No. 21-1173

IN THE

Supreme Court of the United States

JOE ELTON NIXON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

In *Atkins v. Virginia,* 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits executing the intellectually disabled, thus overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Hall v. Florida*, 572 U.S. 701 (2014), this Court, by a five-to-four vote, resolved a disagreement among the States about whether *Atkins* may be implemented through imposing a bright-line IQ cutoff, holding that *Atkins* could not be so implemented consistent with the Constitution. *See id.* at 714–18.

The questions presented are:

1. Whether the Florida Supreme Court correctly concluded that *Hall* established a new procedural rule of federal constitutional law that is inapplicable to petitioner's postconviction proceedings following his conviction's becoming final in 1991.

2. Whether Florida's rule requiring defendants to prove intellectual disability by clear-and-convincing evidence violates the Due Process Clause or the Eighth Amendment.

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STATEMENT

1. In 2002, this Court held that the Eighth Amendment prohibits the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). But *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims" intellectual disability is protected by the Eighth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Instead, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317.

Even before *Atkins* was decided, Florida law barred executing the intellectually disabled. Fla. Stat. § 921.137 (2001). In *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007) (per curiam), the Florida Supreme Court construed that statute to mean that "a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Hall v. Florida*, 572 U.S. 701 (2014). Several other States had similar rules. *See id.* at 714–18.

In *Hall*, a five-Justice majority of this Court held that Florida's strict IQ cutoff of 70 was unconstitutional. In support of that conclusion, the Court noted that "the precedents of this Court," including *Atkins*, "give us essential instruction, but the inquiry must go further." *Id.* at 721 (cleaned up). Thus, the Court considered the views of the States, the Court's precedent, and the views of medical experts. *Id.* Florida's fixed IQ cutoff, the Court held, impermissibly "bar[red] consideration of evidence that

must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 723. The Court instead required that States "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724. Justice Alito's dissent for a four-Justice minority viewed Florida's rule as fully consistent with *Atkins*, and the Court majority's analysis to the contrary as working a "sea change." *Id.* at 736 (Alito, J., dissenting).

Two years later, the Florida Supreme Court held that, under Florida law, *Hall* applies retroactively to cases pending on collateral review. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (per curiam). In 2020, however, the Florida Supreme Court overruled *Walls*, ruling that *Hall* is not, as a matter of Florida law, retroactively applicable to cases on collateral review. *Phillips v. State*, 299 So. 3d 1013, 1019–22 (Fla. 2020) (per curiam), *cert. denied sub nom. Phillips v. Florida*, 141 S. Ct. 2676 (2021). The Florida Supreme Court also held that *Hall* is not retroactively applicable in habeas as a matter of federal law, either. *Id.* at 1022 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

2. On a Sunday after church in 1984, Jeanne Bickner agreed to help petitioner jumpstart his car. *See Nixon v. State*, 572 So. 2d 1336, 1337–38 (Fla. 1990). When that did not work, she gave him a ride home. *Id.* at 1338. "Once on the road, [petitioner] hit Bickner in the face," threw her in the trunk of her car, and drove to a "secluded wooded area." *Id.* at 1338. There he tied her to a tree with her own jumper cables

while Bickner "offered to give [him] money, to sign her car over to him, begging him not to kill her." *Id.* Unmoved, petitioner placed a paper bag over her head and set her on fire, burning her alive. *Id.*

Police found Bickner's "charred body" still tied to that tree the next day. *Id.* at 1337. They also found her car "gutted by fire," abandoned "in a drainage ditch." *Id.* And they received word from petitioner's girlfriend and his brother that he had "been driving [Bickner's] car," had "pawned two of her rings," and had "admitted [to] the killing." *Id.*

"[A]fter Nixon's brother informed the sheriff's office that Nixon had confessed to the murder," petitioner was arrested. *Florida v. Nixon*, 543 U.S. 175, 179 (2004) (Ginsburg, J.). He admitted to the facts above in a taped confession, *Nixon*, 572 So. 2d at 1338, in which he "described in graphic detail how he had kidnaped Bickner, then killed her." *Nixon*, 543 U.S. at 179. Based on this "overwhelming evidence," *id.* at 180, the State charged petitioner with first-degree murder, kidnapping, robbery, and arson. *Nixon*, 572 So. 2d at 1337. The jury convicted him of all charges, and on its recommendation, the trial court imposed the death penalty. *Id.* at 1338. The Florida Supreme Court affirmed petitioner's convictions and sentences, *id.* at 1346, which became final on October 7, 1991, when this Court denied his petition for writ of certiorari. *Nixon v. Florida*, 502 U.S. 854 (1991).

