No. 22-

IN THE

Supreme Court of the United States

IN RE FRANK A. WALLS,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Was *Hall v. Florida*, 572 U.S. 701 (2014) necessarily "made retroactive," for purposes of authorizing a successive federal habeas petition under 28 U.S.C. § 2244(b)(2)(A), by announcing a rule that substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment?

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 habeas corpus petition—a petition for a writ of certiorari, raising different but related issues to those herein. The docket number for the certiorari petition was not yet available at the time of this filing.

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TABLE OF AUTHORITIES

Cases:

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Petitioner Frank Walls, a prisoner on Florida's death row, petitions for a writ of habeas corpus and/or a transfer of his intellectual disability claim to the district court for initial determination. Alternatively, if this Court grants Walls's separately filed petition for a writ of certiorari, which raises issues related to those herein,[1] Walls requests consolidation with that case on the Court's merits docket.

DECISION BELOW

Although this is an original proceeding, it primarily concerns a decision of the United States Court of Appeals for the Eleventh Circuit, which denied Walls authorization to file a successive habeas corpus petition in the district court. The Eleventh Circuit's order is unpublished but is reprinted in the Appendix (App.) at 1a.

JURISDICTION

Jurisdiction is invoked pursuant to Rule 20.4 and this Court's authority to grant a writ of habeas corpus under 28 U.S.C. §§ 1651(a), 2241, and 2254(a), as well as Article III of the Constitution. *See also Felker v. Turpin*, 518 U.S. 651, 663 (1996).

REASONS FOR NOT FILING IN DISTRICT COURT

On April 13, 2023, the Eleventh Circuit denied Walls authorization, under 28 U.S.C. § 2244(b)(3)(A), to file a successive habeas corpus petition in the district court.

EXHAUSTION OF OTHER REMEDIES

Because the Eleventh Circuit denied Walls authorization to file a successive habeas corpus petition in the district court under § 2244(b)(3)(A), and because

[1] Walls's certiorari petition was filed in June 2023, closely in time with this habeas petition. The docket number for the certiorari petition was not yet available at the time of this filing.

§ 2244(b)(3)(E) prohibits Walls from petitioning for certiorari from the Eleventh Circuit's decision, this Court's extraordinary-writ jurisdiction is the proper path to obtain review of the Eleventh Circuit's ruling that this Court has not "made retroactive" a particular rule of constitutional law for purposes of § 2244(b)(2)(A).

The only other path for Walls to obtain relief on this issue is for the Court to grant his separately filed petition for a writ of certiorari, which raises related issues arising from a 2023 decision of the Florida Supreme Court. If the Court grants that petition, Walls requests consolidation of both cases on the Court's merits docket.

CONSTITUTIONAL AND STATUTORY 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.

28 U.S.C. § 2244(b) provides, in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law made retroactive on collateral review by the Supreme Court, that was previously unavailable
> >
> > . . .
>
> (3)
>
> > (A) Before a second or successive application permitted by this section is filed in the district court shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

> . . .
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> . . .
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

I. 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 who illegally surveilled and questioned Walls and gave notes from her activities to the State's psychiatrists).

In 1992, Walls 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 proceedings, 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, *Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011).

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 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. *Walls v. State*, 213 So. 3d 340, 347 (Fla. 2016) ("*Walls I*").

However, before Walls's evidentiary could begin in the circuit court, 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 on the issue. The Florida Supreme Court then began consistently applying *Phillips* to summarily reject intellectual disability claims in cases without a measured IQ score 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).

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 Walls. 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 *was* barred on non-retroactivity grounds, in light of the intervening decision in *Nixon v. State*, 327 So. 3d 780 (Fla. 2021), which applied *Phillips* to a case in which the Florida Supreme Court had earlier remanded for a hearing pursuant to *Walls I*. The circuit court alternatively found that Walls did not meet the diagnostic criteria by clear and convincing evidence. R. 6276-77.

