NO. 18-8027

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EUGENE SAMPLE,
Petitioner,

v.

TENNESSEE,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I

Does this Court have jurisdiction to decide whether its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017), requires Tennessee courts to grant successive collateral review of a criminal judgment?

II

Was the Court's holding in *Moore* dictated by the Court's precedent in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014)?

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The order of the Tennessee Supreme Court denying petitioner's application for permission to appeal is unreported but available at *Sample v. State*, No. W2017-02370-SC-R11-PD, 2018 Tenn. LEXIS 616 (Sep. 17, 2018). (Pet's App'x, 1a.) The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal from the denial of his motion to reopen state post-conviction proceedings is also unreported. (Pet's App'x, 2a-6a.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied petitioner's application for permission to appeal on September 17, 2018. (Pet's App'x, 1a.) Justice Sotomayor extended the time for filing a petition for writ of certiorari until February 14, 2019. *Sample v. Tennessee*, No. 18A589 (U.S. Dec. 3, 2018). Petitioner filed his petition on February 14, 2019. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2 provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority
>
> . . .
>
> In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority

exercised under, the United States.

Tenn. Code Ann. § 40-30-102(c) establishes filing limitations for petitions under the Tennessee Post-Conviction Procedure Act:

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. . . . A petitioner may move to reopen a post-conviction proceeding that has concluded, under the limited circumstances set out in § 40-30-117.

Tenn. Code Ann. § 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial . . . .

Tenn. Code Ann. § 40-30-122 defines the appellate rulings that qualify as a basis for reopening: "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

STATEMENT OF THE CASE

A Shelby County, Tennessee, jury convicted petitioner and his codefendant, Larry McKay, of two counts of first-degree felony murder for the 1981 shooting deaths of Benjamin Cooke and Steve Jones during the perpetration of armed robbery. *State v. McKay*, 680 S.W.2d 447, 448 (Tenn. 1984). The jury sentenced petitioner to death for each of the murders. *See Sample v. State*, 82 S.W.3d 267, 269 (Tenn. 2002). The Tennessee Supreme Court affirmed petitioner's convictions and sentences and denied rehearing. *McKay*, 680 S.W.2d at 453. This Court denied certiorari. *Sample v. Tennessee*, 470 U.S. 1034 (1985).

Petitioner then filed numerous unsuccessful petitions for collateral relief in state court, none of which included a claim that he was ineligible for execution due to intellectual disability. *See McKay v. State*, No. 25, 1989 Tenn. Crim. App. LEXIS 153, at *6 (Mar. 1, 1989), *perm. app. denied* (Tenn. July 3, 1989); *McKay v. State*, No. 02C01-9404-CR-00059, 1994 Tenn. Crim. App. LEXIS 701, at *5 (Oct. 19, 1994), *perm. app. denied* (Tenn. Jan. 30, 1995); *Sample v. State*, No. 02C01-9104-CR-00062, 1995 Tenn. Crim. App. LEXIS 115, at *16 (Feb. 15, 1995), *perm. app. denied* (Tenn. Jan. 27, 1997); *State v. McKay*, No. 02C01-9506-CR-00175, 1996 Tenn. Crim. App. LEXIS 460, at *5 (July 26, 1996), *perm. app. denied* (Tenn. Dec. 2, 1996); *Sample v. State*, Nos. 02C01-9505-CR-00131, 02C01-9505-CR-00139, 1996 Tenn. Crim. App. LEXIS 597, at *45 (Sep. 30, 1996), *perm. app. denied* (Tenn. Jan. 27, 1997); *Sample v. State*, No. W1999-01202-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 33, at *42 (Jan. 17, 2001), *reversed by* 82 S.W.3d at 279 (Tenn. Aug. 2, 2002); *Sample v. State*, No. W2008-02466-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 487, at *57 (June 15, 2010), *perm. app. denied* (Tenn. Nov. 12, 2010).

