CAPITAL CASE

No. 22-7897

In the
Supreme Court of the United States

IN RE FRANK A. WALLS,

Petitioner,

RESPONSE TO PETITION
FOR AN ORIGINAL WRIT OF HABEAS CORPUS

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CAPITAL CASE

QUESTION PRESENTED

Whether this Court should entertain a petition for an original writ of habeas corpus raising the issue of whether *Hall v. Florida*, 572 U.S. 701 (2014), was "made retroactive" for purposes of filing a successive habeas petition, when the capital defendant fails the third prong of onset of the statutory test for intellectual disability.

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OPINION BELOW

This is an original petition. But the Eleventh Circuit's related decision denying authorization to file a successive habeas petition, under 28 U.S.C. § 2244(b)(2), is unreported but available at *In re Walls*, 2023 WL 3745103 (11th Cir. Apr. 13, 2023) (No. 23-10982-P).

JURISDICTION

The Eleventh Circuit denied authorization to file a successive habeas petition on April 13, 2023. On June 29, 2023, Walls filed a petition for an original writ of habeas corpus in this Court. If this Court has jurisdiction, it is under *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996), rather than the typical provision, 28 U.S.C. § 1254(1), due to 28 U.S.C. § 2244(3)(E).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

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

U.S. Const. amend. VIII

The Fourteenth Amendment provides:

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

U.S. Const. amend. XIV, § 1

Three statutes from the Anti-Terrorism and Effective Death Penalty Act (AEDPA) are involved. The first statute involved is the statutory prohibition on filing successive habeas petitions, 28 U.S.C. § 2244(b)(2), which provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; . . .

The second statute involved is the prohibition on filing successive habeas petitions in the district court without prior authorization from the circuit court, 28 U.S.C. § 2244(3)(A), which provides:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

The third statute involved is the prohibition on appealing the denial of authorization from the circuit court, 28 U.S.C. § 2244(3)(E), which provides:

> The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Walls, a capital defendant, seeks an original writ of habeas corpus to raise an issue regarding the retroactivity of *Hall v. Florida*, 572 U.S. 701 (2014). Walls was granted a second evidentiary hearing in state court in the wake of *Hall* at which he once again failed to prove he was intellectually disabled. The state postconviction court denied the intellectual disability claim both on non-retroactivity grounds and on the merits. The state postconviction court found he failed both the first and third prong of Florida's statutory test for intellectual disability. Walls failed the third prong of onset because his IQ scores as a minor were 88, 102, and 101.

Facts of the case

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

Procedural history of the intellectual disability claim in state court

On June 23, 2006, Walls filed a rule 3.203 motion raising a claim of intellectual disability based on *Atkins v. Virginia*, 536 U.S. 304 (2002). Fla. R.

Crim. P. 3.203. On July 10, 2007, the state postconviction court held an evidentiary hearing on the *Atkins* claim at which a defense expert, Dr. Jethro Toomer, and a State expert, Dr. Harry McClaren, both testified. The state postconviction court denied the intellectual disability claim. The Florida Supreme Court affirmed, finding "no evidence that Walls has ever had an IQ of 70 or below." *Walls v. State*, 3 So.3d 1248 (Fla. 2008).

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

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

The Florida Supreme Court, however, reversed and remanded for a second evidentiary hearing, after holding *Hall* was retroactive under state law. *Walls v. State*, 213 So.3d 340, 344 (Fla. 2016). The Florida Supreme Court held that *Hall* was retroactive under the state's retroactivity test of *Witt v. State*, 387

So.2d 922 (Fla. 1980). *Walls*, 213 So.3d at 345-46. The Florida Supreme Court stated that Walls did not receive the type of "holistic review" at the first evidentiary hearing which he was entitled to under *Hall*. *Walls*, 213 So.3d at 347.

