

NO. 17-8543

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IN THE  
SUPREME COURT OF THE UNITED STATES

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PERVIS TYRONE PAYNE,  
Petitioner,

v.

TENNESSEE,  
Respondent.

---

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

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RESPONDENT'S BRIEF IN OPPOSITION

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**CAPITAL CASE**

**QUESTION PRESENTED**

Does this Court have jurisdiction to decide whether its decision in *Hall v. Florida* mandates successive collateral review of a criminal judgment by Tennessee courts?

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## **OPINIONS BELOW**

The order of the Tennessee Supreme Court denying petitioner's application for permission to appeal is unreported but available at *Payne v. State*, No. W2016-02326-SC-R11-PD, 2017 Tenn. LEXIS 829 (Nov. 21, 2017). (Pet. 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. 2a-7a.)

## **JURISDICTIONAL STATEMENT**

The Tennessee Supreme Court denied petitioner's application for permission to appeal on November 21, 2017. (Pet. 1a.) Justice Kagan extended the time for filing a petition for writ of certiorari until April 20, 2018. *Payne v. Tennessee*, No. 17A858 (U.S. Feb. 13, 2018). Petitioner filed his petition on April 16, 2018. He invokes this Court's jurisdiction under 28 U.S.C. § 1257. (Pet. 1.)

## **CONSTITUTIONAL AND STATUTORY PROVISION 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. § 40-30-117(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**

In 1988, a Shelby County, Tennessee, jury convicted petitioner, Pervis Tyrone Payne, of two counts of first-degree murder for killing Charisse Christopher and her two-year-old daughter, Lacie. *State v. Payne*, 791 S.W.2d 10, 11 (Tenn. 1990). The jury also convicted petitioner of assault with intent to commit first-degree murder of Christopher's three-year-old son, Nicholas. *Id.* Petitioner was sentenced to death for each of the murders and to 30 years in prison for the assault. *Id.*

During sentencing proceedings, clinical psychologist Dr. John T. Hutson provided mitigation testimony that petitioner had "a full scale IQ of 78 with a variance of plus or minus three, with a verbal IQ of 78, plus or minus 3, and a performance IQ of 82, plus or minus 4," which placed him "approximately one standard deviation below the norm of average intelligence." *Payne v. State*, No. 02C01-9703-CR-00131, 1998 Tenn. Crim. App. LEXIS 68, at \*42 (Jan. 15, 1998), *perm. app. denied* (Tenn. June 8, 1998).

The Tennessee Supreme Court affirmed petitioner's convictions and sentences on direct appeal. *Payne*, 791 S.W.2d at 21. This Court granted certiorari on the question of whether the Eighth Amendment bars admission of victim impact evidence during the penalty phase of a capital

trial and affirmed the judgment of the Tennessee Supreme Court. *Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

In 1992, petitioner filed a petition for post-conviction relief and a petition for a writ of error coram nobis. *Payne*, 1998 Tenn. Crim. App. LEXIS 68, at \*2-3 n.3. He argued, among other things, that his trial counsel was ineffective for failing to investigate and present certain mitigation evidence during sentencing. *Id.* at \*28. At the post-conviction hearing, Dr. George Baroff, another clinical psychologist, “confirmed Dr. Hutson’s evaluation of [petitioner], i.e., an IQ of 78, which placed [petitioner] in a category of borderline intelligence.” *Id.* at \*47. The trial court denied the petition for post-conviction relief and the petition for a writ of error coram nobis. *Id.* at \*2. In a consolidated appeal, the Tennessee Court of Criminal Appeals affirmed both denials. *Id.* at \*59. The Tennessee Supreme Court denied further review.

In 1998, petitioner sought a writ of habeas corpus under 28 U.S.C. § 2254, which the federal district court denied. *Payne v. Bell*, 418 F.3d 644, 652 (6th Cir. 2005). The United States Court of Appeals for the Sixth Circuit affirmed the judgement of the district court. *Id.* at 646. This Court denied certiorari. *Payne v. Bell*, 548 U.S. 908 (2006).

