No. 19-941

In The Supreme Court of the United States

BILLY DANIEL RAULERSON,

Petitioner,

v.

WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, on AEDPA review, the court of appeals correctly decided that the state court's decision rejecting a due process challenge to Georgia's "beyond a reasonable doubt" burden of proof for intellectual disability was not contrary to, or an unreasonable application of, clearly established federal law, where this Court has expressly "le[ft] to the states" the task of developing procedures for determining intellectual disability, *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), and no decision of this Court has held that due process requires a particular burden of proof for intellectual disability.

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The decision of the state habeas court is included in Petitioner's Appendix B.

The decision of the Georgia Supreme Court denying Petitioner's application for a certificate of probable cause is unpublished and is included in Petitioner's Appendix C.

The decision of the district court denying Petitioner's federal habeas petition is unpublished and found in Respondent's Appendix 1-72.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 928 F.3d 987 (11th Cir. 2019) and is included in Petitioner's Appendix A.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The Georgia Supreme Court held that Georgia's "beyond a reasonable doubt" burden of proof for Eighth Amendment intellectual disability claims did not violate the Due Process Clause. In his federal habeas appeal under 28 U.S.C. § 2254, Petitioner Billy Daniel Raulerson alleged that the state court's holding was an unreasonable application of *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Analyzing these and other precedents of this Court, the court of appeals correctly determined that "[n]o decision of the Supreme Court clearly establishes that Georgia's burden of proof for intellectual disability violates the Due Process Clause" and therefore the

state court "decision was not an unreasonable application of clearly established federal law." Pet. App. 28a-29a. Raulerson now seeks review of that decision. This Court has denied petitions presenting the same question before. *See Hill v. Humphrey*, 566 U.S. 1041 (2012) (No. 11-10109); *King v. Georgia*, 536 U.S. 957 (2002) (No. 00-9976); *In re Holsey*, 574 U.S. 1056 (2014) (14-7439); *Hill v. Turpin*, 525 U.S. 969 (1998) (No. 98-5809); *Tharpe v. Sellers*, ___U.S. ___, 137 S. Ct. 2298 (2017) (No. 16-8733); *Hill v. Humphrey*, 568 U.S. 1187 (2013) (No. 12-8048).[1] The Court should deny this petition too as the decision below represents a straightforward, and correct, application of the AEDPA's well-settled standard for reviewing a state court's merits decision that does not implicate any conflict of authority. Moreover, the decision below shows that requiring a different burden of proof would not affect the outcome of this case because the court of appeals also determined that Raulerson's underlying intellectual disability claim would fail even under the "clear and convincing evidence" standard. Certiorari review should be denied.

STATEMENT

A. Crime and Trial Proceedings

In 1993, "the bodies of Jason Hampton, Charlye Dixon, and Gail Taylor were found in separate locations in Ware County." *Raulerson v. State*, 268 Ga. 623,

[1] *Hill*, 525 U.S. 969, was prior to this Court's holding in *Atkins*.

623, 491 S.E.2d 791, 795 (1997). "Each victim had been shot multiple times. . . ." *Id.* "Semen and spermatozoa were found in Ms. Dixon's rectum." *Id.* Seven months later, Raulerson was arrested on unrelated charges and gave a blood sample, which matched the semen recovered from Ms. Dixon.

Upon questioning, Raulerson "admitted killing the three victims." *Id.* at 623-24. Raulerson stated that he parked his car "near the pickup truck occupied by Hampton and Dixon, . . . stood on the bed of the pickup truck and shot Hampton several times, and then shot Dixon as she attempted to flee." *Id.* Raulerson "dragged Hampton's body from the truck and shot him several more times." *Id.* He placed Dixon in his "vehicle and drove to a wooded area several miles away where he shot Dixon again and sodomized her." *Id.* The following day, he attempted to return to Dixon's body, but people were near the body site. So, Raulerson drove to a rural area "looking for a house to burglarize." *Id.* As he was stealing meat from an outside shed, he heard someone inside the home. *Id.* He broke into the home and shot Ms. Taylor "multiple times." *Id.*

