Nos. 14-7457, 14A614

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE HOLSEY,

PETITIONER,

v.

STATE OF GEORGIA,

RESPONDENT.

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

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI AND RESPONSE IN OPPOSITION TO STAY

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QUESTION PRESENTED

Whether this court should deny certiorari review of the Georgia Supreme Court's order denying petitioner's application for a certificate of probable cause to appeal from the proper denial of his second state habeas corpus petition which was based on adequate and independent state law ground and is in direct accordance with the precedent of this court?

BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

The state habeas court, applying state procedural law, properly dismissed Petitioner's second state habeas petition as procedurally barred as he had previously presented the same claim to the state habeas court, the federal habeas court and this Court.

Again, Petitioner argues that Georgia's beyond a reasonable doubt standard for determining intellectual disability is unconstitutional and that his execution would be a miscarriage of justice based. Petitioner bases his arguments on the same evidence he has previously submitted to the state habeas court, the Georgia Supreme Court, the Eleventh Circuit Court of Appeals, and this Court.[1] All denied Petitioner the relief requested. As the state habeas court properly dismissed Petitioner's second state habeas petition as barred under Georgia law and as Georgia's statutory burden of proof as to claims of intellectual disability does not conflict with this Court's precedent, certiorari review should be denied.

I. STATEMENT OF THE CASE

Petitioner was convicted of malice murder, felony murder, and armed robbery on February 11, 1997. The jury found four statutory aggravating circumstances and Petitioner was sentenced to death. Petitioner's convictions and

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[1] Petitioner has presented no new evidence to any court.

sentences were affirmed by the Georgia Supreme Court. Holsey v. State, 271 Ga. 856, 524 S.E.2d 473 (1999), cert denied, 530 U.S. 1246 (2000).

On October 6, 2000, Petitioner filed a state habeas corpus petition. After Petitioner filed his state habeas petition, but prior to the evidentiary hearing, this Court held that the execution of the intellectually disabled was unconstitutional. Atkins v. Virginia, 536 U.S. 304 (2002).[2]

Evidentiary hearings were conducted in the state habeas court on June 16-18, 2003 and December 8-9, 2003. On May 9, 2006, the state habeas court erroneously granted sentencing relief finding, not that Petitioner was intellectually disabled, but that trial counsel were ineffective for not presenting a claim of intellectual disability and more detailed mitigation evidence.[3] Respondent appealed and the Georgia Supreme Court reversed the state habeas court and reinstated Petitioner's death sentence. Schofield v. Holsey, 281 Ga. 809, 642 S.E. 2d 56 (2007). In denying Petitioner's claims that Georgia's standard of proof was unconstitutional, the Georgia Supreme Court held:

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[2] Georgia has constitutionally prohibited the execution of the intellectual disabled since 1988 Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989).

[3] The state habeas court utilizing an improper Strickland prejudice analysis held, "had the jury been presented with the evidence heard by [the habeas court], a jury verdict would have authorized to find Mr. Holsey mentally retarded **or not**." (Emphasis added).

> The habeas court was also correct in applying the "beyond a reasonable doubt" standard to Holsey's claim. Head v. Hill, 277 Ga. 255, 260-263, (II) (B) (587 SE2d 613) (2003); Stephens v. State, 270 Ga. 354, 357 (2) (509 SE2d 605) (1998).

Schofield v. Holsey, 281 Ga. 809, 817, 642 S.E.2d 56, 63 (2007).

Petitioner then again applied for a writ of certiorari with this Court alleging Georgia's standard of proof as to claims of intellectual disability was unconstitutional. (Attachment A). This Court denied the application. Holsey v. Georgia, 552 U.S. 1070 (2007).

Thereafter, Petitioner filed a federal habeas corpus petition on November 21, 2007, again challenging Georgia's burden of proof as to claims of intellectual disability. On July 2, 2009, the federal habeas court denied relief. Petitioner appealed to the Eleventh Circuit Court of Appeals. On September 13, 2012, the Eleventh Circuit Court of Appeals denied relief. Holsey v. Warden, Georgia Diagnostic and Classification Prison, 694 F.3d 1230 (2012).

On April 5, 2013, Petitioner again filed a petition for certiorari review with this Court again alleging that Georgia's beyond a reasonable doubt standard for proving intellectual disability violates the Eighth Amendment. (Attachment B). On June 10, 2013, this Court again denied certiorari review. Holsey v. Humphrey, 133 S. Ct. 2804 (2013).

Based on the same exact evidence and based on the same arguments, much of which is super-copied from prior pleadings,[4] Petitioner filed his second state habeas petition. The state habeas court, utilizing Georgia law, properly found this barred from review holding:

> This is Petitioner's second state habeas petition. Petitioner again argues Georgia's beyond a reasonable doubt standard for determining intellectual disability is unconstitutional and his execution would be a miscarriage of justice. The Court finds Petitioner has not cited any new law or any new evidence to overcome the procedural bar, nor has Petitioner established a miscarriage of justice. Stevens v. Kemp, 254 Ga. 228, 230 (1984). The instant petition is DISMISSED.
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> This Court is of the opinion that the Hall case is not sufficiently on point to justify a habeas decision overturning the current Georgia law.

(Holsey v. Chatman, Case No. 2014-HC-14 (Dec. 3, 2014)).

On December 5, 2014, Petitioner filed an application for a certificate or probable cause to appeal with the Georgia Supreme Court. On December 9, 2014, the Georgia Supreme Court denied Petitioner's application.

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[4] Petitioner has repeatedly argued the Eighth Amendment, the Fourteenth Amendment, national consensus of the standards of review and the medical standard of review; all the courts have rejected these claims. Notably, even Petitioner's string citation to the change in the national consensus end by 2003, (Petitioner's brief, p. 24, n. 30), leaving Petitioner 11 years to argue this claim, of which he has taken full advantage. The arguments are not new and do not provide Petitioner an avenue to overcome the procedural bar.

II. STATEMENT OF THE FACTS

On appeal, the Georgia Supreme Court held as follows:

The evidence at trial showed that shortly before 1:30 a.m. on December 17, 1995, Holsey entered the Jet Food Store in Milledgeville with a gun and demanded money. After receiving money from the store's cash register, Holsey directed the store clerk to open the store's lottery machine. Although Holsey ordered the clerk into a back room, the clerk was able to observe Holsey leave in a small red automobile. The clerk immediately called the police and provided a description of Holsey and his car.

Less than four minutes after Holsey left the food store, Deputy Sheriff Will Robinson stopped a red Ford Probe at a nearby motel. He relayed the vehicle's license plate number by radio and approached the vehicle; Holsey then fired. Forensic evidence showed that the deputy suffered a fatal head wound.

Several guests at the motel observed a person matching Holsey's descriptions returning to the red Ford Probe and speeding away. The police soon discovered the vehicle and gave chase, but Holsey was able to avoid apprehension. One witness testified that she observed the red Ford Probe and recognized Holsey, with whom she was personally acquainted.

Holsey's girlfriend testified that shortly after the shooting Holsey called and asked her to meet him at his sister's house. He told her to drive her blue Jeep Cherokee rather than her red automobile because the police were searching for a red Ford Probe. When she arrived at the house, Holsey was hiding behind a fence. Holsey had his girlfriend drive him past the murder scene. When she refused his request to be driven to his mother's house where he could monitor a police scanner, Holsey had her drive him through back roads to his sister's house where she had picked him up. Holsey instructed her to park directly behind the red Ford Probe in order to conceal its license plate.

While Holsey and his girlfriend were still in the Jeep, a law enforcement officer drove up to the red Ford Probe. The officer

checked the Probe's license plate number, which matched the number transmitted by the victim. The officer then illuminated the Cherokee and the Probe with his headlights and transmitted a request for additional support. When Holsey exited the Cherokee "very quickly," the officer turned on his blue police lights, exited his own vehicle, drew his service weapon, and twice commanded Holsey to raise his hands. Holsey failed to comply, began looking around as though searching for an escape route, and, after the officer threatened to shoot, Holsey finally raised his hands. The officer then commanded Holsey to lie prone on the ground. When the chief deputy arrived less than two minutes later, he confirmed that the Probe's license plate number matched the number from the victim's radio call and discovered a fresh bullet hole in the back of the Probe. He then awakened and interviewed the occupants of the residence. The occupants, Holsey's sister and another woman who was the owner of the Probe, both stated that Holsey had borrowed the vehicle that night. The chief deputy then, less than fifteen minutes after Holsey was initially detained, asked Holsey his name and placed him under arrest.

> Clothes matching the description of those worn by the armed robbery perpetrator were discovered nearby. Shoes removed from Holsey after his arrest matched the description given by witnesses to both the armed robbery and the murder. A sample of blood taken from one of the shoes proved through DNA analysis to be consistent with the blood of the victim.

Holsey v. State, 271 Ga. at 858, 524 S.E.2d at 476.

II. DENIAL OF SPECIFIC "FACTS" ALLEGED BY PETITIONER

The state habeas court did not find that "a jury would have been authorized to find [Petitioner] intellectually disabled beyond a reasonable doubt based on the evidence presented in the state habeas proceedings." (Petitioner's petition, pp. 4, 13). The state habeas court utilizing an improper Strickland prejudice analysis held, "had the jury been presented with the evidence heard by [the habeas court], a jury verdict would have authorized to find Mr. Holsey mentally retarded **or not**." (Emphasis added).

As to alleged intellectual disabilities in Petitioner's family (Petitioner's petition, p. 3), experts noted that the psychological evaluations on Petitioner's mother consistently indicated borderline intellectually disabled and only once, in 2000, did it drop below into the intellectually disabled range, but opined that this was probably due to her "decompensated mental state and, since it was Social Security evaluation, she might have been malingering." With regard to Petitioner's older sister Angela, her records from Central State Hospital noted an IQ score of 70 when she was 16, which was found could be attributed "in part to cultural deprivation, lack of motivation, and to a severe learning disability…." A 1980 report states that after numerous psychological tests, it was opined that Angela Holsey functioned "in the low borderline range of intelligence, partially due to cultural deprivation, lack of motivation, and severe learning disability," not

intellectually disabilities. This sister was also in a special education class when they were younger, but Petitioner was never placed in special education classes.

Finally, contrary to Petitioner's repeated arguments and his reliance on handpicked selections from the experts' testimony, which were contradicted by other evidence, Petitioner is not intellectually disabled. The evidence showed that, prior to trial, Petitioner was examined by his own independent expert who found that Petitioner: had an IQ of 79; Petitioner's math scores and his adaptive behavior skills were too high for Petitioner to be intellectually disabled; understood complicated legal concepts; and had a sophisticated vocabulary. The expert also found that "the circumstances surrounding the crime" "showed more wherewithal than [he] would attribute to someone who is mentally retarded." The expert concluded that Petitioner had a learning disability and was not intellectually disabled. These pre-trial findings were corroborated by Respondent's habeas expert.[5]

Additionally, at the state habeas hearing a number of unbiased lay witnesses also testified to Petitioner's average mental capacities. (i.e., Petitioner was a trustee and handed out supplies and meals to other inmates and checked each

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[5] Respondent's habeas expert found Petitioner's efforts to elude the police, Petitioner's planning and leading the criminal enterprise, Petitioner getting money from the lottery machine in addition to the cash register, and Petitioner's reluctance to have his hands tested for gun residue showed a higher level of thinking outside the range of mildly intellectually disabled.

inmate's commissary list to ensure each inmate had the correct things listed on his paper); ("normal kid"); ("was intelligent," "a leader"); ("acted like a typical boy growing up"); ("intelligent")). The habeas corpus evidence also showed that: Petitioner's sisters relied on him to help and protect them and be their "father figure"; Petitioner was never placed in special education classes, unlike his sister; at age 15, Petitioner's IQ was 70 and he was found to be in the average range on intelligence testing; and in 1980, a clinical social worker noted Petitioner's strengths are his "physical environment and his average intelligence."

In fact, prior to trial, no one in Petitioner's family, including Petitioner, made any statements to the defense team indicating that Petitioner was intellectually disabled. For instance, Petitioner's sister, in her questionnaire for defense counsel, did **not** note that Petitioner suffered from any mental health history, and stated that she did not know Petitioner to demonstrate avocational weaknesses. In fact, trial counsel noted that Petitioner's sister did not believe Petitioner even had a learning disability, much less that he was intellectually disabled.

Petitioner also argues that trial counsel, Andrew Prince, was an alcoholic, and his alcoholism caused him to be unprepared for trial. Petitioner was represented at trial by Andrew Prince and Brenda Trammell. Prior to his appointment in Petitioner's case, Mr. Prince had tried approximately 50 criminal

cases and had handled four death penalty cases, three in which he was lead counsel. Petitioner's case is the only case in which a death sentence was obtained. As to counsel's representation of Petitioner, Fred Bright, the District Attorney who prosecuted Petitioner in the instant case had worked with Mr. Prince on other death penalty trials. Mr. Bright testified that, in Petitioner's case, Mr. Prince's demeanor was no different than in the prior cases, it was "the same Andy Prince." However, Mr. Bright felt that Mr. Prince had gotten better with each case.

Investigator Mark Robinson with the District Attorney's office worked on Petitioner's case. Investigator Robinson testified that he had worked on approximately 22 death penalty cases and, in Petitioner's case, trial counsel introduced the most evidence in an attempt to mitigate the crime. Further, Investigator Robinson had worked opposite Mr. Prince in four other death penalty cases and did not find Mr. Prince's demeanor any different in Petitioner's case. In fact, Deputy Robinson testified that Mr. Prince was more prepared in Petitioner's case than in other cases.

This assertion is supported by Mr. Bright's testimony that whenever he went and spoke to witnesses to prepare for Petitioner's trial, the defense team had "spoken to those witnesses before him." Mr. Bright testified that the defense team also found witnesses that Mr. Bright and his staff did not find.

The trial judge also testified in the state habeas proceeding that he was impressed with Mr. Prince's work and that Mr. Prince "took an approach in this case like some of the other defense attorneys in death penalty cases take, and some of the ones I think are real good. In fact, they never had anybody that got the death penalty." Following Petitioner's trial, Judge McConnell personally called Mr. Prince to request that he assist on another death penalty case.

Further, Chief Judge William A. Prior, Jr. testified that he was the presiding judge in another death penalty case in which Mr. Prince was lead counsel two months prior to his representation of Petitioner at trial. Judge Prior stated that Mr. Prince's "performance in that case was nothing short of superb, and he was able to secure for his client a sentence of life without parole." Judge Prior further testified because the case was so horrible many people "believed it miraculous that Andrew was able to persuade the jury not to sentence his client to death."

As set forth below, Georgia clearly does not ignore the diagnostic practices and definitions used by the medical and psychiatric community.

The state courts clearly did not rely on stereotypical or outdated ideas of what the intellectually disabled can do. Respondent has not reargued this evidence in full as it was extensively briefed in the pleadings during Petitioner's second state habeas proceeding and the appeal before this Court. However, as to Petitioner's arguments that there are "advancements" in society's understanding of intellectual

disability, Respondent quotes Justice Smith's **1989** dissent in Fleming v. Zant, 259 Ga. 687 (1989), which mirror's Petitioner's argument 25 years later:

> Today there may be a criminal defendant who has been tried, convicted, and sentenced to death for a heinous crime. He may fit within the "medically accepted" definition of mental retardation although he may have functioned in society and, in fact, may have been integrated into society to such an extent that no one considers him unable to act with the degree of blameworthiness associated with the death penalty. His mental retardation may not have prevented him from being able to appreciate the nature and quality or the wrongfulness of his conduct. This criminal defendant may have worked for a living and supported himself, may have a driver's license, may understand and obey the rules of the road, may have a family, may know the difference between right and wrong, may understand and obey the law generally, and may have planned and carried out a heinous crime that warrants the death penalty. That criminal defendant will not receive the death penalty if he can find "newly discovered" evidence that he is mentally retarded. His degree of mental retardation, blameworthiness, or involvement in the crimes will be of no significance; he will be relieved from the ultimate penalty based solely upon the expert's testimony that the defendant is mentally retarded.

Id. at 699. Thus, it is clear that these supposed "advancements" existed and were recognized in Georgia as early as 1989, 11years prior to Petitioner's first state habeas proceeding.

Further, although Petitioner repeatedly argues that because Georgia has a "rigid rule," certiorari review is warranted. He also repeatedly claims that he would not be sentenced to death in any other state because of Georgia's burden of proof. In making these arguments, Petitioner again chooses to ignore that Georgia's procedure for reviewing claims of intellectual disability is actually one

of the more defense oriented procedures in the country and the rules are far from "rigid." Identical tunnel-vision was noted by the Eleventh Circuit in Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011), wherein the Court held, "Hill focuses on Georgia's burden of proof procedure and ignores 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 [v. Wainwright], where the Supreme Court evaluated Florida's process as a whole." Hill v. Humphrey, 662 F.3d 1352.

For instance, a number of states require a determination by a judge and others by a jury. Georgia's procedures allow a defendant to choose whether to have his intellectual disability claim tried before a judge or a jury. O.C.G.A. § 17-7-131(j).

Various states allow only the trial court's experts to evaluate or an expert approved by both the defendant and the State. (See, e.g., Va. Code Ann. § 19.2-264.3:1.2 ("The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert."); Fla. Stat. § 921.137 ("the court shall appoint two experts in the field of intellectual disability who shall evaluate the defendant and report their findings to the court and all interested parties...."). Georgia's procedure allows the defendant or petitioner to

have an unlimited number of experts of his own choosing from anywhere in the world.

Additionally, under Georgia's procedure, the evidence a defendant or petitioner can present in support of his claim is almost completely unrestricted.

Significantly, under Georgia's procedure, if a judge or jury finds that the claim of intellectual disability has not been proven beyond a reasonable doubt in the guilt phase of trial, the defendant may still present his claim of intellectual disability in sentencing as mitigation evidence. See, e.g., Height v. State, 278 Ga. 592, 594, 604 S.E.2d 796, 798 (2004). Moreover, in Georgia, mitigating factors do not have to be found unanimously and the finding by any one juror that the defendant is undeserving of the death penalty, based on any mitigating factor (even in light of finding aggravating factors), prevents the imposition of a death sentence. King v. State, 273 Ga. 258, 277, 539 S.E.2d 783, 801 (2000). Accordingly, defendants get a second bite at the apple, with absolutely no standard of proof. If one juror finds that the defendant should not be sentenced to death based on his intellectual disability, even if not proven beyond a reasonable doubt or even preponderance of the evidence, the defendant is not sentenced to death.

Thus, the result of finding that a defendant is not intellectually disabled in the guilt phase of criminal trial is that the defendant will be tried and subjected to

the death penalty. A finding that Petitioner is not intellectually disabled does not mandate an imposition of the death penalty.

Another safeguard under Georgia's procedure, as noted by the Eleventh Circuit in Hill, is the defendant's right to not be tried while incompetent. Hill, 277 Ga. at 262, 587 S.E.2d at 622). In Georgia, prior to trial, a criminal defendant has a right to a separate competency trial to establish by preponderance of the evidence if he is indeed incompetent to proceed. While this procedure alone, which was noted as a protective procedure by the Georgia Supreme Court, may not prevent those defendants with mild intellectual disability from being sentenced to death, it combined with other capital procedural protections provide adequate safeguards for the criminal defendant as found by the court.

As found by the district court in Hill:

> The Georgia Supreme Court did not simply find that the procedure for demonstrating incompetency alone would protect the mentally retarded. It found that "the special risks and limitations" of the mentally retarded are "sufficiently counterbalanced by the **joint** safeguards of Georgia's procedure for demonstrating incompetency to stand trial under the preponderance of the evidence standard and mental retardation under the beyond a reasonable doubt standard." *Hill*, 277 Ga. at 262 (emphasis added).

