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Insurmountable *Hill*: How Undue AEDPA Deference Has Undermined the *Atkins* Ban on Executing the Intellectually Disabled

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INSURMOUNTABLE *HILL*: HOW UNDUE AEDPA DEFERENCE HAS UNDERMINED THE *ATKINS* BAN ON EXECUTING THE INTELLECTUALLY DISABLED

Abstract: On November 22, 2011, in *Hill v. Humphrey*, the U.S. Court of Appeals for the Eleventh Circuit, sitting en banc, held that a petitioner's federal habeas petition challenging his death sentence must be denied in light of the degree of deference owed to the state habeas court's decision under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In so doing, the court rejected the petitioner's argument that Georgia's beyond a reasonable doubt standard for proving a defendant's intellectual disability is unconstitutionally stringent and thus eviscerates the right of the intellectually disabled to be exempt from capital punishment, a right clearly constitutionalized by the U.S. Supreme Court in *Atkins v. Virginia*. This Comment argues that the majority's overly strict approach in *Hill* has produced an unduly deferential standard for federal review of state court decisions. Consequently, under this approach, important constitutional protections—like that exempting the intellectually disabled from execution—are denied without recourse.

Introduction

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent level of deference that federal habeas courts must afford state court decisions.[1] Under AEDPA, federal habeas relief following state court adjudications is severely circumscribed and cannot be granted unless the adjudication meets one of two exceptions.[2] The first of these is that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law."[3] Courts struggle with how to interpret this statutory language,

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[1] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1) (2006); *see* Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. Rev. 953, 960 (2012) ("Under AEDPA, a federal court may consider granting habeas relief to an individual in state custody under very limited circumstances.").

[2] *See* 28 U.S.C. § 2254(d)(1); Katherine A. McAllister, Comment, *Deferential Dilemmas:* Pinholster v. Ayers *and Federal Habeas Claims for Ineffective Assistance of Counsel After AEDPA*, 52 B.C. L. Rev. E. Supp. 121, 127 (2011), http://lawdigitalcommons.bc.edu/bclr/vol52/iss6/11.

[3] 28 U.S.C. § 2254(d)(1). AEDPA contains a second exception for adjudications that "resulted in a decision that was based on an unreasonable determination of the facts in light of

often disagreeing on (1) whether something is clearly established under federal law, and if so, (2) whether a state decision is "contrary to, or involve[s] an unreasonable application of" that federal law.[4] Grappling with these interpretive questions, the U.S. Court of Appeals for the Eleventh Circuit held, in 2012, in *Hill v. Humphrey* (*Hill IV*), that a petitioner's federal habeas petition must be denied in light of the degree of deference owed to the state habeas court's prior decision under AEDPA.[5]

Part I of this Comment summarizes the factual and procedural history of *Hill IV*.[6] Part II discusses the reasoning underling the *Hill IV* majority's conclusions and explains the degree of deference owed to state habeas courts' decisions under AEDPA and recent U.S. Supreme Court decisions.[7] Finally, Part III argues that the en banc majority's overly deferential approach to AEDPA claims is mistaken as it abdicates an essential function of federal habeas courts and effectively eviscerates the constitutional ban against executing the intellectually disabled.[8]

I. Hill's Journey Through the Courts and Fruitless Request for Federal Habeas Relief

In 1993, a Georgia jury convicted Warren Lee Hill, Jr. of murdering a fellow inmate while he was serving a life sentence and unanimously sentenced him to death.[9] After an unsuccessful direct appeal to the

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the evidence presented in the State court proceeding." *Id.* § 2254(d)(2). This Comment focuses on the first exception.

[4] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 73–77 (2003) (holding—in a 5-4 decision—that federal habeas review would not be granted because the defendant's sentence of twenty-five years to life in prison for a "third strike" conviction was not contrary to, nor an unreasonable application of, clearly established federal law); Lindh v. Murphy, 521 U.S. 320, 336 (1997) (commenting that "in a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting"); *see also* Larry W. Yackle, Federal Courts: Habeas Corpus 113 (2d ed. 2003) ("AEDPA is notorious for poor drafting that frustrates the Court's textualist approach to statutory construction."); John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L. Rev. 259, 272–73 (2006) ("[AEDPA's] statutory language had no habeas pedigree . . . . [T]he federal courts were forced to divine its meaning from scratch."); Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 Vand. L. Rev. 103, 104 (1998) ("[N]o aspect of the statute poses greater or deeper interpretational problems than the new section 2254(d), which governs the way in which federal habeas courts are to regard state court adjudications.").

