No. _____

IN THE

Supreme Court of the United States

JOHN FREEMAN,

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

QUESTIONS PRESENTED

1. Whether Florida's postconviction procedures governing intellectual disability claims fail to vindicate defendants' substantive Eighth Amendment rights, such that it constitutes a violation of due process?

2. Whether this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), 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, **JOHN FREEMAN**, 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 August 13, 2020, reported at 300 So. 3d 591 (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

Petitioner suffers from an intellectual disability. His risk factors for intellectual disability started early. He was born in Georgia in 1963. His biological father, George Jewell, abandoned the family shortly after Petitioner's birth. Petitioner and his siblings, Robert and Danette (Elizabeth), were then raised by his mother, Mary Rigdon Freeman, and his stepfather, Charles Freeman.

Charles was violent and abusive. He would tie Petitioner to the bed or take him to the woods and beat him with a 2x4 until he was bloody. Charles also beat Petitioner with belts, switches, and his fists—he would beat Petitioner on the head to the point of unconsciousness. Petitioner would be seen with bruises and marks on his body. Sometimes, Petitioner was so badly beaten that he could not walk properly or dress for gym class.

His stepfather's abuse was not the only source of Petitioner's childhood head injuries. As a toddler, a car backed over Petitioner's head. He had tire tracks imprinted on his head from the weight of the car. He also fell off his bike, striking his head and ending up unconscious.

As a child, Petitioner spent most of his time alone. He had no outside activities and was not involved in any clubs or organizations. In school, he sat in the corner of the classroom and did not learn. His intellectual disability manifested as early as first grade, where he did poorly. By second grade, he continued falling behind. His teacher commented that "John is very quiet and withdrawn" and "progresses slowly." His report card is empty in the "reading level" line.

In third grade, his teacher wrote "John's progress is slow. His work is all below grade level."

Petitioner's report card for fourth grade continues to highlight that he had problems. His work was all below grade level. The report card states "below" in the "reading level" line.

Throughout these grades, his attendance was excellent, highlighting that his academic difficulties are explained by his underlying impaired intelligence, not by an attendance issue. Petitioner sat in the corner, unable to learn. He did not achieve literacy.

In fourth grade in 1973, Petitioner was evaluated by School Psychology Services. The report states that as he was "presented with more difficult tasks, [he] was reluctant to admit he did not know the correct response. On several occasions John made no response at all and sat silently until another task was presented." The report states he was: "reading orally at the fifth month [level] of kindergarten." The report recommended special education classes.

But the special education classes did not help. In the fifth grade, Petitioner

was absent only four days, but still failed four classes. He was reported as "below" in his "reading level." Teacher comments indicate that his progress was slow, even though this year was his first opportunity to attend a special education class.

In sixth grade, Petitioner had only five absences. He remained "below" in his "reading levels and did not achieve." He also did poorly in the seventh grade.

The next year, Petitioner went to Georgia to live with his biological father. He was observed hiding from the school bus when it pulled up to take him to school. Later that year, in September of 1976, he was charged with criminal damage to property for shooting at pigs with an air rifle and was given probation.

In 1977, Petitioner was charged with committing a burglary with his brother and another male. He was committed to the Department of Youth Services and sent to the Youthful Services Training School followed by the Hillsborough Family Group Home. He was furloughed on July 30, 1977.

School records resume for the school year 1977-78, when Petitioner was in the eighth grade. He failed all classes. He ran away from home, and eventually was sent to the notorious Dozier School for Boys in Marianna, Florida.

Petitioner was retained in tenth grade, the 1978-79 school year. A non-judicial counseling report states that "he was interested in taking up a trade but when John realized that he had to perform academically he could not cope with school and dropped out."

Petitioner was charged with possession of stolen property on August 8, 1979. Consistent with a pattern of being easily led into trouble, the post-sentence

investigation noted the "defendant was involved with another individual and an adult who was also on Florida Probation at the time, one Lonnie Lee Langford." A pre-disposition report indicated "John appears to be drifting, as far as school and community concern [sic]. He has lost interest in schooling because of not being able to perform academically. He has no outside activities other than associating with adult male offenders. John does not [sic] have self confident [sic] and violated the law to be accepted by friends."

Even as an adult, Petitioner's capacity for independent, fully-functioning adult living was limited. He was illiterate, not participating in the community, and in need of vocational training. He was a follower, and his contacts with the criminal justice system involved others. Over the next six years, he would be in and out of custody, with a history reflective of his inability to maintain even simple release terms, such as reporting. Petitioner could not maintain a bank account or credit card, did not vote or participate in community functions or use community resources, did not own property, and did easy to follow, menial work. His friends and family describe him as slow, immature, and easily manipulated. 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. 2016), *corrected op.* (May 4, 2017), the Florida Supreme Court found that *Hall* applies retroactively. 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.

Petitioner filed a successive Rule 3.851 motion within one year of the Florida Supreme Court's decision in *Walls*.[1] 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. The Florida Supreme Court upheld the lower court's denial of relief on August 13, 2020, but on somewhat different procedural grounds from the circuit court. *Freeman v. State*, 300 So. 3d 591 (Fla. 2020). The Florida Supreme Court based its decision on

[1] Petitioner's amended successive Rule 3.851 motion was filed on January 19, 2018, and related back to his motion filed October 19, 2017.

