No. _____

In The
Supreme Court of the United States

JOE ELTON NIXON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth and Fourteenth Amendments preclude the execution of defendants with intellectual disability.

   This case presents the question whether the decision in *Hall v. Florida*, 572 U.S. 701 (2014) (determining that defendants with intellectual disability include those whose IQ scores are within the standard error of measurement), announced a new rule of constitutional law within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989) (denying retroactive application to most new rules of constitutional law), as the court below and the Eleventh Circuit have held, or was instead simply an application of the rule of *Atkins* to particular facts, as Petitioner contends and all other Circuit decisions conclude.

2. This case also presents the question whether it is consistent with the Eighth and Fourteenth Amendments for a State to impose on a capital defendant the burden of proving intellectual disability by clear and convincing evidence, as only Florida does.[1]

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[1] As described in the pending certiorari petition in *Young v. Georgia* (No. 21-782), that State imposes on a capital defendant the burden of proving intellectual disability beyond a reasonable doubt.

LIST OF DIRECTLY RELATED PROCEEDINGS

Conviction and Death Sentence

Caption: *State v. Nixon*
Court: Circuit Court, Second Judicial Circuit, Leon County, Florida
Docket: No. 84-2324 (judgment of conviction and sentence of death following conviction on July 22, 1985 and 10-2 jury recommendation of death sentence on July 25, 1985)
Decided: July 30, 1985
Published: Not published. All postconviction proceedings in this court through the present bear the same docket number.

Direct Review

Caption: *Nixon v. State* ("*Nixon I*")
Court: Supreme Court of Florida
Docket: No. 67,583
Decided: November 29, 1990
Published: 572 So. 2d 1336 (Fla. 1990)

Certiorari denied: *Nixon v. Florida*, 502 U.S. 854 (1991)

State Collateral Review

Caption: *Nixon v. Singletary* ("*Nixon II*")
Court: Supreme Court of Florida
Docket: Nos. SC93192, SC92006
Decided: January 27, 2000 (ruling on initial state postconviction motion and on habeas corpus petition filed with Supreme Court of Florida)
Published: 758 So. 2d 618 (Fla. 2000)

LIST OF DIRECTLY RELATED PROCEEDINGS
—Continued

Caption: *Nixon v. State* ("*Nixon III*")
Court: Supreme Court of Florida
Docket: Nos. SC92006, SC93192 & SC01-2486 (ruling on appeal after remand of *Nixon II*, holding in abeyance habeas corpus petition filed with Supreme Court of Florida that included intellectual disability claim)
Decided: July 10, 2003
Published: 857 So. 2d 172 (Fla. 2003)

Reversed and remanded: *Florida v. Nixon*, 543 U.S. 175 (2004)

Caption: *Nixon v. State ("Nixon IV")*
Court: Supreme Court of Florida
Docket: Nos. SC92-006, SC93-192 & SC01-2486 (ruling on appellate and habeas corpus issues held in abeyance in *Nixon III* and remanding for filing of state postconviction petition regarding intellectual disability)
Decided: April 20, 2006
Published: 932 So. 2d 1009 (Fla. 2006)

Caption: *Nixon v. State*
Court: Circuit Court, Second Judicial Circuit, Leon County, Florida
Docket: No. 84-2324 (order denying state postconviction petition regarding intellectual disability)
Decided: April 26, 2007
Published: Not published. Included in Appendix hereto as A144-76.

LIST OF DIRECTLY RELATED PROCEEDINGS
—Continued

Caption: *Nixon v. State ("Nixon V")*
Court: Supreme Court of Florida
Docket: SC07-953 (affirming denial of state postconviction petition regarding intellectual disability)
Decided: January 22, 2009
Published: 2 So. 3d 137 (Fla. 2009)

Caption: *Florida v. Nixon*
Court: Circuit Court, Second Judicial Circuit, Leon County, Florida
Docket: No. 84-2324 (order denying successive state postconviction petition regarding intellectual disability)
Decided: October 9, 2015
Published: Not published. Included in Appendix hereto as A106-15.

Caption: *Nixon v. State ("Nixon VI")*
Court: Supreme Court of Florida
Docket: SC15–2309 (reversing order denying successive state postconviction petition regarding intellectual disability and remanding for hearing consistent with *Hall v. Florida*, 572 U.S. 701 (2014))
Decided: February 3, 2017
Published: 2017 WL 462148 (Fla. 2017)

Caption: *Florida v. Nixon*
Court: Circuit Court, Second Judicial Circuit, Leon County, Florida
Docket: No. 84-2324 (order on remand from *Nixon VI* denying successive state postconviction petition regarding intellectual disability)
Decided: November 21, 2019
Published: Not published. Included in Appendix hereto as A57-101.

