No. 20-6879

IN THE

Supreme Court of the United States

JOHN D. FREEMAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

ASHLEY MOODY
Attorney General of Florida

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL 32399-1050
Phone: (850) 414-3300
amit.agarwal@myfloridalegal.com

AMIT AGARWAL
Solicitor General
** Counsel of Record*
JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy Solicitor General
DAVID M. COSTELLO
Assistant Solicitor General

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether Petitioner was denied due process when the lower court held that his postconviction intellectual-disability claim was time barred under state law.

II. Whether *Hall v. Florida*, 572 U.S. 701 (2014) announced a new substantive rule that applies retroactively to cases on collateral review in state court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

STATEMENT

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

Even before *Atkins*, Florida law barred imposing death sentences on the intellectually disabled. Fla. Stat. § 921.137 (2001). After *Atkins*, the Florida Supreme Court issued Florida Rule of Criminal Procedure 3.203, which allowed prisoners whose sentences had already become final on direct review to seek relief under *Atkins*. *See* Fla. R. Crim. P. 3.203(d)(4) (2004).[1] To obtain relief, these prisoners typically had to file their intellectual-disability claims within 60 days after the rule went into effect on October 1, 2004. *See* Fla. R. Crim. P. 3.203(d)(4)(C)–(F). The rule was announced months before that date, though, and proposed versions had been published since 2003. *Amendments to Fla. Rules of Crim. Proc. & Fla. Rules of App. Proc.*, 875 So. 2d 563, 566 (Fla. May 20, 2004).

---

[1] This rule has since been amended, but any references in this brief are to the 2004 version, which governs here. Pet. App. 5.

After the Rule 3.203(d)(4) window for filing a postconviction intellectual-disability claim had closed, the Florida Supreme Court construed Section 921.137 to require that prisoners must have an IQ score of 70 or below to establish intellectual disability. *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007); *Zack v. State*, 911 So. 2d 1190, 1201 (Fla. 2005) (construing "intellectual disability" in a similar statute to require a 70-cutoff in the context of an *Atkins* claim). It also rejected claims that this construction was unconstitutional insofar as it barred a claim of intellectual disability based on an above-70 IQ score that still fell within the test's standard error of measurement (SEM). *See Nixon v. State*, 2 So. 3d 137, 142 (Fla. 2009); *Franqui v. State*, 59 So. 3d 82, 91–94 (Fla. 2011); *Hall v. State*, 109 So. 3d 704, 707–09 (Fla. 2012).

The Court took up that constitutional challenge in *Hall v. Florida*, 572 U.S. 701 (2014). "On its face," the Court noted, Section 921.137 "could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case." *Id.* at 711. As the Court saw it, "[n]othing in the statute precludes Florida from taking into account the IQ test's standard error of measurement," and the Court found "evidence that Florida's Legislature intended to include the measurement error in the calculation." *Id.* The Court held that the statute was invalid, however, insofar as it had been narrowly construed by the Florida Supreme Court to impose a "strict IQ test score cutoff of 70," and thus to bar a capital defendant with a score "within the margin for measurement error" from raising a claim of intellectual disability. *Id.* at 711–12, 724.

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

Two years later, the Florida Supreme Court held that, under state law, *Hall* applied retroactively. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016). Last year, however, the Florida Supreme Court receded from *Walls*, recognizing that *Hall* is not retroactive under state law and is not a new substantive rule but a new procedural rule. *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020).

2. In 1986, Petitioner John Freeman committed two capital offenses. First, he robbed and murdered Alvin Epps. *Freeman v. State*, 547 So. 2d 125, 126 (Fla. 1989). He broke into Epps's home through the back window, stabbed him four times in the chest, and paralyzed him with a stab to the neck. *Id.* at 126–27. He then "ransacked" the home as Epps bled to death. *Id.* at 126.

