

CAPITAL CASE

No. 17-A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

PERVIS TYRONE PAYNE,

Petitioner-Applicant

vs.

STATE OF TENNESSEE

Respondent

**APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

To The Honorable Elena Kagan, Associate Justice, and Circuit Justice For The United States Court Of Appeals For The Sixth Circuit: In this capital case, Applicant Pervis Payne respectfully applies for a sixty (60) day extension of time, to and including April 20, 2018, within which to file a petition for writ of certiorari.

In support of this application, Pervis Payne states:

1. This is a capital post-conviction proceeding in which Petitioner has sought application of *Hall v. Florida*, 572 U.S. ____ (2014) to his Eighth Amendment claim that he is intellectually disabled and ineligible for the death penalty.

2. On August 1, 2017, the Tennessee Court of Criminal Appeals denied Payne's motion to reopen his post-conviction petition and refused to apply *Hall*, concluding that *Hall* does not apply retroactively. *Payne v. State*, No. W2016-02326-CCA-R28-PD (Tenn. Crim.App. Aug. 1, 2017)(Exhibit 1).

3. Pervis Payne sought permission to appeal in the Tennessee Supreme Court, arguing that *Hall v. Florida* is retroactive to his case.

4. On November 21, 2017, the Tennessee Supreme Court denied permission to appeal. Exhibit 2.

5. Pervis Payne presently has until February 19, 2018 to file a petition for writ of certiorari. See U.S.S.Ct.R. 13.1.

6. Under Rule 13.5, this Court may extend the time for seeking certiorari for up to sixty (60) additional days. Your Honor should do so under the circumstances.

7. The Court of Criminal Appeals has rejected the retroactivity of *Hall* and refused to find it retroactive under *Montgomery v. Louisiana*, 577 U.S. ____ (2016), having concluded that the retroactivity principles espoused in *Montgomery* “would not, and did not, affect the retroactive application of *Hall* by Tennessee courts.” *Payne*, slip. op. at 4 (Exhibit 1).

8. The Court of Criminal Appeals decision conflicts with *Hall* itself, in which this Court applied its holding retroactively to a post-conviction proceeding.

9. The Court of Criminal Appeals decision also conflicts with *Haliburton v. Florida*, 574 U.S. ____ (2014), in which this Court granted certiorari in a post-conviction case and remanded for reconsideration in light of *Hall*.

10. The Court of Criminal Appeals decision similarly runs counter to *Montgomery*, which itself recognizes that a decision making an intellectually disabled person ineligible for the death sentence is substantive (not procedural) and therefore retroactive. See *Montgomery*, 577 U.S. at ____ (slip op. at 19) (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

11. And the Court of Criminal Appeals decision conflicts with various lower court decisions finding *Hall* retroactive. *See e.g., Walls v. State*, 213 So.3d 340 (Fla. 2016); *White v. Commonwealth*, 500 S.W.3d 208, 214-215 (Ky. 2016)

12. Pervis Payne's petition for writ of certiorari, therefore, will present significant issues worthy of this Court's review, including, for example: (a) Does *Hall v. Florida*, 572 U.S. ____ (2014) apply retroactively in post-conviction proceedings? and (b) Does *Montgomery v. Louisiana*, 577 U.S. ____ (2016) require the retroactive application of *Hall*?

13. In this capital case, Your Honor should therefore grant Pervis Payne a sixty (60) day extension of time, to and including May 21, 2018, within which to file a petition for writ of certiorari. Petitioner requires this additional time where undersigned counsel has had to attend to other responsibilities, including, for example, the filing of a petition for writ of certiorari in *Porter v. Genovese*, U.S. No. 17-7595 (filed Jan. 25, 2018), the preparation of a court of appeals brief in the capital case of *Hall v. Mays*, 6th Cir. Nos. 10-5658, 15-5436 (brief due Feb. 26, 2018), and preparation for a District Court hearing in *Guerrero v. Donahue*, M.D.Tenn. No. 1:14-cv-00151 (hearing scheduled Feb. 27, 2018).

14. Your Honor has previously granted similar extensions of time in intellectual disability cases involving questions about the retroactivity of *Hall*. *See e.g., Chalmers v. Tennessee*, U.S. No. 17A184 (Aug. 16, 2017)(Kagan, J.)(granting 60-day extension); *Sims v. State*, U.S. No. 16A37 (July 25, 2016)(Kagan, J.)(granting 60-day extension).

CONCLUSION

Accordingly, Your Honor should grant a 60-day extension, up to and including April 20, 2018, within which to file a petition for writ of certiorari.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this application was served upon counsel for Respondent, James Gaylord, P. O. Box 20207, Nashville, Tennessee 37202 this the 8th day of February, 2018.



Paul R. Bottei