On June 29, 2021, through July 7, 2021, the postconviction court held a six-day evidentiary hearing on the intellectual disability claim. The defense presented seven witnesses, including six experts, at the second evidentiary hearing: 1) Dr. Mark D. Cunningham; 2) Dr. Karen P. Hagerott; 3) retired Assistant Public Defender James C. Sewell, Jr.; 4) Dr. Daniel A. Martell; 5) Dr. Mark J. Mills; 6) Dr. Robert Ouaou; and 7) Dr. Barry M. Crown as a rebuttal witness. The State presented Dr. Gregory Prichard, as its expert on intellectual disability. On November 22, 2021, the state postconviction court denied the intellectual disability claim both on non-retroactivity grounds and on the merits, making findings regarding all three prongs of the state statutory test for intellectual disability. (2022 Succ. PCR 6258-6279). The postconviction court found Walls failed both the first and third prongs of the state statutory test for intellectual disability.

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

based on his behavior issues rather than his mental abilities. (2022 Succ. PCR 6267-68).

The Florida Supreme Court, however, affirmed the denial of the intellectual disability claim solely on non-retroactivity grounds relying on the current precedent of *Phillips v. State*, 299 So.3d 1013 (Fla. 2020), *cert. denied*, *Phillips v. Florida*, 141 S.Ct. 2676 (2021) (No. 20-6887). *Walls*, 361 So.3d at 233.

On June 22, 2023, Walls, represented by state postconviction counsel, Capital Collateral Regional Counsel - Middle Region (CCRC-M), filed a petition for a writ of certiorari in this Court seeking review of the Florida Supreme Court's decision raising two issues. *Walls v. Florida*, No. 22-7866. The State of Florida filed a brief in opposition to that petition on July 26, 2023.

Procedural history of the intellectual disability claim in federal court

Walls also filed an application for permission to file a successive § 2254 habeas petition, in the Eleventh Circuit, arguing that a successive habeas petition was proper under 28 U.S.C. § 2244(b)(2). *In re Walls*, 2023 WL 3745103 (11th Cir. Apr. 13, 2023) (No. 23-10982-P). Walls asserted that *Hall v. Florida* created a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Walls argued that *Montgomery v. Louisiana*, 577 U.S. 190 (2016), had abrogated the reasoning of the Eleventh Circuit prior precedent of *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). The Eleventh Circuit denied permission relying on *In re Henry* and *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313-16 (11th Cir. 2015), which had characterized *Hall* as a "new procedural rule" and therefore, refused to apply *Hall* retroactively.

Current original petition in this Court

On June 26, 2023, Walls, represented by federal habeas counsel, the Capital Habeas Unit of the Office of the Federal Public Defender of the Northern District of Florida (CHU-N), filed an original habeas petition in this Court. *In re Walls*, No. 22-7897.

REASONS FOR DENYING THE ORIGINAL WRIT

ISSUE I

WHETHER THIS COURT SHOULD ENTERTAIN A PETITION FOR AN ORIGINAL WRIT OF HABEAS CORPUS RAISING AN ISSUE OF WHETHER *HALL V. FLORIDA*, 572 U.S. 701 (2014), WAS "MADE RETROACTIVE" FOR PURPOSES OF FILING A SUCCESSIVE HABEAS PETITION, WHEN THE CAPITAL DEFENDANT FAILS THE THIRD PRONG OF ONSET.

Petitioner Walls seeks an original writ of habeas corpus raising the issue of whether *Hall v. Florida*, 572 U.S. 701 (2014), was "made retroactive" by this court, for purposes of filing a successive habeas petition under 28 U.S.C. § 2244(b)(2)(A). The successive habeas statute does not permit habeas petitioners to seek review of the denial of authorization to file a successive habeas petition in this Court in statutory habeas cases. Alternatively, even if this Court has jurisdiction, the original writ should be dismissed. *Hall* does not apply to Walls because his claim of intellectual disability fails on the third prong of onset, which was not at issue in *Hall*. Walls' three IQ scores as a minor were 88, 102, and 101, as the state postconviction found after the second evidentiary hearing on the claim. Walls' IQ as a minor was an average of 97, which is perfectly normal. Walls was never entitled to a second evidentiary hearing under *Hall* but he is now seeking a third evidentiary hearing in federal court from this Court in an original writ. This Court should dismiss the frivolous original

petition, just as this Court suggested the lower court do in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). *Hall* is a new procedural rule and therefore, is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), and this Court's recent decision in *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021). *Hall* certainly is not retroactive under § 2244(b)(2)(A). The original writ should be dismissed.

