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

BRIEF OF THE SOUTHERN CENTER FOR HUMAN RIGHTS AND THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Southern Center for Human Rights (SCHR) is a nonprofit law office based in Atlanta, Georgia. For the past forty-four years, SCHR has represented people facing the death penalty in the southern United States. In the 1980s, SCHR's advocacy contributed to Georgia becoming the first state in the nation to prohibit the practice of executing people with intellectual disability. This Court later held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of people with intellectual disability violates the Eighth Amendment. Despite those developments, people with intellectual disability are still being sentenced to death and executed in Georgia because the state employs an insurmountable standard of proof for intellectual disability determinations.

The Roderick & Solange MacArthur Justice Center (MJC) is a nonprofit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and for a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, including issues concerning the death penalty, the rights of the indigent in the criminal justice system, and the treatment of incarcerated people. MJC has had substantial practical experience litigating the

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici's intent to file this brief at least 10 days prior to its due date. The parties do not oppose the filing of this brief.

issue of intellectual disability under *Atkins* in states with the death penalty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Georgia's statutory protection against the execution of people with intellectual disability dates back to the 1980s, long before this Court defined the protection mandated by the federal Constitution in *Atkins*. As enacted in 1988, the law limited the exemption to capital defendants who could prove their intellectual disability beyond a reasonable doubt. Despite the passage of nearly two decades since *Atkins* and multiple decisions of this Court implementing *Atkins*,[2] the Georgia legislature has never revised its limited statutory protections in light of what the Constitution requires. Georgia is thus the only state that requires defendants to prove their intellectual disability beyond a reasonable doubt. As a result, protection against the execution of people with intellectual disability exists only in theory in the state. In fact, there has never been a finding of intellectual disability at trial in a case of intentional murder.

Despite having intellectual disability, Petitioner Billy Raulerson was sentenced to death because of

[2] *See Hall v. Florida*, 572 U.S. 701 (2014); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019); *id.* at 672 (Roberts, C.J., concurring).

Georgia's unique standard of proof. At his capital trial, he sought to establish that he was intellectually disabled, and the state court required him to do so beyond a reasonable doubt. Like every other Georgia defendant in this situation, he fell short. He now asks this Court to address whether Georgia's "beyond a reasonable doubt" standard contravenes clearly established federal law in light of *Atkins*, which bars the execution of people with intellectual disability, and *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which governs the standards of proof for constitutional rights.

This brief offers additional context for Raulerson's petition for certiorari by providing an "on the ground" view of how Georgia's standard of proof continues to undermine the purpose of *Atkins*. Three points warrant emphasis.

First, for thirty-two years, the prohibition against the execution of defendants with intellectual disability has existed only in theory in Georgia. No one in Georgia has ever established intellectual disability in a trial involving intentional murder. This fact starkly demonstrates that Georgia's unique standard of proof has undermined the constitutional command of *Atkins*.

Second, Georgia does not impose this standard on intellectual disability claimants in any other context. In fact, the Georgia Legislature implemented this standard out of a desire to limit the availability of intellectual disability claims in capital cases. Thus, the standard is not only an outlier in comparison to other

death penalty states; it is also an outlier in comparison to Georgia's own practices in other contexts.

Third, despite concrete examples of Georgia cases in which the standard of proof has unquestionably been the difference between an execution and an *Atkins* exclusion, Georgia prosecutors and legislators have consistently opposed changes to the standard. State officials have maintained the standard for thirty years and, as recently as 2018, rejected an effort to change it. Unless this Court intervenes, Georgia will continue to execute people with intellectual disability.

In short, the practical effects of Georgia's unique standard of proof strongly support certiorari review in this case.

ARGUMENT

In 1986, Georgia executed Jerome Bowden, a man with a full-scale IQ of 65. In his last words from the electric chair, Bowden thanked the prison for taking good care of him.[3] State officials faced widespread criticism for the execution. Two years later, the Georgia Legislature passed a law that prohibited the death penalty for intellectually disabled defendants but

[3] Associated Press, *Retarded Man, 33, Electrocuted as Plea to High Court Is Rejected*, N.Y. Times, June 25, 1986, at A16, *available at* https://www.nytimes.com/1986/06/25/us/retarded-man-33-electrocuted-as-plea-to-high-court-is-rejected.html (last visited Feb. 24, 2020).

required the defendant to prove his intellectual disability beyond a reasonable doubt.[4]

In the years that followed, other states also passed laws exempting defendants with intellectual disability from the death penalty. Each and every one of them rejected Georgia's onerous standard of proof. Georgia thus has been—and remains—the only state in the country that requires a defendant with intellectual disability to face execution unless he proves his disability beyond a reasonable doubt.

