No. 19-941

IN THE
Supreme Court of the United States

BILLY DANIEL RAULERSON, JR.,
Petitioner,

v.

WARDEN,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In its Brief in Opposition ("BIO"), the State does not defend the merits of requiring a capital defendant to prove intellectual disability beyond a reasonable doubt. Nor does the State deny that, under this burden that Georgia alone imposes, not a single defendant has been able to establish intellectual disability at trial, essentially rendering *Atkins* a nullity in Georgia. Instead, the State invokes AEDPA. But AEDPA provides no deference to a state court decision that not only applies the wrong rule, but also contradicts and unreasonably applies the clearly established holdings of this Court.

With no AEDPA deference due, this Court faces a question of utmost importance, on which other state courts of last resort have disagreed with Georgia, regarding the import of this Court's decision in *Cooper*. The choice is stark: this Court either will allow Georgia to continue to flout *Cooper* and *Atkins* by executing persons with intellectual disabilities, or it will grant review to address Georgia's unique and insurmountable standard. This case is about due process of law, and ensuring that our Nation's most severe punishment is not arbitrarily and unconstitutionally imposed in one single state on persons, like Petitioner, who have an intellectual disability but are denied a meaningful opportunity to prove it.

ARGUMENT

I. The Georgia Supreme Court Decision Is Contrary To And Unreasonably Applies *Cooper*.

The State accuses Petitioner of arguing that the state court decision at issue is both contrary to and an unreasonable application of *Cooper v. Oklahoma*, 517 U.S. 348 (1996). *E.g.*, BIO at 13. The State is correct. As the Petition explains, AEDPA is no impediment to this Court's review for both reasons. Pet. 12-18, 30-33.

A. *Cooper* Was Clearly Established Federal Law Before The State Court Decision.

The State does not contest that the due process requirements of *Cooper* were clearly established at the time of the Georgia court decision at issue. *Cooper* sets forth the clearly established rule the Georgia court failed to follow and on which Petitioner has consistently relied.

The State unsuccessfully attempts to portray the Petition as dependent instead upon the rules of *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). BIO at 25-26. Not so. Petitioner does not argue that *Hall* and *Moore I* were "clearly established law" at the time of the state court's decision. Rather, those cases illustrate this Court's recognition of the importance of rejecting attempts by states to unconstitutionally narrow the *Atkins* right. Pet. at 20-

23. Georgia's standard simply uses an unconstitutional procedural rule to reach a similar result. *Id.* at 23-25.

B. The State Court Decision Is Contrary To *Cooper*.

The state court decision is "contrary to" *Cooper* in two respects. 28 U.S.C. § 2254(d)(1).

First, the decision applied the wrong rule. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (opinion for the Court by O'Connor, J.). Petitioner's due process claim was governed by this Court's decision in *Cooper*. Instead, the state habeas court relied on *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003), which identified the relevant precedent as *Leland v. Oregon*, 343 U.S. 790 (1952). But *Leland* addressed a state statutory right with a burden of proof unrestricted by constitutional due process requirements. *Cf. Cooper*, 517 U.S. at 367-68 (explaining this distinction). The failure in *Head* to apply this Court's clearly established precedent in *Cooper* is alone sufficient to deny AEDPA deference. *See Lafler v. Cooper*, 566 U.S. 156, 173 (2012).

Second, the court's conclusion in *Head* that a state may require a capital defendant to prove intellectual disability beyond a reasonable doubt directly contradicts *Cooper*'s rule. The State attempts to distinguish this case by asserting that "*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." BIO at 16. The State is correct, but this hardly helps its position. Both *Cooper* and the claim at

issue here involve proof of an intellectual impairment. And the Georgia Supreme Court went well beyond the bounds of *Cooper* on both the dimensions on which the State's distinction rests. *Cooper* held that the Constitution does not permit a state to require a defendant to prove mental incompetency, which concerns the fairness of trial proceedings, by clear and convincing evidence. *Cooper*, 517 U.S. at 350-56. In this case, the Georgia Supreme Court incongruously held that a defendant not only may be required to stand trial, but may be *executed*, if he fails to prove a similar condition of intellectual disability *beyond a reasonable doubt*. Such clear contradiction of this Court's precedent is not entitled to AEDPA deference. Pet. 12-14.

