No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 2020

ALPHONSO CAVE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

A CAPITAL CASE

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QUESTION PRESENTED

Must Florida apply *Hall v. Florida*, 134 S. Ct. 1986 (2014) retroactively and review a claim of intellectual disability on the merits for cases on collateral review, pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)?

RELATED PROCEEDINGS

Supreme Court of Florida:

Cave v. State, 476 So. 2d 180 (Fla. 1985)

Cave v. State, 660 So. 2d 705 (Fla. 1995)

Cave v. State, 727 So. 2d 227 (Fla. 1998)

Cave v. State, 899 So. 2d 1042 (Fla. 2005)

Cave v. State, No. SC18-1750 (Fla. June 11, 2020)

United States Court of Appeals (11th Cir.):

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992)

Cave v. Sec'y For the Dep't of Corr., 638 F.3d 739 (11th Cir. 2011)

United States District Court (S.D. Fla.):

Cave v. Dugger, No. 88-977 (S.D. Fla. August 3, 1990)

Cave v. McDonough, No. 05–14137 (S.D. Fla. Sept. 28, 2009)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Constitutional Provisions

CITATION OF OPINIONS AND ORDERS

The Florida Supreme Court's opinion which this petition seeks to challenge is cited as *Cave v. State*, No. SC18-1750 (Fla. June 11, 2020). The record in the postconviction appeal to the Florida Supreme Court will be referenced as "R" for citation purposes, preceded by the volume number and followed with the page number: (1 R 1.) The supplemental record will be referenced as "SR": (1 SR 1.) The transcript of the hearing on September 18, 2018 will be referenced as "Tr": (Tr 1.) The briefing in the postconviction appeal will be referenced by the brief's acronym, e.g. (IB at 1 (initial brief)). Mr. Cave's appendix to this petition contains the Florida Supreme Court's decision as well as its order denying his motion for rehearing and supplemental briefing.

STATEMENT OF JURISDICTION

The Florida Supreme Court's holding in this case that *Hall v. Florida*, 134 S. Ct. 1986 (2014) is not retroactive violates the Eighth and Fourteenth Amendments and the Supremacy Clause, invoking this Court's jurisdiction under 28 U.S.C. 1257(a). The Florida Supreme Court in this case issued its decision on June 11, 2020 and denied Mr. Cave's timely motion for rehearing on July 22, 2020. Under this Court's order regarding filing deadlines in light of COVID-19 filed on March 19, 2020, the deadline to file a petition for certiorari was 150 days from July 22, 2020, which in concert with Supreme Court Rule 30(1), establishes the deadline for filing this certiorari petition as December 21, 2020.

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.*

Article VI, Clause 2 of the Constitution provides:

> *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.*

INTRODUCTION

Alphonso Cave is in a class of individuals who are beyond the state or federal government's power to execute under *Hall v. Florida*, 134 S. Ct. 1986 (2014), but Mr. Cave has never been given an opportunity to have his intellectual disability ("ID") claim considered on the merits. Before *Hall* was decided, Cave had no legal basis for raising an ID claim, since his lowest obtained IQ score was a 72, above Florida's bright-line cutoff of 70. This cutoff was established by Florida statute one year prior to this Court finding that the Eighth Amendment barred the execution of a person with ID in prior to *Atkins v. Virginia*, 536 U.S. 304 (2002). *Hall*'s holding that Florida's bright-line IQ cutoff violated the Eighth Amendment for the first time created a legally-sufficient substantive ID claim for Mr. Cave. Upon *Hall* being found retroactive by the Florida Supreme Court in *Walls v. State*, 213 So. 3d 340, 346 (2016), Cave had a procedural avenue to seek relief under Florida postconviction rules, and he timely filed an *Atkins*/*Hall* claim. However, the Florida Supreme Court, a month prior to ruling on Cave's case, receded from its decision in *Walls* and concluded in *Phillips v. State* that *Hall* no longer applied retroactively, and thereby affirmed the trial court's summary denial of Cave's ID claim. *Phillips*, No. SC18-1149 (Fla. May 21, 2020); *Cave v. State*, No. SC18-1750 (Fla. June 11, 2020). To the present day, no Florida court has found, nor has the State argued, that Mr. Cave has not alleged a legally sufficient basis to establish that he is intellectually disabled. Rather, the Florida Supreme Court used its retroactivity doctrine to refuse to address the question on the merits. The Florida Supreme Court's approach here violates this Court's long-standing jurisprudence that a decision by this Court which creates a new

substantive rule, such as expanding a bar to execution to cover a wider class of individuals, must be applied retroactively to cases on collateral review, a retroactivity doctrine made applicable to the states by *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

STATEMENT OF THE CASE

I. Facts of the crime

Mr. Cave, who had no prior conviction record, was arrested and prosecuted for this murder along with three co-defendants. The four co-defendants were convicted of committing an armed robbery of a convenience store, taking the cashier with them and driving into the woods and killing her there. It is well-settled in this case, and has been acknowledged by the State, the trial court, and the Florida Supreme Court, that co-defendant Bush stabbed the victim and co-defendant Parker shot the victim in the head while Cave and co-defendant Johnson were at the car and did not participate in the homicide. *See*, *e.g.*, *Cave v. State*, 727 So. 2d 227 (Fla. 1998). Co-defendant Bush was executed in the 1980s; co-defendant Johnson was given a life sentence based on *Enmund*[1] and has been since been released on parole; and co-defendant Parker's case is pending a resentencing after his death sentence was vacated based on *Hurst v. Florida*.[2]

II. Procedural history

Cave was convicted of murder and sentenced to death in 1985, with a 7-5 jury recommendation. The Florida Supreme Court affirmed on direct appeal. *Cave v. State*, 476 So. 2d 180 (Fla. 1985). Cave was subsequently granted federal habeas corpus relief based on ineffective

[1] *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed" is improper).
[2] *Hurst v. Florida*, 136 S. Ct. 616 (2016).

assistance of counsel during the penalty phase, and his case was remanded for resentencing. *Cave v. Singletary,* 971 F.2d 1513, 1514 (11th Cir. 1992).

