No. 21-782

IN THE

Supreme Court of the United States

RODNEY RENIA YOUNG,

Petitioner,

—v.—

STATE OF GEORGIA,

Respondent.

CAPITAL CASE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

Georgia's opposition does not dispute that it is the only state in the Union that requires capital defendants with intellectual disability to prove that fact "beyond a reasonable doubt."[1] It identifies no other state—at this time or in the entire history of this country—that has imposed such an onerous burden of proof on an individual asserting *any constitutional right*. Georgia does not dispute that no jury has ever found the standard satisfied by any capital defendant in an intentional murder case. And it does not refute the admission of the standard's author that it was a drafting error. Finally, Georgia concedes that state high courts are divided on this important question.

To call Georgia's standard an "outlier" is an understatement: it stands alone in the history of American constitutional jurisprudence. The Court should grant review.

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[1] Georgia's outlier status is even more extreme than Petitioner set out in his petition. Petitioner initially identified Arizona and Florida as the only states that even impose a "clear and convincing evidence" standard on defendants asserting *Atkins* claims. Pet. 17 n.4 (citing *State v. Grell*, 135 P.3d 696, 705 (Ariz. 2006) (en banc)). But the Arizona high court later clarified that the preponderance standard governs at trial. *State v. Escalante-Orozco*, 386 P.3d 798, 831-32 (Ariz. 2017), *abrogated on other grounds by State v. Escalante*, 425 P.3d 1078 (Ariz. 2018). Thus, Florida is the only state that even requires proof by clear and convincing evidence. Every other state with a death penalty imposes only a preponderance standard. *See Hall v. Florida*, 572 U.S. 701, 710 (2014) (in assessing the constitutionality of a state practice, the Court considers "whether there is a consensus" on "how the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule").

I. THE DECISION CONFLICTS WITH DECISIONS OF OTHER STATE HIGH COURTS AND THIS COURT.

A. Other State Courts.

Georgia concedes that the high courts of Indiana and Tennessee, in conflict with the court below, have held that requiring proof of intellectual disability by clear and convincing evidence would violate due process and run afoul of *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

Georgia contends that these states "have different procedures altogether" from Georgia. BIO 10. But Georgia identifies no procedural difference that would warrant a different result, and neither the court below nor the Indiana or Tennessee courts cited other procedures, or their absence, in their reasoning. *Pruitt v. State*, 834 N.E.2d 90, 103 (Ind. 2005); *Howell v. State*, 151 S.W.3d 450, 464-65 (Tenn. 2004). Instead, the Indiana and Tennessee courts concluded that a "clear and convincing evidence" standard was unconstitutional because it meant that some persons with intellectual disability would be executed. *Pruitt*, 834 N.E.2d at 103; *Howell*, 151 S.W.3d at 464-65 (concluding "it would violate due process to execute a defendant who is more likely than not" intellectually disabled).

The split is actually more pronounced. Georgia seeks to dismiss decisions of the Alabama, Kentucky, and Louisiana high courts requiring a preponderance standard as merely reflecting an exercise of discretion. BIO 10. But each court explicitly cited the Court's constitutional holding in *Cooper v. Oklahoma,* 517 U.S. 348, 364 (1996), requiring a preponderance

standard, indicating that they considered themselves constitutionally bound. Pet. 14-16.

Moreover, because Georgia is the only state with a beyond-a-reasonable-doubt standard, and Florida is the only state that even requires clear and convincing evidence, the split is as mature as it will ever be.

B. *Cooper v. Oklahoma*.

Georgia's standard also conflicts with *Cooper*. Like the "clear and convincing evidence" standard for competence claims declared unconstitutional in *Cooper*, Georgia's standard will inevitably deny constitutional protection to persons who more likely than not fit the category of persons deserving constitutional protection. Georgia does not, and cannot, dispute that reality.

Instead, it maintains that its outlier burden does not violate due process because there is no common-law history of requiring proof of intellectual disability by a preponderance of the evidence. BIO 12-13. Echoing the court below, Georgia argues that there can be no historical tradition with respect to the appropriate standard of proof because this Court did not even recognize such claims until the *Atkins* decision in 2002. *Id*. But that argument is flawed for four reasons.

