

No. _____

In the
**Supreme Court of the United
States**

AKIL JAHI aka PRESTON CARTER,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Petition for Writ of Certiorari to the
Tennessee Court of Criminal Appeals,
Western Division

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE**QUESTIONS PRESENTED**

Although this Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that intellectually disabled individuals are constitutionally ineligible for the death penalty, the Court left the initial integration of medical and legal standards to the lower courts. After more than a decade of substantive development, the Court established in *Hall v. Florida*, 572 U.S. 701 (2014), that courts must follow medical expertise by considering factors like the standard error of measure (SEM) when evaluating standardized tests of intellectual quotient (IQ) to assess intellectual disability. Thereafter, in *Moore v. Texas*, 137 S. Ct. 1039 (2017), the Court showed by example that the individuals whose intellectual disabilities were recognized in *Hall* are entitled to those constitutional protections, even on collateral review.

The questions presented are:

1. Does *Hall v. Florida*, 572 U.S. 701 (2014) apply retroactively to cases on collateral review?
2. Does *Moore v. Texas*, 137 S. Ct. 1039 (2017) apply retroactively to cases on collateral review?
3. Should this Court grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), or summarily reverse and remand for further proceedings not inconsistent with *Moore*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Akil Jahi respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Court of Criminal Appeals in this case. This petition gives the Court an opportunity to resolve a firmly established split over whether the holding of this Court in *Hall v. Florida*, 572 U.S. 701 (2014), establishes substantive rights that state courts must apply retroactively on collateral review or whether states may disregard the standard error of measure (SEM), the Flynn effect, and other established medical standards for accurately evaluating intellectual disability before executing an individual who is otherwise constitutionally ineligible for the death penalty.

OPINIONS BELOW

The Tennessee Supreme Court order denying Akil Jahi's application for permission to appeal is unreported. *Jahi v. State*, No. W2017-02527-SC-R11-PD; App. 25a. The order of the Tennessee Court of Criminal Appeals denying permission to appeal is also unreported. *Jahi v. State*, No. W2017-02527-CCA-R28-PD; App. 1a.

STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1257. The Tennessee Supreme Court's order denying relief was entered September 17, 2018. App. 25a. On December 3, 2018, Justice Sotomayor granted an extension of time, up to and including February 14, 2019, within which to file a petition for

writ of certiorari. *Jahi v. Tennessee*, No. 18A574 (Dec. 3, 2018).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Section 39-13-203 of the Tennessee Code Annotated prohibiting capital punishment of intellectually disabled individuals is included as Appendix E. App. 26a–27a.

Section 40-30-117 of the Tennessee Code Annotated authorizing reopening of post-conviction proceedings following a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial is included as Appendix F. App. 28a–29a.

STATEMENT OF THE CASE

Petitioner Akil Jahi pleaded guilty to two counts of felony murder and was sentenced to death on both counts in 1995 under the name Preston Carter. *State v. Carter (Jahi I)*, 988 S.W.2d 145, 146–147 (Tenn. 1999); *see State v. Carter (Jahi II)*, 114 S.W.3d 895, 900 (Tenn. 2003) (describing the circumstances of Akil Jahi’s name change). The Tennessee Supreme Court affirmed Akil Jahi’s conviction but reversed the death sentences and remanded the case for a new sentencing hearing in 1999 due to void verdict forms. *See Jahi I*, 988 S.W.2d at 147. In 2000, at the resentencing hearing, a jury again sentenced Akil Jahi to death, and the Tennessee Supreme Court affirmed the sentences in 2003. *See Jahi II*, 114 S.W.3d at 910.

Akil Jahi timely filed a petition for post-conviction relief in 2004. Following an evidentiary hearing and testimony that established an intellectual disability under Tennessee law, his counsel submitted a post-hearing brief raising the issues. In 2011, the Tennessee trial court denied Akil Jahi’s petition for post-conviction relief. *Jahi v. State (Jahi III)*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502, at *1 (Tenn. Ct. App. Mar. 13, 2014).

