

CAPITAL CASE

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

IN RE PERVIS TYRONE PAYNE,

Petitioner

**ON PETITION FOR REVIEW
OF COURT OF APPEALS ORDER ENTERED PURSUANT
TO 28 U.S.C. §2244 AND/OR FOR WRIT OF MANDAMUS**

**PETITION FOR REVIEW OF COURT OF APPEALS ORDER
UNDER 28 U.S.C. §1651
AND/OR FOR WRIT OF MANDAMUS,
PURSUANT TO SUPREME COURT RULE 20**

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CAPITAL CASE

QUESTION PRESENTED

Under 28 U.S.C. §2244(b)(2)(A), does *Hall v. Florida*, 572 U.S. ____ (2014) and/or *Moore v. Texas*, 581 U.S. ____ (2017) establish a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” thereby permitting the filing of a second or successive petition for writ of habeas corpus under 28 U.S.C. §2254?

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying leave to file a second or successive §2254 petition for writ of habeas corpus is unreported. *In Re Pervis Payne*, No. 17-6390 (6th Cir. Feb. 8, 2018); Pet. App. 1a-7a.

JURISDICTION

Pervis Payne invokes this Court's jurisdiction under 28 U.S.C. §1651. As Justices Stevens, Souter, and Breyer explained in a concurring opinion in *Felker v. Turpin*, 518 U.S. 651 (1996), pursuant to 28 U.S.C. §1651, this Court has jurisdiction to review an order denying leave to file a second or successive petition under 28 U.S.C. §2244. *See Felker*, 518 U.S. at 665-666 (Stevens, J., concurring). *See also Id.* at 666-667 (Souter, J., concurring).

STATEMENT REGARDING COMPLIANCE WITH UNITED STATES SUPREME COURT RULE 20.1 AND 20.3

This petition seeks direct review of a court of appeals order pursuant to 28 U.S.C. §1651, as permitted by *Felker*. Petitioner's compliance with, and entitlement to relief under U.S.S.Ct. R. 20.1 is set forth at pages 23-28 of this petition. To the extent that this petition alternatively seeks mandamus relief and an order requiring the Sixth Circuit to enter an order allowing the filing of a second or successive habeas corpus petition under 28 U.S.C. §2254, Petitioner respectfully informs the Court, pursuant to Supreme Court Rule 20.3(a), that any mandamus be directed to the judges of the United States Court of Appeals for the Sixth Circuit.

Petitioner cannot seek any further relief in the Sixth Circuit, because all such additional relief is prohibited by 28 U.S.C. §2244(b)(3)(E).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII, provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

28 U.S.C. § 2244(b), provides, in pertinent part: “(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed. (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless – (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”

STATEMENT OF THE CASE

1. Pervis Payne was convicted of first-degree murder and sentenced to death in 1988, and his conviction and sentence became final in 1991. *Payne v. Tennessee*, 501 U.S. 808 (1991). He sought state post-conviction relief, but was denied relief in 1998. *Payne v. State*, 1998 Tenn. Crim. App. Lexis 68 (Jan. 15, 1998). It was not until 2002 that this Court held that the execution of the intellectually disabled violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. In *Atkins*, this Court did not establish any specific standards governing the Eighth Amendment’s prohibition against the execution of the

intellectually disabled. *Hall v. Florida*, 572 U.S. ___, ___ (2014)(slip op. at 16); *Id.* at ___ (Alito, J., dissenting)(slip op. at 3); *Bobby v. Bies*, 556 U.S. 825, 831 (2009).

Rather, *Atkins* left it up to the states to develop appropriate ways to prohibit the execution of the intellectually disabled. *Atkins*, 536 U.S. at 317.

3. In *Hall v. Florida*, 572 U.S. ___ (2014), this Court decided for the first time “how intellectual disability must be defined” under the Eighth Amendment. *Id.* at ___ (slip op. at 7). This Court “consult[ed] the medical community’s opinions,” and concluded that for purposes of the Eighth Amendment, intellectual disability requires “three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period.” *Id.* at ___ (slip op. at 8).

In assessing the intellectual functioning criteria, this Court for the first time required courts reviewing an Eighth Amendment intellectual disability claim to take into account the SEM, or standard error of measurement, of all standardized IQ tests given to an individual. *Id.* at ___ (slip op. at 9-16). This Court thus “agree[d] with medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *Id.* at ___ (slip op. at 21). Thus, as *Hall* now holds as a matter of Eighth Amendment jurisprudence, to determine “whether an intellectual disability exists once the SEM applies and the individual’s IQ score is 75 or below the inquiry

... consider[s] factors indicating whether the person had deficits in adaptive functioning.” *Id.* at ____ (slip op. at 12).

4. In light of *Hall*, on May 21, 2015, Pervis Payne filed a motion to reopen his post-conviction proceedings under Tenn. Code Ann. §40-30-117, seeking an evidentiary hearing and relief on the ground that he is intellectually disabled and exempt from execution under the Eighth Amendment. In his motion, he maintained that *Hall* provides grounds for relief 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).

5. Payne supported his motion with the affidavit of Dr. Daniel Reschly, Ph.D., a nationally-renowned expert in intellectual disability, who opines that Payne is intellectually disabled – including under the standards defining intellectual disability promulgated by the American Psychiatric Association in its Diagnostic & Statistical Manual, Fifth Edition (DSM-5), published in 2013, and the American Association of Intellectual and Developmental Disabilities (AAIDD) in their eleventh edition of *Intellectual Disability: Definition, Classification, and Systems of Support*, published in 2010 (AAIDD-11).