Phillips v. State, 299 So. 3d 1013 (Fla. 2020), a case decided one month earlier, in which the court receded from *Walls* and held that federal law does not require the retroactive application of *Hall* to defendants on collateral review. 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 intellectually disabled defendants on death row to receive *Hall* relief.

STATEMENT OF THE CASE

A. Trial, Conviction, and Death Sentence

On November 11, 1986, Petitioner was arrested and charged with burglary and the aggravated battery of Leonard Collier (hereinafter referred to as the "Collier case") which occurred that same day. (R2. 1-4). On December 4, 1986, Petitioner was indicted for burglary and first-degree murder of Mr. Collier. (R2. 12-14).

On November 26, 1986, and while still in custody from his arrest in the Collier case, Petitioner was charged with burglary and the murder of Alvin Epps (hereinafter referred to as the "Epps case") which occurred on October 20, 1986. (R1. 1-2). On April 23, 1987, Petitioner was indicted for burglary, armed robbery, and the first-degree murder of Mr. Epps. (R1. 143-45).

The Epps case went to trial first, and on October 9, 1987, Petitioner was found guilty of first-degree felony murder, burglary with an assault, and robbery with a deadly weapon. (R1. 399-401). After the penalty phase, the jury recommended a life

sentence on October 13, 1987. (R1. 441). However, on December 11, 1987, the trial court overrode the jury and imposed a death sentence. (R1. 568). On direct appeal, the Florida Supreme Court affirmed Petitioner's convictions, but vacated the sentence of death and remanded to the trial court for the imposition of a life sentence. *Freeman v. State*, 547 So. 2d 125 (Fla. 1989).

While the Epps case was pending on direct appeal, and while Petitioner's death sentence for the Epps case was still intact, the State moved forward with the trial of the Collier case. Petitioner was found guilty of first-degree felony murder and burglary with assault on September 15, 1988. (R2. 182-83). The "advisory" jury recommended a death sentence by a vote of 9 to 3 on September 16, 1988. (R2. 216). On November 2, 1988, the trial court sentenced Petitioner to death. (R2. 252-56).[2] On direct appeal, the Florida Supreme Court affirmed Petitioner's convictions and death sentence for the Collier case. *Freeman v. State*, 563 So. 2d 73 (Fla. 1990). This Court denied certiorari on June 28, 1991. *Freeman v. Florida*, 501 U.S. 1259 (1991).

A death warrant was signed by then-Governor Lawton Chiles on March 12, 1992. (SC60-73299). On April 7, 1992, Petitioner filed a Petition for Extraordinary Relief and for a Writ of Habeas Corpus, containing a single claim in reference to the

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[2] In its sentencing order, the trial court found three aggravating circumstances: (1) Petitioner had previously been convicted of the crimes of first-degree murder, armed robbery, and burglary to a dwelling with an assault, all of which had been committed just three weeks before the killing of Collier; (2) the murder occurred while Petitioner was committing a burglary to a dwelling; and (3) the murder was committed for pecuniary gain. The judge found the second and third aggravating factors merged into one. Although the judge did not find any statutory mitigators, he found the following nonstatutory mitigation: (1) Petitioner was of low intelligence; (2) he had been abused by his stepfather; (3) he possessed some artistic ability; and (4) he enjoyed playing with children. (R2. 257-60).

penalty phase jury instructions, as well as a request for stay of execution. (SC60-79651). On April 10, 1992, the Florida Supreme Court granted a stay of execution, giving Petitioner an opportunity to file a motion for postconviction relief with the trial court. (SC60-79651).

B. Initial State and Federal Collateral Proceedings

Petitioner thereafter proceeded in postconviction as to the Collier case only.[3] He filed his initial Rule 3.850 motion for postconviction relief on June 29, 1992, and then filed an amended Rule 3.850 motion on October 26, 1994. (PCR1. 12-147; 178-318). On July 29, 1996, the circuit court summarily denied all claims without an evidentiary hearing. (PCR1. 424-34). Petitioner appealed to the Florida Supreme Court. The Florida Supreme Court affirmed in part, but remanded for an evidentiary hearing on claims of ineffective assistance of counsel. Petitioner also had filed an Amended Petition for Writ of Habeas Corpus on November 2, 1998. The habeas petition was denied by the Florida Supreme Court in its consolidated opinion. *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000).

After an evidentiary hearing, the circuit court entered an order denying relief on July 24, 2001. (PCR2. 155-67). On appeal, the Florida Supreme Court affirmed the circuit court's denial of postconviction relief. *Freeman v. State*, 858 So. 2d 319 (Fla. 2003).[4] This Court denied certiorari on April 26, 2004. *Freeman v. Florida*, 541 U.S. 1010 (2004).

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[3] Since Petitioner received a life sentence in the Epps case, he was not appointed postconviction counsel and did not file any motions for postconviction relief in that case.

