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NOTES

Mental Retardation as a Bar to the Death Penalty: Who Bears the Burden of Proof?

*State v. Johnson*¹

I. INTRODUCTION

In February of 1994, Ernest Lee Johnson walked into a convenience store in Columbia, Missouri, in the middle of the night.² He was a frequent customer of this particular convenience store and had patronized it four times earlier that day.³ During his fourth visit, the cashier noticed Johnson was staring at her while she deposited money into the store safe.⁴ In his final visit to the store, he murdered the employees working that evening with a hammer and took less than \$500.⁵ Johnson was found guilty of first-degree murder and was sentenced to die for the murder of each of his three victims.⁶

Over the next ten years, Johnson, whom the media dubbed the “claw hammer killer,”⁷ appealed his conviction and his death sentences multiple times.⁸ In the midst of Johnson’s ongoing legal struggle for survival in Missouri, the Supreme Court of the United States held in *Atkins v. Virginia* that the imposition of a death sentence for a mentally retarded offender is uncon-

1. 244 S.W.3d 144 (Mo. 2008) (en banc).

2. *State v. Johnson*, 968 S.W.2d 686, 689 (Mo. 1998) (en banc).

3. *Id.*

4. *Id.* The cashier was working a day shift and left work at 5:00 p.m. *Id.*

5. *Id.* at 689-90. Johnson visited the store sometime before 11:45 p.m.; he returned to his house around 11:45 p.m. splattered in blood. *Id.* at 689.

6. *Id.* at 689.

7. Christine Lesicko, *UPDATE: Johnson Defense Alleges Ineffectiveness of Counsel*, COLUMBIA MISSOURIAN, July 2, 2009, available at <http://www.columbia-missourian.com/stories/2009/07/02/update-defense-alleges-ineffectiveness-counsel>.

8. *State v. Johnson*, 244 S.W.3d 144, 149 (Mo. 2008) (en banc). In Johnson’s first appeal in 1998, he successfully had his death sentences set aside and the case remanded for a new penalty phase hearing due to ineffective assistance of counsel; Johnson’s counsel failed to call an expert witness to testify at the penalty phase. *State v. Johnson*, 968 S.W.2d 686, 702 (Mo. 1998) (en banc). In Johnson’s second appeal in 2000, the court rejected all of Johnson’s arguments and affirmed the death penalties. *State v. Johnson*, 22 S.W.3d 183, 194 (Mo. 2000) (en banc).

titutional.⁹ The *Atkins* opinion opened a new avenue for Johnson, and on appeal his death sentences were set aside.¹⁰ On remand, Johnson argued that he was mentally retarded.¹¹ The jury, in what was Johnson's third penalty phase, found that Johnson was not mentally retarded and sentenced him to die.¹² On appeal to the Supreme Court of Missouri, the court held that the penalty phase court did not err in placing the burden of proof upon Johnson to prove that he was mentally retarded.¹³

In holding that the execution of mentally retarded offenders is cruel and unusual punishment,¹⁴ the instant court followed the current trend of other states. Even before the Supreme Court of the United States rendered its decision in *Atkins*, state legislatures around the country, including the Missouri legislature, had enacted laws prohibiting the execution of mentally retarded offenders.¹⁵ Also, the Supreme Court of Missouri's holding that a defendant bears the burden of proving his mental retardation is consistent with the position taken by the vast majority of states.¹⁶ However, the court rendered its holding in the absence of any legislation placing the burden upon the defendant.¹⁷ In so doing, the court was not acting in conformity with Missouri common law setting forth doctrines of statutory construction.¹⁸ Furthermore, by not requiring that the burden of proving mental retardation be "beyond a reasonable doubt," the court arguably failed to follow precedent of the Supreme Court of the United States.¹⁹ This Note analyzes these issues and con-

9. 536 U.S. 304, 321 (2002). The Court held that executing mentally retarded criminals is excessive and in violation of the Eighth Amendment. *Id.* This author recognizes that the term "mentally retarded" is abrasive and offensive to some and is merely borrowing the language and terminology of the courts. If this term offends any readers, please know that it was not my intention.

10. *State v. Johnson*, 102 S.W.3d 535, 541 (Mo. 2003) (en banc). This was Johnson's third appeal to the Supreme Court of Missouri. *Id.* at 537.

11. *Johnson*, 244 S.W.3d at 149.

12. *Id.*

13. *Id.* at 151.

14. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

15. *See, e.g.*, MO. REV. STAT. § 565.030.4(1) (2000) (enacted 1983) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded . . ."); GA. CODE ANN. § 17-7-131(j) (1998) (enacted 1988); KY. REV. STAT. ANN. §§ 532.150, 532.135, 532.140 (West 2006) (enacted 1990); MD. CODE ANN., CRIM. LAW § 2-202 (West 2002) (portions of former Art. 27, § 412, which placed limitations on death sentences, were repealed and replaced with this statute in 2002); TENN. CODE ANN. § 39-13-203(b) (West 2002) (enacted 1990).

16. *See infra* notes 164-68 and accompanying text.

17. *See infra* notes 234-35 and accompanying text.

18. *See infra* Part III.C.

19. *See infra* Part III.A.

cludes that, while the Supreme Court of Missouri's holding in the instant decision followed the trend of other state legislatures, it failed to make its decision in accordance with Missouri common law.

II. FACTS AND HOLDING

Ernest Lee Johnson is a veteran of Missouri's appellate system, having been before the Supreme Court of Missouri four times.²⁰ Johnson was convicted of three counts of first-degree murder in Boone County, Missouri, on May 18, 1995.²¹ At trial, the prosecution presented evidence that in February of 1994 Johnson bludgeoned to death three employees of a Columbia convenience store using a hammer, a screwdriver, and a gun.²² The prosecution also established that Johnson had been planning to hold up this particular convenience store for weeks²³ and that Johnson's girlfriend's son helped Johnson by hiding evidence.²⁴

In the subsequent penalty phase, the jury recommended the death penalty for each of the three convictions.²⁵ In accordance with the recommendation of the jury, the trial court sentenced Johnson to death.²⁶ Johnson filed a motion for post-conviction relief,²⁷ which the trial court overruled after an

20. See *State v. Johnson*, 244 S.W.3d 144, 149 (Mo. 2008) (en banc).

21. Appellant's Brief at 1, *State v. Johnson*, 968 S.W.2d 686 (Mo. 1998) (No. 78282), 1997 WL 33813040.

22. *State v. Johnson (Johnson I)*, 968 S.W.2d 686, 690 (Mo. 1998) (en banc). Each victim died from head injuries "consistent with a bloody hammer found at the scene." *Id.* In addition to the hammer injuries, one employee had stab wounds consistent with a screwdriver found near the store, while another employee had a nonfatal gunshot wound. *Id.*

23. *Id.* at 689. In January, Johnson had told his girlfriend's eighteen-year-old son that he was planning to hold up that convenience store. *Id.* Additionally, Johnson purchased crack from the eighteen-year-old son and borrowed a handgun from the eighteen year old. *Id.*

24. *Id.* at 689-90. Johnson's girlfriend's sixteen-year-old son had hidden the handgun used to shoot the employee and the clothes Johnson wore during the crime in a park. *Id.* at 690. The clothes Johnson had worn during the crime were splattered with blood consistent with the blood of the victims. *Id.*

25. *Id.* at 689.

26. *Id.*

27. *Id.* See MO. R. CRIM. PRO. 29.15, which reads,

A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court

evidentiary hearing.²⁸ Johnson then appealed to the Supreme Court of Missouri for the first time.²⁹ The court rejected the majority of Johnson's appeals³⁰ and affirmed the conviction on all three counts.³¹ However, the court found that Johnson's counsel, during the penalty phase, failed to exercise the skill and diligence that a reasonably competent attorney would exercise in similar circumstances³² by failing to call an expert witness to testify during the penalty phase whose testimony might have provided mitigating evidence of Johnson's mental health and his mental state at the time of the crime.³³ Further, the court found that Johnson was prejudiced by the absence of this expert's testimony.³⁴ Based on these conclusions, the court found that Johnson had received ineffective assistance of counsel³⁵ and remanded the case for a new penalty phase proceeding.³⁶

28. *Johnson I*, 968 S.W.2d at 689.

29. *Id.*

30. *Id.* at 690-91. Johnson's first point on appeal was that the trial court erred in allowing the State to question potential jurors during voir dire about State witnesses who testify in accordance with a plea agreement. *Id.* The court held that the trial court did not err because the witnesses offered eyewitness testimony concerning the crime, making it so that the State had the right to discern any possible prejudice, and because the plea agreements were not used as substantive evidence of guilt during the trial. *Id.* at 692. The court next rejected Johnson's argument that his voir dire examination was improperly limited. *Id.* at 692-94. Johnson's second point on appeal was that the trial court improperly granted the State's challenge for cause for five potential jurors who indicated that they were hesitant or uncomfortable with giving the death penalty. *Id.* at 692-94. The court affirmed such removal for cause. *Id.* at 695-96. Johnson's final point on appeal was that his counsel during the guilt phase was ineffective. *Id.* at 695-96. The court held that Johnson's counsel was not ineffective and affirmed the convictions on all three counts. *Id.* at 696-97.

31. *Id.* at 689.

32. *Id.* at 699.

33. *Id.* at 697. The expert witness reviewed the police reports, conducted a two-and-a-half hour interview with Johnson, and concluded that at the time of the crime Johnson suffered from "cocaine intoxication," a mental disorder caused by excessive cocaine use. *Id.* at 697-98. Johnson's counsel testified during the post-conviction relief hearing that she intended to call the expert witness but that "communications problems" and scheduling conflicts prevented her from calling the witness. *Id.* at 698. Johnson's counsel testified at the motion hearing that she should have asked for a continuance or a recess. *Id.*

34. *Id.* at 702. The court stated that, while it "does not presume to know the precise effect [the expert]'s testimony would have had on the jurors," it believed that the expert's testimony "would have altered the jurors' deliberations to the extent that a reasonable probability exists that they would have unanimously recommended life imprisonment without eligibility of probation or parole." *Id.*

35. *Id.* at 699.

36. *Id.* at 702.

