No. _____

IN THE

Supreme Court of the United States

FRANK A. WALLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Must *Hall v. Florida*, 572 U.S. 701 (2014), be applied retroactively by state courts because it substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment?

2. Did the Florida Supreme Court's reversal of its long-final mandate granting *Hall* retroactivity to Petitioner specifically, coupled with Petitioner's reasonable and detrimental reliance on the finality of that mandate, violate federal due process?

LIST OF DIRECTLY RELATED PROCEEDINGS

Direct Review

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: 73261
Decided: April 11, 1991
Published: 580 So. 2d 131 (Fla. 1991)

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: 80364
Decided: July 7, 1994
Published: 641 So. 2d 381 (Fla. 1994)

State Collateral Review

Caption: *State v. Walls*
Court: Circuit Court of the First Judicial Circuit, Okaloosa County, Florida
Docket: 1987-CF-856
Decided: January 27, 2003 (Initial State Postconviction Motion)
Published: N/A

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: SC03-633; SC03-1955
Decided: February 9, 2006
Published: 926 So. 2d 1156 (Fla. 2006)

Caption: *State v. Walls*
Court: Circuit Court of the First Judicial Circuit, Okaloosa County, Florida
Docket: 1987-CF-856
Decided: July 18, 2007 (Motion to Vacate Based on Mental Retardation)
Published: N/A

Court: *Walls v. State*
Docket: SC07-2007
Decided: October 31, 2008
Published: 3 So. 3d 1248 (Fla. 2008)

Caption: *State v. Walls*
Court: Circuit Court of the First Judicial Circuit, Okaloosa County, Florida
Docket: 1987-CF-856

Decided: July 15, 2015 (Motion to Vacate Based on *Hall v. Florida*)
Published: N/A

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: SC15-1449
Decided: October 20, 2016
Published: 213 So. 3d 340 (Fla. 2016)

Caption: *State v. Walls*
Court: Circuit Court of the First Judicial Circuit, Okaloosa County, Florida
Docket: 1987-CF-856
Decided: February 20, 2017
Published: N/A

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: SC17-959
Decided: January 22, 2018
Published: 238 So. 3d 96 (Fla. 2018)

Caption: *State v. Walls*
Court: Circuit Court of the First Judicial Circuit, Okaloosa County, Florida
Docket: 1987-CF-856
Decided: November 22, 2021 (On Remand for Hearing Under *Hall v. Florida*)
Published: N/A

Caption: *Walls v. State*
Court: Supreme Court of Florida
Docket: SC22-72
Decided: February 16, 2023
Published: 2023 WL 2027566 (Fla. Feb. 16, 2023)

Federal Habeas Review

Caption: *Walls v. McNeil*
Court: United States District Court, Northern District of Florida
Docket: 3:06-cv-237
Decided: September 30, 2009
Published: 2009 WL 3187066 (N.D. Fla. Sep. 30, 2009)

Caption: *Walls v. Buss*
Court: United States Court of Appeals, Eleventh Circuit
Docket: 09-15706

Decided: September 28, 2011
Published: 658 F.3d 1274 (11th Cir. 2011)

Certiorari Review

Caption: *Walls v. Florida*
Court: Supreme Court of the United States
Docket: 94-7005
Decided: January 23, 1995
Published: 513 U.S. 1130 (Cert. Denied)

Caption: *Walls v. Tucker*
Court: Supreme Court of the United States
Docket: 11-8965
Decided: April 30, 2012
Published: 566 U.S. 976 (Cert. Denied)

Caption: *Florida v. Walls*
Court: Supreme Court of the United States
Docket: 16-1518
Decided: October 2, 2017
Published: 138 S. Ct. 165 (Cert. Denied)

Caption: *Walls v. Florida*
Court: Supreme Court of the United States
Docket: 17-9510
Decided: October 1, 2018
Published: 139 S. Ct. 185 (Cert. Denied)

Note: In June 2023, Petitioner filed—closely in time with this certiorari petition—a petition for a writ of habeas corpus, raising different but related issues to those herein. The docket number for the habeas petition was not yet available at the time of this filing.

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Cases:

Statutes:

Petitioner Frank Walls, a prisoner on Florida's death row, petitions for a writ of certiorari to review the February 16, 2023, decision of the Florida Supreme Court.

DECISION BELOW

The Florida Supreme Court's decision is reported at __ So. 3d __, 2023 WL 2027566 (Fla. Feb. 16, 2023). It is also reprinted in the Appendix (App.) at 3a.

