No. 24-6594

In The
Supreme Court of the United States

JERMAINE A. FOSTER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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Capital Case

QUESTIONS PRESENTED

In 2016, the Florida Supreme Court, using the state retroactivity test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), held that *Hall v. Florida*, 572 U.S. 701 (2014), was retroactive. *Walls v. State*, 213 So. 3d 340, 345-46 (Fla. 2016). Based on the decision in *Walls*, a number of Florida capital cases were remanded by the Florida Supreme Court to the state postconviction courts to conduct ***second*** evidentiary hearings on claims of intellectual disability, including this case. Then, in 2021, the court receded from that prior precedent and held that *Hall* was not retroactive, under state law, in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied, Phillips v. Florida*, 141 S. Ct. 2676 (2021). Shortly after, the Florida Supreme Court held that *Phillips* constituted an intervening change in the law, an exception to the "law of the case" doctrine that obviated the need for a *Hall*-compliant hearing. *Thompson v. State,* 341 So. 3d 303 (Fla. 2022). Consequently, the circuit court granted the State's motion for summary denial of Foster's intellectual disability claim. On appeal, the Florida Supreme Court affirmed on non-retroactivity grounds relying on its existing precedent of *Phillip*s.

The three questions presented are:

1. Must *Hall v. Florida*, 572 U.S. 701 (2014), be applied retroactively by state courts because it substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment?

2. Whether *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), place a categorical limitation on the authority of the state to impose a sentence of death?

3. Whether the Florida Supreme Court correctly determined this Court's holding in *Hall v. Florida*, 572 U.S. 701 (2014), announced a new rule of constitutional law that did not apply retroactively?

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The decision of the Florida Supreme Court is reported at *Foster v. State*, 395 So. 3d 127 (Fla. 2024).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on August 29, 2024. The instant petition was timely filed with this Court on February 13, 2025. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Respondent agrees that that statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE AND FACTS

I. Introduction

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 executing the intellectually disabled. Fla. Stat. § 921.137 (2001). In *Cherry v. State*, 959 So. 2d 702, 712–13 (Fla. 2007) (per curiam), the Florida Supreme Court construed that statute to mean that "a person whose test score is above 70, including a score within the

margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Hall v. Florida*, 572 U.S. 701, 711 (2014). Several other States had similar rules. *See id.* at 714–18.

In *Hall*, a five-Justice majority of this Court held that Florida's strict IQ cutoff of 70 was unconstitutional. This 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. This Court instead required 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 Florida law, *Hall* applied retroactively to cases pending on collateral review. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (per curiam). In 2020, however, the Florida Supreme Court overruled *Walls*, ruling that *Hall* is not, as a matter of Florida law, retroactively applicable to cases on collateral review. *Phillips v. State*, 299 So. 3d 1013, 1019–22 (Fla. 2020) (per curiam), *cert. denied* 141 S. Ct. 2676 (2021). The Florida Supreme Court also held that *Hall* is not retroactively applicable in habeas as a matter of federal law, either. *Id.* at 1022 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

II. Facts of the case

On November 28, 1993, Foster and his co-defendants targeted the victims at a bar and formulated a plan to rob them of their money and their vehicle. Foster stated to [whom? the victims or his co-defendants?] that if the victims did not have any money, he was going to kill them. After the victims left the bar, Foster and his co-defendants followed the victims, eventually ramming their truck into the back of the victims' Pathfinder to get that vehicle to stop. When the victims stopped and got out of the Pathfinder to inspect the damage, the group took out their weapons and demanded money from the victims. After the victims stated that they did not have any money, they were forced to return to the Pathfinder where they were driven to another location. All four of the victims were ordered out of the Pathfinder, and the female victim was separated from the three male victims. The group again demanded money from the male victims. When these victims did not produce any, they were ordered to remove their clothes, and Foster had the men place their underwear and hands on their heads and lie face down on the ground. At this point, Foster, from a position beside and to the rear of Anthony Clifton, shot Clifton in the back of the head, killing him. Foster then approached Rentas and fired at his head. The bullet hit him in the hand, and Rentas pretended to be dead. Foster next walked to Faiella and shot him in the head, killing him. The group then left in the Pathfinder and unsuccessfully tried to dispose of it by driving it into a lake. All four of the assailants were apprehended within days. *Foster v. State*, 679 So. 2d 747, 751 (Fla. 1996).