Prior to trial, Raulerson's counsel investigated his mental health. "They hired five experts, including a licensed clinical social worker, Audrey Sumner; a psychologist, Dr. Daniel Grant; a psychiatrist, Dr. John Savino; a neurologist, Dr. Michael Baker; and a neuropsychologist, Dr. Manual Chaknis." *Raulerson v. Warden*, 928 F.3d 987, 993 (11th Cir. 2019). "Among other things, Raulerson's counsel learned that Raulerson had a tumultuous childhood, abusive parents,

substance-abuse issues, and several emotional and intellectual problems." *Id.*

During the guilt phase, Raulerson alleged that he was intellectually disabled and presented the testimony of Dr. Grant to support his claim. Pet. App. 5a. The State presented two school psychologists who evaluated Raulerson when he was approximately 11 years old and nearly 15 years old and found he had IQ scores of 78 and 83 respectively. Pet. App. 5a-6a. The State also presented psychologist, Dr. Jerold Lower, who evaluated Raulerson for trial. His testing resulted in an IQ score of 69, but "he found signs of malingering." *Raulerson*, 928 F.3d at 994. Pet. App. 6a. "When asked whether there was 'any convincing demonstration' that Raulerson had an intellectual disability onset before age 18, he testified, 'Absolutely none whatever.'" *Id.* The jury, determining the issue of intellectual disability at the guilt phase of trial, rejected this claim and convicted him of three counts of murder, burglary, kidnapping, necrophilia and two counts of possession of a firearm during the commission of a felony. *Id.*

In sentencing-phase closing arguments, counsel argued that Raulerson's alleged limited intellect was a mitigating factor. Resp. App. 76-77, 79-80. The jury was then instructed they could consider anything in mitigation, including the evidence presented in the guilt phase of trial. Resp. App. 83. They were also instructed that regardless of whether they found mitigating or aggravating circumstances, the jury could still recommend a sentence of life for "any reason" or "no reason." Resp. App. 88; *see also* Resp. App. 90. The jury found

the existence of the seven statutory aggravating circumstances beyond a reasonable doubt and recommended three death sentences for the malice murders of Hampton, Dixon, and Taylor. Pet. App. 7a. Raulerson was sentenced accordingly on March 15, 1996.

Raulerson appealed to the Georgia Supreme Court. *Id.* Citing *Cooper v. Oklahoma*, "which held that an Oklahoma requirement that the accused prove his incompetence to be tried by clear and convincing evidence violated the Due Process Clause," he challenged Georgia's burden of proof for claims of intellectual disability under the Fourteenth Amendment. Pet. App. 7a. The Georgia Supreme Court rejected this claim and affirmed Raulerson's convictions and sentences. *Id.* In affirming, the court analyzed the evidence presented during the guilt phase, including the evidence of Raulerson's intellectual disability, and found the jury's guilty verdict was "sufficient[ly]" supported by the evidence. *Raulerson*, 268 Ga. at 623-24. With regard to Raulerson's claim that his intellectual disability precluded a knowing and voluntary waiver of his *Miranda* rights, the Court rejected that claim on the merits finding the trial court did not err in admitting the confession as the "jury was authorized to find that his expert's testimony on [intellectual disability] at trial was effectively rebutted by the State." *Id.* at 627.

In a petition for certiorari review, Raulerson raised this same due process claim, albeit prior to this Court's decision in *Atkins*. This Court denied Raulerson's request for review. *Raulerson v. Georgia*,

523 U.S. 1127 (1998), *rehearing denied*, 524 U.S. 969 (1998).

B. State Habeas Proceedings

Raulerson filed a state habeas corpus petition in 1998, and amended it two years later. Pet. App. 64a. During this proceeding, Raulerson again challenged Georgia's burden of proof for claims of intellectual disability under the Fourteenth Amendment relying in part on the newly decided case of *Atkins v. Virginia*. An evidentiary hearing was conducted in 2001. *Id.* At that hearing, Raulerson submitted the affidavit of Dr. Lower, who testified that Raulerson's IQ and adaptive deficits prior to age 18 "support[ ] a diagnosis" of intellectual disability. Pet. App. 8a. "But Dr. Lower still questioned whether Raulerson's intellectual disability onset before age 18. So even with the additional information, he could not diagnose Raulerson as intellectually disabled." *Id.* at 8a-9a. In Raulerson's post-hearing brief, he argued that the newly decided *Atkins* case supports his due process challenge to Georgia's burden of proof.

The state habeas court denied the petition for habeas corpus relief in its entirety in 2004. Pet. App. 140a. The court found that Raulerson's due process claim concerning the burden of proof as to intellectual disability claims was barred by res judicata and that Raulerson's evidence failed to establish a miscarriage of justice to overcome that state bar. Pet. App. 68a. The court also determined in the alternative, citing *Head v. Hill*, 277 Ga. 255, 260-62, 587 S.E.2d 613, 621-22

(2003),[2] that the claim failed because Georgia's burden of proof to establish intellectual disability was not unconstitutional under *Atkins*. Pet. App. 70a-71a.