JURISDICTION

The Florida Supreme Court's judgment was entered on February 16, 2023, and rehearing was denied on March 29, 2023. App. 1a-11a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Background

In 1988, Walls was convicted of murder in a Florida court. The jury recommended the death penalty by a 7-to-5 vote, and the trial court imposed it. On direct appeal, the Florida Supreme Court vacated Walls's conviction based on the State's use of "illegal subterfuge" to gain an advantage at his pretrial competency hearing. *Walls v. State*, 580 So. 2d 131, 132-35 (Fla. 1991) (the State committed

"gross deception" and violated due process by deploying a jail officer to illegally surveil and question Walls, and then provide notes to the State's psychiatrists).

In 1992, Petitioner was retried, convicted, and sentenced to death. The Florida Supreme Court affirmed, and this Court denied certiorari. *Walls v. State*, 641 So. 2d 381 (Fla. 1994), *cert. denied*, 115 S. Ct. 943 (1995).

In state postconviction, Walls claimed that *Atkins v. Virginia*, 536 U.S. 304 (2002) prohibited his execution on Eighth Amendment grounds because he is intellectually disabled. The Florida Supreme Court rejected Walls's claim because he did not present a measured IQ score of 70 or below, as the state court's then-existing precedent required. *See Walls v. State*, 3 So. 3d 1248 (Fla. 2008) (citing *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)).

The Northern District of Florida denied Walls's federal habeas petition in 2009, *Walls v. McNeil*, 2009 WL 3187066 (N.D. Fla. Sept. 30, 2009), and the Eleventh Circuit affirmed in 2011. *Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011).

B. *Hall* litigation

After this Court invalidated Florida's IQ-score cutoff in *Hall v. Florida*, 572 U.S. 701 (2014), Walls renewed his intellectual disability claim in state court. In 2016, the Florida Supreme Court ruled for Walls, holding that *Hall* applied retroactively to him and all other Florida defendants, and ordering the circuit court to hold an evidentiary hearing and adjudicate his intellectual disability claim on the merits consistent with *Hall*'s standards. App. 34a-60a; *Walls v.* State, 213 So. 3d 340, 347 (Fla. 2016) ("*Walls I*").

In *Walls I*, the Florida Supreme Court held that *Hall* was retroactive because it limited "the power to impose a certain sentence—the sentence of death for individuals within a broader range of IQ scores than before." *Walls*, 213 So. 3d at 346. The State's certiorari petition did not challenge *Hall*'s retroactivity, *see* 2017 WL 2665654 (petition raising other issues), and was denied, 138 S. Ct. 165 (2017).

Walls I became final in 2017, following the Florida Supreme Court's mandate and this Court's denial of the State's certiorari petition. On remand, Walls's counsel focused next on making a robust case for intellectual disability at a *Hall*-compliant evidentiary hearing. Assured that the State was out of legal options to undo the Florida Supreme Court's grant of *Hall* retroactivity to Walls, counsel took the time necessary to gather records, litigate pre-hearing motions, retain new experts, and conduct discovery. The COVID-19 pandemic then delayed the start of the hearing.

In 2020, before Walls's evidentiary could begin, the Florida Supreme Court, in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), overruled, sua sponte, its decision on *Hall* retroactivity in *Walls I*, without any notice or briefing by the parties on the question. The Florida Supreme Court then began consistently applying *Phillips* to summarily reject intellectual disability claims in cases without a measured IQ of 70 or below—the same criteria that *Hall* found violated the Eighth Amendment. *See, e.g.*, *Cave v. State*, 299 So. 3d 352, 353 (Fla. 2020); *Freeman v. State,* 300 So. 3d 591, 594 (Fla. 2020); *Nixon v. State*, 327 So. 3d 780, 781 (Fla. 2021); *Pittman v. State*, 337 So. 3d 776, 777 (Fla. 2022); *Thompson v. State*, 341 So. 3d 303 (Fla. 2022); *Arbelaez v. State*, No. SC2015-1628, 2023 WL 3636175, at *1 (Fla. May 25, 2023).

Based on *Phillips*, the State moved in the circuit court to cancel Walls's hearing, and for summary denial of his claim, on the ground that *Hall* was not retroactive to him. The circuit court denied the State's motion, ruling that, despite *Phillips*'s holding on *Hall*'s non-retroactivity, the Florida Supreme Court's final judgment and mandate in *Walls I* barred using the unconstitutional pre-*Hall* cutoff against him. R. 3784-89 (relying on *State v. Okafor*, 306 So. 3d 930 (Fla. 2020)).

The circuit court thus held an evidentiary hearing in 2021, only to later rule that Walls's intellectual disability claim actually *was* barred on non-retroactivity grounds. The court's ruling relied on the intervening decision in *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), which applied *Phillips* to a case the Florida Supreme Court had remanded for a hearing following *Walls I*. The circuit court alternatively found that Walls did not meet the diagnostic criteria by clear and convincing evidence. App. 12a-33a.

