No. _____

IN THE

Supreme Court of the United States

GARY LAWRENCE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Whether this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), merely clarified *Atkins v. Virginia*, 536 U.S. 304 (2002), or announced a new substantive rule, such that it must be applied retroactively by state courts under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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Petitioner, **GARY LAWRENCE**, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below. Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257(a). The Florida Supreme Court issued an opinion denying relief on June 11, 2020, reported at 296 So. 3d 892 (Fla. 2020). *See* Exhibit 1 of the Appendix.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

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

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state 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.

INTRODUCTION[1]

Petitioner suffers from an intellectual disability and is in a class of individuals who are beyond the State's power to execute under *Hall v. Florida*, 134 S. Ct. 1986 (2014), which expanded the class of "intellectually disabled" individuals who are categorically exempt from capital punishment. Yet Petitioner stands to be executed because the Florida Supreme Court does not apply *Hall* retroactively to defendants on collateral review.

Petitioner displays a lifelong history of intellectual and adaptive deficits with causal risk factors evident from even before his birth. Born to impoverished parents who abused alcohol, Petitioner grew up in squalor, without access to proper medical care, shelter, or nurturing caregiver relationships. He was introduced to alcohol and illicit drugs before the age of ten and his father encouraged him to imbibe. (PP. 467-68). He was subjected to his father's domestic violence and abandoned by his mother prior to his adolescence. His parents' abuse and neglect allowed Petitioner to slip through the cracks without receiving appropriate societal supports.

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[1] The following symbols will be used to designate references to the record: "T" refers to the transcripts of Petitioner's trial; "R" refers to the record on direct appeal; "PP" refers to the transcript of the penalty phase of the trial; "PCR" refers to the record on appeal from the denial of Petitioner's initial 3.850 motion; "PCR-S" refers to the supplemental record on appeal from the denial of Petitioner's initial 3.850 motion; "HPCR" refers to the record on appeal from the denial of Petitioner's successive 3.851 motion based on *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); and "SPCR" refers to the record on appeal from the denial of Petitioner's successive 3.851 that is the subject of this petition.

Petitioner always struggled in school, most notably with basic reading and writing. He scored poorly on achievement tests, and his teachers thought even those poor scores overestimated his true abilities. They described him as "very slow" and recommended he be placed in special education classes. (SPCR. 154). He was held back twice, and at age 15 he was still in the seventh grade. Petitioner would have been held back two additional years if not for social promotions. Ultimately unable to keep up with the expectations of a mainstream classroom, Petitioner was institutionalized during adolescence at the notorious Dozier School for Boys in Marianna, Florida. This marked the end of Petitioner's education and the beginning of his experience with the criminal justice system. As an adult, his literacy level was so low that he could not undergo the basic testing carried out on all inmates in DOC custody. He had to sound out simple words and was unable to properly read, write, or even sign his own name. His trial attorneys noted that he was "very, very slow." (PCR-S. 46, 56).

Deficits were apparent in all aspects of Petitioner's life. Since childhood, Petitioner has struggled with social skills and functioned more like a child than an adult. Gullible and easily manipulated, Petitioner would do whatever anyone asked him to do without thinking of the consequences. Petitioner was unable to manage money or hold down a job. He was unable to live alone, cook, do laundry, or manage day-to-day affairs. He depended on family, friends, and girlfriends for financial support. Even with assistance, Petitioner struggled to function outside of an institutional setting.

Despite his rife history of deficits—and this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of intellectually disabled individuals violates the Eighth Amendment—Petitioner was precluded from litigating his claim of intellectual disability because Florida utilized a strict cutoff rule that required an individual to have an IQ score of 70 or below in order to raise a meritorious claim of intellectual disability. It was not until this Court decided *Hall v. Florida*, 134 S. Ct. 1986 (2014), and deemed Florida's "rigid rule" unconstitutional that Florida defendants, like Petitioner, could raise a claim of intellectual disability with IQ scores above Florida's pre-*Hall* cutoff. In *Walls v. State*, 213 So. 3d 340 (Fla., corrected and reissued May 4, 2017), the Florida Supreme Court found that *Hall* applies retroactively to cases that became final prior to the *Hall* decision. In *Walls* the Florida Supreme Court noted that "[p]rior to the decision in *Hall*, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled." *Walls*, 213 So. 3d at 345. As a result, the *Walls* Court held that under state law, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Id.* at 346. The *Walls* decision enabled Petitioner to finally pursue a good-faith claim of intellectual disability.

