No. 18-1077

In the Supreme Court of the United States

AKIL JAHI, aka PRESTON CARTER,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I

Does this Court have jurisdiction to decide whether its opinion in *Moore v. Texas*, 137 S. Ct. 1039 (2017), requires Tennessee courts to grant successive collateral review of a criminal judgment?

II

Was the Court's holding in *Moore* dictated by the Court's precedent in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014)?

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STATEMENT OF JURISDICTION

The Tennessee Supreme Court denied petitioner's application for permission to appeal on September 17, 2018. (Pet's App'x, at 25a.) Justice Sotomayor extended the time for filing a petition for writ of certiorari until February 14, 2019. *Jahi v. Tennessee*, No. 18A547 (U.S. Dec. 3, 2018). Petitioner filed his petition on February 14, 2019. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (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. § 40-30-102(c) establishes filing limitations for petitions under the Tennessee Post-Conviction Procedure Act:

> This part contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. . . . A petitioner may move to reopen a post-conviction proceeding that has concluded, under the limited circumstances set out in § 40-30-117.

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 . . . .

Tenn. Code Ann. § 40-30-122 defines the appellate rulings that qualify as a basis for reopening: "[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."

STATEMENT OF THE CASE

On January 25, 1995, the petitioner pleaded guilty to two counts of felony murder and was sentenced to death. The Tennessee Supreme Court affirmed the convictions but reversed the sentences and remanded for a new sentencing hearing. *See State v. Carter*, 988 S.W.2d 145, 153 (Tenn. 1999). At the resentencing hearing, a jury again sentenced the petitioner to death, and the Tennessee Supreme Court affirmed the sentences. *See State v. Carter*, 114 S.W.3d 895, 910 (Tenn. 2003).

The petitioner filed a timely post-conviction petition in 2004, which the post-conviction court denied after a hearing. *Jahi v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502, at *1, *99-106 (Tenn. Crim. App. Mar. 13, 2014). Included among the issues addressed by the post-conviction court was the petitioner's alleged intellectually disability.[1] *Id.* at *105-111. The court considered three expert witnesses on this issue, one of whom purported to "adjust" the petitioner's previous, above-70 IQ scores to reflect a range that extended below 70. *Id.* at *106.

The court rejected the petitioner's argument on this point, noting that only one of the experts opined that the petitioner was intellectually disabled. *Id.* This expert, Dr. Geraldine Bishop, relied upon an adjustment to the petitioner's IQ score based upon the Flynn Effect, which she acknowledged was not an accepted practice outside capital litigation. *Id.* Moreover, Dr. Bishop could not state "definitively" whether the petitioner's IQ was above or below 70. *Id.* The court therefore rejected the petitioner's claim of intellectual disability. *Id.*

The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief, including the rejection of the petitioner's intellectual disability claim. *Id.* at *106-11. The court acknowledged that, although

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[1] The petitioner failed to raise this issue in his petition, which, the Court of Criminal Appeals noted, "risked waiving the issue." *Jahi*, 2014 WL 1004502, at *109. The court did not ultimately decide whether the issue was waived, however, because the petitioner otherwise failed to establish that he was intellectually disabled. *Id.*

a petitioner's IQ scores may all be above 70, he may prove his intellectual disability by demonstrating that his functional IQ is 70 or below. *Id.* at *107 (quoting *Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011) (holding that Tennessee's intellectual disability statute requires a "functional intelligence quotient of seventy (70) or below," not a "functional intelligence quotient *test score* of seventy (70) or below")). In the petitioner's case, the court held that the post-conviction court erred when it found that Dr. Bishop did not provide "definite testimony" that the petitioner's functional IQ was 70 or below. *Id.* at *110.

However, the court affirmed the post-conviction court's conclusion "that applying the Flynn Effect was not a generally accepted practice in the psychological community." *Id.* at *111. This conclusion was based not only upon the testimony of the other two expert witnesses but also upon Dr. Bishop's own acknowledgement that the Flynn Effect had not been accepted by the APA, the AAIDD, or the Wechsler series of IQ tests. *Id.* Moreover, Dr. Bishop did not offer testimony about whether the petitioner would be considered intellectually disabled or what his functional IQ would be without use of the Flynn Effect. *Id.* The court therefore concluded that the petitioner "failed to establish by a preponderance of the evidence that he had '[s]ignificantly subaverage general intellectual functioning' as evidence[d] by an IQ of seventy or below." *Id.* (quoting Tenn. Code Ann. § 39-13-203(a)(1)).

On May 27, 2014, this Court decided *Hall v. Florida*, 572 U.S. 701 (2014). Under *Hall*, "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 723. Nearly one year later, the petitioner filed a motion to reopen his post-conviction proceedings, arguing that *Hall* announced a new, retroactively applicable rule of constitutional law. The post-conviction court denied the petition, and the petitioner appealed to the Tennessee Court of Criminal Appeals. Contrary to state procedural rules, however, the petitioner did not file an application for permission to appeal, and the court dismissed the appeal for lack of jurisdiction. (Resp's App'x, 45-70.)

On March 28, 2017, this Court decided *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017), rejecting a multifactor test crafted by the Texas Court of Criminal Appeals for determining whether a capital defendant is intellectually disabled. Relying upon *Moore*, the petitioner filed another motion to reopen his post-conviction proceedings, arguing that *Moore* announced a new, retroactive rule of law that entitled him to relitigate his intellectual disability claim based upon current medical community standards. (Resp's App'x, 21-44.)

The post-conviction court rejected the petitioner's claim, finding that the petitioner had not satisfied the statutory requirements for reopening post-conviction proceedings based upon *Moore*. (Pet's App'x, 2a.) The court also found that the petitioner's alleged

intellectual disability was previously determined on appeal of his post-conviction proceedings. (Pet's App'x, 2a.)

The petitioner filed an application for permission to appeal in the Tennessee Court of Criminal Appeals, reiterating that *Moore* entitled him to reopen his post-conviction proceedings and relitigate his intellectual disability claim. The court denied his application, holding that "*Moore* is clearly derivative of *Atkins* and *Hall*." (Pet's App'x, 5a.) Further, *Moore* did not enlarge the class of individuals affected by *Atkins* and therefore did not create a new rule. (Pet's App'x, 5a-6a.)

The petitioner filed a petition for rehearing, arguing that the court erred in holding that *Moore* did not "enlarge" the class of individuals affected by *Atkins*. The court denied the petition for rehearing. (Pet's App'x, 8a.) The petitioner then sought permission to appeal to the Tennessee Supreme Court, which also denied review. (Pet's App'x, 25a.)

The petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court should deny the petition. First, the state court's decision that the petitioner did not satisfy Tennessee's statutory criteria for successive collateral review did not resolve any federal question. Second, the petitioner may not litigate the retroactivity of *Hall* in this appeal because he did not adequately present that claim to the state courts in this action. Third, the state court properly determined that *Moore*, which merely applied *Atkins* and *Hall*, did not announce a new rule of constitutional law. Fourth, the petitioner has not identified a relevant split of authority for resolution by this Court.

I. This Court Lacks Jurisdiction to Review a Decision Enforcing a State Statutory Restriction on Successive Collateral Review.

The Court does not have jurisdiction over this case because the state court decision does not rest on the resolution of any federal question. The Constitution 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. Congress has also limited 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. 28 U.S.C. § 1257(a); *see also 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").

Here, the state court's decision that successive collateral review is not available for petitioner's intellectual-disability claim does not involve an issue of constitutional dimension. 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 such avenue is through the Post-Conviction Procedure Act, which has built-in restrictions on the availability of collateral review, including that petitioners may file only one petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-102(c).

As pertinent here, however, "[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). Reopening is available if the petitioner's claim in the motion to reopen is (1) based on a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, (2) retrospective application of that right is required, and (3) the motion is filed within one year of the qualifying appellate ruling. Tenn. Code Ann. § 40-30-117(a)(1). By statute, "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." Tenn. Code Ann. § 40-30-122.

Applying this definition, the Tennessee Court of Criminal Appeals concluded that *Moore* did not create a new rule of constitutional criminal law but, instead, was simply an application of existing precedent. This decision did not resolve any Eighth Amendment claim but merely applied the Tennessee statute that restricts successive collateral attacks on criminal judgments. This Court therefore lacks jurisdiction to review the decision because it "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).

Petitioner's reliance on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is misplaced.[2] In *Montgomery*, this Court 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. *Teague* provided that new rules do not apply retroactively unless they are "substantive rules," which forbid "criminal punishment of certain primary conduct" or "a certain category of punishment for a class of defendants," or if they are new "watershed rules of criminal procedure." *Id.* (internal quotation marks omitted). Under *Montgomery*, "when a new

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[2] The petitioner also cites *Welch v. United States*, 136 S. Ct. 1257 (2016), but does not discuss it. *Welch* involved a *federal* petitioner attacking a *federal* sentence under 28 U.S.C. § 2255. *Id.* at 1263. Also, it was undisputed in *Welch* that the appellate decision at issue announced a "new rule." *Id.* at 1264.

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." *Id.*

This holding does not control here. The question in *Montgomery* was whether an admittedly new rule must be applied retroactively. In this case, on the other hand, the state court held that *Moore* did not announce a new rule at all. That question turned not on whether *Moore* was "substantive" but on the relevant state statutes that define what constitutes a "new rule of constitutional criminal law." *See* Tenn. Code Ann. §§ 40-30-117(a)(1), -122. Although this statutory definition was informed by *Teague*, the state court ultimately applied a state statute that controls whether a state prisoner is entitled to a second state collateral review proceeding.[3] *See Bush v. State*, 428 S.W.3d 1, 13, 19-20 (Tenn. 2014) (discussing the adoption of § 40-30-122).

The state court's decision that *Moore* was not a basis for reopening the petitioner's post-conviction proceedings therefore rested on a state law ground that is independent of any federal retroactivity question and adequate to support the judgment.

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[3] The Court of Criminal Appeals's citation to *Teague* along with § 40-30-122 is therefore not sufficient to establish jurisdiction in this case. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). The court's ultimate holding in this case was that the petitioner had not satisfied the statutory basis for reopening. (Pet's App'x, 6a.)

II. The Petitioner May Not Litigate the Retroactivity of *Hall* in this Petition.

The petitioner has raised the retroactivity of *Hall* as a potential issue for review, and he has urged the Court to use this case as a vehicle for addressing the retroactivity of *Hall*. But the petitioner is barred from litigating *Hall*'s retroactivity in this appeal.

This is not the petitioner's first attempt to litigate *Hall*. In 2015, the petitioner filed a timely motion to reopen based upon *Hall*, which was denied. However, he did not follow the proper state procedure for seeking permission to appeal this issue, and the Court of Criminal Appeals dismissed his appeal accordingly. (Resp's App'x, 45-70.) The petitioner did not seek review of this dismissal by the Tennessee Supreme Court. The petitioner may not raise this issue now to avoid the consequences of his procedural failure in a prior appeal.

Further, the petitioner did not adequately present this issue to the state courts in *this* appeal. This Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" when any right "is specially set up or claimed under the Constitution [of the United States]." 28 U.S.C. § 1257(a). Under this statute and its predecessors, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86

(1997)). Further, "when the highest state court is silent on a federal question," the Court assumes "that the issue was not properly presented." *Adams*, 520 U.S. at 86-87.

The state courts considered only whether *Moore* was a basis for reopening the petitioner's post-conviction proceedings. In his motion to reopen, the petitioner focused on *Moore*, mentioning his entitlement to relief under *Hall* only in a footnote and then only "via *Moore* retroactively." (Resp's App'x, 29, 31.) He abandoned this theory before the Court of Criminal Appeals, however, focusing on whether *Moore* announced a new, retroactive rule of law. (Resp's App'x, 1-20.) The Court of Criminal Appeals considered only whether *Moore* established a new rule, and it discussed *Hall* only to demonstrate that *Moore* was dictated by precedent. (Pet's App'x, 4a-6a.) Because he failed to adequately present this issue below, the petitioner may not now seek to litigate this claim before the Court.

Indeed, the petitioner could not have obtained relief in state court had he properly presented this claim. Even assuming *Hall* announced a new, retroactive rule of constitutional law, Tennessee's statutory procedure requires that a motion to reopen be filed within one year of the opinion announcing the new rule.[4] Tenn. Code Ann. § 40-30-117(a)(1). The motion to reopen in this case was filed on August 29, 2017, over three years after the Court decided *Hall*. The state courts were not

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[4] Additionally, the Tennessee Supreme Court has declined to apply *Hall* retroactively. *See Payne v. State*, 493 S.W.3d 478, 490-91 (Tenn. 2016).

constitutionally mandated to provide the petitioner relief for a claim that was not properly presented. *See Montgomery*, 136 S. Ct. at 732 (holding that a state may not deny a controlling right asserted under the Constitution "assuming the claim is properly presented in the case").

