CASE NO. 21-8144

IN THE SUPREME COURT OF THE UNITED STATES

TAVARES J. WRIGHT,

Petitioner,

v.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In 2004, a jury convicted Tavares Wright, Petitioner, of two counts of first-degree murder, two counts of armed kidnapping, two counts of robbery with a firearm, and one count of carjacking with a firearm. Prior to sentencing, Petitioner claimed that he was ineligible for the death penalty due to his intellectual disability. The trial court conducted a hearing and denied Petitioner's claim, which he did not challenge on direct appeal. See Wright v. State, 19 So. 3d 277 (Fla. 2009).

During his state postconviction proceedings, Petitioner again raised claims relating to his alleged intellectual disability. The postconviction court conducted evidentiary hearings and found that Petitioner failed to establish by clear and convincing evidence that he has subaverage general intellectual functioning or deficits in his adaptive behavior. The Florida Supreme Court affirmed the ruling and found that Wright failed to establish by clear and convincing evidence, or even the lesser preponderance of the evidence standard, that he was intellectually disabled. Wright v. State, 213 So. 3d 881, 896 n.3 (Fla. 2017) (hereafter "Wright II").

Petitioner filed a petition for writ of certiorari and this Court granted certiorari, vacated the judgment, and remanded the case to the Florida Supreme Court for further consideration in light of this Court's decision in Moore v. Texas, 137 S. Ct. 1039 (2017). Wright v. Florida, 138 S. Ct. 360 (2017). On remand, the Florida Supreme Court held that Moore did not affect its prior finding that Wright failed to establish that he was intellectually disabled. Wright v. State, 256 So. 3d

766 (Fla. 2018) (hereafter "Wright III").

Thereafter, Petitioner amended his federal habeas petition and claimed that the Florida Supreme Court's resolution of his intellectual disability claim was an unreasonable application of clearly established federal law and was based on an unreasonable determination of the facts. The district court denied Petitioner's claim and the Eleventh Circuit Court of Appeals affirmed the court's ruling. Wright v. Sec'y, Dep't of Corr., No. 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021) (unpublished). Petitioner now seeks certiorari review of the Eleventh Circuit Court of Appeals' decision which gives rise to the following two questions:

> **Whether, under AEDPA review, the Eleventh Circuit Court of Appeals correctly decided that the Florida Supreme Court reasonably applied clearly established federal law and the facts when analyzing the intellectual functioning prong of Wright's claim and when finding that substantial and competent evidence supported the state postconviction court's conclusion that Wright's IQ scores, ranging from 75-82, did not establish significant subaverage general intellectual functioning even after considering testimony regarding the Flynn effect and the standard error of measurement (SEM)?**
>
> **Whether this Court should grant certiorari review to consider Wright's constitutional challenge to Florida's clear and convincing standard of proof for intellectual disability claims when Wright's claim was procedurally barred in state court based on independent state law grounds, and when the federal district court denied the corresponding habeas claim and the Eleventh Circuit Court of Appeals denied a certificate of appealability on the claim?**

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CITATION TO OPINION BELOW

On November 15, 2021, the Eleventh Circuit Court of Appeals released its opinion affirming the district court's rejection of Wright's federal habeas claims relating to his alleged intellectual disability. The opinion of the Eleventh Circuit Court of Appeals' decision is cited as Wright v. Sec'y, Dep't of Corr., No. 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021). On December 2, 2021, Petitioner filed a motion for panel rehearing and rehearing en banc, and on February 15, 2022, the court denied the motion. Petitioner requested from this Court, and was granted, an extension to file the instant petition until June 15, 2022. Petitioner timely filed his petition on June 13, 2022.

JURISDICTION

Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254(1). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE AND FACTS

I. State Court Trial Proceedings

Petitioner, Tavares J. Wright, was charged on May 11, 2000, in a seven-count indictment with armed carjacking, two counts of armed kidnapping, two counts of robbery with a firearm, and two counts of first-degree premeditated murder. See Wright v. State, 19 So. 3d 277, 283-89 (Fla. 2009) (setting forth the extensive factual history of the multi-day crime spree committed by Wright culminating in the instant murders). A jury convicted Wright on all counts. After Wright knowingly, intelligently, and voluntarily waived the right to have a penalty phase jury, the trial court conducted a sentencing hearing.

At the sentencing hearing, one of Wright's two retained mental health experts, Dr. Alan Waldman, testified regarding mitigation evidence and opined that Wright might be intellectually disabled.[1] Wright's counsel thereafter filed a motion to bar the imposition of the death penalty based on Florida statutory law and Atkins v. Virginia, 536 U.S. 304 (2002). Prior to sentencing Wright, the trial court conducted a hearing on his alleged intellectual disability. After hearing testimony from two different court-appointed expert witnesses, Drs. William Kremper and Joel Freid, that Wright was not intellectually disabled given his full-scale IQ scores of 82 and 75, the court issued an order finding that Wright did not meet Florida's statutory definition of intellectual disability.

On October 12, 2005, the trial court entered its sentencing order and found

four aggravating circumstances, three statutory mitigating circumstances, and several nonstatutory mitigating circumstances. The court imposed a death sentence for each count of first-degree murder and life sentences for each of the five noncapital felonies, all to run consecutively. The court further reiterated that Wright was not intellectually disabled. Wright v. State, 19 So. 3d 277, 290-91 (Fla. 2009). On direct appeal to the Florida Supreme Court, Wright did not challenge the trial court's ruling rejecting his intellectual disability claim. The Florida Supreme Court affirmed Wright's convictions and death sentences. Id.

