CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SAMPLE,

Petitioner

vs.

STATE OF TENNESSEE

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS,
WESTERN DIVISION

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

Michael Sample has a full-scale IQ of 68.

He has profound adaptive deficits: he never learned to handle money, to shop, to tell directions, or to perform any complex tasks. He could not measure bleach for the laundry, or formula for a baby bottle. His entire adult life, he lived in homes with older adults who could support him—whether his own mother, or his wife's parents. He was willing to work, but could only perform rote, repetitive tasks, such as attaching handles on an assembly line.

His intellectual impairment clearly began in childhood. Group administered tests of academic functioning provided intelligence scores of 77 at age 9, and 73 at age 11. After those tests were administered, he fell from a truck, suffered a head injury, and displayed ever greater deficits: ceasing to play games with his friends, and becoming "sleepy" and lethargic. He failed all classes in the 9th grade, including PE, shop and home economics. Shortly thereafter his education ended.

Under the standards of the DSM-V and the AAIDD, Michael Sample is clearly intellectually disabled. An assessment begun in 2013, and finished in 2014 by Dr. Joette James, Ph.D, psychologist/neuropsychologist, Assistant Professor at George Washington University Medical Center, established that he met all criteria to be certified as intellectually disabled.

However, Michael Sample was sentenced to death in the 1980s, a time when it was constitutionally acceptable to execute the intellectually disabled. His sentence was reviewed on post-conviction in the mid-1990s, when Tennessee, while recognizing the prohibition on executing the mentally retarded, had bright line rules requiring IQ test scores below 70, with no consideration of standard errors of measurement, and with few resources available to perform new testing.

Thus, since Dr. James recognized his profound intellectual disability in 2014, no court has been willing to hear her testimony. While Michael Sample is clearly ineligible for the death penalty under this court's precedents in *Hall* and *Moore*, no court has found, as of yet, a way to honor this absolute constitutional protection.

This case presents the clear question: is it acceptable to kill a man who is ineligible for the death penalty, due to his misfortune of having been sentenced too soon, but diagnosed too late?

QUESTIONS PRESENTED

1. Does *Moore v. Texas,* 581 U.S. ___, 137 S.Ct. 1039 (2017) apply retroactively to cases on collateral review?

2. Should this Court grant certiorari, vacate the judgment below, and remand for further consideration in light of *Moore v. Texas*, or summarily reverse and remand for further proceedings not inconsistent with *Moore*?

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JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1257. The Tennessee Supreme Court's order denying relief was entered September 17, 2018. 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. *Sample v. Tennessee*, No. 18A589 (Dec. 3, 2018)(Sotomayor, J.).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

1. Michael Sample was convicted of first-degree murder and sentenced to death, and the Tennessee Supreme Court affirmed his convictions and death sentences in 1984. *State v. Sample*, 680 S.W.2d 447 (Tenn. 1984). He was initially denied post-conviction relief in the Tennessee courts. *See e.g.*, *Sample v. State*, No. 02C01-9505-CR-00131, 1996 WL 551754 (Tenn. Crim. App. Sept. 30, 1996) *perm. app. denied* Dec. 2, 1996. He subsequently received a remand to resolve *Brady*

issues, with post-conviction relief being ultimately denied on those grounds. *Sample v. State*, No. W2008-02466-CCA-R3-PD, 2010 WL 2384833 (Tenn. Crim. App. June 15, 2010) *perm. app. denied* Nov. 12, 2010.

2. After this Court's May 27, 2014 decision in *Hall v. Florida*, 572 U.S. 701 (2014), Sample filed a motion to reopen, as well as petitions for writs of error coram nobis and audita querela; all asserting that *Hall* should be applied retroactively, and that, in light of his recently revealed IQ of 68, and Dr. Joette James' conclusion that he was intellectually disabled, he was entitled to relief from the sentence of death. The Tennessee courts uniformly rejected these efforts, finding that *Hall* was not retroactive and that Sample was not entitled to a hearing on the merits of his claim; and this Honorable Court denied certiorari. *E.g. Sample v. State*, No. W2016-02324-CCA-R28-PD (Tenn. Crim. App. Aug. 4, 2017) *cert. denied* 17-8567 (Oct. 1, 2018); *Sample v. State*, No. W2016-02325-CCA-R28-PD (Tenn. Crim. App. Dec. 29, 2016) *cert. denied* 17-5940 (Nov. 13, 2017); *Sims v. State*, No. W215-01713-CCA-R28-PD (Tenn. Crim. App. Jan. 28, 2016) *cert. denied* 16-445 (Mar. 20, 2017).

