

CAPITAL CASE

No. 17-6689

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE CHALMERS,

Petitioner

vs.

STATE OF TENNESSEE

Respondent

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

REPLY TO BRIEF IN OPPOSITION

Jerome C. Del Pino*
Kristen M. Stanley
Gretchen L. Swift

Assistant Federal Public Defenders
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

*Counsel of Record

TABLE OF CONTENTS

I.	By refusing to apply <i>Hall v. Florida</i> retroactively, the decision below conflicts with <i>Montgomery v. Louisiana</i> , <i>Hall</i> , and <i>Haliburton v. Florida</i>	1
II.	This Court has jurisdiction where the court below based its decision on this Court's opinion in <i>Montgomery v. Louisiana</i>	1
III.	There is a conflict in the lower courts that this Court needs to resolve, lest Tyrone Chalmers and all persons exempt from the death penalty under <i>Hall</i> be executed despite promptly invoking <i>Hall</i>	2
	CONCLUSION.....	4

- I. By refusing to apply *Hall v. Florida* retroactively, the decision below conflicts with *Montgomery v. Louisiana*, 577 U.S. ___ (2016), *Hall v. Florida*, 572 U.S. ___ (2014), and *Haliburton v. Florida*, 574 U.S. ___ (2014)

In its decision dismissing Mr. Chalmers' motion to reopen under *Hall*, the Tennessee Court of Criminal Appeals (CCA) failed to acknowledge the effect of *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), and concluded that because *Montgomery* did not specify that *Hall v. Florida*, 572 U.S. ___ (2014), is retroactive, *Montgomery* had no bearing on Mr. Chalmers' motion. *Montgomery*, however, holds that any rule excluding an individual from the death penalty is a *substantive rule of law which applies retroactively*. *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 732, 735. Because the CCA's decision flies in the face of *Montgomery*, this Court should intervene to give meaning to *Montgomery* in the context of a claim under *Hall v. Florida*, just as it did in *Haliburton v. Florida*, 574 U.S. ___ (Oct. 6, 2014) (U.S. No. 13-10790) (granting certiorari and remanding for reconsideration in light of *Hall*).

- II. This Court has jurisdiction where the court below based its decision on this Court's opinion in *Montgomery v. Louisiana*

Respondent is incorrect in his claim that this Court has no jurisdiction to review the retroactivity of *Hall*. *Montgomery v. Louisiana* holds that when a petitioner on state collateral review maintains that 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," "[t]his Court has jurisdiction to review that determination." *Montgomery*, 136 S.Ct. at 732. That is precisely the case here.

This Court lacks jurisdiction only if there is an “adequate and independent” basis for the state court decision. Here, the CCA interpreted and applied the federal law of *Montgomery* in making its determination that *Hall* does not apply retroactively to Mr. Chalmers’s claim of intellectual disability. Because the CCA’s denial of relief by was not independent of federal law, this Court has jurisdiction. *See Foster v. Chatman*, 578 U.S. at ___, 136 S.Ct. at 1746-1747.

At bottom, the question whether *Hall* is retroactive (itself a federal question) is necessary reviewable by this court, where the lower court has failed to give *Hall* retroactive effect. This Court made that clear in *Montgomery*: “If . . . the Constitution establishes a rule and requires that the rule have retroactive application, then a state court’s refusal to give the rule retroactive effect is reviewable by this Court.” *Montgomery*, 577 U.S. at ___, 136 S.Ct. at 727. So it is here. This Court has jurisdiction.

III. There is a conflict in the lower courts that this Court needs to resolve, lest Tyrone Chalmers and all persons exempt from the death penalty under *Hall* be executed despite promptly invoking *Hall*

There is a conflict in the lower courts regarding the retroactivity of *Hall*, and Tennessee is the outlier. This conflict is highlighted by *Kilgore v. Secretary*, 805 F.3d 1301 (11th Cir. 2015), *cert. denied*, U.S. No. 16-9270 (November 13, 2017), in which the Eleventh Circuit held that *Hall* did announce a new rule of law, but believing the rule of *Hall* to be procedural rather than substantive, the Eleventh Circuit concluded that *Hall* does not require retroactive application. This Court requested the record in *Kilgore*, evidencing its interest in the Eleventh Circuit’s

ruling on *Hall*, but denied certiorari after the state court agreed to give Mr. Kilgore a hearing under the Eighth Amendment requirements of *Hall*. See *Florida v. Kilgore*, No. 53-1989-CF-000686-A1, Circuit Court, Tenth Judicial Circuit for Polk County (Oct. 4, 2017) (amended order). In granting Mr. Kilgore a hearing, the state court gave Kilgore what he was entitled to: an application of the Eighth Amendment standards of *Hall* to his evidence of intellectual disability.

Notwithstanding the Eleventh Circuit decision in *Kilgore*, persons in Florida are thus getting retroactive application of *Hall*, as are persons in Kentucky. See Petition, p. 14. Yet, given the errant decisions of the Tennessee courts and the Eighth Circuit (see Petition, pp. 12-15), Mr. Chalmers and others in Tennessee and Missouri will instead be executed even though they fall within *Hall*'s class of persons who are intellectually disabled under the Eighth Amendment – because they have at least one IQ test score of 70-75 or below and adaptive deficits.

The circuit split is established, and will not be resolved until this Court grants certiorari and resolves it. Previously, this Court refused to grant certiorari where the Tennessee courts had not explicitly applied *Montgomery*. Here, the Tennessee courts have now refused to apply *Montgomery* when squarely considering the question of *Hall*'s retroactivity under *Montgomery*. It is thus clear that the Tennessee courts are not properly applying *Montgomery* and do not understand that *Hall* is substantive and not procedural. Certiorari is therefore warranted to resolve the split and to allow this Court to enforce the retroactivity requirements it set forth in *Montgomery*.

Finally, Respondent’s “diligence” argument also fails. Within a year of this Court’s decision in *Hall*, Chalmers promptly and properly sought relief in the state courts invoking *Hall*. *See* Petition for Writ of Certiorari, pp. 6-7.

CONCLUSION

For all of the above reasons, this Court should grant the petition for writ of certiorari and order further briefing, or alternatively, this Court should grant certiorari, vacate and remand this case to the Tennessee courts for reconsideration in light of this Court’s intervening decision in *Moore v. Texas*, 581 U.S. ____ (2017). *See* Petition, pp. 15-18 (identifying cases vacated and remanded in light of *Moore*).

Respectfully submitted,

/s/ Jerome C. Del Pino

Jerome C. Del Pino*

Kristen M. Stanley

Gretchen L. Swift

Assistant Federal Public Defenders
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway Suite 200
Nashville, TN 37203

*Counsel of record

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply to brief in opposition was served via first class mail on this 15th day of December, 2017, upon counsel for Respondent, Nicholas W. Spangler.

/s/ Jerome C. Del Pino
Jerome C. Del Pino