Hill v. Hall, 2007 U.S. Dist. LEXIS 102841, at *24.

Further, the Eleventh Circuit in reviewing Georgia's procedure held:

> Georgia's process, when evaluated as a whole, contains substantial procedural protections.[n21] The Georgia statute allows a defendant to raise the issue of mental retardation in the guilt phase of his criminal

trial and permits a jury to find a defendant guilty but mentally retarded. O.C.G.A. § 17-7-131(c)(3). This has two significant advantages. The jury does not hear the criminal history that is allowed in the penalty phase, and it is not informed that a guilty but mentally retarded verdict will preclude the death penalty. []

> n21 If anything, Georgia's procedural protections go above and beyond the protections required by Ford. For starters, the plurality opinion in Ford made clear that it did not "suggest that only a full trial on the issue of sanity will suffice to protect the federal interests." Id. Here, Georgia provides for a full trial on the issue of mental retardation. Furthermore, Justice Powell's decision to join the four-vote plurality in Ford was based not on plucking out one piece of Florida's procedure, but rather on his assessment that, considered collectively, "the procedures followed by Florida in this case do not comport with basic fairness." Id. at 399, 106 S. Ct. at 2609 (emphasis added).

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

Hill v. Humphrey, 662 F.3d at1353.

Additionally, the Georgia Supreme Court did not hold in Hill that it would consider a challenge to Georgia's standard if the United States Supreme Court "issued a subsequent decision adding clarity to the issue" as alleged by Petitioner. (Petitioner's brief, pp. 9, 20 (citing Hill, 277 Ga. at 261)). What this Court held was as follows:

> As Hill concedes, no other state legislature has enacted that standard for retardation determinations in death penalty cases. However, since Atkins, one state court has relied, as this Court now does, on a statute which requires a standard higher than preponderance of the evidence. State v. Grell, 66 P3d 1234, 1240 (B) (2) (Ariz. 2003). Since the reasonable doubt standard is clearly constitutionally permissible for insanity determinations, and we have already applied Cooper and other federal authority to the choice of a standard of proof in mental retardation cases, and the General Assembly has selected the reasonable doubt standard, we believe that Cooper should not be extended to retardation decisions unless the Supreme Court of the United States **so requires** at some future date.

Head v. Hill, 277 Ga. at 261 (emphasis added).

III. REASONS FOR NOT GRANTING THE WRIT

A. THIS COURT SHOULD DENY CERTIORARI REVIEW OF THE STATE COURT'S ORDER DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF PROBABLE CAUSE TO APPEAL FROM THE PROPER DENIAL OF HIS SECOND STATE HABEAS CORPUS PETITION.

After filing a lengthy series of post-conviction proceedings in the state and federal courts, with his execution scheduled for December 9, 2014, Petitioner filed a successive state habeas corpus petition on November 20, 2014 again alleging that Georgia's statutory burden of proof as to claims of intellectual disability is unconstitutional. There is no new evidence or facts to be considered.

Georgia law provides that:

> Res judicata thus "prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action."

Odom v. Odom, 291 Ga. 811, 812 (1), 733 S.E.2d 741 (2012); see also Bruce v. State, 274 Ga. 432, 434 (2), 553 SE2d 808 (2001) ("Without a change in the facts or the law, a habeas court will not review an issue decided on direct appeal."); Hall v. Lance, 286 Ga. 365, 687 S.E.2d 809 (2010).

In denying relief on Petitioner's second state habeas petition, the state habeas court properly found that Petitioner had failed to submit any new evidence, present any new facts and that this Court's holding in Hall v. Florida, 136 S. Ct.

1986 (2014), did not implicate Georgia's burden of proof as to claims of intellectual disability. Thus, the state habeas court dismissed Petitioner's second state habeas petition as procedurally barred applying state law.

Similarly, the Georgia Supreme Court reviewed Petitioner's application for a certificate of probable cause to appeal the denial of his second state habeas petition and denied the application, clearly declining to address the "merits" of any of Petitioner's successive habeas claims and without relying on any federal constitutional principles. Therefore, the Georgia Supreme Court's decision also rests solely on adequate and independent state law grounds and presents no federal question for this Court's review.

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. See, e.g., Fox Film Corp. v. Miller, 296 U.S. 207, 210 (1935); Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945); Michigan v. Long, 463 U.S. 1032 (1983). Therefore, as the decisions of the state habeas court and the Georgia Supreme Court, which Petitioner is requesting that this Court review, clearly rest upon adequate and independent state law grounds, this Court should deny Petitioner's petition for writ of certiorari.

B. THIS COURT SHOULD DENY CERTIORARI REVIEW OF THE STATE COURT'S ORDER DENYING PETITIONER'S SECOND STATE HABEAS CORPUS PETITION.

Insofar at this Court finds that any of the state court's analysis of the evidence is a merits review of Petitioner's claim or that there is a federal constitutional claim presented, it is clear that the state habeas court's findings are in direct accordance with the precedent of this Court and do not warrant certiorari review.

Petitioner alleges that this Court should grant his petition for a writ of certiorari as Hall v. Florida, supra, is new law affecting his claims. Petitioner's entire brief is based on his own expansion of the actual holding in Hall v. Florida, 136 S. Ct. 1986 (2014); however, it is clear that Georgia's laws regarding intellectual disability is in direct accordance with Hall.

This Court's decision in Hall was limited to the very specific facts of Florida's interpretation of its **definition** of intellectual disability. This Court explicitly stated, "That strict IQ test score cutoff of 70 **is the issue**." Hall v. Florida, 134 S. Ct. at 1994 (emphasis added). This Court found Florida's interpretation of its definition of intellectual disabilities to be unconstitutional. Specifically, in reviewing Florida's interpretation of its definition of intellectual disability, the Court held:

> Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, **all further exploration of intellectual disability is foreclosed**. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

Hall v. Florida, 134 S. Ct. at 1990.

In granting certiorari review and relief, the Court held that the fact that scores are imprecise, (e.g. a standard error of measurement), has to be considered along with whether there are the requisite adaptive deficits. Id. at 2001. Those factors are clearly considered under Georgia law and were considered by the lower courts that previously reviewed and rejected Petitioner's claims.

Indeed, Georgia law **requires** the consideration prohibited by Florida law. Georgia law sets forth the following standards for determining intellectual disabilities in criminal proceedings:

> (i) significantly subaverage general intellectual functioning,
>
> (ii) resulting in or associated with impairments in adaptive behavior,
>
> and (iii) manifestation of this impairment during the developmental period. O.C.G.A. § 17-7-131(a)(3).
>
> "Significantly subaverage intellectual functioning" is generally defined as an IQ of 70 or below. DSM III, supra at 36. **However, an IQ test score of 70 or below is not conclusive. At best, an IQ score is only accurate within a range of several points, and for a variety of reasons, a particular score may be less accurate. Moreover, persons "with IQs somewhat lower than 70" are not diagnosed as**

> **being mentally retarded if there "are no significant deficits or impairment in adaptive functioning.**" DSM III, supra at 37.

Stripling v. State, 261 Ga. 1, 4, 401 S.E.2d 500, 504 (1991) (emphasis added). Accordingly, Georgia law is in direct accordance with Hall.

In Hall, the Court does list the states that could be affected by its ruling, Georgia is not cited "and the reason is obvious: [Georgia] has never adopted the bright-line cutoff at issue in Hall." Mays v. Stephens, 757 F.3d 211, 218 (5th Cir. 2014).

Petitioner further argues that Hall supports his argument that Georgia's beyond a reasonable doubt standard conflicts with Atkins. Unlike the "**issue**" in Hall, however, Georgia's burden of proof does not conflict with Atkins. In Atkins, this Court actually cited to definitions of intellectual disabilities that explicitly rejected a bright-line cut off in Florida's law. (See Atkins, 536 U.S. 305, n. 3). Accordingly, Florida law, as applied, actually conflicted with part of the holding in Atkins. As noted by the Eleventh Circuit Court of Appeals in denying Petitioner's application to file a successive federal habeas, "It is undisputed that Georgia's statutory definition of intellectual disability is consistent with the clinical definitions cited in Atkins. Compare O.C.G.A. § 17-7-131(a)(3), with Atkins, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3." Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011).

Atkins, however, says nothing about burdens of proof or what burden should be utilized and actually cites to Georgia's statute in its discussion. Atkins, 536 U.S. at 314, n.9. The **legal** question of the standard of proof was left to the states. Id. at 317 ("As was our approach in Ford v. Wainwright, with regard to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.' 477 U.S. 399, 405, 416-417, 91 L. Ed. 2d 335, 106 S. Ct. 2595 (1986)."). Georgia law does not conflict with Hall.

As Georgia's law regarding claims of intellectual disability are in direct accordance with this Court's precedent and does not conflict with any precedent o this Court, this Court should deny Petitioner's petition for a writ of certiorari.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari seeking review of the order of the Georgia Supreme Court denying Petitioner's request for certiorari review and deny Petitioner's motion for stay of his execution.

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I do hereby certify that I have this day served the within and foregoing response, prior to filing the same, by email addressed upon:

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This 9th of December, 2014.

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ATTACHMENT A

No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE HOLSEY,

Petitioner,

-v-

HILTON HALL, Warden
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

In 1988 after the execution of a mentally retarded man, Georgia became the vanguard of the movement to protect mentally retarded offenders passing legislation precluding their execution. O.C.G.A. § 17-7-131. In Atkins v. Virginia, 122 S.Ct. 2242, 2252 (2002), this Court, noting Georgia's lead, declared that the Eighth Amendment categorically prohibits the execution of mentally retarded offenders because they inherently lack the requisite moral culpability to make them eligible for the death penalty. Georgia, once the leader, now stands alone as the sole jurisdiction requiring proof of mental retardation beyond a reasonable doubt.

1. Does Georgia's beyond a reasonable doubt standard of proof for establishing mental retardation violate the Eighth Amendment, and this Court's Atkin's mandate prohibiting the execution of the mentally retarded?

2. Does Georgia's statutory scheme for determining mental retardation unconstitutionally allocate the risk of wrongful execution on those defendants, like Mr. Holsey, who suffer from significant subaverage intellectual functioning?

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No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE HOLSEY,

Petitioner,

v

HILTON HALL, Warden
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

Petitioner, Robert Wayne Holsey, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Georgia Supreme Court, entered in the above case on February 26, 2007.

OPINIONS BELOW

The decision of the Georgia Supreme Court, entered February 26, 2007, reversing the state habeas court's grant of sentencing phase relief and affirming the denial of conviction phase relief, is reported as Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007). The Georgia Supreme Court's decision is attached hereto as Appendix A. The underlying state habeas court order vacating Mr. Holsey's death sentence is unreported and attached hereto as Appendix B.

JURISDICTION

The judgment of the Georgia Supreme Court reinstating Petitioner's death sentence was entered on February 26, 2007. See Appendix A. A timely-filed petition for rehearing was denied on March 27, 2007. On June 19, 2007, Justice Thomas granted Petitioner's motion for extension of time to file this Petition to and including August 24, 2007. See Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, as Petitioner is asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Eighth and Fourteenth Amendments to the United States Constitution. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. Amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. Amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

O.C.G.A. § 17-7-131:

(a)(3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period.

(c)(3) The defendant may be found "guilty but mentally retarded" 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 mentally retarded.

(j) In the trial of any case in which the death penalty is sought [...] should [...] the jury or court find in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life.

PROCEEDINGS BELOW

Mr. Holsey was convicted of murder and related charged on February 11, 1997 and sentenced to death on February 13, 1997 in the Superior Court of Morgan County. On direct appeal, the Georgia Supreme Court affirmed his conviction and sentence. Holsey v. State, 271 Ga. 856, 524 S.E.2d 473 (1999). A timely filed motion for reconsideration was denied on December 20, 1999. Mr. Holsey's Petition for Writ of Certiorari in the United States Supreme Court was denied on June 19, 2000. A timely filed motion for rehearing was denied on August 28, 2000.

On October 6, 2000, Mr. Holsey filed a Petition for a Writ of Habeas Corpus in Butts County Superior Court. An amended petition was filed, and after hearing and submission of post hearing briefs, the state habeas court denied the writ as to Mr. Holsey's conviction but granted the writ as to sentence on May 15, 2006. The Georgia Supreme Court affirmed the lower court's denial of conviction phase relief, reversed the lower court's grant of sentencing phase relief and reinstated Petitioner's death sentence on February 26, 2007. A timely filed motion for reconsideration was denied by the Georgia Supreme Court on March 27, 2007. Petitioner sought an extension of time to file for Writ of Certiorari to appeal the final judgment of the Georgia Supreme Court from June 25, 2007 to and including August 24, 2007, which was granted. See Appendix C. This petition follows.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Throughout state habeas proceedings, Mr. Holsey raised the claim that he suffers from mental retardation and that his execution would violate the Eighth and Fourteenth Amendments in light of this Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002). After a hearing and briefing, the state habeas court found that Mr. Holsey had failed to prove "beyond a reasonable

doubt" that he suffers from mental retardation. Appendix B, at 74. Although Petitioner presented expert testimony that "might arguably support the conclusion that Mr. Holsey meets the criteria of the statute establishing a level of mental retardation, evidence refuting this claim was offered by the Respondent." Id. Accordingly, when declining to find Mr. Holsey had met his burden of proof, the state habeas court concluded that "[h]ad the jury been presented with the evidence heard by this Court at the habeas hearing, a jury verdict would have been authorized to find Mr. Holsey mentally retarded or not." Id. The state habeas court, however, did find that Mr. Holsey's trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984) for failing investigate, prepare, and present evidence that Mr. Holsey suffers from mental retardation. Id.

On appeal to the Georgia Supreme Court, Petitioner claimed that the state habeas court erred when it failed to find that Petitioner had proven beyond a reasonable doubt that he suffers from mental retardation. Further, Petitioner challenged the constitutionality of the "beyond a reasonable doubt" standard as an inappropriate measure for proving a mental disability especially where, as in Mr. Holsey's case, Petitioner's and Respondent's experts agreed that Mr. Holsey had met two of the three prongs statutorily required to demonstrate mental retardation, including that Mr. Holsey suffers from significant subaverage intellectual functioning.

The Georgia Supreme Court found that the habeas court was "correct in applying the 'beyond a reasonable doubt' standard to Holsey's [mental retardation] claim." Appendix A, at 16. The court then concluded that Mr. Holsey had not met this standard of proof in showing he suffers from mental retardation. *Id.*

REASONS WHY THE PETITION SHOULD BE GRANTED

Georgia is the only state in the United States that imposes the "beyond a reasonable doubt" standard on an accused who raises mental retardation. As such, Georgia has burdened the Constitutional prohibition against executing a mentally retarded capital defendant with the most stringent standard of proof in the criminal justice system. The consequences of an erroneous rejection of a capital defendant's claim of mental retardation are extreme and irredeemable.

Although there is a federal ban on executing those who suffer from mental retardation, Georgia nonetheless does not prohibit the execution of mentally retarded people. Pursuant to Georgia's statute, the State may execute those who are probably mentally retarded, more likely than not mentally retarded, and even those who are almost certainly mentally retarded. Only those who can prove "beyond a reasonable doubt" – a standard that does not exist in mental heath diagnoses – successfully avoid execution.

It is most commonly those who suffer from mild mental retardation who are in the position of proving they suffer from mental retardation. As a result, Georgia's statute places the most frequent mentally retarded defendant in the greatest risk of erroneous execution. As shown in Mr. Holsey's case, those with mild mental retardation are most apt to be considered not mentally retarded *enough* to satisfy Georgia's burden. Requiring a capital defendant to prove mental retardation "beyond a reasonable doubt" violates the Eighth Amendment and Atkins.

ARGUMENT

[1] GEORGIA'S BEYOND A REASONABLE DOUBT STANDARD OF PROOF FOR ESTABLISHING MENTAL RETARDATION VIOLATES THE EIGHTH AMENDMENT, AND THIS COURT'S ATKIN'S MANDATE PROHIBITING THE EXECUTION OF THE MENTALLY RETARDED.

The right of mentally retarded offenders not to be executed is a fundamental right guaranteed under the Eighth Amendment to the United States Constitution. Atkins v. Virginia, 122 S.Ct. 2242, 2252 (2002). The Eighth Amendment categorically prohibits the execution of mentally retarded offenders because they inherently lack the requisite moral culpability to make them eligible for the death penalty. Id. at 2251-52.[1] Additionally, mentally retarded offenders must be categorically protected because the very characteristics of mental retardation inherently "undermine the strength of procedural protections that our capital jurisprudence steadfastly guards" and therefore put them at an "[enhanced risk] 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Id. at 2250, 2251 (quoting Lockett v. Ohio, 98 S.Ct. 2954, 2965 (1978)).[2]

In Holsey, the Georgia Supreme Court relied on its earlier decision in Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003) when finding the lower court's application of the "beyond a

[1] The Court based its holding in Atkins on the "widespread judgment about the relative culpability of mentally retarded offenders," 122 S.Ct. at 2250, and decades of jurisprudence about the fundamental requirement that death be imposed only on those offenders who are sufficiently morally culpable: "[P]ursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." Atkins, 122 S.Ct. at 2251.

[2] The Court held that mentally retarded offenders are at "special risk of wrongful execution," despite their inherently reduced culpability, because the very characteristics of the syndrome may mislead fact-finders into believing that a mentally retarded offender is not mentally retarded or that mental retardation is an aggravating factor at sentencing: "Mentally retarded persons *frequently know the difference between right and wrong and are competent to stand trial.* Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others..... [and] also ... the lesser ability ... to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." Atkins, 122 S.Ct. at 2250, 2252 (emphasis supplied).

reasonable doubt" standard to be correct. See Appendix A, at 16. The Georgia Supreme Court had determined in Hill that the execution of Mr. Hill was constitutional even where the lower court had found the petitioner was more likely than not mentally retarded. Such a result flies in the face of the holding of Atkins, as well as long-standing Supreme Court precedent which mandates heightened protections against the risk of executing those who do not possess the requisite moral culpability to be subject to the death penalty. See, e.g., Gregg v. Georgia, 96 S.Ct. 2909 (1976); Woodson v. North Carolina, 96 S.Ct. 2978 (1976); Lockett v. Ohio, 98 S.Ct. 2954 (1978); Godfrey v. Georgia, 100 S.Ct. 1759 (1980); Enmund v. Florida, 102 S.Ct. 3368 (1982); Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (rev'd on other grounds, Atkins v. Virginia, supra). In its opinion in Hill, relied upon in Holsey, the Georgia Supreme Court failed to recognize that Atkins v. Virginia "impose[s] a new obligation on the States"[3] by guaranteeing mentally retarded offenders the protection of the Eighth Amendment.

[A] In its 1997 decision in Mosher v. State, 268 Ga. 555, 491 S.E.2d 348 (1997), the Georgia Supreme Court correctly relied on Leland v. Oregon, 72 S.Ct. 1002 (1952) and Patterson v. New York, 97 S.Ct. 2319 (1977)

In Head v. Hill, the Georgia Supreme Court cited and reaffirmed its pre-Atkins v. Virginia opinion in Mosher v. State, 268 Ga. 555, 491 S.E.2d 348 (1997), wherein the court affirmed the reasonable doubt standard for mental retardation claims. Head v. Hill, 587 S.E.2d at 621. In Mosher, the Court relied on Leland v. Oregon, 72 S.Ct. 1002 (1952) and Patterson v. New York, 97 S.Ct. 2319 (1977) to hold that Georgia is permitted to require defendants to prove

[3] Penry v. Lynaugh, 109 S.Ct. 2934, 2952 (1989) (holding that were the Court to find an Eighth Amendment exemption for mentally retarded offenders, such a rule would "break new ground" and therefore apply to defendants on collateral review) (quoting Ford v. Wainwright, 106 S.Ct. 2595, 2602 (1986)).

mental retardation beyond a reasonable doubt in order to invoke Georgia's prohibition against executing such offenders. Mosher, 491 S.E.2d at 352-53.