In 2017, petitioner filed a motion in the Sixth Circuit seeking permission to file a successive § 2254 petition. *In re Payne*, No. 17-6390, 2018 U.S. App. LEXIS 2991, at \*3 (6th Cir. Feb. 8, 2018). He argued that *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), should be applied retroactively to his case. The Sixth Circuit disagreed and denied petitioner’s motion. *In re Payne*, 2018 U.S. App. LEXIS 2991, at \*9. Petitioner then filed a petition for a writ of mandamus, which is pending with this Court. *In re Payne*, No. 17-8871 (U.S. Apr. 30, 2018).

In 2012, petitioner moved to reopen post-conviction proceedings under Tenn. Code Ann. § 40-30-117(a)(1), (2). *Payne v. State*, 493 S.W.3d 478, 481 (Tenn. 2016). He argued that, in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011),<sup>1</sup> the Tennessee Supreme Court established a new and retroactive constitutional right that was not recognized at the time of his trial. *Id.* at 482. Later that year, petitioner filed an “Amended Petition For Relief From Death Sentences,” requesting relief under the coram nobis statute, Tenn. Code Ann. § 40-26-105, and the intellectual disability statute, Tenn. Code Ann. § 39-13-203.<sup>2</sup> *Id.* at 483. He argued that a report prepared by Dr. Daniel Reschly, Ph.D., was new and previously unavailable scientific evidence that he is intellectually disabled and, thus, actually innocent of capital murder and not eligible for execution. *Id.*

According to Dr. Reschly’s report, petitioner took the Wechsler Adult Intelligence Scale-Revised (WAIS-R) in 1987 and achieved a full-scale I.Q. score of 78. *Id.* at 482. He took the test again in 1996 and achieved another full-scale I.Q. score of 78. *Id.* In 2010, he took the fourth edition of the Wechsler Adult Intelligence Scale (WAIS-IV) and achieved a full-scale I.Q. score of 74. *Id.* Dr. Reschly applied the Flynn Effect<sup>3</sup> to adjust these I.Q. scores to 75.4, 72.4, and 73.7 respectively. *Id.* Based on his clinical judgment and consideration of the Flynn Effect, estimation of error, practice effect, and cultural differences, Dr. Reschly found that petitioner’s “functional intelligence clearly is at or below 70.” *Id.* He also found that petitioner has significant deficits in adaptive behavior due to substantial limitations in the conceptual skills and practical skills

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<sup>1</sup> *Coleman* held that “experts [formulating an opinion regarding 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 consideration of “standard error of measurement, the Flynn Effect, and the practice effect.” *Id.* at 242 n.55.

<sup>2</sup> Tenn. Code Ann. § 39-13-203(a)(1)-(3) defines intellectual disability as: (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (“I.Q.”) of 70 or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by 18 years of age.

<sup>3</sup> “The Flynn Effect refers to the observed phenomenon that I.Q. test scores tend to increase over time.” *Coleman*, 341 S.W.3d at 242 n.55.

domains. *Id.* Finally, he found that petitioner’s functional intelligence and significant deficits in adaptive behavior were present before the age of 18. *Id.* Based on these findings, Dr. Reschly opined that petitioner is intellectually disabled. *Id.*

The trial court denied the motion to reopen, and the Tennessee Court of Criminal Appeals denied permission to appeal. *Id.* at 483-84. The Tennessee Supreme Court denied further review. *Payne v. State*, No. W2013-01215-SC-R11-PD, 2013 Tenn. LEXIS 956 (Nov. 14, 2013). Petitioner did not seek further review from this Court.

The trial court also denied petitioner’s coram nobis claims, finding them barred by the one-year statute of limitations. *Id.* at 484. The Court of Criminal Appeals affirmed, finding that petitioner’s 23-year delay in seeking relief was unreasonable. *Payne v. State*, No. W2013-01248-CCA-R3-PD, 2014 Tenn. Crim. App. LEXIS 1005, at \*32-33, 41, 43 (Oct. 30, 2014). The Court of Criminal Appeals also acknowledged this Court’s intervening opinion in *Hall*, noting that unlike *Hall*, “petitioner has not been precluded during his original trial or during post-conviction proceedings from presenting evidence, other than his raw I.Q. test scores, to establish that his ‘functional intelligence quotient’ when he committed the murder was 70 or below.” *Payne*, 2014 Tenn. Crim. App. LEXIS 1005, at \*39.

