No. 20-6887

IN THE

Supreme Court of the United States

HARRY FRANKLIN PHILLIPS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether federal law requires state courts to apply *Hall v. Florida*, 572 U.S. 701 (2014), retroactively to sentences that have already become final on direct review.

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* was decided, Florida law barred the imposition of death sentences on the intellectually disabled. Fla. Stat. § 921.137 (2001). Following *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).

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

measurement error in the calculation." *Id*. The Florida Supreme Court, however, had interpreted Section 921.137 to impose a "strict IQ test score cutoff of 70." *Id*. at 711–12 (citing *Cherry v. State*, 959 So. 2d 702, 712–713 (Fla. 2007) (per curiam)). Confined by that reading, this Court concluded that the statute unconstitutionally barred a capital defendant with a score "within the margin for measurement error" from raising a claim of intellectual disability. *Id*. at 712, 724.

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

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

retroactively under federal law and, as explained below, the court would later recede from its decision.

2. In 1998, Petitioner's conviction and sentence of death for the first-degree murder of a probation officer became final. After this Court's decision in *Atkins*, Petitioner moved to vacate his sentence on the ground that he was intellectually disabled. In 2006, a postconviction court conducted an evidentiary hearing on that claim and, in a nearly 50-page order, denied relief.

The postconviction court applied the three-prong framework for assessing intellectual disability, which requires (1) significantly subaverage intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; (3) which has manifested before the age of 18. Pet. App. 63a. On the first prong, the court observed that defense experts Dr. Denis Keyes, Dr. Glenn Caddy, and Dr. Joyce Carbonell had performed tests indicating that Petitioner had IQ scores of 70, 74, and 75. *Id.* at 70a–71a. Thus, "[t]he Defendant's own experts place[d] the Defendant in the 'borderline' range of sub average intellectual functioning." *Id.* at 73a.

In assessing prong one, the court did not mechanically apply a strict IQ cutoff of 70. Instead, it considered the full range of pertinent record evidence and then concluded that Petitioner's "borderline IQ scores of 74, 75, and 70 are not precise, explicit, lacking in confusion, or of such weight that they produced in this Court's mind a firm belief or conviction, without hesitation, that the Defendant has noticeable sub average intellectual functioning." *Id.* "Therefore," the court explained, Petitioner "has not

proven by clear and convincing evidence that he has significantly (noticeable) sub average intellectual functioning." *Id.*

As an "additional reason[] why [Petitioner] has not met his burden of proof as to this first prong," the postconviction court also discounted Petitioner's IQ scores because it suspected him of malingering. *Id.* at 73a–76a. Though none of the defense experts conducted validity tests to rule out malingering, *id.* at 74a, the State's expert, Dr. Suarez, performed several such tests and concluded that Petitioner "was not putting forth full effort" when responding to test questions. *Id.* at 75a. And, as the court explained, persons with antisocial personalities are more likely to malinger to manipulate IQ results. *Id.* at 73a. The court therefore found that Petitioner had not met his burden of showing, by clear and convincing evidence, that prong one was met. *Id.* at 73, 76a.

As to the second prong—adaptive behavior—the postconviction court found that Petitioner failed to meet his burden. *Id.* at 79a. Under Florida law, the term adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Fla. Stat. § 921.137(1).

Dr. Caddy had not evaluated Petitioner's adaptive functioning at all, and Dr. Keyes admitted that Petitioner's "planning of the murder and . . . cover up are inconsistent with" a finding of intellectual disability. Pet. App. 76a–77a. For example, Petitioner's attempts to manufacture an alibi and to intimidate witnesses by writing letters from jail

"suggests planning skills." *Id.* at 76a–78a. Similarly, Petitioner had collected the shell casings from the scene of the murder, representing "forethought" and a "keen instinct towards self-preservation." *Id.* at 78a–79a. Petitioner's job history was further evidence. *Id.* at 77a. He had held two jobs as a dishwasher, worked as a garbage collector for the City of Miami, and was a short-order cook. *Id.* He received "average" performance reviews as a garbage collector, *id.*, and Dr. Keyes acknowledged that Petitioner's lengthy employment as a short-order cook "was an unusually high level job for someone who suffered from" intellectual disability. *Id.*

The postconviction court also relied on the results of an Adaptive Behavior Assessment System test administered by Dr. Suarez to six prison officials. *Id.* at 76a. As Dr. Suarez explained, "to get concurrent deficits, you have to find people who know the person now." *Id.* Yet "[n]one of the staff members reported that they had even seen [Petitioner] exhibit any type of abnormal or confused behavior or behavior problem." *Id.* Finding Dr. Suarez's conclusions "credible," the postconviction court determined that Petitioner had not shown by clear and convincing evidence any concurrent deficits in adaptive behavior. *Id.* at 76a, 79a.

