CASE NO. 22-6739

IN THE UNITED STATES SUPREME COURT

HARRY FRANKLIN PHILLIPS

Petitioner,

vs.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

C. SUZANNE BECHARD*
Chief-Assistant Attorney General
Counsel of Record

Lisa-Marie Lerner
Assistant Attorney General

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7900
capapp@myfloridalegal.com
CarlaSuzanne.Bechard@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

(Capital Case)

(Restated)

1. Whether the Eleventh Circuit's denial of a certificate of appealability on a claim presented in a successive petition for habeas corpus was properly denied where Petitioner could not prevail on the underlying issue?

2. Whether certiorari review should be granted when Petitioner cannot prove intellectual disability under either *Atkins v. Virginia*, 536 U.S. 304 (2022) or *Hall v. Florida*, 572 U.S. 701 (2014) and whether federal law requires state courts to apply *Hall* retroactively to sentences that have already become final on direct review?

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)
Judgement Entered: August 30, 1985

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

First Post-conviction Proceeding:
Circuit court in and for Miami-Dade County, Florida,
State Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: February 13, 1989

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

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

Resentencing Proceeding:
Circuit court in and for Miami-Dade County, Florida
State Florida v. Harry Franklin Phillips, 88-435
Judgement 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)

Judgement Entered: October 5, 1998

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

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

Third and Fourth Post-conviction proceedings:
Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: October 28, 2004

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

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

Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: September 24, 2007
Florida Supreme Court
Phillips v. State, 984 So. 2d 503 (Fla. 2008)
Judgement Entered: March 20, 2008

Florida Supreme Court
Phillips v. State, 998 So. 2d 859 (Fla. 2008)
Judgement Entered: September 23, 2008

Fifth Post-conviction Proceeding:
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: January 27, 2011

Florida Supreme Court
Unpublished Order, Case No. SC11-472
Judgement 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.
Judgement 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 Post-conviction Proceeding:
Circuit court in and for Miami-Dade County, Florida
State of Florida v. Harry Franklin Phillips, 83-435
Judgement Entered: April 27, 2017

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

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

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

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

Supreme Court of the United States
Phillips v. Florida, 141 S.Ct. 2676 (2021)
Judgement Entered: May 24, 2021

United States District Court for the Southern District of Florida
Phillips v. Jones, No. 08-23420 (S.D. Fla. April 11, 2022)
Judgement 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
Judgement 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
Judgement Entered: Order Denying Certificate ofAppealability, October 7, 20221

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

Petitioner, Harry Franklin Phillips, is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A state prisoner may not appeal from a district court's final order in a habeas case "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §2253(c)(1). The statute governing appeals in habeas corpus case, 28 U.S.C. § 2253(c)(2), provides:

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Petitioner also contends that the Eighth Amendment to the Constitution of the United States is involved.

RELEVANT HISTORY

In 2002, this Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). But *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability]" is protected by the Eighth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Instead, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317.

Even before *Atkins* was decided, Florida law barred the imposition of death sentences on the intellectually disabled. Fla. Stat. § 921.137 (2001). Following *Atkins*, the Florida Supreme Court issued Florida Rule of Criminal Procedure 3.203, which allowed prisoners whose sentences had already become final on direct review to seek relief under *Atkins*. See Fla. R. Crim. P. 3.203(d)(4) (2004).

More than a decade later, the Court considered whether Section 921.137 was unconstitutional to the extent it barred a claim of intellectual disability based on a strict IQ-score cutoff of 70, even if the claimant's score fell within the test's margin of error. *Hall v. Florida*, 572 U.S. 701 (2014). "On its face," the Court noted, "this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Id.* at 711. As the Court saw it, "[n]othing in the statute precludes Florida from taking into account the IQ test's standard error of measurement," and the Court found "evidence that Florida's Legislature intended to include the measurement error in the calculation." *Id.* The Florida Supreme Court,

however, had interpreted Section 921.137 to impose a "strict IQ test score cutoff of 70." *Id.* at 711–12 (citing *Cherry v. State*, 959 So. 2d 702, 712–713 (Fla. 2007) (per curiam)). Confined by that reading, this Court concluded that the statute unconstitutionally barred a capital defendant with a score "within the margin for measurement error" from raising a claim of intellectual disability. *Id.* at 712, 724.