II. State Postconviction Proceedings

Wright filed a motion for postconviction relief in state court and raised numerous ineffective assistance of counsel claims, including an allegation that his trial counsel was ineffective when litigating Wright's intellectual disability claim. The state postconviction court granted Wright an evidentiary hearing on his claim, and ultimately denied his motion. Wright appealed this ruling to the Florida Supreme Court, and while the appeal was pending, this Court issued its decision in Hall v. Florida, 572 U.S. 701 (2014). Wright thereafter requested that the Florida Supreme Court relinquish jurisdiction so that he could again litigate a renewed motion to bar the imposition of the death penalty based on Wright's alleged intellectual disability. Over the State's objection that the issue of Wright's alleged

[1] Dr. Joseph Sesta, Wright's other mental health expert, testified that Wright had a full-scale IQ of 77 and was not intellectually disabled.

intellectual disability was procedurally barred,[2] the Florida Supreme Court relinquished jurisdiction and Wright returned to the postconviction court and presented further evidence in support of his intellectual disability claim.

The postconviction court conducted the intellectual disability hearing in early 2015 and heard testimony from lay witnesses, Wright's two trial attorneys, and mental health experts. After hearing the testimony and reviewing the entire record, including Wright's extensive trial testimony, the court issued an order denying Wright's renewed motion to bar the imposition of the death penalty. The postconviction court made specific findings that Wright failed to prove the elements of an intellectual disability claim as his IQ scores, ranging between 75 and 82, did not demonstrate that he had subaverage general intellectual functioning and Wright failed to establish that he suffers from deficits in his adaptive behavior.[3]

1. Initial postconviction appeal

On appeal from the denial of his postconviction motion and renewed motion to bar the imposition of the death penalty, the Florida Supreme Court agreed that Wright failed to meet his burden of proof on the elements of his intellectual

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[2] As previously noted, Wright raised the issue of intellectual disability in 2005 at the time of his trial and was found not to be intellectually disabled. Wright did not challenge that ruling on direct appeal. As such, under Florida law his renewed motion was procedurally barred. See Hill v. State, 921 So. 2d 579, 584 (Fla.), cert. denied, 546 U.S. 1219 (2006).

[3] The postconviction court considered the range of Wright's IQ scores and the standard error of measurement (SEM), the practice effect, and the Flynn effect, and following this Court's dictates in Hall v. Florida, 572 U.S. 701 (2014), allowed Wright to present evidence regarding his adaptive behavior. Ultimately, the court rejected Wright's intellectual disability claim.

disability claim. The court specifically noted that, although Florida statutory law provides for a clear and convincing burden of proof, see § 921.137(4), Fla. Stat. (2013), Wright failed to establish his claim even by the lesser preponderance of the evidence standard. Wright II, 213 So. 3d 881, 896-97 & n.3 (Fla. 2017). The Florida Supreme Court further noted that Wright's constitutional challenge to the burden of proof was procedurally barred under state law as he failed to properly present the issue for the lower court's review. Id.

In rejecting Wright's intellectual disability claim, the Florida Supreme Court noted that Wright failed to establish that he had significantly subaverage general intellectual functioning or that he suffers from concurrent deficits in his adaptive functioning. The Florida Supreme Court recognized that in Hall, this Court "invalidated Florida's interpretation of its statute as establishing a strict IQ test score cutoff of 70," and determined that "IQ scores are best evaluated as a range, taking into account the standard error of measurement (SEM) and other factors that can affect the accuracy of the score." Wright II, 213 So. 3d at 895-97 (quoting extensively from Hall).

The Florida Supreme Court noted that Wright had taken nine IQ tests, seven of which were non-abbreviated tests, and had scored 75 or above on all of them, including a full scale of 82. Id. (stating that "every single IQ test that Wright took reported a score of 75 or above, five points above the threshold of 70 utilized under Florida law"). Furthermore, the court noted that the postconviction court complied

with Hall by taking into account the SEM and other factors when analyzing his IQ scores. "[T]he postconviction court considered expert testimony regarding Wright's IQ scores, how the SEM applies to those scores, how the practice effect applies to those scores, ***how the Flynn effect applies to those scores, and how Wright's effort may have affected the validity of those scores. After considering that evidence***, the postconviction court found that Wright had not established by clear and convincing evidence that he is of significantly subaverage intellectual functioning. We agree and further hold that Wright has failed to establish this prong by even a preponderance of the evidence." Id. at 897 (emphasis added) (footnote omitted).

In finding that Wright had failed to establish the first prong of his intellectual disability claim, the Florida Supreme Court noted that even the defense expert acknowledged that Wright's full scale IQ score of 82 "was valid and free of any practice effect concerns." Id. at 897-98. Similar to the postconviction court who heard the conflicting opinions of the mental health experts, the Florida Supreme Court credited the State's expert's opinion that Wright's range of IQ scores established that he did not suffer from significantly subaverage intellectual functioning. The State's expert, Dr. Gamache, had concerns regarding Wright malingering on his IQ tests and not putting forth full effort, and opined that IQ tests are performance-based and "one can malinger and fake a low IQ, [but] one cannot fake a higher IQ." Wright II, 213 So. 3d at 898. Thus, given Wright's

consistent scores above the threshold for a determination of intellectual disability, even when factoring in the SEM and other factors as required by Hall, the Florida Supreme Court found that Wright had failed to carry his burden of proof regarding the subaverage intellectual functioning prong. Id.

In addition to failing to establish that Wright suffered from significantly subaverage intellectual functioning, the Florida Supreme Court also determined that Wright failed to establish that he had current deficits in his adaptive functioning. In making this determination, the court stated that the experts' and lay witnesses' testimony at the evidentiary hearing, and the resulting credibility determinations, along with Wright's own actions and testimony at trial, all refuted his claim of deficits in adaptive functioning. The court thoroughly examined the testimony from the State's mental health expert who opined that Wright did not have sufficient deficits in any of the three accepted broad categories of adaptive functioning: conceptual skills, social/interpersonal skills, and practical skills.[4] Wright II, 213 So. 3d at 899-900.

