DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

HARRY FRANKLIN PHILLIPS

Petitioner,

vs.

RICKY D. DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the denial of a Certificate of Appealability (COA) on the denial of a motion that seeks to amend a habeas petition pending on appeal – which is an issue that has generated a broad and sharp circuit split - violates this Court's precedent and 28 U.S.C §2253 as an issue that generates a circuit split is by definition, debatable among jurists of reason.

2. 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.

Subsequently, the Eleventh Circuit held that *Hall* announced a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. *In re Henry*, 757 F.3d 1151, 1158-59 (11th Cir. 2014). In *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), the Florida Supreme Court made the same determination and denied petitioner's intellectual disability claim. *Id.* at 1024.

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 Florida Supreme Court 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.

PARTIES TO THE PROCEEDINGS

Petitioner Harry Franklin Phillips was the petitioner in the district court and the appellant in the United States Court of Appeals for the Eleventh Circuit.

Respondent Ricky D. Dixon, Secretary, Florida Department of Corrections, was the respondent in the district court and the appellee in the United States Court of Appeals for the Eleventh Circuit.

NOTICE OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), these are related cases:

Underlying Trial:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 1, 1984

Direct Appeal:
Florida Supreme Court
Phillips v. State, 476 So.2d 194 (Fla. 1985)
Judgment Entered: August 30, 1985

Habeas Corpus After Death Warrant Signed:
Florida Supreme Court
Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987)
Judgment Entered: November 19, 1987

First Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: February 13, 1989

Florida Supreme Court
Phillips v. State, 608 So.2d 778 (Fla. 1992)
Judgment Entered: September 24, 1992

Supreme Court of the United States
Phillips v. Florida, 509 U.S. 908 (1993)
Judgment Entered: June 21, 1993

Resentencing Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 20, 1994

Second Direct Appeal:
Florida Supreme Court
Phillips v. State, 705 So.2d 1320 (Fla. 1997)
Judgement Entered: September 25, 1997

Supreme Court of the United States
Phillips v. Florida, 525 U.S. 880 (1998)
Judgment Entered: October 5, 1998

Second Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: August 28, 2000

Florida Supreme Court
Phillips v. State, 894 So.2d 28 (Fla. 2004)
Judgment Entered: As Revised on Denial of Rehearing, January 27, 2005

Third and Fourth Postconviction proceedings:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: October 23, 2004

Postconviction Proceeding on Intellectual Disability
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: May 5, 2006

Florida Supreme Court
Unpublished order, Case No. SC04-2476
Judgment Entered: June 21, 2007

Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: September 24, 2007

Florida Supreme Court
Phillips v. State, 984 So.2d 503 (Fla. 2008)
Judgment Entered: March 20, 2008

Florida Supreme Court
Phillips v. State, 996 So.2d 859 (Fla. 2008)
Judgment Entered: September 23, 2008

Fifth Postconviction Proceeding:
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: January 27, 2011

Florida Supreme Court
Unpublished Order, Case No. SC11-472
Judgment Entered: April 26, 2011

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (S.D. Fla. Nov. 19, 2015), as corrected.
Judgment Entered: November 19, 2015

United States Court of Appeals for the Eleventh Circuit
Phillips v. Secretary, Florida Department of Corrections, No. 15-15714-P
Stay Entered: March 2, 2016

Sixth Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: April 27, 2017

Florida Supreme Court
Phillips v. State, 234 So.3d 547 (Fla. 2018)
Judgment Entered: January 22, 2018

Supreme Court of the United States
Phillips v. Florida, 139 S. Ct. 187 (2018)
Judgment Entered: October 1, 2018

Seventh Postconviction Proceeding:
Circuit in and for Miami-Dade County, Florida,
State of Florida v. Harry Franklin Phillips, 83-435
Judgment Entered: June 14, 2018

Florida Supreme Court
Phillips v. State, 299 So.3d 1013 (Fla. 2020)
Judgment Entered: May 20, 2020

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (S.D. Fla. April 11, 2022)

Judgment Entered: Order Denying Motion for Reconsideration, April 11, 2022

United States Court of Appeals for the Eleventh Circuit
Phillips v. Secretary, Florida Department of Corrections, No. 22-11606
Judgment Entered: Order Denying Certificate of Appealability, October 7, 2022

United States Court of Appeals for the Eleventh Circuit
Phillips v. Secretary, Florida Department of Corrections, No. 15-15714
Judgment Entered: Order Denying Certificate of Appealability, October 7, 2022[1]

[1] The Eleventh Circuit separated the case into two cases, 15-15714 and 22-11606. Currently, there are briefs submitted before the Eleventh Circuit for case no. 15-15714 pertaining to a *Giglio*/*Brady* claim.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its order denying a certificate of appealability on October 7, 2022 (A003). On December 23, 2022, Justice Thomas extended the time for filing this petition through February 7, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISONS 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.