The Florida Supreme Court, on petitioner's motion for postconviction relief under Florida law, later held that petitioner had received ineffective assistance of counsel at his trial, but this Court unanimously

reversed that holding in 2004. *Nixon*, 543 U.S. at 185–87.

3. In 2006, petitioner filed another state postconviction motion under Florida Rule of Criminal Procedure 3.851 arguing that he was intellectually disabled and that his death sentence violated *Atkins*. Pet. App. 118; *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006). There he made the argument that this Court accepted years later in *Hall*—that a strict IQ cutoff of 70 incorrectly implemented *Atkins*. Pet. App. 126–27. The postconviction court denied the motion, though, and the Florida Supreme Court affirmed. Pet. App. 118, 126–30. Petitioner did not seek a writ of certiorari from this Court.

Instead, petitioner filed a habeas petition in federal court. *See Nixon v. Jones*, No. 4:10-cv-20, Doc. 1 (N.D. Fla. Jan. 17, 2010). But after this Court decided *Hall*, he obtained a stay from the district court to pursue a "successive motion in state court under [Florida Rules of Criminal Procedure] 3.203 and 3.851, reasserting a claim of intellectual disability in light of" *Hall*. Pet. App. 116.

Back in state court, petitioner filed such a claim. Pet. App. 106. Although the postconviction court recognized that the claim might be barred on retroactivity grounds, Pet. App. 110 (citing *In re Hill*, 777 F.3d 1214 (11th Cir. 2015)), it did not reach whether it was. It instead denied the motion without a hearing because it found that petitioner's IQ score of 80 fell "outside the principles established in *Hall*." *Id.* But the Florida Supreme Court later reversed. Pet. App. 102–05. It held that petitioner's claim could proceed under its decision in *Walls* (which had held

Hall retroactive) and that the postconviction court had failed to conduct the "holistic" inquiry that *Hall* requires. *See id.*

On remand, the postconviction court held an evidentiary hearing and entered a 44-page order finding that petitioner was not entitled to relief. Pet. App. 57–101. It found that petitioner had not established intellectual disability by clear-and-convincing evidence, though its decision did not turn on that standard. Rather, after considering multiple IQ tests that had been conducted over the years (including a childhood score of 88) and testimony from various experts, the court found that petitioner's most credible IQ score was 80, Pet. App. 98–100—far surpassing the 70–75 standard error of measurement (SEM) for subaverage intellectual capacity. *See Hall*, 572 U.S. at 722. The court also found that petitioner could not establish that any subaverage intellectual functioning had manifested before age 18. Pet. App. 100. After all, he was "never diagnosed" with an intellectual disability as a child "despite multiple arrests, incarcerations, screening instruments and the administration of a full-scale cognitive testing instrument." Pet. App. 97. And at any rate, an IQ score of 80 at "age 45 demonstrates that Mr. Nixon was not intellectually disabled before he was 18." Pet. App. 95.

4. Petitioner appealed to the Florida Supreme Court. While his appeal was pending, that court overruled its decision in *Walls* in *Phillips*, holding that *Hall* was not retroactively applicable in habeas. *Phillips*, 299 So. 3d at 1019–24. In response, petitioner argued that *Phillips* was erroneous and

that "[t]he reasoning of" the Florida Supreme Court's "analysis . . . in *Walls* should not have been disturbed." Pet. App. 55. He also asserted that Florida's requirement that he prove his intellectual disability by clear-and-convincing evidence violates the Due Process Clause and the Eighth Amendment. Pet. App. 53–54.

The Florida Supreme Court affirmed. Recognizing that petitioner filed his successive postconviction motion "when *Walls* was still good law," it reasoned that "under *Phillips*, the controlling law in [Florida] *now* is that *Hall* does not apply retroactively." Pet. App. 7. It thus held that petitioner's "successive, *Hall*-based challenge" was "inconsistent with . . . controlling law," *id.*, and therefore did not reach petitioner's challenge to Florida's clear-and-convincing-evidence standard.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S CLAIM THAT *HALL* APPLIES TO HIS POSTCONVICTION PROCEEDINGS DOES NOT WARRANT REVIEW.