Three weeks later, Petitioner committed another murder. This time, he "ransacked" Leonard Collier's home. *Freeman v. State*, 563 So. 2d 73, 75 (Fla. 1990). When Collier returned home during the burglary, Petitioner "jumped" him as he opened the front door. *Id.* The struggle spilled out into the front yard, and as Collier "call[ed] for help" and "tr[ied] to crawl away," Petitioner pistol-whipped him 12 times in the head. *Id.* Collier died of "profuse bleeding" hours later. *Id.*

Police eventually found Petitioner hiding beneath a dock down the street from Collier's home. *Id.* The State prosecuted him for Collier's death, seeking the death penalty and charging him with first-degree felony murder and burglary with assault. *Id.* at 74.[2] The jury convicted Petitioner of both charges. *Id.*

The case then moved to the penalty phase. There, Petitioner did not present any statutory mitigation. *Freeman v. State*, 761 So. 2d 1055, 1060 (Fla. 2000). He instead presented "very limited nonstatutory mitigation," *id.*, including intellectual-capacity evidence, T. XXXIX 1643. On this score, his defense expert testified that he had a fourth-grade achievement level, *id.* at 1649, and an IQ score of 83, *id.* at 1648. In the expert's view, Petitioner was in the "dull normal range of ability" and was at the "very

---

[2] Petitioner was also convicted of first-degree murder, armed robbery, and burglary of a dwelling with assault in the Epps case. *Freeman v. State*, 547 So. 2d 125, 126 (Fla. 1989). The Collier case is the only case on appeal here, though the trial court did consider the Epps murder at sentencing. *Freeman*, 563 So. 2d at 75.

lower end of average intellectual capability." *Id.* But according to his expert, Petitioner was not intellectually disabled. *Id.* at 1648–50, 1658.

The jury ultimately recommended death by a vote of 9-3. Pet. App. 2. Despite finding that Petitioner's low intelligence was a nonstatutory mitigator, *Freeman*, 563 So. 2d at 75, the trial court agreed and imposed a death sentence, Pet. App. 2. The Florida Supreme Court affirmed. *Id.* And his conviction became final in June 1991, when this Court denied review. *Id.* (citing *Freeman v. Florida*, 501 U.S. 1259 (1991)).

3. About a year later, Petitioner filed his first state postconviction motion. *Freeman*, 761 So. 2d at 1060. As relevant here, he claimed that his trial counsel was ineffective for failing to have mental health experts review his family history and present this evidence at the penalty phase. *Id.* at 1064. At an evidentiary hearing on that claim, a new defense expert testified that Petitioner had between a third- and seventh-grade achievement level and had scored an 84 on another IQ test, which placed him in the "low average range" of intelligence. *See* Evidentiary Hearing Record (EH) 124–25. He also testified that the results of Petitioner's second IQ examination were "strikingly consistent" with the first examination, *id.* at 136, suggesting that both tests were "reliab[le]" and "valid[.]" *Id.*

The trial court ultimately denied his ineffective-assistance claim. *Freeman v. State*, 858 So. 2d 319, 321 (Fla. 2003). The Florida Supreme Court affirmed, *id.*, and this Court denied review, *Freeman v. Florida*, 541 U.S. 1010 (2004). Petitioner then filed a related

federal habeas petition, which was denied as well. *Freeman v. Att'y Gen. of Fla.*, 536 F.3d 1225, 1227 (11th Cir. 2008); *Freeman v. McCollum*, 555 U.S. 1110 (2009). A few years later, he filed a successive state postconviction motion alleging ineffective assistance for failure to investigate additional mitigation and DNA evidence, R. 566–84, but this claim was denied and not appealed, *id.* at 585–90. At no point did Petitioner file an intellectual-disability claim within the Rule 3.203(d)(4) time limit.

4. In 2017—after this Court's decision in *Hall* and within a year of the Florida Supreme Court's decision in *Walls*—Petitioner filed another successive state postconviction motion. Pet. App. 3. In it, he alleged for the first time that he was intellectually disabled and was thus entitled to relief under *Atkins* and *Hall*. *Id.* at 3–5. In support, he filed an affidavit from yet another new defense expert, who claimed that Petitioner had scored a 72 on a third IQ test. R. 653–67. Faced with this proffer, the trial court at first granted an evidentiary hearing on whether Petitioner is intellectually disabled. Pet. App. 3. Later, though, it summarily dismissed Petitioner's intellectual-disability claim because he failed to raise it within the time limit in Rule 3.203(d)(4). *Id.* (citing *Bowles v. State*, 276 So. 3d 791 (Fla. 2019), in which the court recognized that petitioners whose sentences were final pre-*Atkins* and who failed to file their intellectual-disability claims within the time limit in Rule 3.203(d)(4) have forfeited those claims)).