28 U.S.C. 2253(c)(2) states in relevant part:

> A certificate of appealability may issue [ ] only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C.A. § 2253

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244 (b) states in relevant part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could

> not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

INTRODUCTION

This case squarely presents an important issue of the standard of granting a COA when the underlying issues have divided the federal courts of appeal. Two courts of appeal have held that while a petition is pending on appeal, an attempt to amend is not a "second or successive" petition. Five circuits have held otherwise and the Eleventh Circuit has not yet squarely ruled on the issue. And the underlying claim Phillips seeks to amend regarding the application of *Hall v. Florida*, 572 U.S. 701, 722 (2014) to that claim, has also divided the courts of appeal and state courts of last resort. . This Court should summarily reverse the Eleventh Circuit's denial of a COA on this issue and remand for the Eleventh Circuit to allow Petitioner to squarely present his claim.

AEDPA entitles every prisoner to "one full opportunity to seek collateral review." *See Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (Sotomayor, J.) (quoting *Littlejohn v. Artuz*, 271 F.3d 360, 363 (2d Cir. 2001)). This Court has never decided when that opportunity ends and the "second or successive" bar is triggered. Consistent with the statutory scheme, courts agree that a filing will not be deemed a

"second or successive" petition unless, at a minimum, an earlier-filed petition has been "finally adjudicated." *See Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016) (citing *Woods v. Carey*, 525 F.3d 886, 889 (9th Cir. 2008); 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 28.3[b], at 1674–75 (7th ed. 2016)). The courts of appeal disagree, however, about what constitutes a final adjudication for these purposes.

Five circuits treat a district court's merits denial of a habeas petition as the "terminal point" and therefore characterize as a "second or successive" petition any effort to amend the underlying petition while review of the denial is pending on appeal. *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012). Those courts, in effect, attach a significant "unstated qualifier" to the "one full opportunity" AEDPA affords: "'one full opportunity to seek collateral review' *in the district court*." *United States v. Santarelli*, 929 F.3d 95, 104 (3d Cir. 2019).

The Second and Third Circuits have reached the opposite conclusion. Writing for a Second Circuit panel, then-Judge Sotomayor explained that "[i]n the AEDPA context, adjudication of an initial habeas petition is not necessarily complete, such that a subsequent filing constitutes a 'second or successive' motion, simply because the district court rendered a judgment that is 'final' within the meaning of 28 U.S.C. § 1291." *See Ching*, 298 F.3d at 178. In the Second Circuit, "so long as appellate proceedings following the district court's dismissal of the initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for 'second or successive' petitions." *Whab v.*

United States, 408 F.3d 116, 118 (2d Cir. 2005); *Santarelli*, 929 F.3d at 105 ("join[ing] the Second Circuit" and rejecting "a rule that would construe as 'second or successive' all habeas petitions filed by a petitioner following a district court's denial of her habeas petition, regardless of whether she has exhausted her appellate remedies"). Thus, Petitioner's claim is highly debatable among jurists of reason.

Further, Petitioner's underlying claim that he is Intellectually Disabled and therefor ineligible for the death penalty is itself meritorious, or, at the very least, debatable among jurists of reason. The Florida Supreme Court's opinion in *Phillips* was itself an unreasonable application of clearly established federal law and served to deny Phillips his clearly established constitutional rights. The Florida Supreme Court's focus that *Hall* was merely procedural resulted in that court's failure to ask at the outset of its *Teague* analysis whether the rule of *Hall* was new and erroneously conclude that *Hall* was non-retroactive. Whether *Hall* is a new rule of constitutional law within the meaning of *Teague*, or is simply an application of the rule of *Atkins* to particular facts, is a question of great importance for this Court to resolve and is debatable among jurists of reason.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. State Court Litigation Concerning Mr. Phillips' Intellectual Disability Claim

Mr. Phillips is an Intellectually Disabled indigent defendant on Florida's Death Row. A jury convicted Mr. Phillips for the tragic 1982 shooting death of Bjorn Svenson, a parole supervisor, based solely on the testimony of four jail house snitches who gave demonstrably false testimony about their interactions with law

enforcement, denied or minimized receiving a benefit for their testimony, and lied about their prior criminal history. There were no witnesses to the crime and no forensic evidence linking Mr. Phillips. The jury recommended death by a bare majority vote of seven to five, and the judge followed this recommendation. *Phillips v. State*, 608 So. 2d 778, 779 (Fla. 1992).