Raulerson filed his application for a certificate of probable cause to appeal to the Georgia Supreme Court in 2004. He referenced his intellectual disability claim and his due process challenge to Georgia's burden of proof in his application, but he did not present argument in support.[3] The Georgia Supreme Court denied the application on January 11, 2005. Pet. App. 142a. Raulerson did not seek review of that decision from this Court.

C. Federal Habeas Petition

Raulerson filed his federal petition for writ of habeas corpus, which was denied by the district court in 2013. Pet. App. 9a. The district court concluded that the state habeas court had denied Raulerson's challenge to the burden of proof for intellectual disability on the merits, and that the decision was not contrary to, or an unreasonable application of, this Court's precedent. Resp. App. 33-36.

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[2] In *Hill*, the Georgia Supreme Court conducted a reasoned analysis of the constitutionality of the burden of proof.

[3] Georgia Supreme Court Rule 22 states, "Any enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned." Raulerson thus did not properly exhaust these claims in the state courts. The court of appeals did not address the issue of exhaustion as to this claim.

On appeal to the Eleventh Circuit, Raulerson argued that under 28 U.S.C. § 2254(d)(1), the state court's rejection of his due process claim was an unreasonable application of *Atkins* and *Cooper* and violated his Fourteenth Amendment rights. Properly applying the AEDPA, the court of appeals held that "[n]o decision of the Supreme Court clearly establishes that Georgia's burden of proof for intellectual disability violates the Due Process Clause," and therefore that the state court "decision was not an unreasonable application of clearly established federal law." Pet. App. 28a-29a.[4]

The court of appeals held that the state court's ruling on Georgia's burden of proof as to intellectual disability claims could not be contrary to *Atkins* because "that decision did not address the burden of proof to prove intellectual disability, much less clearly establish that a state may not require a defendant to prove his intellectual disability beyond a reasonable doubt." Pet. App. 23a. The court explained that in *Atkins*, "the Supreme Court expressly 'le[ft] to the States the task of developing appropriate ways' to identify intellectual disability." *Id.* (quoting *Atkins*, 536 U.S. at 317). The court held that *Atkins* established the "substantive Eighth Amendment right" for the intellectually disabled, but "established no 'minimum procedural due process requirements for bringing that Eighth

[4] Agreeing with the district court, the court of appeals explained that "the superior court dismissed his claim in part because of res judicata. But it did not dismiss the claim only because of res judicata." Pet. App. 21a-22a.

Amendment claim.'" Pet. App. 24a (quoting *Hill v. Humphrey*, 662 F.3d 1335, 1360 (2011); citing *Bobby v. Bies*, 556 U.S. 825, 831 (2009)).

The court of appeals explained that "Raulerson's comparison between the right not to be tried if incompetent and the right not to be executed if intellectually disabled is misplaced." Pet. App. 25a-26a. The right not to be tried if incompetent, the issue in *Cooper*, "has deep roots in our common-law heritage." Pet. App. 26a. In comparison, Georgia was the first state to enact a statute prohibiting the execution of the intellectually disabled in 1989, and "there is no historical tradition regarding the burden of proof as to that right." *Id.* The court concluded that the state court's decision "was not an unreasonable application of clearly established federal law." Pet. App. 28a-29a.

Notably, the court of appeals also reviewed Raulerson's claim that he was "innocent" of the death penalty because he was intellectually disabled and found that he failed to establish this claim under even a clear and convincing burden of proof. Pet. App. 35a-36a.

REASONS FOR DENYING THE PETITION

I. Whether the court of appeals correctly applied the AEDPA standard is not a question that warrants certiorari review.

As Raulerson acknowledges, this case does not present the merits question of whether Georgia's burden of proof for establishing intellectual disability violates due process. The Georgia Supreme Court answered that question on state habeas review in the negative, and Raulerson did not seek certiorari from that decision. Instead, he filed a federal habeas petition raising the due process claim, so the question before the court of appeals below was whether the Georgia Supreme Court's decision rejecting the claim was contrary to, or involved an unreasonable application of, clearly established federal law. That means the question here is whether the court of appeals correctly applied the AEDPA standard in denying this due process claim. That question does not warrant certiorari review.