Finally, the postconviction court found that Petitioner failed to prove that any deficits manifested before age 18. *Id.* at 79a–80a. On that score, the court found that the scant evidence of intellectual disability before the age of 18 was inconclusive and could be explained by other factors, such as shyness and a lack of effort in school. *Id.* at 80a.

The Florida Supreme Court affirmed the denial of postconviction relief in 2008. *Phillips v. State*, 984 So. 2d 503 (Fla. 2008). In doing so, it credited the postconviction court's finding that the State's expert was more credible because, unlike the defense experts, he had tested for malingering. *Id.* at 510 ("Although Phillips challenges the trial court's credibility finding, we give deference to the court's evaluation of the expert opinions.").

3. This case arises out of Petitioner's successive motion for state postconviction relief, filed in 2018. Petitioner argued that in light of *Hall* and *Walls*, as well as a new evaluation report prepared by Dr. Keyes, he was entitled to a new evidentiary hearing. Pet. App. 2a–3a. Alternatively, Petitioner requested that the circuit court reevaluate the evidence presented at the 2006 hearing along with Dr. Keyes's new report, although Petitioner conceded that there was no new evidence of intellectual disability in this case and that Dr. Keyes did not change his opinion in his updated report. *Id.* at 3a. The postconviction court reviewed *de novo* the entire record from the 2006 hearing and Dr. Keyes's new report. *Id.*

The postconviction court denied relief without an evidentiary hearing. *Id.* In doing so, it made new findings regarding the evidence presented at the 2006 evidentiary hearing. *Id.* First, it concluded that because *Hall* requires that courts account for the SEM, which is "plus or minus five points" and "[a]n IQ of up to 75 would meet the definition of [intellectual disability]," Petitioner "has clearly proven the first prong by clear and convincing evidence," because the IQ scores presented in 2006 were 70, 74, and 75. *Id.*

The postconviction court also made a new finding that Petitioner met the third prong—onset before age 18. *Id*. Nonetheless, the court declined to find that Petitioner is intellectually disabled because it agreed with the 2006 court's finding that Petitioner failed to show that he met the second prong of the intellectual disability standard—concurrent deficits in adaptive behavior. *Id*.

Among other things, the postconviction court pointed to the absence of certain adaptive deficits that one might expect to find in a person with intellectual disability. For example, though an intellectually disabled person "may require support with grocery shopping, transportation, home or child-care, food preparation, banking and money management," Petitioner did not exhibit those difficulties. *Id*. at 30a. Likewise, the intellectually disabled are "at risk of being manipulated"—but Petitioner held up under police interrogation and did not confess. *Id*. at 30–31a. And impairments in "abstract thinking and executive function (i.e., planning, strategizing, priority setting, and cognitive flexibility)" are to be expected in persons with intellectual disability, yet Petitioner's conduct reflected careful planning in the murder of his parole officer and a sophisticated strategy afterwards to evade culpability. *Id*. at 31a.

4. Petitioner appealed to the Florida Supreme Court, contending that the postconviction court's decision contravened *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), by overemphasizing Petitioner's adaptive strengths. Init. Br., *Phillips v. State*, No. SC18-1149, at *22, 29–54 (Nov. 26, 2018).

