CAPITAL CASE

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID IVY,

Petitioner

vs.

STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where this Court has declared, "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017)(emphasis in original) (*quoting Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)), may a state thwart the Constitutional prohibition against execution of the intellectually disabled by failing to provide a procedural vehicle for the adjudication of an *Atkins*-exemption claim?

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PETITION FOR WRIT OF CERTIORARI

David Ivy respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court.

OPINIONS BELOW

The ruling of the Tennessee Supreme Court denying a discretionary appeal is unreported.. Appendix A. The opinion of the court of criminal appeals upholding the denial of relief is unreported. *Ivy v. State*, 2018 WL 625127 (Tenn. Ct. Crim. App. 2018). Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Tennessee Supreme Court issued its denial of relief on May 18, 2018. The mandate of the Tennessee Supreme Court issued on May 29, 2018. Appendix C. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth and Fourteenth Amendments to the United States Constitution:

The Eighth Amendment provides in pertinent part: "[N]or [shall] cruel and unusual punishments [be] inflicted."

The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

David Ivy filed a Petition for Writ of Error *Coram Nobis* and/or Other Relief in the Criminal Court of Shelby County Tennessee on May 20, 2015. TR pp. 27-89.[1] The State of Tennessee responded on August 24, 2015. TR pp. 92-94. The proceeding was stayed pending the outcome of the Tennessee Supreme Court's decision in *Payne v. State*, No. W2013-01248-SC-R11-PD; TR p. 95. On April 7, 2016, the Tennessee Supreme Court issued its opinion in the *Payne* case. 492 S.W.3d 478 (Tenn. 2016). The Criminal Court ordered Mr. Ivy to amend his

[1] TR citations are to the state court appellate technical record.

pleadings in light of *Payne*. TR p. 97. Mr. Ivy complied. TR pp. 98-105. Mr. Ivy's additional arguments alerted the lower court to this Court's decisions in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Mr. Ivy included in his requests for relief the opportunity to invoke the court's jurisdiction pursuant to Tenn. R. Crim. P. 36.1 (correct illegal sentence), as well as under the common law writ of *audita querela*. The State responded. TR pp.104-108. The Criminal Court denied relief on September 29, 2016. TR pp. 111-117. Mr. Ivy timely appealed. TR pp.118-119.

While Mr. Ivy's case was pending in the court of criminal appeals, this Court issued its opinion in *Moore v. Texas*, 137 S.Ct. 1039 (2017). During this same time, the state attorney general advised the federal district court – who is also considering an *Atkins* claim in Mr. Ivy's pending federal petition for writ of habeas corpus under 28 U.S.C. § 2254 – that Mr. Ivy had an available remedy in state court. The state attorney general suggested that the *Atkins* claim raised in federal court should be dismissed as unexhausted. *Ivy v. Westbrooks*, 2:03-cv-02374, D.E. 85-1, PageID 5003-04. Given the state attorney general's representation that the Mr. Ivy had a remedy in state court, the federal district court stayed federal proceedings for Mr. Ivy to pursue relief in state court. *Id.*, D.E. 91, PageID 5197. In granting the stay, the federal district court wrote: "A stay will allow the State of Tennessee to fulfill its role in developing appropriate ways to enforce the constitutional restriction on executing the intellectually disabled in the procedural and substantive context of Ivy's claims." *Id.*

At oral argument in the Court of Criminal Appeals on Mr. Ivy's *coram nobis* petition, however, the state attorney general argued that Mr. Ivy did not have an available remedy in state court. Mr. Ivy argued that the state was taking inconsistent positions and that it was incumbent on the state of Tennessee to provide a procedural vehicle for Mr. Ivy in light of *Moore.* http://www.tncourts.gov/courts/court-criminal-appeals/arguments/2017/07/11/david-ivy-v-state-tennessee (last checked April 2, 2018).