At the time, Mosher accurately reflected the Constitutional legal landscape. The Georgia Supreme Court reasoned in Mosher -- correctly -- that Georgia's statute establishing the reasonable doubt standard for mental retardation was like the Oregon and New York statutes at issue in Leland and Patterson, which placed the burden on the defendant to prove affirmative defenses of insanity[4] and extreme emotional disturbance. Mosher, 491 S.E.2d at 352-53. The Georgia Supreme Court noted that in those cases, the U.S. Supreme Court "acknowledged that it is normally 'within the power of the State to regulate procedures under which its laws are carried out.'" Id. at 352 (quoting Patterson, 97 S.Ct. at 2322).

In upholding the reasonable doubt standard for mental retardation in Mosher, the Georgia Supreme Court also explicitly relied on the U.S. Supreme Court's rejection of the argument that the Eighth Amendment categorically prohibits the execution of mentally retarded offenders. Mosher, 491 S.E.2d at 352 n.3 (citing Penry v. Lynaugh, 109 S.Ct. 2934 (1989)). Since the exemption from execution based on mental retardation was at that time only a creature of state law, the Georgia Supreme Court correctly inferred from Leland and Patterson that the federal Constitution did not prohibit the Georgia legislature from imposing the reasonable doubt standard on offenders seeking to invoke the state law exemption. Mosher, 491 S.E.2d at 352-53. The Court also correctly distinguished the state law-created "procedural burden implicated in the present case" from the "fundamental right [not to stand trial while incompetent] implicated in Cooper [v. Oklahoma]" in finding no Due Process violation. Mosher, 491 S.E.2d at 353.

[4] Leland upheld an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt. Leland, 72 S.Ct. at 1004.

The Georgia Supreme Court's ruling in Mosher was appropriate in 1997, given the U.S. Supreme Court's holding in Penry and the lack of a national consensus on the execution of mentally retarded offenders. However, the Georgia Supreme Court's 2003 ruling in Head v. Hill failed to acknowledge the clear ramifications of the "new obligation [imposed] on the States"[5] by the U.S. Supreme Court's landmark holding in Atkins v. Virginia and the national consensus against executing the mentally retarded on which the Court based its ruling. Instead, in Hill, the Georgia Supreme Court relied upon Leland and Mosher and "again f[ound] the comparison between claims of insanity and mental retardation to warrant a conclusion that the beyond a reasonable doubt standard may be applied constitutionally to mental retardation claims." Head v. Hill, 587 S.E.2d at 621. However, because the statutorily created defense of insanity is no longer analogous to the Eighth Amendment prohibition on the execution of mentally retarded offenders established under Atkins v. Virginia, the holding of Mosher is no longer valid and its reasoning, as adopted by the Georgia Supreme Court in Head v. Hill, violates the Eight Amendment.

[B] After Atkins, the analogy of the state-law defense of insanity to the ban on executing the mentally retarded is constitutionally infirm

United States Supreme Court precedent clearly sets forth the fundamental principle that when a Constitutional right is at issue, the more deferential analysis of state procedures enacted to enforce state-created rights or defenses is inappropriate. For example, prior to the application of the Eighth Amendment to the states, the "sole question" for the U.S. Supreme Court in evaluating Georgia's procedures for determining whether a death-sentenced prisoner was insane so as to avoid execution was "whether Georgia's procedure for ascertaining sanity adequately

[5] Penry, 109 S.Ct. at 2952

effectuated that State's own policy of sparing the insane from execution." Ford v. Wainwright, 106 S.Ct. 2595, 2599 (1986) (citing Solesbee v. Balkcom, 70 S.Ct. 457 (1950)).[6] However, "[n]ow that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion." Ford, 106 S.Ct. at 2599. Similarly, the question of executing the mentally retarded now "takes on a wholly different complexion" and demands scrutiny commensurate with the Constitutional dimension of that right. The dissenting Justices in Head v. Hill agreed:

> [Now that the exemption for mentally retarded offenders is a fundamental right grounded in the Eighth Amendment], it follows that the state's power to establish the procedures necessary to enforce the federal constitutional ban on executing the mentally retarded is not left to the state's wholesale discretion, but rather must conform to the United States Constitution's guarantee of procedural due process.

Hill, 587 S.E.2d at 628 (Sears, J., dissenting).

This fundamental analytical distinction between state law rights and Federal Constitutional rights has been clearly set out in U.S. Supreme Court precedent for the last half-century. For example, as in Solesbee, the Supreme Court in Leland v. Oregon rejected the defendant's argument that the Constitution demanded that the State bear the burden of proving he was *not* insane at the time of the crime. Leland invoked the Supreme Court's ruling in Davis v. United States, 16 S.Ct. 353 (1895), where the Court held that the federal government bore the burden of proving sanity, in order to argue that the Oregon insanity statute violated Due Process. Leland, 72 S.Ct. at 1006-07. However, the Court found that Davis "obviously establish(ed) no constitutional doctrine," 72 S.Ct. at 1007, and refused to strike down the Oregon insanity statute

[6] Under Georgia law, the burden is on the prisoner to prove by a preponderance of the evidence that he is incompetent to be executed. O.C.G.A. § 17-10-68(e).

because this was *not* a case "in which it is sought to enforce against the states a right which we have held to be secured to defendants ... by the Bill of Rights." Id. Thus, the decision in Leland is based on the fact that there is no constitutional right to the defense of insanity-at-the-time-of-the-crime. Under these circumstances, the states are free to impose even a very heavy burden of proof on a defendant seeking to invoke that defense unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Leland, 72 S.Ct. at 1007.

The Leland Court's finding that the insanity defense was not a right secured by the Bill of Rights, and that therefore the States have wide latitude to tinker with the procedures for administering the defense, has been reiterated by the Court over the last half-century. In Patterson v. New York, 97 S.Ct. 2319 (1977), which approved New York's placing the burden of proving the defense of "extreme emotional disturbance" on the defendant, the Court reaffirmed that the basis of the Court's ruling in Leland was the fact that there is no Constitutional right to the defense of insanity. Patterson, 97 S.Ct. at 2323-24.

In McKoy v. North Carolina, 110 S.Ct. 1227 (1990), the Supreme Court revisited Patterson when it rejected North Carolina's argument that it should be permitted to enforce a unanimity requirement on jury findings of mitigating circumstances by "characterizing [the requirement] as a standard of proof intended to ensure the reliability of mitigating evidence." McKoy, 110 S.Ct. at 1233. As the Court pointed out, Patterson was based on the fact that "a State is not constitutionally required to provide that affirmative defense [of emotional disturbance].... Patterson, however, *did not involve the validity of a capital sentencing procedure under the Eighth Amendment.*" Id. (emphasis supplied).

More recently, in Dixon v. U.S., 126 S.Ct. 2437 (2006), the Court revisited Leland, explaining that because the aforementioned Davis rule imposing the burden of proving insanity on the government "was not constitutionally mandated," but involved a defense which was "solely [a] creature[] of statute," the Leland decision properly left the Oregon statute intact. Dixon, 126 S.Ct. at 2444-45. In the same term, in Clark v. Arizona, 126 S.Ct. 2709 (2006), where the defendant sought to challenge Arizona's restrictive definition of insanity on Due Process grounds, the Court held that Arizona was free to alter the definition as it saw fit, noting that the Court had "never held that the Constitution mandates an insanity defense." Clark, 126 S.Ct. at 2721 n.20.

In its cases dealing with state procedures for determining competency to stand trial, the Court has clearly emphasized the difference between state-law defenses and rights secured under the federal Constitution. In Medina v. California, 112 S.Ct. 2572 (1992), a case which approved imposing on the defendant the burden of proving incompetence by a preponderance of the evidence, the Court explicitly rejected California's argument that Leland v. Oregon mandated giving states a free hand in determining procedures for determining competency to stand trial, noting "significant differences between a claim of incompetence and a plea of not guilty by reason of insanity." Medina, 112 S.Ct. at 2579. The critical difference identified by the Court is that although a defendant has a Constitutional right not to be tried while incompetent, lest his Sixth Amendment right to a fair trial be abrogated, the Court "ha[s] not said that the Constitution requires States to recognize the insanity defense." Id.

In Cooper v. Oklahoma, 116 S.Ct. 1373 (1996), the Court again rejected the government's argument under Patterson (and effectively, Leland as well) that because states maintain wide latitude to regulate procedural burdens, Oklahoma should be permitted to impose

on defendants the burden of proving incompetence to stand trial by clear and convincing evidence. Cooper, 116 S.Ct. at 1383. The Court specifically distinguished the nature of the rights at issue in either case:

> Unlike Patterson, which concerned procedures for proving a statutory defense, *we consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right.*

Id. at 1383 (emphasis supplied).

Despite the fundamental analytic distinction which the U.S. Supreme Court has repeatedly drawn between state-law created defenses and Constitutional rights, the Georgia Supreme Court in Head v. Hill retreated to the pre-Atkins reasoning of its decision in Mosher and "again f[ou]nd the comparison between claims of insanity and of mental retardation to warrant a conclusion that the beyond a reasonable doubt standard may be applied constitutionally to mental retardation claims." Hill, 587 S.E.2d at 621.[7] However, clearly established Federal law mandated that the Georgia Supreme Court do exactly the opposite of what it did in Hill.

The Georgia Supreme Court's erroneous reliance on pre-Atkins jurisprudence caused it to make two related and fundamental errors in its analysis of the reasonable doubt standard of proof. First, as described above, the Court improperly *equated* a Constitutional claim of mental retardation with the state-law defense of insanity. Hill, 587 S.E.2d at 621. By the same token, the Court improperly *distinguished* the Constitutional right not to stand trial while incompetent from the Constitutional right not to be executed if mentally retarded: "[A]s expressed in Mosher ... we again distinguish the fundamental right not to stand trial implicated in Cooper v. Oklahoma

[7] The Georgia Supreme Court thus insisted on the correctness of its 1997 decision in Mosher v. State despite the fact that Mosher in turn relied on Penry v. Lynaugh, now overturned by Atkins v. Virginia.

[citation omitted] from the procedural burden of proving mental retardation." Id. The Court then held that because of this distinction between "right" and "burden," it would hold to its pre-Atkins precedent, which "repeatedly rejected the application of Cooper's preponderance of the evidence standard to cases involving retardation." Id. The court went so far as to hold that "Cooper should not be extended to retardation decisions." Id. at 622. However, as we have seen, the underlying distinction the Court draws between "right" and "burden" is manifestly false, as well as contrary to Cooper and related precedent.

In Cooper, the Supreme Court compared its decision to overturn Oklahoma's clear and convincing standard for incompetence in criminal cases with its decision in Addington v. Texas, 99 S.Ct. 1804 (1979) to *impose* that standard on the state in civil commitment proceedings, stating the underlying principle as follows:

> Both cases *concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual.* The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent.

Cooper, 116 S.Ct. at 1384 (first set of italics supplied). Very simply, what the Georgia Supreme Court failed to recognize is that, for Due Process purposes, the right at issue in Mr. Hill's case is fundamentally similar to the right at issue in Cooper.

Because the right not to be executed due to mental retardation so clearly resembles the right at issue in Cooper, "the necessity to apply the [principles of Cooper v. Oklahoma is] beyond doubt." Yarborough, 124 S.Ct. at 2151.[8] Both cases involve rights secured by the Bill of

[8] See Murphy v. State, 54 P.3d 556, 573 (Okla. Cr. 2002) (finding that defendants must prove mental retardation by a preponderance of the evidence) ("[The clear and convincing]

Rights and the Fourteenth Amendment. The right not to stand trial while incompetent protects a defendant's Sixth Amendment right to a fair trial, while the Eighth Amendment protects from execution a class of defendants who are inherently insufficiently morally culpable so as to be deserving of the death penalty. It is clear that "[b]oth cases concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual." Cooper, 116 S.Ct. at 1384.

In Cooper, the Court explained that one of the characteristics that indicated the importance of the right not to be tried while incompetent was that it "merit[s] protection even if the defendant has failed to make a timely request for a competency determination." Cooper, 116 S.Ct. at 1377 n.4. Similarly, the ban on execution of mentally retarded offenders is so fundamental that it is retroactive to cases on collateral review. See Penry v. Lynaugh, 109 S.Ct. at 2953 (holding that a categorical prohibition would be retroactive).

Additionally, in Georgia, if a defendant failed to raise mental retardation prior to the enactment of Georgia's statute prohibiting the execution of retarded offenders, but raises in post-conviction proceedings, his case must be remanded for a mandatory, non-waivable jury trial on the retardation question, to be determined by a preponderance of the evidence. See Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989); Rogers v. State, 276 Ga. 67, 575 S.E.2d 879 (2003). If the defendant failed to raise a claim of mental retardation at trial *after* enactment of the

standard was found unconstitutional in the competency context, which offers *disturbing parallels* to [the mental retardation] situation. [Citing Cooper]. The majority prudently uses the "preponderance" standard [for mental retardation determinations]. This is particularly appropriate given Cooper, and the practice of the majority of states which have chosen preponderance as the proper standard in the mental retardation context.") (Chapel, J., concurring) (emphasis supplied).

Georgia statute, he may raise it in post-conviction proceedings, wherein the habeas court determines the issue using the trial-level reasonable doubt standard. See Turpin v. Hill, 269 Ga. 302, 498 S.E.2d 52 (1998). As former Georgia Supreme Court Justice Smith exclaimed in his dissent in Fleming, the Court has "declared that *all* mentally retarded criminal defendants, past, present, and future, are relieved from the death penalty under the Georgia Constitution." Fleming, 386 S.E.2d at 345. Thus, both the right not to be tried while incompetent and the right not to be executed if mentally retarded are obviously similar in their importance.

The Supreme Court in Cooper also pointed out that "the consequences of an erroneous determination of competence [to stand trial] are dire." Cooper, 116 S.Ct. at 1381. By contrast, the "injury to the State of the opposite error ... is modest" in that "the error is subject to correction in a subsequent proceeding." Id.

By comparison, the consequences of an erroneous determination that a defendant is not mentally retarded are "obvious[ly] ... extreme and irredeemable." Head v. Hill, 587 S.E.2d at 629 (Sears, J., dissenting). Meanwhile, the injury to the State of an erroneous determination that the defendant is mentally retarded is even more "modest." In the competency context, a finding of incompetence means that the defendant "go[es] unwhipped of justice," at least temporarily. Cooper, 116 S.Ct. at 1383; but a finding of mental retardation means the defendant goes to prison for life – he does *not* go "unwhipped of justice."

Thus, pursuant to Atkins, Cooper and the related precedent discussed above, the Georgia Supreme Court in Head v. Hill should have *distinguished* the state-law defense of insanity from the Constitutional exemption of mentally retarded offenders from execution, and *analogized* the right not to be tried while incompetent to the right of the mentally retarded not to be executed.

[C] The Finding That Georgia May Limit the Eighth Amendment Exemption to Offenders Who Are Mentally Retarded "Enough" to

Prove it Beyond a Reasonable Doubt is Manifestly Contrary to and/or Involves Unreasonable Applications of the Holdings of Atkins, Cooper, Addington and Related Precedent.

In Head v. Hill, relied upon in Holsey, the Georgia Supreme Court found that

> a higher standard of proof serves to enforce the General Assembly's chosen definition of what degree of impairment qualifies as mentally retarded under Georgia law for the purpose of fixing the appropriate criminal penalty that persons of varying mental impairment should bear for their capital crimes, in light of their individual "diminish[ed] ... personal culpabilit[ies]" and the varying degrees of deterrence possible. [Citing Atkins].

Head v. Hill, 587 S.E.2d at 622. The Court explained further that because of a "lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences," Georgia law appropriately "*limits the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.*" Id. (emphasis supplied).

This formulation of the function of the reasonable doubt standard fundamentally misapprehends the function of a high standard of proof, viewing it as "decreas[ing] the risk of error" whereas it actually only "reallocates that risk between the parties." Cooper v. Oklahoma, 116 S.Ct. 1373, 1383 (1996). Under the Court's ruling, Georgia law prohibits the execution of only those offenders who evidence a severe enough "degree" of mental retardation that it meets the highest standard of proof in the law. This conception of the reasonable doubt standard, by its very terms, ensures that cases "will arise ... in which it is more likely than not that the defendant is [mentally retarded] but the evidence is insufficiently strong to satisfy a [reasonable doubt] standard." Id. The reasonable doubt standard thus ensures that the categorical prohibition on the

execution of *all* mentally retarded offenders, *regardless of degree of severity,*[9] is effectively inoperative.

Additionally, whether an offender is mentally retarded "enough" seems to hinge at least in part on an unguided and undefined assessment of the offender's individual level of personal culpability and "the varying degrees of deterrence possible" in light of his particular capital crime. Hill, 587 S.E.2d at 622. In all, the Court's effective limiting of the Eighth Amendment exemption to severely retarded offenders and its injection of arbitrary and capricious criteria into the determination of mental retardation nullifies both Georgia and Federal categorical prohibitions on the execution of mentally retarded offenders, regardless of severity and regardless of the crime.

Furthermore, the basis of this reformulation of the reasonable doubt standard, so as to limit the Eighth Amendment exemption to offenders who are mentally retarded "enough" to prove it beyond a reasonable doubt, is based on a fundamental misreading of Atkins. To the extent the Georgia Supreme Court based its decision on a presumed "lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences" (Hill, 578 S.E.2d at 622), that finding directly contravenes the holding of Atkins in that the Court *did* find a national consensus that all mentally retarded offenders should be exempt from execution.

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[9] See Stripling v. State, 261 Ga. 1, 401 S.E.2d 500, 504 (1991) (stating that Georgia's statutory definition of mental retardation is consistent with AAMR and DSM criteria defining retardation along a spectrum from mild to severe or profound); Atkins, 122 S.Ct. at 2245, 2250, n.3, n.22 (finding that the "range of mentally retarded offenders about whom there is a national consensus" conforms generally to the AAMR and DSM definitions); see also Atkins, 122 S.Ct. at 2261 (Scalia, J., dissenting) (objecting to the majority's finding that *all* mentally retarded offenders, including those with mild mental retardation, are protected under the Eighth Amendment).

1. The Georgia Supreme improperly relies on the reasonable doubt standard to reduce the risk of error in the determination of mental retardation.

In justifying the reasonable doubt standard as it does, the Georgia Supreme Court in Head v. Hill relied on the same argument that Oklahoma relied on in Cooper v. Oklahoma to defend its imposition of the clear and convincing standard on defendants seeking to prove incompetence. The Oklahoma Court of Criminal Appeals had reasoned that the clear and convincing standard was appropriate and not unduly burdensome to defendants because "'a truly incompetent criminal defendant, through his attorneys and experts, can prove incompetence with relative ease.'" Cooper, 116 S.Ct. at 1376 (quoting Cooper v. State, 889 P.2d 293, 303 (Okla. Cr. 1995)). The Oklahoma court believed that the inexactness and uncertainty surrounding a competency determination, as well as the need to filter out malingering defendants, was worth imposing the higher standard. Id., 116 S.Ct. at 1382. Similarly, the Georgia Supreme Court has reasoned that the reasonable doubt standard ensures that only those offenders who are "truly" mentally retarded (mentally retarded "enough") to be able to prove their retardation beyond a reasonable doubt will properly claim the Eighth Amendment exemption. Head v. Hill, 587 S.E.2d at 622.

