No. 24-

IN THE

Supreme Court of the United States

JERMAINE ALEXANDER FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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QUESTIONS PRESENTED – CAPITAL CASE

Jermaine Alexander Foster is an intellectually disabled man on Florida's death row. In Florida, the categorical prohibition against the execution of the intellectually disabled has been circumvented via the Florida Supreme Court's misinterpretation of *Hall v. Florida*, 572 U.S. 701 (2012), as constituting new, but non-retroactively applicable law, rather than an application of the established principle in *Atkins v. Virginia*, 536 U.S. 304 (2002). As a result, litigants like Mr. Foster who were granted the opportunity to present evidence demonstrating their intellectual disability, had their hearings revoked and have since been precluded from litigating their meritorious claims.

The questions presented are:

1. Whether the categorical restriction against executing the intellectually disabled can be circumvented via procedural hurdles implemented after litigants were initially given the opportunity to prove their intellectual disability?

2. Whether the grants of authority in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Hall v. Florida*, 570 U.S. 701 (2012) which permit states to determine procedures for implementing the categorical restriction against executing the intellectually disabled also permits states autonomy to redefine intellectual disability?

3. Whether the Florida Supreme Court's interpretation that *Hall* constitutes new, non-retroactively applicable law or is an application of the established principle in *Atkins* within the meaning of *Teague v. Lane,* 489 U.S. 288, 307 (1989), and *Chaidez v. U.S.*, 568 U.S. 342, 347-48 (2013), contravenes this Court's categorical prohibition against executing the intellectually disabled?

PARTIES TO THE PROCEEDING

Jermaine Alexander Foster, a death-sentenced Florida prisoner, is the petitioner. The State of Florida is the respondent.

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Orange County, Florida
State of Florida v. Jermaine Alexander Foster, Case No. 1993 CF 12001
Judgment Entered: July 25, 1994

Direct Appeal:
Florida Supreme Court (No. SC60-84228)
Jermaine A. Foster v. State, 679 So. 2d 747 (Fla. 1996)
Judgment Entered: July 18, 1996
Rehearing Denied: September 6, 1996

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 96-7011)
Jermaine A. Foster v. Florida, 520 U.S. 1122 (1997)
Judgment Entered: March 17, 1997

Postconviction Proceedings:
Circuit Court of Orange County, Florida
Foster v. State, 1993 CF 12001
Judgment Entered: July 15, 2002 (denying motion for postconviction relief)

Florida Supreme Court (No. SC03-1331)
Foster v. State, 929 So. 2d 524 (Fla. 2006)
Judgment Entered: March 23, 2006 (affirming)
Rehearing Denied: April 6, 2006

Federal Habeas Proceedings:
District Court for the Middle District of Florida (No. 6:06-cv-00648-KRS)
Foster v. Office of the Att'y Gen. of the State of Fla. et al.
Judgment Entered: February 18, 2010

First Successive Postconviction Proceedings:
Circuit Court of Orange County, Florida
Foster v. State, 1993 CF 12001
Judgment Entered: November 17, 2017

Florida Supreme Court (No. SC17-2198)
Foster v. State, 260 So. 3d 174 (Fla. 2018) (reversing and remanding)
Judgment Entered: December 28, 2018

Second Successive Postconviction Proceedings:
Circuit Court of Orange County, Florida
Foster v. State, 1993 CF 12001
Judgment Entered: May 4, 2023

Florida Supreme Court (No. SC23-0831)
Foster v. State, 395 So. 3d 127 (Fla. 2024) (affirming)
Judgment Entered: August 29, 2024
Rehearing Denied: October 16, 2024

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DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at 395 So. 3d 127 (Fla. 2024), and is reprinted in the Appendix (App.) at A.[1]

JURISDICTION

The judgment of the Florida Supreme Court was entered on August 29, 2024. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

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

The Fourteenth Amendment provides:

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

[1] Citations to non-appendix material from the record below are as follows: The abbreviation "R. _" refers to the first ten volumes of the record on appeal for Foster's direct appeal to the Florida Supreme Court (SC60-84228). "T. _" refers to the separately paginated sixteen-volume guilt phase transcript; "PP. _" refers to the separately paginated six-volume penalty phase transcript; "PCR. _" refers to the fifteen-volume record on appeal for Foster's initial postconviction appeal to the Florida Supreme Court (SC03-1331); "PCR2. _" Refers to the fifteen-volume record on appeal for Foster's successive postconviction appeal (SC17-2198); and "PCR3. _" refers Foster's second successive postconviction record presently on appeal (SC23-0891). All other references are self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE

I. INTRODUCTION

Jermaine Foster was failed by every system put in place to support people like him—people with intellectual disabilities. And due to the Florida Supreme Court's misinterpretation of the interplay between *Atkins v. Virginia*, and *Hall v. Florida*, he has been barred from presenting evidence that demonstrates that he is intellectually disabled and constitutionally exempt from execution. Without clarification from this Court on whether *Hall* constitutes new law or is simply a clarification of the application of *Atkins*, death-sentenced, intellectually disabled prisoners in Florida will continue to be executed.

At the age of six, Mr. Foster was placed in speech and language therapy, a foreseeable outcome for someone born to parents who were both in special education classes as children. As a result of his parents' deficits, Mr. Foster very quickly fell behind in school and lacked in-home resources to grasp what he was being taught in the classroom. In 1987, when Mr. Foster was fourteen, he was referred for placement in an alternative education program. Teachers sent multiple requests to his parents that they attend a conference to discuss establishing an Individual Educational Plan (IEP)[2]. But Mr. Foster never received the accommodations or services he needed, and suffered greatly in and out of the school system because of it.