In concluding that Pervis Payne is intellectually disabled, Dr. Reschly has evaluated each of Pervis Payne’s IQ test scores by applying the SEM, which recognizes that an IQ test score is actually a range of scores around the actual obtained score. Applying the SEM to Pervis Payne’s three IQ test scores of 78 (on a 1987 Wechsler Adult Intelligence Scale, Revised, or WAIS-R), a 78 on the WAIS-R

in 1996, and a 74 on the WAIS-IV in 2010, Dr. Reschly has concluded that Pervis Payne meets the first prong for intellectual disability: He has significantly subaverage intellectual functioning as shown by an IQ of approximately 70 or below. Dr. Reschly has further declared that Pervis Payne satisfies the second prong of the Eighth Amendment test for intellectual disability, namely that he suffers deficits in adaptive behavior in the areas of conceptual skills and practical skills. Dr. Reschly has further concluded that, where Pervis Payne's intellectual and adaptive deficits were apparent during the developmental period (or before age 18), Pervis Payne meets all the criteria for intellectual disability.

6. In arguing that *Hall* establishes Eighth Amendment standards that must be applied retroactively to his evidence of intellectual disability, Payne noted that *Hall*'s Eighth Amendment holding abrogated many aspects of Tennessee law on intellectual disability. To this day, Tennessee's intellectual disability statute requires a petitioner's IQ to be at or below a "bright-line cut-off of 70" (*Keen v. State*, 398 S.W.3d 594, 605 n. 11 (Tenn. 2012)) before s/he can be found intellectually disabled. *See* Tenn. Code Ann. §39-13-203(a)(1)(requiring functional intelligence quotient "of seventy (70) or below"). *Hall*'s Eighth Amendment holding is not so rigid, however, as *Hall* requires a holistic assessment of intellectual disability so long as a petitioner has at least one IQ test score of 75 or below (as *Hall* did, and as Payne does). Also, the Tennessee Supreme Court decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011) does not require, but merely permits, consideration of the SEM of IQ tests. *See Coleman*, 341 S.W.3d at 242 n. 55. *Hall*,

however, establishes an Eighth Amendment requirement that the SEM of IQ tests must always be considered. Moreover, even the Tennessee courts have recognized that by requiring reviewing courts to consider an IQ test score to provide “range of scores” around that score (given the standard error of measurement), *Hall* abrogates Tennessee law which has required experts to testify to an individual’s IQ as being a fixed number. *See State v. Hernandez*, 2014 Tenn. Crim. App. Lexis 736 *48 n.3 (July 29, 2014).

7. The Tennessee post-conviction court denied the motion to reopen. On permission to appeal, the Tennessee Court of Criminal Appeals also denied relief, relying on the Tennessee Supreme Court’s decision in *Payne v. State*, 493 S.W.3d 478, 490 (Tenn. 2016) which held that *Hall v. Florida* does not apply retroactively. *Payne v. State*, No. W2016-02326-CCA-R28-PD (Tenn. Crim. App. Aug. 1, 2017)(slip op. at 3). The Court of Criminal Appeals reached this conclusion notwithstanding Payne’s argument that under *Montgomery v. Louisiana*, 577 U.S. ____ (2016), *Hall* is a substantive rule of law that must be applied retroactively. *Payne*, slip op. at 4. The Court of Criminal Appeals also rejected Payne’s argument that *Hall* must be applied retroactively, because this Court in *Moore v. Texas*, 581 U.S. ____ (2017) applied *Hall* retroactively to a case on collateral review. *Payne*, slip op. at 5. The Tennessee Supreme Court denied permission to appeal. *Payne v. State*, No. W2016-02326-SC-R11-PD (Tenn. Nov. 21, 2017).

8. On April 16, 2018, Payne recently filed a petition for writ of certiorari seeking review of the Court of Criminal Appeals' decision which denied retroactive application of *Hall*. See Pet. for Cert. in *Payne v. Tennessee*, O.T. 2017, No. 17-8543.

9. Having exhausted state remedies, Pervis Payne filed with the United States Court of Appeals for the Sixth Circuit an application under 28 U.S.C. §2244 for leave to file a second or successive habeas corpus petition under 28 U.S.C. §2254. In his application, Payne requested retroactive application of *Hall v. Florida*, 572 U.S. ____ (2014), as well as *Moore v. Texas*, 581 U.S. ____ (2017). See 6th Cir. R. 1-1, p. 5 (application for second or successive petition); Pet. App. 1a-7a. Dr. Reschly's attached affidavit confirms that Pervis Payne is a person with intellectual disability "within the meaning of the United States Supreme Court's decisions in *Hall v. Florida* and *Moore v. Texas*," and consistent with DSM-5 and AAIDD-11. See 6th Cir. R. 1-3, p. 1 (executive summary).

10. Payne has maintained that because *Hall* and *Moore* establish standards that exclude persons from capital punishment, they announce substantive rules of law that are retroactive under this Court's retroactivity analysis in *Welch v. United States*, 578 U.S. ____ (2016) and *Montgomery v. Louisiana*, 577 U.S. ____ (2016). See 6th Cir. R. 1-2, pp. 11-13; Pet. App. 27a-29a (Petitioner's Brief).