The Florida Supreme Court affirmed Phillips' death sentence on direct appeal. *Phillips v. State*, 476 So. 2d 194 (Fla. 1985). However, in 1992, the Florida Supreme Court granted him collateral relief having found deficient performance by his trial counsel which prejudiced his defense and remanded his case for a new sentencing proceeding in front of a new jury. *Phillips*, 608 So. 2d at 783.

The jury once again returned a recommendation of death by a vote of seven to five. *Phillips v. State*, 705 So. 2d 1320, 1321 (Fla. 1997). The United States Supreme Court denied his petition for writ of certiorari on October 5, 1998. *Phillips v. Florida*, 525 U.S. 880 (1998).

Mr. Phillips subsequently filed a motion for post-conviction relief in state court pursuant to Rule 3.850. *See Phillips v. State*, 894 So.2d 28 (F1a. 2005). That motion was summarily denied and the Florida Supreme Court affirmed. *Id.*

After the Supreme Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment prohibited the execution of Intellectually Disabled persons, Mr. Phillips filed a second successive 3.851 motion pursuant to Florida Rule of Criminal Procedure 3.203 asserting that he was intellectually

disabled and, therefore, the Eighth Amendment barred the State of Florida from executing him.

Following an evidentiary hearing, the post-conviction court denied the motion finding that Mr. Phillips had failed to establish by clear and convincing evidence that he met any of the three prongs required under Florida law. The Florida Supreme Court affirmed. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008); (A0124). The Florida Supreme Court stated as to the first prong, "We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below." (A129). In so doing, the State courts relied on the standard set forth in *Cherry v. State*, 959 So.2d 702, 712 (Fla. 2007), which was subsequently determined to be unconstitutional in *Hall v Florida*, 572 U.S. 701, 722 (2014). ("By failing to take into account the SEM and setting a strict cutoff at 70, Florida goes against the unanimous professional consensus.") (internal quotations omitted).

Additionally, the Florida Supreme Court unreasonably applied clearly established federal law in determining that Phillips did not have adaptive deficits based on his abilities and thought processes in planning the crime. "Phillips's ability to orchestrate and carry out his crimes, his foresight, and his acts of self-preservation indicate that he has the ability to adapt to his surroundings." (A130). "But the medical community focuses the adaptive-functioning inquiry on adaptive deficits," assessing limitations in conceptual, social, or practical adaptive skills. *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017) (emphasis in original).

On February 28, 2018, Mr. Phillips filed another successive 3.851 motion in state court reasserting his claim of Intellectual Disability as a bar to execution relying on this Court's decisions in *Hall* and *Moore*. The State post-conviction court conducted a de novo review of the evidence presented at the 2006 Evidentiary Hearing and also considered a new report, dated April 16, 2018, from defense expert Dr. Keyes. However, this time the post-conviction court "concluded that because *Hall* requires that courts take into account the standard error of measurement (SEM), which is 'plus or minus five points' and '[a]n IQ of up to 75 would meet the definition of [intellectual disability],' Phillips 'has clearly proven the first prong by clear and convincing evidence,' because the IQ scores presented in 2006 were 70, 74, and 75. The circuit court also made a new finding that Phillips met the third prong—onset before age eighteen." (A039). However, the court concluded that Mr. Phillips failed to demonstrate by clear and convincing evidence that he had concurrent adaptive deficits. The court determined that Mr. Phillips' employment history and his planning, executing, and covering up the crime was evidence of adaptive behavior (A053). The court determined that this type of learned behavior suggests "functioning well above" that of an individual with ID (A054). This determination, once again, violated clearly established law in *Moore*. The post-conviction entered its Order denying Mr. Phillips' Motion on June 14, 2018. (A049).

Mr. Phillips timely appealed arguing that the post-conviction court unreasonably applied *Moore* when it assessed Mr. Phillips' adaptive functioning based on his perceived strengths and criminal behavior.

On May 21, 2020, the Florida Supreme Court affirmed the postconviction court and in so doing, without briefing from either party, receded from "*Walls [v. State*, 213 So.3d 340 (2016)] and [held] that *Hall* does not apply retroactively," because *Hall* announced a new rule. *Phillips v. State*, 299 So.3d 1013, 1024 (2020); (A036).