First, the core rationale in *Cooper* was that the "clear and convincing" standard meant that some people who were more likely than not incompetent to stand trial would nonetheless stand trial. *Cooper*, 517 U.S. at 363-64. The Georgia beyond-a-reasonable-doubt standard has the same problem, only to a more severe extent.

Second, history and tradition strongly support Petitioner's challenge. As noted above, Georgia does not dispute that its burden is literally unprecedented. No state in American history has ever imposed such a standard on an individual asserting any constitutional right. And as the amici brief of Judge Alcala and her fellow former judges and prosecutors shows, Brief of Elsa R. Alcala et al. as Amici Curiae Supporting Petitioner, *Young v. Georgia*, No. 21-782 (U.S. petition for cert. filed Nov. 22, 2021), the beyond-a-reasonable-doubt standard has for centuries been almost exclusively reserved for the burden the *government* must satisfy to convict in a criminal trial.

Third, Georgia's argument proves too much. If due process cannot be violated because the *Atkins* right was not recognized until 2002, due process would not stop Georgia from deciding intellectual disability by a flip of the coin.

Finally, contrary to Georgia's repeated assertions, BIO 1, 12, 13, the question here is not whether the Constitution *requires Atkins* claims to be decided by a preponderance standard, but whether the Constitution *precludes* Georgia's unprecedented imposition of the beyond-a-reasonable-doubt standard. On that question, the history is all on Petitioner's side.

C. *Hall v. Florida* and *Moore v. Texas*.

The decision below also conflicts with *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017). Those cases establish that states may not adopt rules that create "an unacceptable risk" of executing persons with intellectual disability. Georgia's only response is that those decisions "concern the clinical definition of intellectual

disability specifically referenced in *Atkins*, not the quantum of proof necessary to establish that substantive definition[.]" BIO 17.

But whether a state creates "an unacceptable risk" through a procedural or a substantive rule makes no constitutional difference: what the Eighth Amendment forbids is an unacceptable risk. *Cf. Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) ("[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied."). Thus, even apart from its due process problems, flipping a coin to decide *Atkins* claims would violate the Eighth Amendment as much as the *Hall* and *Moore* rules did. Nothing in the text of the Eighth Amendment, much less in this Court's precedents, supports the distinction Georgia advances.

Moreover, the distinction between procedural and substantive rules is subject to manipulation. The Georgia Supreme Court itself characterized its beyond-a-reasonable-doubt standard as informing the state's substantive definition of intellectual disability—until this Court held in *Hall* and *Moore* rulings that states cannot impose their own definitions. *See Stripling v. State*, 711 S.E.2d 665, 668-669 (Ga. 2011) (explaining that beyond-a-reasonable-doubt standard "define[d] the category of mental retardation"); *Head v. Hill*, 587 S.E.2d 613, 622 (Ga. 2003) (explaining that beyond-a-reasonable-doubt standard "limits the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt"). After this Court decided *Hall* and *Moore*, the Georgia Supreme Court recharacterized the standard of proof as procedural, not substantive. App. 34a ("we disapprove anything in

our prior decisions" defending the burden as definitional or substantive).

The constitutionality of a state's rules for assessing intellectual disability cannot rest on such an evanescent and manipulatable distinction. The Eighth Amendment bars any rule that creates an unacceptable risk that a person with intellectual disability will be executed. Georgia's does exactly that.

II. GEORGIA'S ATTEMPT TO DEFEND THE RESULT BELOW FAILS.

Georgia offers no defense in precedent, history or tradition for its unique imposition of a beyond-a-reasonable-doubt standard on persons claiming a violation of a constitutional right. Instead, it contends that it doesn't matter, because "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. '" BIO 19. And it seeks to call into question an exhaustive empirical study demonstrating that it has been virtually impossible for defendants to satisfy Georgia's beyond-a-reasonable-doubt standard. Neither argument has merit.