The court first considered whether *Hall* applied retroactively under federal law. It concluded that because "*Hall* announced a new procedural rule, which does not categorically place certain criminal laws and punishments altogether beyond the State's power to impose but rather regulates only the manner of determining the defendant's culpability," it did not. *Id.* at 7a. Instead, the court explained, "*Hall* is similar to other nonretroactive 'decisions [that] altered the processes in which States must engage before sentencing a person to death,' which 'may have had some effect on the likelihood that capital punishment would be imposed' but which did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Id.* (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211–12 (2016)). In short, the court concluded, "*Hall*'s limited procedural rule does nothing more than provide certain defendants—those with IQ scores within the test's margin of error—with the opportunity to present additional evidence of intellectual disability." *Id.* at 5a. The court therefore receded from *Walls*. *Id.* at 8a.

As a result, Petitioner was not entitled to "a reconsideration of whether he meets the first prong" of the *Atkins* test because *Hall* does not apply retroactively to him. *Id.* Thus, it was error for the postconviction court to reopen the intellectual disability question in the first place.

That conclusion meant that the Florida Supreme Court "need not address [Petitioner's] *Moore* claim." *Id.* "[I]f a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard," it explained, "he or she will not

be found to be intellectually disabled." *Id.* Because Petitioner "conclusively failed to establish that he meets the first prong of the intellectual disability standard," his *Atkins* claim would fail "even if he were entitled to a renewed determination on the second prong and could establish that he has deficits in adaptive behavior." *Id.* The court therefore affirmed.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IMPLICATES NO SPLIT OF AUTHORITY WORTHY OF REVIEW.

To begin with, there is no split among the lower courts warranting this Court's review.[1] Nearly all the courts that have addressed the issue agree with the decision below and either hold or opine that *Hall* does not apply retroactively on collateral review. *See In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Williams v. Kelley*, 858 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); *Payne v. State*, 493 S.W.3d 478, 489-91 (Tenn. 2016); *State v. Jackson*, 157

[1] Petitioner has alleged no split of authority among the lower courts. But defendants in pending related cases have asserted a split, *see* Petition for Writ of Certiorari, *Lawrence v. Florida*, No. 20-6307, at *13–17 (Nov. 9, 2020); Petition for Writ of Certiorari, *Cave v. Florida*, No. 20-6947, at *13–17 (Dec. 21, 2020); Petition for Writ of Certiorari, *Freeman v. Florida*, No. 20-6879, at *27–32 (Jan. 11, 2021); *see also* Br. of Amicus Curiae Arc of the United States 6 n.11, and the State therefore addresses the point here.

N.E.3d 240, 253 (Ohio Ct. App. 2020) (citing the "substantial and growing body of case law that has declined to apply *Hall* . . . retroactively"). Though the Supreme Court of Kentucky has come out the other way, that case does not give rise to the kind of split that calls for this Court's review.

In *White v. Commonwealth*, the Supreme Court of Kentucky summarily concluded that *Hall* "does not deal with criminal procedure," that *Hall* imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and that it "must be retroactively applied." *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).

The court's opinion included only one paragraph addressing the question presented. *Id.* at 215. And that paragraph cited, in passing, just two cases: this Court's decision in *Atkins*, which preceded *Hall* and arose on direct review, and thus had no occasion to address whether state courts must apply *Hall* retroactively to cases on collateral review; and the Florida Supreme Court's now-defunct view that *Hall* applies retroactively as a matter of state law. *See id.* (citing *Oats v. Florida*, 181 So. 3d 457 (2015), and noting that the Kentucky court's ruling put it "in the company of our sister state Florida which, of course was the state in which the underlying issue in *Hall* first arose"). 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*.

The Tenth Circuit, in *Smith v. Sharp*, has also discussed whether *Hall* is a "new rule," but that case did not hold that state postconviction courts are required to apply *Hall* retroactively. 935 F.3d 1064, 1084–85 (10th Cir. 2019). 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*,[2] and *Moore II*[3] did not state new rules; instead, they applied a general rule set forth in *Atkins*, and so they could not be understood to "yield[] 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

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

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

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 1085–88. *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 foreclosing the presentation of intellectual disability evidence without an IQ score of 70 or below.[4]

At any rate, any conflict among the lower courts does not warrant review at this time, as 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. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("The process of

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[4] Petitioner's *amici* are incorrect in contending that the decision below conflicts with *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014). Br. of Amicus Curiae Arc of the United States 6 n.11. That decision did not purport to address *Hall*'s retroactivity, and simply observed, apparently in dicta, that *Hall* "clarified the minimum *Atkins* standard under the U.S. Constitution." *Van Tran*, 764 F.3d at 612.

percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."). 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.

