22-7866

No. ~~22-7809~~

In The
Supreme Court of the United States

FRANK WALLS,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

In 2016, the Florida Supreme Court, using the state retroactivity test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980), held that *Hall v. Florida*, 572 U.S. 701 (2014), was retroactive. *Walls v. State*, 213 So. 3d 340, 345-46 (Fla. 2016). Based on the decision in *Walls*, a number of Florida capital cases were remanded by the Florida Supreme Court to the state postconviction courts to conduct second evidentiary hearings on claims of intellectual disability, including this case. Then, in 2021, the Florida Supreme Court receded from that prior precedent and held that *Hall* was not retroactive, under state law, in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S. Ct. 2676 (2021) Later in 2021, following an extensive six-day evidentiary hearing on the intellectual disability claim, the state postconviction court denied the intellectual disability claim on non-retroactivity grounds following *Phillips* but, alternatively, addressed the merits. The state postconviction court found Walls failed both the first prong and the third prong of the statutory test for intellectual disability. On appeal, the Florida Supreme Court affirmed solely on non-retroactivity grounds relying on their existing precedent of *Phillips*.

The two questions are presented in the petition:

> I. Whether this Court should grant review of a decision of the Florida Supreme Court following its existing precedent and refusing to apply *Hall v. Florida*, 572 U.S. 701 (2014), retroactively as a matter of state law.

II. Whether the Florida Supreme Court receding from its prior decision in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), violates due process under *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

OPINION BELOW

The Florida Supreme Court's opinion is reported at *Walls v. State*, 361 So. 3d 231 (Fla. 2023) (SC22-72).

JURISDICTION

On February 16, 2023, the Florida Supreme Court denied the claim of intellectual disability on non-retroactivity grounds. *Walls*, 361 So. 3d at 233-34. On March 2, 2023, Walls filed a motion for rehearing in the Florida Supreme Court. The State filed a response to the rehearing. On March 29, 2023, the Florida Supreme Court denied the rehearing. On June 22, 2023, Walls filed a petition for a writ of certiorari in this Court. The petition was timely. *See* Sup.Ct. R. 13.3; 28 U.S.C. § 2101(d). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment due process clause and the Fourteenth Amendment due process provision, as well as the Eighth Amendment prohibition on cruel and unusual punishment:

> The Fifth Amendment to the United States Constitution, provides: No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

> The Eighth Amendment to the United States 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 United States Constitution, provides:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Walls seeks review of an intellectual disability claim. Walls was granted a second evidentiary hearing in state court based on *Hall v. Florida*, 572 U.S. 701 (2014), at which he once again failed to prove he was intellectually disabled. He failed the third prong of onset because his IQ scores as a minor were 88, 102, and 101. The state postconviction court denied the claim both on non- retroactivity grounds and on the merits, but the Florida Supreme Court affirmed on non-retroactivity grounds alone.

Facts of the case

Early one morning in 1987, Walls broke into a mobile home then occupied by Edward Alger and Ann Peterson. Using curtain cords, Walls tied them up. Alger managed to get loose, and a struggle ensued. Ultimately, Walls tackled Alger, slashed his throat, and then shot him in the head several times—killing him. Walls then turned his attention to Peterson, who was at that time helpless and in tears. Though Peterson posed no threat to him, Walls shot her in the head from close range. Peterson began screaming. In response, Walls forced Peterson's face into a pillow and again shot her in the head from close range. She died as a result of these gunshot wounds. *Walls v. State*, 361 So. 3d 231, 232 (Fla. 2023).

Procedural history of the intellectual disability claim

On June 23, 2006, Walls filed a rule 3.203 motion raising a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002). Fla. R. Crim. P. 3.203. On July 10, 2007, the state postconviction court held an evidentiary hearing on the *Atkins* claim at which a defense expert, Dr. Jethro Toomer, and a State expert, Dr. Harry McClaren, both testified. The state postconviction court denied the intellectual

disability claim. The Florida Supreme Court affirmed, finding "no evidence that Walls has ever had an IQ of 70 or below." *Walls v. State*, 3 So. 3d 1248 (Fla. 2008).

On May 27, 2014, this Court decided *Hall v. Florida*, 572 U.S. 701 (2014). The *Hall* Court held that Florida's practice of failing to take into account the standard error of measurement (SEM) violated the Eighth Amendment. The *Hall* Court held a capital defendant whose IQ score fell within the SEM "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits" at an evidentiary hearing. *Id.* at 723.