LIST OF DIRECTLY RELATED PROCEEDINGS
—Continued

Caption: *Nixon v. Florida ("Nixon VII")*
Court: Supreme Court of Florida
Docket: No. SC20-48 (affirming denial of successive state postconviction petition regarding intellectual disability on basis that *Hall v. Florida*, *supra*, is not retroactive)
Decided: August 26, 2021
Published: 327 So. 3d 780 (Fla. 2021)

Federal Habeas Review

Caption: *Nixon v. Jones*
Court: United States District Court for the Northern District of Florida
Docket: No. 4:10-cv-00020-MCR-MAF
Decided: August 11, 2015 (order entered in proceeding filed on January 16, 2010 staying proceedings pending filing and disposition of successive state postconviction petition respecting intellectual disability)
Published: Not published. Included in Appendix hereto as A116-17.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joe Elton Nixon respectfully petitions for the issuance of a writ of certiorari to review the judgment of the Supreme Court of Florida.

OPINIONS BELOW

The decision of the Florida Supreme Court is reported as *Nixon v. Florida*, 327 So. 3d 780 (Fla. 2021). The decision of the state Circuit Court is unreported and appears at A57-101.

JURISDICTION

The Florida Supreme Court denied rehearing on October 27, 2021. A1. On December 15, 2021, Justice Thomas extended the time for the filing of this petition through February 24, 2022. (21A229). The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part,

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Joe Nixon was born in 1961. His mother drank alcohol during her pregnancy. As a small child he was exposed to pesticides in tobacco fields, given alcohol to entertain others, starved by his parents as a form of punishment in addition to their savage beatings, and regularly raped by an uncle. During elementary school he was unable to carry on normal conversations or acquire the rules of games. He could not learn to make change, spell at an age-appropriate level, or succeed at basic arithmetic. Nor could he function effectively within the family setting, whether the task at hand was going to the grocery store or mowing a lawn. All of these deficits were noted with considerable concern at the time by his family, friends, teachers, and institutional counselors, who were sure that his brain had not matured normally. Formal testing during his early adolescence confirmed this. *See* A11-15, A17-31, A34-45.

In August of 1984, shortly before he turned 23, a woman named Jeanne Bickner was abducted from a Tallahassee shopping mall and murdered. Mr. Nixon was soon indicted for the crimes by a Leon County grand jury. Absent from the courtroom and huddled in his cell wearing little more than a blanket while his

lawyer conceded his guilt to the jurors, Mr. Nixon was convicted and sentenced to death in 1985 after a 10-2 jury recommendation.

Pursuing postconviction relief, he asserted to the Florida Supreme Court that counsel had been ineffective and that intellectual disability precluded his execution. He prevailed on the first claim but this Court reversed. *Florida v. Nixon*, 543 U.S. 175 (2004).

On remand, the Florida Supreme Court directed him to pursue the second claim by way of a postconviction petition. *Nixon v. State*, 932 So. 2d 1009, 1024 (Fla. 2006) ("*Nixon IV*"). Mr. Nixon did so, resulting in an evidentiary hearing in the Leon County Circuit Court in October of 2006.

After first objecting to the burden of proof imposed on him, *see* A183-86, Mr. Nixon presented evidence supportive of all three prongs of the intellectual disability diagnosis: (1) sub-average intellectual functioning accompanied by (2) significant behavioral deficits (3) manifesting before the age of 18. *See Atkins*, 536 U.S. at 308 n.3. The State did not contest the second two. And the disagreement between the parties respecting the first one proved to be narrow.

Petitioner's expert, Dr. Keyes, testified that, taking into account the standard error of measurement in accord with *Atkins*, the appropriate conclusion from the various IQ scores Mr. Nixon had achieved over the years was that his IQ was 73, A201-04—a score which qualified him for the intellectual disability diagnosis, A193-94.

The State's expert, Dr. Prichard, asserted, based on a recent IQ test he had administered using the WAIS-III testing instrument, that Mr. Nixon's IQ was 80. Hence the remaining diagnostic criteria did not need to be considered. A195-98.

