NO. 17-6689

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE CHALMERS,
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

QUESTION PRESENTED

Must this Court's decision in *Hall v. Florida* be applied retroactively as a basis to revisit final collateral judgments?

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The order of the Supreme Court of Tennessee denying petitioner's application for permission to appeal is unreported but available at *Chalmers v. State*, No. W2016-02413-SC-R11-PD, 2017 Tenn. LEXIS 383 (June 9, 2017). (Pet. App. 1a.) The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal the denial of his motion to reopen state post-conviction proceedings is also unreported. (Pet. App. 2a-4a.)

JURISDICTIONAL STATEMENT

The Supreme Court of Tennessee denied petitioner's application for permission to appeal on June 9, 2017. (Pet. App. 1a.) Justice Kagan extended the time for filing a petition for writ of certiorari until November 6, 2017. *Chalmers v. Tennessee*, No. 17A184 (U.S. Aug. 16, 2017). Petitioner filed his petition on November 3, 2017. He invokes this Court's jurisdiction under 28 U.S.C. § 1257. (Pet. 1.)

STATUTORY PROVISION INVOLVED

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 . . . .

STATEMENT OF THE CASE

Petitioner was convicted of felony murder for the 1994 shooting death of Randy Allen. *State v. Chalmers*, 28 S.W.3d 913, 915-16 (Tenn. 2000). He was sentenced to death on the strength of the aggravating circumstance that he had been previously convicted of one or more felonies

with statutory elements involving the use of violence to a person. *Id*. at 914-15. The conviction and sentence were affirmed on direct appeal. *Id*. at 915, 920.

In 2001, petitioner filed a pro se application for post-conviction relief claiming that his counsel were ineffective. *Chalmers v. State*, No. W2013-02317-CCA-R3-PD, 2014 Tenn. Crim. App. LEXIS 664, at *6 (June 30, 2014), *perm. app. denied* (Tenn. Nov. 19, 2014). Appointed counsel filed an amended petition in 2003, claiming that petitioner was intellectually disabled and, therefore, ineligible for the death penalty. *Id*.

During the 2005 evidentiary hearing, petitioner presented the testimony of Dr. Keith Caruso as an expert in general and forensic psychiatry. *Id*. Dr. Caruso testified that petitioner had a verbal I.Q. score of 73, a performance I.Q. score of 85, and a full-scale I.Q. score of 77. *Id.* Dr. Caruso further testified that petitioner fell within the borderline range of intellectual functioning. *Id*.

Petitioner abandoned his intellectual-disability claim during the post-conviction hearing, and the post-conviction court did not address the issue in denying relief. *Id*. Petitioner also did not raise the issue on appeal from the denial of post-conviction relief. *Id*. at *7. The Tennessee Court of Criminal Appeals affirmed the post-conviction court's judgment, and the Supreme Court of Tennessee denied further review. *Chalmers v. State*, No. W2006-00424-CCA-R3-PD, 2008 Tenn. Crim. App. LEXIS 464, at *2 (June 25, 2008), *perm. app. denied* (Tenn. Dec. 22, 2008).

Petitioner filed a pro se application for federal habeas relief in 2009. *Chalmers v. Colson*, No. 2:09-cv-02051-SHL-dkv (W.D. Tenn. Jan. 27, 2009) (Docket entry No. 1). Appointed counsel filed an amended petition raising a claim of intellectual disability. *Chalmers v. Colson*, No. 2:09-cv-02051-SHL-dkv (W.D. Tenn. Nov. 25, 2009) (Docket entry No. 12). Federal proceedings remain pending but were stayed pending disposition of the state proceeding at issue here.

Chalmers v. Colson, No. 2:09-cv-02051-SHL-dkv (W.D. Tenn. May. 29, 2012) (Docket entry No. 75).

Petitioner filed his first motion to reopen state post-conviction proceedings in 2012. *Chalmers*, 2014 Tenn. Crim. App. LEXIS 664, at *7. He argued that *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011),[1] established a new retroactive constitutional right not recognized at the time of trial. *Chalmers*, 2014 Tenn. Crim. App. LEXIS 664, at *7. He also contended that an affidavit of a mental health professional opining that he is intellectually disabled amounted to new scientific evidence of his actual innocence. *Id*. Following the Tennessee Supreme Court's decision in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), which rejected the bases on which petitioner sought to reopen his post-conviction proceedings, petitioner amended his motion to include a petition for writ of error coram nobis, and he also directly invoked the intellectual-disability provisions of Tenn. Code Ann. § 39-13-203. *Id*. at *9.