Petitioner's first contention (Pet. 14–22) is that the Florida Supreme Court erred in reiterating its 2020 holding in *Phillips* that this Court's decision in *Hall* is a new procedural rule of constitutional law that is not retroactively applicable in habeas. This Court denied certiorari in *Phillips* in a similar posture in May 2021, *see* 141 S. Ct. at 2676, and the Court should also deny review here. *Phillips* is correct; answering the first question presented in petitioner's favor would not afford him or most capital litigants relief; and the

lower courts are not intractably split on this question in any event.

A. The Florida Supreme Court correctly declined to apply *Hall* to petitioner's habeas proceedings.

The Florida Supreme Court correctly concluded in *Phillips*—and correctly followed *Phillips* in the decision below—that this Court in *Hall* announced a new rule of procedure that is not retroactively applicable to petitioner's conviction on collateral review.

State courts must apply a decision of this Court retroactively on collateral review only if the decision represents a settled, or "old," rule—one that broke no new ground since the conviction in question became final—or if it represents a new, substantive rule. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 & n.3, 1562 (2021); *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016). *Hall* was neither.

1. The rule announced in *Hall* was procedural, not substantive. "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198 (quoting *Penry*, 492 U.S. at 330). But *Hall* does not forbid criminal punishment for any type of primary conduct. Instead, it requires certain "*procedures* for ensuring that states follow the rule enunciated in *Atkins*." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015); *see also Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014)

(per curiam) ("*Hall* merely provides new *procedures* for ensuring that States do not execute members of an already protected group." (emphasis added)). Specifically, "*Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Kilgore*, 805 F.3d at 1314.

Hall requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." 572 U.S. at 724. This Court concluded that Florida's IQ cutoff unconstitutionally "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [its] execution of sentences," *id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (quotations omitted)—a classic procedural defect. The Florida Supreme Court thus has correctly concluded that *Hall* "does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability." *Phillips*, 299 So. 3d at 1022.

2. Petitioner does not dispute that the rule of *Hall* is procedural. Instead, petitioner argues that *Hall* is not a new rule. Pet. 15–19. Petitioner is mistaken.

"A rule is new unless it was '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Edwards*, 141 S. Ct. at 1555 (quoting *Teague*, 489 U.S. at 301 (plurality op.)). In *Atkins*, handed down in 2002, this Court overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989). This Court held that, contrary to *Penry*, the Eighth Amendment prohibits the execution of the intellectually disabled. *Atkins*, 536 U.S. at 321. Twelve years later this Court decided in *Hall* that Florida's method of implementing *Atkins* through a strict IQ cutoff was unconstitutional. But petitioner's conviction "became final," *Edwards*, 141 S. Ct. at 1555, in 1991—when *Penry* was still the law. So not only was *Hall* not "*dictated* by precedent existing at the time [petitioner's] conviction became final," *id.*, it was also foreclosed by it. Accordingly, the rule of *Hall* is plainly new as applied to petitioner.

In any event, petitioner is wrong to argue that *Hall* was dictated by *Atkins*. In *Atkins*, this Court did not define with precision which defendants are so intellectually disabled as to be ineligible for execution, and instead "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction" it had announced. 536 U.S. at 317 (cleaned up). The only thing this Court in *Atkins* said about IQ scores is that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70," *id.* at 308 n.3, and that only five States had "executed offenders possessing a known IQ less than 70" since the Court's decision in *Penry* in 1989, *id.* at 316. Nothing in *Atkins* dictated this Court's subsequent holding in *Hall* that Florida's use of an IQ cutoff of 70 violates the Eighth Amendment. Indeed, this Court in *Hall* recognized

that its "inquiry must go further" than the Court's prior "precedents." 572 U.S. at 721.

Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) confirms that *Hall* was not dictated by *Atkins*. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." *Hall*, 572 U.S. at 725 (Alito, J., dissenting).