In the second penalty phase, the new jury also returned three death sentences.³⁷ In 2000, on his second appeal to the Supreme Court of Missouri, the court rejected all of Johnson's arguments³⁸ and affirmed the death sentence.³⁹ This decision seemingly foreclosed all avenues of appeal for Johnson in Missouri. In 2001, while Johnson was awaiting execution, the Missouri General Assembly adopted an amendment to Missouri Revised Statute section 565.030, which prescribes trial procedure for first-degree murder.⁴⁰ According to amended section 565.030, the trier of fact during the penalty phase of a first-degree murder trial shall render a verdict of life imprisonment rather than the death penalty if the trier finds by a preponderance of evidence that the defendant is mentally retarded.⁴¹ Yet these provisions affected only of-

37. *State v. Johnson (Johnson II)*, 22 S.W.3d 183, 185 (Mo. 2000) (en banc). Tried before a new jury, this and all subsequent penalty phases dealt only with the issue of whether Johnson should receive the death penalty; whether Johnson committed the murders was no longer at issue. *See id.*

38. *See id.* at 187. The court held that the penalty phase court did not abuse its discretion in striking a juror for cause because the juror had misgivings about signing his name to the death verdict form. *Id.* at 188-89. The court held that the penalty phase court did not abuse its discretion in striking for cause a juror who indicated that he would hold the State to a higher burden of proof than beyond a reasonable doubt. *Id.* at 189. Johnson was barred from arguing that the State's method of execution was unconstitutional because the original trial court judge overruled his motion relating to that issue, and Johnson did not appeal that ruling in his original appeal. *Id.* at 189-90. Johnson was barred from arguing that the jury in the penalty phase should not have heard his statements given to the police because he was arrested without a warrant because he did not raise this issue in his first appeal. *Id.* at 190. The trial court did not err in allowing the prosecutor to put forth victim impact evidence. *Id.* at 190. The trial court did not err in refusing Johnson's request for a mistrial because the prosecutor's rebuttal closing argument was based upon personal opinion and belief. *Id.* at 191. The trial court did not err in refusing the defendant's proffered jury instructions, which included non-statutory mitigating circumstances. *Id.* at 191-92. The court rejected Johnson's argument that the aggravating circumstances in the jury instructions were unconstitutional. *Id.* at 192. The court found that the death sentences were not imposed under the influence of passion or prejudice and that the evidence supported each aggravating factor beyond a reasonable doubt. *Id.*

39. *Id.* at 194.

40. 2001 Mo. Legis. Serv. S.B. 267 (West). The amendment added language removing mentally retarded offenders from consideration for the death penalty. *Id.*; *see infra* note 41. All references to a statute are to Missouri Revised Statutes, unless indicated otherwise.

41. MO. REV. STAT. § 565.030.4(1) (2000) ("The trier [of fact] shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier of fact finds by a preponderance of the evidence that the defendant is mentally retarded . . .").

fenses committed on or after August 28, 2001,⁴² and thus did not apply to Johnson.⁴³

Yet, in 2002, the Supreme Court of the United States held in *Atkins v. Virginia* that, because the execution of a mentally retarded criminal does not measurably advance the deterrent or the retributive purposes of the death penalty, executing a mentally retarded criminal is excessive punishment and unconstitutional.⁴⁴ Therefore, the Constitution restricts a state's power to execute a mentally retarded criminal.⁴⁵ After this decision, Johnson once again appealed to the Supreme Court of Missouri.⁴⁶

Before the court for a third time, Johnson argued that his counsel was deficient in failing to present evidence of mental retardation during the second penalty phase and that the sentence was excessive under the Eighth Amendment of the United States Constitution.⁴⁷ In light of the recent *Atkins* decision prohibiting states from executing mentally retarded offenders, the court held that a defendant who is able to prove by a preponderance of evidence that he or she is mentally retarded shall not be subject to the death penalty.⁴⁸ The court further held that, although evidence establishing Johnson's mental retardation was available,⁴⁹ Johnson's counsel did not sufficiently present such evidence.⁵⁰ Therefore, Johnson was entitled to a new penalty phase hearing.⁵¹

In his third penalty phase hearing, Johnson presented evidence that he was mentally retarded.⁵² According to the Diagnostic and Statistical Manual of Mental Disorders IV, a person with an IQ of 70 or below is mentally retarded, but it is also possible for an individual with an IQ between 70 and 75

42. MO. REV. STAT. § 565.030.7.

43. *State v. Johnson (Johnson III)*, 102 S.W.3d 535, 537 (Mo. 2003) (en banc) (Johnson committed his offenses in 1994.).

44. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); see U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

45. *Atkins*, 536 U.S. 304.

46. *Johnson III*, 102 S.W.3d at 537.

47. *Id.*

48. *Id.* at 540. The court used the "preponderance of the evidence" standard because that is the standard given by section 565.030.4(1). See *supra* note 41.

49. *Johnson III*, 102 S.W.3d at 538-39. Johnson was evaluated by three mental health experts prior to the trial; one expert concluded Johnson was borderline mentally retarded based on his IQ scores and his history of deficient adaptive skills; another expert determined that Johnson was brain damaged due to two childhood head injuries and drug use; and the final expert testified that the findings of the two other experts were feasible. *Id.*

50. *Id.* at 538. Only two experts testified during the trial, and the expert who concluded that Johnson was borderline mentally retarded did not testify. *Id.*

51. *Id.* at 541.

52. *State v. Johnson (Johnson IV)*, 244 S.W.3d 144, 151 (Mo. 2008) (en banc).

to be mentally retarded.⁵³ Johnson showed that he had taken IQ tests throughout his life and earned scores of 77, 63, 95, 78, and 84.⁵⁴ After the case was remanded for a third penalty phase hearing, Johnson was again tested and received a full-scale IQ score of 67.⁵⁵ The expert witness for the state testified that he thought Johnson was faking his low IQ.⁵⁶ Johnson's experts testified that Johnson had deficiencies in many categories of adaptive behavior,⁵⁷ such as communication, home living, social skills, functional academics, self-direction, health and safety, and leisure and work.⁵⁸ The state offered testimony from several other witnesses that Johnson was able to communicate well with others, and the jury was shown the interview between the state's expert and Johnson.⁵⁹ The state also offered testimony that Johnson was capable of getting a job and that it was his lack of motivation that kept him unemployed.⁶⁰ In addition, one of Johnson's experts was not qualified to diagnose mental diseases, and the only defect he was qualified to diagnose was mental retardation.⁶¹ This same expert testified that he made about half of his income by serving as an expert witness and testifying that a defendant is mentally retarded and that he had never testified on behalf of the prosecution.⁶² This expert also relied upon anecdotal evidence provided by Johnson's family to test Johnson's adaptive behaviors.⁶³

In this third penalty phase, the jury found that Johnson was not mentally retarded and once again rendered a verdict of the death penalty for each count of murder.⁶⁴ For a fourth time, Johnson appealed to the Supreme Court of Missouri to challenge the imposition of the death penalty.⁶⁵

53. *Id.* at 153 (quoting the Diagnostic and Statistical Manual of Mental Disorders IV, the standard classification of mental disorders used by mental health professionals in the United States).

54. *Id.* at 152.

55. *Id.* Johnson was tested by both his own expert and the expert for the state and received a full-scale score of 67 on both tests. *Id.*

56. *Id.* at 152-53.

57. MO. REV. STAT. § 565.030.6 (2000) (defining mental retardation as "a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age").

58. *Johnson IV*, 244 S.W.3d at 153.

59. *Id.*

60. *Id.* at 156.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 149.

65. *Id.*

As in his prior appearances before the court, Johnson raised a number of points on appeal, each of which the court disposed of relatively quickly.⁶⁶ In addition to these points on appeal, Johnson also made several challenges dealing with the issue of his alleged mental retardation. First, Johnson argued that “the trial court erred in instructing the jury that he had the burden of [proof]” to show that he was mentally retarded.⁶⁷ Johnson alleged that, by putting the burden upon him, the trial court violated his Sixth Amendment right.⁶⁸ Further, Johnson asserted that the burden of proof should have been upon the state.⁶⁹ Second, Johnson argued that the state should have been required to prove beyond a reasonable doubt that he is not mentally retarded before the jury could impose the death penalty, rather than only having to satisfy the lower preponderance of evidence standard prescribed by section 565.030.4(1).⁷⁰ Johnson argued that the holdings of *Atkins*⁷¹ and *Ring v. Ari-*

66. *Id.* at 157-58, 160, 162-65. Johnson alleged that the trial court erred in granting the State’s challenges for cause as to four prospective jurors. *Id.* at 158-60. Each of these four jurors gave answers during the voir dire indicating that he would have difficulty imposing the death penalty. *Id.* For each of these jurors, the court held that the trial court did not abuse its discretion in sustaining the State’s motion to strike for cause. *Id.* at 160. Next, Johnson alleged that the trial court erred in admitting crime scene and autopsy photographs, as they were gruesome, inflammatory, and overly prejudicial. *Id.* at 161. The court held that the trial court did not abuse its discretion in admitting the photographs. *Id.* at 162. Johnson also challenged the jury instructions, alleging that the trial court erred in giving three different jury instructions, one for each count of the three counts of murder. *Id.* The court held that there was no evidence suggesting that the death penalties were imposed as result of passion, prejudice, or any other arbitrary factor because sufficient evidence was presented by the State to support the jury’s findings of aggravating circumstances. *Id.* at 163. Also, the court found that the death sentence imposed upon Johnson was neither excessive nor disproportionate to the penalty imposed in similar cases. *Id.* at 164.

67. *Id.* at 150.

68. *Johnson IV*, 244 S.W.3d at 150. The Sixth Amendment provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

69. *Johnson IV*, 244 S.W.3d at 150.

70. *Id.*

71. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment restricts the State’s power to take the life of a mentally retarded offender).

