No. 21-782

In The Supreme Court of the United States

RODNEY RENIA YOUNG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION

CHRISTOPHER M. CARR
Attorney General
BETH BURTON
Deputy Attorney General
Counsel of Record
SABRINA GRAHAM
Senior Assistant Attorney General
OFFICE OF THE GEORGIA ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-3499
bburton@law.ga.gov

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Georgia's requirement that defendants alleging intellectual disability prove their claim beyond a reasonable doubt violates the Due Process Clause, where there is no deeply rooted historical practice requiring a less exacting standard, and where this Court specifically held that it is "le[ft] to the state" to develop procedures for determining intellectual disability, *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

2. Whether Georgia's requirement that defendants alleging intellectual disability prove their claim beyond a reasonable doubt violates the Eighth Amendment, even though it is a procedural standard, not a substantive requirement, and in any event Georgia provides numerous additional procedural safeguards, including an opportunity to present evidence with no burden of proof in sentencing.

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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. . . .

The Eighth Amendment of the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Ga. Code Ann. § 17-7-131(c)(3) states:

> The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability.

INTRODUCTION

Petitioner Rodney Renia Young asks this Court to grant review in the hopes of forcing the states to align and adopt a preponderance of the evidence burden of proof for intellectual disability claims in capital cases. But this Court has expressly left the implementation of such procedures to the states, and the Court has repeatedly denied review on this very question—as Young has to acknowledge—including as recently as 2020.

With little else to argue, Young is left to demand error correction. But no precedent of this Court has suggested, much less held, that the states must adopt a specific burden of proof with respect to intellectual disability claims. Instead, states generally maintain the authority to prescribe procedures to carry out its laws including the burden of proof, specifically in criminal procedural matters. *See Medina v. California*, 505 U.S. 437, 449 (1992). It is only when the state law offends a deeply rooted, historical principle of justice that it is subject to proscription under the Due Process Clause. *Id.* Because this Court only recently determined that the intellectually disabled had a constitutional right to be exempt from execution, the burden of proof as to an intellectual disability claim is not such a deeply rooted principle, and states are accordingly allowed to construct their own procedures as *Atkins* dictates.

Likewise, Young raises an Eighth Amendment challenge, but that is far afield as well. He points to cases analyzing the *substantive* requirements for intellectual disability claims, *Hall v. Florida*, 572 U.S. 701, 719 (2014), *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017), and tries to extract from them a rule about *procedural* requirements. Young provides no reason to turn the Eighth Amendment into a font of procedural law.

Plus, although Young focuses on Georgia's burden of proof, any review of Georgia's procedures must be conducted analyzing the procedure as a whole. *See Ford v. Wainwright*, 477 U.S. 399, 416 (1986). Any such review establishes that Georgia's procedure provides

defendants reasonable opportunity to present their claims of intellectual disability, both at the guilt and sentencing phase of trial. And, contrary to Young's arguments, numerous defendants in Georgia have satisfied the beyond a reasonable doubt standard and proven their intellectual disability.

Finally, Young's case does not present an adequate vehicle for review. Despite opportunities to present his intellectual disability claim in both the guilt and sentencing phases of trial, he chose not to present *any* expert testimony, testing, or *even an IQ score* that placed him in the intellectually disabled range. Given that basic failure, this is an inappropriate case in which to decide higher level questions about the appropriate procedures for establishing disability.

The Petition should be denied.

STATEMENT

I. The Crimes

Petitioner Rodney "Young had a seven-year relationship with Gary Jones's mother, Doris Jones, that was rife with arguments about money and Young's infidelity and included multiple breakups." Pet.App.2a. In January 2008, following another argument, Doris moved back to Georgia to live with her son Gary. *Id.* "Young wrote Doris multiple letters between January and March 2008, asking her to return to him," and when that failed he planned a trip to Georgia. *Id.* "On

March 3, Young obtained approval from his employer for" time off from March 26 to March 28. *Id.* He contacted his half-sister who lived in Atlanta and told her he was coming to Atlanta and would visit her while there. Pet.App.2a-3a. In preparation for his trip, "Young borrowed a GPS device from his co-worker and obtained instructions on how to use it." Pet.App.3a.

