No. 20-6879

IN THE

Supreme Court of the United States

JOHN FREEMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

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REPLY BRIEF FOR PETITIONER

A. Due Process Issue - First Question Presented

1. Comparison to Ordinary Timeliness Rule is Misleading

The State argues that the *Medina* test[1] cannot be met because there is "nothing fundamentally inadequate about a time bar to postconviction relief." A.B. at 8. To be sure, there is nothing wrong with the general concept of time bars. The due process claim at issue is not being brought against the postconviction time bar at play—Florida Rule of Criminal Procedure 3.851(d)(2)(B).

Although the State acknowledges that Rule 3.203 (2004) is the rule being challenged under *Medina*, the State fails to engage with the offending elements of Rule 3.203 and explain why they are not violative of due process: the one-time opportunity for intellectual disability claims to be raised on postconviction; the egregiously narrow window that was given; and, most importantly, the automatic waiver of all intellectual disability claims otherwise. Fla. R. Crim. P. 3.203 (2004). Although this rule does contain a time component, in that sixteen years ago it a set a 60-day window for all postconviction defendants to claim that they are barred from execution by reason of intellectual disability, it is simply misleading to compare this rule with a normal postconviction time requirement, like that of Rule 3.851(d).

To avoid confusion, it is more appropriate to think of Rule 3.203 in terms of procedural default, preservation, or waiver. For one thing, the rule itself refers to "waiver" if the claim is not raised by November 30, 2004, and, moreover, Rule 3.203 is not an ordinary "time bar" at all. Rather, it is a unique procedural bar crafted by the Florida Supreme Court ("FSC") just for intellectual disability claims.

[1] *Medina v. California*, 505 U.S. 437 (1992).

2. Bowles v. State *and State's Comparison to Federal Cause-and-Prejudice Standard*

In a perfect demonstration of how this rule prohibits defendants from litigating intellectual disability claims, the State argues that Petitioner's due process claim fails because the FSC has found there is no "perceived futility" exception to Rule 3.203 (2004), relying on *Bowles v. State*, 276 So. 3d 791, 794-75 (Fla. 2019), *cert. denied sub nom. Bowles v. Florida*, 140 S. Ct. 2589 (2019). Defendant Bowles, who had IQ scores of 74, 80, and 83, did not raise an intellectual disability claim in 2004. *Id.* at 793-95. Bowles argued that there was "good cause" for his failure to raise an intellectual disability claim back then; however, the FSC found that Bowles' failure to raise an intellectual disability claim in 2004 cannot be excused based on the "perceived futility of his claim." *Id.*

The fact that the "futility" of raising an intellectual disability claim in 2004 is insufficient to excuse Bowles' procedural default is not the argument the State thinks it is. The *Bowles* decision does not demonstrate that Florida's procedure comports with due process. It shows the opposite. Because of Rule 3.203, Defendant Bowles truly has no way of bringing his claim forward—so too for Petitioner Freeman. That no defendant in Bowles' or Freeman's position can litigate their intellectual disability claim is critical to demonstrating that this procedure violates due process.[2]

In line with the *Bowles* decision, the State argues that "[d]efendants must diligently pursue all arguably colorable claims, no matter their views on the likelihood that the state court will find them meritorious." A.B. at 10. The State uses the federal cause-and-prejudice standard as an example of this principle, pointing out

[2] Justice Sotomayor had cause to comment on this very case in 2019: "[T]he Florida Supreme Court has turned away prisoners seeking to vindicate this retroactive constitutional rule for the first time, by requiring them to have brought their *Hall* claims in 2004—a full decade before *Hall* itself was decided." *Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., respecting denial of cert). "This Kafkaesque procedural rule is at odds with another Florida rule requiring counsel raising an intellectual-disability claim to have a 'good faith' basis to believe that a death-sentenced client is intellectually disabled (presumably under the limited definition of intellectual disability that Florida had then imposed)." *Id.*

that a defendant's decision to forgo a claim because it is futile or unlikely to succeed does not constitute "cause." *Id*. (citing *Engle v. Isaac*, 456 U.S. 107 (1982)). However, if one is to draw comparisons to the federal cause-and-prejudice standard, the appropriate comparison is not to the intentional bypass of a futile claim as discussed in *Engle v. Isaac*, but to a novel claim, as discussed in *Reed v. Ross*, 468 U.S. 1 (1984). *"Engle v. Isaac* left open the question whether the novelty of a constitutional issue at the time of a state-court proceeding could, as a general matter, give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures. . . . [W]e answer that question in the affirmative." *Reed v. Ross*, 468 U.S. 1, 13 (1984). "Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar." *Id*. at 15.