C. The State Court Decision Unreasonably Applies *Cooper*.

The state court decision in *Head* also involves, at a minimum, an "unreasonable application" of *Cooper*.

Parroting the Eleventh Circuit's faulty logic, the State seeks to avoid that conclusion by contorting *Cooper*'s historical practice analysis. *Cooper* looked to historical practice as "probative of whether a *procedural rule* [could] be characterized as fundamental." *Cooper*, 517 U.S. at 356 (emphasis added) (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)). The Court stressed that there was "no indication that *the rule Oklahoma seeks to defend* ha[d] any roots in prior practice." *Id.* (emphasis added). Despite the clarity of the Court's analysis, the State contends the Court in fact was concerned with whether the *constitutional right* at issue, not the state rule burdening that right, was longstanding. That reading represents an unreasonable

application of this Court's decision in *Cooper* and ignores clearly established Supreme Court precedent that came before it.

In *Cooper*, this Court first asked whether Oklahoma's requirement that a defendant prove competence by clear and convincing evidence "offend[ed] some principle of justice" that "ranked as fundamental." *Id.* at 355 (quoting *Medina*, 505 U.S. at 449). It concluded that it did. *Id.* at 356. Tellingly, the State does not point to anything in *Cooper* indicating that the age of a constitutional right determines whether it is "fundamental." Nor could it. *Cooper* affirmed "the existence of the fundamental right that the petitioner invoke[d]" without reference to "history," "roots," or "prior practice." *Id.* at 354. It recognized that the competency right arises out of the Due Process Clause, emphasizing that "the significance of this right [is not] open to dispute" because it is essential to a fair trial. *Id.* (citing *Drope v. Missouri*, 420 U.S. 162, 171-72 (Kennedy, J., concurring in the judgment)).

Nor do the cases on which *Cooper* relied provide any support for the notion that the age of the right at issue was material to the decision. For instance, in *Medina*, the Court stressed that "[h]istorical practice is probative of whether *a procedural rule* can be characterized as fundamental." 505 U.S. at 446 (emphasis added). The Court then explained that English common-law and early American decisions offered little guidance regarding whether California's procedural rule had roots in prior practice, because "there is no settled tradition on the proper allocation of the burden of proof in a [competency] proceeding." *Id.* Similarly, in *Speiser*

v. Randall, the Court described how burden-shifting rules squared with common-law tradition. 357 U.S. 513, 523-24 (1958). But in concluding that the California rule at issue violated due process by abridging appellants' First Amendment rights, this Court did not discuss whether the right to free speech had historical "roots." The Court instead acknowledged that, as constitutional rights, appellants' free speech interests were of such "transcendent value" that California could not abridge them through an onerous burden of proof. *Id.* at 526.

As in *Cooper*, *Medina*, and *Speiser*, so too here. The *Atkins* right "ranks as fundamental" not because of its age or roots in prior practice, but because it derives from the Eighth Amendment and concerns the fundamental fairness of whether an individual may be executed. *Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002); *Cooper*, 517 U.S. at 354. Indeed, taken to its logical end, the State's insistence that the *Atkins* right does not "rank as fundamental" because it is "newly created" would compel the same conclusion in nearly all cases where a state attempts to burden an Eighth Amendment right through onerous procedures. Yet notwithstanding the Eighth Amendment's evolving nature, this Court has consistently characterized the rights it entails as "fundamental" and "deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

Thus, the decision of the state court involves an unreasonable application of *Cooper* for two reasons: one, *Cooper* never wavered in its focus on whether "the rule Oklahoma seeks to defend" (rather than the constitutional right at issue) had "roots" in historical or

contemporary practice, 517 U.S. at 356-62; and two, even if the right at issue must have historical roots, this Court has made clear that Eighth Amendment rights, despite their evolving character, nonetheless are fundamental and deeply rooted in this Nation's history and tradition.

