NO. ____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM LEE THOMPSON,

Petitioner

vs.

STATE OF FLORIDA,

Respondent.

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

CAPITAL CASE

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October 21, 2022

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 but left to the states the task of developing a mechanism to determine who is intellectually disabled.

In response, the Florida Supreme Court in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), made Florida an outlier in death penalty jurisprudence by imposing an unscientific cutoff requiring a capital defendant to present an IQ of 70 or below to qualify as intellectually disabled.

On May 27, 2014, this Court in *Hall v. Florida*, 572 U.S. 701 (2014), held the *Cherry* standard unconstitutional, finding that the Florida Supreme Court had interpreted its statute in violation of the Eighth Amendment "[b]y failing to take into account the standard error of measurement [inherent in IQ testing], [so that] 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." 572 U.S. at 724.

In *Walls v. Florida*, 213 So. 3d 340 (Fla. 2016), the Florida Supreme Court held that *Hall* applied retroactively in collateral proceedings. However, following a change in the court, a reconstituted Florida Supreme Court *sua sponte* receded from *Walls* and decided that *Hall* announced a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020).

This case presents the question whether *Hall*'s holding 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. In addition, this case presents the question whether the Florida Supreme Court violated Petitioner's Eighth and Fourteenth Amendment rights by applying Florida's law-of-the-case doctrine arbitrarily so as to deny him the benefit of *Hall* in disregard of the rule that only a "firmly established and regularly followed state practice . . . can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-349 (1984).

PARTIES TO THE PROCEEDINGS BELOW

Petitioner William Lee Thompson, a death-sentenced individual in the State of Florida, was the Movant/Petitioner in the state circuit court and the Appellant in the Florida Supreme Court.

The State of Florida, Respondent, was the Respondent in the circuit court and the Appellee in the Florida Supreme Court proceedings.

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings relate to this case:

Underlying Sentence:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Lee Thompson, No. F76-3350B
Judgment Entered: August 25, 1989

Direct Appeal:

Supreme Court of Florida, Case No. SC60-75499
William Lee Thompson v. State of Florida, 619 So. 2d 261 (Fla. 1993)
Judgment Entered: April 1, 1993, Reh'g Denied June 10, 1993

Certiorari denied: Case No. 93-5621,
William Thompson v. Florida., 510 U.S. 966 (1993)

Initial Postconviction and State Habeas Proceeding:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William L. Thompson, F76-3350B
Judgment Entered: March 6, 1997

Supreme Court of Florida, Case No. SC60-87481; SC60-88321
William L. Thompson v. State of Florida, William L. Thompson v. Harry K. Singletary, Jr., 759 So. 2d 650 (Fla. 2000);
Judgment Entered: April 13, 2000; Reh'g Denied: June 13, 2000

Federal Habeas Proceedings:

United States District Court for the Southern District of Florida
William Lee Thompson v. Sec'y Fla. Dep't of Corr., No. 01-02457-WPD
Judgment Entered: December 24, 2001 (Dismissed as Mixed Petition)

United States Court of Appeals for the Eleventh Circuit, Case No. 02-10642
William Lee Thompson v. Sec'y Fla. Dep't of Corr., 320 F.3d 1228 (11th Cir. 2003)
Judgment Entered: February 6, 2003

Reversed and remanded: Case No. 03-6245,
William Lee Thompson v. Crosby, 544 U.S. 957 (2005)

On Remand:

United States Court of Appeals for the Eleventh Circuit, Case No. 02-10642
William Lee Thompson v. Sec'y Fla. Dep't of Corr., 425 F.3d 1364 (11th Cir. 2005)
Judgment Entered: September 26, 2005

United States District Court for the Southern District of Florida
William Lee Thompson v. Sec'y Fla. Dep't of Corr., No. 01-02457-WPD
Judgment Entered: July 21, 2006

United States Court of Appeals for the Eleventh Circuit, Case No. 06-14660
William Lee Thompson v. Sec'y Fla. Dep't of Corr., 517 F.3d 1279 (11th Cir. 2008)
Judgment Entered: February 25, 2008; Reh'g Denied: June 30, 2008

Certiorari denied: Case No. 08-7969,
William Lee Thompson v. Walter A. McNeil, 556 U.S. 1114 (2009)

First Successive Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Thompson, No. F76-3350B
Judgment Entered: August 1, 2003

Supreme Court of Florida, Case No. 03-2129
William Thompson v. State, 880 So. 2d 1213 (Fla. 2004) (table)
Judgment Entered: July 9, 2004

On Remand:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Thompson, No. F76-3350B
Judgment Entered: December 17, 2004

Supreme Court of Florida, Case No. SC05-279
William Lee Thompson v. State, 962 So. 2d 340 (Fla. 2007) (table)
Judgment Entered: July 9, 2007

On Remand:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Thompson, No. F76-3350B
Judgment Entered: August 28, 2007

Supreme Court of Florida, Case No. SC07-2000
William Lee Thompson v. State of Florida, 3 So. 3d 1237 (Fla. 2009)
Judgment Entered: February 27, 2009

On Remand:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Thompson, No. F76-3350B
Judgment Entered: May 21, 2009

Supreme Court of Florida, Case No. SC09-1085
William Lee Thompson v. State of Florida, 41 So. 3d 219 (Fla. 2010) (table)
Judgment Entered: May 6, 2010, Reh'g Denied: July 9, 2010

Second Successive Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Lee Thompson, No. F76-3350B
Judgment Entered: February 7, 2011

Supreme Court of Florida, Case No. SC11-493
William Lee Thompson v. State of Florida, 94 So. 3d 499 (Fla. 2012)
Judgment Entered: April 26, 2012; Reh'g Denied: July 6, 2012

Third Successive Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Lee Thompson, No. F76-3350B
Judgment Entered: July 10, 2015

Supreme Court of Florida, Case No. 15-1752
William Thompson v. State of Florida, 208 So. 3d 49 (Fla. 2016)
Judgment Entered: November 10, 2016; Reh'g Denied: January 19, 2017

On Remand:

Supreme Court of Florida, Case No. SC18-1395 (Appeal of NonFinal Order)
William Lee Thompson v. State of Florida, 2018 WL 6204120 (Fla. 2018)
Judgment Entered: November 28, 2018