The court of criminal appeals denied relief without citation to *Moore. Ivy . State*, 2018 WL 625127 (Tenn. Crim. App. January 30, 2018), Appendix A. Counsel for Mr. Ivy sought permission to appeal to the Tennessee Supreme Court. Specifically, counsel for Mr. Ivy presented the Tennessee Supreme Court with the following question:

> In *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017), the United States Supreme Court declared "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" 137 S. Ct. at 1051 (emphasis in original) (*quoting Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). *Moore's* dictate echoes the earlier prohibition regarding execution of the mentally incompetent. *See, Ford v. Wainwright*, 477 U.S. 399 (1986). This Court recognized that the *Ford* decision created "an affirmative constitutional duty [for this Court] to ensure that no incompetent prisoner is executed." *Van Tran v. State*, 6 S.W. 3d, 257, 265 (Tenn. 1999). Here, the Supreme Court has extended the prohibition against execution to the intellectually disabled – creating another duty for this Court to fulfill. *Moore* places "an affirmative constitutional duty" on the State of Tennessee to provide a forum for the adjudication of Mr. Ivy's intellectual disability claim. Therefore, the court of criminal appeals decision upholding the denial of Mr. Ivy's petition presents the following question:
>
> **In light of *Moore,* which procedure will this Court identify as the most appropriate vehicle for the adjudication of Mr. Ivy's *Atkins* claim?**

The Tennessee Supreme Court denied Mr. Ivy's application for permission to appeal on May 18, 2018.

REASON THE WRIT SHOULD BE GRANTED

Moore requires state courts to provide a remedy for persons who are exempt from the death penalty due to intellectual disability.

In *Moore v. Texas*, 137 S.Ct. 1039 (2017), this Court held that under the Eighth Amendment, state courts must evaluate an intellectual disability claim using the "medical community's current standards" for identifying those who are intellectually disabled. *Moore*, 137 S.Ct. at 1053. All aspects of an intellectual disability determination must comport with those current clinical standards – which include criteria and standards established by the APA in the Diagnostic and Statistics Manual of Mental Disorders, 5th Edition (DSM-5), and AAIDD's User's Guide to Intellectual Disability, Eleventh Edition (AAIDD-11). *Id.* at 1050.

Adhering to the rule of *Montgomery v. Louisiana,* 138 S.Ct. 718 (2016), that states may not fail to provide a forum for vindication of a constitutional protection, *Moore* holds that states may not fail to provide an appropriate forum for the adjudication of intellectual disability claims. *Moore* adds to *Montgomery* that the Eighth Amendment requires application of the current clinical, scientific standards to the determination of exemption from execution under *Atkins*. Just as Mr. Moore was entitled to have evidence of his intellectual disability assessed in accordance with the current clinical standards set forth in DSM-5 and AAIDD-11, *Moore v. Texas* mandates that Mr. Ivy receive that same review of his intellectual disability claim.

In the years following this Court's decision in *Atkins*, Tennessee courts have failed to grant sentencing phase relief to a single post-conviction defendant based on a claim of intellectual disability. Although the Court has repeatedly stated that the state of Tennessee has no interest in executing the intellectually disabled, they continue to fail to identify a procedural vehicle for inmates such as Mr. Ivy. *See Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012)(" We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled."); *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016)(same).

Mr. Ivy has a meritorious claim that he is ineligible for execution because he is intellectually disabled. He dropped out of school at the age of seventeen at which time he was in the seventh grade for the third consecutive year. Mr. Ivy previously failed the 4th grade. He was recommended for special education classes in the third grade. TR 86. His mother described him as "'kind of slow.'" *Id.* His full scale IQ on the Wechsler Intelligence Scale for Children-Revised was 73 when he was 12 years of age. *Id.*. At that same time, Mr. Ivy's "performance on the Bender Gestalt test suggest[ed] impaired perceptual functioning." *Id.* Mr. Ivy's performance on academic measures "indicate deficits in all three areas." *Id.* Mr. Ivy was "reading on the third grade level." *Id.* The school report concluded:

> David is most appropriately diagnosed as a child having continuing handicap in intellectual functioning and achievement which significantly impairs the ability to think and/or act in a regular school program, but who is functioning socially at or near a level appropriate to his chronological age. Intellectual functioning is more than two standard deviations below the mean[.]"
>
> *Id.*

At age fourteen, Mr. Ivy was given the Peabody Picture Vocabulary Test-Revised and achieved a score of 63. He was also given the Culture Fair Intelligence Test and received an IQ score of 73.

