No. 21-1173

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

REPLY BRIEF FOR PETITIONER

ERIC M. FREEDMAN
Counsel of Record
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
HOFSTRA UNIVERSITY SCHOOL OF LAW
250 West 94th Street
New York, NY 10025
Eric.M.Freedman@hofstra.edu
Tel. 212-665-2713

MOE KESHAVARZI
DAVID POELL
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street
Los Angeles, CA 90071

RANDY HERTZ
Vice Dean & Professor of Clinical Law
NEW YORK UNIVERSITY SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012

JAMES S. LIEBMAN
Simon H. Rifkind Professor of Law
COLUMBIA LAW SCHOOL
35 West 116th Street
New York, NY 10027

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

ARGUMENT 2

I. The Court Should Review the First Question Presented 2

A. A Decision That *Hall* Did Not Announce a New Rule Will Benefit the National Justice System 2

B. The Question Should be Answered in This Case 5

1. This Case Offers an Appropriate Vehicle for the Restatement of Basic Criminal Justice Principles 5

2. This Case is Free of Procedural Entanglements 6

II. The Court Should Review the Second Question Presented 8

A. Florida's Burden of Proof is Unique 8

B. Florida's Standard is Dangerously Unconstitutional 8

1. Florida's Standard Violates Due Process 9

2. Florida's Standard Violates the Eighth Amendment 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002).....2, 3, 4
Caldwell v. Mississippi, 472 U.S. 320 (1985) 7
Chaidez v. United States, 568 U.S. 342 (2013).....2, 3
Cherry v. State, 959 So. 2d 702 (Fla. 2007) 5
Chapman v. California, 386 U.S. 18 (1967).....9
Desist v. United States, 394 U.S. 244 (1969) 3
Ford v. Wainwright, 477 U.S. 399 (1986).....10
Francis v. Franklin, 471 U.S. 307 (1985).....2
Godfrey v. Georgia, 446 U.S. 420 (1980).....9
Hall v. Florida, 572 U.S. 701 (2014)..... 1, 2, 3, 4, 5, 6, 7
Hill v. Humphrey, 662 F.2d 1335 (11th Cir. 2011)..... 10
Kansas v. Marsh, 548 U.S. 163 (2006).....7
Mackey v. United States, 401 U.S. 667 (1971).....3
Michigan v. Long, 463 U.S. 1032 (1983).....7
Nixon v. Florida, 327 So. 3d 780 (Fla. 2021).....6
Phillips v. State, 299 So. 3d 1013 (Fla. 2020).....5, 6
Sandstrom v. Montana, 442 U.S. 510 (1979).....2
Stringer v. Black, 503 U.S. 222 (1992).....4
Teague v. Lane, 489 U.S. 288 (1989) 1, 2, 3, 4, 5
Yates v. Aiken, 484 U.S. 211 (1988).....2

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 9, 10

STATUTES

Antiterrorism and Effective Death Penalty Act (AEDPA) 8, 10

OTHER AUTHORITIES

2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5 (7th ed. 2019) 4

REPLY BRIEF FOR PETITIONER

Joe Nixon has been on death row since 1985. He should have left it long ago. As the opposition brief agrees, his 2006 claim of intellectual disability was rejected on a basis that he correctly contended violated the Constitution, as this Court later held. (Opp. 4). But Florida has not given Mr. Nixon the benefit of the correct rule. (Pet. 22).

Respondent insists that the Florida Supreme Court acted constitutionally in refusing to do so below. According to the opposition brief, in correcting that court's error in *Hall v. Florida*, 572 U.S. 701 (2014), this Court stated a new rule within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). (Opp. 8-11).

The parties agree that this case squarely presents the question of whether that contention is accurate. But they sharply disagree on the answer. The Court should provide one. The outcome below is wrong and respondent defends it by advancing a definition of "new" that undermines *Teague*'s allocation of constitutional review responsibilities between this Court and lower ones.

On the second question presented, the petition accurately sets forth that Florida is unique among current death penalty States in imposing a "clear and convincing" burden of proof on capital prisoners asserting intellectual disability at trial. (A207-09). The court below simply ignored petitioner's direct constitutional attack on its rule. (*See* Pet. 26). Contrary to the opposition brief (Opp. 16-17), that indifference is not a good

reason for the Court to delay invalidating a lingering anachronism that poses a continuing threat to accurate judicial determinations.

ARGUMENT

I. The Court Should Review the First Question Presented

A. A Decision That *Hall* Did Not Announce a New Rule Will Benefit the National Justice System

As the Florida Supreme Court has correctly recognized (Pet. 15-16), *Hall* simply determined that the general rule of *Atkins v. Virginia*, 536 U.S. 304 (2002), applied to a specific set of facts. Such decisions, the petition explains at length, do not announce new rules for *Teague* purposes (Pet. 14-19), *citing Chaidez v. United States*, 568 U.S. 342, 347-48 (2013). *See*, *e.g.*, *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988) (unanimously concluding that *Francis v. Franklin*, 471 U.S. 307 (1985), did not announce a new rule, but was "merely an application of the principle that governed our decision in *Sandstrom v. Montana*, [442 U.S. 510 (1979),] which had been decided before petitioner's trial took place").

