

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*

REPLY BRIEF FOR PETITIONER

A CAPITAL CASE

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
ARGUMENT IN REPLY	1
<u>I.</u> This case presents a strong vehicle for addressing <i>Hall</i> 's retroactivity under <i>Montgomery</i> .1	
A. This Court could grant certiorari here and rule on the retroactivity of <i>Hall</i> without regard to Florida's <i>Rodriguez</i> bar which was not applied in this case.....	2
B. This Court could grant certiorari to also address the subsidiary issue of the constitutionality of Florida's <i>Rodriguez</i> bar.....	4
<u>II.</u> The lower courts have split on whether <i>Hall</i> is retroactive..... 6	
<u>III.</u> <i>Hall</i> is substantive and must be applied retroactively by Florida under <i>Montgomery</i> 9	
<u>IV.</u> Conclusion..... 11	

TABLE OF AUTHORITIES

Cases

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	1, 4, 7, 10
<i>Blanco v. Florida</i> , 139 S. Ct. 1546 (2019).....	2
<i>Bowles v. Florida</i> , 140 S. Ct. 2589 (2019)	9, 12
<i>Chaidez v U.S.</i> , 133 S. Ct. 1103 (2013)	8, 11
<i>Cave v. State</i> , 299 So. 3d 352 (Fla. 2020).....	1
<i>Cave v. State</i> , 727 So. 2d 227 (Fla. 1998).....	12
<i>Cherry v. State</i> , 959 So. 2d 702 (Fla. 2007)	4
<i>Freeman v. Florida</i> , No. 20-6879, pending before this Court.....	2
<i>Freeman v. State</i> , 300 So. 3d 591 (Fla. 2020)	1
<i>Goodwin v. Steele</i> , 814 F.3d 901 (8th Cir. 2014)	7, 9
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	passim
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987).....	3
<i>Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n</i> , 426 U.S. 482 (1976)	4
<i>Hurst v. Florida</i> , 136 S. Ct. 616 (2016).....	4
<i>In re Payne</i> , 722 F. App'x 534 (6th Cir. 2018).....	6, 7
<i>In re Richardson</i> , No. 19-6514 (4th Cir. June 2, 2020).....	7
<i>James v. State</i> , 615 So. 2d 668 (Fla. 1993).....	4
<i>Johnson v. Davis (In re Johnson)</i> , 935 F.3d 284 (5th Cir. 2019)	7
<i>Johnson v. Lee</i> , 136 S. Ct. 1802 (2016)	3
<i>Jones v. Mississippi</i> , 141 S. Ct. 1307 (2021).....	9, 10
<i>Kelley v. Secretary for Dept. of Corr.</i> , 377 F.3d 1317 (11th Cir. 2004).....	6
<i>Kilgore v. Sec'y, Fla. Dep't of Corr.</i> , 805 F.3d 1301 (11th Cir. 2015)	7, 9

<i>Lawrence v. Florida</i> , No. 20-6307, pending before this Court.....	2
<i>Lawrence v. State</i> , 296 So. 3d 892 (Fla. 2020)	1
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965).....	8
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978)	4
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	3
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	passim
<i>Moore v. Texas</i> , 137 S. Ct. 1039 (2017)	6, 7
<i>Nixon v. State</i> , 2 So. 3d 137 (Fla. 2009)	4
<i>Payne v. State</i> , 493 S.W.3d 478 (Tenn. 2016).....	7
<i>Phillips v. Florida</i> , No. 20-6887, pending before this Court.....	2
<i>Phillips v. State</i> , 299 So. 3d 1013 (Fla. 2020)	1, 2
<i>Pooler v. Florida</i> , No. 20-7228, pending before this Court	2
<i>Pooler v. State</i> , 302 So. 3d 744 (Fla. 2020)	1
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	5
<i>Rodriguez v. State</i> , 250 So. 3d 616 (Fla. 2016)	passim
<i>Saffle v. Parks</i> , 494 U.S. 484 (1999).....	10
<i>Sawyer v Smith</i> , 497 US 227 (1990)	8
<i>Schiro v. Summerlin</i> , 542 U.S. 348 (2004)	8
<i>Smith v. Sharp</i> , 935 F.3d 1064 (10th Cir. 2019)	7
<i>State v. Ford</i> , 158 Ohio St. 3d 139 (2019).....	6, 7
<i>State v. Jackson</i> , 157 N.E.3d 240 (Ohio Ct. App. 2020)	6
<i>Stewart v LaGrand</i> , 526 U.S. 115 (1999)	10
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967)	8
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	8, 10
<i>Thompson v. Dugger</i> , 515 So. 2d 173 (Fla. 1987).....	3