Thirty-two years of experience have proven that Georgia's standard is insurmountable. No one has satisfied the standard at trial in a case involving intentional murder, and as a result, the law has not prevented the execution of defendants with intellectual disability. This lack of protection presents a constitutional violation now that *Atkins* prohibits the execution of defendants with intellectual disability.

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[4] Associated Press, *Georgia to Bar Executions of Retarded Killers*, N.Y. Times, Apr. 12, 1988, at A26, *available at* https://www.nytimes.com/1988/04/12/us/georgia-to-bar-executions-of-retarded-killers.html (last visited Feb. 24, 2020); *see also Atkins*, 536 U.S. at 313–14 (noting that "the public reaction to the execution of a mentally retarded murderer in Georgia apparently led to the enactment of the first state statute prohibiting such executions").

I. There Has Never Been a Finding of Intellectual Disability in a Trial Involving Intentional Murder in Georgia.

Dissenting from the Eleventh Circuit decision below, Judge Jordan observed that the standard of proof "plays a critical role in our adversarial system because it often drives the result."[5] That observation rings particularly true in this context. In the thirty-two years since Georgia enacted its intellectual disability law, not a single capital defendant "has successfully obtained a jury verdict of [guilty but mentally retarded] in a case of intentional murder. . . ."[6]

The only explanation for why Georgia has not had any successful *Atkins* claims at trial is that it is the only state that requires defendants to prove intellectual disability beyond a reasonable doubt. Unlike every other state, Georgia demands that jurors determine intellectual disability "with a level of certainty that mental health experts simply cannot provide."[7] By

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[5] *Raulerson v. Warden*, 928 F.3d 987, 1012–13 (11th Cir. 2019) (Jordan, J., dissenting).

[6] Lauren S. 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, 582 (2017); *see also Raulerson*, 928 F.3d at 1017 (Jordan, J., dissenting) (noting that, in an evidentiary hearing below, the State "did not provide *any* cases where a defendant met that standard") (emphasis in original).

[7] *Raulerson*, 928 F.3d at 1018 (Jordan, J., dissenting); *see also* Lauren A. Ricciardelli & Kevin M. Ayres, *The Standard of Proof of Intellectual Disability in Georgia: The Execution of Warren Lee Hill*, 27 J. Disability Pol'y Stud. 158, 165 (2016) (criticizing Georgia's procedures because the "standard of proof for diagnosis

requiring more of jurors than what medical experts can offer, Georgia's standard has failed to "afford capital defendants a meaningful opportunity to prove intellectual disability."[8]

In *Atkins*, this Court tasked the states with "developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."[9] However, as Judge Jordan recognized in his dissent, those "'state procedures must be adequate to protect' the Eighth Amendment prohibition against the execution of the intellectually disabled."[10] Thirty-two years of unsuccessful claims of intellectual disability demonstrate that Georgia's statute is insufficient to enforce this prohibition.

II. Georgia's Standard Is Inconsistent With the State's Treatment of Intellectual Disability Claims in Every Other Context.

The Georgia Supreme Court has upheld the "beyond a reasonable doubt" standard because it reflects "the General Assembly's chosen definition of what degree of mental impairment qualifies as mentally retarded under Georgia law. . . ."[11] However,

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requires something other than what a qualified expert in that field can provide").

[8] *Raulerson*, 928 F.3d at 1018 (Jordan, J., dissenting).

[9] *Atkins*, 536 U.S. at 317 (citation omitted).

[10] *Raulerson*, 928 F.3d at 1012 (Jordan, J., dissenting) (quoting *Pate v. Robinson*, 383 U.S. 375, 378 (1966))

[11] *Head v. Hill*, 277 Ga. 255, 262 (2003).