Moreover, this Court has denied several petitions from other Tennessee prisoners seeking to litigate the retroactivity of *Hall*. *See Payne v. Tennessee*, No. 17-8543 (U.S. Oct. 1, 2018); *Sample v. Tennessee*, No. 17-8567 (U.S. Oct. 1, 2018); *Chalmers v. Tennessee*, No. 17-6689 (U.S. Jan. 8, 2018). There is no reason to treat the present petition any differently.

III. The State Court Correctly Found that *Moore* Did Not Create a New Rule of Constitutional Law.

Even if this Court were to find that it has jurisdiction, certiorari should be denied because the state court correctly concluded that *Moore* merely applied *Atkins* and *Hall* and did not create a new rule of constitutional law requiring retroactive application.

"In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S.

342, 348 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

Moore did not create a new rule because its result was dictated by this Court's precedent. In *Atkins*, the Court held that the Eighth Amendment forbids the execution of persons with intellectual disability. 536 U.S. at 321. However, *Atkins* left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (internal quotation marks and alteration omitted).

In *Hall*, this Court considered Florida's attempt to enforce this restriction with a "rigid rule" that foreclosed exploration of intellectual disability unless the capital defendant had an IQ test score below 70. *Hall*, 572 U.S. at 704. The Court concluded that "Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Id.* at 724. Indeed, *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 719 (citing *Atkins*, 536 U.S. at 308, n.3, 309 n.5). The *Hall* Court made clear how thoroughly its holding was dictated by *Atkins*: "The 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 720 (emphasis added).

In *Moore*, as relevant here, the Court merely applied *Atkins* and *Hall* to a multifactor test created by the Texas Court of Criminal Appeals. "As we instructed in *Hall*," the Court noted, "adjudications of

intellectual disability should be 'informed by the views of medical experts.'" 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 721). The multifactor test in Texas, however, created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* (quoting *Hall*, 572 U.S. at 704).

The Court went on to note that the Texas standard was "irreconcilable with *Hall*," and the Court required, "in line with *Hall*, . . . that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinical established range for intellectual-functioning deficits." *Id.* at 1049-50. Similarly, when ultimately concluding that the "medical community's current standards supply one constraint on States' leeway" to define intellectual disability, the *Moore* Court pointed to both *Hall*'s and *Atkins*'s reliance on current medical standards. *Id.* at 1053 (citing *Hall*, 572 U.S. at 704-06, 709-14 (employing current clinical standards); *Atkins*, 536 U.S. at 308 n.3, 317 n.22 (relying on then-current standards)).

Accordingly, the Court of Criminal Appeals properly held that *Moore* did not announce a new rule because it was simply an application of *Atkins* and *Hall*.

IV. The Petitioner Identifies No Relevant Split of Authority.

The petitioner also argues that a split of authority has developed on the retroactivity of *Moore*, which this Court should address. However, the relevant cases he cites do not establish a split of authority.[5]

The petitioner cites two federal appellate cases and two district court cases that have refused to apply *Moore* retroactively. In three of the cases, the court concluded that *Moore* did not announce a new rule of law or was not retroactive. *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018) (noting that *Moore* and *Hall* "created new procedural requirements" and noting that this court had not determined they should be applied retroactively); *Smith v. Dunn*, No. 2:13-CV-00557-RDP, 2017 WL 3116937, at *4-5 (N.D. Ala. July 21, 2017) (". . . *Moore* does not meet any of the *Teague* exceptions to non-retroactivity[.]"), *appeal docketed*, No. 17-15043 (11th Cir. Nov. 9, 2017); *Lynch v. Hudson*, No. 2:07-CV-948, 2017 WL 3404773, at *3 (S.D. Ohio Aug. 9, 2017) (". . . [*Moore*] is neither a new substantive constitutional rule nor a watershed procedural rule."). In the fourth case, the court did not consider the *Teague* standard but merely described *Moore* as addressing "purely procedural issues." *Davis v. Kelley*, 854 F.3d 967, 970 (8th Cir. 2017). The Eighth Circuit later refused in another case, however, to recognize

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[5] The petitioner also claims there is a split of authority on the retroactivity of *Hall*, but, as discussed above in Section II, he may not litigate the retroactivity of *Hall* in this appeal.

Moore as a "new rule of constitutional procedure." *Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017).

On the other hand, the petitioner claims that a handful of courts have applied *Moore* retroactively. But none of the cases he cites considered *Moore*'s retroactivity under the *Teague* standard. Two cases merely applied *Moore* and *Hall* to *Atkins* claims in collateral review without discussion of *Teague*. *Busby v. Davis*, 892 F.3d 735, 750 (5th Cir. 2018) (not resolving the question of whether the state court's decision "should be assessed under Supreme Court precedent as it existed as of the date" of the decision because "it is not outcome-determinative in this case"); *Wright v. State*, 256 So. 3d 766, 769-78 (Fla. 2018) (not discussing retroactivity and considering an intellectual disability claim properly presented in a post-conviction motion). The third case applied *Moore* and *Hall* to a case that was in the appellate pipeline when both cases were decided, and the court also applied a state statute that applied retroactively by its terms. *State v. Thurber*, 420 P.3d 389, 448-49 (Kan. 2018). The fourth case considered the retroactivity of *Atkins*, not of *Moore*. *In re Cathey*, 857 F.3d 221, 227 (5th Cir. 2017) ("There is no question that *Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court." (alteration omitted)).

The petitioner therefore has not established a split of authority on whether *Moore* established a new rule of constitutional law that must be applied retroactively under *Teague*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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[1] The petitioner's motion to reopen was attached to his Application for Permission to Appeal.

[2] The petitioner's supplement to his motion to reopen was attached to his Application for Permission to Appeal.

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN DIVISION
AT JACKSON

CCA No. W2017-02527-CCA-R28-PD
Shelby County No. P-28413

[Filed December 27, 2017]

AKIL JAHI, aka PRESTON CARTER Petitioner-Applicant	)
vs.	)
STATE OF TENNESSEE Respondent	)

ORAL ARGUMENT REQUESTED

APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Tenn. Code Ann. §40-30-117(c), Akil Jahi seeks permission to appeal the Shelby County Criminal Court's November 28, 2017 denial of his motion to reopen post-conviction proceedings, seeking relief under *Moore v. Texas*, 581 U.S. __, 137 S.Ct. 1039 (2017). Apx. 148-49. This Court should grant permission to appeal because, under Tenn. Code Ann. §40-30-117(a)(1), *Moore* establishes an Eighth Amendment right that did not exist at the time of trial,

but for which retrospective application is required—namely the right not to be executed if one is intellectually disabled under current medical standards. *Moore*, 581 U.S. at __ 137 S.Ct. at 1044-1048, 1049-1053.

Moore's Eighth Amendment holding is retrospective, as established by *Moore* itself, the United States Supreme Court's retroactivity decisions in *Montgomery v. Louisiana*, 577 U.S. __ (2016) and *Welch v. United States*, 578 U.S. __ (2016), and numerous post-*Moore* decisions in which the Supreme Court has required *Moore*'s retrospective application to collateral proceedings: *Wright v. Florida*, 583 U.S. __ (2017)(U.S. No. 17-5575), *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 accordance with Tenn. Code Ann. §40-30-117(a)(1), therefore, Akil Jahi is entitled to reopen post-conviction proceedings under *Moore*. This Court should reverse the judgment of the trial court denying the motion to reopen and remand for proper application of *Moore* to Akil Jahi's claims that he is intellectually disabled and thus exempt from execution under the Eighth and Fourteenth Amendments and the Tennessee Constitution.

I. The United States Supreme Court's recent decision in *Moore v. Texas*, 581 U.S. __ (2017)

In *Moore v. Texas*, the Supreme Court has held that the Eighth Amendment prohibits the execution of someone who is intellectually disabled as defined by current medical standards applicable to the assessment of intellectual disability. *Moore*, 581 U.S. at __, 137 S.Ct. at 1044 ('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 __, 137 S.Ct. at 1048 (Eighth Amendment intellectual disability determination "must be informed by the medical community's diagnostic framework.").

Those current medical standards include those set forth by the American Psychiatric Association (APA) in the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, 2013) and by the American Association on Intellectual and Developmental Disabilities in its Eleventh Edition of *Intellectual Disability: Definition, Classification, and Systems of Support*, or AAIDD-11, published in 2010. As *Moore* has explained, DSM-5 and AAIDD-11 reflect the medical community's "improved understanding over time" of what defines intellectual disability. *Moore*, 581 U.S. at __, 137 S.Ct. at 1053.

In *Moore*, the Supreme Court praised the state trial court for having made its intellectual disability determination by "consult[ing] current medical diagnostic standards" and

> 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 __, 137 S.Ct. at 1045. *Id.* (discussing trial court's proper application of DSM-5 and AAIDD-11). To that end, the *Moore* court admonished reviewing courts to "adequately inform" themselves of the "medical community's diagnostic framework" and made clear that the "medical community's current standards supply one constraint on the States' leeway" in enforcing the holding in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Id.* U.S. at __, 137 S.Ct. at 1053.

The Supreme Court applied these current medical standards in Moore's collateral review case despite the fact that the murder for which Moore was convicted occurred in 1980, and he was resentenced in 2001—long before the publication of either the DSM-5 (published in 2013) or the AAIDD-11 (published in 2010). Nevertheless, the Supreme Court repeatedly applied DSM-5 and AAIDD-11 to Moore's evidence of intellectual disability in conducting its own Eighth Amendment analysis of his claim of intellectual disability. *See e.g., Moore*, 581 U.S. at __, 137 S.Ct. at 1044, 1048-1049 (applying DSM-5 and AAIDD-11 to

intellectual functioning prong of intellectual disability test); *Id.*, 581 U.S. at __, 137 S.Ct. at 1050-1053 (applying DSM-5 and AAIDD-11 to assessment of Moore's adaptive functioning). Although the standards the Supreme Court applied in *Moore* did not exist at the time of Moore's trial, *the* Supreme Court was clear that Moore was entitled to the application of the most current medical standards in assessing his claim of intellectual disability. *Id.* at 1053.

Not only did *Moore* adopt the current medical standards delineated in the DSM-5 and AAIDD-11 as constitutionally mandated as a matter of Eighth Amendment jurisprudence, *Moore* also embraced the standards the Supreme Court previously announced in *Hall v. Florida*, 572 U.S. __ (2014). *Hall* held that the Eighth Amendment requires consideration of the SEM of IQ tests, and a full assessment of a petitioner's intellectual functioning and adaptive deficits should the petitioner have at least one IQ test score of 70 to 75, or below. *Hall*, 572 U.S. at __, 134 S.Ct. at 2001. *Hall* defined IQ tests as providing a "range of scores," constitutionally requiring a reviewing court to consider the standard error of measurement, or SEM, of each IQ score and to consider additional evidence of intellectual disability if a petitioner has an IQ score that falls within the 70-75 range. *Id.*, 581 U.S. at __, 137 S.Ct. at 1995, 2001.

Thus, as a matter of Eighth Amendment jurisprudence, *Moore* and *Hall* provide that a state may not impose a bright-line requirement that a petitioner have an IQ score of 70 before it fully evaluates his/her claim of intellectual disability. Under *Moore* (and *Hall*)

an individual can be intellectually disabled with an obtained IQ score above 70, so long as the range of his IQ, upon application of the SEM, falls within the range of persons who may be deemed intellectually disabled. Post-*Moore*/*Hall*, the Eighth Amendment requires that if after applying the SEM, a petitioner's IQ test score is approximately two standard deviations below the mean (usually 70-75), a reviewing court must assess both intellectual functioning and adaptive deficits as part of a holistic assessment of the petitioner's intellectual disability.

In *Moore*, the Supreme Court concluded that when considering Moore's intellectual functioning, the state appellate court failed to properly apply the SEM to Moore's IQ testing as required by medical standards (and *Hall*). *See Moore*, 581 U.S. at __, 137 S.Ct. at 1048-1049. *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 in *Moore* did not comport with current medical standards, it violated the Eighth Amendment, and the Supreme Court thus reversed the Texas appellate court's intellectual disability ruling. *Moore*, 581 U.S. at __, 137 S.Ct. at 1050-1053. Like Moore, Akil Jahi is now entitled to have his evidence of

intellectual disability evaluated in light of current medical standards, as *Moore* requires and which, as Mr. Jahi now shows, applies retroactively here.

II. Akil Jahi is entitled to reopen post-conviction proceedings under *Moore v. Texas*

Moore entitles Akil Jahi to reopen his post-conviction proceedings under Tenn. Code Ann. §40-30-117(a)(1), which allows a motion to reopen 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." *Moore* fits both of the criteria of §40-30-117(a)(1).

A. *Moore* establishes a right not recognized as existing at the time of Akil Jahi's trial

Akil Jahi satisfies the first requirement of §40-30-117(a)(1), because *Moore* did not exist at the time of Akil Jahi's trial in 1995, resentencing in 2000, and post-conviction in 2009-2011. *Moore* (as already explained) precludes the execution of any person who is intellectually disabled when one applies "current medical standards" or "the medical community's diagnostic framework." *Moore,* 581 U.S. at __, 137 S.Ct. at 1053. The only real question is whether *Moore* is retroactive. As Akil Jahi now shows, it is.

