

No. 18-1077

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
—◆—

REPLY BRIEF FOR PETITIONER
—◆—

Christopher E. Thorsen
Counsel of Record
BAKER, DONELSON, BEARMAN, CALDWELL &
BERKOWITZ, P.C.
211 Commerce Street, Suite 800
Nashville, Tennessee 37201
(615) 726-5586
cthorsen@bakerdonelson.com

Peter C. Sales
Jeffrey W. Sheehan
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, Tennessee 37203

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONER	1
I. This Court has jurisdiction to reverse Tennessee’s erroneous holdings as to the retroactivity of <i>Moore</i> and <i>Hall</i>	1
II. The application of <i>Moore</i> is properly before this Court.....	2
III. This case allows the Court to provide needed clarity regarding the questions presented.....	5
CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bush v. State</i> , 428 S.W.3d 1 (Tenn. 2014).....	2
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991).....	1
<i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008).....	1, 2
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	<i>passim</i>
<i>Harper v. Va. Dep’t of Taxation</i> , 509 U.S. 86 (1993).....	2
<i>Jahi v. State (Jahi III)</i> , No. W2011-02669-CCA-R3PD, 2014 WL 1004502 (Tenn. Ct. App. Mar. 13, 2014).....	5, 6
<i>Montgomery v. Louisiana</i> , 136 S. Ct. 718 (2016).....	3, 4, 5
<i>Moore v. Texas</i> , 137 S. Ct. 1039 (2017).....	<i>passim</i>
<i>Moore v. Texas (Moore II)</i> , 139 S. Ct. 666 (2019).....	6
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989).....	4

TABLE OF AUTHORITIES—continued

<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	4
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	2
<i>Welch v. United States</i> , 136 S. Ct. 1257 (2016)	3, 4, 5
Statutes	
Tenn. Code Ann. § 39-13-203	5
Constitutional Provisions	
U.S. Const. amend. VIII	4, 5, 6
U.S. Const. art. VI, cl. 2	2
Other Authorities	
American Psychiatric Association, <i>Diagnostic & Statistical Manual of Mental Disorders</i> (DSM-5) (5th ed.)	5
Robert Schallock et al., <i>Intellectual Disability: Definition, Classification, and Systems of Support</i> (AAIDD-11) (11th ed. 2010)	4

REPLY BRIEF FOR PETITIONER**I. This Court has jurisdiction to reverse Tennessee’s erroneous holdings as to the retroactivity of *Moore* and *Hall*.**

Tennessee cannot evade this Court’s jurisdiction by declaring that its decision was “independent of any federal question” when the judgment below depended entirely on whether *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), require retroactive application. Br. in Opp. 10 (alteration omitted) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Tennessee law establishes a right to reopen postconviction proceedings following a “ruling of . . . the United States [S]upreme [C]ourt establishing a constitutional right that was not recognized at the time of trial” when that ruling is entitled to “retrospective application.” Pet. App. 28a. Tennessee denied Akil Jahi’s petition to reopen his postconviction proceedings based on its determination that “the Supreme Court’s decision in *Moore v. Texas* did not announce a new constitutional rule requiring retrospective application.” Pet. App. 6a. The question of whether Akil Jahi may be executed despite being ineligible for the death penalty after *Moore* and *Hall* is not “independent of any federal question.” To the contrary, it depends entirely on the federal question of retroactivity.

“Retroactivity is a question of federal law, and [this Court’s] final authority to construe it cannot, at this point in the Nation’s history, be reasonably doubted.” *Danforth v. Minnesota*, 552 U.S. 264, 308

(2008) (C.J. Roberts, dissenting). When determining the retroactive application of this Court’s precedent, federal law “sets certain minimum requirements that States must meet.” *Id.* at 288. “The Supremacy Clause does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law.” *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 100, (1993) (internal citation omitted). Even if it could, Tennessee has described its retroactivity standard as “virtually identical” to the federal standard noting that the Tennessee legislature deliberately enacted “the functional equivalent of the federal standard from *Teague v. Lane*.” *Bush v. State*, 428 S.W.3d 1, 19, 20 (Tenn. 2014). Thus, the judgment below is entirely dependent on the federal retroactivity question.

The questions presented here—whether *Moore* and *Hall* announce new rules of constitutional criminal law that must be applied retroactively—are federal questions falling squarely under this Court’s jurisdiction. The Court should reject the State of Tennessee’s attempt to recast the questions presented as issues of state law when the question presented and the issue wrongly decided below turns entirely on the retroactive application of this Court’s holdings in *Moore* and *Hall*.