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Lee Thompson, No. F76-3350B
Judgment Entered: October 2, 2020

Supreme Court of Florida, Case No. SC20-1847
William Lee Thompson v. State of Florida, 341 So. 3d 303 (Fla. 2022)
Judgment Entered: March 31, 2022; Reh'g Denied: June 23, 2022

Fourth Successive Postconviction Proceeding:

Circuit in and for Miami-Dade County, Florida
State of Florida v. William Thompson, No. F76-3350B
Judgment Entered: July 20, 2018

Supreme Court of Florida, Case No. SC18-1435
William Lee Thompson v. State of Florida, 261 So. 3d 1233 (Fla. 2019) (Mem)
Judgment Entered: January 7, 2019

Certiorari denied: Case No. 18-9274,
William Lee Thompson v. Florida, 140 S. Ct. 214 (2019) (Mem)

Successive Federal Habeas Proceedings:

United States Court of Appeals for the Eleventh Circuit, Case No. 22-12275-P
In re: William Lee Thompson, Application for Leave to File a Second or Successive Habeas Corpus Petition
Judgment Entered: August 3, 2022

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PETITION FOR A WRIT OF CERTIORARI

William Lee Thompson respectfully petitions for the issuance of a writ of certiorari to review a judgment of the Supreme Court of Florida.

OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. The order of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County denying that motion is unreported. That order is attached as Appendix A. On March 31, 2022, the Florida Supreme Court affirmed the lower court's decision, in an opinion reported as *Thompson v. State*, 341 So. 3d 303 (Fla. 2022). That opinion is attached as Appendix B.

JURISDICTION

The Florida Supreme Court's final judgment was entered on March 31, 2022, and denied rehearing on June 23, 2022. *Thompson v. State*, 341 So. 3d 307 (Fla. 2022) (mem). That order is attached as Appendix C. On September 13, 2022, Justice Thomas extended the time for filing this petition through October 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State 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.

INTRODUCTION AND STATEMENT OF THE CASE[1]

Mr. Thompson was identified as "educably mentally retarded" in elementary school (A96) and his mental disabilities have been at issue since the beginning of this case in 1976 (A19). At every stage of litigation, Thompson raised concerns about his ability to comprehend the proceedings and, more recently, the constitutionality of imposing a death sentence on a person with strong evidence of intellectual disability. The state courts have repeatedly denied Thompson the scientifically sound, holistic assessment required by this Court's decisions.

a. Conviction and Sentencing Proceedings

On June 24, 1976, after Thompson and co-defendant, Rocco Surace, pled guilty to charges of first-degree murder, kidnapping, and involuntary sexual battery for the indisputably horrific murder of Sally Ivester in a Miami hotel room, each was sentenced to death. On direct appeal, the Florida Supreme Court allowed Thompson to withdraw his plea because he was prejudiced by an "honest misunderstanding which contaminated the voluntariness of the pleas." *Thompson v. State*, 351 So. 2d 701 (Fla. 1977). Thompson's appellate counsel would later testify at a federal evidentiary hearing in 1984 that he never felt that he was

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[1] Record references: "R2" – 1978 sentencing direct appeal to the Florida Supreme Court; "1984 EH" – 1984 U.S. District Court evidentiary hearing transcripts; "2009 T" – 2009 state court evidentiary hearing transcripts concerning Thompson's intellectual disability challenge pursuant to *Atkins*.

communicating with Thompson. "I simply could not get him to respond or understand anything that I was trying to say, no matter how basic I was trying to make it." "It was obvious to me, from the silence on the other end, and the questions that he asked, in a rather repetitive fashion, that he did not understand what was going on." Counsel noted that Thompson "look[ed] to Surace for guidance" and validation every step of the way (1984 EH 109-11).

On remand in 1978, new "counsel filed a motion for a psychiatric evaluation on the grounds that he had 'reason to believe that the defendant may be suffering a mental deficiency or disease which would render him incapable of assisting in his defense, and may have precluded the defendant from knowing right from wrong at the time of the alleged criminal acts set forth in the indictment.'" *Thompson v. State*, 389 So. 2d 197, 199 (Fla. 1980).[2] Trial counsel told the court that he knew there was "something desperately wrong," (R2 20-21), and twice stated Thompson was "a mental retard." (R2 576-78; 583).

Thompson again pled guilty. His penalty phase jury recommended death by a vote of 7-5, and the court again sentenced Thompson to death.[3] On direct appeal, Thompson challenged the lower court's failure to order psychological testing despite

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[2] The Court has recognized intellectually disabled defendants face special risks as they are more likely to falsely confess, make "poor witnesses," and are less able to assist and work with their own counsel. *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

[3] Surace, who had also been granted a new trial, pled not guilty, was tried and convicted of second-degree murder, and received a life sentence. *Surace v. State*, 378 So. 2d 895 (Fla. 3rd DCA 1980). In postconviction proceedings prior to the current sentence, Thompson said Surace had forced him to take full responsibility for the crime, when Surace was in-fact the leader.

trial counsel's repeated requests. The Florida Supreme Court affirmed. *Thompson*, 389 So. 2d at 199.

In 1987, Thompson filed a successive postconviction motion premised on *Hitchcock v. Dugger*, 481 U.S. 393 (1987). The postconviction court denied relief, but the Florida Supreme Court reversed and remanded for a new penalty phase. *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987). In his 1989 resentencing proceeding, Thompson presented evidence of his intellectual disability through testimony that he was "a slow learner" with "an IQ of seventy-five, had been recommended for special education placement," was "mentally slow," and "retarded." *Thompson v. State*, 619 So. 2d 261, 263-64 (Fla. 1993). The jury recommended death by a bare majority vote of 7 to 5; however, the trial court again imposed death, and the Florida Supreme Court affirmed. *Id.* The 1989 death sentence is at issue in this petition.

b. Postconviction Proceedings

Thompson continued to raise claims concerning his mental health and ability to comprehend in postconviction. The lower court denied his initial motion for postconviction relief, and the Florida Supreme Court affirmed. *Thompson v. State*, 759 So. 2d 650 (Fla. 2000).