B. *Moore v. Texas* is retroactive

Akil Jahi also meets the second requirement of §40-30-117(a)(1), because *Moore* is retroactive for at least two reasons: (1) Under *Welch v. United States*, 578 U.S.

__, 136 S.Ct. 1257 (2016) and *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016), *Moore* constitutes a substantive rule of law that is retroactive; and (2) the United States Supreme Court has made *Moore* retroactive to cases like Akil Jahi's that are on collateral review.

1. Under *Welch v. United States*, 578 U.S. __ (2016) and *Montgomery v. Louisiana*, 577 U.S. __ (2016), *Moore* is a new substantive rule of law that is retroactive because it **circumscribes the class of intellectually disabled persons who cannot be executed**

In *Welch v. United States*, 578 U.S. __, 136 S.Ct. 1257 (2016) and *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016), the Supreme Court held that new rules of law must be applied retroactively on collateral review if such rules are "substantive." *Welch*, 578 U.S. at __, 136 S.Ct. at 1264; *Montgomery*, 577 U.S. at __, 136 S.Ct. at 729. *Moore* is indeed substantive and thus retroactive here.

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 __, 136 S.Ct. at 1265, *citing Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004). *See Montgomery*, 577 U.S. at __, 136 S.Ct. at 728 (a decision is substantive if it precludes "a certain category of punishment for a class of defendants because of their status or offense."). 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 v. United States*, 578 U.S. at __, 136 S.Ct. at 1267. Put another way, a substantive rule is one that "alters . . . the class of persons that the law punishes." *Montgomery*, 577 U.S. at __, 136 S.Ct. at 732. 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 __, 136 S.Ct. at 1265.

That is precisely what *Moore* does: It identifies 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. *Moore* thus defines the "substantive reach" of the Eighth Amendment. Indeed, the Supreme Court vacated Moore's death sentence because persons who are intellectually disabled under DSM-5 and/or AAIDD-11 cannot be executed, yet the Texas state courts failed to properly apply DSM-5 and AAIDD-11 to Moore's evidence of intellectual disability (instead applying outdated notions of what constitutes intellectual disability).

Moore, therefore, places persons like Akil Jahi who are intellectually disabled under current medical standards, as expressed in the DSM-5 and AAIDD-11, "beyond the State's power to punish." *Welch*, 578 U.S. at __, 136 S.Ct. at 1265. *Moore* "deprives the Government of the power to impose the challenged punishment" of death upon such persons. *Id.* at __, 136 S.Ct. at 1267. *Moore* thereby "represent[s] the clearest

instance of substantive rules for which retroactive application is appropriate." *Id.* *Moore* is retroactive, because without its retroactive application, persons like Moore and Akil Jahi would "face[] a punishment that the law cannot impose upon" them. *Montgomery*, 577 U.S. at __, 136 S.Ct. at 734.

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 which, like those in *Moore*, set forth standards for determining whether an individual is exempt from execution because s/he is a person with intellectual disability, require retroactive application. In fact, in *Montgomery*, the Supreme Court specifically identified any rule precluding the execution of the intellectually disabled as a substantive rule of law that is retroactive:

> [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 __, 136 S.Ct. at 735 (emphasis supplied). *Welch* and *Montgomery* thus establish that *Moore* provides a substantive rule of law that is retroactive to Mr. Jahi's case.

2. The Supreme Court has made *Moore* retroactive to cases on collateral review, like Akil Jahi's

There is no question that the Supreme Court has made *Moore* retroactive to cases on collateral review. At least six United States Supreme Court cases prove this point, as they show that the Supreme Court has required retroactive application of *Moore* to cases that were final long before the 2017 decision in *Moore*.

The first case that proves this point is *Moore* itself, which was on collateral review after Moore's death sentence became final in 2004. *See Moore*, 581 U.S. at __, 137 S.Ct. at 1045. In *Moore*, the Supreme Court applied current medical standards from 2017 retroactively to Moore's long-since-final death sentence – both to determine whether Moore suffers deficits in intellectual functioning under the Eighth Amendment (*Moore*, 581 U.S. at __, 137 S.Ct. at 1048-1050), and also to answer whether "Moore's adaptive functioning" shows intellectual disability under the Eighth Amendment. *Id.*, 581 U.S. at __; 137 S.Ct. at 1050-1053. *Moore* itself proves that *Moore* is retroactive.

There are also five other cases in which the Supreme Court has made *Moore* retroactive to cases on collateral review. Four of those cases involve federal habeas corpus proceedings, in which the petitioner's death sentence was final long before the 2017 decision

in *Moore*. Those cases are *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*, the Supreme Court granted certiorari, vacated, and remanded for application of *Moore* to federal habeas corpus proceedings. 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)), the Supreme Court's remand orders in *Weathers*, *Long*, *Martinez* and *Henderson* unquestionably prove that the Supreme Court has made *Moore* retroactive in federal habeas.

In addition, in *Wright v. Florida*, 583 U.S. __ (2017)(U.S. No. 17-5575), a post-conviction case from Florida, the Supreme Court recently granted certiorari, vacated, and remanded for application of *Moore*, once again proving *Moore*'s retroactivity in collateral proceedings. Just as *Moore* applied retrospectively to the state collateral review proceedings in *Wright*, it necessarily applies retrospectively to these Tennessee post-conviction proceedings as well, in accordance with Tenn. Code Ann. §40-30-117(a)(1).

III. This Court should reverse the trial court, grant Mr. Jahi's motion to reopen, and remand for application of *Moore v. Texas* to the evidence of Mr. Jahi's intellectual disability

In considering Mr. Jahi's motion to reopen, the trial court below erroneously concluded that Akil Jahi's intellectual disability claim had been previously considered in accordance with the current medical standards *Moore* requires. Therefore, this Court should conclude that the trial court abused its discretion in denying the motion to reopen, reverse the judgment of the trial court and remand for a post-conviction hearing for application of *Moore*.

A. The trial court below erred in concluding that the post-conviction court in initial post-conviction proceedings applied current medical standards to the evidence of Mr. Jahi's intellectual disability

In denying his motion to reopen, the trial court did not address Mr. Jahi's argument that in *Moore* the United States Supreme Court announced a new rule of law that requires application in Mr. Jahi's case. Instead, the trial court incorrectly concluded that Mr. Jahi's "intellectual disability claim was previously litigated and decided in consideration of all of the evidence introduced at the hearing including the current medical standards" and stated simply that "*Moore v. Texas* does not establish grounds under Tenn. Code Ann. § 40-30-117 to reopen the post-conviction petition." Apx. 149.

The trial court is simply wrong in concluding that the post-conviction court in the initial post-conviction proceedings applied *Moore* and the current clinical standards it adopted in assessing Mr. Jahi's claim of intellectual disability. *Moore* requires a court reviewing a petitioner's claim of intellectual disability to apply the DSM-5 and the AAIDD-11 standards, which include the SEM and the Flynn Effect, which recognizes that IQ test scores get inflated over time the longer a test is administered after it is initially normed. *Moore*, 581 U.S. at __; 137 S.Ct. 1039.

Though the post-conviction court in Mr. Jahi's initial post-conviction proceedings heard evidence regarding the SEM and the Flynn Effect, it did not adjust Mr. Jahi's score pursuant to either the SEM or the Flynn Effect. *See Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *292. The post-conviction court thus did not consider Mr. Jahi's claim pursuant to current medical standards and did not apply *Moore*.

In fact, Mr. Jahi's expert, Dr. Bishop, erroneously testified in his initial post-conviction proceedings that the DSM did not require application of the SEM (*id.*), when the DSM is clear that the SEM should apply.[1] *See*

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[1] At the time of Mr. Jahi's post-conviction proceedings, the DSM-IV-TR was the governing version of the DSM, as the DSM-5 was not published until 2013. Contrary to Dr. Bishop's testimony, the DSM-TR states: "It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus *it is possible to diagnose Mental Retardation in individuals with IQs between 70*

DSM-5, p. 37 (the margin for measurement error "[o]n tests with a standards deviation of 15 and a mean of 100,[] involves a score of 65-75 (70 +/- 5)."). Likewise, the AAIDD-11 is also clear that "[u]nderstanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based in part, on significant limitations in intellectual functioning." AAIDD-11, p. 36.

Moreover, at Mr. Jahi's initial post-conviction proceeding, the post-conviction court stated that because all of Mr. Jahi's raw IQ scores were above seventy (70), he "must present evidence that the raw IQ scores or the method of testing was unreliable and that his functional IQ is seventy or below" in order to establish he had subaverage intellectual functioning as required by Tenn. Code Ann. § 39-13-203(a). *See Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *301. This reasoning cannot be squared with *Moore*.

The AAIDD-11 instructs that "AAIDD and the American Psychiatric Association (2000) support the best practice of reporting an IQ score with an associated confidence interval." AAIDD-11, p. 36. Likewise, *Hall* stated in no uncertain terms that an individual can be intellectually disabled even with an obtained IQ score above 70, so long as the range of his IQ, upon application of the SEM, falls within the range of persons who may be deemed intellectually disabled. *Hall*, 572 U.S. at __, 134 S.Ct. at 2001. Where the

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and 75 who exhibit significant deficits in adaptive behavior." (emphasis added) DSM-IV-TR, p. 41.

initial post-conviction court did not consider the SEM when reviewing Mr. Jahi's IQ scores, and refused to consider his IQ scores within a range, it simply did not comply with *Moore*.

Further, the post-conviction court failed to comply with *Moore* when, in the initial post-conviction proceedings, it "declined to adjust the Petitioner's scores pursuant to the Flynn Effect," finding that the Flynn Effect was not recognized by the APA or the AAIDD. *See Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *292. Just as Dr. Bishop testified incorrectly about the SEM, she also provided erroneous testimony that the Flynn Effect was not accepted by the APA or the AAIDD. *Id.* Both the AAIDD-11 and the DSM-5, however, are clear that clinicians should consider and apply the Flynn Effect when assessing whether individuals are intellectually disabled. The AAIDD-11 notes that "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score." AAIDD-11, p. 37. Likewise, the DSM-5 instructs clinicians to account for the Flynn Effect as it may affect IQ test scores. DSM-5, p. 37.

Nevertheless, the initial post-conviction court relied upon Dr. Bishop's incorrect testimony and did not apply the SEM or the Flynn Effect to Mr. Jahi's IQ scores in assessing his claim of intellectual disability. *See Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *292. Where *Moore*, the DSM-5 and the AAIDD-11 all make clear that best practices include application of the SEM and the Flynn Effect, and where the post-

conviction court applied neither in Mr. Jahi's case, it is clear that the post-conviction court in initial post-conviction proceedings did not consider Mr. Jahi's evidence in accordance with *Moore*. This Court should thus grant permission to appeal to ensure that Mr. Jahi receives the application of *Moore* and current medical standards to his evidence of intellectual disability, as *Moore* and the Eighth Amendment require.

B. The trial court below failed to consider Dr. Kaufman's undisputed proof that Mr. Jahi is intellectually disabled under *Moore* and current medical standards

Because here, in considering Mr. Jahi's motion to reopen, the trial court incorrectly found that Mr. Jahi's intellectual disability claim had been decided in consideration of *Moore*, the trial court below did not address Mr. Jahi's unrefuted evidence from Dr. Alan Kaufman, Ph.D., that he satisfies the three-pronged test for intellectual disability and is intellectually disabled under current medical standards, DSM-5, AAIDD-11, and *Moore*. Apx. 21-117. After reviewing Mr. Jahi's intelligence testing history, prior expert reports, sworn court testimony from lay witnesses and experts, and other related documentation, Dr. Kaufman stated:

> I conclude to a reasonable degree of scientific and professional certainty that under current clinical and legal standards set forth by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (DSM-V), the American Association on

> Intellectual and Developmental Disabilities (AAIDD) Classification Manual (11th ed. 2010, 2012), *Moore v. Texas*, No. 15-797, United States Supreme Court slip opinion; and *Hall v. Florida*, 134 S. Ct. 1986 (2014), Mr. Jahi is intellectually disabled and was intellectually disabled at the time of the offense.

Apx. 21. In ignoring this evidence, the trial court abused its discretion in denying Mr. Jahi's motion to reopen.

This becomes even more evident when one considers that:

(1) The trial court failed to evaluate *Moore* in light of the Supreme Court's retroactivity decisions in *Welch* and *Montgomery*;

(2) The trial court failed to acknowledge that *Montgomery* holds that every rule of law that prohibits the execution of the intellectually disabled is substantive and retroactive – even if it requires procedures for protecting the intellectually disabled from execution. *Montgomery*, 577 U.S. at __, 136 S.Ct. at 735, *citing Atkins* ("procedural requirements do not, of course, transform substantive rules into procedural ones");

(3) The trial court failed to consider the fact that the Supreme Court applied *Moore* retroactively in *Moore* itself; and

(4) The trial court failed to consider the fact (as Mr. Jahi argued in his motion) that the

> Supreme Court has also ordered the retroactive application of *Moore* to the various other cases which Mr. Jahi has cited here, *supra*, pp. 9-11.