In the Florida Supreme Court, Walls argued that *Phillips* should not be applied to him because, among other reasons, federal law requires state courts to apply *Hall* retroactively, given that *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 substantive and therefore automatically retroactive.

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 show that Walls meets the three-prong diagnosis, including two IQ scores—a 72 and a 74—squarely within the *Hall* range.

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." *Walls v. State*, No. SC22-72, 2023 WL 2027566, at *2 (Fla. Feb. 16, 2023) ("*Walls II*").

In *Walls II*, the Florida Supreme Court ruled that, despite its mandate in *Walls I* requiring *Hall* retroactivity in Walls's case, his claim was now foreclosed by *Phillips*. *Id.* at *2. The Florida Supreme Court cited its repeated application of *Phillips* to cases in any posture, including those like *Nixon*, where the Florida Supreme Court had earlier 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.

Justice LaBarga dissented, referencing his dissent in *Phillips*. *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.

II. Application to file a successive federal habeas claim

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. App. 14a-111a; *In re Walls*, 11th Cir. No. 23-10982 (filed Mar. 29, 2023).[2]

Walls acknowledged the circuit precedent *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), in which a divided panel of the Eleventh Circuit ruled that *Hall* does not satisfy the retroactivity provision of § 2244(b)(2)(A). But Walls pointed out that the Eleventh Circuit had recently acknowledged that *Henry*'s reasoning was abrogated by this Court's decision in *Montgomery v. Louisiana*, 577 U.S. 190, 194 (2016). *See Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1339 n.5 (11th Cir. 2019) ("Because *Montgomery* undermined the reasoning of *Kilgore* [*v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301 (11th Cir. 2015)] and *In re Henry*, we do not rely on them in our decision."); *see also In re Sapp*, 827 F.3d 1334, 1340-41 (11th Cir. 2016) (Jordan, Rosenbaum, and Pryor, JJ. concurring) (*Montgomery*'s guarantee of a procedure to implement a substantive constitutional rule did not make the "rule procedural or otherwise take it outside the realm of retroactively applicable substantive rules").

With *Henry*'s reasoning abrogated, Walls argued that he could make a prima facie showing that *Hall* is retroactive because it announced a new rule of Eighth Amendment death-eligibility by broadening the minimum diagnostic standard for intellectual disability, which necessarily expanded the class of persons the law cannot punish. Walls emphasized that *Hall* substantively expanded *Atkins* protection, even

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[2] 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. His federal § 2244 application was filed the same day the Florida Supreme Court denied rehearing in 2023—well prior to issuance of the state court's mandate, which would have ended statutory tolling. *See* 28 U.S.C. § 2244(d)(1)-(2).

if it did so modestly and without guaranteeing relief to any particular defendant—as have at least two other substantive Eighth Amendment rules created by this Court.

Walls further argued that this Court's *Hall* opinion shows the substantive nature of the rule because it applies the 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." 572 U.S. at 714. Because *Hall* announced a substantive rule, Walls argued, it was necessarily "made retroactive" for purposes of § 2244(b)(2)(A). Walls noted that this Court has applied the *Hall* rule to cases on collateral review, and that he stands in the same posture as Freddie Hall himself, as well as Bobby Moore and Kevan Brumfield, all of whom benefited from *Hall*'s standards on collateral review in this Court. *See Moore v. Texas*, 581 U.S. 1 (2017) (citing *Brumfield v. Cain*, 576 U.S. 305, 315 (2015)).

Walls's application recognized that no opinion of this Court has squarely held *Hall* retroactive, but he invoked this Court's precedent providing that the "made retroactive" criteria in § 2244(b)(2)(A) does not require an explicit retroactivity ruling, and that "with the right combinations of holdings," the Court can make a rule retroactive by logical inference or over the course of multiple cases. *See Tyler v. Cain*, 533 U.S. 656, 662, 664 (2001); *id.* at 668-69 (O'Connor, J., concurring). The *Hall* rule, Walls argued, was necessarily made retroactive because it is substantive, as all substantive rules are automatically retroactive. *See id.* at 669 (quoting *Teague v. Lane*, 489 U.S. 288, 307 (1989)). When this Court holds in any case that certain

conduct is beyond the power of the State to proscribe, it "necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Id.*

Given the Florida Supreme Court's abrupt reversal of precedent and disregard for the law of this case to preclude merits review of Walls's intellectual disability claim, Walls urged the Eleventh Circuit to allow his claim to be heard in federal court.