By the time the crimes occurred in November 1992, Mr. Foster had been bounced between the homes of various relatives and spent the majority of his time on

[2] IEPs allow for special education services for students with disabilities so that they can receive the support they need to succeed in school.

"The Hill"—a neighborhood plagued by gun violence and drugs. He had been regularly using marijuana since he was twelve years old, before developing a dependence on it, powder cocaine, and alcohol. He had dropped out of school after eighth grade and was living with his co-defendant who assumed nearly all of the responsibilities around their trailer home as Mr. Foster's disability made it impossible for him to support himself, let alone others. He never received the resources or treatment necessary for him to better manage the manifestations of intellectual disability. And now he is condemned to die for crimes that stemmed, in part, from his disability, and has been barred from adequately presenting his intellectual disability claim to Florida courts.

Dr. Janet Vogelsang, a board certified and licensed social worker, who conducted a psychological assessment of Mr. Foster summarized the systemic failures that worsened Mr. Foster's intellectual and adaptive deficits:

> It's pretty much accepted in the field of social work that childhood – I think in our culture in general that childhood is supposed to be a time of special protection and rights. And when that does not occur in the family, then we expect the community to intervene and to step in and pick up where the family left off or never began. And in this case, I could not find any indication that there had been any intervention on behalf of Jermaine. We fund organizations and institutions to do this. And it's something that we expect to happen. **And I could not determine in my assessment that anyone had come into his life and done anything to help support him or to help him to compensate for the many deficits, an extraordinary number of deficits that he had.**

PP. 119-20.

After this Court held that the execution of intellectually disabled persons violates the Eighth Amendment of the United States Constitution, previously death-

sentenced individuals in Florida, like Mr. Foster, sought relief from their death sentences. *See Atkins v. Virginia*, 536 U.S. 304 (2002). At that time, the Florida legislature defined intellectual disability as requiring an IQ score of "two or more standard deviations from the mean score on a standardized intelligence test." *See* Fla. Stat. § 921.137(1) (2002). The Florida Supreme Court then interpreted this definition as imposing a bright-line IQ score cutoff of 70 effectively barring litigants from presenting evidence on the other two prongs of *Atkins* if their IQ score was above a 70. *See Cherry v. State*, 959 So. 2d 702 (Fla. 2007). But in *Hall v. Florida*, this Court determined that the bright-line cutoff failed to account for the Standard Error of Measurement (SEM) and "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. 701, 705 (2014).

Mr. Foster did not get the benefit of *Atkins* at his trial, or his initial postconviction hearing as both took place years before this Court's ruling. Aside from the trial court's finding that Mr. Foster is "mildly mentally retarded," R. 752, and the minimal presentation of Mr. Foster's deficits in support of an unrelated claim at his postconviction hearing, both of which occurred before *Atkins*, no court has ever heard evidence on all three prongs of *Atkins*. Notably, like Mr. Foster, the trial court in *Hall* too found that the defendant was "mentally retarded" as a mitigating factor in its sentencing order. *Hall v. State*, 109 So. 3d 704, 706 (Fla. 2012). Mr. Hall, however, was also previously foreclosed from pleading his intellectual disability claim due to Florida's bright-line IQ score cutoff before this Court struck it down, and was

resentenced to life in prison.[3]

When *Atkins* was issued, Mr. Foster timely raised an intellectual disability claim which was summarily denied. When *Hall* was issued, Mr. Foster again timely filed a successive motion for postconviction relief renewing his intellectual disability claim on the basis of *Hall* and the Florida Supreme Court's *Walls v. State*, 213 So. 3d 340 (Fla. 2016), decision that determined *Hall* applied retroactively. The Florida Supreme Court remanded for a *Hall*-compliant evidentiary hearing before receding from its decision in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), only four years later which prompted the state circuit court to revoke Mr. Foster's evidentiary hearing. As it stands, Florida litigants who received *Hall*-compliant hearings so that they could present evidence on their intellectual disability claims, but failed to have said hearings before *Phillips* was issued are effectively barred from having their intellectual disability claims ever heard.

Justice Labarga, dissenting from the majority opinion affirming the revocation of Mr. Foster's *Hall*-compliant evidentiary hearing, described the arbitrary outcome of the court's application of *Hall*:

> In my dissent in *Phillips*, I explained that "[t]he import of [*Phillips*] is that some individuals whose convictions and sentences were final before *Hall* was decided, despite timely preserved claims of intellectual disability, are not entitled to consideration of their claims in a manner consistent with *Hall*…. This arbitrary result undermines the prohibition of executing the intellectually disabled.

Foster, 395 So. 3d at 131; *see also Phillips*, 299 So. 3d at 1025.

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[3] Freddie Hall presented evidence of scores of 73 and 80 on the WAIS-R, as well as a 71 on the WAIS-III after receiving an evidentiary hearing on his *Atkins* claim. *Hall*, 109 So. 3d at 707. Like Mr. Foster, each IQ score was above a 70.

Where the crux of the *Phillips* opinion was that *Hall* does not require retroactive application because it constitutes a procedural rule of no fundamental significance, the court's opinion was entirely void of analysis on whether *Hall* announced a new rule of law or was simply an application of the established principle iterated in *Atkins*. *See Teague v. Lane,* 489 U.S. 288, 307 (1989); *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013). Clarification from this Court on how states are to apply *Hall* to cases where states erroneously applied *Atkins* is necessary. Absent such, Florida will continue to reject meritorious intellectual disability claims in favor of an arbitrary application of *Hall* based on a misunderstanding of the import of the opinion.