The *Chaidez* principle is "firmly established." (Pet. 14). In *Teague*, the Court after an extended discussion, 489 U.S. at 303-10, determined that it would "adopt Justice Harlan's view of retroactivity," *id.* at 310. And Justice Harlan repeatedly made clear that to classify a particular decision as non-retroactive a court must

first decide whether it has "really announced a 'new' rule at all, or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting); *Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring and dissenting) (quoting this passage).

The opposition brief simply ignores the petition's demonstration that "*Atkins* and *Hall* [fit] squarely into the *Chaidez* framework." (Pet. 16).

Instead, respondent asserts that the rule of *Hall* was not "dictated" by *Atkins* and therefore was new for *Teague* purposes. (Opp. 9).

This assertion is wrong for two independent reasons.

The narrow one is that respondent's position is flatly inconsistent with what this Court wrote in *Hall*. "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." *Hall*, 572 U.S. at 720. As the petition outlines (Pet. 16-17) and the amicus brief of the National Disability Rights Network *et al.* details (Am. 4-10), the Court was entirely correct on this point. Hence, the question *Hall* addressed was "how intellectual disability must be defined in order to implement . . . the holding of *Atkins*." *Hall*, 572 U.S. at 709. The Court was

correcting a misconstruction of *Atkins*, not mandating an expansion of it. *Hall*, 572 U.S. at 724.

As the petition correctly states, the Eleventh Circuit is "unique" in holding that *Hall* is "new" under *Teague*. (Pet. 20). Petitioner does not say that courts nationally have decided the issue wrongly. He says that the Eleventh Circuit has done so (Pet. 19-20) and that the Florida Supreme Court has "add[ed] an error of its own [by refusing] to even address the question." (Pet. 21).

The broader problem with respondent's position is that its formulaic definition of "new" is at odds with the root purposes of retroactivity doctrine. As both this Court and scholars are well aware, in a common law system a judge wishing to distinguish a prior case can almost always find a basis for doing so. *See* 2 Randy Hertz & James S. Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.5, at 1410 (7th ed. 2019). But a well-constructed postconviction system that includes a non-retroactivity feature will be designed so as to give the lower courts an incentive to enforce constitutional rights, not constrict them.

Hence, to decide whether a particular rule is new for *Teague* purposes this Court asks whether a reasonable judge at the relevant time, fairly surveying the existing legal landscape, would have applied the rule. *Id.* at 1411. That is exactly how the Court explained the meaning of the term "dictated" in *Stringer v. Black*, 503 U.S. 222, 237 (1992):

> The purpose of the new rule doctrine is to validate reasonable interpretations of existing

> precedents. Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether *Clemons* was dictated by precedent is based on an objective reading of the relevant cases.

The opposition brief never addresses what the petition says at the outset. "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." (Pet. 13).

B. The Question Should be Answered in This Case

1. This Case Offers an Appropriate Vehicle for the Restatement of Basic Criminal Justice Principles

When the Florida Supreme Court decided in *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020), that *Teague* did not require retroactive application of *Hall* it conducted no analysis of whether the *Hall* rule was new under federal criteria. Nor did that court conduct such an analysis in this case, which simply cited to *Phillips*. (Pet. 14).[1]

An opinion that not only reaches the wrong result under *Teague* but fails to address the predicate question of whether the rule under consideration is even

[1] The best that respondent can come up with now is that *Hall* must certainly have been news to the Florida Supreme Court because it had previously ruled the other way. (Opp. 11, *citing Cherry v. State*, 959 So. 2d 702 (Fla. 2007)).

new is "a particularly appropriate vehicle for review" (Pet. 21) because it gives the Court an appropriate occasion to reiterate the principles discussed above.

2. This Case is Free of Procedural Entanglements

Respondent's case-specific arguments for the denial of review on state law grounds (Opp. 14-15) are unavailable to it here. If so advised, it may seek to assert them on remand after the Court rules in petitioner's favor on the merits.

The opposition brief confidently asserts that "even if petitioner's retroactivity theory were correct, he could not receive any relief in this Florida postconviction proceeding." (Opp. 14). Below, Mr. Nixon argued to the Florida Supreme Court that its state law precedents militated in favor of granting him relief. (*e.g.*, A52-53). That court did not rule on the point but instead explicitly refused to consider any merits issues because "[u]nder *Phillips* . . . *Hall* does not apply retroactively." *Nixon v. Florida*, 327 So. 3d 780, 783 (Fla. 2021).

