No. 22-

IN THE

Supreme Court of the United States

IN RE FRANK A. WALLS,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS

PETITIONER'S APPENDIX

CAPITAL CASE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 23-10982-P

IN RE: FRANK WALLS,

Petitioner.

Application for Leave to File a Second or Successive
Habeas Corpus Petition, 28 U.S.C. § 2244(b)

Before: WILLIAM PRYOR, Chief Judge, and WILSON and ROSENBAUM, Circuit Judges.

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), Frank Walls has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "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." *Id.* § 2244(b)(3)(C); *see also Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1357-58 (11th Cir. 2007) (explaining that this Court's determination that an applicant has made a *prima facie* showing that the statutory criteria have been met is simply a threshold determination).

In his counseled application, Walls indicates that he wishes to raise one ground in a second or successive 28 U.S.C. § 2254 petition. He argues that his death sentence violates the Eighth and Fourteenth Amendments because he is a person with an intellectual disability under *Hall v. Florida*, 572 U.S. 701 (2014), and that *Hall* created a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Walls asserts that the state court record contains evidence establishing that he meets the three-prong test for intellectual disability, including scores of 72 and 74 on IQ tests, which puts him "squarely within the *Hall* range." While he acknowledges that our decision in *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), held that *Hall* had not been made retroactive to cases on collateral review, he argues that *In re Henry*'s reasoning has been abrogated by *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and that we have recognized this abrogation in *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330 (11th Cir. 2019). He also acknowledges that our decision in *In re Bowles*, 935 F.3d 1210 (11th Cir. 2019), held that our statements in *Smith* about *In re Henry* were *dicta*, but he argues that we misread *Smith*. He further argues that the U.S. Supreme Court has applied *Hall* retroactively in *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 581 U.S. 1 (2017), which conflicts with *In re Henry*. Walls notes that, if we deny his application, he cannot petition for *en banc* review in this Court or for a writ of *certiorari* from the Supreme

Court, and, therefore, authorization of a second or successive § 2254 petition is "the only way for this Court to address its mistaken precedent" in *In re Henry*.

I. Factual Background and Procedural History

A. Facts of the Crime & Direct Criminal Proceedings

In July 1987, Walls was convicted of felony murder in the death of Edward Alger and premeditated and felony murder in the death of Ann Peterson. *Walls v. State*, 926 So. 2d 1156, 1161 (Fla. 2006). Alger's and Peterson's bodies were discovered in Alger's home after he failed to report for duty at Eglin Air Force Base. *Id.* Peterson had been shot twice in the head, while Alger had been tied with a curtain cord, was shot three times, and his throat had been cut. *Id.* After his arrest, Walls gave a detailed statement to police, which the Florida Supreme Court has described as follows:

> In his confession, Walls stated that he entered the house to commit a burglary and that he deliberately woke up the two victims by knocking over a fan. Walls made Peterson tie up Alger and then Walls tied up Peterson. At some point, Alger got loose from the bindings and attacked Walls. Walls tackled Alger and cut him across the throat with a knife. However, Alger continued to struggle, knocked the knife from Walls' hand, and bit Walls on the leg. Walls then pulled out a gun and shot Alger in the head several times. Walls untied Peterson and informed her that he did not originally intend to harm them, but Alger's attack had changed everything. During a struggle, Walls ripped off Peterson's clothes and shot her in the head. When Peterson continued to scream, Walls pushed her face into a pillow and shot her in the head a second time.

Id. After the Florida Supreme Court vacated Walls's conviction and ordered a new trial, he was again convicted and sentenced to death, which the Florida Supreme Court affirmed. *Walls v. State*, 641 So. 2d 381, 385-86, 391 (Fla. 1994). The U.S. Supreme Court denied Walls's petition for a writ of *certiorari*. *Walls v. Florida*, 513 U.S. 1130 (1995).

B. State & Federal Habeas Proceedings

In 1997, Walls filed a Fla. R. Crim. P. 3.850 motion to vacate his conviction and sentences, including a claim that his death sentence was unconstitutional because he was "mentally retarded," which the state postconviction court denied. *Walls*, 926 So. 2d at 1163-64, 1163 n.1. While appealing the denial of his Rule 3.850 motion, he also petitioned the Florida Supreme Court for a writ of habeas corpus. *Id.* at 1164. The Florida Supreme Court affirmed the denial of Walls's Rule 3.850 motion and denied his petition for a writ of habeas corpus, but it noted that Walls could file a "motion for determination of mental retardation as a bar to execution" in the trial court under Fla. R. Crim. P. 3.203 because that rule had been adopted after the trial court denied his "mental retardation" claim. *Id.* at 1174. After Walls filed a successive state motion for postconviction relief, the trial court determined that he was not "mentally retarded" under Fla. R. Crim. P. 3.203, and the Florida Supreme Court affirmed. *Walls v. State*, 3 So. 3d 1248 (Fla. 2008).

Walls then filed his initial § 2254 petition, which the district court denied. *See Walls v. Buss*, 658 F.3d 1274, 1276-77 (11th Cir. 2011). This Court affirmed, and the U.S. Supreme Court denied his petition for a writ of *certiorari*. *Id.* at 1282; *Walls v. Tucker*, 566 U.S. 976 (2012).

In 2015, Walls filed a successive postconviction motion in state court under Fla. R. Crim. P. 3.851 and 3.852, arguing that his death sentence was unconstitutional under *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall* due to his intellectual disability. *Walls v. State*, 213 So. 3d 340, 344 (Fla. 2016). The trial court denied Walls's successive motion without expressly determining whether *Hall* applied retroactively, but the Florida Supreme Court remanded after determining that *Hall* was subject to retroactive application. *Id.* at 345-47. However, the Florida Supreme Court later reversed course, holding that it previously had erred

and that *Hall* did not apply retroactively. *Phillips v. State*, 299 So. 3d 1013, 1024 (Fla. 2020). As a result of *Phillips*, the trial court denied Walls's successive postconviction motion on remand, and the Florida Supreme Court affirmed and denied rehearing. *Walls v. State*, No. SC22-72 (Fla. Feb. 16, 2023); *Walls v. State*, No. SC22-72 (Fla. Mar. 29, 2023).

II. Discussion

A. The Prior-Panel-Precedent Rule

"[A] prior panel's holding in a published three-judge order issued under § 2244(b) is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (quotation marks omitted). "[W]e have categorically rejected an overlooked reason or argument exception to the prior-panel-precedent rule." *Id.* To conclude that a prior panel's holding is no longer binding in light of a Supreme Court case, "we must find that the case is clearly on point and that it actually abrogates or directly conflicts with, as opposed to merely weakens, the holding of the prior panel." *United States v. Dudley*, 5 F.4th 1249, 1265 (11th Cir. 2021) (quotation marks and brackets omitted).

B. *Atkins*, *Hall*, and Retroactive Application

In *Atkins*, the Supreme Court held that the Eighth Amendment prohibits the execution of the intellectually disabled. 536 U.S. at 321. *Atkins* announced a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003). In *Hall*, the Supreme Court held that Florida's procedures for determining whether someone was intellectually disabled under *Atkins* were unconstitutional. 572 U.S. at 704. Under Florida law at that time, "[i]f, from test scores, a prisoner [was] deemed

to have an IQ above 70, all further exploration of intellectual disability [was] foreclosed." *Id.* The Court in *Hall* held that this "rigid rule" was unconstitutional and that Florida had to permit defendants, even those who had a test-measured IQ above 70, "to present evidence of [their] intellectual disability, including deficits in adaptive functioning over [their] lifetime[s]." *Id.* at 724.

Shortly after the Supreme Court issued *Hall*, we determined that, although it created a "new rule of constitutional law," it was not retroactive to cases on collateral review under § 2244(b)(2)(A) because the Supreme Court had not expressly held that it was, and no "combination of Supreme Court holdings compel[led] the conclusion that *Hall* [was] retroactive." *Henry*, 757 F.3d at 1158-61. We concluded that *Hall* did not announce a new "substantive" rule because "[t]he Supreme Court made clear in *Hall* that the class affected by the new rule—those with intellectual disability—is identical to the class protected by *Atkins*." *Id.* at 1160-61; *cf. Welch v. United States*, 578 U.S. 120, 129 (2016) (explaining that 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" (emphasis added) (quotation marks omitted)). We explained that the Supreme Court did not expand this class, but rather "limited the states' power to define the class because the state definition did not protect the intellectually disabled as understood in *Atkins*." *Henry*, 757 F.3d at 1161. We also noted that the principle announced in *Penry v. Lynaugh*, 492 U.S. 302 (1989)—"that any rule placing a class of individuals beyond the state's power to execute is retroactive"—did not make *Hall* retroactive because "*Hall* merely provides new procedures for ensuring that States do not execute members of an already protected group." *Id.*

A year later, we characterized *In re Henry*'s retroactivity holding as "unambiguous," and determined, in the alternative, that we would decline to retroactively apply the "new procedural rule" in *Hall*, even absent *In re Henry*. *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1315-16 (11th Cir. 2015).

C. The Supreme Court's Application and Extension of *Hall*

In *Brumfield*, the U.S. Supreme Court held that the state trial court's rejection of the petitioner's *Atkins* claim without an evidentiary hearing or the time or funding to secure expert evidence was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under 28 U.S.C. § 2254(d)(2). 576 U.S. at 307. After the Court issued *Atkins*, the Louisiana Supreme Court held in 2002 that a diagnosis of intellectual disability had three components, including subaverage intelligence, which it defined as more than two standard deviations below the mean of IQ tests and equated to a score of 70 or less. *Id.* at 308, 314. However, the Louisiana Supreme Court—in relying on sources that described a score of 75 as being consistent with a diagnosis of subaverage intelligence—stated that the margins of error for IQ tests must be considered and that IQ tests are only one factor in assessing intellectual disability. *Id.* at 314-15. The Court noted that the state trial court unreasonably found that, because Brumfield scored a 75 on an IQ test and may have scored higher on another test, he was necessarily precluded from showing that he possessed subaverage intelligence. *Id.* at 314. It then stated, without addressing retroactivity, that the Louisiana Supreme Court's 2002 decision "anticipated" *Hall*'s holding that it is unconstitutional to foreclose exploration of intellectual disability simply because a capital defendant is deemed to have an IQ above 70. *Id.* at 315. It

declined to address whether the state trial court's denial of Brumfield's *Atkins* claim reflected an unreasonable application of clearly established federal law. *Id.* at 312.

In *Moore*, the U.S. Supreme Court held that the Texas Court of Criminal Appeals erred in denying a defendant's *Hall* claim because it relied on state law factors that were untied to information and reasoning from the medical community. 581 U.S. at 5-6. The U.S. Supreme Court expanded on *Hall* without addressing retroactivity, reiterating that state courts do not have "unfettered discretion" in their determination of whether a capital defendant is intellectually disabled. *Id.* at 20. It emphasized that, "in line with *Hall*," state courts must "consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id.* at 15.

D. The Impact of *Montgomery*, *Smith*, *and In re Bowles* on *In re Henry*

In *Miller v. Alabama*, 567 U.S. 460, 489 (2012), the Supreme Court held that state laws mandating life-without-parole sentences for juveniles convicted of homicide were unconstitutional because they did not allow a judge or jury to consider mitigating circumstances, such as age-related characteristics and the nature of their crimes. The Supreme Court noted that juveniles still could be sentenced to life without parole, but courts had to first make an individualized consideration of the circumstances surrounding the case. *Id.* at 479-80. In *Montgomery*, the Supreme Court held that *Miller* announced a new substantive rule of constitutional law retroactive to cases on collateral review because *Miller* "rendered life without parole an unconstitutional penalty for a class of defendants because of their status—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 577 U.S. at 206-08 (quotation marks omitted).

In *Smith*, we held that the Supreme Court's extension of *Hall* in *Moore* was also not retroactive. 924 F.3d at 1338-39. *Moore*, we explained, "established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled." *Id.* at 1337. That rule was procedural, not substantive, because it narrowed only "the range of permissible methods . . . that states may use to determine intellectual disability," not the actual "class of people ineligible for the death penalty," even if the rule could have the effect of expanding that class. *Id.* at 1338-39. In a footnote, we declined to "rely" on *In re Henry* and *Kilgore* insofar as they reasoned that *Hall* was not substantive "because it 'guaranteed only a chance to present evidence, not ultimate relief.'" *Id.* at 1339 n.5 (quoting *Kilgore*, 805 F.3d at 1314). That line of reasoning was undermined by *Montgomery*, we stated, because *Montgomery* stood for the proposition that a new rule of constitutional law can be substantive, even if it only guarantees the chance to present evidence in support of the relief sought, not the ultimate relief itself. *Id.*

In *In re Bowles*, the petitioner sought authorization to file a second or successive habeas petition so he could bring a claim that he was intellectually disabled and, thus, ineligible for the death penalty. 935 F.3d at 1215. Bowles attempted to rely upon *Atkins* as a "new" rule of constitutional law "previously unavailable" to him—even though the Supreme Court issued *Atkins* in 2002, six years before Bowles's initial federal habeas petition—by arguing that *Atkins* became available to him only in 2014, after *Hall* struck down Florida's rigid cutoff for determining intellectual disability. *Id.* at 1215-16. We denied Bowles's application, characterizing his claim as one "dressed up to look like an *Atkins* claim," but relying instead on *Hall*, which the Supreme Court had not made retroactive to cases on collateral review. *Id.* at 1219-20. We explained that,

despite our "dicta" in *Smith*, our holdings in *In re Henry* and *Kilgore* remained binding precedents after *Montgomery* because they did not rely only on the rule that *Montgomery* called into question. *Id.* at 1219 n.3; *cf. Jones v. Mississippi*, 141 S. Ct. 1307, 1317 n.4 (2021) (stating that, "to the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents" before and after *Montgomery*, "those retroactivity precedents—and not *Montgomery*—must guide the determination of whether rules other than *Miller* are substantive"). We clarified that *Montgomery* was not clearly on point regarding the retroactivity of *Hall*, as "*Montgomery* determined that *Miller* announced a substantive rule because it forbade the states from imposing a certain penalty on an entire class of offenders: juveniles whose crimes do not reflect permanent incorrigibility." *In re Bowles*, 935 F.3d at 1219 n.3. By contrast, *In re Henry* and *Kilgore* "relied on the fact that *Hall* does not expand the class of people (the intellectually disabled) who are entitled to relief under *Atkins*." *Id.*

E. Analysis

Here, Walls fails to make a *prima facie* showing that his *Hall* claim satisfies the statutory criteria because he cannot establish that the rule announced in *Hall* has been made retroactive to cases on collateral review. *See* 28 U.S.C. § 2244(b)(2)(A).[1] Walls does not dispute, nor could he, that binding circuit precedent holds that the U.S. Supreme Court has not made *Hall* retroactive. *See Lambrix*, 776 F.3d at 794; *Henry*, 757 F.3d at 1159-61; *Kilgore*, 805 F.3d at 1315-16. We held that *Hall* is not retroactive on collateral review almost immediately after it was decided. *See Henry*, 757 F.3d at 1159. We explained that, although *Hall* created a "new rule of constitutional

[1] Walls does not argue that his claim is based on newly discovered evidence within the meaning of § 2244(b)(2)(B), the only other ground upon which we can authorize him to file a successive application. *See* 28 U.S.C. § 2244(b)(2)(B).

law," it was not retroactive because the Supreme Court had not expressly held that it was, nor had any "combination of Supreme Court holdings compel[led] the conclusion that *Hall* is retroactive." *See id.* at 1158-61. We concluded that *Hall* was not retroactive because it was not a "substantive" new rule: "the class affected by the new rule—those with intellectual disability—is identical to the class protected by *Atkins*." *See id.* at 1160-61; *cf. Welch*, 578 U.S. at 129 (stating that a new constitutional rule is substantive and, therefore, retroactive if it "alters the range of conduct *or the class of persons* that the law punishes" (emphasis added) (quotation marks omitted)). We reiterated this holding a year later in *Kilgore*. *See* 805 F.3d at 1315-16. We not only affirmed that *In re Henry* "unambiguous[ly]" settled the issue, but we even, in the alternative, reached *In re Henry*'s conclusion again as if it were a matter of first impression and held that *Hall* was a non-retroactive "procedural" rule. *See id.* at 1314-16; *cf. Welch*, 578 U.S. at 128.