The Florida Supreme Court affirmed. It noted that Petitioner's successive postconviction claim was premised on *Walls*'s holding that that *Hall* was

retroactive under state law. Pet. App. 4–5. But because the court had receded from *Walls* in *Phillips*, the court held that Petitioner was required to file his claim within the time limit outlined in Rule 3.203(d)(4)—something he had failed to do. *Id.* at 5. Justice Labarga concurred in the result. *Id.* at 6. Though he disagreed with the court's retroactivity analysis, he agreed that Petitioner's claim was time barred, *id.*, consistent with Petitioner's failure to file within the time limit in Rule 3.203(d)(4), *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020) (Labarga, J., concurring).

REASONS FOR DENYING THE PETITION

I. PETITIONER'S DUE PROCESS CLAIM DOES NOT WARRANT REVIEW.

Petitioner claims that the Rule 3.203(d)(4) time limit for intellectual-disability claims violates due process because Florida courts "refused to grant relief" to defendants with IQ scores above 70 until this Court decided *Hall*. Pet. 17. As a result, says Petitioner, his intellectual-disability claim would have been "futile" during the filing period, so he has had no "real opportunity" to raise his intellectual-disability claim. Pet. 16–17.

At the threshold, Petitioner does not allege that there is a split of authority among the state courts of last resort or the federal courts of appeals on whether a time bar to an intellectual-disability claim violates due process when the law at the time made the claim unlikely to succeed. *See* Sup. Ct. R. 10(b). But even if he had, he still cannot meet the high standard for

establishing that Rule 3.203(d)(4) violates due process.

This Court grants the States "substantial deference" in crafting postconviction rules. *Medina v. California*, 505 U.S. 437, 446 (1992); *accord Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009). For that reason, due process challenges to state postconviction procedures do not trigger the test described in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Medina*, 505 U.S. at 443–45. Instead, the Court asks whether the state procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation." *Osborne*, 557 U.S. at 69. In other words, "[f]ederal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Id.* Petitioner bears the burden of making this showing. *Id.* at 71. He cannot do so here.

To start, there is nothing fundamentally inadequate about a time bar to postconviction relief. Federal courts apply habeas time bars all the time. *See, e.g.*, 28 U.S.C. § 2244; *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (denying a Rule 60(b)(6) motion based on a new decision because it was not brought within a "reasonable time" when filed nearly eight months after the new decision); *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016) (same for 2½ years). This Court has also recognized that timeliness is vital in the postconviction context. *See Ryan v. Schad*, 570 U.S. 521, 523 n.2, 526 n.3 (2013) (suggesting that a

motion to vacate based on *Martinez v. Ryan*, 566 U.S. 1 (2012), which had been decided about four months before the motion was filed, was dilatory without an explanation for the delay). In fact, the Court has even held in a case challenging death-penalty procedures that federal courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quotations omitted). These holdings recognize that timeliness is vital to achieving "finality," which is "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality op.). Accordingly, there is nothing "fundamentally inadequate" about a time bar to postconviction relief.

To be sure, Petitioner claims that Florida "refused to grant relief" to defendants with IQ scores above 70 until this Court decided *Hall*, and so his intellectual-disability claim was "futile" when the time limit expired. Pet. 16–17. But this futility claim fails for many reasons. For one thing, though he contends that he did not bring his intellectual-disability claim within the time limit only because Florida law at the time ensured that he would fail, the record does not support that representation. When the time limit expired in 2004, Petitioner had IQ scores of 83 and 84, T. XXXIX 1648; EH 124, he had never before argued that he was intellectually disabled, and his defense expert had testified at sentencing that he was not intellectually disabled, T. XXXIX 1648–50, 1658. So it is unlikely that he would have filed an intellectual-disability claim in 2004, no matter the law at the time.