"[I]f we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, some day, gain recognition." *Id*. "If novelty were never cause, counsel . . . would be obliged to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law." *Ross v. Reed*, 704 F.2d 705, 708 (4th Cir. 1983).

This is precisely the absurd burden that the State and FSC foists on Freeman, Bowles, and other defendants—the FSC held that, to preserve his claim, Bowles should have mounted a constitutional challenge to Florida's standards for determining intellectual disability, *Bowles*, 276 So. 3d at 794-95, even though such a challenge *by its very terms* would violate the rule that applied to all such claims, *see* Fla. R. Crim. P. 3.203(a) (2004) ("This rule applies in *all* first-degree murder cases in which the state attorney has not waived the death penalty on the record and the

defendant's mental retardation becomes an issue.") (emphasis added); R. 3.203(d)(4)(A) (2004) (requiring motion to "contain a certification by counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is mentally retarded").[3]

When a defendant lacked any reasonable basis in then-existing law to raise a claim, the defendant has adequate "cause" to excuse the procedural default. As discussed in the next subsection, Petitioner has been unable to find a single case prior to this Court's decision in *Hall* in which any Florida court either interpreted intellectual disability to take the SEM into account or suggested that Florida's strict IQ cutoff was unconstitutional, and the State does not present one, either.

The State also appears to draw comparisons to the successive federal habeas motion standard as support for the principle that defendants must file claims any way even if they are unprecedented and futile, citing *In re Bowles*, 935 F.3d 1210, 1217 n.2 (11th Cir. 2019). A.B. at 10. Bowles pointed to two cases in which the Fifth Circuit determined that an *Atkins* claim was "previously unavailable" to the petitioners within the meaning of § 2244(b)(2)(A) because the claims would have been meritless under Texas's rigid IQ cutoff that existed at the time. *See In re Cathey*, 857 F.3d 221, 229 (5th Cir. 2017); *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019).[4] Stating that it "was not bound by the decisions of our sister circuits," the Eleventh Circuit rejected the Fifth Circuit's interpretation of § 2244(b)(2)(A) and concluded

[3] Rule 3.203, entitled "Defendant's Mental Retardation as a Bar to Imposition of the Death Penalty," applied to all death-penalty cases in which mental retardation became an issue. Fla. R. Crim. P. 3.203(a) (2004). Therefore, for all but those who were quite recently sentenced to death, Rule 3.203 governed how *Atkins*/intellectual disability claims must be raised, ordering that (1) they "shall" be raised in a successive Rule 3.851 motion and (2) also requiring that those motions contain the reasonable-grounds certificate. *See* Fla. R. Crim. P. 3.203(d)(4)(A)-(F) (2004).

[4] In *Cathey*, the State argued there is "no support for excusing the failure to properly raise an available claim simply because the claim is meritless." *Cathey*, 857 F.3d 221 at 232. The Fifth Circuit disagreed, finding that the State "assumes the conclusion: that claims are 'available' despite being meritless. We think a claim must have some possibility of merit to be considered available." *Id.*

that "[t]here is no futility exception to the AEDPA's restrictions on second and successive petitions." *Id*.

To the extent that the State relies on the Eleventh Circuit's reasoning to bolster the general proposition that defendants should file unprecedented claims on the chance that they might someday be recognized, the Eleventh Circuit's disagreement with the Fifth Circuit on this point underscores that there is not even a consensus as to this interpretation of § 2244(b)(2)(A).