Mr. Phillips timely filed a motion for rehearing arguing that the Florida Supreme Court's sua sponte ruling determining that *Hall v. Florida*, 572 U.S. 701 (2014) announced a new non-watershed rule for Eighth Amendment purposes was flawed in several significant respects and would result in an unconstitutionally arbitrary system that creates a grave and unacceptable risk that Florida will execute persons with intellectual disability in violation of the Eighth Amendment, including Mr. Phillips, while similarly situated others have received the benefits of *Hall*. On August 14, 2020, the Florida Supreme Court denied Mr. Phillips' motion for rehearing (A034).

II. Federal Court Litigation Concerning Mr. Phillips' Intellectual Disability Claim

On Dec. 10, 2008, Mr. Phillips filed his habeas petition with in the District Court for the Southern District of Florida. In Claim V of his Petition, Mr. Phillips argued that the Florida Supreme Court's denial of his *Atkins* claim was an unreasonable application of clearly established federal law and that he was entitled to have his death sentence set aside.

On November 20, 2015, the district court denied Mr. Phillips' Petition (A059). The court determined that Mr. Phillips was not entitled to habeas relief on his ID claim because the Florida Supreme Court alternatively found that the record

contained substantial evidence that Mr. Phillips did not have adaptive deficits and that Mr. Phillips did not show that the Florida Supreme Court's decision was unreasonable (A103-04). The court also held that Mr. Phillips was not entitled to relief because the Florida Supreme Court did not use the strict IQ cut-off rule of 70 from *Cherry* to reject the first prong of his ID claim (A104). The court noted that the Florida Supreme Court found the trial court did not err in concluding that the low IQ scores were the product of malingering and that most of the IQ scores were above 70. *Id.* The court further held that none of Mr. Phillips' records showed adaptive deficits manifesting themselves before Mr. Phillips turned 18 (A105).

On December 20, 2015, Mr. Phillips filed an application for certificate of appealability (hereinafter COA) in the district court. The court granted a COA only as to Ground I's *Brady*[2] and *Giglio*[3] issues (A056). On Feb. 10, 2016, Mr. Phillips filed in the Eleventh Circuit a renewed application seeking to expand the COA to include his ID claim. The proceedings in the Eleventh Circuit remained stayed so that Mr. Phillips could pursue a claim related to this Court's opinion in *Hurst v. Florida,* 577 U.S. 92 (2016). At the same time, Mr. Phillips also pursued collateral relief in state court pursuant to this Court's holding in *Hall* as noted *supra*.

After the Florida Supreme Court issued it's 2020 opinion concerning the application of *Hall* to Mr. Phillips' intellectual disability claim, Petitioner filed a Motion for Leave to Amend Habeas, Or, Alternatively, Petitioner's 60 (b)(6) Motion

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[3] *Giglio v. United States*, 405 U.S. 150, 154 (1972).

for Relief From an Order in a 28 U.S.C.A. § 2254 Proceeding in the United States District Court for the Southern District of Florida. Petitioner argued that he should be allowed to amend his intellectual disability claim with the new 2018 findings of the state post-conviction court because his federal habeas petition was not final under AEDPA.

On January 27, 2022, the district court denied Petitioner's Motion to Amend or Reopen (A015). It found that Petitioner's motion was a successive § 2254 petition that the Eleventh Circuit had not authorized petitioner to file (A021). It also found that amendment would be "futile," and pointed to the Eleventh Circuit's holding that *Hall* is not retroactive as support for its position (A028). On February 1, 2022, the district court denied a certificate of appealability (A012).

On October 7, 2022, the Eleventh Circuit denied the motion for certificate of appealability finding that Phillips failed to make a substantial showing of the denial of a constitutional right. (A003). That order is the judgment petitioner is seeking this Court to review. [4]

PETITION FOR WRIT OF CERTIORARI

Petitioner Harry Franklin Phillips respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit in this case.

[4] On that same day, the Eleventh Circuit also denied Petitioner's Motion to Expand the Certificate of Appealability to include his initial intellectual disability claim (A006). There are currently two United States Supreme Court case numbers (22A-566 and 22A-567) associated with both of the Eleventh Circuit Court's orders denying COAs.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S DECISION DENYING A COA WAS OBJECTIVELY UNREASONABLE. THIS COURT SHOULD GRANT CERTIORARI TO AFFIRM THE COA STANDARD WHEN COURT'S ARE FACED WITH AN ISSUE THAT INVOLVES A CLEAR CIRCUIT SPLIT, AS IS THE CASE HERE

This Court should grant certiorari and summarily reverse the Eleventh Circuit's denial of a COA on an issue marked by a sharp circuit split: whether a motion seeking to amend a habeas petition that the district court has denied is a "second or successive" petition under AEDPA when the underlying petition has not been finally adjudicated because it is pending on appeal. *See Balbuena v. Sullivan*, 980 F. 3d 619, 645 (9th Cir. 2020)(Fletcher, J., concurring)(I write separately to encourage the Supreme Court to resolve the conflict in the circuits.").