III. Eleventh Circuit's order denying authorization

In April 2023, less than 20 days after Walls filed his application,[3] an Eleventh Circuit panel denied Walls leave to file a successive federal habeas claim based on *Hall*, primarily because the panel found that *Hall* has not been "made retroactive" by this Court for purposes of § 2244(b)(2)(A). App 1a-13a; *In re Walls*, No. 23-10982 (11th Cir. April 13, 2023) (unpublished).

The panel explained that, despite the Eleventh Circuit's decision in *Smith*, which recognized *Montgomery*'s abrogation of *Henry*, binding circuit precedent still holds that *Hall* has not been made retroactive by any combination of this Court's rulings. App. 10a (citing *Henry*, *In re Lambrix*, 776 F.3d 789 (11th Cir. 2015), and *Kilgore*, 805 F.3d 1301). The panel further ruled that, even if it were presented with the issue of *Hall* retroactivity as a matter of first impression, it would find that *Hall* was a new rule but that it was procedural and not substantive or retroactive. The

[3] *See St. Hubert v. United States*, 140 S. Ct. 1727 (2020) (Sotomayor, J., statement respecting the denial of certiorari) ("Unlike its sister circuits, the Eleventh Circuit has interpreted the relevant statutes to mandate an authorization decision within 30 days, leaving the court little time to consider a complex inmate application.").

panel also reasoned that *Montgomery* itself was later limited by this Court in *Jones v. Mississippi*, 141 S. Ct. 1307 (2021). *Id.* at 11a-12a.

Finally, the panel rejected Walls's argument that this Court has applied *Hall* collaterally in cases like *Moore* and *Brumfield*. The panel found that this Court "has done no such thing" because, in *Moore*, "the state habeas court had applied *Hall* already, so the Supreme Court was reviewing its reasoning, not concluding that the state court had to apply *Hall* because it was retroactive," and in *Brumfield*, this Court "did not apply *Hall*, but rather held that the state court unreasonably determined, as a matter of *fact*, that the defendant was not intellectually disabled." App. 12a-13a.

REASONS FOR GRANTING THE WRIT

I. Exceptional circumstances justify this petition

In deciding whether to authorize a petitioner to file a second or successive federal habeas petition based on a new rule of constitutional law announced by this Court, a court of appeals must first determine whether the new rule has been "made retroactive to cases on collateral review" by this Court. 28 U.S.C. § 2244(b)(2)(A).

This determination is not always straightforward—this Court has indicated that the "made retroactive" language does not require an explicit or square retroactivity holding as to the rule in a particular case. Rather, "with the right combination of holdings," this Court can make a rule retroactive over the course of multiple cases. *Tyler v. Cain*, 533 U.S. 656, 666 (2001). For instance, as Justice O'Connor has explained, "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is

of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review." *Id*. at 668-69 (O'Connor, J., concurring).

When a court of appeals denies authorization based on the "made retroactive" requirement, this Court should be ultimate authority on whether it has, contrary to the appellate panel's belief, made a specific constitutional rule retroactive. But under § 2244(b)(3)(E), a petitioner may not seek certiorari review from the denial of authorization. In these circumstances, this Court's original habeas jurisdiction is the proper way for a petitioner to seek review. Otherwise, this Court could never correct a court of appeals' misconception of whether a rule has been made retroactive for federal habeas purposes. This would even foreclose review of an appellate court's erroneous refusal to allow a petitioner to pursue a federal habeas claim that renders him constitutionally ineligible for the death penalty. *See* Stephen Vladeck, *Using the Supreme Court's Original Habeas Jurisdiction to 'Ma[k]e" New Rules Retroactive*, 28 Fed. Sent. R. 225, 225-29, 2016 WL 1417783 (2016); Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61, 91-94 (2011); *see also Felker v. Turpin*, 518 U.S. 651 (1996).