[5] *See* Hill v. Humphrey (*Hill IV*), 662 F.3d 1335, 1360–61 (11th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2727 (2012).

[6] *See infra* notes 9–24 and accompanying text.

[7] *See infra* notes 25–36 and accompanying text.

[8] *See infra* notes 37–75 and accompanying text.

[9] Hill v. State (*Hill I*), 427 S.E.2d 770, 772 (Ga. 1993).

Georgia Supreme Court, Hill filed a state habeas petition challenging his death sentence, claiming for the first time that he was intellectually disabled and thus ineligible for capital punishment.[10] Under Georgia state law, a defendant raising an intellectual disability claim bears the burden of proving his disability beyond a reasonable doubt.[11] Notwithstanding this statute, the state habeas court initially employed a preponderance of the evidence standard and determined that Hill was intellectually disabled.[12] On appeal, the Georgia Supreme Court vacated the state habeas court's decision and concluded that according to Georgia law, Hill's intellectual disability status must be evaluated under the stricter reasonable doubt standard.[13] Under this higher standard, the state habeas court, on remand, determined that Hill failed to prove his intellectual disability.[14] As a result, the court denied Hill's state habeas petition, thereby effectively affirming his death sentence.[15]

Barely one month after the state habeas court ultimately denied Hill's petition, in 2002, in *Atkins v. Virginia*, the U.S. Supreme Court held that the execution of an intellectually disabled person is unconstitutional.[16] In light of this decision, Hill filed a federal habeas petition in the U.S. District Court for the Middle District of Georgia challenging his death sentence under AEDPA.[17] The gravamen of Hill's claim was that Georgia's reasonable doubt burden is unconstitutional because the stringent standard makes it practically impossible to prove intellectual disability so as to invoke *Atkins*' protection.[18]

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[10] Turpin v. Hill (*Hill II*), 498 S.E.2d 52, 52–53 (Ga. 1998). This Comment uses the term "intellectual disability" in lieu of "mental retardation" in recognition of the latter term's offensive implications. *Cf.* Press Release, The White House, Statement by the Press Secretary (Oct. 5, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/10/05/statement-press-secretary-10510 (indicating federal statutory changes from using "mental retardation" to "intellectual disability").

[11] GA. CODE ANN. § 17-7-131(c)(3), (j) (2011).

[12] *Hill II*, 498 S.E.2d at 54.

[13] *Id.*; *see* GA. CODE ANN. § 17-7-131(c)(3), (j).

[14] *Hill IV*, 662 F.3d at 1340–41.

[15] *Hill II*, 498 S.E.2d at 54.

[16] Atkins v. Virginia, 536 U.S. 304, 321 (2002). More specifically, *Atkins* held that the execution of a "mentally retarded" person was unconstitutional. *See id. But see supra* note 10 (explaining this Comment's choice of terminology).

[17] *Hill IV*, 662 F.3d at 1342. Prior to petitioning for federal habeas review, Hill first sought reconsideration by the state habeas court in light of the Supreme Court's *Atkins* decision. *Id.* at 1341. Although the state habeas court was again initially receptive to Hill's claim, the Georgia Supreme Court ultimately ordered the state habeas court to reinstate its May 2002 order affirming Hill's death sentence. *Id.* at 1342.

[18] *See id.* at 1342–43.