Addressing the issue of Akil Jahi’s intellectual disability, the post-conviction court found that Akil Jahi satisfied the second and third prongs of Tennessee’s intellectual disability statute Tenn. Code Ann. § 39-13-203, *i.e.*, that he suffered from adaptive behavior deficits and that his deficits were present prior to the age of eighteen. *Jahi III*, 2014 WL 1004502, at *106; *see also* App. 60a–61a

(documenting “lifelong maladaptive behaviors” that indicate “[w]ithout question,” that Akil Jahi “is deficient in his adaptive behavior”); *id.* at 61a–66a (documenting evidence from school records and family interviews that “unequivocally supports the fact that Akil Jahi had an intellectual disability well before adulthood”).

The post-conviction court, however, found that Akil Jahi failed to satisfy the first prong of Tennessee’s statute, *i.e.*, that he had “[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (IQ) of seventy (70) or below.” *Jahi III*, 2014 WL 1004502, at *105. In so ruling, while the post-conviction court heard evidence regarding the standard error of measure (SEM) and current professional standards for determining intellectual disability like the Flynn effect, the post-conviction court gave no weight to that evidence because the expert could only state Akil Jahi’s intellectual functioning as a range of possible scores instead of a single numerical score. *Id.* at *105–106. Because Akil Jahi’s raw IQ test scores of 75, 78, 78 and 79 were above 70, the post-conviction court found that Akil Jahi failed to meet his burden of proving that he was intellectually disabled under Tenn. Code Ann. § 39-13-203. *Ibid.* The post-conviction court concluded, therefore, that the Eighth Amendment did not prohibit Akil Jahi’s death penalty sentence. *Ibid.*

The Tennessee Court of Criminal Appeals affirmed the post-conviction court’s 2011 denial of relief, including the post-conviction court’s refusal to give any weight to evidence of SEM and other

scientifically accepted factors adjusting Akil Jahi's raw IQ test scores. *See Jahi III*, 2014 WL 1004502, at *111. In so holding, the Court of Criminal Appeals recognized that the Tennessee Supreme Court's seminal opinion on intellectual disability jurisprudence, *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), requires experts to provide "definite testimony" regarding a defendant's functional IQ, and that definite testimony must include testimony of a "specific score" or at least that the defendant's functional IQ "is either seventy (70) or below, or above seventy (70)." *Jahi III*, 2014 WL 1004502, at *110.

Accordingly, the Tennessee Court of Criminal Appeals held that the post-conviction court erred in finding that Akil Jahi's expert's testimony was not sufficiently definite under *Coleman* when she testified that Akil Jahi met the definition of intellectually disabled. *Jahi III*, 2014 WL 1004502, at *110. However, the Tennessee Court of Criminal Appeals was willing to overlook this error by giving credence to other expert testimony finding that the consistency of Akil Jahi's raw IQ test scores just above 70 was an "indication of validity" of these raw scores. *Id.* at 111.

Based upon these findings, the Tennessee Court of Appeals upheld the post-conviction court's findings that Akil Jahi failed to satisfy his burden of proving that he was intellectually disabled and, therefore, ineligible for the death penalty under the Eighth Amendment. *Jahi III*, 2014 WL 1004502, at *111. The Tennessee Supreme Court subsequently denied Akil Jahi's Application for Permission to Appeal.

Order, *Jahi v. State*, W2011-02669-SC-R11-PD (Tenn. Sept. 18, 2014).

Two months after the Tennessee Court of Criminal Appeals' decision was announced, this Court issued its opinion in *Hall v. Florida*, 572 U.S. 701 (2014). *Hall*, for the first time, required courts reviewing Eighth Amendment intellectual disability claims to take into account the SEM of all standardized IQ tests given to an individual. *Id.* at 722–24. This Court specifically held in *Hall* that, where an IQ score is close to, but above, 70, courts must account for the test's SEM. *Ibid.* This Court found that a test's SEM “reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.” *Id.* at 713. *Hall* held unambiguously that “an individual with an IQ test score of 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.” *Id.* at 722 (quoting *Atkins v. Virginia*, 536 U.S. 304, 309 (2002)).

Akil Jahi falls squarely within the holding of *Hall*: he has an IQ test score of between 70 and 75 and, according to the post-conviction court, suffered from adaptive behavior deficits that presented prior to the age of eighteen. Accordingly, he moved to reopen his post-conviction proceeding in light of this Court's ruling in *Hall*. App. 11a.