In support of that conclusion, the Court noted that "the precedents of this Court," including *Atkins*, "give us essential instruction, but the inquiry must go further." *Id.* at 721 (citation omitted). Thus, the Court considered the views of the States, the Court's precedent, and the views of medical experts. *Id.* Florida's fixed IQ cutoff, the Court held, impermissibly "bar[red] consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 723. Basically, *Hall* requires that States "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724.

Two years later, the Florida Supreme Court held that, under state law, *Hall* applied retroactively. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (citing *Witt v. State*, 387 So. 2d 922 (Fla. 1980) (setting forth test for applying rule retroactively under Florida law)). The court did not consider whether *Hall* applies retroactively under federal law and, as explained below, the court would later recede from its decision.

In 1998, Petitioner's conviction and sentence of death for the first-degree

murder of a probation officer became final. *Phillips v. Florida*, 509 U.S. 908 (1993). As a result, Petitioner was not entitled to "a reconsideration of whether he meets the first prong" of the *Atkins* test because *Hall* does not apply retroactively to him. *Id.* Thus, it was error for the post-conviction court to reopen the intellectual disability question in the first place.

Petitioner would not prevail in state court even if he were granted a COA and habeas relief since the state courts found his IQ scores were not credible because of his malingering and he cannot show deficits in adaptive functioning. "[I]f a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard," it explained, "he or she will not be found to be intellectually disabled." *Id.* Since Petitioner "conclusively failed to establish that he meets the first prong of the intellectual disability standard," his *Atkins* claim would fail "even if he were entitled to a renewed determination on the second prong and could establish that he has deficits in adaptive behavior." *Id.* The Florida Supreme Court therefore affirmed.

Beginning in 1999, Petitioner sought post-conviction relief regarding his death sentence. *Phillips v. State*, 894 So. 2d 28, 33 (Fla. 2004). While he claimed that his resentencing counsel had been ineffective for failing to present more evidence of retardation as mitigation, he did not claim that his sentence was unconstitutional because he was retarded. *Id.* at 33 n.4. The state trial court summarily denied the motion. *Id.* at 33-34. Phillips appealed the denial and also filed a state habeas petition. *Id.* The Florida Supreme Court affirmed the denial of

post-conviction relief and denied state habeas relief. *Id.* at 28, 34.

After this Court's decision in *Atkins*, Petitioner moved to vacate his sentence on the ground that he was intellectually disabled. After the appeal of a second motion for post-conviction relief was final, the State moved the Florida Supreme Court to relinquish jurisdiction of the appeal of the dismissal of the third motion for post-conviction relief so that it could be heard. Petitioner filed a response, agreeing to the relinquishment and stating that he would file a fourth motion for post-conviction relief, raising an intellectual disability claim. The Florida Supreme Court relinquished jurisdiction for a determination of intellectual disability. In 2006, a post-conviction court conducted an evidentiary hearing on that claim and, in a nearly 50-page order, denied relief, applying the three-prong framework for assessing intellectual disability, which requires: (1) significantly subaverage intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; (3) which has manifested before the age of 18. The Florida Supreme Court affirmed the denial of post-conviction relief in 2008. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008). In doing so, it credited the post-conviction court's finding that the State's expert was more credible because, unlike the defense experts, he had tested for malingering. *Id.* at 510 ("Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions.").

In December 2008, Phillips filed a petition for writ of habeas corpus in the Southern District of Florida, in which he raised 13 claims, including one on the Florida Supreme Court's rejection of his ID claim. On September 15, 2015, the

district court entered its order denying the petition. Regarding the ID claim, on October 28, 2015, Phillips filed a motion to alter or amend the order denying his petition. The district court denied that motion. The district court did not grant a COA on the ID issue.

In February 2016, Phillips moved to expand the COA application with the Eleventh Circuit Court of Appeals.

