No. 20-6307

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 Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

In 1995, Petitioner was convicted of first-degree murder. At sentencing, Petitioner's own expert conceded that Petitioner "is not retarded"—and that Petitioner's IQ score was above, and not within, "the borderline range of retardation." Accordingly, Petitioner did not claim that he was intellectually disabled at sentencing or on direct appeal. Petitioner was sentenced to death, and his sentence became final in 1998.

Four years later, this Court held that the Eighth Amendment bars the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002).

In 2018—twenty years after his sentence became final, sixteen years after *Atkins*, and four years after *Hall v. Florida*, 572 U.S. 701 (2014)—Petitioner filed a successive motion for state postconviction relief, in which he claimed for the first time that he is intellectually disabled. The state postconviction court summarily denied that claim as untimely under state law. The Florida Supreme Court affirmed. The majority cited recent precedent holding that *Hall* does not apply retroactively. Justice Labarga concurred in the result. As he explained, Petitioner "did not timely seek relief under *Atkins*," and thus was "not entitled to relief" even if *Hall* applies retroactively.

The question presented is: Whether the state postconviction court erred as a matter of federal law in denying Petitioner's claim for postconviction relief.

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STATEMENT

1. In 2002, the Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). But *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability]" is protected by the Eighth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Instead, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317.

Even before *Atkins* was decided, Florida law barred the imposition of death sentences on the intellectually disabled. § 921.137, Fla. Stat. (2001). Following *Atkins*, the Florida Supreme Court issued Florida Rule of Criminal Procedure 3.203, which allowed even prisoners whose sentences had already become final on direct review to seek relief under *Atkins*. *See* Fla. R. Crim. P. 3.203(d)(4).

More than a decade later, the Court considered whether Section 921.137 was constitutional insofar as it barred a claim of intellectual disability based on a strict IQ score cutoff of 70, even if the claimant's score fell within the test's margin of error. *Hall v. Florida*, 572 U.S. 701 (2014). "On its face," the Court noted, "this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Id.* at 711. As the Court saw it, "[n]othing in the statute precludes Florida from taking into account the IQ test's standard error of measurement," and the Court found "evidence that Florida's Legislature intended to include the

measurement error in the calculation." *Id.* The Court held that the statute was invalid, however, insofar as it had been narrowly construed by the Florida Supreme Court to impose a "strict IQ test score cutoff of 70," and thus to bar a capital defendant with a score "within the margin for measurement error" from raising a claim of intellectual disability. *Id.* at 711, 724.

In support of that conclusion, the Court noted that "the precedents of this Court," including *Atkins*, "give us essential instruction, but the inquiry must go further." *Id.* at 721 (citation omitted). Thus, the Court considered the views of the States, the Court's precedent, and the views of medical experts. *Id.* Florida's fixed IQ cutoff, the Court held, impermissibly "bar[red] consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." *Id.* at 723. At bottom, *Hall* requires that States "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724.

Two years later, the Florida Supreme Court held that, under state law, *Hall* applied retroactively. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (citing *Witt v. State*, 387 So. 2d 922 (Fla. 1980) (setting forth test for applying rule retroactively under Florida law)). The court did not consider whether *Hall* applies retroactively under federal law and, as explained below, the court would later recede from its decision.

2. On July 28, 1994, Petitioner Gary Lawrence and his wife Brenda were at Brenda's apartment with the victim, Michael Finken, when Petitioner and Michael argued after Petitioner learned that Michael had been sleeping with Brenda. *Lawrence v. State*, 698 So. 2d 1219, 1220 (Fla. 1997). After seemingly having resolved their differences, Michael fell asleep on the couch. *Id.* Petitioner and Brenda told Brenda's two daughters, who were also there, that they were "going to knock off Mike," and that they should stay in their bedroom "no matter what you hear." *Id.* Petitioner and Brenda proceeded to beat Michael over the head with a pipe and a baseball bat, stab him, and shove a mop handle down his throat. *Id.* After Michael died, Petitioner and Brenda took money from his pockets, wrapped his body in a shower curtain, and placed it in his car. *Id.* Petitioner drove to a secluded area where he set the body on fire. *Id.*

3. In 1995, Petitioner was convicted of first-degree murder, conspiracy to commit murder, auto theft, and petty theft. *Id.*

At sentencing, Petitioner did not claim that he was intellectually disabled or that his execution would violate the Eighth Amendment. Indeed, Petitioner's own expert witnesses testified that Petitioner scored *above* what they considered *borderline* range for mental retardation. Dr. James Larson, for example, testified that Petitioner's IQ score was a few points higher than, and did not fall within, "the borderline

range of retardation." Tr. 472 (Mar. 17, 1995).[1] He likewise testified that Petitioner "is not retarded." *Id.* at 486. Similarly, Dr. Galloway referred to Petitioner's IQ score as "nearly borderline mentally defective." R.35 (citing Galloway Deposition, at 7-8).