Both the State's expert and the defense's expert agreed that Wright does not have concurrent deficits in the two categories of practical skills or social skills. Wright II, 213 So. 3d at 899-901. The defense's expert, Dr. Mary Kasper, opined that Wright was intellectually disabled given his IQ scores and current deficits in a

[4] Dr. Gamache, as well as the defense's mental health expert, Dr. Mary Kasper, both noted that the American Psychiatric Association's Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the American

single area; conceptual skills. In determining that Wright had deficits in his conceptual skills, Dr. Kasper relied extensively on her administration of the Adaptive Behavior and Assessment Scales (ABAS-II) which she personally filled out based on interviews she conducted with numerous people who knew Wright at various times during his life. Dr. Kasper acknowledged on cross-examination, however, that her opinion was based on an improper administration of the ABAS-II.[5] Id. at 900 (gratuitously characterizing Dr. Kasper's administration of the ABAS-II as, "at best, unorthodox" and causing the Florida Supreme Court to give "great pause" to the validity of her testing).

In addition to the differing mental health experts' opinions on Wright's alleged deficits in adaptive functioning, the state courts also looked at other evidence when concluding that Wright did not have deficits in his adaptive functioning. The Florida Supreme Court considered the lay witnesses' testimony from the evidentiary hearings, as well as Wright's own statements and conduct at trial. The Florida Supreme Court noted:

Association of Intellectual and Developmental Disabilities (AAIDD-11) clinical manual categorized adaptive behavior into these three broad categories.

[5] Dr. Gamache explained that Dr. Kasper's administration of the ABAS-II test was improper because she personally compiled numerous people's responses into a single test result. Dr. Kasper acknowledged that her retrospective approach of speaking to numerous people and filling out the ABAS-II results herself was "much more difficult" than the normal administration of the test to a single individual or caretaker. Additionally, Dr. Gamache explained that the ABAS-II test was not scientifically valid for these purposes as peer-reviewed literature explained that the test is very susceptible to misrepresentation as the person answering the test questions can very easily make it look like the subject is impaired.

Moreover, we need not limit ourselves to expert testimony alone to conclude that Wright does not have concurrent deficits in adaptive functioning. Wright gave extensive testimony during trial, where he told a coherent narrative of his version of the events. He testified at length and was not generally aided by leading questions. Furthermore, following his testimony, he endured a strong cross-examination by the State in which he demonstrated a clear understanding and unwavering invocation of his Fifth Amendment right against self-incrimination with regard to certain uncharged offenses he was repeatedly questioned about. Moreover, the record demonstrates multiple times that Wright assessed the performance of his counsel across all three of his trials, sometimes expressing dissatisfaction with their inability to elicit certain evidence that had been elicited during a previous trial. In addition, during an extensive colloquy, the trial court judge questioned Wright concerning his waiver of an advisory penalty phase jury and Wright appeared to understand all of the ramifications of such a waiver, a waiver we affirmed on direct appeal. Thus, competent, substantial evidence supports the postconviction court's determination that Wright's testimony during trial and interactions with the trial court refute his alleged deficits in adaptive functioning.

Furthermore, competent, substantial evidence supports the postconviction court's determination that the facts underlying Wright's convictions refute deficits in adaptive functioning. First, the trial court found that Wright committed the murder in a cold, calculated, and premeditated manner. See Phillips, 984 So. 2d at 512 ("The actions required to satisfy the CCP aggravator are not indicative of mental retardation."). Specifically, the trial court found, and we affirmed, the findings that Wright had killed his victims execution style. Second, the complexity of the crime spree reflects someone who is likely not intellectually disabled. In addition, the State presented testimony from Aaron Silas, who drove the car during the Longfellow Boulevard drive-by shooting and testified that Wright instructed him to turn the car around after spotting his victim, someone Wright previously knew.

The State also placed into evidence a transcript of a taped interview with a detective who interviewed Wright following his arrest and presented the detective as a witness. The interview is inconsistent with an intellectually disabled defendant. Wright admitted to running away from the police because he had marijuana in his possession, to discarding the marijuana, and to knowing that possession of marijuana was a crime. Wright was also questioned during the interview about the box of bullets he was carrying, to which he responded, "I think they

was .380 bullets," and that he was holding the bullets for a friend. Then, when informed a .380 caliber handgun was found nearby, Wright denied knowledge of the gun. Furthermore, while it was the detective's practice to inquire about mental illnesses when he suspected it may be a concern, he did not feel the need to ask Wright whether he had been diagnosed with any mental illnesses.

Finally, the lay witness testimony from people who know Wright does not dissuade us from concluding that Wright cannot demonstrate concurrent deficits even by a preponderance of the evidence. Although Wright's witnesses testified to general issues, they all ultimately made concessions that suggest Wright lacks concurrent deficits in adaptive functioning. For instance, Wright's cousin conceded that Wright: (1) had a fast-paced job selecting items for shelving at a grocery store that Wright eventually learned to do on his own, albeit not fluidly; (2) has improved somewhat with regard to grammar and punctuation; (3) writes him cards from prison for the holidays and his birthday; (4) reads the Bible; (5) occasionally calls him on the phone; and (6) has the capacity to learn. Similarly, Wright's aunt conceded that Wright: (1) did not appear to have problems understanding her; (2) did not appear to have problems getting along with other people; (3) was always clean when she saw him; and (4) sent her cards and letters from jail on holidays like Mother's Day, Christmas, Thanksgiving, Easter, and sometimes her birthday.

