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## MEMORANDUM

**TO:** House Judiciary Committee

**FROM:** Andy Hoover, Legislative Director

**DATE:** September 14, 2010

**RE: SUPPORT FOR SENATE BILL 628**

On Wednesday, the House Judiciary Committee is scheduled to consider Senate Bill 628. This legislation, which passed the Senate last year, 45-2, would implement the 2002 United States Supreme Court decision in *Atkins v. Virginia*, banning the execution of persons with mental retardation. SB 628 institutes a definition of mental retardation for courts to follow and a pre-trial procedure for the court to determine if the defendant has this disability. The bill is supported by all of the major advocates for persons with disabilities in Pennsylvania, faith groups, and numerous civil rights organizations, including the American Civil Liberties Union of Pennsylvania. On behalf of the 18,000 members of the ACLU of Pennsylvania, I urge you to **please vote “yes” on SB 628 and oppose all amendments to the bill.**

The definition of mental retardation in SB 628 is the definition used by the American Association on Intellectual and Developmental Disabilities. **The pre-trial procedure for determining the defendant’s eligibility to face the death penalty is the procedure most often used by states with capital punishment.** Seventeen states have statutes or rules of procedure that require the determination be made pre-trial in cases where the district attorney is pursuing the death penalty and the defendant has made a claim of mental retardation, and all but one of those states charge the trial judge with the responsibility of making the decision on the defendant’s claim. It is a diverse group of states that includes South Carolina, California, Kentucky, Colorado, and Utah.

Meanwhile, just ten death penalty states have statutes or rules of procedure that require a post-trial determination, and five of those ten states require the trial judge to rule on the claim, rather than the jury. Thus, **of the 35 death penalty states, only five follow the post-trial by jury procedure proposed by opponents of SB 628.** (Eight death penalty states have not implemented a procedure, have ambiguous rules or laws, or have so few capital cases that the issue has not been raised.)

In addition, the pre-trial procedure in SB 628 has been used by trial courts in Pennsylvania since the *Atkins* decision. Based on media coverage, we are aware of four capital cases in which the defendant filed a claim of mental retardation. In cases in York, Erie, and Washington Counties, the court ruled on the claim before trial. In

the fourth case, in Indiana County, the judge left the decision to the jury after trial but placed the burden on the commonwealth to prove that the defendant did not have mental retardation.

If the legislature and governor implemented a post-trial determination by jury, it would lead to years of litigation. A post-trial determination by jury would require that all jurors are death-qualified, meaning that all jurors must be willing to implement the death penalty. **Because it is unconstitutional to execute persons with mental retardation, it is also likely unconstitutional to try a person with mental retardation before a death-qualified jury.** It is impossible to predict how courts would rule on that issue, but it is easy to predict that capital appeals attorneys would challenge that procedure.

Senate Bill 628 is the best way to implement the Supreme Court's decision in *Atkins*. SB 628 decreases the likelihood that a person with mental retardation would be executed in Pennsylvania while the post-trial procedure supported by opponents of SB 628 both increases the likelihood that a person with mental retardation would be executed and is likely unconstitutional.

Please vote "yes" on SB 628 and oppose all amendments.