The district court denied Hill's petition but granted Hill's request for a certificate of appealability to the Eleventh Circuit on his intellectual disability claim.[19] On appeal, a panel of the Eleventh Circuit reversed the district court's denial, determining that despite AEDPA's required deference, Georgia's reasonable doubt standard was contrary to clearly established federal law and unconstitutional because it facilitated the execution of the intellectually disabled.[20] Accordingly, the court concluded that a less stringent standard should have been used to evaluate Hill's intellectual disability claim.[21]

After a rehearing en banc, however, the Eleventh Circuit vacated the panel's decision and reinstated the district court's judgment sustaining Georgia's reasonable doubt standard.[22] The en banc majority reasoned that AEDPA demands substantial deference to prior decisions of a state habeas court, and accordingly the Georgia Supreme Court's decision affirming the state's reasonable doubt standard must not be disturbed.[23] As such, the Eleventh Circuit reinstated Hill's death sentence.[24]

II. The En Banc Majority's Approach to AEDPA Review

In *Hill IV*, a majority of the Eleventh Circuit sitting en banc concluded that the Georgia state habeas court's decision could not be overturned given the degree of deference due to such a decision under AEDPA.[25] Reasoning that the state habeas court's decision upholding Georgia's reasonable doubt standard for capital defendants' intellectual disability claims was not contrary to clearly established federal law, the court determined that the decision must not be disturbed.[26] The

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[19] Hill v. Schofield (*Hill III*), 608 F.3d 1272, 1275 (11th Cir.), *vacated*, *Hill IV*, 662 F.3d 1335 (11th Cir. 2010). To challenge the denial of a federal habeas petition, a petitioner must first obtain a "certificate of appealability" (COA) from a circuit or district judge. 28 U.S.C. § 2253(c) (2006). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2); Pagan v. United States, 353 F.3d 1343, 1346 (11th Cir. 2003).

[20] *See Hill III*, 608 F.3d at 1273–74 ("We conclude that because Georgia's requirement of proof beyond a reasonable doubt necessarily will result in the execution of the mentally retarded, the Georgia Supreme Court's decision is contrary to the clearly established rule of *Atkins*.").

[21] *See id.* at 1283 & n.11.

[22] *Hill IV*, 662 F.3d at 1343, 1360.

[23] *See id.* at 1360–61.

[24] *See id.*

[25] Hill v. Humphrey (*Hill IV*), 662 F.3d 1335, 1360 (11th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 2727 (2012).

[26] *See id.* at 1343, 1360.

majority further reasoned that the AEDPA standard is strict by design and is not meant to be used as a typical means of error correction.[27] Instead, the high bar exists only as a "guard against extreme malfunctions in the state criminal justice systems."[28]

In reaching its conclusion, the majority relied upon several recent U.S. Supreme Court decisions that reversed circuit appellate courts for not adhering to AEDPA's requirements.[29] The Supreme Court has expressed three key tenets of interpreting an AEDPA claim: (1) for a federal law to be clearly established, it must be embodied in a Supreme Court holding;[30] (2) "an *unreasonable* application of federal law is different from an *incorrect* application of federal law";[31] and (3) a state court's determination that a claim lacks merit precludes federal habeas relief unless no "fairminded jurists" could agree with the court's decision.[32]

Applying these precepts to the intellectual disability context, the majority determined that nothing in the *Atkins v. Virginia* decision mandated a particular burden of proof for assessing the intellectual disability claims for capital defendants.[33] Because the *Atkins* court deliberately left to the states the task of devising appropriate procedures for intellectual disability determinations, there was no clearly established law controlling the issue.[34] Further, the majority concluded that at the very least, fair-minded jurists could certainly agree with the interpretation of the Georgia Supreme Court—which upheld the state's reasonable doubt standard—and thus the decision was not contrary to clearly established federal law.[35] Finding no error beyond any possibility of fair-minded disagreement, the majority considered it proper to leave the state habeas decision undisturbed.[36]

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[27] *See id.* at 1347.

[28] *Id.* (quoting Greene v. Fisher, 132 S. Ct. 38, 43 (2011)).

[29] *Id.* at 1343–47; *see infra* notes 30–32 and accompanying text.

[30] *See* Thaler v. Haynes, 130 S. Ct. 1171, 1173 (2010).

[31] *See* Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (quoting Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[32] *See* Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

[33] *Hill IV*, 662 F.3d at 1348 ("*Atkins* simply did not consider or reach the burden of proof issue, and neither has any subsequent Supreme Court opinion.").