After the Florida Supreme Court found *Hall* retroactive in *Walls*, Phillips renewed his claim of intellectual disability in a successive Fla. R. Crim. P. 3.851 motion. The state post-conviction court heard the motion and reviewed the record, including the 2006 evidentiary hearing on the intellectual disability claim, as well as an additional report for one of the defense psychologists used in 2006. Phillips did not present any new evidence to the court in 2016 although he did submit a new report from one of his original experts who maintained his 2006 opinion. Based upon that review, the post-conviction court denied the motion but did find, under *Hall* and *Walls*, that Phillips had proven the first prong of the three prong ID test. The Court also found that Phillips had met the third prong, the manifestation of subaverage intelligence before the age of eighteen. However, as it did in 2006, the court found that Phillips had failed to prove the required deficit in adaptive behavior and, therefore, could not establish that he is intellectually disabled.

The Florida Supreme Court affirmed. *Phillips v. State*, 299 So. 3d 1013, 1017-24 (Fla. 2020). In the opinion, the court extensively examined and analyzed the reasoning in *Walls v. State*. In keeping with The Eleventh Circuit's case *In re*

Henry, 757 F.3d 1151, 1161 (11th Cir. 2014), the court determined that it had erred in its reasoning when it decided *Walls* since *Hall* merely created a procedural requirement regarding individuals with IQ scores within the test's standard of error. The Florida Supreme Court stated that *"Hall* is merely an application of *Atkins*." *Phillips*, 299 So. 3d at 1020. The court explained, "*Hall* is similar to other non-retroactive 'decisions [that] altered the processes in which States must engage before sentencing a person to death,' which 'may have had some effect on the likelihood that capital punishment would be imposed' but which did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Id.* (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211–12 (2016)). In short, the court concluded, "*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." *Id.* at 1020. The court therefore receded from *Walls*. *Id.* at 1024.

Thus, it was error for the post-conviction court to reopen the intellectual disability question in the first place. *Id.* at 1024. Since that state court found that *Hall* was not retroactive to Phillips, he was not entitled to reconsideration of his original intellectual disability claim. Consequently, any reconsideration done by the post-conviction court in 2016 was both null and moot, leaving him in the same position, factually and legally, he was in during his original federal habeas litigation. Both Phillips's motion for rehearing and his petition for writ of certiorari before the United States Supreme Court were denied.

On June 15, 2021, Phillips moved the Eleventh Circuit Court of Appeals to relinquish jurisdiction to the district court in order for him to move to amend his federal habeas petition to include a new ID claim. The Eleventh Circuit granted that motion as well as a motion to remand to the district court for an indicative ruling, or in the alternative, to relinquish jurisdiction.

Phillips then filed a motion to reopen or amend his federal habeas petition. The district court denied that motion for two reasons: 1) finding it was an unauthorized successive habeas petition; and 2) such an amendment would be futile since it would not provide a basis for relief given the Eleventh Circuit determination that *Hall* is not retroactive. *In re Henry*, 757 F.3d 1151 (11th Cir. 2014); *Kilgore v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314-15 (11th Cir. 2015). Further, the district court noted that the Florida Supreme Court's decision would still stand under *Hall* because the state court found that Phillips's low IQ scores were the result of malingering. Finally, that court denied relief under Federal Rule of Civil Procedure 60(b) as well. The district court also denied a COA on the same day.

Phillips then filed on February 23, 2022, a motion to alter or amend the judgement pursuant to Fed. R. Civ. Pr. 59(e). On April 11, 2022, the district court denied the rehearing. Phillips appealed. On June 15, 2022, Phillips filed a supplemental brief in the Eleventh Circuit on his 2016 motion seeking to expand the COA to include the *Atkins/Hall* issue, which the court denied on October 7, 2022.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE WRIT

I - PHILLIPS HAS FAILED TO SHOW THAT REASONABLE JURISTS WOULD FIND THE DISTRICT COURT'S RULING DEBATABLE.

Petitioner seeks this Court's review of the Eleventh Circuit Court of Appeals' decision denying his application for COA. There is no basis for granting certiorari review of this case. There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of a COA, and Petitioner has not established any reason for this Court to grant review. Phillips argues that the Eleventh Circuit misapplied this Court's law governing the granting of a COA. The State points out, however, that the issue involved in the Eleventh Circuit ruling simply involved the denial of a COA for the procedural and merits-based dismissal by the district court of Phillips's habeas petition. Certiorari must be denied.