In support of his motion to reopen, Akil Jahi pointed out that the facts established at the post-conviction proceeding placed his case squarely within the holding of *Hall*. The court found that he had an IQ test score of 75 in his earliest IQ test, *Jahi III*,

2014 WL 1004502, at *105, and that he had successfully proven that he suffered from adaptive behavioral deficits and the onset of his intellectual functioning deficiencies occurred before the age of eighteen, *id.* at *106. Akil Jahi argued that the post-conviction court's refusal to give any weight to the tests' SEM on the basis that its application prevented the court-appointed expert from being able to reduce his intellectual functioning to a single numerical score was expressly rejected by this Court in *Hall*. *Hall*, 572 U.S. at 723 ("a State must . . . understand that an IQ test score represents a range rather than a fixed number").

As additional support for his motion to reopen, Akil Jahi presented the Affidavit of Dr. Alan Kaufman, Ph.D., App. 30a–69a, an expert this Court relied upon and cited favorably in *Hall*, *see Hall*, 572 U.S. at 713 (citing A. Kaufman, *IQ Testing 101* 138–139 (2009)). Beyond this Court's precedent, Dr. Kaufman is recognized in his field as "arguably the most prominent scholar on intelligence testing and interpretation of the various Wechsler IQ tests," including the tests Tennessee used to assess Akil Jahi's eligibility for the death penalty. App. 35a.

Dr. Kaufman examined "a variety of materials in this case," App. 36a–37a, and "concluded to a reasonable degree of scientific and professional certainty that Akil Jahi is Intellectually Disabled," *id.* at 30a. Consistent with this Court's holdings, Dr. Kaufmann's assessment reflects the standards set forth by the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), published in 2013,

and the American Association of Intellectual and Developmental Disabilities (AAIDD) in its eleventh edition of *Intellectual Disability: Definition, Classification, and Systems of Support*, published in 2010 and revised in 2012 (AAIDD-11), *id.* at 36a–42a, 66a–67a. The AAIDD-11 and DSM-5 were, of course, prominently referenced by this Court throughout *Hall* to establish how courts must account for SEM and other recognized measurement effects when using any particular IQ test result to assess intellectual disability that may render an individual constitutionally ineligible for the death penalty. *Hall*, 572 U.S. at 722.

This Court then, in 2017, issued its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017), making it clear that courts must apply *Hall* retroactively in requiring the consideration of the SEM in determining intellectual functioning and applying the current professional standards for determining intellectual disability, including application of the AAIDD-11 and DSM-5. *Id.* at 1048–1049. This Court in *Moore* overturned a Texas Court of Criminal Appeals’ ruling that denied state habeas relief to a defendant who had proven his intellectual disability under the most current definition of intellectual disability, as set forth in AAIDD-11 and the DSM-5. *Id.* at 1053. In the state habeas action, the Texas Court of Criminal Appeals demanded adherence to the standards set forth in its 2004 decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), which were derived from the 1992 (ninth) edition American Association on Mental Retardation (AAMR) manual, the predecessor to the current AAIDD-11 manual. *Moore*, 137 S. Ct. at 1046.

This Court held that it was Constitutional error to disregard “the best available description of how mental disorders are expressed and can be recognized by trained clinicians” as set forth in AAIDD-11 and the DSM-5. *Moore*, 137 S. Ct. at 1053 (quoting *Hall*, 572 U.S. at 721). Because Moore’s IQ test score of 74 fell within the clinically established range for intellectual functioning deficits—when adjusted for the SEM—the Texas court “had to move on to consider Moore’s adaptive functioning.” *Id.* at 1049 (citing *Hall*, 572 U.S. at 723–724). This Court further found that the Texas court failed to use the current mental-health professionals’ definition of adaptive functioning deficits in its analysis of Moore’s claim of intellectual disability. *Id.* at 1051, 1053 (citing *Hall*, 572 U.S. at 721). This Court reversed the Texas court’s decision and remanded for further proceedings. *Id.* at 1053.

Thus, by relying heavily on *Hall* to overturn an underlying state court collateral review that failed to take the SEM into consideration or apply the current professional standards, *Moore* implicitly applied *Hall* retroactively. Following its decision in *Moore*, this Court granted certiorari, vacated and remanded a number of other pending state court proceedings for further consideration in light of its decision in *Moore*, further demonstrating that *Hall* and *Moore* established rights under the Eighth Amendment that apply retroactively. *See e.g.*, *White v. Kentucky*, 139 S. Ct. 532 (2019); *Wright v. Florida*, 138 S. Ct. 360 (2017).