<i>Tyler v. Cain</i> , 533 U.S. 656 (2001).....	6
<i>Walker v. Martin</i> , 562 U.S. 307 (2011)	3
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016).....	8, 9
<i>Whorton v. Bockting</i> , 549 U.S. 406 (2007).....	8
<i>Williams v. Kelley</i> , 858 F.3d 464 (8th Cir. 2017)	6
<i>Witt v. State</i> , 387 So. 2d 922 (Fla. 1980)	4
<i>Woodall v. Commonwealth</i> , 563 S.W.3d 1 (2018)	7

Statutes

28 U.S.C. 2244.....	6, 7
Fla. Stat. § 921.137	4

Rules

Fla. R. Crim. P. 3.203	4
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ARGUMENT IN REPLY

I. This case presents a strong vehicle for addressing *Hall*'s retroactivity under *Montgomery*.

The State focuses its argument, that Mr. Cave's case is not an appropriate one for granting certiorari, upon a state procedural bar which the Florida Supreme Court majority opinion never addressed or relied upon in Mr. Cave's case. (BIO 6-13.)¹ The procedural bar proposed by the State is based on *Rodriguez v. State*, 250 So. 3d 616 (Fla. 2016), where the Florida Supreme Court barred Rodriguez from raising a claim of intellectual disability ("ID") because he missed a prior opportunity to litigate the issue following *Atkins v. Virginia*, 536 U.S. 304 (2002). In Mr. Cave's appeal, the State advanced this procedural bar argument under *Rodriguez* to the Florida Supreme Court (no argument was made that *Hall v. Florida*, 572 U.S. 701 (2014) was not retroactive) (AB 8-12), and Mr. Cave spent considerable attention in his briefing arguing against the application of the procedural bar given the facts and circumstances of his case. However, the Florida Supreme Court's opinion did not discuss the State's proposed bar under *Rodriguez*, and based its ruling upon its recent opinion in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), finding that *Hall* is not retroactive.^{2,3}

¹ The State's brief in opposition before this Court will be referenced as (BIO 1), and Mr. Cave's certiorari petition will be referenced as (Cert 1). The briefing in the postconviction appeal will be referenced by the brief's acronym, e.g. (IB 1 (initial brief).)

² Justice Labarga wrote a concurring opinion, joined by no other members of the court, taking the position that *Hall v. Florida*, 572 U.S. 701 (2014) was retroactive but that relief should nevertheless be denied to Mr. Cave based on the *Rodriguez* bar. *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020).

³ In 2020, the Florida Supreme Court issued its decision in *Phillips v. State*, 299 So. 3d 1013, and then followed that decision in four other cases, including Mr. Cave's, to affirm summary denials of postconviction motions brought raising *Hall v. Florida*. *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020); *Pooler v. State*, 302 So. 3d 744 (Fla. 2020); *Freeman v. State*, 300 So. 3d 591 (Fla. 2020). All four of those cases following *Phillips* involved *Hall* claims where no *Atkins* claim had been previously raised, but the Florida Supreme Court only mentioned the *Rodriguez* bar as an

A. This Court could grant certiorari here and rule on the retroactivity of *Hall* without regard to Florida's *Rodriguez* bar which was not applied in this case.

The State appears to suggest that if this Court were to grant certiorari and vacate the Florida Supreme Court's decision based on a finding that *Hall* is retroactive under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Florida Supreme Court would nonetheless refuse to provide Mr. Cave an evidentiary hearing on the merits of his ID claim by imposing the *Rodriguez* procedural bar, which the Florida Supreme Court had the opportunity to address but ignored in issuing Mr. Cave's opinion. The State argues that this would render a decision by this Court in this case "academic and non-dispositive." (BIO 6.) The State's argument is speculative. Even if this Court were to issue a holding only on the retroactivity of *Hall* and not address the *Rodriguez* bar (since it was not actually applied to Mr. Cave in the last reasoned opinion in this case), the Florida Supreme Court would have to reckon with how a finding that *Hall* must be applied retroactively under the Supremacy Clause (as opposed to merely state retroactivity jurisprudence) undermines the rationale and logic that it relied upon in deciding *Rodriguez*.

