia's laws regarding the death penalty and the treatment of individuals with intellectual disabilities (ID).



GOAL

Learn to address the myths surrounding death penalty intellectual disability law in Georgia.

Georgia is an outlier. Changing the standard of proof for establishing intellectual disability in death penalty cases and removing the determination from the guilt phase would align Georgia with other key states.





GEORGIA'S CURRENT ID LAW

Despite being the first state to prohibit the execution of people with ID in 1988, Georgia's laws are far from perfect. The law—perhaps due to an oversight during the drafting process—**set an extremely high standard for establishing ID extremely high while also requiring juries to perform the very difficult task of deciding ID and guilt at the same time.**



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Georgia is the **only** state in the country that forces people to prove ID beyond a reasonable doubt to avoid execution. It is also the only state that asks the jury to simultaneously decide guilt and ID. This has led to there never being a finding of ID in a Georgia trial involving intentional murder. The high standard of proof and confusing legal process renders Georgians with ID at risk of execution, despite this being considered cruel and unusual punishment.



MYTH

Changing the standard of proof would “open the flood gates.”

FACT

Changing the standard of proof would align Georgia with the rest of the nation and could reduce litigation about the appropriate standard.



MYTH

Changing the phase of litigation when the ID determination is made would give defendants “three bites at the apple.”

FACT

Most states allow a pretrial hearing on intellectual disability (and many other matters that are also later considered by a jury). Granting a pretrial hearing in Georgia would simply be a safeguard to prevent unconstitutional death sentences.



MYTH

Changing Georgia's ID laws would abolish the death penalty.

FACT

Changing Georgia's statute would only affect a small fraction of people facing the death penalty.



MYTH

Changing the standard of proof from “beyond a reasonable doubt” to “clear and convincing evidence” will address the issue of ID determination.

FACT

The ‘clear and convincing evidence’ standard of proof is very high and often difficult for juries to distinguish from “beyond a reasonable doubt.” Georgia has executed a person even though every expert to evaluate him concluded that he had ID. The only way to prevent that from happening again is to change the standard of proof to “by a preponderance of the evidence” and remove the determination from the guilt phase of litigation.



ACT



WRITE TO YOUR STATE REPRESENTATIVES. LOOK THEM UP USING YOUR MAILING ADDRESS AT [HTTPS://PLURALPOLICY.COM/FIND-YOUR-LEGISLATOR/](https://pluralpolicy.com/find-your-legislator/)



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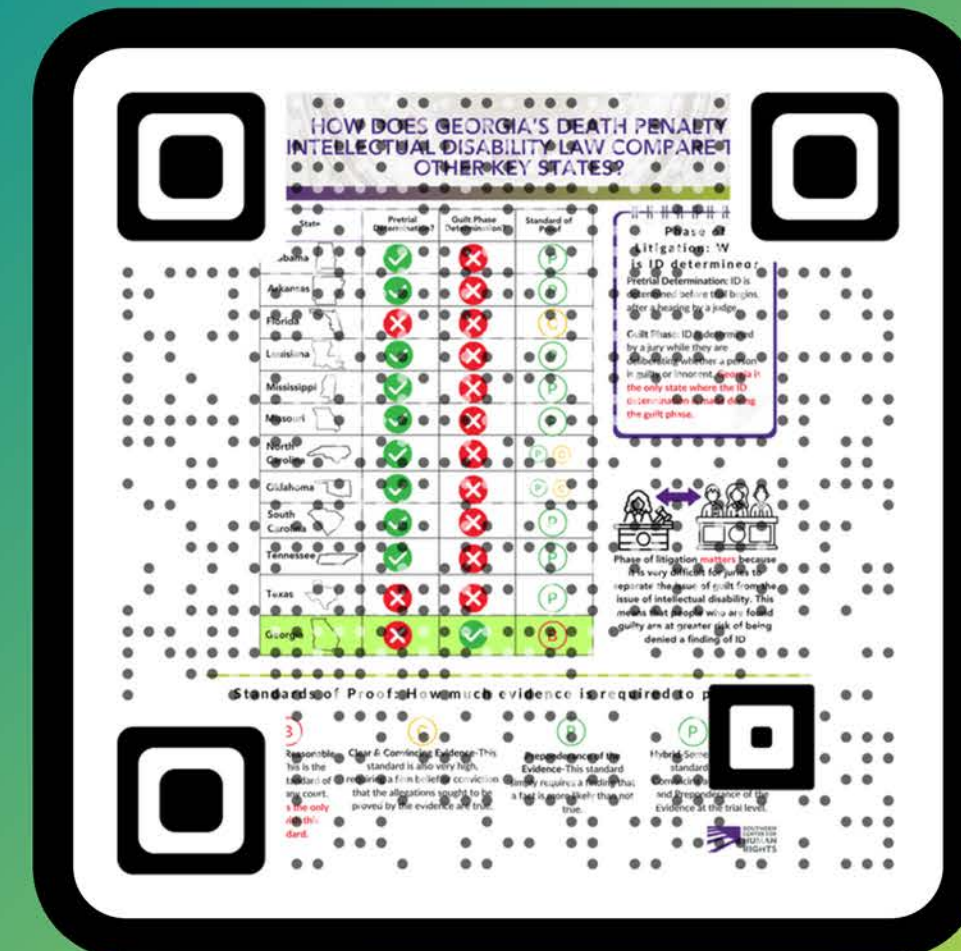