The jury convicted Foster of two counts of first-degree murder, one count of attempted first-degree murder, and four counts of kidnapping. *Id.* After the penalty phase, the jury unanimously recommended that Foster be sentenced to death for the murders. The trial court followed this recommendation, finding four statutory aggravators[1] and one statutory mitigator.[2] In conjunction with the statutory mitigator, the trial court found that Foster is "mildly mentally retarded," *id.* at 755, based on evidence that Foster had an IQ score of 75 and showed deficits in adaptive functioning. However, at that time, "mental retardation," which is now known as intellectual disability, was not a bar to execution. *See Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). The Florida Supreme Court affirmed Foster's convictions and sentences on direct appeal. *Id.* at 756. This Court denied certiorari review of Foster's case on March 17, 1997. *Foster v. Florida*, 520 U.S. 1122 (1997).

Procedural history of the intellectual disability claim

Foster then sought postconviction relief based on intellectual disability claims, filing his first motion in 2002. Before the postconviction court ruled on his motion, but following an evidentiary hearing that included testimony concerning Foster's

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[1] The trial court found the following aggravators: Foster was previously convicted of another capital felony; the capital felony was committed while the defendant was engaged in the commission of a kidnapping; the capital felony was committed for pecuniary gain; and the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. *Foster I*, 679 So. 2d at 751 n.2. 3.

[2] The trial court found that Foster's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. *Id.* at 751 n.3.

mental abilities, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), imposing a bar on the execution of those with an intellectual disability. After the postconviction court denied his motion, Foster appealed to the Florida Supreme Court seeking relief based on *Atkins*, among other grounds. *Foster v. State*, 929 So. 2d 524, 528 (Fla. 2006).

On October 14, 2004, after oral argument, the Florida Supreme Court relinquished jurisdiction to the postconviction court for an evidentiary hearing on one of Foster's claims. *Foster v. State*, 929 So. 2d 524, 528 (Fla. 2006). The postconviction court also reviewed Foster's evidence allegedly supporting his *Atkins* claim and concluded that he failed to establish "the necessary prongs to show mental retardation." *See id.* at 531-33.

Foster appealed alleging that the evidentiary hearing established all factors except whether the onset of his alleged mental retardation occurred before age eighteen. The Florida Supreme Court affirmed the trial court's ruling, holding that Foster had not established the necessary prongs to show mental retardation:

> Foster contends that the evidentiary hearing established all factors except whether the onset of his alleged mental retardation occurred before age eighteen; thus, he contends that the circuit court erred by denying his claim without an additional hearing that would provide him with an opportunity to establish this last element.
>
> Contrary to such allegations, the lower court did not find that Foster established the necessary prongs to show mental retardation. First, after quoting extensive portions of Dr. Dee's testimony, the postconviction court found that Dr. Dee's testimony did not clearly establish that Foster was mentally retarded.

> Q In your testing of Mr. Foster ... did he have the mental functioning to do the everyday chores from what you observed and the testing you did?
>
> A He never had. No. And although there is some question in this case whether there was opportunity and whether or not he was a sufficient age at which—at least to me to make that determination, *so I remember specifically saying while he was mildly retarded or borderline, that's about the best I could do in terms of descriptive functioning.* I think from behavior, he could be considered mildly retarded, he didn't keep a job or kept any accounts, he always depended on other people for support. But, once again, there are socioeconomic factors have to be considered so I wasn't insisting on that.
>
> ....

On cross-examination, however, Dr. Dee further clarified his opinion as to whether Defendant was mentally retarded. He testified that:

> Q In looking at Mr. Foster's adaptive behavioral scales did you do like the Vineland test or any of the—
>
> A No, I didn't think it would be particularly useful because I had the information I needed. I could do one now from the information I have but he never had a job for a substantial period of time. He hadn't finished school. He was not really functioning literal [sic]. He had a lot of cultural deprivation. It's a very difficult call in the situation. Still very young and he's been subject to some very bad influence, involved in criminal behavior and kind of moved around from pillar to post, and *I was kind of reluctant to decide finally whether mental retardation for him so I said mildly retarded to borderline. Not borderline very high, but I was reluctant to make a decision regarding retardation.*

(Emphasis added.) The postconviction court then reviewed the three prongs of mental retardation as noted in *Atkins* to determine whether Foster had proven any of the factors.