At resentencing in 1993, Cave was again sentenced to death, with a jury recommendation of 10-2. *Cave v. State,* 660 So. 2d 705, 706 (Fla. 1995). However, the Florida Supreme Court vacated that death sentence and remanded for resentencing due to errors arising from the trial judge's handling of Cave's motion to disqualify the judge. *Id.* at 709. At the second resentencing in 1996, the advisory jury recommended death by an 11-1 vote, and he was sentenced to death again. *See Cave v. State,* 727 So. 2d 227 (Fla. 1998).

Cave's most recent resentencing occurred in 1996, well before any law existed prohibiting the execution of the intellectually disabled, and seven years after this Court declined to find intellectual disability to be a bar to execution in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Accordingly, Cave did not attempt to prove his intellectual disability at that time, though testimony was presented regarding Cave's low IQ. (Tr 8.) Subsequently in 2001, Florida's legislature enacted F.S. 921.137, establishing a prohibition on the execution of individuals who were intellectually disabled ("ID"),[3] and the legislature imposed a strict cutoff of an IQ score at 70 or below in order to qualify. *See Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007) (analyzing the intent of the legislature in the 2001 enactment of F.S. 921.137). In 2002, this Court in *Atkins* made that ban constitutional under the Eighth Amendment, embracing the widely excepted three prongs of ID: 1) suboptimal intellectual functioning, 2) deficits in adaptive behavior, and 3) onset of both of the first two prongs prior to the age of 18. However, this Court left it up to each state to define

[3] In the original version of Florida's statute, the term *mental retardation* was used. This terminology was changed in 2013 in both the statute and in the criminal rules to use *intellectual disability* instead, consistent with the medical literature. For consistency in this brief, the term *intellectual disability* will be used throughout, referring to the law both before and after the 2013 change.

those prongs of ID, which Florida had already done in F.S. 921.137. As none of Mr. Cave's IQ scores qualified under the statute's strict cutoff of an IQ score of 70 or below, Mr. Cave had no legal basis to bring an ID claim for a period of twelve years following *Atkins*.

The legal landscape for Cave drastically changed with this Court's decision in *Hall* in 2014 to strike down Florida's bright-line cutoff as a violation of the Eighth Amendment. In *Hall*, this Court found that Florida's strict cutoff of an IQ of 70 or below as a prerequisite to raising a claim of intellectual disability violated the Eighth Amendment, because it refused to take into consideration the standard error measurement range as utilized by the medical and psychiatric professional standards governing the diagnosis of intellectual disability. 134 S. Ct. at 1194-95. The standard error measurement range for IQ scores is +/- 5 points, meaning that a person with an IQ score within 71-75 could qualify for the first prong of ID: significantly subaverage intellectual functioning. *Id.* at 1995. Thus, this Court concluded that individuals within obtained IQ scores of 71-75 could establish prong 1, and that Florida violated the Eighth Amendment by applying a 70 cutoff on that prong, rather than allowing a defendant to proceed to present evidence on all three prongs. *Id.* at 2001.

The Florida Supreme Court ruled in *Walls* in 2016 that *Hall* applied retroactively. Within one year of the court's decision,[4] Mr. Cave timely filed a postconviction motion in his trial court, raising the claim that he is intellectually disabled ("ID") under *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017),[5] and that the State of Florida is therefore barred from

[4] Florida's postconviction rules require that a claim based upon a new constitutional decision may not be brought until that decision "has been held to apply retroactively," and then it must be brought within one year of the decision holding the constitutional decision to apply retroactively. Fla. R. Crim. P. 3.851(d)(1)(B); *see Hamilton v. State*, 236 So.3d 276 (Fla. 2018).

[5] As Mr. Cave explained in his reply brief to the Florida Supreme Court in this appeal, he relied exclusively on *Hall* as his basis for filing the successive postconviction motion under Fla. R. Crim. P. 3.851, which requires that the new constitutional decision has already been found retroactive.

executing him under the Eighth Amendment.[6] In that motion, Cave emphasized that federal constitutional law required the application of *Hall* retroactively to him, quoting the following sentence from *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016): "Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." (1 R 160.)

III. Evidence of intellectual disability

To support the merits of his ID claim, Mr. Cave attached to his postconviction motion a declaration from Dr. Harry Krop supporting his petition for an evidentiary hearing to determine ID. (1 R 196-99.) Dr. Krop opined in his October 2017 declaration, within a reasonable medical certainty, that Mr. Cave is intellectually disabled. This affidavit is summarized as follows:

Significantly sub-average intellectual functioning: Dr. Krop's 2017 affidavit was made subsequent to the landmark decisions by the United States Supreme Court in *Atkins* and *Hall*, as well as subsequent to *Moore v. Texas*. (1 R 198.)

In his previous involvement in this case, on or about May 20, 1988 in preparation for the resentencing of Mr. Cave, Dr. Krop administered the Weschsler IQ test on Mr. Cave. Dr. Krop found Mr. Cave to be "functioning in the borderline range of mental retardation" and had an IQ of

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(RB at 7-8.) Mr. Cave stated that his use of *Moore v. Texas* was in further strengthening his argument against any procedural bar for not previously bringing an *Atkins* claim, i.e., that *Hall* and *Moore* had substantially changed the analysis for evaluating an ID claim that had, before *Hall*, been completely closed off to Mr. Cave. (RB 8-9.) As a finding by this Court that *Hall* is substantive and retroactive would adequately revive Mr. Cave's basis for an evidentiary hearing on his ID claim, it is unnecessary for this Court to decide the question of *Moore*'s retroactivity here.