The evidence in record indicates that Mr. Ivy fits within the:

> generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"—i.e., a score of roughly 70—adjusted for "the standard error of measurement," AAIDD–11, at 27); (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing circumstances," *Hall v. Florida*, 572 U.S. ——, —— , 134 S.Ct. 1986, 1994, 188 L.Ed.2d 1007 (2014)); and (3) the onset of these deficits while still a minor. See App. to Pet. for Cert. 150a (citing AAIDD–11, at 1). See also *Hall*, 572 U.S., at ——, 134 S.Ct., at 1993–1994

Moore, 137 S. Ct. at 1045. Tennessee should not be permitted to execute him. "States may not execute anyone in "the entire category of [intellectually disabled] offenders," *Roper*, 543 U.S., at 563–564, 125 S.Ct. 1183 (emphasis added)." *Id.* at 1051.

Where there is a constitutional right there must be a remedy. Such is a bedrock principle of our judicial system. *Marbury v. Madison*, 1 Cranch 137, 162 (1803) ("The very essence of civil liberty certainly consists in the right of every indicial to claim the protection of the laws whenever he receives an injury"). When there is a constitutional limitation on the state's power to act, the courts are constitutionally obligated to provide a substantive opportunity to determine whether that limitation applies. *Montgomery v. Louisiana*, 577 U.S___, 138 S.Ct. 718 (2016). *Moore* places a constitutional obligation on the State of Tennessee to

provide a forum for the adjudication of Mr. Ivy's intellectual disability exemption claim.

Moore and *Montgomery* as well as the bedrock protections of constitutional due process, require that the procedural barricades be removed, and that Mr. Ivy be given a merits hearing on his claim of intellectual disability.

CONCLUSION

For this reason, David Ivy requests that the Court grant a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Andrew Coulam, Assistant Attorney General, 425 Fifth Avenue North, Nashville, Tennessee, 37203, this 11th day of October, 2018.

Kelley J. Henry

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DAVID IVY v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 01-12388

No. W2016-02454-SC-R11-ECN

ORDER

Upon consideration of the application for permission to appeal of David Ivy and the record before us, the application is denied.

PER CURIAM

APPENDIX B

2018 WL 625127
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT JACKSON.

David IVY
v.
STATE of Tennessee

No. W2016-02454-CCA-R3-ECN
|
July 11, 2017 Session
|
FILED 01/30/2018
|
Application for Permission to Appeal
Denied by Supreme Court May 18, 2018

Appeal from the Criminal Court for Shelby County, No. 01-12388, James C. Beasley, Jr., Judge

Attorneys and Law Firms

Kelley J. Henry, Supervisory Assistant Federal Public Defender, and Amy D. Harwell, Assistant Federal Public Defender, Nashville, Tennessee, for the appellant, David Ivy.

Herbert H. Slatery III, Attorney General and Reporter; Andrew C. Coulam, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Stephen P. Jones, Assistant District Attorney General, for the appellee, State of Tennessee.

Norma Mcgee Ogle, J., delivered the opinion of the court, in which D. Kelly Thomas, Jr., and Camille R. McMullen, JJ., joined.

OPINION

Norma Mcgee Ogle, J.

The Petitioner, David Ivy, appeals the Shelby County Criminal Court's denial of his petition for a writ of error coram nobis, seeking relief from his conviction of first degree premeditated murder and resulting sentence of death. On appeal, the Petitioner contends that the coram nobis court erred by dismissing his petition, by denying his Rule 36.1 motion to correct an illegal sentence, and by denying his writ of error audita querela. In addition, he asks that this court advise him as to the correct pleading to file in order to challenge his death sentence. Based upon the oral arguments, the record, and the parties' briefs, we conclude that the coram nobis court did not err by denying relief, and we decline to provide an advisory opinion regarding future requests for relief.

