No. 22-7897

IN THE

Supreme Court of the United States

IN RE FRANK A. WALLS,

Petitioner.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS[1]

I. This Court does not lack jurisdiction to decide for itself whether it has made a particular constitutional rule retroactive

Respondent argues that this Court lacks jurisdiction to decide for itself whether it has made a particular constitutional rule retroactive for purposes of 28 U.S.C. § 2244(b)(2)(A). BIO at 7-9. But that cannot be true. As Respondent himself acknowledges, this Court held in *Felker v. Turpin*, 518 U.S. 651 (1996), that AEDPA does not preclude, and could not constitutionally preclude, the Court from reviewing original habeas corpus applications. BIO at 9 n.1. This is widely understood to include petitions seeking review of § 2244(b)(2)(A) "made retroactive" rulings. *See, e.g.*, Stephen Vladeck, *Using the Supreme Court's Original Habeas Jurisdiction to 'Ma[k]e" New Rules Retroactive*, 28 Fed. Sent. R. 225, 225-29, 2016 WL 1417783 (2016); Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61, 91-94 (2011).

Respondent disagrees with *Felker*'s holding and suggests policy reasons to change it—but cites no case overruling it. And adopting Respondent's view would produce an absurd result—it would mean that this Court would be powerless to correct a lower panel's misconception of whether *this Court* has made a constitutional rule retroactive. As described in the petition, determining whether a particular rule has been "made retroactive" by this Court is not always straightforward. The courts of appeals should not be the final word on those questions when this Court can

[1] As noted in the habeas petition, Walls has filed a separate petition for a writ of certiorari in this Court, seeking review of a Florida Supreme Court decision on a distinct but related issue. The docket number for that certiorari petition is 22-7866.

provide definitive answers. The Court should reject Respondent's view and exercise jurisdiction under 28 U.S.C. §§ 1651(a), 2241, and 2254(a), and Rule 20.4.

II. Respondent does not dispute that substantive rules automatically satisfy § 2244(b)(2)(A)—but is silent on the petition's main substantive retroactivity argument, based on the doctrinal approach in *Hall* itself

Respondent does not dispute that substantive constitutional rules automatically satisfy § 2244(b)(2)(A)'s retroactivity requirement. But Respondent does not address Walls's main substantive retroactivity argument, which is based on the doctrinal approach taken in the *Hall* opinion—one that could only produce a substantive Eighth Amendment rule.

The *Hall* opinion examined evolving societal views on cruel and unusual punishment, surveying "the legislative policies of various States, and the holdings of state courts" for a "consensus" on IQ score minimums. *Hall v. Florida*, 572 U.S. 701, 709, 719 (2014). *Hall* explained that national surveying was doctrinally necessary because "[t]his calculation provides 'objective indicia of society's standards' in the context of the Eighth Amendment." *Id.* at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). The Court determined that both the "aggregate number[]" of state laws, and the "[c]onsistency of the direction of change" informed its "determination of consensus" that imposing a cutoff at 70 was cruel and unusual. *Id.* at 717. *Hall* concluded that "our society does not regard this strict cutoff as proper or humane." *Id.* at 718. *Hall* then moved on to the next doctrinal step—the Court's own judgment—before finding that the class from *Atkins v. Virginia*, 536 U.S. 304 (2002),

should be expanded to include those intellectually disabled individuals with measured IQs between 71 and 75. *Id.* at 721.

This is the doctrinal method used only for deciding what punishments offend "'objective indicia of society's standards.'" *Id.* at 714 (quoting *Roper*, 543 U.S. at 563). And rules derived from this analysis are always substantive. *Hall* itself noted that the Court has performed similar national surveying to create other substantive rules, including in *Atkins*, *Roper*, and *Coker v. Georgia*, 433 U.S. 584 (1977).[2] This makes sense because procedural rules do not implicate moral judgments of decency. The Court thus never looks to state laws and practices when deciding on procedural Eighth Amendment rules. It only does so when it announces substantive rules.

The Fifth Circuit recently discussed the same analytical approach applied in *Hall*, labeling it this Court's "categorical approach," which the Fifth Circuit recognized is used "to craft categorical rules that define Eighth Amendment standards." *Hopkins v. Hosemann*, No. 19-60662, 2023 WL 4990543, at *15 (5th Cir. Aug. 4, 2023). In *Hopkins*, the Fifth Circuit explained:

> [W]e must decide whether this practice is in accord with "the evolving standards of decency that mark the progress of a maturing society." *Graham*, 560 U.S. at 58. In undertaking this inquiry, we first consider whether "there is a national consensus" against the challenged punishment. *Id.* at 61. The Supreme Court has instructed that this determination "should be informed by objective factors to the maximum possible extent." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks omitted). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the

[2] *See also, e.g., Graham v. Florida*, 560 U.S. 48, 60–61 (2010) (juvenile nonhomicide LWOP); *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (rape of young child); *Thompson v. Oklahoma*, 487 U.S. 815, 852 (1988) (death penalty for juveniles under 16); *Enmund v. Florida*, 458 U.S. 782 (1982) (low culpability co-defendants).