II. The application of *Moore* is properly before this Court.

The State of Tennessee in its Brief in Opposition misstates the issue presented to this Court. The issue before this Court is whether *Moore* establishes a new class of defendants that is ineligible for the

death penalty. It is undisputed that Akil Jahi filed a timely appeal regarding the issue presented.

In *Moore*, this Court examined *Hall* and 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 (citing *Hall*, 572 U.S. at 704–716). In that case, Moore’s IQ test score of 74 fell within the clinically established range for intellectual functioning deficits—when adjusted for the SEM. Therefore, 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.

The Tennessee courts have refused to apply the clear teaching of *Moore*. Both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court have concluded that *Moore* did not establish a substantive rule of law and, instead, merely announced rules of criminal procedure and, therefore, does not receive retroactive application.

This Court’s holdings in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), and *Welch v. United States*, 136 S. Ct. 1257 (2016), 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 *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Moore alters the class of persons who are ineligible for the death penalty under the Eighth Amendment. As stated in *Moore*, “we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.” *Moore*, 137 S. Ct. at 1050.

Akil Jahi 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 current definition of intellectually disabled. Applying the holdings of this Court’s precedent, 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, which is well within the clinically established range for intellectual functioning deficits—when adjusted for the SEM. Moreover, Akil Jahi has proven his adaptive behavioral deficits and pre-age-eighteen onset as required by the AAIDD-11

and DSM-5. *See Jahi v. State (Jahi III)*, No. W2011-02669-CCA-R3PD, 2014 WL 1004502, at *106 (Tenn. Ct. App. Mar. 13, 2014) (“The trial court found that the Petitioner met the second and third prongs in Tennessee Code Annotated section 39-13-203. The court found that he suffered from deficits in adaptive behavior in the areas of communication and verbal skills. The court also concluded that the deficits in adaptive behavior and any deficits in intellectual functioning were present prior to the age of eighteen.”). Therefore, because Akil Jahi qualifies as intellectually disabled, he is representative of the new class of defendants established by *Moore*, through its examination of *Hall*, and who are ineligible for the death penalty under the Eighth Amendment. As such, *Moore* establishes a substantive rule that must receive retroactive application under *Welch* and *Montgomery*. Accordingly, Akil Jahi must be found to be ineligible for the death penalty.

III. This case allows the Court to provide needed clarity regarding the questions presented.

The State of Tennessee’s final objections—that Tennessee is correct to deny Akil Jahi the Eighth Amendment rights recognized in *Moore* and *Hall* and the law is clear—are puzzling. As the petition demonstrates, the lower courts are of two minds over the retroactivity of *Moore* and *Hall*. See Pet. 21–23. But to the extent that the law is clear after *Moore* and *Hall*, it cuts directly against Tennessee’s insistence on ignoring contemporary medical standards when evaluating eligibility for the death

penalty. *See, e.g., Moore v. Texas (Moore II)*, 139 S. Ct. 666, 673 (2019) (Alito, J., dissenting) (“While the Court [in *Moore I*] divided on the appropriate disposition, both the majority and the dissent agreed that the Court of Criminal Appeals should have assessed Moore’s claim of intellectual disability under contemporary standards . . .”).

Akil Jahi’s case presents the perfect vehicle for resolving that confusion. As the record and Dr. Kaufman’s affidavit demonstrate, Akil Jahi “is intellectually disabled and it is an egregious error to put this man to death.” Pet. App. 69a. The Tennessee courts “found that he suffered from deficits in adaptive behavior in the areas of communication and verbal skills” and “concluded that the deficits in adaptive behavior and any deficits in intellectual functioning were present prior to the age of eighteen.” *Jahi III*, 2014 WL 1004502, at *106. As to the only prong remaining, modern medical standards for interpreting I.Q. tests are clear, and when applied to the tests in the record, they demonstrate that Akil Jahi has “significantly sub-average intellectual functioning.” Pet. App. 60a. Thus, the only question at issue is whether *Moore* or *Hall* apply retroactively so as to require Tennessee to recognize Akil Jahi as a member of a class of persons whom the Eighth Amendment will not allow Tennessee to execute.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Christopher E. Thorsen
Counsel of Record
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
211 Commerce Street, Suite 800
Nashville, Tennessee 37201
(615) 726-5586
cthorsen@bakerdonelson.com

Peter C. Sales
Jeffrey W. Sheehan
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, Tennessee 37203

Attorneys for Petitioner

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