Here, this Court should exercise its extraordinary writ jurisdiction to review whether, contrary to the Eleventh Circuit's ruling, this Court necessarily made *Hall v. Florida*, 572 U.S. 701 (2014), retroactive by announcing a rule that substantively expanded the class of individuals who qualify as intellectually disabled under the Eighth Amendment. Without this Court's intervention, Walls will be prohibited from seeking federal relief under *Hall*, even after he exhausted the claim in the Florida

courts for nearly 10 years, only to be turned away by the Florida Supreme Court based on a "Kafkaesque procedural rule" blocking merits review.[4]

Because *Hall* announced a substantive rule, which was necessarily "made retroactive" within the meaning of § 2244(b)(2)(A), and because the state-court record reflects that Walls satisfies the diagnostic criteria for intellectual disability, this Court should grant a writ of habeas corpus and/or transfer Walls's claim to the district court for initial determination. Alternatively, if this Court grants Walls's separately filed petition for a writ of certiorari, which raises issues related to those herein,[5] Walls requests consolidation with that case on the Court's merits docket.

II. Because *Hall*'s rule is substantive, it was necessarily "made retroactive" within the meaning of 28 U.S.C. § 2244(b)(2)(A)

Hall was a substantive new rule, and therefore necessarily "made retroactive" for purposes of authorizing successive habeas corpus petitions under § 2244(b).

In *Teague*, 489 U.S. 288, this Court recognized two categories of rules that are not subject to the general bar against retroactivity. As pertinent here, courts must give retroactive effect to new "substantive" rules of constitutional law. *See Montgomery*, 577 U.S. at 190 (citing *Penry v. Lynaugh*, 492 U.S. 302, 220 (1989), and *Teague*, 489 U.S. at 307). To qualify for *Teague* retroactivity, a rule must both be new

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[4] *Cf. Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., statement respecting the denial of certiorari and application for a stay of execution).

[5] As noted earlier, Walls's certiorari petition was filed in June 2023, closely in time with this habeas corpus petition, and addresses a recent decision of the Florida Supreme Court on related *Hall* retroactivity issues. The docket number for the certiorari petition was not yet available at the time of this filing.

and substantive. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or if "the result was not *dictated* by [existing] precedent." *Teague*, 489 U.S. at 301. A new rule is substantive if it prohibits a certain category of punishment for a class of defendants because of their status. *Montgomery*, 577 U.S. at 197.

Hall created a new substantive rule. This is shown by two unquestionable facts about the rule: (1) it abrogated Florida's substantive criterion that capped the class of people who qualify for the intellectual-disability exception to the death penalty—the requirement that a prisoner must score a 70 or below on an IQ test—thus expanding the class of individuals who may not be eligible for execution, and (2) *Hall* arrived at this rule through the doctrinal method permissible solely for substantive—not procedural—Eighth Amendment rules, by examining the practices and laws of states to objectively examine what society regards as cruel and unusual.

A. *Hall* announced a new substantive rule as to the criteria for Eighth Amendment protection

Hall is retroactive because it announced a new rule that went beyond what was compelled by *Atkins* itself; it qualified and expanded the class of persons that Florida exempted from execution. *Atkins*, as previously understood by the Florida Supreme Court, only covered a sub-group among the intellectually disabled. *See Cherry*, 959 So. 2d 702. Before *Hall*, to qualify for protection based on intellectual disability (or "mental retardation" under the old terminology), a person had to 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 were not protected if they fell short of the "national consensus" as to their particular placement within the "range of mentally retarded offenders." *Id.*[6] Indeed, in Florida, persons with an IQ score within the standard error of measurement (SEM) of ± 5 (i.e., scores of 71-75) did not fall under *Atkins*'s Eighth Amendment protection. In *Hall*, the Court revisited the consensus to refine and broaden the IQ score requirement to include the ± 5 SEM.