Tellingly, however, Dr. Prichard agreed with Dr. Keyes's final point:

> Q. Now, if you had found [Mr. Nixon's] IQ to be around 74 or below, then you would have proceeded to an adaptive behavior assessment?
>
> A. Probably, yes.
>
> Q. That's because if, hypothetically, an individual obtains an IQ score of 73, what [a] competent examiner does is to construct a confidence interval around that obtained score and conclude that the likelihood is 95 percent that the true intelligence score must be between 68 and 78?
>
> A. Correct.
>
> Q. And that's how one takes account of Standard Error of Measure?
>
> A. That is Standard Error of Measurement. And that's the correct way to communicate it.
>
> Q. Okay. And on your direct, you recognized as the authoritative standard for doing these assessments the DSM-IV-TR?
>
> A. Yes.

Q. And so I take it, then, you agree with the statement on page 48 that says: ["]As discussed earlier, an IQ score may involve a measurement error of approximately five points depending on the testing instrument. Thus, it is possible to diagnose mental retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for mental retardation. Differentiating mild mental retardation from borderline intellectual functioning requires careful consideration of all available information.["]

A. Correct. I would agree with that, yes.

Q. And, in fact, last year you did a mental retardation assessment on a capital defendant named Roger Cherry, correct?

A. Yes.

Q. And he had a full scale IQ of 72, and you wrote in your report that because this meant that with a 95 percent [confidence] interval, the true IQ was between 67 and 77, it would be imperative that the professional conduct adaptive behavior testing?

. . . .

Q. Could you identify that document for me, Doctor?

A. Yes. It looks like an evaluation report that I conducted and completed on July 17th of 2005 on an individual named Roger Cherry.

> MR. FREEDMAN: I'll offer that into evidence, Your Honor. . . .
>
> THE COURT: Any objection to Defense 8?
>
> MR. EVANS: None.
>
> A198-200; *see* A205-06 (Dr. Prichard's evaluation concluding "that Mr. Roger Cherry likely does meet the statutory criteria for a diagnosis of mental retardation.")

While Mr. Nixon's case was pending before the Circuit Court, the Florida Supreme Court decided Mr. Cherry's case, declaring in *Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007), that the Florida statutes imposed a strict IQ cutoff of 70 for the determination of intellectual disability. Hence, Mr. Cherry was disqualified from that diagnosis by his IQ score of 72. The court held that the resulting decisional framework was consistent with this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which had precluded imposition of the death penalty on intellectually disabled defendants.

The State called *Cherry* to the attention of the Circuit Judge hearing Mr. Nixon's case. Mr. Nixon responded with a motion asserting that the Florida statute as construed by *Cherry* was unconstitutional because it violated *Atkins*. A177-81. In April of 2007 the Circuit Court denied Mr. Nixon's motion, A176, and rejected his intellectual disability claim as legally barred. A144.

Mr. Nixon's appeal of that decision framed the issue sharply:

> If indeed *Cherry* controls, the decision below should be affirmed since Mr. Nixon's own contention was that his true IQ score was 73. But if, as we argue below, the ruling in *Cherry* cannot be reconciled with the Constitution, then there should be a reversal so that the Circuit Court may conduct further proceedings in which it views the facts through the correct legal lens.

A139; *see* A139-43 (arguing at length the federal unconstitutionality of the *Cherry* rule).

In *Nixon v. State*, 2 So. 3d 137, 142-44 (Fla. 2009) ("*Nixon V*"), the Florida Supreme Court considered and rejected Mr. Nixon's constitutional claims and affirmed the ruling below.[2] Mr. Nixon thereupon reiterated his constitutional attacks on Florida's intellectual disability framework in a federal habeas corpus petition filed in 2010.

While that petition was pending, this Court decided *Hall v. Florida*, 572 U.S. 701 (2014), a case which presented the question of "how intellectual disability must be defined in order to implement . . . the holding of *Atkins*," *id.* at 709. Vindicating Mr. Nixon's position, the Court held that the Florida Supreme Court's narrow interpretation of the state statutes to impose a flat

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[2] The court also noted, but found unnecessary to reach, Mr. Nixon's argument regarding the burden of proof. *Id.* at 145.

IQ score cutoff on capital defendants asserting intellectual disability violated *Atkins*. *Id.* at 711-12.

The Court wrote that "the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Id.* at 710. The Florida system was contrary to established clinical practice both because it failed to recognize the standard error of measurement surrounding any single IQ score and because it considered "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id.* at 712 (citing clinical literature dating back to 1944).

In sum: "Intellectual disability is a condition not a number. . . . This Court agrees with the medical experts that . . . it is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. . . . Florida's rule misconstrues . . . *Atkins.*" *Id.* at 723-24.