Unlike the trial court, this Court should properly apply *Welch* and *Montgomery*, and assess and evaluate the facts that the Supreme Court applied *Moore* retroactively in *Moore* and in five other cases on collateral review. Absent such proper application of United States Supreme Court precedent which shows Akil Jahi's entitlement to relief under *Moore*, *Moore* will become a dead letter in Tennessee. This Court should therefore grant permission to appeal.

CONCLUSION

This Court should therefore grant this application for permission to appeal, reverse the judgment below and grant relief and/or remand for further proceedings on the motion to reopen in light of *Moore*. This Court should also permit further briefing and oral argument on the issues presented herein. Tenn.S.Ct.R. 28(10).

Respectfully submitted,

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By: /s/_____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing had been served upon the Office of the District Attorney General, P.O. Box 20207, Nashville, Tennessee 37202, this 22nd day of December, 2017.

/s/_____
Counsel for Petitioner

APPENDIX B

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE

No. P-28413

[Filed August 29, 2017]

AKIL JAHI, fka PRESTON CARTER Petitioner,	)
vs.	)
STATE OF TENNESSEE Respondent	)

MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF

Pursuant to Tenn. Code Ann. § 40-30-117, Akil Jahi, fka Preston Carter, moves this Court to reopen his petition for post-conviction relief in light of the intervening decision in *Moore v. Texas*, 581 U.S. __, 137 S.Ct 1039 (2017), and to vacate his death sentence because he is intellectually disabled and exempt from execution under the Eight Amendment. Akil Jahi establishes his entitlement to relief given the attached affidavit of Dr. Alan Kaufman, Ph.D (Exhibit 1), which proves Akil Jahi is intellectually disabled under the Eighth Amendment and *Moore*.

Moore holds that the Eighth Amendment requires this Court to adjudicate Mr. Jahi's intellectual disability claim using current medical standards for intellectual disability from the American Association on Intellectual and Developmental Disabilities' *Intellectual Disability: Definition, Classification, and Systems of Support*, Eleventh Edition (AAIDD-11) and the American Psychiatric Association (APA) in DSM-5, the Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition (2013). *Moore* is also retroactive under Tenn. Code Ann. §40-30-117(a)(1), and under *Moore* and current medical standards, Akil Jahi is intellectually disabled. Akil Jahi is therefore entitled to proceed via this motion to reopen, and he is entitled to post-conviction relief.

I. Introduction

In *Moore v. Texas*, 581 U.S. __ 137 S.Ct 1039 (2017), the Supreme Court held that the Eighth Amendment requires state courts to evaluate an intellectual disability claim using the "medical community's current standards" for identifying those who are intellectually disabled. *Moore*, 581 U.S. at __, 137 S.Ct at 1053. All aspects of an intellectual disability determination must comport with those current standards, which include criteria and standards established by the American Psychiatric Association (APA) in its Diagnostic & Statistical Manual of Mental Disorders, Fifth Edition (DSM-5, published in 2013), and the American Association of Intellectual and Developmental Disabilities (AAIDD) in its User's Guide to Intellectual Disability, Eleventh Edition(AAIDD-11, published in 2010). *Id.*

With *Moore* having held that the Eighth Amendment requires application of the current standards of DSM-5 and AAIDD-11 to both the intellectual functioning and adaptive functioning prongs of the Eighth Amendment test for intellectual disability, *Moore* sets forth a rule of law that did not exist at the time of trial that must be applied retroactively, thus allowing a motion to reopen under Tenn. Code Ann. §40-30-117(a)(1).

Just as Moore was entitled to have evidence of his intellectual disability assessed in accordance with DSM-5 and AAIDD-11, *Moore v. Texas* mandates that Akil Jahi receive that same review of his intellectual disability claim. Indeed, Akil Jahi has never had an opportunity to have his intellectual disability reviewed in accordance with the 2010 & 2013 medical standards applied in *Moore*—especially where Tennessee law predating *Moore* did not comport with the Eighth Amendment requirements of *Moore*, leaving him without a viable remedy at the time. *See e.g., Howell v. State*, 2011 Tenn. Crim. App. Lexis 447 (June 14, 2011), *permission to appeal denied*, Jan. 9, 2013 (refusing to apply standard error of measurement to IQ tests and applying adaptive functioning standards expressly repudiated in *Moore*).

In fact, during his initial post-conviction proceedings, while Akil Jahi argued he was intellectually disabled under Tenn. Code Ann. § 39-13-203, his claim was not viable because he had IQ test scores of 75, 78, and 79, which precluded a successful intellectual disability claim under Tennessee law. The Tennessee Supreme Court had held that to be found

intellectually disabled, Tennessee had a bright-line rule: He had to have an IQ test score of 70 or below to pursue an intellectual disability claim. *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004).

In analyzing Akil Jahi's claim of intellectual disability, the Court of Criminal Appeals (CCA) noted that while the post-conviction trial court found that Mr. Jahi met the second and third prongs of Tenn. Code Ann. § 39-13-203, Mr. Jahi's "IQ score did not exclude the Petitioner from a death sentence." *Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *293. The CCA further found that the post-conviction court was correct in its refusal to apply the Flynn Effect to determine whether Mr. Jahi's IQ scores satisfied Tenn. Code Ann. § 39-13-203. *Id* at *306 ("The trial court is not required to accept the application of the Flynn Effect to adjust raw IQ scores downward if the court determines that the Flynn Effect is not a generally accepted practice by professional who assess a person's IQ.")(internal citations omitted).

However, when evaluating the proof Mr. Jahi has presented of his intellectual disability by applying all current, medical standards—including those contained in DSM-5 and AAIDD-11—which *Moore* now holds that the Eighth Amendment requires, there is abundant evidence that Akil Jahi is intellectually disabled under Tenn. Code Ann. § 39-13-203 and the Eighth Amendment. Dr. Kaufman explains this in his affidavit attached hereto as Exhibit 1. (Exhibit 1, Affidavit of Dr. Alan Kaufman, Ph.D.) This Court should therefore reopen post-conviction proceedings in light of *Moore* and conclude that Akil Jahi is intellectually disabled

under these standards, that his execution would violate the Eighth Amendment and the Tennessee Constitution, and that his death sentence must be vacated.

II. *Moore v. Texas*, 581 U.S. __ (2017)

In *Moore v. Texas*, 581 U.S. __, 137 S.Ct. 1039 (2017), the Supreme Court has held that a determination of intellectual disability under the Eighth Amendment "must be informed by the medical community's diagnostic framework." *Id.*, 581 U.S. at __, 137 S.Ct. at 1048. *Moore* recognizes that the medical community's current standards include those of the APA set forth in DSM-5 and those set forth by the AAIDD in AAIDD-11. *Moore*, 581 U.S. at __, 137 S.Ct. at 1053.

DSM-5 and AAIDD-11 are current and "[r]eflect improved understanding over time" of those who suffer from intellectual disability. *Moore*, 581 U.S. at __, 137 S.Ct at 1053 (*citing* DSM-5 at 7 and AAIDD-11 at xiv-xv). These "current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Moore*, 581 U.S. at __, 137 S.Ct. at 1053 (*quoting* DSM-5 at xli). A reviewing court may not "disregard [these] current medical standards." *Moore*, 581 U.S. at __, 137 S.Ct. at 1049.

To assess intellectual disability under *Moore*, a reviewing court must initially assess a petitioner's intellectual functioning in accordance with current medical standards. *Moore* requires a reviewing court to first examine a petitioner's IQ test scores by taking into

account the standard error of measurement (SEM), as required by DSM-5 and AAIDD-11. *Moore*, 581 U.S. at __, 137 S.Ct. at 1049 (*citing* DSM-5 at 37, and AAIDD-11, User's Guide at 22-23). Applying DSM-5 and AAIDD-11 in *Moore*, the Supreme Court concluded that because Moore had at least one IQ score which, applying SEM, placed his IQ within a range of 70 or below, Moore could qualify as intellectually disabled and additional proof of his intellectual disability had to be weighed. *Id.*

Thus, to determine whether Moore was intellectually disabled, Moore's adaptive functioning also had to be evaluated: "We require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits. *Moore*, 581 U.S. at __, 137 S.Ct. at 1050.

Moore then held that when assessing a petitioner's adaptive functioning, a reviewing court may not "deviate[] from prevailing clinical standards." *Id.* In accordance with DSM-5 and AAIDD-11, *Moore* requires that a reviewing court focus on the individual's adaptive deficits not adaptive strengths, because "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Moore*, 581 U.S. at __, 137 S.Ct. at 1050 (*citing* DSM-5 at 33, 38 and AAIDD-11 at 47) (emphasis in original). *Moore* further provides that it is improper to rely on adaptive strengths developed in prison. *Moore*, 581 U.S. at __, 137 S.Ct at 1050 (*citing* DSM-5 at 38 and AAIDD-11 at 20).

Moore also holds that a reviewing court may not use an individual's academic failure, history of abuse, or other mental health disorders as undermining a finding of intellectual disability, for DSM-5 and AAIDD-11 recognize such risk factors and co-existing conditions as being fully consistent with intellectual disability. *Moore*, 581 U.S. at __, 137 S.Ct. at 1050, *citing* AAIDD-11 at 58-63, and DSM-5 at 40. Nor may a state apply lay stereotypes concerning intellectual disability. *Moore*, 581 U.S. at 1051-1052, *citing* AAIDD-11 at 25-27.

Ultimately, the Supreme Court concluded that the state habeas court in *Moore* had properly evaluated Moore's intellectual disability because it "applied current medical standards," but that the Texas Court of Criminal Appeals improperly "failed adequately to inform itself of the medical community's diagnostic framework," used "nonclinical" factors, and errantly "reject[ed] the habeas court's application of medical guidance." *Moore*, 581 U.S. at 1053. Consequently, the Supreme Court concluded that the Court of Criminal Appeals' ruling that Moore was not intellectually disabled "cannot stand," because it failed to faithfully apply DSM-5 and AAIDD-11 to Moore's evidence of intellectual disability as required by the Eighth Amendment. *Id.*

III. Until Now, Akil Jahi Has Had No Opportunity To Receive Application Of DSM-5 And AAIDD-11 To His Claim Of Intellectual Disability, And He Is Therefore Entitled To Their Application, Exactly As Occurred In *Moore*.

As Akil Jahi has already noted, DSM-5 and AAIDD-11 set forth current medical standards that apply to any assessment of intellectual disability under the Eighth Amendment. DSM-5 was issued in 2013 and AAIDD-11 was issued in 2010. Akil Jahi has never had an opportunity to have his intellectual disability assessed in light of DSM-5 and AAIDD-11 for at least two reasons.

First, since 2010, Tennessee courts have yet to provide a post-conviction remedy for application of DSM-5 or AAIDD-11 to a claim of intellectual disability. In fact, in its 2011 decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), the Tennessee Supreme Court first permitted (but did not require) consideration of AAIDD-11's clinical standards when assessing intellectual disability. *See Coleman*, 341 S.W.3d at 242 n.55. Even so, *Coleman* only considered the APA's Fourth Edition of its Diagnostic and Statistical Manual (DSM-IV-TR), which was promulgated in 2000—13 years before publication of DSM-5. *See e.g., Coleman*, 341 S.W.3d at 231 n.11. Moreover, the Tennessee Supreme Court held in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), that *Coleman* is not retroactive, and thus Akil Jahi has never had the opportunity for application of either AAIDD-11 or even the outdated DSM-IV-TR to his intellectual disability

claim. The Tennessee Supreme Court's conclusion that *Hall v. Florida*, 572 U.S. __ (2014) is not retroactive (*Payne v. State*, 493 S.W.3d 478 (Tenn. 2016)) has likewise prevented Akil Jahi from receiving application of DSM-5 and AAIDD-11 to his intellectual disability claim.[1]

Second, as Akil Jahi has already noted, during initial post-conviction proceedings, Tennessee had in place erroneous legal standards that precluded the consideration of the Flynn Effect and/or the standard error of measurement (SEM) of IQ tests—thus making Mr. Jahi's IQ test scores (over 75) unavailing for a claim of intellectual disability. In fact, during post-conviction, Dr. Geraldine Bishop testified that clinical standards did not accept application of the Flynn Effect. *Moore*, however, makes clear that a petitioner with a claim of intellectual disability is entitled to the application of current clinical standards for intellectual disability, which require the application of the Flynn Effect. *Moore*, 581 U.S. at __, 137 S.Ct at 1053 (citing DSM-5 and AAIDD-11 as the best and more current standards to determine intellectual disability, which in

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[1] Mr. Jahi filed a motion to reopen his post-conviction proceedings in which he argued that *Hall v. Florida* constitutes a new rule of constitutional law that is retroactively applicable to Mr. Jahi's case. This Court denied Mr. Jahi's motion to reopen under *Hall*, finding that the Tennessee Supreme Court's decision in *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), holds that *Hall* does not apply retroactively. The United States Supreme Court in *Moore,* however, makes clear that *Hall* is in fact retroactive as *Moore* itself applies the new rule of law enunciated in *Hall*. In any case, Mr. Jahi is now entitled to the retroactive application of *Hall* via *Moore* retroactively.

turn require application of the Flynn Effect). Like Mr. Moore, Akil Jahi is entitled to the benefit of the standards enunciated in the DSM-5 and the AAIDD-11, which include application of the Flynn Effect. *See Moore*, 581 U.S. at ___, 131 S.Ct at 1053.