On May 26, 2015, Walls filed a successive postconviction motion in state court relying on *Hall v. Florida*. The trial court summarily denied the successive motion. (PC Vol. I 46-50). The trial court noted that Walls' IQ scores prior to his 18th birthday were 102 and 101. (PC Vol. I 49). The trial court noted that Walls already received an evidentiary hearing on his intellectual disability claim, at which he was permitted to present evidence regarding each of the three prongs. (PC Vol. I 49). The trial court noted that the defense's own expert at the prior evidentiary hearing, Dr. Toomer, had testified that Walls did not meet the juvenile onset prong of the test for intellectual disability. (PC Vol. I 49 citing pages 40-41 of the July 2007 hearing).

The Florida Supreme Court, however, reversed and remanded for a second evidentiary hearing. *Walls v. State*, 213 So. 3d 340, 344 (Fla. 2016). The Florida Supreme Court stated that Walls did not receive the type of "holistic review" at the first evidentiary hearing which he was entitled to under *Hall*. *Walls*, 213 So. 3d at 347. The Florida Supreme Court held that *Hall* was retroactive under the state's retroactivity test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Walls*, 213 So. 3d at 345-46.

On June 29, 2021, through July 7, 2021, the postconviction court held a six-day

evidentiary hearing on the intellectual disability claim. The defense presented seven witnesses, including six experts, at the second evidentiary hearing: 1) Dr. Mark D. Cunningham; 2) Dr. Karen P. Hagerott; 3) retired Assistant Public Defender James C. Sewell, Jr.; 4) Dr. Daniel A. Martell; 5) Dr. Mark J. Mills; 6) Dr. Robert Ouaou; and 7) Dr. Barry M. Crown as a rebuttal witness. The State presented Dr. Gregory Prichard, as its expert on intellectual disability. On November 22, 2021, the trial court denied the intellectual disability claim both on non-retroactivity grounds and on the merits, making findings regarding all three prongs of the state statutory test for intellectual disability. (2022 Succ. PCR 6258-6279). The postconviction court found Walls failed both the first and third prongs.

Regarding the third prong of onset, the state postconviction court recounted Walls' various IQ scores as a minor: 1) at six years old, Walls had a full scale IQ of 88; 2) at seven years old, an average score (between 90 to 110); 3) at twelve years old, Walls had a full scale IQ of 102; 4) at fourteen-years-old, Walls had a full scale IQ of 101. (2022 Succ. PCR 6265-6266). The state postconviction court found all of Walls' scores as a minor to be valid. (2022 Succ. PCR 6266). The postconviction court rejected the defense's reliance on childhood achievement tests rather than IQ scores and rejected the defendant's reliance on his placement in special education classes because his placement was based on his behavior issues rather than his mental abilities. (2022 Succ. PCR 6267- 68).

The Florida Supreme Court, however, affirmed the denial of the intellectual disability claim solely on non-retroactivity grounds relying on their current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S. Ct. 2676 (2021). Walls also filed an application for permission to file a successive § 2254

habeas petition, in the Eleventh Circuit, arguing that a successive habeas petition was proper under 28 U.S.C. § 2244(b)(2). *In re Walls*, 2023 WL 3745103 (11th Cir. Apr. 13, 2023) (No. 23-10982-P). Walls asserted that *Hall v. Florida* created a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Walls additionally argued that *Montgomery v. Louisiana*, 577 U.S. 190 (2016), had abrogated the reasoning of the Eleventh Circuit prior precedent of *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). The Eleventh Circuit denied permission relying on *In re Henry* and *Kilgore v. Sec'y, Fla. Dept. of Corr.*, 805 F.3d 1301, 1313-16 (11th Cir. 2015), which had characterized *Hall* as a "new procedural rule" and refused to apply it retroactively.

On June 26, 2023, Walls filed an original habeas petition in this Court regarding the Eleventh Circuit's denial of authorization to file a successive habeas petition. *In re Walls*, No. 22-7897. That original habeas petition is currently pending in this Court and the State's response to that petition is currently due on July 31, 2023.

On June 22, 2023, Walls, represented by state postconviction counsel, Capital Collateral Regional Counsel - Middle Region (CCRC-M), filed a petition for a writ of certiorari in this Court seeking review of the Florida Supreme Court's decision raising two issues.

REASONS FOR DENYING THE WRIT

ISSUE I

WHETHER THIS COURT SHOULD GRANT REVIEW OF A DECISION OF THE FLORIDA SUPREME COURT FOLLOWING ITS EXISTING PRECEDENT AND HOLDING THAT *HALL V. FLORIDA*, 572 U.S. 701 (2014), IS NOT RETROACTIVE UNDER STATE LAW.