The Eleventh Circuit thus correctly has explained that "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014); *see also Goodwin*, 814 F.3d at 904 (*Hall* mandates "*new* procedures for ensuring that States do not execute members of an already protected group" (emphasis added)). And contrary to petitioner's assertion (Pet. 16), the Florida Supreme Court has also made clear—both before and after *Phillips*—that *Hall* was a new rule not dictated by *Atkins*. *See Phillips*, 299 So. 3d at 1019 ("[I]t remains clear that *Hall* establishes a *new* rule of law that emanates from the United States Supreme Court and is constitutional in nature . . . ." (emphasis added)); *see also Walls*, 213 So. 2d at 346 (holding that *Hall* is retroactive as a matter of Florida

law, but agreeing that *Hall* was a "change in the law"). The Florida Supreme Court's conclusion that *Hall* was not dictated by *Atkins* is hardly surprising. After all, the Florida Supreme Court's 2007 *Cherry* precedent had *upheld* the constitutionality of its strict IQ cutoff as consistent with *Atkins*. *See* 959 So. 2d at 713 (arguing that *Atkins* "left to the states the task of setting specific rules in their determination statutes"). The Florida Supreme Court thus understandably characterized *Hall* as establishing a new rule in abrogating established Florida Supreme Court precedent.

B. This case implicates no disagreement among the lower courts worthy of review.

Petitioner errs in characterizing as "blinkered" and "unique," the Eleventh Circuit's holding that *Hall* is not a new rule. Pet. 20.

The Eleventh Circuit's view is shared not only by the Florida Supreme Court, but also by the Eighth Circuit and the Tennessee Supreme Court. Both those courts have agreed with the Eleventh Circuit that *Hall* announced a new procedural rule, not an old one. *Goodwin*, 814 F.3d at 904 (observing that the "Eleventh Circuit reached an identical conclusion" in *Henry*, 757 F.3d 1151)[1]; *Payne v. State*, 493 S.W.3d 478, 490–91 (Tenn. 2016) (observing that the "United States Courts of Appeal for the Eighth and Eleventh

[11] Petitioner characterizes *Goodwin* as construing *Hall* as an old rule. Pet. 21. But *Goodwin* held that "*Hall* merely provides *new procedures* for ensuring that States do not execute members of an already protected group." *Goodwin*, 814 F.3d at 904 (emphasis added) (quoting *Henry*, 757 F.3d at 1161).

Circuits have concluded that *Hall* does *not* apply retroactively on collateral review" and agreeing).

By contrast, the decisions petitioner identifies as supporting his position (Pet. 20–21) do not suggest that *Hall* is an "old" rule applicable to petitioner's conviction. The Sixth Circuit decisions on which he relies are not retroactivity decisions at all. They instead merely held that, under the standards of the federal Antiterrorism and Effective Death Penalty Act (AEDPA), various state court decisions (dating from 2006 and 2008 respectfully) were unreasonable implementations of *Atkins* and thus warranted federal habeas relief. *See Williams v. Mitchell*, 792 F.3d 606, 619 (6th Cir. 2015); *Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014). Similarly, the Seventh Circuit in *Fulks v. Watson* simply concluded that the petitioner there was barred from raising an *Atkins* claim under 28 U.S.C. § 2241 because he could have raised such a claim in a petition brought under 28 U.S.C. § 2255 in 2008. *See* 4 F. 4th 586, 591–93 (7th Cir. 2021). The court concluded the petitioner "could have raised the same *Atkins* claim" even without *Hall*. *Id.* at 592. None of that bears upon whether *Hall* was "dictated" by *Atkins*, *see Edwards*, 141 S. Ct. at 1555, much less on whether *Hall* is an old rule as applied to petitioner's conviction, which became final in 1991.

Petitioner also cites the Ninth Circuit's decision in *Smith v. Ryan*, 813 F.3d 1175 (9th Cir. 2016). Pet. 21. But even if that case applied *Hall* retroactively on collateral review, *see id.* at 1181, there is no suggestion in the opinion that the reason for that ruling was the court's determination that *Hall* is an old rule, which is petitioner's argument here.

Finally, petitioner cites *Smith v. Sharp*, which contains language suggesting that *Hall*, *Moore I*,[2] and *Moore II*[3] did not "yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." 935 F.3d 1064, 1084 (10th Cir. 2019) (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)). But in *Sharp* the Tenth Circuit reviewed a sentence that became final *after* this Court decided *Atkins* in 2002. *See id.* at 1070–71. The question was thus whether *Hall* was dictated by *Atkins*, which was a precedent when Smith's sentence became final. The question here, by contrast, is whether *Hall* is new in relation to petitioner, whose conviction became final in 1991, and it plainly was. *See Penry*, 492 U.S. at 335.