This case meets this Court's criteria for granting review. It involves a misapplication of this Court's precedent on the standard of granting a COA; and, it presents an important and recurring question of federal law that has produced an acknowledged and intractable split in the courts of appeals. The Eleventh Circuit's decision denying a COA is incorrect, as demonstrated by the entrenched circuit split. Certiorari is warranted.

I. The Question Presented Warrants Summary Reversal

Phillips respectfully asserts that this case warrants summary reversal as the underlying issue – whether a petitioner can amend a habeas petition while his appeal remains pending in the circuit court- is debatable among jurists of reason as demonstrated by an entrenched circuit split. And, Phillips' underlying Intellectual Disability claim, is likewise debatable among jurists of reason. A prisoner seeking a

COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot v. Estelle,* 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed. 2d 1090 (1983). This Court does not require, however, that a petitioner "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 1040, 154 L. Ed. 2d 931 (2003). Nor should a court engage in a merits analysis prior to granting a COA. Here, the circuit court determined that Phillips had not made a substantial showing of the denial of a constitutional right without any explanation of the court's reasoning. That determination is flawed because Phillips has shown that whether his Intellectual Disability claim as he sought to amend it was wrongly denied by the Florida state courts is debatable among jurists of reason, as more thoroughly set out below, and whether he should have been allowed to amend his habeas petition is also debatable among jurists of reason.

This Court should grant the Writ and allow Phillips to proceed in the Eleventh Circuit.

II. The Underlying Issue Implicates an Intractable, Acknowledged Circuit Split That by Definition is Debatable Among Jurists of Reason.

Seven circuits have considered whether a district court filing that seeks to amend a habeas petition currently pending on appeal is a "second or successive" petition under AEDPA. Those decisions have produced an active 5-2 circuit split.

The Eleventh Circuit has not squarely decided the issue. *See Amodeo v. United States*, 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam) (The Eleventh Circuit "has no published opinion establishing when the adjudication of a § 2255 motion becomes final such that the 'second or successive' limitation applies to all future motions."). In two unpublished opinions on this issue, the Court has reached conflicting results. *Compare United States v. Terrell*, 141 F. App'x 849 (11th Cir. 2005) (per curiam) and *In re Cummings*, No. 17-12949 (11th Cir. July 12, 2017) (per curiam).

Recently, a district court granted a COA for the same issue in a separate case. *See Boyd v. Secretary, Florida Department of Corrections*, 16-cv-62555 (S.D. Fla. Dec. 23, 2021). The Eleventh Circuit held oral argument on the issue in December 2022. *See Boyd v. Secretary, Florida Department of Corrections*, 22-10299, Memorandum to Counsel or Parties (11th Cir. August 31, 2022). A circuit split by definition means an issue is debatable among jurists of reason and is a basis to allow Petitioner to proceed.

A. Five Courts of Appeals Treat a Filing Seeking to Amend a Habeas Petition Pending on Appeal as a "Second or Successive" Petition.

Five circuit courts have held that when a prisoner seeks to amend a habeas petition that is pending on appeal following denial in the district court, the filing constitutes a "second or successive" petition under AEDPA.

In *Williams v. Norris*, 461 F.3d 999 (8th Cir. 2006), the Eighth Circuit upheld the district court's dismissal of a prisoner's motions to add an additional claim to a habeas petition that the district court had previously denied. The petitioner argued

"that his motions were not successive habeas petitions because the denial of his initial petition had not yet been affirmed." *Id.* at 1003. Although it acknowledged the question whether a district court decision is a final adjudication "for the purpose[s] of determining whether additional motions should be deemed second or successive habeas petitions," *id.* at 1001, the court of appeals "reject[ed petitioner's] claim that an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal." *Id.* at 1004.