Akil Jahi timely filed a motion to reopen his post-conviction proceedings in light of this Court’s

decision in *Moore* on August 29, 2017. App. 2a. The Tennessee post-conviction court denied the motion, finding that *Moore* was not to be applied retroactively pursuant to Tenn. Code Ann. § 40-30-117. *Ibid.* The Tennessee Court of Criminal Appeals denied Akil Jahi's application for permission to appeal on the grounds that *Moore* is not to be applied retroactively because it did not create a newly established constitutional right enlarging the class of individuals affected by the Supreme Court ruling in *Atkins*. App. 5a–6a.

The Tennessee Supreme Court subsequently denied Akil Jahi's application for permission to appeal on September 17, 2018. App. 25a.

The issue to be expressly decided by this Court then is simple: whether *Hall* and *Moore* are to be applied retroactively in state court collateral review. If *Hall* and *Moore* apply retroactively, the Eighth Amendment prohibits Akil Jahi's death penalty sentences. If, however, these decisions only apply to future trials, as Tennessee and several other jurisdictions continue to hold, then, even though he undisputedly qualifies as being intellectually disabled under the Eighth Amendment and under today's medical standards as set forth in *Hall* and *Moore*, the timing of his sentencing and post-conviction proceedings allow Tennessee to disregard the Eighth Amendment as it applies to Akil Jahi.

In addition to the temporal element to the injustice, there is also a geographic injustice occurring. As is discussed *infra* at Section III, if Akil Jahi's sentence were being reviewed in Kentucky, Florida, Kansas, or under Fifth Circuit law, he would

be recognized as constitutionally ineligible for the death sentence. For a defendant to be found to be constitutionally ineligible for the death penalty in one jurisdiction but not in another is an affront to the rule of law that this Court is uniquely positioned to end.

This Court should not countenance jurisprudence holding that a defendant has an Eighth Amendment right not to be executed so long as his intellectual functioning assessment is litigated today or in Kansas (for example), whereas that same defendant would have no Eighth Amendment protection simply because his issue was litigated before 2014 and in Tennessee. The rights articulated in *Moore* cannot be so novel that they preclude federal habeas review under 28 U.S.C. § 2254(d)(1), *see Shoop v. Hill*, 139 S. Ct. 504, 506507 (2019), but still so “derivative” of *Atkins*, App. 5a; *see App. 17a*, that they can be disregarded by states that reopen postconviction proceedings for retroactively applicable constitutional rules.

This Court’s recent jurisprudence makes it clear that *Hall* and *Moore* are to be applied retroactively to state collateral review actions such as this one. As set forth above, even though *Moore* did not hold that *Hall* is to be applied retroactively to state cases on collateral review, this Court applied *Hall* retroactively in reviewing and reversing a state collateral action in *Moore*. Further, when this Court issued its ruling in *Moore*, it GVR’d other collateral review cases for further consideration in light of its ruling in *Moore*. *See e.g.*, *Wright*, 138 S. Ct. at 360.

Similar treatment or summary reversal is appropriate here.

Additionally, as this Court recently reiterated in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense” must be given retroactive effect in state collateral review matters. *Id.* at 728 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)).

Hall and *Moore* created rules “prohibiting a certain category of punishment for a class of defendants because of their status.” *Montgomery*, 136 S. Ct. at 729. *Hall* and *Moore* make clear that the Eighth Amendment prohibits the death penalty for the class of defendants who qualify as being intellectually disabled pursuant to the definitions set forth by the medical community in the AAIDD-11 and DSM-5. This class includes a significant subclass of defendants, like Akil Jahi, who qualify as being intellectually disabled under the AAIDD-11 and DSM-5, but whose eligibility for the death penalty was subject to differing interpretations in the lower courts prior to *Hall* and *Moore*.

Here, had the Tennessee post-conviction court or the subsequent appellate courts applied the Eighth Amendment and given weight to the SEM as *Hall* and *Moore* expressly require, those courts would have found Akil Jahi ineligible for the death penalty. The rules announced in *Hall* and *Moore*, thus, prohibit the imposition of a death sentence for the class of defendants like Akil Jahi and similarly-situated defendants who have IQ test scores, which adjusted for the SEM, bring them within the range of

having intellectual functioning deficiencies, and who also suffer adaptive behavioral deficits, all manifesting themselves before the age of eighteen.