Walls argues that the Supreme Court's decision in *Montgomery*, coupled with *dicta* from a footnote in *Smith*, mean that our holdings that *Hall* is not retroactive are no longer good law. He asks for us to allow the district court to entertain his habeas corpus petition so that we can definitively reject *In re Henry* and *Kilgore*. However, Walls misreads *Montgomery* and *Smith*, and we have already rejected the precise argument that he presents in his application.

First, our decision in *Smith* did not purport to overrule *In re Henry* or *Kilgore*, as we simply held that *Moore*, a Supreme Court precedent that built on *Hall*, was not retroactive. In reaching that result, we noted in a footnote that we declined to rely on specific reasoning in *In re Henry* and *Kilgore* that *Hall* was not substantive "because it 'guaranteed only a chance to present evidence, not ultimate relief.'" *See Smith*, 924 F.3d at 1339 n.5 (quoting *Kilgore*, 805 F.3d at 1314). But *Smith*'s discussion of *In re Henry* and *Kilgore* is not tantamount to overruling those decisions.

Second, we have already rejected the precise arguments that Walls makes. In *In re Bowles*, we stated that, despite "dicta" in *Smith*, our "holdings in *In re Henry* and *Kilgore* remain binding precedent" because "*In re Henry* and *Kilgore* did not rely only on the rule that was called into question by *Montgomery* anyway." *See Bowles*, 935 F.3d at 1219 n.3. Instead, we explained in *Bowles* that *Hall* is not retroactive under the test the Supreme Court applied in *Montgomery* for the reasons outlined above. *See id.* Walls's only response to *Bowles* is to argue that it misread *Smith*.

Regardless, even if *Montgomery*'s rationale itself would require revisiting *In re Henry*, the Supreme Court in *Jones* limited *Montgomery*'s retroactivity analysis. The Supreme Court explained that "to the extent that *Montgomery*'s application of the *Teague* standard is in tension with the Court's retroactivity precedents" before and after *Montgomery*, "those retroactivity precedents—and not *Montgomery*—must guide the determination of whether rules other than *Miller* are substantive." *See Jones*, 141 S. Ct. at 1317 n.4. Accordingly, the test for substantiveness remains whether the new rule "alters the range of conduct or the class of persons that the law punishes." *See id.* (quoting *Welch*, 578 U.S. at 129). And after *Jones*, *Montgomery*'s application of the retroactivity standard cannot be used to argue the Supreme Court's other decisions, like *Hall*, apply retroactively.

Finally, Walls argues that the Supreme Court applied *Hall* retroactively in *Moore* and *Brumfield*, but it has done no such thing. 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. *See* 581 U.S. at 5. Further, in *Brumfield*, the Supreme

Court did not apply *Hall*, but rather held that the state court had unreasonably determined, as a matter of *fact*, that the defendant was not intellectually disabled. *See* 576 U.S. at 311-32.

Accordingly, because Walls failed to make a *prima facie* showing of the existence of either of the grounds set forth in § 2244(b)(2), his application for leave to file a second or successive petition is hereby DENIED.

No. _____

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: FRANK WALLS,

Petitioner-Applicant.

APPLICATION UNDER 28 U.S.C. § 2244(b) FOR LEAVE TO FILE SECOND OR SUCCESSIVE HABEAS CORPUS PETITION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Grinstead, Albert (Assistant State Attorney)

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APPLICATION UNDER 28 U.S.C. § 2244(b) FOR LEAVE TO FILE SECOND OR SUCCESSIVE HABEAS CORPUS PETITION

I. Introduction

Petitioner-Applicant Frank Walls requests authorization, under 28 U.S.C. § 2244(b)(2)(A), to pursue a second federal habeas proceeding in the district court seeking relief under *Hall v. Florida*, 572 U.S. 701 (2014). Walls's proposed federal *Hall* claim is attached to this application.

Walls exhausted his *Hall* claim in the state courts. *See Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (granting *Hall* retroactivity and remanding for an evidentiary hearing under *Hall*'s standards); *Walls v. State*, No. SC22-72, 2023 WL 2027566 (Fla. Feb. 16, 2022) (revoking *Hall* retroactivity and refusing to review the evidence presented at the evidentiary hearing under *Hall*'s standards).

Walls acknowledges *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), in which this Court ruled that *Hall* does not satisfy the retroactivity provision of § 2244(b)(2)(A). But as this Court recently acknowledged, *Henry*'s reasoning was abrogated by *Montgomery v. Louisiana*, 577 U.S. 190, 194 (2016). *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, 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, this Court should authorize Walls to pursue his *Hall* claim. Walls makes a prima facie showing in this application that *Hall* is retroactive because it announced a new substantive 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. *Hall* substantively expanded *Atkins* protection, even 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 the Supreme Court.

The Supreme Court's *Hall* opinion shows the substantive nature of the rule: the Court arrived at the *Hall* rule by applying 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, the rule is automatically "made retroactive" under § 2244(b)(2)(A). The Supreme Court has thus applied the *Hall* rule to cases on collateral review. Walls stands in the same posture as Freddie Hall himself, as well as Bobby Moore and Kevan Brumfield. *See Moore v. Texas*, 581 U.S. 1 (2017) (citing *Brumfield v. Cain*, 576 U.S. 305, 315 (2015) (applying *Hall*)).

Based on the state-court briefing and the proposed federal claim attached to this application, Walls has also shown a reasonable likelihood that his intellectual disability claim has merit under *Hall*. The state-court record is now replete with expert and lay testimony, and contemporaneous documentation, that Walls meets the three-prong test for intellectual disability. This evidence includes two IQ scores—a 72 and a 74—that are squarely within the *Hall* range.

There is an urgent need for the Court to revisit this issue, for Walls and all Florida defendants. Walls timely raised an intellectual disability claim in state court after *Atkins*, losing only because he failed the unconstitutional "IQ score of 70 or below" criterion. *Walls v. State*, 3 So. 3d 1248 (Fla. 2008). After *Hall*, he filed a renewed state motion. The Florida Supreme Court—after ruling that *Hall* was retroactive to Walls and every Florida defendant—remanded for an evidentiary hearing governed by *Hall*'s standards. *Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016). But while Walls's claim was on remand, the Florida Supreme Court overruled, sua sponte, its decision on *Hall* retroactivity (*Walls*), without notice to any affected party or briefing on the question. *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020). The Florida Supreme Court has since applied *Phillips* to summarily reject intellectual disability claims from prisoners without an IQ score of 70 or below in continued defiance of federal law. *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).

By the time Walls himself returned to the Florida Supreme Court in 2022, after being assured *Hall* retroactivity in 2016, the Florida Supreme Court refused to review his claim on the merits, citing its automatic application of *Phillips* to all *Hall* claims. *Walls*, 2023 WL 2027566, at *2. In applying this "Kafkaesque procedural rule" to Walls,[1] the Florida Supreme Court not only reneged on a promise of *Hall* retroactivity that Walls detrimentally relied on, it effectively reinstated its pre-*Hall* IQ-score-cutoff of 70 to deny his claim. As the Supreme Court held in *Hall*—another 30-year-old capital case with several prior rounds of collateral review—that cutoff cannot be determinative in light of the objective national "consensus that our society does not regard [it] as proper or humane." *Hall*, 572 U.S. at 718.

By denying Walls's claim on retroactivity grounds, the Florida Supreme Court never addressed the extensive evidence of his intellectual disability, including the fact that three experts who evaluated him—one of whom the Supreme Court credited in *Moore* and another who testified against Darryl Atkins himself—agreed that Walls is intellectually disabled. If allowed to continue applying the *Phillips* rule, the Florida Supreme Court will prevent Walls and other Florida defendants—like those

[1] *See Bowles v. Florida*, 140 S. Ct. 2589 (2019) (Sotomayor, J., statement respecting the denial of certiorari).

in *Cave*, *Freeman*, *Pittman*, *Thompson*, and *Nixon*—from accessing *Hall*'s substantive guarantee. This situation calls for federal review.

Under § 2244(b)'s prima facie standard, the Court should authorize Walls to pursue his *Hall* claim in the district court.

II. The "prima facie" standard at the authorization stage

In order to obtain authorization to proceed in the district court, Walls need not prove that he meets the retroactivity criteria in § 2244(b)(2)(A). Under the statute, he only needs to "make a prima facie showing that the application satisfies the requirements [of § 2244(B)(2)(A)]." 28 U.S.C. § 2244 (b)(3)(B)-(C). A prima facie case also includes only "a reasonable likelihood" that the merits of the claim are valid. *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003).

Thus, this Court does not decide the § 2244(b)(2)(A) retroactivity question, but only whether Walls has made "'a sufficient showing of possible merit to warrant a fuller exploration by the district court.'" *Id*. (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)). This is a "limited determination" that "does not bind the district court, which is to decide the 'issues fresh, or in the legal vernacular, de novo.'" *In re Adams*, 825 F.3d 1283, 1286 (11th Cir. 2016) (quoting *In re Moss*, 703 F.3d 1301, 1302 (11th Cir. 2013)).

As discussed below, new Supreme Court and circuit precedent has cast doubt on this Court's current *Henry* retroactivity precedent. This suffices for a prima facie

showing of "possible merit" that *Henry*—issued shortly after *Hall*, by a divided panel, in three days' time, under an active execution warrant—may now be due for reconsideration. *See Smith*, 924 F.3d at 1339 n.5 (refusing to apply *Henry*'s retroactivity analysis due to intervening precedent undermining its reasoning).

III. Walls's federal *Hall* claim is timely

Although not required for authorization, the Court should note that Walls's *Hall* claim will be timely if authorized. *See In re Jackson*, 826 F.3d 1343, 1350-51 (11th Cir. 2016). Including tolling, this application was filed, with the proposed claim attached, within one year of the "date on which the constitutional right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C).

Hall was decided on May 27, 2014. Under § 2244(d)(1)(C), a federal claim based on *Hall* was due within one year, subject to the statutory tolling provisions of § 2244(d)(2). On May 26, 2015, Walls properly filed his *Hall* claim in state court, trigging statutory tolling. That tolling would have continued, with one day remaining on the federal limitations period, until the Florida Supreme Court issued its mandate following the 2023 decision affirming the rejection of the state *Hall* claim. *See Walls*, 2023 WL 2027566, *r'hrg denied* Mar. 29, 2023; *see also Chavez v. Secretary*, 647 F.3d 1057, 1062 (11th Cir. 2011) (statutory tolling ends with Florida Supreme Court's mandate). But before the mandate issued, Walls filed this application, making the claim timely. *See In re Jackson*, 826 F.3d at 1351 n.9.

IV. Prima facie showing of *Hall* retroactivity

Hall was a substantive new rule, and therefore automatically "made retroactive" for purposes of authorizing successive habeas corpus petitions. In *Teague v. Lane*, 489 U.S. 288, 311-12 (1989), the Supreme 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. 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 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 *Hall* 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.

Under Supreme Court precedent, this renders *Hall* applicable to cases on collateral review, not just under *Teague* but under § 2244(b)(2)(A) as well. The Supreme Court has repeatedly applied *Hall* to later cases on collateral review, both those from state court postconviction and those in federal habeas, confirming that it has made the *Hall* rule retroactive under § 2244 (b)(2)(A).

Walls acknowledges that a panel decision from this Court, issued within days of *Hall*, in a case under an active execution warrant, ruled that *Hall* was not "made retroactive" under § 2244(b)(2)(A). *In re Henry*, 757 F.3d 1151. But as explained below, *Henry* is now on too weak footing to preclude authorization at the prima facie stage. This is shown by four unique features of *Henry*: (1) it was decided in three days' time and without any argument about retroactivity; (2) it has since become in conflict with out-of-circuit authority; (3) its reasoning has since been abrogated by the Supreme Court, as acknowledged by this Court; and (4) after *Henry*, the Supreme Court applied *Hall* to two more cases on collateral review, thus at a minimum having made *Hall* retroactive to collateral-review cases at that time.

Given the low prima facie threshold, which applies to the question of retroactivity itself, *Henry* cannot summarily defeat Walls's argument at this stage. This Court should authorize a second or successive petition so that the issue can be

fully explored in the district court and, if relief is denied, reviewed in the normal course in this Court, including en banc and certiorari opportunities to test *Henry*'s continued validity if necessary. *See* 28 U.S.C. § 2244(b)(3)(E) (prohibiting certiorari and en banc review of orders granting or denying authorization).

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 v. State*, 959 So. 2d 702 (Fla. 2007). 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*.[2] Indeed, in Florida, persons with an IQ score within the standard error of measurement (SEM) of ± 5 (i.e., scores of 71-75)

[2] 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).

did not fall under *Atkins*' Eighth Amendment protection. In *Hall*, the Court revisited the consensus to refine and broaden the IQ score requirement to include the ± 5 SEM.

The Supreme 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 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 Supreme 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).[3] The objective-national-consensus method is *not* employed to decide procedural rules, even under the Eighth Amendment.[4] 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).

Hall substantively expanded *Atkins* protection, even if it did so modestly and without guaranteeing relief to any particular defendant. The Supreme 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.*

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[3] 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 (death penalty for juveniles under age 16); *Enmund v. Florida*, 458 U.S. 782 (1982) (low culpability co-defendants).

[4] 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).

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 Supreme 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* of course 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 IQ scores of 70 to 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. Before *Hall*, in Florida, all capital defendants with an IQ over 70 could be executed. After *Hall*, only those with IQs over 75 can be executed.

This Court in *Henry* was correct to recognize that *Hall* is a new rule—concluding that "[f]or the first time … the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *In re Henry*, 757 F.3d at 1158-59. In fact, this Court concluded that *Hall*'s limitation of the State's "previously recognized power to set an IQ score of 70 as a hard cutoff" was "plainly a new obligation that was never before imposed on the states, under the clear language of *Atkins*, and of *Hall* itself." *Id*. at 1159.

B. *Hall* has been "made retroactive" within the meaning of § 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 substantive new rule to have been "made retroactive" by the Supreme Court. The Supreme Court answered what it means to be "made retroactive" in *Tyler v. Cain*, concluding that "made" means "held," or "determined." 533 U.S. 656, 662, 664 (2001). 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 that fall into 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 v. Lane*, 489 U.S. 288, 307 (1989). When the Supreme 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*. Justices Breyer, Stevens, Souter, and Ginsburg joined Justice O'Connor in this view on substantive new rules. *Id*. at 675 (Breyer, J., dissenting).[5] This Court has recognized "'retroactivity by logical necessity' as an

[5] This Court 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

alternative method of satisfying § 2244(b)." *In re Henry*, 757 F.3d at 1160 (quoting *In re Holladay*, 331 F.3d at 1172).

The Supreme 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 defendants with the status of an IQ of 71-75. Because the substantive rule announced in *Hall* prohibited the execution of a broader class of defendants, 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 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*

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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.

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. *Hall* has been "made retroactive" because the Supreme Court has repeatedly applied it to cases on collateral review

If there is any doubt about the retroactivity of the *Hall* rule, this Court should consider that the Supreme Court itself has applied the rule to cases on collateral review. Mr. Hall's sentence was already long final when the Supreme 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 Supreme Court again granted relief in *Moore v. Texas*, 581 U.S. 1 (2017), confirming that the *Hall* rule is retroactive. The defendant in *Moore*—like Walls and Mr. Hall—was on collateral review with a sentence final long before *Hall*. The Supreme Court reversed, as contrary to *Hall,* Mr. Moore's case on collateral review from state postconviction. *Id.* at 5, 13-14 (concluding 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 in which the Supreme Court applied *Hall* on collateral review. *Id*. at 5 (noting that in *Brumfield v. Cain,* 576 U.S. 305, 316 (2015)—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 difference between this case and *Hall*, *Moore*, and *Brumfield*—they are all cases with convictions that were final well before *Hall*. The *Hall* 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.").