The trial court denied coram nobis relief and the motion to reopen. *Id*. The Tennessee Court of Criminal Appeals denied petitioner's application for permission to appeal with respect to the motion to reopen. *Id*. at *10-11. In a separate appeal as of right from the denial of coram nobis relief, the appellate court affirmed that the petition was barred by the statute of limitations. *Id*. at *29. The court further concluded that Tennessee's intellectual disability statute did not create an independent cause of action to challenge eligibility for the death penalty. *Id*. at *30.

On May 26, 2015, petitioner filed a second motion to reopen post-conviction proceedings, again asserting that he is intellectually disabled but this time relying on *Hall v. Florida*, 134 S. Ct. 1986 (2014), as the source of a new retroactive constitutional rule. (Pet. App. 3a.) The trial court

[1] *Coleman* held that "experts [formulating an opinion about a defendant's I.Q.] may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields," including "the standard error of measurement, the Flynn Effect, and the practice effect." *Id*. at 242 & n.55.

summarily denied the motion. (Pet. App. 3a.) The Tennessee Court of Criminal Appeals denied petitioner's application to appeal, noting that in *Payne v. State*, 493 S.W.3d 478, 490-91 (Tenn. 2016), the Supreme Court of Tennessee had declined to hold that *Hall* would allow for retroactive review of Tennessee cases. (Pet. App. 4a.) The Tennessee Court of Criminal Appeals further stated that the holding in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), "would not, and did not, affect the retroactive application of *Hall* by Tennessee courts." (Pet. App. 4a.) The Tennessee Supreme Court denied further review. *Chalmers*, 2017 Tenn. LEXIS 383, at *1.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO REVIEW A DECISION ENFORCING STATE STATUTORY RESTRICTIONS ON SUCCESSIVE COLLATERAL REVIEW.

It is well established that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id*. Moreover, principles of comity require federal courts to defer to state court judgments on issues of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court . . . .").

This Court lacks jurisdiction to review the order of the Tennessee Court of Criminal Appeals because the order rests on a state law ground that is independent of any federal question and adequate to support the judgment. The order denying petitioner's application to appeal the denial of his motion to reopen includes no ruling on the merits of any Eighth Amendment claim. Rather, the order simply applies the Tennessee statute that restricts successive collateral attacks. Tennessee has no constitutional duty to provide any collateral-review procedures. *Pennsylvania*

v. Finley, 481 U.S. 551, 556-57 (1987). This Court lacks jurisdiction to review the enforcement of restrictions on such procedures that exist as a largesse of state law.

II. THIS CASE IS A POOR VEHICLE TO CONSIDER THE IMPORT OF *HALL* BECAUSE IT IS IN A FUNDAMENTALLY DIFFERENT POSTURE.

Petitioner contends that *Hall* must apply in this successive collateral-review case because *Hall* itself was in a collateral posture and because this Court has applied *Hall* to several other cases[2] in a collateral posture. (Pet. 10-11, 15-18.) But *Hall* and the other cases cited by petitioner are procedurally distinct from this case; they all involve claims under *Atkins v. Virginia*, 536 U.S. 304 (2002)—claims that were properly presented in their pertinent collateral contexts. No court has held that *Hall* requires a hearing for every intellectual-disability claim without regard to prior opportunity for presenting such a claim or to the finality of collateral-review proceedings. Despite having had the opportunity, petitioner never properly presented his *Atkins* claim under Tennessee law, and his initial collateral-review proceedings were finalized in 2008. Thus, his case falls outside the purview of *Hall* and other decisions applying it on collateral review.

Hall received a new intellectual-disability hearing because, by operation of the Florida courts' rigid interpretation of that state's intellectual-disability statute, he had been denied a "fair opportunity" to present evidence beyond his raw I.Q. scores. *Hall*, 134 S. Ct. at 2001. But Hall's *Atkins* claim was timely and properly presented under Florida's collateral-review procedures. *Hall v. State*, 109 So. 3d 704, 707 (Fla. 2012). Similarly, Moore properly presented his *Atkins* claim during an initial collateral-review bid that followed retrial proceedings. *Ex parte Moore*, 470

[2] Petitioner cites *Haliburton v. Florida*, 135 S. Ct. 178 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Martinez v. Davis*, 137 S. Ct. 1432 (2017), *Henderson v. Davis*, 137 S. Ct. 1450 (2017), *Carroll v. Alabama*, 137 S. Ct. 2093 (2017), *Weathers v. Davis*, 16-9446, 2017 U.S. LEXIS 6166 (U.S. 2017) and *Wright v. Florida*, No. 17-5575, 2017 U.S. LEXIS 6318 (U.S. 2017).

S.W.3d 481, 484 (Tex. Crim. App. 2015). In *Moore*, the Texas court had erred by completely disregarding current medical standards. *Moore*, 137 S. Ct. at 1049.