Certiorari review is not a matter of right, but of judicial discretion. It is granted only for compelling reasons. A prisoner in state custody challenging the validity of a state court conviction through post-conviction habeas relief under 28 U.S.C. §2254 has no automatic right to appeal a district court's denial or dismissal of the petition. He must first seek and obtain a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029 (2003). Petitioner must show two distinct elements in order to appeal a denial of COA from a circuit court. He must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which this Court has interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Additionally, as Justice Scalia pointed out in his concurrence in *Miller-El*, that this Court imposed "another additional requirement: A circuit justice or judge *must* deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief." *Id.* at 349-50. "When the district court denies a habeas petition on procedural grounds, without reaching petitioner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484. In *Slack*, this Court emphasized that the statute "*mandates that both showings be made before the court of appeals may entertain the appeal.* Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." *Slack*, 529 U.S. 473, 484-485 (e.s.).

1. On the particular facts of this case, the motion to amend was properly denied and is not debatable.

Phillips asserts that the adjudication of his federal habeas petition is not final until the entire appellate litigation, through the United States Supreme Court,

is completed. However, this Court has stated:

> [A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). Accordingly, Petitioner's claim was successive because the district court entered a final order denying habeas relief on this claim years ago and no certificate of appealability ever issued on it. *United States v. Terrell*, 141 F. App'x 849, 850, 851-52 (11th Cir. 2005) (affirming the district court's decision to treat a motion to reopen as an unauthorized successive § 2255 motion while an earlier § 2255 motion was pending on appeal); but cf. *Amodeo v. United States*, 743 Fed. Appx. 381, 385 n.1 (11th Cir. 2018) (noting the apparent conflict between two unpublished opinions in *Terrell* and *In re Cummings*, No. 17-12949 (11th Cir. July 12, 2017)).

Furthermore, treating the petition as final after the district court issues an order on it avoids piecemeal litigation and prevents the use of amendments to circumvent the successive petition restrictions in the AEDPA. *Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012) ("Treating motions filed during appeal as part of the original application, however, would drain most force from the time-and-number limits in §2244 and §2255."). Since it was an unauthorized successive claim, the district court lacked jurisdiction to consider it. *Burton v. Stewart*, 549 U.S. 147, 157 (2007) (holding that a district court must dismiss a petition "for lack of

jurisdiction" if the petitioner doesn't obtain the court of appeal's authorization before filing it); *Osbourne v. Sec'y, Fla. Dep't of Corr.*, 968 F.3d 1261, 1264 (11th Cir. 2020) (stating that absent authorization from this Court, the district court lacks jurisdiction to consider a second or successive habeas petition citing *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003), and holding that the habeas petition was an unauthorized second or successive petition over which the district court lacked jurisdiction); *Holland v. Sec'y, Fla. Dep't of Corr.*, 941 F.3d 1285 (11th Cir. 2019) (affirming a district court dismissing a third habeas petition in a capital case for lack of subject matter jurisdiction as an unauthorized successive habeas petition where the habeas petitioner did not seek prior permission from the Eleventh Circuit to file another petition as required by § 2244(b)(3)(A)); *Bowles v. Sec'y, Fla. Dep't of Corr.*, 935 F.3d 1176, 1180 (11th Cir. 2019) (affirming a district court dismissing a second habeas petition in an active warrant case for lack of subject matter jurisdiction as an unauthorized successive habeas petition where the habeas petitioner did not obtain the Eleventh Circuit's prior authorization before filing it).

The majority of the Circuit Courts of Appeals treat a federal habeas petition as finally adjudicated under AEDPA once the district court issues its order. *See Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999). As mentioned previously, that stance avoids piecemeal litigation and prevents parties from using amendments to the original habeas petition or a 60(b) motion to circumvent the

restrictions in AEDPA to the filing of successive new claims. *Phillips v. United States*, 668 F.3d at 435; *Balbuena v. Sullivan*, 980 F.3d 619, 637-642 (9th Cir. 2012); *Ochoa v. Sirmons*, 485 F.3d 538, 540-541 (10th Cir. 2007); *Williams v. Norris*, 461 F.3d 999, 1002-1004 (8th Cir. 2012). The reasoning of the above Circuits is persuasive. Treating Phillips's petition in this manner was appropriate and not debatable since this particular claim was not on appeal. Furthermore, this is not the case for this Court to settle any split between the courts since it is a non-issue for Petitioner since he cannot prevail on the underlying claim.