The State further argues that Hall himself was able to file a Rule 3.203 motion in 2004, and that Petitioner "could have and should have brought the same claim" in 2004. A.B. at 11. However, this is not true. Hall was in a very different position—Hall had received nine evaluations with IQ scores ranging from 60 to 80. *Hall v. Florida*, 572 U.S. 701, 707 (2014). Thus, Hall had at least some scores below 70 that allowed him reasonable grounds to file an intellectual disability claim in 2004.[5]

The *Bowles* line of cases demonstrate that the Florida courts have tightly shut the door to any consideration of Petitioner's intellectual disability claim, maintaining that defendants who did not have the necessary IQ scores should have preserved their claim in 2004 by arguing that the definition of mental retardation was unconstitutional, which (1) would have been a novel claim, and (2) more importantly, would have violated Florida's own rules of procedure. It is unreasonable to expect that these defendants could have found a way to preserve their claims in 2004. It is also quite evident that there is no way for such defendants to bring their claims now.

3. Florida Cases

The State asserts that *Zack v. State* was the first case to "construe" intellectual disability to require an IQ score of 70 or lower. A.B. at 2, 11. *Zack* did not go out of its

[5] *Hall v. Florida*, 572 U.S. 701, 707 (2014) ("Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80 . . . ."); *Hall v. State*, 109 So. 3d 704, 710 (Fla. 2012) (circuit court refused to admit report that Hall's IQ was 69). Hall's challenge to the strict IQ cutoff was first raised on appeal to the FSC based on the circuit court's reasons for declining to find Hall mentally retarded.

way to explain why a score of 70 was the cutoff. *Zack*'s matter-of-fact reference to the 70-point cutoff does reflect the prevailing understanding in Florida of what mental retardation meant. However, this can also be seen in *Kimbrough v. State*, a case in which the defendant argued his trial attorneys were ineffective for deciding against calling two mental health experts. *Kimbrough v. State*, 886 So. 2d 965 (Fla. June 24, 2004). Trial counsel decided against putting Dr. Berland on the stand because the doctor's intelligence testing gave Kimbrough an IQ of 94. *Id.* at 971. This score was far too high to be helpful—"[Trial counsel] was aware that the cutoff for mental retardation was seventy and that seventy-six reflected a low IQ." *Id*. The FSC agreed that counsel's decision not to call Dr. Berland was reasonable. *Id.* at 980. The FSC's matter-of-fact observation of a 70-point "cutoff for mental retardation" in June of 2004 reflects the then-prevailing understanding in Florida.

The State asserts that because § 921.137 "could be interpreted" "on its face" to take the SEM into account, citing *Hall*, there was no legitimate reason to believe that "a claim based [on] an above-70 IQ score would fail." A.B. at 11-12. The State misappropriates *Hall*'s words to reconstruct an inaccurate picture of what the Florida legal landscape looked like in the past.

Neither *Cherry* (2007), nor *Zack* (2005), nor *Hall* (2012) established a new or different definition of mental retardation in Florida. After the passing of the 2001 statute and *Atkins* in 2002, it took until the mid to late 2000's for litigation around intellectual disability to reach a boil. However, these cases should not be mistaken as decisions establishing a "first" definition of mental retardation. The FSC, over the years, merely reiterated the "plain" language of the statute. *Cherry v. State*, 959 So.2d 702, 712-13 (Fla. 2007) (agreeing with circuit judge's reasoning that the plain language of the statute does not reference the SEM or use the word "approximately").

It was not until 2014 that this Court declared this definition unconstitutional, forcing a different reading of the statute. Because this Court found that the statute

on its face could be fairly read to take the SEM into account, *Hall* found that the statute was only unconstitutional as applied, not facially invalid. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (when there is a choice "between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act"). In other words, a constitutional reading prevailed over the "plain" language of the statute. This is as it should be; however, until this Court declared the literal or plain reading of the statute unconstitutional, the fact is that this "plain" reading was the accepted reading in Florida. No Florida court had interpreted or even hinted otherwise.

Moreover, circuit court cases display this generally accepted understanding of the meaning of significantly subaverage intellectual functioning well before the FSC addressed that issue head-on in *Cherry* (2007).[6] Not a single case can be found that expresses an opinion to the contrary. Circuit courts that had an opportunity to rule on *Atkins* intellectual disability issues 2004 or earlier observed that the first prong of retardation required a 70-point IQ score or lower.[7]

In *Zack*, the circuit court entered a final order on July 15, 2003 denying all relief, including Zack's *Atkins* claim. The circuit court wrote:

> A review of the expert trial testimony on this issue shows that not one expert found Defendant's I.Q. to be near the statutory figure, 70, which would be required to establish mental retardation. Because Defendant is not mentally retarded as defined by Fla. Stat. 921.137, he is not entitled to the Eighth Amendment protections afforded mentally retarded persons who may face the Death Penalty.

