

**CAPITAL CASE
NO EXECUTION DATE SET**

No. 16-395

IN THE
Supreme Court of the United States

PERVIS TYRONE PAYNE,
Petitioner,

v.

TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Tennessee

REPLY BRIEF

Paul R. Bottei
OFFICE OF THE FEDERAL
PUBLIC DEFENDER, MIDDLE
DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203
(615) 736-5047

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER..... 1

I. This Court Should Hold Payne’s Petition In
Light Of Sims’s And Sample’s Petition Or
Grant GVR In Light Of *Montgomery*
Regardless Of Any Vehicle Concerns. 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002)..... 5

Coleman v. State,
341 S.W.3d 221 (Tenn. 2011)..... 3

Hall v. Florida,
134 S. Ct. 1986 (2014)..... 1

Keen v. State,
398 S.W.3d 594 (Tenn. 2012)..... 3

Lawrence v. Chater,
516 U.S. 163 (1996)..... 4

Montgomery v. Louisiana,
136 S. Ct. 718 (2016)..... 1

State ex rel. Lewis v. State,
347 S.W.3d 47 (Tenn. 1961)..... 2

Statutes

Tenn. Code Ann. § 39-13-203 3

REPLY

This petition for certiorari raises the important question whether *Hall v. Florida*, 134 S. Ct. 1986 (2014), applies retroactively on collateral review of a petitioner's capital sentence. Respondent's Brief in Opposition, which is in substance identical to its opposition in the related and co-pending petition brought by Vincent Sims and Michael Sample, contests neither the importance of that question nor the existence of a conflict on this issue in the lower courts. Compare BIO 11-16, with No. 16-445, BIO 14-27. Indeed, these briefs fail to even meaningfully address this Court's controlling decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), or to attempt any distinction between petitioners Payne, Sims, and Sample, and the petitioner in *Hall* himself. Because it is the superior vehicle, the few substantive arguments respondent does raise are addressed in the reply brief filed on behalf of petitioners Sims and Sample in No. 16-445. This reply addresses the sole, unique argument respondent presses in this case. As explained below, this Court should hold this petition pending plenary review in No. 16-445, or else grant, vacate, and remand this case in light of *Montgomery*.

I. This Court Should Hold Payne's Petition In Light Of Sims's And Sample's Petition Or GVR In Light Of *Montgomery* Regardless Of Any Vehicle Concerns.

As the petition predicted, Pet. 1-2, 16-17, respondent argues that Payne's petition is a poor vehicle because the Tennessee Supreme Court addressed *Hall's* retroactivity within the context of a coram nobis proceeding (for Payne) instead of within

a motion to reopen post-conviction proceedings (as for Sims and Sample). BIO 8-11. Respondent argues that the Tennessee Supreme Court dismissed petitioner's request for coram nobis relief on the ground that, as a matter of state law, an intellectual disability claim could not be brought in such a proceeding. BIO 8-9.

Payne does not dispute that, as *part* of its resolution of Payne's appeal, Pet. App. 11a-19a, the Tennessee Supreme Court concluded that coram nobis relief was not available for an intellectual-disability claim. But the court nevertheless sought extra briefing on *Hall's* retroactivity and resolved that question within the same decision. Pet. App. 24a-30a. Indeed, the court held Sims's and Sample's cases for resolution of Payne's appeal even though neither Sims nor Sample sought relief under the coram nobis statute. The Tennessee Supreme Court therefore evidently believed that resolution of the retroactivity of *Hall* was at least relevant to Payne's appeal regardless of the vehicle chosen to bring the intellectual disability claim. This belies respondent's claim that the decision below "does not depend on *Hall's* retroactivity." BIO 10. The Tennessee Supreme Court does not issue advisory opinions, *State ex rel. Lewis v. State*, 347 S.W.3d 47, 48 (Tenn. 1961), so presumably its resolution of the question of *Hall's* retroactivity must have been applicable to Payne's request for relief from the perspective of the state court itself.