Mr. Nixon promptly called this decision to the attention of the District Court considering his federal habeas corpus petition and that court decided to stay its proceedings so that Mr. Nixon could pursue successive state postconviction proceedings in light of *Hall*. A116.

In May of 2015, he filed in state court voluminous evidentiary and expert materials in support of his intellectual disability claim. But in October the Circuit

Court summarily denied it, A106, on the theory that *Hall* was inapplicable because the record contained the IQ score of 80 that had been obtained by Dr. Prichard, *see* A113.

The Florida Supreme Court reversed. In *Nixon v. State*, 2017 WL 462148, at *1-2 (Fla. 2017) ("*Nixon VI*"), it held: "The trial court incorrectly found the significantly subaverage intellectual functioning prong dispositive of Nixon's intellectual disability claim based on Nixon's current score of 80," *id.* at *1. It ordered the Circuit Court to apply *Hall*, as Mr. Nixon had urged. The opinion noted that during the pendency of the appeal the court had decided in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), cert. den'd, 138 S. Ct. 165 (2017), to give *Hall* retroactive application in Florida.[3]

On remand, the State once more relied solely on the testimony of Dr. Prichard and the testing he had done in 2006. Mr. Nixon, for his part, made a comprehensive updated presentation in support of his intellectual disability claim.[4] Notably, Mr. Nixon presented

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[3] One of the beneficiaries of *Walls* was Roger Cherry. *See Cherry v. Jones*, 208 So. 3d 701, 702 (Fla. 2016).

[4] In summary, the "record included, apart from expert submissions: 23 affidavits submitted by eyewitnesses who knew Mr. Nixon literally since birth in a variety of capacities along with dozens of school records, social services reports and psychological test results compiled by independent professionals dating back to 1972, when Mr. Nixon was 11 years old. Everyone—parent, relative, friend, teacher, social worker—who ever knew Mr. Nixon described him as impaired. There is not a single report to the effect that Mr. Nixon was a typical child. On the contrary, one finds nothing but continuing expressions of concern that he was intellectually challenged, a fact that is as significant clinically as

the results of a WAIS-IV test from the spring of 2017 showing Mr. Nixon's IQ score to be 67. At the evidentiary hearing, Mr. Nixon's expert explained why this "gold standard" testing instrument was superior to those previously administered to Mr. Nixon, *see* A46-47, and Dr. Prichard conceded the point:

> Q. You would agree, would you not, that the WAIS-IV and the Stanford-Binet-V are the best and most reliable measures of intellectual functioning today?
>
> A. Yes.

A47.

In November 2019, the state Circuit Court rendered a decision, A57, that denied Mr. Nixon's petition on the basis that *Hall* is inapplicable where the record contains any IQ score above 75. *See* A49-51. This opinion was, of course, flatly inconsistent both with the 2017 remand order issued by the Florida Supreme Court in *Nixon VI*[5] and—as Mr. Nixon had repeatedly pointed out, *see* A49—with *Hall* itself. *See Hall*, 572 U.S. at 707 (noting that one of Mr. Hall's achieved IQ scores was 80). In January 2020, Mr. Nixon appealed

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common sense would suggest." A14-15 (citations omitted). All of this evidence was admitted without objection and the State did not factually contest any of it. *Id.* The material underlying this summary was canvassed to the court below in rich and vivid detail at A17-31, A34-45.

[5] In rendering its decision, that court had been aware of—and specifically cited—all of the IQ scores in the record, *see Nixon VI*, 2017 WL 462148, at *1 n.2, with the exception of the score of 67, which had not yet been obtained.

the Circuit Court's decision to the Florida Supreme Court.

While the appeal was pending, that court on May 21, 2020 issued *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), cert. den'd, 141 S. Ct. 2676 (2021). The court decided to "recede from" its decision in *Walls*, *supra*, which had determined *Hall* to be retroactive, *id.* at 1015. It then proceeded to "consider whether federal law requires retroactive application of *Hall*." *Id.* at 1022. Discussing the requirements of *Teague v. Lane*, 489 U.S. 288 (1989), and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), it ruled that because "*Hall* announced a new procedural rule . . . we conclude that federal law does not require retroactive application of *Hall*." *Phillips*, 299 So. 3d at 1022.

Justice Labarga, dissenting, described the outcome as contravening the Eighth Amendment as explicated in *Atkins* and *Hall* by leaving "open the genuine possibility that an individual will be executed because he is not permitted consideration of his intellectual disability claim." *Id.* at 1026.

