No. 20-6947

IN THE

Supreme Court of the United States

ALPHONSO CAVE,

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

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STATEMENT

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

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

After the Rule 3.203(d)(4) window for filing a postconviction intellectual disability claim had closed,

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

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

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

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

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

2. On April 26, 1982, Petitioner Alphonso Cave and three accomplices drove to a convenience store in Stuart, Florida. *Cave v. State*, 476 So. 2d 180, 183 (Fla. 1985). Petitioner and two of the men entered the store where Petitioner held a handgun on the youthful clerk and demanded the store's cash. *Id.* The clerk surrendered the cash, and then was taken from the store and put in the back seat of the car. *Id.* The men drove her to a rural area approximately 13 miles

away. *Id.* There, one of the men stabbed the victim and another shot her in the back of the head, killing her. *Id.* Though he now implies (Pet. 3) that he played a passive role in the murder, the trial court found that Petitioner was the "ringleader." *Cave v. State*, 727 So. 2d 227, 229 (Fla. 1998).

Petitioner was convicted of first-degree murder and sentenced to death. His conviction and sentence were affirmed on direct appeal, *Cave v. State*, 476 So. 2d 180 (Fla. 1985), but a federal court granted him a new penalty phase in 1992 due to ineffective assistance of counsel. *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992). He was resentenced to death in 1993, though he was awarded yet another resentencing on direct appeal due to the trial court's error in denying Petitioner's recusal motion. *Cave v. State*, 660 So. 2d 705 (Fla. 1995).

Petitioner's most recent resentencing occurred in 1996. He was sentenced to death, and the Florida Supreme Court affirmed the sentence on direct appeal in 1998. *Cave*, 727 So. 2d 227. At no time before *Hall* was decided in 2014 did he argue that the Eighth Amendment barred his sentence of death due to his intellectual disability. Indeed, even after Florida adopted Rule 3.203(d)(4) and provided capital defendants 60 days to raise *Atkins* claims, Petitioner declined to do so.

3. In 2017—after this Court's decision in *Hall* and within a year of the Florida Supreme Court's decision in *Walls*—Petitioner filed a successive state postconviction motion. R. 149–94; *see also* R. 238–62 (first amended motion); R. 292–320 (second amended motion). In it, he alleged for the first time that he was

intellectually disabled and was thus entitled to relief under *Atkins* and *Hall*. R. 294. In support, he filed an affidavit from a defense expert, Dr. Harry Krop, who claimed that he had administered the WAIS-R test to Petitioner in 1988 and that Petitioner's IQ score was 72. R. 196–99. Dr. Krop had opined at the time that Petitioner was merely in the "lower end of the Borderline intellectual range," but noted in his 2017 declaration that his assessment was reached "before *Atkins* and [] *Hall*." R. 199. At a hearing on the postconviction motion, defense counsel reported that the WAIS-R had also been administered by two other doctors in 1982 and 1996, resulting in scores of 76 and 94, respectively. Tr. 9/18/18 at 8.

The postconviction court denied Petitioner's motion without an evidentiary hearing, concluding that the motion was time-barred because Petitioner failed to file an *Atkins* claim within the window opened by Rule 3.203(d)(4). R. 358.

Petitioner appealed to the Florida Supreme Court. That court affirmed. Pet. App. 3. Rather than address the procedural bar, it found that Petitioner's intellectual disability claim failed on the merits because "*Hall* does not apply retroactively" under its recent decision in *Phillips*. *Id*. Justice Labarga concurred in the result. *Id*. at 4–5. Though he disagreed with the court's retroactivity analysis, he agreed with the postconviction court that Petitioner's claim was time barred due to Petitioner's failure to file within the time limit in Rule 3.203(d)(4). *Id*. at 4.

REASONS FOR DENYING THE PETITION

Petitioner contends that *Hall* announced a new substantive rule that must be applied retroactively by state courts under *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Pet. ii. Certiorari is inappropriate for three reasons. First, Petitioner's case is a poor vehicle for considering the question presented. Second, the lower courts are not intractably split on the issue. And third, the Florida Supreme Court properly held that *Hall* did not announce a new substantive rule.