11. Further, where this Court has held that a second petition under §2244 may be filed only if this Court has made a rule retroactive to cases on collateral review, See *Tyler v. Cain*, 533 U.S. 656 (2001), Payne explained that *Hall* and

Moore have been made retroactive by this Court, because: (a) in *Hall* itself, this Court applied *Hall* retroactively to a case on collateral review (6th Cir. R. 1-2, p. 13; Pet. App. 29a: Petitioner’s Brief); (b) in *Moore v. Texas*, this Court applied *Hall* (and *Moore*) retroactively to a case on collateral review (6th Cir. R. 1-2, p. 14; Pet. App. 30a: Petitioner’s Brief); (c) in five cases coming to this Court on collateral review, this Court has granted certiorari, vacated a lower court judgment, and remanded for further consideration in light of *Moore* (and in turn *Hall*), thus showing the retroactivity of *Hall* and *Moore* (R. 1-2, pp. 14-15; Pet. App. 30a-31a: Petitioner’s Brief); and (d) in *Haliburton v. Florida*, 574 U.S. ____ (2014), this Court also granted certiorari and remanded a case on collateral review in light of *Hall*. 6th Cir. R. 1-2, p. 15; Pet. App. 31a: Petitioner’s Brief. *See also* 6th Cir. R. 10: Petitioner’s Reply Brief; Pet. App. 39a-44a (discussing *Hall*, *Moore*, and GVR orders as showing this Court’s retroactive application of *Hall* and *Moore*).

12. The Sixth Circuit has denied leave to file a second or successive §2254 habeas application under *Hall* and/or *Moore*. 6th Cir. R. 11-2, Pet. App. 1a-7a (order). The Sixth Circuit has concluded that *Hall* and *Moore* are not substantive rules of law, but “merely created new procedural requirements that do not amount to ‘watershed rules of criminal procedure.’” 6th Cir. R. 11-2, p. 5; Pet. App. 5a. The Sixth Circuit has also stated that this Court has yet to make *Hall* or *Moore* retroactive to cases on collateral review. *Id.* Notwithstanding Payne’s arguments that this Court already applied *Hall* retroactively in *Hall*, and that this Court already applied *Moore* and *Hall* retroactively in *Moore* itself, the Sixth Circuit has

asserted that “both of those decisions merely analyzed the application of *Atkins* claims that were appropriately raised in state post-conviction proceedings.” 6th Cir. R. 11-2, p. 5; Pet. App. 5a. Rather than refuting Payne’s argument, however, that reasoning actually proves Payne’s point: In *Hall* and *Moore*, this Court applied *Hall* and *Moore* “in state post-conviction proceedings” (6th Cir. R. 11-2, p. 5; Pet App. 5a) that is, “to cases on collateral review” which is what *Tyler v. Cain* requires for the filing of a second or successive §2254 habeas petition. *See* 28 U.S.C. §2244(b) (2)(A). The Sixth Circuit has further concluded that this Court’s GVR orders in light of *Moore* and *Hall* also fail to “logically dictate” that this Court has made *Moore* or *Hall* retroactive to cases on collateral review. R. 11-2, pp. 5-6, Pet. App. 5a-6a.

REASONS FOR GRANTING REVIEW

This Court should grant review because *Hall v. Florida*, 572 U.S. ____ (2014) and *Moore v. Texas*, 581 U.S. ____ (2017) set forth substantive Eighth Amendment standards for assessing intellectual disability that are retroactive, and this Court has already made *Hall* retroactive to cases on collateral review in *Hall* itself and in *Moore*, which applied *Moore* and *Hall* retroactively on collateral review. Numerous GVR orders in which this Court has ordered the lower courts to apply *Hall* and/or *Moore* to collateral proceedings confirm that this Court has made *Hall* and *Moore* retroactive. Under *Tyler v. Cain*, 533 U.S. 656 (2001), Pervis Payne is thus entitled to file a second or successive habeas corpus petition because he “relies on a new rule of law, made retroactive to cases on collateral review by the Supreme Court.” 28 U.S.C. §2244(b)(2)(A). The Sixth Circuit’s contrary conclusion is erroneous.

Short of granting Pervis Payne’s separate petition for writ of certiorari in U.S. No. 17-8543 to determine the retroactivity of *Hall v. Florida*, this Court should exercise its authority under 28 U.S.C. §1651 and grant review here, which seeks review of the Sixth Circuit’s denial of authorization to file a second or successive petition. Though Payne may not seek review of the Sixth Circuit’s “gatekeeping” order via a petition for writ of certiorari (*See* 28 U.S.C. §2244(b)(3)(E)), this Court retains the power to review the court of appeals order under 28 U.S.C. §1651, as Pervis Payne requests here. *Felker v. Turpin*, 518 U.S. 650, 665-666 (1996)(Stevens, J., concurring); *Id.* at 666-667 (Souter, J., concurring). Pervis Payne also meets the standards for granting a writ and the relief he seeks under this Court’s Rule 20.1.

This Court, therefore, should grant review under 28 U.S.C. §1651, reverse the order of the Sixth Circuit, and order that the Sixth Circuit grant Pervis Payne leave to file in the United States District Court a second or successive habeas corpus petition under 28 U.S.C. §2254.