In Cooper, the Supreme Court rejected this rationale as mistaken reliance on a higher standard of proof to improve the reliability of the determination itself. The Court explained: "A heightened standard does not decrease the risk of error, but simply reallocates that risk between the parties." Cooper, 116 S.Ct. at 1383. Furthermore, "the 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'" Id. at 1381 (quoting Cruzan v. Director, Mo. Dept. of Health, 110 S.Ct. 2841, 2853-54 (1990)). Thus, Oklahoma's clear and convincing standard did not make it more likely that "truly incompetent" defendants would be properly identified. Instead, it "allocat[ed] to the criminal defendant the

large share of the risk which accompanies a clear and convincing standard." Cooper, 116 S.Ct. at 1383.

Thus, the Georgia Supreme Court's justification for the reasonable doubt standard -- like Oklahoma's rationale for its clear and convincing standard -- rests on a fundamental misapprehension of the function of the standard of proof. The reasonable doubt standard is not a mechanism which can ensure that only defendants who are impaired "enough" will be exempt from execution. Rather, it shifts *almost the entire risk* of an erroneous decision onto the defendant. This misapprehension of the function of the standard of proof is itself contrary to clearly established principles as set forth in Cooper and precedent cited therein.

2. **Clearly established Federal law mandates that where "the State proposes to take drastic action against an individual," the individual must not bear a disproportionate risk of an erroneous determination.**

The problem with allocating the large share of the risk to the defendant in a procedure ostensibly meant to protect a Constitutional right like the right not to stand trial while incompetent is that:

> questions of competence will arise in a range of cases including not only those in which one side will prevail with relative ease, but also those in which it is more likely than not that the defendant is incompetent but the evidence is insufficiently strong to satisfy a clear and convincing standard.

Cooper, 116 S.Ct. at 1383. The Court characterized the clear and convincing standard of proof as posing a "significant risk" to the defendant:

> Far from "jealously guard[ing]," [citation omitted], an incompetent criminal defendant's fundamental right not to stand trial, Oklahoma's practice of requiring the defendant to prove incompetence by clear and convincing evidence imposes a significant risk of an erroneous determination that the defendant is competent.

Id. at 1381. The Supreme Court held that this is a Constitutionally intolerable result.

Even in civil proceedings such as the termination of parental rights and involuntary civil commitment,[10] the Cooper Court noted, "due process places a heightened burden of proof on the State ... in which the 'individual interests at stake ... are both "particularly important" and "more substantial than mere loss of money."'" Cooper, 116 S.Ct. at 1381 (citations omitted). In Addington v. Texas, a case involving the "fundamental interest in liberty,"[11] the Court stated very clearly that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 99 S.Ct. at 1810. Comparing its decision to overturn Oklahoma's clear and convincing standard for incompetence in criminal cases with its decision to *impose* that standard on the state in civil commitment proceedings (Addington v. Texas), the Cooper Court stated the underlying principle as follows:

> *Both cases concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual.* The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual's fundamental interest in liberty. The *prohibition* against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent. Because Oklahoma's procedural rule allows the State to put to trial a defendant who is more likely than not incompetent, the rule is incompatible with the dictates of due process.

Cooper, 116 S.Ct. at 1384 (first set of italics supplied).

Under the principles clearly established in Cooper and related precedent, the reasonable doubt standard unconstitutionally allocates far too much risk of an erroneous determination that a capital defendant is *not* mentally retarded. Whereas the reasonable doubt standard "applied in

[10] See Santosky v. Kramer, 102 S.Ct. 1388 (1982); Addington v. Texas, 99 S.Ct. 1804 (1979).

[11] Cooper, 116 S.Ct. at 1383

criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free," Addington, 99 S.Ct. at 1810, when that standard is applied to the mental retardation context, it minimizes the risk of error to the State even at the risk that a mentally retarded offender will be executed. This is Constitutionally intolerable.

a. The U.S. Supreme Court has found that psychiatric diagnoses are virtually impossible to prove beyond a reasonable doubt.

The Georgia Supreme Court's insistence that the reasonable doubt standard is a permissible measure to ensure that those who suffer from mental retardation are not executed is objectively unreasonable in light of U.S. Supreme Court precedent.

In Addington v. Texas, 99 S.Ct. 1804 (1979), the Court found that the reasonable doubt standard was virtually insurmountable where psychiatric determinations are at issue. In the context of involuntary civil commitment, the Court found that "the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment." Addington, 99 S.Ct. at 1812-13. The Court offered a lengthy explanation for its rejection of the reasonable doubt standard, expounding on the critical distinction between the function of that standard in straightforward factual determinations, as in criminal cases, and in the psychiatric context:

> In [criminal] cases the basic issue is a straightforward factual question--did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry.

Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.

Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.

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The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient.

Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror--or indeed even a trained judge--who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care.

Addington, 99 S.Ct. at 1811

b. The Georgia Supreme Court contravenes clearly established Federal law by burdening a class of offenders already at "special risk of wrongful execution" with the most stringent standard of proof in our system of laws.

First, compelling an offender asserting a Constitutional right "to bear an enormous risk of erroneous decisions"[12] is, in itself, clearly violative of fundamental principles of Constitutional law as articulated in Cooper and related precedent. But to impose this risk on *mentally retarded* offenders is violative of the fundamental principle of Atkins as well, which is that mentally

[12] Head v. Hill, 587 S.E.2d at 629 (Sears, J., dissenting).

retarded offenders are uniquely vulnerable to "false negative" determinations and wrongful execution as a result. Justice Sears of the Georgia Supreme Court explained in her dissent in Head v. Hill:

> That risk [imposed by the reasonable doubt standard] is compounded by the diminished capacity of mentally retarded offenders, who are more prone than others to make false confessions, and who also exhibit "a lesser ability ... to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors ....may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and [whose] demeanor may create an unwarranted impression of lack of remorse for their crimes.... **Mentally retarded defendants in the aggregate face a special risk of wrongful execution.**"

Head v. Hill, 587 S.E.2d at 629 (quoting Atkins, 122 S.Ct. at 2252) (emphasis supplied by Justice Sears).

As in Cooper, if an offender can prove retardation beyond a reasonable doubt, then he is likely so severely retarded that his case would be resolved short of a penalty phase. He may even be found incompetent.[13] This leaves the majority of mentally retarded offenders, who are mildly mentally retarded,[14] in the lurch, because it is mildly retarded offenders whose symptoms can mislead fact-finders about the significance or even the existence of the syndrome. Given Georgia's policy against executing mentally retarded offenders, Georgia's insistence on imposing the reasonable doubt standard on defendants creates a perverse result. To paraphrase Addington, "since the [reasonable doubt] standard creates the risk of increasing the number of individuals [who are wrongfully executed], it is at least unclear to what extent, if any, the state's

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[13] See Atkins, 122 S.Ct. at 2260-61 (Scalia, J., dissenting) (pointing out that severely retarded offenders with IQs in the 20s historically were deemed incompetent to stand trial).

[14] The U.S. Supreme Court has acknowledged that mildly mentally retarded persons such as Mr. Holsey make up most of the mentally retarded offenders who reach the point of sentencing in our criminal justice system. Penry v. Lynaugh, 109 S.Ct. 2934, 2954 (1989) (citing ABA Standards for Criminal Justice, 7-9.1, commentary, p. 460 (2d ed. 1980)).

interests are furthered by using a [reasonable doubt] standard in such [mental retardation] proceedings." Addington, 99 S.Ct. at 1809.

The principles set forth in Cooper, Addington and related precedent are so fundamental, and the circumstances in this case so obviously parallel those in Cooper that "the necessity to apply the [Cooper] rule [is] be beyond doubt." Yarborough v. Alvarado, 124 S.Ct. at 2151.

The Georgia Supreme Court's obvious contravention of the clearly established principles set out in Atkins, Cooper and related precedent allow this Court to grant Mr. Holsey relief from his unconstitutional sentence of death.

c. The Georgia Supreme Court contravenes Cooper by ignoring the ramifications of the unanimous rejection of the reasonable doubt standard and the widespread adoption of the preponderance standard.

In Cooper, the Supreme Court rejected the Oklahoma court's concern that the uncertainties of psychiatric diagnosis and the state's interest in prompt and orderly disposition of criminal cases warranted forcing defendants to meet the clear and convincing standard for proving incompetence. Cooper, 116 S.Ct. at 1380. The Court based that decision in part on its survey of standards used by other states to determine competency: "Contemporary practice demonstrates that the vast majority of jurisdictions remain persuaded that the heightened standard of proof imposed on the accused in Oklahoma *is not necessary to vindicate the State's interest[s]*." Id. (emphasis supplied). The Court noted that only four states required defendants to prove incompetence by clear and convincing evidence; that several states placed no burden on the defendant, instead placing the burden on the prosecution to prove competence once the issue had been credibly raised. Id. The Court concluded:

> The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule supports

our conclusion that the heightened standard offends a principle of justice that is deeply "rooted in the traditions and conscience of our people."

Id. [citation omitted].

Instead of paying due consideration, as Cooper commands, to the fact that Georgia is the *only* state to require capital defendants to prove mental retardation beyond a reasonable doubt, and to the "near uniform" practice of utilizing the preponderance standard in all other jurisdictions to have considered the matter, the Georgia Supreme Court majority in Hill focused on the fact that "[it is] the only state supreme court that has had the benefit of a legislative judgment that the reasonable doubt standard is appropriate," and that "since Atkins, one state court [Arizona] has relied, as this Court now does, on a statute which requires a standard higher than preponderance of the evidence." Head v. Hill, 587 S.E.2d at 622. This analysis directly contravenes the proper analysis under Cooper.

The Georgia Supreme Court majority's first statement, as quoted above, is a *non sequitur* which only serves to highlight the fact that Georgia is indeed the only state to utilize the reasonable doubt standard. It also highlights the fact that in every other jurisdiction that has had the benefit of legislative analysis of the issue, a lower standard of proof has been enacted. The second statement is disingenuous because the Court fails to mention that the Arizona Supreme Court did not adopt the reasonable doubt standard, but simply validated the clear and convincing standard already enacted in its state statute. Arizona is one of only four states[15] which use the

[15]When the Hill case was decided, five states utilized the clear and convincing standard: Arizona, Colorado, Florida, Indiana, and Delaware. See Ariz. Rev. Stat. § 13-703.02; Colo. Rev. Stat. § 16-9-402(2); Fla. Stat. Ann. § 921.137; Ind. Code Ann. § 35-36-9-4; 11 Del. C. § 4209. However, Indiana's reliance on the clear and convincing standard has since been held unconstitutional under Cooper v. Oklahoma. See Pruitt v. State, 834 N.E.2d 90 (Ind. 2005).

clear and convincing standard.[16] That number has remained constant since prior to Atkins. The Court's reliance on the fact that a small minority of states utilize a standard "higher than preponderance of the evidence," 587 S.E.2d at 622, simply does not address the fact that Georgia is the only state to require the reasonable doubt standard.

Contrary to Cooper, the Georgia Supreme Court totally ignored the explosive national legislative and judicial trend toward use of the preponderance standard of proof in determining mental retardation. Prior to Atkins, ten states utilized the preponderance standard in determining mental retardation.[17] By the time the Georgia Supreme Court decided Hill, that number had almost doubled to eighteen,[18] and increased to twenty by the date of the denial motion for reconsideration in Hill. See, Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); Cal. Penal Code § 1376(b)(3). Nearly eighty percent of jurisdictions that had considered the ramifications of Atkins or already had statutes in place had adopted the preponderance standard.

This trend should have alerted the Georgia Supreme Court to the "near uniform" rejection of even the clear and convincing standard and indicated to the Court that the reasonable doubt

[16] Actually, the Court's reference to Arizona is incorrect. Arizona's statute prescribed the clear and convincing standard before Atkins was decided. See Ariz. Rev. Stat. § 13-703.02. The Court is correct that one state court did adopt clear and convincing after Atkins and before the Court's ruling in Hill: Delaware. See 11 Del. C. § 4209. But as discussed above, Indiana's Supreme Court has recently invalidated the state's clear and convincing standard under Cooper.

[17] See See Ark. Code Ann. § 5-4-618; S.D. Codified Laws § 23A-27A-26.1; Md. Crim. Law §2-202; Mo. Rev. Stat. § 565.030; Neb. Rev. Stat. Ann. § 28-105.01; N.M. Stat. Ann. § 31-20A-2.1; N.Y. Crim. Proc. Law § 400.27; N.C. Gen. Stat. § 15A-2005; Tenn. Code Ann. § 39-13-203; Wash. Rev. Code Ann. § 10.95.030.

[18] States whose legislatures enacted, or whose courts adopted, the preponderance standard after Atkins was decided in 2002 and before Hill issued in 2003 were Utah, Idaho, Virginia, Louisiana, Oklahoma, Mississippi, Ohio and Nevada. See, Utah Code Ann. § 77-15a-104; Idaho Code § 19-2515A; Va. Code. Ann. § 19.2-264.3:1.1; Nev. Rev. Stat. 174.098; State v. Williams, 831 So.2d 835 (La. 2002); Murphy v. State, 54 P.3d 556 (Okla. 2002); State v. Lott, 97 Ohio St.3d 303 (2002); Foster v. State, 848 So.2d 172 (Miss. 2003).

standard "is not necessary to vindicate the State's interest[s]"[19] and offends a deeply rooted principle, i.e., "that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act." Penry v. Lynaugh, 109 S.Ct. at 2956. (Of course, the Supreme Court has now found as a matter of law in Atkins that mentally retarded offenders *are* insufficiently culpable as a class to be eligible for the death penalty.) The Georgia Supreme Court has failed to consider this trend towards near uniform use of the preponderance standard, and failed to even to properly consider the implications of the fact that no other jurisdiction uses the reasonable doubt standard. Further, the Georgia Supreme Court has never acknowledged the national trend concerning the standard imposed on a mentally retarded capital defendant.

Finally, the trend toward adoption of the preponderance standard has continued unabated, as the total number of preponderance states has grown to twenty-six, and the number of clear and convincing states has been reduced to four. See Pruitt v. State, 834 N.E.2d 90 (Ind. 2005); Bowling v. Commonwealth, 163 S.W.3d 361 (Ky. 2005); Ex Parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004); Commonwealth v. Mitchell, 839 A.2d 202 (Pa. 2003); State v. Jimenez, 908 A.2d 181 (N.J. 2006); 725 Ill. Comp. Stat. 5/114-15. This means that seventy percent of all death penalty jurisdictions now require defendants to prove mental retardation by a preponderance of the evidence. No other states have adopted the clear and convincing or reasonable doubt standards.

[19] Cooper, 116 S.Ct. at 1380.

3. The Georgia Supreme Court's decision in Hill relies on a misreading of Atkins to hold that there is no national consensus as to who qualifies as mentally retarded so as to claim the Eighth Amendment exemption from execution.

In Head v. Hill, the Georgia Supreme Court based its affirmation of Georgia's reasonable doubt standard in part on "the lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences." Hill, 587 S.E.2d at 622. Because the U.S. Supreme Court *has* identified a national consensus in favor of a categorical prohibition against executing offenders whose symptoms conform to the nationally accepted clinical definition of mental retardation, the Georgia Supreme Court's finding constitutes an unreasonable misreading of Atkins, and the decision based on that misreading renders Head v. Hill contrary to Atkins.

a. Contrary to the Georgia Supreme Court's holding, the U.S. Supreme Court *has* found a national consensus that offenders whose impairment meets the nationally and clinically accepted criteria for mental retardation may not be executed.

In reasoning that no "national consensus [exists] as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences," 587 S.E.2d at 622, the Georgia Supreme Court explained:

> the [U.S. Supreme] Court in Atkins recognized that, despite a "national consensus" against executing mentally retarded persons, there might be "serious disagreement ... in determining which offenders are in fact retarded." Atkins v. Virginia, supra at 317(III), 122 S.Ct. 2242.

Head v. Hill, 587 S.E.2d at 622. Based on this rendering of the language in Atkins, the Georgia Supreme Court posited a lack of consensus about which offenders qualified as mentally retarded. The Court then reasoned that since there is such a "lack of consensus," the legislature may constitutionally enact the reasonable doubt standard:

> In view of the *lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences*, we conclude that the Georgia General Assembly ... was originally and now remains within constitutional bounds in establishing a procedure for considering alleged mental retardation that *limits the exemption to those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt.*

Id. (italics supplied). Thus, in the first part of this paragraph, the Georgia Supreme Court indicates that it has based its decision on the assumption that Atkins holds that there is no consensus about the criteria for meeting the diagnosis of mental retardation. However, as we shall see, Atkins holds to the contrary, and the Georgia Supreme Court's finding of a "lack of national consensus" about who qualifies as mentally retarded results from an incorrect and unreasonable reading of Atkins.

By ignoring the rest of the U.S. Supreme Court's language in the relied upon passage from Atkins, the Georgia Supreme Court misapprehends the U.S. Supreme Court's meaning completely. The paragraph in Atkins which was selectively quoted by the Georgia Supreme Court (see above) reads in its entirety as follows:

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. *In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation.* Not all people who claim to be mentally retarded will be so impaired as to fall *within the range of mentally retarded offenders about whom there is a national consensus.* As was our approach in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." Id., at 405, 416-417, 106 S.Ct. 2595. [FN 22]

Atkins, 122 S.Ct. at 2250 (italics supplied).

Contrary to the Georgia Supreme Court's holding, the U.S. Supreme Court's reference to "serious disagreement" is emphatically *not* a disagreement about "which mentally impaired

persons are constitutionally entitled to an exemption from death sentences."[20] In fact, the above-quoted passage from Atkins actually affirms that there *is* a national consensus regarding a particular "range of mentally retarded offenders." As the language from that passage makes perfectly clear, the only "serious disagreement" arises when a defendant *claims* to be mentally retarded and the government *disputes* that claim. Atkins, 122 S.Ct. at 2250 (see quote above). In this passage, it is the procedures for resolving *case-specific* disputes about whether a given defendant meets the *nationally accepted* criteria for mental retardation that are to be left to the states. See Atkins, 122 S.Ct. at 2250.

b. The Georgia and Federal Constitutions prohibit the execution of *all* mentally retarded offenders regardless of degree of severity.

Under the Eighth Amendment, an offender is either mentally retarded or he is not; there is no in-between. The footnote referenced at the end of the above-quoted paragraph in Atkins serves to clarify that the "range of mentally retarded offenders about whom there is a national consensus" is encompassed by the clinically accepted definition of mental retardation: "The [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions set forth in n. 3, *supra*." Atkins, 122 S.Ct. at 2250 n.22. Turning back to footnote 3 of the opinion, we see that the Court is referencing the following criteria: significant subaverage intellectual functioning, defined as an IQ of approximately 70 or below; deficits in at least two adaptive skill areas; and onset of the syndrome before age 18. Id. at 2245 n.3.[21] This is

[20] Hill v. Head, 587 S.E.2d at 622.

[21] These are the criteria propounded by the American Association on Mental Retardation (AAMR) and the American Psychiatic Association's Diagnostic and Statistical Manual of Mental Disorders (DSM). Id.

precisely the definition of mental retardation adopted by the State of Georgia, as the Georgia Supreme Court has recognized. See Stripling v. State, 261 Ga. 1, 401 S.E.2d 500, 504 (1991).[22]

There is no doubt that both the Georgia and United States Constitutions proscribe the execution of all mentally retarded offenders, including mildly, moderately and severely retarded offenders. Georgia's "statute was amended [to include the ban on executing mentally retarded offenders] in an emotional response to the execution of a mildly retarded defendant," Jerome Bowden. Fleming v. Zant, 386 S.E.2d at 345 (Smith, J., dissenting); see also, Atkins, 122 S.Ct. at 2248 n.8 (acknowledging same). Both Atkins and Penry v. Lynaugh involved mildly mentally retarded defendants. See Atkins, 122 S.Ct. at 2245 n.5, 2259; Penry, 109 S.Ct. at 2941.

