No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. LOTTER,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari
To The Nebraska Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED
CAPITAL CASE

Atkins v. Virginia, 536 U.S. 304 (2002), decided that the Eighth Amendment "places a substantive restriction on the State's power to take the life" of an individual with an intellectual disability. *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Twice since *Atkins*, this Court has answered questions regarding "how intellectual disability should be measured and assessed" by States exercising their "discretion to define the full scope of the constitutional protection." *Hall v. Florida*, 572 U.S. 701, 719 (2014). The Court first rejected a rule that had treated anyone with a score over 70 on an IQ test as someone who "does not have an intellectual disability" and that had "barred" the person "from presenting other evidence that would show his faculties are limited." *Id.* at 711–12. The Court subsequently decided that "[t]he medical community's current standards supply one constraint on States' leeway" to define intellectual disability and, in particular, the "adaptive functioning" criterion for such a disability. *Moore v. Texas*, 137 S. Ct. 1039, 1050–53 (2017) (*Moore I*).

Lower courts have diverged in three different ways when applying this Court's federal retroactivity rules to both *Hall* and *Moore I*. The decision below joined one group of courts that view both cases as having "adopted new procedures" that do not apply retroactively. App. 28a. That is at odds with a second approach, which applies both *Hall* and *Moore I* retroactively after having explained that the former was substantive—not procedural—because it altered how to define a class of people who are subject to a prohibition on capital punishment. And these two approaches are at odds with a third that treats *Hall* and *Moore I* as old rules that were dictated by *Atkins* and, as a result, can apply retroactively.

The question presented is: Did *Hall* and *Moore I* announce new substantive rules of federal constitutional law that apply retroactively to cases on collateral review?

PARTIES TO THE PROCEEDING

John Lotter was the defendant/petitioner in the proceedings below. The State of Nebraska was the plaintiff/respondent in those proceedings.

RELATED PROCEEDINGS

Nebraska Supreme Court:

- *State v. Lotter*, Nos. S-17-325, S-17-338, S-17-339, S-17-1126, S-17-1127, S-17-1129 (Neb. Sept. 28, 2018), *cert. denied*, *Lotter v. Nebraska*, No. 18-8415 (2019).
- *State v. Lotter*, Nos. S-12-837 to S-12-839 (Neb. Mar. 20, 2013).
- *State v. Lotter*, Nos. S-08-449 to S-08-451 (Neb. Sept. 4, 2009), *cert. denied*, *Lotter v. Nebraska*, No. 09-8682 (2010).
- *State v. Lotter*, Nos. S-03-1278 to S-03-1280 (Neb. Apr. 21, 2004).
- *State v. Lotter*, Nos. S-02-1072 to S-02-1074 (Neb. Sept. 26, 2003).
- *State v. Lotter*, Nos. S-01-091 to S-01-093 (Neb. July 11, 2003), *cert. denied*, *Lotter v. Nebraska*, No. 03-7361 (2004).
- *State v. Lotter*, Nos. S-96-297, S-96-298, S-96-312 (Neb. Nov. 6, 1998), *cert. denied*, *Lotter v. Nebraska*, No. 98-8847 (1999).

Nebraska District Court, Richardson County:

- *State v. Lotter*, Nos. 2682, 2683, 2684 (Sept. 28, 2017).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Aug. 29. 2012).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Apr. 2, 2008).
- *State v. Lotter*, No. 2682 (Feb. 5, 2008).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Oct. 22, 2003).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Sept. 12, 2002).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Dec. 19, 2000).
- *State v. Lotter*, Nos. 2682, 2683, 2684 (Feb. 21, 1996).

United States Court of Appeals for the Eighth Circuit:

- *Lotter v. Britten*, No. 17-2000 (8th Cir. July 31, 2017), *cert. denied*, *Lotter v. Frakes*, No. 17-6602 (2018).
- *Lotter v. Houston*, No. 11-2223 (8th Cir. Aug. 23, 2011), *cert. denied*, *Lotter v. Houston*, No. 11-8458 (2012).

United States District Court for the District of Nebraska:

- *Lotter v. Britten*, No. 4:04-cv-03187 (D. Neb. Mar. 27, 2017).
- *Lotter v. Houston*, No. 4:04-cv-3187 (D. Neb. Mar. 18, 2011).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Lotter respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

INTRODUCTION

This Court originally created a categorical prohibition on executing individuals with intellectual disabilities in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), but declined to "provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability] 'will be so impaired as to fall within [*Atkins*' compass],'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317) (second alteration in original). The Court "le[ft]" that "task" to the States in the early days after *Atkins*. *See* 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416–17 (1986)). But the Court later took up the task itself. And it has since changed the meaning of "intellectual disability" for purposes of the Eighth Amendment's bar on executing anyone in the "class" of individuals who have that "status." *Cf. Penry v. Lynaugh*, 492 U.S. 302, 329–30 (1989)*, holding modified by Boyde v. California*, 494 U.S. 370, 378–86 (1990)*, and abrogated on other grounds by Atkins*, 536 U.S. 304, 321. The Court decided in *Hall v. Florida*, 572 U.S. 701 (2014), that a State cannot exclude from the class individuals who have "scored a 71 instead of a 70 on an IQ test" solely because of that score. *See id.* at 724. And *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), decided that States must adhere to "clinical standards" that focus on "adaptive deficits"—not "adaptive strengths"—when deciding whether individuals are within the class. *See id.* at 1050.

Lower courts have diverged and reached three different answers when asking whether these changes constitute new substantive rules of constitutional law that must be applied retroactively. First, the Kentucky Supreme Court applies both *Hall* and *Moore I* retroactively, after having explained that *Hall* was a "sea change" in the law and substantive because it "define[d] the manner in which the mental deficiencies of offenders must be evaluated" for purposes of a categorical bar on capital punishment. *See White v. Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018); *Woodall*, 563 S.W.3d at 2–7. A second approach—the one adopted by the decision below—views *Hall* and *Moore I* as new, but as having "merely adopted new procedures for ensuring states follow the constitutional rule announced in *Atkins*." *See* App. 28a–29a. Unlike these two approaches, a third one applies throughout the Tenth Circuit. There, *Hall* and *Moore I* are old rules that—regardless of whether they are procedural or substantive—can apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. *See Smith v. Sharp*, 935 F.3d 1064, 1083–85 (10th Cir. 2019).