The Tennessee Supreme Court affirmed the denial of coram nobis relief, bypassing the statute of limitations question and finding instead that petitioner failed to state a cognizable coram nobis claim. *Payne*, 493 S.W.3d at 486. While acknowledging that the post-conviction reopening proceedings were outside the scope of review, the court also rejected petitioner’s argument that *Hall* applies retroactively within the meaning of Tenn. Code Ann. § 40-30-117(a)(1), Tennessee’s post-conviction reopening statute. *Payne*, 493 S.W.3d at 491. This Court denied certiorari. *Payne v. Tennessee*, 137 S. Ct. 1327 (2017).

On May 21, 2015, petitioner filed another motion to reopen, again asserting his intellectual disability and citing *Hall* as the source of a new retroactive constitutional rule. (Pet. 19a.) The post-conviction court summarily denied the motion. (Pet. 15a-16a.) The Tennessee Court of Criminal Appeals denied permission to appeal, citing the holding in *Payne v. State*, 493 S.W.3d 478, 490-91 (Tenn. 2016), that *Hall* would not allow for reopening of Tennessee post-conviction cases. (Pet. 5a.) The 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. 5a.) Similarly, the court stated that *Welch v. United States*, 136 S. Ct. 1257 (2016), “would have no effect upon the retroactive application of *Hall* by Tennessee Courts.” (Pet. 6a.) The Tennessee Supreme Court denied further review. (Pet. 1a.)

### **REASONS FOR DENYING THE WRIT**

This Court has already denied substantially identical petitions from three other Tennessee prisoners. *See Sims and Sample v. Tennessee*, No. 16-445 (U.S. Mar. 20, 2017); *Chalmers v. Tennessee*, No. 17-6689 (U.S. Jan. 8, 2018). There is no reason to treat the present petition any differently.

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

Article III of the Constitution and 28 U.S.C. § 1257(a) limit this Court’s appellate jurisdiction over state courts to reviewing federal questions. *See* Stephen M. Shapiro, *Supreme Court Practice* 208 (10th ed. 2013) (“[T]he Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. § 1257.”). Section 2 of Article III grants this Court “appellate Jurisdiction” to review state cases “arising under” the Constitution,

federal laws, or treaties “with such Exceptions, and under such Regulations as the Congress shall make.” U.S. Const., art. III, § 2. Section 1257(a) limits 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) is limited “to enforcing the commands of the United States Constitution”).

Specifically, “in a case coming from a state court this court can consider only Federal questions, and ... it cannot entertain the case unless the decision was against the plaintiff in error upon those questions.” *Leathe v. Thomas*, 207 U.S. 93, 98 (1907). In contrast, this Court “must accept as controlling” a state court ruling on a state law issue. *Am. Ry. Express Co. v. Kentucky*, 273 U.S. 269, 272 (1927). Consequently, this Court’s appellate jurisdiction over state court decisions is limited to “correct[ing] them to the extent that they incorrectly adjudge federal rights.” *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). That is, this Court may intervene on a state court decision “only to correct wrongs of constitutional dimension.” *Smith v. Phillips*, 455 U.S. 209, 221, 102 S. Ct. 940, 948 (1982).

Here, the state court’s decision that successive collateral review is not available to petitioner’s intellectual-disability claim does not involve an issue of constitutional dimension because 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 avenue is through the “Post-Conviction Procedure Act.” Tenn. Code Ann. § 40-30-101. The Act has built-in restrictions on the availability of collateral review. For example, it “contemplates the filing of only one (1) petition for post-

conviction relief . . . [and] [i]n no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. Tenn. Code Ann. § 40-30-102(c). But, as pertinent here, “[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).