[4] Petitioner raised the following two issues on appeal: (1) whether trial counsel was ineffective in the guilt phase for failing to object to the State's alleged improper reliance on

On December 29, 2004, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The district court denied the petition. *Freeman v. McDonough*, No. 3:03-CV-668-J-32 (M.D. Fla. 2006). Subsequently, the United States Court of Appeals for the Eleventh Circuit concluded that the district court properly denied Petitioner's habeas petition. *Freeman v. Atty. Gen.,* 536 F.3d 1225 (11th Cir. 2008). This Court denied certiorari on January 12, 2009. *Freeman v. McCollum*, 555 U.S. 1110 (2009).

C. Successive State Postconviction Proceedings

Between June 16, 2009, and July 30, 2013, Petitioner litigated postconviction motions concerning DNA testing that are unrelated to the questions presented in this petition. (PCR3. 585-90).

D. *Atkins/Hall* Litigation and Postconviction 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 the implementation of the constitutional restriction up to the states, 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 (2001) required that an individual's IQ score be "two or more

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racial factors in seeking the death penalty; and (2) whether trial counsel was ineffective in the penalty phase for failing to present evidence in mitigation.

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).[5] 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)).

The Florida Supreme Court and lower courts interpreted the 2001 statute to require 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); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) ("Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below.") (citing *Cherry v. State*, 781 So. 2d 1040, 1044–45 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must

[5] The definition of "mentally retarded" as it relates to the death penalty was defined by statute prior to the *Atkins* decision. *See* § 916.106(12), Fla. Stat. (2001) (defining retardation); § 393.063, Fla. Stat. (2001) (same). This preexisting definition was carried over to Section 921.137, Florida Statutes—enacted just one year prior to *Atkins*—which prohibited the execution of the mentally retarded, although this law did not apply to defendants already sentenced. *See* § 921.137(1), Fla. Stat. (2001); Ch. 2001-202, Laws of Fla.; *see Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (referencing Section 916.106(12)). The definition of mental retardation in Florida Rule of Criminal Procedure 3.203(b) mirrors the statutory definition. *See State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011).

score 70 or below on standardized intelligence test)); *State v. Herring*, 76 So. 3d 891, 895 (Fla. 2011) ("Despite various challenges to the application of a bright-line IQ cutoff as it relates to the first prong of the mental retardation standard, this Court has consistently and explicitly held that in order to prove exemption from execution under section 921.137 and rule 3.203, a defendant must establish an IQ of 70 or below."); *Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009) ("We have consistently interpreted this definition to require a defendant seeking exemption from execution to establish he has an IQ of 70 or below."); *Jones v. State*, 966 So.2d 319, 329 (Fla. 2007) ("[U]nder the plain language of the statute, 'significantly subaverage general intellectual functioning' correlates with an IQ of 70 or below."); *Johnston v. State*, 960 So. 2d 757, 760 (Fla. 2006) (finding that trial court committed no error in only considering the first prong of 3.203 because Johnston failed to score 70 or below on IQ test; adaptive functioning test was therefore unnecessary); *State v. Jones*, No. F90-50143, 2006 WL 5837898 (Fla. 11th Cir. Ct. Feb. 24, 2006) ("Jones does not meet the statutory requirements to be defined as mentally retarded. His I.Q. has consistently been tested as above 70. Based on that alone, he is not mentally retarded."); *State v. Thompson*, No. F1976-03350, 2004 WL 7340335, at *4 (Fla. 11th Cir. Ct. Dec. 17, 2004) ("[Defendant] had an IQ of 75 in 1958 and that every IQ test taken during his school years was 74-75. Hence he does not fall under the definition of mentally retarded."); *State v. Barwick*, No. 86-940, 2003 WL 26118942 (Fla. 14th Cir. Ct. Sep. 16, 2003) (noting that both sides agreed the law requires an IQ of 70 or lower).

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 those defendants whose initial postconviction motions had already been ruled on, the rule provided:

> If a death sentenced prisoner has filed a motion for postconviction relief, the motion has been ruled on by the circuit court, and that ruling is final on or before October 1, 2004, the prisoner may raise a claim under this rule in a successive rule 3.851 motion filed within 60 days after October 1, 2004.

Fla. R. Crim. P. 3.203(d)(4)(F) (2004). The rule provided the same deadline for defendants in various stages of postconviction. *See* Fla. R. Crim. P. 3.203(d)(4)(C)-(E). Petitioner's counsel did not file an intellectual disability claim before the expiration of the time frame in subsection (d)(4)(F). 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. 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. 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 October 19, 2017, Petitioner filed a second successive Rule 3.851 motion for postconviction relief, primarily based upon this Court's decisions in *Hurst v. Florida* and *Hall v. Florida*.[6] (PCR3. 626-45). A successive amended Rule 3.851 motion was filed on January 19, 2018. (PCR3. 697-734).[7] The circuit court initially granted an evidentiary hearing on Petitioner's intellectual disability claim, but later vacated the order and summarily denied Petitioner's amended successive motion for postconviction relief. (PCR3. 761-64; 909-14).

Petitioner appealed to the Florida Supreme Court. The Florida Supreme Court affirmed the circuit 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*. *Freeman v. State*, 300 So. 3d 591 (Fla. 2020).

REASONS FOR GRANTING THE WRIT

I.A. Petitioner has been Denied Due Process.