At any rate, his claim fails on a more basic level: There is no "perceived futility" exception to postconviction time bars. *Bowles v. State*, 276 So. 3d 791, 795 (Fla. 2019), *cert. denied sub nom. Bowles v. Florida*, 140 S. Ct. 2589 (2019). Indeed, even if governing state law suggests that the state court will reject a constitutional claim, "the future [is] not known." *In re Bowles*, 935 F.3d 1210, 1217 n.2 (11th Cir. 2019). State courts can and often do change their minds, *see, e.g.*, *Phillips*, 299 So. 3d 1013, so defendants must diligently pursue all arguably colorable claims, no matter their views on the likelihood that the state court will find them meritorious.

Federal cases reviewing state postconviction proceedings exemplify this principle. In *Engle v. Isaac*, this Court held—on review of a 28 U.S.C. § 2254 petition—that petitioners who fail to raise a claim in state court cannot avoid a procedural bar on the theory that state law made the claim futile. 456 U.S. 107, 130 (1982). Indeed, a petitioner must raise his claim before the state court even if "he thinks [the court] will be unsympathetic to the claim," because "a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." *Id.*; *see also Smith v. Murray*, 477 U.S. 527, 535 (1986) (quoting *Isaac* and holding the same).[3]

[3] Given this precedent, Petitioner effectively asks this Court to apply the Due Process Clause more stringently on direct review of state habeas petitions

That is what happened in *Hall*. The petitioner there filed within the Rule 3.203(d)(4) time limit, *Hall*, 109 So. 3d at 707, challenged Florida's strict 70-cutoff as unconstitutional, *id.* at 707–08, "and [he] won," *Bowles*, 935 F.3d at 1217 n.2. Petitioner "could have and should have brought the same claim" within the time limit, *id.*—his failure to do so cannot generate a due process violation. And indeed, this Court recently declined to review cases raising a virtually identical argument. *See Bowles v. Florida*, 140 S. Ct. 2589 (2019); *Blanco v. Florida*, 139 S. Ct. 1546 (2019).

In any event, even if Petitioner were right on the law, he is wrong on the facts. He asserts that his claim was futile because Florida barred an intellectual-disability claim premised on an above-70 IQ score when Rule 3.203(d)(4)'s time limit expired on November 30, 2004. Pet. 17. But the Florida Supreme Court did not construe "intellectual disability" under Florida law to contain a strict 70-cutoff until July 2005. *See Zack*, 911 So. 2d at 1201.[4] That holding was a key development, because Section 921.137, "[o]n its

---

than on review under section 2254. Yet he does not explain why the Due Process Clause should apply differently in this context, and he cites no case supporting that proposition.

[4] *Zack* cited a Florida Supreme Court case from 2000 to derive its rule, but it recognized that the 2000 case merely accepted case-specific expert testimony that an IQ score of 70 can establish intellectual disability. 911 So. 2d at 1201. The *Zack* court was the first to construe that cutoff as necessary to establish intellectual disability under Section 921.137. *Id.*

face," "could be interpreted" to "tak[e] into account the IQ test's standard error of measurement." *Hall*, 572 U.S. at 711. What is more, the Court found "evidence that Florida's Legislature intended to include the measurement error in the calculation." *Id.* So when Petitioner's time limit expired, no Florida Supreme Court precedent held that a claim based an above-70 IQ score would fail; on the contrary, Section 921.137's text and history suggested that a defendant within the SEM could establish intellectual disability under Florida law. *Id.*

And even if it were clear when the time limit expired that an IQ score of 70 was the cut off for establishing intellectual disability, Petitioner's claim still fails because the Florida Supreme Court had not yet rejected a constitutional challenge to that cutoff. The Court first rejected that claim in 2009, when it decided *Nixon*, 2 So. 3d at 142. Until then, Petitioner had no legitimate reason to think that the Florida Supreme Court would reject an intellectual-disability claim based on an above-70 IQ score when coupled with a claim that doing so would violate the Eighth Amendment. That explains why other capital defendants raised this exact claim and filed within the time limit. *Id.*; *Hall*, 109 So. 3d at 707–09.