D. *Henry* does not preclude authorization

As mentioned previously, Walls acknowledges that an earlier authorization panel of this Court decided in *Henry* that *Hall* has not been "made retroactive." But at this stage, Walls's burden is a prima facie showing, a low bar that is not defeated by *Henry* given later decisions of the Supreme Court and this Court.

1. *Henry* was decided under warrant with inadequate briefing

To start, it is important to acknowledge the context of *Henry*. Less than a month after *Hall* was decided, and only three days before an execution date, Mr.

Henry sought to file a second or successive petition based on *Hall*. Mr. Henry's lawyer made the following argument about the § 2244 (b)(2)(A) criteria:

> Changes in the law respecting claims of intellectual disability as a bar to execution support a motion for leave to file a second or successive habeas petition. *In re Hill*, 437 F. 3d 1080 (11th Cir. 2006). The claim is therefore cognizable on a second or successive petition under 28 U.S.C. § 2244(b)(2).

In re Henry, No. 14-12623 at 10-11 (11th Cir. June 14, 2014). This was the entirety of what Mr. Henry's lawyer argued about the key retroactivity issue. And the State filed nothing in response to this retroactivity argument. Rather than granting the motion (or denying it on other grounds) the Court engaged in its own analysis on a difficult retroactivity question of first impression. *See id*. at 1156-62 & nn.8-12. This analysis was made without party presentation or adversarial input from either side. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1578 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation.").

The *Henry* rule was rendered in only three days' time, which is too little to instill lasting confidence in the resolution of such a complex question. As Judge Bibas observed, though panels can consider timeliness, "often [they] should not." *In re Rosado*, 7 F.4th 152, 156 (3d Cir. 2021). Because authorization motions "should [be] decide[d] ... within thirty days," appellate panels "do not have time to resolve complex timing questions" under § 2244(b)(3)(D). *Id*. (examining timeliness of an authorization motion under § 2244 (b)(2)(A)). And if thirty days is "often" not

enough, a mere three days is not enough for a confident ruling on substantive retroactivity—a far more complex issue.[6]

If *Henry* were an unpublished order, it may not have had much staying power. This Court has afforded lesser weight to decisions that "may not have been subject to the sort of vigorous litigation that would give them persuasive value." *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1359 n.4 (11th Cir. 2019). *Henry* was published, so Walls acknowledges that future merits panels, at least before *Montgomery*, had to treat it accordingly. *Accord Kilgore*, 805 F.3d at 1314 (ruling that *Henry* is controlling and dispositive). But as this Court acknowledged recently, *Henry*'s reasoning was abrogated by *Montgomery*. *See Smith*, 924 F.3d at 1339 n.5 (declining to apply *Henry* and *Kilgore* because intervening *Montgomery* decision "undermined the[ir] reasoning").

The extent of *Henry*'s infirmities and analytical defects mean that Walls's retroactivity argument should not be foreclosed at the prima facie stage. Walls's only burden now is "simply a sufficient showing of *possible* merit[.]" *In re Cathey*, 857 F.3d 221, 226 (5th Cir. 2017) (emphasis added). If a question of retroactivity falls into a "gray area," and if the petitioner has a "cogent argument" for meeting the

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[6] The *Henry* dissent criticized the ruling for reaching the "complicated retroactivity issue under the pressure of . . . imminent execution," where doing so was unnecessary in light of the majority's denial of authorization on alternate grounds. 757 F.3d at 1163-64 (Martin, J., dissenting).

§ 2244(b)(2)(A) criteria, the appellate panel should authorize the petition. *See id*. at 230. Even if there is grave doubt about merit, a "tentative" prima facie ruling should still authorize the argument to be heard through "the second gate" in the district court. *In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) & *id*. at 741 (Higginbotham, J., concurring) (relying on the "tentative" approach for authorization in *Bennett*, 119 F.3d at 469-70). This Court has adopted the *Bennett* standard. *See In re Holladay*, 331 F.3d at 1174.

2. *Henry* conflicts with intervening Supreme Court precedent, as acknowledged by this Court

The Supreme Court decided *Montgomery* in 2016, two years after *Hall*, to clarify that its 2012 decision in *Miller v. Alabama* announced a substantive new rule that was retroactive to cases on collateral review. *Montgomery*'s reasoning regarding *Miller* appears to resolve *Hall* retroactivity, as the rule announced in both cases were substantive new rules that functionally expanded a protected class, while containing a procedural mechanism for implementing the new rule.

In *Smith*, this Court declined to continue to rely on *Henry* and *Kilgore*, because "*Montgomery* [] stands for the proposition that a right can be substantive under *Teague* even if it only guarantees the chance to present evidence in support of the relief sought, not ultimate relief itself," and thus it "undermined a core component of [those cases'] retroactivity analysis." *Smith*, 924 F.3d at 1338 n.5.

In *In re Bowles*, 935 F.3d 1210, 1219 n.3 (11th Cir. 2019), the Court acknowledged *Smith*'s refusal to rely on *Henry* or *Kilgore* because their reasoning was undermined by *Montgomery*. But *Bowles*—also decided in three days' time under warrant—raised more questions than answers about the state of *Hall* retroactivity in this circuit. After stating that *Smith*'s refusal to rely on *Henry* was dicta, *Bowles* said that *Henry* is still circuit precedent, and that *Montgomery* did not sufficiently abrogate *Henry* anyway. But *Bowles* appeared to overlook that *Smith*—which expressly stated that *Henry*'s reasoning was abrogated by *Montgomery*—is also circuit precedent and can only be reviewed en banc. To the extent Bowles tried to alter *Smith*, that was inappropriate. In any event, the confusion in these panel precedents provide *more* reason to authorize Walls's claim and allow *Henry*'s validity to be reviewed without the time constraints of an active execution warrant.

Moreover, this Court's reasoning in *Henry* not only conflicts with *Montgomery*, but it also conflicts with how Supreme Court applied *Hall* to *Moore* and *Brumfield*, as noted earlier. If *Henry* were correct that *Hall* was a procedural rule without retroactive application, then the Supreme Court's later decisions in *Brumfield* and *Moore* would not have been able to rely on it.

Along with the fact that Mr. Hall was in postconviction when the Supreme Court granted certiorari and remanded his case for new proceedings in accordance with the new substantive rule it announced, the Court has continued to take certiorari

in postconviction cases to apply these rules. In *Moore*, 581 U.S. 1, the Court vacated the Texas Court of Criminal Appeals postconviction judgment for Bobby Moore, basing its reasoning on the fact that the Texas court improperly used unscientific criteria "to restrict qualification of an individual as intellectually disabled," in violation of *Hall*. *Id.* at 5. The Supreme Court held that the state court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*." *Id.* at 13-14. The Court concluded that "where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.'" *Id*. at 13 (quoting *Hall*, 572 U.S. at 713, 724 and noting that *Brumfield*, 576 U.S. at 315-16 "rel[ied] on *Hall* to find unreasonable a state's conclusion that a score of 75 precluded an intellectual-disability finding").

Mr. Brumfield, like Walls, was tried and sentenced before *Atkins*. *Brumfield,* 576 U.S.at 308. After *Atkins*, Mr. Brumfield amended his state postconviction petition to raise an *Atkins* claim, pointing to, among other things, mitigation evidence from his sentence phase at trial. *Id*. at 309.[7] At the state level, Mr. Brumfield's *Atkins* claim was denied, and he then raised it in a federal habeas petition. *Id*. at 311. He at first won relief in the district court, only for the Fifth Circuit to reverse. *Id*. at 311-

[7] The evidence of Mr. Brumfield's intellectual disability was remarkably similar to Walls's—Mr. Brumfield had an IQ score of 75, a fourth-grade reading level, received treatment at psychiatric hospitals as a child, had "some form of learning disability, and had been placed in special education classes." *Id*. at 310.

12. It was from this procedural posture that the Supreme Court vacated the Fifth Circuit's decision. *Id*. at 312. In evaluating whether the state court's determination "reflected an unreasonable determination of the facts," the Supreme Court relied on *Hall* to conclude that the state court erred in finding that Mr. Brumfield's "IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence." *Id*. at 315-16 (quoting *Hall*, 572 U.S. at 704, for the proposition that it is "unconstitutional to foreclose 'all further exploration of intellectual disability' simply because a capital defendant is deemed to have an IQ above 70.").

For these reasons, this Court's retroactivity analysis in *Henry* and *Kilgore* should not justify denying retroactive application of *Hall* to Walls. *See Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("To the extent of any inconsistency between our [prior] pronouncements and the Supreme Court's supervening ones, of course, we are required to heed those of the Supreme Court.").[8]

Henry also misapplied *Tyler* in concluding that *Hall* was not made retroactive because "*Hall* made no mention of retroactivity." 757 F.3d at 1159. This Court has recognized that *Tyler* makes clear that the Supreme Court need not expressly state in the case announcing the new rule that it is retroactive. *Id*. at 1160. Yet this Court

[8] Additionally, this Court has noted in a different context that other circuits disagree with other aspects of the *Henry* rule. *See Bowles*, 935 F.3d at 1216 (acknowledging the Fifth Circuit's disagreement with *Henry*, citing *In re Johnson*, 935 F.3d 284 (5th Cir. 2019) and *In re Cathey*, 857 F.3d 221, 229 (5th Cir. 2017)).

then concluded in *Henry* that *Hall* was not retroactive because no "subsequent Supreme Court case [has] addressed the issue." *Id*. Unlike its decision in *Holladay*, where this Court read *Atkins* alongside *Penry* to find *Atkins* retroactive, this Court found there "are no Supreme Court cases here that necessarily dictate that the *Hall* rule is retroactive" because the "Court has never held that a rule requiring procedural protections for prisoners with IQ scores within the test's standard of error would be retroactive." *Id*. at 1161. *Henry* erred in concluding that "*Hall* merely provides new procedures for ensuring that States do not execute members of an already protected group," and that "*Hall* did not expand this class." *Id*.

This Court has since acknowledged that its reasoning in *Henry* that *Hall* only created a procedural requirement that those with IQ scores of 71-75 "would have the *opportunity* to otherwise show intellectual disability," *id*. (emphasis in original), rather than categorically placing those individuals "beyond the power of the state to execute," *id*., is likely inaccurate in light of *Montgomery*. *See Smith*, 924 F.3d at 1339 n.5. *Henry*'s reasoning has repeatedly been called into question, and should not justify denying Walls's application at this stage.

3. Authorization is the only way to revisit *Henry*'s validity

The low prima facie threshold for authorization is not only the law, but also good policy, because authorization is the only way to examine disputed questions of law. Without authorization, this Court's decision "shall not be appealable and shall

not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). Because the application cannot be reviewed en banc, the only way for this Court to address its mistaken precedent, as set forth in *Henry*, is to allow Walls to proceed in a manner that will result in the ability for an en banc review. If the claim is denied by the district court, then Walls could seek review in this Court and ultimately request en banc and/or certiorari review of *Henry* if necessary. Without authorization, this Court will be bound by the precedent of *Henry*, despite the cloud of doubt around it. This case is an appropriate vehicle to revisit *Henry*, as Walls has satisfied the statutory requirements for authorization under § 2244(b).

This pragmatic point is illustrated by the litigation underlying *Tyler*, which examined whether the structural-error rule in *Cage* was "made retroactive" under § 2244(b)(2)(A). The reason the Supreme Court could even review the question was that a Fifth Circuit motions panel had authorized a successive petition. *See id*. at 660 (noting that the Fifth Circuit found "Tyler made a 'prima facie showing' that his 'claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable'") (cleaned up). Because Mr. Tyler received authorization, the district court ruled on the merits of retroactivity, and the Fifth Circuit affirmed, finding that (despite its prior authorization at the prima facie stage) *Cage* was not retroactive. *Id*. The Supreme Court was then able to grant certiorari. In its opinion, the Supreme Court specifically

noted the difference between a prima facie showing at the § 2244(b) authorization stage, and ultimate review of retroactivity on the merits. *Id*. at 661 n.3.

Tyler is particularly instructive because the authorization motion was granted despite then-existing binding Fifth Circuit precedent holding that *Cage* error was not retroactive. *See Humphrey v. Cain,* 120 F.3d 526, 529 (5th Cir. 1997) (collecting cases). So until en banc review was conducted, those panel rulings were binding, notwithstanding intervening Supreme Court precedent suggesting *Cage* might be retroactive under *Teague*. *Id*. at 530-31 ("In spite of our view that [new Supreme Court authority] makes *Cage* available retroactively, this panel may not grant Humphrey the relief he requests."). That aspect of the *Tyler* litigation shows that the mere existence of doubt as to circuit precedent on non-retroactivity—as with *Smith* and *Henry*—satisfies a prima facie showing for authorization. Here, doubts over *Henry* in light of *Smith* and *Bowles* similarly satisfies the prima facie standard.

V. On the merits, there is a reasonable likelihood Walls is entitled to relief

The proposed claim attached to this application establishes a reasonable likelihood that Walls's intellectual disability claim has merit. The record includes ample evidence that Walls meets the three prongs of intellectual disability. *Contra In re Henry*, 757 F.3d at 1163 ("Moreover, the record presented to us is very thin."). This evidence includes two IQ scores squarely within the *Hall* range—72 and 74. These scores are even lower when corrected for outdated norms and sampling errors.

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. 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 Florida law allows only if the alleged facts are "facially sufficient to show entitlement to relief," *Patrick v. State*, 246 So. 3d 253, 260 (Fla. 2018).

Walls's intellectual disability claim has only strengthened since the 2016 remand. The record is detailed in the attached proposed petition and shows at least a "reasonable likelihood" that Walls's claim has merit. *See Holladay,* 331 F.3d at 1176 (citing *Bennett*, 119 F.3d at 469-70).

VI. Conclusion

The Court should authorize Walls's claim to proceed in the district court.

Respectfully submitted,

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ATTACHMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

FRANK A. WALLS,

Petitioner,

v.

Case No. 3:06-cv-237-MCR

CAPITAL CASE

RICKY D. DIXON SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

and

ASHLEY MOODY, ATTORNEY GENERAL OF FLORIDA,

Respondents.
_____/

PROPOSED SECOND PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

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INTRODUCTION

Petitioner Frank Walls is in the custody of the Florida Department of Corrections on death row at Union Correctional Institution. Petitioner requests a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, vacating his death sentence, which violates the Eighth and Fourteenth Amendments because he is a person with intellectual disability under *Hall v. Florida*, 572 U.S. 701 (2014). *See also Atkins v. Virginia*, 536 U.S. 304 (2002). This is Petitioner's second § 2254 petition.

Walls exhausted his *Hall* claim in the state courts, concluding with the Florida Supreme Court's final denial of rehearing on March 29, 2023. *See Walls v. State*, 213 So. 3d 340, 346 (Fla. 2016) (granting *Hall* retroactivity and remanding for an evidentiary hearing under *Hall*'s standards); *Walls v. State*, No. SC22-72, 2023 WL 2027566 (Fla. Feb. 16, 2022) (revoking *Hall* retroactivity and refusing to review the evidence presented at the evidentiary hearing under *Hall*'s standards).

PRIOR PROCEEDINGS

In 1988, Petitioner was convicted of murder and sentenced to death following an advisory jury's 7-to-5 recommendation. The Florida Supreme Court vacated the conviction based on "illegal subterfuge" by the State. *Walls v. State*, 580 So. 2d 131, 132-35 (Fla. 1991). Petitioner was again convicted and sentenced to death in 1992. Crediting his 1991 IQ score of 72 and the neuropsychological evaluation of Dr. Karen Hagerott, the trial court's sentencing order made a factual finding that

Petitioner's IQ had significantly decreased from the time of his childhood. *Id*. at 385-86; *see* SC60-80364, R. at 1199-1201. The Florida Supreme Court affirmed, and the United States Supreme Court denied certiorari. *Walls v. State*, 641 So. 2d 381 (Fla. 1994); *Walls v. Florida*, 115 S. Ct. 943 (1995).