On May 2, 2018, Petitioner filed a successive Rule 3.851 motion within one year of the Florida Supreme Court's decision in *Walls*. Petitioner proffered

unrebutted expert and lay evidence that he is intellectually disabled within the meaning of *Hall*.

The circuit court summarily denied Petitioner's claim of intellectual disability on procedural grounds without addressing the merits of Petitioner's claim. On June 11, 2020, the Florida Supreme Court upheld the lower court's denial of relief, but rather than base it on the circuit court's procedural default, the Florida Supreme Court based its decision on *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), a case decided one month earlier in which the court receded from its holding three years ago in *Walls* and held that federal law does not require the retroactive application of *Hall* to defendants on collateral review. *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020). The Florida Supreme Court raised the issue of retroactivity *sua sponte*, and did not allow Petitioner to brief the issue of whether *Walls* should be overruled.

With the *Phillips* decision, the Florida Supreme Court continues to be an outlier in Eighth Amendment jurisprudence, making it impossible for Petitioner and other intellectually disabled defendants on death row to receive *Hall* relief.

STATEMENT OF THE CASE

A. Trial, Conviction, and Death Sentence

In 1995, before this Court decided *Atkins v. Virginia,* Petitioner was convicted of first-degree murder, conspiracy to commit first-degree murder, and petit theft, and was sentenced to death in Santa Rosa County. In his pre-*Atkins* mitigation investigation, he was evaluated by Dr. James Larson as part of a mitigation assessment. (PP. 456). Dr. Larson testified at the penalty phase that he had

administered the Wechsler Adult Intelligence Scale Revised (WAIS-R) to Petitioner and determined that Petitioner's full-scale score to be 81. (T. 469-70). Dr. Larson indicated that Petitioner's intellectual functioning appeared so low that "[i]f it got a couple points lower, we would say it fell in the borderline range of retardation." (T. 470). Dr. Larson administered further tests and determined that Petitioner's actual functioning "fell lower than we would expect based upon his overall IQ" and, consequently, "he never achieved anything more than someone in the borderline range of retardation." (T. 472). Dr. Larson testified that his findings were consistent with Petitioner's school records, which mostly consisted of D's and F's. (T. 475).

Dr. Larson testified that Petitioner's intellectual deficits coexisted with problems in academic achievement (T. 468-69, 471-74), personal relationships (T. 481-83), and an unstable home environment defined by parental alcoholism, domestic violence, physical abuse, neglect, and childhood introduction to alcohol and illicit substances. (T. 465-67). His testimony makes plain that Petitioner's deficits manifested prior to the age of eighteen.

Petitioner's advisory jury recommended death by a 9 to 3 vote. On May 5, 1995, the trial court sentenced Petitioner to death. (R. 239). The judge found the following aggravating factors: (1) Petitioner was under a sentence of imprisonment when he committed the murder; (2) the murder was heinous, atrocious or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R. 231-34). The trial court found no statutory mitigating factors (R. 234-35), but found the following nonstatutory mitigating

factors: (1) Petitioner's cooperation with law enforcement; (2) Petitioner's *learning disability and low IQ*; (3) Petitioner's deprived childhood and poor upbringing; (4) Petitioner was under the influence of alcohol at the time of the murder; and (5) Petitioner does not have a violent history. The trial court rejected the following nonstatutory mitigating factors: (1) the murder was the result of a heated domestic dispute, specifically a love triangle; (2) Petitioner has mental health problems; and (3) there is an equally culpable co-defendant who might receive disparate treatment. (R. 236-38).

On direct appeal, the Florida Supreme Court affirmed Petitioner's convictions and sentences. *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997). This Court thereafter denied certiorari. *Lawrence v. Florida*, 522 U.S. 1080 (1998).

B. State and Federal Collateral Proceedings

Petitioner's Rule 3.850 motion for postconviction relief was filed on January 19, 1999. (PCR. 1-19). It was amended on April 22, 1999, and noted that Petitioner has a "limited intellectual grasp." (PCR. 3, 23). The evidentiary hearing commenced on June 12, 2000, and the circuit court entered its order denying postconviction relief on October 11, 2000. (PCR. 192-98).

The Florida Supreme Court affirmed and denied Petitioner's Petition for Writ of Habeas Corpus. *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002). This Court denied certiorari. *Lawrence v. Florida*, 538 U.S. 926 (2003).

Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States District Court, Northern District of Florida. (Case No.

3:03CV97-RH). His petition was dismissed as untimely by the district court. The Eleventh Circuit affirmed on August 26, 2005. *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005). This Court granted certiorari and affirmed. *Lawrence v. Florida*, 549 U.S. 327 (2007).

C. *Hurst* Litigation

On April 5, 2017, Petitioner filed a successive 3.851 motion for postconviction relief based on *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). (HCPR. 18-45). The circuit court summarily denied Petitioner's motion for postconviction relief (HPCR. 104-6), and the Florida Supreme Court affirmed. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018). This Court denied certiorari. *Lawrence v. Florida*, 139 S. Ct. 170 (2018).

D. *Atkins/Hall* Litigation and Decision Below

On June 20, 2002, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). Although this Court was explicit in *Atkins* about the prohibition on execution of the intellectually disabled, this Court's decision "left 'to the State the task of developing appropriate ways to enforce the constitutional restriction.'" *Hall*, 572 U.S. at 719 (quoting *Atkins*, 536 U.S. at 317). Because *Atkins* left to states how to implement the constitutional restriction, and thus how to define how to raise a meritorious *Atkins*-based claim, litigants in Florida were constrained by Florida's statutory definition of intellectual disability in pursuing claims.

Florida's statutory definition of intellectual disability in Section 921.137, Florida Statutes (2002) required that an individual's IQ score be "two or more

standard deviations from the mean score on a standardized intelligence test," to qualify him as intellectually disabled. *See Cherry v. State*, 959 So. 2d 702, 712-13 (Fla. 2007) (interpreting the "clear" language of the 2001 statute). Two standard deviations from the mean is an IQ score of 70. *See Hall*, 472 U.S. at 711 ("The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points.") (quoting § 921.137(1), Fla. Stat. (2013)). As the Florida Supreme Court confirmed in *Cherry*, a plain reading of the statute from its enactment in 2001 required individuals asserting an intellectual disability claim to have an IQ score of 70 or below. *Cherry*, 959 So. 2d at 712-14 (rejecting argument that courts should take margin of error into account and finding that statute required "strict cutoff" of IQ score of 70).

In 2004, the Florida Supreme Court promulgated Fla. R. Crim. P. 3.203. *See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 875 So. 3d 563 (Mem) (Fla. 2004) (hereinafter "*Amendments*"). With respect to timeliness, in its initial iteration, Rule 3.203(d)(4)(C) provided:

> If a death sentenced prisoner has filed a motion for postconviction relief and that motion has not been ruled on by the circuit court on or before October 1, 2004, the prisoner may amend the motion to include a claim under this rule within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(C).

After the promulgation of Rule 3.203, and the expiration of the time frame in subsection (d)(4)(C), Petitioner's postconviction counsel did not file an intellectual

disability claim. Petitioner did not meet Florida's strict IQ cutoff score of 70 necessary to raise a meritorious *Atkins* claim in the State of Florida.

In 2014, this Court decided *Hall v. Florida*, which invalidated Florida's bright-line IQ score cutoff of 70 and found Florida's statutory scheme for the determination of intellectual disability, as interpreted by Florida courts, unconstitutional. *See Hall*, 572 U.S. at 724. Thereafter, on October 20, 2016, the Florida Supreme Court decided *Walls v. State*, 213 So. 3d 340. In *Walls*, the Florida Supreme Court noted that "[p]rior to the decision in *Hall*, a Florida defendant with an IQ score above 70 could not be deemed intellectually disabled." *Walls*, 213 So. 3d at 345. As a result, the *Walls* Court held that under state law, "*Hall* warrants retroactive application as a development of fundamental significance that places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Id.* at 346.

On May 2, 2018, Petitioner filed a successive 3.851 motion for postconviction relief based on *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Atkins v. Virginia*, 536 U.S. 304 (2002), asserting that he is ineligible for the death penalty because he meets all three prongs of a finding of intellectual disability under *Hall* and *Walls v. State*. (SPCR. 23-95). *See Franqui v. State*, 211 So. 3d 1026, 1028 (Fla. 2017) (requiring Florida defendants claiming intellectual disability to establish (1) significantly subaverage intellectual functioning; (2) deficits in adaptive behavior; and (3) manifestation before the age of eighteen). After the State filed its answer, Petitioner filed a reply including a proffer of the report of Dr.