In the Florida Supreme Court, Walls argued that *Phillips* should not be applied to him. First, Walls argued that federal law requires state courts to apply *Hall* retroactively to all postconviction claims, because *Hall* substantively expanded the class of individuals who may qualify as intellectually disabled under the Eighth Amendment. Walls emphasized that this Court arrived at the *Hall* rule by applying the doctrinal analysis required when deciding substantive—and only substantive—Eighth Amendment rules, surveying "the legislative policies of various States, and the holdings of state courts" for "'objective indicia of society's standards' in the

context of the Eighth Amendment." *Hall*, 572 U.S. at 714. Such Eighth Amendment rules, Walls argued, are always regarded as substantive and thus retroactive.

Second, Walls argued that the Florida Supreme Court's effective reversal of its 2017 mandate requiring application of *Hall* to his case violated his federal due process rights. Walls asserted that he reasonably and detrimentally relied on his vested right to *Hall* retroactivity following the Florida Supreme Court's mandate in *Walls I*, and that the Florida Supreme Court's abrupt reversal of *Walls I* in *Phillips*, while his counsel were still preparing for the hearing promised to him years earlier, violated the Due Process Clause's guarantee of fundamental fairness in litigation. *See, e.g.*, *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 69 (2009); *Carmell v. Texas*, 529 U.S. 513, 533 (2000); *Lankford v. Idaho*; 500 U.S. 110 U.S. 110 (1991); *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Walls explained that the retroactivity question was critical to him because the 2021 hearing evidence established his intellectual disability. The record contains substantial expert and lay testimony and contemporaneous documentation that Walls meets the three-prong diagnosis, including two IQ scores—a 72 and a 74—squarely within the *Hall* range.

C. Florida Supreme Court decision

In 2023, the Florida Supreme Court affirmed, "declin[ing] to reach [Walls's] merits-based argument and instead affirm[ing] on the basis that *Hall* is not retroactive." App 1a-9a; *Walls v. State*, No. SC22-72, 2023 WL 2027566 (Fla. Feb. 16, 2023) ("*Walls II*").

In *Walls II*, the Florida Supreme Court ruled that, despite its mandate in *Walls I* requiring that *Hall*'s standards be applied to Walls, his intellectual disability claim was now foreclosed by *Phillips*. *Walls*, 2023 WL 2027566, at *2. The Florida Supreme Court cited its repeated application of *Phillips* to cases in any posture, including those like *Nixon*, where the court had previously remanded for a *Hall*-compliant hearing pursuant to *Walls I*. *Id.* The Florida Supreme Court thus found that Walls's "*Hall*-based intellectual disability claim fails regardless of the evidence presented at his evidentiary hearing." *Id.* at *3.

In a footnote, the Florida Supreme Court purported to address Walls's due process argument. The footnote stated: "We reject this argument. Of significance, federal and state courts alike have concluded that *Hall* is not retroactive." The court cited decisions of the Nebraska and Ohio Supreme Courts, and a decision of the Sixth Circuit. *Id.* at *3 n.5.

Justice Labarga dissented, referencing his *Phillips* dissent. *Id.* at *3. In *Phillips*, Justice Labarga "strongly dissent[ed from] the majority's decision to recede from *Walls* [*I*], and [wrote] to underscore the unraveling of sound legal holdings in this most consequential area of the law." *Phillips*, 299 So. 3d at 1024.

D. Denial of federal authorization

After the Florida Supreme Court denied all relief, Walls sought authorization from the Eleventh Circuit to file a successive federal habeas claim in the district

court based on the *Hall* claim he exhausted in state court.[1] In April 2023, the Eleventh Circuit denied leave, on the ground that *Hall* has not been "made retroactive" by this Court within the meaning of 28 U.S.C. § 2244(b)(2)(A). *In re Walls*, No. 23-10982 (11th Cir. April 13, 2023).[2]

REASONS FOR GRANTING THE WRIT

I. Introduction

The Court should grant certiorari for two reasons. First, the Court should take this case to decide whether *Hall* must be applied retroactively because it substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment. This petition outlines why the doctrinal method this Court used to arrive at the *Hall* rule proves that it was a substantive decision about the class of defendants who are not death eligible. The Court arrived at the *Hall* rule by doing what is doctrinally required when deciding substantive—and only substantive—Eighth Amendment rules, which states are required to apply retroactively. This Court has applied *Hall*'s standards to two cases final before *Hall*.