*zona*⁷² supported his proposition that a jury must find beyond a reasonable doubt that a defendant is not mentally retarded.⁷³ Finally, Johnson argued that the trial court erred in not granting his motion for a directed verdict because the mitigating evidence presented at the penalty phase outweighed the aggravating evidence as a matter of law.⁷⁴ The court rejected Johnson's arguments, affirmed the death penalties, and held that when a defendant guilty of first-degree murder wishes to avoid the death penalty because he is mentally retarded it is the defendant's burden to prove to a jury that he is mentally retarded.⁷⁵ The court further held that a jury is not required to find beyond a reasonable doubt that the defendant is mentally retarded.⁷⁶

III. LEGAL BACKGROUND

A. *The Death Penalty in the United States*

The death penalty has existed throughout history.⁷⁷ Hammurabi's Code, the earliest recorded body of laws,⁷⁸ provided for the death penalty for twenty-five different offenses.⁷⁹ For hundreds of years prior to the formation of the United States, the death penalty existed in Britain.⁸⁰ In fact, the British made extensive use of the death penalty.⁸¹ For example, under the rule of Henry VIII, who reigned over England for thirty-eight years, 72,000 people were executed.⁸² One reason so many individuals were executed by the Brit-

72. *Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the findings of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.").

73. *Johnson IV*, 244 S.W.3d at 150.

74. *Id.* at 157.

75. *Id.* at 151.

76. *Id.*

77. Jeffrey M. Banks, Note, *In re Stanford: Do Evolving Standards of Decency Under Eighth Amendment Jurisprudence Render Capital Punishment Inapposite for Juvenile Offenders?*, 48 S.D. L. REV. 327, 338 (2003).

78. Derek W. St. Pierre, Note, *The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 262 (1998).

79. Michael H. Reggio, *History of the Death Penalty*, in SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 1, 1 (Laura E. Randa ed., 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html>.

80. Dawinder S. Sidhu, *On Appeal: Reviewing the Case Against the Death Penalty*, 111 W.VA. L. REV. 453, 457 (2009).

81. *Id.* at 457-58.

82. George Lawyer, *Should the Grand Jury System Be Abolished?*, 15 YALE L.J. 178, 179 (1906). Henry VIII ascended the throne of England in 1509 and died in 1547. British History Online, Timeline of Henry VIII, <http://british-history.ac.uk/>

ish is that Britain's list of capital crimes was quite lengthy: in the eighteenth century, one could be sentenced to death for 222 crimes, including cutting down a tree and counterfeiting stamps.⁸³

When the British colonists arrived in America, they brought with them British forms of justice, including the death penalty.⁸⁴ Generally, the American colonies imposed the death sentence for the same offenses as the English. In Massachusetts Bay Colony during the seventeenth century, a person could be sentenced to death for pre-meditated murder, sodomy, witchcraft, adultery, idolatry, blasphemy, assault in anger, rape, statutory rape, poisoning, and bestiality.⁸⁵ By the late eighteenth century, the number of capital crimes in Massachusetts had been whittled down to seven: murder, sodomy, burglary, arson, rape, and treason.⁸⁶ By 1776, most of the colonies had nearly the same death statutes, which provided for the death penalty in instances of arson, piracy, treason, murder, sodomy, burglary, robbery, rape, horse-stealing, slave rebellion, and often counterfeiting.⁸⁷

The American public has been debating the merits of the death penalty in the United States since the founding of the nation.⁸⁸ The first great era of reform occurred between 1833 and 1853.⁸⁹ As a result of opposition to the death penalty, fifteen states banned public hangings.⁹⁰ Interestingly, the banning of public executions was opposed by many death penalty abolitionists, who felt as though the public executions provided firsthand evidence of the cruelty of the death penalty.⁹¹ Abolitionists hoped more people would come to find the death penalty abhorrent by observing the executions firsthand.⁹² In the second half of the nineteenth century, several states abolished the death

period.aspx?tme=8 (last visited March 16, 2010). For comparison, only 4,916 individuals were executed in the United States between the years of 1930 and 2006. Bureau of Justice Statistics, Capital Punishment, 2006 Statistical Tables, <http://bjs.ojp.usdoj.gov/content/pub/html/cp/2006/tables/cp06st09.cfm> (last visited Feb. 15, 2010).

83. Sidhu, *supra* note 80, at 457-58.

84. *Id.* at 458-59. However, the American colonies sought to limit the use of the death penalty before the enactment of the U.S. Constitution. *Id.* at 458.

85. HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 7 (1982).

86. *Id.*

87. *Id.*

88. See SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 22 (2003) ("To some extent, the debate about capital punishment has been going on almost since the founding of the Republic."); Sidhu, *supra* note 80, at 454.

89. PHILIP ENGLISH MACKEY, *VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT*, xix-xxviii (Philip English Mackey ed., 1976).

90. *Id.* at xx.

91. *Id.*

92. *Id.*

penalty altogether; however, some of those states reinstated the death penalty decades later.⁹³

A recurring argument against the death penalty is that sentencing a defendant to death violates the Eighth Amendment's prohibition against cruel and unusual punishment.⁹⁴ However, prior to 1962 few Supreme Court cases construing the Eighth Amendment were decided.⁹⁵ In 1892, in *O'Neil v. Vermont*, the Court reaffirmed that the Eighth Amendment was not applicable to the states.⁹⁶ Years later, in *Weems v. United States*, a Coast Guard officer was convicted of falsifying documents of the United States government of the Philippine Islands⁹⁷ and was sentenced to fifteen years of imprisonment and hard labor.⁹⁸ The Court overturned his sentence, holding that the sentence was excessive and in violation of the Constitutional prohibition against cruel and unusual punishment.⁹⁹ In so holding, the Court stated that the Eighth Amendment is not forever bound to the standards of public opinion that the drafters of the amendment possessed, but rather it is progressive and "may acquire meaning as public opinion becomes enlightened by a humane justice."¹⁰⁰

Another case prior to 1962 dealing with the interpretation of the Eighth Amendment was *Trop v. Dulles*, which was decided in 1958.¹⁰¹ In this case, a private in the United States Army was found guilty of the crime of desertion, was dishonorably discharged, and lost his citizenship as a result.¹⁰² The Court reversed the conviction¹⁰³ in part on the ground that denationalization as a punishment is barred by the Eighth Amendment.¹⁰⁴ In its opinion, the Court found that the basic concept behind the amendment is "nothing less than the dignity of man."¹⁰⁵ Also, the Court concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency" of society.¹⁰⁶ In dicta, the Court stated that "the death penalty has been employed

93. *Id.* at xxxiii-xxxiv, xl.

94. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

95. Bethany C. Bryant, Comment, *Expanding Atkins and Roper: A Diagnostic Approach to Excluding the Death Penalty as Punishment for Schizophrenic Offenders*, 78 MISS. L.J. 905, 909 (2009).

96. *O'Neil v. Vermont*, 144 U.S. 323, 331-32 (1892).

97. *Weems v. United States*, 217 U.S. 349, 357-58 (1910).

98. *Id.* at 358.

99. *Id.* at 382.

100. *Id.* at 378.

101. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958).

102. *Id.* at 88.

103. *Id.* at 91.

104. *Id.* at 101.

105. *Id.* at 100.

106. *Id.* at 101.

throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”¹⁰⁷

In 1962, the Supreme Court decided the case of *Robinson v. California*, in which the Court held that a California law that made it a crime to be a drug addict was unconstitutional.¹⁰⁸ In so holding, the Court stated that punishing an individual for suffering from the disease of drug addiction¹⁰⁹ “inflicts a cruel and unusual punishment” in violation of the Fourteenth Amendment.¹¹⁰ Furthermore, comparing the California law against being a drug addict to a hypothetical law against being mentally ill or suffering from some other socially stigmatized disease, the Court concluded that such a law would be “universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”¹¹¹ Thus, the Supreme Court first held in *Robinson* that the Eighth Amendment’s limitation on cruel and unusual punishment was applicable to state governments.¹¹²

In 1972 the Supreme Court finally had the opportunity to consider, for the first time, whether the death penalty is a cruel and unusual punishment in violation of the Eighth Amendment.¹¹³ In *Furman v. Georgia*, the Court considered three consolidated state cases in which each defendant was sentenced to die.¹¹⁴ The Court held that the statutes under which the defendants were given the death penalty were unconstitutional, but the Court was unable to agree as to a rationale, and each Justice wrote a separate opinion.¹¹⁵ Accordingly, the defendants’ death sentences were set aside,¹¹⁶ and the death penalty, as it largely existed in the United States at that time, was rendered uncons-

107. *Id.* at 99.

108. *Robinson v. California*, 370 U.S. 660, 667 (1962).

109. *Id.* (counsel for the State recognized that narcotic addiction is an illness).

110. *Id.*

111. *Id.* at 666.

112. *Id.*; see *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (citing *Robinson*, Justice Douglas claims “[t]hat the requirements of due process ban cruel and unusual punishment is now settled”).

113. Bryant, *supra* note 95, at 910. The Court had broached the issue of the death penalty and the Eighth Amendment in prior cases. In *Rudolph v. Alabama*, in which the majority denied certiorari, Justice Goldberg in his dissent stated he would have granted certiorari to consider whether the Eighth and Fourteenth Amendments bar the imposition of the death penalty upon a convicted rapist. 375 U.S. 889 (1963) (Goldberg, J., dissenting). Five years later, in *Witherspoon v. Illinois*, Justice Douglas in his dissent raised the issue of whether the death penalty violates the Eighth Amendment but also stated that the Eighth Amendment issue was not relevant in that case. 391 U.S. 510, 530 n.13 (1968) (Douglas, J., dissenting).

114. *Furman*, 408 U.S. at 240 (per curiam opinion). One of the defendants was charged with murder; the other two were charged with rape. *Id.*

115. *Id.* at 238.

116. *Id.* at 240 (per curiam opinion).

titutional.¹¹⁷ However, Chief Justice Burger's dissenting opinion explained that the Court's ruling did not render capital punishment unconstitutional under the Eighth Amendment; rather, the decision of the Court meant that legislatures of state and federal governments could no longer use discretionary sentencing statutes if they wished to continue to employ capital punishment.¹¹⁸ According to the Chief Justice, states could continue to use the death penalty by providing stricter standards for juries and judges to follow in determining the sentence in capital cases or by imposing a death sentence for fewer crimes.¹¹⁹ Thus, the exact holding of *Furman* and its effect on the death penalty was left unclear.