[34] *Id.*; *see also* Bobby v. Bies, 556 U.S. 825, 831 (2009) ("Our opinion did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].'" (alteration in original) (quoting Atkins v. Virginia, 536 U.S. 304, 317 (2002))); *Atkins*, 536 U.S. at 317 ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction.").

[35] *Hill IV*, 662 F.3d at 1360.

[36] *Id.*

III. The Majority's Misconceived Hyper-Deferential Standard Endangers Constitutional Rights

The *Hill IV* majority's literal and narrow reading of AEDPA's requirements improperly enabled the court to shirk its duty as a defender of constitutional rights.[37] The AEDPA deference standard should not be construed so indomitably high as to foreclose federal habeas courts from conducting independent review of important constitutional claims.[38] The majority's highly deferential conception of AEDPA review stripped the federal habeas court of its all-important function of being an ultimate check on the justice system.[39] Although AEDPA sought to curtail the discretion of federal judges and discourage the use of collateral attacks on constitutional infirmities, a more pragmatic approach to interpreting the deference AEDPA demands would better serve its intended purpose.[40] In essence, the majority transformed AEDPA beyond its intended housekeeping function of deterring frivolous appeals, and in so doing, deprived the federal court system of its ability to effectively ensure state court compliance with constitutional law.[41] Consequently, if the Eleventh Circuit and other courts continue to follow this approach, many strong constitutional claims will go unheard, and countless individuals may have their rights violated without recourse in the federal courts.[42]

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[37] *See* Hill v. Humphrey (*Hill IV*), 662 F.3d 1335, 1367 (11th Cir. 2011) (en banc) (Barkett, J., dissenting), *cert. denied*, 132 S. Ct. 2727 (2012); *id.* at 1378 (Wilson, J., dissenting); *id.* at 1381–82 (Martin, J., dissenting).

[38] *See Hill IV*, 662 F.3d at 1385 (Martin, J., dissenting).

[39] *See* U.S. Const. art. I, § 9, cl. 2; *Hill IV*, 662 F.3d at 1385 (Martin, J., dissenting); *see also* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 441 (1961) ("[W]hen state courts insist upon literal compliance with state procedures as the price of relief from the deprivation of fundamental rights, it is hard to see any basis in this for automatic preclusion from relief in federal habeas corpus.").

[40] *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 398 (1996) (discussing the Senate debate surrounding AEDPA, including Senator Orrin Hatch's supportive claim that AEDPA would "correct some of the deficiencies" in the current scheme and limit "frivolous appeals," yet do so "while still preserving and protecting the constitutional rights of those who are accused"); *see also* Recent Case, Hill v. Humphrey, *662 F.3d 1335 (11th Cir. 2011) (en banc)*, 125 Harv. L. Rev. 2185, 2190 & n.58 (2012) (arguing that Congress meant to preserve a degree of habeas protection in drafting AEDPA, "not strip prisoners of their right to meaningful review of their federal constitutional claims" (quoting Claudia Wilner, Note, *"We Would Not Defer to That Which Did Not Exist": AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U. L. Rev. 1442, 1459 (2002))).

[41] Wilner, *supra* note 40, at 1459 (noting that in passing AEDPA, Congress undoubtedly "wanted the federal courts to continue their longstanding practice of protecting prisoners' federal constitutional rights where the state courts failed to do so").

[42] *See id.*

Section A of this Part suggests that the *Hill IV* majority was overly rigid in how it construed the AEDPA inquiry, phrasing the question of what deference is due under AEDPA.[43] Section B considers the purpose of the U.S. Supreme Court's decision in *Atkins v. Virginia* and argues that the *Hill IV* majority was mistaken in permitting the Georgia courts to eviscerate a constitutional right procedurally.[44] Finally, Section C evaluates the *Hill IV* majority decision in light of the Supreme Court's broader death-is-different jurisprudence.[45]

A. *The* Hill IV *Majority Was Overly Rigid in Phrasing the AEDPA Inquiry*

In *Hill IV*, the majority of the Eleventh Circuit sitting en banc continued an unsettling trend among federal appellate courts of interpreting AEDPA quite narrowly and rephrasing the threshold deference question in a manner that essentially answers itself.[46] Initially, the Supreme Court framed the inquiry as a matter of reasonableness—whether AEDPA required deference to the state court's decision hinged on whether that decision was "objectively reasonable."[47] As presented in a recent flurry of AEDPA decisions, however, the inquiry has become whether *any* fair-minded jurists could agree with the state court's decision.[48] Because it will almost invariably be the case that at least *some* fair-

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[43] *See infra* notes 46–54 and accompanying text.