Second, the Court should review the Florida Supreme Court's effective revocation of its long-final mandate assuring Walls that *Hall* would be applied to

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[1] Walls's federal *Hall* filing was timely under the federal habeas statute's one-year limitations period. His state claim was filed 364 days after *Hall*, triggering statutory tolling, and his federal § 2244 application was filed the same day that the Florida Supreme Court denied rehearing in February 2023—prior to issuance of the mandate, which would have ended statutory tolling. *See* 28 U.S.C. § 2244(d)(1)-(2).

[2] The Eleventh Circuit's decision is addressed more fully in a separate habeas corpus petition that was filed in this Court closely in time with the instant petition. The habeas petition's docket number was not yet available at the time of this filing.

his case specifically. This petition outlines how, after the *Walls I* mandate issued and the State's certiorari petition was denied, Walls accrued an irrevocable right to have his intellectual disability claim decided under *Hall*'s standards. Because he reasonably and detrimentally relied on his vested *Hall* rights, and the Florida Supreme Court unexpectedly and unjustifiably revoked them while his case was still on remand—for reasons having nothing to do with his case or any intervening precedent from this Court—Walls's federal due process rights were violated.

The effect of the Florida Supreme Court's ruling was to reimpose on Walls, and many others, the same unconstitutional IQ-score cutoff *Hall* struck down. This Court's intervention is urgently needed to stop Florida's continued defiance of *Hall*.[3]

II. The Court should grant certiorari to review whether states must apply *Hall* retroactively because it substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment

The Florida Supreme Court correctly ruled in *Walls I* that *Hall* must be retroactively applied to all *Atkins* claims. *Hall* substantively qualified and expanded the class of individuals who may not be executed. While the state court's ruling relied on both state and federal law, the ruling was compelled by the federal retroactivity floor set by *Teague v. Lane,* 489 U.S. 288 (1989).

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[3] Justice Sotomayor has called for review of the Florida Supreme Court's mishandling of *Hall* retroactivity in related contexts. *See, e.g.*, *Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., statement respecting the denial of certiorari and application for stay of execution) (Florida's time-bar of certain *Hall* claims amounted to "Kafkaesque procedural rule" and created "grave tension" with *Montgomery v. Louisiana*, 577 U.S. 190 (2016), warranting review in a future case).

Hall must be substantive and retroactive because it qualified and expanded the class of persons exempt from execution.[4] *Atkins*, as previously understood by the Florida Supreme Court, only covered a sub-group among the intellectually disabled. To qualify for protection, a person must be "so impaired as to fall within the range of mentally retarded offenders *about whom there is a national consensus*." *Atkins*, 536 U.S. at 317 (emphasis added). This meant that less-impaired persons might not be protected if their impairment falls short of the "national consensus," even if they are also in the "range of mentally retarded offenders." *Id*.[5]

The doctrinal method this Court used to arrive at the *Hall* rule proves that *Hall* was a substantive decision, i.e., a decision on the scope of the class of defendants who are not death-eligible due to "society's standards" of decency. In *Hall*, this Court revisited the existing consensus and refined its definition of who is "so impaired . . . within the range of mentally retarded offenders," 572 U.S. at 719, to include a broader set of IQ scores, i.e., those scores within the +/- 5 standard error of measurement (SEM). As required by Eighth Amendment precedent, the

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[4] *Walls*'s expansion-of-protected-class arguments for retroactivity are rooted in federal retroactivity law for "substantive" new rules, which was not affected by *Teague*'s limits for retroactivity of new procedural rules. *Compare id*. at 346 (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967) and *Linkletter v. Walker*, 381 U.S. 618, 636 (1965)), with *Teague,* 489 U.S. at 307-08; *see also Edwards v. Vannoy,* 141 S. Ct. 1547, 1571 (2021) (Gorsuch, J., concurring).

[5] In a later case, the Florida Supreme Court again relied on this sentence to reiterate that *Atkins* "did not provide definitive . . . substantive guides for determining when a person . . . 'will be so impaired as to fall [within *Atkins'* compass].'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (last alteration in original). *Cf.* A. Scalia & B. Gardner, Reading Law, at 107 (explaining negative implication).

Court surveyed "the legislative policies of various States, and the holdings of state courts" for the existence of "consensus" as to IQ score minimums. *Id.* at 709.

The Court explained that national surveying was doctrinally necessary because "[t]his calculation provides 'objective indicia of society's standards' in the context of the Eighth Amendment." *Id.* at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). The Court determined that both the "aggregate number[]" of state laws, and the "[c]onsistency of the direction of change" informed its "determination of consensus" that imposing a cutoff at 70 was cruel and unusual. *Id.* at 717. The Court thus concluded that "our society does not regard this strict cutoff as proper or humane." *Id.* at 718.