The procedural mechanism provided in Florida to raise an Eighth Amendment intellectual disability claims on postconviction review is fundamentally inadequate to vindicate Petitioner's substantive Eighth Amendment rights. These procedures are inconsistent with the Eighth Amendment's prohibition against arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of due process and equal protection. These procedures violate fundamental

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[6] *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

[7] The postconviction court granted the State's motion to strike the motion filed on October 19, 2017, because the Assistant Attorney General claimed to have not received it via the e-portal. This resulted in the filing of the amended motion for Petitioner on January 19, 2018.

fairness and offend a longstanding principle of justice essential to due process itself: a meaningful opportunity to be heard.

Atkins was decided on June 20, 2002. In 2003, the Florida Supreme Court proposed a rule providing the procedures for a defendant wishing to raise an *Atkins* intellectual disability claim, which was adopted and went into effect October 1, 2004.

As mentioned above, the rule announced that, for defendants who needed to raise an intellectual disability claim through a successive postconviction motion, the defendants had 60 days from the effective date of rule to raise their claims. In other words, Florida offered postconviction defendants from October 1, 2004 to November 30, 2004 to raise such a claim. *See* Fla. R. Crim. P. 3.203(d)(4)(C), (E)-(F). If the defendants failed to raise an intellectual disability claim in this 60-day window, the issue was declared waived. Fla. R. Crim. P. 3.203(f).

Medina v. California, 505 U.S. 437 (1992), "provide[s] the appropriate framework for assessing the validity of state procedural rules" that "are part of the criminal process." *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). The *Medina* test concerns, for example, rules governing "the allocation of burdens of proof and the type of evidence qualifying as admissible." *Id*.[8] The question under *Medina* is whether Florida's procedures for barring *Atkins/Hall* postconviction claims (i) "offends some

[8] The *Mathews* test is the "general approach for testing challenged state procedures under a due process claim." *Medina v. California*, 505 U.S. 437, 444 (1992). The *Matthews* test has three prongs: (A) the private interest affected; (B) risk of erroneous deprivation of that interest through the procedures used; and (C) governmental interest at stake. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *75 Acres, LLC v. Miami-Dade Cty., Fla.*, 338 F.3d 1288, 1294 (11th Cir. 2003). This Court adopted a different due process test for challenges to state criminal procedures. *Medina*, 505 U.S. at 444-46. Nevertheless, the factors outlined by *Matthews* are still a useful guide. *See id*. at 453. (O'Connor, J., concurring).

principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or (ii) "transgresses any recognized principle of fundamental fairness in operation." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 69 (2009) (applying *Medina* due process test to state law governing procedures for postconviction relief). "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Id.*

The Florida Supreme Court denied petitioner due process of law "in its primary sense of an opportunity to be heard and to defend its substantive right." *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). Constitutional due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67 (1972) (striking down Florida replevin statutes as constitutionally defective for failing to provide hearings at a meaningful time).[9] This Court has long recognized that forcing litigants to pursue futile courses of action does not translate into meaningful due process. *Brinkerhoff-Faris*, in which the plaintiff asserted a violation of his constitutional right to equal protection, is relevant in terms of this Court's analysis of the plaintiff's frustrated efforts in bringing the claim forward:

> It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion

[9] Due process cases dealing with deprivation of property are frequently used to inform due process requirements in other contexts. *See Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974).

> of its substantive right under the federal Constitution to equality of treatment. . . .
>
> [I]t would have been entirely futile for the plaintiff to apply to the commission. That body [the state tax commission] had persistently refused to entertain such applications; and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the Laclede Case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent.

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 679 (1930).

Similarly, until May 27, 2014, Florida courts had consistently refused to grant relief on intellectual disability claims if the defendant did not have an IQ score of 70 or below. *See supra* sources cited pp. 11-12. Additionally, the 2004 rule required counsel to certify that reasonable grounds existed to believe their client was intellectually disabled and include a statement certifying that that counsel had filed the motion in good faith. *Amendments*; Fla. R. Crim. P. 3.203(d)(4)(A) (2004). Until *Hall* was decided, counsel could not, with the required good faith certification, file a postconviction motion raising intellectual disability as a bar to execution if the defendant had an IQ above 70. By the time the *Hall* case was decided (and then, *Walls*), the brief 60-day window to raise this claim had long since expired. At no point in time has there been a real opportunity provided for Petitioner to pursue his claim.

This Court found in *Brinkerhoff* that the state judgment violated the plaintiff's right to due process when the state court refused to hear the plaintiff's claim on the

basis that "the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it." *Brinkerhoff*, 281 U.S. at 453-54. In this Court's view, the claim "was raised at the first opportunity." *Id*. Just as here, Petitioner raised his intellectual disability claim at the first meaningful opportunity made available under the law after *Hall* was decided. However, the Florida Supreme Court and lower tribunal denied Mr. Freeman the opportunity to present evidence of his intellectual disability on the basis that he did not previously pursue a course which was, in reality, not available to him then, and is not available now. "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id*.