2. Jurists of reason would not debate the denial of Phillips's underlying intellectual disability claim.

Furthermore, the district court also denied the petition on the merits when it gave the indicative ruling required by the Eleventh Circuit. Where a district court has rejected a petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack*, 529 U.S. at 484. Such is not the case in Phillips's situation. Phillips failed in the state 2006 evidentiary hearing to not only prove that he had an IQ-score of 75-70 or below, but also that he has deficits in adaptive functioning, both of which *Atkins* requires to prove ID. Focusing on the 2016 post-conviction court decision (finding he met the first and third *Atkins* prongs but not the second) and the 2020 Florida Supreme Court opinion affirming that denial of relief, he contends that the Florida Supreme Court's determination

that he failed to prove his intellectual disability was unreasonable under prevailing federal law. In his previous application for a COA on this issue, he argued that the state court was unreasonable in finding his adult IQ scores, as assessed by his experts, were not credible. Here, he also argues that the finding that he failed the first prong under *Atkins* was unreasonable under *Hall*. Phillips cannot show that the state courts unreasonably applied the law or unreasonably determined the facts. None of Phillips's arguments show that the district court's determination that Phillips failed to prove that he met the requirements of 28 U.S.C. §2254(d) were in error. Phillips has not made a prima facia showing of a violation of *Atkins* which is necessary for relief.

The district court noted that the Florida Supreme Court's decision would still stand under *Hall* because it found that Phillips's low IQ scores were the result of malingering. The post-conviction court, after the 2006 evidentiary hearing, made a factual finding accepting the state's expert opinion that Phillips's low IQ test scores were the result of malingering and made the finding that the state's expert was more credible than the defense experts. The Florida Supreme Court adopted the factual finding and accepted the credibility assessment. *Phillips v. State*, 984 So. 2d at 510. The record supported the state court's determination that Phillips failed to prove the first prong, with or without the *Hall* analysis. Under state law, the Florida Supreme Court "does not reweigh evidence or second guess credibility findings on appeal. *See Nixon*, 2 So.3d at 141." *Rodriguez v. State*, 219 So. 3d 751,

757 (Fla. 2017). Federal courts, in turn, must defer to those state court findings. *Consalvo v. Sec'y, Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). The presumption of correctness applies to both implicit and explicit factual findings. *See Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). That Phillips did not overcome the presumption of correctness by clear and convincing evidence is not debatable.

Moreover, to satisfy 28 U.S.C. §2254(d)(2), a petitioner must show that a state court factual finding is unreasonable in light of the record to qualify for relief. To show a state court finding is unreasonable, it does not suffice to show that reasonable minds would differ from the state court on the issue of fact. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Moreover, a federal court may not hold a state court factual finding unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Id.*

While the Court has yet to explain the interaction between §2254(e)(1) and §2254(d)(2) fully, it had made clear that state courts' finding must be unreasonable and that a determination that state courts' decision was unreasonable requires a greater showing than would be necessary to show that a conclusion would have been reversible on direct appeal. *Wood*, 558 U.S. at 300-01; *Felkner v. Jackson*, 562 U.S. 594, 598 (2011). On direct review, a factual finding cannot be overturned simply because there is evidence in the record that would have supported a different

factual finding. *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). Instead, even in the direct review context, a factual finding may not be overturned if it "is plausible in light of the record." *Id.* Moreover, the Court has stated that it is particularly inappropriate for a reviewing court to overturn a factual finding that already had been reviewed twice even in a direct review context. *Burger v. Kemp*, 483 U.S. 776, 785 (1987). Phillips did not demonstrate that those state court factual determinations were implausible in light of the record. The issue is not debatable.

Phillips does not even begin to explain how the district court's rejection of his intellectual disability claim is debatable. As seen above, the Florida Supreme Court had rejected his intellectual disability claim on the merits, finding that he failed to prove the necessary deficits in adaptive functioning. Neither *Hall* nor *Moore* is retroactive to his case and cannot be the basis for him to argue that jurists of reason would find the issue debatable. Phillips cannot have the federal courts conduct an independent review under *Hall* and *Moore*. While this Court has held that a federal habeas court can deny a claim based on a *de novo* review when 28 U.S.C. §2254(d) applied, it has also held that a district court cannot grant relief based on such a review. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010). Again, it has recognized that the question of whether §2254(d) is satisfied presents a different question from whether the underlying claim has merit and has specified that the determining of this different question be made based on an analysis of the state court's rationale for finding the claim meritless. *Richter*, 562 U.S. at 101. The Eleventh Circuit's

denial of the COA properly applied this Court's precedence. Certiorari should be denied.

