DOCKET NO. 20-6887

OCTOBER TERM 2020

IN THE

SUPREME COURT OF THE UNITED STATES

HARRY FRANKLIN PHILLIPS
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

Marie-Louise Samuels Parmer
Special Assistant CCRC-South
Fla. Bar No.: 0005584
Counsel of Record

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL-SOUTHERN REGION
110 SE 6th St., Suite 701
Fort Lauderdale, FL 33301
TEL: (954) 713-1284
FAX: (954) 713-1299

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF FOR PETITIONER

1. The parties agree that the core issue in this case is whether *Hall v. Florida* is retroactive. Respondent's Brief in Opposition ("BIO"), states that the question presented is "Whether federal law requires state courts to apply *Hall v. Florida*, 572 U.S. 701 (2014), retroactively to sentences that have already become final on direct review." (Page i). This is plainly correct. The Florida Supreme Court below concluded its opinion by holding: "We . . . recede from our prior opinion in *Walls* [*v. State*, 213 So.3d 340 (2016)] and hold that *Hall* does not apply retroactively." *Phillips v. State*, 299 So.3d 1013, 1024 (2020).

2. The parties also agree that the doctrinal and analytical first step in deciding whether *Hall* is retroactive under *Teague v. Lane*, 498 U.S. 288 (1989), is to determine whether *Hall* established a new rule of constitutional law. The BIO begins its substantive argument by saying: "1. As to *Teague*, the Florida Supreme Court properly held that *Hall* announced a new rule of constitutional procedure. First, *Hall* announced a new rule." (Page 13).

3. Here, the first step is also the last. If a case does *not* announce a new rule, there is no need to ask any of the follow-up, more complex questions posed by *Teague*, such as whether the rule is "substantive" or "procedural" (a question that recently divided the Justices in *Jones v. Mississippi,* 2021 WL 1566605 (U.S., April 22, 2021)),[1]

[1] Compare footnote 4 in Justice Kavanaugh's majority opinion with Justice Thomas's view that *Montgomery v. Louisiana*, 577 U.S. 190 (2016), "proceeded to 'rewrite' . . . [*Miller v. Alabama*, 567 U.S. 460 (2012),] into a substantive rule" (*id.* at *14; and see *id.* at *15) and with Justice Sotomayor's view that "*Montgomery* held

or whether it marks a "watershed" (a question upon which the petitioner and notable *amici* in *Edward v. Vannoy* (No. 19-5807) place heavy emphasis[2]).

4. *Hall* did not announce a new rule:

(4)(a). *Atkins v. Virginia*, 536 U.S. 304 (2002), deliberately forbore laying down strictly doctrinal criteria for determining the nature and degree of mental retardation (hereafter, "intellectual disability") which shelters a convicted murderer from exposure to the death penalty. *Id.* at 317. As *Hall* was later to point out, *Atkins* established a general framework which takes account of nationwide legislative judgments, this Court's precedents, and "the views of medical experts." *Hall*, 572 U.S. at 721. "The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals." *Id. And see Moore v. Texas,* 137 S. Ct. 1039, 1048-1049 (2017).[3]

---

that *Miller* applies retroactively based solely on *Teague*'s first exception for substantive rules" (*id.* at *22).

[2] See Brief for Petitioner in *Edwards*, 2020 WL 4455249 (U.S.) (Appellate Brief) at *23 - *36; Brief for Former Judges, Prosecutors and Public Officials as Amici Curiae Supporting Petitioner, 2020 WL 4450444 (U.S.) (Appellate Brief), at *11 - *27.

[3] *See also id.* at 1050: "In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. . . . But the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.*, AAIDD–11, at 47 ('significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills'); DSM–5, at 33, 38 (inquiry should focus on '[d]eficits in adaptive functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see *Brumfield*, 576 U.S., at ___, 135 S.Ct., at 2281 ('[I]ntellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which

(4)(b). *Hall* went on to observe that "this Court and the States have placed substantial reliance on the expertise of the medical profession" and concluded that:

> "[b]y failing to take into account the SEM and setting a strict cutoff at 70, Florida 'goes against the unanimous professional consensus.' APA Brief 15. Neither Florida nor its *amici* point to a single medical professional who supports this cutoff. The DSM–5 repudiates it: 'IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.' DSM–5, at 37." 572 U.S. at 721 – 722.

(4)(c). This was the pivotal point for the Court in *Hall*. It involved no new legal rule, but rather the factual recognition that the Florida practice condemned in *Hall* was out of keeping with unquestioned, pervasive, established professional norms. And – critically for the question of retroactivity – *Hall* recognized not only that those norms were well established but that they were *long*-established.[4] "The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." 572 U.S. at 712. In this, *Hall* was well informed. See the *amicus* brief filed in support of Mr. Phillips' petition for *certiorari*[5] (pages 13-17) by counsel who include the country's

---

they otherwise show an overall limitation.'" (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002))."

[4] "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of Atkins. And those clinical definitions have long included the SEM." 572 U.S. at 720.