I. *Hall v. Florida*, 572 U.S. ____ (2014) And *Moore v. Texas*, 581 U.S. ____ (2017) Constitute New Rules Of Law That Have Been Made Retroactive To Cases On Collateral Review Within The Meaning Of 28 U.S.C. §2244(b)(2)(A), And Under *Tyler v. Cain*, 533 U.S. 656 (2001), Pervis Payne Is Entitled To File A Second §2254 Petition Invoking *Hall* And *Moore*

Hall v. Florida and *Moore v. Texas* circumscribe the class of persons who are exempt from execution because of intellectual disability. As such, *Hall* and *Moore* are substantive rules of law that are retroactive under *Welch v. United States*, 578 U.S. ____ (2016) and *Montgomery v. Louisiana*, 577 U.S. ____ (2016). Moreover, in both *Hall* and *Moore* themselves, this Court applied the rules of *Hall* and

Moore retroactively to petitioners who sought relief “on collateral review by the Supreme Court.” 28 U.S.C. §2244(b)(2)(A). That conclusion is underlined by additional cases on state collateral review and on federal habeas review for which this Court has required application of *Hall* and *Moore*. Pervis Payne, therefore, is entitled to file a second §2254 petition invoking *Hall* and *Moore*.

A. *Hall* And *Moore* Set Forth Eighth Amendment Standards Identifying The Class Of Persons Who Are Intellectually Disabled And Therefore Exempt From Execution Under The Eighth Amendment

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of the intellectually disabled, but in doing so, this Court did not set forth any specific Eighth Amendment standards governing such an inquiry, instead leaving that task to the states. *See Hall v. Florida*, 572 U.S. at ____ (slip op. at 16); *Id.* at ____ (slip op. at 3 (Alito, J., dissenting)); *Bobby v. Bies*, 556 U.S. at 831.

In both *Hall v. Florida* and *Moore v. Texas*, this Court has now held that the Eighth Amendment requires a reviewing court to adhere to current medical standards when determining who is intellectually disabled, and thus exempt from capital punishment. Those standards include those contained in the American Psychiatric Association’s (APA) Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) and the American Association on Intellectual and Developmental Disabilities Guide: *Intellectual Disability: Definition, Classification, and Systems of Support, Eleventh Edition* (AAIDD-11).

1. *Hall v. Florida*, 572 U.S. ____ (2014)

As the Court held in *Hall* and re-emphasized in *Moore*, the Eighth Amendment demands that any intellectual disability assessment conform to the medical community's current standards for evaluating whether a person is intellectually disabled. *Hall* and *Moore* undoubtedly establish new law, because, as *Hall* conceded, *Atkins* itself did not dictate any particular substantive Eighth Amendment standards for assessing intellectual disability. *See Welch v. United States*, 578 U.S. at ____ (slip op. at 8)(case establishes new rule if not “dictated by precedent existing at the time the defendant’s conviction became final.”); *Kilgore v. Secretary*, 805 F.3d 1301, 1311 (11th Cir. 2015)(*Hall* sets forth a new rule of law that was not dictated by *Atkins v. Virginia*: “Notably, *Atkins* did not define intellectual disability, nor did it direct the states on how to define intellectual disability, nor, finally, did it provide the range of IQ scores that could be indicative of intellectual disability.”).

As *Hall* concluded, an Eighth Amendment intellectual disability determination requires a three-pronged assessment of: (1) whether the petitioner has significantly subaverage intellectual functioning as demonstrated by an IQ around two (2) or more standard deviations below the norm, or approximately 70; (2) whether the petitioner suffers deficits in adaptive behavior; and (3) whether the onset of such disability occurred during the developmental period, or by age eighteen. *See Hall*, 572 U.S. at ____ (slip op. at 8). *Hall* itself focused on the first prong (intellectual functioning) of the Eighth Amendment intellectual disability

determination. *Hall* held that an Eighth Amendment intellectual disability assessment must be based on standards established by the medical community. *Id.* at ____ (slip op. at 10, 19-21).

Hall then repeatedly cited the current medical standards contained in DSM-5 and AAIDD-11 to conclude that under the Eighth Amendment, any intellectual functioning determination must now account for the standard error of measurement (SEM) of IQ tests, which reflects the “inherent imprecision of the test itself.” *Id.*, 572 U.S. at ____ (slip op. at 10). The SEM “reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score,” but that an IQ test score “should be read not as a single fixed number but as a range.” *Id.* at ____ (slip op. at 11). Accordingly, *Hall* concluded that given the constitutionally-required application of the SEM, under the Eighth Amendment, “an individual with an IQ test score ‘between 70 and 75 or lower’ . . . may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.” *Id.* at ____ (slip op. at 20). In other words, *Hall* makes the application of the SEM mandatory under the Eighth Amendment, requiring a holistic assessment of intellectual disability by evaluating not only intellectual functioning but also adaptive deficits as part of a “conjunctive and interrelated assessment” – so long as an individual has at least one IQ test score of 75 or below. *Id.* at ____ (slip op. at 21).

Hall’s Eighth Amendment holding has also overturned numerous aspects of Tennessee statutory and case law concerning intellectual disability:

First, *Hall*’s Eighth Amendment requirement that a reviewing court

apply the SEM to IQ tests abrogates prior Tennessee law that made the application of SEM discretionary. *See Coleman v. State*, 341 S.W.3d 221, 242 n. 55 (2011) (SEM discretionary); *Howell v. State*, 2011 Tenn.Crim.App.Lexis 447 *39 (*Coleman* does not require application of . . . [SEM].”).

Second, *Hall*'s Eighth Amendment holding that an individual may be constitutionally ineligible for death so long as s/he has an IQ score “between 70 and 75 or lower” (*Id.*, 572 U.S. at ___ (slip op. at 20)) abrogates Tennessee statutory law that to this day requires an individual's IQ to satisfy a “bright-line cut-off of 70” (*Keen v. State*, 398 S.W.3d 594, 605 n. 11 (Tenn. 2012)) before s/he can be found intellectually disabled.