In 2011, petitioner filed a petition for a federal writ of habeas corpus, followed by an amended petition, neither of which included a claim of intellectual disability. *Sample v. Carpenter*, No. 11-2362-SHL-dkv, 2014 U.S. Dist. LEXIS 180618, at *9 (W.D. Tenn. Oct. 20, 2014). In 2014, he filed a motion to amend his petition to include an intellectual-disability claim and a motion to stay federal proceedings to allow exhaustion of that claim in state court. *Id*. at *1. This was the first time that petitioner had asserted an intellectual-disability claim during the 30 years since his conviction. The district court granted both motions, and federal proceedings remain stayed. *Id*. at *17-18.

On May 27, 2014, this Court decided *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), holding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of

error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."

In 2014, petitioner filed a motion to reopen state post-conviction proceedings, seeking to litigate a claim of intellectual disability and contending that *Hall* created a new constitutional rule requiring retroactive application for the purposes of Tenn. Code Ann. § 40-30-117(a)(1). (Pet. 2.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal, concluding that *Hall* did not announce a new rule of constitutional law. (Pet. 2.) The Tennessee Supreme Court denied further review. (Pet. 2.) This Court denied certiorari. *Sims and Sample v. Tennessee*, No. 16-445 (U.S. Mar. 20, 2017).

In 2016, petitioner filed another motion to reopen state post-conviction proceedings, again contending that *Hall* announced a new constitutional rule that must apply retroactively. (Pet. 2.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal. (Pet. 2.) The Tennessee Supreme Court denied further review. (Pet. 2.) This Court again denied certiorari. *Sample v. Tennessee*, No. 17-8567 (U.S. Oct. 1, 2018).

On March 28, 2017, this Court decided *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017), rejecting a multifactor test crafted by the Texas Court of Criminal Appeals for determining whether a capital defendant was intellectually disabled. In the context of Moore's initial state collateral-review bid following retrial, this Court held that Texas's multifactor standard improperly "deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id*. The Court required, "in line with *Hall*, . . . 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." *Id*. at 1050.

On September 12, 2017, petitioner filed yet another motion to reopen state post-conviction

proceedings, asserting that *Moore* created a new constitutional right that must apply retroactively. (Pet's App'x, 3a.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal. (Pet's App'x, 2a-30a.) In denying an appeal, the Court of Criminal Appeals held that *Moore* "is clearly derivative of *Atkins*[1] and *Hall*" and that the decision "did not announce a new constitutional rule requiring retrospective application." (Pet's App'x, 5a-6a.) The Tennessee Supreme Court denied further review. (Pet's App'x, 1a.)

Petitioner now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

The petition should be denied because the Court does not have jurisdiction to decide the question presented, i.e., whether *Moore* requires Tennessee courts to grant successive collateral review of a criminal judgment. The state court's decision that petitioner's claim does not satisfy Tennessee's statutory criteria for successive collateral review did not resolve any federal question that would give this Court jurisdiction. In any event, the state court properly determined that *Moore*, which merely applied *Atkins* and *Hall*, did not announce a new rule of constitutional law. And petitioner has not identified any split of authority for resolution by this Court.

I. This Court Lacks Jurisdiction to Review a Decision Enforcing a State Statutory Restriction on Successive Collateral Review.

The Court does not have jurisdiction over this case because the state court decision does not rest on the resolution of any federal question. With 28 U.S.C. § 1257(a), Congress has limited the Court's jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" to issues governed by binding federal law. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court's appellate jurisdiction under § 1257(a)

[1] In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment forbids the execution of defendants who are intellectually disabled.

is limited "to enforcing the commands of the United States Constitution"). This Court may intervene on a state court decision "only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

Here, the state court's decision that successive collateral review is not available for petitioner's intellectual-disability claim does not involve an issue of constitutional dimension. The states have no constitutional obligation to provide any procedures for the collateral review of criminal judgments. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Though not compelled by the Constitution, Tennessee provides several avenues to collaterally attack criminal judgments. One such avenue is through the Post-Conviction Procedure Act, which has built-in restrictions on the availability of collateral review, including that petitioners may file only one petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-102(c).