This split calls out for the Court's intervention, and the decision below provides an excellent vehicle to resolve it. The Nebraska Supreme Court squarely answered the question presented and embraced the second of the three approaches. *See* App. 28a–29a. In doing so, it both mischaracterized *Hall* and *Moore I* and misapplied this Court's retroactivity jurisprudence. *Hall* and *Moore I* both "alter[ed] . . . the class of persons that the law punishes" with a sentence of death. *See Jones v. Mississippi*, 141

S. Ct. 1307, 1317 n.4 (2021) (quoting *Welch v. United States*, 578 U.S. 120, 129 (2016)). Unlike in the early days after *Atkins*, an individual who scores a 74 on an IQ test (with a standard error of measurement of five points) and who has exhibited some adaptive strengths, but who everyone agrees has an intellectual disability under "current medical standards," has the same status under the Eighth Amendment today. *See Moore I*, 137 S. Ct. at 1050–53. Both *Hall* and *Moore I* expanded the class under the Eighth Amendment and are substantive.

Now is the time to answer the question presented. Every time it arises, it can mean the difference between an execution and life imprisonment without the possibility of parole. Unlike similarly situated petitioners in a jurisdiction like Kentucky, in Nebraska John Lotter was denied an evidentiary hearing to prove his intellectual disability and categorical ineligibility to be executed. Yet he received an intellectual-disability diagnosis under current medical guidelines—a diagnosis grounded in evidence that dates back to his placement in special education classes when he was a child attempting to navigate the first grade. This Court should resolve the federal question that has divided lower courts and that was dispositive in the appeal below.

OPINIONS BELOW

The decision of the Nebraska Supreme Court (App. 1a–41a) is reported at 311 Neb. 878, 976 N.W.2d 721. The opinion and order of the District Court of Richardson County, Nebraska, is unreported and appears at App. 42a–51a.

JURISDICTION

The Nebraska Supreme Court, exercising jurisdiction under Neb. Rev. Stat. §§ 25-1912 and 29-3002, entered judgment on July 1, 2022. *See* App. 1a, 41a. On September 19, 2022, Justice Kavanaugh extended the time to file a petition for a writ of certiorari until November 28, 2022. This Court has jurisdiction over this petition under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in part: "nor 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." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

1. John Lotter was tried and convicted by a jury in Nebraska state court for three counts of first-degree murder in May 1995 and, in February 1996, was sentenced to death by a three-judge panel. *See* App. 52a–99a. The sentencing judges found multiple mitigating circumstances, including that Lotter's "capacity . . . to conform his conduct to the requirements of law was impaired as a result of mental illness" at the time of the crime. App. 95a. Lotter had a history of "serious medical/psychiatric problems," "cognitive deficits, learning disabilities and

educational deficiencies," and a "turbulent family history" that included "removal from his home in the second grade" followed by "placement in group homes, foster ca[r]e, psychiatric hospitals," and—when he was sixteen years old—state prison. *See* App. 78a–79a, 95a–96a. The sentencing panel found three types of aggravating circumstances—with two such circumstances applying to each murder conviction—and decided that neither the mitigating circumstances nor the fact that Lotter's co-defendant had been sentenced to life imprisonment justified a life sentence for Lotter. *See* App. 85a, 94a–97a. Ultimately, the panel sentenced Lotter to death. App. 98a. The judgment became final in June 1999. App. 6a.

2. Lotter sought state post-conviction relief later that year. *See* App. 6a. In June 2002, while appellate state post-conviction proceedings were ongoing, this Court decided *Atkins*. *See* App. 6a; *State v. Lotter*, 664 N.W.2d 892, 901–02 (Neb. 2003).

Atkins concluded that the Eighth Amendment to the U.S. Constitution "places a substantive restriction on the State's power to take the life" of an individual with an intellectual disability. *See* 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). In doing so, the Court pointed to definitions of intellectual disability from two clinical sources. *See id.* at 308 n.3, 317 n.22, 318. These clinical sources recognized three criteria for a diagnosis of intellectual disability: (1) "significantly subaverage intellectual functioning," (2) "limitations in . . . [designated] adaptive skill areas," and (3) "manifest[ation] before age 18." *Id.* at 308 n.3 (quoting American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992); and going on to cite American Psychiatric Association,

Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)). *Atkins* acknowledged, however, "serious disagreement" among the States when it came to "determining which offenders are in fact [intellectually disabled]." *Id.* at 317. Regarding that disagreement, the Court "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* (second and third alterations in original) (footnote omitted) (quoting *Ford*, 477 U.S. at 405, 416–417).

Lotter's counsel did not raise an intellectual-disability claim when this Court first issued *Atkins*, and the Nebraska Supreme Court subsequently affirmed the denial of Lotter's initial motion for post-conviction relief in July 2003. *See Lotter*, 664 N.W.2d at 923.[1] In May 2004, counsel for Lotter initially sought "an *Atkins* determination" in a motion for state post-conviction relief, but later "abandoned the effort" without appearing to have completed any evaluations and without obtaining judicial review of the merits of such a claim. *See* App. 25a; *Lotter v. Britten*, No. 4:04-cv-03187, ECF No. 1-2, PageID 29–30, 95–96 (D. Neb. filed May 11, 2004). Apart from any *Atkins* claim, Lotter filed three additional motions for state post-conviction relief and two petitions for federal habeas corpus relief between 2007 and 2017, all of which were denied. *See* App. 6a.

[1] Also that year, the Nebraska Supreme Court affirmed a separate denial of relief Lotter had sought under a state DNA testing statute. *See* App. 6a.

During these intervening years, this Court twice decided cases regarding "how intellectual disability should be measured and assessed" after acknowledging "that *Atkins* 'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment." *See Hall,* 572 U.S. at 718–19 (quoting *Bies*, 556 U.S. at 831). In May 2014, the Court "invalidated" one State's use of a "strict IQ cutoff" for the intellectual-functioning prong of the definition of intellectual disability, "because the cutoff took 'an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence.'" *Moore I*, 137 S. Ct. at 1050 (quoting *Hall*, 572 U.S. at 712). And on March 28, 2017, the Court held that "[t]he medical community's current standards" for defining both the intellectual-functioning prong and the adaptive-functioning prong "constrain[]" the "leeway" States had when defining intellectual disability under the Eighth Amendment. *Id.* at 1050–53; *see also Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (per curiam) (*Moore II*) (reversing a subsequent state-court judgment that "rest[ed] upon analysis too much of which too closely resemble[d] what [the Court] previously found improper" in *Moore I*). Each case arose in a post-conviction posture. *See Moore I*, 137 S. Ct. at 1044–45; *Hall*, 572 U.S. at 707.