Georgia does not treat intellectual disability claims in a similar manner in any other context. This Court has recognized that it is constitutionally suspect for a state to single out capital defendants' intellectual disability claims in this manner. For instance, this Court viewed Texas's use of the *Briseno* factors with suspicion in part because those factors were inconsistent with "Texas' own practices in other contexts."[12] This Court then faulted Texas for "appl[ying] current medical standards for diagnosing intellectual disability in other contexts, yet cling[ing] to superseded standards when an individual's life is at stake."[13]

The same is true in Georgia. The state demands an unattainable level of certainty for making intellectual disability determinations only when an individual's life is at stake. For example, an individual is eligible for disability services in Georgia if she receives a diagnosis of intellectual disability before she turns 18 and is eligible for Medicaid disability support.[14] This diagnosis need only be made to a clinical standard—that is, to a reasonable degree of medical or scientific certainty. Georgia adopts a similar standard when considering whether to place a child in special education; a child is eligible if a "comprehensive evaluation indicates deficits in both intellectual functioning and

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[12] *Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017)

[13] *Id.*

[14] *Application for Intellectual/Developmental Disabilities Services*, Georgia Dept. of Behavioral Health and Developmental Disabilities, *available at* https://dbhdd.georgia.gov/be-compassionate/how-do-i-apply-dd-services (last visited Feb. 24, 2020).

adaptive behavior."[15] As above, that determination adopts clinical standards, not a "beyond a reasonable doubt" standard. Thus, Georgia has imposed an insurmountable standard for proving intellectual disability in the criminal context; yet it does not apply that standard in any other context within the state.

This discrepancy is intentional. The Georgia Legislature specifically implemented the "beyond a reasonable doubt" standard to minimize the ability of capital defendants to raise this defense.[16] The Legislature first debated the bill in 1987. However, it quickly shelved the proposal after then-Attorney General Michael Bowers voiced concerns that it would "virtually end executions in Georgia."[17] The Legislature considered the bill again the following year and ultimately passed it, but with the reasonable doubt burden in place. Then-Fulton County District Attorney Lewis Slaton, who participated in the legislative debate over the law, explained prosecutors' overarching concern with the exemption: "What we've always been concerned about is that we are leery of changing the law

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[15] Ga. Comp. R. & Regs. 160-4-7-.05(e).

[16] *See Hill*, 277 Ga. at 262 (noting that the Georgia Legislature chose to "limi[t] the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt").

[17] Joseph B. Frazier, *Too Retarded to Die for Crimes? Laws Say No*, Los Angeles Times, Apr. 17, 1988.

because it means that every person on death row can now raise another ground."[18]

From its inception, Georgia's standard of proof has narrowed the class of eligible capital defendants to a nullity. Thus, "[b]y design and in operation," Georgia's statute has "'creat[ed] an unacceptable risk that persons with intellectual disability will be executed."[19] Nevertheless, as discussed below, it is clear that state officials will not change the standard of proof.

III. Despite Evidence That Georgia Has Executed an Individual With Intellectual Disability, State Officials Have Consistently Opposed Changes to the Standard of Proof.

Time and again, Georgia legislators and prosecutors have demonstrated their commitment to imposing an unattainable standard of proof for intellectual disability claims in the criminal context. Just two years after the law's passage, Georgia legislators introduced a bill that would have effectively reversed the exemption, but the bill was never passed.[20] More recently, in

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[18] Associated Press, *Georgia to Bar Executions of Retarded Killers*, N.Y. Times, Apr. 12, 1988, at A26, *available at* https://www.nytimes.com/1988/04/12/us/georgia-to-bar-executions-of-retarded-killers.html (last visited Feb. 24, 2020).

[19] *Moore*, 137 S. Ct. at 1051 (quoting *Hall v. Florida*, 572 U.S. 701, 704 (2014)).

[20] Jeanne Cummings, *The 1990 Legislative Session Bill Could Reverse Execution Ban on Retarded*, Atlanta J.-Const., Feb. 8, 1990, at C3 (noting that the bill "would allow jurors to sentence a mentally retarded person to the electric chair if they decide the defendant knew what he did was wrong, and understood that the

the years since this Court's decision in *Atkins*, state officials have repeatedly opposed changes to the statute both in court and in the Legislature—even when confronted with the possibility of executing an individual with intellectual disability.