3. On August 30, 2017, Sample filed a Motion to Re-Open based on this Honorable Court's decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017), He again relied upon Dr. Joette James' conclusion that he was intellectually disabled, and thus ineligible for the penalty of death. On November 2, 2017 the trial court denied relief finding that *Moore* was not retroactive, thus, regardless of his intellectual disability, Sample was not entitled to a merits hearing.

4. On December 1, 2017, Sample filed an Application to Appeal the denial of his Motion to Reopen to the Tennessee Court of Criminal Appeals. This was denied. *Sample v. State*, No. W2017-02370-CCA-R28-PD (Tenn. Crim. App. April 23, 2018); App. 2a-6a. A request for rehearing was summarily denied. No. W2017-02370-CCA-R28-PD (Tenn. Crim. App. May 18, 2018). The Tennessee Supreme Court then declined to grant leave to appeal. *Sample v. State*, No. W2017-02370-SC-R11-PD (Tenn. Sept. 17, 2018); App. 1a.

5. On December 3, 2018, Justice Sotomayor granted a 60-day extension to file the petition for writ of certiorari to February 14, 2019. No. 18-A-589.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because: (1) The Tennessee courts have failed to apply this Court's intervening decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017) which is an Eighth Amendment right that did not exist at the time of trial, but for which retrospective application is required – namely the right not to be executed if one is intellectually disabled under current medical standards—thus it would be appropriate to grant certiorari, vacate, and remand for further consideration in light of *Moore*; (2) The Tennessee courts' failure to apply *Moore* retroactively conflicts directly with *Moore* itself, as well as this Court's retroactivity jurisprudence in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) 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 *Moore* and that conflict is properly resolved now; and (4) This petition presents an appropriate vehicle for addressing the retroactivity of *Moore*.

I. 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 proceedings not inconsistent with *Moore*.

Perhaps the most direct way of resolving this petition and ensuring the proper retroactive application of *Moore v. Texas*, 137 S. Ct. 1039 (2017), is to grant certiorari, vacate the judgment below, and remand for further consideration 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 Court of Criminal Appeals has concluded that *Moore* is merely derivative of *Atkins* and *Hall.* Pet. App. 5a. Moreover, the courts have concluded that *Moore* does not enlarge the class of individuals protected from execution. Pet. App. 6a. This is in error; plainly in the 1980s when sentenced to death, Sample was in a class of individuals eligible for the death penalty. While, in the 1990s, with no valid IQ testing having been performed (and academic group testing, conducted prior to Sample's head injury at age 12, having elicited scores of 73 and 77), and with *Atkins* being applied by Tennessee Courts to require a test score below 70, he remained fully eligible for death. Only following *Moore's* re-definition of the class, coupled with Dr. James' 2014 testing, did Sample become a member of a class of individuals ineligible for execution.

Thus, as Sample is clearly a member of the class ineligible for execution under *Moore*, this Court should grant certiorari, vacate, and remand (GVR) for further consideration in light of *Moore*. Indisputably, *Moore* answers the questions posed by this petition. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

II. The decision below conflicts with *Montgomery v. Louisiana* and *Welch v. United States* which mandate the retroactive application of *Moore*, which is a substantive rule of law.

This Court's decisions in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) and *Welch v. United States*, 136 S. Ct. 1257 (2016) compel the retroactive application of *Moore*. *Montgomery* and *Welch* hold that states must retroactively apply "substantive" rules of law. *Montgomery*, 136 S. Ct. at 729-30; *Welch*, 136 S. Ct. at 1265-67. 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 *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 1264-65 (slip op. at 11).

That is precisely what *Moore* does here. *Moore* identifies the boundaries of the class of persons who are intellectually disabled and cannot be executed. All persons within that class include those who are intellectually disabled under the medical standards set forth in DSM-5 and AAIDD-11. *Moore* thus defines the "substantive reach" of the Eighth Amendment. The Supreme Court vacated Moore's death sentence because persons who are intellectually disabled under DSM-5 and/or AAIDD-11 simply cannot be executed, yet the Texas state courts failed to properly

apply DSM-5 and AAIDD-11 to Moore's evidence of intellectual disability (having instead applied outdated notions of what constitutes intellectual disability).