Furthermore, the State presented the testimony of Samuel Pitts's sisters, Sandrea Allen, Darletha Jones, and Vontrese Anderson, the latter of whom Wright dated for two to three weeks. All three testified that they had known Wright, Wright never had trouble understanding them, and they never had trouble understanding him. All three also testified to having observed Wright ride the city bus to varying degrees. Vontrese also testified that Wright would follow her around after they had ended their relationship, and that even though he was advised by law enforcement to end that activity, he would continue to follow her anyway. She believed Wright knew he was not supposed to follow her, but chose to follow her regardless. Vontrese added that Wright had memorized her phone number and that she received five or fewer jail calls from Wright, but she did not answer them, and that she had received a letter from the jail that appeared to be written by Wright.

Wright II, 213 So. 3d at 900-02 (footnote omitted). Thus, because the Florida

Supreme Court agreed with the postconviction court that Wright failed to establish by a preponderance of the evidence the first two prongs for a determination of intellectual disability, the court determined that Wright was not categorially ineligible for execution.

2. Second opinion following this Court's GVR

Following the release of the Florida Supreme Court's opinion in Wright II, Petitioner filed a petition for writ of certiorari with this Court. On October 16, 2017, this Court granted certiorari, vacated the judgment, and remanded the case (GVR) to the Florida Supreme Court for further consideration in light of this Court's decision in Moore v. Texas, 137 S. Ct. 1039 (2017). Wright v. Florida, 138 S. Ct. 360 (2017).

On remand, the Florida Supreme Court found that Moore did not alter its prior decision that Wright failed to establish intellectual disability. Wright III, 256 So. 3d 766 (Fla. 2018). The court held that Wright did not establish significant subaverage general intellectual functioning as evidenced by his range of IQ scores and noted that Moore did "not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination." Id. at 770-72 ("As it pertains to the intelligence prong of the ID test, Moore generally embodies a simple affirmation of the principles announced in Hall. Following Hall, the Supreme Court again stated that when a defendant establishes an IQ score range - adjusted for the SEM - 'at or below 70,' then a court must 'move on to

consider [the defendant's] adaptive functioning.'") (quoting Moore, 137 S. Ct. at 1049). As the Florida Supreme Court discussed at length in Wright II and Wright III, Petitioner's IQ scores ranged from 75-82, and even when adjusted for the SEM as required by Hall and Moore, there was competent, substantial evidence to support the lower court's finding that Wright failed to satisfy his burden of establishing significantly subaverage intelligence. Specifically, the court noted that "[n]either Hall nor Moore require a significantly subaverage finding when one of many IQ scores falls into the ID range." Wright III, 256 So. 3d at 772. Similar to the Wright II opinion, the Wright III court did not address the lower court's consideration of the practice effect or the Flynn effect when affirming the lower court's ruling.

In addition to concluding that Moore did not affect its prior determination that Wright failed to establish significant subaverage intellectual functioning, the Wright III court also determined that Moore did not alter its finding with regard to Wright's alleged deficits in adaptive functioning. The court observed that Florida's statutory definition of intellectual disability requires a defendant to establish significantly subaverage intellectual functioning "existing concurrently with deficits in adaptive behavior." § 921.137, Fla. Stat. (2017). The court recognized that Florida's statutory definitions were similar to the current medical consensus regarding intellectual disability. Wright III, 256 So. 3d at 770-71 & n.2 (citing the definitions contained in the American Psychiatric Association, Diagnostic and

Statistical Manual of Mental Disorders 37 (5th ed. 2013) (DSM-5), and the American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 5 (11th ed. 2010) (AAIDD-11). The court noted that the current medical standards divide adaptive functioning into three broad categories: conceptual, social, and practical. Id. at 773 (citing DSM-5 at 37; AAIDD-11 at 43).

In addressing Wright's adaptive functioning, the court noted that "only one domain is at issue here: the conceptual. Both experts testified at the renewed ID determination hearing – including Wright's own expert – that Wright has no deficits in the social and practical domains that rise to the level of an ID determination." Wright III, 256 So. 3d at 774 (quoting Wright II, 213 So. 3d at 900). The court proceeded to analyze Wright's adaptive functioning in light of this Court's pronouncements in Moore:

> The record in this case demonstrates that the postconviction court and the medical experts below relied on current medical standards. Even the State's expert, Dr. Gamache, used current medical expertise to inform his testimony. Moreover, the postconviction court demonstrated a willingness to engage with the clinical manuals and understand how they fit together with the case law. Unlike Moore, this Court did not reject the postconviction court's reliance on current medical standards. Compare Moore, 137 S. Ct. at 1045-47, with Wright, 213 So. 3d at 899-902. Instead, we accepted the findings and affirmed the postconviction court's determination that Wright does not qualify as an ID defendant who cannot be executed. Wright, 213 So. 3d at 902. In doing so, current medical understanding served as the basis for the rejection of Wright's claim, which differentiates this case from Moore where the CCA relied on outdated medical standards and lay perceptions of ID. See Moore, 137 S. Ct. at 1050-51. Furthermore, we did not rely on ID risk factors as a foundation to counter an ID determination. See generally Wright, 213 So. 3d at 899-902; see Moore, 137 S. Ct. at 1051. Therefore, the

> only remaining basis from Moore that could even remotely entitle Wright to relief was an alleged overemphasis on adaptive strengths and improper focus on prison conduct. Moore, 137 S. Ct. at 1050.

Wright III, 256 So. 3d at 775-76.

On March 28, 2019, Wright filed a petition for writ of certiorari with this Court seeking review of the Florida Supreme Court's Wright III decision. This Court denied certiorari review on June 3, 2019. Wright v. Florida, 139 S. Ct. 2671 (2019).