A. Georgia's asserted "additional procedures" will not prevent the execution, under its standard of proof, of people with intellectual disability.

Georgia claims that its uniquely onerous burden of proof passes constitutional muster because its law provides additional procedures that make up for the standard's unique burden. It claims that Georgia law: 1) places "virtually no limit to the evidence" that can be presented in support of an

intellectual disability claim; 2) permits an "unlimited number of experts" of the accused's own choosing, while other states permit only a court expert; 3) permits defendants to present intellectual disability as a mitigating circumstance at sentencing; and 4) the jury must be unanimous for death. BIO 19-22. But these procedures are not "additional" in any meaningful sense, and do not mitigate the risks created by requiring proof beyond a reasonable doubt.

First, evidence is not limitless. Georgia permits no more than that which falls "[w]ithin the bounds of evidentiary admissibility[.]" *Hill v. Humphrey*, 662 F.3d 1335, 1353 (11th Cir. 2011). The trial court in this very case declined to admit various pieces of evidence that Mr. Young proffered in support of his *Atkins* defense. App. 63a-65a.

Second, no Georgia statute permits an unlimited number of experts on intellectual disability. And the other states Georgia identifies do not limit defendants to a "court-appointed expert." BIO 21.[2]

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[2] By "court appointed expert" Georgia appears to be describing experts who report to the trial judge, rather than those appointed to assist the defense. BIO 21. In fact, however, each state Georgia cites permits defendants to present evidence through their own experts. *See* Fla. Stat. § 921.137(4) (allowing "any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability"); Utah Code Ann. § 77-15a-104(9)(a) ("[T]his chapter does not prevent any party from producing any other testimony as to the mental condition of the defendant."); *Ramirez v. Ryan*, No. CV-97-1331-PHX-JAT, 2010 WL 3854792, at *11 (D. Ariz. Sept. 28, 2010) ("each party selects one psychological expert to evaluate and report to the court their findings on whether the petitioner is mentally retarded"); Kan. Stat. Ann. § 21-6622(c) ("The defendant shall have the right to present evidence and cross-examine any witnesses at the [intellectual disability]

Third, permitting defendants to present evidence of intellectual disability in mitigation is by definition inadequate. This Court recognized a categorical exemption from execution in *Atkins* because the existing regime, which allowed evidence of intellectual disability to be presented in mitigation, was constitutionally insufficient. *Compare Atkins*, 536 U.S. at 320-21 *with Penry v. Lynaugh*, 492 U.S. 302, 337-38 (1989) (describing the general rule prior to *Atkins* as "the sentencing body must be allowed to consider mental retardation as a mitigating circumstance in making the individualized determination whether death is the appropriate punishment in a particular case"), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002). Allowing defendants to do what this Court has deemed constitutionally insufficient is no response.

The same goes for the requirements of a unanimous jury verdict, a virtually unlimited right to present mitigation, and individual consideration of mitigation. These procedures offer nothing more than what this Court's precedents and virtually every other state's procedures already provide. *Ring v. Arizona*, 536 U.S. 584 (2002) (requiring unanimous findings on aggravating circumstances); *Mills v. Maryland*, 486 U.S. 367, 383 (1988) (requiring states to permit individual consideration of mitigating circumstances); *Lockett v. Ohio*, 438 U.S. 586 (1978) (establishing broad right to present mitigating evidence).

Most importantly, none of the procedures Georgia points to mitigate the risk that, under a

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hearing."); *Commonwealth v. Hill*, 95 Va. Cir. 83, 85 (2017) ("[T]he Commonwealth of Virginia cannot interfere with non-indigent capital defendant's ability to contract with mental health experts to assist the defense[.]").

beyond-a-reasonable-doubt standard, some people who are more likely than not intellectually disabled will be executed.

B. Georgia's criticisms of the Sudeall Lucas study are unfounded.

As the petition showed, Professor Sudeall Lucas's study demonstrates that it has been virtual impossible to satisfy Georgia's uniquely onerous standard of proof. Pet. 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. 553 (2017)) [hereinafter *Empirical Assessment*].