The Eleventh Circuit's decision

While this is an original petition, the background is that the Eleventh Circuit denied Walls authorization to file a successive habeas petition relying on its precedent that *Hall* is a new procedural rule and therefore, is not retroactive. *In re Walls*, 2023 WL 3745103 (11th Cir. Apr. 13, 2023) (No. 23-10982-P). Walls filed an application for permission to file a successive § 2254 habeas petition in the Eleventh Circuit arguing that a successive habeas petition was proper under 28 U.S.C. § 2244(b)(2). Walls asserted that *Hall v. Florida* created a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Walls argued that *Montgomery v. Louisiana*, 577 U.S. 190 (2016), had abrogated the reasoning of the Eleventh Circuit prior precedent of *In re Henry*, 757 F.3d 1151 (11th Cir. 2014). The Eleventh Circuit denied permission reaffirming its precedent of *In re Henry* and *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313-16 (11th Cir. 2015).

Under 28 U.S.C. § 2244(3)(E), Walls may not seek review of that denial of authorization to file a successive habeas petition in this Court, so he filed an original habeas petition instead, relying on *Felker v. Turpin*, 518 U.S. 651

(1996).[1]

Insubstantial original habeas petitions

Assuming this Court has jurisdiction under *Felker*, this Court should not entertain any original habeas petitions except those raising the most substantial of claims. Insubstantial original habeas petitions, such as this one, should be dismissed. Such original writs are likely to become another type of "abusive litigation" so common in capital cases unless this Court is vigilant. *Ramirez v. Collier*, 142 S.Ct. 1264, 1292-93 (2022) (Thomas, J. dissenting) (listing some of

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[1] This Court in *Felker v. Turpin*, 518 U.S. 651, 654 (1996), held that the AEDPA does not preclude this Court from entertaining an application for habeas corpus relief. The *Felker* Court ordered briefing on whether the prohibition on seeking review in this Court from a circuit court's denial of authorization to file a successive habeas petition in § 2244(b)(3)(E) constituted an unconstitutional restriction on the jurisdiction of this Court. *Id.* at 658. The Court ultimately concluded that § 2244(b)(3)(E), did not deprive this Court of jurisdiction to entertain original habeas petitions under 28 U.S.C. § 2241. *Id.* at 658-62 (relying on *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332 (1869)). This Court found that because of this Court's original habeas jurisdiction, § 2244(b)(3)(E), did not deprive this Court of appellate jurisdiction in violation of Article III, § 2. *Id.* at 662.
While there is no doubt about this Court's constitutional jurisdiction over the pre-trial, common-law "Great Writ," there is doubt about this Court's jurisdiction to issue original writs under § 2241 in post-trial statutory habeas cases, especially when the § 2241 petition is filed to evade the AEDPA. *In re Davis*, 557 U.S. 952, 954 (2009) (Stevens, J., concurring) (relying on § 2241, in part, as authority for issuing an original writ); *but see Jones v. Hendrix*, 143 S.Ct. 1857 (2023) (limiting the use of § 2241 petitions to evade the restrictions of the AEDPA). Normally, if Congress creates a cause of action, such as § 2254, it may also place reasonable limits on that cause of action and certainly may place reasonable limits on successive causes of action, without those reasonable limitations being viewed as a violation of Article III, § 2. An original writ filed in this Court after a circuit court denies authorization to file a successive petition amounts to a second appeal because a three-judge panel in the circuit court decided whether to authorize a successive habeas petition. A limit on multiple appeals regarding successive petitions seems like a reasonable limitation given the well-known, widespread, and long-standing problems of federal habeas review. *Kell v. Benzon*, 925 F.3d 448, 467 (10th Cir. 2019) (noting the 1989 report by Justice Powell's committee on federal habeas review of capital cases stated that federal habeas law "led to piecemeal and repetitious litigation" and "years of delay."). And it was this Court, not Congress, that dramatically expanded the scope of § 2254 in *Brown v. Allen*, 344 U. S. 443, 463 (1953). *See Edwards v. Vannoy*, 141 S. Ct. 1547, 1563 (2021) (Thomas, J., concurring) (explaining that *Brown* was the first time this Court "decided that federal courts could grant a writ of habeas corpus simply because they disagreed with a state court's judgment"). Congress was just trying to restore some balance with the AEDPA including by limiting the number of appeals associated with successive § 2254 petitions.