Petitioner moved to reopen post-conviction proceedings under Tenn. Code Ann. § 40-30-117(a)(1), which permits state post-conviction proceedings to be reopened when 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, if retrospective application of that right is required, and if the motion is filed within one 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. The state court denied that motion.

This Court lacks jurisdiction to review the state court’s decision denying successive collateral review under Tenn. Code Ann. § 40-30-117(a), because that denial “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). To be clear, the state court’s decision includes no ruling on any Eighth Amendment claim. The court simply applied a Tennessee statute that restricts successive collateral attacks on criminal judgments. Specifically, the court concluded that *Hall* does not meet the state law criteria for successive collateral review under Tenn. Code Ann. § 40-30-117(a). (Pet. 5a.) The court relied primarily on another state court decision from one of petitioner’s previous appeals, *Payne*, 493 S.W.3d 478, *cert denied*, 137 S. Ct. 1327 (2017). In *Payne*, petitioner argued, as he does here, that *Hall* satisfies Tenn. Code Ann. § 40-30-117(a), because it “established a new constitutional right that must be applied retroactively.” *Payne*, 493

S.W.3d at 489. The Tennessee Supreme Court flatly rejected petitioner’s argument, concluding (1) that *Hall* established no new constitutional right to a collateral-review hearing for intellectual disability claims and (2) that even if *Hall* established such a right, the decision did not apply retroactively. *Id.* at 490-91.

Petitioner might argue under *Montgomery* that the question of “retrospective application” or retroactivity embedded within Tenn. Code Ann. § 40-30-117(a) is a federal one over which this Court has jurisdiction. *Montgomery* held that the conclusion 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. But *Montgomery* says nothing about a state court’s authority to determine, as a matter of limiting successive collateral review, when a “final ruling of an appellate court establish[es] a constitutional right that was not recognized as existing at the time of trial.” Tenn. Code Ann. § 40-30-117(a). The Post-Conviction Procedure Act sets forth the state law criteria for qualifying appellate rulings. See Tenn. Code Ann. § 40-30-122 (“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”). Petitioner cites no authority that those criteria encompass a federal question.

By way of reference to *Payne*, 493 S.W.3d at 490, the state court’s reaffirmation that *Hall* did not establish any new constitutional right to a hearing on petitioner’s intellectual-disability claim rests on a state law ground that is independent of any federal retroactivity question and independent to support the judgement. This Court lacks jurisdiction to second-guess that enforcement of a state procedural bar on successive collateral review—review that is not mandated by the constitution.

**II. THIS CASE IS NO VEHICLE TO CONSIDER THE IMPORT OF *HALL* BECAUSE THE STATE COURT DID NOT RESOLVE ANY EIGHTH AMENDMENT ISSUE TO WHICH *HALL* WOULD APPLY.**

This case is not a vehicle for considering *Hall*'s impact on an Eighth Amendment claim since the state court refused to reach that claim based on the enforcement of a state procedural bar.

Petitioner contends that *Hall* must apply to his successive collateral-review bid because this Court has applied *Hall* to several other cases in a collateral-review posture. (Pet. 7-10.) Petitioner cites *Moore v. Texas*, 137 S. Ct. 1039 (2017), and points out that *Martinez v. Davis*, 137 S. Ct. 1432 (2017), *Henderson v. Davis*, 137 S. Ct. 1450 (2017), and *Long v. Davis*, 138 S. Ct. 72 (2017), were all remanded for consideration of *Moore*. (Pet. 8-9.) But *Hall* itself and the other cases cited by petitioner are procedurally distinct from this case; they all involve claims that were (1) brought under *Atkins v. Virginia*, 536 U.S. 304 (2002), (2) properly presented in the pertinent collateral-review context, and (3) adjudicated on Eighth Amendment grounds.

In all petitioner's remand examples, there had been an adjudication of an Eighth Amendment claim to which *Hall* applied. 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 presented under Florida's collateral-review procedures. *Hall v. State*, 109 So. 3d 704, 707 (Fla. 2012). Accordingly, the Florida courts reached the merits of Hall's Eighth Amendment claim, and this Court's review focused on that underlying constitutional question.