Having found the consensus, the Court moved on to the next doctrinal step in the Eighth Amendment inquiry: its own judgment. *Id.* at 721 (quoting *Roper,* 543 U.S. at 564, and *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality op.)). Applying its "independent judgment," *id.* at 721-23, the Court affirmed the consensus and held Florida's cutoff unconstitutional.

Hall was a decision on the scope of the class of defendants who are not death-eligible due to "society's standards" of decency. *See id.* at 714; *Jones v. Mississippi,* 141 S. Ct. 1307, 1315 (2021) (noting this method as being reserved for establishing substantive Eighth Amendment eligibility criteria) (citing *Graham,* 560 U.S. at 61, and *Roper,* 543 U.S. at 563).[6] This doctrinal method is not employed when deciding

[6] *Hall* pointed to similar national surveying used to make substantive rules in *Atkins*, *Roper*, and *Coker*. Every other substantive Eighth Amendment rule was also decided through this prescribed method. *See, e.g., Graham v. Florida*, 560 U.S. 48,

procedural rules, even under the Eighth Amendment.[7] The *Hall* rule was necessarily substantive because it stemmed from the doctrinal method used only for deciding what punishments offend "'objective indicia of society's standards.'" *Id.* at 714 (quoting *Roper*, 543 U.S. at 563).

Hall substantively expanded *Atkins* protection, even if it did so modestly and without guaranteeing relief to any particular defendant. This Court has twice made modest incremental changes to substantive prohibitions, and their size did not affect their substantive nature. *See Kennedy*, 554 U.S. at 422 (expanding on *Coker* to cover rape of a younger child); *Roper*, 543 U.S. at 561 (expanding on *Thompson* to cover juveniles ages 16 and 17).

Similarly, in *Montgomery*, 577 U.S. 190, the Court held *Miller v. Alabama*, 567 U.S. 460 (2012) to be substantive and retroactive, even though *Miller* only barred *automatic* juvenile life-without-parole sentences. The Court reasoned that *Miller* rendered life-without-parole (LWOP) "an unconstitutional penalty for a class of defendants because of their status" as juvenile offenders whose crimes reflect the transient immaturity of youth, and therefore announced a new substantive rule

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60–61 (2010) (juvenile nonhomicide LWOP); *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (rape of a young child); *Thompson v. Oklahoma*, 487 U.S. 815, 852 (1988) (death penalty for juveniles under age 16); *Enmund v. Florida*, 458 U.S. 782 (1982) (low culpability co-defendants).

[7] Procedural rules, by their nature, do not implicate moral judgments of decency. The Court thus never looks to state laws and practices when deciding on procedural or technical Eighth Amendment rules. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 602-605 (1978) (exclusion of relevant evidence); *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (validity of aggravating factors); *Pulley v. Harris*, 465 U.S. 37, 47-50 (1984) (necessity of proportionality review mechanisms); *Booth v. Maryland*, 482 U.S. 496, 509 (1987) (victim impact admissibility).

that is retroactive on collateral review. 577 U.S. at 206, 208 (quoting *Penry v. Lynaugh,* 492 U.S. 302, 330 (1989)).

Montgomery specifically rejected the argument that the *Miller* rule was procedural, even though *Miller* required procedures to implement its substantive holding. *Id.* at 208. It is often necessary for a substantive change to be accompanied by a procedure "that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735, *citing Mackey v. U.S.*, 401 U.S. 667 (1971) (Harlan, J., concurring). Otherwise, there would be no way for a defendant to show that he belongs to the protected class that the Constitution prohibits a particular form of punishment from being imposed on. *Montgomery*, 577 U.S. at 210. "Those procedural requirements, of course, do not transform substantive rules into procedural ones." *Id.*

Although *Miller* did not foreclose a sentencer's ability to impose LWOP on a juvenile, it found life in prison disproportionate for all but the rarest of children and set a procedure for determining which children would fall into that category. *Id.* After *Miller*, only juveniles whose "crimes reflect irreparable corruption," *id.* at 208-09, can be sentenced to LWOP. The procedure used to make that categorization was necessary to implement *Miller* and did not make its substantive guarantee non-retroactive. Where, as in *Miller*, the holding announces procedural requirements necessary to implement a substantive guarantee that expands a protected class, the rule itself is still substantive and retroactive. *Id.* at 209-11.

Similarly, *Hall* did not foreclose that someone like Walls *could* be sentenced to death, but it expanded the category of individuals who would be exempt from that disproportionate sentence and provided a procedure for determining which capital defendants fell into that expanded category.