II - THE DECISION BELOW THAT *HALL* IS NOT RETROACTIVE IMPLICATES NO SPLIT OF AUTHORITY WORTHY OF REVIEW.

There is no split among the lower courts warranting this Court's review. Nearly all the courts that have addressed the issue agree with the decision below and either hold or opine that *Hall* does not apply retroactively on collateral review. *See In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (per curiam); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314-15 (11th Cir. 2015); *Payne v. State*, 493 S.W.3d 478, 489-91 (Tenn. 2016); *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020) (citing the "substantial and growing body of case law that has declined to apply *Hall* ... retroactively"). Though the Supreme Court of Kentucky has come out the other way, that case does not give rise to the kind of split that calls for this Court's review.

In *White v. Commonwealth*, the Supreme Court of Kentucky summarily concluded that *Hall* "does not deal with criminal procedure," that *Hall* imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and that it "must be retroactively applied." *White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), as modified (Oct. 20, 2016), and abrogated on other grounds by *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018).

The court's opinion included only one paragraph addressing the question presented. *Id.* at 215. And that paragraph cited, in passing, just two cases: this Court's decision in *Atkins*, which preceded *Hall* and arose on direct review, and thus had no occasion to address whether state courts must apply *Hall* retroactively to cases on collateral review; and the Florida Supreme Court's now-defunct view that *Hall* applies retroactively as a matter of state law. *See id.* (citing *Oats v. Florida*, 181 So. 3d 457 (2015), and noting that the Kentucky court's ruling put it "in the company of our sister state Florida which, of course was the state in which the underlying issue in *Hall* first arose"). Given that the Florida Supreme Court has recently overruled its state law retroactivity ruling and held that *Hall* does not apply retroactively under *Teague*, the Kentucky Supreme Court is no longer "in the company of" the state in which *Hall* arose—and might well be amenable to revisiting its conclusory decision in *White*. At a minimum, the Kentucky court should have an opportunity to reconsider - and provide a reasoned basis for—its decision before this Court is asked to resolve a conflict arising out of *White*.

The Tenth Circuit, in *Smith v. Sharp*, has also discussed whether *Hall* is a "new rule," but that case did not hold that state post-conviction courts are required to apply *Hall* retroactively. 935 F.3d 1064, 1084-85 (10th Cir. 2019). Instead, the Tenth Circuit reviewed *de novo* a federal district court's conclusion concerning the propriety of federal habeas relief. *Id.* at 1069, 1085. In assessing that issue, the Tenth Circuit considered whether, under Oklahoma's implementation of *Atkins*,

Smith was intellectually disabled because he "ha[d] significant limitations in adaptive functioning in at least two of the nine listed skill areas." *Id.* at 1083. In so doing, the court assessed "whether the Supreme Court's recent applications of *Atkins* 'are novel.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)).

The court concluded that *Hall*, *Moore I*,[1] and *Moore II*[2] did not state new rules; instead, they applied a general rule set forth in *Atkins*, and so they could not be understood to "yield[] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 1084 (quoting *Chaidez*, 568 U.S. at 348). Although the court relied on some statements in *Hall* in reaching this conclusion, it did not apply *Hall* to Smith's case. It merely applied *Moore I* and *Moore II* - "which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated" - in determining whether Smith "suffered deficits in at least two areas of adaptive functioning." *Id.* at 1085–88. *Hall*'s rule that States must account for the SEM when evaluating an individual's IQ scores did not come into play because, in finding that Smith satisfied prong one, the Tenth Circuit observed that nearly all his scores fell below 70. *See id.* at 1079 (discussing scores of 65, 55, 55, 69-78, 73). In other words, the Tenth Circuit did not squarely address the question at issue here, and its statements pertaining to *Hall* were not essential to the disposition of the case. Indeed, Smith's case did not involve any law foreclosing the presentation of

---

[1] *Moore v. Texas*, 137 S. Ct. 1039 (2017).