the abusive litigation tactics common in capital cases including bringing "any meritless claim available, no matter how frivolous" and noting that such "tactics all too often succeed" in, at least, causing delay). Indeed, opposing counsel cites to law reviews advocating the widespread use of this Court's original habeas jurisdiction. Pet. at 11.

If this Court is going to entertain original habeas petitions in § 2254 cases, this Court should warn the capital defense bar that only original petitions making the most compelling case on a serious issue, such as the claim of actual innocence at issue in *In re Davis* involving seven recanting witnesses, will be entertained by this Court. *In re Davis*, 557 U.S. 952 (2009); *id.* at 954 (Scalia, J., dissenting) (noting that this Court had not instructed a district court to hear an original writ of habeas corpus in nearly 50 years). Claims warranting original writs occur once in a generation. This Court should inform the capital defense bar that insubstantial original petitions will not be tolerated by dismissing original petitions rather than merely denying them.

This Court should also warn the capital defense bar that frivolous original petitions are subject to Rule 11 sanctions, particularly when the petition is filed by counsel. *United States v. Quin*, 836 F.2d 654 (1st Cir. 1987) (holding Rule 11 applies to § 2255 proceedings); *Pouncy v. Murray*, 45 F.3d 427 (4th Cir. 1995) (holding Rule 11 applies to § 2254 proceedings but vacating the imposition of costs as a sanction on a pro se habeas petitioner and noting the question of whether the habeas prisoner is without counsel is relevant to the imposition of sanctions)[2]; *Anderson v. Butler*, 886 F.2d 111, 114 (5th Cir. 1989) (holding Rule 11 applies to § 2254 proceedings based in part on the difference between the

[2] All capital habeas petitioners are statutorily entitled to habeas counsel under 18 U.S.C. § 3599.

Great Writ with § 2254, which in modern day practice functions similarly to "ordinary" appeals, but vacating the imposition of costs as a sanction on a pro se habeas petitioner). As this Court stated over a century ago, the capital defense bar should not be permitted to interfere with the administration of justice "on mere pretexts." *Lambert v. Barrett*, 159 U.S. 660, 662 (1895).

This original writ is a good example of the possibility of abusive and wasteful litigation that the failure to dismiss such petitions will encourage. The issue of the retroactivity of *Hall* under *Teague* can be addressed by this Court in normal petitions for writ of certiorari both from state courts of last resort and from initial habeas petitions. Indeed, that issue is currently pending before this Court in another petition that Walls filed seeking review of a decision of the Florida Supreme Court denying a *Hall* claim on non-retroactivity grounds. *Walls v. Florida*, No. 22-7866.

This Court has exhorted federal courts to protect settled state judgments "by invoking their equitable powers to dismiss or curtail suits that are pursued in a dilatory fashion or based on speculative theories." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006)). That exhortation should apply with greater force to frivolous original writs, such as this one, raising a claim of intellectual disability when the defendant had an average IQ score of 97 as a minor. After the latest evidentiary hearing held in 2021 in state court, the state postconviction court found that Walls failed both the first and third prongs of Florida's statutory test for intellectual disability. Regarding the third prong of onset, the state postconviction court recounted Walls' various IQ scores as a minor: 1) at six years old, Walls had a full-scale IQ of 88; 2) at seven years old, an average score (between 90 to 110); 3) at twelve years old, Walls had a full-scale IQ of 102; 4)

at fourteen-years-old, Walls had a full-scale IQ of 101. (2022 Succ. PCR 6265-6266). The state postconviction court found all of Walls' scores as a minor to be valid. (2022 Succ. PCR 6266). Opposing counsel is wasting this Court's time filing a petition for an original writ based on such facts and after such findings, particularly after already having received the windfall of a second evidentiary hearing in state court. And yet he is actually seeking a third evidentiary hearing on this meritless *Atkins* claim, this time in federal court, despite those facts and findings. Pet. at 22.

