No. 22-7866

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

CAPITAL CASE

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I. Respondent's *Hall* retroactivity arguments

A. *Hall*'s retroactivity as a substantive rule is not a state-law issue—Respondent mischaracterizes *Montgomery* and *Jones*

The first question presented in the petition is whether *Hall* "must be applied retroactively by state courts because it substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment." Pet. at 7. The brief in opposition argues that this Court lacks jurisdiction over that question because the Florida Supreme Court's refusal to apply *Hall* retroactively is based on adequate and independent state retroactivity law. BIO at 7-9, 11-12. Respondent's argument is largely based on mischaracterizations of *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Jones v. Mississippi*, 141 S. Ct. 1307 (2021).

Montgomery is relevant to this case for two reasons, neither of which *Jones* undermined. First, *Montgomery* held that, under the Supremacy Clause of the United States Constitution, substantive constitutional rules must be given retroactive effect by state courts, irrespective of state retroactivity law. 577 U.S. at 200 ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").[2] Nowhere does Respondent dispute this holding of

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[1] As noted in the petition, Walls has filed a separate petition for a writ of habeas corpus in this Court. The docket number for the habeas petition is 22-7897.

[2] This holding answered a "question left open in *Danforth*" *v. Minnesota*, 552 U.S. 264 (2008)—one of the main cases upon which Respondent relies. *See, e.g.*, BIO at 7-8 (citing *Danforth* to argue that retroactivity is "largely a matter of state law").

Montgomery, yet Respondent oddly argues that Florida's refusal to apply *Hall* retroactively should be left undisturbed as a matter of state retroactivity law. That is not a reason to deny certiorari review. If *Hall* is a substantive constitutional rule, the Florida Supreme Court was obligated to apply it retroactively, irrespective of its own state retroactivity law.

Second, *Montgomery* is instructive here because it found that *Miller v. Alabama*, 567 U.S. 460 (2012), announced a substantive, and therefore retroactive, constitutional rule. 577 U.S. at 212. *Montgomery* found the *Miller* rule substantive because it created or expanded a class protected by the Eighth Amendment in light of society's evolving standards: juvenile offenders whose crimes reflect the transient immaturity of youth, not "irreparable corruption." *Id.* at 206, 208-09. *Miller* also set procedural requirements for determining who would be included in the newly protected class but, *Montgomery* stressed, that "[t]hose procedural requirements, of course, do not transform substantive rules into procedural ones." *Id.* at 210.

The same is true of *Hall*, which expanded the class of intellectually disabled prisoners entitled to Eighth Amendment protection from execution to include those with IQ scores between 71 and 75. That expansion may have been modest, but it makes *Hall* a substantive Eighth Amendment rule in the same manner that, for instance, this Court modestly expanded upon *Coker v. Georgia*, 433 U.S. 584 (1977) in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), or modestly expanded upon *Thompson v. Oklahoma*, 487 U.S. 815 (1988), in *Roper v. Simmons*, 543 U.S. 551 (2005), based on society's evolving standards. Though *Hall*, like *Miller*, implicated new procedures

to determine who would qualify for the expanded class of individuals diagnosable as intellectually disabled, those procedures do not change the substantive nature of the *Hall* expansion itself.[3]

Respondent says *Montgomery* was "disavowed" by this Court in *Jones*. That is wrong. *Jones* explicitly dismissed any suggestion that it altered *Montgomery*'s or *Miller*'s holdings. 141 S. Ct. at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*."); *id.* ("Today's decision does not overrule *Montgomery* or *Miller*."); *id.* ("*Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding.").

In fact, *Jones* reaffirmed that substantive rules include those which create or expand a protected Eighth Amendment class: "A rule is substantive and applies retroactively on collateral review . . . if it alters the range of conduct or *the class of persons that the law punishes*." 141 S. Ct. at 1317 n. 4 (emphasis added, internal quotations omitted). *Hall* resulted in more people being eligible for *Atkins* protection than before—all those with IQs between 71 and 75. In fact, Respondent speculates that the Florida Supreme Court decided to withdraw *Hall* retroactivity precisely because it resulted in more eligibility for relief. BIO at 9.

