

NO. 17-8567

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SAMPLE,
Petitioner,

v.

TENNESSEE,
Respondent.

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

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 *Sample v. State*, No. W2016-02324-SC-R11-PD, 2017 Tenn. LEXIS 847 (Nov. 21, 2017). 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-6a.)

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. *Sample v. Tennessee*, No. 17A857 (U.S. Feb. 12, 2018). Petitioner filed his petition on April 18, 2018. He invokes this Court's jurisdiction under 28 U.S.C. § 1257. (Pet. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS 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

A Shelby County, Tennessee, jury convicted petitioner and his codefendant, Larry McKay, of two counts of first-degree felony murder for the 1981 shooting deaths of Benjamin Cooke and Steve Jones during the perpetration of armed robbery. *State v. McKay*, 680 S.W.2d 447, 448 (Tenn. 1984). The jury sentenced petitioner to death for each of the murders. *See Sample v. State*, 82 S.W.3d 267, 269 (Tenn. 2002). The Tennessee Supreme Court affirmed petitioner's convictions and sentences and denied rehearing. *McKay*, 680 S.W.2d at 453. This Court denied certiorari. *Sample v. Tennessee*, 470 U.S. 1034 (1985).

Petitioner then filed numerous unsuccessful petitions for collateral relief in state court, none of which included a claim that he was ineligible for execution due to intellectual disability. *See McKay v. State*, No. 25, 1989 Tenn. Crim. App. LEXIS 153, at *6 (Mar. 1, 1989), *perm. app. denied* (Tenn. July 3, 1989); *McKay v. State*, No. 02C01-9404-CR-00059, 1994 Tenn. Crim. App. LEXIS 701, at *5 (Oct. 19, 1994), *perm. app. denied* (Tenn. Jan. 30, 1995); *Sample v. State*, No. 02C01-9104-CR-00062, 1995 Tenn. Crim. App. LEXIS 115, at *16 (Feb. 15, 1995), *perm. app. denied* (Tenn. Jan. 27, 1997); *State v. McKay*, No. 02C01-9506-CR-00175, 1996 Tenn. Crim. App. LEXIS 460, at *5 (July 26, 1996), *perm. app. denied* (Tenn. Dec. 2, 1996); *Sample v. State*, Nos. 02C01-9505-CR-00131, 02C01-9505-CR-00139, 1996 Tenn. Crim. App. LEXIS 597, at *45 (Sep.

30, 1996), *perm. app. denied* (Tenn. Jan. 27, 1997); *Sample v. State*, No. W1999-01202-CCA-R3-PC, 2001 Tenn. Crim. App. LEXIS 33, at *42 (Jan. 17, 2001), *reversed by* 82 S.W.3d at 279 (Tenn. Aug. 2, 2002); *Sample v. State*, No. W2008-02466-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 487, at *57 (June 15, 2010), *perm. app. denied* (Tenn. Nov. 12, 2010).

In 2011, petitioner filed a petition for a federal writ of habeas corpus, followed by an amended petition, neither of which included a claim of intellectual disability. *See Sample v. Carpenter*, No. 11-2362-SHL-dkv, 2014 U.S. Dist. LEXIS 180618, at *9 (W.D. Tenn. Oct. 20, 2014). In 2014, he filed a motion to amend his petition to include an intellectual-disability claim and a motion to stay federal proceedings to allow exhaustion of that claim in state court. *Id.* at *1. This was the first time petitioner had asserted an intellectual-disability claim during the 30 years since his conviction. The district court granted both motions, and federal proceedings remain stayed. *Id.* at *17-18.

In 2014, petitioner filed a motion to reopen state post-conviction proceedings, contending that *Hall v. Florida*, 134 S. Ct. 1986 (2014), created a new constitutional rule requiring retroactive application for the purposes of Tenn. Code Ann. § 40-30-117(a)(1). (Pet. 2.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal, concluding that *Hall* did not announce a new rule of constitutional law that applied retroactively. (Pet. 2.) The Tennessee Supreme Court denied further review. (Pet. 2.) This Court denied certiorari. *Sims and Sample v. Tennessee*, No. 16-445 (U.S. Mar. 20, 2017).

On June 2, 2016, petitioner filed another motion to reopen, again asserting that *Hall* announced a new constitutional rule that must apply retroactively. (Pet. 3a.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal. (Pet. 5a-6a.) The Tennessee Supreme Court denied further review. (Pet. 1a.)

REASONS FOR DENYING THE WRIT

This Court has already denied substantially identical petitions from Sample and 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 involving the same issue, *Payne*, 493 S.W.3d 478, *cert denied*, 137 S. Ct. 1327 (2017). *Payne* argued, as petitioner 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 that 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. Moreover, petitioner’s motion to reopen was filed in 2016, well after the one-year window under Tenn. Code. Ann. § 40-30-117(a)(1), for seeking relief based on the 2014 decision in *Hall*. This also presents a state law procedural bar that is independent of any federal question and independent to support the judgment. This Court lacks jurisdiction to second-guess enforcement of these state procedural bars 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. 5.) 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 to review any Eighth Amendment issue.

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. 7-9.) 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. 8-9.) 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. 9.) But petitioner cites only two state court decisions holding that *Hall*

is retroactive and a Fifth Circuit decision that does not address the issue.¹ (Pet. 10.) 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.

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.

¹ 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).

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 20th day of June, 2018. I further certify that all parties required to be served have been served.

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