The Tenth Circuit has adopted the same rule. In *Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) (per curiam), the court rejected petitioner's argument that the Section 2244 (b) gatekeeping provision did not apply to his motion to amend his habeas petition because that "habeas action ha[d] not been finally adjudicated on appeal." The Tenth Circuit held that "the pendency of an appeal from the denial of a first petition does not obviate the need for authorization of newly raised claims" under Section 2244 (b), *id.* at 539; such authorization, the court reasoned, "is required whenever substantively new claims are raised" after "the district court has adjudicated a habeas action." *Id.* at 540.[5]

The Seventh Circuit agreed in *Phillips v. United States*, 668 F.3d 433 (2012). There, the panel concluded that, under this Court's decision in *Gonzalez v. Crosby*,[6]

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[5] In *Douglas v. Workman*, the Tenth Circuit deviated from this rule to allow "a habeas petitioner to supplement his habeas petition" when "his first habeas petition was already pending . . . on appeal." 560 F.3d 1156, 1189 (2009). The court noted that while it "would not ordinarily permit" such an amendment, *id.* (citing *Ochoa*, 485 F.3d at 540–41), the case presented "unique circumstances," including that the supplemental filing related to the prosecutor's active concealment of his own misconduct in a death penalty case, *id.* at 1169, 1190–96.

[6] 545 U.S. 524 (2005).

a prisoner's Rule 60 (b) motion filed after the district court's denial must be characterized as "an 'application' for collateral relief." *Phillips*, 668 F.3d at 435. The court nevertheless recognized that such a characterization raised a different question: "But was it a second application?" *Id.* The court answered that question yes, rejecting the contention that "until a district court's decision has become final by the conclusion of any appeal taken," a request to add claims "should be treated as an amendment to the pending [petition], rather than as a new one." *Id.*

The Sixth Circuit has also endorsed this position. In *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2016), the court acknowledged an apparent intracircuit conflict between two panel decisions: one holding "that a post-judgment petition was not second or successive in a case where the petition was filed before the expiration of the time to appeal the district court's denial of the first petition," *id.* at 324 (citing *Clark v. United States*, 764 F.3d 653, 659 (6th Cir. 2014)); and another holding "that a habeas petition was a second or successive petition where the petition was filed during the pendency of the appeal from denial of the first petition," *id.* (citing *Post v. Bradshaw*, 422 F.3d 419, 421, 424–25 (6th Cir. 2005)). Recognizing its duty to "reconcile" these holdings, the court adopted a rule that a "motion to amend that seeks to raise habeas claims is a second or successive habeas petition when that motion is filed after the petitioner has appealed the district court's denial of his original habeas petition or after the time for the petitioner to do so has expired." *Id.* at 325.

The Ninth Circuit recently aligned itself with these four circuits. *Balbuena v. Sullivan*, 980 F.3d 619 (9th Cir. 2020). The court acknowledged the generally accepted principle that "a petition will not be deemed second or successive unless, at a minimum, an earlier-filed petition has been finally adjudicated." *Id.* at 635 (internal quotation marks omitted). The court reasoned, however, that the district court's denial of petitioner's initial habeas petition was a "final adjudication," and thus that the underlying petition was no longer "pending" even though it was on appeal. *Id.* at 636. The majority opinion acknowledged a split of authority on the question and "decline[d] to follow" Second and Third Circuit "cases conclud[ing] that [because] a habeas petition is not 'fully adjudicated' while its denial is pending on appeal," "a second petition filed while that appeal is pending is not a second or successive petition under § 2244." *Id.* at 637. Judge Fletcher's concurring opinion explained that the circuit precedent that foreclosed relief had been "a mistake" and urged this Court to "recognize the circuit split." *Id.* at 642-45 (Fletcher, J., concurring).

B. Two Courts of Appeals Have Held That a Filing Seeking to Amend a Petition Pending on Appeal Is Not a "Second or Successive" Petition.

Two circuits have held, in clear conflict with the five other circuit courts, that a district court's denial of a habeas petition is not a final adjudication triggering the AEDPA gatekeeping requirements, and a subsequent filing while the denial is pending on appeal therefore is not a "second or successive" petition. The Second Circuit established that rule in *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002). After the district court denied a § 2255 petition, and while the court of

appeals was reviewing that decision, the prisoner filed a habeas application in the district court asserting additional grounds for relief. *Id.* at 176. The district court denied the subsequent petition on the ground that it was "second or successive," but the Second Circuit reversed. *Id.*

Then-Judge Sotomayor began by observing that AEDPA "does not define what constitutes a 'second or successive'" petition. *Id.* at 177. "Nonetheless," she reasoned, "it is clear that for a petition to be 'second or successive' within the meaning of the statute, it must at a minimum be filed subsequent to the conclusion of a proceeding that counts as the first." *Id.* While "[a] petition that has reached final decision counts for this purpose," the court explained, a "prior district court judgment dismissing a habeas petition does not conclusively establish that there has been a final adjudication of that claim" because "adjudication of [an] initial § 2255 motion [is] still ongoing during the period of appellate review." *Id.* at 177–78.