In the context of the prohibition on the execution of insane individuals, this Court had occasion to evaluate the adequacy of Florida's procedures for determining a prisoner's sanity before execution, and ultimately found that Florida's mechanisms failed to "achieve even the minimal degree of reliability required for the protection of any constitutional interest . . . ." *Ford v. Wainwright*, 477 U.S. 399, 411–14 (1986) (determining if Florida's factfinding procedure was inadequate to afford a full and fair hearing, such that federal evidentiary hearing would be required under § 2254). Noting that the prisoner's sanity is a "predicate" to his "lawful execution," and citing the long-standing principle that due process requires, at minimum, an opportunity to be heard, the Court found that "any procedure" that "precludes the prisoner or his

counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." *Id.* (emphasis added).

> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. . . . That need is greater still because the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations. Cf. *Woodson v. North Carolina, supra,* 428 U.S., at 304, 96 S.Ct., at 2991. In light of these concerns, the procedures employed in petitioner's case do not fare well.
>
> . . . Notwithstanding this Court's longstanding pronouncement that "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, [234 U.S. 385, 394 (1914)], state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. . . . [C]onsistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." *Solesbee v. Balkcom*, supra, 339 U.S., at 23, 70 S.Ct., at 464 (Frankfurter, J., dissenting).

Id. The adequacy of a state procedure which impedes the courts from hearing evidence of the defendant's insanity—when the Constitution makes the legality of his execution contingent on such a fact—is strongly paralleled here. Florida has blocked

multiple defendants, such as Petitioner, from even presenting material relevant to the issue of their intellectual disability on the grounds that they had passively waived the claim back in 2004. Persons with IQ scores in the 70-75 range did not have a meaningful opportunity to present their intellectual disability claims during the two-month window made available in 2004. Yet, the Florida Supreme Court now faults these petitioners and their counsel for failing to violate state procedures and failing to file frivolous claims—the type of waste of judicial resources that courts normally disparage. *See Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., respecting denial of certiorari). Because the mental capacity of the defendant is a "predicate to [his] lawful execution," any procedure that would prevent a full hearing on this issue before his execution is necessarily inadequate. *See Ford*, 477 U.S. at 411–14 (emphasis added).

The narrower holding in Justice Powell's concurrence describes the minimum procedures a State must provide to a person raising a claim of insanity as a bar to his execution. Because of the shared common law background, these minimal procedures apply with as much force to the intellectually disabled. *See Ford*, 477 U.S. at 406-408 (reviewing common law history barring execution of those who lack mental capacity: the mentally retarded and insane).

> Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness. This protection means a prisoner must be accorded an 'opportunity to be heard,' though 'a constitutionally acceptable procedure may be far less formal than a trial.'

Panetti v. Quarterman, 551 U.S. 930, 949, 952 (2007) (internal citations omitted)

(finding that the state court failed to provide petitioner with a constitutionally adequate opportunity to be heard).

The significance of *Hall* with respect to these due process requirements is that it demonstrates Florida has failed to meet these minimum procedures. Florida forced defendants to meet an overly strict standard in order to make a threshold showing of intellectual disability. Because Florida courts viewed a 70-or-below IQ score as an absolute requirement, the courts could and would decline to hear the remaining evidence (the fair hearing). *Hall*, 572 U.S. at 704 ("Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule . . . is unconstitutional."). Between the now-invalidated procedures as outlined in *Hall* and Florida's Rule 3.203 (2004) being used to bar consideration of present-day *Atkins/Hall* claims, one cannot say that Petitioner was ever afforded a meaningful opportunity to be heard on his intellectual disability claim in state court. Florida has tightly shut the door to any consideration of this federal claim, and this violates due process. *Young v. Ragen*, 337 U.S. 235, 238 (1949) ("[I]t is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right.").

The Florida procedure (i) offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and (ii) transgresses a "recognized principle of fundamental fairness in operation" by invoking state procedure to deny the basic ingredient of due process: an opportunity

to substantiate his claim before it is denied. *Medina,* 505 U.S. at 445. To this day, no state court has allowed Petitioner a hearing on or considered the evidence of petitioner's intellectual disability. The current procedure is "fundamentally inadequate" to vindicate the Eighth Amendment bar against the execution of mentally disabled defendants, violating the Fourteenth Amendment.

I.B. There is No Adequate State Bar.

The fact that Florida's postconviction procedures dealing with Eighth Amendment intellectual disability claims are inadequate is significant not only because it constitutes a due process violation in and of itself, but because a state procedure which is violative of due process could not serve as an adequate state bar to this Court's review. *See generally, Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (noting a "basic due process concept" inherent in holding that an unforeseeable or unsupported decision on a question of state procedure does not constitute an adequate ground); 16B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4025 (3d ed. 2020). However, the procedural mechanism that the Florida courts invoked to bar consideration of Petitioner's claim—and that which the State will likely raise—is inadequate for more than one reason.

As an initial matter, the terminology used by the state courts should be clarified. The circuit court conflated waiver—which was avoided according to Rule 3.203 (2004) by *timely* raising an intellectual disability claim back in 2004—with *timeliness* of the 3.851 motion itself under Rule 3.851(d)(2)(B). Persons who raised a *Hall* claim within one year of *Walls* were, at the time of filing, fully in compliance

with 3.851(d)(2)(B)[10] but did not necessarily meet the preservation requirement/had waived the issue according to Rule 3.203(f) (2004).