It follows that *Moore* places persons like Michael Sample who are intellectually disabled under DSM-5 and AAIDD-11 and current medical standards "beyond the State's power to punish" *Welch*, 136 S. Ct. 1265. *Moore* "deprives the Government of the power to impose the challenged punishment" of death upon such persons. 136 S. Ct. at 1267. *Moore* thereby "represent[s] the clearest instance of substantive rules for which retroactive application is appropriate." *Id. Moore* is retroactive, because without its retroactive application, persons like Moore and Michael Sample would "face[ ] a punishment that the law cannot impose upon" them. *Montgomery*, 136 S. Ct. at 734.

In *Montgomery*, this Court noted that even when a new rule of law requires certain procedures for identifying a class of persons who are exempt from a particular punishment, that rule is substantive, not procedural. *Montgomery* thus cited *Atkins v. Virginia*, 536 U.S. 304 (2002) as being substantive because it identifies the class of persons who are exempt from execution because of intellectual disability. *Montgomery*, 136 S. Ct. at 735. Just as *Atkins* is substantive and retroactive because it identifies the class of persons exempt from execution, *Moore* likewise identifies the boundaries of the class of persons who must not be executed under the Eighth Amendment. As such, *Moore* is substantive within the meaning of *Montgomery*, and it is likewise retroactive.

Below, the Tennessee courts have failed to apply *Montgomery*'s teaching to Michael Sample's claim that *Moore* is retroactive. The Tennessee courts have failed to acknowledge that *Moore* is 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 are in conflict on *Moore's* retroactivity, that conflict is firmly established, and the issue requires no further percolation.

While the decision below highlights a conflict with this Court's cases, it likewise highlights a conflict in the lower courts on the question whether *Moore* is 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, the Tennessee courts join the Sixth, Eighth and Eleventh Circuits which have concluded that *Moore* is not retroactive to cases on collateral review. *See* Pet. App. 4a. *see In re Payne*, 722 Fed. Appx. 534, 538 (6th Cir. 2018) (*Hall* and *Moore* not retroactive); *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (*Moore* 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 these courts have adopted a similar rationale, concluding that *Moore* 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." *See e.g., In Re Henry*, 757 F.3d at 1161.

On the other hand, the Florida and Kansas Supreme Courts, as well as the Fifth Circuit Court of Appeals have explicitly held that *Moore* is retroactive. The Kansas Supreme Court, in *State of Kansas Thurber*, 420 P.3d 389, 446–453, 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*. *See also Wright* v. *State of Florida*, 256 So. 3d 766, 770–778 (Fla. 2018) (applying *Moore* retroactively on collateral review). The Fifth Circuit 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*. It is a binary choice. Under *Montgomery* and *Welch*, either *Moore* is a substantive rule of law and retroactive or it is a procedural rule and not retroactive. Any prospect of further percolation is dim, as confirmed by the decision below. Accordingly, the time is ripe to grant certiorari to resolve this established conflict.

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

Finally, this Court should grant certiorari because this petition presents an appropriate vehicle for addressing the question whether *Moore* is retroactive to cases on collateral review. Michael Sample seeks retroactive application of *Moore* 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).

And as this Court has explained, when a petitioner on state collateral review, like Sample, maintains that s/he is entitled to retroactive application of a new, "substantive constitutional rule and that the [state] court erred by failing to recognize its retroactive effect," "This 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. There is no question that this Court has jurisdiction to decide the retroactivity of *Moore* in these proceedings.

Thus, this petition presents an appropriate vehicle for addressing the questions presented, and this Court should grant certiorari. This is especially true where Mr. Sample has been found to have a full-scale IQ score of 68, and numerous deficits in adaptive functioning that manifested before the developmental age. As a result, Dr. James has explained in her sworn affidavit that Michael Sample is indeed intellectually disabled and exempt from execution under the Eighth

Amendment under the medical standards set forth by the AAIDD and the American Psychiatric Association in DSM-5 -- the standards that *Moore* itself requires.

CONCLUSION

This Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore v. Texas*, 581 U.S. ___ (2017) or summarily reverse and remand for further proceedings not inconsistent with Moore.

Respectfully Submitted,

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By: /s/ *Richard Lewis Tennent*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari and appendix were served via first-class mail upon James Gaylord, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 14th day of February, 2019.

/s/ *Richard Lewis Tennent*