The GPS device memory and cell phone records established that, once in Georgia, "Young drove repeatedly from his half-sister's home in Atlanta to the area of Gary's home in Covington" between March 28 and March 30. *Id.* A witness identified Young as the man driving a car with New Jersey license plates to whom he had given directions to Gary's neighborhood. *Id.*

On March 30, "Gary attended church." Pet.App.3a. "A little after 1:00 p.m.," he spoke to his grandmother on the telephone and told her he was "arriving at his home and would call her back in 15 minutes, which he never did." *Id*.

Doris discovered Gary's body around 11:20 p.m. where he was tied to a chair with "duct tape, a telephone cord, and fabric from some curtains." *Id*. "A bloody butcher knife and a bloody hammer were found next to his body." *Id.* The medical examiner opined that the victim's death was caused by a blunt force injury to the head. T2319-2323, 2331, 2336. Handwriting, later matched to Young, was in several areas of the wall in what appeared to be an attempt to blame the crime on an Atlanta gang. Pet.App.4a.

Investigators in New Jersey interviewed Young four days after the murder. *Id.* At that time, Young "had two cuts on his right hand, and he denied traveling recently to Georgia." *Id.* Upon searching Young's apartment and car, investigators discovered directions to Covington, Doris' ring that was taken from Gary's home, duct tape that matched tape used to secure Gary, and a cell phone belonging to the victim. T2666-80, 2837-38.

Young was arrested and indicted for malice murder, felony murder, aggravated assault and burglary.

II. Trial Proceedings

Although Young presented a claim of intellectual disability at trial, he chose not to present any expert testimony, intelligence testing, or even an IQ score that placed him in the intellectually disabled range. Pet.App.5a. Instead, he presented "testimony from staff members at his former high school stating that he had been in special education, had been classified as 'educable mentally retarded' and therefore must have been tested with an IQ of between 60 and 69, and had struggled intellectually in academics and in sports." Pet.App.4a-5a. Similarly, Young failed to present the jury with testing results of his adaptive functioning or an expert opining about his specific impairments in adaptive functioning. Young had lay witnesses testify that he had limitations in adaptive functioning, but they were surprised to learn that he (1) could read—e.g. a DNA consent form, (2) had attended college; and

(3) had been able to navigate a round-trip between New Jersey and Georgia. *See, e.g.*, T2879-2880, 2883, 2933-34, 2964.

The State, through direct and cross-examination, presented evidence "showing Young's ability to function normally at work and in various other settings in life." Pet.App.5a. For instance, Young ran a label machine, which was not automatic, and required attention to detail for various orders. T3190-3203, 3211-12. "The State also presented" an expert who "was able to testify about the subject of intellectual disability in general terms." *Id*. The jury found Young guilty of "one count of malice murder, two counts of felony murder, one count of aggravated assault, and one count of burglary." Pet.App.1a-2a, n.2.

In sentencing, additional evidence was presented about Young having difficulties in school, but also that he: had attended parent conferences at school for his daughter as he was concerned for her well-being (T3483-84); was a "father figure" to a number of cousins and his sister (T3510, 3544); and he raised his daughter without her mother (T3533-34, 3551-53). As noted by Young in his petition, Pet. at 8, the jury again considered in sentencing his evidence of intellectual disability, but no juror found it compelling enough to mitigate against a sentence of death.[1] On February 21, 2012, the jury unanimously voted for death and the

[1] In Georgia, a juror can consider anything in mitigation without limitation. There is no burden of proof and any one juror can find that the sentence should be mitigated to less than death. *See Stinski*, 691 S.E.2d at 873.

trial court sentenced Young accordingly. Pet.App.2a, n.2.

III. Direct Appeal Proceedings

The Georgia Supreme Court affirmed Young's convictions and sentences on June 2, 2021. Pet.App.1a-106a. The Georgia Supreme Court followed its prior precedents and held that Georgia's beyond a reasonable doubt burden of proof as to intellectual disability claims is constitutional. The court first explained that there was no substantive, Eighth Amendment issue: "Georgia, by statute and through case law, has always applied [the] prevailing clinical standards" required by this Court. Pet.App.35a. The court rejected Young's claim that *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017) "require[d] this Court's disapproval of Georgia's beyond a reasonable doubt standard" explaining that both cases "addressed . . . the requirement that states must, as Georgia indisputably does, adhere to prevailing clinical definitions of intellectual disability in fashioning such a definition." Pet.App.36a-37a.