Petitioner Walls seeks review of the Florida Supreme Court's decision holding that *Hall v. Florida*, 572 U.S. 701 (2014), is not retroactive. The Florida Supreme Court followed its current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied, Phillips v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6887). The issue is largely a matter of state law because Florida has a different test for retroactivity than the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). Opposing counsel relies on *Montgomery v. Louisiana*, 577 U.S. 190 (2016), to establish conflict with this Court's retroactivity jurisprudence. But this Court recently disavowed *Montgomery* in *Jones v. Mississippi*, 141 S. Ct. 1307, 1317, n.4 (2021). There is no conflict between this Court's current retroactivity jurisprudence and the Florida Supreme Court's decision in this case. Nor is there an active conflict among the federal circuit courts or state courts of last resort regarding the retroactivity of *Hall* under a *Teague* analysis. The cases relied on in the petition to establish such a conflict either contain no *Teague* analysis at all or were decided years before this Court's recent decisions in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), and *Jones*. There is no conflict among the lower appellate courts and the Florida Supreme Court's decision in this case. Furthermore, the retroactivity of *Hall* is a theoretical issue that is not outcome determinative. *Hall* does not apply to Walls at all because his claim of intellectual disability failed on the third prong of onset which was not at issue in *Hall*. Walls' three IQ scores as a minor were 88, 102, and 101. Walls was never entitled to a second evidentiary hearing under *Hall*, whether *Hall* is retroactive or not. Review of this

issue should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court affirmed the denial of the claim solely on non-retroactivity grounds. *Walls v. State*, 361 So. 3d 231 (Fla. 2023). The Florida Supreme Court relied on their current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6887), which had receded from their prior holding that *Hall* was retroactive in *Walls v. State*, 213 So. 3d 340 (Fla. 2016). *Walls*, 361 So. 3d at 233. The Florida Supreme Court also relied on two prior decisions, *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), *cert. denied, Nixon v. Florida*, 142 S. Ct. 2836 (2022) (No. 21-1173), and *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), *cert. denied, Thompson v. Florida*, 143 S. Ct. 592 (2023) (No. 22-5906), that had both followed *Phillips*. *Id.* at 233-34. The Florida Supreme Court concluded that Walls was not entitled to retroactive benefit of *Hall* and therefore, his intellectual disability claim based on *Hall* failed, regardless of the evidence he presented at the second evidentiary hearing *Id.* at 234.

Retroactivity in Florida is a matter of state law

This Court lacks jurisdiction to review a state court judgment if that judgment rests on state law. *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989)). And the retroactivity of *Hall v. Florida* is largely a matter of state law. *Danforth v. Minnesota*, 552 U.S. 264, 266, 280 (2008) (explaining that states are free to grant retroactive benefit of a case to a "broader effect" than *Teague* because the "finality of state convictions is a state interest, not a federal one"). While state courts may not create a state test of retroactivity that would grant less retroactivity protection than *Teague*, state courts may have a different test for retroactivity than *Teague*. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1438, n.31 (2020). And

Florida does. The state test for retroactivity in Florida is *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

The Florida Supreme Court in this case relied mainly on its current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied, Phillips v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6887), which had applied the state test of *Witt* to overrule *Walls v. State*, 213 So. 3d 340 (Fla. 2016). All of the decisions cited by the Florida Supreme Court in its opinion in support of its conclusion that *Hall* was not retroactive, *i.e.*, *Phillips*, *Nixon*, and *Thompson*, had applied *Witt*. All of these decisions, including *Walls v. State*, 213 So. 3d 340 (Fla. 2016), which was overruled, had applied the state test of *Witt*, not the federal test of *Teague*. Basically, the Florida Supreme Court at first had provided broader retroactivity protection than *Teague* but then the Florida Supreme Court reconsidered its view and brought the state result more in line with the result under *Teague*. The change in its view, no doubt, was motivated because the prior precedent had resulted in second evidentiary hearings for capital defendants who clearly were not intellectually disabled, such as Walls with his normal IQ scores as a minor. But regardless of whether the state test for retroactivity results in the same outcome as a *Teague* analysis, the state law test for retroactivity still remains largely a matter of state law.