As pertinent here, however, "[a] petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in [Tenn. Code Ann.] § 40-30-117." Tenn. Code Ann. § 40-30-102(c). Reopening is available if (1) the claim in the motion to reopen is based on a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, (2) retrospective application of that right is required, and (3) the motion is filed within one year of the qualifying appellate ruling. Tenn. Code Ann. § 40-30-117(a)(1). By statute, "a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122.

Applying this definition, the Tennessee Court of Criminal Appeals concluded that *Moore* did not create a new rule of constitutional criminal law but, instead, was simply an application of

existing precedent. This decision did not resolve any Eighth Amendment claim but merely applied the Tennessee statute that restricts successive collateral attacks on criminal judgments. This Court therefore lacks jurisdiction to review the decision because it "rests on a state law ground that is independent of [any] federal question and adequate to support the judgment." *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Petitioner's reliance on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is misplaced.[2] (Pet. 7, 9.) In *Montgomery*, this Court held that the holding in *Teague v. Lane*, 489 U.S. 288 (1989), "establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." 136 S. Ct. at 729. *Teague* provided that new rules do not apply retroactively unless they are "substantive rules," which forbid "criminal punishment of certain primary conduct" or "a certain category of punishment for a class of defendants," or if they are new "watershed rules of criminal procedure." *Id.* (internal quotation marks omitted). Under *Montgomery*, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.*

This holding does not control here. The question in *Montgomery* was whether an admittedly new rule must be applied retroactively. In this case, on the other hand, the state court held that *Moore* did not announce a new rule at all. That question turned not on whether *Moore* was "substantive" but on the relevant state statutes that define what constitutes a "new rule of constitutional criminal law." *See* Tenn. Code Ann. §§ 40-30-117(a)(1), -122. Although this statutory definition was informed by *Teague*, the state court ultimately applied a state statute that

[2] Petitioner also cites *Welch v. United States*, 136 S. Ct. 1257 (2016), but does not discuss it. *Welch* involved a federal petitioner attacking a federal sentence under 28 U.S.C. § 2255. *Id.* at 1263. And it was undisputed in *Welch* that the appellate decision at issue announced a "new rule." *Id.* at 1264.

controls whether a state prisoner is entitled to a second state collateral review proceeding.[3] *See Bush v. State*, 428 S.W.3d 1, 13, 19-20 (Tenn. 2014) (discussing the adoption of § 40-30-122).

The state court's decision that *Moore* was not a basis for reopening the petitioner's post-conviction proceedings rests on a state law ground that is independent of any federal retroactivity question and adequate to support the judgment. Thus, this Court does not have jurisdiction to review that decision.

II. The State Court Correctly Found that *Moore* Did Not Create a New Rule of Constitutional Law.

Even if this Court were to find that it has jurisdiction, certiorari should be denied because the state court correctly concluded that *Moore* merely applied *Atkins* and *Hall* and did not create a new rule of constitutional law requiring retroactive application.

"In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S. 342, 348 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

Moore did not create a new rule because its result was dictated by this Court's precedent. In *Atkins*, the Court held that the Eighth Amendment forbids the execution of persons with intellectual disability. 536 U.S. at 321. However, *Atkins* left "to the States the task of developing

3 The Court of Criminal Appeals' citation to *Teague* along with § 40-30-122 is therefore not sufficient to establish jurisdiction in this case. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). The court's ultimate holding in this case was that the petitioner had not satisfied the statutory basis for reopening. (Pet's App'x, 5a-6a.)

appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (internal quotation marks and alteration omitted).

In *Hall*, this Court considered Florida's attempt to enforce this restriction with a "rigid rule" that foreclosed exploration of intellectual disability unless the capital defendant had an IQ test score below 70. *Hall*, 572 U.S. at 704. The Court concluded that "Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Id.* at 724. Indeed, *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id*. at 719 (citing *Atkins*, 536 U.S. at 308, n.3, 309 n.5). The *Hall* Court made clear how thoroughly its holding was dictated by *Atkins*: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, *were a fundamental premise of Atkins*." *Id.* at 720 (emphasis added).