> country's legislatures." *Id.* (internal quotation marks omitted); *see also Graham*, 560 U.S. at 61 ("The Court first considers objective indicia of society's standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the ... practice at issue.") (internal quotation marks omitted). These benchmarks, however, are not completely dispositive of the matter. "[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of [Mississippi's voter disenfranchisement scheme] under the Eighth Amendment." *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *see also Graham*, 560 U.S. at 61 (same).
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> [8] In *Graham v. Florida*, the Supreme Court explained that the two-step analysis outlined above applies when a "case implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes." 560 U.S. at 61. The Court uses this "categorical approach" in order to craft "categorical rules to define Eighth Amendment standards." *Id.* at 60, 62.

Id. & n.8. The Fifth Circuit was correct, and this was the same doctrinal analysis applied in *Hall*. That analysis only produces substantive Eighth Amendment rules.

This point about *Hall*'s "categorical" approach is central to the petition, but Respondent says nothing about it. Review is appropriate for this Court to clarify that Eighth Amendment rules derived from the methodology in *Hall* are substantive.

III. If *Hall* was "not even foreshadowed by *Atkins*," the *Hall* class cannot be "identical" to the *Atkins* class

Respondent and the Eleventh Circuit agree with Walls that *Hall* announced a new rule because "*Hall* was not even foreshadowed by *Atkins*, much less dictated by *Atkins*." BIO at 13-14. Yet in disputing that *Hall*'s new rule was substantive, both Respondent and the Eleventh Circuit wrongly contend that the class protected by *Hall* is identical to the class protected by *Atkins*. *See id.* (citing *In re Henry*, 757 F.3d 1151, 1160-61 (11th Cir. 2014)). Respondent and the Eleventh Circuit cannot have it

both ways. *Hall* cannot be both a completely unpredictable addition to *Atkins*, while protecting the identical class. *Hall* expanded the class.

In Florida, before *Hall*, the class protected by *Atkins* only included intellectually disabled individuals with a measured IQ score of 70 or below. In *Hall*, the class was expanded to include intellectually disabled individuals with measured IQ scores up to 75. Respondent does not dispute that, as a result of *Hall*, more individuals became eligible for relief based on intellectual disability. As the petition explains, such an expansion of an Eighth Amendment class—using the doctrinal analysis reserved only for substantive rules—makes the *Hall* rule substantive.

IV. Respondent mischaracterizes *Jones* as overruling *Montgomery*

Echoing the Eleventh Circuit's order, Respondent mischaracterizes *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), as overruling or "disavowing" the retroactivity analysis in *Montgomery v. Louisiana*, 577 U.S. 190 (2016). BIO at 15-16. That is wrong—*Jones* said repeatedly that it did not alter *Montgomery* or *Miller v. Alabama*, 567 U.S. 460 (2012). *See, e.g.,* 141 S. Ct. at 1321 ("The Court's decision today carefully follows both *Miller* and *Montgomery*."); *id.* ("Today's decision does not overrule *Montgomery* or *Miller*."); *id.* ("*Montgomery* later held that *Miller* applies retroactively on collateral review. Today's decision likewise does not disturb that holding.").

In fact, *Jones* buttressed Walls's contention that substantive rules include those that create or expand a protected Eighth Amendment class. *Jones* reaffirmed: "A rule is substantive and applies retroactively on collateral review . . . if it alters the range of conduct or *the class of persons that the law punishes*." 141 S. Ct. at 1317 n.4

(emphasis added, internal quotations omitted). *Hall* resulted in more intellectually disabled people being eligible for *Atkins* protection: all those with IQs between 71 and 75. Both *Jones* and *Montgomery* provide that such a rule is necessarily substantive.[3]

V. Respondent does not dispute that this Court has applied *Hall* on collateral review—only whether those applications are precedential

Respondent offers little explanation for this Court applying *Hall*'s standards in *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 137 S. Ct. 1039 (2017)—both of which were on collateral review when this Court granted relief. Respondent says mainly that "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*." BIO at 17. But that is not a reason to deny relief here. If anything, it strengthens the case for the Court to grant review and explain why it applied *Hall*'s standards in *Brumfield* and *Moore* on collateral review.[4]

Mr. Hall's sentence was already long final when this Court reviewed it following a successive state postconviction proceeding. This means that before the Court could grant him relief it had to be sure, "as a threshold matter," that doing so would not create a new non-retroactive rule. *See Penry v. Lynaugh,* 492 U.S. 302, 313 (1989). The defendant in *Moore*—like Walls and Mr. Hall—was also on collateral review with a sentence final long before *Hall*. The Court reversed, as contrary to *Hall,*

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[3] If *Jones* did alter *Montgomery* or *Miller*, it was only with respect to particularities of juvenile sentencing proceedings that are not relevant here. Nothing in *Jones* changes *Montgomery*'s determination that *Miller* is a substantive rule.

