No. 20-6887

In The Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida In A Capital Case

BRIEF OF *AMICI CURIAE* THE ARC OF THE UNITED STATES, THE NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS FLORIDA, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND THE CENTER FOR PUBLIC REPRESENTATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTERESTS OF *AMICI CURIAE*[1]

THE ARC OF THE UNITED STATES ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities and consists of over 600 state and local chapters across the country. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports to which they are entitled by law, and that courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual and developmental disabilities. The Arc has appeared as *amicus curiae* in this Court in a variety of cases involving intellectual disability and the death penalty, including *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

THE NATIONAL DISABILITY RIGHTS NETWORK ("NDRN") is the non-profit membership organization for the federally mandated Protection and

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *Amici Curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for both the State of Florida (Jeffrey DeSousa) and Mr. Phillips (Marie-Louise Parmer) received timely notice and have consented to the filing of this *amicus* brief.

Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

DISABILITY RIGHTS FLORIDA is a not-for-profit corporation serving as Florida's federally-funded protection and advocacy system for individuals with disabilities. Disability Rights Florida's mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as legal and legislative strategies. Specifically, on behalf of persons with intellectual and other developmental disabilities, Disability Rights Florida is authorized by federal law to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State. . . ." 42 U.S.C. § 15043(a)(2)(A)(i) (2018). Disability Rights Florida

has represented and continues to represent persons with disabilities in individual actions, class actions, and systemic relief initiatives affecting all such individuals. The protection and advocacy system is unique in its authority to protect and advocate for the legal and human rights of persons with disabilities and its presence will provide a necessary perspective to assist the Court in this matter.

THE BAZELON CENTER FOR MENTAL HEALTH LAW is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, legislative and administrative advocacy, and public education, the Bazelon Center advances equal opportunities for individuals with mental disabilities in all aspects of life, including employment, education, housing, health care, community living, voting, and family rights.

THE CENTER FOR PUBLIC REPRESENTATION ("CPR") is a public interest law firm that has assisted people with disabilities for more than 40 years. CPR uses legal strategies, systemic reform initiatives, and policy advocacy to enforce civil rights, expand opportunities for inclusion and full community participation, and empower people with disabilities to exercise choice in all aspects of their lives. CPR is both a statewide and a national legal backup center that provides assistance and support to public and private attorneys representing people with disabilities in Massachusetts and to the federally funded protection and advocacy programs in each of the States. CPR has litigated systemic cases on behalf of persons with

disabilities in more than 20 states and submitted *amicus* briefs to the United States Supreme Court and many courts of appeals in order to enforce the constitutional and statutory rights of persons with disabilities, including those involved in the criminal justice system.

SUMMARY OF ARGUMENT

The purpose of this submission is to ensure that the Court is aware of the central issue which this case presents for review. It is whether *Hall v. Florida*[2] establishes a new rule for *Teague*[3] purposes.

The case arises from a surprise decision of the Florida Supreme Court in *Phillips v. State*[4] overruling *sua sponte* its own 2016 decision that had held *Hall* retroactive as a matter of state law.[5] Phillips' motion for rehearing—the first chance he had to challenge this judicial about-face—argued *inter alia* and thus preserved the contention that "[t]his Court's May 21, 2020 holding in Mr. Phillips' case—that *Hall* announced a new non-watershed rule of federal Eighth Amendment

[2] 572 U.S. 701 (2014).

[3] *Teague v. Lane*, 489 U.S. 288 (1989).

[4] 299 So. 3d 1013 (Fla. 2020).

[5] *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

law for purposes of *Teague* and *Witt*—was error. This Court's holding violates *Witt*[6] and *Teague*."[7]

The issue whether *Hall* is retroactive as a matter of federal Eighth Amendment law is subsumed[8] in the first Question Presented by Mr. Phillips to this Court.[9] That issue is one whose erroneous resolution may have fatal consequences not only for condemned individuals in Florida; it also potentially affects death-sentenced people in many other States.[10] It is the subject of

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[6] The reference is to Florida's leading state-law retroactivity decision, *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

[7] Motion for Rehearing at 8, *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (No. SC18-1149).

