

CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SAMPLE,

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

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)?

See Payne v. Tennessee, U.S. No. 17-8543 (same questions presented)

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OPINIONS BELOW

The Tennessee Supreme Court order denying Michael Sample's application for permission to appeal is unreported. *Sample v. State*, No. W2016-02324-SC-R11-PD (Tenn. Nov. 21, 2017); App. 1a. The opinion of the Tennessee Court of Criminal Appeals denying permission to appeal is also unreported. *Sample v. State*, No. W2016-02324-CCA-R28-PD (Tenn. Crim. App. Aug. 4, 2017); App. 2a-6a.

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. *Sample v. Tennessee*, No. 17A857 (Feb. 12, 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. Michael Sample was convicted of first-degree murder and sentenced to death, and the Tennessee Supreme Court affirmed his convictions and death sentences in 1984. *State v. Sample*, 680 S.W.2d 447 (Tenn. 1984). He was denied post-conviction relief in the Tennessee courts. *See e.g., Sample v. State*, 2010 Tenn. Crim. App. Lexis 487 (June 15, 2010).

2. After this Court's May, 2014 decision in *Hall v. Florida*, 572 U.S. ____ (2014), Sample filed a motion to reopen his post-conviction petition under Tenn. Code Ann. §40-30-117, contending that *Hall* established a new rule of law retroactively applicable to his case, and making him ineligible for the death sentence. The post-conviction trial court denied relief, and the Tennessee Court of Criminal Appeals denied permission to appeal, concluding that regardless of whether *Hall* established a new rule of law, it was not retroactive. *Sample v. State*, No. W2015-00713-CCA-R28-PD (Tenn. Crim. App. July 1, 2015). The Tennessee Supreme Court denied application for permission to appeal. *Sample v. State*, No. W2015-00713-SC-R11-PD (Tenn. May 9, 2016).

3. Sample then petitioned this Court for a writ of certiorari on the question whether *Hall v. Florida* applies retroactively to cases on collateral review. *Sims & Sample v. Tennessee*, U.S. No. 16-445. This Court denied certiorari. *Sims v. Tennessee*, 580 U.S. ____ (Mar. 20, 2017).

4. In the meantime, Michael Sample had filed in state court a petition for writ of error *coram nobis* on the ground that he is intellectually disabled and therefore exempt from execution under the Eighth Amendment, as set forth in *Hall*. After the Tennessee Supreme Court concluded in *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016) that *Hall* could not be applied in *coram nobis* proceedings, the trial court ordered Sample to amend his pending petition.

5. On June 2, 2016, Sample thus filed an amended petition for relief, in which he filed, *inter alia*, a renewed motion to reopen his post-conviction

proceedings seeking retroactive application of *Hall v. Florida*, 572 U.S. ____ (2014).

He maintained that he was entitled to reopen his post-conviction proceedings because *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.” Tenn. Code Ann. §40-30-117(a)(1)(motion to reopen statute).

As he has explained, *Hall* established Eighth Amendment standards that apply here: *Hall* requires a reviewing court to consider the standard error of measurement (SEM) of all IQ tests, and if a petitioner has at least one IQ test score of 75 or below, a court must conduct a holistic evaluation of intellectual disability applying standards employed by the medical community. *See generally Hall*, 572 U.S. at ____ (slip op. at 7-22). *Hall*’s application in Tennessee and to Michael Sample’s case is of special significance, because the Tennessee Supreme Court in 2004 prohibited the consideration of SEM (*Howell v. State*, 151 S.W.3d 450 (Tenn. 2004)), Tennessee law to this day only permits (but does not require) consideration of SEM (*Coleman v. State*, 341 S.W.3d 221, 242 n. 55 (Tenn. 2011)), and Tennessee’s intellectual disability statute (Tenn. Code Ann. §39-13-203) requires a petitioner to establish proof that s/he meets a bright-line requirement (*Keen v. State*, 398 S.W.3d 594, 603 (Tenn. 2012)) of having an IQ of 70 or below – something which *Hall* says is constitutionally impermissible.