II. PROCEDURAL HISTORY

A. Mr. Foster's Death Sentences and Prior Litigation

In 1994, Mr. Foster was convicted of two counts of first-degree murder in the Ninth Judicial Circuit, in and for Orange County. *See Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996). Following a penalty phase, the jury recommended two death sentences. *Id.* On July 18, 1996, the Florida Supreme Court affirmed Mr. Foster's convictions and death sentences, *Foster*, 679 So. 2d at 756, and this Court denied certiorari. *Foster v. Florida*, 520 U.S. 1122 (1997).

Mr. Foster filed his initial motion for postconviction relief in 1998, which he later supplemented and amended. *Foster v. State*, 929 So. 2d 524, 527 (Fla. 2006). An evidentiary hearing was held in 2002, and the circuit court denied relief. *Id.* at 528.

Between the evidentiary hearing and the date that the circuit court denied Mr.

Foster's postconviction motion, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Foster raised an *Atkins* claim during the rehearing period for the denial of his postconviction motion, which the circuit court summarily denied. *Foster v. State*, 929 So. 2d 524 (Fla. 2006). The Florida Supreme Court affirmed on appeal. *Id.*

On August 29, 2017, Mr. Foster filed his first successive motion for postconviction relief, which included a claim that he is intellectually disabled and ineligible for execution under *Hall v. Florida*, 572 U.S. 701 (2014). The circuit court denied those claims on November 17, 2017. PCR2. 641-48. On appeal, the Florida Supreme Court reversed the summary denial of Mr. Foster's claim of intellectual disability and ordered an evidentiary hearing. *See Foster v. State*, 260 So. 3d 174 (Fla. 2018). The court explained:

> At the prior postconviction evidentiary hearing concerning intellectual disability, Foster's counsel was focused on proving that an involuntary intoxication defense would have been enhanced with evidence of intellectual disability, not on proving a claim of intellectual disability as a bar to execution under the governing case law, which was issued after that hearing. He presented evidence of intellectual disability only to show that his drug and alcohol use would have affected him more severely than it would have affected another person with higher intellectual functioning, and he came to the hearing with the background of having received a finding from the trial court that he is mildly intellectually disabled (albeit not a finding based on the *Atkins* prongs). The limitation on Foster's evidentiary presentation is illustrated by the fact that he did not offer any of his school records into evidence, even though the record generated in connection with the motion under review shows that Foster's school records would have afforded favorable, though not conclusive, evidence for Foster. Similarly, he did not include testimony from friends and family who observed adaptive deficits in him as a child, even though the current record includes affidavits showing that this testimony would have been available. In fact, it includes an attestation from a family member that Foster was in special education, which was not indicated at the original postconviction evidentiary hearing.

Foster, 260 So. 3d at 180-81.

Before his *Hall*-compliant evidentiary hearing was held, the Florida Supreme Court's issued *Phillips*, which receded from its *Walls* decision and held that *Hall* does not apply retroactively. On that basis, the State moved for summary denial of Mr. Foster's intellectual disability claim, which it later renewed alleging *Phillips* constituted an intervening change in the law. PCR3. 667-77, 820-22. The circuit court granted the State's renewed motion on May 4, 2023, and summarily denied relief on Mr. Foster's intellectual disability claim. PCR3. 911-19.

Mr. Foster appealed the circuit court's denial to the Florida Supreme Court, which affirmed. *Foster*, 395 So. 3d at 128.

B. Mr. Foster's Intellectual Disability Litigation

At the 1994 penalty phase, Mr. Foster presented testimony of two experts—Janet Vogelsang, a board certified and licensed social worker, and Henry Dee, a clinical neuropsychologist. Dr. Dee testified that Mr. Foster was administered the Wechsler Adult Intelligence Scale, Revised Edition (WAIS-R) test prior to trial which he received an IQ score of 75. PP. 320. An IQ of 75 places Mr. Foster in the fifth percentile, meaning about ninety-four percent of the population "function higher than he does[4]." PP. 320. According to Dr. Dee, this "cutting score" as recognized by the American Association of Mental Deficiency, when seen in conjunction with two areas

[4] To clarify, at Mr. Foster's 2002 evidentiary hearing, Dr. Dee testified that Mr. Foster was in the sixth percentile, meaning that "93 percent of the population would score higher" PCR. 705. The undersigned acknowledges this discrepancy, and notes that both testimonies generally demonstrate that Mr. Foster's IQ score places him in the bottom five percentiles.

of adaptive dysfunction, indicates that a person is "mentally retarded." PP. 321-21. He testified that Mr. Foster's adaptive dysfunction is demonstrated by his inability to become functionally literate, maintain employment, productively use his time, function in family settings, and these, coupled with his low IQ score of 75, demonstrate he "meets the criteria for mental retardation." PP. 321.

Dr. Vogelsang conducted a psychological assessment on Mr. Foster. PP. 112. This assessment involved reviewing a number of Mr. Foster's records, including his medical and school records, interviewing his family members, and consulting with Dr. Dee. PP. 111-12. Part of her assessment involved identifying certain risk factors which are extraordinary events that impact child development. PP. 115. These include family violence, hunger, lack of medical care, psychological battering, living under constant threat of violence, exposure to weapons and drugs, and impaired intellectual capacity, among others, **all of which** were present in Mr. Foster's assessment. PP. 116-17. Dr. Vogelsang testified that Mr. Foster was exposed to violence, hunger, and emotional and psychological battering at a very early age, and noted that intellectual impairment was generational:

> As far as I could determine, there was not any help in learning basic life skills and getting through developmental stages, that any information that was gathered had to be gathered by the child, that there was corruption by a parent, that there is some intellectual impairment, that there was psychological battering and emotional battering, an almost constant threat of violence, exposure to weapons and to drugs, and some impaired intellectual capacity. Actually not some. There was **a great deal** of intellectual incapacity among members – actually extensive family members across three generations in the family.