[8] Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

[9] "[O]n appeal from the denial of his *Atkins*/*Hall* claim, a newly constituted five-Justice Florida Supreme Court *sua sponte* reversed its decision in *Walls*, held Phillips was not entitled to have his intellectual disability claim analyzed under the *Hall* framework, and determined that *Hall* announced a new non-watershed rule for Eighth Amendment purposes and thus was not retroactive. The question[ ] presented [is]:

> Whether a state court must give retroactive effect on collateral review to the rule announced in *Hall* because the Supremacy Clause, as held in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), mandates that a State court cannot deny a prisoner's claim that his sentence is violative of the federal constitution by interpreting a case such as *Hall* as a mere procedural modification of the substantive holding of *Atkins* but rather the State court must give effect to *Atkins*' substantive holding?"

Pet. Cert., at i.

[10] *See Hall*, 572 U.S. at 714–17. Kentucky, Alabama, Arizona, Kansas, North Carolina and Nebraska are states in which

conflicting lower-court decisions.[11] Its consideration by the Court would provide a clarifying counterpoint to

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it appeared that the standard error of measurement (SEM) might not be taken into account in adjudicating the issue of subaverage intellectual functioning. *Id.* at 714–15. The *Hall* opinion notes that in several of these States there were no pre-*Hall* appellate decisions authoritatively resolving the SEM question. *Id.* at 716. We know of no reported data bearing directly on the number of cases in which *Atkins* claims were lost on that issue in these States, or on the number of cases in which *Atkins* claims were not raised because postconviction counsel failed to consider the SEM. But it does appear that nationwide 31% of the *Atkins* losses between mid-2002 and the end of 2013 rested solely upon adverse appellate findings on the intellectual-deficits prong of the three-pronged orthodox diagnostic formula, and that 29% of these cases in turn involved average I.Q. scores below 75. And the study which documents these figures mentions at least two such cases—*State v. Elmore*, No. 2005-CA-32, 2005 WL 2981797 (Ohio App. Nov. 3, 2005), and *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009)—in which the SEM was erroneously disregarded in a State *other* than those identified by *Hall* as treating an I.Q. above 70 as precluding *Atkins* relief. John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three)* Atkins: *Intellectual Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill of Rights J. 393, 400–04 (2014).

[11] Compare *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014) ("For the first time in *Hall***,** the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled. In addition, Justice Kennedy's *Hall* opinion explained that the basis for its holding stretched beyond *Atkins* alone: '[T]he precedents of this Court "give us essential instruction," . . . but the inquiry must go further. . . . In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional.' *Hall* . . . (quoting *Roper v. Simmons*. . . .). Nothing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states'

Edwards v. Vannoy,[12] which presents a less stark, more complicated variant of the "new rule" issue under *Teague*.

previously recognized power to set an IQ score of 70 as a hard cutoff. This is plainly a new obligation that was never before imposed on the states, under the clear language of *Atkins*, and of *Hall* itself.") (internal citations omitted), *and Kilgore v. Sec'y, Fla Dep't of Corr.*, 805 F.3d 1301, 1313 (11th Cir. 2015) ("[I]n *In re Henry* . . . we rejected the argument that *Hall's* holding—limiting the states' previously recognized power to set an IQ score of 70 as a hard cutoff—was 'clearly established' by *Atkins*. . . . [W]e held that *Hall* necessarily established a new rule of constitutional law.") (internal citations omitted), *with Smith v. Sharp*, 935 F.3d 1064, 1084–85 (10th Cir. 2019) ("As in *Strickland*, the Supreme Court in *Atkins* declared 'a rule of general application . . . designed for the specific purpose of evaluating a myriad of factual contexts.' . . . The application of this general rule to *Hall*, . . . *Moore I* . . . and *Moore II* cannot be understood to 'yield[ ] a result so novel that it forges a new rule, one not dictated by precedent' . . . in light of the Court's proclamation in *Hall* that '*Atkins* . . . provide[s] substantial guidance on the definition of intellectual disability'. . . . The Court's application of *Atkins* more closely resembles, for example, our conclusion that the extension of *Strickland*'s guarantee of effective counsel to the plea-bargaining context merely applied *Strickland* rather than created a new rule."); and *see Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014) (determining that *Hall* "clarified the minimum *Atkins* standard under the U.S. Constitution. . . . In [*Hall*], the Court confronted directly the question of 'how intellectual disability must be defined in order to implement the[ ] principles and the holding of *Atkins*.' ").

