

CAPITAL CASE

No. 17-8567

**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**

REPLY TO BRIEF IN OPPOSITION

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1. In Question Presented #2, Michael Sample 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 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 Sample'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 Sample'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, this Court is not being asked to provide an advisory opinion, and hence this Court does have jurisdiction – exactly as it did in *Montgomery*.

In a similar vein, Respondent asserts that Sample’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. Pet.App. 4a-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. This Court should therefore decide the retroactivity of *Hall* in these proceedings unless, of course, it GVRs in light of *Moore*, as Sample has already requested. Indeed, *Moore* is an intervening decision from this Court that was not available when this Court considered Sample's earlier petition in U.S. No. 16-445. In light of the intervening decision in *Moore*, this current petition provides Sample's first opportunity for application of *Moore*. Moreover, Respondent does not dispute that Michael Sample is intellectually disabled and would thus be entitled to relief under *Hall*, once applied to his case. Because Sample's meritorious intellectual disability claim merely requires this Court to remand in light of *Moore*, this petition provides an excellent vehicle for requiring the application of *Moore* or otherwise addressing the retroactivity of *Hall*, especially where the decision below cannot be squared with this Court's retroactivity jurisprudence as expressed in *Montgomery* and *Welch*.

4. One last point. Respondent tries to claim that Sample should not be entitled to application of *Hall* because he first sought relief once *Hall* was decided and others sought relief before *Hall* was decided. BIO p. 8. Respondent's position, however, is unreasonable. It makes no sense to say that where Sample'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 Sample 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: A petitioner need not anticipatorily invoke a retroactive right before it was actually enunciated, at the risk of losing that not-yet-expressed right. Sample'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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By: /s/ *Paul R. Bottei*

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 29th day of June, 2018.

/s/ Paul R. Bottei