In the following years, the Court attempted to clarify its holding from *Furman*. In 1976 the Court held that the death penalty does not violate the Eighth Amendment in every circumstance¹²⁰ and clarified that discretion in giving the death penalty is acceptable but must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹²¹ At the other end of the discretionary spectrum, the Court held in *Woodson v. North Carolina* that North Carolina's death sentence statute providing for mandatory imposition of the death sentence for defendants convicted of first-degree murder was unconstitutional because it did not comply with *Furman*'s requirement of replacing arbitrary and wanton jury discretion with objective standards.¹²² State legislatures listened, and by 1976 at least thirty-five states had either revised their old death penalty statutes or enacted new ones that comported with *Furman* and its progeny.¹²³

Over the next three decades, the Court continued to limit the availability of the death penalty for criminal offenders. In *Coker v. Georgia*, the Court held that a sentence of death for an offender convicted of the rape of an adult violates the Eighth Amendment.¹²⁴ The Court based its holding largely on

117. *Id.* at 239-40. Justice Douglas believed that the death penalty violates the Eighth and Fourteenth Amendments. *Id.* at 240 (Douglas, J., concurring). Justice Brennan also believed that the death penalty violates the Constitution. *Id.* at 306 (Brennan, J., concurring). Justice Stewart found it unnecessary to reach the ultimate question of the constitutionality of the death penalty. *Id.* at 306 (Stewart, J., concurring). Justice White did not think that the death penalty was per se unconstitutional. *Id.* at 310-11 (White, J., concurring). Justice Marshall believed that the death penalty does violate the Constitution. *Id.* at 314 (Marshall, J., concurring).

118. *Id.* at 398 (Burger, J., dissenting).

119. *Id.* at 400.

120. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

121. *Id.* at 189. The Court further stated that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Id.* at 195.

122. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

123. *Gregg*, 428 U.S. at 179-80.

124. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

the distinction between the crime of murder and the crime of rape; while a murder victim's life is forever extinguished, a rape victim is still alive, albeit traumatized.¹²⁵ Later, in *Roper v. Simmons*, the Court held that the execution of offenders who were less than eighteen years old at the time they committed the crime is unconstitutional.¹²⁶ Then, in *Kennedy v. Louisiana*, the Court held that it is unconstitutional to sentence an offender to die for the rape of a child.¹²⁷

In 2002, the Court dealt with another case impacting the imposition of the death penalty in the states.¹²⁸ In *Ring v. Arizona*, the defendant and two accomplices hijacked an armored car carrying nearly a million dollars and killed the driver.¹²⁹ The defendant was found guilty of felony murder.¹³⁰ The evidence admitted at trial failed to prove that the defendant was a major participant in the armed robbery or the actual murder, but clear evidence showed that the defendant benefitted from the proceeds of the robbery.¹³¹ Under Arizona law at the time, the defendant could not be sentenced to death unless a further penalty phase hearing was held, in which the judge alone made all factual findings without a jury,¹³² meaning that the judge determined the presence or absence of aggravating circumstances and mitigating circumstances.¹³³ In the penalty phase hearing, the defendant's accomplice, who was unavailable to testify in the guilt phase,¹³⁴ testified that the defendant planned the robbery and killed the guard.¹³⁵ The judge entered a special verdict sentencing the defendant to death, acknowledging that the defendant would only be eligible for the death penalty if he had been the actual killer of the driver.¹³⁶ Citing the testimony of the accomplice, the judge found that the defendant was the actual killer.¹³⁷

125. *Id.* at 598.

126. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

127. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008).

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

129. *Id.* at 589-90.

130. *Id.* at 591-92.

131. *Id.*

132. *Id.* at 592.

133. *Id.*

134. *Id.* at 593. Both of the defendant's accomplices were also charged with robbery and murder in separate trials. *Id.* Between the defendant's trial and the penalty phase hearing, one of the accomplices pled guilty to second-degree murder and armed robbery, having testified that the defendant was the one who actually shot the driver of the armored car. *Id.*

135. *Id.*

136. *Id.* at 594.

137. *Id.*

On appeal, the Supreme Court overturned the death sentence.¹³⁸ The Court noted that, based upon the findings of the jury during the guilt phase, the maximum punishment the defendant could have received was life imprisonment for felony murder.¹³⁹ Thus, the question was whether the aggravating factors triggering the death penalty properly could be found by the judge rather than by the jury.¹⁴⁰ The Court held that, if a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact must be found beyond a reasonable doubt by a jury.¹⁴¹ The Court held that a sentencing judge sitting without a jury may not find an aggravating factor necessary for the imposition of the death sentence and that, because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.¹⁴² Further, the Court held that the right to a trial guaranteed by the Sixth Amendment applies to the fact-finding hearing necessary to increase a defendant's sentence.¹⁴³

Prior to 1989, the Court had not considered whether a mentally retarded individual could be executed. In 1989, the Supreme Court of the United States finally had the opportunity to consider the matter in the case of *Penry v. Lynaugh*, in which the defendant was a mentally retarded individual¹⁴⁴ who raped and murdered a young woman in 1979.¹⁴⁵ When the case finally reached the Supreme Court, the Court held that, while mental retardation is a factor that a jury may consider in determining culpability, the Eighth Amendment does not preclude the execution of a mentally retarded offender by the sole virtue of his or her mental retardation.¹⁴⁶ The Supreme Court based its holding largely on the fact that there was no clear national consensus on the issue.¹⁴⁷

In response to the Court's holding in *Penry*, many state legislatures passed statutes exempting the mentally retarded from the death penalty. Prior to *Penry*, only two states excluded mentally retarded offenders from the death

138. *Id.* at 597. The Arizona Supreme Court had affirmed the death sentence, and the defendant appealed to the Supreme Court of the United States. *Id.* at 596.

139. *Id.* at 597.

140. *Id.*

141. *Id.* at 602 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000)).

142. *Id.* at 609.

143. *Id.*

144. *Penry v. Lynaugh*, 492 U.S. 302, 309-10 (1989). Evidence was presented that the defendant was mentally retarded. *Id.* The expert witness for the State even testified that the defendant was mentally retarded. *Id.*

145. *Id.* at 308.

146. *Id.* at 340.

147. *Id.* at 334.

penalty.¹⁴⁸ In the years following the Court's decision in *Penry*, fourteen states, including Missouri, adopted statutes exempting mentally retarded offenders from the death penalty.¹⁴⁹ Additionally, the federal government excluded mentally retarded offenders from the death penalty in 1994.¹⁵⁰

In 2002, the Supreme Court readdressed the issue of mental retardation as a potential bar to execution under the Eighth Amendment in *Atkins v. Virginia*.¹⁵¹ In *Atkins*, the defendant was found guilty of capital murder, and in the penalty phase the expert witness for the defendant testified that the defendant was mildly mentally retarded.¹⁵² The state presented evidence that the defendant was not mentally retarded but was at least of "average intelligence."¹⁵³ In his challenge to the Supreme Court, the defendant argued that a mentally retarded offender could not be sentenced to death.¹⁵⁴ The Supreme Court held that the execution of mentally retarded criminals is excessive under the Eighth Amendment and that the Constitution places a substantive restriction on the state's power to take the life of a mentally retarded offender.¹⁵⁵

148. Georgia and Maryland already excluded mentally retarded offenders from the death penalty. GA. CODE ANN. § 17-7-131(j) (1998); MD. CODE ANN., CRIM. LAW § 2-202 (West 2002).

149. In 1990, the Kentucky and Tennessee legislatures also enacted such statutes. KY. REV. STAT. ANN. §§ 532.150, 532.135, 532.140 (West 2006); TENN. CODE ANN. § 39-13-203(b) (West 2002). In 1991, New Mexico, Arkansas, Colorado, Washington, Indiana, and Kansas exempted the mentally retarded from the death penalty. N.M. STAT. § 31-20A-2.1 (2003) (repealed 2009) (in 2009, New Mexico abolished the death penalty, N.M. STAT. § 31-18-14 (2003 & Supp. 2009)); ARK. CODE ANN. § 5-4-618(b) (West 2002); COLO. REV. STAT. § 16-9-401 (2001) (repealed 2002); WASH. REV. CODE § 10.95.030(2) (1993); IND. CODE §§ 35-36-9-2 through 35-36-9-6 (2007); KAN. STAT. ANN. § 21-4623(d) (2009). In 2000 and 2001, South Dakota, Arizona, Connecticut, Florida, North Carolina, and Missouri followed suit. S.D. CODIFIED LAWS § 23A-27A-26.1 (2009); ARIZ. REV. STAT. ANN. § 13-753 (2009); CONN. GEN. STAT. § 53a-46a(h) (2002); FLA. STAT. § 921.137 (2006); N.C. GEN. STAT. § 15A-2005 (2001); MO. REV. STAT. § 565.030 (2000 & Supp. 2001).

150. Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (2006).

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

152. *Id.* at 308.

153. *Id.* at 338-39. There were two penalty phase hearings. *Id.* at 309. In the first, the jury sentenced the defendant to death, but the Supreme Court of Virginia ordered a second sentencing hearing because the trial court had used a misleading verdict form. *Id.* In the second penalty phase, the State presented evidence that the defendant was not retarded but was of average intelligence, and the second jury again sentenced the defendant to death. *Id.*

154. *Id.* at 310 (The defendant first brought his challenge in the Supreme Court of Virginia. The majority of that court rejected the defendant's argument, based upon the Supreme Court of the United States' holding in *Penry*. The Court granted certiorari.).

155. *Id.* at 321.

In its discussion, the Court first noted that it is a “precept of justice that punishment for crime should be graduated and proportioned to the offense.”¹⁵⁶ The Court also noted that a claim of excessive punishment under the Eighth Amendment is judged by currently prevailing standards and that the Amendment must draw its meaning from the “evolving standards of decency that mark the progress of a maturing society.”¹⁵⁷ However, the Court’s holding was principally based upon the fact that, in the years since the Penry decision, many more state legislatures had enacted statutes banning death sentences for mentally retarded criminals.¹⁵⁸ Noting that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures”¹⁵⁹ and that enacting a statute that is considered beneficial to criminals is unpopular for legislators,¹⁶⁰ the Court reasoned that the consistent shift among state legislatures against executing mentally retarded offenders provided powerful evidence that modern society views mentally retarded offenders as less culpable than the average criminal.¹⁶¹ Additionally, the consensus suggested that some characteristics of mental retardation undermine the appropriateness of the death penalty.¹⁶² Namely, because mentally retarded individuals have diminished capacities, their personal culpability is diminished,¹⁶³ and thus executing mentally retarded offenders will not measurably further the goals of deterrence and retribution.¹⁶⁴

Since the decision in *Atkins*, more states have passed statutes banning the execution of mentally retarded offenders in accordance with the Court’s holding. As a general trend, most states require the defendant to prove that he or she is mentally retarded in order to be exempt from the death penalty. Twenty-one states have passed statutes that expressly require the defendant to bear the burden of proving his or her own mental retardation.¹⁶⁵ In another

156. *Id.* at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

157. *Id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

158. *Id.* at 314-15.

159. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

160. *Id.* at 315-16.

161. *Id.*

162. *Id.* at 317.

163. *Id.* at 318.

164. *Id.* at 321.

165. *State v. Johnson*, 244 S.W.3d 144, 150 n.3 (Mo. 2008) (en banc). These states include Arizona (which has since abolished the death penalty), Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Nebraska, Nevada, New Mexico, North Carolina, South Dakota, Tennessee, Utah, Virginia, and West Virginia. See ARIZ. REV. STAT. § 13-753 (2009); ARK. CODE. § 5-4-618(b) (1993); CAL. PENAL CODE § 1376 (2000); COLO. REV. STAT. § 18-1.3-1102 (2002); DEL. CODE tit. 11 § 4209 (2007); FLA. STAT. § 921.137 (2006); GA. CODE ANN. § 17-7-130.1 (1998); IDAHO CODE ANN. § 19-2515A (2009); 725 ILL. COMP. STAT. ANN. 5/114-15 (2003); IND. CODE ANN. § 35-36-9-2(b) (2007); LA. REV.

eight states, courts have held that the defendant is required to prove mental retardation.¹⁶⁶ Four states do not have any laws addressing the execution of the mentally retarded.¹⁶⁷ The remaining states do not allow for the imposition of the death penalty upon any defendant under any circumstance.¹⁶⁸ Three state statutes do not express whether the defendant or the state has the burden of proving mental retardation – including Missouri’s statute.¹⁶⁹

STAT. § 15:567.1 (2004); MD. CODE, CRIM. LAW § 2-202 (2009); NEB. REV. STAT. ANN. § 28-105.01 (West 2002); NEV. REV. STAT. ANN. § 174.098 (West 2003); N.M. STAT. § 31-20A-2.1 (2003) (repealed 2009) (In 2009, New Mexico abolished the death penalty. N.M. STAT. § 31-18-14 (Supp. 2009)); N.C. GEN. STAT. § 15A-2005 (2001); S.D. CODIFIED LAWS § 23A-27A-26.3 (2000); TENN. CODE ANN. § 39-13-203 (West 2005); UTAH CODE ANN. § 77-15a-104(12)(a) (West 2003); VA. CODE ANN. § 19.2-264.3:1.1(C) (West 2009); WASH. REV. CODE § 10.95.030(2) (1993).

166. *Johnson*, 244 S.W.3d at 150 n.3. The courts of Alabama, Kentucky, Mississippi, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas have held that the defendant shall bear the burden of proving that he is mentally retarded. *Morrow v. State*, 928 So. 2d 315, 322-23 (Ala. Crim. App. 2004); *Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005); *Goodin v. State*, 856 So. 2d 267, 276 (Miss. 2003); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002); *Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006); *Commonwealth v. Mitchell*, 839 A.2d 202, 211 (Pa. 2003); *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003); *Ex parte Briseno*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).

167. *Johnson*, 244 S.W.3d at 150 n.3. Montana, New Hampshire, Oregon, and Wyoming do not have any laws addressing the burden of proving mental retardation. *Id.*

168. *Id.* These states include Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See* ALASKA STAT. § 12.55.125 (2008); HAW. REV. STAT. § 707-701 (2008); IOWA CODE ANN. § 792.10 (repealed 2003); ME. REV. STAT. ANN. tit. 17-A § 1251 (2005); MASS. GEN. LAWS ch. 279, § 68 (1998), *invalidated by Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); MICH. COMP. LAWS § 750.316 (2006); MINN. STAT. § 609.185 (2005); N.J. STAT. ANN. § 2C:11-3 (West 2007); N.M. STAT. § 31-18-14 (Supp. 2009); N.Y. CRIM. PROC. LAW § 400.27 (2005), *invalidated by People v. LaValle*, 3 N.Y.3d 88, 120 (N.Y. 2004); N.D. CENT. CODE § 12.1-32-01 (2008); R.I. GEN. LAWS § 11-23-2 (2007); VT. STAT. ANN. tit. 13, § 2303 (2008), *invalidated by State v. Provost*, 896 A.2d 55, 57 (Vt. 2005); W. VA. CODE ANN. § 61-2-2 (West 2008); WIS. STAT. ANN. § 939.50 (West 2005).

169. *Johnson*, 244 S.W.3d at 150 n.3. The statutes of Kansas and Connecticut do not state which party has the burden of proving that the defendant is mentally retarded. *Id.*; *see* KAN. STAT. ANN. § 21-4623(d) (2009) (“If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder.”); CONN. GEN. STAT. § 53a-46a(h) (2002) (“The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided by subsection (e), that at the time of the offense . . . the defendant was a person with mental retardation.”); *see also* MO. REV. STAT. § 565.030.4(1) (2000).

B. The Death Penalty in Missouri

Like many other states' laws, the Supreme Court of the United States' decision in *Furman* rendered Missouri's permissive death penalty statute unconstitutional.¹⁷⁰ In response to the holding in *Furman*, the Missouri General Assembly, along with other state legislatures, passed death sentence statutes with mandatory sentencing for defined offenses.¹⁷¹ In *State v. Duren*, the Supreme Court of Missouri held that such mandatory sentencing was unconstitutional under the Eighth Amendment.¹⁷² The court relied on the Supreme Court's holding in *Woodson* that mandatory sentencing provides no standards to guide the jury and no check on arbitrary and capricious imposition of the death sentence.¹⁷³ However, the court in *Duren* did not hold that execution is always unconstitutional; rather, the court held that Missouri's death penalty statute failed to comport with the Supreme Court's holding in *Furman*.¹⁷⁴ The court noted that it was possible to construct a death penalty statute that would not contravene the Supreme Court's holding in *Furman*.¹⁷⁵ Thus, the court did not close the door forever on the death penalty in Missouri.

Five years later, the Supreme Court of Missouri considered the state's new permissive death penalty statute,¹⁷⁶ enacted by the General Assembly in the wake of the court's decision in *Duren*. In *State v. Newlon*,¹⁷⁷ the court held that the death penalty statute was constitutionally permissible under the Eighth Amendment.¹⁷⁸ The court reasoned that, because the Missouri statute closely mirrored Georgia's death sentence statute, which the Supreme Court held to be constitutionally valid in *Gregg*,¹⁷⁹ the Missouri statute also was constitutionally permissible.¹⁸⁰ Furthermore, the court went on to hold that the death penalty does not violate provisions of the Missouri Constitution,¹⁸¹ thereby affirming that the imposition of the death penalty is constitutionally permissible.

Under the current statutory scheme in Missouri, cases in which the defendant could potentially be sentenced to death are partitioned into two separate hearings.¹⁸² First, facts are presented to allow the fact-finder to deter-

170. *State v. Duren*, 547 S.W.2d 476, 480 (Mo. 1977) (en banc).

171. *Id.* at 478.

172. *Id.* at 481.

173. *Id.* at 479-80 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)).

174. *Id.* at 479-80.

175. *Id.* at 479.

176. MO. REV. STAT. § 565.008 (repealed 1983).

177. *State v. Newlon*, 627 S.W.2d 606 (Mo. 1982) (en banc).

178. *Id.* at 612.

179. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

180. *Newlon*, 627 S.W.2d at 612.

181. *Id.* at 612-13.

182. MO. REV. STAT. § 565.030.2 (2000).

mine whether the defendant is guilty of the crime charged.¹⁸³ If during the guilty phase the fact-finder finds the defendant guilty of first-degree murder, a second stage, during which the punishment is assessed, proceeds.¹⁸⁴ Evidence of mitigating circumstances and aggravating circumstances is presented by both the state and the defendant, bound by the rules of evidence.¹⁸⁵ If the fact-finder does not find at least one statutory aggravating factor,¹⁸⁶ or if the

183. *Id.* (“Where murder in the first degree is submitted to the trier without a waiver of the death penalty, the trial shall proceed in two stages before the same trier. At the first stage the trier shall decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment shall not be submitted to the trier at the first stage.”).

184. *Id.* § 565.030.4 (“If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment . . . may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others.”).

185. *Id.*

186. *Id.* § 565.032.2

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions; (2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide; (3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; (4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another; (5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty; (6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person; (7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind; (8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty; (9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; (10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or

fact-finder finds that the mitigating factor(s) outweighs any aggravating factor(s), then the fact-finder must assess life imprisonment rather than the death sentence.¹⁸⁷ Prior to the Supreme Court's holding in *Atkins*, the Supreme Court of Missouri did not have the occasion to consider the constitutionality of executing mentally retarded offenders. However, the Missouri General Assembly passed legislation proscribing the execution of mentally retarded offenders two years prior to the Court's decision in *Atkins*.¹⁸⁸ Under the statute, if the fact-finder determines by a preponderance of evidence that the defendant is mentally retarded, the defendant is disqualified from the death penalty.¹⁸⁹ The statute does not expressly state whether the state or the defendant bears the burden of proving the defendant's mental retardation or lack thereof.

another; (11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo; (12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness; (13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility; (14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; (15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo; (16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo; (17) The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421.

Id.

187. *Id.* § 565.030.4

(2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier

Id.

188. *State v. Johnson*, 102 S.W.3d 535, 537 (Mo. 2003) (en banc).

189. *Id.* § 565.030.4(1) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded . . .").