Petitioner filed a state postconviction motion and state habeas petition, alleging various claims, which were denied. The Florida Supreme Court affirmed and denied state habeas relief. *Walls v. State,* 926 So.2d 1156, 1161 (Fla. 2006). Petitioner's first federal habeas petition was denied by this Court and affirmed by the Eleventh Circuit. *Walls v. McNeil,* 2009 WL 3187066 (N.D. Fla. Sept. 30, 2009); *Walls v. Buss,* 658 F.3d 1274 (11th Cir. 2011).

In 2001, Florida enacted Florida Statutes § 921.137, which prohibited executing "mentally retarded" persons. Petitioner timely raised a claim under this law, which was rejected on the merits solely because he presented "no evidence that [he] has ever had an IQ of 70 or below," as the Florida Supreme Court interpreted § 921.173 to require. *Walls v. State*, 3 So. 3d 1248 (Fla. 2008) (citing *Cherry v. State*, 959 So. 2d 702 (Fla. 2007)). The record showed that Petitioner had two IQ scores of 74 and 72, measured 15 years apart.

In 2014, the United States Supreme Court held in *Hall* that the *Cherry* rule was unconstitutional, expanding the class of intellectually disabled persons who may not be executed to include persons with IQ scores between 70 and 75. *See* 572 U.S.

at 714-23 (holding that "'objective indicia of society's standards' in the context of the Eighth Amendment" showed a "consensus" against executing intellectually disabled persons who fail *Cherry*'s "strict cutoff") (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

In 2015, Petitioner timely initiated another intellectual disability claim, this time unburdened by the unconstitutional *Cherry* cutoff. The Florida Supreme Court agreed that, in light of *Hall*, Petitioner was entitled to rehearing of his intellectual disability claim. Acknowledging that *Hall* expanded the class of persons who may not be executed to now include those with Petitioner's IQ scores, the Florida Supreme Court ruled that he was entitled to a new evidentiary hearing. *Walls v. State*, 213 So. 3d 340, 346-47 (Fla. 2016).

A six-day evidentiary hearing was conducted beginning on June 29, 2021, in accordance with the Florida Supreme Court's mandate.[1] Petitioner presented testimony of psychologist Mark Cunningham, Ph.D., neuropsychologist Daniel

[1] Several factors contributed to the delay in conducting the evidentiary hearing that was ordered by the Florida Supreme Court in 2016, including the State's initial efforts to challenge the 2016 decision on rehearing and in the United States Supreme Court; the need for counsel to prepare and conduct discovery for a complicated hearing involving medical experts and evidence in addition to lay witnesses; the COVID-19 pandemic; and, finally, the State's motion in the circuit court to disregard the Florida Supreme Court's mandate, cancel the evidentiary hearing, and summarily deny the intellectual disability claim in light of *Phillips*. Judge Stone rejected the State's motion on February 8, 2021, ruling that the Florida Supreme Court's January 2017 mandate to hold a new hearing in Petitioner's case under the standards in *Hall* was final and binding as a matter of state law.

Martell, Ph.D., neuropsychologist Karen Hagerott, Ph.D., neuropsychologist Robert Ouaou, Ph.D., neuropsychologist Barry Crown, Ph.D., psychiatrist Mark Mills, J.D., M.D., and former assistant public defender James Sewell, J.D. The State presented the testimony of psychologist Gregory Prichard, Psy.D.

The state circuit court denied relief on the merits and on the basis of the Florida Supreme Court's intervening decisions in *Phillips v. State*, 299 So. 3d 1013 (Fla. 2020) (abrogating the retroactivity holding in *Walls*); and *Nixon v. State*, 327 So. 3d 780 (Fla. 2021) (applying *Phillips* to a case with a mandate based on *Walls*).

The Florida Supreme Court declined to reach the merits of Petitioner's intellectual disability claim, instead dismissing his appeal on the retroactivity bar alone. *Walls*, 2023 WL 2027566, at *3 ("Accordingly . . . we conclude that Walls does not get the benefit of *Hall*. As a consequence, his *Hall*-based intellectual disability claim fails regardless of the evidence presented at the evidentiary hearing."). The Florida Supreme Court denied rehearing on March 29, 2023.

TIMELINESS

This petition is timely. When accounting for all tolling, Walls filed his *Hall* claim in federal court within one year of the "date on which the constitutional right asserted was initially recognized by the Supreme Court." 28 U.S.C. § 2244(d)(1)(C).

Hall was decided on May 27, 2014. Under § 2244(d)(1)(C), a federal claim based on *Hall* was due within one year, subject to the statutory tolling provisions of

§ 2244(d)(2). On May 26, 2015, Walls properly filed his *Hall* claim in state court, trigging statutory tolling. That tolling would have continued, with one day remaining on the federal limitations period, until the Florida Supreme Court issued its mandate following the 2023 decision affirming the denial of *Hall* relief. *See Walls*, 2023 WL 2027566, *r'hrg denied*, Mar. 29, 2023; *see also Chavez v. Secretary*, 647 F.3d 1057, 1062 (11th Cir. 2011) (statutory tolling ends with Florida Supreme Court mandate).

But on March 29, 2023, before the state court's mandate issued, Walls filed his § 2244(b) application and proposed *Hall* claim in the Eleventh Circuit, making the claim timely. *See In re Jackson*, 826 F.3d 1343, 1351 n.9 (11th Cir. 2016).

CLAIM FOR RELIEF

I. Petitioner's death sentence violates the Eighth Amendment because he is an intellectually disabled person

A. Legal standard for intellectual disability

In 2002, the United States Supreme Court held that execution of people with intellectual disabilities violates the Eighth Amendment. *Atkins*, 536 U.S. 304. The Court explained:

> Those [intellectually disabled] persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

536 U.S. at 306-07.

Atkins further explained that while people with intellectual disabilities frequently know the difference between right and wrong and are competent to stand trial, "by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others." *Id*. at 318. Because of their diminished capacity and culpability, neither of the two rationales supporting capital punishment— retribution and deterrence— properly applies to people with intellectual disabilities. *Id*. at 319-20.

Atkins referred to clinical definitions of intellectual disability as helpful in the task of determining whether an individual should be exempted from the death penalty. 536 U.S. at 308 n.3, 317. The Supreme Court cited the definition established by the American Association on Mental Retardation, which has since been renamed the American Association on Intellectual and Developmental Disabilities ("AAIDD"). The Supreme Court also cited the definition contained in the American Psychiatric Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders—4th Edition—Text Revision ("DSM-IV-TR"), which was the most significant diagnostic guide for mental health practitioners in the United States at the time of the Supreme Court's opinion. The DSM-IV-TR has since been replaced by the Diagnostic and Statistical Manual of Mental Disorders—5th Edition (DSM-5),

and more recently, the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition—Text Revision ("DSM-5-TR"). But the Court did not hold that the Eighth Amendment required following the APA or the AAIDD definitions.

Although *Atkins* left to each state discretion to enforce the categorical ban on executing the intellectually disabled, states do not have "unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719; *Moore v. Texas*, 581 U.S. 1, 13, 20 (2017) (*Moore I*) (same). "The medical community's current standards supply one constraint on states' leeway in this area. Reflecting improved understanding over time ... current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Moore*, 581 U.S. at 20 (quoting DSM-5 at 7). The Eighth Amendment after *Hall* does not "license disregard of current medical standards." *Id.* at 13.

Looking to the "medical community's current standards," *Hall* acknowledged that the "professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range[,]" measured by a "standard error of measure," or "SEM." 572 U.S. at 712-713. The Court further determined that a rule limiting the class of people who are protected by the Eighth Amendment to those with IQ scores of 70 or below violates the objective national consensus as to society's standards of decency. *Id.* at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

Hall broadened the criteria of people now eligible, at least in Florida, for a determination of intellectual disability as a bar to execution. Individuals whose measured IQ scores fell within the ± 5 SEM, i.e. scores up to 75, were legally entitled to a consideration of their intellectual disability, "including deficits in adaptive functioning," as well as any "IQ test score [that] falls within the test's acknowledged and inherent margin of error." *Id.* at 723-24. This new, substantive rule, announced in a case on collateral review, placed beyond the State's authority to execute individuals with an intellectual disability based on an IQ score within the SEM.

B. Petitioner meets the criteria for intellectual disability

Under the Eighth Amendment, a person is not eligible for the death penalty if her is intellectually disabled "according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Hall*, 572 U.S. at 710. Based on the evidence presented at the 2021 evidentiary hearing, Petitioner meets each of these criteria.

1. Petitioner has significantly subaverage general intellectual functioning

a. Petitioner's measured IQ scores of 72 and 74 satisfy prong one under clinical and legal standards

Petitioner has two scores on individualized, standardized intelligence testing instruments—the Wechsler Adult Intelligence Test-Revised ("WAIS-R") and the

Wechsler Adult Intelligence Test-Third Edition ("WAIS-III")—that fall in the accepted range of intellectual disability to satisfy the first prong. EH at 53-54, 241, 613, 856.[2] The Full-Scale IQ ("FSIQ") scores that Petitioner obtained on these tests —72 and 74 respectively—meet the legal definition of significantly subaverage general intellectual functioning. *Id*.

Petitioner obtained an FSIQ score of 72 in 1991 at age 23. EH at 231. He was administered the WAIS-R by psychometrist Janet Stocker, whose data was interpreted by psychologist James Larson, Ph.D. 228-30. Fifteen years later, Petitioner obtained a psychometrically identical FSIQ score of 74 at the age of 39. EH at 55. Petitioner was administered the WAIS-III by the State's expert, Harry McClaren, Ph.D. EH at 55, 87.

Petitioner's 72 and 74 FSIQ scores alone, without considering other clinically relevant psychometric evidence, are sufficient to demonstrate that he meets the first prong of intellectual disability. EH at 75, 122. These measured scores must be assessed in light of the standard error of measurement (SEM), or confidence interval, as directed by the Supreme Court and explained by experts for Petitioner and the State. *Hall*, 572 U.S. at 713; EH at 57-60. Indeed, any score on a Wechsler test that is 75 or below qualifies as significantly subaverage general intellectual functioning.

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[2] References to the transcript of the 2021 evidentiary hearing are designated "EH __". References to the record of Petitioner's fourth successive postconviction proceedings are designated "PCR5 __" (corrected 3/5/22).

See Brumfield v. Cain, 576 U.S. 305, 315 (2015). The State's expert, Dr. Gregory Prichard, agreed these scores would qualify for a finding of intellectual disability and that the tests were validly administered. EH at 855-56. Dr. Prichard agreed that the SEM is clinically used and "legally … adopted." EH at 785, 795.

b. Petitioner's true IQ is significantly lower due to obsolete norms

Because federal law requires this Court's "adjudications of intellectual disability [to] be 'informed by the views of medical experts,'" *Moore I*, 581 U.S. at 4, the analysis of Petitioner's intellectual functioning must be informed by other relevant clinical considerations.

Professional authority provides for the correction of IQ scores to account for norm obsolescence. This refers to the observation that IQ scores of the population increases over time, which is also known as the Flynn Effect. *See, e.g.,* James W. Ellis, Carolina Everington & Anna M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 HOFSTRA L. REV. 1305, 1363-66 (2018) (discussing the Norm Obsolescence ("Flynn") Effect); DSM-5, p. 37 (discussing the Flynn Effect); AAIDD-11, p. 37 (same).

For example, the AAIDD-11 advises that "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11 at 37. "[I]n cases in which a test with aging norms is used as part

of a diagnosis of ID, a corrected Full Scale IQ upward of 3 points per decade for age of the norms is warranted." User's Guide to AAIDD-11, p. 23; *see also* AAIDD-12 at 58-59 ("Current best practice guidelines recommend that in cases in which an IQ test with aged norms is used as part of a diagnosis of ID, a correction to the full-scale IQ score of 0.3 points per since the test []norms were collected is warranted.").

In considering whether Petitioner meets the first prong of intellectual disability – significantly subaverage intellectual functioning – his IQ test scores must be considered in conjunction with the factors the medical community uses in their interpretation of the same, including the SEM and the Flynn Effect.

At his 2021 evidentiary hearing, Petitioner presented unrefuted evidence showing that his IQ scores came from instruments with significantly outdated norms, and that norm obsolescence (the Flynn effect) is a scientifically valid phenomenon.

Clinicians must consider norm obsolescence in determining intellectual disability. EH at 60. This phenomenon is "the very well-established scientific finding that IQ scores [from] western countries, including the United States, are very slowly drifting to the right at about three points a decade, or .3 per year." EH at 61. Thus, because IQ scores are only useful as demonstrating someone's position relative to the population, one must look at the normed population of the given testing instrument. Dr. Cunningham illustrated the 0.3-point annual drift as follows:

> [L]et's say that an IQ test is standardized in 1990, and based on that standardization, the mean is established as

> 100; standard deviations are 15. 20 years go by and you take that same IQ test and you standardize it with the 2010 population, and when the 2010 population takes that test, they don't obtain a mean of a 100, the whole curve has been drifting to the right at three points a decade, so when the 2010 population takes the 1990 test, they obtain a mean IQ score of 106, not 100. Whole curve has drifted to the right. Well, now two standard deviations below the mean is not 70, it's 76.

EH at 61. Dr. Cunningham explained that it is "critically important" to know when the test was normed "so that a correction can be made to adjust that score to the current population, not the population that existed" when the test was normed. EH at 61-62. Dr. Prichard agreed "that the data [supporting norm obsolescence] is pretty significant in the sense that what was seen in the research in the United States of America [and has] been replicated in a number of different countries[.]" EH at 796. He testified that the Flynn effect "absolutely" is a "scientifically recognized phenomenon," EH at 796, 910; *see Hall*, 572 U.S. at 709 ("[I]t is proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine [the import of scores]"). Dr. Prichard did not disagree with the exact adjustments that Dr. Cunningham made to Petitioner's IQ scores.

Critically, there is broad acceptance that IQ scores must be individually corrected to account for norm obsolescence. EH at 62-63; PCR5 5635. IQ scores are not numbers in a vacuum but are *comparative* scores that measure an individual's intelligence compared to the population average. EH at 48. An IQ score "is always

measuring [intelligence] against the population, and if that psychometric meaning is going to be preserved, then the score has to be corrected for psychometric factors that are distorting the meaning of that score and it's position, vis-à-vis, the rest of the distribution." EH at 72. Psychologists who disagree on whether to correct for this phenomenon are "increasingly regarded as outlier opinions." *Id*. When Petitioner's IQ scores are corrected for norm obsolescence, his WAIS-R score (observed as 72) is in actuality a 68, with a confidence interval (or SEM) of 63-73. EH at 63. His WAIS-III score (observed as 74) is actually a 70.6, with a confidence interval of 67.7 -75.7. EH at 64. This is demonstrated in Dr. Cunningham's slide show. PCR5 5638.

c. Petitioner's true IQ scores are significantly lower due to sampling errors

In addition to norm obsolescence, the unrebutted testimony at the 2021 evidentiary hearing demonstrates that it is important to take into consideration issues associated with the sampling of the IQ test that are discovered after the test is put out to the public. EH at 64.

