No. 22-6191 (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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

There is no dispute that the Nebraska Supreme Court squarely answered the question presented: whether *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), announced new substantive rules of federal constitutional law that apply retroactively. And the State never tries to explain how two rules that redefined the *substantive* criteria for a categorical restriction on the punishment of death could be anything *but* substantive. Instead, the State calls lower courts' split on the question not "genuine," apparently because the Kentucky Supreme Court's first opinion applying *Hall* retroactively also "involved" a state procedural question. *See* BIO at 5–6. Yet addressing an entirely separate procedural issue did not change the fact that the court decided *Hall*'s retroactivity as a matter of federal law—all before later applying *Moore I* retroactively too. The State ignores the later opinion and even more opinions demonstrating lower courts' *three* different approaches to the question presented. This Court should sort out the split once and for all.

As for why this case provides an ideal vehicle to do so, the State does not contest the fact of John Lotter's intellectual disability under current medical standards. Nor does the State say a word about what the decision below recognized: If *Hall* and *Moore I* announced new substantive rules of federal law, Lotter's claim would have been timely under a new one-year limitations period under state law. *See* Pet. App. 29a. Contrary to the State's argument that Lotter's claim is procedurally barred and time barred, *see* BIO at 5, no state rule stands in the way of this Court answering the critical, recurring question that has divided lower courts.

I. The State disregards decisions from three courts to assert the absence of any split.

Without once casting doubt on the importance of the question presented, the State suggests that lower courts have not actually diverged when answering it. Yet the State does so only by closing its eyes to courts' three different approaches. Whichever way this Court may ultimately answer the question, now is the time to create uniformity in federal law.

The State points out two non-controversial facts about one court's retroactive application of *Hall*: that the Kentucky Supreme Court applied *Hall* retroactively in a case which (1) "involved" a question of state law and (2) pre-dated *Moore I*. BIO at 5. Both facts are true, but neither one matters here. The Kentucky Supreme Court applied *Teague v. Lane*, 489 U.S. 288 (1989), and concluded that "*Hall* must be retroactively applied" to a petitioner's collateral attack on a judgment that had become final long before *Hall*. *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, 6 (Ky. 2018). Wholly separate from the court's answer to that federal question was the court's answer to a state-law question not implicated here: whether the petitioner had an independent right to refuse to undergo an intellectual-disability evaluation by a state actor as opposed to an expert the petitioner selected. *See White*, 500 S.W.3d at 216 (holding "that once an evaluation has been ordered for the purpose of determining intellectual disability, then the evaluation must meet the dictates of *Hall*," and rejecting the distinct argument that a state entity was not "capable of

examining and evaluating" the petitioner). Answering that separate question in no way affected the court's retroactive application of *Hall* under *Teague*.

After this Court issued *Moore I*, the Kentucky Supreme Court also applied *Moore I* retroactively. *See Woodall*, 563 S.W.3d at 2, 6. Again on collateral review, the Kentucky Supreme Court explained that lower courts "must follow" *Moore I* and apply "prevailing medical standards" when evaluating claims of intellectual disability. *See id.* at 6 (footnote omitted). The State has nothing to say about this second ruling.

The State ignores even more decisions that confirm the split. One is a recent plurality opinion from the Georgia Supreme Court that distinguished *Hall*'s and *Moore I*'s answers to "questions regarding the *substantive* definition of intellectual disability" from an answer to a "*procedural* question," like—in that case—defining a petitioner's burden of proof. *See Young v. State*, 860 S.E.2d 746, 771 (Ga. 2021) (plurality opinion). That reasoning about the substantive-procedural line aligns with this Court's, which the State tellingly declines to address: Just as "[a] decision that modifies the elements of an offense is normally substantive rather than procedural," *see Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), so too is this Court's modification of a categorical bar governing eligibility for the death penalty, *see* Pet. at 26–31. And the third way lower courts have diverged in the absence of this Court's guidance goes entirely unmentioned by the State: the Tenth Circuit's retroactive application of both *Hall* and *Moore I* as old rules, not new ones. *See* Pet. at 23–24.

No matter what the State might think about the best way to resolve the split, it cannot overcome the fact that lower courts around the country have taken divergent paths. This geographic disparity deserves this Court's review.

II. The State's argument that Lotter is asking this Court to create an intellectual-disability exception to state procedural rules misunderstands his claim, the question presented, and the decision below.

Apart from incorrectly asserting the absence of a split, the State asserts state procedural and time bars, but no such bars exist in this case. In fact, the nature of the decision below and Lotter's claim makes this case an ideal vehicle to finally create geographic uniformity on a question with life-or-death implications.

The State asserts that "[i]t was *Atkins v. Virginia*, 536 U.S. 304 (2002), which announced the new constitutional rule" barring the execution of individuals with intellectual disabilities and that Lotter wants this Court to decide that a death-sentenced individual can raise an intellectual-disability claim "at any time." *See* BIO at 4–5. These assertions reveal the State's misunderstanding of this case. This Court need look no further than the decision below to see why. The Nebraska Supreme Court recognized that, had it agreed that *Hall* and *Moore I* announced new substantive rules of federal constitutional law, Lotter's claim would be timely under a one-year state statute of limitations—not an indefinite time period. *See* Pet. App. 26a–29a.

Nebraska law sets out multiple dates on which a new one-year statute-of-limitations clock might start ticking. *See* Neb. Rev. Stat. § 29-3001(4). Lotter filed a

new claim in March 2018 and argued that it was "timely" under "either" of two statutory dates—one triggered by newly discovered facts and another triggered by a retroactive change in law. *See* Pet. App. 21a–29a. The decision below addressed each one separately. *See* Pet. App. 21a–29a. But the State refers to only the first one, i.e., when Lotter "could reasonably [have] discovered" the facts to present an *Atkins* claim. *See* Pet. App. 22a–26a; *see also* BIO at 6. That trigger date for a new statute of limitations is *not* at issue here though.