The AEDPA review standard is long established and well understood, and the petition does not suggest that the application of any language of that standard implicated here—"contrary to," "unreasonable application of," "clearly established Federal law," or the like—or even application of the standard to this particular due process question is a subject of conflict or confusion for the circuits. This Court overwhelmingly denies petitions that merely seek to correct applications of the AEDPA standard, and indeed, it has denied just such a petition on the same issue raised here, *see Hill v.*

Humphrey, 566 U.S. 1041 (2012) (No. 11-10109). Raulerson identifies no reason to make this case the rare exception, particularly since the decision below is correct, and as the decision below made clear, the record shows that holding Raulerson to a lower burden of proof of intellectual disability would not have changed the outcome of his claim, *see infra* Section III.

II. The decision below is correct: the state court's decision that Georgia's burden of proof for intellectual disability claims does not violate due process is not contrary to, or an unreasonable application of, this Court's precedent.

As this Court has instructed in many cases, 28 U.S.C. § 2254(d) stringently circumscribes federal habeas review of a state court decision. Indeed, this Court has remarked on more than one occasion "that 'this standard is difficult to meet' 'because it was meant to be.'" *Sexton v. Beaudreaux*, ___ U.S. ___, 138 S. Ct. 2555, 2558 (2018) (quoting *Burt v. Titlow*, 571 U.S. 12, 20 (2013). The court of appeals correctly determined that Raulerson failed to meet the demanding standard of § 2254(d)(1) in his attack on the state court's decision that the burden of proof for intellectual disability did not violate the Due Process Clause of the Fourteenth Amendment.

A. Raulerson muddles the § 2254(d) standard.

Section 2254(d)(1) provides that federal habeas relief cannot be granted on a claim "adjudicated on the merits in State court" unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Raulerson deliberately confuses each element of this standard throughout his arguments. First, although he admits that the court of appeals' decision is based upon the "unreasonable application" portion of § 2254(d)(1), his primary heading only quotes the "contrary to" portion—a standard not suited to this issue. *See*, *e.g.*, Pet. 9, 12. Second, in arguing "contrary to" he erroneously defines this standard. *See*, *e.g.*, Pet. 14. Third, to the extent that certain portions of his arguments relate to the "unreasonable application" portion of § 2254(d), he fails to provide an argument proving the circuit court's decision was in error. And finally, many of Raulerson's arguments are not based upon "Supreme Court precedent that was *clearly established at the time*" of the state court decision in 2004. *Shoop v. Hill*, ___ U.S. ___, 139 S. Ct. 504, 505 (2019) (emphasis added). While Raulerson may claim the AEDPA is not an "impediment" to relief, he does little to appropriately address why not.

B. The state court's decision was not "contrary to" this Court's established precedent.

In the circuit court, Raulerson only argued the state court's decision on this issue was an "unreasonable application of" this Court's precedent. Pet. App. 23a. Raulerson now argues that the court of appeals erred in denying relief because the state court's decision was "contrary to" the established federal precedent of *Atkins* and *Cooper*. Pet. 12. Analyzing this claim through the AEDPA lens, the Eleventh Circuit correctly held that there was no clearly established Supreme Court precedent because *Atkins* and *Cooper* neither asked nor answered the question of the appropriate burden of proof for claims of intellectual disability.

The circuit court, noting the parameters of its AEDPA review, held that it could "not grant habeas relief on any claim 'adjudicated on the merits' in state court unless [] the state court's decision denying relief was either "contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States." Pet. App. 10a (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that *reached by this Court on a question of law* or if the state court decides a case differently than this Court has *on a set of materially indistinguishable facts*." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (emphasis added).

Atkins did not impose any procedural requirements on the States. Pet. App. 23a-24a. In *Shoop*, this Court explained that: (1) "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes," (2) "that state statutory definitions of mental retardation at the time [of *Atkins*] '[were] not identical, but generally conform[ed] to [] clinical definitions' " and; (3) "left 'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction' that the Court adopted." *Shoop*, 139 S. Ct. at 507 (quoting *Atkins*, 536 U.S. at 317 n.22). The *Shoop* Court admonished the Sixth Circuit for reading requirements into *Atkins* that did not exist at the time *Atkins* was decided.