The court next held that there is no procedural, Due Process problem either, as there is no deeply historical basis for requiring a specific burden of proof on intellectual disability claims. Pet.App.38a-40a. And although this Court has imposed a required preponderance standard with respect to *competence* claims, *Cooper v. Oklahoma*, 517 U.S. 348, 366-67 (1996), competence to stand trial is a wholly separate question

from intellectual disability with respect to culpability. The court also noted *Leland v. Oregon*, 343 U.S. 790 (1952), which upheld Oregon's beyond a reasonable-doubt standard for insanity defense claims. *E.g.*, Pet.App.37a-44a. Although recognizing that *Leland* considered a substantive defense not then considered constitutionally required, *Leland* nevertheless provided important guidance in how to understand the procedural requirements mandated by the Constitution. *Id.* For instance, this Court in *Leland* held that there was "no practical difference of such magnitude" between a preponderance standard and a beyond a reasonable-doubt standard as to implicate Due Process concerns. Pet.App.41a (quoting *Leland*, 343 U.S. at 798).

REASONS FOR DENYING THE PETITION

There is no reason to grant Young's Petition. He points to an illusory "split" of authority between state courts, on an issue where states are allowed to disagree and on which this Court has repeatedly declined certiorari review. Further, contrary to his argument, the decision of the Georgia Supreme Court does not conflict with any holding of this Court as there is no precedent of this Court that requires a specific burden of proof as to any constitutional claim, and more specifically as to *Atkins* claims. When reviewed as a whole, Georgia's procedure for protecting the rights of the intellectually disabled, does not violate the Eighth or Fourteenth Amendment. And finally, this case does not present a

good vehicle for review of this claim as Young would not be found intellectually disabled using any burden of proof. Certiorari review is unwarranted.

I. There is no meaningful split of authority as to whether the Constitution requires a certain burden of proof for claims of intellectual disability in capital cases.

Young asserts a "split" of authority, but his split is hardly anything of the kind. Pet. at 11-17. He argues that because other states have applied a standard different from Georgia's, the Court should resolve that "split." But differing state rules are perfectly permissible and no cause for this Court's review.

The vast majority of the cases that Young cites merely held what the burden of proof *was* in a given state, not what it constitutionally *had* to be. In *Bowling v. Comm.*, 163 S.W.3d 361, 381 (Ky. 2005), for instance, the Kentucky Supreme Court decided to "apply" a preponderance standard, where there was no statutory provision providing any standard, but it did not hold that it was constitutionally required. The same is true in *State v. Williams*, 831 So. 2d 835, 853 (2002), which recognized that this "Court . . . left to the states the task of developing appropriate ways to determine which offenders will be spared the death penalty because of [intellectual disability]." In *Morrow v. State*, 928 So. 2d 315, 324, n.10 (Ala. Crim. App. 2004)—not even a decision of Alabama's highest court—the court specifically explained that it "need not determine

whether a higher standard would be constitutional." *See also* Pet. at 16 n.4, 17 n.5. In only two of Young's cited cases has another state court held that a preponderance standard is required, *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005), *Howell v. State*, 151 S.W.3d 450, 464-65 (Tenn. 2004), and even there, those states have different procedures altogether. As explained further below, Georgia's procedure is far more generous to defendants than other states in many respects, so even these cases are not an apples-to-apples comparison.

Indeed, this Court itself has had numerous occasions to weigh in on this question and declined every time. *See Holsey v. Hall*, 552 U.S. 1070 (2007); *King v. Georgia*, 536 U.S. 982 (2002); *Stripling v. Head*, 541 U.S. 1070 (2004); *In re Hill*, 571 U.S. 813 (2013); *Burgess v. Scofield*, 546 U.S. 944 (2005); *Tharpe v. Sellers*, 138 S. Ct. 55 (2017); *Arrington v. Georgia*, 562 U.S. 853 (2010); *Raulerson v. Warden*, 140 S. Ct. 2568 (2020). Young asserts there were "vehicle problems" in these cases, but no greater than the problems present here and none that would have precluded this Court from answering the question presented—then, as now, the question was simply not worth this Court's review. At most, there are differences in the procedures between Georgia and other states, on an issue that this Court "'left to the State(s).'" Pet.App.31a (citing *Atkins*, 536 U.S. at 317 (III) (citation omitted)).