The State disregards the second statutory trigger and the only relevant one here: when "the Supreme Court of the United States or the Nebraska Supreme Court . . . initially recognized" a constitutional right that "has been made applicable retroactively to cases on postconviction collateral review." Pet. App. 26a–27a (quoting Neb. Rev. Stat. § 29-3001(4)(d)). The decision below recognized that if *Hall* and *Moore I* are retroactively applicable, then the latter "trigger[ed]" a new one-year "limitations period" under state law. Pet. App. 29a. There is no dispute that Lotter filed his new claim and sought an evidentiary hearing within that period. Pet. App. 7a–8a, 26a.

If that were not enough, the Nebraska Supreme Court also recognized that Lotter's claim—and the state's collateral-review process—"require[d]" the court "to determine whether *Moore I* recognized a new constitutional right which has been applied retroactively to cases on collateral review." Pet. App. 27a; *see also* Pet. App. 27a & n.88 (citing *Montgomery v. Louisiana*, 577 U.S. 190, 200 (2016), and *Teague* when acknowledging "that state courts considering a matter on collateral review

must give retroactive effect to new substantive rules of federal constitutional law"). The decision below squarely made that federal determination free of any procedural or time bar. *See* Pet. App. 27a–29a. As a result, the State's assertion that lower courts can apply procedural and time bars to *Atkins* claims, *see* BIO at 6, is neither here nor there.

The State's misunderstanding of this case does not stop there: The State asserts that Lotter has never claimed that Nebraska applied the sort of "flawed definition[]" that Florida and Texas used before *Hall* and *Moore I*. BIO at 4. That is irrelevant as a matter of law and wrong as a matter of fact. The State's assertion is irrelevant because the timeliness of Lotter's new claim under state law turned on the federal question of whether *Hall* and *Moore I* announced new rules that redefined the "status" of having an intellectual disability or the "class of defendants" who have one as a matter of law, such that both cases apply retroactively. *See Montgomery*, 577 U.S. at 206 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). If this Court agrees that *Hall* and *Moore I* announced new substantive rules, Lotter's claim was timely. *See* Pet. App. 27a–29a. Or, if this Court decides otherwise and adopts one of the two other approaches lower courts have taken, the Court would create much-needed uniformity in the law. Either way, this Court should resolve the split.[1]

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[1] The State's characterization of Lotter's previous collateral challenges—all of which he filed before this Court decided *Moore I*—has no bearing on the federal

The State's assertion is wrong factually because Lotter has identified defects in Nebraska's definition of intellectual disability. Nebraska previously defined adaptive behavior based on "adaptive strengths," not "deficits," Pet. App. 153a–54a (discussing *State v. Vela*, 777 N.W.2d 266, 308 (Neb. 2010)), despite *Moore I*'s requirement that States follow current clinical guidelines focusing on the latter, *see* Pet. at 32–33. The State has also treated an IQ score of "seventy or below" as "presumptive evidence of intellectual disability," Pet. App. 152a–53a (quoting Neb. Rev. Stat. § 28-105.01(3)), despite *Hall*'s teaching that "[i]ntellectual disability is a condition, not a number," *see* 572 U.S. at 723. In *Moore I*, this Court redefined "the *entire category* of [intellectually disabled] offenders" in such a way that was irreconcilable with Nebraska's prior approach. *See* 581 U.S. at 18 (alteration in

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question the Nebraska Supreme Court squarely answered. Even so, that characterization lacks critical context, including the fact that multiple challenges arose out of efforts to demonstrate that Lotter was wrongly convicted and sentenced to death based on the testimony of a codefendant who has now admitted that he testified falsely against Lotter. *See, e.g.*, *State v. Lotter*, 771 N.W.2d 551, 561–63 (Neb. 2009) (acknowledging the codefendant's recantation but denying relief based, in part, on the conclusion that "the presence of perjury by a key witness does not, in and of itself, present a constitutional violation"); *State v. Lotter*, 669 N.W.2d 438, 447–49 (Neb. 2003) (denying a post-conviction motion to conduct DNA testing on gloves, shoes, and clothes worn by the codefendant). "[T]he heightened 'risk of wrongful execution' faced by persons with intellectual disability" only confirms the importance of the question presented in this case. *See* Sheri Lynn Johnson et. al., *Convictions of Innocent People with Intellectual Disability*, 82 Alb. L. Rev. 1031, 1032 (2019) (quoting *Atkins*, 536 U.S. at 321); *see also id.* at 1034–39 ("identif[ying] 172 individuals with documented claims of intellectual disability and innocence" since 1989 and explaining how the nature of an intellectual disability makes that count "almost certainly an underestimate").

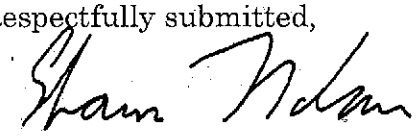
original) (quoting *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005)); *see also id.* at 20 (holding that "[t]he medical community's current standards" for both prongs "constrain[]" "States' leeway" when defining intellectual disability).

Finally, the State never contests the extraordinary implications of the question presented, which include the risk of wrongly executing individuals with intellectual disabilities based on geographic happenstance. Lower courts around the country are looking to this Court for guidance on the question. *See* Pet. at 22 n.5, 23 n.6, 32. Lotter simply seeks the chance to prove that he has an IQ of sixty-seven and adaptive deficits that date back to his placement in a special education program as a first-grade boy. *See* Pet. at 10–11, 32–33. That he is in Nebraska and not Kentucky should not be dispositive of whether he receives an opportunity to prove his disability under current clinical standards.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,



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