Here, the circuit court correctly concluded that *Atkins* was clearly an Eighth Amendment decision and did not impose procedural requirements for the States to follow regarding claims of intellectual disability. *Id.* The court correctly noted that "[t]o the contrary, the Supreme Court expressly 'le[ft] to the States the task of developing appropriate ways' to identify intellectual disability." Pet. App. 23a (quoting *Atkins*, 536 U.S. at 317). The circuit court concluded, "we cannot 'import a procedural burden of proof requirement' that the Supreme Court declined to adopt in our review of a habeas petition." Pet. App. 24a. The state court's opinion could not be "contrary to" *Atkins* because *Atkins* did not even suggest a standard of proof for intellectual disability.

The circuit court also correctly found Raulerson's reliance on *Cooper* in conjunction with *Atkins*

unavailing. In *Cooper*, this Court reviewed whether Oklahoma's statute requiring a defendant to prove his incompetence to stand trial by clear and convincing evidence violated the Due Process Clause. Because *Cooper* concerned incompetence to stand trial, not intellectual disability, the state court's decision in this case cannot be "contrary to" that precedent.

Raulerson argues that "[t]here is no reasonable way to distinguish this case from *Cooper*." Pet. at 5. Yet, in *Woods v. Donald*, 575 U.S. 312, 317 (2015), this Court explained that "if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases." (Citing *Carey v. Musladin*, 549 U.S. 70, 76-77 and n.2 (2006)). If "none of our cases confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court." *Woods*, *supra* (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). Just so here. Simply because *Cooper* set the appropriate burden of proof for a mental health issue does not mean it is indistinguishable from this case. *Cooper* addressed a clear-and-convincing burden of proof for a defendant claiming to be incompetent to stand trial; this claim concerns a beyond-a-reasonable-doubt burden of proof for determining whether a defendant is eligible for a death sentence based upon a plea of guilty-but-intellectually-disabled. No amount of dicta from *Cooper* can change the immovable fact that it did not decide the "specific question presented" in this case.

Raulerson also argues under his "contrary to" heading that some *state court* "holdings," in setting the burden of proof for intellectual disability, "follow inexorably from *Cooper*'s materially indistinguishable reasoning." Pet. 14. But none of the state court decisions relied upon by Raulerson are "clearly established federal law, as determined by" this Court. § 2254(d)(1). And, just as important, "materially indistinguishable reasoning" does not meet the AEDPA standard. "Contrary to" means the "specific [legal] question presented in this case" has been decided by this Court or the state court has decided a case "differently than this Court has *on a set of materially indistinguishable facts*." *Woods*, 575 U.S. at 317; *Williams*, 529 U.S. at 412-13 (emphasis added). Simply because a state court chose to rely on reasoning from *Cooper* does not prove that Georgia's decision *not* to rely upon *Cooper* is "contrary to" *Cooper*.

In total, Raulerson's arguments that the state court's decision was "contrary to" any clearly established law by this Court fail. Without a clear holding on this specific issue, Raulerson's arguments breach the "important interests of federalism and comity" that is part of the foundation of the AEDPA. *Woods*, 575 U.S. at 316.

C. The state court's holding was not based on an "unreasonable application of" this Court's established precedent.

The circuit court determined that the state court's decision was also not an "unreasonable application of" this Court's precedent. Although Raulerson does not specifically designate any arguments in support of the "unreasonable application" part of § 2254(d)(1), certain of his arguments seem more appropriate to that part than the "contrary to" part. His two main arguments most closely related to "unreasonable application" are (1) that failing to properly apply *Cooper*, or in essence "ignoring *Cooper,*" the state court decision "redefine[d] the *Atkins* right" so that it was either "nullified" or created a standard that is not "uniform" with all the other states; and (2) the state court was wrong to rely upon *Leland v. Oregon*, 343 U.S. 790, 796-97 (1952) instead of *Cooper*. Pet. 19, 22. Other than showing Raulerson's mere disagreement with the state court, these arguments do not prove that the state court's decision was an "unreasonable application of" *Cooper* and *Atkins*.

"[A] state court's application of federal law is unreasonable 'only if no fairminded jurist could agree with the state court's determination or conclusion.'" Pet. App. 10a (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Richter*, 562 U.S. at 101 (quoting *Knowles v. Mirzayance*, 556 U.S. 111,

122 (2009) (internal quotation marks omitted)). "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably applies this Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014) (citing Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 949 (1998)).

