

No. 03-1392

In the Supreme Court of the United States

ALPHONSO STRIPLING,

Petitioner,

v.

FREDRICK HEAD, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

**On Petition for a Writ of Certiorari to
the Supreme Court of Georgia**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This Court observed in *Atkins v. Virginia* that “some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards.” 536 U.S. 304, 317 (2002) (emphasis added). For example, mentally retarded defendants are more likely to give false confessions, less able “to make a persuasive showing of mitigation,” and “less able to give meaningful assistance to their counsel.” *Id.* at 320-321. Because of their reduced abilities, “[m]entally retarded defendants in the aggregate face a special risk of wrongful execution” (*id.* at 321), and that is a “justification for a categorical rule making such offenders ineligible for the death penalty” (*id.* at 320).

But mentally retarded defendants may be put to death as easily by procedural rules as by the substantive laws that the Court condemned in *Atkins*. This case shows how. The habeas court found that the evidence Mr. Stripling presented at his criminal trial probably “was sufficient to prove his mental retardation by *at least* a preponderance of the evidence.” Pet. App. 94a (emphasis added). However, under Georgia’s statutory procedure, a defendant may be executed although he has proven that he is mentally retarded by a preponderance of the evidence – or even by clear and convincing evidence. Respondent does not dispute that Georgia’s procedure will cause wrongful executions of mentally retarded defendants.

In *Cooper v. Oklahoma*, this Court held that “[b]ecause 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.” 517 U.S. 348, 369 (1996). Georgia’s rule is even worse than the rule in *Cooper* because (1) it requires proof by a higher standard, and therefore allocates more of the risk of error to the defendant; and (2) the consequences of error are far more pro-

found: death by unconstitutional execution. The Georgia statute denies defendants due process by requiring them to prove their mental retardation beyond a reasonable doubt before they may invoke their substantive rights under *Atkins*. See *Cooper*, 517 U.S. at 362-367.

As we demonstrated in the petition, this Court should grant certiorari to review the Georgia Supreme Court's decision upholding the constitutionality of the Georgia statute. That decision (1) conflicts with the decisions of several other state courts of last resort, (2) cannot be reconciled with *Cooper*, and (3) is based on a flawed understanding of the federal due process limitations on state procedural rules. Respondent's arguments to the contrary are entirely unpersuasive.

1. Respondent does not even *attempt* to deny that state courts of last resort are split on the question presented. See Pet. 10-12. Nor does he deny that this split will only get deeper until this Court resolves the question (*id.* at 14-15), or that review will provide necessary guidance to state legislatures and courts (*ibid.*). Instead of addressing these reasons why certiorari should be granted, respondent dwells on the entirely irrelevant facts of the crime (Br. in Opp. 1-5) and three pages of quotes from the Georgia Supreme Court's decision in *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003) (see Br. in Opp. 7-9), which is reproduced in full in the Appendix to the Petition (at 106a-135a).

2. Respondent's assertion that the petition "does not present a federal constitutional question for this Court's review" (Br. in Opp. 6; see *id.* at i, 10-11) is completely frivolous. Respondent does not deny that petitioner raised the federal due process issue in both the habeas court and the Georgia Supreme Court, and in fact *quotes* the Georgia Supreme Court's explicit holding that the challenged statute "'is constitutional'" (Br. in Opp. 6 (quoting Pet. App. 12a)). Respondent confuses the jurisdictional question whether petitioner's constitutional claim was *presented to and resolved*

by the lower court with the entirely distinct issue of whether the lower court found a constitutional *violation*. There can be no dispute that petitioner raised, and the Georgia Supreme Court resolved, a federal constitutional challenge to Georgia's mental retardation statute. Thus, review by this Court is entirely appropriate.

3. Respondent's claim that the decision below is correct (Br. in Opp. 9, 10) entirely ignores our explanation of why the decision cannot be reconciled with *Cooper*. See Pet. 16-21. Respondent does not deny (a) that mentally retarded criminals have a federal constitutional right not to be executed, (b) that Georgia is the only state to require defendants to prove their own mental retardation beyond a reasonable doubt, or (c) that because of Georgia's procedural rule, mentally retarded defendants *will* be executed despite their mental retardation. That cannot possibly be called fair, directly subverts *Atkins*, and is barred by federal due process under *Cooper*. But even if the Georgia Supreme Court's resolution of the question presented were correct, the split among state courts of last resort on that question would nonetheless warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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