> Dr. Dee testified that Defendant's IQ was 75, which at most is borderline to even begin to consider whether a person is mentally retarded. Nevertheless, even if Defendant's IQ

> score of 75 is considered as evidence of mental retardation, Defendant does not meet the second prong of the test set forth in *Atkins,* i.e., significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Dr. Dee's testimony was refuted by the testimony of Leonore [sic] Henderson and by Mr. Smallwood, Defendant's original trial attorney....
>
> ....
>
> Evidence showed that Defendant was supporting himself and functioning on his own, albeit, by illegal drug sales. He was even able to provide shelter and sustenance for another, Leondre [sic] Henderson. His communication skills, as evidenced by his meetings with his trial attorney and by his own testimony before this Court, did not indicate significant limitations as required by *Atkins,* 122 S.Ct. at 2242.
>
> Moreover, the testimony from the original trial does not support the allegation that Defendant evidenced significant limitations in adaptive skills before age 18. In school, Defendant was not placed in special education classes nor was there any indication from teachers that Defendant was possibly mentally retarded.
>
> It is evident that the issue as to whether Defendant is mentally retarded was presented at and explored during the evidentiary hearing in this matter. In *Atkins,* the Court stated that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins,* 122 S.Ct. at 2250. After considering all the evidence and personally observing Defendant testify, this is just such an instance as contemplated by the United States Supreme Court. This Court finds that Defendant is not mentally retarded as defined in *Atkins.* The evidence simply does not support this claim.

After reviewing the record and the postconviction court's findings, we reject Foster's claim that his rights under *Atkins* were violated. Foster was afforded a hearing on the issue of mental retardation and was

> permitted to introduce expert testimony on the issue. The postconviction court found that the evidence did not support his claim. We find no errors in the postconviction court's findings or conclusions.

Id. at 532-33.

On August 29, 2017, Foster filed a successive motion for postconviction relief, raising a claim of intellectual disability again, based on the decision of *Hall v. Florida*, 572 U.S. 701, 704 (2014). On November 17, 2017, the circuit court denied his *Hall* claim without an evidentiary hearing, because all three prongs of the intellectual disability test had already been considered. Foster appealed, and the Florida Supreme Court remanded for a "*Hall*-compliant" evidentiary hearing on the intellectual disability claim.[3] *Foster v. State*, 260 So. 3d 174, 181 (Fla. 2018).

On May 21, 2020, before Foster's *Hall*-compliant hearing could begin, the Florida Supreme Court issued *Phillips v. State*, 299 So. 3d 1013, 1018 (Fla. 2020), which held that *Hall* was not retroactive, explicitly overruling its prior decision in *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

On June 17, 2020, relying on *Phillips,* the State filed a motion for summary denial of the intellectual disability claim, arguing that Foster was not entitled to an evidentiary hearing because *Hall* did not apply retroactively to him. On February 18, 2021, the circuit court denied the State's motion, ruling that, despite *Phillips's* holding on *Hall's* non-retroactivity, the Florida Supreme Court's final judgment and

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[3] In *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), the Florida Supreme Court held that *Hall* applies retroactively.

mandate in *Foster* barred using the unconstitutional pre-*Hall* cutoff against him. (relying on *State v. Okafor*, 306 So. 3d 930 (Fla. 2020)).

On March 31, 2022, however, the Florida Supreme Court held that *Phillips* constituted an intervening change in law, which as an exception to the "law of the case" doctrine eliminated the need for a new *Hall*-compliant hearing. *Thompson v. State,* 341 So. 3d 303 (Fla. 2022). That same day, the State filed a Renewed Motion for Summary Denial of the Intellectual Disability Claim, arguing that there had been an intervening change in the law which had eliminated a need for a new *Hall*-compliant hearing. The circuit court granted the State's renewed motion on May 4, 2023, and summarily denied Foster's intellectual disability claim.

On appeal, the Florida Supreme Court relied on its current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), to deny Fosters intellectual disability claim, finding that Foster had the opportunity to litigate his intellectual disability and was now procedurally barred from seeking relief on a *Hall*-based intellectual disability claim. *Foster*, 395 So. 3d at 128. The Florida Supreme Court also relied on three other cases that had likewise been remanded for evidentiary hearings based on *Hall,* but on appeal from the remand, the Florida Supreme Court had denied the claims solely on non-retroactivity grounds, *Walls v. State*, 361 So. 3d 231 (Fla. 2023), *cert. denied,* 144 S. Ct. 174, 217 L. Ed. 2d 68 (2023); *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), and *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), *cert. denied,* 143 S. Ct. 592 (2023). *Foster*, 395 So. 3d at 130.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE WRIT

I. Following its existing precedent and refusing to apply *Hall v. Florida*, 572 U.S. 701 (2014), retroactively as a matter of state law, the Florida Supreme Court properly held that *Phillips* eliminated the need for a new *Hall*-compliant hearing in Foster's case.