PP. 117.

Mr. Foster's trial occurred in February 1994, **nearly a decade** before this Court issued *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of the intellectually disabled constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. There, this Court defined intellectually disability as: 1) subaverage intellectual functioning accompanied by 2) adaptive deficits 3) which manifested before the age of 18. *Atkins*, 536 U.S. at 318. Thus, Mr. Foster's intellectual disability was not the focus of the defense's penalty phase presentation, but merely a sidenote. Neither Dr. Dee nor Dr. Vogelsang were asked to render an opinion on whether Mr. Foster met the three-prong test established in *Atkins*.

Consequently, the trial court's sentencing order was void of an *Atkins* analysis. Alongside finding four aggravating factors[5] and one statutory mitigating factor[6], the trial court also found as a non-statutory mitigating factor that Mr. Foster "suffers some organic brain damage, **is mildly mentally retarded**, and has a low IQ." R. 752-53 (emphasis added). The trial court also found:

> "Foster suffered an abusive childhood. He was subject to physical and mental abuse, deprived of proper nurturing and guidance, and was repeatedly exposed to the physical abuse of his mother by her live-in boyfriend. He often failed to receive proper nutrition and clothing."

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[5] The four aggravating factors were: (1) previously convicted of another capital felony; 2) the capital felony was committed while the defendant was engaged in the commission of a kidnapping; 3) the capital felony was committed for pecuniary gain; and 4) the capital felony was committed in a cold, calculated, and premeditated manner. R. 749-51.

[6] The statutory mitigating factor was that Mr. Foster's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. R. 753.

R. 752. Finally, it found that the duration and degree of Mr. Foster's drug and alcohol use demonstrated that he suffers from a substance abuse problem and was, to some extent, under the influence of drugs and alcohol at the time of the killings. R. 753.

The trial court sentenced Mr. Foster to two death sentences despite finding that Mr. Foster is "mildly mentally retarded." R. 752, 753. The Florida Supreme Court affirmed, and this Court denied certiorari. *Foster*, 679 So. 2d at 751, *cert. denied*, 520 U.S. 1122 (1997).

Mr. Foster filed a motion for postconviction relief on January 16, 1998, PCR. 29-77, which he later amended and supplemented at the circuit court's request. PCR. 407-17, 418-21, 426. The circuit court granted an evidentiary hearing on the claim that trial counsel was constitutionally ineffective for failing to investigate and prepare a voluntary intoxication defense as it effected Mr. Foster's mental disability and lack of mental capacity to commit and appreciate the consequences of his actions. PCR. 418-20.

The evidentiary hearing occurred January 30 through February 1, 2002. PCR. 628. Dr. Dee was retained for additional testimony. This hearing, like Mr. Foster's trial, took place prior to *Atkins*, and therefore Dr. Dee's testimony was limited to the intoxication defense claim in conjunction with his mental deficits. PCR. 694-741. Dr. Dee testified that, given Mr. Foster's reduced intellectual functioning, drugs and alcohol would have a more deleterious effect on him than the average person. PCR. 697, 709. At a baseline, because Mr. Foster is "mildly intellectually impaired," he suffers from poor social judgment; but this, coupled with the use of drugs and alcohol

further compromised his intellectual functioning. PCR. 709.

On cross-examination, Dr. Dee testified to what this Court later recognized in *Atkins* as adaptive deficits. *See Atkins*, 536 U.S. at 318. According to Dr. Dee, Mr. Foster was unable to finish school, was subjected to poor influences at a very young age and was culturally deprived. PCR. 725. As the hearing occurred pre-*Atkins*, there was no testimony on whether Mr. Foster's reduced intellectual functioning and adaptive deficits manifested before the age of 18[7].

After the evidentiary hearing but prior to the state circuit court's July 8, 2002, denial of Mr. Foster's motion for postconviction relief, PCR. 514-42, this Court decided *Atkins*. Upon the circuit court's denial, Mr. Foster moved for rehearing alleging that he is intellectually disabled pursuant to *Atkins*. PCR. 543-46. The circuit court denied rehearing without holding an additional evidentiary hearing on his *Atkins* claim on June 3, 2003. PCR. 616-22.

The Florida Supreme Court affirmed the circuit court's denial of relief. *Foster v. State*, 929 So. 2d 523, 531-33 (Fla. 2006). It relied on the circuit court's post factum findings that the *Atkins* claim had been fully presented at the evidentiary hearing, and that Mr. Foster failed to satisfy all three prongs. *Id.* at 532-33. In rejecting the claim, the court noted that Mr. Foster was supporting himself at the time of the crimes, "albeit, by illegal drug sales," and providing shelter to his younger co-defendant, as well as a lack of evidence supporting that his adaptive deficits

[7] Mr. Foster had only turned nineteen years old a few weeks before the crimes were committed.

manifested before the age of 18. *Id.* at 533. It further found that Mr. Foster was never in special education, a falsity that is now acknowledged by both parties. *Id.*; *see Foster*, 260 So. 3d at 180-81. Finally, the court's denial was issued at the time when Florida imposed an unconstitutional, bright-line IQ cutoff score of 70 for proving intellectual disability, and Mr. Foster's IQ was measured as a 75. *Id.* at 532-33; *see Cherry v. State*, 959 So. 2d 702, 711-14 (Fla. 2007).

