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 Supreme Court of Florida

REPLY BRIEF FOR PETITIONER

THIS IS A CAPITAL CASE

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A. State Procedural Question is Not Independent and Not Referenced by Florida Supreme Court in its Opinion

The first reason the State offers for denying the petition is that Petitioner's claim is "untimely as a matter of state law." (Brief in Opposition 10-12). The State goes on to argue that "Petitioner's argument that *Hall* applies retroactively appears to be only a method of avoiding Rule 3.851's time bar"—a statement which hits so very close to the mark. (Brief in Opposition 12). Indeed, this state law matter is intertwined with the issue presented to this Court, because under Rule 3.851(d)(2)(b), a petitioner is permitted to file a Rule 3.851 motion when a new constitutional right is established and has been held to apply retroactively. Fla. R. Crim. P. 3.851(d)(2)(b).

Thus, there is no independent state law issue impeding this Court's review because it is intertwined with the question presented. "As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

The State also appears to rely on reasons offered by the state *trial* court for denying the motion, such as the issue of whether the one-year limitations period ran from the date that the Florida Supreme Court originally issued the *Walls* opinion or the date that it corrected and reissued the *Walls* opinion. However, the Florida Supreme Court did not rely on, or even reference, these reasons on appeal. On June 11, 2020, the Florida Supreme Court affirmed the denial of Petitioner's Rule 3.851 motion based solely and explicitly on its newly revised opinion—decided while Petitioner's case was pending before it—that *Hall* did not apply retroactively. *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020) (citing *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020)). This Court reviews "[f]inal judgments or decrees rendered by the highest court of a State." 28 U.S.C. § 1257. Even if some other aspect of state law was examined by the state trial judge, because they were not relied on by the Florida Supreme Court, those issues have no import here. When a constitutional issue is decided on the merits, it is irrelevant to this Court's jurisdiction whether the decision merely *could* have been disposed of on a state law ground. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) ("[S]ince the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and

independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question.").[1]

As is obvious from the opinion, the Florida Supreme Court considered the issue of *Hall*'s retroactivity to be before it and rendered its decision on that ground alone. The time bar the State raises was not mentioned by the Florida Supreme Court.[2] *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (requiring "plain statement" that state court relied on state ground). Rather, the Florida Supreme Court appears to cut directly to the merits by stating that *Hall* simply does not apply to Petitioner; therefore, Petitioner cannot receive its benefits. The Florida Supreme Court stated: "We conclude that Lawrence's argument lacks merit. As this Court stated in *Phillips v. State . . . Hall v. Florida*, 572 U.S. 701 (2014), does not apply retroactively. Therefore, Lawrence is not entitled to relief." *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020). The plain language of the opinion makes no reference to any procedural bar—it is a judgment on the merits.

B. Petitioner's Most Recent IQ Score is 75

The State argues that Petitioner's IQ score is 81 and that *Hall* is irrelevant to Petitioner's case. The State chooses to cite the results of the test performed by Dr.

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[1] *See also Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 104 (1963) ("[I]t is said that petitioner has sought relief too late. But the Court of Appeals did not reject his petition on that ground.").

[2] The State appears to rely on the *concurring* opinion, which does reference the time bar. (Brief in Opposition 10); *Lawrence v. State*, 296 So. 3d 892, 892-93 (Fla. 2020) (Labarga, J., concurring in result). Justice Labarga's explanation makes clear that he strongly disagrees with the majority's reasoning and reliance on *Phillips*, while he *instead* relies on the time bar—this is why he can "only concur in the result." *Id.*

Larson in 1995, using the now-outdated WAIS-R.[3] The State ignores the fact that Dr. Toomer administered the more current WAIS-IV IQ test in June of 2018 and determined that Petitioner had an unadjusted full scale IQ of 75. R. 148-155. If the Flynn effect is applied, as professional norms deem it should, Petitioner's IQ score is even lower than 75.[4] Although this information was included in the petition for certiorari, the State does not address Dr. Toomer's opinion at all.