In this instance, it was noted that after the WAIS-R was published, lower-range IQ scores contained noticeable sampling errors. In several studies cited by Dr. Cunningham, scientists compared the Wechsler Intelligence Scales for Children–Revised (WISC-R) scores to WAIS-R scores two years later and noticed that people who tested on the WISC-R in the "trainable mentally retarded" range, with a score of below 55, scored significantly higher on the WAIS-R than they did on the WISC-

R. EH at 67-68. For those who took the WISC-R and tested in the "educatable mentally retarded range" of 55-70, their WAIS-R score was markedly higher. EH at 68-69. This indicates that the WAIS-R is inaccurately overinflating the scores of individuals at the lower end of normed population. Petitioner's WAIS-R score was measured as a 72 (not accounting for norm obsolescence or SEM). It is appropriate to understand this score in light of the inflation that the WAIS-R creates for those in these lower ranges. EH at 70. Any sound interpretation of this score must include an understanding that Petitioner's score is likely observed as being approximately 5-7 points higher than his true score. EH at 70, 72. Conservatively, this brings Petitioner's true IQ score on the WAIS-R down to a 62 or 63. EH at 73-74.

The same is true, though to a lesser extent, for the WAIS-III score obtained by Petitioner. The WAIS-III's standardization included too many individuals in the lower range of the distribution, EH at 71, which results in scores being about 2.34 points higher than the true score. As such, in addition to correcting for norm obsolescence and the SEM, the inflated 74 IQ score should be corrected to account for this sampling error. EH at 72. Correcting Petitioner's WAIS-III score for this error, in addition to norm obsolescence, brings his true IQ score down to a 68. EH at 74. Dr. Cunningham's peer-reviewed paper, which was favorably cited by the Supreme Court, discussed this very phenomenon. EH at 73; *Moore I*, 581 U.S. at 19, n.10 (citing Macvaugh & Cunningham).

d. Petitioner's low intelligence is confirmed by neuropsychological testing

Clinical considerations of intelligence go beyond simply looking to an observed IQ score. An IQ score is "not a final and infallible assessment of intellectual functioning," and thus the limits of these scores have "particular importance when conducting the conjunctive assessment necessary to assess an individual's intellectual ability." *Hall*, 572 U.S. at 722-23. (citations omitted).

The DSM-5 has deemphasized the IQ score as the sole instrument for determining intellectual functioning. EH at 41, 66. "Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning." DSM-5 at 37. It is important to look to the neuropsychological testing as part of an assessment into intellectual functioning, as it "provides a more comprehensive standardized assessment than IQ testing does alone." EH at 92. It is valuable because it has "other techniques to further understand and quantify deficits in intellectual or cognitive functioning that may be present." EH at 92-93.

In 1984, when Petitioner was 16, neuropsychologist Dr. Edward Chandler conducted a neuropsychological evaluation on Petitioner. EH at 215, PCR5 4803-07. Dr. Hagerott noted this was unusual because neuropsychological testing was not standard to do at the time. EH at 216. Dr. Chandler administered the Luria-Nebraska

battery as well as other tests, and found Petitioner "very emotionally labile and impulsive." EH at 216. Dr. Chandler noted that Petitioner had "difficulty with being abstract when necessary on complex items." EH at 216. Dr. Chandler noted language deficits and concrete thinking, EH at 216-17, and that Petitioner frequently maintained a blank stare with his mouth open," had "slurred speech," requiring "frequent repetitions," and that his "mind worked more slowly than usual at times," or in other words, had processing delays/problems. EH at 94; PCR5 4804. Dr. Chandler diagnosed Petitioner with mild cerebral dysfunction and specific concerns about language deficits. EH 216. There were no concerns that Petitioner was faking, and he had no incentive to do so, as he was being tested due to concerns regarding behavior and low academic performance. EH at 270.

Dr. Cunningham considered Dr. Chandler's observations of Petitioner as "compelling." EH at 93-94. He explained that this is a common manifestation of intellectual disability; the person eventually gets the right answer, but it takes them longer to get there. EH at 94. Processing speed is a profound and significant factor in understanding intelligence. EH at 94.

Neuropsychological batteries are not IQ tests, but they do have portions that test intellectual processes, EH at 96-97, and on these portions, Dr. Chandler described Petitioner as having "relative difficulty dealing with complex and/or abstract ideas" and "rather concrete." EH at 94; PCR5 4805-05. The DSM-5

identifies such features as indicative of intellectual disability. EH at 94. Dr. Cunningham considered Dr. Chandler's neuropsychological battery as revealing that Petitioner's intelligence as a 16-year-old in the developmental period was "quite consistent with" intellectual disability. EH at 95-96. Petitioner's scores in the "brain damaged range" at this time reveal a decline in intellectual abilities compared to his earlier observed IQ scores. EH at 97.

In 1992, Petitioner's public defender James Sewell retained Dr. Karen Hagerott, a neuropsychologist, to perform more neuropsychological tests on Petitioner. EH at 287. At this time, intellectual disability was not a bar to execution, and Petitioner was neither evaluated for, nor had any incentive to appear as, intellectually disabled. Nevertheless, after review of records, interviews, and rigorous testing, Dr. Hagerott diagnosed Petitioner with significant neuropsychological deficits and brain impairments. EH at 100; PCR5 5125. Her 1992 Modified Reitan Neuropsychological Battery results were consistent with Dr. Chandler's results from eight years prior. EH at 217. Specifically, Dr. Hagerott noted the same "speech differences, slurred, poor articulation, concreteness," and her need to "rephrase or simplify statements for him to understand what [she] was saying," as well as the "same difficulty connecting information together that Dr. Chandler had noted in his report." EH at 217-18. This correlation in results lends credibility to the veracity of the results of each set of testing.

In 1992, Dr. Hagerott also conducted testing of higher cognitive functioning and noted Petitioner "understands basic concepts but is often very concrete and is very limited in his abstract reasoning or problem solving of complex situations." EH at 98; PCR5 5121. His reasoning was "very inflexible," and when confronted with failure he often did "not generate new ideas about solutions or try new approaches." EH at 98; PCR5 5122. Dr. Hagerott reported "[q]ualitatively, tests of higher cortical functioning were replete with extreme impulsivity and poor-self monitoring." EH at 99; PCR5 5122. "Overall, testing of higher cortical functioning was felt … to indicate diffuse deficits in processing," beyond only those related to the frontal lobe. *Id*. Dr. Cunningham explained the significance: Petitioner demonstrated he could not learn from experience and could not process, or filter, what is important or worth reacting to. EH at 99. These are classic indications of intellectual deficits seen in people with intellectual disability. EH at 98-99.

e. IQ scores are part of a holistic consideration in tandem with prong two

There may be "instances where the person's adaptive deficits are consistent with the presentation of somebody with intellectual disability even though the IQ score is higher than might otherwise be considered as diagnostic." EH at 42. Dr. Cunningham testified that clinical guides call for "simultaneous consideration of adaptive skills" as well as the "gathering [of] clinical information that would inform intellectual functioning." EH at 66. Dr. Martell testified to a move away from IQ

scores and an increased emphasis on a person's adaptive impairments as the best measure of the person's functioning.

The diagnosis of intellectual disability has evolved, especially over the last five or ten years, away from the use of IQ as the indicator of the degree of intellectual disability and in favor of the degree of adaptive impairment. EH at 336; *cf*. *Hall*, 572 U.S. at 723 ("A State that ignores the inherent imprecision of [IQ] tests risks executing a person who suffers from intellectual disability."). This makes sense because adaptive deficits are the often the presenting symptom of intellectual disability and dictate the effect the intellectual disability has on a person's life.

As discussed next, Petitioner has significant deficits in all three domains of adaptive functioning. These deficits were not disputed at the evidentiary hearing and were found to exist by the circuit court. The extent of Petitioner's adaptive deficits supports the inference that his IQ scores likely overstate his intellectual functioning.

2. Petitioner has adaptive deficits in all three adaptive domains

Petitioner has deficits in adaptive functioning concurrent with significantly subaverage intellectual functioning. Adaptive functioning, as explained by Dr. Martell, "refers to how a person gets along in the world: caring for themselves, caring for others, functioning in society." EH at 335; *accord* Fla. Stat. § 921.137. Adaptive deficits are conceptualized by three broad domains of a person's abilities: conceptual, social, and practical skills. EH at 335. Impairment in only one domain

is sufficient for a diagnosis of intellectual disability. EH at 335. A clinician looks to a person's typical functioning, not whether they are ever able to perform a certain task. EH at 335-36; *see also Moore I*, 581 U.S. at 14 (rejecting focus on strengths because "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*") (emphasis in original) (citing AAIDD–11 at 47; DSM–5 at 33, 38, and *Brumfield,* 576 U.S. at 320).

Adaptive functioning is typically measured by a careful examination of the person's history and records; interviews with friends, neighbors, teachers, and people that know or knew the person; and interviews with the person being evaluated. EH at 336. A person does not need "global" impairment or a complete absence of adaptive functioning for a finding of intellectual disability. EH at 336. "All that is required is at least mild impairment in one of these three areas." EH at 336. "Even mild impairment in one of these areas reflects a significantly different or impaired level of functioning." EH at 340. The vast majority of people with intellectual disability fall within the "mild" range of adaptive deficits. EH at 340-41.

Because an adaptive functioning inquiry considers a wide range of behaviors and source of information, clinicians rely on "convergent validity," which refers to "evidence from multiple methods, multiple strains, interviews, tests, different tests, school records, and when they all converge on the same answer, it increases [the] confidence that this is a correct finding." EH at 351.

In this case, Dr. Martell examined Petitioner's history and records, interviewed Petitioner and his family, and reviewed affidavits from people who know or knew Petitioner as part of the adaptive functioning assessment. EH at 341. There is ample evidence in the record of unbiased, contemporaneous sources that Petitioner was not functioning intellectually or adaptively at a normal range throughout his childhood and into his teen years. Dr. Martell concluded that Petitioner has deficits in all domains of adaptive functioning.

a. Petitioner has deficits in the conceptual domain

Petitioner has deficits in adaptive functioning in the conceptual domain. EH at 341. The conceptual domain looks to language, reading, writing, arithmetic, reasoning ability, the basic fund of knowledge, memory, and the capacity to self-direct. EH at 342. Impairment in this domain often overlaps with considerations for prong one – intellectual functioning. EH at 342.

Dr. Martell testified that Petitioner's deficits in the conceptual domain are of mild severity. EH at 371. The DSM-5 defines mild deficits in this domain as follows:

> For preschool children there may be no obvious conceptual differences. For school-aged children and adults, there are difficulties in learning academic skills involved in reading, writing, or arithmetic, time or money, with support needed in one or more areas to meet age-related expectations. In adults, abstract thinking, executive function -- for example, planning, strategizing, priority setting, and cognitive flexibility -- and short-term memory, as well as functional use of academic skills -- for example, reading, money management -- are impaired.

> There is a somewhat concrete approach to problems and solutions compared with age-mates.

EH at 371-72; DSM-5 at 34. Deficits in conceptual functioning that correspond with this definition are considered significant deficits in adaptive functioning and qualify for a diagnosis of intellectual disability. EH at 372.

Although there is evidence of these impairments from birth, Petitioner's conceptual skills further diminished after his bouts of meningitis. EH at 342. Dr. Martell testified that the records he reviewed showed that Petitioner may have been hypoxic (oxygen impaired) shortly after birth, experienced high fevers requiring hospitalization at age 2 and again at age 3 or 4, and was referred for "possible mental deficiency or possible minimal brain damage" at age 5. EH 343-44; PCR5 4617. Air Force clinic records indicate that Petitioner was "delayed in learning to walk at one and a half years, that he only began to say words at two and a half years, and that he was late to speak in complete sentences." EH at 344-45. These are some of the earliest deficits noted in the conceptual domain. EH at 345. His father reported that Petitioner was "slow to talk, hesitant, slow to answer, and could not form words," and even then, he "spoke more than he understood." EH 345; PCR5 5738; *accord Hall*, 572 U.S. at 705-06 ("Hall's siblings testified that there was something 'very wrong' with him as a child. … Hall was 'slow with speech and ... slow to learn.' He 'walked and talked long after his other brothers and sisters,' and had 'great difficulty forming his words.') (internal citations omitted).

At age eight, Petitioner was evaluated for an Individualized Educational Plan ("IEP"), which included a Wide Range Achievement Test ("WRAT") administration. EH at 347. At this time, he was in third grade but functioning a full grade level lower in reading, spelling, and math. EH at 347. The reading portion of this WRAT only tested Petitioner's ability to pronounce words. *Id.*; PCR5 4658. A childhood neighbor, Kathy Brittingham, who met Petitioner when she was eight years old, provided an affidavit describing Petitioner as stuttering a lot around others, but it was less pronounced around her when he would relax. EH at 346; PCR5 5743.

At age twelve (sixth grade) and after his first bout of meningitis in 1979, Petitioner was again tested with the WRAT. Dr. Martell noted that Petitioner's "spelling was at the third-grade level, his arithmetic was at the fourth grade level, and his reading was at the fifth grade level, so he was still at least a full school year behind in each area." EH at 348; PCR5 4663.

Petitioner's emotionally-handicapped-class teacher, Bruce Ravan, noted that after Petitioner's second bout of meningitis in 1980, he "was bad with long-term goals. He also struggled with multistep activities and had to be reminded of the next step and stay on task. Frank had to be constantly reminded of daily activities of the class despite how structured it was." EH at 350; PCR5 4756. He also noted that "Frank was not caught up to the other students. He had a 5th grade brain when he was in the 7th grade." EH at 350; PCR5 4756. Dr. Martell testified such a description

was "consistent" with a child whose WRAT scores "show him a couple of years behind in his academic achievement." EH at 350-51.

In 1981, at age 14 (seventh grade), Petitioner underwent psychological testing, the results of which were consistent with deficits in conceptual skills. A school psychologist Dr. Smith gave him the Peabody Picture Vocabulary Test, which revealed problems with language: "A low level of verbal knowledge and ability to use verbal information." EH at 351; PCR5 5422.

In February 1982 (eighth grade), Petitioner was again given the WRAT, this time by Donna Harper, a school psychologist, and performed several grade levels below his peers: at the fifth-grade level in reading recognition, at the third-grade level in spelling, and at the sixth grade level in arithmetic. EH at 352-53. Petitioner was more than four years behind in his spelling, three years behind in reading, and two years behind in math. Dr. Martell explained that these scores are:

> [C]ompletely consistent with the pattern that we've seen, and they do indicate that he was beginning to plateau, which is often what you'll see, is children with ID kind of start out indistinguishable from their peers and then as school progresses they fall behind and don't progress at the same level…

EH at 353.

Also in the eighth grade, Petitioner's records reveal an outlier score, diametrically higher than the previous testing, that would make him among the most well-achieved of his peers. Clinch Ballew, an emotionally handicapped teacher,

reported this outlier WRAT score in addition to the one Donna Harper administered months earlier. EH 353. There was no raw data for this test. EH at 353-354 Given the consistency of the entire record of Petitioner's testing, Dr. Martell found that the WRAT score reported by Mr. Ballew as not credible. Compared to the scores in February of that year, Petitioner was reportedly six grades higher in reading and four grade levels higher in spelling and in math. Dr. Martell testified that he has never seen such an increase, and it would "be highly unusual for it to be real." EH at 355.

Dr. Cunningham agreed that the second 1982 WRAT score obtained by Mr. Ballew was "inexplicabl[e] and incredibl[e]." EH at 183. As Dr. Cunningham explained, "the implication of this is that these scores … are not accurate reflections [of Petitioner's abilities] or that [Mr.] Ballew is teaching to the test." EH at 184. This is not an insinuation that Mr. Ballew was up to something nefarious. But it does imply some intentionality behind the increased scores, for whatever reason, be it school funding, personal career advancement, or some well-intentioned attempt to make Petitioner appear to be moving along in his academic performance. Dr. Cunningham explained how this would work. Instead of blindly giving the test, Mr. Ballew would have practiced the word with Petitioner in class before administering the test. EH at 184. Dr. Cunningham explained that it is not appropriate to "simply turn to the educational records and cherry-pick out the scores that seem to support a viewpoint … without any context of the testing before and after." EH at 184-85.

