

CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PERVIS TYRONE PAYNE,

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

QUESTIONS PRESENTED

In *Hall v. Florida*, 572 U.S. ____ (2014), this Court held, *inter alia*, that when assessing an Eighth Amendment claim of intellectual disability, a reviewing court must apply the standard error of measurement (SEM) to IQ test scores, and when a petitioner has an IQ test score of 70-75 or below, the court must conduct a holistic assessment whether the petitioner is intellectually disabled.

The Tennessee courts, however, have refused to apply *Hall* retroactively to Pervis Payne's intellectual disability claim. In an earlier petition for writ of certiorari, Payne sought retroactive application of *Hall* in a *coram nobis* proceeding. *Payne v. Tennessee*, U.S. No. 16-395. Respondent contended that Payne's *coram nobis* proceedings provided a poor vehicle for addressing *Hall*'s retroactivity, as the issue was properly addressed in a motion to reopen post-conviction proceedings under state law, and this Court denied certiorari. *Payne v. Tennessee*, 580 U.S. ____ (Mar. 20, 2017).

The vehicle problem in Payne's earlier petition has now vanished, as Pervis Payne's current petition seeks retroactive application of *Hall* on review of his motion to reopen post-conviction proceedings. And since this Court denied certiorari in No. 16-395, this Court has applied *Hall* retroactively in *Moore v. Texas*, 581 U.S. ____ (2017), but the Tennessee courts below have also failed to apply *Moore*.

The Questions Presented are:

1. Does *Hall v. Florida*, 572 U.S. ____ (2014) 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*, 581 U.S. ____ (2017)?

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OPINIONS BELOW

The Tennessee Supreme Court order denying Pervis Payne’s application for permission to appeal is unreported. *Payne v. State*, No. W2016-02326-SC-R11-PD (Tenn. Nov. 21, 2017); App. 1a. The order of the Tennessee Court of Criminal Appeals denying permission to appeal is also unreported. *Payne v. State*, No. W2016-02326-CCA-R28-PD (Tenn. Crim. App. Aug. 1, 2017); App. 2a-7a.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1257. The Tennessee Supreme Court’s order denying relief was entered November 21, 2017. On February 13, 2018, Justice Kagan granted an extension of time, up to and including April 20, 2018, within which to file a petition for writ of certiorari. *Payne v. Tennessee*, No. 17A858 (Feb. 13, 2018)(Kagan, 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. Pervis Payne was convicted of first-degree murder and sentenced to death in 1988, and his conviction and sentence became final in 1991. *Payne v. Tennessee*, 501 U.S. 808 (1991). In 2002, this Court held that the execution of the intellectually disabled violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002). In 2004, the Tennessee Supreme Court held that when applying Tennessee’s intellectual disability statute (Tenn. Code Ann. §39-13-203), a capital

petitioner could only be found intellectually disabled if s/he met the statute's bright-line requirement of a "functional intelligence quotient of 70 or below," and an IQ test's standard error of measurement (SEM) could not be considered when assessing intellectual disability. *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004).

It was not until 2011 that the Tennessee Supreme Court relaxed the unforgiving standard set forth in *Howell*, when *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), concluded that the standard error of measurement of IQ tests could be (but need not be) considered when assessing a petitioner's intellectual disability. *Id.* at 242 n. 55.

2. In light of *Coleman*, on December 27, 2012, Payne filed an amended petition for relief from his death sentence in the Criminal Court for the 30th Judicial District at Memphis. In that petition, he asserted that he is intellectually disabled, and he sought relief via two procedures: (1) via a motion to reopen his post-conviction proceedings under Tenn. Code Ann. 40-30-117, in which he sought retroactive application of *Coleman*; and (2) under Tennessee's *coram nobis* statute, Tenn. Code Ann. §40-26-105. After the lower courts denied relief, the Tennessee Court of Criminal Appeals concluded that Payne could not invoke *Coleman* as grounds for relief under Tennessee's motion to reopen statute, Tenn. Code Ann. §40-30-117. *Payne v. State*, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App. July 29, 2013).