In 2014, this Court decided *Hall v. Florida*, where the issue was "how intellectually disability must be defined in order to implement . . . the holding of *Atkins*." 572 U.S. 701, 709 (2014). At the time, the Florida Supreme Court interpreted the statute defining intellectual disability as requiring an IQ score of 70 or below. *See Cherry*, 959 So. 2d at 712-13; Fla. Stat. § 921.137(1) (2013). In *Hall*, this Court struck down the bright-line cutoff as creating the "unacceptable risk that persons with intellectual disability will be executed." *Id.* at 704. The core of this Court's analysis was looking to how the medical community interprets IQ scores to better understand how state courts and legislatures "implement the *Atkins* rule." *Id.* at 709-10.

Pursuant to this Court's ruling in *Hall*, and the Florida Supreme Court's subsequent ruling in *Walls v. State*, 213 So. 3d 340, which held that *Hall* applies retroactively under state law, and warrants a "holistic review" of all three *Atkins* prongs, *id.* at 346, Mr. Foster filed a successive motion for postconviction relief in state court asserting that he is ineligible for the death penalty. PCR2. 155-179. Mr. Foster explained that none of the reasons provided by the Florida Supreme Court for affirming the summary denial of intellectual disability relief in 2006, pre-*Hall*,

remained valid bases to deny relief. PCR2. 159-61; PCR3. 55-57. After the State filed its answer, Mr. Foster filed a reply and attached a proffer of the expert report of Dr. Jethro Toomer, an experienced forensic and clinical psychologist with expertise in the assessment of adaptive deficits, addressing Mr. Foster's intellectual disability. *See* PCR2. 530-32, 613. Dr. Toomer opined:

> Mr. Foster does have significant adaptive deficits. It is also quite clear that these deficits originated in childhood . . . [H]is intelligence was previously tested within the current range for an Intellectual Disability Diagnosis. In my opinion, a diagnosis of intellectual disability is appropriate for Jermaine Foster under the current professional and legal standards.

PCR2. 532.

Mr. Foster also attached sworn statements by friends and family who witnessed his deficits and could relate that he struggled in every facet of his life. *See* PCR2. 514-29. These statements and Dr. Toomer's report were discussed at length at a case management conference where Mr. Foster gave formal argument on his adaptive deficits and the manifestation of his intellectual disability during his developmental period. Mr. Foster did not argue subaverage intellectual functioning as the State did not dispute that his IQ score was consistent with *Hall*. PCR2. 696-97.

In further support of his claim, Mr. Foster attached his school records which confirm that he faced significant barriers to learning beginning in early elementary school. PCR2. 533-603. Throughout elementary school, Mr. Foster was unable to perform simple tasks like identifying specific details, distinguishing between reality and fiction, putting words in alphabetical order, solving word problems involving

addition, and solving money problems involving subtraction. PCR2. 575-77. By the fourth grade, Mr. Foster was only reading at a first-grade level, and thus often relied on his younger siblings to complete his homework for him.

Mr. Foster's deficits worsened throughout elementary school, resulting in him being held back repeatedly. PCR2. 697. Eventually, Mr. Foster was socially promoted from one grade to the next due to his age and size despite failing to meet minimum student performance standards. PCR2. 566-67, 700. By junior high school, Mr. Foster was in special education classes and was additionally placed into speech and language therapy classes. PCR2. 578-79, 698. Once Mr. Foster reached eighth grade, he was already sixteen years old and was four years behind his classmates. PCR2. 698. School records demonstrate that he still could not distinguish between fact and opinion, put words into alphabetical order, write simple sentences, subtract triple or even double-digit numbers, identify city and states, months and days, or capitalize proper nouns. PCR2. 698-700.

At the conclusion of eighth grade, Mr. Foster took a standardized exam that tested educational and real-world skills. On the communications portion, which tested reading and writing, he mastered only four out of fourteen of the minimum student performance standards, PCR2. 569, and on the mathematics portion, he mastered only five out of fourteen of the minimum student performance standards, PCR2. 569.

Mr. Foster's inability to meet even the bare minimum requirements in school ultimately led to him dropping out after eighth grade, though his deficiencies

remained. PCR2. 519. Mr. Foster's friends and family characterized him as "slow his entire life." PCR2. 702. Children in his neighborhood often bullied and took advantage of Mr. Foster's deficits by convincing him to lick batteries, jump off roofs, sniff ammonia, and run in front of oncoming cars. PCR2. 703. Mr. Foster's compliance with these dangerous demands was a direct result of his adaptive deficits. PCR2. 703. Family members often had to remind Mr. Foster to bathe, helped him cook and wash his clothing, and had to remind him of how to dress appropriately for the weather. PCR2. 703.

Andrea Spillman, Mr. Foster's older, first cousin who resided with him during his childhood, attested in a sworn statement that he was unable to grasp seemingly basic out-of-school activities like kicking a kickball and jumping rope. PCR2. 516. Board games like Monopoly, Checkers, Jacks, and Operation were "too advanced" for Mr. Foster. PCR2. 516. According to her:

> Jermaine never did anything by himself. If he needed to go somewhere my grandmother would take him. If he needed to eat my grandmother would feed him. When his clothes were dirty my grandmother would wash them. After she showed him multiple times how to use the dryer she would allow him to put the clothes in the dryer but she never allowed him to use the washing machine. She knew he couldn't separate the clothes correctly or wash them on the right temperature.
>
> ***
>
> Jermaine has always been immature. When Jermaine was seventeen or eighteen I was in a bind and asked Jermaine to babysit for me. My kids at the time ranged from an infant to elementary school age. Jermaine agreed to babysit for me. I found out later that he left the house right after I did leaving the kids alone. **He just didn't get it.**

PCR2. 517.