As for Petitioner's alternative theories (Pet. 32–38) that *Hall* must be considered retroactive under freestanding Eighth Amendment principles and the Ex Post Facto Clause, Petitioner does not point to any split of authority on those issues and the State is unaware of any.

II. 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. Indeed, Petitioner's claims fail regardless whether they are framed in terms of *Teague*, a freestanding Eighth Amendment analysis, or the Ex Post Facto Clause.

1. As to *Teague*, the Florida Supreme Court properly held that *Hall* announced a new rule of constitutional procedure.

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 v. Lane*, 489 U.S. 288, 301 (1989) (plurality op.) (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." *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014). As *Hall* itself pointed out, while this Court's precedents were instructive, "the inquiry must go further." *Hall v. Florida*, 572 U.S. 701, 721 (2014). 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 in *Hall* (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." *Hall*, 572 U.S. at 725 (Alito, J., dissenting).

Second, the new rule announced in *Hall* is not a substantive rule.[5] "Substantive rules include 'rules

[5] 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

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), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002)). 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*, 805 F.3d at 1314. Specifically, "*Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability." *Id.*

Indeed, by its terms, *Hall* requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." 572 U.S. at 724. In other words, Florida's IQ cutoff was defective because it "bar[red] further consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the

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procedure is a constitutional rule that state collateral review courts must apply. 577 U.S. at 200.

constitutional restriction upon [their] execution of sentences," *id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted)—a classic procedural defect.

Petitioner nonetheless insists that *Hall* announced a new substantive rule because it purportedly "broad[ened] the class" of individuals who could not be executed under *Atkins*. Pet. 31. That is wrong. *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 724–25 (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 the decision below, 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.'" Pet. App. 7a.

2. Petitioner next argues that the Florida Supreme Court's decision to recede from *Walls* results in the death penalty in Florida being "wantonly and [] freakishly imposed" in violation of the Eighth Amendment, Pet. 32, a purportedly independent basis for applying *Hall* retroactively to him. But, to begin with, this Court has never suggested that a capital defendant can circumvent its generally applicable retroactivity framework by arguing that denying retroactive application will independently offend the Eighth Amendment. In fact, it has said the opposite. *See Penry*, 492 U.S. at 314 ("In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity.").

And Petitioner is wrong at any rate that Florida has "no non-arbitrary rational basis" for correcting its misapplication of retroactivity principles. Pet. 33. Once a conviction is secured and the sentence becomes final, States have "a strong interest in preserving the integrity of the judgment." *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394, 403 (2001). Consistent with that state interest, this Court has recognized that "the principle of finality . . . is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309 (plurality op.). "Without finality," this Court has explained, "the criminal law is deprived of much of its deterrent effect." *Id*.

Were finality not a sufficient reason to deny application of new rules, all new constitutional rules would need to be retroactive—at least in capital cases.

This Court has rejected that approach. *E.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004).

In effect, Petitioner argues that Florida is bound to apply *Hall* retroactively—even if *Walls* were wrongly decided—because to do otherwise would treat different capital defendants differently. But that different treatment inheres in retroactivity jurisprudence—defendants whose convictions became final before a new rule took effect are not entitled to invoke it, while those whose convictions became final after are. And nothing in the Eighth Amendment says that a state court is powerless to fix its mistakes simply because the death penalty is involved. Were it otherwise, no state court could recede from precedent affecting the death penalty; some defendants, after all, would have received the benefit of the old precedent whereas future defendants would not. That approach is untenable. Similarly untenable, Petitioner's proposed rule would result in the arbitrary application of new procedural rules to capital cases but not to non-capital criminal cases, hinging the availability of relief on whether the defendant was sentenced to death.

3. Finally, Petitioner argues that receding from *Walls* violated the Ex Post Facto Clause by "depriv[ing] [him] of the benefits of a rule that as recently as 2017 was squarely held to be applicable to his case." Pet. 37–38. But the Ex Post Facto Clause is inapplicable to changes in decisional law; it applies only to *legislative* changes. *See Rogers v. Tennessee*, 532 U.S. 451, 456 (2001) (explaining that the Ex Post Facto Clause "is a limitation upon the powers of the Legislature, and does not of its own force apply to the

Judicial Branch of government."). For that reason alone, Petitioner's *ex post facto* challenge fails.