The trial court found three aggravating circumstances: (1) Petitioner was under sentence of imprisonment; (2) the murder was heinous, atrocious or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner (CCP). *Lawrence*, 698 So. 2d at 1221, n.1. The court also found that Petitioner failed to establish any statutory mitigating factors. Of particular relevance, the trial court declined to find that murder was committed while Petitioner was under the influence of extreme mental or emotional distress pursuant to Section 921.141(6)(b). Consistent with Dr. Larson's testimony that Petitioner's IQ score fell "in the low average range," the trial court found that the "evidence presented during the penalty phase showed that the Defendant does in fact have a low IQ." R.45. That evidence, however, did "not rise to the level of 'extreme mental or emotional disturbance.'" *Id.* In making that determination, the trial court "recognize[d] that this issue must not be determined solely upon the opinion of an expert witness but must be based upon the totality of the circumstances at the time the murder was committed." *Id.* And Petitioner was "able to

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[1] Citations in this brief styled as "R." followed by a pincite refer to the Florida Supreme Court's record on appeal in this case, *available at* https://efactssc-public.flcourts.org/casedocuments/2018/1172/2018-1172_record_130075_rc02.pdf. *See Lawrence v. Florida*, No. SC18-1172 (docket entry filed on Aug. 8, 2018).

recognize the necessity for driving his wife to and from work" and "able to communicate and visit his friends and even when confronted with the affair between his wife and the victim was able to control himself after an initial outburst of anger." R.45-46. Instead, Petitioner established only the non-statutory mitigating circumstances that he (1) cooperated with law enforcement; (2) had a learning disability and "low IQ is a mitigating factor";[2] (3) had a deprived childhood; (4) was under the influence of alcohol at the time of the crimes; and (5) did not have a violent history. R.47-49; *see also Lawrence*, 698 So. 2d at 1221 n.2.

Summarizing its conclusion, the trial court found that "the three statutory aggravating factors far outweigh the mitigating factors." R.49. Accordingly, the court determined that "the jury's recommendation for the imposition of the death penalty is the appropriate sentence in this case." *Id*.

Petitioner raised seven issues on direct appeal. *Lawrence*, 698 So. 2d at 1221 & n.3.[3] Petitioner did not

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[2] The trial court stated that "the Defendant appeared to be able to function in society and as pointed out in the penalty proceeding many people with low IQs do not commit serious criminal offenses such as this case." R.47-48. The trial court also took into consideration Petitioner's assertion of "mental health problems," stating, "this Court is of the opinion that this factor duplicates the Defendant's learning disability factor and marginal IQ which has already been considered by this Court." *Id*.

[3] In particular, Petitioner "claim[ed] that the court erred in the following matters: 1) proportionality; 2) finding CCP; 3) instructing on CCP; 4) finding HAC; 5) instructing on HAC; 6) failing to inform the jury that it could recommend life even if the

claim that he was intellectually disabled, that his execution would violate the Eighth Amendment, or that the trial court erred insofar as it relied on testimony—offered by Petitioner's own expert witness—that Petitioner's IQ score was above the borderline range for mental retardation. *See id.*

The Florida Supreme Court affirmed Petitioner's convictions and sentences. *Id.* at 1222. The court rejected Petitioner's claim that the trial court erred in failing to find statutory mitigating circumstances. *Id.* "The trial court's sentencing order," the Florida Supreme Court concluded, was "sound." *Id.* That is, the order "show[ed] that the trial court considered all the proposed mitigating circumstances, [and] found some as established and others not." *Id.* Based on its review of the record, the Florida Supreme Court concluded that "[c]ompetent substantial evidence supports the trial court's findings." *Id.*

Petitioner's sentence became final on January 20, 1998, when this Court denied certiorari. *Lawrence v. Florida*, 522 U.S. 1080 (1998).