Furthermore, the petition is frivolous because Walls has had two evidentiary hearings on his claim of intellectual disability in state court and is now seeking a third evidentiary hearing in federal court when he was never entitled to a second evidentiary hearing under *Hall*. Pet. at 22. The evidentiary hearing on intellectual disability held in 2021 in state court was a six-day evidentiary hearing at which Walls presented six experts, yet he now is asking this Court for a third evidentiary hearing. *In re Davis*, in contrast, involved a claim of actual innocence that was never explored at an evidentiary hearing before this Court granted an evidentiary hearing. *In re Davis*, 557 U.S. at 953 (Stevens, J., concurring) (observing that "no court, state or federal, has ever conducted a hearing to assess the reliability" of the "score of postconviction affidavits" supporting the claim of actual innocence).

This petition requesting a third evidentiary hearing to explore for a third time a meritless intellectual disability claim should be dismissed, just as this Court, in *Bucklew*, suggested the lower courts do. *Bucklew*, 139 S. Ct. at 1134.

The retroactivity of *Hall v. Florida*

This Court established the federal test for retroactivity in *Teague v. Lane*,

489 U.S. 288 (1989), for initial habeas petitions. But there is a statutory test for retroactivity for successive habeas petitions which requires habeas petitioners to show "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." 28 U.S.C. § 2244(b)(2)(A); *see also Tyler v. Cain*, 533 U.S. 656, 663 (2001) (noting that significantly, under this statutory provision, "the Supreme Court is the only entity that can make a new rule retroactive"). *Hall* is not retroactive under *Teague*, much less under the statute.

The first step in a *Teague* analysis is to determine if the rule created by the decision is a settled rule or a new rule. *Chaidez v. United States*, 568 U.S. 342, 347 (2013). To be considered a settled rule or old rule, the rule must be "dictated" by an earlier decision. *Id.* at 347. So, here, *Hall* would have to have been dictated by *Atkins v. Virginia*, 536 U.S. 304 (2002), to be considered an old rule. But *Hall* was not even foreshadowed by *Atkins*, much less "dictated" by *Atkins*. *Hall* held that capital defendants, whose IQ scores are within the statistical error of measurement (SEM) are entitled to an evidentiary hearing to explore all of the prongs of the test for intellectual disability. *Hall*, 572 U.S. at 724. But *Atkins* said nothing about the SEM. Nor did *Atkins* speak to when evidentiary hearings were required to explore claims of intellectual disability. Indeed, the phrase "evidentiary hearing" does not appear in the *Atkins* opinion. To the contrary, *Atkins* explicitly left it to the States to develop the procedures for determining intellectual disability. *Atkins*, 536 U.S. at 317 (leaving to the States the "task" of developing procedures to enforce the newly-created Eighth Amendment class relying on *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)). As this Court has observed, *Atkins* "did not provide definitive procedural or substantive guides" for determining which capital defendants fell within the

protection of the Eighth Amendment. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). *Hall* was not dictated by *Atkins* and therefore, *Hall* is a new rule. *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311, 1313-14 (11th Cir. 2015) (concluding that *Hall* was "undeniably" new under *Teague* citing *In re Henry*, 757 F.3d 1151, 1158 (11th Cir. 2014), and quoting *Bies*, 556 U.S. at 831); *but see Smith v. Sharp*, 935 F.3d 1064, 1083-84 (10th Cir. 2019).