True enough, this Court has said that "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process," such that courts interpreting "a common law doctrine of criminal law" cannot deprive persons of "fair warning." *Rogers*, 532 U.S. at 456, 462. Thus, when changes to the criminal common law are "unexpected and indefensible," they must apply prospectively only. *Id.* at 461–62. But even if Petitioner had framed his *ex post facto* challenge as a due process argument under *Rogers*, it would fall short. Receding from *Walls* did not deprive Petitioner of fair warning that his prior act of killing his parole officer constituted first-degree murder. Nor did it deprive him of fair warning that the offense subjected him to capital punishment—Florida's statutory ban on executing the intellectually disabled did not even exist in the 1980's when Petitioner committed the crime. And correcting Florida's approach to *Hall* retroactivity was neither "unexpected" nor "indefensible," as nearly all courts to consider the question agree with Florida's current view, and *Walls* itself was issued over the dissent of two justices.

III. A FAVORABLE RULING HERE WOULD NOT CHANGE THE OUTCOME IN STATE COURT.

Last, Petitioner cannot prevail in state court even if *Hall* is retroactive, meaning the question presented is not case-dispositive and does not merit certiorari. *Cf. Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (certiorari should not be granted when the question presented, though "intellectually

interesting," is merely "academic"). That is so for two reasons.

1. As a matter of state law, Petitioner was not entitled to reconsideration of his intellectual disability claim in 2018 because the Florida Supreme Court has held that a defendant "is not entitled to a new hearing in order to present additional evidence of intellectual disability [if] he was already provided the opportunity to present evidence regarding each of the three prongs of the intellectual disability standard." *Jones v. State*, 231 So. 3d 374, 376 (Fla. 2017), *cert. denied*, 139 S. Ct. 122 (2018). As noted, a person sentenced to death may prevail under *Atkins* if he meets a three-prong test for intellectual disability: (1) significantly subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, and (3) manifestation of the condition before age 18. *See Atkins*, 536 U.S. at 318; *see also Salazar v. State*, 188 So. 3d 799, 811 (Fla. 2016). In *Jones*, the defendant received a post-*Atkins* evidentiary hearing in 2006, at which the postconviction court concluded that he "did not meet even one of the three statutory requirements." 231 So. 3d at 375 (quotations omitted). The court therefore denied relief. *Id.* Post-*Hall*, Jones sought a new evidentiary hearing, claiming that his above-70 IQ scores were no longer determinative and that he could now meet the first prong. *Id.* He appealed the denial of an evidentiary hearing to the Florida Supreme Court. *Id.* That court affirmed, explaining that "*Hall* does not change the fact that Jones failed to establish that he meets the second or third prong." *Id.* at 376. Because a defendant who "fails to prove any one of these components . . . will not be found to be intellectually disabled," *Hall* was irrelevant to Jones'

claim and did not open the door to a new determination as to intellectual disability. *Id.*

That rule applies here as well. In 2006, the postconviction court permitted Petitioner to present evidence on all three prongs of the intellectual disability standard and concluded that Petitioner failed to prove by clear and convincing evidence that he met any of them. Pet. App. 2a. The Florida Supreme Court affirmed that ruling. In Petitioner's most recent postconviction motion, he argued that *Hall* opened the door to reconsideration of the 2006 denial. But, under *Jones*, he was not entitled to relief because *Hall*'s holding that Florida cannot impose a rigid IQ-score cutoff would not have changed the result of the 2006 determination, which was independently supported by the postconviction court's findings that Petitioner failed to meet prongs two and three.

Indeed, recognizing "the inherent error in IQ tests," this Court concluded in *Hall* that the State could not seek "to execute a man because he scored a 71 instead of a 70 on an IQ test." 572 U.S. at 722, 724. Rather, the Court concluded, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. That ruling does not help Petitioner: *Hall* does not change the 2006 postconviction court's bottom-line conclusion that Petitioner failed to meet any of the three prongs because *Hall* goes to only one of the prongs—intellectual functioning. Thus, granting review to

decide whether *Hall* is retroactive will not affect the postconviction court's determination that Petitioner is not entitled to relief.

