

INTERESTS OF AMICI CURIAE

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 or 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) (2011). 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 REAL RETROACTIVITY ISSUE

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*¹ establishes a new rule for *Teague*² purposes.

The case arises from a surprise decision of the Florida Supreme Court in *Phillips v. State*³ overruling *sua sponte* its own 2016 decision that had held *Hall* retroactive as a matter of state law.⁴ Phillips' motion for rehearing—the first chance he had to challenge this overrule—argued *inter alia* and thus preserved the contention that “This Court’s May 21, 2020 holding in Mr. Phillips’ case—that *Hall* announced a new non-watershed rule of federal Eighth Amendment law for purposes of *Teague* and *Witt*—was error. This Court’s holding violates *Witt*⁵ and *Teague*.”⁶

The issue whether *Hall* is retroactive as a matter of federal Eighth Amendment law is subsumed⁷ in the first Question Presented by Mr.

¹ 572 U.S. 701 (2014).

² 498 U.S. 288 (1989).

³ 299 So. 3d 1013 (Fla. 2020).

⁴ *Walls v. State*, 213 So. 3d 340 (Fla. 2016).

⁵ The reference is to Florida’s leading state-law retroactivity decision, *Witt v. State*, 387 So. 2d 982 (Fla. 1980).

⁶ Motion for rehearing, *Phillips v. State*, Florida Supreme Court No. SC18-1149, June 12, 2020, page 8.

⁷ Rule 14.1(a)

Phillips to this Court.⁸ That issue is not only one whose erroneous resolution may have fatal consequences for condemned inmates in Florida; it also potentially affects death-sentenced inmates in as many as eleven other States.⁹ It is the subject of

⁸ “[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 questions presented are:

“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?” *Petition for a Writ of Certiorari*, page i.

⁹ See *Hall*, 572 U.S. at 714-717, identifying nine States in which it appeared that the standard error of measurement (SEM) might not be taken into account in adjudicating the issue of subaverage intellectual functioning. The *Hall* opinion notes that in most of these States there were no pre-*Hall* appellate decisions authoritatively resolving the SEM question. We know of no reported data bearing directly on the number of cases in which *Atkins* claims were lost on that issue in these nine 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

conflicting lower-court decisions.¹⁰ Its consideration by the Court would provide a clarifying counterpoint

which documents these figures mentions at least two such cases—*State v. Elmore*, 2005 WL 2981797 (Ohio App. 2005), and *Cribbs v. State*, 2009 WL 1905454 (Tenn. Crim. App. 2009)—in which the SEM was erroneously disregarded in a State other than the nine 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 William & Mary Bill of Rights Journal 393, 400 - 404 (2014).

¹⁰ Compare *In re Henry*, 757 F.3d 1151, 1158-1159 (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’ 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.”), and *Kilgore v. Secretary, Florida Department of Corrections*, 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.”) with *Smith v. Sharp*, 935 F.3d 1064, 1084-1085 (10th Cir. 2019) (“As in *Strickland*, the Supreme Court in *Atkins* declared ‘a rule of general application . . . designed for the specific purpose of

to *Edwards v. Vannoy*, No. 19-5807, which presents a less stark, more complicated variant of the “new rule” issue under *Teague*.

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)). “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

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).

circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes.” (*Chaidez*, 568 U.S. at 347-348.)

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*.”¹¹

(*Hall v. Florida*, 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

¹¹ *Atkins* is reported as *Atkins v. Virginia*, 536 U.S. 304 (2002).

the Florida Supreme Court more than once.¹² “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*, 329 U.S. 362, 391 (2000)).

To the contrary, *Hall* simply implemented the substantive rule of *Atkins* by invalidating an aberrant Florida ruling that had “misconstrue[d] the Court’s statements in *Atkins* that intellectual disability is characterized by an IQ of ‘approximately 70.’ . . . Florida’s rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida’s law not only contradicts the test’s own design but also bars an essential part of a sentencing court’s inquiry into adaptive functioning.” (*Hall*, 572 U.S. at 724.) To correct a glaring misconception of 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.”¹³

¹² See *McNeal v. Culver*, 365 U.S. 109 (1961); *Carnley v. Cochran*, 369 U.S. 506 (1962)).

¹³ 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. *Henry* 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.” (757 F.3d at 1158-1159.) But *Hall*

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

had written: "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 provide substantial guidance on the definition of intellectual disability." (572 U.S. at 720-721.) *Henry* writes: "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, 562-564 (2005).)

provide certain defendants—those with IQ scores within the test’s margin of error—with the opportunity to present additional evidence of intellectual disability.”

(299 So.3d at 1020.)¹⁴

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 one of the factual

¹⁴ See also 299 So.3d at 1019-1020: “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.’”

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 under *Atkins* were standard operating procedure for diagnosticians long before *Hall*¹⁵ and even before *Atkins*.¹⁶ See, e.g., AMERICAN ASSOCIATION ON

¹⁵ 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, 412-413 (2011).

¹⁶ 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 509 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 394, 398 (Robert J. Sternberg, editor in chief, 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 scale, (4) correlations between repeated administrations of the tests to the same individuals." And see *id.*, Table 26: "*Measures of standard error*".)

INTELLECTUAL & DEVELOPMENTAL DISABILITIES, USER'S GUIDE: [to] MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS 12 (10th ed. 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.”);¹⁷ American Psychological Association, *APA’s Guidelines for Test User Qualifications: An Executive Summary*, 56 AMERICAN 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.”);¹⁸ Richard J. Bonnie & Katherine

¹⁷ See also *id.* (“[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 JOURNAL OF LEGISLATION 77, 96 (2003) (“[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.”).

¹⁸ 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

Gustafson, *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.”).¹⁹

It was, indeed, Florida’s deviation from the professionally recognized process for ID diagnosis that largely underlay the holding in *Hall*:²⁰

process is facilitated by 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.”); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [DSM-IV-TR] 41 - 42 (4th ed. 2000); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [DSM-III] 36 – 37 (3d ed. 1980).

¹⁹ 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 JOURNAL OF LAW & PUBLIC POLICY 689, 697-698 (2009).

²⁰ 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 “The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM.”²¹

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

²¹ 572 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

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"²² 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."²³

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 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."

²² *Phillips*, 299 So.3d at 1022.

²³ Rule 10(c).