As demonstrated by Dr. Dee's trial testimony, Mr. Foster was always a "follower" who could not maintain a checkbook, a bank account, or himself generally. PCR2. 702. Mr. Foster never lived independently as a result. PCR2. 703-04. He continued to struggle to maintain his hygiene, and often had to be reminded to shower, dress appropriately for the weather, wear shoes, and brush his teeth. PCR2. 703. He also struggled with verbal communication, and often became frustrated when he was unable to understand things. PCR2. 704. He never lived independently, never learned how to pay bills, balance a checkbook, or prepare meals for himself. PCR2. 703-04. Mr. Foster required help from his aunt filling out an application form for a position at McDonalds, and was ultimately fired. PCR2. 703-04.

Mr. Foster earned the reputation of "happy go lucky" and a "big kid" who "delighted in watching cartoons and playing in the motel pools." PCR2. 521, 523. His deficits made leading an impossibility, and often resulted in him being "taken advantage of" by people younger and older, family and non-family. PCR2. 517, 520.

In his later teens, Mr. Foster began living with his younger friend and eventual co-defendant, Leondra Henderson, and similarly relied on Henderson for assistance. PCR2. 522. Mr. Foster could not fill out the paperwork to get their utilities turned on, and could not read the utility bills, let alone pay them, so Henderson assumed those responsibilities. PCR2. 522. When Mr. Foster tried to purchase a vehicle, he was forced to rely on Henderson to finalize the transaction as Mr. Foster was unable to read or sign the title. PCR2. 522. Henderson prepared all their meals because Mr. Foster's deficits made his attempts to cook life threatening—on more than one

occasion, he forgot he began cooking and nearly started a fire. PCR2. 522. When Henderson sent Mr. Foster to buy groceries, Mr. Foster would often return with the wrong items. PCR2. 523. As a result, someone would have to accompany Mr. Foster to the grocery store. PCR2. 520, 523.

Mr. Foster's "inability to understand what was happening around him" caused him immense confusion and frustration. PCR2. 523. This frustration was especially present when the conversation topic was money. PCR2. 523. He also struggled to pick up on social cues; when certain situations called for seriousness, Mr. Foster opted for playfulness. PCR2. 523. He just "couldn't understand what was going on around him." PCR2. 523.

After the presentation of the accounts of Dr. Toomer and Mr. Foster's friends and family, the circuit court denied relief on November 17, 2017. PCR2. 641-48. The court ruled that Mr. Foster was procedurally barred from raising a claim under *Hall* because he had already raised an intellectual disability claim during his pre-*Atkins* penalty phase and pre-*Atkins* postconviction hearing. PCR2. 641-48. But in light of *Hall*, and subsequently *Walls v. State,* 213 So. 3d 340 (2016), the Florida Supreme Court reversed on appeal and remanded for the circuit court to hold a *Hall*-compliant evidentiary hearing on the claim. *Foster v. State*, 260 So. 3d 174 (Fla. 2018)[8].

Before a hearing was held, the Florida Supreme Court issued *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), receding from *Walls* and holding that *Hall* is not

[8] The State neither moved for reconsideration nor sought certiorari review from the Florida Supreme Court's decision.

retroactive. The State then moved for summary denial of Mr. Foster's intellectual disability claim and requested that the evidentiary hearing be canceled. PCR3. 667-77.

The circuit court denied the State's motion on February 18, 2021, finding it lacked the authority to disregard the Florida Supreme Court's mandate[9] directing it to hold a hearing. PCR3. 753-57. The State renewed its motion for summary denial of the intellectual disability claim on March 31, 2022, arguing that *Phillips* constituted intervening change in the law obviated the need for a *Hall*-compliant hearing. PCR3. 820-22. The circuit court granted the State's renewed motion and summarily denied Mr. Foster's intellectual disability claim. PCR3. 911-19. The Florida Supreme Court affirmed. *Foster*, 395 So. 3d at 128.

C. The Florida Supreme Court's Decision Below

On August 29, 2024, the Florida Supreme Court issued an opinion affirming the circuit court's denial of relief on Mr. Foster's intellectual disability claim. *Foster*, 395 So. 3d at 128. The court rejected the arguments that *Phillips* was wrongly decided, and that the circuit court erred by summarily denying without a hearing. *Id.* at 130. The court found that Mr. Foster had the opportunity to litigate his intellectual disability and is now procedurally barred seeking relief on a *Hall*-based intellectual disability claim due to its precedent in *Walls v. State*, 361 So. 3d 231, 233-34 (Fla. 2023) (declining to review the merits of *Hall*-based intellectual disability claim after defendant presented evidence on all three prongs at *Cherry* and *Hall*-compliant

[9] The mandate was issued on January 17, 2019.

hearing), *Nixon v. State*, 327 So. 3d 780, 783 (Fla. 2021) (declining to review the merits of *Hall*-based intellectual disability claim after defendant presented evidence on all three prongs at *Hall*-compliant hearing), and *Thompson v. State*, 341 So. 3d 303, 306 (Fla. 2022) (affirming summary denial of *Hall*-based intellectual disability claim after defendant received hearing under *Cherry*). Accordingly, the court held that Mr. Foster is not entitled to the benefit of *Hall*. *Foster*, 395 So. 3d at 130.

REASONS FOR GRANTING THE WRIT

I. The promise this Court made in *Atkins*—that the Constitution prohibits the intellectually disabled from being executed—has, again, been defied by the Florida courts which have denied Mr. Foster a fair opportunity to establish that he is intellectually disabled and therefore exempt from execution.