On June 12, 2001, then-Governor Jeb Bush signed Florida Statute, section 921.137 (2001) prohibiting the execution of persons with intellectual disability. Two days later, Thompson filed his petition for habeas corpus with the U.S. District Court for the Southern District of Florida. He included two claims challenging the constitutionality of his sentence due to his intellectual disability and the new

Florida law, but these claims were unexhausted in state court. Thompson filed a motion for the court to hold his petition in abeyance as he litigated the issue in state court. The district court denied his motion to stay, reasoning, "[s]taying this petition would delay this Court's decision for an indefinite period of time so that state collateral attacks could proceed." Order Denying Stay and Giving Opportunity for Election at 2, *William Lee Thompson v. Sec'y Fla. Dep't of Corr.*, No. 01-02457-WPD (S.D. Fla. Nov. 21, 2011). Thompson elected to abandon his unexhausted claims.[4]

On November 15, 2001, following the enactment of section 921.137, Thompson timely filed a successive motion for postconviction relief in state court

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[4] The Eleventh Circuit affirmed the District Court's initial dismissal of Thompson's mixed petition, noting: "Even if we assume, for the sake of discussion, that the district court had discretion not to dismiss the mixed petition, we conclude there was no abuse of that discretion. This litigation has been going on for decades." *Thompson v. Sec'y for Dep't of Corr.*, 320 F.3d 1228, 1229 (11th Cir. 2003) *cert. granted, judgment vacated sub nom. Thompson v. Crosby*, 544 U.S. 957 (2005). While the crime occurred in 1976, Thompson's postconviction process on the death sentence at issue began following his direct appeal in 1993. Thompson's prior proceedings were unreliable and have been overturned—they are irrelevant. Thompson filed his initial motion for relief in 1995 and filed his first successive motion promptly after Florida rightly recognized intellectual disability as a bar to execution. Thompson also faced a state circuit court erroneously denying him a hearing, resulting in a back and forth volley between the state circuit court and the Florida Supreme Court, forcing Thompson to refile the same challenges as directed by the Florida Supreme Court. The motion at issue here is Thompson's fourth postconviction motion, not his seventh. More importantly, all of Thompson's postconviction challenges have been proper and timely based on the Florida Rules of Criminal Procedure.

The Eleventh Circuit further reasoned, "In addition, a district court could reasonably believe that these unexhausted claims might properly be brought later in a second or successive petition." Thompson sought review by this Court, and while his petition was pending, this Court issued *Rhines v. Weber*, 544 U.S. 269 (2005). This Court remanded for further review, *Thompson v. Crosby*, 544 U.S. 957 (2005); however, after lengthy litigation, the district court refused to grant a *Rhines* stay and forced Thompson to abandon federal review of his intellectual disability claim. Following the state court's denial of his intellectual disability claim on June 23, 2022, Thompson followed the guidance of the Eleventh Circuit and filed an application for leave to file a second or successive petition for writ of habeas corpus. The Eleventh Circuit denied his application on August 3, 2022.

asserting intellectual disability as a bar to execution. Six days later this Court granted certiorari review in *Atkins v. Virginia*, 533 U.S. 976 (2001).

c. *Atkins v. Virginia*: Intellectual Disability as a Cognizable Claim

In 2002, this Court issued *Atkins*, holding that the Eighth and Fourteenth Amendments prohibit a state from executing an individual who is intellectually disabled. 536 U.S. 304 (2002). *Atkins* left to the states the task of defining intellectual disability. *Id.* Thompson timely amended his state postconviction motion to include this Court's authority in support of his claim that he was constitutionally ineligible for the death penalty. In 2007, amidst Thompson's litigation, the Florida Supreme Court issued *Cherry v. State*, 959 So. 2d 702, which set Florida as an outlier in death penalty jurisprudence by requiring a capital defendant to present an IQ score of 70 or below as an indispensable fact to be proven in order to establish intellectual disability.

i. 2009 State Court Evidentiary Hearing

The state circuit court conducted an evidentiary hearing[5] in 2009, at which Thompson established that school officials observed signs of intellectual disability at an early age. The school told Mrs. Thompson, as early as preschool, that her son was mildly intellectually disabled. At age five, Thompson took the Stanford-Binet

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[5] To get this hearing, Thompson had to obtain from the Florida Supreme Court three successive remands to the state circuit court. *See Thompson v. State*, 880 So. 2d 1213 (Fla. 2004); *Thompson v. State*, SC05-279, 962 So. 2d 340 (Fla. 2007) (unpublished table opinion); *Thompson v. State*, 3 So. 3d 1237, 1238 (Fla. 2009) (citations omitted).

The Defense presented Faye Sultan, Ph.D. and Bill Weaver, Thompson's special education teacher, and attempted to present Stephen Greenspan, Ph.D. The hearing was rife with rulings limiting Thompson's presentation of evidence.

IQ test and achieved a full-scale IQ score of 75. Three years later he scored 74 on the same test (A25).

In 1961, school officials identified Thompson as an "educable mentally retarded" (EMR) student. The school placed him in EMR classes where he remained through fourth grade, but the family subsequently moved to a school that did not offer a special education program. Thompson obtained Ds and Fs in mainstream classes. He was held back three times (in first, fifth, and eighth grade), although the school frequently "placed" Thompson in the next grade even though he could not comprehend the curriculum. Thompson dropped out of school just before ninth grade. He was 18 at the time, yet his classmates were only 14 (*See* 2009 T1 39-40; 50; 70).

Thompson presented Faye Sultan, Ph. D. a clinical and forensic psychologist, who opined that based on her review of records, witness interviews, and WAIS-IV administration on which Thompson obtained a full-scale IQ score of 71, Thompson met the diagnostic criteria for intellectual disability. At age fifty-seven, Thompson functioned at the same intellectual level as he was at age ten; as he got older, "the discrepancy between his chronological age and his mental age grew." (2009 T1 107-08). She noted Thompson had the mental skills of roughly a twelve-year-old, which are reading and writing grammatically correct sentences and paragraphs on a sixth to seventh-grade level (2009 T1 108).

