CAPITAL CASE
NO EXECUTION DATE SET

No. 16-445

IN THE

Supreme Court of the United States

VINCENT SIMS & MICHAEL SAMPLE,

Petitioners,

v.

TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari
to the Tennessee Court of Criminal Appeals,
Western Division

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REPLY

Petitioners Vincent Sims and Michael Sample raise a question of exceptional importance that has divided the lower courts—namely, whether states must apply this Court's holding in *Hall v. Florida*, 134 S. Ct. 1986 (2014) retroactively on collateral review. More precisely, the question is whether *Hall*'s new, minimum floor for how states may define intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), governs petitioners' post-conviction claims that their intellectual functioning actually falls below that floor. Petitioners' death sentences hang in the balance, as do those of many others like them. *See* Pet. 14-21, *Payne v. Tennessee*, No. 16-395 ("*Payne* Pet.").

Respondents do not deny that, applying *Hall* and *Atkins* properly on direct review, petitioners would be deemed intellectually disabled and ineligible for death. Nor do they deny the existence of an obvious disagreement among lower courts of last resort on the question presented—one those courts themselves have recognized. *Payne* Pet. 17-24. Nor do they provide any substantial basis on which to distinguish this Court's answer in favor of retroactivity in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)—a precedent the lower courts here failed even to consider. These are reasons enough to grant plenary review, or else to grant, vacate, and remand in light of *Montgomery* itself.

Indeed, respondent's only non-merits argument against this Court's intervention is manifestly insubstantial. It suggests that the split in lower-court authority is not implicated here because petitioners failed to request state collateral relief immediately

after *Atkins*—demonstrating a lack of "diligence" on their part. BIO 14-21. But no court below (or in the split) has actually relied on this diligence issue in denying (or granting) relief, and so this alleged procedural issue has no interaction whatsoever with the split itself or the sole federal question presented in this case. Indeed, respondent does not even provide the state-law basis on which such a defense would rest, let alone provide a reason why the federal rule governing *Hall*'s retroactivity would depend on an inmate's diligence in asserting a *non-Hall* claim. At best, respondent merely highlights facts about cases in the split that no opinion has emphasized and that *might* constitute unsubstantiated, alternative reasons respondent could win on remand. But even that won't happen: The record plainly reveals that the claims respondent says should have been brought earlier would in fact have been futile until *Hall* was decided.

In short, petitioners have identified a clear split among courts of last resort regarding *Hall*'s retroactivity that requires resolution by this Court. This case—unencumbered by AEDPA, and by the independent-state-ground issue in *Payne*—is an ideal vehicle for that resolution. Pet. 15-23. The petition should be granted.

I. There Is No Jurisdictional Issue.

Respondent's opposition begins with a tellingly obtuse jurisdictional argument. It suggests (at 12-14) that the state court's decision is unreviewable because it rests on the state-law determination that petitioners did not meet the statutory criteria for post-conviction relief. But after two pages of windup, it concedes that if the answer to the Question Presented is "yes"—that

is, if this Court holds that *Hall* does govern petitioners' cases because it applies retroactively on collateral review—"the Constitution requires state collateral review courts to give [it] retroactive effect." BIO 14 (quoting *Montgomery*, 136 S. Ct. at 729). Put otherwise, respondent itself recognizes that this jurisdictional issue adds nothing to the merits question of whether *Montgomery* requires state courts to apply *Hall* retroactively to cases like petitioners'. And that is a federal question this Court can unquestionably review.[1]

II. Respondent's Diligence Argument Is Insubstantial And Does Not Undermine The Need For A Grant.

Respondent next presses two related arguments. First, it argues (at 14-15) that these cases are poor vehicles because petitioners (allegedly) failed to diligently pursue their right to make a full-blown intellectual-disability presentation immediately after *Atkins*. Second, it argues (at 15-21) that the acknowledged split in lower-court authority is not implicated here because the petitioners in every other case diligently pressed their rights. These related arguments fail for multiple reasons, not the least of which is that petitioners *did* assert their intellectual-disability claims with all the diligence that could possibly be required.