Applying that reasoning, the court held that because "the denial of the [underlying petition] was still pending on appeal before this Court and no final decision had been reached with respect to [its] merits," the district court "erred in treating [the subsequent] petition as" second or successive. *Id.* at 178–79. The court of appeals instructed that "instead, the district court should have construed it as a motion to amend [the] original § 2255 petition." *Id.* at 177.

The Second Circuit followed that holding in *Whab*, 408 F.3d at 116. Emphasizing that "the law allows every petitioner one full opportunity for collateral review," the court confirmed that a petition is not "second or successive" when it is

filed while the denial of an earlier petition is pending on appeal. *Id.* at 118 (internal quotations omitted). Applying *Ching*, the court explained:

> [U]ntil the adjudication of an earlier petition has become final, its ultimate disposition cannot be known. Thus, so long as appellate proceedings following the district court's dismissal of the initial petition remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for "second or successive" petitions.

Id. (citations omitted). Citing the broader understanding of "finality" in the post-conviction context, the court explained that an appealable denial "did not ma[ke] the adjudication of the earlier petition final; that adjudication will not be final until petitioner's opportunity to seek review in the Supreme Court has expired." *Id.* at 120; *see also Floyd v. Kirkpatrick*, No. 17-451, 2017 WL 3629902, at *1, 1 (2d Cir. Apr. 21, 2017) ("Because that motion was filed during the pendency of Petitioner's appeal from the denial of his first § 2254 petition, his proposed § 2254 petition would not be successive."); *Grullon v. Ashcroft*, 374 F.3d 137, 139 (2d Cir. 2004) (per curiam) (holding "that *Ching*'s rationale is applicable in the context of § 2241 petitions as well").

The Third Circuit explicitly aligned itself with the Second Circuit. *See Santarelli*, 929 F.3d at 105. There, the court was "asked to decide whether a petition is 'second or successive' for purposes of AEDPA when it is filed during the pendency of appellate proceedings concerning a district court's denial of a petitioner's initial habeas petition." *Id.* at 103–04. The court answered no: "a subsequent habeas petition is not 'second or successive' under AEDPA when a petitioner files such a petition prior to her exhaustion of appellate remedies with respect to the denial of

her initial habeas petition, and thus AEDPA does not require us to perform the gatekeeping function prior to a petitioner's filing such a subsequent petition in a district court." *Id.* at 104.

In reaching that conclusion, the court considered the position advanced by the Government and adopted by circuits on the opposite side of the split, which "construe[s] as 'second or successive' all habeas petitions filed by a petitioner following a district court's denial of her initial habeas petition, regardless of whether she has exhausted her appellate remedies." *Id.* The court viewed that position as tantamount to arguing "that we should interpret 'one full opportunity to seek collateral review' to include an unstated qualifier: 'one full opportunity to seek collateral review' in the district court." *Id.* The Third Circuit rejected that interpretation as "counter to Supreme Court precedent on the finality of district court judgments in the AEDPA context." *Id.* It explained that this Court's decisions "counsel that a subsequent habeas petition is not necessarily a 'second or successive' petition simply because the district court has issued a 'final' judgment denying a petitioner's initial habeas petition." *Id.*

The Third Circuit instead adopted the Second Circuit's interpretation, concluding that a prisoner has not "expended the 'one full opportunity to seek collateral review'" until "after [she] has exhausted all of her appellate remedies with respect to her initial habeas petition or after the time for appeal has expired." *Id.* at 104–05. The court stated:

> We thus join the Second Circuit in holding that "so long as appellate proceedings following the district court's dismissal of the initial petition

> remain pending when a subsequent petition is filed, the subsequent petition does not come within AEDPA's gatekeeping provisions for 'second or successive' petitions" at the time of the subsequent petition's filing.

Id. at 105 (quoting *Whab*, 408 F.3d at 118).