The State presented Gregory Prichard, Psy.D. Prichard administered the Stanford-Binet, Fifth Edition (SB-5). He gave the test sixteen days after Sultan

administered the WAIS-IV, which is widely recognized as improper because it risks artificially inflating the subject's IQ score due to the practice effect. Prichard's administration resulted in Thompson achieving a full-scale IQ score of 88, an outlier among Thompson's scores. Prichard did not conduct any adaptive deficits analysis and did not interview any witnesses because he believed Thompson failed to meet the *Cherry* standard. He based his opinion on "'common-sense,' his interactions with Thompson, and a review of Thompson's records" to opine that Thompson was not intellectually disabled because of his "ability to enlist in the Marines, obtain his GED, and work as a security guard, cook, roofer and truck driver." (A23).

Thompson sought to present Stephen Greenspan, Ph.D., a nationally recognized expert on intellectual disability, to explain the meaning and significance of Thompson's IQ scores over his lifetime and a general explanation to the court of the medically accepted consensus on evaluating individuals with intellectual disabilities. The court excluded Greenspan's testimony because he had not evaluated Thompson. Had Thompson been able to present Greenspan's testimony, Greenspan would have explained the relationship between IQ scores and adaptive functioning, "including how significant deficits in adaptive functioning can affect a full-scale IQ score." (A26). This testimony, based on established scientific principles, would have rebutted Prichard's testimony and established that the evidence Thompson presented "was more supported by the facts and data than [the findings of] Dr. Prichard." (A23).

ii. 2009 State Court Order Denying *Atkins* Relief

The state circuit court denied Thompson's motion relying on the now-unconstitutional standard established in *Cherry*. *Thompson*, 41 So. 3d 219. Almost exclusively addressing only the first prong of the three-prong standard, the court found, "[e]very expert, including Dr. Sultan, testified that Defendant's IQ is above 70. That would put the Defendant in the borderline category, which is not mentally retarded." (A42). As for the remaining two criteria, the court did not conduct any analysis. Noting the strict limitations in *Cherry*, the court stated that when a defendant "does not meet the first prong . . . we do not consider the [other] two prongs . . . ." (A41).

On appeal, the Florida Supreme Court affirmed, holding "that there is competent, substantial evidence to support the circuit court's factual findings that Thompson is not mentally retarded, based on this [c]ourt's definition of the term as set forth in *Cherry*." *Thompson v. State*, SC09-1085, 41 So. 3d 219 (Fla. 2010) (unpublished table opinion).

d. *Hall v. Florida*: Precluding Thompson from a "fair opportunity to show that the Constitution prohibits his execution" would result in manifest injustice.[6]

On May 27, 2014, this Court in *Hall* held the *Cherry* standard unconstitutional,[7] finding that the Florida Supreme Court interpreted its statute in

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[6] *Thompson*, 208 So. 3d at 50. (Appendix D).

[7] In the seven-year span between *Cherry* and *Hall*, capital defendants around the State, including Thompson, were denied relief under an unconstitutional doctrine. The *Cherry* opinion and the rule it announced have been widely criticized by legal scholars and experts in intellectual disability. *See* John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 697 (2009) ("*Cherry* illustrates a recurring problem after *Atkins*: the failure of courts to apply the standard error of measurement and other practice effects to all IQ

violation of the Eighth Amendment "[b]y failing to take into account the standard error of measurement [inherent in IQ testing], [such that] 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." 572 U.S. at 724. On remand in *Hall v. State*, 201 So. 3d 628 (Fla. 2016), the Florida Supreme Court acknowledged it had wrongly "disregard[ed] established medical practice in two interrelated ways." 201 So. 3d at 634. After recognizing that its interpretation of section 921.137 of the Florida Statutes was inconsistent with the medical community's diagnostic framework, the court agreed that "fixed number IQ scores" are not determinative of intellectual disability. *Id.* Rather, "Florida courts must also use other indicative evidence such as past performance, environment, and upbringing," in order to properly adjudicate a claim of intellectual disability. *Id.*

As a result of *Hall v. Florida*, both this Court and the Florida Supreme Court remanded cases to lower courts for further evidentiary development or imposition of a life sentence to ensure capital defendants received a "fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724. *See, e.g.*, *Hall v.*

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scores."); James W. Ellis, Caroline Everington, and Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1305, 1357-1360 (2018); Lois A. Weithorn, *Conceptual Hurdles to the Application of Atkins v. Virginia*, 59 Hastings L. J. 1203, 1228-1234 (2008); Sarah E. Warlick and Ryan V.P. Dougherty, *Hall v. Florida Reinvigorates Concept of Protection for Intellectually Disabled*, 29-Winter Criminal Justice 4 (2015).

By 2013, Florida courts had denied every single *Atkins* claim presented. John H. Blume et. al., *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 Wm. & Mary Bill Rts. J. 393, 412 (2014) (of the 24 intellectual disability cases identified, every single case had been denied on the merits).

State, 201 So. 3d 628 (remanded to the lower court for imposition of a life sentence); *see also Haliburton v. Florida*, 574 U.S. 801 (2014); *Haliburton v. State*, 163 So. 3d 509 (Fla. 2015); *Franqui v. State*, 211 So. 3d 1026 (Fla. 2017); *Nixon v. State*, SC15-2309, 2017 WL 462148 (Fla. Feb. 3, 2017); *Walls v. State*, 213 So. 3d 340 (Fla. 2016), *cert. den'd*, 138 S. Ct. 165 (2017); *Oats v. State*, 181 So. 3d 457 (Fla. 2015). Mr. Thompson's case fell into this category (A18).

In 2015, Thompson timely filed the successive postconviction motion at issue, in which he argued that the circuit court's initial assessment of his *Atkins* claim improperly relied on the unconstitutional rule announced in *Cherry* and rejected in *Hall*. He requested an evidentiary hearing where he could present evidence that he meets all three prongs of the intellectual disability standard. Relying on the record and order from the 2009 proceedings denying Thompson's claim based solely on *Cherry* and further argument at the case management conference, the circuit court, with a new postconviction judge presiding, ruled that indeed "the requirements of *Hall* were met." *State v. Thompson*, No. 76-3350B (Fla. 11th Cir. Ct. July 10, 2015), *rev'd, Thompson*, 208 So. 3d 49.