In any event, even if *Sharp* mirrored this posture, it still does not establish a disagreement worthy of review. Although *Sharp* relied on some statements in *Hall* to determine that neither *Hall*, *Moore I*, nor *Moore II* were novel, it did not apply *Hall* to Smith's case. Instead, it applied only *Moore I* and *Moore II*, "which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated," in determining whether Smith "suffered deficits in at least two areas of adaptive functioning." *Id.* at 1085. *Hall*'s rule that States must account for the SEM when evaluating an individual's IQ scores did not come into play because, in finding that Smith satisfied prong one, the Tenth Circuit observed that nearly all his scores fell below 70. *See id.* at 1079 (discussing scores of 65, 55, 55, 69–78, 73). In other

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

[3] *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam).

words, the Tenth Circuit did not squarely address the question here.

For these reasons, petitioner's asserted conflict is illusory.

C. Resolution of the question presented would not affect petitioner's case or the situation of most capital defendants.

As framed and argued by petitioner, the first question presented is inconsequential in his own case and for most capital defendants. It therefore does not merit review. *See* Sup. Ct. R. 10(c).

For starters, a win for petitioner in this Court would not secure him a victory in state court; just the opposite, petitioner's theory of retroactivity would guarantee that his claim is barred under Florida rules of procedure. Petitioner argues that *Hall* was dictated by *Atkins*. But if that were true, his successive intellectual-disability claim would not be a new claim; it would be an *Atkins* claim—in fact, the very *Atkins* claim that he litigated and lost back in 2009. *See* Pet. App. 118, 126–30. "Claims raised in prior [Florida] postconviction proceedings," however, "cannot be relitigated in a subsequent postconviction motion" barring exceptions irrelevant here. *Hunter v. State*, 29 So. 3d 256, 267 (Fla. 2008). So even if petitioner's retroactivity theory were correct, he could not receive any relief in this Florida postconviction proceeding. *Cf. Bowles v. State*, 276 So. 3d 791, 794 (Fla. 2019) (per curiam) (denying *Hall* claim as procedurally barred), *cert. denied*, 140 S. Ct. 2589 (2019).

Even if *Hall* were retroactive, petitioner still could not establish intellectual disability. Under *Hall*,

petitioner would have to show, among other things, that he has a tested IQ of at most 75 and that his subaverage intellectual functioning manifested before age 18. *See Hall*, 572 U.S. at 710, 722. Yet the trial court found that petitioner could establish neither. After reviewing multiple IQ scores in a painstaking 44-page order, the court found that the most credible score was 80. Pet. App. 98–100. And it found that any subaverage intellectual functioning did not manifest before age 18. Pet. App. 100. After all, petitioner was "never diagnosed" with intellectual disability as a child "despite multiple arrests, incarcerations, screening instruments and the administration of a full-scale cognitive testing instrument." Pet. App. 97. And at any rate, an IQ score of 80 at "age 45 demonstrates that [he] was not intellectually disabled before he was 18." Pet. App. 95.

On top of this, petitioner's theory would help few defendants in Florida, and it may well ensure that few defendants in other states can pursue relief under *Hall*. Even if *Hall* were dictated by *Atkins*, the only Florida defendants who could even potentially benefit from *Hall* on collateral review would be those who have yet to exhaust their *Atkins*-based habeas petitions—exceedingly few given that *Hall* was decided in 2014 and that petitioners typically must follow stringent time limits when filing an initial petition. *See, e.g.*, Fla. R. Crim. P. 3.851(d)(1) (one year after judgment and sentence become final). For other capital defendants, procedural bars would prevent a successive habeas petition, because generally only a new, retroactively applicable rule opens the door to successive habeas relief. *See, e.g.*, Fla. R. Crim. P. 3.851(d)(2)(B); 28 U.S.C. § 2244(b); 28

U.S.C § 2255(h); *see also, e.g.*, Tenn. Code § 40-30-117(a)(1) (only new rules, not old rules, justify successive habeas relief); Ky. R. Crim. P. 11.42(10)(b) & *Fraser v. Commonwealth*, 59 S.W.3d 448, 454 (Ky. 2001) (same); Okla. Stat. tit. 22, § 1089 (same).