4. Subsequently, Petitioner filed a postconviction motion, including three claims for ineffective assistance of counsel; the trial court denied that motion after holding an evidentiary hearing. *Lawrence v. State*, 831 So. 2d 121, 126 (Fla. 2002), *cert. denied*, *Lawrence v. Florida*, 123 S. Ct. 1575 (2003) (Mem.). He appealed and also filed a habeas petition raising thirteen claims for ineffective assistance of

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mitigating circumstances did not outweigh the aggravating circumstances; 7) failing to find all possible mitigation." *Lawrence*, 698 So. 2d at 1221 n.3.

counsel. *Id*. None of the claims in his postconviction motion or habeas petition involved a claim that he was intellectually disabled. The Florida Supreme Court denied habeas relief and affirmed the denial of Petitioner's postconviction motion. *Id*. at 137.

Petitioner next filed a federal habeas petition, which was dismissed as untimely. *Lawrence v. Florida*, 2004 WL 5286227, 3:03-cv-97 (N.D. Fla. Sept. 16, 2004). As with his state postconviction and habeas claims, he did not raise an intellectual disability claim. The Eleventh Circuit affirmed, *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005); this Court then granted review and affirmed as well, *Lawrence v. Florida*, 127 S. Ct. 1079 (2007).

Petitioner then filed his first successive postconviction motion, seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *receded from in part by State v. Poole*, 297 So. 3d 487 (Fla. 2020), *reh'g denied, clarification granted*, No. SC18-245, 2020 WL 3116598 (Fla. Apr. 2, 2020), *and cert. denied sub nom. Poole v. Florida*, No. 20-250, 2021 WL 78099 (U.S. Jan. 11, 2021). The trial court denied his motion, and the Florida Supreme Court affirmed. *Lawrence v. State*, 236 So. 3d 240 (Fla. 2018).

5. This case arises out of Petitioner's second successive motion for state postconviction relief. R.23. Petitioner filed that motion on May 2, 2018—almost sixteen years after this Court issued its opinion in *Atkins*. R.23. In the motion, Petitioner claimed—for the first time—that he is intellectually disabled, relying on *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall*, and *Atkins*. In filing the motion, Petitioner pointed to

Walls' holding that *Hall* applies retroactively under state law.

In his motion, Petitioner acknowledged that, at the time of trial, his own expert, Dr. Larson, had conducted tests reflecting that Petitioner had "a full scale IQ score of 81." R.35. Petitioner now relied on a new declaration from Dr. Larson. *Id.* Petitioner did not assert that Dr. Larson is now of the view that Petitioner is intellectually disabled. *See id.* Rather, Petitioner cited Dr. Larson's new declaration for the proposition that Petitioner "is eligible to pursue an intellectual disability claim." *Id.* As the State pointed out in response, however, Petitioner's IQ score of 81 was six points above the range that, under *Hall* and *Moore*, would entitle him to an evidentiary hearing to establish the other prongs of intellectual disability. R.116. The State also pointed out that the motion was untimely under state law. R.10-13.

The postconviction court summarily denied Petitioner's claim as untimely under Florida Rule of Criminal Procedure 3.851. R.161-63. Petitioner's second successive motion, the court noted, was "based on *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016), which held that *Hall v. [Florida]*, 134 S. Ct. 1986 (2014), is to be applied retroactively." R.161. "The mandate in *Walls* was issued on January 25, 2017," and Petitioner's motion "was filed more than one year later on May 2, 2018." *Id.* Citing state law, the court dismissed Petitioner's motion as untimely. *Id.* (citing Fla. R. Crim. P. 3.851(d)(2)(B) & (e)(2); *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2016); *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999)). Petitioner moved for

rehearing and clarification, and the trial court denied that motion. R.185-86.

Petitioner appealed, and while that appeal was pending, the Florida Supreme Court decided *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). There, the court receded from *Walls* and held that *Hall* did not apply retroactively under either state or federal law. As relevant to the federal-law inquiry, the court concluded that because "*Hall* announced a new procedural rule, which does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability," it was not retroactive under federal law. *Id.* at 1022. Instead, the court explained, "*Hall* is similar to other nonretroactive 'decisions [that] altered the processes in which States must engage before sentencing a person to death,' which 'may have had some effect on the likelihood that capital punishment would be imposed' but which did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Id.* at 1022 (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016)). In short, the court concluded, "*Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability." *Id.* at 1020.

Relying on *Phillips* here, the Florida Supreme Court affirmed the postconviction court's summary denial of Petitioner's intellectual disability claim. Pet. App. 1. Justice Labarga concurred in the result. Pet.