3. On March 27, 2018, Lotter filed an amended motion for post-conviction relief that led to the decision below. App. 100a–61a. The motion included a declaration from a forensic psychologist, Dr. Ricardo Weinstein, who had evaluated Lotter and diagnosed him with an intellectual disability. App. 162a–75a. Specifically, the

psychologist determined that Lotter met the requirements for each of the three prongs that define intellectual disability: (1) "'significant limitations in intellectual functioning'" and (2) "deficits" in "'adaptive functioning,'" which (3) "originate[d] before" Lotter turned eighteen years old or during his "'developmental period.'" App. 165a–68a (quoting American Association on Intellectual and Developmental Disability (AAIDD), Intellectual Disability: Definition, Classification, and Systems of Support 1, 15 (11th Ed. 2010); American Psychiatric Association, Diagnostic and Statistical Manual 33 (5th ed. 2013) (DSM-5)).

To evaluate Lotter's intellectual functioning (prong one), the psychologist administered the Fourth Edition of the Woodcock-Johnson Tests of Cognitive Abilities in March 2018. App. 163a, 169a–70a. Lotter achieved a full-scale score of 67, which "is more than two standard deviations below the mean" score. App. 163a, 169a–70a. The psychologist added that this score "is at the level of someone who is [eight] years [seven] months old." App. 169a. The psychologist also noted a prior score of 76 on a test from May 1981, when Lotter was under ten years old. App. 170a. Based on the Flynn Effect,[2] the psychologist adjusted that score to a 73, which "is within the

[2] The Flynn Effect "describes the phenomenon whereby the American public's score on any given IQ test increases by approximately three points per decade," such that "'when an older test is used to measure a test subject, the subject's IQ score may be artificially inflated because that test was normalized using a past sample of Americans.'" *See Brumfield v. Cain*, 808 F.3d 1041, 1060 n.27 (5th Cir. 2015) (quoting *Brumfield v. Cain*, 854 F. Supp. 2d 366, 391 (M.D. La. 2012)). To "accurately depict

70–75 range" to meet the intellectual-functioning prong while accounting for "the standard error of measurement." App. 170a.[3] The psychologist concluded that Lotter's IQ scores met the requirements of prong one. App. 163a, 169a–70a.

Relying on reports from witnesses who knew Lotter throughout his life, the psychologist next found that Lotter exhibited "significant adaptive deficits" (prong two). App. 168a–74a. According to the AAIDD's diagnostic guidelines, an individual who experienced "significant limitations in one" of three adaptive-skill categories—"conceptual," "social," and "practical" skills—satisfies this prong. App. 166a (citing AAIDD, Intellectual Disability: Definition, Classification, and Systems of Support, at 15, 43) (emphasis omitted). The DSM-5 similarly "identifies three parallel domains of adaptive functioning" and does not require limitations in all three to meet this prong. App. 166a (citing DSM-5 at 33, 37–38). The psychologist explained that Lotter "has significant adaptive deficits" in each of the three categories. App. 170a.

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an individual's intellectual functioning" in light of this phenomenon, experts adjust scores from tests that used "out-of-date test norms" through a process the psychologist applied to Lotter's score from 1981. *See* App. 165a n.17, 170a.

[3] Lotter had taken other IQ tests as a child, one of which resulted in a reported score of 92 at age twelve. *See* App. 22a; *Lotter*, No. 4:04-cv-03187, ECF No. 57-21 at PageID 7888–90. The psychologist acknowledged additional childhood scores, but explained that "[t]here were no records and[/]or protocols of prior testing performed available for review." App. 170a & n.43. "Without a proper review of the data," it "[wa]s not possible to opine regarding the accuracy and validity of the test[] results." App. 170a n.43.

Lotter suffered from significant deficits in the "conceptual" domain "as early as the first grade" when he was placed in a "special education" program. App. 170a–71a. That type of placement continued "[e]ven at youth detention facilities," when Lotter later "was placed in separate classrooms" and received "special—and sometimes one-on-one—instruction." App. 171a. A psychiatrist who treated Lotter in Lotter's childhood added that Lotter had impairments in his ability to consider "various potential outcomes of his actions and weigh the consequences" beforehand. App. 171a.

Lotter also exhibited significant deficits in the "social" domain. App. 171a– 72a. He was manipulated and "bullied" by "his peers" throughout "nearly every stage of his life." App. 171a–72a. A social worker who knew Lotter when Lotter was a young boy, for instance, described how "Lotter wanted to fit in and would do anything his [foster] brothers asked," even though "[t]he other kids would set him up, and [Lotter] kept falling for it." App. 171a–72a. Unable to avoid being manipulated by children his own age, "Lotter was more comfortable playing with children three to four years younger than him." App. 172a. One example of how Lotter acted years behind his age group occurred around age ten: Lotter "asked his foster mother to give him a bottle and hold him like a baby." App. 172a. Throughout his life, Lotter was considered "a follower and easily influenced." App. 172a.

Lotter struggled significantly with "practical" skills too, which include "age-appropriate tasks of daily living." App. 173a. As a child, he struggled with simple activities like washing dishes or combing his hair. App. 173a. Even as an adult, he

"could not cook," "lived primarily with family members who did not charge him rent," and "struggled to manage money and maintain long-term employment" while mostly working jobs that "involved unskilled labor." App. 173a. The psychiatrist who treated Lotter in Lotter's childhood opined that "Lotter's impairments are so severe that he would require an assisted living facility for adults." *See* App. 173a.

Finally, Lotter "exhibited very significant deficits and required intervention by professionals . . . early on in his developmental years." App. 174a. The psychologist who evaluated Lotter opined that his deficits were "present since childhood" and that he met the third and final prong to qualify for a diagnosis of intellectual disability. App. 174a.

Lotter relied on this diagnosis and the Court's decisions in *Hall* and *Moore I* to argue (as relevant here) that he is a member of a "[c]lass" of individuals who are ineligible to be executed under the Eighth Amendment. *See* App. 144a–58a. Although the Nebraska Supreme Court had previously "relied on evidence of [a defendant's] adaptive strengths, not his deficits," when deciding whether the defendant had an intellectual disability as matter of law, Lotter argued that this type of reasoning was "inconsistent with *Moore* [*I*] and current medical standards." *See* App. 153a–54a (discussing *State v. Vela*, 777 N.W.2d 266, 308 (Neb. 2010)).