In the Georgia Supreme Court's decision finding a state constitutional ban on the execution of mentally retarded offenders, Fleming v. Zant, the Court's majority *rejected* dissenting Justice Smith's argument that the Georgia legislature did not "intend[] for the Georgia Constitution to be used to excuse *all* mentally retarded criminal defendants from the death penalty regardless of the degree of their retardation, blameworthiness, or involvement in crimes past, present, or future." Fleming, 386 S.E.2d at 343 (Smith, J., dissenting). Justice Smith also argued unsuccessfully that the Court had by judicial fiat prevented the legislature from ever amending the Georgia statute banning executions of retarded offenders to prevent the execution of only severely retarded offenders. Id. at 345. He described the current statute thusly: "The statute relieves any criminal defendant from the death penalty if he fits within the 'medically

[22] The Court stated: "Our statutory definition of "mentally retarded" is consistent with that supplied by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (Third Edition 1980) (hereinafter DSM III). The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period. OCGA § 17-7-131(a)(3). 'Significantly subaverage intellectual functioning' is generally defined as an IQ of 70 or below. DSM III, supra at 36."

accepted' definition of mental retardation adopted by the statute.... The degree of retardation is not relevant, and there is no requirement that the defendant be unable to appreciate the nature and quality or the wrongfulness of his conduct." Id. Finally, Justice Smith vigorously protested the exemption of even mildly mentally retarded offenders from execution:

> Today there may be a criminal defendant who has been tried, convicted, and sentenced to death for a heinous crime. He may fit within the "medically accepted" definition of mental retardation although he may have functioned in society and, in fact, may have been integrated into society to such an extent that no one considers him unable to act with the degree of blameworthiness associated with the death penalty. His mental retardation may not have prevented him from being able to appreciate the nature and quality or the wrongfulness of his conduct. This criminal defendant may have worked for a living and supported himself, may have a driver's license, may understand and obey the rules of the road, may have a family, may know the difference between right and wrong, may understand and obey the law generally, and may have planned and carried out a heinous crime that warrants the death penalty. That criminal defendant will not receive the death penalty if he can find "newly discovered" evidence that he is mentally retarded. His degree of mental retardation, blameworthiness, or involvement in the crimes will be of no significance; he will be relieved from the ultimate penalty based solely upon the expert's testimony that the defendant is mentally retarded.

Fleming, 386 S.E.2d at 348. In light of the language of Georgia's statutory and constitutional definitions of the scope of mental retardation, and of the Georgia Supreme Court's rejection of Justice Smith's detailed dissent, there can be no doubt that Georgia protects *all* mentally retarded offenders from execution – not simply those who are impaired "enough" to prove mental retardation beyond a reasonable doubt.

Justice Antonin Scalia made the same unsuccessful objections to the majority opinion in Atkins v. Virginia, decrying the majority's finding that all mentally retarded offenders, regardless of degree of impairment or depravity of crime, are exempted from execution under the Eighth Amendment: "The Court is left to argue ... that *execution of the mildly retarded* is inconsistent with the 'evolving standards of decency that mark the progress of a maturing

society.'" Atkins, 122 S.Ct. at 2261 (Scalia, J., dissenting) (emphasis supplied). Justice Scalia posed almost exactly the same scenario as Justice Smith in protesting the "indiscriminate" protection of the Eighth Amendment:

> [W]hat scientific analysis can possibly show that a mildly retarded individual who commits an exquisite torture-killing is "no more culpable" than the "average" murderer in a holdup-gone-wrong or a domestic dispute? Or a moderately retarded individual who commits a series of 20 exquisite torture-killings? Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime--which is precisely why this sort of question has traditionally been thought answerable not by a categorical rule of the sort the Court today imposes upon all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case.

Atkins, 122 S.Ct. at 2266. There can therefore be no reasonable doubt that the holding of Atkins encompassed *all* mentally retarded offenders, not merely those mentally retarded "enough" to be able to prove it beyond a reasonable doubt. Whether mild, moderate or severe, mental retardation prevents an offender from being eligible for execution.

c. Because the Georgia Supreme Court's conclusion that the reasonable doubt standard is Constitutional turns on the manufacture of a phony "lack of consensus" about the scope of the mental retardation diagnosis, it directly contravenes Atkins.

Thus, in order to uphold the reasonable doubt standard, the Georgia Supreme Court has inappropriately conflated the U.S. Supreme Court's language regarding potential disagreement about how to resolve individual claims of mental retardation in specific cases with a "lack of national consensus as to which mentally impaired persons are constitutionally entitled to an exemption from death sentences." Hill, 587 S.E.2d at 622. This is an unwarranted and unreasonable error which directly contradicts the holding in Atkins that there *is* indeed a "national consensus as to which mentally impaired persons are constitutionally entitled to an

exemption from death sentences." Those offenders who meet nationally and clinically accepted definitions of mental retardation are within the "range of mentally retarded offenders about whom there is a national consensus" and are *categorically* exempt from execution. See Atkins, 122 S.Ct. at 2245 n.3; id. at 2250 and n.22. Thus, Georgia's statute "limits the exemption to those whose mental deficiencies are *significant enough* to be provable beyond a reasonable doubt." Hill, 587 S.E.2d at 622 (italics supplied).

This inappropriate conception of the function of the standard of proof, along with the finding of a "lack of consensus" about the range of offenders entitled to Constitutional protection, allows the Georgia Supreme Court to justify the reasonable doubt standard as properly delimiting the range of mentally retarded offenders who are exempt from execution. Thus, if there is no national consensus about who is mentally retarded – literally, about what constitutes mental retardation – then it must be permissible (in the Georgia Supreme Court's view) to limit the exemption from execution to only those offenders who are so severely retarded that they can prove their retardation beyond a reasonable doubt.

The Georgia Supreme Court's contorted logic is really a back-handed acknowledgement that the reasonable doubt standard protects only severely mentally retarded offenders and leaves even those offenders who are "almost certainly" mentally retarded vulnerable to wrongful execution. See Hill, 587 S.E.2d at 630 (Sears, J., dissenting). However, since the U.S. Supreme Court *has* held that even mildly mentally retarded offenders fall within the "range of mentally retarded offenders about whom there is a national consensus,"[23] one of the Georgia Supreme

[23] Atkins, 122 S.Ct. at 2250.

Court's fundamental bases for its affirmance of Georgia's standard of proof is fatally undermined, rendering its decision contrary to Atkins.[24]

4. Mentally retarded offenders run a special risk that their condition will not be recognized or will not be considered severe enough to render them incompetent to stand trial.

As the U.S. Supreme Court recognized, the nature of mental retardation is such that, in criminal cases particularly, the risk that the fundamental disabilities caused by mental retardation will not be recognized by the criminal justice system is high. This is because "[t]he efforts that many mentally retarded people typically expend in trying to prevent any discovery of their handicap may render the existence or the magnitude of their disability invisible to criminal justice system personnel." Luckasson & Ellis, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. Law Rev. at 458.[25]

Mildly mentally retarded individuals like Robert Wayne Holsey frequently defy the stereotypical image we often have of persons with the disorder in part because they tend to make efforts to hide the symptoms:

> Most lay persons underestimate the possible existence of mental retardation, thinking that anyone with mental retardation is virtually incapable of almost any self-care. As a result, many people find it difficult to imagine that a person with mental retardation could drive a car, work, take the bus, or perform simple tasks with relative ease. They assume mental retardation would be detected quickly and easily because it would be so "obvious." [C]apital cases [do not often

[24] In fact, it is only by willfully misreading Atkins to endorse a "lack of consensus" about the nationally accepted scope of the mental retardation exemption that the Georgia Supreme Court can ignore the *actual* national consensus that a preponderance standard of proof is the only standard which adequately and reliably protects the fundamental constitutional right of mentally retarded offenders not to be executed.

[25] The Supreme Court relied on this article and repeatedly cited publications by Ruth Luckasson and other experts on mental retardation in its decision in Atkins. See Atkins, 122 S.Ct. at 2250 nn.23-24.

involve] defendants who have severe or profound retardation, because they are almost always more easily identified and diverted from the criminal justice system. Rather, *it is people who have mild mental retardation that is, those who are able to function with the least assistance, who present the greatest obstacle to lawyers, the criminal justice system, and even their own defense. . . .*

Such defendants may be hindered by their "normal" appearance. Their appearance does not meet the expectation that people with mental retardation will look obviously different, slovenly, odd, and unaware of fashion. To the contrary many criminal defendants with mild retardation have no obvious atypical facial features, nor do they speak loudly, rock back and forth, grunt, grind their teeth, or pick at themselves. These are characteristics commonly found among people with severe retardation, who often are "weeded out" of the criminal justice system.

People with mild mental retardation may attempt to compensate for their mental limitations through their appearance. While they may take pride in their appearance, this "masking" may throw off jurors, or even attorneys and mental health professionals.

Keyes, et al, "Mitigating Mental Retardation in Capital Cases: Finding the 'Invisible Defendant,'" 22 Mental & Physical Disability L. Rep. at 530-31. The paradox of this masking effect in such individuals is that "[i]mpairments become visible enough to trigger evaluation . . . mainly when the defendant is also mentally ill or acts in a bizarre or disruptive fashion." Luckasson, et al., The Criminal Justice System and Mental Retardation at 98.[26]

The resulting "underrecognition of the disability compromises the defendants' constitutional interests." Luckasson, et al., The Criminal Justice System & Mental Retardation, at 99. For these reasons, the Atkins Court held that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution," Atkins, 122 S.Ct. at 2252. But *mildly* mentally retarded offenders, who make up the vast majority of mentally retarded persons in the

[26] This publication was specifically relied upon by the Supreme Court in Atkins, 122 S.Ct. at 2250 n.23.

justice system,[27] face an even greater risk in this regard, and even more so when required to prove their condition beyond a reasonable doubt.[28]

[2] GEORGIA'S STATUTORY SCHEME FOR DETERMINING MENTAL RETARDATION UNCONSTITUTIONALLY ALLOCATES THE RISK OF WRONGFUL EXECUTION ON THOSE DEFENDANTS, LIKE MR. HOLSEY, WHO SUFFER FROM SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING RESULTING IN DEFICITS IN ADAPTIVE FUNCTIONING

"The essential features of mental retardation are (i) significantly subaverage general intellectual functioning, (ii) resulting in or associated with impairments in adaptive behavior, and (iii) manifestation of this impairment during the developmental period."[29]

First, Mr. Holsey has significantly subaverage intellectual functioning. In three standardized tests, administered when Mr. Holsey was 15, 36 and 37 years old, he achieved IQ

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[27] The U.S. Supreme Court has acknowledged that mildly mentally retarded persons such as Mr. Hill make up most of the mentally retarded offenders who reach the point of sentencing in our criminal justice system. Penry v. Lynaugh, 109 S.Ct. 2934, 2954 (1989) (citing ABA Standards for Criminal Justice, 7-9.1, commentary, p. 460 (2d ed. 1980)).

[28] Georgia Supreme Court Justice Smith unwittingly explained why in his dissent in Fleming v. Zant: "[A capital murder defendant] may fit within the 'medically accepted' definition of mental retardation although he may have functioned in society and, in fact, may have been integrated into society to such an extent that no one considers him unable to act with the degree of blameworthiness associated with the death penalty. His mental retardation may not have prevented him from being able to appreciate the nature and quality or the wrongfulness of his conduct. This criminal defendant may have worked for a living and supported himself, may have a driver's license, may understand and obey the rules of the road, may have a family, may know the difference between right and wrong, may understand and obey the law generally." Fleming, 259 Ga. 687, 386 S.E.2d 339, 348 (1989) (Smith, J., dissenting).

[29] *Stripling v. State*, 261 Ga. 1, 4, 401 S.E.2d 500, 504 (1991); *see also* O.C.G.A.§ 17-7-131(a)(3); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. text rev'n 2000) ("DSM IV-TR") (PX 197); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d Ed. 1980) ("DSM III"); and American Association on Mental Retardation, Mental Retardation: Definitions, Classifications and Systems of Support (9th Ed. 1992). The DSM and AAMR definitions are widely accepted within the psychological and psychiatric communities. Further, the definition of mental retardation set forth in O.C.G.A.§ 17-7-131(a)(3), "is consistent with" that supplied by DSM III. *Stripling*, 261 Ga. at 4; *see also Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

scores of 70, 69 and 72 respectively. His teachers socially promoted him every academic year through the 9th grade, until he dropped out of school in 10th grade. Witness testimony corroborates Mr. Holsey's subaverage intellectual functioning. *See* PX 12, 13, 14, 15, 20, 22, 33, 35, 43, 46, 57, 58, 60, 61, 158, 174; *See also* HT 293, 294-95, 712, 714, 715.

Second, Mr. Holsey demonstrates deficits in those skills essential to functioning independently in daily life. Although the second prong of mental retardation as defined in the DSM-IV requires limitations in 2 or more adaptive skill areas,[30] Mr. Holsey has significant deficits in 8 of the 10 adaptive skills areas. *See* PX 1a, 2, 3, 4, 7, 9, 11a, 11b, 12-17, 19, 20-24, 26, 27, 31, 32, 35-37, 41-44, 51, 80-87, 91, 93 156, 159, 197; *See also* HT 44, 45, 47, 63, 70, 71, 76. 79, 80, 81, 82, 84, 87, 90, 97, 99, 100, 104-108, 218-219.

Finally, Mr. Holsey has also proven the third prong of the definition of mental retardation, that his significant cognitive and functional deficits manifested during the developmental period, defined as before the age of 18. HT 112; HT 221; DSM-IV, the AAMR, *See Stripling v. State*, 261 Ga. 1, 4, 401 S.E.2d 500, 504 (1991); *see also* O.C.G.A.§ 17-7-131(a)(3).

Testimony from YDC counselors, teachers, jailors, family and friends was submitted in support of his mental retardation claim. Nonetheless, Georgia does not acknowledge that the Constitution prohibits Mr. Holsey's execution because he has not proven his mental retardation beyond a reasonable doubt. Mr. Holsey's standardized tests, anecdotal information, and life

[30] Mental Retardation: Definitions, Classifications and Systems of Support (9th Ed. 1992). The definitions of each skill area -- 1) communication, 2) self-care, 3) home living, 4) social/interpersonal skills, 5) use of community resources, 6) self-direction, 7) functional academics, 8) work, 9) leisure, 10) health and safety -- are provided by the American Association on Mental Retardation. *Id.*

history records all substantiate a finding that Mr. Holsey suffers from mild mental retardation such that his execution should be prohibited under Atkins.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to correct Georgia's application of the "beyond a reasonable doubt" standard of proof for mental retardation.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. 06-

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT WAYNE HOLSEY,

Petitioner,

-v-

HILTON HALL, Warden
Georgia Diagnostic Prison,

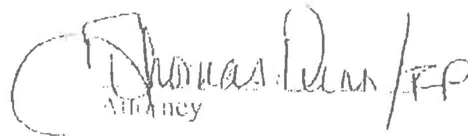
Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by U.S. Mail, first-class postage prepaid, on counsel for Respondent at the following address:

Beth Burton, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This the 28th day of October, 2007.



ATTACHMENT B

No. 12-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

ROBERT WAYNE HOLSEY,

Petitioner,

v

WARDEN,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

"The jury never learned that throughout his childhood he was subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home "the Torture Chamber." Likewise, with reference to his status as borderline mentally retarded, a diagnosis that is undisputed by the state's expert witnesses, the jury heard only that a report listed him as borderline mentally retarded without any testimony to explain the extent and consequences of his condition. Only one juror's vote was necessary to impose a life sentence." – *Holsey v. Warden* Panel Decision, Judge Barkett, dissenting.

"[A] determination that Petitioner did not show the required prejudice is within the outside border of the range of reasonable." -- *Holsey v. Warden* Panel Decision, Judge Edmondson, concurring in judgment only.

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Before and during Petitioner's trial, his lead attorney was consuming up to a quart of vodka a night and knew he was on the verge of being criminally prosecuted, civilly sued and disbarred for embezzling over $100,000 of another client's money. He left the development of mitigating evidence to his recently appointed second-chair counsel, but failed to tell her she had this responsibility. Second chair counsel, in turn, waited for lead counsel to tell her what to do, though instruction was not forthcoming. Counsel consequently entered the penalty phase with no theory of mitigation and, in second-chair counsel's words, presented the meager mitigating evidence they had assembled in "a shotgun scatter effect, at that point in time." Much of the defense concerned proof that Petitioner was defending himself when he committed a prior assault the state had introduced in aggravation and that he had been a good worker at Pizza Hut. The remaining presentation consisted of "sparse – almost non-existent – evidence of childhood abuse and mental retardation . . . ."[1] For instance, the sum total of testimony showing Petitioner's significant intellectual disability consisted of his sister Regina being asked to read a sentence from a record she had never before seen stating that in 1980 Petitioner "function[ed] in the borderline mental retardation range of intelligence."

In state habeas proceedings, Petitioner presented substantial, though contested, evidence that he is mentally retarded and uncontroverted evidence that his intellectual functioning is significantly impaired. He also presented a wealth of evidence documenting the childhood abuse

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[1] *Holsey v. Warden*, 694 F.3d 1230, 1275 (11th Cir. 2012) (Barkett, J., dissenting).

and privation he suffered in the home his neighbors called "the Torture Chamber." The state habeas trial court granted sentencing relief, finding that counsel were ineffective in failing to investigate and present this readily available mitigating evidence. The court further found that Petitioner had a colorable claim of mental retardation, but had not proven it under Georgia's uniquely high beyond-a-reasonable-doubt standard, given the opinion of the state's experts that Petitioner only has borderline intellectual functioning.

The Georgia Supreme Court reversed the grant of sentencing relief. It concluded that the lower court properly applied the reasonable doubt standard for proving mental retardation and that Petitioner had not shown prejudice from counsel's performance because the "additional evidence . . . presented in his habeas proceedings . . . is largely cumulative of evidence presented at trial . . . ." In federal habeas proceedings, the Eleventh Circuit dismissed the challenge to Georgia's mental retardation standard of proof, on the ground that this challenge had recently been rejected by the court, and further held that the Georgia Supreme Court had reasonably applied *Strickland* in its prejudice analysis.

The following questions arise from these facts:

1. Whether the Eleventh Circuit erred in finding that the Georgia Supreme Court reasonably applied *Strickland* in ruling that Petitioner had not shown that he was prejudiced by counsel's performance because the habeas evidence was "largely cumulative" of the trial presentation, where the new evidence both provided actual substance to defense themes that had scarcely been sketched out, let alone substantiated, at trial and where trial counsel did not present any expert testimony to explain Petitioner's severe intellectual deficits.

2. Whether Georgia's requirement that a capital defendant establish by proof beyond a reasonable doubt that he is ineligible for the death penalty due to mental retardation violates the Eighth Amendment and Due Process.

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No. 12-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

ROBERT WAYNE HOLSEY,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Robert Wayne Holsey, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above case on September 13, 2012.