Final Order on First Amended Motion to Vacate, Set Aside or Correct Sentence Pursuant to Fl. R. Crim. P. 3.850 or 3.851, *Zack v. State*, No. 96-CF-2517 (Fla. 1st

[6] In Florida, death penalty cases are appealed directly from the circuit court to the Florida Supreme Court. There are no intermediate appellate opinions.

[7] There are circuit court cases decided in 2005 or later that contribute to the circuit consensus on this issue; however, in response to the State's argument, Petitioner focuses on describing cases decided around 2004 or earlier. *E.g.*, *Cherry v. State*, No. 86–4473 (Fla. 7th Cir. Ct. Oct. 14, 2005) ("Neither Rule nor statute reference the standard error measurement or use the word 'approximately.' ").

Cir. Ct. July 15, 2003) (emphasis added).

In *Barwick*, Barwick brought a claim that he was mentally retarded and therefore barred from execution in August of 2002. At the *Huff* hearing, counsel argued that they were prepared to present evidence that Barwick had scored an I.Q. of 75 on the most recent IQ testing models. The State argued that an I.Q. test of at least 70 was needed under the statute and that, furthermore, Mr. Barwick's previous IQ tests had been much higher. On September 16, 2003, the circuit court wrote: "Both sides agreed that . . . one prong of the test requires an IQ of 70 or lower. The record in this case indicates that the Defendant had an IQ of 90-103. Far above that which is required to fall within the statutory definition for the first prong of the test." *State v. Barwick*, No. 86-940, 2003 WL 26118942 (Fla. 14th Cir. Ct. Sep. 16, 2003). Thus, the claim was denied without an evidentiary hearing to present evidence of Barwick's 75-point IQ score.

In *Jones*, Jones filed a second successive postconviction motion alleging mental retardation on October 14, 2003. *See* Motion to Vacate, *Jones v. State*, No. 1990-CF-50143, 2003 WL 25754442 (Fla. 11th Cir. Oct. 14, 2003). The circuit court issued an order denying the claim, without an evidentiary hearing, on January 14, 2004. The court found the claim to be conclusively refuted by the record, in part because his IQ scores were consistently above the level for retardation (Jones' scores were 72, 70, 67, 72, and 75). *See* Order, *Jones v. State*, No. 1990-CF-50143 (Fla. 11th Cir. Ct. Jan. 14, 2004). Because Jones' scores are within the SEM, a finding that he still did not meet the first prong for mental retardation indicates the circuit court viewed an IQ score of 70 as a strict threshold.[8]

[8] While pending on appeal, the FSC temporarily relinquished jurisdiction because of the newly promulgated Rule 3.203 with instructions to the lower court to conduct a hearing. The circuit court issued a second order reiterating that it found Jones was not mentally retarded. *State v. Jones*, No. 1990-CF-50143, 2006 WL 5837898 (Fla. 11th Cir. Ct. Feb. 24, 2006) ("Jones does not meet the statutory requirements to be defined as mentally retarded. His I.Q. has consistently been tested as above 70. Based on that alone, he is not mentally retarded."). The FSC affirmed: "Jones first argues that the

In *Thompson*, Thompson filed a successive motion to vacate on November 15, 2001 (amended August 9, 2004). The circuit court noted there were delays in resolving the motion due to a number of incidents, including three hurricanes. The circuit court wrote: "By definition, someone with an IQ level of 70 or below would be mentally retarded. Defendant . . . had an IQ of 75 in 1958 and that every IQ test taken during his school years was 74-75. Hence he does not fall under the definition of mentally retarded." *State v. Thompson*, No. F1976-03350, 2004 WL 7340335 (Fla. 11th Cir. Ct. Dec. 17, 2004).