4. A state trial-level court denied Lotter's motion on procedural grounds without an evidentiary hearing. App. 48a–50a.[4] In relevant part, the court applied Neb. Rev. Stat. § 29-3001(4), which imposes "[a] one-year period of limitation . . . to the filing of a verified motion for postconviction relief." *See* App. 48a–50a. The statute of limitations can start running on "[t]he date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review." Neb. Rev. Stat. § 29-3001(4)(d); *see also id.* § 29-3001(4) (listing other potential start dates). But the state trial-level court reasoned that Lotter's "constitutional claim has been recognized by the United States Supreme Court for more than fifteen years" (i.e., since *Atkins*), App. 48a, and that Lotter's "intellectual disability claim is not a new rule of constitutional law applicable on collateral review," App. 49a.

The Nebraska Supreme Court affirmed. Regarding the relevant time bar, the decision below explained that Lotter's argument "require[d] [the court] to determine whether *Moore I* recognized a new constitutional right which has been applied retroactively to cases on collateral review." App. 26a–27a. The Nebraska Supreme

[4] The court held a "records hearing" in February 2020. App. 7a (footnote omitted). No witnesses testified; the purpose of this type of hearing was "to receive existing files and records before deciding whether to grant or deny [an] evidentiary hearing on [the] motion for postconviction relief." App. 7a n.12.

Court recognized that it had an obligation to "give retroactive effect to new substantive rules of federal constitutional law," App. 27a (footnote omitted), and that *Atkins* announced such a rule, App. 27a. But the Nebraska Supreme Court decided to follow a group of "state and federal courts" that "ha[s] reasoned that *Hall* and *Moore I* merely adopted new procedures for ensuring states follow the constitutional rule announced in *Atkins*, and did not expand the class of individuals protected by *Atkins*' prohibition against the execution of individuals who are intellectually disabled." App. 28a (footnotes omitted). The Nebraska Supreme Court decided, in turn, "that neither *Hall* nor *Moore I* announced a new substantive rule of constitutional law that must be applied retroactively to cases on collateral review." App. 29a. After having resolved this federal issue, the Nebraska Supreme Court explained that Lotter could not rely on *Moore I* to "trigger the [one]-year limitations period under § 29-3001(4)(d)," because the case "did not recognize a new constitutional right which has been applied retroactively to cases on collateral review." App. 29a.

REASONS FOR GRANTING THE WRIT

The decision below squarely answered a question that has divided courts around the country and that calls for this Court's review: whether the rules governing the substantive definition of "intellectual disability" this Court announced in *Hall* and *Moore I* "must be applied retroactively to cases on collateral review" under *Teague* and its progeny. *See* App. 27a–29a.

The division among lower courts breaks down into three types of decisions. First, the Kentucky Supreme Court applies both *Hall* and *Moore I* retroactively. *See White*, 500 S.W.3d at 214–15; *Woodall*, 563 S.W.3d at 2–7. And it does so after having treated this Court's "directive" in *Hall* regarding how to "evaluate[]" intellectual disability as a new *substantive* rule that "must be retroactively applied." *See White*, 500 S.W.3d at 215. The Georgia Supreme Court recently lent support to this approach when it reasoned that *Hall* and *Moore I* answered "questions regarding the *substantive* definition of intellectual disability," not a "*procedural* question," like the burden of proof to meet that definition. *See Young v. State*, 860 S.E.2d 746, 771 (Ga. 2021) (plurality op.).

A second set of courts, including the Nebraska Supreme Court in the decision below, similarly view *Hall* and *Moore I* as having created new rules, but treat them as procedural rules that do not apply retroactively on collateral review. *See Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1338–39 (11th Cir. 2019); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (per curiam); App. 27a–29a; *see also Phillips v. State*, 299 So. 3d 1013, 1022 (Fla. 2020) (per curiam) (deciding that "*Hall*

announced a new procedural rule"); *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020) (concluding "that *Hall* and *Moore* did not announce new substantive rights that must be applied retroactively").

And there is yet a third approach: The Tenth Circuit applies *Hall* and *Moore I* retroactively, but—unlike the aforementioned courts—views both decisions to be applications of an old rule, i.e., as having been "dictated by" by *Atkins*. *See Smith*, 935 F.3d at 1083–85 (quoting *Chaidez v. United States*, 568 U.S. 342, 348 (2013)).

The Court should use this case to resolve the split. The decision below reflects what numerous courts have gotten wrong when applying this Court's retroactivity precedents. According to the decision below, "neither *Hall* nor *Moore I* announced a new substantive rule of constitutional law" because both cases merely "refined the appropriate standards states should apply to determine whether an offender is intellectually disabled." App. 29a. That analysis correctly recognized that neither *Moore I* nor *Hall* was "*dictated* by precedent." *See Teague*, 489 U.S. at 301 (plurality op.); *see also, e.g.*, *In re Henry*, 757 F.3d 1151, 1159 (11th Cir. 2014) (cited in App. 28a nn.91, 93). But it misunderstood *Hall*'s and *Moore I*'s effects as well as this Court's retroactivity jurisprudence. Both *Hall* and *Moore I* redefined "intellectual disability" as a matter of law; both decisions "expand[ed] the class of individuals" who qualify for the status of having an intellectual disability under the Eighth Amendment. *But see* App. 28a. Both *Hall* and *Moore I* therefore announced "substantive guarantee[s]" that apply retroactively, not mere "rule[s] that 'regulate only the manner of determining the defendant's culpability'" that would be inapplicable on collateral

review. *See Montgomery v. Louisiana*, 577 U.S. 190, 210 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)) (emphasis and alteration omitted).

The Court should answer this important, recurring question now. Each time the question arises, it has extraordinary implications for petitioners and States. And a decision that both *Hall* and *Moore I* established new substantive rules that define "the *entire category* of [intellectually disabled] offenders," *Moore I*, 137 S. Ct. at 1051 (quoting *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005)), would be dispositive of Lotter's appeal. All he sought was a remand for an evidentiary hearing on his intellectual-disability claim. Without resolving any factual disputes, the decision below relied on an understanding of both federal law and a bar to collateral review that would be wiped away by this Court's clarification of its retroactivity precedent and long-overdue recognition of *Hall*'s and *Moore I*'s retroactivity.

I. The decision below deepens a split of authority regarding the retroactivity of *Hall* and *Moore I*.

Since this Court announced *Atkins*, *Hall*, and *Moore I*, lower courts have diverged on how to address the retroactivity of the latter two. The Kentucky Supreme Court gives retroactive effect to both, after having expressly described why *Hall* constitutes a new substantive rule. Another group of courts, including the Nebraska Supreme Court in the decision below, views *Hall* and *Moore I* to have announced new rules that are merely procedural in nature and thus not retroactively applicable to criminal judgments that became final before this Court issued each decision. And the Tenth Circuit considers both *Hall* and *Moore I* to be mere applications of old rules that can apply retroactively. As a result of this split, and based merely on geographic happenstance, similarly situated petitioners are treated differently on a life-or-death question of federal law.