This Court's current retroactivity jurisprudence

This Court established the federal test for retroactivity in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* originally had an exception to the general rule of non-retroactivity of new procedural rules for "watershed rules of criminal procedure." *Id.* at 311. But, recently, in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), this Court narrowed *Teague* by abolishing the exception for "watershed" procedural rules. This Court characterized the watershed exception as "moribund" and noted that it was only a "theoretical exception" because no new decision had qualified as being a watershed in the 32 years

since *Teague* had been decided. *Edwards*, 141 S. Ct. at 1551.

Whether a new rule applies retroactively depends on whether the rule is substantive or procedural. A new constitutional rule is substantive and, therefore, retroactive, if the rule "alters the range of conduct or the class of persons that the law punishes." *Welch v. United States*, 578 U.S. 120, 129 (2016). New substantive rules apply retroactively in federal collateral review. *Edwards*, 141 S. Ct. at 1562. But new procedural rules do not apply retroactively in federal collateral review. *Id.* at 1562. One of the rationales for the distinction is that new substantive rules rise to the specter of legal innocence in a way that new procedural rules do not.

Under *Teague*, as narrowed in *Edwards*, *Hall v. Florida* is not retroactive because it is a procedural rule. Contrary to opposing counsel's assertion, *Hall* is not a substantive rule. *Hall* held that capital defendants, whose IQ scores are within the statistical error of measurement (SEM) are entitled to an evidentiary hearing to explore the other two prongs of the test for intellectual disability. *Hall*, 572 U.S. at 724 (holding that the law requires capital defendants whose IQ scores are within the SEM have an "opportunity to present evidence" of their "intellectual disability, including deficits in adaptive functioning"); *Moore v. Texas*, 581 U.S. 1, 13 (2017) ("*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement"); *Moore*, 581 U.S. at 14 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning"). The holding in *Hall* concerned which capital defendants were entitled to an evidentiary hearing to establish their claims of intellectual disability and which capital defendants were not. In the Eleventh Circuit's words, *Hall* merely provided new procedures for ensuring that States do not execute members of an already protected group. *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014). The Eighth Amendment class of intellectually disabled capital defendants had been established

decades earlier in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Hall* did not create or expand that Eighth Amendment class itself. Indeed, the *Hall* Court made it clear that the class affected was "identical" to the class created by *Atkins*. *In re Henry*, 757 F.3d at 1160-61 (quoting *Hall*, 572 U.S. at 704). The class was intellectually disabled capital defendants before *Hall* and the class remained intellectually disabled capital defendants after *Hall*. *Hall* is procedural and therefore, under *Teague*, it is not retroactive.

Opposing counsel relies on *Montgomery v. Louisiana*, 577 U.S. 190 (2016), to assert the Florida Supreme Court's decision conflicts with this Court's retroactivity jurisprudence. Pet. at 8, n.3,11-12,16. The Eleventh Circuit explained the wrinkle that *Montgomery*'s half substantive/half procedural analysis had caused in federal retroactivity analysis in *Smith v. Commr., Ala. Dept. of Corr.*, 924 F.3d 1330, 1339, n.5 (11th Cir. 2019). But this Court has since ironed that wrinkle out by disavowing *Montgomery* altogether in *Jones v. Mississippi*, 141 S. Ct. 1307, 1317, n.4 (2021). The *Jones* Court disavowed *Montgomery* and stated that whether a rule is substantive or procedural for retroactivity purposes is determined by considering "the function of the rule itself," not by determining whether the underlying constitutional right is substantive or procedural. *Id.* at n.4 (citing *Welch v. United States*, 578 U. S. 120, 130-131 (2016)). The *Jones* Court explained that in the future, the reasoning of *Welch*, not *Montgomery*, will govern retroactivity determinations. This Court saw no need to formally overrule *Montgomery* based on the practical reality that the vast majority of juvenile resentencings at issue in *Montgomery* had already occurred. This Court's current retroactivity jurisprudence is reflected in *Welch*, *Edwards*, and *Jones*, not *Montgomery*. And the Florida Supreme Court's decision regarding the retroactivity of *Hall* does not conflict with *Welch*, *Edwards*, or *Jones*.

No conflict with this Court's retroactivity jurisprudence

There is no conflict with this Court's current retroactivity jurisprudence and the Florida Supreme Court's decision in this case. This Court disavowed *Montgomery* which is the main case opposing counsel relies upon to establish conflict with this Court's retroactivity jurisprudence in the petition. Pet. at 11-12. *Montgomery* is no longer valid after *Jones v. Mississippi* and cannot be used to establish conflict with this Court because it does not reflect this Court's current retroactivity jurisprudence.