App. 3. The Florida Supreme Court, he noted, had "consistently affirmed the denial of relief in cases where the defendant failed to timely raise an intellectual disability claim based on *Atkins*." *Id.* (citing cases). Petitioner here "did not timely seek relief under *Atkins*." *Id.* Accordingly, Justice Labarga "agree[d] with the majority that [Petitioner] is not entitled to relief," even though he disagreed with the court's ruling that *Hall* does not apply retroactively. *Id.*

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE FOR DECIDING WHETHER *HALL* APPLIES RETROACTIVELY.

Petitioner asks this Court to decide whether *Hall* "merely clarified" *Atkins* "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)." Pet. i. This case is not a suitable vehicle for resolving that question, for several reasons.

First, as the state postconviction court explained in summarily denying relief, Petitioner's intellectual disability claim is untimely as a matter of state law. R.161; Pet. App. 3 (Labarga, J., concurring in result) (explaining that Petitioner "did not timely seek relief under *Atkins*," and thus "agree[ing] with the majority that [Petitioner] is not entitled to relief").

Florida Rule of Criminal Procedure 3.851(d)(1), pursuant to which Petitioner filed his motion in 2018, requires motions to be filed "within 1 year after the

judgment and sentence become final." Petitioner's death sentence became final on January 20, 1998. Pet. App. 1. Thus, for his second successive motion for postconviction relief to be timely, Petitioner had to meet one of the exceptions to this time bar. The relevant exception here provides that Rule 3.851 motions can be filed outside of the one-year limitations period if "the fundamental constitutional right asserted was not established within the [one-year period] and has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). "The relevant time in which to file a claim based on a new fundamental constitutional right is one year from the date of the decision announcing that the right applies retroactively." *Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018) (citing *Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999)). Under Florida Supreme Court precedent, that date turns on the court's issuance of the mandate. *Id*. (citing *Dixon*, 730 So. 3d at 267, for the proposition that "the basis for calculating a cut-off period for postconviction claims based on a fundamental constitutional right is the date of the issuance of the mandate in the case in which this Court announces retroactivity").

This Court has never held that *Hall* applies retroactively. In a decision later reversed in *Phillips*, the Florida Supreme Court held that *Hall* applied retroactively under state law. *Walls v. State*, 213 So. 3d 340 (Fla. 2016). That decision issued on October 20, 2016; the mandate issued January 25, 2017. Petitioner, however, did not file his Rule 3.851 motion until May 2, 2018, more than a year after *Walls* was decided. Thus, Petitioner's successive motion was untimely under state law. Indeed, that is why the trial

court summarily denied his motion: Petitioner's motion "is based on *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016)," but his motion "was filed more than one year later on May 2, 2018." R.161.

That state-law procedural default confirms that review is not warranted here. Although Petitioner was convicted in 1995 and his death sentence became final in 1998, he did not raise an intellectual disability claim until 2018—20 years after his sentence became final, 16 years after *Atkins*, and 4 years after *Hall*. Thus, Petitioner's argument that *Hall* applies retroactively appears to be only a method of avoiding Rule 3.851's time bar and to present a claim of intellectual disability at this very late stage.

Second, even if Petitioner's claim were timely, this case has nothing to do with *Hall*. Recognizing "the inherent error in IQ tests," the Court concluded in *Hall* that the State could not seek "to execute a man because he scored a 71 instead of a 70 on an IQ test." 572 U.S. at 722, 724. Rather, the Court concluded, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id*. at 723.

That ruling does not help Petitioner. At sentencing, Petitioner's own expert testified that Petitioner "is not retarded" and had a "full scale IQ score of 81." Tr. 486 (Mar. 17, 1995); *see* R.35; R.99. Petitioner does not claim that an IQ score of 81 "falls within the test's acknowledged and inherent margin of error." *See Hall*, 572 U.S. at 723. And for good reason: As Petitioner's own experts explained, his

score was *above*—and not within—what *they considered* the *borderline* range for intellectual disability. Dr. Larson, for example, testified that Petitioner's IQ score was a few points higher than, and thus did not fall within, "the borderline range of retardation." Tr. 472 (Mar. 17, 1995). Similarly, Dr. Galloway referred to Petitioner's IQ score as "nearly borderline mentally defective." R.35.