This Court arrived at the *Hall* rule by doing what is doctrinally required when deciding substantive—and only substantive—Eighth Amendment rules. The Court surveyed "the legislative policies of various States, and the holdings of state courts" for the existence of "consensus" as to IQ score minimums. *Hall*, 572 U.S. at 710. 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)). Applying this test, both the "aggregate number[]" of state laws, and the "[c]onsistency of the direction of change" informed the "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

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[6] In a later case, the 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).

U.S. at 564, and *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality op.)). Applying its "independent judgment," the Court affirmed the consensus and held Florida's cutoff unconstitutional. *Id*. at 721-23.

The doctrinal method the Court used to arrive at the *Hall* rule proves that *Hall* was a substantive decision about the class of defendants who are not death-eligible due to "society's standards" of decency. *See id.* at 714; *see also Jones,* 141 S. Ct. at 1315 (noting this method as being used for establishing substantive Eighth Amendment eligibility criteria) (citing *Graham v. Florida,* 560 U.S. 48, 61 (2010), and *Roper,* 543 U.S. at 563).[7] The objective-national-consensus method is *not* employed to decide procedural rules, even under the Eighth Amendment.[8]

The *Hall* rule was necessarily substantive because it derived from the doctrinal method used only for deciding what punishments offend "'objective indicia of society's standards.'" *Hall*, 572 U.S. at 714 (quoting *Roper*, 543 U.S. at 563).

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[7] In addition to the substantive cases cited in *Hall*'s national-consensus examination, it should be noted that every other substantive Eighth Amendment rule was also decided through this method. *See, e.g., Graham*, 560 U.S. at 60-61 (1988) (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).

[8] 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).

Hall substantively expanded *Atkins* protection, even if it did so modestly and without guaranteeing relief to any particular defendant. The Court has twice made modest incremental changes to substantive prohibitions, but that did not affect their substantive nature. *See Kennedy*, 554 U.S. 407 (expanding on *Coker v. Georgia* to cover rape of a younger minor); *Roper*, 543 U.S. at 561 (expanding prohibition on juvenile death sentences by two years).

Similarly, in *Montgomery*, 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. *See* 577 U.S. at 206, 208 (quoting *Penry,* 492 U.S. at 330). *Montgomery* rejected the argument that the *Miller* rule was procedural, even though *Miller* required procedures to implement its substantive holding. *Id.* at 208. Sometimes it is 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 210 (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 constitutionally protected class. *Id.* "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 life without parole 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.* 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 with an IQ score between 70 and 75 *could* be sentenced to death, but it still 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.

B. *Hall* was "made retroactive" under § 2244(b)(2)(A) because all new substantive rules under *Teague* are automatically deemed to have been made retroactive

Section 2244(b)(2)(A) requires the new rule to have been "made retroactive" by this Court. The Court answered what it means to be "made retroactive" in *Tyler*, concluding that "made" means "held," or "determined." 533 U.S. at 662, 664. The Court elaborated that "with the right combination of holdings," the Court can make a rule retroactive over the course of two cases. *Id*. at 666. As Justice O'Connor explained in her concurrence, "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review." *Id*. at 668-69 (O'Connor, J., concurring).

It is "relatively easy" to demonstrate this for cases within the first *Teague* exception for new, substantive rules. *Id*. at 669 (O'Connor, J., concurring). Any rule that places "'certain kinds of primary, private individual conduct beyond the power of the [State] proscribe'" should be deemed to have been made retroactive. *Id*. (quoting *Teague*, 489 U.S. at 307). When this Court holds that certain conduct is beyond the

power of the State to proscribe, it "necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Id*. Justices Breyer, Stevens, Souter, and Ginsburg joined Justice O'Connor in this view on substantive new rules. *Id*. at 675 (Breyer, J., dissenting).[9] The Eleventh Circuit recognizes "'retroactivity by logical necessity' as a means of satisfying § 2244(b)." *In re Henry*, 757 F.3d at 1160 (quoting *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003)).