[12] No. 18-31095, 2019 WL 8643258 (5th Cir. May 20, 2019), *cert. granted*, 206 L.Ed.2d 917 (U.S. May 4, 2020) (No. 19-5807).

ARGUMENT

I. *Hall* and the rule of *Teague*

Under *Teague*, "[w]hen . . . [this Court] announce[s] a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding." *Chaidez v. United States*, 568 U.S. 342, 347 (2013). This Court continued in *Chaidez*:

> But that account has a flipside. *Teague* also made clear that a case does *not* "announce a new rule, [when] it '[is] merely an application of the principle that governed' " a prior decision to a different set of facts. . . . As JUSTICE KENNEDY has explained, "[w]here the beginning point" of our analysis is a rule of "general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." *Wright v. West*, 505 U.S. 277, 309 . . . (1992) (concurring in judgment). . . . Otherwise said, when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.

Chaidez, 568 U.S. at 347–48 (full citation omitted).

In *Hall v. Florida*, this Court stated with deliberate precision the issue it decided: "The question this case presents is how intellectual disability must be defined in order to implement these principles and the

holding of *Atkins*."[13] 572 U.S. 701, 709 (2014). And the concluding passage of *Hall*'s *Atkins* analysis casts *Hall*'s holding in terms of invalidation of an evidentiary restriction that impedes the proper adjudication of *Atkins* claims:

> The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

Hall, 572 U.S. at 723.

A state-law rule that precludes the proper evidentiary examination of a federal claim is constitutionally impermissible, as this Court has told the Florida Supreme Court more than once.[14] "There is surely nothing new about this principle," *Bousley v. United States*, 523 U.S. 614, 620 (1998)—nothing that is "novel," *Chaidez*, 568 U.S. at 347, or that "'breaks new ground or imposes a new obligation on the States,'" *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (quoting *Teague*, 489 U.S. at 301).

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[13] *Atkins* is reported as *Atkins v. Virginia*, 536 U.S. 304 (2002).

[14] *See McNeal v. Culver*, 365 U.S. 109 (1961); *Carnley v. Cochran*, 369 U.S. 506 (1962).

To the contrary, *Hall* simply implemented the substantive rule of *Atkins* by invalidating an aberrant Florida ruling that

> misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of "approximately 70." . . . Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning.

Hall, 572 U.S. at 724. To correct a glaring misconception about the sort of factual analysis necessary for the proper adjudication of a claim under an established rule of federal constitutional law is not to make "new law."[15]

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[15] It is notable that the key elements in the reasoning by which the Eleventh Circuit in *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), concluded that *Hall* created a new rule are manifestly ill-conceived. The *Henry* court writes: "For 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." *Id.* at 1158–59. But the *Hall* Court explained:

> If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads *Atkins* to

The Florida Supreme Court's *Phillips* opinion itself recognizes that *Hall* represents only "an evolutionary refinement of the procedure necessary to comply with *Atkins*. It [*Hall*] merely clarified the manner in which courts are to determine whether a capital defendant is intellectually disabled and therefore ineligible for the death penalty." 299 So. 3d at 1021.

> *Hall* merely more precisely defined the procedure that is to be followed in certain cases to determine whether a person facing the death penalty is intellectually disabled. *Hall* is merely an application of *Atkins*. . . . *Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—

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provide substantial guidance on the definition of intellectual disability.

572 U.S. at 720–21. The *Henry* opinion says:

> In addition, Justice Kennedy's *Hall* opinion explained that the basis for its holding stretched beyond *Atkins* alone: "[T]he precedents of this Court 'give us essential instruction,' . . . but the inquiry must go further. . . . In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional."