Foster first argues that by rescinding the retroactive application of *Hall*, "Florida has now greenlit the execution of the intellectually disabled." (Pet. at 23) In effect, Foster argues that Florida is bound to apply *Hall* retroactively—even if *Walls* were wrongly decided—because to do otherwise would treat different capital defendants differently. But that different treatment inheres in retroactivity jurisprudence—defendants whose convictions became final before a new rule took effect are not entitled to invoke it, while those whose convictions became final after are. And nothing in the Eighth Amendment says that a state court is powerless to fix its mistakes simply because the death penalty is involved.

Hall held that capital defendants, whose IQ scores are within the statistical error of measurement (SEM) are entitled to an evidentiary hearing to explore the other two prongs of the test for intellectual disability. *Hall*, 572 U.S. at 724 (holding that the law requires capital defendants whose IQ scores are within the SEM have an "opportunity to present evidence" of their "intellectual disability, including deficits in adaptive functioning"). The holding in *Hall* concerned which capital defendants were entitled to an evidentiary hearing to establish their claims of intellectual disability and which capital defendants were not. In the Eleventh Circuit's words, *Hall* merely provided new procedures for ensuring that States do not execute members of an already protected group. *In re Henry*, 757 F.3d 1151, 1161 (11th Cir.

2014). The Eighth Amendment class of intellectually disabled capital defendants had been established decades earlier in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Hall* did not create or expand that Eighth Amendment class itself. Indeed, the *Hall* Court made it clear that the class affected was "identical" to the class created by *Atkins*. *In re Henry*, 757 F.3d at 1160-61 (quoting *Hall*, 572 U.S. at 704). The class was intellectually disabled capital defendants before *Hall* and the class remained intellectually disabled capital defendants after *Hall*.

Applying constitutional rules not in existence at the time a conviction became final undermines the principal of finality and undermines our criminal justice system. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (citing *Teague v. Lane*, 489 U.S. 288, 304 (1989)). As the court in *Phillips* explained, "*stare decisis* provides stability to the law and to the society governed by that law. Yet *stare decisis* does not command blind allegiance to precedent. Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." *Phillips*, 299 So. 3d at 1023.

Foster received the windfall of being granted a second evidentiary hearing that he was never entitled to under *Hall* due to his normal IQ scores as a minor. Foster is not intellectually disabled, and his sentence and judgment were final long before *Hall* was decided. Applying *Hall* to Foster would result in a manifest injustice because he is asserting a right that does not exist, that *Hall* should be applied retroactively to him.

II. *Hall* places no categorical limitation on the authority of the state to impose a sentence of death.

The categorical prohibition on executing the intellectually disabled was not expanded by *Hall*. The issue addressed in *Hall* was not whether the State is categorically prohibited from executing those intellectually disabled defendants with IQs above 70 but within the SEM. What *Hall* did was preclude the State from using an IQ score of 70 to automatically exclude a defendant from the class of the intellectually disabled, for purposes of determining death-eligibility under the Eighth Amendment. *Phillips v. State*, 299 So. 3d 1013, 1020 (Fla. 2020).

In *Hall*, this Court unambiguously set out the issue it was to address: "The question this case presents is *how* intellectual disability must be defined in order to *implement* ... the holding of *Atkins*." *Id.* at 709 (emphasis added). *Hall* implemented *Atkins* by holding that it is unconstitutional not to allow capital defendants with IQ scores above 70 but within the SEM to present evidence of their asserted adaptive deficits. *Hall*, 572 U.S. at 723.

In short, *Hall* did not bar a penalty for a class but provided guidance to courts on how to make the intellectual disability finding. Thus, *Hall* did not place any punishment beyond the State's power to impose.

III. The Florida Supreme Court correctly concluded in *Phillips*—and correctly followed *Phillips* in ruling below—that this Court in *Hall* announced a new rule of procedure that is not retroactively applicable to petitioner's conviction on collateral review.

The Florida Supreme Court, the controlling authority, receded from its decision in *Walls*, and determined that the United States Supreme Court decision in

Hall did not warrant retroactive application.[5] *Phillips*, 299 So. 3d at 1013. State courts must apply a decision of this Court retroactively on collateral review only if the decision represents a settled, or "old," rule—one that broke no new ground since the conviction in question became final—or if it represents a new, substantive rule. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 & n.3, 1562 (2021); *Montgomery v. Louisiana*, 577 U.S. 190, 198–200 (2016). Foster does not argue that *Hall* constitutes a new, substantive rule; to the contrary, he states: "While *Atkins* did announce a new rule of law, . . . *Hall* did not." (Pet. 26). That *Hall* did not announce a new substantive is borne out by Part II, *supra*: *Hall* did not place any category of punishment absolutely beyond the power of the State to impose.