III. Federal Habeas Proceedings

Wright filed his habeas petition in April, 2017, and following the Florida Supreme Court's opinion in Wright III, amended his habeas petition and argued that the Florida Supreme Court's resolution of his intellectual disability claim was contrary to or an unreasonable application of clearly established federal law, or involved an unreasonable determination of the facts. Wright also argued that Florida's clear and convincing standard of proof violated his due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The district court found that the Florida courts reasonably determined that Wright is not intellectually disabled. The district court stated that the "conclusions of the Florida courts that petitioner did not meet the definition of intellectually disabled . . . are sound, and reasonable. The state circuit court and the Florida Supreme Court followed Atkins, Hall, and Moore." Wright v. Sec'y, Dep't of Corr., No. 8:17-cv-974-T-02TGW, 2020 WL 481633, *12 (M.D. Fla. Aug. 19, 2020). The

district court reviewed the entire state court record and noted that, in lay terms, Wright is not intellectually disabled. Id. at *11-12. "On the IQ testing element alone, Petitioner is clearly not disabled.' Id. at *12. The district court noted that, even when the SEM was applied to Wright's numerous IQ scores, he scored a 70 on all but two of the tests. Furthermore, as the state courts reasonably concluded based on the expert testimony, Wright may have been malingering on his tests. Id. at *12-13.

With regard to Petitioner's constitutional challenge to Florida's clear and convincing burden of proof for intellectual disability claims, the district court found the claim must be denied for three reasons. Wright v. Sec'y, Dep't of Corr., No. 8:17-cv-974-T-02TGW, 2020 WL 481633, *14 (M.D. Fla. Aug. 19, 2020). First, the claim was unexhausted as Petitioner did not timely present the claim to the state court in order to preserve it under Florida's well-established pleading requirements.[6] Id. at *14. Second, the claim was foreclosed by Eleventh Circuit Court of Appeals caselaw which establishes that the state courts' decision, even if properly presented to the state court, was not contrary to, or involved an unreasonable application of, clearly established federal law. Id. (citing Raulerson v. Warden, 928 F.3d 987 (11th Cir. 2019), cert. denied, 140 S. Ct. 2568 (2020)). Lastly, the district court noted that Petitioner could not establish his claim by even a preponderance of the evidence,

[6] At the outset of the state court evidentiary hearing, Petitioner conceded that the clear and convincing standard was the applicable burden of proof and did not raise any claim on this issue until his written closing arguments following the evidentiary hearing. Id.

and thus, "he could meet no standard of proof whatsoever, as the Florida Supreme Court has noted correctly." Id.

Following the denial of his habeas petition, Petitioner sought a certificate of appealability (COA) in the Eleventh Circuit Court of Appeals. The court of appeals denied a COA on the clear and convincing burden of proof claim, but granted COA on the issue of whether Wright is intellectually disabled and therefore ineligible for the death penalty under the Eighth Amendment.

In its opinion affirming the district court's denial of habeas relief, the Eleventh Circuit Court of Appeals found that the Florida Supreme Court did not unreasonably apply clearly established federal law, nor did the court make unreasonable determinations of fact, in concluding that Petitioner was not intellectually disabled. Wright v. Sec'y, Dep't of Corr., No. 20-13966, 2021 WL 5293405 (11th Cir. Nov. 15, 2021). In rejecting Wright's claim that the Florida Supreme Court disregarded clearly established federal law when analyzing the first prong of his intellectual disability claim, the court stated:

> Mr. Wright now asserts that the Florida Supreme Court in Wright III disregarded Hall and instead misconstrued IQ as a single number (rather than a range) when it focused on his highest score of 82 and failed to explicitly mention any of his other scores. This is an incorrect reading of Hall—and of Wright III—for a couple of reasons.

Wright, 2021 WL 5293405 at *4. The court noted that Hall did not "establish any rule regarding how to weigh IQ tests when a person takes several of them," but held that each separate score must be assessed using the SEM. Id. As the Eleventh

Circuit correctly found, the state postconviction court and Florida Supreme Court followed Hall and considered Wright's range of IQ scores on his various tests, adjusted for the SEM, and concluded that he failed to establish subaverage intellectual functioning. Id. at *4-5.

The Eleventh Circuit further rejected Wright's contention that the Florida Supreme Court unreasonably applied this Court's command in Hall that the analysis of an intellectual disability claim must be "informed by the medical community's diagnostic framework" by failing to account for the Flynn effect.[7] The court noted that it had previously held that there is no consensus about the Flynn effect among experts, or among the courts. Id. (citing Raulerson v. Warden, 928 F.3d 987, 1008 (11th Cir. 2019), cert. denied, 140 S. Ct. 2568 (2020), and Ledford v. Warden, Ga. Diagnostic and Classification Prison, 818 F.3d 600, 636 (11th Cir. 2016), cert. denied, 137 S. Ct. 1432 (2017)). Because Wright failed to even attempt to explain how the medical consensus had changed since those cases, the Eleventh Circuit found that it was bound by its prior precedent that courts need not "accept and apply the Flynn effect." Id. at *5.