757 F.3d at 1159. But *Hall*'s reference to the Court's "independent judgment" did not mean "independent of *Atkins*." It was an instance of the Court's repeated recognition that legislative judgments and other indicia of national consensus are to be supplemented in Eighth Amendment analysis by "the Court's independent judgment." *Roper v. Simmons*, 543 U.S. 551, 562–64 (2005).

> with the opportunity to present additional evidence of intellectual disability.

299 So. 3d at 1020.[16]

These descriptions accurately portray the respective positions of *Atkins* and *Hall* for *Teague* purposes: *Atkins* as " 'the beginning point' of . . . analysis is a rule of 'general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts' "; and "all . . . [this Court did in *Hall* was to] apply a general standard to the kind of factual circumstances it was meant to address. . . ." *Chaidez*, 568 U.S. at 348. But the conclusion of non-retroactivity which the Florida Supreme Court drew from this entirely accurate portrait flouts the admonition of this Court that its decisions clarifying how a general rule is to be applied to

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[16] *See also* 299 So.3d at 1019–20:

> In *Hall*, the Supreme Court recounted its decisions holding that particular punishments are prohibited by the Eighth Amendment "as a categorical matter". . . . The Court then 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*." . . . And the holding of *Hall* was limited to a determination that it is unconstitutional for courts to refuse to allow capital defendants whose IQ scores are above 70 but within the test's standard error of measurement to present evidence of their asserted adaptive deficits. . . . Thus, *Hall* merely "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."

one of the factual situations contemplated by the rule "will rarely state a new rule for *Teague* purposes." *Id.*

II. *Hall* and Diagnostic Practice

The procedures which *Hall* found necessary for a constitutional evaluation of intellectual disability[17] under *Atkins* were standard operating procedure for diagnosticians long before *Hall*[18] and even before

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[17] In *Hall v. Florida*, this Court recognized the pejorative connotations of the term "mental retardation," and instead "us[ed] the term 'intellectual disability' to describe the identical phenomenon." 572 U.S. 701, 704 (2014). In keeping with this Court's decision, this brief also uses "intellectual disability" in place of "mental retardation" except where naming or directly quoting sources.

[18] American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 36 (11th ed. 2010) ("Understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual functioning."); American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 58 (10th ed. 2002) ("In the 2002 AAMR system, the 'intellectual functioning' criterion for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the *SEM* for the specific assessment instruments used and the instruments' strengths and limitations."); John Matthew Fabian, William W. Thompson, IV & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in* Atkins *Intellectual Disability/Mental Retardation Cases*, 59 Cleveland State L. Rev. 399, 412–13 (2011).

Atkins.[19] *See, e.g.*, American Association on Intellectual & Developmental Disabilities, *User's Guide: [to]*

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[19] *See Hall*, 572 U.S. at 719: "The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *E.g.*, *Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed.2000)."); *see also* American Association on Mental Retardation, *Mental Retardation: Definition, Classification and Systems of Supports* 37 (9th ed. 1992) ("This [assessment] process is facilitated by considering the concept of standard error of measurement, which has been estimated to be three to five points for well-standardized measures of general intellectual functioning. . . . This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation."); Edward J. Slawski, *Error of Measurement*, in 1 Encyclopedia of Human Intelligence 395, 398 (Robert J. Sternberg ed., 1994) ("The standard error of measurement described earlier can be used to estimate how good a measure of true score an observed score provides. If certain assumptions are met, psychologists can construct confidence intervals around true score estimates by adding to and subtracting from the observed score the appropriate multiple of the standard error of measurement."); American Association on Mental Retardation, *Classification in Mental Retardation* 56 (1983) ("*Error of measurement of IQ*. In addition to the possibility of temporal change, an obtained IQ must also be considered in terms of its fallibility as a measurement. . . . This is interpreted to mean that if a retest is promptly given with the same instrument, discounting any practice effect, the second IQ would be within 1 standard error of measurement of the first IQ about two thirds of the time."); David Wechsler, *The Measurement of Adult Intelligence* 135 (1939) ("As criteria of a scale's reliability, statisticians generally use one or several of the following measures: (1) the standard error of the scale's central tendency, (2) the degree of correlation between the various portions of the scale, (3) the correlation between alternate forms of the same