[44] *See infra* notes 55–67 and accompanying text.

[45] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); Furman v. Georgia, 408 U.S. 238, 286–87 (1972) (Brennan, J., concurring) (explaining that the death penalty is "a unique punishment in the United States" that is "unusual in its pain, in its finality, and in its enormity"); Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. Rev. 847, 858 (2007) (explaining that Justice William Brennan's concurrence in *Furman v. Georgia* is credited as the source of the reasoning behind death-is-different jurisprudence); *infra* notes 68–75 and accompanying text.

[46] *See Hill IV*, 662 F.3d at 1347 ("[T]his Court cannot find that highest state court's habeas decision unreasonable *unless no fairminded jurist could agree* with that [state] court's decision.") (alteration in original) (emphasis added) (internal quotation marks omitted).

[47] Williams v. Taylor, 529 U.S. 362, 409 (2000).

[48] *Compare* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) (denying federal habeas review because the state court's determination was "objectively reasonable" despite the fact that "fairminded jurists" could agree with the state court), *and Williams*, 529 U.S. at 409 ("Defining an 'unreasonable application' by reference to a 'reasonable jurist,' however, is of little assistance to the courts that must apply § 2254(d)(1) and, in fact, may be misleading. Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."), *with* Harrington v. Richter, 131 S. Ct. 770, 786 (2011) ("Under § 2254(d), a habeas court *must* determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it *must* ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior

minded jurists will agree, the federal courts will rarely find it proper to intervene under this estranged conception.[49]

Not only is this threshold question phrased in a manner that essentially compels deference to the state court's decision, but it also marks a significant departure from the Supreme Court's initial interpretation of AEDPA deference, which was far more receptive to defendants with strong constitutional claims.[50] In 2000, in *Williams v. Taylor*, the Supreme Court defined its role as assessing whether the state court's application of clearly established federal law was *objectively unreasonable*.[51] As made explicit by Justice Sandra Day O'Connor in her concurring opinion, "[t]he federal habeas court should not transform the inquiry into a subjective one" that would preclude federal habeas review whenever "at least one of the Nation's jurists" has applied the state court's approach.[52] Short of de novo review, this initial conception of AEDPA deference provided federal habeas courts with the necessary discretion to correct unreasonable constitutional infirmities.[53] Unfortunately for defendants like Hill, this natural reading of AEDPA has succumbed to the narrow, hyper-deferential conception adopted by the *Hill IV* majority.[54]

B. *Georgia's Reasonable Doubt Standard Undermines* Atkins

Moreover, Georgia's uniquely stringent reasonable doubt standard[55] violates the Eighth and Fourteenth Amendments, and thus the Eleventh Circuit was free to correct this constitutional infirmity regard-

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decision of this Court." (emphasis added)), *and* Bobby v. Dixon, 132 S. Ct. 26, 27 (2011) ("Under [AEDPA], a state prisoner seeking a writ of habeas corpus from a federal court '*must* show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" (emphasis added)), *and* Loggins v. Thomas, 654 F.3d 1204, 1220 (11th Cir. 2011) ("[I]f some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief *must* be denied." (emphasis added)).

[49] Blume, *supra* note 4, at 284 (noting that "AEDPA has made habeas relief even more difficult for state prisoners to obtain in the lower federal courts").

[50] *See Williams*, 529 U.S. at 378 ("Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.").

[51] *Id.* at 377–78 (emphasis added).

[52] *Id.* at 409–10 (O'Connor, J., concurring in part, concurring in judgment).

[53] *See id.*

[54] *See, e.g.*, *Dixon*, 132 S. Ct. at 27; *Harrington*, 131 S. Ct. at 786; *Hill IV*, 662 F.3d at 1347 (emphasizing that AEDPA demands substantial deference).