There is no meaningful split of authority that would require this Court's review.

II. The Georgia Supreme Court's decision is correct.

Unable to point to any meaningful split or special reason to grant review, Young relies almost entirely on the need for supposed error correction. But there is no need for error correction, as there is no error. There is no historical basis for a supposed right to a particular burden of proof in intellectual disability cases, no conflict with this Court's precedent, Georgia's procedural rule does not implicate the substantive standards of the Eighth Amendment.

A. There is no deeply rooted historical right to a particular burden of proof on intellectual disability claims, so there is no constitutionally required standard under the Due Process Clause.

"[I]t has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Medina*, 505 U.S. at 443-44 (quoting *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (brackets in original)). Instead, this Court has generally held that states maintain the authority to prescribe procedures to carry out their laws, including the burden of proof, specifically in criminal procedural matters. *See, e.g.*, *Medina*, 505 U.S. at 445. The state's "decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting

Speiser v. Randall, 357 U.S. 513, 523 (1958)); *Leland*, 343 U.S. at 798; *Snyder*, 291 U.S. at 105; *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)).

Here, Young simply cannot establish that a preponderance standard is "deeply rooted in the traditions and conscience of our people." *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996). "There is no historical right of an intellectually disabled person not to be executed." Pet.App.40 (quoting *Raulerson*, 928 F.3d at 1002(III)(B)(2)). "And since the constitutional right itself is new, there is no historical tradition regarding the burden of proof as to that right." Pet.App. 39a (quoting *Hill v. Humphrey*, 662 F.3d at 1350-51).

The lack of any "deep rooted" fundamental right as to the burden of proof is clear from *Atkins* itself. In concluding that the execution of the intellectually disabled was neither considered cruel and unusual punishment nor prohibited under common law, the Court noted that only those individuals that were so profoundly intellectually disabled as to be "unable to tell right from wrong" were "excused from the guilt, and of course the punishment, of any criminal action." *See Atkins*, 536 U.S. at 340 (quoting 4 Blackstone, Commentaries on the Laws of England 24 (1769); *Penry*, 492 U.S. 302, at 331-32; 2 A. Fitz-Herbert, Natura Brevium 233B (9th ed. 1794) (originally published 1534); A. Highmore, Law of Idiocy and Lunacy 200 (1807)). If there was no common-law right not to be executed if intellectually disabled, clearly there was no common-law right to a certain standard of proof. *See, e.g.*, *Medina*, 505 U.S. at 446-47 (upholding California's

burden of proof because there is no common-law background on the burden of proof although the prohibition of trying someone who is incompetent has "deep roots in our common-law heritage.").

Young tries to flip the historical analysis on its head, arguing that Georgia's standard "lacks any historical support." Pet. at 19. That is a strange argument, to say the least. The ordinary rule is that States run their own criminal systems. States do not have to justify their own rules, and *Cooper* did not hold otherwise. The important point in that case was that there *was* a significant historical tradition, deeply rooted in our law, of preponderance standards for competency hearings, which is what supported the Court's holding that Due Process requires as much.

Young argues, notwithstanding the lack of historical support for his position, that this Court somehow already decided the issue in *Cooper*. But it is Young that reads *Cooper* for too much, not the Georgia Supreme Court that reads it for too little. This Court has not held that *Cooper* "established a procedural standard [applicable] to *all* constitutional rights." *Raulerson v. Warden*, 928 F.3d 987, 1003 (11th Cir. 2019), cert. denied, 2020 U.S. LEXIS 1922 (U.S. Mar. 30, 2020) (citation omitted). Instead, as explained above, *Cooper* looked to the historical record applicable to the specific issue.

Finally, Young argues that the enactment of the preponderance standard by a majority of other states, mandates this standard for all states. This Court's

precedent does not hold accordingly. For instance, once the *Medina* Court determined there was no common-law basis for the allocation of the burden as to incompetency claims, the Court then looked to contemporary practices, which it held had "*limited relevance* to the due process inquiry." *Medina*, 505 U.S. at 447 (emphasis added).

Ultimately, the *Medina* Court held that "it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Medina*, 505 U.S. at 451. A reasonable opportunity is provided and Georgia's burden of proof is not unconstitutional "because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Leland*, 343 U.S. at 799 (quoting *Snyder*, 291 U. S. at 105).

