No. 18-7226

IN THE

Supreme Court of the United States

OMAR BLANCO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Petitioner, Omar Blanco, files this reply in support of his Petition for Writ of Certiorari, and prays that the Court issue its writ of certiorari to review the State of Florida's attempt to circumvent the substantive holdings of *Hall v. Florida*, 572 U.S. 701 (2014), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Without review from this Court, Mr. Blanco, an intellectually disabled man who was sentenced to death by a judge following a non-unanimous jury recommendation, faces the very real possibility that no court will ever consider the merits of his claims.

ARGUMENT

I. THE FLORIDA SUPREME COURT'S PROCEDURAL-BAR RULING ON MR. BLANCO'S CLAIM OF INTELLECTUAL DISABILITY IS NOT ADEQUATE TO PRECLUDE FEDERAL REVIEW.

The State defends the Florida Supreme Court's denial of Mr. Blanco's facially valid claim of intellectual disability on procedural grounds, arguing that the state court's decision rested on an independent and adequate state-law ground, and thus presents no federal question worthy of this Court's review. *See* BIO 8-15. The State is mistaken.

While this Court may not undertake review of judgments that rest upon independent and adequate state-law grounds, "[i]t is, of course, 'incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment.'" *Michigan v. Long*, 463 U.S. 1032, 1038 (1983) (quoting *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931)) (ellipses in original). And "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

In order to be "adequate," a state procedural rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). Novel state procedural rules are therefore inadequate. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *see also Ford v. Georgia*, 498 U.S. 411, 424 (1991) (previously unannounced rule was "inadequate to serve as an independent state ground within the meaning of *James*.").

Moreover, "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1964) (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Staub v. City of Baxley*, 355 U.S. 313, 318-20 (1958)). Whatever "springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis*, 263 U.S. at 24.

The procedural bar imposed by the Florida Supreme Court here was inadequate under this Court's precedents. The procedural rule that Petitioner allegedly violated was Fla. R. Crim. P. 3.203 (2004). Under that rule, capital post-conviction prisoners whose motions for post-conviction relief were pending on appeal to the Florida Supreme Court on or before October 1, 2004, and who sought to raise

intellectual disability claims, had 60 days to file a motion to relinquish jurisdiction to the trial court. Fla. R. Crim. P. 3.203(d)(4)(E) (2004). Additionally, that motion had to contain "a certificate by appellate counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is mentally retarded." *Id.*

Mr. Blanco's current claim of intellectual disability under *Hall* was deemed barred by the Florida Supreme Court solely on the ground that he had not raised an intellectual disability claim within the 60-day period provided for by Rule 3.203 in 2004. *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018). But Mr. Blanco was *precluded* from raising a claim of intellectual disability by Florida law in 2004. His failure to have done so is not an adequate basis upon which to deny relief of his *Hall* claim over a decade later.

The State's argument to the contrary is dependent on the premise that "[i]t was not until June 7, 2007 that the Florida Supreme Court interpreted the definition of ID to have a bright-line cutoff IQ of 70 without consideration of the Standard Error of Measurement." BIO 11 (citing *Cherry v. State*, 959 So.2d 702, 712-13 (Fla. 2007)). Under the State's view, ordinary state time-bar principles now apply to bar Mr. Blanco from vindicating his Eighth Amendment right because he missed his opportunity in 2004. *See* BIO 8-12. But as Mr. Blanco argued below, the State's premise is faulty.

In the Florida Supreme Court's 2007 *Cherry* decision, the state court specifically noted that the bright-line cutoff was already a settled question of state law. *Cherry*, 959 So.2d at 713 ("The legislature set the IQ cutoff score at two standard

deviations from the mean, *and this Court has enforced this cutoff*.") (emphasis added). *Cherry* proceeded to quote from the Florida Supreme Court's 2005 decision in *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005), which, in turn, relied upon the Florida Supreme Court's earlier decision in *Cherry* in 2000:

> The evidence in this case shows Zack's lowest IQ score to be 79. Pursuant to *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), a mentally retarded person cannot be executed, and it is up to the states to determine who is "mentally retarded." Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. *See* § 916.106(12), Fla. Stat. (2003) [parenthetical omitted]; *Cherry v. State*, 781 So.2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test).

Zack, 911 So.2d at 1201.[1]

The procedural bar relied upon by the State is inadequate because it required Mr. Blanco to attempt to vindicate his rights at a time when he had no legal basis for doing so.[2] *See, e.g.*, *Barnett v. Hargett*, 174 F.3d 1128, 1135 (10th Cir. 1999) (procedural bar applied by state to claim under *Cooper v. Oklahoma*, 517 U.S. 348 (1996), for failure to raise on direct appeal, was not adequate "where the direct appeal predated" the decision in *Cooper*). Here, as Mr. Blanco has shown, a claim under *Atkins* was not available to him in Florida until *Hall* was decided. *Cf. Brumfield v.*

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[1] *See also Foster v. State*, 260 So. 3d 174, 180 n.8 (Fla. 2018) (noting that cutoff was "announced" in *Zack*, and was "driven by the statutory definition of 'mental retardation' that was already in effect at that time" (citing § 921.137, Fla. Stat. (2001))).

[2] In fact, *the State* took the position that established Florida law already included a strict cutoff of 70 while litigating the 2007 *Cherry* case, specifically arguing in its brief to the Florida Supreme Court that the cutoff dates back to the 2000 *Cherry* decision. *See* R150 (Petitioner's 10/16/15 Response to Motion for Rehearing at 4 (quoting Supplemental Brief of Appellee in *Cherry*)). The State should not be permitted to take the exact opposite position now.