In *Atkins*, this Court held that the Constitution "places a substantive restriction on the State's power to take the life" of intellectually disabled persons, and clarified in *Moore* that this applies to "*any* intellectually disabled individual." 536 U.S. at 321; 581 U.S. at 12. And where this Court delegated to states the task of determining how to enforce the constitutional restriction, *see Atkins*, 536 U.S. at 317, it intervened when it was clear that Florida's statutory scheme as interpreted by its courts allowed for the unconstitutional execution of the intellectually disabled, *see Hall*, 572 U.S. at 721.

The Florida Supreme Court briefly adhered to the ruling of this Court when it issued *Walls* and granted previously foreclosed litigants their day in court to present evidence on their intellectual disability claims. But reversed after only four years, leaving litigants like Mr. Foster who were granted hearings but had yet to have them

due to outside factors like a clogged court system without any remedy for challenging their unconstitutional death sentences. *See Phillips v. State*, 299 So. 3d 1013 (Fla. 2020).

In upholding the revocation of Mr. Foster's hearing and summary denial of his intellectual disability claim, the Florida Supreme Court outlined how initially the postconviction court was unwilling to deviate from the court's mandate requiring a *Hall*-compliant evidentiary hearing and thus denied the state's motion for summary denial on that basis, as well as the fact that it was filed after the statutorily imposed 120-day deadline. *Foster*, 395 So. 3d at 128. Two years later, the Florida Supreme Court decided *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), which had an identical procedural posture, but there, the Court determined that *Phillips* constituted an intervening change in the law thus eliminating the need for a *Hall*-compliant hearing and constituting an exception to the law of the case doctrine.[10] As a result, Thompson, and subsequently Mr. Foster, had their *Hall*-compliant hearings revoked, and were procedurally barred from challenging their sentences because *Hall* was no longer applied retroactively.

Florida's unwillingness to adhere to this Court's precedent does not negate the fact that Mr. Foster, and other similarly situated death-sentenced individuals, are

[10] The law of the case doctrine "requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). The Florida Supreme Court recognizes an exception to this doctrine when there has been an intervening change of controlling law. *Wagner v. Baron*, 64 So. 2d 267 268 (Fla. 1953).

members of "the *entire category* of [intellectually disabled] offenders." *Moore v. Texas*, 581 U.S. 1, 18 (2017) (quoting *Roper v. Simmons*, 543 U.S. 563-64 (2005)) (emphasis in original). Mr. Foster is categorically prohibited from being executed due to his intellectually disability—this is so despite Florida's arbitrary procedural bars.

In *Graham v. Florida*, this Court chronicled its Eighth Amendment jurisprudence with respect to the proportionality of sentences which fall into two classifications: 1) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and 2) cases where the Court implements the proportionality standard by certain **categorical restrictions** on the death penalty. 560 U.S. 48, 59 (2010). The ladder classification, at issue in this case, has two subsets, one considering the nature of the offense, *see Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting the death penalty for crimes that did not result, and were not intended to result, in the death of the victim), and the other considering the characteristics of the offender, *see Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the death penalty for defendants whose crimes were committed before the age of 18); *Atkins*, 536 U.S. 304 (2002) (prohibiting the death penalty for defendants whose intellectual functioning is in a low range).

The modicum of categorical restrictions outlined by this Court both highlights their magnitude, as well as the imperativeness that States adhere to them. This means that states cannot circumvent this Court's categorical restriction against executing the disabled via arbitrary procedural barriers. As this Court explained in *Atkins*, "[t]his consensus" that the execution of intellectually disabled offenders

should be prohibited "suggests that some characteristics of mental retardation **undermine the strength of procedural protections that [its] capital jurisprudence steadfastly guards**." *Atkins*, 536 U.S. at 317 (emphasis added). By rescinding the retroactive application of *Hall* and revoking hearings previously granted to litigants who had been foreclosed from presenting evidence demonstrating their intellectual disability claims, Florida has greenlit the execution of the intellectually disabled. The justification of such a ruling is a procedural bar of the kind that this Court explicitly explained is eclipsed by the categorical prohibition against executing the intellectually disabled. *See Atkins*, 536 U.S. at 317.

II. Florida has, again, redefined intellectual disability to only include those pre-*Hall* litigants who met the bright line IQ score.

This Court defined intellectual disability in *Atkins*, and merely left to the states the discretion to distinguish between those alleging intellectual disability and those who are actually intellectually disabled. *Atkins*, 508-09. It did not permit states to develop their own, more restrictive definitions of intellectual disability noting that "[i]f states were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* would become a nullity." *Hall*, 572 U.S. at 720-21.

We see examples of this Court correcting states that have wrongly assumed autonomy to define intellectual disability as they wish in its precedent that followed *Hall*. In *Moore v. Texas*, 586 U.S. 133 (2019), this Court struck down the *Briseno* factors as having "no grounding in prevailing medical practice" and reiterated that **both** "*Atkins* and *Hall*" left to states the task of developing ways to enforce the