Mr. Nixon filed his appellate brief on December 14, 2020. In it, he set forth a number of reasons why *Phillips* should not be—and could not as a matter of federal constitutional law be—applied to his case. *See* A54-56. Specifically, he argued, "The conclusion of *Phillips* that *Hall* announced a new non-watershed rule of federal

Eighth Amendment law for purposes of *Teague v. Lane*, 489 U.S. 288 (1989) . . . was error." A55.[6]

The Florida Supreme Court's response in the decision below, *Nixon v. Florida*, 327 So. 3d 780 (Fla. 2021) ("*Nixon VII*"), was terse and straightforward. It declined to engage in any discussion of the lower court's intellectual disability determination and wrote, "[U]nder *Phillips*, the controlling law in our Court *now* is that *Hall* does not apply retroactively. It would be inconsistent with that controlling law for us to entertain Nixon's successive, *Hall*-based challenge to the trial court's order here. . . . Accordingly, we affirm the denial of Nixon's successive intellectual disability claim." *Id.* at 783 (original emphasis).

Justice Labarga again dissented, reasserting his "fundamental disagreement with the holding in *Phillips*," *id.* at 784.[7]

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[6] Mr. Nixon also fully reasserted his argument that placing on him the burden of proving intellectual disability by clear and convincing evidence was unconstitutional. *See* A53-54.

[7] Similar cursory rejections of *Hall*-based intellectual disability claims on the basis of *Phillips* include *Pooler v. State*, 302 So. 3d 744, 745 (2020), cert. den'd, 141 S. Ct. 2636 (2021); *Freeman v. State*, 300 So. 3d 591, 594 (Fla. 2020), cert. den'd, 141 S. Ct. 2676 (2021); *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020), cert. den'd, 141 S. Ct. 2705 (2021); and *Lawrence v. State*, 296 So. 3d 892, 892 (Fla. 2020), cert. den'd, 141 S. Ct. 2676 (2021).

REASONS FOR GRANTING THE PETITION

1. Overview

The reason the Court should grant review in this case is not to engage in error correction. It should grant review to avoid repeated meritorious demands for error correction. The most fundamental vice of the decision below is not that it is wrong, although it certainly is, but that the incentive structure it creates is inimical to the sound administration of the national judicial system. If on each occasion when this Court corrects a State's reading of the federal Constitution, as it did in *Hall*, the State benefits from an overly-expansive determination that the Court's rule was "new," the States will have an incentive to err in the direction of denying constitutional rights and this Court's workload in criminal cases will be correspondingly increased, to the detriment of both efficiency and justice.

With specific respect to capital defendants with intellectual disability, that injustice will be compounded in the outlier state of Florida, which imposes upon them the burden of demonstrating their condition by clear and convincing evidence.

2. Structural Implications of the First Question Presented

As the Supremacy Clause mandates, the States may benefit from the retroactivity doctrine of *Teague* only in the case of new rules. *See Stringer v. Black*, 503 U.S. 222, 227-28 (1991).

For that reason, this and other courts dealing with *Teague* problems have long devoted a good deal of effort to deciding whether a particular rule was "new." *See* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5 (7th ed. 2019). Although there remain zones of uncertainty, one principle has been firmly established. As most recently reiterated in *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013):

> *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. . . . As JUSTICE KENNEDY has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 . . . (1992) (concurring in judgment). . . . Otherwise said, when 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.

Yet the Florida Supreme Court's opinion in *Phillips*, which was the basis for the decision below, devoted much attention to whether the rule of *Hall* was procedural and none at all to whether it was new.

A grant of review on the first Question Presented will provide this Court the opportunity not only to

state the correct result but also to illustrate the correct *Teague* methodology.

3. *Hall* Did Not Announce a New Rule

Under the ruling below, the fact that the Florida Supreme Court misunderstood *Atkins* in its 2007 decision in *Cherry* has made the State's litigation posture better than it would be if that court had decided the constitutional issue correctly.

This outcome is topsy-turvy. It should be righted by a ruling of this Court that *Hall* did not announce a new rule but simply corrected the Florida Supreme Court's erroneous reading of the holding in *Atkins*.

Indeed, the Florida Supreme Court's *Phillips* opinion itself recognizes that *Hall* represents only "an evolutionary refinement of the procedure necessary to comply with *Atkins*. It [*Hall*] 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. It explains:

> *Hall* merely more precisely defined the procedure that is to be followed in certain cases to determine whether a person facing the death penalty is intellectually disabled. *Hall* is merely an application of *Atkins*. *Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—

> with the opportunity to present additional evidence of intellectual disability.