I. Factual Background

***1** In June 2000, the Petitioner was released from prison and placed on parole. David Ivy v. State, No. W2010-01844-CCA-R3-PD, 2012 WL 6681905, at *1 (Tenn. Crim. App. at Jackson, Dec. 21, 2012). Subsequently, he began dating the victim, LaKisha Thomas. Id. Their relationship was "marked by Ivy's violence against Thomas," and the victim obtained an order of protection against the Petitioner on June 6, 2001. Id. at *2. Two days later, the Petitioner ran up to the victim while she was sitting in her car and shot her five times, killing her. Id. In 2003, a Shelby County Criminal Court Jury convicted the Petitioner of first degree premeditated murder and sentenced him to death. State v. Ivy, 188 S.W.3d 132, 138-39 (Tenn. 2006).

In 2012, the Petitioner filed a petition for post-conviction relief claiming, in pertinent part, that trial counsel were ineffective during the penalty phase of his trial by failing to have him evaluated by a mental health professional. David Ivy, No. W2010-01844-CCA-R3-PD, 2012 WL 6681905, at *26. This court found that while counsel were deficient, the Petitioner failed to demonstrate prejudice. Id. at 44-46. On May 28, 2015, the Petitioner filed a petition for a writ of error coram nobis "and/or other relief," which is the basis for this appeal, asserting that he was intellectually disabled and, therefore, ineligible for the death penalty pursuant to Atkins v. Virginia, 536 U.S. 304 (2002). In support of his claim, the Petitioner attached a 1984 mental health report from the Memphis School System. According to the report, the then twelve-year-old Petitioner's I.Q. score

on the WISC–R was 73, "placing him in the borderline range of intelligence." The report stated that additional testing showed the Petitioner, who was in the sixth grade, exhibited "deficits" in reading, math, and written language and was reading on just the third-grade level. The report concluded that the Petitioner's "[i]ntellectual functioning is more than two standard deviations below the mean, academic achievement is at or below the fourth percentile in Reading Comprehension, Reading Mechanics and Written Language and adaptive behavior is not significantly impaired."

The State responded to the petition, arguing that it was barred by the one-year statute of limitations. On May 11, 2016, the Petitioner filed additional argument in support of his petition, also seeking relief pursuant to Tennessee Rule of Criminal Procedure 36.1 and a petition for writ of audita querela.

The coram nobis court denied relief without a hearing. First, the court concluded that relief was not available to the Petitioner for his intellectual disability issue due to our supreme court's ruling in Payne v. State, 493 S.W.3d 478, 480 (Tenn. 2016). As to the motion for relief pursuant to Tennessee Rule of Criminal Procedure 36.1, the court determined that the Petitioner was not entitled to relief because his death sentence was authorized by statute. The court noted that "changes in constitutional law render a sentence voidable, not illegal and void." As to the audita querela claim, the court concluded that the writ was obsolete and, thus, could not provide relief. The Petitioner challenges the rulings of the coram nobis court.

II. Analysis

A. Writ of Error Coram Nobis

***2** The Petitioner "acknowledges that our supreme court's decision in Payne holds that coram nobis does not provide a procedural adjudication of an Atkins claim." He contends, though, that Payne was wrongly decided. In the alternative, he contends that this case is distinguishable from Payne. The State maintains on appeal that the petition was barred by the statute of limitations. The State also argues that Payne held that a defendant cannot raise an intellectual disability claim via a petition for a writ of error coram nobis and that this court is bound by that decision.

The writ of error coram nobis is codified in Tennessee Code Annotated section 40–26–105 and provides as follows:

> There is hereby made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith .... Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 40–26–105(a), (b). Generally, a decision whether to grant a writ of error coram nobis rests within the sound discretion of the trial court. See State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995).

The writ of error coram nobis is a post-conviction mechanism that has a long history in the common law and the State of Tennessee. See, e.g., State v. Vasques, 221 S.W.3d 514, 524–26 (Tenn. 2007). The writ "is an extraordinary procedural remedy ... [that] fills only a slight gap into which few cases fall." State v. Mixon, 983 S.W.2d 661, 672 (Tenn. 1999).