[6] Mr. Cave also alleged he was entitled to a resentencing under *Hurst v. Florida*, 136 S. Ct. 616 (2016). This claim was denied by the trial court, and the trial court's order was affirmed on appeal by the Florida Supreme Court.

72.[7] This placed Mr. Cave in "the lower four percent of the entire population compared to all individuals." Dr. Krop opined that Mr. Cave was probably "retarded or at this level of intellectual functioning all of his life."

Dr. Krop explained in his affidavit that because he previously evaluated Cave in 1988, he did not specifically attempt to focus on "whether a diagnosis of intellectual disability was viable when the offense occurred." (1 R 196.) However, Dr. Krop reiterated that his IQ testing in 1988 demonstrated Cave had a full-scale IQ of 72 – well within the standard error measurement range for intellectual deficits discussed in the above cases. This IQ was from a Wechsler test, which continues to be "the most widely used and generally accepted form of IQ testing." (1 R 198.)

During the 35 years since the crime in this case, only three IQ tests have been administered, all prior to *Atkins* and *Hall*. One of the other two tests was conducted in 1982 by Dr. Sheldon Rifkin when Cave was 23 years old. Cave scored a full-scale IQ of 76, indicating he was functioning in the borderline range of intellectual disabilities. Dr. Rifkin's findings also indicated the "very possible presence of a learning disability." The evidence was "consistent" with Cave's self-description that he is a "slow learner." The final other IQ test was administered by Dr. Alegria in 1996, resulting in a score in the low 90s. However, Dr. Alegria opined that the raw data and the score itself "does not tell the story." Dr. Alegria explained that Cave's score may actually be lower. Dr. Alegria further explained Cave was a "follower" and Cave's academic records indicated "[v]ery poor" performance. Indeed, Dr. Alegria asked Cave the same questions Dr. Krop previously asked him, and Dr. Alegria conceded this "can be attributed to the effect of practice," which can increase an IQ score by ten points. In other words, Cave's repetition of IQ testing can

[7] Excerpts of Dr. Krop's testimony was taken from a 1988 postconviction hearing where he testified, as well as his May 23, 1988 report.

give the appearance of a higher IQ than he actually exhibits.[8] Of the three tests, Dr. Krop's 1988 IQ result of 72 is the most reliable assessment of Cave's IQ, and it fits squarely within the standard error range that was first constitutionalized in *Hall*.

Adaptive deficits: Dr. Krop's 1988 examination highlighted "areas of adaptive deficits and a history congruent with a diagnosis of intellectual disability." Dr. Krop explained that utilizing this information under the "current, post-*Hall* approach reflects that there existed adaptive deficits information in Mr. Cave's history." Mr. Cave's work history also demonstrates a lack of adaptive functioning according to Dr. Krop. He had "menial jobs" until his arrest, including kitchen boy, landscaping, and road work—all types of work that a person with an intellectual disability could carry out. As recognized by this Court in *Moore*, current medical consensus mandates that these adaptive deficits not be balanced or offset by perceived adaptive strengths exhibited by Mr. Cave, or undermined by clinically unsound attempts to determine adaptive deficits in a controlled prison environment. 137 S. Ct. at 1046, 1050. Further, Cave need only show deficits in one of the three categories: conceptual, social, practical, and practical, not deficits in all three. *Id.* at 1046.

Onset since childhood: Dr. Krop reported that Mr. Cave attended special education classes in the fifth and tenth grades. Dr. Krop found it important to note that "mild intellectual disability

[8] Mr. Cave's latest IQ score may have been artificially inflated because of the Flynn and practice effect. "The practice effect…suggest that repeated administration of the same…test can artificially inflate an individual's IQ…increases in IQ scores over time may be a product of the practice effect rather than true increases in intelligence." Natalie Pifer, The Scientific and the Social in Implementing *Atkins v. Virginia*, 41 Law & Soc. Inquiry 1036, 1039 (2016) (citations omitted). "[T]he Flynn effect suggests that IQ scores need adjusting to account for differences in when intelligence tests are normed, since population-wide shifts in average intelligence may also artificially inflate individual test results." Id. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013) ("DSM-5") ("Factors that may affect test scores include practice effects and the Flynn effect"); AAIDD-11 at 37-38.

often begins to manifest in children in the fifth or sixth grades – when education models shift away from concrete or rote learning to more abstract concepts. This history of school performance is not surprising for a person with an intellectual disability." Even in special education classes, Mr. Cave received poor grades, and after being retained in the tenth grade, he dropped out of school. Mr. Cave's history is "consistent with deficits in the conceptual, and possibly the practical and/or social domains." (1 R 197.) Dr. Krop also noted that Mr. Cave's functional academic ability "was so poor" that Dr. Krop had to verbally administer the MMPI to Mr. Cave. Additionally, Dr. Krop observed that Mr. Cave's IQ of 72 would have been consistent with his IQ prior to age 18 as well, as there was "no indication" he had an intervening factor explaining an IQ "drop" after 18. The same came be said for his adaptive deficits, which would have manifested before age 18.

Dr. Krop opined that in light of *Hall*, his prior findings "are not inconsistent with the definition of intellectual disability given by the courts in the *Hall* case." Specifically, Dr. Krop opined that (1) Mr. Cave's IQ is 72; (2) Mr. Cave's history is consistent with deficits in adaptive functioning; and (3) these were apparent before Mr. Cave was 18 years old. (1 R 199.)