That *Cooper* and *Atkins* decided issues plausibly within the same larger realm of constitutional dimension does not mean their holdings can be extrapolated to create the mandatory application Raulerson advocates. In *Cooper*, this Court first analyzed "whether the criminal procedural rule 'offends a principle of justice that is [so] deeply rooted in the traditions and conscience of our people' as to be considered fundamental." Pet. App. 25a (quoting *Cooper*, 517 U.S. at 362). Applying this standard, the circuit court correctly reasoned that competence to stand trial had "deep roots in our common-law heritage," but contrastingly "there is no historical right of an intellectually disabled person not to be executed." Pet. App. 26a. Instead, the prohibition on imposing a death sentence on the intellectually disabled is based "on the contemporary national consensus that reflected 'the evolving standards of decency' that informed the meaning of the Eighth Amendment." *Hill v. Humphrey*, 662 F.3d 1335, 1350 (2011) (quoting *Atkins*, 536 U.S. at 311-12). "And since the constitutional right itself is new, there is no historical tradition regarding the burden of proof as to that right." Pet.

App. 26a (quoting *Hill v. Humphrey*, 662 F.3d at 1350, *cert denied*, 132 S. Ct. 2727 (2012)). The circuit court correctly held that, given this reasonable distinction, Raulerson cannot show that the state court's denial of his claim was an "unreasonable application of" *Cooper*.

Turning *Cooper*'s rationale on its head, Raulerson argues that Georgia's burden of proof does not have "deep roots" in "prior practice." Pet. 13. Raulerson contends that the circuit court was wrong to look at the "deep roots" of the constitutional right at issue instead of the burden of proof. *Id.* at 9. But one does not exist without the other; there can be no "deep roots" for a particular burden of proof unless it was attached to a particular deep-rooted constitutional right.[5] The court of appeals was correct to train its attention on the constitutional right at issue, as *Cooper* did. Because the prohibition on capital sentences for the intellectually disabled is a newly created right, Georgia's burden of proof need not have "deep roots" in "prior practice." At the least, it was not an unreasonable application of *Cooper* to hold as much.

Raulerson's argument that failure to abide *Cooper*'s holding improperly "redefine[d]" *Atkins* is also unsupported. Again, as *Shoop* pointed out, "*Atkins*

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[5] In fact, it was only after a thorough review of the historical practice of not trying an incompetent defendant and the determination that the Court was not aware of any "decisional law from this country suggesting that any Sate employed Oklahoma's heightened standard until quite recently," that the Court determined that the preponderance was the proper standard to be used in incompetency to stand trial claims. *Cooper*, 517 U.S. at 359.

gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop*, 139 S. Ct. at 507. Likewise, *Atkins* gave no definition for a burden of proof. Thus, what was never defined—i.e., a burden of proof for intellectual disability—cannot be "redefine[d]."

Nor are there any teeth to Raulerson's nullification or uniformity arguments. Relying upon evidence that is not before this Court,[6] Raulerson states that no one could ever be found intellectually disabled under Georgia's standard. This argument fails to take into account two important points. First, "state statutory definitions of mental retardation at the time [of *Atkins*] '[were] not identical, but generally conform[ed] to [] clinical definitions.'" *Shoop*, 139 S. Ct. at 507. Second, the states are not uniform in their procedures for determining intellectual disability. *See*, *e.g.*, Va. Code

[6] In his petition, Raulerson relies heavily on statistics from interrogatories and expert testimony submitted to the federal court to argue that no capital inmate in Georgia has ever been found, at trial, to be intellectually disabled. Raulerson presented this evidence in the federal proceedings after the judge initially assigned to the case found the state habeas court had not reviewed the *Atkins* claim as it was barred by res judicata. Resp. App. 6-7. The district judge that ultimately ruled on the case, however, found the claim was not barred by res judicata and that it was reviewed on the merits by the state habeas court. Resp. App. 33-36. Because § 2254 review is limited to the record before the state court that adjudicated the claim on the merits, and as this evidence was not presented to the state courts, Raulerson's reliance upon this evidence is in error. *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011). Notably, the district court did not rely upon this evidence in denying Raulerson's claim. Resp. App. 36-38.

Ann. § 19.2-264.3:1.2 ("The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert."); Fla. Stat. § 921.137 ("the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties. . . ."); K.S.A. § 21-6622 (determination by trial court).[7] In other words, just comparing Georgia's burden of proof to that of other states without taking into account these significant substantive and procedural differences is an apples-to-oranges comparison.