Though he does not raise it as an independent question presented, Petitioner asserts that *Hall* forecloses the view that *Atkins* requires proof of all three prongs, and thus implies that *Jones* was wrongly decided. Pet. 29. He is incorrect. In a lone sentence, *Hall* noted that "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment," and cited medical literature for the proposition that a person who scores above 70 on an IQ test "may have such severe adaptive behavior problems . . . that the person's actual [intellectual] functioning is comparable to that of individuals with a lower IQ score." 572 U.S. at 723 (quotations omitted). That reasoning, however, is limited to how a court must evaluate a claim that the defendant meets prong one: the court cannot look solely to IQ scores and should instead consider all relevant evidence. That question—and not whether *Atkins*' three prongs were a conjunctive or disjunctive test—was the question presented in *Hall*. *See id*. at 712 ("That strict IQ score cutoff of 70 is the issue in this case.").

Jones' reading of the relationship between the intellectual disability prongs flows from *Atkins* itself, which made clear that "clinical definitions of mental retardation require *not only* subaverage intellectual functioning, *but also* significant limitations in adaptive skills." *Atkins*, 536 U.S. at 318 (emphases added); *see also Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (*Moore I*) (Roberts, C.J., dissenting) (explaining

that even though the state court erred in evaluating the adaptive behavior prong, its finding that the defendant did not meet the intellectual functioning prong "is an independent basis for its judgment"). And that is consistent with the DSM-5, which recognizes intellectual disability only when "both" intellectual and adaptive functioning deficits are present. Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013); *see also id.* (stating that "three criteria must be met," including deficits in intellectual functioning, deficits in adaptive behavior, and onset before 18).

In any event, Petitioner has not asked this Court to take up the question whether *Atkins* requires a defendant to meet all three prongs of the intellectual disability standard—he simply assumes that his view is right, and asks the Court to hold that this purported aspect of *Hall* is retroactive. That merits question is therefore not properly before the Court. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979) ("We do not normally address any issues other than those fairly comprised within the questions presented by the petition for certiorari and any cross-petitions."). Because Petitioner's intellectual disability claim is independently barred by *Jones*, the question of *Hall*'s retroactivity "is irrelevant to the ultimate outcome of the case." *See* Stephen M. Shapiro et al., Supreme Court Practice § 4.4(f) (10th ed. 2013) (observing that "certiorari may be denied" in this instance).

2. Petitioner's intellectual disability claim fails for another reason unrelated to *Hall*: At the 2018 hearing, the postconviction court acknowledged that,

under *Hall*, it could not deny Petitioner's intellectual disability claim solely because his IQ scores were at or above 70. Pet. App. 3a. It also concluded that Petitioner met the third prong—onset before age 18. *Id.* "Nonetheless, the 2018 circuit court ultimately declined to find that [Petitioner] is intellectually disabled based on its agreement with the 2006 circuit court's finding . . . that [Petitioner] failed to establish that he met the second prong of the intellectual disability standard—concurrent deficits in adaptive behavior." *Id.*

Thus, the 2018 postconviction court applied *Hall* retroactively and rejected Petitioner's claim on a ground unrelated to any IQ-score cutoff. As *Hall* requires, Petitioner was "able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." 572 U.S. at 723. Even with that evidence, the postconviction court found that Petitioner's intellectual disability claim failed.

To be sure, Petitioner argued on appeal that the postconviction court violated *Moore I*'s holding that a State, in assessing the adaptive deficits prong, must not "overemphasize[]" a defendant's "perceived adaptive strengths." 137 S. Ct. at 1050. As Petitioner points out (Pet. 27), the Florida Supreme Court declined to reach that argument because, having found that *Hall* was not retroactive and therefore that Petitioner failed at prong one, it "need not address [the] *Moore* claim." *See* Pet. App. 8a (explaining that Petitioner "cannot be found to be intellectually disabled even if he were entitled to a renewed determination on the second prong and could establish that he has deficits in adaptive behavior"

because "if a defendant fails to prove that he or she meets any one of the three prongs of the intellectual disability standard, he or she will not be found to be intellectually disabled"). But even if the Florida Supreme Court considers *Moore*'s applicability on remand, Petitioner will not be entitled to relief.