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

To start, Petitioner's claim is not a good vehicle to consider his question presented because Petitioner's intellectual disability claim fails for a different reason: As the circuit court ruled, and as Justice Labarga explained in his concurring opinion, Petitioner did not raise his claim within the time limit prescribed in Rule 3.203(d)(4). Pet. App. 4. Rather, Petitioner first raised his claim of intellectual disability in 2017—35 years after his conviction, 18 years after his current sentence became final, 16 years after this Court's decision in *Atkins*, and 3 years after this Court decided *Hall*. Given that protracted and inexcusable delay, the state postconviction court properly ruled that Petitioner has forfeited his intellectual disability claim under state law, *Bowles v. State*, 276 So. 3d 791, 795 (Fla. 2019), *cert. denied sub nom. Bowles v. Florida*, 140 S. Ct. 2589 (2019), making the retroactivity issue "academic" and non-dispositive in his case. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari should not

be granted when the "problem" is only "academic"); *see also* Stephen M. Shapiro et al., Supreme Court Practice § 4.4(f) (10th ed. 2013) (observing that "certiorari may be denied" where the question presented "is irrelevant to the ultimate outcome of the case").

Anticipating this defect in his case, Petitioner argues (Pet. 22) 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." And though he does not raise the procedural-bar issue as a standalone question presented, *see* Pet. ii, he asks the Court to address it. That request fails for several reasons.

First, Petitioner does not elaborate on the contours of his *Montgomery* claim—he merely asserts that *Montgomery* forbids a State from requiring that *Atkins* claims be brought in an orderly and timely fashion. *See* Pet. 21–23.[2] His conclusory arguments are insufficient to properly present the question for review. *See* Sup. Ct. R. 14.1(h) (petition shall contain "[a] direct and concise argument amplifying the

[2] In support of his argument, Petitioner cites only Justice Sotomayor's statement respecting the denial of certiorari in *Bowles v. Florida*, 140 S. Ct. 2589 (2019). That statement opined that Florida's *Atkins* time-bar rule "creates grave *tension* with this Court's guidance in *Montgomery*." *Id.* (Sotomayor, J., statement respecting the denial of certiorari) (emphasis added). However, the petition in *Bowles* did "not squarely present" that issue; Justice Sotomayor did not purport to reach any conclusion as to whether any such tension was irreconcilable with *Montgomery*; the statement did not identify or address the arguments that might support any such conclusion; and no other member of the Court joined that statement. *See id.*

reasons relied on for allowance of the writ"). What is more, Petitioner did not raise this claim in the postconviction court. *See* R. 299–302 (arguing that Petitioner's motion was timely for reasons unrelated to *Montgomery* or retroactivity); Tr. 9/18/18 at 5–18, 29–39 (same). His argument to that tribunal was that he had "good cause" for not timely filing an *Atkins* claim because he believed that, under Florida law as it stood at the time, any such claim would have been futile. *See* R. 300–02. In fact, Petitioner offered no federal constitutional basis at all for his view that the procedural bar did not apply to him.[3] Thus, his *Montgomery*-based argument is unpreserved for review. *See Cardinale v. Louisiana*, 394 U.S. 437, 438–39 (1969) (dismissing after certiorari was granted because "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below").

Second, Petitioner does not allege that there is a split of authority among the state courts of last resort

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[3] In his briefs to the Florida Supreme Court, Petitioner argued in a single sentence that "[t]o 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 homicides was. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)." Initial Br., *Cave v. State*, No. SC18-1750, at *29 (Dec. 27, 2018). He did not explain that argument further. As a matter of Florida law, such vague arguments are insufficient to preserve an appellate issue. *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (holding that a "failure to fully brief and argue" a point "constitutes a waiver"); *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990) (holding that "[m]erely making reference to arguments . . . without further elucidation does not suffice to preserve issues").

or the federal courts of appeals on whether a time bar to an intellectual disability claim violates *Montgomery* when the law at the time made the claim unlikely to succeed. *See* Sup. Ct. R. 10(b).