Because this question holds neither widespread nor case-specific importance, the Court should deny review.

II. PETITIONER'S CHALLENGE TO FLORIDA'S BURDEN OF PROOF FOR INTELLECTUAL DISABILITY DOES NOT WARRANT REVIEW.

Petitioner next contends that Florida's requirement that defendants prove their intellectual disability by clear-and-convincing evidence violates the Due Process Clause and the Eighth Amendment. Pet. 22–26. This question, too, does not warrant review. The Court recently denied certiorari on a materially identical question. *Young v. Georgia*, 142 S. Ct. 1206 (2022).[4] For five reasons, it should do the same here.

First, the Florida Supreme Court did not pass on this question below; it instead reaffirmed that *Hall* was not retroactive and thus had no reason to decide whether Florida's chosen burden of proof is unconstitutional. Pet. App. 7. Because "this is a court of final review and not first view," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001), it should not "disturb the finality of state judgments

[4] The Court has declined to review this question many times. *See, e.g.*, *Raulerson v. Warden*, 140 S. Ct. 2568 (2020); *Hill v. Humphrey*, 566 U.S. 1041 (2012); *Burgess v. Scofield*, 546 U.S. 944 (2005); *Stripling v. Head*, 541 U.S. 1070 (2004).

on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 90 (1997) (quotation omitted).

Second, as already noted, *supra* 14–15, this question makes no difference in petitioner's case because he could not establish intellectual disability under even the preponderance standard. The trial court did not reject petitioner's claim because of the heightened burden of proof; it rejected his claim because petitioner had a credible IQ score of 80 and lacked evidence showing that any subaverage intellectual functioning manifested before age 18. Pet. App. 95–100. Because even a favorable ruling would not change the outcome, review is unwarranted.

Third, the shallow split of authority on this issue does not merit review. Most courts have held that a heightened burden for proving intellectual disability is constitutional. *See, e.g.*, *Arizona v. Grell*, 135 P.3d 696, 702 (Ariz. 2006) (clear-and-convincing-evidence burden was constitutional); *People v. Vasquez*, 84 P.3d 1019, 1022 (Colo. 2004) (same); *Young v. State*, 860 S.E.2d 746, 768–77 (Ga. 2021) (plurality op.) (same for beyond-a-reasonable-doubt burden). The only federal courts to decide the issue on AEDPA review have held that these holdings are reasonable. *See Raulerson v. Warden*, 928 F.3d 987, 992 (11th Cir. 2019) (state-court holding that beyond-a-reasonable-doubt burden was constitutional was reasonable); *Hill v. Humphrey*, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc) (same). And the only two courts to hold otherwise, *Pruitt v. State*, 834 N.E.2d 90, 100–03 (Ind. 2005) (preponderance standard is required); *Howell v. State*, 151 S.W.3d 450, 464–65 (Tenn. 2004) (similar),

misunderstood the historical analysis mandated by *Medina v. California*, 505 U.S. 437 (1992) and *Cooper v. Oklahoma*, 517 U.S. 348 (1996). *See infra* 18–20.

Fourth, Florida's clear-and-convincing-evidence standard does not violate the Due Process Clause. To prove a due process violation, petitioner "must show that the principle of procedure violated by the rule (and allegedly required by due process) is so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996) (plurality op.) (cleaned up); *see also Cooper*, 517 U.S. at 355 (applying this test). The "primary guide" in this analysis is "historical practice." *Egelhoff*, 518 U.S. at 43 (plurality op.) (citing *Medina*, 505 U.S. at 446). Also relevant is whether the State's rule has "considerable justification," which "casts doubt upon the proposition that the opposite rule is" fundamental. *Id.* at 49 (quotation omitted). And so is whether the allegedly fundamental rule has "received sufficiently uniform and permanent allegiance" nationwide. *Id.* at 51.