Jethro Toomer, whom the Florida Supreme Court found in *Walls* to be an expert in intellectual disability. Dr. Toomer stated that Petitioner is intellectually disabled and has an *unadjusted* full-scale IQ score of 75.[2] (SPCR. 170).

The circuit court heard argument at the *Huff* hearing conducted on June 18, 2018. Counsel for Petitioner discussed Petitioner's proffer. Counsel explained that Dr. Toomer's administration of the WAIS-IV revealed that Petitioner has an unadjusted full-scale IQ of 75.[3] Petitioner's unadjusted score of 75 is within the Standard Error of Measurement (SEM). (SPCR. 214). Counsel spoke to Petitioner's adaptive deficits, which satisfy the second prong of intellectual disability diagnosis. To satisfy this prong, an individual must have deficits in one of three categories of adaptive functioning: conceptual, social, and practical. Petitioner has deficits in all three domains, as explained in Dr. Toomer's report. (SPCR. 216). Dr. Toomer's findings also establish the third and final prong of an intellectual disability diagnosis: that the deficits manifest before the age of 18. (SPCR. 216). Additionally, counsel directed the circuit court to the declaration of Dr. Larson, the original expert from Petitioner's trial. Like Dr. Toomer, Dr. Larson called for a hearing on the issue of

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[2] The Flynn Effect was not applied to Petitioner's WAIS-IV score. If, however, one did apply the Flynn Effect to Petitioner's unadjusted score (as professional norms deem appropriate), that would lower Petitioner's full-scale IQ score by several points. (SPCR. 213-14).

The State proffered that, when considering the Flynn Effect, Petitioner's properly corrected IQ from his WAIS-R examination is 69. (SPCR. 118).

[3] The Flynn Effect was not applied to Petitioner's WAIS-IV score. If, however, one did apply the Flynn Effect to Petitioner's unadjusted score (as professional norms deem appropriate, that would lower Petitioner's full-scale IQ score by several points. (SPCR. 213-14).

intellectual disability and presented a myriad of causal risk factors in four categories: biomedical, social, behavioral, and educational. (SPCR. 217).

The circuit court summarily denied Petitioner's motion for postconviction relief. (SPCR. 161-63). Petitioner filed a Motion for Rehearing and Clarification. (SPCR. 164-70). The circuit court denied Petitioner's motion. (SPCR. 185-86).

Petitioner appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the circuit's court's denial, citing to *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), which overruled *Walls* and held that federal law does not require the retroactive application of *Hall*. *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020).

REASONS FOR GRANTING THE WRIT

I. Certiorari is warranted to resolve a split over whether *Hall* applies retroactively to cases on collateral review

The decision below deepens a split among the lower courts. In the Tenth Circuit, *Hall* applies retroactively on collateral review. *See Smith v. Sharp*, 935 F.3d 1064, 1083-85 (10th Cir. 2019). But in the Sixth, Eighth, and Eleventh Circuits, it does not. *See In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Williams v. Kelley*, 838 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).

State courts, too, are divided on this issue with regard to *Hall*. Compare *White v. Commonwealth*, 500 S.W.3d 208, 214-15 (Ky. 2016), *abrogated in part on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018), with *Phillips v. State,* 299 So. 3d 1013, 1022 (Fla. 2020), and *Payne v. State*, 493 S.W.3d 478, 489-91 (Tenn. 2016).

This case presents an excellent vehicle to resolve this split because the question of whether *Hall* applies retroactively is dispositive of Petitioner's right to relief from his death sentence. This question also has significant implications for numerous other death-row inmates nationwide. The Court should grant certiorari to answer it.

A. The decision below deepens a split

1. Courts that have held *Hall* applies retroactively on collateral review

Two courts—the Tenth Circuit and the Supreme Court of Kentucky—have held that *Hall* applies on collateral review.

