

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**

PETITIONER'S SUPPLEMENTAL BRIEF

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Seeking application of *Hall v. Florida*, 572 U.S. ____ (2014) to his evidence of intellectual disability, Pervis Payne has requested that this Court either: (1) grant certiorari, vacate, and remand for further consideration in light of *Moore v. Texas*, 581 U.S. ____ (2017), which applied *Hall* retroactively; or (2) grant certiorari and conclude that *Hall* is retroactive on collateral review. Petition, p. i.

The recently-filed petition for writ of certiorari in *Shoop v. Hill*, U.S. No. 18-56, confirms that certiorari is warranted here, as does the recent Eighth Circuit decision in *Jackson v. Kelley*, ____ F.3d ____ (8th Cir. Aug. 7, 2018).

Shoop asks whether a federal habeas court properly applies *Hall* and/or *Moore* to a death sentence reviewed by a state court before *Hall* and *Moore* were decided. While *Shoop* specifically queries whether *Hall* and/or *Moore* were “clearly established law” under 28 U.S.C. §2254(d), this Court in *Shoop* ultimately must decide whether *Hall* is an application of *Atkins v. Virginia*, 536 U.S. 304 (2002) or whether it broke new ground, establishing a new rule of law. If *Hall* was not “clearly established” and is new, the question still arises whether *Hall* applies retroactively. *See e.g., Kilgore v. Secretary*, 805 F.3d 1301, 1312 (11th Cir. 2015) (after finding that *Hall* was not clearly-established law for purposes of §2254(d), court of appeals addressed whether *Hall* still applied, concluding that *Hall* did not apply because it is a new rule of law and not retroactive), *cert. denied*, 583 U.S. ____ (2017)(No. 16-9270).¹

¹ In *Kilgore v. Jones*, U.S. No. 16-9270, this Court called for the record before denying certiorari.

That is the essential question that Payne presents, but in the context of a state court proceeding. Payne's petition and *Shoop* confirm that the lower courts – state and federal – face a recurring question on which this Court's guidance is needed: Does *Hall* apply retroactively to cases on collateral review?

In fact, in *Jackson v. Kelley*, ___ F.3d ___ (8th Cir. Aug. 7, 2018), the Eighth Circuit recently required application of *Moore v. Texas*, 581 U.S. ___ (2017) to a death sentence that was imposed in 1996 -- more than 20 years before. Where *Jackson* shows that *Moore* is retroactive, *Jackson* clearly indicates that *Hall* must be retroactive as well. *Compare Ex Parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018)(on remand from this Court in *Moore v. Texas*, concluding that petitioner sentenced to death in 1980 is not intellectually disabled under current clinical standards).

Thus, short of GVR'ing in light of *Moore v. Texas*, this Court should otherwise grant certiorari. Where Payne's state case and the federal case of *Shoop* present similar issues but in different procedural postures, this Court may wish to grant certiorari in both cases to address the related issues as presented in those different postures. *See e.g., Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012)(addressing ineffectiveness of counsel regarding plea offers in both state proceedings and federal habeas corpus proceedings).

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) applies retroactively on collateral review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this supplemental brief was served via first-class mail upon Nicholas W. Spangler, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this 16th day of August, 2018.

/s/ *Paul R. Bottei*