On appeal, the Florida Supreme Court reversed and remanded for an evidentiary hearing "to be conducted pursuant to the [Court's] holding in *Hall* and this [c]ourt's holding in *Oats*," (A26). Expressly finding that the requirements of *Hall* were in fact not met, the court noted,

> Although Thompson has had a broad range of IQ scores over his lifetime, he received several IQ scores below 75, and in 2009 the defense expert tested him with a score of 71. In reviewing the history of this case, it is clear that

> Thompson did not receive the type of 'conjunctive and interrelated assessment' that *Hall* requires, as more recently set forth in *Oats v. State*.

(A18) (citations omitted). The court unequivocally determined that "Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores established by this [c]ourt in *Cherry*," (A24), and therefore he had been deprived of a full and fair hearing:

> Simply put, it is impossible to know the true effect of this [c]ourt's holding in *Cherry* on the circuit court's review of the evidence presented at Thompson's intellectual disability hearing, particularly on Thompson's range of IQ scores from 71–88. What is clear is that this [c]ourt instructed the circuit court to conduct Thompson's intellectual disability hearing pursuant to *Cherry*, a case that has since been abrogated by the United States Supreme Court in *Hall*. The circuit court took *Cherry* into consideration at Thompson's intellectual disability hearing and in denying Thompson's intellectual disability claim, and this [c]ourt relied on *Cherry* to affirm the circuit court's order. Because of this reliance on *Cherry's* bright-line cutoff of 70 for IQ scores, Thompson has yet to have "a fair opportunity to show that the Constitution prohibits [his] execution." *Hall,* 134 S. Ct. at 2001.

(A26). The court issued its mandate on February 6, 2017.

In October 2016, one month prior to remanding Thompson's case, the Florida Supreme Court had determined that *Hall* was retroactive to cases where death-sentenced individuals had timely raised intellectual disability as a bar to execution, entitling them to have a holistic assessment of their claim under the appropriate clinical definitions and constitutional standards. *Walls*, 213 So. 3d 340. In Thompson's case, the Florida Supreme Court noted while it had "determined that

Hall is retroactive utilizing a *Witt*[8] analysis, [failing] to give Thompson the benefit of ***Hall***, which disapproved of ***Cherry***, would result in a manifest injustice, which is an exception to the law of the case doctrine." (A18) (citations omitted) (emphasis added). Thus, Thompson was given *Hall* relief premised not only on *Walls* but on the recognition that a manifest injustice would result were he to be denied a new hearing under the principles announced in *Hall*.

i. *Phillips v. State*: The Florida Supreme Court recedes from *Walls v. State*.

On May 21, 2020, the Florida Supreme Court *sua sponte* revisited *Walls* in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). After a shift in the Florida Supreme Court's composition, the court receded from *Walls* and held that *Hall* does not apply retroactively. *Id.* at 1024 The majority said nothing about manifest injustice or the effect the decision would have on cases like Thompson's.

Justice Labarga, the only remaining Justice who was in the majority in *Walls,* dissented. Labarga wrote that "[y]et again, this [c]ourt has removed an important safeguard in maintaining the integrity of Florida's death penalty jurisprudence. The result is an increased risk that certain individuals may be executed, even if they are intellectually disabled[.]" *Phillips*, 229 So. 3d at 1024. The majority's decision produces an "arbitrary result" where an intellectually disabled capital defendant is "completely barred from proving" his intellectual disability

[8] *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980) (establishing Florida's retroactivity standard in holding that a change in law can be raised in postconviction if it: "(a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance . . . .").

"because of the timing of his legal process." *Id.* at 1025. Jsutice Labarga further noted this Court's admonition, that "states do not have 'unfettered discretion to define the full scope of the constitutional protection.'" *Id.* (quoting *Hall*, 572 U.S. at 702). He rejected the majority's conclusion that "*Hall* was a mere procedural evolution in the law" and argued that Equal Protection concerns were raised because some capital defendants had received the benefits of *Hall*, but similarly situated others would not, based on mere happenstance. *Id.* at 1025-26; *see, e.g.*, *Herring v. State*, SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017) (declining to remand for a new evidentiary hearing as IQ scores of 80, 81, 72, and 76, clearly establish intellectual disability within the meaning of *Hall* and thus reversing for the imposition of a life sentence); *Cherry v. Jones*, 208 So. 3d 701 (Fla. 2016) (imposing a life sentence in light of 72 IQ score).

ii. After *Phillips*, the State Urges the Lower Court to Disregard the Mandate in Thompson's case and Dismiss Thompson's Motion.

The parties were scheduled to begin depositions of experts in June of 2020 when the State filed its "Motion for Reconsideration and Request to Deny Defendant's Seventh Motion for Postconviction Relief Pursuant to *Phillips v. State*." Misconstruing the Florida Supreme Court's 2016 opinion, the State argued that because Thompson's case was remanded "solely based on the Florida Supreme Court's opinion announced in *Walls v. State*, that *Hall v. State* [sic] was retroactive," in light of *Phillips*, Thompson was no longer entitled to his mandated hearing (A28) (citations omitted). The State requested that the lower court reinstate the previously invalidated Order authored by the prior circuit court judge in 2009,

calling it "controlling" and reliable because it had "already been affirmed by the Florida Supreme Court in 2010." (A29).

In response, Thompson argued as a threshold matter that the circuit court was required to deny the State's motion. The court did not have the authority to simply reinstate the previously vacated 2009 Order and disregard the Florida Supreme Court's mandate, issued more than three years prior, commanding the circuit court to hold an evidentiary hearing (A33). Thompson also reminded the circuit court that the 2009 Order was upheld based on an objectively unreasonable application of clearly established federal law as set out by the Florida Supreme Court. "It is clear that Thompson's previous hearing on intellectual disability was tainted by the bright-line cutoff of 70 for IQ scores established by this Court in *Cherry*, which was abrogated by *Hall*." (A67).