Georgia's critiques of the study are baseless. BIO 24-25. First, the study did not rely only on "reported judicial decisions." BIO 24. Its express purpose was to *supplement* those decisions. *Empirical Assessment*, 33 Ga. St. U. L. Rev. at 577-78. To that end, Sudeall Lucas reviewed over 1,100 capital cases, and identified 379 cases that were actually tried to a jury. *Id.* at 578-79. She contacted clerks in each of Georgia's 159 counties to ascertain whether her list was complete, obtain verdict forms, and collect disposition sheets recording the sentence imposed. *Id.* at 579-80.

Georgia does not dispute her finding that no one in an intentional murder case has ever satisfied the burden. Instead, it points to other facts that it implies mitigate that stark finding. They don't. That Georgia prosecutors ultimately spared some defendants through plea or settlement negotiation does not show that they would have been able to prove intellectual disability beyond a reasonable doubt at

trial, or even that intellectual disability had anything to do with the negotiation. Similarly, that Georgia juries spared other defendants at sentencing does not cast any doubt on the study's findings about the impossibility of making out the categorical defense required by *Atkins*. And that some defendants in *non-murder* cases have been found guilty but intellectually disabled is entirely irrelevant, because outside of the death penalty context, that verdict offers no reduction in sentence whatsoever, and is therefore pursued by prosecutors, not by defendants.[3]

The unrebutted bottom line is that virtually no Georgia defendant has been able to surmount the beyond-a-reasonable-doubt standard, whereas defendants in other states, proceeding typically under a preponderance standard, often prevail. *See* Pet. 18.

III. THIS CASE PROVIDES AN IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

Finally, Georgia raises no valid vehicle concerns. The trial court denied Mr. Young's motions to strike the burden of proof as unconstitutional, on both Due Process and Eighth Amendment grounds. The jury rejected Mr. Young's plea of intellectual disability under that standard, even though he offered *unrebutted* evidence that the public school system

[3] *See* Mark A. Woodmansee, *The Guilty but Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 341, 348 (1996) ("The state of Georgia, for example, enacted its GBMI verdict to prevent insanity acquittees from gaining an "early release" from mental health institutions[.]") (footnote omitted); C. Palmer & M. Hazelrigg, *The Guilty but Mentally Ill Verdict: A Review and Conceptual Analysis of Intent and Impact*, 28 J. Am. Acad. Psychiatry & L. 47, 49 (2000) (same for other states).

classified him as mentally retarded during his developmental period. The Georgia Supreme Court squarely addressed both questions, and splintered into three on the Eighth Amendment question. And the case arises on direct review, not via habeas, allowing this Court to address the constitutional question directly.[4] Georgia disputes none of this.

Georgia instead claims that this case makes a poor vehicle because no expert testified or provided an opinion at trial. But Georgia does not argue that the evidence Mr. Young presented at trial would have been legally insufficient to meet his burden under a less demanding standard of proof, so this Court's resolution of the question presented will be dispositive. In any event, there is no legal requirement that an expert testify, especially where, as here, there was *uncontradicted* evidence that Mr. Young was consistently classified intellectually disabled during the developmental period of his life, based on IQ test scores between 60 and 69 and direct educator observations about his academic functioning and learning capacity. App. 220a-221a.

CONCLUSION

The Court should grant the petition for certiorari and either schedule the case for full briefing

[4] Contrary to Georgia's assertion, BIO 10, the Court did not deny certiorari in *In re Hill*, 571 U.S. 813 (2013) or *Tharpe v. Sellers*, 138 S. Ct. 55 (2017). *In re Hill* was an original habeas petition filed shortly before a scheduled execution, and did not present a challenge to the burden of proof. In *Tharpe*, the Court dismissed the petition concerning the burden of proof *on stipulation of both parties*, after this Court granted a stay of execution on a different issue. And *Arrington v. Georgia*, 562 U.S. 853 (2010), did not involve intellectual disability, much less the questions presented here.

and argument, or summarily vacate the decision below.

Respectfully submitted,

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