This type of factual dispute between experts as to whether Petitioner suffers from "significantly subaverage general intellectual functioning" is exactly what the state courts must allow an evidentiary hearing for. *See* Fla. R. Crim. P. 3.203(b); § 921.137(1), Fla. Stat.

C. The State Misrepresents the Tenth Circuit and Kentucky Cases

The State misunderstands the Tenth Circuit and Kentucky Supreme Court cases, perhaps because the State fails to appreciate all aspects involved in a *Teague* inquiry. One question to be asked is whether the particular rule is "new" or "old." A separate aspect of the inquiry is asking whether a particular rule is "substantive" or "procedural." Truthfully, the lower courts are not split merely along one fault line—although they agree that *Hall* should apply retroactively, the Tenth Circuit and Kentucky Supreme Court are not in sync. These are different facets of *Teague*.

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[3] Dr. Galloway reviewed Dr. Larson's report and interviewed Petitioner but did not administer his own test.

[4] Dr. Toomer opined that "his actual intellectual functioning is likely lower" in light of the Flynn effect and other factors. R. 148-155.

Generally, the "threshold" question is whether the rule is "new" or "old." "Before a state prisoner may upset his state conviction or sentence on federal collateral review, he must demonstrate as a threshold matter that the court-made rule of which he seeks the benefit is not 'new.' " *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (describing steps taken to conduct *Teague* inquiry); *Graham v. Collins*, 506 U.S. 461, 466 (1993) ("[W]e must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule' of constitutional law."). An "old rule" automatically applies on collateral review because an "old rule" has always been in effect. This is why an "old rule" is "retroactive" in a sense. *Teague* stands for the proposition that *new* procedural rules do not apply retroactively. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). So, to put it plainly, an old rule is simply not barred by *Teague* because it was already around to apply to the defendant's claim before the defendant's sentence became final.

The State either misunderstands or misinterprets the Tenth Circuit opinion, *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019). The State writes that the Tenth Circuit "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 [announce a new rule]" and the State argues that the "Tenth Circuit did not squarely address the question at issue [of whether *Hall* must apply retroactively]." (Brief in Opposition 15-16). What the State fails to understand is that by concluding *Hall* is an expression of the settled law of *Atkins*, the Tenth Circuit did not need to inquire further into "retroactivity": a belabored *Teague* inquiry into

retroactive application only needs to be done for new rules. The Tenth Circuit clearly stated that "[i]f the rule is not new, the petitioner may avail herself of the decision on collateral review," and then went on to hold that "these cases do not state a new rule." *Smith v. Sharp*, 935 F.3d 1064, 1084 (10th Cir. 2019) (citing *Chaidez v. United States*, 568 U.S. 342 (2013)). By concluding that *Hall* was not "new" law, the Tenth Circuit already answered the question.

Accordingly, on review of the state court's decision, the Tenth Circuit considered the "Supreme Court's application of *Atkins* in *Hall*, *Moore I*, and *Moore II*." *Id*. at 1085. The Tenth Circuit went on to hold that the Oklahoma Court of Criminal Appeals (OCCA) relied on an unreasonable determination of the facts or unreasonably applied clearly established federal law. *Id.* at 1077-79 ("The State cannot prevail on either basis. The former requires an unreasonable construction of the facts; the latter an unreasonable application of *Atkins*."). "[I]ntellectual disability must be assessed, at least in part, under the existing clinical definitions applied through expert testimony." *Id*.; *see* 28 U.S.C. § 2254(d). The Tenth Circuit clearly did believe this expression of the *Atkins* rule applies to state courts, because the Tenth Circuit applied it to the OCCA's (pre-*Hall*) 2013 decision.