Taking those things into account paints a different picture. Compared to other states, in Georgia, a jury or a judge can consider anything from both phases of trial in mitigation and give a sentence of less than death for any reason or no reason. *See* Resp. App. 83; O.C.G.A. § 17-10-2(c). And they can consider a defendant's intellectual disability claim a second time in sentencing, with no burden of proof. The Eleventh Circuit noted this in *Hill v. Humphrey*, as well as other guarantees

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[7] Raulerson cites to the procedures adopted by Indiana and Tennessee as support that Cooper prohibits a standard of proof beyond preponderance of the evidence. (Petition, p. 3). Yet, compared to Georgia's liberal trial procedures for establishing intellectual disability, Indiana limits the review to a court-ordered evaluation, with a bench trial prior to the criminal trial. *See* Ind. Code §§ 35-36-9-1 through 7; *Pruitt v. State*, 834 N.E.2d 90, 99 (2005). Tennessee's statute requires the determination to be made by the court, although a defendant can submit the evidence as a mitigating factor. *See* Tenn. Code Ann. § 39-13-203. Viewed in their entirety, Georgia's procedures are far less constrictive than procedures of other states.

Georgia has implemented to ensure someone intellectually disabled is not death eligible, including:

> the right: (1) not to be sentenced to death except by unanimous verdict, with no judicial override possible; (2) to a full and fair plenary trial on his mental retardation claim, as part of the guilt phase of his capital trial; (3) to present his own experts and all other relevant evidence; (4) to cross-examine and impeach the State's experts and other witnesses; (5) to have a neutral factfinder (the jury, if Hill had elected to have mental retardation decided during the guilt phase, and a judge if otherwise) decide the issue; (6) to question prospective jurors about their biases related to mental retardation; (7) to have jurors decide mental retardation without being informed that a finding of mental retardation precludes the death penalty and without being informed of the defendant's criminal record; (8) to orally argue before the factfinder; and (9) to appeal any adverse mental retardation determination. *Within the bounds of evidentiary admissibility, there is virtually no limit to the evidence a Georgia defendant can present in support of his mental retardation claim. Thus, the reasonable doubt standard is but one aspect of a multifaceted fact-finding process under Georgia law.* This is not to say what the ultimate outcome of the constitutional issue may or should be in future non-AEDPA cases, but only illustrates further how Hill's challenge to the burden of proof standard should not be viewed in isolation.

Hill, 662 F.3d at 1353 (emphasis added). Given these features of Georgia's procedures for determining intellectual disability, it cannot be said that its burden of proof "nullifies" the right announced in *Atkins* in a way that other states' procedures do not.

Finally, Raulerson argues that the circuit court was wrong to "ground[] [its] opinion" in *Leland* because *Leland* does not implicate a federal constitutionally protected right. (Petition, p. 31). Raulerson is mistaken. The circuit court initially noted that it had "held in *Hill v. Humphrey* that it was reasonable for the Supreme Court of Georgia to conclude that the burden of proof for intellectual disability is analogous to insanity, which permits a beyond-a-reasonable-doubt standard." Pet. App. 27a (citing 662 F.3d at 1350).[8] However, the circuit court explained that neither *Cooper* nor *Leland* held that there were "different procedural standards for constitutional and nonconstitutional rights respectively" nor was there "clearly established federal law" concerning "an unstated rationale underlying their divergent outcomes." Pet. App. 27a. Continuing on, the court stated, "[i]ndeed, *Leland* did not even hold that the right to present an insanity defense was not constitutionally based, so this key premise of [] that *Head v. Hill* transgressed clearly established federal law is itself not clearly established." Pet. App. 28a. The court determined that although *Cooper* had clearly established a procedural

[8] Analogous to *Atkins*' holding that the intellectually disabled are less culpable, *Leland* noted that a defense of insanity at the time of the crime lessened one's culpability.

standard for the right not to be tried if incompetent, "it does not follow that *Cooper* clearly established a procedural standard applicable to all constitutional rights." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The court rejected Raulerson's arguments, correctly concluding that to accept them would extend *Cooper*, but "section 2254(d)(1) neither 'require[s] state courts to extend [Supreme Court] precedent [n]or license[s] federal courts to treat the failure to do so as error.'" Pet. App. 28a (quoting *White v. Woodall*, 572 U.S. 415, 426 (2014)).

At bottom, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then . . . AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *White*, 572 U.S. at 426 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S. Ct. 2140 (2004)). That is precisely what Raulerson asked the circuit court to do, and it rightly refused.