4. Due Process Argument Raised Below

The State argues that Petitioner "never raised it [the due process argument] below." A.B. at 14. This is untrue. Petitioner argued to the circuit court that the procedural bar violates "the rights of individuals like Mr. Freeman by depriving him of due process guarantees of notice and an opportunity to be heard . . . [and creates] an unconstitutional risk of arbitrary and capricious imposition of the death penalty . . . ." Response to Order to Show Cause at 7-8, No. 1986-CF-11599 (Fla. 4th Cir. July 2, 2019). "That Mr. Freeman could potentially suffer the ultimate loss—his life—because he failed to meet a procedural requirement, when he could not have been on notice that he was eligible for relief, violates his due process rights." *Id.* at 10.[9]

The circuit court acknowledged that Petitioner claimed a due process violation, but that it was not free to stray from controlling FSC precedent stating that Petitioner needed to preserve his claim in 2004. "Defendant argues that . . . *Rodriguez*

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trial court erred in concluding that because his IQ was consistently above 70, he did not meet the first prong of the mental retardation definition. Jones claims that mental retardation may be diagnosed in individuals with IQs between 70 and 75 when they exhibit significant deficits in adaptive behavior. First, we already have found the trial court's determination that Jones is not deficient in adaptive functioning to be supported by competent, substantial evidence. Insofar as this involves the application of Florida's statute, we find this claim also fails under the plain language of the statute." *Jones v. State*, 966 So. 2d 319, 329 (Fla. May 24, 2007) (SC04-726).

[9] Petitioner also argued that, because he could not have raised a meritorious intellectual disability claim until *Halls* and then *Walls* was decided, he should be excused under Rule 3.203(f) for "good cause." (This argument was condemned by decisions like *Bowles*.)

and *Blanco* in this manner both violates his due process rights and 'create[s] an unconstitutional risk of imposition of the death penalty on intellectually disabled persons.' Defendant urges this Court not to follow *Rodriguez* and *Blanco*, something this Court is not free to do." Order at 4-5, No. 1986-CF-11599 (Fla. 4th Cir. Aug. 14, 2019). Finding no way to distinguish Petitioner's case from *Rodriguez*, *Blanco*, *Harvey*, and *Bowles*,[10] the circuit court wrote the "fact is that, in order to preserve a postconviction claim of intellectual disability as a bar to execution, a defendant must have made the claim [in 2004]." *Id.*

In his initial brief to the FSC, Petitioner again raised the claim that Florida's procedural bar violated due process:

> Justice Sotomayor's comment aptly describes Florida's procedural bar which requires intellectually disabled defendants to have filed a frivolous and meritless claim nearly fifteen years ago—before they were on notice that they were potentially in a class of persons that could be entitled to *Atkins*-based relief—in order to get the retroactive benefit of *Hall* guaranteed by *Walls*. This Court's procedural bar violates the principles of fundamental fairness articulated by this Court in *James v. State*, 615 So. 2d 668, 669 (Fla. 1993) and is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of due process and equal protection.

Appellant's Initial Brief at 31, 37-40, *Freeman v. State*, No. SC19-1532 (Fla. Dec. 24, 2019). The FSC did not address Petitioner's due process argument in its opinion. However, the failure of a state appellate court to pass on a federal claim squarely presented to it does not impinge this Court's review. *See Street v. New York*, 394 U.S. 576, 583 (1969); *Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) ("Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it."); *Smith v. Digmon*, 434 U.S. 332, 333 (1978) (noting there is no failure to exhaust simply because "a state appellate court chooses to ignore in its opinion a federal

[10] *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016); *Blanco v. State*, 249 So. 3d 536 (Fla. 2018); *Harvey v. State*, 260 So. 3d 906 (Fla. 2018).

constitutional claim squarely raised in petitioner's brief . . . .").

5. Discussion of IQ Tests

The State's argument that Mr. Freeman should remain married to the results of tests administered in 1987[11] and 1992 shows how Florida's procedure for raising intellectual disability claims was built around a misleading idea of how IQ tests work. As discussed in *Hall*, the persistent flaw in Florida's approach to mental retardation is that it views an IQ score as final conclusion of a defendant's intellectual capacity while "refusing to recognize that the score is, on its own terms, imprecise." *Hall*, 572 U.S. at 712. "An IQ score is an approximation, not a final and infallible assessment of intellectual functioning." *Id.* at 722.