Third, Tennessee's requirement that a petitioner show a fixed number (70 or below) to be considered intellectually disabled has also fallen in light of *Hall*'s recognition that under the Eighth Amendment, IQ scores are a range, not a fixed number. *See State v. Hernandez*, 2014 Tenn.Crim.App.Lexis 736 *48 n. 3 (Tenn. Crim. App. July 29, 2014)(*Hall*, when it “rejected the use of a fixed number when using IQ to determine intellectual disability,” abrogated *Coleman*'s requirement (341 S.W.3d at 242) that experts can only state IQ as a fixed number).

Thus, while *Hall* has affirmatively established Eighth Amendment requirements for any intellectual disability assessment, *Hall* likewise shows that Tennessee's intellectual disability standards have (to date) been inadequate under the Eighth Amendment. All the more reason that Payne is now entitled to

application of *Hall*'s constitutionally-required Eighth Amendment standards to his evidence of intellectual disability.

2. *Moore v. Texas*, 581 U.S. ____ (2017)

In *Moore*, this Court held that to comply with the Eighth Amendment, any intellectual disability determination must apply current medical standards. *Moore*, 581 U.S. at ____ (slip op. at 2) (“adjudications of intellectual disability should be informed by the views of medical experts” and state court violated Eighth Amendment by applying standards “[n]ot aligned with the medical community’s information.”); *Id.* at ____ (slip op. at 9) (citing *Hall* for the proposition that Eighth Amendment intellectual disability determination “must be informed by the medical community’s diagnostic framework.”)

This Court thus specifically praised the state trial court for having “consulted current medical diagnostic standards,” by

relying on the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual, *See* AAIDD, Intellectual Disability: Definition, Classification, and Systems of Support (2010) (hereinafter AAIDD-11), and on the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (APA), *see* APA, Diagnostic and Statistical Manual of Mental Disorders (2013) (hereinafter DSM-5).

Moore, 581 U.S. at ____ (slip op. at 3-4); *Id.* (discussing trial court’s proper application of DSM-5 and AAIDD-11). Then, in conducting its own Eighth Amendment analysis, this Court repeatedly applied DSM-5 and AAIDD-11 to Moore’s evidence of intellectual disability. *See e.g.*, *Moore*, 581 U.S. at ____ (slip op. at 10-12) (applying DSM-5 and AAIDD-11 to intellectual functioning prong); *Id.* at

___ (slip op. at 12-18)(applying DSM-5 and AAIDD-11 to adaptive functioning assessment).

Moore applied DSM-5 and AAIDD-11 to both the intellectual functioning and adaptive functioning prongs of the Eighth Amendment test for intellectual disability. As in *Hall*, *Moore* concluded that the state appellate court had failed to properly apply SEM to the intellectual functioning prong, as required by medical standards and *Hall. Moore*, 581 U.S. at ___ (slip op. at 10-12). *Moore* also concluded that the state appellate court had failed to apply DSM-5 and AAIDD-11's understanding of adaptive deficits to the intellectual disability determination. Rather than focusing on adaptive deficits as DSM-5 and AAIDD-11 require, the state appellate court instead focused on adaptive strengths (which does not occur in medical practice) and relied on stereotypes of intellectual disability disavowed by the medical community. Because the state appellate court's intellectual disability determination did not comport with current medical standards, it did not satisfy the Eighth Amendment. *Moore*, 581 U.S. at ___ (slip op. at 10-18).

B. *Hall* And *Moore* Are Retroactive

Hall and *Moore* establish substantive Eighth Amendment rules and are therefore retroactive on collateral review under *Welch v. United States*, 578 U.S. ___ (2016) and *Montgomery v. Louisiana*, 577 U.S. ___ (2016).

In *Welch* and *Montgomery*, this Court has held that new rules of law must be applied retroactively on collateral review if such rules are “substantive.” *Welch*, 578 U.S. at ___ (slip op. at 8); *Montgomery*, 577 U.S. at ___ (slip op. at 6-8). A decision is

substantive if it involves a “constitutional determination[] that place[s] particular conduct or persons . . . beyond the State’s power to punish.” *Welch*, 578 U.S. at ____ (slip op. at 8), *citing Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004). *See Montgomery*, 577 U.S. at ____ (slip op. at 9)(a decision is substantive if it precludes “a certain category of punishment for a class of defendants because of their status or offense.”). Thus, as *Welch* explains: “Cases . . . in which the Constitution deprives the Government of the power to impose the challenged punishment represent the clearest instance of substantive rules for which retroactive application is appropriate.” *Welch*, 578 U.S. at ____ (slip op. at 12). Put another way, a substantive rule is one that “alters . . . the class of persons that the law punishes.” *Montgomery*, 577 U.S. at ____ (slip op. at 14). Thus, any decision that “change[s] the substantive reach of” a statute or limits a state’s ability to punish a certain class of persons is substantive and retroactive. *Welch*, 578 U.S. at ____ (slip op. at 9).

That is precisely what *Hall* and *Moore* do: They identify the boundaries of the class of persons who are intellectually disabled and cannot be executed. All persons within that class include those who are intellectually disabled under the medical standards set forth in DSM-5 and AAIDD-11. *Hall* and *Moore* thus define the “substantive reach” of the Eighth Amendment. Indeed, this Court vacated the death sentences of both Hall and Moore because persons who are intellectually disabled under DSM-5 and/or AAIDD-11 substantively cannot be executed, yet the state courts failed to properly apply DSM-5 and AAIDD-11 to those petitioners’ evidence of intellectual disability.

Hall and *Moore*, therefore, place persons like Pervis Payne who are intellectually disabled under DSM-5 and AAIDD-11 and current medical standards “beyond the State’s power to punish.” *Welch*, 578 U.S. at ____ (slip op. at 12).