In the *coram nobis* proceedings, the Tennessee Supreme Court granted permission to appeal, but denied relief. *Payne v. State*, 493 S.W.3d 478 (Tenn.

2016). The Tennessee Supreme Court held that Payne could not seek relief via Tennessee's *coram nobis* statute. *Id.* at 484-487. Though reviewing a petition for *coram nobis* relief, the Court also opined that under Tennessee's post-conviction motion to reopen statute (Tenn. Code Ann. §40-30-117), Payne could not reopen his post-conviction proceedings and receive retroactive application of this Court's intervening 2014 decision in *Hall v. Florida*, 572 U.S. ____ (2014). The Court concluded that *Hall* did not apply retroactively, and it believed (erroneously) that Payne had not filed a motion to reopen proceedings within a year of *Hall*. *See Payne*, 493 S.W.3d at 489-491 & n. 8.

3. Seeking review of the Tennessee Supreme Court's decision, Payne filed a petition for writ of certiorari, querying whether *Hall v. Florida* must be applied retroactively in collateral proceedings. Pet. for Cert. in *Payne v. Tennessee*, O.T. 2016, No. 16-395, pp. i-ii. In doing so, Payne acknowledged potential vehicle problems with his petition, since he sought review of a lower court *coram nobis* proceeding. *Id.*, pp. 2, 31-34. Respondent contended that, given the procedural posture of the case, the question of *Hall*'s retroactivity was not cleanly presented by Payne's petition. Brief in Opposition in *Payne v. Tennessee*, O.T. 2016, No. 16-395, pp. 8-11. Respondent did agree, however, that Payne had indeed sought the retroactive application of *Hall* via a timely filed a motion to reopen his state post-conviction proceedings, which was then pending before the Tennessee Court of Criminal Appeals. *Id.*, p. 10.

On March 20, 2017, after relisting Payne’s petition (along with a similar petition in *Sims & Sample v. Tennessee*, U.S. No. 16-445), this Court denied certiorari. *Payne v. Tennessee*, 580 U.S. ____ (2017).

4. As noted, Payne has indeed sought retroactive application of *Hall* by filing a timely May 21, 2015, motion to reopen his post-conviction proceedings under Tenn. Code Ann. §40-30-117, which is the subject of this petition for writ of certiorari. In his motion, he has maintained that *Hall* provides grounds for relief because, under §40-30-117(a)(1), *Hall* “establish[es] a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required.”

Pervis Payne has supported his motion with the affidavit of Dr. Daniel Reschly, Ph.D., a nationally-renowned expert in intellectual disability, who opines that Payne is intellectually disabled – including under the standards defining intellectual disability promulgated by the American Psychiatric Association in its Diagnostic & Statistical Manual, Fifth Edition (DSM-5), published in 2013, and the American Association of Intellectual and Developmental Disabilities (AAIDD) in its eleventh edition of *Intellectual Disability: Definition, Classification, and Systems of Support*, published in 2010 and revised in 2012 (AAIDD-11).

In concluding that Pervis Payne is intellectually disabled, Dr. Reschly has evaluated each of Pervis Payne’s IQ test scores by applying the SEM which recognizes (as held in *Hall v. Florida*) that an IQ test score is actually a range of scores around that score. Applying, *inter alia*, the SEM to Pervis Payne’s three IQ

test scores of 78 (on a Wechsler Adult Intelligence Scale, Revised, or WAIS-R) in 1987, 78 on the WAIS-R in 1996, and 74 on the WAIS-IV in 2010, Dr. Reschly has concluded that Pervis Payne meets the first prong for determining intellectual disability: He has significantly subaverage intellectual functioning as shown by an IQ of approximately 70 or below. Dr. Reschly has further declared that Pervis Payne satisfies the second prong of the Eighth Amendment test for intellectual disability, because he suffers deficits in adaptive behavior in the areas of conceptual skills and practical skills. Dr. Reschly also concludes that, where Pervis Payne's intellectual and adaptive deficits were apparent during the developmental period (or before age 18), Pervis Payne meets all the criteria for intellectual disability.