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[3] Respondent asserts that the class protected by *Hall* is "identical" to the class protected by *Atkins*. BIO at 10-11. But that is not true. In Florida, before *Hall*, the class protected by *Atkins* only included intellectually disabled individuals with a measured IQ score of 70 or below. After *Hall*, the class was expanded to include intellectually disabled individuals with measured IQ scores up to 75. Respondent does not dispute that, as a result of *Hall*, more individuals became eligible for *Atkins* relief. In fact, Respondent bemoans it. *See* BIO at 9.

If *Jones* did alter *Montgomery* or *Miller*, it was only with respect to particularities of juvenile sentencing proceedings that are not relevant to the points Walls argues. Nothing in *Jones* undermines the two aspects of *Montgomery* that Walls relies on here: (1) that state courts must grant retroactivity to substantive rules, and (2) like *Hall, Montgomery* found that *Miller* announced a substantive rule through creation or expansion of an Eighth Amendment protected class.

Respondent's own confusion over the effect of *Jones* on the core tents of *Montgomery* is its own evidence for the cert-worthiness of Walls's case. This Court should grant certiorari to reaffirm that state courts must apply substantive rules retroactively, and hold that *Hall* announced a substantive, expansion-of-class rule.[4]

B. Respondent is silent on the petition's main retroactivity argument, based *Hall*'s plain language: This Court only surveys the evolving societal consensus on cruel and unusual punishment standards when creating substantive Eighth Amendment rules

Respondent says nothing about Walls's principal retroactivity argument—that this Court need look no further than the *Hall* opinion itself to confirm that it announced a substantive rule. *Hall* was a decision on the scope of the class of defendants who are not death-eligible due to "society's standards of decency." The doctrinal analysis *Hall* employed to expand that class was critical: the Court's opinion examined evolving societal attitudes on cruel and unusual punishment standards,

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[4] Respondent notes that this Court has denied certiorari in other post-*Phillips* cases challenging the Florida Supreme Court's refusal to apply *Hall* retroactively. But this petition presents the unique opportunity to decide the issue in the same case that Florida first used to announce *Hall* retroactivity statewide, before later reneging on that promise to everyone who had relied on it, including Walls himself.

surveying "the legislative policies of various States, and the holdings of state courts" for a "consensus" on IQ score minimums. 572 U.S. at 709, 719.

Hall 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*, 543 U.S. at 563). 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. *Hall* concluded that "our society does not regard this strict cutoff as proper or humane." *Id.* at 718. *Hall* then moved on to the next doctrinal step—the Court's judgment—before announcing that the *Atkins* class was expanded to include those with IQs between 71 and 75. *Id.* at 721.

This is 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). Rules derived from this analysis are substantive. *Hall* even noted that the Court performed similar national surveying to create other substantive Eighth Amendment rules, including in *Atkins*, *Roper*, and *Coker*.[5] This makes sense: 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 Eighth Amendment

[5] *See also, e.g., Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (juvenile nonhomicide LWOP); *Kennedy*, 554 U.S. 407 (rape of young child); *Thompson*, 487 U.S. 815 (death penalty for juveniles under 16); *Enmund v. Florida*, 458 U.S. 782 (1982) (low culpability co-defendants).

rules. Based on its own doctrinal analysis, *Hall* must be substantive and therefore retroactive on collateral review.

This point is central to the petition, but Respondent offers no response to it at all. The Court should grant review to clarify that Eighth Amendment rules derived from the Eighth Amendment methodology used in *Hall* are necessarily substantive.

C. Courts are not aligned nationally on *Hall* retroactivity—they are in disarray

Respondent asserts that despite the conflicting decisions cited in the petition, courts are united nationally on *Hall*'s non-retroactivity. According to Respondent, in order to establish an "active conflict, opposing counsel must cite to cases that employ a *Teague* analysis rather than a state law test of retroactivity." BIO at 14. But this misses the point. As Respondent is aware, "[w]hile 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*." BIO at 8; *see also Danforth*, 552 U.S. at 280 ("Nonuniformity is, in fact, an unavoidable reality in a federalist system of government[]" so long as the different ways do not violate the Federal Constitution."). The fact that some of the cited decisions found *Hall* non-retroactive under a state retroactivity test does not undermine the petition's point—state courts are confused and in disarray over whether the federal constitution requires *Hall* to be applied retroactively, a requirement that obviates any state-law analysis under the Supremacy Clause and *Montgomery*. The appropriate inquiry when assessing an inter-state split is to evaluate whether the states are applying retroactivity in a manner that does not offend federal law.