To date, Akil Jahi has had no remedy for his claim of intellectual disability which, as more fully explained *infra*, is viable if not meritorious. *Moore* holds, however, that a petitioner with an Eighth Amendment intellectual disability claim is entitled to the application of the current medical standards set forth in DSM-5 and AAIDD-11—just like the review the Supreme Court granted to Moore. Because Mr. Jahi has yet to receive application of DSM-5 and AAIDD-11 to his Eighth Amendment Intellectual Disability claim—the very review that the Supreme Court provided in *Moore v. Texas*—Akil Jahi is entitled to that review now, given the holding in *Moore*. Equal protection and equal justice demand nothing less.

IV. For Purposes Of Tenn. Code Ann. §40-30-117(a)(1), *Moore v. Texas*, 581 U.S. __ (2017) Is A Retroactive Rule Of Law Permitting This Motion To Reopen.

Under Tenn. Code Ann. §40-30-117(a)(1), a petitioner may reopen post-conviction proceedings based upon "a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." As already noted, *Moore* sets forth an Eighth Amendment requirement that a reviewing court apply the 2013 standards of DSM-5 and the 2010 standards of AAIDD-11 to any claim of intellectual disability. Where Akil

Jahi was tried in 1995, and resentenced in 2000, and DSM-5 and AAIDD-11 were promulgated years later, it is clear that this Eighth Amendment requirement did not exist at the time of his trial and resentencing.

The only real question is whether *Moore* must be applied retroactively. Quite clearly it must. This is proven by *Moore* itself, which involved a Texas post-conviction proceeding which followed Moore's death sentence in 2001. *See Moore*, 581 U.S. at __ 137 S.Ct. at 1045. Obviously, the holding of *Moore* is retroactive where the United States Supreme Court's recent 2017 decision applies to Moore's Texas death sentence imposed many, many years before. In other words, on its facts, *Moore* itself proves its retroactivity for purposes of Tenn. Code Ann. §40-30-117(a)(1).[2]

Moreover, after *Moore* was decided, the Supreme Court remanded two federal habeas corpus proceedings for application of *Moore: Martinez v. Davis*, 581 U.S. __ (Apr. 3, 2017) and *Henderson v. Davis*, 581 U.S. __ (Apr. 3, 2017). Martinez's death sentence became 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*, 191 F.3d 567, 571 (5th Cir. 2015). Because only retroactive rules of law can be applied in federal habeas corpus proceedings

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[2] *Moore* also applied *Hall* retroactively, including its Eighth Amendment requirement that the standard error of measurement be applied to all IQ tests. *Moore* thus establishes not only that *Moore* itself is retroactive, but that *Hall* is retroactive as well. *Moore* thus confirms that the Tennessee Supreme Court's decision in *Payne v. State* was wrong to conclude that *Hall* is not retroactive.

(*Teague v. Lane*, 489 U.S. 288 (1989)), the Supreme Court's remand orders in *Martinez* and *Henderson* likewise prove that *Moore v. Texas* is retroactive.

In addition, the Fifth Circuit's recent decision in *In Re Cathey*, __ F.3d __, 2017 U.S.App.Lexis 8430 *23-35 (5th Cir. May 11, 2017) has applied *Moore* retroactively in federal habeas proceedings. *Cathey* proves yet again that *Moore* is retroactive here and provides a basis for a motion to reopen under Tenn. Code Ann. §40-30-117(a)(1).

In addition, *Montgomery v. Louisiana*, 577 U.S. __, 136 S.Ct. 718 (2016) proves the retroactivity of *Moore*. *Montgomery* requires the retroactive application of substantive rules of law that allow a person to show that s/he "belongs to a protected class" that is exempt from a particular punishment. *Montgomery*, 577 U.S. at __, 136 S.Ct. at 735. Because application of *Moore* means that Akil Jahi falls within the "entire category of intellectually disabled offenders" whom the "States may not execute," (*Moore*, 581 U.S. at __, 137 S.Ct. at 1051), *Moore* is indeed a substantive rule of law that is retroactive.

In sum: (a) *Moore* proves itself to be retroactive to a post-conviction proceeding like this; (b) the Supreme Court's remand orders in *Martinez* and *Henderson* prove *Moore* is retroactive in federal habeas corpus proceedings; (c) so does the Fifth Circuit's decision in *In Re Cathey*; and (d) *Montgomery v. Louisiana* makes clear that *Moore* is a substantive rule that must apply retroactively, because application of *Moore* places Akil Jahi among the class of intellectually disabled offenders whom Tennessee may not execute.

Consequently, *Moore v. Texas* is retroactive for purposes of Tenn. Code Ann. §40-30-117(a)(1), and Akil Jahi is entitled to proceed via this motion to reopen.

V. This Court Should Grant The Motion To Reopen, Conduct An Evidentiary Hearing Or Jury Trial, And Vacate Akil Jahi's Death Sentence Because Akil Jahi Has Uncontroverted Evidence That He Is Intellectually Disabled And Entitled TO Relief Under The Eighth Amendment And *Moore.*

The attached affidavit of Dr. Alan Kaufman, Ph.D. (Exhibit 1) proves that Akil Jahi is intellectually disabled within the meaning of *Moore v. Texas*, 581 U.S. __ (2017), DSM-5, and AAIDD-11. Because Akil Jahi is entitled to application of *Moore* and because the affidavit of Dr. Kaufman establish his entitlement to relief under *Moore* and the Eighth Amendment, this Court should grant this motion to reopen, conduct a hearing on his claim of intellectual disability, and afterwards vacate his death sentence.

Dr. Alan Kaufman, Ph.D. is quite clear that under *Moore*, Akil Jahi is entitled to relief through application of current medical standards to his claim of intellectual disability:

> I conclude to a reasonable degree of scientific and professional certainty that under current clinical and legal standards set forth by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (DSM-V), the American Association on

> Intellectual and Developmental Disabilities (AAIDD) Classification Manual (11th ed. 20110, 2012), Moore v. Texas, No. 15-797, United States Supreme Court slip opinion; and Hall v. Florida, 134 S. Ct 1986 (2014), Mr. Jahi is intellectually disabled and was intellectually disabled at the time of the offense.

(Exhibit 1, Affidavit of Dr. Alan Kaufman, Ph.D., p. 1.) Dr. Kaufman's conclusions are based on a careful analysis of the three-pronged test for intellectual disability which governs Eighth Amendment Intellectual Disability claims.

Dr. Alan Kaufman, Ph.D., a world-renowned expert in intellectual disability and intellectual assessment from the Yale University School of Medicine, has concluded that Akil Jahi is intellectually disabled under the current clinical and legal standards required by *Moore*. (Exhibit 1, Affidavit of Dr. Alan Kaufman, Ph.D., pp. 1-3 & c.v.) Dr. Kaufman has analyzed Akil Jahi's prior IQ testing, prior expert reports, sworn court testimony from lay witnesses and experts regarding Mr. Jahi's adaptive deficits and concluded that Akil Jahi meets the three-pronged criteria for intellectual disability. (*Id*.)

As Dr. Kaufman explains, AAIDD-11 and DSM-5 provide a three-pronged definition of Intellectual Disability: (1) deficits in intellectual functioning; (2) deficits in adaptive functioning; and (3) onset during the developmental period. (Exhibit 1, Affidavit of Alan Kaufman, Ph.D., pp. 1-3.) He concludes "[t]here is ample evidence that Akil Jahi meets all three of these

criteria currently, and he did so at the time of the offense as well." (*Id*. at p. 7.)

As to the first prong of the intellectual disability definition—subaverage intellectual functioning—Dr. Kaufman highlights that the state courts did not follow appropriate clinical standards in evaluating Mr. Jahi's claim of intellectual disability, which "requires taking into account both the Flynn effect (the fact that test norms get outdated) and the practice effect (the spurious inflation of IQs when a person is repeatedly tested over time)." (*Id*.) In fact, "[c]ontrary to established mental health profession standards, the State did not apply the Flynn effect to Mr. Jahi's IQs and did not adequately address the issue of practice effects in producing spuriously high IQs the second, third, and fourth times he was administered Wechsler's scales as an adult." (*Id*.)

When applying the current clinical standards set out in AAIDD-11 and DSM-5 (and required by *Moore*) to Mr. Jahi's IQ scores, Dr. Kaufman is clear that Akil Jahi's IQ scores place him within the class of persons who are intellectually disabled. (*Id.,* pp. 8-25.) When Mr. Jahi's IQ scores are adjusted to take into account the Flynn effect, the practice effect, and the standard error of measurement, "every single one of these IQ administrations indicate that Mr. Jahi's intelligence test score clearly qualifies him as an individual with an 'IQ between 70 and 75 or lower' as required for a finding of ID under the Eighth Amendment. . ." (*Id*. at 25.) Mr. Jahi thus meets the first prong for a diagnosis of intellectual disability. (*Id*.).

With regard to Mr. Jahi's adaptive behavior, Dr. Kaufman fmds that "[w]ithout question, Akil Jahi meets the second prong of the definition of intellectual disability. He is deficient in his adaptive behavior." (Exhibit 1, Affidavit of Dr. Alan Kaufman, p. 27.) Dr. Kaufman bases his scientific conclusion on the results of the Vineland Adaptive Behavior Scales, a standardized measure of adaptive behavior that Dr. Bishop administered in 2009 (during Mr. Jahi's post-conviction proceedings). (*Id.* at 26.) Moreover, in post-conviction this Court already found that Mr. Jahi "established that he suffered from deficits in adaptive behavior in the areas of communication and verbal skills." *Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *293.

And lastly, Dr. Kaufman finds that Mr. Jahi meets the third criteria for a diagnosis of intellectual disability in that his limitations were evident before he was 18 years old. (Exhibit 1, Affidavit of Dr. Alan Kaufman, pp. 27-31.) Dr. Kaufman points to ample proof in Mr. Jahi's school records that corroborate his sub-average intellectual functioning as well as sworn statements from those who knew him well in his youth and adolescence. (*Id.*) This Court also concluded during post-conviction that "the deficits in adaptive behavior and any deficits in intellectual functioning were present prior to the age of eighteen." *Jahi v. State*, 2014 Tenn. Crim. App. Lexis 229, *293

Thus, because Akil Jahi "clearly meets all three prongs of the current clinical and legal standards" set out in *Moore*, the DSM-V, and the AAIDD-11, Dr. Kaufman finds that Akil Jahi is currently intellectually

disabled and was intellectually disabled at the time of the offense. (*Id.*, p. 31.)

VI. Conclusion

Akil Jahi is intellectually disabled. As the affidavit of Alan Kaufman, Ph.D., establishes, Mr. Jahi satisfies the criteria for intellectual disability under AAIDD-11, DSM-5, and *Moore v. Texas*. Mr. Jahi, therefore, is ineligible to be put to death under the Eighth Amendment. Mr. Jahi has never had an opportunity for a full and fair hearing on his claim of intellectual disability under current clinical standards and *Moore v. Texas*. *Moore* did not exist at the time of trial and is retroactive to Mr. Jahi's case under Tenn. Code Ann. §40-30-117. This Court should therefore grant the motion to reopen, conduct a hearing (or jury trial under the Sixth Amendment, *see Hurst v. Florida*, 577 U.S. __ (2016)) on his claim of intellectual disability, and after applying *Moore* and the Eighth Amendment, vacate his death sentence and impose a sentence of life imprisonment instead.

Respectfully submitted,

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(615) 726-5586
By: /s/

VERIFICATION

I affirm that, under the penalty of perjury, to the best of my knowledge and ability, what is contained in this document is true and correct as far as I know.

Date: 8-25-17

Signature: /s/ Akil Jahi
Akil Jahi

Sworn to and subscribed before me this the 25th day of August, 2017.

/s/
Notary Public

My Commission Expires: May 6, 2019

VERIFICATION

I affirm that, under the penalty of perjury, to the best of my knowledge and ability, what is contained in this document is true and correct as far I know.[3]

Date: 8-28-17

Signature: /s/ _____
Counsel for Petitioner

Sworn to and subscribed before me this the 28th day of August, 2017.