299 So. 3d at 1020.

These accurate descriptions fit *Atkins* and *Hall* squarely into the *Chaidez* framework: *Atkins* was "a rule of 'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts'"; and "all . . . [this Court did in *Hall* was to] apply a general standard to the kind of factual circumstances it was meant to address. . . ." *Chaidez*, 568 U.S. at 348. Such decisions "will rarely state a new rule for *Teague* purposes." *Id.*

But the Florida Supreme Court failed to ask at the outset of its *Teague* analysis whether the rule of *Hall* was new, and erroneously concluded that *Hall* was non-retroactive.

In *Atkins* the Court did indeed announce a new rule: the Eighth Amendment precludes the execution of prisoners with intellectual disability. The Court defined the protected group by closely tracking the clinical definition of intellectual disability, and specifically stated "an IQ between 70 and 75 or lower, . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (7th ed. 2000)." 536 U.S. at 309, n.5.[8]

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[8] In his 2006 presentation to the state Circuit Court on Mr. Nixon's behalf Dr. Keyes specifically cited this passage. A202.

As the Court was well aware when it decided *Atkins*,[9] the clinical community had a robust literature dating back into the 1930s recognizing the importance of reading IQ test scores with an understanding of the standard error of measurement surrounding the results.[10]

> There is a strong consensus among clinicians that the SEM must always be taken into account when assessing whether the results of an individual's testing satisfy the first prong of the definition of mental retardation. [It was] against the backdrop of that clear professional consensus, [that] the Supreme Court's decision in *Hall v. Florida* addressed the constitutionality of a Florida rule barring consideration of the SEM in making *Atkins* adjudications.

James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1359 (2018) (footnote omitted).[11]

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[9] *See* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law as Amici Curiae in Support of Petitioner 14-15. This brief was originally filed in *McCarver v. North Carolina*, No. 00-8727. By an order of the Court entered on the docket of *Atkins* on December 3, 2001 it was considered in support of the petitioner in that case.

[10] *See* David Wechsler, THE MEASUREMENT OF ADULT INTELLIGENCE 135 (1939).

[11] The clinical consensus remains unchanged. *See* American Association on Intellectual and Developmental Disabilities, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 131 (12th ed. 2021) ("Reporting

The question before this Court in *Hall* was unambiguously stated in the opinion: "The question this case presents is how intellectual disability must be defined in order to implement . . . the holding of *Atkins*." *Hall*, 572 U.S. at 709. In answering that question the Court corrected a decision in which the Florida Supreme Court had:

> misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of "approximately 70." . . . Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning.

Hall, 572 U.S. at 724.

To correct a misconception about the facts that support a claim under an established rule of federal constitutional law is not to make new law but rather to ensure that the existing law is applied on the ground. Suppose that in one pathbreaking case this Court announces a rule against coerced confessions and reverses a conviction because it was based on a confession that was obtained by beating the suspect with a rubber hose. If the Court subsequently reverses a court which had upheld a conviction based on a

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of the 95% confidence interval (i.e., score range) must be a part of any decision concerning the diagnosis of ID.")

confession obtained by prolonged starvation, the second decision does not create a new rule but rather safeguards compliance with the non-coercion rule of the first.

That is exactly what this Court said in *Hall*: "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.*, 572 U.S. at 720-21.

But the Eleventh Circuit failed to heed the warning and within a few weeks issued a decision classifying the *Hall* rule as new. *See In re Henry*, 757 F. 3d 1151, 1158-59 (11th Cir. 2014) ("For the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because . . . [n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff.") (internal citations omitted);[12] *but see id.* at 1165 (Martin, J.,

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[12] This reading of *Hall* is squarely at odds with the *Hall* opinion, which explicitly holds that the States do not have "complete autonomy to define intellectual disability as they wish[ ]" and that "[t]his Court thus reads *Atkins* to provide substantial guidance on the definition of intellectual disability. 572 U.S. at 720-21. "*Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. . . . 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*." *Id*. The *Henry* opinion also said:

dissenting) (questioning whether rule of *Hall* was "new"); *see also Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F. 3d 1301, 1311-13 (11th Cir. 2015) (reaffirming *Henry*); *In re Bowles*, 935 F. 3d 1210, 1219 (11th Cir. 2019) (reaffirming *Kilgore* and *Henry*: "*Hall* did announce a new rule of constitutional law"). In other words, until this Court decided its hypothetical starvation case above, nothing restricted the States' previously recognized power to extract confessions by that method.