Further, even if the Florida Supreme Court had partially based its decision on the *Rodriguez* procedural bar, it would not defeat this Court's jurisdiction to reach the issue of *Hall*'s retroactivity. The State's brief avoids engaging Mr. Cave's argument that the *Rodriguez* procedural

alternative basis for its decision in *Freeman*. All four of those cases, in addition to *Phillips*, currently have certiorari petitions pending before this Court, though the petition in *Pooler* raises only a *Hurst v. Florida* issue and not the *Hall* issue. *Lawrence v. Florida*, No. 20-6307 (arguing that *Montgomery* requires the retroactive application of *Hall*); *Freeman v. Florida*, No. 20-6879 (arguing that due process requires the retroactive application of *Hall* to *Freeman*); *Pooler v. Florida*, No. 20-7228 (raising a *Hurst* claim); *Phillips v. Florida*, No. 20-6887 (arguing that *Hall* is not a new rule under *Teague*). The *Rodriguez* bar was also raised in prior terms in two other certiorari petitions denied by this Court. *Blanco v. Florida*, 139 S. Ct. 1546 (2019) (certiorari denied on Apr. 15, 2019); *Bowles v. Florida*, 140 S. Ct. 2589 (2019) (certiorari denied on Aug. 22, 2019).

bar is not an independent and adequate state law ground. (Cert 21-22.) For the independence prong, this Court held in *Michigan v. Long*, 463 U.S. 1032 (1983):

[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. Here, the *Rodriguez* bar cannot be analyzed independently from the question of *Hall*'s holding and if it was substantive or procedural in nature, because that conclusion is intertwined with whether Mr. Cave had cause for not bringing an ID claim prior to *Hall*.

As to the “adequate” prong, state rules qualify as adequate if they are “firmly established and regularly followed.” *Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016) (internal citations omitted); *see also Walker v. Martin*, 562 U.S. 307, 320 (2011) (state procedural ground may be inadequate where discretion is used “to impose novel and unforeseeable requirements without fair or substantial support in prior state law”). The *Rodriguez* bar does not come close to meeting this standard. In Mr. Cave’s briefing to the Florida Supreme Court, he provided a survey of Florida retroactivity decisions stretching back decades, to demonstrate that the Florida Supreme Court never previously ruled that the retroactive application of a new constitutional decision hinged upon whether the defendant had made the same argument before the judicial opinion announcing the new rule. *See Thompson v. Dugger*, 515 So. 2d 173, 175 (Fla. 1987) (finding that *Hitchcock v. Dugger*, 481 U.S. 393 (1987) “represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat the claim of a procedural default.”); (IB 16-28 (examining Florida Supreme Court retroactivity decisions under *Witt v. State*, 387 So. 2d 922 (Fla.

1980) regarding *Lockett v. Ohio*, 438 U.S. 586 (1978), *Hitchcock*, 481 U.S. 393, *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Atkins v. Virginia*).)⁴

B. This Court could grant certiorari to also address the subsidiary issue of the constitutionality of Florida's *Rodriguez* bar.

However, if this Court determines that the *Rodriguez* bar itself is ripe for review, this Court could use Mr. Cave's case to examine its constitutional viability. Mr. Cave's case presents an ideal factual basis to scrutinize the constitutionality of *Rodriguez* because Mr. Cave had received an IQ score prior to the time that *Atkins* was issued that qualified him for an ID claim under *Hall* but not under Florida's prior strict 70 IQ cutoff.

The State argues that Mr. Cave should have brought a claim after *Atkins* by the deadline of December 2004 set by Fla. R. Crim. P. 3.203, because it argues that the strict 70 IQ cutoff was not established until *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). (AB 11-13.) The State's analysis of Florida law is incorrect. When the Florida legislature statutorily imposed its prohibition of the execution of intellectually disabled persons in 2001 in F.S. 921.137, it considered, but *rejected*, the standard error measurement range, imposing instead a strict cutoff of an IQ of 70 or below. The Florida Supreme Court reached this conclusion regarding F.S. 921.137 in 2007 in *Cherry v. State*, 959 So. 2d 702, 712-14, and that court is the ultimate arbiter of the law in Florida. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (This Court is generally "bound to accept the interpretation of the State's law by the highest court of the State.")