Because there is clearly no historical basis for a right to a particular burden of proof to be applied, the Georgia Supreme Court is simply correct: there is no Due Process right to a particular standard.

B. Georgia's standard does not create any conflict with this Court's precedent.

The analysis in *Cooper* is also unhelpful here as it involved a claim for incompetency to stand trial, not intellectual disability, and that distinction is critical. "[T]here are significant differences between a claim of incompetence and a plea of not guilty by reason of

insanity." *Medina*, 505 U.S. at 448. An intellectual disability claim is "comparable to a claim of insanity at the time of the crime in that both relieve a guilty person of at least some of the statutory penalty to which he would otherwise be subjected." *Head v. Hill*, 587 S.E.2d 613, 621 (2003) (cited in the decision below, *see* Pet.App.37a). In contrast, the issue in *Cooper* extends further: an incompetent defendant cannot be *tried*, much less punished.

In *Atkins*, the Court based its judgment on the "widespread judgment about the relative culpability of [intellectually disabled] offenders, and the relationship between [intellectual disability] and the penological purposes served by the death penalty." *Atkins*, 536 U.S. at 317. That concern goes to *substantive rights*, not procedure, and the *Atkins* court specifically held that procedures were left to the states. 536 U.S. at 317 (III).

Likewise, in *Ford*, cited in *Atkins*, 536 U.S. at 321, this Court noted that the insane should not be executed because it "contributes nothing to whatever deterrence value is intended to be served by capital punishment" and/or that "retribution" is not served by the execution of the insane. *Ford*, 477 U.S. at 407-08. Although finding that Florida's scheme for determining sanity was not acceptable,[2] the Court, just as it did in *Atkins*, nevertheless still expressly left "to the State the task of developing appropriate ways to enforce the

[2] Florida's scheme did not allow for a full and fair hearing. The defendant could not present evidence or cross-examine witnesses, and the appointment of experts and decision was made solely by the executive branch. *See Ford*, 477 U.S. at 414-16.

constitutional restriction upon its execution of sentences." *Ford*, 477 U.S. 416-17. Moreover, the Court opined that "[i]t *may be that some high threshold showing* on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity." *Id.* (emphasis added).[3] The same holds true here, and the Georgia Supreme Court did not err in holding that a "high threshold showing" is constitutional.

Further, as the Georgia Supreme Court explained, this Court's decision in *Leland*, *supra*, bolsters its holding. In that case, the Court rejected a claim that a particular burden of proof must apply to insanity defense claims. In Young's view, the Georgia Supreme Court erred by relying on *Leland*, since that case did not concern what was, at the time, a recognized constitutional right. But the Georgia Supreme Court did not ignore this distinction, and it did not hold that *Leland* controlled—it was helpful, not determinative. Pet.App.37a. That this Court held in the 1950s that there is no constitutional right to a particular burden of proof with respect to insanity defense claims, which are clearly akin to intellectual disability claims, is surely *relevant* to the analysis here.

Georgia's law does not conflict with any precedent of this Court and certiorari review is unwarranted.

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[3] Florida's burden of proof for defendant claiming to be insane at the time of the crime of clear and convincing. Fla. Stat. Ann. § 775.027.

C. Georgia's procedural rule does not implicate the substantive standards of the Eighth Amendment.

Young also argues that Georgia's burden violates the Eighth Amendment, but this makes little sense. The Eighth Amendment provides a substantive standard (which Georgia concededly satisfies), not a suite of procedural rules.

Young relies on *Hall* and *Moore*, arguing that Georgia's procedural standard "creates an unacceptable risk of executing persons with intellectual disability." Pet. at 22. But *Moore* and *Hall* concern the *clinical definition* of intellectual disability specifically referenced in *Atkins*, not the quantum of proof necessary to *establish* that substantive definition—which is exactly what the Georgia Supreme Court held. Pet.App.36a-37a (those cases "addressed only questions regarding the *substantive* definition of intellectual disability and the requirement that states must, as Georgia indisputably does, adhere to prevailing clinical definitions of intellectual disability. . . ." (emphasis in original)).