This Court has suggested that *Hall* warrants retroactive application in other collateral-review cases. Mr. Hall's sentence was already long final when the Court reviewed it following a successive postconviction proceeding. This means that before the Court could grant him relief it had to be sure, "as a threshold matter," that doing so would not create a new non-retroactive rule. *See Penry,* 492 U.S. at 313.

The Court again granted relief in *Moore v. Texas*, 137 S. Ct. 1039 (2017). The defendant in Moore—like Walls and Mr. Hall—was on collateral review with a sentence final long before *Hall*. The Court reversed Mr. Moore's case on collateral review as contrary to *Hall*. *Id.* at 1049 (concluding that the Texas court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*"). *Moore* also cited another case in which the Court applied *Hall* to an *Atkins* claim on collateral review. *Id.* at 1049 (noting that in *Brumfield v. Cain,* 576 U.S. 305, 316 (2015), the Court "rel[ied] on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding."). The four dissenters in *Moore* took no issue with applying *Hall* retroactively to Mr. Moore's case. *Id.* at 1057 (Roberts, C.J., dissenting).

For retroactivity purposes, there is no difference between this case and *Hall*, *Moore*, and *Brumfield*. They are all cases with convictions that were final well

before *Hall*. The *Hall* rule should apply to Walls too. *See Collins v. Youngblood*, 497 U.S. 37, 40–41 (1990) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.").

There is an urgent need to address uncertainty in Florida and the federal courts about *Hall* retroactivity. Of the nine states this Court identified in *Hall* as imposing a strict IQ score cutoff at 70, *see* 572 U.S. at 716, Florida is the only state continuing to circumvent application of *Hall*'s rule through a series of procedural obstacles and unexpected reversals of precedent.[8] But other states have since sided with Florida in holding *Hall* non-retroactive, with an Ohio appeals court even citing *Phillips*. *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020); *see also Payne v. State*, 493 S.W.3d 478, 490 (Tenn. 2016).

The minority position of those states refusing to apply *Hall* retroactively has bred intra- and inter-circuit conflict in the federal courts. Initially, the Fifth, Sixth, and Seventh circuits retroactively applied *Hall* without discussion. *See In re Cathey*, 857 F.3d at 237-38 (5th Cir. 2017); *Williams v. Mitchell*, 792 F.3d 606, 620 (6th Cir. 2015); *Webster v. Daniels*, 784 F.3d 1123, 1143 (7th Cir. 2015). However, these

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[8] Virginia, Delaware, and Washington have since abolished the death penalty. Kentucky has held *Hall* applies retroactively. *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016), *as modified* (Oct. 20, 2016), and *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). Alabama and Arizona automatically confirmed their law to *Hall*. *Reeves v. State*, 226 So. 3d 711, 728 (Ala. Crim. App. 2016); *State v. Escalante-Orozco*, 386 P.3d 798, 811 (Ariz. 2017), *abrogated on other grounds by State v. Escalante*, 425 P.3d 1078 (Ariz. 2018). Kansas enacted legislation specifically applying *Hall* retroactively. *State v. Thurber*, 420 P.3d 389, 402 (Kan. 2018). North Carolina has not directly addressed the issue.

jurisdictions subsequently undermined—without engaging with or acknowledging—their own precedent by holding in later cases that *Hall* is not retroactive. *Weathers v. Davis*, 915 F.3d 1025, 1027–28 (5th Cir. 2019); *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Fulks v. Watson*, 4 F.4th 586, 592 (7th Cir. 2021).

The Eleventh Circuit was one of the first jurisdictions to hold *Hall* non-retroactive, but even that court has since applied *Hall*'s standards to cases that were final before *Hall*. *See In re Henry*, 757 F.3d 1151, 1153 (11th Cir. 2014); *Smith v. Comm'r, Alabama Dep't of Corr.*, No. 21-14519, 2023 WL 3555565, at *8-11 (11th Cir. May 19, 2023). In the same vein, the Eighth Circuit held that the petitioner had not made a prima facie showing under *Tyler v. Cain,* 533 U.S. 656 (2001), that this Court has held that *Hall* is retroactive. *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014). However, in *Jackson v. Payne*, the Eighth Circuit retroactively applied the intervening Supreme Court decision, *Moore*, and by extension, *Hall*:

> After the district court's 2016 decision and while Jackson's appeal in *Jackson III* was pending, the Supreme Court decided *Moore I* … Reaffirming its analysis in *Hall v. Florida*, 572 U.S. 701, 713, 724, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the *Moore I* Court explained that "where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.' " Id. at 1049.
>
> *Moore I* heavily informed our decision in *Jackson III* and our instructions to the district court on remand.