/s/ _____
Notary Public

My Commission Expires: Sept. 10, 2018

[3] Counsel prepared this motion and verifies its accuracy. Given the nature of the claims raised in this motion, Akil Jahi lacks certain intellectual abilities. He also is not an attorney. For these reasons, his verification is based solely upon the nature of his knowledge of such matters contained in this motion and his ability to understand and/or verify such matters. The motion is verified in its entirety by counsel.

AFFIDAVIT OF INDIGENCY

I, Akil Jahi, am too poor to pay any money to the court.

/s/ Akil Jahi
Signature of Petitioner

Sworn to and subscribed before me this the 25th day of August, 2017.

/s/ _____
Notary Public

My Commission Expires: May 6, 2019

AFFIDAVIT OF COUNSEL REGARDING INDIGENCY

I, counsel for Akil Jahi, do solemnly affirm and declare that because of his poverty, Akil Jahi is not able to bear the expenses of the action which he is about to commence. Akil Jahi has been permitted to proceed *in forma pauperis* at trial, on direct appeal, in post-conviction proceedings in state court, and in federal habeas proceedings. I further affirm that to the best of my knowledge, Akil Jahi is justly entitled to the relief sought.

/s/ _____
Counsel for Petitioner

Sworn to and subscribed before me this the 28th day of August, 2017.

/s/ _____
Notary Public

My Commission Expires: Sept. 10, 2018

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing had been served upon the Office of the District Attorney General, 201 Poplar Street, Suite 301, Memphis, Tennessee 38103-1945, this 28th day of August, 2017 via U.S. mail.

/s/ _____
Counsel for Petitioner

APPENDIX C

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE

No. P-28413

[Filed November 8, 2017]

AKIL JAHI, fka PRESTON CARTER Petitioner,	)
vs.	)
STATE OF TENNESSEE Respondent	)

SUPPLEMENT TO MOTION TO REOPEN POST-CONVICTION PETITION

In these proceedings, Akil Jahi has asserted that *Moore v. Texas*, 581 U.S. __ (2017) is retroactive and entitles him to reopen his post-conviction proceedings under Tenn. Code Ann. §40-30-117. Mr. Jahi would alert this Court that since he filed his Motion to Reopen Post-Conviction Petition, the United States Supreme Court has remanded several collateral review cases for the application of *Moore*, thus making clear that *Moore* does apply retroactively and therefore applies retroactively in Mr. Jahi's case. Mr. Jahi should thus be permitted to reopen his post-conviction petition

to assert his claim of intellectual disability under the Eighth Amendment and this Court should evaluate that claim under the standards enunciated in *Moore*.

Since its decision in *Moore*, the United States Supreme Court has granted certiorari, vacated, and remanded several collateral review cases in light of *Moore*, thus illustrating that *Moore* does indeed apply retroactively in cases on collateral review. *See Wright v. Florida*, 583 U.S. __ (Oct. 16, 2017) (U.S. No. 17-5575)(certiorari granted and case remanded for application of *Moore* where petitioner had IQ scores of 76, 80, 81, 75, 82, and 75 as well as evidence of adaptive deficits in conceptual skills); *Carroll v. Alabama*, 581 U.S. __ (May 1, 2017) (U.S. No. 16-7685) (remanded for application of *Moore* where petitioner had IQ scores of 71, 85, and 87 and evidence of adaptive deficits); *Weathers v. Davis*, 583 U.S. __ (Oct. 10, 2017) (U.S. No. 16-9446) (*Moore* remand where petitioner had IQ scores of 53, 65, and 79 as well as evidence of adaptive deficits); *Long v. Davis*, 581 U.S. __ (Oct. 2, 2017) (U.S. No. 16-8909) (*Moore* remand where petitioner had IQ test scores of 62, 63, 63, and 64).[1]

Exactly like the petitioners in each of the above cases, Mr. Jahi has presented an IQ test score of 75 or below, as well as proof of deficits in adaptive behavior,

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[1] The Supreme Court has also remanded two federal habeas corpus proceedings for application of *Moore* that Mr. Jahi has already cited in his Motion to Reopen: *Martinez v. Davis*, 581 U.S. __ (Apr. 3, 2017)(where petitioner had IQ scores of 65, 79, 89, 93; and 107) and *Henderson v. Davis*, 581 U.S. __ (Apr. 3, 2017) (where petitioner had IQ scores of 66, 77, and 83).

and like the above petitioners, he too deserves retroactive application of the Eighth Amendment standards applied in *Moore*.

This Court should grant Mr. Jahi's Motion to Reopen Post-Conviction Petition.

Respectfully submitted,

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Attorneys for Akil Jahi fka Preston Carter

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing had been served upon the Office of the District Attorney General, 201 Poplar Street, Suite 301, Memphis, Tennessee 38103-1945, this 8th day of November, 2017 via U.S. mail.

/s/ Peter C. Sales
Peter C. Sales

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

SHELBY COUNTY
No. W2016-02201-CCA-R3-PD
Capital Case

[Filed February 24, 2017]

AKIL JAHI, fka PRESTON CARTER, Petitioner–Appellant,	)
v.	)
STATE OF TENNESSEE Respondent-Appellee.	)

ON APPLICATION FOR PERMISSION TO APPEAL

REPLY TO THE STATE'S RESPONSE TO THE APPLICATION FOR PERMISSION TO APPEAL

This Court should construe Mr. Jahi's Notice of Appeal (filed on October 24, 2016), the record of the proceedings below, and his Brief as an Application for Permission to Appeal under Tenn. Code Ann. § 40-30-117, and thus address the merits of his claims: Whether the trial court abused its discretion when it did not allow Mr. Jahi to re-open his post-conviction

proceedings in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014). This Court has jurisdiction to reach the merits of Mr. Jahi's appeal and moreover, Mr. Jahi has substantially complied with Tenn. Code Ann. § 40-30-117 and *Graham v. State*, 90 S.W.3d 687 (Tenn. 2002). This Court should therefore address the merits of Mr. Jahi's application, particularly given the underlying basis of his motion to reopen—that Mr. Jahi is categorically exempt from punishment of death because he is intellectually disabled.

I. This Court Should Grant Permission to Appeal

The procedure for appealing the denial of a motion to reopen post-conviction proceedings is set forth in Tenn. Code Ann. § 40-30-117(c), which generally requires petitioner to file an application for permission to appeal, which includes the date and judgment from which the petitioner seeks review, and the issue and reasons why it should be reviewed. Where a petitioner files a "notice of appeal" in place of an application for permission to appeal, the Tennessee Supreme Court has made clear that the "label is not dispositive of whether this Court may nonetheless treat the filing as an application for permission to appeal." *Graham v. State*, 90 S.W.3d at 691. Where the notice of appeal and documents before this Court contain sufficient information, substance, and documentation, the Court may find that the petitioner substantially complied with Tenn. Code Ann. § 40-30-117(c), even where he did not file a formal application for permission to appeal. *See id.* That is precisely the case here. Where Mr. Jahi filed a notice of appeal with sufficient information,

substance and documentation to substantially comply with the statute, this Court should construe Mr. Jahi's notice of appeal, the record and brief in support as an application for permission to appeal, and address the merits of his appeal.

A. Mr. Jahi Has Substantially Complied With Tenn. Code Ann. § 40-30-117(c)

Though admittedly Mr. Jahi's undersigned counsel did not strictly comply with Tenn. Code Ann. § 40-30-117(c), counsel nevertheless provided this Court more than the materials necessary for this Court to address the merits of Mr. Jahi's appeal, and thus substantially complied with Tenn. Code Ann. § 40-30-117(c). Moreover, counsel's divergence from the proscribed method to appeal by permission caused no harm to either this Court nor to the State. There was never a question about the ruling from which Mr. Jahi intended to appeal, and the motion to reopen and trial court decision were before this Court within a reasonable period of time. As Mr. Jahi substantially complied with the statutory requirements to appeal from the denial of his motion to reopen, this Court should address the merits of Mr. Jahi's appeal despite counsel's filing error.

Mr. Jahi is represented *pro bono* by counsel from BRADLEY ARANT BOULT CUMMINGS LLP and BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC, who also represented Mr. Jahi during his post-conviction proceedings. To appeal the trial court's dismissal of Mr. Jahi's motion to reopen post-conviction, on October 24, 2016, undersigned counsel, in good faith, filed a notice of appeal, making

clear that Mr. Jahi sought review of the trial court's September 29, 2016 order denying his motion to reopen his post-conviction petition under *Hall v. Florida,* following the same procedures they had followed during Mr. Jahi's post-conviction proceedings. Just 20 days later, on November 14, 2016, the appellate record was filed, which included, *inter alia*, Mr. Jahi's motion to reopen, as well as the trial court's order dismissing it, both of which are required for an application for permission to appeal under Ann. § 40-30-117(c). Thus, within a reasonable period of time—21 days—of Mr. Jahi's filing his notice of appeal, and long before ruling on this application, this Court had before it far more than is required to review the ruling below.[1]

There is not now, nor has there ever been, any confusion about the ruling Mr. Jahi seeks to appeal, so the manner in which it was filed did not cause any harm or injury. As stated, the appellate record included the trial court's order denying Mr. Jahi's motion to reopen, as well as the motion to reopen itself. By November 14, 2016, both this Court and the State were aware of Mr. Jahi's intention—to appeal the trial court's denial to this Court. And by November 21, 2016, Mr. Jahi's docketing statement made crystal clear that the subject of his appeal, his "Motion to Re-Open Petition for Post-Conviction Relief was Denied on September 29, 2016." Mr. Jahi thus provided this Court all the information it needed to decide Mr. Jahi's appeal, and did so within a reasonable period of time

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[1] On November 21, 2016, Mr. Jahi also filed a docketing statement which identified the final judgment which he was appealing as well as the date of that judgement.

(21 days), thereby substantially complying with Tenn. Code Ann. § 40-30-117(c). This is particularly true where this Court was already on notice as to the nature of Mr. Jahi's case where Mr. Jahi requested this Court review his motion to reopen after several other death-sentenced individuals had previously filed similar motions to reopen and sought review of the trial court's denial in this Court. *See Sims v. State*, W2015-01713-CCA-R28-PD; *Sample v. State*, W2015-00713-CCA-R28-PD; *Chalmers v. State*, W2016-02413-CCA-R28-PD; *Payne v. State*, W2016-0111-CCA-R28-PD.

B. This Court Has Jurisdiction to Review the Instant Application

The State's argument that Mr. Jahi did not substantially comply with Tenn. Code Ann. § 40-30-117(c), and therefore this Court is without jurisdiction to address his appeal is incorrect and misleading. As noted *supra*, Mr. Jahi has substantially complied with the rules. Moreover, this Court has jurisdiction to review this application.

Rule 2 of the Tennessee Rules of Appellate Procedure permits this Court to suspend the requirements or provisions of many rules of appellate procedure for good cause, including the instant situation. Rule 2 specifically outlines those circumstances in which either the Supreme Court or this Court may *not* suspend the rules. For instance, Tennessee Appellate Procedure Rule 2 does not permit the extension of time for filing a Rule 4 notice of appeal, a Rule 9(c) application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate court, a

Rule 10(b) application for permission to appeal to the Supreme Court from an intermediate court's denial of an extraordinary appeal, a Rule 11 application for permission to appeal, or a petition for review under Rule 12. Tenn. App. R. 2. Appellate Procedure Rule 2 reserves only those handful of circumstances in which the limitation period is jurisdictional and thus may not be suspended, allowing appellate courts to suspend the rules in all other situations. Rule 2 thus explicitly allows this Court to suspend the rules in all other situations, including Mr. Jahi's situation here—on application for permission to appeal from the denial of a motion to reopen post-conviction proceedings.

Tennessee Supreme Court Rule 1 further clarifies that Appellate Procedure Rule 2 controls in this situation. Supreme Court Rule 1 states, "All rules of this Court in conflict with or modified by the Tennessee Rules of Appellate Procedure are hereby superseded and modified by the Tennessee Rules of Appellate Procedure." Tenn. S. Ct. R. 1. Where the Supreme Court rules expressly state that the Rules of Appellate Procedure trump any rules of the Supreme Court that conflict, it is clear that this Court may suspend the procedural requirements regarding the filing of an application for permission to appeal. Tenn. Code Ann. § 16-3-406 further confirms that the Supreme Court Rule 1 controls in the face of all other conflicting authority, allowing consideration of this application, regardless of the provisions of Tenn. Code Ann. § 40-30- 117(c).[2]

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[2] Tenn. Code Ann. § 16-3-406 states "After the rules have become effective, all laws in conflict with the rules shall be of no further force or effect."

To be sure, where an application for permission to appeal has not strictly complied with Tenn. Code Ann. § 40-30-117(c), this Court has declined to review the application citing lack of jurisdiction, but given Supreme Court Rule 1 and Appellate Procedure Rule 2 these cases are incorrect. *See, Griffin v. State*, 2015 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. 2015)(finding no jurisdiction where petitioner failed to comply with Tenn. Code Ann. § 40-30-117(c)); *Richardson v. State*, 2015 Tenn. Crim. App. LEXIS 191 (Tenn. Crim. App. 2015)(same); *Ramsey v. State*, 2106 Tenn. Crim. App. LEXIS 394 (Tenn. Crim. App. 2016); *Nelson v. State,* 2013 Tenn. Crim. App. LEXIS 272 (Tenn. Crim. App. 2013). Supreme Court Rule 1 and Appellate Rule demonstrate that even where the statutory requirements have not been met, this Court retains jurisdiction ensuring a just result.