Hall and *Moore* “deprive[] the Government of the power to impose the challenged punishment” of death upon persons who intellectually disabled under DSM-5 and AAIDD-11. *Id.* *Hall* and *Moore* thus “represent the clearest instance of substantive rules for which retroactive application is appropriate.” *Id.* *Hall* and *Moore* are indeed retroactive, because without their retroactive application, persons like Hall and Moore and Pervis Payne would “face[] a punishment that the law cannot impose upon” them. *Montgomery*, 577 U.S. at ____ (slip op. at 17).

Importantly, *Montgomery* holds that a substantive rule is not merely procedural even if it requires procedures for precluding a particular punishment upon a class of persons. As *Montgomery* notes, substantive rules include those rules which set forth standards for determining whether an individual is exempt from execution because s/he is intellectually disabled. *Hall* and *Moore* are such rules. And indeed, in *Montgomery*, this Court identified a rule precluding the execution of the intellectually disabled as a substantive rule of law that is retroactive, notwithstanding any procedures that attach to such a rule:

[W]hen the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. *See, e.g., Atkins v. Virginia*, 536 U. S. 304, 317, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)(requiring a procedure to determine whether a particular individual with an intellectual disability ‘fall[s] within the range of [intellectually disabled] offenders about whom there is a national consensus” that execution is impermissible). Those procedural

requirements do not, of course, transform substantive rules into procedural ones.

Montgomery, 577 U.S. at ____ (slip op. at 18-19). *Welch* and *Montgomery* thus establish that *Hall* and *Moore* are substantive rules that apply retroactively to Payne in these federal habeas corpus proceedings.

C. This Court Has Made *Hall* And *Moore* Retroactive To Cases On Collateral Review

This Court has also made *Hall* and *Moore* retroactive to cases on collateral review. At least eight (8) cases from this Court prove this point as they show that this Court has made *Hall* and *Moore* retroactive to cases that were final long before 2014 and 2017, when *Hall* and *Moore* were decided:

(1) The first case that proves this point is *Hall* itself, which was on collateral review and in which this Court, by definition, applied *Hall* retroactively to Hall's death sentence, which became final in 1981. *See Hall*, 572 U.S. at ____ (slip op. at 2). *Hall* proves that the Eighth Amendment application of DSM-5 (from 2013) and AAIDD-11 (from 2010) is retroactive where those standards were applied to a case on collateral review in which a death sentence was final on direct review decades before the 2014 decision in *Hall*, and long before DSM-5 and AAIDD-11 were ever issued.

(2) The second case is *Moore* itself, which was also on collateral review, and where Moore's death sentence was final in 2004. *See Moore*, 581 U.S. at ____ (slip op. at 3). In *Moore*, the Supreme Court

applied current medical standards from 2017 retroactively to a long-since-final death sentence. *Moore*'s Eighth Amendment holding was applied retroactively in *Moore* itself. *Moore* also applied the Eighth Amendment standards of *Hall* not only to the determination whether Moore suffers deficits in intellectual functioning under the Eighth Amendment (*Moore*, 581 U.S. at ___, slip op. at 10-12), but also to its determination whether “Moore’s adaptive functioning” shows intellectual disability under the Eighth Amendment. *Id.*, 581 U.S. at ___, slip op. at 12-18. Overall, this Court cited *Hall* no fewer than 18 times in concluding that Moore was entitled to relief under the Eighth Amendment. *Moore* thus proves unequivocally that: (a) *Moore* applies retroactively; and (b) *Hall* applies retroactively.

(3), (4), (5), (6) and (7): There are five other cases in which this Court has shown *Moore* to be retroactive on collateral review. Four of those cases involve federal habeas corpus proceedings like Payne's: *Weathers v. Davis*, 583 U.S. ___ (2017)(U.S. No. 16-9446), *Long v. Davis*, 583 U.S. ___ (2017)(U.S. No. 16-8909), *Martinez v. Davis*, 581 U.S. ___ (2017)(U.S. No. 16-6445) and *Henderson v. Davis*, 581 U.S. ___ (2017)(U.S. No. 15-7974). In *Weathers*, *Long*, *Martinez* and *Henderson*, this Court granted certiorari, vacated, and remanded for application of *Moore* to federal habeas corpus proceedings. While Weathers' death sentence was final in 2004 (*Weathers v. Davis*, 659

Fed.Appx. 778, 780 (5th Cir. 2016)), Long's death sentence was final in 2009 (*Long v. Davis*, 663 Fed.Appx. 361, 363 (5th Cir. 2016)), Martinez's death sentence was final in 1994 (*Martinez v. Davis*, 653 Fed.Appx. 308, 311 (5th Cir. 2016)), and Henderson's death sentence became final in 2004. *Henderson v. Stephens*, 791 F.3d 567, 571 (5th Cir. 2015). Because retroactive rules of law are to be applied in federal habeas corpus proceedings (*Teague v. Lane*, 489 U.S. 288 (1989)), this Court's remand orders in *Weathers*, *Long*, *Martinez*, and *Henderson* unquestionably prove that this Court has made *Moore* retroactive in federal habeas. Also, in *Wright v. Florida*, 583 U.S. ____ (2017)(U.S. No. 17-5575), a post-conviction case from Florida, this Court granted certiorari, vacated, and remanded for application of *Moore*, once again proving *Moore's* retroactivity.