Martinez and Weathers both properly presented their *Atkins* claims during initial federal habeas review. *Martinez v. Davis*, 653 F. App'x 308, 313 (5th Cir. 2016); *Weathers v. Davis*, 659 F. App'x 778, 785 (5th Cir. 2016). Wright properly presented his claim in an initial motion to vacate, and Carroll properly presented his claim on direct appeal. *Wright v. State*, 213 So. 3d 881, 886 (Fla. 2017); *Carroll v. State*, 215 So. 3d 1135, 1147 (Ala. Crim. App. 2015).

While Haliburton raised his *Atkins* claim in a successive post-conviction motion, the claim was properly presented under Florida law. *Haliburton v. State*, No. SC12-893, 2013 Fla. LEXIS 1544, at *1 (July, 18 2013). Similarly, Henderson's claim arose from a successive federal habeas petition, but that petition had been pre-authorized by the Fifth Circuit. *Henderson v. Stephens*, 791 F.3d 567, 576 (5th Cir. 2015).

In contrast, petitioner never properly presented his *Atkins* claim despite having had a reasonable opportunity to do so. He offered evidence about his intellect during the 2005 post-conviction hearing but declined to present an intellectual-disability claim for determination at that time. Indeed, he completely abandoned any such claim until his first motion to reopen in 2012, nearly a decade after this Court decided *Atkins*. *Chalmers*, 2014 Tenn. Crim. App. LEXIS 664, at *6-7. Petitioner's lack of diligence in this regard sets his case apart from the cases he cites in support of certiorari.

Petitioner suggests that any *Atkins* claim would have been futile during his initial post-conviction proceedings because *Howell v. State,* 151 S.W.3d 450 (Tenn. 2004), "imposed a strict 'bright-line' cutoff requiring proof of an IQ if 70 or below." (Pet. 3.) But the *Coleman* decision demonstrates that *Howell* did not create an insurmountable hurdle to presenting comprehensive

evidence of intellectual functioning. 341 S.W.3d at 242 & n.55. Coleman's capital sentence was affirmed in 1981. *Coleman*, 619 S.W.2d 112, 116 (Tenn. 1981). Coleman's initial post-conviction bid concluded before *Atkins* was decided. *See Coleman v. State*, No. 31, 1984 Tenn. Crim. App. LEXIS 2883 (June 28, 1984), *perm. app. denied* (Tenn. Oct. 29, 1984). But in 2002, Coleman filed a motion to reopen based on *Atkins*, and that motion paved the way to a decision which allowed him to present comprehensive evidence of his intellectual disability, in accord with *Hall* and notwithstanding *Howell*. *See Coleman*, 341 S.W.3d at 224, 258.

After *Atkins* was decided, petitioner and Coleman were similarly situated. But unlike Coleman, petitioner failed to pursue an *Atkins* claim during the reasonable window for doing so. *Chalmers*, 2014 Tenn. Crim. App. LEXIS 664, at *6-7. Under these circumstances, *Hall* simply does not apply because it does not address whether an *Atkins* claim may be barred during a successive collateral attack after the claimant failed to avail himself of a "fair opportunity" to present the claim and supporting evidence earlier. *See Hall*, 134 S. Ct. at 2001. For all of these reasons, this case is a poor vehicle for considering the import of *Hall*.

III. THE DECISION OF THE TENNESSEE COURT OF CRIMINAL APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioner asserts that the decision below conflicts with this Court's holdings in *Montgomery*, 136 S. Ct. 718 and *Welch v. United States*, 136 S. Ct. 1257 (2016). (Pet. 8-9.) But even passing review of those decisions reveals their irrelevance to petitioner's claim of intellectual disability. *Montgomery* concerned the retroactive application of a prior holding that mandatory life sentences for juveniles violate the Eighth Amendment. 136 S. Ct. at 732. *Welch* concerned the retroactive application of another prior holding that the residual clause of the Armed Career Criminal Act of 1984 is void for vagueness. 136 S. Ct. at 1268. These decisions shed no light on

petitioner's claim of intellectual disability or on the propriety of Tennessee's enforcement of statutory restrictions on successive collateral relief.

Still, petitioner maintains that a conflict exists in that *Montgomery* and *Welch* "require the retroactive application of substantive rules of law, and *Hall* is such a rule." (Pet. 11.) Substantive rules requiring retroactive application include those "'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 136 S. Ct. at 728 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). But the procedural holding in *Hall* is not substantive because *Hall* did not protect any new class apart from the class protected by *Atkins*. Instead, *Hall* made clear that the class affected by its holding—those with an intellectual disability—is identical to the class protected by *Atkins*. *See Hall*, 134 S. Ct. at 1990.