As stated, the Florida Supreme Court affirmed the circuit court's decision on slightly different procedural grounds. The Florida Supreme Court found that Petitioner's intellectual disability claim was "untimely," but unlike the circuit court, the Florida Supreme Court relied on the *Phillips* decision which indicates the Court reasoned the *Phillips* decision invalidated Petitioner's pathway though the (d)(2)(B) gate.[11] However, the Florida Supreme Court also agreed that Petitioner should have raised his intellectual disability claim in 2004, during the 60-day window. This points to the passive "waiver" of the claim in Rule 3.203(f) (2004). This rule is inadequate.

"The adequate state ground doctrine cannot be applied without consideration of the purposes it is designed to serve," that is, to show "respect for state courts and avoid rendering advisory opinions." *Beard v. Kindler*, 558 U.S. 53, 63 (2009) (Kennedy, J., Concurring). "[A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965) ("In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights."); *Kindler*, 558 U.S. at 64 (Kennedy, J., concurring) (noting this Court's

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[10] *See Hamilton v. State*, 236 So. 3d 276, 278 (Fla. 2018); *Dixon v. State*, 730 So.2d 265, 267 (Fla. 1999).

[11] The time bar of Rule 3.851(d)(2)(B) is not an independent bar because it turns on the retroactivity of *Hall*, the second question presented.

mindfulness "of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard").

Atkins was decided on June 20, 2002. In 2003, the Florida Supreme Court proposed a rule providing the procedures for a defendant wishing to raise an *Atkins* intellectual disability claim, which was adopted and went into effect October 1, 2004. *Amendments*. Florida offered defendants from October 1, 2004 to November 30, 2004 to raise such a claim. *See* Fla. R. Crim. P. 3.203(d)(4)(C), (E)-(F). If the defendants failed to raise an *Atkins* claim in the two-month window following the rule's effective date, the claim was declared waived. Fla. R. Crim. P. 3.203(f).

In order to be an "adequate" state rule, it must be "firmly established and regularly followed." *Kindler*, 558 U.S. at 60. The forced waiver rule at issue in this case is not the type of well-known procedural rule that applies generally to 3.851 motions. The rule at issue was promulgated swiftly and in response to *Atkins*. The Florida Supreme Court offered defendants an immediate, 60-day window to raise any Eighth Amendment intellectual disability claims on postconviction appeal. That window has never been renewed. This waiver rule applied to Eighth Amendment intellectual disability claims specifically, and existed for but a brief period of time in Florida history. *See In re Amendments to the Fla. Rules of Criminal Procedure*, 26 So. 3d 534, 536 (Fla. 2009) (removing obsolete *Atkins* regulations).

This is a far cry from the type of "firmly established and regularly followed" procedural rules that are recognized as adequate. *C.f. Walker v. Martin*, 562 U.S. 307, 312 (2011) (finding California's timeliness rule to be "firmly established" in its case

law based on trilogy of 1990's California Supreme Court cases outlining the California timeliness rule); *Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016) (finding procedural rule which is "longstanding, oft-cited, and shared by habeas courts across the Nation" to be adequate state bar). The relatively swift enactment of the provisions of Rule 3.203 (2004), its limited purpose, and its short-lived nature show that the procedure at issue is simply not a "firmly established" rule.

In *Beard v. Kindler*, this Court ultimately remanded on the question of whether the Pennsylvania courts applied a new procedural rule which, as the petitioner contended, could not provide an adequate state ground. *Kindler*, 558 U.S. at 62. On remand, the Third Circuit Court Appeals agreed with petitioner, finding that the state procedural rule was "novel," and therefore inadequate. *Kindler v. Horn*, 642 F.3d 398, 404-05 (3d Cir. 2011). The Third Circuit rejected the Commonwealth's argument that a state procedural rule can be adequate even if it is new; the Third Circuit emphasized that a new state procedural rule, by definition, cannot meet the "firmly established and regularly followed" standard. *Id*.

This Court has explicitly stated that the state procedural bar must be firmly established and regularly followed "by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (emphasis added). There are two potential points of application. At the point of application to Petitioner's motion, this rule was already repealed, and therefore could not be "firmly established." The bizarre fact that the Florida courts were compelled to apply a rule that was no longer in effect to Petitioner's postconviction motion in order to bar his claims highlights the infirmity

of the rule. On the other hand, if the rule's point of application was the time period between October 1 and November 30, 2004, then the rule was certainly "novel" or "new" upon its immediate application, and therefore inadequate—comparable to the rule in *Kindler v. Horn*, 642 F.3d 398, 404-05 (3d Cir. 2011).

This Court should inquire into whether Florida's rule 3.203 (2004), mandating that intellectually disabled defendants are deemed to have automatically waived their *Atkins* claims if they did not raise them an immediate two-month window of time following the rule's effective date, is a firmly established, regularly followed rule of procedure that serves a legitimate state interest—or, whether its design merely "give[s] color" to this Eighth Amendment categorical ban while allowing Florida to avoid meaningful enforcement of it. *Rogers v. State of Alabama*, 192 U.S. 226, 230 (1904). "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." *Id.*; *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary.") (citing *Ward v. Love County*, 253 U. S. 17, 22 (1920)); *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 21 (1923); *see also Kindler*, 558 U.S., at 65 (Kennedy, J., concurring). Because this rule was not firmly established at the point of its application, it cannot serve as an adequate state bar.