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MYTH OR FACT

GEORGIA & DEATH PENALTY INTELLECTUAL DISABILITY REFORM

Changing the standard of proof would “open the floodgates.”

VS

Georgia is an outlier. Changing the standard of proof would align Georgia with the rest of the nation and would substantially reduce litigation about the appropriate standard.

Changing the phase when the ID determination is made would give defendants “three bites at the apple.”

VS

Most states allow the parties to have a pretrial hearing on intellectual disability before the issue goes to a jury. A pretrial hearing would be an additional safeguard to ensure that no one with ID is unconstitutionally sentenced to death.

Changing Georgia’s ID laws would abolish the death penalty.

VS

Changing Georgia’s statute would only affect a small fraction of people facing the death penalty.

Changing the standard of proof from “beyond a reasonable doubt” to “clear and convincing evidence” will address the issue of ID determination.

VS

The ‘clear and convincing evidence’ standard of proof is difficult for juries to distinguish from “beyond a reasonable doubt.” Georgia has executed a person even though every expert to evaluate him concluded that he had ID. The only way to prevent that from happening again is to change the standard of proof to “by a preponderance of the evidence” and remove the determination from the guilt phase of litigation.



Georgia: A Dangerous Outlier in Death Penalty & Intellectual Disability Law

It is important that your legislators know how you feel about intellectual disability and the death penalty. Writing to them is one way to make a concrete impact. Below is a sample letter that you should edit to suit **your unique voice**.

Find your legislators by entering your address at <https://pluralpolicy.com/find-your-legislator/>. If a bill reaches the floor of either chamber (House or Senate) for a vote, your legislator will vote. **For this reason, it's important that your legislators know that their constituents support important changes to death penalty disability law in Georgia!**

For the complete SCHR advocacy toolkit, just scan the QR code at the bottom of the page. A printable version of this list is available there, as well.

Sample Email or Letter to Legislators

Dear **State Representative (if House)/Senator (if Senate) [Insert Last Name]**,

My name is **[Insert Your Name]** and I am a Georgia voter from District **[insert here]**.

I am writing you to ask that you support HB 123, a bill that changes Georgia's process and standard for proving intellectual disability in death penalty cases.

Intellectual disability (ID) is a cognitive disability that lasts for a person's lifetime. The onset of the disability occurs during childhood and is characterized by significant limitations in both intellectual functioning and adaptive behavior.

In 2002, the United States Supreme Court ruled in *Atkins v. Virginia* that executing people with ID violates the Eighth Amendment's protection against cruel and unusual punishment. Additionally, the Court said that a diagnosis of ID, regardless of severity, categorically excludes defendants with ID from execution.

Despite this ruling, Georgia is the only state in the country that forces people to prove ID beyond a reasonable doubt to avoid execution. It is also the only state that asks the jury to simultaneously decide guilt and ID. Not one person facing the death penalty has ever met the standard for intentional murder, which means that Georgians with ID are at risk for execution.