[2] *Moore v. Texas*, 139 S. Ct. 666 (2019).

intellectual disability evidence without an IQ score of 70 or below.

Further, the decision below does not conflict with the other cases cited by Petitioner, including *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014). That decision did not purport to address *Hall*'s retroactivity, and simply observed, apparently in *dicta*, that *Hall* "clarified the minimum *Atkins* standard under the U.S. Constitution." *Van Tran*, 764 F.3d at 612.

At any rate, any conflict among the lower courts does not warrant review at this time, as further percolation would give the lower courts an opportunity to carefully assess the varying arguments that have been advanced for concluding that *Hall* applies retroactively. *See, e.g., California v. Carney*, 471 U.S. 386, 400 n.11 (1985) Justice Stevens's dissent ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."). In *White*, for example, the Kentucky Supreme Court summarily concluded that *Hall* announced a substantive restriction on the State's power to impose capital punishment, without addressing whether *Hall* imposed a new rule. *See* 500 S.W.3d at 215.

Review is not warranted for the additional reason that the Florida Supreme Court correctly concluded that *Hall* does not apply retroactively. As to *Teague*, the Florida Supreme Court properly held that *Hall* announced a new rule of constitutional procedure. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."

Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality op.) (emphasis omitted). As the Eleventh Circuit has explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014). As *Hall* itself pointed out, while this Court's precedents were instructive, "the inquiry must go further." *Hall v. Florida*, 572 U.S. 701, 721 (2014). And "[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." *Henry*, 757 F.3d at 1159. Justice Alito's dissent in *Hall* (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also supports the conclusion that *Hall* announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (indicating that a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." *Hall*, 572 U.S. at 725 (Alito, J., dissenting).

Additionally, the new rule announced in *Hall* is not a substantive rule. "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198

(quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), overruled on other grounds, *Atkins v. Virginia*, 536 U.S. 304 (2002)). But *Hall* does not forbid criminal punishment for any type of primary conduct. Nor does it prohibit any category of punishment for any class of defendants because of their status or offense. While *Atkins* prohibits states from executing intellectually disabled defendants, *Hall* requires only certain "procedures for ensuring that states follow the rule enunciated in *Atkins*." *Kilgore*, 805 F.3d at 1314. Specifically, "*Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Id.*

Atkins protects every individual who is intellectually disabled, while *Hall* simply prevents States from using a particular procedure, which the Court deemed inappropriate, when determining whether an individual falls into that class. *See, e.g., Hall*, 572 U.S. at 723 (concluding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"); *see also id.* at 724–25 (Alito, J., dissenting) (observing that *Hall* "mandate[s] the use of a single method for identifying" persons with intellectual disability (emphasis added)); *Id.* at 727 (referring to "the procedure now at issue"). In other words, "*Hall* did not expand the class of individuals protected by *Atkins*'s prohibition." *Kilgore*, 805 F.3d at 1314.

Once a conviction is secured and the sentence becomes final, States have "a

strong interest in preserving the integrity of the judgment." *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 403 (2001). Consistent with that state interest, this Court has recognized that "the principle of finality . . . is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309 (plurality op.). "Without finality," this Court has explained, "the criminal law is deprived of much of its deterrent effect." *Id.*

Were finality not a sufficient reason to deny application of new rules, all new constitutional rules would need to be retroactive - at least in capital cases. This Court has rejected that approach. *E.g., Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Importantly, this Court has determined that new procedural rules categorically do not warrant retroactive application. *Edwards v. Vannoy*, 209 L. Ed. 2d 651 (2021) ("It is time—probably long past time—to make explicit what has become increasingly apparent to bench and bar over the last 32 years: New procedural rules do not apply retroactively on federal collateral review.").

A favorable ruling here would not change the outcome.

As an initial matter, this claim comes to this Court in a federal habeas posture with the circumscribed review mandated under the AEDPA. This Court previously had an opportunity to address this case more directly on review from the Florida Supreme Court and declined to do so. See *Phillips v. Florida*, 141 S.Ct. 2676 (2021). At this point, any intellectual disability claim is much more attenuated and the fact-finding deference, already strong, has an even greater deference on federal

review. A case in this procedural posture therefore presents a very poor vehicle to address any intellectual disability claim Petitioner seeks to present in this Court.