5. Given such proof that he is intellectually disabled, Pervis Payne's motion to reopen has requested retroactive application of *Hall v. Florida*, 572 U.S. ____ (2014), to his evidence of intellectual disability. In his motion, he has explained that in *Hall*, this Court decided for the first time "how intellectual disability must be defined" under the Eighth Amendment. *Id.* at ____ (slip op. at 7). This Court thus "consult[ed] the medical community's opinions," and concluded that for purposes of the Eighth Amendment, intellectual disability requires "three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Id.* at ____ (slip op. at 8).

In assessing the intellectual functioning criteria in *Hall*, this Court for the first time required courts reviewing Eighth Amendment intellectual disability

claims to take into account the SEM of all standardized IQ tests given to an individual. *Id.* at ____ (slip op. at 9-16). This Court thus “agree[d] with medical experts 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.” *Id.* at ____ (slip op. at 21). Thus, as *Hall* now holds as a matter of Eighth Amendment jurisprudence, to determine “whether an intellectual disability exists once the SEM applies and the individual’s IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning.” *Id.* at ____ (slip op. at 12).

6. In arguing that *Hall* establishes new Eighth Amendment standards that must be applied retroactively, Payne has noted that *Hall*’s Eighth Amendment holding abrogated many aspects of Tennessee law on intellectual disability. To this day, Tennessee’s intellectual disability statute requires a petitioner to meet a “bright-line” requirement (*Keen v. State*, 398 S.W.3d 594, 603 (Tenn. 2012)) that the petitioner have a functional IQ of 70 or below. *See* Tenn. Code Ann. §39-13-203(a)(1). *Hall*’s Eighth Amendment holding is not so rigid, however, as *Hall* requires a holistic assessment of intellectual disability so long as a petitioner has at least one IQ test score of 75 or below (as *Hall* did, and as Payne does). Also, the Tennessee Supreme Court decision in *Coleman v. State*, *supra*, does not require, but merely permits, consideration of the SEM of IQ tests. *See Coleman*, 341 S.W.3d at 242 n. 55. *Hall*, however, has set forth an Eighth Amendment requirement that the

SEM of IQ tests must always be considered. Moreover, even the Tennessee courts have recognized that by requiring reviewing courts to consider an IQ test score as a “range of scores” (given the standard error of measurement), *Hall* abrogates Tennessee law which had previously required experts to testify to an individual’s IQ as being a fixed number. *See State v. Hernandez*, 2014 Tenn. Crim. App. Lexis 736 *48 n.3 (July 29, 2014).

In other words, *Hall* has imposed new Eighth Amendment obligations in Tennessee. Pervis Payne thus maintained below that *Hall* establishes a new constitutional rule that is retroactive, as evidenced by this Court’s decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which requires retroactive application of all “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.” *Id.* at 330. After this Court decided *Montgomery v. Louisiana*, 577 U.S. ____ (2016), Payne emphasized that *Montgomery* confirms that any rule that places a person within the class of persons excluded from the death sentence because of intellectual disability is a substantive rule of law, and therefore retroactive. *See Montgomery*, 577 U.S. at ____ (slip op. at 19)(requiring retroactive application of rules by which “a prisoner receives a procedure through which he can show that he belongs to [a] protected class.”). *Hall*, he asserts, is such a rule.

7. The trial court denied Payne’s motion to reopen and Payne sought permission to appeal in the Court of Criminal Appeals. While Payne’s case remained pending in the Court of Criminal Appeals, this Court decided *Moore v. Texas*, 581 U.S. ____ (2017), in which this Court applied *Hall* retroactively to a case

on collateral review, citing *Hall* no fewer than 18 times. *See Moore*, 581 U.S. at ____ (slip op. at 9-12, 14-18). On March 28, 2017, Payne thus promptly cited *Moore* to the Court of Criminal Appeals as supplemental authority proving *Hall*'s retroactivity.