1. The *Atkins* Court decided for the first time "that the Constitution 'places a substantive restriction on the State's power to take the life' of" individuals with intellectual disabilities. *See Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). At the time, however, the Court "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within [*Atkins*' compass].'" *Bies*, 556 U.S. at 831 (quoting *Atkins*, 536 U.S. at 317); *see also Shoop v. Hill*, 139 S. Ct. 504, 507 (2019) (per curiam) (reaffirming that "*Atkins* gave no comprehensive definition of 'mental retardation' for

Eighth Amendment purposes"). Instead, *Atkins* decided to "leave" such tasks "to the State[s]." 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 405, 416–17).

The Court later changed course in *Hall* and ruled that, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity." *Hall*, 572 U.S. at 720. *Hall* then held that a State's "rigid rule" that "foreclosed" "all further exploration of intellectual disability" for any individual sentenced to death who "[wa]s deemed to have an IQ above 70" was unconstitutional. *Id.* at 704. "[I]nformed by the medical community's diagnostic framework," *id.* at 721, *Hall* recognized 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," *id.* at 723.

Moore I further extended the legal definition of intellectual disability, holding that a state court's approach to someone's "adaptive functioning" that "deviated from prevailing clinical standards and from [an earlier set of] clinical standards the court claimed to apply" was unconstitutional. 137 S. Ct. at 1050. *Moore I* explicitly decided that "[t]he medical community's current standards supply one constraint on States' leeway" to "enforc[e] *Atkins*' holding" and "'to define intellectual disability.'" *Id.* at 1053 (quoting *Hall*, 572 U.S. at 720–21). Thus, when States define and apply the criteria for an intellectual disability, they must follow medical standards that focus "the adaptive-functioning inquiry on adaptive *deficits*"—not "adaptive strengths." *See id.* at 1050.

2. *Hall*'s and *Moore I*'s retroactive application to final criminal judgments turns on a set of well-known questions: whether each rule is "new" and, if so, whether each is "substantive." Old rules, i.e., rules that were "dictated by precedent existing at the time the defendant's conviction became final," apply regardless of the date of a conviction's finality. *See Teague*, 489 U.S. at 301 (plurality op.) (emphasis omitted). So do new rules that are "substantive," e.g., "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 U.S. at 198, 201 (quoting *Penry*, 492 U.S. at 330); *see also id.* at 198 (including "rules forbidding criminal punishment of certain primary conduct" as "substantive" rules (quoting *Penry*, 492 U.S. at 330)). In contrast, "a new constitutional rule of criminal procedure does not apply . . . to convictions that were final when the new rule was announced." *See id.*

3. The Kentucky Supreme Court has decided that *Teague* poses no bar to the retroactive application of *Hall* and *Moore I*. Echoing Justice Alito, the Kentucky Supreme Court first described *Hall* as having created a "sea change" in the law. *See White*, 500 S.W.3d at 214; *see also Hall*, 572 U.S. at 736 (Alito, J., dissenting). It then decided on collateral review that *Hall* "must be retroactively applied," explaining that "*Hall*[] does not deal with criminal procedure," but rather "is 'a substantive restriction on the State's power to take the life' of individuals suffering from intellectual disabilities." *White*, 500 S.W.3d at 215 (quoting *Atkins*, 536 U.S. at 321); *see also id.* at 214 (explaining that *Teague* "governed" the analysis). To the Kentucky Supreme Court, a rule from this Court that "defines the manner in which the mental

deficiencies of offenders must be evaluated" for purposes of a categorical bar to execution under the Eighth Amendment is substantive, not procedural. *See id.* at 215. In a later case similarly arising on collateral review, the Kentucky Supreme Court held that lower courts also "must follow" *Moore I*, which "predicate[s] a finding of intellectual disability" on the application of "prevailing medical standards." *See Woodall*, 563 S.W.3d at 2, 6 (footnote omitted).

The Georgia Supreme Court recently lent support to this approach. In a direct appeal, a plurality opinion of the court reasoned that both *Hall* and *Moore I* answered "questions regarding the *substantive* definition of intellectual disability and the requirement that states must . . . adhere to prevailing clinical definitions of intellectual disability in fashioning such a definition." *Young*, 860 S.E.2d at 771. And the Georgia Supreme Court's opinion distinguished a "*procedural* question"—a petitioner's burden of proof to demonstrate an intellectual disability—from "*substantive*" questions about the meaning of intellectual disability this Court answered in *Moore I* and *Hall*. *See id.* (plurality op.).

4. Another set of decisions, including the decision below, has agreed that both *Hall* and *Moore I* established new rules, but has viewed them to be new rules of procedure that are barred from applying retroactively on collateral review.

The Eleventh Circuit illustrated this approach when it stated that *Moore I* established a new rule that "may have the effect of expanding the class of people ineligible for the death penalty." *See Smith*, 924 F.3d at 1338. In spite of this observation, the Eleventh Circuit decided that *Moore I* "effectively narrowed the

range of permissible methods—the procedure—that states may use to determine intellectual disability." *Id.* The Eleventh Circuit therefore viewed *Moore I* to be procedural in nature and to not apply retroactively under *Teague*. *Id.* at 1338–40. That conclusion followed the circuit's earlier decisions that *Hall* did not apply retroactively either. *See id.* at 1339 n.5. The Eleventh Circuit acknowledged that this Court's retroactivity precedent "stands for the proposition that a right can be substantive under *Teague* even if it only guarantees the chance to present evidence in support of relief sought, not ultimate relief itself." *Id.* (citing *Montgomery*, 577 U.S. at 210). In spite of that acknowledgment, the Eleventh Circuit stayed its ultimate course, deciding that *Hall* and *Moore I* announced new "procedural" rules, not "substantive" ones. *Id.* at 1338–39.