(8) The eighth and final case establishing retroactivity is *Haliburton v. Florida*, 574 U.S. ____ (2014), a case on collateral review (like *Hall*) in which this Court vacated a collateral judgment and remanded for application of *Hall*. Haliburton's death sentence was final in 1990 (*Haliburton v. State*, 561 So.2d 248 (Fla. 1990)), yet this Court ordered application of its 2014 decision in *Hall* to Haliburton's collateral proceedings. *Haliburton*, just like *Hall* itself, proves that *Hall* is retroactive to cases on collateral review, like *Payne's*.

D. Under 28 U.S.C. §2244(b)(2)(A), Pervis Payne Is Entitled To File A Second Or Successive §2254 Habeas Petition

Under 28 U.S.C. §2244(b)(2)(A), a federal habeas petitioner is entitled to file a second or successive habeas petition under 28 U.S.C. §2254 if “the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” Because *Hall* and *Moore* establish new, substantive Eighth Amendment standards for assessing a capital petitioner’s intellectual disability, and because this Court has already made both *Hall* and *Moore* retroactive to cases on collateral review, Pervis Payne is entitled to file a second or successive §2254 petition.

As Pervis Payne has already shown, *Hall* is new because it was not dictated by *Atkins* (*See* pp. 2, 10, *supra*); *Moore*’s adaptive deficit analysis is also new (because it was not dictated by *Hall* or *Atkins*); both *Hall* and *Moore* are substantive rules of law that are retroactive because they circumscribe the class of persons who may be subjected to capital punishment (*See* pp. 16-18, *supra*); and both *Hall* and *Moore* have already been “made retroactive to cases on collateral review by the Supreme Court” in *Hall* itself, in *Moore* itself, and as confirmed by the numerous cases on collateral review in which this Court has remanded in light of *Hall* and/or *Moore*. Indeed, why would this Court GVR in light *Hall* or *Moore* if *Hall* and *Moore* didn’t apply retroactively? Presumably, this Court was not just sending the lower courts on fools’ errands.

This Court has thus made *Hall* and *Moore* retroactive to cases on collateral review, as required by *Tyler v. Cain*, 533 U.S. 656 (2001). Accordingly, under 28

U.S.C. §2244(b)(2)(A), Pervis Payne is entitled to file a second §2254 habeas petition invoking *Hall* and *Moore* and requesting their application to his claim of intellectual disability under the Eighth Amendment. The Sixth Circuit’s contrary conclusion is clearly in error. *See, e.g., In Re Cathey*, 857 F.3d 221 (5th Cir. 2017)(granting leave to file second or successive habeas petition in light of *Moore* and *Hall*).

II. Pervis Payne Is Entitled To The Relief He Requests Under Supreme Court Rule 20.1

This Court’s Rule 20.1 provides:

Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. §1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court’s appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

In seeking review of the Sixth Circuit’s order under 28 U.S.C. §1651, Pervis Payne satisfies the standards of Rule 20.1. It is perhaps easiest to evaluate the criteria of Rule 20.1 in reverse order, as Pervis Payne now does.

A. Pervis Payne Cannot Obtain Relief In Any Other Form Or From Any Other Court

First, the relief that Payne seeks here is the right to file a second or successive §2254 petition in the United States District Court, and such relief “cannot be obtained in any other form or from any other court.” A Sixth Circuit panel has already denied Payne his request to file a second §2254 habeas petition, and that denial “shall not be the subject of a petition for rehearing” in the court of appeals. 28 U.S.C. §2244(b)(3)(E). Thus, the court of appeals cannot provide the

relief Payne now requests. This Court likewise cannot grant Payne leave to file a §2254 petition in the District Court, because that power alone is vested in the court of appeals under 28 U.S.C. §2244(b)(3). At best, this Court could only consider an original §2241 petition for writ of habeas corpus, which is different from the §2254 petition which Payne seeks to file now. *See Felker v. Turpin*, 518 U.S. 651 (1996). And under 28 U.S.C. §2244(b)(3)(E), this Court cannot grant certiorari under 28 U.S.C. §1254 to review the Sixth Circuit’s order below. Thus, §1651 provides Payne this Court’s available remedy under the circumstances.

B. There Are Exceptional Circumstances, Where Payne Faces Execution Though He Is Categorically Exempt From Execution Because Of His Status As Someone With Intellectual Disability

Second, Pervis Payne establishes “exceptional circumstances” warranting this Court’s intervention. It was not until this Court’s 2014 decision in *Hall* that this Court first determined “how intellectual disability must be defined” under the Eighth Amendment. *Hall*, 572 U.S. at ___ (slip op. at 7). And in 2017, *Moore v. Texas*, 581 U.S. ___ (2017) applied *Hall* and further extended the reach of the Eighth Amendment by applying current medical standards not only to the assessment of intellectual functioning but to the assessment of adaptive deficits as well. So long as Pervis Payne satisfies the Eighth Amendment criteria set forth in *Hall* (and/or *Moore*), he is categorically exempt from execution. The state simply has no power to take his life when the Constitution deprives the state of the power to execute him.

While the execution of the intellectually disabled is constitutionally intolerable and categorically prohibited, the undisputed proof presented in the proceedings below establishes that Pervis Payne is indeed intellectually disabled under *Hall, Moore*, and current clinical standards. *See e.g.*, 6th Cir. R. 1-3, p. 1 (executive summary of Dr. Reschly’s affidavit). Where, as here, a petitioner establishes his intellectual disability in accordance with newly-announced and retroactive Eighth Amendment standards, it would be extraordinary to allow that petitioner to be executed *even though he is exempt from execution under those standards that fully apply to his case.*

Put otherwise, Pervis Payne’s case presents exceptional circumstances for the simple reason that he presents undisputed proof that he is intellectually disabled in light of intervening, retroactive Eighth Amendment decisions of this Court which deprive the state of the power to take his life.