[4] Although retroactivity was not raised by the State in *Brumfield* or *Moore*, this Court's opinions did not find forfeiture or waiver.

Mr. Moore's case on collateral review from state postconviction. *Id.* at 5, 13-14 (determining that the Texas court's "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*").

And *Moore* cited *Brumfield*, in which the Court also applied *Hall*'s standards on collateral review. *Id*. at 5 (noting that in *Brumfield,* 576 U.S. at 316—a federal habeas case—the Supreme Court "rel[ied] on *Hall* to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding.").

Even in the Eleventh Circuit, shortly after Walls was denied § 2244(b) authorization, a different panel applied *Hall*'s and *Moore*'s standards to a case that was final before *Hall*, and where the claim would not have succeeded without them. *Smith v. Comm'r, Alabama Dep't of Corr.*, 67 F.4th 1335, 1346-48 (11th Cir. 2023).

For retroactivity purposes, there is no meaningful distinction between Walls's case and *Hall*, *Moore*, and *Brumfield*—they are all cases with convictions final well before *Hall*. If the Eleventh Circuit were correct that *Hall* was a procedural rule without retroactive application, this Court's later decisions in *Brumfield* and *Moore* would not have been able to rely on it. The rule must apply to Walls too. *See Collins v. Youngblood*, 497 U.S. 37, 40–41 (1990) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.").

VI. Walls's ineligibility for execution is a "serious issue"—and the brief in opposition misleads on his childhood IQ scores and other evidence

Respondent argues that the Court should reserve original habeas review for "the most substantial of claims," deriding Walls's intellectual disability claim as not

a "serious issue." BIO at 9-10. But Walls's intellectual disability is a serious issue—it renders him constitutionally ineligible for execution. And Respondent's description of Walls's intellectual disability evidence as weak and "easily resolved" on the third prong of the diagnosis is misleading.

Respondent repeatedly emphasizes Walls's childhood IQ scores of 102 and 101, which were measured at ages 12 and 14, respectively. Respondent says that these scores show that Walls fails the third prong of the diagnosis—onset before age 18. *See* BIO at 11-12, 17-20. According to Respondent, Walls was "never entitled to a second evidentiary hearing following *Hall* because these scores were simply too high for him to obtain any relief under *Hall* and *Atkins*." *Id.* at 18.

This is a mischaracterization of the voluminous evidence presented during the six-day evidentiary hearing in 2021—evidence which the Florida Supreme Court refused to review on appeal, based on an abrupt reversal of its *Hall* retroactivity precedent. *See Walls v. State*, 361 So. 3d 231 (Fla. 2023); *Walls v. Florida*, No. 22-7866 (cert. petition seeking review of Florida Supreme Court's ruling).

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

In remanding for a second hearing, the Florida Supreme Court specifically rejected the argument Respondent makes here—that Walls's intellectual disability claim was meritless because "his only IQ scores below 75 were received after he had turned 18: his scores were 102 at age 12, 101 at age 14, 72 at about age 23, and 74 at about age 40." *Walls v. State*, 213 So. 3d 340, 345 (Fla. 2016). Instead, the Florida Supreme Court found that a remand for a new hearing on the merits was appropriate. The court would not have done that if Walls's childhood IQ scores were disqualifying.

And even in later refusing to review the new evidence at all when the case returned in 2023, the Florida Supreme Court declined the State's invitation to alternatively deny Walls's claim on the merits. As Respondent acknowledges, the Florida Supreme Court ruled based on retroactivity alone.

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

Respondent omits that Walls presented detailed evidence and expert testimony at the 2021 hearing showing that, following a series of head injuries and afflictions,

including viral meningitis, onset of his condition occurred after his IQ was measured 12 and 14, but before he turned 18. Walls showed that no other incidents after age 18 explained the drop to his consistent adult IQ scores in the low 70s. Walls also presented age-of-onset evidence including childhood achievement tests and placement in special education, among other things. Respondent ignores all of this.

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

The Court should reject Respondent's mischaracterization of the merits and review the retroactivity question presented.

CONCLUSION

The Court should grant a writ of habeas corpus and/or transfer Walls's intellectual disability claim to the district court for initial determination—or if the Court grants Walls's separately filed certiorari petition, *see* No. 22-7866, it should consolidate the two cases on the merits docket.

Respectfully submitted,

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