Under those standards, a clear-and-convincing-evidence burden for proving intellectual disability is not unconstitutional. *Cf. Young*, 860 S.E.2d at 772–73 (plurality op.). To start, "there is no historical right of an intellectually disabled person not to be executed," and thus "no historical tradition regarding the burden of proof as to that right." *Raulerson*, 928 F.3d at 1002 (citation omitted); *cf. Egelhoff*, 518 U.S. at 51 (plurality op.) (voluntary-intoxication defense was not fundamental when it was "of too recent vintage" and there was no "lengthy common-law tradition" of permitting defense). The clear-and-convincing-

evidence burden also has "considerable justification." *Egelhoff*, 518 U.S. at 48 (plurality op.). Indeed, a "robust burden of proof" is necessary to offset the "substantial" risk of "malingering" by a defendant who is in fact not intellectually disabled. *Hill*, 662 F.3d at 1354; *see also Young*, 860 S.E.2d at 776 n.17 (plurality op.) (same).

Nor has the preponderance standard "received sufficiently uniform and permanent allegiance" nationwide. *Egelhoff*, 518 U.S. at 51 (plurality op.). In *Egelhoff*, the Court held that the defense of voluntary intoxication fell short of this standard when "one-fifth of the States" had not adopted it. *Id.* at 48. Here, the preponderance standard is even less accepted. Of the 29 jurisdictions that impose the death penalty, almost one-fourth have not adopted it.[5]

This case is thus quite different from *Cooper*, in which this Court held that due process prohibits the government from using a standard of proof more

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[5] *See* Pet. App. 207–09. Along with the 27 states listed in petitioner's appendix, both the United States military and the United States impose the death penalty. Of those 29 jurisdictions, at least Georgia, Florida, Kansas, Montana, Wyoming, the military, and the United States have not adopted the preponderance standard. *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond A Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 560–61 & n.23–25 (2017). And though petitioner claims that Oregon has adopted the preponderance standard, the case he cites does no such thing—it merely acknowledges that the *trial court* applied that standard. *See State v. Agee*, 364 P.3d 971, 983, 986 (Or. 2015). In fact, a 2017 law review article surveying the field counts Oregon as a state that has "not imposed any explicit standard of proof for determining intellectual disability." *Supra* Lucas at 561 & n.25.

demanding than a preponderance in demonstrating competency to stand trial. There, unlike here, the preponderance standard for proving incompetency had "deep roots in our common-law heritage." *Raulerson*, 928 F.3d at 1002; *see also Young*, 860 S.E.2d at 772 (plurality op.). There, unlike here, the preponderance standard had "near-uniform application" among the states. *Cooper*, 517 U.S. at 362. And there, unlike here, the preponderance standard implicated a defendant's fitness to stand trial, not a defendant's "moral culpability." *Atkins*, 536 U.S. at 306. That distinction makes intellectual disability much more like the insanity defense, *see Kahler v. Kansas*, 140 S. Ct. 1021, 1025 (2020)—a defense for which states may require proof even beyond a reasonable doubt without violating the Due Process Clause. *Leland v. Oregon*, 343 U.S. 790, 798–800 (1952).

Petitioner's argument about the "risk of error" (Pet. 22–24) does not demonstrate otherwise. The lower courts have widely rejected this claim, *e.g.*, *Hill*, 662 F.3d at 1354–56; *Young*, 860 S.E.2d at 776 n.18 (plurality op.), and petitioner cites no "empirical . . . evidence in the record" showing that the risk of an erroneous execution is exceedingly high under Florida's standard. *See Hill*, 662 F.3d at 1356. Indeed, under even Georgia's reasonable-doubt standard, "judges and juries do find defendants guilty but [intellectually disabled]," *id.* at 1357 (collecting examples)—a good indicator that a heightened standard does not prevent those truly disabled from proving as much. And petitioner "ignores all of the many other procedures in [Florida] law" that protect against erroneous executions, *id.* at 1354, including

the jury's right to consider intellectual capacity as a mitigator in deciding whether to recommend a death sentence. *See* Fla. Stat. § 921.141(7).

Finally, petitioner's alleged claim is "governed by norms of procedural due process," not the Eighth Amendment. *Hill*, 662 F.3d at 1362 (Tjoflat, J. concurring); *see also Medina*, 505 U.S. at 443 (analyzing challenge to burden of proof under the Due Process Clause); *Cooper*, 517 U.S. at 350 (same). But at any rate, for the reasons above, there is also no Eighth Amendment violation. Indeed, in the "[230]-year history of our nation's Bill of Rights, no Supreme Court decision has ever held, or even implied, that a burden of proof standard on its own can so wholly burden an Eighth Amendment right as to eviscerate or deny that right." *Hill*, 662 F.3d at 1351 (emphasis omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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