The Supreme Court of Kentucky finds that *Hall* applies retroactively on collateral review. *See White v. Commonwealth*, 500 S.W.3d 208, 214-15 (Ky. 2016). In *White*, the trial court denied an *Atkins* claim governed by a state statute that, like the Florida statute at issue in *Hall*, barred execution of an intellectually disabled person only if his or her IQ score was below 70, not accounting for the standard error of measurement. *Id.* at 211 (citing Ky. Rev. Stat. §§ 532.10, 532.140). But the Supreme Court of Kentucky held that *Hall* applied retroactively under *Teague*'s *exception* for new "substantive" rules. *Id.* at 214-15.[4] Describing *Hall* as a "sea change," the court concluded that *Hall* established a new substantive rule for

[4] State courts must give new substantive rules under *Teague* retroactive application because *Teague*'s holding regarding new substantive rules "rest[s] upon constitutional premises." *Montgomery*, 136 S. Ct. at 729 ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

purposes of *Teague*, rather than an old or procedural one, because it imposed a "restriction on the State's power to take the life of individuals suffering from intellectual disabilities." *Id*. (quotation marks omitted). The court then remanded the case for further proceedings on the issue of whether White was intellectually disabled. *Id*. at 216-47.[5]

The Tenth Circuit found that *Hall* did not create a new rule of constitutional law, but was rather the mere application of "settled" law that applies on collateral review. *Smith*, 935 F.3d at 1083-85 (noting that a person can avail herself of a settled rule on collateral review, and "the Supreme Court's post-*Atkins* jurisprudence has expressly confirmed that its reliance on the clinical standards endorsed in *Atkins* constitutes a mere application of that case").

The *Hall* Court expressly noted that *Atkins* guided its decision. *Hall*, 572 U.S. at 720-21. The *Hall* Court noted that the *Atkins* Court "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Hall*, 572 U.S. at 719. *Hall* expressly countered the State's reliance on the fact that the *Atkins* Court instructed states to find appropriate ways to enforce the rule—"[i]f 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."

[5] In *White*, the Kentucky Supreme Court only went so far as to direct trial courts in Kentucky to consider an IQ test's margin of error, but did not declare the relevant statute unconstitutional; in *Woodall*, the Kentucky Supreme Court struck down the relevant statute that *White* had tenuously upheld. *Woodall v. Commonwealth*, 563 S.W.3d 1, 4-7 (Ky. 2018).

Id. at 720. And, "immediately after the Court declared that it left 'to the States the task of developing appropriate ways to enforce the constitutional restriction,' the Court stated in an accompanying footnote that '[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions.' " *Id.* at 719. These statements support that *Hall* applies on collateral review because it is a clarification of *Atkins*.

Applying *Hall*'s holding that intellectual disability determinations must be informed by the medical community's existing clinical standards to the case before it, the Tenth Circuit concluded that no reasonable factfinder could disagree that the petitioner was intellectually disabled. *Smith*, 935 F.3d at 1085-88. It therefore remanded with instructions to vacate the petitioner's death sentence. *Id.* at 1092.

Since *Smith*, the Tenth Circuit has continued to follow this approach. In *Harris v. Sharp*, 941 F.3d 962, 982-83 (10th Cir. 2019), a postconviction case, the court explained that whether the petitioner had been prejudiced by his counsel's failure to raise an *Atkins* claim during a state-court hearing pre-*Hall* depended on whether the hearing would have likely shown the petitioner to be intellectually disabled "under the existing clinical definitions applied through expert testimony." *Id.* (quoting *Smith*, 935 F.3d at 1077). *Harris*' language regarding the role of "existing clinical definitions"—an unmistakable reference to the holding of *Hall*—confirms the Tenth Circuit's position that *Hall* applies retroactively on collateral review. *See id.*

Although the Eleventh Circuit decided that *Hall* did not apply to collateral review, the dissenting judge in that decision believed that *Hall* was an old rule, in

line with the Tenth Circuit's stance. The dissenting judge pointed out the "important procedural context" of the *Hall* decision, namely, "*Hall* was decided in the collateral review context." *Henry*, 757 F.3d at 1164-65 (Martin, J., dissenting).

Mr. Hall's conviction and sentence were affirmed by the Florida Supreme Court on direct appeal in 1981. *Hall v. State*, 403 So. 2d 1321 (Fla. 1981). Mr. Hall had gone through two rounds of state postconviction proceedings when he filed a motion for *Atkins* relief in 2004. *See Hall v. State*, 109 So. 3d 704, 706-07 (Fla. 2012) (outlining procedural history). Since this Court's rejection of the *Linkletter* standard, this Court's retroactivity jurisprudence has focused on remedying the disparate treatment of similarly situated defendants. *See Teague*, 489 U.S. at 315 ("Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated . . . ."); *Griffith v. Kentucky*, 479 U.S. 314, 322-23 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."); *see also Williams v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., dissenting); *Fuller v. Alaska*, 393 U.S. 80, 82 (1968) (Douglas, J., dissenting). "[E]venhanded justice" was the animating principle behind the *Teague* decision. *Teague*, 489 U.S. at 299-302 ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."). *Teague* stated that this