The state's assumption that a defendant, if he was mentally retarded, would have already had the "right score" at the "right time" (a relatively arbitrary point in time) is reflected in the *Bowles* line of cases. The way that this procedural default rule was designed is in conflict with the correct medical understanding that an IQ score is inherently "imprecise" and thus a defendant might easily receive different scores over time and over the course of different tests. For example, Hall himself had received nine IQ scores ranging from as low as 60 to as high as 80.

The two tests done on Petitioner in 1987 and 1992 are based on out of date models—the current science says Petitioner has a full-scale IQ of 72. Dr. Barry Crown, who administered the WAIS-IV in 2017 to Petitioner, found that Petitioner "has significantly sub-average and impaired intellectual functioning, consistent with a diagnosis of intellectual disability. Upon review of his history, I have also concluded that Mr. Freeman has significant adaptive deficits, and that his intellectual and adaptive deficits originated prior to 18. Mr. Freeman meets the criteria for a diagnosis of intellectual disability, and I make that diagnosis."

[11] The WAIS-R test administered by Dr. Legum was in 1987, not 1988, which resulted in a score of 83.

6. Note on Ford v. Wainwright

In response to the State's note on *Ford v. Wainwright*, 477 U.S. 399 (1986), Justice Powell agreed with the plurality opinion that the procedures in that case failed to comport with due process. The additional significance of Justice Powell's concurrence in *Ford* is that it set "the minimum procedures a State must provide to a prisoner" regarding a claim of insanity:

> Justice Powell's opinion states the relevant standard as follows. Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness.

Panetti v. Quarterman, 551 U.S. 930, 948 (2007). These minimum procedures apply with as much force to the intellectual disability context. The threshold showing of intellectual disability was met when Petitioner filed a motion in 2017 alleging that Dr. Barry Crown, who administered the WAIS-IV in 2017, diagnosed Petitioner as intellectually disabled and found Petitioner had a full-scale IQ of 72. After this threshold showing, Petitioner should have been given a 'fair hearing' on the issue, but was denied any hearing. Thus, a comparison to the minimum requirements outlined in *Ford* demonstrate that Florida's procedures for raising intellectual disability claims as a bar to execution fall short of due process.

The State simply argues that Petitioner "had the chance to present evidence of intellectual disability" in 2004 and that the State did provide a fair opportunity to be heard in 2004; however, this defense is merely a repackaging of the procedural default argument. A.B. at 14.

Because Florida's postconviction procedures for raising an intellectual disability claim as a bar to execution fail to comport with due process and fail to vindicate Petitioner's Eighth Amendment rights, this Court should grant certiorari to review this question.

B. Whether *Hall* is Substantive Law – Second Question Presented

1. Procedural Default/Waiver Argument

The State asserts there is an independent and adequate state bar, arguing that this Court should not reach the second Question Presented because it is procedurally barred by Rule 3.203(d)(4). A.B. at 15. Petitioner has already explained in the certiorari petition why this procedural rule does not present an adequate state bar. *See* Pet. at 22-26.[12]

2. Significance of Hall *as a Collateral Review Case*

In response to the fact that *Hall* (2014) was decided on collateral review, the State argues that this Court's silence means this fact carries "no precedential effect." A.B. at 23. The first footnote cited by the State applies to unaddressed jurisdictional defects. *Lewis v. Casey*, 518 U.S. 343, 353 n.2 (1996) (noting that "standing was neither challenged nor discussed in that case," and "the existence of *unaddressed jurisdictional defects* has no precedential effect") (emphasis added). The second footnote cited by the State is a reference to the extremely specific question of whether a decision of this Court laying down the retroactivity framework is itself retroactive.[13]

The State contends the "procedural context in which *Hall* was decided" does not carry any significance with respect to retroactivity. A.B. at 24. The State argues that it is not "this Court's practice to decide retroactivity by implication," and that this Court typically "decides the merits of a constitutional claim first, followed by a

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[12] Rule 3.851(d)(2)(B) (the time bar) is intertwined with the second Question Presented, and is therefore not an independent bar to this Court's review.