1. As an initial matter, respondent simply fails to contest the core criteria that govern the certiorari

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[1] Respondent also fails to contest other federal jurisdictional bases asserted in the petition, including Tennessee's statutory incorporation of the federal standard. *See* Pet. 14 n.3, BIO 13.

inquiry. For example, respondent does not dispute that the Tennessee Supreme Court squarely held, in *Payne*, that *Hall* is not retroactive on collateral review as a matter of federal law. *See* Pet. App. 24a-30a, *Payne v. Tennessee*, No. 16-395. Nor does respondent dispute that other state courts and federal courts of appeal have reached squarely opposite holdings. *See, e.g.*, BIO 16 n.3, 18 n.4; *Payne* Pet. 17-24. Nor does petitioner dispute the importance of this issue—a difficult task, as it raises the possibility of unconstitutionally executing an inmate who is actually disabled. And given the concentration of relevant death-penalty decisions within a small number of states and circuits, *see Payne* Pet. 22-23, further percolation will be of little value—another point respondent leaves unchallenged. There is thus no apparent dispute that the petition presents a mature split on a vitally important issue with multiple, reasoned decisions on both sides that is ideally suited for this Court's immediate resolution. *Payne* Pet. 23-24.

Respondent does seem to contest the point that this issue is better considered in its present posture rather than federal habeas, *see Payne* Pet. 24-26, but ends up making petitioners' point. It argues (at 19) that the Court should deny here because "it is at least foreseeable" that petitioners will be able to litigate intellectual-disability claims under *Hall* in federal court—dropping a footnote to preserve its procedural defenses. Of course, the presence of these procedural defenses, including potential bars to supplementing the record with current intellectual-disability testing, is a core reason why state habeas or post-conviction is the superior pathway for review. For perhaps obvious

reasons, respondent also fails to mention that, in order to prevail on federal habeas, petitioners would have to show that the state court's disposition on *Hall*'s retroactivity was not just wrong, but an objectively unreasonable application of federal law.

This is, in short, the best possible vehicle for resolution of a mature lower-court conflict on a critical issue regarding capital punishment. That conflict cannot be avoided: Tennessee now denies collateral review under *Hall* for *all* petitioners, without regard to "diligence" or any other issue, while other states give *Hall* retroactive force and have granted relief from capital sentences on that ground. *See Payne* Pet. 17-24. It would thus take a substantial objection for this Court not to resolve the conflict.

2. Respondent's core objection, however, is insubstantial. It argues that the cases cited on both sides of the split are distinguishable because those cases involved inmates who, like petitioners, were convicted prior to *Atkins* and yet, unlike petitioners, filed "timely" or "diligent" post-conviction challenges to their sentences immediately after *Atkins*. BIO 15-21. This is a distinction without a difference, both on the facts and as a matter of law.

First, this distinction is entirely of respondent's invention: No court has ever relied on it in deciding the Question Presented, so it cannot possibly be true that, as respondent argues (at 21), "[a]ny disparity between the outcomes of other capital inmates' cases and the petitioners' is as much a product of the petitioners' comparative lack of diligence as anything." Indeed, it is quite clear that, if Hall himself or others granted retroactive relief under *Hall* had brought their cases in Tennessee, they would have lost under

the decision in *Payne* denying *Hall* any retroactive effect. Having formed no basis for the decisions below (or any others), there is no sense in which the disparate outcomes can be the "product" of comparative diligence. Indeed, it is notable that—as respondent *concedes* (at 18-19)—diligence inquiries would not resolve the split, because the federal courts that have denied *Hall* retroactive effect have done so even where the petitioner was diligent. *See* BIO 18-19 (discussing *Goodwin v. Steele*, 135 S. Ct. 780 (2014)).[2]

Second, this argument simply ignores the details of applicable Tennessee statutory and constitutional law at the time *Atkins* issued. As the *Payne* petition explained (at 4-8), a challenge by these petitioners after *Atkins* would have been entirely frivolous. Tennessee enacted Tenn. Code Ann. §39-13-203 in 1990, and its "intellectual disability" definition requires "significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." The plain language of the statute therefore clearly required an I.Q. score of 70 or below to qualify for relief—which these petitioners did not have and *Hall* now forbids. And while the Tennessee Supreme Court recognized a state-constitutional basis for prohibiting executions of the intellectually disabled in *Van Tran v. State*, 66

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[2] Respondent's discussion of *Goodwin* (at 18-19) is confusing—apparently treating this Court's denial of certiorari as a merits disposition. And notably, while this Court denied certiorari in *Goodwin*, that case *predated the split*, was presented to the Court in an emergency posture, and involved confounding AEDPA issues. All *Goodwin* shows is that the Eighth Circuit has decided the *Hall* retroactivity issue quite differently from other courts. *See Payne* Pet. 22.