The Eighth Circuit has followed this course, but included its own caveat. The Eighth Circuit agreed with the Eleventh Circuit that "*Hall* 'created a procedural requirement.'" *See Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014) (per curiam) (quoting *Henry*, 757 F.3d at 1161). Later, the Eighth Circuit similarly concluded "that *Moore* [*I*] discussed purely procedural issues." *See Williams*, 858 F.3d at 474 (quoting *Davis v. Kelley*, 854 F.3d 967, 970 (8th Cir. 2017) (per curiam)). In doing so, however, the circuit noted that the Chief Justice's "observation" that *Moore I* "had crafted 'a constitutional holding' may presage an eventual ruling by the Court that *Moore* [*I*] will be given [retroactive] effect." *Id.* (quoting *Moore I*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting)). Yet the Eighth Circuit left the issue "for the [Supreme] Court to

decide in due course and not [the circuit]" when the issue had arisen on a request to file a second or successive federal habeas petition under AEDPA. *Id.*[5]

Two state supreme courts have adopted this approach, including the Nebraska Supreme Court in the decision below. The decision below held "that neither *Hall* nor *Moore I* announced a new substantive rule of constitutional law," reasoning that these decisions "refined the appropriate standards states should apply to determine whether an offender is intellectually disabled." App. 29a. It also pointed to the Florida Supreme Court and a court of appeals in Ohio as other state courts that have treated

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[5] Other circuits have also avoided squarely answering the question in the context of AEDPA's restrictions on "second or successive" petitions. *See* 28 U.S.C. §§ 2244(b), 2255(h). The Sixth Circuit "assume[d], without deciding, that *Hall* and *Moore I* announce new rules of constitutional law," and cited lower-court decisions concluding that both "merely created new procedural requirements" that do not apply retroactively. *See In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018). "More importantly," though, the circuit was applying AEDPA's limitations on "second or successive" habeas applications, § 2244(b)(2), and simply concluded that *this Court* has never "dictate[d] that the decisions . . . are to be applied retroactively." *See Payne*, 722 F. App'x at 538–39. The Fourth Circuit denied a request to file a "second or successive" petition for the same reason. *See In re Richardson*, 802 F. App'x 750, 755–56 (4th Cir. 2020) (per curiam). So far, the Fifth Circuit has avoided its own definitive ruling on the question. *See In re Milam*, 838 F. App'x 796, 798 (5th Cir. 2020) (per curiam) (noting that it has "not definitively rejected or supported the contention that *Moore* [*I*] is a new retroactive rule of constitutional law in the context of successive habeas petitions sought under 28 U.S.C. § 2244"). And the Seventh Circuit has characterized *Hall* and *Moore I* as having "refined the application of *Atkins*" without having announced "'new rule[s] of constitutional law, made retroactive to cases on collateral review by [this] Court,' that would permit a second or successive motion under § 2255(h)(2)." *See Fulks v. Watson*, 4 F.4th 586, 592 (7th Cir. 2021). But the Seventh Circuit did so only after a petitioner had "concede[d] that his *Atkins* claim does not satisfy either of [§ 2255(h)'s] exceptions," when denying that petitioner's separate effort to invoke § 2255(e)'s "savings clause." *Id.* at 589–92.

Hall and *Moore I* as having "adopted new procedures." *See* App. 28a; *see also Phillips*, 299 So. 3d at 1022; *Jackson*, 157 N.E.3d at 253.[6]

5. The Tenth Circuit has taken a third approach to the question, deciding that neither *Moore I* nor *Hall* created a "new" rule at all and applying both on collateral review. *See Smith*, 935 F.3d at 1083–85. The Tenth Circuit reached this result by explaining that, in *Atkins*, this Court "declared 'a rule of general application . . . designed for the specific purpose of evaluating a myriad of factual contexts.'" *See id.* at 1084 (quoting *Chaidez*, 568 U.S. at 348). *Hall* and *Moore I* merely applied that "general standard to the kind of factual circumstances it was meant to address," *Smith*, 935 F.3d at 1084 (quoting *Chaidez*, 568 U.S. at 348), much as extending "*Strickland*'s guarantee of effective counsel to the plea-bargaining context merely applied *Strickland* rather than created a new rule," *id.* at 1085 (quoting *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013) (per curiam)). To the Tenth Circuit then, *Moore I* and *Hall* were "dictated by" *Atkins*. *See Smith*, 935 F.3d at 1084–85 (quoting *Chaidez*, 568 U.S. at 348).[7] *Teague* therefore poses no bar to petitioners in

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[6] The Tennessee Supreme Court has declined to apply *Hall* retroactively too, but its reasoning focused on the fact that neither this Court nor a federal court of appeals had decided that "*Hall* must be applied retroactively to cases on collateral review." *See Payne v. State*, 493 S.W.3d 478, 490–91 (Tenn. 2016).

[7] The Alabama Court of Criminal Appeals similarly "view[ed] *Hall*, not as a new rule of constitutional law, but simply as an application of existing law, i.e., *Atkins*, to a specific set of facts," though it did not cite *Teague* alongside that conclusion. *See Reeves v. State*, 226 So. 3d 711, 727 n.7 (Ala. Crim. App. 2016).

that circuit who seek to rely on both *Hall* and *Moore I* in collateral proceedings. *See Smith*, 935 F.3d at 1084–85.

II. The decision below misapplied this Court's retroactivity jurisprudence and calls out for this Court's review to resolve the split on this critical question.

This Court's longstanding precedent on retroactivity demonstrates that the decision below—along with the others that have declined to view *Hall* and *Moore I* as having established new substantive rules—is wrong. And this case provides an excellent vehicle to answer a question that will continue to arise and have life-or-death consequences every time.

A. The decision below cannot be squared with this Court's retroactivity precedents.

The decision below started out on the right track by concluding that *Hall* and *Moore I* created new rules and that the Nebraska Supreme Court must apply any new "substantive" rule on collateral review. But the decision below went off course by misapplying this Court's precedent governing the difference between procedural and substantive rules. Contrary to the Nebraska Supreme Court's decision, *Hall* and *Moore I* did "expand the class of individuals" whom the Eighth Amendment defines as having intellectual disabilities and announced new substantive rules, not merely procedural ones. *But see* App. 28a.

1. The Nebraska Supreme Court properly agreed with the courts that treat *Hall* and *Moore I* as having established "new" rules for petitioners whose convictions had become final on a date before this Court announced each decision. Resolving this

issue required a "survey" of "the legal landscape as of that date[] to determine whether the rule later announced in [each case] was *dictated* by then-existing precedent—whether, that is, the unlawfulness of [a petitioner]'s conviction was apparent to all reasonable jurists." *See Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997). As explained by one decision the Nebraska Supreme Court followed, "[n]othing in *Atkins* dictated or compelled [this] Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff." *See Henry*, 757 F.3d at 1159; *see also* App. 28a. Nor did *Atkins* or *Hall* require that States treat "[t]he medical community's current standards" for the adaptive-deficits prong—like not using adaptive strengths to offset deficits in a way no clinician would condone—to be a "constraint on States' leeway in this area," as *Moore I* later mandated. *See Moore I*, 137 S. Ct. at 1050–53; *see also Smith*, 924 F.3d at 1338 (concluding that, because *Moore I* "defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty," it "announced a new rule").