[5] Brief of *Amici Curiae* The ARC of the United States, The National Disability Rights Network, Disability Rights Florida, The Bazelon Center for Mental Health Law, and the Center for Public Representation in Support of Petitioner.

foremost legal experts on intellectual disability[6] and empirical researchers of *Atkins* history.[7]

(4)(d). So, far from being "new", *Hall* represents nothing more or less than the application of "a general standard to the kind of factual circumstances it was meant to address" (*Chaidez v. United States*, 568 U.S. 342, 348 (2013)),[8] and specifically to circumstances recognized by the relevant professional community long before *Atkins.*

(4)(e). Respondent's argument to the contrary (BIO, pages 13-14) not only flies in the face of *Chaidez*, *Hall*, and history, but in the face of the Florida Supreme Court's own understanding of *Hall*, as repeatedly expressed by the opinion below. *Hall*, the Florida Supreme Court explained, "merely clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty." 299 So.3d at 1021. *See also id.* at 1019 –

---

[6] *See*, *e.g.*, James W. Ellis, Caroline Everington, and Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases,* 46 Hofstra L. Rev. 1305, 1359 (2018); Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 George Washington L. Rev. 414 (1985).

[7] *See*, *e.g.*, John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola*, A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 William & Mary Bill of Rights Journal 393, 400 - 404 (2014); John H. Blume, Sheri Lynn Johnson & Christopher Seeds*, Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 CORNELL JOURNAL OF LAW & PUBLIC POLICY 689, 697-698 (2009).

[8] As Justice Kagan wrote for the Court in *Chaidez: "Teague* . . . made clear that a case does *not* 'announce a new rule, [when] it "[is] merely an application of the principle that governed"' a prior decision to a different set of facts. . . . . [W]hen all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes." *Id. at* 347 – 348.

1020 *passim.* A clarification of the procedure necessary to adjudicate intellectual disability claims in keeping with *Atkins*'s basic dictate does not constitute a new rule.

5. Respondent's other grounds for opposing a grant of certiorari are baseless.

5(a). Respondent's several arguments at pages 19 – 27 of the BIO, suggesting that there are reasons independent of *Hall* for rejecting Mr. Phillips' *Atkins* claim, once again disregard the specific rationale upon which the Florida Supreme Court below denied Mr. Phillips postconviction relief. That rationale was:

> "We conclude that we should not continue to apply the erroneous reasoning of *Walls*. And because *Hall* does not apply retroactively, it does not entitle Phillips to a reconsideration of whether he meets the first prong of the intellectual disability standard." 299 So.3d at 1024.

and

> "[B]ecause Phillips has conclusively failed to establish that he meets the first prong of the intellectual disability standard, he cannot be found to be intellectually disabled even if he were entitled to a renewed determination on the second prong and could establish that he has deficits in adaptive behavior. As we have repeatedly stated, if a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled." *Id.*

The potential subterranean existence in a case of issues which a lower court might or might not have relied upon – but explicitly did not rely upon – in rejecting a federal claim has never been thought an obstacle to *certiorari*. *See*, *e.g.*, *Bearden v. Georgia*, 461 U.S. 660 (1983); *Roe v. Flores-Ortega*, 528 U.S. 470, 478 - 481 (2000); *Padilla v. Kentucky,* 559 U.S. 356 (2010).

(5)(b). The BIO's four pages devoted to arguing that "there is no split among the lower courts warranting this Court's review" because "*[n]early all* the courts that have addressed the issue agree with the decision below" (BIO, page 9; emphasis added) fare no better. Even were a "split" the indispensable precondition for a grant of certiorari, Respondent's labors to look behind the explicit holdings of *White v. State*, 500 S.W.3d 208 (Ky. 2016),[9] *overruled on an unrelated point in Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), and *Smith v. Sharp*, 935 F.3d 1064, 1084-1085 (10th Cir. 2019),[10] while ignoring the defects of the decisions which "agree with the decision below" – and were, indeed, cited in support by the Florida Supreme Court below[11] – are too contrived to be taken seriously.

---

[9] "We held that the rule in *Martin* was a 'new rule' and, therefore, did not apply retroactively. . . . Applying this standard to the present case, unlike *Teague, . . .* or *Martin,* the 2014 U.S. Supreme Court case of *Hall,* does not deal with criminal procedure. It is 'a substantive restriction on the State's power to take the life' of individuals suffering from intellectual disabilities. *See Atkins . . .* We are dealing here with a U.S. Supreme Court directive that not only proscribes intellectually disabled people from being put to death, but defines the manner in which the mental deficiencies of offenders must be evaluated. Therefore, *Hall* must be retroactively applied."

[10] "The application of . . . [the] general rule [of *Atkins*] to *Hall*, . . . *Moore I*, . . . and *Moore II* cannot be understood to 'yield[ ] a result so novel that it forges a new rule, one not dictated by precedent.'" *Id.* at 1084.

[11] See footnote 15 at pages 10 – 11 of the Brief of *Amici Curiae* of The ARC *et al.*, note 5 *supra.*

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

/s/ Marie-Louise Samuels Parmer
Marie-Louise Samuels Parmer
Counsel of Record

Capital Collateral Regional
Counsel-Southern Region
110 S.E. 6th St. Suite 701
Fort Lauderdale, FL 33301

April 27, 2021.