A.R.S. § 13-703.02 [13-753] Sets Forth the Procedure to be Followed in Determining Whether Defendant is Mentally Retarded. Defendant is not Entitled to a Jury Determination on that Question, and Defendant Bears the Burden of Proof.

In *State v. Grell*, 205 Ariz. 57, 66 P.3d 1234 (2003) (*Grell I*), the Arizona Supreme Court noted that the United States Supreme Court had "left to the States the task of developing appropriate ways to enforce the constitutional restriction upon [the] execution of sentences" concerning claims of mental retardation. 205 Ariz. at 61-62, 66 P.3d at 1238-39 (quoting *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2250 (2002), quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The Arizona Legislature had passed a bill prohibiting the execution of defendants who suffer mental retardation, and the court said that the law "appears to comport with *Atkins*' principles." 205 Ariz. at 63, 66 P.3d at 1240. The court in remanding the case stated:

> The trial court should use *Atkins* as a guide and should insofar as is practical in the post-trial posture of this case, follow the procedures established in A.R.S. section 13-703.02. [Footnote 4. We note that A.R.S. section 13-703.02 appears to comport substantively and procedurally with the principles set forth in *Atkins.*]

205 Ariz. at 64, 66 P.3d at 1241. The court had noted earlier in its opinion when describing the procedures of A.R.S. § 13-703.02 that at a hearing on whether a defendant has mental retardation, "the defendant bears the burden of proving mental retardation by clear and convincing evidence. *Id.* § 13-703.02(G)." 205 Ariz. at 63, 66 P.3d at 1240. Section 13-703.02 has been renumbered as § 13-753 (Laws 2008).

In *Grell I*, the court remanded for a redetermination of whether defendant was mentally retarded in light of *Atkins*. After the trial court again found no mental retardation, defendant appealed in *State v. Grell*, 212 Ariz. 516, 135 P.3d 696 (2006) (*Grell II*). The Supreme Court there upheld Arizona's statutory procedure for determining whether a defendant is mentally retarded.

A. The burden of proof is on defendant to show he is retarded by clear and convincing evidence.

Grell first argued that the State should have the burden of proving lack of retardation to a jury beyond a reasonable doubt, but even if defendant had the burden, the standard should be no higher than a preponderance of the evidence. The court found no constitutional bar to imposing the burden on defendant:

> We disagree that the Constitution requires the prosecution to bear this burden. The Supreme Court has held that a state may require that the defendant prove affirmative defenses. . . . Proof of mental retardation is like proof of an affirmative defense in that it serves to relieve or mitigate a defendant's criminal responsibility, and as with affirmative defenses, the evidence of retardation will lie largely within the possession and control of the defendant.
>
> Because the defendant has superior access to the evidence to prove his mental condition, it is not inappropriate to place the burden on him. . . .

212 Ariz. at 522, 135 P.3d at 702.

The court also found that requiring defendant to prove mental retardation by clear and convincing evidence was not unconstitutional. The court explained that Arizona's statutory scheme provided a detailed process that required a pretrial hearing at which defendant could attempt to show, by clear and convincing evidence, that he has mental retardation. If defendant fails to make that

showing, he may still present mental retardation evidence to the jury in mitigation of his sentence.

> By creating a pretrial process, the legislature provided a way for mentally retarded defendants to avoid the burden of a capital trial and the risk of imposition of the capital penalty. All defendants who do not prove mental retardation at the pretrial hearing retain the ability to present mental retardation evidence to the jury under a preponderance standard in the penalty phase of the trial. That opportunity reduces the ultimate risk they face from an adverse determination in the pretrial mental retardation hearing.

212 Ariz. at 524, 135 P.3d at 704. The Arizona procedure "occurs early in the capital process and removes defendants found to have mental retardation from exposure to a capital trial and hence to a sentence of death. . . . The application of Arizona's tiered procedure does not deprive Grell of a right rooted in fundamental justice." 212 Ariz. at 525, 135 P.3d at 705.

B. Defendant is not entitled to a jury determination of his claim that he is mentally retarded.

Grell alleged that *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required that mental retardation be determined by a jury beyond a reasonable doubt. However, the court found that mental retardation was not "the functional equivalent of an element of the crime," and absence of retardation did not increase the available penalty. Therefore, *Ring* and *Apprendi* did not apply. 212 Ariz. at 526, 135 P.3d at 706.

Grell argued that the jury should not only hear mental retardation evidence in mitigation, but should decide whether it should serve as a bar to execution following an initial determination by the trial judge:

> Because *Atkins* left the procedure for determining mental retardation to the states, such a procedure would not be prohibited; but neither is it required. Indeed, the statute already requires that both the judge and jury evaluate mental retardation before a sentence of death may be imposed. The judge hears mental retardation evidence as a legal bar to execution and the jury hears it for mitigation purposes.

212 Ariz. at 527, 135 P.3d at 707. The court held that the trial court did not err in determining that a jury need not determine mental retardation as a bar to execution.

CONCLUSION

Under A.R.S. § 13-703.02 [13-753], defendant must establish mental retardation by clear and convincing evidence. He is not entitled to a jury determination on the question of whether he is mentally retarded.

(Revised 7/09)