The dissenting Justices in each case helped to prove the point. *Hall*'s dissenters considered the decision to be a "remarkable change in what [this Court] took to be a universal understanding of intellectual disability just 12 years [earlier]." *Hall*, 572 U.S. at 736 (Alito, J., dissenting). *Moore I*'s dissenters saw a "depart[ure] from this Court's precedents, followed in *Atkins* and *Hall*, establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice." *Moore I*, 137 S. Ct. at 1057–68 (Roberts, C.J., dissenting). Contrary to the Tenth Circuit's approach then, *Hall*'s

and *Moore I*'s constitutional rules were not "already 'apparent to all reasonable jurists'" before this Court decided them. *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 (2021) (quoting *Lambrix*, 520 U.S. at 528); *see also Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015) (applying this Court's observation "that it may rely on a dissenting opinion to determine whether the holding in a case was dictated by existing precedent" (citing *Beard v. Banks*, 542 U.S. 406, 416 (2004)).[8]

2. The Nebraska Supreme Court also correctly recognized state courts' obligation to apply any constitutional rule on collateral review that is "substantive," e.g., one that "'prohibit[s] a certain category of punishment for a class of defendants because of their status.'" *See* App. 27a (quoting *Montgomery*, 577 U.S. at 201). There is no doubt that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 577 U.S. at 200.

3. The critical question then is whether the new rules *Hall* and *Moore I* announced are "substantive" ones that must apply retroactively. They are.

Both rules "prohibit[] 'a certain category of punishment for a class of defendants because of their status." *Id.* at 206 (quoting *Penry*, 492 U.S. at 330). *Atkins* prohibited the execution of a "class of defendants" whose "status" as individuals with

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[8] The "newness" of each rule vis-à-vis Lotter's final judgment is beyond doubt in this case, because that judgment became final years before this Court had decided *Atkins*, i.e., at a time when federal constitutional law permitted the execution of individuals with intellectual disabilities. *See Penry*, 492 U.S. at 340.

intellectual disabilities was defined by the States. *See Bies*, 556 U.S. at 831 (acknowledging that *Atkins* "did not provide definitive . . . substantive guides" for defining intellectual disability). At the time, States could deem individuals who had received an IQ score over 70 and who had exhibited adaptive strengths in some domains that "offset[]" deficits in other domains to have *no* intellectual disabilities as a matter of Eighth Amendment law. *Compare Moore I*, 137 S. Ct. at 1049–50 & n.8 (rejecting such a way of defining intellectual disability)*, with, e.g.*, *Atkins*, 536 U.S. at 316–17 (referring to "a known IQ less than 70" when describing States' practices before *Atkins* and defining intellectual disability for purposes of the Eighth Amendment only in terms of a meaning for which "there is a national consensus" (footnotes omitted)). Such a definition of intellectual disability was controlling under the Eighth Amendment, even if a physician diagnosed an individual as having an intellectual disability based on a medically necessary consideration of a range of IQ scores and a set of well-known adaptive deficits.

Only years later did *Hall* and *Moore I* redefine the class or the status of being a person with an intellectual disability under the Eighth Amendment based on "[t]he medical community's current standards." *See Moore I*, 137 S. Ct. at 1053. After *Moore I*, individuals who have IQ scores over 70 and exhibited some adaptive strengths, but whose status or class would still be "individuals with intellectual disabilities" under "current medical standards," now have that very same status or class under the Eighth Amendment. *See id.* at 1053. To put it differently, both *Hall* and *Moore I* expanded the boundaries for the "status" of intellectual disability or the

"class of defendants" who have it. *See Montgomery*, 577 U.S. at 206 (quoting *Penry*, 492 U.S. at 330); *see also Goodwin*, 814 F.3d at 905 (Murphy, J., concurring in part and dissenting in part) ("Under *Atkins*, defendants with IQ scores above 70 in Florida were not protected from capital punishment because they were not intellectually disabled. Now, under *Hall*, defendants with IQ scores above 70 in Florida may be considered intellectually disabled under *Atkins*."); *Henry*, 757 F.3d at 1167 (Martin, J., dissenting) ("*Hall* is substantive because it grew the class of people who are not eligible for the death penalty."). Neither rule was merely "designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *See Montgomery*, 577 U.S. at 201 (quoting *Summerlin*, 542 U.S. at 353; and citing *Teague*, 489 U.S. at 313 (plurality op.)). Both rules redefined what it means to have an "intellectual disability" as a matter of law. Just as a decision from this Court "that modifies the elements of an offense is normally substantive," so too is a decision that "modifies the elements" of a categorical restriction on the punishment of death. *See Summerlin*, 542 U.S. at 354.

For example, after *Moore I*, to say that someone does not have an intellectual disability simply because he exhibited some strengths in prison would be invalid as a matter of both medical guidelines and Eighth Amendment law. *See Moore I*, 137 S. Ct. at 1050. If a court upheld a death sentence on that faulty basis and in spite of overwhelming evidence of "adaptive *deficits*" alongside evidence satisfying the other clinical criteria for an intellectual disability, *id.*, then no one could conclude that the death sentence still is "accurate" in any sense of that word. *See Montgomery*, 577 U.S.

at 201–02. To execute that individual would not simply reflect adherence to a flawed "sentencing procedure[]"; it would reflect a flawed understanding of the very status that renders the person one with an intellectual disability under the Eighth Amendment and, in turn, ineligible for the punishment of death. *Cf. id.* at 202 (explaining that "the use of flawless sentencing procedures" could not "legitimate a punishment where the Constitution immunizes the defendant from the sentence imposed"); *id.* at 211–12 (distinguishing decisions that "altered the processes in which States must engage before sentencing a person to death," which "may have had some effect on the likelihood that capital punishment would be imposed," but did not "render[] a certain penalty unconstitutionally excessive for a *category* of offenders" (emphasis added)). The fact that *Hall* and *Moore I* changed the boundaries of the status or class of defendants with intellectual disabilities makes each one "a substantive guarantee," not "a rule that 'regulate[s] only the *manner of determining* the defendant's culpability.'" *See id.* at 210 (quoting *Summerlin*, 542 U.S. at 353).