In short, Petitioner's own expert told the sentencing court that Petitioner was *not* intellectually disabled; consistent with that view, Petitioner did not even try to bring a claim of intellectual disability at sentencing or for a full 16 years after *Atkins*; no court has ever told Petitioner that he could not "present additional evidence of intellectual disability" based on his inability to meet a strict IQ cutoff of 70, *see Hall*, 572 U.S. at 723; and, even now, Petitioner does not argue that an IQ score of 81 "falls within the test's acknowledged and inherent margin of error," *id*. Accordingly, *Hall* adds nothing to Petitioner's belated claim of intellectual disability, rendering this case an unsuitable vehicle for resolving whether *Hall* applies retroactively to sentences that have already become final on direct review.

II. THE LOWER COURTS ARE NOT INTRACTABLY SPLIT ON PETITIONER'S QUESTION PRESENTED.

According to Petitioner, the question presented in this case is whether *Hall* announced a new substantive rule of federal constitutional law that state postconviction courts must apply retroactively under *Montgomery* and *Teague v. Lane*, 489 U.S. 288 (1989). *See* Pet. i. Even if this case were a suitable vehicle for resolving that question, the lopsided

conflict Petitioner asserts as to that issue does not warrant this Court's review.

As Petitioner recognizes, almost all the courts that have addressed the issue have agreed with the decision below and either held or opined that *Hall* does not apply retroactively on collateral review. *See* Pet. 18 ("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."); *see id.* at 18-20 (discussing those cases). Petitioner points to only "[t]wo courts"—"the Tenth Circuit and the Supreme Court of Kentucky"—that have purportedly come out the other way. *Id.* at 13. But neither case gives rise to the kind of split that calls for this Court's review.

Petitioner identifies only one state court of last resort that has held that state postconviction courts must apply *Hall* retroactively. Pet. 13 (citing *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), *as modified* (Oct. 20, 2016), *and abrogated by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018)). There, the Supreme Court of Kentucky summarily concluded that *Hall* "does not deal with criminal procedure," imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and "must be retroactively applied." 500 S.W.3d at 215.

Notably, the Kentucky Supreme Court's opinion included only one paragraph addressing Petitioner's question presented. 500 S.W.3d at 215. And that paragraph cited, in passing, just two cases: this Court's decision in *Atkins*, which preceded *Hall* and arose on direct review, and thus had no occasion to

address whether state courts must apply *Hall* retroactively to cases on collateral review; and the Florida Supreme Court's now-defunct view that *Hall* applies retroactively as a matter of state law. *See id.* (citing *Oats v. Florida*, 181 So. 3d 457 (2015), and noting that the Kentucky court's ruling put it "in the company of our sister state Florida which, of course was the state in which the underlying issue in *Hall* first arose"); *Walls*, 213 So. 3d 340. Given that the Florida Supreme Court has recently overruled its state law retroactivity ruling and held that *Hall* does not apply retroactively as a matter of federal law, the Kentucky Supreme Court is no longer "in the company of" the state in which *Hall* arose—and might well be amenable to revisiting its conclusory decision in *White*. At a minimum, the Kentucky court should have an opportunity to reconsider—and provide a reasoned basis for—its decision before this Court is asked to resolve a conflict arising out of *White*.

Petitioner also relies on *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019), but the Tenth Circuit did not hold there that state postconviction courts are required to apply *Hall* retroactively. Instead, the Tenth Circuit reviewed de novo a federal district court's conclusion concerning the propriety of federal habeas relief. *Id.* at 1069, 1085. In assessing that issue, the Tenth Circuit considered whether, under Oklahoma's implementation of *Atkins*, Smith was intellectually disabled because he "ha[d] significant limitations in adaptive functioning in at least two of the nine listed skill areas." *Id.* at 1083. In so doing, the court assessed "whether the Supreme Court's recent applications of *Atkins* 'are novel.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)).

The court concluded that *Hall*, *Moore I*, and *Moore II* did not state new rules but instead that they applied a general rule set forth in *Atkins*, and thus that they could not be understood to "yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quoting *Chaidez*, 568 U.S. at 348). Although the court relied on some statements in *Hall* in reaching this conclusion, it did not apply *Hall* to Smith's case. Instead, it applied *Moore I* and *Moore II*, "which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated," in determining whether Smith "suffered deficits in at least two areas of adaptive functioning." *Id.* at 1085. In other words, the Tenth Circuit did not squarely address the question at issue here, and its statements pertaining to *Hall* were not essential to the disposition of the case. Indeed, Smith's case did not involve any law foreclosing the presentation of intellectual disability evidence without an IQ score of 70 or below.