A separate aspect of the *Teague* inquiry is asking whether the rule is "substantive." Sometimes this has been framed as a part of the "final step" of the *Teague* analysis; however, more modern decisions by this Court have clarified that substantive rules are "more accurately characterized" as "not subject to the bar." *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) ("If the rule is determined to be new,

the final step in the *Teague* analysis requires the court to determine whether the rule nonetheless falls within one of the two narrow exceptions to the *Teague* doctrine."); *Schriro v. Summerlin*, 542 U.S. 348, 352 n.4 (2004) ("We have sometimes referred to rules of this latter type as falling under an exception to *Teague*'s bar on retroactive application of procedural rules . . . . they are more accurately characterized as substantive rules not subject to the bar."); *Beard v. Banks*, 542 U.S. 406, 417 n.7 (2004) ("As noted above, these rules are more properly viewed as substantive and therefore not subject to *Teague*'s bar.").

The State argues that the Kentucky Supreme Court in *White v. Commonwealth*, 500 S.W. 3d 208, 214-15 (Ky. 2016), "summarily concluded that *Hall* announced a substantive restriction . . . without addressing whether *Hall* imposed a new rule," suggesting that part of the analysis is missing. (Brief in Opposition 14, 16). The State uses this to argue that state courts need more time to "carefully assess" *Hall*'s retroactivity. (*Id.* at 16). However, because the Kentucky Supreme Court found *Hall* to be "substantive," there is no missing part of the analysis. Substantive rules are simply "not subject to *Teague*'s bar." *Beard*, 542 U.S. at 417 n.7.

D. Significance of Circuit Cases Dealing With Successive Petitions

The State argues that the federal court cases addressing defendants filing successive habeas petitions are irrelevant to state defendants, stating that whether a "second or successive petition [is permitted] under section 2254" is a "distinct [question] from whether the Court [in *Hall*] announced a new substantive rule." (Brief in Opposition 17). To those unfamiliar with second or successive federal petitions, the

State's argument has a superficial appeal. However, an examination of these statutory requirements shows the State's position is not accurate.

"[Section 2244(b)(2)(A) or Section 2255(h)] establishes three prerequisites to obtaining relief in a second or successive petition: First, the rule on which the claim relies must be a 'new rule' of constitutional law; second, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court'; and third, the claim must have been 'previously unavailable.' "[5] *Tyler v. Cain*, 533 U.S. 656, 662 (2001). The requirements of Section 2244(b)(2)(A) or Section 2255(h)[6] do have specific conditions to unlock the barrier against successive petitions beyond the bigger question of retroactivity that dictates whether a rule should apply to the merits of a petitioner's claims. For example, only a new rule of law will satisfy the successive petition requirements—i.e. an "old rule" would still apply to the merits, but will not help get past the bar against successive petitions. Contrary to the State's position, however, the requirements for second or successive petitions means that these courts *do* still have to answer questions like whether the rule is new or old, substantive or

[5] These three prerequisites resemble procedural requirements often faced by state petitioners in similar postures. In fact, the very procedural bar that the State invokes in its brief in opposition requires (1) a fundamental "constitutional right"; (2) the right has been held to apply retroactively; and (3) the right was not established within the original time period. *See* Fla. R. Crim. P. 3.851(d)(2)(b).

[6] The gatekeeping procedures governing second or successive Section 2255 petitions (for federal prisoners) and Section 2254 petitions (for state prisoners) are the same. *See Reyes-Requena v. United States*, 243 F.3d 893, 898 (5th Cir. 2001) (Section 2255 incorporates the procedures for certification set forth in Section 2244); *United States v. Villa–Gonzalez*, 208 F.3d 1160, 1164 (9th Cir. 2000); *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997).

procedural. Any federal court opinion that examines *Hall* to address the "new" or "old" question, or "substantive" or "procedural" question, is extremely relevant.