Third, the procedural-bar argument Petitioner *did* preserve in the postconviction court—that Petitioner "can't be faulted" for failing to timely file an *Atkins* claim because he "didn't have a legally valid claim [in 2004] under Florida law," Tr. 9/18/18 at 30–31; *see also id.* at 33 (alleging that Petitioner had "shown cause"); R. 300–02 (arguing that he had "good cause" for not filing in 2004 because his claim would have failed under state law at that time)—does not excuse his procedural default. This Court grants the States "substantial deference" in crafting postconviction rules. *Medina v. California*, 505 U.S. 437, 446 (1992); *accord Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009). As a result, federal courts generally "may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. Petitioner bears the burden of making this showing. *Id.* at 71. He cannot do so here.

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

This Court has also recognized that timeliness is vital in the postconviction context. *See Ryan v. Schad*, 570 U.S. 521, 523 n.2, 526 n.3 (2013) (suggesting that a motion to vacate based on *Martinez v. Ryan*, 566 U.S. 1 (2012), which had been decided about four months before the motion was filed, was dilatory without an explanation for the delay). The Court has even held in a case challenging death-penalty procedures that federal courts "can and should protect settled state judgments from undue interference by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quotations omitted). These holdings recognize that timeliness is vital to achieving "finality," which is "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality op.).

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

Federal cases reviewing state postconviction proceedings exemplify this principle. In *Engle v.*

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

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

In any event, even if Petitioner were right on the law, he is wrong on the facts. He asserted before the postconviction court that his claim was futile—and thus that he had "good cause" for not timely filing—because Florida barred an intellectual disability claim premised on an above-70 IQ score when Rule 3.203(d)(4)'s time limit expired on November 30, 2004. R. 300–02. But the Florida Supreme Court did not construe "intellectual disability" under Florida law to

contain a strict 70-cutoff until July 2005. *See Zack*, 911 So. 2d at 1201.[4] That holding was a key development, because Section 921.137, "[o]n its face," "could be interpreted" to "tak[e] into account the IQ test's standard error of measurement." *Hall*, 572 U.S. at 711. What is more, the Court found "evidence that Florida's Legislature intended to include the measurement error in the calculation." *Id.* So when Petitioner's time limit expired, no Florida Supreme Court precedent held that a claim based an above-70 IQ score would fail; on the contrary, Section 921.137's text and history suggested that a defendant within the SEM could establish intellectual disability under Florida law. *Id.*

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

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

defendants raised this exact claim and filed within the time limit. *Id.*; *Hall*, 109 So. 3d at 707–09.

Because Petitioner's postconviction motion failed under state law for reasons that have nothing to do with *Hall*'s retroactivity, the Court should decline review.

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

Even if this case were a suitable vehicle for resolving whether *Hall* announced a new substantive rule, the lopsided conflict Petitioner asserts (Pet. 13–15) as to that issue does not warrant this Court's review.

Nearly every court that has addressed the issue has agreed with the decision below and either held or opined 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 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"). Petitioner points to only two courts—the Supreme Court of Kentucky and the Tenth Circuit—that have purportedly come out the other way. Pet. 14–15. But neither gives rise to the kind of split that calls for this Court's review.

Petitioner identifies only one state court of last resort that has held that state postconviction courts must apply *Hall* retroactively. Pet. 15; *see 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)). In *White*, the Supreme Court of Kentucky summarily concluded that *Hall* "does not deal with criminal procedure," imposed "'a substantive restriction on the State's power to take the life'" of individuals suffering from intellectual disabilities, and "must be retroactively applied." 500 S.W.3d at 215.

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

decision before this Court is asked to resolve a conflict arising out of *White*.