II. 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, e.g., 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 (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 (Fla. 2020), *and Payne v. State*, 493 S.W.3d 478 (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 death-row inmates nationwide. The Court should grant certiorari to answer it.

A. Overview of Opinions that have found *Hall* applies Retroactively on Collateral Review.

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

The Supreme Court of Kentucky found 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 margin of error. *Id*. at 211 (citing Ky. Rev. Stat. §§ 532.10, 532.140). The Supreme Court of Kentucky held that *Hall* applied retroactively under *Teague*'s exception for new "substantive" rules. *Id*. at 214-15. Describing *Hall* as a "sea change," the court concluded that *Hall* established a new substantive rule for purposes of *Teague* 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.[12]

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 *Atkins* "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. The *Hall* Court also countered the State's reliance on the fact that *Atkins* instructed states to find appropriate ways to enforce the rule—"[i]f the

[12] 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).

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." *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*'s 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 *In re Henry* pointed out the "important procedural context" of the *Hall* decision, namely, "*Hall* was decided in the collateral review context." *In re Henry*, 757 F.3d 1151, 1164-65 (11th Cir. 2014) (Martin, J., dissenting). As the dissent 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.

B. Overview of Opinions that have found *Hall* is not Retroactively Applicable to Postconviction 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 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).

As discussed, the dissent in *Henry* believed *Hall* was an old rule. *Henry*, 757 F.3d at 1164-65 (Martin, J., dissenting). Although the petitioner in *Henry* would nevertheless fail to meet § 2244(b) if so, the *Hall* decision must "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 still apply to 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.

III. The Florida Supreme Court's Decision Below Violates *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

This Court should grant certiorari because the position adopted by the Florida Supreme Court is wrong and violates *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Hall* is a "substantive" decision of constitutional law and applies on collateral review.

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." *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). States cannot deny retroactive effect to decisions that announce substantive/watershed procedural rules because that would violate the Supremacy Clause. *Id.* at 730-31 ("[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."). A sentence imposed in violation of such law is not just erroneous, but contrary to law and, as a result, void. *See Ex parte Siebold*, 100 U.S. 371, 376 (1879).

First, the Florida Supreme Court ignored *Hall*'s important procedural context. *Hall* itself was decided on postconviction review. 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 for *Atkins* relief in 2004. *See Hall v. State*, 109 So. 3d 704, 706-07 (Fla. 2012) (outlining procedural history).

The purpose of adopting the *Teague* framework was to remedy the disparate treatment of similarly situated defendants that was engendered by the previous standard. *See Teague v. Lane*, 489 U.S. 288, 299-305 (1989) (noting that the *Linkletter* standard had led to dissatisfying, inconsistent results). "[E]venhanded justice" was the animating principle behind this new framework. *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."); *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). This Court said that retroactivity should be "properly treated as 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." *Id*. *Hall* must apply to Mr. Hall and "all others similarly situated," i.e., defendants on collateral review. *Id*.

In *Hall*, this Court did not address retroactivity as a threshold question, which indicates that retroactivity was not an issue that would bar reaching the merits either because (1) this Court was merely applying settled precedent (an "old" rule) on postconviction review, or (2) this Court was applying a rule which was "not subject to [*Teague*'s] bar" against retroactive application. *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."); *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) ("We have sometimes referred to rules of this latter type [decisions which place particular conduct or persons covered by the statute beyond the State's power to punish] 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."). The rule of *Hall* fits into the latter type of decisions referred to in *Shriro.*[13] At a minimum, this Court signaled that *Hall* should be applied on postconviction review.[14] The Florida Supreme Court wrongly disregarded *Hall*'s postconviction context and interpreted *Hall* in such a way as to only give it prospective effect. As outlined below, the Florida Supreme Court's decision violates *Montgomery v. Louisiana* because *Hall* is substantive law.

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).

Due Process, Equal Protection, and Cruel and Unusual Punishment Clause considerations are, like in numerous other capital cases, intertwined. *See Furman v. Georgia*, 408 U.S. 238, 240-49 (1972) (Douglas, J., concurring) (discussing how the Eighth Amendment concerns not only the severity of punishments but with selective

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[13] It is not unheard of for retroactivity to be decided by implication by the rule being announced in a postconviction posture. "[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).