This Court has held that "the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. Because *Hall* altered the substantive definition of the class of people who are intellectually disabled, along with modifying the procedure for making that determination, *Hall* prohibits punishment for a new class of defendants, i.e., those with an IQ of 71-75. Because the substantive rule announced in *Hall* prohibited the execution of a broader class, that rule is automatically made retroactive to cases on collateral review.

Where *Tyler* differs from this case is that Mr. Tyler argued that a particular *procedural* rule—the structural error reasonable-doubt rule of *Cage v. Louisiana*, 498

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[9] The Eleventh Circuit has recognized that it is appropriate to look to the O'Connor concurrence for the full meaning of *Tyler*. *In re Henry*, 757 F.3d at 1160; *see also Marks v. U.S.*, 430 U.S. 188, 193 (1977) ("'[T]he holding of the Court may be viewed as that position taken by those Members [of the Court] who concurred in the judgments on the narrowest grounds.'") (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). Because nine Justices joined the holding that two cases can make a case retroactive on collateral review, and five took the position that any case under the first *Teague* exception is automatically retroactive, this "constitute[s] the holding of the Court and provide[s] the governing standards." *Marks*, 430 U.S. at 194.

U.S. 39 (1990)—was made retroactive under the second *Teague* exception for "watershed rule of criminal procedure." In concluding that *Cage* was not retroactive, the Court reasoned that there was "no second case that held that all structural-error rules apply retroactively or that all structural-error rules fit within the second *Teague* exception." *Tyler*, 533 U.S. at 666. But because the majority in *Tyler* already deemed substantive *Teague* rules to necessarily satisfy § 2244(b)(2)(A) retroactivity, *Hall* applicability has been "made retroactive" for purposes of the authorization statute. *See generally* 13 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure, § 28.3[e] & nn.144-146 (Dec. 2021 Rev.) (explaining the *Tyler* rule for § 2244 retroactivity of new rules that meet the *Teague* substantive-rule criteria).

C. This Court has applied *Hall* to cases on collateral review

This Court has applied the *Hall* rule to cases on collateral review. Mr. Hall's sentence was already long final when this Court reviewed it following a successive state 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.

But there is more than just granting relief in *Hall*. The Court again granted relief in *Moore*, 581 U.S. 1. The defendant in *Moore*—like Walls and Mr. Hall—was on collateral review with a sentence final long before *Hall*. The Court reversed, as contrary to *Hall,* Mr. Moore's case on collateral review from state postconviction. *Id.* at 5, 13-14 (determining that the Texas court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*"). And

Moore cited yet another case, *Brumfield*, in which the Court applied *Hall*'s standards on collateral review. *Id*. at 5 (noting that in *Brumfield,* 576 U.S. at 316—a federal habeas case—the Supreme Court "rel[ied] on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding."). Even the four dissenters in *Moore* took no issue with applying *Hall* retroactively to Mr. Moore's case. *Id.* at 27-28 (Roberts, C.J., dissenting).

For retroactivity purposes, there is no meaningful distinction between Walls's case and *Hall*, *Moore*, and *Brumfield*—they are all cases with convictions final well before *Hall*. If the Eleventh Circuit were correct that *Hall* was a procedural rule without retroactive application, this Court's later decisions in *Brumfield* and *Moore* would not have been able to rely on it. The rule must 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.").

III. The Eleventh Circuit's reasons for denying authorization were wrong and blocked review of a meritorious intellectual disability claim

The Eleventh Circuit's order makes clear that it will continue to adhere to its precedent on *Hall*'s non-retroactivity, which it now considers unassailable. App 11a; *In re Walls*, No. 23-10982 (11th Cir. April 13, 2023) (unpublished). But the reasons the panel offered for that continued adherence—beyond the fact that existing circuit precedent is not easily overcome—are misguided and should be corrected.