Respondent's attempts to undermine a few specific cases cited in the petition are also unconvincing. For example, Respondent asserts that there is no "active" circuit split because it is unknown whether Kentucky would still consider *Hall* retroactive. BIO at 15. This is purely speculative and ignores Kentucky's current law—which holds *Hall* substantive and therefore retroactive. Respondent also cites to an intra-circuit split in the Eighth Circuit. BIO at 14-15, n. 1. Oddly, Respondent sets forth this circuit split to support the premise that "[a] circuit court whose law is unclear on an issue cannot provide a proper basis to establish conflict." BIO at 15, n.1. But an intra-circuit split only furthers the need for this Court's clarification. Despite Respondent's arguments, inter- and intra-circuit splits exist among the state and federal courts on *Hall* retroactivity. *State v. Jackson*, 157 N.E.3d 240, 253 (Ohio Ct. App. 2020) ("Nevertheless, some courts have determined that *Hall* and *Moore* apply retroactively . . . However, we choose to follow a substantial and growing body of case law that has declined to apply *Hall* and *Moore* retroactively.").[6]

The confusion among courts is understandable because this Court has applied *Hall* on collateral review three times: in *Hall*, *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Brumfield v. Cain*, 576 U.S. 305 (2015). And although retroactivity was not raised by the State in *Brumfield* and *Moore*, this Court likewise remained silent on the State's forfeiture of the issue. Ultimately, this Court *did* apply *Hall* on collateral

[6] Respondent also misconstrues Walls' citation to *Smith v. Sharp,* 935 F.3d 1064, 1083-85 (10th Cir. 2019), as support for a circuit split. However, Walls had explicitly stated that the Tenth Circuit has not resolved the issue of *Hall* retroactivity. Pet. at 15 n.9.

review in these cases. At a minimum, this Court should clarify the situation by granting certiorari in this case.

D. Respondent misleads on Walls's IQ scores and intellectual disability evidence, which the Florida Supreme Court refused to review

Respondent alternatively urges the Court to decline review of the Florida Supreme Court's retroactivity holding because Walls's underlying intellectual disability claim is meritless, repeatedly emphasizing Walls's childhood IQ scores of 102 and 101, which were measured at ages 12 and 14, respectively. Respondent says these scores show that Walls inevitably fails the third prong of the diagnosis—onset before age 18. *See* BIO at 7, 16-17. According to Respondent, Walls was "never entitled to a second evidentiary hearing following *Hall* because these scores were simply too high for him to obtain any relief under *Hall* and *Atkins*." *Id.* at 17.

This is a misleading depiction of the evidence presented during a six-day evidentiary hearing below, which Respondent concedes the Florida Supreme Court refused to review at all.

For starters, a second evidentiary hearing was necessary in this case after *Hall* because the Florida Supreme Court had rejected Walls's initial *Atkins* claim on the sole basis that "there is no evidence that Walls has ever had an IQ of 70 or below." *Walls v. State*, 3 So. 3d 1248, 1248 (Fla. 2008). The Florida Supreme Court remanded for a second hearing in 2016 because its prior analysis clearly conflicted with *Hall*'s holding invalidating the IQ score cutoff at 70.

In remanding for a second hearing, the Florida Supreme Court specifically rejected the argument Respondent makes here—that Walls's intellectual disability claim was frivolous because "his only IQ scores below 75 were received after he had turned 18: his scores were 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at about age 40." *Walls v. State*, 213 So. 3d 340, 345 (Fla. 2016). Instead, the Florida Supreme Court found that a remand for a new hearing on the merits was appropriate. And even in later refusing to review the new evidence in 2023, based on its abrupt reversal of its *Hall* retroactivity precedent, the Florida Supreme Court declined the State's invitation to alternatively deny Walls's claim on the merits.

The reason the Florida Supreme Court has consistently rejected the State's suggestion to deny Walls's intellectual disability claim on the merits is that the record, particularly following the six-day evidentiary hearing in 2021, strongly establishes all three diagnostic criteria for intellectual disability—including onset before 18. In citing Walls's IQ scores from ages 12 and 14, Respondent omits critical context. First, satisfying the age-of-onset prong does not require qualifying IQ scores before age 18, and scores measured at ages 12 and 14 cannot by themselves defeat the age-of-onset prong because onset of the condition can occur at *any time* before age 18—for instance, at ages 16 or 17, when Walls's IQ was not measured.