[55] *See Hill IV*, 662 F.3d at 1365 n.1 (Barkett, J., dissenting) ("Georgia is the only state to require proof of mental retardation beyond a reasonable doubt.").

less of how the threshold question was phrased.[56] The Eighth Amendment—extended to the states through the Fourteenth Amendment—guarantees that no government body shall impose "cruel and unusual punishment" on its citizens.[57] In 2002, in *Atkins v. Virginia*, the Supreme Court constitutionalized the substantive protection that exempts intellectually disabled people from capital punishment.[58] Although *Atkins* applies to *all* intellectually disabled people, Georgia's reasonable doubt standard effectively ensures that many of these individuals will be eligible for execution nonetheless based on their inability to satisfy Georgia's standard of proof.[59]

The elusive nature of the intellectual disability prognosis ensures that there will always be competing evidence—including expert testimony—regarding a defendant's mental status.[60] The unfortunate consequence of this reality is that a great number of borderline cases—the mildly intellectually disabled—will be denied this constitutional protection.[61] Consequently, although *Atkins* protects *all* intellectually disabled individuals, under the majority's conception of the burden of proof, only those who are severely and profoundly intellectually disabled will actually benefit from the protection.[62]

Although *Atkins* did not specifically establish a singularly accepted burden of proof for intellectual disability claims, it nonetheless limited the standard of review by setting a "constitutional floor."[63] The *Hill IV* majority failed to recognize that states must ensure that they do not procedurally eviscerate constitutional rights through insufficient procedural

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[56] *See Hill IV*, 662 F.3d at 1370 (Barkett, J., dissenting).

[57] U.S. CONST. amend. VIII; U.S. CONST. amend. XIV.

[58] Atkins v. Virginia, 536 U.S. 304, 321 (2002); *see supra* note 16 (noting *Atkin*'s use of different terminology).

[59] *See id.*; *Hill IV*, 662 F.3d at 1370–71 (Barkett, J., dissenting) ("Requiring the mentally retarded to prove their mental retardation beyond any reasonable doubt will inevitably lead, through the rule's natural operation, to the frequent execution of mentally retarded individuals . . . .").

[60] Addington v. Texas, 441 U.S. 418, 430 (1979) ("The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations."); *see Hill IV*, 662 F.3d at 1371 (Barkett, J., dissenting).

[61] *Hill IV*, 662 F.3d at 1367 (Barkett, J., dissenting) ("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. Indeed, the offender in *Atkins* himself was only *mildly* mentally retarded.").

[62] *Id.* (highlighting the unsettling irony that the majority of intellectually disabled individuals fit into the mildly disabled category, and thus these individuals are most likely to require *Atkins* protection).

[63] *See id.* at 1380 (Wilson, J., dissenting).

schemes.[64] By setting its burden of proof unreachably high, Georgia effectively nullified the exemption from capital punishment that *Atkins* provided to the intellectually disabled.[65] Because "deciding a constitutional entitlement using a standard of proof foreclosed by Supreme Court precedent constitutes a decision that is 'contrary to' federal law," the Eleventh Circuit was free to determine that Georgia's reasonable doubt standard is unconstitutional.[66] Instead, it refused to review Hill's federal claim based on misconceptions of AEDPA deference.[67]

C. *Extreme AEDPA Deference Contradicts Death-Is-Different Jurisprudence*

Finally, the *Hill IV* majority's extreme deference to state court decisions under AEDPA runs counter to the Supreme Court's death-is-different jurisprudence.[68] A survey of death penalty jurisprudence reveals a broad trend toward limiting capital punishment and carving out more and more exceptions curtailing its use.[69] The impetus behind this movement has been the recognition that death is different than all other forms of punishment.[70] Due to the severity and finality of capital

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[64] *See* Speiser v. Randall, 357 U.S. 513, 521 (1958) (establishing that states must provide "procedures which are adequate to safeguard against infringement of constitutionally protected rights").

[65] *See Hill IV*, 662 F.3d at 1370–71 (Barkett, J., dissenting).

[66] *Id.* at 1366 n.2.