S.W.2d 790 (Tenn. 2001), the State neither amended §39-13-203 nor broadened its bright-line cutoff as a matter of state-constitutional law. Instead, the Tennessee Supreme Court eventually reaffirmed the bright-line statutory cut-off in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). And even after the Tennessee Supreme Court decided—*a decade after Atkins*—to broaden the ways that defendants could prove that their functioning fell below the 70-point level, *see Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), it eventually denied that decision retroactive effect as well. *See Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

The foregoing clearly demonstrates that petitioners did not have a valid claim at any time after *Atkins* and before *Hall*. Respondent does not contest that, when this Court decided *Atkins* in 2002, neither Sims nor Sample had individually-administered unadjusted I.Q. scores of 70 or below. *See* Pet. 6-7, 11-13. And so, with §39-13-203 on the books, a petition to reopen post-conviction proceedings would have been entirely futile; indeed, that is *exactly* what *Howell* eventually held when it confirmed the statute's textual cutoff. Notably, *Atkins* granted the states the freedom to define intellectual disability, 536 U.S. at 317, and as of 2002, Tennessee had defined intellectual disability to require an I.Q. score of 70 or below. Petitioners cannot be required to bring claims refuted by plain statutory text, perhaps explaining

why respondent cites no law for the proposition that they should have done so.[3]

Nonetheless, respondent still claims (at 20-21) that petitioners should have filed motions seeking to reopen collateral review after *Atkins* because that is what the petitioner did in *Coleman*. But, critically, Coleman *had* at least one individually-administered unadjusted I.Q. score below 70 at the time he filed suit, and so was at least nominally eligible for relief under §39-13-203. *Coleman v. State*, No. W2007-02767, 2010 WL 118696, at *23 (Tenn. Crim. App. June 17, 2010). After *Coleman* held that §39-13-203 could be met by adjusted scores accounting for influences like standard error or the Flynn Effect, 341 S.W.3d at 252 & n.55, petitioners finally had a reason to seek relief—until, of course, the Tennessee courts denied *Coleman* retroactive effect. Accordingly, while respondent speculates that there was some point when petitioners could have "present[ed] comprehensive evidence of intellectual disability," BIO 19 (but see n.3), the State ultimately fails to dispute that petitioners had *no chance of winning that claim* until after *Hall*.

Regardless of the intricacies of the Tennessee regime, it is also legally irrelevant that petitioners did not seek to reopen their post-conviction proceedings after *Atkins*. As detailed in the *Payne* petition (at 27-31), *Hall* undoubtedly established a new substantive rule of constitutional law that applies retroactively under *Montgomery*. *Hall* expanded the class of people

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[3] This point is made abundantly clear in the portion of Sims' post-conviction hearing (included at Pet. 7), where the trial court refused to even consider evidence of intellectual disability beyond the above-70 I.Q. scores in light of §39-13-203.

protected by *Atkins* to those with I.Q. scores of up to 75 who present evidence of actual intellectual disability. *Payne* Pet. 28-29. Petitioners are thus entitled to a hearing that applies *Hall*'s rule, not the skim-milk hearings theoretically available at various stages between *Atkins*, *Howell*, *Coleman*, and *Keen*. This is exactly why, after *Hall*, petitioners in Florida have received new hearings: Their pre-*Hall* post-conviction hearings were constitutionally deficient, and they are thus entitled to new ones. *Payne* Pet. 20-22. Petitioners have filed affidavits demonstrating adjusted I.Q. scores of 70 or below—scores which *Hall* only now makes sufficient to create the possibility of relief after a constitutionally adequate intellectual-disability hearing. The sole question presented is whether Tennessee, unlike other states, can yet deny that hearing.