Court would refuse to "announce a new rule in a given case *unless* the rule would be applied retroactively to the defendant in the case and to all others similarly situated." *Id.* at 316 (emphasis added). Therefore, according to this Court's own explicit pronouncement in *Teague*, *Hall* must apply to Mr. Hall and "all others similarly situated." As the dissent in *Henry* noted, "[i]t would be passing strange, and contrary to everything the Supreme Court has told us about retroactivity, if the rule in *Hall* only applied to Mr. Hall's collateral review proceedings and not to other defendants' collateral review proceedings." *Henry*, 757 F.3d at 1167.[6]

Similarly, in *Moore v. Texas*, the petitioner came before this Court on postconviction review. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017). "A state habeas court . . . determined that, under this Court's decisions . . . Moore qualified as intellectually disabled." *Id*. The Texas Court of Criminal Appeals ("CCA") declined to adopt the state habeas court's judgment. *Id*. This Court found that the CCA improperly used a seven-factor test to determine intellectual disability—several factors of which were "invention[s] of the CCA" drawn from neither the medical community's information nor this Court's precedent. *Id.* Texas, like Florida, had

[6] If this Court viewed its decision in *Hall* as the announcement of a "new" rule, rather than the straightforward application of *Atkins*, it would have by necessity addressed retroactivity as a threshold issue before applying it to Mr. Hall's case. However, it did not, which indicates that *Hall* is not "new" law, but settled law. *See Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("[W]hen we apply a settled rule may a person avail herself of the decision on collateral review."). In *Moore*, this Court similarly applied *Atkins* and *Hall* in a straightforward manner without pausing to address retroactivity, again indicating that this Court was applying settled precedent on postconviction review when it found that the habeas court had been correct to apply current medical standards. *Moore*, 137 S. Ct. at 1048-49.

violated the Eighth Amendment by disregarding current medical standards. *Id.* at 1048-53. "The postconviction context of the Court's decision[s] in *Hall* [and *Moore*] tells us that, at a minimum, the Supreme Court intended its holding to apply retroactively to all cases on collateral review." *Henry*, 757 F.3d at 1166.

2. Courts that have held *Hall* is not retroactive on collateral review

The Sixth, Eighth, and Eleventh Circuits, as well as the Tennessee Supreme Court and the Florida Supreme Court, have refused to apply *Hall* retroactively on collateral review. As a result, in these jurisdictions, a person whose conviction became final before *Hall* can still be executed by the State even if he or she is intellectually disabled under the medical community's prevailing clinical standards.

Shortly after *Hall* was decided, the Eleventh Circuit held that *Hall* did not announce a new rule that was made retroactively applicable on collateral review. *See In re Henry*, 757 F.3d 1151, 1158-59 (11th Cir. 2014) (addressing application to file second or successive § 2254 petition). In the majority's view, *Hall* "did indeed announce a new rule of constitutional law," but did not affect the class of individuals ineligible for the death penalty and thus did not create a new "substantive" rule. *Id.* at 1158, 1161. The panel also analogized to circuit precedent holding that the rule from *Miller v. Alabama*, 567 U.S. 460 (2012), was not substantive. *Henry*, 757 F.3d at 1161 (citing *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013)).

The circuit precedent that the *Henry* majority relied on was abrogated by this Court in 2016. *See Montgomery*, 136 S. Ct. at 734 (holding that the rule from *Miller* is substantive and applies retroactively). The Eleventh Circuit has nevertheless

consistently adhered to its decision in *Henry* and declined to give *Hall* retroactive effect. *See, e.g., Jenkins v. Comm'r, Ala. Dep't of Corr.*, 936 F.3d 1252, 1275 (11th Cir. 2019); *In re Bowles*, 935 F.3d 1210, 1219-20 (11th Cir. 2019); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314-15 (11th Cir. 2015).

Although the petitioner in *Henry* would nevertheless fail to meet the requirements of § 2244(b) (which requires a *new* rule of constitutional law to file a second or successive petition), as stated, the dissent in *Henry* believed that *Hall* was an old rule. *Henry*, 757 F.3d at 1164-65 (Martin, J., dissenting). "[T]he Supreme Court's decision in *Hall* must also apply retroactively, to the extent it merely represents an application or clarification of the *Atkins* decision." *Id*. The dissent further reasoned that, even if *Hall* were new law, it would follow that *Hall* was substantive and apply retroactively on collateral review. *Id*. at 1167-68.