The views of all nine Justices in *Jones v. Mississippi* confirm that *Moore I* and *Hall* created new "substantive" rules. The opinion for the Court viewed *Miller v. Alabama*, 567 U.S. 460 (2012), as having mandated "a discretionary sentencing procedure" and did not view "permanent incorrigibility" as "an eligibility criterion." *Jones*, 141 S. Ct. at 1314–17. But the majority did not question that a rule "permitting life-without-parole sentences only for 'those whose crimes reflect permanent incorrigibility,' rather than 'transient immaturity'" would be substantive. *See id.* at 1317 (quoting *Montgomery*, 577 U.S. at 209). And the opinion called for "the Court's

retroactivity precedents that both pre-date and post-date *Montgomery*" to "guide the determination of whether rules other than *Miller* are substantive." *Id.* at 1317 n.4. Based on those precedents, a rule that prohibits States from executing an individual who scored a 72 on one IQ test and has various adaptive strengths but who has an intellectual disability under "[t]he medical community's current standards," *Moore I*, 137 S. Ct. at 1053, is a rule that "alters . . . the class of persons that the law punishes" with a sentence of death. *See Jones*, 141 S. Ct. at 1317 n.4 (quoting *Welch*, 578 U.S. at 129).

Hall and *Moore I* are "substantive" under Justice Thomas's and the dissenting Justices' views too. Justice Thomas viewed *Miller* as "procedural" and *Montgomery* as having "reimagined" *Miller* in a way that "was substantive under [the Court's] precedents." *Jones*, 141 S. Ct. at 1325 (Thomas, J., concurring in the judgment). To Justice Thomas though, *Montgomery*'s definition of a class of individuals "categorically exempt" from a given punishment, minus those "whose crimes reflect permanent incorrigibility," was "a substantive rule." *Id.* (Thomas, J., concurring in the judgment). By that same logic, *Hall*'s and *Moore I*'s redefinitions of a class that is "categorically exempt" from the death penalty were "substantive rule[s]" too. *Cf. id.* (Thomas, J., concurring in the judgment). Likewise for the dissenting Justices who took issue with Justice Thomas's view of *Miller*: These Justices reasoned that *Miller* itself "rendered life without parole an unconstitutional penalty for a class of defendants because of their status[,] that is, juvenile offenders whose crimes reflect the transient immaturity of youth." *Id.* at 1334 n.3 (Sotomayor, J., dissenting)

(quoting *Montgomery*, 577 U.S. at 208). *Hall* and *Moore I* warrant retroactive application under every line of reasoning this Court employed in *Jones*.

Imagine, for instance, if this Court were to redefine the "juvenile offender" protected by the Eighth Amendment's bar on capital punishment to include not only one who was "younger than [eighteen] when he committed a capital crime," but also one who was younger than twenty-one. *See Roper*, 543 U.S. at 555–56, 568–74; *see also Montgomery*, 577 U.S. at 209 (taking it as a given that *Roper* adopted a new "substantive" rule). Would this Court call a redrawing of the line between adulthood and adolescence—an expansion of the class of protected defendants—a mere change in procedure, and then deny relief to a nineteen-year-old scheduled to be executed? If this Court would answer "No" to that question, it should not hesitate to grant certiorari and answer the question presented here. An individual who relies upon *Hall*'s and *Moore I*'s new, medically grounded definitions of intellectual disability under the Eighth Amendment is relying upon a substantive change in the law.

B. The Court should use this case to resolve the critical and recurring question of Hall*'s and* Moore I*'s retroactivity.*

The question presented has arisen numerous times. Each time, it has life-or-death consequences. This case, in which the Nebraska Supreme Court squarely addressed the question outside the strictures of AEDPA, presents an ideal opportunity for this Court to answer it once and for all.

1. This Court has made clear that "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders,'" *Moore I*, 137 S. Ct. at 1051 (quoting

Roper, 543 U.S. at 563–64). Yet federal courts of appeals and state courts of last resort remain divided on both whether this Court's own expansion of the bounds of that "category" is "new" and whether it is a "substantive" or "procedural" development in the law. Without an answer from this Court, lower courts are likely to continue to seek this Court's guidance and to apply *Hall*'s and *Moore I*'s holdings inconsistently from one jurisdiction to the next. These courts are left to continue guessing, for instance, whether the Chief Justice's dissent in *Moore I* "may presage an eventual ruling" that *Moore I* applies retroactively. *See Williams*, 858 F.3d at 474.

2. This case provides an ideal vehicle to finally answer the question. The Nebraska Supreme Court answered it directly. The answer was dispositive of Lotter's appeal and reaches this Court unadorned by any restrictions AEDPA might place on the Court's review. A decision from this Court that *Moore I* is a new rule that applies retroactively would also mean that Lotter's "claim was timely" under state law. *See* App. 27a. And the Nebraska Supreme Court already recognized its obligation to "appl[y] retroactively to cases on collateral review" "a new substantive rule of constitutional law." App. 27a.

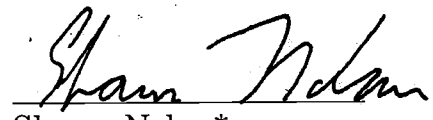
All Lotter sought was an opportunity to prove his intellectual disability under current clinical guidelines and this Court's precedent demanding fidelity to those guidelines. *See* App. 144a–58a. Yet, even before the decision below rejected Lotter's claim without an evidentiary hearing, the Nebraska Supreme Court's pre–*Moore I* precedent "overemphasized [a petitioner]'s perceived adaptive strengths" in a way this Court has repudiated. *Compare Moore I*, 137 S. Ct. at 1050 (rejecting one court's

focus on adaptive strengths and "improved behavior in prison" because it "deviated from . . . clinical standards"), *with Vela*, 777 N.W.2d at 307 (applying the same type of focus by emphasizing that a petitioner had a job, "was well-liked, responsive, hard-working, friendly, and talkative," and "selected books from the prison book cart," among other adaptive strengths). Only after *Moore I* and its announcement that petitioners like Lotter must be assessed for an intellectual disability based on current clinical guidelines did Lotter's Eighth Amendment claim become cognizable and timely in a subsequent state post-conviction proceeding. At that time, he underwent an evaluation, was diagnosed with an intellectual disability (and an IQ of 67), and presented the claim in a motion for state post-conviction relief within a year of *Moore I*'s announcement. *See* App. 108a–10a, 149a–58a, 163a–64a. If Lotter had done so in a jurisdiction like Kentucky, he would have had a meaningful opportunity to prove his disability. *See Woodall*, 563 S.W.3d at 2, 6. Unless the Nebraska Supreme Court's erroneous decision is corrected, he may be denied that opportunity by virtue of geography alone. This disparity—and its extraordinary consequences for Lotter and others who are similarly situated—deserves resolution from this Court. *Cf. Teague*, 489 U.S. at 305 (plurality op.) (criticizing this Court's prior retroactivity standard's "unfortunate disparity in the treatment of similarly situated defendants on collateral review").

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,



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