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered September 13, 2012, denying Petitioner's appeal from the denial of habeas corpus relief, is reported as *Holsey v. Warden*, 694 F.3d 1230 (11th Cir. 2012). A photocopy of the decision is attached hereto as Appendix A. The federal habeas court decision (*Holsey v. Schofield*, Case No. 3:07-CV-129 (M.D.Ga.)) affirmed by the Eleventh Circuit Court of Appeals in its denial of relief is unreported

and attached hereto as Appendix B. The underlying state habeas court order in *Holsey v. Schofield*, Butts Co. Superior Court Case No. 2000-V-604 granting sentencing relief is unreported and attached hereto as Appendix C. The Georgia Supreme Court's decision reversing sentencing relief is reported as *Schofield v. Holsey*, 281 Ga. 809 (2007); a photocopy of that decision is attached as Appendix D.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioner's appeal from the denial of federal habeas relief was entered on April 20, 2012. *See* Appendix A. A timely-filed petition for rehearing was denied on November 6, 2012. *See* Appendix E. On January 29, 2013, Justice Thomas granted Petitioner's timely-filed motion for extension of time within which to file this Petition until April 5, 2013. *See* Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) r esulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Procedural History

Mr. Holsey was indicted on capital murder charges in Baldwin County, Georgia, for the December 17, 1995, murder of Baldwin County Sheriff's Deputy William Robinson.[2] A jury trial commenced fourteen months later in Morgan County, Georgia, after a change of venue was granted. Mr. Holsey was convicted of malice murder, felony murder and armed robbery on February 11, 1997. Two days later, on February 13, 1997, the jury returned a verdict imposing

[2] Deputy Will Robinson was shot and killed in the early morning hours of December 17, 1995, at the Royal Inn Motel in Milledgeville, Georgia during the routine stop of a car he suspected had been involved in the robbery of a local convenience store just minutes earlier. R1-9, Resp. Ex. 24 at 126. Patrons of the Royal Inn Motel disagreed about how many people occupied the car, a Red Ford Probe, which sped quickly away from the scene of the crime under the cover of night. *Id.* at 121, 146. Although the Baldwin County Sheriff's Office ("BCSO") originally issued a Be On the Lookout "BOLO" statement concerning a car with two occupants, the BCSO investigation eventually led to the sole arrest of Petitioner Robert Wayne Holsey that same morning. R1-9, Resp. Ex. 25 at 80; Resp. Ex. 29 at 23; Resp. Ex. 113 at 5249.

the death penalty. On December 2, 1999, the Georgia Supreme Court affirmed the convictions and death sentence. *Holsey v. State*, 271 Ga. 856 (1999), *cert. denied*, 530 U.S. 1246 (2000).

On October 6, 2000, Mr. Holsey filed a Petition for Writ of Habeas Corpus. The state habeas court conducted an evidentiary hearing on the claims raised in the petition on June 16-18 and December 8-9, 2003. The hearing focused on Mr. Holsey's claims of ineffective assistance of counsel and mental retardation, and consisted of substantial documentary evidence, as well as extensive affidavit and live testimony. On May 9, 2006, following briefing by the parties, the state habeas court granted sentencing relief, finding that "counsel at trial failed to prepare and present any meaningful mitigation evidence as a defense to the death penalty. In light of this lack of any significant preparation or presentation of such defense, no one can seriously believe that the Petitioner received the constitutional guarantees of the Sixth Amendment." R1-9, Resp. Ex. 145 at 83 (Appendix C). Regarding the claim that Mr. Holsey is exempt from the death penalty because of mental retardation, the court found itself constrained by Georgia's "beyond a reasonable doubt" standard[3] and denied relief, finding nevertheless that "a jury verdict would have been authorized to find Mr. Holsey mentally retarded or not." *Id.* at 73-74.

On February 26, 2007, the Supreme Court of Georgia reversed the state habeas court's grant of sentencing relief, finding a lack of prejudice to Mr. Holsey from trial counsel's deficient performance. *Schofield v. Holsey*, 281 Ga. 809, 814 (2007) (Appendix D). The court otherwise affirmed the state habeas order. *Id.* A timely filed motion for reconsideration was denied on March 27, 2007.

On November 21, 2007, Mr. Holsey filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia, Athens Division. On July 2,

[3] O.C.G.A. §17-7-131(c)(3).

2009, the district court denied all relief. The district court later issued a Certificate of Appealability to address Mr. Holsey's claim of ineffective assistance of counsel at sentencing and his challenge to Georgia's application of the reasonable doubt standard of proof to claims of ineligibility for the death penalty on the basis of mental retardation.

Following briefing and oral argument, a panel of the Eleventh Circuit affirmed the district court in a sharply divided opinion entered September 13, 2012. A majority of the panel dismissed the mental retardation claim on the ground that the court had recently rejected the identical challenge to Georgia's capital mental retardation statute in *Hill v. Humphrey*, 662 F.3d 1335, 1360-61 (11th Cir. 2011) (en banc). *See Holsey*, 694 F.3d at 1232 (Appendix A). Judge Carnes' opinion for the court also concluded that the Georgia Supreme Court had not unreasonably applied *Srickland v. Washington*, 466 U.S. 668 (1984), in holding that Mr. Holsey was not prejudiced by any deficiencies in trial counsel's representation. *Id.* at 1274. In his concurring opinion, Judge Edmondson took issue with Judge Carnes's "longish opinion[]," but concluded that "[o]bjectively reasonable jurists might disagree about prejudice on this record; but to me, a determination that Petitioner did not show the required prejudice is within the outside border of the range of reasonable." *Id.* at 1274, 1275 (Edmondson, J., concurring). Judge Barkett, in dissent, disagreed both with the rejection of the mental retardation issue (for the reasons set forth in her dissent in *Hill*, 662 F.3d at 1365-78) and with the majority's denial of sentencing relief, observing that "the Georgia Supreme Court's determination that the extensive evidence offered on collateral review as 'largely cumulative' is unreasonable in light of the sparse – almost non-existent – evidence of childhood abuse and mental retardation presented in Holsey's trial." *Holsey*, 694 F.3d at 1275 (Barkett, J., dissenting).

On January 29, 2013, Justice Thomas granted Petitioner's timely-filed motion for extension of time within which to file this Petition until November 18, 2012. *See* Appendix F. This petition follows.

B. Statement of Relevant Facts

1. The Offense

Deputy Will Robinson was shot and killed in the early morning hours of December 17, 1995, at the Royal Inn Motel in Milledgeville, Georgia during the routine stop of a car he suspected had been involved in the robbery of a local convenience store just minutes earlier. R1-9[1], Resp. Ex. 24 at 126. He received "two bullet wounds, one to his right arm and one to the back of the right side of his head," but also "managed to fire several shots before sustaining the fatal head wound." *Holsey*, 281 Ga. at 810. A few hours later, Mr. Holsey was arrested at his sister's house. *Id.* Evidence at trial linked Mr. Holsey to the convenience store robbery and Deputy Robinson's death, *id.*, although there remained questions regarding whether someone else was also involved in the crimes and may have caused the officer's fatal injury.[4]

2. Trial

Following Mr. Holsey's arrest, the trial court appointed attorney Andy Prince to represent him at trial. Although Mr. Prince was a seasoned lawyer at the time he took Mr. Holsey's case, his struggle with chronic alcoholism and the knowledge that he would soon be facing criminal charges of his own prevented him from devoting his attention to Mr. Holsey's case. This

[4] At trial, the medical examiner testified that he could not determine whether the fatal shot to the back of Deputy Robinson's head was sustained while he was standing up or laying down, suggesting that a different assailant may have fired the fatal shot. *See* R1-9, Resp. Ex. 27 at 42, 62, 67.

shortcoming impacted both the investigation and his performance at trial. While his far less experienced co-counsel Brenda Trammell cross-examined witness es, Mr. Prince would step outside the courtroom to soothe his nerves with a cigarette. R1-9, Resp. Ex. 102 at 2594. Each night during the trial, back in his hotel room, he would anesthetize himself with up to a quart of vodka. R1-9, Resp. Ex. 101 at 2381. The state habeas court made the following findings regarding Mr. Prince's performance during Mr. Holsey's trial:

> Mr. Andy Prince was undergoing professional pressures and problems with substance abuse. He was an admitted alcoholic. He was threatened with a lawsuit by a client from whom he had taken over $116,000.00 (HT 679). He knew that a grievance was imminent from this client, and he had lost the ability to communicate with the client in an effort to resolve their differences (HT 760). This claim ultimately led to Mr.Prince receiving a three-year prison sentence and the forfeiture of his law license (HT 679). He admitted drinking as much as a quart of vodka each day at night after being in court all day (HT 755).

R1-9, Resp. Ex. 145 at 81.

The state habeas court found that trial counsel's preparation for the penalty phase of Mr. Holsey's trial was utterly inadequate, resulting from counsel's unrealistic belief that death would not be imposed and his disorganized abdication of the mitigation inquiry to his less experienced co-counsel, Brenda Trammel, who did not even realize that lead counsel Mr. Prince was relying on her to prepare the mitigation case. R1-9, Resp. Ex. 145 at 81-83. Notably, the state habeas court found it revealing that "while trial counsel petitioned for and obtained an order authorizing $3,500.00 to hire a mitigation specialist, and attached to the motion an affidavit of such a specialist, none was ever hired." R1-9, Resp. Ex. 145 at 82; *see also* R1-9, Resp. Ex. No. 115 at 5610. The state habeas court also observed that, "[n]o one seemed to know what use, if any, was made of the $3,500.00 allocated for such purposes." R1-9, Resp. Ex. 145 at 82.

At the state habeas hearing, Mr. Prince acknowledged that he had not assigned anyone on the defense team to perform the functions that a mitigation specialist would normally undertake.

R1-9, Resp. Ex. 94 at 706-07. The state habeas court noted: "The lack of any clear delineation of duties and responsibilities between lead counsel and assisting counsel was apparent. . . . There was no preparation of the mitigation witnesses or any mitigation theory ever developed." R1-9, Resp. Ex. 145 at 82. Co-counsel Trammel testified: "We really didn't have a theory of mitigation. We didn't have a lot of mitigation; ours was a shotgun scatter effect, at that point in time." R1-9, Resp. Ex. 93 at 324.

At Mr. Holsey's sentencing, the jury was presented with "sparse – almost non-existent – evidence of childhood abuse and mental retardation." *Holsey*, 694 F.3d at 1275 (Barkett, J., dissenting).

> At trial, a brief mention was made of the fact that Holsey was beaten, without any further explanation or description. The jury never learned that throughout his childhood he was subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home "the Torture Chamber." Likewise, with reference to his status as borderline mentally retarded, a diagnosis that is undisputed by the state's expert witnesses, the jury heard only that a [school] report listed him as borderline mentally retarded without any testimony to explain the extent and consequences of his condition.

Id.

Counsel's failure to present anything other than the most cursory outline of Mr. Holsey's background was exploited by the district attorney, who argued in his sentencing phase closing, "the defendant did not have a perfect childhood.... Does that justify what he's done? No doctors have told us that Robert Wayne Holsey has any mental problems." R-9, Resp. Ex. 34 at 9.

3. State Habeas

By contrast, as Judge Barkett noted in the decision below, the state habeas court was presented with ample documentary, affidavit, deposition and live lay[5] and expert testimony which, as in *Williams v. Taylor*, 529 U.S. 362 (2000), offered a "graphic description of [Mr. Holsey's] childhood, filled with abuse and privation, [and] the reality that he was [at least] 'borderline mentally retarded.'" *Williams*, 529 U.S. at 398.[6] In all, over fifty witnesses submitted detailed testimony on Mr. Holsey's behalf to the state habeas court, painting a picture which contrasted sharply with the brief, scattershot, and cursory outline of Mr. Holsey's life history as recounted by an unprepared Regina Holsey, Mr. Holsey's sister, at the original sentencing proceeding. *See* R1-9, Resp. Ex. 32 at 95-144.

The state habeas court detailed the graphic, detailed presentation which counsel failed to present to the jury:

> [T]rial counsel ... failed to thoroughly present the extent of the background in which Mr. Holsey was reared. While there is some evidence of physical beatings and the fact that Mr. Holsey stuttered as a child [cits. omitted], the testimony at the habeas hearing was much more detailed. Regina, Petitioner's sister, testified he was beaten with extension cords, brooms and shoes, which left marks on his back. His mother belittled him. He was told he was no good. He had a problem with bedwetting until the age of thirteen (13) and was disciplined and abused for this practice (HT 610-618). While Petitioner's sister, Regina, testified in both phases of the trial, she apparently never had any preparation time with the attorneys during trial (HT 644, 645). She did not review or receive the Youth Detention Center records or the Juvenile Court records that were presented to

[5] Lay witnesseses included Mr. Holsey's peers, teachers, relatives, neighbors, co-workers and jailers.

[6] This Court found unreasonable the Virginia Supreme Court's characterization of the mitigation evidence as constituting merely "'numerous people, mostly relatives, [who] thought that defendant was nonviolent and could cope very well in a structured environment'" whose testimony "'barely would have altered the profile of this defendant that was presented to the jury.'" *Williams*, 529 U.S. at 372, 397-98.

> thejnry. Mitigation evidence at trial consisted primarily of the testimony of Regina that Mr. Holsey was not a violent person, and that he was a model prisoner or trustee during the periods of previous incarceration. While there were some school records presented at trial, and one excerpt that referred to the Petitioner as "borderline mentally retarded" (Trt-Vol. 12, p. 116), there was no effort made to explain these records in any meaningful way to assist the jury in connecting the dots. There was ... no argument made by counsel to support a defense to the death penalty based on mental retardation. Petitioner's trial counsel advised the trial judge at a pretrial hearing that I.Q. and mental retardation were not going to be issues at trial (HT 719, 720). In fact, they were not presented and argued.

R1-9, Resp. Ex. 145 at 82-83.

The state habeas court found Mr. Holsey's alcoholic trial counsel prejudicially deficient in his preparation and presentation of mitigation, to include the failure to present expert testimony about Mr. Holsey's undisputed intellectual disability. R1-9, Resp. Ex. 145 at 82-84. Indeed, neither the psychologist retained by trial counsel nor the experts retained by Respondent in habeas proceedings disputed that Mr. Holsey had a mitigating background and was significantly impaired, even if they could not agree that he had full-blown mental retardation.

For example, Dr. Thomas Sachy, the psychiatrist retained by Respondent, diagnosed Mr. Holsey with Borderline Intellectual Functioning and Major Depression. *See* R1-9, Resp. Ex. 97 at 1454. Sachy found that Mr. Holsey's 71 IQ represented a "significant impairment." *Id.* at 1492. Further, Sachy testified that Mr. Holsey's cognitive impairment was effectively "brain damage" caused by a "hefty dose" of "deprivation of nurturance and of social, linguistic, and other stimulation .... during the developmental periods." R1-9-97 at 1490. Sachy found a "genetic and ... developmental process here[, including a sister and mother diagnosed with mental retardation, which] helps explain [Mr. Holsey's] brain, whatever the process is, whatever the level of impairment." *Id.* at 1490-91. Sachy concluded: "[D]oes [sic] his intellectual abilities and upbringing have anything to do with what he's charged with? Absolutely." *Id.* at 1496.

Similarly, Dr. Marc Einhorn, a psychologist retained by Respondent, found that Mr. Holsey had an IQ of 71 and demonstrated Borderline Intellectual Functioning. *See* R1-9, Resp. Ex. 97 at 1323, 1393. Dr. Einhorn testified that he (Einhorn) would decline any amount of money in exchange for being endowed with an IQ of 71, noting that it was a far lower level of cognitive ability than found even in most prisoners who typically show decreased intellectual functioning. *See id.* at 1402, 1415. Further, Dr. Einhorn was deeply saddened by the uniquely horrific circumstances of Mr. Holsey's upbringing and believed that it, in conjunction with his impaired cognitive functioning and adaptive deficits, had directly contributed to his "poor overall adjustment to life" and "impaired" ability to conform to societal, family and psychological expectations (*id.* at 1405, 1422-23) as well as his criminal behavior:

> He's neglected, he's abused, he drinks, he does poorly in school, he gets into trouble, he starts hanging out with the wrong people, and it's all pretty predictable.... *He never had the advantages of what most of us would have even in a less marginal sense. He was culturally deprived. He was psychologically deprived. He didn't have anything. He was a victim of his circumstances.* He didn't have proper parenting. He didn't have proper food. He didn't have a proper education. He didn't have a father figure at all. He didn't have really anything.... It's pretty sad.... It's pitiful.
>
> [H]e started drinking at an early age ... and then alcohol abuse ... and I'm sure it just contributed to his lack of development, I mean, as would be the case with anybody.... But in his case, you know, he was poverty stricken and started drinking.... *If you throw into the [Borderline Intellectual Functioning] equation alcohol abuse, his terrible conditions he grew up in, practically anyone would make a poor adjustment to life with that equation.*

Id. at 1405-06, 1413-15, 1423-24 (emphasis supplied).

Finally, Dr. Michael Shapiro, the original defense psychologist, could have told the jury that Mr. Holsey had poor impulse control and read at a 4th grade level. R1-9, Resp. Ex. 93 at 310; Resp. Ex. 114 at 5508. He could have explained to the jury what it meant for a 15 year old Robert Holsey to have a "prepsychotic disturbance," "borderline MR," "severe amount of

depression," "paranoid traits," and a history of suicide attempts. R1-9, Resp. Ex. 98 at 1635. He could have discussed 18 year old Robert Holsey's documented suicidality, his "severe anxiety" and "psychotic withdrawal." *Id.* at 1636. He could have illuminated for the jury Mr. Holsey's "hereditary predisposition for borderline [intellectual functioning]," (*id.* at 1639), his "hereditary predisposition towards mood/psychotic disorders [and other] pre-existing prob[lem]s ... which could have contributed to his actions" (*id.* at 1640). Finally, Shapiro could have helped the jury understand that borderline intellectual functioning is a "mitigating" condition which puts Mr. Holsey in approximately the bottom 5% of the population in cognitive ability. *Id.* at 1627-28.

The state habeas court credited the evidence and testimony presented by Mr. Holsey and concluded that it was compelling, persuasive and non-cumulative. R1-9, Resp. Ex. 145 at 82-83.[7] **The court found that Mr. Holsey's defense was prejudiced by counsel's failure to obtain and present that far more thorough and detailed body of evidence at sentencing.** ***Id.*** **In fact, the state** habeas court was emphatic in its finding of ineffective assistance:

> **The death penalty should never be imposed lightly. While there certainly is sufficient evidence to support a verdict imposing the death penalty in this case, counsel at trial failed to prepare and present any meaningful mitigation evidence as a defense to the death penalty. In light of this lack of any significant preparation or presentation of such defense, *no one can seriously believe that the Petitioner received the constitutional guarantees of the Sixth Amendment right to effective assistance of counsel* as established by the U.S. Supreme Court.**

R-9, Resp. Ex. 145 at 83 (emphasis supplied).

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[7] Respondent's mental health experts also credited this evidence, finding that Mr. Holsey's "history of childhood abuse and neglect is well documented" and that his "childhood focus was self-preservation with the use of alcohol, rather than the vicissitudes of normal childhood." R1-9, Resp. Ex. 97 at 1324 (Dr. Einhorn report). For this reason, Judge Barkett found the new evidence "especially strong because it is 'consistent, unwavering, compelling, and wholly unrebutted.'" *Holsey*, 694 F.3d at 1290 (Barkett, J., dissenting) (quoting *Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011)).

4. Findings on Appeal in Habeas

On appeal, the Georgia Supreme Court assumed deficient performance had been rendered, that evidence presented in habeas proceedings could have been presented at sentencing. However, the court reversed the state habeas court's grant of sentencing relief, finding (without acknowledging critical aspects of trial counsel's deficiencies, such as counsel's alcoholism and absences from the courtroom) that the evidence presented to the habeas court, including even expert testimony regarding Mr. Holsey's cognitive impairment and other disorders, did not matter because it was "largely cumulative" of that presented at sentencing. *Holsey*, 281 Ga. at 813-14.