Moreover, *Graham*, the controlling Supreme Court case, is silent regarding jurisdictional issues and does *not* hold that failure to comply with Tenn. Code Ann. § 40-30-117(c), deprives the reviewing court of jurisdiction. *Graham*, 90 S.W.3d at 691. To the contrary, the Supreme Court in *Graham* found substantial compliance by the filing of the notice of appeal and retained jurisdiction to consider the case on the merits. *Id.* Indeed, even in other cases where this Court believed it lacked jurisdiction because the appellant did not comply with Tenn. Code Ann. § 40-30-117(c), this Court has nevertheless addressed the merits of the motion the appellant sought to review. That would not be possible if this Court actually lacked jurisdiction. *See e.g.*, *Roberson v. State*, 2007 Tenn. Crim. App. LEXIS 853 (Tenn. Crim. App. 2007)("even

had the appellant vested this Court with jurisdiction, the motion fails to assert a claim upon which a motion to reopen a petition for post-conviction relief may be granted."); *Pisano v. State*, 2012 Tenn. Crim. LEXIS 924 (Tenn. Crim. App. 2012)(finding no jurisdiction to hear the appeal, yet noting that the petitioner would not have been successful on the merits because his motion did not raise any of the grounds which provide a basis for reopening post-conviction proceedings); *Carter v. State*, 2008 Tenn. Crim. App. LEXIS 916 (Tenn. Crim. App. 2008)("even had an application been properly filed, the application would fail on its merits"). As in *Roberson*, *Pisano*, and *Carter*, and in light of the Supreme Court precedent in *Graham*, this Court should nevertheless review the denial of Mr. Jahi's motion to reopen on the merits.

C. This Court Has Addressed the Merits of Other Appeals in Which the Appellant Did Not Properly File a Formal Application for Permission to Appeal and Should Follow Suit Here

As it has done in other similar situations, this Court should construe Mr. Jahi's notice of appeal and brief in support as an application for permission to appeal, and reach the underlying merits of his motion to reopen his post-conviction proceedings. In accordance with Tennessee Appellate Procedure Rule 2 and Supreme Court Rule 1, this Court is free to address the merits of Mr. Jahi's motion to reopen, and should do so as it has done in other similar situations in which the appellant did not strictly comply with Tenn. Code Ann. § 40-30-117(c). *See Thomas v. State*, No. E2009-01039-CCA-

R28-PC (Tenn. Crim. App. Dec. 22, 2009)(*no app. taken*)(Tab I); *Kennebrew v. State*, No. E2005-00380-CCA-R28-PC (Tenn. Crim. App. Apr. 8, 2005)(*no app. taken*)(Tab 2); *Shelton v. State*, 2005 Tenn. Crim. App. LEXIS 1337 (Tenn. Crim. App. 2005); *Shuttle v. State*, No. E2001-001744-CCA-R28-PC (Tenn. Crim. App. Oct. 4, 2001)(*perm. app. denied* Feb. 11, 2002)(Tab 3); *Richardson v. State*, No. E2002-02747-CCA-R28-PC (Tenn. Crim. App. Mar. 11, 2003)(*no app. taken*)(Tab 4); *Shabazz v. State*, No. E2005-01298-CCA-R28-PC (Tenn. Crim. App. Aug. 2 25, 2005)(*no app. taken*)(Tab 5); *Drinnon v. State*, No. E2004-02484-CCA-R28-PC (Tenn. Crim. App. Dec. 9, 2004)(*no app. taken*)(Tab 6); *Livesay v. State*, Tenn. Crim. App. LEXIS 42 (Tenn. 1999). Mr. Jahi deserves no less treatment, particularly where his motion to reopen is literally a matter of life or death. Rather, principles of equal protection and due process under the 14th Amendment counsel this Court conduct the same review here as it did in *Thomas*, *Kennebrew*, *Shelton* and the above cited cases.

In *Thomas v. State*, No. E2009-01039-CCA-R28-PC, Mr. Thomas appealed the denial of the trial court's denial of his motion to reopen his post-conviction petition by filing a "Notice of Appeal by Paupers Other-OR-Pro Se Application for Permission to Appeal." *Thomas v. State*, No. E2009-01039-CCA-R28-PC, p. 1. His application did not include copies of all the documents filed below. *Id.* The trial clerk, however, transmitted a record for his case, which included the documents that Mr. Thomas should have attached to his application. *Id.* As such, this Court considered "the document initiating this proceeding, together with the record, as a timely filed application for permission to

appeal in accordance with *Graham v. State*." *Thomas v. State*, No. E2009-01039-CCA-R28-PC (internal citations omitted). *Id.* Nevertheless, this Court denied the application on the merits.

Kennebrew v. State, No. E2005-00380-CCA-R28-PC also involved an untimely and incomplete application for permission to appeal. Mr. Kennebrew filed an application for permission to appeal from the denial of his motion to reopen, but filed his application in the court below, and not before this Court. *Kennebrew v. State*, No. E2005-00380-CCA-R28-PC, p. 2. Moreover, Mr. Kennebrew failed to include the motion to reopen, the trial court's denial of his motion, or any other documentation. *Id.* As in *Thomas*, the trial clerk, who construed the application as a notice of appeal, transmitted a record to this Court. *Id.* Despite Mr. Kennebrew' s untimely and incomplete application, this Court nevertheless addressed his motion on the merits, where, as here, this Court had before it all required materials. *Id.* Ultimately, Mr. Kennebrew was denied relief on the merits.

In *Shelton v. State*, 2005 Tenn. Crim. App. LEXIS 1337 (Tenn. Crim. App. 2005), Mr. Shelton attempted to appeal the denial of post-conviction relief on a motion to reopen post-conviction proceedings by filing a "notice of appeal" from the order of denial rather than filing a formal application for permission to appeal.[3]

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[3] It is relevant that the timelines in Shelton and Mr. Jahi's case are very similar. In Shelton, the trial court denied relief on October 18, 2004, and on October 29. 2004, Mr. Shelton filed a notice of appeal from the denial. On November 10, 2004, the record on appeal was filed. Mr. Shelton filed a brief on January 10, 2005.

The state moved to dismiss the appeal arguing that Shelton had no appeal as of right and his notice of appeal was not a proper application for discretionary review. This Court, however, construed his notice of appeal and appellate brief as an application for permission to appeal, despite the untimely and improper filing of the application, and addressed the merits of Shelton's application, which they ultimately denied. *Id.*, at *7.

The petitioner in *Shuttle v. State*, No. E2001-001744-CCA-R28-PC, also filed an untimely application seeking permission to appeal, which this Court nevertheless considered on its merits. *Shuttle*, No. E2001-001744-CCA-R28-PC, p. 1. Similarly, *Richardson v. State*, No. E2002-02747-CCA-R28-PC (Tenn. Crim. App. Mar. 11, 2003), *Shabazz v. State*, No. E2005-01298-CCA-R28-PC, and *Drinnon v. State*, No. E2004-02484-CCA-R28-PC (Tenn. Crim. App. Dec. 9, 2004), all involve an appeal from the denial of a motion to reopen post-conviction proceedings. In each case, the petitioner filed an untimely application for permission to appeal, and failed to attach the motion to reopen which had been denied by the trial court. *Richardson*, No. E2002-02747-CCA-R28-PC; *Shabazz*, No. E2005-01298-CCA-R28-PC; *Drinnon*, No. E2004-02484-CCA-R28-PC. Regardless of the untimely improperly filed application, this Court considered the merits of the application each of these cases. *Id.*

Livesay v. State, Tenn. Crim. App. LEXIS 42 (Tenn. 1999), also involved an appeal from the denial of post-conviction relief. There, petitioner filed a second petition for post-conviction relief after the denial of his

first petition and attempted to appeal the second denial, but did not file a formal application for permission to appeal. There too, this Court considered the grounds for reopening the post-conviction petition, and ultimately found them without merit. *Id.*, at *5.

Presumably, this Court relied upon Appellate Procedure Rule 2 in *Thomas*, *Kennebrew*, and *Shelton* when it construed the untimely and improperly filed applications as properly filed applications for permission to appeal. As discussed *supra*, Appellate Procedure Rule 2 permits this Court to suspend the statutory regulations which govern permissive appeals from the trial court denial of a motion to reopen, and Supreme Court Rule 1 expressly states that Appellate Procedure Rule 2 controls in the face of conflicting authority. It is Appellate Procedure Rule 2 and Supreme Court Rule 1 which allowed this Court to overlook the strict requirements of Tenn. Code Ann. § 40-30-117(c) and to address the merits of the untimely and incomplete applications in *Shuttle*, *Richardson*, *Shabazz*, and *Drinnon*. Just as in *Thomas*, *Kennebrew*, *Shelton*, *Shuttle*, *Richardson*, *Shabazz*, *Drinnon*, and *Livesay*, this Court should address the merits of Mr. Jahi's appeal from the trial court's denial of his motion to reopen post-conviction proceedings despite the technical flaws in the manner in which he gave notice of his appeal.

D. Principles of Equity Compel This Court to Construe Mr. Jahi's Appeal as an Application for Permission to Appeal, Particularly in This Capital Case

This Court should construe Mr. Jahi's notice of appeal and brief in support as an application for permission to appeal where Mr. Jahi's is a capital case, and where capital cases have long been considered "different" from non-capital cases, requiring extra procedural safeguards.[4] Tennessee courts relax

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[4] *See, e.g.*, *Furman v. Georgia,* 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment"; "[d]eath . . . is in a class by itself'); *id*. at 306 (Stewart, J ., concurring) ("penalty of death differs from all other forms of criminal punishment, not in degree but in kind"); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("penalty of death is qualitatively different from a sentence of imprisonment, however long"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("qualitatively different"); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing Court's prior recognition of the "qualitative difference of the death penalty"); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) ("death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards"); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing "previously unquestioned principle" that unique safeguards necessary because death penalty is "qualitatively different"); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death"); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (majority opinion holding it cruel and unusual to punish retarded persons with death is "pinnacle of . . . death-is-different jurisprudence"); *Ring v.*

technical procedural requirements in capital cases to enable review that might otherwise be barred. *See State v. Nesbit*, 978 S.W.2d 872, 881 (Tenn. 1998); *State v. Bigbee*, 885 S.W.2d 797, 805 (Tenn. 1994); *State v. Martin*, 702 S.W.2d 560, 564 (Tenn. 1985); *State v. Duncan*, 698 S.W.2d 63, 67-68 (Tenn. 1985); *State v. Strouth*, 620 S.W.2d 467, 471 (Tenn. 1981). Such should be the case here.

Moreover, the underlying basis of Mr. Jahi's motion to reopen is his claim that he is intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304 (2003) and *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), and thus ineligible to be executed under both the United States and Tennessee Constitutions. Where the Tennessee Supreme Court has made clear that "Tennessee has no business executing persons who are intellectually disabled," *Keen v. State,* 398 S.W.3d 594, 613 (Tenn. 2012), and where at the heart of Mr. Jahi's Motion to Reopen is his ineligibility to be executed, this Court should follow *Shelton*, *Richardson*, and *Livesay* and construe Mr. Jahi's notice of appeal and his brief in support as an application for permission to appeal.

Undersigned counsel's less than strict compliance with Tenn. Code Ann. § 40-30-117(c) should only be attributed to Mr. Jahi's counsel and not to Mr. Jahi himself, who is an intellectually disabled, uneducated, and indigent man who took no part in preparing this

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Arizona, 536 U.S. 584, 605-06 (2002) ("no doubt that '[d]eath is different'") (citation omitted); *id*. at 614 (Breyer, J., concurring in the judgment) ("Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.").

appeal. To the extent this Court finds counsel erred in the way he attempted to appeal from the denial of the reopening of post-conviction, counsel's mistakes should not be held against Mr. Jahi. Mr. Jahi has already had to endure the service of ineffective counsel during his capital trial, and at post-conviction. Mr. Jahi should not now have to bear the burden of any error that, as already shown, has not prejudiced either the state or this Court.[5]

Equitable principles also counsel this Court to construe Mr. Jahi's filings in this Court as an application for permission to appeal in compliance with Tenn. Code Ann. § 40-30-117(c). The United States Supreme Court's decision in *Holland v. Florida*, 560 U.S. 631 (2010) provides guiding principles in equity which should be applied here. In *Holland v. Florida*, the Supreme Court held that the statute of limitations under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) was subject to equitable tolling as the statute of limitations defense is not jurisdictional. *Id.* That is precisely the situation here. Tenn. Code Ann. § 40-30-117(c) is not jurisdictional,[6] and should be

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[5] Petitioner acknowledges that the Supreme Court's decision in *Payne* stands in the way of his motion to reopen, and seeks review of the trial court's denial of his motion so as to preserve the issue for further litigation. Given that Mr. Jahi faces an uphill battle given *Payne*, and the history of poor lawyering he has endured in his capital trial and appeal, there is all the more reason for this Court to construe Mr. Jahi's notice of appeal as an application for permission to appeal.