Hall also did not announce any new rule insofar as the result there was dictated by *Atkins*. *Hall* noted that *Atkins* "itself acknowledges the inherent error in IQ testing" and that *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id*. at 1998 (citing *Atkins*, 536 U.S. at 308, n.3, 309 n.5.) *Hall* also recognized that "[t]he 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 1999 (emphasis added).

To be sure, *Montgomery* held that "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." 136 S. Ct. at 729. But as discussed in the previous section, *Hall* does not apply when there was prior opportunity for presenting comprehensive evidence of intellectual functioning. Given petitioner's extraordinary lack of diligence, *Hall* neither applies nor controls the outcome of this case. Moreover, *Montgomery* concerned the application of a new

rule to a claim that was "properly presented in the case." *Id*. at 732. Under Tennessee law, petitioner did not properly present an *Atkins* claim by abandoning it in 2005 and reasserting it during a second successive collateral attack in 2015. Thus, like the holding in *Hall*, *Montgomery*'s discussion of federal retroactivity standards is inapposite under the circumstances of this case.

IV. THE DECISION OF THE TENNESSEE COURT OF CRIMINAL APPEALS DOES NOT CONTRIBUTE TO ANY CONFLICT AMONG LOWER COURTS.

Petitioner also asserts that certiorari is appropriate because "lower courts are in conflict on the question [of] whether *Hall* is retroactive to cases on collateral review." (Pet. 12.) But petitioner cites only two state-court decisions holding that *Hall* is retroactive.[3] (Pet. 14.) These two decisions evince no mature conflict, and neither stands for the proposition suggested by petitioner—that *Hall* announced a new rule to be applied on collateral review without regard to prior opportunity for presenting a claim or evidence of intellectual disability. There is no conflict arising from that proposition because no court has adopted it.

In *Walls*, a Florida inmate repeatedly raised an intellectual-disability claim through initial post-conviction proceedings and two successive post-conviction motions. 213 So.3d at 343-44. Because the claim had been properly presented at each juncture, Walls received an initial evidentiary hearing before *Hall* and a new hearing after *Hall*. *Id*. at 344, 347. In *White*, a Kentucky inmate filed a successive collateral motion in 2004 that timely asserted an intellectual-disability claim. 500 S.W.3d 208, 211 (Ky. 2016). After further proceedings on that motion, the Kentucky Supreme Court held that any evaluation of White's intellect must "meet the dictates of *Hall*." *Id*. at 216.

Like petitioner's sentence, Walls' and White's sentences were affirmed on direct review before this Court decided *Atkins*, and so their intellectual-disability claims necessarily arose for

[3] Petitioner cites *Walls v. State*, 213 So.3d 340 (Fla. 2016) and *White v. Commonwealth*, 500 S.W.3d 208 (Ky. 2016).

the first time on collateral review. But Walls and White timely pursued *Atkins* claims under the collateral review laws of their respective states. And it was *Atkins* rather than *Hall* that initially opened the door for their claims. Petitioner showed no comparable diligence in pursuing his claim after *Atkins*. Thus, there is no sound basis to revisit his final collateral judgment.

The denial of certiorari in *Goodwin v. Steele*, 135 S. Ct. 780 (2014), and *Goodwin v. Missouri*, 135 S. Ct. 780 (2014), indicates this Court's reluctance to apply *Hall* without limitation in every collateral-review context. Goodwin's sentence also preceded *Atkins*. *Goodwin v. Steele*, 814 F.3d 901, 902 (8th Cir. 2014). But unlike petitioner, Goodwin timely pursued an *Atkins* claim during initial state collateral proceedings that concluded before *Hall* was decided. *Goodwin v. State*, 191 S.W.3d 20, 30-31 (Mo. 2006). Goodwin also exhausted his federal habeas remedies before *Hall* was decided. *Goodwin*, 814 F.3d at 902. After *Hall*, Goodwin unsuccessfully sought to benefit from its retroactive application by requesting stays of execution in state and federal court. *Id*. at 902-03. This Court denied certiorari in both cases, implicitly refusing to apply *Hall* as a basis for revisiting final collateral judgements. So too here, *Hall* provides no basis to revisit petitioner's final collateral judgment in 2017, after he abandoned an *Atkins* claim during initial post-conviction proceedings in 2005.

Finally, this Court has already denied a substantially identical joint petition filed by two Tennessee prisoners seeking certiorari review of the denial of motions to reopen that were premised on *Hall*. *See Sims and Sample v. Tennessee*, No. 16-445 (U.S. Mar. 20, 2017). There is no reason to treat the present petition any differently.

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: Jerome C. Del Pino, at 810 Broadway, Suite 200, Nashville, Tennessee 37203, on the 7th day of December, 2017. I further certify that all parties required to be served have been served.

s/ Nicholas W. Spangler
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