The circuit court did not hold the mandated evidentiary hearing and instead adopted the State's argument and relied on the record and findings from the 2009 hearing:

> In this regard, however, this [c]ourt believes that Mr. Thompson has had the full, comprehensive evidentiary review of his claim before a predecessor Judge, and, thereafter, by this [c]ourt, who relied on the entire record and transcript of the prior proceeding, heard additional witness testimony and additional argument and assessed Mr. Thompson's intellectual disability claim under the requisite legal and constitutional standard.

(A7). The circuit court granted the State's motion to dismiss holding "this [c]ourt believes that it is proper to follow the existing law enunciated in *Phillips* – that *Walls* was erroneously decided, and that the *Hall* decision is not to be applied

retroactively to intellectually disabled defendants."[9]

iii. 2022 Florida Supreme Court Opinion at Issue

On appeal, Thompson argued that the Florida Supreme Court in *Phillips* erred in holding that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague v. Lane,* 489 U.S. 288 (1989). He asserted that the court's opinion in *Phillips* was premised on an erroneous understanding of *Hall v. Florida*, and he urged the Florida Supreme Court to consider that applying *Phillips* to his case would result in a death penalty system that violates due process as well as the Eighth Amendment prohibition against arbitrary imposition of the death penalty and equal protection of the laws (A147-48).[10]

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[9] In anticipation of the mandated evidentiary hearing, Thompson had provided reports from two experts: Dr. Robert Ouaou and Dr. Gale Roid. Dr. Ouaou conducted interviews of some of the same witnesses as Dr. Sultan, who testified in the previous hearing, plus a childhood friend Glen Anderson. In these interviews, Ouaou utilized the Adaptive Behavior Diagnostic Scale ("ABDS") (2016), a testing instrument to determine the presence and magnitude of adaptive deficits. He concluded that Thompson exhibits clear deficits in adaptive functioning. Ouaou opined that the deficits are significant (A97).

Thompson retained Gale Roid, Ph. D., author of the SB-5 with more than 50 years of experience in assessment psychology, to review Prichard's 2009 administration of that testing instrument. Roid noted in his report that he discovered several red flags and errors that rendered Prichard's testing—the score relied upon by the 2009 postconviction court—invalid and unreliable, resulting in Thompson's IQ score being artificially inflated by at least 12 points (*See* A102). Despite notice to the state circuit court that the State was relying solely on an expert whose testing was called into question, the court summarily denied Thompson's claim.

[10] Relying on companion cases, *Okafor v. State*, 306 So. 3d 930 (Fla. 2020) and *State v. Jackson*, 306 So. 3d 936 (Fla. 2020), Thompson argued that the lower court was without authority to disregard a duly issued mandate of the Florida Supreme Court (A154-65). Both Mr. Jackson and Mr. Okafor were granted new penalty phase proceedings in light of this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016) and the Florida Supreme Court's decision on remand in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Following the change in the Florida Supreme Court, in January of 2020, the court issued *Poole v. State*, 297 So. 3d 487 (Fla. 2020), in which the court receded from its *Hurst v. State* decision and determined *Hurst* error was no longer retroactive to capital defendants on collateral review. The State immediately moved to reinstate the death sentences in both cases. The Florida Supreme

Thompson maintained that if given a hearing that comports with the requirements of *Hall*, he would present evidence that he is intellectually disabled under sound clinical and legal standards. Further, he argued that the denial of this meaningful opportunity would violate his Fifth and Eighth Amendment rights and create an undue risk that the State of Florida will execute an intellectually disabled person (A166).

The Florida Supreme Court affirmed the lower court's denial of Thompson's motion, holding that its decision in *Phillips* receding from *Walls* constituted an intervening change in the law such that Thompson is no longer entitled to the retroactive application of *Hall v. Florida*. The court declined to engage in any discussion of the circuit court's intellectual determination (A11). This petition follows.

Court held that such reinstatement would be impermissible.

In *Okafor*, the Florida Supreme Court reaffirmed that where an appellate court issues a mandate, "it is a bedrock principle" that the judgment is final. 306 So. 3d at 933 (citing *O.P. Corp. v. Village of North Palm Beach*, 302 So. 2d 130, 131 (Fla. 1974)). "An appellate court decision ordinarily becomes final when the appellate court issues a document known as a mandate." *Id.* (quoting Philip J. Padovanao, *Florida Appellate Practice* § 20:8 (2020 ed.)). In *Jackson*, the court noted that the State's requested relief was "grounded in the notion that the circuit court has the inherent authority to reconsider the final order that vacated Jackson's sentences." 306 So. 3d at 939. It recognized that "a 'trial court retains inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order terminating an action,'" *id*, but it held "'that an order disposing of a postconviction motion which partially denies and partially grants relief is [not a nonfinal ruling but is] a final order for purposes of appeal, even if the relief granted requires subsequent action in the underlying case, such as resentencing" *id.* at 941.

REASONS FOR GRANTING THE WRIT

For seven years the Florida Supreme Court employed an unconstitutional rule in determining intellectual disability, rendering the Eighth Amendment protections established in *Atkins v. Virginia* futile. This Court was forced to correct that error in *Hall v. Florida*, yet the Florida Supreme Court is now defying *Hall* and once again undermining the very tenets of *Atkins* and Eighth Amendment jurisprudence.

Granting review in this case is not engaging in error correction but is instead the Court's opportunity 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.[11] If on each occasion when this Court

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[11] At the time of *Hall*, it appeared at least six states in addition to Florida—Kentucky, Alabama, Arizona, Kansas, North Carolina and Nebraska—did not consider the standard error of measurement (SEM) in adjudicating the issue of subaverage intellectual functioning. *See Hall*, 572 U.S. at 714–15. Despite medical and scientific literature establishing that consideration of the SEM is a "critical consideration that must be part" of the diagnosis, American Association on Mental Retardation, Mental Retardation: Definition, Classification and Systems of Supports 37 (9th ed. 1992), there has been no reported data showing how many *Atkins* claims were lost due to the misunderstanding of SEM or how many of the same were abandoned due to counsel's failure to consider the SEM.