8. The Court of Criminal Appeals denied relief. Relying on the Tennessee Supreme Court's earlier decision in *Payne*, 493 S.W.3d 478 (Tenn. 2016), the Court of Criminal Appeals held that *Hall* does not apply retroactively. Pet. App. 5a. The Court of Criminal Appeals also rejected Payne's argument that *Montgomery v. Louisiana*, 577 U.S. ____ (2016), establishes that *Hall* is a substantive, retroactive rule because it places Payne in the class of persons exempt from execution: "The holdings of the *Montgomery* opinion would not, and did not, affect the retroactive application of *Hall* by the Tennessee courts." Pet. App. 5a. The Court of Criminal Appeals further refused to find that relief was warranted under *Moore v. Texas*, because *Moore* post-dated the trial court's consideration of the motion to reopen. Pet. App. 7a.

9. On permission to appeal in the Tennessee Supreme Court, Payne urged the Tennessee Supreme Court to overrule *Payne v. State* and to apply *Hall* retroactively, because it constitutes a substantive rule of Eighth Amendment law. He cited *Moore v. Texas*, 581 U.S. ____ (2017), *Montgomery v. Louisiana*, 577 U.S. ____ (2016), and *Welch v. United States*, 578 U.S. ____ (2016), as proving the retroactivity of *Hall*, as well as orders from this Court in which this Court granted certiorari, vacated and remanded for application of *Moore* to several federal habeas corpus proceedings. *See Henderson v. Davis*, 581 U.S. ____ (2017)(No. 15-7974);

Martinez v. Davis, 581 U.S. ____ (2017)(No. 16-6445); *Long v. Davis*, 583 U.S. ____ (2017)(No. 16-8909). The Tennessee Supreme Court denied permission to appeal without mentioning *Moore* or *Montgomery*, or any of the federal habeas cases remanded for further consideration in light of *Moore*. *See* Pet. App. 1a.

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*, 581 U.S. ____ (2017), which proves the retroactivity of *Hall*, and this Court should thus grant certiorari, vacate, and remand for further consideration in light of *Moore*; (2) The Tennessee courts' failure to apply *Hall* retroactively conflicts directly with *Moore*, as well as this Court's retroactivity jurisprudence in *Montgomery v. Louisiana*, 577 U.S. ____ (2016) and *Welch v. United States*, 578 U.S. ____ (2016), which require retroactive application of substantive rules of law; (3) The lower courts are in conflict about the retroactivity of *Hall* and that conflict is properly resolved now; and (4) This petition presents an appropriate vehicle for addressing the retroactivity of *Hall*.

- I. Where This Court Has Applied *Hall* Retroactively In The Intervening Decision Of *Moore v. Texas*, 581 U.S. ____ (2017), But The Tennessee Courts Have Failed To Apply *Moore*, This Court Should Grant Certiorari, Vacate The Judgment Below, And Remand For Reconsideration In Light Of *Moore*

Perhaps the cleanest way of resolving this petition and ensuring the proper retroactive application of *Hall v. Florida*, 572 U.S. ____ (2014), is to grant certiorari, vacate the judgment below, and remand for further consideration in light of *Moore v. Texas*, 581 U.S. ____ (2017).

The Tennessee courts have refused to apply the clear teaching of *Moore* because the Court of Criminal Appeals has concluded that *Moore* could not have changed the trial court's ruling because *Moore* was decided after the motion to reopen was filed and the trial court ruled. Pet. App. 7a. That, however, misapprehends the state courts' role in this matter. As this Court has held, when this Court issues a controlling ruling during the course of a pending proceeding, the lower courts are constrained to apply this Court's intervening ruling to that proceeding. *See e.g., Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993).

The Tennessee courts, however, have ignored that principle, and as a result, Pervis Payne has been denied application of this Court's intervening decision in *Moore v. Texas*, which establishes that *Hall v. Florida* applies retroactive to cases on collateral review. Where *Moore* has cited and applied *Hall* retroactively to a case on collateral review thus proving *Hall*'s retroactivity, the Tennessee courts may not ignore *Moore* by invoking flawed reasoning that *Moore* did not exist when the motion to reopen was considered in the trial court. Rather, under *Harper v. Va. Dept. of Taxation, supra*, the appellate courts below were required to apply *Moore* because it had been decided during the pendency of this litigation.

Because the Tennessee courts have refused to apply *Moore* despite the requirement that they do so, this Court should simply grant certiorari, vacate, and remand (GVR) for further consideration in light of *Moore*, where *Moore* certainly appears to answer the questions posed by this petition. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996)(GVR order appropriate where lower court did not fully consider

intervening development for which there is reasonable probability of a different result if applied by lower court).