C. *The Rule of Lenity*

The rule of lenity originated in England during the late seventeenth and early eighteenth centuries to protect individuals from the severity and expansion of the death penalty.¹⁹⁰ In Missouri, when interpreting criminal statutes, the rule of lenity requires a court to strictly construe the statute against the state.¹⁹¹ Also, the rule provides that, in order to protect a defendant from the loss of his or her freedom, courts may not interpret criminal statutes “so as to embrace persons and acts not specifically and unambiguously brought within their terms.”¹⁹² The rule of lenity applies both when interpreting statutes defining crimes and when providing for sentencing.¹⁹³ While the rule provides that criminal statutes must be strictly construed, the court interpreting the statute may consider the intent of the legislature in enacting the statute, and the court may interpret the statute in the context of common sense or evident statutory purpose.¹⁹⁴ As a corollary of the rule, if there is doubt concerning the harshness of the penalty defined by a statute, the rule of lenity states that the milder penalty shall be assessed rather than the harsher one.¹⁹⁵

In recent years, the rule of lenity has been applied by the Supreme Court of Missouri to dispose of cases favorably for defendants. In *J.S. v. Beaird*, the court held that a convicted sex offender was not required to register as a sex offender in Jackson County.¹⁹⁶ Under the state sex offender registry law, any person convicted of a sex crime shall register with the county sheriff within ten days of “coming into any county.”¹⁹⁷ The convicted sex offender had lived in Jackson County for a year before the statute was passed.¹⁹⁸ After noting that the phrase “coming into” is subject to several different interpretations,¹⁹⁹ the court held that the statute did not apply to the convicted sex offender because he had resided in Jackson County since before the statute was enacted.²⁰⁰ The court noted that its interpretation of the statute²⁰¹ was consistent with the rule of lenity.²⁰²

190. Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 200 (1994).

191. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. 2007) (en banc) (citing *State v. Hobokin*, 768 S.W.2d 76, 77 (Mo. 1989) (en banc)).

192. *Id.* (citing *State v. Lloyd*, 7 S.W.2d 344, 346 (Mo. 1928)).

193. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. 2006) (en banc).

194. *State v. Hobokin*, 768 S.W.2d 76, 77 (Mo. 1989) (en banc) (citing *State v. Ballard*, 294 S.W.2d 666, 669 (Mo. App. 1956)).

195. *State v. Stewart*, 832 S.W.2d 911, 914 (Mo. 1992) (en banc).

196. *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. 2000) (en banc).

197. MO. REV. STAT. § 589.400.2 (2000).

198. *Beaird*, 28 S.W.3d at 875.

199. *Id.* at 876.

200. *Id.* at 877.

In *Woods v. State*, a defendant, who pled guilty to stealing clothing, challenged his enhanced penalty for prior offenses.²⁰³ Under Missouri statutory law, an enhanced penalty is appropriate when the defendant has been convicted of stealing on two separate occasions.²⁰⁴ At trial, the state offered evidence of two prior convictions of stealing entered on the same date in the same court by the same judge.²⁰⁵ The defendant argued that the state failed to establish that the defendant had two prior convictions on two separate occasions.²⁰⁶ The court held that the enhanced penalty statute did not apply to the defendant, reasoning that the statute is ambiguous as to whether the prior convictions must be on separate occasions or the crimes must be committed on separate occasions.²⁰⁷ The court stated that, under the rule of lenity, the defendant “is entitled to the benefit of that ambiguity.”²⁰⁸

In *State v. Graham*, a defendant was convicted of sodomy based upon events that occurred nearly thirty years earlier.²⁰⁹ The defendant appealed the denial of his motion for dismissal of the indictment.²¹⁰ He made his motion to dismiss based upon the three-year statute of limitation²¹¹ that applied to all felonies, except those punishable by death or a minimum of life imprisonment.²¹² The state argued that life imprisonment was a potential punishment for the crime of sodomy because the statute²¹³ provided no time limitation on the sentence.²¹⁴ Thus, the state argued, the three-year statute of limitation did not apply to the defendant.²¹⁵ The court reversed the trial court’s decision

201. *Id.* (The court adopts an interpretation that “only a person coming into a county to establish residence must register with the sheriff.”).

202. *Id.*

203. *Woods v. State*, 176 S.W.3d 711, 712 (Mo. 2005) (en banc).

204. MO. REV. STAT. § 570.040 (2000 & Supp. 2009) (“Every person who has previously pled guilty to or been found guilty of two stealing-related offenses committed on two separate occasions where such offenses occurred within ten years of the date of occurrence of the present offense and who subsequently pleads guilty or is found guilty of a stealing-related offense is guilty of a class D felony . . .”).

205. *Woods*, 176 S.W.3d at 712. To prove the existence of the prior conviction, the state offered “two previous guilty pleas entered on the same date, in the same court, with the same counsel, and the same judge.” *Id.*

206. *Id.*

207. *Id.* at 712-13.

208. *Id.* at 713.

209. *State v. Graham*, 204 S.W.3d 655, 656 (Mo. 2006) (en banc). The defendant was convicted in 2002 for crimes that took place between 1975 and 1978. *Id.*

210. *Id.*

211. MO. REV. STAT. § 541.200 (repealed 1979).

212. *Graham*, 204 S.W.3d at 656.

213. MO. REV. STAT. § 541.190 (repealed 1979).

214. *Graham*, 204 S.W.3d at 656-57 (The statute under which the defendant was prosecuted provided that those convicted of sodomy shall be punished by “not less than two years.”).

215. *Id.* at 657.

and granted the defendant's motion for dismissal.²¹⁶ The court stated that section 541.190 was ambiguous.²¹⁷ It held that the statute could be interpreted as allowing the prosecution of sodomy because the offense is potentially punishable by life imprisonment²¹⁸ or could be interpreted as referring only to the most serious crimes, which specify death and life imprisonment as punishments.²¹⁹ Citing the rule of lenity, the court held that section 541.190 applied only to the most serious offenses, for which death or life imprisonment are the two possible penalties.²²⁰

Most recently, in *State v. Salazar*, the defendant challenged his conviction for criminal nonsupport of a child.²²¹ Under the statute, a person commits the crime of nonsupport if that person fails to provide for his or her child;²²² a child includes any child "legitimated by legal process."²²³ Prior to the trial, an administrative order of the department of child support enforcement (DCSE) declared the defendant to be the child's father.²²⁴ In convicting the defendant, the circuit court did not make its own determination as to whether the defendant was the father; instead it relied upon the department of child support enforcement's order.²²⁵ The court first noted that the phrase "legal process" is not defined in the statute.²²⁶ Citing the rule of lenity,²²⁷ the court went on to hold that the DCSE's order did not constitute "legal process" under the statute and reversed the defendant's conviction.²²⁸

It should be noted that typically in instances where the criminal statute may appear ambiguous but is in fact unambiguous, and therefore does not trigger the rule of lenity, the court expressly takes note of such lack of ambiguity.²²⁹

216. *Id.* at 658.

217. *Id.* at 657.

218. *Id.* at 656 (The statute under which the defendant was prosecuted provided that those convicted of sodomy shall be punished by "not less than two years.>").

219. *Id.* at 656-57.

220. *Id.* at 658.

221. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. 2007) (en banc).

222. MO. REV. STAT. § 568.040.1 (2000).

223. *Id.* § 568.040.2(1).

224. *Salazar*, 236 S.W.3d at 645.

225. *Id.* at 646.

226. *Id.*

227. *Id.*

228. *Id.* at 647.

229. See generally *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. 2002) (en banc); *State v. Stewart*, 832 S.W.2d 911, 913 (Mo. 1992) (en banc); *Sours v. State*, 603 S.W.2d 592, 611 (Mo. 1980) (en banc).

IV. INSTANT DECISION

In Johnson's fourth appeal before the Supreme Court of Missouri, as in his three prior appearances, the court rejected Johnson's arguments that the penalty phase trial court²³⁰ made multiple reversible errors.²³¹ Several of Johnson's arguments involved the issue of his alleged mental retardation.²³² The court rejected Johnson's argument that the trial court erred in instructing the jury that the burden of proof was upon him.²³³ The court first noted that "[i]t is within the trial court's discretion to decide whether a tendered jury instruction should be submitted."²³⁴ Next, the court examined section 565.030.4(1), which provides that the jury shall render a verdict of life imprisonment if it finds by a preponderance of evidence that the defendant is mentally retarded.²³⁵ The court held that the language of the statute "neces-

230. In the opinion, the Supreme Court of Missouri uses the term "trial court" when referring to Johnson's third penalty phase trial. *State v. Johnson*, 244 S.W.3d 144, 150 (Mo. 2008) (en banc). I shall use the term "trial court" as well, but note that I am referring to the third penalty phase and not his guilt phase trial.

231. *Id.* at 158. First, Johnson argued that the trial court erred in granting the State's challenge for cause as to four venirepersons. *Id.* Johnson asserted that "their views on the death penalty would not substantially impair their ability to participate in the deliberative process." *Id.* The court held that the trial court "did not abuse its discretion in granting the State's challenges for cause" as to the four jurors. *Id.* at 160. Next, the court rejected Johnson's argument that the trial court erred in admitting crime scene and autopsy photographs into evidence during the penalty phase because the photographs were gruesome and inflammatory. *Id.* at 161-62. The court found that the penalty phase jurors had no prior opportunity to examine the photographs. *Id.* at 161. Also, the court rejected Johnson's argument that three jury instructions were given in error because these arguments were not preserved for appeal. *Id.* at 163-64. The court held that there was no evidence suggesting that the imposition of the death sentences was a result of passion or prejudice and that the death penalties were not disproportionate to those imposed in similar cases. *Id.* at 164.

232. On appeal, Johnson alleged that the penalty phase court erred in instructing the jury that Johnson had the burden of proving he was mentally retarded by a preponderance of the evidence. *Id.* at 150. Johnson further alleged that the penalty phase court erred in not granting "his motions for directed verdict on the issue of [his] mental retardation." *Id.* at 151.

233. *Id.* At the penalty phase, Johnson tendered his own instructions for the jury; these instructions provided that the state had the burden of proving that Johnson was not mentally retarded and that the state must prove this fact beyond a reasonable doubt. *Id.* at 150. The penalty phase court did not accept Johnson's tendered instruction because it was not a Missouri Approved Instruction. *Id.*

234. *Id.* (quoting *State v. Hartman*, 224 S.W.3d 642, 648 (Mo. App. S.D. 2007)).