At the time of the outlier WRAT score, Petitioner received two sets of grades for his eighth-grade year. One semester he received Ds in English, math, and science, and a C in social studies. EH 354. The other semester, with emotionally handicapped class teacher Ms. Cary Schwencke, his grades were Fs, Ds, Cs, and one B. EH at 355. Ms. Schwencke described in her 2019 affidavit that in eighth grade "Frank was well below his peers in the domains of academics, judgment, problem solving, self-care like hygiene and grooming." EH at 355; PCR5 5766. He was generally "unable to achieve school work similar to normal peers" and most importantly she believed he would "[c]ontinue to need intensive intervention for the foreseeable future," and it was "highly unlikely that Frank would ever become an individual that did not have special needs or was not disabled." Ms. Schwencke's qualitative observations reinforce that Petitioner's near-failing grades disprove the inconsistent outlier WRAT scores as reported by Mr. Ballew. EH at 355.

At age 15 (ninth grade), Petitioner spent a year at a residential setting at Camp E-Ma-Chamee. He was given the California Achievement Test at the conclusion of his stay where he scored about a year behind in reading and math, overall language at the sixth-grade level, spelling at the fifth-grade level, reference skills at the fifth-grade level, with a total grade level equivalent score of 7.6. EH at 357; PCR5 4768. This represented being more than two years behind, despite being held back, staffed into emotionally handicapped classes, and spending a year at an intensive residential

program specifically addressing these conceptual domain issues. The setting of this test, in addition to the reported results, are consistent with intellectual disability and disprove Mr. Ballew's outlier WRAT score from a year earlier.

At age 16 (tenth grade), after a third bout of meningitis that occurred in September 1983, Petitioner's conceptual functioning kept declining. EH at 358. In 1984, Petitioner underwent a vocational assessment for the Exceptional Student Education ("ESE") program, including being administered the Brigance Achievement Test, on which he scored at the seventh-grade level in reading and sixth-grade level in math. EH at 358; PCR5 4809. He was also administered the Burks Behavior Rating Scale, indicating "very significant problems" – the highest measurable level – with attention, impulse control, and sense of identity. EH at 359; PCR5 4844. These attributes affect conceptual skills in a way that is relevant to a diagnosis of intellectual disability. EH at 359.

That same year, at age 16, Petitioner was evaluated by neuropsychologist Dr. Chandler. In addition to noting the intellectual deficits discussed earlier, Dr. Chandler's neuropsychological testing revealed "spelling and reading skills have remained at any early 4th and 5th grade level respectively during the past 4 years." EH at 360; PCR5 4805.[3]

[3] In 1992, when Petitioner was age 24, Dr. Hagerott also described language deficits, reporting his "language was marked by vary impulsive remarks. His speech included poor articulation, occasional word finding problems, and was generally

At age 17, Petitioner was seen by Dr. Randell Brooke for a mental status exam. EH at 361. Dr. Brooke opined:

> [Walls's] fund of information is rather shallow. He had no awareness of numerous major events that had recently happened in the news. He had a very difficult time with calculation. He was unable to multiply by threes past a very basic number. His abstract thinking is very poor. He is unable to interpret even simple proverbs. He is very concrete in his thinking. Frank's judgment appears to be very poor. When given situational problems requiring judgment, he tended to be very egocentric.

EH at 361.

Dr. Chandler next conducted a follow up with more achievement testing. He administered the Peabody Individual Achievement Test, which is "quite similar to" later iterations of the WRAT. EH at 362-63. Despite this being the summer after his tenth-grade year, Petitioner tested at the following levels: fifth grade in reading recognition, fourth grade in reading comprehension, fourth grade in spelling, eighth grade in math, fourth grade in general information, with an overall test level score of functioning at the middle of fifth grade. EH at 362.

Evidence of Petitioner's conceptual domain deficits continued after he turned 18, while he was still in the developmental period. In October 1991, when Petitioner was 23, psychometrist Janet Stocker administered a WRAT-R2. Petitioner "had a

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slurred. Prosody was diminished." Dr. Martell reported of his own exam, "I observed him to stutter, to stammer, and to mumble." EH at 346; PCR5 4804-07.

reading score in the beginning of the seventh grade, a spelling score at the end of the fifth grade, and an arithmetic score at the end of the fifth grade, essentially unchanged from his previous level of functioning." EH at 363-64. His abilities remained consistent even after becoming close to attaining what is scientifically considered brain maturity. In 2007, when Petitioner was 36, the State's expert Dr. Harry McClaren administered the WRAT-III, indicating that reading[4] and spelling were at an unspecified "high school level" and arithmetic scores were at the "8th grade level." EH at 364. The raw data from this testing was not available. EH at 364, 851. Dr. McClaren also noted that, "despite treatment and classes for the emotionally handicapped, Petitioner was not able to … pass the GED." EH at 364.

More recent evaluations confirm such ongoing deficits. In 2017, Dr. Prichard administered serial sevens and a mental status evaluation, noting results "consistent with the prior mental status examination findings where he was asked to do the same things and he had the same problems decades earlier." EH at 365-67. In 2018, Dr. Cunningham administered a partial WRAT-IV, where he found a word reading score in the fifth-grade level, a sentence comprehension score in the seventh-grade level, and an overall reading composite in the bottom fourth percentile. EH at 367. These

[4] Dr. McClaren reported that this score reflected "reading comprehension," but the WRAT-III tested simple word recognition.

scores are markedly similar to those from more than 30 years prior. EH at 368. The results provide convergent validity and reveal current conceptual domain deficits.

Dr. Martell's evaluation shows that Petitioner does not always understand what he reads and that he did not understand his school work, but would carry books around to make people think he did. EH at 368. He tried to look good so he had friends. *Id*. He did not know fractions. EH at 369. He would approximate in the kitchen and stated that "Mommy and Daddy did all that stuff." EH at 369-70. He also reported that he has other inmates write letters for him, and he copies what they have written. EH at 370-71. This is consistent with Dr. Cunningham's evaluation. EH at 371. Dr. Martell concluded that Petitioner continues to require ongoing support in the conceptual domain due to his adaptive deficits. EH at 372.

Dr. Martell testified that the record shows that Petitioner was bullied in school and had a hard time making friends, and so he resorted to what is commonly seen in persons with intellectual disability - the "cloak of competence." EH at 369. Dr. Martell described this compensatory mechanism as something individuals with intellectual disability "do to try and appear as if they understand when maybe they don't, as if they're capable of doing things when maybe they aren't[,] in defense of their own ego so that they aren't ostracized, so that they can make friends, so that people will think that they're normal" EH at 332.

Importantly, the State's expert does not dispute that Petitioner has deficits in conceptual functioning. Dr. Prichard testified that during the developmental period, Petitioner "definitely" had adaptive deficits in the conceptual domain, such as "judgment problems, impulsivity, not thinking about consequences." EH at 863. He did not have an opinion on whether he presently has these deficits in prison. EH at 863. Because deficits on only one area are required, Petitioner's overwhelming conceptual deficits are alone enough to satisfy deficits in adaptive functioning.

b. Petitioner has deficits in the social domain

Petitioner has adaptive deficits in the social domain as well. EH at 373. This domain looks to social skills and getting along with others, capacity for empathy, social judgment, interpersonal communication skills, ability to make and retain friendships, control one's behavior, and similar social abilities. EH at 373-74. Petitioner has deficits in three areas within the social domain: (1) social relationship formation, *i.e.*, making friends and getting along with others; (2) emotional dysregulation, *i.e.,* trouble controlling his emotions and behavior; and (3) gullibility, *i.e.*, being vulnerable to manipulation by others. EH at 374; DSM-5 at 38.

Dr. Martell testified that Petitioner's deficits in the social domain are of mild severity. EH at 400. The DSM-5 defines mild deficits in this domain as follows:

> Compared with typically developing age-mates, the individual is immature in social interactions. For example, there may be difficulty in accurately perceiving peers, social cues. Communication, conversation, and language

> are more concrete or immature than expected for age. There may be difficulties regulating emotion and behavior in an age appropriate fashion. These difficulties are noticed by peers in social situations. There is limited understanding of risk in social situations. Social judgment is immature for their age, and the person is at risk of being manipulated by others' gullibility.

EH at 400-01; DSM-5 at 34. Such deficits in social functioning are significant deficits in adaptive functioning and qualify for a diagnosis of intellectual disability. EH at 401. That Petitioner had such deficits since grade school and continues to have them now indicates that they are genuine. EH at 401. Dr. Martell testified that there was convergent validity between the various people reporting this information and the record, which gave him "confidence in making that determination that he has mild impairment" in this domain. EH at 402.

i. Relationship formation

Petitioner was observed in 1980, at the age of 12, by school psychologist Susan Lowery who noted he was "unable to adjust to a level of behavior appropriate for his age, despite repeated attempts of intervention, such as counseling and disciplinary action." EH at 375; PCR5 4685. His emotionally handicapped class teacher Ms. Schwencke described that "Frank could be easily setup and exploited ... He was a vulnerable target and was unable to advocate for his own needs." EH at 375; PCR5 5766. While at the E-Ma-Chamee boy's camp at age 14, Petitioner's emotional stability and maturity were "far below average." EH at 376. After a full

year at the camp, the discharge summary from May of 1983, stated "Frank will need guidance and counseling concerning peer relationships and social skills. He needs considerable development in the area of social skills." EH at 376; PCR5 4757, 4767. His social skills were rated in the bottom fifth percentile on the California Test of Personality. EH at 376; PCR5 4768.

In tenth grade, Petitioner's emotionally handicapped class teacher Bob Jones noted that "Frank acts very immature for his age. He likes to act silly a lot and seems to have the emotional level of a small child." EH at 377; PCR5 4850. Dr. Martell explained this was relevant because "other kids don't want to play with you [and it's] part of why he became ostracized and bullied and maltreated." EH at 377. Dr. Martell explained that people with intellectual disability "don't have the intellect to understand the impact that they're having on other people." EH at 378.

Petitioner's teacher Mr. Ravan explained "Frank had no friends in the emotionally handicapped class, and I do not recall him having any friends outside the class either." EH at 379; PCR5 5756. Ms. Brittingham, a childhood neighbor, recounted that Petitioner was "never quite intelligent," and that people could not stand to speak to him because he "don't make no sense." EH at 378; PCR5 5742. This was a barrier to his social relationship formation. EH at 378.

Petitioner's parents reported similar issues. EH at 379; PCR5 5733-41. His father reported that "Frank did not make a lot of friends. Relationships with peers

were very few and far between and never lasted long periods[, g]irls especially[.]" He also stated that "Frank's supposed friends bullied him and took advantage of him," that they "utilized and brutalized him," and that they "were not real friends." EH at 380; PCR5 5739. He ultimately pulled Petitioner out of the emotionally handicapped class because he did not want him to be labeled or targeted. EH at 380.

These social domain deficits continue in prison. Inmate Michael Reynolds, who has known Petitioner since 2005, and is housed nearby, observed:

> Frank is still a child in many ways. When he learns something new or understands something for the first time, which is usually obvious or old to everyone else, he lights up like a lightbulb and gets giddy. This is true even for things that do not matter…Frank gets easily embarrassed and his tone changes when he gets upset. Frank does not want people to think that he is stupid so he tries to play it off by being funny or saying something slipped his mind. … Frank has trouble understanding what people mean when they speak to him, which is obvious from the way he responds.

EH at 381; PCR5 5748. Dr. Martell testified that this demonstrates a deficit in receptive language and is a perfect example of the cloak of competence. EH at 381-382. These lay observations are consistent with intellectual disability. EH at 382.

Dr. Martell noted the relevance of other inmates' lack of patience due to Petitioner's "interjecting and participating in conversations even when it's clear that he does not understand the subject matter," because they find discussing even simple topics with him taxing. EH at 383; PCR5 5749. Mr. Reynolds also helps Petitioner

with simple things "like how to think about things, respond to others, and how to conduct himself on a daily basis." *Id.* Mr. Reynolds recounts that "[p]eople have taken advantage of Frank" and that Petitioner "does not understand that people can like him or he can be a good person without giving [his] things away." *Id.*

Petitioner's communication skills are also part of the social domain assessment. EH at 397. Dr. Martell observed difficulty with expressive speech during his evaluation. EH at 397. Petitioner noted he sometimes does not "understand what they're saying[.]" EH at 397. He asks "someone else to read" and "explain" letters to him. EH at 397. He also reported that he tried to make friends, but was only accepted "sometimes for a little while, sometimes not." EH at 398.

ii. Emotional dysregulation

Dr. Martell testified that Petitioner's lack of awareness of social norms for appropriate behavior cannot be divorced from his intellectual functioning; they are "part and parcel of it." EH at 394. He opined that there is "a lot" of evidence showing Petitioner's noncompliance with rules and social expectations are based on true deficits, instead of a disregard of rules and social expectations of others "in an antisocial way." EH at 395.

For example, at 12 years old, the Okaloosa County School District reported Petitioner to act "very impulsively without thinking," and to have "poor self control." EH at 384. A 1981 school note recorded difficulties with withdrawing

tendencies, eye contact, nervous tendencies, social standards, and communication, further evidencing barriers to forming social relationships. EH at 386-87. When he was 14, his E-Ma-Chamee camp application listed his focus problems for treatment as "impulsivity, low tolerance for frustration, [and] tantrums" alongside "poor ability to distinguish right from wrong, difficulty in playground activities usually or always, poor relationships with peers, and difficulty getting along[.]" EH at 384-85; PCR5 4745. Dr. Martell testified that these observations reveal emotional dysregulation that is "off-putting to others." EH at 385.

In 1983, E-Ma-Chamee camp staff described Petitioner as having "[i]mmature behavior" and being "over sensitive to constructive criticism, exhibitionistic tendencies, lack of control over body drives" as well as having "poor social awareness of conduct in relationships." EH at 386; PCR5 4754. After a year, the discharge summary stated that Petitioner "needs considerable development in the area of social skills" and recommended emotionally handicapped classes to provide "structure … for Frank's fragile self-concept." EH at 387. Dr. Martell explained this shows an ongoing need for support in the social domain. EH at 388. These behaviors show symptoms of both ADHD and intellectual disability presented as adaptive impairments. EH at 387-88.

These impairments continued in high school. In 1984 (tenth grade), school psychologist Jan Robinson noted that Petitioner exhibited "explosive, erratic mood

swings, which he apparently does not recall." EH at 389. A neuropsychological report by Dr. Chandler noted that Petitioner's referral was based on suspected "cerebral dysfunction and/or learning disability" due to "difficulties with mood regulation, angry outbursts, and defensive hostility[.]" EH at 389; PCR5 4802. Dr. Martell explained that such emotional dysregulation is different from the "hyperkinetic" behavior of those with ADHD. EH at 389. And the referral makes it apparent that the school recognized that this was more than simply ADHD.

As noted earlier, Dr. Chandler's neuropsychological report observed Petitioner staring blankly with his mouth open and slurring his speech. Dr. Chandler documented Petitioner's father recounting anger control issues becoming prominent around age 12 or 13, and that this anger was not near as bad prior to the bout of viral meningitis. EH at 390; PCR5 4804. Dr. Martell found it important that Dr. Chandler noted that:

> Cerebral dysfunction may well contribute significantly to his emotional lability and acting out, angry acting out, and dissociative experiences may be evident. For example, the school records indicate erratic mood swings, which Frank does not recall. Frank also displays significant emotional lability, impulsivity, angry acting out, and paranoid trends, and is quite prone to express his anger both intensely and impulsively. He shows limited frustration tolerance, coupled with impulsive, poorly planned behavior which fails to take into account significant stimulus properties in the environment.

EH at 390-91; PCR5 4804-07. Dr. Martell testified that this illustrates that Petitioner's issues with emotional regulation undermined his capacity to form relationships. EH at 391. This is a cerebral dysfunction causing Petitioner's inability to control behavior, beyond just the ADHD diagnosis that was not capturing or explaining the breadth of Petitioner's issues.

In 1985, Petitioner's relationship deficits continued. A Gulf Coast Hospital report noted that "Frank does not have any meaningful relationships with any extended family members. Father reports that he is susceptible to peer influence, unable to control his impulses most of … his life." EH at 392. The discharge summary from about a month later noted that his "[j]udgment is poor, impulsive, and immature." EH at 392; PCR5 2261.