IV. The Florida courts denied Mr. Cave's intellectual disability claim without reviewing it on the merits.

In response to Mr. Cave's 2017 postconviction motion, the trial court found that *Hall* applied retroactively to Mr. Cave, based upon the Florida Supreme Court's opinion so holding in *Walls*, 213 So. 3d 340. Nonetheless, the trial court summarily denied Mr. Cave's ID claim, based on its conclusion that Mr. Cave was procedurally barred from raising such a claim because he did not file an ID claim soon after this Court in 2002 decided *Atkins*, based upon the Florida Supreme Court's decision in *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016).

Mr. Cave appealed to the Florida Supreme Court. In his briefing, Mr. Cave reiterated his argument that *Hall* must be applied to him under federal constitutional law in this postconviction context:

> Walls makes clear that Hall "increase[d] the number of potential cases in which the State cannot impose the death penalty." Walls, 213 So. 3d at 346. As Walls explained, "more defendants may be eligible for relief . . . . more than just those cases in which the defendant has an IQ score of 70 or below." Id. (emphasis added). To prohibit allowing Cave to receive the benefit of Hall, based on a procedural bar with no rational application here, would be a violation of the supremacy clause, just as surely as Louisiana's refusal to apply Miller v. Alabama to life sentences mandatorily issued for juvenile homides was. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

(IB 29.) However, after the completion of the written briefing but before issuing its opinion in Mr. Cave's appeal, the Florida Supreme Court overturned its prior decision in *Walls* and decided that *Hall* was no longer retroactive. *Phillips v. State*, No. SC18-1149 (Fla. May 21, 2020). Less than one month later, the Florida Supreme Court issued its decision in Mr. Cave's case, affirming the summary denial of his ID claim based on its holding in *Phillips* that *Hall* is not retroactive. *Cave v. State*, No. SC18-1750 (Fla. June 11, 2020).[9] In his motion for rehearing, Mr. Cave focused his argument upon how the Florida Supreme Court's decision violated this Court's retroactivity holding in *Montgomery*, 136 S. Ct. 718. The Florida Supreme Court denied that motion on July 22, 2020. Given the basis for its holding, the Florida Supreme Court made no ruling on whether Mr. Cave had presented a facially sufficient claim under *Hall* for the three prongs of ID, and the State never argued that his claim is not legally sufficient on the merits to entitle Mr. Cave to an evidentiary hearing.[10]

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[9] The majority opinion did not mention the procedural bar issue relied upon by the trial court, though a concurring in result opinion by Justice Labarga took the position that the procedural bar should be applied against Mr. Cave; however, Justice Labarga did not join the majority because he believed that *Phillips* wrongly decided the retroactivity of *Hall*. *Cave v. State*, No. SC18-1750 (Fla. June 11, 2020) (slip op. at 4).

[10] *See*, *e.g.*, State's answer brief to the Florida Supreme Court. (AB at 8-12.)

This petition for certiorari timely follows.

ARGUMENT – REASONS FOR GRANTING THE PETITION

I. Legal framework for deciding whether *Hall* is substantive or procedural.

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court implemented the governing retroactivity analysis as to decisions establishing new rules for cases on collateral review.[11] In *Teague*, this Court established the general principle that cases which announce a new rule[12] do not apply retroactively to cases already final at the time of the new decision, but the Court carved out two exceptions to that general rule: 1) decisions which establish a new substantive rule, and 2) decisions which establish a new procedural rule that "implicate[s] the fundamental fairness of [a] trial" and without which there is "an impermissibly large risk that the innocent will be convicted." *Id.* at 311-12. While the states may apply a retroactivity doctrine that is more generous to defendants than that afforded in *Teague*, *see Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), this Court has established two retroactivity applications that are federally mandated upon the states. First, in *Griffith v. Kentucky*, this Court held that states must apply new decisions retroactively to cases pending on direct appeal, and second, in *Montgomery*, this Court held that state courts must apply retroactively to collateral cases new decisions which fall into *Teague*'s substantive category. *Griffith*, 479 U.S. 314 (1987).

A few months after *Teague*, this Court decided *Penry v. Lynaugh*, 492 U.S. 309 (1989), a capital case raising on collateral review an Eighth Amendment challenge to the execution of a person who is intellectual disabled. As a threshold issue, this Court addressed *Teague*'s

[11] Two years prior in *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court held that all decisions establishing new constitutional rules must be applied retroactively to cases pending on direct appeal, based on "basic norms of constitutional adjudication" and to preserve "the integrity of judicial review." *Id.* at 322-23.

[12] This Court stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

retroactivity holding and the "substantive" exception, concluding that, "if we held, as a substantive matter, that the Eight Amendment prohibits the execution of mentally retarded persons . . ., such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review." *Id.* at 330. This Court in *Penry* ultimately concluded that the Eighth Amendment did not bar the execution of the intellectually disabled, but this conclusion was reversed seven years later in *Atkins*, which established a constitutional bar to the execution of persons with ID. Although this Court has not addressed the retroactivity of *Atkins*, based on *Teague* and *Penry*, lower courts have nearly universally accepted *Atkins* retroactivity as a new substantive decision under the Eighth Amendment. *See*, *e.g.*, *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). *Hall* built upon and expanded *Atkins*' Eighth Amendment restriction upon the states in an important and substantive way that expanded the category of persons who are exempt from execution because of their intellectual disability, and thus should be found to be a new substantive decision and apply retroactively. The time is ripe for this Court to decide the retroactivity of *Hall* under the *Teague*/*Penry* framework.

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016), this Court held that the Supremacy Clause of the Constitution requires state courts to apply "substantive" constitutional rules retroactively as a matter of federal constitutional law, notwithstanding any separate state-law retroactivity analysis. In *Montgomery*, a Louisiana state prisoner filed a claim in state court seeking retroactive application of the rule announced in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that imposition of mandatory sentences of life without parole on juveniles violates the Eighth Amendment). The state court denied the prisoner's claim on the ground that *Miller* was not retroactive as a matter of state retroactivity law. *Montgomery*, 136 S. Ct. at 727. This Court

reversed that decision, holding that because the *Miller* rule was substantive as a matter of federal law, the state court was obligated to apply it retroactively. *See id.* at 732-34.