D. Raulerson incorrectly relies upon Federal law that was not established at the time of the state court's decision.

Raulerson relies heavily upon *Hall v. Florida*, 572 U.S. 701, 134 S. Ct 1986 (2014) and *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039 (2017). But § 2254(d)(1) requires review of a state court's decision under "[c]learly established Federal law" which "refers only 'to the holdings, as opposed to the dicta, of this Court's

decision *as of the time of the relevant state-court decision*.'" Pet. App. 10a (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (emphasis added)). In *Shoop*, the Sixth Circuit granted federal habeas relief because it determined that the Ohio court's intellectual disability determination was contrary to, or an unreasonable application of, *Moore.* The Sixth Circuit reasoned that the state court wrongly decided the adaptive deficits prong of Hill's intellectual disability claim. *Shoop*, 139 S. Ct. at 506. The Supreme Court reversed the Sixth Circuit because *Moore* was not "clearly established Federal law" at the time of the state court decision. *Id.* at 505.

In granting relief under § 2254(d)(1), the Sixth Circuit "acknowledged that '[o]rdinarily, Supreme Court decisions that post-date a state court's determination cannot be 'clearly established law' for the purposes of [the federal habeas statute]," but the court found "that *Moore*'s holding regarding adaptive strengths [was] merely an application of what was clearly established by *Atkins*." *Shoop*, 139 S. Ct. at 506 (quoting *Hill v. Anderson*, 881 F.3d 483, 486 (6th Cir. 2018)). The Supreme Court rejected this argument. It pointed out, as stated *supra*, "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Id.* at 507. The Court then explained it had "expounded on the definition of intellectual disability in" *Hall* and *Moore*, but those cases came to the Court not under AEDPA review. *Id.* And "[w]hile *Atkins* noted that standard definitions of mental retardation included as a necessary element

'significant limitations in adaptive skills . . . that became manifest before age 18,' [] *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States." *Id.* at 508. The *Shoop* Court concluded that the Sixth Circuit was in error to rely "so heavily on *Moore*" because it was not "clearly established Federal law" at the time of the state court's decision. *Id.* at 509.

Likewise, Raulerson cannot rely upon *Moore* and *Hall* to attack the state court's decision as they were not "clearly established" at the time in question. Because there was no "clearly established Federal law" on the issue here, the circuit court correctly noted that if Georgia's burden of proof on intellectual disability "is to be declared unconstitutional, it must be done by the Supreme Court in a direct appeal, in an appeal from the decision of a state habeas court, or in an original habeas proceeding filed in the Supreme Court." Pet. App. 28a (quoting *Hill v. Humphrey*, 662 F.3d at 1361). Notably, this Court has previously denied certiorari review from two direct appeal cases raising this same Fourteenth Amendment claim. *See King v. Georgia*, 536 U.S. 957 (2002); *see also Hill v. Turpin*, 525 U.S. 969 (1998). This case does not present that vehicle.

III. The court of appeals' decision shows that the choice of burden of proof for determining intellectual disability is not dispositive in this case.

In the court of appeals, Raulerson also raised a claim that he was innocent of the death penalty because he is intellectually disabled. In analyzing and ultimately rejecting this claim, the circuit court "made three important assumptions in Raulerson's favor": (1) his claim was exhausted; (2) his claim was not adjudicated on the merits and therefore was subject to *de novo* review rather than § 2254's demanding standard; and (3) section 2254(e)(1) allowed him to prove his claim of intellectual disability "by clear and convincing evidence to a federal court in the first instance." Pet. App. 35a-36a. After a *de novo* review of the record, the circuit court found "even with these assumptions in his favor, Raulerson is not entitled to relief based on his *Atkins* claim because the record does not clearly and convincingly prove that he is intellectually disabled." Pet. App. 36a.

The court of appeals' rejection of Raulerson's "actual innocence" claim based on this analysis provides another reason to deny review of this petition: even granting the petition and reversing the court of appeals would not affect the outcome of Raulerson's underlying Eighth Amendment claim. As the court of appeals determined, even taking into account all of the evidence before the state courts and the federal courts sitting in habeas and reviewing that claim *de novo* under a clear-and-convincing standard *instead* of

Georgia's beyond-a-reasonable-doubt standard, Raulerson's intellectual-disability claim fails. The petition thus lacks practical import, which further cuts against granting review.

CONCLUSION

Raulerson has failed to show that the state court's decision that Georgia's burden of proof does not violate the Due Process Clause of the Fourteenth Amendment is contrary to, or an unreasonable application of, any established holdings of this Court. Certiorari review should be denied.

Respectfully submitted,

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