[13] The question was whether *Griffith v. Kentucky*, deciding that new rules are to be applied to cases pending on direct review/not yet final, was itself a retroactive decision. Wilkerson pointed out that in the "five cases where the issue of the retroactivity of *Griffith* has come up, the courts applied *Griffith* retroactively," but the Fifth Circuit found that the courts' "silence is best viewed as a failure to address or decide the issue" and in the absence of a reasoned analysis as to why *Griffith* should apply retroactively, the Fifth Circuit found these cases "unpersuasive." *Wilkerson v. Whitley*, 28 F.3d 498, 506 n.12 (5th Cir. 1994). The fact that the Fifth Circuit afforded little weight to cases in which the courts did not explain their reasoning has little to do with whether the *Hall*'s postconviction procedural context carries significance with respect to the *Teague* framework.

different case deciding whether its holding is retroactive." *Id*.

While it is true that this often happens in this order, it does not follow that this is any reason to disregard *Hall*'s procedural context. The procedural context of *Hall* is important because in *Teague*, this Court announced that it would not proceed to the merits of a postconviction claim unless the rule to be applied could be applied retroactively to *all* defendants on collateral review:

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated. Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

Teague v. Lane, 489 U.S. 288, 316 (1989) (emphasis in original). Because the Court in *Hall* addressed the merits of the claim, despite being on collateral review, it signifies that the rule "would be applied retroactively to all defendants on collateral review" through one of the exceptions/exemptions to *Teague*.

3. State Argues Circuit Split Not Worthy of Review

The State's arguments in Section II.B. of the Answer Brief overlap with those raised in its brief for *Lawrence v. Florida*. The State misinterprets the significance of several cases involved in the circuit split over *Hall*'s retroactive application.

In an effort to avoid repetitive briefing, Petitioner would direct the reader's attention to the Reply Brief submitted in *Lawrence v. Florida* (SC20-6307), specifically Sections C, D, and E.

4.* Hall *is Substantive Law

The State argues that review is not warranted because the FSC was correct to find that *Hall* is a new, procedural rule. The State argues that "*Atkins* protects every individual who is intellectually disabled, while *Hall* simply prevents States from

using a particular procedure . . . ." A.B. at 24.[14]

The central arguments for *Hall* being substantive law were discussed in the certiorari petition, and need not be reproduced here. However, it is worth noting that the State does not adequately address the functional effect test described in *Welch*. An emerging rule is substantive or procedural based on "the function of the rule," not the decision's underlying reasoning. *Welch v. United States*, 136 S. Ct. 1257, 1265-68 (2016). The mere fact that *Hall* discussed or was concerned with procedure does not mean that the effect of the *Hall* decision is "procedural." Under the test set forth in *Welch*, *Hall* could have been a self-professed procedural due process case, and the emerging rule would still not be procedural. *See id.* (a decision striking down a substantive statute—like one which governs punishment—is itself substantive because the effect is "alter[ing] the . . . class of persons that the law punishes"). *Hall* found that § 921.137, Florida Statutes was unconstitutional as applied. The function of this statute is to define who is "intellectually disabled" and exempt from execution. The State makes no argument that the purpose of this statute is "procedural." Because the statute at issue in *Hall* is substantive—it determines who can be subject to the penalty of execution—the functional effect of the rule must be substantive.

CONCLUSION

The petition for writ of certiorari should be granted.

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[14] This argument is remarkably similar to that advanced by Louisiana in *Montgomery* (state "argues that *Miller* is procedural because it did not place any punishment beyond the State's power to impose" "[i]nstead, it mandates only that a sentencer follow a certain process"). *Montgomery v. Louisiana*, 577 U.S. 190, 209-210 (2016). Louisiana argued that the decision was not substantive because a judge *could* engage in the appropriate process and come to the same conclusion—they could still decide that life without parole was the correct sentence for this defendant. *Id.* The punishment is not entirely eliminated. *Id.* This is the same argument the State makes here. A trial judge in Florida *could* be forced to engage in the appropriate process and still find that the death sentence is appropriate—they could very well decide that the defendant is *not* intellectually disabled. Just as in *Montgomery*, the fact that death could still be appropriate for some offenders does not mean that other defendants "have not suffered the deprivation of a substantive right." *Id.*

Respectfully submitted,

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