Foster argues instead that *Hall* did not even announce a new *procedural* rule but was "'merely an application of the principle that governed' in Atkins," thus requiring state courts to apply *Hall* retroactively. Pet. 27 (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)). This is wrong. *Hall* is a procedural rule that constitutes a clear break from past precedent. Because of *Hall*, Florida courts no longer can use a bright-line cutoff for IQ scores when determining if an individual is intellectually disabled.

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[5] 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").

"A rule is new unless it was '*dictated* by precedent existing at the time the defendant's conviction became final.'" *Edwards*, 141 S. Ct. at 1555 (quoting *Teague*, 489 U.S. at 301 (plurality op.)). In *Atkins*, handed down in 2002, this Court overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989). This Court held that, contrary to *Penry*, the Eighth Amendment prohibits the execution of the intellectually disabled. *Atkins*, 536 U.S. at 321. Twelve years later this Court decided in *Hall* that Florida's method of implementing *Atkins* through a strict IQ cutoff was unconstitutional. But petitioner's conviction "became final," *Edwards*, 141 S. Ct. at 1555, in 1997—when *Penry* was still the law. So not only was *Hall* not "*dictated* by precedent existing at the time [petitioner's] conviction became final," *id.*, it was also foreclosed by it. Accordingly, the rule of *Hall* is plainly new as applied to Foster.

In any event, Petitioner is wrong to argue that *Hall* was dictated by *Atkins*. In *Atkins*, this Court did not define with precision which defendants are so intellectually disabled as to be ineligible for execution, and instead "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction" it had announced. 536 U.S. at 317 (cleaned up). The only thing this Court in *Atkins* said about IQ scores is that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70," *id.* at 308 n.3, and that only five States had "executed offenders possessing a known IQ less than 70" since the Court's decision in *Penry* in 1989, *id.* at 316. Nothing in *Atkins* dictated this Court's subsequent holding in *Hall* that Florida's use of an IQ cutoff of 70 violates the Eighth

Amendment. Indeed, this Court in *Hall* recognized that its "inquiry must go further" than the Court's prior "precedents." 572 U.S. at 721.

Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) confirms that *Hall* was not dictated by *Atkins*. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (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).

The Eleventh Circuit thus correctly has explained that "[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); *see also Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014) (*Hall* mandates "*new* procedures for ensuring that States do not execute members of an already protected group" (emphasis added)).

The Florida Supreme Court has made clear that *Hall* was a new rule not dictated by *Atkins*. *See Phillips*, 299 So. 3d at 1019 ("[I]t remains clear that *Hall* establishes a *new* rule of law that emanates from the United States Supreme Court and is constitutional in nature . . . ." (emphasis added)); *see also Walls*, 213 So. 3d at 346 (overruled decision holding that *Hall* is retroactive as a matter of Florida law but

still agreeing that *Hall* was a "change in the law"). The Florida Supreme Court's conclusion that *Hall* was not dictated by *Atkins* is hardly surprising. After all, the Florida Supreme Court's 2007 *Cherry* precedent had *upheld* the constitutionality of its strict IQ cutoff as consistent with *Atkins*. *See* 959 So. 2d at 713 (arguing that *Atkins* "left to the states the task of setting specific rules in their determination statutes"). The Florida Supreme Court thus understandably characterized *Hall* as establishing a new rule in abrogating established Florida Supreme Court precedent.

IV. A favorable ruling here would not change the outcome in state court.

Last, 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"). Even if this Court were to consider accepting review, it would find itself in the position of addressing a fact-intensive ruling where there is no reasonable argument that the lower court's ruling as to the reliability of the underlying finding was flawed.

A bright line IQ score cut-off was not the reason Foster lost his intellectual disability claim. Contrary to Foster's allegations, Foster did have the benefit of the trial court reviewing all three prongs of the intellectual disability test without one prong being dispositive of the other. *See Foster*, 929 So. 2d at 532 ("Contrary to such allegations, the lower court did not find that Appellant established the necessary prongs to show mental retardation.")

This Court does not grant certiorari when the asserted error consists of an erroneous factual finding. See Sup. Ct. R. 10. The state court did not unreasonably apply this Court's clearly established precedent and, Foster never rebutted the state court's factual determinations by clear and convincing evidence.

Hall does not change the postconviction court's bottom-line conclusion that Foster 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 state court's determination that Foster is not entitled to relief.

Accordingly, certiorari should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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