[14] The petitioner in *Moore v. Texas* also came before this Court on postconviction review. *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017). This Court found that the Texas Court of Criminal Appeals ("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 disregarded current medical standards. *Id.* at 1048-53.

or irregular application of harsh penalties).[15] It can be fairly said that *Hall* concerned not only the substantive Eighth Amendment guarantee of *Atkins*, but what process is due to intellectually disabled defendants in the context of asserting that Eighth Amendment right against execution. *See supra* pp. 20-21. Even so, this Court has said that a rule is substantive or procedural with respect to *Teague* based on the function of the rule, not its underlying constitutional source. *Welch*, 136 S. Ct. at 1265 (rejecting *amicus*' argument that case announced "procedural" rule because decision was based on procedural due process). Thus, the mere fact that *Hall* was concerned with process does not mean that the emerging rule is procedural. *Id.* In this respect, the Florida Supreme Court has made the same mistake that *amicus* did in *Welch*, by failing to distinguish the procedural concerns upholding the decision from the functional effect of the rule. *Id.*

This Court has further indicated that in determining the functional effect of a rule in cases where statutory language has been struck down, it is useful to look at the function of the statute. *See Welch*, 136 S. Ct. at 1266, 1268 (reasoning that a decision that strikes down a procedural statute would be a procedural decision; a decision striking down substantive statute would be substantive in effect). *Hall* found that the Florida statute defining "intellectual disability" was unconstitutional as applied. It is evident that the effect of the *Hall* decision is substantive in nature because the purpose of the statute is to define who is "intellectually disabled" and therefore exempt from execution. The effect of invalidating this section is substantive

[15] "[W]e are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment. . . ." *Id.* at 274 (Brennan, J., concurring).

because it alters the definition of "intellectually disabled" persons, who are placed beyond the State's power to punish, even if the reasons for holding this statutory definition to be unconstitutional could be characterized as procedural.[16]

The Florida Supreme Court in *Phillips* gave too much consideration to the fact that the execution of intellectually disabled defendants was already unconstitutional—essentially faulting *Hall* for not announcing a brand-new category of protected individuals—instead of addressing the decision's functional effect. *See Phillips*, 299 So. 3d at 1019-22 (stating that intellectually disabled persons with IQ scores above 70 are "not a distinct class from intellectually disabled persons with IQ scores of 70 or below"). However, this Court has acknowledged rules to be substantive when an existing class of defendants, or range of punishments, is merely altered; for example, decisions which "*narrow* the scope of a criminal statute" qualify as substantive because the range of persons affected by the statutory provision has been altered. *See Welch*, 136 S. Ct. at 1265 (emphasis added); *Bousley v. United States*, 523 U.S. 614, 620 (1998). A change to the class—like expansion of a protected class, or narrowing of the class subject to punishment—is still substantive law.

This Court has said that when 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." *See Montgomery*, 136 S. Ct. at 735. But "[t]hose procedural requirements do not, of course, transform

[16] There is no difference for *Teague* purposes whether it is a case of unconstitutional statutory "interpretation" or statutory "invalidation." *Welch*, 136 S. Ct. at 1267-68 (rejecting argument that statutory construction cases are different than statutory invalidation cases).

substantive rules into procedural ones." *Id. Miller v. Alabama*, 567 U.S. 460 (2012), altered the class of individuals that the law could punish by prohibiting life without parole for juvenile offenders, though the case itself contained procedural components. *Id.* Likewise, *Hall* announced a substantive rule because in effect it expanded a class of individuals who could not be executed, though it involved procedural components.

Lastly, this Court signaled to lower courts that *Hall* was substantive by inserting 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*, 572 U.S. at 704 ("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 brings the discussion back to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). State courts must give retroactive effect to substantive rules. *Id.* at 729. "[If] the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." *Id.* at 727. The Florida Supreme Court held that Petitioner's claim was barred based on its earlier decision that *Hall* does not have retroactive effect on collateral review. *Freeman v. State*, 300 So. 3d 591, 594 (Fla. 2020) (citing *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020)).[17] Thus, just as the Louisiana state court's decision

[17] Fla. R. Crim. P. 3.851(d)(2)(B) allows a state prisoner to bring a 3.851 motion outside of the initial time period to bring such motion if he alleges a (1) "fundamental constitutional right"

that *Miller* did not apply to postconviction proceedings was reviewable, the Florida Supreme Court's decision is reviewable here. *Montgomery*, 136 S. Ct. at 732 ("[Petitioner] alleges that *Miller* announced a substantive constitutional rule and that the Louisiana Supreme Court erred by failing to recognize its retroactive effect. This Court has jurisdiction to review that determination.").

This Court should grant certiorari because the Florida Supreme Court continues to bar consideration of intellectual disability claims for death-sentenced defendants based on a flawed interpretation of federal retroactivity law. *Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020) (finding that federal law does not require retroactive application of *Hall*). The questions presented in this case are important and have profound consequences for many individuals on death row and the States that have sentenced them.

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). Some intellectually disabled persons who, for example, have an IQ score of 72 are entitled to relief, but others are sent to the execution chamber. *Compare Hall v. State*, 201 So. 3d 628, 632-638 (Fla. 2016) (on remand finding that Mr. Hall is intellectually disabled and vacating death sentence), *with Goodwin v. Steele*, 814 F.3d 901, 904-05 (8th Cir. 2014) (denying certificate of appealability and motion to stay next-day execution of person with IQ score of 72 on

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not established within the initial time period and which (2) "has been held to apply retroactively." Fla. R. Crim. P. 3.851(d)(2)(B). The time bar of Rule 3.851(d)(2)(B) is no independent state bar because it turns on the retroactivity of *Hall*, the question presented.

the basis that *Hall* is non-retroactive). Such 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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