In *Moore* and *Hall*, this Court held that Texas and Florida, respectively, had used substantive criteria for assessing intellectual disability that conflicted with *Atkins* and disregarded views held by the medical community. *See Hall*, 572 U.S. at 721; *Moore*, 137 S. Ct. at 1053. In *Hall*, the Court reviewed Florida's diagnostic procedures for defining intellectual disability and, specifically, its strict 70 IQ score. *Hall*, 572 U.S. at 707 ("Florida law requires that, as a threshold matter, Hall

show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability"). This Court held that Florida's strict cut-off score, which was contrary to the medical community's diagnostic standards, was unconstitutional. *Hall*, 1572 U.S. at 704.[4] In *Moore*, in contrast to the clinical definitions used in assessing adaptive functioning for intellectual disability, Texas used non-clinical criteria, the "*Briseno* factors," to evaluate Moore's intellectual disability. The Court concluded that because these factors were not based on any clinical standards, Texas' diagnostic framework could not stand. *See Moore*, 137 S. Ct. at 1053.[5]

By contrast, this Court has "not provide[d] definitive procedural . . . guides for determining when a person who claims [intellectual disability] 'will be so impaired as to fall within [*Atkins'* compass]." *Bobby v. Bies*, 556 U.S. 825, 831 (2009). (Indeed, in *Hall*, this Court listed the states that could be affected by its ruling, and Georgia is not even cited. *See Hall*, 572 U.S. at 714-15.) Georgia's procedural rule does not exclude any intellectually disabled person from obtaining relief, nor does the Georgia Supreme Court's rationale exclude mildly intellectually disabled persons from

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[4] These factors are considered under Georgia law. *See Stripling v. State*, 401 S.E.2d 500, 504 (noting "IQ test score of 70 or below is not conclusive," the standard error of measurement and adaptive functioning must also be considered).

[5] Georgia's diagnostic framework for proving intellectual disability tracks the clinical definitions mentioned in *Atkins*. *In re Hill*, 777 F.3d 1214, 1217 (11th Cir. 2015).

proving their intellectual disability. *Hall* and *Moore* thus have little, if anything, to contribute.[6]

D. The constitutionality of the burden of proof cannot be reviewed in isolation.

Just as important, Young and his Amici focus solely, and erroneously, on Georgia's burden of proof, to the exclusion of its many other procedural protections. That myopic view is inconsistent with this Court's analyses in past cases. Even if there were a potential constitutional concern with Georgia's burden of proof in the abstract, it is error to "focus[ ] on Georgia's burden of proof procedure [while] ignor[ing] the many other procedural protections afforded under Georgia's statute and processes. Looking solely to one aspect of Georgia's procedures, without placing them in context, is inconsistent with *Ford*, where [this Court] evaluated Florida's process as a whole." *Hill v. Humphrey*, 662 F.3d 1335, 1352 (11th Cir. 2011); *see also Leland*, 343 U.S. at 796-97 (review of a state's burden-of-proof statute "must be viewed in its relation to other relevant [state] law").

"Georgia's process, when evaluated as a whole, contains substantial procedural protections" and cannot be defined solely by the burden of proof. *Hill*, 662

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[6] Young's Amici also assert that Georgia's statute included a beyond a reasonable doubt standard inadvertently. *See* Brief of Amici Curiae Elsa R. Alcala, et al. This does not have any actual effect on the legal argument, and it is also based on statements made by an avid death penalty opponent, and the statute has clearly been reviewed by the legislature and left intact.

F.3d at 1353. To note just a few aspects here: First, at trial, evidentiary bars are lowered and "there is virtually no limit to the evidence a Georgia defendant can present in support of his [intellectual disability] claim." *See id.* at 1353. This aspect of Georgia's procedure is significant as "[i]t is all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Ford*, 477 U.S. at 417.

Second, and further promoting unrestricted evidentiary presentation, defendants are allowed an unlimited number of experts of their own choosing at trial, and on collateral review a petitioner may submit expert and lay testimony by sworn affidavit. *See* Ga. Code Ann. § 9-14-48(a). As noted in *Ford*, "[a]lso essential is that the manner of selecting and using the experts responsible for producing that 'evidence' be conducive to the formation of neutral, sound, and professional judgments." 477 U.S. at 417. This stands in stark contrast to other states that allow only a court-appointed expert to evaluate a defendant's cognitive functioning. *Compare* Ga. Code Ann. § 9-14-48(a) (placing no restrictions on the number of defense experts that may be introduced on collateral appeal) *with* Va. Code Ann. § 19.2-264.3:1.2 ("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. Ann. § 921.137 ("the court shall appoint two experts in the field of intellectual disability who shall evaluate the defendant"), Ariz. Rev. Stat. § 13-753 (initial prescreening by trial court and then if IQ is 75 or less the

trial court will choose one expert nominated by each party or one joint expert agreed on by the parties), Kan. Stat. Ann. § 21-6622(c) (the trial court appoints two experts), Utah Code Ann. § 77-15a-104(3)(a) (the trial court appoints experts).