Petitioner also relies (Pet. 14) on *Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019), but the Tenth Circuit did not hold there that state postconviction courts are required to apply *Hall* retroactively. Instead, the Tenth Circuit reviewed de novo a federal district court's conclusion concerning the propriety of federal habeas relief. *Id.* at 1069, 1085. In assessing that issue, the Tenth Circuit considered whether, under Oklahoma's implementation of *Atkins*, Smith was intellectually disabled because he "ha[d] significant limitations in adaptive functioning in at least two of the nine listed skill areas." *Id.* at 1083. In so doing, the court assessed "whether the Supreme Court's recent applications of *Atkins* 'are novel.'" *Id.* (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)).

The court concluded that *Hall*, *Moore I*,[5] and *Moore II*[6] did not state new rules but instead that they applied a general rule set forth in *Atkins*, and thus that they could not be understood to "yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* at 1084 (quoting *Chaidez*, 568 U.S. at 348). Although the court relied on some statements in *Hall* in reaching this conclusion, it did not apply *Hall* to Smith's case. It merely applied *Moore I* and *Moore II*, "which directly address the adaptive functioning component of the clinical definitions that *Atkins* mandated," in determining whether Smith "suffered deficits in at least two areas of adaptive functioning." *Id.* at 1085. *Hall*'s rule that States must account for

[5] *Moore v. Texas*, 137 S. Ct. 1039 (2017).
[6] *Moore v. Texas*, 139 S. Ct. 666 (2019).

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.

At any rate, any conflict among the lower courts does not warrant this Court's 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 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.

C. The decision below is correct.

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

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

First, *Hall* announced a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis omitted). As the Eleventh Circuit has explained, "[f]or the first time in *Hall*, the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014). Indeed, the Court pointed out in *Hall* that while its precedents were instructive, "the inquiry must go further." 572 U.S. at 721. And "[n]othing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff." *Henry*, 757 F.3d at 1159. Justice Alito's dissent (joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas) also supports the conclusion that *Hall* announced a new rule. *See Beard v. Banks*, 542 U.S. 406, 414 (2004) (indicating that a result is not dictated by precedent if "reasonable jurists could have differed as to whether [precedent] compelled" the result). In Justice Alito's view, the Court's approach "mark[ed] a new and most unwise turn in [the Court's] Eighth Amendment case law" that "cannot be reconciled with the framework prescribed by our Eighth Amendment cases." 572 U.S. at 725 (Alito, J., dissenting).

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

Indeed, by its terms, *Hall* requires merely that a State "take into account the standard error of measurement" by allowing a capital defendant "the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." 572 U.S. at 724. That is, Florida's IQ cutoff was defective because it "bar[red] further

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

consideration of other evidence bearing on the question of intellectual disability." *Id.* at 714. That error in deciding "how intellectual disability should be measured and assessed" meant that Florida had failed to "develo[p] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *id.* at 719 (quoting *Atkins*, 536 U.S. at 317) (internal quotation marks omitted)—a classic procedural defect.

Petitioner nonetheless insists that *Hall* is retroactive. He argues, for example, that *Hall* announced a new substantive rule because it purportedly "redefined the universe of individuals ineligible for the death penalty." Pet. 17. That is incorrect. *Atkins* protects every individual who is intellectually disabled, while *Hall* simply prevents States from using a particular procedure, which the Court deemed inappropriate, when determining whether an individual falls into that class. *See, e.g.*, *Hall*, 572 U.S. at 723 (concluding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"); *see also id.* at 724 (Alito, J., dissenting) (observing that *Hall* "mandate[s] the use of a *single method* for identifying" persons with intellectual disability (emphasis added)); *id.* at 727 (referring to "the procedure now at issue"). In other words, despite Petitioner's claim to the contrary, "*Hall* did not expand the class of individuals protected by *Atkins*'s prohibition." *Kilgore*, 805 F.3d at 1314. As the Florida Supreme Court explained in *Phillips*, although *Hall*'s procedural change "may have had

some effect on the likelihood that capital punishment would be imposed," it "did not render 'a certain penalty unconstitutionally excessive for a category of offenders.'" *Phillips*, 299 So. 3d at 1322.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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