In *Moore*, as relevant here, the Court merely applied *Atkins* and *Hall* to a multifactor test created by the Texas Court of Criminal Appeals. "As we instructed in *Hall*," the Court noted, "adjudications of intellectual disability should be 'informed by the views of medical experts.'" 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 721). The multifactor test in Texas, however, created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* (quoting *Hall*, 572 U.S. at 704).

The Court went on to note that the Texas standard was "irreconcilable with *Hall*," and the Court required, "in line with *Hall*, . . . 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 clinical established range for intellectual-functioning deficits." *Id.* at 1049-50. Similarly, when ultimately concluding that the "medical community's current standards supply

one constraint on States' leeway" to define intellectual disability, the *Moore* Court pointed to both *Hall*'s and *Atkins*'s reliance on current medical standards. *Id.* at 1053 (citing *Hall*, 572 U.S. at 704-06, 709-14 (employing current clinical standards); *Atkins*, 536 U.S. at 308 n.3, 317 n.22 (relying on then-current standards)).

Accordingly, the Court of Criminal Appeals properly held that *Moore* did not announce a new rule because it was simply an application of *Atkins* and *Hall*.

III. Petitioner Identifies No Relevant Split of Authority.

Petitioner also argues that a split of authority has developed on the retroactivity of *Moore*, which this Court should resolve. But the cases he cites do not establish any split of authority.

Petitioner cites two federal appellate cases and two district court cases that have refused to apply *Moore* retroactively. In three of the cases, the courts concluded that *Moore* did not announce a new rule of law or was not retroactive. *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) (noting that *Moore* and *Hall* "created new procedural requirements" and noting that this Court had not determined they should be applied retroactively); *Smith v. Dunn*, No. 2:13-CV-00557-RDP, 2017 U.S. Dist. LEXIS 113862, at *13 (N.D. Ala. July 21, 2017) (". . . *Moore* does not meet any of the *Teague* exceptions to non-retroactivity[.]"), *appeal docketed*, No. 17-15043 (11th Cir. Nov. 9, 2017); *Lynch v. Hudson*, No. 2:07-cv-948, 2017 U.S. Dist. LEXIS 125725, at *6 (S.D. Ohio Aug. 9, 2017) (". . . [*Moore*] is neither a new substantive constitutional rule nor a watershed procedural rule."). In the fourth case, the court did not consider the *Teague* standard but merely described *Moore* as addressing "purely procedural issues." *Davis v. Kelley*, 854 F.3d 967, 970 (8th Cir. 2017). The Eighth Circuit later refused in another case, however, to recognize *Moore* as a "new rule of constitutional procedure." *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017).

On the other hand, petitioner claims that a handful of courts have applied *Moore*

retroactively. But none of the cases he cites considered *Moore*'s retroactivity under the *Teague* standard. Two case merely applied *Moore* and *Hall* to *Atkins* claims in collateral review without discussion of *Teague*. *Busby v. Davis*, 892 F.3d 735, 750 (5th Cir. 2018) (not resolving the question of whether the state court's decision "should be assessed under Supreme Court precedent as it existed as of the date" of the decision because "it is not outcome-determinative in this case"); *Wright v. State*, 256 So. 3d 766, 769-78 (Fla. 2018) (not discussing retroactivity and considering an intellectual disability claim properly presented in a post-conviction motion). The third case applied *Moore* and *Hall* to a case that was in the appellate pipeline when both cases were decided, and the court also applied a state statute that applied retroactively by its terms. *State v. Thurber*, 420 P.3d 389, 448-49 (Kan. 2018). The fourth case considered the retroactivity of *Atkins*, not of *Moore*. *In re Cathey*, 857 F.3d 221, 227 (5th Cir. 2017) ("There is no question that *Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court." (alteration omitted)).

Petitioner therefore has not established a split of authority on whether *Moore* established a new rule of constitutional law that must be applied retroactively under *Teague*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for petitioner: Richard L. Tennent, at 810 Broadway, Suite 200, Nashville, Tennessee 37203, on the 21st day of March 2019. I further certify that all parties required to be served have been served.

s/ Nicholas W. Spangler
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