Third, at trial, a Georgia defendant gets two opportunities to prove an intellectual disability claim: if a defendant fails to meet the burden of proof for an intellectual disability claim at the guilt phase of trial, he has a second chance to present the claim in the sentencing phase of trial as mitigation evidence—with no burden of proof whatsoever. *See Stinski*, 691 S.E.2d at 873-74. Young and the Amici argue as if a rejection of an intellectual disability claim during the guilt phase automatically results in a death sentence. To the contrary, defendants have the opportunity to assert their claims without any burden of proof in the second phase of trial. The import of this protection is established in the cases where the defendant's intellectual disability claim was rejected at the guilt phase of the trial, but the defendant was ultimately sentenced to less than death. *See infra*.

Fourth, in Georgia, mitigating and aggravating factors are not weighed, and there are no statutory mitigators; jurors may consider *anything* to be mitigating, and mitigating factors do not have to be found unanimously. *Id*. A death sentence cannot be imposed unless the jury finds at least one statutory aggravating circumstance and votes unanimously for death. Ga. Code Ann. § 17-10-30(c). "If the jury is unable to reach a unanimous verdict as to sentence," the judge must

dismiss the jurors and must "impose a sentence of either life imprisonment or imprisonment for life without parole." Ga. Code Ann. § 17-10-31(c). Thus, if one juror finds that a defendant's cognitive abilities militate against imposing a death sentence (even if not meeting the requirements of intellectual disability), a death sentence may not be imposed and there is no judicial override. *See also Hill*, 662 F.3d at 1353 (listing the protections provided by Georgia's procedure). If anything, Georgia's procedures "go above and beyond" the necessary procedural safeguards. *Id.* at 1353 n.21.

Even with all these safeguards that favor the defense and clearly give a defendant a reasonable opportunity to present his intellectual disability claim, Young and the Amici still argue someone who is intellectually disabled *might* not be able to satisfy the burden of proof. They assert there is an imprecision in IQ scores; that adaptive deficits rely on deficits not strengths, which are garnered from "records, test results, employment evaluations, and interviews with family, friends, teacher and employers" which may be misunderstood by jurors; and finally, the age onset is prior to age 18, which may not be detected in that time period. Brief of the Rutherford Institute, et al., at 6-8. But the same could be said for *any standard at all*. If intellectual disability is difficult to determine, there will be cases under a clear-and-convincing or preponderance standard that still require factfinders to make close calls. Nothing about the beyond a reasonable-doubt standard is unique in that regard.

Plus, as this Court has noted, in contrast to other mental states of mind, intellectually disability is *easier* to prove. Intellectual disability "is a permanent, relatively static condition," and capital cases necessarily deal with adults, "so almost by definition in the case of the [intellectually disabled] there is an 18-year record upon which to rely." *Heller v. Doe*, 509 U.S. 312, 323 (1993) (citations omitted). In contrast, "[m]anifestations of mental illness may be sudden, and past behavior may not be an adequate predictor of future actions." *Id.* If anything, a *higher* standard for proof is necessary, since a large bulk of the testing and information is provided by the defendant and his immediate family, necessarily biased witnesses with a considerable interest in skewing the findings. Further, Georgia correctly allows for the standard error measurement (including IQ scores from 65 to 75 in the potentially intellectually disabled range). With these factors that skew in a defendant's favor, a higher burden of proof is appropriate.