⁴ In *James v. State*, 615 So. 2d 668 (Fla. 1993), the Florida Supreme Court did not find *Espinosa v. Florida*, 505 U.S. 1079 (1992) retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980), but it nevertheless permitted defendants who preserved the argument in their prior trial and appeals to raise an *Espinosa* challenge under Florida's doctrine of fundamental fairness. *James* is a unique application in Florida jurisprudence of fundamental fairness, and its holding has come under scrutiny recently from the Florida Supreme Court. *See, e.g., Owen v. State*, SC18-810 (Apr. 24, 2019) (ordering full briefing upon whether, among other issues, the Florida Supreme Court should recede from *James v. State*).

(internal citation omitted); *Ring v. Arizona*, 536 U.S. 584, 603 (2002) (abandoning its prior construction of Arizona’s capital statute due to a later Arizona Supreme Court decision stating that this Court’s prior construction was in error, based on a recognition that “the Arizona court’s construction of the State’s own law is authoritative”). The State’s reliance on dicta from *Hall* discussing the intent of the Florida legislature in 2001 (BIO 12), to the extent that such dicta is inconsistent with the Florida Supreme Court’s opinion in *Cherry*, is misguided and unpersuasive here.

Further, contrary to the State’s argument (BIO 7-8), Mr. Cave adequately made the argument to both the Florida Supreme Court and in his certiorari petition here that the holding of *Montgomery* dictates that the *Rodriguez* bar violates the Supremacy Clause. In his initial brief to the Florida Supreme Court, Mr. Cave had an entire section entitled “Legal/constitutional problems with imposing a procedural bar against Mr. Cave in order to prevent his ID claim from ever being heard on the merits.” (IB 28-31.) The first subsection was entitled “Supremacy Clause,” in which Mr. Cave explicitly presented his argument that the *Rodriguez* bar was unconstitutional under *Montgomery*. (IB 29.) The State never argued in its answer brief that the *Montgomery* argument was not preserved for the Florida Supreme Court’s consideration. (AB 8-12.) After the Florida Supreme Court issued its decision with a concurring opinion referencing the *Rodriguez* bar, Mr. Cave filed a “Motion for Rehearing and Supplemental Briefing,” due to the Florida Supreme Court deciding his case on retroactivity despite that the parties had not focused on that issue given the governing caselaw in place at the time finding *Hall* retroactive. In that motion, Mr. Cave again elaborated on the ways in which the *Rodriguez* ban violates a finding under *Montgomery* that *Hall* is retroactive. (Motion 3-5.) Mr. Cave made the Florida Supreme Court well aware of his argument that its denial of a hearing on the merits of his ID claim, whether through a general finding of the

non-retroactivity of *Hall*, or through the application of the *Rodriguez* bar, would violate federal constitutional law as set forth in *Montgomery*. *C.f., Kelley v. Secretary for Dept. of Corr.*, 377 F.3d 1317 (11th Cir. 2004) (an issue is exhausted if “the reasonable reader would understand [the] claim’s particular legal basis and specific factual foundation” to be the same as it was presented in state court). The State seems to take the position that Mr. Cave’s argument on this point does not meet a certain length or complexity, but this is not the standard for preservation in the state court nor for requesting this Court to grant certiorari to fully consider the matter on the merits.

II. The lower courts have split on whether *Hall* is retroactive.

The State asserts that there is a “lopsided” conflict regarding *Hall*’s retroactivity, implying that various jurisdiction have largely “held or opined” that *Hall* does not apply retroactively on collateral review. (BIO 13.) However, the State overinflates the “lopsided” nature of the current conflict by incorrectly categorizing at least one case as determining *Hall*’s nonretroactivity when, in actuality, the case reached a more modest conclusion that this Court has not yet ruled on *Hall*’s retroactivity, or that *Hall*’s retroactivity is not “logically dictated” under *Tyler v. Cain*, 533 U.S. 656 (2001). (BIO 13 (citing *In re Payne*, 722 F. App’x 534 (6th Cir. 2018) (analyzing under *Tyler* for 2244 purposes).⁵ Additionally, the State cites to an intermediate appellate court decision in Ohio for its statement regarding the “body of caselaw” that has found *Hall* nonretroactive. (BIO 13 (citing *State v. Jackson*, 157 N.E.3d 240 (Ohio Ct. App. 2020); (Cert 15.) However, that decision itself followed the Ohio Supreme Court’s decision in *State v. Ford*, 158 Ohio St. 3d 139 (2019), in which that court overruled the prior standard in Ohio for ID, relying on *Hall* and *Moore v. Texas*,