The petition does not acknowledge or distinguish the majority opinion in *Edwards* or the footnote in *Jones* disavowing *Montgomery* Petitions for writ of certiorari that do not account for this Court's recent decisions in an area do not warrant this Court's serious consideration.

Opposing counsel also relies on *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 581 U.S. 1 (2017), asserting that this Court, in effect, applied *Hall* retroactively in both cases. Pet. at 13. But a case that does not address an issue in any manner does not create precedent regarding that particular issue. There is no *Teague* discussion in either *Brumfield* or *Moore* including in the dissents. Perhaps, the issue of retroactivity was not raised by Louisiana or Texas in either case or was not raised properly. *Cf. Buck v. Davis*, 580 U.S. 100, 127 (2017) (refusing to address an issue raised for the first time in the Supreme Court in the merits briefing). There is no such thing as an implicit *Teague* analysis, as opposing counsel would have it. Neither *Brumfield* nor *Moore* can be used as support for an assertion that *Hall* is retroactive under *Teague* because neither case addresses that issue.

Furthermore, the issue in *Moore* was different from the issue in *Hall*. *Moore* did

not concern adjusting IQ scores to account for the statistical error of measurement (SEM) of which capital defendants were entitled to evidentiary hearings to prove their claims of intellectual disability which were the issues in *Hall*. Rather, the issue in *Moore* was that Texas' definition of intellectual disability, established in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), did not align with any of the standard clinical definitions of intellectual disability. *Hall*, which concerned which capital defendants would be entitled to an evidentiary hearing, is even more overtly procedural than *Moore*. A *Teague* analysis of *Hall* and *Moore* would not necessarily be coextensive.

This Court has previously denied similar petitions regarding the Florida Supreme Court's decision in *Phillips* on the retroactivity of *Hall*. *Lawrence v. State*, 296 So. 3d 892 (Fla. 2020), *cert. denied*, *Lawrence v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6307); *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6887); *Freeman v. State*, 300 So. 3d 591 (Fla. 2020), *cert. denied*, *Freeman v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6879); *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), *cert. denied*, *Nixon v. Florida*, 142 S. Ct. 2836 (2021) (No. 21-1173); *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), *cert. denied*, *Thompson v. Florida*, 143 S. Ct. 592 (2023) (No. 22-5906). This Court should likewise deny review of this petition. There is no conflict with this Court's current retroactivity jurisprudence and the Florida Supreme Court's decision in this case.

No active conflict among the lower appellate courts

As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state

supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 184 n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

Opposing counsel points to the conflict among the federal circuit courts and the state courts of last resort regarding the retroactivity of *Hall v. Florida*. Pet at 14-16. While normally a conflict among the federal circuits and the state courts of last resort would be a proper consideration in granting review, it is not in this situation. The cases opposing counsel relies upon to establish a conflict among the lower appellate courts regarding the retroactivity of *Hall* were decided before this Court's recent decisions in *Edwards* and *Jones*. To establish an active conflict, opposing counsel must cite to cases that employ a *Teague* analysis rather than a state law test of retroactivity and in addition account for *Edwards* limiting *Teague* to substantive rules and account for the footnote in *Jones* disavowing *Montgomery*. The vast majority of cases opposing counsel relies upon to establish conflict do not meet that criteria. All of the cases cited in the petition addressing the retroactivity of *Hall* pre-date *Edwards* and *Jones*.[1]

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[1] The sole case that post-dates *Edwards* and *Jones* cited in the petition is *Jackson v. Payne*, 9 F.4th 646, 652 (8th Cir. 2021), *cert. denied*, *Payne v. Jackson*, 142 S. Ct. 2745 (2022) (No. 21-1021). But *Payne* concerned the application of *Moore v. Texas*, not *Hall v. Florida*, to a claim of intellectual disability. *Payne*, 9 F.4th at 652 (*Moore I* "heavily informed" our decision ordering a remand); *id.* at 653 ("We view *Moore II* as reaffirming *Moore I*'s reasoning and guidance on how to properly evaluate intellectual disability claims under *Atkins*). The case does not state even in dicta that *Hall* is retroactive. Actually, there is no *Teague* analysis whatsoever in the case. Indeed, *Teague* is not cited even once in the *Payne* opinion. Obviously, a case that does not perform a *Teague* retroactivity analysis cannot establish a conflict among the federal circuit courts regarding the retroactivity.