There were no pre-*Hall* appellate decisions authoritatively resolving the SEM question in several of these states. *Hall*, 572 U.S. at 716. Yet, we do know that nationwide 31% of the *Atkins* losses between mid-2002 and the end of 2013 rested solely upon adverse appellate findings on the intellectual-deficits prong of the three-pronged orthodox diagnostic formula and that 29% of these cases in turn involved average IQ scores below 75. And the study which documents these figures mentions at least two such cases—*State v. Elmore*, No. 2005-CA-32, 2005 WL 2981797 (Ohio App. Nov. 3, 2005), and *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009)—in which the SEM was erroneously disregarded in a State other than those identified by *Hall*

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.

This case presents questions of great importance for this Court regarding the analysis of a state court's duty to give retroactive effect to a federal constitutional holding. This area of the law remains complicated and unclear to many lower courts and practitioners. This petition is an ideal vehicle for addressing the Florida Supreme Court's error, and it presents a question of life-or-death importance for Thompson and for the other death-row inmates in Florida whose claims have been denied premised on the same incorrect application of *Hall*.

1. The Florida Supreme Court's Refusal to Apply *Hall* to Cases on Collateral Review Defies this Court's Precedents.

Under federal law, *Hall* followed the settled rule of *Atkins* and therefore applies to cases on direct review and collateral review alike.

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

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as treating an IQ above 70 as precluding *Atkins* relief. Blume, *supra* note 7, at 400-04; *see Hall*, 572 U.S. at 714–17.

> 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. The Supremacy Clause requires state courts, no less than federal courts, to apply settled federal rules to cases adjudicating federal claims on collateral review.

Under *Teague*, if an intervening decision applies a new rule, "a person whose conviction is already final may not benefit from the decision" on collateral review unless an exception applies. *Id.* at 347; *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021). By contrast, if an intervening decision applies an "old" or "settled" rule, the decision "applies both on direct and collateral review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *see Chaidez*, 568 U.S. at 347.

In the context of decisions that apply settled rules, the concept of retroactivity is irrelevant. When an intervening decision of this Court merely applies "settled precedents" in a new factual context, "no real question" arises "as to whether the later decision should apply retrospectively." *Yates v. Aiken*, 484 U.S. 211, 216 n.3 (1988) (quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)). Instead, it is "a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.* (quoting *Johnson*, 457 U.S. at 549).

2. *Hall* Did Not Announce a New Rule

The Florida Supreme Court's opinion in *Phillips*, which was the basis for the decision below, ignored any discussion of whether the rule of *Hall* was new. Instead,

it focused entirely on whether it was procedural. In failing to ask at the outset of its *Teague* analysis whether the rule of *Hall* was new, the court erroneously concluded that *Hall* was non-retroactive.

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

Atkins and *Hall* fit 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] 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.*

In *Hall v. Florida*, this Court stated with deliberate precision the issue it decided: "The question this case presents is how intellectual disability must be defined in order to implement these principles and the holding of *Atkins*." 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. This kind of correction does not create a new rule but rather safeguards compliance with the preexisting rule. 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." 572 U.S. at 720-21.

It was *Atkins* that made the rule applied in *Hall*, and the *Atkins* opinion itself indicated that an I.Q. below 70 did not exclude a finding of intellectual disability. The *Atkins* 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.

Certiorari to review the Florida Supreme Court's misconception of *Hall* is more imperative because the Eleventh Circuit offers no redress for Florida inmates who are denied relief on the basis of that misconception. Notwithstanding the clear instruction of *Chaidez*, the Eleventh Circuit has classified 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., dissenting) (questioning whether rule of *Hall* was new); *see also Kilgore v. Sec'y, Fla. Dep't of*

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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.* at 719-720. The *Henry* opinion also said:

> 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).

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").

The Eleventh Circuit is alone in this position. In decisions both favoring and adverse to capital defendants asserting intellectual disability as a bar to execution, courts in the 6th, 7th, 8th, 9th, and 10th Circuits have determined that the *Hall* rule is not new. *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. 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); *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. 2014), *cert. den'd*, 574 U.S. 1057 (2014) (same).

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* lacked any consideration of whether the *Hall* rule was new within the meaning of *Teague*. The opinion below simply cites *Phillips*. Although this Court has long said that it reviews state court judgments not opinions, *e.g., Williams v. Norris*, 25 U.S. 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.

The Court was well aware when it decided *Atkins*[13] that the clinical community had robust literature dating back to the 1930's recognizing the importance of reading IQ test scores with an understanding of the standard error of measurement surrounding the results.[14]

> 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).[15]

The meaning of "intellectually disabled" is the same as it was the day this Court issued *Atkins*, yet Thompson has been continually denied the opportunity to have his claim judged under the correct standard because the Florida Supreme

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[13] *See* Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law as Amici Curiae 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.

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

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

Court concluded in the opinion below that it need not rectify an error of federal constitutional law that it made in 2007 and that this Court corrected in 2014.

3. State Postconviction Courts Must Give Effect To This Court's Decisions Applying Settled Rules.

The inherently unbounded, makeshift nature of Florida's law of the case rules and the result-oriented way in which the Florida Supreme Court applies them create an arbitrary system hindering the implementation of federal constitutional rights.

Following this Court's decision in *Hall v. Florida*, the Florida Supreme Court in *Thompson* unequivocally found:

> Not only have we determined that *Hall* is retroactive utilizing a *Witt* analysis, [. . .], but to fail to give Thompson the benefit of *Hall*, which disapproved of *Cherry*, would result in a manifest injustice, which is an exception to the law of the case doctrine.
>
> [. . .]
>
> Because Thompson's eligibility or ineligibility for execution must be determined in accordance with the correct United States Supreme Court jurisprudence, this case is a prime example of preventing a manifest injustice if we did not apply *Hall* to Thompson.

(A18) (citations omitted) (emphasis added). Five years later, the Florida Supreme Court relied on its own recent decision in *Phillips v. State* and offered a different justification for disregarding the law-of-the-case-rule.

> [The law of the case] doctrine "requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). However, we have recognized exceptions to the doctrine, including

> where there has been an intervening change of controlling law. *Wagner v. Baron*, 64 So. 2d 267, 268 (Fla. 1953) (noting that the law of the case doctrine "must give way where there has been a change in the fundamental controlling legal principles").
>
> Such a change occurred when we decided in *Phillips* that *Hall* did not warrant retroactive application.

(A13).