The implicit conclusion that the determination of the *Hall* retroactivity question played a role in the Tennessee Supreme Court's resolution of petitioner's case is reinforced by the case's unusual procedural

posture. As the petition explains, Payne initially sought relief through a timely motion to reopen his post-conviction proceedings after the Tennessee Supreme Court issued *Coleman v. State*, 341 S.W.3d 221, 252 & n.55 (Tenn. 2011) (permitting individuals to present additional evidence beyond an individually-administered unadjusted I.Q. score to show they met the requirements for intellectual disability under Tenn. Code Ann. § 39-13-203). The Tennessee Supreme Court subsequently decided that *Coleman* did not apply retroactively on collateral review, *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), rendering Payne's motion to reopen essentially frivolous. In response, he filed a motion for coram nobis relief under *Coleman* in the same court. Pursuant to Tennessee's appellate procedures, the denials of the motion to reopen and for coram nobis relief were bifurcated on appeal, with the Tennessee Court of Criminal Appeals denying the motion to reopen entirely on the basis of *Keen* and the Tennessee Supreme Court denying permission to appeal. Pet. 9-13. Meanwhile, Payne took an appeal as of right from the denial of coram nobis relief, and both the Tennessee Court of Criminal Appeals, over the dissent of Judge McMullen, and Tennessee Supreme Court denied relief. *Id.* Thus, Payne only raises the issue of *Hall's* retroactivity in this procedural posture because of the bifurcated nature of Tennessee's appellate procedure and the vagaries of exactly when in time those bifurcated appeals were resolved.

Given that the Tennessee Supreme Court sought briefing on both *Hall's* retroactivity *and* the appropriate vehicle through which to assert it, *see*

Pet. App. 23a, there is a reasonable chance the Tennessee Supreme Court might dispose of petitioner's case differently if this Court were to hold its *Hall* determination in error. That, of course, is all this Court requires for a GVR. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (noting that GVR is proper where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome"). Accordingly, Payne sought only this limited intervention in his petitioner for certiorari, in recognition of the very vehicle concerns the state now raises, Pet. 1-2, 16-17, 31-34. And meanwhile, apart from making arguments on the likely merits outcome, the State does not contest that a hold or GVR could be procedurally appropriate, and is consistent with outcomes in similar cases. *See* Pet. 31-34, BIO 10-11.

Respondent also argues that this case may be a bad vehicle because Payne has since filed a second, timely motion to reopen his post-conviction proceedings that properly raises the *Hall* issue, which would make relief in this case unnecessary. BIO 10-11. To the extent the State is conceding that relief will be available to petitioner Payne if this Court overturns the Tennessee Supreme Court's ruling regarding *Hall's* retroactivity, the concession is welcome. But there is no need to rely upon it: Granting, vacating, and remanding will simply leave it to the Tennessee Supreme Court to decide (as it should) whether to grant Payne relief and to determine how it will effectuate this Court's ruling

that *Hall* is retroactive—whether through the current error coram nobis proceedings, the pending motion to reopen, or some other appropriate state procedure.

Petitioner of course understands that his petition suffers from vehicle concerns not present in the co-pending petition in No. 16-445. Petitioner, however, has adequately raised the identical issue—indeed, the Tennessee Supreme Court rendered its substantive decision in his case—and therefore the best resolution of these interlocking petitions would be to grant Sims’s and Sample’s petition and hold Payne’s petition. In the alternative, as noted at Pet. 31-34, the Court could grant a GVR for both petitions in light of *Montgomery*, which is dispositive of the question presented—a point the briefs in opposition fail even to contest.¹

¹ Similar to Sims and Sample, Reply 6-9, *Sims v. Tennessee*, No. 16-445, Payne received his first individually-administered unadjusted I.Q. score below 75 in 2010, and at the same time his prior I.Q. scores of above 75 were properly adjusted considering standard error and the Flynn Effect. Pet. 8. Thus, similar to Sims and Sample, Payne would have had no reason to file for relief after *Atkins v. Virginia*, 536 U.S. 304 (2002), until his scores could be properly evaluated post-*Coleman*. See *supra* 2-3.

CONCLUSION

The Court should grant the petition in *Sims* and *Sample* and hold this petition for their resolution, or, alternatively, GVR both petitions in light of *Montgomery*.

Respectfully submitted,

Paul R. Bottei
OFFICE OF THE FEDERAL
PUBLIC DEFENDER,
MIDDLE DISTRICT OF
TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37230
(615) 736-5047

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

February 15, 2017