235. *Id.*; see MO. REV. STAT. § 565.030.4 (2000) ("The trier of fact shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier of fact finds by a preponderance of the evidence that the defendant is mentally retarded . . .").

sarily implies” that the burden is upon the defendant to prove to a jury that he is mentally retarded and therefore ineligible for the death penalty.²³⁶

The court also rejected Johnson’s argument that the jury must find that a defendant is not mentally retarded beyond a reasonable doubt, rather than by a mere preponderance of evidence as prescribed by section 565.030.4(1).²³⁷ Johnson contended that the Supreme Court of the United States’ decisions in *Atkins*²³⁸ and *Ring*²³⁹ supported his argument.²⁴⁰ The court in the instant decision noted that, although in *Atkins* the Supreme Court held that sentencing a mentally retarded offender to the death penalty is in contravention of the Eighth Amendment, the Supreme Court did not state who shall bear the burden of proof.²⁴¹ In lieu of creating a bright line rule, the Supreme Court left it to the individual states to determine appropriate ways to enforce the constitutional restriction on executing mentally retarded offenders.²⁴² The court in the instant decision also noted that no state requires the prosecution to prove beyond a reasonable doubt that the defendant is not mentally retarded and that twenty-nine states have a procedure similar to Missouri’s, in which a defendant is required to prove mental retardation.²⁴³

The court in the instant decision distinguished Johnson’s case from *Ring*.²⁴⁴ The court noted that, in *Ring*, the Supreme Court held that “if a ‘[s]tate makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt.’”²⁴⁵ The court concluded that the holding of *Ring* does not apply to the issue of mental retardation because, under section 565.030.4(1), a finding of mental retardation is not a finding of fact that increases the potential range of punishment.²⁴⁶ Rather, a finding of mental retardation is merely a finding that removes the defendant from consideration for the death penalty.²⁴⁷ Thus, the court held that the trial court did not err in instructing the jury

236. *Johnson*, 244 S.W.3d at 150.

237. *Id.*

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

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

240. *Johnson*, 244 S.W.3d at 151.

241. *Id.* at 150.

242. *Id.*

243. *Id.* at 150 n.3. Twenty-one states have statutes requiring the defendant or the proponent to prove mental retardation; eight states do not have statutes addressing the issue, but their courts have held that the defendant is required to demonstrate that he is mentally retarded; two states have statutes that do not state which party has the burden of proving that the defendant is mentally retarded; four states do not have any laws addressing the issue; and the remaining fourteen states do not allow for the death penalty. *Id.*

244. *Id.* at 151.

245. *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

246. *Id.*

247. *Id.*

that Johnson had the burden of proof in showing that he was mentally retarded by a preponderance of the evidence.²⁴⁸

Finally, the court held that the trial court did not err in overruling Johnson's motion for a directed verdict on the issue of his mental retardation.²⁴⁹ Johnson made his motion at the close of the prosecutor's case, before he had introduced any evidence.²⁵⁰ Because Johnson had the burden of proving that he was mentally retarded, Johnson had not established his claim as a matter of law.²⁵¹ Despite this, the court treated Johnson's motion for a directed verdict as a motion for acquittal and discussed the strength of the evidence presented by the state.²⁵² The court stated that, despite a substantial amount of conflicting evidence, there was sufficient evidence from which a juror could have found that Johnson did not prove by a preponderance of evidence that he suffered from mental retardation.²⁵³ The court noted that "of all the experts that examined Johnson, only Dr. Smith and Dr. Keyes found that he was mentally retarded."²⁵⁴ Of these two experts, Dr. Smith did not initially find Johnson mentally retarded when he examined him in 1996 and 1999 but changed his opinion after reviewing the tests conducted by Dr. Keyes.²⁵⁵ Dr. Keyes himself was not qualified to diagnose mental diseases, and the only type of mental defect he was qualified to diagnose was mental retardation.²⁵⁶ Furthermore, Dr. Keyes relied on anecdotal evidence gleaned from Johnson's family and friends to diagnose Johnson's adaptive behaviors.²⁵⁷ Therefore, the court found that there was sufficient evidence to support a jury finding that Johnson had not proven that he suffered from mental retardation.

Judge Michael A. Wolff filed a dissenting opinion and was joined by Judges Stith and Teitelman.²⁵⁸ Judge Wolff began by stating that the allocation of the burden of proving mental retardation was made by the court in the absence of statutory mandate and without considering constitutional questions.²⁵⁹ Judge Wolff echoed the majority's assessment that the Supreme Court of the United States in *Atkins* did not discuss whether the defendant or

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 152.

253. *Id.* at 156.

254. *Id.* "Evidence was presented that Johnson was evaluated by a psychiatrist and two psychologists, all of whom determined that [Johnson] was not mentally retarded." *Id.* at 155. Dr. Smith evaluated Johnson in 1996 and 1999 and both times found that Johnson was not mentally retarded. *Id.* Dr. Keyes examined Johnson in 2003. *Id.* at 152.

255. *Id.*

256. *Id.* at 156.

257. *Id.*

258. *Id.* at 165.

259. *Id.* at 165-66 (Wolff, J., dissenting).

the state should bear the burden of proving mental retardation or by what standard it should be proved.²⁶⁰ Next, Judge Wolff noted that section 565.030.4(1), providing that life imprisonment shall be assessed if the trier of fact finds by a preponderance of evidence that the defendant is mentally retarded,²⁶¹ does not specify whether the state or the defendant has the burden of proof.²⁶²

Judge Wolff argued that because of the contradicting evidence presented by the state and by Johnson, the allocation of the burden of proof is important in determining the punishment Johnson receives.²⁶³ The evidence supported both a finding that Johnson is mentally retarded and a finding that Johnson is not mentally retarded,²⁶⁴ and, thus, if the burden of proof had been upon the state, the jury may have found that the evidence was insufficient to support a conclusion that Johnson was not mentally retarded.²⁶⁵ Therefore, the allocation of the burden of proof was a matter of life or death for Johnson.²⁶⁶

Judge Wolff next argued that the majority's position was inconsistent with the Supreme Court's holding in *Ring*.²⁶⁷ In *Ring*, the Court held that, where a defendant's increased punishment is contingent upon a finding of fact, the fact must be found beyond a reasonable doubt by a jury.²⁶⁸ Contrary to the majority's holding,²⁶⁹ Judge Wolff stated that *Ring* speaks of the state's burden to prove each fact upon which the defendant's punishment depends and that the burden should be on the state to prove that he was not mentally retarded and, thus, eligible for the death penalty.²⁷⁰ Judge Wolff stated that this burden does not require the state to prove lack of mental retardation in

260. *Id.* at 166.

261. MO. REV. STAT. § 565.030.4(1) (Supp. 2009).

262. *Johnson*, 244 S.W.3d at 166 (Wolff, J., dissenting).

263. *Id.* at 167.

264. *Id.* Judge Wolff noted that the defense offered evidence that Johnson scored 63 on an intelligence test when he was a child and that Johnson scored 67 on two separate IQ tests he took as an adult. *Id.* An IQ below 70 indicates that a person has significantly subaverage intelligence. *Id.* Also, the defense presented evidence that Johnson was deficient in many adaptive behaviors and that as a child Johnson was in many special education classes. *Id.* The prosecution presented evidence that Johnson received four IQ scores indicating an absence of mental retardation, and the prosecution's expert witness testified that he believed Johnson was faking mental retardation. *Id.* Also, the prosecution presented evidence based on his behavior in prison and prior to his incarceration that Johnson did not have adaptive deficiencies. *Id.*

265. *Id.* at 167-68.

266. *Id.* at 167.

267. *Id.*

268. *Id.*

269. *Id.* at 151 (majority opinion). The majority held that a determination that a defendant is mentally retarded is not a finding of fact that increases the potential range of punishment under *Ring*, and, therefore, the state is not required to prove the defendant's lack of mental retardation beyond a reasonable doubt. *Id.*

270. *Id.* at 168 (Wolff, J., dissenting).

every case, but only in cases in which the defendant introduces evidence that supports a finding of mental retardation.²⁷¹ In other words, the evidence of mental retardation presented by Johnson established a *prima facie* case of mental retardation, and it then became the burden of the state to prove that Johnson was not mentally retarded.²⁷²

Judge Wolff also stated that “[w]here there is ambiguity, the rule of lenity requires . . . the court to strictly construe a criminal statute against the state.”²⁷³ Judge Wolf noted that “[u]nder the rule of lenity, criminal statutes may not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within their terms.”²⁷⁴ Because, argued Judge Wolff, section 565.030.4(1) does not specify which party must bear the burden of proving mental retardation, the rule of lenity should have applied to Johnson’s case.²⁷⁵ As articulated by Judge Wolff, under the rule of lenity, the court may not infer that the law implies something that is not written in the statute.²⁷⁶ Therefore, according to Judge Wolff, the ambiguity in the statute must be construed against the state, and thus the court should have interpreted the statute as placing the burden of proof upon the state.²⁷⁷

Judge Wolff would have held that Johnson was “entitled to a new penalty phase trial in which the state had the burden of proving that Johnson is not retarded,” thereby becoming “subject to the death penalty.”²⁷⁸

V. COMMENT

In the last half century, the Supreme Court of the United States has limited the usage of the death penalty by declaring certain types of sentencing procedures unconstitutional and by creating protected classes of individuals.²⁷⁹ In *Furman*, decided in 1972, the Supreme Court nearly held the death penalty unconstitutional in its entirety.²⁸⁰ In the years after the *Furman* decision, the Court clarified its position, holding that both permissive and mandatory sentencing procedures were unconstitutional in part because they did nothing to prevent the arbitrary imposition of the death penalty.²⁸¹ The Court has held that it is unconstitutional to execute an offender guilty of raping an

271. *Id.*

272. *Id.*

273. *Id.* (citing *State v. Hobokin*, 768 S.W.2d 76, 77 (Mo. 1989) (en banc)).

274. *Id.* (citing *State v. Salazar*, 236 S.W.3d 644, 645 (Mo. 2007) (en banc)).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *See supra* Part III.A.

280. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

281. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

adult,²⁸² an offender under the age of eighteen,²⁸³ and an offender guilty of the rape of a child.²⁸⁴ The Court also has held that it is unconstitutional to execute a mentally retarded offender.²⁸⁵

By placing the burden of proving mental retardation upon the defendant, the majority in the instant decision followed the common trend of the other jurisdictions in the United States.²⁸⁶ In fact, no state places the burden of proving mental retardation on the state.²⁸⁷ The court's decision positions Missouri among the states that allocate the burden of proving mental retardation to the defendant through judicial interpretation.²⁸⁸

However, conformity with other jurisdictions aside, the court's decision ignored the rule of lenity, which states that an ambiguous criminal statute should be construed in favor of the defendant. Missouri's death penalty statute does not expressly provide whether the defendant or the state shall bear the burden of proof.²⁸⁹ Thus, it is reasonable to assume that the General Assembly intended for the state to bear the burden, just as it is reasonable to assume that the General Assembly intended for the defendant to bear the burden. Therefore, there is an ambiguity in the statute, and the rule of lenity should have been triggered.