This blinkered view is unique to the Eleventh Circuit.

Some courts have determined that the *Hall* rule is not new in the course of decisions favoring capital prisoners asserting intellectual disability. *See*, *e.g.*, *Smith v. Sharp*, 935 F. 3d 1064, 1083-85 (10th Cir. 2019) (holding *Hall* not "new" under *Teague*); *Van Tran v. Colson*, 764 F. 3d 594, 612 (6th Cir. 2014) (stating *Hall* "clarified the minimum *Atkins* standard under the U.S.

> In addition, Justice Kennedy's *Hall* opinion explained that the basis for its holding stretched beyond *Atkins* alone: "[T]he precedents of this Court 'give us essential instruction,' . . . but the inquiry must go further. In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional."

757 F. 3d at 1159. But *Hall*'s reference to the Court's "independent judgment" did not mean "independent of *Atkins*." The Court made clear that it was implementing *Atkins.* The quoted statement was merely an instance of the Court's repeated recognition that legislative judgments and other indicia of national consensus are to be supplemented in Eighth Amendment analyses by "the Court's independent judgment." *Roper v. Simmons*, 543 U.S. 551, 562-64 (2005).

Constitution"). *See also Smith v. Ryan*, 813 F. 3d 1175, 1181 (9th Cir. 2016) (applying *Hall* to a state appellate decision of 2008); *Williams v. Mitchell*, 792 F. 3d 606, 619 (6th Cir. 2015) (applying *Hall* to a state appellate decision of 2008).

Other courts have determined that the *Hall* rule is not new in the course of decisions adverse to capital prisoners asserting intellectual disability. *E.g.*, *Fulks v. Watson*, 4 F. 4th 586, 592 (7th Cir. 2021) (denying relief because claim being asserted under *Hall* could have been asserted under *Atkins*); *Goodwin v. Steele*, 814 F. 3d 901, 904 (8th Cir.), cert. den'd, 574 U.S. 1057 (2014) (same); *Sims v. State*, 2016 Tenn. Crim. App. LEXIS 613, at *22 (Tenn. Crim. App. 2016) (denying relief; "[I]t does not appear that *Hall* announced a new rule. Rather, *Hall* appears to have clarified provisions in *Atkins* that the Florida courts had misconstrued."), cert. den'd, 137 S. Ct. 1327 (2017).

Adding an error of its own to that of the Eleventh Circuit, the Florida Supreme Court refuses to even address the question. As noted above, its terse federal law discussion in *Phillips*, 299 So. 3d at 1022, lacked any consideration of whether the *Hall* rule was new within the meaning of *Teague*. The opinion below simply cites to *Phillips*. Although this Court has long said that it reviews state court judgments not opinions, *e.g.*, *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827) (Marshall, C.J.), an erroneous judgment on a federal question that is predicated on an opinion misconceiving the question presents a particularly appropriate vehicle for review.

Mr. Nixon's view of the meaning of "intellectually disabled" was right in 2006 and is right today. But he has yet to have his claim judged under the correct standard because the Florida Supreme Court concluded in the opinion below that it need not rectify an error of federal constitutional law which it made in 2007 and this Court corrected in 2014.[13]

4. The Decision Below Unconstitutionally Imposed on Mr. Nixon the Burden of Proving his Intellectual Disability by Clear and Convincing Evidence

Due process requires that the States' rules respecting burdens of proof "allocate the risk of error between the litigants . . . [in light of] the relative importance attached to the ultimate decision." *Addington v. Texas*, 441 U.S. 418, 423 (1979). *See*, *e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Before a State may [terminate] the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.")

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[13] Mr. Nixon's correct assertion long before *Hall* was decided that *Atkins* embodied the rule that *Hall* eventually enunciated distinguishes his case from the several *Phillips* decisions this Court declined to review late last Term. *See Pooler v. State*, 302 So. 3d 744, 745 (Fla. 2020), cert. den'd, 141 S. Ct. 2636 (2021); *Freeman v. State*, 300 So. 3d 591, 594 (Fla. 2020), cert. den'd, 141 S. Ct. 2676 (2021); *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020), cert. den'd, 141 S. Ct. 2705 (2021); *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020), cert. den'd, 141 S. Ct. 2676 (2021). Moreover, none of the petitioners in those cases asked this Court to decide whether the *Hall* rule was new.