The State also seeks AEDPA deference because *Atkins* "le[ft] to the states the task of developing appropriate ways to enforce the constitutional restriction." 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416 (1986)). But this proves too much. Certainly, in making this statement, the Court did not wipe out the entirety of its established due process jurisprudence, including prior decisions like *Cooper*. Indeed, this Court has already rejected a similar claim. Even though this Court in *Ford* left states "the task of developing appropriate ways to enforce the constitutional restriction" on executing one who is insane, 477 U.S. at 413-16, the Court nevertheless later found that *Ford* "clearly established" that "a prisoner must be accorded an 'opportunity to be heard'" and a "fair hearing" on the question of sanity. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). So too here: Even though *Atkins* "le[ft] to the states" the task of developing procedures for determining intellectual disability, that did not leave Georgia free to disregard and unreasonably apply the clearly established due process principles set forth in *Cooper*.

This Court has long held that a state cannot undermine constitutional rights with procedure "any more than it can . . . violate[them] by direct enactment." *Bailey v. Alabama*, 219 U.S. 219, 239 (1911). As recognized by several other state courts of last resort,

Cooper forecloses the use of a heightened burden of proof for *Atkins* claims. *Pruitt v. State*, 834 N.E.2d 90, 101 (Ind. 2005) ("The reasoning of *Cooper* in finding a clear and convincing standard unconstitutional as to incompetency is directly applicable to the issue of mental retardation."); Pet. 14-17 (collecting cases).

II. Georgia's Failure To Apply *Cooper* Eliminates The *Atkins* Right In That State.

A. Georgia's Procedures Are Not Comparably Favorable To Defendants.

Georgia's burden of proof effectively eliminates the right of defendants with an intellectual disability not to be executed. Pet. 26-27. The State responds, incredibly, that Georgia's procedures for determining intellectual disability are in fact "far less constrictive than procedures of other states" and "ensure . . . intellectually disabled" defendants will not be put to death. BIO at 22 n.7, 23.

But the State cannot deny that, despite these supposed protections, "not a single capital defendant in Georgia has been able to establish intellectual disability when the matter has been disputed." Pet. App. 41a. (Jordan, J., dissenting in part and concurring in part). If anything, the State's litany of other procedures only underscores that its reasonable doubt standard is dispositive of any defendant's *Atkins* claim. Although there is virtually no limit to the evidence a Georgia defendant can present in support of an *Atkins* claim, BIO at 23, not a single defendant has been able to demonstrate intellectual disability beyond a reasonable doubt at trial. Thus, the State only proves that it is impossible, given the nature of intellectual disability

diagnosis, for most defendants to satisfy that standard—*no matter the evidence presented*. *See* Pet. at 28-30; *Addington v. Texas*, 441 U.S. 418, 430 (1979).

B. The State Misconstrues The Significance Of The Record.

Rather than address the historical experience in Georgia, the State tries to prevent the Court from considering it, suggesting it is not properly in the record. The State is wrong. District Judge Alaimo properly admitted this evidence, which came directly from the State. But more important, even if it had never been introduced into the record, the State misconstrues the *significance* of the information. Petitioner does not contend the Georgia decision in *Head* is wrong because of this historical evidence. *Head* was wrongly decided because of *Cooper*. The historical experience simply contextualizes the undeniable real-world effect of the Georgia court's error: By requiring intellectual disability to be proven beyond a reasonable doubt, a standard even more demanding than that struck down in *Cooper*, Georgia has erected an insurmountable procedural barrier that eviscerates a fundamental constitutional right.[1]

C. Petitioner Did Not Fail To Exhaust His Claim.

The State makes a passing reference in its

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[1] The State's additional assertion that this Court "has denied . . . a petition on the same issue raised here," BIO at 11, is incorrect. As Judge Tjoflat explained in *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (en banc), that case did not properly present a due process challenge to Georgia's burden of proof but stated claims only under the Eighth Amendment. *See Hill*, 662 F.3d at 1362 (Tjoflat, J., concurring).