II. The Decision Below Conflicts With *Montgomery v. Louisiana*, 577 U.S. ____ (2016) And *Welch v. United States*, 578 U.S. ____ (2016), Which Mandate The Retroactive Application Of *Hall*, Which Is A Substantive Rule Of Law

This Court’s decisions in *Montgomery v. Louisiana*, 577 U.S. ____ (2016) and *Welch v. United States*, 578 U.S. ____ (2016) also compel the retroactive application of *Hall*. *Montgomery* and *Welch* hold that courts must retroactively apply “substantive” rules of law. *Montgomery*, 577 U.S. at ____ (slip op. at 6-8); *Welch*, 578 U.S. at ____ (slip op. at 8). A substantive rule of law is one that prohibits “a certain category of punishment for a class of defendants because of their status.” *Montgomery*, 577 U.S. at ____ (slip op. at 14), 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*, 578 U.S. at ____ (slip op. at 11).

That is precisely what *Hall* does. *Hall* constitutionally requires courts to consider the standard error of measurement of IQ tests, requires a holistic evaluation of all evidence of intellectual disability, requires states to apply professional standards for determining intellectual disability, and requires a state to consider all evidence of intellectual disability so long as a petitioner has one obtained IQ test score of 75 or below. *Hall*, 572 U.S. at ____ (slip op. at 10, 19-21). *Hall* thus alters, redefines, and refines the class of persons who are considered intellectually disabled under the constitution, such that they may not be punished by death. *Hall* thus circumscribes the class of persons who may not be executed

because of their intellectual disability. As such, *Hall* establishes a substantive rule that must receive retroactive application under *Welch* and *Montgomery*.

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*, 577 U.S. at ____ (slip op. at 18-19). Just as *Atkins* is substantive and retroactive because it identifies the class of persons exempt from execution, *Hall* likewise identifies and categorizes persons who may not be executed under the Eighth Amendment. As such, *Hall* is substantive within the meaning of *Montgomery*, and it is likewise retroactive.

Below, the Tennessee courts have failed to apply *Montgomery*'s teaching to Pervis Payne's claim that *Hall* is retroactive. The Tennessee courts have failed to acknowledge that *Hall* 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 *Hall*'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 *Hall* 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, Tennessee has joined the Sixth, Eighth, and Eleventh Circuits which have concluded that *Hall* is not retroactive to cases on collateral review. *See* Pet. App. 4a. To conclude that *Hall* is not retroactive, the Court of Criminal Appeals here simply cited the Tennessee Supreme Court's decision in *Payne v. State*, 493 S.W.3d at 490, which in turn cited with approval the Eighth and Eleventh Circuit's rulings in *Goodwin v. Steele*, 814 F.3d 901 (8th Cir. 2014)(per curiam) and *In Re Henry*, 757 F.3d 1151 (11th Cir. 2014). *See also Kilgore v. Secretary*, 805 F.3d 1301 (11th Cir. 2015)(finding *Hall* to be a new rule and not retroactive to cases on collateral review). Recently, the Sixth Circuit likewise concluded that *Hall* is not retroactive by simply following the lead of the Eighth and Eleventh Circuits. *In Re Payne*, 2018 U.S.App. Lexis 2991 *7 (6th Cir. Feb. 8, 2018). All these courts have thus adopted a similar rationale, concluding that *Hall* 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 Kentucky Supreme Courts have explicitly held that *Hall* is retroactive. In *White v. Commonwealth*, 500 S.W.3d 208 (Ky. 2016), the Kentucky Supreme Court has held that *Hall* is retroactive, because it is a substantive rule of law that excludes a class of persons from the death penalty.

White, 500 S.W.3d at 215. Similarly, in *Walls v. State*, 213 So.3d 340 (Fla. 2016), the Florida Supreme Court found *Hall* retroactive because *Hall* limits the class of persons who may be executed. And, without explicitly addressing the retroactivity of *Hall*, the Fifth Circuit has applied *Hall* retroactively in federal habeas proceedings when granting leave to file a second or successive federal habeas petition. *In Re Cathey*, 857 F.3d 221, 236-241 (5th Cir. 2017).