Furthermore, there seems to be an intracircuit split in the Eighth Circuit regarding the retroactivity of *Hall* and *Moore*. *Davis v. Kelley*, 854 F.3d 967, 970 (8th Cir. 2017) (holding *Hall* is not retroactive for purposes of filing a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A) and characterizing *Hall* as addressing "purely procedural issues"); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (holding *Moore*

Attempting to establish conflict among the state supreme courts, opposing counsel cites to the Kentucky Supreme Court's decision in *White v. Commonwealth*, 500 S.W.3d 208, 214 (Ky. 2016). Pet. at 14, n.8. The Kentucky Supreme Court concluded that *Hall* was a substantive rule. But *White* was decided in 2016, years before this Court's recent decisions in *Jones v. Mississippi* in 2021. It is unknown whether the Kentucky Supreme Court would still consider *Hall* to be retroactive in the wake of *Jones* disavowing *Montgomery* or would reconsider its prior decision and adopt the majority position that *Hall* is procedural and therefore, not retroactive under *Edwards*. There is no active conflict among the state courts of last resort.

Attempting to establish conflict among the federal appellate courts, opposing counsel cites to the Ninth Circuit's decision in *Smith v. Ryan*, 813 F.3d 1175, 1181 (9th Cir. 2016). Pet. at 14, n.8. But *Smith* was also decided in 2016, years before this Court's recent decisions in *Edwards* and *Jones*. Additionally, the Ninth Circuit in *Smith* did not perform a *Teague* retroactivity analysis of *Hall*. *Teague* is not cited even once in passing by the Ninth Circuit in the *Smith* opinion. Such a case cannot establish a conflict among the federal circuit courts regarding retroactivity.

Opposing counsel also cites to the Tenth Circuit's decision in *Smith v. Sharp*, 935 F.3d 1064, 1083-85 (10th Cir. 2019), which reasoned that *Hall* and *Moore* were settled rules that were available in collateral review. Pet. at 16, n.10. But neither the Florida Supreme Court's decision in *Phillips* nor the Florida Supreme Court's decision in this case conducted any analysis regarding the issue of settled rules versus new rules. Neither *Phillips* nor this case contain any discussion of the "dictated by" standard or cite to *Chaidez v. United States*, 568 U.S. 342 (2013), or any similar case. *Phillips*, 299 So.3d at 1022. There is no active conflict between the federal circuit

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is not retroactive for purposes of filing a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A)). A circuit court whose law is unclear on an issue cannot provide a proper basis to establish conflict.

courts and the Florida Supreme Court's decision in this case.

There is no active conflict between the state courts of last resort or the federal circuit courts and the Florida Supreme Court's decision in this case.

Purely theoretical issue

While retroactivity is normally a threshold issue, the retroactivity of *Hall* is a purely theoretical issue that is not outcome determinative in this case because *Hall* does not apply at all to Walls. *Cf. Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (discussing whether the issue of procedural default should be considered before the retroactivity issue). *Hall* does not apply as a matter of law to any capital defendant who fails the third prong of onset. *Hall*, 572 U.S. at 710 ("This last factor, referred to as 'age of onset,' is not at issue"); *Moore*, 581 U.S. at 7, n.3 ("The third element is not at issue here"). Walls' three IQ scores as a minor were 88, 102, and 101. His intellectual functioning as a minor was perfectly normal. He failed the third prong of onset based on his IQ scores as a minor, as the state postconviction court found following the extensive second evidentiary hearing. And much of this evidence regarding his IQ scores as a minor was known from the first evidentiary hearing conducted years before *Hall* was decided in 2014. As Justice Canady observed, in his dissent from the opinion remanding the case for a second evidentiary hearing, this case was "easily resolvable" without any discussion of *Hall* or any consideration of whether *Hall* should be applied retroactively because the onset prong "was not at issue and played no part in the Court's analysis in *Hall*." *Walls v. State*, 213 So. 3d 340, 349 (Fla. 2016) (Canady, J., dissenting). Justice Canady stated that the trial court had correctly denied Walls' intellectual disability claim because the evidence at the first evidentiary hearing "showed without dispute that as a juvenile Walls had IQ scores of 102 (at age 12) and 101 (at age 14)" which means he necessarily failed to meet the third prong of the test

for intellectual disability. *Walls*, 213 So. 3d at 349 (citing § 921.137(1), Fla. Stat. (2006)). Walls was never entitled to a second evidentiary hearing based on *Hall* due to his IQ scores on the third prong of onset. Walls' IQ score as a minor are simply too high for him to obtain any relief under either *Hall* or *Aktins*.