Ultimately, respondent's position is that, because petitioners did not try to obtain a hearing that either (a) the statute foreclosed or (b) would have been constitutionally inadequate under the rule eventually announced in *Hall*, they are not entitled to retroactive relief under *Hall*. But this amounts only to denying that *Hall* is retroactive on the merits, since the consequence of finding a rule retroactive is to acknowledge that it is *new* and must be *newly applied* in collateral-review proceedings. Respondent does not dispute that petitioners diligently filed timely challenges to their sentence after *Hall*, and if *Hall* actually is a new, retroactive rule under *Montgomery*, that is the only procedure necessary to entitle them to relief. The split is thus fully implicated here, and petitioners may very well obtain the ultimate relief that inmates like them have obtained in other states.

III. Respondent Is Wrong On The Merits, And Even If It Were Right, The Court Should Still Grant Certiorari.

Respondent's sole remaining argument is its submission (at 21-26) that, on the merits, *Hall* is not in fact retroactive under *Teague v. Lane*, 489 U.S. 288 (1989), and *Montgomery*. But while respondent reproduces a long paragraph from *Montgomery* (at 21-22), it does not even engage with the petition's analysis of that closely analogous case. And even if respondent were right, the Court should still grant this petition to resolve the disagreement among the lower courts.

Indeed, the last point is the most important—this case implicates a square circuit split on a capital issue, and that situation should not persist regardless of who is right on the merits. If respondent is correct and *Hall* is not retroactive, then valid death sentences in Florida, Alabama, and Kentucky should not be cancelled on account of a federal constitutional rule that does not exist. Conversely, if petitioners are correct and *Hall* is retroactive, then they should not be executed without the process that could well have spared them in other states. Life and death should not depend upon such geographic vagaries; regardless of one's intuitions about the merits, the Court should accordingly grant this petition to resolve the split.

That said, respondent's merits argument clearly flies in the face of *Montgomery*. Respondent claims that *Hall* did not expand the class of protected individuals beyond *Atkins* and therefore did not create a new substantive rule of constitutional law with retroactive effect. BIO 22-24. To this end, respondent quotes (at length) a distinction laid out in *Montgomery* between procedural and substantive rules. But the

holding of *Montgomery* is what matters here. *Montgomery* held that *Miller v. Alabama*, 132 S. Ct. 2455 (2012)—which required individualized consideration before a juvenile could be sentenced to life in prison without parole—announced a new *substantive* rule of constitutional law that applied retroactively on collateral review, even though its limitation on juvenile life without parole required a particular *procedure* rather than outlawing the life-without-parole sentence entirely. *Montgomery*, 136 S. Ct. at 732. As the *Payne* petition explained (at 27-31) the parallels between *Miller-Montgomery*, on the one hand, and *Hall* and the present petitions, on the other, are thus incredibly precise. Yet, remarkably, respondent offers no response on this point at all.

Even without *Montgomery*, *Hall* would clearly be a new and retroactive constitutional rule under established criteria. By requiring states to recognize that individuals with I.Q. scores of up to 75 could be classified as intellectually disabled under modern clinical practices, *Hall* expanded the protection of *Atkins* to include individuals that were previously excluded, specifically because bright-line cut-offs "create[] an unacceptable risk that persons with intellectual disabilities will be executed, and thus [are] unconstitutional." *Hall*, 134 S. Ct. at 1990. And, as this Court observed in *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004), new substantive rules of law apply retroactively precisely "because they necessarily carry a significant risk that a defendant … faces a punishment that the law cannot impose upon him." That is a perfect description of these petitioners, who face a "significant risk" of being executed while they are actually intellectually disabled because they have

never been afforded the chance to show that their execution would violate the federal floor on *Atkins* that *Hall* finally created.[4]

The clarity of the foregoing suggests that this Court could GVR in light of *Montgomery*, which the lower courts failed to discuss. But given the importance of the split at issue, the better course would be for this Court to speedily grant plenary review and resolve the disagreement in the lower courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondent's argument (at 25-26) that *Hall* is not a "watershed rule" is beside the point. *Teague* establishes two *separate* sets of rules that must be given retroactive effective: (1) "new substantive rules of constitutional law," and (2) "watershed rules of criminal procedure." *Montgomery*, 136 S. Ct. at 728. This case concerns the former.