The second step in a *Teague* analysis is to determine whether a new rule is substantive or procedural. A new constitutional rule is substantive and, therefore, retroactive, if the rule "alters the range of conduct or the class of persons that the law punishes." *Welch v. United States*, 578 U.S. 120, 129 (2016). New substantive rules apply retroactively in federal collateral review. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021). But new procedural rules do not apply retroactively in collateral review. *Id.* at 1562. *Teague* originally had an exception to the general rule of non-retroactivity of new procedural rules for "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311. But in *Edwards*, this Court narrowed *Teague* by abolishing the exception for "watershed" procedural rules. This Court characterized the watershed exception as "moribund" and noted that it was only a "theoretical exception" because no new decision had qualified as being a watershed procedural rule in the 32 years since *Teague* had been decided. *Edwards*, 141 S. Ct. at 1551. Under *Teague*, as narrowed in *Edwards*, *Hall* is not retroactive because it is a procedural rule.

Contrary to opposing counsel's assertion, *Hall* is not a substantive rule. The Eighth Amendment class of intellectually disabled capital defendants had been established decades earlier in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Hall* did not create or expand the Eighth Amendment class itself. Indeed, the *Hall* Court made it clear that the class affected was "identical" to the class created

by *Atkins*. *In re Henry*, 757 F.3d 1151, 1160-61 (quoting *Hall*, 572 U.S. at 704). The class was intellectually disabled capital defendants before *Hall* and the class remained intellectually disabled capital defendants after *Hall*. In the Eleventh Circuit's words, *Hall* merely provided new procedures for ensuring that States do not execute members of an already protected group. *In re Henry*, 757 F.3d at 1161.

Again, *Hall* held that capital defendants, whose IQ scores are within the statistical error of measurement (SEM) are entitled to an evidentiary hearing to explore all the prongs of the test for intellectual disability. *Hall*, 572 U.S. at 724 (holding that the law requires capital defendants whose IQ scores are within the SEM have an "opportunity to present evidence" of their "intellectual disability, including deficits in adaptive functioning"); *Moore v. Texas*, 581 U.S. 1, 13 (2017) ("*Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test's standard error of measurement"); *Moore*, 581 U.S. at 14 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning"). The holding in *Hall* concerned which capital defendants were entitled to an evidentiary hearing to establish their claims of intellectual disability and which capital defendants were not. Those capital defendants whose current IQ score, adjusted for the SEM, were 75 or lower, were entitled to a hearing but those capital defendants whose current IQ score, adjusted for the SEM were above 75, were not. *Hall* concerns when evidentiary hearings are warranted and therefore, is a prototypical procedural matter. *Hall* is procedural and therefore, under *Teague*, it is not retroactive.

Opposing counsel relies on *Montgomery v. Louisiana*, 577 U.S. 190 (2016), to assert that *Hall* is substantive. The Eleventh Circuit explained the wrinkle

that *Montgomery*'s half substantive/half procedural analysis had caused in federal retroactivity analysis in *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1339, n.5 (11th Cir. 2019). But this Court has since ironed that wrinkle out by disavowing *Montgomery* altogether in *Jones v. Mississippi*, 141 S. Ct. 1307, 1317, n.4 (2021). The *Jones* Court disavowed *Montgomery* and stated that whether a rule is substantive or procedural for retroactivity purposes is determined by considering "the function of the rule itself," not by determining whether the underlying constitutional right is substantive or procedural. *Id.* at n.4 (citing *Welch v. United States*, 578 U. S. 120, 130-131 (2016)). The *Jones* Court explained that, in the future, the reasoning of *Welch*, not *Montgomery*, will govern retroactivity determinations. This Court saw no need to formally overrule *Montgomery* based on the practical consideration that the vast majority of juvenile resentencing's, which were the underlying issue in *Montgomery*, had already occurred. This Court's current retroactivity jurisprudence is reflected in *Welch*, *Edwards*, and *Jones*, not *Montgomery*.