This is a new class of defendants, a class whose ineligibility for the death penalty under *Atkins* was clearly and unambiguously articulated in *Hall* and *Moore*. *Cf. Shoop*, 139 S. Ct. at 506–507 (explaining how *Hall* and *Moore* “expounded on the definition of intellectual disability” after *Atkins* failed to provide a “comprehensive definition of ‘mental retardation’ for Eighth Amendment purposes”). *Hall* and *Moore* put to rest any fair-minded disagreement over whether the Eighth Amendment permits the execution of individuals like Akil Jahi. Accordingly, this Court’s holdings in *Hall* and *Moore* should be applied retroactively in state collateral review proceedings such as this.

The rules announced by this Court in *Hall* and *Moore* expressly determine which of our nation’s most vulnerable adult defendants, *i.e.*, those suffering from intellectual disabilities, are eligible to be put to death and which ones are not under the Eighth Amendment. This Court recognized the importance of fairness and accuracy on this critical issue where it stated in *Moore*, “[i]f the States were to have complete autonomy to define intellectual disability as they wished,’ we have observed, ‘*Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.” *Moore*, 137 S. Ct. at 1053 (quoting *Hall*, 134 S. Ct. at 1999). “The medical community’s current standards supply one constraint on States’ leeway in this area. Reflecting improved

understanding over time, *see* DSM-5, at 7; AAIDD-11, at xiv–xv, current manuals offer ‘the best available description of how mental disorders are expressed and can be recognized by trained clinicians.’” *Ibid.* (quoting *Hall*, 134 S. Ct. at 1990, 1991, 1993–1994, 1994–1996).

Akil Jahi’s case demonstrates the fundamental fairness of using the medical community’s current standards in understanding whether a defendant suffers from an intellectual disability, as required by *Hall* and *Moore*, versus the application of “lay stereotypes of the intellectually disabled” and “wholly nonclinical” factors pervasive among the state cases decided prior to *Hall* and *Moore*. *Moore*, 137 S. Ct. at 1052, 1053. Under the current rules set forth by *Hall* and *Moore*, Akil Jahi and defendants like him are properly diagnosed as intellectually disabled and cannot be executed. Before these two cases, states like Tennessee were all too eager to impose lay stereotypes and wholly nonclinical factors to impose findings that defendants were not intellectually disabled and, thus, not eligible for Eighth Amendment protections.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because: (1) The Tennessee courts have failed to apply this Court's intervening decision in *Moore*, which proves the retroactivity of *Hall*, and this Court should thus grant certiorari, vacate, and remand for further consideration in light of *Moore*; (2) The Tennessee courts' failure to apply *Hall* retroactively conflicts directly with *Moore*, as well as this Court's retroactivity jurisprudence in *Montgomery* and *Welch v. United States*, 136 S. Ct. 1257 (2016), which require retroactive application of substantive rules of law; (3) The lower courts are in conflict about the retroactivity of *Hall* and *Moore*, and that conflict is properly resolved now; and (4) This petition presents an appropriate vehicle for addressing the retroactivity of *Hall* and *Moore*.

I. This Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore*, or summarily reverse and remand for proceedings not inconsistent with *Moore*.

Perhaps the cleanest way of resolving this petition and ensuring the proper retroactive application of *Hall*, is to grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore*, or summarily reverse and remand for proceedings not inconsistent with *Moore*.

The Tennessee courts have refused to apply the clear teaching of *Moore* because the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court in *Payne v. State*, 493 S.W.3d 478 (Tenn.

2016), have concluded that *Moore* and *Hall* are not to be applied retroactively because they merely announced rules of criminal procedure that do not receive retroactive application. Such holdings ignore the obvious fact that *Moore* itself applied *Hall* retroactively to a state collateral review proceeding such as this. As this Court has held, when this Court issues a controlling ruling during the course of a pending proceeding, the lower courts are constrained to apply this Court's intervening ruling to that proceeding. *See e.g., Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993). The Tennessee courts have ignored that principle, and as a result, Akil Jahi has been denied application of this Court's intervening decision in *Moore v. Texas*, which establishes that *Hall v. Florida* applies retroactively to cases on collateral review.