In concluding that *Miller* was a substantive holding, this Court explained, "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within a category of persons whom the law may no longer punish," *id.* at 735, and that requiring the necessary procedures do not "transform substantive rules into procedural ones." *Id. Miller*'s substantive holding was to bar life without parole except for that narrow class of juveniles who are irreparably incorrigible, rather than those with crimes that "reflect transient immaturity," *id.* at 734, a holding which built upon and expanded *Graham v. Florida*, 560 U.S. 48 (2010), which barred life without parole for juveniles for non-homicide offenses. *See also Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (finding its decision to be substantive and thus retroactive in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held unconstitutional various aspects of the Armed Career Criminal Act based on lack of notice, arbitrariness, and vagueness, reasoning: "[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule.").

II. Lower courts have split on whether *Hall* is retroactive.

In the *Hall* decision, this Court noted three states that had explicitly adopted a strict 70 IQ cutoff as Florida had,[13] and another five states with statutes "which could be interpreted to provide a bright-line cutoff leading to the same result."[14] 134 S. Ct. at 1996. The dissent in *Hall* argued

[13] Ky. Rev. Stat. Ann. §532.130(2) (Lexis Supp. 2013); *Bowling v. Commonwealth*, 163 S. W. 3d 361, 375 (Ky. 2005); Va. Code Ann. §19.2–264.3:1.1 (Lexis Supp. 2013); *Johnson v. Commonwealth*, 267 Va. 53, 75, 591 S. E. 2d 47, 59 (2004), vacated and remanded on other grounds, 544 U. S. 901 (2005); *Smith v. State*, 71 So. 3d 12, 20 (Ala. Crim. App. 2008) ("The Alabama Supreme Court . . . did not adopt any 'margin of error' when examining a defendant's IQ score").

[14] Ariz. Rev. Stat. Ann. §13–753(F) (West 2013); Del. Code Ann. Tit. 11, §4209(d)(3) (2012 Supp.); Kan. Stat. Ann. §76–12b01 (2013 Supp.); N. C. Gen. Stat. Ann. §15A–2005 (Lexis 2013);

that one additional state should be added to that list, raising the total number of states with potentially a strict 70 IQ cutoff at ten.[15] *Id.* at 2004 (Alito, J., dissenting).

Given that significant number of states, it was inevitable that the question of *Hall*'s retroactivity would be raised in collateral cases in multiple jurisdictions. Over the past six years, the federal and state courts have come to conflicting results as to the answer of the retroactivity question. In the federal circuits, the Eleventh Circuit has explicitly held that *Hall* is procedural rather than substantive and does not apply retroactively, whereas the Tenth Circuit found that *Hall* does apply retroactively because it is not a new rule at all, but merely an application of Atkins. *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301 (11th Cir. 2015); *Smith v. Sharp*, 935 F.3d 1064, 1083–85 (10th Cir. 2019). Further, multiple federal circuits have denied successive collateral challenges based upon *Hall* under 28 U.S.C. 2244, a statute which requires that, prior to filing a successive habeas, this Court must have explicitly held that the new decision was retroactive, or that retroactivity was "logically dictated" by this Court's precedent, as held by *Tyler v. Cain*, 533 U.S. 656 (2001). *See In re Richardson*, No. 19-6514 (4th Cir. June 2, 2020); *In re Payne*, 722 F. App'x. 534, 539 (6th Cir. 2018); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014). While these cases do not constitute holdings that *Hall* is not retroactive, they are noted as illustrative of the confusion that an absence of a clear holding from this Court allows among the intermediate federal courts. The Fifth Circuit has considered yet another approach, considering whether an ID claim may be brought more than one year after *Atkins* under 28 U.S.C. 2244, based on a finding that *Atkins* was previously "unavailable" to the defendant because of a strict 70 IQ cutoff. *See*,

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Wash. Rev. Code §10.95.030(2)(c) (2012).

[15] *See* Idaho Code §19–2515A(1)(b) (Lexis Cum. Supp. 2013); *Pizzuto v. State*, 146 Idaho 720, 729, 202 P. 3d 642, 651 (2008).

e.g., *Johnson v. Davis* (*In re Johnson*), 935 F.3d 284 (5th Cir. 2019); *Cathey v. Davis* (*In re Cathey*), 857 F.3d 221 (5th Cir. 2017).

In state courts, Kentucky is the one state that currently holds that *Hall* is substantive and thus retroactive. *Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). Besides Florida's current holding, Tennessee and Ohio have also found that *Hall* is procedural and not retroactive. *Payne v. State*, 493 S.W.3d 478, 489–91 (Tenn. 2016); *State v. Jackson*, 2020 Ohio 4015 (Ohio App. 2020).

Finally, last term this Court denied at least three certiorari petitions seeking to address *Hall* and/or *Moore*'s retroactivity from courts outside of Florida. *Sharp v. Smith*, No. 19-1106 (Oklahoma seeking to challenge the Tenth Circuit's holding that *Moore* and *Hall* were retroactive); *Smith v. Dunn*, No. 19-7745 (Smith seeking to challenge the Eleventh Circuit's holding that *Hall* was not retroactive); *Keen v. Tennessee*, No. 19-7369 (Payne seeking to challenge Tennessee's postconviction procedural rules which do not allow an avenue to raise an ID claim in a successive petition, regardless of whether *Hall* and/or *Atkins* are retroactive).

In short, the lower courts have clearly divided on the retroactivity of *Hall*, and a decision by this Court to grant certiorari here and resolve that question would provide a great deal of clarity to the convoluted approaches being followed across various jurisdictions, most notably in Florida.