Florida's law of the case doctrine is featured in the leading case of *Strazulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965):

> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to 'the law of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons—and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule.

(emphasis added).

The "matter of grace" not "matter of right" framework gives the Florida Supreme Court the power to turn the law-of-the-case rule on and off at will, subject to no regular legal constraint. *See also, e.g., Brunner Enterprises, Inc. v. Department of Revenue*, 452 So. 2d 550, 552-553 (Fla. 1984) ("As stressed in *Strazulla*, no party is entitled as a matter of right to have the law of the case reconsidered, and a change in the law of the case should only be made in those situations where strict adherence to the rule would result in 'manifest injustice.'"); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1266-1267 (Fla. 2006); *Greene v. Massey*, 384 So. 2d 24, 28 (Fla. 1980); *Van Poyk v. Singletary*, 715 So. 2d 930, 940

(Fla. 1998) (Anstead, J., joined by Kogan, C.J. and Shaw, J., concurring) (writing that "perhaps most unsettling of all, the majority opinion, in casually casting aside our prior holding, disregards the important and stabilizing legal doctrine of the law of the case without so much as a hint of explanation or justification").

Thompson's case illustrates the Florida Supreme Court's practice of invoking one exception or another to meet the court's desired outcome. In 2016, the court relies on *Walls* to hold that its 2010 rejection of Thompson's intellectual-disability claim under *Cherry* would not be treated as the law of the case, because that would constitute a "manifest injustice" after *Hall*; then in 2022, the court – with changed personnel having a different agenda – relies on *Phillips* to hold that its 2016 decision giving Thompson the benefit of *Hall* would not be treated as the law of the case because *Phillips* represented "a change in the fundamental controlling legal principles."[16] (A13).

In other words, the Florida Supreme Court first found that strict adherence to a prior ruling premised on an unconstitutional rule would have resulted in "manifest injustice" because it would deny Thompson a full and fair hearing to establish that the federal constitution categorically prohibits his execution. Yet, in 2022, the court decided Thompson is not entitled to a full and fair hearing solely because the clarification in *Hall* is not retroactive to him, notwithstanding that his

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[16] Thompson emphasized below that *Phillips v. State* was not an intervening change in the law as applied to his case because the Florida Supreme Court's 2016 opinion granting Thompson evidentiary development on his intellectual disability claim did not rely on *Walls v. State* and instead was rooted in avoiding manifest injustice (A68). Thompson must be given a full and fair opportunity to present his claim notwithstanding the court's treatment of *Walls*.

prior ruling is constitutionally infirm. Any concerns of a manifest injustice inexplicably evaporated. In the time between the Florida Supreme Court's decisions at issue, there was no change in the facts or change in established constitutional protections. But because of a change in the composition of the court, Florida no longer favored this Court's federal ruling in *Hall.*

The Florida Supreme Court cannot pick and choose which federal law it will implement. On the contrary, "[s]tates are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (emphasis added). In *Yates v. Aiken*, this Court rejected the argument that a state may provide a forum for adjudicating federal constitutional claims on collateral review but then "refuse to apply" a decision of this Court involving a settled rule. 484 U.S. at 217. Florida, having opened its collateral review proceedings to federal constitutional claims, must at least meet federal requirements when applying settled federal rights on collateral review. *See id.*; *Danforth*, 552 U.S. at 288.

The issue here is akin to that in that which certiorari has been granted in *Cruz v. Arizona*, No. 21-846. The "in unusual circumstances and for the most cogent reasons" language in *Strazulla* defining Florida's rule has much in common with the Arizona Supreme Court's law-of-the-case exception. In both *Thompson* and *Cruz*, a state court has barred a federal claim through the application of an amorphous law-of-the-case rule, which is subject to manipulation whenever the state courts are hostile to the federal right at stake.

In *State v. Cruz*, 487 P.3d 991 (Ariz. 2021), the Arizona Supreme Court framed the issue as:

> A defendant is generally precluded from seeking collateral review of a matter he could have raised during his direct appeal. Ariz. R. Crim. P. 32.2. One exception is when there is a significant change in the law which, if applicable to his case, would probably overturn his judgment or sentence. Ariz. R. Crim. P. 32.2(g). In this matter, we determine whether *Lynch v. Arizona* (*Lynch II*) . . . , which held that this Court misapplied *Simmons v. South Carolina*, . . . was such a significant change in the law.

487 P.3d at 992. The court held that Arizona Criminal Rule 32 barred Cruz's *Simmons* claim because "[a] significant change in the law pursuant to Rule 32.1(g) 'requires some transformative event, a clear break from the past,'" 487 P.3d at 994, and "*Lynch II* did not declare any change in the law representing a clear break from the past." *Id.* In granting certiorari, this Court has rewritten the Question Presented as: "Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.2(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment."

Thompson is like *Cruz* inasmuch as in both cases a state's highest court has turned away a federal claim by applying a state issue-preclusion rule that is administered through a verbal formula or formulas that enable the state courts to turn the rule off-and-on at will to suit their result-directed predilections.

Only a "firmly established and regularly followed state practice . . . can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). This Court's analysis on this issue is often conceptualized

as whether a state court's rejection of a federal claim is based on an "adequate and independent" state-law ground of decision. If it is, this Court lacks jurisdiction to review it. If it is not, this Court can review the merits of the claim on a petition for certiorari coming up from the state's highest court. *See id.*; *Barr v. City of Colombia*, 378 U.S. 146 (1964) (state procedural rules not strictly followed may be subject to federal review); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964) (state procedural rule subject to review when state fails to apply with "pointless severity shown here"). Because federal law is dispositive here, this Court has jurisdiction to review the judgment below even though the Florida Supreme Court entirely failed to address federal law. It is "well settled that the failure of the state court to pass on the Federal right" renders its decision reviewable where "the necessary effect of the judgment is to deny a Federal right." *Chi., B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 580 (1906) (Harlan, J.); *see also Young v. Ragen*, 337 U.S. 235, 238 (1949) ("[I]t is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a Federal right.").

CONCLUSION

The necessary effect of the decision below was to deny Thompson the federal right announced in *Atkins* and affirmed in *Hall*. That decision is subject to this Court's review.

Respectfully submitted,

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