Cain, 135 S. Ct. 2269, 2281 (2015) (recognizing that at Brumfield's pre-*Atkins* trial, he "had little reason to investigate or present evidence relating to his intellectual disability"); *Reed v. Ross*, 468 U.S. 1, 16-17 (1984) (claim not barred where claim was "so novel that its legal basis [wa]s not reasonably available to counsel" because the "state of the law at the time of Ross' appeal did not offer a 'reasonable basis' upon which" to raise his claim). Here, there was no "reasonable basis" under Florida law for Mr. Blanco to raise an *Atkins* claim prior to *Hall*.

Moreover, in the 2007 *Cherry* decision, the Florida Supreme Court unanimously determined that the plain text of the Florida intellectual disability statute and Rule 3.203 themselves precluded raising a claim of intellectual disability with an above-70 score. As *Cherry* explained in support of its strict cutoff:

> The statute does not use the word approximate, nor does it reference the SEM. Thus, the language of the statute and the corresponding rule are clear. We defer to the plain meaning of statutes . . . .

Cherry, 959 So.2d at 713 (quoting *Daniels v. Florida Dept. of Health*, 898 So.2d 61, 64-65 (Fla. 2005)). If the statute and rule were "clear" in 2007, when *Cherry* was decided, they were equally clear at the time of Mr. Blanco's purported default. It cannot be said that the state procedural bar imposed is "adequate" when satisfying it would have required Mr. Blanco's attorney to have raised a claim (signing a certification that he had a good-faith basis for doing so) that every single member of the state's highest court ultimately ruled was clearly precluded by the plain language of the statute.[3]

[3] The fact that this Court in *Hall* subsequently determined that Florida's statute could be interpreted in a constitutional manner is of no moment. *See Hall*, 572 U.S. at 711. What is

The procedural bar at issue was also inadequate because it was novel. *See Ford*, 498 U.S. at 423-24. There was no firmly established, readily ascertainable rule informing Mr. Blanco that he had to file a meritless post-conviction motion in 2004 in order to preserve an intellectual disability claim that only became potentially meritorious under Florida law over a decade later, once *Hall* was decided. And the State has provided no suggestion of any "consistently and regularly applied" Florida procedural rule that requires litigants to raise claims that cannot possibly succeed under current law in order to preserve them later, should the law eventually change. *See Johnson v. Mississippi*, 486 U.S. 578, 587-88 (1988) (failure to raise claim in forum where claim was not available was not adequate procedural bar).

Moreover, Florida's novel rule was enforced for the very first time in Mr. Blanco's case. *Blanco*, 249 So. 3d 536 (Fla. 2018). Prior to that opinion, the only enforcement of a procedural bar of a *Hall* claim for failure to previously raise an *Atkins* claim could be found by the Florida Supreme Court's two-page order in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016). In *Rodriguez*, the Florida Supreme Court upheld a trial court's summary dismissal on timeliness grounds of an intellectual disability claim filed in the wake of *Hall* because "there was no reason Rodriguez could not have previously raised a claim of intellectual disability based on *Atkins v. Virginia*." *Id.*

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significant is that the Florida Supreme Court imposed a procedural bar for Mr. Blanco's failure to take a step that every one of its members once believed to be clearly precluded by the plain language of the statute. Nor should the dicta from *Hall* stating that Florida's bright-line cutoff was not imposed until *Cherry* was decided in 2007 serve to preclude relief. *See id.* at 720. The precise timing of the cutoff was not at issue in *Hall*.

But *Rodriguez* is readily distinguishable from Mr. Blanco's case. Rodriguez, unlike Mr. Blanco, had sub-70 IQ scores at the time *Atkins* was decided and Rule 3.203 was promulgated. *See* R468-69 (*Rodriguez v. State*, No. SC15-1278, Initial Brief of Appellant at 6-7 (noting that Rodriguez obtained two separate full-scale IQ scores of 62 and 58 in 1977)). Unlike Mr. Blanco, whose qualifying IQ scores are all in the newly opened *Hall* range (between 71-75), there was in fact no impediment to Rodriguez filing a claim of intellectual disability in the wake of *Atkins*.

There was no firmly established rule that was regularly followed and enforced at the time of the Florida Supreme Court's opinion in 2018; such a rule certainly did not exist at the time of Mr. Blanco's alleged violation in 2004. The State's suggestion that Florida's procedural bar is an independent and adequate reason to preclude this Court's review should be rejected.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE IN WHICH TO DECIDE THE RETROACTIVITY OF *HALL*.

The State argues that this case is not an appropriate vehicle in which to decide the retroactivity of *Hall*, given that the state court found *Hall* retroactive as a matter of state law. BIO 16. The State misses the point.

Mr. Blanco alleges that he is intellectually disabled. The State has not meaningfully challenged his allegation on the merits. If there is no valid procedural bar to Mr. Blanco's claim, and if *Hall* is retroactive as a matter of federal law, then the Supremacy Clause precludes Florida from refusing to consider Mr. Blanco's claim. *Montgomery v. Alabama*, 136 S. Ct. 718, 731-32 (2016). Because the Florida courts

did refuse to hear Mr. Blanco's claim, these subsidiary questions are properly presented to the Court.

The State does not dispute that the retroactivity of *Hall* is an important issue; rather, it argues that several courts have decided the issue in its favor. That is not, however, a reason for this Court to deny certiorari. This case presents important issues. Moreover, there is no other apparent vehicle for Mr. Blanco to raise his presumptively valid Eighth Amendment claim. Unless this Court grants certiorari review, he will likely be executed in violation of the Eighth Amendment, but with no court having considered the merits of his claim.

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, Petitioner respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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