Because the Tennessee courts have refused to apply *Moore* despite the requirement that they do so, this Court should grant certiorari, vacate, and remand (GVR) for further consideration in light of *Moore*, where *Moore* certainly appears to answer the questions posed by this petition. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (GVR order appropriate where lower court did not fully consider intervening development for which there is reasonable probability of a different result if applied by lower court). In the alternative, the Court should summarily reverse the judgment below and remand for further proceedings not inconsistent with *Moore*.

II. The decision below conflicts with *Montgomery* and *Welch*, which mandate the retroactive application of *Moore* and *Hall*.

The retroactive application of *Hall* by this Court in *Moore* is mandated by this Court's recent decisions in *Montgomery* and *Welch*, which also compel the retroactive application of *Hall*. *Montgomery* and *Welch* hold that courts must retroactively apply "substantive" rules of law. *Montgomery*, 136 S. Ct. at 728; *Welch*, 136 S. Ct. at 1264. A substantive rule of law is one that prohibits "a certain category of punishment for a class of defendants because of their status." *Montgomery*, 136 S. Ct. at 728–729 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). A new rule is substantive, and thus retroactive, if it "alters . . . the class of persons that the law punishes." *Welch*, 136 S. Ct. at 1264–1265 (quoting *Schrivo v. Summerlin*, 542 U.S. 348, 353 (2004)).

"Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 730 (quoting *Schrivo*, 542 U.S. at 353). Procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Ibid.* (quoting *Schrivo*, 542 U.S. at 352).

As this Court found in *Montgomery*, "[t]he same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." 136 S. Ct. at 730. Even "the use of flawless sentencing procedures [cannot] legitimate a

punishment where the Constitution immunizes the defendant from the sentence imposed.” *Ibid.* “No circumstances call more for the invocation of a rule of complete retroactivity.” *Ibid.* (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971)).

Applying these fundamental principles in *Montgomery*, this Court held that its prior decision in *Miller v. Alabama*, 567 U.S. 460 (2012)—which held that the Eighth Amendment prohibits courts from sentencing juveniles to life without parole—was a substantive ruling and was, thus, to be applied retroactively to cases on collateral review. In so holding, this Court reasoned that, “[b]efore *Miller*, every juvenile convicted of a homicide offense could be sentenced to a life without parole.” *Montgomery*, 136 S. Ct. at 734. After *Miller*, however, “it will be the rare juvenile offender who can receive that same sentence.” *Ibid.* This Court found that even though the determination of a juvenile’s youth and attendant circumstances has a procedural component, this “procedural requirement [is] necessary to implement” and “give[] effect to *Miller*’s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.” *Id.* at 734, 735. In light of *Miller*’s conclusion that a life sentence without parole is unconstitutional for the vast majority of juvenile offenders, there is “a grave risk that many are being held in violation of the Constitution.” *Id.* at 734, 736. Therefore, this Court concluded, “[l]ike other substantive rules, *Miller* is retroactive because it ‘necessarily carries a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot

impose upon him.” *Id.* at 734 (quoting *Schrivo*, 542 U.S. at 352).

Hall and *Moore* likewise alter the class of persons who are ineligible for the death penalty under the Eighth Amendment and shine light on the significant risk that a vast number of intellectually disabled defendants face a punishment—the death penalty—that the law cannot impose upon them. *Hall* and *Moore* constitutionally require courts to (1) consider the SEM of IQ tests, (2) conduct a holistic evaluation of all evidence of intellectual disability, (3) apply professional standards for determining intellectual disability, and (4) consider all evidence of intellectual disability so long as a petitioner has one obtained IQ test score of 75 or below. *Hall*, 572 U.S. at 714, 719–721. *Hall* and *Moore*, thus, alter, redefine, and refine the class of persons who are considered intellectually disabled under the constitution, such that they may not be punished by death. *Hall* and *Moore* expand the class of persons who may not be executed because of their intellectual disability. The procedural component of identifying whether a defendant is intellectually disabled under these modern standards is a procedural component necessary to implement and give effect to the substantive Eighth Amendment guarantees that individuals with intellectual disabilities, like Akil Jahi, not be sentenced to death. *Hall* and *Moore* are, thus, substantive rulings to be applied retroactively.