Like the Eleventh Circuit, the Eighth Circuit has held that *Hall* does not apply retroactively on collateral review. It first addressed the retroactivity of *Hall* in *Goodwin v. Steele*, 814 F.3d 901 (8th Cir. 2014) (per curiam). Relying heavily on the Eleventh Circuit's decision in *Henry*, the *Goodwin* court concluded that *Hall* merely created an opportunity to present certain evidence of intellectual disability, rather than changing the class of individuals ineligible for the death penalty, and that it is therefore procedural. *Id*. at 904.

In a pair of related state and federal cases involving the same death-row inmate, the Tennessee Supreme Court and the Sixth Circuit also adopted this position. The Tennessee Supreme Court refused to apply *Hall* retroactively on

collateral review. *Payne v. State*, 493 S.W.3d 478, 489-91 (Tenn. 2016) (denying relief because the United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review). In Payne's federal habeas proceedings, the Sixth Circuit agreed. *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) ("Even if we assume, without deciding, that *Hall* and *Moore* announce new rules of constitutional law, Payne has not shown that these decisions apply retroactively.").

The lower courts have clearly divided on the retroactivity of *Hall*. This split is unlikely to resolve itself, as courts on both sides have now cemented their positions in repeat holdings across multiple cases within their respective jurisdictions. This Court should resolve this split now.

B. The Florida Supreme Court's decision below is wrong.

This Court should grant certiorari because the position adopted by the Florida Supreme Court is wrong and *Hall* is a new "substantive" decision of constitutional law and should apply on collateral review.

There is good reason to consider *Hall* substantive law. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court established a framework for the application of new watershed procedure rules and substantive rules of constitutional law. Under *Teague*, courts must retroactively apply new substantive rules of constitutional law. Rules that prohibit a certain category of punishment for a class of defendants because of their status or offense are substantive in nature. *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). In *Montgomery v. Louisiana*, this Court held "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state

collateral review courts to give retroactive effect to that rule." 136 S. Ct. 718 (2016). In *Montgomery*, this Court found that the source of the substantive/procedural watershed categories was the Constitution, not the federal habeas statute. For that reason, *Montgomery* held states cannot deny retroactive effect to rules that are substantive/watershed procedural because that would violate the Supremacy Clause.

In *Atkins v. Virginia*, this Court issued a new substantive rule of constitutional law and held that the Eighth Amendment's prohibition against cruel and unusual punishments deprives states of the authority to impose the death penalty on intellectual disabled individuals. *Atkins* prohibited a specific punishment—a death sentence—from being imposed on a particular class of defendants—intellectually disabled individuals. A sentence imposed in violation of *Atkins* is not just erroneous, but contrary to law and, as a result, void. *See Ex parte Siebold*, 100 U.S. 371, 376 (1879). A court "has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." *Montgomery*, 136 S. Ct. at 731.

Although *Hall* followed *Atkins*, and implicated the same constitutional prohibition on the execution of the intellectually disabled, *Hall* too announced a new substantive rule. Whether a constitutional rule is substantive or procedural "does not depend on whether the underlying constitutional guarantee is characterized as procedural or substantive," but rather whether "the new rule itself has a procedural function or a substantive function," i.e., whether the new rule alters only the procedures used obtain the conviction, or alters instead the class of persons the law

punishes. *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016). *Atkins* altered the class of individuals that the law could punish by prohibiting the execution of the intellectually disabled, even though *Atkins* itself contained procedural components. *See Montgomery*, 136 S. Ct. at 735. "[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class." *Id.* But "[t]hose procedural requirements do not, of course, transform substantive rules into procedural ones." *Id*.

Hall likewise announced a substantive rule because it expanded that class of individuals who could not be executed—the intellectually disabled—to individuals who had IQ scores falling in a broader range than previously recognized. *See, e.g.*, *Walls*, 213 So. 3d at 346 ("We find that *Hall* . . . places beyond the State of Florida the power to impose a certain sentence—the sentence of death for individuals *within a broader range of IQ scores than before*.") (emphasis added). The Florida Supreme Court in *Phillips* gave too much consideration to the fact that the execution of intellectually disabled defendants is already unconstitutional, and faulted *Hall* for not announcing a brand-new category of protected individuals. *Phillips*, 299 So. 3d at 1019-22.