9 F.4th 646, 652 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2745 (2022).[9]

This Court should grant certiorari to hold that *Hall* must be applied retroactively to Walls and all other individuals regardless of the date of their

[9] The Ninth Circuit has applied *Hall* retroactively. *Smith v. Ryan*, 813 F.3d 1175, 1181 (9th Cir. 2016), *as corrected* (9th Cir. Feb. 17, 2016). The Third and Tenth Circuits have not resolved the issue.

conviction and sentence. *See Montgomery*, 577 U.S. at 204-05 (holding substantive protections must be given retroactive effect in state collateral review).[10]

III. The Court should grant certiorari to review whether the Florida Supreme Court's revocation of its long-final mandate granting *Hall* retroactivity to Walls violated his federal due process rights

When *Walls I* became final in 2017—following the mandate and denial of the State's certiorari petition—Walls accrued an irrevocable right to have his *Atkins* claim decided under *Hall*'s standards. Assured that the State was out of legal options to undo the Florida Supreme Court's grant of *Hall* retroactivity to Walls specifically, counsel took the time necessary to gather records, litigate pre-hearing motions, retain new experts, and conduct discovery. The COVID-19 pandemic then delayed the start of the hearing until 2021. The year before, the Florida Supreme Court overruled *Walls I* in *Phillips* and began indiscriminately applying the *Phillips* rule to deny merits review of *Hall* claims to defendants in any procedural posture.

Walls acted in reasonable reliance on his vested *Hall* rights due to the combination of (1) stare decisis generally, and (2) decades of Florida law on finality of individual appellate judgments. These rules, firmly embedded in Florida law, generate an interest upon which individuals are entitled to rely. It is firmly established that state law can create interests which then entail federal constitutional protection. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963); *Goldberg*

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[10] Alternatively, the Court may find that *Hall* did not announce a "new" rule at all. If *Atkins* itself dictated *Hall*'s clarification of the substantive scope of who is deemed intellectually disabled, then, under *Teague*, this independently makes *Hall* applicable on state collateral review. *See Yates v. Aiken*, 484 U.S. 211, 217 (1988); *Smith v. Sharp*, 935 F.3d 1064, 1084 (10th Cir. 2019) (finding that *Hall* did not break sufficiently "new" ground from what *Atkins* held).

v. Kelly, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Evitts*, 469 U.S. 387. "This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'" *Bell v. Burson*, 402 U.S. 535, 539 (1971); *accord, Graham v. Richardson*, 403 U.S. 365, 374 (1971). The interest created thus commands Fourteenth Amendment Due Process protection.

But by mid-2020, Wall's two firewalls of vested rights began to fail. The first assurance—stare decisis principles—buckled when the Florida Supreme Court abruptly overruled *Hall* retroactivity in an unforeseeable 180-degree about-face. *See Phillips,* 299 So. 3d at 1024. The State in *Phillips* did not ask the Florida Supreme Court to overrule the *Walls I* retroactivity holding. Nor did the court seek supplemental briefing (or otherwise give notice to other litigants) before, sua sponte, issuing a pathbreaking opinion that effectively brought back the unconstitutional IQ-score cutoff for many Florida defendants on collateral review.

The second assurance on which Walls reasonably relied—the Florida law on finality of individual appellate judgments—although briefly prevailing in the circuit court,[11] ultimately failed in the Florida Supreme Court on the basis of the state

[11] Before the 2021 hearing, the circuit court found that *Phillips* "does not affect the mandate for this Court to hold the evidentiary hearing. Indeed, because well over 120 days passed between the time the mandate issued in *Walls* [*I*] and the time the *Phillips* decision was rendered, the mandate for this Court to hold an evidentiary hearing on the intellectual disability claim remains undisturbed. *See State v. Okafor*, 306 So. 3d 930, 933 (Fla. 2020)." R. 3787.

court's application of *Phillips* in *Nixon*, which made clear that no defendant's intellectual disability claim, in any posture, would be spared from *Phillips*'s rule.

By taking away the rights vested to Walls in 2017—rights that any litigant in his position would have reasonably relied on—the state court's ruling violated the Due Process Clause of the Fourteenth Amendment, which ensures fundamental fairness in litigation, including in state postconviction proceedings. *See Osborne*, 557 U.S. at 69; *Evitts*, 469 U.S. at 400-01 (1985) (if a state chooses to provide post-conviction review "it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause").