In the past ten years alone, the Supreme Court of Missouri cited the rule of lenity to the benefit of defendants several times. The court has used the rule of lenity to dispose of cases that might be considered mundane. In *Woods*, the court followed the rule of lenity to interpret a statute in favor of a

282. *Coker v. Georgia*, 433 U.S. 584, 597 (1977).

283. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

284. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664 (2008).

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

286. *See supra* notes 165-69 and accompanying text.

287. *See id.*

288. *See supra* note 166 and accompanying text.

289. *See* MO. REV. STAT. § 565.030.4 (Supp. 2009) (“The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor . . . [i]f the trier finds by a preponderance of the evidence that the defendant is mentally retarded . . .”). The language of Missouri's statute is substantially the same as the language of Kansas's and Connecticut's statutes removing mentally retarded offenders from the death penalty. *See* KAN. STAT. ANN. § 21-4623(d) (2009) (“If, at the conclusion of a hearing pursuant to this section, the court determines that the defendant is mentally retarded, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder.”); CONN. GEN. STAT. § 53a-46a(h) (2002) (“The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided by subsection (e), that at the time of the offense . . . the defendant was a person with mental retardation.”). The majority opinion in the instant decision said, “Connecticut's and Kansas's statutes do not state which party has the burden of proving that the defendant is mentally retarded.” *State v. Johnson*, 244 S.W.3d 144, 150 n.3 (Mo. 2008) (en banc).

shoplifter.²⁹⁰ In *Salazar*, the court cited the rule of lenity in holding that a defendant did not commit the crime of failing to support his supposed child.²⁹¹ The court has also used the rule of lenity to dispose of cases involving heinous crimes and unsympathetic defendants. In *Beaird*, the court followed the rule of lenity to interpret an ambiguous statute in favor of a sex offender.²⁹² In *Graham*, the court used the rule of lenity to dismiss a case against a defendant convicted of sodomy.²⁹³

In the instant decision, the majority opinion did not give a detailed discussion of the interpretation of the statute.²⁹⁴ Despite the ambiguity of the statute, the majority stated that the statute “necessarily implies” that the defendant must bear the burden of proof.²⁹⁵ The dissenting opinion was correct when it noted that under the rule of lenity the court must not infer that the law implies something that is not expressly provided for in the statute.²⁹⁶ In holding that the statute “necessarily implies” that the defendant bears the burden of proof, the majority opinion construed an ambiguous statute against the defendant in violation of the rule of lenity.

Cases in which the death penalty is a potential punishment should require the highest level of certainty in our judicial process.²⁹⁷ Historically, the rule of lenity was created with the intention of protecting defendants from the death penalty.²⁹⁸ In the instant decision, in which a defendant’s life was potentially forfeited, the court ignored the rule. If the rule of lenity is applicable in all cases except cases in which the defendant may be sentenced to death, the value of the rule is severely diminished.

Furthermore, the majority’s decision did not strictly follow the Supreme Court’s holding in *Ring*. The majority held that the Supreme Court’s holding

290. *Woods v. State*, 176 S.W.3d 711, 713 (Mo. 2005) (en banc).

291. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. 2007) (en banc).

292. *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. 2000) (en banc).

293. *State v. Graham*, 204 S.W.3d 655, 658 (Mo. 2006) (en banc).

294. *Johnson*, 244 S.W.3d at 150.

295. *Id.*

296. *Id.* at 168 (Wolff, J., dissenting).

297. *See Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.”). Universally, it is seen that “those charged with capital offenses are granted special considerations.” *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 28 (1956)). In cases in which the death penalty is the possible penalty, “doubts such as presented here should be resolved in favor of the accused.” *Id.* at 287 (quoting *Andres v. United States*, 333 U.S. 740, 752 (1948)). Whatever process may be due a defendant facing a fine or imprisonment may not necessarily satisfy the process due a defendant facing the death penalty. *Id.* at 287 n.3 (quoting *Reid v. Covert*, 354 U.S. 1, 77 (1957)). “Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering.” *Id.* at 287.

298. Newland, *supra* note 190, at 197.

in *Ring* did not require the jury in the instant case to find beyond a reasonable doubt that the defendant was not mentally retarded.²⁹⁹ The majority stated that a finding that the defendant is not mentally retarded “is not a finding of fact that increases the potential range of punishment; it is a finding that removes the defendant from consideration of the death penalty.”³⁰⁰ The distinction between *increasing* the punishment to the death penalty and *decreasing* the punishment from the death penalty is arguably ethereal. Under Missouri’s death penalty statute, the state must prove at least one aggravating factor if it seeks the penalty of death for an offender.³⁰¹ Furthermore, if the mitigating factors outweigh the aggravating factors, then a life sentence will be assessed rather than a death sentence.³⁰² So, the practical effect of Missouri’s death penalty statute is that, in the absence of a showing of aggravating factors, a life sentence will be given to the defendant. Therefore, while a finding that the defendant is not mentally retarded is not strictly a statutory aggravating factor, such a finding is necessary for the increased penalty of execution.³⁰³

According to the Supreme Court in *Ring*, “If 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.”³⁰⁴ Under Missouri’s death penalty statute, the death penalty is an increased punishment; without a showing of aggravating factors, the defendant will be given a life sentence. For a defendant, a death sentence is contingent upon a finding that he is not mentally retarded. Although the defendant’s lack of mental retardation has not been labeled as a statutory aggravating factor, a finding of a lack of mental retardation nevertheless allows for the imposition of the death penalty. Thus, the court in the instant decision arguably misread *Ring* and should have held that the jury must find mental retardation or a lack thereof beyond a reasonable doubt.³⁰⁵

Because the court’s holding is consistent with the majority of other jurisdictions in the United States, one may be inclined to find that this decision is of little importance. However, as Judge Wolff noted in his dissent, in Johnson’s case the burden of proof meant the difference between life and death.³⁰⁶ In order to prove his mental retardation, Johnson presented evidence in the form of treating mental health experts, teachers, friends, family, and the results of intelligence tests he took earlier in life.³⁰⁷ Still, such evi-

299. *Johnson*, 244 S.W.3d at 151.

300. *Id.*

301. MO. REV. STAT. § 565.030.4 (2000).

302. *Id.*

303. *See id.*

304. *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

305. The Supreme Court of the United States has never had the occasion to address whether *Ring* requires that the state prove beyond a reasonable doubt that a defendant facing the death penalty is not mentally retarded.

306. *Johnson*, 244 S.W.3d at 167 (Wolff, J., dissenting).

307. *Id.*

dence was not enough to prove mental retardation by a preponderance of evidence. In capital cases in the future, an undiagnosed mentally retarded defendant may be before a sentencing jury. For such a defendant, who may have slipped through the cracks of the education system, proving mental retardation will be difficult.

The dissenting opinion offers an alternative to the majority's holding that the defendant must bear the burden of proof. Judge Wolff stated that, where a defendant's evidence establishes *prima facie* mental retardation, the burden should then shift to the state to prove that the defendant is not mentally retarded.³⁰⁸ Such a procedure would be problematic if it were used in Missouri. The result would be that many or perhaps all defendants potentially subject to the death penalty would assert mental retardation in hopes of receiving a life sentence. It would be rather simple to offer testimony from family members of the defendants or to purposefully "fail" an IQ test, thereby establishing *prima facie* mental retardation. Thus, the state would be required to prove beyond a reasonable doubt that the defendant is not mentally retarded in every capital case. Also, the appeals process for defendants convicted of first-degree murder would be even further prolonged – this was Johnson's fourth time before the court. Of course, perhaps the best way to prevent such use of state resources would be for the General Assembly to pass legislation expressly placing the burden upon either the state or the defendant. Although in the future a defendant may successfully challenge a state death penalty statute before the Supreme Court under *Ring*, currently it cannot be said that placing the burden upon the defendant is unconstitutional.³⁰⁹ In holding that a defendant asserting that he is mentally retarded must bear the burden of proof, the court may have been purposefully siding with judicial economy rather than choosing to abide by judicial precedent.

VI. CONCLUSION

The defendant Ernest Lee Johnson had been before the Supreme Court of Missouri three times prior to the instant ruling. In his final appearance before the court, the court held that the Missouri statute excluding mentally retarded offenders from the death penalty, which does not expressly state which party has the burden of proof, "necessarily implies" that the defendant bears the burden of proving mental retardation. Such a holding is in direct contravention with Missouri's rule of lenity, which states that an ambiguous

308. *Id.* at 168.

309. An argument in favor of placing the burden of proof upon the defendant is strengthened by the fact that no state statute places the burden upon the state to prove lack of mental retardation. See *supra* Part III.A. Should a defendant challenge a state statute and the Supreme Court hold that *Ring* requires states to prove mental retardation beyond a reasonable doubt, such a holding would have far-reaching effects and would overturn every state statute governing the imposition of the death penalty against mentally retarded offenders. See *supra* Part III.A.

statute must be construed in favor of the defendant. Also, the court held that the finding of mental retardation may be made by a showing of mere preponderance of the evidence, rather than requiring proof beyond a reasonable doubt. In so holding, the court arguably misread the Supreme Court of the United States' decision in *Ring*. Under the statute, the state should have had to prove that the defendant was not mentally retarded; instead, the court held that the defendant had the burden of proving he was mentally retarded.

The rule of lenity was first created with the goal of ameliorating the harshness of the death penalty and to guard against the possibility that innocent men and women might face "the ultimate sanction"³¹⁰ of death.³¹¹ Although the majority of states have passed legislation placing the burden of proving that the defendant is mentally retarded upon the defendant,³¹² the Missouri statute does not expressly place the burden upon the defendant. While the court followed the common trend among the states, the court failed to adhere to the rule of lenity and construed an ambiguous statute against the defendant. In so doing, the court sentenced the defendant, a man who may or may not have been mentally retarded, to the "ultimate sanction."

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310. *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction.").

311. *See Newland*, *supra* note 190, at 199-200.

312. *See supra* note 165 and accompanying text.