Akil Jahi, in this case, is the perfect representative of this expanded class of defendants who are at risk of being put to death in violation of the Constitution. As his post-conviction proceeding

and subsequent appeals demonstrate, Tennessee has found that Akil Jahi did not fit within the pre-*Hall* and *Moore* definitions of intellectually disabled. Thus, even to the extent there was room for fair-minded debate prior to *Hall* and *Moore*, applying the holdings of those cases to the facts found by Tennessee, Akil Jahi is unquestionably intellectually disabled and ineligible for the death penalty. It is undisputed that Akil Jahi has a reported IQ test score of 75 and has proven his adaptive behavioral deficits and pre-age-eighteen onset as required by the AAIDD-11 and DSM-5. Therefore, because Akil Jahi qualifies as intellectually disabled under the decisions in *Hall* and *Moore*, he is representative of the new class of defendants whose eligibility for the death penalty under the Eighth Amendment is no longer subject to any debate. As such, *Hall* and *Moore* establish substantive rules that must receive retroactive application under *Welch* and *Montgomery* to squelch the grave risk that intellectually disabled defendants will be executed in violation of the Constitution.

The Tennessee courts below have failed to apply *Montgomery*'s teaching to Akil Jahi's claim that *Hall* and *Moore* are retroactive. The Tennessee courts have failed to acknowledge that these decisions are both substantive and retroactive. As such, the decision below conflicts with *Montgomery* (and *Welch*), and given that conflict, this Court should grant certiorari.

III. The lower courts’ conflict over the retroactive application of *Moore* and *Hall* is firmly established and requires no further percolation.

The decision below highlights a conflict in the lower courts on the question of whether *Moore* and *Hall* are retroactive to cases on collateral review—a conflict that is well-established, in need of resolution, and will gain no benefit from any further percolation in the lower courts.

On the one hand, Tennessee has joined the Sixth, Eighth, and Eleventh Circuits which have concluded that *Moore* and *Hall* are not retroactive to cases on collateral review. *See* App. 6a; *Payne v. State*, 493 S.W.3d at 490–491 (*citing Goodwin v. Steele*, 814 F.3d 901 (8th Cir. 2014) (per curiam) (*Hall* not retroactive); *In re Henry*, 757 F.3d 1151 (11th Cir. 2014) (*Hall* not retroactive)); *see also In re Payne*, 722 F. App’x 534, 538 (6th Cir. 2018) (*Hall* and *Moore* not retroactive); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (*Moore* not retroactive); *Kilgore v. Sec’y, Fla. Dep’t of Corr.*, 805 F.3d 1301 (11th Cir. 2015) (*Hall* not retroactive); *Lynch v. Hudson*, No. 2:07-CV-948, 2017 WL 3404773, at *2–3 (S.D. Ohio Aug. 9, 2017) (*Hall* and *Moore* not retroactive); *Smith v. Dunn*, No. 2:13-CV-00557-RDP, 2017 WL 3116937, at *4–6 (N.D. Ala. July 21, 2017) (*Hall* and *Moore* not retroactive). All of these courts have thus adopted a similar rationale, concluding that *Moore* and *Hall* did not establish a substantive prohibition against punishing a class of persons deemed intellectually disabled, but only “created a procedural requirement that those with IQ

test scores within the test's standard of error would have the *opportunity* to otherwise show intellectual disability." *E.g.*, *In re Henry*, 757 F.3d at 1161.

On the other hand, the Florida, Kansas and Kentucky Supreme Courts, as well as the Fifth Circuit have held that *Moore* and *Hall* are retroactive. In *White v. Commonwealth*, 500 S.W.3d 208 (Ky. 2016), the Kentucky Supreme Court has held that *Hall* is retroactive, because it is a substantive rule of law that excludes a class of persons from the death penalty. *White*, 500 S.W.3d at 215. Similarly, in *Walls v. State*, 213 So. 3d 340 (Fla. 2016), the Florida Supreme Court found *Hall* to be retroactive because *Hall* alters the class of persons who may be executed. *See also Wright v. State*, 256 So. 3d 766, 770–778 (Fla. 2018) (applying *Moore* retroactively on collateral review following GVR). The Kansas Supreme Court, in *State of Kansas v. Thurber*, 420 P.3d 389 (2018), found that *Moore* and *Hall* applied retroactively in remanding that collateral review of a death penalty for reconsideration consistent with the findings of *Moore* and *Hall*. *Id.* at 446–453. The Fifth Circuit has also recently applied *Moore* and *Hall* retroactively to *Atkins* claims litigated pre-*Hall* in *Busby v. Davis*, 892 F.3d 735, 749–750 (5th Cir. 2018); *see also In re Cathey*, 857 F.3d 221, 236–241 (5th Cir. 2017) (*Moore* and *Hall* applied retroactively in federal habeas proceedings when granting leave to file a second or successive federal habeas petition).