In addressing successive petitions, federal courts still have to use the *Teague* framework to determine (1) whether the rule announced by this Court is new or old (2) and, if this Court has not made an explicit declaration of retroactivity, whether this Court's holdings "logically dictate" the retroactive application of the rule (for example, because the rule is substantive). These cases show that these circuits deemed the issue to be before them and did examine whether *Hall* has announced a substantive rule. The Eleventh Circuit will be used as a primary example.

Besides an explicit announcement of retroactivity, this Court can make a new rule retroactive to cases on collateral review through "holdings that logically dictate the retroactivity of the new rule." *In re Henry*, 757 F.3d 1151, 1160 (11th Cir. 2014) (citing *Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring)). Based on Justice O'Connor's narrowest concurring opinion, the federal circuit courts have "recognized 'retroactivity by logical necessity' as an alternative method of satisfying § 2244(b)." *Id.* (referencing other circuits). The Eleventh Circuit addressed whether this Court's holdings logically dictate the retroactivity of *Hall*, finding that "even if . . . *Hall* expanded the class of individuals described in *Atkins*, it did not categorically place them beyond the power of the state to execute. Instead, *Hall* created a procedural requirement" and "[t]herefore, [it is not] dictated that the rule announced in *Hall* is retroactive . . . ." *Id* at 1161. This language is a finding by the Eleventh

Circuit that *Hall* is not a substantive rule. The State's position that the Eleventh Circuit did not address the substantive-or-procedural question in *Henry* is untenable.

The State also fails to acknowledge the Eleventh Circuit opinions cited on pages 12 and 19 of the petition for certiorari. In *Kilgore*—the appeal of an initial Section 2254 petition—the Eleventh Circuit noted that in *Henry* "we held that *Hall* necessarily established a new rule of constitutional law" and "[n]either [*Teague* exception] applies here." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313-14 (11th Cir. 2015) ("[W]e turn to Kilgore's claim that it meets the first *Teague* exception—that it prohibits the imposition of a certain type of punishment for a class of defendants because of their status or offense. . . . As we held in *In re Henry*, *Hall* did not [meet this exception].").

The same applies to the Eighth and Sixth Circuit. *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014) ("Rather than announce a substantive rule, *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.' "); *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) ("Federal courts have repeatedly concluded that *Hall* and *Moore* merely created new procedural requirements . . . .").

Multiple courts have reached differing conclusions on the substantive nature of *Hall* under *Teague*. Despite the State's assertions, the Eleventh Circuit, Eighth Circuit, Sixth Circuit, and Florida Supreme Court are in conflict with the Tenth Circuit and Kentucky Supreme Court.

E. The Right Kind of Split

In a tacit acknowledgment that there is a circuit split, the State nonetheless submits that the cases cited do not give rise to "the kind of split that calls for this Court's review." (Brief in Opposition 14). What is the right "kind" of split? Rule 10 supplies the sort of reasons that would warrant granting certiorari in this Court's view and outlines different kinds of splits, all of which are implicated here:

(a) A conflict between a state court of last resort and another state court of last resort (Florida Supreme Court[7], Tennessee Supreme Court[8] v. Kentucky Supreme Court[9]).

(b) A conflict between a United States court of appeals and another United States court of appeals (Tenth Circuit v. Eleventh Circuit, Eighth Circuit, Sixth Circuit).

(c) A conflict between a state court of last resort and a United States court of appeals (Florida Supreme Court v. Tenth Circuit) (Kentucky Supreme Court v. Eleventh Circuit, Eight Circuit, Sixth Circuit).

F. The Functional Effect Test

Finally, the State argues that review is not warranted because the state court of last resort in this case was correct to find that *Hall* is a new, procedural rule, rather

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[7] *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (finding that federal law did not require retroactive application of *Hall*).

[8] *Payne v. State*, 493 S.W.3d 478, 491 (Tenn. 2016) (declining to apply *Hall* retroactively).