The Legislature's continued refusal to revisit its pre-*Atkins* statute following Warren Hill's case is particularly illustrative. Prior to *Atkins*, Hill alleged that he was intellectually disabled and therefore exempt from the death penalty under Georgia's statute. However, the state habeas court denied relief because Hill could not prove his intellectual disability beyond a reasonable doubt.[21] After *Atkins* was decided, Hill moved for reconsideration of this finding. The habeas court made two important conclusions. First, it held that *Atkins* rendered Georgia's standard of proof unconstitutional because "the State has created an extremely high likelihood of erroneously executing mentally retarded defendants by placing 'almost the entire risk of error' upon the defendant."[22] Second, it found that

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act carries serious consequences"). Despite significant support from Attorney General Bowers, the state Senate rejected the bill. *See* Jeanne Cummings, *Ban on Execution of Retarded Kept Intact; Bill to Let Juries Decide Dies 34–22 in the Senate*, Atlanta J.-Const., Feb. 27, 1990, at B3.

[21] *Hill v. Head*, No. 94-V-216 Order at 3–4 (Ga. Super. Ct. Butts Cty. May 13, 2002).

[22] *Hill v. Head*, No. 94-V-216 Order on Petitioner's Motion for Reconsideration of Denial of Habeas Relief at 8 (Ga. Super. Ct. Butts Cty. Nov. 19, 2002) (quoting *Addington v. Texas*, 441 U.S. 418, 423–24 (1979)).

under a preponderance standard, Hill was intellectually disabled.[23]

Georgia prosecutors appealed both rulings to the Georgia Supreme Court, which reversed the lower court's order and reinstated Hill's death sentence.[24] The majority concluded that Georgia's onerous standard did not create a special risk of wrongful execution, and therefore, *Atkins* did not compel a lower standard of proof for intellectual disability determinations.[25] The court also found that Hill could not prove his disability beyond a reasonable doubt.[26]

Nearly a decade later, Hill pursued relief in the Eleventh Circuit. Although Hill obtained relief before a three-judge panel of the appeals court, the *en banc* court upheld Georgia's standard of proof.[27]

After Hill's execution was stayed on other grounds, there was a further legislative effort to change the standard of proof. State legislators convened an "informational session" regarding Georgia's standard of proof—as State Representative Rick Golick stated,

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[23] *Id.* at 9.

[24] *Head v. Hill*, 277 Ga. 255 (2003); *see also* Bill Rankin, *Retarded Inmates Still Must Prove It; Court Upholds High Bar for Avoiding Execution*, Atlanta J.-Const., Oct. 7, 2003, at B1.

[25] *Hill*, 277 Ga. at 262.

[26] *Id.* at 262–63.

[27] *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011); *see also* Bill Rankin, *Mentally Retarded Inmate Fights to Live*, Atlanta J.-Const., Feb. 16, 2011, at B1; Bill Rankin, *Legal Threshold for Proving Mental Disability Challenged*, Atlanta J.-Const., Mar. 22, 2011, at B2.

"When you're an outlier, you really ought not to stick your head in the sand."[28] However, legislators emphasized that the meeting would not necessarily result in changes to the law. No such changes occurred, and less than two years later, Hill was executed—even though he proved his intellectual disability by a preponderance of the evidence and thus would have been ineligible for the death penalty across the state line in Alabama.

The standard was the difference in Petitioner Raulerson's case as well. Nevertheless, Georgia prosecutors have consistently opposed Raulerson's challenges to the standard of proof. Moreover, as recently as 2018, Georgia legislators defeated a proposal that would have changed the standard.[29] It is therefore abundantly clear that Georgia will not change the standard on its own; only this Court can bring Georgia in line with the rest of the country.

This Court should do so. As Raulerson explains in his petition, this case presents a fully-developed factual record that no other case has had. As part of that record, there is evidence regarding Georgia's treatment of intellectual disability claims, both before

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[28] Kate Brumback, *Georgia Reviews Burden of Proof for Mentally Disabled Death Row Defendants*, Christian Science Monitor, Oct. 19, 2013, *available at* https://www.csmonitor.com/USA/Latest-News-Wires/2013/1019/Georgia-reviews-burden-of-proof-for-mentally-disabled-death-row-defendants (last visited Feb. 14, 2020).

[29] H.B. 768, 154th Gen. Assemb., Reg. Sess. (Ga. 2018), *available at* http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/768 (last visited Feb. 24, 2020).

and since the Court's decision in *Atkins*. This evidence underscores the reason why the Court "did not give the States unfettered discretion to define the full scope of the constitutional protection":

> If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.[30]

Intellectually disabled defendants in Georgia have been and will be executed. That unconstitutional practice will continue unless this Court intervenes.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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[30] *Hall*, 572 U.S. at 719, 720–21.