After concluding that the state court reasonably applied clearly established

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[7] As the court explained "[t]he Flynn effect describes an upward drift in IQ scores over time. Under this theory, a person's score can be artificially higher if he takes an IQ test several years after the test was normed on the population. See Raulerson v. Warden, 928 F.3d 987, 1008 (11th Cir. 2019). See also AAIDD-11, at 37 ("Because Flynn reported that mean IQ increases about 0.33 points per year, some investigators have suggested that any obtained IQ score should be adjusted 0.33 points for each year the test was administered after the standardization was completed.") (cleaned up)." Wright, 2021 WL 5293405 at *5.

federal law and the facts when determining that Wright did not have subaverage general intellectual functioning, the court analyzed the second prong and found that the Florida Supreme Court followed Atkins, Hall, and Moore, and made reasonable factual determinations when determining that Wright did not have deficits in his adaptive behavior. Wright, 2021 WL 5293405 at *4-8. As previously noted, the court did not grant a COA on Wright's claim regarding the constitutionality of the clear and convincing burden of proof and therefore did not address this claim in any fashion. Petitioner now seeks certiorari review of the Eleventh Circuit Court of Appeals' decision affirming the denial of habeas corpus relief.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Court of Appeals' Finding that the Florida Supreme Court Reasonably Applied Clearly Established Federal Law When Analyzing Wright's Intellectual Disability Claim Presents No Issue Warranting this Court's Exercise of its Certiorari Jurisdiction.

This Court held in Atkins v. Virginia, 536 U.S. 304, 317 (2002), that the Eighth Amendment's prohibition against cruel and unusual punishment bars the execution of an intellectually disabled person but left to the States "the task of developing appropriate ways" to identify intellectually disabled defendants and to enforce this constitutional protection. Under Florida law, a defendant claiming intellectual disability must establish by clear and convincing evidence that he has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. See § 921.137(1), Fla. Stat. (2013).

In Hall v. Florida, 572 U.S. 701, 719-20 (2014), this Court stated that Florida's statutory definition of intellectual disability, on its face, was consistent with the views of the medical community, but the Florida Supreme Court's narrow interpretation of the statute, foreclosing further evidentiary development when a defendant had an IQ score above 70, was unconstitutional and ran afoul of Atkins. By applying a strict cut-off score of 70, the Florida Supreme Court disregarded established medical practice by failing to account for a standard error of measurement (SEM) on the test and by failing to recognize that IQ scores are imprecise and cannot be reduced to a single numerical score. Id. at 711-12. Subsequently, in Moore v. Texas, 137 S. Ct. 1039, 1049-50 (2017), this Court reiterated its instruction from Hall that adjudications of intellectual disability claims should be informed by the views of medical experts,[8] and required that "courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits."

Petitioner now asserts that this Could should grant certiorari review because the Eleventh Circuit Court of Appeals decided an important federal question that conflicts with this Court's decisions in Atkins, Hall, and Moore. Specifically, Petitioner claims that he should have been granted federal habeas corpus relief pursuant to 28 U.S.C. § 2254(d)(1) because the Florida Supreme Court

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[8] However, as this Court noted, "Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical

"unreasonably applied this Court's direction in Hall that the legal determination of intellectual disability is 'informed by the medical community's diagnostic framework' by failing to consider Wright's Flynn-corrected scores." Petition at 26. Wright's claim is without merit and does not warrant this Court's exercise of its certiorari jurisdiction.

A. This Court has never held that a trial court must apply the Flynn effect to an individual defendant's IQ score when assessing the intellectual functioning prong of an intellectual disability claim.

In order to obtain federal habeas relief, Petitioner had to establish that the state court's resolution of his intellectual disability claim was contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d)(1); White v. Woodall, 572 U.S. 415, 419 (2014). "'Clearly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of this Court's decisions.'" Id. (quoting Howes v. Fields, 565 U.S. 499, 505 (2012)).

Petitioner contends that this Court's dictum in Hall and Moore that trial courts' determination of an intellectual disability claim must be "informed by the medical community's diagnostic framework" mandates that a trial court *must* apply the Flynn effect when an IQ score is utilized from a test with older norms. Contrary to Petitioner's assertion, the law from this Court is not "clearly established" that a court must apply the Flynn effect to a defendant's IQ test scores. See Postelle v.

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guide." Moore, 137 S. Ct. at 1049.

Carpenter, 901 F.3d 1202, 1212 (10th Cir. 2018) (noting that Atkins and Hall do not mandate an adjustment for the Flynn effect, but does require consideration of the SEM); Black v. Carpenter, 866 F.3d 734, 745-46 (6th Cir. 2017) (stating that this Court's precedent does not even mention the Flynn effect, but does the SEM); McManus v. Neal, 779 F.3d 634, 653 (7th Cir. 2015) (stating that "nothing in Atkins suggests that IQ test scores *must* be adjusted to account for the Flynn Effect in order to be considered reliable evidence of intellectual functioning").

In Atkins v. Virginia, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of an intellectually disabled person, but "did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability]" falls within the protection of the Eighth Amendment. Hall v. Florida, 572 U.S. 701, 718 (2014) (quoting Bobby v. Bies, 556 U.S. 825, 831 (2009)). After examining the views of the States, this Court's precedent, and medical experts, the Hall Court found that "the legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community diagnostic framework." Id. at 721. Because the Florida Supreme Court failed to "take into account the SEM and set[] a strict cutoff at 70, Florida 'goes against the unanimous professional consensus.'" Hall, 572 U.S. at 722 (citation omitted). The Hall court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony

regarding adaptive deficits." Id. at 723.

In the instant case, the Eleventh Circuit Court of Appeals held that the Florida Supreme Court did not unreasonably apply clearly established federal law, or the facts, when addressing Wright's intellectual disability claim. Wright, 2021 WL 5293405 at *2-8. The state court heard conflicting expert testimony regarding Wright's IQ scores, which ranged between 75-82, and even after factoring in the SEM, the state court concluded that Wright failed to establish subaverage general intellectual functioning but nevertheless allowed Wright to present evidence regarding his adaptive behavior. Id.