There is a fundamental disagreement among the circuit courts about the meaning of AEDPA: does the fact that the district court has issued an appealable denial mean that a petitioner's habeas petition has been "finally adjudicated" for purposes of triggering application of that statute's gatekeeping mechanism? Five circuits answer yes and therefore treat any filing while the denial is on appeal as "second or successive." Two circuits answer no because the ongoing appeal means that the underlying petition is still pending within the federal system. Currently, the Eleventh Circuit "has no published opinion establishing when the adjudication of a § 2255 motion becomes final such that the 'second or successive' limitation applies to all future motions." *Amodeo v. United States*, 743 F. App'x 381, 385 (11th Cir. 2018) (per curiam). "In two unpublished opinions, however, [the Eleventh Circuit] appear[s] to have taken opposite positions." *Id.* at 385 n.1 (citing *United States v. Terrell*, 141 F. App'x 849 (11th Cir. 2005) (per curiam); *In re Cummings*, No. 17-12949 (11th Cir. July 12, 2017) (per curiam) (docket entry 3)). Despite the circuit split, the Eleventh Circuit refused to issue a certificate of appealability for Petitioner (A003). This cannot comport with this Court's determination as to the issuance of a COA. "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the

COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 1040, 154 L. Ed. 2d 931 (2003).

THIS COURT SHOULD GRANT CERTIORARI BECAUSE WHETHER *HALL* ANNOUNCED A NEW RULE OF CONSTITUTIONAL LAW WITHIN THE MEANING OF *TEAGUE V. LANE*, 489 U.S. 288 (1989), AS THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT HAVE HELD, OR IS SIMPLY AN APPLICATION OF THE RULE OF *ATKINS* TO PARTICULAR FACTS, IS DEBATABLE AMONG JURISTS OF REASON

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*, but the Florida Supreme Court determined *Hall* was a new non-watershed rule. *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020).

The postconviction court and, to the extent it reviewed this finding, the Florida Supreme Court, both unreasonably applied *Atkins*, *Hall* and *Moore* in assessing Mr. Phillips' adaptive deficits. *See id.* at 1024. The Florida Supreme Court unreasonably applied *Teague* in its analysis of the impact of the *Hall* decision. *See id.* at 1022. Therefore, AEDPA is not a bar to relief. 28 U.S.C. § 2254.

The district court denied Petitioner's motion to amend or reopen in part because of the Eleventh Circuit's erroneous holding that *Hall* is not retroactive (A028). Here, the Eleventh Circuit did not grant a COA on either issue, despite an existing circuit split on both the finality of a habeas petition under AEDPA and the retroactivity of *Hall* (A003, 006). The pro-forma, non-reasoned denial of the COA stands particularly egregious as this is a capital case. Petitioner has demonstrated

sufficient merit to proceed further.

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. This case presents questions of great importance for this Court regarding the analysis of a court's duty to give retroactive effect to a federal constitutional holding and the required showing for the issuance of a COA. The underlying issue of retroactivity is an area of the law which remains complicated and unclear to many lower courts and practitioners. This petition is an ideal vehicle for addressing the district court and the Eleventh Circuit's error in denying a COA, the underlying Florida Supreme Court ruling is debatable among jurists of reason and d presents a question of life-or-death importance for Phillips and for the other death-row inmates whose claims have been denied premised on the same incorrect application of *Hall*.

I. Both the District Court and the Eleventh Circuit's Refusal to Apply *Hall* to Cases on Collateral Review Is Debatable Among Jurists of Reason.

Phillips' claim that under federal law, *Hall* followed the settled rule of *Atkins* and therefore applies to cases on direct review and collateral review alike, is debatable among jurists of reason, is meritorious and Phillips should be allowed to proceed to merits review of his claim.

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. 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).

II. *Hall* Did Not Announce a New Rule

The Eleventh Circuit incorrectly classified the *Hall* rule as new in an earlier decision. *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);[7] *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 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 Florida Supreme Court made the same error in Petitioner's case. *Phillips v. State*, 299 So.3d 1013, 1020

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[7] 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).

(Fla. 2020) ("*Hall* does not place beyond the authority of the State the power to regulate certain conduct or impose certain penalties; *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*.").

But, it is debatable among jurists of reason that in actuality, *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. 536 U.S. at 309, n.5 (citation omitted).

The Eleventh Circuit and Florida stand alone in this position, and the Eleventh Circuit's denial of a COA ignores the disagreement among its sister circuits. 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).

The Court was well aware when it decided *Atkins*[8] 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.[9]

> 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).[10]

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[8] *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.

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

[10] 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

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

Additionally, 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.

Indeed, 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

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

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

The necessary effect of the circuit court's denial of a certificate of appealability was to deny Phillips the federal right announced in *Atkins* and affirmed in *Hall*. That decision is subject to this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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s/Marie-Louise Samuels Parmer
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