Indeed, Petitioner cannot prevail in state court even if *Hall* is retroactive, meaning the question presented is not case-dispositive and does not merit certiorari. *Cf. Rice v. Sioux City Mem'l Park Cemetery*, Inc., 349 U.S. 70, 74 (1955) (certiorari should not be granted when the question presented, though "intellectually interesting," is merely "academic"). That is so for two reasons.

As a matter of state law, Petitioner was not entitled to reconsideration of his intellectual disability claim in 2018 because the Florida Supreme Court has held that a defendant "is not entitled to a new hearing in order to present additional evidence of intellectual disability [if] he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard." *Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017), *cert. denied*, 139 S. Ct. 122 (2018). As noted, a person sentenced to death may prevail under *Atkins* if he meets a three-prong test for intellectual disability: (1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age 18. *See Atkins*, 536 U.S. at 318; *see also Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016). In *Jones*, the defendant received a post-*Atkins* evidentiary hearing in 2006, at which the post-conviction court concluded that he "did not meet even one of the three statutory requirements." 231 So. 3d at 375 (quotations omitted). The court therefore denied relief. *Id.* Post-*Hall*,

Jones sought a new evidentiary hearing, claiming that his above-70 IQ scores were no longer determinative and that he could now meet the first prong. *Id.* He appealed the denial of an evidentiary hearing to the Florida Supreme Court. *Id.* That court affirmed, explaining that "*Hall* does not change the fact that Jones failed to establish that he meets the second or third prong." *Id.* at 376. Because a defendant who "fails to prove any one of these components . . . will not be found to be intellectually disabled," *Hall* was irrelevant to Jones' claim and did not open the door to a new determination as to intellectual disability. *Id.*

That rule applies here as well. In 2006, the post-conviction court permitted Petitioner to present evidence on all three prongs of the intellectual disability standard and concluded that Petitioner failed to prove by clear and convincing evidence that he met any of them. The Florida Supreme Court affirmed that ruling. In Petitioner's most recent post-conviction motion, he argued that *Hall* opened the door to reconsideration of the 2006 denial. But, under *Jones*, he was not entitled to relief because *Hall*'s holding that Florida cannot impose a rigid IQ-score cutoff would not have changed the result of the 2006 determination, which was independently supported by the post-conviction court's findings that Petitioner failed to meet prongs two and three.

Indeed, recognizing "the inherent error in IQ tests," this Court concluded in *Hall* that the State could not seek "to execute a man because he scored a 71 instead of a 70 on an IQ test." 572 U.S. at 722, 724. Rather, the Court concluded, "when a

defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. That ruling does not help Petitioner; *Hall* does not change the 2006 post-conviction court's ultimate conclusion that Petitioner failed to meet any of the three prongs because *Hall* goes to only one of the prongs, intellectual functioning. Thus, granting review to decide whether *Hall* is retroactive will not affect the post-conviction court's determination that Petitioner is not entitled to relief.

Petitioner's intellectual disability claim fails for another reason unrelated to *Hall*. Contrary to its 2006 findings, in the 2018 hearing the post-conviction court acknowledged that, under *Hall*, it could not deny Petitioner's intellectual disability claim solely because his IQ scores were at or above 70. It also concluded that Petitioner met the third prong, onset before age 18. *Phillips*, 299 So.3d at 1017. Nonetheless, the post-conviction court declined to find that Petitioner is intellectually disabled based on its agreement with the 2006 post-conviction court's finding that he failed to establish that he met the second prong of the intellectual disability standard, concurrent deficits in adaptive behavior. *Id.*

Thus, the 2018 post-conviction court applied *Hall* retroactively and rejected Petitioner's claim on a ground unrelated to any IQ-score cutoff. As *Hall* requires, Petitioner was "able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." 572 U.S. at 723. Even with that

evidence, the post-conviction court found that Petitioner's intellectual disability claim failed.

In short, certiorari is not warranted because a reversal here would not change the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

C. SUZANNE BECHARD*
Chief-Assistant Attorney General
Florida Bar No. 0147745
OFFICE OF THE ATTORNEY GENERAL
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Office: (813) 287-7900
Facsimile: (813) 281-5500
capapp@myfloridalegal.com
CarlaSuzanne.Bechard@myfloridalegal.com