III. Morass in Florida jurisprudence

Florida has failed to consistently apply a retroactivity principle to *Hall*. In *Walls* (2016), the Florida Supreme Court found that *Hall* was substantive and retroactive, but four years later that court reversed course in *Phillips* (2020). Between issuing *Walls* and *Phillips*, the Florida Supreme Court applied *Hall* retroactively in at least twelve cases to require a merits review of a defendant's collateral ID challenge, not including in the case of Freddie Hall himself, which was in collateral review when this Court issued its decision and when the Florida Supreme Court

granted relief on remand.[16] During that period of accepting *Hall*'s retroactivity, the Florida Supreme Court nonetheless crafted a procedural bar that defendants who had not timely raised an ID claim after *Atkins* were barred from raising a claim post-*Hall*, even if those defendants had no legal basis to establish prong 1 of ID until after *Hall*. In four cases, the Florida Supreme Court applied that procedural bar.[17] Finally, after the Florida Supreme Court reversed its retroactivity decision in *Phillips* in May of this year, it applied that decision to refuse merits review on ID claims in four other cases, including Mr. Cave's.[18]

This type of course reversal raises exactly the kind of equitable concerns that this Court considered when attempting to create a clear retroactivity rule in *Teague*, and Florida jurisprudence would benefit greatly by this Court accepting jurisdiction in this case and resolving the question of *Hall*'s retroactivity. *See Teague*, 489 U.S. at 305 (plurality opinion) (trying to avoid the "unfortunate disparity in the treatment of similarly situated defendants on collateral review"). Under Florida postconviction law, a holding by this Court that Florida must apply *Hall* retroactively, and that a procedural bar cannot be applied against those who did not bring an *Atkins* claim pre-*Hall*, would permit those nine Florida death row inmates mentioned above to finally achieve a merits consideration for their ID claims, Fla. R. Crim. P. 3.851(d)(2)(B), and would

[16] *Walls v. State*, 213 So. 3d 340, 346 (2016); *Thompson v. State*, 208 So. 3d 49 (Fla. 2016); *Cherry v. Jones*, 208 So.3d 701 (Fla. 2016); *Oats v. Jones*, 220 So.3d 1127 (Fla. 2017); *Zack v. State*, 228 So. 3d 41 (Fla. 2017); *Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017); *Herring v. State*, No. SC15-1562 (Fla. Mar. 31, 2017); *Franqui v. State*, 211 So.3d 1026 (Fla. 2017); *Nixon v. State*, No. SC15-2309 (Fla. Feb. 3, 2017); *Jones v. State*, 231 So.3d 374 (Fla. 2017); *Quince v. State*, 241 So.3d 58 (Fla. 2018); *Foster v. State*, 260 So.3d 174 (Fla. 2018); *Hall v. State*, 201 So. 3d 628 (Fla. 2016).
[17] *Rodriguez v. State*, 250 So. 3d 616, 616 (Fla. 2016); *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018); *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018); *Bowles v. State*, 276 So. 3d 791, 794-95 (Fla. 2019).
[18] *Lawrence v. State*, SC18-1172 (decided June 11, 2020); *Pooler v. State*, No. SC18-2024 (Fla. July 2, 2020); *Freeman v. State*, No. SC19-1532 (Fla. Aug. 13, 2020). A petition for certiorari is currently pending before this Court in *Lawrence v. Florida*, No. 20-6307.

remedy the arbitrary distinctions created among inmates by the Florida Supreme Court's inconsistent jurisprudence regarding *Hall*'s retroactivity and its unfounded application of this procedural bar.

IV. The Florida Supreme Court's decision that *Hall* is not retroactive and its *Rodriguez* procedural bar violate the federal constitution.

In its decision in Mr. Cave's case, the Florida Supreme Court ruled against his ID claim in a two-sentence paragraph, citing to *Phillips*' retroactivity holding without providing further explanation. (Sl. Op. 3.) Thus, Mr. Cave will focus his critique here on the analysis provided in *Phillips*.

A. The Florida Supreme Court wrongly concluded that *Hall* established a procedural rule.

In *Walls*, the Florida Supreme Court found that *Hall* was substantive and retroactive because "increase[d] the number of potential cases in which the State cannot impose the death penalty." 213 So. 3d at 346. In particular, the court explained, *Hall* redefined the universe of individuals ineligible for the death penalty by "plac[ing] beyond the State of Florida the power to impose ... the sentence of death for individuals within a broader range of IQ scores than before." *Id.*

In *Phillips*, the Florida Supreme Court reinterpreted the nature of *Hall*'s holding regarding the constitutional invalidity of that strict 70 cutoff, this time concluding that the holding was merely procedural rather than substantive. *Id.* at 14-15. The court drew this conclusion by asserting that *Hall* did not create a new class of persons protected from a particular punishment (e.g., juveniles from death; juvenile non-homicide offenders from life without parole; the intellectually disabled from death), but rather redefined an element of a previously-established protected constitutional category. *Id.* at 13. The court stated that "intellectually disabled defendants with IQ scores above 70 are not a distinct class from intellectually disabled persons with IQ scores of 70

or below." *Id.* The court concluded that "*Hall*'s limited procedural rule does nothing more than provide certain defendants—those within the test's margin of error—with the opportunity to present additional evidence of intellectual disability." *Id.* at 15.