For these reasons, *Brinkerhoff–Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), does not help Petitioner. Pet. 16–17. To the contrary, the case bars his claim. *Brinkerhoff* centered on a challenge to state taxes imposed on a bank's stock. *Id.* at 674. The Missouri Supreme Court had previously held that the state tax commission lacked authority under its governing statute to review those challenges, *id.* at

676, so the bank sought an injunction in state court instead, *id.* at 674–75. After the state court dismissed the action, the Missouri Supreme Court overruled its prior precedent, held that the bank had to file first with the tax commission, denied relief because the bank had failed to do so, and then held that a successive attempt to file before the tax commission would be time barred. *Id.* at 675–76. This Court held that the bank was effectively robbed of a forum to challenge the taxes on its stock, which violated due process. *Id.* at 678–79. Yet it noted that "[h]ad there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk" that the court might later rule against him and file its claim. *See id.* at 682 n.9. And it recognized that "if the administrative remedy" of tax-commission review were still available to the bank, "there would be no denial of due process." *Id.*

Brinkerhoff therefore forecloses Petitioner's contention. Unlike the bank there, Petitioner had a forum to raise his intellectual-disability claim: a habeas petition filed within the time limits outlined in Rule 3.203(d)(4). It does not matter if Florida law at the time suggested that his intellectual-disability claim might fail; he still had an "available" forum to pursue it and, if it were rejected, challenge the denial before this Court. What is more, Florida law at the time did not suggest that a claim based on an above-70 IQ score was doomed to fail. *See Zack*, 911 So. 2d at 1201; *Hall*, 572 U.S. at 711. And even if the Florida Supreme Court had already construed Section 921.137 to have a strict 70-cutoff, it did not reject an Eighth Amendment challenge to that construction until five years after the Rule 3.203(d)(4) time period

expired. *Nixon*, 2 So. 3d at 142. So Petitioner—like all criminal defendants—could not simply assume that his claim would fail; rather, he had to file within the time limits and "assume the risk" that the Florida Supreme Court might rule against him.

Finally, Petitioner cites *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality op.), seemingly to argue that Rule 3.203(d)(4) should not apply because it prevents the factfinder from considering "material relevant to the issue of" intellectual disability and is thus a "necessarily inadequate" procedure. Pet. 18–20. This argument fails for a host of reasons. First, Petitioner never raised it below, and this Court should decline to consider it in the first instance. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court." (cleaned up)). Second, the portion of *Ford* that he cites is a nonbinding plurality opinion. 477 U.S. at 414 (plurality op.). As Petitioner recognizes, Pet. 20–21, the narrower concurrence sets out the accepted principle of law: All Petitioner must receive is a fair "opportunity to be heard," *id.* at 424 (Powell, J., concurring), which the State provided here through the availability of a timely Rule 3.203 motion. And third, *Ford* is distinguishable, as the procedures there—much like the Missouri Supreme Court's ruling in *Brinkerhoff*—effectively barred the defendant from ever presenting relevant evidence of insanity. *Id.* at 413–14 (plurality op.). In contrast, Petitioner had the chance to present evidence of intellectual disability under Rule 3.203.

Because Petitioner had ample opportunity to raise his intellectual-disability claim, there is no due process violation.

II. PETITIONER'S RETROACTIVITY CLAIM DOES NOT WARRANT REVIEW.

Petitioner next contends that *Hall* announced a new substantive rule that must be applied retroactively by state courts under *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Pet. i. Yet Petitioner's case is not a good vehicle to consider that question. Nor are the lower courts intractably split on the issue. And in any event, *Hall* did not announce a new substantive rule.

A. This case is a poor vehicle because a favorable ruling would not change the outcome in state court.

To start, Petitioner's claim is not a good vehicle to consider his question presented because Petitioner's intellectual-disability claim fails for a different reason: He did not raise his claim within the time limit prescribed in Rule 3.203(d)(4). He has thus forfeited his intellectual-disability claim under state law, *Bowles*, 276 So. 3d at 795, making the retroactivity issue "academic" and non-dispositive in his case. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not be granted when the "problem" is only "academic"); *see also* Stephen M. Shapiro et al., Supreme Court Practice § 4.4(f) (10th ed. 2013) (observing that "certiorari may be denied" where the question presented "is irrelevant to the ultimate outcome of the case").

B. The decision below implicates no split of authority worthy of review.

Even if this case were a suitable vehicle for resolving whether *Hall* announced a new substantive rule, the lopsided conflict Petitioner asserts as to that issue does not warrant this Court's review.