The *Medina* Court reviewed the same arguments Young makes to this Court, that because psychiatric diagnoses are not an exact science, to place the burden on him would violate due process. 505 U.S. at 451. The Court rejected that argument holding that the "Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused." *Id.* (citing *Patterson*, 432 U.S. at 208. The Court concluded that it was "enough that the State affords the criminal defendant" a reasonable opportunity to present his claim. *Id.*

In a failing attempt to bolster his argument that the burden of proof is too restrictive, Young and his Amici rely heavily on a law review article asserting that only one capital defendant has succeeded in proving their intellectual disability under Georgia's burden of proof. Pet. at 18 (citing Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 597-98 (2017) (hereinafter "study")). The Georgia Supreme Court did not find this data "complete nor constitutionally compelling," and for good reason. Pet.App.38a (noting that "the fact remains that reported cases in Georgia actually show that judges and juries do find defendants guilty but mentally retarded under Georgia's proof beyond a reasonable doubt standard.").

As the court explained, Young's statistic excluded those "cases in which intellectually disabled persons are never charged with crimes, resolve charges without a trial, or obtain a not guilty verdict from a jury," which "would rarely if ever result in reported judicial decisions and thus would not be included in the statistics that Young offers here." Pet.App.38a n.13. This explanation is supported by even a cursory review of Georgia case law. *See, e.g.*, *Head v. Stripling*, 590 S.E.2d 122 (2003) (remanded for hearing on intellectual disability, pled to sentence less than death—http://www.dcor.state.ga.us/GDC/Offender/Query); *Walker v. State*, 653 S.E.2d 439 (2007), Case No. S07P0687 (co-defendant allowed to plead guilty but intellectually disabled); *Livingston*, 486 S.E.2d 845, n.1 (1997) (same).

The study relied on by Young also ignores those cases in which the death penalty was sought, where the defendant's intellectual disability claim was raised and rejected, but the defendant was sentenced by the jury to less than death. *See, e.g.*, *Torres v. State*, 529 S.E.2d 883 (2000) (sentenced to life without parole); *Lyons v. State*, 522 S.E.2d 225 (1999) (same); *Mosher v. State*, 491 S.E.2d 348 (1997) (sentenced to life); *Williams v. State*, 426 S.E.2d 348 (1993) (sentenced to life).

It also excludes cases that are not murder cases. Yet, based on a simple LEXIS search, at least six defendants have been found to be guilty but intellectually disabled under the beyond a reasonable doubt standard. *See Hill v. Humphrey*, 662 F.3d at 1357 (citing *Marshall v. State*, 583 S.E.2d 884 (2003) (found intellectually disabled at trial)); *Chauncey v. State*, 641 S.E.2d 229 (2007) (found intellectually disabled at bench trial); *Laster v. State*, 505 S.E.2d 560 (1998) (found intellectually disabled at trial); *Moody v. State*, 422 S.E.2d 70 (1992) (same); *see also Sims v. State*, 614 S.E.2d 73 (2005) (same); *Birdette v. State*, 748 S.E.2d 472 (2013) (found intellectually disabled at bench trial). Contrary to Young and his Amici's arguments and "evidence," defendants in Georgia have proven their intellectual disability to juries, as well as prosecutors.

Georgia's longstanding, multi-faceted procedure for determining intellectual disability affords the defendant a reasonable opportunity to prove his claim and ensures that no intellectually disabled offender is excluded from constitutional protection by Georgia's

burden of proof. The burden of proof, which is one part of a robust procedure, is constitutional.

III. This case does not present a suitable vehicle for this Court's review.

Finally, this case does not present an adequate vehicle for this Court's review of Georgia's burden of proof as to intellectual disability. Regardless of the standard, Young's evidence does not support such a finding.

Even with Georgia's lenient evidentiary standards on claims of intellectual disability, Young did not present any expert or records diagnosing him with intellectual disability. Instead, he chose to forego presenting *any* expert testimony, intelligence testing, or even an IQ score that placed him in the intellectually disabled range. Pet.App.5a. Evidence was presented however that he went to college, took care of his daughter, was a father figure to a number of family members, and navigated from New Jersey to Georgia to commit the crimes. Based on the weak evidence of intellectual disability in this case, Young's intellectual disability claim would fail under any standard. This Court should not grant review.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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CHRISTOPHER M. CARR
Attorney General
BETH BURTON
Deputy Attorney General
Counsel of Record
SABRINA GRAHAM
Senior Assistant
Attorney General
OFFICE OF THE GEORGIA
ATTORNEY GENERAL
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 656-3499
bburton@law.ga.gov

Counsel for Respondent