Because this case is so easily resolved on the merits of the third prong of onset, the retroactivity of *Hall* is not a critical question. The issue of the retroactivity of *Hall* is purely a theoretical issue given that Walls' IQ scores as a minor cannot result in any relief, regardless of how this Court answers the question of retroactivity. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (observing that this Court's "power is to correct wrong judgments, not to revise opinions" and explaining that if that same judgment would be rendered by the state court after we corrected its views, this Court's review would "amount to nothing more than an advisory opinion"). This Court typically does not waste its time answering purely theoretical questions and should not do so in this case.

Review of the issue of the retroactivity of *Hall* under state law should be denied.

ISSUE II

WHETHER THE FLORIDA SUPREME COURT RECEDING FROM ITS PRIOR DECISION IN *PHILLIPS V. STATE*, 299 So. 3d 1013 (Fla. 2020), VIOLATES DUE PROCESS UNDER *BOUIE V. CITY OF COLUMBIA*, 378 U.S. 347 (1964).

Petitioner Walls claims that the Florida Supreme Court refusing to address the intellectual disability claim on the merits and instead denying the claim solely on non-retroactivity grounds is a violation of due process. He asserts that the Florida Supreme Court overruling their prior precedent in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), *cert. denied, Phillips v. Florida*, 141 S. Ct. 2676 (2021) (No. 20-6887), and holding that *Hall* was not retroactive was an "unforeseeable 180-degree about-face" in violation of *Bouie v. City of Columbia*, 378 U.S. 347 (1964). A court overruling its prior precedent does not, by itself, violate due process. A state court joining the majority view that *Hall* is not retroactive is hardly unexpected or indefensible, as required to establish a violation of *Bouie*. There is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision in this case. Nor is there any conflict between the lower appellate courts and the Florida Supreme Court's decision in this case. Opposing counsel cites no case from any federal circuit court or state court of last resort finding a *Bouie* violation based solely on the fact a court overruled its prior precedent, much less a case involving the retroactivity of *Hall*. Therefore, review of this issue should be denied.

The Florida Supreme Court's decision in this case

The Florida Supreme Court relied on its current precedent of *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020), to deny the claim. The Florida Supreme Court also relied on two other cases that had likewise been remanded for evidentiary hearings based on *Hall* but on appeal from the remand, the Florida Supreme Court had denied the claims

solely on non-retroactivity grounds. *Walls*, 361 So.3d at 233-34 (citing *Nixon v. State*, 327 So.3d 780 (Fla. 2021), and *Thompson v. State*, 341 So. 3d 303 (Fla. 2022), *cert. denied*, *Thompson v. Florida*, 143 S. Ct. 592 (2023).).

Bouie and receding from prior precedent

In *Rogers v. Tennessee*, 532 U.S. 451 (2001), this Court held that the Tennessee Supreme Court's abrogation of the common law year-and-a-day rule was not unexpected or indefensible and therefore, did not violate due process. The *Rogers* Court clarified that *Bouie* was premised on the due process principle of fair warning. *Id.* at 459; *see also Metrish v. Lancaster*, 569 U.S. 351, 359-60, 368 (2013) (discussing the holdings of *Bouie* and *Rogers* and concluding the Michigan Supreme Court's decision was not unexpected or indefensible by reference to existing law and therefore, did not violate due process). *Bouie* claims are limited to substantive changes in the law that result in a lack of fair warning but the change in the law at issue here involves a procedural change regarding which capital defendants are entitled to an opportunity to prove all three prongs of their intellectual disability claim at an evidentiary hearing. Opposing counsel fails to explain how Walls lacked due process notice or fair warning.

The Florida Supreme Court's decision to overrule its precedent cannot be said to be unexpected or indefensible, as required to establish a *Bouie* violation. It is hardly unexpected, much less indefensible, for a state court to adopt the majority view that *Hall* is not retroactive.

Opposing counsel is advocating that this Court adopt quite an odd view of due process. It cannot be a violation of due process for a state court to adopt the position that the majority of federal circuit courts have adopted on an issue. So, the only possible basis for a due process concern would be the fact that the Florida Supreme Court changed its mind regarding the retroactivity of *Hall*. Opposing counsel's view due

process means that appellate courts could never recede from their own prior precedent, including presumably this Court as well. But this Court has receded from its prior precedent on occasion as well. *See e.g.*, *Hurst v. Florida*, 577 U.S. 92, 102 (2016) (overruling both *Hildwin v. Florida*, 490 U.S. 638 (1989), and *Spaziano v. Florida*, 468 U.S. 447(1984)); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (overruling both *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972)). A Court overruling its prior precedent is not per se a violation of due process.