Like Hall, Moore properly presented his *Atkins* claim during an initial collateral-review bid that followed retrial proceedings. *Ex parte Moore*, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015). Martinez and Long also properly presented their fully exhausted *Atkins* claims during initial federal

habeas review. *Martinez v. Davis*, 653 F. App'x 308, 313-14 (5th Cir. 2016); *Long v. Davis*, 663 F. App'x 361, 363-65 (5th Cir. 2016). And though this Court's remand in *Henderson* arose from an *Atkins* claim in a successive federal habeas petition, that claim had been properly presented in state court and adjudicated on the merits after a hearing. *Henderson v. Stephens*, 791 F.3d 567, 572-76 (5th Cir. 2015).

Here, on the other hand, there has been no adjudication of petitioner's Eighth Amendment claim because he never properly presented that claim through the procedures available under Tennessee law. Instead, the state court's decision rests on the application of a state procedural bar to successive collateral review—review for which there is no constitutional mandate. No court has held that *Hall* requires a state court to adjudicate an intellectual-disability claim without regard to whether that claim was properly presented under state law. Since the state court did not reach petitioner's Eighth Amendment claim due to its enforcement of a state procedural bar, this case offers no vehicle for review.

### **III. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH ANY OPINION OF THIS COURT.**

Petitioner asserts that the state court's decision conflicts with this Court's holdings in *Montgomery*, 136 S. Ct. 718 and *Welch*, 136 S. Ct. 1257. (Pet. 11.) But those decisions are irrelevant 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 adequacy of Tennessee's statutory restriction on successive collateral relief.

Still, petitioner maintains that a conflict exists because *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 it does 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* 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).

Moreover, *Montgomery*’s discussion of federal retroactivity standards is inapposite under the circumstances of this case. *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 *Montgomery* concerned the retroactive application of a new rule to an Eighth Amendment claim that was “properly presented in the case.” *Id.* at 732. The Court held that “[i]n adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution.” *Id.* (emphasis added).

Here, the state court refused to reach petitioner’s Eighth Amendment claim because it did not meet the criteria of Tenn. Code Ann. § 40-30-117(a)(1). *Montgomery* does not preclude Tennessee’s enforcement of that gate-keeping provision for successive collateral review. Nor does *Hall* require Tennessee courts to adjudicate an intellectual-disability claim that was never properly presented under state law.

#### **IV. THE STATE COURT’S DECISION DOES NOT CONTRIBUTE TO ANY CONFLICT AMONG LOWER COURTS.**

Petitioner also asserts that certiorari is appropriate because “lower courts are in conflict on *Hall*’s retroactivity.” (Pet. 12.) But petitioner cites only two state court decisions holding that *Hall* is retroactive and a Fifth Circuit decision that does not address the issue.<sup>4</sup> (Pet. 13-14.) These decisions neither evince a mature conflict nor do they support the proposition suggested by petitioner—that *Hall* requires Tennessee to ignore its own statutory restrictions on successive collateral review and adjudicate an Eighth Amendment claim that was never properly presented under state law. 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 at 211. 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.

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<sup>4</sup> Petitioner cites *Walls v. State*, 213 So.3d 340 (Fla. 2016), *White v. Commonwealth*, 500 S.W.3d 208 (Ky. 2016), and *In re Cathey*, 857 F.3d 221 (5th Cir. 2017).

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 the first time on collateral review. But Walls and White properly presented *Atkins* claims under the collateral review laws of their respective states. And *Atkins* rather than *Hall* opened the door for their underlying Eighth Amendment claims. Petitioner has never properly presented an *Atkins* claim under Tennessee's collateral review procedures. Thus, there is no sound basis to revisit his final collateral judgment.

### 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: Paul R. Bottei, at 810 Broadway, Suite 200, Nashville, Tennessee 37203, on the 18th day of June, 2018. I further certify that all parties required to be served have been served.

s/ Nicholas W. Spangler  
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