As Justices Stevens, Ginsburg, and Breyer stated in their concurring opinion in *In Re Davis*, 557 U.S. 952, 953 (2009)(Stevens, J., concurring), the “substantial risk of putting an innocent man to death” makes a case “sufficiently ‘exceptional’” to warrant this Court’s intervention and exercise of discretion under Rule 20. Just as the risk of putting an innocent man to death warranted this Court’s intervention in *Davis*, the intolerable risk of putting to death someone who is intellectually disabled and therefore “innocent of the death penalty” (*see Sawyer v. Whitley*, 505 U.S. 333 (1992)) establishes exceptional circumstances as well.

In fact, the Fifth Circuit cited and applied the standards of *Hall* and *Moore* to grant a similarly-situated death-sentenced petitioner leave to file a second §2254 petition, precisely because the Constitution “places a substantive restriction on the State’s power to take the life” of an intellectually disabled offender, where the petitioner made a *prima facie* showing of his exemption from execution. *In Re Cathey*, 857 F.3d at 240. When similarly situated persons like Cathey and Payne are treated unequally (as now is the case), there are exceptional circumstances warranting the intervention of the federal courts, as this Court recently recognized. *Buck v. Davis*, 580 U.S. ___, ___ (2017)(slip op. at 23-24)(petitioner showed extraordinary circumstances warranting relief from judgment under Fed.R.Civ.P. 60(b) where similarly-situated petitioners obtained the same relief sought by petitioner). *See Deutsch Bank Trust Co. Americas v. McCormick Foundation*, 584 U.S. ___ (Apr. 3, 2018)(statement of Justices Kennedy & Thomas respecting petition for writ of certiorari)(lower federal courts should consider reopening proceedings to allow proper application of intervening Supreme Court decision that otherwise might not be applied absent such relief).

C. Review Is In Aid Of This Court’s Jurisdiction

Third, review under 28 U.S.C. §1651 is in aid of this Court’s jurisdiction. A writ is “aid of this Court’s appellate jurisdiction” so long as it will facilitate this Court’s jurisdiction in the future. As Justices Breyer, Ginsburg, Sotomayor, and Kagan explained in *Garcia v. Texas*, 564 U.S. 940, 947 (2011)(Breyer, J., dissenting):

[T]his Court, under the All Writs Act, 28 U.S.C. §1651, can take appropriate action to preserve its ‘potential jurisdiction.’

Id., citing *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). As Justice Breyer explained in his opinion in *Garcia*, §1651 may be used (for example) to issue a stay of execution to await a future event, namely the passage of legislation that would affect the outcome of Garcia’s petition. In other words, §1651 gave this Court the authority to preserve Garcia’s opportunity to be heard in the future, including in this Court.

As this Court explained in *Dean Foods*, under the All Writs Act, the authority of this Court (or any appellate court) “is not confined to issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.” *FTC v. Dean Foods Co.*, 384 U.S. at 603-604, quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943). Under §1651, this Court’s authority extends to support an ultimate power to review a case like Payne’s, even if immediate review of the matter is not involved. *United States v. United States District Court*, 334 U.S. 258, 263 (1948).

Stated differently, 28 U.S.C. §1651(a) empowers this Court to issue a writ or order that is necessary to protect this Court’s prospective jurisdiction, which Justice Breyer has denoted as “potential jurisdiction” in *Garcia v. Texas*, *supra*. In this case, such potential jurisdiction is the jurisdiction to review (under 28 U.S.C. §1254) Pervis Payne’s second or successive habeas petition, once properly filed in the District Court as required by *Tyler v. Cain*, *supra*.

Under 28 U.S.C. §1651, *FTC v. Dean Foods*, and Justice Breyer’s opinion in *Garcia v. Texas*, this Court’s review under §1651 is in aid of this Court’s jurisdiction. And where Pervis Payne faces execution despite his ineligibility for the death sentence, it certainly is appropriate for this Court to intervene and grant review, as Payne’s case presents an appropriate case for the exercise of this Court’s discretionary powers under §1651.

CONCLUSION

The Sixth Circuit has erroneously concluded that Pervis Payne is not entitled to file a second or successive §2254 petition invoking *Hall v. Florida*, 572 U.S. ____ (2014) and *Moore v. Texas*, 581 U.S. ____ (2017). *Hall* and *Moore* constitute new substantive rules of Eighth Amendment jurisprudence that are retroactive and have been made retroactive by this Court. Under 28 U.S.C. §2244(b)(2)(A) and *Tyler v. Cain*, 533 U.S. 656 (2001), Pervis Payne is thus entitled to file a second or successive §2254 petition.

The Sixth Circuit has manifestly erred in denying Payne leave to file a second or successive §2254 petition, and this Court should thus grant review of the Sixth Circuit’s order under 28 U.S.C. §1651, reverse the order of the Sixth Circuit, and order the Sixth Circuit to grant Pervis Payne leave to file a second or successive §2254 petition seeking retroactive application of *Hall* and *Moore* to his Eighth Amendment intellectual disability claim.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for review and/or for writ of mandamus and appendix were served via first-class mail upon John Bledsoe, Esq., Office of the Attorney General, P. O. Box 20207, Nashville, Tennessee 37202 this the 8th day of May, 2018.

/s/ *Paul R. Bottei*