Contrary to opposing counsel's argument, there was no detrimental reliance on Walls' part regarding the Florida Supreme Court's prior decision applying *Hall* retroactively to him. Pet. at 16. Walls received the full benefit of that prior decision granting him an evidentiary hearing at the trial court level. The state postconviction court held a six-day evidentiary hearing on his intellectual disability claim. Walls was permitted to present any evidence he desired on all three prongs of Florida's statutory test for intellectual disability. The defense presented seven witnesses, including six experts, at the second evidentiary hearing. Following that second evidentiary hearing, the state postconviction court addressed the claim on the merits in the alternative and found that Walls failed both the first prong and third prong.

Walls received an evidentiary hearing and full merits review of his intellectual disability claim in the state trial court, regardless of the Florida Supreme Court limiting its analysis to retroactivity on appeal. In other words, Walls got his day in court. Actually, he got a second day in court. Walls has now had two evidentiary hearings in state court regarding his intellectual disability claim, despite having normal intellectual functioning as a minor. Walls has now had two opportunities to prove his frivolous *Atkins* claim and failed both times.

Indeed, far from being harmed, Walls received the windfall of being granted a second evidentiary hearing that he was never entitled to under *Hall* due to his normal IQ scores as a minor. He also received an additional windfall due to his second evidentiary hearing being delayed for four years, mainly because of COVID. *Walls*, 361 So.3d at

233 (observing that it took over four years after the Florida Supreme Court remanded the case to conduct the second evidentiary hearing). The delay resulted in his death sentence being commuted to a sentence of imprisonment for four years. *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019) (observing that each delay in a capital case amounts to a "commutation of a death sentence to one of imprisonment" citing cases). Attempting to fashion a due process violation out of such windfalls is nonsensical. There was no due process violation.

No conflict with this Court's due process jurisprudence

There is no conflict between this Court's due process jurisprudence and the Florida Supreme Court's decision in this case. Opposing counsel cites to no case from this Court finding a violation of *Bouie* based solely on a court overruling its prior precedent, much less finding a *Bouie* violation involving a court receding from its precedent regarding the retroactivity of *Hall*. There is no conflict with this Court's due process jurisprudence and the Florida Supreme Court's decision in this case.

No conflict with the lower appellate courts

There is also no conflict between the decision of any federal appellate court or any state court of last resort and the Florida Supreme Court's decision in this case. As this Court has observed, a principal purpose for certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also* Sup. Ct. R. 10(b) (listing conflict among federal appellate courts and state supreme courts as a consideration in the decision to grant review). Issues that have not divided the courts or are not important questions of federal law do not merit this Court's attention. *Rockford Life Ins. Co. v. Ill. Dept. of Revenue*, 482 U.S. 182, 184

n.3 (1987). In the absence of such conflict, certiorari is rarely warranted.

Opposing counsel cites to no case from any court—state or federal— finding a violation of *Bouie* based solely on a court overruling its prior precedent, much less finding a *Bouie* violation involving a court receding from its precedent regarding the retroactivity of *Hall*. There is no conflict between the lower appellate courts and the Florida Supreme Court's decision in this case.

Purely theoretical issue

Again, this is a purely theoretical issue in this case. Regardless of whether *Hall* should be applied retroactively to Walls, Walls was not entitled to a second evidentiary hearing based on his IQ scores of 88, 102, and 101, as a minor. The state postconviction court found all of Walls' scores as a minor to be valid. (2022 Succ. PCR 6266). Walls' IQ scores as a minor clearly establish that he is not intellectually disabled. Walls is not intellectually disabled and never was. This Court does not typically waste its time answering purely theoretical questions and should not do so regarding this issue. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (observing that this Court's "power is to correct wrong judgments, not to revise opinions" and explaining that if that same judgment would be rendered by the state court after we corrected its views, this Court's review would "amount to nothing more than an advisory opinion"). Review of the due process issue should be denied.

In sum, the petition presents two issues both of which are purely theoretical exercises because, regardless of whether *Hall* is applied retroactively to Walls, he was not entitled to a second evidentiary hearing due to his normal IQ scores as a minor. *Hall* does not apply to Walls based on the onset prong alone. His *Atkins* claim was frivolous both before and after *Hall*.

Accordingly, this Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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