At any rate, any conflict among the lower courts does not warrant this Court's review at this time. At least two additional considerations support that conclusion.

First, further percolation would give the lower courts an opportunity to carefully assess the varying arguments that have been advanced for concluding that *Hall* applies retroactively. In *White*, for example, the Kentucky Supreme Court summarily concluded that *Hall* announced a substantive restriction on the State's power to impose capital punishment, without addressing whether *Hall* imposed a new rule. *See* 500 S.W.3d at 215.

Second, some of the cases Petitioner cites for the proposition that the lower courts are split on the question presented turned on a different issue: whether federal habeas petitioners seeking leave to file a second or successive habeas petition were barred by 28 U.S.C. § 2244(b) because this Court has not held that *Hall* is retroactive. *See In re Payne*, 722 F. App'x 534, 537 (6th Cir. 2018); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). But the question of whether this Court has expressly held that a particular rule is retroactive, and therefore that section 2244(b) permits a second or successive petition under section 2254, is a question distinct from whether the Court announced a new substantive rule that state courts must apply retroactively under *Teague* and *Montgomery*. *Greene v. Fisher*, 565 U.S. 34, 39 (2011) (explaining that "[t]he retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other"); *Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[I]f our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct."). That is because under section 2244, a "new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). In other words, whether the statutory dictates of section 2244 have been met is a different question from whether, under *Teague*, a new rule is a substantive rule that state postconviction courts must apply retroactively.

For these reasons, Petitioner's asserted conflict does not warrant review at this time. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (explaining that percolation "allow[s] . . . the issue [to] receiv[e] further study" in the lower courts "before it is addressed by this Court").

III. THE DECISION BELOW IS CORRECT.

Review is not warranted for the additional reason that the Florida Supreme Court correctly concluded that *Hall* does not apply retroactively under federal law and, in any event, did not require the state postconviction court to consider Petitioner's belated claim of intellectual disability.

First, *Hall* announced a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. As the Eleventh Circuit has explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *Henry*, 757 F.3d at 1158-59. Indeed, the Court pointed out in *Hall* that while its precedents were instructive, "the inquiry must go further." 572 U.S. at 721. And "[n]othing 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." *Henry*, 757 F.3d at 1159. Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also supports the conclusion that *Hall* announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (indicating that a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." 572 U.S. at 725 (Alito, J., dissenting).

Second, the new rule announced in *Hall* is not a substantive rule.[4] "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S. Ct. at 728 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). But *Hall* does not forbid criminal punishment for any type of primary conduct. Nor does it prohibit any category of punishment for any class of defendants because of their status or offense. While *Atkins* prohibits states from executing intellectually disabled defendants, *Hall* requires only certain

[4] Nor is it a "watershed" rule of criminal procedure. Indeed, those rules are "hen's-teeth rare." *Sepulveda v. United States*, 330 F.3d 55, 61 (1st Cir. 2003). But to even reach that question, the Court would have to take the step it did not in *Montgomery* and hold that *Teague*'s second exception for "watershed" rules of procedure is a constitutional rule that state collateral review courts must apply. 136 S. Ct. at 729.

"*procedures* for ensuring that states follow the rule enunciated in *Atkins*." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015). Specifically, "*Hall* 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." *Id.*

Indeed, by its terms, *Hall* requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." 572 U.S. at 724. In other words, Florida's IQ cutoff was defective because it "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted)—a classic procedural defect.

Petitioner nonetheless insists that *Hall* announced a new substantive rule because it purportedly "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." Pet. 22. Petitioner is incorrect. *Atkins* protects every individual who is intellectually disabled, while *Hall* simply prevents States from using a particular procedure, which the Court deemed inappropriate, when determining whether an

individual falls into that class. *See, e.g.*, *Hall*, 572 U.S. at 723 (concluding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"); *see also id*. at 724 (Alito, J., dissenting) (observing that *Hall* "mandate[s] the use of a *single method* for identifying" persons with intellectual disability (emphasis added)); *id*. at 727 (referring to "the procedure now at issue"). In other words, despite Petitioner's claim to the contrary, "*Hall* did not expand the class of individuals protected by *Atkins*'s prohibition." *Kilgore*, 805 F.3d at 1314. As the Florida Supreme Court explained in *Phillips*, although *Hall*'s procedural change "may have had some effect on the likelihood that capital punishment would be imposed," it "did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Phillips*, 299 So. 3d at 1322.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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