However, this Supreme Court has acknowledged decisions as substantive in which an existing class of defendants or range of punishments is merely altered; for example, decisions which "*narrow* the scope of a criminal statute" still qualify as substantive because the range of persons affected by the relevant statutory provision

has been altered. *See Welch*, 136 S. Ct. at 1265 (emphasis added); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (this Court's interpretation of a criminal statute is always substantive because it changes the class of persons affected or range of conduct proscribed). A change to the class—like an expansion of or narrowing of the class—is still substantive law.

Although *Hall*, like *Atkins*, contains procedural components—namely, the mechanics of the proper application of the SEM in the interpretation of IQ scores for the diagnosis of intellectual disability—these procedural components are not an impediment to *Hall*'s classification as a substantive constitutional rule. For example, *Miller v. Alabama*, 567 U.S. 460 (2012), held that the Eighth Amendment forbids mandatory life without parole sentences for juvenile homicide offenders and thereby announced a new substantive rule, though this Court's decision in *Miller* contained procedural components. These procedural components—such as requiring a hearing in which a sentencer considers a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence—were not an impediment to this Court's ruling that *Miller* announced a substantive constitutional rule. They simply described a process by which courts could "give[] effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery*, 136 S. Ct. at 735.

Similar to *Miller*, *Hall* announced a new substantive constitutional rule when it prohibited a certain type of punishment on an expanded category of offenders. The

procedural components delineated in *Hall*, which required the recognition of the SEM in the determination of IQ scores consistent with the medical community's standards, were designed to give effect to the new rule protecting the expanded class, in the same way that *Miller*'s procedural components gave effect to the constitutional rule therein. *Miller* and *Hall* both have procedural components designed to give effect to "a substantive change in the law" by requiring that States "must [] attend[] by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Montgomery*, 136 S. Ct. at 735. *Hall* established a procedure that enabled defendants within five points of two standard deviations to present additional evidence of intellectual disability at an evidentiary hearing.

The substantive component of *Hall* is clearer when one considers the reasoning for allowing a conviction already final to stand despite a violation of a procedural rule—procedural rules "enhance the accuracy of a conviction or sentence," and "[e]ven where procedural error has infected a trial, the resulting conviction or sentence may still be accurate." *Id*. at 730. "The same possibility of a valid result does not exist" when the State's power to "impose a given punishment" has been eliminated. *Id*. The most impeccable procedural mechanisms could not legitimize a punishment imposed on those who are constitutionally immune from such punishment. *Id*. In the instant case, the most flawless procedural mechanisms could not legitimize the imposition of the punishment of death on Mr. Lawrence, who has an IQ score of 75 and is intellectually disabled. "No circumstances call more for the invocation of a rule of complete retroactivity." *Id*.

Florida is violating federal law by refusing to give effect to *Hall* for individuals in that expanded category. While states are free to create their own retroactivity schemes, in doing so states cannot violate federal law in doing so; in other words, states may only provide the same or broader relief for constitutional violations than federal law requires. *See*, *e.g., Danforth v. Minnesota*, 522 U.S. 264, 282 (2008).

II. The question presented is important

The question presented has profound consequences for many individuals on death row and the States that have sentenced them. Underlying this Court's retroactivity precedents is the concern that new substantive rules of constitutional law carry a "significant risk" that individuals will face a punishment that is beyond States' power to impose on them. *See Montgomery*, 136 S. Ct. at 734; *Schriro*, 542 U.S. at 352. That risk has now become a certainty in some jurisdictions. By denying capital defendants the benefit of *Hall*, the courts in those jurisdictions have left intellectually disabled individuals to face the death penalty—even though the Eighth Amendment forbids it—and they will continue to do so until this Court intervenes.

Moreover, until the split is resolved, there will continue to be an "unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Teague*, 489 U.S. at 305 (plurality opinion). Intellectually disabled persons who, for example, have an IQ score of 72 and were sentenced to death pre-*Hall* are entitled to relief in some jurisdictions, but in others are sent to the execution chamber. Compare, *Hall*, 201 So. 3d at 632, 638 (vacating death sentence of person with IQ scores of 71 and 73), with, *Goodwin*, 814 F.3d at 904 (denying motion to stay next-day execution

of person with an IQ score of 72 on the basis that *Hall* is non-retroactive). Such arbitrary and stark disparities should not be allowed to persist, particularly when they involve matters of such grave consequence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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