⁵ *Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017) also involved analysis under 2244 as to whether Williams had made a prima facie showing under 2244 that this Court had held that *Hall* is retroactive, but the opinion does contain the additional assertion (arguably dicta) that *Hall* is procedural rather than substantive, relying on a similar statement in another 2244 analysis in *Goodwin v. Steel*, 814 F.3d 901, 904 (8th Cir. 2014). (BIO 13.)

137 S. Ct. 1039 (2017). Despite Ford’s case being in the postconviction posture, the Ohio Supreme Court applied *Hall* and *Moore* to his case without conducting an explicit retroactivity analysis, and it approvingly cited the Kentucky Supreme Court’s holding on the merits in *Woodall v. Commonwealth*, 563 S.W.3d 1 (2018), a decision which additionally found *Hall* to be retroactive.

With those distinctions noted, Mr. Cave and the State are otherwise largely in agreement regarding the existence of conflicted and varying approaches by the lower courts to analyzing the application of *Hall* to cases that were in collateral posture at the time *Hall* was issued.

Case Citation	Jurisdiction & Year	Holding
<i>Kilgore v. Sec'y, Fla. Dep't of Corr.</i> , 805 F.3d 1301 (11th Cir. 2015)	CA11 – 2015	<i>Hall</i> is new but not substantive and thus not retroactive.
<i>Smith v. Sharp</i> , 935 F.3d 1064, 1083–85 (10th Cir. 2019)	CA10 – 2019	<i>Hall</i> is not new so it applies to cases on collateral review.
<i>Payne v. State</i> , 493 S.W.3d 478 (Tenn. 2016)	TN – 2016	<i>Hall</i> is not retroactive.
<i>In re Richardson</i> , No. 19-6514 (4th Cir. June 2, 2020)	CA4 - 2020	Denied 28 U.S.C. 2244 because retroactivity not logically dictated by <i>Hall</i>
<i>In re Payne</i> , 722 F. App'x. 534, 539 (6th Cir. 2018)	CA6 - 2018	Denied 28 U.S.C. 2244 because retroactivity not logically dictated by <i>Hall</i> , and concluding that <i>Hall</i> is not retroactive
<i>Goodwin v. Steele</i> , 814 F.3d 901, 904 (8th Cir. 2014)	CA8 - 2014	Denied 28 U.S.C. 2244 because retroactivity not logically dictated by <i>Hall</i> , and concluding that <i>Hall</i> is procedural
<i>Woodall v. Commonwealth</i> , 563 S.W.3d 1 (Ky. 2018)	Ky. - 2018	<i>Hall</i> is new and substantive and applies retroactively.
<i>Phillips v. State</i> , 299 So. 3d 1013 (Fla. 2020)	Fla. - 2020	<i>Hall</i> is new but not substantive and not retroactive.
<i>State v. Ford</i> , 2019-Ohio-4539, ¶ 1, 158 Ohio St. 3d 139, 139, 140 N.E.3d 616, 641	Ohio - 2019	Without explicit retroactivity analysis, applied <i>Hall</i> (and <i>Moore</i>) retroactively on collateral review
<i>Johnson v. Davis (In re Johnson)</i> , 935 F.3d 284 (5th Cir. 2019)	CA5 - 2019	Considered whether an ID claim may be brought more than one year after <i>Atkins</i> under 28 U.S.C. 2244, based on a finding that <i>Atkins</i> was previously “unavailable” to the defendant because of a strict 70 IQ cutoff