A suggested state law ground upon which the decision of a State's highest court could have rested, but did not, is not a legal bar to review on the merits and the Court has rejected it as a reason to deny certiorari. "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the

case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). *See Kansas v. Marsh*, 548 U.S. 163, 169 (2006). *See also Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In both *Caldwell* and *Marsh*, as here, respondent called the claimed state law ground to the attention of the Court in opposing certiorari. In both cases, certiorari was granted.

The opposition brief next claims that "[e]ven if *Hall* were retroactive, petitioner still could not establish intellectual disability." (Opp. 14). The basis of this assertion (Opp. 15) is the very opinion of the state trial court that Mr. Nixon attacked at length (A11-53) when he unsuccessfully sought to obtain merits review from the Florida Supreme Court. The trial court's legal propositions that the existence in the record of an IQ score of 80 removes a case from the ambit of *Hall* and that intellectual disability can only be diagnosed if it was found by testing conducted before the age of 18 are wrong. (A47-51). Its belief that the record lacks evidence showing Mr. Nixon's subaverage intellectual development during childhood is also wrong. (*See* A17-45; Pet. 9 n.4).

Petitioner's problem in making good his claim of intellectual disability is not that the evidence doesn't exist. The obstacles he confronts are that (1) the state trial court, thoroughly misunderstanding *Hall*, ignored the evidence and (2) the Florida Supreme Court, wrongly concluding that *Hall* was inapplicable, refused to review the trial court's work.

This Court should remove the second obstacle, enabling Mr. Nixon to obtain on remand the legally sound adjudication of his intellectual disability claim that Florida has long denied him.

II. The Court Should Review the Second Question Presented

A. Florida's Burden of Proof is Unique

The petition accurately sets forth that Florida is unique among current death penalty States in imposing a "clear and convincing" burden of proof on capital prisoners asserting intellectual disability at trial. (A207-09).[2]

B. Florida's Standard is Dangerously Unconstitutional

As the petition recounts (Pet. 26), Mr. Nixon's brief below attacked Florida's standard but the Florida Supreme Court ignored him. Respondent seeks to benefit from that neglect, asserting it as a reason to deny review. (Opp. 16). In light of Florida's uniquely error-prone death penalty system (Pet. 24), the Court should reject that argument.

---

[2] The canvass in the opposition brief (Opp. 17) is outdated (*e.g.*, in its inclusion of Colorado and in the Arizona authority cited) and includes citations to procedural postures (*e.g.*, AEDPA review) not at issue here.

1. Florida's Standard Violates Due Process

Contrary to the argument of the opposition brief (Opp. 18-20), this is not a case in which the Court is called upon to trace the boundaries of some substantive right derived from the history and traditions of our people. This is a case in which the substantive right – not to be executed if intellectually disabled – is well-established and the issue before the Court is whether the State's adjudicative procedures are sufficient to safeguard it. (Pet. 23). *See Chapman v. California*, 386 U.S. 18, 21 (1967). Florida's unique procedural rule is inadequate to provide reasonable confidence that its determination of the constitutional issue will be correct. (Pet. 23).

2. Florida's Standard Violates the Eighth Amendment

The bedrock Eighth Amendment principle by which all state rules of law governing capital punishment are judged is that they must distinguish among cases in such a way as to serve the purpose of ensuring that the death penalty is predictably inflicted only on the most morally culpable criminals. *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). A State rule that "will frequently and predictably cause a factfinder to determine that an individual who in fact is intellectually disabled is not"

(Pet. 23) manifestly does not meet the command of the Eighth Amendment.

The opposition brief (Opp. 21) rests almost exclusively on *Hill v. Humphrey*, 662 F.2d 1335 (11th Cir. 2011), whose consideration of the issues presented was tightly constricted by AEDPA.

This Court will not be operating under the same constraints after granting the petition. The Court should then invalidate a lingering outlier rule that Florida should have repudiated in the wake of *Ford v. Wainwright*, 477 U.S. 399 (1986). (Pet. 25-26).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC M. FREEDMAN
Counsel of Record
Siggi B. Wilzig Distinguished Professor of Constitutional Rights
HOFSTRA UNIVERSITY SCHOOL OF LAW
250 West 94th Street
New York, NY 10025
Eric.M.Freedman@hofstra.edu
Tel. 212-665-2713

MOE KESHAVARZI
DAVID POELL
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
333 South Hope Street
Los Angeles, CA 90071

RANDY HERTZ
Vice Dean & Professor of Clinical Law
NEW YORK UNIVERSITY SCHOOL OF LAW
245 Sullivan Street
New York, NY 10012

JAMES S. LIEBMAN
Simon H. Rifkind Professor of Law
COLUMBIA LAW SCHOOL
35 West 116th Street
New York, NY 10027

Counsel for Petitioner

May 2022