This analysis demonstrates an incorrect understanding of this Court's jurisprudence defining the nature of a new substantive decision,[19] as well as a misunderstanding of the holding of *Hall* itself. The Florida Supreme Court's assumption that a decision by this Court regarding an Eighth Amendment ban cannot be substantive unless it creates a brand-new category or class of persons protected from a type of punishment draws no support from this Court's substantive/procedural jurisprudence. If the Florida Supreme Court's conclusion were correct, no decision by this Court expanding a punishment ban, or restricting the state's ability to prohibit certain conduct, could be substantive unless it was the first decision to deal with that category. Thus, if this Court in *Hall* had eliminated prong 1 altogether as an element which a defendant must prove in order to establish ID as a bar to execution, widely enlarging the class of persons who would qualify for ID, under *Phillips* this would still be a procedural holding that need not be applied retroactively. *C.f.*, *Hall*, 134 S. Ct. at 2009 (Alito, J., dissenting) ("A defendant who does not display significantly subaverage intellectual functioning is therefore not among the *class* of defendants we identified in Atkins." (emphasis added). This cannot be a correct understanding of *Teague*'s holding defining new substantive rules, and this Court could utilize this case to re-

[19] Mr. Cave's position that *Hall* qualifies as a "new rule" under *Teague* is consistent on that point with the Florida Supreme Court. *Teague*, 489 U.S. at 301 (This Court stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."). *Hall* fits squarely into this category, as it imposed a restriction upon the states as to the definition of prong 1 of ID, whereas *Atkins* left the work of defining ID up to the states. *See Hall*, 134 S. Ct. at 2002, 2008 (Alito, J., dissenting) (*Atkins* left the definition of ID up to the states but *Hall* was a "sea change" that "overrules" *Atkins* and "sharply departs" from prior Eighth Amendment precedent).

emphasize that a new decision that redefines an element of an exemption from a specific punishment and expands that class of protected persons is substantive and retroactive.

Part of the confusion by the Florida Supreme Court stems from the wording of this Court's opinion in *Hall*, in declaring that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [+/-5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. The Florida Supreme Court interpreted this to mean that *Hall* merely afforded a defendant the procedural right of receiving an evidentiary hearing on prongs 2 and 3, but the court did not thoroughly explicate what type of change *Hall* required for Florida's substantive definition of prong 1.

Hall's holding cannot reasonably be concluded as to make no change to the threshold required for prong 1 and merely granting an evidentiary hearing as a consolation prize before relief would be eventually denied for not having an IQ score of 70 or below. On the contrary, there seem to be two ways to interpret *Hall*'s statement quoted above, either of which should result in a conclusion that its holding is substantive. First, *Hall*'s holding is that reliable IQ scores within the 71-75 range must be found to satisfy prong 1 of ID, either standing alone or along with additional evidence specifically as to deficient *intellectual* functioning (prong 1). If prong 1 is satisfied in that manner, then a defendant must be allowed to attempt to prove prongs 2 and 3 at an evidentiary hearing. The other available interpretation of *Hall*'s statement regarding the right to a hearing on prongs 2 and 3 would be that *Hall* fundamentally changed the nature of the interaction of the three prongs of ID, changing them from being elements which must all be individually proven into become some sort of balancing test of factors or a sliding scale, such that the failure to conclusively prove prong 1 of deficient intellectual functioning is not fatal for an ID claim, if the defendant has

particularly strong evidence of adaptive functioning.[20] Under either of these interpretations of *Hall*'s holding, or a combination of both, it must be concluded that these are substantive changes to the elements of the Eighth Amendment ID exemption and thus must by applied retroactively by Florida under *Teague* and *Montgomery*.

Florida's strict IQ cutoff was not a procedural rule analogous to relaxing hearsay provisions or even adjusting the burden of proof. When *Hall* constitutionally required that Florida permit an inmate with an IQ up to 75 to prove intellectual deficiency under prong 1, this Court changed the element of what must be proven. Under Florida law at the time, a low IQ score of 71 or above created essentially an irrebuttable presumption that the person did not satisfy prong 1 and thus was not ID. An irrebuttable presumption is not a procedural rule but a rule of law,[21] and what matters in the retroactivity analysis is not how a court labels its new decision but rather how that new rule actually functions in the current scheme. *See Welch*, 136 S. Ct. at 1265 (2016) ("[T]his Court has determined whether a new rule is substantive or procedural by considering the function of the rule."). Just as this Court concluded regarding *Miller*'s holding as to non-incorrigible juveniles in *Montgomery* and regarding *Johnson*'s holding as to recidivism enhancers in *Welch*, so should this

[20] For example, Florida initially seemed to adopt an understanding that both of those interpretations were involved in *Hall*'s holding. *See Walls*, 213 So. 3d at 346-47 ("In applying *Hall* to Florida, we have recognized the Supreme Court's mandate that all three prongs of the intellectual disability test be considered in tandem and that the conjunctive and interrelated nature of the test requires no single factor to be considered dispositive. *Oats* [*v. State*], 181 So.3d [457,] 459, 467 [(Fla. 2015)] (citing *Hall*, 134 S.Ct. at 2001; *Brumfield v. Cain*, ––U.S. ––––, 135 S.Ct. 2269, 2278–82, 192 L.Ed.2d 356 (2015)."). The Florida Supreme Court later receded from this analysis *Salazar v. State*, finding: "If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled." 188 So. 3d 799, 812 (Fla. 2016).

[21] *See* Richard Eggleston, *Evidence, Proof and Probability* 92 (1978) ("Conclusive presumptions, sometimes called irrebuttable presumptions of law, are really rules of law. Thus it is said that a child under the age of fourteen years is conclusively presumed to be incapable of committing rape. This is only another way of saying that such a child cannot be found guilty of rape.").

Court find that *Hall*'s expansion of prong 1 to enlarge the class of defendants protected under the Eighth Amendment is substantive and retroactive.

B. Florida's decision to apply a procedural bar to prevent a defendant from raising a claim based upon a new constitutional rule that the states must apply retroactively violates *Montgomery*.