First, the panel stated that, "even if *Montgomery*'s rationale itself would require revisiting *In re Henry*, the Supreme Court in *Jones* limited *Montgomery's*

retroactivity analysis." App. 12a. The panel determined that, after *Jones*, *Montgomery*'s application of the retroactivity standard cannot be used to argue the Supreme Court's other decisions, like *Hall*, apply retroactively." *Id.* But the panel mischaracterized *Jones*, which stressed, "[t]o be clear, however, our decision today does not disturb *Montgomery*'s holding that *Miller* applies retroactively on collateral review." *Jones v. Mississippi*, 141 S. Ct. 1307, 1317 n.4 (2017). The same retroactivity analysis under which *Montgomery* deemed *Miller* a substantive retroactive rule compels finding that *Hall* is also a substantive retroactive rule. *See also Smith*, 924 F.3d at 1339 n.5. *Hall* "alters the range of conduct or the class of persons that the law punishes," *Jones*, 141 S. Ct. at 1317 n.4, by—even modestly—expanding the class of individuals ineligible for the death penalty to include those with IQ scores over 70.

The panel's insistence that this Court has never applied *Hall* retroactively is "slicing the baloney pretty thin." *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, No. 21-869, 2023 WL 3511534 (May 18, 2023) (Kagan, J., dissenting). The panel stated that, in *Moore*, the state habeas court "had applied *Hall* already, so the Supreme Court was reviewing its reasoning, not concluding that the state court had to apply *Hall* because it was retroactive." App. 12a. And the panel said that in *Brumfield*, this Court "did not apply *Hall*, but rather held that the state court unreasonably determined, as a matter of *fact*, that the defendant was not intellectually disabled." App. 12a-13a.

But the panel does not address the fact that this Court applied *Hall*'s standards to both cases, which were unquestionably final and on collateral review before *Hall*.

And shortly after Walls was denied authorization, another panel applied *Hall*'s and *Moore*'s standards to a case that was final before *Hall*, and where the claim would not have succeeded on the merits without them. *See Smith v. Comm'r, Alabama Dep't of Corr.*, No. 21-14519, 2023 WL 3555565, at *8-11 (11th Cir. May 19, 2023). Here, the panel turned those facts on their head, justifying the denial of federal *Hall* retroactivity on the basis that the state courts did not afford Walls retroactivity first.

The panel's refusal to allow Walls to proceed blocked federal review of a meritorious intellectual disability claim—a copy of which Walls attached to his application. Walls's proposed federal claim, available at App. 48-111a, established at least a reasonable likelihood that his intellectual disability argument has merit.

As far back as 1992, the trial court recognized Walls's significant IQ drop to a score of 72, expressing no doubt about that score's validity. *Cf. In re Holladay*, 331 F.3d at 1174, 1176. And in 2016, the Florida Supreme Court found that Walls had made a sufficient showing of intellectual disability under *Hall* when it remanded for an evidentiary hearing, *Walls*, 213 So. 3d at 347, which it could do only if the alleged facts were "facially sufficient to show entitlement to relief," *Patrick v. State*, 246 So. 3d 253, 260 (Fla. 2018). Walls's claim has only strengthened since the 2016 remand.

Because of the Eleventh Circuit's decision, a federal court will not hear the extensive evidence of Walls's 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 contains substantial expert

and lay testimony, and contemporaneous documentation, showing that Walls meets each of the intellectual disability criteria. This evidence includes two IQ scores—a 72 and a 74—that are squarely within the *Hall* range.

If allowed to continue denying authorization to federal *Hall* litigants, the Eleventh Circuit will prevent Walls and others from accessing *Hall*'s substantive guarantee. This Court's intervention is needed.

CONCLUSION

The Court should grant a writ of habeas corpus and/or transfer Walls's intellectual disability claim to the district court for initial determination—or if the Court grants Walls's separately filed certiorari petition, it should consolidate the two cases on the merits docket.

Respectfully submitted,

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