As Petitioner recognizes, almost all the courts that have addressed the issue have agreed with the decision below and either held or opined that *Hall* does not apply retroactively on collateral review. *See* Pet. 30 ("The Sixth, Eighth, and Eleventh Circuits, as well as the Tennessee Supreme Court and the Florida Supreme Court, have refused to apply *Hall* retroactively on collateral review."); *see id.* at 30–32 (discussing those cases). Petitioner points to only "[t]wo courts—the Supreme Court of Kentucky and the Tenth Circuit"—that have purportedly come out the other way. *Id.* at 27. But neither case gives rise to the kind of split that calls for this Court's review.

Petitioner identifies only one state court of last resort that has held that state postconviction courts must apply *Hall* retroactively. *Id.* (citing *White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *as modified* (Oct. 20, 2016), *and abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018)). There, the Supreme Court of Kentucky summarily concluded that *Hall* "does not deal with criminal procedure," imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and "must be retroactively applied." *Id.* at 215.

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

Petitioner also relies on *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019), but the Tenth Circuit did not hold there that state postconviction courts are required to apply *Hall* retroactively. Instead, the Tenth Circuit reviewed de novo a federal district court's conclusion concerning the propriety of federal habeas relief. *Id.* at 1069, 1085. In assessing that issue, the Tenth Circuit considered whether, under Oklahoma's implementation of *Atkins*, Smith was

intellectually disabled because he "ha[d] significant limitations in adaptive functioning in at least two of the nine listed skill areas." *Id.* at 1083. In so doing, the court assessed "whether the Supreme Court's recent applications of *Atkins* 'are novel.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)).

The court concluded that *Hall*, *Moore I*,[5] and *Moore II*[6] did not state new rules but instead that they applied a general rule set forth in *Atkins*, and thus that they could not be understood to "yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 1084 (quoting *Chaidez*, 568 U.S. at 348). Although the court relied on some statements in *Hall* in reaching this conclusion, it did not apply *Hall* to Smith's case. It merely applied *Moore I* and *Moore II*, "which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated," in determining whether Smith "suffered deficits in at least two areas of adaptive functioning." *Id.* at 1085. *Hall*'s rule that States must account for the SEM when evaluating an individual's IQ scores did not come into play because, in finding that Smith satisfied prong one, the Tenth Circuit observed that nearly all his scores fell below 70. *See id.* at 1079 (discussing scores of 65, 55, 55, 69–78, 73). In other words, the Tenth Circuit did not squarely address the question at issue here, and its statements pertaining to *Hall* were not essential to the disposition of the case. Indeed, Smith's case did not involve any law

---

[5] *Moore v. Texas*, 137 S. Ct. 1039 (2017).

[6] *Moore v. Texas*, 139 S. Ct. 666 (2019).

foreclosing the presentation of intellectual disability evidence without an IQ score of 70 or below.

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

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

Second, some of the cases Petitioner cites for the proposition that the lower courts are split on the question presented turned on a different issue: whether federal habeas petitioners seeking leave to file a second or successive habeas petition were barred by 28 U.S.C. § 2244(b) because this Court has not held that *Hall* is retroactive. *See In re Payne*, 722 F. App'x 534, 537 (6th Cir. 2018); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). But the question of whether this Court has expressly held that a particular rule is retroactive, and therefore that section 2244(b) permits a second or successive petition under section 2254, is a question distinct from whether the Court announced a new substantive rule that state courts must apply retroactively under *Teague* and *Montgomery*. *Greene v. Fisher*, 565 U.S. 34, 39 (2011) (explaining that "[t]he retroactivity rules that govern federal habeas review

on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other"); *Horn v. Banks*, 536 U.S. 266, 272 (2002) ("[I]f our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct."). That is because under section 2244, a "new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive." *Tyler v. Cain*, 533 U.S. 656, 663 (2001). In other words, whether the statutory dictates of section 2244 have been met is a different question from whether, under *Teague*, a new rule is a substantive rule that state postconviction courts must apply retroactively.

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

C. The decision below is correct.

Review is not warranted for the additional reason that the Florida Supreme Court correctly concluded that *Hall* does not apply retroactively under federal law and, in any event, did not require the state

postconviction court to consider Petitioner's belated claim of intellectual disability.