Petitioner's high school track coach, Joy Aplin, described him as "clearly struggling," having "no friends" and being "very sensitive." EH at 393; PCR5 5761. Ms. Aplin reported that Petitioner "had trouble fitting in and had trouble following directions," often resulting in him being "frustrated and angry." EH at 393; PCR5 5761. Similarly, Petitioner's mother reported to Dr. Martell that after a few days people would distance themselves from Petitioner. EH at 394. She described several incidents of bad judgment when Petitioner was nine or ten. EH 394-95. She likewise described that while at the inpatient hospital at age 17, Petitioner "just could not understand social norms and how to conduct himself." EH at 393-94; PCR5 5735.

iii. Gullibility

Dr. Martell found that Petitioner had significant gullibility, which reflects how easily someone can be manipulated and relates to the "cloak of competence" as a willingness to be manipulated to make friends or be liked and accepted. EH at 395. Dr. Martell testified that many sources supported this finding. Ms. Schwencke described Petitioner's interpersonal vulnerabilities. EH at 396; PCR5 5764-67. Dr. Chandler, who evaluated Petitioner when he was 16, reported in 1984 that he "was quite susceptible to peer pressure in order to obtain approval." EH at 396; PCR5 4804. And, Petitioner's parents reported that he was often taken advantage of by his peers because he was so gullible. Perhaps the hallmark evidence of Petitioner's judgment and gullibility was "playing hooky with some other boys," who "put him up to making the call [to school to report a bomb] that was ultimately traced back to him" resulting in only him being expelled from school. EH at 399, *see Atkins*, 536 U.S. at 318 ("[T]here is abundant evidence that … in group settings they are followers rather than leaders.").

The State did not dispute Petitioner's deficits in social adaptive functioning. Dr. Prichard agreed that Petitioner "has significant deficits" in the social domain, exhibited by conflict with others, including peers and teachers, "documented throughout his school career," and that any progress in restrictive environments "didn't endure." EH at 802. However, Dr. Prichard "didn't assess" whether

Petitioner had current deficits in this domain. EH at 862. Despite testifying that he evaluates adaptive behavior "all the time," because it's "part of an intellectual disability assessment," EH at 786, Dr. Prichard declined to examine Petitioner's adaptive behavior in this case. EH at 862; *see* PCR5 4422. He also testified that "it's really hard to make that judgment" in a restrictive environment such as prison. EH at 862. Dr. Prichard also did not dispute the accounts of other prisoners as to social domain deficits. Petitioner has therefore demonstrated deficits in the social domain.

c. Petitioner has deficits in the practical domain

Petitioner has deficits in adaptive functioning in the practical domain. EH at 403. The practical domain concerns day-to-day life skills, such as personal care, grooming, home living, safety, being responsible at a job or school, money management, recreation, and organizing oneself at school or work. EH at 403.

Dr. Martell testified that Petitioner's deficits in the practical domain are of moderate severity. EH at 429. The DSM-5 defines deficits in this domain:

> The individual can care for personal needs involving eating, dressing, elimination, and hygiene as an adult, although an extended period of teaching and time is needed for the individual to become independent in these areas and reminders may be needed. Similarly, participation in all household tasks can be achieved by adulthood, although an extended period of teaching is needed and ongoing support will typically occur for adult-level performance. Independent employment in jobs that require a limited conceptual and communication skills can be achieved but considerable support from coworkers, supervisors, and others as needed to manage social

> expectations, job complexities, and ancillary responsibilities, such as scheduling, transportation, health benefits, and money management. A variety of recreational skills can be developed. This typically requires additional supports and learning opportunities over an extended period of time. Maladaptive behavior is present in a significant minority and causes social problems.

EH at 429-30; DSM-5 at 34. Deficits in practical functioning that correspond with this definition are considered significant deficits in adaptive functioning and qualify for an intellectual disability diagnosis. EH at 430-31. That Petitioner demonstrated these deficits since grade school and continues to do so now indicates that they are genuine. EH at 431.

By its nature, evidence for this domain is typically based on primary recollections and not found in historical records. Dr. Martell had the opportunity to review many accounts from people who know Petitioner. His mother stated that things were wrong with Petitioner from the start, and that even her relatives would say to her "something is not right with that boy." EH at 408; PCR5 5733; *cf. Hall*, 572 U.S. at 705-06. She said he was bad about chores and cleanliness, often not understanding as a teen why his four-year-old brother did not also have chores. EH at 409. He required reminders and supervision, and she wound up doing things herself instead, and he was particularly unable to cook. EH at 409. His father said Petitioner needed prompting, repeated reminders, and direct supervision, and that he lacked responsibility in assigned tasks. EH at 410-11. Dr. Martell explained that

these are all examples of Petitioner requiring external systems of support for daily living activities. EH at 409-10.

Petitioner's mother was surprised that he got a driver's license through his school, but as soon as he did, he "demolished" her car. EH at 405. Petitioner's neighbor Ms. Brittingham said she never saw Petitioner drive. EH at 405. Petitioner himself said that he rode his bicycle almost everywhere and would just walk around until he found his way when he was lost, because he could not remember the directions people would give him. EH at 405.

When Petitioner was 16 and in tenth grade, he underwent a vocational assessment, which noted "problems with concentration and motor coordination that would impact the kind of work" he could do. EH at 406; PCR5 4844. This was consistent with what Dr. Hagerott noted about eight years later, in 1992. Dr. Martell explained that, in assessing the whole person, it is relevant that Petitioner's deficits undermine his vocational abilities to take a higher-level job beyond dishwashing or cutting lawns. EH at 408. Petitioner's mother confirmed that Petitioner had menial jobs such as dishwasher, which he struggled to keep. EH at 410.

This is consistent with how Petitioner's trial attorney described him. James Sewell has extensive experience working with clients with mental illness, including competency and sanity. EH at 275, 279-80. Mr. Sewell represented Petitioner from 1991-92 and visited with him "very, very frequently." EH at 278. Mr. Sewell

described Petitioner as cooperative and testified that Petitioner did his best to answer questions and pay attention. EH at 279. However, Mr. Sewell testified that he had difficulties explaining legal issues to Petitioner and would constantly have to repeat information to him. EH at 281. In his words: "From one meeting to the next, I don't recall that he was able to remember details," beyond a vague description of people he was interacting with, but not details of relevant issues. EH at 281-82. Mr. Sewell testified that Petitioner not only would forget information, but had difficulty grasping what he was given, even though his counsel would simplify and provide this information in a piecemeal fashion. EH at 281-82. Mr. Sewell observed that Petitioner lacked capacity to comprehend complex information. EH at 285.

Mr. Sewell testified that Petitioner never asked relevant questions about his case, but not because he was not interested. EH at 283. He could tell Petitioner "was not comprehending and retaining" the information, and he certainly wasn't able to formulate relevant questions. EH at 283. Mr. Sewell recalled that Petitioner had a limited vocabulary and vacant expressions when his lawyers would explain legal concepts to him. EH at 283. Unlike his other clients who would send him "bundles" of mail from jail, Mr. Sewell "did not receive much communication at all from" Petitioner. EH at 283-84. In their visits, Petitioner was easily distracted, had trouble focusing, and had a flat affect with his eyes trailing toward the ceiling. EH at 284. This behavior continued during the trial: Petitioner "wrote nothing down," and

"communicated very little with" his lawyers, sitting with his head down, detached most of the time. EH at 284-85. This made it difficult for Mr. Sewell to prepare for the penalty phase, as most of the information they obtained was from third parties, as Petitioner was not really "able to relate [] any of his history." EH at 286.

As the Supreme Court has recognized, this is common in people with intellectual disability. *Hall*, 572 U.S. at 705 ("[T]he lawyer couldn't really understand anything Hall said. And, with respect to the murder trial given him in this case, Hall's counsel recalled that Hall could not assist in his own defense") (internal citations omitted).

Mr. Sewell noted that Petitioner was "not playing with a full deck" and as a result of these impressions, referred him for evaluation by neuropsychologist Karen Hagerott, Ph.D., a fact which Martell found significant and corroborative of the deficits. EH at 287, 406-07; PCR5 5654. At the time, mental retardation was not a bar to execution; Dr. Hagerott was only looking for penalty phase mitigation. EH at 288-89. Mr. Sewell testified that if *Atkins* existed at the time of trial, he would have brought such a claim because he "knew [Petitioner] was retarded." EH at 289-90.

Petitioner's mother noted that he "did not use a bank account or a credit card. I never saw him make change, and I know that he often wasted money when he had the cash." EH at 410. Petitioner's father said "he would use cash that we gave him and did not count the change. He just accepted whatever was given" and one time

had his paycheck taken from him. EH at 411; PCR5 5739-40. Petitioner independently gave a similar account to Dr. Martell. He stated he needed reminders on chores and basic hygiene from his parents and still gets those reminders from his neighbors on death row. EH at 419-21. Dr. Martell explained that these are "deficits because he doesn't have the wherewithal to self-direct to do these things," and needs an external person—be it his parents or cell-neighbor—to tell him to perform basic hygiene. EH at 241. Petitioner told Dr. Martell that he did not use the post office and "cheated" on the driver's license test. He also admitted being careless with others' belongings. EH at 423-24. He always had someone to remind him of his medication. EH at 425. He did not use a bank and trusted what cashiers gave him for change. EH at 425-26. He gave a similar accounting of his jobs: he had a hard time doing new things and was not responsible enough to be on time or do things properly, often resulting in being fired. EH at 427. One time he was mopping a bathroom floor at work and mixed chemicals creating toxic fumes causing him to nearly pass out. EH at 428.

Petitioner's practical domain deficits continue in prison. The deficits noted by fellow inmates are consistent with those observed by people who knew him prior to his arrest at age 19. EH at 431. Dr. Martell relied on the affidavit of inmate Michael Reynolds, who reported that Petitioner "cannot articulate what he's thinking, unless he really tries, and even then it requires a lot of patience to communicate with him.

He has a hard time maintaining his train of thought and his thinking processes." EH at 412; PCR5 5748. Mr. Reynolds also said Petitioner "has issues writing. … We will help, and then he reprints things after we help him or do it for him." *Id*. Mr. Reynolds stated that he didn't really want to get involved with helping Petitioner, but he didn't like hearing "other people telling him things that were wrong," so he decided to help. EH at 413; PCR5 5749. Petitioner needs assistance in part because he "obviously" fails to understand the "legal words or concepts" in his legal documents. EH at 413; PCR5 5749. Mr. Reynolds knows others who help Petitioner in other aspects of prison life, such as with his canteen. EH at 414; PCR5 5749.

Another inmate, Anthony Lamarca, has also provided Petitioner a system of support in prison. EH at 414-15; PCR5 5758-60. He observed Petitioner having "trouble reading and understanding his legal work," and that while Mr. Lamarca was working in the writ room, he "observed that [Petitioner] understood almost nothing about his legal documents." PCR5 5759. Mr. Lamarca read documents to Petitioner "over and over to him, breaking the concepts down as simple as possible." *Id*. Similarly, Mr. Lamarca stated that Petitioner had "trouble reading and writing in a nonlegal capacity as well." *Id*. Mr. Lamarca would read letters people sent to Petitioner and "help him understand what the letter was saying. Then I would ask him what he wanted to say back, and I would write things for him to send to people." *Id*. Mr. Lamarca called Petitioner "terrible at writing." *Id*.

Likewise, inmate Duane Owen said that in "the nearly 30 years that I have known Frank Walls, I have observed how he functions with day-to-day activities and have often assisted him in those activities." EH at 415; PCR5 5752. Part of what Mr. Owen observed is that "Frank has difficulties with letters, and trying to teach him is like trying to teach a kindergartener. Frank can read, but he often does not appear to comprehend what he reads." EH at 415-16; PCR5 5752. This is evidenced by how Petitioner "asks odd questions about what he reads." *Id*. Mr. Owen said that "it is apparent that he does not know …what [people] are trying to express when they write to him[, and w]hen Frank writes back to his pen pals, he requires coaching." EH at 416; PCR5 5752. Mr. Owen has "written letters for Frank, and Frank would copy it and send it back to his pen pal." PCR5 5752.

Mr. Owen also helps Petitioner with legal issues "by breaking down and . . . explaining the legal concepts in Frank's legal documents to him," but even then, "Frank continued to ask the same question over and over again . . . after it had been explained on numerous occasions." *Id*. Mr. Owen also did "not believe that Frank really understands the grievance process despite the fact that other inmates and I have explained the rules and procedures to him over and over and over again. He continually needed assistance with his grievances." PCR5 5752-53. Mr. Owen has seen Petitioner struggle with the canteen form, and "would end up filling out the order form and calculating the total for him." EH at 419; PCR5 5754. Mr. Owen said

that Petitioner would lose track of money and "thought that the prison was trying to steal his money." *Id*. Mr. Owen reflected that Petitioner gets stuck on things and gets agitated, stuttering so much that it is hard to understand him. EH at 417. PCR5 5753. He said that Petitioner "thinks that he is stupid and is self-conscious about it," but that he "tries to express outwardly that he is smarter than everyone else." *Id*.[5]

As with other domains, the State's expert agreed that Petitioner demonstrated adaptive deficits in the practical domain. EH at 862. Dr. Prichard cited commentary in the records regarding inability to clean the house and "difficulty responsibly doing a lot of the typical tasks that you would have to do for" self-care. EH at 862. He did not have an opinion on whether Petitioner still suffers from these deficits. EH at 862-63. However, Dr. Prichard did not attempt to cast doubt on Petitioner's evidence related to his support in prison.

3. Petitioner's intellectual disability manifested prior to age 18

Petitioner has been suffering significant deficits in both intellectual and adaptive functioning before his 18th birthday, and certainly before his mid-twenties, which is scientifically considered the end of the developmental period. An

[5] These descriptions align with the AAIDD's Brown Book. On page 196, paragraph 12, the book states "Clinical judgment is required to answer several questions… Are letters or forms with the defendant's name on them valid measures of academic functioning, or did the defendant copy them from another source or receive assistance in completing these tasks?" EH at 338. Dr. Martell testified that all of this is an example of an ongoing support system in prison. EH at 412-13, 419.

intellectual disability diagnosis requires the symptoms to manifest during the developmental period. Such a manifestation, as recognized by the Florida Supreme Court and the United States Supreme Court, does not require a diagnosis during the developmental period. *See, e.g., Oats v. State*, 181 So. 3d 457, 460, 464-65 (Fla. 2015). "This prong simply requires that a defendant demonstrate that his 'intellectual deficiencies manifested while he was in the 'developmental stage'—that is, before he reached adulthood.'" *Id*. at 468 (citing *Brumfield*, 135 S. Ct. at 2282); *see id*. at 469 (citing *Hall*, 134 S. Ct. at 1994, for the proposition that "this prong simply requires the "onset of these deficits during the developmental period").

Petitioner's childhood IQs, which measured in the average and low-average range, do not defeat the onset prong. As described earlier, testing and other indicia—particularly the comprehensive neuropsychological battery by Dr. Chandler at age 16—indicate intellectual functioning deficits by at least as early as age 16.

Since Petitioner satisfies prong one by virtue of IQ scores measured at ages 23 and 39 (plus neuropsychological batteries), that should satisfy developmental onset as well. That is because, in the state courts, the State offered no indication of anything *after* the developmental period, but *before* his age-23 qualifying IQ score, which could show a drop in intellectual functioning as an adult. EH at 859. Petitioner was arrested for these crimes and has been incarcerated since he was 19. The State produced 3,000 pages of DOC records to their expert. Not one piece of evidence in

those records indicates any causation for Petitioner's decline post-incarceration. EH at 746, 859. There is no reason to believe that Petitioner became intellectually disabled at some point after the age of 18. EH at 859.