A writ of error coram nobis must be filed within one year after the judgment becomes final in the trial court. Tenn. Code Ann. § 27–7–103. Nevertheless, the statute of limitations may be tolled on due process grounds if a petition seeks relief based upon newly discovered evidence of actual innocence. Wilson v. State, 367 S.W.3d 229, 234 (Tenn. 2012). Our supreme court has stated that "[i]n determining whether tolling of the statute is proper, the court is required to balance the petitioner's interest in having a hearing with the interest of the State in preventing a claim that is stale and groundless." Id. In general,

" 'before a state may terminate a claim for failure to comply with ... statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner.' " Id. (quoting Burford v. State, 845 S.W.2d 204, 208 (Tenn. 1992)). Our supreme court described the three steps of the "Burford rule" as follows:

> "(1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are 'later-arising,' determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim."

Id. (quoting Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995)).

In Payne, the petitioner was sentenced to death in 1988 for two murders he committed in 1987. 493 S.W.3d at 480–81. In 1990, the Tennessee General Assembly passed legislation prohibiting a death sentence for a defendant with an intellecual disability at the time of the offense. On December 4, 2001, our supreme court held in Van Tran v. State, 66 S.W.3d 790, 812 (Tenn. 2001), that the federal and state constitutions prohibited the execution of individuals who were intellectually disabled. Id. at 480, 481. In 2002, the United States Supreme Court held in Atkins, 536 U.S. at 321, that the federal constitution prohibited the execution of intellectually disabled defendants. Id. at 481.

***3** Ten years later, Payne sought coram nobis relief on the basis that his intellectual disability prohibited his death sentence. Id. at 483. In support of his claim, he submitted a psychologist's 2012 affidavit, opining that the petitioner's " 'functional intelligence clearly is at or below 70.' " Id. at 482. The petitioner claimed that the opinion "was new scientific evidence establishing that 'he is actually innocent of capital murder and the death penalty.' " Id. at 483. In denying relief, our supreme court explained as follows:

> The evil that the coram nobis statute is aimed at remedying is a conviction based on materially incomplete or inaccurate information. It is not intended to provide convicted felons a second trial due to subsequent changes in the law. Here, the Petitioner is attempting to challenge his sentence of death based on changes in the law that occurred many years after his trial. A petition for writ of error coram nobis pursuant to Tennessee Code Annotated section 40–26–105(b) is not the appropriate procedural mechanism for pursuing the Petitioner's claim of intellectual disability. We hold that the Petitioner has failed to state a claim that is cognizable under the coram nobis statute.

Id. at 486.

Turning to the instant case, both the Petitioner and the State contend that Payne held that a defendant cannot raise an intellectual disability claim via a petition for a writ of error coram nobis. However, our supreme court actually found in Payne that a writ of error coram nobis was not the proper avenue for relief in that particular case because the petitioner was "attempting to challenge his sentence of death based on changes in the law that occurred many years after his trial." Id.; see David Keen v. State, No. W2016–02463–CCA–R3–ECN, 2017 WL 3475438 (Tenn. Crim. App. at Jackson, Aug. 11, 2017), perm. to app. filed, (Tenn. Oct. 9, 2017). Such is not the case here. The statutory and case law prohibiting the execution of the intellectually disabled was established before the Petitioner went to trial. Therefore, we do not think Payne is dispositive of this case.

That said, though, the Petitioner has failed to satisfy a crucial prerequisite to a proper petition for a writ of error coram nobis in that, unlike the petitioner in Payne, he did not allege in his petition and does not allege on appeal that he is presenting newly discovered evidence. In fact, he notes in his brief that his mental deficiencies were first recognized when he was a child, and he attached only a 1984 mental health report from the Memphis School System to his petition. Furthermore, the Petitioner's judgment became final in 2003, but he did not file his petition for a writ of error coram nobis until 2015.