First, *Hall* announced a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis omitted). As the Eleventh Circuit has explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *Henry*, 757 F.3d at 1158–59. Indeed, the Court pointed out in *Hall* that while its precedents were instructive, "the inquiry must go further." 572 U.S. at 721. And "[n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff." *Henry*, 757 F.3d at 1159. Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also supports the conclusion that *Hall* announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (indicating that a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." 572 U.S. at 725 (Alito, J., dissenting).

Second, the new rule announced in *Hall* is not a substantive rule.[7] "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). But *Hall* does not forbid criminal punishment for any type of primary conduct. Nor does it prohibit any category of punishment for any class of defendants because of their status or offense. While *Atkins* prohibits states from executing intellectually disabled defendants, *Hall* requires only certain "*procedures* for ensuring that states follow the rule enunciated in *Atkins*." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015). Specifically, "*Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Id.*

Indeed, by its terms, *Hall* requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning

---

[7] Nor is it a "watershed" rule of criminal procedure. Indeed, those rules are "hen's-teeth rare." *Sepulveda v. United States*, 330 F.3d 55, 61 (1st Cir. 2003). But to even reach that question, the Court would have to take the step it did not in *Montgomery* and hold that *Teague*'s second exception for "watershed" rules of procedure is a constitutional rule that state collateral review courts must apply. 577 U.S. at 200.

over his lifetime." 572 U.S. at 724. That is, Florida's IQ cutoff was defective because it "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted)—a classic procedural defect.

Petitioner nonetheless insists that *Hall* is retroactive. He first argues that this Court decided that *Hall* was retroactive "by implication" since it decided *Hall* on collateral review. Pet. 33–35. Yet neither the parties nor the Court addressed retroactivity in *Hall*, and this Court's silence on an issue—especially an issue as important as retroactivity—"has no precedential effect." *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *see also Wilkerson v. Whitley*, 28 F.3d 498, 506 n.12 (5th Cir. 1994) (noting that a court's "silence" in the retroactivity context "is best viewed as a failure to address and decide the issue"). Nor is it this Court's practice to decide retroactivity by implication. To the contrary, it typically decides the merits of a constitutional claim first, followed by a different case deciding whether its holding is retroactive. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (announcing the constitutional right to a unanimous jury in state criminal trials); *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (granting review to consider whether *Ramos* applies retroactively). So the

procedural context in which *Hall* was decided does not touch on whether its holding applies retroactively.

Next, Petitioner argues that *Hall* announced a new substantive rule because it purportedly "expanded a class of individuals who could not be executed"—the intellectually disabled—to include individuals who had IQ scores falling in a broader range than previously recognized. Pet. 37–38. Petitioner is incorrect. *Atkins* protects every individual who is intellectually disabled, while *Hall* simply prevents States from using a particular procedure, which the Court deemed inappropriate, when determining whether an individual falls into that class. *See, e.g.*, *Hall*, 572 U.S. at 723 (concluding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"); *see also id.* at 724 (Alito, J., dissenting) (observing that *Hall* "mandate[s] the use of a *single method* for identifying" persons with intellectual disability (emphasis added)); *id.* at 727 (referring to "the procedure now at issue"). In other words, despite Petitioner's claim to the contrary, "*Hall* did not expand the class of individuals protected by *Atkins*'s prohibition." *Kilgore,* 805 F.3d at 1314. As the Florida Supreme Court explained in *Phillips*, although *Hall*'s procedural change "may have had some effect on the likelihood that capital punishment would be imposed," it "did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Phillips*, 299 So. 3d at 1322.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
Attorney General of Florida

OFFICE OF THE
ATTORNEY GENERAL
State of Florida
The Capitol – PL-01
Tallahassee, FL
32399-1050
Phone: (850) 414-3300
amit.agarwal@
myfloridalegal.com

AMIT AGARWAL
Solicitor General
** Counsel of Record*
JEFFREY PAUL DESOUSA
Chief Deputy Solicitor General
CHRISTOPHER J. BAUM
Senior Deputy Solicitor General
DAVID M. COSTELLO
Assistant Solicitor General

April 19, 2021