After concluding that Wright failed to establish that the state court unreasonably applied clearly established federal law, the Eleventh Circuit discussed Petitioner's argument that "the Florida courts unreasonably applied the Hall command that the legal determination of intellectual disability be 'informed by the medical community's diagnostic framework' by failing to account for the so-called Flynn effect." Wright, 2021 WL 5293405 at *5. The court noted that, in the Eleventh Circuit, courts are not *required* to accept and apply the Flynn effect, but rather, courts *may* hear and consider the Flynn effect and make its own fact-finding about the credibility and weight of the expert evidence regarding the Flynn effect. Id. (citing and Ledford v. Warden, Ga. Diagnostic and Classification Prison, 818 F.3d 600, 636-37 (11th Cir. 2016), cert. denied, 137 S. Ct. 1432 (2017)). Further, the court stated that there is no consensus regarding the application of the Flynn effect

among experts or the courts. Id. (citing Raulerson v. Warden, 928 F.3d 987, 1008 (11th Cir. 2019), cert. denied, 140 S. Ct. 2568 (2020)).

The Eleventh Circuit's discussion of the Flynn effect in its circuit does not provide a basis for this Court to exercise its certiorari jurisdiction. Notably, the Eleventh Circuit did not discuss the Florida Supreme Court's application, or alleged lack thereof, of the Flynn effect on Petitioner's IQ scores. The relevant inquiry for the habeas court under AEDPA was whether the state court unreasonably applied clearly established federal law or unreasonably determined the facts and the Eleventh Circuit did not address that question as it relates to the Flynn effect. Accordingly, the court of appeals' decision does not provide a valid basis for this Court's exercise of its certiorari jurisdiction.

B. Even if clearly established federal law mandated the application of the Flynn effect to Petitioner's IQ scores, Wright would not be entitled to federal habeas relief as the state court reasonably considered this evidence when finding that his range of IQ scores did not demonstrate subaverage intellectual disability.

Although the Eleventh Circuit Court of Appeals did not address the state courts' application of the Flynn effect to Wright's IQ scores, the record clearly establishes that the state postconviction court heard expert testimony regarding the Flynn effect and considered it before rejecting Petitioner's contention that he had subaverage general intellectual functioning. The state postconviction court noted that Wright had been given numerous IQ tests and scored between 75 and 82. These scores "only suggest a range of his IQ, . . . and each separate IQ score is

subject to a standard error of measurement (SEM) which is generally understood to be approximately five points on either side of the recorded score. Hall v. Florida, 134 S. Ct. 1986, 1995 (2014). Further, the Court has heard testimony concerning the 'practice effect' and the 'Flynn effect' which can also affect the determination as to whether or not a test taker has a significantly subaverage general intellectual functioning." Petitioners' App. F at 108. The state postconviction court, following the dictates of Hall, found that even though Wright failed to establish by clear and convincing evidence that he had significant subaverage general intellectual functioning, because his scores fell within the tests' acknowledged and inherent margin of error, Wright was allowed to present and have considered evidence concerning his adaptive behavior. Id. at 108-09.

After having considered Wright's expert witness's testimony concerning the practice effect, the Flynn effect, and the SEM, the state postconviction court rejected Wright's contention that he had subaverage general intellectual functioning. On appeal following this Court's remand, the Florida Supreme Court found that competent, substantial evidence supported the lower court's factual findings based on Wright's IQ scores ranging between 75-82.

> Both this Court and the postconviction court followed Moore's subsequent instructions. In this case, both courts acknowledged that Wright's IQ score range—adjusted for the SEM—fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70; therefore, Wright was allowed to offer evidence of adaptive functioning. Wright, 213 So. 3d at 897-98. Rather than disregarding the lower range of Wright's IQ scores, as the CCA did in Moore, both Florida courts properly considered all valid, SEM-adjusted scores and moved on to examine Wright's adaptive functioning. Wright, 213 So. 3d

> at 898; see Moore, 137 S. Ct. at 1049. Neither Hall nor Moore requires a significantly subaverage intelligence finding when one of many IQ scores falls into the ID range. Instead, those cases instruct courts to be "informed by the medical community's diagnostic framework," not employ a strict cutoff, and consider other evidence of ID when clinical experts would do the same. Hall, 134 S. Ct. at 2000; see Moore, 137 S. Ct. at 1048-49. This Court and the postconviction court below followed that directive and properly considered all three prongs of the ID test.

Wright III, 256 So. 3d 766, 771-72 (Fla. 2018). The Florida Supreme Court did not mention the lower court's consideration of the Flynn effect in its opinion.

Likewise, in his federal habeas appeal, the Eleventh Circuit Court of Appeals did not specifically address the state postconviction court's consideration of the Flynn effect on Wright's IQ scores. Rather, as previously noted, the court of appeals engaged in a generic discussion of the Flynn effect and noted that the Eleventh Circuit allows, but does not mandate, its application. Wright, 2021 WL 5293405 at *5-6.

In affirming the denial of habeas relief, the Eleventh Circuit found that the Florida Supreme Court reasonably applied clearly established federal law, reasonably applied the facts, and determined that Wright's IQ scores, when adjusted for the SEM, did not establish significantly subaverage intellectual functioning. The court noted that on Wright's highest IQ score of 82, the SEM range was 79-86; well above the approximation for intellectual disability. Wright, 2021 WL 5293405 at *4-5. The Eleventh Circuit further noted that the state courts did not limit its consideration to a single score, but rather considered his range of scores and noted that, even when Wright's lowest scores were adjusted for the SEM, he

only fell one point below 70. Id.