Despite this range of conclusions stretching over the past seven years since *Hall* was issued, the State asserts that “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.” (BIO 16.) However, the seven years that have already passed is a substantial amount of time, longer than many of the other important post-*Teague* retroactivity decisions this Court has entered. *Teague v. Lane*, 489 U.S. 288, 315 (1989); *see, e.g., Welch v. United States*, 136 S. Ct. 1257 (2016) (ruling on retroactivity of *Johnson v. United States*, 135 S. Ct. 2551 (2015)); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (ruling on retroactivity of *Miller v. Alabama*, 567 U.S. 460 (2012)); *Chaidez v. U.S.*, 133 S. Ct. 1103 (2013) (ruling on retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010)); *Whorton v. Bockting*, 549 U.S. 406 (2007) (ruling on retroactivity of *Crawford v. Washington*, 541 U.S. 36 (2004)); *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004) (ruling on retroactivity of *Ring v. Arizona*, 536 U.S. 584, 603 (2002)); *Lambrrix v. Singletary*, 520 U.S. 518 (1997) (ruling on retroactivity of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *Sawyer v. Smith*, 497 US 227 (1990) (ruling on retroactivity of *Caldwell v. Mississippi*, 472 US 320 (1985)).

Further, the post-*Teague* retroactivity analysis of whether a decision is substantive or procedural does not benefit from an extraordinarily lengthy period of “percolation.” Unlike the previous retroactivity analysis under *Stovall/Linkletter*,⁶ which required consideration of the likely empirical effect of retroactive application of a new decision upon the administration of justice nationwide, deciding the retroactivity of *Hall* necessitates no empirical concerns but rather abstract legal reasoning regarding the nature of this Court’s own holding in *Hall*. Sufficient abstract reasoning has been conducted at this point in the lower courts, and the day has arrived for this

⁶ *Stovall v. Denno*, 388 U.S. 293 (1967); *Linkletter v. Walker*, 381 U.S. 618 (1965).

Court to address *Hall*'s retroactivity. In the capital context, where delay in ruling upon *Hall*'s retroactivity results in some jurisdictions granting relief and postconviction challenges under *Hall*, and other jurisdictions executing those who this Court might now find were covered by *Hall* all along, it is urgent that this Court grant certiorari to resolve this discrete but important criminal justice issue. *See, e.g., Goodwin v. Steele*, 814 F.3d 901, 904-06 (8th Cir. 2014) (Paul Goodwin was executed on December 10, 2014.); *Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Gary Ray Bowles was executed on August 22, 2019.).

III. *Hall* is substantive and must be applied retroactively by Florida under *Montgomery*.

The State's brief lifts superficially helpful quotes from *Hall* itself and from the Eleventh Circuit's decision in *Kilgore*, 805 F.3d 1301 (BIO 18-20), but engages very little with the core of *Hall*'s holding. In his certiorari petition, Mr. Cave argued that *Hall* must stand for one of the following propositions, all of which are substantive: 1) individuals with IQs between 71 and 75 can establish Prong 1 of ID; 2) that the three prongs of ID are interrelated and that the failure to prove Prong 1 is not fatal if the individual has strong proof of Prongs 2 and/or 3; or 3) some combination of these two propositions. (Cert 19-20.) Mr. Cave argued that under any of these three readings, *Hall* must be found to be substantive, as it changed the elements necessary for establishing ID. (Cert 20.) The State's brief makes no attempt to refute this argument. There is no coherent reading of the entire opinion in *Hall*, which allows for a purely procedural interpretation of its holding. *See Jones v. Mississippi*, 141 S. Ct. 1307 n.4 (2021) ("As the Court has stated in cases both before and after *Montgomery*, the Court determines whether a rule is substantive or procedural for retroactivity purposes 'by considering the function of the rule' itself—not 'by asking whether the constitutional right underlying the new rule is substantive or procedural.' *Welch v. United States*, 578 U. S. 120, 130-131, 136 S. Ct. 1257, 194 L. Ed. 2d 387

(2016.”); *Montgomery*, 136 S. Ct. at 734 (a new decision can have a “procedural component” that is necessary to “implement a substantive guarantee,” as was the case in *Atkins* itself).⁷