In support his renewed motion to reopen his post-conviction proceedings to have *Hall* applied retroactively to his Eighth Amendment intellectual disability claim, Michael Sample relied on the sworn affidavit of Dr. Joette James, Ph.D., who

has provided her “professional opinion to a reasonable degree of psychological certainty, that Mr. Sample fulfills the criteria for a diagnosis of Intellectual Disability . . . in each of the prongs outlined by both the AAIDD [American Association on Intellectual And Developmental Disabilities] and the DSM-5 [the American Psychiatric Association’s Diagnostic and Statistical Manual Of Mental Disorders, Fifth Edition], and as outlined and explained in *Hall v. Florida*.”

5. The trial court denied the motion to reopen, and Sample sought relief in the Tennessee Court of Criminal Appeals. While Sample’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, Sample thus promptly cited *Moore* to the Court of Criminal Appeals as supplemental authority proving the retroactivity of *Hall*.

The Court of Criminal Appeals denied permission to appeal. Relying on the Tennessee Supreme Court’s decision in *Payne v. State*, 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 Sample’s argument that *Montgomery v. Louisiana*, 577 U.S. ____ (2016) establishes that *Hall* is a substantive, retroactive rule because it places Sample within 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 Tennessee courts.” Pet. App. 4a. The Court of Criminal Appeals also concluded that this Court’s retroactivity holding

in *Welch v. United States*, 578 U.S. ____ (2016) “has no effect on the settled law as stated in *Payne v. State of Tennessee* finding *Hall v. Florida* has no retroactive application.” Pet. App. 5a. The Court of Criminal Appeals further refused to find that relief was warranted in light of *Moore v. Texas* and summary dispositions issued by this Court after *Moore*, because such decisions post-dated the ruling of the post-conviction trial court. Pet. App. 5a.

On permission to appeal in the Tennessee Supreme Court, Sample 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 granting certiorari, vacating a judgment, and remanding 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 v. Florida*, 572 U.S. ____ (2014) 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 most direct 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 misapprehends the state courts' role in this matter. As this Court has stated repeatedly, when a controlling ruling is issued by this Court during the course of a pending proceeding,

the lower courts are constrained to apply this Court's intervening ruling to those proceedings. *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, Michael Sample has been denied application of this Court's intervening decision in *Moore v. Texas*, which establishes that *Hall v. Florida* applies retroactively to cases on collateral review, like Sample's. Where *Moore* has cited and applied *Hall* retroactively to a case on collateral review and thus proven *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*, which was decided during the pendency of this litigation.

Thus, where the Tennessee courts have refused to apply *Moore* despite the requirement that they do so, this Court should 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 states 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 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* 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 Michael Sample'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, the Tennessee courts join 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 adopting the reasoning 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 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 to grant 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. 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 *Halls* 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 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 prior proceedings in the case of *Payne v. Tennessee*, U.S. No. 16-395, the Respondent State of Tennessee noted that Payne’s seeking relief via a motion to reopen post-conviction proceedings was the proper means of securing retroactive application of *Hall*. See Brief in Opposition, *Payne v. Tennessee*, O.T. 2016, No. 16-395, p. 10. That is precisely what Michael Sample has done here.

And as this Court explained in *Montgomery v. Louisiana*, 577 U.S. ____ (2016), when a petitioner on state collateral review like Sample 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. There is no question that this Court has jurisdiction to decide the retroactivity of *Hall* in these proceedings.

Thus, this petition presents an appropriate vehicle for addressing the questions presented, and this Court should grant certiorari. This is especially true

where, as Dr. James has explained in her sworn affidavit, Michael Sample is indeed intellectually disabled and exempt from execution under the Eighth Amendment when one applies the medical standards set forth by the AAIDD and the American Psychiatric Association in DSM-5 -- the standards that *Hall* itself requires.

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 in collateral proceedings.

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 18th day of April, 2018.

/s/ Paul R. Bottei