There is thus a clear split in the lower courts. It is appropriate for this Court to resolve that split now, because the issue will not benefit from any

further percolation. In reality, there is little more the lower courts can say about the retroactivity of *Moore* and *Hall*. It is a binary choice. Under *Montgomery* and *Welch*, either *Moore* and *Hall* are substantive rules of law and retroactive (as, for example, the Kentucky Supreme Court, the Florida Supreme Court, the Kansas Supreme Court, and the Fifth Circuit, and dissenters in *Goodwin* and *In Re Henry* have concluded) or it is merely a procedural rule and not retroactive (as, for example, the Tennessee Supreme Court and the Sixth, Eighth and Eleventh Circuits have concluded). Any prospect of further percolation is dim, as confirmed by the decision below and the recent decision of the Sixth Circuit, which merely parroted the reasoning of other courts. Accordingly, the time is now ripe to grant certiorari to resolve this established conflict. This is particularly true in light of the fact that lives hang in the balance of this conflicting jurisprudence.

IV. This petition presents an appropriate vehicle for deciding the retroactivity of *Hall*.

Finally, this Court should grant certiorari because this petition presents, not only an appropriate vehicle for addressing and answering the question whether *Moore* and *Hall* are retroactive to cases on collateral review, but perhaps the best possible vehicle. With this petition, Akil Jahi seeks retroactive application of *Moore* and *Hall* via Tennessee's motion to reopen statute, which expressly requires the retroactive application of new rules of law established by this Court. *See* Tenn. Code Ann. §40-30-117(a)(1). When a petitioner on

state collateral review maintains that this Court has announced a new, “substantive constitutional rule and that the [state court] erred by failing to recognize its retroactive effect,” “[t]his Court has jurisdiction to review that determination.” *Montgomery*, 136 S. Ct. at 732. So it is here, where Tennessee’s motion to reopen statute (like the Louisiana law in *Montgomery*) requires the retroactive application of new substantive rules of law.

As discussed above, the facts related to this collateral review are simple and clear cut, and put the direct issue of whether *Moore* and *Hall* are to be applied retroactively squarely before this Court. Under Tennessee’s statutory framework for identifying whether a defendant is intellectually disabled and the pre-*Hall* Tennessee cases interpreting that statute, the Tennessee courts have held that Akil Jahi does not qualify as being intellectually disabled, despite the existence of an IQ test score of 75 and specific findings that Akil Jahi suffers from adaptive behavioral deficits and that his intellectual deficiencies were present by the age of eighteen. Under the specific holding of *Hall*, therefore, and the application of AAIDD-11 and DSM-5, as required by *Moore*, these cases, in light of Akil Jahi’s raw IQ test score of 75 and Dr. Kaufman’s uncontested affidavit finding Akil Jahi to be intellectually disabled under AAIDD-11 and DSM-5 (*See Section II, supra*), dictate that if Akil Jahi’s intellectual functioning were determined by a court under the framework set forth by *Hall* and *Moore*, he would be intellectually disabled and, thus, constitutionally ineligible for the death penalty.

Under the current legal landscape, this Court's decisions in *Hall* and *Moore* are being applied unequally. An individual who received the exact same sentence in Kentucky under the same facts and circumstances as Akil Jahi is constitutionally ineligible for the death penalty, yet in Tennessee, Akil Jahi is found to be constitutionally eligible for the death penalty. If, however, the Tennessee courts are permitted to ignore *Hall* and *Moore* because those decisions are deemed not retroactive, then the Eighth Amendment would not afford any protection for Akil Jahi under these same facts and circumstances. Therefore, this is an ideal action for the Supreme Court to provide clarity and guidance on this very important issue, as there are no other complicating factors to distract the Court from this single question.

This petition, therefore, presents an appropriate vehicle for addressing the questions presented, and this Court should grant certiorari.

CONCLUSION

This Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), or summarily reverse and remand for further proceedings not inconsistent with *Moore*. Otherwise, this Court should grant certiorari to decide whether *Hall v. Florida*, 572 U.S. 701 (2014) and/or *Moore* must be applied retroactively on collateral review.

Respectfully submitted,

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