In light of this Court's recent decision in *Edwards* abolishing the exception for watershed procedural rules, and the footnote in *Jones* disavowing *Montgomery*, it certainly cannot be said that this Court has "made" *Hall* retroactive under *Tyler*, as required under § 2244(b)(2)(A). If a case is not retroactive under *Teague*, it necessarily is not retroactive under *Tyler*, but the converse is not true. *In re Richardson*, 802 Fed. Appx. 750, 755 (4th Cir. 2020) (explaining that to receive authorization to file a second or successive § 2254 petition, a habeas petitioner "must do more than convince this court" that *Hall* or *Moore* are retroactive under *Teague* citing § 2244(b)(2)(A)). *Tyler* is a higher standard.

The majority of federal circuit courts have held that *Hall* is not

retroactive for purposes of filing a successive habeas petition under § 2244(b)(2)(A), and *Tyler*. *In re Richardson*, 802 Fed. Appx. 750, 755-56 (4th Cir. 2020); *In re Payne*, 722 F. App'x. 534, 539 (6th Cir. 2018); *Goodwin v. Steele*, 814 F.3d 901, 904 (8th Cir. 2014); *In re Henry*, 757 F.3d 1151, 1159-61 (11th Cir. 2014). The Fourth Circuit specifically rejected *Montgomery* as a basis for concluding this Court had made *Hall* and *Moore* retroactive for purposes of filing a successive habeas petition under § 2244(b)(2)(A). *In re Richardson*, 802 Fed. Appx. at 756.

Opposing counsel also relies on *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 581 U.S. 1 (2017), asserting that this Court, in effect, applied *Hall* retroactively in both cases. Pet. at 19. But a case that does not address an issue in any manner does not create precedent regarding that particular issue. There is no *Teague* discussion in either *Brumfield* or *Moore*, much less a statutory retroactivity discussion under § 2244(b)(2)(A), and *Tyler*. There is no such thing as an implicit *Teague* analysis or an implicit *Tyler* analysis, as opposing counsel would have it. Neither *Brumfield* nor *Moore* can be used as support for an assertion that *Hall* is retroactive under *Teague* or the statute because neither case addresses those issues.

Hall has not been made retroactive by this Court under § 2244(b)(2)(A), and *Tyler*.

Purely theoretical issue

While retroactivity is normally a threshold issue, the retroactivity of *Hall* is a purely theoretical issue that is not outcome determinative in this case because *Hall* does not apply at all to Walls. *Cf. Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (discussing whether the issue of procedural default should be

considered before the retroactivity issue). *Hall* does not apply as a matter of law to any capital defendant who fails the third prong of onset. The third prong was not at issue in *Hall* or *Moore*. *Hall*, 572 U.S. at 710 ("This last factor, referred to as 'age of onset,' is not at issue"); *Moore*, 581 U.S. at 7, n.3 ("The third element is not at issue here"). Walls' three IQ scores as a minor were 88, 102, and 101, for an average of 97. His intellectual functioning as a minor was perfectly normal. He failed the third prong of onset based on his IQ scores as a minor, as the state postconviction court found following the extensive second evidentiary hearing.

And much of this evidence, regarding his IQ scores as a minor, was known from the first evidentiary hearing conducted years before *Hall* was decided. As Justice Canady observed, in his dissent from the opinion remanding the case for a second evidentiary hearing, this case was "easily resolvable" without any discussion of *Hall* or any consideration of whether *Hall* should be applied retroactively because the onset prong was critical in this case but "was not at issue and played no part in the Court's analysis in *Hall*." *Walls v. State*, 213 So.3d 340, 349 (Fla. 2016) (Canady, J., dissenting). Justice Canady stated that the trial court had correctly denied Walls' intellectual disability claim because the evidence at the first evidentiary hearing "showed without dispute that as a juvenile Walls had IQ scores of 102 (at age 12) and 101 (at age 14)" which means he necessarily failed to meet the third prong of the test for intellectual disability. *Walls*, 213 So.3d at 349 (citing § 921.137(1), Fla. Stat. (2006)). Walls was never entitled to a second evidentiary hearing based on *Hall* due to his IQ scores on the third prong of onset. Walls' IQ scores as a minor are simply too high for him to obtain any relief under either *Hall* or *Aktins*.

Because this case is so easily resolved on the merits of the third prong of

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

Accordingly, this Court should deny the original writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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