Petitioner argues that the state courts unreasonably applied clearly established federal law and the facts when failing to apply the Flynn effect to his "most reliable" full scale IQ scores of 75 and 76, as the Flynn effect would lower these scores to a 69 and 70. The courts, however, specifically found that these were not the "most reliable" scores given the evidence of Wright's malingering. See Wright, 2021 WL 5293405 at *8 (noting that the State's expert, Dr. Gamache, testified that Wright malingered on his IQ tests and opined that "one can malinger and fake a low IQ" but one "cannot fake a higher IQ"); Wright III, 256 So. 3d at 772 (noting the competing expert testimony regarding Wright's IQ scores and that numerous tests were above 70, even after SEM adjustments, including a score of 82 with a range of 79-86). Additionally, according to Wright, his "most reliable" Flynn-adjusted scores were 69 and 70. Of course, the state courts explicitly discussed at length the application of the SEM to Wright's range of IQ scores and noted that the range indicated a low score of 69 and a high of 86. As Wright's lowest score, whether adjusted for the Flynn effect or the SEM, never dipped more than one point below 70, and his more reliable scores were "well above" the approximation for intellectual disability, he would not have been entitled to federal habeas relief even if the courts had specifically addressed the application of the Flynn effect to his IQ scores.

Because the Eleventh Circuit Court of Appeals correctly determined that the Florida Supreme Court reasonably applied clearly established federal law and the

facts when determining that Wright was not intellectually disabled, this Court should decline to exercise its certiorari jurisdiction. Even if this Court were to determine that the Flynn effect *must* be applied to IQ scores, it would not affect Petitioner's case as he still would not be able to establish subaverage general intellectual functioning or deficits in his adaptive behavior. This Court does not grant review of issues that will have no impact on the outcome of the case. Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955) (stating that certiorari should not be granted when the issue is only academic); Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (stating that this Court's power is the power "to correct wrong judgments, not to revise opinions" and explaining, if the same judgment would be rendered by the state court after we corrected its view of federal laws, that review would be nothing more than an advisory opinion). Thus, because Wright has failed to offer any compelling reason meriting this Court's review, his petition should be denied. See Sup. Ct. R. 10(a) & (c).

II. Petitioner's Challenge to Florida's Burden of Proof for Intellectual Disability Does Not Warrant Review When the Eleventh Circuit Court of Appeals Denied a Certificate of Appealability on this Issue and the Federal District Court Denied the Claim Based on the State Court's Finding that Petitioner' Claim was Unpreserved and Procedurally Barred.

Petitioner concedes that the Eleventh Circuit Court of Appeals denied a certificate of appealability (COA) on his claim challenging the constitutionality of Florida's burden of proof for intellectual disability claims and further acknowledges that the district court denied his claim, in part, because it was procedurally barred

as the Florida Supreme Court dismissed it on an adequate and independent state law ground. Nevertheless, Petitioner requests that this Court grant certiorari review and determine that Florida's clear and convincing burden of proof violates the Due Process Clause and the Eighth Amendment. This Court has repeatedly declined to review materially identical questions,[9] including last month in a Florida case. See Nixon v. Florida, No. 21-1173, 2022 WL 2203355 (June 21, 2022). For numerous reasons, this Court should once again do the same here.

First, neither the Eleventh Circuit Court of Appeals, nor the state courts, passed on the merits of the question below. The court of appeals denied COA on this claim. The legal standard for obtaining a COA is well established. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c)(1). A COA may be granted only where there is "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires the Petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); Miller-El, 537 U.S. at 336. As will be discussed infra, reasonable jurists could not debate the district court's assessment of this claim. 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 on a federal ground that the state court did not have occasion to consider." Adams v. Robertson, 520 U.S. 83, 90

[9] See, e.g., Young v. Georgia, 142 S. Ct. 1206 (2022); Raulerson v. Warden, 140 S. Ct. 2568 (2020); Hill v. Humphrey, 566 U.S. 1041 (2012); Burgess v. Scofield, 546

(1997).

Second, this question makes no difference in Petitioner's case because he could not establish intellectual disability under even the lesser preponderance of the evidence standard. See Wright II, 213 So. 3d at 896 (finding Wright's constitutional challenge procedurally barred and further noting that he could not prove his intellectual disability claim by even a preponderance of the evidence). The state court did not reject Petitioner's claim because of the heightened burden of proof; it rejected his claim because petitioner had credible IQ scores ranging from 75-82 and lacked evidence showing any subaverage intellectual functioning or deficits in his adaptive behavior. Because even a favorable ruling would not change the outcome, review is unwarranted.

Third, 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.) (quotations and citation omitted); see also Cooper v. Oklahoma, 517 U.S. 348, 355 (1996) (applying this test). The "primary guide" in this analysis is "historical practice." Egelhoff, 518 U.S. at 43 (plurality op.) (citing Medina v. California, 505 U.S. 437, 446 (1992)). Also relevant is whether the State's rule has "considerable justification," which "casts doubt upon the proposition that the opposite rule is"

U.S. 944 (2005); Stripling v. Head, 541 U.S. 1070 (2004).

fundamental. Id. at 49. 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. 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 v. Warden, 928 F.3d 987, 1002 (11th Cir. 2019) (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 v. Humphrey, 662 F.3d 1335, 1354 (11th Cir. 2011).

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.[10]

[10] See Pet. App. P. 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

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 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. 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. 29–31) does not demonstrate otherwise. The lower courts have widely rejected this claim, see e.g., Hill, 662 F.3d at 1354–56; Young v. State, 860 S.E.2d 746, 776 n.18 (Ga. 2021) (plurality op.), and Petitioner cites no "empirical . . . evidence in the record" showing

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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." Lucas, supra at 561 & n.25.

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 beyond-a-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 § 921.141(6), Fla. Stat. (2009).

Finally, Petitioner's 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 v. California, 505 U.S. 437, 443 (1992) (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

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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