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. Indeed, in the majority and dissenting opinions in *Goodwin* and *In Re Henry*, the Eighth and Eleventh Circuits have carefully laid out the arguments for and against the retroactive application of *Hall*. *See Goodwin*, 814 F.3d at 902 (majority opinion); *Id.* at 904 (Murphy, J., concurring and dissenting); *In Re Henry*, 757 F.3d at 1152 (majority opinion); *Id.* at 1163 (Martin, J., dissenting). In turn, the Tennessee Supreme Court in *Payne*, the Tennessee courts below, and the Sixth Circuit in *Payne* have added little to the discussion, simply adopting the reasoning of the Eighth and Eleventh Circuits. *See* Pet App. 4a (Court of Criminal Appeals citing *Payne v. State*, 493 S.W.3d at 490, which cites *Goodwin* and *In Re Henry*); *Payne v. State*, 493 S.W.3d at 490 (citing *Goodwin* and *In Re Henry*); *In Re Payne*, 2018 U.S.App. Lexis 2991 *7 (6th Cir. Feb. 8, 2018)(citing *Goodwin* and *Kilgore v. Secretary*, 805 F.3d 1301 (11th Cir. 2015)).

In reality, there is little more the lower courts can say about *Hall*'s retroactivity. It is a binary choice. Under *Montgomery* and *Welch*, either *Hall* is a

substantive rule of law and retroactive (as, for example, the Kentucky Supreme Court and dissenters in *Goodwin* and *In Re Henry* have concluded) or it is a procedural rule and not retroactive (as the majorities have concluded in *Goodwin* and *In Re Henry*). Any prospect of further percolation is dim, as confirmed by the decision below and the recent decision of the Sixth Circuit, which merely parroted the reasoning of other courts. Accordingly, the time is now ripe to grant certiorari to resolve this established conflict.

IV. This Petition Presents An Appropriate Vehicle For Deciding The Retroactivity Of *Hall*

Finally, this Court should grant certiorari because this petition presents an appropriate vehicle for addressing and answering the question whether *Hall* is retroactive to cases on collateral review. In his prior petition for writ of certiorari, Pervis Payne sought retroactive application of *Hall* in state *coram nobis* proceedings, which posed a potential vehicle problem for addressing the retroactivity of *Hall*. *See* Pet. for Cert. in *Payne v. Tennessee*, O.T. 2016, No. 16-395, pp. 2, 31-34.

With this petition, Pervis Payne seeks retroactive application of *Hall* 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). The potential vehicle problems facing Payne's prior petition are thus not present here. In fact, in earlier proceedings, Respondent noted that seeking relief via a motion to reopen post-conviction proceedings was the proper means for

Payne to secure retroactive application of *Hall*. See Brief in Opposition in *Payne v. Tennessee*, O.T. 2016, No. 16-395, p. 10.

As this Court explained in *Montgomery v. Louisiana*, 577 U.S. ____ (2016), when a petitioner on state collateral review 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.” *Id.*, 577 U.S. at ____ (slip op. at 14). 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.

Accordingly, this Court may decide the retroactivity of *Hall* in these proceedings, and it may do so free from the vehicle problems associated with Payne’s earlier petition for writ of certiorari.

This petition, therefore, presents an appropriate vehicle for addressing the questions presented, and this Court should grant certiorari, especially where, given Pervis Payne’s raw IQ test scores and Dr. Reschly’s uncontroverted affidavit (*See* pp. 4-5, *supra*), it appears that Payne is entitled to relief under *Hall*’s Eighth Amendment requirements, because he is intellectually disabled and thus Tennessee lacks the power to carry out the death sentence under *Hall*.

CONCLUSION

This Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Moore v. Texas*, 581 U.S. ____ (2017). Otherwise, this

Court should grant certiorari to decide whether *Hall v. Florida*, 572 U.S. ____ (2014) must be applied retroactively on collateral review.

Respectfully Submitted,

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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 16th day of April, 2018.

/s/ *Paul R. Bottei*