background statement, but does not argue, that Petitioner failed to exhaust his due process claim in state court. BIO at 8 & n.3. This suggestion has no merit; the Eleventh Circuit did not find a failure to exhaust. *Id.* at 8 n.3. And the State does not argue non-exhaustion here because it clearly waived the argument below. In its Answer and brief on procedural default in the District Court, the State listed six claims as being procedurally defaulted—but *not* Petitioner's due process claim. Suppl. App. 3-6, 153. The State affirmatively characterized the due process claim as properly before the District Court—not once, but repeatedly. *Id.* at 17 & n.2, 153 & n.3, 174; *see also id.* at 181, 185-92 (due process claim among "Claims On The Merits Before This Court"). The State thus waived this argument under 28 U.S.C. § 2254(b)(3).

D. The State's Suggestion Of Harmless Error Is Incorrect.

The State contends the Petition should be denied because "the choice of burden of proof for determining intellectual disability is not dispositive in this case." BIO at 28. The State fails to even address, however, the relevant legal standard for determining whether the due process violation asserted by Petitioner was constitutionally harmless.

"[T]he standard for determining whether habeas relief must be granted is whether . . . the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The government bears the burden of "demonstrat[ing] harmlessness." *Davis v.*

Ayala, 135 S. Ct. 2187, 2197 (2015). The State does not address this standard, and it cannot show that Georgia's unique burden of proof did not have "a substantial and injurious effect or influence" on the jury's verdict on Petitioner's intellectual disability. As Petitioner has shown, the prosecutor repeatedly argued at trial that Petitioner's intellectual disability claim failed because he could not prove it beyond a reasonable doubt despite the substantial evidence of intellectual disability before the jury. Pet. 6-8, 23-25. But critically, this Court need not address that issue now, or if review is granted. Because it is "a court of review, not of first view," *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017), the Court may leave that issue to the lower courts to decide in the first instance.

The State's argument relies on a *different* issue addressed by the Eleventh Circuit. The panel majority rejected a claim that Petitioner was "actually innocent" of the death penalty because he has intellectual disability. Pet App. at 29a-40a. The panel ruled that "[b]ecause the state courts determined that Raulerson is not intellectually disabled *and that determination is entitled to be presumed correct*, he bears 'the burden of rebutting the presumption of correctness by clear and convincing evidence.'" *Id.* at 33a (emphasis added) (quoting 28 U.S.C. § 2254(e)(1)). The panel held Petitioner failed to rebut this "presumption of

correctness" by clear and convincing evidence. *Id.* at 36a.[2]

A state court determination is not entitled to the presumption of correctness, however, if the court applied an erroneous legal standard. *See, e.g.*, *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001) (*en banc*) ("When a criminal defendant's competency was determined under an unconstitutional burden of proof, the prior competency determination merits no presumption of correctness.").

If this Court finds that Georgia's burden of proof for intellectual disability violates due process as clearly established in *Cooper*, Petitioner is entitled to a new determination of the issue under an appropriate burden of proof. Whether that determination would be made in federal court or remanded to the state court, and what burden of proof would apply, are matters to be addressed on remand. Significantly, the Georgia Supreme Court previously held that an intellectual disability claim that arose before the State's heightened burden was enacted should be resolved under a preponderance standard. *Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989). In any event, nothing in the panel decision of the Eleventh Circuit establishes that the

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[2] The panel expressly and correctly found that the only determination on the merits of Petitioner's intellectual disability claim was made by the jury at trial, under the beyond-a-reasonable doubt standard; the state habeas court found the intellectual disability claim to be "res judicata" and the court did not make an independent determination in state habeas or apply a different standard after *Atkins*. Pet. App. 32a-33a.

burden of proof is immaterial to Petitioner's *Atkins* claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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