This Court has repeatedly held that a litigant's procedural due process rights are violated when a state court unexpectedly decides a key issue contrary to a party's detrimentally relied-upon expectations. In *Bouie*, for example, the Court held that a new judicial construction of state law exposing a defendant to previously unavailable liability violates the Due Process Clause. 378 U.S. at 362. The Court later described *Bouie* as akin to a "limitation[] on ex post facto judicial decision making" which is "inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Thus, where a court decision overruling its precedent is "'unexpected and indefensible'" it will "offend[] the due process principle of fair warning articulated in *Bouie* and its progeny." *Id*. at 466. Under *Bouie*, the Florida Supreme Court's application of *Phillips* to Walls deprived him of due process of law.

Further, this Court has acknowledged that the Due Process Clause protects a party's "rights acquired in previous litigation" from being later rescinded on the

basis of relitigation of the same issues that were "decided in the first suit." *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 597 (1962). Where the State has had an opportunity to be heard and take an appeal on an issue, due process forbids re-litigation of the issue determined adversely to it. *U. S. ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262, 1266 (2d Cir. 1975) (Friendly, J.).

Similarly, where the state postconviction rules are abruptly changed with the retroactive effect of denying a litigant a hearing in a pending case, such a change deprives him of due process of law in its primary sense—an opportunity to be heard. *Bouie*, 378 U.S. 347 at 354 (quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930)). This "transgression of the due process clause" is just as clear regardless if the supervening change in procedural rules is done by the legislature or, as here, "accomplished by the state judiciary[.]" *Id*. at 355.

Consistent with these principles, this Court has recognized that due process protects a capital defendant who relies on reasonable expectations, created by the State or by a state court, about the possible range of legal outcomes. *See Lankford*, 500 at 119. The fair-notice case of *Lankford*, clearly shows how, due to the "unique circumstances," of Walls's case, a decision reneging on the guarantee of a *Hall*-compliant *Atkins* ruling would violate due process. In *Lankford*, this Court ruled that issuing a previously unforeseeable ruling (in that case, a death sentence, where it seemed that only a term-of-years or life sentence was considered) violates the due process right to fair notice if a court reasonably assures, even if implicitly, that a

particular outcome was off the table, and the defense detrimentally relies on such expectation. *Id*. at 120-27.

As in *Lankford*, Walls reasonably relied on the 2017 mandate as guaranteeing one of two outcomes: either he would be granted relief, or he would be denied relief under *Hall*'s standards. As a result, he focused on remand on making the most robust merits case possible—without worrying about a third scenario where the guarantee of *Hall* would end up nullified. This scenario, in which the Florida Supreme Court would sua sponte overrule its precedent and then reinterpret its finality-of-judgment law to reverse Walls's 2017 judgment, was not one he could reasonably have expected. If Walls had fair notice on remand that neither stare decisis nor finality-of-appellate-judgment law would hold for even a few years, and that his otherwise-vested rights were at risk, he would have changed his litigation approach to prioritize expedience above all, so that he could prove his claim before the Florida Supreme Court decided to set aside its longstanding rules.

The Florida Supreme Court's broken promise to Walls on *Hall* retroactivity rendered the state proceedings fundamentally unfair and violated federal due process. *See Osborne*, 557 U.S. at 69 (state postconviction procedures must be fundamentally fair and comport with due process); *Evitts*, 469 U.S. at 400-01; *see also Carmell*, 529 U.S. at 533 ("[T]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by

the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life").[12]

The Florida Supreme Court's contortions on *Hall* retroactivity in this case should be reviewed. "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

IV. The decision below forecloses review of a meritorious intellectual disability claim

By denying Walls's claim on retroactivity grounds, the Florida Supreme Court never addressed the extensive evidence of his intellectual disability, including the fact that three experts who evaluated him—one of whom this Court credited in *Moore* and another who testified against Darryl Atkins himself—agreed that Walls is intellectually disabled.

The record from the 2021 evidentiary hearing, ignored by the Florida Supreme Court, contains substantial expert and lay testimony, and contemporaneous documentation, that Walls meets each of the intellectual disability criteria. The evidence in the current record includes two IQ scores—a 72 and a 74—that are squarely within the *Hall* range.

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[12] The changes from *Phillips* and its progeny also result in Walls being arbitrarily singled out, compared to similarly situated *Atkins* claimants. Thus, besides the due process violation, the non-retroactivity denial violated the Eighth Amendment, *see Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (pl. op. of Stewart, Powell, and Stevens, JJ.) and *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), and the Equal Protection Clause of the Fourteenth Amendment, *see Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

If allowed to continue applying the *Phillips* rule, the Florida Supreme Court will prevent Walls and others from accessing *Hall*'s substantive guarantee. This Court's intervention is needed.

CONCLUSION

The Court should grant the petition for a writ of certiorari and review the decision of the Florida Supreme Court.

Respectfully submitted,

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