Without discussing any of the troubling aspects of trial counsel's dismal performance, Judge Carnes found the Georgia Supreme Court's characterization of the new mitigating lay and expert testimony as "largely cumulative" reasonable, likening this case to the facts in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) (finding post-conviction evidence to be "largely duplicat[ive]" of evidence presented at trial) and Eleventh Circuit cases like *Sochor v. Sec'y, DOC*, 685 F.3d 1016 (11th Cir. 2012). Notably, Judge Carnes distinguished Mr. Holsey's case from the recent outcome in *Cooper v. Sec'y, DOC*, 646 F.3d 1328 (11th Cir. 2011), highlighting the Eleventh Circuit's finding in that case that although "the trial evidence told the jury that 'the extent of the abuse inflicted on Cooper was the emotional abuse of his father not being involved in his life and getting whipped by a belt, sometimes leaving marks,' [that] 'did not begin to describe the horrible abuse testified to by Cooper's brother and sister' at the collateral evidentiary hearing." *Holsey*, 694 F.3d at 1267. With respect to Mr. Holsey's case, Judge Carnes found, by contrast, that the jury already new the "basic story of his troubled, abusive childhood," and that the new evidence merely added "more details." *Id.* at 1266.

Judge Edmondson concurred in the judgment only, noting, importantly, that in his opinion, the Georgia Supreme Court's decision lay just "within the outside border of the range of reasonable." *Holsey*, 694 F.3d at 1275.

Judge Barkett dissented at length from Judge Carnes' opinion, finding that the panel decision could not be reconciled with this Court's precedents including *Porter v. McCollum*, 130 S.Ct. 447 (2009); *Williams v. Taylor*, *supra*; and *Wiggins v. Smith*, 539 U.S. 510 (2003). Judge Barkett pointed out that

> both the Supreme Court and our court have held prejudice to be established under Strickland where the testimony presented at trial failed to describe the "nature and extent" of childhood abuse suffered by the petitioner. If such evidence is capable of establishing prejudice, it cannot reasonably be dismissed as "largely cumulative" of testimony that merely mentions that the defendant was beaten. Specifically, in *Wiggins*, it was precisely the "nature and extent of the abuse [the] petitioner suffered" that led the Supreme Court to conclude that any reasonable counsel would introduce evidence of the petitioner's abusive childhood due to its likely impact on the jury. *See* 539 U.S. at 535–37, 123 S.Ct. 2527 (emphasis added).
>
> Similarly, in *Williams*, the Court held that the petitioner was prejudiced by counsel's omission of a "graphic description of [the petitioner's] childhood" including "documents ... that dramatically described mistreatment, abuse, and neglect during his early childhood." 529 U.S. at 370, 398, 120 S.Ct. 1495 (emphasis added). And in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam), the Court held that "it is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." 130 S.Ct. at 455.
>
> *In each of these cases, it was not the omission of an acknowledgment of abuse that the Court found prejudicial, but the omission of testimony that described this abuse in sufficient detail for the jury to understand what actually occurred....*
>
> [In Mr. Holsey's case, a]lthough mention was made by Clifford Holsey and Regina Reeves about beatings, it is no less true in Holsey's case than it was in *Johnson* [*v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011)] *that the "description, details, and depth" of the abuse are what gives this evidence mitigating value and are what was completely omitted in Holsey's trial....* Counsel's failure to present any testimony about the "nature and extent" of the abuse Holsey suffered, *Wiggins*, 539 U.S. at 535, 123 S.Ct. 2527, similarly *misled the jury about*

> *Holsey's background because it "minimized the mitigating circumstances" of Holsey's abusive history.*

Holsey, 694 F.3d at 1280 (emphasis supplied).

With respect to the cases Judge Carnes' used to ratify the Georgia Supreme Court's findings, Judge Barkett further explained that

> [t]he [Eleventh Circuit] cases relied upon by the majority are inapplicable to the facts of this case. In the cases cited by the majority, there either was descriptive evidence at sentencing conveying the nature and extent of the abuse suffered by the petitioner, or the mitigating evidence introduced on collateral review did not resemble the consistent, voluminous, and unrebutted evidence of pervasive and severe abuse that is at issue in [Mr. Holsey's] case.
>
> Likewise, in *Cullen v. Pinholster*, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the testimony presented on collateral review was relatively limited in scope and did not approach a description of the scale of abuse at issue here, where not only family members but also members of Holsey's community stepped forward to describe the severity and widespread notoriety of this abuse. *See Cullen*, 131 S.Ct. at 1409–10. The evidence presented at the collateral hearing provided far less support than that presented on behalf of Holsey at his collateral hearing. See *Pinholster v. Ayers*, 590 F.3d 651, 712 (9th Cir. 2009) (en banc), (Kozinski, C.J., dissenting), rev'd, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 ("[W]hat's remarkable is how little support the family members provide for Pinholster's theory of extreme abuse and deprivation .... What's remarkable here is just how weak this testimony actually is."); *id.* at 713 ("The simple fact is, there's nothing supporting the theory of abuse or deprivation, in stark contrast to the evidence in many other cases.") (citing *Wiggins*, 539 U.S. at 517, 123 S.Ct. 2527; *Williams*, 529 U.S. at 370, 120 S.Ct. 1495).
>
> Moreover, the ostensibly mitigating testimony at issue in *Cullen* was undermined by the fact that the petitioner himself denied that any abuse had actually occurred, and in fact described the purported abuse by his stepfather as "'discipline' from which he 'benefitted.'" See *Pinholster v. Ayers*, 525 F.3d 742, 767–68 (9th Cir. 2008), vacated en banc, 590 F.3d 651 (9th Cir.2009), rev'd, —— U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011); see also *id.* at 767 ("Pinholster's primary complaint about his step-father was that 'he didn't seem to want the kids around.'"). *In contrast, in Holsey's case, the evidence of pervasive abuse is uncontradicted.*

Holsey, 694 F.3d at 1281, 1282-83 (emphasis supplied)

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

Mr. Holsey's claims of ineffective assistance of counsel and mental retardation, including the issue of the constitutionality of Georgia's "reasonable doubt" standard of proof, were raised in state and federal habeas corpus proceedings below. The state habeas court granted sentencing relief on the Sixth Amendment claim but denied his mental retardation claim. The Georgia Supreme Court reversed the grant of sentencing relief on appeal and affirmed the remainder of the lower court's findings. The federal district court and the Court of Appeals affirmed the Georgia Supreme Court's decision below.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Georgia Supreme Court's Reversal of Sentencing Relief on the Basis That the New Evidence is "Largely Cumulative" of Evidence Presented at Trial Resulted from an Unreasonable Application of *Strickland v. Washington*, 466 U.S. 668 (1984).

Judge Barkett is correct that it is objectively unreasonable to mischaracterize and discount the habeas corpus evidentiary record as "largely cumulative" of the sentencing record in this case. This is not a case in which the new "testimony would have added nothing of value." *Bobby v. Van Hook*, 130 S. Ct. 13, 19 (2009).[8] In contrast to her testimony at sentencing, which referenced "beatings" without any specificity or detail and in the context of only a few lines of

[8] "The record here demonstrates that 'both the *nature* and the *extent* of the abuse the petitioner suffered' would have affected the probability that 'at least one juror' would have voted for a sentence less than death, *see Wiggins v. Smith*, 539 U.S. at 535, 536 (2003) (emphasis added), and the mitigating evidence describing the behavioral and cognitive impact of Holsey's borderline retardation would have influenced 'the jury's appraisal of his moral culpability,' see *Williams v. Taylor*, 529 U.S. 362, 398 (2000)." *Holsey*, 694 F.3d at 1275 (Barkett, J., dissenting) (emphasis in original).

testimony about Mr. Holsey's dysfunctional childhood home,[9] Regina Holsey's habeas testimony,[10] as well as that of numerous other witnesses, revealed the full dimensions of Wayne Holsey's nightmarish upbringing by a violent woman who was herself schizophrenic and intellectually disabled.[11] In addition, extensive testimony by experts of both parties in habeas proceedings established that Mr. Holsey is undisputedly functioning at best at the level of borderline intellectual functioning with an IQ of approximately 70 and has a disability which compromised his mental capacity at the time of the crime. Judge Barkett noted that Mr. Holsey's evidence "is precisely the potent combination of child abuse and borderline mental retardation that was held to establish prejudice in *Williams v. Taylor*." *Holsey*, 694 F.3d at 1290. Relief is warranted.

A. The Failure of the Eleventh Circuit and the Georgia Supreme Court to Consider the Unique Circumstances that Rendered Counsel's Performance Deficient Undermines the Reliability of Their No-Prejudice Finding.

In their opinions, neither the Georgia Supreme Court nor the Eleventh Circuit even mention the extreme dysfunction of the defense team identified by the state habeas court or the fact that counsel themselves candidly admitted their deficient performance. Here, where Mr. Holsey's alcoholic trial attorney consumed a fifth of vodka every night during trial as he waited to be indicted, counsel "admitted ... that, at the time he was preparing for Holsey's capital murder trial, he 'probably shouldn't have been allowed to represent anybody' due to his condition." *Holsey*, 694 F.3d at 1276 (Barkett, J., dissenting). The failure of the Eleventh

[9] R1-9, Resp. Ex. 32 at 107-08.

[10] *See* R1-9, Resp. Ex. 94 at 587-678

[11] R-9, Resp. Ex. 92 at 62-3.

Circuit court and the Georgia Supreme Court to pay heed to these unique and appalling circumstances runs afoul of this Court's warning not to place undue reliance on the soundness of the actual trial presentation where deficient performance is manifest.

For example, in *Sears v. Upton*, 130 S.Ct. 3259 (2010), "the [state habeas] court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. . . . [T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not." *Sears*, 130 S. Ct. at 3265. The deficient analysis in *Sears* is similar to that which occurred in this case and resulted in a similarly superficial reading of the record as to prejudice.

As Justice Sotomayor has explained: "[W]e have explained that there is no prejudice when the new mitigation evidence 'would barely have altered the sentencing profile presented' to the decisionmaker, *Strickland, supra*, at 700, 104 S. Ct. 2052. But we have also found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Sears*, 130 S. Ct. at 3266.

B. **Evidence of Mr. Holsey's Severe Intellectual Deficits was a Critical Aspect of Mitigation That Could Not Have Been Credibly Presented by Having Mr. Holsey's Sister Read Out a Single Sentence From a Report Stating That he Functioned in the Borderline Mental Retardation Range When he was Around Fifteen Years Old.**

There is *no* dispute that Mr. Holsey, at the very least, has suffered from borderline intellectual functioning since childhood and that extensive evidence concerning his condition could have been offered at sentencing through a variety of potential expert witnesses. As this Court has repeatedly recognized, evidence of "impaired intellectual functioning is inherently mitigating . . . . [W]e cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence." *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). *See Williams*, 529 U.S. at 398 (noting "the reality that [the defendant] was 'borderline mentally retarded,' might well ... influenc[e] the jury's appraisal of his moral culpability.").[12]

Despite the "inherently mitigating" nature of this evidence, the Eleventh Circuit determined that the Georgia Supreme Court had reasonably concluded that evidence of Mr. Holsey's severe intellectual deficits was adequately presented at trial because Regina Holsey Reese had read a few isolated sentences from school and juvenile detention records she had never before seen which stated merely that her brother was a poor student who needed help and

[12] *See also, e.g., Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013) ("Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available. . . . 'Counsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's *mental problems,* life circumstances, and personal history and, on the other, his commission of the crime in question'") (quoting *Hooks v. Workman*, 689 F.3d 1148, 1204) (emphasis added in original; additional citation omitted); *Hooks*, 689 F.3d at 1205 ("While he may not meet the legal definition of mentally retarded under Oklahoma law, no one disputes that by the time of trial he had been clinically diagnosed with mild or borderline mental retardation. . . . Evidence of Mr. Hook's educational handicaps was surely relevant to the jury's appraisal. It was readily available and should have been part of Mr. Evan's mitigation case.").

that he "functions in the borderline mental retardation range of intelligence . . . ." *Holsey*, 694 F.3d at 1262.

Evidence of Mr. Holsey's severe intellectual deficits was a critical aspect of mitigation that was not and could not have been credibly presented by having Mr. Holsey's sister reading snippets from records written by others without either context or meaningful content. It was "patently unreasonable" for trial counsel to fail to present meaningful evidence of Mr. Holsey's borderline mental retardation, as such evidence "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). In her dissent in *Holsey*, Judge Barkett explained *Atkins v. Virginia*, 536 U.S. 304 (2002) :

> The majority refers to Regina Reeves' sentencing phase testimony that Holsey "performed poorly in school, and was usually assigned to the next grade level instead of actually passing into that grade level," that Holsey "dropped out of school before finishing the tenth grade," and that Holsey was " 'very slow' and a 'poor worker' who 'need[ed] help from home' but never got that help." Majority op. at 1262. However, nothing in the testimony referred to describes the depth and severity of mental impairment that distinguishes a borderline mentally retarded defendant from the general population. *See Atkins [v. Virginia]*, 536 U.S. [304,] 319, 122 S.Ct. 2242 [(2002)] ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."). To say that testimony describing Holsey as having academic difficulties that are shared by non-mentally retarded individuals "highlighted" the effects of Holsey's mental retardation described on collateral review is to erase the distinction between mentally retarded persons and those who are not....
>
> Testimony that describes the impairments that are unique to mentally retarded individuals is necessary to distinguish the mentally retarded or borderline mentally retarded defendant from a defendant whose culpability is not decreased by this incapacity. Such testimony does not, as the majority claims, merely add "details" or elaborate on "themes" that have already been canvassed; instead, it is essential to give recognition to the "cognitive and behavioral impairments that make these defendants less morally culpable." *Id.* at 320, 534 S.E.2d 312. The sentencing phase testimony wholly failed to describe the effects of Holsey's borderline mental retardation.

Holsey, 694 F.3d at 1287.

Ignored by Judge Carnes in citing Respondent's experts' suggestion of the possibility of anti-social personality[13] is the fact that evidence of "antisocial" personality was already presented in youth detention records to the jury at sentencing. *See* R1-9, Resp. Ex. 32 at 117. Moreover, Dr. Thomas Sachy, Respondent's retained psychiatrist, found that Mr. Holsey's 71 IQ represented a "significant impairment." R1-9, Resp. Ex. 97 at 1492. Further, Sachy testified that Mr. Holsey's cognitive impairment was effectively "brain damage" caused by a "hefty dose" of "deprivation of nurturance and of social, linguistic, and other stimulation .... during the developmental periods." *Id.* at 1490.[14] Sachy concluded: "[D]oes [sic] his intellectual abilities and upbringing have anything to do with what he's charged with? Absolutely." *Id.* at 1496.

Similarly, Dr. Marc Einhorn, Respondent's retained psychologist, found that Mr. Holsey had an IQ of 71 and demonstrated Borderline Intellectual Functioning. *See* R1-9, Resp. Ex. 97 at 1323, 1393.[15] Further, Dr. Einhorn believed that his disability, in conjunction with his impaired cognitive functioning and adaptive deficits, had directly contributed to his "poor overall adjustment to life" and "impaired" ability to conform to societal, family and psychological expectations (*id.* at 1405, 1422-23) as well as his criminal behavior:

[13] *See Holsey*, 694 F.3d at 1270.

[14] Sachy also found a "genetic and ... developmental process here[, including a sister and mother diagnosed with mental retardation, which] helps explain [Mr. Holsey's] brain, whatever the process is, whatever the level of impairment." R1-9, Resp. Ex. 97 at 1490-91.

[15] Dr. Einhorn testified that he (Einhorn) would decline any amount of money in exchange for being endowed with an IQ of 71, noting that it was a far lower level of cognitive ability than found even in most prisoners who typically show decreased intellectual functioning. *See* R1-9, Resp. Ex. 97 at 1402, 1415.

> He's neglected, he's abused, he drinks, he does poorly in school, he gets into trouble, he starts hanging out with the wrong people, and it's all pretty predictable.... *He never had the advantages of what most of us would have even in a less marginal sense. He was culturally deprived. He was psychologically deprived. He didn't have anything. He was a victim of his circumstances.* He didn't have proper parenting. He didn't have proper food. He didn't have a proper education. He didn't have a father figure at all. He didn't have really anything.... It's pretty sad.... It's pitiful. [H]e started drinking at an early age ... and then alcohol abuse ... and I'm sure it just contributed to his lack of development, I mean, as would be the case with anybody.... But in his case, you know, he was poverty stricken and started drinking.... *If you throw into the [Borderline Intellectual Functioning] equation alcohol abuse, his terrible conditions he grew up in, practically anyone would make a poor adjustment to life with that equation.*

R1-9, Resp. Ex. 97 at 1405-06, 1413-15, 1423-24 (emphasis supplied).

Further, Dr. Michael Shapiro, the original defense psychologist who did not testify at trial, initially found that Mr. Holsey was "borderline deficient" in intellectual capacity, that he was "immature," had "poor impulse control" and was reading at a 4th grade level. *See* R1-9, Resp. Ex. 93 at 310; Resp. Ex. 114 at 5508. Having reviewed additional background materials in habeas proceedings,[16] Dr. Shapiro explicitly revised his initial impressions and found that Mr. Holsey had a "hereditary predisposition for borderline [intellectual functioning]. R1-9, Resp. Ex. 98 at 1639. He also had a "hereditary predisposition towards mood/psychotic disorders. In fact, his profile when I saw him was much like his [mother's].... So – he *did* have some pre-existing prob[lem]s ... which could have contributed to his actions." *Id.* at 1640. Finally, Shapiro

[16] When provided with a comprehensive background on Mr. Holsey in habeas proceedings (*see* R1-9, Resp. Ex. 98 at 1584), Dr. Shapiro found significant 15 year old Wayne Holsey's IQ score of 70, his potential "prepsychotic disturbance," "borderline MR," "severe amount of depression," "paranoid traits," and a suicide attempt. R1-9, Resp. Ex. 98 at 1635. Shapiro noted that prison records described 18 year old Wayne Holsey as someone who "may become easily suicidal," has "severe anxiety" and "elements of psychotic withdrawal," and who "may have a specific [learning disability]." *Id.* at 1636. Shapiro also noted his mother's and sister's documented history of mental retardation, borderline intellectual functioning, and major depression (in his mother's case, with psychotic features and paranoid ideation). *Id.* at 1637-38.

testified that borderline intellectual functioning is a "mitigating" condition which puts Mr Holsey in approximately the bottom 5% of the population in cognitive ability. *Id.* at 1627-28 The jury heard none of the foregoing.

As Judge Barkett noted in her dissent:

> Clearly, Regina Reeves' unexplained reading [in a school record] of the words "borderline mental retardation range" cannot reasonably be called "largely cumulative" of this testimony. The cognitive and behavioral impairments that were painstakingly explained on collateral review by the psychologists are not a matter of everyday knowledge such that a jury will be reminded of them automatically merely by hearing the words " borderline mental retardation " spoken. Rather, the testimony by these experts would have enabled the jury to understand in concrete terms that Holsey suffers from the "cognitive and behavioral impairments" that reduce the moral culpability of mentally retarded and borderline mentally retarded offenders, including Holsey's diminished capacity "to understand and process information, to communicate, to engage in logical reasoning, to control impulses, and to understand the reactions of others."

Holsey, 694 F.3d at 1286-87 (quoting *Atkins*, 536 U.S. at 318).

Indeed, in the absence of any such expert testimony, the prosecution told the jury, "*No doctors have told us that Robert Wayne Holsey has any mental problems*." R1-9, Resp. Ex. 34 at 9 (emphasis supplied). As the record plainly demonstrates, any doctor making an informed evaluation of Mr. Holsey's mental health profile would have had much to say to a jury about Mr. Holsey's significant mental impairments. The jury in this case labored under a profoundly incomplete and inaccurate impression of Mr. Holsey's background and mental health status.

C. The Georgia Supreme Court and Eleventh Circuit Grossly Misrepresented the Substantiality and Persuasiveness of the Evidence Uncovered in State Habeas Proceedings in Writing It Off as "Largely Cumulative" Simply Because Trial Counsel Offered a Fleeting and Wholly Undeveloped Glimpse of the Mitigation Case that Competent Counsel Would Have Presented.