Respondent also omits that Walls presented detailed evidence and expert testimony at the 2021 hearing showing that, following a series of head injuries and afflictions, including viral meningitis, onset of his condition must have occurred after his IQ was measured 12 and 14, but before he turned 18. Walls showed that no other

incidents after age 18 explain the drop to his current adult IQ in the low 70s. Walls also presented age-of-onset evidence including childhood achievement tests and placement in special education classes. Respondent ignores all of this.

There is also significant evidence in the record establishing the other two prongs of the diagnosis. The State's expert did not even contest that Walls satisfies prong two regarding adaptive deficits, and the circuit court agreed. The record also shows that, based on *Hall*'s standards, Walls satisfies prong one regarding intellectual functioning. Walls's adult IQ has been measured at 72 and 74—psychometrically identical scores that were found 15 years apart, are squarely within the range of the class expansion announced in *Hall*, and, experts testified, would be unachievable through malingering or lack of effort.

The Florida Supreme Court refused to review any of this evidence below, despite Respondent's renewed request that relief be denied on the merits. This Court should similarly decline Respondent's invitation to deem Walls's intellectual disability claim "frivolous." There is no support in the record for Respondent's view that Walls's intellectual disability "is so easily resolved on the merits of the third prong of onset." BIO at 17. This Court should grant review of the Florida Supreme Court's retroactivity holding and, if the Court ultimately finds that *Hall* must be applied retroactively, remand for the Florida Supreme Court to consider Walls's claim on the merits in the first instance.

II. Respondent's due process arguments

The majority of Respondent's due process arguments respond to an issue the petition does not present. Walls does not claim a due process violation "based solely on the fact a court overruled its prior precedent." Walls does not believe that "appellate courts c[an] never recede from their own precedent." And Walls has never said that a "Court overruling its prior precedent is [a] per se violation of due process." BIO at 18-20.[7] In framing the issue this way, Respondent misses the point.

The second question presented is whether "the Florida Supreme Court's reversal of its long-final mandate granting *Hall* retroactivity *to Walls specifically*, coupled with Walls's reasonable and detrimental reliance on the finality of that mandate, violate federal due process." Pet. at i (emphasis added). The due process issue in this case thus stems from the Florida Supreme Court's mandate granting *Hall* retroactivity to Walls specifically, and subsequent refusal, after the evidentiary hearing, to review his intellectual disability claim under *Hall*'s standards, instead affirming the denial of relief on nonretroactivity grounds alone.

In reframing the issue as simply a matter of a court changing its precedent, Respondent ignores that the Florida Supreme Court's mandate requiring *Hall* retroactivity to Walls himself was long final by the time the court withdrew that promise just a few years later, a result Walls could not reasonably have predicted when litigating the merits of his claim in the circuit court, secure in the knowledge

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[7] Respondent continues in this vein throughout. *See, e.g.*, BIO at 21-22 ("Opposing counsel cites 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*.").

that nonretroactivity was off the table. For the reasons in the petition, that broken promise to Walls—on an issue that determines whether he is constitutionally eligible to be put to death—rises to the level of a federal due process violation. *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).

Respondent suggests that Walls cannot establish detrimental reliance as to the Florida Supreme Court's 2017 mandate granting *Hall* retroactivity because the evidentiary hearing took place and the circuit court reviewed the merits. But Respondent concedes that Walls received no Florida Supreme Court review of the merits. The Florida Supreme Court's 2017 mandate did not just guarantee Walls the right to a hearing and trial-level review, it promised him full review of his claim under *Hall's* standards, including on appeal.

Respondent does not address the crux of detrimental reliance here: If Walls had known that his *Hall* retroactivity had an expiration date, he would have proceeded differently. He relied on the finality of the Florida Supreme Court's mandate granting him *Hall* retroactivity—to his plain detriment in the Florida Supreme Court on appeal. *Cf. Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *id.* at 652 (citing *Bouie*).

Because Walls reasonably and detrimentally relied on his vested *Hall* rights, and because the Florida Supreme Court unexpectedly and unjustifiably revoked those rights during the remand period—for reasons having nothing to do with his case or intervening precedent from this Court—federal due process was violated. The Court should grant certiorari and review the second question presented.

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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