First, Petitioner's conviction became final in 1998, meaning he cannot obtain relief unless *Moore* (decided in 2017) is retroactive. Yet Petitioner says nothing of this threshold issue. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[I]f the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply [a retroactivity analysis] before considering the merits of the claim." (emphasis in original)); *Graham v. Collins*, 506 U.S. 461, 477 (1993) (refusing to reach the merits when petitioner asked for a new rule to be applied in his habeas case because any decision would not have been retroactive). He has not attempted to explain in the Florida Supreme Court—or now in this Court—why *Moore* might apply retroactively to him. Nor could he. For reasons mirroring those offered above for why *Hall* is a new rule of criminal procedure, *supra* 13–16, *Moore* likewise does not apply retroactively under *Teague*. *See, e.g.*, *Smith v. Ala. Dep't of Corr.*, 924 F.3d 1330, 1338–39 (11th Cir. 2019); *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020) (citing the "substantial and growing body of case law that has declined to apply . . . *Moore* retroactively"). And Petitioner has offered no reason to think that it would apply retroactively under Florida law either.

Second, Petitioner's claim that the postconviction court's decision contravened *Moore* was incorrect. In

Moore I, this Court held that a handful of "perceived adaptive strengths" may be "[in]adequate to overcome [] considerable objective evidence of [a defendant's] adaptive deficits." 137 S. Ct. at 1050. That is, a court cannot rely on the presence of adaptive strengths if the defendant's adaptive deficits are so great as to compel a finding that prong two is met. But in rejecting Petitioner's claims that he exhibited concurrent deficits in adaptive behavior, neither the 2006 nor 2018 postconviction courts "overemphasized" Petitioner's adaptive strengths to the exclusion of his adaptive deficits. On the contrary, those courts were hard-pressed to identify any adaptive deficits at all. The 2006 court, for example, cited just two anecdotes reported by one of Petitioner's friends: that Petitioner sometimes had trouble figuring out "which bathroom was appropriate to use" and had been asked to leave a pool because he "would swim in his clothes instead of just his underwear." Pet. App. 78a. That fell well short of the "considerable objective evidence" of adaptive deficits in *Moore*.

Against that scant evidence, the 2006 postconviction court credited the facts that Petitioner carefully planned the murder, had the wherewithal to collect shell casings at the scene, made a sophisticated effort to silence the State's witnesses, held up under police interrogation, and received "average" performance reviews and enjoyed a work history that would have been "unusual" for a person with intellectual disability. *Id*. at 76a–79a. And for its part, the Florida Supreme Court—in affirming the 2006 postconviction denial—observed that Petitioner "functioned well at home," including by paying most of his and his mother's bills and doing the majority of

household chores. *Phillips v. State*, 984 So. 2d 503, 511 (Fla. 2008). He was "described as a great son, brother, and uncle"; he "purchased a new car for his mother and a typewriter for his sister"; and he "spent a lot of time with his nieces and nephews," for instance, taking the children overnight and for ice cream. *Id*. He could drive, cook, and grocery shop, all of which were "indicative of the ability to cope with life's common demands." *Id*. The 2018 postconviction court also highlighted Petitioner's adaptive strengths insofar as those strengths illustrated that Petitioner lacked corresponding adaptive deficits, Pet. App. 30a–31a—a permissible approach.

Moore I and *II* do not preclude a state court from considering adaptive strengths, which *Moore II* acknowledges are "relevant" to the adaptive behavior inquiry. *Moore v. Texas*, 139 S. Ct. 666, 671 (2019) (*Moore II*); *see also Moore I*, 137 S. Ct. at 1059 (Roberts, C.J., dissenting) (observing that the majority opinion "suggest[s] that some—but not *too much*—consideration of strengths and prison functioning is acceptable" (emphasis in original)). Hence, *Moore* and *Hall* do not provide a basis for relitigating the 2006 postconviction court's rejection of Petitioner's intellectual disability claim, regardless whether they apply retroactively.

In short, certiorari is not warranted because a reversal here would not change the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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