This process and standard create an extremely challenging legal obstacle, and Georgia is an outlier in requiring it. No defendant in Georgia has ever been able to prove intellectual disability beyond a reasonable doubt to avoid execution for intentional murder. Georgia allows the execution of people with intellectual disability because the burden of proof is too high and the determination process is too prejudicial.

Lowering the standard of proof and separating the determination of ID from the guilt-phase of trial is the only way to ensure that Georgia is in line with the *Atkins* decision.

[State any additional reasons you support this change here. Include a personal story related to this issue if you have one you are comfortable sharing]

Please vote YES on HB 123 and get Georgia on the right side of history and in line with the rest of the country and support reforming the way we treat intellectually disabled people facing the death penalty.

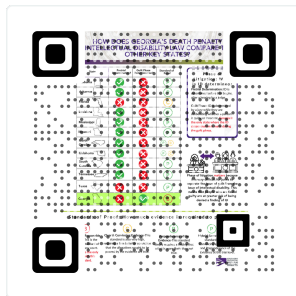
Sincerely,

[Insert Your Name]

[Insert Your Contact Information]

For more information or if you would like to make a Capitol visit with SCHR, please contact Blake Feldman (bfeldman@schr.org).

Scan this QR code for our Death Penalty & Intellectual Disability legal advocacy toolkit.





Georgia: A Dangerous Outlier in Death Penalty & Intellectual Disability Law

Finding your legislators in the Georgia General Assembly

Find your legislators by entering your address at <https://pluralpolicy.com/find-your-legislator/>. If a bill reaches the floor of either chamber (House or Senate) for a vote, your legislator will vote. **For this reason, it's important that your legislators know that their constituents support important changes to death penalty disability law in Georgia!** For the complete SCHR advocacy toolkit, just scan the QR code at the bottom of the page. A printable version of this list is available there, as well.

House Judiciary Non-Civil Committee Members

The House Judiciary Non-Civil Committee in the Georgia General Assembly is responsible for reviewing most proposed legislation impacting the criminal legal system in the House. Click each name to visit the official representative webpage. Once there is a proposed bill, contact these legislators even if *your* legislator isn't on the committee. If your representative *is* on the committee, make sure to let them know that you are their constituent.

Name	District	Position
<u>Tyler Paul Smith</u>	18th	Chairman
<u>Deborah Silcox</u>	53rd	Vice Chairman
<u>Soo Hong</u>	103rd	Secretary, Governor's Floor Leader
<u>Mandi Ballinger</u>	23rd	Member
<u>James Burchett</u>	176th	Member, Majority Whip
<u>Charlice Byrd</u>	20th	Member
<u>Sharon Cooper</u>	45th	Member
<u>Clint Crowe</u>	118th	Member
<u>Chuck Efstration</u>	104th	Member, Majority Leader
<u>Joseph Gullett</u>	19th	Member
<u>Stan Gunter</u>	8th	Ex-Officio
<u>El-Mahdi Holly</u>	116th	Member
<u>Dar'shun Kendrick</u>	95th	Member
<u>Rob Leverett</u>	123rd	Member

<u>Yasmin Neal</u>	79th	Member
<u>Esther Panitch</u>	51st	Member
<u>Shea Roberts</u>	52nd	Member

Senate Judiciary Committee Members

The Senate Judiciary Committee in the Georgia General Assembly is responsible for reviewing most proposed legislation impacting the criminal legal system in the House. Click each name to visit the official representative webpage. Once there is a proposed bill, contact these legislators even if *your* legislator isn't on the committee. If your representative *is* on the committee, make sure to let them know that you are their constituent.

Name	District	Position
<u>Brian Strickland</u>	42nd	Chairman
<u>Bill Cowsert</u>	46th	Vice Chairman
<u>John F. Kennedy</u>	18th	Secretary, President Pro Tempore
<u>Greg Dolezal</u>	27th	Ex-Officio
<u>Steve Gooch</u>	51st	Ex-Officio, Majority Leader
<u>Bo Hatchett</u>	50th	Member, Governor's Floor Leader
<u>Harold Jones II</u>	22nd	Member, Minority Leader
<u>Elena Parent</u>	44th	Member, Minority Caucus Chair
<u>Michael 'Doc' Rhett</u>	33rd	Member
<u>Shawn Still</u>	48th	Member
<u>Blake Tillery</u>	19th	Member
<u>Ben Watson</u>	1st	Member

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