In its argument that Mr. Cave is procedurally barred for not arguing the constitutional holding of *Hall* a decade prior to this Court’s decision, the State cites to Freddie Hall himself as an exemplar for continuing to make constitutional arguments that have previously been rejected by the courts. (BIO 11.) The procedural posture of *Hall* is important to consider here, given that *Hall* was decided on collateral review, which under *Teague* requires that this Court viewed *Hall*’s decision as applicable to all other defendants in collateral posture, either as being substantive, a watershed procedural rule, or as not a new rule at all. *Teague*, 489 U.S. at 315 (“We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.”); *see Saffle v. Parks*, 494 U.S. 484 (1999) (finding new a rule that Parks urged regarding violation of Eighth Amendment to tell jury not to consider sympathy in capital sentencing to be nonretroactive, since his case was in collateral review); *Stewart v LaGrand*, 526 U.S. 115 (1999) (refusing to hold in collateral review that Eighth Amendment claims cannot be waived in capital cases because it would create and apply a new procedural rule in violation of *Teague*); *Gray v Netherland*, 518 U.S. 152 (1996) (defendant not entitled to bring “notice-of-evidence” capital sentencing claim in collateral review because it would require

⁷ In *Jones v. Mississippi*, this Court left undisturbed and unquestioned *Montgomery*’s holding that new substantive constitutional rules from this Court must be applied retroactively by the states under the Supremacy Clause. 141 S. Ct. 1307 n.4 (2021). To the extent that this Court’s statement regarding potential tension between *Montgomery*’s *Teague* analysis and this Court’s other recent retroactivity jurisprudence, this Court could grant certiorari here to provide additional guidance for lower courts in applying *Teague* moving forward.

adoption of a new constitutional rule that would not fit into one of *Teague*'s two exceptions); *but see Chaidez v. United States*, 568 U.S. 342 (2013) (finding the new *Strickland* rule announced in collateral review in *Padilla v. Kentucky*, 559 U.S. 356 (2010) to not be retroactive under *Teague*). To the extent that *Chaidez* is inconsistent with this strain of *Teague* cases, and perhaps represents a proper acknowledgement that some constitutional advancements can only be made as a practical matter in collateral review, granting certiorari in this case would present this Court with an opportunity to elucidate this aspect of its *Teague* doctrine in the context of *Hall*.

IV. Conclusion

As to the facts of the crime, the State quotes a line from the sentencing judge that Mr. Cave was allegedly a “ringleader” in the robbery (BIO 4), but the State does not contest Mr. Cave’s assertion in his certiorari petition that the Florida courts have long recognized that he was not the person who stabbed or shot the victim. (Cert 3.) Further, the dissenting opinion in the direct appeal of Mr. Cave’s death sentence decisively critiques the assertion that Mr. Cave was a “ringleader” in any sense:

On the contrary, however, the record does not contain evidence that Cave planned this murder at all. Rather, the facts appear to show that Cave was a minion who agreed to participate in the robbery, following orders from at least one of the two prior convicted felons, Bush and Parker. That he immediately turned the gun over to Bush and Parker in the front seat upon returning to the car appears to confirm his subordinate status.

* * *

Further, it appears to defy common sense that Cave, a person with no prior criminal history, was somehow the “ringleader” of a group that included Bush, a felon previously convicted of robbery and rape, and another felon, Parker, previously convicted of accessory to armed robbery. It is also difficult to square with this Court’s prior, explicit determination that “Bush played a predominant role in this crime.” *Bush v. State*, 682 So. 2d 85, 87 (Fla. 1996). Bush’s car was used throughout the criminal episode; the gun used to rob and eventually kill the victim belonged to Bush; and Bush allowed Cave alone to expose himself to possible identification and apprehension during the robbery, while he and the others waited safely in the car. Thus, Bush apparently determined where they would go and what

they would do with the innocent victim, presumably in league with Parker, who sat next to Bush in the front passenger's seat and later joined Bush in executing the victim.

Cave v. State, 727 So. 2d 227, 235 (Fla. 1998) (Anstead, J., dissenting).

Since Mr. Cave filed his 2017 postconviction motion alleging his intellectual disability under *Hall* based upon his IQ score of 72, the State has never once (including in its brief in opposition to this Court) suggested that Mr. Cave has not adequately pled a factual basis to establish all three prongs of ID under *Hall*. Rather, the State has argued retroactivity doctrines and a “Kafkaesque” procedural bar to attempt to avoid any court from providing Mr. Cave a hearing on the merits of his ID claim. *See Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., Statement respecting the denial of certiorari). For the sake of assuring the opportunity for a fair hearing on the merits of his Eighth Amendment for Mr. Cave, as well as for providing guidance to courts nationwide regarding the retroactivity of this Court’s seven-year-old *Hall* decision, certiorari should be granted here.

Respectfully submitted,

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