Mental Retardation: Definition, Classification and Systems of Supports 12 (2007) ("[T]he assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement.");[20] American Psychological Association, *APA's Guidelines for Test User Qualifications: An Executive Summary*, 56 Am. Psychologist 1099, 1101 (2001) ("[T]est users should understand the standard error of measurement, which presents a numerical estimate of the range of scores consistent with the individual's level of performance.");[21] Richard J. Bonnie &

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scale, (4) correlations between repeated administrations of the tests to the same individuals."); and *see id.*, Table 26: ("*Measures of standard error*").

[20] *See also* American Association on Intellectual & Developmental Disabilities, *User's Guide: [to] Mental Retardation: Definition, Classification and Systems of Supports* 12 (2007) ("[A]n IQ of 70 is most accurately understood not as a precise score, but as a range of confidence with parameters of at least one standard error of measurement . . . or parameters of two standard errors of the mean. . . . This is a critical consideration underlying the appropriate use of intelligence tests and best practices and that must be a part of any decision concerning the diagnosis of mental retardation."); Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. Legis. 77, 96 (2004) ("[A]ny state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.").

[21] *See also* American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 57 (10th ed. 2002) ("Errors of measurement as well as true changes in performance outcome must be considered in the interpretation of test results. This process is facilitated by

Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811, 836 (2007) ("[T]he SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests. The importance of the SEM is so well-established in the field that it would be superfluous to direct experts to take it into account in a statute governing *Atkins* evaluations and adjudications, and most state laws say nothing about it.").[22]

It was, indeed, Florida's deviation from the professionally recognized process for an intellectual disability diagnosis that largely underlay the holding in *Hall*:[23]

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considering the concept of standard error of measurement (*SEM*), which has been estimated to be three to five points for well-standardized measures of general intellectual functioning. . . . This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation."); and *see also* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* [DSM-IV-TR] 41–42 (4th ed. text rev. 2000); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* [DSM-III] 36–37 (3d ed. 1980).

[22] *See also* John H. Blume, Sheri Lynn Johnson & Christopher Seeds, *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 697–98 (2009).

[23] It was "[a]gainst the backdrop of that clear professional consensus . . . [that] the Supreme Court's decision in *Hall v.*

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.
>
> The professionals who design, administer, and interpret IQ tests have agreed, *for years now*, that IQ test scores should be read not as a single fixed number but as a range.

Hall, 572 U.S. at 712 (emphasis added). *Hall* stated explicitly that "[t]he clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM."[24]

Florida addressed the constitutionality of a Florida rule barring consideration of the SEM in making *Atkins* adjudications." James W. Ellis, Caroline Everington, & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1359 (2018).

[24] 572 U.S. at 720. Unlike the Florida Supreme Court, the clinical community has not reversed this longstanding premise. *See* American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 131 (12th ed. 2021) ("[I]n reference to an IQ or an adaptive behavior standard score of 70 that is obtained on an assessment instrument with a *SEM* of 4, *the score of 70 is most accurately understood not as a precise score, but as a range of scores* with parameters of at least two *SEM* units (i.e., score range of 62-78, 95% probability). Reporting the range within

Precisely because they were a fundamental premise of *Atkins*, the command of *Hall* that they be respected in conducting *Atkins* evaluations has got to be understood as enforcing a preexisting Eighth Amendment requirement, not creating a new one.

CONCLUSION

The Florida Supreme Court's decision below that "federal law does not require retroactive application of *Hall* as a new substantive rule of federal constitutional law"[25] appears on its face to be at odds with both *Hall* and *Teague*. Certiorari should be granted to determine whether it "conflicts with [those] relevant decisions of this Court."[26]

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which the person's true score falls, rather than only a score, represents both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices in the field of ID. Reporting of the 95% confidence interval (i.e., score range) must be a part of any decision concerning the diagnosis of ID.").

[25] *Phillips*, 299 So. 3d at 1022.

[26] Sup. Ct. R. 10(c).

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