[6] As was discussed *supra*, Appellate Procedure Rule 2 trumps all other rules and codes in Tennessee (as Tennessee Supreme Court

subject to the principles of equity, just as AEDPA is subject to equitable tolling. Thus, just as in *Shelton*, *Richardson*, and *Livesay*, and to ensure justice, this Court should construe this matter as a proceeding on application for permission to appeal.

II. The Trial Court Erred in Denying Mr. Jahi's Motion to Reopen

This Court should review the final court order denying Mr. Jahi's motion to reopen because Mr. Jahi is entitled to retroactive application of *Hall v. Florida.* The post-conviction court in Mr. Jahi's initial post-conviction proceedings found that Mr. Jahi suffers from deficits in adaptive behavior, that the deficits in his intellectual functioning were present prior to the age of eighteen, and therefore Mr. Jahi met the second and third prongs of Tennessee's intellectual disability statute, Tenn. Code Ann. § 39-13-203(a) (2) & (3). *See Jahi*, 2014 WL 1004502, at *106. The post-conviction court also found that Mr. Jahi failed to prove that he had an IQ of "70 or below" as required by the first prong of the statute, despite the fact that the trial court refused to consider application of the standard error of measurement ("SEM") or the Flynn Effect to Mr. Jahi's raw IQ test scores.

However, when the SEM and Flynn are applied to Mr. Jahi's raw test scores, as is required by the current

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Rule 1 makes clear), and allows appellate courts to suspend the rules in most situations, reserving only a handful of circumstances in which the limitation period is jurisdictional and thus may not be suspended. Rule 2 does not include the limitations period in which to file a permission to appeal from motions to reopen.

clinical standards, Mr. Jahi's IQ score is "70 or below," (Kaufmann Affidavit) and he is entitled to relief under the 8th Amendment, because he meets each of the three-prongs of the clinically accepted test for intellectual disability as set forth in *Hall*. The trial court's order denying the motion to reopen should therefore be reversed.

A. Mr. Jahi Satisfied All Three Prongs of the Test for Intellectual Disability Under the Eighth Amendment and Tenn. Code Ann. § 39-13-203(a).

1. Intellectual Functioning

As part of his Motion to Reopen, Mr. Jahi submitted the affidavit of Alan S. Kaufman. Dr. Kaufman opined that: "After adjusting Mr. Jahi's IQ scores, as recommended by the applicable mental health professional standards, Mr. Jahi achieved a full scale IQ score ranging from 70-75." *See* Kaufmann Affidavit. Mr. Jahi's scores thus place him, "squarely in the range for the Intellectual Disability diagnosis that the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), American Association on Intellectual and Developmental (AAIDD), American Psychiatric Association (APA), and *Hall v. Florida*." *Id*. With an I.Q. score in the range of 70-75, Mr. Jahi meets prong one of Tenn. Code Ann. § 39-13-203(a).

2. Adaptive Behavior

Mr. Jahi also displays deficits in adaptive functioning and therefore meets the second prong of Tenn. Code Ann. § 39-13-203(a). The post-conviction court found that Mr. Jahi established deficits in

adaptive behavior in the areas of communication and verbal skills based upon the evidence presented in post-conviction. *Jahi v. State*, 2014 Tenn. Crim. App. LEXIS 229, *293.

Dr. Kaufmann has also concluded that Mr. Jahi has adaptive deficits. Dr. Kaufmann's finding is based upon the results of the Vineland Adaptive Behaviors Scales Second Edition, a standardized test designed to measure an individuals' ability to function in day to day life, which was conducted in 2009. Kaufmann Affidavit, ¶ 43. Where deficits in one or more domain will support a diagnosis of intellectual disability, Mr. Jahi displayed deficits in three domains: Communication, Daily Living Skills, and Socialization. *Id.* Further, where deficits in two or more areas support an intellectual disability diagnosis, Mr. Jahi had deficits in five areas: Expressive Communication, Written Communication, Community Daily Living Skills, Interpersonal Relations, and Coping Skills. *Id.* Mr. Jahi thus meets prong two of Tenn. Code Ann. § 39-13-203(a).

3. Age of Onset

Both the post-conviction court and Dr. Kaufmann found that Mr. Jahi's intellectual disability manifested before adulthood, meeting the third prong of § 39-13-203(a). The trial court found Mr. Jahi's "deficits in adaptive behavior and any deficits in intellectual functioning were present prior to the age of eighteen." *Jahi v. State*, 2014 Tenn. Crim. App. LEXIS 229, *293. Likewise, Dr. Kaufmann's examination of Mr. Jahi's school records and the testimony of individuals who knew Mr. Jahi well before he turned eighteen (18),

reveal that "[a]ll evidence unequivocally supports the fact that Akil Jahi had an intellectual disability well before adulthood." Kaufmann Affidavit, ¶ 49.

The evidence Mr. Jahi has presented establishes that Mr. Jahi meets each of the three prongs of the test for intellectual disability set forth by *Hall* and § 39-13-203(a): substandard intellectual functioning, deficits in behavioral functioning, and a manifestation of these limitations in the developmental period.

B. Mr. Jahi is Entitled to Relief under *Hall* and *Montgomery*

Hall v. Florida, 134 S. Ct. 1986 (2014), constitutionally requires courts to (1) consider the standard error of measurement (SEM) of I.Q. tests; (2) conduct a holistic evaluation of all evidence of intellectual disability; (3) apply professional standards for determining intellectual disability; and (4) grant a hearing and consider all evidence of intellectual disability (including adaptive deficits and age of onset) where a petitioner has at least one raw I.Q. score of 75 or below. *Hall*, 134 S.Ct. at 1993-2001. *Hall* thus alters, redefines, and refines the class of persons considered intellectually disabled under the Constitution, as such persons may not be punished by death.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016), dictates that the rule announced in *Hall* should be applied retroactively in cases such as the instant action. *Montgomery* holds that the Supremacy Clause of the United States Constitution requires state collateral review courts give retroactive effect to

substantive rules of law, which include any rule which "alters . . . the class of persons the law punishes." *Montgomery*, 136 S.Ct. at 613, 618, 731-732. This is precisely the impact of *Hall*. Like *Atkins v. Virginia*, 536 U.S. 304 (2002), *Hall* set forth substantive Eighth Amendment standards that govern a state's determination of intellectual disability, and therefore *Hall*'s standards must be applied retroactively.

To be sure, in *Payne v. Tennessee*, 493 S.W.3d 478, 491 (Tenn. 2016), the Tennessee Supreme Court "decline[d] to hold that *Hall* applies retroactively within the meaning of Tennessee Code Annotated section 40-30-117(a)(1)." *Payne*, however, did not address the applicability of, or the arguments in support of, the U.S. Supreme Court's holding in *Montgomery*.

Mr. Jahi falls squarely within the class of protected individuals identified for the first time by *Hall*. Mr. Jahi's test scores, both raw and adjusted as recommended by the applicable mental health professional standards, range between 70 and 75. Mr. Jahi has further proven by a preponderance of the evidence that he suffers from deficits in adaptive behavior and that any deficits in intellectual functioning were present prior to the age of eighteen. *See Jahi*, 2014 WL 1004502, at *106. *Hall* has established that an individual in Mr. Jahi's position is not eligible for the death penalty. Yet, Mr. Jahi currently faces a punishment that the law cannot impose on him.

In denying Mr. Jahi's Motion to Reopen, the trial court relied on the Tennessee Supreme Court's decision

in *Payne*, and, like the *Payne* court, did not address the impact of *Montgomery* on *Hall*, namely that because *Hall* is exactly the substantive rule of law that *Montgomery* defines, it must therefore be applied retroactively. Contrary to *Hall* and *Montgomery*, Mr. Jahi's request for relief has been denied on the grounds that *Hall* is not retroactive though Mr. Jahi falls squarely within the class of individuals who are not eligible for the death penalty under *Hall* and the 8th Amendment. It simply cannot be that Mr. Jahi would have a constitutional right not to be put to death if his case were brought after the U.S. Supreme Court's decision in *Hall*, but, because it was brought prior to the ruling in *Hall* he has no such constitutional right. *Hall* should, therefore, be applied retroactively, and Mr. Jahi is constitutionally entitled to a hearing under *Hall*, the 8th Amendment and Tennessee law. Thus, notwithstanding the Tennessee Supreme Court's decision in Payne, this Court should conclude that Hall is retroactive, reverse the trial court's denial of the motion to reopen, and remand for further proceedings.

CONCLUSION

For the reasons set forth herein, Applicant Akil Jahi respectfully requests that this Court construe his notice of appeal and other filings in this Court as an application for permission to appeal, grant review of the decision of the lower court, grant his motion to reopen his petition for post-conviction relief, conclude that it is retroactive in light of *Montgomery*, and remand for further proceedings on Mr. Jahi's claims that he is intellectually disabled under *Hall*, the 8th

Amendment, the Tennessee Constitution and Tenn. Code Ann. § 39-13-203.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2017, a true and exact copy of this brief was mailed, first class postage prepaid, to Assistant Attorney General Andrew C. Coulam, Team Leader—West Region, Criminal Appeals Division, P.O. Box 20207, Nashville, TN 37202-0207.

/s/ Christopher E. Thorsen
Christopher E. Thorsen

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

Criminal Court for Shelby County
No. P-28413

No. W2016-02201-CCA-R3-PD

[Filed August 1, 2017]

AKIL JAHI, aka PRESTON CARTER	)
	)
v.	)
	)
STATE OF TENNESSEE	)
	)

ORDER

This matter is before the Court upon the filing of a Notice of Appeal by counsel for the Petitioner. The stated purpose of the notice of appeal was to appeal the order denying the Petitioner's motion to reopen petition for post-conviction relief. On September 29, 2016, the Criminal Court of Shelby County, Tennessee entered an Order denying the motion to reopen petition for post-conviction relief. On October 24, 2016, the Petitioner filed the Notice of Appeal with the Criminal Court.

If a motion to reopen a petition for post-conviction relief is denied, the petitioner must file an application

for permission to appeal with this Court within 30 days of the denial. *See* T.C.A. §40-30-117(c); Tenn. Sup. Ct. R. 28, § 10(b)[1]. "The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion." *Id.* The application must include "the date and judgment from which the petitioner seeks review, the issue which the petitioner seeks to raise, and the reasons why the appellate court should grant review." *Graham v. State*, 90 S.W.3d 687, 691 (Tenn. 2002).

In order to obtain appellate review of the post-conviction court's order, a petitioner must comply with the statutory requirements in section 40-30-117(c), Tennessee Code Annotated. *See John Harold Williams, Jr. v. State,* No. W1999-01731-CCA-R3-PC (Tenn. Crim. App. at Jackson, Mar. 23, 2000), *perm. to appeal denied,* (Tenn. Oct. 16, (2000)[2]; *Mario Gates v. State*, No. W2002-02873-CCA-R3-PC (Tenn. Crim. App. at Jackson, Dec. 31, 2003). The failure of a petitioner to comply with statutory requirements governing review of the denial of a motion to reopen deprives this Court of jurisdiction to entertain such matter. *Gates* at *2. Neither the Post-Conviction Procedure Act nor the Rules of the Supreme Court

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[1] Notwithstanding the title of the pleading, a notice of appeal may be considered as an application for permission to appeal if it includes "sufficient substance that it may be effectively treated as an application for permission to appeal." *Graham v. State*, 90 S.W.3d 687, 697 (Tenn. 2002).

[2] Tennessee Code Annotated §40-30-117 was formerly §40-30-217 and was transferred to §40-30-117 in 2003.

permit this Court to suspend the statutory requirements. *Id.*

Even in light of the allowances of the *Graham v. State* opinion, the pleadings filed by the Petitioner fail to meet the requirements set out in Tennessee Code Annotated section 40-30-117 and section 10(b) of Rule 28 of the Rules of the Supreme Court. The pleading was not filed with the correct court, did not include copies of the underlying documents necessary for this Court to render a decision and did not set out the issues which he seeks to raise and the reasons why the appellate court should grant review. This Court acknowledges that an appellate record and a brief were filed but neither is allowed by statute or rule absent compliance with the above procedures. There is no absolute right to appeal the denial of a request to re-open a petition for post-conviction relief other than that granted by the statute set out above. This Court is without jurisdiction to entertain this matter.

Accordingly, it is ORDERED that the appeal is DISMISSED. Because it appears that the Petitioner is indigent, costs of this appeal are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE
CAMILLE R. MCMULLEN, JUDGE
J. ROSS DYER, JUDGE