restriction on executing the disabled, but that in all cases, such enforcement must be informed by the medical community's diagnostic framework. 586 U.S. at 137. Like *Hall* corrected Florida's application of *Atkins*, *Moore* corrected Texas' application of *Atkins*. Neither opinion constituted new law, but simply clarified that *Atkins*' principle cannot be enforced my means that disregard current medical standards. And this Court acknowledged this very proposition in *Shoop v. Hill*, 586 U.S. 45 (2019). There, it explained, "[o]f course, *Atkins* itself was on the books, but *Atkins* gave no comprehensive definition of "mental retardation" for Eighth Amendment purposes." *Id.* at 49. *Atkins* acknowledged the definitions adopted by the American Association of Mental Retardation and the American Psychiatric Association, as well as state statutory definitions which were not identical, but appeared to conform to the clinical definitions. *Id.* It wasn't until *Hall* and *Moore* that the Court, "[m]ore than a decade later, [] expounded on the definition of intellectual disability." *Id.* Where the *Atkins* rule had already been established, *Hall* and *Moore* simply informed states that they were not applying it in a manner that passed constitutional muster. *Hall*, like *Moore*, is not new law—neither opinions would stand without *Atkins*. *See also Brumfield v. Cain*, 576 U.S. 305, (2015) (finding Louisiana state court's determination that IQ of 75 foreclosed further exploration of intellectual disability unreasonable where court failed to consider that petitioner's trial occurred before *Atkins* and evidence was presented when intellectual disability was not at issue).

This case is another example of a state misinterpreting *Hall* as a broad grant of authority to define intellectual disability as it wishes. All *Hall* did was clarify the

definition of intellectual disability and demonstrate to states that they cannot overextend their authority to determine procedures for identifying the intellectually disabled by imposing a more restrictive definition. As it stands, by holding that *Hall* is not retroactive, Florida has simply reapplied the bright-line cutoff of a 70 IQ score that it unconstitutionally imposed in *Cherry v. State*, 959 So. 2d 702 (2007). This ruling and definition defies this Court's precedent, disregards established medical practice by forbidding the production of all medical evidence demonstrating intellectual disability, and bypasses this Court's clear, categorical restriction against executing the intellectually disabled.

III. Clarification from this Court is needed on how states are to distinguish between rules of law from applications of previously established rules within the framework of *Teague v. Lane*, and *Chaidez v. U.S.*

The Florida Supreme Court dedicated its analyses in *Walls* and in *Phillips* to whether this Court's *Hall* decision warranted retroactive application under state law in *Walls*, and state and federal law under *Phillips*. Yet the court neglected step zero of both tests—determining whether *Hall* announced a new rule of law to begin with.

In *Chaidez v. U.S.*, 568 U.S. 342 (2013), this Court reiterated that its precedent announces a new rule "when it breaks new ground or imposes a new obligation" on the government. 568 U.S. 342 (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)). It continued that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Ibid.* A case does not announce a new rule, however, when it is "merely an application of the principle that governed" a prior decision to a different set of facts. *Chaidez*, 568 U.S.

at 348 (internal quotations omitted). Rarely, this Court made clear, does it "state a new rule for *Teague* purposes," but far more frequently applies "a general standard to the kind of factual circumstances it was meant to address." *Id.*

While *Atkins* did announce a new rule of law—that it would violate the Eighth Amendment's Cruel and Unusual Punishment Clause to execute the intellectually disabled—*Hall* did not. The Florida Supreme Court in *Phillips* dedicated little analysis to whether *Hall* established a new rule of law that emanates from this Court—the first two prongs of the *Witt* test—before determining that it does. The bulk of the court's analysis was on the third prong, whether *Hall* constitutes a development of fundamental significance. This prong is met when the case either "places beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or "is of sufficient magnitude" to necessitate retroactive application. *Witt v. State*, 387 So. 2d 922, 931 (Fla. 1980). In determining the second category under *Witt*, courts look to the *Stovall/Linkletter* factors: 1) the purpose to be served by the new rule 2) the extent of reliance on the old rule; and 3) the effect of retroactive application of the new rule on the administration of justice. *Id.* at 926.

In finding that *Hall* did not constitute a development of significance, ironically, the court repeatedly iterated reasons that demonstrate that *Hall* was never a new rule of law to begin with. It's very reasoning for rescinding its retroactive application is the reason the case should not be considered new law at all. The court explained:

> *Hall* is an evolutionary refinement of the procedure necessary to comply with *Atkins*. It merely clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty … It did not invalidate any

> statutory means for imposing the death sentence, nor did it prohibit the states from imposing a death penalty against any new category of persons.

Phillips, 299 So. 3d at 1021.

The above explanation aligns exactly with what this Court determined in *Atkins*—that states be given authority to determine how best to apply the *Atkins* rule. *Atkins*, 536 U.S. at 317. This grant of authority did not then bind this Court from informing states when that authority has extended beyond what this Court intended and into a realm of unconstitutionality. And the Florida Supreme Court recognized this, which is why it identified *Hall* as simply an overcorrection of that prior grant of authority. Where it went wrong was when it used this reasoning as a means of revoking the relief it initially granted when it incorrectly found that *Hall* constituted new law warranting retroactive application.

Hall is "merely an application of the principle that governed" in *Atkins*. *Chaidez*, 568 U.S. at 348. It did not establish a new categorical prohibition, whereas *Atkins* did—precluding the execution of the intellectually disabled. This Court consulted the work of medical and psychiatric experts and expanded upon how those professionals have developed a consensus that an arbitrary IQ cutoff score is inconsistent with the scientific understanding of intellectually disability. *Hall*, 572 U.S. at 710-18. That this analysis was lacking in *Atkins* does not support the argument that *Hall* constitutes new law, but that *Hall* occurred twelve years later and corrected a misunderstanding by the Florida Supreme Court of medical standards concerning intellectual disability.

Absent this Court's intervention, individuals like Mr. Foster, who have already been found to suffer from mild intellectual disability, risk being executed in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. An outcome exactly contrary to this Court's decision and reasoning *in Atkins*.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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