Petitioner's medical and social history trace the likely etiology of his deteriorating intellectual and adaptive functioning. His continually declining functioning is a result of various, serious neurological insults to the brain, from early childhood into his teen years. This provides explanatory context for his deteriorating conceptual and intellectual functioning, and his general predisposition to various deficits, due to the organic insults. Such insults are risk factors that caused or contributed to Petitioner's intellectual disability and serve as evidence that his significant drop in IQ, which the trial court found in 1992 to have occurred, was before age 18. The best way to determine a potential etiology is a comprehensive review of the history, such as that done by the experts in this case. EH at 581.

Dr. Mills testified that viral meningitis is an infection caused by a virus on the three layers that cover the brain—called the meninges. EH at 543. These protective layers of the brain become infected and inflamed and can serve as a route for infection to the brain tissue itself. EH at 543. A brain needs the support of the meninges to function properly. EH at 544. Encephalitis is "an inflammation caused by either bacteria or viruses of . . . the encephalon, the brain itself." EH at 549. Meningoencephalitis is "a combination of both," typically that starts in the meninges

and spreads to the brain tissue itself. EH at 549. Dr. Mills testified that the classic signs or symptoms or meningitis were evident in this case. EH at 544. These include: headache, sensitivity to light, malaise, exhaustion, irritability, vomiting, and stiff neck. EH at 544-45, 558.

Dr. Mills explained that viral meningitis can cause long-term negative effects to the brain. EH at 545; PCR5 5841. The literature suggests that in about half of the cases, people will experience cognitive problems and related sequelae (after effects) after being diagnosed with viral meningitis. EH at 545-46. These effects can include cognition impairment; issues with planning, organization, inhibition (all related to the prefrontal cortex); and changes in behavior, affect, and emotion. EH at 545. Cognitive impairments caused by viral meningitis can also include impaired memory and learning; and increased impulsivity disinhibition, and outbursts of rage or aggression. EH at 546. Dr. Mills testified that the "literature suggests that as we get more bouts of viral meningitis the risk of . . . significant problem increases over time." EH at 568. Once someone has had one episode of viral meningitis, it is more likely that another incidence will occur. EH at 602-03.

The long-term negative effects of a brain injury can be worsened by subsequent brain injuries, of either the same type or a different type. EH at 542. Dr. Mills testified that a series of infections can produce injuries which are subtle, complex, and can be progressive in nature. EH at 541. This can be just as

catastrophic as one major injury. EH at 575. Dr. Mills testified that any one of these viral infections, high fevers, or other insults to the brain were sufficient to cause brain damage resulting in intellectual disability. EH at 613-14. Even if the 1980 and 1983 infections (discussed below) were not meningitis, they were still medical events that could have caused or contributed to Petitioner's brain damage, which resulted in him becoming intellectually disabled. EH at 614.

The various neurological "insults" are well documented in Petitioner's social and medical history and have been comprehensively reviewed and examined by Dr. Mills. At age 2, Petitioner was hospitalized for roseola. EH at 551; PCR5 5117. He was experiencing a "sustained high fever of 105 or 106" and was hospitalized for a week and a half. *Id*. Dr. Mills explained that roseola is caused by the herpes virus, and tends to be self-limiting, but a ten-day hospitalization and sustained high fever "would suggest that . . . this was an exceptional roseola and that could have caused injury and maybe even serious injury" to Petitioner's brain. EH at 552. While the herpes virus itself could cause cellular damage, the body's response to the infection—e.g. inflammation in the brain—is most likely what caused the lasting sequelae. EH at 552-53; 613.

According to his parents, Petitioner was not talking in sentences until age three or four, when most children are doing so by age two, which Dr. Mills testified

"could represent a pretty significant delay" and "suggests a genuine problem." EH at 550; *Hall*, 572 U.S. at 705-06.

At five and a half years old, Petitioner was referred to the doctor for "possible mental deficiency and learning problems." EH at 553; PCR5 4617. Petitioner was experiencing attention problems that far exceeded that of his peers as early as five years old. EH at 550.

In 1976, when he was 9, a school counselor noted that Petitioner could not remain seated, had negative interactions with others, and "was easily distracted." EH at 554; PCR5 4615. Petitioner was given the Bender test of visual and motor functioning and he made seven errors, where typically children his age make no more than two and a half. EH at 554-55; PCR5 4615. In addition to making nearly three times as many errors as his peers, Petitioner rotated two of the images, demonstrating that his visual and motor impairments were "pretty significant," which Dr. Mills testified indicated a "cognitive deficit." EH at 555-56.

Petitioner repeatedly presented to the Air Force clinic complaining of severe headaches and possible migraines as a child. PCR5 4571-73; EH at 556-57.

In 1979, at age 12, Petitioner presented to the hospital with another high fever of 102 degrees that began two days prior. EH at 557; PCR5 4638, 4640. Petitioner had butted heads with another child during a volleyball game and he was experiencing fever, anorexia, malaise, and vomiting. EH at 557-58. He was also

demonstrating nuchal rigidity (or stiff neck) as well as papilledema (enlargement of the optic nerve). EH at 558-59; PCR5 4638, 4640. Dr. Mills testified that these are the most common signs of meningitis, and that the involvement of the optic nerve suggests that the infection may have been more severe than meningitis; it could have been encephalitis, as well. EH at 558-59. Petitioner was hospitalized for five days, suggesting this was "a fairly serious infection." EH at 559-60. To diagnose this infection as meningitis, the doctors performed a spinal tap within the first 24 hours, EH at 590, but it was negative for meningitis, meaning that there was not an increased number of lymphocytes (white blood cells). EH at 560-61. However, Petitioner underwent a second spinal tap several days into his hospitalization and at that time he had 30 lymphocytes, which is well above the ordinary count of two or three. EH at 561-62. Dr. Mills testified that is "fairly common in viral meningitis" for the test to "stay[] normal for up to a day or so," and the "characteristic lymphocytosis" to appear on later testing. EH at 561.

At that time, Petitioner was diagnosed with and treated for viral meningitis. EH at 564; PCR5 4638, 4640. Even upon discharge, Petitioner had inflamed throat and neck, indicating his meninges were still enlarged from the infection he had experienced. EH at 563. Dr. Mills testified that this was a "moderate to severe" episode of viral meningitis. EH at 564.

The following year, at age thirteen, Petitioner presented again to the hospital with a high fever of 103, headache, stiff neck, swollen lymph nodes, and pharyngitis. EH at 564-65; PCR5 4610. Dr. Mills testified these are the symptoms of meningitis. EH at 564. Petitioner underwent a blood test that revealed 21,000 white blood cells compared to the normal 5,000-6,000 that could be expected, indicating a "very elevated white blood count." EH at 565; PCR5 4610. Although there was no formal diagnosis at this time, Dr. Mills testified that "there is no doubt [Petitioner] has some kind of infection," and "that he [wa]s probably suffering from meningitis." EH at 565. Dr. Mills testified that the severity of this infection was in the "mild to moderate range." EH at 566.

In 1983, when Petitioner was 15 years old, he again presented with stiff neck, headache, nausea and self-described feeling "exactly like previous viral meningitis." EH at 566; PCR5 4618. Dr. Mills testified that this was "almost certain[ly] another episode of viral meningitis. EH at 566. Petitioner again underwent a spinal tap immediately at the hospital, and just like the first time, the result was negative for meningitis. EH at 566-67. Dr. Mills testified that, while it cannot be positively confirmed that this was meningitis, the negative spinal tap does not rule it out, as it was taken too early to be determinative. EH at 567. Dr. Mills further testified that this third bout of meningitis "could have been an independent cause for a diminution

in [Petitioner's] cognitive abilities." EH at 611. It also could have been a tipping point in the cumulative effect previous injuries were having on his brain. EH at 612.

In 1985, Petitioner spent two months in inpatient treatment at Gulf Coast Hospital. EH at 218; PCR5 2305. The doctors sought to rule-out seizure disorder, conducting an electroencephalogram (EEG) and computerized tomography scan (CT). EH at 1059. However, neither of these tests are able to conclusively assess for neurological or neurocognitive deficits. EH at 219. Dr. Mills explained that these tests "are often negative in the case of mild to moderate brain damage." EH at 571. In fact, brain damage caused by meningitis is "[o]rdinarily not" reflected on tests such as EEG or CT. EH at 571. The CT can show physical issues such as bleeds or masses. EH 219. EEGs measure electric activity and are good for demonstrating whether there is a seizure. EH at 219. The damage caused to the brain by meningitis is something you "certainly wouldn't see [] on imaging studies." EH at 540. Neither a CT nor an EEG would be used to diagnose intellectual disability. EH at 220.

In the 1980s and today, both imaging testing and neuropsychological workup are used jointly when looking at what could be causing brain dysfunction. EH at 220. A test to determine functional impairment in intelligence would be a "comprehensive neuropsychological battery." EH at 539. In determining whether

meningitis has affected a brain's functioning, a functional assessment of the brain over time would be conducted. EH at 540.[6]

Dr. Mills testified that if intelligence testing is done too soon after the brain injury (including meningitis), the impairments will not have manifested in a significant enough way to be measurable. EH at 548-49. In Petitioner's case, the IQ testing conducted in 1982 was not far enough along to reveal the full scope of the impairments that his brain would endure.

Dr. Prichard testified that "any brain disease," including viral meningitis, "can damage" the brain and render a person intellectually disabled. EH at 853-54. He then testified that he reviewed the records revealing at least one diagnosed episode of viral meningitis in 1979. EH at 860. He testified that meningitis is a "brain pathogen," or a "disease process that can attack part of the brain." EH at 889. But Dr. Prichard testified that he is not a medical doctor and does not know much more about it, including what layers of the brains are affected by meningitis. EH at 889.

Petitioner had many "intervening brain-related events" during adolescence, including "[h]ead injuries, toxin exposures, asphyxia," and other things that injure the brain and result in less effective brain functioning. EH at 88. Dr. Prichard testified that "certainly high fevers can damage a brain, and it happens sometimes"

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[6] In 1984, Petitioner underwent a neuropsychological battery of tests that resulted in a diagnosis of cerebral dysfunction. EH at 612. These cognitive deficits noted in this testing are indicative of intellectual disability. EH at 612.

that an "excessively high fever" causes a decrease in the child's performance. EH at 868. The cause of the fever does not change the effect of the fever.

To further illustrate how Petitioner's neurological insults affected his brain during the developmental period, Dr. Robert Ouaou explained how the brain undergoes a series of changes and develops into maturity in early adulthood. EH at 643. The developmental period extends into the mid-20s. EH at 646. Many external factors, known as "risk factors," can cause abnormal neurodevelopment. These risk factors that cause a brain to develop abnormally can cause an intellectual disability if they occur during the developmental period. EH at 653.

One part of the brain that undergoes development up until the mid-20s is the prefrontal cortex, which is part of the frontal lobe of the brain. EH at 643. This is the seat of reasoning, perspective taking, and the ability to make rational decisions. EH at 644. This is known as executive functioning. EH at 547-48, 645. This is an area in the brain that is often significantly limited in someone with intellectual disability.

A second part of the brain that undergoes significant neurodevelopment is the limbic system, which is more primitive and responsible for instincts. EH at 644. In a fully formed adult brain, the primitive part of the brain connects to the frontal part, which links the part of the brain that interprets impulses and feelings and helps govern them. EH at 644-45. This link does not exist in a developing brain. EH at 645. Once executive functioning develops, people are better able to plan, sequence,

reason through things, make changes midstream if responses are not working, have rational thoughts, and develop a personality. EH at 645.

The frontal area is the most susceptible to damage because it is the largest and forefront part of the brain. EH at 645. This damage can come from blunt impact or from consecutive, small impacts. EH at 646. Childhood trauma including sexual abuse, chronic stress, neglect, traumatic brain injury; substance abuse; hypoxemia; alcohol abuse; fetal alcohol exposure; infection and disease; and repeated heads injuries can cause abnormal neurodevelopment. EH at 649-50. Childhood trauma causes increased chemical changes that override the frontal part of the brain and allow the primitive part to take over so there is more risk taking and impulsivity; less self-control, planning, and forethought. EH at 649-5. People who experience these risk factors during development become less able to comport themselves to social roles, less likely to take the perspective of others, less social, and more impulsive. EH at 650. An abnormally developed brain will resemble a developing brain, but it remains this way past the time of expected brain maturation. EH at 651.

Petitioner experienced a "series of slower, smaller insults" to the brain. EH at 579. The progressive nature of these insults can take weeks, months, or even years to manifest. EH at 541-42, 548. However, the effects of compounding brain injuries are expected to appear within five years at the most. EH at 541. These various insults

(such as the three bouts of viral meningitis) to Petitioner's brain could cause intellectual disability before Petitioner turned 18 years old.

Dr. Mills testified that the neurological insults contributed to Petitioner's mental decline as an early adolescent and affected his brain broadly. EH at 580. This is shown by dysfunction in intellectual, affective, behavioral, and interpersonal skills. *Id*. Dr. Mills testified that Petitioner's prefrontal cortex in particular was injured, which is typical with the types of illnesses he experienced. *Id*. These neurological insults, and the resulting brain damage, caused or contributed to Petitioner becoming intellectually disabled prior to his 18th birthday. EH at 580-81.

C. The elements of an intellectual disability claim are satisfied

Petitioner is intellectually disabled. He suffers from significant deficits in intellectual and adaptive functioning, which have been present since the early developmental period and fully onset prior to 18. Because Petitioner is intellectually disabled, he is categorically excluded from execution. *Atkins*, 536 U.S. at 318.

If this Court finds the current state-court record inadequate to prove that he is an individual with intellectual disability under *Atkins* and *Hall* outright, a new evidentiary hearing is required. There is no AEDPA bar to a hearing on the merits in this case. Because the Florida Supreme Court denied the claim on non-retroactivity grounds without reaching the merits, federal habeas review is de novo and § 2254(d) does not limit new evidence on the merits of the claim. *Rompilla v.*

Beard, 545 U.S. 374, 390 (2005); *Landers v. Warden, Atty. Gen. of Ala.,* 776 F.3d 1288, 1295 (11th Cir. 2015) (citing *Cullen v. Pinholster,* 563 U.S. 170 (2011)). Nor does § 2254 (e)(2) restrict holding a hearing, given that Petitioner did not "fail[] to develop the factual basis" of his claim in the state court proceedings. *See Burgess v. Comm'r, Alabama Dep't of Corr.,* 723 F.3d 1308, 1319-20 (11th Cir. 2013).

D. A claim of intellectual disability cannot be barred

Just as the Eighth Amendment prohibition on executing the incompetent, the Eighth Amendment prohibition on executing the intellectually disabled is "a substantive restriction on the State's power to take the life" of a person sentenced to death. *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405). The Eighth Amendment categorically excludes the imposition of death on people with intellectual disability because of their reduced moral culpability. *See Atkins*, 536 U.S. at 321. The Supreme Court has held that "death is not a suitable punishment for [an intellectually disabled] criminal" and the execution of such individuals does not "measurably advance the deterrent or the retributive purpose of the death penalty." *Id.* No legitimate penological purpose is served by executing a person with intellectual disability. *Hall*, 572 U.S. at 708 (citing *Atkins*, 538 U.S. at 317, 320).

Any procedural obstacle to considering Petitioner's claim of intellectual disability must yield to the categorical protections of the Eighth Amendment. Just as *Roper v. Simmons,* 543 U.S. 551 (2005), would prevent the execution of a juvenile

at any point from the time of sentencing until the execution, so too *Atkins* protects individuals with intellectual disability from execution regardless of when the claim is brought. *See Hall*, 572 U.S. at 708 ("The Eighth Amendment prohibits certain punishments as a categorical matter. . . . No person may be sentenced to death for a crime committed as a juvenile. And, as relevant for this case, persons with intellectual disability may not be executed.") (citations omitted).

CONCLUSION

The Court should rule that Petitioner is intellectually disabled and therefore constitutionally ineligible for the death penalty.

Respectfully submitted,

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