Thus, in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), this Court determined that when criminal defendants assert their incompetence to stand trial the States cannot require them to prove it by any more demanding burden than a preponderance of the evidence. The "standard of proof, as . . . embodied in the Due Process Clause . . . is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions." *Id.* at 362 (citing *Addington*). The Court should hold here that the decision whether an individual may constitutionally be executed is one whose importance requires it to be made with as little room for error as the decision whether an individual may constitutionally be put on trial.

Certainly that is so where the determinative issue is the presence of intellectual disability.

The Court has long invalidated as denials of due process state burden-shifting rules whose effect is to deny the substance of the underlying right. *See*, *e.g.*, *Morrison v. California*, 291 U.S. 82, 93, 96 (1934) (reversing a conviction because "the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance"). Here, as further explained below, the Florida standard will frequently and predictably cause a factfinder to determine that an individual who in fact is intellectually disabled is not.

The potential consequences of such an error are unsettling to say the least. One of the explicit bases

for the holding in *Atkins* was "that in recent years a disturbing number of inmates on death row have been exonerated," *Atkins*, 536 U.S. at 321 n.25. Since 1973 Florida has sent more innocent defendants to death row than any other State. *See* "Death Row Exonerations," https://deathpenaltyinfo.org/policy-issues/innocence.

Florida's outlier rule imposing a clear and convincing burden of proof on capital litigants asserting intellectual disability violates not only due process but also the Eighth Amendment.

The Florida standard, which is articulated in Fla. Stat. Ann. § 921.137(4) and which the Florida Supreme Court recently reiterated in *Wright v. State*, 256 So. 3d 766, 771 (Fla. 2018), is unique both within Florida's own legal framework and among the remaining states with the death penalty.[14] *Cf. Coker v. Georgia*, 433 U.S. 584, 595-96 (1977) (holding a State could not authorize capital punishment for the rape of an adult woman, as only Georgia did).

In addition to being the epitome of "unusual," the Florida rule creates an unacceptable risk that intellectually disabled persons will be executed in violation of the Eighth Amendment holdings of *Moore v. Texas*, 139

[14] The States' standards are summarized in a table compiled by counsel that appears at A207-09. The situation in Georgia, which imposes on a capital prisoner the burden of proving intellectual disability beyond a reasonable doubt, is fully addressed by the petitioner and his amici in their filings in *Young v. Georgia* (No. 21-782).

S. Ct. 666 (2019), *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), *Hall*, and *Atkins*. In litigated cases the contested factual issue is almost always whether the defendant has mild intellectual disability or no intellectual disability. *See* A189. The answer to that question frequently depends on evidence which is less than clear and convincing.

Intellectual disability "is a multifaceted and complex condition that comes in a wide range of clinical presentations." Marc J. Tassé & John H. Blume, INTELLECTUAL DISABILITY AND THE DEATH PENALTY: CURRENT ISSUES AND CONTROVERSIES 1 (2018). The three diagnostic criteria involve fact-bound inquiries and necessarily imprecise measurements.

The frank recognition of the resulting zone of uncertainty underlies the unanimous professional recognition of the need to allow for the standard error of measurement in assessing IQ tests, clinicians' use of the preponderance standard in making intellectual disability diagnoses, *see* A188, and this Court's insistence in *Hall* on a "conjunctive and interrelated assessment," 572 U.S. at 723-24.

The States overwhelmingly recognize that the Eighth Amendment does not permit them to require proof of intellectual disability by a standard that is inconsistent with the nature of the condition itself. They have taken to heart the teaching of *Ford v. Wainwright*, 477 U.S. 399 (1986). In invalidating Florida's procedure for determining the sanity of a prisoner about to be executed, this Court wrote:

> [I]f the Constitution renders [an] execution contingent upon . . . a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need for guarding against error inheres in a determination that "in the present state of the mental sciences is at best a hazardous guess however conscientious." *Solesbee* v. *Balkcom*, 339 U.S. [9, 23 (1949)] (Frankfurter, J., dissenting). That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations.

Id. at 411-12.

But in *Wright*, *supra*, the Florida Supreme Court explicitly reaffirmed its clear and convincing standard in the face of a renewed attack based on *Moore I*. The state Circuit Court in this case, citing *Wright*, thereupon applied the clear and convincing standard to reject Mr. Nixon's intellectual disability claim. A65, A100. On appeal to the Florida Supreme Court, Mr. Nixon directly assailed that standard as unconstitutional. *See* A53-54. The Florida Supreme Court ignored him.

This Court should not.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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