The lower courts wrote off the powerful evidence presented in the state habeas court – which persuaded the habeas trial court to grant sentencing relief – on grounds the evidence was

"largely cumulative" of barely sketched themes that trial counsel touched upon but failed to animate with readily available proof. The courts' casual rejection of this evidence as merely "cumulative" flies in the face of this Court's decisions repudiating trial counsel's failure to develop and present precisely such fundamental mitigation.

This is not a case in which the new "testimony would have added nothing of value." *Van Hook*, 130 S. Ct. at 19. Nor is it "a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.' *Porter*, 130 S. Ct. at 454. To the contrary, as in *Porter*, the "jury at . . . sentencing heard almost nothing that would humanize [Holsey] or allow [jurors] to accurately gauge his moral culpability. They learned about [Holsey's] crimes, and almost nothing else. Had [Holsey's] counsel been effective, the . . . jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" *Id.* (citation omitted).

As this Court recently explained in *Sears v. Upton*, "there is no prejudice when the new mitigation evidence 'would barely have altered the sentencing profile presented' to the decisionmaker, *Strickland, supra*, at 700, 104 S. Ct. 2052. But we have also found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Sears*, 130 S. Ct. at 3266 (quoting *Strickland*, 466 U.S. at 700).[17]

Here, the evidence presented in state habeas proceedings "is not merely cumulative. There is no question that the additional mitigating evidence is stronger than anything the panel

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[17] *See also id.* ('We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.")

learned about [Holsey's] background from the [testimony of his sister and fragments of records that she read, which] spoke in generalities that lacked any details of the severe abuse and the abject poverty [Mr. Holsey] experienced as a child, or any 'graphic descriptions' of the atmosphere of violence that permeated his formative years. [Cit. omitted]. In contrast, [Holsey]'s family members offered first-hand, eyewitness accounts of specific examples of extreme poverty and abuse. These specifics had far more evidentiary power than the abstractions and oblique references contained in the experts' written reports." *Sowell v. Anderson*, 663 F.3d 783, 795 (6th Cir. 2011).[18]

Had Mr. Holsey's jury heard the evidence that was presented at the state habeas hearing, there is more than a reasonable probability that at least one juror would have voted in favor of a life sentence. **The Georgia Supreme Court unreasonably applied *Strickland* in finding the ample available mitigating evidence in this case to be "largely cumulative" of that presented at trial.**

[18] *See also id.* at 796 ("The evidence the panel did not hear – specific details about Sowell's horrific childhood – is often the kind of evidence that undermines a court's confidence in the outcome of a capital sentencing proceeding."); *Foust v. Houk*, 655 F.3d 524, 545 (6th Cir. 2011) ("In this case, counsel presented some evidence at the mitigation hearing, but the evidence in no way conveyed the horror of Foust's childhood or Foust's attempt to combat his family history by helping Amy. By 1988, a social worker concluded that '[t]he Foust family has a continuous social services history of mental neglect, non[-]nurturance, drug and alcohol usage, substandard living habitats[,] and an overall defiant, confrontational lifestyle that has developmentally delayed and conceivably retarded any reasonable expectations one ... might wish for the Foust children.' App'x Vol. 3 at 1032. This type of evidence reveals far more than 'minor additional details.' *Van Hook*, 130 S.Ct. at 20. The new information "picture[s Foust's] childhood ... very differently from anything defense counsel had seen or heard." *Rompilla[v. Beard]*, 545 U.S. [374,] 390, 125 S.Ct. 2456 [(2005)]. Had the full information been available to the three-judge panel who sentenced Foust to death, there is a reasonable probability that one judge would have opted to sentence Foust to life imprisonment.").

D. The Eleventh Circuit has Adopted an Impermissible Double Standard that Improperly Discounts Mitigating Evidence for Addressing So-Called "Double-Edged" Evidence, Deeming its Mitigating Aspects Merely "Cumulative" if the Jury was Aware of its Generalities, but Emphasizing the Potential Harm of the Aggravating Side Despite the Jury's Exposure at the Original Trial to the Substance of that Aggravation.

In the decision below, the Eleventh Circuit wholly discounted the significance of mental health expert testimony on the ground that such evidence contained the risk that jurors would also learn additional, potentially aggravating evidence expanding upon information they had already heard:

> Finally, it came out during the evidentiary hearing that Dr. Sachy, the State's expert witness, and Dr. Shapiro, the psychologist Holsey's trial lawyers had hired to evaluate him, were of the opinion that Holsey's history . . . evidenced an antisocial personality disorder. Although Holsey was never formally diagnosed as having antisocial personality disorder, the testimony of those two experts, and other evidence corroborating what they said, would have been additional aggravating evidence because it indicates that, formal diagnoses or not, Holsey does have an antisocial personality disorder. And that is "a trait most jurors tend to look disfavorably upon" and evidence of which "is not mitigating but damaging." * * * Evidence corroborating Dr. Sachy's and Dr. Shapiro's opinions was admitted during the sentencing phase.

Holsey, 694 F.3d at 1270.

In another recent case, the Eleventh Circuit had adopted this view even more clearly:

> Second, the evidence presented at the state posconviction hearing, in any event, included new aggravating evidence concerning Evan's background. The evidence provided new details about Evans's violence toward women, his long pattern of violence toward authority figures, his violence criminal activity, and his belief that he was not 'ready' unless he had a gun. Judge Martin's dissent does not dispute that the sentencing court would have heard this new aggravating evidence. Judge Martin's dissent instead argues that this new evidence is cumulative because the sentencing court 'was already generally aware of' Evan's background.. . . . But Judge Martin's dissent does not, and cannot, explain why "general[] aware[ness]" of Evans' violent background renders unreasonable the decision of the Supreme Court of Florida that the evidence from Evan's postconviction hearing, which included both harmful and helpful details about Evan's background, was more harmful than helpful.

Evans v. Sec'y, DOC, 703 F.3d 1316, 1332 (11th Cir. 2012), *cert. petition pending in* Sup. Ct. Docket No. 12-9448.[19]

In Mr. Holsey's case, the jury had already been informed at the original sentencing that youth detention records described Mr. Holsey unflatteringly as "appear[ing] as an antisocial individual who thrives on taking risks or thrill seeking. He exhibits an inability to plan ahead and may show a reckless disregard for the consequences of his actions." R1-9, Resp. Ex. 98 at 1692. Thus, any suggestion of "antisocial" traits which may have emerged had the new evidence been presented would have been merely cumulative of aggravating evidence to which Mr. Holsey's jury had been exposed *without rebuttal or context in the form of a detailed discussion of his mental impairments*.[20] The Eleventh Circuit's contradictory approaches to considering the relevance and impact of new evidence in mitigation and new evidence in aggravation when the jury had a "general awareness" of the subjects of that evidence underscores the court's inappropriate double standard and demonstrates that it has turned this Court's analysis of undeveloped mitigating evidence on its head.

In *Porter*, for example, this Court explained that "the State's experts identified perceived problem with the tests that [the petitioner's expert] used and the conclusions that he drew from

[19] The second question presented in the petition for writ of *certiorari* in *Evans* is: "**Error! Main Document Only.**2. Whether failure to discover and present evidence of mental mitigation can be a "double-edged sword" when the jury was already informed of the facts concerning the aggravating edge of the sword?" Mr. Holsey respectfully submits that, in the event the Court does not grant *certiorari* outright in his case, that it hold it pending the Court's resolution of *Evans*.

[20] *See, e.g., Sears*, 130 S.Ct. at 3264: "[T]he fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising ... given that counsel's initial mitigation investigation was constitutionally inadequate. Competent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory."

them," did not justify the rejection of that evidence, as "it was not reasonable to discount entirely the [mitigating] effect that his testimony might have had on the jury or the sentencing judge." *Porter*, 130 S. Ct. at 455. *See also id.* ("It is also unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions,' . . . simply because the jury would also have learned that Porter went AWOL on more than one occasion.") (quoting *Porter v. State*, 788 So. 2d 917, 925 (Fla. 2001)). Relief is warranted.

II. Georgia's "Beyond a Reasonable Doubt" Standard for Mental Retardation Claims Vitiates the Eighth Amendment Guarantee that Mentally Retarded Persons Shall Not Be Executed and Contravenes Due Process.

The Eighth Amendment categorically prohibits the execution of mentally retarded offenders because they inherently lack the requisite moral culpability to make them eligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

In Mr. Holsey's case, the state habeas court, as the fact-finder tasked with adjudicating Mr. Holsey's mental retardation claim on the merits under *Turpin v. Hill*, 269 Ga. 302, 304 (1998), was not limited to considering evidence presented at Mr. Holsey's initial trial, but was permitted to evaluate the totality of the data introduced at trial and in state habeas proceedings.

In Mr. Holsey's state habeas proceeding, extensive evidence was presented demonstrating Mr. Holsey's mild mental retardation and family history of intellectual disabilities. This evidence included the testimony of two psychologists, Dr. Jethro Toomer and Dr. Marc Cunningham, who found Mr. Holsey to have mental retardation. While the state habeas court found this evidence compelling, and while all experts agreed that Mr. Holsey had an IQ of approximately 70, the court found itself constrained by Georgia's unique "reasonable doubt" standard. R1-9, Resp. Ex. 145 at 73. As a result, the state habeas court found that because the state had introduced evidence showing, in the court's view, that Mr. Holsey did not

quite meet the criteria for mental retardation in that he seemed to be "functioning in a relatively normal fashion" with respect to adaptive skills, despite his significantly subaverage intellectual functioning.[21] *Id.* at 74. The court could therefore not find Mr. Holsey to be mentally retarded beyond a reasonable doubt, although "*a jury verdict would have been authorized to find Mr. Holsey mentally retarded or not.*" *Id.* (emphasis supplied).

Indeed, the Georgia Supreme Court affirmed the state habeas court's ruling, citing "the conflicting evidence" presented at the state habeas hearing. *Holsey*, 281 Ga. at 817. In affirming the habeas court's employment of the reasonable doubt standard (*id.*), the Court relied on its previous ruling affirming the reasonable doubt standard in *Head v. Hill*, 277 Ga. 255 (2003). *See Holsey*, 281 Ga. at 817.

The Georgia Supreme Court's decision permits Mr. Holsey to be executed ***despite the state habeas court's finding that the evidence would have been sufficient to authorize a jury finding that he is mentally retarded beyond a reasonable doubt.*** In other words, Mr. Holsey is substantially likely to be mentally retarded, yet he may be executed as a result of Georgia's stringent burden of proof for such claims – a result that flies in the face of the holding of *Atkins*. As Judge Barkett noted in her dissent in *Hill v. Humphrey*, *supra* (a similar case in which the

[21] While the Respondent's experts agreed that Mr. Holsey's long-standing intellectual deficit, indicated by his approximately 70 IQ, consistently demonstrated throughout his life, is within the significantly subaverage, or mentally retarded, range (R1-9, Resp. Ex. 95 at 890-93), they disputed that he possessed adaptive skill deficits sufficient to qualify for a diagnosis of mental retardation. Nevertheless, the state experts believed that Mr. Holsey's cognitive impairment consisted of "brain damage" caused by a "hefty dose" of "deprivation of nurturance and of social, linguistic, and other stimulation .... during the developmental periods." R1-9, Resp. Ex. 97 at 1490. The state experts believed also that Mr. Holsey's impairments directly contributed to his "poor overall adjustment to life" and "impaired" ability to conform to societal, family and psychological expectations (*id.* at 1405, 1422-23) as well as his criminal behavior (*id.* at 1405-06, 1413-15, 1423-24).

petitioner's significantly subaverage IQ was not in dispute and where the state habeas court found that Hill would be deemed mentally retarded under a preponderance standard):

> Requiring proof beyond a reasonable doubt, when applied to the highly subjective determination of mental retardation, eviscerates the Eighth Amendment constitutional right of all mentally retarded offenders not to be executed, contrary to *Atkins*....
>
> The state court's decision, however, endorses the use of a standard of proof so high that it effectively limits the constitutional right protected in *Atkins* to only those who are severely or profoundly mentally retarded. In holding that *Atkins* applies only to "those whose mental deficiencies are significant enough to be provable beyond a reasonable doubt," *Head v. Hill,* 277 Ga. 255, 587 S.E.2d 613, 622 (2003), Georgia's determination is directly contrary to *Atkins*'s command to protect from execution *all* of the mentally retarded. That a mildly mentally retarded individual's "mental deficiencies" are less "significant" than the deficits of one who is severely or profoundly mentally retarded does not alter the indisputable fact that both are mentally retarded and entitled to the protection of the Eighth Amendment....
>
> Where the proof must be beyond a reasonable doubt, common sense tells us that requiring reliance on these unavoidably incomplete and subjective sources of information renders the *Atkins* claimant's job a near-impossible task. Compounding the difficulty of this inherently subjective diagnosis is that all of the relevant proof will be presented to a judge or jury via the dueling views of mental health experts who have evaluated subtle and often contradictory aspects of the offender's behavioral history, often times through second- or third-hand accounts of a long distant past not subject to direct observation. Because of the subjectivity of both the diagnosis and the documentation of the offender's childhood, experts are bound to disagree about whether an offender is mentally retarded. Obviously, the less severe an individual's mental retardation, the more susceptible his condition is to differing interpretations by the experts. For these offenders, the result of the experts' dispute about whether the offender falls just within or just outside the ambit of mental retardation is some quantum of irreducible doubt—which in Georgia amounts to a death sentence.

Hill, 662 F.3d at 1365, 1367, 1374.

The Georgia Supreme Court's decision in *Schofield v. Holsey,* relying as it does on *Head v. Hill, supra,* is contrary to and/or involves an unreasonable application of principles articulated in such Supreme Court precedent as *Bailey v. Alabama,* 219 U.S. 219 (1911); *In re Winship,* 397

U.S. 358 (1970); *Speiser v. Randall*, 357 U.S. 513 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952); *Patterson v. New York*, 432 U.S. 197 (1977); *Addington v. Texas*, 441 U.S. 418 (1979); *Medina v. California*, 505 U.S. 437 (1992); *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *Panetti v. Quarterman*, 551 U.S. 930 (2007), which relate to the assessment of whether procedural rules comport with Due Process and adequately protect the rights asserted.

"[H]ere, the state court utterly failed to identify and apply ... governing Supreme Court precedent [*i.e.*, *Bailey*, *Speiser*, *supra*], by failing even to confront the fact that requiring an offender to prove mental retardation beyond a reasonable doubt 'necessarily produce[s] a result which the State could not command directly,' namely, making the mildly and even moderately mentally retarded eligible for execution." *Hill*, 662 F.3d at 1369 (Barkett, J., dissenting) (quoting *Speiser*, 357 U.S. at 526).

In particular, as shown by its decision in *Head v. Hill*, *supra*, the Georgia Supreme Court failed to recognize that the change in the status of the *Atkins* right from a creation solely of Georgia state statutory law to a fundamental Constitutional right requiring states to adhere to basic requirements of Due Process in its enforcement. Those basic requirements include a "'fair hearing' in accord with fundamental fairness" which does not "'invite arbitrariness and error'" and is "'adequate for reaching reasonably correct results'" *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 424, 426-27). Because of Georgia's "reasonable doubt" standard, Mr. Holsey did not receive a fundamentally fair adjudication of his mental retardation claim.

The State of Georgia, alone among the states and the federal government, requires a capital defendant to prove beyond a reasonable doubt that he or she is ineligible for the death penalty as a result of mental retardation. *See* O.C.G.A. § 17-7-131; Peggy M. Tobolowsky, *A*

*Different Path Taken: Texas Capital Offender's Post-*Atkins *Claims of Mental Retardation*, 39 Hastings Const. L. Q. 1, 142 n.769 (Fall 2011) (noting that "Georgia is the only state that requires a reasonable doubt standard regarding mental retardation"). "The net effect of the high burden Georgia imposes on defendants is that disagreement among experts will invariably support a finding against the defendant." Carol S. Steiker, Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 726 (Spring 2008) (hereinafter *Lessons*).

Mr. Holsey and other Georgia capital defendants have no meaningful recourse outside of this Court in which they may challenge this law. The Georgia Supreme Court has resolutely stuck to its holding that the statute complies with the federal constitution. *See, e.g.* *Hill*, 277 Ga. at 261 (Georgia Supreme Court will not strike the "reasonable doubt" standard "unless the Supreme Court of the United States so requires at some future date"); *Stripling v. State*, 289 Ga. 370, 371-72 (2011) ("[W]e now reiterate our prior holding that Georgia's beyond a reasonable doubt standard is not unconstitutional.") (citing *Hill*, 277 Ga. at 260-263). Moreover, in *Hill v. Humphrey*, *supra*, a majority of the Eleventh Circuit court, sitting *en banc*, upheld that law, concluding that, as a federal court sitting in habeas, it could not construe *Atkins*' holding to speak in any fashion to the burden of proof and that this Court alone has the authority to force Georgia's hand:

> *Atkins* simply did not consider or reach the burden of proof issue, and neither has any subsequent Supreme Court opinion. We do not gainsay the possibility that the Supreme Court may *later* announce that a reasonable doubt standard for establishing the mental retardation exception to execution is constitutionally impermissible. But under AEDPA, we are not concerned with what a United States Supreme Court holding could or should be in the future, but only what holdings of the Supreme Court established the law to be at the time the Georgia Supreme Court decided *Hill III* in 2003.

Hill, 662 F.3d at 1348-49 (*en banc*).[22]

Nor is Georgia's clemency process a satisfactory failsafe. The Georgia clemency board, for instance, refused to commute the death sentence of Warren Hill, despite the habeas court's finding that he is mentally retarded by a preponderance of the evidence. *See Hill v. Humphrey*, Case No. 12-8048, Petition for Writ of Certiorari, n.2 and Appendix G.

Mr. Holsey's case presents an excellent vehicle in which to address this question. The constitutionality of Georgia's burden is squarely and cleanly presented, and there is no need for this Court to expend its efforts parsing an intricate factual record to ascertain whether the quantum of the burden of proof was dispositive of the case. If this Court concludes that the burden of persuasion is inconsistent with the right of defendants with mental retardation to be protected from the death penalty, it can then simply remand the case for a determination of whether Mr. Holsey is entitled to relief. Issuing the writ will allow this Court to resolve this important but relatively narrow constitutional issue, and thereby give direction to state and federal courts that ensures that all capital defendants who raise *Atkins* claims have an opportunity to have their cases evaluated in an even-handed and fair proceeding.

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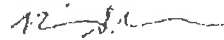
[22] The *Hill* court also suggested that "[i]f the standard of proof Georgia has adopted for claims of mental retardation is to be declared unconstitutional, it must be done by the Supreme Court in a direct appeal, in an appeal from the decision of a state habeas court, or in an original habeas proceeding filed in the Supreme Court . . . ." *Id.* at 1361 (citing *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996)). Should this Court conclude that it may not consider this issue as it arises in an application to review the Eleventh Circuit's decision, Mr. Holsey respectfully requests that the Court exercise its original jurisdiction under 28 U.S.C. § 1241 to decide this case.

CONCLUSION

This Court should grant Mr. Holsey's Petition to rectify "extreme malfunction[s]"[23] in the lower courts in Mr. Holsey's case and to impose consistency on the decisions of the Eleventh Circuit Court of Appeals in its adjudication of claims under *Strickland v. Washington*.

Respectfully submitted,



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[23] *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011).

No. 12-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

ROBERT WAYNE HOLSEY,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail and/or overnight courier on counsel for Respondent at the following address:

Beth Burton, Esq.
Deputy Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
bburton@law.ga.gov

This the 5th day of April, 2013.

Attorney

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Brian Kammer
Brian.kammer@garesource.org

This 5th day of December, 2014.

s/Beth Burton
BETH A. BURTON
Deputy Attorney General