

CAPITAL CASE

No. 17-8543

**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**

REPLY TO BRIEF IN OPPOSITION

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1. In Question Presented #2, Pervis Payne has requested that this Court GVR in light of *Moore v. Texas*, 581 U.S. ____ (2017). In the Brief in Opposition, Respondent does not contest that *Moore* applies here or that application of *Moore* would resolve the petition. Instead, as Respondent frames this issue, the question presented is simply whether there is jurisdiction to review this matter. BIO p. i. As shown *infra*, this Court does have jurisdiction. Thus, where this Court has jurisdiction and Respondent does not contest Petitioner's assertion that *Moore* will resolve the petition, this Court should indeed GVR in light of *Moore*, which will ensure the proper application of *Hall v. Florida*, 572 U.S. ____ (2014) to these proceedings.

2. Respondent's jurisdictional argument is fundamentally flawed. The question whether *Hall* (or any decision of this Court) applies retroactively in collateral proceedings is a federal question for which this Court has jurisdiction under 28 U.S.C. §1257. As this Court emphasized in *Montgomery v. Louisiana*, 577 U.S. ____ (2016): "[I]f . . . 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." *Id.* (slip op. at 5). That is precisely the case here, given the questions presented.

Moreover, under Tennessee's post-conviction statute (Tenn. Code Ann. §40-30-117(a)(1)) *Hall* must be applied to Payne's case if it is a new rule that requires retrospective application. Application of Tennessee's statute is essentially coterminous with Question Presented #1: By answering Question #1 in Payne's

favor, this Court will necessarily require the Tennessee courts to apply *Hall* retroactively on remand when applying the statute. Because this Court's decision on Question #1 will affect the outcome of this case, there is no question that this Court is not providing an advisory opinion, and hence that this Court does have jurisdiction under 28 U.S.C. §1257 – exactly as it did in *Montgomery*.

In a similar vein, Respondent asserts that Payne's *Hall* claim cannot be reviewed by this Court because the application of the post-conviction statute provides an adequate and independent state ground that bars review under §1257. Not so. The application of any state bar is fully dependent on an interpretation of the federal case of *Hall*. As this Court held in *Foster v. Chatman*, 578 U.S. ____ (2016): "When application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.'" *Id.* (slip op. at 7), *citing Ake v. Oklahoma*, 470 U.S. 68 (1985). So it is here.

So long as *Hall* is retroactive, the application of §40-30-117 cannot provide, and does not provide, any bar to this Court's jurisdiction that is independent of federal law. In fact, before denying relief, the court below discussed not only *Hall*, but the federal cases of *Montgomery* and *Welch v. United States*, 578 U.S. ____ (2016), as the predicates for the court's ultimate decision whether Payne can obtain relief in these proceedings. Pet.App. 5a. Having interpreted federal law in order to apply the state statute, the state court rendered a decision that was not independent of federal law. The decision below thus confirms that there was, and

is, no independent state law ground precluding this Court's review under §1257.

The decision below was dependent upon an interpretation of federal law.

This Court has jurisdiction.

3. Because this Court has jurisdiction, this Court should either GVR in light of *Moore* or grant certiorari and set this matter for further proceedings on the question of *Hall's* retroactivity.

Indeed, Respondent does not dispute that Pervis Payne is intellectually disabled and would thus be entitled to relief under *Hall*. This petition, arising from state court proceedings, thus provides an excellent vehicle for determining *Hall's* retroactivity – especially where it does not suffer the vehicle problem Payne faced in an earlier petition, U.S.No. 16-395, where he sought relief in a state *coram nobis* proceeding. Payne does have before this Court another pending request for retroactive application of *Hall* which comes from the lower federal courts, and as such, that petition arrives at this Court in a more challenging posture. *In Re Payne*, U.S. No. 17-8871. This current petition (No. 17-8543) would appear to be a better vehicle for deciding the issue in Payne's case. Yet if this Court were not to grant certiorari to resolve this petition, then it should grant review in 17-8871 and rule in Payne's favor in that proceeding.

Either way, this Court should grant certiorari in No. 17-8543 and/or grant review in No. 17-8871 to ensure that Payne receives the benefit of *Hall*, which categorically precludes his execution – and which we know from *Moore* and *Hall* must be applied to all cases on collateral review.

4. One last point. Respondent tries to claim that Payne should not be entitled to application of *Hall* because he first sought relief once *Hall* was decided whereas others sought relief before *Hall* was decided. BIO pp. 10-11. Respondent's position is unreasonable. It makes no sense to say that where Payne's claim for relief seeks the application of standards first promulgated in *Hall*, he should somehow be precluded from securing relief under *Hall* because he invoked his *Hall* rights after *Hall* was decided, not before. To state Respondent's position is to see its folly. Why should Payne be penalized for promptly invoking rights first established by this Court in 2014? He shouldn't. The whole point of retroactivity is that a new decision may be invoked and applied once it is decided. Under this Court's retroactivity jurisprudence, a petitioner need not anticipatorily invoke a right before it was actually enunciated, at the risk of losing that not-yet-expressed right. Payne's invocation of *Hall* was prompt and timely.

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 reply was served via first-class mail upon Nicholas W. Spangler, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 28th day of June, 2018.

/s/ Paul R. Bottei