[9] *White v. Commonwealth*, 500 S.W.3d 208, 214-15 (Ky. 2016) (*Hall* is a substantive rule because it imposed a "restriction on the State's power to take the life of individuals suffering from intellectual disabilities").

than a substantive one. The State argues that "*Atkins* protects every individual who is intellectually disabled, while *Hall* simply prevents States from using a particular procedure . . . ." (Brief in Opposition 20).

On this matter, the State has failed to consider this Court's rejection of *amicus*'s argument in *Welch*. In *Welch v. United States*, *amicus* argued that that "*Johnson* is a procedural decision because the . . . doctrine that *Johnson* applied [to strike down the statute] is based . . . on procedural due process." *Welch v. United States*, 136 S. Ct. 1257, 1265-66 (2016). This Court rejected this argument, stating that an emerging rule is substantive or procedural based on "the function of the rule." *Id*. "Decisions from this Court show that a rule that is procedural for *Teague* purposes still can be grounded in a substantive constitutional guarantee" and "[f]rom the converse perspective, there also can be substantive rules based on constitutional protections that, on the theory *amicus* advances, likely would be described as procedural." *Id*. at 1266. "For instance, a decision that invalidates as void for vagueness a statute prohibiting 'conduct annoying to persons passing by,' would doubtless alter the range of conduct that the law prohibits," and would be a substantive decision even if the reasons for the decision can be characterized as procedural. *Id*.

This Court has said to look at the "function" of the rule, not the decision's underlying reasoning. Thus, the mere fact that *Hall* discussed or was concerned with procedure does not mean that the effect of the *Hall* decision is "procedural." Under the test set forth in *Welch*, *Hall* could have even been a full-blown procedural due

process case, and the emerging rule would still not be procedural. *Hall* found that Section 921.137, Florida Statutes was unconstitutional as applied. *Welch* directed lower courts to look at what the function of the statute or rule is. The function of this statute is to define who is "intellectually disabled" and exempt from execution. Thus, because the rule at issue defines who is exempt from execution, the functional effect of invalidating this definition *must be* substantive.

Lastly, the Florida Supreme Court and the State overlooked two important details. One, this Court inserted the definition of a substantive rule in the very first paragraph of *Hall*, in which this Court declared Florida's strict IQ cutoff rule to be unconstitutional. *Compare Hall v. Florida*, 572 U.S. 701, 704 (2014) ("This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional."), *with Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (substantive rules carry a "significant risk . . . that a defendant . . . faces a punishment that the law cannot impose upon him"). This statement was not dicta, but a holding. ("[T]he Court now holds . . . ."). It is difficult to square the Florida Supreme Court's position with this Court's holding that Florida's rule created an "unacceptable risk that persons with intellectual disability" will face execution, a punishment that the law cannot impose on them.

Two, *Hall* itself was decided on collateral review.[10] The State does not address

[10] 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 at least two rounds of state postconviction proceedings when he filed a motion based on intellectual disability in 2004. *See Hall v. State*, 109 So. 3d 704, 706-07 (Fla. 2012) (outlining procedural history).

this fact at all in its brief. The disparate treatment of similarly situated defendants was the entire reason this Court jettisoned the previous *Linkletter* framework in favor of *Teague*. This Court held that retroactivity is a threshold question because "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 v. Lane*, 489 U.S. 288, 299-305 (1989). By applying the rule to Mr. Hall's case, *Hall* must apply to Mr. Hall and "all others similarly situated," i.e., defendants on collateral review.[11] *Id.* "It would be . . . 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." *In re Henry*, 757 F.3d 1151, 1164-65 (11th Cir. 2014) (Martin, J., dissenting).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[11] "[M]any times retroactivity is decided by implication rather than explicitly, as was the case in *Gideon*, where relief was granted in a postconviction habeas proceeding . . . ." *Chandler v. Crosby*, 916 So. 2d 728, 737-38 (Fla. 2005) (Anstead, J., concurring) (noting this Court applied *Gideon* in ten other collateral proceedings).