In *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), while *Hall* was still considered retroactive in Florida, the Florida Supreme Court affirmed the summary denial of a *Hall* ID claim because the inmate did not raise an ID claim in 2002 - 2004,[22] despite him not having a qualifying IQ score under Florida law at that time. This procedural bar was applied in three other cases while *Hall* was still considered retroactive in Florida,[23] and it was referenced once more as an alternative basis for denying an ID evidentiary hearing after Florida had reversed its position on *Hall*'s retroactivity.[24] While the majority in Cave's case did not reference the procedural/time bar, a concurring opinion which rejected *Phillips*' conclusion on *Hall*'s retroactivity nonetheless agreed that Cave's ID claim should be summarily denied because of the *Rodriguez* procedural bar. *Cave*, No. SC18-1750 (Labarga, J., concurring in result) (sl. op. at 4).

In the event that the State argues here that Florida's decision in Mr. Cave's case is supported by an independent state law basis of the procedural bar, despite it not being referenced in the majority opinion, Mr. Cave addresses the constitutional violation that applying that bar creates. As an initial matter, this *Rodriguez* bar, which applies a procedural bar to deny any meaningful access to a decision of this Court held to be retroactive, is without precedent in Florida jurisprudence, and is unquestionably not a procedural bar that is consistently applied in the Florida

[22] When Florida adopted Florida Rule of Criminal Procedure 3.203 on October 1, 2004, which established the procedures for raising an ID claim, it required than any ID claim in pending cases must be raised within sixty days of that date.
[23] *Harvey v. State*, 260 So. 3d 906, 907 (Fla. 2018); *Blanco v. State*, 249 So. 3d 536, 537 (Fla. 2018); *Bowles v. State*, 276 So. 3d 791, 794-95 (Fla. 2019).
[24] *Freeman v. State*, No. SC19-1532 (Fla. Aug. 13, 2020).

courts.[25] Mr. Cave would argue that applying that procedural/time bar to his claim under *Hall*'s new substantive rule would violate *Montgomery* just as a full denial of retroactivity would, because it functions essentially the same. Justice Sotomayor made this point persuasively in her statement regarding the denial of certiorari in *Bowles v. Florida*:

> This case implicates important questions related to this Court's decision in *Hall v. Florida*, 572 U. S. 701 (2014). *Hall* invalidated a Florida law categorically prohibiting intellectually disabled death-row prisoners with IQs above 70 from raising successful claims under *Atkins v. Virginia*, 536 U. S. 304 (2002). Later, the Florida Supreme Court held that Hall was retroactive. *Walls v. State*, 213 So. 3d 340, 346 (2016). With one hand, the Florida Supreme Court recognized that such intellectually disabled prisoners sentenced before *Hall* have a right to challenge their executions on collateral review. With the other hand, however, the Florida Supreme Court has turned away prisoners seeking to vindicate this retroactive constitutional rule for the first time, by requiring them to have brought their *Hall* claims in 2004—a full decade before *Hall* itself was decided. See, e.g., 2019 WL 3789971, *2 (Aug. 13, 2019) (case below); *Harvey v. State*, 260 So. 3d 906, 907 (2018); *Blanco v. State*, 249 So. 3d 536, 537 (2018); *Rodriguez v. State*, 250 So. 3d 616 (2016). This Kafkaesque procedural rule is at odds with another Florida rule requiring counsel raising an intellectual-disability claim to have a "good faith" basis to believe that a death-sentenced client is intellectually disabled (presumably under the limited definition of intellectual disability that Florida had then imposed). Fla. Rule Crim. Proc. 3.203(d)(4)(A) (Supp. 2004). The time-bar rule also creates grave tension with this Court's guidance in *Montgomery v. Louisiana*, 577 U. S. ___ (2016).
>
> This petition, however, does not squarely present the concerns addressed in *Montgomery*. Instead, the questions presented challenge Florida's procedural rule requiring certain post-Hall claims to have been brought in 2004 solely under the Eighth Amendment. Because I do not believe that the questions as presented merit this Court's review at this time, I do not disagree with the denial of certiorari. In an appropriate case, however, I would be prepared to revisit a challenge to Florida's procedural rule.

No. 19-5617 (19A183) (Aug. 22, 2019). As Cave's petition focuses upon *Montgomery* for his argument that Florida's summary denial of his ID claim violates the Eighth Amendment, this case

[25] In Mr. Cave's initial brief to the Florida Supreme Court in this case, he provided a survey of prior cases which the Florida Supreme Court had found retroactive and demonstrated that the court had never before raised this type of a procedural bar against claims not raised prior to the decision establishing the new rule. (IB at 16-28.)

presents an ample opportunity for this Court to address Florida's problematic and illogical procedural rule.

V. Mr. Cave's case is a solid vehicle for this Court to rule upon *Hall*'s retroactivity.

Mr. Cave's petition for certiorari presents an excellent opportunity for this Court to address the jurisprudential issues raised above. The substantive Eighth Amendment claims regarding the Florida Supreme Court's retroactivity decision and procedural bar are well preserved in the Florida trial court and Florida Supreme Court, as is the argument that these positions violate *Montgomery v. Louisiana*. Mr. Cave has a compelling claim of intellectual disability on the merits, as supported by the affidavit of Dr. Harry Krop, and his lowest obtained IQ score fits him squarely into that category of persons who lacked a legal basis for ID under past Florida law but who were included within the substantive changes to prong 1 of ID that *Hall* created. Finally, Mr. Cave brought a timely *Hall* claim under Florida postconviction rules, and thus his case does not involve complicated questions of AEDPA deference or defaulted claims under valid and established state postconviction rules (as distinguished from the recently-invented *Rodriguez* bar). In order to provide clarity to the retroactive application of *Hall* nationwide, to remedy the inequities created by the Florida Supreme Court's disparate *Hall* jurisprudence and unfounded *Rodriguez* bar, and to address the inequity of Mr. Cave being forever denied his basic right to have the Florida courts consider his ID claim on the merits, Mr. Cave petitions this Court to grant certiorari in his case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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