[67] *See id.* at 1377–78 ("*Atkins* has recognized the federal constitutional right of mentally retarded offenders not to be executed. Georgia, therefore, cannot indirectly authorize the execution of mentally retarded offenders through a procedure that in practical operation accomplishes that result."); *see also* Bailey v. Alabama, 219 U.S. 219, 239 (1911) (establishing that state procedures are unconstitutional if they transgress a substantive constitutional right in their natural operation).

[68] *See supra* note 49 and accompanying text; *infra* notes 69–75 and accompanying text.

[69] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that it is unconstitutional to execute for the offense of rape of a child); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that it is unconstitutional to execute juveniles); *Atkins*, 536 U.S. at 321 (holding that it is unconstitutional to execute the intellectually disabled); Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding that it is unconstitutional to execute for the offense of felony murder); Coker v. Georgia, 433 U.S. 584, 599 (1977) (holding that it is unconstitutional to execute for the offense of rape of a woman); Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. Rev. 785, 792 (2009) (suggesting that the Supreme Court's recent death penalty cases indicate that the Court will soon find the execution of mentally ill offenders unconstitutionally disproportionate because it does not adequately serve the goals of retribution or deterrence).

[70] Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117, 117–19 (2004) ("One of the enduring arguments in Supreme Court death penalty jurisprudence is that the death penalty is 'qualitatively different' from all other punishments in ways that require extraordinary procedural protection against error."); *see, e.g.*, Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) ("[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death

punishment, procedural schemes that facilitate imposing the death penalty must be carefully crafted to ensure that they do not undermine constitutional values.[71] Federal habeas review has historically been an important channel through which capital defendants have successfully raised strong constitutional claims.[72] Despite this long history, the Eleventh Circuit majority in *Hill IV* read AEDPA in a way that severely limited the role of the federal court system in protecting constitutional rights.[73] Although Congress meant to limit and demystify the federal habeas review process by passing AEDPA, it is doubtful that AEDPA was meant to demand such deference to state court decisions as to deprive the federal habeas review process of its force or to leave those with worthy constitutional claims without recourse.[74] In light of the Supreme Court's recognition that death is different, the federal court system should remain especially vigilant in its protection of constitutional rights when the death penalty is at issue.[75]

Conclusion

In *Hill IV*, the Eleventh Circuit sitting en banc concluded that the Georgia Supreme Court's decision to uphold the state's reasonable doubt standard for intellectual disability claims was not contrary to clearly established federal law. The court did so by holding that *Atkins* did not establish a singularly acceptable burden of proof for such claims and, thus, fair-minded jurists could disagree as to the proper standard of review. As such, the court considered itself bound by AEDPA-imposed deference to allow the state decision to stand and, in effect, affirm Hill's death sentence. In coming to this conclusion, however, the Eleventh Circuit misconstrued AEDPA's effect on the federal habeas review process in a manner that has stripped this review of its potency, leaving it but a rubber stamp for unchecked state court decisions.

By failing to reject Georgia's reasonable doubt standard, the *Hill IV* majority has enshrined a standard of review that ensures that many

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penalty."); McCleskey v. Kemp, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("[T]his Court has consistently acknowledged the uniqueness of the punishment of death."); Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("[T]he death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards.").

[71] *See* Abramson, *supra* note 70, at 118–19.

[72] *See* Wilner, *supra* note 40, at 1459.

[73] *See Hill IV*, 662 F.3d at 1385 (Martin, J., dissenting); Wilner, *supra* note 40, at 1459.

[74] *See* Brennan, *supra* note 39, at 441; Yackle, *supra* note 40, at 398–401.

[75] *See* Abramson, *supra* note 70, at 118.

mildly intellectually disabled individuals will be eligible for the death penalty despite their constitutional exemption from capital punishment. Although AEDPA was passed in part to curtail frivolous claims and economize judicial proceedings, it was not meant to gut the federal habeas system of its bite and leave those with important constitutional claims without recourse. In light of the broad trend of death-is-different jurisprudence that has consistently limited the applicability of the death penalty over the past thirty-five years, AEDPA's call for deference to state court decisions should not prevent federal habeas courts from rectifying constitutional infirmities. In accordance with their important historical function, federal habeas courts must not stumble over an unintended procedural hurdle.

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