The Petitioner offered no explanation in his petition and has offered no explanation on appeal as to why the statute of limitations should be tolled. His petition was untimely by well over a decade, and, therefore, was barred by the statute of limitations. Accordingly, the coram nobis court properly dismissed the petition.

B. Rule 36.1 Relief from an Illegal Sentence

The Petitioner argues that he is entitled to relief pursuant to Tennessee Rule of Criminal Procedure 36.1 because he is intellectually disabled and, thus, not eligible to be executed. In support of this argument, he cites Tennessee Code Annotated section 39–13–203(b), which prohibits capital punishment for defendants who are intellectually disabled, stating that "no defendant with intellectual disability at the time of committing first degree murder shall be sentenced to death."

***4** Rule 36.1 permits a defendant to seek correction of an unexpired illegal sentence at any time. See State v. Brown, 479 S.W.3d 200, 211 (Tenn. 2015). "[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." Tenn. R. Crim. P. 36.1(a).

As the State correctly notes, the flaw in the Petitioner's argument is that his punishment was authorized by statute when it was imposed upon him and, thus, was not illegal. Moreover, neither at the time of the Petitioner's sentencing, nor when this present petition was filed, had he been found to be "intellectually disabled" as contemplated by the applicable statute. [1] Thus, at the time of sentencing, the Petitioner's sentence did not contravene any statute, and he is not eligible for relief under Rule 36.1.

C. Writ of Audita Querela

Finally, the Petitioner argues that he is entitled to a writ of audita querela, which is "a common law writ affording 'relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution.' " Dwight Seaton v. State, No. E1999–01312–CCA–R3–CD, 2000 WL 1177462, at *3 (Tenn. Crim. App. at Knoxville, Aug. 21, 2000) (quoting United States v. Fonseca–Martinez, 36 F.3d 62, 64 (9th Cir. 1994) (citation omitted)). However, the writ is no longer available in Tennessee. As this court explained in James Dellinger v. State:

> The Tennessee Supreme Court has concluded that the writ of audita querela "is absolutely unknown and obsolete in the practice of this State." Marsh v. Haywood, 25 Tenn. 210, 1845 WL 1897, at *1 (Tenn. 1845). Furthermore, Tennessee Code Annotated section 27–8–102 (2000) reflects that the writ of audita querela is obsolete by providing that the statutory writ of certiorari lies "[i]nstead of audita querela[.]"

No. E2013–02094–CCA–R3–ECN, 2015 WL 4931576, at *13 (Tenn. Crim. App. at Knoxville, Aug. 18, 2015). Accordingly, we conclude that this claim is without merit.

We note that the Petitioner requests that we "identify an appropriate procedural vehicle" in which he can present his claim that he is ineligible for the death penalty due to his intellectual disability. However, this court cannot provide such an advisory opinion. See Nichols v. State, 90 S.W.3d 576, 607 (Tenn. 2002) (stating that this court erred by providing an advisory opinion).

III. Conclusion

Based upon the oral arguments, the record, and the parties' briefs, we affirm the judgment of the coram nobis court.

All Citations

Slip Copy, 2018 WL 625127

Footnotes

1 Tennessee Code Annotated section 39–13–203(a) defines "intellectual disability" as "(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by

eighteen (18) years of age." We note that the Memphis School System report stated that the Petitioner's I.Q. was 73 and that his adaptive behavior was not significantly impaired.

End of Document

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DAVID IVY v. STATE OF TENNESSEE

Shelby County Criminal Court
01-12388

No. W2016-02454-SC-R11-ECN

Date Printed: 05/29/2018 **Notice / Filed Date: 05/29/2018**

NOTICE - Mandate - Issued

The Appellate Court Clerk's office has issued the Court of Criminal Appeals mandate in its entirety to the trial court clerk in the above-styled appeal. The mandate consists of certified copies of the judgment, any order as to costs, and a copy of the opinion. This action signifies the end of the appeal.

The Appellate Court Clerk's office will not accept any filing from any parties or their counsel after issuance of mandate except those requesting recall of the mandate, those related to withdrawing the record or portions thereof, and those related to the assessment of costs.

James M. Hivner
Clerk of the Appellate Courts